

ORIGINAL

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21 **DISTRICT COURT**  
22 **CLARK COUNTY, NEVADA**

23 CLUB VISTA FINANCIAL SERVICES,  
24 L.L.C., a Nevada limited liability company,  
25 THARALDSON MOTELS II, INC., a North  
26 Dakota corporation; and GARY D.  
27 THARALDSON,  
28

Plaintiffs,

vs.

23 SCOTT FINANCIAL CORPORATION, a  
24 North Dakota corporation; BRADLEY J.  
25 SCOTT; BANK OF OKLAHOMA, N.A., a  
26 national bank; GEMSTONE DEVELOPMENT  
27 WEST, INC., a Nevada corporation;  
28 ASPHALT PRODUCTS CORP., a Nevada  
corporation, dba APCO CONSTRUCTION;  
DOE INDIVIDUALS 1-100; and ROE  
BUSINESS ENTITIES 1-100,

Defendants.

CASE NO. A579963  
DEPT NO. XI

**GARY D. THARALDSON'S ANSWER  
TO COUNTERCLAIM**

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**GARY D. THARALDSON'S ANSWER TO COUNTERCLAIM**

For his Reply to the Counterclaim of Scott Financial Corporation, Plaintiff/Counterdefendant Gary D. Tharaldson admits, denies and alleges as follows:

1. Tharaldson admits the allegations of paragraph 1.
2. Tharaldson admits the allegations of paragraph 2.
3. Replying to paragraph 3, Tharaldson admits only that there is a guaranty instrument which he executed which is void, but denies that it gives rise to any counterclaim and denies the remaining allegations of paragraph 3.
4. Replying to paragraph 4, Tharaldson admits that the borrower has defaulted on the Senior Loan and denies that there is any valid Tharaldson Guaranty and denies the remaining allegations of paragraph 4.
5. Tharaldson denies the allegations of paragraph 5.

**FIRST CLAIM FOR RELIEF****(Breach of Contract)**

6. Replying to paragraph 6, Tharaldson re-alleges and incorporates herein by reference each and every allegation contained within the paragraphs set forth above.
7. Tharaldson denies the allegations of paragraph 7 and affirmatively alleges that SFC has committed multiple breaches of its obligations under the terms of the Senior Loan and Guaranty.
8. Replying to paragraph 8, admits only that Exhibit A to the Counterclaim is a true and correct copy of an instrument executed by Tharaldson and denies the remaining allegations of paragraph 8.
9. Tharaldson denies the allegations of paragraph 9.
10. Tharaldson admits the allegations of paragraph 10.
11. Tharaldson admits the allegations of paragraph 11.
12. Tharaldson admits the allegations of paragraph 12.
13. Tharaldson admits the allegations of paragraph 13.
14. Tharaldson denies the allegations of paragraph 14.

1 15. Tharaldson denies the allegations of paragraph 15, and affirmatively alleges that  
2 Tharaldson is entitled to recover his attorneys' fees, costs of suit, litigation expenses including expert  
3 witness fees, and costs of collection.

#### 4 **SECOND CLAIM FOR RELIEF**

##### 5 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

6 16. Tharaldson re-alleges and incorporates herein by reference each and every allegation  
7 contained within the paragraphs set forth above.

8 17. Tharaldson admits the allegations of paragraph 17.

9 18. Tharaldson admits the allegations of paragraph 18 and alleges that he at all times has  
10 acted and performed in good faith consistent with the implied covenant of good faith and fair dealing.

11 19. Tharaldson denies the allegations of paragraph 19, and affirmatively alleges he had a  
12 judicial privilege to bring this action.

13 20. Tharaldson denies the allegations of paragraph 20.

14 21. Tharaldson denies the allegations of paragraph 21, and affirmatively alleges that he is  
15 entitled to recover his attorneys' fees, costs of suit, litigation expenses including expert witness fees,  
16 and costs of collection.

#### 17 **AFFIRMATIVE DEFENSES**

##### 18 FIRST AFFIRMATIVE DEFENSE

19 Tharaldson denies all Counterclaim allegations not expressly admitted herein.

##### 20 SECOND AFFIRMATIVE DEFENSE

21 The Counterclaim fails to state a claim upon which relief can be granted.

##### 22 THIRD AFFIRMATIVE DEFENSE

23 The Counterclaim is barred by the allegations of the Amended Complaint attached to the  
24 Motion for Leave to File Amended Complaint currently pending herein. The allegations of this  
25 Amended Complaint are incorporated by reference in their entirety.

##### 26 FOURTH AFFIRMATIVE DEFENSE

27 The Counterclaim is barred by fraud, mistake, misrepresentation, material omission,  
28 constructive fraud, securities fraud and breach of fiduciary duty.

1 FIFTH AFFIRMATIVE DEFENSE

2 The Counterclaim is barred by Counterclaimant's prior material breach of its expressed and  
3 implied contractual obligations to Plaintiff/Counterdefendant Tharaldson.

4 SIXTH AFFIRMATIVE DEFENSE

5 The Guaranty is void for fraud, misrepresentation or material omission in its inducement.

6 SEVENTH AFFIRMATIVE DEFENSE

7 The Guaranty is subject to equitable rescission and/or reformation.

8 EIGHTH AFFIRMATIVE DEFENSE

9 The Counterclaim is barred by the lack or failure of consideration.

10 NINTH AFFIRMATIVE DEFENSE

11 The Counterclaim is barred by waiver, estoppel and/or laches.

12 TENTH AFFIRMATIVE DEFENSE

13 The Counterclaim is barred by Counterclaimant's assumption of risk.

14 ELEVENTH AFFIRMATIVE DEFENSE

15 The Counterclaim is barred by or subject to Counterclaimant's contributory negligence and/or  
16 comparative fault.

17 TWELFTH AFFIRMATIVE DEFENSE

18 The Counterclaim is barred by illegality.

19 THIRTEENTH AFFIRMATIVE DEFENSE

20 Tharaldson had a judicial privilege to bring suit herein and said privilege bars the  
21 Counterclaim.

22 FOURTEENTH AFFIRMATIVE DEFENSE

23 Material conditions precedent to Tharaldson's alleged liability did not occur in that  
24 Counterclaimant advanced loan funds without first establishing unbroken lien priority,  
25 Counterclaimant advanced loan funds without first determining that pre-sales and pre-leases were to  
26 bona fide independent third parties, Counterclaimant advanced loan funds without properly  
27 underwriting and qualifying the borrower, and Counterclaimant advanced loan funds without  
28 diligently, competently and appropriately administering the Senior Loan.

1 FIFTEENTH AFFIRMATIVE DEFENSE

2 These answering Defendants hereby incorporate by reference those affirmative  
3 defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth at length  
4 herein. In the event further investigation or discovery reveals the applicability of any such defenses,  
5 these answering Defendants reserve the right to seek leave of court to amend their answer to  
6 specifically assert the same. Said defenses are incorporated by reference for the specific purpose of  
7 not waiving the same.  
8

9 SIXTEENTH AFFIRMATIVE DEFENSE

10 Pursuant to NRCP 11, all possible affirmative defenses may not have been alleged  
11 herein insofar as insufficient facts were available after reasonable inquiry upon the filing of this  
12 answer, and, therefore, these answering Defendants reserve the right to amend this Answer to  
13 Complaint to allege additional affirmative defenses if subsequent investigation so warrants.  
14

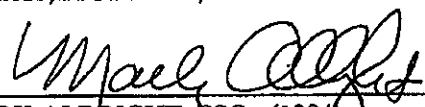
15 PRAYER FOR RELIEF

16 WHEREFORE, Tharaldson prays for judgment on the Counterclaim as follows:

- 17 A. That the Counterclaim be dismissed and Counterclaimant take nothing;  
18 B. For an award of Tharaldson's attorneys' fees, costs of suit, litigation expenses  
19 including expert witness fees, and costs of collection; and  
20 C. For such other and further relief as the Court deems proper.  
21

22 DATED this 1 day of June, 2009.

23 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

24   
25 G. MARK ALBRIGHT, ESQ. (1394)  
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**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 1<sup>st</sup> day of June, 2009, I served the foregoing **GARY D.**

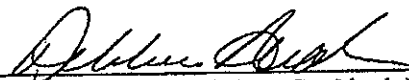
**THARALDSON'S ANSWER TO COUNTERCLAIM** by mailing a copy of the same, postage prepaid and addressed to the following:

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An Employee of Albright, Stoddard, Warnick  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

CLUB VISTA FINANCIAL SERVICES,  
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THARALDSON MOTELS II, INC., a North  
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THARALDSON,

Plaintiffs,

vs.

SCOTT FINANCIAL CORPORATION, a  
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SCOTT; BANK OF OKLAHOMA, N.A., a  
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WEST, INC., a Nevada corporation;  
ASPHALT PRODUCTS CORP., a Nevada  
corporation, dba APCO CONSTRUCTION;  
DOE INDIVIDUALS 1-100; and ROE  
BUSINESS ENTITIES 1-100,

Defendants.

CASE NO. A579963  
DEPT NO. XI

PLAINTIFFS' FIRST AMENDED  
COMPLAINT

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**PLAINTIFFS' FIRST AMENDED COMPLAINT**

COME NOW the Plaintiffs, by and through their counsel undersigned, and for their Amended Complaint against Defendants allege as follows:

**NATURE OF THE ACTION**

1. This case for fraud and breach of fiduciary duty and breach of contract and other claims arises out of a highly unusual real estate finance deal. Defendants SFC and BoK are co-lead lenders in a 29 lender \$110 Million syndicated loan participation, which those Defendants structured to provide above market interest rates for the lenders and substantial loan origination and servicing fees for co-lead lender Defendant Scott Financial Corporation. Even though called the co-lead lender, SFC did not loan a single dollar to the developer/borrower, but did collect substantial fees. Fiduciary Defendants induced Plaintiffs Tharaldson and Tharaldson Motels II, Inc., with whom Defendants Scott and Scott Financial corporation have long had a fiduciary relationship of the highest trust and confidence, to give 100% unlimited guarantees of the performance of a wholly unrelated developer/borrower. Now that the Project has failed, Plaintiffs have learned that Fiduciary Defendants did not perform appropriate due diligence and loan administration, but instead "underwrote" (without disclosure) the Project solely on the financial strength of Plaintiffs' guarantees. While this allowed Fiduciary Defendants to obtain a sub prime rate of return on a prime rate credit, Defendants wrongfully induced Plaintiffs' participation in the financing transaction through multiple breaches of fiduciary duty, misrepresentations and omissions.

**PLAINTIFFS**

2. Plaintiff Club Vista Financial Services LLC ("CVFS") is a Nevada limited liability company with its principal place of business in Las Vegas, Nevada.

3. Plaintiff Tharaldson Motels II, Inc. ("TM2I"), is a North Dakota global corporation with its principal place of business in Las Vegas, Nevada.

4. Plaintiff Gary D. Tharaldson ("Tharaldson") is a resident of the State of Nevada. Tharaldson indirectly owns one hundred percent of the member interests in CVFS and a minority interest in TM2I.

1           5.       CVFS, TM2I, and Tharaldson are hereinafter collectively referred to as "Plaintiffs."

2                               **THE FIDUCIARY DEFENDANTS**

3           6.       Defendant Scott Financial Corporation ("SFC") is a North Dakota corporation with  
4 its principal place of business in Bismark, North Dakota. SFC is engaged in the business of  
5 underwriting and originating loans, selling participations in those loans to various banks, financial  
6 institutions, and other investors, and servicing the loans. SFC was a long-time financial advisor to  
7 the Plaintiffs. SFC is sued on its own account and in its representative capacity as Co-Lead Lender  
8 for 29 participating lenders on the Senior Loan defined below, including CVFS. SFC acted in a  
9 position of inherently conflicting interests in its capacity as agent for both Plaintiffs and Defendant  
10 Bank of Oklahoma in the transactions at issue herein.

11           7.       Defendant Bradley J. Scott ("Scott"), a resident of North Dakota, is the owner,  
12 director, and officer of SFC. Scott committed or was responsible for committing the wrongful acts  
13 of SFC alleged herein.

14           8.       Defendant Bank of Oklahoma, N.A. ("BOK") is a national bank with its principal  
15 place of business in Tulsa, Oklahoma. BOK acted in a fiduciary capacity to Plaintiffs as Co-Lead  
16 Lender in a \$110,000,000 loan transaction. BOK is sued on its own account and in its  
17 representative capacity as Co-Lead Lender for 28 other participating lenders on the Senior Loan  
18 defined below, including CVFS. It is also sued because Scott and SFC acted as its agents in  
19 connection with the wrongful acts alleged herein.

20           9.       SFC, Scott, and BOK are hereinafter referred to as the "Fiduciary Defendants."

21                               **OWNER DEFENDANT**

22           10.       Defendant Gemstone Development West, Inc. ("Gemstone West Inc.") is a Nevada  
23 corporation which is an obligor by assumption on the Prior Loan and a direct obligor on the Senior  
24 Loan, both as defined below, and which owns certain real property located in Clark County,  
25 Nevada, which is security for both the Prior Loan and the Senior Loan. Gemstone West Inc. is  
26 named as a defendant in this action because it claims an interest in the Property and is therefore an  
27 appropriate party to ensure a full adjudication concerning conflicting claims and interests in the  
28 Property.

**CONTRACTOR DEFENDANT**

11. Defendant Asphalt Products Corporation d/b/a APCO Construction ("Contractor") is a Nevada corporation which contracted and was responsible for construction of the Project on the Property. Contractor is named as a defendant in this action because it has filed liens against the Property or has caused liens to be filed against the Property directly contrary to its agreement to subordinate its claims (as set forth herein) in favor of the lender under the Senior Loan.

**FICTITIOUS DEFENDANTS**

12. Plaintiffs are informed and believe and therefore allege that the true names and capacities whether individuals, corporate entities, associates or otherwise of DOE 1-100 and ROE 101-200 are presently unknown to Plaintiffs and therefore sue said Defendants by said fictitious names. Plaintiffs are informed and believe and therefore allege that each of the Defendants designated as DOE and ROE is responsible in some manner for the events and happenings described in this Complaint, which proximately caused the damages to Plaintiffs as alleged herein, or claim some interest in the Project, over which Plaintiff's claims have priority. Plaintiffs will seek leave of this Court to amend its Complaint to insert the true names and capacities of the DOE and ROE parties and state appropriate charging allegations when that information has been ascertained.

**SUBJECT MATTER JURISDICTION**

13. This Court has subject matter jurisdiction under Article 6, Section 6 of the Nevada Constitution and under NRS 4.370(1), because the amount in controversy exceeds \$10,000 and under NRS 4.370(2) because the case involves title to real property and is not a forcible entry and detainer action.

14. Plaintiffs also invoke the Nevada Uniform Declaratory Judgment Act, NRS 30.010 to 30.160.

**GENERAL AND PERSONAL JURISDICTION**

15. SFC is qualified to do business in, and does business in, Clark County, Nevada. In addition, SFC is subject to personal jurisdiction in this Court under NRS 14.065 because it has caused events to occur in Las Vegas, Nevada, which are the subject matter of this action; and

1 because the Senior Debt Loan Agreement out of which this action arises provides for personal  
2 jurisdiction in Clark County, Nevada.

3 16. Scott is subject to personal jurisdiction in this Court under NRS 14.065 because he  
4 has caused events to occur in Las Vegas, Nevada, which are the subject matter of this action.

5 17. BOK is subject to personal jurisdiction in this Court under NRS 14.065 because it  
6 has caused events to occur in Las Vegas, Nevada, which are the subject matter of this action; and  
7 because the Senior Debt Loan Agreement in which it owns a participation and acts as Co-Lead  
8 Lender, provides for personal jurisdiction in Clark County, Nevada.

9 18. Gemstone West Inc. and Contractor are subject to general jurisdiction in this Court  
10 because their principal place of business is in Clark County, Nevada.

### 11 VENUE

12 19. Venue is appropriate in this Court under NRS 13.010(2)(a) and (c) because this  
13 dispute involves interests in real property located in Clark County, Nevada. Venue is also  
14 appropriate under NRS 13.040 as to SFC and Gemstone West Inc., because they are engaged in  
15 business in Clark County, Nevada. Furthermore, the Senior Debt Loan Agreement out of which  
16 this action arises provides for venue in the state and federal courts located in Clark County,  
17 Nevada. Finally, the *res* of the action is real property located in Clark County, Nevada, in which  
18 Plaintiffs and Defendants claim an interest.

### 19 GENERAL ALLEGATIONS

#### 20 Plaintiffs' Business

21 20. Plaintiff Tharaldson is a successful real estate entrepreneur who has had substantial  
22 success in the motel and lodging business.

23 21. Plaintiff TM2I is an owner and operator of motel and lodging properties.

24 22. Tharaldson and TM2I have very substantial assets and net worth. They are highly  
25 credit worthy and routinely obtain credit and credit facilities at or near the prime rate of interest.

26 23. Plaintiff CVFS is an entity owned by Tharaldson which is involved in making or  
27 participating as a lender in acquisition, development and construction loans for third party  
28 developers' real estate projects.

Scott's and SFC's Fiduciary Relationship With Plaintiffs

24. Tharaldson's business relationship with Scott began in about 1992. Scott was employed by Bismark National Bank in Bismark, North Dakota. Scott arranged several loans to Tharaldson to finance acquisition or construction of motel properties. In about 2000, Scott, through Bismark National Bank, arranged a \$50,000,000 loan to facilitate Tharaldson's sale of motel properties. Scott also arranged some unsecured lines of credit for Tharaldson.

25. In 2003, Scott left Bismark National Bank and founded his own company, SFC, a firm specializing in corporate lending and lending services. SFC does not actually loan its own moneys. Instead it acts as a "lead lender" in syndicating participation interests to other lenders who actually supply loan funds. In addition to earning origination fees on such loans, SFC typically also earns a loan servicing fee equal to 0.5% interest (fifty "basis points") on each loan it originates.

26. Since 2003, Scott has advised Tharaldson concerning business and financial matters, including numerous investments in real estate loans originated, underwritten, and administered by Scott through SFC for the benefit of CVFS and Tharaldson (the "SFC Loans").

27. Tharaldson and his business entities have relied exclusively on Scott and SFC for credit underwriting, due diligence and feasibility analysis for the SFC loans. Scott and SFC knew of and encouraged this exclusive reliance. Tharaldson only invested 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.

28. Scott became Tharaldson's investment broker and agent for loan participation investments by Tharaldson and Tharaldson entities in real estate loans recommended by SFC. Since the inception of their business relationship, Tharaldson or entities he controls have invested and/or participated in the following SFC Loans based on Scott's advice and recommendation:

- A. \$65,600,000 construction loan and \$38,900,000 construction loan to Gemstone LVS, LLC made in June, 2004 in which Tharaldson Financial Group, Inc. was lender and SFC was its financial consultant in the underwriting, documentation and servicing, secured by Phase 1 and Phase 2

respectively of the Manhattan Project in Las Vegas, Nevada.

- B. \$10,000,000 construction loan made October 2005 and subsequently modified and extended, \$2,000,000 second loan made in March 2006, and \$3,750,000 inventory loan made in September 2008, in all of which Mesquite Investor Group is the borrower, SFC is lender, and Tharaldson Financial Group, L.L.C. is the 100% participant and owner of the Lender's interest, secured by a condominium project in Mesquite, Nevada.
- C. \$2,400,000 subordinate loan and \$4,000,000 senior loan to 40<sup>th</sup> Street and Baseline, LLC made in March, 2006, in which SFC is the Lender and CVFS is the 100% participant and owner of the Lender's interest, secured by real property located in Phoenix, Arizona.
- D. \$2,250,000 subordinate loan and \$3,750,000 senior loan to El Mirage and Camelback, LLC made March, 2006, in which SFC is the Lender and CVFS is the 100% participant and owner of the Lender's interest, secured by real property located in Phoenix, Arizona.
- E. \$46,000,000 land loan to Desert Springs Partners, L.L.C. and Ave. 48 Investment Group, L.L.C. made in August 2006 with a maturity of January 1, 2009, in which SFC is the Lender and CVFS is the majority participant and majority owner of the Lender's interest, secured by land located in Palm Springs, California.
- F. \$10,000,000 subordinate and \$20,000,000 senior land loan to Torrey Pines Development, LLC, ABCDW, LLC, and Vanderbilt Farms, LLC with SFC as the Lender and CVFS as the 100% participant and owner of the Lender's interest, made in September 2006 with a maturity of December 31, 2008, secured by land in western Maricopa County, Arizona.
- G. \$20,000,000 subordinate and \$82,000,000 senior land loan to Vanderbilt Farms, Vineyard Farms, ABCDS, and Gillespie Properties with SFC as Lender and CVFS as the majority participant and majority owner of the

1 Lender's interest, made in September 2006 with a maturity of December 31,  
2 2008, secured by land in western Maricopa County, Arizona.

3 H. \$1,890,000 subordinate and \$3,150,000 senior loan to Leadermark  
4 Communities made in February, 2007, in which SFC was the Lender and  
5 CVFS was the 100% participant and owner of the Lender's interest, secured  
6 by real property located in Phoenix, Arizona.

7 29. A special relationship of trust and confidence developed between Scott and  
8 Tharaldson. Scott and SFC became intimately aware of and advised Tharaldson on Tharaldson's  
9 businesses, assets, income, cash flows, and manner of operation. Indeed, throughout this  
10 relationship Scott reviewed Tharaldson's internal personal financial statements and provided  
11 presentation and formatting suggestions. Also, Scott routinely reformatted Tharaldson financial  
12 information for banks with whom Tharaldson deals and acted as Tharaldson's agent in dealing  
13 directly with banks who sought to remain current on Tharaldson's financial information.

14 30. In each of the SFC Loans, Plaintiffs relied entirely upon Scott and SFC to  
15 underwrite and evaluate the merits of the loans and to prepare the appropriate loan documentation  
16 to protect Plaintiffs' legal and financial interests in the SFC Loans, and Scott and SFC knew about  
17 and encouraged this reliance. Even though it was not the actual source of loan funds, SFC  
18 typically prepared the loan documents for the SFC Loans in its name as the Lender. The only  
19 documentation Plaintiffs typically signed with respect to each of the SFC Loans was a separate  
20 Non-Recourse Participation Agreement and related commitment acknowledging their acquisition  
21 of ownership of the particular SFC Loan as the Participant. It was pursuant to these Agreements  
22 that Tharaldson and his entities made loan funds available to the ultimate borrowers.

23 31. Since about 2003, Tharaldson has provided to Scott and SFC office space and  
24 facilities, lodging accommodations, and transportation assistance through Tharaldson's Las Vegas  
25 office on Scott's regular trips to Las Vegas.

26 32. SFC is licensed by the Mortgage Lending Division of the Nevada Department of  
27 Business and Industry. Its license with the Mortgage Lending Division lists Tharaldson's son, Matt  
28 Tharaldson, as SFC's "licensed employee" in Las Vegas.

1           33. Scott has regularly described his role as overseeing Tharaldson's lending division  
2 and third parties have in turn referred to Scott as overseeing Tharaldson's lending operations.  
3 Tharaldson has relied exclusively on Scott and SFC to protect Tharaldson's interests in these  
4 transactions, and Scott and SFC knew about and encouraged this reliance.

5           34. On information and belief, Defendant BOK knew and understood at all material  
6 times that Scott and SFC were acting as Plaintiffs' agents in overseeing Tharaldson's lending  
7 operations.

8           35. From January through April 2006, a period during which several of the SFC loans  
9 were made, Tharaldson underwent double knee replacement surgeries and back surgery. A long  
10 period of recovery followed that included pain medications until February 2007, during which  
11 several more of the SFC loans were made. Scott and SFC knew about Tharaldson's medical  
12 condition and wrongfully took advantage of it by proposing questionable transactions to  
13 Tharaldson at a time when Scott knew Tharaldson was partially incapacitated.

14           36. In connection with each of the SFC Loans, Scott through SFC has performed the  
15 credit underwriting, due diligence investigation, negotiated the loan terms with the borrower, hired  
16 the same counsel to represent both SFC and CVFS as the participant in documenting the loan,  
17 selected the title insurer for obtaining lenders title insurance policies on the real estate loan  
18 collateral, sold participations in the loans to Plaintiffs, and then performed all loan administration  
19 and servicing, including collection of interest and principal from the borrower and remitting those  
20 payments, less SFC's fees, to Plaintiffs and any other participants.

21           37. Plaintiffs' investment in each of the SFC Loans was documented by a separate  
22 Nonrecourse Loan Participation Agreement (Consulting Agreements in the case of the Manhattan  
23 Loans) prepared by Scott. Each participation agreement (and the Consulting Agreements in the  
24 case of the Manhattan Loans) appoints SFC as the agent of CVFS or other Tharaldson affiliate with  
25 respect to the loan and acknowledges the fiduciary relationship and agency between SFC and such  
26 participant.

27           38. SFC and Scott have earned substantial loan origination fees and servicing fees for  
28 their work on the SFC Loans in which Plaintiffs invested based upon their expert advice and

1 recommendations, and Plaintiffs' trust in Scott and SFC.

2 **The Manhattan West Project**

3 39. Based on SFC's recommendations, a Tharaldson entity named Tharaldson Financial  
4 Group, Inc. had previously made a successful loan through SFC on a mixed use project known as  
5 the Manhattan Project in Las Vegas, Nevada. The Developer of the Manhattan Project was  
6 Alexander Edelstein.

7 40. Following the success of the Manhattan Project, SFC through Scott approached  
8 Tharaldson about making a loan on a sister project called Manhattan West which is located on 21  
9 acres of land on Russell Road in Las Vegas, Nevada. Manhattan West was being developed by  
10 Alexander Edelstein, the same principal who had developed the Manhattan Project.

11 41. An Edelstein entity known as Gemstone Apache, LLC, ("Apache") acquired the  
12 land in June 2006 for \$31,540,000.

13 42. The development entity for the Project was Gemstone Development West, LLC, a  
14 Nevada limited liability company ("Developer") which owned 100% of the equity interests in  
15 Apache.

16 43. Gemstone Development, L.L.C., a Nevada limited liability company ("Gemstone  
17 Development") is wholly owned by Edelstein and serves as manager to Gemstone LVS.

18 44. Manhattan West was designed and approved as a mixed use community featuring  
19 more than 600 condominium residences in one 11 story tower and several mid-rise buildings, plus  
20 200,000 square feet of shops, restaurants, and office and hotel space.

21 45. The Project, Phase 1 of Manhattan West, involves approximately 228 residential  
22 condominium units and approximately 195,350 square feet of retail and office space.

23 **The Manhattan West Acquisition and Development Financing**

24 **(The Prior Loan and Edelstein Loan)**

25 46. On or about June 26, 2006, SFC, as lender, entered into a Loan Agreement with  
26 Apache, as borrower (the "Prior Loan Agreement") for the purpose of acquisition and  
27 preconstruction development of the Manhattan West Project. Although SFC was the named lender  
28 under the Prior Loan Agreement, all loan funds came from CVFS.

1           47. Pursuant to the Prior Loan Agreement, SFC agreed to loan Apache up to  
2 \$25,000,000 (the "Prior Loan").

3           48. The Prior Loan was composed of two parts represented by two separate notes and  
4 deeds of trust: a "junior loan" in the maximum amount of \$10,000,000 (the "First Junior DOT  
5 Note"), and a "senior loan" in the maximum amount of \$15,000,000 (the "First Senior DOT  
6 Note").

7           49. The First Junior DOT is dated June 26, 2006 and was recorded on July 5, 2006 in  
8 the real property records of Clark County, Nevada at Book 20060705, Instrument No. 0004265.

9           50. The First Senior DOT is dated June 26, 2006, and was recorded on July 5, 2006 in  
10 the real property records of Clark County, Nevada at Book 20060705, Instrument No. 0004264.

11           51. In addition, the Prior Loan Agreement provided that a Third Deed of Trust on the  
12 Property and the Project (the "Third DOT") would be executed by Apache in favor of SFC to  
13 secure a \$13,000,000 note made by Edelstein payable to SFC (the "Edelstein Note"). As with the  
14 Prior Loan Agreement, the loan funds actually came from CVFS and not SFC, even though SFC  
15 was named as the lender.

16           52. The Third DOT is dated June 26, 2006, and was recorded on July 5, 2006 in the real  
17 property records of Clark County, Nevada at Book 20060705, Instrument No. 0004266.

18           53. The Edelstein Note was executed in connection with a Loan Agreement between  
19 Edelstein and SFC dated June 26, 2006 (the "Edelstein Loan Agreement"), the funds of which  
20 were to be used solely for the purpose of contributing the Owner's Equity to Apache as needed  
21 under the Prior Loan Agreement.

22           54. In addition to the First Junior DOT, First Senior DOT, and Third DOT on the  
23 Project, the Prior Loan Agreement also provided for the pledging of additional collateral by  
24 Apache, Edelstein, Gemstone LVS, L.L.C., a Delaware limited liability company ("Gemstone  
25 LVS") and Gemstone Development West, L.L.C., as developer as security for the Prior Loan  
26 and/or the Edelstein Loan.

27           55. Part of the additional collateral for the Prior Loan and Edelstein Loan included a  
28 pledge by Gemstone LVS of certain of collateral, including but not limited to the 59 then unsold

1 condominium units in the original Manhattan Project (the "Condo Units").

2 56. Pursuant to a Nonrecourse Participation Agreement dated May 23, 2006 by and  
3 between SFC on the Condo Units, as Originating Lender, and CVFS, as Participant, as amended by  
4 the Addendum to Nonrecourse Participation Agreement dated May 23, 2006, as well as a  
5 Commitment to Participate executed on or about June 29, 2006 (the "Prior Loan Participation  
6 Agreement"), CVFS agreed to provide the funds for the Prior Loan. The Prior Loan Participation  
7 Agreement provided that SFC was agent for CVFS concerning the Prior Loan and acknowledged  
8 SFC's fiduciary duties to CVFS.

9 57. Pursuant to a Nonrecourse Participation Agreement dated May 23, 2006 by and  
10 between SFC, as Originating Lender, and CVFS, as Participant, as amended by the Addendum to  
11 Nonrecourse Participation Agreement executed May 23, 2006, as well as a Commitment to  
12 Participate dated on or about June 26, 2006 (the "Edelstein Loan Participation Agreement"), CVFS  
13 agreed to provide the money necessary to fund the Edelstein Loan. The Edelstein Loan  
14 Participation Agreement provided that SFC was agent for CVFS concerning the Edelstein Loan  
15 and acknowledged SFC's fiduciary duties to CVFS.

16 58. The parties contemplated that at the maturity date of the Prior Loan, the First Junior  
17 DOT Note and First Senior DOT Note would be restructured into one credit facility which would  
18 be a construction loan.

19 59. Under Section 5 of the Prior Loan Agreement, Apache covenanted and agreed not  
20 to create, permit to be created, or allow to exist, any unauthorized liens, charges or encumbrances  
21 on the Project.

22 **Subsequent Modifications to Prior Loan and Edelstein Loan**

23 60. During the course of the Project, the parties amended the documentation for the  
24 Prior Loan and the Edelstein Loan to provide for the advancement of a total of \$18,000,000 in  
25 additional loan funds and to extend the loan maturity dates to December 31, 2007.

26 61. The First Junior DOT was amended by a First Amendment Junior Deed of Trust  
27 and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) dated May  
28 22, 2007 and recorded in the real property records of Clark County, Nevada on May 22, 2007 at

1 Book 20070522, Instrument No. 0004011, to increase the amount secured thereby to  
2 \$18,000,000.00 to correspond to an additional \$8,000,000 advance on the Junior Deed of Trust  
3 Loan.

4 62. Pursuant to a Nonrecourse Participation Agreement dated May 15, 2007 by and  
5 between SFC, as Originating Lender, and CVFS, as Participant, as amended by the Addendum to  
6 Nonrecourse Participation Agreement dated May 15, 2007, as well as a Commitment to Participate  
7 executed on or about May 17, 2007 (the "LOC Participation Agreement"), CVFS agreed to provide  
8 the \$8,000,000 in additional loan funds on the Junior Deed of Trust. The LOC Participation  
9 Agreement provided that SFC was agent for CVFS concerning the Additional LOC Note and  
10 acknowledged SFC's fiduciary duties to CVFS.

11 63. The Third DOT was amended by a First Amendment to Third Deed of Trust and  
12 Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) dated October  
13 19, 2007 and recorded in the Clark County, Nevada land records on October 24, 2007 at Book  
14 20071024, Instrument No. 0004182, amending the Third DOT to secure an additional \$10,000,000  
15 advanced on the Edelstein Loan.

16 64. Pursuant to a Nonrecourse Participation Agreement dated October 9, 2007 by and  
17 between SFC, as Originating Lender, and CVFS, as Participant, as amended by the Addendum to  
18 Nonrecourse Participation Agreement dated October 9, 2007, as well as a Commitment to  
19 Participate executed on or about October 12, 2007 (the "Construction LOC Participation  
20 Agreement"), CVFS agreed to provide funds for the Construction LOC Note to Edelstein. The  
21 Construction LOC Participation Agreement provided that SFC was agent for CVFS concerning the  
22 Construction LOC Note and acknowledged SFC's fiduciary duties to CVFS.

23 65. As of January 22, 2008, the total outstanding balance owed to Plaintiffs under the  
24 Prior Loan was approximately \$42,273,146 and under the Edelstein Loan was approximately  
25 \$13,000,000, for a total owed of approximately \$55,273,146.

26 **The Construction Financing Syndication**

27 **(The Senior Loan)**

28 66. By late 2007, the Project was ready to commence vertical construction, but needed

1 an additional \$110,000,000 of construction loan funds to commence construction on Phase I.

2 67. Defendants SFC and Scott desired to broker the accumulation of \$110,000,00 in  
3 construction loan funds because of the substantial loan origination fees and 50 basis point loan  
4 servicing fees the construction financing would generate for SFC.

5 68. On information and belief, the credit markets had begun to tighten and the real  
6 estate market had begun to deteriorate significantly and it was not feasible to obtain a construction  
7 loan to fund Phase I construction and also "take out" and pay off the Prior Loan and the Edelstein  
8 Loan as was anticipated when those Loans were made.

9 69. On information and belief, Defendant BOK and SFC or Scott had communications  
10 about BOK being a lender or participating lender on the construction loan. BOK was not interested  
11 in loaning on the Project on its own merits but had a strong interest in making a loan guaranteed by  
12 Tharaldson and TM2I because this would allow BOK to receive a subprime rate of return on a  
13 prime rate quality credit.

14 70. On information and belief SFC and BOK as co-lead lenders were unable to generate  
15 sufficient loan funds to take out the Prior Loan and the Edelstein Loan. So SFC and BOK needed  
16 to arrange for CVFS to agree that those loans would be subordinated to the new construction  
17 financing.

18 71. To induce the cooperation of Tharaldson, CVFS and TM2I, SFC and BOK offered  
19 Tharaldson and TM2I a 500 basis point (5%) cut of the interest to be paid on the 14% construction  
20 loan in exchange for the guarantees of Tharaldson and TM2I and in exchange for CVFS'  
21 agreement to subordinate its position to the \$110,000,000 in construction financing. This  
22 arrangement would still leave BOK and other participating lenders with a net 8.5% interest rate  
23 after payment of 50 basis points (.5%) in loan servicing fees to SFC.

24 72. This complex structure was highly unusual for a number of reasons. First, it is  
25 unusual for entities not affiliated with the developer and having no equity stake in the development  
26 to be guaranteeing the development's success. Second, it is highly unusual for a subordinating  
27 lender and its affiliates to take on both the risk of being subordinated and to guaranty their  
28 unaffiliated borrower's performance. Third guarantees are typically given by the borrower's "side"

1 in a financing transaction, and not, as here, given by a substantial project lender.

2 73. Notwithstanding the highly unusual nature of this transaction, Tharaldson and his  
3 entities were persuaded to proceed with it due to the unusual level of trust and confidence they had  
4 in Scott and SFC.

5 74. This highly unusual transaction was highly advantageous to BOK as co-lead lender  
6 for reasons including, but not limited to the following:

- 7 • BOK received the guarantees of prime rate quality credits;
- 8 • BOK received an 8.5% net rate of return which was substantially above the  
9 prime rate of interest;
- 10 • BOK contracted for what should have been a first lien position through  
11 CVFS' agreement to subordinate the Prior Loan and the Edelstein Loan;
- 12 • BOK was able to participate in this attractive arrangement without raising the  
13 loan capital necessary to take out the Prior Loan and Edelstein Loan;
- 14 • BOK did not need to worry about whether or not the actual project was  
15 financially viable in what it knew were rapidly deteriorating real estate  
16 market conditions because it could count on full recovery under the  
17 Tharaldson and TM2I guarantees even if the actual developer never repaid a  
18 nickel of the loan;
- 19 • In effect, although the loan was made to finance the Project BOK looked at  
20 the loan as a loan to Tharaldson and TM2I, thereby making the Project's  
21 performance virtually irrelevant to BOK.
- 22 • The transaction structure ultimately put all lending risk on the Project on the  
23 shoulders of CVFS (who had made and subordinated the Prior Loan and  
24 Edelstein Loan) and Tharaldson and TM2I who had guaranteed the  
25 \$110,000,000 construction loan.

26 75. SFC acted as Bok's agent in procuring for it this deal which was so highly  
27 beneficial to BOK and so highly detrimental to Plaintiffs.

28

**The Senior Loan Documentation and the "Mezzanine Financing"**

76. On or about January 22, 2008, SFC, as lender, entered into a Loan Agreement with Gemstone West Inc., as borrower (the "Senior Loan Agreement").

77. Pursuant to the Senior Loan Agreement, SFC agreed to loan Gemstone West Inc. up to the amount of \$110,000,000 (the "Senior Loan"). These Loan Funds were ultimately provided by a consortium of 29 participating lenders.

78. SFC and BOK are, and since the inception of the Senior Loan have been, Co-Lead Lenders on the Senior Loan.

79. At all times while acting as Co-Lead Lenders with respect to the Senior Loan, BOK knew of the fiduciary relationship SFC occupied toward Plaintiffs due to the general relationship of trust and confidence between them and due to the CVFS Pre-Senior Participation Agreements, each of which appointed SFC as agent for CVFS and acknowledged SFC's fiduciary duties to CVFS.

80. The Senior Loan was composed of two parts represented by two separate notes: a "Senior Debt Construction Note" in the amount of the \$100,000,000 (the "Senior Construction Note") and a "Senior Debt Contingency Note" in the amount of \$10,000,000 (the "Senior Contingency Note").

81. The Senior Construction Note and Senior Contingency Note were secured by a Senior Debt Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Construction) dated January 22, 2008 between Gemstone West Inc, as trustor, and SFC, as beneficiary, which was recorded in the real property records of Clark County, Nevada on February 7, 2008, at Book 20080207, Instrument No. 0001482 (the "Senior DOT").

82. The Senior Loan Agreement refers to the Prior Loan and the Edelstein Loan, as amended, as the "Mezzanine Financing" and the documents relating to the Prior Loan and the Edelstein Loan, as amended, as the "Mezzanine Financing Documents."

83. The Senior Loan Agreement provides that Gemstone West Inc. would assume the obligations of Apache under and in regards to the Mezzanine Financing as set forth in the Mezzanine Financing Documents, including but not limited to the obligations with respect to the

1 First Junior DOT, First Senior DOT, and the Third DOT (as amended).

2 84. The Senior Loan Agreement provides that the First Junior DOT, First Senior DOT,  
3 and the Third DOT would subordinate to the Senior DOT.

4 85. Pursuant to Section 2.2 of the Senior Loan Agreement, the initial advance under the  
5 Senior Construction Note was to be used to pay the Mezzanine Financing with the exception of: a)  
6 land costs, b) loan fees or interest expense paid the Mezzanine Financing participant, or c) required  
7 equity as defined in the Section 3.1.10 of the Senior Loan Agreement.

8 86. Advances under the Senior Loan for the Construction of Improvements were subject  
9 to the satisfaction of several conditions precedent set forth in Article 4 of the Senior Loan  
10 Agreement, including but not limited to:

11 A. Gemstone West Inc. having aggregate pre-sale revenue of not less than  
12 \$60,000,000 from: (i) Qualified Sales of condo units, (ii) the capitalized  
13 value (at a 7.0% capitalization rate measured against triple net lease  
14 payments) of Class A office and retail leases, and (iii) the sales price of  
15 Class A office space; and

16 B. Gemstone West Inc. obtaining and maintaining certain nonrefundable cash  
17 deposits or deposit bonds on condominium units sold but not yet closed and  
18 square footage leased.

19 87. Section 6.2 of the Senior Loan Agreement requires, among other things, that: a)  
20 Gemstone West Inc. construct the Improvements free from any mechanic's, laborer's and  
21 materialman's liens; b) Gemstone West Inc. further covenants and agrees not to create, permit to be  
22 created, or allow to exist any liens, charges or encumbrances on the Trust Property and  
23 Improvements other than certain Permitted Encumbrances (as defined therein) or than those  
24 otherwise allowed by the Collateral Documents; and c) not encumber any interest of Gemstone  
25 West Inc. in the Property and Improvements without the prior written approval of Lender.

26 88. Article 7 of the Senior Loan Agreement defines an event of default under the  
27 Agreement, and includes, among other things: a) if Gemstone West Inc. fails to pay principal or  
28 interest under the Senior Construction Note or Senior Contingency Note and such failure continues

1 for a period of ten (10) days; b) if any representation or warranty made by Gemstone West Inc. in  
2 the Senior Loan Agreement or in any certificate or document furnished pursuant to the Senior Loan  
3 Agreement proves untrue; c) if Gemstone West Inc. fails to keep, enforce, perform and maintain in  
4 full force and effect any provision of the Senior Loan Agreement, the Collateral Documents or  
5 Construction Documents after 30 days written notice of said non-monetary default; and d) if  
6 Gemstone West Inc. further encumbers the Trust Property or Improvements or an interest therein  
7 without the prior written approval of SFC, except as otherwise permitted in the Collateral  
8 Documents.

9 89. The Senior DOT provides that it shall secure future advances as if made on the date  
10 of the Senior DOT, up to the maximum amount of 150% of the principal amount of the Senior  
11 Construction Note and Senior Contingency Note.

12 90. The Senior DOT requires Gemstone West Inc. to pay, 10 days before default or  
13 delinquency, any obligations secured by liens, encumbrances, charges and/or claims on the  
14 Property or any part thereof, which appear to have priority over the lien of the Senior DOT.

15 91. The Senior DOT includes a Due on Sale clause which provides that Gemstone West  
16 Inc. shall not make a "Transfer of Interest", which includes but is not limited to, a sale,  
17 encumbrance or junior lien on the Property, without Trustor's prior written consent.

18 92. As part of the Senior Loan Agreement, Tharaldson agreed to guarantee the Senior  
19 Loan pursuant to Guaranty, and Addendum thereto, each dated January 22, 2008.

20 93. In connection with the Senior Loan Agreement, TM2I agreed to guaranty the Senior  
21 Loan pursuant to a separate Guaranty dated January 22, 2008.

22 94. Neither Tharaldson nor TM2I is a shareholder, owner, officer or affiliated party of  
23 Gemstone West Inc., but rather executed the Guaranty on the condition that Tharaldson receive  
24 5.0% of the 14.0% interest rate on the Senior Loan regardless of who participated in funding the  
25 Senior Loan.

26 95. On or about March 21, 2008, SFC, as Originating Lender, and CVFS, as Participant,  
27 executed a Nonrecourse Participation Agreement as amended by the Addendum to Nonrecourse  
28 Participation Agreement dated March 21, 2008, as well as a Commitment to Participate dated on or

1 about the same date, which superseded two prior CVFS Senior Participation Agreements (the  
2 "CVFS Third Senior Participation Agreement"), under which CVFS agreed to provide \$400,000 of  
3 the Senior Loan. Under the CVFS Third Senior Participation Agreement, CVFS was to receive  
4 8.5% interest, Guarantor was to receive 5.0% interest, and SFC made a service fee of .50%. The  
5 CVFS Third Senior Participation Agreement provided that SFC was agent for CVFS concerning  
6 the Senior Construction Note and acknowledged SFC's fiduciary duties to CVFS.

7 96. In connection with the Senior Loan, General Contractor consented to an Assignment  
8 of Construction Contract, Plans and Specifications executed by Gemstone West Inc. in favor of  
9 SFC, pursuant to a Consent of General Contractor dated January 22, 2008 (the "Contractor  
10 Consent"). That Contractor Consent specifically provides that "[a]ll liens, claims, rights, remedies  
11 and recourses that [Asphalt Products Corporation] may have or may otherwise be entitled to assert  
12 against all or any portion of the Project shall be, and they hereby are made expressly subordinate,  
13 junior and inferior to the liens, claims, rights, remedies and recourses as created by the Loan  
14 Agreement and the Collateral Documents." In addition, General Contractor executed a certificate  
15 as to Sworn Construction Statement dated January 22, 2008 indicating that no work had been  
16 completed to date on the Property or Project (the "Contractor Certificate").

17 97. At the closing of the Senior Loan on January 22, 2008, CVFS received a net  
18 paydown of \$9,930,348, reducing the unpaid balance of the Prior Loan to approximately  
19 \$35,278,688 and of the Edelstein Loan to approximately \$9,229,412, for a total balance then owed  
20 to CVFS of \$45,342,798.

21 98. On or about January 22, 2008, Gemstone West Inc., Gemstone Apache and SFC  
22 entered into an Assumption Agreement whereby SFC consented to: a) a sale of the Trust Property  
23 under the First Senior DOT, First Junior DOT and Third DOT (collectively referred to as the  
24 "Mezzanine Deeds of Trust") from Apache to Gemstone West Inc.; and b) Gemstone West Inc.'s  
25 assumption of all liability pertaining to the Mezzanine Notes and Mezzanine Loans; and c) the lien  
26 of the Mezzanine Deeds of Trust on the Trust Property.

27 99. On or about January 22, 2008, Gemstone West Inc. and SFC executed a Fourth  
28 Amendment to Mezzanine Loan Agreement [Prior Loan Agreement] whereby SFC agreed to

1 extend the maturity date of the First Junior DOT Note, First Senior DOT Note, and LOC Note  
2 (collectively referred to as the "Mezzanine Notes") to December 31, 2009 and increase the total  
3 principal amount of the Mezzanine Notes from \$33,000,000 to \$46,000,000, to be evidenced by a  
4 new Mezzanine Note dated January 22, 2008 in the maximum principal amount of \$46,000,000.

5 100. On or about January 22, 2008, Gemstone West Inc executed a Mezzanine Note in  
6 the principal amount of \$46,000,000 bearing interest at the fixed rate of 14.5% per annum. The  
7 Mezzanine Note calls for monthly interest payments only, with the entire principal balance, and all  
8 unpaid accrued interest, due in full on the maturity date of December 31, 2009.

9 101. On or about January 22, 2008, Gemstone West Inc. and SFC executed a First  
10 Amendment to Senior Deed of Trust and Security Agreement with Assignment of Rents and  
11 Fixture Filing (Line of Credit) (Mezzanine) ("First Senior DOT Amendment"), to confirm that the  
12 First Senior DOT secured \$28,000,000 of the refinanced Mezzanine Note. The First Senior DOT  
13 Amendment was recorded in the real property records of Clark County, Nevada on February 7,  
14 2008 at Book 20080207, Instrument No. 0001484.

15 102. On or about January 22, 2008, Gemstone West Inc. and SFC executed a Second  
16 Amendment to Junior Deed of Trust and Security Agreement with Assignment of Rents and  
17 Fixture Filing (Line of Credit) (Mezzanine) ("First Junior DOT Second Amendment"), to confirm  
18 that the First Junior DOT secured \$18,000,000 of the refinanced Mezzanine Note. The First Junior  
19 DOT Second Amendment was recorded in the real property records of Clark County, Nevada on  
20 February 7, 2008 at Book 20080207, Instrument No. 0001485.

21 103. Pursuant to a Nonrecourse Participation Agreement dated January 21, 2008 by and  
22 between SFC, as Originating Lender, and CVFS, as Participant and Loan Participation Certificate  
23 attached thereto (the "Mezzanine Participation Agreement"), CVFS agreed to provide funds for the  
24 Mezzanine Loans, primarily by refinancing the outstanding balances on the Prior Loan and the  
25 Edelstein Loan. Under the Mezzanine Participation Agreement, CVFS was to receive 14.0%  
26 interest and SFC made a service fee of .50%. The Mezzanine Loan Participation Agreement  
27 provided that SFC was agent for CVFS concerning the Mezzanine Note and acknowledged SFC's  
28 fiduciary duties to CVFS.

104. On February 6, 2008, Apache conveyed the Property under the Senior DOT to Gemstone West Inc. via a Grant, Bargain, Sale Deed recorded in the real property records of Clark County, Nevada on February 7, 2008 at Book 20080207, Instrument No. 0001480.

105. On January 30, 2008, SFC's counsel opined to SFC that SFC was in a position to fund the Senior Loan, provided each Participant funds its pro rata share.

**The Senior Loan Agreement Signature, the Subordination, the Guaranty, the TM2I**

**Guaranty and the CVFS Participation**

106. In connection with the Senior Loan, Tharaldson executed the Senior Loan Agreement under the heading "acknowledgment of guarantor" and the Guaranty.

107. In connection with the Senior Loan, TM2I executed the TM2I Guaranty,

108. In connection with the Senior Loan, CVFS executed the CVFS Senior Participation Agreement.

109. The Senior Loan Agreement, the CVFS Participation, the Guaranty, and the TM2I Guaranty are hereafter collectively referred to as the "Plaintiffs' Senior Loan Documents."

110. In connection with the Senior Loan, SFC executed a Mezzanine Deeds of Trust Subordination Agreement dated January 22, 2008, and recorded in the real property records of Clark County, Nevada on February 7, 2008, at Book 20080207, Instrument No. 0001486, purporting to subordinate the Prior Loan Deeds of Trust to the Senior Loan Deed of Trust.

111. SFC expressed its intent that the Prior Loan Deeds of Trust and the indebtedness secured thereby be subordinate to the \$110,000,000 Senior Deed of Trust and indebtedness secured thereby.

112. At the time the Plaintiffs' Senior Loan Documents were agreed to, and at all times thereafter, the Fiduciary Defendants owed to Plaintiffs fiduciary duties of undivided loyalty; due care, competence, and diligence; and the duty to provide to Plaintiffs all material information.

113. At the time the Plaintiffs' Senior Loan Documents agreed to were executed and at all times thereafter, the Fiduciary Defendants owed to Plaintiffs a duty not to deal with Plaintiffs on behalf of an adverse party in a transaction connected with their fiduciary duty to Plaintiffs.

**Subsequent Changes to Loans**

114. On August 11, 2008, Edelstein and SFC executed a Fourth Amendment to Loan Agreement (Edelstein) to provide for, among other things: 1) SFC's agreement to lend Edelstein and Gemstone Manhattan Holdings I, LLC, a Nevada limited liability company ("Gemstone Manhattan") an additional sum of \$9,000,000 to enable Edelstein to refinance the Condo Units; 2) to provide that the first \$6,000,000 of the LOC Note be used to permanently repay the Edelstein Note; 3) to advance funds on the Edelstein Note to make the interest payment for August 2008 but to then convert the Edelstein Note to a closed-end note with no further advances; and 4) to release the lien of the Gemstone LVS DOT on the remaining 17 Condo Units.

115. On or about August 11, 2008, Gemstone Manhattan and SFC executed a First Amendment and Assumption Agreement to the Gemstone LVS DOT, which was recorded on September 9, 2008 in the public real property records of Clark County, Nevada at Book 20080909, Instrument No. 0003944 (the "Gemstone LVS DOT Amendment"). Under the Gemstone LVS DOT Amendment, Gemstone Manhattan assumed the obligations of Apache under the Gemstone LVS DOT and the principal amount secured under the Gemstone LVS DOT was increased to include the Rental LOC Note.

116. On or about August 18, 2008, SFC, as Origination Lender, and CVFS, as Participant, executed a new Nonrecourse Participation Agreement as amended by the Addendum to Nonrecourse Participation Agreement dated August 18, 2008, as well as a Commitment to Participate dated on or about the same date (the "CVFS Rental Participation Agreement"), under which CVFS agreed to provide the \$9,000,000 for the Rental LOC Note. Under the CVFS Rental LOC Participation Agreement, CVFS was to receive 7.0% interest and SFC made a service fee of .125%. The CVFS Rental LOC Nonrecourse Participation Agreement provided that SFC was agent for CVFS concerning the Construction LOC Note and acknowledged SFC's fiduciary duties to CVFS.

**Default under the Prior Loan, the Edelstein Loan, the Mezzanine Loans,**

**the Senior Loan and the Rental LOC Notes**

117. The obligors on the Prior Loan, the Edelsteins Loan, the Mezzanine Loans, the

1 Senior Loan and the Rental LOC Note (collectively the "Manhattan West Loans") have not made  
2 any of the required interest payments since September 2008, and all promissory notes making up  
3 the Manhattan West Loans are therefore in monetary default.

4 118. The obligors on the Manhattan West Loans are in material breach of various  
5 covenants in the loan documents relating to the Manhattan West Loans, including the Deeds of  
6 Trust securing those loans.

7 119. More than sixty (60) days have expired after SFC's written notice of default to the  
8 obligors on the Manhattan West Loans dated October 28, 2008, and none of the defaults has been  
9 cured within any applicable cure periods.

10 120. The unpaid principal balances on the Manhattan West Loans, together with all  
11 accrued but unpaid interest, including late penalties and default interest, are now immediately due  
12 and payable.

13 121. On January 9, 2009, the Fiduciary Defendants threatened to commence private  
14 trustee sales under the Deeds of Trust securing the Manhattan West Loans, all to Plaintiffs'  
15 detriment.

16 **The Fraudulent Inducement**

17 122. Plaintiffs' decisions to modify the Prior Loan and the Edelstein Loan as provided in  
18 the Senior Loan Agreement, and to agree to the Plaintiffs' Senior Loan Documents was based upon  
19 the trust and confidence Plaintiffs reposed in Scott and SFC due to their longstanding business  
20 relationship, and upon the Fiduciary Defendants' recommendations to Plaintiffs which Plaintiffs  
21 understood to be backed up by the Fiduciary Defendants' rigorous due diligence and the Fiduciary  
22 Defendants' assurances to Plaintiffs that the transaction was sound and would be in Plaintiffs' best  
23 interest.

24 123. Defendants SFC and BOK as lead lenders co-underwrote and performed all due  
25 diligence investigations on the Senior Loan transaction. SFC's April 27, 2007 conditional  
26 financing commitment letter to Gemstone Apache states "The Construction Financing Proposal  
27 would be followed (sic) executed only after acceptable due diligence is completed inclusive of an  
28 industry review, appraisal, underwriting as well as complete Project analysis by the Lender."

1 124. Before Plaintiffs agreed to the Senior Loan transactions, Scott and SFC told  
2 Plaintiffs that with the advent of the Senior Loan, their business and economic position with  
3 respect to construction lending on the Project, would be:

- 4 A. The Senior Loan of \$110,000,000 would become a first lien position on the  
5 Project.  
6 B. Plaintiffs would receive a net paydown on the Prior Loan and Edelstein  
7 Loan aggregating about \$10,000,000, and the Prior Loan and the Edelstein  
8 Loan, as amended, would become a second position lien on the Project.  
9 C. There was a fixed price construction agreement with a viable and reputable  
10 general contractor which would deliver all of the required construction for  
11 the Project at a cost of approximately \$79,000,000.  
12 D. There would be \$60,000,000 in "lender approved" pre-sales and/or pre-  
13 leases (the "Pre-Sales Contracts") prior to closing of the Senior Loan, which  
14 would provide sources of repayment of the Senior Loan in those amounts.  
15 E. Based upon pro formas prepared by Developer and vetted by the Fiduciary  
16 Defendants prior to the Plaintiffs making any commitments with respect to  
17 the Senior Loan, the total acquisition, development, and construction costs  
18 estimated for the Project were \$120,000,000 and the total revenues  
19 estimated for the Project were \$154,000,000, for a projected net income of  
20 \$34,000,000 from the Project. Scott and SFC provided these pro formas to  
21 Plaintiffs in May, 2007.  
22 F. SFC and BOK had rigorously underwritten the financial pro formas and the  
23 financial viability of the Project and were relying primarily on the financial  
24 viability of the Project in making the Senior Loan.  
25 G. Tharaldson's exposure on the Guaranty and TM2I's exposure on the TM2I  
26 Guaranty of the Senior Loan would be limited to any excess of the Senior  
27 Loan balance on any given day over the fair market value of all of the  
28 collateral for the Senior Loan (including the Project, the Construction

Contract, and the Pre-Sales Contracts.)

125. Communications between Plaintiffs and SFC/Scott concerning the Manhattan West Loan, and SFC/Scott's material misrepresentations and omissions relating to that loan occurred over the period between February 15, 2007 and execution of the Senior Loan documents on January 22, 2008. The communications were numerous. They were oral and written, formal and informal, in person and telephonic. Sometimes they were no more formal than Scott dropping into Tharaldson's office to chat, and most communications were undocumented. Among the many communications were the following:

- |    |                   |  |
|----|-------------------|--|
| a. | February 15, 2007 | Initial presentation by Scott and Edelstein of proposed Manhattan West Loan.                             |
| b. | April 12, 2007    | SFC submits first Manhattan West Loan analysis summary to Plaintiffs.                                    |
| c. | April 18, 2007    | Email communication from CVFS to Scott concerning pre-sale amounts with no mention of sales to insiders. |
| d. | April 30, 2007    | Tharaldson executes first financing commitment letter.   |
| e. | May 6, 2007       | SFC discusses modifying loan. Does not mention related party pre-sales.                                  |
| f. | May 17, 2007      | Tharaldson executes \$8 million financing commitment.  |
| g. | May 21, 2007      | SFC provides project pro formas to Plaintiffs.   |

- 1  
2 h. October 12, 2007 Tharaldson executes modified financing  
3 commitment letter.  
4  
5 i. October 19, 2007 Scott provides updated financial analysis  
6 which has no indication project revenues  
7 would drop to \$10 million and no indication  
8 that developer would be relying on related  
9 party sales.  
10  
11 j. November 19, 2007 SFC provides updated projections with no  
12 indication of related party sales.  
13  
14 k. January 22, 2008 Tharaldson executes Senior Loan documents.  
15  
16 l. February 25, 2008 Tharaldson executes revised commitment  
17 letter.  
18

19 126. Plaintiffs understood all of the foregoing statements to be true and this  
20 understanding is reflected in part in a Conditional Commitment Letter dated April 27, 2007 and a  
21 modification to Conditional Commitment Letter dated October 8, 2007. The April 27, 2007  
22 Conditional Commitment Letter stated that it was contingent on:

- 23 • "Subordination of Land Loan to Senior Construction Loan."  
24 • "Senior Construction Loan personally guaranteed by Gary D. Tharaldson."  
25 • "Monthly lender inspection and third party inspections."  
26 • "Voucher control on all draws."  
27 • "Acceptable abacus feasibility analysis on entire Project."  
28 • "Acceptable lender approved project budget."

- "Acceptable GMP contract assigned to lender."
- "All sales must be approved by lender."
- "Lender and Participant to verify cash flow and IRR calculations."
- "Total pre-sale revenue \$60 million required to be secured before vertical financing."
- "A minimum of monthly SFC on site inspections will be required."

127. Scott, SFC and BOK knew that Scott and SFC occupied a fiduciary relationship with Plaintiffs based on the overall longstanding business advisory relationship and specifically with reference to the several Participation Agreements relating to various components of the Prior Loan and the Edelstein Loan.

128. Consistent with their prior course of dealing, Plaintiffs relied upon the lending experience and expertise of Scott and SFC to perform the underlying due diligence with respect to the Senior Loan, to engage counsel to represent both SFC and Plaintiffs in preparation of the appropriate loan documentation, and to properly close and administer the Senior Loan.

129. The Fiduciary Defendants knew that SFC and BOK, as Co-Lead Lenders, also occupied a fiduciary relationship with Plaintiffs with specific reference to the Senior Loan as a participant in the Senior Loan, as the intended Guarantors of the Senior Loan, and as sole owner of the Prior Loan and the Edelstein Loan to be subordinated to the Senior Loan.

130. The Fiduciary Defendants knew but did not identify and resolve with Plaintiffs that the Senior Loan transaction presented direct and substantial conflicts between: (a) SFC's and Scott's position as fiduciaries to Plaintiffs with respect to Plaintiffs 100% ownership interest in the Prior Loan and the Edelstein Loan; and (b) the Fiduciary Defendants' position as fiduciaries to all Senior Loan participants, including CVSF.

131. In connection with the Senior Loan, the Fiduciary Defendants made misrepresentations to Plaintiffs and failed to disclose to Plaintiffs material information concerning the Project and the Senior Loan, which are described in the following sections.

***Deteriorated Financial Prospects.***

132. SFC, Scott and BOK attached to the Senior Loan Agreement a pro forma for the

1 Project that showed projected net income for the Project of \$10,000,000 rather than the  
2 \$34,000,000 reflected in the pro forma the Fiduciary Defendants had previously provided to  
3 Plaintiffs and on which Plaintiffs had relied in agreeing to the Plaintiffs' Senior Loan Documents.

4 133. The Fiduciary Defendants knew about and initialed the revised pro forma showing  
5 estimated net income from the Project less than one-third of the amount represented to Plaintiffs.

6 134. The Fiduciary Defendants failed to disclose the revised pro forma to Plaintiffs or  
7 ask Plaintiffs to initial it.

8 135. The revised pro forma was highly material and Plaintiffs never would have agreed  
9 to the Plaintiffs' Senior Loan Documents had they known of the substantial deterioration in the  
10 projected financial viability of the Project.

11 ***Primary Reliance on Guarantors.***

12 136. The Fiduciary Defendants failed to disclose to Plaintiffs that their underwriting of  
13 the Senior Loan relied solely on the Guaranty and the TM2I Guaranty, not on the financial  
14 viability of the Project. Instead they misled Plaintiffs into believing that SFC, Scott and BOK had  
15 found the Senior Loan to be credit worthy on the basis of the merits and projected performance of  
16 the Manhattan West Project.

17 137. Plaintiffs never would have agreed to the Plaintiffs' Senior Loan Documents had  
18 they known that the Fiduciary Defendants were not relying primarily on the financial viability of  
19 the Project in underwriting the Senior Loan.

20 138. The Fiduciary Defendants later admitted to Plaintiffs orally in October 2008 and in  
21 writing in December 2008, that their underwriting of the Senior Loan had relied solely on the  
22 financial resources of the Guarantors and not primarily on the financial viability of the Project as  
23 Plaintiffs had understood.

24 ***Fraud Relating to the Pre-sale Condition.***

25 139. A condition to the closing of the Senior Loan, and therefore to the effectiveness of  
26 Plaintiffs' Senior Loan Documents was that \$60,000,000 in "lender approved" pre-sales and/or  
27 pre-leases must have occurred (the "Pre-Sale Condition"). (Senior Loan Agreement §§ 4.1.3,  
28 1.16.)

1 140. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had  
2 they known that the Pre-Sale Condition was not satisfied, because bona fide, third party pre-sales  
3 and pre-leases provide an assurance of true market interest in a project and a known source of  
4 revenue for repayment of the loan.

5 141. The Fiduciary Defendants knew or should have known that the Pre-Sale Condition  
6 was commercially atypical and unreasonable because it used language unusual for this type of a  
7 condition in large commercial loans, by not expressly requiring that Pre-Sales be bona fide sales  
8 to parties unrelated to the borrower and its affiliates, as this condition is designed to provide  
9 strong evidence of market acceptance of the project from persons whose net worth is not already  
10 invested in the project.

11 142. The Fiduciary Defendants had a duty not to approve and count toward satisfaction  
12 of the pre-sale condition, pre-sales that were made to insiders, affiliates or other persons or  
13 entities related to the borrower. Nevertheless, the Fiduciary Defendants certified at the closing of  
14 the Senior Loan that there were \$62,700,000 of "lender approved" pre-sales and/or pre-leases, and  
15 that the Pre-Sale Condition had been satisfied. It was not reasonable or appropriate to make this  
16 certification.

17 143. The Fiduciary Defendants certified that the lender approved pre-sales and/or pre-  
18 leases consisted of \$45,000,000 in residential pre-sales and \$17,250,000 of commercial pre-sales  
19 and/or pre-leases.

20 144. The Fiduciary Defendants knew or should have known that at the closing of the  
21 Senior Loan, at least \$2,500,000 of the "lender approved" residential pre-sales (5.6%) were sales  
22 to parties closely related to Gemstone West Inc., including but not limited to family members of  
23 Gemstone West Inc.'s principal Alex Edelstein (Alex Edelstein, Charles Edelstein, Sara  
24 Edelstein), Peter Smith (Gemstone West Inc.'s COO), and Defendant Scott. Other "lender  
25 approved" residential pre-sales may also be questionable related party sales.

26 145. The Fiduciary Defendants knew or should have known that at the closing of the  
27 Senior Loan, all \$17,250,000 of the commercial pre-sales and/or pre-leases were sales and/or  
28 leases to parties closely related to the Gemstone West Inc. All three pre-leases were with

1 affiliates of the Gemstone West Inc. (Manhattan West Residential, Inc., Gemstone Coffee House,  
2 LLC, and Gemstone Development LLC (1,800 square feet)). The one commercial sale  
3 (\$5,500,000) was to Santa Rita Management Company, an entity owned by the Edelstein's father.

4 146. The Fiduciary Defendants failed to disclose to Plaintiffs that highly questionable  
5 related party sales and leases made up nearly one third of the entire \$60,000,000 in "lender  
6 approved" pre-sales.

7 147. The certification by the Fiduciary Defendants that the Pre-Sale Condition had been  
8 satisfied was false and fraudulent.

9 148. After the closing of the Senior Loan, many of the related party condominium sales  
10 and the \$5.5 million office sale were cancelled. The office sale was then "replaced" by a lease to  
11 Gemstone West Inc.'s affiliate Gemstone Development, L.L.C. (19,861 square feet).

12 ***Fraud Relating to First Lien Condition.***

13 149. A condition to the closing of the Senior Loan, and therefore to the effectiveness of  
14 Plaintiffs' Senior Loan Documents, was that the Gemstone West Inc. provide a first position Deed  
15 of Trust on the Project (the "First Lien Condition"). (Senior Loan Agreement §§ 3.1.1, 1.18;  
16 3.1.3, 3.1.4)

17 150. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had  
18 they known that the First Lien Condition was not satisfied, because of the hassle, expense, and  
19 uncertainty of resolving senior lien claims.

20 151. The Fiduciary Defendants were aware prior to the closing of the Senior Loan of  
21 any construction work that had been performed on the Project prior to recording of the Senior  
22 Loan Deed of Trust, that might cause a broken priority with respect to the Senior Loan.

23 152. The Fiduciary Defendants knew or should have known that under NRS 108.225(1)  
24 and (2) mechanics liens for any work performed prior to the recording date of the Senior Loan  
25 Deed of Trust (the "Priority Construction Liens") would be prior and superior to the Senior Loan  
26 Deed of Trust.

27 153. The Fiduciary Defendants also knew that the Deeds of Trust securing the Prior  
28 Loan were prior and superior to any Priority Construction Liens.

154. The Fiduciary Defendants failed to inform Plaintiffs prior to the closing of the Senior Loan of the existence or amount of any Priority Construction Liens and the fact that they enjoyed a statutory preference over the Deed of Trust securing the Senior Loan.

155. The Fiduciary Defendants certified at the closing of the Senior Loan that the First Lien Condition had been satisfied.

156. This certification was a misrepresentation and a fraud.

***Insurance Over Broken Priority; Switched Title Insurance Companies.***

157. Rather than informing Plaintiffs of any Priority Construction Liens that enjoyed statutory priority over the Senior Loan Deed of Trust, Defendants chose to "insure over" the Priority Construction Liens in a title policy issued by Defendants' chosen title company, Commonwealth Land Title Insurance Company ("Commonwealth"). Fiduciary Defendants did not disclose this decision to Plaintiffs.

158. This was a change from First American Title Insurance Co. ("First American") which had provided the title work and title insurance on the Prior Loan and the Edelstein Loan.

159. The Fiduciary Defendants failed to inform Plaintiffs prior to the closing of the Senior Loan that they had chosen to "insure over" any Priority Construction Liens or that they had switched from First American to Commonwealth.

160. The Fiduciary Defendants knew or should have known that Commonwealth was financially troubled and that First American was not.

161. The Fiduciary Defendants failed to inform Plaintiffs prior to the closing of the Senior Loan, of Commonwealth's questionable financial condition.

162. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had they known that the Fiduciary Defendants were insuring over the Priority Construction Liens and were switching from First American to Commonwealth.

163. In November 2008, the Nebraska Insurance Commissioner informed Commonwealth that it was in a "hazardous financial condition" under Nebraska law and filed a petition for rehabilitation against Commonwealth. Commonwealth consented to the rehabilitation petition.

1 164. Also in November 2008, the parent company of Commonwealth, Land America  
2 Financial Group, Inc. filed a petition under Chapter 11 of the Bankruptcy Code.

3 165. On or about December 22, 2008, under regulatory pressure on Commonwealth,  
4 Fidelity National Title Insurance Company acquired Commonwealth from its parent company. It  
5 is not presently known whether Fidelity National Title Insurance Company assumed all of the  
6 liabilities of Commonwealth.

7 *Subordination Exacerbates Broken Priority.*

8 166. The Fiduciary Defendants knew or should have known that subordinating the  
9 Deeds of Trust securing the Prior Loan to the Deed of Trust securing the Senior Loan would  
10 create a substantial risk of elevating any Priority Construction Liens in priority ahead of the Prior  
11 Loan.

12 167. The Fiduciary Defendants failed to inform Plaintiffs of the risk that any Priority  
13 Construction Liens would become senior to the Deeds of Trust securing the Prior Loan as a result  
14 of the Subordination and to provide their evaluation of that risk.

15 168. The Fiduciary Defendants caused the Subordination Agreement to be drafted in a  
16 manner that substantially increased the risk that any Priority Construction Liens would become  
17 senior to the Prior Loan as a result of the Subordination. Specifically, paragraph 1 provides that  
18 the extent of the subordination is "as though the Mezzanine Deeds of Trust had been recorded  
19 subsequent to the recordation of the \$110,000,000 Senior Debt Deed of Trust." Under that  
20 hypothetical recording order, the Prior Loan would also have been subordinate to any previously  
21 vested Priority Construction Liens. If the language of paragraph 1 had been drafted so that the  
22 extent of the subordination were "as though the Senior Debt Deed of Trust had been recorded  
23 prior to the recordation of the Mezzanine Deeds of Trust" that argument would be negated. Also  
24 paragraph 10 provides that this Subordination Agreement "shall not be construed as affecting the  
25 priority of any other liens or encumbrances in favor of SFC on the Trust Property." The failure  
26 also to negate any intent to affect the priority of other liens arguably supports giving effect to the  
27 literal language of paragraph 1.

28 169. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents, had

1 they known that the Fiduciary Defendants through their drafting of the Subordination had  
2 substantially increased the risk of any Priority Construction Liens gaining priority over the Deeds  
3 of Trust securing the Prior Loan and the Edelstein Loan.

4 170. The Fiduciary Defendants failed to inform Plaintiffs that the Subordination  
5 Agreement had been drafted in a manner that substantially increased the risk that any Priority  
6 Construction Liens would become senior to the Prior Loan as a result of the Subordination.

7 ***Fraud Relating to Terms of Guaranty, the TM2I Guaranty and the Subordination.***

8 171. As Fiduciaries, Defendants Scott, SFC and BOK had a duty to disclose that they  
9 were preparing legal instruments that had the effect of negating protective provisions of Nevada  
10 law.

11 172. The Fiduciary Defendants caused to be prepared and submitted to Tharaldson for  
12 signature a form of Guaranty of the Senior Loan that contained a Nevada choice of law provision.

13 173. The Fiduciary Defendants knew or should have known that Nevada law provided a  
14 single action rule and also accorded to a guarantor of a real estate loan a fair market value defense,  
15 insuring that the guarantor's exposure for a deficiency judgment was limited to the excess of the  
16 loan over the fair market value of the loan collateral for a deficiency judgment.

17 174. The Fiduciary Defendants knew that Nevada law permitted a guarantor in a  
18 commercial loan over \$500,000 to waive the single action rule and the guarantor's fair market  
19 value defense.

20 175. The Fiduciary Defendants inserted in the Guaranty of the Senior Loan a waiver of  
21 all statutory rights of a guarantor under Nevada law, including the single action rule and the fair  
22 market value defense. They did not disclose to Plaintiffs their insertion of this waiver provision.

23 176. The Fiduciary Defendants caused to be prepared and submitted to TM2I for  
24 signature a form of guaranty that adopted North Dakota law.

25 177. The Fiduciary Defendants knew or should have known that North Dakota law did  
26 not provide a single action rule nor extend a borrower's fair market value defense to a guarantor.  
27 They did not disclose to Plaintiffs that they had selected the law of a state which substantially  
28 altered their rights as they would have existed under Nevada law.

1           178. The Fiduciary Defendants advised Plaintiffs that the documents they were signing,  
2 including the Guaranty and the TM2I Guaranty, were appropriate to sign and protected Plaintiffs'  
3 interests, as was the Subordination Agreement relating to the Prior Loan which SFC as Lender  
4 was signing.

5           179. The Fiduciary Defendants failed to advise Plaintiffs that under the Guaranty and  
6 the TM2I Guaranty as presented, Tharaldson's exposure on the Guaranty and TM2I's exposure  
7 on the TM2I Guaranty would be far greater than Plaintiffs intended or understood because of the  
8 waivers contained in the Guaranty and the choice of law in the TM2I Guaranty.

9           180. The provisions the Fiduciary Defendants inserted into the Guaranty instruments  
10 were one sided and greatly benefitted BOK and the other participating lenders to the substantial  
11 detriment of Tharaldson and TM2I. The Fiduciary Defendants failed to advise Plaintiffs to  
12 consult with independent counsel concerning the Plaintiffs' Senior Loan Documents due to the  
13 Fiduciary Defendants' conflicting duties of undivided loyalty with respect thereto.

14           181. In agreeing to Plaintiff's Senior Loan Documents, Plaintiffs were unaware of  
15 Nevada law permitting waiver of the fair market value defense, the legal effect of the waiver  
16 provisions inserted in the Guaranty, that North Dakota law did not extend a Borrower's fair  
17 market value defense to a guarantor, or the legal risks inherent in the Subordination in light of the  
18 undisclosed Priority Construction Liens.

19           182. Plaintiffs would not have agreed to the Senior Loan Documents had they known  
20 any of the matters alleged in the preceding paragraph.

21                           Administration of Senior Loan

22           183. During their due diligence review of the Senior Loan, the Fiduciary Defendants  
23 failed to detect that the \$79,000,000 fixed sum construction contract for the Project failed to cover  
24 about \$3,800,000 in work required by the construction drawings for completion of the Project.

25           184. During the course of their administration of the Senior Loan, when the Fiduciary  
26 Defendants did become aware of this problem, they failed to secure an early and appropriate  
27 resolution of the scope problem with the existing contractor to maintain a fixed sum contract  
28 increased by some amount to cover cost overruns.

185. During the course of their administration of the Senior Loan, the Fiduciary Defendants in their inspections of construction progress, failed to detect that about \$7,900,000 in work on the Project was not properly performed in accordance with the construction documents and would have to be redone.

186. During their administration of the Senior Loan, the Fiduciary Defendants failed take appropriate action to avert approximately \$25.8 million in construction liens against the Project.

187. As the direct and proximate result of these actions and omissions by the Fiduciary Defendants, Plaintiffs and the other participants in the Senior Loan are left with an unfinished Project on which construction has ceased, encumbered by \$25.8 million in construction liens, and with virtually all pre-sale purchasers of residential condominiums and lessees of commercial office space having fled from the Project.

#### Defamatory Statements

188. From at least December 15, 2008, SFC and BOK as Co-Lead Lenders have engaged in oral and written communications with the other participants in the Senior Loan.

189. These communications have included, but are not limited to, such statements as:

- A. Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal "will likely have farther reaching negative implications for his banking relationships with all banks going forward."
- B. Tharaldson's "reputation will be unquestionably damaged."
- C. "The 29 banks stretching from North Dakota to Oklahoma that are in this deal, plus banks not in this deal, will look very unfavorably on any future credit request from Gary."

190. In light of the Fiduciary Defendants' fraud, constructive fraud, breach of fiduciary duty, breaches of contract, and negligence which caused the problems now facing Plaintiffs and the other participants in the Senior Loan, the above statements are false and misleading.

191. The above statements are defamatory *per se*.

**Termination of SFC's Agency on Prior Loan, the Edelstein Loan,  
the Mezzanine Loans, and the Senior Loan**

192. On or about January 12, 2009, Plaintiffs terminated all of the CVFS Pre-Senior Loan Participation Agreements and demanded that SFC assign all components of the loans covered thereby to CVFS and deliver all of the executed original loan documents for such loans to CVFS.

193. On or about January 12, 2009, Plaintiffs terminated the CVFS Senior Participation Agreement and demanded that SFC assign all components of the loans covered thereby to CVFS to the extent of its percentage interest therein.

**Punitive Damages**

194. As set forth more fully in the following claims for relief, Plaintiffs' claims against the Fiduciary Defendants for fraud, constructive fraud, securities fraud, defamation, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, acting in concert/civil conspiracy, and negligence to the extent such negligence rises to the level of gross negligence (the "Predicate Claims") are independent tort claims not arising from contract.

195. The Fiduciary Defendants' actions giving rise to the Predicate Claims make them guilty of "oppression, fraud or malice, express or implied."

196. The Fiduciary Defendants' actions giving rise to the Predicate Claims constituted conduct intended to injure Plaintiffs.

197. The Fiduciary Defendants' actions giving rise to the Predicate Claims constitute "despicable conduct which is engaged in with a conscious disregard of the rights of others ...."

198. The Fiduciary Defendants acted intentionally and/or in concert and are subject to joint and several liability for all damages resulting therefrom.

199. Plaintiffs are entitled to an award of punitive damages against the Fiduciary Defendants in an amount not more than three times the compensatory damages proved at trial.

**FIRST CLAIM FOR RELIEF**

**(Fraudulent Misrepresentation)**

200. Plaintiffs incorporate by reference all prior paragraphs of their Amended

1 Complaint.

2 201. Defendants Scott and SFC, in connection with inducing Plaintiffs to enter into the  
3 Senior Loan transaction made the following misrepresentations of material fact:

- 4 a. Scott and SFC told Plaintiff that SFC and BOK had thoroughly  
5 underwritten the Manhattan West Project and that the Project, on its  
6 own merits was a viable and prudent credit risk that justified the  
7 Senior Loans;
- 8 b. Scott and SFC told Plaintiffs that SFC and BOK expected the  
9 Project to generate \$34,000,000 in net revenues based on project  
10 pro formas and their thorough underwriting of the Project;
- 11 c. SFC and BOK, by making statements, representations and  
12 warranties either expressed or necessarily implied in closing the  
13 Senior Loan transaction that the pre-sale conditions to closing the  
14 Senior Loan had been satisfied through bonafide arms-length pre-  
15 sales to legitimate buyers or tenants who were unrelated to the  
16 Project developer;
- 17 d. SFC and BOK, by making statements, representations and  
18 warranties either expressed or necessarily implied in closing the  
19 Senior Loan transaction that the First Lien condition to closing of  
20 the Senior Loan had been satisfied;

21 202. Plaintiffs are informed and believe that Scott and SFC made additional  
22 misrepresentations of fact which Plaintiffs have not yet discovered and reserve the right to prove  
23 additional misrepresentations at trial.

24 203. General Contractor made certain representations to SFC, as agent for Plaintiffs, in  
25 connection with the Senior Loan. Specifically, General Contractor represented that: A) "[a]ll  
26 liens, claims, rights, remedies and recourses that [Asphalt Products Corporation] may have or may  
27 otherwise be entitled to assert against all or any portion of the Project shall be, and they hereby are  
28 made expressly subordinate, junior and inferior to the liens, claims, rights, remedies and recourses

1 as created by the Loan Agreement and the Collateral Documents"; and B) that no work had been  
2 completed to date on the Property or the Project.

3 204. Scott, SFC and General Contractor made the aforementioned representations with  
4 either knowledge or belief that they were false or without sufficient foundation.

5 205. Scott, SFC and General Contractor made the aforementioned representations with  
6 the intent that Plaintiffs rely on them.

7 206. The representations by Scott, SFC and General Contractor were material to  
8 Plaintiffs' actions with respect to the Senior Loan.

9 207. Plaintiffs had a right to rely on the representations of Scott, SFC and General  
10 Contractor.

11 208. Plaintiffs did detrimentally rely upon those representations by agreeing to the  
12 Plaintiffs' Senior Loan Documents.

13 209. Scott, SFC and General Contractor knew or should have known that the  
14 representations were false.

15 210. Plaintiffs were ignorant of the falsity of the representations.

16 211. As the direct and proximate result of the representations, Scott, SFC and General  
17 Contractor induced Plaintiffs to agree to the Plaintiffs' Senior Loan Documents.

18 212. Scott and SFC acted as agents for BOK in connection with making the  
19 misrepresentations alleged above, and BOK is liable as if it had made those misrepresentations  
20 itself.

21 213. As the result of the Fiduciary Defendants' conduct and General Contractor's  
22 conduct, Plaintiffs were substantially damaged in an amount to be proven at trial.

23 214. Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by  
24 Fiduciary Defendants' fraud and the General Contractor's and therefore are not the valid, binding,  
25 or enforceable obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment voiding  
26 the Plaintiffs' Senior Loan documents. Alternatively, they are entitled to equitable reformation of  
27 the Plaintiffs' Senior Loan documents.

28 215. In the alternative, the matters alleged as fraudulent misrepresentations were mutual

1 mistakes of fact or law or unilateral mistakes of fact or law induced through Defendants'  
2 inequitable conduct, and Plaintiffs are entitled to equitable rescission or reformation of Plaintiffs'  
3 Senior Loan documents.

4 216. By virtue of their agencies for one another, the Fiduciary Defendants are jointly  
5 and severally liable on this claim.

## 6 SECOND CLAIM FOR RELIEF

### 7 (Fraudulent Concealment/Fraudulent Omissions)

8 217. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
9 Complaint.

10 218. By making the misrepresentations and reliance-inducing statements alleged herein,  
11 Defendants Scott and SFC had a duty to speak and disclose the following material facts, which  
12 they knew and which were necessary to make the statements which Scott and SFC did make not  
13 misleading:

- 14 a. That even though they had previously shared with Plaintiffs a pro  
15 forma projecting \$34 million in net project income, Defendants  
16 Scott, SFC and BOK had in their possession at the time the Senior  
17 Loan closed a revised pro forma which they did not share with  
18 Plaintiffs projecting only \$10 million in net project income;
- 19 b. That SFC and BOK had not underwritten the Senior Loan on the  
20 basis of the financial merits and viability of the Manhattan West  
21 Project, but instead had based their underwriting decision solely on  
22 the strength of the guarantees of Tharaldson and TM21;
- 23 c. That First American Title Insurance Co. had refused to issue title  
24 insurance because of prior recorded liens of the General Contractor;
- 25 d. That SFC and BOK were closing the Senior Loan transaction with  
26 actual and undisclosed knowledge that they were insuring over  
27 known General Contractor lien claims;
- 28 e. That so-called lender approved pre-sales were not arms length sales

1 to unrelated third parties, but in many cases were to the affiliates or  
2 principals of the developer or to other insiders;

3 f. That Scott and SFC acting as dual agents for Plaintiffs and BOK had  
4 an inherent conflict of interest that could not be waived;

5 g. That Scott and BOK had prepared guaranty documentation that  
6 substantially reduced Plaintiffs' rights under Nevada law and  
7 materially enhanced BOK's position at Plaintiffs' expense and  
8 detriment.

9 219. On information and belief, Scott and SFC concealed and omitted to state additional  
10 material facts which Plaintiffs have not yet discovered. Plaintiffs reserve the right to prove such  
11 additional concealment and omissions at trial.

12 220. Defendants Scott and SFC knew the truth of the foregoing facts, knew that  
13 Plaintiffs were ignorant of the truth of those facts and knew that they were material to Plaintiffs'  
14 decision to enter into the Senior Loan transaction. Defendants Scott and SFC concealed and  
15 omitted to state these material facts for the purpose of inducing Plaintiffs to enter into the Senior  
16 Loan transaction.

17 221. Defendants Scott and SFC were acting as agent for Defendant BOK in connection  
18 with these concealed and omitted facts and BOK is liable to Plaintiffs for the actions of Scott and  
19 SFC as if BOK itself had concealed material facts and made material omissions.

20 222. Plaintiffs have been damaged and are entitled to recover their damages according  
21 to proof at trial.

22 223. Plaintiffs' agreement to the Plaintiffs' Senior Loan documents was induced by the  
23 fiduciary Defendants' fraudulent concealment and omissions and therefore are not the valid,  
24 binding or enforceable obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment  
25 voiding Plaintiffs' Senior Loan documents. Alternatively, they are entitled to equitable  
26 reformation of the Plaintiffs' Senior Loan documents.

27 224. In the alternative, the matters fraudulently concealed or omitted were mutual  
28 mistakes of fact or law or were unilateral mistakes of fact or law induced by Defendants'

1 inequitable conduct and Plaintiffs are entitled to equitable rescission or reformation of Plaintiffs'  
2 Senior Loan documents.

3 225. By virtue of their agencies for one another, the Fiduciary Defendants are jointly  
4 and severally liable on this claim.

### 5 THIRD CLAIM FOR RELIEF

#### 6 (Constructive Fraud)

7 226. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
8 Complaint.

9 227. The Fiduciary Defendants had a fiduciary and confidential relationship with  
10 Plaintiffs.

11 228. Given the nature of their relationship, the Fiduciary Defendants were under a duty  
12 to disclose to Plaintiffs on a timely basis all material information relating to their decisions to  
13 agree to the Plaintiffs' Senior Loan Documents.

14 229. The Fiduciary Defendants were aware of all of the following prior to the closing of  
15 the Senior Loan:

- 16 A. The Deteriorated Financial Prospects as set forth under that heading above.
- 17 B. The Primary Reliance on Guarantors as set forth under that heading above.
- 18 C. The Insurance over Broken Priority and Switched Title Insurance  
19 Companies as set forth under that heading above.
- 20 D. The Subordination Exacerbates Broken Priority as set forth under that  
21 heading above.
- 22 E. The Fraud Relating to Terms of Guaranty, TM2I Guaranty and  
23 Subordination as set forth under that heading above.

24 230. The Fiduciary Defendants also failed to disclose:

- 25 A. That they were underwriting the Project based solely on the Guarantees;
- 26 B. That the pro forma project profits had decreased from \$34,000,000 to  
27 \$10,000,000;
- 28 C. That the pre-sale conditions were met only through significant sales to

1 insiders and affiliates;

2 D. That there were known lien priority problems which at least one title  
3 insurer had refused to insure over;

4 E. That Scott and SFC had substantial conflicts of interest;

5 F. That SFC and BOK had prepared guaranty documents that were highly  
6 disadvantageous to Plaintiffs' rights under Nevada law.

7 231. Each of the items of information described in the preceding paragraphs were  
8 material to Plaintiffs' decisions to agree to the Plaintiffs' Senior Loan Documents.

9 232. The Fiduciary Defendants failed to disclose that material information to Plaintiffs.

10 233. As the direct and proximate result of the Fiduciary Defendants' misrepresentations  
11 and omissions, Plaintiffs were substantially damaged in an amount to be proven at trial.

12 234. Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by  
13 Fiduciary Defendants' constructive fraud and therefore are not the valid, binding, or enforceable  
14 obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment voiding the Senior Loan  
15 documents. Alternatively, they are entitled to equitable reformation of the Plaintiffs' Senior Loan  
16 documents.

17 235. In the alternative, the matters alleged as constructively fraudulent were mutual  
18 mistakes of fact or law or were unilateral mistakes of fact or law induced by Defendants'  
19 inequitable conduct, and Plaintiffs are entitled to equitable rescission or reformation of Plaintiffs'  
20 Senior Loan documents.

21 236. By virtue of their agencies for one another, the Fiduciary Defendants are jointly  
22 and severally liable on this claim.

23 **FOURTH CLAIM FOR RELIEF**

24 **(Negligent Misrepresentation/Negligent Omission)**

25 237. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
26 Complaint.

27 238. The Fiduciary Defendants had a duty to exercise due care in making  
28 representations to Plaintiffs concerning the Senior Loan, to make all material disclosures, and to

1 scrupulously act in Plaintiffs' best interests.

2 239. The Fiduciary Defendants' made certain representations to Plaintiffs in connection  
3 with the Senior Loan, including but not limited to:

- 4 A. That the Fiduciary Defendants were primarily relying on the financial  
5 viability of the Project in underwriting the Senior Loan and that  
6 Tharaldson's exposure on the Guaranty and TM2I's exposure on the TM2I  
7 Guaranty would be limited.  
8 B. That the Pre-Sale Condition was satisfied.  
9 C. That the First Lien Condition was satisfied.

10 240. On information and belief, Fiduciary Defendants made other negligent  
11 misrepresentations which Plaintiffs have not yet discovered. Plaintiffs reserve the right to prove  
12 such other negligent misrepresentations at trial.

13 241. The Fiduciary Defendants had a duty to exercise due care in not omitting to state  
14 material facts, to make all material disclosures, and to scrupulously act in Plaintiffs' best interest.

15 242. The Fiduciary Defendants breached this duty by omitting to state:

- 16 a. That even though they had previously shared with Plaintiffs a pro  
17 forma projecting \$34 million in net project income, Defendants  
18 Scott, SFC and BOK had in their possession at the time the Senior  
19 Loan closed a revised pro forma which they did not share with  
20 Plaintiffs projecting only \$10 million in net project income;  
21 b. That SFC and BOK had not underwritten the Senior Loan on the  
22 basis of the financial merits and viability of the Manhattan West  
23 Project, but instead had based their underwriting decision solely on  
24 the strength of the guarantees of Tharaldson and TM2I;  
25 c. That First American Title Insurance Co. had refused to issue title  
26 insurance because of prior recorded liens of the General Contractor;  
27 d. That SFC and BOK were closing the Senior Loan transaction with  
28 actual and undisclosed knowledge that they were insuring over

known General Contractor lien claims;

- e. That so-called lender approved pre-sales were not arms length sales to unrelated third parties, but in many cases were to affiliates or principals of the developer or to other insiders;
- f. That Scott and SFC acting as dual agents for Plaintiffs and BOK had an inherent conflict of interest that could not be waived;
- g. That Scott and BOK had prepared guaranty documentation that substantially reduced Plaintiffs' rights under Nevada law and materially enhanced BOK's position at Plaintiffs' expense and detriment.

243. On information and belief, Fiduciary Defendants made additional negligent omissions which Plaintiffs have not yet discovered. Plaintiffs reserve the right to prove such additional negligent omissions at trial.

244. In making these negligent misrepresentations, and negligent omissions the Fiduciary Defendants breached their duty of care.

245. The representations were false, and the facts omitted were material.

246. As the direct and proximate result of the Fiduciary Defendants' misrepresentations and omissions, Plaintiffs were substantially damaged in an amount to be proven at trial.

247. Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by Fiduciary Defendants' negligent misrepresentations and omissions and therefore are not the valid, binding, or enforceable obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment voiding the Senior Loan documents. Alternatively, they are entitled to equitable reformation of the Plaintiffs' Senior Loan documents.

248. In the alternative, the matters identified as misrepresentations or omissions were mutual mistakes of fact or law or unilateral mistakes of fact or law induced by Defendants' inequitable conduct, and Plaintiffs are entitled to equitable rescission or reformation of Plaintiffs' Senior Loan documents.

249. By virtue of their agencies for one another, the Fiduciary Defendants are jointly

1 and severally liable on this claim.

2 **FIFTH CLAIM FOR RELIEF**

3 **(Securities Fraud - Violation of NRS 90.211 et seq.)**

4 250. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
5 Complaint.

6 251. As alleged more fully above and incorporated herein, the Fiduciary Defendants,  
7 directly or indirectly, made certain untrue statements of material fact and/or omitted to state  
8 certain material facts necessary to make the statements made not misleading to Plaintiffs in  
9 connection with an offer to sell and/or the sale of a security.

10 252. The Senior Loan Agreement, including the Plaintiffs' Senior Loan Documents and  
11 Loan Participation, are all "securities" within the meaning of NRS 90.295.

12 253. The Loan Participation transaction and Senior Loan Agreement were unique and  
13 were made in reliance on the unusual relationship of trust and confidence that existed between  
14 Plaintiffs and Scott and SFC.

15 254. The Loan Participation transaction was not a simple investment in a promissory  
16 note or even a typical loan participation transaction for numerous reasons including, but not  
17 limited to the following:

- 18 a. A typical loan participation has one to four participating lenders.  
19 This loan participation had 29 participants.
- 20 b. A usual seller of participation interests is a bank who sells  
21 participations in a loan to avoid violating federal lending limits.  
22 Here the "seller" is not an actual lender and does not advance its  
23 own loan funds. Instead its entire business is to find investors to  
24 invest in and fund loans.
- 25 c. Usual loan participants are banks or other lending institutions. Here  
26 Plaintiff Participant CVFS as well as other participants were non-  
27 bank entities.
- 28 d. In a typical participation, the participants fund only part of the loan

1 with the seller funding the balance. Here the participants funded the  
2 entire loan and Plaintiff Participant funded only a small percentage  
3 of the Senior Loan but its affiliates Tharaldson and TM2I gave  
4 100% guarantees of the entire loan.

5 e. In a typical participation, guarantees are provided by affiliates of the  
6 borrower. Here, Plaintiffs who had no interest in the borrower  
7 provided 100% guarantees.

8 f. In a typical loan participation, the loan is underwritten and  
9 collateralized on the value of a first position lien on the project  
10 property, with guarantees serving as potential and additional  
11 supplemental collateral. Here, the co-lead lenders admit that the  
12 loan was underwritten not based on the real property collateral, but  
13 based solely on the guarantees provided by Plaintiff Participant.

14 g. In a typical participation, if the project fails the participant loses no  
15 more than its participation interest. Here, if the project fails,  
16 Plaintiff Participants are on the hook through their guarantees for  
17 100% of the Senior Loan.

18 255. The existence of 100% guarantees by a project lender and affiliates of a project  
19 participation make this investment an unusual transaction that never would have proceeded  
20 without guarantees by parties who were wholly unaffiliated with the Project developer/borrower.  
21 This investment is not a normal lender/borrower relationship or a standard lending transaction.

22 256. The transaction whereby Defendants SFC and BOK induced Tharaldson and TM2I  
23 to give guarantees in exchange for a 5% or 500 basis point "cut" of interest on money they did not  
24 loan was an investment contract and therefore a security under Nevada law. The guarantees were  
25 a passive investment of risk capital without control involving an investment of money or a  
26 monetary equivalent (the guarantees) in a common enterprise (the Project and the Senior Loan  
27 consortium and its 29 participating lenders) with an expectation of profits (the 500 basis point cut)  
28 solely from the efforts of others (the developer's ability to retire the Senior Loan through success

1 of the Manhattan West Project and/or the co-lead lender's management of the Loan/Project). The  
2 guarantors were not lenders receiving interest on money loaned.

3 257. On information and belief, both Plaintiffs and Defendants viewed (a) the  
4 investment contract transaction involving the guarantees and (b) the loan participation transaction  
5 as securities, and their motivation in entering into the transactions treated Plaintiffs, through their  
6 guarantees, as if they had made an investment in the Manhattan West Project. All purchasers of  
7 loan participation interests were motivated by investment motives.

8 258. The loan participation transaction including the guarantees given by Plaintiffs  
9 involved a broad plan of distribution and common trading with 29 actual participating lenders  
10 and, on information and belief, additional offerees of participation interests who chose not to  
11 invest. Co-lead lender SFC made no funding investment with its own money; all the loan capital  
12 came from loan participants, several of whom were not banks or financial institutions.

13 259. On information and belief, parties to the senior loan transaction and Plaintiffs'  
14 senior loan documents considered participation in the senior loan transaction to be an investment,  
15 and reasonably expected the participation interests to be investments.

16 260. There is no effective regulatory scheme outside of the securities laws to protect  
17 Plaintiffs or the loan participants.

18 261. Plaintiffs did not know that a statement of material fact was untrue or that there  
19 was an omission of a statement of material fact.

20 262. The Fiduciary Defendants knew or in the exercise of reasonable care could have  
21 known of the untrue statements or misleading omissions.

22 263. The Fiduciary Defendants are civilly liable to Plaintiffs for damages as provided  
23 in NRS 90.660(1)(d).

#### 24 SIXTH CLAIM FOR RELIEF

##### 25 (Defamation)

26 264. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
27 Complaint as if set forth fully herein.

28 265. SFC and BOK as Co-Lead Lenders made statements, including but not limited to,

1 that:

- 2 A. Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal  
3 "will likely have farther reaching negative implications for his banking  
4 relationships with all banks going forward."  
5 B. Tharaldson's "reputation will be unquestionably damaged."  
6 C. "The 29 banks stretching from North Dakota to Oklahoma that are in this  
7 deal, plus banks not in this deal, will look very unfavorably on any future  
8 credit request from Gary."

9 266. The statements made by SFC and BOK as Co-Lead Lenders were published to the  
10 other 27 Senior Loan participants and potentially republished to numerous other people, including  
11 but not limited to persons employed by the 27 Senior Loan participants, persons doing business  
12 with the 27 Senior Loan participants, and persons in the communities in and around the Property  
13 and Project.

14 267. The statements made by SFC and BOK are false and defamatory and impeached the  
15 honesty and integrity of Plaintiffs.

16 268. SFC and BOK made the statements with knowledge of their falsity or with reckless  
17 disregard of whether the statements were true, but at a minimum, negligently.

18 269. As a direct and proximate result of the defamation made by SFC and BOK,  
19 Plaintiffs have suffered serious injury to their business reputations.

20 270. Further, in light of the Fiduciary Defendants' fraud, constructive fraud, breach of  
21 fiduciary duty, breaches of contract, and negligence which caused the problems now facing  
22 Plaintiffs and the other participants in the Senior Loan, the above statements are false and  
23 misleading and defamatory *per se* and are actionable irrespective of special harm.

24 **SEVENTH CLAIM FOR RELIEF**

25 **(Breach of Fiduciary Duty)**

26 271. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
27 Complaint.

28 272. The Fiduciary Defendants were agents of Plaintiffs and owed to Plaintiffs fiduciary

1 duties of undivided loyalty, due care, and full disclosure of material information.

2 273. The Fiduciary Defendants breached their fiduciary duties to Plaintiffs by making  
3 misrepresentations, concealing and failing to disclose material facts and failing to inform  
4 Plaintiffs of material information related to their agency, and by acting for their own benefit and  
5 the benefit of others which actions conflicted with the best interests of Plaintiffs.

6 274. As the direct and proximate result of the Fiduciary Defendants' breaches of  
7 fiduciary duty, Plaintiffs have been substantially damaged.

8 275. The Fiduciary Defendants acted intentionally and/or in concert and are subject to  
9 joint and several liability for all damages resulting therefrom.

#### 10 EIGHTH CLAIM FOR RELIEF

##### 11 (BOK, Aiding and Abetting Breach of Fiduciary Duty)

12 276. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
13 Complaint.

14 277. The Fiduciary Defendant BOK was aware of the fiduciary duties owed to Plaintiffs  
15 by the Fiduciary Defendants Scott and SFC.

16 278. The Fiduciary Defendant BOK knew or should have known that Fiduciary  
17 Defendants Scott and SFC were breaching their fiduciary duties to Plaintiffs.

18 279. The Fiduciary Defendant BOK acted intentionally and/or in concert with Scott and  
19 SFC and provided substantial assistance to them in their breaches of fiduciary duty toward  
20 Plaintiffs.

21 280. As the direct and proximate result of the actions of Fiduciary Defendant BOK, the  
22 Plaintiffs have been substantially damaged in an amount to be proven at trial.

#### 23 NINTH CLAIM FOR RELIEF

##### 24 (Acting in Concert/Civil Conspiracy)

25 281. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
26 Complaint.

27 282. The Defendants, and each of them, acting in concert with each of the other  
28 Defendants' tortious conduct constituted a breach of their duties, including fiduciary duties, to

1 Plaintiffs.

2 283. Defendants, and each of them, knew that they were agreeing to engage in conduct  
3 that involved breach of fiduciary duties and a substantial risk of harm to Plaintiffs.

4 284. The Defendants, and each of them, knowingly or recklessly gave substantial  
5 assistance or encouragement to each of the other Defendants in committing their tortious acts  
6 against Plaintiffs in breach of their duties to Plaintiffs.

7 285. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have  
8 suffered substantial damages in an amount to be proven at trial.

9 **TENTH CLAIM FOR RELIEF**

10 **(Breach of Contract)**

11 286. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
12 Complaint.

13 287. The Fiduciary Defendants had contractual duties to Plaintiffs related to the Senior  
14 Loan Agreement.

15 288. The Fiduciary Defendants breached those duties to Plaintiffs in many ways,  
16 including but not limited to the following:

17 A. Certifying that the Pre-Sale Condition was satisfied when it was not, in  
18 violation of the CVFS Senior Participation Agreement.

19 B. Certifying that the First Lien Condition was satisfied when it was not in  
20 violation of the CVFS Senior Participation Agreement

21 289. As the direct and proximate result of the Fiduciary Defendants' breaches of  
22 contract, Plaintiffs have been substantially damaged in an amount to be proven at trial.

23 **ELEVENTH CLAIM FOR RELIEF**

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

25 290. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
26 Complaint.

27 291. Implied in all of the contractual relations between Plaintiffs and the Fiduciary  
28 Defendants is a covenant of good faith and fair dealing.

1           292. The Fiduciary Defendants breached the implied covenant of good faith and fair  
2 dealing in many ways, including but not limited to the following:

- 3           A. Making the misrepresentations concerning the Pre-Sale Condition and the  
4 First Lien Condition as alleged herein.  
5           B. Failing to disclose to Plaintiffs the material information related to the  
6 Senior Loan and the Plaintiffs' Senior Loan Documents as alleged herein.  
7           C. Failing to raise with Plaintiffs the conflicts of interest inherent in the  
8 Plaintiffs' Senior Loan Documents.  
9           D. Failing to advise Plaintiffs to consult with independent counsel concerning  
10 the Plaintiffs' Senior Loan Documents.  
11           E. Preferring their interests (to earn fees and eight and one-half per cent  
12 interest per annum in a time that the prime rate was six and one half percent  
13 and the interest rate environment was sharply downward) over Plaintiffs  
14 interests in having the Plaintiffs' Senior Loan Documents reasonably and  
15 adequately protect their reasonable expectations concerning the Senior  
16 Loan based upon the discussions that occurred between Plaintiffs and the  
17 Fiduciary Defendants.

18           293. Due to the fiduciary and confidential nature of the parties' relationship, the breach  
19 of the covenant of good faith and fair dealing by the Defendants gives rise to tort liability.

20           294. As the direct and proximate result of the Fiduciary Defendants' breaches of the  
21 implied covenant of good faith and fair dealing, Plaintiffs have been substantially damaged and  
22 Defendants are responsible for all natural and probable consequences of their wrong in an amount  
23 to be proven at trial.

24                           **TWELFTH CLAIM FOR RELIEF**

25   **(Negligence)**

26           295. Plaintiffs incorporate by reference all prior paragraphs of their Amend  
27 Complaint.

28           296. The Fiduciary Defendants owed to Plaintiffs a duty to exercise due care in

1 connection with the underwriting, funding, and administration of the Senior Loan.

2 297. The Fiduciary Defendants breached their duty of due care in many ways, including  
3 but not limited to the following:

- 4 A. Making the misrepresentations concerning the Pre-Sale Condition and the  
5 First Lien Condition as alleged herein.  
6 B. Failing to disclose to Plaintiffs the material information related to the  
7 Senior Loan and the Plaintiffs' Senior Loan Documents as alleged herein.  
8 C. Failing to raise with Plaintiffs the conflicts of interest inherent in the  
9 Plaintiffs' Senior Loan Documents.  
10 D. Failing to advise Plaintiffs to consult with independent counsel concerning  
11 the Plaintiffs' Senior Loan Documents.  
12 E. Failing to determine, prior to funding of the Senior Loan, that a substantial  
13 amount of work required by the construction drawings for the Project was  
14 not covered by the construction agreement.  
15 F. Failing to determine, during the course of inspections of the Project during  
16 construction, that nearly \$8,000,000 in substandard work was performed.  
17 G. Failure to obtain, in connection with each draw, the necessary lien waivers  
18 for work reflected in that draw.  
19 H. Failure to make sure that the loan draws were spent by the contractor to pay  
20 subcontractors and material suppliers.  
21 I. Allowing \$26,000,000 in construction liens to be filed against the Project  
22 during the course of their loan administration.

23 298. As the direct and proximate result of the Fiduciary Defendants' negligence,  
24 Plaintiffs have been substantially damaged.

25 **THIRTEENTH CLAIM FOR RELIEF**

26 **(Declaratory Judgment)**

27 299. Plaintiffs incorporate by reference all prior paragraphs of their Amended  
28 Complaint as if set forth fully herein.

1           300. As is set forth herein, Gemstone West Inc. is the owner of the Property and Project  
2 and the primary obligor on the Senior Loan and, by assumption, the Prior Loan.

3           301. As set forth herein, Contractor is the General Contractor of the Project.

4           302. As is set forth herein, the General Contractor consented to the Assignment of  
5 Construction Contract, Plans and Specifications executed by Gemstone West Inc. in favor of SFC,  
6 pursuant to a General Contractor Consent.

7           303. That General Contractor Consent specifically provides that "[a]ll liens, claims,  
8 rights, remedies and recourses that [Asphalt Products Corporation] may have or may otherwise be  
9 entitled to assert against all or any portion of the Project shall be, and they hereby are made  
10 expressly subordinate, junior and inferior to the liens, claims, rights, remedies and recourses as  
11 created by the Loan Agreement and the Collateral Documents."

12           304. Plaintiffs are entitled to a court order declaring that the Deed of Trust securing the  
13 Prior Loan has a first lien position on the Property and the Project notwithstanding any other liens  
14 created therein by or for the benefit of Gemstone West Inc. or Contractor.

15           305. Plaintiffs are entitled to a court order declaring that Tharaldson and TM2I have no  
16 further liability relating to the Senior Loan and that as between Tharladson, TM2I and Gemstone  
17 West Inc., Gemstone West Inc. is the sole party responsible for the Senior Loan.

18           306. Plaintiffs are entitled to a court order declaring that the Deeds of Trust relating to  
19 the Prior Loan have priority over the Construction Liens due to recordation date, and a court order  
20 declaring that the Senior Loan DOT has priority over the Construction Liens due to the Consent  
21 signed by the Contractor, wherein the Contractor specifically agreed to subordinate any and all  
22 claims to SFC.

23           307. In addition, the Contractor executed the Contractor Certificate indicating that no  
24 work had been completed on the Property or the Project to date.

25           308. Plaintiffs are entitled to a court order declaring that the Senior Loan Documents  
26 were induced by fraud and/or mistake and are not the valid, legally binding, and/or enforceable  
27 obligations of Plaintiffs.

28           309. Plaintiffs are entitled to a court order declaring that, upon CVFS's restoration to

1 the Fiduciary Defendants as agent for the Senior Loan Participants of the net \$10,000,000  
2 paydown received from the Senior Loan proceeds together with interest thereon, the  
3 Subordination is rescinded.

4 310. Plaintiffs are entitled to a court order declaring that the Deeds of Trust securing the  
5 Prior Loan are prior and superior to the Senior Loan Deed of Trust and to any liens for  
6 construction work performed on the Property after July 5, 2006, and to any and all other liens or  
7 encumbrances on the Project recorded subsequent to recordation of the Deeds of Trust securing  
8 the Prior Loans and constitute first lien positions on the Property.

9 311. Plaintiffs are entitled to a court order declaring that Plaintiffs have one or more  
10 valid legal defenses to the Plaintiffs' Senior Loan Documents if those documents would otherwise  
11 be the valid, legally binding, or enforceable obligation of Plaintiffs.

12 WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

- 13 A. Declaring that CVFS has terminated all of the CVFS Pre-Senior  
14 Participation Agreements and the CVFS Senior Loan Participation  
15 Agreement, that SFC has no authority to act for CVFS with respect to any  
16 of the loans covered thereby, and ordering SFC to execute and deliver  
17 appropriate assignments of those loans and related documents to CVFS.
- 18 B. Declaring that the Senior Loan Documents were induced by fraud,  
19 misrepresentation, omission and/or mistake and are not the valid, legally  
20 binding, and/or enforceable obligations of Plaintiffs.
- 21 C. Declaring that, upon CVFS's restoration to the Fiduciary Defendants as  
22 agent for the Senior Loan Participants of the net \$10,000,000 paydown  
23 received from the Senior Loan proceeds together with interest thereon, the  
24 Subordination is rescinded.
- 25 D. Declaring that the Deeds of Trust securing the Prior Loan are prior and  
26 superior to the Senior Loan Deed of Trust and to any liens for construction  
27 work performed on the Property after July 5, 2006, and to any and all other  
28 liens or encumbrances on the Project recorded subsequent to recordation of

the Deeds of Trust securing the Prior Loans and constitute first lien positions on the Property.

- E. Declaring that Plaintiffs have one or more valid legal defenses to the Plaintiffs' Senior Loan Documents if those documents would otherwise be the valid, legally binding, or enforceable obligation of Plaintiffs.
- F. In the alternative, reforming the Guaranty and the TM2I Guaranty due to fraud and/or mistake to affirm the single action rule and the fair market value defense that was part of Plaintiffs' understanding with the Fiduciary Defendants.
- G. In the alternative, ordering that the Fiduciary Defendants jointly and severally, disgorge to Plaintiffs any and all direct benefit they have obtained in connection with their breaches of fiduciary duty.
- H. In the alternative, awarding Plaintiffs compensatory damages against the Fiduciary Defendants jointly and severally, in an amount equal to all direct, consequential, and other damages they have suffered, in amounts to be proved at the trial of this matter.
- I. In the alternative, and in addition to compensatory damages, awarding Plaintiffs punitive damages against the Fiduciary Defendants jointly and severally, in connection with the Predicate Claims in an amount to be determined by the Court, but not to exceed three times compensatory damages.
- J. Awarding to Plaintiffs their costs of suit, expenses of litigation, including but not limited to expert fees and reasonable attorneys fees.

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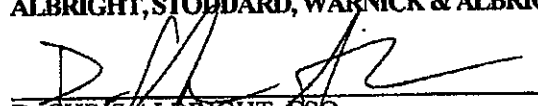
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K. Granting such other and further relief as the Court may deem just and proper

DATED this 25<sup>th</sup> day of July, 2009.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

  
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 15<sup>th</sup> day of July, 2009, I served the foregoing  
PLAINTIFFS' FIRST AMENDED COMPLAINT by mailing a copy of the same, postage prepaid  
and addressed to the following:


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An Employee of Albright, Stoddard, Warnick  
& Albright

  
CLERK OF THE COURT

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12 Attorneys for Scott Financial Corporation  
13 and Bradley J. Scott

8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

10 CLUB VISTA FINANCIAL SERVICES,  
11 L.L.C., a Nevada Limited Liability  
12 Company; THARALDSON MOTELS II,  
13 INC., a North Dakota corporation; and  
14 GARY D. THARALDSON,

15 Plaintiffs,

16 v.

17 SCOTT FINANCIAL CORPORATION, a  
18 North Dakota corporation; BRADLEY J.  
19 SCOTT; BANK OF OKLAHOMA, N.A., a  
20 national bank; GEMSTONE  
21 DEVELOPMENT WEST, INC., a Nevada  
22 corporation; ASPHALT PRODUCTS  
23 CORPORATION D/B/A APCO  
24 CONSTRUCTION, a Nevada corporation;  
25 DOES INDIVIDUALS 1-100; and ROE  
26 BUSINESS ENTITIES 1-100,

27 Defendants:

28 AND ALL RELATED CLAIMS.

Case No.: A579963  
Dept. No.: XIII

SCOTT FINANCIAL CORPORATION  
AND BRADLEY J. SCOTT'S AMENDED  
ANSWER TO APCO CONSTRUCTION'S  
CROSS-CLAIM AND THIRD-PARTY  
COMPLAINT

24 COME NOW Defendants/Crossdefendants Scott Financial Corporation and Bradley J.  
25 Scott (hereinafter collectively, "Scott"), by and through their attorneys, Kemp, Jones &  
26 Coulthard, LLP, and hereby answer the cross-claim and third-party complaint of APCO  
27 Construction as follows:

28 1. With respect to the allegations contained in paragraph 1 of the cross-claim and  
third-party complaint, Scott is without sufficient information to form a belief as to the truth or

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Las Vegas, Nevada 89169  
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1 falsity of said allegations and therefore denies said allegations.

2       2. With respect to the allegations contained in paragraph 2 of the cross-claim and  
3 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
4 falsity of said allegations and therefore denies said allegations.

5       3. With respect to the allegations contained in paragraph 3 of the cross-claim and  
6 third-party complaint, Scott admits said allegations.

7       4. With respect to the allegations contained in paragraph 4 of the cross-claim and  
8 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
9 falsity of said allegations and therefore denies said allegations.

10       5. With respect to the allegations contained in paragraph 5 of the cross-claim and  
11 third-party complaint, Scott admits said allegations.

12       6. With respect to the allegations contained in paragraph 6 of the cross-claim and  
13 third-party complaint, Scott was informed by the borrower that the Project was to be constructed  
14 in three phases. With respect to the balance of the allegations contained in paragraph 6 of the  
15 cross-claim and third-party complaint, Scott admits said allegations.

16       7. With respect to the allegations contained in paragraph 7 of the cross-claim and  
17 third-party complaint, Scott denies said allegations.

18       8. With respect to the allegations contained in paragraph 8 of the cross-claim and  
19 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
20 falsity of said allegations and therefore denies said allegations.

21       9. With respect to the allegations contained in paragraph 9 of the cross-claim and  
22 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
23 falsity of said allegations and therefore denies said allegations.

24       10. With respect to the allegations contained in paragraph 10 of the cross-claim and  
25 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
26 falsity of said allegations and therefore denies said allegations.

27       11. With respect to the allegations contained in paragraph 11 of the cross-claim and  
28 third-party complaint, Scott is without sufficient information to form a belief as to the truth or

1 falsity of said allegations and therefore denies said allegations.

2 12. With respect to the allegations contained in paragraph 12 of the cross-claim and  
3 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
4 falsity of said allegations and therefore denies said allegations.

5 13. With respect to the allegations contained in paragraph 13 of the cross-claim and  
6 third-party complaint, Scott denies said allegations.

7 14. With respect to the allegations contained in paragraph 14 of the cross-claim and  
8 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
9 falsity of said allegations and therefore denies said allegations.

10 15. With respect to the allegations contained in paragraph 15 of the cross-claim and  
11 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
12 falsity of said allegations and therefore denies said allegations.

13 16. With respect to the allegations contained in paragraph 15 of the cross-claim and  
14 third-party complaint, Scott denies that it received the complete pay application from the  
15 borrower in June. Rather, Scott received the application in mid-July. With respect to the balance  
16 of the allegations contained in paragraph 16 of the cross-claim and third-party complaint, Scott  
17 admits said allegations.

18 17. With respect to the allegations contained in paragraph 17 of the cross-claim and  
19 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
20 falsity of said allegations and therefore denies said allegations.

21 18. With respect to the allegations contained in paragraph 18 of the cross-claim and  
22 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
23 falsity of said allegations and therefore denies said allegations.

24 19. With respect to the allegations contained in paragraph 19 of the cross-claim and  
25 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
26 falsity of said allegations and therefore denies said allegations.

27 20. With respect to the allegations contained in paragraph 20 of the cross-claim and  
28 third-party complaint, Scott is without sufficient information to form a belief as to the truth or

1 falsity of said allegations and therefore denies said allegations.

2 21. With respect to the allegations contained in paragraph 21 of the cross-claim and  
3 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
4 falsity of said allegations and therefore denies said allegations.

5 22. With respect to the allegations contained in paragraph 22 of the cross-claim and  
6 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
7 falsity of said allegations and therefore denies said allegations.

8 23. With respect to the allegations contained in paragraph 23 of the cross-claim and  
9 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
10 falsity of said allegations and therefore denies said allegations.

11 24. With respect to the allegations contained in paragraph 24 of the cross-claim and  
12 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
13 falsity of said allegations and therefore denies said allegations.

14 25. With respect to the allegations contained in paragraph 25 of the cross-claim and  
15 third-party complaint, Scott admits said allegations.

16 26. With respect to the allegations contained in paragraph 26 of the cross-claim and  
17 third-party complaint, Scott admits said allegations.

18 27. With respect to the allegations contained in paragraph 27 of the cross-claim and  
19 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
20 falsity of said allegations and therefore denies said allegations.

21 28. With respect to the allegations contained in paragraph 28 of the cross-claim and  
22 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
23 falsity of said allegations and therefore denies said allegations.

24 29. With respect to the allegations contained in paragraph 29 of the cross-claim and  
25 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
26 falsity of said allegations and therefore denies said allegations.

27 30. With respect to the allegations contained in paragraph 30 of the cross-claim and  
28 third-party complaint, Scott is without sufficient information to form a belief as to the truth or

1 falsity of said allegations and therefore denies said allegations.

2 31. With respect to the allegations contained in paragraph 31 of the cross-claim and  
3 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
4 falsity of said allegations and therefore denies said allegations.

5 32. With respect to the allegations contained in paragraph 32 of the cross-claim and  
6 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
7 falsity of said allegations and therefore denies said allegations.

8 33. With respect to the allegations contained in paragraph 33 of the cross-claim and  
9 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
10 falsity of said allegations and therefore denies said allegations.

11 34. With respect to the allegations contained in paragraph 34 of the cross-claim and  
12 third-party complaint, Scott admits said allegations.

13 35. With respect to the allegations contained in paragraph 35 of the cross-claim and  
14 third-party complaint, Scott denies said allegations.

15 36. With respect to the allegations contained in paragraph 36 of the cross-claim and  
16 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
17 falsity of said allegations and therefore denies said allegations.

18 37. With respect to the allegations contained in paragraph 37 of the cross-claim and  
19 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
20 falsity of said allegations and therefore denies said allegations.

21 38. With respect to the allegations contained in paragraph 38 of the cross-claim and  
22 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
23 falsity of said allegations and therefore denies said allegations.

24 39. With respect to the allegations contained in paragraph 39 of the cross-claim and  
25 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
26 falsity of said allegations and therefore denies said allegations.

27 40. With respect to the allegations contained in paragraph 40 of the cross-claim and  
28 third-party complaint, Scott is without sufficient information to form a belief as to the truth or

1 falsity of said allegations and therefore denies said allegations.

2 41. With respect to the allegations contained in paragraph 41 of the cross-claim and  
3 third-party complaint, Scott denies said allegations.

4 42. With respect to the allegations contained in paragraph 42 of the cross-claim and  
5 third-party complaint, Scott denies said allegations.

6 43. With respect to the allegations contained in paragraph 43 of the cross-claim and  
7 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
8 falsity of said allegations and therefore denies said allegations.

9 44. With respect to the allegations contained in paragraph 44 of the cross-claim and  
10 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
11 falsity of said allegations and therefore denies said allegations.

12 **FIRST CAUSE OF ACTION**

13 **(Breach of Contract against Gemstone Only)**

14 45. Answering paragraph 45 of the cross-claim and third-party complaint, Scott  
15 repeats and realleges herein all of its answers set forth above.

16 46. With respect to the allegations contained in paragraph 46 of the cross-claim and  
17 third-party complaint, Scott admits said allegations.

18 47. With respect to the allegations contained in paragraph 47 of the cross-claim and  
19 third-party complaint, Scott denies said allegations.

20 48. With respect to the allegations contained in paragraph 48 of the cross-claim and  
21 third-party complaint, Scott denies said allegations.

22 49. With respect to the allegations contained in paragraph 49 of the cross-claim and  
23 third-party complaint, Scott denies said allegations.

24 50. With respect to the allegations contained in paragraph 50 of the cross-claim and  
25 third-party complaint, Scott denies said allegations.

26 51. With respect to the allegations contained in paragraph 51 of the cross-claim and  
27 third-party complaint, Scott denies said allegations.

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**SECOND CAUSE OF ACTION**

**(Breach of Duty of Good Faith and Fair Dealing against Gemstone Only)**

52. Answering paragraph 52 of the cross-claim and third-party complaint, Scott repeats and realleges herein all of its answers set forth above.

53. With respect to the allegations contained in paragraph 53 of the cross-claim and third-party complaint, Scott admits said allegations.

54. With respect to the allegations contained in paragraph 54 of the cross-claim and third-party complaint, Scott denies said allegations.

55. With respect to the allegations contained in paragraph 55 of the cross-claim and third-party complaint, Scott denies said allegations.

56. With respect to the allegations contained in paragraph 56 of the cross-claim and third-party complaint, Scott denies said allegations.

57. With respect to the allegations contained in paragraph 57 of the cross-claim and third-party complaint, Scott denies said allegations.

58. With respect to the allegations contained in paragraph 58 of the cross-claim and third-party complaint, Scott denies said allegations.

**THIRD CAUSE OF ACTION**

**(Violation of NRS 624 Prompt Payment Act against Gemstone Only)**

59. Answering paragraph 59 of the cross-claim and third-party complaint, Scott repeats and realleges herein all of its answers set forth above.

60. With respect to the allegations contained in paragraph 60 of the cross-claim and third-party complaint, Scott denies said allegations.

61. With respect to the allegations contained in paragraph 61 of the cross-claim and third-party complaint, Scott denies said allegations.

62. With respect to the allegations contained in paragraph 62 of the cross-claim and third-party complaint, Scott denies said allegations.

63. With respect to the allegations contained in paragraph 63 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or

1 falsity of said allegations and therefore denies said allegations.

2 64. With respect to the allegations contained in paragraph 64 of the cross-claim and  
3 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
4 falsity of said allegations and therefore denies said allegations.

5 65. With respect to the allegations contained in paragraph 65 of the cross-claim and  
6 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
7 falsity of said allegations and therefore denies said allegations.

8 66. With respect to the allegations contained in paragraph 66 of the cross-claim and  
9 third-party complaint, Scott denies said allegations.

10 67. With respect to the allegations contained in paragraph 67 of the cross-claim and  
11 third-party complaint, Scott denies said allegations.

12 68. With respect to the allegations contained in paragraph 68 of the cross-claim and  
13 third-party complaint, Scott denies said allegations.

14 **FOURTH CAUSE OF ACTION**

15 **(Defamation against Gemstone Only)**

16 69. Answering paragraph 69 of the cross-claim and third-party complaint, Scott  
17 repeats and realleges herein all of its answers set forth above.

18 70. With respect to the allegations contained in paragraph 70 of the cross-claim and  
19 third-party complaint, Scott denies said allegations.

20 71. With respect to the allegations contained in paragraph 71 of the cross-claim and  
21 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
22 falsity of said allegations and therefore denies said allegations.

23 72. With respect to the allegations contained in paragraph 72 of the cross-claim and  
24 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
25 falsity of said allegations and therefore denies said allegations.

26 73. With respect to the allegations contained in paragraph 73 of the cross-claim and  
27 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
28 falsity of said allegations and therefore denies said allegations.

74. With respect to the allegations contained in paragraph 74 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

4        75.     With respect to the allegations contained in paragraph 75 of the cross-claim and  
5 third-party complaint, Scott denies said allegations.

6 76. With respect to the allegations contained in paragraph 76 of the cross-claim and  
7 third-party complaint, Scott denies said allegations.

8 77. With respect to the allegations contained in paragraph 77 of the cross-claim and  
9 third-party complaint, Scott denies said allegations.

### FIFTH CAUSE OF ACTION

**(Declaratory Relief against Gemstone Only)**

12 78. Answering paragraph 78 of the cross-claim and third-party complaint, Scott  
13 repeats and realleges herein all of its answers set forth above.

14           79. With respect to the allegations contained in paragraph 79 of the cross-claim and  
15 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
16 falsity of said allegations and therefore denies said allegations.

17 80. With respect to the allegations contained in paragraph 80 of the cross-claim and  
18 third-party complaint, Scott admits said allegations.

81. With respect to the allegations contained in paragraph 81 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

22: 82. With respect to the allegations contained in paragraph 82 of the cross-claim and  
23: third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
24: falsity of said allegations and therefore denies said allegations.

25           83. With respect to the allegations contained in paragraph 83 of the cross-claim and  
26 third-party complaint, Scott denies said allegations.

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**SIXTH CAUSE OF ACTION**

**(Unjust Enrichment against All Cross and Third-Party Defendants)**

84. Answering paragraph 84 of the cross-claim and third-party complaint, Scott repeats and realleges herein all of its answers set forth above.

85. With respect to the allegations contained in paragraph 85 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

86. With respect to the allegations contained in paragraph 86 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

87. With respect to the allegations contained in paragraph 87 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

88. With respect to the allegations contained in paragraph 88 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

89. Scott denies that it has failed, neglected, and refused to pay any sums to APCO. With respect to the balance of the allegations contained in paragraph 89 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

90. With respect to the allegations contained in paragraph 90 of the cross-claim and third-party complaint, Scott denies said allegations.

91. With respect to the allegations contained in paragraph 91 of the cross-claim and third-party complaint, Scott denies said allegations.

**SEVENTH CAUSE OF ACTION**

**(Monies Due and Owing Against Gemstone Only)**

92. Answering paragraph 92 of the cross-claim and third-party complaint, Scott repeats and realleges herein all of its answers set forth above.

1 93. With respect to the allegations contained in paragraph 93 of the cross-claim and  
2 third-party complaint, Scott denies said allegations.

3 94. With respect to the allegations contained in paragraph 94 of the cross-claim and  
4 third-party complaint, Scott denies said allegations.

5 95. With respect to the allegations contained in paragraph 95 of the cross-claim and  
6 third-party complaint, Scott denies said allegations.

7 **EIGHTH CAUSE OF ACTION**

8 **(Interference with Contractual Relations against Gemstone Only)**

9 96. Answering paragraph 96 of the cross-claim and third-party complaint, Scott  
10 repeats and realleges herein all of its answers set forth above.

11 97. With respect to the allegations contained in paragraph 97 of the cross-claim and  
12 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
13 falsity of said allegations and therefore denies said allegations.

14 98. With respect to the allegations contained in paragraph 98 of the cross-claim and  
15 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
16 falsity of said allegations and therefore denies said allegations.

17 99. With respect to the allegations contained in paragraph 99 of the cross-claim and  
18 third-party complaint, Scott denies said allegations.

19 100. With respect to the allegations contained in paragraph 100 of the cross-claim and  
20 third-party complaint, Scott denies said allegations.

21 101. With respect to the allegations contained in paragraph 101 of the cross-claim and  
22 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
23 falsity of said allegations and therefore denies said allegations.

24 102. With respect to the allegations contained in paragraph 102 of the cross-claim and  
25 third-party complaint, Scott denies said allegations.

26 103. With respect to the allegations contained in paragraph 103 of the cross-claim and  
27 third-party complaint, Scott denies said allegations.

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1 104. With respect to the allegations contained in paragraph 104 of the cross-claim and  
2 third-party complaint, Scott denies said allegations.

3 **NINTH CAUSE OF ACTION**

4 **(Breach of Duty- Violation of NRS 627 Against NCS)**

5 105. Answering paragraph 105 of the cross-claim and third-party complaint, Scott  
6 repeats and realleges herein all of its answers set forth above.

7 106. With respect to the allegations contained in paragraph 106 of the cross-claim and  
8 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
9 falsity of said allegations and therefore denies said allegations.

10 107. With respect to the allegations contained in paragraph 107 of the cross-claim and  
11 third-party complaint, Scott admits said allegations.

12 108. With respect to the allegations contained in paragraph 108 of the cross-claim and  
13 third-party complaint, Scott admits said allegations.

14 109. With respect to the allegations contained in paragraph 109 of the cross-claim and  
15 third-party complaint, Scott admits said allegations.

16 110. With respect to the allegations contained in paragraph 110 of the cross-claim and  
17 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
18 falsity of said allegations and therefore denies said allegations.

19 111. With respect to the allegations contained in paragraph 111 of the cross-claim and  
20 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
21 falsity of said allegations and therefore denies said allegations.

22 112. With respect to the allegations contained in paragraph 112 of the cross-claim and  
23 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
24 falsity of said allegations and therefore denies said allegations.

25 113. With respect to the allegations contained in paragraph 113 of the cross-claim and  
26 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
27 falsity of said allegations and therefore denies said allegations.

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1 114. With respect to the allegations contained in paragraph 114 of the cross-claim and  
2 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
3 falsity of said allegations and therefore denies said allegations.

4 115. With respect to the allegations contained in paragraph 115 of the cross-claim and  
5 third-party complaint, Scott denies said allegations.

6 116. With respect to the allegations contained in paragraph 116 of the cross-claim and  
7 third-party complaint, Scott denies said allegations.

8 117. With respect to the allegations contained in paragraph 117 of the cross-claim and  
9 third-party complaint, Scott denies said allegations.

10 **TENTH CAUSE OF ACTION**

11 **(Fraud Against Gemstone and SFC)**

12 118. Answering paragraph 118 of the cross-claim and third-party complaint, Scott  
13 repeats and realleges herein all of its answers set forth above.

14 119. With respect to the allegations contained in paragraph 119 of the cross-claim and  
15 third-party complaint, Scott denies said allegations.

16 120. With respect to the allegations contained in paragraph 120 of the cross-claim and  
17 third-party complaint, Scott admits said allegations.

18 121. With respect to the allegations contained in paragraph 121 of the cross-claim and  
19 third-party complaint, Scott denies said allegations.

20 122. With respect to the allegations contained in paragraph 122 of the cross-claim and  
21 third-party complaint, Scott denies said allegations.

22 123. With respect to the allegations contained in paragraph 123 of the cross-claim and  
23 third-party complaint, Scott denies said allegations.

24 124. With respect to the allegations contained in paragraph 124 of the cross-claim and  
25 third-party complaint, Scott denies said allegations.

26 125. With respect to the allegations contained in paragraph 125 of the cross-claim and  
27 third-party complaint, Scott denies said allegations.

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1 126. With respect to the allegations contained in paragraph 126 of the cross-claim and  
2 third-party complaint, Scott denies said allegations.

3 127. With respect to the allegations contained in paragraph 127 of the cross-claim and  
4 third-party complaint, Scott denies said allegations.

5 128. With respect to the allegations contained in paragraph 128 of the cross-claim and  
6 third-party complaint, Scott denies said allegations.

7 129. With respect to the allegations contained in paragraph 129 of the cross-claim and  
8 third-party complaint; Scott denies said allegations.

9 **ELEVENTH CAUSE OF ACTION**

10 **(Negligent Misrepresentation against Gemstone and SFC Plead in the Alternative)**

11 130. Answering paragraph 130 of the cross-claim and third-party complaint, Scott  
12 repeats and realleges herein all of its answers set forth above.

13 131. With respect to the allegations contained in paragraph 131 of the cross-claim and  
14 third-party complaint, Scott denies said allegations.

15 132. With respect to the allegations contained in paragraph 132 of the cross-claim and  
16 third-party complaint, Scott denies said allegations.

17 133. With respect to the allegations contained in paragraph 133 of the cross-claim and  
18 third-party complaint, Scott denies said allegations.

19 134. With respect to the allegations contained in paragraph 134 of the cross-claim and  
20 third-party complaint, Scott denies said allegations.

21 **TWELFTH CAUSE OF ACTION**

22 **(Priority over Deeds of Trust)**

23 135. Answering paragraph 135 of the cross-claim and third-party complaint, Scott  
24 repeats and realleges herein all of its answers set forth above.

25 136. With respect to the allegations contained in paragraph 136 of the cross-claim and  
26 third-party complaint, Scott admits said allegations.

27 137. With respect to the allegations contained in paragraph 137 of the cross-claim and  
28 third-party complaint, Scott admits said allegations.

1 138. With respect to the allegations contained in paragraph 138 of the cross-claim and  
2 third-party complaint, Scott denies said allegations to the extent that the date should be February  
3 7, 2008. With respect to the balance of the allegations contained in paragraph 138 of the cross-  
4 claim and third-party complaint, Scott admits said allegations.

5 139. With respect to the allegations contained in paragraph 139 of the cross-claim and  
6 third-party complaint, Scott admits said allegations.

7 140. With respect to the allegations contained in paragraph 140 of the cross-claim and  
8 third-party complaint, Scott admits said allegations.

9 141. With respect to the allegations contained in paragraph 141 of the cross-claim and  
10 third-party complaint, Scott admits said allegations.

11 142. With respect to the allegations contained in paragraph 142 of the cross-claim and  
12 third-party complaint, Scott admits said allegations.

13 143. With respect to the allegations contained in paragraph 143 of the cross-claim and  
14 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
15 falsity of said allegations and therefore denies said allegations.

16 144. With respect to the allegations contained in paragraph 144 of the cross-claim and  
17 third-party complaint, Scott denies said allegations.

18 145. With respect to the allegations contained in paragraph 145 of the cross-claim and  
19 third-party complaint, Scott denies said allegations.

20 **THIRTEENTH CAUSE OF ACTION**

21 **(Indemnification)**

22 146. Answering paragraph 146 of the cross-claim and third-party complaint, Scott  
23 repeats and realleges herein all of its answers set forth above.

24 147. With respect to the allegations contained in paragraph 147 of the cross-claim and  
25 third-party complaint, Scott admits said allegations.

26 148. With respect to the allegations contained in paragraph 148 of the cross-claim and  
27 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
28 falsity of said allegations and therefore denies said allegations.

1 149. With respect to the allegations contained in paragraph 149 of the cross-claim and  
2 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
3 falsity of said allegations and therefore denies said allegations.

4 150. With respect to the allegations contained in paragraph 150 of the cross-claim and  
5 third-party complaint, Scott denies said allegations.

6 151. With respect to the allegations contained in paragraph 151 of the cross-claim and  
7 third-party complaint, Scott denies said allegations.

8 **AFFIRMATIVE DEFENSES**

9 1. APCO Construction has failed to state a claim for which relief may be granted.

10 2. APCO Construction has failed to commence this action within the time required by the  
11 applicable statutes of limitations and APCO Construction's claims are therefore barred.

12 3. APCO Construction lacks standing to bring this action.

13 4. APCO Construction's claims are barred by the doctrines of laches, waiver and estoppel.

14 5. APCO Construction has failed to mitigate its damages, if any, after discovery of the  
15 alleged injury, if any.

16 6. APCO Construction is guilty of unclean hands and therefore is not entitled to any relief  
17 from Scott.

18 7. Any damages which APCO Construction may have sustained were proximately caused by  
19 the acts of persons other than Scott, and therefore, APCO Construction is not entitled to  
20 any relief from Scott.

21 8. Alternatively, should Scott be found liable, the fault of all parties, joined and nonjoined,  
22 including that of APCO Construction must be evaluated and liability apportioned among  
23 all persons and entities appropriate to respective fault.

24 9. APCO Construction's recovery, if any, must be offset by any compensation already  
25 received.

26 10. If APCO Construction has incurred any injury or damage, which Scott denies, the risk of  
27 such injury or damage was not foreseeable.

28 11. APCO Construction failed to give requisite notice as required by statute, contract or other

- 1 rule.
- 2 12. By its own actions, APCO Construction has ratified, approved and adopted the actions of
- 3 Scott in connection with the allegations contained in the Counterclaim.
- 4 13. By reason of its own acts, APCO Construction has released and discharged Scott from the
- 5 claims alleged.
- 6 14. APCO Construction has failed to do equity towards Scott and therefore is not entitled to
- 7 any relief.
- 8 15. APCO Construction's claims are barred by the statute of frauds.
- 9 16. APCO Construction's claims are not well grounded in fact and are not warranted by
- 10 existing law or a good faith argument for the extension or modification of existing law,
- 11 but are initiated only for purposes of harassment, unnecessary delay and the occurrence of
- 12 needless costs of litigation to Scott.
- 13 17. The claims of APCO Construction are barred in whole or in part to the extent that APCO
- 14 Construction has not suffered any injury in fact.
- 15 18. Any damages that APCO Construction alleges to have suffered from the matters alleged
- 16 in the Counterclaim are too remote or speculative to allow recovery.
- 17 19. Any injuries APCO Construction claims to have suffered were not proximately or
- 18 materially caused by Scott's alleged acts, conduct, or omissions; and APCO Construction
- 19 is therefore barred from recovery.
- 20 20. The acts alleged were performed by an employee or representative lacking authority and
- 21 acting outside the scope of his or her employment.
- 22 21. There is no privity of contract nor any other type of privity between APCO Construction
- 23 and Scott.
- 24 22. APCO Construction's claims are barred due to a lack of consideration.
- 25 23. Scott hereby reserves the right to allege additional defenses as they
- 26 may become known, or as they evolve during the litigation, and to amend its Answer
- 27 accordingly.
- 28

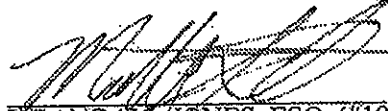
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Las Vegas, Nevada 89169  
(702) 385-6000  
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1 WHEREFORE, Scott Financial Corporation and Bradley J. Scott pray for judgment on  
2 the crossclaim as follows:

- 3 1. That APCO take nothing and that the crossclaim be dismissed with prejudice;  
4 2. That they be awarded their attorney's fees and costs of suit in defending the  
5 crossclaim; and  
6 3. For such other and further relief as this Court may deem just and proper.

7 DATED this 4 day of May, 2009.

8 KEMP, JONES & COULTHARD, LLP

9   
10

11 J. RANDALL JONES, ESQ. (#1927)  
12 MARK M. JONES, ESQ. (#267)  
13 MATTHEW S. CARTER, ESQ. (#9524)  
14 3800 Howard Hughes Parkway  
15 Seventeenth Floor  
16 Las Vegas, Nevada 89169  
17 Attorneys for Defendants/Crossdefendants  
18 Scott Financial Corporation and Bradley J. Scott  
19  
20  
21  
22  
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24  
25  
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27  
28

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CERTIFICATE OF MAILING

I hereby certify that on the 4<sup>th</sup> day of May, 2009, the foregoing SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S AMENDED ANSWER TO APCO CONSTRUCTION'S CROSS-CLAIM AND THIRD-PARTY COMPLAINT was served on the following person(s) by mailing a copy thereof, first class mail, postage prepaid, to:

ALBRIGHT, STODDARD,  
WARNICK & ALBRIGHT  
Mark Albright, Esq.  
801 S. Rancho Drive  
Suite D-4  
Las Vegas, NV 89106

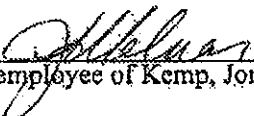
LEWIS & ROCA  
Von Heinz, Esq.  
3993 Howard Hughes Pkwy.  
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MORRILL & ARONSON  
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Las Vegas, NV 89145

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Gwen Rutar Mullins, Esq.  
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1400 Floor  
Las Vegas, NV 89169

Nik Skrinjaric, Esq.  
2500 N. Buffalo Drive  
Suite 250  
Las Vegas, NV 89128

  
An employee of Kemp, Jones & Coulthard

  
CLERK OF THE COURT

1 CCAN  
J. RANDALL JONES, ESQ.  
2 Nevada Bar No.: 001927  
MARK M. JONES, ESQ.  
3 Nevada Bar No.: 000267  
MATTHEW S. CARTER, ESQ.  
4 Nevada Bar No.: 009524  
KEMP, JONES & COULTHARD, LLP  
5 3800 Howard Hughes Parkway  
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6 Las Vegas, Nevada 89169  
Tel. (702) 385-6000  
7 Attorneys for Scott Financial Corporation  
and Bradley J. Scott

8  
9 DISTRICT COURT  
10 CLARK COUNTY, NEVADA

11 CLUB VISTA FINANCIAL SERVICES,  
12 L.L.C., a Nevada Limited Liability Company;  
THARALDSON MOTELS II, INC., a North  
13 Dakota corporation; and GARY D.  
THARALDSON,

14 Plaintiffs,

15 v.

16 SCOTT FINANCIAL CORPORATION, a  
North Dakota corporation; BRADLEY J.  
17 SCOTT; BANK OF OKLAHOMA, N.A., a  
national bank; GEMSTONE  
18 DEVELOPMENT WEST, INC., a Nevada  
corporation; ASPHALT PRODUCTS  
19 CORPORATION D/B/A APCO  
CONSTRUCTION, a Nevada corporation;  
20 DOES INDIVIDUALS 1-100; and ROE  
21 BUSINESS ENTITIES 1-100,

22 Defendants.

23 SCOTT FINANCIAL CORPORATION, a  
foreign corporation,

24 Counterclaimant,

25 v.

26 GARY D. THARALDSON,

27 Counterdefendant.  
28

Case No.: A579963  
Dept. No.: XIII

SCOTT FINANCIAL CORPORATION  
AND BRADLEY J. SCOTT'S ANSWER  
TO COMPLAINT AND  
COUNTERCLAIM

KEMP, JONES & COULTHARD, LLP  
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I.

ANSWER

COME NOW Defendants Scott Financial Corporation and Bradley J. Scott (hereinafter collectively, "Scott"), by and through their attorneys, Kemp, Jones & Coulthard, LLP, and hereby answer Plaintiffs' complaint in this matter as follows:

1. With respect to the allegations contained in paragraph 1 of the complaint, Scott denies said allegations.

2. With respect to the allegations contained in paragraph 2 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

3. With respect to the allegations contained in paragraph 3 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

4. With respect to the allegations contained in paragraph 4 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

5. With respect to the allegations contained in paragraph 5 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

6. With respect to the allegations contained in paragraph 6 of the complaint, Scott admits said allegations.

7. With respect to the allegations contained in paragraph 7 of the complaint, Scott admits said allegations.

8. With respect to the allegations contained in paragraph 8 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

9. With respect to the allegations contained in paragraph 9 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and

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1 therefore denies said allegations.

2 10. With respect to the allegations contained in paragraph 10 of the complaint, Scott  
3 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
4 therefore denies said allegations.

5 11. With respect to the allegations contained in paragraph 11 of the complaint, Scott  
6 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
7 therefore denies said allegations.

8 12. With respect to the allegations contained in paragraph 12 of the complaint, Scott  
9 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
10 therefore denies said allegations.

11 13. With respect to the allegations contained in paragraph 13 of the complaint, Scott  
12 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
13 therefore denies said allegations.

14 14. With respect to the allegations contained in paragraph 14 of the complaint, Scott  
15 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
16 therefore denies said allegations.

17 15. With respect to the allegations contained in paragraph 15 of the complaint, Scott  
18 admits that SFC is qualified to do business in, and does business in, Clark County, Nevada. With  
19 respect to the balance of the allegations contained in paragraph 15 of the complaint, Scott is  
20 without sufficient information to form a belief as to the truth or falsity of said allegations and  
21 therefore denies said allegations.

22 16. With respect to the allegations contained in paragraph 16 of the complaint, Scott  
23 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
24 therefore denies said allegations.

25 17. With respect to the allegations contained in paragraph 17 of the complaint, Scott  
26 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
27 therefore denies said allegations.

28 18. With respect to the allegations contained in paragraph 18 of the complaint, Scott

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1 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
2 therefore denies said allegations.

3 19. With respect to the allegations contained in paragraph 19 of the complaint, Scott  
4 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
5 therefore denies said allegations.

6 20. With respect to the allegations contained in paragraph 20 of the complaint, Scott  
7 admits said allegations.

8 21. With respect to the allegations contained in paragraph 21 of the complaint, Scott  
9 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
10 therefore denies said allegations.

11 22. With respect to the allegations contained in paragraph 22 of the complaint, Scott  
12 denies that the current principal balance is \$82,000,000. With respect to the balance of the  
13 allegations contained in paragraph 22 of the complaint, Scott admits said allegations.

14 23. With respect to the allegations contained in paragraph 23 of the complaint, Scott  
15 denies said allegations.

16 24. With respect to the allegations contained in paragraph 24 of the complaint, Scott  
17 denies said allegations.

18 25. With respect to the allegations contained in paragraph 25 of the complaint, Scott  
19 denies said allegations.

20 26. With respect to the allegations contained in paragraph 26 of the complaint, Scott  
21 denies said allegations.

22 27. With respect to the allegations contained in paragraph 27 of the complaint, Scott  
23 denies said allegations.

24 28. With respect to the allegations contained in paragraph 28 of the complaint, Scott  
25 admits said allegations.

26 29. With respect to the allegations contained in paragraph 29 of the complaint, Scott  
27 denies said allegations.

28 30. With respect to the allegations contained in paragraph 30 of the complaint, Scott

1 denies said allegations.

2 31. With respect to the allegations contained in paragraph 31 of the complaint, Scott  
3 denies said allegations.

4 32. With respect to the allegations contained in paragraph 32 of the complaint, Scott  
5 admits said allegations.

6 33. With respect to the allegations contained in paragraph 33 of the complaint, Scott  
7 denies said allegations.

8 34. With respect to the allegations contained in paragraph 34 of the complaint, Scott  
9 denies said allegations.

10 35. With respect to the allegations contained in paragraph 35 of the complaint, Scott  
11 admits said allegations.

12 36. With respect to the allegations contained in paragraph 36 of the complaint, Scott  
13 denies said allegations.

14 37. With respect to the allegations contained in paragraph 37 of the complaint, Scott  
15 admits said allegations.

16 38. With respect to the allegations contained in paragraph 38 of the complaint, Scott  
17 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
18 therefore denies said allegations.

19 39. With respect to the allegations contained in paragraph 39 of the complaint, Scott  
20 denies said allegations.

21 40. With respect to the allegations contained in paragraph 40 of the complaint, Scott  
22 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
23 therefore denies said allegations.

24 41. With respect to the allegations contained in paragraph 41 of the complaint, Scott  
25 denies said allegations.

26 42. With respect to the allegations contained in paragraph 42 of the complaint, Scott  
27 admits said allegations.

28 43. With respect to the allegations contained in paragraph 43 of the complaint, Scott

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1 admits said allegations.

2 44. With respect to the allegations contained in paragraph 44 of the complaint, Scott  
3 denies said allegations.

4 45. With respect to the allegations contained in paragraph 45 of the complaint, Scott  
5 denies said allegations.

6 46. With respect to the allegations contained in paragraph 46 of the complaint, Scott  
7 admits said allegations.

8 47. With respect to the allegations contained in paragraph 47 of the complaint, Scott  
9 admits said allegations.

10 48. With respect to the allegations contained in paragraph 48 of the complaint, Scott  
11 admits said allegations.

12 49. With respect to the allegations contained in paragraph 49 of the complaint, Scott  
13 admits said allegations.

14 50. With respect to the allegations contained in paragraph 50 of the complaint, Scott  
15 admits said allegations.

16 51. With respect to the allegations contained in paragraph 51 of the complaint, Scott  
17 admits said allegations.

18 52. With respect to the allegations contained in paragraph 52 of the complaint, Scott  
19 admits said allegations.

20 53. With respect to the allegations contained in paragraph 53 of the complaint, Scott  
21 admits said allegations.

22 54. With respect to the allegations contained in paragraph 54 of the complaint, Scott  
23 admits said allegations.

24 55. With respect to the allegations contained in paragraph 55 of the complaint, Scott  
25 admits said allegations.

26 56. With respect to the allegations contained in paragraph 56 of the complaint, Scott  
27 admits said allegations.

28 57. With respect to the allegations contained in paragraph 57 of the complaint, Scott

1 admits said allegations.

2 58. With respect to the allegations contained in paragraph 58 of the complaint, Scott  
3 admits said allegations.

4 59. With respect to the allegations contained in paragraph 59 of the complaint, Scott  
5 admits said allegations.

6 60. With respect to the allegations contained in paragraph 60 of the complaint, Scott  
7 admits said allegations.

8 61. With respect to the allegations contained in paragraph 61 of the complaint, Scott  
9 admits said allegations.

10 62. With respect to the allegations contained in paragraph 62 of the complaint, Scott  
11 admits said allegations.

12 63. With respect to the allegations contained in paragraph 63 of the complaint, Scott  
13 admits said allegations.

14 64. With respect to the allegations contained in paragraph 64 of the complaint, Scott  
15 denies said allegations.

16 65. With respect to the allegations contained in paragraph 65 of the complaint, Scott  
17 admits said allegations.

18 66. With respect to the allegations contained in paragraph 66 of the complaint, Scott  
19 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
20 therefore denies said allegations.

21 67. With respect to the allegations contained in paragraph 67 of the complaint, Scott  
22 admits said allegations.

23 68. With respect to the allegations contained in paragraph 68 of the complaint, Scott  
24 admits said allegations.

25 69. With respect to the allegations contained in paragraph 69 of the complaint, Scott  
26 admits said allegations.

27 70. With respect to the allegations contained in paragraph 70 of the complaint, Scott  
28 admits said allegations.

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- 1           71.     With respect to the allegations contained in paragraph 71 of the complaint, Scott  
2 admits said allegations.
- 3           72.     With respect to the allegations contained in paragraph 72 of the complaint, Scott  
4 admits said allegations.
- 5           73.     With respect to the allegations contained in paragraph 73 of the complaint, Scott  
6 admits said allegations.
- 7           74.     With respect to the allegations contained in paragraph 74 of the complaint, Scott  
8 admits said allegations.
- 9           75.     With respect to the allegations contained in paragraph 75 of the complaint, Scott  
10 admits said allegations.
- 11          76.     With respect to the allegations contained in paragraph 76 of the complaint, Scott  
12 admits said allegations.
- 13          77.     With respect to the allegations contained in paragraph 77 of the complaint, Scott  
14 admits said allegations.
- 15          78.     With respect to the allegations contained in paragraph 78 of the complaint, Scott  
16 admits said allegations.
- 17          79.     With respect to the allegations contained in paragraph 79 of the complaint, Scott  
18 denies said allegations.
- 19          80.     With respect to the allegations contained in paragraph 80 of the complaint, Scott  
20 admits said allegations.
- 21          81.     With respect to the allegations contained in paragraph 81 of the complaint, Scott  
22 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
23 therefore denies said allegations.
- 24          82.     With respect to the allegations contained in paragraph 82 of the complaint, Scott  
25 denies said allegations.
- 26          83.     With respect to the allegations contained in paragraph 83 of the complaint, Scott  
27 denies said allegations.
- 28          84.     With respect to the allegations contained in paragraph 84 of the complaint, Scott

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1 denies said allegations.

2 85. With respect to the allegations contained in paragraph 85 of the complaint, Scott  
3 admits said allegations.

4 86. With respect to the allegations contained in paragraph 86 of the complaint, Scott  
5 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
6 therefore denies said allegations.

7 87. With respect to the allegations contained in paragraph 87 of the complaint, Scott  
8 admits said allegations.

9 88. With respect to the allegations contained in paragraph 88 of the complaint, Scott  
10 denies said allegations.

11 89. With respect to the allegations contained in paragraph 89 of the complaint, Scott  
12 admits said allegations.

13 90. With respect to the allegations contained in paragraph 90 of the complaint, Scott  
14 denies said allegations.

15 91. With respect to the allegations contained in paragraph 91 of the complaint, Scott  
16 admits said allegations.

17 92. With respect to the allegations contained in paragraph 92 of the complaint, Scott  
18 admits said allegations.

19 93. With respect to the allegations contained in paragraph 93 of the complaint, Scott  
20 admits said allegations.

21 94. With respect to the allegations contained in paragraph 94 of the complaint, Scott  
22 admits said allegations.

23 95. With respect to the allegations contained in paragraph 95 of the complaint, Scott  
24 admits said allegations.

25 96. With respect to the allegations contained in paragraph 96 of the complaint, Scott  
26 admits said allegations.

27 97. With respect to the allegations contained in paragraph 97 of the complaint, Scott  
28 admits said allegations.

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1           98.    With respect to the allegations contained in paragraph 98 of the complaint, Scott  
2 admits said allegations.

3           99.    With respect to the allegations contained in paragraph 99 of the complaint, Scott  
4 admits said allegations.

5           100.   With respect to the allegations contained in paragraph 100 of the complaint, Scott  
6 admits said allegations.

7           101.   With respect to the allegations contained in paragraph 101 of the complaint, Scott  
8 admits said allegations.

9           102.   With respect to the allegations contained in paragraph 102 of the complaint, Scott  
10 admits said allegations.

11           103.   With respect to the allegations contained in paragraph 103 of the complaint, Scott  
12 admits said allegations.

13           104.   With respect to the allegations contained in paragraph 104 of the complaint, Scott  
14 admits said allegations.

15           105.   With respect to the allegations contained in paragraph 105 of the complaint, Scott  
16 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
17 therefore denies said allegations.

18           106.   With respect to the allegations contained in paragraph 106 of the complaint, Scott  
19 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
20 therefore denies said allegations.

21           107.   With respect to the allegations contained in paragraph 107 of the complaint, Scott  
22 admits said allegations.

23           108.   With respect to the allegations contained in paragraph 108 of the complaint, Scott  
24 admits said allegations.

25           109.   With respect to the allegations contained in paragraph 109 of the complaint, Scott  
26 admits said allegations.

27           110.   With respect to the allegations contained in paragraph 110 of the complaint, Scott  
28 admits said allegations.

1           111. With respect to the allegations contained in paragraph 111 of the complaint, Scott  
2 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
3 therefore denies said allegations.

4           112. With respect to the allegations contained in paragraph 112 of the complaint, Scott  
5 admits said allegations.

6           113. With respect to the allegations contained in paragraph 113 of the complaint, Scott  
7 admits said allegations.

8           114. With respect to the allegations contained in paragraph 114 of the complaint, Scott  
9 admits said allegations.

10          115. With respect to the allegations contained in paragraph 115 of the complaint, Scott  
11 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
12 therefore denies said allegations.

13          116. With respect to the allegations contained in paragraph 116 of the complaint, Scott  
14 admits said allegations.

15          117. With respect to the allegations contained in paragraph 117 of the complaint, Scott  
16 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
17 therefore denies said allegations.

18          118. With respect to the allegations contained in paragraph 118 of the complaint, Scott  
19 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
20 therefore denies said allegations.

21          119. With respect to the allegations contained in paragraph 119 of the complaint, Scott  
22 admits said allegations.

23          120. With respect to the allegations contained in paragraph 120 of the complaint, Scott  
24 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
25 therefore denies said allegations.

26          121. With respect to the allegations contained in paragraph 121 of the complaint, Scott  
27 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
28 therefore denies said allegations.

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1           122. With respect to the allegations contained in paragraph 122 of the complaint, Scott  
2 admits said allegations.

3           123. With respect to the allegations contained in paragraph 123 of the complaint, Scott  
4 denies said allegations.

5           124. With respect to the allegations contained in paragraph 124 of the complaint, Scott  
6 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
7 therefore denies said allegations.

8           125. With respect to the allegations contained in paragraph 125 of the complaint, Scott  
9 denies said allegations.

10          126. With respect to the allegations contained in paragraph 126 of the complaint, Scott  
11 admits said allegations.

12          127. With respect to the allegations contained in paragraph 127 of the complaint, Scott  
13 admits said allegations.

14          128. With respect to the allegations contained in paragraph 128 of the complaint, Scott  
15 admits said allegations.

16          129. With respect to the allegations contained in paragraph 129 of the complaint, Scott  
17 admits said allegations.

18          130. With respect to the allegations contained in paragraph 130 of the complaint, Scott  
19 admits said allegations.

20          131. With respect to the allegations contained in paragraph 131 of the complaint, said  
21 allegations are not stated with sufficient specificity and thus are neither admitted nor denied.

22          132. With respect to the allegations contained in paragraph 132 of the complaint, Scott  
23 admits said allegations.

24          133. With respect to the allegations contained in paragraph 133 of the complaint, Scott  
25 admits said allegations.

26          134. With respect to the allegations contained in paragraph 134 of the complaint, Scott  
27 admits said allegations.

28          135. With respect to the allegations contained in paragraph 135 of the complaint, Scott

1 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
2 therefore denies said allegations.

3 136. With respect to the allegations contained in paragraph 136 of the complaint, Scott  
4 admits said allegations.

5 137. With respect to the allegations contained in paragraph 137 of the complaint, Scott  
6 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
7 therefore denies said allegations.

8 138. With respect to the allegations contained in paragraph 138 of the complaint, Scott  
9 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
10 therefore denies said allegations.

11 139. With respect to the allegations contained in paragraph 139 of the complaint, Scott  
12 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
13 therefore denies said allegations.

14 140. With respect to the allegations contained in paragraph 140 of the complaint, Scott  
15 denies said allegations.

16 141. With respect to the allegations contained in paragraph 141 of the complaint, Scott  
17 admits said allegations.

18 142. With respect to the allegations contained in paragraph 142 of the complaint, Scott  
19 admits said allegations.

20 143. With respect to the allegations contained in paragraph 143 of the complaint, Scott  
21 admits said allegations.

22 144. With respect to the allegations contained in paragraph 144 of the complaint, Scott  
23 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
24 therefore denies said allegations.

25 145. With respect to the allegations contained in paragraph 145 of the complaint, Scott  
26 admits said allegations.

27 146. With respect to the allegations contained in paragraph 146 of the complaint, Scott  
28 is without sufficient information to form a belief as to the truth or falsity of said allegations and

1 therefore denies said allegations.

2 147. With respect to the allegations contained in paragraph 147 of the complaint, Scott  
3 admits said allegations.

4 148. With respect to the allegations contained in paragraph 148 of the complaint, Scott  
5 admits said allegations.

6 149. With respect to the allegations contained in paragraph 149 of the complaint, Scott  
7 denies said allegations.

8 150. With respect to the allegations contained in paragraph 150 of the complaint, Scott  
9 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
10 therefore denies said allegations.

11 151. With respect to the allegations contained in paragraph 151 of the complaint, Scott  
12 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
13 therefore denies said allegations.

14 152. With respect to the allegations contained in paragraph 152 of the complaint, Scott  
15 denies said allegations.

16 153. With respect to the allegations contained in paragraph 153 of the complaint, Scott  
17 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
18 therefore denies said allegations.

19 154. With respect to the allegations contained in paragraph 154 of the complaint, Scott  
20 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
21 therefore denies said allegations.

22 155. With respect to the allegations contained in paragraph 155 of the complaint, Scott  
23 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
24 therefore denies said allegations.

25 156. With respect to the allegations contained in paragraph 156 of the complaint, Scott  
26 denies said allegations.

27 157. With respect to the allegations contained in paragraph 157 of the complaint, Scott  
28 denies said allegations.

1           158. With respect to the allegations contained in paragraph 158 of the complaint, Scott  
2 denies said allegations.

3           159. With respect to the allegations contained in paragraph 159 of the complaint, Scott  
4 denies said allegations.

5           160. With respect to the allegations contained in paragraph 160 of the complaint, Scott  
6 denies said allegations.

7           161. With respect to the allegations contained in paragraph 161 of the complaint, Scott  
8 denies said allegations.

9           162. With respect to the allegations contained in paragraph 162 of the complaint, Scott  
10 denies said allegations.

11           163. With respect to the allegations contained in paragraph 163 of the complaint, Scott  
12 denies said allegations.

13           164. With respect to the allegations contained in paragraph 164 of the complaint, Scott  
14 denies said allegations.

15           165. With respect to the allegations contained in paragraph 165 of the complaint, Scott  
16 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
17 therefore denies said allegations.

18           166. With respect to the allegations contained in paragraph 166 of the complaint, Scott  
19 denies said allegations.

20           167. With respect to the allegations contained in paragraph 167 of the complaint, Scott  
21 denies said allegations.

22           168. With respect to the allegations contained in paragraph 168 of the complaint, Scott  
23 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
24 therefore denies said allegations.

25           169. With respect to the allegations contained in paragraph 169 of the complaint, Scott  
26 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
27 therefore denies said allegations.

28           170. With respect to the allegations contained in paragraph 170 of the complaint, Scott

1 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
2 therefore denies said allegations.

3 171. With respect to the allegations contained in paragraph 171 of the complaint, Scott  
4 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
5 therefore denies said allegations.

6 172. With respect to the allegations contained in paragraph 172 of the complaint, Scott  
7 denies said allegations.

8 173. With respect to the allegations contained in paragraph 173 of the complaint, Scott  
9 denies said allegations.

10 174. With respect to the allegations contained in paragraph 174 of the complaint, Scott  
11 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
12 therefore denies said allegations.

13 175. With respect to the allegations contained in paragraph 175 of the complaint, Scott  
14 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
15 therefore denies said allegations.

16 176. With respect to the allegations contained in paragraph 176 of the complaint, Scott  
17 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
18 therefore denies said allegations.

19 177. With respect to the allegations contained in paragraph 177 of the complaint, Scott  
20 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
21 therefore denies said allegations.

22 178. With respect to the allegations contained in paragraph 178 of the complaint, Scott  
23 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
24 therefore denies said allegations.

25 179. With respect to the allegations contained in paragraph 179 of the complaint, Scott  
26 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
27 therefore denies said allegations.

28 180. With respect to the allegations contained in paragraph 180 of the complaint, Scott

1 denies said allegations.

2 181. With respect to the allegations contained in paragraph 181 of the complaint, Scott  
3 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
4 therefore denies said allegations.

5 182. With respect to the allegations contained in paragraph 182 of the complaint, Scott  
6 denies said allegations.

7 183. With respect to the allegations contained in paragraph 183 of the complaint, Scott  
8 denies said allegations.

9 184. With respect to the allegations contained in paragraph 184 of the complaint, Scott  
10 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
11 therefore denies said allegations.

12 185. With respect to the allegations contained in paragraph 185 of the complaint, Scott  
13 denies said allegations.

14 186. With respect to the allegations contained in paragraph 186 of the complaint, Scott  
15 denies said allegations.

16 187. With respect to the allegations contained in paragraph 187 of the complaint, Scott  
17 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
18 therefore denies said allegations.

19 188. With respect to the allegations contained in paragraph 188 of the complaint, Scott  
20 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
21 therefore denies said allegations.

22 189. With respect to the allegations contained in paragraph 189 of the complaint, Scott  
23 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
24 therefore denies said allegations.

25 190. With respect to the allegations contained in paragraph 190 of the complaint, Scott  
26 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
27 therefore denies said allegations.

28 191. With respect to the allegations contained in paragraph 191 of the complaint, Scott

1 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
2 therefore denies said allegations.

3 192. With respect to the allegations contained in paragraph 192 of the complaint, Scott  
4 denies said allegations.

5 193. With respect to the allegations contained in paragraph 193 of the complaint, Scott  
6 denies said allegations.

7 194. With respect to the allegations contained in paragraph 194 of the complaint, Scott  
8 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
9 therefore denies said allegations.

10 195. With respect to the allegations contained in paragraph 195 of the complaint, Scott  
11 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
12 therefore denies said allegations.

13 196. With respect to the allegations contained in paragraph 196 of the complaint, Scott  
14 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
15 therefore denies said allegations.

16 197. With respect to the allegations contained in paragraph 197 of the complaint, Scott  
17 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
18 therefore denies said allegations.

19 198. With respect to the allegations contained in paragraph 198 of the complaint, Scott  
20 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
21 therefore denies said allegations.

22 199. With respect to the allegations contained in paragraph 199 of the complaint, Scott  
23 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
24 therefore denies said allegations.

25 200. With respect to the allegations contained in paragraph 200 of the complaint, Scott  
26 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
27 therefore denies said allegations.

28 201. With respect to the allegations contained in paragraph 201 of the complaint, Scott

1 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
2 therefore denies said allegations.

3 202. With respect to the allegations contained in paragraph 202 of the complaint, Scott  
4 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
5 therefore denies said allegations.

6 203. With respect to the allegations contained in paragraph 203 of the complaint, Scott  
7 denies said allegations.

8 204. With respect to the allegations contained in paragraph 204 of the complaint, Scott  
9 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
10 therefore denies said allegations.

11 205. With respect to the allegations contained in paragraph 205 of the complaint, Scott  
12 denies said allegations.

13 206. With respect to the allegations contained in paragraph 206 of the complaint, Scott  
14 denies said allegations.

15 207. With respect to the allegations contained in paragraph 207 of the complaint, Scott  
16 denies said allegations.

17 208. With respect to the allegations contained in paragraph 208 of the complaint, Scott  
18 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
19 therefore denies said allegations.

20 209. With respect to the allegations contained in paragraph 209 of the complaint, Scott  
21 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
22 therefore denies said allegations.

23 210. With respect to the allegations contained in paragraph 210 of the complaint, Scott  
24 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
25 therefore denies said allegations.

26 211. With respect to the allegations contained in paragraph 211 of the complaint, Scott  
27 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
28 therefore denies said allegations.

1           212. With respect to the allegations contained in paragraph 212 of the complaint, Scott  
2 denies said allegations.

3           213. With respect to the allegations contained in paragraph 213 of the complaint, Scott  
4 admits said allegations.

5        214. With respect to the allegations contained in paragraph 214 of the complaint, Scott  
6 admits said allegations.

7        215. With respect to the allegations contained in paragraph 215 of the complaint, Scott  
8 denies said allegations.

9           216. With respect to the allegations contained in paragraph 216 of the complaint, Scott  
10 denies said allegations.

217. With respect to the allegations contained in paragraph 217 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

14           218. With respect to the allegations contained in paragraph 218 of the complaint, Scott  
15 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
16 therefore denies said allegations.

### FIRST CLAIM FOR RELIEF

(Fraud)

19            219. Answering paragraph 219 of the complaint, Scott repeats and realleges herein all  
20 of the answers set forth above.

21           220. With respect to the allegations contained in paragraph 220 of the complaint, Scott  
22 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
23 therefore denies said allegations.

24            221. With respect to the allegations contained in paragraph 221 of the complaint, Scott  
25 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
26 therefore denies said allegations.

27           222. With respect to the allegations contained in paragraph 222 of the complaint, Scott  
28 is without sufficient information to form a belief as to the truth or falsity of said allegations and

1 therefore denies said allegations.

2       223. With respect to the allegations contained in paragraph 223 of the complaint, Scott  
3 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
4 therefore denies said allegations.

5       224. With respect to the allegations contained in paragraph 224 of the complaint, Scott  
6 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
7 therefore denies said allegations.

8       225. With respect to the allegations contained in paragraph 225 of the complaint, Scott  
9 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
10 therefore denies said allegations.

11       226. With respect to the allegations contained in paragraph 226 of the complaint, Scott  
12 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
13 therefore denies said allegations.

14       227. With respect to the allegations contained in paragraph 227 of the complaint, Scott  
15 denies said allegations.

16       228. With respect to the allegations contained in paragraph 228 of the complaint, Scott  
17 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
18 therefore denies said allegations.

19       229. With respect to the allegations contained in paragraph 229 of the complaint, Scott  
20 denies said allegations.

21       230. With respect to the allegations contained in paragraph 230 of the complaint, Scott  
22 denies said allegations.

23       231. With respect to the allegations contained in paragraph 231 of the complaint, Scott  
24 denies said allegations.

25                   **SECOND CLAIM FOR RELIEF**

26                   **(Constructive Fraud)**

27       232. Answering paragraph 232 of the complaint, Scott repeats and realleges herein all  
28 of the answers set forth above.

1           233. With respect to the allegations contained in paragraph 233 of the complaint, Scott  
2 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
3 therefore denies said allegations.

4           234. With respect to the allegations contained in paragraph 234 of the complaint, Scott  
5 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
6 therefore denies said allegations.

7           235. With respect to the allegations contained in paragraph 235 of the complaint, Scott  
8 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
9 therefore denies said allegations.

10          236. With respect to the allegations contained in paragraph 236 of the complaint, Scott  
11 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
12 therefore denies said allegations.

13          237. With respect to the allegations contained in paragraph 237 of the complaint, Scott  
14 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
15 therefore denies said allegations.

16          238. With respect to the allegations contained in paragraph 238 of the complaint, Scott  
17 denies said allegations.

18          239. With respect to the allegations contained in paragraph 239 of the complaint, Scott  
19 denies said allegations.

20                                   **THIRD CLAIM FOR RELIEF**

21                                   **(Negligent Misrepresentation)**

22          240. Answering paragraph 240 of the complaint, Scott repeats and realleges herein all  
23 of the answers set forth above.

24          241. With respect to the allegations contained in paragraph 241 of the complaint, Scott  
25 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
26 therefore denies said allegations.

27          242. With respect to the allegations contained in paragraph 242 of the complaint, Scott  
28 is without sufficient information to form a belief as to the truth or falsity of said allegations and

1 therefore denies said allegations.

2 243. With respect to the allegations contained in paragraph 243 of the complaint, Scott  
3 denies said allegations.

4 244. With respect to the allegations contained in paragraph 244 of the complaint, Scott  
5 denies said allegations.

6 245. With respect to the allegations contained in paragraph 245 of the complaint, Scott  
7 denies said allegations.

8 246. With respect to the allegations contained in paragraph 246 of the complaint, Scott  
9 denies said allegations.

10 **FOURTH CLAIM FOR RELIEF**

11 **(Mistake of Fact)**

12 247. Answering paragraph 247 of the complaint, Scott repeats and realleges herein all  
13 of the answers set forth above.

14 248. With respect to the allegations contained in paragraph 248 of the complaint, Scott  
15 denies said allegations.

16 249. With respect to the allegations contained in paragraph 249 of the complaint, Scott  
17 denies said allegations.

18 250. With respect to the allegations contained in paragraph 250 of the complaint, Scott  
19 denies said allegations.

20 **FIFTH CLAIM FOR RELIEF**

21 **(Mistake of Law)**

22 251. Answering paragraph 251 of the complaint, Scott repeats and realleges herein all  
23 of the answers set forth above.

24 252. With respect to the allegations contained in paragraph 252 of the complaint, Scott  
25 denies said allegations.

26 253. With respect to the allegations contained in paragraph 253 of the complaint, Scott  
27 denies said allegations.

28 ///

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**SIXTH CLAIM FOR RELIEF**

**(Reformation of the Guaranty and TM2I Guaranty)**

254. Answering paragraph 254 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

255. With respect to the allegations contained in paragraph 255 of the complaint, Scott denies said allegations.

256. With respect to the allegations contained in paragraph 256 of the complaint, Scott denies said allegations.

257. With respect to the allegations contained in paragraph 257 of the complaint, Scott denies said allegations.

**SEVENTH CLAIM FOR RELIEF**

**(Damages – Fraud)**

258. Answering paragraph 258 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

259. With respect to the allegations contained in paragraph 259 of the complaint, Scott denies said allegations.

260. With respect to the allegations contained in paragraph 260 of the complaint, Scott denies said allegations.

**EIGHTH CLAIM FOR RELIEF**

**(Damages – Negligent Misrepresentation)**

261. Answering paragraph 261 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

262. With respect to the allegations contained in paragraph 262 of the complaint, Scott denies said allegations.

263. With respect to the allegations contained in paragraph 263 of the complaint, Scott denies said allegations.

///

///

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**NINTH CLAIM FOR RELIEF**

**(Damages – Loan Fraud)**

264. Answering paragraph 264 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

265. With respect to the allegations contained in paragraph 265 of the complaint, Scott denies said allegations.

266. With respect to the allegations contained in paragraph 266 of the complaint, Scott denies said allegations.

267. With respect to the allegations contained in paragraph 267 of the complaint, Scott denies said allegations.

268. With respect to the allegations contained in paragraph 268 of the complaint, Scott denies said allegations.

**TENTH CLAIM FOR RELIEF**

**(Securities Fraud – Violation of NRS 90.211 et. seq.)**

269. Answering paragraph 269 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

270. With respect to the allegations contained in paragraph 270 of the complaint, Scott denies said allegations.

271. With respect to the allegations contained in paragraph 271 of the complaint, Scott denies said allegations.

272. With respect to the allegations contained in paragraph 272 of the complaint, Scott denies said allegations.

273. With respect to the allegations contained in paragraph 273 of the complaint, Scott denies said allegations.

274. With respect to the allegations contained in paragraph 274 of the complaint, Scott denies said allegations.

///

///

**ELEVENTH CLAIM FOR RELIEF**

**(Defamation)**

275. Answering paragraph 275 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

276. With respect to the allegations contained in paragraph 276 of the complaint, Scott admits said allegations.

277. With respect to the allegations contained in paragraph 277 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

278. With respect to the allegations contained in paragraph 278 of the complaint, Scott denies said allegations.

279. With respect to the allegations contained in paragraph 279 of the complaint, Scott denies said allegations.

280. With respect to the allegations contained in paragraph 280 of the complaint, Scott denies said allegations.

281. With respect to the allegations contained in paragraph 281 of the complaint, Scott denies said allegations.

**TWELFTH CLAIM FOR RELIEF**

**(Damages – Breach of Fiduciary Duty)**

282. Answering paragraph 282 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

283. With respect to the allegations contained in paragraph 283 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

284. With respect to the allegations contained in paragraph 284 of the complaint, Scott denies said allegations.

285. With respect to the allegations contained in paragraph 285 of the complaint, Scott denies said allegations.

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1           286. With respect to the allegations contained in paragraph 286 of the complaint, Scott  
2 denies said allegations.

3                                   **THIRTEENTH CLAIM FOR RELIEF**

4                           **(Damages – BOK, Aiding and Abetting Breach of Fiduciary Duty)**

5           287. Answering paragraph 287 of the complaint, Scott repeats and realleges herein all  
6 of the answers set forth above.

7           288. With respect to the allegations contained in paragraph 288 of the complaint, Scott  
8 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
9 therefore denies said allegations.

10          289. With respect to the allegations contained in paragraph 289 of the complaint, Scott  
11 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
12 therefore denies said allegations.

13          290. With respect to the allegations contained in paragraph 290 of the complaint, Scott  
14 denies said allegations.

15          291. With respect to the allegations contained in paragraph 291 of the complaint, Scott  
16 denies said allegations.

17                                   **FOURTEENTH CLAIM FOR RELIEF**

18                           **(Acting in Concert)**

19          292. Answering paragraph 292 of the complaint, Scott repeats and realleges herein all  
20 of the answers set forth above.

21          293. With respect to the allegations contained in paragraph 293 of the complaint, Scott  
22 denies said allegations.

23          294. With respect to the allegations contained in paragraph 294 of the complaint, Scott  
24 denies said allegations.

25          295. With respect to the allegations contained in paragraph 295 of the complaint, Scott  
26 denies said allegations.

27       ///

28       ///

**FIFTEENTH CLAIM FOR RELIEF**

**(Punitive Damages)**

296. Answering paragraph 296 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

297. With respect to the allegations contained in paragraph 297 of the complaint, Scott denies said allegations.

298. With respect to the allegations contained in paragraph 298 of the complaint, Scott denies said allegations.

299. With respect to the allegations contained in paragraph 299 of the complaint, Scott denies said allegations.

300. With respect to the allegations contained in paragraph 300 of the complaint, Scott denies said allegations.

301. With respect to the allegations contained in paragraph 301 of the complaint, Scott denies said allegations.

302. With respect to the allegations contained in paragraph 302 of the complaint, Scott denies said allegations.

**SIXTEENTH CLAIM FOR RELIEF**

**(Damages – Breach of Contract)**

303. Answering paragraph 303 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

304. With respect to the allegations contained in paragraph 304 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

305. With respect to the allegations contained in paragraph 305 of the complaint, Scott denies said allegations.

306. With respect to the allegations contained in paragraph 306 of the complaint, Scott denies said allegations.

///

**SEVENTEENTH CLAIM FOR RELIEF**

**(Damages – Breach of Covenant of Good Faith and Fair Dealing)**

307. Answering paragraph 307 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

308. With respect to the allegations contained in paragraph 308 of the complaint, Scott admits said allegations.

309. With respect to the allegations contained in paragraph 309 of the complaint, Scott denies said allegations.

310. With respect to the allegations contained in paragraph 310 of the complaint, Scott denies said allegations.

311. With respect to the allegations contained in paragraph 311 of the complaint, Scott denies said allegations.

**EIGHTEENTH CLAIM FOR RELIEF**

**(Negligence)**

312. Answering paragraph 312 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

313. With respect to the allegations contained in paragraph 313 of the complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

314. With respect to the allegations contained in paragraph 314 of the complaint, Scott denies said allegations.

315. With respect to the allegations contained in paragraph 315 of the complaint, Scott denies said allegations.

**NINETEENTH CLAIM FOR RELIEF**

**(Declaratory Judgment)**

316. Answering paragraph 316 of the complaint, Scott repeats and realleges herein all of the answers set forth above.

317. With respect to the allegations contained in paragraph 317 of the complaint, Scott

1 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
2 therefore denies said allegations.

3 318. With respect to the allegations contained in paragraph 318 of the complaint, Scott  
4 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
5 therefore denies said allegations.

6 319. With respect to the allegations contained in paragraph 319 of the complaint, Scott  
7 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
8 therefore denies said allegations.

9 320. With respect to the allegations contained in paragraph 320 of the complaint, Scott  
10 is without sufficient information to form a belief as to the truth or falsity of said allegations and  
11 therefore denies said allegations.

12 321. With respect to the allegations contained in paragraph 321 of the complaint, Scott  
13 denies said allegations.

14 322. With respect to the allegations contained in paragraph 322 of the complaint, Scott  
15 denies said allegations.

16 323. With respect to the allegations contained in paragraph 323 of the complaint, Scott  
17 denies said allegations.

18 324. With respect to the allegations contained in paragraph 324 of the complaint, Scott  
19 denies said allegations.

20 325. With respect to the allegations contained in paragraph 325 of the complaint, Scott  
21 denies said allegations.

22 326. With respect to the allegations contained in paragraph 326 of the complaint, Scott  
23 denies said allegations.

24 327. With respect to the allegations contained in paragraph 327 of the complaint, Scott  
25 denies said allegations.

26 328. With respect to the allegations contained in paragraph 328 of the complaint, Scott  
27 denies said allegations.

28 ///

AFFIRMATIVE DEFENSES

1. Plaintiffs have failed to state a claim for which relief may be granted.
2. Plaintiffs lack standing to bring this action.
3. Plaintiffs' claims are barred by the doctrines of laches, waiver and estoppel.
4. Plaintiffs have failed to mitigate their damages, if any, after discovery of the alleged injury, if any.
5. Plaintiffs are guilty of unclean hands and therefore are not entitled to any relief from Scott.
6. Plaintiffs' recovery is barred by contributory negligence as whatever injuries or damages sustained by Plaintiffs as a result of the allegations of the Complaint were proximately caused in whole or in part or were contributed to by reason of Plaintiffs' own negligence.
7. Plaintiffs' recovery is barred by comparative negligence as Plaintiff was comparatively more negligent than Scott.
8. Any damages which Plaintiffs may have sustained were proximately caused by the acts of persons other than Scott, and therefore, Plaintiffs are not entitled to any relief from Scott.
9. Alternatively, should Scott be found liable, the fault of all parties, joined and nonjoined, including that of the Plaintiffs must be evaluated and liability apportioned among all persons and entities appropriate to respective fault.
10. If Plaintiffs have incurred any injury or damage, which Scott denies, the risk of such injury or damage was not foreseeable.
11. Plaintiffs' claims should be dismissed for failure to join indispensable parties.
12. By their own actions, Plaintiffs have ratified, approved and adopted the actions of Scott in connection with the allegations contained in the Complaint.
13. By reason of their own acts, Plaintiffs have released and discharged Scott from the claims alleged.
14. Plaintiffs have failed to do equity towards Scott and therefore are not entitled to any relief.
15. Plaintiffs have been unjustly enriched to the injury and detriment of Scott and

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1 therefore are not entitled to any relief.

2 16. Plaintiffs' claims are not well-grounded in fact and are not warranted by existing  
3 law or a good faith argument for the extension or modification of existing law, but are initiated  
4 only for purposes of harassment, unnecessary delay and the occurrence of needless costs of  
5 litigation to Scott.

6 17. The claims of Plaintiffs are barred in whole or in part to the extent that Plaintiff  
7 have not suffered any injury in fact.

8 18. Any damages that Plaintiffs allege to have suffered from the matters alleged in the  
9 Complaint are too remote or speculative to allow recovery.

10 19. Scott hereby adopts and incorporate by this reference any and all other defenses  
11 asserted or to be asserted by any other defendant in this proceeding to the extent that Scott may  
12 share in such defenses.

13 20. Scott hereby reserves the right to allege additional defenses as they may become  
14 known, or as they evolve during the litigation, and to amend their Answer accordingly.

15 21. Any statements made by Scott or Scott's representatives were true.

16 22. Any statements made by Scott or Scott's representatives were privileged.

17 WHEREFORE, Scott Financial Corporation and Bradley J. Scott pray for judgment on  
18 the complaint as follows:

19 1. That Plaintiffs take nothing and that the complaint be dismissed with prejudice;

20 2. That Scott Financial Corporation and Bradley J. Scott be awarded their attorney's  
21 fees and costs of suit in defending the complaint; and

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

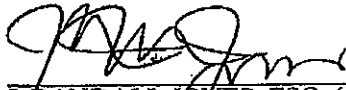
28 ///

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

2 DATED this 8<sup>th</sup> day of May, 2009.

3 KEMP, JONES & COULTHARD, LLP

4 

5 J. RANDALL JONES, ESQ. (#1927)  
6 MARK M. JONES, ESQ. (#267)  
7 MATTHEW S. CARTER, ESQ. (#9524)  
8 3800 Howard Hughes Parkway  
9 Seventeenth Floor  
10 Las Vegas, Nevada 89169  
11 Attorneys for Defendants Scott Financial  
12 Corporation and Bradley J. Scott

13 II.

14 COUNTERCLAIM

15 COMES NOW Counterclaimant SCOTT FINANCIAL CORPORATION, a foreign  
16 corporation (hereinafter, "SFC"), by and through its attorneys of record, Kemp, Jones &  
17 Coulthard, LLP, and hereby complains and alleges against Counterdefendant GARY D.  
18 THARALDSON (hereinafter, "Tharaldson") as follows:

19 1. SFC is a North Dakota Corporation with its principal place of business in  
20 Bismarck, North Dakota, and is registered and doing business in Nevada as a foreign corporation.

21 2. SFC is informed and believes that Tharaldson is a resident of the County of Clark,  
22 in the State of Nevada.

23 3. This counterclaim arises from Tharaldson's guaranty of a loan to borrower  
24 Gemstone Development West, Inc. (the "Senior Loan").

25 4. The borrower defaulted on the Senior Loan subsequent to Tharaldson's guaranty  
26 thereof.

27 5. Tharaldson has since refused to fulfill and honor his contractual obligations as  
28 guarantor, opting instead to initiate the instant lawsuit as a way of avoiding his responsibilities.

///

///

**FIRST CLAIM FOR RELIEF**  
**(Breach of Contract)**

6. SFC re-alleges and incorporates herein by reference each and every allegation contained within the paragraphs set forth above.

7. SFC performed its obligations pursuant to the terms of the Senior Loan and guaranty by loaning funds to the borrower.

8. Upon the breach of the Senior Loan and pursuant to the terms of the guaranty SFC became entitled to collect the amounts due and owing thereon from Tharaldson. A true and correct copy of Tharaldson's guaranty is attached hereto and incorporated herein by this reference as Exhibit A.

9. Pursuant to the guaranty, Tharaldson has waived any right to require SFC to proceed against or exhaust any security for the Senior Loan, and has expressly waived any rights and defenses based upon NRS 40.430, commonly referred to as Nevada's 'One Action Rule'.

10. The principal obligation on the Senior Loan is, and at all relevant times was, greater than \$500,000.00.

11. The Senior Loan is not secured by indebtedness to a seller of real property for which the obligation was originally extended to the seller for any portion of the purchase price.

12. The Senior Loan is not secured by real property used primarily for the production of farm products.

13. The Senior Loan is not secured by real property on which there is one residential structure and upon which four or fewer families reside.

14. Upon the breach of the Senior Loan and pursuant to the terms of the guaranty SFC is entitled to damages from Tharaldson in an amount in excess of Ten Thousand Dollars (\$10,000.00).

15. SFC has been required to retain the services of counsel to prosecute this action to collect the amounts owed, and SFC is entitled to an award of attorney's fees, costs of suit and collection.

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**SECOND CLAIM FOR RELIEF**  
**(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

16. SFC re-alleges and incorporates herein by reference each and every allegation contained within the paragraphs set forth above.
17. Implied in every contract is a covenant of good faith and fair dealing.
18. As guarantor of the Senior Loan, Tharaldson owed and owes SFC a duty of good faith and fair dealing.
19. Tharaldson breached this duty by, *inter alia*, instituting the instant lawsuit as a "preemptive strike" to attempt to get out of his obligations under the guaranty.
20. Tharaldson's breach has actually and proximately damaged SFC in an amount in excess of Ten Thousand Dollars (\$10,000.00).
21. SFC has been required to retain the services of counsel to prosecute this action to collect the amounts owed, and SFC is entitled to an award of attorney's fees, costs of suit and collection.

**PRAYER FOR RELIEF**

**WHEREFORE**, SFC prays upon its counterclaims for the following:

1. Compensatory damages from Tharaldson in excess of \$10,000.00;
2. An award of court costs and reasonable attorney's fees; and
3. For such other and further relief as the Court deems just and proper.

DATED this 8<sup>th</sup> day of May, 2009.

KEMP, JONES & COULTHARD, LLP



J. RANDALL JONES, ESQ. (#1927)  
MARK M. JONES, ESQ. (#267)  
MATTHEW S. CARTER, ESQ. (#9524)  
3800 Howard Hughes Parkway  
Seventeenth Floor  
Las Vegas, Nevada 89169  
Attorneys for Scott Financial Corporation and  
Bradley J. Scott

KEMP, JONES & COULTHARD, LLP  
3800 Howard Hughes Parkway  
Seventeenth Floor  
Las Vegas, Nevada 89169  
(702) 385-6000  
Fax (702) 385-6001

**CERTIFICATE OF MAILING**

I hereby certify that on the 07<sup>th</sup> day of May, 2009, the foregoing **SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S ANSWER TO COMPLAINT AND COUNTERCLAIM** was served on the following persons by mailing a copy thereof, first class mail, postage prepaid, to:

ALBRIGHT, STODDARD,  
WARNICK & ALBRIGHT  
Mark Albright, Esq.  
801 S. Rancho Drive  
Suite D-4  
Las Vegas, NV 89106

LEWIS & ROCA  
Von Heinz, Esq.  
3993 Howard Hughes Pkwy.  
Suite 600  
Las Vegas, Nevada 89169

HOWARD & HOWARD ATTORNEYS P.C.  
Gwen Rutar Mullins, Esq.  
3800 Howard Hughes Parkway  
1400 Floor  
Las Vegas, NV 89169

Nik Skrinjaric, Esq.  
2500 N. Buffalo Drive  
Suite 250  
Las Vegas, NV 89128

MORRIL & ARONSON, P.L.C.  
K. Layne Morrill  
Martin A. Aronson, Esq.  
Stephanie L. Samuelson, Esq.  
1 East Camelback Road, Suite 340  
Phoenix, AZ 85012

FREDERIC DORWART, LAWYERS  
John D. Clayman, Esq.  
Old City Hall  
124 East Fourth Street  
Tulsa, OK 74103

  
An employee of Kemp, Jones & Coulthard

# **EXHIBIT A**

ORIGINAL



**GUARANTY**

(\$100,000,000 Senior Debt Construction Note)  
(Unlimited—Gary D. Tharaldson, Individually)

WHEREAS SCOTT FINANCIAL CORPORATION, a North Dakota corporation (the "Lender") has agreed to loan up to \$110,000,000.00 (the "Loan") to GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation (the "Borrower");

WHEREAS the Loan will be evidenced by the Borrower's promissory notes of even date herewith payable to the order of the Lender consisting of a \$100,000,000 Senior Debt Construction Note and a \$10,000,000 Senior Debt Contingency Note (collectively, the "Senior Notes");

WHEREAS, to secure payment of the Senior Notes and all other Obligations in connection with the Loan, the Borrower has executed and delivered to the Lender a Senior Debt Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Construction) of even date herewith (the "Senior Debt Deed of Trust");

WHEREAS the Lender, as a condition to making the Loan, has required the execution of this Guaranty of the \$100,000,000 Senior Construction Note;

NOW, THEREFORE, the undersigned (hereinafter the "Guarantor"), in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby agrees as follows:

1. The Guarantor hereby absolutely, unconditionally and jointly and severally guarantees to the Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of (i) the repayment of all funds disbursed under and evidenced by the \$100,000,000 Senior Debt Construction Note (and all interest thereon) and any extensions or renewals thereof and substitutions therefor; and (ii) each and every sum secured by the Security Documents; and (iii) each and every other of the Obligations in connection with the \$100,000,000 Senior Debt Construction Note or sum now or hereafter owing under any agreement now or hereafter entered into between the Lender and the Borrower in connection with the \$100,000,000 Senior Debt Construction Note or the Property encumbered therein, including, without limitation, the indemnification provisions of the Senior Debt Deed of Trust (all of said sums being hereinafter called the "Indebtedness"); and the Guarantor agrees to pay all reasonable costs, expenses and attorneys' fees paid or incurred by the Lender in endeavoring to collect the Indebtedness and in enforcing this Guaranty. The obligations of the Guarantor shall be joint and several with all other parties liable for the Indebtedness.

2. Indebtedness of the Borrower under the Note or otherwise may be created and

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continued in any amount without affecting or impairing the liability of the Guarantor hereunder.

3. No act or thing need occur to establish the liability of the Guarantor hereunder, and with the exception of full payment, no act or thing (including, but not limited to, a discharge in bankruptcy of the Indebtedness, and/or the running of the statute of limitations) relating to the Indebtedness which but for this provision could act as a release of the liabilities of the Guarantor hereunder, shall in any way exonerate the Guarantor, or affect, impair, reduce or release this Guaranty and the liability of the Guarantor hereunder; and this shall be a continuing, absolute, unconditional and joint and several guaranty and shall be in force and be binding upon the Guarantor until the Indebtedness is fully paid.

4. The liability of the Guarantor hereunder shall not be affected or impaired in any way by any of the following acts or things (which the Lender is hereby expressly authorized to do, omit or suffer from time to time without notice to or consent of anyone): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all Indebtedness; (ii) any extension or renewal of any Indebtedness (whether or not for longer than the original period) or any modification of the interest rate, maturity or other terms of any Indebtedness; (iii) any waiver or indulgence granted to the Borrower, any delay or lack of diligence in the enforcement of the Note or any other Indebtedness, or any failure to institute proceedings, file a claim, give any required notices or otherwise protect any Indebtedness; (iv) any full or partial release of, compromise or settlement with, or agreement not to sue, the Borrower or any other guarantor or other person liable on any Indebtedness or the death of any other guarantor or obligor on any Indebtedness; (v) any release, surrender, cancellation or other discharge of any Indebtedness or the acceptance of any instrument in renewal or substitution for any instrument evidencing Indebtedness; (vi) any failure to obtain collateral security (including rights of setoff) for any Indebtedness, or to see to the proper or sufficient creation and perfection thereof, or to establish the priority thereof, or to preserve, protect, insure, care for, exercise or enforce any of the Security Documents or any other collateral security for any of the Indebtedness; (vii) any modification, alteration, substitution, exchange, surrender, cancellation, termination, release or other change, impairment, limitation, loss or discharge of any of the Security documents or any other collateral security for any of the Indebtedness; (viii) any assignment, sale, pledge or other transfer of any of the Indebtedness; or (ix) any manner, order or method of application of any payments or credits on any Indebtedness. The Guarantor waives any and all defenses and discharges available to a surety, guarantor, or accommodation co-obligor, dependent on their character as such.

5. The Guarantor waives any and all defenses, claims, setoffs, and discharges of the Borrower, or any other obligor, pertaining to the Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Guarantor will not assert against the Lender any defense of waiver, release, discharge in bankruptcy, res judicata, statute of frauds, anti-deficiency statute, fraud, ultra vires acts, usury, illegality or unenforceability which may be available to the Borrower in respect of the Indebtedness, or any setoff available against the Lender to the Borrower, whether or not on account of a related transaction, and the Guarantor expressly agrees that he shall be and remain liable for any deficiency remaining after foreclosure of the Deed of Trust or other security interest securing any Indebtedness, notwithstanding provisions of law that may prevent the Lender from enforcing such deficiency against the Borrower. The liability of the Guarantor shall not be affected or impaired by any voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all the assets, marshalling of

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assets and liabilities, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition or readjustment of, or other similar event or proceeding affecting the Borrower or any of its assets. The Guarantor will not assert against the Lender any claim, defense or setoff available to the Guarantor against the Borrower.

6. The Guarantor also hereby waives: (i) presentment, demand for payment, notice of dishonor or nonpayment, and protest of the Indebtedness; (ii) notice of the acceptance hereof by the Lender and of the creation and existence of all Indebtedness; and (iii) notice of any amendment to or modification of any of the terms and provisions of the Note, the Security Documents or any other agreement evidencing any Indebtedness. The Lender shall not be required to first resort for payment of the indebtedness to the Borrower or other persons or corporations, their properties or estates, or to any collateral, property, liens or other rights or remedies whatsoever.

7. Whenever, at any time or from time to time, the Guarantor shall make any payment to the Lender hereunder, the Guarantor shall notify the Lender in writing that such payment is made under this Guaranty for such purpose. If any payment applied by the Lender to the Indebtedness is thereafter set aside, recovered, rescinded or required to be returned for any reason (including, without limitation, the bankruptcy, insolvency or reorganization of the Borrower or any other obligor), the Indebtedness to which such payment was applied shall for the purposes of this Guaranty be deemed to have continued in existence, notwithstanding such application, and this Guaranty shall be enforceable as to such Indebtedness as fully as if such application had never been made.

8. No payment by the Guarantor pursuant to any provision hereof shall entitle the Guarantor, by subrogation to the rights of the Lender or otherwise, to any payment by the Borrower or out of the property of the Borrower until all of the Indebtedness (including interest) and all costs, expenses and attorneys' fees paid or incurred by the Lender in endeavoring to collect the Indebtedness and enforcing this Guaranty have been fully paid. The Guarantor will not exercise or enforce any right or contribution, reimbursement, recourse or subrogation available to the Guarantor as to any Indebtedness, or against any person liable therefor, or as to any collateral security therefor, unless and until all such Indebtedness shall have been fully paid and discharged.

9. The Guarantor hereby represents and warrants to Lender that there is no action, proceeding or investigation pending or threatened (or any basis therefor) which involves the Property encumbered by the Senior Debt Deed of Trust or which may materially adversely affect the condition, business or prospects of the Borrower or the Guarantor or any of Borrower's or the Guarantor's properties or assets, or which might adversely affect the Borrower's or the Guarantor's ability to perform their obligations under the Security Documents.

10. The Guarantor shall maintain a minimum personal net worth of not less than \$500,000,000 and liquidity (defined as cash and available lines of credit) of at least \$25,000,000, measured annually at each December 31. The Guarantor shall provide to Lender annual financial statements and tax returns in a timely manner.

11. This Guaranty shall be binding upon the heirs, legal representatives, successors and assigns of the Guarantor, and shall inure to the benefit of the successors and assigns of the Lender.

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 ORIGINAL

12. This Guaranty shall be construed according to and will be enforced under the substantive and procedural the laws of the State of Nevada. Guarantor hereby consents to the exclusive personal and venue jurisdiction of the state and federal courts located in Clark County, Nevada in connection with any controversy related in any way to this Guaranty, and waives any argument that venue in such forums is not convenient.

13. **WAIVER OF JURY TRIAL.** THE GUARANTOR ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED AND THAT THE TIME AND EXPENSE REQUIRED FOR TRIAL BY A JURY MAY EXCEED THE TIME AND EXPENSE REQUIRED FOR TRIAL WITHOUT A JURY. THE GUARANTOR, AFTER CONSULTING (OR HAVING HAD THE OPPORTUNITY TO CONSULT) WITH COUNSEL OF GUARANTOR'S CHOICE, KNOWINGLY AND VOLUNTARILY, AND FOR THE MUTUAL BENEFIT OF LENDER AND GUARANTOR, WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING THE PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO, THIS GUARANTY, ANY RELATED AGREEMENTS, OR OBLIGATIONS THEREUNDER. THE GUARANTOR HAS READ ALL OF THIS GUARANTY AND UNDERSTANDS ALL OF THE PROVISIONS OF THIS GUARANTY. THE GUARANTOR ALSO AGREES THAT COMPLIANCE BY THE LENDER WITH THE EXPRESS PROVISIONS OF THIS GUARANTY SHALL CONSTITUTE GOOD FAITH AND SHALL BE CONSIDERED REASONABLE FOR ALL PURPOSES.

IN WITNESS WHEREOF, the Guarantor has executed this Guaranty as of this 22<sup>nd</sup> day of January, 2008.

GUARANTOR:

  
Gary D. Tharaldson, Individually

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**ADDENDUM TO GUARANTY**  
**(Nevada Law Provisions)**

This Addendum is incorporated into the Guaranty dated January 22, 2008 (the "Guaranty") executed by GARY D. THARALDSON ("Guarantor") in favor of SCOTT FINANCIAL CORPORATION ("Lender").

In addition the waivers set forth in the Guaranty, the Guarantor hereby expressly waives the following:

(a) any and all rights or defenses arising by reason of election of remedies by Lender that destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's right to proceed against Borrower for reimbursement, including, without limitation, loss of rights Guarantor may suffer by reason of any law limiting, qualifying or discharging the Obligations; and (b) any "one action" or "antideficiency" law (including, without limitation, N.R.S. §40.430) or any other law that may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of power of sale.

Guarantor warrants and agrees that each of the waivers set forth above and in the Guaranty above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law. If such waiver are determined to be contrary to any applicable law or public policy, such waivers shall be effective only to the extent permitted by law or public policy. Guarantor waives: (i) to the full extent permitted by N.R.S. ¶ 40-495, the benefits of the one-action rule under N.R.S. §40.430; and (ii) to the full extent permitted by N.R.S. §§ 104.3605 and 104.3419, discharge under N.R.S. §§ 104.3605(8) and/or 104.3419.

THE WAIVER OF SUBROGATION AND OTHER RIGHTS SET FORTH IN PARAGRAPH 8 OF THE GUARANTY IS HEREBY EXPRESSLY MADE NOTWITHSTANDING THE PROVISIONS OF N.R.S. §§ 40.475 AND 40.485 OR ANY OTHER STATUTORY OR COMMON LAW OR PROCEDURAL RULE TO THE CONTRARY.

IN WITNESS WHEREOF, the Guarantor has executed this Addendum to Guaranty as of this 22<sup>nd</sup> day of January, 2008.

**GUARANTOR:**

A handwritten signature in cursive script, appearing to read 'Gary D. Tharaldson', written over a horizontal line.  
Gary D. Tharaldson, Individually

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*Erin D. Smith*  
CLERK OF THE COURT

1 ANS

2 HOWARD & HOWARD

3 GWEN RUTAR MULLINS, ESQ.

4 Nevada Bar No. 3146

5 WADE B. GOCHNOUR, ESQ.

6 Nevada Bar No. 6314

7 3800 Howard Hughes Parkway, Ste. 1400

8 Las Vegas, Nevada 89169

9 Telephone: (702) 257-1483

10 Fax: (702) 567-1568

11 Email: [grm@h2law.com](mailto:grm@h2law.com)

12 [wbg@h2law.com](mailto:wbg@h2law.com)

13 Attorneys for Defendant

14 APCO CONSTRUCTION formerly

15 ASPHALT PRODUCTS CORPORATION

16 d/b/a APCO Construction

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

22 SCOTT FINANCIAL CORPORATION, a  
23 North Dakota corporation; BRADLEY J.  
24 SCOTT; BANK OF OKLAHOMA, N.A., a  
25 national bank; GEMSTONE  
26 DEVELOPMENT WEST, INC., a Nevada  
27 corporation; ASPHALT PRODUCTS  
28 CORPORATION, dba APCO  
29 CONSTRUCTION, a Nevada Corporation;  
30 DOE INDIVIDUALS 1 -100, ROE  
31 BUSINESS ENTITIES 1- 100,

Defendants.

CASE NO.: A579963

DEPT. NO.: XI

APCO CONSTRUCTION'S ANSWER  
TO COMPLAINT, CROSS-CLAIM AND  
THIRD-PARTY COMPLAINT

Page 1 of 47

#472451-v4

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Wells Fargo Tower, Suite 1400  
Las Vegas, Nevada 89169  
(702) 257-1483

1 APCO CONSTRUCTION, a Nevada  
2 Corporation formerly named as ASPHALT  
3 PRODUCTS CORPORATION, dba APCO,

4 Cross-Claimant,

5 vs.

6 GEMSTONE DEVELOPMENT WEST,  
7 INC., a Nevada corporation; SCOTT  
8 FINANCIAL CORPORATION, a North  
9 Dakota corporation; DOES I through X,  
10 inclusive,

11 Cross-Defendants.

12 APCO CONSTRUCTION, a Nevada  
13 Corporation formerly named as ASPHALT  
14 PRODUCTS CORPORATION, dba APCO,

15 Third-Party Plaintiff,

16 vs.

17 NEVADA CONSTRUCTION SERVICES, a  
18 Nevada corporation and DOES I through X,  
19 inclusive,

20 Third-Party Defendants.

21 **APCO CONSTRUCTION'S ANSWER TO COMPLAINT, CROSS-CLAIM AND**  
22 **THIRD PARTY COMPLAINT**

23 **Date: N/A**

24 **Time: N/A**

25 Defendant APCO CONSTRUCTION, formerly known as ASPHALT PRODUCTS  
26 CORPORATION, dba APCO, a Nevada Corporation ("APCO") by and through their counsel,  
27 Gwen Rutar Mullins, Esq., and Wade B. Gochnour, Esq., of the law firm of HOWARD &  
28 HOWARD hereby files this Answer to the Complaint and alleges as follows:

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**Nature of the Action**

1. Answering Paragraph 1 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies them.

**Plaintiffs**

2. Answering Paragraphs 2, 3 and 4 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

3. Answering Paragraph 5 of the Complaint, APCO, upon information and belief, admits the allegations of Paragraph 5 of the Complaint.

**Fiduciary Defendants**

4. Answering Paragraphs 6, 7 and 8 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

5. Answering Paragraph 9 of the Complaint, APCO, upon information and belief, admits the allegations of Paragraph 9 of the Complaint.

**Owner Defendant**

6. Answering Paragraph 10 of the Complaint, APCO, upon information and belief, admits that Gemstone Development West Inc, ("Gemstone West, Inc.") is a Nevada corporation and that Gemstone West, Inc. is named as a defendant in this action. As to the remaining allegations of Paragraph 10 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

**Contractor Defendant**

7. Answering Paragraph 11 of the Complaint, APCO admits that it is a Nevada corporation, that its prior corporate name was Asphalt Products Corporation, and that it was doing business as "APCO" and/or "APCO Construction." APCO further admits that APCO contracted with Gemstone West, Inc. to perform work on the Project commonly referred to as

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1 the Manhattan West Project. As to the remaining allegations of Paragraph 11 of the Complaint,  
2 APCO does not have sufficient knowledge or information upon which to base a belief as to the  
3 truth of these remaining allegations and upon said grounds, denies them.

4 **Fictitious Defendants**

5 8. Answering Paragraph 12 of the Complaint, APCO admits that APCO does not  
6 have sufficient knowledge or information upon which to base a belief as to the truth of these  
7 remaining allegations and upon said grounds, denies them.

8 **Subject Matter Jurisdiction**

9 9. Answering Paragraphs 13 and 14 of the Complaint, APCO admits that the above  
10 referenced Court has a subject matter jurisdiction of this action. As to the remaining allegations  
11 of Paragraphs 13 and 14 of the Complaint, APCO does not have sufficient knowledge or  
12 information upon which to base a belief as to the truth of these remaining allegations and upon  
13 said grounds, denies them.

14 **General and Personal Jurisdiction**

15 10. Answering Paragraphs 15, 16 and 17 of the Complaint, APCO does not have  
16 sufficient knowledge or information upon which to base a belief as to the truth of these  
17 remaining allegations and upon said grounds, denies them.

18 11. Answering Paragraph 18 of the Complaint, APCO admits that this Court has  
19 general jurisdiction over APCO and, upon information and belief, admits that this Court has  
20 general jurisdiction over Gemstone West, Inc. APCO further admits that both APCO and  
21 Gemstone West, Inc. have their principal business in Clark County, Nevada. APCO denies all  
22 remaining allegations of Paragraph 18 of the Complaint.

23 **Venue**

24 12. Answering Paragraph 19 of the Complaint, APCO admits that venue is  
25 appropriate in this Court under NRS 13.010(2) and (c) because the dispute set forth in the  
26 Complaint involves interest in real property located in Clark County, Nevada and that the res of  
27 the action is the real property located in Clark County, Nevada. As to the remaining allegations  
28 of Paragraph 19 of the Complaint, APCO does not have sufficient knowledge or information

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1 upon which to base a belief as to the truth of these remaining allegations and upon said  
2 grounds, denies them.

3 **Overview of Plaintiff's Claims**

4 13. Answering Paragraphs 20 of the Complaint, upon information and belief, APCO  
5 admits that SFC was the lender with respect to the Prior Loan and the Edelstein Loan relative  
6 the Manhattan West Project. As to the remaining allegations of Paragraph 20 of the Complaint,  
7 APCO does not have sufficient knowledge or information upon which to base a belief as to the  
8 truth of these remaining allegations and upon said grounds, denies them.

9 14. Answering Paragraphs 21, 23, 24, 25, 26, and 27 of the Complaint, APCO does  
10 not have sufficient knowledge or information upon which to base a belief as to the truth of  
11 these remaining allegations and upon said grounds, denies them. Moreover, APCO specifically  
12 denies any allegation that any loan on the Property is prior to and/or superior to any liens,  
13 including that of APCO, that were recorded against the real property subject to this action.

14 15. Answering Paragraph 22 of the Complaint, upon information and belief, APCO  
15 admits that SFC was a lender on the Senior Loan as defined in the Complaint, which originated  
16 in January 2008 and which provided funding for construction of the Project. As to the  
17 remaining allegations of Paragraph 22 of the Complaint, APCO does not have sufficient  
18 knowledge or information upon which to base a belief as to the truth of these remaining  
19 allegations and upon said grounds, denies them.

20 **Relation of Trust and Confidence**

21 16. Answering Paragraphs 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41 of  
22 the Complaint, APCO does not have sufficient knowledge or information upon which to base a  
23 belief as to the truth of these remaining allegations and upon said grounds, denies them.

24 **The Project**

25 17. Answering Paragraph 42 of the Complaint, APCO, upon information and belief,  
26 admits that the Manhattan West Project is generally located on Russell Road in Las Vegas,  
27 Nevada. As to the remaining allegations of Paragraph 42 of the Complaint, APCO does not  
28

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1 have sufficient knowledge or information upon which to base a belief as to the truth of these  
2 remaining allegations and upon said grounds, denies them.

3 18. Answering Paragraph 43 of the Complaint, APCO, upon information and belief,  
4 admits that Gemstone Apache, LLC acquired the real property subject to this action. As to the  
5 remaining allegations of Paragraph 43 of the Complaint, APCO does not have sufficient  
6 knowledge or information upon which to base a belief as to the truth of these remaining  
7 allegations and upon said grounds, denies them.

8 19. Answering Paragraphs 44 and 45 of the Complaint, APCO upon information and  
9 belief admits the allegations contained therein.

10 **The Prior Loan and the Edelstein Loan**

11 20. Answering Paragraphs 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60,  
12 61, 62, 63, 64, 66, 67, 68, 69, and 70 of the Complaint, APCO does not have sufficient  
13 knowledge or information upon which to base a belief as to the truth of these remaining  
14 allegations and upon said grounds, denies them.

15 21. Answering Paragraph 65 of the Complaint, APCO admits that Gemstone  
16 Development West, LLC, a Nevada limited liability company, was the developer of the Project.  
17 As to the remaining allegations of Paragraph 65 of the Complaint, APCO does not have  
18 sufficient knowledge or information upon which to base a belief as to the truth of these  
19 remaining allegations and upon said grounds, denies them.

20 **Subsequent Changes to Prior Loan and Edelstein Loan Before the Senior Loan**

21 22. Answering Paragraphs 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81 and 82 of the  
22 Complaint, APCO does not have sufficient knowledge or information upon which to base a  
23 belief as to the truth of these remaining allegations and upon said grounds, denies them.

24 **Senior Loan**

25 23. Answering Paragraph 83 of the Complaint, upon information and belief, APCO  
26 admits the allegations set forth therein.

27 24. Answering Paragraphs 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98,  
28 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117,

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1 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130 and 131 of the Complaint,  
2 APCO does not have sufficient knowledge or information upon which to base a belief as to the  
3 truth of these remaining allegations and upon said grounds, denies them.

4 **The Senior Loan Agreement Signature, the Subordination, the Guaranty, the TM21**

5 **Guaranty and the CVFS Participation**

6 25. Answering Paragraphs 132, 133, 134, 135, 136, 137, 138 and 139 of the  
7 Complaint, APCO does not have sufficient knowledge or information upon which to base a  
8 belief as to the truth of these remaining allegations and upon said grounds, denies them.

9 **Subsequent Changes to Loans**

10 26. Answering Paragraphs 140, 141, 142, 143 and 144 of the Complaint, APCO  
11 does not have sufficient knowledge or information upon which to base a belief as to the truth of  
12 these remaining allegations and upon said grounds, denies them.

13 **Default under the Prior Loan, the Edelstein Note, the Mezzanine Loans,**

14 **the Senior Loan and the Rental LOC Notes**

15 27. Answering Paragraphs 145, 146, 147, 148 and 149 of the Complaint, APCO  
16 does not have sufficient knowledge or information upon which to base a belief as to the truth of  
17 these remaining allegations and upon said grounds, denies them.

18 **The Fraudulent Inducement**

19 28. Answering Paragraphs 150, 151, 152, 153, 154, 155, 156 and 157 of the  
20 Complaint, APCO does not have sufficient knowledge or information upon which to base a  
21 belief as to the truth of these remaining allegations and upon said grounds, denies them.

22 **Deteriorated Financial Prospects.**

23 29. Answering Paragraphs 158, 159, 160 and 161 of the Complaint, APCO does not  
24 have sufficient knowledge or information upon which to base a belief as to the truth of these  
25 remaining allegations and upon said grounds, denies them.

26 ////

27 ////

28 ////

***Primary Reliance on Guarantors.***

30. Answering Paragraphs 162, 163, and 164 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

***Fraud Relating to the Pre-sale Condition.***

31. Answering Paragraphs 165, 166, 167, 168, 169, 170, 171, 172, 173 and 174 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

***Fraud Relating to First Lien Condition.***

32. Answering Paragraph 175, 176, 177, 178, 179, 180, 181 and 182 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

***Insurance Over Broker Priority; Switched Title Insurance Companies.***

33. Answering Paragraphs 183, 184, 185 186, 187, 188, 189, 190 and 191 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

***Subordination Exacerbates Broken Priority***

34. Answering Paragraphs 192, 193, 194, 195, and 196 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

***Fraud Relating to Terms of Guaranty, the TM2I Guaranty and the Subordination.***

35. Answering Paragraphs 197, 198, 199, 200, 201, 202, 203, 204, 205, 206 and 207 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

**Administration of Senior Loan**

36. Answering Paragraphs 208, 210, 212, 213, 214, 215, and 216 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

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1           37.     Answering Paragraph 209 of the Complaint, APCO admits that Gemstone West,  
2 Inc. failed to attempt to resolve the payment issues for the work performed by APCO and its  
3 subcontractors on the Project or otherwise address the change orders that increased the contract  
4 amount to pay for such additional work. As to the remaining allegations of Paragraph 209 of  
5 the Complaint, APCO does not have sufficient knowledge or information upon which to base a  
6 belief as to the truth of these remaining allegations and upon said grounds, denies them.

7           38.     Answering Paragraph 211 of the Complaint, APCO admits that Gemstone West,  
8 Inc. failed to pay for the work performed by APCO and the subcontractors which resulted in  
9 construction liens filed against the Project, including that of APCO. As to the remaining  
10 allegations of Paragraph 211 of the Complaint, APCO does not have sufficient knowledge or  
11 information upon which to base a belief as to the truth of these remaining allegations and upon  
12 said grounds, denies them.

13                   **Termination of SFC's Agency on Prior Loans, the Edelstein Loan,**  
14                   **the Mezzanine Loans and the Senior Loans**

15           39.     Answering Paragraphs 217 and 218 of the Complaint, APCO does not have  
16 sufficient knowledge or information upon which to base a belief as to the truth of these  
17 remaining allegations and upon said grounds, denies them.

18  
19                   **FIRST CLAIM OF RELIEF**

20                   **(Fraud)**

21           40.     Answering Paragraph 219 of the Complaint, APCO repeats and realleges each  
22 and every answer and allegation contained in paragraphs 1 through 39 of this Answer to  
23 Complaint as though fully set forth herein.

24           41.     Answering Paragraph 220 of the Complaint, APCO does not have sufficient  
25 knowledge or information upon which to base a belief as to the truth of these remaining  
26 allegations and upon said grounds, denies them.

27           42.     Answering Paragraphs 221, 226, and 228 of the Complaint, APCO denies each  
28 and every allegation contained therein.

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1 43. Answering Paragraphs 222, 223, 224, 225, 227, 229, 230 and 231 of the  
2 Complaint, APCO denies each and every allegation contained therein as they are asserted  
3 against or otherwise relate to APCO. As to the remaining allegations of Paragraphs 222, 223,  
4 224, 225, 227, 229, 230 and 231 of the Complaint as they are made or relate to the Fiduciary  
5 Defendants as defined in the Complaint, APCO does not have sufficient knowledge or  
6 information upon which to base a belief as to the truth of these remaining allegations and upon  
7 said grounds, denies them.

8  
9 **SECOND CLAIM FOR RELIEF**

10 **(Constructive Fraud)**

11 44. Answering Paragraph 232 of the Complaint, APCO repeats and realleges each  
12 and every answer and allegation contained in paragraphs 1 through 43 of this Answer to  
13 Complaint as though fully set forth herein.

14 45. Answering Paragraphs 233, 234, 235, 236, 237, 238 and 239 of the Complaint,  
15 APCO does not have sufficient knowledge or information upon which to base a belief as to the  
16 truth of these remaining allegations and upon said grounds, denies them.

17  
18 **THIRD CLAIM OF RELIEF**

19 **(Negligent Misrepresentation)**

20 46. Answering Paragraph 240 of the Complaint, APCO repeats and realleges each  
21 and every answer and allegation contained in paragraphs 1 through 45 of this Answer to  
22 Complaint as though fully set forth herein.

23 47. Answering Paragraphs 241, 242, 243, 244, 245 and 246 of the Complaint,  
24 APCO does not have sufficient knowledge or information upon which to base a belief as to the  
25 truth of these remaining allegations and upon said grounds, denies them.

26 ////

27 ////

28 ////

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**FOURTH CLAIM OF RELIEF**

**(Mistake of Fact)**

48. Answering Paragraph 247 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 47 of this Answer to Complaint as though fully set forth herein.

49. Answering Paragraphs 248, 249 and 250 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

**FIFTH CLAIM OF RELIEF**

**(Mistake of Law)**

50. Answering Paragraph 251 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 49 of this Answer to Complaint as though fully set forth herein.

51. Answering Paragraphs 252 and 253 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

**SIXTH CLAIM OF RELIEF**

**(Reformation of the Guaranty and the TM2I Guaranty)**

52. Answering Paragraph 254 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 51 of this Answer to Complaint as though fully set forth herein.

53. Answering Paragraphs 255, 256 and 257 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

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**SEVENTH CLAIM OF RELIEF**

**(Damages - Fraud)**

54. Answering Paragraph 258 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 53 of this Answer to Complaint as though fully set forth herein.

55. Answering Paragraph 259 of the Complaint, APCO denies each and every allegation contained therein as they are asserted against or otherwise relate to APCO. As to the remaining allegations of Paragraph 259 of the Complaint as they are made or relate to the Fiduciary Defendants as defined in the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

56. Answering Paragraph 260 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

**EIGHTH CLAIM OF RELIEF**

**(Damages - Negligent Misrepresentation)**

57. Answering Paragraph 261 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 56 of this Answer to Complaint as though fully set forth herein.

58. Answering Paragraphs 262 and 263 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

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**NINTH CLAIM OF RELIEF**

**(Damages –Loan Fraud)**

59. Answering Paragraph 264 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 58 of this Answer to Complaint as though fully set forth herein.

60. Answering Paragraphs 265, 266, 267 and 268 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

**TENTH CLAIM OF RELIEF**

**(Securities Fraud – Violation of NRS 90.211 et. seq.)**

61. Answering Paragraph 269 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 60 of this Answer to Complaint as though fully set forth herein.

62. Answering Paragraphs 270, 271, 272, 273 and 274 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

**ELEVENTH CLAIM OF RELIEF**

**(Defamation)**

63. Answering Paragraph 275 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 62 of this Answer to Complaint as though fully set forth herein.

64. Answering Paragraphs 276, 277, 278, 279, 280 and 281 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

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**TWELFTH CLAIM OF RELIEF**

**(Damages – Breach of Fiduciary Duty)**

65. Answering Paragraph 282 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 64 of this Answer to Complaint as though fully set forth herein.

66. Answering Paragraphs 283, 284, 285 and 286 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

**THIRTEENTH CLAIM OF RELIEF**

**(Damages –BOK, Aiding and Abetting Breach of Fiduciary Duty)**

67. Answering Paragraph 287 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 66 of this Answer to Complaint as though fully set forth herein.

68. Answering Paragraphs 288, 289, 290 and 291 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

**FOURTEENTH CLAIM OF RELIEF**

**(Acting in Concert)**

69. Answering Paragraph 292 of the Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 68 of this Answer to Complaint as though fully set forth herein.

70. Answering Paragraphs 293, 294 and 295 of the Complaint, APCO denies each and every allegation contained therein as they are asserted against or otherwise relate to APCO. As to the remaining allegations of Paragraphs 293, 294 and 295 of the Complaint as they are made or relate to other Defendants in this action, APCO does not have sufficient knowledge or

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1 information upon which to base a belief as to the truth of these remaining allegations and upon  
2 said grounds, denies them.

3  
4 **FIFTEENTH CLAIM OF RELIEF**

5 **(Punitive Damages)**

6 71. Answering Paragraph 296 of the Complaint, APCO repeats and realleges each  
7 and every answer and allegation contained in paragraphs 1 through 70 of this Answer to  
8 Complaint as though fully set forth herein.

9 72. Answering Paragraphs 297, 298, 299, 300, 301 and 302 of the Complaint,  
10 APCO does not have sufficient knowledge or information upon which to base a belief as to the  
11 truth of these remaining allegations and upon said grounds, denies them.

12  
13 **SIXTEENTH CLAIM OF RELIEF**

14 **(Damages -Breach of Contract)**

15 73. Answering Paragraph 303 of the Complaint, APCO repeats and realleges each  
16 and every answer and allegation contained in paragraphs 1 through 72 of this Answer to  
17 Complaint as though fully set forth herein.

18 74. Answering Paragraphs 304, 305 and 306 of the Complaint, APCO does not have  
19 sufficient knowledge or information upon which to base a belief as to the truth of these  
20 remaining allegations and upon said grounds, denies them.

21  
22 **SEVENTEENTH CLAIM OF RELIEF**

23 **(Damages -Breach of Covenant of Good Faith and Fair Dealing)**

24 75. Answering Paragraph 307 of the Complaint, APCO repeats and realleges each  
25 and every answer and allegation contained in paragraphs 1 through 74 of this Answer to  
26 Complaint as though fully set forth herein.

27 ////

28 ////

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1 76. Answering Paragraphs 308, 309 and 311 of the Complaint, APCO does not have  
2 sufficient knowledge or information upon which to base a belief as to the truth of these  
3 remaining allegations and upon said grounds, denies them.

4 77. Answering Paragraph 310 of the Complaint, APCO denies each and every  
5 allegation contained therein as they are asserted against or otherwise relate to APCO. As to the  
6 remaining allegations of Paragraph 310 of the Complaint as they are made or relate to other  
7 Defendants in this action, APCO does not have sufficient knowledge or information upon  
8 which to base a belief as to the truth of these remaining allegations and upon said grounds,  
9 denies them.

10  
11 **EIGHTEENTH CLAIM OF RELIEF**

12 **(Negligence)**

13 78. Answering Paragraph 312 of the Complaint, APCO repeats and realleges each  
14 and every answer and allegation contained in paragraphs 1 through 77 of this Answer to  
15 Complaint as though fully set forth herein.

16 79. Answering Paragraphs 313, 314 and 315 of the Complaint, APCO does not  
17 have sufficient knowledge or information upon which to base a belief as to the truth of these  
18 remaining allegations and upon said grounds, denies them.

19  
20 **NINETEENTH CLAIM OF RELIEF**

21 **(Declaratory Judgment)**

22 80. Answering Paragraph 316 of the Complaint, APCO repeats and realleges each  
23 and every answer and allegation contained in paragraphs 1 through 79 of this Answer to  
24 Complaint as though fully set forth herein.

25 81. Answering Paragraph 317 of the Complaint, APCO, upon information and  
26 belief, admits that Gemstone West, Inc. is the owner of the Property and Project subject to this  
27 action. As to the remaining allegations of Paragraph 317 of the Complaint, APCO does not  
28

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1 have sufficient knowledge or information upon which to base a belief as to the truth of these  
2 remaining allegations and upon said grounds, denies them.

3 82. Answering Paragraph 318 of the Complaint, APCO admits that APCO was the  
4 initial contractor of the Project. As to the remaining allegations of Paragraph 318 of the  
5 Complaint, APCO does not have sufficient knowledge or information upon which to base a  
6 belief as to the truth of these remaining allegations and upon said grounds, denies them.

7 83. Answering Paragraphs 319, 320, 321, 322, 323, 324, 325, 326, 327, and 328 of  
8 the Complaint, APCO denies each and every allegation contained therein.

9 **FIRST AFFIRMATIVE DEFENSE**

10 Plaintiffs have failed to state a claim against APCO upon which relief can be granted.

11 **SECOND AFFIRMATIVE DEFENSE**

12 The claims of the Plaintiffs have been waived as a result of their acts and conduct.

13 **THIRD AFFIRMATIVE DEFENSE**

14 APCO's notice of lien against the Property or the Project has priority over any deeds of  
15 trusts or mortgages on the Property pursuant to the Nevada law.

16 **FOURTH AFFIRMATIVE DEFENSE**

17 Any and all damages sustained by the Plaintiffs are the result of negligence, breach of  
18 contract and breach of warranty, express and/or implied, of a third-party over whom APCO has  
19 no control.

20 **FIFTH AFFIRMATIVE DEFENSE**

21 At the time and place under the circumstances alleged by the Plaintiffs, Plaintiffs had  
22 full and complete knowledge and information in regard to the conditions and circumstances  
23 then and there existing, and through Plaintiffs' own knowledge, conduct, acts and omissions,  
24 assumed the risk attendant to any condition there or then present.

25 **SIXTH AFFIRMATIVE DEFENSE**

26 Whatever damages, if any, were sustained by the Plaintiffs, were caused in whole or in  
27 part or were contributed to by reason of Plaintiffs' own actions.

28

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**SEVENTH AFFIRMATIVE DEFENSE**

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

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs are estopped from pursuing any claim against APCO.

**NINTH AFFIRMATIVE DEFENSE**

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

**TENTH AFFIRMATIVE DEFENSE**

Plaintiffs have failed to name indispensable parties.

**ELEVENTH AFFIRMATIVE DEFENSE**

APCO is not liable to the Plaintiffs.

**TWELFTH AFFIRMATIVE DEFENSE**

The damages, if any, were caused in whole or in part, or were contributed to be reason of the negligence of the Plaintiffs.

**THIRTEENTH AFFIRMATIVE DEFENSE**

APCO alleges that its or its subcontractor's work, products, materials and services on the Project that were performed by APCO and/or its subcontractors were performed in compliance with all applicable laws, building codes and/or governmental regulations enacted by the State of Nevada, and any applicable political subdivision of the State of Nevada.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs have failed to plead with sufficient specificity any fraud against APCO.

**FIFTEENTH AFFIRMATIVE DEFENSE**

APCO denies that it was a joint tort-feasor or acting in concert with the remaining Defendants in this action.

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**SIXTEENTH AFFIRMATIVE DEFENSE**

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

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs failed to mitigate their damages.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

The doctrine of unclean hands prevents any recovery by Plaintiffs.

**NINETEENTH AFFIRMATIVE DEFENSE**

Plaintiffs are not entitled to the declaratory relief or other remedies requested.

**TWENTIETH AFFIRMATIVE DEFENSE**

Plaintiffs had full knowledge of all of the actions alleged against APCO through their authorized agent(s).

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

Plaintiffs lack standing to bring these actions against APCO.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

APCO alleges that APCO performed no acts or omissions relevant to the subject matter of the Plaintiffs' Complaint such as would create any liability or duty whatsoever on the part of APCO.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

The incident alleged in the Plaintiffs' Complaint, and the resulting damage, if any, to Plaintiffs, was proximately caused or contributed to by its own negligence, and such negligence was greater than the negligence, if any, of APCO.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims against APCO are barred for failure of consideration.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred due to the intervening, vested rights of APCO and third-parties.

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**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

Any term of a contract that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier is void pursuant to Nevada law, including but no limited to NRS 108.2453 and NRS 108.2457.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

The alleged agreement referred to in the Complaint was void for want of any consideration whatsoever.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

The damages, if any, suffered by Plaintiffs were avoidable to them prior to, contemporaneously with, and subsequent to, all acts or omissions allegedly committed by APCO.

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

APCO is not liable to Plaintiffs for any damages claimed in the Complaint.

**THIRTIETH AFFIRMATIVE DEFENSE**

Because the Complaint is couched in conclusory and vague terms, APCO cannot fully anticipate all affirmative defenses that may be applicable to this case. Accordingly, APCO reserves the right to assert additional affirmative defenses.

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

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

WHEREFORE, APCO prays for judgment as follows:

1. That Plaintiffs take nothing by way of their Complaint on file herein and that the same be dismissed with prejudice;
2. For an award of attorneys' fees and costs incurred herein by APCO; and
3. For such other and further relief as this Court may deem just and proper.

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## CROSS-CLAIM AND THIRD-PARTY COMPLAINT

APCO CONSTRUCTION ("APCO"), by and through its attorneys, the law firm of Howard and Howard, and hereby alleges as follows:

1. Upon information and belief, Cross-Defendant GEMSTONE DEVELOPMENT WEST, INC. ("Gemstone") is a Nevada corporation, and is the owner of the Manhattan West Mixed-Use Development Project, commonly referred to as 9205 W. Russell Road, 9215 W. Russell Road, 9255 W. Russell Road, 9265 W. Russell Road, and 9275 W. Russell Road, Clark County, Nevada and described in the contract with APCO as being located on Assessors Parcel Numbers 163-32-101-003, 163-32-101-004, 163-32-101-005, 163-32-101-010 and 163-32-101-014 but initially listed by the Clark County Assessors Office as APN #163-32-101-019, and then well after commencement of construction was subdivided into 163-32-101-019; 163-32-101-020; 163-32-101-022; 163-32-101-023 and 163-32-112-001 through 163-32-112-246, inclusive together with an undivided allocated fractional interest in and to any common elements on said property ("Property"). Lots identified as 163-32-112-001 through 163-32-112-246 consist of Buildings 2, 3, 7, 8 and 9 of Manhattan West, Phase 1. Each separate condominium unit in Buildings 2, 3, 7, 8 and 9 is more fully identified in Exhibit 1 attached hereto and incorporated herein by this reference). The entire Property is described by the Clark County Assessor's Office as PT NE4 NW4 SEC 32 21 60, SEC 32 TWP 21 RNG 60 and more fully described in that certain Grant Bargain Sale Deed recorded on February 7, 2008 in Book 20080207 as Instrument No. 01481 of the Official Records of Clark County Recorder.

2. That the true names and capacities, whether individual, corporate, associate or otherwise of those Cross-Defendants and Third-Party Defendants (jointly referred to as "Defendants") named herein as Does I through X, are Defendants presently unknown to APCO, who therefore sues said Defendants by such fictitious names and APCO will seek leave to amend this Complaint to show their true names and capacities when the same has been ascertained. APCO believes that the Doe Defendants are individuals or entities within the jurisdiction of this Court, who may be holders of promissory notes secured by deeds of trust

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1 recorded against the subject property, an ownership or leasehold interest of the property, may  
2 be responsible for monies due and owing to APCO, may be interfering with payments due to  
3 APCO, or are otherwise negligent or responsible in some manner for events referred to in this  
4 Complaint, and caused damages approximately thereby to APCO as alleged herein.

5 3. APCO and Gemstone entered into the ManhattanWest General Construction  
6 Agreement for GMP, dated September 6, 2007 (the "Agreement").

7 4. The Agreement was drafted by Gemstone.

8 5. Pursuant to the Agreement, APCO was to act as the General Contractor for the  
9 construction of the Manhattan West Mixed-Use development project located on the Property  
10 (the "Project").

11 6. The Project was to be constructed in two phases, with the first Phase consisting  
12 of the construction of five (5) buildings.

13 7. APCO performed its work on the Project pursuant to the Agreement.

14 8. Almost from the beginning of the Project, APCO had difficulty obtaining  
15 required information from Gemstone.

16 9. Gemstone also began making changes to the plans and specifications from the  
17 beginning of APCO's work on the Project.

18 10. During the course of the construction of the Project, Gemstone continued to  
19 make changes in the plans and specifications, including changes to the electrical, plumbing and  
20 HVAC plans.

21 11. As changes were made, APCO would submit requests for change orders to  
22 Gemstone.

23 12. Many of the changes made by Gemstone affected the timing and sequence of the  
24 Project. As a result, APCO also made several requests for an extension of time to complete the  
25 buildings, which were part of Phase I of the Project.

26 13. With very limited exceptions, Gemstone would find excuses to ignore or  
27 otherwise refuse to approve the change orders submitted by APCO.

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1           14. This included a refusal to approve requests for extensions of the Agreement  
2 schedule.

3           15. In order to keep the Project moving, APCO continued to work on the Project  
4 and incorporate the changes made despite Gemstone's refusal to approve the change orders.

5           16. On or about June 20, 2008, APCO submitted its Application and Certification  
6 For Payment for the month ending May 31, 2008, requesting a total amount of \$3,230,671.71  
7 (the "May Application").

8           17. Without prior warning, on or about July 2, 2008, Gemstone sent a letter to  
9 APCO, giving APCO notice of Gemstone's intent to withhold the sum of \$226,360.88 from  
10 APCO's May Application, which represented APCO's fee for the billing period.

11           18. On or about July 8, 2008, APCO provided Gemstone its written notice of  
12 APCO's dispute of the intended withholding.

13           19. As of July 17, 2008, Gemstone still had not paid APCO any sums due for the  
14 May Application.

15           20. As a result of Gemstone's failure to make any payment, APCO provided  
16 Gemstone with written notice of APCO's intent to stop work pursuant to NRS 624.610, if  
17 APCO was not paid in full for the May Application, by July 28, 2008.

18           21. After receiving the stop work notice, Gemstone paid APCO all amounts except  
19 for the sum of \$226,360.88.

20           22. As a result of Gemstone's failure to make full payment, APCO stopped work on  
21 the Project.

22           23. After APCO stopped work on the Project, Gemstone paid APCO the outstanding  
23 sum of \$226,360.88 from the May Application, and as a result, APCO returned to work on the  
24 Project.

25           24. During this time, APCO and Gemstone exchanged correspondence regarding  
26 many of the change order requests submitted by APCO, and Gemstone's failure and/or refusal  
27 to act upon or otherwise respond to the change order requests.

28           25. NRS 624.610(1)(d) provides:

(d) Within 30 days after the date that a written request for a change order is submitted by the prime contractor to the owner, the owner fails to:

- (1) Issue the change order; or
- (2) If the request for a change order is unreasonable or does not contain sufficient information to make a determination, give written notice to the prime contractor of the reasons why the change order is unreasonable or explain that additional information and time are necessary to make a determination . . .

26. NRS 624.610(3) provides:

3. If an owner fails to issue a change order or give written notice to the prime contractor pursuant to the provisions of paragraph (d) of subsection 1:

(a) The agreement price must be increased by the amount sought in the request for a change order;

(b) The time for performance must be extended by the amount sought in the request for a change order;

(c) The prime contractor may submit to the owner a bill or invoice for the labor, materials, equipment or services that are the subject of the request for a change order; and

(d) The owner shall pay the prime contractor for such labor, materials, equipment or services with the next payment made to the prime contractor.

27. On or about July 18, 2008, APCO submitted its Application and Certification For Payment for the month ending June 30, 2008, requesting a total amount of \$6,566,720.38 (the "June Application").

28. Because Gemstone had simply not responded to several change order requests submitted by APCO, the June Application included these undisputed change order requests as provided for in NRS 624.610.

29. After submission of the June Application, some discussions were held between APCO and Gemstone, and APCO agreed to accept less than all of the undisputed change orders.

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1           30. Even after this agreement, on or about August 6, 2008, Gemstone provided  
2 APCO with notice of its intent to withhold the additional sum of \$1,770,444.28, representing  
3 "all unapproved change order requests included in the June Progress Payment."

4           31. As of August 8, 2008, the date payment was due for the June Application,  
5 Gemstone had not made any payment for the June Application.

6           32. As a result of Gemstone's failure to make any payment on the June Application,  
7 APCO sent its notice of intent to stop work on Monday, August 11, 2008, noting that if APCO  
8 was not paid by August 21, 2008, APCO would stop work on the Project.

9           33. After receipt of APCO's written notice of intent to stop work for non-payment,  
10 Gemstone sent a letter on Friday, August 15, 2008, claiming that APCO was in breach of the  
11 contract and that Gemstone would terminate the Agreement for cause if the alleged breaches  
12 were not cured by Sunday, August 17, 2008 (the "Termination Letter").

13           34. The Termination Letter actually set out what Gemstone stated were "Immediate  
14 Termination Breaches" and the "Curable Breaches."

15           35. As part of the "Immediate Termination Breaches," Gemstone included several  
16 items of work that had been completed by APCO months before, as Gemstone's grounds for  
17 termination of the Agreement. More specifically, Gemstone claimed APCO to be in breach for  
18 failure to supply rebar and concrete workers for concrete work. APCO and its subcontractors  
19 completed this work months before the Gemstone's notice.

20           36. APCO, through its counsel, responded to each of the alleged grounds for  
21 termination on August 15, 2008, the same day that APCO received the Termination Letter, and  
22 noted that APCO would continue to work on the Project.

23           37. Also on August 15, 2008, despite the cure period still being in effect, Gemstone  
24 improperly contacted several of APCO Subcontractors for the Project, notifying them that  
25 Gemstone was terminating its Agreement with APCO as of Monday, August 18, 2008, and that  
26 Gemstone already had a replacement general contractor in place.

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1 38. On Monday, August 18, 2008, while at the Project site, Gemstone's CEO, Alex  
2 Edelstein, asked the APCO site personnel why they were still on the Project since they had  
3 been terminated.

4 39. As a result of these statements, APCO asked for written confirmation of  
5 Gemstone's position, and noted that APCO intended to continue to work on the Project until  
6 Gemstone no longer allowed APCO on the Project site, or until the deadline for APCO's stop  
7 work notice had run.

8 40. Ultimately, APCO was not paid for the June Application and stopped work on  
9 the Project on August 21, 2008, and provided Gemstone with written notice of APCO's intent  
10 to terminate the Agreement on September 5, 2008.

11 41. Gemstone, without valid cause or reason, informed APCO that it was  
12 proceeding with its improper termination and ordered APCO off of the Project by Saturday,  
13 August 23, 2008.

14 42. Since payment for the June Application was not made in full by Gemstone, the  
15 Agreement terminated pursuant to APCO's notice of termination on September 5, 2008,  
16 pursuant to NRS 624.610.

17 43. After improperly removing APCO from the Project, Gemstone agreed to issue  
18 joint checks to some of the subcontractors in an effort to induce the subcontractors to return to  
19 work on the Project for the replacement General Contractor.

20 44. Gemstone has further notified APCO of Gemstone's intent to withhold any  
21 further payment to APCO.

#### 22 FIRST CAUSE OF ACTION

#### 23 (Breach of Contract against Gemstone Only)

24 45. APCO repeats and realleges each and every allegation contained in paragraphs 1  
25 through 44 as though fully set forth herein.

26 46. There was a valid and enforceable contract between APCO and Gemstone.

27 47. APCO complied with the material terms of the Agreement.

28 48. Gemstone materially breached the Agreement by, among other things:

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- a. Failing to make payments due to APCO;
- b. Interfering with APCO's relationships with its subcontractors;
- c. Refusing to review, negotiate or consider change order requests in good faith;
- d. Failing to timely provide fully approved construction documents;
- e. Removing APCO from the Project without valid or appropriate grounds;
- and
- f. Otherwise breaching the terms of the Agreement.

49. As a result of Gemstone's material breach of the Agreement, APCO has been damaged in an amount in excess of \$10,000.

50. APCO is entitled to pre-judgment and post-judgment interest on all amounts found due and owing.

51. APCO has been forced to retain the services of an attorney in this matter, and APCO is entitled to an award of attorney's fees and costs incurred.

#### SECOND CAUSE OF ACTION

##### (Breach of the Duty of Good Faith and Fair Dealing against Gemstone Only)

52. APCO repeats and realleges each and every allegation contained in paragraphs 1 through 51 as though fully set forth herein.

53. There is an implied duty of good faith and fair dealing implied in all contracts in the state of Nevada.

54. Gemstone has breached the duty of good faith and fair dealing by performing in a manner that was unfaithful to the purpose of the contract by among other things:

- a. Refusing to consider change order requests seeking additional time due to Gemstone's changes of the Project plans and specifications;
- b. Insisting, that the despite the many changes made by Gemstone, that the original schedule be followed, and by attempting to use the original schedule to justify withholding sums due to APCO;

- c. Creating a pretext for the alleged termination of APCO for cause after receiving APCO's notice of intent to stop work for non-payment;
- d. Citing items of work that had been completed for months as a basis for the alleged termination of the contract; and
- e. Employing another General Contractor and notifying APCO's subcontractors of Gemstone's intent to replace APCO on the same day that Gemstone provided APCO notice of its right to cure the alleged breaches of the Agreement.

55. As a result of Gemstone's breach of the duty of good faith and fair dealing, APCO has been damaged in an amount in excess of \$10,000.

56. APCO is entitled to pre-judgment and post-judgment interest on all amounts found due and owing.

57. Gemstone's actions were intentional and malicious and evidence a wanton and reckless disregard of APCO's rights and APCO is therefore entitled to punitive damages in excess of \$10,000.

58. APCO has been forced to retain the services of an attorney in this matter, and APCO is entitled to an award of attorney's fees and costs incurred.

### THIRD CAUSE OF ACTION

#### (Violation of NRS 624 Prompt Payment Act against Gemstone Only)

59. APCO repeats and realleges each and every allegation contained in paragraphs 1 through 58 as though fully set forth herein.

60. Gemstone violated NRS 624.609 by improperly withholding payments due to APCO.

61. Gemstone violated NRS 624.610 by failing to approve or give written notice of the reasons why change order requests were not being approved within 30 days.

62. Gemstone further violated NRS 624.610 by failing to pay for change order requests that were deemed approved pursuant to the statute.

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1 63. APCO provided Gemstone with written notice of APCO's intent to stop work if  
2 payment was not made, and stopped work after payment was not made.

3 64. After stopping work, APCO provided Gemstone with written notice of APCO's  
4 intent to terminate the Agreement.

5 65. APCO has now terminated the Agreement in accordance with the terms of NRS  
6 624.610.

7 66. APCO is entitled to the remedies set forth in NRS 624.610.

8 67. APCO is entitled to pre-judgment and post-judgment interest on all amounts  
9 found due and owing.

10 68. APCO has been forced to retain the services of an attorney in this matter, and  
11 APCO is entitled to an award of attorney's fees and costs incurred.

12 **FOURTH CAUSE OF ACTION**  
13 **(Defamation against Gemstone Only)**

14 69. APCO repeats and realleges each and every allegation contained in paragraphs 1  
15 through 68 as though fully set forth herein.

16 70. Gemstone has made false and defamatory statements about APCO, including,  
17 but not limited to:

- 18 a. That Gemstone has "recorded Over (sic) 60 distinct contract breaches"  
19 by APCO;  
20 b. That subcontractor change orders were not being approved because  
21 APCO commingled the subcontractor change order with illegitimate  
22 change order requests from APCO;  
23 c. That APCO owes Gemstone a great deal of damages;  
24 d. That APCO "squandered" time on the Project; and  
25 e. That APCO was more interested in "CYA activities and unjustified  
26 change order requests" than the Project schedule.

27 71. Gemstone published these and other false and defamatory statements to third  
28 parties.

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1 72. The publication by Gemstone was not privileged.

2 73. Gemstone knew, or should have known, that the statements were false and  
3 defamatory.

4 74. The statements by Gemstone would tend to injure APCO in its trade, business  
5 and/or profession, and therefore are defamation *per se*.

6 75. As a result of Gemstone's defamatory statements, APCO has been damaged in  
7 an amount to be determined at trial, which sum is in excess of \$10,000.00.

8 76. Gemstone's actions were intentional and malicious and evidence a wanton and  
9 reckless disregard of APCO, and APCO is therefore entitled to punitive damages in excess of  
10 \$10,000.

11 77. APCO has been forced to retain the services of an attorney in this matter, and  
12 APCO is entitled to an award of attorney's fees and costs incurred.

13 **FIFTH CAUSE OF ACTION**

14 **(Declaratory Relief against Gemstone Only)**

15 78. APCO repeats and realleges each and every allegation contained in paragraphs 1  
16 through 77 as though fully set forth herein.

17 79. There exists a justiciable controversy between APCO and Gemstone as to the  
18 terms of the Agreement, the effect of Gemstone's purported termination of the Agreement,  
19 APCO's termination of the Agreement, and the legal rights and remedies of the parties.

20 80. The interests of APCO and Gemstone are adverse.

21 81. APCO has a legally protectible interest in the controversy between itself and  
22 Gemstone.

23 82. The issues are ripe for judicial determination.

24 83. APCO has been forced to retain the services of an attorney in this matter, and  
25 APCO is entitled to an award of attorney's fees and costs incurred.

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## SIXTH CAUSE OF ACTION

### (Unjust Enrichment against All Cross and Third-Party Defendants)

84. APCO repeats and realleges each and every allegation contained in paragraphs 1 through 83 as though fully set forth herein.

85. APCO furnished work on the Project for the benefit of the Cross and Third-Party Defendants, the owners, reputed owners or those parties that may have an interest in the Property at the specific instance and request of Gemstone.

86. Cross and Third-Party Defendants, owners, reputed owners and those parties that may have an interest in the Property accepted, used and enjoyed the benefit of the work that APCO provided on the Project.

87. Cross and Third-Party Defendants, owners, reputed owners and those parties that may have an interest in the Property knew, or should have known, that APCO expected to be paid for the work that APCO furnished on the Project.

88. APCO has demanded that Gemstone pay the sums outstanding for the Work furnished by APCO on the Project through the date of termination in the total sum of \$20,782,659.95.

89. To date, Gemstone, owners, reputed owners and those parties that may have an interest in the Property, and each of them, have failed, neglected and refused to pay said sums to the detriment of APCO.

90. Cross and Third-Party Defendants, owners, reputed owners and those parties that may have an interest in the Property have been unjustly enriched to the detriment of APCO.

91. It has been necessary for APCO to engage the services of an attorney, and APCO is entitled to reasonable attorneys' fees and costs as damages.

## SEVENTH CAUSE OF ACTION

### (Monies Due and Owing Against Gemstone Only)

92. APCO repeats and realleges each and every allegation contained in paragraphs 1 through 91 as though fully set forth herein.

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1 93. Up to the date of termination by APCO for Gemstone's failure to pay, APCO  
2 has performed all terms and conditions of the agreement executed between the parties and has  
3 not been paid for all sums justly due and owing.

4 94. The monies due and owing to APCO by Gemstone are in excess of \$10,000.00  
5 according to proof at trial.

6 95. It has been necessary for APCO to engage the services of an attorney and APCO  
7 is entitled to reasonable attorneys' fees and costs as damages.

8 **EIGHTH CAUSE OF ACTION**

9 **(Interference with Contractual Relations against Gemstone Only)**

10 96. APCO repeats and realleges each and every allegation contained in paragraphs 1  
11 through 95 as though fully set forth herein.

12 97. There exists a valid contract between APCO and its subcontractors for the work  
13 on the Project.

14 98. Gemstone knew of the contracts between APCO and subcontractors.

15 99. Gemstone committed intentional acts intended or designed to disrupt or interfere  
16 with the contractual relationship that existed between APCO and its subcontractors.

17 100. Gemstone caused substantial interference and delay in APCO's ability to  
18 perform under the contacts between APCO and its subcontractors.

19 101. There was an actual disruption of the contracts.

20 102. As a result of Gemstone's interference with APCO's contractual relations with  
21 its subcontractors and disruption of APCO's ability to perform thereunder, APCO has suffered  
22 substantial damages, in an amount in excess of \$10,000.00.

23 103. Gemstone's actions were intentional and malicious and evidence a wanton and  
24 reckless disregard of APCO and APCO is therefore entitled to exemplary and/or punitive  
25 damages in excess of \$10,000.

26 104. It has been necessary for APCO to engage the services of an attorney and APCO  
27 is entitled to reasonable attorneys' fees and costs as damages.

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## NINTH CAUSE OF ACTION

### (Breach of Duty- Violation of NRS 627 Against NCS)

105. APCO repeats and realleges each and every allegation contained in paragraphs 1 through 104 as though fully set forth herein.

106. Upon information and belief, Third-Party Defendant Nevada Construction Services ("NCS") is a Nevada corporation duly organized under the laws of this state, doing business as a construction control company.

107. Upon information and belief, at all times relevant hereto, NCS was and is the construction control company on the Project.

108. NCS is, and at all times mentioned herein was, engaged in the control or disbursement of funds payable or paid to laborers, materialmen, material suppliers, contractors, subcontractors, architects, engineers, or others, for the purpose of satisfying bills incurred in the construction, repair, alteration or improvement of the Property, including APCO's invoices for the work and materials furnished by APCO and its subcontractors for the work of improvement of the Property.

109. Upon information and belief, Cross-Defendant Scott Financial Corporation ("SFC"), a North Dakota corporation duly qualified to do business in the State of Nevada, provided monies to be used in the payment of the bills incurred in the construction, repair, alteration or improvement of the Property.

110. By providing the monies to be used in the payment of bills incurred in the construction, repair, alteration or improvement of the Property, SFC acted as lender as defined in NRS Chapter 627.

111. Upon information and belief, NCS and SFC have construction loan funds for the benefit of APCO and its subcontractors for the work performed on the Project.

112. At all times relevant hereto, APCO relied upon the construction control of NCS and SFC and based upon that reliance, furnished labor and materials for the improvement of the Property.

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1 113. APCO, in reliance upon NCS, executed vouchers and lien releases for payment  
2 for the labor and materials, which vouchers were dishonored by NCS and SFC.

3 114. NCS knew, or should have known, that APCO relied upon NCS and SFC for  
4 payment of the sums due APCO.

5 115. APCO performed all conditions required of APCO and submitted requests for  
6 payment to NCS and SFC.

7 116. By refusing to pay the valid claims of APCO, NCS and SFC violated the  
8 provisions of NRS Chapter 627 and APCO has been damaged in excess of \$10,000.00.

9 117. It has been necessary for APCO to engage the services of an attorney, and  
10 pursuant to NRS 627.200(2), APCO is entitled to reasonable attorneys' fees and costs as  
11 damages.

12 **TENTH CAUSE OF ACTION**  
13 **(Fraud Against Gemstone and SFC)**

14 118. APCO repeats and realleges each and every allegation contained in paragraphs 1  
15 through 117 as though fully set forth herein.

16 119. Gemstone approached APCO to be the general contractor on the Project.

17 120. The original contract price for the work on the Project to be performed by  
18 APCO and its subcontractor was the sum of \$153,472,300.00.

19 121. Prior to the execution of the agreement, Gemstone and SFC, through their  
20 agents, made certain representations that were material and induced APCO to execute the  
21 agreement.

22 122. More specifically, Gemstone and SFC represented to APCO that there was  
23 sufficient funding to pay for all the work to be performed by APCO and its subcontractors to  
24 complete the Project on the Property.

25 123. Gemstone and SFC further represented that they had the ability to pay for all the  
26 work performed by APCO and its subcontractors on the Project and that funding for the Project  
27 was in place.

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1 124. Gemstone and SFC knew or should have known that the conditions for financing  
2 were not properly met and the representations made by Gemstone and SFC to APCO were false  
3 and Gemstone and SFC knew them to be false when they were made.

4 125. In reliance upon those representations, APCO entered into a contract for  
5 construction with Gemstone.

6 126. APCO would not have entered into the agreement had APCO known that those  
7 representations were false and untrue.

8 127. As a result of those false representations, which caused and induced APCO to  
9 enter into the agreement with Gemstone, APCO has been damaged in excess of \$10,000.00.

10 128. Gemstone and SFC misrepresentations warrant the imposition of exemplary  
11 and/or punitive damages in excess of \$10,000.00.

12 129. It has been necessary for APCO to engage the services of an attorney and APCO  
13 is entitled to reasonable attorneys' fees and costs as damages.

14 **ELEVENTH CAUSE OF ACTION**

15 **(Negligent Misrepresentation against Gemstone and SFC**  
16 **Plead in the Alternative)**

17 130. APCO repeats and realleges each and every allegation contained in paragraphs 1  
18 through 129 as though fully set forth herein.

19 131. Gemstone and SFC were negligent in their representations as set forth in  
20 paragraphs 121 through 123 above.

21 132. As a result of Gemstone and SFC's negligent representations, APCO executed  
22 the agreement.

23 133. As a direct, proximate and foreseeable result of APCO's reliance upon  
24 Gemstone and SFC negligent representations, APCO has been damaged in an amount in excess  
25 of \$10,000.00.

26 134. It has been necessary for APCO to engage the services of an attorney and APCO  
27 is entitled to reasonable attorneys' fees and costs as damages.

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**TWELFTH CAUSE OF ACTION**

**(Priority over Deeds of Trust)**

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2  
3 135. APCO repeats and realleges each and every allegation contained in paragraphs 1  
4 through 134 as though fully set forth herein.

5 136. Gemstone Apache, LLC was the Trustor on the Deeds of Trust recorded on July  
6 5, 2006 in Book 20060705 as Instrument Nos. 04264, 04265 and 04266, in the office of the  
7 County Recorder for Clark County, Nevada, as amended ("Mezzanine Deed of Trust").

8 137. First American Title Insurance Company ("First American") is the trustee of the  
9 Deeds of Trust recorded on July 5, 2006 in Book 20060705 as Instrument Nos. 04264, 04265  
10 and 04266, in the office of the County Recorder for Clark County, Nevada, as amended, on  
11 February 7, 2008 as Instruments Nos. 01484 and 01485 and the Second Amendment to Third  
12 Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing Line of  
13 Credit, recorded on September 9, 2008 against the Property, in Book 20080909 as Instrument  
14 No. 03943 of the Official Records of Clark County Nevada.

15 138. Gemstone acquired the Property from Gemstone Apache, LLC on or around  
16 February 7, 2007 and assumed the Mezzanine Deeds of Trust, which have been amended to  
17 secure payment of the restructured mezzanine note.

18 139. Gemstone is the Trustor on the Senior Debt Deed of Trust, recorded on February  
19 7, 2008 against the Property, in Book No. 20080207 as Instruments No. 01482 ("Construction  
20 Deed of Trust") as well as the Mezzanine Deed of Trust, as amended on February 7, 2008 by  
21 Instruments Nos. 01484 and 01485 and the Second Amendment to Third Deed of Trust and  
22 Security Agreement with Assignment of Rents and Fixture Filing Line of Credit, recorded on  
23 September 9, 2008 against the Property, in Book 20080909 as Instrument No. 03943 of the  
24 Official Records of Clark County Nevada.

25 140. Commonwealth Land Title Insurance Company ("Land Title") is the trustee of  
26 the Construction Deed of Trust recorded on the Property on February 7, 2008 the Property, in  
27 Book No. 20080207 as Instrument No. 01482.

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1 141. SFC is the beneficiary on the Mezzanine Deed of Trust, as amended, and the  
2 Construction Deed of Trust.

3 142. SFC subordinated the Mezzanine Deeds of Trust to the Construction Deed of  
4 Trust per the Mezzanine Deeds of Trust Subordination Agreement which SFC signed and  
5 recorded on February 7, 2008 in Book No. 20080207 as Instrument No. 001486 of the Official  
6 Records of Clark County Nevada.

7 143. The work of improvement to the Property commenced prior to the recording of  
8 the Construction Deed of Trust, which is the senior deed of trust on the Property.

9 144. APCO's claim is superior to the claims against the Property of Gemstone, SFC,  
10 and other Cross and Third-Party Defendants.

11 145. It has been necessary for APCO to engage the services of an attorney and APCO  
12 is entitled to reasonable attorneys' fees and costs as damages.

### 13 THIRTEENTH CAUSE OF ACTION

#### 14 (Indemnification)

15 146. APCO repeats and realleges each and every allegation contained in paragraphs 1  
16 through 145 as though fully set forth herein.

17 147. The construction work performed by APCO's subcontractors was performed on  
18 the Property being developed by Gemstone.

19 148. Pursuant to the agreement between APCO and Gemstone, Gemstone agreed to  
20 pay for all labor and materials performed by APCO's subcontractors on the Property.

21 149. Gemstone obtained any benefit that would have been conferred by the  
22 construction work performed by APCO's subcontractor on the Property.

23 150. Gemstone should indemnify APCO for any and all losses, damages or expenses  
24 APCO sustains as a result of any complaint or action that is brought and filed against APCO by  
25 any of its subcontractors for non-payment or otherwise for work performed on the Project and  
26 for any monies that APCO may be forced to otherwise pay as a result of any such actions,  
27 including, but not limited, any judgment award and the attorney's fees and costs incurred by  
28 APCO in defending the action filed by any such subcontractor.

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1 151. It has been necessary for APCO to engage the services of an attorney and APCO  
2 is entitled to reasonable attorneys' fees and costs as damages.

3 WHEREFORE, APCO prays for the following relief:

4 1. That APCO be awarded general and consequential damages in excess of  
5 \$10,000;

6 2. That APCO be awarded special damages in excess of \$10,000;

7 3. That APCO be awarded punitive or exemplary damages in excess of \$10,000;

8 4. That APCO be awarded pre-judgment on all amounts found due and owing;

9 5. For a reasonable sum as and for the costs of preparation, verification, service  
10 and recording of the Lien;

11 6. For an award of reasonable attorneys fees;

12 7. For costs of suit;

13 8. That the Court declare the rank and priority of all lien claims and secured  
14 claims, including those of SFC and that APCO's Lien be ascertained and adjudged as a valid  
15 lien having priority over the deeds of trust, including those of SFC;

16 9. That APCO's Lien be enforced according to Nevada law;

17 10. That the Court direct a foreclosure sale of the Property;

18 11. That the Property be sold and the proceeds be applied to the payments of the  
19 sums found due to APCO;

20 12. That the Court enter such deficiency judgment against Defendants as the Court  
21 deems proper in the premises;

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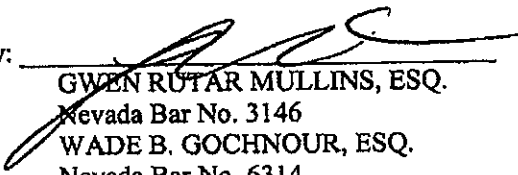
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13. That APCO be awarded post-judgment interest on all amounts; and  
14. For such other and further relief as the Court deems just and proper.  
DATED this 13<sup>th</sup> day of February, 2009.

**HOWARD & HOWARD**

By:   
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WADE B. GOCHNOUR, ESQ.  
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## EXHIBIT 1

Condominium units identified as APN 163-32-112-001 through 163-32-112-246, inclusive are further broken down per separate buildings as follows:

### Building 2

9275 W. Russell Road, Las Vegas Nevada consisting of the following:

APN: 163-32-112-001 (Unit 101) owned by Gemstone Development West, Inc.  
163-32-112-002 (Unit 102) owned by Gemstone Development West, Inc.  
163-32-112-003 (Unit 201) owned by Gemstone Development West, Inc.  
163-32-112-004 (Unit 301) owned by Gemstone Development West, Inc.  
163-32-112-005 (Unit 401) owned by Gemstone Development West, Inc.

### Building 3

9205 W. Russell Road, Las Vegas, Nevada consisting of the following:

APN: 163-32-112-006 (Unit 101) owned by Gemstone Development West, Inc.  
163-32-112-007 (Unit 102) owned by Gemstone Development West, Inc.  
163-32-112-008 (Unit 201) owned by Gemstone Development West, Inc.  
163-32-112-009 (Unit 301) owned by Gemstone Development West, Inc.  
163-32-112-010 (Unit 401) owned by Gemstone Development West, Inc.

### Building 7

9215 W. Russell Road, Las Vegas, Nevada consisting of the following:

APN: 163-32-112-011 (Unit 101) owned by Gemstone Development West, Inc.  
163-32-112-012 (Unit 102) owned by Gemstone Development West, Inc.  
163-32-112-013 (Unit 103) owned by Gemstone Development West, Inc.  
163-32-112-014 (Unit 201) owned by Gemstone Development West, Inc.  
163-32-112-015 (Unit 202) owned by Gemstone Development West, Inc.  
163-32-112-016 (Unit 203) owned by Gemstone Development West, Inc.  
163-32-112-017 (Unit 204) owned by Gemstone Development West, Inc.  
163-32-112-018 (Unit 205) owned by Gemstone Development West, Inc.  
163-32-112-019 (Unit 206) owned by Gemstone Development West, Inc.  
163-32-112-020 (Unit 207) owned by Gemstone Development West, Inc.  
163-32-112-021 (Unit 208) owned by Gemstone Development West, Inc.  
163-32-112-022 (Unit 209) owned by Gemstone Development West, Inc.  
163-32-112-023 (Unit 210) owned by Gemstone Development West, Inc.  
163-32-112-024 (Unit 301) owned by Gemstone Development West, Inc.  
163-32-112-025 (Unit 302) owned by Gemstone Development West, Inc.  
163-32-112-026 (Unit 303) owned by Gemstone Development West, Inc.

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- 1 163-32-112-027 (Unit 304) owned by Gemstone Development West, Inc.
- 2 163-32-112-028 (Unit 305) owned by Gemstone Development West, Inc.
- 3 163-32-112-029 (Unit 306) owned by Gemstone Development West, Inc.
- 4 163-32-112-030 (Unit 307) owned by Gemstone Development West, Inc.
- 5 163-32-112-031 (Unit 308) owned by Gemstone Development West, Inc.
- 6 163-32-112-032 (Unit 309) owned by Gemstone Development West, Inc.
- 7 163-32-112-033 (Unit 310) owned by Gemstone Development West, Inc.
- 8 163-32-112-034 (Unit 401) owned by Gemstone Development West, Inc.
- 9 163-32-112-035 (Unit 402) owned by Gemstone Development West, Inc.
- 10 163-32-112-036 (Unit 403) owned by Gemstone Development West, Inc.
- 11 163-32-112-037 (Unit 404) owned by Gemstone Development West, Inc.
- 12 163-32-112-038 (Unit 405) owned by Gemstone Development West, Inc.
- 13 163-32-112-039 (Unit 406) owned by Gemstone Development West, Inc.
- 14 163-32-112-040 (Unit 407) owned by Gemstone Development West, Inc.
- 15 163-32-112-041 (Unit 408) owned by Gemstone Development West, Inc.
- 16 163-32-112-042 (Unit 409) owned by Gemstone Development West, Inc.
- 17 163-32-112-043 (Unit 410) owned by Gemstone Development West, Inc.
- 18 163-32-112-044 (Unit 501) owned by Gemstone Development West, Inc.
- 19 163-32-112-045 (Unit 502) owned by Gemstone Development West, Inc.
- 20 163-32-112-046 (Unit 503) owned by Gemstone Development West, Inc.
- 21 163-32-112-047 (Unit 504) owned by Gemstone Development West, Inc.
- 22 163-32-112-048 (Unit 505) owned by Gemstone Development West, Inc.
- 23 163-32-112-049 (Unit 506) owned by Gemstone Development West, Inc.
- 24 163-32-112-050 (Unit 507) owned by Gemstone Development West, Inc.
- 25 163-32-112-051 (Unit 508) owned by Gemstone Development West, Inc.
- 26 163-32-112-052 (Unit 509) owned by Gemstone Development West, Inc.
- 27 163-32-112-053 (Unit 510) owned by Gemstone Development West, Inc.
- 28 163-32-112-054 (Unit 601) owned by Gemstone Development West, Inc.
- 163-32-112-055 (Unit 602) owned by Gemstone Development West, Inc.
- 163-32-112-056 (Unit 603) owned by Gemstone Development West, Inc.
- 163-32-112-057 (Unit 604) owned by Gemstone Development West, Inc.
- 163-32-112-058 (Unit 605) owned by Gemstone Development West, Inc.
- 163-32-112-059 (Unit 606) owned by Gemstone Development West, Inc.
- 163-32-112-060 (Unit 607) owned by Gemstone Development West, Inc.
- 163-32-112-061 (Unit 608) owned by Gemstone Development West, Inc.
- 163-32-112-062 (Unit 609) owned by Gemstone Development West, Inc.
- 163-32-112-063 (Unit 610) owned by Gemstone Development West, Inc.
- 163-32-112-064 (Unit 701) owned by Gemstone Development West, Inc.
- 163-32-112-065 (Unit 702) owned by Gemstone Development West, Inc.
- 163-32-112-066 (Unit 703) owned by Gemstone Development West, Inc.
- 163-32-112-067 (Unit 704) owned by Gemstone Development West, Inc.
- 163-32-112-068 (Unit 705) owned by Gemstone Development West, Inc.
- 163-32-112-069 (Unit 706) owned by Gemstone Development West, Inc.
- 163-32-112-070 (Unit 707) owned by Gemstone Development West, Inc.
- 163-32-112-071 (Unit 708) owned by Gemstone Development West, Inc.
- 163-32-112-072 (Unit 709) owned by Gemstone Development West, Inc.

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- 1 163-32-112-073 (Unit 710) owned by Gemstone Development West, Inc.
- 2 163-32-112-074 (Unit 801) owned by Gemstone Development West, Inc.
- 3 163-32-112-075 (Unit 802) owned by Gemstone Development West, Inc.
- 4 163-32-112-076 (Unit 803) owned by Gemstone Development West, Inc.
- 5 163-32-112-077 (Unit 804) owned by Gemstone Development West, Inc.
- 6 163-32-112-078 (Unit 805) owned by Gemstone Development West, Inc.
- 7 163-32-112-079 (Unit 806) owned by Gemstone Development West, Inc.
- 8 163-32-112-080 (Unit 807) owned by Gemstone Development West, Inc.
- 9 163-32-112-081 (Unit 808) owned by Gemstone Development West, Inc.
- 10 163-32-112-082 (Unit 809) owned by Gemstone Development West, Inc.
- 11 163-32-112-083 (Unit 810) owned by Gemstone Development West, Inc.
- 12 163-32-112-084 (Unit 902) owned by Gemstone Development West, Inc.
- 13 163-32-112-085 (Unit 903) owned by Gemstone Development West, Inc.
- 14 163-32-112-086 (Unit 904) owned by Gemstone Development West, Inc.

**Building 8**

9265 W. Russell Road, Las Vegas, Nevada consisting of the following:

- 15 APN: 163-32-112-087 (Unit 101) owned by Gemstone Development West, Inc.
- 16 163-32-112-088 (Unit 102) owned by Gemstone Development West, Inc.
- 17 163-32-112-089 (Unit 103) owned by Gemstone Development West, Inc.
- 18 163-32-112-090 (Unit 104) owned by Gemstone Development West, Inc.
- 19 163-32-112-091 (Unit 105) owned by Gemstone Development West, Inc.
- 20 163-32-112-092 (Unit 106) owned by Gemstone Development West, Inc.
- 21 163-32-112-093 (Unit 107) owned by Gemstone Development West, Inc.
- 22 163-32-112-094 (Unit 108) owned by Gemstone Development West, Inc.
- 23 163-32-112-095 (Unit 109) owned by Gemstone Development West, Inc.
- 24 163-32-112-096 (Unit 110) owned by Gemstone Development West, Inc.
- 25 163-32-112-097 (Unit 111) owned by Gemstone Development West, Inc.
- 26 163-32-112-098 (Unit 112) owned by Gemstone Development West, Inc.
- 27 163-32-112-099 (Unit 113) owned by Gemstone Development West, Inc.
- 28 163-32-112-100 (Unit 114) owned by Gemstone Development West, Inc.
- 163-32-112-101 (Unit 115) owned by Gemstone Development West, Inc.
- 163-32-112-102 (Unit 116) owned by Gemstone Development West, Inc.
- 163-32-112-103 (Unit 117) owned by Gemstone Development West, Inc.
- 163-32-112-104 (Unit 118) owned by Gemstone Development West, Inc.
- 163-32-112-105 (Unit 119) owned by Gemstone Development West, Inc.
- 163-32-112-106 (Unit 120) owned by Gemstone Development West, Inc.
- 163-32-112-107 (Unit 201) owned by Gemstone Development West, Inc.
- 163-32-112-108 (Unit 202) owned by Gemstone Development West, Inc.
- 163-32-112-109 (Unit 203) owned by Gemstone Development West, Inc.
- 163-32-112-110 (Unit 204) owned by Gemstone Development West, Inc.
- 163-32-112-111 (Unit 205) owned by Gemstone Development West, Inc.
- 163-32-112-112 (Unit 206) owned by Gemstone Development West, Inc.

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- 1 163-32-112-113 (Unit 207) owned by Gemstone Development West, Inc.
- 2 163-32-112-114 (Unit 208) owned by Gemstone Development West, Inc.
- 3 163-32-112-115 (Unit 209) owned by Gemstone Development West, Inc.
- 4 163-32-112-116 (Unit 210) owned by Gemstone Development West, Inc.
- 5 163-32-112-117 (Unit 211) owned by Gemstone Development West, Inc.
- 6 163-32-112-118 (Unit 212) owned by Gemstone Development West, Inc.
- 7 163-32-112-119 (Unit 213) owned by Gemstone Development West, Inc.
- 8 163-32-112-120 (Unit 214) owned by Gemstone Development West, Inc.
- 9 163-32-112-121 (Unit 215) owned by Gemstone Development West, Inc.
- 10 163-32-112-122 (Unit 216) owned by Gemstone Development West, Inc.
- 11 163-32-112-123 (Unit 217) owned by Gemstone Development West, Inc.
- 12 163-32-112-124 (Unit 218) owned by Gemstone Development West, Inc.
- 13 163-32-112-125 (Unit 219) owned by Gemstone Development West, Inc.
- 14 163-32-112-126 (Unit 220) owned by Gemstone Development West, Inc.
- 15 163-32-112-127 (Unit 301) owned by Gemstone Development West, Inc.
- 16 163-32-112-128 (Unit 302) owned by Gemstone Development West, Inc.
- 17 163-32-112-129 (Unit 303) owned by Gemstone Development West, Inc.
- 18 163-32-112-130 (Unit 304) owned by Gemstone Development West, Inc.
- 19 163-32-112-131 (Unit 305) owned by Gemstone Development West, Inc.
- 20 163-32-112-132 (Unit 306) owned by Gemstone Development West, Inc.
- 21 163-32-112-133 (Unit 307) owned by Gemstone Development West, Inc.
- 22 163-32-112-134 (Unit 308) owned by Gemstone Development West, Inc.
- 23 163-32-112-135 (Unit 309) owned by Gemstone Development West, Inc.
- 24 163-32-112-136 (Unit 310) owned by Gemstone Development West, Inc.
- 25 163-32-112-137 (Unit 311) owned by Gemstone Development West, Inc.
- 26 163-32-112-138 (Unit 312) owned by Gemstone Development West, Inc.
- 27 163-32-112-139 (Unit 313) owned by Gemstone Development West, Inc.
- 28 163-32-112-140 (Unit 314) owned by Gemstone Development West, Inc.
- 163-32-112-141 (Unit 315) owned by Gemstone Development West, Inc.
- 163-32-112-142 (Unit 316) owned by Gemstone Development West, Inc.
- 163-32-112-143 (Unit 317) owned by Gemstone Development West, Inc.
- 163-32-112-144 (Unit 318) owned by Gemstone Development West, Inc.
- 163-32-112-145 (Unit 319) owned by Gemstone Development West, Inc.
- 163-32-112-146 (Unit 320) owned by Gemstone Development West, Inc.
- 163-32-112-147 (Unit 401) owned by Gemstone Development West, Inc.
- 163-32-112-148 (Unit 402) owned by Gemstone Development West, Inc.
- 163-32-112-149 (Unit 403) owned by Gemstone Development West, Inc.
- 163-32-112-150 (Unit 404) owned by Gemstone Development West, Inc.
- 163-32-112-151 (Unit 405) owned by Gemstone Development West, Inc.
- 163-32-112-152 (Unit 406) owned by Gemstone Development West, Inc.
- 163-32-112-153 (Unit 407) owned by Gemstone Development West, Inc.
- 163-32-112-154 (Unit 408) owned by Gemstone Development West, Inc.
- 163-32-112-155 (Unit 409) owned by Gemstone Development West, Inc.
- 163-32-112-156 (Unit 410) owned by Gemstone Development West, Inc.
- 163-32-112-157 (Unit 411) owned by Gemstone Development West, Inc.
- 163-32-112-158 (Unit 412) owned by Gemstone Development West, Inc.

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- 1 163-32-112-159 (Unit 413) owned by Gemstone Development West, Inc.
- 2 163-32-112-160 (Unit 414) owned by Gemstone Development West, Inc.
- 3 163-32-112-161 (Unit 415) owned by Gemstone Development West, Inc.
- 4 163-32-112-162 (Unit 416) owned by Gemstone Development West, Inc.
- 5 163-32-112-163 (Unit 417) owned by Gemstone Development West, Inc.
- 6 163-32-112-164 (Unit 418) owned by Gemstone Development West, Inc.
- 7 163-32-112-165 (Unit 419) owned by Gemstone Development West, Inc.
- 8 163-32-112-166 (Unit 420) owned by Gemstone Development West, Inc.

9 **Building 9**

10 9255 W. Russell Road, Las Vegas, Nevada consisting of the following:

- 11 APN: 163-32-112-167 (Unit 101) owned by Gemstone Development West, Inc.
- 12 163-32-112-168 (Unit 102) owned by Gemstone Development West, Inc.
  - 13 163-32-112-169 (Unit 103) owned by Gemstone Development West, Inc.
  - 14 163-32-112-170 (Unit 104) owned by Gemstone Development West, Inc.
  - 15 163-32-112-171 (Unit 105) owned by Gemstone Development West, Inc.
  - 16 163-32-112-172 (Unit 106) owned by Gemstone Development West, Inc.
  - 17 163-32-112-173 (Unit 107) owned by Gemstone Development West, Inc.
  - 18 163-32-112-174 (Unit 108) owned by Gemstone Development West, Inc.
  - 19 163-32-112-175 (Unit 109) owned by Gemstone Development West, Inc.
  - 20 163-32-112-176 (Unit 110) owned by Gemstone Development West, Inc.
  - 21 163-32-112-177 (Unit 111) owned by Gemstone Development West, Inc.
  - 22 163-32-112-178 (Unit 112) owned by Gemstone Development West, Inc.
  - 23 163-32-112-179 (Unit 113) owned by Gemstone Development West, Inc.
  - 24 163-32-112-180 (Unit 114) owned by Gemstone Development West, Inc.
  - 25 163-32-112-181 (Unit 115) owned by Gemstone Development West, Inc.
  - 26 163-32-112-182 (Unit 116) owned by Gemstone Development West, Inc.
  - 27 163-32-112-183 (Unit 117) owned by Gemstone Development West, Inc.
  - 28 163-32-112-184 (Unit 118) owned by Gemstone Development West, Inc.
  - 163-32-112-185 (Unit 119) owned by Gemstone Development West, Inc.
  - 163-32-112-186 (Unit 120) owned by Gemstone Development West, Inc.
  - 163-32-112-187 (Unit 201) owned by Gemstone Development West, Inc.
  - 163-32-112-188 (Unit 202) owned by Gemstone Development West, Inc.
  - 163-32-112-189 (Unit 203) owned by Gemstone Development West, Inc.
  - 163-32-112-190 (Unit 204) owned by Gemstone Development West, Inc.
  - 163-32-112-191 (Unit 205) owned by Gemstone Development West, Inc.
  - 163-32-112-192 (Unit 206) owned by Gemstone Development West, Inc.
  - 163-32-112-193 (Unit 207) owned by Gemstone Development West, Inc.
  - 163-32-112-194 (Unit 208) owned by Gemstone Development West, Inc.
  - 163-32-112-195 (Unit 209) owned by Gemstone Development West, Inc.
  - 163-32-112-196 (Unit 210) owned by Gemstone Development West, Inc.
  - 163-32-112-197 (Unit 211) owned by Gemstone Development West, Inc.
  - 163-32-112-198 (Unit 212) owned by Gemstone Development West, Inc.

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- 1 163-32-112-199 (Unit 213) owned by Gemstone Development West, Inc.
- 2 163-32-112-200 (Unit 214) owned by Gemstone Development West, Inc.
- 3 163-32-112-201 (Unit 215) owned by Gemstone Development West, Inc.
- 4 163-32-112-202 (Unit 216) owned by Gemstone Development West, Inc.
- 5 163-32-112-203 (Unit 217) owned by Gemstone Development West, Inc.
- 6 163-32-112-204 (Unit 218) owned by Gemstone Development West, Inc.
- 7 163-32-112-205 (Unit 219) owned by Gemstone Development West, Inc.
- 8 163-32-112-206 (Unit 220) owned by Gemstone Development West, Inc.
- 9 163-32-112-207 (Unit 301) owned by Gemstone Development West, Inc.
- 10 163-32-112-208 (Unit 302) owned by Gemstone Development West, Inc.
- 11 163-32-112-209 (Unit 303) owned by Gemstone Development West, Inc.
- 12 163-32-112-210 (Unit 304) owned by Gemstone Development West, Inc.
- 13 163-32-112-211 (Unit 305) owned by Gemstone Development West, Inc.
- 14 163-32-112-212 (Unit 306) owned by Gemstone Development West, Inc.
- 15 163-32-112-213 (Unit 307) owned by Gemstone Development West, Inc.
- 16 163-32-112-214 (Unit 308) owned by Gemstone Development West, Inc.
- 17 163-32-112-215 (Unit 309) owned by Gemstone Development West, Inc.
- 18 163-32-112-216 (Unit 310) owned by Gemstone Development West, Inc.
- 19 163-32-112-217 (Unit 311) owned by Gemstone Development West, Inc.
- 20 163-32-112-218 (Unit 312) owned by Gemstone Development West, Inc.
- 21 163-32-112-219 (Unit 313) owned by Gemstone Development West, Inc.
- 22 163-32-112-220 (Unit 314) owned by Gemstone Development West, Inc.
- 23 163-32-112-221 (Unit 315) owned by Gemstone Development West, Inc.
- 24 163-32-112-222 (Unit 316) owned by Gemstone Development West, Inc.
- 25 163-32-112-223 (Unit 317) owned by Gemstone Development West, Inc.
- 26 163-32-112-224 (Unit 318) owned by Gemstone Development West, Inc.
- 27 163-32-112-225 (Unit 319) owned by Gemstone Development West, Inc.
- 28 163-32-112-226 (Unit 320) owned by Gemstone Development West, Inc.
- 163-32-112-227 (Unit 401) owned by Gemstone Development West, Inc.
- 163-32-112-228 (Unit 402) owned by Gemstone Development West, Inc.
- 163-32-112-229 (Unit 403) owned by Gemstone Development West, Inc.
- 163-32-112-230 (Unit 404) owned by Gemstone Development West, Inc.
- 163-32-112-231 (Unit 405) owned by Gemstone Development West, Inc.
- 163-32-112-232 (Unit 406) owned by Gemstone Development West, Inc.
- 163-32-112-233 (Unit 407) owned by Gemstone Development West, Inc.
- 163-32-112-234 (Unit 408) owned by Gemstone Development West, Inc.
- 163-32-112-235 (Unit 409) owned by Gemstone Development West, Inc.
- 163-32-112-236 (Unit 410) owned by Gemstone Development West, Inc.
- 163-32-112-237 (Unit 411) owned by Gemstone Development West, Inc.
- 163-32-112-238 (Unit 412) owned by Gemstone Development West, Inc.
- 163-32-112-239 (Unit 413) owned by Gemstone Development West, Inc.
- 163-32-112-240 (Unit 414) owned by Gemstone Development West, Inc.
- 163-32-112-241 (Unit 415) owned by Gemstone Development West, Inc.
- 163-32-112-242 (Unit 416) owned by Gemstone Development West, Inc.
- 163-32-112-243 (Unit 417) owned by Gemstone Development West, Inc.
- 163-32-112-244 (Unit 418) owned by Gemstone Development West, Inc.

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1 163-32-112-245 (Unit 419) owned by Gemstone Development West, Inc.  
2 163-32-112-246 (Unit 420) owned by Gemstone Development West, Inc.  
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CERTIFICATE OF MAILING

I do hereby certify that on the 30 day of February, 2009 I served a copy of the foregoing ANSWER TO COMPLAINT, CROSS-CLAIM AND THIRD-PARTY COMPLAINT, by enclosing a true and correct copy of the same in a sealed envelope upon which first-class postage was fully prepaid, and addressed to the following:

G. Mark Albright, Esq.  
D. Chris Albright, Esq.  
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT  
801 South Rancho Dr., Bldg. D-4  
Las Vegas, Nevada 89106

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MORRILL & ARONSON  
One E. Camelback Road, Suite 340  
Phoenix, AZ 85012

Attorneys for Plaintiffs

Kellie Piet  
An employee of HOWARD & HOWARD

  
CLERK OF THE COURT

1 ANS  
J. RANDALL JONES, ESQ.  
2 Nevada Bar No.: 001927  
MARK M. JONES, ESQ.  
3 Nevada Bar No.: 000267  
MATTHEW S. CARTER, ESQ.  
4 Nevada Bar No.: 009524  
KEMP, JONES & COULTHARD, LLP  
5 3800 Howard Hughes Parkway, Seventeenth Floor  
Las Vegas, Nevada 89169  
6 Tel. (702) 385-6000  
Attorneys for Scott Financial Corporation  
7 and Bradley J. Scott

8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

10 CLUB VISTA FINANCIAL SERVICES,  
L.L.C., a Nevada Limited Liability  
11 Company; THARALDSON MOTELS II,  
INC., a North Dakota corporation; and  
12 GARY D. THARALDSON,

13 Plaintiffs,

14 v.

15 SCOTT FINANCIAL CORPORATION, a  
North Dakota corporation; BRADLEY J.  
16 SCOTT; BANK OF OKLAHOMA, N.A., a  
national bank; GEMSTONE  
17 DEVELOPMENT WEST, INC., a Nevada  
corporation; ASPHALT PRODUCTS  
18 CORPORATION D/B/A APCO  
CONSTRUCTION, a Nevada corporation;  
19 DOES INDIVIDUALS 1-100; and ROE  
20 BUSINESS ENTITIES 1-100,

21 Defendants.

22 AND ALL RELATED CLAIMS.

Case No.: A579963  
Dept. No.: XIII

**SCOTT FINANCIAL CORPORATION  
AND BRADLEY J. SCOTT'S ANSWER  
TO APCO CONSTRUCTION'S CROSS-  
CLAIM AND THIRD-PARTY  
COMPLAINT**

23  
24 COME NOW Defendants/Crossdefendants Scott Financial Corporation and Bradley J.  
25 Scott (hereinafter collectively, "Scott"), by and through their attorneys, Kemp, Jones &  
26 Coulthard, LLP, and hereby answer the cross-claim and third-party complaint of APCO  
27 Construction as follows:

28 1. With respect to the allegations contained in paragraph 1 of the cross-claim and  
third-party complaint, Scott is without sufficient information to form a belief as to the truth or

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Las Vegas, Nevada 89169  
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Fax (702) 385-6001

1 falsity of said allegations and therefore denies said allegations.

2       2.       With respect to the allegations contained in paragraph 2 of the cross-claim and  
3 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
4 falsity of said allegations and therefore denies said allegations.

5       3.       With respect to the allegations contained in paragraph 3 of the cross-claim and  
6 third-party complaint, Scott admits said allegations.

7       4.       With respect to the allegations contained in paragraph 4 of the cross-claim and  
8 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
9 falsity of said allegations and therefore denies said allegations.

10       5.       With respect to the allegations contained in paragraph 5 of the cross-claim and  
11 third-party complaint, Scott admits said allegations.

12       6.       With respect to the allegations contained in paragraph 6 of the cross-claim and  
13 third-party complaint, Scott was informed by the borrower that the Project was to be constructed  
14 in three phases. With respect to the balance of the allegations contained in paragraph 6 of the  
15 cross-claim and third-party complaint, Scott admits said allegations.

16       7.       With respect to the allegations contained in paragraph 7 of the cross-claim and  
17 third-party complaint, Scott denies said allegations.

18       8.       With respect to the allegations contained in paragraph 8 of the cross-claim and  
19 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
20 falsity of said allegations and therefore denies said allegations.

21       9.       With respect to the allegations contained in paragraph 9 of the cross-claim and  
22 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
23 falsity of said allegations and therefore denies said allegations.

24       10.       With respect to the allegations contained in paragraph 10 of the cross-claim and  
25 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
26 falsity of said allegations and therefore denies said allegations.

27       11.       With respect to the allegations contained in paragraph 11 of the cross-claim and  
28 third-party complaint, Scott is without sufficient information to form a belief as to the truth or

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1 falsity of said allegations and therefore denies said allegations.

2 12. With respect to the allegations contained in paragraph 12 of the cross-claim and  
3 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
4 falsity of said allegations and therefore denies said allegations.

5 13. With respect to the allegations contained in paragraph 13 of the cross-claim and  
6 third-party complaint, Scott denies said allegations.

7 14. With respect to the allegations contained in paragraph 14 of the cross-claim and  
8 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
9 falsity of said allegations and therefore denies said allegations.

10 15. With respect to the allegations contained in paragraph 15 of the cross-claim and  
11 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
12 falsity of said allegations and therefore denies said allegations.

13 16. With respect to the allegations contained in paragraph 15 of the cross-claim and  
14 third-party complaint, Scott denies that it received the complete pay application from the  
15 borrower in June. Rather, Scott received the application in mid-July. With respect to the balance  
16 of the allegations contained in paragraph 16 of the cross-claim and third-party complaint, Scott  
17 admits said allegations.

18 17. With respect to the allegations contained in paragraph 17 of the cross-claim and  
19 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
20 falsity of said allegations and therefore denies said allegations.

21 18. With respect to the allegations contained in paragraph 18 of the cross-claim and  
22 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
23 falsity of said allegations and therefore denies said allegations.

24 19. With respect to the allegations contained in paragraph 19 of the cross-claim and  
25 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
26 falsity of said allegations and therefore denies said allegations.

27 20. With respect to the allegations contained in paragraph 20 of the cross-claim and  
28 third-party complaint, Scott is without sufficient information to form a belief as to the truth or

1 falsity of said allegations and therefore denies said allegations.

2       21. With respect to the allegations contained in paragraph 21 of the cross-claim and  
3 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
4 falsity of said allegations and therefore denies said allegations.

5       22. With respect to the allegations contained in paragraph 22 of the cross-claim and  
6 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
7 falsity of said allegations and therefore denies said allegations.

8       23. With respect to the allegations contained in paragraph 23 of the cross-claim and  
9 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
10 falsity of said allegations and therefore denies said allegations.

11       24. With respect to the allegations contained in paragraph 24 of the cross-claim and  
12 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
13 falsity of said allegations and therefore denies said allegations.

14       25. With respect to the allegations contained in paragraph 25 of the cross-claim and  
15 third-party complaint, Scott admits said allegations.

16       26. With respect to the allegations contained in paragraph 26 of the cross-claim and  
17 third-party complaint, Scott admits said allegations.

18       27. With respect to the allegations contained in paragraph 27 of the cross-claim and  
19 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
20 falsity of said allegations and therefore denies said allegations.

21       28. With respect to the allegations contained in paragraph 28 of the cross-claim and  
22 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
23 falsity of said allegations and therefore denies said allegations.

24       29. With respect to the allegations contained in paragraph 29 of the cross-claim and  
25 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
26 falsity of said allegations and therefore denies said allegations.

27       30. With respect to the allegations contained in paragraph 30 of the cross-claim and  
28 third-party complaint, Scott is without sufficient information to form a belief as to the truth or

1 falsity of said allegations and therefore denies said allegations.

2       31. With respect to the allegations contained in paragraph 31 of the cross-claim and  
3 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
4 falsity of said allegations and therefore denies said allegations.

5       32. With respect to the allegations contained in paragraph 32 of the cross-claim and  
6 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
7 falsity of said allegations and therefore denies said allegations.

8       33. With respect to the allegations contained in paragraph 33 of the cross-claim and  
9 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
10 falsity of said allegations and therefore denies said allegations.

11       34. With respect to the allegations contained in paragraph 34 of the cross-claim and  
12 third-party complaint, Scott admits said allegations.

13       35. With respect to the allegations contained in paragraph 35 of the cross-claim and  
14 third-party complaint, Scott denies said allegations.

15       36. With respect to the allegations contained in paragraph 36 of the cross-claim and  
16 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
17 falsity of said allegations and therefore denies said allegations.

18       37. With respect to the allegations contained in paragraph 37 of the cross-claim and  
19 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
20 falsity of said allegations and therefore denies said allegations.

21       38. With respect to the allegations contained in paragraph 38 of the cross-claim and  
22 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
23 falsity of said allegations and therefore denies said allegations.

24       39. With respect to the allegations contained in paragraph 39 of the cross-claim and  
25 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
26 falsity of said allegations and therefore denies said allegations.

27       40. With respect to the allegations contained in paragraph 40 of the cross-claim and  
28 third-party complaint, Scott is without sufficient information to form a belief as to the truth or

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1 falsity of said allegations and therefore denies said allegations.

2 41. With respect to the allegations contained in paragraph 41 of the cross-claim and  
3 third-party complaint, Scott denies said allegations.

4 42. With respect to the allegations contained in paragraph 42 of the cross-claim and  
5 third-party complaint, Scott denies said allegations.

6 43. With respect to the allegations contained in paragraph 43 of the cross-claim and  
7 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
8 falsity of said allegations and therefore denies said allegations.

9 44. With respect to the allegations contained in paragraph 44 of the cross-claim and  
10 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
11 falsity of said allegations and therefore denies said allegations.

12 **FIRST CAUSE OF ACTION**

13 **(Breach of Contract against Gemstone Only)**

14 45. Answering paragraph 45 of the cross-claim and third-party complaint, Scott  
15 repeats and realleges herein all of its answers set forth above.

16 46. With respect to the allegations contained in paragraph 46 of the cross-claim and  
17 third-party complaint, Scott admits said allegations.

18 47. With respect to the allegations contained in paragraph 47 of the cross-claim and  
19 third-party complaint, Scott denies said allegations.

20 48. With respect to the allegations contained in paragraph 48 of the cross-claim and  
21 third-party complaint, Scott denies said allegations.

22 49. With respect to the allegations contained in paragraph 49 of the cross-claim and  
23 third-party complaint, Scott denies said allegations.

24 50. With respect to the allegations contained in paragraph 50 of the cross-claim and  
25 third-party complaint, Scott denies said allegations.

26 51. With respect to the allegations contained in paragraph 51 of the cross-claim and  
27 third-party complaint, Scott denies said allegations.

28 ///

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**SECOND CAUSE OF ACTION**

**(Breach of Duty of Good Faith and Fair Dealing against Gemstone Only)**

52. Answering paragraph 52 of the cross-claim and third-party complaint, Scott repeats and realleges herein all of its answers set forth above.

53. With respect to the allegations contained in paragraph 53 of the cross-claim and third-party complaint, Scott admits said allegations.

54. With respect to the allegations contained in paragraph 54 of the cross-claim and third-party complaint, Scott denies said allegations.

55. With respect to the allegations contained in paragraph 55 of the cross-claim and third-party complaint, Scott denies said allegations.

56. With respect to the allegations contained in paragraph 56 of the cross-claim and third-party complaint, Scott denies said allegations.

57. With respect to the allegations contained in paragraph 57 of the cross-claim and third-party complaint, Scott denies said allegations.

58. With respect to the allegations contained in paragraph 58 of the cross-claim and third-party complaint, Scott denies said allegations.

**THIRD CAUSE OF ACTION**

**(Violation of NRS 624 Prompt Payment Act against Gemstone Only)**

59. Answering paragraph 59 of the cross-claim and third-party complaint, Scott repeats and realleges herein all of its answers set forth above.

60. With respect to the allegations contained in paragraph 60 of the cross-claim and third-party complaint, Scott denies said allegations.

61. With respect to the allegations contained in paragraph 61 of the cross-claim and third-party complaint, Scott denies said allegations.

62. With respect to the allegations contained in paragraph 62 of the cross-claim and third-party complaint, Scott denies said allegations.

63. With respect to the allegations contained in paragraph 63 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or

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1 falsity of said allegations and therefore denies said allegations.

2 64. With respect to the allegations contained in paragraph 64 of the cross-claim and  
3 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
4 falsity of said allegations and therefore denies said allegations.

5 65. With respect to the allegations contained in paragraph 65 of the cross-claim and  
6 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
7 falsity of said allegations and therefore denies said allegations.

8 66. With respect to the allegations contained in paragraph 66 of the cross-claim and  
9 third-party complaint, Scott denies said allegations.

10 67. With respect to the allegations contained in paragraph 67 of the cross-claim and  
11 third-party complaint, Scott denies said allegations.

12 68. With respect to the allegations contained in paragraph 68 of the cross-claim and  
13 third-party complaint, Scott denies said allegations.

14 **FOURTH CAUSE OF ACTION**

15 **(Defamation against Gemstone Only)**

16 69. Answering paragraph 69 of the cross-claim and third-party complaint, Scott  
17 repeats and realleges herein all of its answers set forth above.

18 70. With respect to the allegations contained in paragraph 70 of the cross-claim and  
19 third-party complaint, Scott denies said allegations.

20 71. With respect to the allegations contained in paragraph 71 of the cross-claim and  
21 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
22 falsity of said allegations and therefore denies said allegations.

23 72. With respect to the allegations contained in paragraph 72 of the cross-claim and  
24 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
25 falsity of said allegations and therefore denies said allegations.

26 73. With respect to the allegations contained in paragraph 73 of the cross-claim and  
27 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
28 falsity of said allegations and therefore denies said allegations.

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1 74. With respect to the allegations contained in paragraph 74 of the cross-claim and  
2 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
3 falsity of said allegations and therefore denies said allegations.

4 75. With respect to the allegations contained in paragraph 75 of the cross-claim and  
5 third-party complaint, Scott denies said allegations.

6 76. With respect to the allegations contained in paragraph 76 of the cross-claim and  
7 third-party complaint, Scott denies said allegations.

8 77. With respect to the allegations contained in paragraph 77 of the cross-claim and  
9 third-party complaint, Scott denies said allegations.

10 **FIFTH CAUSE OF ACTION**

11 **(Declaratory Relief against Gemstone Only)**

12 78. Answering paragraph 78 of the cross-claim and third-party complaint, Scott  
13 repeats and realleges herein all of its answers set forth above.

14 79. With respect to the allegations contained in paragraph 79 of the cross-claim and  
15 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
16 falsity of said allegations and therefore denies said allegations.

17 80. With respect to the allegations contained in paragraph 80 of the cross-claim and  
18 third-party complaint, Scott admits said allegations.

19 81. With respect to the allegations contained in paragraph 81 of the cross-claim and  
20 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
21 falsity of said allegations and therefore denies said allegations.

22 82. With respect to the allegations contained in paragraph 82 of the cross-claim and  
23 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
24 falsity of said allegations and therefore denies said allegations.

25 83. With respect to the allegations contained in paragraph 83 of the cross-claim and  
26 third-party complaint, Scott denies said allegations.

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**SIXTH CAUSE OF ACTION**

**(Unjust Enrichment against All Cross and Third-Party Defendants)**

84. Answering paragraph 84 of the cross-claim and third-party complaint, Scott repeats and realleges herein all of its answers set forth above.

85. With respect to the allegations contained in paragraph 85 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

86. With respect to the allegations contained in paragraph 86 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

87. With respect to the allegations contained in paragraph 87 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

88. With respect to the allegations contained in paragraph 88 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

89. Scott denies that it has failed, neglected, and refused to pay any sums to APCO. With respect to the balance of the allegations contained in paragraph 89 of the cross-claim and third-party complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said allegations and therefore denies said allegations.

90. With respect to the allegations contained in paragraph 90 of the cross-claim and third-party complaint, Scott denies said allegations.

91. With respect to the allegations contained in paragraph 91 of the cross-claim and third-party complaint, Scott denies said allegations.

**SEVENTH CAUSE OF ACTION**

**(Monies Due and Owing Against Gemstone Only)**

92. Answering paragraph 92 of the cross-claim and third-party complaint, Scott repeats and realleges herein all of its answers set forth above.

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1 93. With respect to the allegations contained in paragraph 93 of the cross-claim and  
2 third-party complaint, Scott denies said allegations.

3 94. With respect to the allegations contained in paragraph 94 of the cross-claim and  
4 third-party complaint, Scott denies said allegations.

5 95. With respect to the allegations contained in paragraph 95 of the cross-claim and  
6 third-party complaint, Scott denies said allegations.

7 **EIGHTH CAUSE OF ACTION**

8 **(Interference with Contractual Relations against Gemstone Only)**

9 96. Answering paragraph 96 of the cross-claim and third-party complaint, Scott  
10 repeats and realleges herein all of its answers set forth above.

11 97. With respect to the allegations contained in paragraph 97 of the cross-claim and  
12 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
13 falsity of said allegations and therefore denies said allegations.

14 98. With respect to the allegations contained in paragraph 98 of the cross-claim and  
15 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
16 falsity of said allegations and therefore denies said allegations.

17 99. With respect to the allegations contained in paragraph 99 of the cross-claim and  
18 third-party complaint, Scott denies said allegations.

19 100. With respect to the allegations contained in paragraph 100 of the cross-claim and  
20 third-party complaint, Scott denies said allegations.

21 101. With respect to the allegations contained in paragraph 101 of the cross-claim and  
22 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
23 falsity of said allegations and therefore denies said allegations.

24 102. With respect to the allegations contained in paragraph 102 of the cross-claim and  
25 third-party complaint, Scott denies said allegations.

26 103. With respect to the allegations contained in paragraph 103 of the cross-claim and  
27 third-party complaint, Scott denies said allegations.

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1 104. With respect to the allegations contained in paragraph 104 of the cross-claim and  
2 third-party complaint, Scott denies said allegations.

3 **NINTH CAUSE OF ACTION**

4 **(Breach of Duty- Violation of NRS 627 Against NCS)**

5 105. Answering paragraph 105 of the cross-claim and third-party complaint, Scott  
6 repeats and realleges herein all of its answers set forth above.

7 106. With respect to the allegations contained in paragraph 106 of the cross-claim and  
8 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
9 falsity of said allegations and therefore denies said allegations.

10 107. With respect to the allegations contained in paragraph 107 of the cross-claim and  
11 third-party complaint, Scott admits said allegations.

12 108. With respect to the allegations contained in paragraph 108 of the cross-claim and  
13 third-party complaint, Scott admits said allegations.

14 109. With respect to the allegations contained in paragraph 109 of the cross-claim and  
15 third-party complaint, Scott admits said allegations.

16 110. With respect to the allegations contained in paragraph 110 of the cross-claim and  
17 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
18 falsity of said allegations and therefore denies said allegations.

19 111. With respect to the allegations contained in paragraph 111 of the cross-claim and  
20 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
21 falsity of said allegations and therefore denies said allegations.

22 112. With respect to the allegations contained in paragraph 112 of the cross-claim and  
23 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
24 falsity of said allegations and therefore denies said allegations.

25 113. With respect to the allegations contained in paragraph 113 of the cross-claim and  
26 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
27 falsity of said allegations and therefore denies said allegations.

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1 114. With respect to the allegations contained in paragraph 114 of the cross-claim and  
2 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
3 falsity of said allegations and therefore denies said allegations.

4 115. With respect to the allegations contained in paragraph 115 of the cross-claim and  
5 third-party complaint, Scott denies said allegations.

6 116. With respect to the allegations contained in paragraph 116 of the cross-claim and  
7 third-party complaint, Scott denies said allegations.

8 117. With respect to the allegations contained in paragraph 117 of the cross-claim and  
9 third-party complaint, Scott denies said allegations.

10 **TENTH CAUSE OF ACTION**

11 **(Fraud Against Gemstone and SFC)**

12 118. Answering paragraph 118 of the cross-claim and third-party complaint, Scott  
13 repeats and realleges herein all of its answers set forth above.

14 119. With respect to the allegations contained in paragraph 119 of the cross-claim and  
15 third-party complaint, Scott denies said allegations.

16 120. With respect to the allegations contained in paragraph 120 of the cross-claim and  
17 third-party complaint, Scott admits said allegations.

18 121. With respect to the allegations contained in paragraph 121 of the cross-claim and  
19 third-party complaint, Scott denies said allegations.

20 122. With respect to the allegations contained in paragraph 122 of the cross-claim and  
21 third-party complaint, Scott denies said allegations.

22 123. With respect to the allegations contained in paragraph 123 of the cross-claim and  
23 third-party complaint, Scott denies said allegations.

24 124. With respect to the allegations contained in paragraph 124 of the cross-claim and  
25 third-party complaint, Scott denies said allegations.

26 125. With respect to the allegations contained in paragraph 125 of the cross-claim and  
27 third-party complaint, Scott denies said allegations.

28 ///

1 126. With respect to the allegations contained in paragraph 126 of the cross-claim and  
2 third-party complaint, Scott denies said allegations.

3 127. With respect to the allegations contained in paragraph 127 of the cross-claim and  
4 third-party complaint, Scott denies said allegations.

5 128. With respect to the allegations contained in paragraph 128 of the cross-claim and  
6 third-party complaint, Scott denies said allegations.

7 129. With respect to the allegations contained in paragraph 129 of the cross-claim and  
8 third-party complaint, Scott denies said allegations.

9 **ELEVENTH CAUSE OF ACTION**

10 **(Negligent Misrepresentation against Gemstone and SFC Plead in the Alternative)**

11 130. Answering paragraph 130 of the cross-claim and third-party complaint, Scott  
12 repeats and realleges herein all of its answers set forth above.

13 131. With respect to the allegations contained in paragraph 131 of the cross-claim and  
14 third-party complaint, Scott denies said allegations.

15 132. With respect to the allegations contained in paragraph 132 of the cross-claim and  
16 third-party complaint, Scott denies said allegations.

17 133. With respect to the allegations contained in paragraph 133 of the cross-claim and  
18 third-party complaint, Scott denies said allegations.

19 134. With respect to the allegations contained in paragraph 134 of the cross-claim and  
20 third-party complaint, Scott denies said allegations.

21 **TWELFTH CAUSE OF ACTION**

22 **(Priority over Deeds of Trust)**

23 135. Answering paragraph 135 of the cross-claim and third-party complaint, Scott  
24 repeats and realleges herein all of its answers set forth above.

25 136. With respect to the allegations contained in paragraph 136 of the cross-claim and  
26 third-party complaint, Scott admits said allegations.

27 137. With respect to the allegations contained in paragraph 137 of the cross-claim and  
28 third-party complaint, Scott admits said allegations.

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1 138. With respect to the allegations contained in paragraph 138 of the cross-claim and  
2 third-party complaint, Scott denies said allegations to the extent that the date should be February  
3 7, 2008. With respect to the balance of the allegations contained in paragraph 138 of the cross-  
4 claim and third-party complaint, Scott admits said allegations.

5 139. With respect to the allegations contained in paragraph 139 of the cross-claim and  
6 third-party complaint, Scott admits said allegations.

7 140. With respect to the allegations contained in paragraph 140. of the cross-claim and  
8 third-party complaint, Scott admits said allegations.

9 141. With respect to the allegations contained in paragraph 141 of the cross-claim and  
10 third-party complaint, Scott admits said allegations.

11 142. With respect to the allegations contained in paragraph 142 of the cross-claim and  
12 third-party complaint, Scott admits said allegations.

13 143. With respect to the allegations contained in paragraph 143 of the cross-claim and  
14 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
15 falsity of said allegations and therefore denies said allegations.

16 144. With respect to the allegations contained in paragraph 144 of the cross-claim and  
17 third-party complaint, Scott denies said allegations.

18 145. With respect to the allegations contained in paragraph 145 of the cross-claim and  
19 third-party complaint, Scott denies said allegations.

20 **THIRTEENTH CAUSE OF ACTION**

21 **(Indemnification)**

22 146. Answering paragraph 146 of the cross-claim and third-party complaint, Scott  
23 repeats and realleges herein all of its answers set forth above.

24 147. With respect to the allegations contained in paragraph 147 of the cross-claim and  
25 third-party complaint, Scott admits said allegations.

26 148. With respect to the allegations contained in paragraph 148 of the cross-claim and  
27 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
28 falsity of said allegations and therefore denies said allegations.

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1 149. With respect to the allegations contained in paragraph 149 of the cross-claim and  
2 third-party complaint, Scott is without sufficient information to form a belief as to the truth or  
3 falsity of said allegations and therefore denies said allegations.

4 150. With respect to the allegations contained in paragraph 150 of the cross-claim and  
5 third-party complaint, Scott denies said allegations.

6 151. With respect to the allegations contained in paragraph 151 of the cross-claim and  
7 third-party complaint, Scott denies said allegations.

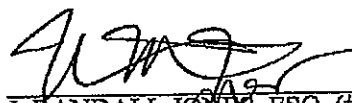
8 WHEREFORE, Scott Financial Corporation and Bradley J. Scott pray for judgment on  
9 the crossclaim as follows:

- 10 1. That APCO take nothing and that the crossclaim be dismissed with prejudice;  
11 2. That they be awarded their attorney's fees and costs of suit in defending the  
12 crossclaim; and

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

14 DATED this 15<sup>th</sup> day of April, 2009.

KEMP, JONES & COULTHARD, LLP



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**CERTIFICATE OF MAILING**

I hereby certify that on the 15<sup>th</sup> day of April, 2009, the foregoing **SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S ANSWER TO APCO CONSTRUCTION'S CROSS-CLAIM AND THIRD-PARTY COMPLAINT** was served on the following persons by mailing a copy thereof, first class mail, postage prepaid, to:

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3800 Howard Hughes Parkway, Ste. 1400  
Las Vegas, NV 89169  
*Counsel for Defendant APCO Construction and Asphalt Products Corporation*

  
An employee of Kemp, Jones & Coulthard

1       202. The Fiduciary Defendants knew or should have known that North Dakota law did  
2 not provide a single action rule nor extend a borrower's fair market value defense to a guarantor.

3       203. The Fiduciary Defendants advised Plaintiffs that the documents they were signing,  
4 including the Guaranty and the TM2I Guaranty, were appropriate to sign and protected  
5 Plaintiffs' interests, as was the Subordination Agreement relating to the Prior Loan which SFC  
6 as Lender was signing.

7       204. The Fiduciary Defendants failed to advise Plaintiffs that under the Guaranty and  
8 the TM2I Guaranty as presented, Tharaldson's exposure on the Guaranty and TM2I's exposure  
9 on the TM2I Guaranty would be far greater than Plaintiffs intended or understood because of the  
10 waivers contained in the Guaranty and the choice of law in the TM2I Guaranty.

11       205. The Fiduciary Defendants failed to advise Plaintiffs to consult with independent  
12 counsel concerning the Plaintiffs' Senior Loan Documents due to the Fiduciary Defendants'  
13 conflicting duties of undivided loyalty with respect thereto.

14       206. In agreeing to Plaintiff's Senior Loan Documents, Plaintiffs were unaware of  
15 Nevada law permitting waiver of the fair market value defense, the legal effect of the waiver  
16 provisions inserted in the Guaranty, that North Dakota law did not extend a Borrower's fair  
17 market value defense to a guarantor, or the legal risks inherent in the Subordination in light of  
18 the undisclosed Priority Construction Liens.

19       207. Plaintiffs would not have agreed to the Senior Loan Documents had they known  
20 any of the matters alleged in the preceding paragraph.

21                   **Administration of Senior Loan**

22       208. During their due diligence review of the Senior Loan, the Fiduciary Defendants  
23 failed to detect that the \$79,000,000 fixed sum construction contract for the Project failed to  
24 cover about \$3,800,000 in work required by the construction drawings for completion of the  
25 Project.

26       209. During the course of their administration of the Senior Loan, when the Fiduciary  
27 Defendants did become aware of this problem, they failed to secure an early and appropriate  
28 resolution of the scope problem with the existing contractor to maintain a fixed sum contract

1 increased by some amount to cover cost overruns.

2 210. During the course of their administration of the Senior Loan, the Fiduciary  
3 Defendants in their inspections of construction progress, failed to detect that about \$7,900,000  
4 in work on the Project was not properly performed in accordance with the construction  
5 documents and would have to be redone.

6 211. During their administration of the Senior Loan, the Fiduciary Defendants failed  
7 to take appropriate action to avert approximately \$25.8 million in construction liens against the  
8 Project.

9 212. As the direct and proximate result of these actions and omissions by the Fiduciary  
10 Defendants, Plaintiffs and the other participants in the Senior Loan are left with an unfinished  
11 Project on which construction has ceased, encumbered by \$25.8 million in construction liens,  
12 and with virtually all pre-sale purchasers of residential condominiums and lessees of commercial  
13 office space having fled from the Project.

14 213. From at least December 15, 2008, SFC and BOK as Co-Lead Lenders have  
15 engaged in oral and written communications with the other participants in the Senior Loan.

16 214. These communications have included, but are not limited to, such statements as:

- 17 A. Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal  
18 "will likely have farther reaching negative implications for his banking  
19 relationships with all banks going forward."  
20 B. Tharaldson's "reputation will be unquestionably damaged."  
21 C. "The 29 banks stretching from North Dakota to Oklahoma that are in this  
22 deal, plus banks not in this deal, will look very unfavorably on any future  
23 credit request from Gary."

24 215. In light of the Fiduciary Defendants' fraud, constructive fraud, breach of fiduciary  
25 duty, breaches of contract, and negligence which caused the problems now facing Plaintiffs and  
26 the other participants in the Senior Loan, the above statements are false and misleading.

27 216. The above statements are defamatory *per se*.  
28

1                   **Termination of SFC's Agency on Prior Loan, the Edelstein Loan,**  
2                   **the Mezzanine Loans, and the Senior Loan**

3           217. On or about January 12, 2009, Plaintiffs terminated all of the CVFS Pre-Senior  
4 Loan Participation Agreements and demanded that SFC assign all components of the loans  
5 covered thereby to CVFS and deliver all of the executed original loan documents for such loans  
6 to CVFS.

7           218. On or about January 12, 2009, Plaintiffs terminated the CVFS Senior Participation  
8 Agreement and demanded that SFC assign all components of the loans covered thereby to CVFS  
9 to the extent of its percentage interest therein.

10                   **FIRST CLAIM FOR RELIEF**

11                   **(Fraud)**

12           219. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

13           220. The Fiduciary Defendants made certain representations to Plaintiffs in connection  
14 with the Senior Loan. Those representations included, but are not limited to:

15               A. That the Fiduciary Defendants were primarily relying on the financial  
16 viability of the Project in underwriting the Senior Loan. Tharaldson's  
17 exposure on the Guaranty and TM2I's exposure on the TM2I guaranty  
18 would be limited.

19               B. That the Pre-Sale Condition to the closing of the Senior Loan was satisfied.

20               C. That the First Lien Condition to the closing of the Senior Loan was  
21 satisfied.

22           221. General Contractor made certain representations to SFC, as agent for Plaintiffs,  
23 in connection with the Senior Loan. Specifically, General Contractor represented that: A) "[a]ll  
24 liens, claims, rights, remedies and recourses that [Asphalt Products Corporation] may have or  
25 may otherwise be entitled to assert against all or any portion of the Project shall be, and they  
26 hereby are made expressly subordinate, junior and inferior to the liens, claims, rights, remedies  
27 and recourses as created by the Loan Agreement and the Collateral Documents"; and B) that no  
28 work had been completed to date on the Property or the Project.

222. The Fiduciary Defendants and General Contractor made the aforementioned representations with either knowledge or belief that they were false or without sufficient foundation.

223. The Fiduciary Defendants and General Contractor made the aforementioned representations with the intent that Plaintiffs rely on them.

224. The representations by the Fiduciary Defendants and General Contractor were material to Plaintiffs' actions with respect to the Senior Loan.

**225. Plaintiffs had a right to rely on the representations of the Fiduciary Defendants and General Contractor.**

226. Plaintiffs did detrimentally rely upon those representations by agreeing to the Plaintiffs' Senior Loan Documents.

227. The Fiduciary Defendants and General Contractor knew or should have known that the representations were false.

228. Plaintiffs were ignorant of the falsity of the representations.

229. As the direct and proximate result of the representations, the Fiduciary Defendants and General Contractor induced Plaintiffs to agree to the Plaintiffs' Senior Loan Documents.

230. As the result of the Fiduciary Defendants' conduct and General Contractor's conduct, Plaintiffs were substantially damaged.

231. Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by Fiduciary Defendants' fraud and the General Contractor's and therefore are not the valid, binding, or enforceable obligations of Plaintiffs.

## SECOND CLAIM FOR RELIEF

**(Constructive Fraud)**

232. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

233. The Fiduciary Defendants had a fiduciary and confidential relationship with Plaintiffs.

234. Given the nature of their relationship, the Fiduciary Defendants were under a duty to disclose to Plaintiffs on a timely basis all material information relating to their decisions to

1 agree to the Plaintiffs' Senior Loan Documents.

2 235. The Fiduciary Defendants were aware of all of the following prior to the closing  
3 of the Senior Loan:

- 4 A. The Deteriorated Financial Prospects as set forth under that heading above.
- 5 B. The Primary Reliance on Guarantors as set forth under that heading above.
- 6 C. The Insurance over Broken Priority and Switched Title Insurance  
7 Companies as set forth under that heading above.
- 8 D. The Subordination Exacerbates Broken Priority as set forth under that  
9 heading above.
- 10 E. The Fraud Relating to Terms of Guaranty, TM2I Guaranty and  
11 Subordination as set forth under that heading above.

12 236. Each of the items of information described in the preceding paragraph was  
13 material to Plaintiffs' decisions to agree to the Plaintiffs' Senior Loan Documents.

14 237. The Fiduciary Defendants failed to disclose that material information to Plaintiffs.

15 238. As the direct and proximate result of the Fiduciary Defendants' misrepresentations,  
16 Plaintiffs were substantially damaged.

17 239. Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by  
18 Fiduciary Defendants' constructive fraud and therefore are not the valid, binding, or enforceable  
19 obligations of Plaintiffs.

### 20 **THIRD CLAIM FOR RELIEF**

#### 21 **(Negligent Misrepresentation)**

22 240. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

23 241. The Fiduciary Defendants had a duty to exercise due care in making  
24 representations to Plaintiffs concerning the Senior Loan.

25 242. The Fiduciary Defendants' made certain representations to Plaintiffs in connection  
26 with the Senior Loan, including but not limited to:

- 27 A. That the Fiduciary Defendants were primarily relying on the financial  
28 viability of the Project in underwriting the Senior Loan and that

1                   Tharaldson's exposure on the Guaranty and TM2I's exposure on the TM2I  
2                   Guaranty would be limited.

3                   B.     That the Pre-Sale Condition was satisfied.

4                   C.     That the First Lien Condition was satisfied.

5           243.   In making these representations, the Fiduciary Defendants breached their duty of  
6   care.

7           244.   The representations were false.

8           245.   As the direct and proximate result of the Fiduciary Defendants' misrepresentations,  
9   Plaintiffs were substantially damaged.

10          246.   Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by  
11   Fiduciary Defendants' negligent misrepresentation and therefore are not the valid, binding, or  
12   enforceable obligations of Plaintiffs.

13                                   **FOURTH CLAIM FOR RELIEF**

14   **(Mistake of Fact)**

15          247.   Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

16          248.   Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by one  
17   or more mutual mistake of fact.

18          249.   Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by one  
19   or more unilateral mistake of fact of which the Fiduciary Defendants' and/or General Contractor  
20   took advantage by their inequitable conduct.

21          250.   The Plaintiffs' Senior Loan Documents are not the valid, binding, or enforceable  
22   obligations of Plaintiffs.

23                                   **FIFTH CLAIM FOR RELIEF**

24   **(Mistake of Law)**

25          251.   Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

26          252.   Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by  
27   one or more mutual mistake of law; or by one or more unilateral mistakes of law coupled with  
28   inequitable conduct by the Fiduciary Defendants.

1        253. The Plaintiffs' Senior Loan Documents are not the valid, binding, or enforceable  
2 obligations of Plaintiffs.

3                                    **SIXTH CLAIM FOR RELIEF**

4                                    **(Reformation of the Guaranty and the TM2I Guaranty)**

5        254. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

6        255. The Guaranty and the TM2I Guaranty did not reflect the understanding and  
7 agreement of the parties, which was that Tharaldson's economic responsibility under the  
8 Guaranty and TM2I's economic responsibility under the TM2I Guaranty would be for any  
9 deficiency remaining after the fair market value of the Project is subtracted from the balance of  
10 the Senior Loan.

11        256. The Fiduciary Defendants knew, but failed to inform Plaintiffs, that the Guaranty  
12 and the TM2I Guaranty did not reflect the understanding of the parties, but instead the Guaranty  
13 contained a waiver of all guarantor rights under Nevada law, including the fair market value  
14 defense and the TM2I Guaranty adopted North Dakota law which did not provide guarantors  
15 with a fair market value defense.

16        257. Given the relationship of trust and confidence between Plaintiffs and the Fiduciary  
17 Defendants, the Fiduciary Defendants' failure to inform Plaintiffs that the Guaranty and the  
18 TM2I Guaranty did not reflect the understanding of the parties constitutes inequitable conduct  
19 justifying reformation of the Guaranty and the TM2I Guaranty.

20                                    **SEVENTH CLAIM FOR RELIEF**

21                                    **(Damages – Fraud)**

22        258. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

23        259. As the direct and proximate result of the Fiduciary Defendants' fraud and General  
24 Contractor's fraud alleged in the First Claim for Relief and the Second Claim for Relief,  
25 Plaintiffs have been substantially damaged.

26        260. The Fiduciary Defendants acted intentionally and/or in concert and are subject to  
27 joint and several liability for all damages resulting therefrom.  
28

1 **EIGHTH CLAIM FOR RELIEF**

2 **(Damages -- Negligent Misrepresentation)**

3 261. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

4 262. As the direct and proximate result of the Fiduciary Defendants' negligent  
5 misrepresentation, Plaintiffs were substantially damaged.

6 263. The Fiduciary Defendants acted intentionally and/or in concert and are subject to  
7 joint and several liability for all damages resulting therefrom.

8 **NINTH CLAIM FOR RELIEF**

9 **(Damages -- Loan Fraud)**

10 264. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

11 265. The Fiduciary Defendants, for the purpose of obtaining a loan secured by a lien  
12 on real property, made false statements, and concealed material facts that they had a duty to  
13 disclose, as more fully alleged above.

14 266. The Fiduciary Defendants are liable to Plaintiffs for compensatory damages under  
15 NRS 40.750(2).

16 267. In addition, the Fiduciary Defendants are liable to Plaintiffs for exemplary or  
17 punitive damages in an amount not to exceed 50% of the actual damages awarded, under NRS  
18 40.750(3).

19 268. The Fiduciary Defendants acted intentionally and/or in concert and are subject to  
20 joint and several liability for all damages resulting therefrom.

21 **TENTH CLAIM FOR RELIEF**

22 **(Securities Fraud - Violation of NRS 90.211 et seq.)**

23 269. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

24 270. The Fiduciary Defendants, directly or indirectly, made certain untrue statements  
25 of material fact and/or omitted to state certain material facts necessary to make the statements  
26 made not misleading to Plaintiffs in connection with an offer to sell and/or the sale of a security.

27 271. The Senior Loan Agreement, including the Plaintiffs' Senior Loan Documents, are  
28 all "securities" within the meaning of NRS 90.295.

1           272. Plaintiffs did not know that a statement of material fact was untrue or that there  
2 was an omission of a statement of material fact.

3           273. The Fiduciary Defendants knew or in the exercise of reasonable care could have  
4 known of the untrue statements or misleading omissions.

5           274. The Fiduciary Defendants are civilly liable to Plaintiffs for damages as provided  
6 in NRS 90.660(1)(d).

7                                   **ELEVENTH CLAIM FOR RELIEF**

8                                   **(Defamation)**

9           275. Plaintiffs incorporate by reference all prior paragraphs of their Complaint as if set  
10 forth fully herein.

11           276. SFC and BOK as Co-Lead Lenders made statements, including but not limited to,  
12 that:

13                   A.   Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal  
14                   "will likely have farther reaching negative implications for his banking  
15                   relationships with all banks going forward."

16                   B.   Tharaldson's "reputation will be unquestionably damaged."

17                   C.   "The 29 banks stretching from North Dakota to Oklahoma that are in this  
18                   deal, plus banks not in this deal, will look very unfavorably on any future  
19                   credit request from Gary."

20           277. The statements made by SFC and BOK as Co-Lead Lenders were published to the  
21 other 27 Senior Loan participants and potentially republished to numerous other people,  
22 including but not limited to persons employed by the 27 Senior Loan participants, persons doing  
23 business with the 27 Senior Loan participants, and persons in the communities in and around the  
24 Property and Project.

25           278. The statements made by SFC and BOK are false and defamatory and impeached  
26 the honesty and integrity of Plaintiffs.

27           279. SFC and BOK made the statements with knowledge of their falsity or with reckless  
28 disregard of whether the statements were true, but at a minimum, negligently.



1 Plaintiffs.

2 291. As the direct and proximate result of the actions of Fiduciary Defendant BOK, the  
3 Plaintiffs have been substantially damaged.

4 **FOURTEENTH CLAIM FOR RELIEF**

5 **(Acting in Concert)**

6 292. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

7 293. The Defendants, and each of them, acting in concert with each of the other  
8 Defendants' tortious conduct constituted a breach of their duties, including fiduciary duties, to  
9 Plaintiffs.

10 294. The Defendants, and each of them, knowingly or recklessly gave substantial  
11 assistance or encouragement to each of the other Defendants in committing their tortious acts  
12 against Plaintiffs in breach of their duties to Plaintiffs.

13 295. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have  
14 suffered substantial damages.

15 **FIFTEENTH CLAIM FOR RELIEF**

16 **(Punitive Damages)**

17 296. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

18 297. Plaintiffs' claims against the Fiduciary Defendants for fraud, constructive fraud,  
19 loan fraud, securities fraud, defamation, breach of fiduciary duty, and aiding and abetting breach  
20 of fiduciary duty (the "Predicate Claims") are independent tort claims not arising from contract.

21 298. The Fiduciary Defendants' actions giving rise to the Predicate Claims make them  
22 guilty of "oppression, fraud or malice, express or implied."

23 299. The Fiduciary Defendants' actions giving rise to the Predicate Claims constituted  
24 conduct intended to injure Plaintiffs.

25 300. The Fiduciary Defendants' actions giving rise to the Predicate Claims constituted  
26 "despicable conduct which is engaged in with a conscious disregard of the rights of others ...."

27 301. The Fiduciary Defendants acted intentionally and/or in concert and are subject to  
28 joint and several liability for all damages resulting therefrom.

1       302. Plaintiffs are entitled to an award of punitive damages against the Fiduciary  
2 Defendants in an amount not more than three times the compensatory damages proved at trial.

3                               **SIXTEENTH CLAIM FOR RELIEF**

4                               **(Damages – Breach of Contract)**

5       303. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

6       304. The Fiduciary Defendants had contractual duties to Plaintiffs related to the Senior  
7 Loan Agreement.

8       305. The Fiduciary Defendants breached those duties to Plaintiffs in many ways,  
9 including but not limited to the following:

10               A.    Certifying that the Pre-Sale Condition was satisfied when it was not, in  
11                      violation of the CVFS Senior Participation Agreement.

12               B.    Certifying that the First Lien Condition was satisfied when it was not in  
13                      violation of the CVFS Senior Participation Agreement

14       306. As the direct and proximate result of the Fiduciary Defendants' breaches of  
15 contract, Plaintiffs have been substantially damaged.

16                               **SEVENTEENTH CLAIM FOR RELIEF**

17                               **(Damages–Breach of Covenant of Good Faith and Fair Dealing)**

18       307. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

19       308. Implied in all of the contractual relations between Plaintiffs and the Fiduciary  
20 Defendants is a covenant of good faith and fair dealing.

21       309. The Fiduciary Defendants breached the implied covenant of good faith and fair  
22 dealing in many ways, including but not limited to the following:

23               A.    Making the misrepresentations concerning the Pre-Sale Condition and the  
24                      First Lien Condition as alleged herein.

25               B.    Failing to disclose to Plaintiffs the material information related to the  
26                      Senior Loan and the Plaintiffs' Senior Loan Documents as alleged herein.

27               C.    Failing to raise with Plaintiffs the conflicts of interest inherent in the  
28                      Plaintiffs' Senior Loan Documents.

1 D. Failing to advise Plaintiffs to consult with independent counsel concerning  
2 the Plaintiffs' Senior Loan Documents.

3 E. Preferring their interests (to earn fees and eight per cent interest per annum  
4 in a time that the prime rate was six and one half percent and the interest  
5 rate environment was sharply downward) over Plaintiffs interests in having  
6 the Plaintiffs' Senior Loan Documents reasonably and adequately protect  
7 their reasonable expectations concerning the Senior Loan based upon the  
8 discussions that occurred between Plaintiffs and the Fiduciary Defendants.

9 310. Due to the fiduciary and confidential nature of the parties' relationship, the breach  
10 of the covenant of good faith and fair dealing by the Defendants gives rise to tort liability.

11 311. As the direct and proximate result of the Fiduciary Defendants' breaches of the  
12 implied covenant of good faith and fair dealing, Plaintiffs have been substantially damaged and  
13 Defendants are responsible for all natural and probable consequences of their wrong.

#### 14 EIGHTEENTH CLAIM FOR RELIEF

##### 15 (Negligence)

16 312. Plaintiffs incorporate by reference all prior paragraphs of their Complaint.

17 313. The Fiduciary Defendants owed to Plaintiffs a duty to exercise due care in  
18 connection with the underwriting, funding, and administration of the Senior Loan.

19 314. The Fiduciary Defendants breached their duty of due care in many ways, including  
20 but not limited to the following:

21 A. Making the misrepresentations concerning the Pre-Sale Condition and the  
22 First Lien Condition as alleged herein.

23 B. Failing to disclose to Plaintiffs the material information related to the  
24 Senior Loan and the Plaintiffs' Senior Loan Documents as alleged herein.

25 C. Failing to raise with Plaintiffs the conflicts of interest inherent in the  
26 Plaintiffs' Senior Loan Documents.

27 D. Failing to advise Plaintiffs to consult with independent counsel concerning  
28 the Plaintiffs' Senior Loan Documents.

- 1 E. Failing to determine, prior to funding of the Senior Loan, that a substantial  
2 amount of work required by the construction drawings for the Project was  
3 not covered by the construction agreement.
- 4 F. Failing to determine, during the course of inspections of the Project during  
5 construction, that nearly \$8,000,000 in substandard work was performed.
- 6 G. Failure to obtain, in connection with each draw, the necessary lien waivers  
7 for work reflected in that draw.
- 8 H. Failure to make sure that the loan draws were spent by the contractor to pay  
9 subcontractors and material suppliers.
- 10 I. Allowing \$26,000,000 in construction liens to be filed against the Project  
11 during the course of their loan administration.

12 315. As the direct and proximate result of the Fiduciary Defendants' negligence,  
13 Plaintiffs have been substantially damaged.

14 **NINETEENTH CLAIM FOR RELIEF**

15 **(Declaratory Judgment)**

16 316. Plaintiffs incorporate by reference all prior paragraphs of their Complaint as if set  
17 forth fully herein.

18 317. As is set forth herein, Gemstone West Inc. is the owner of the Property and Project  
19 and the primary obligor on the Senior Loan and, by assumption, the Prior Loan.

20 318. As set forth herein, Contractor is the General Contractor of the Project.

21 319. As is set forth herein, the General Contractor consented to the Assignment of  
22 Construction Contract, Plans and Specifications executed by Gemstone West Inc. in favor of  
23 SFC, pursuant to a General Contractor Consent.

24 320. That General Contractor Consent specifically provides that "[a]ll liens, claims,  
25 rights, remedies and recourses that [Asphalt Products Corporation] may have or may otherwise  
26 be entitled to assert against all or any portion of the Project shall be, and they hereby are made  
27 expressly subordinate, junior and inferior to the liens, claims, rights, remedies and recourses as  
28 created by the Loan Agreement and the Collateral Documents."

1           321. Plaintiffs are entitled to a court order declaring that the Deed of Trust securing the  
2 Prior Loan has a first lien position on the Property and the Project notwithstanding any other  
3 liens created therein by or for the benefit of Gemstone West Inc. or Contractor.

4           322. Plaintiffs are entitled to a court order declaring that Tharaldson and TM2I have no  
5 further liability relating to the Senior Loan and that as between Tharladson, TM2I and Gemstone  
6 West Inc., Gemstone West Inc. is the sole party responsible for the Senior Loan.

7           323. Plaintiffs are entitled to a court order declaring that the Deeds of Trust relating to  
8 the Prior Loan have priority over the Construction Liens due to recordation date, and a court  
9 order declaring that the Senior Loan DOT has priority over the Construction Liens due to the  
10 Consent signed by the Contractor, wherein the Contractor specifically agreed to subordinate any  
11 and all claims to SFC.

12           324. In addition, the Contractor executed the Contractor Certificate indicating that no  
13 work had been completed on the Property or the Project to date.

14           325. Plaintiffs are entitled to a court order declaring that the Senior Loan Documents  
15 were induced by fraud and/or mistake and are not the valid, legally binding, and/or enforceable  
16 obligations of Plaintiffs.

17           326. Plaintiffs are entitled to a court order declaring that, upon CVFS's restoration to  
18 the Fiduciary Defendants as agent for the Senior Loan Participants of the net \$10,000,000  
19 paydown received from the Senior Loan proceeds together with interest thereon, the  
20 Subordination is rescinded.

21           327. Plaintiffs are entitled to a court order declaring that the Deeds of Trust securing  
22 the Prior Loan are prior and superior to the Senior Loan Deed of Trust and to any liens for  
23 construction work performed on the Property after July 5, 2006, and to any and all other liens  
24 or encumbrances on the Project recorded subsequent to recordation of the Deeds of Trust  
25 securing the Prior Loans and constitute first lien positions on the Property.

26           328. Plaintiffs are entitled to a court order declaring that Plaintiffs have one or more  
27 valid legal defenses to the Plaintiffs' Senior Loan Documents if those documents would  
28 otherwise be the valid, legally binding, or enforceable obligation of Plaintiffs.

1  
2 WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

- 3 A. Declaring that CVFS has terminated all of the CVFS Pre-Senior  
4 Participation Agreements and the CVFS Senior Loan Participation  
5 Agreement, that SFC has no authority to act for CVFS with respect to any  
6 of the loans covered thereby, and ordering SFC to execute and deliver  
7 appropriate assignments of those loans and related documents to CVFS.  
8 B. Declaring that the Senior Loan Documents were induced by fraud and/or  
9 mistake and are not the valid, legally binding, and/or enforceable  
10 obligations of Plaintiffs.  
11 C. Declaring that, upon CVFS's restoration to the Fiduciary Defendants as  
12 agent for the Senior Loan Participants of the net \$10,000,000 paydown  
13 received from the Senior Loan proceeds together with interest thereon, the  
14 Subordination is rescinded.  
15 D. Declaring that the Deeds of Trust securing the Prior Loan are prior and  
16 superior to the Senior Loan Deed of Trust and to any liens for construction  
17 work performed on the Property after July 5, 2006, and to any and all other  
18 liens or encumbrances on the Project recorded subsequent to recordation  
19 of the Deeds of Trust securing the Prior Loans and constitute first lien  
20 positions on the Property.  
21 E. Declaring that Plaintiffs have one or more valid legal defenses to the  
22 Plaintiffs' Senior Loan Documents if those documents would otherwise be  
23 the valid, legally binding, or enforceable obligation of Plaintiffs.  
24 F. In the alternative, reforming the Guaranty and the TM2I Guaranty due to  
25 fraud and/or mistake to affirm the single action rule and the fair market  
26 value defense that was part of Plaintiffs' understanding with the Fiduciary  
27 Defendants.  
28 G. In the alternative, ordering that the Fiduciary Defendants jointly and

severally, disgorge to Plaintiffs any and all direct benefit they have obtained in connection with their breaches of fiduciary duty.

H. In the alternative, awarding Plaintiffs compensatory damages against the Fiduciary Defendants jointly and severally, in an amount equal to all direct, consequential, and other damages they have suffered, in amounts to be proved at the trial of this matter.

I. In the alternative, and in addition to compensatory damages, awarding Plaintiffs punitive damages against the Fiduciary Defendants jointly and severally, in connection with the Predicate Claims in an amount to be determined by the Court, but not to exceed three times compensatory damages.


J. Awarding to Plaintiffs their costs of suit, expenses of litigation, including but not limited to expert fees and reasonable attorneys fees.

K. Granting such other and further relief as the Court may deem just and proper

RESPECTFULLY SUBMITTED this 13th day of January 2009.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, P.C.

By

  
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Counsel for Plaintiffs  
(pro hac vice application in process)

# **Exhibit A**

# ManhattanWest

ManhattanWest



ManhattanWest.com • Phone: 702 893 2663 • email: info@manhattanwest.com

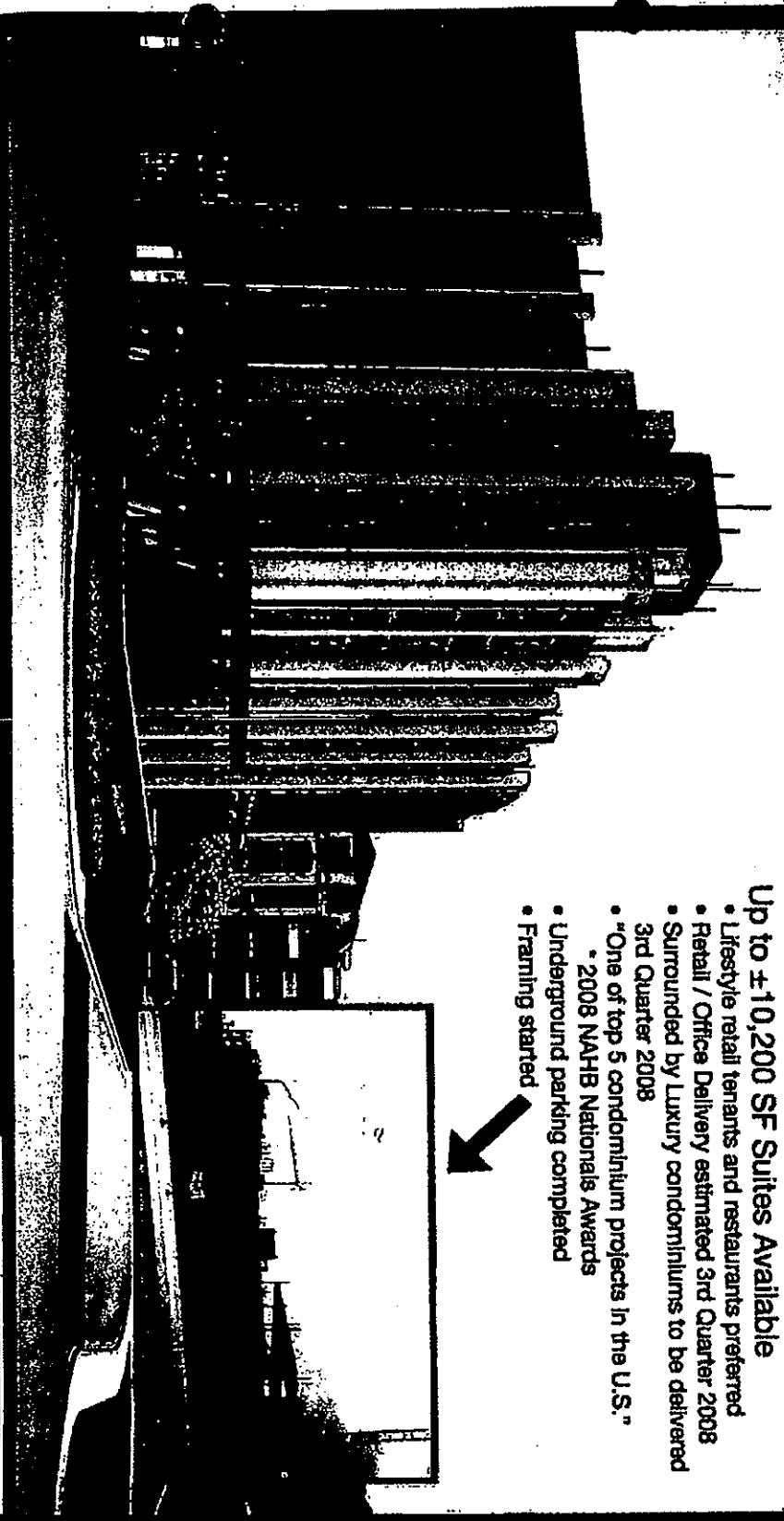
# ManhattanWest Retail

I-215 & Russell, Las Vegas, Nevada

ManhattanWest is a dynamic, mixed-use project consisting of shopping, restaurants, luxury condominiums, and professional office space. This state-of-the-art center provides an upscale experience for today's sophisticated consumer.

## Up to ±10,200 SF Suites Available

- Lifestyle retail tenants and restaurants preferred
- Retail / Office Delivery estimated 3rd Quarter 2008
- Surrounded by luxury condominiums to be delivered 3rd Quarter 2008
- "One of top 5 condominium projects in the U.S."
- 2008 NAHB Nationals Awards
- Underground parking completed
- Framing started



# Manhattan

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# ManhattanWest Retail

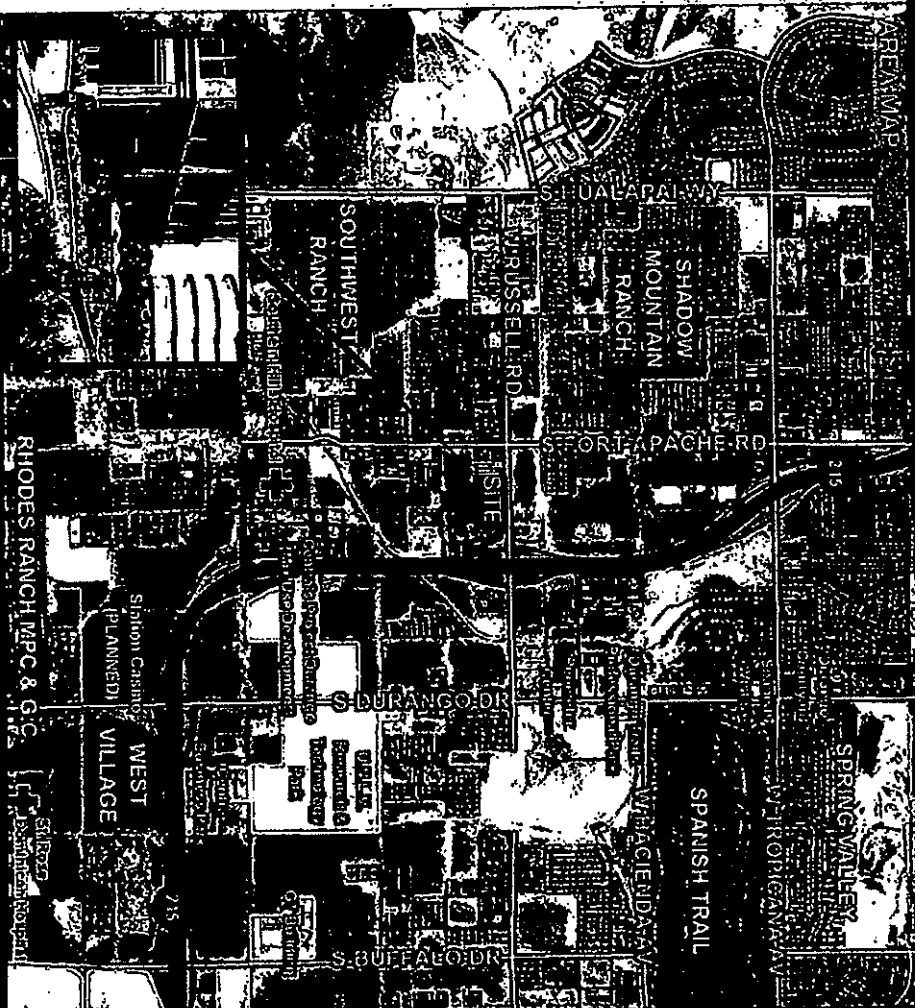
I-215 & Russell, Las Vegas, NV

## DEMOGRAPHICS

	1 MI	3 MI	5 MI
Population 2005	10,109	72,881	193,706
Population 2010	13,983	94,151	237,511
Households 2005	3,733	27,894	76,677
Households 2010	5,053	35,474	92,681
Median Age	34	35	36
Average HH	78,261	70,913	61,714

## LOCATION FEATURES

- Located at Russell Road and I-215, in the booming Southwest area of Las Vegas
- ManhattanWest will provide a dynamic and unique destination point for area residents and numerous office tenants in the Southwest.
- The Southwest has some of the highest income demographics in the Las Vegas Valley
- Close proximity to exclusive master plans such as: Summerlin and Southern Highlands



# Manhattan

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Mobile: 702.266.5179

bmasi@mpdny.com

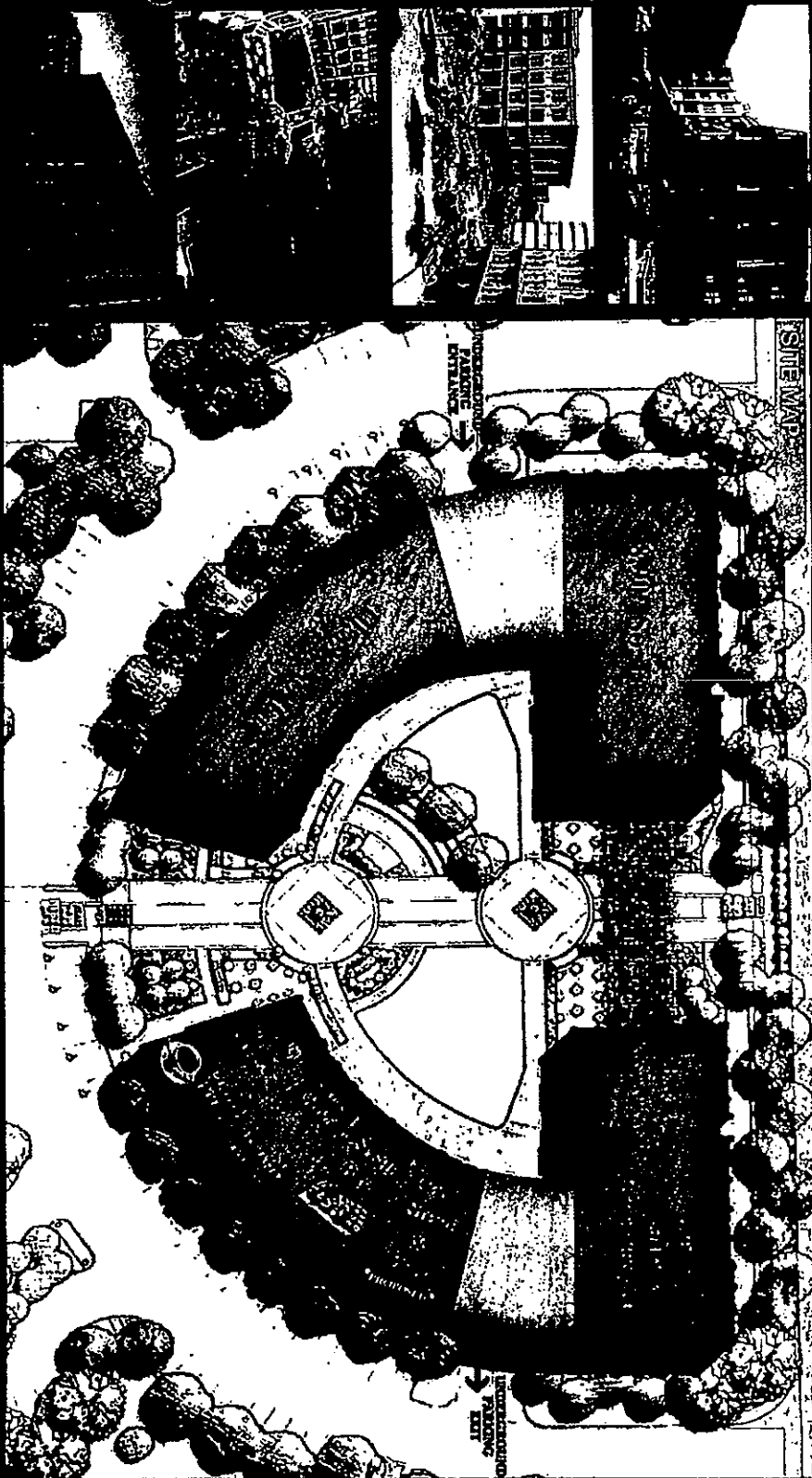
avece@mpdny.com

[www.ManhattanWest-retail.com](http://www.ManhattanWest-retail.com)



# ManhattanWest Retail

I-215 & Russell, Las Vegas, NV



## Manhattan

**Bart Masi**

Direct: 702.688.6434  
Mobile: 702.275.2580  
bmasi@mpdny.com

**Anthony Vece**

Direct: 702.688.6479  
Mobile: 702.266.5179  
avece@mpdny.com

[www.ManhattanWest-retail.com](http://www.ManhattanWest-retail.com)



1-215 & Russell, Las Vegas, NV

**Bird & Butterfly Garden**      **Hammock Garden**      **Basketball Court**

Rooftop Lounge Pods, Lap Pool, Shaded Grilla, 7,000 sq. ft. Fitness

**Room, Guest Suites, & Business Center**

Swimming Pool 1,000

Swiss Bar  
Rosa

00



Prof. A. D. Williams

**Early Day**

Columns

1

1. *Chlorophyll a* (Chl *a*)

**Anthony Vecce**

Direct: 702.688.6473  
Mobile: 702.266.5179

avecece@mpdny.com

TEST-16944-001

1000

# Anthony Vecce

Direct: 702.688.6479

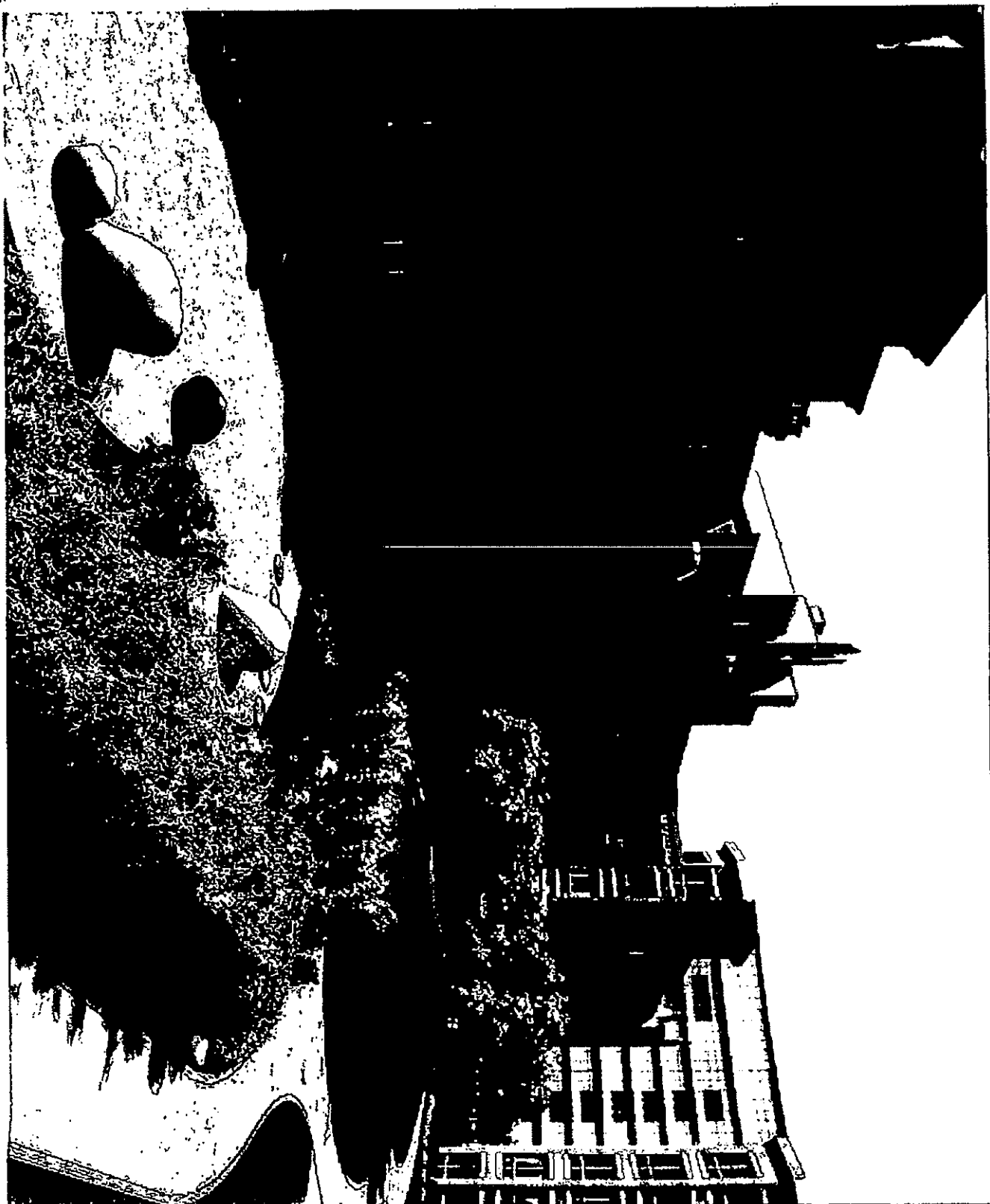
Mobile: 702.266.5179  
avece@mpdnv.com

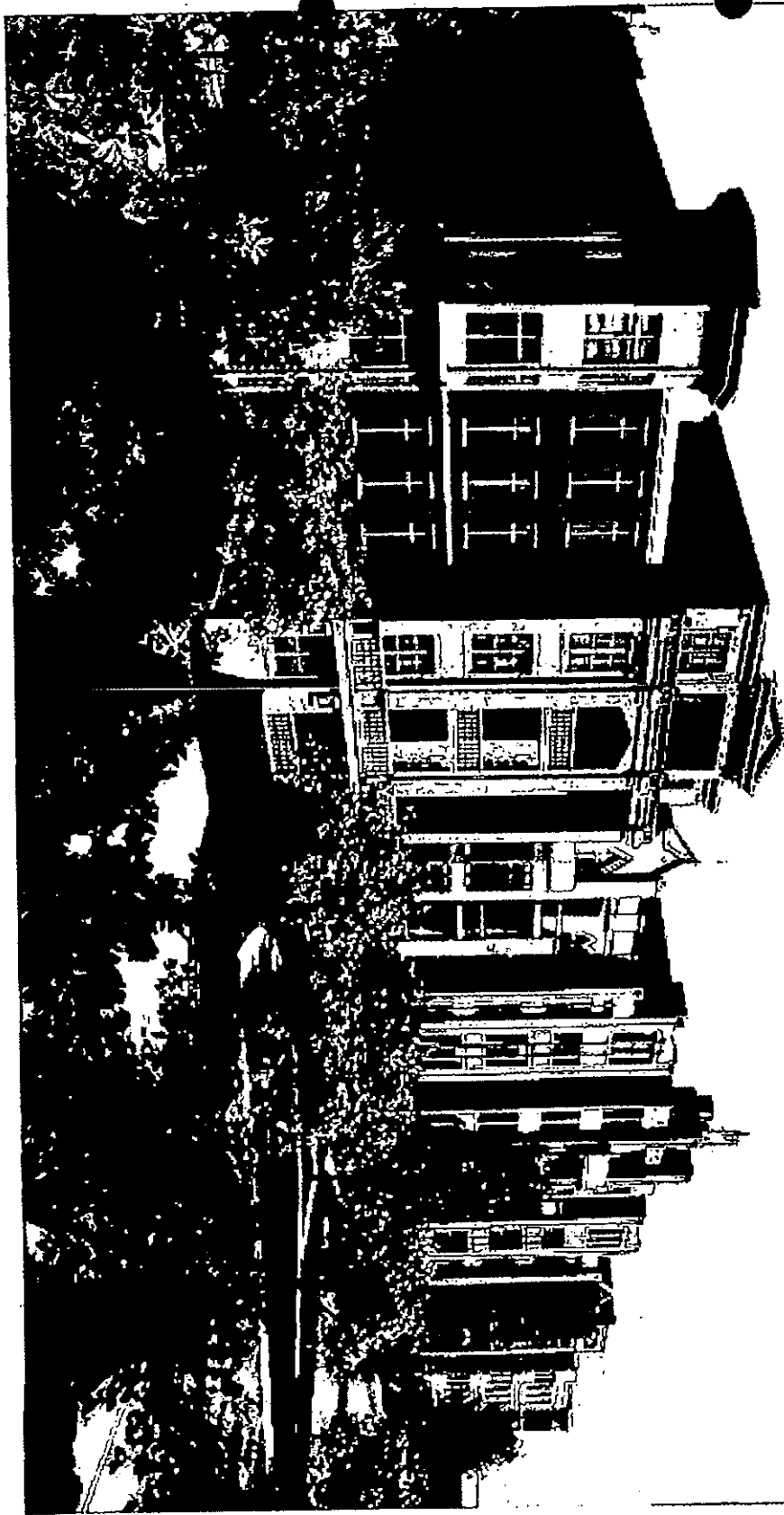


**RE/MAX**

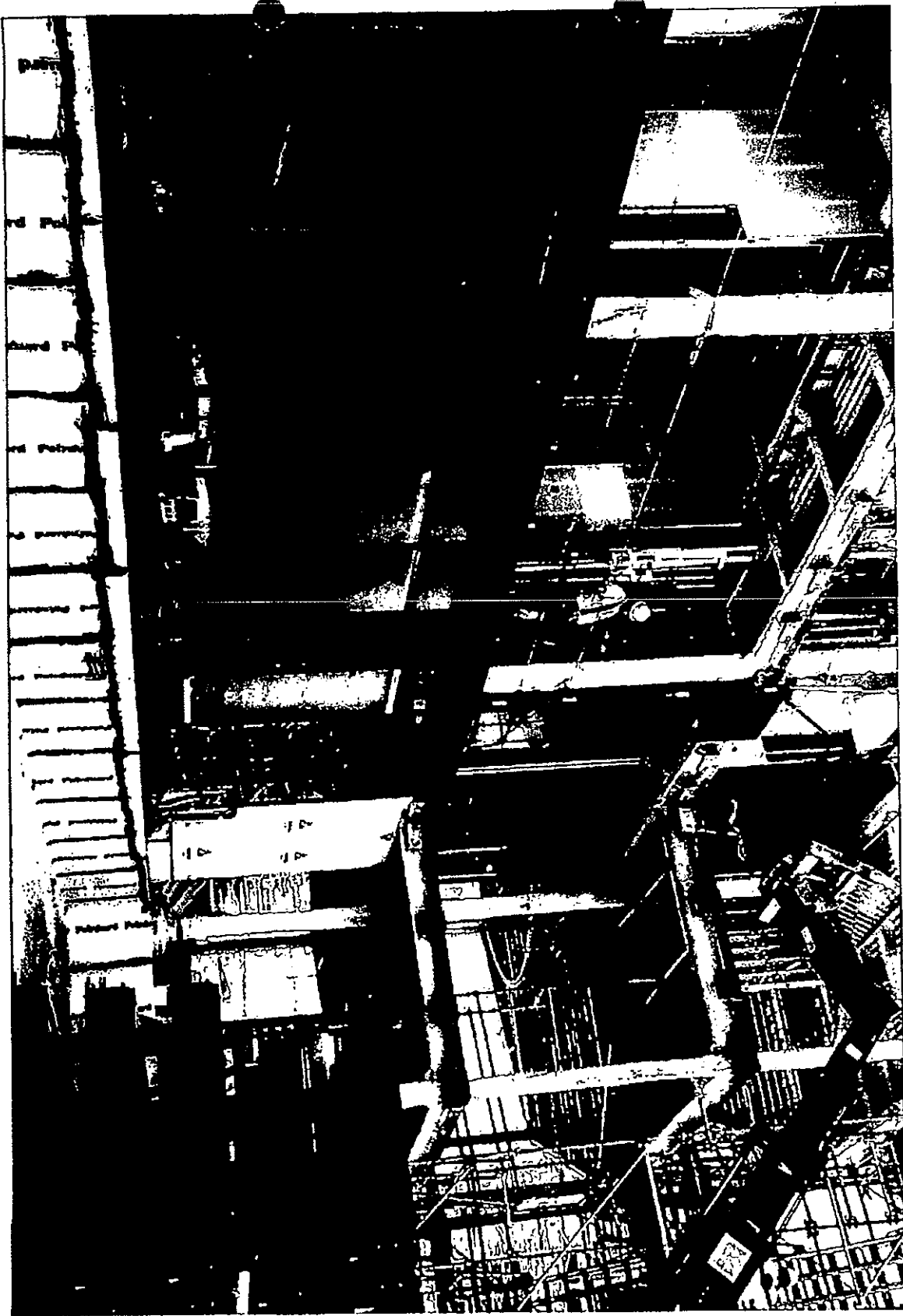
**COMMERCIAL**

12019-001 00058









# **Exhibit B**

**PARCEL 1:**

THE WEST HALF (W1/2) OF THE NORTHEAST QUARTER (NE1/4) OF THE NORTHWEST QUARTER (NW1/4) OF THE NORTHWEST QUARTER (NW1/4) OF SECTION 32, TOWNSHIP 21 SOUTH, RANGE 60 EAST, M.D.B. & M.

EXCEPTING THEREFROM ALL THAT REAL PROPERTY AS CONVEYED TO THE COUNTY OF CLARK BY DEED RECORDED SEPTEMBER 22, 1972 IN BOOK 265 AS DOCUMENT NO. 224982 OF OFFICIAL RECORDS.

**PARCEL 2:**

THE EAST HALF (E1/2) OF THE NORTHEAST QUARTER (NE1/4) OF THE NORTHWEST QUARTER (NW1/4) OF THE NORTHWEST QUARTER (NW1/4) OF SECTION 32, TOWNSHIP 21 SOUTH, RANGE 60 EAST, M.D.B. & M.

EXCEPTING THEREFROM THE SOUTHERLY 396 FEET THEREOF.

FURTHER EXCEPTING THEREFROM THE NORTH 50 FEET AS CONVEYED TO THE COUNTY OF CLARK BY DEED RECORDED SEPTEMBER 22, 1972 IN BOOK 265 AS DOCUMENT NO. 224981.

**PARCEL 3:**

THE SOUTHERLY 396 FEET OF THE EAST HALF (E1/2) OF THE NORTHEAST QUARTER (NE1/4) OF THE NORTHWEST QUARTER (NW1/4) OF THE NORTHWEST QUARTER (NW1/4) OF SECTION 32, TOWNSHIP 21 SOUTH, RANGE 60 EAST, M.D.M., CLARK COUNTY, NEVADA.

**PARCEL 4:**

THE EAST HALF (E 1/2) OF THE SOUTHEAST QUARTER (SE 1/4) OF THE NORTHWEST QUARTER (NW 1/4) OF THE NORTHWEST QUARTER (NW 1/4) OF SECTION 32, TOWNSHIP 21 SOUTH, RANGE 60 EAST, M.D.M., CLARK COUNTY, NEVADA.

**PARCEL 5:**

THE WEST HALF (W 1/2) OF THE NORTHWEST QUARTER (NW 1/4) OF THE NORTHEAST QUARTER (NE 1/4) OF THE NORTHWEST QUARTER (NW 1/4) OF SECTION 32, TOWNSHIP 21 SOUTH, RANGE 60 EAST, M.D.B. & M.

EXCEPTING THEREFROM THE NORTH FIFTY (50) FEET AS GRANTED TO CLARK COUNTY IN DEED RECORDED SEPTEMBER 22, 1972 IN BOOK 265 AS INSTRUMENT NO. 224994 OF OFFICIAL RECORDS.

FURTHER EXCEPTING THEREFROM ALL THAT REAL PROPERTY AS TAKEN BY CLARK COUNTY IN THAT CERTAIN FINAL ORDER OF CONDEMNATION RECORDED NOVEMBER 20, 1998 IN BOOK 981120 AS DOCUMENT NO. 00763, OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

**PARCEL 6:**

AN EASEMENT FOR DRAINAGE PURPOSES AS CREATED BY THOSE CERTAIN DOCUMENTS ENTITLED GRANT OF PRIVATE DRAINAGE EASEMENT, RECORDED DECEMBER 30, 2004, IN BOOK 20041230 AS INSTRUMENTS NO. 01346 AND 01347 OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

ORIGINAL

FILED

2009 JAN 13 P 4:20

*[Signature]*  
CLERK OF THE COURT

1 APN Nos.: 163-32-101-003  
2 163-32-101-004  
3 163-32-101-005  
4 163-32-101-014  
5 163-32-101-010  
6 163-32-101-019

7 **LISP**

8 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, P.C. CLERK OF THE COURT

9 MARK ALBRIGHT, ESQ.

10 Nevada Bar No. 001394

11 D. CHRIS ALBRIGHT, ESQ.

12 Nevada Bar No. 004904

13 801 South Rancho Drive

14 Quail Park - Suite D-4

15 Las Vegas, Nevada 89106

16 Telephone: (702) 384-7111

17 MORRILL & ARONSON, P.L.C.

18 K. LAYNE MORRILL, ESQ.

19 Arizona Bar No. 004591

20 MARTIN A. ARONSON, ESQ.

21 Arizona Bar No. 009005

22 STEPHANIE L. SAMUELSON, ESQ.

23 Arizona Bar No. 018099

24 One E. Camelback Road, Suite 340

25 Phoenix, Arizona 85012

26 Telephone: (602) 2638993

27 Pro Hac Vice Application In Process

28 Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

'A 579963

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

Plaintiffs,

v.

24 SCOTT FINANCIAL CORPORATION, a North  
25 Dakota corporation; BRADLEY J. SCOTT;  
26 BANK OF OKLAHOMA, N.A., a national bank;  
27 GEMSTONE DEVELOPMENT WEST, INC., a  
28 Nevada corporation; ASPHALT PRODUCTS  
CORP., a Nevada corporation, dba APCO  
CONSTRUCTION; DOE INDIVIDUALS 1-  
100; and ROE BUSINESS ENTITIES 1-100,

Defendants.

Case No.

Department No. X1

NOTICE OF PENDENCY OF  
ACTION (LIS PENDENS)

RECEIVED

JAN 13 2009

CLERK OF THE COURT

1 PLEASE TAKE NOTICE that an action was commenced and is pending in the above-  
2 entitled Court which affects title or possession of the real property described on Exhibit 1 hereto  
3 which by this reference is incorporated herein (the "Property"). The Property is further  
4 described on the last vesting Deed, attached hereto as Exhibit 2 and the legal description of  
5 which is incorporated herein by reference.

6 The following instruments appear on the public real property records of Clark County,  
7 Nevada, affecting the Property:

- 8 A. Senior Deed of Trust dated June 26, 2006, and recorded July 5, 2006 in the real  
9 property records of Clark County, Nevada at Book 20060705, Instrument No.  
10 0004264, as amended by Amendment recorded in the real property records of  
11 Clark County, Nevada on February 7, 2008 at Book 20080207, Instrument No.  
12 0001484.
- 13 B. Junior Deed of Trust dated June 26, 2006 and recorded July 5, 2006 in the real  
14 property records of Clark County, Nevada at Book 20060705, Instrument No.  
15 0004265, as amended by: (i) First Amendment dated May 22, 2007 and recorded  
16 in the real property records of Clark County, Nevada May 22, 2007 at Book  
17 20070522, Instrument No. 0004011; and (ii) Second Amendment recorded in the  
18 real property records of Clark County, Nevada February 7, 2008 at Book  
19 20080207, Instrument No. 0001485.
- 20 C. Third Deed of Trust dated June 26, 2006, and recorded July 5, 2006 in the real  
21 property records of Clark County, Nevada at Book 20060705, Instrument No.  
22 0004266, as amended by First Amendment dated October 19, 2007 and recorded  
23 on October 24, 2007 at Book 20071024, Instrument No. 0004182.
- 24 D. Senior Debt Deed of Trust dated January 22, 2008, and recorded in the real  
25 property records of Clark County, Nevada, February 7, 2008, at Book 20080207,  
26 Instrument No. 0001482
- 27 E. Mezzanine Deeds of Trust Subordination Agreement dated January 22, 2008, and  
28 recorded in the real property records of Clark County, Nevada, February 7, 2008,


1 at Book 20080207, Instrument 0001486, purporting to subordinate the Deeds of  
2 Trust described in items A through C above to the Deed of Trust described in item  
3 D above.

4 F. Various mechanics, materialmens and/or construction liens for work performed  
5 on the Property.

6 In this action, Plaintiffs seek an order of the Court determining and declaring that: (i) the  
7 Subordination Agreement listed as item E above was induced by fraud and mistake and is  
8 rescinded; and (ii) the Deeds of Trust described as items A through C above are prior and  
9 superior to: (1) the Deed of Trust described as item D above; and (2) any and all mechanics,  
10 materialmens, and/or construction liens for work performed or materials supplied on the Property  
11 after July 5, 2006.

12 DATED this 13<sup>th</sup> day of January 2009.

13 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, P.C.

14  
15 By   
16 Mark Albright, Esq.  
17 D. Chris Albright, Esq.  
18 801 South Rancho Drive  
19 Quail Park - Suite D-4  
20 Las Vegas, Nevada 89106  
21 Attorneys for Plaintiffs

22 MORRILL & ARONSON, P.L.C.  
23 K. Layne Morrill  
24 Martin A. Aronson  
25 Stephanie L. Samuelson  
26 One East Camelback Road, Suite 340  
27 Phoenix, AZ 85012  
28 Counsel for Plaintiffs  
(pro hac vice application in process)

**EXHIBIT 1**

**PARCEL 1:**

THE WEST HALF (W1/2) OF THE NORTHEAST QUARTER (NE1/4) OF THE NORTHWEST QUARTER (NW1/4) OF THE NORTHWEST QUARTER (NW1/4) OF SECTION 32, TOWNSHIP 21 SOUTH, RANGE 60 EAST, M.D.B. & M.

EXCEPTING THEREFROM ALL THAT REAL PROPERTY AS CONVEYED TO THE COUNTY OF CLARK BY DEED RECORDED SEPTEMBER 22, 1972 IN BOOK 265 AS DOCUMENT NO. 224982 OF OFFICIAL RECORDS.

**PARCEL 2:**

THE EAST HALF (E1/2) OF THE NORTHEAST QUARTER (NE1/4) OF THE NORTHWEST QUARTER (NW1/4) OF THE NORTHWEST QUARTER (NW1/4) OF SECTION 32, TOWNSHIP 21 SOUTH, RANGE 60 EAST, M.D.B. & M.

EXCEPTING THEREFROM THE SOUTHERLY 396 FEET THEREOF.

FURTHER EXCEPTING THEREFROM THE NORTH 50 FEET AS CONVEYED TO THE COUNTY OF CLARK BY DEED RECORDED SEPTEMBER 22, 1972 IN BOOK 265 AS DOCUMENT NO. 224981.

**PARCEL 3:**

THE SOUTHERLY 396 FEET OF THE EAST HALF (E1/2) OF THE NORTHEAST QUARTER (NE1/4) OF THE NORTHWEST QUARTER (NW1/4) OF THE NORTHWEST QUARTER (NW1/4) OF SECTION 32, TOWNSHIP 21 SOUTH, RANGE 60 EAST, M.D.M., CLARK COUNTY, NEVADA.

**PARCEL 4:**

THE EAST HALF (E 1/2) OF THE SOUTHEAST QUARTER (SE 1/4) OF THE NORTHWEST QUARTER (NW 1/4) OF THE NORTHWEST QUARTER (NW 1/4) OF SECTION 32, TOWNSHIP 21 SOUTH, RANGE 60 EAST, M.D.M., CLARK COUNTY, NEVADA.

**PARCEL 5:**

THE WEST HALF (W 1/2) OF THE NORTHWEST QUARTER (NW 1/4) OF THE NORTHEAST QUARTER (NE 1/4) OF THE NORTHWEST QUARTER (NW 1/4) OF SECTION 32, TOWNSHIP 21 SOUTH, RANGE 60 EAST, M.D.B. & M.

EXCEPTING THEREFROM THE NORTH FIFTY (50) FEET AS GRANTED TO CLARK COUNTY IN DEED RECORDED SEPTEMBER 22, 1972 IN BOOK 265 AS INSTRUMENT NO. 224994 OF OFFICIAL RECORDS.

FURTHER EXCEPTING THEREFROM ALL THAT REAL PROPERTY AS TAKEN BY CLARK COUNTY IN THAT CERTAIN FINAL ORDER OF CONDEMNATION RECORDED NOVEMBER 20, 1998 IN BOOK 981120 AS DOCUMENT NO. 00763, OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

**PARCEL 6:**

AN EASEMENT FOR DRAINAGE PURPOSES AS CREATED BY THOSE CERTAIN DOCUMENTS ENTITLED GRANT OF PRIVATE DRAINAGE EASEMENT, RECORDED DECEMBER 30, 2004, IN BOOK 20041230 AS INSTRUMENTS NO. 01345 AND 01347 OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

**EXHIBIT 2**

20080207-0001480

Fee: \$15.00 RPTT: EX001  
N/C Fee: \$9.00

02/07/2008 10:08:58

120808021465

Requester:

COMMONWEALTH TITLE

Debbie Conway RPF  
Clark County Recorder Pgs: 1

APN: 163-32-101-019  
ESCROW NO: 05111973-510-TGO  
WHEN RECORDED MAIL TO and  
MAIL TAX STATEMENT TO:

Gemstone Development West, Inc.  
9121 West Russell Road, #117  
Las Vegas, NV 89148

4-1

### GRANT, BARGAIN, SALE DEED

R.P.T.T. \$ 0.00

THIS INDENTURE WITNESSETH: That Gemstone Apache LLC, a Nevada limited liability company, FOR A VALUABLE CONSIDERATION, the receipt of which is hereby acknowledged, do(es) hereby Grant, Bargain, Sell and Convey to Gemstone Development West, LLC, a Nevada limited liability company, all that real property situated in the County of Clark, State of Nevada, described as follows:

For legal description of the real property, see Exhibit A attached hereto and made a part hereof.

SUBJECT TO: 1. Taxes for the fiscal year 2007 - 2008  
2. Rights of Way, reservations, restrictions, easements, and conditions of record.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Witness my hand this \_\_\_\_\_ day of JANUARY, 2008.

Gemstone Apache, LLC



Alexander Edelstein  
Chief Executive Officer

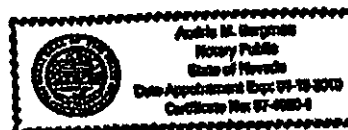
STATE OF NEVADA  
COUNTY OF CLARK

} ss:

On FEBRUARY 01, 2008, personally appeared before me, a Notary Public in and for said County and State, ALEXANDER EDELSTEIN, Chief Executive Officer, who acknowledged to me that he executed the same.

WITNESS my hand and official seal.

  
NOTARY PUBLIC in and for said County and State.



### **Exhibit "A"**

All that certain real property situated in the County of Clark, State of Nevada, described as follows:

**PARCEL 1:**

The West Half (W1/2) of the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

EXCEPTING THEREFROM that property conveyed to Clark County by Grant Deed recorded September 22, 1972 in Book 265 as Document No. 224982 of Official Records.

AND EXCEPTING THEREFROM that property conveyed to the County of Clark by Grant, Bargain, Sale and Dedication Deed recorded August 23, 2007 in Book 20070823 as Document No. 0004782 of Official Records.

TOGETHER WITH that property shown in Order of Vacation recorded August 23, 2007 in Book 20070823 as Document No. 0004781 and re-recorded August 28, 2007 in Book 20070828 as Document No. 0004280 of Official Records.

**ASSESSOR'S PARCEL NO.: 163-32-101-003**

**PARCEL 2:**

The East Half (E1/2) of the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

EXCEPTING THEREFROM the Southerly 396 feet thereof.

AND EXCEPTING THEREFROM that property conveyed to Clark County by Grant Deed recorded September 22, 1972 in Book 265 as Document No. 224981 of Official Records.

TOGETHER WITH that property shown in Order of Vacation recorded August 23, 2007 in Book 20070823 as Document No. 0004781 and re-recorded August 28, 2007 in Book 20070828 as Document No. 0004280 of Official Records.

**ASSESSOR'S PARCEL NO.: 163-32-101-004**

**PARCEL 3:**

The Southerly 396 feet of the East Half (E1/2) of the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

**ASSESSOR'S PARCEL NO.: 163-32-101-005**

**PARCEL 4:**

The West Half (W1/2) of the Northwest Quarter (NW1/4) of the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

EXCEPTING THEREFROM that property conveyed to Clark County by Grant Deed recorded September 22, 1972 in Book 265 as Document No. 224994 of Official Records.

FURTHER EXCEPTING THEREFROM that property shown in Final Order of Condemnation recorded November 20, 1998 in Book 981120 as Document No. 00763 of Official Records.

**ASSESSOR'S PARCEL NO.: 163-32-101-014**

**PARCEL 5:**

The East Half (E1/2) of the Southeast Quarter (SE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

EXCEPTING THEREFROM that property conveyed to the County of Clark by Grant, Bargain, Sale and Dedication Deed recorded August 23, 2007 in Book 20070823 as Document No. 0004783 of Official Records.

**ASSESSOR'S PARCEL NO.: 163-32-101-010**

**NOTE: THE NEW PARCEL NO. FOR THE ALL OF THE ABOVE IS  
163-32-101-019**

**STATE OF NEVADA  
DECLARATION OF VALUE**

**1. Assessor Parcel Number(s)**

a) 163-32-101-019  
b) \_\_\_\_\_  
c) \_\_\_\_\_  
d) \_\_\_\_\_

**2. Type of Property:**

a) ☒ Vacant Land      b) ☐ Single Fam Res  
c) ☐ Condo/Twnhse      d) ☐ 2-4 Plex  
e) ☐ Apt. Bldg      f) ☐ Comm'l/Ind'l  
g) ☐ Agricultural      h) ☐ Mobile Home  
Other \_\_\_\_\_

FOR RECORDER'S OPTIONAL USE ONLY	
Book: _____	Page: _____
Date of Recording: _____	
Notes: <u>20 August 2011</u>	

**3. Total Value/Sales Price of Property:**

Deed in Lieu of Foreclosure Only (value of property) \$ \_\_\_\_\_  
Transfer Tax Value per NRS 375.010, Section 2: (\$ \_\_\_\_\_)  
Real Property Transfer Tax Due: \$ 0.00

**4. If Exemption Claimed**

a. Transfer Tax Exemption, per NRS 375.090, Section 1: 1  
b. Explain Reason for Exemption: Transfer between subsidiary to parent

**5. Partial Interest: Percentage being transferred: 100 %**

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature: [Signature] Capacity: CEO/PRESIDENT

Signature: \_\_\_\_\_ Capacity: \_\_\_\_\_

**SELLER (GRANTOR) INFORMATION  
(REQUIRED)**

Print Name: Gemstone Apache LLC  
Address: 9121 W. Russell Road #117  
City/State/Zip: Las Vegas, NV 89148

**BUYER (GRANTEE) INFORMATION  
(REQUIRED)**

Print Name: Gemstone Development West, LLC  
Address: 9121 W. Russell Road #117  
City/State/Zip: Las Vegas, NV 89148

**COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)**

COMMONWEALTH LAND TITLE INSURANCE COMPANY  
2200 Paseo Verde Parkway  
Henderson, NV 89052

Escrow #: 5111973-510-TG0  
Escrow Officer: Trish Gladd

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

1480

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. 57784  
Electronic Filed  
Feb 17 2011 04:22 p.m.  
Tracie K. Lindeman

**PETITIONERS' APPENDIX**  
**(VOLUME 1 BATES NUMBERS 00001-00262)**

**Marquis Aurbach Coffing**  
TERRY A. COFFING, ESQ.  
Nevada Bar No. 4949  
MICAH S. ECHOLS  
Nevada Bar No. 8437  
DAVID T. DUNCAN, ESQ.  
Nevada Bar No. 9546  
10001 Park Run Drive  
Las Vegas, Nevada 89145

**Cooksey, Toolen, Gage, Duffy & Woog**  
GRIFFITH H. HAYES, ESQ.  
Nevada Bar No. 7374  
MARTIN A. MUCKLEROY, ESQ.  
Nevada Bar No. 9634  
3930 Howard Hughes Parkway, Suite 200

**Morrill & Aronson, P.L.C.**  
K. LAYNE MORRILL, ESQ.  
Arizona Bar No. 4591  
MARTIN A. ARONSON, ESQ.  
Arizona Bar No. 9005  
JOHN T. MOSHIER, ESQ.  
Arizona Bar No. 7460  
One E. Camelback Road, Suite 340  
Phoenix, AZ 85012

**Lemons, Grundy & Eisenberg**  
ROBERT L. EISENBERG, ESQ.  
Nevada Bar No. 950  
6005 Plumas Street, Suite 300  
Reno, NV 89519

## **INDEX TO PETITIONERS' APPENDIX**

<b><u>DOCUMENT DESCRIPTION</u></b>	<b><u>LOCATION</u></b>
Complaint (filed 01/13/09)	Vol. 1, Bates No. 00001–00064
Notice of Pendency of Action (Lis Pendens) (filed 01/13/09)	Vol. 1, Bates No. 00065–00074
APCO Construction's Answer to Complaint, Cross-Claim and Third-Party Complaint (filed 02/13/09)	Vol. 1, Bates No. 00075–00121
Scott Financial Corporation and Bradley J. Scott's Answer to APCO Construction's Cross-Claim and Third-Party Complaint (filed 04/15/09)	Vol. 1, Bates No. 00122–00138
Scott Financial Corporation and Bradley J. Scott's Amended Answer to APCO Construction's Cross-Claim and Third-Party Complaint (filed 05/04/09)	Vol. 1, Bates No. 00139–00157
Scott Financial Corporation and Bradley J. Scott's Answer to Complaint and Counterclaim (filed 05/08/09)	Vol. 1, Bates No. 00158–00199
Gary Tharaldson's Answer to Counterclaim (filed 06/01/09)	Vol. 1, Bates No. 00200–00205
Plaintiff's First Amended Complaint (filed 07/01/09)	Vol. 1, Bates No. 00206–00262
Plaintiff's Demand for Jury Trial (filed 07/07/09)	Vol. 2, Bates No. 00263–00265
Scott Financial Corporation and Bradley J. Scott's Answer to First Amended Complaint (filed 07/20/09)	Vol. 2, Bates No. 00266–00296
Defendant Bank of Oklahoma, N.A.'s Answer to Plaintiffs' First Amended Complaint (filed 07/21/09)	Vol. 2, Bates No. 00297–00342
Defendants Scott Financial Corporation and Bradley J. Scott's Motion to Strike Jury Demand (filed 08/06/09)	Vol. 2, Bates No. 00343–00432
Scott Financial Corporation and Bradley J. Scott's Errata to Answer to First Amended Complaint (filed 08/10/09)	Vol. 2, Bates No. 00433–00436
Defendant Bank of Oklahoma, N.A.'s Answer to Plaintiffs' First Amended Complaint and Counterclaim Against Gary D. Tharaldson (filed 08/10/09)	Vol. 2, Bates No. 00437–00479
Defendants Scott Financial Corporation and Bradley J. Scott's Motion for Firm Trial Setting (filed 08/20/09)	Vol. 2, Bates No. 00480–00483
Gary D. Tharaldson's Reply to Bank of Oklahoma N.A.'s Counterclaim (filed 08/31/09)	Vol. 2, Bates No. 00484–00492
Response to Defendants Scott Financial Corporation and Bradley J. Scott's Motion for Firm Trial Setting (filed 09/08/09)	Vol. 2, Bates No. 00493–00499

Opposition to Defendants Scott Financial Corporation and Bradley J. Scott's Motion to Strike Jury Demand (filed 09/08/09)	Vol. 3, Bates No. 00500-00512
Defendants Scott Financial Corporation and Bradley J. Scott's Reply in Support of Motion to Strike Jury Demand (filed 09/28/09)	Vol. 3, Bates No. 00513-00521
Defendant Bank of Oklahoma's Joinder in Defendants Scott Financial Corporation and Bradley J. Scott's Motion to Strike Jury Demand (filed 09/29/09)	Vol. 3, Bates No. 00522-00525
Court Minutes October 05, 2009: Motion for Firm Trial Setting: Granted; Motion to Strike Jury Demand: Denied (filed 10/05/09)	Vol. 3, Bates No. 00526-00528
Notice of Entry of Order Granting Motion for Firm Trial Setting (filed 11/09/09)	Vol. 3, Bates No. 00529-00533
Notice of Entry of Order Denying Motion to Strike Jury Demand Without Prejudice (filed 11/09/09)	Vol. 3, Bates No. 00534-00538
Plaintiffs' More Definite Statement of Fraud Claims Against Defendant APCO Construction (filed 11/24/09)	Vol. 3, Bates No. 00539-00543
Order Setting Civil Jury Trial, Pre-Trial, and Calendar Call (filed 12/11/09)	Vol. 3, Bates No. 00544-00546
APCO Construction's Answer to Plaintiffs' First Amended Complaint and Plaintiffs' More Definite Statement of Fraud Claims; and Cross-Claim (filed 01/25/10)	Vol. 3, Bates No. 00547-00589
Scott Financial Corporation and Bradley J. Scott's Amended Answer to APCO Construction's Cross-Claim (filed 02/23/10)	Vol. 3, Bates No. 00590-00607
Scott Financial Corporation, Bradley J. Scott and Bank of Oklahoma, N.A.'s Motion (1) To Bifurcate Trial, and (2) to Extend Deadline for Filing Motions <i>In Limine</i> ; and (3) Renewed Motion to Strike Jury Demand on Order Shortening Time (filed 01/10/11)	Vol. 3, Bates No. 00608-00626
APCO Construction's Joinder to Scott Financial Corporation, Bradley J. Scott and Bank of Oklahoma, N.A.'s Motion (1) To Bifurcate Trial, and (2) to Extend Deadline for Filing Motions <i>In Limine</i> ; and (3) Renewed Motion to Strike Jury Demand on Order Shortening Time (filed 01/17/11)	Vol. 3, Bates No. 00627-00629
Plaintiffs' Opposition to Fiduciary Defendants' Motion to Bifurcate Trial and Strike Jury Demand and Plaintiffs' Counter-Motion under Rule 39(c) for Advisory Jury on All Claims Not Triable of Right by Jury (filed 01/24/11)	Vol 3, Bates No. 00630-00753

Decision: Scott Financial's Motion for Summary Judgment Regarding Plaintiffs' First, Second and Third Claims for Relief: Granted in Part and Denied in Part; Bank of Oklahoma's Motion for Partial Summary Judgment on Plaintiffs' First and Second Claims for Relief: Granted (filed 01/25/11)	Vol. 4, Bates No. 00754-00757
Decision: Bank of Oklahoma's Motion for Partial Summary Judgment on Plaintiffs' Third, Seventh and Eleventh Claims for Relief: Granted; Scott Financial Corporation and Bradley J. Scott's Motion for Summary Judgment on Tharaldson's and Tharaldson Motels II Inc.'s Third and Seventh Claims for Relief and for Partial Summary Judgment on Their Eleventh Claim for Relief: Granted in Part as to the Third Claim, Denied in Part as to the Seventh and Eleventh Claims (filed 01/25/11)	Vol. 4, Bates No. 00758-00761
Joint Reply in Support of Scott Financial Corporation, Bradley J. Scott and Bank of Oklahoma, N.A.'s Motion (1) To Bifurcate Trial, and (2) to Extend Deadline for Filing Motions <i>In Limine</i> ; and (3) Renewed Motion to Strike Jury Demand on Order Shortening Time and Joint Opposition to Counter-Motion Under Rule 39(c) for Advisory Jury on All Claims Not Triable of Right by Jury (filed 01/28/11)	Vol. 4 Bates No. 00762-00798
Court Minutes January 31, 2011: Motion to 1) Bifurcate Trial, 2) Extend Deadline for Filing Motions <i>In Limine</i> , and 3) Renewed Motion to Strike Jury Demand: Under Advisement; Joinder to Motion to 1) Bifurcate Trial, 2) Extend Deadline for Filing Motions <i>In Limine</i> , and 3) Renewed Motion to Strike Jury Demand: Under Advisement; Counter-Motion Under Rule 39(c) for Advisory Jury on All Claims Not Triable of Right by Jury: Continued (filed 01/31/11)	Vol. 4, Bates No. 00799-00802
Plaintiffs' Reply to Fiduciary Defendants' Joint Opposition to Plaintiffs' Motion Under Rule 39(c) for Advisory Jury on All Claims Not Triable of Right by Jury (filed 02/01/11)	Vol. 4, Bates No. 00803-00806
Court Minutes February 04, 2011: Motion to 1) Bifurcate Trial: Motion Granted, Court Will Try Guaranty Issues First in Bench Trial; Counter-Motion Under Rule 39(c) for Advisory Jury on All Claims Not Triable of Right by Jury: Denied (filed 02/04/11)	Vol. 4, Bates No. 00807-00808

Decision: Motion to 1) Bifurcate Trial, 2) Extend Deadline for Filing Motions <i>In Limine</i> , and 3) Renewed Motion to Strike Jury Demand: Under Advisement; Joinder to Motion to 1) Bifurcate Trial, 2) Extend Deadline for Filing Motions <i>In Limine</i> , and 3) Renewed Motion to Strike Jury Demand: Granted in All Respects; Counter-Motion Under Rule 39(c) for Advisory Jury on All Claims Not Triable of Right by Jury: Denied (filed 02/04/11)	Vol. 4, Bates No. 00809–00812
Decision: As to Club Vista- First, Second, Third and Fourth Claims for Relief: Denied; As to TM2I- Denied in Part as to the Second and Fourth Claims for Relief and Granted in Part as to the Third Claim for Relief; As to Tharaldson- Denied as to the First Claim for Relief (filed 2/07/11)	Vol. 4, Bates No. 00813–00817
Order Granting Motion (1) to Bifurcate Trial, (2) to Extend Time for Filing Motions <i>In Limine</i> , and (3) Renewed Motion to Strike Jury Demand, and Denying Plaintiffs' Counter-Motion Under Rule 39(c) for Advisory Jury on All Claims Not Triable of Right By Jury (filed 02/10/11)	Vol. 4, Bates No. 00818–00820
Transcript of Proceedings: Hearing on Motions (filed 02/10/11)	Vol. 4, Bates No. 00821–00876
Notice of Entry of Order Denying Plaintiffs' Motion for Partial Summary Judgment RE: First and Prior Lien Condition (filed 02/10/11)	Vol. 4, Bates No. 00877–00882
Notice of Entry of Order Denying Plaintiffs' Motion for Partial Summary Judgment RE: Construction Risk Conditions (filed 02/10/11)	Vol. 4, Bates No. 00883–00887
District Court Docket	Vol. 4, Bates No. 00888–00915

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*[Signature]*  
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13  
14 DISTRICT COURT  
15 CLARK COUNTY, NEVADA

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

21 Plaintiffs,

22 v.

23 SCOTT FINANCIAL CORPORATION, a North  
24 Dakota corporation; BRADLEY J. SCOTT;  
25 BANK OF OKLAHOMA, N.A., a national bank;  
26 GEMSTONE DEVELOPMENT WEST, INC., a  
27 Nevada corporation; ASPHALT PRODUCTS  
28 CORPORATION D/B/A APCO  
CONSTRUCTION, a Nevada corporation; DOE  
INDIVIDUALS 1-100; and ROE BUSINESS  
ENTITIES 1-100,

Defendants.

Case No. *AJ79963*  
Department No. *X1*

COMPLAINT

Exemption From Arbitration Claim:  
Matter Involves Title to Real Estate

RECEIVED COME NOW the Plaintiffs, by and through their counsel undersigned, and for their

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1 complaint against Defendant allege as follows:

2 **Nature of the Action**

3 1. This action results from the fraud, constructive fraud, and breach of fiduciary duty  
4 by financial advisors to the Plaintiffs in a \$150,000,000 real estate loan transaction relating to  
5 the Manhattan West mixed use project on Russell Road in Las Vegas, Nevada. A site plan and  
6 photos of the Project are attached as Exhibit A hereto. An overview of Plaintiffs claims is found  
7 in paragraphs 20-27 below.

8 **Plaintiffs**

9 2. Plaintiff Club Vista Financial Services LLC ("CVFS") is a Nevada limited liability  
10 company with its principal place of business in Las Vegas, Nevada.

11 3. Plaintiff Tharaldson Motels II, Inc. ("TM2I"), is a North Dakota global  
12 corporation with its principal place of business in Las Vegas, Nevada.

13 4. Plaintiff Gary D. Tharaldson ("Tharaldson") is a resident of the State of Nevada.  
14 Tharaldson indirectly owns one hundred percent of the member interests in CVFS a minority  
15 interest in TM2I..

16 5. CVFS, TM2I, and Tharaldson are hereinafter collectively referred to as "Plaintiffs."

17 **The Fiduciary Defendants**

18 6. Defendant Scott Financial Corporation ("SFC") is a North Dakota corporation  
19 with its principal place of business in Bismark, North Dakota. SFC is engaged in the business  
20 of underwriting and originating loans, selling participations in those loans to various banks,  
21 financial institutions, and other investors, and servicing the loans. SFC was a long-time  
22 financial advisor to the Plaintiffs. SFC is sued on its own account and in its representative  
23 capacity as Co-Lead Lender for 29 participating lenders on the Senior Loan defined below,  
24 including CVFS.

25 7. Defendant Bradley J. Scott ("Scott"), a resident of North Dakota, is the owner,  
26 director, and officer of SFC.

27 8. Defendant Bank of Oklahoma, N.A. ("BOK") is a national bank with its principal  
28 place of business in Tulsa, Oklahoma. BOK acted in a fiduciary capacity to Plaintiffs as Co-

1 Lead Lender in a \$110,000,000 loan transaction. BOK is sued on its own account and in its  
2 representative capacity as Co-Lead Lender for 28 other participating lenders on the Senior Loan  
3 defined below, including CVFS.

4 9. SFC, Scott, and BOK are hereinafter referred to as the "Fiduciary Defendants."

5 **Owner Defendant**

6 10. Defendant Gemstone Development West, Inc. ("Gemstone West Inc.") is a Nevada  
7 corporation which is an obligor by assumption on the Prior Loan and a direct obligor on the  
8 Senior Loan, both as defined below, and which owns certain real property located in Clark  
9 County, Nevada described on Exhibit B (the "Property"), which is security for both the Prior  
10 Loan and the Senior Loan. Gemstone West Inc. is named as a defendant in this action because  
11 it claims an interest in the Property and is therefore an appropriate party to ensure a full  
12 adjudication concerning conflicting claims and interests in the Property.

13 **Contractor Defendant**

14 11. Defendant Asphalt Products Corporation d/b/a APCO Construction ("Contractor")  
15 is a Nevada corporation which contracted and was responsible for construction of the Project  
16 on the Property. Contractor is named as a defendant in this action because it has filed liens  
17 against the Property or has caused liens to be filed against the Property directly contrary to its  
18 agreement to subordinate its claims (as set forth herein) in favor of the lender under the Senior  
19 Loan.

20 **Fictitious Defendants**

21 12. Plaintiffs are informed and believe and therefore allege that the true names and  
22 capacities whether individuals, corporate entities, associates or otherwise of DOE 1-100 and  
23 ROE 101-200 are presently unknown to Plaintiffs and therefore sue said Defendants by said  
24 fictitious names. Plaintiffs are informed and believe and therefore allege that each of the  
25 Defendants designated as DOE and ROE is responsible in some manner for the events and  
26 happenings described in this Complaint, which proximately caused the damages to Plaintiffs as  
27 alleged herein, or claim some interest in the Project, over which Plaintiff's claims have priority.  
28 Plaintiffs will seek leave of this Court to amend its Complaint to insert the true names and

1 capacities of the DOE and ROE parties and state appropriate charging allegations when that  
2 information has been ascertained.

3 **Subject Matter Jurisdiction**

4 13. This Court has subject matter jurisdiction under Article 6, Section 6 of the Nevada  
5 Constitution and under NRS 4.370(1), because the amount in controversy exceeds \$10,000 and  
6 under NRS 4.370(2) because the case involves title to real property and is not a forcible entry  
7 and detainer action.

8 14. Plaintiffs also invoke the Nevada Uniform Declaratory Judgment Act, NRS 30.010  
9 to 30.160.

10 **General and Personal Jurisdiction**

11 15. SFC is qualified to do business in, and does business in, Clark County, Nevada.  
12 In addition, SFC is subject to personal jurisdiction in this Court under NRS 14.065 because it  
13 has caused events to occur in Las Vegas, Nevada, which are the subject matter of this action; and  
14 because the Senior Debt Loan Agreement out of which this action arises provides for personal  
15 jurisdiction in Clark County, Nevada.

16 16. Scott is subject to personal jurisdiction in this Court under NRS 14.065 because  
17 he has caused events to occur in Las Vegas, Nevada, which are the subject matter of this action.

18 17. BOk is subject to personal jurisdiction in this Court under NRS 14.065 because  
19 it has caused events to occur in Las Vegas, Nevada, which are the subject matter of this action;  
20 and because the Senior Debt Loan Agreement in which it owns a participation and acts as Co-  
21 Lead Lender, provides for personal jurisdiction in Clark County, Nevada.

22 18. Gemstone West Inc. and Contractor are subject to general jurisdiction in this Court  
23 because their principal place of business is in Clark County, Nevada.

24 **Venue**

25 19. Venue is appropriate in this Court under NRS 13.010(2)(a) and (c) because this  
26 dispute involves interests in real property located in Clark County, Nevada. Venue is also  
27 appropriate under NRS 13.040 as to SFC and Gemstone West Inc., because they are engaged in  
28 business in Clark County, Nevada. Furthermore, the Senior Debt Loan Agreement out of which

1 this action arises provides for venue in the state and federal courts located in Clark County,  
2 Nevada. Finally, the *res* of the action is real property located in Clark County, Nevada, in which  
3 Plaintiffs and Defendants claim an interest.

4 **Overview of Plaintiffs' Claims**

5 20. SFC is the lender with respect to the Prior Loan and the Edelstein Loan, as  
6 hereinafter defined, the current principal balances of which are approximately \$50,000,000. The  
7 Prior Loan and the Edelstein Loan, both made in June 2006, financed the acquisition and  
8 development of, and are secured by, a mixed use real estate development project on the Property  
9 known as Manhattan West, Phase 1 (the "Project").

10 21. Plaintiff CVFS is the 100% participant in and the 100% owner of the Lender's  
11 interest in the Prior Loan and the Edelstein Loan. SFC was CVFS's agent in all matters relating  
12 to the Prior Loan and the Edelstein Loan.

13 22. SFC and BOk are Co-Lead Lenders with respect to a Senior Loan as hereinafter  
14 defined, originated in January 2008, which has provided funding for the vertical construction  
15 of the Project, the current principal balance of which is about \$82,000,000.

16 23. SFC and BOk, as Co-Lead Lenders, are agents of the approximately 28 other  
17 participants in the Senior Loan, were jointly responsible for all aspects of the closing of the  
18 Senior Loan, and are jointly responsible for its subsequent administration.

19 24. Each of SFC and BOk, as joint agents and partners with respect to the  
20 administration and management of the Senior Loan, are bound by all acts of the other relating  
21 to the Senior Loan, and together are jointly and severally liable for any and all damages that may  
22 be awarded herein.

23 25. Based upon the longstanding position of trust and confidence as a financial advisor  
24 to Plaintiffs, Scott, on behalf of SFC and BOk, approached Tharaldson concerning participation  
25 in the Senior Loan.

26 26. In reliance on information Scott provided, and on the position of trust and  
27 confidence Scott occupied with him, at Scott's recommendation Tharaldson: (a) signed the  
28 Senior Loan Agreement under the heading "Acknowledgment of Guarantor"; (b) through

1 CVFS, acquired a participating interest in the Senior Loan (the "CVFS Participation"); (c)  
2 signed a guaranty of the Senior Loan (the "Guaranty") for a fee negotiated by Scott; (d) through  
3 TM2I, signed its guaranty of the Senior Loan (the "TM2I Guaranty") and (e) consented to SFC's  
4 subordination of the Prior Loan to the Senior Loan (the "Subordination"). The foregoing are  
5 hereafter sometimes collectively referred to as the Plaintiff's Senior Loan Documents.

6 27. In recent months, Plaintiffs discovered that the Fiduciary Defendants had induced  
7 the Senior Loan Agreement execution, the CVFS Participation, the Subordination, the Guaranty,  
8 and the TM2I Guaranty by actual fraud and constructive fraud, including egregious breaches  
9 of fiduciary duty, and Plaintiffs therefore seek, along with other relief:

- 10 A. A declaration that as of January 12, 2009, SFC's agency for CVFS with  
11 respect to the Prior Loan, the Edelstein Loan, the Mezzanine Loan and the  
12 Senior Loan has been terminated.
- 13 B. A declaration that the Plaintiffs' Senior Loan Documents are not legally  
14 binding or enforceable obligations of Plaintiffs.
- 15 C. A declaration that upon restoration by CVFS to SFC and BOK as agents for  
16 the Senior Loan participants, the net paydown of approximately  
17 \$10,000,000 CVFS received on the Prior Loan at the Senior Loan closing  
18 and interest thereon, the Subordination is rescinded.
- 19 D. A declaration that the Deeds of Trust securing the Prior Loan are prior and  
20 superior to the Senior Loan Deed of Trust and any other liens recorded  
21 after recordation of the Prior Loan Deeds of Trust.
- 22 E. In the alternative, if the Court determines any of the Plaintiffs' Senior Loan  
23 Documents to be valid, binding, and enforceable against Plaintiffs, a  
24 judgment against the Fiduciary Defendants for damages caused by their  
25 fraud, constructive fraud, breach of fiduciary duty, breach of contract,  
26 breach of the implied covenant of good faith and fair dealing, and  
27 negligence, and for punitive damages for fraud and breach of fiduciary  
28 duty.

**Relation of Trust and Confidence**

28. Tharaldson's business relationship with Scott began in about 1992. Scott was employed by Bismark National Bank in Bismark, North Dakota. Scott arranged several loans to Tharaldson to finance acquisition or construction of motel properties. In about 2000, Scott, through Bismark National Bank, arranged a \$50,000,000 loan to facilitate Tharaldson's sale of motel properties. Scott also arranged some unsecured lines of credit for Tharaldson.

29. In 2003, Scott left Bismark National Bank and founded his own company, SFC, a firm specializing in corporate lending and lending services.

30. Since 2003, Scott has advised Tharaldson concerning business and financial matters, including numerous investments in real estate loans originated, underwritten, and administered by Scott through SFC for the benefit of CVFS and Tharaldson (the "SFC Loans").

31. Since the inception of their business relationship, Tharaldson or entities he controls have invested in the following SFC Loans based on Scott's advice and recommendation:

- A. \$65,600,000 construction loan and \$38,900,000 construction loan to Gemstone LVS, LLC made in June, 2004 in which Tharaldson Financial Group, Inc. was lender and SFC was its financial consultant in the underwriting, documentation and servicing, secured by Phase 1 and Phase 2 respectively of the Manhattan Project in Las Vegas, Nevada.
- B. \$10,000,000 construction loan made October 2005 and subsequently modified and extended, \$2,000,000 second loan made in March 2006, and \$3,750,000 inventory loan made in September 2008, in all of which Mesquite Investor Group is the borrower, SFC is lender, and Tharaldson Financial Group, L.L.C. is the 100% participant and owner of the Lender's interest, secured by a condominium project in Mesquite, Nevada.
- C. \$2,400,000 subordinate loan and \$4,000,000 senior loan to 40<sup>th</sup> Street and Baseline, LLC made in March, 2006, in which SFC is the Lender and CVFS is the 100% participant and owner of the Lender's interest, secured

- 1 by real property located in Phoenix, Arizona.
- 2 D. \$2,250,000 subordinate loan and \$3,750,000 senior loan to El Mirage and
- 3 Camelback, LLC made March, 2006, in which SFC is the Lender and
- 4 CVFS is the 100% participant and owner of the Lender's interest, secured
- 5 by real property located in Phoenix, Arizona.
- 6 E. \$46,000,000 land loan to Desert Springs Partners, L.L.C. and Ave. 48
- 7 Investment Group, L.L.C. made in August 2006 with a maturity of January
- 8 1, 2009, in which SFC is the Lender and CVFS is the majority participant
- 9 and majority owner of the Lender's interest, secured by land located in
- 10 Palm Springs, California.
- 11 F. \$10,000,000 subordinate and \$20,000,000 senior land loan to Torrey Pines
- 12 Development, LLC, ABCDW, LLC, and Vanderbilt Farms, LLC with SFC
- 13 as the Lender and CVFS as the 100% participant and owner of the
- 14 Lender's interest, made in September 2006 with a maturity of December
- 15 31, 2008, secured by land in western Maricopa County, Arizona.
- 16 G. \$20,000,000 subordinate and \$82,000,000 senior land loan to Vanderbilt
- 17 Farms, Vineyard Farms, ABCDS, and Gillespie Properties with SFC as
- 18 Lender and CVFS as the majority participant and majority owner of the
- 19 Lender's interest, made in September 2006 with a maturity of December
- 20 31, 2008, secured by land in western Maricopa County, Arizona.
- 21 H. \$1,890,000 subordinate and \$3,150,000 senior loan to Leadermark
- 22 Communities made in February, 2007, in which SFC was the Lender and
- 23 CVFS was the 100% participant and owner of the Lender's interest,
- 24 secured by real property located in Phoenix, Arizona.
- 25 32. During this relationship, Scott and SFC became intimately aware of Tharaldson's
- 26 businesses, assets, income, cash flows, and manner of operation. Indeed, throughout this
- 27 relationship Scott reviewed Tharaldson's internal personal financial statements and provided
- 28 presentation and formatting suggestions. Also, Scott routinely reformatted Tharaldson financial

1 information for banks with whom Tharaldson deals and spoke directly with banks who sought  
2 to remain current on Tharaldson's financial information.

3 33. In each of the SFC Loans, Plaintiffs relied entirely upon Scott and SFC to prepare  
4 the appropriate loan documentation to protect their legal and financial interests in the SFC  
5 Loans. SFC typically prepared the loan documents for the SFC Loans in its name as the Lender.  
6 The only documentation Plaintiffs typically signed with respect to each of the SFC Loans was  
7 a separate Non-Recourse Participation Agreement and related commitment acknowledging their  
8 acquisition of ownership of the particular SFC Loan as the Participant.

9 34. Since about 2003, Tharaldson has provided to Scott and SFC office space and  
10 facilities, lodging accommodations, and transportation assistance through Tharaldson's Las  
11 Vegas office on Scott's regular trips to Las Vegas.

12 35. SFC is licensed by the Mortgage Lending Division of the Nevada Department of  
13 Business and Industry. Its license with the Mortgage Lending Division lists Tharaldson's son,  
14 Matt Tharaldson, as SFC's "licensed employee" in Las Vegas.

15 36. Scott has regularly described his role as overseeing Tharaldson's lending division  
16 and third parties have in turn referred to Scott as overseeing Tharaldson's lending operations.

17 37. In 2005 or 2006, when the University of Mary in Bismark, North Dakota was to  
18 present an entrepreneurship award to Tharaldson, University of Mary asked Scott to introduce  
19 Tharaldson at the formal presentation program.

20 38. From January through April 2006, a period during which several of the SFC loans  
21 were made, Tharaldson underwent double knee replacement surgeries and back surgery. A long  
22 period of recovery followed that included pain medications until February 2007, during which  
23 several more of the SFC loans were made.

24 39. In connection with each of the SFC Loans, Scott through SFC has performed the  
25 due diligence investigation, negotiated the loan terms with the borrower, hired the same counsel  
26 to represent both SFC and CVFS as the participant in documenting the loan, selected the title  
27 insurer for obtaining lenders title insurance policies on the real estate loan collateral, sold  
28 participations in the loans to Plaintiffs, and then performed all loan administration and servicing,

1 including collection of interest and principal from the borrower and remitting those payments,  
2 less SFC's fees, to Plaintiffs and any other participants.

3 40. Plaintiffs' investment in each of the SFC Loans was documented by a separate  
4 Nonrecourse Loan Participation Agreement (Consulting Agreements in the case of the  
5 Manhattan Loans) prepared by Scott. Each participation agreement (and the Consulting  
6 Agreements in the case of the Manhattan Loans) appoints SFC as the agent of CVFS or other  
7 Tharaldson affiliate with respect to the loan and acknowledges the fiduciary relationship  
8 between SFC and such participant.

9 41. SFC and Scott have earned substantial loan origination fees and servicing fees for  
10 their work on the SFC Loans in which Plaintiffs invested based upon their expert advice and  
11 recommendations.

#### 12 The Project

13 42. Manhattan West is located on the Property which is 21 acres of land on Russell  
14 Road in Las Vegas, Nevada.

15 43. Gemstone Apache, LLC, a Nevada limited liability company ("Apache") acquired  
16 the land in June 2006 from unrelated parties for \$31,540,000.

17 44. Manhattan West was designed and approved as a mixed use community featuring  
18 more than 600 condominium residences in one 11 story tower and several mid-rise buildings,  
19 plus 200,000 square feet of shops, restaurants, and office and hotel space.

20 45. The Project, Phase 1 of Manhattan West, involves approximately 228 residential  
21 condominium units and approximately 195,350 square feet of retail and office space.

#### 22 The Prior Loan and the Edelstein Loan

23 46. On or about June 26, 2006, SFC, as lender, entered into a Loan Agreement with  
24 Apache, as borrower (the "Prior Loan Agreement").

25 47. Pursuant to the Prior Loan Agreement, SFC agreed to loan Apache up to  
26 \$25,000,000 (the "Prior Loan").

27 48. The Prior Loan was composed of two parts represented by two separate notes: a  
28 "junior loan" in the amount of the lesser of \$10,000,000 or 30% of the Development Costs (as

1 defined in the Prior Loan Agreement) (the "First Junior DOT Note"), and a "senior loan" in the  
2 amount of the lesser of \$15,000,000 or 50% of the "As-Is" appraised value of the land  
3 underlying the Property (the "First Senior DOT Note").

4 49. The First Junior DOT Note is a multiple advance closed end note dated June 26,  
5 2006 bearing interest at the fixed rate of 16.50% per annum. The First Junior DOT Note calls  
6 for monthly interest payments only, with the entire principal balance, and all unpaid accrued  
7 interest, due in full on the maturity date set forth in the Prior Loan Agreement (November 1,  
8 2007 unless earlier accelerated following a default).

9 50. The First Senior DOT Note is a multiple advance closed end note dated June 26,  
10 2006 bearing interest at the fixed rate of 10.50 % per annum. The First Senior DOT Note calls  
11 for monthly interest payments only, with the entire principal balance, and all unpaid accrued  
12 interest, due in full on the maturity date set forth in the Prior Loan Agreement (November 1,  
13 2007 unless earlier accelerated following a default).

14 51. The First Junior DOT Note, which was to be funded first, was to be secured by a  
15 Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing on  
16 the Property and the Project executed by Apache in favor of SFC (the "First Junior DOT").

17 52. The First Junior DOT is dated June 26, 2006 and was recorded on July 5, 2006 in  
18 the real property records of Clark County, Nevada at Book 20060705, Instrument No. 0004265.

19 53. The First Senior DOT Note, which was to be funded after the First Junior DOT  
20 Note, was to be secured by a Senior Deed of Trust and Security Agreement with Assignment of  
21 Rents and Fixture Filing on the Property and the Project executed by Apache in favor of SFC  
22 (the "First Senior DOT").

23 54. The First Senior DOT is dated June 26, 2006, and was recorded on July 5, 2006  
24 in the real property records of Clark County, Nevada at Book 20060705, Instrument No.  
25 0004264.

26 55. In addition, the Prior Loan Agreement provided that a Third Deed of Trust and  
27 Security Agreement with Assignment of Rents and Fixture Filing on the Property and the Project  
28 (the "Third DOT") would be executed by Apache in favor of SFC to secure a \$13,000,000 note

1 made by Edelstein payable to SFC (the "Edelstein Note").

2 56. The Third DOT is dated June 26, 2006, and was recorded on July 5, 2006 in the  
3 real property records of Clark County, Nevada at Book 20060705, Instrument No. 0004266.

4 57. The Edelstein Note was executed in connection with a Loan Agreement between  
5 Edelstein and SFC dated June 26, 2006 (the "Edelstein Loan Agreement"), the funds of which  
6 were to be used solely for the purpose of contributing the Owner's Equity to Apache as needed  
7 under the Prior Loan Agreement.

8 58. The Edelstein Note is dated June 26, 2006 and is in the principal amount of  
9 \$13,000,000 bearing interest at a fixed rate of 16.5% interest per annum. The Edelstein Note  
10 calls for monthly interest payments only, with the entire principal balance, and all unpaid  
11 accrued interest, due in full on the maturity date set forth in the Edelstein Loan Agreement  
12 (November 1, 2007 unless earlier accelerated following a default).

13 59. In addition to the First Junior DOT, First Senior DOT, and Third DOT on the  
14 Project, the Prior Loan Agreement also provided for the pledging of additional collateral by  
15 Apache, Edelstein, Gemstone LVS, L.L.C., a Delaware limited liability company ("Gemstone  
16 LVS") and Gemstone Development West, L.L.C., as developer as security for the Prior Loan  
17 and/or the Edelstein Loan.

18 60. Part of the additional collateral for the Prior Loan and Edelstein Loan included a  
19 pledge by Gemstone LVS of certain of collateral, including but not limited to the 59 then unsold  
20 condominium units in the Manhattan Project (the "Condo Units").

21 61. On or about June 26, 2006, Gemstone LVS executed a Junior Third Party Deed  
22 of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit)  
23 in favor of SFC, which was recorded on July 5, 2006 in the real property records of Clark  
24 County, Nevada at Book 20060705, Instrument No. 0004259 (the "Gemstone LVS DOT").

25 62. Pursuant to a Nonrecourse Participation Agreement dated May 23, 2006 by and  
26 between SFC on the Condo Units, as Originating Lender, and CVFS, as Participant, as amended  
27 by the Addendum to Nonrecourse Participation Agreement dated May 23, 2006, as well as a  
28 Commitment to Participate executed on or about June 29, 2006 (the "Prior Loan Participation

1 Agreement"), CVFS agreed to provide the funds for the Prior Loan. Under the Prior Loan  
2 Participation Agreement, as pertaining to the First Senior DOT Note, CVFS was to receive  
3 10.00% interest and SFC made a service fee of 0.50%, and pertaining to the First Junior DOT  
4 Note, CVFS was to receive 16.00% interest and SFC made a service fee of 0.50%. The Prior  
5 Loan Participation Agreement provided that SFC was agent for CVFS concerning the Prior Loan  
6 and acknowledged SFC's fiduciary duties to CVFS.

7 63. Pursuant to a Nonrecourse Participation Agreement dated May 23, 2006 by and  
8 between SFC, as Originating Lender, and CVFS, as Participant, as amended by the Addendum  
9 to Nonrecourse Participation Agreement executed May 23, 2006, as well as a Commitment to  
10 Participate dated on or about June 26, 2006 (the "Edelstein Loan Participation Agreement"),  
11 CVFS agreed to provide the money necessary to fund the Edelstein Note. Under the Edelstein  
12 Loan Participation Agreement, CVFS was to receive 16% interest and SFC made a service fee  
13 of .50%. The Edelstein Loan Participation Agreement provided that SFC was agent for CVFS  
14 concerning the Edelstein Loan and acknowledged SFC's fiduciary duties to CVFS.

15 64. The parties contemplated that at the maturity date of the Prior Loan, the First  
16 Junior DOT Note and First Senior DOT Note would be restructured into one credit facility  
17 which would be a construction loan.

18 65. The developer of the Project was Gemstone Development West, LLC, a Nevada  
19 limited liability company ("Developer") which owned 100% of the equity interests in Apache.

20 66. Gemstone Development, L.L.C., a Nevada limited liability company ("Gemstone  
21 Development") is wholly owned by Edelstein and serves as manager to Gemstone LVS.

22 67. The Prior Loan and the Edelstein Loan were to be repaid from: a) the proceeds of  
23 any equity interests in Apache sold by Apache, Gemstone West, L.L.C. or Edelstein; b) all net  
24 income of Gemstone LVS and the proceeds from the sale of equity interests in Gemstone LVS;  
25 and c) any and all payments due and owing Gemstone Development under a Profit Sharing  
26 Agreement dated October 29, 2004 between Gemstone Development (as successor to Gemstone  
27 Properties, LLC) and Tharaldson Financial Group, Inc.

28 68. All advances under the Prior Loan were subject to the satisfaction of several

1 conditions precedent set forth in Article 3 of the Prior Loan Agreement, including but not limited  
2 to:

- 3 A. Title to the Trust Property being approved by SFC and SFC's counsel;
- 4 B. A title insurance company selected by SFC having committed to issue a  
5 title policy in form and substance acceptable to SFC;
- 6 C. Apache not being in default under any of the documents relating to the  
7 Prior Loan or the Edelstein Loan;
- 8 D. SFC having a first perfected lien on all collateral securing the repayment  
9 of the Prior Loan and Edelstein Loan, subject to no prior liens or interests  
10 except for "Permitted Encumbrances";
- 11 E. There being no material adverse change in the financial or other condition  
12 of Apache, the Project, or any other Obligor; and
- 13 F. No Default having occurred under the Prior Loan Agreement or under any  
14 loan agreement or other agreement relating to the Property and Project.

15 69. Under Section 5 of the Prior Loan Agreement, Apache covenanted and agreed not  
16 to create, permit to be created, or allow to exist, any liens, charges or encumbrances on the  
17 Project other than Permitted Encumbrances, or those allowed by the Collateral Documents.

18 70. Article 6 of the Prior Loan Agreement defines an Event of Default which includes,  
19 among other things: a) a default under the Edelstein loan documents; b) a default by Gemstone  
20 LVS or any other borrower on any financing related to the Manhattan Project after any  
21 applicable grace or cure period; c) Apache fails to pay principal or interest under the First Junior  
22 DOT Note of First Senior DOT Note and such failure continues for a period of ten (10) days  
23 after written notice to Apache; d) if any representation or warranty made by Apache in the Prior  
24 Loan Agreement or in any certificate or document furnished pursuant to the Prior Loan  
25 Agreement proves untrue; e) if Apache fails to keep, enforce, perform and maintain in full force  
26 and effect any provision of the Prior Loan Agreement or any of the Collateral Documents; f) if  
27 Apache further encumbers the Project or an interest therein without the prior written approval  
28 of Lender, except as otherwise permitted in the Collateral Documents; g) if Apache, Developer,

1 Gemstone Development or Gemstone LVS creates or permits to exist any security interest on  
2 any real or personal property asset, including but not limited to collateral for the Prior Loan and  
3 Edelstein Loan, except: i) those security interests in favor of SFC held by SFC, ii) those security  
4 interests constituting Permitted Encumbrances, or iii) tax liens not yet due and payable or being  
5 contested in good faith; h) if Apache, Developer, Gemstone Development or Gemstone LVS  
6 grant any lien on its assets other than the pledges and liens executed in connection with the Prior  
7 Loan and existing liens granted in connection with the Manhattan Project; or i) Apache fails to  
8 keep in force or maintain any provision of the Prior Loan Agreement or any of the Collateral  
9 Documents or makes any untrue representation or warranty.

10 **Subsequent Changes to Prior Loan and Edelstein Loan Before the Senior Loan**

11 71. On or about May 23, 2007, Apache and SFC entered into a First Amendment to  
12 Loan Agreement relating to the Prior Loan ("Prior Loan First Amendment").

13 72. Under the Prior Loan First Amendment, among other things, SFC agreed to  
14 provide additional financing to Apache in the form of an additional line of credit in the amount  
15 of \$8,000,000.00 to pay additional costs related to the Project, which additional sum was to be  
16 secured by the First Junior DOT.

17 73. On or about May 23, 2007, Apache executed an Additional Line of Credit Note  
18 in favor of SFC (the "LOC Note"). The LOC Note is a multiple advance closed end note  
19 bearing interest at the fixed rate of 14.5% per annum. The LOC Note calls for monthly interest  
20 payments only, with the entire principal balance, and all unpaid accrued interest, due in full on  
21 the maturity date set forth in the Prior Loan Agreement (November 1, 2007 unless earlier  
22 accelerated following a default).

23 74. The First Junior DOT was amended by a First Amendment Junior Deed of Trust  
24 and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) dated May  
25 22, 2007 and recorded in the real property records of Clark County, Nevada on May 22, 2007  
26 at Book 20070522, Instrument No. 0004011, to increase the amount secured thereby to  
27 \$18,000,000.00.

28 75. Pursuant to a Nonrecourse Participation Agreement dated May 15, 2007 by and

1 between SFC, as Originating Lender, and CVFS, as Participant, as amended by the Addendum  
2 to Nonrecourse Participation Agreement dated May 15, 2007, as well as a Commitment to  
3 Participate executed on or about May 17, 2007 (the "LOC Participation Agreement"), CVFS  
4 agreed to provide the funds for the Additional LOC Note. Under the LOC Participation  
5 Agreement, CVFS was to receive 14.0% interest and SFC made a service fee of .50%. The LOC  
6 Participation Agreement provided that SFC was agent for CVFS concerning the Additional LOC  
7 Note and acknowledged SFC's fiduciary duties to CVFS.

8 76. On or about October 19, 2007, Edelstein and SFC entered into a First Amendment  
9 to Loan Agreement pertaining to the Edelstein Loan ("Edelstein First Amendment") whereby  
10 SFC agreed to advance to Edelstein an additional \$10,000,000 for interim funding to be repaid  
11 by the anticipated but not yet funded vertical construction financing. In addition, the parties  
12 extended the maturity date of the Edelstein Note to December 31, 2007.

13 77. On or about October 19, 2007, Edelstein and SFC entered into a Senior Debt  
14 Construction Line of Credit Note in the principal amount of \$10,000,000 bearing interest at a  
15 fixed rate of 14.0% interest (the "Construction LOC Note"). The Construction LOC Note calls  
16 for monthly interest payments only, with the entire principal balance, and all unpaid accrued  
17 interest, due in full on the maturity date set forth in the Edelstein Loan Agreement, as amended  
18 (December 31, 2007 unless earlier accelerated following a default).

19 78. The Third DOT was amended by a First Amendment to Third Deed of Trust and  
20 Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) dated October  
21 19, 2007 and recorded in the Clark County, Nevada land records on October 24, 2007 at Book  
22 20071024, Instrument No. 0004182, amending the Third DOT to secure the Construction LOC  
23 Note in addition to the Edelstein Note.

24 79. Pursuant to a Nonrecourse Participation Agreement dated October 9, 2007 by and  
25 between SFC, as Originating Lender, and CVFS, as Participant, as amended by the Addendum  
26 to Nonrecourse Participation Agreement dated October 9, 2007, as well as a Commitment to  
27 Participate executed on or about October 12, 2007 (the "Construction LOC Participation  
28 Agreement"), CVFS agreed to provide funds for the Construction LOC Note to Edelstein.

1 Under the Construction LOC Participation Agreement, CVFS was to receive 13.5% interest and  
2 SFC made a service fee of .50%. The Construction LOC Participation Agreement provided that  
3 SFC was agent for CVFS concerning the Construction LOC Note and acknowledged SFC's  
4 fiduciary duties to CVFS.

5 80. On or about October 19, 2007, Apache and SFC entered into a Second  
6 Amendment to Loan Agreement to the Prior Loan Agreement (the "Prior Loan Second  
7 Amendment") to extend the maturity date under the Prior Loan Agreement to December 31,  
8 2007.

9 81. The Prior Loan Participation Agreement, the Edelstein Loan Participation  
10 Agreement, the LOC Participation Agreement, the Construction LOC Participation Agreement,  
11 and the Mezzanine Loans Participation Agreement are hereinafter collectively referred to as the  
12 "CVFS Pre-Senior Participation Agreements."

13 82. As of January 22, 2008, the total outstanding balance owed to Plaintiffs under the  
14 Prior Loan was approximately \$42,273,146 and under the Edelstein Loan was approximately  
15 \$13,000,000, for a total owed of approximately \$55,273,146.

#### 16 The Senior Loan

17 83. On or about January 22, 2008, SFC, as lender, entered into a Loan Agreement with  
18 Gemstone West Inc., as borrower (the "Senior Loan Agreement").

19 84. Pursuant to the Senior Loan Agreement, SFC agreed to loan Gemstone West Inc.  
20 up to the amount of \$110,000,000 (the "Senior Loan").

21 85. SFC and BOK are, and since the inception of the Senior Loan have been, Co-Lead  
22 Lenders on the Senior Loan.

23 86. At all times while acting as Co-Lead Lender with respect to the Senior Loan, BOK  
24 knew of the fiduciary relationship SFC occupied toward Plaintiffs due to the general relation of  
25 trust and confidence between them and due to the CVFS Pre-Senior Participation Agreements,  
26 each of which appointed SFC as agent for CVFS and acknowledged SFC's fiduciary duties to  
27 CVFS.

28 87. The Senior Loan was composed of two parts represented by two separate notes:

1 a "Senior Debt Construction Note" in the amount of the \$100,000,000 (the "Senior Construction  
2 Note") and a "Senior Debt Contingency Note" in the amount of \$10,000,000 (the "Senior  
3 Contingency Note").

4 88. The Senior Construction Note and Senior Contingency Note were secured by a  
5 Senior Debt Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing  
6 (Construction) dated January 22, 2008 between Gemstone West Inc, as trustor, and SFC, as  
7 beneficiary, which was recorded in the real property records of Clark County, Nevada on  
8 February 7, 2008, at Book 20080207, Instrument No. 0001482 (the "Senior DOT").

9 89. The Senior Construction Note is a revolving note dated January 22, 2008 in the  
10 principal amount of \$100,000,000 bearing interest at the fixed rate of 14.0% per annum. The  
11 Senior Construction Note calls for monthly interest payments only, with the entire principal  
12 balance, and all unpaid accrued interest, due in full on the maturity date set forth in the Senior  
13 Loan Agreement (December 31, 2009 unless earlier accelerated following a default).

14 90. A default occurs under the Senior Construction Note if, among other things: a)  
15 Gemstone West Inc. fails to make any payment when due and such default continues for 20 days  
16 after written notice; or b) a default occurs under the Senior Loan Agreement or the Senior DOT.

17 91. The Senior Contingency Note is a revolving note dated January 22, 2008 in the  
18 principal amount of \$10,000,000 bearing interest at the fixed rate of 14.0% per annum. The  
19 Senior Contingency Note calls for monthly interest payments only, with the entire principal  
20 balance, and all unpaid accrued interest, due in full on the maturity date set forth in the Senior  
21 Loan Agreement (December 31, 2009 unless earlier accelerated following a default).

22 92. A default occurs under the Senior Construction Note if, among other things: a)  
23 Gemstone West Inc. fails to make any payment when due and such default continues for 20 days  
24 after written notice; or b) a default occurs under the Senior Loan Agreement or the Senior DOT.

25 93. The Senior Loan Agreement refers to the Prior Loan and the Edelstein Loan, as  
26 amended, as the "Mezzanine Financing" and the documents relating to the Prior Loan and the  
27 Edelstein Loan, as amended, as the "Mezzanine Financing Documents."

28 94. The Senior Loan Agreement provides that Gemstone West Inc. would assume the

1 obligations of Apache under and in regards to the Mezzanine Financing as set forth in the  
2 Mezzanine Financing Documents, including but not limited to the obligations with respect to the  
3 First Junior DOT, First Senior DOT, and the Third DOT (as amended).

4 95. The Senior Loan Agreement provides that the First Junior DOT, First Senior DOT,  
5 and the Third DOT would subordinate to the Senior DOT.

6 96. Pursuant to Section 2.2 of the Senior Loan Agreement, the initial advance under  
7 the Senior Construction Note was to be used to pay the Mezzanine Financing with the exception  
8 of: a) land costs, b) loan fees or interest expense paid the Mezzanine Financing participant, or  
9 c) required equity as defined in the Section 3.1.10 of the Senior Loan Agreement.

10 97. All advances under the Senior Loan were subject to the satisfaction of several  
11 conditions precedent set forth in Article 3 of the Senior Loan Agreement, including but not  
12 limited to:

- 13 A. Title to the Trust Property being approved by SFC and SFC's counsel;
- 14 B. Gemstone West Inc. Delivering all documents requested by SFC;
- 15 C. Gemstone West Inc. not being in default under the Senior Loan  
16 Agreement, Collateral Documents, or under any of the Mezzanine  
17 Financing Documents; and
- 18 D. Gemstone West Inc. delivering to Lender an acceptable Abacus Project  
19 Feasibility Analysis.

20 98. Advances under the Senior Loan for the Construction of Improvements were  
21 subject to the satisfaction of several conditions precedent set forth in Article 4 of the Senior  
22 Loan Agreement, including but not limited to:

- 23 A. Gemstone West Inc. having aggregate pre-sale revenue of not less than  
24 \$60,000,000 from: (i) Qualified Sales of condo units, (ii) the capitalized  
25 value (at a 7.0% capitalization rate measured against triple net lease  
26 payments) of Class A office and retail leases, and (iii) the sales price of  
27 Class A office space; and
- 28 B. Gemstone West Inc. obtaining and maintaining certain nonrefundable cash

1                   deposits or deposit bonds on condominium units sold but not yet closed  
2                   and square footage leased.

3           99.    Section 5.4 of the Senior Loan Agreement provides that if Gemstone West Inc.  
4   withholds any amount from any contractor, SFC may withhold from Gemstone West Inc. 100%  
5   of that amount.

6           100. Section 6.2 of the Senior Loan Agreement requires, among other things, that: a)  
7   Gemstone West Inc. construct the Improvements free from any mechanic's, laborer's and  
8   materialman's liens; b) Gemstone West Inc. further covenants and agrees not to create, permit  
9   to be created, or allow to exist any liens, charges or encumbrances on the Trust Property and  
10   Improvements other than certain Permitted Encumbrances (as defined therein) or than those  
11   otherwise allowed by the Collateral Documents; and c) not encumber any interest of Gemstone  
12   West Inc. in the Property and Improvements without the prior written approval of Lender.

13          101. Under Section 6.2.17 of the Senior Loan Agreement, Gemstone West Inc. further  
14   covenants and agrees that there are no existing defaults or events of default under any of the  
15   Mezzanine Financing Documents.

16          102. Article 7 of the Senior Loan Agreement defines an event of default under the  
17   Agreement, and includes, among other things: a) if Gemstone West Inc. fails to pay principal  
18   or interest under the Senior Construction Note or Senior Contingency Note and such failure  
19   continues for a period of ten (10) days; b) if any representation or warranty made by Gemstone  
20   West Inc. in the Senior Loan Agreement or in any certificate or document furnished pursuant  
21   to the Senior Loan Agreement proves untrue; c) if Gemstone West Inc. fails to keep, enforce,  
22   perform and maintain in full force and effect any provision of the Senior Loan Agreement, the  
23   Collateral Documents or Construction Documents after 30 days written notice of said non-  
24   monetary default; and d) if Gemstone West Inc. further encumbers the Trust Property or  
25   Improvements or an interest therein without the prior written approval of SFC, except as  
26   otherwise permitted in the Collateral Documents.

27          103. In connection with the Senior Loan Agreement, Gemstone West Inc., as debtor,  
28   executed a Security Agreement dated January 22, 2008 (the "Security Agreement") in favor of

1 SFC, as secured party, under which Gemstone West Inc. granted SFC a security interest in all  
2 personal property of Gemstone West Inc. whether now owned or existing or thereafter acquired  
3 by Gemstone West Inc. (the "Personal Property").

4 104. Among other requirements, the Security Agreement obligated Gemstone West Inc.  
5 to keep the Personal Property free of all liens and encumbrances except as otherwise permitted  
6 by SFC, and to keep the Personal Property free from all liens and encumbrances other than  
7 SFC's paramount security interest, except for liens permitted under the Senior Loan Agreement.

8 105. Failure to comply with any provision of the Security Agreement is a default  
9 thereunder.

10 106. A default or event of default under the Senior Loan Agreement constitutes a  
11 default under the Security Agreement.

12 107. The Senior DOT provides that it shall secure future advances as if made on the  
13 date of the Senior DOT, up to the maximum amount of 150% of the principal amount of the  
14 Senior Construction Note and Senior Contingency Note.

15 108. The Senior DOT requires Gemstone West Inc. to pay, 10 days before default or  
16 delinquency, any obligations secured by liens, encumbrances, charges and/or claims on the  
17 Property or any part thereof, which appear to have priority over the lien of the Senior DOT.

18 109. The Senior DOT includes a Due on Sale clause which provides that Gemstone  
19 West Inc. shall not make a "Transfer of Interest", which includes but is not limited to, a sale,  
20 encumbrance or junior lien on the Property, without Trustor's prior written consent.

21 110. Under the Senior DOT, Gemstone West Inc. warranted that it was sole owner of  
22 good and marketable unencumbered title to the Property, subject to only matters approved by  
23 SFC.

24 111. Subject to any applicable cure period, failure to comply with any provision of the  
25 Senior DOT is a default thereunder.

26 112. The Senior DOT provides that a default or an Event of Default under the Senior  
27 Construction Note, Senior Contingency Note or the Senior Loan Agreement is a default under  
28 the Senior DOT.

1           113. As part of the Senior Loan Agreement, Tharaldson agreed to guarantee the Senior  
2 Loan pursuant to Guaranty, and Addendum thereto, each dated January 22, 2008.

3           114. In connection with the Senior Loan Agreement, TM2I agreed to guaranty the  
4 Senior Loan pursuant to a separate Guaranty dated January 22, 2008.

5           115. Neither Tharaldson nor TM2I is a shareholder, owner, officer or affiliated party  
6 of Gemstone West Inc., but rather executed the Guaranty on the condition that Tharaldson  
7 receive 5.0% of the 14.0% interest rate on the Senior Loan regardless of who participated in  
8 funding the Senior Loan.

9           116. CVFS originally agreed to provide \$400,000 of the \$100,000,000 ("CVFS Senior  
10 Original Participation") under the Senior Loan pursuant to a Nonrecourse Participation  
11 Agreement dated on or about January 21, 2008 as amended by the Addendum to Nonrecourse  
12 Participation Agreement, as well as a Commitment to Participate dated on or about January 22,  
13 2008 (the "CVSF Senior First Participation Agreement"), under which CVFS agreed to provide  
14 \$400,000 of the Senior Loan. Under the CVFS First Participation Agreement, CVFS was to  
15 receive 8.5% interest and SFC made a service fee of .50%. The CVFS First Participation  
16 Agreement provided that SFC was agent for CVFS concerning the Senior Construction Note and  
17 acknowledged SFC's fiduciary duties to CVFS.

18           117. SFC subsequently requested that CVFS increase its participation by \$1,000,000.

19           118. On or about February 21, 2008, SFC, as Originating Lender, and CVFS, as  
20 Participant, executed a new Nonrecourse Participation Agreement as amended by the Addendum  
21 to Nonrecourse Participation Agreement dated on or about the same date, as well as a  
22 Commitment to Participate dated on or about the same date, under which CVFS agreed to  
23 provide \$1,400,000 of the Senior Loan which superseded the CVFS Senior First Participation  
24 Agreement (the "CVFS Second Senior Participation Agreement"). Under the CVFS Second  
25 Senior Participation Agreement, CVFS was to receive 8.5% interest, Guarantor was to receive  
26 5.0% and SFC made a service fee of .50%. The Nonrecourse Participation Agreement provided  
27 that SFC was agent for CVFS concerning the Senior Construction Note and acknowledged  
28 SFC's fiduciary duties to CVFS.

1 119. SFC subsequently obtained a new loan participant to acquire \$1,000,000 of  
2 CVFS's Second Senior Participation.

3 120. On or about March 21, 2008, SFC, as Originating Lender, and CVFS, as  
4 Participant, executed a new Nonrecourse Participation Agreement as amended by the Addendum  
5 to Nonrecourse Participation Agreement dated March 21, 2008, as well as a Commitment to  
6 Participate dated on or about the same date, which superseded the CVFS Second Senior  
7 Participation Agreement (the "CVFS Third Senior Participation Agreement"), under which  
8 CVFS agreed to provide \$400,000 of the Senior Loan. Under the CVFS Third Senior  
9 Participation Agreement, CVFS was to receive 8.5% interest, Guarantor was to receive 5.0%  
10 interest, and SFC made a service fee of .50%. The CVFS Third Senior Participation Agreement  
11 provided that SFC was agent for CVFS concerning the Senior Construction Note and  
12 acknowledged SFC's fiduciary duties to CVFS.

13 121. The CVFS First Senior Participation Agreement, CVFS Second Senior  
14 Participation Agreement and CVFS Third Participation Agreement collectively referred to as  
15 the CVFS Senior Participation referred to herein.

16 122. In connection with the Senior Loan, General Contractor consented to an  
17 Assignment of Construction Contract, Plans and Specifications executed by Gemstone West Inc.  
18 in favor of SFC, pursuant to a Consent of General Contractor dated January 22, 2008 (the  
19 "Contractor Consent"). That Contractor Consent specifically provides that "[a]ll liens, claims,  
20 rights, remedies and recourses that [Asphalt Products Corporation] may have or may otherwise  
21 be entitled to assert against all or any portion of the Project shall be, and they hereby are made  
22 expressly subordinate, junior and inferior to the liens, claims, rights, remedies and recourses as  
23 created by the Loan Agreement and the Collateral Documents." In addition, General Contractor  
24 executed a certificate as to Sworn Construction Statement dated January 22, 2008 indicating that  
25 no work had been completed to date on the Property or Project (the "Contractor Certificate").

26 123. At the closing of the Senior Loan on January 22, 2008, CVFS received a net  
27 paydown of \$9,930,348, reducing the unpaid balance of the Prior Loan to approximately  
28 \$35,278,688 and of the Edelstein Loan to approximately \$9,229,412, for a total balance then

1 owed to CVFS of \$45,342,798.

2 124. On or about January 22, 2008, Gemstone West Inc., Gemstone Apache and SFC  
3 entered into an Assumption Agreement whereby SFC consented to: a) a sale of the Trust  
4 Property under the First Senior DOT, First Junior DOT and Third DOT (collectively referred to  
5 as the "Mezzanine Deeds of Trust") from Apache to Gemstone West Inc.; and b) Gemstone  
6 West Inc.'s assumption of all liability pertaining to the Mezzanine Notes and Mezzanine Loans;  
7 and c) the lien of the Mezzanine Deeds of Trust on the Trust Property.

8 125. On or about January 22, 2008, Gemstone West Inc. and SFC executed a Fourth  
9 Amendment to Mezzanine Loan Agreement [Prior Loan Agreement] whereby SFC agreed to  
10 extend the maturity date of the First Junior DOT Note, First Senior DOT Note, and LOC Note  
11 (collectively referred to as the "Mezzanine Notes") to December 31, 2009 and increase the total  
12 principal amount of the Mezzanine Notes from \$33,000,000 to \$46,000,000, to be evidenced by  
13 a new Mezzanine Note dated January 22, 2008 in the maximum principal amount of  
14 \$46,000,000.

15 126. On or about January 22, 2008, Gemstone West Inc executed a Mezzanine Note in  
16 the principal amount of \$46,000,000 bearing interest at the fixed rate of 14.5% per annum. The  
17 Mezzanine Note calls for monthly interest payments only, with the entire principal balance, and  
18 all unpaid accrued interest, due in full on the maturity date of December 31, 2009.

19 127. On or about January 22, 2008, Gemstone West Inc. and SFC executed a First  
20 Amendment to Senior Deed of Trust and Security Agreement with Assignment of Rents and  
21 Fixture Filing (Line of Credit) (Mezzanine) ("First Senior DOT Amendment"), to confirm that  
22 the First Senior DOT secured \$28,000,000 of the refinanced Mezzanine Note. The First Senior  
23 DOT Amendment was recorded in the real property records of Clark County, Nevada on  
24 February 7, 2008 at Book 20080207, Instrument No. 0001484.

25 128. On or about January 22, 2008, Gemstone West Inc. and SFC executed a Second  
26 Amendment to Junior Deed of Trust and Security Agreement with Assignment of Rents and  
27 Fixture Filing (Line of Credit) (Mezzanine) ("First Junior DOT Second Amendment"), to  
28 confirm that the First Junior DOT secured \$18,000,000 of the refinanced Mezzanine Note. The

1 First Junior DOT Second Amendment was recorded in the real property records of Clark County,  
2 Nevada on February 7, 2008 at Book 20080207, Instrument No. 0001485.

3 129. Pursuant to a Nonrecourse Participation Agreement dated January 21, 2008 by and  
4 between SFC, as Originating Lender, and CVFS, as Participant and Loan Participation  
5 Certificate attached thereto (the "Mezzanine Participation Agreement"), CVFS agreed to provide  
6 funds for the Mezzanine Loans, primarily by refinancing the outstanding balances on the Prior  
7 Loan and the Edelstein Loan. Under the Mezzanine Participation Agreement, CVFS was to  
8 receive 14.0% interest and SFC made a service fee of .50%. The Mezzanine Loan Participation  
9 Agreement provided that SFC was agent for CVFS concerning the Mezzanine Note and  
10 acknowledged SFC's fiduciary duties to CVFS.

11 130. On February 6, 2008, Apache conveyed the Property under the Senior DOT to  
12 Gemstone West Inc. via a Grant, Bargain, Sale Deed recorded in the real property records of  
13 Clark County, Nevada on February 7, 2008 at Book 20080207, Instrument No. 0001480.

14 131. On January 30, 2008, SFC's counsel opined to SFC that SFC was in a position to  
15 fund the Senior Loan, provided each Participant funds its pro rata share.

16 **The Senior Loan Agreement Signature, the Subordination, the Guaranty, the TM2I**

17 **Guaranty and the CVFS Participation**

18 132. In connection with the Senior Loan, Tharaldson executed the Senior Loan  
19 Agreement under the heading "acknowledgment of guarantor" and the Guaranty.

20 133. In connection with the Senior Loan, TM2I executed the TM2I Guaranty,

21 134. In connection with the Senior Loan, CVFS executed the CVFS Senior  
22 Participation Agreement.

23 135. The Senior Loan Agreement, the CVFS Participation, the Guaranty, and the TM2I  
24 Guaranty are hereafter collectively referred to as the "Plaintiffs' Senior Loan Documents."

25 136. In connection with the Senior Loan, SFC executed a Mezzanine Deeds of Trust  
26 Subordination Agreement dated January 22, 2008, and recorded in the real property records of  
27 Clark County, Nevada on February 7, 2008, at Book 20080207, Instrument No. 0001486,  
28 purporting to subordinate the Prior Loan Deeds of Trust to the Senior Loan Deed of Trust.

1 137. SFC expressed its intent that the Prior Loan Deeds of Trust and the indebtedness  
2 secured thereby be subordinate to the \$110,000,000 Senior Deed of Trust and indebtedness  
3 secured thereby.

4 138. At the time the Plaintiffs' Senior Loan Documents were agreed to, and at all times  
5 thereafter, the Fiduciary Defendants owed to Plaintiffs fiduciary duties of undivided loyalty; due  
6 care, competence, and diligence; and the duty to provide to Plaintiffs all material information.

7 139. At the time the Plaintiffs' Senior Loan Documents agreed to were executed and  
8 at all times thereafter, the Fiduciary Defendants owed to Plaintiffs a duty not to deal with  
9 Plaintiffs on behalf of an adverse party in a transaction connected with their fiduciary duty to  
10 Plaintiffs.

11 Subsequent Changes to Loans

12 140. On August 11, 2008, Edelstein and SFC executed a Fourth Amendment to Loan  
13 Agreement (Edelstein) to provide for, among other things: 1) SFC's agreement to lend Edelstein  
14 and Gemstone Manhattan Holdings I, LLC, a Nevada limited liability company ("Gemstone  
15 Manhattan") an additional sum of \$9,000,000 to enable Edelstein to refinance the Condo Units;  
16 2) to provide that the first \$6,000,000 of the LOC Note be used to permanently repay the  
17 Edelstein Note; 3) to advance funds on the Edelstein Note to make the interest payment for  
18 August 2008 but to then convert the Edelstein Note to a closed-end note with no further  
19 advances; and 4) to release the lien of the Gemstone LVS DOT on the remaining 17 Condo  
20 Units.

21 141. On or about August 11, 2008, SFC, Alexander Edelstein and Gemstone Manhattan  
22 executed a Rental Line of Credit Note in the principal sum of \$9,000,000 at a fixed rate of  
23 7.125% (subject to increase in the event of an untimely payment or a default under the Prior  
24 Loan Agreement) payable in full on December 31, 2010 (the "Rental LOC Note").

25 142. On or about August 11, 2008, Gemstone Manhattan and SFC executed a First  
26 Amendment and Assumption Agreement to the Gemstone LVS DOT, which was recorded on  
27 September 9, 2008 in the public real property records of Clark County, Nevada at Book  
28 20080909, Instrument No. 0003944 (the "Gemstone LVS DOT Amendment"). Under the

1 Gemstone LVS DOT Amendment, Gemstone Manhattan assumed the obligations of Apache  
2 under the Gemstone LVS DOT and the principal amount secured under the Gemstone LVS DOT  
3 was increased to include the Rental LOC Note.

4 143. The Edelstein Note was amended by a Fourth Amendment to Edelstein Note on  
5 or about August 11, 2008, under which: a) SFC agreed to reduce the interest rate on the  
6 Edelstein Note so long as Edelstein met certain monthly payment obligations and was not in  
7 default; b) the Edelstein Note was converted to a closed end note with no further advances  
8 permitted; and c) the maturity date of the Edelstein Note was extended to December 31, 2010.

9 144. On or about August 18, 2008, SFC, as Origination Lender, and CVFS, as  
10 Participant, executed a new Nonrecourse Participation Agreement as amended by the Addendum  
11 to Nonrecourse Participation Agreement dated August 18, 2008, as well as a Commitment to  
12 Participate dated on or about the same date (the "CVFS Rental Participation Agreement"), under  
13 which CVFS agreed to provide the \$9,000,000 for the Rental LOC Note. Under the CVFS  
14 Rental LOC Participation Agreement, CVFS was to receive 7.0% interest and SFC made a  
15 service fee of .125%. The CVFS Rental LOC Nonrecourse Participation Agreement provided  
16 that SFC was agent for CVFS concerning the Construction LOC Note and acknowledged SFC's  
17 fiduciary duties to CVFS.

18 **Default under the Prior Loan, the Edelstein Loan, the Mezzanine Loans,**

19 **the Senior Loan and the Rental LOC Notes**

20 145. The obligors on the Prior Loan, the Edelstein Loan, the Mezzanine Loans, the  
21 Senior Loan and the Rental LOC Note (collectively the "Manhattan West Loans") have not  
22 made any of the required interest payments since September 2008, and all promissory notes  
23 making up the Manhattan West Loans are therefore in monetary default.

24 146. The obligors on the Manhattan West Loans are in material breach of various  
25 covenants in the loan documents relating to the Manhattan West Loans, including the Deeds of  
26 Trust securing those loans.

27 147. More than sixty (60) days have expired after SFC's written notice of default to the  
28 obligors on the Manhattan West Loans dated October 28, 2008, and none of the defaults has

1 been cured within any applicable cure periods.

2 148. The unpaid principal balances on the Manhattan West Loans, together with all  
3 accrued but unpaid interest, including late penalties and default interest, are now immediately  
4 due and payable.

5 149. On January 9, 2009, the Fiduciary Defendants threatened to commence private  
6 trustee sales under the Deeds of Trust securing the Manhattan West Loans, all to Plaintiffs'  
7 detriment.

8 **The Fraudulent Inducement**

9 150. Plaintiffs' decisions to modify the Prior Loan and the Edelstein Loan as provided  
10 in the Senior Loan Agreement, and to agree to the Plaintiffs' Senior Loan Documents was based  
11 upon the trust and confidence Plaintiffs reposed in Scott and SFC due to their longstanding  
12 business relationship, and upon the Fiduciary Defendants' recommendations to Plaintiffs which  
13 Plaintiffs understood to be backed up by the Fiduciary Defendants' rigorous due diligence and  
14 the Fiduciary Defendants' assurances to Plaintiffs that the transaction was sound and would be  
15 in Plaintiffs' best interest.

16 151. As a result of discussions with the Fiduciary Defendants, Plaintiffs understood that  
17 with the advent of the Senior Loan, their business and economic position with respect to  
18 construction lending on the Project, would be:

- 19 A. The Senior Loan of \$110,000,000 would become a first lien position on the  
20 Project.  
21 B. Plaintiffs would receive a net paydown on the Prior Loan and Edelstein  
22 Loan aggregating about \$10,000,000, and the Prior Loan and the Edelstein  
23 Loan, as amended, would become a second position lien on the Project.  
24 C. There was a fixed price construction agreement with a viable and reputable  
25 general contractor which would deliver all of the required construction for  
26 the Project at a cost of approximately \$79,000,000.  
27 D. There would be \$60,000,000 in "lender approved" pre-sales and/or pre-  
28 leases (the "Pre-Sales Contracts") prior to closing of the Senior Loan,

1 which would provide sources of repayment of the Senior Loan in those  
2 amounts.

3 E. Based upon pro formas prepared by Developer and vetted by the Fiduciary  
4 Defendants prior to the Plaintiffs making any commitments with respect  
5 to the Senior Loan, the total acquisition, development, and construction  
6 costs estimated for the Project were \$120,000,000 and the total revenues  
7 estimated for the Project were \$154,000,000, for a projected net income of  
8 \$34,000,000 from the Project.

9 F. The Fiduciary Defendants had rigorously underwritten the financial pro  
10 formas and the financial viability of the Project and were relying primarily  
11 on the financial viability of the Project in making the Senior Loan.

12 G. Tharaldson's exposure on the Guaranty and TM2I's exposure on the TM2I  
13 Guaranty of the Senior Loan would be limited to any excess of the Senior  
14 Loan balance on any given day over the fair market value of all of the  
15 collateral for the Senior Loan (including the Project, the Construction  
16 Contract, and the Pre-Sales Contracts.)

17 152. This understanding is reflected in part in a Conditional Commitment Letter dated  
18 April 27, 2007 and a modification to Conditional Commitment Letter dated October 8, 2007.

19 153. The Fiduciary Defendants knew that Scott and SFC occupied a fiduciary  
20 relationship with Plaintiffs based on the overall longstanding business advisory relationship and  
21 specifically with reference to the several Participation Agreements relating to various  
22 components of the Prior Loan and the Edelstein Loan.

23 154. Consistent with their prior course of dealing, Plaintiffs relied upon the lending  
24 experience and expertise of Scott and SFC to perform the underlying due diligence with respect  
25 to the Senior Loan, to engage counsel to represent both SFC and Plaintiffs in preparation of the  
26 appropriate loan documentation, and to properly close and administer the Senior Loan.

27 155. The Fiduciary Defendants knew that SFC and BOK, as Co-Lead Lenders, also  
28 occupied a fiduciary relationship with Plaintiffs with specific reference to the Senior Loan as

1 a participant in the Senior Loan, as the intended Guarantors of the Senior Loan, and as sole  
2 owner of the Prior Loan and the Edelstein Loan to be subordinated to the Senior Loan.

3 156. The Fiduciary Defendants knew but did not identify and resolve with Plaintiffs that  
4 the Senior Loan transaction presented direct and substantial conflicts between: (a) SFC's and  
5 Scott's position as fiduciaries to Plaintiffs with respect to Plaintiffs 100% ownership interest in  
6 the Prior Loan and the Edelstein Loan; and (b) the Fiduciary Defendants' position as fiduciaries  
7 to all Senior Loan participants, including CVSF.

8 157. In connection with the Senior Loan, the Fiduciary Defendants made  
9 misrepresentations to Plaintiffs and failed to disclose to Plaintiffs material information  
10 concerning the Project and the Senior Loan, which are described in the following sections.

11 ***Deteriorated Financial Prospects.***

12 158. The Fiduciary Defendants attached to the Senior Loan Agreement a pro forma for  
13 the Project that showed projected net income for the Project of \$10,000,000 rather than the  
14 \$34,000,000 reflected in the pro forma the Fiduciary Defendants had previously provided to  
15 Plaintiffs and on which Plaintiffs had relied in agreeing to the Plaintiffs' Senior Loan  
16 Documents.

17 159. The Fiduciary Defendants initialed the revised pro forma showing estimated net  
18 income from the Project less than one-third of the amount represented to Plaintiffs.

19 160. The Fiduciary Defendants failed to disclose the revised pro forma to Plaintiffs or  
20 ask Plaintiffs to initial it.

21 161. Plaintiffs never would have agreed to the Plaintiffs' Senior Loan Documents had  
22 they known of the substantial deterioration in the projected financial viability of the Project.

23 ***Primary Reliance on Guarantors.***

24 162. The Fiduciary Defendants failed to disclose to Plaintiffs that their underwriting of  
25 the Senior Loan relied solely on the Guaranty and the TM2I Guaranty, not on the financial  
26 viability of the Project.

27 163. Plaintiffs never would have agreed to the Plaintiffs' Senior Loan Documents had  
28 they known that the Fiduciary Defendants were not relying primarily on the financial viability

1 of the Project in underwriting the Senior Loan.

2 164. The Fiduciary Defendants later admitted to Plaintiffs orally in October 2008 and  
3 in writing in December 2008, that their underwriting of the Senior Loan had relied solely on the  
4 financial resources of the Guarantors and not primarily on the financial viability of the Project  
5 as Plaintiffs had understood.

6 ***Fraud Relating to the Pre-sale Condition.***

7 165. A condition to the closing of the Senior Loan, and therefore to the effectiveness  
8 of Plaintiffs' Senior Loan Documents was that \$60,000,000 in "lender approved" pre-sales  
9 and/or pre-leases must have occurred (the "Pre-Sale Condition"). (Senior Loan Agreement §§  
10 4.1.3, 1.16.)

11 166. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had  
12 they known that the Pre-Sale Condition was not satisfied, because bona fide, third party pre-sales  
13 and pre-leases provide an assurance of true market interest in a project and a known source of  
14 revenue for repayment of the loan.

15 167. The Fiduciary Defendants knew or should have known that the Pre-Sale Condition  
16 used language unusual for this type of a condition in large commercial loans, by not expressly  
17 requiring that Pre-Sales be bona fide sales to parties unrelated to the borrower and its affiliates,  
18 as this condition is designed to provide strong evidence of market acceptance of the project from  
19 persons whose net worth is not already invested in the project.

20 168. The Fiduciary Defendants certified at the closing of the Senior Loan that there  
21 were \$62,700,000 of "lender approved" pre-sales and/or pre-leases, and that the Pre-Sale  
22 Condition had been satisfied.

23 169. The Fiduciary Defendants certified that the lender approved pre-sales and/or pre-  
24 leases consisted of \$45,000,000 in residential pre-sales and \$17,250,000 of commercial pre-  
25 sales and/or pre-leases.

26 170. The Fiduciary Defendants knew or should have known that at the closing of the  
27 Senior Loan, at least \$2,500,000 of the "lender approved" residential pre-sales (5.6%) were sales  
28 to parties closely related to Gemstone West Inc., including but not limited to family members

1 of Gemstone West Inc.'s principal Alex Edelstein (Alex Edelstein, Charles Edelstein, Sara  
2 Edelstein), Peter Smith (Gemstone West Inc.'s COO), and Defendant Scott. Other "lender  
3 approved" residential pre-sales may also be questionable related party sales.

4 171. The Fiduciary Defendants knew or should have known that at the closing of the  
5 Senior Loan, all \$17,250,000 of the commercial pre-sales and/or pre-leases were sales and/or  
6 leases to parties closely related to the Gemstone West Inc.. All three pre-leases were with  
7 affiliates of the Gemstone West Inc. (Manhattan West Residential, Inc., Gemstone Coffee  
8 House, LLC, and Gemstone Development LLC (1,800 square feet)). The one commercial sale  
9 (\$5,500,000) was to Santa Rita Management Company, an entity owned by the Edelsteins'  
10 father.

11 172. The Fiduciary Defendants failed to disclose to Plaintiffs that highly questionable  
12 related party sales and leases made up nearly one third of the entire \$60,000,000 in "lender  
13 approved" pre-sales.

14 173. The certification by the Fiduciary Defendants that the Pre-Sale Condition had been  
15 satisfied was false and fraudulent.

16 174. After the closing of the Senior Loan, many of the related party condominium sales  
17 and the \$5.5 million office sale were cancelled. The office sale was then "replaced" by a lease  
18 to Gemstone West Inc.'s affiliate Gemstone Development, L.L.C. (19,861 square feet).

19 ***Fraud Relating to First Lien Condition.***

20 175. A condition to the closing of the Senior Loan, and therefore to the effectiveness  
21 of Plaintiffs' Senior Loan Documents, was that the Gemstone West Inc. provide a first position  
22 Deed of Trust on the Project (the "First Lien Condition"). (Senior Loan Agreement §§ 3.1.1,  
23 1.18; 3.1.3, 3.1.4)

24 176. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had  
25 they known that the First Lien Condition was not satisfied, because of the hassle, expense, and  
26 uncertainty of resolving senior lien claims.

27 177. The Fiduciary Defendants were aware prior to the closing of the Senior Loan of  
28 any construction work that had been performed on the Project prior to recording of the Senior

1 Loan Deed of Trust, that might cause a broken priority with respect to the Senior Loan.

2 178. The Fiduciary Defendants knew or should have known that under NRS 108.225(1)  
3 and (2) mechanics liens for any work performed prior to the recording date of the Senior Loan  
4 Deed of Trust (the "Priority Construction Liens") would be prior and superior to the Senior Loan  
5 Deed of Trust.

6 179. The Fiduciary Defendants also knew that the Deeds of Trust securing the Prior  
7 Loan were prior and superior to any Priority Construction Liens.

8 180. The Fiduciary Defendants failed to inform Plaintiffs prior to the closing of the  
9 Senior Loan of the existence or amount of any Priority Construction Liens and the fact that they  
10 enjoyed a statutory preference over the Deed of Trust securing the Senior Loan.

11 181. The Fiduciary Defendants certified at the closing of the Senior Loan that the First  
12 Lien Condition had been satisfied.

13 182. This certification was a misrepresentation and a fraud.

14 ***Insurance Over Broken Priority; Switched Title Insurance Companies.***

15 183. Rather than informing Plaintiffs of any Priority Construction Liens that enjoyed  
16 statutory priority over the Senior Loan Deed of Trust, Defendants chose to "insure over" the  
17 Priority Construction Liens in a title policy issued by Defendants' chosen title company,  
18 Commonwealth Land Title Insurance Company ("Commonwealth").

19 184. This was a change from First American Title Insurance Co. ("First American")  
20 which had provided the title work and title insurance on the Prior Loan and the Edelstein Loan.

21 185. The Fiduciary Defendants failed to inform Plaintiffs prior to the closing of the  
22 Senior Loan that they had chosen to "insure over" any Priority Construction Liens or that they  
23 had switched from First American to Commonwealth.

24 186. The Fiduciary Defendants knew or should have known that Commonwealth was  
25 financially troubled and that First American was not.

26 187. The Fiduciary Defendants failed to inform Plaintiffs prior to the closing of the  
27 Senior Loan, of Commonwealth's questionable financial condition.

28 188. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had

1 they known that the Fiduciary Defendants were insuring over the Priority Construction Liens and  
2 were switching from First American to Commonwealth.

3 189. In November 2008, the Nebraska Insurance Commissioner informed Common-  
4 wealth that it was in a "hazardous financial condition" under Nebraska law and filed a petition  
5 for rehabilitation against Commonwealth. Commonwealth consented to the rehabilitation  
6 petition.

7 190. Also in November 2008, the parent company of Commonwealth, Land America  
8 Financial Group, Inc. filed a petition under Chapter 11 of the Bankruptcy Code.

9 191. On or about December 22, 2008, under regulatory pressure on Commonwealth,  
10 Fidelity National Title Insurance Company acquired Commonwealth from its parent company.  
11 It is not presently known whether Fidelity National Title Insurance Company assumed all of the  
12 liabilities of Commonwealth.

13 ***Subordination Exacerbates Broken Priority.***

14 192. The Fiduciary Defendants knew or should have known that subordinating the  
15 Deeds of Trust securing the Prior Loan to the Deed of Trust securing the Senior Loan would  
16 create a substantial risk of elevating any Priority Construction Liens in priority ahead of the Prior  
17 Loan.

18 193. The Fiduciary Defendants failed to inform Plaintiffs of the risk that any Priority  
19 Construction Liens would become senior to the Deeds of Trust securing the Prior Loan as a  
20 result of the Subordination and to provide their evaluation of that risk.

21 194. The Fiduciary Defendants caused the Subordination Agreement to be drafted in  
22 a manner that substantially increased the risk that any Priority Construction Liens would become  
23 senior to the Prior Loan as a result of the Subordination. Specifically, paragraph 1 provides that  
24 the extent of the subordination is "as though the Mezzanine Deeds of Trust had been recorded  
25 subsequent to the recordation of the \$110,000,000 Senior Debt Deed of Trust." Under that  
26 hypothetical recording order, the Prior Loan would also have been subordinate to any previously  
27 vested Priority Construction Liens. If the language of paragraph 1 had been drafted so that the  
28 extent of the subordination were "as though the Senior Debt Deed of Trust had been recorded

1 prior to the recordation of the Mezzanine Deeds of Trust" that argument would be negated. Also  
2 paragraph 10 provides that this Subordination Agreement "shall not be construed as affecting  
3 the priority of any other liens or encumbrances in favor of SFC on the Trust Property." The  
4 failure also to negate any intent to affect the priority of other liens arguably supports giving  
5 effect to the literal language of paragraph 1.

6 195. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents, had  
7 they known that the Fiduciary Defendants through their drafting of the Subordination had  
8 substantially increased the risk of any Priority Construction Liens gaining priority over the Deeds  
9 of Trust securing the Prior Loan and the Edelstein Loan.

10 196. The Fiduciary Defendants failed to inform Plaintiffs that the Subordination  
11 Agreement had been drafted in a manner that substantially increased the risk that any Priority  
12 Construction Liens would become senior to the Prior Loan as a result of the Subordination.

13 ***Fraud Relating to Terms of Guaranty, the TM2I Guaranty and the Subordination.***

14 197. The Fiduciary Defendants caused to be prepared and submitted to Tharaldson for  
15 signature a form of Guaranty of the Senior Loan that contained a Nevada choice of law  
16 provision.

17 198. The Fiduciary Defendants knew or should have known that Nevada law provided  
18 a single action rule and also accorded to a guarantor of a real estate loan a fair market value  
19 defense, insuring that the guarantor's exposure for a deficiency judgment was limited to the  
20 excess of the loan over the fair market value of the loan collateral for a deficiency judgment.

21 199. The Fiduciary Defendants knew that Nevada law permitted a guarantor in a  
22 commercial loan over \$500,000 to waive the single action rule and the guarantor's fair market  
23 value defense.

24 200. The Fiduciary Defendants inserted in the Guaranty of the Senior Loan a waiver of  
25 all statutory rights of a guarantor under Nevada law, including the single action rule and the fair  
26 market value defense.

27 201. The Fiduciary Defendants caused to be prepared and submitted to TM2I for  
28 signature a form of guaranty that adopted North Dakota law.