IN THE SUPREME COURT OF THE STATE OF NEVADA

CLUB VISTA FINANCIAL SERVICES, L.L.C., a Nevada limited liability company, THARALDSON MOTELS II, INC., a North Dakota corporation; and GARY D. THARALDSON,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,

Respondents.

and

SCOTT FINANCIAL CORPORATION, A North Dakota corporation; BRADLEY J. SCOTT; BANK OF OKLAHOMA, N.A., a national bank; GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation; ASPHALT PRODUCTS CORPORATION, dba APCO CONSTRUCTION, a Nevada Corporation

Real Parties in Interest.

Case No.:

District Court Case No.: A579963

PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, PETITION FOR WRIT OF PROHIBITION

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I. INTRODUCTION AND OVERVIEW OF RELIEF REQUESTED

This case challenges the District Court's arbitrary decision to strike Plaintiffs' jury demand while offering only an incomplete analysis of the issue. Even though the District Court had previously found that Plaintiffs' claims for misrepresentation and fraud with respect to certain contracts survived summary judgment,[1] the Court surprisingly enforced the jury trial waiver provisions within those contracts.[2] Such an arrangement now unfairly requires Plaintiffs to essentially try their case twice—once before the District Court and once before the jury. And, under the scenario offered by Defendants, there may even be a third trial before the District Court following the jury trial.[3] Certainly, such an arrangement does not promote judicial economy, nor does Nevada law require that allegations of fraud and misrepresentation relate directly to jury trial waiver provisions, as opposed to the contracts and written documents governing a transaction.[4]

Therefore, Plaintiffs seek this Court's relief in clarifying that their allegations of misrepresentation and fraud which were sufficient to overcome summary judgment are also sufficient for allowing this Court to order, at a minimum, a jury trial on these allegations prior to the jury trial on the substance of the contracts and other documents.[5]

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[1] Petitioner's Appendix ("PA") 4:754.

[2] PA 4:810.

[3] PA 4:849.

[4] See Tuxedo Int'l Inc. v. Rosenberg, 127 Nev. Adv. Op. No. 2, at 10–11, n. 4 (Feb. 10, 2011) (stating that this Court disagrees with United States Supreme Court law on the presumption of contractual waivers in that it is not "good policy for Nevada regarding general forum selection clauses, as we do not believe, in reality, a party is likely to be defrauded only in the inclusion of a forum selection clause but not defrauded by the contract as a whole."). While this law was not available at the time the District Court entered its order of bifurcation, this Court applies intervening case law to a pending matter, even if the face of the law of the case doctrine (which does not apply in this case). Hsu v. Clark Cty, 123 Nev. 625, 173 P.3d 724 (2007).

[5] PA 4:804–805.

Additionally, Plaintiffs also seek relief from this Court on the issue of the District Court's improperly-ordered bifurcation. The District Court relied upon inapposite case law to bifurcate Plaintiffs' claims for supposed non-jury trial claims and jury trial claims.[6] But, the District Court failed to evaluate, or make any specific findings, regarding the interrelation of the issues in the two anticipated trials, the prejudice to Plaintiffs, the duplication of proceedings, or the jury's confusion.[7] If this Court finds in favor of Plaintiffs with regard to the first issue presented in this writ petition dealing with the jury trial waivers, this second issue may be moot. However, even if the Court finds that Plaintiffs are not entitled to a jury trial on all issues, the Court should, nevertheless, allow an advisory jury with any outstanding issues to be decided by the District Court in post-jury proceedings since the prospect of two or even three trials creates a prejudicial situation for Plaintiffs. Plaintiffs would essentially have to prove their case more than once due to the related nature of the claims and issues. Moreover, if this issue is not resolved prior to trial through this original proceeding, Plaintiffs' potential appeal from a final judgment would be an inadequate remedy to properly address both the jury trial waiver and the bifurcations issues.[8]

Therefore, Plaintiffs request that this Court exercise its jurisdiction to entertain Plaintiffs' writ petition and decide these two important areas of law in Plaintiffs' favor. In deciding these issues of law, Plaintiffs request either a writ of mandamus or a writ of prohibition to compel the District Court to allow a jury trial on all claims, even if the jury's findings are advisory as to some issues.

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[6] PA 4:810.

[7] PA 809–812.

[8] See Lowe Enters. Residential Partners, L.P. v. Dist. Ct., 118 Nev. 92, 97, 40 P.3d 405, 408 (2002) ("If petitioners had to wait to challenge the district court's denial of their motion to strike the jury demand on appeal, petitioners would have too difficult a burden to meet on appellate review.").

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II. ISSUES PRESENTED

A. WHETHER THE DISTRICT COURT ERRED BY ENFORCING JURY TRIAL WAIVERS WITHIN CERTAIN CONTRACTS WHILE SIMULTANEOUSLY FINDING THAT THERE WERE FACTUAL ISSUES REGARDING PLAINTIFFS' MISREPRESENTATION AND FRAUD CLAIMS WITH RESPECT TO THOSE SAME CONTRACTS.

B. WHETHER THE DISTRICT COURT ERRED BY ORDERING BIFURCATION OF JURY TRIAL AND SUPPOSED NON-JURY TRIAL CLAIMS WHERE: (1) THE DISTRICT COURT RELIED UPON INAPPOSITE CASE LAW TO BIFURCATE JURY TRIAL AND SUPPOSED NON-JURY TRIAL CLAIMS; (2) THE ISSUES ARE INTERRELATED AND CANNOT BE TRIED SEPARATELY WITHOUT PREJUDICING PLAINTIFFS; AND (3) SEPARATE TRIALS WOULD CREATE UNNECESSARY CONFUSION AND DEPRIVE PLAINTIFFS OF A FAIR TRIAL.

III. STANDARDS OF REVIEW FOR WRIT PETITIONS

A. STANDARDS FOR REVIEWING THE RIGHT TO A JURY TRIAL.

Issues related to a party's constitutional right to a jury trial are reviewed de novo.[9]

B. STANDARDS FOR REVIEWING QUESTIONS OF LAW.

This Court reviews questions of law de novo.[10] Statutory interpretation is a question of law which this Court reviews de novo.[11] Although this Court generally reviews petitions for extraordinary relief with an abuse of discretion standard, this Court will still apply a de novo standard of review to questions of law and statutory interpretation in writ petition proceedings.[12]

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[9] Zamora v. Price, 213 P.3d 490, 492 (Nev. 2009) (citing Moldon v. Clark Cty., 188 P.3d 76, 79 (2008); Awada v. Shuffle Master, Inc., 123 Nev. 613, 618, 173 P.3d 707, 711 (2007)).

[10] See Birth Mother v. Adoptive Parents, 18 Nev. 972, 974, 59 P.3d 1233, 1235 (2002).

[11] Id.

[12] See Roberts v. State of Nev., 104 Nev. 33, 752 P.2d 31 (1988).

C. STANDARDS FOR REVIEWING PETITIONS FOR WRITS OF MANDAMUS AND PROHIBITION.

This Court has jurisdiction to grant the requested relief pursuant to Article 6, Section 4 of the Nevada Constitution: "[t]he court shall also have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." NRS 34.160 provides that "[t]he writ [of mandamus] may be issued by the Supreme Court . . . to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station . . ." For more than a century, this Court has interpreted Nevada's constitutional and statutory law to vest original jurisdiction in the Supreme Court to issue writs of mandamus.[13] Thus, this Court has the constitutional and statutory authority to issue a writ of mandamus when, in the Court's discretion, circumstances warrant.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse of discretion.[14] An abuse of discretion occurs if the district court's decision is arbitrary and capricious or if it exceeds the bounds of law or reason.[15] "Arbitrary and capricious" is defined as a willful and unreasonable action without consideration or in disregard of the facts or law, or without a determining principle.[16] "Abuse of discretion"

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[13] See State v. Dist. Ct., 116 Nev. 127, 994 P.2d 692 (2000) (citing State ex rel. Curtis v. McCollough, 3 Nev. 202 (1867)).

[14] See Beazer Homes, Nev., Inc. v. Dist. Ct., 120 Nev. 575, 97 P.3d 1132, 1135 (2004); NRS 34.160.

[15] Crawford v. State, 121 P.3d 582, 585 (Nev. 2005) (citation omitted).

[16] Elwood Invs. Co. v. Behme, 79 Misc.2d 910, 913, 361 N.Y.S.2d 488, 492 (N.Y. Sup. 1974).

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is defined as the failure to exercise a sound, reasonable, and legal discretion.[17] "Abuse of discretion" is a strict legal term indicating that the appellate court is of the opinion that there was a commission of an error of law by the trial court.[18] It does not imply intentional wrongdoing or bad faith, or misconduct, nor any reflection on the judge but refers to the clearly erroneous conclusion and judgment—one that is clearly against logic.[19]

A writ of prohibition is the appropriate remedy for a court's improper exercise of jurisdiction.[20] A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court.[21] "Jurisdictional rules go to the very power" of a court's ability to act.[22] A court must know the limits of its own jurisdiction and stay within those limits.[23] "A writ of prohibition will lie to prevent a district court from exceeding its jurisdiction."[24] Although an individual can appeal a final judgment, where there is no legal remedy, extraordinary relief is justified.[25]

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[17] BLACK'S LAW DICTIONARY, 11 (6th ed. 1990) (citing State v. Draper, 27 P.2d 39, 50 (Utah 1933)).

[18] Id.

[19] Id.

[20] See NRS 34.320; Smith v. Dist. Ct., 107 Nev. 674, 818 P.2d 849 (1991).

[21] See id.

[22] See Pengilly v. Rancho Santa Fe HOA, 116 Nev. 646, 5 P.3d 569 (2000).

[23] See id.

[24] See Cunningham v. Dist. Ct., 102 Nev. 551, 560, 729 P.2d 1328, 1334 (1986).

[25] See Zhang v. Dist. Ct., 103 P.3d 20 (Nev. 2004), *abrogated on other grounds by*, Buzz Stew, LLC v. City of N. Las Vegas,181 P.3d. 670 (Nev. 2008).

Petitions for extraordinary writs are addressed to the sound discretion of the Court and may only issue where there is no "plain, speedy, and adequate remedy" at law.[26] However, "each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted."[27] This Court will exercise its discretion to consider writ petitions, despite the existence of an otherwise adequate legal remedy, when an important issue of law needs clarification, and this Court's review would serve considerations of public policy, sound judicial economy, and administration.[28]

In the instant case, extraordinary relief is justified for two main reasons. First, this petition presents the Court with an opportunity to clarify an important issue of statewide significance dealing with invalid jury trial waivers in the face of fraud and misrepresentation in the inducement, especially when the District Court has concluded that there is a factual issue precluding summary judgment with respect to such claims. The resolution of this issue will provide guidance to similarly-situated litigants on bifurcation issues as well. This Court previously held in Lowe Enterprises Residential Partners, L.P. v. District Court that "the validity of contractual jury trial waivers is an important issue of Nevada law that needs clarification, and public policy would be served by our invocation of original jurisdiction."[29] Notably, Lowe did not involve or contemplate the facts of this case involving fraud and misrepresentation in the

[26] See NRS 34.330; State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 662 P.2d 1138 (1983).

[27] See Jeep Corp. v. Dist. Ct., 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (citing Shelton v. Dist. Ct., 64 Nev. 487, 185 P.2d 320 (1947)).

[28] See Dayside Inc. v. Dist. Ct., 119 Nev. 404, 407, 75 P.3d 384, 386 (2003), *overruled on other grounds by,* Countrywide Home Loans, Inc. v. Thitchener, 124 Nev. Adv. Op. No. 64, 192 P.3d 243 (2008).

[29] 118 Nev. 92, 97, 40 P.3d 405, 408 (2002).

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inducement of the document containing the waiver. This Court has also exercised its discretion to entertain issues involving the right to jury trial on the basis that the issue impacts judicial economy and administration.[30]

Second, the deprivation of Plaintiffs' constitutional right to a jury trial will be lost if the case is permitted to go to trial under the current bifurcation (or possible trifurcation, as proposed by Defendants).[31] In Lowe, this Court also stated, "If petitioners had to wait to challenge the district court's denial of their motion to strike the jury demand on appeal, petitioners would have too difficult a burden to meet on appellate review."[32] This case is no different than Lowe in the sense that allowing the parties to proceed to trial would require Plaintiffs, if aggrieved by the final judgment, to demonstrate that the result would have been different. As this Court previously recognized in Lowe, many jurisdictions address similar issues involving jury trial rights through original proceedings.[33] Therefore, this Court should exercise its original jurisdiction and order briefing to resolve these issues of public importance.

IV. RELEVANT FACTUAL BACKGROUND

Plaintiffs/Petitioners, Gary Tharaldson; Club Vista Financial Services LLC; and Tharaldson Motels II, Inc. (collectively "Plaintiffs"); and Defendants/Real Parties in Interest, Scott Financial Corporation; Brad Scott; Bank of Oklahoma; Gemstone Development West; and APCO Construction (collectively "Defendants") were involved in a complex, mixed-use, commercial real estate development project in Las Vegas,

[30] Cheung v. Dist. Ct., 121 Nev. 867, 869, 124 P.3d 550, 552 (2005).

[31] PA 4:849–850.

[32] 118 Nev. at 97, 40 P.3d at 408.

[33] Id.; 118 Nev. at 96–97, 40 P.3d at 407–408.

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Nevada known as "ManhattanWest."[34] ManhattanWest was designed and approved as a mixed-use community featuring more than 600 condominium residences and 200,000 square feet of shops, restaurants, office, and hotel space that has come to a complete standstill.[35] The claims in this case arise from a culmination of factors where the unusual structure of the financing is at the center of the dispute.[36]

A. GARY THARALDSON.

Gary Tharaldson ("Tharaldson") formed entities such as Club Vista Financial Services LLC ("CVFS"), a Nevada company; and Tharaldson Motels II, Inc. ("TM2I"), a North Dakota corporation.[37] TM2I is an owner and operator of motel and lodging properties. Tharaldson owns one hundred percent of the member interest in CVFS and a minority interest in TM2I.[38]

In 2006, Tharaldson decided to create a portfolio of quality real estate loans for the production of income, to be held by CVFS. Part of this portfolio included a first lien on ManhattanWest in the amount of $46 million, which was ultimately subordinated to the $100 million Senior Construction Loan at issue in this case.[39]

B. GARY THARALDSON AND BRAD SCOTT'S RELATIONSHIP.

Tharaldson began his business relationship with Brad Scott ("Scott") in 1992 while Scott was employed by Bismarck National Bank in North Dakota.[40] During that

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[34] PA 1:207–208.

[35] PA 1:215.

[36] PA 1:207.

[37] Id.

[38] Id.

[39] PA 1:225–226.

[40] PA 1:211.

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time, Scott arranged several loans to assist Tharaldson to finance acquisition or construction of motel properties.[41] In 2003, Scott founded his own company, Scott Financial Corporation ("SFC"), a North Dakota corporation specializing in corporate lending and lending services.[42] SFC earns income through origination fees on the loans and servicing fees equal to 0.5% of the loan balance.[43]

Since SFC's inception in 2003, Scott has continued to advise Tharaldson concerning business and financial matters. Upon the encouragement of Scott, Tharaldson and his entities exclusively relied on Scott and SFC as an investment broker and agent for credit underwriting, due diligence, and feasibility analysis for the SFC loans to protect Tharaldson's legal and financial interests.[44] This seemingly trustworthy reliance resulted in Tharaldson only investing in loans that Scott represented SFC had thoroughly underwritten, investigated, and concluded were prudent credit risks based on the financial merits of the underlying projects.[45] Scott regularly described his role as overseeing Tharaldson's lending division, and third parties perceived the same.[46]

C. THE MANHATTANWEST PROJECT.

Tharaldson was introduced to ManhattanWest through his previous investment in a related project, "Manhattan Project."[47] The developer of the Manhattan Project was

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[41] Id.

[42] Id.

[43] Id.

[44] Id.

[45] Id.

[46] PA 1:213–214.

[47] PA 1:215.

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Alexander Edelstein ("Edelstein").[48] SFC, through Scott, made the investment recommendation on both projects, where ManhattanWest was recommended due to Tharaldson's investment success of the original Manhattan Project.[49]

D. THE FRAUDULENT INDUCEMENT.

Tharaldson's decision to modify, extend, and subordinate the Prior Loan and Edelstein Loan for the ManhattanWest project, as provided in the Senior Loan Agreement and documents, was based upon the trust and confidence Tharaldson reposed in Scott and SFC.[50] The recommendations to Tharaldson were understood to be backed up by rigorous due diligence and assurances that the transaction was in the Plaintiffs' best interest. These understandings were based from Tharaldson's long-time business relationship with Scott.

SFC and Bank of Oklahoma ("BOK") as lead lenders co-underwrote and were supposed to have performed all due diligence investigations on the Senior Loan Agreement ("SLA") transaction.[51] The material promises made to Tharaldson include:

(1) Plaintiffs would receive a pay down on the Prior Loans aggregating $10 million. These loans, as amended, would become a second position lien on the project.[52]

(2) Fixed price construction agreement with a viable and reputable general contractor, which would deliver all required construction for approximately $79 million.[53]

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[48] Id.

[49] Id.

[50] PA 1:228.

[51] PA 1:228–232.

[52] PA 1:229.

[53] Id.

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(3) $60 million in "lender approved" pre-sales and/or pre-leases secured before vertical financing of the senior loan. This was to provide sources of repayment of the senior loan.[54]

(4) The May 2007 pro formas prepared by Edelstein and vetted by the Defendants, before Tharaldson made any commitments on the senior loan, estimated total acquisition, development, and construction costs to be $120 million. Total revenues were projected at $154 million giving a net income of $34 million.[55]

(5) Limited exposure on the guaranties to any excess of the senior loan balance on any given day over the fair market value of all collateral for the senior loan.[56]

Consistent with their prior course of dealing, Tharaldson relied upon the lending experience and expertise of Scott and SFC to perform the underlying due diligence and engage counsel to represent both SFC and Tharaldson in the proper administering of the loan.[57] However, with respect to the foregoing material promises above, Defendants omitted to identify that the Senior Loan transaction presented substantial conflicts of interest and failed to disclose material information concerning the project and the Senior Loan.

E. THE SENIOR LOAN.

In January 2008, the SLA was entered into by SFC, as lender, and Gemstone West as borrower.[58] The loan consisted of two separate notes: A Senior Debt Construction

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[54] Id.

[55] Id.

[56] PA 1:229–230.

[57] PA 1:232.

[58] PA 1:221.

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Note for $100,000,000 and a Senior Contingency Note for $10,000,000.[59] CVFS provided $400,000 to the senior loan.[60] BOK committed to purchase a $24 million participation in the loan. The purchase was made under the condition that BOK act as a Co-Lead to SFC.[61] As Co-Lead, BOK had a joint approval right over all advances under the loan and any change in terms from what had been reflected in the Credit Display. The finalization of the Senior Loan documents included Tharaldson's execution of the Loan under the heading "acknowledgement of guarantor" and the Guaranty.[62] Also in connection with the SLA, TM2I executed the TM2I Guaranty, and CVFS executed the CVFS Senior Participation Agreement.[63]

F. THE MISREPRESENTATIONS AND OMISSION OF MATERIAL INFORMATION.

In October 2007, SFC and Scott attached a pro forma to the Senior Loan Agreement that now projected a net income of $10 million, rather than the $34 million reflected in the pro forma that Scott and SFC had previously provided to Tharaldson.[64] Scott and SFC had clear knowledge the net income decreased two-thirds of the amount that had been represented to the Plaintiffs. This was evidenced by Defendants' initials on the pro forma itself.[65] This material information was not disclosed to Plaintiffs which

[59] Id.

[60] PA 1:224.

[61] PA 1:219.

[62] PA 1:226.

[63] Id.

[64] PA 1:233.

[65] Id.

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caused them to continue to make additional pre-construction loans and ultimately execute the Senior Loan documents.

The substantial deterioration in the projected financial viability of the project was also not disclosed to Tharaldson.[66] Had he been apprised of this information, he never would have agreed to the Senior Loan documents. Defendants also failed to disclose that their underwriting of the senior loan relied solely on the guaranty and the TM2I Guaranty, not on the financial viability of the project.[67] Instead, Tharaldson was misled into believing that SFC, Scott, and BOK had found the Senior Loan to be credit worthy on the basis of the merits and projected performance of the project.[68] This is another omission which would have prevented Tharaldson from signing the Senior Loan documents. In fact, Defendants orally told Tharaldson in October of 2008 (several months after the Senior Loan Agreement was entered into) that their underwriting of the loan had solely relied on the financial resources of the guarantors and not primarily on financial viability as Tharaldson had understood.[69]

G. FRAUD RELATING TO THE PRE-SALE CONDITION.

A condition to the funding of the Senior Loan was that $60 million in "lender approved" pre-sales and/or preleases must have occurred.[70] The pre-sales provide an assurance of true market interest in a project and a known source of revenue. Defendants approved sales that were made to insiders, affiliates, or other persons or entities related to

[66] Id.

[67] Id.

[68] Id.

[69] PA 1:233.

[70] Id.

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Gemstone West Inc.[71] These sales were used towards satisfaction of the pre-sales condition, where $2.5 million were sales closely related to Gemstone, including but not limited to family members. In addition, $17.5 million of the commercial pre-sales/ pre-leases were to Gemstone West affiliates including Gemstone Coffee House LLC; Gemstone Development LLC; and Santa Rita Management Co., an entity owned by Edelstein's father.[72] This amount made up one-third of the supposedly "qualified" pre-sales.

It was not until after closing the Senior Loan, many of the related party condominium sales and the $5.5 million office sale were cancelled.[73] The certification by SFC that the pre-sale condition had been satisfied and Bank of Oklahoma's acceptance of the certificate approving the advances under the Senior Loan were, therefore, fraudulent.

H. THE GUARANTIES.

The guaranties prepared by Defendants had an effect of negating protective provisions of the Nevada Law. Defendants inserted a waiver of all statutory rights of a guarantor under Nevada law, including the one action rule, the fair market defense, and the jury trial waiver.[74] Defendants also did not disclose to Tharaldson their insertion of these waiver provisions or explain their legal ramifications. The same can be stated with regard to TM2I, except in this guaranty, North Dakota law applied.[75] And, North Dakota does not provide a one action rule which also altered Plaintiffs' rights. The guaranties severely limited Tharaldson's knowledge to make a proper business decision. The

[71] PA 1:234.

[72] Id.

[73] PA 1:235.

[74] PA 1:238.

[75] Id.

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omission of material facts and misrepresentations as to the financials camouflaged what the true finance structure and ramifications would be to make a truly informed decision.

I. DEFAULT BY THE OBLIGORS.

The obligors on the ManhattanWest Loans have not made any of the required interest payments since September 2008 and are in monetary default.[76] Written notice of default was given to the obligors, and in response none of the defaults have been cured within the applicable cure periods.[77] The monies owed on the loans including interest and penalties continue to be due and payable. These events gave rise to the instant litigation.

V. RELEVANT PROCEDURAL HISTORY

A. PLAINTIFFS' COMPLAINT.

On July 1, 2009, Plaintiffs Gary Tharaldson and his entities Club Vista Financial Services LLC and Tharaldson Motels II, Inc filed their Complaint against Scott Financial Corporation; Bank of Oklahoma; Gemstone Development West, Inc.; and Asphalt Products Corporation.[78] Plaintiffs' Complaint states that the nature of their action was based upon fraud, breach of fiduciary duty, and breach of contract in addition to other claims arising from a highly unusual real estate finance deal.[79] The basic premise of Plaintiffs' Complaint is that the Defendants wrongfully induced Plaintiffs' participation in the financing transaction through multiple breaches of fiduciary duty, misrepresentations, and omissions.[80] Plaintiffs' claims against Defendants include

[76] PA 1:227–228.

[77] PA 1:228.

[78] PA 1:206–262.

[79] Id.

[80] Id.

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fraudulent misrepresentation, fraudulent concealment/omissions, constructive fraud, negligent misrepresentation/omission, securities fraud, defamation, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, acting in concert/civil conspiracy, breach of contract, breach of covenant of good faith and fair dealing, negligence, and declaratory judgment.[81]

B. PLAINTIFFS DEMAND FOR A JURY TRIAL.

Plaintiffs demanded a jury trial on July 7, 2009.[82] In response, Defendants filed a motion to strike the jury demand, arguing all claims relating to the guaranty would be covered by the jury trial waiver.[83] The District Court properly denied Defendants' motion without prejudice, stating the jury demand would have to be determined down the road how the case would be tried.[84]

C. THE DISTRICT COURT PROPERLY DENIES DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO FRAUDULENT CONCEALMENT/FRAUDULENT OMISSION.

The District Court found there were material issues of fact to be settled as to SFC's motion for summary judgment regarding the Plaintiffs' first, second, and third claims for relief, which were claims for fraudulent misrepresentation, fraudulent concealment/omission, and constructive fraud.[85] Although the District Court granted summary judgment in part, the District Court found there were issues to be resolved as to the fraud claims.[86]

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[81] Id.

[82] PA 2:263–265.

[83] PA 2:343–432.

[84] PA 3:526–528; PA 3:534–538.

[85] PA 4:754–757.

[86] Id.

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With regard to BOK's motion for summary judgment on Plaintiffs' third, seventh, and eleventh claims, the District Court found that genuine issues of material fact exist as to constructive fraud and breach of implied covenant of good faith and fair dealing.[87] Therefore, the District Court had already recognized that many of the operative agreements may not even be capable of enforcement, given the context in which they were obtained.

D. THE DISTRICT COURT PROPERLY DENIES EDELSTEIN'S MOTION FOR SUMMARY JUDGMENT AS TO FRAUDULENT MISREPRESENTATIONS AND FRAUDULENT CONCEALMENT.

The District Court allowed the relationship between CVFS and SFC to dictate its decision that representations made about pre-condition sales would arguably be made to CVFS.[88] The District Court noted that although there are no proscriptions against sales to family members, the Court was unable to say as a matter of law or fact that reasonable expectations of lenders in the transaction would not have meant qualified sales would have been deemed to refer to third parties dealing at arm's length.[89] The District Court was of the same view with respect to Plaintiffs' concealment claim.[90] The District Court also reasoned that genuine issues exist as to what Defendants did in conjunction with the Scott Defendants that would bear upon aiding and abetting of fiduciary duties owed by the Scott Defendants to Club Vista.[91] The District Court also recognized that these relationships were created on trust.[92] Thus, the motions were properly denied.

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[87] PA 4:754–757.

[88] PA 4:759–761.

[89] Id.

[90] Id.

[91] Id.

[92] Id.

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E. DEFENDANTS MOVE THE DISTRICT COURT TO BIFURCATE THE TRIAL WHILE AGAIN ASKING THE COURT TO STRIKE PLAINTIFFS' JURY DEMAND.

On January 10, 2011 Defendants asked the District Court to bifurcate this matter into two parts.[93] The first part would be for claims related to the guarantor Plaintiffs, Gary Tharaldson and Tharaldson Motel II Inc., while the second portion would be for claims related to Club Vista Financial Services.[94] Only a few weeks before trial, Defendants requested that the Court separate the case to hear the non-jury portion of the trial first based upon a renewed motion to strike Plaintiffs' jury demand.[95] And, Defendants proposed that the District Court allow a second trial with a jury to decide remaining claims that were not subject to any jury trial waiver.[96]

Plaintiffs opposed both requests and particularly the motion to strike the jury trial waivers in the guaranties because they were procured by fraudulent inducement and, thus, ineffective.[97] Plaintiffs set forth four main arguments: (1) Plaintiffs have a constitutional right to a jury trial on the fraudulent inducement claims relating to the guaranties; (2) it is not necessary to prove the jury waiver itself was specifically induced by fraud to avoid a jury trial waiver in a document that is voidable by fraudulent inducement; (3) there is a genuine issue of material fact regarding the validity of the jury waiver in the guaranties under Nevada law; and (4) if North Dakota law applies to the TM2I guaranty, then the waiver of jury trial in that document is legally invalid.[98]

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[93] PA 3:608–626.

[94] Id.

[95] Id.

[96] Id.

[97] PA 3:630–753.

[98] Id.

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F. THE DISTRICT COURT ERRONEOUSLY GRANTS BIFURCATION OF THE CASE AND UPHOLDS THE FRAUDULENTLY-OBTAINED JURY TRIAL WAIVERS.

The District Court reasoned in its written decision that according to Lowe, the conspicuous upper case jury waiver language just above the signature lines for use by Tharaldson is valid and enforceable as to all issues surrounding the validity and enforceability of the guaranties, despite the previous findings that fraud and misrepresentation were at least factual issues for trial.[99] Yet, the District Court did not make specific findings regarding the remaining Lowe factors.[100] The District Court surprisingly never acknowledged in this decision that it had previously found that questions of fact remain as to the fraud and its application to the contracts.

The District Court further reasoned that it was never directed to any North Dakota law to the effect that the right to a jury trial cannot be waived.[101] However, in the Plaintiffs' Opposition to bifurcate the trial and strike the jury demand, they explained that no North Dakota case has validated a contractual waiver of jury trial in bank financing documents.[102] Plaintiffs also pointed out that the North Dakota Constitution provides, "the right of trial by jury shall be secured to all, and remain inviolate…"[103]

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[99] PA 4:809–812; PA 4:818–820.

[100] Id. See Lowe Enters. Residential Partners, L.P. v. Dist. Ct., 118 Nev. 92, 97, 40 P.3d 405, 408 (2002) (outlining relevant factors to determine whether a jury trial has been waived, including: (1) the parties' negotiations concerning the waiver provision, if any; (2) the conspicuousness of the provision; (3) the relative bargaining power of the parties; and (4) whether the waiving party's counsel had an opportunity to review the agreement).

[101] PA 4:809–812; PA 4:818–820.

[102] PA 3:630–753.

[103] N.D. CONST. Art 1 Sec. 13.

Finally, the District Court concluded that some of Plaintiffs' claims were subject to the jury trial waiver, while others were not.[104] And, the District Court relied upon inapposite case law allowing the bifurcation of equitable and legal claims to arbitrarily bifurcate non-jury claims and jury trial claims without any regard to the prejudicial effect to Plaintiffs, especially in light of the fraud and misrepresentation claims that the District Court already allowed to be presented at trial.[105] Upon these issues, Plaintiffs seek extraordinary relief.

VI. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED BY ENFORCING JURY TRIAL WAIVERS WITHIN CERTAIN CONTRACTS WHILE SIMULTANEOUSLY FINDING THAT THERE WERE FACTUAL ISSUES REGARDING PLAINTIFFS' MISREPRESENTATION AND FRAUD CLAIMS WITH RESPECT TO THOSE SAME CONTRACTS.

1. Nevada Law Does Not Require a Showing that There Was Particularized Fraud/Misrepresentation as to the Jury Trial Waiver Provisions.

In order to be sustained as a valid contract, a contract must be fairly and knowingly made. Where fraud or mistake is alleged, the intent of the parties should be considered. Factors include: (1) the haste with which the contract was obtained; (2) the amount of consideration; (3) the circumstances surrounding the contract, including the intelligence of all parties involved; and (4) the actual presence of an issue of liability.[106] Total reliance upon a misrepresentation, however, is not required to void the contract. It is enough that the misrepresentation is part of the inducement to enter into the

[104] PA 4:809–812; PA 4:818–820.

[105] Id.

[106] Oh v. Wilson, 112 Nev. 38, 910 P.2d 276 (1996).

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transaction.[107] Even negligence on the part of the party seeking rescission will not bar relief when the misrepresentation was made intentionally by the other party.[108] A party who has made a false representation knowingly and with the intention that the other party be deceived by it should not be allowed to profit from the credulity or negligence of the party upon whom it had its intended effect.[109] It is, of course, true that one has an obligation not to speak falsely when inducing another to make a bargain; and, this worthy rule is recognized both by statute and case law in Nevada.[110]

In Nevada, an agreement induced by fraud or misrepresentation never came into being and there is no contract to enforce.[111] The facts that vitiate the guaranty must also vitiate the waiver of jury trial term of the guaranty. In fact, this Court recently explained that it is ***not*** good policy for Nevada that a party asserting fraud or misrepresentation be required to show particularized fraud for a certain contractual provision when there are indications that there was fraud or misrepresentation with respect to the entire agreement.[112] This Court's recent position on this topic is of utmost importance because it parted ways with federal case law and the United States Supreme Court.[113]

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[107] Pacific Maxon, Inc. v. Wilson, 96 Nev. 867, 619 P.2d 816 (1980).

[108] Id.

[109] Id.

[110] Violin v. Fireman's Fund Ins. Co., 81 Nev. 456, 406 P.2d 287 (1965).

[111] Awada v. Shuffle Master, Inc., 123 Nev. 613, 623, 173 P.3d 707, 713 (2007); Havas v. Bernhard, 85 Nev. 627, 631, 461 P.2d 857, 859–860 (1969).

[112] See Tuxedo Int'l Inc. v. Rosenberg, 127 Nev. Adv. Op. No. 2, at 10–11, n. 4 (Feb. 10, 2011) While Rosenberg analyzed forum selection clauses, there is no material difference between such a clause and a jury trial waiver clause for purposes of the stated policy.

[113] Id. (stating that this Court does not follow Scherk v. Alberto-Culver Co., 417 U.S. 506, 519, n. 14 (1974)).

State courts have consistently held that a claim for fraud in the inducement of a contract as a whole invalidates the jury trial waiver along with the rest of the contract.[114] Defendants asserted in the District Court that the Bank of N.Y. case requires a guarantor to show that "the waiver itself was induced by fraud."[115] That assertion is clearly false. The defense asserted in Bank of N.Y. went to the "validity of the guaranty" not to the "validity of the jury trial waiver."[116] Only federal courts, applying a different rule of federal common law, have held that a party must prove fraud specific to the jury trial waiver provision itself in order to avoid its impact.[117] However, this Court is not bound by any federal common law of jury waiver and should hold that if a guaranty as a whole is induced by fraud or other invalidating cause, the jury trial waiver is also invalidated. And, this Court has already parted ways with the federal cases making this distinction.

In the District Court, the Defendants asserted that there is "zero evidence that either Gary Tharaldson or TM2I were fraudulently induced into waiving their right to trial by jury."[118] As shown above, that is not the applicable legal standard. Plaintiffs are entitled to a jury trial on their fraudulent inducement claims relative to the two guaranties. And, the District Court previously found that there were issues of fact with regard to Plaintiffs' claims for fraud and misrepresentation.

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[114] See, e.g., Bank of N.Y. v. Royal Athletic Ind. Ltd., 637 N.Y.S.2d 478, 479 (App. Div. 1996); Cupps v. South Trust Bank, 782 So.2d 772, 776–777 (Ala. 2000); cf. C & C Wholesale, Inc. v. Fusco Management Corp., 564 So.2d 1259, 1261 (Fla. App. 1990) (jury trial waiver enforced because "there are no allegations that the lease is not legally enforceable as a whole").

[115] PA 3:608–626.

[116] See PA 3:635; PA 3:510.

[117] See PA 3:635–636.

[118] PA 3:608–626.

Even if specific fraud with respect to the jury waiver provision had to be proved, it has been proved here. The Tharaldson Guaranty is a contract between Tharaldson and SFC, and the TM2I Guaranty is a contract negotiated and prepared by SFC and provided by SFC to Tharaldson for signature and sent by SFC to BOK after it was signed.[119] The District Court had previously ruled that if Plaintiffs prove at trial that Tharaldson (individually and as a representative of TM2I) had a "right to expect trust and confidence in the integrity and fidelity of [SFC]," then a fiduciary relationship exists.[120] In that event, both guaranties are contracts between a fiduciary and the fiduciary's principal. Under those circumstances, SFC had a duty not to enter into either contract until it had first assured itself that Tharaldson's assent to those contracts was "with full understanding of his legal rights and of all relevant facts [SFC] knows or should know."[121] Scott has admitted that he took no steps to assure that Tharaldson's assent to these documents was with "full understanding of his legal rights" with respect to jury trial waiver provision (or any of the other unfair provisions of the two guaranties).[122] Nor did he advise Tharaldson that he should consult with independent legal counsel to review those important matters.[123] BOK, Co-Lead in the transaction in which it required the TM2I Guaranty, had no conversations at all with Tharaldson about any aspect of the TM2I Guaranty, including the jury trial waiver provision.[124] Under any circumstances,

[119] PA 3:663–715.

[120] PA 3:657–662.

[121] RESTATEMENT (SECOND) CONTRACTS § 173.

[122] PA 3:663–692.

[123] Id.

[124] PA 3:693–715.

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Plaintiffs' fraud in the inducement claims are sufficient to invalidate both guaranties, including their respective jury trial waivers.

2. The District Court Abused Its Discretion by Failing to Consider or Analyze the Minimum *Lowe* Factors.

Although the District Court's order striking Plaintiffs' jury demand relies upon Lowe Enterprises Residential Partners, L.P. v. District Court,[125] the District Court failed to consider and analyze the minimum standards set forth by this Court. Lowe adopted the holding of Whirlpool Finance Corp. v. Sevaux,[126] which requires the following minimum elements to be considered in determining whether a jury trial waiver was entered into knowingly, voluntarily, and intentionally:

> The factors to consider in determining whether a contractual waiver of the right to jury trial was entered into knowingly and voluntarily include: (1) the parties' negotiations concerning the waiver provision, if any, (2) the conspicuousness of the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party's counsel had an opportunity to review the agreement.

Instead of considering and analyzing each of these issues, the District Court's order simply states that because the jury trial waiver provision was conspicuous and near Tharaldson's signature, the waiver provision was somehow valid.[127] Had the District Court actually considered the remaining Lowe factors, the District Court would have been restrained to deny Defendants' motion to strike the jury demand.

It is undisputed that Tharaldson was not provided advance copies of any drafts of any of the Senior Loan Documents, including any guaranties, during the two week or so

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[125] 118 Nev. 92, 40 P.3d 405 (2002).

[126] Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994).

[127] PA 4:809–812.

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drafting process.[128] It is also undisputed that Tharaldson received the Senior Loan Documents on Wednesday, January 30, 2008, with each signature page "flagged by rose color post it" and with instructions from SFC to deliver them to Gemstone as soon as possible, so the documents could be returned that same day.[129] Further, by the time Tharaldson saw the documents, SFC's time deadline was imminent.[130]

Tharaldson also testified that he believed that Scott, SFC, and the Maslon law firm had reviewed the documents he was asked to sign and they were protecting his interests in doing so.[131] According to Tharaldson, "Brad, you know, he put in emails and told Ryan that Maslon was looking out for our best interests and that we didn't have to go get an outside attorney."[132] Tharaldson further explained,

> My complaint I guess is that Brad Scott and Scott Financial and Maslon when they reviewed this for me they didn't. Didn't point it out and not only that I didn't have a chance to read it, we were instructed to get them over to Alex within a short time after I received them. So I signed them with knowing the fact that they's already been review by the attorneys that Brad had returned, reviewed them for us, and so one of our issues is the one action rule. If I'd have known the One Action Rule my, Maslon's attorneys would have explained it to me they'd have never, they'd advise me not to, not to, to sign it.[133]

In short, they should have advised him on the guaranties, but did not. Nor was there any time for Tharaldson to have a separate attorney review the guaranties.[134]

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[128] PA 3:663–692; PA 3:716–724.

[129] PA 3:725–753.

[130] PA 3:725–749.

[131] Id.

[132] Id.

[133] Id.

[134] Id.

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The evidence also supports TM2I's contention that TM2I did not knowingly, intentionally or voluntarily waive its right to a jury trial. There is no corporate resolution establishing that TM2I authorized Tharaldson to execute the TM2I Guaranty in the first place. Moreover, Tharaldson testified he did not agree to have TM2I guaranty the BOK portion of the Senior Loan, he does not recall signing the TM2I Guaranty, and he did not know about it until early 2009.[135] Tharaldson also testified he did not have personal knowledge of the TM2I Guaranty, but that if he did sign it, his signature was obtained "fraudulently" and "through deception" since it was never discussed and was not supposed to be part of the agreement."[136]

Scott did not communicate to Tharaldson that the two guaranties contained jury trial waivers or discuss the scope of the waivers or their possible implications.[137] As a result of these circumstances, Tharaldson did not have actual knowledge that the two guaranties contained waivers of jury trial.[138] Although he signed the two guaranties at Scott's direction, being unaware of the jury trial provision he did not knowingly and intentionally waive jury trial rights or any other rights.[139]

Whether the jury trial waivers were made knowingly, intentionally, and voluntarily is a material issue in this case. And the evidence summarized above creates a genuine question of fact on that material issue. On these facts, a jury could find as a matter of fact that the jury trial waivers in both guaranties were ***not*** knowing, intentional,

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[135] Id.

[136] Id.

[137] PA 3:663–692.

[138] PA 3:723–724.

[139] Id.

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and voluntary. Therefore, it was error for the District Court to engage in an incomplete analysis of the Lowe factors and summarily strike Plaintiffs' jury demand.

3. According to North Dakota Law, the Pre-Litigation Jury Trial Waivers Are Not Valid or Enforceable.

In its order, the District Court concluded that it was not provided with any North Dakota law stating that the pre-litigation jury trial waivers were invalid.[140] However, the District Court overlooked the arguments in this regard which provide an alternative basis for allowing Plaintiffs' jury demand to stand.

In the District Court, Defendants contended that the TM2I Guaranty is governed by North Dakota Law. No North Dakota case has validated a contractual waiver of jury trial in bank financing documents. Cases of the North Dakota Supreme Court have, however, made clear that the right of jury trial in civil cases is a "basic and fundamental part of our system of jurisprudence," and other cases have held that important statutory rights of debtors cannot be contractually waived in advance of default on a loan. Thus, presented with this question, the North Dakota Supreme Court would conclude that the jury waiver in the TM2I Guaranty is invalid as a matter of law.

The North Dakota Constitution provides that "the right of trial by jury shall be secured to all, and remain inviolate. . . . All verdicts must be unanimous."[141] The North Dakota Supreme Court has repeatedly held that "the right to trial by jury in actions at law is a basic and fundamental part of our system of jurisprudence."[142] Further, the Supreme Court has noted that "This State has been more liberal than most in construing the guarantee of jury trial, indicating the high regard with which we value the right to a jury

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[140] PA 4809–812.

[141] N.D. CONST., Art. 1 § 13.

[142] C.I.T. Corp. v. Hetland, 143 N.W.2d 94, 100 (N.D. 1966); Cook v. Hansen, 499 N.W.2d 94, 97 (1993).

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trial."[143] Its "high regard [for] the right to a jury trial" led the North Dakota Supreme Court to hold that, before a debtor can be deprived of a jury trial on the ground that the action is "equitable" in nature, the lender must "clearly and unambiguously" show that "he is seeking an equitable remedy and that he is clearly entitled to it if he proves the facts as alleged in his complaint."[144] In Richman, the court held that the complaint sought money damages on a promissory note and recovery of specific property, not foreclosure (an equitable proceeding), and therefore the defendant must be accorded a jury trial. The same "high regard" for a right to civil jury trial articulated by the North Dakota Supreme Court has led other courts to hold that pre-litigation contractual jury trial waivers are entirely unenforceable.[145]

When it comes to overreaching by lenders attempting to secure advance contractual waivers of a debtor's rights, the North Dakota Supreme Court has resolutely invalidated pre-default waivers. In First Interstate Bank of New Rockford v. Anderson, the Court reaffirmed its earlier holdings that there can be no pre-default waiver by a mortgagor of his statutory right of redemption which right the Supreme Court "zealously guards."[146] Similarly, the North Dakota Supreme Court has held that a debtor's rights under the anti-deficiency statute cannot be waived prior to default.[147] A right to a jury trial entailing a unanimous verdict held to be "fundamental and sacred" under the North

[143] See, e.g., Dobervich v. Central Cass Pub. Sch. Dist. No. 17, 283 N.W.2d 187, 190 (N.D. 1979); Cook v. Hansen, 499 N.W.2d at 97.

[144] Gen. Elec. Credit Corp. v. Richman, 338 N.W.2d 814, 818 (N.D. 1983).

[145] Grafton Partners L.P. v. Superior Court, 116 P.3d 479, 483–484 (Cal. 2005) (California's "unwavering commitment" to the right to jury trial cited as a reason for invalidating all pre-litigation, contractual jury trial waivers); Bank South, NA v. Howard, 444 S.E.2d 799, 800–801 (Ga. 1994).

[146] 452 N.W.2d 90, 92 (N.D. 1990).

[147] Borsheim v. Owan, 467 N.W.2d 95, 98 (N.D. 1991); Brunsoman v. Scarlett, 465 N.W.2d 162, 167 (N.D. 1991).

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Dakota Constitution, is at least as important as whether the statutory redemption period is one year or six months, and at least as important as a guarantor's rights under the anti-deficiency statutes. Accordingly, if North Dakota Law applies to the TM2I Guaranty, as Defendants suggest, this Court should hold that the jury trial waiver is unconstitutional and invalid. Therefore, this Court should order the extraordinary relief that Plaintiffs seek based upon these alternative grounds.

4. Instead of Arbitrarily Concluding that Plaintiffs Waived Their Right to a Trial by Jury, the District Court Should Have Ordered a Jury Trial Limited to This Sole Issue of Waiver.

Since the District Court already found that there are factual issues with regard to Plaintiffs' fraud and intentional misrepresentation claims, the waiver issue with respect to Plaintiffs' jury demand should also be presented to a jury to first determine the sole issue of waiver. This precise issue was decided in Federal Housecraft, Inc. v. Faria:[148]

> I think there should be a reappraisal of our position in respect to a situation, such as this one, involving a defense which challenges the validity of the writing wherein the jury waiver clause appears. In such a case, it seems to me that the party resisting the contract should be afforded the privilege of a preliminary trial by jury on the defense of fraud.[149]

So, the decision of whether there was fraud can actually be made by the jury so that the waiver issue is not treated lightly, as in the instant case. Other courts weighing the available remedies when fraud is alleged with respect to contracts containing jury trial waivers have reached similar conclusions. For example, in Gardner and North Roofing and Siding Corp. v. Champagne, the court confirmed the holding of Faria and reasoned:

> One who disaffirms for fraud a writing which contains a jury waiver clause should not be required to proceed to trial without a jury until there has been a determination as to the validity of the disputed instrument.[150]

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[148] 216 N.Y.S.2d 113 (N.Y. App. Term 1961).

[149] Id. at 114 (citing Gotham Credit Corp. v. Brancaccio City Ct., 83 N.Y.S.2d 341 (1948)).

[150] 285 N.Y.S.2d 693, 415 (1967) (citations omitted).

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Since the District Court already found that fraud and intentional misrepresentation are issues for the jury to decide, with regard to the substance of Plaintiffs' claims, the District Court should have also allowed Plaintiffs to dispute the validity of the waiver before a jury. Therefore, this Court should, at a minimum, order Plaintiffs' fraud and misrepresentation issues to be tried before a jury on the issue of jury trial waivers prior to reaching the substance of the actual claims.

B. THE DISTRICT COURT ERRED BY ORDERING BIFURCATION OF JURY TRIAL AND SUPPOSED NON-JURY TRIAL CLAIMS WHERE: (1) THE DISTRICT COURT RELIED UPON INAPPOSITE CASE LAW TO BIFURCATE JURY TRIAL AND SUPPOSED NON-JURY TRIAL CLAIMS; (2) THE ISSUES ARE INTERRELATED AND CANNOT BE TRIED SEPARATELY WITHOUT PREJUDICING PLAINTIFFS; AND (3) SEPARATE TRIALS WOULD CREATE UNNECESSARY CONFUSION AND DEPRIVE PLAINTIFFS OF A FAIR TRIAL.

1. The District Court Abused Its Discretion in Relying Upon *Awada* to Bifurcate the Trial.

The District Court's bifurcation order cites to Awada v. Shuffle Master, Inc. for the proposition that the District Court had the authority to bifurcate non-jury issues from jury issues.[151] In reaching this conclusion, the District Court did not provide any analysis under NRCP 42—all to the detriment of Plaintiffs. At a minimum, this Court should require the District Court to properly analyze any bifurcation in light of the controlling rule, if necessary. Of course, if this Court rules in favor of Plaintiffs on the jury trial waiver issue, bifurcation may not even be necessary.

In the District Court, Defendants cited to Awada, claiming that bifurcation would not impair Plaintiffs' constitutional right to jury trial.[152] Awada does not support Defendants' argument for two separate and independently sufficient reasons. First, the

[151] 123 Nev. 613, 173 P.3d 707 (2007).

[152] PA 3:608–626.

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distributor in Awada had no jury-triable claims that could possibly have been adversely affected by trying the rescission claim first, resulting in an order of rescission. Second, the distributor in Awada voluntarily made an early election of remedies, which has not occurred in this case, and which Plaintiffs are entitled to delay until a jury verdict is rendered.

In Awada, the distributor filed a counterclaim which sought the equitable remedy of rescission of a licensing agreement with the developer. There is no indication that the distributor asserted a tort claim for fraud, a contract claim for damages, or any other claim that might have had common issues of fact with the rescission claim.[153] In the absence of such claims having been asserted, there was no risk that trying the equitable claim first could intrude on the distributor's right to a jury trial on any other claims. In this case, however, CVFS's claims that the Mezzanine Deeds of Trust Subordination Agreement in which it subordinated $46 million in first position liens, and the Nonrecourse Participation Agreement through which it also purchased a loan participation, were induced by the very same acts and omissions by the very same Defendants as the claims of Tharaldson and TM2I to avoid the Tharaldson Guaranty and the TM2I Guaranty.[154]

Also in Awada, prior to litigation, the distributor sent a letter to the developer notifying that it was rescinding the licensing agreement due to fraud and returned to the developer everything he had provided to the distributor in connection with the licensing agreement.[155] In its counterclaim, the distributor sought rescission, not damages, thereby

[153] 123 Nev. at 617–618, 173 P.3d at 710.

[154] PA 1:225.

[155] Id., 123 Nev. 617, 173 P.3d at 709.

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confirming its early election not to sue for damages. Under Nevada law, such an election does not have to be made prior to obtaining a jury verdict.[156]

Trial of the "guarantor related claims" first, in a non-jury trial, would force Plaintiffs to elect prematurely whether to affirm the guaranties and seek breach of contract and tort damages, or whether to elect the equitable remedy of rescission, without the benefit of a jury verdict. Where, as here, the jury claims and the alleged non-jury claims are "inextricably intertwined" an order of bifurcation with trial first of the non-jury claims violates the fundamental right of jury trial.[157] Therefore, because there is no logical analogy between the equitable claims/legal claims and non-jury claims/jury claims, Awada did not excuse the District Court from analyzing NRCP 42 before bifurcating the trial.

2. Because the Issues Are Interrelated, the Bifurcation of Jury Trial and Non-Jury Trial Issues Severely Prejudices Plaintiffs.

When the issues are inextricably interrelated, there should not be separate trials, and a district court abuses its discretion when order bifurcation.[158] Although Rule 42 allows for separate trials, it is not a rule that lends itself to a liberal or indiscriminate application.[159] It should be carefully and cautiously applied and be utilized only in a case and at a juncture where informed judgment impels the court to conclude that application

[156] J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc., 120 Nev. 277, 289, 89 P.3d 1009, 1017 (2004); May v. Watt, 822 F.2d 896 (9th Cir. 1987) (a party is not required to make an election between breach of contract remedies and rescission prior to a jury verdict); RESTATEMENT (SECOND) OF CONTRACTS, § 378, Comment a. (no "particular time" limit for electing between rescission and damages).

[157] Shum v. Intel Corp., 499 F.3d 1272, 1278–1279 (Fed. Cir. 2007) (plaintiff's claim of inventorship has common factual issues with claim defendant misrepresented his claim of inventorship); see also NRCP 42(b) (. . . always preserving inviolate the right of trial by jury.).

[158] Verner v. Nev. Power Co., 101 Nev. 551, 706 P.2d 147 (1985).

[159] Brown v. Gen. Motors Corp., 407 P.2d 461, 463–464 (Wash. App. 1965).

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of the rule will manifestly promote convenience and actually avoid prejudice.[160] Defendants simply did not carry their burden to demonstrate that bifurcation satisfied these tests.

Of the Rule 42(b) factors, the avoidance of prejudice is the most compelling justification for bifurcation.[161] So, how would Defendants be prejudiced by a single trial of all of the claims and counterclaims in this case? Defendants did not even attempt to make a case that they would be prejudiced by a failure to bifurcate. And, they failed to even cite any cases identifying the types of "prejudice" that have been accepted, or rejected, by courts under Rule 42(b). So, Defendants tacitly concede that bifurcation is not required to avoid prejudice to them.

Where a proposed bifurcation would create prejudice to any party, granting a separate trial is an abuse of discretion.[162] The prejudice to Plaintiffs from Defendants' notion of bifurcation is obvious and far reaching. First, the proposed bifurcation would unconstitutionally impair the Plaintiffs' right to a jury trial. Beyond that, however, the same decision maker, under the same facts and circumstances, including Defendants' misrepresentations and omissions, simultaneously decided to agree to all aspects of the Senior Loan Transaction including two guaranties, a $46 million Subordination, and the purchase of a Participant Interest.[163] So the facts of both sets of claims are "inextricably intertwined" requiring the same proof at both proposed trials, clearly a prejudicial waste

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[160] Id.

[161] Cox v. E.I. duPont de Nemours and Co., 39 F.R.D. 56, 58 (D.S.C. 1965).

[162] Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 964 (10th Cir. 1993) ("[R]egardless of efficiency and separability, however, bifurcation is an abuse of discretion if it is unfair or prejudicial to a party."); Guedry v. Marino, 164 F.R.D. 181, 186 (Ed.La. 1995) ("[E]ven if bifurcation might somehow promote judicial economy, courts should not order separate trials when bifurcation would result in unnecessary delay, additional expense, or some other form of prejudice.").

[163] PA 1:224–225.

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of resources. At the hearing for Defendants' bifurcation motion, Defendants even suggested that there could potentially be three trials—a completely unnecessary trifurcation.[164] Undoubtedly, Defendants' intentions with respect to dividing Plaintiffs' claims was designed to separate the fraud and intentional misrepresentation claims from the contractual claims, which is simply impossible. Tellingly, the District Court's order provides no reasoning with respect to this prejudice.

3. The District Court's Bifurcation Order Deprives Plaintiffs of a Fair Trial.

a. The Bifurcated Trials Do Not Promote Judicial Economy.

The "convenience" factor in Rule 42(b) as distinct from the "expedition" and "economy" factors goes to logistical issues of "parties" and non-party "witnesses" in connection with the litigation.[165] The Parties reside in Nevada, North Dakota, and Oklahoma. The fact witnesses reside in California, Colorado, North Dakota, Oklahoma, Texas, Nevada, and perhaps others. The expert witnesses reside in Arizona, Texas, Montana, and Nevada. It is hardly "convenient" for all these out of state fact witnesses and expert witnesses to testify at two trials in Las Vegas rather than one. Additionally, counsel for the parties reside in Oklahoma, Arizona, and Nevada. It is much more "convenient" for out of state witnesses and counsel to participate in one trial of all claims in Las Vegas rather than two. As it stands, the Court's bifurcation order deprives Plaintiffs of a fair trial by requiring them to participate in at least two trials involving the same witnesses.

Despite Defendants' assertions, there is no judicial economy in holding two separate trials, one before the court and one before a jury, rather than a single trial. The

[164] PA 3:849.

[165] State of Montana v. Dist. Ct., 467 P.2d 145, 147 (Mont. 1970).

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"expedition" factor in Rule 42(b) goes to the time that will elapse in the complete resolution of an entire case. In the abstract, it is hard to see how two trials can, in combination, be more "expeditious" than one. In a specific case, in assessing whether two trials could more expeditiously resolve an entire case, three considerations arise. First, what is the probability that the first trial may resolve the entire case, and therefore eliminate the second trial? Second, how long will the first trial take, compared with the second trial? And third, what is the state of the court's trial calendar? All three considerations cut against Defendants' position in the bifurcation.

Where a single defense, such as laches, statute of limitations, or release would be case dispositive and can be tried in a relatively short time period, bifurcation makes sense. In this case, however, the proposed first trial would not be short, as it would require trial of the same Fraudulent Inducement Claims as to the Tharaldson Guaranty and the TM2I Guaranty as are involved in the CVFS Subordination and Participant Interest purchase claims. And, the proposed first trial will not be case dispositive. If the Court at the first trial were to hold that the guaranties are enforceable, Plaintiffs' affirmative tort claims for fraud, constructive fraud, and breach of fiduciary duty, and their statutory claim for securities fraud, would still have to be tried, but the damages on those claims would increase from the $46 million subordinated debt to include also the amount required to be paid on the guaranties.

The "economy" factor in Rule 42(b) goes to conservation of resources, including both the Court's available time and the costs to the parties of concluding the litigation. The two trials ordered by the District Court would waste, not conserve, judicial resources, especially since Defendants suggest that there may need to be a third trial. Instead of bifurcation, there could simply be a single, simultaneous trial of all claims. Under these

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circumstances, "bifurcation of claims is not warranted, as it would hamper judicial economy, rather than promoting it as defendants contend."[166]

b. The Bifurcated Trials Would Not Preserve Inviolate Plaintiffs' Right to a Jury Trial.

A jury trial in civil cases is guaranteed by Article 1, § 3 of the Nevada Constitution and Article I, § 13 of the North Dakota Constitution. Where claims triable to a jury and claims triable to the court involve common questions of fact, it is unconstitutional to try the non-jury claims first, as the doctrines of res judicata or collateral estoppel could effectively eliminate the right to jury trial.[167] In Wood, the plaintiff had a breach of contract claim for damages as well as claims for trademark infringement, for injunctive relief, and for an accounting. The Supreme Court reversed the district court's refusal to grant the plaintiff's jury demand. The Supreme Court held that because the "factual issues related to the question of whether there has been a breach of contract" are "common with those upon which respondents' claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims."[168]

In the decades since Wood, both federal and state courts have consistently held that claims triable to a jury must be tried first whenever those claims have common factual issues with the claims not triable to a jury.[169] Indeed, a guaranty case cited by

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[166] Tuttle v. Sears Roebuck & Co., 2009 WL 2916894 *3 (N.D. Ohio 2009).

[167] Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

[168] 369 U.S. at 479–480.

[169] See, e.g., Kolstad v. Am. Dental Ass'n, 108 F.3d 1431, 1440 (D.C. Cir. 1997) (jury claims tried first; court bound by jury's fact finding in later deciding non-jury claims); Zions First Nat'l Bank v. Rocky Mtn. Irrigation, Inc., 795 P.2d 548, 662 (UT 1990) (fraud issue must be resolved by jury first; court is bound by jury's factual determinations on the "parallel equitable issue.")

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Defendants holds that, even if bifurcation between jury issues and non-jury issues were to occur, the jury claims must be tried first.[170] Only where the claims triable to the jury do not involve common factual issues with claims triable only to the court can the court exercise discretion to try the non-jury claims first.[171]

In light of these authorities, it is obvious that Tharaldson's decision under all the facts and circumstances, to sign the Tharaldson Guaranty and the TM2I Guaranty have "common factual issues" with his simultaneous decision, under all the same facts and circumstances, to sign CVFS's $46 million Subordination and its Participant Interest purchase. Because the facts giving rise to the Fraudulent Inducement Claims relative to the Guarantor Claims are the same as the facts giving rise to the Fraudulent Inducement Claims relative to CVFS's claims, the facts are not distinct, but are common. Therefore, the District Court abused its discretion by ordering bifurcated trial, which in turn diminishes Plaintiffs' jury demand since the jury trial would be held after the non-jury trial. As a result, Plaintiffs request extraordinary relief from this Court to either hold a single jury trial or allow Plaintiffs' jury trial claims be heard first prior to the non-jury claims.

4. Even if this Court Were to Uphold the Jury Trial Waivers, the Court Should Order This Case Submitted to an Advisory Jury.

NRCP 39(c) permitted the District Court "upon motion" to "try any issue with an advisory jury" that is not "triable of right by a jury." The purpose of Rule 39(c) is to

[170] Bank of N.Y. v. Royal Athletic Ind., Ltd., 637 N.Y.S.2d 478, 479 (App. Div. 1996) (jury trial first on defenses going to validity of guaranty; if defenses are rejected, then a non-jury trial would be held on the guaranty liability).

[171] Granite State Ins. Co. v. Smart Modular Technologies, Inc., 76 F.3d 1023, 1027 (9th Cir. 1996) (facts related to equitable estoppel defense are "distinct rather than common issues" with the breach of contract and negligence claims.); West v. Devitt, 311 F.2d 787, 788 (8th Cir. 1963) (issue of laches independent of the merits of Plaintiff's claim could be tried to the court first).

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perfect the "complete fusion of law and equity" and to permit "the time-saving trial of common jury and non-jury issues at one time without the loss or surrender of any substantive rights by the parties."[172] Nevada courts have often taken this approach where a case involves both equitable claims and legal claims.[173]

Even if this Court were to uphold the jury trial waivers, the fact that a trial by jury on some issues may have been waived does not preclude the District Court from impaneling an advisory jury to assist in its determinations of those and other non-jury claims.[174] Any other interpretation of Rule 39(c) is "undesirable" because "the use of an advisory jury is of no binding legal significance, and the responsibility for the decision remains with the judge, he or she should be allowed whatever help in reaching the decision he or she thinks desirable."[175] Additionally, the advisory jury hearing all issues would then allow the District Court to subsequently resolve any issues either by judgment or by a potential second trial, which is consistent with Defendants' position that a second non-trial may be needed anyway after the jury trial. Therefore, even if this Court is inclined to uphold the jury trial waivers, as ordered by the District Court, this Court

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[172] Note 1 to FRCP Rule 39(c); Bruckman v. Hollzer, 152 F.2d 730, 732–733 (9th Cir. 1946).

[173] See, e.g., Anderson v. Weise, 95 Nev. 540, 543, 598 P.2d 1144, 1147 (1979) (action to reform legal description on a deed and to recover damages; jury was advisory on the reformation action and Court decided to follow its recommendation; but mandatory on the damages claim).

[174] Am. Lumbermens Mut. Cas. Co v. Timms & Howard, Inc., 108 F.2d 497, 499–500 (2d Cir 1939) (advisory jury is the "discretionary right of the court to have its 'conscience enlightened.'"); Cudmore v. Smith, 260 F. Supp. 760 (D. Conn. 1966) (jury trial waived by lack of timely demand; court impaneled advisory jury anyway); Computer Sys. Engineering, Inc. v. Qantel Corp., 571 F. Supp. 1365, 1372–1373 (D. Mass. 1983) (jury advisory on statutory unfair business practice claim, but mandatory on fraud claim tried concurrently).

[175] 9 Wright & Miller, FED. PRAC. & PROC. CIV. § 2335 (3rd ed.).

should, at a minimum, require the District Court to analyze NRCP 42 and 39 to maintain the integrity of Plaintiffs' jury trial claims.

VII. CONCLUSION

This case presents two main issues of public importance dealing with the right to a jury trial. Plaintiffs request that this Court find that when fraud and intentional misrepresentation have been alleged and supported with respect to certain documents that no further proof be required to show that there was fraud and intentional misrepresentation with respect to waiver of jury trial provisions within those documents. Once there has been a showing of a factual issue regarding fraud and misrepresentation, the District Court should allow this waiver issue to go to a jury to first decide this issue before summarily denying a party's right to a jury trial.

Second, once the invalidity of the jury trial waiver is determined by a jury, only then can the District Court determine whether any bifurcation of issues is necessary. However, even if this Court upholds the District Court's order striking Plaintiffs' jury demand, the Court should, nevertheless, order the District Court to consider the mandatory factors of NRCP 42 in determining bifurcation, as well as the use of an advisory jury for issues triable only before the District Court in a non-jury capacity.

Dated this 17th day of February, 2011.

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DECLARATION OF TERRY A. COFFING, ESQ. IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, PETITION FOR WRIT OF PROHIBITION TO COMPLY WITH NRS 34.170 AND NRS 34.330

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

Terry A. Coffing, Esq., being first duly sworn deposes and says:

1. I am an attorney at Marquis Aurbach Coffing, which is counsel for Petitioners. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those, I believe them to be true.

2. This writ petition deals with issues of the invalidity of jury trial waivers, improper bifurcation of jury and non-jury trial issues, and the District Court's refusal to hold a single jury trial with some issues being advisory.

3. As such, an appeal from a final order or judgment would not adequately address the issues raised in the writ petition, so there is no other plain, adequate, and speedy remedy available to Petitioners.

4. I certify and affirm, under the penalties of perjury, that this Petition for Writ of Mandamus, or Alternatively, Petition for Writ of Prohibition is made in good faith and not for delay.

Dated this 17th day of February, 2011.

/s/ Terry A. Coffing, Esq.
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, PETITION FOR WRIT OF PROHIBITION**, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page and volume number of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, PETITION FOR WRIT OF PROHIBITION** and **PETITIONERS' APPENDIX** were filed electronically with the Nevada Supreme Court on the 17th day of February, 2011. Electronic Service of the foregoing documents shall be made in accordance with the Master Service List as follows:

Robert Eisenberg, Esq.
Gwen Mullins, Esq.
Matthew Carter, Esq.
J. Randall Jones, Esq.

I further certify that I served a copy of these documents by hand delivery to the following:

The Honorable Mark R. Denton
Eighth Judicial District Court, Dept. 13
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155
Respondents

I further certify that I served a copy of these documents by mailing a true and correct copy thereof, postage prepaid, addressed to:

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