

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
Consolidated with 80508

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Elizabeth A. Brown
Clerk of Supreme Court

HELIX ELECTRIC OF NEVADA, LLC,

Appellant,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent.

**JOINT APPENDIX
VOLUME 82**

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CHRONOLOGICAL APPENDIX OF EXHIBITS

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04-26-10	CAMCO and Fidelity's Answer and CAMCO's Counterclaim	JA000031- JA000041	1
07-02-10	Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default	JA000042- JA000043	1
06-06-13	APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time	JA000044- JA000054	1
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¹ Filed January 31, 2018

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	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546- JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551- JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564- JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO (\$33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568- JA002571	44
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572- JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576- JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578- JA002579	46
	Trial Exhibit 129 - Photo of Video (Construction Project)	JA002580- JA002581	46

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	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582- JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592- JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599- JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613- JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652- JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677- JA002713	48
	Trial Exhibit 171 - Work Order No. 100	JA002714- JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719- JA002730	48

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	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731- JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746- JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748- JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752- JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772- JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798- JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826- JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029- JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334- JA003338	55
	Helix Trial Exhibits:		
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57 /58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61

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	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65 /66/67/ 68/69/70/ 71/72 /73/74/75 /76/77
01-19-18	Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA005282- JA005283	78
01-18-18	Transcript – Bench Trial (Day 2)²	JA005284- JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) (<i>Admitted</i>)	JA005371- JA005623	78/79/80
01-19-18	Transcript – Bench Trial (Day 3)³	JA005624- JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint (<i>Admitted</i>)	JA005786- JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone (<i>Admitted</i>)	JA005802- JA005804	80

² Filed January 31, 201879

³ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 320 – June-August Billings—not paid to APCO (<i>Admitted</i>)	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec (<i>Admitted</i>)	JA005806-	80
	Trial Exhibit 536 – Lien math calculations (handwritten) (<i>Admitted</i>)	JA005807- JA005808	80
	Trial Exhibit 804 – Camco Correspondence (<i>Admitted</i>)	JA005809- JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien (<i>Admitted</i>)	JA005817- JA005819	81
01-24-18	Transcript – Bench Trial (Day 5)⁴	JA005820- JA005952	81
03-08-18	Letter to Judge Denton submitting Helix Electric of Nevada, LLC’s (Proposed) Findings of Fact and Conclusions of Law	JA005953- JA005985	81
03-08-18	Letter to Judge Denton submitting APCO Construction, Inc.’s Proposed Findings of Fact and Conclusions of Law	JA005986- JA006058	8/821
03-08-18	APCO Construction Inc.’s Post-Trial Brief	JA006059- JA006124	82/83
03-23-18	APCO Opposition to Helix Electric of Nevada, LLC’s Findings of Fact and Conclusions of Law	JA006125- JA006172	83/84
03-23-18	Helix Electric of Nevada, LLC’s Responses to APCO Construction’s Post-Trial Brief	JA006173- JA006193	84
04-25-18	Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO	JA006194- JA006264	84/85

⁴ Filed January 31, 201883

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05-08-18	APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA006265- JA006284	85
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285- JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357- JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370- JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386- JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399- JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403- JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407- JA006411	87
	Exhibit 7A – Billing Entries	JA006412- JA006442	87/88

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 7B – Time Recap	JA006443- JA006474	88
	Exhibit 8 – Declaration of Cody S. Munteer, Esq. in Support of Motion for Attorney’s Fees and Costs	JA006475- JA006478	88
	Exhibit 9 – APCO Construction, Inc.’s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479- JA006487	88
	Exhibit 10 – Depository Index	JA006488- JA006508	88/89
05-08-18	Helix Electric of Nevada, LLC’s Motion to Retax Costs Re: Defendant APCO Construction’s Memorandum of Costs and Disbursements	JA006509- JA006521	89
05-31-18	Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]	JA006522 JA006540	89
06-01-18	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.]	JA006541 JA006550	90
06-01-18	Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006551- JA006563	90
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564- JA006574	90

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	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575- JA006580	90
	Exhibit 3 – Prime Interest Rate	JA006581- JA006601	90
	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006583- JA006588	90
	Exhibit 5 – Summary of Fees	JA006589- JA006614	90
06-15-18	APCO Construction, Inc.’s Opposition to Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.’s Motions to Retax Costs	JA006615- JA006637	90/91
	Exhibit 1-A Declaration of Mary Bacon in Support of APCO’s Supplement to its Motion for Attorney’s Fees	JA006635 JA006638	91
	Exhibit 1-B – Declaration of Cody Munteer in Support of APCO’s Supplement to its Motion for Attorney’s Fees	JA006639- JA006916	91/92/93 94/95/96
06-15-18	Helix Electric of Nevada, LLC’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA006917 – JA006942	96
	Exhibit 1 – Notice of Entry of Staying the Case, Except for the Sale of the Property, Pending Resolution of the Petition before the Nevada Supreme Court	JA006943- JA006948	96

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 2 – Notice of Entry of Denying APCO Construction’s Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA006949- JA006954	96
	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955- JA006958	96
	Exhibit 4 – Order Denying <i>En Banc</i> Reconsideration	JA006959- JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA006964- JA006978	96
	Exhibit 6A – Interstate Plumbing and Air Conditioning, LLC’s Response to Special Master Questionnaire	JA006977- JA006980	96
	Exhibit 6B – Nevada Prefab Engineers, Inc.’s Response to Special Master Questionnaire	JA006981- JA006984	96
	Exhibit 6C – Zitting Brothers Construction, Inc.’s Response to Special Master Questionnaire	JA006985- JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal’s Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC’s Special Master Questionnaire	JA007002- JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006- JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037- JA007060	97

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042- JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff’s Motion to Dismiss	JA007047 JA007053	97
	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054- JA007056	97
	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057- JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction’s Omnibus Motion <i>in Limine</i>	JA007060- JA007088	97
	Exhibit 12 – Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC’s Motion in Limine (against APCO Construction)	JA007070- JA007078	97
	Exhibit 13 – Notice of Entry of Order Denying APCO Constructions’ Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA007079- JA007084	97
	Exhibit 14 – Notice of Entry of Order Denying APCO Construction’s Motion for Reconsideration of Order Granting Partial Summary	JA007085- JA007087	97

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Judgment Precluding Defenses Based on Pay-if-Paid Agreements		
	Exhibit 15 – Notice of Association of Counsel	JA007088- JA007094	97
06-15-18	Plaintiff in Intervention National Wood Products, Inc.’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007095- JA007120	97/98
06-15-18	Declaration of S. Judy Hirahara in support of National Woods’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007121- JA007189	98
06-18-18	Plaintiff in Intervention National Wood Products, Inc.’s Joinder to Helix Electric of Nevada, LLC’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007190- JA007192	99
06-21-18	Helix Electric of Nevada, LLC’s Notice of Non-Opposition to its Motion for Attorney’s Fees, Interest and Costs	JA007193- JA007197	99
06-29-18	APCO Construction, Inc.’s Reply in Support of its Motion for Attorney’s Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA007198- JA007220	99
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221- JA007222	99
	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223- JA007224	99

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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07-02-18	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA007238- JA007245	100
07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246- JA007261	100
08-08-18	Court's Decision on Attorneys' Fees and Cost Motions	JA007262- JA007280	100
09-28-18	Notice of Entry of (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281- JA007299	100
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300- JA007312	100/101
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007313- JA007315	101

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
08-06-19	Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA007316- JA007331	101
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.	JA007332- JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007336- JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345- JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395- JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance	JA007401- JA007517	102/103

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Solutions, Inc., E&E Fire Protection		
	Exhibit 6 – Order Dismissing Appeal in Part (Case No. 76276)	JA007518- JA007519	103
	Exhibit 7 – Order to Show Cause	JA007520- JA007542	103
	Exhibit 8 -Order Dismissing Appeal (Case No. 76276)	JA007524- JA007527	103
	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528- JA007541	103
	Exhibit 10 (Part One)	JA007537- JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543- JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586- JA008129	103/104/105 /106/107 /108/109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130- JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants’ Motions for Partial Summary Judgment Against Gemstone Development West	JA008139- JA008141	109
	Exhibit 10 (Part Two)	JA008142- JA008149	109

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10E – 131 Nev. Advance Opinion 70	JA008150- JA008167	109
	Exhibit 10F – Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status	JA008168- JA008170	109
	Exhibit 10EG – Notice of Entry of Granting Plaintiff’s Motion to Dismiss	JA008171- JA008177	109
	Exhibit 10H – Complaint re Foreclosure	JA008178- JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215- JA008230	109
	Exhibit 10J – APCO Construction’s Answer to Accuracy Glass & Mirror Company’s First Amended Complaint re Foreclosure	JA008231- JA008265	109/110
	Exhibit 10K – Answer to Accuracy Glass & Mirror Company, Inc.’s Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008266- JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008286- JA008290	110
	Exhibit 10M – Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291- JA008306	110
	Exhibit 10N – APCO Construction’s Answer to Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307- JA008322	110
	Exhibit 10O – Answer to Helix Electric’s Statement of Facts	JA008323- JA008338	110

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.'s Counterclaim		
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Interest and Costs	JA008339 JA008347	110
	Exhibit 10Q – Notice of Entry of Judgment [As to the claims of Helix Electric of Nevada, LLC Against Camco Construction Co., Inc.]	JA008348- JA008367	110
	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368- JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenetec Against APCO	JA008379- JA008450	110/111
	Exhibit 10T -WRG Design, Inc.'s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008451- JA008486	111
	Exhibit 10U – APCO Construction's Answer to WRG Design Inc.'s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468- JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.'s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc.'s Counterclaim	JA008484- JA008504	111

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505- JA008512	111
	Exhibit 10X – WRG Design, Inc.'s Answer to Camco Pacific Construction Company, Inc.'s Counterclaim	JA008513 JA008517	111
	Exhibit 10Y – Heinaman Contract Glazing's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518- JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction's Counterclaim	JA008531- JA008551	111
	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing's Motion for Attorneys's Fees, Interest and Costs	JA008552- JA008579	111/112
	Exhibit 10BB -Notice of Entry of Judgment [As to the Claims of Heinaman Contract Glazing Against Camco Construction Co., Inc.]	JA008561- JA008582	112
	Exhibit 10CC – Heinaman Contract Glazing's Answer to Camco Pacific Construction Company's Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589- JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party	JA008602- JA008621	112

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Complaint and Camco Pacific Construction, Inc.'s Counterclaim		
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622- JA008624	112
	Exhibit 10GG – HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625- JA008642	112
	Exhibit 10HH – APCO Construction's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643- JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658- JA008664	112
	Exhibit 10JJ -Defendants Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008665- JA008681	112
	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682- JA008685	112
	Exhibit 10LL – HD Supply Waterworks, LP's Voluntary Dismissal of Platte River Insurance Company Only Without Prejudice	JA008686- JA008693	112

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10MM – Scott Financial Corporation’s Answer to HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008694- JA008717	112/113
	Exhibit 10NN-Notice of Appeal	JA008718 JA008723	113
	Exhibit 10OO – Amended Notice of Appeal	JA008724- JA008729	113
	Exhibit 10PP – Notice of Cross Appeal	JA008730- JA008736	113
	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737- JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747- JA008755	113
	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875- JA008758	113
	Exhibit 13 – Stipulation and Order with Prejudice	JA008759- JA008780	113
	Exhibit 14 – Docket/United Subcontractors, Inc. dba Skyline Insulation’s Motion to Enforce Settlement Agreement and Enter Judgment	JA008762- JA008788	113
	Exhibit 15 – Notice of Entry of Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	JA008789- JA008798	113

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 16 – Notice of Appeal	JA008799- JA008810	113
08-16-19	APCO’s Opposition to Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA008811- JA008821	114
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822- JA008824	114
	Exhibit 2 – Order to Show Cause	JA008825- JA008828	114
	Exhibit 3 – Appellant/Cross-Respondent’s Response to Order to Show Cause	JA008829- JA008892	114/115/116
	Exhibit 4 – Order Dismissing Appeal	JA008893- JA008896	116
	Exhibit 5 – Chart of Claims	JA008897- JA008924	116
	Exhibit 6 – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company, Inc.’s Counterclaim	JA008925- JA008947	116/117
	Exhibit 7 – Answer to Cactus Rose’s Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.’s Counterclaim	JA008948- JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008966- JA008986	117/118

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987- JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998- JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011- JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025- JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039- JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111- JA009113	119
	Exhibit 15 – Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond	JA009114- JA009116	119
08-29-19	Helix Electric of Nevada LLC's Reply to APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II)	JA009117- JA009123	119

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Dismiss All Unresolved Claims and/or (III) In The Alternative for a Rule 54(B) Certification as to Helix and APCO		
01-03-20	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification	JA009124- JA009131	119
01-29-20	Notice of Appeal	JA009132- JA009136	119/120
	Exhibit A – 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.]	JA009137- JA009166	120
	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148- JA009156	120
02-11-20	Case Appeal Statement	JA009157- JA009163	120
02-11-20	APCO's Notice of Cross Appeal	JA009164- JA010310	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorney's Fees and Costs; (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Party (4) Granting Plaintiff-in-Intervention National Wood Productions, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA009168- JA009182	120

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 2 – Notice of Entry of Order Granting Helix Electric of Nevada’s Motion for Rule 54(b) Certification	JA009183- JA00991	120

ALPHABETICAL APPENDIX OF EXHIBITS

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
08-05-09	APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA000016 – JA000030	1
05-08-18	APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA006265- JA006284	85
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285- JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357- JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370- JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386- JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399- JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403- JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407- JA006411	87
	Exhibit 7A – Billing Entries	JA006412-	87/88

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
		JA006442	
	Exhibit 7B – Time Recap	JA006443- JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounter, Esq. in Support of Motion for Attorney’s Fees and Costs	JA006475- JA006478	88
	Exhibit 9 – APCO Construction, Inc.’s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479- JA006487	88
	Exhibit 10 – Depository Index	JA006488- JA006508	88/89
06-06-13	APCO’s Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO’s Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time	JA000044- JA000054	1
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO’s Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO’s Motion for Judgment Against Gemstone Only	JA000055- JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317- JA000326	6
02-11-20	APCO’s Notice of Cross Appeal	JA009164- JA010310	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.’s Motion for Attorney’s Fees and Costs; (2) Granting APCO Construction, Inc.’s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC’s	JA009168- JA009182	114

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Motion to Retax in Party (4) Granting Plaintiff-in-Intervention National Wood Productions, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply		
	Exhibit 2 – Notice of Entry of Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification	JA009183- JA00991	120
11-06-17	APCO Construction, Inc.'s Omnibus Motion <i>in Limine</i>	JA000590 JA000614	9
	Exhibit 1 – Second Amended Notice of taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615- JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	JA000625- JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting's Deposition Transcript taken October 27, 2017	JA000647- JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679- JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731- JA000808	10/11
	Exhibit 6 – Subcontract Agreement dated April 17, 2007	JA000809- JA000826	11/12
	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827- JA000831	12
	Exhibit 8 – Email from Mary Bacon dated October 17, 2017	JA000832- JA000837	12
	Exhibit 9 – Email from Eric Zimbelman dated October 17, 2017	JA000838- JA000844	12
	Exhibit 10 – Special Master Report, Recommendation and District Court Order	JA00845- JA000848	12

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 11 – Plaintiff in Intervention, National Wood Products, Inc.’s Initial Disclosures Pursuant to NRCP 16.1	JA000849- JA000856	12
	Exhibit 12 – Plaintiff in Intervention, National Wood Products, Inc.’s First Supplemental Disclosures Pursuant to NRCP 16.1	JA000857- JA000864	12
	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865- JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC’s 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874- JA000897	12
03-23-18	APCO Opposition to Helix Electric of Nevada, LLC’s Findings of Fact and Conclusions of Law	JA006125- JA006172	83/84
08-16-19	APCO’s Opposition to Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA008811- JA008821	114
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822- JA008824	114
	Exhibit 2 – Order to Show Cause	JA008825- JA008828	114
	Exhibit 3 – Appellant/Cross-Respondent’s Response to Order to Show Cause	JA008829- JA008892	114/115/116
	Exhibit 4 – Order Dismissing Appeal	JA008893- JA008896	116
	Exhibit 5 – Chart of Claims	JA008897- JA008924	116
	Exhibit 6 – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008925- JA008947	116/117

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Pacific Construction Company, Inc.'s Counterclaim		
	Exhibit 7 – Answer to Cactus Rose's Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.'s Counterclaim	JA008948- JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction's Counterclaim	JA008966- JA008986	117/118
	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987- JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998- JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011- JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025- JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039- JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111- JA009113	119
	Exhibit 15 – Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond	JA009114- JA009116	119

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
06-15-18	APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Motions to Retax Costs	JA006615- JA006637	90/91
	Exhibit 1-A Declaration of Mary Bacon in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006635 JA006638	91
	Exhibit 1-B – Declaration of Cody Mounteer in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006639- JA006916	91/92/93 94/95/96
11-14-17	APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions in <i>Limine</i> Nos. 1-4	JA000929- JA000940	13/14
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941- JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967- JA000969	16/17
	Exhibit 3 – Excerpts from the Deposition Transcript of Andrew Rivera taken July 20, 2017	JA000970- JA000993	17/18/19
08-21-17	APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000393- JA000409	6/7
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410- JA000412	7
03-08-18	APCO Construction Inc.'s Post-Trial Brief	JA006059- JA006124	82/83
11-15-17	APCO Construction, Inc.'s Reply in Support of its Omnibus <i>Motion in Limine</i>	JA001133 JA001148	21

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	Exhibit 1 – Special Master Report Regarding Discovery Status	JA001149- JA001151	21
	Exhibit 2 – Notice of Taking NRCP Rule 30(b)(6) Deposition of the Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA001152- JA001160	21
06-29-18	APCO Construction, Inc.’s Reply in Support of its Motion for Attorney’s Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA007198- JA007220	99
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221- JA007222	99
	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223- JA007224	99
04-26-10	CAMCO and Fidelity’s Answer and CAMCO’s Counterclaim	JA000031- JA000041	1
11-14-17	Camco Pacific Construction Company, Inc.’s Opposition to Lien Claimants’ Motions in Limine Nos. 1-6	JA000898- JA000905	12
	Exhibit A – Nevada Construction Services Cost Plus GMP Contract Disbursement Agreement	JA000906- JA000907	12
	Exhibit B – Scott Financial Corporation’s April 28, 2009 letter to the Nevada State Contractor’s Board	JA000908- JA000915	2/13
	Exhibit C – E-mail from Alex Edelstein dated December 15, 2008 Re: Letter to Subs	JA000916- JA000917	13
	Exhibit D – Camco Pacific’s letter dated December 22, 2008	JA000918- JA000920	13
	Exhibit E – Order Approving Sale of Property	JA000921- JA000928	13
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06-15-18	Declaration of S. Judy Hirahara in support of National Woods's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs	JA007121- JA007189	98
06-13-13	Docket Entry and Minute Order Granting APCO's Motion for Summary Judgment Against Gemstone	JA000327	6
04-25-18	Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO	JA006194- JA006264	84/85
11-06-17	Helix Electric of Nevada's Motion <i>in Limine</i> Nos. 1-4	JA000534- JA000542	8
	Exhibit 1 – Notice of Entry of Order	JA000543- JA000549	8
	Exhibit 2 – Helix Electric of Nevada, LLC's Amended Notice of 30(b)(6) Deposition of APCO Construction	JA000550 JA000558	8/9
	Exhibit 3 - Excerpts from Brian Benson Deposition Transcript taken June 5, 2017	JA000559 JA000574	9
	Exhibit 4 – Excerpts from Mary Jo Allen's Deposition Transcript taken July 18, 2017	JA000575- JA000589	9
06-01-18	Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA006551- JA006563	90
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564- JA006574	90
	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575- JA006580	90
	Exhibit 3 – Prime Interest Rate	JA006581- JA006601	90

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006583- JA006588	90
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08-06-19	Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA007316- JA007331	101
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.’s Against APCO Construction, Inc.	JA007332- JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.’s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC’s Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC’s Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.’s Motion to File a Surreply	JA007336- JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345- JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395- JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of	JA007401- JA007517	102/103

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	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528- JA007541	103
	Exhibit 10 (Part One)	JA007537- JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543- JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586- JA008129	103/104/105/ 106/107/108 109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130- JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants’ Motions for Partial Summary Judgment Against Gemstone Development West	JA008139- JA008141	109
	Exhibit 10 (Part Two)	JA008142- JA008149	109
	Exhibit 10E – 131 Nev. Advance Opinion 70	JA008150- JA008167	109
	Exhibit 10F – Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status	JA008168- JA008170	109

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	Exhibit 10H – Complaint re Foreclosure	JA008178- JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215- JA008230	109
	Exhibit 10J – APCO Construction’s Answer to Accuracy Glass & Mirror Company’s First Amended Complaint re Foreclosure	JA008231- JA008265	109/110
	Exhibit 10K – Answer to Accuracy Glass & Mirror Company, Inc.’s Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008266- JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008286- JA008290	110
	Exhibit 10M – Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291- JA008306	110
	Exhibit 10N – APCO Construction’s Answer to Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307- JA008322	110
	Exhibit 10O – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.’s Counterclaim	JA008323- JA008338	110
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC’s Motion for Attorney’s Fees, Interest and Costs	JA008339 JA008347	110
	Exhibit 10Q – Notice of Entry of Judgment [As to the claims of Helix Electric of Nevada, LLC Against Camco Construction Co., Inc.]	JA008348- JA008367	110

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	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368- JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenotec Against APCO	JA008379- JA008450	110/111
	Exhibit 10T -WRG Design, Inc.’s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008451- JA008486	111
	Exhibit 10U – APCO Construction’s Answer to WRG Design Inc.’s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468- JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.’s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc’s Counterclaim	JA008484- JA008504	111
	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505- JA008512	111
	Exhibit 10X – WRG Design, Inc.’s Answer to Camco Pacific Construction Company, Inc.’s Counterclaim	JA008513 JA008517	111
	Exhibit 10Y – Heinaman Contract Glazing’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518- JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing’s Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction’s Counterclaim	JA008531- JA008551	111

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	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing’s Motion for Attorneys’s Fees, Interest and Costs	JA008552- JA008579	111/112
	Exhibit 10BB -Notice of Entry of Judgment [As to the Claims of Heinaman Contract Glazing Against Camco Construction Co., Inc.]	JA008561- JA008582	112
	Exhibit 10CC – Heinaman Contract Glazing’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589- JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008602- JA008621	112
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622- JA008624	112
	Exhibit 10GG – HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625- JA008642	112
	Exhibit 10HH – APCO Construction’s Answer to HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643- JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658- JA008664	112

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	Exhibit 10JJ -Defendants Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008665- JA008681	112
	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682- JA008685	112
	Exhibit 10LL – HD Supply Waterworks, LP's Voluntary Dismissal of Platte River Insurance Company Only Without Prejudice	JA008686- JA008693	112
	Exhibit 10MM – Scott Financial Corporation's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008694- JA008717	112/113
	Exhibit 10NN-Notice of Appeal	JA008718 JA008723	113
	Exhibit 10OO – Amended Notice of Appeal	JA008724- JA008729	113
	Exhibit 10PP – Notice of Cross Appeal	JA008730- JA008736	113
	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737- JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747- JA008755	113
	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875- JA008758	113
	Exhibit 13 – Stipulation and Order with Prejudice	JA008759- JA008780	113

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	Exhibit 15 – Notice of Entry of Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	JA008789- JA008798	113
	Exhibit 16 – Notice of Appeal	JA008799- JA008810	113
05-08-18	Helix Electric of Nevada, LLC’s Motion to Retax Costs Re: Defendant APCO Construction’s Memorandum of Costs and Disbursements	JA006509- JA006521	89
06-21-18	Helix Electric of Nevada, LLC’s Notice of Non-Opposition to its Motion for Attorney’s Fees, Interest and Costs	JA007193- JA007197	99
06-15-18	Helix Electric of Nevada, LLC’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA006917 – JA006942	96
	Exhibit 1 – Notice of Entry of Staying the Case, Except for the Sale of the Property, Pending Resolution of the Petition before the Nevada Supreme Court	JA006943- JA006948	96
	Exhibit 2 – Notice of Entry of Denying APCO Construction’s Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA006949- JA006954	96
	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955- JA006958	96
	Exhibit 4 – Order Denying <i>En Banc</i> Reconsideration	JA006959- JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment	JA006964- JA006978	96

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	Exhibit 6B – Nevada Prefab Engineers, Inc.’s Response to Special Master Questionnaire	JA006981- JA006984	96
	Exhibit 6C – Zitting Brothers Construction, Inc.’s Response to Special Master Questionnaire	JA006985- JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal’s Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC’s Special Master Questionnaire	JA007002- JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006- JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037- JA007060	97
	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042- JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff’s Motion to Dismiss	JA007047 JA007053	97
	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054- JA007056	97
	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057- JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction’s Omnibus Motion <i>in Limine</i>	JA007060- JA007088	97

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 12 – Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC’s Motion in Limine (against APCO Construction)	JA007070- JA007078	97
	Exhibit 13 – Notice of Entry of Order Denying APCO Constructions’ Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA007079- JA007084	97
	Exhibit 14 – Notice of Entry of Order Denying APCO Construction’s Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA007085- JA007087	97
	Exhibit 15 – Notice of Association of Counsel	JA007088- JA007094	97
11-14-17	Helix Electric of Nevada’s Opposition to APCO Construction’s Omnibus Motion in Limine	JA000994- JA001008	20
	Exhibit 1 – Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001009- JA001042	20
	Exhibit 2 - Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001043- JA001055	20
	Exhibit 3 – Special Master Order Requiring Completion of Questionnaire	JA001056- JA001059	20
	Exhibit 4 – Excerpts from the Deposition Transcript of the 30(b)(6) Witness for Helix Electric of Nevada taken July 20, 2017	JA001060- JA001064	20
	Exhibit 5 - Excerpts from the Deposition Transcript of David E. Parry taken June 20, 2017	JA001065 JA001132	20/21
08-29-19	Helix Electric of Nevada LLC’s Reply to APCO’s Opposition to Helix Electric of Nevada LLC’s Motion to (I) Re-	JA009117- JA009123	119

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In The Alternative for a Rule 54(B) Certification as to Helix and APCO		
06-29-18	Helix Electric of Nevada, LLC's Reply Re: Motion to Retax	JA007225- JA007237	100
03-23-18	Helix Electric of Nevada, LLC's Responses to APCO Construction's Post-Trial Brief	JA006173- JA006193	84
06-24-09	Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint	JA000001- JA000015	1
01-12-18	Joint Pre-Trial Memorandum [for APCO Construction, Inc., the Peel Brimley Lien Claimants and National Wood Products, LLC ONLY]	JA001574- JA001594	27/28
	Exhibit 1 – Exhibit List APCO	JA001595- JA001614	28
	Exhibit 2 – Helix Trial Exhibits	JA001615- JA001616	28
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA001617- JA001635	28
	Exhibit 4 – Cactus Rose Trial Exhibits	JA001636- JA001637	28
	Exhibit 5 – Heinaman Trial Exhibits	JA001638- JA001639	28
	Exhibit 6 – Fast Glass Trial Exhibits	JA001640- JA001641	28
	Exhibit 7 – SWPPP Trial Exhibits	JA001642- JA001643	28
	Exhibit 8 - Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion <i>in Limine</i>	JA001644- JA001647	28

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 9 - Amended <i>nunc pro tunc</i> order regarding APCO Construction, Inc.'s Omnibus Motion <i>in Limine</i> No. 7	JA001648- JA001650	28
	Exhibit 10 - Order Granting in Part and Denying in part Helix Electric of Nevada, LLC's Motions <i>in Limine</i> 1-4 (Against APCO Construction)	JA001651- JA001653	28
	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654- JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion <i>in Limine</i>	JA001658- JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661- JA001667	28/9/29
03-08-18	Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law	JA005986- JA006058	8/821
03-08-18	Letter to Judge Denton submitting Helix Electric of Nevada, LLC's (Proposed) Findings of Fact and Conclusions of Law	JA005953- JA005985	81
01-04-18	Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses based on Pay-if-Paid provision on an Order Shortening Time	JA001199- JA001217	22
	Exhibit 1 – Subcontract Agreement (Helix Electric of Nevada, LLC)	JA001218- JA001245	22/23/24
	Exhibit 2 – Subcontract Agreement (Zitting Brothers)	JA001246- JA001263	24

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 3 – Subcontract Agreement (CabineTec)	JA001264- JA001281	24/25
	Exhibit 4 – Amended Notice of Lien	JA001282- JA001297	25
	Exhibit 5 - Amended NOL	JA001298- JA001309	25
	Exhibit 6 – Notice of Lien	JA001310- JA001313	25
	Exhibit 7 – Order Approving Sale of Property	JA001314- JA001376	25/26
	Exhibit 8 – Order Releasing Sale Proceeds from Court Controlled Escrow Account	JA001377- JA001380	26
	Exhibit 9 – Order Denying <i>En Banc</i> Reconsideration	JA001381- JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386- JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393- JA001430	26
	Exhibit 12 – Order Big D Construction Corp.’s Motion for Attorney’s Fees, Costs and Interest Pursuant to Judgment	JA001431- JA001435	26
	Exhibit 13 – Appellant’s Opening Brief (Padilla v. Big D)	JA001436- JA001469	26
	Exhibit 14 – Respondent’s Answering Brief	JA001470- JA001516	26/27
	Exhibit 15 – Appellant’s Reply Brief (Padilla v. Big D)	JA001517- JA001551	27
	Notice of Appeal	JA009132- JA009136	119/120
	Exhibit A – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention	JA009137- JA009166	120

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	National Wood Products, Inc.'s Against APCO Construction, Inc.]		
	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148- JA009156	120
05-31-18	Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]	JA006522 JA006540	89
06-01-18	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.]	JA006541 JA006550	90
09-28-18	Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281- JA007299	100
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion <i>in Limine</i>	JA001178- JA001186	22
07-02-18	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA007238- JA007245	100
01-03-20	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification	JA009124- JA009131	119

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
01-03-18	Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001187- JA001198	22
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion <i>in Limine</i> 1-4	JA001170- JA001177	22
12-29-17	Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion <i>in Limine</i> 1-6	JA001161- JA001169	22
01-19-18	Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA005282- JA005283	78
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007332- JA007334	101
07-02-10	Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default	JA000042- JA000043	1
08-02-17	Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements and <i>Ex Parte</i> Application for Order Shortening Time	JA000328- JA000342	6
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343- JA000379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380- JA000392	6
11-06-17	Peel Brimley Lien Claimants' Motion <i>in Limine</i> Nos. 1-6	JA000419- JA000428	7
	Exhibit 1 – Notice of Entry of Order	JA000429	7

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
		JA000435	
	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.’s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC’s	JA000436- JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry’s Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000501- JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000512- JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC’s First Set of Request for Admissions to Camco Pacific Construction	JA000523- JA000533	8
09-28-17	Peel Brimley Lien Claimants’ Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000413- JA00418	7
01-09-18	Peel Brimley Lien Claimants’ Opposition to APCO Construction’s Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001552- JA001560	27
06-18-18	Plaintiff in Intervention National Wood Products, Inc.’s Joinder to Helix Electric of Nevada, LLC’s Opposition	JA007190- JA007192	99

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	to APCO Construction's Motion for Attorneys' Fees and Costs		
06-15-18	Plaintiff in Intervention National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Attorneys' Fees and Costs	JA007095- JA007120	97/98
07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246- JA007261	100
01-10-18	Reply in Support of Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions on an Order Shortening Time	JA001561- JA001573	27
01-18-18	Stipulation and Order Regarding Trial Exhibit Admitted into Evidence	JA002199- JA002201	36
	Exhibit 1 – Exhibit List APCO	JA002208- JA002221	36
	Exhibit 2 – Helix Trial Exhibits	JA002222- JA002223	36
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224- JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244- JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283- JA002284	38

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 17 – Video (Construction Project)	JA002285	N/A
	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A
	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286- JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307- JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309- JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311- JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313- JA002314	40
	Exhibit 36 and 130 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002315- JA002316	40

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibits 37 and 131 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002317- JA002318	40
	Trial Exhibits 38 and 132 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002319- JA002320	41
	Trial Exhibit 39 -Email from K. Costen to Subcontractors informing that Manhattan West Project no longer open	JA002321- JA002322	41
	Trial Exhibit 40- Letter from D. Parry to Subcontractors Re: Funding Withdrawn	JA002323 JA002326	41
	HELIX Related Exhibits:		41
	Trial Exhibit 46 - Helix Pay Application No. 16713-008R1 with Proof of Payment	JA002327- JA002345	41
	Trial Exhibit 47 - Helix Pay Application No. 16713-009R1 with Proof of Payment	JA002346- JA002356	41
	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357- JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359- JA002364	41/42
	Trial Exhibit 50 - Unconditional Waiver and Release re: Pay Application No. 8 with Copy of Payment	JA002365- JA002366	42
	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367- JA002368	42
	Trial Exhibit 52 -Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002369- JA002370	42
	Trial Exhibit 53 -Photo re: Building - 2 & 3, West (No Exterior fixtures installed. Helix billed out at 90%)	JA002371- JA002372	42

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 54 - Photo re: Building - 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002373- JA002374	42
	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375- JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377- JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379- JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382- JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392- JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406- JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413- JA002415	43
	Trial Exhibit 62 - Photo re: Building 8 & 9, South	JA002416- JA002417	43
	Trial Exhibit 63 - Photo re: Building 2 & 3, West	JA002418- JA002419	43
	Trial Exhibit 64 - Photo re: Building 2 & 3, West	JA002420- JA002421	43
	Trial Exhibit 65 - Photo re: Building 2 & 3, South	JA002422- JA002423	43
	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424- JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435- JA002436	43

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 68 -Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002437- JA002438	43
	Trial Exhibit 69 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002439- JA002440	43
	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441- JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443- JA002444	43
	Trial Exhibit 72 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002445- JA002446	43
	Trial Exhibit 73 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002447- JA002448	43
	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448- JA002449	43
	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450- JA002456	43
	Exhibit 77 - Helix Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA002457- JA002494	43
	Zitting Brothers Related Exhibits:		
	Trial Exhibit 100 - Check No. 14392 payable to Zitting (\$27,973.80); Progress Payment No. 7	JA002495- JA002497	44
	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498- JA002500	44
	Trial Exhibit 102 -Email from L. Lynn to J. Griffith, et al. re: Change Order No. 00011 “pending”	JA002501- JA002503	44

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 103- Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour	JA002504- JA002505	44
	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour with copies of change orders	JA002506- JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527- JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting (\$27,973.80)	JA002529	44
	Trial Exhibit 108 - Photo of Video (Construction Project)	JA002530- JA002531	44
	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532- JA002533	44
	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534- JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536- JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538- JA002539	44
	Trial Exhibit 113 -Photo of Video (Construction Project)	JA002550- JA002541	44
	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542- JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544- JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546- JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551- JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564- JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO (\$33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568- JA002571	44

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572- JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576- JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578- JA002579	46
	Trial Exhibit 129 - Photo of Video (Construction Project)	JA002580- JA002581	46
	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582- JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592- JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599- JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613- JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652- JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677- JA002713	48

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 171 - Work Order No. 100	JA002714- JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719- JA002730	48
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731- JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746- JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748- JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752- JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772- JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798- JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826- JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029- JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334- JA003338	55
	Helix Trial Exhibits:		

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	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57/ 58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61
	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65/66/6 7/ 68/69/70 /71/72 /73/74/75/ 76/77
01-17-18	Transcript Bench Trial (Day 1)⁵	JA001668- JA001802	29/30
	Trial Exhibit 1 - Grading Agreement (<i>Admitted</i>)	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement (<i>Admitted</i>)	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement (<i>Admitted</i>)	JA001869- JA001884	30
	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone (<i>Admitted</i>)	JA001885- JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work (<i>Admitted</i>)	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work (<i>Admitted</i>)	JA001979- JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) (<i>Admitted</i>)	JA001981- JA001987	32

⁵ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) (<i>Admitted</i>)	JA001988- JA002001	32
	Trial Exhibit 14 - Letter from W. Gochmour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause (<i>Admitted</i>)	JA002002- JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices (<i>Admitted</i>)	JA002011- JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks (<i>Admitted</i>)	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract (<i>Admitted</i>)	JA002015- JA002016	33
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record (<i>Admitted</i>)	JA002017- JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks (<i>Admitted</i>)	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment (<i>Admitted</i>)	JA002025- JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP (<i>Admitted</i>)	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner (<i>Admitted</i>)	JA002082- JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement (<i>Admitted</i>)	JA002121- JA002146	35

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO (<i>Admitted</i>)	JA002147- JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice (<i>Admitted</i>)	JA002177- JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice (<i>Admitted</i>)	JA002182- JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors (<i>Admitted</i>)	JA002186- JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions (<i>Admitted</i>)	JA002189 – JA002198	36
01-18-18	Transcript – Bench Trial (Day 2)⁶	JA005284- JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) (<i>Admitted</i>)	JA005371- JA005623	78/79/80
01-19-18	Transcript – Bench Trial (Day 3)⁷	JA005624- JA005785	80
	Trial Exhibit 231 – Helix Electric’s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint (<i>Admitted</i>)	JA005786- JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix’s Motion for Partial Summary Judgment against Gemstone (<i>Admitted</i>)	JA005802- JA005804	80
	Trial Exhibit 320 – June-August Billings—not paid to APCO (<i>Admitted</i>)	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec (<i>Admitted</i>)	JA005806-	80

⁶ Filed January 31, 201879

⁷ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 536 – Lien math calculations (handwritten) (<i>Admitted</i>)	JA005807- JA005808	80
	Trial Exhibit 804 – Camco Correspondence (<i>Admitted</i>)	JA005809- JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien (<i>Admitted</i>)	JA005817- JA005819	81
01-24-18	Transcript – Bench Trial (Day 5)⁸	JA005820- JA005952	81
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300- JA007312	100/101

⁸ Filed January 31, 2018

1 131. Camco's Steve Parry confirmed that Exhibit E to the Camco contract represented
2 the state of the Project when Camco took over.¹³⁹

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

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

7 133. Among other things, the Camco contract required that Camco "shall engage the
8 Third-Party Service Providers listed on Exhibit C (the "Existing Third-Party Service
9 Providers)."¹⁴³

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

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

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

15 [Exhibit 162 was on the elmo]

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

17 A. Yes.

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

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

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

21 A. Yes.

22 Q. And, sir, if you would, turn to Exhibit C within the exhibit.
Those assumed contracts from APCO included CabineTec and

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

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

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

26 ¹⁴¹ Exhibit 160-3.

27 ¹⁴² Exhibit 160-3.

28 ¹⁴³ Exhibit 162-2.

¹⁴⁴ Exhibit 162-23.

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

1 Helix; correct?

2 A. Yes.

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

6 A. Yes.

7 Q.¹⁴⁶

8 137. After Camco became the general contractor, APCO was not responsible to pay
9 subcontractors for work performed under Camco.¹⁴⁷

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

13 139. APCO played no role in the pay application process or the actual field work on the
14 Project from September-December 2008.¹⁵⁰

15 140. And no Helix or CabineTec representative ever approached APCO with questions
16 or concerns about proceeding with work on the Project after APCO's termination.¹⁵¹

17 141. So APCO did not receive any benefit from the work or materials that Helix or
18 CabineTec performed or provided to the Project after August 21, 2008.¹⁵²

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

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

21 Q. Now, I have highlighted the retainage line item of
22 \$5,337,982.74 [on Exhibit 218]. Do you see that?

23 A. Yes.

24 Q. What did that figure represent?

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

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

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

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

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.

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

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

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

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

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

2 A. Gemstone, the owner.

3 ...

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

7 A. That's correct.¹⁵⁴

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

10 **K. Cabinetec's entered into a ratification agreement with Camco.**

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

13 145. CabineTec understood the ratification to mean that "you guys [APCO] were
14 stepping out and Camco was stepping in."¹⁵⁶

15 146. CabineTec further clarified its understanding of the ratification agreement as
16 follows:

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

22 A. So APCO was going away and Camco was coming
23 on. That's what was happening.¹⁵⁷

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

- 25 • "B. Subcontractor and Camco desire to acknowledge, ratify and agree to the
26 terms of the Subcontract Agreement, whereby Camco will replace APCO as
27 the "Contractor" under the Subcontract Agreement but, subject to the terms
28 of this Ratification, all other terms and conditions of the Subcontract
Agreement will remain in full force and effect."¹⁵⁸
- The ratification agreement acknowledged that \$264,395.00 of work remained

25 ¹⁵⁴ Testimony of Steve Parry (Camco) Day 5, p. 30.

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

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

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

¹⁵⁸ Exhibit 183-1.

- 1 to be finished on Building 8 and \$264,395.00 on Building 9.¹⁵⁹
- 2 • “5. Ratification. Subcontractor and Camco agree that (a) the terms of the
- 3 Subcontract Agreement (as amended by this Ratification and including all
- 4 Amendments, Previously Approved Change Orders, and the Camco
- 5 Schedule) will govern their relationship regarding the Project, (b) Camco
- 6 will be the “Contractor” under the Subcontract Agreement, and (c)
- 7 Subcontractor and Camco agree to perform and fulfill all of the executory
- 8 terms, covenants, conditions and obligations required to be performed and
- 9 fulfilled thereunder by Subcontractor and Camco, respectively.”¹⁶⁰

10 Accordingly, all retention and future payments to CabineTec, which were executory

11 obligations, were Camco’s responsibility.

12 148. After Gemstone could no longer pay Camco, CabineTec filed a complaint against

13 APCO and Camco and alleged that it entered into a ratification agreement with Camco:

14 10. On or about August 26, 2008, pursuant to Gemstone’s

15 request CABINETEC entered into a Ratification and

16 Amendment of Subcontract Agreement (the “Ratification”)

17 with CAMCO, whereby CAMCO agreed to the terms of the

18 APCO Subcontract and to replace APCO as the “Contractor”

19 under the APCO Contract. . .

20 14. CABINETEC entered into the Ratification with CAMCO,

21 pursuant to Gemstone’s request, wherein CAMCO agreed to

22 pay CABINETEC for the services and materials on the Project.

23 15. Pursuant to, and in reliance upon, the aforementioned

24 Subcontract, Ratification and representations, CABINETEC

25 performed the work of providing services and materials (the

26 “Work.”)...¹⁶¹

27 So there is no basis for CabineTec to seek payment from APCO for its retention, which

28 never became due under the retention payment schedule while APCO was the contractor.

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

¹⁵⁹ Exhibit 183-2.

¹⁶⁰ Exhibit 172-5.

¹⁶¹ Exhibit 156 at ¶ 10-15.

1 149. The fact is, APCO paid (and even overpaid) CabineTec for materials delivered to
2 the Project while APCO was contractor.¹⁶²

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

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

5 152. Exhibit 148 is CabineTec's first invoice to Camco for \$70,836.¹⁶⁴

6 153. CabineTec's second invoice is for \$72,540.¹⁶⁵

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

8 155. But APCO actually paid CabineTec a total of \$161,262 for these two invoices.¹⁶⁷

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

10 157. CabineTec did not submit a pay application for August 2008.¹⁶⁸

11 158. APCO is entitled to be paid this over payment.

12 **L. CabineTec Claims retention against APCO.**

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

15 "50. As a result of the foregoing, and in accordance with the
16 principles of equity and common law, CABINETEC is entitled
17 to judgment in its favor, and against APCO in the amount of
18 \$19,547.00, together with interest thereon at the highest legal
19 rate."¹⁶⁹

20 160. And, CabineTec's initial and first supplemental disclosures only disclosed
21 \$30,110.95 in damages against APCO: "...National Wood seeks to recover those
22 damages claimed by CabineTec in its complaint in intervention against APCO in the

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

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

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

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

28 ¹⁶⁶ Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

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

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

¹⁶⁹ Exhibit 156-8.

1 amount of \$30,110.95 and CAMCO in the amount of \$1,125,374.94..."¹⁷⁰ The
2 \$30,110.95 represented \$19,547 in alleged retention, and \$10,563.95 in interest and
3 fees.¹⁷¹

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

7 162. Aside from the late disclosure there is no basis for that amount as it is undisputed
8 that CabineTec was paid every dollar it billed APCO, less retention, notwithstanding
9 the overpayment.¹⁷³

10 **M. Helix's claim for \$505,021 in retention.**

11 163. Helix's designated PMK and Project Manager, Andy Rivera, confirmed that Helix's
12 only claim in this litigation against APCO was for the retention of \$505,021.¹⁷⁴

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

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

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

19 A. Correct.

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

21 A. Yes.

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

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

27 ¹⁷² Exhibit 159-6.

28 ¹⁷³ Exhibit 147 summarizing payments and releases.

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

¹⁷⁵ Testimony, Day 1 at p. 10. ("...Helix remains to be unpaid \$505,021, while 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 do you recall if you were designated as the
2 person most knowledgeable for one of the topics being the
3 damages that Helix was seeking from APCO in these
proceedings, correct?

4 A. Correct.

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

8 A. Correct.

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

12 A. Correct.

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

15 A. Yes.

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

20 A. Yes.

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

23 A. No. No. I'm sorry.

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

26 A. I would not know.

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

A. Correct.

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

A. Yes.¹⁷⁶

166. Helix received direct payments from APCO through May 2008.¹⁷⁷

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

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

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

2 169. Mr. Rivera admitted Helix is only seeking \$505,021 in retention from APCO, which
3 Helix never billed Apco.¹⁸⁰

4 **N. Retention never became due to Helix or CabineTec.**

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

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

10 172. More specifically, Helix's Mr. Johnson admitted Helix did not meet the
11 preconditions in Section 3.8 of the Subcontract to be entitled to retention.¹⁸¹

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

14 A. Not to my knowledge.¹⁸²

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

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

21
22 ¹⁷⁹ Exhibit 508, p. 1; Testimony of Andy Rivera (Helix) Day 2 at p. 65.

23 ¹⁸⁰ Testimony of Andy Rivera (Helix) Day 2, pp. 50 and 58. Exhibit 501, p. 393 is the
24 spreadsheet Helix created of payments it applied for and received from APCO. Helix's
25 Mr. Rivera admitted Helix was paid a total of \$4,626,186.11 on the Project by and through
26 APCO, which reflected payment for work billed (and retention) through August 31, 2008.
27 Testimony of Andy Rivera (Helix) Day 2, pp. 58-59; Exhibits 46-47, Helix May and June
28 billings; Exhibit 49-50; APCO Checks to Helix, Exhibit 58, Exhibit 59, Exhibit 60, Exhibit
61, Exhibit 66, Exhibit 75.

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

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

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

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

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

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

5 177. The Court also heard unrefuted testimony that APCO was never paid from
6 Gemstone for Helix's or CabineTec's retention.¹⁸⁸

7 178. The fact is APCO and its subcontractors never got to the point where they could
8 request retention while APCO was the contractor.¹⁸⁹

9 179. To that end, Helix's Mr. Johnson admitted that Helix did not present a claim to
10 APCO for any additional compensation for disputed claims or changes while APCO
11 was on the Project.¹⁹⁰

12 180. Helix's Mr. Rivera admitted Helix *has never* billed APCO for retention, and that all
13 amounts that Helix did bill APCO were paid, less retention.¹⁹¹

14 181. The fact that Helix did not bill retention confirms that Helix recognized that
15 retention never became due from APCO under the retention payment schedule.

16 182. Both Helix and CabineTec rolled their retention account over to Camco and
17 Gemstone in their post-APCO billings as it was truly a Project and Gemstone
18 liability.¹⁹²

19
20
21 ¹⁸⁵ 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

22 ¹⁸⁶ Exhibit 32-38, 51-57, 108-114, 62-65, 67-74, 125-132, Pictures of Status of Project;
23 Testimony of Brian Benson (APCO) Day 3, pp. 53-71.

24 ¹⁸⁷ Exhibits 17-22, Videos of Project.

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

27 ¹⁸⁹ Testimony of Joe Pelan (APCO) Day 1, pp. 60 and 82; Testimony of Bob Johnson
28 (Helix) Day 2, pp. 36-37; Testimony of Joe Pelan (APCO) Day 3, p. 151.

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

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.

1 183. APCO was never responsible for retention under the subcontract's retention
2 payment schedule.

3 184. That is confirmed by Helix's and Camco's conduct at the Project level through their
4 pay applications.¹⁹³

5 **O. Similarly, APCO never earned or received its retention.**

6 185. Gemstone and/or its lender maintained the retention account.¹⁹⁴

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

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

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

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

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

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

18
19
20 ¹⁹³ Compare Exhibit 58, Helix's August 2008 pay application to APCO, to reflecting
21 \$513,120.71 in retention to Exhibit 173, Helix's September 2008 payment application to
22 Camco reflecting \$553,404.81 in retention. See also, Exhibit 151 pgs. 1, 2 CabineTec's
last pay application to APCO for \$179,180 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).

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

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

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

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

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

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

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

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

1 192. Neither Helix nor CabineTec ever billed APCO for any of the materials or work it
2 performed after Camco signed its prime contract with Gemstone.²⁰²

3 193. And notably, neither Helix nor CabineTec billed APCO or submitted a claim letter
4 for the retention they now claim.²⁰³

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

7 **P. Helix's also entered into a ratification agreement with Camco.**

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

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

13 A. We knew they were having issues.

14 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?

15 A. Correct.²⁰⁵

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

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

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

24 ²⁰² Testimony of Joe Pelan (APCO) Day 1, p. 97.

25 ²⁰³ Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Mary Jo Allen (APCO)
26 Day 3, p. 128 (as to CabineTec); Testimony of Joe Pelan (APCO) Day 3, p. 150.

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

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

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

1 A. Something to that effect, yes.²⁰⁷

2

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

7 A. Correct.²⁰⁸

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

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

12 A. Gemstone.

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

15 A. Correct.

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

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

21 Q. Did you come to find out?

22 A. Yes.

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

24 A. Yes.²⁰⁹

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

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

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

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

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

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

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

36 ²¹¹ Exhibit 170.

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

- 1 • "Retention Monies- Final retention monies will only be
2 released to Camco Pacific from Owner when all Punch list
3 Items, Contract Items, and Close-Out Documents have been
4 fully completed and inspected by the owner. Any delay by a
5 single Subcontractor in completing this will delay the entire
6 project's final payment. PLEASE DO NOT DELAY IN
7 COMPLETING YOUR PUNCHLIST ITEMS. Exhibit 170-
8 3.
- 9 • "D. Final Payment." Subcontractor shall not be entitled to
10 payment of the balance of the Contract Price, including,
11 without limitation, the Retainage, until (1) the Contract
12 Work has been completed to the satisfaction of Contractor,
13 (2) Subcontractor has submitted to Contractor an invoice
14 for the final payment accompanied by (i) a final complete
15 list of all suppliers and subcontractors whose material or
16 services have been utilized by subcontractor, (ii) all
17 closeout documents including, warranties, guarantees, as-
18 builds, drawings, operation and maintenance manuals and
19 such other items required of Subcontractor have been
20 provided and accepted by Owner, (iii) executed
21 unconditional lien releases and waivers from Subcontractor
22 and all of its mechanics, subcontractors, and suppliers for
23 the Contract Work covered by all preceding progress
24 payments, and (iv) executed unconditional lien releases and
25 waivers upon final payment from all mechanics,
26 subcontractors, and suppliers who have previously received
27 final payment, and conditional lien releases and waiver
28 upon final payment from Subcontractor and each mechanic,
subcontractor or supplier from which an unconditional lien
release and waiver upon 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

²¹³ Exhibit 170.

1 removed.²¹⁴

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

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

6 Q. Would it be fair to conclude the technical scope of work
7 remained the same as you transitioned to work with 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 Gemstone.²¹⁶

12 204. The purpose of that meeting was to: "represent that work was still proceeding,
13 nothing had changed with our contracts with the current APCO relationship, and that
14 we were to take direction for construction from Camco, and they wanted to negotiate a
15 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 Helix-
20 APCO subcontract.²²⁰

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

22
23 ²¹⁴ Exhibit 170-11, 170-12.

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
3 were using that agreement in order to proceed with – hold us as the subcontractor going
4 forward."²²²

5 210. Camco's understanding was the same, i.e. the Ratification agreement formed the
6 basis of Camco's agreement in allowing Helix to proceed on the Project.²²³

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

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

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

- 15 • "B. Subcontractor and Camco desire to acknowledge, ratify and agree to the
16 terms of the Subcontract Agreement, whereby Camco will replace APCO as
17 the "Contractor" under the Subcontract Agreement but, subject to the terms
18 of this Ratification, all other terms and conditions of the Subcontract
19 Agreement will remain in full force and effect."
- 20 • "5. Ratification. Subcontractor and Camco agree that (a) the terms of the
21 Subcontract Agreement (as amended by this Ratification and including all
22 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 executory

26
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.

1 terms, covenants, conditions and obligations required to be performed and
2 fulfilled thereunder by Subcontractor and Camco, respectively.”²²⁵
3 214. Helix admitted it entered into a ratification agreement with Camco on September 4,
4 2008 to continue on and complete the APCO scope of work.²²⁶
5 215. Helix even added a document to the ratification entitled “Helix Electric’s Exhibit to
6 the Ratification and Amendment.”²²⁷
7 216. The Helix Exhibit to the Ratification and Amendment contained language
8 confirming that APCO was removed as the general contractor and that Helix submitted
9 \$994,025 in change orders to APCO prior to August 26, 2008, the date Camco was
10 using for its ratification agreement.²²⁸
11 217. Helix included a total contract price of \$5.55 million for the Project, which was its
12 original contract price with APCO for Phase 1, and added \$480,689 as approved
13 change orders under APCO to the total contract price.²²⁹
14 218. The proposed Helix Amendment to the ratification agreement also included the
15 following term: “All close out documents must be turned in before Camco Pacific can
16 release final payment.”²³⁰
17 219. And although Helix has not produced a signed copy of the ratification agreement,
18 Helix has admitted entering into its ratification and amended subcontract agreement in
19 its complaint as follows:

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

24 ²²⁵ Exhibit 172-5.

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

4 20. Pursuant to the CPCC Agreement, Helix was to be paid an
5 amount in excess of Ten Thousand Dollars (\$10,000.00)
6 (hereinafter "CPCC Outstanding Balance") for the CPCC
7 Work.

8 21. Helix furnished the CPCC Work and has otherwise
9 performed its duties and obligations as required by the CPCC
10 Agreement.

11 22. CPCC has breached the CPCC Agreement...

12 CPCC breached its duty to act in good faith by performing the
13 Ratification Agreement in a manner that was unfaithful to the
14 purpose of the Ratification Agreement, thereby denying
15 Helix's justified expectations...²³¹

16 Helix's Mr. Johnson admitted that Exhibit 172, the Ratification Agreement, was the
17 document that Helix referenced in its complaint (Exhibit 77) as the Ratification.²³²

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

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

21 222. The scope of work that Helix and CabineTec undertook on the Project was the same
22 as each had previously contracted with APCO for.²³⁵

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

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

27 225. In fact, both Helix and CabineTec rolled their retention over into the Camco
28 billings.²³⁷

²³¹ Exhibit 77.

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

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

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

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

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

1 226. Helix's Andy Rivera specifically admitted that it rolled its \$505,000 in retention
2 billings over to Camco.²³⁸

3 227. After Helix and CabineTec went to work for Camco, neither sent APCO any further
4 pay applications or billings for work they performed on the Project.²³⁹

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

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

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

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

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

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

16 [I]t has come to Camco Construction, Inc.'s attention that
17 funding for the completion of the Manhattan West project (the
18 "Project") has been withdrawn. Camco recently received the

19 ²³⁷ Compare Exhibit 58, Helix's last pay application to APCO to Exhibit 173, Helix's first
20 payment application to Camco. See also Exhibit 176 and 177 showing Helix's retention
21 rolled over. See also, Exhibit 150, CabineTec's last pay application to APCO, to Exhibit
22 185, CabineTec's first payment application to Camco showing CabineTec's retention
23 rolled over. See also, Exhibit 30 (Camco's August 2008 draw request confirming retention
24 was being held for the entire Project).

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

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

28 ²⁴⁰ Exhibit 173-1.

²⁴¹ Exhibit 173-2

²⁴² Exhibit 176-2.

²⁴³ Exhibit 177-4.

²⁴⁴ Exhibit 178-4.

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

²⁴⁶ Testimony of Steven Parry (Camco) Day 5, p. 36.

1 following email from [Gemstone]...As a result, Gemstone does
2 not have funds sufficient to pay out the October draw or other
3 obligations...Based on the foregoing facts and circumstances,
4 Camco has no other alternative but to immediately terminate
5 all subcontracts on the Project, including the agreement with
6 your company... you have acknowledged that Camco is not
7 liable to you for payment unless and until Camco receives the
8 corresponding payment from the Owner...Camco's contract
9 with Gemstone is a cost plus agreement wherein the
10 subcontracts and supplies were paid directly by Gemstone
11 and/or its agent, Nevada Construction Services, based on the
12 invoices and/or payment applications submitted through
13 voucher control... Therefore, Camco has no contractual and/or
14 statutory obligation to pay any claim that may be alleged by
15 any of the subcontractors and/or suppliers on the Project... any
16 claim for payment alleged against Camco will result in
17 additional fees, costs ...Therefore, all claims for payment must
18 be directed to and/or alleged against Gemstone and the
19 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 in
24 retention.²⁵⁰ Camco's Parry admitted that Exhibit 220 does include billings
25 from Helix to Camco that Camco was passing on to Gemstone.²⁵¹
- 26 • Exhibit 221 is Camco's billing to Gemstone through October 31, 2008;
27 reflecting a total retention of \$6,928,767.84 in retention.
- 28 • Exhibit 163 is Camco's November 2008 billing, reflecting a total retention of
\$7,275,991.08.

25 ²⁴⁷ Exhibit 40 and Exhibit 39.

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

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

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

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

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

3 **R. The litigation.**

4 235. On September 9, 2008, APCO brought an action against Gemstone for breach of
5 Contract and nonpayment.²⁵⁴

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

7 237. On November 4, 2008, the Project lender confirmed that it was reviewing
8 September's pay application, and confirmed that the subcontractors would be paid for
9 the work performed for Camco.²⁵⁶

10 238. In December 2008 Gemstone suspended work on the Project and advised Camco
11 and its various subcontractors that the lender was halting all financing for the
12 Project.²⁵⁷

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

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

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

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

26 ²⁵³ Exhibit 163; Testimony of Steven Parry (Camco), Day 5, p. 36.

27 ²⁵⁴ Exhibit 219.

28 ²⁵⁵ Exhibit 226.

²⁵⁶ Exhibit 138.

²⁵⁷ Exhibit 48; Exhibit 138.

1 December 19, 2008. Pursuant to our discussions, we
2 understand that you agree with the termination
3 and the effective date of termination.

4 ...
5 Pursuant to our discussions and with Gemstone's consent,
6 Camco will immediately send notices to all of the
7 subcontractors to terminate their subcontract agreements. In
8 Camco's termination notice, we will ask the subcontractors to
9 submit their payment applications to Camco. Camco will
10 review the payment applications and, if they appear proper,
11 Camco will forward them to Gemstone for payment.²⁵⁸

12 In response, Camco terminated the subcontracts with its subcontractors on December 22,
13 2008.²⁵⁹

14 241. On May 26, 2010, Judge Delaney filed an Order Striking Defendant Gemstone
15 Development West, Inc.'s Answer and Counterclaims, and Entering Default for failure
16 to give reasonable attention to matters, failure to obtain new counsel, failure to appear
17 at hearings.²⁶⁰

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

25 243. On June 13, the Court granted that motion.²⁶² The record does not reflect a final
26 order or judgment.

27 ²⁵⁸ Exhibit 165.

28 ²⁵⁹ Exhibit 166-2.

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

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

²⁶² Docket at Minutes from June 13, 2013.

1 244. APCO did not receive any funds associated with its work from June, July or August
2 2008 on the Project and never received its or any subcontractor's retention.

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

6 246. Despite APCO's efforts, Helix and CabineTec are seeking to hold APCO
7 responsible for retention that never became due under the subcontract retention
8 payment schedule and for work that both subcontractors provided to Camco and
9 Gemstone knowing full well that APCO had no liability for any further payments.

10 247. The inequities are obvious.

11 248. Any of the foregoing findings of fact that would be more appropriately considered
12 conclusions of law should be deemed so.

13 **II. CONCLUSIONS OF LAW**

14 **1. Helix's Claims Against APCO Fail**

15 249. All of Helix's claims for relief against APCO fail. Helix's First Amended
16 Complaint asserts five claims for relief against APCO: (1) breach of contract, (2)
17 breach of the covenant of good faith and fair dealing, (3) quantum meruit/unjust
18 enrichment, (4) mechanic's lien foreclosure, and (5) violation of NRS 624.606 through
19 624.630 *et seq.* Helix has failed to meet its burden of proof on its claims and APCO is
20 entitled to recover its attorneys fees and costs.

21 **A. Breach of Contract**

22 250. Helix's first claim for breach of contract fails because Helix failed to demonstrate
23 two essential elements of its claim—that it met all preconditions under the Helix
24 Subcontract or that APCO breached any contractual obligation.
25
26
27
28

1 251. In Nevada, there are four elements to a claim for breach of contract: “(1) formation
2 of a valid contract, (2) performance or excuse of performance by the plaintiff, (3)
3 material breach by the defendant, and (4) damages.”²⁶³

4 252. Exhibit 45 is the Helix Subcontract, which represents the valid, final written
5 agreement between APCO and Helix.

6 253. Helix’s claim against APCO is for \$505,021 in alleged retention.²⁶⁴ As a condition
7 precedent to payment for retention, the Helix Subcontract required Helix to properly
8 comply with the retention payment schedule in Section 3.8.²⁶⁵ Specifically, Section 3.8
9 required: (1) completion of the entire project, (2) owner acceptance, (3) final payment
10 from owner to APCO, (4) final as-built drawings, and (5) releases.²⁶⁶

11 254. A party who seeks to recover on a contract has the burden of establishing any
12 condition precedent to the respective contract.²⁶⁷

13
14 **1. Retention payment schedules and related preconditions are valid.**

15 255. Parties can agree to a schedule of payments.²⁶⁸

16 256. Parties can agree to conditions precedent to payment, including one that requires a
17 general contractor to pay a subcontractor only after the general contractor has received
18 payment from the owner.²⁶⁹

19
20 ²⁶³ *Laguerre v. Nevada System of Higher Education*, 837 F.Supp.2d 1176, 1180 (D. Nev.
21 2011).

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

23 ²⁶⁵ Exhibit 45 at Section 3.8.

24 ²⁶⁶ Exhibit 45 at Section 3.8.

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

26 ²⁶⁸ NRS 624.624(1)(a).

27 ²⁶⁹ *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982
28 (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
and never paid Big-D for 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.

1 257. Under Nevada precedent and legislative action, these provisions are valid
2 conditions precedent to payment when not combined with a waiver of a mechanic's
3 lien rights.²⁷⁰

4 258. NRS 624.624 was meant to ensure payment to subcontractors **after** the owner paid
5 the general for the subcontractor's work.²⁷¹

6 259. In the present action, the Helix Subcontract: (1) incorporated the Contract,²⁷² (2)
7 confirmed that the subcontractors would be bound to Gemstone to the same extent
8 APCO was,²⁷³ 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.²⁷⁴

10 260. Only one of those preconditions involved Gemstone's payment of retention to
11 APCO, which never occurred.

12
13 **2. Retention payments never became due.**

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

17 **NRS 624.624 Payment of lower-tiered subcontractor;
18 grounds and procedure for withholding amounts from
19 payment; rights and duties after notice of withholding,
20 notice of objection or notice of correction.**

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

23 (a) A written Contract with a lower-tiered
24 subcontractor that includes a schedule for payments, the
25 higher-tiered contractor shall pay the lower-tiered
26 subcontractor:

27 ²⁷⁰ *Id.*

28 ²⁷¹ *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 (1) On or before the date payment is due; or

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

→ whichever is earlier.

7 262. Section 3.8 of the Helix Subcontract contained a retention payment schedule that
8 was acknowledged and affirmed by Helix and APCO at trial. As such, Helix needed to
9 show these five conditions precedent were satisfied before APCO had to pay retention.
10 *See Lucini-Parish Ins. v. Buck*,²⁷⁵ (a party who seeks to recover on a contract has the
11 burden of establishing any condition precedent to the respective contract).

12 263. Helix admitted that it did not comply with the five conditions precedent to be
13 entitled to its retention payments from APCO.²⁷⁶

14 264. Helix did not meet its burden of proof and APCO never received Helix's retention
15 to trigger the 10 day period.

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

20 266. Helix never sent APCO an invoice or billing for its retention.

21 267. Accordingly, Helix's retention payment never became due from APCO.

22 268. As a result, Helix's first claim for relief for breach of contract for failing to pay
23 retention fails as a matter of law.

24 269. Lastly, there is no contractual obligation for APCO to pay Helix for the work it
25 performed for Gemstone and/or Camco after APCO left the Project. Helix knowingly

26
27 ²⁷⁵ 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

28 ²⁷⁶ See Testimony of Helix's Bob Johnson, Day 2 at pg. 19 ("Q. Well, let me ask 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 replaced APCO with Camco under the Helix Subcontract on all executory obligations,
2 including payment for future work and retention.

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

4 270. Helix's second claim for relief for breach of the covenant of good faith and fair
5 dealing also fails.

6 271. In Nevada, "[e]very contract imposes upon each party a duty of good faith and fair
7 dealing in its performance and enforcement."²⁷⁷ This implied covenant requires that
8 parties "act in a manner that is faithful to the purpose of the contract and the justified
9 expectations of the other party."²⁷⁸

10 272. A breach of the implied covenant of good faith and fair dealing occurs when the
11 terms of a contract are complied with but one party to the contract deliberately
12 contravenes the intention of the contract.²⁷⁹

13 273. To prevail on a theory of breach of the covenant of good faith and fair dealing, a
14 plaintiff must establish: (1) plaintiff and defendants were parties to a contract, (2)
15 defendants owed a duty of good faith to the plaintiff, (3) defendants breached that duty
16 by performing in a manner that was unfaithful to the purpose of the contract, and (3)
17 plaintiff's justified expectations were denied.²⁸⁰

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

19 275. Helix claims APCO breached its duty of good faith and fair dealing by "performing
20 in a manner that was unfaithful to the purpose of the APCO Agreement."²⁸²

21 276. APCO acted in good faith with respect to Helix:

22
23 ²⁷⁷ *A.C. Shaw Cont., Inc. v. Washoe Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9 (Nev. 1989)
(quoting NRS 104.1203).

24 ²⁷⁸ *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n.2, 886 P.2d 454, 457 n.2 (Nev.
1994) (internal quotations omitted).

25 ²⁷⁹ See *Hilton Hotels v. Butch Lewis Prods.*, 107 Nev. 226, 232, 808 P.2d 919, 923 (Nev.
1991).

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

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

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

- 1 a. APCO paid Helix all sums Helix billed APCO through August 2008 (when
2 APCO left the Project),²⁸³
3 b. APCO signed joint checks so that its subcontractors, including Helix, would
4 get paid, even though APCO was not getting paid,²⁸⁴
5 c. APCO pulled its general contractor permits so that Camco could get permits
6 for the Project and APCO's subcontractors could continue on with the
7 Project (less retention),²⁸⁵ and
8 d. APCO also financed the related appeal to obtain priority for Helix and the
9 other subcontractors once Gemstone shut the Project down.

10 277. Helix failed to present any evidence that APCO failed to act in good faith under the
11 Helix Subcontract or these circumstances. While it is undisputed that APCO did not
12 pay Helix the retention, there is no evidence that this non-payment was in bad faith.

13 278. As a result, Helix's second claim for breach of the implied covenant of good faith
14 and fair dealing of the subcontract fails as a matter of law.

15 **C. Unjust Enrichment/Quantum Meruit**

16 279. Helix asserted breach of contract *and* unjust enrichment claims against APCO.²⁸⁶

17 280. APCO had a subcontract with Helix, **Exhibit 45**. Helix admitted the same in its
18 complaints, at trial, and in its May 10, 2010 Motion for Partial Summary Judgment
19 Against Gemstone (and corresponding errata), on file with this Court.

20 281. An action based upon a theory of unjust enrichment is not available when there is
21 an express, written contract because no contract can be implied when there is an
22 express contract.²⁸⁷

23
24 ²⁸³ Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1 at pg. 67; Testimony of Mary
25 Jo Allen (APCO), Day 3 pg. 127 (as to Helix) and Testimony of Mary Jo Allen (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.

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

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

1 282. Even if the Helix Subcontract did not preclude an unjust enrichment/quantum
2 merit theory of recovery (which it does), APCO was not unjustly enriched by Helix's
3 work. The undisputed evidence confirms that APCO was not paid any amounts for
4 Helix's work that it did not transmit to Helix, and APCO did not get to keep the
5 property. Instead, APCO remains unpaid \$1,400,036.75 from the failed Project.²⁸⁸

6 283. As such, APCO was not unjustly enriched by Helix's work.

7 **D. Mechanic's Lien Foreclosure**

8 284. Helix's fourth claim for relief was of a mechanic's lien foreclosure, which also
9 fails.

10 285. APCO was not the owner of the Project.

11 286. The Project has already been foreclosed upon and the proceeds were awarded to the
12 lender. The Nevada Supreme Court affirmed the decision of the trial court that the
13 lender was entitled to keep the Project and related proceeds, and the subcontractors
14 (and APCO) were left with nothing. Thus, Helix cannot foreclose upon the property.

15 287. APCO is not legally liable for any deficiency judgment because it is not the party
16 responsible for any deficiency.²⁸⁹

17 **E. Violation of NRS 624.606 through 624.630 et seq.**

18 288. NRS 624.624 is designed to ensure that general contractors promptly pay
19 subcontractors after the general contractor receives payment from the owner for the
20 work performed by the subcontractor.

21 289. By its own terms, NRS 624.624 yields to a schedule of payments contained in
22 subcontracts.

23 290. Here, it is undisputed that Exhibit 45, the Helix Subcontract is a written agreement
24 between APCO and Helix and contained a retention payment schedule in Section 3.8.

25
26
27 ²⁸⁸ Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

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

1 Accordingly, pursuant to NRS 624.624(1)(a) payment is due on the date specified in
2 the subcontract.

3 291. The Helix Subcontract confirmed that Helix would get paid retention after it met
4 the five conditions precedent in the retention payment schedule.

5 292. It is undisputed that Helix never met the five preconditions in the subcontract's
6 payment schedule.²⁹⁰ Accordingly, payment of retention to Helix never became due
7 under NRS 624 and Helix's claim for a violation of NRS 624 fails.

8 293. Additionally, Helix never billed APCO for its retention and APCO never received
9 Helix's retention from Gemstone.

10 **2. CabineTec's claims against APCO all fail as well.**

11 294. All of CabineTec's claims for relief against APCO fail. CabineTec's Complaint
12 asserts the following claims for relief against APCO: (1) breach of contract, (2) breach
13 of implied covenant of good faith and fair dealing, (3) unjust enrichment/ quantum
14 meruit, (4) violation of NRS 624, (5) monies due and owing, and (6) account stated.
15 CabineTec has failed to meet its burden of proof on its claims and APCO is entitled to
16 recover its attorneys fees and costs.

17 **A. Breach of Contract**

18 295. CabineTec's first claim for breach of contract fails because CabineTec failed to
19 demonstrate two essential elements of its claim—that it met all preconditions under the
20 CabineTec Subcontract or that APCO breached any contractual obligation.

21 296. In Nevada, there are four elements to a claim for breach of contract: "(1) formation
22 of a valid contract, (2) performance or excuse of performance by the plaintiff, (3)
23 material breach by the defendant, and (4) damages."²⁹¹

24 297. Exhibit 149 is the CabineTec Subcontract, which represents the valid, final written
25 agreement between APCO and CabineTec.

26
27 ²⁹⁰ Testimony of Bob Johnson (Helix) Day 2 at pg. 36 and 37

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

1 298. Exhibit 156, CabineTec's Complaint (page 7, paragraph 50) confirms that
2 CabineTec's principal claim against APCO is for \$19,547.00 for retention.

3 299. As a condition precedent to payment for retention, the CabineTec Subcontract
4 required CabineTec to properly comply with the retention payment schedule in Section
5 3.8.²⁹² Specifically, Section 3.8 required: (1) completion of the entire project, (2) owner
6 acceptance, (3) final payment from owner to APCO, (4) final as-built drawings, and (5)
7 releases.²⁹³

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

10 **1. Retention payment schedules and related preconditions are valid.**

11 301. Parties can agree to a schedule of payments.²⁹⁵

12 302. Parties can agree to conditions precedent to payment, including one that requires a
13 general contractor to pay a subcontractor only after the general contractor has received
14 payment from the owner.²⁹⁶

15 303. Under Nevada precedent and legislative action, these provisions are valid
16 conditions precedent to payment when not combined with a waiver of a mechanic's
17 lien rights.²⁹⁷

18 304. NRS 624.624 was meant to ensure payment to subcontractors **after** the owner paid
19 the general for the subcontractor's work.²⁹⁸

20
21 ²⁹² Exhibit 149, CabineTec Subcontract at Section 3.8.

22 ²⁹³ Exhibit 149, CabineTec Subcontract at Section 3.8.

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

24 ²⁹⁵ NRS 624.624(1)(a).

25 ²⁹⁶ *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982
26 (Nev. 2016) (unpublished) ("Because the parties' subcontract contained a payment schedule
27 that required that Padilla be paid within ten days after IGT accepted Padilla's work and
28 paid Big-D for that work and it is undisputed that IGT never accepted Padilla's work
and never paid Big-D for 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.

²⁹⁷ Id.

1 305. In the present action, the CabineTec Subcontract: (1) incorporated the Contract,²⁹⁹
2 (2) confirmed that the subcontractors would be bound to Gemstone to the same extent
3 APCO was,³⁰⁰ and (3) contained a schedule of payments for both retention and change
4 orders with preconditions before APCO had an obligation to pay the subcontractors.³⁰¹
5 306. Only one of those preconditions involved Gemstone's payment of retention to
6 APCO, which never occurred.

7
8 **2. Retention payments never became due.**

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

12 **NRS 624.624 Payment of lower-tiered subcontractor;
13 grounds and procedure for withholding amounts from
14 payment; rights and duties after notice of withholding,
15 notice of objection or notice of correction.**

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

18 (a) A written Contract with a lower-tiered
19 subcontractor that includes a schedule for payments, the
20 higher-tiered contractor shall pay the lower-tiered
21 subcontractor:

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

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

28 → whichever is earlier.

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

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

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

³⁰¹ *Id.* at Section 3.8 and Article 4.

1 308. Section 3.8 of the CabineTec Subcontract contained retention payment schedules
2 that were acknowledged and affirmed by CabineTec and APCO at trial. As such,
3 CabineTec needed to show these five conditions precedent were satisfied before APCO
4 had to pay retention. *See Lucini-Parish Ins. v. Buck*,³⁰² (a party who seeks to recover on
5 a contract has the burden of establishing any condition precedent to the respective
6 contract).

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

11 310. CabineTec did not meet its burden of proof and APCO never received CabineTec's
12 retention to trigger the 10 day period.

13 311. Accordingly, CabineTec's retention payment never became due from APCO.

14 312. As a result, CabineTec's first claim for relief for breach of contract fails as a matter
15 of law.

16 313. There is no contractual obligation for APCO to pay CabineTec for the work it
17 performed for Gemstone and/or Camco after APCO left the Project. CabineTec
18 knowingly replaced APCO with Camco under the CabineTec Subcontract on all
19 executory obligations, including payment for future work and retention.

20
21 **3. CabineTec's damages are limited to \$30,110.95.**

22 314. NRCP 16.1(a)(1)(c) requires that a plaintiff "**must, without awaiting a discovery**
23 **request, provide to other parties . . . [a] a computation of any category of damages**
24 **claimed by the disclosing party, making available for inspection and copying under**
25 **Rule 34 of the documents or other evidentiary matter... on which such computation is**
26 **based, including materials bearing on the nature and extent of injuries suffered...**"³⁰³

27
28 ³⁰² 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

³⁰³ NRCP 16.1(a)(1)(c) (emphasis added).

1 315. A plaintiff “is not excused from making its disclosures because it has not fully
2 completed its investigation of the case.”³⁰⁴

3 316. NRCP 16.1(a)(c) requires that parties voluntarily disclose “[a] computation of any
4 category of damages claimed by the disclosing party” and documents to support the
5 computation.³⁰⁵

6 317. Under NRCP 26(e)(1), a plaintiff must immediately supplement its initial damages
7 computation if it “learns that in some material respect the information disclosed is
8 incomplete or incorrect.”³⁰⁶ *See Keener v. United States*,³⁰⁷ (finding a second disclosure
9 so substantially different from the first that it could not qualify as a correction of an
10 incomplete or inaccurate expert report).

11 318. CabineTec’s complaint alleged \$19,547.00 against APCO.³⁰⁸

12 319. CabineTec’s initial, and first supplemental disclosures disclosed \$30,110.95 in
13 damages against APCO, which included interest and fees on the retention amount of
14 \$19,547.³⁰⁹

15 320. Those were the only disclosures that CabineTec made prior to the close of
16 discovery, as extended by the Court.

17 321. CabineTec’s damage claims against APCO are limited to \$30,110.95.

18 322. National Wood’s Second Supplemental Disclosure containing amended damages
19 was filed on November 13, 2017, two weeks before a November 28 trial date. This
20 supplement increases the damages from \$30,110.95 to \$1,154,680.40, a 3600%
21 increase.

24 ³⁰⁴ *Id.*

25 ³⁰⁵ NRCP 16.1(a)(1)(c).

26 ³⁰⁶ NRCP 26(e)(1).

27 ³⁰⁷ 181 F.R.D. 639, 640 (D. Mont. 1998)

28 ³⁰⁸ Exhibit 156-8.

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

1 323. APCO has been prejudiced as a result of this late disclosure as APCO described in
2 its motion in limine, and National Wood's error in not disclosing its damages pursuant
3 to these rules was not harmless.

4 324. CabineTec/National Wood has no adequate justification for its repeated failure to
5 comply with Rule 16.1(a)'s disclosure requirements.

6 325. CabineTec did not present any testimony confirming it met any of the conditions in
7 Section 3.8. Instead, CabineTec's Mr. Thompson admitted that the buildings had to be
8 drywalled and painted before the cabinets were installed³¹⁰ and he had no
9 documentation (daily reports, photographs, etc.) that would confirm that CabineTec
10 ultimately installed cabinets in Phase 1 for APCO.³¹¹

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

12 326. CabineTec's second claim for relief for breach of the covenant of good faith and
13 fair dealing also fails.

14 327. In Nevada, "[e]very contract imposes upon each party a duty of good faith and fair
15 dealing in its performance and enforcement."³¹² This implied covenant requires that
16 parties "act in a manner that is faithful to the purpose of the contract and the justified
17 expectations of the other party."³¹³

18 328. A breach of the implied covenant of good faith and fair dealing occurs when the
19 terms of a contract are complied with but one party to the contract deliberately
20 contravenes the intention of the contract.³¹⁴

21 329. To prevail on a theory of breach of the covenant of good faith and fair dealing, a
22 plaintiff must establish: (1) plaintiff and defendants were parties to a contract, (2)

23
24 ³¹⁰ Testimony of Mr. Thompson (CabineTec) at Day 5 p. 69.

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

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

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

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

1 defendants owed a duty of good faith to the plaintiff, (3) defendants breached that duty
2 by performing in a manner that was unfaithful to the purpose of the contract, and (4)
3 plaintiff's justified expectations were denied.³¹⁵

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

5 331. APCO acted in good faith with respect to CabineTec:

- 6 a. APCO paid CabineTec all sums CabineTec billed APCO through August
7 2008 (when APCO left the Project),³¹⁷
- 8 b. APCO signed joint checks so that its subcontractors, including CabineTec,
9 would get paid, even though APCO was not getting paid,³¹⁸
- 10 c. APCO pulled its general contractor permits so that Camco could get permits
11 for the Project and APCO's subcontractors could continue on with the
12 Project (less retention),³¹⁹ and
- 13 d. APCO also financed the related appeal to obtain priority for CabineTec and
14 the other subcontractors once Gemstone shut the Project down.

15 332. CabineTec failed to present any evidence that APCO failed to act in good faith
16 under the CabineTec Subcontract. While it is undisputed that APCO did not pay
17 CabineTec the retention, there is no evidence that this non-payment was in bad faith.

18 333. As a result, CabineTec's second claim for breach of the implied covenant of good
19 faith and fair dealing of the subcontract fails as a matter of law.

20 **C. Unjust Enrichment/Quantum Meruit**

21 334. CabineTec asserted breach of contract *and* unjust enrichment/ quantum meruit
22 claims against APCO.³²⁰

23
24 ³¹⁵ *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (Nev. 1995).

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

26 ³¹⁷ 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.

27 ³¹⁸ 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.

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

1 335. APCO had a subcontract with CabineTec, **Exhibit 149**.

2 336. An action based upon a theory of unjust enrichment is not available when there is
3 an express, written contract because no contract can be implied when there is an
4 express contract.³²¹

5 337. Even if the CabineTec Subcontract did not preclude an unjust enrichment/quantum
6 meruit theory of recovery (which it does), APCO was not unjustly enriched by
7 CabineTec's work. The undisputed evidence confirms that APCO was not paid any
8 amounts for CabineTec's work that it did not transmit to CabineTec, and APCO did not
9 get to keep the property. Instead, APCO remains unpaid \$1,400,036.75 from the failed
10 Project.³²²

11 338. As such, APCO was not unjustly enriched by CabineTec's work.

12 **D. Violation of NRS 624.606 through 624.630 et seq.**

13 339. NRS 624.624 is designed to ensure that general contractors promptly pay
14 subcontractors after the general contractor receives payment from the Owner for the
15 work performed by the subcontractor.

16 340. By its own terms, NRS 624.624 yields to a schedule of payments contained in
17 subcontracts.

18 341. Here, it is undisputed that Exhibit 149, the CabineTec Subcontract is a written
19 agreement between APCO and CabineTec and contained a retention payment schedule
20 in Section 3.8. Accordingly, pursuant to NRS 624.624(1)(a) payment is due on the date
21 specified in the subcontract.

22 342. The CabineTec Subcontract confirmed that CabineTec would get paid retention
23 after it met the five conditions precedent in the retention payment schedule.
24
25
26

27 ³²⁰ See Exhibit 149, CabineTec Subcontract.

28 ³²¹ *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182 (1997).

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

1 343. It is undisputed that CabineTec never met the five preconditions in the subcontract's
2 payment schedule. Accordingly, payment of retention to CabineTec never became due
3 under NRS 624 and CabineTec's claim for a violation of NRS 624 fails.

4 344. Additionally, CabineTec never billed APCO for its retention and APCO never
5 received CabineTec's retention from the Owner. CabineTec rolled its retention over to
6 Camco as a Project liability, and actually billed its retention to Camco.

7 **E. Monies Due and Owing**

8 345. CabineTec has failed to prove that it is due monies from APCO.

9 346. "The word due always imports a fixed and settled obligation or liability."³²³

10 347. Exhibit 149 governed the relationship between the parties and it was subject to the
11 retention payment schedule in Section 3.8.

12 348. Payment never became due under Section 3.8 for the reasons set forth above.

13 **F. Account Stated**

14 349. CabineTec's claim for account stated fails.

15 350. In Nevada, "[a]n account stated may be broadly defined as an agreement based
16 upon prior transactions between the parties with respect to the items composing the
17 account and the balance due, if any, in favor of one of the parties."³²⁴

18 351. "To effect an account stated, the outcome of the negotiations must be the
19 recognition of a sum due from one of the parties to the other with a promise, express or
20 implied, to pay that balance."³²⁵

21 352. "The genesis of an account stated is the agreement of the parties, express or
22 implied."³²⁶ APCO and CabineTec had an express written agreement that governed
23 their relationship.
24
25

26 ³²³ *Black's Law Dictionary*, Sixth Edition, 1990.

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

28 ³²⁵ *Id.*

³²⁶ *Id.*

1 353. APCO and CabineTec did not have any prior transactions with respect to the items
2 composing any account.

3 354. No evidence was presented that APCO agreed that any sum was due. Instead,
4 APCO disputed any payment obligation.

5 355. APCO and CabineTec have not agreed to any other payment provisions outside of
6 Exhibit 149 and this claim fails.

7
8 **3. Helix and CabineTec ratified their subcontracts with Camco.**

9 356. "Ratification of a contract occurs when one approves, adopts, or confirms a contract
10 previously executed by another..."³²⁷

11 357. Ratification may be express or implied by the conduct of the parties.³²⁸ The party to
12 be charged with ratification of such a contract must have acted voluntarily and with full
13 knowledge of the facts.³²⁹

14 358. "A person ratifies an act by manifesting assent that the act affects the person's legal
15 relations or conduct that justifies a reasonable assumption that the person so
16 consents."³³⁰

17 359. "Any conduct which indicates assent by the purported principal to become a party
18 to the transaction or which is justifiable only if there is ratification is sufficient, and
19 even silence with full knowledge of the facts may operate as a ratification."³³¹

20 360. "If a person makes a manifestation that the person has ratified another's act and the
21 manifestation, as reasonably understood by a third party, induces the third party to
22 make a detrimental change in position, the person may be estopped to deny the
23 ratification."³³²

24
25 ³²⁷ *Id.*

26 ³²⁸ 17A Am Jur 2d Contracts § 10.

27 ³²⁹ *Id.*

28 ³³⁰ 3 Am Jur 2d Agency § 169.

³³¹ *Id.*

³³² 3 Am Jur 2d Agency § 171.

1 361. "A valid ratification by the principal relieves the agent from any liability to the
2 principal which would otherwise result from the fact that the agent acted in an
3 unauthorized way or without authority."³³³

4 362. Helix legally admitted it ratified the Helix/APCO subcontract to the Court and to
5 APCO in its complaint, thereby replacing Camco for APCO in all executory
6 obligations under the Helix Subcontract, including payment for retention and future
7 work.

8 363. CabineTec signed a ratification agreement with Camco.

9 364. After APCO left the Project, Helix and CabineTec took direction from Gemstone
10 or Camco, not APCO.

11 365. Helix and CabineTec submitted billings to Camco including rolling over the
12 retention they now seek from APCO, and each performed work under the ratified
13 original scope of work.

14 366. None of the ongoing work was done for or on behalf of APCO and there is no legal
15 authority that would make APCO liable for their ongoing work on the Project, or the
16 Project retention.

17 367. Helix never billed APCO for retention because it never became due.³³⁴

18 368. Helix and CabineTec waived all claims against APCO by knowingly contracting to
19 work on the Project for Camco/Gemstone and rolling their retention over to Camco and
20 Gemstone.

21 369. When Helix and CabineTec ratified their subcontracts with Camco, they replaced
22 APCO and released APCO from liability. See *Foley Co. v. Scottsdale Ins. Co.*,³³⁵ ("The
23 ratification, by subcontractor's liability insurer, of its general agent's allegedly
24 unauthorized placement of coverage released the general agent from liability to the
25

26 ³³³ 2A C.J.S. Agency § 85.

27 ³³⁴ CabineTec admittedly sent one billing for the full amount of CabineTec's delivered (but
uninstalled) cabinets that incorrectly included retention. Retention clearly was not due
under the retention payment schedule.

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

insurer.”); *Brooks v. January*,³³⁶ (holding that because a dissident faction of a church congregation ratified their pastor's unauthorized sale of property, the pastor was relieved from liability to the church); *Southwest Title Ins. Co. v. Northland Bldg.*,³³⁷ (holding that because the title insurance company ratified its agent's arguably unauthorized actions, the agent could not be held liable to the title insurance company); *Rakestraw v. Rodrigues*,³³⁸ (holding that because a wife ratified forgery of her name on a deed of trust, the agent was relieved of liability to the principal).

370. CabineTec and Helix ratified their subcontracts with Camco and discharged APCO.

4. The Subcontracts were assigned to Gemstone.

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

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

- **Gemstone:** Gemstone attempted to “terminate” the APCO/Gemstone prime contract and stopped giving direction and/or orders to APCO. Gemstone told the subcontractors to stop working for APCO and that their contracts would be assumed by Camco. Gemstone also ordered APCO off the site.
- **Camco:** Camco started giving direction to the subcontractors and dictating their work. Camco sent subcontracts and/or Ratification agreements to both Helix and CabineTec. It engaged in negotiations of the respective subcontracts, and it received billings directly from Helix and CabineTec, including the rollover of their retention.

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

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)

³³⁹ *J. Christopher Stuhmer, Inc. v. Centaur Sculpture Galleries, Ltd., Inc.*, 110 Nev. 270, 274, 871 P.2d 327, 330 (1994)

- 1 • **Helix:** Helix did not contact APCO after August 2008 and remained on-site
2 working directly for Gemstone and Camco. It engaged in subcontract
3 negotiations for the same scope of work as it had initially subcontracted for
4 with APCO with Camco, and took direction and performed work under
5 Camco's and Gemstone's direction. Helix submitted pay applications to
6 Camco and even rolled its retention account over to Camco billings. Helix
7 also represented that it signed a ratification Contract and subcontract with
8 Camco in its complaint and its amended complaint.
- 9 • **CabineTec:** CabineTec did not contact APCO after August 2008 and
10 remained on-site working for Camco. It engaged in subcontract negotiations
11 for the same scope of work as it had initially subcontracted for with APCO
12 with Camco, and took direction and performed work under Camco's
13 direction. CabineTec submitted pay applications to Camco including all
14 retention. CabineTec also signed a ratification agreement with Camco.
- 15 • **APCO:** APCO was off-site and did not dictate or control the subcontractors'
16 work. It did not have any communication with Gemstone or the
17 subcontractors after August 2008. It did not participate in construction
18 related meetings, did not receive billings from subcontractors, or submit
19 payment applications on behalf of subcontractors. In fact, Helix never
20 invoiced APCO for its retention.

21 373. The Contract contained a subcontract assignment provision that assigned Gemstone
22 APCO's subcontracts upon termination of the Contract.³⁴⁰

23 374. The Contract was incorporated into the subcontracts.³⁴¹

24 375. Once APCO left the Project, the Helix and CabineTec Subcontracts were assigned
25 to Gemstone per Gemstone's written notice to APCO.

26 376. Once Gemstone had those Subcontracts, it facilitated Camco's assumption of those
27 subcontracts.³⁴²

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

30 378. An assignment took place thereby making Gemstone/Camco the party responsible
31 for payment to the subcontractors, not APCO.

32 ³⁴⁰ Exhibit 2 at 10.4.

33 ³⁴¹ See Sections 1.1 of Helix and CabineTec subcontracts. Helix's Mr. Johnson admitted it
34 was Helix's practice to request and review an incorporated prime contract. Testimony of
35 Bob Johnson (Helix) Day 2, p.16.

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

38 ³⁴³ See Exhibit 2, Section 10.4.

1 **5. Helix and CabineTec waived any right to pursue APCO.**

2 379. "Waiver requires the intentional relinquishment of a known right."³⁴⁴

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

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

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

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

22
23 **6. The new subcontracts are novations.**

24 384. "A novation consists of four elements: (1) there must be an existing valid contract;
25 (2) all parties must agree to a new contract; (3) the new contract must extinguish the

26 ³⁴⁴ *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 123 Nev.
27 44, 49, 152 P.3d 737, 740 (2007) (internal citations omitted).

28 ³⁴⁵ *Id.*

³⁴⁶ *Id.*

1 old contract; and (4) the new contract must be valid.”³⁴⁷ “If all four elements exist, a
2 novation occurred.”³⁴⁸ “Additionally, the intent of all parties to cause a novation must be
3 clear.”³⁴⁹

4 385. “A ‘novation’ may be defined as a substitution of a new contract or obligation for
5 an old one which is thereby extinguished.”³⁵⁰

6 386. “All novations are substituted contracts, and the converse is also true that all
7 substituted contracts are novations. An existing claim can be instantly discharged by
8 the substitution of a new executory Contract in its place.”³⁵¹

9 387. “This substitution of a new obligation for an existing one, effects a novation, which
10 thereby discharges the parties from all of their obligations under the former Contract
11 inasmuch as such obligations are extinguished by the novation.”³⁵²

12 388. “However, consent to novation may be implied from the circumstances of the
13 transaction and by the subsequent conduct of the parties.”³⁵³

14 389. “Whether a novation occurred is a question of fact if the evidence is such that
15 reasonable persons can draw more than one conclusion.”³⁵⁴

16 390. The conduct of the parties, as described above, confirm a novation.

17 391. The new agreements between Camco and Helix and Camco and CabineTec are
18 novations. The substituted ratification agreements and subcontracts clearly replaced
19 and extinguished APCO’s obligations.

20 ³⁴⁷ *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989)
21 (internal citations omitted).

22 ³⁴⁸ *Id.*

23 ³⁴⁹ *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989)
citing *Pink v. Busch*, 100 Nev. 684, 690, 691 P.2d 456, 460 (1984).

24 ³⁵⁰ 66 C.J.S. Novation § 1.

25 ³⁵¹ *Lazovich & Lazovich, Inc. v. Harding*, 86 Nev. 434, 437, 470 P.2d 125, 127 (1970)

26 ³⁵² *Williams v. Crusader Disc. Corp.*, 75 Nev. 67, 70, 334 P.2d 843, 845 (1959) citing 66
C.J.S. Novation § 1, p. 681; 39 Am.Jur. Novation § 2,254.

27 ³⁵³ *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989)
citing *Sans Souci v. Div. of Fla. Land Sales*, 448 So.2d 1116, 1121
28 (Fla.Dist.Ct.App.1984).

³⁵⁴ *Id.* (internal citations omitted).

1 392. Once the novation occurred, placing Camco as the completion contractor into
2 privity with the subcontractors, APCO was wholly removed from contractual privity
3 with either Helix or CabineTec as a matter of law.

4 393. APCO did not retain any obligations (including payment) following the novations
5 of the APCO/ Helix and APCO/CabineTec subcontracts.
6

7
8 Any of the foregoing conclusions of law that would be more appropriately be
9 considered findings of fact should be deemed so.

10 NOW, THEREFORE, IT IS HEREBY SO FOUND AND CONCLUDED; and same to
11 be entered concurrently with the entry hereof:

- 12 A. That Helix and CabineTec take nothing by way of their complaints.
- 13 B. APCO, as the prevailing party, be entitled to attorney's fees per the Helix and
14 CabineTec Subcontracts.
- 15 C. APCO is granted leave to apply for the same by way of an amendment to these
16 Findings of Fact and Conclusions of Law and for judgment as to the same.
- 17 D. As the prevailing party, APCO may also apply for an award of costs.
18
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ORDER

IT IS SO ORDERED this ____ day of March, 2018.

DISTRICT COURT JUDGE

Submitted by:

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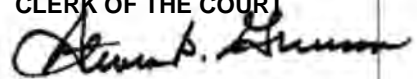
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

v.

GEMSTONE DEVELOPMENT WEST,
INC., A Nevada corporation,

Defendant.

Case No.: A571228

Dept. No.: XIII

Consolidated with:

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

APCO CONSTRUCTION, INC.'S
POST-TRIAL BRIEF

Date of Trial: January 17, 2018

AND ALL RELATED MATTERS

APCO Construction, Inc. ("APCO") hereby submits its post-trial brief, which
incorporates the following proposed findings of fact and preliminary legal analysis.

1 **I. STATEMENT OF FACTS**

2 **A. The Project**

3 This action arises out of a construction project in Las Vegas, Nevada known as the
4 Manhattan West Condominiums project in Clark County Nevada, (the "Project").
5 Gemstone Development West, Inc. ("Gemstone") was the owner and developer of the
6 Project that contracted APCO to serve as the prime contractor. On or about September 6,
7 2007, Gemstone and APCO entered into the Manhattan West General Construction
8 Contract for GMP (the "Contract")¹. The Contract included Phase 1 and Phase 2 and
9 consisted of nine buildings, with five of the nine buildings in Phase 1 (buildings 2, 3, 7, 8
10 and 9).² The Contract price for Phase 1 was \$78,938,160.³ APCO started work on the
11 Project in September, 2007.⁴

12 **B. The Contract**

13 The following are several critical Contract provisions that relate to the current
14 claims.

15 **1. Completion**

16 Section 2.10 of the Contract defines completion as follows:

17 (a) The Work within or related to each Building shall be
18 deemed completed upon the (i) completion of the Work in such
19 Building and the Corresponding Common Area; (ii) issuance
20 of the Certificate of Occupancy for such Building; (iii)
21 completion of any corrections that are requested by Developer,
22 set forth on a Developer Punch List; and (iv) delivery of the
23 applicable Completion Documents (collectively, a "Building
Completion"). The Project shall be deemed completed upon the

24 ¹ Exhibit 2. Gemstone and APCO also entered into a grading contract on April 17, 2017 but that
25 contract is not the subject of this lawsuit. Exhibit 1.

26 ² Testimony of Joe Pelan (APCO) Day 1, pp. 19 and 22; Exhibit 13, p.1. Joe Pelan is the General
27 Manager of APCO Construction.

28 ³ Testimony of Joe Pelan (APCO), Day 1, p. 28.

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

1 Building Completion of each Building (collectively "Final
2 Completion").⁵

3 Given the ultimate disputes between APCO and Gemstone, APCO did not meet this
4 definition of completion.⁶

5 **2. Progress Payments.**

6 Section 5.05 outlined the progress payment process as follows:

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

11 ...

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

28 ...

(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

⁵ Exhibit 2, Section 2.10.

⁶ Testimony of Joe Pelan (APCO), Day 1, p. 23.

1 agreement with each Third-Party Service Provider, require
2 each Third-Party Service Provider to make payment to sub-
3 contractors in a similar manner.⁷

4 Per this provision, on the 20th of each month subcontractors submitted their billings
5 to APCO for the current month (including a projection of what each intended to complete
6 through the end of that month).⁸ APCO would then provide all of these documents to
7 Gemstone.⁹ Gemstone would then walk the Project and determine the percentage each
8 subcontractor had completed.¹⁰ Gemstone would adjust each subcontractor's billings to
9 match its estimate of the percentage complete.¹¹ Gemstone would give the revised billings
10 back to APCO, and APCO would return them to each subcontractor to revise.¹² Once
11 revised, the subcontractors would submit them to APCO, APCO would submit them to
12 Gemstone, and Gemstone would submit them to its construction funds control company,
13 Nevada Construction Services ("NCS") for further review and payment.¹³ NCS would then
14 send an inspector to verify the work was complete.¹⁴ NCS would then request funds from
15 the lender and pay the total amount directly to APCO.¹⁵ APCO then paid the subcontractor
16 the final amount received from Gemstone.¹⁶ As discussed more fully below, this process
17 continued until June 2008.¹⁷

18
19 ⁷ Exhibit 2 at Section 5.05. The Contract defines APCO's subcontractors as a "Third Party
20 Service Provider." Exhibit 2, Section 2.02(a).

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

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

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

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

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

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

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

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
2 **3. Final Payment**

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

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

8 (i) All maintenance and operating manuals;

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

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

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

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

18 (vi) verification that all waivers that should be issued to
19 Developer concurrent with Final payment.¹⁸

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

22 **4. Retainage**

23 Section 5.07 contained the Contract's retention (or retainage) payment schedule.²⁰
24 Retainage is a portion of a billing that is retained by Gemstone to ensure that the work is
25 complete properly, that all material suppliers are paid and lien releases have been
26 provided, and that all certificates of occupancy were issued.²¹ APCO and the

27 ¹⁸ Exhibit 2 at Section 5.06(c).

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

²⁰ Exhibit 2 at Section 5.07.

²¹ Testimony of Joe Pelan (APCO), Day 1, p. 25; Exhibit 2 at Section 5.07.

1 subcontractors tracked the 10% retention in their billings each month.²² APCO never held
2 or otherwise received any subcontractor's retention withheld by Gemstone and kept by the
3 lender for the Project.²³

4 Section 5.05(f) sets forth the preconditions for APCO to receive its retention:

5 (f) Any remaining Standard Retainage, Monthly Retainage, and
6 Milestone Retainage shall be released to General Contractor on
7 the date that (i) Final Completion is attached and (ii) all
8 outstanding disputes between Developer and General
9 Contractor and Developer and any Third Party Service
Providers have been resolved, and any liens against the Project
related to such disputes have been removed.²⁴

10 APCO admits that it never met any of the milestones or preconditions to be entitled to its
11 retention from Gemstone.²⁵ Accordingly, APCO never billed and did not receive any
12 retention from Gemstone.²⁶

13 5. Termination for Convenience

14 Section 10.01 of the Contract is entitled "Termination by the Developer Without
15 Cause."²⁷ In the construction industry, this is known as a "termination for convenience."²⁸
16 Gemstone never terminated the Contract for convenience.

17 6. Termination for Cause

18 Section 10.02 of the Contract is entitled "Termination by Developer With Cause"
19 and states:

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

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

24 ²⁴ Exhibit 2 at Section 5.07(f).

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

26 ²⁶ Testimony of Mary Jo Allen (APCO), Day 3, p. 127. Mary Jo Allen is a bookkeeper for APCO,
27 and has been a bookkeeper for approximately 40 years. Testimony of Mary Jo Allen (APCO), Day
28 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.

²⁷ Exhibit 2 at Section 10.01.

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

1 (b) When any of the reasons set forth in Section 10.02(a) exist,
2 Developer may without prejudice to any other rights or
3 remedies available to Developer and after giving General
4 Contractor seven days' written notice (in addition to the 48
5 hours notice for purposes of Section 10.02 (a)(vi)), terminate
6 employment of General Contractor and may do the following:

7 ...

8 (ii) Accept assignment of any Third-Party Agreements
9 pursuant to Section 10.04.²⁹

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

12 7. Assignment

13 The Contract contained an assignment provision confirming that upon the
14 Contract's termination, APCO's subcontracts would be assigned to Gemstone. At that
15 point, Gemstone would be responsible for any amounts that Gemstone had not already paid
16 APCO for the subcontractors' work:

17 10.04 Assignment. Each Third-Party Agreement for a portion
18 of the Work is hereby assigned by General Contractor to
19 Developer provided that such assignment is effective only after
20 termination of the Agreement by Developer for cause pursuant
21 to Section 10.02 and only for those Third-Party Agreements
22 which Developer accepts by notifying General Contractor and
23 the applicable Third Party Service Provider in writing. General
24 Contractor shall execute and deliver all such documents and
25 take all such steps as Developer *may* require for the purpose of
26 fully vesting in Developer the rights and benefits of General
27 Contractor under such documents. Upon the acceptance by
28 Developer of any Third-Party Agreement, subject to the other
terms of this Article X; Developer shall pay to the
corresponding Third-Party Service Provider any undisputed
amounts owed for any Work completed by such Third Party
Provider, prior to the underlying termination for which

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

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

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

Developer has not yet paid General Contractor prior to such underlying termination.³²

Despite its dispute with Gemstone, APCO could not have terminated its subcontracts or it would have been in breach of the Contract.³³ Notably, the Contract and this assignment clause were incorporated into the APCO subcontracts.³⁴ And before APCO left the Project, Gemstone and APCO ensured that all subcontractors were properly paid up through that last period.³⁵

C. Subcontracts

1. Helix

Helix Electric of Nevada, LLC ("Helix") was originally selected and retained by Gemstone and performed work on the Project prior to APCO becoming the general contractor.³⁶ Specifically, Helix's Vice President, Bob Johnson,³⁷ admitted Helix participated in preparing engineering and design services for Gemstone on the Project's electrical scope of work.³⁸ So at Gemstone's direction, APCO entered into a subcontract with Helix for the electrical work (the "Helix Subcontract") required on the Project.³⁹ Helix's scope of work included "electrical installation for the project, which consists of

³² Exhibit 2, Section 10.04 (p. 36).

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

³⁴ Exhibit 45 (Helix Subcontract) and Exhibit 149 (CabineTec Subcontract), 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.

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 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 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 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 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.

1 distribution of power, lighting, power for the units, connections to equipment that required
2 electrical.”⁴⁰ So Helix’s work was based, in part, on the electrical drawings that Helix
3 prepared under contract to Gemstone.⁴¹

4 The Helix subcontract included the following relevant provisions:

- 5 ○ Section 1.1: The subcontract incorporates the Contract including all exhibits
6 and attachments, specifically including the Helix exhibit.
- 7 ○ Section 1.3: Helix was bound to APCO to the same extent and duration that
8 APCO was bound to Gemstone.
- 9 ○ Section 3.4 outlined the agreed upon progress payment schedule as follows:
Progress Payments

- 10 ■ The progress payment to Subcontractor shall be one
11 hundred percent (100%) of the value of Subcontract
12 work completed (less 10% retention) during the
13 preceding month as determined by the Owner, less such
14 other amounts as Contractor shall determine as being
15 property withheld as allowed under this Article or as
16 provided elsewhere in this Subcontract. The estimates of
17 Owner as to the amount of Work completed by
18 Subcontractor shall be binding upon Contractor and
19 Subcontractor and shall conclusively establish the
20 amount of Work performed by Subcontractor. As a
21 condition precedent to receiving partial payments from
22 Contractor for Work performed, Subcontractor shall
23 execute and deliver to Contractor, with its application
24 for payment, a full and complete release (Forms
25 attached) of *all* claims and causes of action
26 Subcontractor may have against Contractor and Owner
through) the date of the execution of said release, save
and except those claims specifically listed on said
release and described in a manner sufficient for
Contractor to Identify such claim or claims with
certainty. Upon the request of Contractor, Subcontractor
shall provide an Unconditional Waiver of Release in
form required by Contractor for any previous payment
made to Subcontractor. Any payment to Subcontractor
shall be conditioned upon receipt of the actual payments
by Contractor from Owner. Subcontractor herein agrees
to assume the same risk that the Owner *may* become

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

28 ⁴¹ Testimony of Bob Johnson (Helix) Day 2, p. 7.

1 insolvent that Contractor has assumed by entering Into
2 the Prime Contract with the Owner.

3 ○ 3.5 Progress Payments

- 4 ■ Progress payments will be made by Contractor to
5 Subcontractor within 15 days after Contractor actually
6 receives payment for Subcontractor's work from
7 Owner.... The estimate of owner as to the amount of
8 Work completed by Subcontractor be binding upon
9 Contractor and Subcontractor and shall conclusively
10 establish the amount of Work performed by
11 Subcontractor...⁴²

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

14 ○ Section 3.8: Retainage

15 The 10 percent withheld retention shall be payable to
16 Subcontractor upon, and only upon the occurrence of all
17 the following events, each of which is a condition
18 precedent to Subcontractor's right to receive final
19 payment hereunder and payment of such retention: (a)
20 completion of the entire project as described in the
21 Contract Documents; (b) the approval of final
22 acceptance of the project Work by Owner, (c) Receipt of
23 final payment by Contractor from Owner; (d) Delivery
24 to Contractor from Subcontractor all as-built drawings
25 for it's scope of work and other close out documents; (e)
26 Delivery to Contractor from Subcontractor a Release
27 and Waiver of Claims from all of Subcontractor's
28 laborers, material and equipment suppliers, and
subcontractors, providing labor, materials or services to
the Project.⁴³

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

⁴² Exhibit 45.

⁴³ Exhibit 45.

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

1 2. **Helix Clearly had a Subcontract with APCO.**

2 In its lien documents,⁴⁵ complaint against APCO,⁴⁶ and its amended complaint,
3 Helix has unequivocally admitted that it had a binding subcontract with APCO.⁴⁷ In fact,
4 Victor Fuchs, the President of Helix,⁴⁸ also confirmed the following in an affidavit
5 attached to Helix's May 5, 2010 Motion for Summary Judgment Against Gemstone
6 Development West (and corresponding errata) filed with this Court:

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

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

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

18 7. Camco Pacific Construction Company, Inc. ("Camco")
19 replaced APCO as the general contractor. Thereafter, Helix
20 performed its Work for Gemstone and/or Camco...⁴⁹

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

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

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

26 A. Okay.

27

⁴⁵ Exhibits 512 pp. 5-6, 7-9, 10-11.

28 ⁴⁶ Exhibit 77.

⁴⁷ Exhibit 231.

⁴⁸ Testimony of Bob Johnson (Helix), Day 1, p. 108.

⁴⁹ Exhibit 314.

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

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

3 A. I do.

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

9 A. In the original form, yes.

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

13 A. Correct.

14 Q. Through your change in paragraph 7, on page 16 of Exhibit
15 45, you did not otherwise modify the preconditions in the
16 retention payment schedule of 3.8, did you?

17 A. We did not.⁵¹

18 Mr. Johnson, also admitted that Exhibit 45 represented the APCO agreement that
19 Helix alleges APCO somehow breached:

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

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

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

26 A. For the Manhattan West project.

27 Q. Is there a document?

28 A. There is a document.

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

A. Okay.

The Court: Which item is it, counsel?

Mr. Jefferies: Exhibit 45.

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

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

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

A. It is the agreement between APCO and Helix.⁵²

⁵¹ Testimony of Bob Johnson, Day 2, pp. 17-18.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
Consolidated with 80508

HELIX ELECTRIC OF NEVADA, LLC,

Appellant,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent.

JOINT APPENDIX
VOLUME 83

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CHRONOLOGICAL APPENDIX OF EXHIBITS

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
06-24-09	Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint	JA000001- JA000015	1
08-05-09	APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA000016 – JA000030	1
04-26-10	CAMCO and Fidelity's Answer and CAMCO's Counterclaim	JA000031- JA000041	1
07-02-10	Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default	JA000042- JA000043	1
06-06-13	APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time	JA000044- JA000054	1
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (1) APCO's Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only	JA000055- JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317- JA000326	6

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
06-13-13	Docket Entry and Minute Order Granting APCO's Motion for Summary Judgment Against Gemstone	JA000327	6
08-02-17	Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements and <i>Ex Parte</i> Application for Order Shortening Time	JA000328- JA000342	6
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343- JA000379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380- JA000392	6
08-21-17	APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000393- JA000409	6/7
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410- JA000412	7
09-28-17	Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000413- JA000418	7
11-06-17	Peel Brimley Lien Claimants' Motion in Limine Nos. 1-6	JA000419- JA000428	7

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 1 – Notice of Entry of Order	JA000429 JA000435	7
	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.’s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC’s	JA000436- JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry’s Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000501- JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000512- JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC’s First Set of Request for Admissions to Camco Pacific Construction	JA000523- JA000533	8
11-06-17	Helix Electric of Nevada’s Motion in Limine Nos. 1-4	JA000534- JA000542	8
	Exhibit 1 – Notice of Entry of Order	JA000543- JA000549	8
	Exhibit 2 – Helix Electric of Nevada, LLC’s Amended Notice of 30(b)(6) Deposition of APCO Construction	JA000550 JA000558	8/9

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 3 - Excerpts from Brian Benson Deposition Transcript taken June 5, 2017	JA000559 JA000574	9
	Exhibit 4 – Excerpts from Mary Jo Allen’s Deposition Transcript taken July 18, 2017	JA000575- JA000589	9
11-06-17	APCO Construction, Inc.’s Omnibus Motion <i>in Limine</i>	JA000590 JA000614	9
	Exhibit 1 – Second Amended Notice of taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615- JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.’s Motion for Partial Summary Judgment Against APCO Construction	JA000625- JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting’s Deposition Transcript taken October 27, 2017	JA000647- JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679- JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731- JA000808	10/11
	Exhibit 6 – Subcontract Agreement dated April 17, 2007	JA000809- JA000826	11/12
	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827- JA000831	12
	Exhibit 8 – Email from Mary Bacon dated October 17, 2017	JA000832- JA000837	12
	Exhibit 9 – Email from Eric Zimbelman dated October 17, 2017	JA000838- JA000844	12
	Exhibit 10 – Special Master Report, Recommendation and District Court Order	JA00845- JA000848	12

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 11 – Plaintiff in Intervention, National Wood Products, Inc.’s Initial Disclosures Pursuant to NRCP 16.1	JA000849- JA000856	12
	Exhibit 12 – Plaintiff in Intervention, National Wood Products, Inc.’s First Supplemental Disclosures Pursuant to NRCP 16.1	JA000857- JA000864	12
	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865- JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC’s 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874- JA000897	12
11-14-17	Camco Pacific Construction Company, Inc.’s Opposition to Lien Claimants’ Motions in Limine Nos. 1-6	JA000898- JA000905	12
	Exhibit A – Nevada Construction Services Cost Plus GMP Contract Disbursement Agreement	JA000906- JA000907	12
	Exhibit B – Scott Financial Corporation’s April 28, 2009 letter to the Nevada State Contractor’s Board	JA000908- JA000915	2/13
	Exhibit C – E-mail from Alex Edelstein dated December 15, 2008 Re: Letter to Subs	JA000916- JA000917	13
	Exhibit D – Camco Pacific’s letter dated December 22, 2008	JA000918- JA000920	13
	Exhibit E – Order Approving Sale of Property	JA000921- JA000928	13

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
11-14-17	APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions in Limine Nos. 1-4	JA000929- JA000940	13/14
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941- JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967- JA000969	16/17
	Exhibit 3 – Excerpts from the Deposition Transcript of Andrew Rivera taken July 20, 2017	JA000970- JA000993	17/18/19
11-14-17	Helix Electric of Nevada's Opposition to APCO Construction's Omnibus Motion in Limine	JA000994- JA001008	20
	Exhibit 1 – Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001009- JA001042	20
	Exhibit 2 - Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001043- JA001055	20
	Exhibit 3 – Special Master Order Requiring Completion of Questionnaire	JA001056- JA001059	20
	Exhibit 4 – Excerpts from the Deposition Transcript of the 30(b)(6) Witness for Helix Electric of Nevada taken July 20, 2017	JA001060- JA001064	20
	Exhibit 5 - Excerpts from the Deposition Transcript of David E. Parry taken June 20, 2017	JA001065 JA001132	20/21
11-15-17	APCO Construction, Inc.'s Reply in Support of its Omnibus Motion in Limine	JA001133 JA001148	21

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 1 – Special Master Report Regarding Discovery Status	JA001149- JA001151	21
	Exhibit 2 – Notice of Taking NRCP Rule 30(b)(6) Deposition of the Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA001152- JA001160	21
12-29-17	Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion in <i>Limine</i> 1-6	JA001161- JA001169	22
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC’s Motion in <i>Limine</i> 1-4	JA001170- JA001177	22
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part APCO Construction’s Omnibus Motion in <i>Limine</i>	JA001178- JA001186	22
01-03-18	Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001187- JA001198	22
01-04-18	Motion for Reconsideration of Court’s Order Granting Peel Brimley Lien Claimants’ Partial Motion for Summary Judgment to Preclude Defenses based on Pay-if-Paid provision on an Order Shortening Time	JA001199- JA001217	22
	Exhibit 1 – Subcontract Agreement (Helix Electric of Nevada, LLC)	JA001218- JA001245	22/23/24
	Exhibit 2 – Subcontract Agreement (Zitting Brothers)	JA001246- JA001263	24

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 3 – Subcontract Agreement (CabineTec)	JA001264- JA001281	24/25
	Exhibit 4 – Amended Notice of Lien	JA001282- JA001297	25
	Exhibit 5 - Amended NOL	JA001298- JA001309	25
	Exhibit 6 – Notice of Lien	JA001310- JA001313	25
	Exhibit 7 – Order Approving Sale of Property	JA001314- JA001376	25/26
	Exhibit 8 – Order Releasing Sale Proceeds from Court Controlled Escrow Account	JA001377- JA001380	26
	Exhibit 9 – Order Denying <i>En Banc</i> Reconsideration	JA001381- JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386- JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393- JA001430	26
	Exhibit 12 – Order Big D Construction Corp.’s Motion for Attorney’s Fees, Costs and Interest Pursuant to Judgment	JA001431- JA001435	26
	Exhibit 13 – Appellant’s Opening Brief (Padilla v. Big D)	JA001436- JA001469	26
	Exhibit 14 – Respondent’s Answering Brief	JA001470- JA001516	26/27
	Exhibit 15 – Appellant’s Reply Brief (Padilla v. Big D)	JA001517- JA001551	27
01-09-18	Peel Brimley Lien Claimants’ Opposition to APCO Construction’s Motion for Reconsideration of Order	JA001552- JA001560	27

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements		
01-10-18	Reply in Support of Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions on an Order Shortening Time	JA001561- JA001573	27
01-12-18	Joint Pre-Trial Memorandum [for APCO Construction, Inc., the Peel Brimley Lien Claimants and National Wood Products, LLC ONLY]	JA001574- JA001594	27/28
	Exhibit 1 – Exhibit List APCO	JA001595- JA001614	28
	Exhibit 2 – Helix Trial Exhibits	JA001615- JA001616	28
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA001617- JA001635	28
	Exhibit 4 – Cactus Rose Trial Exhibits	JA001636- JA001637	28
	Exhibit 5 – Heinaman Trial Exhibits	JA001638- JA001639	28
	Exhibit 6 – Fast Glass Trial Exhibits	JA001640- JA001641	28
	Exhibit 7 – SWPPP Trial Exhibits	JA001642- JA001643	28
	Exhibit 8 - Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion <i>in Limine</i>	JA001644- JA001647	28

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 9 - Amended <i>nunc pro tunc</i> order regarding APCO Construction, Inc.'s Omnibus Motion <i>in Limine</i> No. 7	JA001648- JA001650	28
	Exhibit 10 - Order Granting in Part and Denying in part Helix Electric of Nevada, LLC's Motions <i>in Limine</i> 1-4 (Against APCO Construction)	JA001651- JA001653	28
	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654- JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion <i>in Limine</i>	JA001658- JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661- JA00167	28/9/29
01-17-18	Transcript Bench Trial (Day 1)¹	JA001668- JA001802	29/30
	Trial Exhibit 1 - Grading Agreement (<i>Admitted</i>)	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement (<i>Admitted</i>)	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement (<i>Admitted</i>)	JA001869- JA001884	30

¹ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone (<i>Admitted</i>)	JA001885- JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work (<i>Admitted</i>)	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work (<i>Admitted</i>)	JA001979- JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) (<i>Admitted</i>)	JA001981- JA001987	32
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) (<i>Admitted</i>)	JA001988- JA002001	32
	Trial Exhibit 14 - Letter from W. Gochmour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause (<i>Admitted</i>)	JA002002- JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices (<i>Admitted</i>)	JA002011- JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks (<i>Admitted</i>)	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract (<i>Admitted</i>)	JA002015- JA002016	33

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	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record (<i>Admitted</i>)	JA002017- JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks (<i>Admitted</i>)	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment (<i>Admitted</i>)	JA002025- JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP (<i>Admitted</i>)	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner (<i>Admitted</i>)	JA002082- JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement (<i>Admitted</i>)	JA002121- JA002146	35
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO (<i>Admitted</i>)	JA002147- JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice (<i>Admitted</i>)	JA002177- JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice (<i>Admitted</i>)	JA002182- JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors (<i>Admitted</i>)	JA002186- JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions (<i>Admitted</i>)	JA002189 – JA002198	36

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 2 – Helix Trial Exhibits	JA002222- JA002223	36
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224- JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244- JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283- JA002284	38
	Trial Exhibit 17 – Video (Construction Project)	JA002285	N/A
	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286- JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307- JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309- JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311- JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313- JA002314	40
	Exhibit 36 and 130 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002315- JA002316	40
	Trial Exhibits 37 and 131 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002317- JA002318	40
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<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 39 -Email from K. Costen to Subcontractors informing that Manhattan West Project no longer open	JA002321- JA002322	41
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	Trial Exhibit 46 - Helix Pay Application No. 16713-008R1 with Proof of Payment	JA002327- JA002345	41
	Trial Exhibit 47 - Helix Pay Application No. 16713-009R1 with Proof of Payment	JA002346- JA002356	41
	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357- JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359- JA002364	41/42
	Trial Exhibit 50 - Unconditional Waiver and Release re: Pay Application No. 8 with Copy of Payment	JA002365- JA002366	42
	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367- JA002368	42
	Trial Exhibit 52 -Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002369- JA002370	42
	Trial Exhibit 53 -Photo re: Building - 2 & 3, West (No Exterior fixtures installed. Helix billed out at 90%)	JA002371- JA002372	42

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 54 - Photo re: Building - 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002373- JA002374	42
	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375- JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377- JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379- JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382- JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392- JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406- JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413- JA002415	43
	Trial Exhibit 62 - Photo re: Building 8 & 9, South	JA002416- JA002417	43
	Trial Exhibit 63 - Photo re: Building 2 & 3, West	JA002418- JA002419	43
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<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424- JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435- JA002436	43
	Trial Exhibit 68 -Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002437- JA002438	43
	Trial Exhibit 69 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002439- JA002440	43
	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441- JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443- JA002444	43
	Trial Exhibit 72 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002445- JA002446	43
	Trial Exhibit 73 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002447- JA002448	43
	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448- JA002449	43

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	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450- JA002456	43
	Exhibit 77 - Helix Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA002457- JA002494	43
	Zitting Brothers Related Exhibits:		
	Trial Exhibit 100 - Check No. 14392 payable to Zitting (\$27,973.80); Progress Payment No. 7	JA002495- JA002497	44
	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498- JA002500	44
	Trial Exhibit 102 -Email from L. Lynn to J. Griffith, et al. re: Change Order No. 00011 “pending”	JA002501- JA002503	44
	Trial Exhibit 103- Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour	JA002504- JA002505	44
	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour with copies of change orders	JA002506- JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527- JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting (\$27,973.80)	JA002529	44
	Trial Exhibit 108 - Photo of Video (Construction Project)	JA002530- JA002531	44
	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532- JA002533	44

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	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534- JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536- JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538- JA002539	44
	Trial Exhibit 113 -Photo of Video (Construction Project)	JA002550- JA002541	44
	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542- JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544- JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546- JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551- JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564- JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO (\$33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568- JA002571	44
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572- JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576- JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578- JA002579	46
	Trial Exhibit 129 - Photo of Video (Construction Project)	JA002580- JA002581	46

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	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582- JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592- JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599- JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613- JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652- JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677- JA002713	48
	Trial Exhibit 171 - Work Order No. 100	JA002714- JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719- JA002730	48

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731- JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746- JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748- JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752- JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772- JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798- JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826- JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029- JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334- JA003338	55
	Helix Trial Exhibits:		
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57 /58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61

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	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65 /66/67/ 68/69/70/ 71/72 /73/74/75 /76/77
01-19-18	Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA005282- JA005283	78
01-18-18	Transcript – Bench Trial (Day 2)²	JA005284- JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) (<i>Admitted</i>)	JA005371- JA005623	78/79/80
01-19-18	Transcript – Bench Trial (Day 3)³	JA005624- JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint (<i>Admitted</i>)	JA005786- JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone (<i>Admitted</i>)	JA005802- JA005804	80

² Filed January 31, 201879

³ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 320 – June-August Billings—not paid to APCO (<i>Admitted</i>)	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec (<i>Admitted</i>)	JA005806-	80
	Trial Exhibit 536 – Lien math calculations (handwritten) (<i>Admitted</i>)	JA005807- JA005808	80
	Trial Exhibit 804 – Camco Correspondence (<i>Admitted</i>)	JA005809- JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien (<i>Admitted</i>)	JA005817- JA005819	81
01-24-18	Transcript – Bench Trial (Day 5)⁴	JA005820- JA005952	81
03-08-18	Letter to Judge Denton submitting Helix Electric of Nevada, LLC’s (Proposed) Findings of Fact and Conclusions of Law	JA005953- JA005985	81
03-08-18	Letter to Judge Denton submitting APCO Construction, Inc.’s Proposed Findings of Fact and Conclusions of Law	JA005986- JA006058	8/821
03-08-18	APCO Construction Inc.’s Post-Trial Brief	JA006059- JA006124	82/83
03-23-18	APCO Opposition to Helix Electric of Nevada, LLC’s Findings of Fact and Conclusions of Law	JA006125- JA006172	83/84
03-23-18	Helix Electric of Nevada, LLC’s Responses to APCO Construction’s Post-Trial Brief	JA006173- JA006193	84
04-25-18	Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO	JA006194- JA006264	84/85

⁴ Filed January 31, 201883

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05-08-18	APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA006265- JA006284	85
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285- JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357- JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370- JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386- JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399- JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403- JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407- JA006411	87
	Exhibit 7A – Billing Entries	JA006412- JA006442	87/88

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 7B – Time Recap	JA006443- JA006474	88
	Exhibit 8 – Declaration of Cody S. Munteer, Esq. in Support of Motion for Attorney’s Fees and Costs	JA006475- JA006478	88
	Exhibit 9 – APCO Construction, Inc.’s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479- JA006487	88
	Exhibit 10 – Depository Index	JA006488- JA006508	88/89
05-08-18	Helix Electric of Nevada, LLC’s Motion to Retax Costs Re: Defendant APCO Construction’s Memorandum of Costs and Disbursements	JA006509- JA006521	89
05-31-18	Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]	JA006522 JA006540	89
06-01-18	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.]	JA006541 JA006550	90
06-01-18	Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006551- JA006563	90
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564- JA006574	90

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575- JA006580	90
	Exhibit 3 – Prime Interest Rate	JA006581- JA006601	90
	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006583- JA006588	90
	Exhibit 5 – Summary of Fees	JA006589- JA006614	90
06-15-18	APCO Construction, Inc.’s Opposition to Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.’s Motions to Retax Costs	JA006615- JA006637	90/91
	Exhibit 1-A Declaration of Mary Bacon in Support of APCO’s Supplement to its Motion for Attorney’s Fees	JA006635 JA006638	91
	Exhibit 1-B – Declaration of Cody Munteer in Support of APCO’s Supplement to its Motion for Attorney’s Fees	JA006639- JA006916	91/92/93 94/95/96
06-15-18	Helix Electric of Nevada, LLC’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA006917 – JA006942	96
	Exhibit 1 – Notice of Entry of Staying the Case, Except for the Sale of the Property, Pending Resolution of the Petition before the Nevada Supreme Court	JA006943- JA006948	96

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 2 – Notice of Entry of Denying APCO Construction’s Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA006949- JA006954	96
	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955- JA006958	96
	Exhibit 4 – Order Denying <i>En Banc</i> Reconsideration	JA006959- JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA006964- JA006978	96
	Exhibit 6A – Interstate Plumbing and Air Conditioning, LLC’s Response to Special Master Questionnaire	JA006977- JA006980	96
	Exhibit 6B – Nevada Prefab Engineers, Inc.’s Response to Special Master Questionnaire	JA006981- JA006984	96
	Exhibit 6C – Zitting Brothers Construction, Inc.’s Response to Special Master Questionnaire	JA006985- JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal’s Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC’s Special Master Questionnaire	JA007002- JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006- JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037- JA007060	97

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042- JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff’s Motion to Dismiss	JA007047 JA007053	97
	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054- JA007056	97
	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057- JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction’s Omnibus Motion <i>in Limine</i>	JA007060- JA007088	97
	Exhibit 12 – Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC’s Motion in Limine (against APCO Construction)	JA007070- JA007078	97
	Exhibit 13 – Notice of Entry of Order Denying APCO Constructions’ Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA007079- JA007084	97
	Exhibit 14 – Notice of Entry of Order Denying APCO Construction’s Motion for Reconsideration of Order Granting Partial Summary	JA007085- JA007087	97

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Judgment Precluding Defenses Based on Pay-if-Paid Agreements		
	Exhibit 15 – Notice of Association of Counsel	JA007088- JA007094	97
06-15-18	Plaintiff in Intervention National Wood Products, Inc.’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007095- JA007120	97/98
06-15-18	Declaration of S. Judy Hirahara in support of National Woods’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007121- JA007189	98
06-18-18	Plaintiff in Intervention National Wood Products, Inc.’s Joinder to Helix Electric of Nevada, LLC’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007190- JA007192	99
06-21-18	Helix Electric of Nevada, LLC’s Notice of Non-Opposition to its Motion for Attorney’s Fees, Interest and Costs	JA007193- JA007197	99
06-29-18	APCO Construction, Inc.’s Reply in Support of its Motion for Attorney’s Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA007198- JA007220	99
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221- JA007222	99
	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223- JA007224	99

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
06-29-18	Helix Electric of Nevada, LLC's Reply Re: Motion to Retax	JA007225- JA007237	100
07-02-18	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA007238- JA007245	100
07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246- JA007261	100
08-08-18	Court's Decision on Attorneys' Fees and Cost Motions	JA007262- JA007280	100
09-28-18	Notice of Entry of (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281- JA007299	100
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300- JA007312	100/101
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007313- JA007315	101

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
08-06-19	Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA007316- JA007331	101
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.	JA007332- JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007336- JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345- JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395- JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance	JA007401- JA007517	102/103

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Solutions, Inc., E&E Fire Protection		
	Exhibit 6 – Order Dismissing Appeal in Part (Case No. 76276)	JA007518- JA007519	103
	Exhibit 7 – Order to Show Cause	JA007520- JA007542	103
	Exhibit 8 -Order Dismissing Appeal (Case No. 76276)	JA007524- JA007527	103
	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528- JA007541	103
	Exhibit 10 (Part One)	JA007537- JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543- JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586- JA008129	103/104/105 /106/107 /108/109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130- JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants’ Motions for Partial Summary Judgment Against Gemstone Development West	JA008139- JA008141	109
	Exhibit 10 (Part Two)	JA008142- JA008149	109

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10E – 131 Nev. Advance Opinion 70	JA008150- JA008167	109
	Exhibit 10F – Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status	JA008168- JA008170	109
	Exhibit 10EG – Notice of Entry of Granting Plaintiff’s Motion to Dismiss	JA008171- JA008177	109
	Exhibit 10H – Complaint re Foreclosure	JA008178- JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215- JA008230	109
	Exhibit 10J – APCO Construction’s Answer to Accuracy Glass & Mirror Company’s First Amended Complaint re Foreclosure	JA008231- JA008265	109/110
	Exhibit 10K – Answer to Accuracy Glass & Mirror Company, Inc.’s Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008266- JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008286- JA008290	110
	Exhibit 10M – Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291- JA008306	110
	Exhibit 10N – APCO Construction’s Answer to Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307- JA008322	110
	Exhibit 10O – Answer to Helix Electric’s Statement of Facts	JA008323- JA008338	110

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.'s Counterclaim		
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Interest and Costs	JA008339 JA008347	110
	Exhibit 10Q – Notice of Entry of Judgment [As to the claims of Helix Electric of Nevada, LLC Against Camco Construction Co., Inc.]	JA008348- JA008367	110
	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368- JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenetec Against APCO	JA008379- JA008450	110/111
	Exhibit 10T -WRG Design, Inc.'s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008451- JA008486	111
	Exhibit 10U – APCO Construction's Answer to WRG Design Inc.'s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468- JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.'s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc.'s Counterclaim	JA008484- JA008504	111

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505- JA008512	111
	Exhibit 10X – WRG Design, Inc.'s Answer to Camco Pacific Construction Company, Inc.'s Counterclaim	JA008513 JA008517	111
	Exhibit 10Y – Heinaman Contract Glazing's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518- JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction's Counterclaim	JA008531- JA008551	111
	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing's Motion for Attorneys's Fees, Interest and Costs	JA008552- JA008579	111/112
	Exhibit 10BB -Notice of Entry of Judgment [As to the Claims of Heinaman Contract Glazing Against Camco Construction Co., Inc.]	JA008561- JA008582	112
	Exhibit 10CC – Heinaman Contract Glazing's Answer to Camco Pacific Construction Company's Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589- JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party	JA008602- JA008621	112

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Complaint and Camco Pacific Construction, Inc.'s Counterclaim		
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622- JA008624	112
	Exhibit 10GG – HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625- JA008642	112
	Exhibit 10HH – APCO Construction's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643- JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658- JA008664	112
	Exhibit 10JJ -Defendants Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008665- JA008681	112
	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682- JA008685	112
	Exhibit 10LL – HD Supply Waterworks, LP's Voluntary Dismissal of Platte River Insurance Company Only Without Prejudice	JA008686- JA008693	112

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10MM – Scott Financial Corporation’s Answer to HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008694- JA008717	112/113
	Exhibit 10NN-Notice of Appeal	JA008718 JA008723	113
	Exhibit 10OO – Amended Notice of Appeal	JA008724- JA008729	113
	Exhibit 10PP – Notice of Cross Appeal	JA008730- JA008736	113
	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737- JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747- JA008755	113
	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875- JA008758	113
	Exhibit 13 – Stipulation and Order with Prejudice	JA008759- JA008780	113
	Exhibit 14 – Docket/United Subcontractors, Inc. dba Skyline Insulation’s Motion to Enforce Settlement Agreement and Enter Judgment	JA008762- JA008788	113
	Exhibit 15 – Notice of Entry of Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	JA008789- JA008798	113

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	Exhibit 16 – Notice of Appeal	JA008799- JA008810	113
08-16-19	APCO’s Opposition to Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA008811- JA008821	114
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822- JA008824	114
	Exhibit 2 – Order to Show Cause	JA008825- JA008828	114
	Exhibit 3 – Appellant/Cross-Respondent’s Response to Order to Show Cause	JA008829- JA008892	114/115/116
	Exhibit 4 – Order Dismissing Appeal	JA008893- JA008896	116
	Exhibit 5 – Chart of Claims	JA008897- JA008924	116
	Exhibit 6 – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company, Inc.’s Counterclaim	JA008925- JA008947	116/117
	Exhibit 7 – Answer to Cactus Rose’s Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.’s Counterclaim	JA008948- JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008966- JA008986	117/118

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	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998- JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011- JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025- JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039- JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111- JA009113	119
	Exhibit 15 – Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond	JA009114- JA009116	119
08-29-19	Helix Electric of Nevada LLC's Reply to APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II)	JA009117- JA009123	119

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	Dismiss All Unresolved Claims and/or (III) In The Alternative for a Rule 54(B) Certification as to Helix and APCO		
01-03-20	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification	JA009124- JA009131	119
01-29-20	Notice of Appeal	JA009132- JA009136	119/120
	Exhibit A – 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.]	JA009137- JA009166	120
	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148- JA009156	120
02-11-20	Case Appeal Statement	JA009157- JA009163	120
02-11-20	APCO's Notice of Cross Appeal	JA009164- JA010310	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorney's Fees and Costs; (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Party (4) Granting Plaintiff-in-Intervention National Wood Productions, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA009168- JA009182	120

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 2 – Notice of Entry of Order Granting Helix Electric of Nevada’s Motion for Rule 54(b) Certification	JA009183- JA00991	120

ALPHABETICAL APPENDIX OF EXHIBITS

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05-08-18	APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA006265- JA006284	85
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285- JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357- JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370- JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386- JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399- JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403- JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407- JA006411	87
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		JA006442	
	Exhibit 7B – Time Recap	JA006443- JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounter, Esq. in Support of Motion for Attorney’s Fees and Costs	JA006475- JA006478	88
	Exhibit 9 – APCO Construction, Inc.’s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479- JA006487	88
	Exhibit 10 – Depository Index	JA006488- JA006508	88/89
06-06-13	APCO’s Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO’s Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time	JA000044- JA000054	1
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO’s Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO’s Motion for Judgment Against Gemstone Only	JA000055- JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317- JA000326	6
02-11-20	APCO’s Notice of Cross Appeal	JA009164- JA010310	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.’s Motion for Attorney’s Fees and Costs; (2) Granting APCO Construction, Inc.’s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC’s	JA009168- JA009182	114

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Motion to Retax in Party (4) Granting Plaintiff-in-Intervention National Wood Productions, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply		
	Exhibit 2 – Notice of Entry of Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification	JA009183- JA00991	120
11-06-17	APCO Construction, Inc.'s Omnibus Motion <i>in Limine</i>	JA000590 JA000614	9
	Exhibit 1 – Second Amended Notice of taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615- JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	JA000625- JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting's Deposition Transcript taken October 27, 2017	JA000647- JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679- JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731- JA000808	10/11
	Exhibit 6 – Subcontract Agreement dated April 17, 2007	JA000809- JA000826	11/12
	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827- JA000831	12
	Exhibit 8 – Email from Mary Bacon dated October 17, 2017	JA000832- JA000837	12
	Exhibit 9 – Email from Eric Zimbelman dated October 17, 2017	JA000838- JA000844	12
	Exhibit 10 – Special Master Report, Recommendation and District Court Order	JA00845- JA000848	12

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	Exhibit 12 – Plaintiff in Intervention, National Wood Products, Inc.’s First Supplemental Disclosures Pursuant to NRCP 16.1	JA000857- JA000864	12
	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865- JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC’s 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874- JA000897	12
03-23-18	APCO Opposition to Helix Electric of Nevada, LLC’s Findings of Fact and Conclusions of Law	JA006125- JA006172	83/84
08-16-19	APCO’s Opposition to Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA008811- JA008821	114
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822- JA008824	114
	Exhibit 2 – Order to Show Cause	JA008825- JA008828	114
	Exhibit 3 – Appellant/Cross-Respondent’s Response to Order to Show Cause	JA008829- JA008892	114/115/116
	Exhibit 4 – Order Dismissing Appeal	JA008893- JA008896	116
	Exhibit 5 – Chart of Claims	JA008897- JA008924	116
	Exhibit 6 – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008925- JA008947	116/117

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 7 – Answer to Cactus Rose's Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.'s Counterclaim	JA008948- JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction's Counterclaim	JA008966- JA008986	117/118
	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987- JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998- JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011- JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025- JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039- JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111- JA009113	119
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	Exhibit 1-B – Declaration of Cody Mounteer in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006639- JA006916	91/92/93 94/95/96
11-14-17	APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions in Limine Nos. 1-4	JA000929- JA000940	13/14
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941- JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967- JA000969	16/17
	Exhibit 3 – Excerpts from the Deposition Transcript of Andrew Rivera taken July 20, 2017	JA000970- JA000993	17/18/19
08-21-17	APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000393- JA000409	6/7
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410- JA000412	7
03-08-18	APCO Construction Inc.'s Post-Trial Brief	JA006059- JA006124	82/83
11-15-17	APCO Construction, Inc.'s Reply in Support of its Omnibus Motion in Limine	JA001133 JA001148	21

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	Exhibit 1 – Special Master Report Regarding Discovery Status	JA001149- JA001151	21
	Exhibit 2 – Notice of Taking NRCP Rule 30(b)(6) Deposition of the Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA001152- JA001160	21
06-29-18	APCO Construction, Inc.’s Reply in Support of its Motion for Attorney’s Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA007198- JA007220	99
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221- JA007222	99
	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223- JA007224	99
04-26-10	CAMCO and Fidelity’s Answer and CAMCO’s Counterclaim	JA000031- JA000041	1
11-14-17	Camco Pacific Construction Company, Inc.’s Opposition to Lien Claimants’ Motions in Limine Nos. 1-6	JA000898- JA000905	12
	Exhibit A – Nevada Construction Services Cost Plus GMP Contract Disbursement Agreement	JA000906- JA000907	12
	Exhibit B – Scott Financial Corporation’s April 28, 2009 letter to the Nevada State Contractor’s Board	JA000908- JA000915	2/13
	Exhibit C – E-mail from Alex Edelstein dated December 15, 2008 Re: Letter to Subs	JA000916- JA000917	13
	Exhibit D – Camco Pacific’s letter dated December 22, 2008	JA000918- JA000920	13
	Exhibit E – Order Approving Sale of Property	JA000921- JA000928	13
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06-15-18	Declaration of S. Judy Hirahara in support of National Woods's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs	JA007121- JA007189	98
06-13-13	Docket Entry and Minute Order Granting APCO's Motion for Summary Judgment Against Gemstone	JA000327	6
04-25-18	Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO	JA006194- JA006264	84/85
11-06-17	Helix Electric of Nevada's Motion <i>in Limine</i> Nos. 1-4	JA000534- JA000542	8
	Exhibit 1 – Notice of Entry of Order	JA000543- JA000549	8
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	Exhibit 3 - Excerpts from Brian Benson Deposition Transcript taken June 5, 2017	JA000559 JA000574	9
	Exhibit 4 – Excerpts from Mary Jo Allen's Deposition Transcript taken July 18, 2017	JA000575- JA000589	9
06-01-18	Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA006551- JA006563	90
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564- JA006574	90
	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575- JA006580	90
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	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006583- JA006588	90
	Exhibit 5 – Summary of Fees	JA006589- JA006614	90
08-06-19	Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA007316- JA007331	101
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.’s Against APCO Construction, Inc.	JA007332- JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.’s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC’s Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC’s Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.’s Motion to File a Surreply	JA007336- JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345- JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395- JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of	JA007401- JA007517	102/103

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	Exhibit 8 -Order Dismissing Appeal (Case No. 76276)	JA007524- JA007527	103
	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528- JA007541	103
	Exhibit 10 (Part One)	JA007537- JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543- JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586- JA008129	103/104/105/ 106/107/108 109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130- JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants’ Motions for Partial Summary Judgment Against Gemstone Development West	JA008139- JA008141	109
	Exhibit 10 (Part Two)	JA008142- JA008149	109
	Exhibit 10E – 131 Nev. Advance Opinion 70	JA008150- JA008167	109
	Exhibit 10F – Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status	JA008168- JA008170	109

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	Exhibit 10EG – Notice of Entry of Granting Plaintiff’s Motion to Dismiss	JA008171- JA008177	109
	Exhibit 10H – Complaint re Foreclosure	JA008178- JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215- JA008230	109
	Exhibit 10J – APCO Construction’s Answer to Accuracy Glass & Mirror Company’s First Amended Complaint re Foreclosure	JA008231- JA008265	109/110
	Exhibit 10K – Answer to Accuracy Glass & Mirror Company, Inc.’s Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008266- JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008286- JA008290	110
	Exhibit 10M – Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291- JA008306	110
	Exhibit 10N – APCO Construction’s Answer to Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307- JA008322	110
	Exhibit 10O – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.’s Counterclaim	JA008323- JA008338	110
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC’s Motion for Attorney’s Fees, Interest and Costs	JA008339 JA008347	110
	Exhibit 10Q – Notice of Entry of Judgment [As to the claims of Helix Electric of Nevada, LLC Against Camco Construction Co., Inc.]	JA008348- JA008367	110

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	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368- JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenotec Against APCO	JA008379- JA008450	110/111
	Exhibit 10T -WRG Design, Inc.’s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008451- JA008486	111
	Exhibit 10U – APCO Construction’s Answer to WRG Design Inc.’s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468- JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.’s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc’s Counterclaim	JA008484- JA008504	111
	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505- JA008512	111
	Exhibit 10X – WRG Design, Inc.’s Answer to Camco Pacific Construction Company, Inc.’s Counterclaim	JA008513 JA008517	111
	Exhibit 10Y – Heinaman Contract Glazing’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518- JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing’s Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction’s Counterclaim	JA008531- JA008551	111

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	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing’s Motion for Attorneys’s Fees, Interest and Costs	JA008552- JA008579	111/112
	Exhibit 10BB -Notice of Entry of Judgment [As to the Claims of Heinaman Contract Glazing Against Camco Construction Co., Inc.]	JA008561- JA008582	112
	Exhibit 10CC – Heinaman Contract Glazing’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589- JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008602- JA008621	112
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622- JA008624	112
	Exhibit 10GG – HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625- JA008642	112
	Exhibit 10HH – APCO Construction’s Answer to HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643- JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658- JA008664	112

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10JJ -Defendants Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008665- JA008681	112
	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682- JA008685	112
	Exhibit 10LL – HD Supply Waterworks, LP's Voluntary Dismissal of Platte River Insurance Company Only Without Prejudice	JA008686- JA008693	112
	Exhibit 10MM – Scott Financial Corporation's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008694- JA008717	112/113
	Exhibit 10NN-Notice of Appeal	JA008718 JA008723	113
	Exhibit 10OO – Amended Notice of Appeal	JA008724- JA008729	113
	Exhibit 10PP – Notice of Cross Appeal	JA008730- JA008736	113
	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737- JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747- JA008755	113
	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875- JA008758	113
	Exhibit 13 – Stipulation and Order with Prejudice	JA008759- JA008780	113

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 14 – Docket/United Subcontractors, Inc. dba Skyline Insulation’s Motion to Enforce Settlement Agreement and Enter Judgment	JA008762- JA008788	113
	Exhibit 15 – Notice of Entry of Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	JA008789- JA008798	113
	Exhibit 16 – Notice of Appeal	JA008799- JA008810	113
05-08-18	Helix Electric of Nevada, LLC’s Motion to Retax Costs Re: Defendant APCO Construction’s Memorandum of Costs and Disbursements	JA006509- JA006521	89
06-21-18	Helix Electric of Nevada, LLC’s Notice of Non-Opposition to its Motion for Attorney’s Fees, Interest and Costs	JA007193- JA007197	99
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	Exhibit 2 – Notice of Entry of Denying APCO Construction’s Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA006949- JA006954	96
	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955- JA006958	96
	Exhibit 4 – Order Denying <i>En Banc</i> Reconsideration	JA006959- JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment	JA006964- JA006978	96

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	Exhibit 6B – Nevada Prefab Engineers, Inc.’s Response to Special Master Questionnaire	JA006981- JA006984	96
	Exhibit 6C – Zitting Brothers Construction, Inc.’s Response to Special Master Questionnaire	JA006985- JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal’s Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC’s Special Master Questionnaire	JA007002- JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006- JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037- JA007060	97
	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042- JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff’s Motion to Dismiss	JA007047 JA007053	97
	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054- JA007056	97
	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057- JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction’s Omnibus Motion <i>in Limine</i>	JA007060- JA007088	97

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	Exhibit 14 – Notice of Entry of Order Denying APCO Construction’s Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA007085- JA007087	97
	Exhibit 15 – Notice of Association of Counsel	JA007088- JA007094	97
11-14-17	Helix Electric of Nevada’s Opposition to APCO Construction’s Omnibus Motion in Limine	JA000994- JA001008	20
	Exhibit 1 – Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001009- JA001042	20
	Exhibit 2 - Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001043- JA001055	20
	Exhibit 3 – Special Master Order Requiring Completion of Questionnaire	JA001056- JA001059	20
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	Exhibit 5 - Excerpts from the Deposition Transcript of David E. Parry taken June 20, 2017	JA001065 JA001132	20/21
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03-23-18	Helix Electric of Nevada, LLC's Responses to APCO Construction's Post-Trial Brief	JA006173- JA006193	84
06-24-09	Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint	JA000001- JA000015	1
01-12-18	Joint Pre-Trial Memorandum [for APCO Construction, Inc., the Peel Brimley Lien Claimants and National Wood Products, LLC ONLY]	JA001574- JA001594	27/28
	Exhibit 1 – Exhibit List APCO	JA001595- JA001614	28
	Exhibit 2 – Helix Trial Exhibits	JA001615- JA001616	28
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA001617- JA001635	28
	Exhibit 4 – Cactus Rose Trial Exhibits	JA001636- JA001637	28
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	Exhibit 6 – Fast Glass Trial Exhibits	JA001640- JA001641	28
	Exhibit 7 – SWPPP Trial Exhibits	JA001642- JA001643	28
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	Exhibit 9 - Amended <i>nunc pro tunc</i> order regarding APCO Construction, Inc.'s Omnibus Motion <i>in Limine</i> No. 7	JA001648- JA001650	28
	Exhibit 10 - Order Granting in Part and Denying in part Helix Electric of Nevada, LLC's Motions <i>in Limine</i> 1-4 (Against APCO Construction)	JA001651- JA001653	28
	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654- JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion <i>in Limine</i>	JA001658- JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661- JA001667	28/9/29
03-08-18	Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law	JA005986- JA006058	8/821
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01-04-18	Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses based on Pay-if-Paid provision on an Order Shortening Time	JA001199- JA001217	22
	Exhibit 1 – Subcontract Agreement (Helix Electric of Nevada, LLC)	JA001218- JA001245	22/23/24
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	Exhibit 6 – Notice of Lien	JA001310- JA001313	25
	Exhibit 7 – Order Approving Sale of Property	JA001314- JA001376	25/26
	Exhibit 8 – Order Releasing Sale Proceeds from Court Controlled Escrow Account	JA001377- JA001380	26
	Exhibit 9 – Order Denying <i>En Banc</i> Reconsideration	JA001381- JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386- JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393- JA001430	26
	Exhibit 12 – Order Big D Construction Corp.’s Motion for Attorney’s Fees, Costs and Interest Pursuant to Judgment	JA001431- JA001435	26
	Exhibit 13 – Appellant’s Opening Brief (Padilla v. Big D)	JA001436- JA001469	26
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	Exhibit A – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention	JA009137- JA009166	120

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05-31-18	Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]	JA006522 JA006540	89
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09-28-18	Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281- JA007299	100
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion <i>in Limine</i>	JA001178- JA001186	22
07-02-18	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA007238- JA007245	100
01-03-20	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification	JA009124- JA009131	119

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12-29-17	Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion <i>in Limine</i> 1-6	JA001161- JA001169	22
01-19-18	Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA005282- JA005283	78
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007332- JA007334	101
07-02-10	Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default	JA000042- JA000043	1
08-02-17	Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements and <i>Ex Parte</i> Application for Order Shortening Time	JA000328- JA000342	6
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343- JA000379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380- JA000392	6
11-06-17	Peel Brimley Lien Claimants' Motion <i>in Limine</i> Nos. 1-6	JA000419- JA000428	7
	Exhibit 1 – Notice of Entry of Order	JA000429	7

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		JA000435	
	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.’s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC’s	JA000436- JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry’s Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000501- JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000512- JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC’s First Set of Request for Admissions to Camco Pacific Construction	JA000523- JA000533	8
09-28-17	Peel Brimley Lien Claimants’ Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000413- JA00418	7
01-09-18	Peel Brimley Lien Claimants’ Opposition to APCO Construction’s Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001552- JA001560	27
06-18-18	Plaintiff in Intervention National Wood Products, Inc.’s Joinder to Helix Electric of Nevada, LLC’s Opposition	JA007190- JA007192	99

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07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246- JA007261	100
01-10-18	Reply in Support of Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions on an Order Shortening Time	JA001561- JA001573	27
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	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224- JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244- JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283- JA002284	38

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	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A
	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286- JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307- JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309- JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311- JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313- JA002314	40
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	Trial Exhibit 40- Letter from D. Parry to Subcontractors Re: Funding Withdrawn	JA002323 JA002326	41
	HELIX Related Exhibits:		41
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	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357- JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359- JA002364	41/42
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	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367- JA002368	42
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	Trial Exhibit 53 -Photo re: Building - 2 & 3, West (No Exterior fixtures installed. Helix billed out at 90%)	JA002371- JA002372	42

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	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375- JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377- JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379- JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382- JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392- JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406- JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413- JA002415	43
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	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424- JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435- JA002436	43

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	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441- JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443- JA002444	43
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	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448- JA002449	43
	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450- JA002456	43
	Exhibit 77 - Helix Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA002457- JA002494	43
	Zitting Brothers Related Exhibits:		
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	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498- JA002500	44
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	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527- JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting (\$27,973.80)	JA002529	44
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	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534- JA002535	44
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	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538- JA002539	44
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	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544- JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546- JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551- JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564- JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO (\$33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568- JA002571	44

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	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572- JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576- JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578- JA002579	46
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	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582- JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592- JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599- JA002612	46
	CAMCO Related Exhibits:		
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	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652- JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
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	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731- JA002745	48
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	Trial Exhibit 175 - Change Notice No. 41	JA002748- JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752- JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772- JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798- JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826- JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029- JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334- JA003338	55
	Helix Trial Exhibits:		

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	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61
	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65/66/6 7/ 68/69/70 /71/72 /73/74/75/ 76/77
01-17-18	Transcript Bench Trial (Day 1)⁵	JA001668- JA001802	29/30
	Trial Exhibit 1 - Grading Agreement (<i>Admitted</i>)	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement (<i>Admitted</i>)	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement (<i>Admitted</i>)	JA001869- JA001884	30
	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone (<i>Admitted</i>)	JA001885- JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work (<i>Admitted</i>)	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work (<i>Admitted</i>)	JA001979- JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) (<i>Admitted</i>)	JA001981- JA001987	32

⁵ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) (<i>Admitted</i>)	JA001988- JA002001	32
	Trial Exhibit 14 - Letter from W. Gochmour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause (<i>Admitted</i>)	JA002002- JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices (<i>Admitted</i>)	JA002011- JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks (<i>Admitted</i>)	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract (<i>Admitted</i>)	JA002015- JA002016	33
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record (<i>Admitted</i>)	JA002017- JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks (<i>Admitted</i>)	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment (<i>Admitted</i>)	JA002025- JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP (<i>Admitted</i>)	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner (<i>Admitted</i>)	JA002082- JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement (<i>Admitted</i>)	JA002121- JA002146	35

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO (<i>Admitted</i>)	JA002147- JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice (<i>Admitted</i>)	JA002177- JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice (<i>Admitted</i>)	JA002182- JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors (<i>Admitted</i>)	JA002186- JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions (<i>Admitted</i>)	JA002189 – JA002198	36
01-18-18	Transcript – Bench Trial (Day 2)⁶	JA005284- JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) (<i>Admitted</i>)	JA005371- JA005623	78/79/80
01-19-18	Transcript – Bench Trial (Day 3)⁷	JA005624- JA005785	80
	Trial Exhibit 231 – Helix Electric’s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint (<i>Admitted</i>)	JA005786- JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix’s Motion for Partial Summary Judgment against Gemstone (<i>Admitted</i>)	JA005802- JA005804	80
	Trial Exhibit 320 – June-August Billings—not paid to APCO (<i>Admitted</i>)	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec (<i>Admitted</i>)	JA005806-	80

⁶ Filed January 31, 201879

⁷ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 536 – Lien math calculations (handwritten) (<i>Admitted</i>)	JA005807- JA005808	80
	Trial Exhibit 804 – Camco Correspondence (<i>Admitted</i>)	JA005809- JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien (<i>Admitted</i>)	JA005817- JA005819	81
01-24-18	Transcript – Bench Trial (Day 5)⁸	JA005820- JA005952	81
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300- JA007312	100/101

⁸ Filed January 31, 2018

1 So Helix's counsel's attempts to avoid the agreed upon retention schedule are unpersuasive
2 and not supported by the evidence.

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

5 **3. CabineTec**

6 Gemstone also selected CabineTec, Inc. ("CabineTec") to serve as APCO's cabinet
7 subcontractor.⁵³ APCO entered into a subcontract with CabineTec on April 28, 2008 for
8 the delivery and installation of cabinets on the Project (the "CabineTec Subcontract")⁵⁴

9 CabineTec's Subcontract contained the same retention and progress payment
10 schedules quoted above from the Helix Subcontract.⁵⁵ CabineTec's Nicholas Cox⁵⁶
11 admitted CabineTec did not change the retention payment schedule found in Section 3.8.⁵⁷

12 CabineTec and APCO also signed an August 6, 2008 letter regarding Terms &
13 Conditions.⁵⁸ That letter confirmed that CabineTec would be paid when "APCO receives
14 payment from Gemstone per subcontract."⁵⁹

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

17 **D. The Contract was terminated.**

18 APCO did not finish the Project as the general contractor.⁶⁰ Despite APCO's
19 performance, issues with Gemstone's payments started in May 2008 and Gemstone
20

21 ⁵² Testimony of Bob Johnson (Helix), Day 2, p. 9.

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

23 ⁵⁴ Exhibit 149, CabineTec Subcontract.

24 ⁵⁵ Exhibit 149.

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

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

27 ⁵⁸ Exhibit 152.

28 ⁵⁹ Exhibit 152.

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

1 reduced the May Pay Application to exclude any money for APCO.⁶¹ "Gemstone will
2 withhold \$226,360.88 from the May Progress Payment (the "Withheld Amount" in
3 addition to the 10% retainage that was already being withheld. The Withheld Amount
4 represents the APCO Construction Contractor's Fee line-item from the May Progress
5 Payment."⁶² As a result, Gemstone only paid the subcontractors for the May time period.
6 Given the wrongful withholding, APCO provided Gemstone with written notice of its
7 intent to stop work pursuant to NRS 624.610 if APCO was not paid in full.⁶³

8 On or about July 18, 2008, APCO submitted its pay application for the month
9 ending June 30, 2008, and requested \$6,566,720.38 (the "June Application").⁶⁴ The cover
10 page of the June Application, like all other pay applications, tracked the total value of the
11 Contract, the total requested for that month, subcontractor billings and retention.⁶⁵ The
12 June Application shows Gemstone was withholding \$4,742,574.01 in retainage as of that
13 date.⁶⁶

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

16 Specifically, Gemstone has failed to pay \$3,434,396.50 for
17 Application for Payment No. 8, Owner Draw No. 7, which was
18 submitted to Gemstone on June 20, 2008, and was due no later
19 than July 11, 2008 pursuant to NRS 624.609(A). Accordingly,
20 THIS LETTER SHALL SERVE AS APCO'S NOTICE OF
21 INTENT TO STOP WORK PURSUANT TO NRS 624.609
22 THROUGH NRS 624.630, INCLUSIVE, UNLESS APCO IS
23 PAID THE TOTAL AMOUNT OF \$3,434,396.50 FOR ITS
WORK ON THE PROJECT... Accordingly, pursuant to NRS
624.609(1)(b), payment was due to APCO within 21 days of its
request for payment (again, no later than July 11, 2008). To
date, no payment has been made...If APCO has not been paid

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

25 ⁶² Exhibit 212-1.

26 ⁶³ Exhibit 5.

27 ⁶⁴ Exhibit 4.

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

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

1 for Application for Payment No. 8, Owner Construction Draw
2 No. 7, in the amount of \$3,434,396.50 by the close of business
3 on Monday, July 28, 2008, APCO reserves the right to stop
4 work on the Project anytime after that date. While APCO is
5 willing to continue to work with Gemstone to get these issues
6 resolved, APCO is not waiving its right to stop work any time
7 after July 28, 2008, if APCO continues to work on the Project
8 or otherwise attempts to resolve these issues with Gemstone.⁶⁷

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

11 As you area aware, on July 17, 2008, APCO provided
12 Gemstone with written notice that unless APCO was paid the
13 full amount of \$3,434,396 by the close of business on Monday,
14 July 28, 2008, that APCO would stop work on the Project.
15 Gemstone failed to make full payment and has improperly
16 withheld \$203,724.29, despite having no good faith or proper
17 statutory basis for withholding the payment. AS a result,
18 APCO is stopping work on the Manhattan West Project
19 effective immediately.

20 In addition to stopping work on the project, APCO hereby
21 asserts its rights to terminate the contract pursuant to NRS
22 624.610(2). THIS LETTER SHALL SERVICE AS APCO'S
23 NOTICE OF INTENT TO TERMINATE THE
24 MANHATTAN WEST GENERAL CONSTRUCTION
25 CONTRACT FOR GMP PURSUANT TO NRS 624.606
26 THROUGH NRS 624.630, INCLUSIVE, PURSUANT TO
27 THE TERMS OF THE NRS 624.610, THE CONTRACT
28 SHALL BE TERMINATED AS OF AUGUST 14, 2008.⁶⁸

29 Helix was aware that shortly after a July 11, 2008 email,⁶⁹ APCO began issuing
30 stop work notices to Gemstone on the Project.⁷⁰ Gemstone ultimately paid APCO for
31 May.⁷¹

32 In addition, on July 29, 2008, APCO sent the following letter to its subcontractors:

33 _____
34 ⁶⁷ Exhibit 5.

35 ⁶⁸ Exhibit 6.

36 ⁶⁹ Exhibit 506, p. 1.

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

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

1 As most of you are now aware, APCO Construction and
2 GEMSTONE are embroiled in an unfortunate contractual
3 dispute which has resulted in the issuance of a STOP WORK
4 NOTICE to GEMSTONE. While it is APCO Construction's
5 desire to amicably resolve these issues so work may resume, it
6 must also protect its contractual and legal rights. This directive
7 is to advise all subcontractors on this project that until further
8 notice, all work on the Manhattan West project will remain
9 suspended.

10 THIS SUSPENSION IS NOT A TERMINATION OF THE
11 GENERAL CONTRACT AT THIS TIME AND AS SUCH
12 ALL SUBCONTRACTORS ARE STILL
13 CONTRACTUALLY BOUND TO THE TERMS OF THEIR
14 RESPECTIVE SUBCONTRACTS WITH APCO
15 CONSTRUCTION. Additionally, the subcontractors are
16 advised that, at the present time they are not obligated to
17 perform any subcontract work on the project at the direction or
18 insistence of Gemstone.

19 We will keep all subcontractors advised on a timely basis if the
20 status of the work suspension changes. Should you have any
21 questions, feel free to call.⁷²

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

24 On or about August 6, 2008, Gemstone provided APCO notice of its intent to
25 withhold the sum of \$1,770,444.28 from APCO for the June Application.⁷⁴ Accordingly,
26 APCO sent Gemstone another notice of intent to stop work on August 11, 2008, noting
27 that if APCO was not paid by August 21, 2008, APCO would suspend work on the Project:

28 On July 18, 2008, APCO Construction submitted its Progress
Payment for June 2008 pursuant to the terms of the General
Construction Agreement for GMP, dated September 6, 2007 in
the amount of \$6,566,720.38. This number has since been
adjusted on your submittal to the lender to reflect
\$5,409,029.42 currently due to APCO Construction. We
understand this number reflects certain upward adjustments to
change orders made after the Progress Payment was submitted

⁷² Exhibit 48.

⁷³ Exhibit 7.

⁷⁴ Exhibit 313.

1 on July 18, 2008. Pursuant to NRS 624.609(1), this payment
2 was due on or before August 8, 2008. By way of good faith
3 agreement extended by APCO Construction to Peter Smith,
4 this deadline was extended for three (3) days as a result of what
5 were intended to be "good faith" efforts to fully resolve certain
6 change order issues. While APCO Construction does not feel at
7 this time that Gemstone participated in good faith, we will
8 nevertheless honor our commitment to you to extend the
9 deadline. Accordingly, and pursuant to the aforementioned
10 statute and agreement, deadline for payment for the June
11 Progress Payment was close of business Monday, August 11,
12 2008.

13 ...

14 In review of your August 6, 2008 correspondence you have
15 provided a "withholding breakdown" wherein you have given
16 notice of your intent to withhold \$1,770,444.28, allegedly
17 pursuant to NRS 624.609(3) and Section 5.05(d) and
18 5.05(f)(vii) of the Agreement.

19 ...

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

23 THIS LETTER SHALL SERVE AS APCO'S NOTICE OF
24 INTENT TO STOP WORK PURSUANT TO NRS 624.606
25 THROUGH NRS 624.630, INCLUSIVE, UNLESS APCO IS
26 PAID THE TOTAL AMOUNT OF \$6,183,445.24 FOR ITS
27 WORK ON THE PROJECT.

28 IF APCO CONSTRUCTION HAS NOT BEEN PAID FOR
29 PAYMENT NO. 9 OWNER CONSTRUCTION DRAW NO.
30 8, IN THE AMOUNT OF \$6,183,445.24 BY CLOSE OF
31 BUSINESS ON THURSDAY, AUGUST 21, 2008, APCO
32 CONSTRUCTION RESERVES THE RIGHT TO STOP
33 WORK ON THE PROJECT ANYTIME AFTER THAT
34 DATE.

35 As we have previously demonstrated, APCO Construction will
36 continue to work with Gemstone to resolve the various issues
37 affecting this project, however, we will not waive our right to

1 stop work anytime after August 21, 2008. We trust you will
2 give this Notice appropriate attention.⁷⁵

3 All subcontractors were copied on this notice.⁷⁶ APCO informed all subcontractors that it
4 intended to terminate the Contract as of September 5, 2008.⁷⁷ Helix's Project Manager,
5 Andy Rivera,⁷⁸ admitted that he received APCO's stop work notice and possible
6 termination.⁷⁹

7 After receipt of APCO's written notice, Gemstone sent a letter on Friday, August
8 15, 2008, claiming that APCO was in breach of contract and that Gemstone would
9 terminate the Contract for cause if the alleged breaches were not cured by Sunday, August
10 17, 2008.⁸⁰ That letter divided APCO's alleged breaches into curable breaches and non-
11 curable breaches⁸¹ and also confirmed that upon termination: "(a) all Third-Party
12 Agreements shall be assigned to Gemstone and (b) APCO must execute and deliver all
13 documents and take such steps as Gemstone may require for the purpose of fully vesting in
14 Gemstone the rights and benefits of such assigned Third-Party Agreements."⁸²

15
16
17
18 ⁷⁵ Exhibit 10; Testimony of Joe Pelan (APCO) Day 1, pp. 30 and 32.

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

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

21 ⁷⁸ Andy Rivera was Helix's Project Manager. Testimony of Andy River (Helix), Day 2, p. 48. As
22 the Project Manager, he was in charge of labor, materials, subcontractors, labor reports, billings,
23 change orders, submittals, requests for information, and most other documents on the Project. Mr.
24 Rivera reported to Robert Johnson. Testimony of Andy Rivera (Helix), Day 2, p. 48. Andy Rivera
25 prepared Helix's pay applications. Testimony of Bob Johnson (Helix), Day 2, p. 8. So while
26 Robert Johnson signed the pay applications for Helix, Mr. Andy Rivera had the most personal
27 knowledge of the financial aspects of the Project for Helix and was actually designated as Helix's
28 PMK on Helix's claim. Testimony of Andy Rivera, Day 2, p. 73.

⁷⁹ Testimony of Bob Johnson (Helix), Day 1, p. 113.

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.

1 APCO's counsel responded to the letter the same day, August 15, 2008.⁸³ That letter
2 refuted Gemstone's purported basis for termination for cause,⁸⁴ as there was no factual
3 basis for any of the alleged defaults in Gemstone's letter:

4 Gemstone's demand is factually incorrect as APCO is not in
5 default of the agreement, and even if APCO was in default of
6 the Agreement as alleged, the issues set forth by Gemstone
7 would not support a termination of the contract...APCO has
8 provided Gemstone with a 10 day Notice of Intent to Stop
9 Work on the project due to Gemstone's failure to pay the June
10 2008 Application. Instead of making the payment that is due,
11 Gemstone is seeking to terminate the contract on or before the
12 date that APCO will stop work on the project...APCO has
13 received a copy of the e-mail sent to APCO's subcontractors by
14 Gemstone. The e-mail notes that Gemstone has a replacement
15 General Contractor in place. Obviously, Gemstone's intent is to
16 improperly declare APCO in default and then attempt to move
17 forward with the project using APCO's subcontractors... Items
18 (ii), (iii), (iv) and (v) were all complete months ago as part of
19 the normal job process.⁸⁵

20 There was no evidence presented at trial rebutting Mr. Pelan's testimony that APCO was
21 not in default. And since the Court has stricken Gemstone's answer and counterclaim
22 against APCO,⁸⁶ the Court must find that APCO was not in breach.

23 On or about August 15, 2008, prior to its purported termination, Gemstone
24 improperly contacted APCO's subcontractors and notified them that Gemstone was
25 terminating APCO as of Monday, August 18, 2008.⁸⁷ Gemstone confirmed it had already
26 retained a replacement general contractor.⁸⁸ Gemstone advised the APCO subcontractors
27 as follows:

28 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.

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

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

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

⁸⁸ Exhibit 215.

1 In the event that APCO does not cure breaches to Gemstone's
2 satisfaction during the cure period, Gemstone will proceed with
3 a new general contractor. This GC has been selected and they
4 are ready to go. We do not expect any delays or
5 demobilizations in 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

6 The replacement contractor turned out to be Camco.⁹⁰

7 On August 18, 2008, APCO emailed Gemstone objecting to such direct
8 communications with the subcontractors: "The APCO Construction GMP and Grading
9 Contracts are still in effect and as such Gemstone shall not meet with our subcontractors.
10 Please read the contract and other correspondence closely. If APCO didn't (and APCO
11 did) cure the breach, Gemstone must issue a seven day notice of termination. You are
12 disrupting my ability to perform the work."⁹¹ That same day, APCO submitted its July
13 2008 pay application for \$6,307,487.15.⁹²

14 The next day on August 19, 2008, APCO sent Gemstone a letter noting Gemstone's
15 breaches:

16 [I]t was and is my clear position that any termination of our
17 contract would be a breach of the agreement. Then today
18 before I could end my letter I received a letter from your
19 lawyer saying our contract was over.... As with the other
20 changes, it is impossible to fully account for the delays and full
21 impacts to our schedule at this stage. Consistent with the (2)
22 two change orders that Alex signed after Pete initially rejected
23 them for the HVAC deltas, I would propose that we hold the
24 time issues for now... I also find it interesting that you have
sent us letters to terminate the contract all within the time that
we were allowed to provide you notice of our intent to suspend
the work if the change orders on the June pay application were
not paid. That was to elapse on Thursday and now your lawyer
is proposing that we agree to a termination before that date. We

25
26 ⁸⁹ Exhibit 215-2.

27 ⁹⁰ Exhibit 162, Camco/Gemstone Prime Contract.

28 ⁹¹ Exhibit 216-1.

⁹² Exhibit 8.

1 will not agree and intend to fully proceed with our contract
2 obligations... Yesterday morning, Alex came in and asked me
3 what we were still doing on site because there was nothing that
4 we could do to satisfy Gemstone. That would be consistent
5 with the email that was sent to all of our subcontractors on
6 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

7 On August 19, 2008, Gemstone confirmed that joint checks to the Subcontractors
8 and Apco would be written for the June 2008's pay application: "I'd like to have dual
9 checks cut for this [June, 2008] pay application directly to the subs and the general. I
10 believe this is different than what we have historically done on ManhattanWest, but similar
11 to how we have paid some Manhattan Pay Apps in the past."⁹⁴ Gemstone confirmed that
12 all future payments would essentially go directly from Nevada Construction Control to the
13 subcontractors.⁹⁵

14 Although it disagreed with Gemstone's conduct, APCO cooperated in this post
15 termination process to ensure that all subcontractors were properly paid for work
16 performed on APCO's watch:

17 An APCO representative has to sign all of *the* subcontractor
18 checks due to Gemstone's request to prepare the "joint checks".
19 An APCO signer should be doing that by the end of today or
20 tomorrow morning. At that time, NCS will contact all of the
21 subcontractors to pick up their checks. Furthermore, today the
22 APCO's July pay application was submitted to NCS. As
23 mentioned in the meeting on Monday, August 25, 2008,
24 enclosed is the contact information for Camco Pacific
25 regarding pay applications... Please forward your July and
26 August pay requests to Yvonne. Obviously, July was already

27 ⁹³ Exhibit 15.

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

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

1 submitted to NCS but we would like Camco to have record of
2 the most current pay requests.⁹⁶

3 None of the joint checks that NCS and Gemstone issued and that APCO properly
4 endorsed included any funds for APCO.⁹⁷ And none of the joint checks accounted for any
5 APCO or subcontractor retention because retention had not been earned under either the
6 Contract or the various subcontracts.⁹⁸ As of the end of August, the Project was only about
7 74% complete.⁹⁹

8 Ultimately, APCO was not paid for its share June Application even though the
9 subcontractors received their money.¹⁰⁰

10 On August 21, 2008, APCO sent a letter to its subcontractors informing them that
11 APCO would stop work on the Project on August 21, 2008:

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

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

24 ⁹⁷ Testimony Day 1, p. 38.

25 ⁹⁸ Testimony of Joe Pelan (APCO), Day 1, pp. 38-39.

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

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

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

1 On August 21, 2008 APCO also provided Gemstone with written notice of APCO's
2 intent to terminate the Contract as of September 5, 2008.¹⁰² APCO's last work on the
3 Project was August 21, 2008.¹⁰³

4 On August 22, 2008, APCO sent a letter to the Clark County Building Department
5 advising that APCO was withdrawing as the general contractor for the Project.¹⁰⁴ APCO
6 was required to cancel its current building permits so the Project permits could be issued
7 and transferred to Camco.¹⁰⁵

8 In an August 28, 2008 letter, Gemstone advised that APCO was terminated for
9 cause as of August 24, 2008:

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

21 APCO contested Gemstone's purported termination and APCO's evidence was
22 uncontested on that issue that it was not in default.¹⁰⁷ APCO properly terminated the
23 Contract for cause in accordance with NRS 624.610 and APCO's notice of termination
24 since Gemstone did not pay the June Application, as of September 5, 2008.¹⁰⁸ Helix and
25

26 ¹⁰² Exhibit 23.

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

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

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

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

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

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

1 CabineTec both received a copy of the termination letter.¹⁰⁹ APCO considered its notice of
2 termination to be effective as of September 5, 2008.¹¹⁰ But Gemstone proceeded with the
3 Project as if it had terminated the Contract with APCO.¹¹¹ APCO was physically asked to
4 leave the Project as of the end of August, 2008.¹¹² And all subcontractors received notice
5 from Gemstone that APCO was terminated on August 26, 2008 and would not be returning
6 to the Project.¹¹³

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

8 Even though the subcontractors had received all amounts billed through August
9 2008, Gemstone owed APCO \$1,400,036.75 for APCO's June, July, and August 2008
10 payment applications.¹¹⁴ Gemstone also owed APCO \$200,000 from various
11 reimbursements.¹¹⁵ APCO has never received payment in any form from any entity for
12 these pay applications or the \$200,000 in reimbursements.¹¹⁶ The \$1,400,036.75 does not
13
14

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

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

17 ¹¹¹ Testimony of Joe Pelan (APCO), Day 1, pp. 100-101; Exhibit 29.

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

19 ¹¹³ Exhibit 118.

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

1 reflect any of the retention that Gemstone withheld from APCO on the Project because the
2 retention never became due.¹¹⁷

3 Ultimately, Gemstone would not accept APCO's final August 2008 pay
4 application.¹¹⁸ So Camco submitted APCO's August 2008 billing so APCO's
5 subcontractors would get paid.¹¹⁹ Camco's August 2008 pay application tracked the full
6 retention from the Project (including APCO's)¹²⁰ and APCO's full contract amount.¹²¹ As
7 of its last pay application, APCO believed it was 76% complete with the Project.¹²²

8 Despite the amounts owed to APCO, the evidence was uncontested that the
9 subcontractors received all of their billed amounts, less retention, up through August
10 2008.¹²³

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

12 During this dispute, APCO did not terminate the Helix or CabineTec
13 subcontracts,¹²⁴ but advised its subcontractors that they could suspend work on the Project
14 in accordance with NRS Chapter 624.¹²⁵ If APCO wanted to terminate its subcontractors,
15 it had to do so in writing.¹²⁶ Helix admitted it knew APCO was off the Project as of August
16 28, 2008¹²⁷ and that neither APCO nor Helix terminated the Helix Subcontract.¹²⁸

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

18 ¹¹⁸ Testimony of Joe Pelan (APCO), Day 1, pp. 44-45. Exhibit 31.

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

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

21 ¹²¹ Exhibit 218-10.

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

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

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

26 ¹²⁵ Exhibit 23.

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

28 ¹²⁷ 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 Additionally, Helix admitted it never issued a stop work notice to APCO pursuant to NRS
2 624 because it had no payment disputes with APCO.¹²⁹ In fact, per Gemstone's notice
3 dated August 15, 2008, Gemstone gave APCO notice that it exercised its right under
4 Contract Section 10.04 to accept an assignment of the APCO subcontracts.¹³⁰ Accordingly,
5 any purported termination of a subcontract by APCO would have breached the Contract.¹³¹

6 During August 2008, subcontractors on the Project were getting information
7 directly from Gemstone.¹³² Helix and CabineTec both continued work on the Project for
8 Gemstone and Camco, and submitted their August billings to Camco.¹³³

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

10 Before APCO was asked to leave the Project on August 19 and 20, 2008, APCO
11 documented the as-built conditions and confirmed that Helix and CabineTec were not
12 anywhere close to completing their respective scopes of work.¹³⁴

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

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

16 Camco and Gemstone had several meetings and Gemstone contracted with Camco
17 to complete the Project on August 25, 2008.¹³⁵ In terms of the plans, specifications and
18 technical scope of work, Camco's work was the same as APCO's.¹³⁶ In fact, Camco used

19 _____
20 ¹²⁹ Testimony of Bob Johnson (Helix) Day 1, p. 127.

21 ¹³⁰ Exhibit 13.

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

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

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

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

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

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

1 the same schedule of values and cost coding that APCO had been using on the Project.¹³⁷

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

3 Camco's Steve Parry confirmed that Exhibit E to the Camco contract represented
4 the state of the Project when Camco took over.¹³⁹ Gemstone and Camco estimated the
5 Project to be 74% complete for Phase 1.¹⁴⁰ Those estimates also confirmed that:

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

8 Among other things, the Camco contract required that Camco "shall engage the
9 Third-Party Service Providers listed on Exhibit C (the "Existing Third-Party Service
10 Providers)."¹⁴³ Helix and CabineTec are both listed as Existing Third-Party Service
11 Providers on Exhibit C.¹⁴⁴ And Camco had worked with Helix before.¹⁴⁵ Camco's Steve
12 Parry admitted that Camco was assuming the subcontracts that APCO had with Helix and
13 CabineTec:

14 [Exhibit 162 was on the elmo]

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

16 A. Yes.

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

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

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

20 A. Yes.

21 Q. And, sir, if you would, turn to Exhibit C within the exhibit.

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

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

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

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

26 ¹⁴¹ Exhibit 160-3.

27 ¹⁴² Exhibit 160-3.

28 ¹⁴³ Exhibit 162-2.

¹⁴⁴ Exhibit 162-23.

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

1 Those assumed contracts from APCO included CabineTec and
2 Helix; correct?

3 A. Yes.

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

7 A. Yes.

8 Q.¹⁴⁶

9 After Camco became the general contractor, APCO was not responsible to pay
10 subcontractors for work performed under Camco.¹⁴⁷ Camco never had any contact or
11 involvement with APCO on the Project,¹⁴⁸ nor did APCO provide any direction or impose
12 any scheduling requirements on subcontractors proceeding with their work.¹⁴⁹ APCO
13 played no role in the pay application process or the actual field work on the Project from
14 September-December 2008.¹⁵⁰ And no Helix or CabineTec representative ever approached
15 APCO with questions or concerns about proceeding with work on the Project after
16 APCO's termination.¹⁵¹ So APCO did not receive any benefit from the work or materials
17 that Helix or CabineTec performed or provided to the Project after August 21, 2008.¹⁵²

18 Camco's first pay application was for the period through August 31, 2008.¹⁵³ That
19 billing reflected Gemstone retainage account for APCO's work:

20 Q. Now, I have highlighted the retainage line item of
21 \$5,337,982.74 [on Trial Exhibit 218]. Do you see that?

22 A. Yes.

23 Q. What did that figure represent?

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

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.

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

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

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

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

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

2 A. Gemstone, the owner.

3 ...

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

7 A. That's correct.¹⁵⁴

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

10 **I. Cabinetec's entered into a ratification agreement with Camco.**

11 After APCO left the Project, CabineTec signed a ratification agreement with Camco
12 whereby CabineTec agreed to complete its original scope of work for Camco.¹⁵⁵
13 CabineTec understood the ratification to mean that "you guys [APCO] were stepping out
14 and Camco was stepping in."¹⁵⁶ CabineTec further clarified its understanding of the
15 ratification agreement as follows:

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

21 A. So APCO was going away and Camco was coming
22 on. That's what was happening.¹⁵⁷

23 In addition, the signed ratification agreement contained the following
24 terms:

- 25 • "B. Subcontractor and Camco desire to acknowledge, ratify and agree to the
26 terms of the Subcontract Agreement, whereby Camco will replace APCO as
27 the "Contractor" under the Subcontract Agreement but, subject to the terms
28 of this Ratification, all other terms and conditions of the Subcontract
Agreement will remain in full force and effect."¹⁵⁸

24 ¹⁵⁴ Testimony of Steve Parry (Camco) Day 5, p. 30.

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

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

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

¹⁵⁸ Exhibit 183-1.

- 1 • The ratification agreement acknowledged that \$264,395.00 of work remained
2 to be finished on Building 8 and \$264,395.00 on Building 9.¹⁵⁹
- 3 • “5. Ratification. Subcontractor and Camco agree that (a) the terms of the
4 Subcontract Agreement (as amended by this Ratification and including all
5 Amendments, Previously Approved Change Orders, and the Camco
6 Schedule) will govern their relationship regarding the Project, (b) Camco
7 will be the “Contractor” under the Subcontract Agreement, and (c)
8 Subcontractor and Camco agree to perform and fulfill all of the executory
9 terms, covenants, conditions and obligations required to be performed and
10 fulfilled thereunder by Subcontractor and Camco, respectively.”¹⁶⁰

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

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

15 10. On or about August 26, 2008, pursuant to Gemstone’s
16 request CABINETEC entered into a Ratification and
17 Amendment of Subcontract Agreement (the “Ratification”)
18 with CAMCO, whereby CAMCO agreed to the terms of the
19 APCO Subcontract and to replace APCO as the “Contractor”
20 under the APCO Contract. . .

21 14. CABINETEC entered into the Ratification with CAMCO,
22 pursuant to Gemstone’s request, wherein CAMCO agreed to
23 pay CABINETEC for the services and materials on the Project.

24 15. Pursuant to, and in reliance upon, the aforementioned
25 Subcontract, Ratification and representations, CABINETEC
26 performed the work of providing services and materials (the
27 “Work.”) ...¹⁶¹

28 So there is no basis for CabineTec to seek payment from APCO for its retention, which
never became due under the retention payment schedule while APCO was the contractor.
And APCO had no liability for the materials CabineTec provided to Camco and Gemstone
after termination.

¹⁵⁹ Exhibit 183-2.

¹⁶⁰ Exhibit 172-5.

¹⁶¹ Exhibit 156 at ¶ 10-15.

1 The fact is, APCO paid (and even overpaid) CabineTec for materials delivered to
2 the Project while APCO was contractor.¹⁶² CabineTec did not dispute this overpayment at
3 trial. CabineTec submitted two invoices while APCO was on the Project.¹⁶³ Exhibit 148 is
4 CabineTec's first invoice to Camco for \$70,836.¹⁶⁴ CabineTec's second invoice is for
5 \$72,540.¹⁶⁵ The total amount due to CabineTec, less retention, was \$129,038.40.¹⁶⁶ But
6 APCO actually paid CabineTec a total of \$161,262 for these two invoices.¹⁶⁷ As such,
7 CabineTec was overpaid \$32,223.60 by APCO on the Project. CabineTec did not submit a
8 pay application for August 2008.¹⁶⁸ APCO is entitled to be paid this over payment.

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

10 When CabineTec originally filed suit CabineTec disclosed \$19,547.00 in damages
11 against APCO in its complaint:

12 "50. As a result of the foregoing, and in accordance with the
13 principles of equity and common law, CABINETEC is entitled
14 to judgment in its favor, and against APCO in the amount of
15 \$19,547.00, together with interest thereon at the highest legal
16 rate."¹⁶⁹

17 And, CabineTec's initial and first supplemental disclosures only disclosed
18 \$30,110.95 in damages against APCO: "...National Wood seeks to recover those damages
19 claimed by CabineTec in its complaint in intervention against APCO in the amount of
20 \$30,110.95 and CAMCO in the amount of \$1,125,374.94..."¹⁷⁰ The \$30,110.95

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

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

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

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

26 ¹⁶⁶ Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

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

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

¹⁶⁹ Exhibit 156-8.

¹⁷⁰ Exhibit 157, CabineTec's Initial Disclosure, Exhibit 158, CabineTec's First Supplemental
Disclosure.

1 represented \$19,547 in alleged retention, and \$10,563.95 in interest and fees.¹⁷¹ Those
2 were the only two disclosures CabineTech made before the close of discovery, as was
3 extended by the Court. Then on the eve of trial, CabineTec attempted to disclose and seek
4 \$1,154,680.40 in damages against APCO.¹⁷² Aside from the late disclosure there is no
5 basis for that amount as it is undisputed that CabineTec was paid every dollar it billed
6 APCO, less retention, notwithstanding the overpayment.¹⁷³

7 **K. Helix's claim for \$505,021 in retention.**

8 Helix's designated PMK and Project Manager, Andy Rivera, confirmed that Helix's
9 only claim in this litigation against APCO was for the retention of \$505,021.¹⁷⁴ Helix's
10 counsel admitted this limited claim in its opening statement.¹⁷⁵ And then at trial, Mr.
11 Rivera confirmed Helix was only seeking retention and not the unpaid invoices submitted
12 to Camco:

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

16 A. Correct.

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

18 A. Yes.

19 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?

20 A. Correct.

21 Q. And would you agree that as the PMK, you identified
22 a figure of \$505,021 as the amount that Helix in this lawsuit

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

24 ¹⁷² Exhibit 159-6.

25 ¹⁷³ Exhibit 147 summarizing payments and releases.

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

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

1 claims APCO owes it, correct?

2 A. Correct.

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

6 A. Correct.

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

9 A. Yes.

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

14 A. Yes.

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

17 A. No. No. I'm sorry.

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

20 A. I would not know.

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

24 A. Correct.

25 Q. Okay. And in light of your summary within Exhibit
26 44, would it be fair to conclude that all of the amounts that
27 Helix billed to APCO were, in fact, paid but for retention?

28 A. Yes.¹⁷⁶

19 Helix received direct payments from APCO through May 2008.¹⁷⁷ After May 2008,
20 Helix received payment for its APCO billings directly from NCS through joint checks to
21 Helix and APCO, which APCO endorsed over to Helix.¹⁷⁸ Helix's first billing to Camco
22 was on September 19, 2008.¹⁷⁹ Mr. Rivera admitted Helix is only seeking \$505,021 in
23 retention from APCO, which Helix never billed Apco.¹⁸⁰

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

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

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

28 ¹⁷⁹ 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

1 **L. Retention never became due to Helix or CabineTec.**

2 As noted above, both the Helix Subcontract and the CabineTec Subcontract
3 included an agreed upon retention payment schedule in Paragraph 3.8. The evidence was
4 undisputed, and even acknowledged by Helix and CabineTec, that the level of completion
5 and other preconditions of the retention payment schedule were not met while APCO was
6 the general contractor. More specifically, Helix's Mr. Johnson admitted Helix did not meet
7 the preconditions in Section 3.8 of the Subcontract to be entitled to retention:¹⁸¹

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

11 A. Not to my knowledge.¹⁸²

12 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 for APCO.¹⁸⁴

15 It is undisputed that neither Helix nor CabineTec presented *any* testimony that they
16 met the valid conditions precedent to payment to be entitled to retention. *See Lucini-Parish*
17 *Ins. v. Buck*,¹⁸⁵ (a party who seeks to recover on a contract has the burden of establishing
18 any condition precedent to the respective contract). Instead, the Court saw pictures¹⁸⁶ and
19
20

21 Helix was paid a total of \$4,626,186.11 on the Project by and through APCO, which reflected
22 payment for work billed (and retention) through August 31, 2008. Testimony of Andy Rivera
23 (Helix) Day 2, pp. 58-59; Exhibits 46-47, Helix May and June billings; Exhibit 49-50; APCO
Checks to Helix, Exhibit 58, Exhibit 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.

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

28 ¹⁸⁵ 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

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

1 videos¹⁸⁷ confirming that Helix's and CabineTec's work was not completed. The Court
2 also heard unrefuted testimony that APCO was never paid from Gemstone for Helix's or
3 CabineTec's retention.¹⁸⁸ The fact is APCO and its subcontractors never got to the point
4 where they could request retention while APCO was the contractor.¹⁸⁹

5 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
7 on the Project.¹⁹⁰ Helix's Mr. Rivera admitted Helix *has never* billed APCO for retention,
8 and that all amounts that Helix did bill APCO were paid, less retention.¹⁹¹ The fact that
9 Helix did not bill retention confirms that Helix recognized that retention never became due
10 from APCO under the retention payment schedule.

11 Both Helix and CabineTec rolled their retention account over to Camco and
12 Gemstone in their post-APCO billings as it was truly a Project and Gemstone liability.¹⁹²
13 APCO was never responsible for retention under the subcontract's retention payment
14 schedule. That is confirmed by Helix's and Camco's conduct at the Project level through
15 their pay applications.¹⁹³

16
17
18
19 ¹⁸⁷ Exhibits 17-22, Videos of Project.

20 ¹⁸⁸ Testimony of Mary Jo Allen (APCO) Day 3, p. 144; Testimony of Joe Pelan (APCO) Day 1, p.
21 26.

22 ¹⁸⁹ Testimony of Joe Pelan (APCO) Day 1, pp. 60 and 82; Testimony of Bob Johnson (Helix) Day
23 2, pp. 36-37; Testimony of Joe Pelan (APCO) Day 3, p. 151.

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

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

26 ¹⁹² Exhibits 170-177, Helix billings to Camco and Exhibit 185, CabineTec's billings to Camco;
27 Testimony of Mary Jo Allen (APCO) Day 3, pp. 129-130; Testimony of Andy Rivera (Helix) Day
28 2, p. 74.

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

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

2 Gemstone and/or its lender maintained the retention account.¹⁹⁴ APCO's August
3 2008 pay application did not bill Gemstone for APCO's retention.¹⁹⁵ In fact, APCO never
4 billed Gemstone for retention¹⁹⁶ because APCO had not earned the retention and thus was
5 not entitled to it.¹⁹⁷ And APCO never billed or received the retention funds from Gemstone
6 for any of the subcontractors.¹⁹⁸ APCO never received CabineTec's or Helix's retention
7 from Gemstone.¹⁹⁹ Helix's Mr. Johnson admitted that Gemstone, not APCO, was holding
8 its retention.²⁰⁰ And Helix admitted it had no information to suggest that APCO was ever
9 paid Helix's retention.²⁰¹

10 Neither Helix nor CabineTec ever billed APCO for any of the materials or work it
11 performed after Camco signed its prime contract with Gemstone.²⁰² And notably, neither
12 Helix nor CabineTec billed APCO or submitted a claim letter for the retention they now
13 claim.²⁰³ In fact, CabineTec actually billed Camco for the retention it incurred under
14 APCO.²⁰⁴

15 **N. Helix's also entered into a ratification agreement with Camco.**

16 Helix's Project Manager, Mr. Rivera understood that Gemstone purported to
17 terminate the Contract:

18
19 ¹⁹⁴ Testimony of Joe Pelan (APCO) Day 1, p. 30.

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

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

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

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

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

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

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

27 ²⁰² Testimony of Joe Pelan (APCO) Day 1, p. 97.

28 ²⁰³ 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.

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

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

4 A. We knew they were having issues.

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

7 A. Correct.²⁰⁵

8 In fact, during the August 2008 timeframe, Helix was getting information directly from
9 Gemstone.²⁰⁶ Mr. Rivera admitted Helix was copied on certain communications between
10 APCO and Gemstone:

11 Q. And wouldn't it be fair to say that you received
12 copies of certain communications from APCO to the owner,
13 Gemstone, 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?

14 A. Something to that effect, yes.²⁰⁷

15

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

18 A. Correct.²⁰⁸

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

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

23 A. Gemstone.

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

26 A. Correct.

27 Q. And based on your personal involvement with

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

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

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

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

1 Gemstone and Camco, did you understand that, in fact, Camco
2 was replacing APCO as the prime contractor?

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

5 Q. Did you come to find out?

6 A. Yes.

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

8 A. Yes.²⁰⁹

9 Helix was directed to hook up power to the Camco trailer on August 26, 2008.²¹⁰

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

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

- 14 • “Retention Monies- Final retention monies will only be
15 released to Camco Pacific from Owner when all Punch list
16 Items, Contract Items, and Close-Out Documents have been
17 fully completed and inspected by the owner. Any delay by a
18 single Subcontractor in completing this will delay the entire
19 project’s final payment. PLEASE DO NOT DELAY IN
20 COMPLETING YOUR PUNCHLIST ITEMS. Exhibit 170-
21 3.
- 22 • “D. Final Payment.” Subcontractor shall not be entitled to
23 payment of the balance of the Contract Price, including,
24 without limitation, the Retainage, until (1) the Contract
25 Work has been completed to the satisfaction of Contractor,
26 (2) Subcontractor has submitted to Contractor an invoice
27 for the final payment accompanied by (i) a final complete
28 list of all suppliers and subcontractors whose material or
services have been utilized by subcontractor, (ii) all
closeout documents including, warranties, guarantees, as-
builts, drawings, operation and maintenance manuals and
such other items required of Subcontractor have been
provided and accepted by Owner, (iii) executed

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 unconditional lien releases and waivers from Subcontractor
2 and all of its mechanics, subcontractors, and suppliers for
3 the Contract Work covered by all preceding progress
4 payments, and (iv) executed unconditional lien releases and
5 waivers upon final payment from all mechanics,
6 subcontractors, and suppliers who have previously received
7 final payment, and conditional lien releases and waiver
8 upon final payment from Subcontractor and each mechanic,
9 subcontractor or supplier from which an unconditional lien
10 release and waiver upon final payment has not been
11 submitted to Contractor, (3) Contractor has received the
12 corresponding final payment from Owner, (4) Contractor
13 has received evidence of Subcontractor's insurance
14 required to be in place, (5) 45 days have elapsed after a
15 Notice of Completion has been recorded or if a valid Notice
16 of Completion is not recorded, upon Subcontractor's receipt
17 of a written notice of acceptance of the Contract Work that
18 shall be given by Contractor not later than 91 days after
19 Contractor determines in good faith that the Contract Work
20 has been performed completed and in acceptable manner
21 and (6) all outstanding disputes related to the Project have
22 been resolved, and any liens against the Project have been
23 removed.²¹⁴

24 Having received these requirements, Helix continued on as the electrical subcontractor for
25 Camco after APCO's termination. Helix's Andy Rivera admitted Helix's technical scope
26 of work remained the same under Camco:

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

A. Yeah.

Q. —for Helix?

A. Yes.²¹⁵

29 During the transition of APCO to Camco, Helix had a meeting with Gemstone.²¹⁶
30 The purpose of that meeting was to: "represent that work was still proceeding, nothing had

31 ²¹⁴ Exhibit 170-11, 170-12.

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

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

1 changed with our contracts with the current APCO relationship, and that we were to take
2 direction for construction from Camco, and they wanted to negotiate a contract.”²¹⁷ Helix
3 never sent APCO a letter or requested that APCO clarify or provide any information to
4 Helix on the status of its relationship to the Project.²¹⁸

5 Camco presented Helix with a ratification agreement.²¹⁹ It was Camco’s intent and
6 understanding that it was replacing APCO in the Helix-APCO subcontract.²²⁰ Helix had a
7 copy of the ratification agreement by at least September 3, 2008.²²¹ Helix understood the
8 purpose of the ratification agreement as follows: “...they [Camco] were stepping in as
9 construction management for the project and that they were using that agreement in order
10 to proceed with – hold us as the subcontractor going forward.”²²² Camco’s understanding
11 was the same, i.e. the Ratification agreement formed the basis of Camco’s agreement in
12 allowing Helix to proceed on the Project.²²³ Helix continued working on the Project after
13 receiving the ratification agreement from Gemstone.²²⁴ Camco sent Helix the ratification
14 agreement with a September 4, 2008 letter that included the following representations:
15 “The conditional acceptance of this work is based on the execution of a standard Camco
16 Pacific Ratification Agreement... We have provided you a copy of the Camco Pacific
17 Ratification Agreement for your review and acceptance.”

18 The Ratification Agreement contained the following additional terms:

- 19 • “B. Subcontractor and Camco desire to acknowledge, ratify and agree to the
20 terms of the Subcontract Agreement, whereby Camco will replace APCO as
21 the “Contractor” under the Subcontract Agreement but, subject to the terms

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

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

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

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

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

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

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

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

1 of this Ratification, all other terms and conditions of the Subcontract
2 Agreement will remain in full force and effect.”

- 3 • “5. Ratification. Subcontractor and Camco agree that (a) the terms of the
4 Subcontract Agreement (as amended by this Ratification and including all
5 Amendments, Previously Approved Change Orders, and the Camco
6 Schedule) will govern their relationship regarding the Project, (b) Camco
7 will be the “Contractor” under the Subcontract Agreement, and (c)
8 Subcontractor and Camco agree to perform and fulfill all of the executory
9 terms, covenants, conditions and obligations required to be performed and
10 fulfilled thereunder by Subcontractor and Camco, respectively.”²²⁵

11 Helix admitted it entered into a ratification agreement with Camco on September 4,
12 2008 to continue on and complete the APCO scope of work.²²⁶ Helix even added a
13 document to the ratification entitled “Helix Electric’s Exhibit to the Ratification and
14 Amendment.”²²⁷ The Helix Exhibit to the Ratification and Amendment contained language
15 confirming that APCO was removed as the general contractor and that Helix submitted
16 \$994,025 in change orders to APCO prior to August 26, 2008, the date Camco was using
17 for its ratification agreement.²²⁸ Helix included a total contract price of \$5.55 million for
18 the Project, which was its original contract price with APCO for Phase 1, and added
19 \$480,689 as approved change orders under APCO to the total contract price.²²⁹

20 The proposed Helix Amendment to the ratification agreement also included the
21 following term: “All close out documents must be turned in before Camco Pacific can
22 release final payment.”²³⁰

23
24 ²²⁵ Exhibit 172-5.

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 And although Helix has not produced a signed copy of the ratification agreement,
2 Helix has admitted entering into its ratification and amended subcontract agreement in its
3 complaint as follows:

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

9 19. **Helix furnished the CPCC Work for the benefit of and at the
10 specific instance and request of CPCC and/or Owner.**

11 20. Pursuant to the CPCC Agreement, Helix was to be paid an
12 amount in excess of Ten Thousand Dollars (\$10,000.00) (hereinafter
13 "CPCC Outstanding Balance") for the CPCC Work.

14 21. Helix furnished the CPCC Work and has otherwise performed its
15 duties and obligations as required by the CPCC Agreement.

16 22. CPCC has breached the CPCC Agreement...

17 CPCC breached its duty to act in good faith by performing the
18 Ratification Agreement in a manner that was unfaithful to the
19 purpose of the Ratification Agreement, thereby denying Helix's
20 justified expectations...²³¹

21 Helix's Mr. Johnson admitted that Exhibit 172, the Ratification Agreement, was the
22 document that Helix referenced in its complaint (Exhibit 77) as the Ratification.²³² Helix
23 sought \$834,476.45 against Camco.²³³ Helix also admitted it had a contract with
24 Camco/Gemstone for \$8.6 million in its lien documents.²³⁴

25 The scope of work that Helix and CabineTec undertook on the Project was the same
26 as each had previously contracted with APCO for.²³⁵ Helix did not have any further
27 communication with APCO after Camco took over the Project.²³⁶ That is because both
28 knew that APCO was no longer involved and had no further liability. In fact, both Helix

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.

1 and CabineTec rolled their retention over into the Camco billings.²³⁷ Helix's Andy Rivera
2 specifically admitted that it rolled its \$505,000 in retention billings over to Camco.²³⁸ After
3 Helix and CabineTec went to work for Camco, neither sent APCO any further pay
4 applications or billings for work they performed on the Project.²³⁹ And it's undisputed that
5 Helix submitted its September 2008 pay application for \$354,456.90 to Camco.²⁴⁰ That
6 pay application tracked Helix's full retainage of \$553,404.81 for the Project, not just work
7 completed under Camco.²⁴¹ Helix also submitted its October 2008 billing for
8 \$361,117.44,²⁴² its November 2008 pay application for \$159,475.68,²⁴³ and its December
9 2008 billing for \$224,805.30 to Camco.²⁴⁴

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

11 Camco never finished the Project²⁴⁵ and was never paid retention by Gemstone.²⁴⁶
12 In its letter to the subcontractors dated December 22, 2008, Camco advised the
13 subcontractors as follows:

14 [I]t has come to Camco Construction, Inc.'s attention that
15 funding for the completion of the Manhattan West project (the
16 "Project") has been withdrawn. Camco recently received the
17 following email from [Gemstone]...As a result, Gemstone does
not have funds sufficient to pay out the October draw or other
obligations...Based on the foregoing facts and circumstances,

18
19 ²³⁷ Compare Exhibit 58, Helix's last pay application to APCO, Exhibit 173, Helix's first payment
20 application to Camco. See also Exhibit 176 and 177 showing Helix's retention rolled over. See
also, Exhibits 148/150, CabineTec's last pay application to APCO, to Exhibits 182/185,
CabineTec's first payment application to Camco showing CabineTec's retention rolled over.

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 Camco has no other alternative but to immediately terminate
2 all subcontracts on the Project, including the agreement with
3 your company... you have acknowledged that Camco is not
4 liable to you for payment unless and until Camco receives the
5 corresponding payment from the Owner...Camco's contract
6 with Gemstone is a cost plus agreement wherein the
7 subcontracts and supplies were paid directly by Gemstone
8 and/or its agent, Nevada Construction Services, based on the
9 invoices and/or payment applications submitted through
10 voucher control... Therefore, Camco has no contractual and/or
11 statutory obligation to pay any claim that may be alleged by
12 any of the subcontractors and/or suppliers on the Project... any
13 claim for payment alleged against Camco will result in
14 additional fees, costs ...Therefore, all claims for payment must
15 be directed to and/or alleged against Gemstone and the
16 Project.²⁴⁷

17 Camco's Parry was not able to tell if CabineTec billed Camco in August 2008,
18 Exhibit 218 and Camco's first pay app to Gemstone.²⁴⁸

- 19 • Exhibit 220 is Camco's second pay application for the Project, through
20 September 30, 2008.²⁴⁹ That pay application accounted \$6,004,763 in
21 retention.²⁵⁰ Camco's Parry admitted that Exhibit 220 does include billings
22 from Helix to Camco that Camco was passing on to Gemstone.²⁵¹
- 23 • Exhibit 221 is Camco's billing to Gemstone through October 31, 2008;
24 reflecting a total retention of \$6,928,767.84 in retention.
- 25 • Exhibit 163 is Camco's November 2008 billing, reflecting a total retention of
26 \$7,275,991.08.

27 ²⁴⁷ Exhibit 40 and Exhibit 39.

28 ²⁴⁸ 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.

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

3
4 **P. The litigation.**

5 On September 9, 2008, APCO brought an action against Gemstone for breach of
6 Contract and nonpayment.²⁵⁴ Gemstone counterclaimed alleging that APCO breached the
7 Contract.²⁵⁵

8 On November 4, 2008, the Project lender confirmed that it was reviewing
9 September's pay application, and confirmed that the subcontractors would be paid for the
10 work performed for Camco.²⁵⁶

11 In December 2008 Gemstone suspended work on the Project and advised Camco
12 and its various subcontractors that the lender was halting all financing for the Project.²⁵⁷
13 That led to the onslaught of liens and the related priority litigation.

14 On December 16, 2008, Camco officially terminated its prime contract with
15 Gemstone:

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

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

25 ²⁵³ Exhibit 163; Testimony of Steven Parry (Camco) Day 5, p. 36.

26 ²⁵⁴ Exhibit 219.

27 ²⁵⁵ Exhibit 226.

28 ²⁵⁶ Exhibit 138.

²⁵⁷ Exhibit 48; Exhibit 138.

1 December 19, 2008. Pursuant to our discussions, we
2 understand that you agree with the termination
and the effective date of termination.

3 ...
4 Pursuant to our discussions and with Gemstone's consent,
5 Camco will immediately send notices to all of the
6 subcontractors to terminate their subcontract agreements. In
7 Camco's termination notice, we will ask the subcontractors to
submit their payment applications to Camco. Camco will
review the payment applications and, if they appear proper,
Camco will forward them to Gemstone for payment.²⁵⁸

8
9 In response, Camco terminated the subcontracts with its subcontractors on December 22,
10 2008.²⁵⁹

11 On May 26, 2010, Judge Delaney filed an Order Striking Defendant Gemstone
12 Development West, Inc.'s Answer and Counterclaims, and Entering Default for failure to
13 give reasonable attention to matters, failure to obtain new counsel, failure to appear at
14 hearings.²⁶⁰

15 On June 6, 2013, APCO filed a motion for summary judgment against Gemstone.
16 That Motion confirmed that APCO complied with all terms of the Agreement and that
17 Gemstone materially breached the Agreement by, among other things: (1) failing to make
18 payments due to APCO; (2) interfering with APCO's relationships with its subcontractors;
19 (3) refusing to review, negotiate, or consider change order requests in good faith; (4)
20 removing APCO from the Project without valid or appropriate grounds; and (5) otherwise
21 breaching the terms of the Agreement.²⁶¹ On June 13, the Court granted that motion.²⁶²
22 The record does not reflect a final order or judgment.

23 APCO did not receive any funds associated with its work from June, July or August

24 ²⁵⁸ Exhibit 165.

25 ²⁵⁹ Exhibit 166-2.

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

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

²⁶² Docket at Minutes from June 13, 2013.

1 2008 on the Project and never received its or any subcontractor's retention. APCO did
2 cooperate with Gemstone to see that all subcontractors, including Helix and CabineTec
3 were paid all progress payments that were billed and due while APCO was in charge.
4 Despite APCO's efforts, Helix and CabineTec are seeking to hold APCO responsible for
5 retention that never became due under the subcontract retention payment schedule and for
6 work that both subcontractors provided to Camco and Gemstone knowing full well that
7 APCO had no liability for any further payments. The inequities are obvious.

8 **II. ISSUES OF LAW**

9 **A. Retention payment schedules and related preconditions are valid.**

10 The Helix and CabineTec Subcontracts contain enforceable retention payment
11 schedules that include owner payment and other preconditions.²⁶³ Under Nevada precedent
12 and legislative action, these provisions are valid conditions precedent to payment when not
13 combined with a waiver of a mechanic's lien rights.

14 **a. Padilla Construction v. Big-D Construction**

15 In *Padilla Construction Company of Nevada v. Big-D Construction Corp.*,²⁶⁴ the
16 Nevada Supreme Court and this Court analyzed and enforced valid payment schedules. In
17 fact, these courts enforced similar conditions precedent to payment requiring the owner's
18 payment to the general contractor before the general contractor is required to pay a
19 subcontractor. That decision also confirmed that NRS 624.624 was meant to ensure
20 payment to subcontractors **after** the owner paid the general for the subcontractor's work.²⁶⁵

21 In *Padilla Construction*, Big-D was hired as the general contractor for a
22 construction project and subcontracted with Padilla to install a stucco system on the
23 building. While the stucco was being installed, separation issues developed and the owner
24 rejected Padilla's work. Padilla filed a complaint against Big-D for non-payment. After
25

26 ²⁶³ Exhibit 45 and Exhibit 149 at Sections 3.4, 3.5 and 3.8.

27 ²⁶⁴ 386 P.3d 982 (Nev. 2016)(unpublished).

28 ²⁶⁵ *Padilla Construction Company of Nevada v. Big-D Construction Corp.*, 386 P.3d 982 (Nev. 2016) (unpublished).

1 trial, this Court found that: (1) Padilla's signed subcontract bound it to the owner's
2 decisions,²⁶⁶ (2) NRS 624.624 was designed to ensure that general contractors pay
3 subcontractors **after** the owner pays the general,²⁶⁷ (3) NRS 624.624 yields to a schedule
4 of payments,²⁶⁸ (4) the subcontract confirmed that Padilla would get paid after the owner
5 accepted and paid the prime contractor for the work,²⁶⁹ and (5) the owner never accepted
6 the work so Big-D's payment to Padilla never became due.²⁷⁰ Then this Court awarded
7 Big-D damages and attorney's fees.²⁷¹

8 As explained below, the Nevada Supreme Court analyzed the pay-if-paid provision
9 in the subcontract under a condition precedent analysis, not whether the language was void
10 as against public policy. The Nevada Supreme Court affirmed this Court's decision
11 finding:

12 Because the parties' **subcontract contained a payment**
13 **schedule** that required that Padilla be paid within ten days
14 after IGT accepted Padilla's work **and paid Big-D for that**
15 **work** and it is undisputed that IGT never accepted Padilla's
16 work **and never paid Big-D for Padilla's work**, the district

17 ²⁶⁶ See *Padilla v. Big D* Docket, Case No: A-10-609048-C, Findings of Fact and Conclusions of
18 Law and Judgment at 19:15-18 ("9A. In the Subcontract Agreement, Padilla agreed to be subject
19 to the Owner's decisions and actions and that Big-D 'shall have the rights, remedies, powers and
privileges as to, or against You which the Owner has against us.'").

20 ²⁶⁷ *Id.* at 21:14-16 (emphasis added) ("NRS 624.624 is designed to ensure that general
21 subcontractors promptly pay subcontractor after the general contractor receives payment from the
Owner associated with work performed by the subcontract.").

22 ²⁶⁸ *Id.* at 21: 17-19. ("By its own terms, NRS 624.624 yields to (a) payment schedules contained in
23 subcontract agreements and (b) contractual rights to withhold payments from a subcontractor after
arising from deficient work."); *Id.* at 22:6-9. ("Here, it is undisputed that the Subcontract
24 Agreement is a written agreement between Big-D and Padilla. **Accordingly, pursuant to NRS**
624.624(1)(a) payment is due to Padilla on the date specified in the Subcontract
Agreement.").

25 ²⁶⁹ *Id.* at 22:9-11. ("The Subcontract provided that Padilla was to be paid within ten (10) days after
26 IGT paid Big-D and after IGT accepted the Padilla work.").

27 ²⁷⁰ *Id.* at 23:2-3 ("Here, it is undisputed that IGT never accepted the Padilla work. Accordingly,
payment to Padilla never became due.").

28 ²⁷¹ *Padilla v. Big D* Docket, Case No: A-10-609048-C, Order Granting Attorney's Fees.

1 court correctly found that payment never became due to
2 Padilla under the subcontract or *NRS 624.624(1)(a)*.²⁷²

3 So payment schedules that are triggered after owner payment are not unenforceable pay-if-
4 paid provisions; they are valid conditions precedent to payment.

5 In the present action, the Helix and CabineTec Subcontracts: (1) incorporated the
6 Contract,²⁷³ (2) confirmed that the subcontractors would be bound to Gemstone to the
7 same extent APCO was,²⁷⁴ and (3) contained a schedule of payments for both retention and
8 change orders with preconditions before APCO had an obligation to pay the
9 subcontractors.²⁷⁵ Only one of those preconditions involved Gemstone's payment of
10 retention to APCO, which never occurred. It is undisputed that the preconditions to
11 retention payments were never satisfied and that APCO did not receive the amounts the
12 subcontractors currently seek from APCO. Accordingly, given the Nevada Supreme
13 Court's analysis in *Padilla v. Big-D*, APCO's retention payments to the subcontractors
14 never became due. Neither the subcontracts nor NRS 624.624 were intended to make the
15 general contractor Gemstone's guarantor. From a policy standpoint, such a ruling would
16 drive prime contractors out of business.

17
18 b. The Nevada Legislature has recognized owner payment preconditions.

19 Consistent with *Padilla v. Big D*, the Nevada Legislature has recognized that parties
20 can agree to conditions precedent to payment, including one that requires a general
21 contractor to pay a subcontractor only after the general contractor has received payment
22 from the owner.²⁷⁶ This is evident from the Legislature's recognition of such clauses in
23 prompt payment statutes. But instead of finding them against public policy, the
24 Legislature merely gave subcontractors a right to suspend operations:

25
26 ²⁷² 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958 (emphasis added).

27 ²⁷³ Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 1.1.

28 ²⁷⁴ Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 3.4.

²⁷⁵ *Id.* at Section 3.8 and Article 4.

1 NRS 624.626 Grounds and procedure for stopping work or
2 terminating Contract; change orders; damages and other
3 remedies; rights of lower-tiered subcontractors after work
4 stoppage or termination of Contract; limitations on liability.

5 1. If:

6 ..

7 (b) A higher-tiered contractor fails to pay the lower-
8 tiered subcontractor within 45 days after the 25th day of the
9 month in which the lower-tiered subcontractor submits a
10 request for payment, **even if the higher-tiered contractor has
11 not been paid and the Contract contains a provision which
12 requires the higher-tiered contractor to pay the lower-
13 tiered subcontractor only if or when the higher-tiered
14 contractor is paid;**

15 ..

16 →the lower-tiered subcontractor may stop work under
17 the Contract until payment is received if the lower-tiered
18 subcontractor gives written notice to the higher-tiered
19 contractor at least 10 days before stopping work.²⁷⁷

20 If the Legislature wanted to prohibit contracts with pay if paid language, it could
21 have easily done so. It did not and gave the subcontractor the right to suspend work and
22 ultimately terminate if necessary. The Legislature also recognized that parties can agree to
23 a schedule of payments,²⁷⁸ and the Nevada Supreme Court confirmed that payment
24 schedules that include owner payment preconditions are valid in *Padilla Construction*.

25 **B. Retention payments never became due.**

26 NRS 624.624 is designed to ensure that general subcontractors promptly pay
27 subcontractors after the general contractor receives payment from the owner for the
28 subcontractor's work.²⁷⁹ Pursuant to NRS 624.624(1)(a), the Helix and CabineTec

25 ²⁷⁶ NRS 624.626.

26 ²⁷⁷ NRS 624.626 (1)(b) (emphasis added).

27 ²⁷⁸ NRS 624.624(1)(a).

28 ²⁷⁹ *Big D v. Padilla* Findings of Fact and Conclusions of Law, at 21:14-16 (emphasis added).
("NRS 624.624 is designed to ensure that general subcontractors promptly pay subcontractor after

1 subcontracts contain valid retention payment schedules, or payment is otherwise due 10
2 days after APCO received payment from Gemstone:

3 **NRS 624.624 Payment of lower-tiered subcontractor; grounds**
4 **and procedure for withholding amounts from payment; rights**
5 **and duties after notice of withholding, notice of objection or**
6 **notice of correction.**

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

9 (a) A written Contract with a lower-tiered
10 subcontractor that includes a schedule for payments, the
11 higher-tiered contractor shall pay the lower-tiered
12 subcontractor:

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

14 or

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

20 → whichever is earlier.

21 Section 3.8 of the Helix Subcontract and the CabineTec Subcontract contained
22 retention payment schedules that were acknowledged and affirmed by all parties at trial.
23 As such, Helix and CabineTec needed to show they complied with each of these five
24 conditions precedent to payment before it would be entitled to retention. *See Lucini-Parish*
25 *Ins. v. Buck*,²⁸⁰ (a party who seeks to recover on a contract has the burden of establishing
26 any condition precedent to the respective contract). They did not meet their burden of
27 proof and APCO never received their retention to trigger the 10 day period

28 First, Helix never even sent APCO an invoice or billing for its final retention.
29 Second, Helix and CabineTec did not even attempt to show: (1) completion of the entire

30 the general contractor receives payment from the Owner associated with work performed by the
31 subcontract.”).

32 ²⁸⁰ 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

1 Project, (2) final acceptance of the Project by Gemstone, (3) receipt of final payment from
2 Gemstone to APCO, (4) delivery of all as-builts and close out document, and (5) delivery
3 of all final waivers and releases. Accordingly, Helix and CabineTec's retention payment
4 never became due from Apco. And lastly, the evidence was clear that Apco did not receive
5 any retention payment from Gemstone.

6 **C. The Subcontracts were assigned to Gemstone.**

7 The Contract contained a subcontract assignment provision.²⁸¹ That provision
8 confirmed that upon termination of the Contract, APCO's subcontracts were assigned to
9 Gemstone. Thereafter, Gemstone would be responsible for the payment of work
10 completed by the subcontracts that was due to the subcontractors prior to the
11 termination.²⁸² The Contract was incorporated into the subcontracts.²⁸³

12 On August 15, 2008, Gemstone sent APCO a letter confirming its intention to
13 terminate the Contract, and accept the assignment of subcontracts.²⁸⁴ On August 28, 2008,
14 Gemstone sent another letter indicating the Contract was terminated as of August 24,
15 2008.²⁸⁵ Accordingly, once APCO left the Project, the Helix and CabineTec Subcontracts
16 were assigned to Gemstone. And once Gemstone had those Subcontracts, it facilitated
17 Camco's assumption of those subcontracts.²⁸⁶ Camco's Steve Parry admitted that Camco
18 was assuming the subcontracts that APCO had with Helix and CabineTec:

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

21 A. Yes.

22 ²⁸¹ Exhibit 2 at 10.4.

23 ²⁸² Exhibit 2, Section 10.4.

24 ²⁸³ Sections 1.1 of Helix and CabineTec subcontracts. Helix's Mr. Johnson admitted it was Helix's
25 practice to request and review an incorporated prime contract. Testimony of Bob Johnson (Helix)
Day 2, p. 16.

26 ²⁸⁴ Exhibit 13-14.

27 ²⁸⁵ Exhibit 27.

28 ²⁸⁶ Exhibit 170/169 Helix's subcontract and Helix Amendment with Camco; and Exhibit 184,
CabineTec's subcontract with Camco.

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

4 A. Yes.²⁸⁷

5 In *J. Christopher Stuhmer, Inc. v. Centaur Sculpture Galleries, Ltd., Inc.*,²⁸⁸ the
6 Nevada Supreme Court considered whether an assignment of a construction contract took
7 place and considered the following factors: which party was responsible for the
8 administration of the project, which party ensured the design was correctly carried out,
9 who paid the subcontractors and materialmen, which party answered questions from the
10 owner, which parties were on the job site, which party had ongoing involvement with the
11 project, and which party was corresponding with the owner.²⁸⁹ These factors could not
12 weigh more clearly in APCO's favor. Each party's behavior is consistent with the
13 assignment of the subcontracts to Gemstone:

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

²⁸⁷ Testimony of Steve Parry (Camco) Day 5, p. 26.

²⁸⁸ 110 Nev. 270, 274, 871 P.2d 327, 330 (1994).

²⁸⁹ *Id.*

1 direction. CabineTec submitted pay applications to Camco including all
2 retention. CabineTec also signed a ratification agreement with Camco.

- 3 • **APCO:** APCO was off-site and did not dictate or control the subcontractors'
4 work. It did not have any communication with Gemstone or the
5 subcontractors after August 2008. It did not participate in construction
6 related meetings, did not receive billings from subcontractors, or submit
7 payment applications on behalf of subcontractors. In fact, Helix never
8 invoiced APCO for its retention.

9 As such, it is clear that an assignment took place thereby making Gemstone/Camco the
10 party responsible for payment to the subcontractors, not APCO.

11 **D. The Court should preclude evidence or argument of CabineTec's**
12 **damages over \$30,110.95.**

13 CabineTec's complaint alleged \$19,547.00 against APCO.²⁹⁰ CabineTec's initial,
14 and first supplemental disclosures disclosed \$30,110.95 in damages against APCO, which
15 included interest and fees on the \$19,547.²⁹¹ Those were the only disclosures that
16 CabineTec made prior to the close of discovery, as extended by the Court. As such, the
17 Court should preclude any evidence or argument of CabineTec's alleged damages against
18 APCO in excess of \$30,110.95.

19 NRCP 16.1(a)(1)(c) requires that a plaintiff "**must, without awaiting a discovery**
20 **request, provide to other parties . . . [a] a computation of any category of damages**
21 **claimed by the disclosing party, making available for inspection and copying under Rule**
22 **34 of the documents or other evidentiary matter... on which such computation is based,**
23 **including materials bearing on the nature and extent of injuries suffered...**"²⁹² Early
24 disclosure of damages is mandatory. The rule is clear—a plaintiff "is not excused from
25 making its disclosures because it has not fully completed its investigation of the case."²⁹³

26 ²⁹⁰ Exhibit 156-8.

27 ²⁹¹ Exhibits 157 (CabineTec's initial disclosures); Exhibit 158 (CabineTec's First Supplemental
28 Disclosure), and Exhibit 159 (CabineTec's second supplemental disclosure).

²⁹² NRCP 16.1(a)(1)(c) (emphasis added).

²⁹³ *Id.*

1 NRCP 16.1(a)(c) requires that parties voluntarily disclose “[a] computation of any
2 category of damages claimed by the disclosing party” and documents to support the
3 computation.²⁹⁴

4 Under NRCP 26(e)(1), a plaintiff must immediately supplement its initial damages
5 computation if it “learns that in some material respect the information disclosed is
6 incomplete or incorrect.”²⁹⁵ See *Keener v. United States*,²⁹⁶ (finding a second disclosure so
7 substantially different from the first that it could not qualify as a correction of an
8 incomplete or inaccurate expert report).

9 National Wood’s Second Supplemental Disclosure containing amended damages
10 was filed on November 13, 2017, two weeks before a November 28 trial date. This
11 supplement increases the damages from \$30,110.95 to \$1,154,680.40, a 3600% increase.
12 APCO has suffered huge prejudice as a result of this late disclosure as APCO described in
13 its motion in limine, and National Wood’s error in not disclosing its damages pursuant to
14 these rules was certainly not harmless.

15 CabineTec has no adequate justification for its repeated failure to comply with Rule
16 16.1(a)’s disclosure requirements. APCO should not be forced to defend against
17 undisclosed damages due to CabineTec’s disregard of Nevada’s disclosure rules. Per the
18 Court’s Order dated January 2, 2018, and the evidence presented at trial, the Court should
19 exclude all evidence of CabineTec’s damages above its prior disclosures.

20 **E. Helix and CabineTec ratified their subcontracts with Camco.**

21 “Ratification of a contract occurs when one approves, adopts, or confirms a contract
22 previously executed by another...”²⁹⁷ Ratification may be express or implied by the
23 conduct of the parties.²⁹⁸ The party to be charged with ratification of such a contract must
24

25 ²⁹⁴NRCP 16.1(a)(1)(c).

26 ²⁹⁵ NRCP 26(e)(1).

27 ²⁹⁶ 181 F.R.D. 639, 640 (D. Mont. 1998)

28 ²⁹⁷ *Id.*

²⁹⁸ 17A Am Jur 2d Contracts § 10.

1 have acted voluntarily and with full knowledge of the facts.²⁹⁹ “A person ratifies an act by
2 manifesting assent that the act affects the person's legal relations or conduct that justifies a
3 reasonable assumption that the person so consents.”³⁰⁰ “Any conduct which indicates
4 assent by the purported principal to become a party to the transaction or which is
5 justifiable only if there is ratification is sufficient, and even silence with full knowledge of
6 the facts may operate as a ratification.”³⁰¹ “If a person makes a manifestation that the
7 person has ratified another's act and the manifestation, as reasonably understood by a third
8 party, induces the third party to make a detrimental change in position, the person may be
9 estopped to deny the ratification.”³⁰² “A valid ratification by the principal relieves the
10 agent from any liability to the principal which would otherwise result from the fact that the
11 agent acted in an unauthorized way or without authority.”³⁰³

12 In this case, CabineTec and Helix ratified their subcontracts with Camco. Helix
13 legally admitted this fact to the Court and to APCO in its complaint. CabineTec signed a
14 ratification agreement with Camco. After APCO left the Project, both took direction for
15 their respective work from Camco. Each submitted billings to Camco including rolling
16 over the retention they now seek from APCO, and each performed work under the ratified
17 original scope of work. None of the ongoing work was done for or on behalf of APCO and
18 there is no legal authority that would make APCO liable for their ongoing work on the
19 Project, or the Project retention. Neither party continued to take direction or send invoices
20 to APCO. And notably, Helix never billed APCO for retention because it never became
21 due.³⁰⁴ Helix and CabineTec waived all claims against APCO by knowingly contracting to

23 ²⁹⁹ *Id.*

24 ³⁰⁰ 3 Am Jur 2d Agency § 169.

25 ³⁰¹ *Id.*

26 ³⁰² 3 Am Jur 2d Agency § 171.

27 ³⁰³ 2A C.J.S. Agency § 85.

28 ³⁰⁴ CabineTec admittedly sent one billing for the full amount of CabineTec's delivered (but
uninstalled) cabinets that incorrectly included retention. Retention clearly was not due under the
retention payment schedule.

1 work on the Project for Camco/Gemstone and rolling their retention over to Camco and
2 Gemstone.

3 When Helix and CabineTec ratified their subcontracts with Camco, they effectively
4 replaced APCO and released it from liability. See *Foley Co. v. Scottsdale Ins. Co.*,³⁰⁵ ("The
5 ratification, by subcontractor's liability insurer, of its general agent's allegedly
6 unauthorized placement of coverage released the general agent from liability to the
7 insurer."); *Brooks v. January*,³⁰⁶ (holding that because a dissident faction of a church
8 congregation ratified their pastor's unauthorized sale of property, the pastor was relieved
9 from liability to the church); *Southwest Title Ins. Co. v. Northland Bldg.*,³⁰⁷ (holding that
10 because the title insurance company ratified its agent's arguably unauthorized actions, the
11 agent could not be held liable to the title insurance company); *Rakestraw v. Rodrigues*,³⁰⁸
12 (holding that because a wife ratified forgery of her name on a deed of trust, the agent was
13 relieved of liability to the principal).

14 **F. Helix's legally admitted that it entered into a subcontract with APCO**
15 **and a ratification Contract with Camco.**

16 "Judicial admissions are defined as deliberate, clear, unequivocal statements by a
17 party about a concrete fact within that party's knowledge."³⁰⁹ Concessions in pleadings are
18 judicial admissions whereas oral testimony subject to traditional impeachment is construed
19 as evidence.³¹⁰

20 **1. Helix had a subcontract with APCO.**

21
22
23 ³⁰⁵ 28 Kan. App. 2d 219, 15 P.3d 353 (2000).

24 ³⁰⁶ 116 Mich.App. 15, 321 N.W.2d 823 (1982).

25 ³⁰⁷ 542 S.W.2d 436 (Tex.App.1976), *rev'd in part on other grounds* 552 S.W.2d 425 (Tex.1977).

26 ³⁰⁸ 8 Cal.3d 67, 104 Cal.Rptr. 57, 500 P.2d 1401 (1972).

27 ³⁰⁹ *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d
28 268, 276 (2011) citing *Smith v. Pavlovich*, 394 Ill.App.3d 458, 333 Ill.Dec. 446, 914 N.E.2d 1258,
1267 (2009).

³¹⁰ See *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, *supra*.

1 Helix admitted it had a valid written subcontract with APCO in its lien
2 documents,³¹¹ in its complaint against APCO,³¹² and in its amended complaint against
3 APCO.³¹³ Then, Victor Fuchs, the President of Helix, also confirmed that the first 15
4 pages of Trial Exhibit 45 was the written agreement that governed the APCO/Helix
5 relationship.³¹⁴ Given these admissions and the conduct of the parties, it is clear that there
6 was a subcontract between APCO and Helix.

7 2. Helix ratified its subcontract with Camco and replaced APCO.

8
9 Helix also admitted the following regarding its ratification Contract with Camco:

10 18. On or about September 4, 2008, Helix entered into the
11 Ratification and Amendment of Subcontract Contract ("CPCC
12 Contract") with Camco who replaced APCO as the general
13 contractor on the Project, to continue the work for the Property
14 ("CPCC Work").

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

17 20. Pursuant to the CPCC Contract, Helix was to be paid an
18 amount in excess of Ten Thousand Dollars (\$10,000.00)
19 (hereinafter "CPCC Outstanding Balance") for the CPCC
20 Work.

21 21. Helix furnished the CPCC Work and has otherwise
22 performed its duties and obligations as required by the CPCC
23 Contract.

24 22. CPCC has breached the CPCC Contract...³¹⁵

25 While Helix has not produced a signed version of the "Ratification and Amendment
26 of Subcontract Contract" it entered into with Camco on September 4, 2008, it represented
27 these facts to this Court and to APCO and proceeded accordingly. So Helix's intentions
28

29 ³¹¹ Exhibits 512 and pages 5-6, 7-9, 10-11.

30 ³¹² Exhibit 77.

31 ³¹³ Exhibit 231.

32 ³¹⁴ Exhibit 314. This affidavit was attached to Helix's Motion for Summary Judgment Against
33 Gemstone filed on May 10, 2010. The attachment referenced in the Fuchs affidavit is the first
34 fifteen pages of Exhibit 45.

35 ³¹⁵ Exhibit 77.

1 and actions were clear: it understood that it was entering into a ratification agreement, that
2 it was replacing APCO as the general contractor with Camco, and that it was amending the
3 APCO subcontract. Accordingly, the retention account was transferred to Camco and
4 Gemstone, and Helix's work was for the benefit and direction of Camco. Helix's
5 representations and intentions in entering into a ratification agreement with Camco were
6 clear and now legally admitted.

7 **G. Helix and CabineTec waived any right to pursue APCO.**

8 "Waiver requires the intentional relinquishment of a known right."³¹⁶ "If intent is to
9 be inferred from conduct, the conduct must clearly indicate the party's intention."³¹⁷ "Thus,
10 the waiver of a right may be inferred when a party engages in conduct so inconsistent with
11 an intent to enforce the right as to induce a reasonable belief that the right has been
12 relinquished."³¹⁸

13 In this case, CabineTec's and Helix's intent was clear: they understood that APCO
14 left the Project. They entered into ratification agreements with Camco and continued
15 working for Camco and Gemstone on the Project without any further dealings with APCO.
16 They did not negotiate entirely new contracts – their contract amounts and retention rolled
17 over from APCO to Camco. They took orders and direction from Camco employees. They
18 sent billings to Camco. They submitted change orders to Camco. They showed up to the
19 Project at Camco's direction and Camco ultimately informed them the Project had shut
20 down. By pursuing this course of action, it was clear that none of the parties believed
21 APCO was the general contractor on the Project. This conduct is entirely inconsistent with
22 any claim that APCO was the general contractor and was responsible for retention or other
23 future payments. APCO paid Helix and CabineTec all amounts due while APCO was the
24 general contractor.

25
26 ³¹⁶ *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).

27 ³¹⁷ *Id.*

28 ³¹⁸ *Id.*

1 **H. The new subcontracts or ratification agreements are novations.**

2 “A novation consists of four elements: (1) there must be an existing valid contract;
3 (2) all parties must agree to a new contract; (3) the new contract must extinguish the old
4 contract; and (4) the new contract must be valid.”³¹⁹ “If all four elements exist, a novation
5 occurred.”³²⁰ “Additionally, the intent of all parties to cause a novation must be clear.”³²¹
6 “A ‘novation’ may be defined as a substitution of a new contract or obligation for an old
7 one which is thereby extinguished.”³²² “All novations are substituted contracts, and the
8 converse is also true that all substituted contracts are novations. An existing claim can be
9 instantly discharged by the substitution of a new executory Contract in its place.”³²³

10 “This substitution of a new obligation for an existing one, effects a novation, which
11 thereby discharges the parties from all of their obligations under the former Contract
12 inasmuch as such obligations are extinguished by the novation.”³²⁴ “However, consent to
13 novation may be implied from the circumstances of the transaction and by the subsequent
14 conduct of the parties.”³²⁵ “Novation is a question of law only when the Contract and
15 consent of the parties are unequivocal.”³²⁶ “Whether a novation occurred is a question of
16 fact if the evidence is such that reasonable persons can draw more than one conclusion.”³²⁷

17
18
19 ³¹⁹ *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) (internal
citations omitted).

20 ³²⁰ *Id.*

21 ³²¹ *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) citing
22 *Pink v. Busch*, 100 Nev. 684, 690, 691 P.2d 456, 460 (1984).

23 ³²² 66 C.J.S. Novation § 1.

24 ³²³ *Lazovich & Lazovich, Inc. v. Harding*, 86 Nev. 434, 437, 470 P.2d 125, 127 (1970).

25 ³²⁴ *Williams v. Crusader Disc. Corp.*, 75 Nev. 67, 70, 334 P.2d 843, 845 (1959) citing 66 C.J.S.
26 Novation § 1, p. 681; 39 Am.Jur. Novation § 2,254.

27 ³²⁵ *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) citing
28 *Sans Souci v. Div. of Fla. Land Sales*, 448 So.2d 1116, 1121 (Fla.Dist.Ct.App.1984).

³²⁶ *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) citing
Downing v. Dial, 426 N.E.2d 416, 419 (Ind.Ct.App.1981).

³²⁷ *Id.* (internal citations omitted).

1 “Moreover, the party asserting novation has the burden of proving all the essentials of
2 novation by clear and convincing evidence.”³²⁸

3 The new subcontracts between Camco and Helix and Camco and CabineTec are
4 novations. The substituted ratification agreements and subcontracts clearly replaced and
5 extinguished the APCO subcontracts. The Camco subcontracts picked up where the
6 subcontractors left off with APCO in terms of scope and payment. Once the novation
7 occurred, placing Camco as the completion contractor into privity with the subcontractors,
8 APCO was wholly removed from contractual privity with either Helix or CabineTec as a
9 matter of law. It is clear that, “[c]onsent to novation may be implied from the
10 circumstances of the transaction and by the subsequent conduct of the parties.”³²⁹
11 Accordingly, APCO did not retain any obligations (including payment) following the
12 novations of the APCO/ Helix and APCO/CabineTec subcontracts.

13 **I. CabineTec and Helix cannot pursue their unjust enrichment or**
14 **quantum meruit claims.**

15 CabineTec and Helix asserted breach of contract *and* unjust enrichment damages
16 against APCO.³³⁰ APCO had a subcontract with CabineTec and Helix. An action based
17 upon a theory of unjust enrichment is not available when there is an express, written
18 contract because no contract can be implied when there is an express contract.³³¹
19
20
21
22
23
24

25 ³²⁸ *Id.*

26 ³²⁹ *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) citing
27 *Sans Souci v. Div. of Fla. Land Sales*, 448 So.2d 1116, 1121 (Fla.Dist.Ct.App.1984).

28 ³³⁰ See Exhibit 45, Helix Subcontract, and Exhibit 149, CabineTec Subcontract.

³³¹ *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182 (1997).

1 DATED: March 8, 2018.
2
3

4 **SPENCER FANE LLP**

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of SPENCER FANE LLP and that a copy of the
3 foregoing **APCO CONSTRUCTION, INC.'S POST-TRIAL BRIEF** was served by electronic
4 transmission through the E-Filing system pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 or by
5 mailing a copy to their last known address, first class mail, postage prepaid for non-registered
6 users, on this 8th day of March, 2018, as follows:

7
8 **Counter Claimant: Camco Pacific Construction Co Inc**

9 Steven L. Morris (steve@gmdlegal.com)

10 **Intervenor Plaintiff: Cactus Rose Construction Inc**

11 Eric B. Zimbelman (ezimbelman@peelbrimley.com)

12 **Intervenor Plaintiff: Interstate Plumbing & Air Conditioning Inc**

13 Jonathan S. Dabbieri (dabbieri@sullivanhill.com)

14 **Intervenor: National Wood Products, Inc.'s**

15 Dana Y Kim (dkim@caddenfuller.com)

16 Richard L Tobler (rltldck@hotmail.com)

17 Richard Reincke (rreincke@caddenfuller.com)

18 S. Judy Hirahara (jhirahara@caddenfuller.com)

19 Tammy Cortez (tcortez@caddenfuller.com)

20 **Other: Chapter 7 Trustee**

21 Elizabeth Stephens (stephens@sullivanhill.com)

22 Gianna Garcia (ggarcia@sullivanhill.com)

23 Jennifer Saurer (Saurer@sullivanhill.com)

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25 **Plaintiff: Apco Construction**

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

v.

GEMSTONE DEVELOPMENT WEST,
INC., A Nevada corporation,

Defendant.

Case No.: A571228

Dept. No.: XIII

Consolidated with:

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

**APCO'S OPPOSITION TO HELIX
ELECTRIC OF NEVADA, LLC'S
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

AND ALL RELATED MATTERS

1 APCO Construction, Inc. ("APCO") submits its response to Helix Electric of Nevada,
2 LLC's ("Helix") Proposed Findings of Fact and Conclusions of Law.

3 **I. Helix's most critical proposed findings of fact are not supported by the weight**
4 **of the evidence.**

5 APCO disputes the following "findings of fact" which Helix proposed to this Court.
6 The findings of fact which APCO disputes include the following 4-5, 8, 9, 12, 14, 15, 17,
7 21-24, 36-38, and 40. For ease of review, Helix's proposed finding precedes APCO's
8 response to the same.

9 **A. Helix's Proposed Finding of Fact No: 4.** After APCO provided its form
10 Subcontract Agreement ("the APCO Subcontract"). Helix modified, signed and on or
11 about November 28, 2007 returned the same to APCO for its review, consideration and
12 execution. **[Exhibit 45 - "the Helix-APCO Subcontract"]**. Helix's proposed
13 modifications were contained in an attachment called the Helix Electric Exhibit to the
14 Standard Subcontract Agreement [between APCO and Helix (hereinafter, "the Helix
15 Exhibit (APCO)"]. [See Ex. 45-016-023]. Helix also interlineated Section 1.1 of the
16 Helix-APCO Subcontract to reflect that "the attached Helix Electric Exhibit is also part
17 of this Subcontract Agreement." [Ex. 45, ~ 1.1]. Among the modifications proposed by
18 Helix were:

19 ///

20 ///

21 ///

22 ///

23 ///

1 • Deleting "Pay-if-Paid" language, including a provision purporting to require Helix to
2 assume the risk that the owner may become insolvent. [See also Trial Transcript Vol. 1
3 pp.116:2-117-18¹]...

4 **APCO's Response:** The Helix Amendment did not delete the provisions that make
5 payment from the owner a condition precedent to APCO's payment obligations,
6 including the retention payment schedule preconditions in Section 3.8 of the
7 Subcontract:

8 The 10 percent withheld retention shall be payable to Subcontractor upon,
9 and only upon the occurrence of all the following events, each of which is a
10 condition precedent to Subcontractor's right to receive final payment
11 hereunder and payment of such retention: (a) completion of the entire project
12 as described in the Contract Documents; (b) the approval of final acceptance
13 of the project Work by Owner, (c) Receipt of final payment by Contractor
14 from Owner; (d) Delivery to Contractor from Subcontractor all as-built
15 drawings for it's scope of work and other close out documents; (e) Delivery
16 to Contractor from Subcontractor a Release and Waiver of Claims from all of
17 Subcontractor's laborers, material and equipment suppliers, and
18 subcontractors, providing labor, materials or services to the Project.²

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

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

20 A. Okay.

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

23 A. I do.

24 Q. And in fairness to you and the record, you did propose a
25 change to paragraph 3.8. Could you turn to page 16 of the
26 exhibit, Exhibit 45? And directing your attention to paragraph
27 7, does this reflect your proposed change to the retention
28 payment schedule in the original form of Exhibit 45?

A. In the original form, yes.

¹ References to the Trial Transcript will hereafter be in the following format to represent the day/volume, page and line citation: "TR1-116:2-117-18." The identity of the witness will appear in a footnote. In this instance the witness is Robert Johnson.

² Exhibit 45-4.

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

4 A. Correct.

5 Q. Through your change in paragraph 7, on page 16 of Exhibit
6 45, you did not otherwise modify the preconditions in the
7 retention payment schedule of 3.8, did you?

8 A. We did not.³

9 So the retention payment schedule was always in effect.

10 **B. Helix's Proposed Finding of Fact No: 5.** On or about April 8, 2008 (i.e.,
11 nearly 5 months after Helix submitted its proposed amendments to APCO), APCO
12 signed and returned the Helix-APCO Subcontract with numerous changes to the
13 proposed Helix Exhibit-APCO rejecting many of Helix's proposed revisions. Helix did
14 not consent to APCO's proposed revisions to the Helix Exhibit (APCO).

15 **APCO's Response:** Helix did not provide any citation to the record for this
16 statement, as such, it should not be given any weight. And Helix's Mr. Johnson
17 received APCO's revisions to the Subcontract on July 11, 2008,⁴ and continued to
18 work on the Project knowing of APCO's revisions.⁵

19 More substantively, Helix's Mr. Johnson, also admitted that Exhibit 45 represented
20 the APCO agreement that Helix alleges APCO somehow breached:

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

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

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

27 A. For the Manhattan West project.

28 Q. Is there a document?

A. There is a document.

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

³ Testimony of Bob Johnson (Helix) Day 2, pp. 17-18.

⁴ Exhibit 506.

⁵ Testimony of Bob Johnson (Helix) Day 2, p. 21.

1 A. Okay.

2 The Court: Which item is it, counsel?

3 Mr. Jefferies: Exhibit 45.

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

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

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

7 A. It is the agreement between APCO and Helix.⁶

8 **C. Helix's Proposed Finding of Fact No: 8.** Johnson's undisputed testimony is that
9 Helix did not agree to or accept APCO's July 11, 2008 revisions. [TR1-113:20- 114:8].⁷
10 Accordingly, and in the absence of evidence to the contrary, the Court finds that Helix
11 and APCO did not reach a meeting of the minds with respect to the Helix-APCO
12 Subcontract.

13 **APCO's Response:** Helix's corporate representatives, counsel, and conduct
14 throughout this litigation all confirm that Exhibit 45 represented the Subcontract
15 with APCO. In its lien documents,⁸ complaint against APCO,⁹ and its amended
16 complaint,¹⁰ Helix has unequivocally admitted that it had a binding subcontract with
17 APCO.¹¹ In fact, Victor Fuchs, the President of Helix,¹² also confirmed the
18 following in an affidavit attached to Helix's May 5, 2010 Motion for Summary
19 Judgment Against Gemstone Development West (and corresponding errata) filed
20 with this Court:

21 4. On or around April 17, 2007 [the date of Exhibit
22 45], APCO contracted with Helix to perform certain
23 work on the Property.

24 5. Helix's relationship with APCO was governed by
25 a subcontract, which provided the scope of Helix's work
26 and method of billing and payments to Helix for work

27 ⁶ Testimony of Bob Johnson (Helix) Day 2, p. 9.

28 ⁷ Testimony of Robert Johnson.

⁸ Exhibits 512 pp. 5-6, 7-9, 10-11.

⁹ Exhibit 77.

¹⁰ Exhibit 231.

¹¹ Exhibit 231.

¹² Testimony of Bob Johnson (Helix) Day 1, p. 108.

1 performed on the Property (the "Subcontract"). A true
2 and correct copy of the Subcontract is attached hereto as
3 Exhibit 1.

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

7 7. Camco Pacific Construction Company, Inc.
8 ("Camco") replaced APCO as the general contractor.
9 Thereafter, Helix performed its Work for Gemstone
10 and/or Camco...¹³

11 Exhibit 1 to the declaration was the first fifteen pages of Exhibit 45.¹⁴ And
12 notwithstanding Helix's proposed interlineations to the subcontract, Helix's Mr.
13 Johnson admitted he did not change the retention payment schedule in the
14 subcontract:

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

17 A. Okay.

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

20 A. I do.

21 Q. And in fairness to you and the record, you did
22 propose a change to paragraph 3.8. Could you turn to
23 page 16 of the exhibit, Exhibit 45? And directing your
24 attention to paragraph 7, does this reflect your proposed
25 change to the retention payment schedule in the original
26 form of Exhibit 45?

27 A. In the original form, yes.

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

A. Correct.

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

¹³ Exhibit 314.

¹⁴ Helix Electric's May 5, 2010 Motion for Partial Summary Judgment Against Gemstone Development West (and corresponding errata).

1 A. We did not.¹⁵

2 Mr. Johnson, also admitted that Exhibit 45 represented the APCO agreement that
3 Helix alleges APCO somehow breached:

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

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

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

10 A. For the Manhattan West project.

11 Q. Is there a document?

12 A. There is a document.

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

16 A. Okay.

17 The Court: Which item is it, counsel?

18 Mr. Jefferies: Exhibit 45.

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

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

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

24 A. It is the agreement between APCO and Helix.¹⁶

25 So Helix's counsel's attempts to avoid the agreed upon retention schedule are
26 unpersuasive and not supported by the evidence.

27 **D. Helix's Proposed Finding of Fact No: 9.** However, for the reasons discussed
28 below, the Court concludes that Helix and APCO did reach an agreement with respect
to material terms constituting a contract. The evidence is undisputed that Helix
performed agreed-upon work on the Project for APCO, submitted multiple payment
applications to APCO for an agreed-upon price, and (except for some payments made
to Helix from a voucher control company after APCO left the Project), was paid
directly by APCO throughout APCO's time on the Project. [See e.g., **Exhibit 501**].

¹⁵ Testimony of Bob Johnson (Helix) Day 2, pp. 17-18.

¹⁶ Testimony of Bob Johnson (Helix) Day 2, p. 9.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
Consolidated with 80508

HELIX ELECTRIC OF NEVADA, LLC,

Appellant,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent.

JOINT APPENDIX
VOLUME 84

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CHRONOLOGICAL APPENDIX OF EXHIBITS

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
06-24-09	Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint	JA000001- JA000015	1
08-05-09	APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA000016 – JA000030	1
04-26-10	CAMCO and Fidelity's Answer and CAMCO's Counterclaim	JA000031- JA000041	1
07-02-10	Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default	JA000042- JA000043	1
06-06-13	APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time	JA000044- JA000054	1
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (1) APCO's Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only	JA000055- JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317- JA000326	6

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
06-13-13	Docket Entry and Minute Order Granting APCO's Motion for Summary Judgment Against Gemstone	JA000327	6
08-02-17	Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements and <i>Ex Parte</i> Application for Order Shortening Time	JA000328- JA000342	6
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343- JA000379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380- JA000392	6
08-21-17	APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000393- JA000409	6/7
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410- JA000412	7
09-28-17	Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000413- JA000418	7
11-06-17	Peel Brimley Lien Claimants' Motion in Limine Nos. 1-6	JA000419- JA000428	7

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 1 – Notice of Entry of Order	JA000429 JA000435	7
	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.’s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC’s	JA000436- JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry’s Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000501- JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000512- JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC’s First Set of Request for Admissions to Camco Pacific Construction	JA000523- JA000533	8
11-06-17	Helix Electric of Nevada’s Motion <i>in Limine</i> Nos. 1-4	JA000534- JA000542	8
	Exhibit 1 – Notice of Entry of Order	JA000543- JA000549	8
	Exhibit 2 – Helix Electric of Nevada, LLC’s Amended Notice of 30(b)(6) Deposition of APCO Construction	JA000550 JA000558	8/9

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 3 - Excerpts from Brian Benson Deposition Transcript taken June 5, 2017	JA000559 JA000574	9
	Exhibit 4 – Excerpts from Mary Jo Allen’s Deposition Transcript taken July 18, 2017	JA000575- JA000589	9
11-06-17	APCO Construction, Inc.’s Omnibus Motion in Limine	JA000590 JA000614	9
	Exhibit 1 – Second Amended Notice of taking NRCF Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615- JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.’s Motion for Partial Summary Judgment Against APCO Construction	JA000625- JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting’s Deposition Transcript taken October 27, 2017	JA000647- JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679- JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731- JA000808	10/11
	Exhibit 6 – Subcontract Agreement dated April 17, 2007	JA000809- JA000826	11/12
	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827- JA000831	12
	Exhibit 8 – Email from Mary Bacon dated October 17, 2017	JA000832- JA000837	12
	Exhibit 9 – Email from Eric Zimbelman dated October 17, 2017	JA000838- JA000844	12
	Exhibit 10 – Special Master Report, Recommendation and District Court Order	JA00845- JA000848	12

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 11 – Plaintiff in Intervention, National Wood Products, Inc.’s Initial Disclosures Pursuant to NRCP 16.1	JA000849- JA000856	12
	Exhibit 12 – Plaintiff in Intervention, National Wood Products, Inc.’s First Supplemental Disclosures Pursuant to NRCP 16.1	JA000857- JA000864	12
	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865- JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC’s 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874- JA000897	12
11-14-17	Camco Pacific Construction Company, Inc.’s Opposition to Lien Claimants’ Motions in Limine Nos. 1-6	JA000898- JA000905	12
	Exhibit A – Nevada Construction Services Cost Plus GMP Contract Disbursement Agreement	JA000906- JA000907	12
	Exhibit B – Scott Financial Corporation’s April 28, 2009 letter to the Nevada State Contractor’s Board	JA000908- JA000915	2/13
	Exhibit C – E-mail from Alex Edelstein dated December 15, 2008 Re: Letter to Subs	JA000916- JA000917	13
	Exhibit D – Camco Pacific’s letter dated December 22, 2008	JA000918- JA000920	13
	Exhibit E – Order Approving Sale of Property	JA000921- JA000928	13

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
11-14-17	APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions in <i>Limine</i> Nos. 1-4	JA000929- JA000940	13/14
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941- JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967- JA000969	16/17
	Exhibit 3 – Excerpts from the Deposition Transcript of Andrew Rivera taken July 20, 2017	JA000970- JA000993	17/18/19
11-14-17	Helix Electric of Nevada's Opposition to APCO Construction's Omnibus Motion in <i>Limine</i>	JA000994- JA001008	20
	Exhibit 1 – Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001009- JA001042	20
	Exhibit 2 - Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001043- JA001055	20
	Exhibit 3 – Special Master Order Requiring Completion of Questionnaire	JA001056- JA001059	20
	Exhibit 4 – Excerpts from the Deposition Transcript of the 30(b)(6) Witness for Helix Electric of Nevada taken July 20, 2017	JA001060- JA001064	20
	Exhibit 5 - Excerpts from the Deposition Transcript of David E. Parry taken June 20, 2017	JA001065 JA001132	20/21
11-15-17	APCO Construction, Inc.'s Reply in Support of its Omnibus Motion in <i>Limine</i>	JA001133 JA001148	21

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 1 – Special Master Report Regarding Discovery Status	JA001149- JA001151	21
	Exhibit 2 – Notice of Taking NRCP Rule 30(b)(6) Deposition of the Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA001152- JA001160	21
12-29-17	Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion in <i>Limine</i> 1-6	JA001161- JA001169	22
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC’s Motion in <i>Limine</i> 1-4	JA001170- JA001177	22
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part APCO Construction’s Omnibus Motion in <i>Limine</i>	JA001178- JA001186	22
01-03-18	Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001187- JA001198	22
01-04-18	Motion for Reconsideration of Court’s Order Granting Peel Brimley Lien Claimants’ Partial Motion for Summary Judgment to Preclude Defenses based on Pay-if-Paid provision on an Order Shortening Time	JA001199- JA001217	22
	Exhibit 1 – Subcontract Agreement (Helix Electric of Nevada, LLC)	JA001218- JA001245	22/23/24
	Exhibit 2 – Subcontract Agreement (Zitting Brothers)	JA001246- JA001263	24

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	Exhibit 3 – Subcontract Agreement (CabineTec)	JA001264- JA001281	24/25
	Exhibit 4 – Amended Notice of Lien	JA001282- JA001297	25
	Exhibit 5 - Amended NOL	JA001298- JA001309	25
	Exhibit 6 – Notice of Lien	JA001310- JA001313	25
	Exhibit 7 – Order Approving Sale of Property	JA001314- JA001376	25/26
	Exhibit 8 – Order Releasing Sale Proceeds from Court Controlled Escrow Account	JA001377- JA001380	26
	Exhibit 9 – Order Denying <i>En Banc</i> Reconsideration	JA001381- JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386- JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393- JA001430	26
	Exhibit 12 – Order Big D Construction Corp.’s Motion for Attorney’s Fees, Costs and Interest Pursuant to Judgment	JA001431- JA001435	26
	Exhibit 13 – Appellant’s Opening Brief (Padilla v. Big D)	JA001436- JA001469	26
	Exhibit 14 – Respondent’s Answering Brief	JA001470- JA001516	26/27
	Exhibit 15 – Appellant’s Reply Brief (Padilla v. Big D)	JA001517- JA001551	27
01-09-18	Peel Brimley Lien Claimants’ Opposition to APCO Construction’s Motion for Reconsideration of Order	JA001552- JA001560	27

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01-10-18	Reply in Support of Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions on an Order Shortening Time	JA001561- JA001573	27
01-12-18	Joint Pre-Trial Memorandum [for APCO Construction, Inc., the Peel Brimley Lien Claimants and National Wood Products, LLC ONLY]	JA001574- JA001594	27/28
	Exhibit 1 – Exhibit List APCO	JA001595- JA001614	28
	Exhibit 2 – Helix Trial Exhibits	JA001615- JA001616	28
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA001617- JA001635	28
	Exhibit 4 – Cactus Rose Trial Exhibits	JA001636- JA001637	28
	Exhibit 5 – Heinaman Trial Exhibits	JA001638- JA001639	28
	Exhibit 6 – Fast Glass Trial Exhibits	JA001640- JA001641	28
	Exhibit 7 – SWPPP Trial Exhibits	JA001642- JA001643	28
	Exhibit 8 - Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion <i>in Limine</i>	JA001644- JA001647	28

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	Exhibit 9 - Amended <i>nunc pro tunc</i> order regarding APCO Construction, Inc.'s Omnibus Motion <i>in Limine</i> No. 7	JA001648- JA001650	28
	Exhibit 10 - Order Granting in Part and Denying in part Helix Electric of Nevada, LLC's Motions <i>in Limine</i> 1-4 (Against APCO Construction)	JA001651- JA001653	28
	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654- JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion <i>in Limine</i>	JA001658- JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661- JA00167	28/9/29
01-17-18	Transcript Bench Trial (Day 1)¹	JA001668- JA001802	29/30
	Trial Exhibit 1 - Grading Agreement (<i>Admitted</i>)	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement (<i>Admitted</i>)	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement (<i>Admitted</i>)	JA001869- JA001884	30

¹ Filed January 31, 2018

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	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone <i>(Admitted)</i>	JA001885- JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work <i>(Admitted)</i>	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work <i>(Admitted)</i>	JA001979- JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) <i>(Admitted)</i>	JA001981- JA001987	32
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) <i>(Admitted)</i>	JA001988- JA002001	32
	Trial Exhibit 14 - Letter from W. Gochmour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause <i>(Admitted)</i>	JA002002- JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices <i>(Admitted)</i>	JA002011- JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks <i>(Admitted)</i>	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract <i>(Admitted)</i>	JA002015- JA002016	33

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	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record (<i>Admitted</i>)	JA002017- JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks (<i>Admitted</i>)	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment (<i>Admitted</i>)	JA002025- JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP (<i>Admitted</i>)	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner (<i>Admitted</i>)	JA002082- JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement (<i>Admitted</i>)	JA002121- JA002146	35
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO (<i>Admitted</i>)	JA002147- JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice (<i>Admitted</i>)	JA002177- JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice (<i>Admitted</i>)	JA002182- JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors (<i>Admitted</i>)	JA002186- JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions (<i>Admitted</i>)	JA002189 – JA002198	36

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	Exhibit 1 – Exhibit List APCO	JA002208- JA002221	36
	Exhibit 2 – Helix Trial Exhibits	JA002222- JA002223	36
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224- JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244- JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283- JA002284	38
	Trial Exhibit 17 – Video (Construction Project)	JA002285	N/A
	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A

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	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286- JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307- JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309- JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311- JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313- JA002314	40
	Exhibit 36 and 130 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002315- JA002316	40
	Trial Exhibits 37 and 131 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002317- JA002318	40
	Trial Exhibits 38 and 132 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002319- JA002320	41

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 39 -Email from K. Costen to Subcontractors informing that Manhattan West Project no longer open	JA002321- JA002322	41
	Trial Exhibit 40- Letter from D. Parry to Subcontractors Re: Funding Withdrawn	JA002323 JA002326	41
	HELIX Related Exhibits:		41
	Trial Exhibit 46 - Helix Pay Application No. 16713-008R1 with Proof of Payment	JA002327- JA002345	41
	Trial Exhibit 47 - Helix Pay Application No. 16713-009R1 with Proof of Payment	JA002346- JA002356	41
	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357- JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359- JA002364	41/42
	Trial Exhibit 50 - Unconditional Waiver and Release re: Pay Application No. 8 with Copy of Payment	JA002365- JA002366	42
	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367- JA002368	42
	Trial Exhibit 52 -Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002369- JA002370	42
	Trial Exhibit 53 -Photo re: Building - 2 & 3, West (No Exterior fixtures installed. Helix billed out at 90%)	JA002371- JA002372	42

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 54 - Photo re: Building - 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002373- JA002374	42
	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375- JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377- JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379- JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382- JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392- JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406- JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413- JA002415	43
	Trial Exhibit 62 - Photo re: Building 8 & 9, South	JA002416- JA002417	43
	Trial Exhibit 63 - Photo re: Building 2 & 3, West	JA002418- JA002419	43
	Trial Exhibit 64 - Photo re: Building 2 & 3, West	JA002420- JA002421	43
	Trial Exhibit 65 - Photo re: Building 2 & 3, South	JA002422- JA002423	43

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424- JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435- JA002436	43
	Trial Exhibit 68 -Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002437- JA002438	43
	Trial Exhibit 69 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002439- JA002440	43
	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441- JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443- JA002444	43
	Trial Exhibit 72 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002445- JA002446	43
	Trial Exhibit 73 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002447- JA002448	43
	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448- JA002449	43

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	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450- JA002456	43
	Exhibit 77 - Helix Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA002457- JA002494	43
	Zitting Brothers Related Exhibits:		
	Trial Exhibit 100 - Check No. 14392 payable to Zitting (\$27,973.80); Progress Payment No. 7	JA002495- JA002497	44
	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498- JA002500	44
	Trial Exhibit 102 -Email from L. Lynn to J. Griffith, et al. re: Change Order No. 00011 “pending”	JA002501- JA002503	44
	Trial Exhibit 103- Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour	JA002504- JA002505	44
	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour with copies of change orders	JA002506- JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527- JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting (\$27,973.80)	JA002529	44
	Trial Exhibit 108 - Photo of Video (Construction Project)	JA002530- JA002531	44
	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532- JA002533	44

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	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534- JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536- JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538- JA002539	44
	Trial Exhibit 113 -Photo of Video (Construction Project)	JA002550- JA002541	44
	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542- JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544- JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546- JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551- JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564- JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO (\$33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568- JA002571	44
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572- JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576- JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578- JA002579	46
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<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592- JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599- JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613- JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652- JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677- JA002713	48
	Trial Exhibit 171 - Work Order No. 100	JA002714- JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719- JA002730	48

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	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731- JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746- JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748- JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752- JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772- JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798- JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826- JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029- JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334- JA003338	55
	Helix Trial Exhibits:		
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57 /58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61

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	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65 /66/67/ 68/69/70/ 71/72 /73/74/75 /76/77
01-19-18	Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA005282- JA005283	78
01-18-18	Transcript – Bench Trial (Day 2)²	JA005284- JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) (<i>Admitted</i>)	JA005371- JA005623	78/79/80
01-19-18	Transcript – Bench Trial (Day 3)³	JA005624- JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint (<i>Admitted</i>)	JA005786- JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone (<i>Admitted</i>)	JA005802- JA005804	80

² Filed January 31, 201879

³ Filed January 31, 2018

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	Trial Exhibit 320 – June-August Billings—not paid to APCO (<i>Admitted</i>)	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec (<i>Admitted</i>)	JA005806-	80
	Trial Exhibit 536 – Lien math calculations (handwritten) (<i>Admitted</i>)	JA005807- JA005808	80
	Trial Exhibit 804 – Camco Correspondence (<i>Admitted</i>)	JA005809- JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien (<i>Admitted</i>)	JA005817- JA005819	81
01-24-18	Transcript – Bench Trial (Day 5)⁴	JA005820- JA005952	81
03-08-18	Letter to Judge Denton submitting Helix Electric of Nevada, LLC’s (Proposed) Findings of Fact and Conclusions of Law	JA005953- JA005985	81
03-08-18	Letter to Judge Denton submitting APCO Construction, Inc.’s Proposed Findings of Fact and Conclusions of Law	JA005986- JA006058	8/821
03-08-18	APCO Construction Inc.’s Post-Trial Brief	JA006059- JA006124	82/83
03-23-18	APCO Opposition to Helix Electric of Nevada, LLC’s Findings of Fact and Conclusions of Law	JA006125- JA006172	83/84
03-23-18	Helix Electric of Nevada, LLC’s Responses to APCO Construction’s Post-Trial Brief	JA006173- JA006193	84
04-25-18	Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO	JA006194- JA006264	84/85

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05-08-18	APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA006265- JA006284	85
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285- JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357- JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370- JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386- JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399- JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403- JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407- JA006411	87
	Exhibit 7A – Billing Entries	JA006412- JA006442	87/88

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	Exhibit 7B – Time Recap	JA006443- JA006474	88
	Exhibit 8 – Declaration of Cody S. Munteer, Esq. in Support of Motion for Attorney’s Fees and Costs	JA006475- JA006478	88
	Exhibit 9 – APCO Construction, Inc.’s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479- JA006487	88
	Exhibit 10 – Depository Index	JA006488- JA006508	88/89
05-08-18	Helix Electric of Nevada, LLC’s Motion to Retax Costs Re: Defendant APCO Construction’s Memorandum of Costs and Disbursements	JA006509- JA006521	89
05-31-18	Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]	JA006522 JA006540	89
06-01-18	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.]	JA006541 JA006550	90
06-01-18	Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006551- JA006563	90
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564- JA006574	90

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575- JA006580	90
	Exhibit 3 – Prime Interest Rate	JA006581- JA006601	90
	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006583- JA006588	90
	Exhibit 5 – Summary of Fees	JA006589- JA006614	90
06-15-18	APCO Construction, Inc.’s Opposition to Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.’s Motions to Retax Costs	JA006615- JA006637	90/91
	Exhibit 1-A Declaration of Mary Bacon in Support of APCO’s Supplement to its Motion for Attorney’s Fees	JA006635 JA006638	91
	Exhibit 1-B – Declaration of Cody Munteer in Support of APCO’s Supplement to its Motion for Attorney’s Fees	JA006639- JA006916	91/92/93 94/95/96
06-15-18	Helix Electric of Nevada, LLC’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA006917 – JA006942	96
	Exhibit 1 – Notice of Entry of Staying the Case, Except for the Sale of the Property, Pending Resolution of the Petition before the Nevada Supreme Court	JA006943- JA006948	96

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955- JA006958	96
	Exhibit 4 – Order Denying <i>En Banc</i> Reconsideration	JA006959- JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA006964- JA006978	96
	Exhibit 6A – Interstate Plumbing and Air Conditioning, LLC’s Response to Special Master Questionnaire	JA006977- JA006980	96
	Exhibit 6B – Nevada Prefab Engineers, Inc.’s Response to Special Master Questionnaire	JA006981- JA006984	96
	Exhibit 6C – Zitting Brothers Construction, Inc.’s Response to Special Master Questionnaire	JA006985- JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal’s Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC’s Special Master Questionnaire	JA007002- JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006- JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037- JA007060	97

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042- JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff’s Motion to Dismiss	JA007047 JA007053	97
	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054- JA007056	97
	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057- JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction’s Omnibus Motion <i>in Limine</i>	JA007060- JA007088	97
	Exhibit 12 – Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC’s Motion in Limine (against APCO Construction)	JA007070- JA007078	97
	Exhibit 13 – Notice of Entry of Order Denying APCO Constructions’ Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA007079- JA007084	97
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06-15-18	Declaration of S. Judy Hirahara in support of National Woods’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007121- JA007189	98
06-18-18	Plaintiff in Intervention National Wood Products, Inc.’s Joinder to Helix Electric of Nevada, LLC’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007190- JA007192	99
06-21-18	Helix Electric of Nevada, LLC’s Notice of Non-Opposition to its Motion for Attorney’s Fees, Interest and Costs	JA007193- JA007197	99
06-29-18	APCO Construction, Inc.’s Reply in Support of its Motion for Attorney’s Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA007198- JA007220	99
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221- JA007222	99
	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223- JA007224	99

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08-08-18	Court's Decision on Attorneys' Fees and Cost Motions	JA007262- JA007280	100
09-28-18	Notice of Entry of (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281- JA007299	100
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300- JA007312	100/101
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	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.	JA007332- JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007336- JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345- JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395- JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance	JA007401- JA007517	102/103

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528- JA007541	103
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	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130- JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants’ Motions for Partial Summary Judgment Against Gemstone Development West	JA008139- JA008141	109
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	Exhibit 10H – Complaint re Foreclosure	JA008178- JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215- JA008230	109
	Exhibit 10J – APCO Construction’s Answer to Accuracy Glass & Mirror Company’s First Amended Complaint re Foreclosure	JA008231- JA008265	109/110
	Exhibit 10K – Answer to Accuracy Glass & Mirror Company, Inc.’s Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008266- JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008286- JA008290	110
	Exhibit 10M – Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291- JA008306	110
	Exhibit 10N – APCO Construction’s Answer to Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307- JA008322	110
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	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368- JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenetec Against APCO	JA008379- JA008450	110/111
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	Exhibit 10U – APCO Construction's Answer to WRG Design Inc.'s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468- JA008483	111
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	Exhibit 10Z – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction's Counterclaim	JA008531- JA008551	111
	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing's Motion for Attorneys's Fees, Interest and Costs	JA008552- JA008579	111/112
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	Exhibit 10CC – Heinaman Contract Glazing's Answer to Camco Pacific Construction Company's Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589- JA00861	112
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	Exhibit 10HH – APCO Construction's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643- JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658- JA008664	112
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	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682- JA008685	112
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<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 10OO – Amended Notice of Appeal	JA008724- JA008729	113
	Exhibit 10PP – Notice of Cross Appeal	JA008730- JA008736	113
	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737- JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747- JA008755	113
	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875- JA008758	113
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	Exhibit 14 – Docket/United Subcontractors, Inc. dba Skyline Insulation’s Motion to Enforce Settlement Agreement and Enter Judgment	JA008762- JA008788	113
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	Exhibit 5 – Chart of Claims	JA008897- JA008924	116
	Exhibit 6 – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company, Inc.’s Counterclaim	JA008925- JA008947	116/117
	Exhibit 7 – Answer to Cactus Rose’s Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.’s Counterclaim	JA008948- JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008966- JA008986	117/118

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011- JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025- JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039- JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111- JA009113	119
	Exhibit 15 – Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond	JA009114- JA009116	119
08-29-19	Helix Electric of Nevada LLC's Reply to APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II)	JA009117- JA009123	119

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01-29-20	Notice of Appeal	JA009132- JA009136	119/120
	Exhibit A – 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.]	JA009137- JA009166	120
	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148- JA009156	120
02-11-20	Case Appeal Statement	JA009157- JA009163	120
02-11-20	APCO's Notice of Cross Appeal	JA009164- JA010310	120
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<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357- JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370- JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386- JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399- JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403- JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407- JA006411	87
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	Exhibit 9 – APCO Construction, Inc.’s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479- JA006487	88
	Exhibit 10 – Depository Index	JA006488- JA006508	88/89
06-06-13	APCO’s Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO’s Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time	JA000044- JA000054	1
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO’s Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO’s Motion for Judgment Against Gemstone Only	JA000055- JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317- JA000326	6
02-11-20	APCO’s Notice of Cross Appeal	JA009164- JA010310	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.’s Motion for Attorney’s Fees and Costs; (2) Granting APCO Construction, Inc.’s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC’s	JA009168- JA009182	114

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 2 – Notice of Entry of Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification	JA009183- JA00991	120
11-06-17	APCO Construction, Inc.'s Omnibus Motion <i>in Limine</i>	JA000590 JA000614	9
	Exhibit 1 – Second Amended Notice of taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615- JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	JA000625- JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting's Deposition Transcript taken October 27, 2017	JA000647- JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679- JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731- JA000808	10/11
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	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827- JA000831	12
	Exhibit 8 – Email from Mary Bacon dated October 17, 2017	JA000832- JA000837	12
	Exhibit 9 – Email from Eric Zimbelman dated October 17, 2017	JA000838- JA000844	12
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<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 11 – Plaintiff in Intervention, National Wood Products, Inc.’s Initial Disclosures Pursuant to NRCP 16.1	JA000849- JA000856	12
	Exhibit 12 – Plaintiff in Intervention, National Wood Products, Inc.’s First Supplemental Disclosures Pursuant to NRCP 16.1	JA000857- JA000864	12
	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865- JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC’s 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874- JA000897	12
03-23-18	APCO Opposition to Helix Electric of Nevada, LLC’s Findings of Fact and Conclusions of Law	JA006125- JA006172	83/84
08-16-19	APCO’s Opposition to Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA008811- JA008821	114
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822- JA008824	114
	Exhibit 2 – Order to Show Cause	JA008825- JA008828	114
	Exhibit 3 – Appellant/Cross-Respondent’s Response to Order to Show Cause	JA008829- JA008892	114/115/116
	Exhibit 4 – Order Dismissing Appeal	JA008893- JA008896	116
	Exhibit 5 – Chart of Claims	JA008897- JA008924	116
	Exhibit 6 – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008925- JA008947	116/117

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 7 – Answer to Cactus Rose's Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.'s Counterclaim	JA008948- JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction's Counterclaim	JA008966- JA008986	117/118
	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987- JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998- JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011- JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025- JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039- JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111- JA009113	119
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	Exhibit 1-B – Declaration of Cody Mounteer in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006639- JA006916	91/92/93 94/95/96
11-14-17	APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions in Limine Nos. 1-4	JA000929- JA000940	13/14
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941- JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967- JA000969	16/17
	Exhibit 3 – Excerpts from the Deposition Transcript of Andrew Rivera taken July 20, 2017	JA000970- JA000993	17/18/19
08-21-17	APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000393- JA000409	6/7
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410- JA000412	7
03-08-18	APCO Construction Inc.'s Post-Trial Brief	JA006059- JA006124	82/83
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	Exhibit 1 – Invoice Summary by Matter Selection	JA007221- JA007222	99
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11-14-17	Camco Pacific Construction Company, Inc.’s Opposition to Lien Claimants’ Motions in Limine Nos. 1-6	JA000898- JA000905	12
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	Exhibit B – Scott Financial Corporation’s April 28, 2009 letter to the Nevada State Contractor’s Board	JA000908- JA000915	2/13
	Exhibit C – E-mail from Alex Edelstein dated December 15, 2008 Re: Letter to Subs	JA000916- JA000917	13
	Exhibit D – Camco Pacific’s letter dated December 22, 2008	JA000918- JA000920	13
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11-06-17	Helix Electric of Nevada's Motion <i>in Limine</i> Nos. 1-4	JA000534- JA000542	8
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	Exhibit 2 – Helix Electric of Nevada, LLC's Amended Notice of 30(b)(6) Deposition of APCO Construction	JA000550 JA000558	8/9
	Exhibit 3 - Excerpts from Brian Benson Deposition Transcript taken June 5, 2017	JA000559 JA000574	9
	Exhibit 4 – Excerpts from Mary Jo Allen's Deposition Transcript taken July 18, 2017	JA000575- JA000589	9
06-01-18	Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA006551- JA006563	90
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	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575- JA006580	90
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08-06-19	Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA007316- JA007331	101
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	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008286- JA008290	110
	Exhibit 10M – Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291- JA008306	110
	Exhibit 10N – APCO Construction’s Answer to Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307- JA008322	110
	Exhibit 10O – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.’s Counterclaim	JA008323- JA008338	110
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC’s Motion for Attorney’s Fees, Interest and Costs	JA008339 JA008347	110
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	Exhibit 10U – APCO Construction’s Answer to WRG Design Inc.’s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468- JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.’s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc’s Counterclaim	JA008484- JA008504	111
	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505- JA008512	111
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	Exhibit 10Y – Heinaman Contract Glazing’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518- JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing’s Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction’s Counterclaim	JA008531- JA008551	111

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	Exhibit 10CC – Heinaman Contract Glazing’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589- JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008602- JA008621	112
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622- JA008624	112
	Exhibit 10GG – HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625- JA008642	112
	Exhibit 10HH – APCO Construction’s Answer to HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643- JA008657	112
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	Exhibit 10LL – HD Supply Waterworks, LP's Voluntary Dismissal of Platte River Insurance Company Only Without Prejudice	JA008686- JA008693	112
	Exhibit 10MM – Scott Financial Corporation's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008694- JA008717	112/113
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	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737- JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747- JA008755	113
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	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955- JA006958	96
	Exhibit 4 – Order Denying <i>En Banc</i> Reconsideration	JA006959- JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment	JA006964- JA006978	96

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	Exhibit 6C – Zitting Brothers Construction, Inc.’s Response to Special Master Questionnaire	JA006985- JA006993	96/97
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	Exhibit 6 E – Unitah Investments, LLC’s Special Master Questionnaire	JA007002- JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006- JA007036	97
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	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054- JA007056	97
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	Exhibit 1 – Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001009- JA001042	20
	Exhibit 2 - Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001043- JA001055	20
	Exhibit 3 – Special Master Order Requiring Completion of Questionnaire	JA001056- JA001059	20
	Exhibit 4 – Excerpts from the Deposition Transcript of the 30(b)(6) Witness for Helix Electric of Nevada taken July 20, 2017	JA001060- JA001064	20
	Exhibit 5 - Excerpts from the Deposition Transcript of David E. Parry taken June 20, 2017	JA001065 JA001132	20/21
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03-23-18	Helix Electric of Nevada, LLC's Responses to APCO Construction's Post-Trial Brief	JA006173- JA006193	84
06-24-09	Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint	JA000001- JA000015	1
01-12-18	Joint Pre-Trial Memorandum [for APCO Construction, Inc., the Peel Brimley Lien Claimants and National Wood Products, LLC ONLY]	JA001574- JA001594	27/28
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	Exhibit 2 – Helix Trial Exhibits	JA001615- JA001616	28
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA001617- JA001635	28
	Exhibit 4 – Cactus Rose Trial Exhibits	JA001636- JA001637	28
	Exhibit 5 – Heinaman Trial Exhibits	JA001638- JA001639	28
	Exhibit 6 – Fast Glass Trial Exhibits	JA001640- JA001641	28
	Exhibit 7 – SWPPP Trial Exhibits	JA001642- JA001643	28
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	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654- JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion <i>in Limine</i>	JA001658- JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661- JA001667	28/9/29
03-08-18	Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law	JA005986- JA006058	8/821
03-08-18	Letter to Judge Denton submitting Helix Electric of Nevada, LLC's (Proposed) Findings of Fact and Conclusions of Law	JA005953- JA005985	81
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	Exhibit 1 – Subcontract Agreement (Helix Electric of Nevada, LLC)	JA001218- JA001245	22/23/24
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	Exhibit 7 – Order Approving Sale of Property	JA001314- JA001376	25/26
	Exhibit 8 – Order Releasing Sale Proceeds from Court Controlled Escrow Account	JA001377- JA001380	26
	Exhibit 9 – Order Denying <i>En Banc</i> Reconsideration	JA001381- JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386- JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393- JA001430	26
	Exhibit 12 – Order Big D Construction Corp.’s Motion for Attorney’s Fees, Costs and Interest Pursuant to Judgment	JA001431- JA001435	26
	Exhibit 13 – Appellant’s Opening Brief (Padilla v. Big D)	JA001436- JA001469	26
	Exhibit 14 – Respondent’s Answering Brief	JA001470- JA001516	26/27
	Exhibit 15 – Appellant’s Reply Brief (Padilla v. Big D)	JA001517- JA001551	27
	Notice of Appeal	JA009132- JA009136	119/120
	Exhibit A – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention	JA009137- JA009166	120

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06-01-18	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.]	JA006541 JA006550	90
09-28-18	Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281- JA007299	100
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion <i>in Limine</i>	JA001178- JA001186	22
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12-29-17	Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion <i>in Limine</i> 1-6	JA001161- JA001169	22
01-19-18	Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA005282- JA005283	78
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007332- JA007334	101
07-02-10	Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default	JA000042- JA000043	1
08-02-17	Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements and <i>Ex Parte</i> Application for Order Shortening Time	JA000328- JA000342	6
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343- JA000379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380- JA000392	6
11-06-17	Peel Brimley Lien Claimants' Motion <i>in Limine</i> Nos. 1-6	JA000419- JA000428	7
	Exhibit 1 – Notice of Entry of Order	JA000429	7

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
		JA000435	
	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.’s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC’s	JA000436- JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry’s Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000501- JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000512- JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC’s First Set of Request for Admissions to Camco Pacific Construction	JA000523- JA000533	8
09-28-17	Peel Brimley Lien Claimants’ Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000413- JA00418	7
01-09-18	Peel Brimley Lien Claimants’ Opposition to APCO Construction’s Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001552- JA001560	27
06-18-18	Plaintiff in Intervention National Wood Products, Inc.’s Joinder to Helix Electric of Nevada, LLC’s Opposition	JA007190- JA007192	99

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	to APCO Construction's Motion for Attorneys' Fees and Costs		
06-15-18	Plaintiff in Intervention National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Attorneys' Fees and Costs	JA007095- JA007120	97/98
07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246- JA007261	100
01-10-18	Reply in Support of Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions on an Order Shortening Time	JA001561- JA001573	27
01-18-18	Stipulation and Order Regarding Trial Exhibit Admitted into Evidence	JA002199- JA002201	36
	Exhibit 1 – Exhibit List APCO	JA002208- JA002221	36
	Exhibit 2 – Helix Trial Exhibits	JA002222- JA002223	36
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224- JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244- JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283- JA002284	38

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 17 – Video (Construction Project)	JA002285	N/A
	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A
	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286- JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307- JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309- JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311- JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313- JA002314	40
	Exhibit 36 and 130 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002315- JA002316	40

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibits 37 and 131 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002317- JA002318	40
	Trial Exhibits 38 and 132 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002319- JA002320	41
	Trial Exhibit 39 -Email from K. Costen to Subcontractors informing that Manhattan West Project no longer open	JA002321- JA002322	41
	Trial Exhibit 40- Letter from D. Parry to Subcontractors Re: Funding Withdrawn	JA002323 JA002326	41
	HELIX Related Exhibits:		41
	Trial Exhibit 46 - Helix Pay Application No. 16713-008R1 with Proof of Payment	JA002327- JA002345	41
	Trial Exhibit 47 - Helix Pay Application No. 16713-009R1 with Proof of Payment	JA002346- JA002356	41
	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357- JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359- JA002364	41/42
	Trial Exhibit 50 - Unconditional Waiver and Release re: Pay Application No. 8 with Copy of Payment	JA002365- JA002366	42
	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367- JA002368	42
	Trial Exhibit 52 -Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002369- JA002370	42
	Trial Exhibit 53 -Photo re: Building - 2 & 3, West (No Exterior fixtures installed. Helix billed out at 90%)	JA002371- JA002372	42

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 54 - Photo re: Building - 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002373- JA002374	42
	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375- JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377- JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379- JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382- JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392- JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406- JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413- JA002415	43
	Trial Exhibit 62 - Photo re: Building 8 & 9, South	JA002416- JA002417	43
	Trial Exhibit 63 - Photo re: Building 2 & 3, West	JA002418- JA002419	43
	Trial Exhibit 64 - Photo re: Building 2 & 3, West	JA002420- JA002421	43
	Trial Exhibit 65 - Photo re: Building 2 & 3, South	JA002422- JA002423	43
	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424- JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435- JA002436	43

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 68 -Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002437- JA002438	43
	Trial Exhibit 69 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002439- JA002440	43
	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441- JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443- JA002444	43
	Trial Exhibit 72 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002445- JA002446	43
	Trial Exhibit 73 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002447- JA002448	43
	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448- JA002449	43
	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450- JA002456	43
	Exhibit 77 - Helix Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA002457- JA002494	43
	Zitting Brothers Related Exhibits:		
	Trial Exhibit 100 - Check No. 14392 payable to Zitting (\$27,973.80); Progress Payment No. 7	JA002495- JA002497	44
	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498- JA002500	44
	Trial Exhibit 102 -Email from L. Lynn to J. Griffith, et al. re: Change Order No. 00011 “pending”	JA002501- JA002503	44

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 103- Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour	JA002504- JA002505	44
	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour with copies of change orders	JA002506- JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527- JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting (\$27,973.80)	JA002529	44
	Trial Exhibit 108 - Photo of Video (Construction Project)	JA002530- JA002531	44
	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532- JA002533	44
	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534- JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536- JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538- JA002539	44
	Trial Exhibit 113 -Photo of Video (Construction Project)	JA002550- JA002541	44
	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542- JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544- JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546- JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551- JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564- JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO (\$33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568- JA002571	44

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572- JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576- JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578- JA002579	46
	Trial Exhibit 129 - Photo of Video (Construction Project)	JA002580- JA002581	46
	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582- JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592- JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599- JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613- JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652- JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677- JA002713	48

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 171 - Work Order No. 100	JA002714- JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719- JA002730	48
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731- JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746- JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748- JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752- JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772- JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798- JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826- JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029- JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334- JA003338	55
	Helix Trial Exhibits:		

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57/ 58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61
	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65/66/6 7/ 68/69/70 /71/72 /73/74/75/ 76/77
01-17-18	Transcript Bench Trial (Day 1)⁵	JA001668- JA001802	29/30
	Trial Exhibit 1 - Grading Agreement (Admitted)	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement (Admitted)	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement (Admitted)	JA001869- JA001884	30
	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone (Admitted)	JA001885- JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work (Admitted)	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work (Admitted)	JA001979- JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) (Admitted)	JA001981- JA001987	32

⁵ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) <i>(Admitted)</i>	JA001988- JA002001	32
	Trial Exhibit 14 - Letter from W. Gochmour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause <i>(Admitted)</i>	JA002002- JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices <i>(Admitted)</i>	JA002011- JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks <i>(Admitted)</i>	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract <i>(Admitted)</i>	JA002015- JA002016	33
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record <i>(Admitted)</i>	JA002017- JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks <i>(Admitted)</i>	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment <i>(Admitted)</i>	JA002025- JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP <i>(Admitted)</i>	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner <i>(Admitted)</i>	JA002082- JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement <i>(Admitted)</i>	JA002121- JA002146	35

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO (<i>Admitted</i>)	JA002147- JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice (<i>Admitted</i>)	JA002177- JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice (<i>Admitted</i>)	JA002182- JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors (<i>Admitted</i>)	JA002186- JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions (<i>Admitted</i>)	JA002189 – JA002198	36
01-18-18	Transcript – Bench Trial (Day 2)⁶	JA005284- JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) (<i>Admitted</i>)	JA005371- JA005623	78/79/80
01-19-18	Transcript – Bench Trial (Day 3)⁷	JA005624- JA005785	80
	Trial Exhibit 231 – Helix Electric’s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint (<i>Admitted</i>)	JA005786- JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix’s Motion for Partial Summary Judgment against Gemstone (<i>Admitted</i>)	JA005802- JA005804	80
	Trial Exhibit 320 – June-August Billings—not paid to APCO (<i>Admitted</i>)	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec (<i>Admitted</i>)	JA005806-	80

⁶ Filed January 31, 201879

⁷ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 536 – Lien math calculations (handwritten) (<i>Admitted</i>)	JA005807- JA005808	80
	Trial Exhibit 804 – Camco Correspondence (<i>Admitted</i>)	JA005809- JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien (<i>Admitted</i>)	JA005817- JA005819	81
01-24-18	Transcript – Bench Trial (Day 5)⁸	JA005820- JA005952	81
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300- JA007312	100/101

⁸ Filed January 31, 2018

1 **APCO's Response:** If Exhibit 45 was not the subcontract between APCO and
2 Helix, Helix has failed to provide the material terms of the supposed agreement, as
3 confirmed by its lack of proper citation to the record. Further, Helix only cites to
4 Exhibit 501 for its statement. If anything, Exhibit 501 contains the payment records
5 between Helix and APCO¹⁷—it does not confirm any other material terms of the
6 alleged agreement between Helix and APCO.

7 **E. Helix's Proposed Finding of Fact No: 12.** APCO and Helix agree that the
8 remaining sum of \$505,021.00 not paid to Helix for work performed while APCO was
9 the general contractor is monies withheld from Helix as "retention."...

10 **APCO's Response:** It is undisputed that APCO never held or otherwise received
11 any subcontractor's retention withheld by Gemstone and kept by the lender for the
12 Project.¹⁸ It is also undisputed that complying with the preconditions (submitting
13 close out documents, as-builts, etc.) is part of the work that needed to be performed
14 in order to earn the retention.

15 **F. Helix's Proposed Finding of Fact No: 14.** APCO ceased work on the Project
16 in or about the end of August 2008. APCO and Gemstone each claim to have
17 terminated the other. Among other events leading up to APCO's stopping work on the
18 Project are the following:

19 ...

20 • On September 5, 2008, APCO wrote to Gemstone confirming that, pursuant to its
21 August 21, 2008 notice (Ex. 23) it "has terminated the [APCO-Gemstone Agreement]
22 in accordance with NRS 624.610." [Exhibit 28]. Although the notice contains the
23 notation "Cc: All Subcontractors" APCO was unable to demonstrate that it actually
24 provided a copy of this notice to Helix.

25
26
27
28 ¹⁷ See Exhibit 501.

¹⁸ Testimony of Joe Pelan (APCO) Day 1, p. 26.

1 **APCO's Response:** Helix's Andy Rivera confirmed that he received copies of
2 communications between APCO and Gemstone regarding their payment dispute.¹⁹
3 Helix's proposed Finding of Fact No. 20 confirmed the same to this Court: "Just as
4 APCO was advising its subcontractors of its notices of intent to stop work and
5 terminate its agreement with Gemstone (see e.g. Exs. 26, 48), Gemstone notified the
6 subcontractors that it disputed APCO's claims."²⁰

7 **G. Helix's Proposed Finding of Fact No: 17.** By way of APCO's final certified
8 payment application [**Exhibit 31**], which it submitted on October 3, 2008 (i.e., more
9 than a month after stopping work and terminating the APCO-Gemstone Agreement)
10 APCO showed similar figures. Specifically, on the Contractor's Application for
11 Payment document [Ex. 31-002], APCO showed "total completed & stored to date" of
12 \$62,101,623.10 and a current payment due of \$5,276,181.54. While these figures are
13 lower than the subtotal of work performed, and the amounts owed as represented by the
14 APCO Notice of Lien, APCO's Joe Pelan testified that APCO was owed for changed
15 work that Gemstone had not approved and allowed to be billed. [*See* TR1-65:7-9].
16 APCO's Mary Joe Allen contradicted APCO's Joe Pelan by testifying that APCO was
17 owed only approximately \$1.4 million when it stopped work on the Project. [TR3-
18 122:10-12]. However, it is clear that Ms. Allen's calculations only selected line items
19 earned by APCO and did not include any amounts owed to subcontractors that had
20 otherwise been included in APCO's pay applications. In any event, the Court finds that
21 APCO billed for and included in its Notice of Lien amounts earned by (but not paid to)
22 subcontractors, including their retention.

23 **APCO's Response:** The \$1,400,036.75 Ms. Allen calculated does not reflect any of
24 the retention that Gemstone withheld from APCO on the Project because the
25 retention never became due.²¹ The \$1,400,036.75 also does not include any
26

27 ¹⁹ Testimony of Andy Rivera (APCO) Day 2, p.76.

28 ²⁰ Helix's Proposed Finding of Fact No: 20.

²¹ Testimony of Mary Jo Allen (APCO) Day 3, p. 127.

1 amounts to subcontractors because APCO ensured subcontractors had received all
2 amounts billed through August 2008 before it left the Project.²²

3 **H. Helix's Proposed Finding of Fact No: 21.** After APCO stopped work, Helix
4 had a meeting with Gemstone's principal, Alex Edelstein, and a Camco representative
5 in which Gemstone represented to Helix that "work was still proceeding, nothing had
6 changed with our contracts with the current APCO relationship, and that we were to
7 take direction for construction from Camco, and they wanted to negotiate a contract."
8 [TR2-22:10-23:3²³]. Despite repeatedly requesting to know what happened to APCO,
9 Helix "never got a clear signal. So you stop asking after a while because you get
10 different messages from everybody. Our people had even asked in the field what's
11 going on, and people didn't know. So it was just confusion." [TR2-23:8-14].²⁴

12 **APCO's Response:** Helix cites Bob Johnson's testimony for the proposition that
13 Helix was somehow confused about the status of the Project. But Mr. Johnson
14 admitted that Andy Rivera was more knowledgeable about the Project. And Andy
15 Rivera understood that Gemstone purported to terminate the APCO Contract, that
16 Helix was getting information directly from Gemstone, that Helix was being copied
17 on APCO/Gemstone emails, and was getting direction directly from Gemstone:

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

22 A. We knew they were having issues.

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

26 A. Correct.²⁵

27 ²² Exhibit 26; Exhibit 152; Testimony of Joe Pelan (APCO) Day 1, pp. 46, 67, and 82. Testimony of Mary
28 Jo Allen (APCO) Day 3, pp. 127-128.

²³ Testimony of Robert Johnson on cross-examination by APCO's counsel.

²⁴ Testimony of Robert Johnson on cross-examination by APCO's counsel.

²⁵ Testimony of Andy Rivera (Helix) Day 2, p. 75.

1 In fact, during the August 2008 timeframe, Helix was getting information directly
2 from Gemstone.²⁶ And Mr. Rivera admitted Helix was copied on certain
3 communications between APCO and Gemstone:

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

9 A. Something to that effect, yes.²⁷

10

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

15 A. Correct.²⁸

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

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

20 A. Gemstone.

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

23 A. Correct.

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

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

Q. Did you come to find out?

A. Yes.

Q. that was, in fact, the case?

A. Yes.²⁹

²⁶ Testimony of Andy Rivera (Helix) Day 2, p. 76.

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

²⁸ Testimony of Andy Rivera (Helix) Day 2, p. 77.

²⁹ Testimony of Andy Rivera (Helix) Day 2, pp. 76-77. *See also* Testimony of Bob Johnson (Helix) Day 2, p. 25.

1 Helix was directed to hook up power to the Camco trailer on August 26, 2008.³⁰
2 During the transition of APCO to Camco, Helix had a meeting with Gemstone.³¹ And the
3 purpose of that meeting was to: “represent that work was still proceeding, nothing had
4 changed with our contracts with the current APCO relationship, and that we were to take
5 direction for construction from Camco, and they wanted to negotiate a contract.”³² Lastly,
6 on August 26, 2008, Gemstone sent a “question and answer” letter to the Project’s
7 subcontractors.³³ That letter contained the following questions and answers:

8 Q. APCO is refusing to pay me, saying that you haven’t
9 paid them. What’s up with that?

10 A. The most recent pay application submitted by APCO
11 is Pay Application [NUMBER]. IT’s processing and is nearly
12 complete, and money will be wired to NCS, most likely, within
13 1 week. [At that point we will instruct NCS to pay the
14 subcontractors portions of the draw by joint check.]. We have
15 paid APCO 100% of all legitimate pay applications they have
16 made of us.

17 Q. How do I get paid going forward?

18 A. Please plan on submitting your next pay application
19 by the 25th of August. You can send it to CAMCO c/o Jennifer
20 Griffith in the construction trailer. Gemstone and CAMCO will
21 collaborate on the analysis and signoff of subcontractor pay
22 applications, and we hope to fund that pay application by the
23 15th of September.

24 ...

25 Q. APCO owes me (money/retention). What do I do
26 about that?

27 A. Please contact APCO directly. They owe us a great
28 deal in damages, and we do not expect to pay them any
additional money after the current pay application is
processed.³⁴

29 So Helix was always aware of the status of the Project.

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

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

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

33 Trial Exhibit 118.

34 Trial Exhibit 118.

1 **I. Helix's Proposed Finding of Fact No: 22.** Helix's Robert Johnson testified
2 that, from Helix's perspective, "until APCO does something contractually to inform me
3 our relationship is different, it's not changed." [TR2-23:17-19]. As noted, APCO never
4 gave Helix written notice of termination of the Helix-APCO Subcontract. [TR1: 126:1-
5 4³⁵] It also never advised Helix that by way of an incorporation clause in the APCO
6 Subcontract the termination of the APCO-Gemstone Agreement somehow served to
7 terminate the APCO Subcontract by implication. [TR1:126:12-22].³⁶ Indeed, as
8 discussed above, APCO had rejected Helix's attempt to modify the APCO Subcontract
9 by including language in the Helix Exhibit (APCO) that would have granted Helix the
10 same rights of termination that APCO possessed in the APCO-Gemstone Agreement.
11 [See Ex. 506-004; TR1 121: 17-122:6].³⁷

12 **APCO's Response:** Helix understood exactly what was going on. It received
13 Gemstone's notice of termination, received direction and work directly from
14 Gemstone, was copied on communications between APCO and Gemstone, and even
15 had private meetings directly with Gemstone. See APCO's Response to Helix's
16 Proposed Finding of Fact No. 21. Helix even admitted that it negotiated to complete
17 the same technical scope of work under Camco:

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

20 A. Yeah.

21 Q. —for Helix?

22 A. Yes.³⁸

23 So Helix clearly understood APCO was being replaced.

24 **J. Helix's Proposed Finding of Fact No: 23.** Mr. Johnson also testified that,
25 unlike APCO, Helix did not believe it had a legal right to stop work on the Project after
26 APCO did so. [TR1:128:12-16]. In fact, Helix worried that if it had stopped work it

27 ³⁵ Testimony of Robert Johnson.

28 ³⁶ Testimony of Robert Johnson.

³⁷ Testimony of Robert Johnson.

³⁸ Testimony of Andy Rivera (Helix) Day 2, p. 78.

1 "would have been at full risk of [APCO] pursuing us for abandoning the contract."
2 [TR1: 128:15-16]. APCO did not dispute this point.

3 **APCO Response:** APCO had paid all amounts due to Helix before APCO left the
4 Project.³⁹ The statutes invoked by APCO gave Helix the right to suspend and
5 terminate if they desired.⁴⁰ And Exhibit 23, APCO's letter to Helix, specifically
6 advised Helix of its right to suspend work.⁴¹ Helix never elected to do so and
7 simply entered into the ratification agreement with Camco and replaced APCO.
8 And after APCO terminated the prime contract, there was no work to perform other
9 than under a new contract with Camco, as Helix has admitted in its President's own
10 affidavit:

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

13 7. Camco Pacific Construction Company, Inc. ("Camco")
14 replaced APCO as the general contractor. Thereafter, Helix
15 performed its Work for Gemstone and/or Camco...⁴²

16 **K. Helix's Proposed Finding of Fact No: 24.** Section 10.04 of the APCO-
17 Gemstone Agreement provides in part:

18 Each Third-Party Agreement for a portion of the Work is hereby assigned by
19 [APCO] to [Gemstone] provided that such assignment is effective only after
20 termination of the Agreement by [Gemstone] for cause pursuant to Section 10.02
21 and only for those Third-Party Agreements which developer accepts by notifying
22 [APCO] and the applicable Third-Party Provider in writing.
23
24
25

26 ³⁹ Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1, pp. 46, 67, and 82. Testimony of Mary Jo Allen
27 (APCO) Day 3, pp. 127-128.

28 ⁴⁰ Exhibit 23; NRS 624.610(7).

⁴¹ Exhibit 23.

⁴² Exhibit 314.

1 There was no evidence presented at trial that Gemstone ever notified APCO, Helix or
2 any other subcontractor of its acceptance of an assignment of the relevant subcontracts.
3 [See e.g., TR2-36:12-16].⁴³

4 **APCO's Response:** Helix's citation to TR2-36:12-16 does not support this
5 proposition. Instead, it only confirms that Bob Johnson doesn't remember seeing
6 anything in writing confirming:

7 Q: To your knowledge, did the developer accept the assignment by notifying
8 general contractor and the applicable third-party service provider in writing?
9 Did Gemstone notify you in writing that it was accepting assignment of
10 APCO's contract?

11 A: I have never seen anything in writing.⁴⁴

12 This citation ignores the weight of the evidence. First, Helix received Exhibit 172, a
13 letter from Gemstone to Helix confirming its intention to have Helix continue
14 performing work under Camco.⁴⁵ Next, Helix received Gemstone's notice of
15 termination of APCO, received direction and work directly from Gemstone, was copied
16 on communications between APCO and Gemstone, and even had private meetings
17 directly with Gemstone. *See* APCO's Response to Helix's Proposed Finding of Fact
18 No. 21. Lastly, Gemstone did invoke the assignment in written communication. See
19 Exhibit 13 (confirming that upon a termination of the Contract "(a) all Third-Party
20 Agreements shall be assigned to Gemstone and (b) APCO must execute and deliver all
21 documents and take such steps as Gemstone may require for the purpose of fully
22 vesting in Gemstone the rights and benefits of such assigned Third-Party
23 Agreements."").⁴⁶

24 **L. Helix's Proposed Finding of Fact No: 36.** Based on Helix's undisputed
25 testimony and the lack of signed agreements, the Court finds that Helix did not sign or
26 enter into either the Camco Subcontract or the Camco Ratification. Although Camco

27 ⁴³ Testimony of Robert Johnson.

28 ⁴⁴ Testimony of Bob Johnson (Helix) Day 2, p. 36.

⁴⁵ Exhibit 172.

⁴⁶ Exhibit 13, p. 14, Section C.3.

1 presented each of these forms to Helix, the testimony is undisputed that Helix did not
2 execute either. [See **Exhibit 510-006-042; Exhibit 172-003-011; TR1-123:1-**
3 **124:25**].⁴⁷ As it did with the APCO Subcontract, Helix prepared a Helix Electric
4 Exhibit ("the Helix Exhibit (Camco)") to the Camco Subcontract with multiple
5 proposed revisions to which Camco never agreed [See **Exhibit 510-043-045; TR1-**
6 **125:2-10**].⁴⁸

7 **APCO's Response:** The cited evidence does not support this proposition and
8 ignores conclusive evidence and Helix's own admissions: Helix admitted it entered
9 into a ratification agreement with Camco on September 4, 2008 to continue on and
10 complete the APCO scope of work.⁵⁰ Helix even added a document to the
11 ratification entitled "Helix Electric's Exhibit to the Ratification and Amendment."⁵¹

- 12 • The Helix Exhibit to the Ratification and Amendment contained language
13 confirming that APCO was removed as the general contractor and that Helix
14 submitted \$994,025 in change orders to APCO prior to August 26, 2008, the
15 date Camco was using for its ratification agreement.⁵²
- 16 • Helix included a total contract price of \$5.55 million for the Project, which was
17 its original contract price with APCO for Phase 1, and added \$480,689 as
18 approved change orders under APCO to the total contract price.⁵³
- 19 • And although Helix has not produced a signed copy of the ratification
20 agreement, Helix has admitted entering into its ratification and amended
21 subcontract agreement in its complaint as follows:

22
23 ⁴⁷ Testimony of Robert Johnson.

24 ⁴⁸ Testimony of Robert Johnson.

25 ⁴⁹ APCO argues that by way of its initial pleading in this action Helix admitted to entering into the Cameo
26 Ratification. However, (i) Helix moved to amend its pleading during opening statement to correct this mis-
27 statement [see TRI :9: 19-25]; (ii) Helix provided credible and undisputed testimony is the pleading is
28 incorrect and that it did not in fact sign or agree to the document which (iii) outweighs any pleading
admission. A trial is a search for the truth and the evidence at trial supports the truth that Helix did not enter
into the Camco Ratification.

⁵⁰ Exhibit 77, Helix Complaint, ¶18.

⁵¹ Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, p. 42.

⁵² Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, pp. 42-43.

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

6 19. **Helix furnished the CPCC Work for the benefit of and**
7 **at the specific instance and request of CPCC and/or**
8 **Owner.**

9 20. Pursuant to the CPCC Agreement, Helix was to be paid an
10 amount in excess of Ten Thousand Dollars (\$10,000.00)
11 (hereinafter "CPCC Outstanding Balance") for the CPCC
12 Work.

13 21. Helix furnished the CPCC Work and has otherwise
14 performed its duties and obligations as required by the CPCC
15 Agreement.

16 22. CPCC has breached the CPCC Agreement...

17 CPCC breached its duty to act in good faith by performing the
18 Ratification Agreement in a manner that was unfaithful to the
19 purpose of the Ratification Agreement, thereby denying
20 Helix's justified expectations...⁵⁴

- 21 • Helix's Mr. Johnson admitted that Exhibit 172, the Ratification Agreement, was the
22 document that Helix referenced in its complaint (Exhibit 77) as the Ratification.⁵⁵
- 23 • Helix also admitted it had a contract with Camco/Gemstone for \$8.6 million in its
24 lien documents.⁵⁶ So the referenced documents clearly reflect the replacement
25 agreement between Helix and Camco.

26 **M. Helix's Proposed Finding of Fact No: 37.** Among other things, by way of the
27 Helix Exhibit (Camco), Helix noted in Item 1 that **["p]rior to the removal of APCO**
28 **as the contractor** and the issuance of this Ratification and Amendment of Subcontract
29 Agreement, Helix Electric and APCO were in the process of completing negotiations of
30 the [Helix Exhibit (APCO)] " Helix attempted to incorporate into the Helix Exhibit
31 (Camco) the last version of the Helix Exhibit (APCO) that was acceptable to Helix.

32 ⁵³ Exhibit 170-54; Testimony of Bob Johnson (Helix) Day 2, p. 44; Exhibit 169-8.

33 ⁵⁴ Exhibit 77.

34 ⁵⁵ Testimony of Bob Johnson (Helix) Day 2, p. 28.

35 ⁵⁶ Exhibit 512; Testimony of Bob Johnson (Helix) Day 2, p. 29.

1 [See Ex. 510-043]. Helix felt it had to do so "because we're still under contract with
2 APCO." [TR125:11-25].⁵⁷

3 **APCO's Response:** The bolded language confirms that Helix had full knowledge
4 that APCO was removed from the Project and could have invoked its statutory right
5 to terminate the subcontract.⁵⁸

6 **N. Helix's Proposed Finding of Fact No: 38.** As it was instructed to do, and
7 while it continued to negotiate with Camco with respect to the Camco Subcontract, the
8 Camco Ratification Agreement and the Helix Exhibit (Camco), Camco continued to
9 perform the work it had agreed to perform on the Project until Gemstone suspended
10 work on December 15, 2008. As it was also instructed to do, Helix submitted
11 payment applications to Camco using the same forms and same procedures as it had
12 employed while APCO was still on the Project. [See e.g., Ex. 508-067-074]. Camco in
13 turn submitted its pay applications to Gemstone in the same way, and using the same
14 forms, as APCO had used. [See e.g., Ex. 522-001-011].

15 **APCO's Response:** Helix failed to cite at whose direction it was performing work
16 or specific tasks. APCO was not giving Helix any direction after August 2008.⁵⁹ So
17 Helix was clearly taking direction from Camco and Gemstone.

18 **O. Helix's Proposed Finding of Fact No: 40.** The Court finds that Helix and
19 Camco did not enter into the Camco Subcontract or the Camco Ratification. However,
20 the Court finds that Helix and Camco entered into a contractor/subcontractor
21 relationship and agreement whereby they agreed on the material terms of a contract-
22 i.e., the work to be performed, the price for the work and Camco's obligation to pay.
23 The Court finds that Camco breached its obligation to pay Helix the sum of
24 \$834,476.45.

25 **APCO's Response:** Helix and Camco entered into a ratification agreement.⁶⁰ And
26

27 ⁵⁷ Testimony of Robert Johnson (emphasis added).

28 ⁵⁸ NRS 624.6210(7).

⁵⁹ 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 they agreed on the material terms of the agreement⁶¹ including price⁶² and scope⁶³
2 to complete the Project under Camco.

3
4 **II. Many of Helix's "Conclusions of Law" are not supported by Nevada Law.**

5 APCO disputes the following "conclusions of law" that Helix proposed to this Court:
6 2-6, 8-10, 13-22, 27, 29, 30, 32, 34 and 36. For ease of review, Helix's proposed finding
7 precedes APCO's response to the same.

8 **A. Helix's Proposed Conclusions of Law No: 2.** Because there was no meeting of
9 the minds with respect to materials terms of the APCO Subcontract, the Court
10 concludes that this document does not constitute the parties' agreement.

11 **APCO's Response:** *See* APCO's Response to Helix's Proposed Finding of Fact
12 No: 8 (confirming the numerous times Helix has admitted its contract with APCO
13 was Exhibit 45).

14 **B. Helix's Proposed Conclusions of Law No: 3.** However, the Court concludes that
15 APCO and Helix entered into a contract for an agreed-upon sum for the work
16 performed by Helix, that Helix performed that work and that in breach of that contract,
17 APCO has not paid Helix in full. APCO owes Helix the principal sum of \$505,021.00
18 for monies earned and not paid to Helix while APCO was on site as the general
19 contractor.⁶⁴

20 **APCO's Response:** *See* APCO's Response to Helix's Proposed Finding of Fact
21 No: 8 and Proposed Conclusion of Law No. 2. Exhibit 45 is the agreement between
22
23

24 ⁶⁰ Exhibit 172.

25 ⁶¹ *Medina v. Medina*, No. 67008, 2016 WL 1298974, at *1 (Nev. App. Mar. 31, 2016) (internal citations
26 omitted) ("Unless the parties agree to all material terms, preliminary negotiations cannot constitute a
binding contract. However, a contract is formed 'when the parties have agreed to the material terms, even
though the contract's exact language is not finalized until later.'")

27 ⁶² Exhibit 172.

28 ⁶³ Testimony of Andy Rivera (Helix) Day 2, p. 78.

⁶⁴ Helix's claim that APCO is also liable for sums earned by Helix after APCO left the site and while
Cameo was on site as the general contractor is discussed infra.

1 Helix and APCO. Helix cannot pick and choose which provisions it wants to govern
2 its relationship with APCO.

3 Pursuant to NRS 624.624(1)(a), there are two events that would trigger when
4 retention is due to Helix: (1) compliance with the retention payment schedule, or (2)
5 within 10 days after APCO received the retention from Gemstone. Neither event
6 occurred here.

7 Section 3.8 of the Helix Subcontract contained a retention payment schedule
8 that was acknowledged and affirmed by Helix and APCO at trial. As such, Helix
9 needed to show these five conditions precedent were satisfied before APCO had to
10 pay retention. *See Lucini-Parish Ins. v. Buck*,⁶⁵ (a party who seeks to recover on a
11 contract has the burden of establishing any condition precedent to the respective
12 contract). Helix admitted that it did not comply with the five conditions precedent
13 to be entitled to its retention payments from APCO.⁶⁶ So Helix did not meet its
14 burden of proof. Also, APCO never received Helix's retention to trigger the
15 statutory 10 day period. Helix never sent APCO an invoice or billing for its
16 retention, thereby confirming its intention and understanding that it never earned
17 retention while APCO was the contractor.⁶⁷ And Helix has no information to
18 suggest APCO received Helix's retention⁶⁸ because that never occurred.⁶⁹
19 Accordingly, Helix's retention payment never became due from APCO.⁷⁰

21 ⁶⁵ 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

22 ⁶⁶ See Testimony of Helix's Bob Johnson, Day 2, p. 19 ("Q. Well, let me ask it this way: Did Helix satisfy
23 any of these preconditions found in paragraph 3.8 while APCO was the general contractor on the project?
A. Not to my knowledge.")

24 ⁶⁷ Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

25 ⁶⁸ Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

26 ⁶⁹ Testimony of Joe Pelan (APCO) Day 3, p. 150.

27 ⁷⁰ See also *Titus v. Gunn*, 69 N.J.L. 410, 55 A. 735 (1903) (the delivery of a release of liens is a condition
28 precedent to the contractor's right to recover unless there are no liens to waive); *Kilianek v. Kim*, 192 Ill.
App. 3d 139, 139 Ill. Dec. 213, 548 N.E.2d 598 (1st Dist. 1989) (architect's certificate was condition
precedent for payment). *D. I. Corbett Elec., Inc. v. Venture Const. Co.*, 140 Ga. App. 586, 231 S.E.2d 536
(1976); (under subcontract which provided that final payment was to be made by contractor within 30 days
after subcontractor's completion of work, written acceptance by architect and owner and full payment
therefore by owner, acceptance and payment were conditions precedent to final payment to subcontractor).

1
2 **C. Helix's Proposed Conclusions of Law No: 4.** Alternatively, the Court concludes
3 that there is an implied contract between Helix and APCO and that Helix is entitled
4 quantum meruit damages for recovery of the full and reasonable value of the work its
5 performed. See *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 379, 283
6 P.3d 250, 257 (2012) ("quantum meruit's first application is in actions based upon
7 contracts implied-in-fact."). A contract implied-in-fact must be "manifested by
8 conduct." *Id.* at 380 citing *Smith v. Recrion Corp.*, 91 Nev. 666, 668, 541 P.2d 663, 664
9 (1975); *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). It "is a true contract
10 that arises from the tacit agreement of the parties." *Id.* To find a contract implied-in-
11 fact, the fact-finder must conclude that the parties intended to contract and promises
12 were exchanged, the general obligations for which must be sufficiently clear. *Id.* Here,
13 APCO and Helix clearly intended to enter into a contract whereby Helix would perform
14 work for APCO and APCO would pay Helix for its work.

15 **APCO's Response:** See APCO's Response to Helix's Proposed Finding of Fact
16 No. 8 and Proposed Conclusion of Law No 2. Helix admitted Exhibit 45 was the
17 subcontract that governed the APCO/ Helix relationship. And Helix has not shown
18 that APCO received any benefit from the \$505,021 in retention that Helix rolled
19 over in its billings to Camco.⁷¹ APCO never received that retention payment from
20 Gemstone. The retention was always held by Gemstone and/or its lender.⁷²

21 **D. Helix's Proposed Conclusions of Law No: 5.** Where an implied-in-fact contract
22 exists "quantum meruit ensures the laborer receives the reasonable value, usually
23 market price, for his services." *Precision Constr.*, 128 Nev. at 380 citing Restatement
24 (Third) of Restitution and Unjust Enrichment § 31 cmt. e (2011), *Sack v. Tomlin*, 110
25 Nev. 204, 208, 871 P.2d 298, 302 (1994) ("The doctrine of quantum meruit generally
26 applies to an action ... involving work and labor performed which is founded on a[n]
27

28 ⁷¹ Exhibit 60.

⁷² Testimony of Joe Pelan (APCO) Day 1, p. 30.

1 oral promise [or other circumstances] on the part of the defendant to pay the plaintiff as
2 much as the plaintiff reasonably deserves for his labor in the absence of an agreed upon
3 amount."). **Here, the only and undisputed testimony was that the monies Helix**
4 **billed for its work were a reasonable value for the work performed.** Moreover,
5 APCO's submission of such amounts to Gemstone as part of its own pay application
6 estops APCO from disputing the reasonable value of Helix's work. Because Helix has
7 been paid all but \$505,021.00 of the value its established for the work it performed
8 while APCO was on site as the general contractor, APCO owes Helix no less than that
9 amount.⁷³

10 **APCO's Response:** APCO paid Helix for all amounts Helix actually billed to
11 APCO, and Helix's Andy Rivera admitted it never billed APCO for its retention and
12 APCO never received Helix's retention:

13 Q. Sir, could you pull out Exhibit 44. And I want to
14 make sure my record's clear. Exhibit 44 that I marked is, in
15 fact, the same summary that was found in Exhibit 535, page
16 252, that you and Mr. Zimbleman went over; is that—

17 A. Correct.

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

20 A. Yes.

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

25 A. Correct.

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

A. Correct.

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

A. Correct.

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

⁷³ Emphasis added.

1 A. Yes.

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

6 A. Yes.

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

9 A. No. No. I'm sorry.

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

12 A. I would not know.

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

16 A. Correct.

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

20 A. Yes.⁷⁴

21 So under Helix's unjust enrichment/quantum meruit theory, it is not entitled to any
22 further payment from APCO as APCO has not retained any benefit received from
23 Helix.

24 **E. Helix's Proposed Conclusions of Law No: 6.** Alternatively, and even if (as
25 APCO contends despite of the lack of a fully executed agreement) Helix and APCO
26 entered into the APCO Subcontract and that document is therefore controlling, the
27 court concludes that APCO is nonetheless in breach of that agreement for failure to pay
28 Helix in full as required by that document for the work Helix performed while APCO
was on site as the general contractor.

APCO's Response: See APCO's Response to Helix's Proposed Conclusion of Law
No: 3. The retention never became due while APCO was contractor and Helix never
billed APCO for its retention. So there was never an existing payment obligation
that APCO breached.

⁷⁴ Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

1 **F. Helix's Proposed Conclusions of Law No: 8.** Section 3.8 of the Helix-APCO
2 Subcontract provides in part:

3 The 10 percent withheld retention shall be payable to Subcontractor upon,
4 and only upon the occurrence of all of the following events, each of which is
5 a condition precedent to Subcontractor's right to receive final payment
6 hereunder and payment of such retention: (a) Completion of the entire
7 project described in the Contract Documents; (b) The approval and final
8 acceptance of the project Work by Owner; (c) Receipt of final payment by
9 Contractor from Owner; (d) Delivery to Contractor from Subcontractor all
as-built drawings from its 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 ...

10 APCO argues that because Helix it did not comply with these conditions it has no right
11 to receive its retention. The Court rejects this argument because (i) Section 3.8
12 otherwise assumes that the Project would be completed such that Helix's compliance
13 with Section 3.8 would not otherwise be impossible and futile, (ii) enforcement of
14 Section 3.8 as demanded by APCO would impermissibly avoid APCO's payment
15 obligations under NRS 624 and attempt to waive or impair lien rights, and (iii) there
16 was a termination event that triggers APCO's payment obligations pursuant to Section
17 9.4, which overrides the provisions of Section 3.8.

18 **APCO's Response:** Complying with Section 3.8 was not impossible when APCO
19 left the Project. This is obvious since Helix continued on the Project with Camco.
20 And, enforcement of Section 3.8 does not waive Helix's lien rights. Helix
21 vigorously pursued its lien rights.⁷⁵ Lastly, no party presented evidence that there
22 was a termination for convenience under Section 9.4 of the Subcontract. And even
23 Helix's Mr. Johnson admitted that Section 9.4 of the Subcontract *only* applies to a
24 termination for convenience:

25 Q And then directing your attention to the next page -- excuse me. Well, now
26 I'm missing a page.
27 Can you go to page 9 [of Exhibit 45]?
A. Okay.

28

⁷⁵ Exhibits 76 (Helix's Amended Lien) and 77 (Helix's Statement of Facts Constituting Lien).

1 Q Does that have Article 9?

2 A It does.

3 Q Terminations for convenience?

4 A Yes.

5 Q Okay. Would you take a minute and review, just to yourself, Articles 9.4
6 and 9.5?

7 A [Mr. Johnson complies.]

8 Okay.

9 Q Would you agree with me, sir, that Articles 9.4 and 9.5 contemplate an
10 owner's termination of the prime contract for the owner's convenience?

11 A It appears to be that.

12 Q And Helix never submitted a claim invoking these provisions of the
13 subcontract, did it?

14 A. Not to my knowledge.⁷⁶

15 So even Helix's Mr. Johnson admitted that Article 9.4 was never intended to apply in
16 this situation.

17 **G. Helix's Proposed Conclusions of Law No: 9.** When one party abandons contract,
18 the other party need not "engage in futile gestures to preserve contractual rights."
19 *Mayfield v. Koroghli*, 124 Nev. 343, 349, 184 P.3d 362, 366 (2008). Furthermore, it is
20 futile for a party to make a demand "if the other party has repudiated the contract or
21 otherwise indicated [he] refuses to perform." *Id.* Here, it was impossible and would
22 have been futile for Helix to comply with the provisions of Section 3.8. For example,
23 the "entire project" was never completed through no fault of Helix, nor was there any
24 "approval and final acceptance of the project Owner" as Section 3.8 otherwise plainly
25 anticipated. Of course, "receipt of final payment by Contractor from Owner" is a Pay-
26 if-Paid clause that is void and unenforceable.

27 **APCO's Response:** Helix did not present any evidence that APCO abandoned the
28 APCO/Gemstone prime contract. Instead, APCO presented evidence of a statutory
notice of nonpayment to the Owner and ultimately an assignment, ratification, and
novation between Helix and Camco.⁷⁷ Exhibit 45, the Helix/APCO subcontract,

⁷⁶ Testimony of Bob Johnson (Helix) Day 2, pp. 20-21.

⁷⁷ See APCO's Proposed Findings of Fact and Conclusions of Law at 371-379 (regarding the assignment), 384-393 (confirming the novation) and 195-222 (confirming the ratification).

1 contained a valid retention payment schedule, and payment to Helix never became
2 due under that schedule because: (1) Helix did not bill APCO for its retention, and
3 (2) APCO never received Helix's retention. See *Padilla Construction Company of*
4 *Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016)
5 (unpublished)("Because the parties' subcontract contained a payment schedule that
6 required that Padilla be paid within ten days after IGT accepted Padilla's work and
7 paid Big-D for that work and it is undisputed that IGT never accepted Padilla's
8 work and never paid Big-D for Padilla's work, the district court correctly found
9 that payment never became due to Padilla under the subcontract or *NRS*
10 *624.624(1)(a)*; see generally, *NRS 624.626*. As Helix continued working with
11 Gemstone and Camco and rolled its retention over to its Camco billings,
12 compliance with Article 3.8 was not only possible but obviously contemplated by
13 Helix. APCO paid Helix all amounts Helix billed APCO while APCO was the
14 contractor. After Helix continued, APCO lost all control. The events of which Helix
15 complains took place months after Camco replaced APCO.

16 Lastly, complying with these conditions would not have been futile. In *Am. Cont'l*
17 *Life Ins. Co. v. Ranier Const. Co.*,⁷⁸ the contractor made the same argument that
18 complying with a condition precedent to payment (obtaining a final certificate of payment
19 from the architect) would have been futile. The court reject contractor's argument and
20 confirmed that contractor was not excused from obtaining "the contractually-imposed
21 duty of acquiring a certificate". The court held:

22 Without it, we have no way of knowing if the architect was
23 satisfied that the list of items to be completed between the time
24 of issuance of the certificate of substantial compliance and the
25 application for final payment had been completed and that the
26 contract was, thus, fully performed. At the trial, in fact, the
27 architect testified that after he issued the certificate of
substantial completion, the building was not complete, and
items on the "punch" list remained unfinished.

28 ⁷⁸ 125 Ariz. 53, 56, 607 P.2d 372, 375 (1980).

1 The appellate court went on to agree with the owner, finding, “the final certificate
2 for payment is not ‘procedural chaff.’” Instead, the court found “[the certificate] is
3 a major substantive right, which “serves a vital interest, in that it induces the
4 contractor to render a performance that conforms in fact to plans and
5 specifications, spurs him to stay with the job and, upon completion, furnishes the
6 main incentive to make conforming corrections.” The appellate court reversed the
7 decision of the trial court and directed a verdict in the owner's favor because of
8 contractor’s non-compliance with the condition precedent of obtaining a final
9 certificate of payment. *See also Dixie Roof Decks, Inc. v. Borggren/Dickson*
10 *Const., Inc.*, 195 Ga. App. 881, 881, 395 S.E.2d 19, 19 (1990) The trial court did
11 not err in granting directed verdict in favor of defendant general contractor on
12 grounds that subcontractor had failed to deliver the roof warranty to general
13 contractor as expressly required as a condition precedent to payment by the
14 construction contract); *Titus v. Gunn*, 69 N.J.L. 410, 55 A. 735 (1903) (the
15 delivery of a release of liens is a condition precedent to the contractor's right to
16 recover unless there are no liens to waive); *Kilianek v. Kim*, 192 Ill. App. 3d 139,
17 139 Ill. Dec. 213, 548 N.E.2d 598 (1st Dist. 1989) (architect's certificate was
18 condition precedent for payment). *D. I. Corbett Elec., Inc. v. Venture Const. Co.*,
19 140 Ga. App. 586, 231 S.E.2d 536 (1976); (under subcontract which provided that
20 final payment was to be made by contractor within 30 days after subcontractor's
21 completion of work, written acceptance by architect and owner and full payment
22 therefore by owner, acceptance and payment were conditions precedent to final
23 payment to subcontractor). So the law clearly suggests the enforceability of these
24 preconditions.

25 **H. Helix’s Proposed Conclusions of Law No: 10.** To the extent Section 3.8 serves to
26 avoid APCO's obligation to promptly pay Helix for its work on the Project (as it is
27 obligated to do pursuant to NRS 624.624), it is a "condition stipulation or provision"
28 that is against public policy, void and unenforceable pursuant to NRS 624.628(3)

1 because it "(a) Requires a lower-tiered subcontractor to waive any rights provided in
2 NRS 624.624 to 624.630, inclusive, or which limits those rights; [or] (b) Relieves a
3 higher-tiered contractor of any obligation or liability imposed pursuant to NRS 624.624
4 to 624.630, inclusive."⁷⁹ -

5 **APCO's Response:** See APCO's Response to Conclusion of Law No. 11. The
6 preconditions in Section 3.8 are not against public policy. First, the legislature has
7 already agreed that contracts between prime contractors and subcontractors can
8 contain payment schedules and there are not against public policy.⁸⁰ And the
9 Nevada Supreme Court has already recognized that prime contractors and
10 subcontractors can agree to conditions precedent to payment. See *Padilla*
11 *Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev.
12 2016)(enforcing the owner acceptance and owner payment preconditions). Lastly, it
13 is undisputed that the Subcontract did not waive Helix's right to place a mechanic's
14 lien on the Project, so Helix had multiple avenues to collect payment on the Project.

15 **I. Helix's Proposed Conclusion of Law No: 11.** Similarly, if Section 3.8 prevents
16 Helix from being paid in full it violates the Nevada Mechanic's Lien Statute and is void
17 and unenforceable because it impermissibly "require[s] a lien claimant to waive rights
18 provided by law to lien claimants or to limit the rights provided to lien claimants"
19 (NRS 1 08.2453(2). See also, NRS 1 08.2457(1) and (2)) and is a "term of a contract
20 that attempts to waive or impair the lien rights of a contractor, subcontractor or
21 supplier" (NRS 108.2457(1).

22
23
24 ⁷⁹ NRS 624.628(3) provides: 3. A condition, stipulation or provision in an agreement which:
25 (a) Requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630,
26 inclusive, or which limits those rights; (b) Relieves a higher-tiered contractor of any obligation or liability
27 imposed pursuant to NRS 624.624 to 624.630, inclusive; or (c) Requires a lower-tiered subcontractor to
28 waive, release or extinguish a claim or right for damages or an extension of time that the lower-tiered
subcontractor may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact
event that is unreasonable under the circumstances, that was not within the contemplation of the parties at
the time the agreement was entered into, or for which the lower-tiered subcontractor is not responsible, -
is against public policy and is void and unenforceable.

⁸⁰ See NRS 624.624.

1 **APCO Response:** There is nothing in the Helix Subcontract that waives lien rights.
2 Helix fully prosecuted its lien rights.⁸¹ And it is undisputed that APCO financed the
3 prosecution of Helix's lien rights throughout a costly appeal.⁸²

4 **J. Helix's Proposed Conclusion of Law No: 12.** More fundamentally, the
5 termination of the APCO-Gemstone Agreement triggered Section 9.4 of the Helix-
6 APCO Subcontract, overrides Section 3.8 and requires APCO to pay Helix in full.
7 Section 9.4 provides:

8 Effect of Owner's Termination of Contractor. If there has been a termination
9 of the Contractor's contract with the Owner, the Subcontractor *shall be paid*
10 the amount due from the Owner to the Contractor for the Subcontractor's
11 completed work ... after payment by the Owner to the Contractor. [Ex. 45,
12 ~9.4, emphasis added].

13 **APCO's Response:** And even Helix's Mr. Johnson admitted that Section 9.4 of the
14 Subcontract *only* applies to termination for convenience, which obviously did not
15 occur here:

16 Q And then directing your attention to the next page -- excuse me. Well, now
17 I'm missing a page.

18 Can you go to page 9 [of Exhibit 45]?

19 A. Okay.

20 Q Does that have Article 9?

21 A It does.

22 Q Terminations for convenience?

23 A Yes.

24 Q Okay. Would you take a minute and review, just to yourself, Articles 9.4
25 and 9.5?

26 A [Mr. Johnson complies.]

27 Okay.

28 Q Would you agree with me, sir, that Articles 9.4 and 9.5 contemplate an
owner's termination of the prime contract for the owner's convenience?

A It appears to be that.

Q And Helix never submitted a claim invoking these provisions of the
subcontract, did it?

⁸¹ Exhibit 76 and 77.

⁸² See Exhibit 13, Declaration of Mary Jo Allen of APCO's January 2018 Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment.

1 A. Not to my knowledge.⁸³

2 So even Helix's Mr. Johnson admitted that Article 9.4 was never intended to apply in
3 this situation. Nothing in Article 9 obligates APCO to pay if Gemstone has not paid
4 APCO and APCO exercises its right to terminate. That would be contrary to the
5 expressed and agreed upon payment precondition that Gemstone pay APCO first. That
6 requirement shows up in multiple places in Article 3 of the Helix Subcontract.

7 **K. Helix's Proposed Conclusions of Law No: 13.** Irrespective of who terminated
8 first (i.e., APCO or Gemstone), there was clearly "a termination of the Contractor's
9 contract with the Owner" and the plain language of Section 9.4 requires APCO to then
10 pay Helix in full for its completed work "after payment by the Owner." Because that
11 final clause ("after payment by the Owner") is a Pay-if-Paid clause it is void as against
12 public policy, unenforceable and must therefore be ignored. The Court therefore
13 concludes that once the APCO-Gemstone Agreement was terminated (i.e., no later than
14 September 5, 2008), APCO became obligated to pay Helix in full, including its
15 retention.

16 **APCO's Response:** There is no legal support for this position. Helix admittedly
17 continued on the Project with Camco knowing that its retention rolled over (in its
18 billings) to Camco,⁸⁴ and any post-APCO events cannot trigger APCO's liability.
19 And Helix admitted that: (1) Section 9.4 only applies to a termination for
20 convenience, and (2) Helix never submitted anything to APCO alleging a
21 termination for convenience or submitted a request for payment under that section.⁸⁵
22 Lastly, the Court has not heard any testimony from any party alleging that there was
23 a termination for convenience.

24 And the owner payment precondition is not void as against public policy.
25 Nev. Rev. Stat. 624.628(3) does not support a conclusion that pay-if-paid
26 provisions are illegal. Instead, it confirms that a term which "[r]equires a lower-

27
28 ⁸³ Testimony of Bob Johnson (Helix) Day 2 at pp. 20-21.

⁸⁴ Exhibit 60.

1 tiered subcontractor to waive, release or extinguish a claim or right for damages or
2 an extension of time that the lower-tiered subcontractor may otherwise possess or
3 acquire as a result of delay, acceleration, disruption or an impact event that is
4 unreasonable under the circumstances, that was not within the contemplation of the
5 parties at the time the agreement was entered into, or for which the lower-tiered
6 subcontractor is not responsible is against public policy and is void and
7 unenforceable.”⁸⁶

8 In fact, the Nevada Legislature has recognized that parties can agree to
9 conditions precedent to payment (including a condition precedent that only requires
10 a general contractor to pay a subcontractor after the general contractor has received
11 payment for the subcontractor’s work from the owner) in its prompt payment
12 statutes:

13 **NRS 624.626 Grounds and procedure for stopping**
14 **work or terminating agreement; change orders;**
15 **damages and other remedies; rights of lower-tiered**
16 **subcontractors after work stoppage or termination**
17 **of agreement; limitations on liability.**

18 1. If:

19 ..

20 (b) A higher-tiered contractor fails to pay the lower-
21 tiered subcontractor within 45 days after the 25th day of
22 the month in which the lower-tiered subcontractor
23 submits a request for payment, **even if the higher-**
24 **tiered contractor has not been paid and the**
25 **agreement contains a provision which requires the**
26 **higher-tiered contractor to pay the lower-tiered**
27 **subcontractor only if or when the higher-tiered**
28 **contractor is paid;**

..

→ the lower-tiered subcontractor may stop work under
the agreement until payment is received if the lower-
tiered subcontractor gives written notice to the higher-
tiered contractor at least 10 days before stopping work.⁸⁷

⁸⁵ Testimony of Bob Johnson (Helix) Day 2 at pp.20-21.

⁸⁶ NRS 624.628(3).

⁸⁷ NRS 624.626 (1)(b) (emphasis added).

1 If the Legislature wanted to prohibit contracts with pay if paid language, it
2 could have easily done so. It did not and gave the subcontractor the right to suspend
3 work and ultimately terminate if necessary. The Legislature also recognized that
4 parties can agree to a schedule of payments,⁸⁸ and the Nevada Supreme Court
5 confirmed that payment schedules that include owner payment preconditions are
6 valid.⁸⁹

7 **L. Helix's Proposed Conclusions of Law No: 14.** The first sentence of Subsection 9.4
8 ("Effect of Owner's Termination of Contractor") does not affect the Court's analysis,
9 particularly where APCO and Gemstone both claimed to have terminated the other.
10 First, Subsection 18.6 provides that "all sections and headings are descriptive only and
11 not controlling." Second, the header of Section 9 as a whole is "Termination for
12 Convenience," the text of Section 9 identifies only APCO as having the right of
13 termination for convenience⁹⁰ and no other provision grants Helix a right of termination
14 for convenience. As such, the Court may ignore the descriptive heading of Subsection
15 9.4 and apply the text of the subsection because there "has been a termination of the
16 Contractor's Contract with Owner."

17 **APCO's Response:** To so find would ignore the admitted intent of the parties and
18 the industry accepted terminology.⁹¹ Helix's Mr. Johnson has already admitted this
19 provision does not apply and was never invoked by Helix.⁹²

20 **M. Helix's Proposed Conclusions of Law No: 15.** Moreover, even if Section 9.4 is
21 intended to apply only when the owner has terminated APCO and the Court were to
22 assume that APCO's termination of the owner takes precedence over the owner's
23 termination of APCO, APCO admits that it never exercised its right to terminate Helix
24

25 ⁸⁸ NRS 624.624(1)(a).

26 ⁸⁹ *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev.
27 2016)(unpublished).

28 ⁹⁰ *See. e.g.*, Subsection 9.1 ("The Contractor [i.e., APCO] shall have the right to terminate for convenience,
at any time, with or without cause, Subcontractor's performance of all or part of the Subcontract or
Subcontract Work ... ").

⁹¹ Testimony of Bob Johnson (Helix) Day 2, pp.20-21; Testimony of Joe Pelan (APCO) Day 1 at 27.

1 for convenience. As such, the provisions of (i) Subsection 9.3 ("Subcontractor's
2 Obligations" - describing the procedures Helix would be required to follow) and (ii)
3 Subsection 9.5 ("Compensation" - describing the compensation to which Helix would
4 be entitled) in the event of an APCO termination for convenience are inapplicable.
5 Because the agreement is otherwise silent as to Helix's rights when APCO terminates
6 its contact with the owner but fails to terminate its contract with Helix, it is appropriate
7 for the Court to "invoke quantum meruit as a gap-filler to supply absent terms" and
8 "ensure the laborer receives the reasonable value ... for his services." *Certified Fire*
9 *Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 380, 283 P.3d 250, 257 (2012). See also
10 discussion *infra* at Conclusion of Law ¶ 20.

11 **APCO's Response:** Helix's speculative and contrived arguments confirm that
12 Article 9 was never intended to apply to this situation. It would be inappropriate for
13 the Court to "fill the gaps" of Exhibit 45. Helix cannot claim the benefits of Section
14 9.4 and not comply with Section 9.3 (subcontractor's obligations).⁹³ And Helix
15 admitted there was not a termination for convenience,⁹⁴ and as such, Helix's
16 counsel elicited testimony from APCO's Joe Pelan that Helix did not need to
17 comply with the requirements of Section 9.3:

18 Q Now, under Section 9.3 defines subcontractor's obligations upon
19 receipt of the written notice of termination, correct?

20 A Yes.

21 Q Now, given that APCO never sent Helix and Helix never received
22 written notice of termination that provision, you will agree with me,
23 has no application to this analysis, correct?

24 A Yes.⁹⁵

25 Counsel's attempt to misuse Article 9, despite the admission of his own witnesses,
26 should not be sanctioned by the Court.

27 ⁹² Testimony of Bob Johnson (Helix) Day 2, pp. 20-21.

28 ⁹³ See Exhibit 45.

⁹⁴ Testimony of Bob Johnson (Helix) Day 2, pp. 20-21.

⁹⁵ Cross-examination of Joe Pelan (APCO) Day 1 at 82.

1 **N. Helix's Proposed Conclusions of Law No: 16.** Even if the Court were to (i) ignore
2 the termination of the APCO-Gemstone Agreement and (ii) otherwise enforce
3 Subsection 3.8 of the Helix-APCO Agreement (as APCO urges) so as to preclude Helix
4 from receiving its retention until, among other things, "completion of the entire
5 project," APCO's decision to stop work on the Project and subsequently seek to enforce
6 this provision constitutes a breach of the duty of good faith and fair dealing that is
7 implied in every contract in Nevada. *See Hilton Hotels Corp. v. Butch Lewis Prods.,*
8 *Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 923-24 (1991).

9 **APCO's Response:** APCO's decision to invoke its statutory rights to stop work on
10 the Project due to non-payment does not discharge Helix's responsibilities under
11 Section 3.8. Helix elected to enter into an agreement/subcontract, ratification and
12 novation with Camco and carry over its retention to the billings it submitted to
13 Camco, as explained in Sections C, E and F of APCO's Post-Trial Brief. Helix
14 entered into all of these agreements at its own risk. APCO has ensured payment to
15 Helix through August 2008 when APCO left⁹⁶ and financed the lien litigation which
16 fought to obtain priority for Helix and the other subcontractors. How can APCO
17 have acted in bad faith when it has paid every invoice received from Helix
18 regarding the Project? Helix knows full well retention never became due from
19 APCO, which is why Helix never billed APCO for retention or Helix's subsequent
20 work for Camco.

21 **O. Helix's Proposed Conclusions of Law No: 17.** When one party performs a
22 contract in a manner that is unfaithful to the purpose of the contract and the justified
23 expectations of the other party are thus denied, damages may be awarded against the
24 party who does not act in good faith. *Butch Lewis Prods.*, 107 Nev. at 234. Here, by (i)
25 terminating its relationship with Gemstone and (ii) failing to terminate APCO for
26

27
28 ⁹⁶ 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.

1 convenience pursuant to Subsection 9.2⁹⁷ (and thereby establishing a procedure and
2 contractual basis for Helix to recover the value of its work performed to that point),
3 APCO effectively deprived Helix of a contractual means of recovery. APCO also
4 exposed Helix to the risk that the project would not be completed while compelling
5 Helix to "remain under contract" [see Ex. 23] and continuing working to its ultimate
6 detriment.

7 **APCO's Response:** APCO cannot be found to have acted in bad faith for
8 exercising its statutory right to stop work for non-payment. This is especially true
9 when APCO went out of its way to cooperate in the process of onboarding a new
10 general contractor and ensured payment to APCO's subcontractors through August
11 2008.⁹⁸ And none of the joint checks that NCS and Gemstone issued and that APCO
12 properly endorsed included any funds for APCO.⁹⁹ APCO also canceled its current
13 building permits so the Project permits could be issued and transferred to Camco.¹⁰⁰
14 And nobody forced Helix to continue on the Project. Helix never exercised its
15 statutory right to suspend and/or terminate the Helix/APCO Subcontract.¹⁰¹ Instead,
16 it knowingly waived and released APCO by contracting with Camco and Gemstone
17 and rolling its retention over to Camco's billings.¹⁰² If anyone has acted in bad faith
18 it is Helix in trying to now recover amounts from APCO that it never billed
19 knowing the retention never became due and knowing that APCO could not be
20 liable for Helix's subsequent work for Camco.

21 **P. Helix's Proposed Conclusions of Law No: 19.** Like the provisions of Section 3.8
22 of the Helix-APCO Subcontract, compliance with these provisions of the APCO-
23 Gemstone Agreement also would not have been possible once APCO and/or Gemstone
24

25 ⁹⁷ Indeed, as noted above, APCO informed Helix that it was "STILL CONTRACTUALLY BOUND" [see
26 Ex. 48] and "remain[s] under contract" [see Ex. 23] to APCO. [See supra, Finding of Fact~ 19].

27 ⁹⁸ Exhibit 26. Testimony of Joe Pelan (APCO) Day 1, pp. 38 and 41.

28 ⁹⁹ Testimony Day 1, p. 38.

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

¹⁰¹ Exhibit 23.

¹⁰² Exhibit 60.

1 terminated the APCO-Gemstone Agreement. APCO nonetheless sought recovery and
2 obtained a summary judgment of all sums earned, including retention. APCO is
3 therefore estopped to deny Helix a recovery on grounds that APCO does not apply to
4 itself.

5 **APCO's Response:** Compliance with Article 3.8 was not possible but was
6 contemplated by Helix as it proceeded with the APCO scope with Gemstone and/or
7 Camco. The claimed roadblock occurred months after APCO left the project and
8 Helix continued working. And the basis for APCO's prior motion for summary
9 judgment was that Gemstone breached by failing to properly pay APCO.

10 **Q. Helix's Proposed Conclusions of Law No: 20.** Finally, even if Helix were not
11 entitled to payment from APCO for work Helix performed while APCO was on site as
12 the general contractor for any of the foregoing reasons as urged by APCO, the Court
13 concludes in the alternative that APCO has been unjustly enriched to the extent of the
14 monies Helix earned but was not paid during that time.

15 **APCO's Response:** Helix does not have any support for the fact that APCO was
16 allegedly "unjustly enriched." The undisputed evidence confirms that APCO was
17 not paid any amounts for Helix's work that it did not transmit to Helix, and APCO
18 did not get to keep the property or any Helix money. Instead, APCO remains unpaid
19 \$1,400,036.75 from the failed Project despite its exceptional efforts to ensure all
20 subcontracts were fully paid for all amounts billed.¹⁰³

21 **R. Helix's Proposed Conclusions of Law No: 21.** A claim for unjust enrichment
22 arises when a "plaintiff confers a benefit on the defendant, the defendant appreciates
23 such benefit, and there is 'acceptance and retention by the defendant of such benefit
24 under circumstances such that it would be inequitable for him to retain the benefit
25 without payment of the value thereof.'" *Certified Fire Prot.*, 128 Nev. at 381, 283 P.3d
26 250, 257 (2012) *citing Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d
27 1272, 1273 (1981). Here, APCO benefitted from Helix's work and the monies it
28

1 otherwise earned by (i) submitting the same as part of its own pay applications, (ii)
2 including in its Notice of Lien all amounts earned by (but not paid to) subcontractors,
3 including their retention.

4 **APCO's Response:** First, an action based upon a theory of unjust
5 enrichment is not available when there is an express, written contract
6 because no contract can be implied in that situation.¹⁰⁴ So Helix cannot
7 proceed with any unjust enrichment claims since it has admitted a contract
8 with APCO. The evidence also confirms APCO received no benefit that was
9 not conveyed to Helix. In *Nev. Nat'l Bank v. Snyder*,¹⁰⁵ the owner of a
10 project optioned a piece of land to develop. He engaged engineers to begin
11 developing the land. The next year, the owner received a loan from a bank,
12 and purchased the land. The owner did not pay the engineers, and the
13 engineers recorded mechanic's liens against the property. The owner
14 declared bankruptcy and owed the engineers money for work done for the
15 project. The bank foreclosed upon the property and kept the proceeds. The
16 architect and engineer argued that the bank was unjustly enriched because
17 the work they performed increased the value of the property. The Nevada
18 Supreme Court found that "[w]hile there was a benefit conferred on the
19 Bank, it does not rise to unjust enrichment."¹⁰⁶

20 The record here does not show how APCO retained some unjust
21 enrichment or benefit. And since Helix's disclosed damages only sought
22 retentions, there is no dispute that APCO did not receive Helix's retention
23 from Gemstone.¹⁰⁷

26 ¹⁰³ Testimony of Mary Jo Allen (APCO) Day 3, p. 122.

27 ¹⁰⁴ *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182 (1997).

28 ¹⁰⁵ 108 Nev. 151, 157, 826 P.2d 560, 563 (1992).

¹⁰⁶ *Id.* at 157.

¹⁰⁷ Testimony of Joe Pelan (APCO) Day 3, p. 150.

1 **S. Helix's Proposed Conclusions of Law No: 22.** For all of the foregoing reasons,
2 and in the alternative, Helix is entitled to an award of \$505,021 for monies earned and
3 not paid to Helix while APCO was on site as the general contractor.¹⁰⁸

4 **APCO's Response:** See APCO's Response to Helix's Proposed Conclusion of Law
5 No. 10. To so hold would undermine the parties agreed to and statutorily authorized
6 retention payment schedule under NRS 624.624.¹⁰⁹

7 **T. Helix's Proposed Conclusions of Law No: 27.** As between Helix and Camco
8 specifically, and even if Pay-if-Paid was a viable legal defense (which it is not), Helix
9 and Camco did not reach a meeting of the minds on either the Camco Subcontract or
10 the Camco Ratification through which Camco asserts Pay-if-Paid. As there is no other
11 factual basis for a Pay-if-Paid agreement as between Helix and Camco, the Court
12 rejects any such defense for Camco as against Helix.

13 **APCO's Response:** Helix admitted it entered into a ratification agreement with
14 Camco on September 4, 2008 to continue on and complete the APCO scope of
15 work.¹¹⁰ Helix even added a document to the ratification entitled "Helix Electric's
16 Exhibit to the Ratification and Amendment."¹¹¹ The Helix Exhibit to the
17 Ratification and Amendment contained language confirming that APCO was
18 removed as the general contractor.¹¹² And Helix included a total contract price of
19 \$5.55 million for the Project, which was its original contract price with APCO for
20 Phase 1, and added \$480,689 as approved change orders under APCO to the total
21 contract price.¹¹³ The proposed Helix Amendment to the ratification agreement also
22 included the following term: "All close out documents must be turned in before
23
24

25 ¹⁰⁸ As noted, Helix's claim that APCO is also liable for sums earned by Helix after APCO left the site and
26 while Cameo was on site as the general contractor is discussed infra.

27 ¹⁰⁹ See *Padilla Construction Company of Nevada v. Big-D Construction Corp.*, 386 P.3d 982 (Nev. 2016).

28 ¹¹⁰ Exhibit 77, Helix Complaint, ¶18.

¹¹¹ Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, p. 42.

¹¹² Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, pp. 42-43.

¹¹³ Exhibit 170-54; Testimony of Bob Johnson (Helix) Day 2, p. 44; Exhibit 169-8.

1 Camco Pacific can release final payment.”¹¹⁴ So Helix knew it had rolled its
2 retention over to Camco.

3 And although Helix has not produced a signed copy of the ratification agreement,
4 Helix has admitted entering into its ratification and amended subcontract agreement
5 in its complaint as follows:

6 18. On or about September 4, 2008, Helix entered
7 into the Ratification and Amendment of Subcontract
8 Agreement (“CPCC Agreement”) **with Camco who**
9 **replaced APCO as the general contractor on the**
10 **Project**, to continue the work for the Property
11 (“CPCC Work”).

12 19. **Helix furnished the CPCC Work for the**
13 **benefit of and at the specific instance and request**
14 **of CPCC and/or Owner.**

15 20. Pursuant to the CPCC Agreement, Helix was to
16 be paid an amount in excess of Ten Thousand
17 Dollars (\$10,000.00) (hereinafter “CPCC
18 Outstanding Balance”) for the CPCC Work.

19 21. Helix furnished the CPCC Work and has
20 otherwise performed its duties and obligations as
21 required by the CPCC Agreement.

22 22. CPCC has breached the CPCC Agreement...
23 CPCC breached its duty to act in good faith by
24 performing the Ratification Agreement in a manner
25 that was unfaithful to the purpose of the Ratification
26 Agreement, thereby denying Helix’s justified
27 expectations...¹¹⁵

28 Helix’s Mr. Johnson admitted that Exhibit 172, the Ratification Agreement, was the
document that Helix referenced in its complaint (Exhibit 77) as the Ratification.¹¹⁶
Helix sought \$834,476.45 against Camco.¹¹⁷ Helix also admitted it had a contract
with Camco/Gemstone for \$8.6 million in its lien documents.¹¹⁸

Lastly, Helix has not advanced a single legal theory or any legal support to

¹¹⁴ Exhibit 169-1.

¹¹⁵ Exhibit 77.

¹¹⁶ Testimony of Bob Johnson (Helix) Day 2, p. 28.

¹¹⁷ Testimony of Joe Pelan (APCO) Day 1, p. 10.

¹¹⁸ Exhibit 512; Testimony of Bob Johnson (Helix) Day 2, p. 29.

1 impose joint and several liability on APCO for work Helix performed under Camco.
2 **U. Helix's Proposed Conclusions of Law No: 29.** First, as discussed above, APCO
3 never terminated its subcontract with Helix and instead repeatedly informed Helix that
4 it was "STILL CONTRACTUALLY BOUND" [see Ex. 48] and "remain[s] under
5 contract" [see Ex. 23] to APCO. That Helix subsequently contracted (expressly or
6 impliedly) with Camco to continue the work Helix was contractually bound to APCO
7 to perform is of no consequence to APCO's liability to Helix for the full amount of
8 Helix's unpaid work. As Helix testified, and APCO did not dispute, Helix reasonably
9 concluded that it was still under contract with APCO and exposed to a claim of
10 abandonment of contract if it failed to continue working (unless and until APCO
11 terminated Helix or otherwise directed it to stop working, which it never did).

12 **APCO's Response:** There is no legal or factual basis for such a speculative ruling.
13 *See* APCO's Response to Helix's Proposed Finding of Fact No. 21 (confirming
14 Andy Rivera understood the status the Gemstone purported to terminate the APCO
15 Contract, that Helix was getting information directly from Gemstone, that Helix
16 was being copied on APCO/Gemstone emails, and was getting direction directly
17 from Gemstone). And Helix elected to continue to work on the Project after APCO
18 left. APCO's letters confirmed Helix's statutory right to suspend work given
19 APCO's suspension and claims of nonpayment.

20 **V. Helix's Proposed Conclusions of Law No: 30.** First, APCO hired Helix to perform
21 work at a specific price and/or for a reasonable value for the duration of the Project and
22 never terminated that relationship. To the contrary, APCO repeatedly informed Helix
23 and other subcontractors that they were "still contractually bound to" and "remain
24 under contract with" APCO. [See Ex. 23, 48]. APCO's letters confirmed Helix's
25 statutory right to suspend work given APCO's suspension and claims of non-payment.
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1 **APCO's Response:** APCO did not have to terminate Helix. Helix's subcontract
2 with APCO was assigned,¹¹⁹ ratified,¹²⁰ and novated.¹²¹

3 **W. Helix's Proposed Conclusions of Law No: 32.** APCO has not established a
4 novation by clear and convincing evidence. First, there is no evidence that "all parties"
5 (i.e., Helix, APCO and Camco) agreed to a new contract because APCO is not a party
6 to any agreement (express or implied between Helix and Camco. Second, APCO
7 cannot prove that the Helix-Camco Subcontract "extinguished" the Helix-APCO
8 Subcontract. To establish this element, the party claiming novation must show that the
9 creditor clearly intended to release the original obligor. See *Pink v. Busch*, 100 Nev.
10 684 (1984) ("the intent to cause a novation must be clear" and the evidence must show
11 a "clear understanding that a complete novation is proposed.").

12 **APCO's Response:** "However, consent to novation may be implied from the
13 circumstances of the transaction and by the subsequent conduct of the parties."¹²²

14 The conduct of the parties, as described below, confirm a novation:

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

¹¹⁹ See APCO's Proposed Findings of Fact and Conclusions of Law at 371-378.

¹²⁰ See APCO's Proposed Findings of Fact and Conclusions of Law at 195-222.

¹²¹ See APCO's Proposed Findings of Fact and Conclusions of Law at 384-393.

¹²² *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195-96 (1989) citing *Sans Souci v. Div. of Fla. Land Sales*, 448 So.2d 1116, 1121 (Fla. Dist. Ct. App. 1984).

- **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 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.

The new agreements between Camco and Helix and Camco and CabineTec are novations. The substituted ratification agreements and subcontracts clearly replaced and extinguished APCO's obligations. Once the novation occurred, placing Camco as the completion contractor into privity with the subcontractors, APCO was wholly removed from contractual privity with Helix as a matter of law. APCO did not retain any obligations (including payment) following the novations of the APCO/Helix and subcontracts.

Next, *Pink v. Busch*¹²³ is clearly distinguishable. Essentially, the Nevada Supreme Court found that nothing about the addition of new personal guarantees undermined the existence of the prior personal guarantees, and confirmed: "Finding an inferred novation where the creditor was simply aware of the execution of new guarantees by third parties and did not accept any payments under the personal guarantees is tantamount to forcing new debtors on the creditor...and is also clearly erroneous." This case is distinguishable because the conduct of the parties did not clearly evidence a novation. Here, the expressed intent and related conduct replacing APCO clearly amounts to a novation. See APCO's Response to Helix's Proposed Conclusion of Law No. 32.

X. Helix's Proposed Conclusions of Law No: 33. In *Pink*, the plaintiff sold a business to certain parties with a guaranty of performance. Thereafter, the buyers sold to new

¹²³ 100 Nev. 684, 690-91, 691 P.2d 456, 461 (1984).

1 buyers, who provided a new guaranty of performance. When the new buyers defaulted,
2 Pink sued the original and new buyers and all of the guarantors. The original guarantors
3 claimed that the contract had been novated, but the Nevada Supreme Court ruled that
4 even the plaintiffs acceptance of the new guarantees (as found by the trial court) did not
5 serve to release the original guarantors. 100 Nev. at 690-691. Instead, this merely
6 provided additional security for the Plaintiff. In fact, "the failure of the creditor to
7 cancel the original note [served] to negate one of the essential elements of a novation -
8 that the parties agreed to extinguish the original debt or obligation." Id. at 690.

9 **APCO's Response:** See APCO's Response to Helix's Proposed Conclusion of Law
10 No: 32, distinguishing *Pink*.

11 **Y. Helix's Proposed Conclusions of Law No: 34.** Similarly here, Helix's agreement
12 to work for Camco was a reasonable means of seeking additional security for payment
13 of the work it had agreed to perform for APCO, but it does not relieve APCO of its
14 continuing obligation to pay Helix for that work. Like the plaintiff in *Pink*, Helix also
15 did not terminate its agreement with APCO or ever agree to stop looking to APCO for
16 payment.

17 **APCO's Response:** Helix has failed to cite any law to confirm that a general
18 contractor like APCO can be liable to a subcontractor like Helix for work the
19 subcontractor does under the direction of another general contractor. See APCO's
20 Response to Helix's Proposed Conclusion of Law No: 32, distinguishing *Pink*.

21 **Z. Helix's Proposed Conclusions of Law No: 36.** Accordingly, the Court concludes
22 that, in addition to the \$505,012.00 awarded to Helix against APCO for unpaid work
23 while APCO was on site serving as the general contractor, Helix is entitled to an
24 additional award against APCO for \$834,476.45 for Helix's unpaid work after APCO
25 left the Project.

26 **APCO's Response:** Again, Helix has not advanced a single legal theory to hold
27 APCO jointly and severally liable for work Helix performed under Camco or the
28 retention that never became due while APCO was the prime contractor.

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DATED: March 23, 2018.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of SPENCER FANE LLP and that a copy of the
3 foregoing **APCO CONSTRUCTION, INC.'S OPPOSITION TO HELIX ELECTRIC**
4 **OF NEVADA, LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF**
5 **LAW** was served by electronic transmission through the E-Filing system pursuant to NEFCR 9,
6 NRCP 5(b) and EDCR 7.26 or by mailing a copy to their last known address, first class mail,
7 postage prepaid for non-registered users, on this 23rd day of March, 2018, as follows:

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10 **Intervenor Plaintiff: Cactus Rose Construction Inc**

11 Eric B. Zimbelman (ezimbelman@peelbrimley.com)

12 **Intervenor Plaintiff: Interstate Plumbing & Air Conditioning Inc**

13 Jonathan S. Dabbieri (dabbieri@sullivanhill.com)

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25 **Plaintiff: Apco Construction**

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27 **Third Party Plaintiff: E & E Fire Protection LLC**

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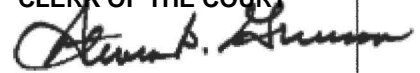
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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs

GEMSTONE DEVELOPMENT WEST, INC.,
Nevada corporation; NEVADA
CONSTRUCTION SERVICES, a Nevada
corporation; SCOTT FINANCIAL
CORPORATION, a North Dakota
corporation; COMMONWEALTH LAND
TITLE INSURANCE COMPANY; FIRST
AMERICAN TITLE INSURANCE
COMPANY and DOES I through X,

Defendants.

AND ALL RELATED MATTERS.

CASE NO.: A571228

DEPT. NO.: XIII

Consolidated with:

A571792, A574391, A577623, A580889,
A583289, A584730, and A587168

**HELIX ELECTRIC OF NEVADA,
LLC'S RESPONSE TO APCO
CONSTRUCTION'S POST-TRIAL
BRIEF**

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**HELIX ELECTRIC OF NEVADA, LLC'S RESPONSE TO APCO CONSTRUCTION'S
POST-TRIAL BRIEF**

COMES NOW HELIX ELECTRIC OF NEVADA, LLC ("Helix") and does hereby submit the following Response to the Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law submitted by APCO Construction("APCO").

DATED this 23rd day of March 2017.

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HELIX'S RESPONSE TO APCO'S POST-TRIAL BRIEF

I. INTRODUCTION/SUMMARY OF RESPONSE.

APCO's Post-Trial Brief ("APCO Brief") and Proposed Findings of Fact and Conclusions of Law ("APCO FFCL") predictably attempt to absolve APCO of liability to Helix by, among other things, (i) relying on an inapplicable and unenforceable set of preconditions to payment, (ii) asserting that Gemstone took (or that Helix assented to or ratified) an assignment of APCO's obligations to Helix and (iii) re-arguing Pay-if-Paid and other legal questions this Court has already resolved in Helix's favor. Although Helix's Proposed Findings of Fact and Conclusions of Law ("Helix FFCL") have already anticipated most of APCO's arguments, Helix submits the following in response to APCO's primary positions.

II. SECTION 3.8 DOES NOT APPLY

APCO contends in its brief (see APCO Brief, p. 34) and its Proposed FFCL (see APCO FFCL pp. 49-53) that Helix's claim to payment of the \$505,021.00 is invalid because Helix failed

1 to meet certain “preconditions” to payment of Helix’s retention found in Section 3.8 of Helix-
2 APCO Subcontract. As discussed in detail in Helix’s Proposed Findings of Fact (Helix FF”) and
3 Conclusions of Law (“Helix CL”), APCO is incorrect on multiple grounds.

4 **A. Helix’s Retention Was Earned.**

5 As an initial but important matter, APCO is simply wrong to assert that Helix’s “retention
6 had not been earned.” [See APCO Brief p. 22]. To the contrary, retention is monies earned by a
7 contractor but withheld from progress payments (usually 5-10%)¹ until the conclusion of the
8 project in case the contractor abandons the project, fails to complete its work or there is otherwise
9 some kind of dispute relating to the contractor’s work. [See e.g., TR2-38:2-22; Helix FF ¶ 12].²
10 Retention is not a bonus or additional payment but rather an “escrow account” of temporarily
11 withheld portion of the monies otherwise earned by the contractor for its work in place. [See e.g.,
12 TR2-38:8-13; TR2-39:1-3³; Helix FF ¶ 12]. By way of its progress payment applications on the
13 forms required by APCO, Helix showed a gross billing, 10% retention and a “net amount due this
14 period.” [See e.g. Ex. 501-006]. As such, while the release of Helix’s retention may have been
15 deferred pending potential workmanship disputes that never materialized, such monies were
16 always earned by and due to Helix.

17 **B. There Was No Meeting Of The Minds On The Helix-APCO Subcontract.**

18 As explained in detail in, without limitation, Sections 4-8 of the Helix FF, Helix and
19 APCO never reached a meeting of the minds with respect to the Helix-APCO Subcontract.
20 Among other things, Helix demonstrated at trial that its acceptance of the Helix-APCO
21 Subcontract was conditioned upon APCO’s assent to multiple revisions as contained in the Helix
22 Electric Exhibit to the Standard Subcontract Agreement [between APCO and Helix (hereinafter,
23 “the Helix Exhibit (APCO)”]. [See e.g., Ex. 45-016-023; Helix FF ¶4].

24 APCO rejected many of Helix’s proposed revisions and the parties were still exchanging
25 proposed versions of the Helix Exhibit (APCO) as late as July 11, 2008, shortly before APCO
26 stopped work on the Project. [See Exhibit 506; Helix FF ¶¶6-7]. Helix’s Bob Johnson provided

27 ¹ By way of amendments to NRS 624 that took effect after the events of this Project (and therefore not applicable to
this Project), retention from a lower-tiered subcontractor is now limited to 5%. NRS 624.624(2)(a)(1).

28 ² Testimony of Andy Rivera.

³ Testimony of Andy Rivera.

undisputed testimony that Helix did not agree to or accept APCO's July 11, 2008 revisions. [TR1-113:20 – 114:8; Helix FF ¶8]. Helix and APCO therefore did not reach a meeting of the minds with respect to the Helix-APCO Subcontract. Accordingly, Helix's entitlement to payment for the earned and unpaid retention should be analyzed as oral contract [see e.g., Helix FF 9, Helix CL 3], quasi-contract and/or quantum meruit [see e.g., Helix CL ¶¶ 4-5] rendering APCO's analysis of Section 3.8 moot.

C. Section 3.8 Does Not Bar Helix's Claims.

Even if the Court concludes that the Helix-APCO Subcontract was adopted in whole or in part such that APCO's contentions relating to Section 3.8 must be considered, the Court should nonetheless reject APCO's position. As more fully discussed in the Helix FFCL:

- Section 3.8 assumes that the Project would be completed such that Helix's compliance with Section 3.8 would not otherwise be impossible and futile, [see Helix CL ¶¶ 8-9];
- Enforcement of Section 3.8 as demanded by APCO would impermissibly avoid APCO's payment obligations under NRS Chapter 624 and attempt to waive or impair lien rights secured by NRS Chapter 108. [see Helix CL ¶¶ 10-11]. Specifically, but without limitation, the "conditions precedent" of Section 3.8 contain (and are inextricably intertwined with) a Pay-if-Paid agreement that this Court has already rejected on summary judgment; and
- There was a termination event that triggers APCO's payment obligations pursuant to Section 9.4, which negates the provisions of Section 3.8 [see Helix CL ¶¶ 12-15].

Without restating the Helix CL (and/or Helix's prior briefing on summary judgment), Helix respectfully requests that the Court consider the following.

1. Compliance with Section 3.8 would be futile.

When one party abandons 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, APCO repudiated or indicated its intention not to perform when it stopped work and later terminated its contractual relationship

1 with the owner. It was also otherwise impossible and would have been futile for Helix to comply
2 with the provisions of Section 3.8. For example, the “entire project” was never completed through
3 no fault of Helix, nor was there any “approval and final acceptance of the project Owner” as
4 Section 3.8 otherwise plainly anticipated.

5 Of course, “receipt of final payment by Contractor from Owner” is a Pay-if-Paid clause
6 that is void and unenforceable and barred by Nevada law and this Court’s partial summary
7 judgment. In addition, because the APCO-Gemstone Agreement contains similar conditions
8 precedent to APCO’s receipt of its retention [*see e.g.*, Ex. 2, ¶ 5.07(f)⁴], the conditions precedent
9 to APCO’s receipt of payment are inextricably intertwined with the conditions precedent to
10 Helix’s receipt of retention under Section 3.8 such that they are virtually indistinguishable. In
11 other words, the other conditions to payment under Section 3.8 are also impermissible Pay-if-Paid
12 agreements.

13 APCO nonetheless attempts to rejuvenate its Pay-if-Paid defense by relying - as it did in
14 its Motion for Reconsideration of this Court’s summary judgment Order - on *Padilla*
15 *Construction Company of Nevada v. Big-D Construction Corp.*, 386 P.3d 982 (Nev. 2016,
16 unpublished). [*See* APCO Brief pp 47-51]. APCO now suggests that *Padilla* allows APCO to
17 deny retention to Helix because Section 3.8 contains conditions precedent to such payment, even
18 though (as noted above) one of the conditions precedent is payment from the Owner to APCO
19 (i.e., Pay-if-Paid) and the others are themselves conditions precedent to the Owner’s obligation of
20 payment to APCO. For all of the reasons discussed above and below, nothing in *Padilla* changes
21 the analysis of Section 3.8.
22

23 Importantly, and as this Court has previously noted [*see e.g.*, TR5-125:10-126:2], the
24 plaintiff in *Padilla* provided defective work, which breached the subcontract before any payment
25 was owed and which was therefore never accepted. That condition precedent (acceptance of the
26 work) was at least theoretically possible (i.e., if *Padilla* had performed properly) and was not
27

28 ⁴ Pursuant to Section 5.07(f), APCO is entitled to its retention “on the date that (i) Final Completion is attained and
(ii) all outstanding disputes between Developer and General Contractor and any Third-Party Service Providers have
been resolved, and any liens against the Project related to such disputes have been resolved.”

solely dependent on the acts or omissions of higher-tiered parties, such as the conditions precedent to Section 3.8. Here, there is no evidence of any defective or non-confirming work, or any act or omission, by Helix that created a failure of any condition precedent and all of the conditions precedent in Section 3.8 failed because the owner stopped the project. Even if defective or non-conforming work were at issue here (which it is not), 624.624(3) required APCO – “on or before the date the payment is due” - to issue a written notice of withholding giving a “reasonably detailed explanation of the condition or reason for the withholding.”⁵ This is did not do.

In addition, it is plainly apparent from the face of this unpublished decision⁶ that the Supreme Court did not consider the applicability of *Bullock* and its prohibition on pay-if-paid, presumably because neither party raised the issue. *See Nye Cty. v. Washoe Med. Ctr.*, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992) (Generally, an issue which is not raised in the district court is waived on appeal). There is also no indication from the Supreme Court decision in *Padilla* that Pay-if-Paid was brought to the attention of the District Court or the Supreme Court.

Finally, as has been repeatedly argued, NRS 624.624(1) does not allow a Pay-if-Paid agreement simply because it is written into the “schedule of payments.” Stated differently, a “schedule of payments” that makes payment due within 15 days after the general contractor receives payment from the Owner (like the APCO Subcontract does – *see* Ex. 45, ¶ 3.5) is nothing more than a prohibited Pay-if-Paid agreement. Similarly, conditioning APCO’s obligation to pay Helix its retention upon “receipt of final payment by Contractor from Owner”

⁵ NRS 624.624(3) provides in part:

If, pursuant to subparagraph (2) or (3) of paragraph (a) of subsection 2 or paragraph (b) of subsection 2, a higher-tiered contractor intends to withhold any amount from a payment to be made to a lower-tiered subcontractor, the higher-tiered contractor must give, on or before the date the payment is due, a written notice to the lower-tiered subcontractor of any amount that will be withheld and give a copy of such notice to all reputed higher-tiered contractors and the owner.

⁶ To the extent the Court wishes to consider intervening case decisions, the court should consider *Cashman Equipment Company v. West Edna Associates, Ltd.*, 380 P.3d 844 (2016), 132 Nev. Adv. Op. 69 (2016). *Cashman* is a 2016 published decision that relied on and reaffirmed *Bullock*. *Cashman* rejected the argument that a lower-tiered subcontractor’s unconditional lien release waived its right to lien when in fact it never received payment, holding: “the waiver is void. Just as we refused to enforce the pay-if-paid provision in [*Bullock*] we likewise refuse to enforce *Cashman*’s release.” 380 P.3d at 849. In other words, *Bullock* remains good law and this Court’s Order was proper and should not be reconsidered.

(and other conditions that are inextricably intertwined with the Owner's obligation to make that final payment to APCO) is also contrary to APCO's obligation of prompt payment under NRS 624.624(1).

2. Enforcement of Section 3.8 impermissibly defeats statutory rights.

To the extent Section 3.8 serves to avoid APCO's obligation to promptly pay Helix for its work on the Project (as it is obligated to do pursuant to NRS 624.624), it is a "condition stipulation or provision" that is against public policy, void and unenforceable pursuant to NRS 624.628(3) because it "(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."

Similarly, if Section 3.8 prevents Helix from being paid in full it violates the Nevada Mechanic's Lien Statute and is void and unenforceable because it impermissibly "require[s] 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). See also, NRS 108.2457(1) and (2))⁸ and is a "term of a contract

⁷ NRS 624.628(3) provides:

3. A condition, stipulation or provision in an agreement which:

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

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

(c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages or an extension of time that the lower-tiered subcontractor may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact event that is unreasonable under the circumstances, that was not within the contemplation of the parties at the time the agreement was entered into, or for which the lower-tiered subcontractor is not responsible,

↪ is against public policy and is void and unenforceable.

⁸ NRS 108.2453(2) provides:

2. A condition, stipulation or provision in a contract or other agreement for the improvement of property or for the construction, alteration or repair of a work of improvement in this State that attempts to do any of the following is contrary to public policy and is void and unenforceable:

(a) Require a lien claimant to waive rights provided by law to lien claimants or to limit the rights provided to lien claimants, other than as expressly provided in NRS 108.221 to 108.246, inclusive;

(b) Relieve a person of an obligation or liability imposed by the provisions of NRS 108.221 to 108.246, inclusive;

(c) Make the contract or other agreement subject to the laws of a state other than this State;

(d) Require any litigation, arbitration or other process for dispute resolution on disputes arising out of the contract or other agreement to occur in a state other than this State; or

(e) Require a prime contractor or subcontractor to waive, release or extinguish a claim or right that the prime contractor or subcontractor may otherwise possess or acquire for delay, acceleration, disruption or impact damages or an extension of time for delays incurred, for any delay, acceleration, disruption or impact event which was

that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier” (NRS 108.2457(1)).⁹

3. Section 3.8 does not apply because there was a “termination of the Contractor’s contract with the Owner.”

As more fully discussed at Helix FF ¶¶ 12-15, there was a plainly a “termination of the Contractor’s contract with the Owner” as provided for in Section 9.4.¹⁰ In that event, Section 9.4 requires APCO to then pay Helix in full for its completed work “after payment by the Owner.” However, because that final clause (“after payment by the Owner”) is itself a Pay-if-Paid clause it is void as against public policy, unenforceable and must therefore be ignored. Accordingly, APCO became obligated to pay Helix in full, including its retention.

4. Good faith and fair dealing precludes application of Section 3.8.

Even if the Court were to (i) ignore the termination of the APCO-Gemstone Agreement and (ii) otherwise enforce Subsection 3.8 of the Helix-APCO Agreement (as APCO urges), it will have countenanced APCO’s breach of the duty of good faith and fair dealing that is implied in every contract in Nevada. *See 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).

Here, APCO failed to terminate Helix for convenience pursuant to Section 9.2,¹¹ yet nonetheless apparently contends (for reasons it has never explained other than Pay-if-Paid) that

unreasonable under the circumstances, not within the contemplation of the parties at the time the contract was entered into, or for which the prime contractor or subcontractor is not responsible.

⁹ NRS 108.2457(1) provides:

1. Any term of a contract that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier is void. An owner, contractor or subcontractor by any term of a contract, or otherwise, may not obtain the waiver of, or impair the lien rights of, a contractor, subcontractor or supplier, except as provided in this section. Any written consent given by a lien claimant that waives or limits any lien rights is unenforceable unless the lien claimant:

(a) Executes and delivers a waiver and release that is signed by the lien claimant or the lien claimant’s authorized agent in the form set forth in this section; and

(b) In the case of a conditional waiver and release, receives payment of the amount identified in the conditional waiver and release.

¹⁰ Section 9.4 provides: “If there has been a termination of the Contractor’s contract with the Owner, the Subcontractor shall be paid the amount due from the Owner to the Contractor for the Subcontractor’s completed work ... after payment by the Owner to the Contractor.

¹¹ Section 9.2 requires APCO to “provide Subcontractor with written notice of [a Section 9.1 termination for convenience] two calendar days in advance of the effective date of the termination.” [See Ex. 45, ¶¶ 9.1, 9.2].

Helix is not entitled to full compensation pursuant to Section 9.4, until, among other things, “completion of the entire project.” Specifically, but without limitation, by (i) terminating its relationship with Gemstone and (ii) failing to terminate APCO for convenience pursuant to Subsection 9.2 (and thereby creating a procedure and contractual basis for Helix to recover the value of its work performed to that point), APCO effectively deprived Helix of a contractual means of recovery that was otherwise provided for by the agreement. APCO also exposed Helix to the risk that the project would not be completed while compelling Helix to “remain under contract” [see Ex. 23] and continuing working to its ultimate detriment.¹² There is no better example than this of failing to perform a contract “in a manner that is unfaithful to the purpose of the contract and [denying] the justified expectations of the other party.” See *Butch Lewis Prods*, 107 Nev. at 234.

In addition, and while APCO contends that Helix is barred from recovering its retention pursuant to Subsection 3.8, it hypocritically sought and obtained a summary judgment against Gemstone for all monies it earned, including retention, despite the fact that its agreement with Gemstone contains similar language. Specifically, but without limitation, the APCO-Gemstone Agreement:

- requires APCO to “complete the work” and “use its best efforts to complete the Project” [Ex. 2, ¶2.01(a)];
- conditions APCO’s entitlement to final payment until, among other things, APCO “has fully performed the contract” [Ex. 2, ¶5.06(a)(i)], and “a final Certificate of Payment has been issued by the architect” [Ex. 2, ¶5.06(a)(iv)]; and
- conditions payment of retention to APCO on (i) attainment of final completion, (ii) resolution of “all outstanding disputes,” and (iii) removal of all liens. [Ex. 2, ¶5.07(f)].

Simply stated, APCO is engaging in rank hypocrisy. While it simultaneously asks this Court to deem the APCO-Gemstone Contract incorporated by reference into the Helix-APCO

¹² APCO not only (by its own admission) failed or refused to terminate the Helix-Apco Subcontract [see e.g., Helix FF ¶15, TR1-80:13-25], it repeatedly affirmed the Helix-APCO Subcontract by advising Helix that it was “STILL CONTRACTUALLY BOUND” [see Ex. 48] and “remain[s] under contract” [see Ex. 23] to APCO. [See also Helix FF ¶¶ 18-19].

1 Subcontract, it demands that this Court enforce Section 3.8 of the Helix-APCO Subcontract while
2 ignoring the near identical language of (without limitation) Section 5.07(f) of the APCO-
3 Gemstone Contract. In summary, APCO's decision to stop work on the Project and (by APCO's
4 theory) leave Helix without a contractual remedy for recovery of its monies earned is a breach of
5 good faith and fair dealing.

6 5. Enforcement of Section 3.8 would unjustly enrich APCO.

7 Similarly, APCO's hypocritical juxtaposition of Section 3.8 of the Helix-APCO
8 Subcontract and Section 5.07(f) of the APCO-Gemstone Contract also allows it to be unjustly
9 enriched by the work Helix performed and the monies it earned while denying Helix its share of
10 the same.

11 A claim for unjust enrichment arises when a "plaintiff confers a benefit on the defendant,
12 the defendant appreciates such benefit, and there is 'acceptance and retention by the defendant of
13 such benefit under circumstances such that it would be inequitable for him to retain the benefit
14 without payment of the value thereof.'" *Certified Fire Prot.*, 128 Nev. at 381, 283 P.3d 250, 257
15 (2012) *citing Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981).
16 Here, APCO benefitted from Helix's work and the monies it otherwise earned by, among other
17 things, (i) submitting the same as part of its own pay applications and (ii) including in its Notice
18 of Lien all amounts earned by (but not paid to) Helix and other subcontractors, including
19 retention.

20 Notwithstanding the self-serving testimony of APCO's own witness, APCO incorrectly
21 asserts that it "did not receive any benefit from the work or materials that Helix or CabineTec
22 performed or provided to the Project after August 21, 2008." [See APCO Brief, p. 28]. To the
23 contrary, by continuing the work Helix was contractually obligated to perform (because APCO
24 never terminated Helix), Helix did it's best to ensure that APCO would be entitled to all of its
25 monies owed, including retention. [See also Helix FF 18-19]. APCO rewarded Helix's faithful
26 compliance to its contractual obligations by putting a proverbial knife in Helix's back.

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1 **III. THE HELIX-APCO SUBCONTRACT WAS NEVER “ASSIGNED” TO**
2 **GEMSTONE.**

3 Apparently in an effort to deflect the Court’s attention from APCO’s failure to (i) pay
4 Helix in full or (ii) terminate the Helix-APCO Subcontract (thereby leaving Helix in factual and
5 legal limbo), APCO argues that it could not have terminated the subcontracts because “Gemstone
6 gave APCO notice that it exercised its right under Contract Section 10.04 to accept an assignment
7 of the APCO subcontracts. [See APCO Brief p. 26 citing Exhibit 13]. This contention is factually
8 and legally incorrect.

9 **A. The APCO-Gemstone Agreement Was Terminated.**

10 First, APCO asserted to this Court and obtained summary judgment on the grounds that
11 APCO complied with (and Gemstone materially breached) the terms of the APCO-Gemstone
12 Agreement and, therefore, (ii) Gemstone owes APCO \$20,782,659.95. [Joint Pre-Trial
13 Memorandum ¶17]. If this is true, Gemstone’s attempt to terminate APCO was always baseless
14 and Gemstone’s brief statement of intent to seek assignment of “all Third-Party Agreements” [see
15 Ex. 13-014] in a fourteen-page letter is without any legal effect.

16 In addition, APCO claims that, irrespective of Gemstone’s purported termination, APCO
17 statutorily terminated the APCO-Gemstone Agreement as of September 5, 2008. [See e.g.,
18 Exhibit 28; Helix FF ¶14]. That being the case, APCO cannot claim, as it did in its brief, that
19 “any purported termination of a subcontract by APCO would have breached the [APCO-
20 Gemstone Agreement]” [see APCO Brief p. 26]. The APCO-Gemstone Agreement was
21 terminated - by one party or the other - no later than September 5, 2008 and it is therefore legally
22 impossible for APCO to have breached the agreement by thereafter terminating the Helix-APCO
23 Agreement.¹³

24 **B. Gemstone Did Not Accept Assignment.**

25 Even if APCO were somehow justified in not notifying Helix of Gemstone’s purported,
26 but ineffective, termination, there was no evidence presented at trial that Gemstone ever notified
27 Helix (or any other subcontractor) of its acceptance of an assignment of the relevant

28 ¹³ As noted, APCO admits it did not terminate the Helix-APCO Subcontract, either before or after September 5,
2008. [See e.g., Helix FF ¶18, TR1-70:15-19].

subcontracts. [See e.g., TR2-36:12-16].¹⁴ Section 10.04 of the APCO-Gemstone Agreement provides in part:

Each Third-Party Agreement for a portion of the Work is hereby assigned by [APCO] to [Gemstone] provided that such assignment is effective only after termination of the Agreement by [Gemstone] for cause pursuant to Section 10.02 and only for those Third-Party Agreements which developer accepts by notifying [APCO] and the applicable Third-Party Provider in writing.

[See Ex. 2-036, ¶10.04]. Simply stated, even if Gemstone had intended to accept an assignment (which it did not – *see infra*) it did not do so in accordance with the APCO-Gemstone Agreement.

In fact, the evidence squarely demonstrates that Gemstone did not intend or attempt to take assignment of the subcontracts. Instead, Gemstone hired a replacement general contractor, Camco, who entered into (or attempted to enter into) formal subcontracts with some of the APCO subcontractors and hired others in different ways. In an apparent attempt to confuse the Court, APCO even claims, incorrectly, that “Gemstone provided Helix with the Camco subcontract” [APCO Brief p. 38] yet only two sentences later correctly states that “Camco sent Helix a checklist for starting work,” citing to Exhibit 170, which enclosed the Camco Subcontract. [APCO Brief p. 38]. Stated differently, Exhibit 170 proves that Camco, not Gemstone, “provided Helix with the Camco subcontract.”

C. Gemstone Did Not “Facilitate” Assumption by Camco

APCO’s contention that Gemstone “facilitated Camco’s assumption” of the Helix-APCO Subcontract [see APCO Brief p. 52] is as irrelevant as it is inaccurate. First, the mere fact that Camco’s witness *believed* Camco made such an assumption [see APCO Brief 52]¹⁵ does not demonstrate that it was *in fact* assigned to or assumed by Camco or that Helix consented to the same,¹⁶ for which there is simply no evidence. More fundamentally, Section 10.04 of the APCO-Gemstone Agreement (pursuant to which APCO claims an assignment was made) permits only *Gemstone* (i.e., not Camco) to take assignment of the subcontracts. Stated differently, even if

¹⁴ Testimony of Robert Johnson.

¹⁵ APCO incorrectly identifies Camco’s witness as “Steve Parry.” In fact, his name is Dave Parry.

¹⁶ APCO’s reliance on *J. Christopher Stuhmer, Inc. v. Centaur Sculpture Galleries, Ltd., Inc.*, 110 Nev. 270, 871 P.2d 327 (1994) is misplaced. There the Nevada Supreme Court rejected the argument that a Nevada plaintiff had assigned its contract to a California affiliate (and therefore had no standing to sue) because of the “absolute lack of evidence that a legal assignment took place.” 110 Nev. at 275.

Gemstone wanted to “facilitate Camco’s assumption” of the Helix-APCO Subcontract, the APCO-Gemstone Agreement provides no basis for doing so. As such, any assignment to Camco would be predicated upon Gemstone first taking an assignment, which it did not do.¹⁷

Finally, the lack of any assignment to Gemstone is best exemplified by the fact that Gemstone did not, as required for an assignment to occur pursuant to Section 10.04, “pay to [Helix] any undisputed amounts owed for any Work completed by [Helix] prior to the underlying termination for which [Gemstone] had not yet paid [APCO].” [See Ex. 2-036, ¶10.04]. Had this occurred, of course, Helix would not be pursuing a claim against APCO for the \$505,021.00 “owed for any Work completed [by Helix] ... prior to the underlying termination.”¹⁸ Helix is here because it did not get paid.

IV. There Was No Novation, Waiver or Ratification

APCO asks this Court, in several different interconnected theories, to conclude that it has been relieved of its obligations to its subcontractor, Helix, with respect to any work performed by Helix after APCO ceased working on the Project. Each of these theories requires APCO to prove that there has been a novation, which APCO cannot do.

A. There Was No Novation.

APCO agrees that a novation exists only when (1) there is an existing valid contract; (2) all parties agree to a new contract; (3) the new contract extinguishes the old contract; and (4) the new contract is valid. [See APCO Brief p. 60 citing *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 509 (1989)]. APCO tellingly ignores the requirement that these conditions be proved with clear and convincing evidence and that APCO carries this heavy burden of proof. [See *Id.*; Helix CL ¶ 31]. In any event, APCO cannot prove the elements of novation under any burden of proof.

First, there is no evidence that “all parties” (i.e., Helix, APCO and Camco) agreed to a new contract because APCO is not a party to any agreement (express or implied between Helix

¹⁷ In other words, the only way Gemstone could “facilitate” an assumption by Camco is for Gemstone to first take assignment of the subcontracts and then assign those same subcontracts to Camco. That plainly did not happen here.

¹⁸ In an obvious effort to mislead the Court, APCO inaccurately states that “Helix admitted it never issued a stop work notice to APCO pursuant to NRS 624 *because it had no payment disputes with APCO.*” [See APCO Brief, p. 26, *italics added*]. In fact, Helix’s Bob Johnson testified that Helix “didn’t feel like we had a legal right because I had no direction through their contract to stop work” and that if Helix had stopped work it “would have been at full risk of [APCO] pursuing us for abandoning the contract.” [TR1:128:12-16].

1 and Camco. [See also Helix CL ¶¶32-33]. Second, APCO cannot prove that any agreement it may
2 have made with Camco “extinguished” the Helix-APCO Subcontract.¹⁹ To establish this element,
3 the party claiming novation must show that the creditor clearly intended to release the original
4 obligor. See *Pink v. Busch*, 100 Nev. 684 (1984) (“the intent to cause a novation must be clear”
5 and the evidence must show a “clear understanding that a complete novation is proposed.”).

6 In *Pink*, the plaintiff sold a business to certain parties with a guaranty of performance.
7 Thereafter, the buyers sold to new buyers, who provided a new guaranty of performance. When
8 the new buyers defaulted, Pink sued the original and new buyers and all of the guarantors. The
9 original guarantors claimed that the contract had been novated, but the Nevada Supreme Court
10 ruled that even the plaintiff’s acceptance of the new guarantees (as found by the trial court) did
11 not serve to release the original guarantors. 100 Nev. at 690-691. Instead, this merely provided
12 additional security for the Plaintiff. In fact, “the failure of the creditor to cancel the original note
13 [served] to negate one of the essential elements of a novation – that the parties agreed to
14 extinguish the original debt or obligation.” *Id.* at 690

15 Similarly here, Helix’s agreement to work for Camco was a reasonable means of seeking
16 an additional means of payment of the work it had agreed to perform for APCO,²⁰ but it does not
17 relieve APCO of its continuing obligation to pay Helix for that work. Like the plaintiff in *Pink*,
18 Helix also did not terminate its agreement with APCO or ever agree to stop looking to APCO for
19 payment.

20 Finally, even where a party might appear to have given consent to a novation (which
21 Helix did not do), if it has not been given full details regarding the transaction, the apparent
22 consent may not be effective. See *United Fire*, 105 Nev. at 509 (apparent acquiescence “did not
23 constitute consent when plaintiff knew nothing” of certain key facts). Here, because Helix was
24 never provided with the Camco-Gemstone Agreement, Helix was not informed that Camco was

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¹⁹ Helix also never entered into the Camco Subcontract or the Camco Ratification. See discussion *infra*.

²⁰ Much like a landlord whose tenant has breached and abandoned the premises may seek to re-let the premises and thereby mitigate its losses.

1 not acting in the nature of a true general contractor.²¹ Helix was also not informed that payments
2 would not pass through Camco even though (i) the Camco Subcontract (which Helix received
3 and reviewed, even if it was never agreed to) provides otherwise and (ii) Camco in fact required
4 Helix to submit pay applications to Camco that Camco in turn submitted to Gemstone exactly as
5 described in the Camco Subcontract. Given these conditions, any consent to novation that might
6 be implied to Helix is excused by its ignorance of the true facts.

7 **B. There Was No Ratification.**

8 APCO also argues that “CabineTec and Helix ratified their subcontracts with Camco.”
9 While Helix cannot speak for CabineTec (who apparently did sign a Ratification Agreement and
10 the Camco Subcontract), Helix signed no such agreements. APCO’s only “evidence” that Helix
11 entered into the Camco Ratification is an unfortunate error in its initial pleading, which Helix has
12 disavowed and for which Helix requested amendment at the time of trial. [See TR1:9:19-25].

13 Helix provided credible and undisputed testimony that the pleading is incorrect and that it
14 did not in fact sign or agree to the document [see Exhibit 510-006-042; Exhibit 172-003-011;
15 TR1-123:1-124:25²²; Helix FF 36]. A trial is a search for the truth and the evidence at trial
16 supports the truth that Helix did not enter into the Camco Ratification.²³

17 Helix also did not enter into the Camco Subcontract. Instead, as it did with the APCO
18 Subcontract, Helix prepared a Helix Electric Exhibit (“the Helix Exhibit (Camco)”) to the Camco
19 Subcontract with multiple proposed revisions to which Camco never agreed. [See Exhibit 510-
20 043-045; TR1-125:2-10²⁴; Helix FF 36-37].

21 In any event, Helix’s purported entry into the Camco Ratification and Camco Subcontract
22 (for which, again, there is no evidence) would not alone establish a novation, which is the only
23 means which by APCO can escape liability to Helix for the work it performed pursuant to its

24 ²¹ For example, instead of being incentivized to earn a profit for completing the Project (like a true general
25 contractor), Camco was, by its own admission, a project supervisor hired to rent its license to Gemstone for a fee of
\$100,000 per month whether the Project was moving forward or not – and whether the subcontractors were being
paid or not. [See e.g., Helix FF 26-28].

26 ²² Testimony of Robert Johnson.

27 ²³ APCO unfairly and maliciously impugns Helix’s integrity by suggesting the lack of a signed Camco Ratification is
simply because “Helix has not produced a signed copy.” [See APCO Brief p. 41]. Of course, APCO had the same
opportunity to seek and produce such a document in discovery (in which, among others, Camco was a participant).
28 The signed document was “not produced” (by any party) because it does not exist.

²⁴ Testimony of Robert Johnson.

1 agreement with APCO to (at least attempt to) perform its scope of work on the Project. See
2 *McClelland*, 105 Nev. at 509 (requiring proof of all four elements of novation).

3 **C. Helix Did Not Waive Its Rights Against APCO**

4 Similarly, APCO argues (wrongly) that Helix and CabinteTec waived all claims against
5 APCO by knowingly contracting to work on the Project for Camco/Gemstone and rolling their
6 retention over to Camco and Gemstone. Waiver is usually defined as “the voluntary and
7 intentional relinquishment of a known right” and may be either express or implied. *Udevco, Inc.*
8 *v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) citing 5 Williston On Contracts § 678
9 (3d ed. 1961). Waiver can be implied from conduct such as making payments for or accepting
10 performance which does not meet contract requirements; waiver can also be expressed verbally or
11 in writing. 17 Am.Jur.2d Contracts §§ 393, 396 (1964). Express waiver, when supported by
12 reliance thereon, excuses nonperformance of the waived condition. *Udevco* citing 5 Williston On
13 Contracts § 679 (3d ed. 1961); 17 Am.Jur.2d Contracts § 392 (1964); Restatement (Second) of
14 Contracts § 84(1) (1981). In *Udevco*, the Nevada Supreme Court allowed a subcontractor to
15 receive payment for extra work that was necessary, properly performed and accepted in spite of a
16 a contract provision requiring written change orders for such extra work when the developer
17 orally requested such modifications. 100 Nev. at 189.

18 Here, there is no evidence whatsoever that Helix waived its right to seek payment from
19 APCO. To the contrary, Helix has consistently maintained that, as APCO had repeatedly
20 instructed, it remained “under contract” with APCO. [See e.g., see Ex. 48; Ex. 23; Helix FF ¶¶
21 18-19]. APCO did nothing (such as providing a simple notice of termination) to change that
22 belief. [See e.g., Helix FF ¶18, TR1-70:15-19].²⁵ Indeed, as part of its review and proposed
23 revision to the Camco Ratification, Helix attempted to incorporate into the Helix Exhibit (Camco)
24 the last version of the Helix Exhibit (APCO) that was acceptable to Helix. [See Ex. 510-043].
25 Helix felt it had to do so “because we’re still under contract with APCO.” [TR125:11-25].²⁶

26 APCO’s argument that Helix (and other subcontractors) “rolled their retention account
27 over to Camco and Gemstone” [see APCO Brief p. 35] presupposes that Helix and the other

28 ²⁵ Testimony of Joe Pelan.

²⁶ Testimony of Robert Johnson.

1 subcontractors had any say in the matter, which they of course did not. Rather than voluntarily
2 relinquish known rights, the undisputed evidence is that APCO's decision to stop work created
3 mass confusion for Helix and other subcontractors. Further, and despite repeatedly requesting to
4 know what happened to APCO, Helix "never got a clear signal. So you stop asking after a while
5 because you get different messages from everybody. Our people had even asked in the field
6 what's going on, and people didn't know. So it was just confusion." [TR2-23:8-14].²⁷ Having put
7 Helix and its other subcontractors in such uncertain circumstances, APCO's assertion that the
8 subcontractors waived claims against APCO by continuing the work they were contracted to
9 perform is rich with irony indeed.

10 **V. Helix Is Entitled To Relief Pursuant to NRS 108.**

11 Citing *Nev. Nat'l Bank v. Snyder*, 108 Nev. 151, 157, 826 P.2d 56 (1992) abrogated on
12 other grounds by *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (2002),
13 APCO argues that it "is not legally liable for any deficiency judgment because it is not the party
14 responsible for any deficiency." [See APCO FFCL 287]. In *Snyder*, the Court ruled that the bank
15 whose priority over a contractor/lien claimant was established was not personally liable for the
16 deficiency created for the lien claimant because it was not a party to the underlying contract. 108
17 Nev. at 157.

18 **A. APCO Is A "Party Responsible."**

19 Unlike the defendant in *Snyder*, APCO certainly was a party to an agreement (whether
20 express or implied) giving rise to Helix's claims. In this regard it is hardly "unjust" to hold APCO
21 personally liable under NRS Chapter 108 (like it is contractually or as a matter of quasi-
22 contract/unjust enrichment) for the monies owed to Helix on account of Helix's work as a
23 subcontractor to APCO. This conclusion is codified at NRS 108.239(12), which provides:

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

27 NRS 108.239(12). Plainly APCO has been personally summoned, has appeared and is a party
28

²⁷ Testimony of Robert Johnson on cross-examination by APCO's counsel.

legally liable for the monies earned by but not paid to Helix.²⁸

B. Helix Is Entitled To A Lien And All Lien Rights.

In addition, and as argued in response to APCOs Motion for Summary Judgment on Lien Claimants' NRS Ch 108 Claim for Foreclosure of Mechanic's Lien, which this Court denied, the mere loss of priority does not "wipe out" Helix's lien claim. As the Nevada Supreme Court has repeatedly held, "whether work is entitled to a lien pursuant to NRS 108.22184 and whether it is entitled to priority over other encumbrances pursuant to NRS 108.225 are two entirely separate issues." *Byrd Underground*, 332 P.3d at 277 citing *J.E. Dunn* 127 Nev. at 81(emphasis added).

NRS 108.22132 defines a lien as "the statutory rights and security interest in ... property or any improvements thereon provided to a lien claimant by NRS 108.221 to 108.246, inclusive." (Emphasis added). Helix possesses and asserts statutory rights and security interests by virtue of its notice of lien (the validity and perfection of which APCO did not dispute at trial). Even where, as here, the adverse Priority Decision disposes of the *res* in which the lien claimants have a security interest, Helix retains its statutory rights as provided to them by NRS 108.221 to 108.246, inclusive.

One of those statutory rights is the right to adjudication as a "prevailing lien claimant." As defined in NRS 108.22156, a prevailing lien claimant is "a lien claimant to whom an amount is found due by a trier of fact on a notice of lien." The amount due is determined by NRS 108.237, which provides that:

1. The court shall award to a prevailing lien claimant, whether on its lien or on a surety bond, the lienable amount found due to the lien claimant by the court and the cost of preparing and recording the notice of lien, including, without limitation, attorney's fees, if any, and interest. The court shall also award to the prevailing lien claimant, whether on its lien or on a surety bond, the costs of the proceedings, including, without limitation, reasonable attorney's fees, the costs for representation of the lien claimant in the proceedings, and any other amounts as the court may find to be justly due and owing to the lien claimant.

NRS 108.237(1) (emphasis added). Accordingly, Helix is entitled to prove up and be awarded (against APCO and Camco) its lienable amounts, costs of the proceedings and

²⁸ See also NRS 108.238 ("The provisions of NRS 108.221 to 108.246, inclusive, must not be construed to impair or affect the right of a lien claimant to whom any debt may be due for work, materials or equipment furnished to maintain a civil action to recover that debt against the person liable therefor ...").

reasonable attorney's fees. Nothing in the Priority Decision alters these rights

VI. APCO's Failure to Pay Violated NRS Chapter 624

Recycling old arguments, and notwithstanding substantial prior briefing and this Court's Order granting partial summary judgment to Helix and other subcontractors precluding APCO's reliance on any Pay-if-Paid agreement, APCO contends that Helix's claims pursuant to NRS Chapter 624 must be dismissed. Specifically, APCO contends that NRS 624.624 permits it to deny payment of retention to Helix because Section 3.8 contains a payment schedule that requires certain conditions to be met, including APCO's receipt of payment from Gemstone.²⁹ APCO's contention must be rejected.

Generally, but without limitation, the Court previously 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 624.624(1) and may not fail to make such payment based on so-called "pay-if-paid" agreements ("Pay-if-Paid") that are against public policy, void and unenforceable except under very limited circumstances that do not exist in this case. Accordingly, the Court ruled that APCO and Camco may not assert or rely on any defense to their payment obligations, if any, to the party subcontractors that is based on a pay-if-paid agreement.

Despite the Court's ruling, APCO nonetheless argues that "payment of retention to Helix never became due under NRS 624" because "Helix never met the five preconditions in the subcontract's payment schedule." [See APCO FFCL 202]. One of those "preconditions is, of course, "receipt of final payment by [APCO] from Owner." [See Exhibit 45-004, ¶ 3.8(c)]. On such grounds alone, Section 3.8 is void and unenforceable. *See also*, discussion *supra*.

In addition, and as noted above, any condition stipulation or provision in an agreement that requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630, inclusive, or which limits those rights, or that relieves a higher-tiered contractor of any

²⁹ While APCO focuses this argument on Section 3.8, its arguments under NRS 624 are identically applicable (or more accurately, inapplicable) to any payment owing under the Helix-APCO Subcontract. As noted in previous briefing and argument, the "schedule of payments" for progress payments is "within 15 days after [APCO] actually receives payment for [Helix's] work from Owner."

obligation or liability imposed pursuant to NRS 624.624 to 624.630, inclusive, is “void and unenforceable.” NRS 624.628(3). As also noted above, if any portion of Section 3.8 prevents Helix from being paid in full it violates the Nevada Mechanic’s Lien Statute and is void and unenforceable because it impermissibly “require[s] 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). *See also*, NRS 108.2457(1) and (2)) and is a “term of a contract that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier” (NRS 108.2457(1).

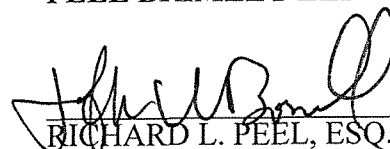
The public policy of Nevada “favors securing payment for labor and material contractors.” *Bullock*, 124 Nev. at 1117-18. Simply stated, APCO had an obligation to pay Helix for the monies it earned on the Project and cannot hide behind a Pay-if-Paid clause or any condition, stipulation or provision that interferes with Helix’s right to receive, and APCO’s obligation to make, prompt payment to Helix. Helix has waited more than nine years. Enough is enough.

CONCLUSION

Based on the foregoing and the evidence adduced at trial, the Court should adopt, in substantially similar form, Helix’s Proposed Findings of Fact and Conclusions of Law.

DATED this 23rd day of March 2017.

PEEL BRIMLEY LLP

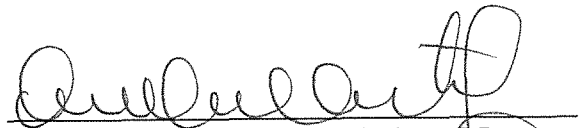
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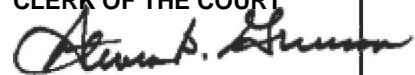
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 23rd day of March 2018, I caused the above and foregoing document entitled **HELIX ELECTRIC OF NEVADA, LLC'S RESPONSE TO APCO CONSTRUCTION'S POST-TRIAL BRIEF** 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 to the party(ies) and/or attorney(s) listed below; and/or
- ☒ to registered parties via Wiznet, the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____


An Employee of Peel Brimley LLP



1 FFCO

2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

4 APCO CONSTRUCTION, a Nevada
5 corporation,

6 Plaintiff,

7 v.

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

10 Defendant.

Case No.: 08A571228

Dept. No.: XIII

Consolidated with:

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

11 AND ALL RELATED MATTERS

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

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

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MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

JA006194

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.

1 2. **Progress Payments.**

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

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

7 ...

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

23 ...

24 (g) Upon receipt of the Progress Payment, General Contractor
25 shall promptly pay each Third-Party Service Provider the amount
26 represented by the portion of the Percentage of Work Completed
27 that was completed by such Third-Party Service Provider during
28 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.

properly, that all material suppliers are paid and lien releases have been provided, and that all certificates of occupancy were issued.²¹

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

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

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

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

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

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

5. Termination for Convenience

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

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

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

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

²⁴ Exhibit 2 at Section 5.07(f).

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

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:

13 ...

14 (ii) Accept assignment of any Third-Party Agreements pursuant
15 to Section 10.04.²⁹

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

18 **7. Assignment**

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

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

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

28 ²⁷ Exhibit 2 at Section 10.01.

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

²⁹ Exhibit 2 at Section 10.02(b)(2).

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

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 ▪

25 ³⁷ Bob Johnson is the Vice President of the major projects group at Helix.
26 Testimony of Bob Johnson (Helix), Day 1, p. 106. Mr. Johnson has negotiated more
27 than 50 subcontracts in his career, three to four of which have been with APCO.
28 Testimony of Bob Johnson (Helix), Day 2, p. 17. Mr. Johnson was involved in the
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
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
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.

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

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

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

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

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

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

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

27 ⁴³ Exhibit 45.

28 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
5 Exhibit 45. You spent some time talking about this yesterday.
6 A. Okay.
7 The Court: Which item is it, counsel?
8 Mr. Jefferies: Exhibit 45.
9 Q. Is it your position that APCO breached this agreement?
10 A. My assumption would be they breached it, yes.
11 Q. Okay. But this is the document that represents the
12 agreement between APCO and Helix for the project?
13 A. It is the agreement between APCO and Helix.⁵²

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

16 2. CabineTec

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

22 53. APCO entered into a subcontract with CabineTec on April 28, 2008 for the
23 delivery and installation of cabinets on the Project (the "CabineTec Subcontract")⁵⁴

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

26 ⁵² Testimony of Bob Johnson (Helix), Day 2, p. 9.

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

28 ⁵⁴ Exhibit 149, CabineTec Subcontract.

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
22 Nicholas Cox (CabineTec) Testimony Day 3, p. 13.

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

24 ⁵⁸ Exhibit 152.

25 ⁵⁹ Exhibit 152.

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

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

⁶² Exhibit 212-1.

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

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

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

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

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

...
...
...

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

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

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

- 24 100. On August 22, 2008, APCO sent a letter to the Clark County Building
- 25 Department advising that APCO was withdrawing as the general contractor for the Project.¹⁰⁴
- 26
- 27
- 28

29 ⁹⁹ Exhibit 218-10; Testimony of Steven Parry (Camco), Day 5, pp. 31-32. Mr.

30 Parry was Camco's project manager for the approximate four months that Camco

31 worked on the Project. Testimony of Steven Parry (Camco), Day 5, p. 24.

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

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

34 ¹⁰² Exhibit 23.

35 ¹⁰³ Testimony of Brian Benson (APCO), Day 3, p. 50; Testimony of Joe Pelan

36 (APCO), Day 1, p. 40.

37 ¹⁰⁴ 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
(APCO), Day 3, pp. 125-127. Exhibit 31 was APCO's August 2008 pay application and
its final pay application. Accordingly, the August 2008 application shows everything
that was done by APCO and its subcontractors through the end of August 2008.
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.

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

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

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

28 ¹¹⁸ 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,
p. 150; Exhibit 26; Exhibit 152; Testimony of Joe Pelan (APCO) Day 1, pp. 26, 46, 67
and 82.

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

25 ¹²⁵ Exhibit 23.

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

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

28 ¹²⁸ 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

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
8 shall engage third-party service providers." Do you see that?

9 A. Yes.

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

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

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

15 A. Yes.

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

19 A. Yes.

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

23 A. Yes.¹⁴⁶

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

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

29 ¹⁴⁴ Exhibit 162-23.

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

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

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

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

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.

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

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

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

28 ¹⁵⁸ 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
12 \$19,547.00, together with interest thereon at the highest legal
13 rate."¹⁶⁹

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

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

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
26 Supplemental Disclosure), and Exhibit 159 (CabineTec's Second Supplemental
27 Disclosure).

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

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
11 general contractor on the project?

12 A. Not to my knowledge.¹⁸²

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

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

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

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

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

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

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

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

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

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.

28 ²⁰⁷ 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
Camco—

7 A. Yeah.

8 Q. —for Helix?

9 A. Yes.²¹⁵

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

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

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

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

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

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

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

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

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

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

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

21 ²³¹ Exhibit 77.
22 ²³² Testimony of Bob Johnson (Helix) at Day 2, p. 28.
23 ²³³ Testimony of Joe Pelan (APCO) Day 1 at p. 10.
24 ²³⁴ Exhibit 512; Testimony of Bob Johnson (Helix) at Day 2, p. 29.
25 ²³⁵ Exhibit 314 and Testimony of Bob Johnson (Helix) Day 2, p. 10.
26 ²³⁶ Testimony of Bob Johnson (Helix) Day 2, p. 14.
27 ²³⁷ Compare Exhibit 58, Helix's last pay application to APCO to Exhibit 173,
28 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
23 Andy Rivera (Helix) Day 2, p. 76.

24 ²⁴⁰ Exhibit 173-1.

25 ²⁴¹ Exhibit 173-2

26 ²⁴² Exhibit 176-2.

27 ²⁴³ Exhibit 177-4.

28 ²⁴⁴ Exhibit 178-4.

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).

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

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

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

18

19 ²⁶⁸ NRS 624.624(1)(a).

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

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

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

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

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

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

26 NRS 624.626.

27 ²⁷⁰ *Id.*

28 ²⁷¹ *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
25 of Mary Jo Allen (APCO), Day 3 pg. 127 (as to Helix) and Testimony of Mary Jo Allen
(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.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
Consolidated with 80508

HELIX ELECTRIC OF NEVADA, LLC,

Appellant,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent.

JOINT APPENDIX
VOLUME 85

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CHRONOLOGICAL APPENDIX OF EXHIBITS

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06-24-09	Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint	JA000001- JA000015	1
08-05-09	APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA000016 – JA000030	1
04-26-10	CAMCO and Fidelity's Answer and CAMCO's Counterclaim	JA000031- JA000041	1
07-02-10	Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default	JA000042- JA000043	1
06-06-13	APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time	JA000044- JA000054	1
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (1) APCO's Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only	JA000055- JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317- JA000326	6

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
06-13-13	Docket Entry and Minute Order Granting APCO's Motion for Summary Judgment Against Gemstone	JA000327	6
08-02-17	Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements and Ex Parte Application for Order Shortening Time	JA000328- JA000342	6
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343- JA000379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380- JA000392	6
08-21-17	APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000393- JA000409	6/7
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410- JA000412	7
09-28-17	Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000413- JA000418	7
11-06-17	Peel Brimley Lien Claimants' Motion in Limine Nos. 1-6	JA000419- JA000428	7

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 1 – Notice of Entry of Order	JA000429 JA000435	7
	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.’s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC’s	JA000436- JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry’s Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000501- JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000512- JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC’s First Set of Request for Admissions to Camco Pacific Construction	JA000523- JA000533	8
11-06-17	Helix Electric of Nevada’s Motion <i>in Limine</i> Nos. 1-4	JA000534- JA000542	8
	Exhibit 1 – Notice of Entry of Order	JA000543- JA000549	8
	Exhibit 2 – Helix Electric of Nevada, LLC’s Amended Notice of 30(b)(6) Deposition of APCO Construction	JA000550 JA000558	8/9

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	Exhibit 3 - Excerpts from Brian Benson Deposition Transcript taken June 5, 2017	JA000559 JA000574	9
	Exhibit 4 – Excerpts from Mary Jo Allen’s Deposition Transcript taken July 18, 2017	JA000575- JA000589	9
11-06-17	APCO Construction, Inc.’s Omnibus Motion in Limine	JA000590 JA000614	9
	Exhibit 1 – Second Amended Notice of taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615- JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.’s Motion for Partial Summary Judgment Against APCO Construction	JA000625- JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting’s Deposition Transcript taken October 27, 2017	JA000647- JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679- JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731- JA000808	10/11
	Exhibit 6 – Subcontract Agreement dated April 17, 2007	JA000809- JA000826	11/12
	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827- JA000831	12
	Exhibit 8 – Email from Mary Bacon dated October 17, 2017	JA000832- JA000837	12
	Exhibit 9 – Email from Eric Zimbelman dated October 17, 2017	JA000838- JA000844	12
	Exhibit 10 – Special Master Report, Recommendation and District Court Order	JA00845- JA000848	12

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	Exhibit 11 – Plaintiff in Intervention, National Wood Products, Inc.’s Initial Disclosures Pursuant to NRCP 16.1	JA000849- JA000856	12
	Exhibit 12 – Plaintiff in Intervention, National Wood Products, Inc.’s First Supplemental Disclosures Pursuant to NRCP 16.1	JA000857- JA000864	12
	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865- JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC’s 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874- JA000897	12
11-14-17	Camco Pacific Construction Company, Inc.’s Opposition to Lien Claimants’ Motions in Limine Nos. 1-6	JA000898- JA000905	12
	Exhibit A – Nevada Construction Services Cost Plus GMP Contract Disbursement Agreement	JA000906- JA000907	12
	Exhibit B – Scott Financial Corporation’s April 28, 2009 letter to the Nevada State Contractor’s Board	JA000908- JA000915	2/13
	Exhibit C – E-mail from Alex Edelstein dated December 15, 2008 Re: Letter to Subs	JA000916- JA000917	13
	Exhibit D – Camco Pacific’s letter dated December 22, 2008	JA000918- JA000920	13
	Exhibit E – Order Approving Sale of Property	JA000921- JA000928	13

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11-14-17	APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions in Limine Nos. 1-4	JA000929- JA000940	13/14
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941- JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967- JA000969	16/17
	Exhibit 3 – Excerpts from the Deposition Transcript of Andrew Rivera taken July 20, 2017	JA000970- JA000993	17/18/19
11-14-17	Helix Electric of Nevada's Opposition to APCO Construction's Omnibus Motion in Limine	JA000994- JA001008	20
	Exhibit 1 – Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001009- JA001042	20
	Exhibit 2 - Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001043- JA001055	20
	Exhibit 3 – Special Master Order Requiring Completion of Questionnaire	JA001056- JA001059	20
	Exhibit 4 – Excerpts from the Deposition Transcript of the 30(b)(6) Witness for Helix Electric of Nevada taken July 20, 2017	JA001060- JA001064	20
	Exhibit 5 - Excerpts from the Deposition Transcript of David E. Parry taken June 20, 2017	JA001065 JA001132	20/21
11-15-17	APCO Construction, Inc.'s Reply in Support of its Omnibus Motion in Limine	JA001133 JA001148	21

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12-29-17	Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion in <i>Limine</i> 1-6	JA001161- JA001169	22
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC’s Motion in <i>Limine</i> 1-4	JA001170- JA001177	22
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part APCO Construction’s Omnibus Motion in <i>Limine</i>	JA001178- JA001186	22
01-03-18	Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001187- JA001198	22
01-04-18	Motion for Reconsideration of Court’s Order Granting Peel Brimley Lien Claimants’ Partial Motion for Summary Judgment to Preclude Defenses based on Pay-if-Paid provision on an Order Shortening Time	JA001199- JA001217	22
	Exhibit 1 – Subcontract Agreement (Helix Electric of Nevada, LLC)	JA001218- JA001245	22/23/24
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<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 3 – Subcontract Agreement (CabineTec)	JA001264- JA001281	24/25
	Exhibit 4 – Amended Notice of Lien	JA001282- JA001297	25
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	Exhibit 6 – Notice of Lien	JA001310- JA001313	25
	Exhibit 7 – Order Approving Sale of Property	JA001314- JA001376	25/26
	Exhibit 8 – Order Releasing Sale Proceeds from Court Controlled Escrow Account	JA001377- JA001380	26
	Exhibit 9 – Order Denying <i>En Banc</i> Reconsideration	JA001381- JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386- JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393- JA001430	26
	Exhibit 12 – Order Big D Construction Corp.’s Motion for Attorney’s Fees, Costs and Interest Pursuant to Judgment	JA001431- JA001435	26
	Exhibit 13 – Appellant’s Opening Brief (Padilla v. Big D)	JA001436- JA001469	26
	Exhibit 14 – Respondent’s Answering Brief	JA001470- JA001516	26/27
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01-09-18	Peel Brimley Lien Claimants’ Opposition to APCO Construction’s Motion for Reconsideration of Order	JA001552- JA001560	27

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01-10-18	Reply in Support of Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions on an Order Shortening Time	JA001561- JA001573	27
01-12-18	Joint Pre-Trial Memorandum [for APCO Construction, Inc., the Peel Brimley Lien Claimants and National Wood Products, LLC ONLY]	JA001574- JA001594	27/28
	Exhibit 1 – Exhibit List APCO	JA001595- JA001614	28
	Exhibit 2 – Helix Trial Exhibits	JA001615- JA001616	28
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA001617- JA001635	28
	Exhibit 4 – Cactus Rose Trial Exhibits	JA001636- JA001637	28
	Exhibit 5 – Heinaman Trial Exhibits	JA001638- JA001639	28
	Exhibit 6 – Fast Glass Trial Exhibits	JA001640- JA001641	28
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	Exhibit 9 - Amended <i>nunc pro tunc</i> order regarding APCO Construction, Inc.'s Omnibus Motion <i>in Limine</i> No. 7	JA001648- JA001650	28
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	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654- JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion <i>in Limine</i>	JA001658- JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661- JA00167	28/9/29
01-17-18	Transcript Bench Trial (Day 1)¹	JA001668- JA001802	29/30
	Trial Exhibit 1 - Grading Agreement (<i>Admitted</i>)	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement (<i>Admitted</i>)	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement (<i>Admitted</i>)	JA001869- JA001884	30

¹ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work <i>(Admitted)</i>	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work <i>(Admitted)</i>	JA001979- JA001980	32
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	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) <i>(Admitted)</i>	JA001988- JA002001	32
	Trial Exhibit 14 - Letter from W. Gochmour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause <i>(Admitted)</i>	JA002002- JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices <i>(Admitted)</i>	JA002011- JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks <i>(Admitted)</i>	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract <i>(Admitted)</i>	JA002015- JA002016	33

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	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks (<i>Admitted</i>)	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment (<i>Admitted</i>)	JA002025- JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP (<i>Admitted</i>)	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner (<i>Admitted</i>)	JA002082- JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement (<i>Admitted</i>)	JA002121- JA002146	35
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO (<i>Admitted</i>)	JA002147- JA002176	35/36
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	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice (<i>Admitted</i>)	JA002182- JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors (<i>Admitted</i>)	JA002186- JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions (<i>Admitted</i>)	JA002189 – JA002198	36

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	Exhibit 2 – Helix Trial Exhibits	JA002222- JA002223	36
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224- JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244- JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283- JA002284	38
	Trial Exhibit 17 – Video (Construction Project)	JA002285	N/A
	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A

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	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286- JA002306	39
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	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309- JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311- JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313- JA002314	40
	Exhibit 36 and 130 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002315- JA002316	40
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	Trial Exhibit 39 -Email from K. Costen to Subcontractors informing that Manhattan West Project no longer open	JA002321- JA002322	41
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	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357- JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359- JA002364	41/42
	Trial Exhibit 50 - Unconditional Waiver and Release re: Pay Application No. 8 with Copy of Payment	JA002365- JA002366	42
	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367- JA002368	42
	Trial Exhibit 52 -Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002369- JA002370	42
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<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 54 - Photo re: Building - 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002373- JA002374	42
	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375- JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377- JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379- JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382- JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392- JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406- JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413- JA002415	43
	Trial Exhibit 62 - Photo re: Building 8 & 9, South	JA002416- JA002417	43
	Trial Exhibit 63 - Photo re: Building 2 & 3, West	JA002418- JA002419	43
	Trial Exhibit 64 - Photo re: Building 2 & 3, West	JA002420- JA002421	43
	Trial Exhibit 65 - Photo re: Building 2 & 3, South	JA002422- JA002423	43

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424- JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435- JA002436	43
	Trial Exhibit 68 -Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002437- JA002438	43
	Trial Exhibit 69 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002439- JA002440	43
	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441- JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443- JA002444	43
	Trial Exhibit 72 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002445- JA002446	43
	Trial Exhibit 73 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002447- JA002448	43
	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448- JA002449	43

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450- JA002456	43
	Exhibit 77 - Helix Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA002457- JA002494	43
	Zitting Brothers Related Exhibits:		
	Trial Exhibit 100 - Check No. 14392 payable to Zitting (\$27,973.80); Progress Payment No. 7	JA002495- JA002497	44
	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498- JA002500	44
	Trial Exhibit 102 -Email from L. Lynn to J. Griffith, et al. re: Change Order No. 00011 “pending”	JA002501- JA002503	44
	Trial Exhibit 103- Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour	JA002504- JA002505	44
	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour with copies of change orders	JA002506- JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527- JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting (\$27,973.80)	JA002529	44
	Trial Exhibit 108 - Photo of Video (Construction Project)	JA002530- JA002531	44
	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532- JA002533	44

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	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534- JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536- JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538- JA002539	44
	Trial Exhibit 113 -Photo of Video (Construction Project)	JA002550- JA002541	44
	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542- JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544- JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546- JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551- JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564- JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO (\$33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568- JA002571	44
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572- JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576- JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578- JA002579	46
	Trial Exhibit 129 - Photo of Video (Construction Project)	JA002580- JA002581	46

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	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582- JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592- JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599- JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613- JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652- JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677- JA002713	48
	Trial Exhibit 171 - Work Order No. 100	JA002714- JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719- JA002730	48

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731- JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746- JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748- JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752- JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772- JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798- JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826- JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029- JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334- JA003338	55
	Helix Trial Exhibits:		
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57 /58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61

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	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65 /66/67/ 68/69/70/ 71/72 /73/74/75 /76/77
01-19-18	Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA005282- JA005283	78
01-18-18	Transcript – Bench Trial (Day 2)²	JA005284- JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) (<i>Admitted</i>)	JA005371- JA005623	78/79/80
01-19-18	Transcript – Bench Trial (Day 3)³	JA005624- JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint (<i>Admitted</i>)	JA005786- JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone (<i>Admitted</i>)	JA005802- JA005804	80

² Filed January 31, 201879

³ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 320 – June-August Billings—not paid to APCO (<i>Admitted</i>)	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec (<i>Admitted</i>)	JA005806-	80
	Trial Exhibit 536 – Lien math calculations (handwritten) (<i>Admitted</i>)	JA005807- JA005808	80
	Trial Exhibit 804 – Camco Correspondence (<i>Admitted</i>)	JA005809- JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien (<i>Admitted</i>)	JA005817- JA005819	81
01-24-18	Transcript – Bench Trial (Day 5)⁴	JA005820- JA005952	81
03-08-18	Letter to Judge Denton submitting Helix Electric of Nevada, LLC’s (Proposed) Findings of Fact and Conclusions of Law	JA005953- JA005985	81
03-08-18	Letter to Judge Denton submitting APCO Construction, Inc.’s Proposed Findings of Fact and Conclusions of Law	JA005986- JA006058	8/821
03-08-18	APCO Construction Inc.’s Post-Trial Brief	JA006059- JA006124	82/83
03-23-18	APCO Opposition to Helix Electric of Nevada, LLC’s Findings of Fact and Conclusions of Law	JA006125- JA006172	83/84
03-23-18	Helix Electric of Nevada, LLC’s Responses to APCO Construction’s Post-Trial Brief	JA006173- JA006193	84
04-25-18	Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO	JA006194- JA006264	84/85

⁴ Filed January 31, 201883

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05-08-18	APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA006265- JA006284	85
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285- JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357- JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370- JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386- JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399- JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403- JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407- JA006411	87
	Exhibit 7A – Billing Entries	JA006412- JA006442	87/88

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 7B – Time Recap	JA006443- JA006474	88
	Exhibit 8 – Declaration of Cody S. Munteer, Esq. in Support of Motion for Attorney’s Fees and Costs	JA006475- JA006478	88
	Exhibit 9 – APCO Construction, Inc.’s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479- JA006487	88
	Exhibit 10 – Depository Index	JA006488- JA006508	88/89
05-08-18	Helix Electric of Nevada, LLC’s Motion to Retax Costs Re: Defendant APCO Construction’s Memorandum of Costs and Disbursements	JA006509- JA006521	89
05-31-18	Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]	JA006522 JA006540	89
06-01-18	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.]	JA006541 JA006550	90
06-01-18	Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006551- JA006563	90
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564- JA006574	90

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575- JA006580	90
	Exhibit 3 – Prime Interest Rate	JA006581- JA006601	90
	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006583- JA006588	90
	Exhibit 5 – Summary of Fees	JA006589- JA006614	90
06-15-18	APCO Construction, Inc.’s Opposition to Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.’s Motions to Retax Costs	JA006615- JA006637	90/91
	Exhibit 1-A Declaration of Mary Bacon in Support of APCO’s Supplement to its Motion for Attorney’s Fees	JA006635 JA006638	91
	Exhibit 1-B – Declaration of Cody Munteer in Support of APCO’s Supplement to its Motion for Attorney’s Fees	JA006639- JA006916	91/92/93 94/95/96
06-15-18	Helix Electric of Nevada, LLC’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA006917 – JA006942	96
	Exhibit 1 – Notice of Entry of Staying the Case, Except for the Sale of the Property, Pending Resolution of the Petition before the Nevada Supreme Court	JA006943- JA006948	96

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 2 – Notice of Entry of Denying APCO Construction’s Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA006949- JA006954	96
	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955- JA006958	96
	Exhibit 4 – Order Denying <i>En Banc</i> Reconsideration	JA006959- JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA006964- JA006978	96
	Exhibit 6A – Interstate Plumbing and Air Conditioning, LLC’s Response to Special Master Questionnaire	JA006977- JA006980	96
	Exhibit 6B – Nevada Prefab Engineers, Inc.’s Response to Special Master Questionnaire	JA006981- JA006984	96
	Exhibit 6C – Zitting Brothers Construction, Inc.’s Response to Special Master Questionnaire	JA006985- JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal’s Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC’s Special Master Questionnaire	JA007002- JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006- JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037- JA007060	97

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042- JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff’s Motion to Dismiss	JA007047 JA007053	97
	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054- JA007056	97
	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057- JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction’s Omnibus Motion <i>in Limine</i>	JA007060- JA007088	97
	Exhibit 12 – Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC’s Motion in Limine (against APCO Construction)	JA007070- JA007078	97
	Exhibit 13 – Notice of Entry of Order Denying APCO Constructions’ Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA007079- JA007084	97
	Exhibit 14 – Notice of Entry of Order Denying APCO Construction’s Motion for Reconsideration of Order Granting Partial Summary	JA007085- JA007087	97

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Judgment Precluding Defenses Based on Pay-if-Paid Agreements		
	Exhibit 15 – Notice of Association of Counsel	JA007088- JA007094	97
06-15-18	Plaintiff in Intervention National Wood Products, Inc.’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007095- JA007120	97/98
06-15-18	Declaration of S. Judy Hirahara in support of National Woods’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007121- JA007189	98
06-18-18	Plaintiff in Intervention National Wood Products, Inc.’s Joinder to Helix Electric of Nevada, LLC’s Opposition to APCO Construction’s Motion for Attorneys’ Fees and Costs	JA007190- JA007192	99
06-21-18	Helix Electric of Nevada, LLC’s Notice of Non-Opposition to its Motion for Attorney’s Fees, Interest and Costs	JA007193- JA007197	99
06-29-18	APCO Construction, Inc.’s Reply in Support of its Motion for Attorney’s Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA007198- JA007220	99
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221- JA007222	99
	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223- JA007224	99

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
06-29-18	Helix Electric of Nevada, LLC's Reply Re: Motion to Retax	JA007225- JA007237	100
07-02-18	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA007238- JA007245	100
07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246- JA007261	100
08-08-18	Court's Decision on Attorneys' Fees and Cost Motions	JA007262- JA007280	100
09-28-18	Notice of Entry of (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281- JA007299	100
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300- JA007312	100/101
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007313- JA007315	101

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
08-06-19	Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA007316- JA007331	101
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]	JA007332- JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007336- JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345- JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395- JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance	JA007401- JA007517	102/103

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Solutions, Inc., E&E Fire Protection		
	Exhibit 6 – Order Dismissing Appeal in Part (Case No. 76276)	JA007518- JA007519	103
	Exhibit 7 – Order to Show Cause	JA007520- JA007542	103
	Exhibit 8 -Order Dismissing Appeal (Case No. 76276)	JA007524- JA007527	103
	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528- JA007541	103
	Exhibit 10 (Part One)	JA007537- JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543- JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586- JA008129	103/104/105 /106/107 /108/109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130- JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants’ Motions for Partial Summary Judgment Against Gemstone Development West	JA008139- JA008141	109
	Exhibit 10 (Part Two)	JA008142- JA008149	109

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10E – 131 Nev. Advance Opinion 70	JA008150- JA008167	109
	Exhibit 10F – Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status	JA008168- JA008170	109
	Exhibit 10EG – Notice of Entry of Granting Plaintiff’s Motion to Dismiss	JA008171- JA008177	109
	Exhibit 10H – Complaint re Foreclosure	JA008178- JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215- JA008230	109
	Exhibit 10J – APCO Construction’s Answer to Accuracy Glass & Mirror Company’s First Amended Complaint re Foreclosure	JA008231- JA008265	109/110
	Exhibit 10K – Answer to Accuracy Glass & Mirror Company, Inc.’s Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008266- JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008286- JA008290	110
	Exhibit 10M – Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291- JA008306	110
	Exhibit 10N – APCO Construction’s Answer to Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307- JA008322	110
	Exhibit 10O – Answer to Helix Electric’s Statement of Facts	JA008323- JA008338	110

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.'s Counterclaim		
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Interest and Costs	JA008339 JA008347	110
	Exhibit 10Q – Notice of Entry of Judgment [As to the claims of Helix Electric of Nevada, LLC Against Camco Construction Co., Inc.]	JA008348- JA008367	110
	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368- JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenetec Against APCO	JA008379- JA008450	110/111
	Exhibit 10T -WRG Design, Inc.'s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008451- JA008486	111
	Exhibit 10U – APCO Construction's Answer to WRG Design Inc.'s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468- JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.'s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc's Counterclaim	JA008484- JA008504	111

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505- JA008512	111
	Exhibit 10X – WRG Design, Inc.'s Answer to Camco Pacific Construction Company, Inc.'s Counterclaim	JA008513 JA008517	111
	Exhibit 10Y – Heinaman Contract Glazing's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518- JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction's Counterclaim	JA008531- JA008551	111
	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing's Motion for Attorneys's Fees, Interest and Costs	JA008552- JA008579	111/112
	Exhibit 10BB -Notice of Entry of Judgment [As to the Claims of Heinaman Contract Glazing Against Camco Construction Co., Inc.]	JA008561- JA008582	112
	Exhibit 10CC – Heinaman Contract Glazing's Answer to Camco Pacific Construction Company's Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589- JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party	JA008602- JA008621	112

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Complaint and Camco Pacific Construction, Inc.'s Counterclaim		
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622- JA008624	112
	Exhibit 10GG – HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625- JA008642	112
	Exhibit 10HH – APCO Construction's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643- JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658- JA008664	112
	Exhibit 10JJ -Defendants Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008665- JA008681	112
	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682- JA008685	112
	Exhibit 10LL – HD Supply Waterworks, LP's Voluntary Dismissal of Platte River Insurance Company Only Without Prejudice	JA008686- JA008693	112

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10MM – Scott Financial Corporation’s Answer to HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008694- JA008717	112/113
	Exhibit 10NN-Notice of Appeal	JA008718 JA008723	113
	Exhibit 10OO – Amended Notice of Appeal	JA008724- JA008729	113
	Exhibit 10PP – Notice of Cross Appeal	JA008730- JA008736	113
	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737- JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747- JA008755	113
	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875- JA008758	113
	Exhibit 13 – Stipulation and Order with Prejudice	JA008759- JA008780	113
	Exhibit 14 – Docket/United Subcontractors, Inc. dba Skyline Insulation’s Motion to Enforce Settlement Agreement and Enter Judgment	JA008762- JA008788	113
	Exhibit 15 – Notice of Entry of Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	JA008789- JA008798	113

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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08-16-19	APCO’s Opposition to Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA008811- JA008821	114
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822- JA008824	114
	Exhibit 2 – Order to Show Cause	JA008825- JA008828	114
	Exhibit 3 – Appellant/Cross-Respondent’s Response to Order to Show Cause	JA008829- JA008892	114/115/116
	Exhibit 4 – Order Dismissing Appeal	JA008893- JA008896	116
	Exhibit 5 – Chart of Claims	JA008897- JA008924	116
	Exhibit 6 – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company, Inc.’s Counterclaim	JA008925- JA008947	116/117
	Exhibit 7 – Answer to Cactus Rose’s Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.’s Counterclaim	JA008948- JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008966- JA008986	117/118

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Pacific Construction's Counterclaim		
	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987- JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998- JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011- JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025- JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039- JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111- JA009113	119
	Exhibit 15 – Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond	JA009114- JA009116	119
08-29-19	Helix Electric of Nevada LLC's Reply to APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II)	JA009117- JA009123	119

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	Dismiss All Unresolved Claims and/or (III) In The Alternative for a Rule 54(B) Certification as to Helix and APCO		
01-03-20	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification	JA009124- JA009131	119
01-29-20	Notice of Appeal	JA009132- JA009136	119/120
	Exhibit A – 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.]	JA009137- JA009166	120
	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148- JA009156	120
02-11-20	Case Appeal Statement	JA009157- JA009163	120
02-11-20	APCO's Notice of Cross Appeal	JA009164- JA010310	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorney's Fees and Costs; (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Party (4) Granting Plaintiff-in-Intervention National Wood Productions, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA009168- JA009182	120

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 2 – Notice of Entry of Order Granting Helix Electric of Nevada’s Motion for Rule 54(b) Certification	JA009183- JA00991	120

ALPHABETICAL APPENDIX OF EXHIBITS

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
08-05-09	APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA000016 – JA000030	1
05-08-18	APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA006265- JA006284	85
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285- JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357- JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370- JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386- JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399- JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403- JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407- JA006411	87
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<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 7B – Time Recap	JA006443- JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounter, Esq. in Support of Motion for Attorney’s Fees and Costs	JA006475- JA006478	88
	Exhibit 9 – APCO Construction, Inc.’s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479- JA006487	88
	Exhibit 10 – Depository Index	JA006488- JA006508	88/89
06-06-13	APCO’s Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO’s Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time	JA000044- JA000054	1
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO’s Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO’s Motion for Judgment Against Gemstone Only	JA000055- JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317- JA000326	6
02-11-20	APCO’s Notice of Cross Appeal	JA009164- JA010310	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.’s Motion for Attorney’s Fees and Costs; (2) Granting APCO Construction, Inc.’s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC’s	JA009168- JA009182	114

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Motion to Retax in Party (4) Granting Plaintiff-in-Intervention National Wood Productions, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply		
	Exhibit 2 – Notice of Entry of Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification	JA009183- JA00991	120
11-06-17	APCO Construction, Inc.'s Omnibus Motion <i>in Limine</i>	JA000590 JA000614	9
	Exhibit 1 – Second Amended Notice of taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615- JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	JA000625- JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting's Deposition Transcript taken October 27, 2017	JA000647- JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679- JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731- JA000808	10/11
	Exhibit 6 – Subcontract Agreement dated April 17, 2007	JA000809- JA000826	11/12
	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827- JA000831	12
	Exhibit 8 – Email from Mary Bacon dated October 17, 2017	JA000832- JA000837	12
	Exhibit 9 – Email from Eric Zimbelman dated October 17, 2017	JA000838- JA000844	12
	Exhibit 10 – Special Master Report, Recommendation and District Court Order	JA00845- JA000848	12

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	Exhibit 12 – Plaintiff in Intervention, National Wood Products, Inc.’s First Supplemental Disclosures Pursuant to NRCP 16.1	JA000857- JA000864	12
	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865- JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC’s 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874- JA000897	12
03-23-18	APCO Opposition to Helix Electric of Nevada, LLC’s Findings of Fact and Conclusions of Law	JA006125- JA006172	83/84
08-16-19	APCO’s Opposition to Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA008811- JA008821	114
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822- JA008824	114
	Exhibit 2 – Order to Show Cause	JA008825- JA008828	114
	Exhibit 3 – Appellant/Cross-Respondent’s Response to Order to Show Cause	JA008829- JA008892	114/115/116
	Exhibit 4 – Order Dismissing Appeal	JA008893- JA008896	116
	Exhibit 5 – Chart of Claims	JA008897- JA008924	116
	Exhibit 6 – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008925- JA008947	116/117

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 7 – Answer to Cactus Rose's Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.'s Counterclaim	JA008948- JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction's Counterclaim	JA008966- JA008986	117/118
	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987- JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998- JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011- JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025- JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039- JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111- JA009113	119
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	Exhibit 1-B – Declaration of Cody Mounteer in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006639- JA006916	91/92/93 94/95/96
11-14-17	APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions in Limine Nos. 1-4	JA000929- JA000940	13/14
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941- JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967- JA000969	16/17
	Exhibit 3 – Excerpts from the Deposition Transcript of Andrew Rivera taken July 20, 2017	JA000970- JA000993	17/18/19
08-21-17	APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000393- JA000409	6/7
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410- JA000412	7
03-08-18	APCO Construction Inc.'s Post-Trial Brief	JA006059- JA006124	82/83
11-15-17	APCO Construction, Inc.'s Reply in Support of its Omnibus Motion in Limine	JA001133 JA001148	21

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 1 – Special Master Report Regarding Discovery Status	JA001149- JA001151	21
	Exhibit 2 – Notice of Taking NRCP Rule 30(b)(6) Deposition of the Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA001152- JA001160	21
06-29-18	APCO Construction, Inc.’s Reply in Support of its Motion for Attorney’s Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.	JA007198- JA007220	99
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221- JA007222	99
	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223- JA007224	99
04-26-10	CAMCO and Fidelity’s Answer and CAMCO’s Counterclaim	JA000031- JA000041	1
11-14-17	Camco Pacific Construction Company, Inc.’s Opposition to Lien Claimants’ Motions in Limine Nos. 1-6	JA000898- JA000905	12
	Exhibit A – Nevada Construction Services Cost Plus GMP Contract Disbursement Agreement	JA000906- JA000907	12
	Exhibit B – Scott Financial Corporation’s April 28, 2009 letter to the Nevada State Contractor’s Board	JA000908- JA000915	2/13
	Exhibit C – E-mail from Alex Edelstein dated December 15, 2008 Re: Letter to Subs	JA000916- JA000917	13
	Exhibit D – Camco Pacific’s letter dated December 22, 2008	JA000918- JA000920	13
	Exhibit E – Order Approving Sale of Property	JA000921- JA000928	13
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06-15-18	Declaration of S. Judy Hirahara in support of National Woods's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs	JA007121- JA007189	98
06-13-13	Docket Entry and Minute Order Granting APCO's Motion for Summary Judgment Against Gemstone	JA000327	6
04-25-18	Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO	JA006194- JA006264	84/85
11-06-17	Helix Electric of Nevada's Motion <i>in Limine</i> Nos. 1-4	JA000534- JA000542	8
	Exhibit 1 – Notice of Entry of Order	JA000543- JA000549	8
	Exhibit 2 – Helix Electric of Nevada, LLC's Amended Notice of 30(b)(6) Deposition of APCO Construction	JA000550 JA000558	8/9
	Exhibit 3 - Excerpts from Brian Benson Deposition Transcript taken June 5, 2017	JA000559 JA000574	9
	Exhibit 4 – Excerpts from Mary Jo Allen's Deposition Transcript taken July 18, 2017	JA000575- JA000589	9
06-01-18	Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA006551- JA006563	90
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564- JA006574	90
	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575- JA006580	90
	Exhibit 3 – Prime Interest Rate	JA006581- JA006601	90

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC’s Motion for Attorneys’ Fees, Interest and Costs	JA006583- JA006588	90
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08-06-19	Helix Electric of Nevada LLC’s Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO	JA007316- JA007331	101
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.’s Against APCO Construction, Inc.	JA007332- JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.’s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC’s Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC’s Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.’s Motion to File a Surreply	JA007336- JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345- JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395- JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of	JA007401- JA007517	102/103

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 6 – Order Dismissing Appeal in Part (Case No. 76276)	JA007518- JA007519	103
	Exhibit 7 – Order to Show Cause	JA007520- JA007542	103
	Exhibit 8 -Order Dismissing Appeal (Case No. 76276)	JA007524- JA007527	103
	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528- JA007541	103
	Exhibit 10 (Part One)	JA007537- JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543- JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586- JA008129	103/104/105/ 106/107/108 109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130- JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants’ Motions for Partial Summary Judgment Against Gemstone Development West	JA008139- JA008141	109
	Exhibit 10 (Part Two)	JA008142- JA008149	109
	Exhibit 10E – 131 Nev. Advance Opinion 70	JA008150- JA008167	109
	Exhibit 10F – Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status	JA008168- JA008170	109

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10EG – Notice of Entry of Granting Plaintiff’s Motion to Dismiss	JA008171- JA008177	109
	Exhibit 10H – Complaint re Foreclosure	JA008178- JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215- JA008230	109
	Exhibit 10J – APCO Construction’s Answer to Accuracy Glass & Mirror Company’s First Amended Complaint re Foreclosure	JA008231- JA008265	109/110
	Exhibit 10K – Answer to Accuracy Glass & Mirror Company, Inc.’s Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008266- JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008286- JA008290	110
	Exhibit 10M – Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291- JA008306	110
	Exhibit 10N – APCO Construction’s Answer to Helix Electric’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307- JA008322	110
	Exhibit 10O – Answer to Helix Electric’s Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.’s Counterclaim	JA008323- JA008338	110
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC’s Motion for Attorney’s Fees, Interest and Costs	JA008339 JA008347	110
	Exhibit 10Q – Notice of Entry of Judgment [As to the claims of Helix Electric of Nevada, LLC Against Camco Construction Co., Inc.]	JA008348- JA008367	110

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368- JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenotec Against APCO	JA008379- JA008450	110/111
	Exhibit 10T -WRG Design, Inc.’s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008451- JA008486	111
	Exhibit 10U – APCO Construction’s Answer to WRG Design Inc.’s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468- JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.’s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc’s Counterclaim	JA008484- JA008504	111
	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505- JA008512	111
	Exhibit 10X – WRG Design, Inc.’s Answer to Camco Pacific Construction Company, Inc.’s Counterclaim	JA008513 JA008517	111
	Exhibit 10Y – Heinaman Contract Glazing’s Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518- JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing’s Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction’s Counterclaim	JA008531- JA008551	111

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing’s Motion for Attorneys’s Fees, Interest and Costs	JA008552- JA008579	111/112
	Exhibit 10BB -Notice of Entry of Judgment [As to the Claims of Heinaman Contract Glazing Against Camco Construction Co., Inc.]	JA008561- JA008582	112
	Exhibit 10CC – Heinaman Contract Glazing’s Answer to Camco Pacific Construction Company’s Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589- JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint and Camco Pacific Construction, Inc.’s Counterclaim	JA008602- JA008621	112
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622- JA008624	112
	Exhibit 10GG – HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625- JA008642	112
	Exhibit 10HH – APCO Construction’s Answer to HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643- JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks’ Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658- JA008664	112

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682- JA008685	112
	Exhibit 10LL – HD Supply Waterworks, LP's Voluntary Dismissal of Platte River Insurance Company Only Without Prejudice	JA008686- JA008693	112
	Exhibit 10MM – Scott Financial Corporation's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008694- JA008717	112/113
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	Exhibit 10OO – Amended Notice of Appeal	JA008724- JA008729	113
	Exhibit 10PP – Notice of Cross Appeal	JA008730- JA008736	113
	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737- JA008746	113
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	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875- JA008758	113
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	Exhibit 15 – Notice of Entry of Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	JA008789- JA008798	113
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06-21-18	Helix Electric of Nevada, LLC’s Notice of Non-Opposition to its Motion for Attorney’s Fees, Interest and Costs	JA007193- JA007197	99
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	Exhibit 2 – Notice of Entry of Denying APCO Construction’s Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA006949- JA006954	96
	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955- JA006958	96
	Exhibit 4 – Order Denying <i>En Banc</i> Reconsideration	JA006959- JA006963	96
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	Exhibit 6C – Zitting Brothers Construction, Inc.’s Response to Special Master Questionnaire	JA006985- JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal’s Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC’s Special Master Questionnaire	JA007002- JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006- JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037- JA007060	97
	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042- JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff’s Motion to Dismiss	JA007047 JA007053	97
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	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057- JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction’s Omnibus Motion <i>in Limine</i>	JA007060- JA007088	97

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	Exhibit 14 – Notice of Entry of Order Denying APCO Construction’s Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA007085- JA007087	97
	Exhibit 15 – Notice of Association of Counsel	JA007088- JA007094	97
11-14-17	Helix Electric of Nevada’s Opposition to APCO Construction’s Omnibus Motion in Limine	JA000994- JA001008	20
	Exhibit 1 – Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001009- JA001042	20
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	Exhibit 3 – Special Master Order Requiring Completion of Questionnaire	JA001056- JA001059	20
	Exhibit 4 – Excerpts from the Deposition Transcript of the 30(b)(6) Witness for Helix Electric of Nevada taken July 20, 2017	JA001060- JA001064	20
	Exhibit 5 - Excerpts from the Deposition Transcript of David E. Parry taken June 20, 2017	JA001065 JA001132	20/21
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03-23-18	Helix Electric of Nevada, LLC's Responses to APCO Construction's Post-Trial Brief	JA006173- JA006193	84
06-24-09	Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint	JA000001- JA000015	1
01-12-18	Joint Pre-Trial Memorandum [for APCO Construction, Inc., the Peel Brimley Lien Claimants and National Wood Products, LLC ONLY]	JA001574- JA001594	27/28
	Exhibit 1 – Exhibit List APCO	JA001595- JA001614	28
	Exhibit 2 – Helix Trial Exhibits	JA001615- JA001616	28
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA001617- JA001635	28
	Exhibit 4 – Cactus Rose Trial Exhibits	JA001636- JA001637	28
	Exhibit 5 – Heinaman Trial Exhibits	JA001638- JA001639	28
	Exhibit 6 – Fast Glass Trial Exhibits	JA001640- JA001641	28
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	Exhibit 9 - Amended <i>nunc pro tunc</i> order regarding APCO Construction, Inc.'s Omnibus Motion <i>in Limine</i> No. 7	JA001648- JA001650	28
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	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654- JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion <i>in Limine</i>	JA001658- JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661- JA001667	28/9/29
03-08-18	Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law	JA005986- JA006058	8/821
03-08-18	Letter to Judge Denton submitting Helix Electric of Nevada, LLC's (Proposed) Findings of Fact and Conclusions of Law	JA005953- JA005985	81
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	Exhibit 1 – Subcontract Agreement (Helix Electric of Nevada, LLC)	JA001218- JA001245	22/23/24
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	Exhibit 6 – Notice of Lien	JA001310- JA001313	25
	Exhibit 7 – Order Approving Sale of Property	JA001314- JA001376	25/26
	Exhibit 8 – Order Releasing Sale Proceeds from Court Controlled Escrow Account	JA001377- JA001380	26
	Exhibit 9 – Order Denying <i>En Banc</i> Reconsideration	JA001381- JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386- JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393- JA001430	26
	Exhibit 12 – Order Big D Construction Corp.’s Motion for Attorney’s Fees, Costs and Interest Pursuant to Judgment	JA001431- JA001435	26
	Exhibit 13 – Appellant’s Opening Brief (Padilla v. Big D)	JA001436- JA001469	26
	Exhibit 14 – Respondent’s Answering Brief	JA001470- JA001516	26/27
	Exhibit 15 – Appellant’s Reply Brief (Padilla v. Big D)	JA001517- JA001551	27
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	Exhibit A – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention	JA009137- JA009166	120

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05-31-18	Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]	JA006522 JA006540	89
06-01-18	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.]	JA006541 JA006550	90
09-28-18	Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281- JA007299	100
12-29-17	Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion <i>in Limine</i>	JA001178- JA001186	22
07-02-18	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA007238- JA007245	100
01-03-20	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification	JA009124- JA009131	119

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12-29-17	Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion <i>in Limine</i> 1-4	JA001170- JA001177	22
12-29-17	Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion <i>in Limine</i> 1-6	JA001161- JA001169	22
01-19-18	Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA005282- JA005283	78
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007332- JA007334	101
07-02-10	Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default	JA000042- JA000043	1
08-02-17	Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements and <i>Ex Parte</i> Application for Order Shortening Time	JA000328- JA000342	6
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343- JA000379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380- JA000392	6
11-06-17	Peel Brimley Lien Claimants' Motion <i>in Limine</i> Nos. 1-6	JA000419- JA000428	7
	Exhibit 1 – Notice of Entry of Order	JA000429	7

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	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.’s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC’s	JA000436- JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry’s Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000501- JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.’s First Set of Request for Admissions to Camco Pacific Construction	JA000512- JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC’s First Set of Request for Admissions to Camco Pacific Construction	JA000523- JA000533	8
09-28-17	Peel Brimley Lien Claimants’ Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA000413- JA00418	7
01-09-18	Peel Brimley Lien Claimants’ Opposition to APCO Construction’s Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001552- JA001560	27
06-18-18	Plaintiff in Intervention National Wood Products, Inc.’s Joinder to Helix Electric of Nevada, LLC’s Opposition	JA007190- JA007192	99

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07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246- JA007261	100
01-10-18	Reply in Support of Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions on an Order Shortening Time	JA001561- JA001573	27
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	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224- JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
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	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244- JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283- JA002284	38

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	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A
	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286- JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307- JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309- JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311- JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313- JA002314	40
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	HELIX Related Exhibits:		41
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	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357- JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359- JA002364	41/42
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	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367- JA002368	42
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	Trial Exhibit 53 -Photo re: Building - 2 & 3, West (No Exterior fixtures installed. Helix billed out at 90%)	JA002371- JA002372	42

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	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375- JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377- JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379- JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382- JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392- JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406- JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413- JA002415	43
	Trial Exhibit 62 - Photo re: Building 8 & 9, South	JA002416- JA002417	43
	Trial Exhibit 63 - Photo re: Building 2 & 3, West	JA002418- JA002419	43
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	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424- JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435- JA002436	43

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
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	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441- JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443- JA002444	43
	Trial Exhibit 72 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002445- JA002446	43
	Trial Exhibit 73 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002447- JA002448	43
	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448- JA002449	43
	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450- JA002456	43
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	Zitting Brothers Related Exhibits:		
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	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498- JA002500	44
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	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to \$30 per hour with copies of change orders	JA002506- JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527- JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting (\$27,973.80)	JA002529	44
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	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532- JA002533	44
	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534- JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536- JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538- JA002539	44
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	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542- JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544- JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546- JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551- JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564- JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO (\$33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568- JA002571	44

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572- JA002575	44/45
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	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578- JA002579	46
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	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582- JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592- JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599- JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613- JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652- JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
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	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
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<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 171 - Work Order No. 100	JA002714- JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719- JA002730	48
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731- JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746- JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748- JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752- JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772- JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798- JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826- JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029- JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334- JA003338	55
	Helix Trial Exhibits:		

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57/ 58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61
	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65/66/6 7/ 68/69/70 /71/72 /73/74/75/ 76/77
01-17-18	Transcript Bench Trial (Day 1)⁵	JA001668- JA001802	29/30
	Trial Exhibit 1 - Grading Agreement (Admitted)	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement (Admitted)	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement (Admitted)	JA001869- JA001884	30
	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone (Admitted)	JA001885- JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work (Admitted)	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work (Admitted)	JA001979- JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) (Admitted)	JA001981- JA001987	32

⁵ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) <i>(Admitted)</i>	JA001988- JA002001	32
	Trial Exhibit 14 - Letter from W. Gochmour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause <i>(Admitted)</i>	JA002002- JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices <i>(Admitted)</i>	JA002011- JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks <i>(Admitted)</i>	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract <i>(Admitted)</i>	JA002015- JA002016	33
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record <i>(Admitted)</i>	JA002017- JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks <i>(Admitted)</i>	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment <i>(Admitted)</i>	JA002025- JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP <i>(Admitted)</i>	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner <i>(Admitted)</i>	JA002082- JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement <i>(Admitted)</i>	JA002121- JA002146	35

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO (<i>Admitted</i>)	JA002147- JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice (<i>Admitted</i>)	JA002177- JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice (<i>Admitted</i>)	JA002182- JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors (<i>Admitted</i>)	JA002186- JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions (<i>Admitted</i>)	JA002189 – JA002198	36
01-18-18	Transcript – Bench Trial (Day 2)⁶	JA005284- JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) (<i>Admitted</i>)	JA005371- JA005623	78/79/80
01-19-18	Transcript – Bench Trial (Day 3)⁷	JA005624- JA005785	80
	Trial Exhibit 231 – Helix Electric’s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint (<i>Admitted</i>)	JA005786- JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix’s Motion for Partial Summary Judgment against Gemstone (<i>Admitted</i>)	JA005802- JA005804	80
	Trial Exhibit 320 – June-August Billings—not paid to APCO (<i>Admitted</i>)	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec (<i>Admitted</i>)	JA005806-	80

⁶ Filed January 31, 201879

⁷ Filed January 31, 2018

<u>Date</u>	<u>Description</u>	<u>Bates Number</u>	<u>Volume(s)</u>
	Trial Exhibit 536 – Lien math calculations (handwritten) (<i>Admitted</i>)	JA005807- JA005808	80
	Trial Exhibit 804 – Camco Correspondence (<i>Admitted</i>)	JA005809- JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien (<i>Admitted</i>)	JA005817- JA005819	81
01-24-18	Transcript – Bench Trial (Day 5)⁸	JA005820- JA005952	81
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300- JA007312	100/101

⁸ Filed January 31, 2018

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.

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

²⁹⁰ Testimony of Bob Johnson (Helix) Day 2 at pg. 36 and 37

1 41. Additionally, Helix never billed APCO for its retention and APCO never
2 received Helix's retention from Gemstone.

3 **CabineTec's claims against APCO**

4 **A. Breach of Contract**

5 42. In Nevada, there are four elements to a claim for breach of contract: "(1)
6 formation of a valid contract, (2) performance or excuse of performance by the plaintiff, (3)
7 material breach by the defendant, and (4) damages."²⁹¹

8 43. Exhibit 149 is the CabineTec Subcontract, which represents the valid, final
9 written agreement between APCO and CabineTec.

10 44. Exhibit 156, CabineTec's Complaint (page 7, paragraph 50) confirms that
11 CabineTec's principal claim against APCO is for \$19,547.00 for retention.

12 45. As a condition precedent to payment for retention, the CabineTec Subcontract
13 required CabineTec to properly comply with the retention payment schedule in Section 3.8.²⁹²
14 Specifically, Section 3.8 required: (1) completion of the entire project, (2) owner acceptance,
15 (3) final payment from owner to APCO, (4) final as-built drawings, and (5) releases.²⁹³

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

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

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

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

22 ²⁹² Exhibit 149, CabineTec Subcontract at Section 3.8.

23 ²⁹³ Exhibit 149, CabineTec Subcontract at Section 3.8.

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

25 ²⁹⁵ NRS 624.624(1)(a).

26 ²⁹⁶ *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386
27 P.3d 982 (Nev. 2016) (unpublished)("Because the parties' subcontract contained a
28 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.

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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] 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 ³⁰³NRCP 16.1(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

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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
disclosure).

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

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

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

2 72. In Nevada, “[e]very contract imposes upon each party a duty of good faith and
3 fair dealing in its performance and enforcement.”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

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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
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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.

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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).

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23 ³³⁴ CabineTec admittedly sent one billing for the full amount of CabineTec's
delivered (but uninstalled) cabinets that incorrectly included retention. Retention clearly
was not due under the retention payment schedule.

24 ³³⁵ 28 Kan. App. 2d 219, 15 P.3d 353 (2000)

25 ³³⁶ 116 Mich.App. 15, 321 N.W.2d 823 (1982)

26 ³³⁷ 542 S.W.2d 436 (Tex.App.1976), *rev'd in part on other grounds* 552 S.W.2d
425 (Tex.1977)

27 ³³⁸ 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)

1 submitted pay applications to Camco including all retention. CabineTec also
2 signed a ratification agreement with Camco.

- 3 • **APCO:** APCO was off-site and did not dictate or control the subcontractors'
4 work. It did not have any communication with Gemstone or the subcontractors
5 after August 2008. It did not participate in construction related meetings, did not
6 receive billings from subcontractors, or submit payment applications on behalf
7 of subcontractors. In fact, Helix never invoiced APCO for its retention.

8 117. The Contract contained a subcontract assignment provision that assigned
9 Gemstone APCO's subcontracts upon termination of the Contract.³⁴⁰

10 118. The Contract was incorporated into the subcontracts.³⁴¹

11 119. Once APCO left the Project, the Helix and CabineTec Subcontracts were
12 assigned to Gemstone per Gemstone's written notice to APCO.

13 120. Once Gemstone had those Subcontracts, it facilitated Camco's assumption of
14 those subcontracts.³⁴²

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

17 122. An assignment took place thereby making Gemstone/Camco the party
18 responsible for payment to the subcontractors.

19 **Helix and CabineTec waived any right to pursue APCO.**

20 123. "Waiver requires the intentional relinquishment of a known right."³⁴⁴

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

23 ³⁴⁰ Exhibit 2 at 10.4.

24 ³⁴¹ See Sections 1.1 of Helix and CabineTec subcontracts. Helix's Mr. Johnson
25 admitted it was Helix's practice to request and review an incorporated prime contract.
26 Testimony of Bob Johnson (Helix) Day 2, p.16.

27 ³⁴² See Exhibit 170/169 Helix's subcontract and Helix Amendment with Camco;
28 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).

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

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

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

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

ORDER

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

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

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345 *Id.*

346 *Id.*

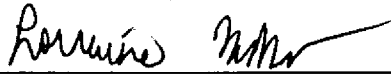
1 consolidated cases, the Court shall issue a separate Judgment or Judgments reflective of the
2 same at the appropriate time subject to further order of the Court.

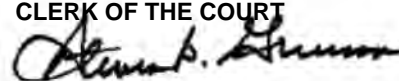
3 DATED this 24th day of April, 2018.

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.

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11 _____
12 LORRAINE TASHIRO
13 Judicial Executive Assistant
14 Dept. No. XIII
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22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 APCO CONSTRUCTION, a Nevada
25 corporation,

26 Plaintiff,

27 v.

28 GEMSTONE DEVELOPMENT WEST,
INC., A Nevada corporation,

Defendant.

Case No.: A571228

Dept. No.: XIII

Consolidated with:

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


**APCO CONSTRUCTION, INC.'S
MOTION FOR ATTORNEY'S FEES
AND COSTS AGAINST HELIX
ELECTRIC OF NEVADA, LLC AND
PLAINTIFF IN INTERVENTION
NATIONAL WOOD PRODUCTS, INC.**

AND ALL RELATED MATTERS

1 Pursuant to this Court's April 26, 2018 Findings of Fact and Conclusions of Law as
2 to the Claims of Helix Electric and CabineTec Against APCO ("FFCL"), APCO is the
3 prevailing party in this litigation. As a result, APCO is entitled to its attorneys fees and
4 costs pursuant to its subcontracts with Helix Electric of Nevada, LLC ("Helix") and
5 CabineTec, Inc. ("CabineTec"). Further, the Court has discretion to award APCO fees and
6 costs under two additional bases: (1) NRS 108.237 since a mechanic's lien against APCO
7 was not upheld and (2) NRCP 68 since Helix and CabineTec failed to beat offers of
8 judgment. APCO submits this motion in support of an award for: \$239,550.03 in
9 attorney's fees against Helix; \$208,259.25 in attorneys fees against National Wood;
10 \$33,423.31 in costs as against Helix and \$22,180.36 in costs against National Wood.

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DATED this 25th day of May, 2018.

By: 
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND STATEMENT OF FACTS**

3 This action arises out of a construction project in Las Vegas, Nevada known as the
4 Manhattan West Condominiums Project ("the Project or the "Property") owned by
5 Gemstone Development West, Inc. ("Gemstone"). As detailed in the FFCL,¹ APCO was
6 the original general contractor on the Project.² APCO entered into a subcontract with
7 Helix for electrical work on April 8, 2008,³ and entered into a subcontract with CabineTec
8 on April 28, 2008 for the delivery and installation of cabinets on the Project.⁴ Both
9 subcontracts provide for an award of attorneys fees to the prevailing party in the event
10 litigation was initiated:

11 18.5 In the event either party employs an attorney to institute a
12 lawsuit or to demand arbitration for any cause arising out of the
13 Subcontract Work, or any of the Contract Documents, the
prevailing party shall be entitled to all costs,⁵ attorney's fees
and other reasonable expenses incurred therein.

14 Helix initiated litigation against APCO on April 14, 2009.⁶ CabineTec initiated
15 litigation against APCO on February 6, 2009.⁷ National Wood Products, Inc. intervened in
16 the litigation on April 12, 2012,⁸ and was assigned CabineTec's claim.⁹ That assignment
17 confirmed:

18 Cabinetec hereby confirms that it has assigned the Manhattan
19 West Claims, including all claims that have been brought or
20 could have been brought in the APCO Lawsuit to National
21 Wood. Any amounts recovered by National Wood on the
22 Manhattan West Claims, net of all attorney's fees and costs,

23 ¹ The FFCL are incorporated into this Motion by this reference.

24 ² **Exhibit 1**, FFCL.

25 ³ Trial Exhibit 45, Helix Subcontract.

26 ⁴ Trial Exhibit 149, CabineTec Subcontract.

27 ⁵ Trial Exhibit 45, Helix Subcontract at Section 18.5; Trial Exhibit 149 CabineTec Subcontract at
Section 18.5.

28 ⁶ Trial Exhibit 77, Helix Complaint against APCO.

⁷ Trial Exhibit 156, CabineTec's Complaint against APCO.

⁸ **Exhibit 2**, National Wood's Motion to Intervene.

⁹ Trial Exhibit 3177, CabineTec Assignment to National Wood.

1 shall be credited to the Judgment in favor of National Wood
2 against CabineTec.¹⁰

3 In fact, in the Court's April 26, 2018 Findings of Fact and Conclusions of Law Re:
4 Camco, the Court found, "Cabinetec assigned all of its rights, title and interest in the
5 Manhattan West Claims to National Wood on or about January 22, 2018."¹¹ From that
6 point on, National Wood stepped in CabineTec's shoes for all purposes of CabineTec's
7 claim against APCO.¹² After more than 9 years of litigation, APCO is the prevailing party
8 and is entitled to an award of fees and costs.¹³

9 APCO seeks \$447,809.28 in attorney's fees and \$55,603.57 in costs, as detailed
10 below. As set forth below, the amount of attorney's fees requested is reasonable under the
11 *Brunzell* analysis.

12 **II. ARGUMENT**

13 **A. The subcontracts provide an award of attorney's fees to the prevailing** 14 **party.**

15 "Where a contract provision purports to allow attorney's fees in an action arising out
16 of the terms of the instrument, conventional rules of construction apply."¹⁴ "Thus, every
17 word must be given effect if at all possible, and a court should avoid an interpretation that
18 makes a contract provision meaningless."¹⁵

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21 ¹⁰ Trial Exhibit 3177.

22 ¹¹ **Exhibit 3**, Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and
23 Conclusions of Law Re: Camco at 2.

24 ¹² *3685 San Fernando Lenders, LLC v. Compass USA SPE, LLC (In re USA Commer. Mortg. Co.)*,
802 F Supp. 2d 1147, 1162-1163 (D. Nev. 2011), citing *Enright v. Mintz*, 116 Misc.2d 1084, 457
25 N.Y.S.2d 180, 181 (N.Y.Civ.Ct.1982).

26 ¹³ See FFCL; Section 18.5 of Helix and CabineTec Subcontracts.

27 ¹⁴ *Robert Dillon Framing, Inc. v. Canyon Villas Apartment Corp.*, No. 55897, 2013 WL 3984885,
at *4 (Nev. Apr. 17, 2013)(internal quotations omitted) citing *Dobron v. Bunch*, 125 Nev. 460,
464, 215 P.3d 35, 37-38 (2009) (quoting *Campbell v. Nocilla*, 101 Nev. 9, 12, 692 P.2d 491, 493
28 (1985)).

¹⁵ *Id.* citing *Musser v. Bank of America*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) (alteration in
original) (quoting *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966)).

1 As quoted above, Section 18.5 of the Helix and CabineTec Subcontracts requires an
2 award of attorney's fees to APCO as the prevailing party.¹⁶ "When there are multiple
3 parties and an award of attorney fees is entered against only one of the parties, the trial
4 court, to the extent practical, should apportion the fees so that only those fees incurred with
5 regard to that party are awarded."¹⁷

6 "A corollary to the rule is that the services for which reasonable fees may be
7 awarded include those rendered in connection with all claims, even if recovery of attorney
8 fees is not authorized for such claims, if they arise out of the same transaction and are so
9 interrelated that their prosecution or defense entails proof or denial of essentially the same
10 facts."¹⁸ "Therefore, when the causes of action involved in the suit are dependent upon the
11 same set of facts or circumstances and thus are 'intertwined to the point of being
12 inseparable,' the party suing for attorney's fees may recover the entire amount covering all
13 claims."¹⁹ See also *Jarvis v. Rocanville Corp.*,²⁰ (upholding a trial court's decision to
14 award fees when the fees were supported by sufficient evidence and were "inextricably
15 intertwined"); *Tony Gullo Motors I, L.P. v. Chapa*,²¹ ("Requests for standard disclosures,
16 proof of background facts, depositions of the primary actors, discovery motions and
17 hearings, *voir dire* of the jury, and a host of other services may be necessary whether a
18 claim is filed alone or with others. To the extent such services would have been incurred
19 on a recoverable claim alone, they are not disallowed simply because they do double
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22 ¹⁶ Trial Exhibit 45, Helix Subcontract at Section 18.5; Exhibit 149 CabineTec Subcontract at
Section 18.5.

23 ¹⁷ *Newport Pac. Capital Co. v. Waste*, 878 P.2d 136, 140 (Colo. App. 1994).

24 ¹⁸ *Flint & Assocs. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 624-25 (Tex. App.
1987), *writ denied* (June 29, 1988) (internal citations omitted).

25 ¹⁹ *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006) citing
26 *Gill Sav. Ass'n v. Chair King, Inc.*, 783 S.W.2d 674, 680 (Tex.App.-Houston [14th Dist.] 1989),
modified, 797 S.W.2d 31 (Tex.1990) (remanded to the trial court for reexamination of attorney's
27 fee award).

28 ²⁰ 298 S.W.3d 305, 320 (Tex. App. 2009)

²¹ 212 S.W.3d 299, 313 (Tex. 2006)

1 service.”). The law also acknowledges that attorneys can estimate the segregation of their
2 time per activity.²²

3 According to the FFCL, APCO defeated all of Helix and CabineTec’s claims.²³
4 After segregating fees where appropriate and splitting the time in trial, \$239,550.03 of
5 attorney’s fees has been allocated to Helix and \$208,259.25 has been allocated to
6 CabineTec/National Wood, representing a total fee award of \$447,809.28.²⁴ The specific
7 allocations are set forth in **Exhibits 7A and 7B.**²⁵

8 **B. National Wood is responsible for APCO’s attorneys fees defending**
9 **against its pursuit of CabineTec’s claim.**

10 CabineTec assigned its claim to National Wood.²⁶ The District Court for the District
11 of Nevada confirmed that “[i]t is hornbook law that an assignee steps into the shoes of the
12 assignor.”²⁷ “As a basic premise of assignment law, with assignment of rights comes
13
14

15 ²² See, e.g., *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314 (Tex. 2006) (“Here, Chapa’s
16 attorneys did not have to keep separate time records when they drafted the fraud, contract, or
17 DTPA paragraphs of her petition; an opinion would have sufficed stating that, for example, 95
18 percent of their drafting time would have been necessary even if there had been no fraud claim.”);
19 *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 73 (Tex.1997) (noting that claimant’s attorney
20 “testified that approximately twenty-percent of his time and fifteen-percent of his paralegal’s time
21 concerned issues predating the agreed judgment”); *Med. Specialist Group, P.A. v. Radiology*
22 *Assocs., L.L.P.*, 171 S.W.3d 727, 738 (Tex.App.-Corpus Christi 2005, pet. denied) (“In his
23 affidavit, Radiology Associates’ counsel... testified that his fees for the defense of the case totaled
24 \$460,087.00, and approximately forty percent of these fees were directly related to Saratoga’s
25 antitrust claims.”); *Flagship Hotel*, 117 S.W.3d at 566 n. 7 (“Flagship argues that the segregation
26 standard is difficult to meet. We disagree and note that segregated attorney’s fees can be
27 established with evidence of unsegregated attorney’s fees and a rough percent of the amount
28 attributable to the breach of contract claim.”).

23 ²³ **Exhibit 1**, FFCL.

24 ²⁴ See **Exhibit 7**, Declaration of Randy Jefferies, Esq.

25 ²⁵ If fees were incurred for a specific subcontractor, APCO’s attorneys allocated those fees directly
26 to that subcontractor. If fees were incurred in the general defense of the case (since the facts are so
27 intertwined), fees were allocated between the remaining subcontractors.

27 ²⁶ Trail Exhibit 3177, CabineTec assignment of claims to National Wood.

28 ²⁷ *3685 San Fernando Lenders, LLC v. Compass USA SPE, LLC (In re USA Commer. Mortg. Co.)*,
802 F Supp. 2d 1147, 1162-1163 (D. Nev. 2011) citing *Enright v. Mintz*, 116 Misc.2d 1084, 457
N.Y.S.2d 180, 181 (N.Y.Civ.Ct.1982).

1 assignment of duties.”²⁸ Essentially, “the assignee stands in the shoes of the assignor,
2 subject to all the equities and defenses which existed against it in the hands of the
3 assignor.”²⁹ “As Chief Judge Posner wrote, ‘the common law puts the assignee in the
4 assignor's shoes, whatever the shoe size.’”³⁰ See also *Childs Real Estate Co., Inc. v.*
5 *Shelburne Realty Co.*,³¹ (holding an assignee with notice of claims or equities against his
6 assignor ordinarily obtains no rights greater than those possessed by the assignor, but
7 simply stands in the shoes of the latter, subject to all equities which may be asserted
8 against the assignor).

9 And any attempt by National Wood to try and claim APCO is not entitled to fees
10 would be disingenuous. In its proposed findings of fact and conclusions of law to this
11 court, National Wood represented that National Wood would be entitled to attorney's fees
12 as the prevailing party: “Pursuant to the Contracts, specifically Section 18.5 of the APCO
13 Contract, National Wood is entitled to all costs, attorney's fees and any other reasonable
14 expenses incurred.”³² Relatedly, National Wood was actually awarded fees pursuant to
15 Section 18.5 pursuant to the Court's April 26, 2018 Findings of Fact and Conclusions of
16 Law RE Camco.³³ “Pursuant to the ratified Contracts with CAMCO, specifically Section
17 18.5 thereof, National Wood is entitled to all costs, attorney's fees, and any other
18 reasonable expenses incurred.”

19 Accordingly, an assignment of CabineTec's claims came with the burden of
20 CabineTec's duties. Since attorney's fees were authorized under the CabineTec
21 subcontract, as an assignee and intervenor, National Wood is liable for all fees attributable
22 to APCO's defense against CabineTec's claims.

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25 ²⁸ *Mept St. Matthews, Inc. v. Baltimore Masonry, Inc.*, 2014 WL 12551200 (D.C.Super.), 27.

26 ²⁹ *Corbin on Contracts*, § 51.1 (Volume 9, Revised Edition, 2011).

27 ³⁰ *Mept St. Matthews, Inc. v. Baltimore Masonry, Inc.*, 2014 WL 12551200 (D.C.Super.) citing
28 *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 289 (7th Cir. 2005).

³¹ 143 P.2d 697, 699 (Cal. 1943)

³² **Exhibit 3**, National Wood's Proposed Findings of Fact and Conclusions of Law at 12

³³ **Exhibit 4**, at 10.

1 **III. THE COURT MAY AWARD FEES PURSUANT TO NRS § 108.237 SINCE**
2 **HELIX'S LIEN CLAIM WAS NOT UPHELD.**

3 Pursuant to NRS 108.237(3), “[i]f the lien claim is not upheld, the court may award
4 costs and reasonable attorney's fees to the owner or other person defending against the lien
5 claim if the court finds that the notice of lien was pursued by the lien claimant without a
6 reasonable basis in law or fact.”³⁴

7 In this case, the Helix elected to pursue foreclosure of a mechanic's lien against
8 both Gemstone and APCO.³⁵ APCO was not the owner of the Project.³⁶ The Project was
9 already foreclosed upon and the proceeds were awarded to the lender.³⁷ And the Nevada
10 Supreme Court affirmed the decision of the trial court that the lender was entitled to keep
11 the Project and related proceeds, and the subcontractors (and APCO) were left with
12 nothing.³⁸ Thus, Helix could not legally foreclose upon the property.³⁹ As recognized by
13 the court, APCO is not legally liable for any deficiency judgment because it is not the
14 party responsible for any deficiency.⁴⁰ So in addition to an award of fees under the Helix
15 Subcontract, APCO is also entitled to fees under NRS 108.237(3) against Helix since it
16 had no reasonable basis in law or fact to continue to pursue a lien claim against APCO.

17 **IV. LASTLY, THE COURT HAS DISCRETION TO AWARD APCO FEES**
18 **SINCE BOTH SUBCONTRACTORS FAILED TO ACCEPT APCO'S**
19 **OFFERS OF JUDGMENT.**

20 NRCP 68 provides that at “any time more than 10 days before trial, any party may
21 serve an offer in writing to allow judgment to be taken in accordance with its terms and
22 conditions.”⁴¹ “If the offer is not accepted within 10 days after service, it shall be
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24 ³⁴ NRS 108.237(3)

25 ³⁵ Trial Exhibit 45, Helix Complaint.

26 ³⁶ **Exhibit 1**, FFCL at Conclusion of Law at 34.

27 ³⁷ *Id.* at 35.

28 ³⁸ *Id.* at 35.

³⁹ *Id.*

⁴⁰ *Id.* at 36; NRS 108.239(12); *Nev. Nat'l Bank v. Snyder*, 108 Nev. 151, 157, 826 P.2d 560, 563 (1992).

⁴¹ NRCP 68(a).

1 considered rejected by the offeree and deemed withdrawn by the offeror.”⁴² And “[i]f the
2 offeree rejects an offer and fails to obtain a more favorable judgment, (1) the offeree
3 cannot recover any costs or attorney’s fees and shall not recover interest for the period
4 after the service of the offer and before the judgment; and (2) the offeree shall pay the
5 offeror’s post-offer costs, applicable interest on the judgment from the time of the offer to
6 the time of entry of the judgment and reasonable attorney’s fees, if any be allowed,
7 actually incurred by the offeror from the time of the offer.”⁴³

8 The purpose of NRCP 68 is to promote and encourage settlement and save time and
9 money for the court system, the parties, and the taxpayers.⁴⁴ It rewards a party who makes
10 a reasonable offer to settle a lawsuit and punishes the party who refuses to accept such an
11 offer.⁴⁵ The operation of the offer of judgment law encourages litigants who receive offers
12 of judgment to settle lawsuits by forcing the offeree to make a “difficult choice” and
13 “balance the uncertainty of receiving a more favorable judgment against the risk of
14 receiving a less favorable judgment and being forced to pay the offeror’s costs and
15 attorney’s fees.”⁴⁶

16 On November 13, 2018, APCO made an offer of judgment to Helix for \$25,000 and
17 an offer of judgment to National Wood for \$35,000.⁴⁷ Neither party accepted APCO’s
18 offer. Since November 23, 2018, APCO has incurred \$113,622.77 of attorney’s fees
19 against Helix⁴⁸ and \$90,993.77 in attorney’s fees against National Wood.⁴⁹

20 **A. APCO incurred \$447,809.78 in attorney’s fees in connection with**
21 **defending against Helix and CabineTec’s claims, which is reasonable**
22 **under the *Brunzell* factors.**

23 ⁴² NRCP 68(e).

24 ⁴³ NRCP 68(f).

25 ⁴⁴ *Muije v. A N. Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990).

26 ⁴⁵ *Dillard Dep’t Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999).

27 ⁴⁶ *Bergmann v. Boyce*, 109 Nev. 670, 678, 856 P.2d 560, 565 (1993).

28 ⁴⁷ **Exhibit 5**, Offer of Judgment to Helix; **Exhibit 6**, Offer of Judgment to National Wood.

⁴⁸ \$11,132.42 represents fees incurred by Marquis & Aurbach and \$102,490.35 represents fees incurred by Spencer Fane. See Exhibits 7 and 8.

⁴⁹ \$9,190.42 represents fees incurred by Marquis & Aubach and \$81,803.35 represents fees incurred by Spencer Fane. See Exhibits 7 and 8.

1 Section 18.5 allows APCO, as the prevailing party, to recover all attorney's fees
2 incurred in connection with litigation of the claims arising out of the contract.⁵⁰ As noted,
3 APCO's fees total \$447,809.28 which is a reasonable amount.

4 The *Brunzell* factors govern the evaluation of whether the attorney's fees are
5 reasonable:

6 (1) the qualities of the advocate: [their] ability, [their] training, education,
7 experience, professional standing and skill; (2) the character of the work to
8 be done: its difficulty, its intricacy, its importance, time and skill required,
9 the responsibility imposed and the prominence and character of the parties
10 where they affect the importance of the litigation; (3) the work actually
11 performed by the lawyer: the skill, time and attention given to the work; (4)
12 the result: whether the attorney was successful and what benefits were
13 derived.⁵¹

14 Although courts consider each factor, no one factor predominates the consideration nor "be
15 given undue weight."⁵²

16 **1. The first *Brunzell* factor favors the amount of the requested**
17 **attorney's fees.**

18 As to the first factor, the qualities of the advocate, experienced attorneys from
19 Spencer Fane and Marquis Aurbach Coffing represented APCO in this litigation. John
20 Randall Jefferies and Mary Bacon at Spencer Fane, and Jack Juan, Micah Echols, and
21 Cody Mounteer at Marquis Aurbach Coffing performed the bulk of the work to obtain the
22 favorable results for APCO.⁵³

23 Mr. Jefferies is a partner at Spencer Fane, and has been practicing law in Nevada
24 since 1988.⁵⁴ He received his J.D. from the University of Utah in 1987, where he was
25 Order of the Coif.⁵⁵ He has an "AV" rating from Martindale Hubbell.⁵⁶ In addition, he

26 ⁵⁰ Trial Exhibit 45, Helix Subcontract at Section 18.5; Trial Exhibit 149, CabineTec Subcontract at
27 Section 18.5.

28 ⁵¹ *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

⁵² *Id.*

⁵³ **Exhibit 7**, Declaration of John Randall Jefferies in Support of APCO's Motion for Attorneys
Fees.

⁵⁴ *Id.*

⁵⁵ *Id.*

1 was named to *Arizona's Top Lawyers*®, in the construction litigation category in the AZ
2 Business Magazine in 2014, *Southwest Super Lawyers*® in the construction litigation
3 category from 2009-2016, *Best Lawyers in America*® for construction law in 2008, *Best*
4 *Lawyers in America*® for construction litigation from 2009-2016, *Best Lawyers in*
5 *America*® for commercial litigation, construction law, litigation-construction from 2005-
6 2017 and *Best Lawyers in America*® "Lawyer of the Year" in construction law in 2018.⁵⁷
7 His billed rate to APCO is \$400 per hour.⁵⁸

8 Ms. Bacon is an associate at Spencer Fane, and has been practicing law in Nevada
9 since 2013.⁵⁹ She received her J.D. from University of Southern California, was recently
10 named as one of the "Best Up and Coming Attorneys" by *Nevada Business Magazine*, and
11 was recognized as a *Mountain State Super Lawyer*.⁶⁰ Her billing rate is \$285 per hour.⁶¹

13 Jack C. Juan, Esq. is a shareholder at Marquis Aurbach Coffing.⁶² As an
14 experienced litigator, Mr. Juan has an excellent reputation in this community for
15 competency in civil litigation and quality legal work over 20 years.⁶³ Mr. Juan's skills
16 have been recognized as an AV Preeminent attorney, one of Nevada's *Legal Elite*, and a
17 *Mountain States Super Lawyer*.⁶⁴ His billed rate was \$300 per hour.⁶⁵

18 Mr. Echols is a director at Marquis Aurbach Coffing.⁶⁶ As the chair of the firm's
19 Appellate Department, he focuses his practice on civil appeals, including state and federal
20
21

22 ⁵⁶ *Id.*

23 ⁵⁷ *Id.*

24 ⁵⁸ *Id.*

25 ⁵⁹ *Id.*

26 ⁶⁰ *Id.*

27 ⁶¹ *Id.*

28 ⁶² **Exhibit 8**, Declaration of Cody Munteer, Esq.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ **Exhibit 8**, Declaration of Cody Munteer, Esq.

1 appeals, writ petitions and petitions for judicial review of agency decisions.⁶⁷ Mr. Echols
2 has participated in the briefing or argument for over 200 appellate matters.⁶⁸ He has argued
3 cases in both the Nevada Supreme Court and the Ninth Circuit.⁶⁹ Mr. Echols holds an AV
4 Preeminent rating from Martindale-Hubbell and is also recognized by Super Lawyers for
5 his appellate practice.⁷⁰ His billed rate was \$300 per hour.⁷¹

6 Cody S. Munteer, Esq. is a director at Marquis Aurbach Coffing.⁷² As an
7 experienced litigator, Mr. Munteer has an excellent reputation in this community for
8 competency in civil litigation and quality legal work.⁷³ Mr. Munteer's skills have been
9 recognized as one of Nevada's Legal Elite in 2013, 2014, 2015, 2016 and 2018 by the
10 Nevada Business Magazine, and a Mountain States Super Lawyer for 2017 and 2018.⁷⁴ His
11 billed rate was \$285-\$300 per hour.⁷⁵

12 Counsel for APCO undeniably and unequivocally have the professional standing
13 and skill justifying the reasonable rate and amount of attorneys' fees sought by APCO in
14 this case.

15 **2. The second *Brunzell* factor favors the amount of the requested**
16 **attorney's fees.**

17 The second factor, the character of the work, more than supports the requested
18 amount of attorney's fees. Early in this case, this Court deemed this case complex,⁷⁶ as it
19 involved "complex issues, multiple parties, difficult legal questions, or unusual proof

20 ⁶⁷ *Id.*

21 ⁶⁸ *Id.*

22 ⁶⁹ *Id.*

23 ⁷⁰ *Id.*

24 ⁷¹ *Id.*

24 ⁷² *Id.*

25 ⁷³ **Exhibit 8**, Declaration of Cody Munteer, Esq.

26 ⁷⁴ *Id.*

26 ⁷⁵ *Id.*

27 ⁷⁶ This Court's Order Setting Rule 16 conference, designating the Case as Complex Pursuant to
28 NRCP 16.1(f), and Continuing the Hearing on Defendant Scott Financial Corporation's Motion to
Dismiss Co-Defendants Vista Financial Services, L.L.C. and Tharaldson Motels II, Inc.'s
Counterclaim, entered on November 10, 2009, as "NRCP 16.1(f) Order."

1 problems...”⁷⁷ The parties ultimately disclosed tens of thousands of pages of documents
2 and prepared briefing on numerous motions.⁷⁸ The case also involved a writ petition before
3 the Nevada Supreme Court, resulting in a published decision.⁷⁹ At its height, this case
4 involved almost 100 parties,⁸⁰ and included the defense of numerable subcontractor claims
5 against APCO.⁸¹ Even APCO’s defense of Helix and CabineTec’s claims was complex, as
6 both had separate and complex factual histories, which proceeded through trial.⁸²

7 Therefore, the character of the work supports the reasonableness of the rates
8 charged and the attorney’s fees sought to be recovered by APCO.

9 **3. The third *Brunzell* factor favors the amount of the requested**
10 **attorney’s fees.**

11 The third factor, the work actually performed, justifies the requested award.
12 APCO’s attorneys spent over 9 years defending against Helix and CabineTec’s claims.⁸³
13 The hourly rate for the attorneys was between \$285 and \$400 per hour.⁸⁴ Spencer Fane and
14 Marquis & Aurbach billed hundreds hours in the defense of claims against APCO.⁸⁵ The
15 hourly billing rate for attorneys in the Las Vegas legal market of the caliber and with the
16 reputation of APCO’s counsel are at or in excess of those billed by APCO’s counsel in this
17 matter.⁸⁶

18 The attorneys working on this file only took those actions that were necessary to
19 ensure that APCO obtained a favorable result.⁸⁷ Discrete tasks on this file were assigned to
20 an attorney or paralegal based on the experience level needed to achieve the desired

21 ⁷⁷ Nev. R. Civ. P. 16.l(f).

22 ⁷⁸ See Docket and **Exhibit 10**, Litigation Services Index.

23 ⁷⁹ See generally *In re Manhattan W: Mech.’s Lien Litig.*, 131 Nev. Adv. Op. 70, 359 P.3d 125
(2015).

24 ⁸⁰ See Docket.

25 ⁸¹ See Docket.

26 ⁸² **Exhibit 1**, FFCL.

27 ⁸³ **Exhibit 7**, Declaration of John Randall Jefferies in Support of APCO’s Motion for Attorney’s
28 Fees.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

1 result.⁸⁸ This resulted in a lowering of the fees expended on behalf of APCO, as attorneys
2 with higher billing rates were not employed to conduct tasks that could have been
3 accomplished by an attorney or employee with a lower hourly rate.⁸⁹

4 **4. The fourth *Brunzell* factor favors the amount of the requested**
5 **attorney's fees.**

6 The fourth Brunzell factor is the result of the litigation. The fourth factor clearly
7 favors APCO. APCO was successful in defeating Helix and CabineTec's multiple claims
8 through trial.⁹⁰

9 As set forth above, the rate and amount of the attorney's fees sought by APCO is
10 reasonable and justified based upon application of the *Brunzell* factors. Therefore, this
11 Court should award the requested amount of \$447,809.78 of attorney's fees.

12 **B. The requested \$55,603.57 in costs and other reasonable expenses is**
13 **recoverable under the subcontracts.**

14 Section 18.5 provides for an award of costs and "other reasonable expenses" to the
15 prevailing party in the event litigation was initiated.⁹¹

16 Here, APCO has documented its recoverable costs incurred in the attached
17 memorandum of costs.⁹² These costs relate to court costs, filing fees, photocopying,
18 postage, research, court reporter fees, messenger services, process servers, travel and other
19 reasonable expenses.⁹³ APCO's costs were reasonable and necessary to its efforts to
20 defend against Helix and CabineTec's claims.⁹⁴ Additionally, the costs are not estimates,

21
22 ⁸⁸ *Id.*

23 ⁸⁹ *Id.*

24 ⁹⁰ See FFCL.

25 ⁹¹ Trial Exhibit 45, Helix Subcontract at Section 18.5; Trial Exhibit 149, CabineTec Subcontract at
26 Section 18.5.

27 ⁹² **Exhibit 9**, Memorandum of Costs and see *Docket* for any errata filed to the Memorandum of
28 Costs.

⁹³ **Exhibit 9**, Memorandum of Costs see *Docket* for any errata filed to the Memorandum of Costs.
See also *Thon v. Thompson*, 29 Cal. App. 4th 1546, 35 Cal. Rptr. 2d 346 (1994) (defendants were
entitled to award for travel expenses of their out-of-county attorneys in attending proceedings in
county of jurisdiction).

⁹⁴ **Exhibit 7**, Declaration of John Randall Jefferies.

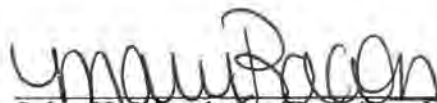
1 but the costs that were actually incurred by APCO.⁹⁵ Therefore, APCO requests an award
2 of costs in the amount of \$55,603.57 and other reasonable expenses.⁹⁶

3 **V. CONCLUSION**

4 Based on the foregoing reasons, APCO requests a judgment of \$272,973.34 for fees
5 and costs against Helix and \$230,439.61 for fees and costs against National Wood, with
6 simple interest accruing daily from the date judgment is entered until the judgment amount
7 owed to APCO is completely paid.

8 Dated this 8th day of May, 2018

9 **SPENCER FANE LLP**

10 

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27
28 ⁹⁵ **Exhibit 7**, Declaration of John Randall Jefferies.

⁹⁶ **Exhibit 9**, Memorandum of Costs.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Spencer Fane LLP and that a copy of the
3 foregoing **APCO CONSTRUCTION, INC.'S MOTION FOR ATTORNEY'S FEES**
4 **AND COSTS AGAINST HELIX ELECTRIC OF NEVADA, LLC AND PLAINTIFF**
5 **IN INTERVENTION NATIONAL WOOD PRODUCTS, INC.** was served by
6 electronic transmission through the E-Filing system pursuant to NEFCR 9, NRCP 5(b) and
7 EDCR 7.26 or by mailing a copy to their last known address, first class mail, postage
8 prepaid for non-registered users, on this 8th day of May, 2018, as follows:

9 **Counter Claimant: Camco Pacific Construction Co Inc**

10 Steven L. Morris (steve@gmdlegal.com)

11 **Intervenor Plaintiff: Cactus Rose Construction Inc**

12 Eric B. Zimbelman (ezimbelman@peelbrimley.com)

13 **Intervenor Plaintiff: Interstate Plumbing & Air Conditioning Inc**

14 Jonathan S. Dabbieri (dabbieri@sullivanhill.com)

15 **Intervenor: National Wood Products, Inc.'s**

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17 Richard L Tobler (rltldck@hotmail.com)

18 Richard Reincke (rreincke@caddenfuller.com)

19 S. Judy Hirahara (jhirahara@caddenfuller.com)

20 Tammy Cortez (tcortez@caddenfuller.com)

21 **Other: Chapter 7 Trustee**

22 Elizabeth Stephens (stephens@sullivanhill.com)

23 Gianna Garcia (ggarcia@sullivanhill.com)

24 Jennifer Saurer (Saurer@sullivanhill.com)

25 Jonathan Dabbieri (dabbieri@sullivanhill.com)

26 **Plaintiff: Apco Construction**

27 Rosie Wesp (rwesp@maclaw.com)

28 **Third Party Plaintiff: E & E Fire Protection LLC**

TRACY JAMES TRUMAN (DISTRICT@TRUMANLEGAL.COM)

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/s/ Adam Miller

an employee of Spencer Fane LLP

EXHIBIT 1

Steven D. Grierson

FFCO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

v.

GEMSTONE DEVELOPMENT WEST, INC., A
Nevada corporation,

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

AND ALL RELATED MATTERS

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
AS TO THE CLAIMS OF HELIX ELECTRIC
AND CABENETEC AGAINST APCO**

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

I. FINDINGS OF FACT

A. The Project

1. This action arises out of a construction project in Las Vegas, Nevada known as the Manhattan West Condominiums project in Clark County Nevada, (the "Project").
2. Gemstone Development West, Inc. ("Gemstone") was the owner and developer of the Project that contracted APCO to serve as the prime contractor.

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MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 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
23 17, 2007 but that contract is not the subject of this lawsuit. Exhibit 1.

24 ² Testimony of Joe Pelan (APCO) Day 1, pp. 19 and 22; Exhibit 13, p.1. Joe
25 Pelan is the General Manager of APCO Construction.

26 ³ Testimony of Joe Pelan (APCO), Day 1, p. 28.

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

⁵ Exhibit 2, Section 2.10.

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:

13 ...

14 (ii) Accept assignment of any Third-Party Agreements pursuant
15 to Section 10.04.²⁹

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

18 7. **Assignment**

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

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

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

28 ²⁷ Exhibit 2 at Section 10.01.

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

²⁹ Exhibit 2 at Section 10.02(b)(2).

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

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
5 Exhibit 45. You spent some time talking about this yesterday.
6 A. Okay.
7 The Court: Which item is it, counsel?
8 Mr. Jefferies: Exhibit 45.
9 Q. Is it your position that APCO breached this agreement?
10 A. My assumption would be they breached it, yes.
11 Q. Okay. But this is the document that represents the
12 agreement between APCO and Helix for the project?
13 A. It is the agreement between APCO and Helix.⁵²

14
15 51. Notably, the Helix Subcontract did not contain a provision purporting to waive
16 Helix's statutory lien rights.

17 2. CabineTec

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

23 53. APCO entered into a subcontract with CabineTec on April 28, 2008 for the
24 delivery and installation of cabinets on the Project (the "CabineTec Subcontract")⁵⁴

25 54. CabineTec's Subcontract contained the same retention and progress payment
26 schedules quoted above from the Helix Subcontract.⁵⁵
27
28

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

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

⁵⁴ Exhibit 149, CabineTec Subcontract.

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
22 Nicholas Cox (CabineTec) Testimony Day 3, p. 13.

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

24 ⁵⁸ Exhibit 152.

25 ⁵⁹ Exhibit 152.

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

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

⁶² Exhibit 212-1.

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 are aware, on July 17, 2008, APCO provided Gemstone
2 with written notice that unless APCO was paid the full amount of
3 \$3,434,396 by the close of business on Monday, July 28, 2008,
4 that APCO would stop work on the Project. Gemstone failed to
5 make full payment and has improperly withheld \$203,724.29,
6 despite having no good faith or proper statutory basis for
7 withholding the payment. AS a result, APCO is stopping work on
8 the Manhattan West Project effective immediately.
9 In addition to stopping work on the project, APCO hereby asserts
10 its rights to terminate the contract pursuant to NRS 624.610(2).
11 THIS LETTER SHALL SERVICE AS APCO'S NOTICE OF
12 INTENT TO TERMINATE THE MANHATTAN WEST
13 GENERAL CONSTRUCTION CONTRACT FOR GMP
14 PURSUANT TO NRS 624.606 THROUGH NRS 624.630,
15 INCLUSIVE, PURSUANT TO THE TERMS OF THE NRS
16 624.610, THE CONTRACT SHALL BE TERMINATED AS OF
17 AUGUST 14, 2008.⁶⁸

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.

29 ⁶⁸ Exhibit 6.

30 ⁶⁹ Exhibit 506, p. 1.

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

⁸⁸ Exhibit 215.

⁸⁹ Exhibit 215-2.

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 ManhattanWest, 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

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

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

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

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

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

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

¹⁰² Exhibit 23.

¹⁰³ Testimony of Brian Benson (APCO), Day 3, p. 50; Testimony of Joe Pelan
(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 I 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
26 182/185, CabineTec's first payment application to Camco.

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

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

2 127. Camco and Gemstone had several meetings and Gemstone contracted with
3 Camco to complete the Project on August 25, 2008.¹³⁵

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 I.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

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

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

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

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

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

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

28 ¹⁴¹ Exhibit 160-3.

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
8 shall engage third-party service providers." Do you see that?

9 A. Yes.

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

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

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

15 A. Yes.

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

19 A. Yes.

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

23 A. Yes.¹⁴⁶

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

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

¹⁴⁴ Exhibit 162-23.

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

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

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

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

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.