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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

Case No.: A579963
Dept. No.: XIII

**DEFENDANT BANK OF OKLAHOMA,
N.A.'S ANSWER TO PLAINTIFFS'
FIRST AMENDED COMPLAINT¹ AND
COUNTERCLAIM AGAINST GARY D.
THARALDSON**

¹ Defendant Bank of Oklahoma, N.A. objects to the Court's exercise of jurisdiction over it to the extent the Plaintiffs' claim relate to that certain guaranty executed by Plaintiff Tharaldson Motels II, Inc. (the "TMII Guaranty"). Any claim relating to the TMII Guaranty should be resolved in the United States District Court for the District of North Dakota, Case No. 1:09-cv-30.

1 SCOTT FINANCIAL CORPORATION, a
2 North Dakota corporation; BRADLEY J.
3 SCOTT; BANK OF OKLAHOMA, N.A., a
4 national bank; GEMSTONE DEVELOPMENT
5 WEST, INC., a Nevada corporation;
6 ASPHALT PRODUCTS CORPORATION
D/B/A APCO CONSTRUCTION, a Nevada
corporation; DOE INDIVIDUALS 1-100; and
ROE BUSINESS ENTITIES 1-100,

7 Defendants.

8
9 BANK OF OKLAHOMA,

10 Defendant and
11 Counterclaimant,

12 v.

13 GARY D. THARALDSON,

14 Plaintiff and
15 Counterdefendant.

16 For its amend answer to the First Amended Complaint of plaintiffs, defendant Bank of
17 Oklahoma, N.A. ("BOK") admits, denies and alleges as follows:

18 1. BOK denies the allegations against it contained in paragraph 1. To the extent the
19 allegations of paragraph 1 are asserted against defendants other than BOK, BOK lacks sufficient
20 information so as to form a belief as to the truthfulness of them and therefore denies them.

21 2. BOK admits the allegations of paragraph 2 on information and belief.

22 3. BOK admits the allegations of paragraph 3 on information and belief.

23 4. BOK admits the allegations of paragraph 4 on information and belief.

24 5. Answering the allegations of paragraph 5, BOK admits that plaintiffs collectively refer
25 to themselves as "Plaintiffs" in their complaint.

26 6. BOK admits the first and second sentences of paragraph 6 on information and belief.
27 BOK lacks sufficient information so as to form a belief as to the truthfulness of the allegations of
28 the third sentence of paragraph 6 and therefore denies them. BOK alleges that the allegations of

1 the fourth and fifth sentence of paragraph 6 do not purport to state a claim against it and is
2 therefore required neither to admit nor to deny them in response.

3 7. BOK admits the first sentence of the allegations of paragraph 7 on information and
4 belief. BOK lacks sufficient information so as to form a belief as to the truthfulness of the
5 allegations of the second sentence of paragraph 7 and therefore denies them.

6 8. BOK admits the allegations of the first sentence of paragraph 8. BOK denies the
7 remaining allegations of paragraph 8 other than the fact it is the named Co-Lead Lender of the
8 transaction.

9 9. Answering the allegations of paragraph 9, BOK admits that plaintiffs collectively refer
10 to SFC, Scott and BOK collectively as the "Fiduciary Defendants." BOK denies the representation
11 made by plaintiffs that BOK is or was a fiduciary to the plaintiffs.

12 10. BOK admits the allegations of the first sentence of paragraph 10 on information and
13 belief. BOK alleges that the allegations of the second sentence of paragraph 10 do not purport to
14 state a cause of action against it and that it therefore is required neither to admit nor to deny them.

15 11. BOK admits the allegations of the first sentence of paragraph 11 on information and
16 belief. BOK alleges that the allegations of the second sentence of paragraph 11 do not purport to
17 state a cause of action against it and that it therefore is required neither to admit nor to deny them.

18 12. BOK alleges that the allegations of paragraph 12 do not purport to state a cause of
19 action against it and that it therefore is required neither to admit nor to deny them.

20 13. Answering the allegations of paragraph 13, BOK denies all allegations of this
21 paragraph as Plaintiff Tharaldson Motels II, Inc. has agreed to the exclusive jurisdiction of the
22 courts of the State of North Dakota.

23 14. BOK alleges that the allegations of paragraph 14 do not purport to state a cause of
24 action against it and that it therefore is required neither to admit nor to deny them.

25 15. BOK alleges that the allegations of paragraph 14 do not purport to state a cause of
26 action against it and that it therefore is required neither to admit nor to deny them.

27 16. BOK alleges that the allegations of paragraph 16 do not purport to state a cause of
28 action against it and therefore denies them.

1 17. Answering the allegations of paragraph 17, BOK denies all allegations of this
2 paragraph as Plaintiff Tharaldson Motels II, Inc. has agreed to the exclusive jurisdiction of the
3 courts of the State of North Dakota.

4 18. BOK alleges that the allegations of paragraph 18 do not purport to state a cause of
5 action against it and therefore denies them.

6 19. Answering the allegations of paragraph 19, BOK denies that venue of this matter is
7 appropriate in this Court and denies all allegations against it contained in this paragraph. To the
8 extent the Plaintiffs' claims herein relate to the TMII Guaranty such claims must be resolved in the
9 United States District Court for the District of North Dakota, Case No. 1:09-cv-30.

10 20. BOK admits the allegations of paragraph 20 of the Amended Complaint.

11 21. BOK admits the allegations of paragraph 21 of the Amended Complaint.

12 22. BOK admits the allegations of the first sentence of paragraph 22 of the Amended
13 Complaint. BOK is without knowledge or information sufficient to form a belief as to the
14 allegations of the remaining sentence of paragraph 22 and therefore denies the same.

15 23. BOK admits the allegations of paragraph 23 of the Amended Complaint.

16 24. BOK alleges that the allegations of paragraph 24 do not purport to state a cause of
17 action against it and therefore denies them.

18 25. BOK alleges that the allegations of paragraph 25 do not purport to state a cause of
19 action against it and therefore denies them.

20 26. BOK alleges that the allegations of paragraph 26 do not purport to state a cause of
21 action against it and therefore denies them.

22 27. BOK alleges that the allegations of paragraph 27 do not purport to state a cause of
23 action against it and therefore denies them.

24 28. BOK alleges that the allegations of paragraph 28 do not purport to state a cause of
25 action against it and therefore denies them.

26 29. BOK alleges that the allegations of paragraph 29 do not purport to state a cause of
27 action against it and therefore denies them.

28 30. BOK alleges that the allegations of paragraph 30 do not purport to state a cause of

1 action against it and therefore denies them.

2 31. BOK alleges that the allegations of paragraph 31 do not purport to state a cause of
3 action against it and therefore denies them.

4 32. BOK alleges that the allegations of paragraph 32 do not purport to state a cause of
5 action against it and therefore denies them.

6 33. BOK alleges that the allegations of paragraph 33 do not purport to state a cause of
7 action against it and therefore denies them.

8 34. BOK denies the allegations of paragraph 34 against it. To the extent the allegations of
9 paragraph 34 are asserted against defendants other than BOK, BOK lacks sufficient information so
10 as to form a belief as to the truthfulness of them and therefore denies them.

11 35. BOK alleges that the allegations of paragraph 35 do not purport to state a cause of
12 action against it and therefore denies them.

13 36. BOK alleges that the allegations of paragraph 36 do not purport to state a cause of
14 action against it and therefore denies them.

15 37. BOK alleges that the allegations of paragraph 37 do not purport to state a cause of
16 action against it and therefore denies them.

17 38. BOK alleges that the allegations of paragraph 38 do not purport to state a cause of
18 action against it and therefore denies them.

19 39. BOK alleges that the allegations of paragraph 39 do not purport to state a cause of
20 action against it and therefore denies them.

21 40. BOK admits that Manhattan West is located on 21 acres of land on Russell Road in Las
22 Vegas, Nevada. BOK lacks sufficient information so as to form a belief as to the truthfulness of
23 the allegations of paragraph 40 and therefore denies them.

24 41. BOK admits the allegations of paragraph 41 on information and belief.

25 42. BOK alleges that the allegations of paragraph 42 do not purport to state a cause of
26 action against it and therefore denies them.

27 43. BOK alleges that the allegations of paragraph 43 do not purport to state a cause of
28 action against it and therefore denies them.

1 44. BOK admits the allegations of paragraph 44.
2 45. BOK admits the allegations of paragraph 45.
3 46. BOK alleges that the allegations of paragraph 46 do not purport to state a cause of
4 action against it and therefore denies them.
5 47. BOK alleges that the allegations of paragraph 47 do not purport to state a cause of
6 action against it and therefore denies them.
7 48. BOK alleges that the allegations of paragraph 48 do not purport to state a cause of
8 action against it and therefore denies them.
9 49. BOK alleges that the allegations of paragraph 49 do not purport to state a cause of
10 action against it and therefore denies them.
11 50. BOK alleges that the allegations of paragraph 50 do not purport to state a cause of
12 action against it and therefore denies them.
13 51. BOK alleges that the allegations of paragraph 51 do not purport to state a cause of
14 action against it and therefore denies them.
15 52. BOK alleges that the allegations of paragraph 52 do not purport to state a cause of
16 action against it and therefore denies them.
17 53. BOK alleges that the allegations of paragraph 53 do not purport to state a cause of
18 action against it and therefore denies them.
19 54. BOK alleges that the allegations of paragraph 54 do not purport to state a cause of
20 action against it and therefore denies them.
21 55. BOK alleges that the allegations of paragraph 55 do not purport to state a cause of
22 action against it and therefore denies them.
23 56. BOK alleges that the allegations of paragraph 56 do not purport to state a cause of
24 action against it and therefore denies them.
25 57. BOK alleges that the allegations of paragraph 57 do not purport to state a cause of
26 action against it and therefore denies them.
27 58. BOK alleges that the allegations of paragraph 58 do not purport to state a cause of
28 action against it and therefore denies them.

1 59. BOK alleges that the allegations of paragraph 59 do not purport to state a cause of
2 action against it and therefore denies them.

3 60. BOK alleges that the allegations of paragraph 60 do not purport to state a cause of
4 action against it and therefore denies them.

5 61. BOK alleges that the allegations of paragraph 61 do not purport to state a cause of
6 action against it and therefore denies them.

7 62. BOK alleges that the allegations of paragraph 62 do not purport to state a cause of
8 action against it and therefore denies them.

9 63. BOK alleges that the allegations of paragraph 63 do not purport to state a cause of
10 action against it and therefore denies them.

11 64. BOK alleges that the allegations of paragraph 64 do not purport to state a cause of
12 action against it and therefore denies them.

13 65. BOK alleges that the allegations of paragraph 65 do not purport to state a cause of
14 action against it and therefore denies them.

15 66. BOK alleges that the allegations of paragraph 66 do not purport to state a cause of
16 action against it and therefore denies them.

17 67. BOK alleges that the allegations of paragraph 67 do not purport to state a cause of
18 action against it and therefore denies them.

19 68. BOK alleges that the allegations of paragraph 68 do not purport to state a cause of
20 action against it and therefore denies them.

21 69. BOK admits the first sentence of paragraph 69. BOK denies the remaining
22 allegations of paragraph 69 against it. To the extent the allegations of paragraph 69 are asserted
23 against defendants other than BOK, BOK lacks sufficient information so as to form a belief as to
24 the truthfulness of them and therefore denies them.

25 70. BOK denies the allegations of paragraph 70. To the extent the allegations of
26 paragraph 70 are asserted against defendants other than BOK, BOK lacks sufficient information so
27 as to form a belief as to the truthfulness of them and therefore denies them.

28 71. BOK denies the allegations of paragraph 71 except for the last sentence. To the

1 extent the allegations of paragraph 71 are asserted against defendants other than BOK, BOK lacks
2 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
3 them.

4 72. BOK denies the allegations of paragraph 72.

5 73. BOK alleges that the allegations of paragraph 73 do not purport to state a cause of
6 action against it and therefore denies them.

7 74. BOK denies the allegations of paragraph 74. To the extent the allegations of
8 paragraph 74 are asserted against defendants other than BOK, BOK lacks sufficient information so
9 as to form a belief as to the truthfulness of them and therefore denies them.

10 75. BOK denies the allegations of paragraph 75. To the extent the allegations of
11 paragraph 75 are asserted against defendants other than BOK, BOK lacks sufficient information so
12 as to form a belief as to the truthfulness of them and therefore denies them.

13 76. Answering the allegations of paragraph 76, BOK admits the existence of the Senior
14 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
15 is required neither to admit nor to deny further.

16 77. Answering the allegations of paragraph 77, BOK admits the existence of the Senior
17 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
18 is required neither to admit nor to deny further.

19 78. Answering the allegations of paragraph 78, BOK admits the existence of the Senior
20 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
21 is required neither to admit nor to deny further.

22 79. BOK denies the allegations of paragraph 79.

23 80. Answering the allegations of paragraph 80, BOK admits the existence of the Senior
24 Loan Agreement, the Senior Debt Construction Note, and the Senior Debt Contingency Note, the
25 terms and provisions of which speak for themselves and about which BOK is required neither to
26 admit nor to deny further.

27 81. Answering the allegations of paragraph 81, BOK admits the existence of the Senior
28 Debt Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing

1 (Construction), the terms and provisions of which speak for themselves and about which BOK is
2 required neither to admit nor to deny further.

3 82. Answering the allegations of paragraph 82, BOK admits the existence of the Senior
4 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
5 is required neither to admit nor to deny further.

6 83. Answering the allegations of paragraph 83, BOK admits the existence of the Senior
7 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
8 is required neither to admit nor to deny further.

9 84. Answering the allegations of paragraph 84, BOK admits the existence of the Senior
10 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
11 is required neither to admit nor to deny further.

12 85. Answering the allegations of paragraph 85, BOK admits the existence of the Senior
13 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
14 is required neither to admit nor to deny further.

15 86. Answering the allegations of paragraph 86, BOK admits the existence of the Senior
16 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
17 is required neither to admit nor to deny further.

18 87. Answering the allegations of paragraph 87, BOK admits the existence of the Senior
19 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
20 is required neither to admit nor to deny further.

21 88. Answering the allegations of paragraph 88, BOK admits the existence of the Senior
22 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
23 is required neither to admit nor to deny further.

24 89. Answering the allegations of paragraph 89, BOK admits the existence of the Senior
25 Deed of Trust, the terms and provisions of which speak for themselves and about which BOK is
26 required neither to admit nor to deny further.

27 90. Answering the allegations of paragraph 90, BOK admits the existence of the Senior
28 Deed of Trust, the terms and provisions of which speak for themselves and about which BOK is

1 required neither to admit nor to deny further.

2 91. Answering the allegations of paragraph 91, BOK admits the existence of the Senior
3 Deed of Trust, the terms and provisions of which speak for themselves and about which BOK is
4 required neither to admit nor to deny further.

5 92. Answering the allegations of paragraph 92, BOK admits the existence of the Senior
6 Loan Agreement, the Senior Loan, the Guaranty, and the Addendum, the terms and provisions of
7 which speak for themselves and about which BOK is required neither to admit nor to deny further.

8 93. Answering the allegations of paragraph 93, BOK admits the existence of the Senior
9 Loan Agreement and the Guaranty, the terms and provisions of which speak for themselves and
10 about which BOK is required neither to admit nor to deny further.

11 94. BOK alleges that the allegations of paragraph 94 do not purport to state a cause of
12 action against it and that it therefore is required neither to admit nor to deny them in response.

13 95. Answering the allegations of paragraph 95, BOK admits the existence of the
14 Nonrecourse Participation Agreement, the Addendum to Nonrecourse Agreement, the
15 Commitment to Participate, and the CVFS Third Senior Participation Agreement, the terms and
16 provisions of which speak for themselves and about which BOK is required neither to admit nor to
17 deny further.

18 96. Answering the allegations of paragraph 96, BOK admits the existence of the Senior
19 Loan, the Assignment of Construction Contract, Plans and Specifications, the Consent of General
20 Contractor, and the Sworn Construction Statement, the terms and provisions of which speak for
21 themselves and about which BOK is required neither to admit nor to deny further.

22 97. BOK alleges that the allegations of paragraph 97 do not purport to state a cause of
23 action against it and that it therefore is required neither to admit nor to deny them in response.

24 98. Answering the allegations of paragraph 98, BOK admits the existence of the
25 Assumption Agreement, the terms and provisions of which speak for themselves and about which
26 BOK is required neither to admit nor to deny further.

27 99. Answering the allegations of paragraph 99, BOK admits the existence of the Fourth
28 Amendment to Mezzanine Loan Agreement, the terms and provisions of which speak for

1 themselves and about which BOK is required neither to admit nor to deny further.

2 100. Answering the allegations of paragraph 100, BOK admits the existence of the
3 Mezzanine Note, the terms and provisions of which speak for themselves and about which BOK is
4 required neither to admit nor to deny further.

5 101. Answering the allegations of paragraph 101, BOK admits the existence of the
6 First Amendment to Senior Deed of Trust and Security Agreement, the terms and provisions of
7 which speak for themselves and about which BOK is required neither to admit nor to deny further.

8 102. Answering the allegations of paragraph 102, BOK admits the existence of the First
9 Junior DOT Second Amendment, the terms and provisions of which speak for themselves and
10 about which BOK is required neither to admit nor to deny further.

11 103. Answering the allegations of paragraph 103, BOK admits the existence of the
12 Mezzanine Participation Agreement, the terms and provisions of which speak for themselves and
13 about which BOK is required neither to admit nor to deny further.

14 104. Answering the allegations of paragraph 104, BOK admits the existence of the
15 Grant, Bargain, Sale Deed recorded February 7, 2008, the terms and provisions of which speak for
16 themselves and about which BOK is required neither to admit nor to deny further.

17 105. BOK alleges that the allegations of paragraph 105 do not purport to state a cause of
18 action against it and that it therefore is required neither to admit nor to deny them in response.

19 106. Answering the allegations of paragraph 106, BOK admits the existence of the
20 Senior Loan, the terms and provisions of which speak for themselves and about which BOK is
21 required neither to admit nor to deny further.

22 107. BOK admits the allegations of paragraph 107.

23 108. Answering the allegations of paragraph 108, BOK admits the existence of the
24 Senior Loan and the CVFS Senior Participation Agreement, the terms and provisions of which
25 speak for themselves and about which BOK is required neither to admit nor to deny further.

26 109. Answering the allegations of paragraph 109, BOK admits that plaintiffs refer to the
27 Senior Loan Agreement, the CVFS participation, the Guaranty, and the TM21 Guaranty
28 collectively in their complaint as "Plaintiffs Senior Loan Documents," the terms and provisions of

1 which speak for themselves and about which they are required neither to admit nor to deny further.

2 110. Answering the allegations of paragraph 110, BOK admits the existence of the
3 Senior Loan and the Mezzanine Deeds of Trust Subordination Agreement, the terms and
4 provisions of which speak for themselves and about which BOK is required neither to admit nor to
5 deny further.

6 111. BOK alleges that the allegations of paragraph 111 do not purport to state a cause of
7 action against it and that it therefore is required neither to admit nor to deny them in response.

8 112. BOK denies the allegations of paragraph 112. To the extent the allegations of
9 paragraph 112 are asserted against defendants other than BOK, BOK lacks sufficient information
10 so as to form a belief as to the truthfulness of them and therefore denies them.

11 113. BOK denies the allegations of paragraph 113. To the extent the allegations of
12 paragraph 113 are asserted against defendants other than BOK, BOK lacks sufficient information
13 so as to form a belief as to the truthfulness of them and therefore denies them.

14 114. Answering the allegations of paragraph 114, BOK admits the existence of the
15 Fourth Amendment to Loan Agreement (Edelstein), the terms and provisions of which speak for
16 themselves and about which BOK is required neither to admit nor to deny further.

17 115. Answering the allegations of paragraph 115, BOK admits the existence of the First
18 Amendment and Assumption Agreement to Gemstone LVS DOT, the terms and provisions of
19 which speak for themselves and about which BOK is required neither to admit nor to deny further.

20 116. Answering the allegations of paragraph 116, BOK admits the existence of the
21 August 18, 2008 Nonrecourse Participation Agreement and the August 18, 2008 Addendum to
22 Nonrecourse Participation Agreement, the terms and provisions of which speak for themselves and
23 about which BOK is required neither to admit nor to deny further.

24 117. BOK admits the allegations of paragraph 117.

25 118. BOK admits the allegations of paragraph 118

26 119. BOK admits the allegations of paragraph 119.

27 120. BOK admits the allegations of paragraph 120.

28 121. BOK denies the allegations contained in paragraph 121. To the extent the

1 allegations of paragraph 121 are asserted against defendants other than BOK, BOK lacks sufficient
2 information so as to form a belief as to the truthfulness of them and therefore denies them.

3 122. BOK denies all allegations contained in paragraph 122. To the extent the
4 allegations of paragraph 122 are asserted against defendants other than BOK, BOK lacks sufficient
5 information so as to form a belief as to the truthfulness of them and therefore denies them.

6 123. BOK denies the allegations contained in paragraph 123. To the extent the
7 allegations of paragraph 123 are asserted against defendants other than BOK, BOK lacks sufficient
8 information so as to form a belief as to the truthfulness of them and therefore denies them.

9 124. BOK denies the allegations contained in paragraph 124. To the extent the
10 allegations of paragraph 124 are asserted against defendants other than BOK, BOK lacks sufficient
11 information so as to form a belief as to the truthfulness of them and therefore denies them.

12 125. BOK denies the allegations contained in paragraph 125. To the extent the
13 allegations of paragraph 125 are asserted against defendants other than BOK, BOK lacks sufficient
14 information so as to form a belief as to the truthfulness of them and therefore denies them.

15 126. BOK denies the allegations contained in paragraph 126. To the extent the
16 allegations of paragraph 126 are asserted against defendants other than BOK, BOK lacks sufficient
17 information so as to form a belief as to the truthfulness of them and therefore denies them.

18 127. BOK denies the allegations contained in paragraph 127. To the extent the
19 allegations of paragraph 127 are asserted against defendants other than BOK, BOK lacks sufficient
20 information so as to form a belief as to the truthfulness of them and therefore denies them.

21 128. BOK denies the allegations contained in paragraph 128. To the extent the
22 allegations of paragraph 128 are asserted against defendants other than BOK, BOK lacks
23 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
24 them.

25 129. BOK denies the allegations contained in paragraph 129. To the extent the
26 allegations of paragraph 129 are asserted against defendants other than BOK, BOK lacks sufficient
27 information so as to form a belief as to the truthfulness of them and therefore denies them.

28 130. BOK denies the allegations contained in paragraph 130. To the extent the

1 allegations of paragraph 130 are asserted against defendants other than BOK, BOK lacks sufficient
2 information so as to form a belief as to the truthfulness of them and therefore denies them.

3 131. BOK denies the allegations contained in paragraph 131. To the extent the
4 allegations of paragraph 131 are asserted against defendants other than BOK, BOK lacks sufficient
5 information so as to form a belief as to the truthfulness of them and therefore denies them.

6 132. BOK denies the allegations contained in paragraph 132. To the extent the
7 allegations of paragraph 132 are asserted against defendants other than BOK, BOK lacks sufficient
8 information so as to form a belief as to the truthfulness of them and therefore denies them.

9 133. BOK denies the allegations contained in paragraph 133. To the extent the
10 allegations of paragraph 133 are asserted against defendants other than BOK, BOK lacks sufficient
11 information so as to form a belief as to the truthfulness of them and therefore denies them.

12 134. BOK denies the allegations contained in paragraph 134. To the extent the
13 allegations of paragraph 134 are asserted against defendants other than BOK, BOK lacks sufficient
14 information so as to form a belief as to the truthfulness of them and therefore denies them.

15 135. BOK alleges that the allegations of paragraph 135 call for speculation, and
16 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

17 136. BOK denies the allegations contained in paragraph 136. To the extent the
18 allegations of paragraph 136 are asserted against defendants other than BOK, BOK lacks sufficient
19 information so as to form a belief as to the truthfulness of them and therefore denies them.

20 137. BOK denies the allegations contained in paragraph 137. To the extent the
21 allegations of paragraph 137 are asserted against defendants other than BOK, BOK lacks sufficient
22 information so as to form a belief as to the truthfulness of them and therefore denies them.

23 138. BOK denies the allegations contained in paragraph 138. To the extent the
24 allegations of paragraph 138 are asserted against defendants other than BOK, BOK lacks sufficient
25 information so as to form a belief as to the truthfulness of them and therefore denies them.

26 139. Answering the allegations of paragraph 139, BOK admits the existence of the
27 Senior Loan, the terms and provisions of which speak for themselves and about which BOK is
28 required neither to admit nor to deny further.

1 140. BOK alleges that the allegations of paragraph 140 call for speculation, and
2 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

3 141. BOK denies the allegations contained in paragraph 141. To the extent the
4 allegations of paragraph 141 are asserted against defendants other than BOK, BOK lacks sufficient
5 information so as to form a belief as to the truthfulness of them and therefore denies them.

6 142. BOK denies the allegations contained in paragraph 142. To the extent the
7 allegations of paragraph 142 are asserted against defendants other than BOK, BOK lacks sufficient
8 information so as to form a belief as to the truthfulness of them and therefore denies them.

9 143. BOK denies the allegations contained in paragraph 143. To the extent the
10 allegations of paragraph 143 are asserted against defendants other than BOK, BOK lacks sufficient
11 information so as to form a belief as to the truthfulness of them and therefore denies them.

12 144. BOK denies the allegations contained in paragraph 144. To the extent the
13 allegations of paragraph 144 are asserted against defendants other than BOK, BOK lacks sufficient
14 information so as to form a belief as to the truthfulness of them and therefore denies them.

15 145. BOK denies the allegations contained in paragraph 145. To the extent the
16 allegations of paragraph 145 are asserted against defendants other than BOK, BOK lacks sufficient
17 information so as to form a belief as to the truthfulness of them and therefore denies them.

18 146. BOK denies the allegations contained in paragraph 146. To the extent the
19 allegations of paragraph 146 are asserted against defendants other than BOK, BOK lacks sufficient
20 information so as to form a belief as to the truthfulness of them and therefore denies them.

21 147. BOK denies the allegations contained in paragraph 147. To the extent the
22 allegations of paragraph 147 are asserted against defendants other than BOK, BOK lacks sufficient
23 information so as to form a belief as to the truthfulness of them and therefore denies them.

24 148. BOK admits the allegations of paragraph 148 of the Amended Complaint.

25 149. Answering the allegations of paragraph 149, BOK admits the existence of the
26 Senior Loan, the terms and provisions of which speak for themselves and about which BOK is
27 required neither to admit nor to deny further.

28 150. BOK alleges that the allegations of paragraph 150 call for speculation, and

1 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

2 151. BOK denies the allegations contained in paragraph 151. To the extent the
3 allegations of paragraph 151 are asserted against defendants other than BOK, BOK lacks sufficient
4 information so as to form a belief as to the truthfulness of them and therefore denies them.

5 152. BOK denies the allegations contained in paragraph 152. To the extent the
6 allegations of paragraph 152 are asserted against defendants other than BOK, BOK lacks sufficient
7 information so as to form a belief as to the truthfulness of them and therefore denies them.

8 153. BOK denies the allegations contained in paragraph 153. To the extent the
9 allegations of paragraph 153 are asserted against defendants other than BOK, BOK lacks sufficient
10 information so as to form a belief as to the truthfulness of them and therefore denies them.

11 154. BOK denies the allegations contained in paragraph 154. To the extent the
12 allegations of paragraph 154 are asserted against defendants other than BOK, BOK lacks sufficient
13 information so as to form a belief as to the truthfulness of them and therefore denies them.

14 155. BOK denies the allegations contained in paragraph 155. To the extent the
15 allegations of paragraph 155 are asserted against defendants other than BOK, BOK lacks sufficient
16 information so as to form a belief as to the truthfulness of them and therefore denies them.

17 156. BOK denies the allegations contained in paragraph 156. To the extent the
18 allegations of paragraph 156 are asserted against defendants other than BOK, BOK lacks sufficient
19 information so as to form a belief as to the truthfulness of them and therefore denies them.

20 157. BOK denies the allegations contained in paragraph 157. To the extent the
21 allegations of paragraph 157 are asserted against defendants other than BOK, BOK lacks sufficient
22 information so as to form a belief as to the truthfulness of them and therefore denies them.

23 158. BOK admits the allegations of paragraph 158.

24 159. BOK denies the allegations contained in paragraph 159. To the extent the
25 allegations of paragraph 159 are asserted against defendants other than BOK, BOK lacks sufficient
26 information so as to form a belief as to the truthfulness of them and therefore denies them.

27 160. BOK denies the allegations contained in paragraph 160. To the extent the
28 allegations of paragraph 160 are asserted against defendants other than BOK, BOK lacks sufficient

1 information so as to form a belief as to the truthfulness of them and therefore denies them.

2 161. BOK denies the allegations contained in paragraph 161. To the extent the
3 allegations of paragraph 161 are asserted against defendants other than BOK, BOK lacks sufficient
4 information so as to form a belief as to the truthfulness of them and therefore denies them.

5 162. BOK alleges that the allegations of paragraph 162 call for speculation, and
6 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

7 163. BOK alleges that the allegations of paragraph 163 do not purport to state a claim
8 for relief against BOK and therefore denies them.

9 164. BOK alleges that the allegations of paragraph 164 do not purport to state a claim
10 for relief against BOK and therefore denies them.

11 165. BOK alleges that the allegations of paragraph 165 do not purport to state a claim
12 for relief against BOK and therefore denies them.

13 166. BOK denies the allegations contained in paragraph 166. To the extent the
14 allegations of paragraph 166 are asserted against defendants other than BOK, BOK lacks sufficient
15 information so as to form a belief as to the truthfulness of them and therefore denies them.

16 167. BOK denies the allegations contained in paragraph 167. To the extent the
17 allegations of paragraph 167 are asserted against defendants other than BOK, BOK lacks sufficient
18 information so as to form a belief as to the truthfulness of them and therefore denies them.

19 168. BOK denies the allegations contained in paragraph 168. To the extent the
20 allegations of paragraph 168 are asserted against defendants other than BOK, BOK lacks sufficient
21 information so as to form a belief as to the truthfulness of them and therefore denies them.

22 169. BOK alleges that the allegations of paragraph 169 call for speculation, and
23 specifically speculation as to plaintiffs' state of mind, and therefore denies them. BOK denies any
24 assertion that it was a "Fiduciary Defendant" to the plaintiffs.

25 170. BOK denies the allegations contained in paragraph 170. To the extent the
26 allegations of paragraph 170 are asserted against defendants other than BOK, BOK lacks sufficient
27 information so as to form a belief as to the truthfulness of them and therefore denies them.

28 171. BOK denies the allegations contained in paragraph 171. To the extent the

1 allegations of paragraph 171 are asserted against defendants other than BOK, BOK lacks sufficient
2 information so as to form a belief as to the truthfulness of them and therefore denies them.

3 172. BOK denies the allegations contained in paragraph 172. To the extent the
4 allegations of paragraph 172 are asserted against defendants other than BOK, BOK lacks sufficient
5 information so as to form a belief as to the truthfulness of them and therefore denies them.

6 173. BOK denies the allegations contained in paragraph 173. To the extent the
7 allegations of paragraph 173 are asserted against defendants other than BOK, BOK lacks sufficient
8 information so as to form a belief as to the truthfulness of them and therefore denies them.

9 174. BOK denies the allegations contained in paragraph 174. To the extent the
10 allegations of paragraph 174 are asserted against defendants other than BOK, BOK lacks sufficient
11 information so as to form a belief as to the truthfulness of them and therefore denies them.

12 175. BOK denies the allegations contained in paragraph 175. To the extent the
13 allegations of paragraph 175 are asserted against defendants other than BOK, BOK lacks sufficient
14 information so as to form a belief as to the truthfulness of them and therefore denies them.

15 176. BOK denies the allegations contained in paragraph 176. Subject to this denial,
16 BOK admits that TM2I executed a guaranty that adopted North Dakota law. To the extent the
17 allegations of paragraph 176 are asserted against defendants other than BOK, BOK lacks sufficient
18 information so as to form a belief as to the truthfulness of them and therefore denies them.

19 177. BOK denies the allegations contained in paragraph 177. To the extent the
20 allegations of paragraph 177 are asserted against defendants other than BOK, BOK lacks sufficient
21 information so as to form a belief as to the truthfulness of them and therefore denies them.

22 178. BOK denies the allegations contained in paragraph 178. To the extent the
23 allegations of paragraph 178 are asserted against defendants other than BOK, BOK lacks sufficient
24 information so as to form a belief as to the truthfulness of them and therefore denies them.

25 179. BOK denies the allegations contained in paragraph 179. To the extent the
26 allegations of paragraph 179 are asserted against defendants other than BOK, BOK lacks sufficient
27 information so as to form a belief as to the truthfulness of them and therefore denies them.

28 180. BOK denies the allegations contained in paragraph 180. To the extent the

1 allegations of paragraph 180 are asserted against defendants other than BOK, BOK lacks sufficient
2 information so as to form a belief as to the truthfulness of them and therefore denies them.

3 181. BOK denies the allegations contained in paragraph 181. To the extent the
4 allegations of paragraph 181 are asserted against defendants other than BOK, BOK lacks sufficient
5 information so as to form a belief as to the truthfulness of them and therefore denies them.

6 182. BOK alleges that the allegations of paragraph 182 call for speculation, and
7 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

8 183. BOK denies the allegations contained in paragraph 183. To the extent the
9 allegations of paragraph 183 are asserted against defendants other than BOK, BOK lacks sufficient
10 information so as to form a belief as to the truthfulness of them and therefore denies them.

11 184. BOK denies the allegations contained in paragraph 184. To the extent the
12 allegations of paragraph 184 are asserted against defendants other than BOK, BOK lacks sufficient
13 information so as to form a belief as to the truthfulness of them and therefore denies them.

14 185. BOK denies the allegations contained in paragraph 185. To the extent the
15 allegations of paragraph 185 are asserted against defendants other than BOK, BOK lacks sufficient
16 information so as to form a belief as to the truthfulness of them and therefore denies them.

17 186. BOK denies the allegations contained in paragraph 186. To the extent the
18 allegations of paragraph 186 are asserted against defendants other than BOK, BOK lacks sufficient
19 information so as to form a belief as to the truthfulness of them and therefore denies them.

20 187. BOK denies the allegations contained in paragraph 187. To the extent the
21 allegations of paragraph 187 are asserted against defendants other than BOK, BOK lacks sufficient
22 information so as to form a belief as to the truthfulness of them and therefore denies them.

23 188. BOK admits the allegations of paragraph 188 of the Amended Complaint.

24 189. BOK admits the allegations of paragraph 189 of the Amended Complaint.

25 190. BOK denies the allegations contained in paragraph 190. To the extent the
26 allegations of paragraph 190 are asserted against defendants other than BOK, BOK lacks sufficient
27 information so as to form a belief as to the truthfulness of them and therefore denies them.

28 191. BOK denies the allegations contained in paragraph 191. To the extent the

1 allegations of paragraph 191 are asserted against defendants other than BOK, BOK lacks sufficient
2 information so as to form a belief as to the truthfulness of them and therefore denies them.

3 192. BOK alleges that the allegations of paragraph 192 do not purport to state a claim
4 for relief against BOK and therefore denies them.

5 193. BOK alleges that the allegations of paragraph 193 do not purport to state a claim
6 for relief against it and therefore denies them.

7 194. BOK denies the allegations contained in paragraph 194. To the extent the
8 allegations of paragraph 194 are asserted against defendants other than BOK, BOK lacks sufficient
9 information so as to form a belief as to the truthfulness of them and therefore denies them.

10 195. BOK denies the allegations contained in paragraph 195. To the extent the
11 allegations of paragraph 195 are asserted against defendants other than BOK, BOK lacks sufficient
12 information so as to form a belief as to the truthfulness of them and therefore denies them.

13 196. BOK denies the allegations contained in paragraph 196. To the extent the
14 allegations of paragraph 196 are asserted against defendants other than BOK, BOK lacks sufficient
15 information so as to form a belief as to the truthfulness of them and therefore denies them.

16 197. BOK denies the allegations contained in paragraph 197. . To the extent the
17 allegations of paragraph 197 are asserted against defendants other than BOK, BOK lacks sufficient
18 information so as to form a belief as to the truthfulness of them and therefore denies them.

19 198. BOK denies the allegations contained in paragraph 198. To the extent the
20 allegations of paragraph 198 are asserted against defendants other than BOK, BOK lacks sufficient
21 information so as to form a belief as to the truthfulness of them and therefore denies them.

22 199. BOK denies the allegations contained in paragraph 199. To the extent the
23 allegations of paragraph 199 are asserted against defendants other than BOK, BOK lacks sufficient
24 information so as to form a belief as to the truthfulness of them and therefore denies them.

25 200. Answering the allegations of paragraph 200, BOK repeats and realleges its
26 responses to paragraphs 1 through 199, inclusive, as if fully stated here.

27 201. BOK alleges that the allegations of paragraph 201 do not purport to state a claim
28 against it and that it is required neither to admit nor to deny them in response.

1 202. BOK alleges that the allegations of paragraph 202 do not purport to state a claim
2 against it and that it is required neither to admit nor to deny them in response.

3 203. BOK alleges that the allegations of paragraph 203 do not purport to state a claim
4 against it and that it is required neither to admit nor to deny them in response.

5 204. BOK alleges that the allegations of paragraph 204 do not purport to state a claim
6 against it and that it is required neither to admit nor to deny them in response.

7 205. BOK alleges that the allegations of paragraph 205 do not purport to state a claim
8 against it and that it is required neither to admit nor to deny them in response.

9 206. BOK alleges that the allegations of paragraph 206 do not purport to state a claim
10 against it and that it is required neither to admit nor to deny them in response.

11 207. BOK alleges that the allegations of paragraph 207 do not purport to state a claim
12 against it and that it is required neither to admit nor to deny them in response.

13 208. BOK alleges that the allegations of paragraph 208 do not purport to state a claim
14 against it and that it is required neither to admit nor to deny them in response.

15 209. BOK alleges that the allegations of paragraph 209 do not purport to state a claim
16 against it and that it is required neither to admit nor to deny them in response.

17 210. BOK alleges that the allegations of paragraph 210 call for speculation, and
18 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

19 211. BOK denies the allegations contained in paragraph 211. To the extent the
20 allegations of paragraph 211 are asserted against defendants other than BOK, BOK lacks sufficient
21 information so as to form a belief as to the truthfulness of them and therefore denies them.

22 212. BOK denies the allegations contained in paragraph 212. To the extent the
23 allegations of paragraph 212 are asserted against defendants other than BOK, BOK lacks sufficient
24 information so as to form a belief as to the truthfulness of them and therefore denies them.

25 213. BOK denies the allegations contained in paragraph 213. To the extent the
26 allegations of paragraph 213 are asserted against defendants other than BOK, BOK lacks sufficient
27 information so as to form a belief as to the truthfulness of them and therefore denies them.

28 214. BOK denies the allegations contained in paragraph 214. To the extent the

1 allegations of paragraph 214 are asserted against defendants other than BOK, BOK lacks sufficient
2 information so as to form a belief as to the truthfulness of them and therefore denies them.

3 215. BOK denies the allegations contained in paragraph 215. To the extent the
4 allegations of paragraph 215 are asserted against defendants other than BOK, BOK lacks sufficient
5 information so as to form a belief as to the truthfulness of them and therefore denies them.

6 216. BOK denies the allegations contained in paragraph 216. To the extent the
7 allegations of paragraph 216 are asserted against defendants other than BOK, BOK lacks sufficient
8 information so as to form a belief as to the truthfulness of them and therefore denies them.

9 217. Answering the allegations of paragraph 217, BOK repeats and realleges its
10 responses to paragraphs 1 through 216, inclusive, as if fully stated here.

11 218. BOK denies the allegations contained in paragraph 218. To the extent the
12 allegations of paragraph 218 are asserted against defendants other than BOK, BOK lacks sufficient
13 information so as to form a belief as to the truthfulness of them and therefore denies them.

14 219. BOK denies the allegations contained in paragraph 219. To the extent the
15 allegations of paragraph 219 are asserted against defendants other than BOK, BOK lacks sufficient
16 information so as to form a belief as to the truthfulness of them and therefore denies them.

17 220. BOK denies the allegations contained in paragraph 220. To the extent the
18 allegations of paragraph 220 are asserted against defendants other than BOK, BOK lacks sufficient
19 information so as to form a belief as to the truthfulness of them and therefore denies them.

20 221. BOK denies the allegations contained in paragraph 221. To the extent the
21 allegations of paragraph 221 are asserted against defendants other than BOK, BOK lacks sufficient
22 information so as to form a belief as to the truthfulness of them and therefore denies them.

23 222. BOK denies the allegations contained in paragraph 222. To the extent the
24 allegations of paragraph 222 are asserted against defendants other than BOK, BOK lacks sufficient
25 information so as to form a belief as to the truthfulness of them and therefore denies them.

26 223. BOK denies the allegations contained in paragraph 223. To the extent the
27 allegations of paragraph 223 are asserted against defendants other than BOK, BOK lacks sufficient
28 information so as to form a belief as to the truthfulness of them and therefore denies them.

1 224. BOK denies the allegations contained in paragraph 224. To the extent the
2 allegations of paragraph 224 are asserted against defendants other than BOK, BOK lacks sufficient
3 information so as to form a belief as to the truthfulness of them and therefore denies them.

4 225. BOK denies the allegations contained in paragraph 225. To the extent the
5 allegations of paragraph 225 are asserted against defendants other than BOK, BOK lacks sufficient
6 information so as to form a belief as to the truthfulness of them and therefore denies them.

7 226. Answering the allegations of paragraph 226, BOK repeats and realleges its
8 responses to paragraphs 1 through 225, inclusive, as if fully stated here.

9 227. BOK denies the allegations contained in paragraph 227. To the extent the
10 allegations of paragraph 227 are asserted against defendants other than BOK, BOK lacks sufficient
11 information so as to form a belief as to the truthfulness of them and therefore denies them.

12 228. BOK denies the allegations contained in paragraph 228. To the extent the
13 allegations of paragraph 228 are asserted against defendants other than BOK, BOK lacks sufficient
14 information so as to form a belief as to the truthfulness of them and therefore denies them.

15 229. BOK denies the allegations contained in paragraph 229. To the extent the
16 allegations of paragraph 229 are asserted against defendants other than BOK, BOK lacks sufficient
17 information so as to form a belief as to the truthfulness of them and therefore denies them.

18 230. BOK denies the allegations contained in paragraph 230. To the extent the
19 allegations of paragraph 230 are asserted against defendants other than BOK, BOK lacks sufficient
20 information so as to form a belief as to the truthfulness of them and therefore denies them.

21 231. BOK denies the allegations contained in paragraph 231. To the extent the
22 allegations of paragraph 231 are asserted against defendants other than BOK, BOK lacks sufficient
23 information so as to form a belief as to the truthfulness of them and therefore denies them.

24 232. BOK denies the allegations contained in paragraph 232. To the extent the
25 allegations of paragraph 232 are asserted against defendants other than BOK, BOK lacks sufficient
26 information so as to form a belief as to the truthfulness of them and therefore denies them.

27 233. BOK denies the allegations contained in paragraph 233. To the extent the
28 allegations of paragraph 233 are asserted against defendants other than BOK, BOK lacks sufficient

1 information so as to form a belief as to the truthfulness of them and therefore denies them.

2 234. BOK denies the allegations contained in paragraph 234. To the extent the
3 allegations of paragraph 234 are asserted against defendants other than BOK, BOK lacks sufficient
4 information so as to form a belief as to the truthfulness of them and therefore denies them.

5 235. BOK denies the allegations contained in paragraph 235. To the extent the
6 allegations of paragraph 235 are asserted against defendants other than BOK, BOK lacks sufficient
7 information so as to form a belief as to the truthfulness of them and therefore denies them.

8 236. BOK denies the allegations contained in paragraph 236. To the extent the
9 allegations of paragraph 236 are asserted against defendants other than BOK, BOK lacks sufficient
10 information so as to form a belief as to the truthfulness of them and therefore denies them.

11 237. Answering the allegations of paragraph 237, BOK repeats and realleges its
12 responses to paragraphs 1 through 236, inclusive, as if fully stated here.

13 238. BOK denies the allegations contained in paragraph 238. To the extent the
14 allegations of paragraph 238 are asserted against defendants other than BOK, BOK lacks sufficient
15 information so as to form a belief as to the truthfulness of them and therefore denies them.

16 239. BOK denies the allegations contained in paragraph 239. To the extent the
17 allegations of paragraph 239 are asserted against defendants other than BOK, BOK lacks sufficient
18 information so as to form a belief as to the truthfulness of them and therefore denies them.

19 240. BOK denies the allegations contained in paragraph 240. To the extent the
20 allegations of paragraph 240 are asserted against defendants other than BOK, BOK lacks sufficient
21 information so as to form a belief as to the truthfulness of them and therefore denies them.

22 241. BOK denies the allegations contained in paragraph 241. To the extent the
23 allegations of paragraph 241 are asserted against defendants other than BOK, BOK lacks sufficient
24 information so as to form a belief as to the truthfulness of them and therefore denies them.

25 242. BOK denies the allegations contained in paragraph 242. To the extent the
26 allegations of paragraph 242 are asserted against defendants other than BOK, BOK lacks sufficient
27 information so as to form a belief as to the truthfulness of them and therefore denies them.

28 243. BOK denies the allegations contained in paragraph 243. To the extent the

1 allegations of paragraph 243 are asserted against defendants other than BOK, BOK lacks sufficient
2 information so as to form a belief as to the truthfulness of them and therefore denies them.

3 244. BOK denies the allegations contained in paragraph 244. To the extent the
4 allegations of paragraph 244 are asserted against defendants other than BOK, BOK lacks sufficient
5 information so as to form a belief as to the truthfulness of them and therefore denies them.

6 245. BOK denies the allegations contained in paragraph 245. To the extent the
7 allegations of paragraph 245 are asserted against defendants other than BOK, BOK lacks sufficient
8 information so as to form a belief as to the truthfulness of them and therefore denies them.

9 246. BOK denies the allegations contained in paragraph 246. To the extent the
10 allegations of paragraph 246 are asserted against defendants other than BOK, BOK lacks sufficient
11 information so as to form a belief as to the truthfulness of them and therefore denies them.

12 247. BOK denies the allegations contained in paragraph 247. To the extent the
13 allegations of paragraph 247 are asserted against defendants other than BOK, BOK lacks sufficient
14 information so as to form a belief as to the truthfulness of them and therefore denies them.

15 248. BOK denies the allegations contained in paragraph 248. To the extent the
16 allegations of paragraph 248 are asserted against defendants other than BOK, BOK lacks sufficient
17 information so as to form a belief as to the truthfulness of them and therefore denies them.

18 249. BOK denies the allegations contained in paragraph 249. To the extent the
19 allegations of paragraph 249 are asserted against defendants other than BOK, BOK lacks sufficient
20 information so as to form a belief as to the truthfulness of them and therefore denies them.

21 250. Answering the allegations of paragraph 250, BOK repeats and realleges its
22 responses to paragraphs 1 through 249, inclusive, as if fully stated here.

23 251. BOK denies the allegations contained in paragraph 251. To the extent the
24 allegations of paragraph 251 are asserted against defendants other than BOK, BOK lacks sufficient
25 information so as to form a belief as to the truthfulness of them and therefore denies them.

26 252. BOK denies the allegations contained in paragraph 252. To the extent the
27 allegations of paragraph 252 are asserted against defendants other than BOK, BOK lacks sufficient
28 information so as to form a belief as to the truthfulness of them and therefore denies them.

1 253. BOK denies the allegations contained in paragraph 253. To the extent the
2 allegations of paragraph 253 are asserted against defendants other than BOK, BOK lacks sufficient
3 information so as to form a belief as to the truthfulness of them and therefore denies them.

4 254. BOK denies the allegations contained in paragraph 254. To the extent the
5 allegations of paragraph 254 are asserted against defendants other than BOK, BOK lacks sufficient
6 information so as to form a belief as to the truthfulness of them and therefore denies them.

7 255. BOK denies the allegations contained in paragraph 255. To the extent the
8 allegations of paragraph 255 are asserted against defendants other than BOK, BOK lacks sufficient
9 information so as to form a belief as to the truthfulness of them and therefore denies them.

10 256. BOK denies the allegations contained in paragraph 256. To the extent the
11 allegations of paragraph 256 are asserted against defendants other than BOK, BOK lacks sufficient
12 information so as to form a belief as to the truthfulness of them and therefore denies them.

13 257. BOK denies the allegations contained in paragraph 257. To the extent the
14 allegations of paragraph 257 are asserted against defendants other than BOK, BOK lacks sufficient
15 information so as to form a belief as to the truthfulness of them and therefore denies them.

16 258. BOK denies the allegations contained in paragraph 258. To the extent the
17 allegations of paragraph 258 are asserted against defendants other than BOK, BOK lacks sufficient
18 information so as to form a belief as to the truthfulness of them and therefore denies them.

19 259. BOK denies the allegations contained in paragraph 259. To the extent the
20 allegations of paragraph 259 are asserted against defendants other than BOK, BOK lacks sufficient
21 information so as to form a belief as to the truthfulness of them and therefore denies them.

22 260. BOK denies the allegations contained in paragraph 260. To the extent the
23 allegations of paragraph 260 are asserted against defendants other than BOK, BOK lacks sufficient
24 information so as to form a belief as to the truthfulness of them and therefore denies them.

25 261. BOK denies the allegations contained in paragraph 261. To the extent the
26 allegations of paragraph 261 are asserted against defendants other than BOK, BOK lacks sufficient
27 information so as to form a belief as to the truthfulness of them and therefore denies them.

28 262. BOK denies the allegations contained in paragraph 262. To the extent the

1 allegations of paragraph 262 are asserted against defendants other than BOK, BOK lacks sufficient
2 information so as to form a belief as to the truthfulness of them and therefore denies them.

3 263. BOK denies the allegations contained in paragraph 263. To the extent the
4 allegations of paragraph 263 are asserted against defendants other than BOK, BOK lacks sufficient
5 information so as to form a belief as to the truthfulness of them and therefore denies them.

6 264. Answering the allegations of paragraph 264, BOK repeats and realleges its
7 responses to paragraphs 1 through 263, inclusive, as if fully stated here.

8 265. BOK admits the allegations of paragraph 265 on information and belief.

9 266. BOK lacks sufficient information so as to form a belief as to the truthfulness of the
10 allegations of paragraph 266 and therefore denies them.

11 267. BOK denies the allegations contained in paragraph 267. To the extent the
12 allegations of paragraph 267 are asserted against defendants other than BOK, BOK lacks sufficient
13 information so as to form a belief as to the truthfulness of them and therefore denies them.

14 268. BOK denies the allegations contained in paragraph 268. To the extent the
15 allegations of paragraph 268 are asserted against defendants other than BOK, BOK lacks sufficient
16 information so as to form a belief as to the truthfulness of them and therefore denies them.

17 269. BOK denies the allegations contained in paragraph 269. To the extent the
18 allegations of paragraph 269 are asserted against defendants other than BOK, BOK lacks sufficient
19 information so as to form a belief as to the truthfulness of them and therefore denies them.

20 270. BOK denies the allegations contained in paragraph 270. To the extent the
21 allegations of paragraph 270 are asserted against defendants other than BOK, BOK lacks sufficient
22 information so as to form a belief as to the truthfulness of them and therefore denies them.

23 271. Answering the allegations of paragraph 271, BOK repeats and realleges its
24 responses to paragraphs 1 through 270, inclusive, as if fully stated here.

25 272. BOK denies the allegations contained in paragraph 272. To the extent the
26 allegations of paragraph 272 are asserted against defendants other than BOK, BOK lacks sufficient
27 information so as to form a belief as to the truthfulness of them and therefore denies them.

28 273. BOK denies the allegations contained in paragraph 273. To the extent the

1 allegations of paragraph 273 are asserted against defendants other than BOK, BOK lacks sufficient
2 information so as to form a belief as to the truthfulness of them and therefore denies them.

3 274. BOK denies the allegations contained in paragraph 274. To the extent the
4 allegations of paragraph 274 are asserted against defendants other than BOK, BOK lacks sufficient
5 information so as to form a belief as to the truthfulness of them and therefore denies them.

6 275. BOK denies the allegations contained in paragraph 275. To the extent the
7 allegations of paragraph 275 are asserted against defendants other than BOK, BOK lacks sufficient
8 information so as to form a belief as to the truthfulness of them and therefore denies them.

9 276. Answering the allegations of paragraph 276, BOK repeats and realleges its
10 responses to paragraphs 1 through 275, inclusive, as if fully stated here.

11 277. BOK denies the allegations contained in paragraph 277. To the extent the
12 allegations of paragraph 277 are asserted against defendants other than BOK, BOK lacks sufficient
13 information so as to form a belief as to the truthfulness of them and therefore denies them.

14 278. BOK denies the allegations contained in paragraph 278. To the extent the
15 allegations of paragraph 278 are asserted against defendants other than BOK, BOK lacks sufficient
16 information so as to form a belief as to the truthfulness of them and therefore denies them.

17 279. BOK denies the allegations contained in paragraph 279. To the extent the
18 allegations of paragraph 279 are asserted against defendants other than BOK, BOK lacks sufficient
19 information so as to form a belief as to the truthfulness of them and therefore denies them.

20 280. BOK denies the allegations contained in paragraph 280. To the extent the
21 allegations of paragraph 280 are asserted against defendants other than BOK, BOK lacks sufficient
22 information so as to form a belief as to the truthfulness of them and therefore denies them.

23 281. Answering the allegations of paragraph 281, BOK repeats and realleges its
24 responses to paragraphs 1 through 280, inclusive, as if fully stated here.

25 282. BOK denies the allegations contained in paragraph 282. To the extent the
26 allegations of paragraph 282 are asserted against defendants other than BOK, BOK lacks sufficient
27 information so as to form a belief as to the truthfulness of them and therefore denies them.

28 283. BOK denies the allegations contained in paragraph 283. To the extent the

1 allegations of paragraph 283 are asserted against defendants other than BOK, BOK lacks sufficient
2 information so as to form a belief as to the truthfulness of them and therefore denies them.

3 284. BOK denies the allegations contained in paragraph 284. To the extent the
4 allegations of paragraph 284 are asserted against defendants other than BOK, BOK lacks sufficient
5 information so as to form a belief as to the truthfulness of them and therefore denies them.

6 285. BOK denies the allegations contained in paragraph 285. To the extent the
7 allegations of paragraph 285 are asserted against defendants other than BOK, BOK lacks sufficient
8 information so as to form a belief as to the truthfulness of them and therefore denies them.

9 286. Answering the allegations of paragraph 286, BOK repeats and realleges its
10 responses to paragraphs 1 through 285, inclusive, as if fully stated here.

11 287. BOK denies the allegations contained in paragraph 287. To the extent the
12 allegations of paragraph 287 are asserted against defendants other than BOK, BOK lacks sufficient
13 information so as to form a belief as to the truthfulness of them and therefore denies them.

14 288. BOK denies the allegations contained in paragraph 288. To the extent the
15 allegations of paragraph 288 are asserted against defendants other than BOK, BOK lacks sufficient
16 information so as to form a belief as to the truthfulness of them and therefore denies them.

17 289. BOK denies the allegations contained in paragraph 289. To the extent the
18 allegations of paragraph 289 are asserted against defendants other than BOK, BOK lacks sufficient
19 information so as to form a belief as to the truthfulness of them and therefore denies them.

20 290. Answering the allegations of paragraph 290, BOK repeats and realleges its
21 responses to paragraphs 1 through 289, inclusive, as if fully stated here.

22 291. The allegations contained in paragraph 291 call for a legal conclusion, therefore
23 BOK is required neither to admit nor to deny them in response.

24 292. BOK denies the allegations contained in paragraph 292. To the extent the
25 allegations of paragraph 292 are asserted against defendants other than BOK, BOK lacks sufficient
26 information so as to form a belief as to the truthfulness of them and therefore denies them.

27 293. BOK denies the allegations contained in paragraph 293. To the extent the
28 allegations of paragraph 293 are asserted against defendants other than BOK, BOK lacks sufficient

1 information so as to form a belief as to the truthfulness of them and therefore denies them.

2 294. BOK denies the allegations contained in paragraph 294. To the extent the
3 allegations of paragraph 294 are asserted against defendants other than BOK, BOK lacks sufficient
4 information so as to form a belief as to the truthfulness of them and therefore denies them.

5 295. Answering the allegations of paragraph 295, BOK repeats and realleges its
6 responses to paragraphs 1 through 294, inclusive, as if fully stated here.

7 296. BOK denies the allegations contained in paragraph 296. To the extent the
8 allegations of paragraph 296 are asserted against defendants other than BOK, BOK lacks sufficient
9 information so as to form a belief as to the truthfulness of them and therefore denies them.

10 297. BOK denies the allegations contained in paragraph 297. To the extent the
11 allegations of paragraph 297 are asserted against defendants other than BOK, BOK lacks sufficient
12 information so as to form a belief as to the truthfulness of them and therefore denies them.

13 298. BOK denies the allegations contained in paragraph 298. To the extent the
14 allegations of paragraph 298 are asserted against defendants other than BOK, BOK lacks sufficient
15 information so as to form a belief as to the truthfulness of them and therefore denies them.

16 299. Answering the allegations of paragraph 299, BOK repeats and realleges its
17 responses to paragraphs 1 through 298, inclusive, as if fully stated here.

18 300. BOK alleges that the allegations of paragraph 300 do not purport to state a claim
19 against it and that it is required neither to admit nor to deny them in response.

20 301. BOK alleges that the allegations of paragraph 301 do not purport to state a claim
21 against it and that it is required neither to admit nor to deny them in response.

22 302. BOK alleges that the allegations of paragraph 302 do not purport to state a claim
23 against it and that it is required neither to admit nor to deny them in response.

24 303. BOK alleges that the allegations of paragraph 303 do not purport to state a claim
25 against it and that it is required neither to admit nor to deny them in response.

26 304. BOK alleges that the allegations of paragraph 304 do not purport to state a claim
27 against it and that it is required neither to admit nor to deny them in response.

28 305. BOK alleges that the allegations of paragraph 305 do not purport to state a claim

1 against it and that it is required neither to admit nor to deny them in response.

2 306. BOK alleges that the allegations of paragraph 306 do not purport to state a claim
3 against it and that it is required neither to admit nor to deny them in response.

4 307. BOK alleges that the allegations of paragraph 307 do not purport to state a claim
5 against it and that it is required neither to admit nor to deny them in response.

6 308. BOK alleges that the allegations of paragraph 308 do not purport to state a claim
7 against it and that it is required neither to admit nor to deny them in response.

8 309. BOK alleges that the allegations of paragraph 309 do not purport to state a claim
9 against it and that it is required neither to admit nor to deny them in response.

10 310. BOK alleges that the allegations of paragraph 310 do not purport to state a claim
11 against it and that it is required neither to admit nor to deny them in response.

12 311. BOK alleges that the allegations of paragraph 311 do not purport to state a claim
13 against it and that it is required neither to admit nor to deny them in response.

14 AFFIRMATIVE DEFENSES

15 FIRST AFFIRMATIVE DEFENSE

16 The Court lacks jurisdiction to reach a determination as to the guaranty executed by
17 Plaintiff Tharaldson Motels II, Inc. as the guaranty provides that North Dakota is the exclusive
18 jurisdiction to resolve the dispute.

19 SECOND AFFIRMATIVE DEFENSE

20 Any claim relating to the TMII Guaranty should be resolved in the United States District
21 Court for the District of North Dakota, Case No. 1:09-cv-30.

22 THIRD AFFIRMATIVE DEFENSE

23 Each cause of action fails to state a claim upon which relief can be granted.

24 FOURTH AFFIRMATIVE DEFENSE

25 Each cause of action lacks the essential element of causation and proximate causation as to
26 BOK, including but not limited to the fact that the losses to the plaintiffs were caused by the
27 actions of others and that such superseding, intervening causes break the chain of causation.
28

1 FIFTH AFFIRMATIVE DEFENSE

2 Any damage, injury or loss sustained by the plaintiffs was proximately and exclusively
3 caused by the acts or omissions of persons or entities other than BOK, over which persons or
4 entities BOK had no control. The plaintiffs' recovery, if any, should therefore be barred, reduced
5 or apportioned in accordance with the comparative fault of those persons or entities.

6 SIXTH AFFIRMATIVE DEFENSE

7 All actions by BOK were in good faith and do not constitute any grounds for punitive or
8 exemplary damages.

9 SEVENTH AFFIRMATIVE DEFENSE

10 Any application of punitive damages in this matter is prohibited as excessive fines,
11 deprivation of property without due process, and a denial of fair and due process.

12 EIGHTH AFFIRMATIVE DEFENSE

13 BOK's actions are fully excused under the doctrine of legal compulsion.

14 NINTH AFFIRMATIVE DEFENSE

15 The plaintiffs' claims against BOK are barred in whole or in part as BOK has strictly or
16 substantially complied with all applicable laws, statutes and regulations and has fully performed
17 any and all statutory or other duties owed plaintiffs.

18 TENTH AFFIRMATIVE DEFENSE

19 The plaintiffs' claims are barred, in whole or in part, by the contributory and/or
20 comparative negligence of plaintiffs, plaintiffs' agents, other defendants, or third parties.

21 ELEVENTH AFFIRMATIVE DEFENSE

22 BOK owed no legal duty to the plaintiffs. If BOK did owe such a legal duty, BOK did not
23 breach that duty.

24 TWELFTH AFFIRMATIVE DEFENSE

25 The plaintiffs' cause of action for mistake is insufficient pursuant to Fed. R. Civ. P. 9(b).

26 THIRTEENTH AFFIRMATIVE DEFENSE

27 The plaintiffs' claim for punitive damages is insufficient pursuant to Fed. R. Civ. P. 9(b).
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FOURTEENTH AFFIRMATIVE DEFENSE

The statements, if any, made by BOK were opinions, and not statements of fact.

FIFTEENTH AFFIRMATIVE DEFENSE

The statements, if any, made by BOK are subject to a privilege, a qualified privilege, common interest privilege and/or were made during a privileged occasion.

SIXTEENTH AFFIRMATIVE DEFENSE

The statements, if any, made by BOK were truthful.

SEVENTEENTH AFFIRMATIVE DEFENSE

The statements, if any, made by BOK were not false and Plaintiffs' negligent misrepresentation claim is barred as a matter of law.

EIGHTEENTH AFFIRMATIVE DEFENSE

The statements, if any, made by BOK were not material and Plaintiffs' negligent misrepresentation claim is barred as a matter of law.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs lack standing to bring this action.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrines of laches, waiver and estoppel.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to mitigate their damages, if any, after discovery of the alleged injury, if any.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Plaintiffs are guilty of unclean hands and therefore are not entitled to any relief from BOK.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs have failed to join indispensable parties and their complaint fails as a result.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Plaintiffs have been unjustly enriched to the injury and detriment of BOK and therefore are not entitled to any relief.

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TWENTY-FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, to the extent that Plaintiffs have not suffered any injury in fact.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Any damages that Plaintiffs allege to have suffered are too remote or speculative as to allow recovery.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

BOK adopts and incorporates by reference all other defenses asserted or to be asserted by any other defendant in this proceeding to the extent that BOK may share in such defenses.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

BOK reserves the right to supplement its affirmative defenses in accordance with the Rules of Civil Procedure and the governing procedural orders of this case.

TWENTY-NINTH AFFIRMATIVE DEFENSE

Venue is not proper with this Court.

THIRTIETH AFFIRMATIVE DEFENSE

Proper venue for these claims lies in the federal court located in Burleigh County, North Dakota in Case No. 1:09-CV-30.

THIRTY-FIRST AFFIRMATIVE DEFENSE

Venue is improper in this Court because the parties agreed in writing that TM2I "consents to the exclusive personal and venue jurisdiction of the state and federal courts located in Burleigh County, North Dakota in connection with any controversy related in any way to this Guaranty, and waives any argument that venue in such forums is not convenient."

THIRTY-SECOND AFFIRMATIVE DEFENSE

Plaintiffs have waived their claims in this litigation by virtue of the terms and conditions of the guaranties executed in the loan transaction.

THIRTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by their fraud that induced BOK to participate in the loan transaction that is the subject of the litigation.

1 THIRTY-FOURTH AFFIRMATIVE DEFENSE

2 Plaintiffs' claims are barred by their negligence that caused BOK to participate in the loan
3 transaction that is the subject of the litigation.

4 COUNTERCLAIM AGAINST PLAINTIFF GARY D. THARALDSON

5 Defendant/Counterclaim-Plaintiff, Bank of Oklahoma, N.A., (hereinafter referred to as
6 "BOK") for its action against Defendant, Gary D. Tharaldson, an individual ("Tharaldson"),
7 alleges and states as follow:

8 I.

9 Parties, Jurisdiction and Venue

10 1. BOK is a national banking association formed in accordance with the laws and
11 regulations of the United States. The principal offices of BOK are located at One Williams
12 Center, in the City of Tulsa, Tulsa County, State of Oklahoma.

13 2. Tharaldson is presently a North Dakota resident but, at the time of the transaction at
14 issue, was a resident of the City of Las Vegas, Clark County, Nevada.

15 3. Venue is proper with the Court as the parties engaged in meetings and the
16 transaction at issue occurred in the City of Las Vegas, Clark County, Nevada.

17 II.

18 Factual Background

19 4. BOK incorporates and realleges the allegations contained in ¶¶1-3 above as if fully
20 restated herein.

21 5. BOK is a financial services company engaged in, among its financial activities,
22 commercial lending activities for the development of commercial, retail and residential real estate
23 development and construction.

24 6. Tharaldson is a developer and operator of select service and extended service hotels
25 across the United States.

26 7. Tharaldson has very substantial assets and net worth. Tharaldson is highly credit
27 worthy and routinely obtains credit and credit facilities at or near the prime rate of interest.

28 8. BOK and Tharaldson are involved in a certain real estate development project

1 located on 21 acres of land on Russell Road in Las Vegas, Nevada known as "Manhattan West."

2 9. Manhattan West was designed and approved as a mixed use community featuring
3 more than 600 condominium residences, an eleven story tower and several mid-rise buildings in
4 addition to more than 200,000 square feet of shops, restaurants and office and hotel space.

5 10. The development of Manhattan West was to take place in certain distinct phases.
6 Phase 1 of Manhattan West was to involve 228 residential condominium units and approximately
7 195,350 square feet of retail and office space.

8 11. The developer of Manhattan West was Gemstone Development West, LLC, a
9 Nevada limited liability company ("Gemstone West").

10 12. Scott Financial Corporation, a North Dakota corporation, ("Scott Financial")
11 agreed to loan up to the amount of \$110,000,000.00 (the "Loan") to Gemstone Development for
12 the development of Manhattan West.

13 13. As a potential participating construction lender for the Gemstone West project,
14 BOK received a loan package ("Credit Display") from Scott Financial on or around November 1,
15 2007.

16 14. Tharaldson became involved in the Gemstone West project sometime in the first
17 quarter of 2007.

18 15. By April 30, 2007, Tharaldson had committed one of his entities, Club Vista
19 Financial Services, LLC, to participate as a lender for Manhattan West.

20 16. Tim James, a Senior Vice President of BOK, was the BOK representative who took
21 the lead in the review of the Loan involving Manhattan West.

22 17. During the normal course of underwriting and due diligence functions, Tim James
23 attended a meeting in Las Vegas during the week of November 26 through 30, 2007 at the
24 Gemstone West sales office. In addition to Tim James, those attending the meeting were Brad
25 Scott of Scott Financial, Alex Edelstein of Gemstone Development and Tharaldson. The purpose
26 of the meeting was to discuss the merits of Manhattan West and the possibility of BOK being a
27 participant in the Loan.

28 18. During the meeting about Manhattan West referenced above in ¶17, Tharaldson

1 furnished Tim James with a copy of a report originally created by Applied Analytics for the
2 Southern Nevada Home Builders Association, titled Southern Nevada Housing Supply-Demand
3 Analysis (the "Report").

4 19. The Report essentially concluded that there would be a large demand for housing
5 units in the future due to a significant number of new casino hotel projects planned and under
6 construction in Las Vegas. Tharaldson expressed his personal faith in the contents of the Report
7 and represented that the Report supported the development of Manhattan West. Scott Financial
8 had not furnished the Report to BOK, only Tharaldson furnished it.

9 20. At the meeting referenced in ¶17, Tharaldson stated to Tim James that the
10 information contained in the Report "was what ultimately sold him" [Tharaldson] on the
11 Gemstone West project.

12 21. Based upon his long time involvement in the Gemstone West project and his then
13 residency in Las Vegas, Tharaldson had extensive knowledge and superior information to that
14 which was available to BOK.

15 22. Tharaldson's involvement in the meeting referenced in ¶17 was as an advocate and
16 supporter of Manhattan West. Tharaldson promoted BOK to participate in the Credit, as he or his
17 corporate entities had committed significant funds to the development of Manhattan West that
18 were ultimately subordinated to the Loan.

19 23. Tharaldson's advocacy and support of Manhattan West was a substantial factor
20 contributing to BOK's decision to participate in the Loan.

21 24. In addition to his advocacy and support of Manhattan West, Tharaldson provided
22 extensive personal and corporate financial information in support of BOK's participation in the
23 Loan.

24 25. Without the advocacy and support of Tharaldson and his entities in the Manhattan
25 West project, BOK would not have agreed to participate in the Loan.

26 26. By convincing BOK and other lenders of the merits of the Manhattan West
27 development based upon his commitment and support, Tharaldson and/or his corporate entities
28 were able to avoid a \$30,000,000.00 commitment to fund the Loan.

1 27. Scott Financial obtained funding for the Loan through a banking syndicate Scott
2 Financial arranged with the assistance of Tharaldson. The members of the banking syndicate are
3 twenty-nine (29) financial institutions located in the states of Oklahoma, Kansas, Minnesota,
4 Nebraska and North Dakota. The dollar amount of the participation by each of the banks in the
5 syndication varied.

6 28. Scott Financial served as the Lead of the Loan.

7 29. BOK agreed to fund \$24 million of the Loan as a participant in the bank
8 syndication arranged by Scott Financial (the "Participation"). BOK was also named as Co-Lead
9 for purposes of the Loan.

10 30. Tharaldson never disclosed to BOK the matters he alleges in ¶¶66 to 75 of his First
11 Amended Complaint. At all times, Tharaldson held himself out as a sophisticated and
12 knowledgeable investor and businessman that actively sought out BOK's participation in the
13 Loan.

14 31. As a resident at that time of Las Vegas, Nevada, Tharaldson had firsthand
15 knowledge of the substantial negative changes in the Las Vegas real estate market during 2007.

16 32. Gemstone West has not made any payments on the Loan since November of 2008.

17 33. The Loan is in monetary default as a result of the non-payment of the Loan by
18 Gemstone West.

19 34. Tharaldson and his entities have filed this action despite Tharaldson's superior
20 knowledge, advocacy and support of the Gemstone West project that induced BOK's participation
21 in the Loan.

22 35. Based upon the allegations and legal theories asserted in his First Amended
23 Complaint, Tharaldson is attempting to repudiate the representations he made to induce BOK
24 during the course of BOK's investigation and due diligence into participating in the Loan.

25 36. BOK is now owed the principal sum of \$20,009,128.66, plus accrued interest of
26 \$1,540,926.80 through the 10th day of August, 2009 with per diem interest of \$6,113.90 as well as
27 other fees due under the terms of the Loan.

28 37. BOK has been damaged in the amount of \$20,009,128.66, plus accrued interest of

1 \$1,540,926.80 through the 10th day of August, 2009 with per diem interest of \$6,113.90 as well as
2 other fees due under the terms of the Loan by Tharaldson's representations, information and
3 support that induced BOK to participate in the Loan.

4 III.

5 Claims for Relief

6 First Claim for Relief

7 38. BOK realleges and incorporates the allegations contained in ¶¶1-37 above.

8 39. Tharaldson had been participating with the financing of Gemstone West since the
9 first quarter of 2007 and had full knowledge and information concerning the project.

10 40. The representations and information furnished by Tharaldson to BOK during the
11 November 2007 meeting pertaining to BOK's investigation and due diligence of the Gemstone
12 West was material to BOK's decision to participate in the Loan.

13 41. The representations and information furnished by Tharaldson to BOK during the
14 November 2007 meeting were false in order to induce BOK into participating in the Loan so that
15 Tharaldson or his entities could avoid their own \$30,000,000.00 commitment.

16 42. Tharaldson knew or should have known that his representations and the
17 information he furnished to BOK were false.

18 43. Further, Tharaldson omitted material information about the substantial decline of
19 the Las Vegas real estate market and failed to advise BOK of any concerns that he had about
20 Manhattan West as alleged in ¶¶66-75 of his First Amended Complaint.

21 44. BOK relied upon Tharaldson

22 45. BOK relied upon Tharaldson to its detriment.

23 46. BOK has been damaged in the amount of \$20,009,128.66, plus accrued interest of
24 \$1,540,926.80 through the 10th day of August, 2009 with per diem interest of \$6,113.90 as well as
25 other fees due under the terms of the Loan by Tharaldson's representations, information and
26 support that induced BOK to participate in the Loan.

27 47. BOK is entitled to the recovery of exemplary damages for the harm caused by
28 Tharaldson that fraudulently induced BOK to participate in the Loan.

WHEREFORE, premises considered, BOK prays for judgment against Tharaldson in the amount of \$20,009,128.66, plus accrued interest of \$1,540,926.80 through the 10th day of August, 2009 with per diem interest of \$6,113.90 as well as other fees due under the terms of the Loan, exemplary damages, its costs, including a reasonable attorney's fee and such other and further relief that this Court deems just and proper.

Second Claim for Relief

48. BOK realleges and incorporates the allegations contained in ¶¶1-47 above.

49. Tharaldson undertook extensive efforts to furnish BOK with information to induce BOK's participation in the Loan.

50. Tharaldson failed to furnish BOK with accurate information as to the deteriorating conditions of the Las Vegas real estate market.

51. Tharaldson acted in reckless disregard and/or negligent disregard of his obligations or responsibilities to furnish BOK with accurate market and financial information pertaining to the Manhattan West project.

52. As a result of Tharaldson's negligence, BOK has been damaged in the amount of \$20,009,128.66, plus accrued interest of \$1,540,926.80 through the 10th day of August, 2009 with per diem interest of \$6,113.90 as well as other fees due under the terms of the Loan.

53. As a result of Tharaldson's negligent misrepresentation, BOK has been damaged in the amount of \$20,009,128.66, plus accrued interest of \$1,540,926.80 through the 10th day of August, 2009 with per diem interest of \$6,113.90 as well as other fees due under the terms of the Loan.

54. BOK is entitled to the recovery of exemplary damages for the harm caused by Tharaldson's negligence that induced BOK to participate in the Loan.

WHEREFORE, premises considered, BOK prays for judgment against Tharaldson in the amount of \$20,009,128.66, plus accrued interest of \$1,540,926.80 through the 10th day of August, 2009 with per diem interest of \$6,113.90 as well as other fees due under the terms of the Loan, exemplary damages, its costs, including a reasonable attorney's fee and such other and further relief that this Court deems just and proper.

1 DATED this 10th day of August, 2009.

2 LEWIS AND ROCA LLP

3 By /s/ Von S. Heinz

4 VON S. HEINZ

5 Nevada Bar No. 859

6 ABRAN E. VIGIL

7 Nevada Bar No. 7548

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13 John D. Clayman

14 Admitted Pro Hac Vice

15 FREDERIC DORWART, LAWYERS

16 Old City Hall

17 124 East Fourth Street

18 Tulsa, Oklahoma 74103

19 Attorneys for Defendant

20 BANK OF OKLAHOMA, N.A.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing
3 **DEFENDANT BANK OF OKLAHOMA, N.A.'S ANSWER TO PLAINTIFFS' FIRST**
4 **AMENDED COMPLAINT AND COUNTERCLAIM AGAINST GARY D. THARALDSON**
5 made this date by electronic filing and by depositing a copy in the U.S. Mail, at Las Vegas,
6 Nevada, addressed to the following:
7

8 Mark Albright
9 D. Chris Albright
10 Albright, Stoddard, Warnick & Albright, P.C.
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12 Quail Park - Suite D-4
13 Las Vegas, Nevada 89106
14 Attorneys for Plaintiffs

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16 Martin A. Aronson
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Bradley J. Scott

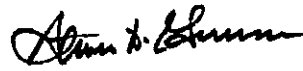
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Gwen Mullins
Howard & Howard Attorneys PLLC
3800 Howard Hughes Parkway, Suite 1400
Las Vegas, Nevada 89169
Attorneys for APCO Construction

DATED this 10th day of August, 2009.

/s/ Judith A. Vienneau
An Employee of Lewis and Roca LLP


CLERK OF THE COURT

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2 MARK M. JONES, ESQ. (#267)
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5 Seventeenth Floor
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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 Company;
11 THARALDSON MOTELS II, INC., a North
Dakota corporation; and GARY D.
12 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.

Case No.: A579963
Dept. No.: XIII

**DEFENDANTS SCOTT FINANCIAL
CORPORATION AND BRADLEY J.
SCOTT'S MOTION FOR FIRM TRIAL
SETTING**

Hearing Date: October 5, 2009
Hearing Time: 9:00 a.m.

22
23 COME NOW Defendants SCOTT FINANCIAL CORPORATION and BRADLEY J.

24 SCOTT (collectively hereinafter, "Scott"), by and through their attorneys of record, Kemp, Jones &
25 Coulthard, LLP, and move this Court to set a firm trial date in the above-referenced matter.

26 This motion is made and based upon the attached Memorandum of Points and Authorities,
27 any attached exhibits, all pleadings and papers on file in this action, and any oral argument that this

28 ///

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1 Court might entertain at the hearing on this motion.

2 Dated this 20th day of August, 2009.

3 Respectfully submitted,

4 KEMP, JONES & COULTHARD

5 

6 J. RANDALL JONES, ESQ. (#1927)
7 MARK M. JONES, ESQ. (#267)
8 MATTHEW S. CARTER, ESQ. (#9524)
9 KEMP, JONES & COULTHARD, LLP
10 3800 Howard Hughes Parkway
11 Seventeenth Floor
12 Las Vegas, Nevada 89169
13 Attorneys for Scott Financial Corporation
14 and Bradley J. Scott

11 **NOTICE OF MOTION**

12 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

13 PLEASE TAKE NOTICE that the undersigned will bring the foregoing **DEFENDANTS**
14 **SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION FOR FIRM**
15 **TRIAL SETTING** on for hearing before the above-entitled Court on the 5th day of October, 2009,
16 at 9:00 a.m., or as soon thereafter as counsel may be heard.

17 Dated this 20th day of August, 2009.

18 Respectfully submitted,

19 KEMP, JONES & COULTHARD

20 

21 J. RANDALL JONES, ESQ. (#1927)
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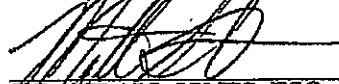
MEMORANDUM OF POINTS AND AUTHORITIES

"Setting trial dates and other matters done in the arrangement of a trial court's calendar is within the discretion of that Court. . . ."¹ Scott now comes before this Court to request a firm date for trial. A date certain is necessary in this case because of the large geographic distance between the parties, all of whom, with the sole exception of APCO Construction, reside outside of the state of Nevada. (Scott and the Plaintiffs are based in North Dakota, and Bank of Oklahoma is, obviously, based in Oklahoma.) Also, a vast majority of the witnesses in this matter may come from the banks participating in the subject Manhattan West loan, and none of those banks are based in Nevada. This distance, combined with the schedules of out-of-state counsel, percipient witnesses, and expert witnesses that will likely be retained by all parties, makes it nearly impossible to properly schedule trial testimony when the trial is on a three week stack, or can get bumped from the calendar at the last moment by a case with priority. Accordingly, Scott respectfully requests that this Court exercise its discretion and set a date certain for trial in this matter.

DATED this 20th day of August, 2009.

Respectfully submitted,

KEMP, JONES & COULTHARD



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¹ *Monroe, Ltd. v. Central Tel. Co. So. Nev. Div.*, 91 Nev. 450, 456, 538 P.2d 152, 156 (1975) (citing *Close v. Second Judicial Dist.*, 76 Nev. 194, 314 P.2d 379 (1957)).

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CERTIFICATE OF MAILING

I hereby certify that on the 20th day of August, 2009, the foregoing **DEFENDANTS SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION FOR FIRM TRIAL SETTING** was served on the following persons by mailing a copy thereof, first class mail, postage prepaid, and e-mailing to the e-mail addresses listed as follows:

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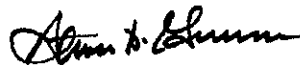
26 **DISTRICT COURT**
27 **CLARK COUNTY, NEVADA**28 CLUB VISTA FINANCIAL SERVICES,
L.L.C., a Nevada limited liability company,
THARALDSON MOTELS II, INC., a North
Dakota corporation; and GARY D.
THARALDSON,

Plaintiffs,

vs.

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 CORP., a Nevada
corporation, dba APCO CONSTRUCTION;
DOE INDIVIDUALS 1-100; and ROE
BUSINESS ENTITIES 1-100,

Defendants.

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CLERK OF THE COURT

CASE NO. A579963

DEPT NO. XIII

**GARY D. THARALDSON'S REPLY
TO BANK OF OKLAHOMA, N.A.'S
COUNTERCLAIM**

///

1 For his Reply to the Counterclaim of Bank of Oklahoma, Plaintiff/Counterdefendant
2 Gary D. Tharaldson ("Tharaldson") admits, denies and avers as follows:

3 **I.**

4 **Parties, Jurisdiction and Venue**

5 1. Replying to Paragraph 1 of the Counterclaim, Tharaldson admits the
6 allegations of Paragraph 1.

7 2. Replying to Paragraph 2 of the Counterclaim, Tharaldson states that he is a
8 resident of Clark County, Nevada. Tharaldson denies the remaining allegations of
9 Paragraph 2.

10 3 Replying to Paragraph 3 of the Counterclaim, Tharaldson admits that venue is
11 proper in this Court. Tharaldson denies the remaining allegations of Paragraph 3.

12 **II.**

13 **Factual Background**

14 4. Tharaldson re-alleges and incorporates herein by reference each and every
15 answer set forth above.

16 5. Replying to Paragraph 5 of the Counterclaim, Tharaldson admits the
17 allegations of Paragraph 5, upon information and belief.

18 6. Replying to Paragraph 6 of the Counterclaim, Tharaldson admits the
19 allegations of Paragraph 6.

20 7. Replying to Paragraph 7 of the Counterclaim, Tharaldson admits the
21 allegations of Paragraph 7.

22 8. Replying to Paragraph 8 of the Counterclaim, Tharaldson admits that he
23 signed a guaranty related to the project known as "Manhattan West" and that Club Vista
24 Financial Services, LLC provided certain acquisition and development financing for the
25 project. Tharaldson admits that Bank of Oklahoma was co-lead lender on a financing
26 syndicate for the "Manhattan West" project. Tharaldson states that the allegations in
27 Paragraph 8 are vague and therefore denies the remaining allegations of Paragraph 8.
28

1 9. Replying to Paragraph 9 of the Counterclaim, Tharaldson admits the
2 allegations of paragraph 9.

3 10. Replying to Paragraph 10 of the Counterclaim, Tharaldson admits the
4 allegations of Paragraph 10.

5 11. Replying to Paragraph 11 of the Counterclaim, Tharaldson admits the
6 allegations of Paragraph 11.

7 12. Replying to Paragraph 12 of the Counterclaim, Tharaldson admits that Scott
8 Financial Corporation arranged for financing of up to \$110,000,000.00 for the construction
9 of the Manhattan West project. The loan funds were provided by a consortium of 29
10 participating banks.

11 13. Replying to Paragraph 13 of the Counterclaim, Tharaldson is without
12 sufficient knowledge and information to form a belief as to the truth of the allegations and
13 therefore denies the same.

14 14. Replying to Paragraph 14 of the Counterclaim, Tharaldson denies the
15 allegations in Paragraph 14.

16 15. Replying to Paragraph 15 of the Counterclaim, Tharaldson admits that Club
17 Vista was one of the 29 participating banks. Tharaldson denies the remaining allegations in
18 Paragraph 15.

19 16. Replying to Paragraph 16 of the Counterclaim, Tharaldson is without
20 sufficient knowledge and information to form a belief as to the truth of the allegations and
21 therefore denies the same.

22 17. Replying to Paragraph 17 of the Counterclaim, Tharaldson admits that in
23 November 2007, there were meetings in Las Vegas, Nevada, with representatives of Scott
24 Financial Corporation, Bank of Oklahoma, Gemstone Development and Tharaldson to
25 discuss the financing for the construction of the Manhattan West project. Tharaldson
26 denies the remaining allegations of Paragraph 17.

27 18. Replying to Paragraph 18 of the Counterclaim, Tharaldson admits that there
28 exists a report prepared by Applied Analytics, a company wholly unrelated to Tharaldson,

1 prepared for the Southern Nevada Home Builders Association, titled Southern Nevada
2 Housing Supply-Demand Analysis. Tharaldson denies the remaining allegations of
3 Paragraph 18.

4 19. Replying to Paragraph 19 of the Counterclaim, Tharaldson states that the
5 Report speaks for itself and Tharaldson is not required to either admit or deny the
6 allegations. Tharaldson denies the remaining allegations of Paragraph 19.

7 20. Replying to Paragraph 20 of the Counterclaim, Tharaldson denies the
8 allegations in Paragraph 20.

9 21. Replying to Paragraph 21 of the Counterclaim, Tharaldson denies the
10 allegations in Paragraph 21.

11 22. Replying to Paragraph 22 of the Counterclaim, Tharaldson denies the
12 allegations in Paragraph 22.

13 23. Replying to Paragraph 23 of the Counterclaim, Tharaldson denies the
14 allegations in Paragraph 23.

15 24. Replying to Paragraph 24 of the Counterclaim, Tharaldson admits that he
16 provided certain financial information and signed a guarantee, as described in the First
17 Amended Complaint. Tharaldson denies the remaining allegations of Paragraph 24.

18 25. Replying to Paragraph 25 of the Counterclaim, as alleged in the First
19 Amended Complaint, Bank of Oklahoma relied on the financial resources of the guarantors,
20 Tharaldson and Tharaldson Motels II, in its underwriting and not on the financial viability
21 of the Project. Tharaldson denies the remaining allegations of Paragraph 25.

22 26. Replying to Paragraph 26 of the Counterclaim, Tharaldson denies the
23 allegations of Paragraph 26.

24 27. Replying to Paragraph 27 of the Counterclaim, Tharaldson admits that Scott
25 Financial Corporation funded the \$110 Million loan through a banking syndicate of 29
26 banks in various states, with varying dollar amounts for each of the participants.
27 Tharaldson denies the remaining allegations of Paragraph 27.

28 28. Replying to Paragraph 28 of the Counterclaim, Tharaldson states that Scott

1 Financial Corporation and Bank of Oklahoma were designated co-Lead lenders of the
2 Senior Loan. Tharaldson denies the remaining allegations of Paragraph 28.

3 29. Replying to Paragraph 29 of the Counterclaim, Tharaldson admits the
4 allegations of Paragraph 29.

5 30. Replying to Paragraph 30 of the Counterclaim, Tharaldson denies the
6 allegations of Paragraph 30.

7 31. Replying to Paragraph 31 of the Counterclaim, Tharaldson denies the
8 allegations of Paragraph 31.

9 32. Replying to Paragraph 32 of the Counterclaim, Tharaldson states that the
10 obligors on the Senior Loan have not made the required payments since September 2008
11 and are in monetary default.

12 33. Replying to Paragraph 33 of the Counterclaim, Tharaldson admits the
13 allegations of Paragraph 33.

14 34. Replying to Paragraph 34 of the Counterclaim, Tharaldson denies the
15 allegations of Paragraph 34.

16 35. Replying to Paragraph 35 of the Counterclaim, Tharaldson denies the
17 allegations of Paragraph 35.

18 36. Replying to Paragraph 36 of the Counterclaim, Tharaldson denies the
19 allegations of Paragraph 36.

20 37. Replying to Paragraph 37 of the Counterclaim, Tharaldson denies the
21 allegations of Paragraph 37.

22 **III.**

23 **Claims for Relief**

24 **First Claim for Relief**

25 38. Tharaldson re-alleges and incorporates herein by reference each and every
26 answer set forth above.

27 39. Replying to Paragraph 39 of the Counterclaim, Tharaldson denies the
28 allegations of Paragraph 39.

1 40. Replying to Paragraph 40 of the Counterclaim, Tharaldson denies the
2 allegations of Paragraph 40.

3 41. Replying to Paragraph 41 of the Counterclaim, Tharaldson denies the
4 allegations of Paragraph 41.

5 42. Replying to Paragraph 42 of the Counterclaim, Tharaldson denies the
6 allegations of Paragraph 42.

7 43. Replying to Paragraph 43 of the Counterclaim, Tharaldson denies the
8 allegations of Paragraph 43.

9 44. Replying to Paragraph 44 of the Counterclaim, Tharaldson denies the
10 allegations of Paragraph 44.

11 45. Replying to Paragraph 45 of the Counterclaim, Tharaldson denies the
12 allegations of Paragraph 45.

13 46. Replying to Paragraph 46 of the Counterclaim, Tharaldson denies the
14 allegations of Paragraph 46.

15 47. Replying to Paragraph 47 of the Counterclaim, Tharaldson denies the
16 allegations of Paragraph 47, and affirmatively avers that Bank of Oklahoma take nothing
17 on its Counterclaim and that Tharaldson is entitled to recover his attorneys' fees, costs of
18 suit, litigation expenses including expert witness fees, and costs of collection.

19 **Second Claim for Relief**

20 48. Tharaldson re-alleges and incorporates herein by reference each and every
21 answer set forth above.

22 49. Replying to Paragraph 49 of the Counterclaim, Tharaldson denies the
23 allegations of Paragraph 49.

24 50. Replying to Paragraph 50 of the Counterclaim, Tharaldson denies the
25 allegations of Paragraph 50.

26 51. Replying to Paragraph 51 of the Counterclaim, Tharaldson denies the
27 allegations of Paragraph 51.

28

1 52. Replying to Paragraph 52 of the Counterclaim, Tharaldson denies the
2 allegations of Paragraph 52.

3 53. Replying to Paragraph 53 of the Counterclaim, Tharaldson denies the
4 allegations of Paragraph 53.

5 54. Replying to Paragraph 54 of the Counterclaim, Tharaldson denies the
6 allegations of Paragraph 54, and affirmatively avers that Bank of Oklahoma take nothing
7 on its Counterclaim and that Tharaldson is entitled to recover his attorneys' fees, costs of
8 suit, litigation expenses including expert witness fees, and costs of collection.

9 55. Tharaldson denies each and every allegation of the Counterclaim not
10 expressed admitted herein.

11 **AFFIRMATIVE DEFENSES**

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

13 2. The Counterclaim is barred by the allegations of the First Amended
14 Complaint, which are incorporated by reference in their entirety.

15 3. The Counterclaim is barred by fraud, mistake, misrepresentation, material
16 omission, constructive fraud, securities fraud and breach of fiduciary duty.

17 4. The Counterclaim is barred by Counterclaimant's prior material breach of its
18 express and implied contractual obligations to Plaintiff/Counterdefendant Tharaldson.

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

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

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

22 8. The Counterclaim is barred by or subject to Counterclaimant's contributory
23 negligence and/or comparative fault.

24 9. The Counterclaim is barred by its illegality.

25 10. Tharaldson has a judicial privilege to bring suit herein and said privilege bars
26 the Counterclaim.

27 11. Material conditions precedent to Tharaldson's alleged liability did not occur
28 in that Counterclaimant's advanced loan funds without first establishing unbroken lien

1 priority, Counterclaimant's advanced loan funds without first determining the pre-sales and
2 pre-leases were to bona fide independent third parties, Counterclaimant's advanced loan
3 funds without properly underwriting and qualifying the borrower, and Counterclaimant's
4 advanced loan funds without diligently, competently and appropriately administering the
5 Senior Loan.

6 12. Tharaldson owed no duty to Counterclaimant.


7 13. Tharaldson hereby incorporates by reference those affirmative defenses
8 enumerated in Rule 8 of the Nevada Rules of civil Procedure as if fully set forth herein. In
9 the event further investigation or discovery reveals the applicability of any such defenses,
10 Tharaldson reserve the right to seek leave of court to amend his reply to specifically assert
11 the same.

12 14. Tharaldson reserves the right to supplement his answer and affirmative
13 defenses in accordance with the Rules of Civil Procedure and the governing procedural
14 orders of this case.

15 WHEREFORE, Tharaldson requests that the Court dismiss the Counterclaim in its
16 entirety, and that the Bank of Oklahoma take nothing thereunder, and that Tharaldson be
17 awarded his attorneys' fees and costs pursuant to applicable statutory and/or common law,
18 and for other such relief as the Court deems just and proper.

19 DATED this 31st day of August, 2009.

20 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

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Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 31st day of August, 2009, I served the foregoing
GARY D. THARALDSON'S REPLY TO BANK OF OKLAHOMA, N.A.'S
COUNTERCLAIM by mailing a copy of the same, postage prepaid and addressed to the
following:

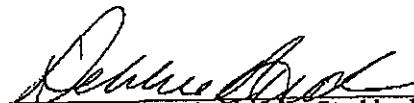
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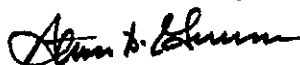
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CLERK OF THE COURT

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17 Attorneys for Plaintiff

18 **DISTRICT COURT**
19 **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,

22 Plaintiffs,

23 vs.

24 SCOTT FINANCIAL CORPORATION, a
25 North Dakota corporation; BRADLEY J.
26 SCOTT; BANK OF OKLAHOMA, N.A., a
27 national bank; GEMSTONE DEVELOPMENT
28 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.

AND RELATED COUNTERCLAIMS

CASE NO. A579963
DEPT NO. XIII

**RESPONSE TO DEFENDANTS
SCOTT FINANCIAL CORPORATION
AND BRADLEY J. SCOTT'S MOTION
FOR FIRM TRIAL SETTING**

ASWA

ALBRIGHT • STODDARD • WARNICK • ALBRIGHT
LAW OFFICES
A PROFESSIONAL CORPORATION

DATED this 8th day of September, 2009.

25	///
26	///
27	///
28	///

MEMORANDUM OF POINTS AND AUTHORITIES

The Scott Defendants' Motion is considerably premature. Plaintiffs do not object to a firm trial date being set at an appropriate time. But it is much too early to select a firm trial date now. As of this writing, there is no case management order, and no discovery deadline has been established. Discovery is in its initial stages, and no depositions have been taken or even scheduled. Defendants have requested early discovery cutoffs, but have failed to engage in any discovery to date. Trying to guess now at what firm trial date will be appropriate when case preparation is in its relative infancy is truly taking the proverbial "shot in the dark." Indeed even considering setting a firm trial date now would increase the risk of what Defendants say they want to avoid. With no significant case preparation completed, unforeseen developments in discovery, motion practice and case preparation could lead to the need to later change the trial date should a firm trial date indeed be set now.

This is a complex, multi party case that is being intensely litigated. No one knows how the issues ultimately will be decided and it is likely that issues will come up that the parties have not yet anticipated. Because discovery has not really even commenced, no one knows whether rulings on motions or evidence and issues adduced in case preparation will impact the pretrial preparation of the case. There is an unresolved dispute that is the subject of a pending Motion to Strike Jury Demand as to whether parts of the case are not subject to a jury trial and whether separate jury and non-jury trial should take place. At the August Rule 16 Conference, defense counsel acknowledged that a firm trial date should not be set until it is determined whether the case will be a jury or non-jury case.¹ Both sides have estimated that trial will take fifteen days. A firm trial date set now as a "shot in the dark" could prove problematic as the case progresses.

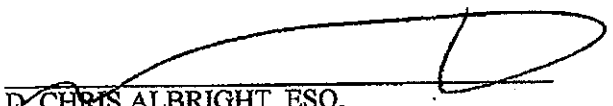
At the August Rule 16 Conference, Defendants also requested a firm trial setting in 2011 and were advised by the JEA that no firm trial settings in 2011 had yet been made. Plaintiffs do not object to setting a firm trial date at an appropriate future time. But it is premature to set that date now. Instead, the Court should wait until a time at or near the close of discovery when it can

¹ A copy of the August 3, 2009 Rule 16 Conference Minutes is attached.

1 determine that the case is, or soon will be, "trial ready." The Court should then set a firm trial date
2 at that time.

3 DATED this 8th day of September, 2009.

4 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**

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24
25
26
27
28 Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 7 day of September, 2009, I served the foregoing
NOTICE OF ENTRY OF ORDER by mailing a copy of the same, postage prepaid and addressed
to the following:

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& Albright

EXHIBIT 1

EVENTS & ORDERS OF THE COURT

08/03/2009 Mandatory Rule 16 Conference (3:15 PM) (Judicial Officer Denton, Mark R.)
Business Court Order

Minutes

08/03/2009 3:15 PM

- IN CHAMBERS: Martin A. Aaronson, Esq., Arizona counsel, also present on behalf of Pitt; and Justice Mark Gibbons also present. Court noted that Scott Financial Corp has requested this Court supervise discovery issues. Statements by Mr. Aaronson as to the 16.1 Case Conference Report; noting this case has the potential for discovery disputes, being a complex case in terms of the number of witnesses, and that this is a high stakes case. Court noted this is a somewhat complex case and due to the complexity, the non-practice that has taken place, and the Court's understanding of the case, the Court will monitor discovery issues. Court noted a Case Conference Report needs to be filed so the Court can be aware of the disputes of discovery deadlines. Statements by Mr. Jones as to filing the proper Case Conference Report. Mr. Aaronson objected, and noted he filed a Case Management Report as they were not yet stipulated out of the discovery process. Mr. Heinz referred to the Jury demand, and noted Mr. Jones is in the process of filing a Motion to Strike the Jury Demand. Mr. Jones concurred, and stated he will be filing a Motion to Strike the Jury Demand by this Wednesday, and noted a trial date cannot be set until it is determined whether or not it will be a jury case. Court stated that can be heard on an Order Shortening Time. Mr. Muckleroy stated that whether it is a jury or bench trial should not change the discovery close date. Statements by Mr. Jones as to Case Management Order, this being a complex case and referred to nine (9) months for the discovery. Mr. Muckleroy stated the standard is 18 months, and noted Mr. Gochnour referred to a 12-month schedule. Colloquy regarding the Case Management Report. Statements by Mr. Gochnour, noting 18 months is too long. Statements by Mr. Aaronson as to 18 months, noting there are many out-of-state participants and banks and over 100 witnesses; referred to 12 months being too aggressive; and requested 18 months. Further statements by Mr. Jones and Mr. Heinz. Court stated he will confer with the JEA and take a look at what he did last time when taking on the Discovery Commissioner's role; and will issue an Order after looking at both of the submissions. Mr. Gochnour noted he sent an e-mail but did not file anything. Mr. Jones referred to pages 4 and 5, paragraph 8 of the proposed Case Management Order. Upon Court's inquiry as to a Settlement Conference, Mr. Aaronson made statements as to having discovery, and stated it would not be beneficial until there is at least a full exchange of documents, which would be in approximately three (3) to six (6) months. Court stated that if and when there is a consensus that this case would be ripe for a Settlement Conference, counsel to contact the JEA, who will advise as to scheduling same. Mr. Aaronson referred to page 4 of the proposed order, and made statements as to lay witnesses. Colloquy regarding same. Mr. Heinz referred to the proposed case Management Order, and noted there are a number of housekeeping issues that will simplify the case. As to confidentiality issues, Mr. Aaronson stated a Stipulation and Order can be made as to confidentiality. Further statements by Mr. Jones. Court directed counsel to try to work out a stipulation as to any issues. Mr. Gochnour stated this should be an e-filing case. Mr. Heinz referred to e-filing, and courtesy copies, and stated that should be part of the Case Management Order. Court stated he will include that in this order. Mr. Jones referred to the Motion to Strike. Statements by Mr. Aaronson as to his schedule. Court directed Mr. Jones to file the Motion to Strike in ordinary course. Statements by Mr. Jones as to the trial setting, and requested a firm setting. Court stated he requires a Motion for Firm Setting to be filed.; noted that once he determines what the discovery and case management issues will be, the Court will issue a trial order, depending on the ruling as to the Jury Demand. Mr. Gochnour inquired as to whether discovery can begin after this conference. Mr. Johnson concurred, as long as everyone has complied with the 16.1, and COURT SO ORDERED. CLERK'S NOTE: Following the Rule 16 conference on 8/3/09, counsel met with the Court's JEA to discuss possible dates for a "firm" trial setting in 2011 for a jury or non-jury trial. The Court's JEA informed counsel that she is still working on the trial schedule for 2011, and at this time there is no firm setting yet set in 2011, so it did not matter whether it will be a jury or non-jury trial. She further informed counsel that she will need to have the 2011 trial schedule done by September, so if they wanted to, they could schedule a telephonic conference with her at their convenience the end of September or early October. She also informed counsel that a motion for firm setting usually has to be done, unless the Judge granted a firm trial setting at their Rule 16 conference.../sb/08-13-09


CLERK OF THE COURT

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12 Tel. (702) 385-6000
13 Attorneys for Scott Financial Corporation
14 and Bradley J. Scott

DISTRICT COURT
CLARK COUNTY, NEVADA

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

16 Plaintiffs,

17 v.

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

28 Defendants.

Case No.: A579963
Dept. No.: XIII

**DEFENDANTS SCOTT FINANCIAL
CORPORATION AND BRADLEY J.
SCOTT'S MOTION TO STRIKE JURY
DEMAND**

Hearing Date: September 14, 2009
Hearing Time: 9:00 a.m.

24 COME NOW Defendants SCOTT FINANCIAL CORPORATION and BRADLEY J.
25 SCOTT (collectively hereinafter, "Scott"), by and through their attorneys of record, Kemp, Jones &
26 Coulthard, LLP, and move this Court to strike Plaintiffs Gary D. Tharaldson ("Tharaldson") and
27 Tharaldson Motels II, Inc.'s ("TM2I") Demand for Jury Trial in the above-referenced matter. The
28 grounds for this Motion are that these Plaintiffs voluntarily waived a jury trial pursuant to the

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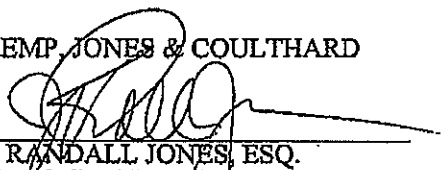
1 guaranty and other loan documents that are the subject of this action, and may not obtain a jury trial
2 by indiscriminately "bootstrapping" their claims onto those of the other Plaintiff in this matter, Club
3 Vista Financial Services ("Club Vista").

4 This motion is made and based upon the attached Memorandum of Points and Authorities,
5 any attached exhibits, all pleadings and papers on file in this action, and any oral argument that this
6 Court might entertain at the hearing on this motion.

7 Dated this 5th day of August, 2009.

8 Respectfully submitted,

9 KEMP, JONES & COULTHARD

10 
11 J. RANDALL JONES, ESQ.
12 Nevada Bar No.: 1927
13 MARK M. JONES, ESQ.
14 Nevada Bar No.: 267
15 MATTHEW S. CARTER, ESQ.
16 Nevada Bar No.: 9524
17 KEMP, JONES & COULTHARD, LLP
18 3800 Howard Hughes Parkway
19 Seventeenth Floor
20 Las Vegas, Nevada 89169
21 Attorneys for Scott Financial Corporation
22 and Bradley J. Scott

23 NOTICE OF MOTION

24 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD;

25 PLEASE TAKE NOTICE that the undersigned will bring the foregoing DEFENDANTS
26 SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION TO STRIKE
27 JURY DEMAND on for hearing before the above-entitled Court on the 14th day of September,
28 2009, at the hour of 9:00 a.m., or as soon thereafter as counsel

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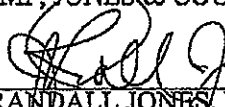
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1 may be heard.

2 Dated this 5th day of August, 2009.

3 KEMP, JONES & COULTHARD

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15 Attorneys for Scott Financial Corporation
16 and Bradley J. Scott

12 MEMORANDUM OF POINTS AND AUTHORITIES

13 I.

14 INTRODUCTION

15 Despite the fact that, over the course of filing their original complaint and several proposed
16 amendments in addition to the early case conference, it never occurred to Plaintiffs to make a
17 demand for jury trial in this matter, Plaintiffs have suddenly made exactly that demand. However,
18 this latest tactical maneuver is expressly forbidden by the guaranties of Tharaldson and TM2I, both
19 of which provide that any and all matters related to the loans and documents that are the subject of
20 this action must be tried without a jury. Although Plaintiffs will almost certainly argue that a jury
21 trial waiver does not apply to all of the claims because one of the Plaintiffs (Club Vista Financial
22 Services) did not sign a guaranty with the jury trial waiver, Plaintiffs have made no attempt to
23 separate their claims in this way. It would be a violation of established case law and principles of
24 fairness to allow Tharaldson and TM2I to get out of their knowing, intentional, and voluntary
25 promises simply by lumping in one entity that has not signed a waiver with two that did. Even
26 assuming *arguendo* that Club Vista is not affected by the jury trial waivers that were signed by
27 Tharaldson and TM2I, there can be no dispute that, at the very least, all claims relating to either
28 Tharaldson and TM2I must be severed as the subjects of a non-jury trial, pursuant to the agreements

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1 of the parties evidenced by those guaranties.

2 **II.**

3 **STATEMENT OF FACTS**

4 On or about January 22, 2008, Tharaldson, the principal of both Plaintiff Club Vista Financial
5 Services and TM2I, entered into several agreements regarding the loans that are the subject of this
6 action. Tharaldson signed two guaranties on behalf of himself and TM2I, as well as a participation
7 agreement on behalf of Club Vista.¹ Both of the subject guaranty agreements contain an identical
8 provision waiving the right to jury trial for *all matters* related to the subject loan:

9 **WAIVER OF JURY TRIAL. THE GUARANTOR**
10 **ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY**
11 **JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY**
12 **BE WAIVED AND THAT THE TIME AND EXPENSE**
13 **REQUIRED FOR TRIAL BY JURY MAY EXCEED THE**
14 **TIME AND EXPENSE REQUIRED FOR TRIAL WITHOUT**
15 **A JURY. THE GUARANTOR, AFTER CONSULTING (OR**
16 **HAVING HAD THE OPPORTUNITY TO CONSULT) WITH**
17 **COUNSEL OF GUARANTOR'S CHOICE, KNOWINGLY**
18 **AND VOLUNTARILY, AND FOR THE MUTUAL BENEFIT**
19 **OF LENDER AND GUARANTOR, WAIVES ANY RIGHT**
20 **TO TRIAL BY JURY IN THE EVENT OF LITIGATION**
21 **REGARDING THE PERFORMANCE OR ENFORCEMENT**
22 **OF, OR IN ANY WAY RELATED TO, THIS GUARANTY,**
23 **ANY RELATED AGREEMENTS, OR OBLIGATIONS**
24 **THEREUNDER. THE GUARANTOR HAS READ ALL OF**
25 **THIS GUARANTY AND UNDERSTANDS ALL OF THE**
26 **PROVISIONS OF THIS GUARANTY. THE GUARANTOR**
27 **ALSO AGREES THAT COMPLIANCE BY THE LENDER**
28 **WITH THE EXPRESS PROVISIONS OF THIS GUARANTY**
SHALL CONSTITUTE GOOD FAITH AND SHALL BE
CONSIDERED REASONABLE FOR ALL PURPOSES.²

21 As this Court is aware, the Plaintiffs filed suit in this matter on January 13, 2009, which Scott
22 answered with a motion to dismiss. After a substantial amount of legal wrangling on which claims
23 for relief were actually valid under Nevada law, Plaintiffs filed their First Amended Complaint,
24 which includes several theories of fraud, negligence, and conspiracy allegedly regarding the
25

26
27 ¹ Attached hereto as Exhibits 1, 2, and 3, respectively.

28 ² See Exhibit 1 at ¶ 13 and Exhibit 2 at ¶ 11 (bolding and capitalization original; underlining added).

1 Plaintiffs.³ As the Court can see from a review of this First Amended Complaint, however, none of
2 the claims for relief are divided as to which Plaintiff is pursuing which claim. Under the strict
3 language of the guaranties, it appears that all claims, as they relate to the guarantors, would be
4 covered by the jury trial waiver. The only question which really remains for this Court is which
5 claims or parts of claims, if any, may be exempt from the jury trial waivers agreed to by Tharaldson
6 and TM2I.

7 **III.**

8 **ARGUMENT**

9 **A. Tharaldson and TM2I Both Knowingly, Intentionally, and Voluntarily Waived
10 Their Respective Rights to a Jury Trial as a Matter of Law.**

11 The Nevada Supreme Court has held that "contractual jury trial waivers are **presumptively**
12 **valid** unless the challenging party can demonstrate that the waiver was not entered into knowingly,
13 voluntarily or intentionally."⁴ In order to determine whether a jury waiver was entered into
14 knowingly, voluntarily, and intentionally, Nevada courts are directed to consider the following
15 factors: (1) the parties' negotiations concerning the waiver provision, if any, (2) the conspicuousness
16 of the provision, (3) the relative bargaining power of the parties, and (4) whether the waiving party's
17 counsel had an opportunity to review the agreement.⁵ Where the loan documents signed by a
18 guarantor contain a conspicuous waiver, the guarantor has the opportunity to have the documents
19 reviewed by counsel, and the guarantor has prior experience in real estate, Nevada courts will
20 generally find that the jury trial waiver is valid.⁶

21 On the first point, an examination of the Plaintiffs' First Amended Complaint alone shows
22 this Court that this transaction was heavily and thoroughly negotiated by all of the parties involved,
23

24 ³ See First Amended Complaint, attached hereto as Exhibit 4.

25 ⁴ *Lowe Enterprises Residential Partners, L.P. v. Eighth Judicial District Court ex. rel. County of Clark*,
26 118 Nev. 92, 100, 40 P.3d 405, 410 (2002) (emphasis added).

27 ⁵ *Id.* at 101.

28 ⁶ See *id.* at 101-02.

1 particularly Plaintiffs. Tharaldson is admittedly a savvy and experienced businessman who has had
2 great success with other real estate deals and construction projects. Given the level of understanding
3 demonstrated by Tharaldson throughout this transaction, any suggestion that he did not closely
4 scrutinize and negotiate these terms is not credible.

5 The second factor, the conspicuousness of the jury trial waiver, also weighs in favor of
6 enforcement of the subject waivers by this Court. As can be seen from Exhibits 1 and 2, the
7 guaranties of both Tharaldson and TM2I clearly state in bold capital letters that Tharaldson has
8 waived the right to trial by jury for all matters related to the subject loan for the Manhattan West
9 project, knowingly and voluntarily, after having had the chance to consult with counsel. It is hard
10 to imagine language which more clearly expresses each parties' waiver of trial by jury.

11 With regard to the relative bargaining power of the parties, Plaintiffs's First Amended
12 Complaint clearly demonstrates Tharaldson's proficiency and expertise regarding real estate and
13 construction loans. This was not a situation in which Tharaldson was in any way naive or
14 uneducated as to what was happening. Indeed, in the business of real estate, he is arguably as
15 experienced as anyone in the United States. There is no imbalance of power that should concern this
16 Court when determining whether or not the subject jury waivers are valid.

17 Finally, the jury trial waivers in both guaranties explicitly state that, should Tharaldson wish,
18 he may have the agreements reviewed by independent counsel before agreeing to waive the right to
19 a jury trial.⁷ A sophisticated and successful professional such as Tharaldson should have no trouble
20 understanding the ramifications of these agreements on his own, but even if he did not, he would
21 certainly have had both the resources and the ability to have the agreements reviewed by his counsel
22 prior to signing them. If he did not, then that failure rests solely with him.

23 Both Tharaldson and TM2I freely acknowledged that they were knowingly, voluntarily, and
24 intentionally waiving any right to demand a trial by jury. The language of the guaranties is clear and
25 unambiguous. For that reason, the they have waived their right to trial by jury and their respective
26 demands for jury trial on their claims in this matter must be stricken.

27
28 ⁷ See Exhibit 1 at ¶ 13 and Exhibit 2 at ¶ 11.

1 **B. This Court Should Strike the Plaintiffs' Jury Demand With Respect the Majority of**
2 **the Claims in the Complaint, as They Fall Under the Waivers Signed by Tharaldson**
3 **and TM2I.**

4 Since it cannot reasonably be disputed that either Tharaldson or TM2I entered into their
5 respective jury trial waivers knowingly, intentionally, and voluntarily, the only issue remaining to
6 be determined by this Court is exactly how many of Plaintiffs' claims are subject to the jury waivers.
7 Scott submits that the vast majority of the claims must be tried without a jury, since the heart and
8 soul of Plaintiffs' claims relate to alleged fraud or other wrongful acts against Tharaldson, as
9 opposed to Club Vista Financial Services as a loan participant.

10 With respect to the fraud and negligent misrepresentation claims in the First Amended
11 Complaint (the first through fourth claims for relief), the allegations all center around what was
12 communicated to Tharaldson personally, allegedly in order to get him to guaranty the subject loan.
13 Nowhere in these allegations is there a statement that Club Vista or any of the other loan participants
14 were fraudulently induced into funding the loan. None of the allegations speak to representations
15 made to the participants generally; all of them relate back to conversations and correspondence that
16 was had with Tharaldson personally.⁸ Absent from the allegations are any specific descriptions of
17 how Club Vista, as a loan participant, was specifically defrauded. Because none of these allegations
18 relate to the subject loan participation, a jury trial on the fraud claims is not appropriate, since they
19 fall squarely within the scope of the claims covered by Tharaldson and TM2I's jury trial waivers.

20 Similarly, Plaintiffs' sixth claim for relief (defamation) focuses only on statements that relate
21 to Tharaldson personally. Since there are no alleged statements that were made about Club Vista,
22 Tharaldson's jury trial waiver controls, and a jury trial cannot proceed on this claim.

23 On the breach of fiduciary claims (the seventh and eighth claims for relief), it is true that, if
24 Club Vista claims a breach of fiduciary duty, then that claim would be subject to a jury trial. If either
25 of the other two Plaintiffs, however, are bringing a claim for breach of fiduciary duty, then those
26 claims have necessarily been excluded by the jury trial waivers contained in the guaranties.

27
28 ⁸ See, e.g., Exhibit 4 at ¶ 138 (alleging that the loan was underwritten not on the strength of the
Manhattan West project, but instead on Tharaldson's guaranty of the full loan amount.)

1 The civil conspiracy claim (ninth claim for relief) would only be triable in front of a jury
2 insofar as the subject of the alleged conspiracy was only Club Vista, not Tharaldson or TM2I. The
3 First Amended Complaint makes no distinction on this basis, so at the very least part of this claim,
4 if not all, would be subject to the jury trial waiver. Similarly, since neither of the contract claims
5 (tenth and eleventh claims for relief) involve the participation agreement of Club Vista, those claims
6 are not appropriate for jury trial, either.

7 With regard to negligence claim (twelfth claim for relief) and all other remaining claims, it
8 is unclear from the First Amended Complaint how much of them, if any, is related solely to Club
9 Vista as opposed to Tharaldson or TM2I. However, Scott respectfully submits that this Court should
10 not allow Plaintiffs to obtain a jury trial on the basis of vague and unspecified allegations.
11 Therefore, if this Court has any doubt as to which claims are subject to the jury trial waivers agreed
12 to by Tharaldson and TM2I, it should order Plaintiffs to show cause as to why the claims in question
13 should not be subject to those jury trial waivers.

14 IV.

15 CONCLUSION

16 Plaintiffs must not be allowed to escape their knowing and voluntary contractual obligations
17 by the clever and nonspecific pleading of their claims. The fact is that Plaintiffs' claims center
18 around Tharaldson's personal involvement in the Manhattan West project, and actions and
19 representations that were made to him before and during the construction of that project.
20 Accordingly, and for all the foregoing reasons, Scott respectfully requests that this Court grant the
21 instant motion in its entirety, and strike Plaintiffs' demand for jury trial as to all claims. In the
22 alternative, if this Court is not convinced that all of Plaintiffs' claims are subject to Tharaldson's and
23 TM2I's jury trial waivers, Scott respectfully requests that this Court order the Plaintiffs to show

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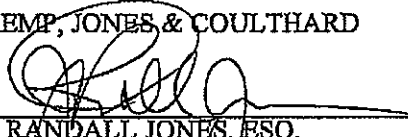
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1 cause as to why any of their individual claims should not be subject to those waivers.

2 DATED this 5th day of August, 2009.

3 Respectfully submitted,

4 KEMP, JONES & COULTHARD

5 
6 J. RANDALL JONES, ESQ.

7 Nevada Bar No.: 1927

8 MARK M. JONES, ESQ.

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17 and Bradley J. Scott

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CERTIFICATE OF MAILING

I hereby certify that on the 5th day of August, 2009, the foregoing **DEFENDANTS**
SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION TO STRIKE
JURY DEMAND was served on the following persons by mailing a copy thereof, first class mail,
postage prepaid, and e-mailing to the e-mail addresses listed as follows:

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WARNICK & ALBRIGHT**
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An employee of Kemp, Jones & Coulthard

EXHIBIT 1

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.

RA

 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 22nd day of January, 2008.

GUARANTOR:


Gary D. Tharaldson, Individually

ORIGINAL



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 22nd day of January, 2008.

GUARANTOR:

A handwritten signature in dark ink, appearing to read 'Gary D. Tharaldson', written over a horizontal line.
Gary D. Tharaldson, Individually

EXHIBIT 2

 ORIGINAL

GUARANTY
(Unlimited—Tharaldson Motels II, Inc.)

WHEREAS SCOTT FINANCIAL CORPORATION, a North Dakota corporation (the "Originating 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 two promissory notes of even date herewith payable to the order of the Originating Lender in the principal amount of \$100,000,000 (the "Senior Debt Construction Note") and the principal amount of \$10,000,000 (the "Senior Debt Contingency Note");

WHEREAS, BANK OF OKLAHOMA, N.A., a national banking association ("Bank OK") has purchased from Originating Lender a participation in the Senior Debt Construction Note (the "Participation"); and

WHEREAS Bank OK, as a condition to purchasing the Participation, has required the execution of this Guaranty;

NOW, THEREFORE, the undersigned, a North Dakota corporation (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 Bank OK 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 by Bank OK under the Participation and under and evidenced by the Note (and all interest thereon) and any extensions or renewals thereof and substitutions therefor; and (ii) Bank OK's Participation share of (a) each and every sum secured by the Security Documents; and (b) each and every other of the Obligations in connection with the Loan or sum now or hereafter owing under any agreement now or hereafter entered into between the Originating Lender and the Borrower in connection with the Loan or the Property encumbered therein, including, without limitation, the indemnification provisions of the 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 Bank OK 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 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 Originating 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 Bank OK 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 Originating Lender to the Borrower, whether or not on account of a related unsuction, 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 Originating 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 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 Originating Lender or Bank OK 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 Bank OK 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. Neither the Originating Lender nor Bank OK shall 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 Bank OK hereunder, the Guarantor shall notify Bank OK in writing that such payment is made under this Guaranty for such purpose. If any payment applied by Bank OK 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 Bank OK 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 Originating Lender and Bank OK 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. 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 Bank OK.

10. This Guaranty shall be construed according to and will be enforced under the substantive and procedural the laws of the State of North Dakota. Guarantor hereby consents to the exclusive personal and venue jurisdiction of the state and federal courts located in Burleigh County, North Dakota in connection with any controversy related in any way to this Guaranty, and waives any argument that venue in such forums is not convenient.

11. 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 22nd day of January, 2008.

GUARANTOR:

THARALDSON MOTELS II, INC.

By

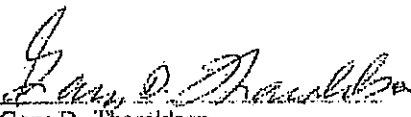

Gary D. Tharaldson
Its President

EXHIBIT 3



ORIGINAL

NONRECOURSE PARTICIPATION AGREEMENT

This Agreement is made as of January 21, 2008, by and between SCOTT FINANCIAL CORPORATION ("Originating Lender") and CLUB VISTA FINANCIAL SERVICES, LLC ("Participant") and shall govern and control the loan participations between Originating Lender and Participant described in this Agreement.

1. Definitions.

- (a) "Participant's Interest" means the percentage interest of Participant in the principal amount of and interest on the Loan, the Loan Documents and the Collateral. The percentage interest of Participant in the Loan is 3.4%.
- (b) "Banking Day" means a day on which the Federal Reserve Bank of Minneapolis is open for business.
- (c) "Borrower" means Gemstone Development West, Inc. a Nevada Corporation.
- (d) "Certificate" means the Loan Participation Certificate, in the form of Exhibit A to this Agreement, issued by Originating Lender to Participant evidencing Participant's Interest in the Loan to Borrower.
- (e) "Co-Lead" means Bank of Oklahoma, N.A.
- (f) "Collateral" means all collateral securing payment of the indebtedness evidenced by the note or the performance of the Borrower's obligations under the Loan Documents or the performance of any guaranty.
- (g) "Loan" means the certain \$100,000,000 loan that Originating Lender has made to the Borrower and in which Participant has agreed to participate under the terms of this Agreement.
- (h) "Loan Documents" means all documents evidencing, securing and/or relating to the Loan, including, but not limited to, the note, financing statements, security agreements, deed of trust, mortgage, assignments, certificates, powers, filings, agreements and all other writings executed or to be executed in connection with the Loan and all credit displays and modifications to credit displays, appraisals, environmental site assessments, geotechnical reports, surveys, title insurance policies, and other documents delivered in connection with the Loan.
- (i) "Loss" means any and all liabilities, claims, damages, actions, costs, expenses, settlements or penalties, including, without limitation, attorneys' fees, which may be incurred by either Originating Lender or Participant with respect to the Loan.
- (j) "Originating Lender's Interest" means the percentage interest of Originating Lender in the principal amount of and interest on the Loan and the Collateral, which is 0%.

2. Sale and Participation.

- (a) Subject to the terms and conditions of this Agreement and all related documents including Participation Certificates, Originating Lender sells and assigns to Participant, and Participant purchases and accepts from Originating Lender Participant's Interest in the Loan. This Agreement constitutes a sale of Participant's Interest by Originating Lender to Participant without recourse and shall in no way be construed as a loan by Participant to Originating Lender or as creating any relationship other than as provided in this Agreement.
- (b) Originating Lender's Interest and Participant's Interest and the rights and powers contained in and in connection with these interests shall be ratably concurrent and neither shall have priority over the other.
- (c) Originating Lender shall hold the Loan Documents as trustee for Participant to the extent of Participant's interest; provided that the Loan Documents shall be kept offsite in safekeeping at the Bank of North Dakota, in Bismarck, North Dakota.
- (d) Originating Lender warrants that it owns the percentage interest in the Loan, the Loan Documents and the Collateral that it has sold and assigned to Participant under the terms and provisions of this Agreement.

15010 Sundown Drive • Bismarck, ND 58503
Office: 701-255-2215 • Fax: 701-223-7299

A licensed and bonded corporate finance company.

3. Loan.

(a) Originating Lender agrees to make the Loan to the Borrower on the terms and conditions set forth in the Loan Documents. Participant will pay to Originating Lender an amount equal to Participant's interest in the unpaid principal balance of the Loan and in each advance under the Loan, on the date or dates on which such advances are to be made as requested by the Originating Lender, and with not less than one Banking Day's notice, in immediately available funds, not later than 11:00 a.m. Bismarck, North Dakota time.

(b) Funding of the Loan or any advance on the Loan by Originating Lender shall be deemed to be a representation and warranty by Originating Lender that (i) Originating Lender has in its possession all Loan Documents which, in appropriate cases, have been duly and properly filed or recorded to provide a secured position in the Collateral; (ii) prior to funding, Originating Lender has, in a manner appropriate to the type of Collateral, inspected the Collateral; and (iii) Borrower has fulfilled all conditions in the Loan Documents and is entitled to the Loan or the advance.

(c) Originating Lender agrees to pay interest, in the manner set forth in Section 5(a) below, to Participant on Participant's interest at the rate set forth in the Certificate evidencing the Loan, which Certificate is hereby incorporated herein.

(d) Participant's interest in the principal amount of and interest on the Loan shall be paid on the basis of Participant's Participation interest in the principal amount of and interest on the Loan.

(e) Contemporaneously with its execution of this Agreement, Originating Lender will execute and deliver to Participant a Loan Participation Certificate in the form attached to this Agreement evidencing the Participant's interest in the Loan, the Loan Documents and the Collateral.

(f) Unless otherwise disclosed to Participant, the Loan and Loan Documents shall not be cross-defaulted with any other loan or loan documents.

(g) Unless otherwise disclosed to Participant, the Collateral shall not serve as collateral for any other loan or obligation.

(h) If Participant does not fund any amount it owes to the Originating Lender on the date or by the time specified above, and without in any way limiting the Originating Lender's rights to payment hereunder, Participant shall pay the Originating Lender a late fee of the per diem note rate on the Loans on the requested advance for each day until the date of delivery of such amount in immediately available funds to the Originating Lender.

(i) To the extent Participant has defaulted in its funding obligations under this Section 3 and notwithstanding any other provision of this Agreement to the contrary, Participant's right to receive its share of collections shall be suspended until such default is cured, but Participant shall continue to be obligated to perform its obligations under this Agreement; provided, however, that the Originating Lender may continue to apply Participant's share of collections to Participant's funding obligations under this Section 3.

(j) Participant agrees that its obligation to make payments to the Originating Lender in accordance with this Agreement shall at all times and in all events be absolute, irrevocable and unconditional and shall not be subject to any right of counterclaim, set-off or withholding of any type.

4. Additional Covenants.

(a) Originating Lender shall cause Borrower to reimburse Co-Lead for (i) its "out of pocket" expenses incurred and expended in reviewing the terms of the Loan Documents and this Agreement, including its reasonable attorney's fees in an amount not to exceed \$5,000, together with its reasonable out of pocket incurred and expended in monitoring the Loan and the Project, including on-site inspections.

(b) Originating Lender shall provide to Co-Lead a schedule of all Participants and their respective Participating interest and notify Co-Lead of any changes thereto.

5. Receipts, Collections and Expenses.

(a) Originating Lender shall receive all amounts as they become due and any prepayments in connection with or arising out of the Loan and shall, on the Banking Day the amounts are received, if time permits wires to be sent after receipt, and if not, on the following Banking Day, account for and pay over to Participant its share of all amounts. Any amount due to Participant which is not paid on the Banking Day it is received or the following Banking Day by Originating Lender shall accrue interest at Participant's customer billing rate for each day it is held by Originating Lender. Notwithstanding the date on which Participant is paid, Borrower shall receive credit on the date it presents collected funds to the Originating Lender.

(b) In the event of Borrower's failure to pay taxes, assessments, insurance premiums, claims against the Collateral or any other amount required to be paid by any of the Loan Documents, Originating Lender shall, to the extent permitted under the Loan Documents, advance amounts necessary to pay them unless Originating Lender reasonably determines that the payment is not necessary to protect or preserve the Collateral, and Participant will reimburse Originating Lender for Participant's pro rata share of the amount of the payment made by Originating Lender within a reasonable time following delivery to Participant of evidence of the payment by Originating Lender. In the event Borrower reimburses the Originating Lender for such advances, Originating Lender shall promptly disburse such funds ratably to the Participant.

(c) Participant shall, on reasonable notice, deliver to Originating Lender Participant's pro rata share of any expenses reasonably incurred by Originating Lender in connection with the enforcement of the Loan or the Loan Documents and the protection and preservation of the Collateral.

(d) Originating Lender shall use due diligence to collect all amounts on the Loan when due and to recover from the Borrower all costs and expenses which are reimbursable from the Borrower.

6. Servicing.

(a) Subject to paragraph (f), below, Originating Lender shall service the Loan as the disclosed agent of Participant and shall receive a servicing fee in the amount of one half percent (.50%) per annum, unless otherwise agreed in any Loan Participation Certificate, so long as Borrower is making required monthly installments of principal and interest. Originating Lender shall be entitled to its servicing fee during the continuation of the Loan and shall not be required to share such fee with the Co-Lead regardless of Co-Lead's co-management, unless Originating Lender has been removed pursuant to Section 6(e) below. Originating Lender and Participant acknowledge and agree that Originating Lender's servicing fee is payable solely from interest received with respect to the Loan. In the event that Borrower is unable to pay all principal of the Loan and any collection costs relating thereto, or such amounts cannot be recovered from the Collateral, Originating Lender hereby subordinates payment of its servicing fee to payment of all principal of the Loan. If Originating Lender has deferred its servicing fee until payment of the principal of the Loan, Originating Lender shall be entitled to collect such servicing fee from the next proceeds available after payment of all principal. Upon repayment in full of all principal of the Loan and the collection costs related thereto, Originating Lender shall be entitled to collect any portion of its servicing fees still outstanding from the next funds available from the Borrower or the Collateral for payment of interest. The servicing shall include, without limitation, the obtaining and review of updated reports with respect to the Collateral, periodic inspections of the Collateral and all other action normally taken by a prudent lender with respect to loans of a comparable nature. Originating Lender will promptly furnish to Participant a complete copy of any report as to Collateral obtained by Originating Lender and copies of all updated or amended Loan Documents.

(b) Originating Lender and Participant shall each disclose to the other party immediately any material information received or obtained concerning the financial condition of the Borrower or any guarantor or the ability of the Borrower to manage or complete improvements to Collateral or to conduct its business operations as a going concern on a basis substantially equivalent to that existing on the date of this Agreement, or any change in the condition or status of Collateral, or the ability of the Borrower to repay the Loan and otherwise to perform its duties and obligations under the Loan Documents.

(c) Participant shall have the right to examine the Collateral and to examine and make copies of all original Loan Documents and records with respect to the Loan, the Loan Documents, and the Collateral at any reasonable time during Originating Lender's normal business hours.

(d) As to Participant, the powers of Originating Lender as agent are limited to those powers expressly set forth in this Agreement.

(e) Originating Lender's agency status under this Agreement with respect to the Loan shall terminate at the written election of Participant (i) upon the insolvency, closing or liquidation of Originating Lender; or (ii) if Participants of at least 80% of all interests in the Loan determine that Originating Lender has committed gross negligence or has otherwise materially failed to comply with its fiduciary obligations as agent for and on behalf of Participant. On termination of Originating Lender's agency status with respect to the Loan, Co-Lead shall automatically assume and be assigned all of Originating Lender's rights and duties under this Agreement and shall have the right to notify Borrower to direct the Borrower to forward payments under the Loan Documents directly to Co-Lead on behalf of all Participants. Originating Lender shall join in such notice at Co-Lead's request. On such termination and on Co-Lead's demand, Originating Lender shall deliver such documents, files and records with respect to the Loan as Co-Lead deems necessary to enable Co-Lead to continue to receive Loan payments and, if necessary, to commence appropriate proceedings to collect the Loan and enforce any Collateral. On such termination, Co-Lead shall be entitled to servicing fees otherwise payable Originating Lender.

(f) Originating Lender's administration of the Loan, as it relates to draws and procedures under the Construction Loan (as defined within the Loan Agreement) shall be subject to the following:

(i) Originating Lender shall provide to Co-Lead, on a timely basis following receipt and review by Originating Lender, a copy of each construction loan draw request received from Borrower.

(ii) All construction loan draw requests submitted by Borrower shall be subject to approval by Originating Lender and Co-Lead.

(iii) Co-Lead shall be permitted, through its representatives (in addition to Originating Lender's third party inspectors) to conduct reasonable and timely inspections of the Project (as defined within the Loan Agreement) prior to approval of each draw request.

7. Modification and Waiver.

Except as set forth below, but otherwise notwithstanding anything in this Agreement or in the Loan Documents to the contrary, Originating Lender, by and with approval of Co-Lead, reserves the right in its discretion, in each instance upon prior written notice to Participant, to amend, modify, restate or terminate any of the Loan Documents, consent to or waive any action or failure to act by the Borrower or any Guarantor, and to exercise or refrain from exercising any powers or rights which Originating Lender may have under or in respect of Loan Documents or any Collateral, including, without limitation, the right to enforce or refrain from enforcing the obligations of the Borrower and of any person liable for the payment of the Loan or the performance of any Loan Documents, except that Originating Lender shall not, except as provided under Section 8 of this Agreement (Default and Enforcement), without the prior written consent of Participants who, in the aggregate, hold at least fifty one percent (51%) of the ownership interests in the Loan (it being understood that Originating Lender shall not have any vote unless Originating Lender holds an interest in the Loan, in which case Originating Lender shall be deemed to be a Participant for purposes of this paragraph):

- (a) Make or consent to any change in the maturity date of the Loan;
- (b) Make or consent to any change in the interest rate of the Loan;
- (c) Make or consent to any change in the time of payment of interest;
- (d) Make or consent to any change in the maximum principal amount of the Loan or the priority of the lien of the Deed of Trust;
- (e) Compromise any claim against the Borrower or Guarantor or any amount due under the Loan Documents;
- (f) Release any of the collateral other than upon payment of release consideration in the ordinary course of Borrower's business; or
- (g) Approve any material modifications to approved project budgets.

If Originating Lender shall request Participant's written consent to the exercise of any rights set forth above and shall not receive Participant's consent or a denial thereof in writing within three (3) Banking Days of the making of such request, Participant shall be deemed to have given its consent. If Participant shall refuse to consent to any such request, Originating Lender may, at its option, purchase the Participating Interest of Participant by paying to Participant an amount equal to its Participating Interest of the unpaid principal and accrued interest on the Loan and Participant's interest in all protective advancements for Borrower or the collateral and all reimbursements by Participant to Originating Lender pursuant to this Agreement, and upon such payment this Agreement shall be terminated, and Participant shall have no further interest in the Loan or in any of the Loan Documents. As a condition of purchasing Participant's Participating Interest pursuant to this paragraph, Originating Lender shall give Participant notice of intent to purchase, and may consummate the purchase at any time following such notice.

8. Default and Enforcement.

(a) Immediately upon learning of the existence of any event or condition which would constitute a default under any Loan Documents, Originating Lender shall notify and consult with Co-Lead and Participant and shall exercise, or refrain from exercising, any rights Originating Lender may have only with the prior written consent of Participants who, in the aggregate, hold at least fifty one percent (51%) of the Loan (it being understood that Originating Lender shall not have any vote unless Originating Lender holds an interest in the Loan, in which case it shall be deemed to be a Participant and its interest shall be deemed to be a Participating Interest and it being understood that so long as Co-Lead holds an interest in the Loan, Co-Lead shall be deemed to be a Participant and its interest shall be deemed to be a Participating Interest).

(b) Following any material default, as reasonably determined by Co-Lead, under any Loan Documents that shall continue, uncured, for a period of ninety (90) days after the occurrence of the material default (except in the case of a monetary payment default, in which case the period shall be thirty (30) days), Co-Lead shall have the right to co-manage the Loan with Originating Lender, provided that:

(i) Co-Lead shall be subject to all of the obligations and limitations of Originating Lender hereunder, including the obligation to obtain consent of Participants who hold in the aggregate at least fifty one (51%) of the Loan for certain actions, as set forth herein, and shall be entitled to the indemnification and other protections provided for the Originating Lender in this Agreement;

(ii) Co-Lead shall continue to be deemed to be a Participant retaining its right to vote its percentage ownership in the Loan;

(iii) Co-Lead shall not be entitled to receive a fee for its co-management;

(iv) Originating Lender shall continue to be entitled to any servicing fees it is otherwise entitled to under this Agreement or any other agreement with Participant, provided, however, that no servicing fee shall be payable if required monthly installments of principal and interest are not being paid.

(c) For the purposes of this Agreement, the term "co-manage" contemplates that Co-Lead shall consult with Originating Lender and share in the Originating Lender's duties to manage, perform and enforce the terms of the Loan Agreement and to exercise and enforce all privileges and rights exercisable or enforceable by it thereunder, for the joint benefit of Originating Lender and all the Participants, according to Co-Lead's discretion and in the exercise of its reasonable business judgment. Co-Lead shall exercise the same degree of care and judgment with respect to the Loan as it exercises with respect to loans in which no participations are sold and, in exercising such degree of care and judgment, Co-Lead shall not be under any liability to any Participant with respect to anything it may do or refrain from doing in the exercise of its judgment or which may seem to Co-Lead to be necessary or desirable in the servicing and management of the Loan, except for its gross negligence or willful misconduct.

(d) In the event of a default and the refusal of Participants holding at least fifty one percent (51%) of the Loan to consent under (a) above, Originating Lender and, if it shall have become a co-manager as provided herein, Co-Lead or Participants holding at least fifty one percent (51%) of the Loan may elect, on written notice to the other Participants and, if applicable, Originating Lender, to institute such proceedings as are necessary or appropriate to collect the Loan, to enforce the Loan Documents or the Collateral, and to protect the rights of the Originating Lender and Participants. The party instituting such proceedings shall make all other Participants and the Originating Lender parties to the proceedings and the parties shall share the costs and expenses, including attorney's fees, in proportion to their respective percentage interests in the Loan at the time of default. If Participants holding at least fifty one percent (51%) of the Loan take such action, Originating Lender shall execute such documents as may be necessary or appropriate to facilitate such action.

(e) In the alternative, in the event of a default and the refusal of Participants holding at least fifty one percent (51%) of the Loan to consent under (a) above, Originating Lender and, if it shall have become a co-manager as provided herein, Co-Lead or Participants holding at least fifty one percent (51%) of the Loan may, at its or their option, purchase the Participating Interest of Participant, if Participant shall have refused to consent to any proposed action, by paying to Participant an amount equal to its Participating Interest of the unpaid principal and accrued interest on the Loan and Participant's interest in all protection advancements for Borrower or the collateral and all reimbursements by Participant to Originating Lender pursuant to this Agreement, and upon such payment this Agreement shall be terminated, and Participant shall have no further interest in the Loan or in any of the Loan Documents.

(f) The agreement of Participants holding at least fifty one percent (51%) of the Loan shall be required for all matters and decisions relating to the operation, improvement, and disposition of, and any capital expenditures with respect to, Collateral which is acquired by either Originating Lender or Participant under this Section 8.

(g) All Collateral shall be applied to reduction of the Loan in proportion to the respective percentage interests of the Originating Lender, if any, and Participant in the Loan at the time of the default, and shall be applied to other indebtedness of Borrower to Originating Lender only after the Loan and any expenses related to the Loan are satisfied in full.

(h) If Originating Lender or any Participant should exercise its right of setoff with respect to any deposit or other indebtedness owing by Originating Lender or any Participant to the Borrower, the setoff shall be applied to the Loan and to other indebtedness of the Borrower to Originating Lender or such Participant on a pro rata basis.

9. Collection After Acceleration.

(a) If Originating Lender receives a payment after acceleration of the Loan, whether pursuant to a demand for payment or as a result of legal proceedings against the Borrower or through payment by or action against any other person in any way liable on account of the indebtedness evidenced by the Loan, or from realization upon any security for the Loan, or from any source whatsoever, the payment shall be applied to the interest, principal or other amounts owing on the Loan in the manner to be agreed upon between Originating Lender and Participant at the time the Loan is accelerated, ratably among all Participants.

(b) The foregoing notwithstanding, it is expressly understood that any losses sustained in respect of the Loan shall be borne by Originating Lender and Participant in accordance with the pro rata share of each unless such losses are the direct result of the gross negligence, recklessness, or willful misconduct of Originating Lender or Participant.

10. Additional Terms.

(a) Originating Lender's Right to Repurchase Participant's Interest; Prepayment Fees. Upon Participant's failure to comply with its duties under this Agreement, the Originating Lender reserves the right (but shall have no duty) at any time, upon at least (three) 3 business days' prior written notice to Participant, to purchase from Participant, at par (unless otherwise agreed) plus accrued interest, and without recourse, Participant's Interest. Upon Lender's repurchase, Participant shall not be entitled to any prepayment fees, inclusive of fees established as "make whole" fees.

(b) Noncompete. Unless otherwise agreed upon in writing between Participant and Originating Lender, Participant shall not directly or indirectly solicit or assist in the solicitation of the making of loans to the Borrower within five (5) years after termination of this Agreement without Originating Lender's express written consent; provided that this prohibition does not apply to direct or purchased loans to Borrower in existence as of the date of this Agreement.

(c) Inability of Originating Lender to Perform. If the Originating Lender is unable to perform its duties and obligations under this Agreement, or the Originating Lender has been removed pursuant to Section 6(e), the Originating Lender's rights, duties and obligations hereunder automatically shall be deemed to be assigned to Co-Lead through these Agreements and Co-Lead shall have the right to obtain from the Originating Lender the original Loan Documents (held offsite in safekeeping) and all records of the Originating Lender relating to the Credit, and Originating Lender's rights, duties and obligations under the Loan Documents shall be automatically assigned to Co-Lead.

(d) Loan Fee Schedule. Unless otherwise agreed in writing, the following loan fee schedule shall be effect for each Loan:

(i). Transaction Fees. All Transaction Fees, including without limitation hard costs and vendor fees associated with obtaining, documenting, closing and securing the Loan, including but not limited to filing and recording fees, title insurance, appraisal fees and legal fees, will be paid by Borrower directly to Originating Lender.

(ii) Prepayment Fees. Defined as those Prepayment Fees separate and apart from "make whole" prepayment fees for a fixed rate commitment. Prepayment Fees paid by Borrower to Originating Lender as approved by the Participant as presented in the Loan Documents shall be divided between Originating Lender (50%) and Participants (50%, split pro rata between Participants based on Participating Interest). Any and all other Prepayment Fees will be retained by the Originating Lender.

(iii) Default Fees. Default Fees actually collected by Originating Lender from Borrower shall be divided between Originating Lender (50%) and Participants (50%, split pro rata between Participants based on Participating Interest).

(iv) Default Premium. Default Premiums actually collected by Originating Lender from Borrower shall be divided between Originating Lender (50%) and Participants (50%, split pro rata between Participants based on Participating Interest).

(v) Origination Fees. Origination fees shall be retained by Originating Lender, unless otherwise set forth in writing in the Loan Participation Certificate attached hereto.

(vi) Late Charges. All Late Charges collected from Borrower, if any, shall be retained by the Originating Lender.

(vii) Other Fees. All other fees paid by the Borrower and not otherwise described in this Section 10(d) shall be retained by the Originating Lender.

11. Risks and Standard of Care.

(a) Participant acknowledges that it has become a party to this Agreement with the understanding and expectation that it will rely upon its own independent analysis of the Borrower's financial condition and creditworthiness to the extent deemed necessary or advisable by Participant. Participant further acknowledges that Participant is solely responsible for meeting all bank regulatory and compliance requirements, including but not limited to independent appraisal review and Patriot Act compliance.

(b) The responsibilities of Originating Lender shall include, without limitation, attending to the execution of the Loan Documents, keeping complete and accurate books, files, and records to the Loan Documents and administering the Loan with the same care as a prudent lender would exercise.

12. Assignments.

Neither Originating Lender nor Participant may sell, pledge, assign, subordinate, or otherwise transfer its interest in the Loan, Loan Documents, Collateral, Loan security or Loan guaranty therefore without the prior written consent of the other party which will not be unreasonably withheld, except that Originating Lender may sell other participations in the Loan, so long as Originating Lender continues to service the Loan. The duties and benefits of this Agreement will bind and benefit the successors and assigns of Originating Lender and Participant.

13. Indemnification.

(a) Participant hereby indemnifies Originating Lender, its officers, directors, employees, or agents for its pro rata share of any loss arising out of any action taken or to be taken by Originating Lender with respect to the Loan, the Collateral, or the Loan Documents pursuant to this Agreement, unless such action is the direct result of the gross negligence, recklessness or willful misconduct of Originating Lender. In the event that Originating Lender recovers any such amounts from the Borrower after Participant has reimbursed Originating Lender for Participant's interest of all such amounts, Originating Lender shall return Participant's interest of the amounts recovered to Participant.

(b) Originating Lender hereby indemnifies Participant, its officers, directors, employees, or agents for its pro rata share of any loss arising out of any action taken or to be taken with respect to the Loan, the Collateral, or the Loan Documents in the event Participant takes or is to take action under the provisions of Sections 6(e) or 8(b) of this Agreement (Servicing and Default and Enforcement), unless such action is the direct result of the gross negligence, recklessness or willful misconduct of Participant. In the event that Participant recovers any such amounts from the Borrower after Originating Lender has reimbursed Participant for Originating Lender's interest of all such amounts, Participant shall return Originating Lender's interest of the amounts recovered to Originating Lender.

14. Miscellaneous.

(a) Neither the execution of this Agreement, nor the participation in the Loan, the Collateral or the Loan Documents, nor any agreement to participate in profits or losses resulting from the transaction, is intended to be, nor shall it be construed to be, the formation of a partnership or joint venture between Originating Lender and Participant.

(b) This Agreement supersedes any prior negotiations, discussions or communications between Originating Lender and Participant and constitutes the entire agreement of Originating Lender and Participant with respect to the Loan, and shall survive any foreclosure of Collateral.

(c) Neither Originating Lender nor Participant has, as of the date of this Agreement, any loans or any other direct or indirect financial accommodations to, or financial interest in, Borrower, or any principal or affiliate of Borrower, which has not been disclosed in writing to the other party to this Agreement. Originating Lender and Participant agree that they will immediately disclose in writing to the other if they make any additional loans or other direct or indirect financial accommodations to, or acquire any financial interest in, Borrower, or any principal or affiliate of Borrower.

(d) Any notice or demand to be given under this Agreement shall be duly and properly given if delivered personally or sent by private delivery service or mailed, postage prepaid, to the party entitled to the notice or demand at the address set forth below under its name, or at such other address as the party may, from time to time, specify in writing, and shall be effective when actually received by the party.

(e) This Agreement and the duties and obligations contained in this Agreement shall be, except as otherwise provided in Section 12 of this Agreement (Assignments), solely for the benefit of the parties to this Agreement and no third party shall have any rights under this Agreement as a third party beneficiary or otherwise.

(f) Participant represents and warrants to Originating Lender, and Originating Lender represents and warrants to Participant, that it has the power and authority to execute, deliver, and perform this Agreement.

(g) Participant and Originating Lender shall each be entitled to recover from the other any direct costs and expenses, including attorneys' fees, incurred in enforcing this Agreement and the duties of the other contained in this Agreement following any default under this Agreement.

(h) In the event any provision of this Agreement should be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions shall not be affected or impaired in any way.

(i) The failure to exercise, or delay in exercising, any right under this Agreement by either party shall not operate as a waiver of that right, and the single or partial exercise of any right under this Agreement by either party shall not preclude the further exercise of the right or the exercise of any other right. Any remedies provided in this Agreement are cumulative and are not exclusive of any remedies provided by law.

(j) This Agreement shall be governed by North Dakota law.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

67 Original


Originating Lender and Participant each has caused this Agreement to be executed by a duly authorized officer all as of the day and year first set forth above.

ORIGINATING LENDER:

PARTICIPANT:

SCOTT FINANCIAL CORPORATION

CLUB VISTA FINANCIAL SERVICES, LLC

By 
Brad J. Scott, Its President

By 
Gary D. Tharaldson, Its President

15010 Sundown Drive
Bismarck, ND 58503
Email: brad@scottfinancialcorp.com
Telephone: (701) 255-2215

10421 Nostalgia Circle
Las Vegas, NV 89135
Email: gdtaraldson@tharaldson.com
Telephone: (702) 463-8668

Attachments: Exhibit A - Loan Participation Certificate



ORIGINAL

EXHIBIT A

LOAN PARTICIPATION CERTIFICATE

ORIGINATING LENDER	PARTICIPANT	BORROWER
Scott Financial Corporation 15010 Sundown Drive Bismarck, ND 58503	Club Vista Financial Services, LLC 10421 Nostalgia Circle Las Vegas, NV 89135	Gemstone Development West, Inc. 9121 West Russell Road Suite 117 Las Vegas, NV 89148


DATE OF NOTE(S)	TOTAL PRINCIPAL AMOUNT	PARTICIPANT'S COMMITMENT AMOUNT	PARTICIPANT'S COMMITMENT PERCENTAGE
January 22, 2008	\$100,000,000	\$3,400,000	3.4%

NOTE RATE	PARTICIPANT RATE	GUARANTOR SPREAD	ORIGINATING LENDER SERVICE FEE
14.00% Fixed	8.50% Fixed	5.00%	.50%

ORIGINATION FEE	PARTICIPANT'S SHARE OF ORIGINATION FEE
\$275,000	None

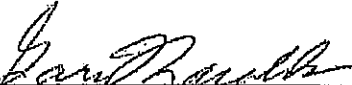
ORIGINATING LENDER:

SCOTT FINANCIAL CORPORATION

By 
Brad J. Scott, Its President
Email: brad@scottfinancialcorp.com
Telephone: (701) 255-2215

PARTICIPANT:

CLUB VISTA FINANCIAL SERVICES, LLC

By 
Gary D. Tharaldson, Its President
Email: gdtharaldson@tharaldson.com
Telephone: (702) 463-8666

15010 Sundown Drive • Bismarck, ND 58503
Office: 701-255-2215 • Fax: 701-223-7299

A licensed and bonded corporate finance company.

12019-001 00374

EXHIBIT 4

1 D. CHRIS ALBRIGHT, ESQ.
2 Nevada Bar No. 004904
3 MARTIN A. MUCKLERROY, ESQ.
4 Nevada Bar No. 009634
5 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
6 801 South Rancho Dr., Bldg. D
7 Las Vegas, NV 89106
8 Tel: (702) 384-7111
9 Fax: (702) 384-0605
10 ema@albrightstoddard.com
11 calbright@albrightstoddard.com

8 MORRILL & ARONSON, P.L.C.
9 K. LAYNE MORRILL, ESQ.
10 Arizona Bar No. 004591
11 MARTIN A. ARONSON, ESQ.
12 Arizona Bar No. 009005
13 STEPHANIE L. SAMUELSON, ESQ.
14 Arizona Bar No. 018099
15 One E Camelback Road, Suite 340
16 Phoenix, Arizona 85012
17 (602) 263-8993

18 Attorneys for Plaintiff

19 DISTRICT COURT

20 CLARK COUNTY, NEVADA

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

26 Plaintiffs,

27 vs.

28 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 CORP., a Nevada
corporation, dba APCO CONSTRUCTION;
DOE INDIVIDUALS 1-100; and ROE
BUSINESS ENTITIES 1-100,

Defendants.

FILED

JUL 1 11 23 AM '09

Ed Smith
CLERK OF THE COURT

CASE NO. A579963
DEPT NO. XI

PLAINTIFFS' FIRST AMENDED
COMPLAINT

///

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, TM2L, 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

- 1 respectively of the Manhattan Project in Las Vegas, Nevada.
- 2 B. \$10,000,000 construction loan made October 2005 and subsequently
- 3 modified and extended, \$2,000,000 second loan made in March 2006, and
- 4 \$3,750,000 inventory loan made in September 2008, in all of which
- 5 Mesquite Investor Group is the borrower, SFC is lender, and Tharaldson
- 6 Financial Group, L.L.C. is the 100% participant and owner of the Lender's
- 7 interest, secured by a condominium project in Mesquite, Nevada.
- 8 C. \$2,400,000 subordinate loan and \$4,000,000 senior loan to 40th Street and
- 9 Baseline, LLC made in March, 2006, in which SFC is the Lender and CVFS
- 10 is the 100% participant and owner of the Lender's interest, secured by real
- 11 property located in Phoenix, Arizona.
- 12 D. \$2,250,000 subordinate loan and \$3,750,000 senior loan to El Mirage and
- 13 Camelback, LLC made March, 2006, in which SFC is the Lender and CVFS
- 14 is the 100% participant and owner of the Lender's interest, secured by real
- 15 property located in Phoenix, Arizona.
- 16 E. \$46,000,000 land loan to Desert Springs Partners, L.L.C. and Ave. 48
- 17 Investment Group, L.L.C. made in August 2006 with a maturity of January
- 18 1, 2009, in which SFC is the Lender and CVFS is the majority participant
- 19 and majority owner of the Lender's interest, secured by land located in Palm
- 20 Springs, California.
- 21 F. \$10,000,000 subordinate and \$20,000,000 senior land loan to Torrey Pines
- 22 Development, LLC, ABCDW, LLC, and Vanderbilt Farms, LLC with SFC
- 23 as the Lender and CVFS as the 100% participant and owner of the Lender's
- 24 interest, made in September 2006 with a maturity of December 31, 2008,
- 25 secured by land in western Maricopa County, Arizona.
- 26 G. \$20,000,000 subordinate and \$82,000,000 senior land loan to Vanderbilt
- 27 Farms, Vineyard Farms, ABCDS, and Gillespie Properties with SFC as
- 28 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.

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

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

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

7 **Guaranty and the CVFS Participation**

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

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

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

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

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

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

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

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

28

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."

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

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

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

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

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

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

27 *Deteriorated Financial Prospects.*

28 132. 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.

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

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

6 156. This certification was a misrepresentation and a fraud.

7
8 *Insurance Over Broken Priority; Switched Title Insurance Companies.*

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

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

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

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

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

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

26 163. In November 2008, the Nebraska Insurance Commissioner informed Common-
27 wealth that it was in a "hazardous financial condition" under Nebraska law and filed a petition for
28 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.

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

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

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

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

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

Administration of Senior Loan

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

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

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

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

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

13 Defamatory Statements

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

16 189. 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."

24 190. 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.

27 191. The above statements are defamatory *per se*.
28

**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 Tharaldson, 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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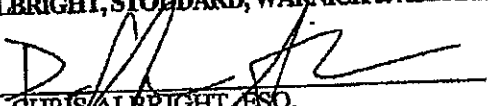
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1 K. Granting such other and further relief as the Court may deem just and
2 proper

3 DATED this 25 day of July, 2009.
4

5 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

6 
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13 Attorneys for Plaintiff

ASWA

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
LAW OFFICES
A PROFESSIONAL CORPORATION

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 15th 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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14 and Bradley J. Scott

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

23 SCOTT FINANCIAL CORPORATION, a
24 foreign corporation,

Counterclaimant,

v.

26 GARY D. THARALDSON,

Counterdefendant.

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CLERK OF THE COURT

Case No.: A579963
Dept. No.: XIII

SCOTT FINANCIAL CORPORATION
AND BRADLEY J. SCOTT'S ERRATA
TO ANSWER TO FIRST AMENDED
COMPLAINT

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ERRATA TO ANSWER TO FIRST AMENDED COMPLAINT

COME NOW Defendants SCOTT FINANCIAL CORPORATION and BRADLEY J. SCOTT, by and through their counsel of record, and hereby submit this Errata to their Answer to First Amended Complaint filed on July 20, 2009, a copy of which is attached hereto. Specifically, there were clerical errors in several portions of the Answer, which should read as follows:

6. With respect to the allegations contained in paragraph 6 of the complaint, Scott denies that SFC was a long-term financial advisor to Plaintiffs and that SFC acted in a position of inherently conflicting interests, or that it did so in any capacity as agent for Plaintiffs or Defendant bank of Oklahoma in the transactions at issue herein. With respect to the balance of the allegations in paragraph 6 of the complaint, Scott admits the allegations.

9. With respect to the allegations contained in paragraph 9 of the complaint, Scott denies any fiduciary relationship existing between Plaintiffs Gary D. Tharaldson and/or Tharaldson Motels II, Inc., on one hand, and Scott Financial Corporation, Bradley J. Scott, and/or Bank of Oklahoma, on the other. Scott further denies and objects to the use of the term "Fiduciary Defendants" to describe Scott Financial Corporation, Bradley J. Scott, and/or Bank of Oklahoma throughout the complaint, and hereby incorporates by reference this denial and objection in each and every paragraph in the complaint in which the term "Fiduciary Defendants" is used. With respect to the balance of the allegations 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 therefore denies said allegations.

25. With respect to the allegations contained in paragraph 25 of the complaint, denies the allegations of the first sentence and that it "syndicates" participation interests to other lenders. With respect to the balance of the allegations in paragraph 25 of the complaint, Scott admits said allegations.

28. With respect to the allegations contained in paragraphs 28, 29, 39, 117 and 214 of the complaint, Scott denies said allegations.

32. With respect to the allegations contained in paragraph 32 of the complaint, Scott admits SFC is licensed by the Mortgage Lending Division of the Department of Business and Industry. With respect to the balance of the allegations in paragraph 32 of the complaint, Scott

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1 denies said allegations.


2 123. With respect to the allegations contained in paragraph 123 of the complaint, Scott
3 denies that Bank of Oklahoma co-underwrote and performed all due diligence investigations on the
4 Senior Loan transaction, as they were not yet involved with the Senior Loan transaction at the time
5 referenced in this paragraph. With respect to the balance of the allegations contained in paragraph
6 123 of the complaint, Scott admits said allegations.

7 Additionally, SFC hereby strikes paragraphs 56, 57, 62, 103, and 116 of its answer to the
8 First Amended Complaint and replaces them with the amended paragraph 56, which reads as
9 follows:

10 56. With respect to the allegations contained in paragraph 56, 57, 62, 103, and 116 of
11 the complaint, Scott admits that those paragraphs may accurately reflect the language of each of
12 those respective agreements, but denies all allegations to the extent that they state a legal
13 conclusion.

14 DATED this 10 day of August, 2009.

15 KEMP, JONES & COULTHARD, LLP

16 
17 J. RANDAL JONES, ESQ. (#1927)
18 MARK M. JONES, ESQ. (#267)
19 MATTHEW S. CARTER, ESQ. (#9524)
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22 Las Vegas, Nevada 89169
23 Attorneys for Defendants Scott Financial
24 Corporation and Bradley J. Scott
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CERTIFICATE OF MAILING

I hereby certify that on the 10th day of August, 2009, the foregoing **SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S ERRATA TO ANSWER TO FIRST AMENDED COMPLAINT** was served on the following persons by mailing a copy thereof, first class mail, postage prepaid, and e-mailing to the e-mail addresses listed as follows:

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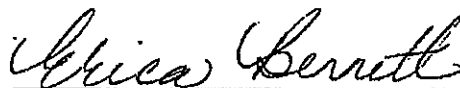
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An employee of Kemp, Jones & Coulthard

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. 1579968
Electronically Filed
Feb 17 2011 04:22 p.m.
Tracie K. Lindeman

PETITIONERS' APPENDIX
(VOLUME 2 BATES NUMBERS 00263-00499)

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INDEX TO PETITIONERS' APPENDIX

<u>DOCUMENT DESCRIPTION</u>	<u>LOCATION</u>
Complaint (filed 01/13/09)	Vol. 1, Bates No. 00001–00064
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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
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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

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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
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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
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CLERK OF THE COURT

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23 Attorneys for Plaintiff

24 **DISTRICT COURT**
25 **CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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 CORP., a Nevada
corporation, dba APCO CONSTRUCTION;
DOE INDIVIDUALS 1-100; and ROE
BUSINESS ENTITIES 1-100,

Defendants.

CASE NO. A579963
DEPT NO. XIII

**PLAINTIFFS' DEMAND FOR JURY
TRIAL**

///

ASWA
ALBRIGHT · STODDARD · WARNICK · ALBRIGHT
LAW OFFICES
A PROFESSIONAL CORPORATION

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DATED this 7th day of July, 2009.

(602) 263-8993

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 2 day of July, 2009, I served the foregoing
PLAINTIFFS' DEMAND FOR JURY TRIAL 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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CLERK OF THE COURT

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

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

23 SCOTT FINANCIAL CORPORATION, a
24 foreign corporation,

Counterclaimant,

v.

26 GARY D. THARALDSON,

Counterdefendant.

Case No.: A579963
Dept. No.: XIII

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

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

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

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

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

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

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

19 6. With respect to the allegations contained in paragraph 6 of the complaint, Scott
20 denies that SFC acted in a position of inherently conflicting interests, or that it did so in any
21 capacity as agent for Plaintiffs or Defendant bank of Oklahoma in the transactions at issue herein.
22 With respect to the balance of the allegations in paragraph 6 of the complaint, Scott admits the
23 allegations.

24 7. With respect to the allegations contained in paragraph 7 of the complaint, Scott
25 denies that Bradley J. Scott committed or was responsible for committing any wrongful acts of
26 SFC. With respect to the balance of the allegations in paragraph 7 of the complaint, Scott admits
27 the allegations.

28 8. With respect to the allegations contained in paragraph 8 of the complaint, Scott

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1 denies that Bank of Oklahoma is being sued because Bradley J. Scott and/or SFC acted as agents
2 in connection with any wrongful acts. With respect to the balance of the allegations in paragraph
3 8 of the 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 9. With respect to the allegations contained in paragraph 9 of the complaint, Scott is
6 without sufficient information to form a belief as to the truth or falsity of said allegations and
7 therefore denies said allegations.

8 10. With respect to the allegations contained in paragraph 10 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 11. With respect to the allegations contained in paragraph 11 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 12. With respect to the allegations contained in paragraph 12 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 13. With respect to the allegations contained in paragraph 13 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 14. With respect to the allegations contained in paragraph 14 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 15. With respect to the allegations contained in paragraph 15 of the complaint, Scott
24 admits that SFC is qualified to do business in, and does business in, Clark County, Nevada. With
25 respect to the balance of the allegations contained in paragraph 15 of the complaint, Scott is
26 without sufficient information to form a belief as to the truth or falsity of said allegations and
27 therefore denies said allegations.

28 16. With respect to the allegations contained in paragraph 16 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 17. With respect to the allegations contained in paragraph 17 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 18. With respect to the allegations contained in paragraph 18 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 19. With respect to the allegations contained in paragraph 19 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 20. With respect to the allegations contained in paragraph 20 of the complaint, Scott
13 admits said allegations.

14 21. With respect to the allegations contained in paragraph 21 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 22. With respect to the allegations contained in paragraph 22 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 23. With respect to the allegations contained in paragraph 23 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 24. With respect to the allegations contained in paragraph 24 of the complaint, Scott
24 admits said allegations.

25 25. With respect to the allegations contained in paragraph 25 of the complaint, denies
26 the allegations of the first sentence. With respect to the balance of the allegations in paragraph
27 25 of the complaint, Scott admits said allegations.

28 26. With respect to the allegations contained in paragraph 26 of the complaint, Scott

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1 denies said allegations.

2 27. With respect to the allegations contained in paragraph 27 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 28. With respect to the allegations contained in paragraph 28 of the complaint, Scott
6 denies that Bradley J. Scott was the exclusive investment broker or agent for Tharaldson. With
7 respect to the balance of the allegations contained in paragraph 28 of the complaint, Scott admits
8 said allegations.

9 29. With respect to the allegations contained in paragraph 29 of the complaint, Scott
10 is without sufficient information to form a belief as to the truth or falsity of the allegation that a
11 special relationship of trust and confidence developed between Bradley J. Scott and Gary D.
12 Tharaldson, and therefore denies that allegation. With respect to the balance of the allegations
13 contained in paragraph 29 of the complaint, Scott admits said allegations.

14 30. With respect to the allegations contained in paragraph 30 of the complaint, Scott
15 denies said allegations.

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

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

20 33. With respect to the allegations contained in paragraph 33 of the complaint, Scott
21 admits that Bradley J. Scott has regularly described his role as overseeing Tharaldson's lending
22 division. With respect to the balance of the allegations contained in paragraph 33 of the
23 complaint, Scott is without sufficient information to form a belief as to the truth or falsity of said
24 allegations and therefore denies said allegations.

25 34. With respect to the allegations contained in paragraph 34 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 35. With respect to the allegations contained in paragraph 35 of the complaint, Scott

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1 is without sufficient information to form a belief as to the truth or falsity of the allegations
2 regarding the details of Tharaldson's surgeries or medications, and therefore denies said
3 allegations. With respect to the balance of the allegations contained in paragraph 35 of the
4 complaint, Scott denies said allegations.

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

7 37. With respect to the allegations contained in paragraph 37 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 38. With respect to the allegations contained in paragraph 38 of the complaint, Scott
11 denies said allegations.

12 39. With respect to the allegations contained in paragraph 39 of the complaint, Scott
13 is without sufficient information to form a belief as to the truth or falsity of said allegations and
14 therefore denies said allegations.

15 40. With respect to the allegations contained in paragraph 40 of the complaint, Scott
16 admits that Manhattan West is a project located on 21 acres of land on Russell Road in Las
17 Vegas, Nevada, and that Manhattan West was being developed by Alexander Edelstein. With
18 respect to the balance of the allegations in paragraph 40 of the complaint, Scott denies said
19 allegations.

20 41. With respect to the allegations contained in paragraph 41 of the complaint, Scott
21 admits said allegations.

22 42. With respect to the allegations contained in paragraph 42 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 43. With respect to the allegations contained in paragraph 43 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 44. With respect to the allegations contained in paragraph 44 of the complaint, Scott

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1 denies said allegations.

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

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

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

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

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

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

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

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

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

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

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

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

26 57. With respect to the allegations contained in paragraph 57 of the complaint, Scott
27 admits said allegations.

28 58. With respect to the allegations contained in paragraph 58 of the complaint, Scott

1 denies said allegations.

2 59. With respect to the allegations contained in paragraph 59 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 60. With respect to the allegations contained in paragraph 60 of the complaint, Scott
6 admits said allegations.

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

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

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

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

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

17 66. With respect to the allegations contained in paragraph 66 of the complaint, Scott
18 admits said allegations.

19 67. With respect to the allegations contained in paragraph 67 of the complaint, Scott
20 denies said allegations.

21 68. With respect to the allegations contained in paragraph 68 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 69. With respect to the allegations contained in paragraph 69 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 70. With respect to the allegations contained in paragraph 70 of the complaint, Scott
28 denies said allegations.

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- 1 71. With respect to the allegations contained in paragraph 71 of the complaint, Scott
2 denies said allegations.
- 3 72. With respect to the allegations contained in paragraph 72 of the complaint, Scott
4 denies said allegations.
- 5 73. With respect to the allegations contained in paragraph 73 of the complaint, Scott
6 denies said allegations.
- 7 74. With respect to the allegations contained in paragraph 74 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 75. With respect to the allegations contained in paragraph 75 of the complaint, Scott
11 denies said allegations.
- 12 76. With respect to the allegations contained in paragraph 76 of the complaint, Scott
13 denies said allegations.
- 14 77. With respect to the allegations contained in paragraph 77 of the complaint, Scott
15 denies said allegations.
- 16 78. With respect to the allegations contained in paragraph 78 of the complaint, Scott
17 admits said allegations.
- 18 79. With respect to the allegations contained in paragraph 79 of the complaint, Scott
19 denies said allegations.
- 20 80. With respect to the allegations contained in paragraph 80 of the complaint, Scott
21 admits said allegations.
- 22 81. With respect to the allegations contained in paragraph 81 of the complaint, Scott
23 denies said allegations.
- 24 82. With respect to the allegations contained in paragraph 82 of the complaint, Scott
25 admits said allegations.
- 26 83. With respect to the allegations contained in paragraph 83 of the complaint, Scott
27 admits said allegations.
- 28 84. With respect to the allegations contained in paragraph 84 of the complaint, Scott

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1 admits 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 admits said allegations.

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

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

10 89. With respect to the allegations contained in paragraph 89 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 90. With respect to the allegations contained in paragraph 90 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 91. With respect to the allegations contained in paragraph 91 of the complaint, Scott
17 admits said allegations.

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

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

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

24 95. With respect to the allegations contained in paragraph 95 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 96. With respect to the allegations contained in paragraph 96 of the complaint, Scott
28 admits said allegations.

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1 97. With respect to the allegations contained in paragraph 97 of the complaint, Scott
2 denies said allegations.

3 98. With respect to the allegations contained in paragraph 98 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 99. With respect to the allegations contained in paragraph 99 of the complaint, Scott
7 denies said allegations.

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

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

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

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

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

18 105. With respect to the allegations contained in paragraph 105 of the complaint, said
19 allegations are not stated with sufficient specificity and thus are neither admitted nor denied.

20 106. With respect to the allegations contained in paragraph 106 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.

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

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

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

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

3 111. With respect to the allegations contained in paragraph 111 of the complaint, Scott
4 admits said allegations.

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

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

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

11 115. With respect to the allegations contained in paragraph 115 of the complaint, Scott
12 admits 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 admits said allegations.

17 118. With respect to the allegations contained in paragraph 118 of the complaint, Scott
18 admits said allegations.

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

21 120. With respect to the allegations contained in paragraph 120 of the complaint, Scott
22 admits said allegations

23 121. With respect to the allegations contained in paragraph 121 of the complaint, Scott
24 denies said allegations

25 122. With respect to the allegations contained in paragraph 122 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.

28 123. With respect to the allegations contained in paragraph 123 of the complaint, Scott

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1 admits said allegations.

2 124. With respect to the allegations contained in paragraph 124 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.

5 125. With respect to the allegations contained in paragraph 125 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.

8 126. With respect to the allegations contained in paragraph 126 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.

11 127. With respect to the allegations contained in paragraph 127 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.

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

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

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

20 131. With respect to the allegations contained in paragraph 131 of the complaint, Scott
21 denies said allegations.

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

24 133. With respect to the allegations contained in paragraph 133 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.

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

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1 135. With respect to the allegations contained in paragraph 135 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.

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

6 137. With respect to the allegations contained in paragraph 137 of the complaint, Scott
7 denies said allegations.

8 138. With respect to the allegations contained in paragraph 138 of the complaint, Scott
9 denies said allegations.

10 139. With respect to the allegations contained in paragraph 139 of the complaint, Scott
11 admits said allegations.

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

14 141. With respect to the allegations contained in paragraph 141 of the complaint, Scott
15 denies said allegations.

16 142. With respect to the allegations contained in paragraph 142 of the complaint, Scott
17 denies said allegations.

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

20 144. With respect to the allegations contained in paragraph 144 of the complaint, Scott
21 denies that any of the sales in question were "questionable". With respect to the balance of the
22 allegations in paragraph 144 of the complaint, Scott admits said allegations.

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

25 146. With respect to the allegations contained in paragraph 146 of the complaint, Scott
26 denies said allegations.

27 147. With respect to the allegations contained in paragraph 147 of the complaint, Scott
28 denies said allegations.

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- 1 148. With respect to the allegations contained in paragraph 148 of the complaint, Scott
2 admits said allegations.
- 3 149. With respect to the allegations contained in paragraph 149 of the complaint, Scott
4 admits said allegations.
- 5 150. With respect to the allegations contained in paragraph 150 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.
- 8 151. With respect to the allegations contained in paragraph 151 of the complaint, Scott
9 admits said allegations.
- 10 152. With respect to the allegations contained in paragraph 152 of the complaint, Scott
11 admits said allegations.
- 12 153. With respect to the allegations contained in paragraph 153 of the complaint, Scott
13 admits said allegations.
- 14 154. With respect to the allegations contained in paragraph 154 of the complaint, Scott
15 denies said allegations.
- 16 155. With respect to the allegations contained in paragraph 155 of the complaint, Scott
17 admits said allegations.
- 18 156. With respect to the allegations contained in paragraph 156 of the complaint, Scott
19 denies said allegations.
- 20 157. With respect to the allegations contained in paragraph 157 of the complaint, Scott
21 denies said allegations.
- 22 158. With respect to the allegations contained in paragraph 158 of the complaint, Scott
23 admits said allegations.
- 24 159. With respect to the allegations contained in paragraph 159 of the complaint, Scott
25 denies said allegations.
- 26 160. With respect to the allegations contained in paragraph 160 of the complaint, Scott
27 denies said allegations.
- 28 161. With respect to the allegations contained in paragraph 161 of the complaint, Scott

1 denies said allegations.

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

4 163. With respect to the allegations contained in paragraph 163 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.

7 164. With respect to the allegations contained in paragraph 164 of the complaint, Scott
8 admits said allegations.

9 165. With respect to the allegations contained in paragraph 165 of the complaint, Scott
10 denies said allegations.

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

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

15 168. With respect to the allegations contained in paragraph 168 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.

18 169. With respect to the allegations contained in paragraph 169 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.

21 170. With respect to the allegations contained in paragraph 170 of the complaint, Scott
22 denies said allegations.

23 171. With respect to the allegations contained in paragraph 171 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.

26 172. With respect to the allegations contained in paragraph 172 of the complaint, Scott
27 admits said allegations.

28 173. With respect to the allegations contained in paragraph 173 of the complaint, Scott

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1 admits said allegations.

2 174. With respect to the allegations contained in paragraph 174 of the complaint, Scott
3 admits said allegations

4 175. With respect to the allegations contained in paragraph 175 of the complaint, Scott
5 denies that it did not disclose the subject waiver provision to the plaintiffs. With respect to the
6 balance of the allegations in paragraph 175 of the complaint, Scott admits said allegations.

7 176. With respect to the allegations contained in paragraph 176 of the complaint, Scott
8 admits said allegations

9 177. With respect to the allegations contained in paragraph 177 of the complaint, Scott
10 denies that Plaintiff was not made aware of the effect of the selection of North Dakota law. With
11 respect to the balance of the allegations in paragraph 177 of the complaint, Scott is without
12 sufficient information to form a belief as to the truth or falsity of said allegations and therefore
13 denies said allegations.

14 178. With respect to the allegations contained in paragraph 178 of the complaint, Scott
15 denies said allegations.

16 179. With respect to the allegations contained in paragraph 179 of the complaint, Scott
17 denies said allegations.

18 180. With respect to the allegations contained in paragraph 180 of the complaint, Scott
19 denies said allegations.

20 181. With respect to the allegations contained in paragraph 181 of the complaint, Scott
21 denies said allegations.

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

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

26 184. With respect to the allegations contained in paragraph 184 of the complaint, Scott
27 denies said allegations.

28 185. With respect to the allegations contained in paragraph 185 of the complaint, Scott

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1 denies said allegations.

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

4 187. With respect to the allegations contained in paragraph 187 of the complaint, Scott
5 denies said allegations.

6 188. With respect to the allegations contained in paragraph 188 of the complaint, Scott
7 admits said allegations.

8 189. With respect to the allegations contained in paragraph 189 of the complaint, Scott
9 admits said allegations.

10 190. With respect to the allegations contained in paragraph 190 of the complaint, Scott
11 denies said allegations.

12 191. With respect to the allegations contained in paragraph 191 of the complaint, Scott
13 denies said allegations.

14 192. With respect to the allegations contained in paragraph 192 of the complaint, Scott
15 admits said allegations.

16 193. With respect to the allegations contained in paragraph 193 of the complaint, Scott
17 admits said allegations.

18 194. With respect to the allegations contained in paragraph 194 of the complaint, Scott
19 denies said allegations.

20 195. With respect to the allegations contained in paragraph 195 of the complaint, Scott
21 denies said allegations.

22 196. With respect to the allegations contained in paragraph 196 of the complaint, Scott
23 denies said allegations.

24 197. With respect to the allegations contained in paragraph 197 of the complaint, Scott
25 denies said allegations.

26 198. With respect to the allegations contained in paragraph 198 of the complaint, Scott
27 denies said allegations.

28 199. With respect to the allegations contained in paragraph 199 of the complaint, Scott

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1 denies said allegations.

2 **FIRST CLAIM FOR RELIEF**

3 **(Fraudulent Misrepresentation)**

4 200. Answering paragraph 200 of the complaint, Scott repeats and realleges herein all
5 of the answers set forth above.

6 201. With respect to the allegations contained in paragraph 201 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.

9 202. With respect to the allegations contained in paragraph 202 of the complaint, Scott
10 denies said allegations

11 203. With respect to the allegations contained in paragraph 203 of the complaint, Scott
12 denies said allegations.

13 204. With respect to the allegations contained in paragraph 204 of the complaint, Scott
14 denies said allegations

15 205. With respect to the allegations contained in paragraph 205 of the complaint, Scott
16 denies said allegations.

17 206. With respect to the allegations contained in paragraph 206 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.

20 207. With respect to the allegations contained in paragraph 207 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.

23 208. With respect to the allegations contained in paragraph 208 of the complaint, Scott
24 denies said allegations.

25 209. With respect to the allegations contained in paragraph 209 of the complaint, Scott
26 denies said allegations.

27 210. With respect to the allegations contained in paragraph 210 of the complaint, Scott
28 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.

2 211. With respect to the allegations contained in paragraph 211 of the complaint, Scott
3 denies said allegations.

4 212. With respect to the allegations contained in paragraph 212 of the complaint, Scott
5 denies said allegations.

6 213. With respect to the allegations contained in paragraph 213 of the complaint, Scott
7 denies said allegations.

8 214. With respect to the allegations contained in paragraph 214 of the complaint, Scott
9 admits said allegations.

10 215. With respect to the allegations contained in paragraph 215 of the complaint, Scott
11 denies said allegations.

12 216. With respect to the allegations contained in paragraph 216 of the complaint, Scott
13 denies said allegations.

14 **SECOND CLAIM FOR RELIEF**

15 **(Fraudulent Concealment/Fraudulent Omission)**

16 217. Answering paragraph 217 of the complaint, Scott repeats and realleges herein all
17 of the answers set forth above.

18 218. With respect to the allegations contained in paragraph 218 of the complaint, Scott
19 denies said allegations.

20 219. With respect to the allegations contained in paragraph 219 of the complaint, Scott
21 denies said allegations.

22 220. With respect to the allegations contained in paragraph 220 of the complaint, Scott
23 denies said allegations.

24 221. With respect to the allegations contained in paragraph 221 of the complaint, Scott
25 denies said allegations.

26 222. With respect to the allegations contained in paragraph 222 of the complaint, Scott
27 denies said allegations.

28 223. With respect to the allegations contained in paragraph 223 of the complaint, Scott

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1 denies said allegations.

2 224. With respect to the allegations contained in paragraph 224 of the complaint, Scott
3 denies said allegations.

4 225. With respect to the allegations contained in paragraph 225 of the complaint, Scott
5 denies said allegations.

6 **THIRD CLAIM FOR RELIEF**

7 **(Constructive Fraud)**

8 226. Answering paragraph 226 of the complaint, Scott repeats and realleges herein all
9 of the answers set forth above.

10 227. With respect to the allegations contained in paragraph 227 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.

13 228. With respect to the allegations contained in paragraph 228 of the complaint, Scott
14 denies said allegations.

15 229. With respect to the allegations contained in paragraph 229 of the complaint, Scott
16 denies said allegations.

17 230. With respect to the allegations contained in paragraph 230 of the complaint, Scott
18 denies said allegations.

19 231. With respect to the allegations contained in paragraph 231 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.

22 232. With respect to the allegations contained in paragraph 232 of the complaint, Scott
23 denies said allegations.

24 233. With respect to the allegations contained in paragraph 233 of the complaint, Scott
25 denies said allegations.

26 234. With respect to the allegations contained in paragraph 234 of the complaint, Scott
27 denies said allegations.

28 235. With respect to the allegations contained in paragraph 235 of the complaint, Scott

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1 denies said allegations.

2 236. With respect to the allegations contained in paragraph 236 of the complaint, Scott
3 denies said allegations.

4 **FOURTH CLAIM FOR RELIEF**

5 **(Negligent Misrepresentation/Negligent Omission)**

6 237. Answering paragraph 237 of the complaint, Scott repeats and realleges herein all
7 of the answers set forth above.

8 238. With respect to the allegations contained in paragraph 238 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.

11 239. With respect to the allegations contained in paragraph 239 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.

14 240. With respect to the allegations contained in paragraph 240 of the complaint, Scott
15 denies said allegations.

16 241. With respect to the allegations contained in paragraph 241 of the complaint, Scott
17 denies said allegations.

18 242. With respect to the allegations contained in paragraph 242 of the complaint, Scott
19 denies said allegations.

20 243. With respect to the allegations contained in paragraph 243 of the complaint, Scott
21 denies said allegations.

22 244. With respect to the allegations contained in paragraph 244 of the complaint, Scott
23 denies said allegations.

24 245. With respect to the allegations contained in paragraph 245 of the complaint, Scott
25 denies said allegations.

26 246. With respect to the allegations contained in paragraph 246 of the complaint, Scott
27 denies said allegations.

28 247. With respect to the allegations contained in paragraph 247 of the complaint, Scott

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1 denies said allegations.

2 248. With respect to the allegations contained in paragraph 248 of the complaint, Scott
3 denies said allegations.

4 249. With respect to the allegations contained in paragraph 249 of the complaint, Scott
5 denies said allegations.

6 **FIFTH CLAIM FOR RELIEF**

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

8 250. Answering paragraph 250 of the complaint, Scott repeats and realleges herein all
9 of the answers set forth above.

10 251. With respect to the allegations contained in paragraph 251 of the complaint, Scott
11 denies said allegations.

12 252. With respect to the allegations contained in paragraph 252 of the complaint, Scott
13 denies said allegations.

14 253. With respect to the allegations contained in paragraph 253 of the complaint, Scott
15 denies said allegations.

16 254. With respect to the allegations contained in paragraph 254 of the complaint, Scott
17 denies said allegations.

18 255. With respect to the allegations contained in paragraph 255 of the complaint, Scott
19 denies said allegations.

20 256. With respect to the allegations contained in paragraph 256 of the complaint, Scott
21 denies said allegations.

22 257. With respect to the allegations contained in paragraph 257 of the complaint, Scott
23 denies said allegations.

24 258. With respect to the allegations contained in paragraph 258 of the complaint, Scott
25 denies said allegations.

26 259. With respect to the allegations contained in paragraph 259 of the complaint, Scott
27 denies said allegations.

28 260. With respect to the allegations contained in paragraph 260 of the complaint, Scott

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1 denies said allegations.

2 261. With respect to the allegations contained in paragraph 261 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.

5 262. With respect to the allegations contained in paragraph 262 of the complaint, Scott
6 denies said allegations.

7 263. With respect to the allegations contained in paragraph 263 of the complaint, Scott
8 denies said allegations.

9 **SIXTH CLAIM FOR RELIEF**

10 **(Defamation)**

11 264. Answering paragraph 264 of the complaint, Scott repeats and realleges herein all
12 of the answers set forth above.

13 265. With respect to the allegations contained in paragraph 265 of the complaint, Scott
14 admit said allegations.

15 266. With respect to the allegations contained in paragraph 266 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.

18 267. With respect to the allegations contained in paragraph 267 of the complaint, Scott
19 denies said allegations.

20 268. With respect to the allegations contained in paragraph 268 of the complaint, Scott
21 denies said allegations.

22 269. With respect to the allegations contained in paragraph 269 of the complaint, Scott
23 denies said allegations.

24 270. With respect to the allegations contained in paragraph 270 of the complaint, Scott
25 denies said allegations.

26 **SEVENTH CLAIM FOR RELIEF**

27 **(Breach of Fiduciary Duty)**

28 271. Answering paragraph 271 of the complaint, Scott repeats and realleges herein all

1 of the answers set forth above.

2 272. With respect to the allegations contained in paragraph 272 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.

5 273. With respect to the allegations contained in paragraph 273 of the complaint, Scott
6 denies said allegations.

7 274. With respect to the allegations contained in paragraph 274 of the complaint, Scott
8 denies said allegations.

9 275. With respect to the allegations contained in paragraph 275 of the complaint, Scott
10 denies said allegations.

11 **EIGHTH CLAIM FOR RELIEF**

12 **(BOK, Aiding and Abetting Breach of Fiduciary Duty)**

13 276. Answering paragraph 276 of the complaint, Scott repeats and realleges herein all
14 of the answers set forth above.

15 277. With respect to the allegations contained in paragraph 277 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.

18 278. With respect to the allegations contained in paragraph 278 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.

21 279. With respect to the allegations contained in paragraph 279 of the complaint, Scott
22 denies said allegations.

23 280. With respect to the allegations contained in paragraph 280 of the complaint, Scott
24 denies said allegations.

25 **NINTH CLAIM FOR RELIEF**

26 **(Acting in Concert/Civil Conspiracy)**

27 281. Answering paragraph 281 of the complaint, Scott repeats and realleges herein all
28 of the answers set forth above.

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1 282. With respect to the allegations contained in paragraph 282 of the complaint, Scott
2 denies said allegations.

3 283. With respect to the allegations contained in paragraph 283 of the complaint, Scott
4 denies said allegations.

5 284. With respect to the allegations contained in paragraph 284 of the complaint, Scott
6 denies said allegations.

7 285. With respect to the allegations contained in paragraph 285 of the complaint, Scott
8 denies said allegations.

9 **TENTH CLAIM FOR RELIEF**

10 **(Breach of Contract)**

11 286. Answering paragraph 286 of the complaint, Scott repeats and realleges herein all
12 of the answers set forth above.

13 287. With respect to the allegations contained in paragraph 287 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.

16 288. With respect to the allegations contained in paragraph 288 of the complaint, Scott
17 denies said allegations.

18 289. With respect to the allegations contained in paragraph 289 of the complaint, Scott
19 denies said allegations

20 **ELEVENTH CLAIM FOR RELIEF**

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

22 290. Answering paragraph 290 of the complaint, Scott repeats and realleges herein all
23 of the answers set forth above.

24 291. With respect to the allegations contained in paragraph 291 of the complaint, Scott
25 admits said allegations.

26 292. With respect to the allegations contained in paragraph 292 of the complaint, Scott
27 denies said allegations.

28 293. With respect to the allegations contained in paragraph 293 of the complaint, Scott

1 denies said allegations.

2 294. With respect to the allegations contained in paragraph 294 of the complaint, Scott
3 denies said allegations.

4 **TWELFTH CLAIM FOR RELIEF**

5 **(Negligence)**

6 295. Answering paragraph 295 of the complaint, Scott repeats and realleges herein all
7 of the answers set forth above.

8 296. With respect to the allegations contained in paragraph 296 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.

11 297. With respect to the allegations contained in paragraph 297 of the complaint, Scott
12 denies said allegations.

13 298. With respect to the allegations contained in paragraph 298 of the complaint, Scott
14 denies said allegations.

15 **THIRTEENTH CLAIM FOR RELIEF**

16 **(Declaratory Judgment)**

17 299. Answering paragraph 299 of the complaint, Scott repeats and realleges herein all
18 of the answers set forth above.

19 300. With respect to the allegations contained in paragraph 300 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.

22 301. With respect to the allegations contained in paragraph 301 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.

25 302. With respect to the allegations contained in paragraph 302 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.

28 303. With respect to the allegations contained in paragraph 303 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.

3 304. With respect to the allegations contained in paragraph 304 of the complaint, Scott
4 denies said allegations.

5 305. With respect to the allegations contained in paragraph 305 of the complaint, Scott
6 denies said allegations.

7 306. With respect to the allegations contained in paragraph 306 of the complaint, Scott
8 denies said allegations.

9 307. With respect to the allegations contained in paragraph 307 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.

12 308. With respect to the allegations contained in paragraph 308 of the complaint, Scott
13 denies said allegations.

14 309. With respect to the allegations contained in paragraph 309 of the complaint, Scott
15 denies said allegations.

16 310. With respect to the allegations contained in paragraph 310 of the complaint, Scott
17 denies said allegations.

18 311. With respect to the allegations contained in paragraph 311 of the complaint, Scott
19 denies said allegations.

20 **AFFIRMATIVE DEFENSES**

21 1. Plaintiffs have failed to state a claim for which relief may be granted.

22 2. Plaintiffs lack standing to bring this action.

23 3. Plaintiffs' claims are barred by the doctrines of laches, waiver and estoppel.

24 4. Plaintiffs have failed to mitigate their damages, if any, after discovery of the
25 alleged injury, if any.

26 5. Plaintiffs are guilty of unclean hands and therefore are not entitled to any relief
27 from Scott.

28 6. Plaintiffs' recovery is barred by contributory negligence as whatever injuries or

1 damages sustained by Plaintiffs as a result of the allegations of the Complaint were proximately
2 caused in whole or in part or were contributed to by reason of Plaintiffs' own negligence.

3 7. Plaintiffs' recovery is barred by comparative negligence as Plaintiff was
4 comparatively more negligent than Scott.

5 8. Any damages which Plaintiffs may have sustained were proximately caused by the
6 acts of persons other than Scott, and therefore, Plaintiffs are not entitled to any relief from Scott.

7 9. Alternatively, should Scott be found liable, the fault of all parties, joined and
8 nonjoined, including that of the Plaintiffs must be evaluated and liability apportioned among all
9 persons and entities appropriate to respective fault.

10 10. If Plaintiffs have incurred any injury or damage, which Scott denies, the risk of
11 such injury or damage was not foreseeable.

12 11. Plaintiffs' claims should be dismissed for failure to join indispensable parties.

13 12. By their own actions, Plaintiffs have ratified, approved and adopted the actions of
14 Scott in connection with the allegations contained in the Complaint.

15 13. By reason of their own acts, Plaintiffs have released and discharged Scott from the
16 claims alleged.

17 14. Plaintiffs have failed to do equity towards Scott and therefore are not entitled to
18 any relief.

19 15. Plaintiffs have been unjustly enriched to the injury and detriment of Scott and
20 therefore are not entitled to any relief.

21 16. Plaintiffs' claims are not well-grounded in fact and are not warranted by existing
22 law or a good faith argument for the extension or modification of existing law, but are initiated
23 only for purposes of harassment, unnecessary delay and the occurrence of needless costs of
24 litigation to Scott.

25 17. The claims of Plaintiffs are barred in whole or in part to the extent that Plaintiff
26 have not suffered any injury in fact.

27 18. Any damages that Plaintiffs allege to have suffered from the matters alleged in the
28 Complaint are too remote or speculative to allow recovery.

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1 19. Scott hereby adopts and incorporate by this reference any and all other defenses
2 asserted or to be asserted by any other defendant in this proceeding to the extent that Scott may
3 share in such defenses.

4 20. Scott hereby reserves the right to allege additional defenses as they may become
5 known, or as they evolve during the litigation, and to amend their Answer accordingly.

6 21. Any statements made by Scott or Scott's representatives were true.

7 22. Any statements made by Scott or Scott's representatives were privileged.

8 23. Scott reserves the right to allege additional defenses as they may become known,
9 or as they evolve during the litigation, and to amend its Answer accordingly.

10 WHEREFORE, Scott Financial Corporation and Bradley J. Scott pray for judgment on
11 the complaint as follows:

12 1. That Plaintiffs take nothing and that the complaint be dismissed with prejudice;

13 2. That Scott Financial Corporation and Bradley J. Scott be awarded their attorney's
14 fees and costs of suit in defending the complaint; and

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

16 DATED this 20th day of July, 2009.

17 KEMP, JONES & COULTHARD, LLP

18 

19 J. RANDALL JONES, ESQ. (#1927)

20 MARK M. JONES, ESQ. (#267)

21 MATTHEW S. CARTER, ESQ. (#9524)

22 3800 Howard Hughes Parkway

23 Seventeenth Floor

24 Las Vegas, Nevada 89169

25 Attorneys for Defendants Scott Financial
26 Corporation and Bradley J. Scott
27
28

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CERTIFICATE OF MAILING & FACSIMILE

I hereby certify that on the 30th day of July, 2009, the foregoing **SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S ANSWER TO FIRST AMENDED COMPLAINT** was served on the following persons by mailing a copy thereof, first class mail, postage prepaid, to:

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Attorneys for Defendant
BANK OF OKLAHOMA, N.A.

DISTRICT COURT
CLARK COUNTY, 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,

Plaintiffs,

v.

Case No.: A579963
Dept. No.: XIII

**DEFENDANT BANK OF OKLAHOMA,
N.A.'S ANSWER TO PLAINTIFFS'
FIRST AMENDED COMPLAINT¹**

¹ Defendant Bank of Oklahoma, N.A. objects to the Court's exercise of jurisdiction over it to the extent the Plaintiffs' claim relate to that certain guaranty executed by Plaintiff Tharaldson Motels II, Inc. (the "TMII Guaranty"). Any claim relating to the TMII Guaranty should be resolved in the United States District Court for the District of North Dakota, Case No. 1:09-cv-30.

1 SCOTT FINANCIAL CORPORATION, a
North Dakota corporation; BRADLEY J.
2 SCOTT; BANK OF OKLAHOMA, N.A., a
national bank; GEMSTONE DEVELOPMENT
3 WEST, INC., a Nevada corporation;
ASPHALT PRODUCTS CORPORATION
4 D/B/A APCO CONSTRUCTION, a Nevada
corporation; DOE INDIVIDUALS 1-100; and
5 ROE BUSINESS ENTITIES 1-100,

6 Defendants.

7
8 For its answer to the First Amended Complaint of plaintiffs, defendant Bank of
9 Oklahoma, N.A. ("BOK") admits, denies and alleges as follows:

10 1. BOK denies the allegations against it contained in paragraph 1. To the extent the
11 allegations of paragraph 1 are asserted against defendants other than BOK, BOK lacks sufficient
12 information so as to form a belief as to the truthfulness of them and therefore denies them.

13 2. BOK admits the allegations of paragraph 2 on information and belief.

14 3. BOK admits the allegations of paragraph 3 on information and belief.

15 4. BOK admits the allegations of paragraph 4 on information and belief.

16 5. Answering the allegations of paragraph 5, BOK admits that plaintiffs collectively refer
17 to themselves as "Plaintiffs" in their complaint.

18 6. BOK admits the first and second sentences of paragraph 6 on information and belief.
19 BOK lacks sufficient information so as to form a belief as to the truthfulness of the allegations of
20 the third sentence of paragraph 6 and therefore denies them. BOK alleges that the allegations of
21 the fourth and fifth sentence of paragraph 6 do not purport to state a claim against it and is
22 therefore required neither to admit nor to deny them in response.

23 7. BOK admits the first sentence of the allegations of paragraph 7 on information and
24 belief. BOK lacks sufficient information so as to form a belief as to the truthfulness of the
25 allegations of the second sentence of paragraph 7 and therefore denies them.

1 8. BOk admits the allegations of the first sentence of paragraph 8. BOk denies the
2 remaining allegations of paragraph 8 other than the fact it is the named Co-Lead Lender of the
3 transaction.

4 9. Answering the allegations of paragraph 9, BOk admits that plaintiffs collectively refer
5 to SFC, Scott and BOk collectively as the "Fiduciary Defendants." BOk denies the representation
6 made by plaintiffs that BOk is or was a fiduciary to the plaintiffs.

7 10. BOk admits the allegations of the first sentence of paragraph 10 on information and
8 belief. BOk alleges that the allegations of the second sentence of paragraph 10 do not purport to
9 state a cause of action against it and that it therefore is required neither to admit nor to deny
10 them.

11 11. BOk admits the allegations of the first sentence of paragraph 11 on information and
12 belief. BOk alleges that the allegations of the second sentence of paragraph 11 do not purport to
13 state a cause of action against it and that it therefore is required neither to admit nor to deny
14 them.

15 12. BOk alleges that the allegations of paragraph 12 do not purport to state a cause of
16 action against it and that it therefore is required neither to admit nor to deny them.

17 13. Answering the allegations of paragraph 13, BOk denies all allegations of this
18 paragraph as Plaintiff Tharaldson Motels II, Inc. has agreed to the exclusive jurisdiction of the
19 courts of the State of North Dakota.

20 14. BOk alleges that the allegations of paragraph 14 do not purport to state a cause of
21 action against it and that it therefore is required neither to admit nor to deny them.

22 15. BOk alleges that the allegations of paragraph 14 do not purport to state a cause of
23 action against it and that it therefore is required neither to admit nor to deny them.

24 16. BOk alleges that the allegations of paragraph 16 do not purport to state a cause of
25 action against it and therefore denies them.

1 17. Answering the allegations of paragraph 17, BOk denies all allegations of this
2 paragraph as Plaintiff Tharaldson Motels II, Inc. has agreed to the exclusive jurisdiction of the
3 courts of the State of North Dakota.

4 18. BOk alleges that the allegations of paragraph 18 do not purport to state a cause of
5 action against it and therefore denies them.

6 19. Answering the allegations of paragraph 19, BOk denies that venue of this matter is
7 appropriate in this Court and denies all allegations against it contained in this paragraph. To the
8 extent the Plaintiffs' claims herein relate to the TMII Guaranty such claims must be resolved in
9 the United States District Court for the District of North Dakota, Case No. 1:09-cv-30.

10 20. BOk admits the allegations of paragraph 20 of the Amended Complaint.

11 21. BOk admits the allegations of paragraph 21 of the Amended Complaint.

12 22. BOk admits the allegations of the first sentence of paragraph 22 of the Amended
13 Complaint. BOk is without knowledge or information sufficient to form a belief as to the
14 allegations of the remaining sentence of paragraph 22 and therefore denies the same.

15 23. BOk admits the allegations of paragraph 23 of the Amended Complaint.

16 24. BOk alleges that the allegations of paragraph 24 do not purport to state a cause of
17 action against it and therefore denies them.

18 25. BOk alleges that the allegations of paragraph 25 do not purport to state a cause of
19 action against it and therefore denies them.

20 26. BOk alleges that the allegations of paragraph 26 do not purport to state a cause of
21 action against it and therefore denies them.

22 27. BOk alleges that the allegations of paragraph 27 do not purport to state a cause of
23 action against it and therefore denies them.

24 28. BOk alleges that the allegations of paragraph 28 do not purport to state a cause of
25 action against it and therefore denies them.

1 29. BOk alleges that the allegations of paragraph 29 do not purport to state a cause of
2 action against it and therefore denies them.

3 30. BOk alleges that the allegations of paragraph 30 do not purport to state a cause of
4 action against it and therefore denies them.

5 31. BOk alleges that the allegations of paragraph 31 do not purport to state a cause of
6 action against it and therefore denies them.

7 32. BOk alleges that the allegations of paragraph 32 do not purport to state a cause of
8 action against it and therefore denies them.

9 33. BOk alleges that the allegations of paragraph 33 do not purport to state a cause of
10 action against it and therefore denies them.

11 34. BOk denies the allegations of paragraph 34 against it. To the extent the allegations of
12 paragraph 34 are asserted against defendants other than BOk, BOk lacks sufficient information
13 so as to form a belief as to the truthfulness of them and therefore denies them.

14 35. BOk alleges that the allegations of paragraph 35 do not purport to state a cause of
15 action against it and therefore denies them.

16 36. BOk alleges that the allegations of paragraph 36 do not purport to state a cause of
17 action against it and therefore denies them.

18 37. BOk alleges that the allegations of paragraph 37 do not purport to state a cause of
19 action against it and therefore denies them.

20 38. BOk alleges that the allegations of paragraph 38 do not purport to state a cause of
21 action against it and therefore denies them.

22 39. BOk alleges that the allegations of paragraph 39 do not purport to state a cause of
23 action against it and therefore denies them.

24 40. BOk admits that Manhattan West is located on 21 acres of land on Russell Road in
25 Las Vegas, Nevada. BOk lacks sufficient information so as to form a belief as to the truthfulness

1 of the allegations of paragraph 40 and therefore denies them.

2 41. BOk admits the allegations of paragraph 41 on information and belief.

3 42. BOk alleges that the allegations of paragraph 42 do not purport to state a cause of
4 action against it and therefore denies them.

5 43. BOk alleges that the allegations of paragraph 43 do not purport to state a cause of
6 action against it and therefore denies them.

7 44. BOk admits the allegations of paragraph 44.

8 45. BOk admits the allegations of paragraph 45.

9 46. BOk alleges that the allegations of paragraph 46 do not purport to state a cause of
10 action against it and therefore denies them.

11 47. BOk alleges that the allegations of paragraph 47 do not purport to state a cause of
12 action against it and therefore denies them.

13 48. BOk alleges that the allegations of paragraph 48 do not purport to state a cause of
14 action against it and therefore denies them.

15 49. BOk alleges that the allegations of paragraph 49 do not purport to state a cause of
16 action against it and therefore denies them.

17 50. BOk alleges that the allegations of paragraph 50 do not purport to state a cause of
18 action against it and therefore denies them.

19 51. BOk alleges that the allegations of paragraph 51 do not purport to state a cause of
20 action against it and therefore denies them.

21 52. BOk alleges that the allegations of paragraph 52 do not purport to state a cause of
22 action against it and therefore denies them.

23 53. BOk alleges that the allegations of paragraph 53 do not purport to state a cause of
24 action against it and therefore denies them.

25 54. BOk alleges that the allegations of paragraph 54 do not purport to state a cause of

1 action against it and therefore denies them.

2 55. BOk alleges that the allegations of paragraph 55 do not purport to state a cause of
3 action against it and therefore denies them.

4 56. BOk alleges that the allegations of paragraph 56 do not purport to state a cause of
5 action against it and therefore denies them.

6 57. BOk alleges that the allegations of paragraph 57 do not purport to state a cause of
7 action against it and therefore denies them.

8 58. BOk alleges that the allegations of paragraph 58 do not purport to state a cause of
9 action against it and therefore denies them.

10 59. BOk alleges that the allegations of paragraph 59 do not purport to state a cause of
11 action against it and therefore denies them.

12 60. BOk alleges that the allegations of paragraph 60 do not purport to state a cause of
13 action against it and therefore denies them.

14 61. BOk alleges that the allegations of paragraph 61 do not purport to state a cause of
15 action against it and therefore denies them.

16 62. BOk alleges that the allegations of paragraph 62 do not purport to state a cause of
17 action against it and therefore denies them.

18 63. BOk alleges that the allegations of paragraph 63 do not purport to state a cause of
19 action against it and therefore denies them.

20 64. BOk alleges that the allegations of paragraph 64 do not purport to state a cause of
21 action against it and therefore denies them.

22 65. BOk alleges that the allegations of paragraph 65 do not purport to state a cause of
23 action against it and therefore denies them.

24 66. BOk alleges that the allegations of paragraph 66 do not purport to state a cause of
25 action against it and therefore denies them.

1 67. BOk alleges that the allegations of paragraph 67 do not purport to state a cause of
2 action against it and therefore denies them.

3 68. BOk alleges that the allegations of paragraph 68 do not purport to state a cause of
4 action against it and therefore denies them.

5 69. BOk admits the first sentence of paragraph 69. BOk denies the remaining
6 allegations of paragraph 69 against it. To the extent the allegations of paragraph 69 are asserted
7 against defendants other than BOk, BOk lacks sufficient information so as to form a belief as to
8 the truthfulness of them and therefore denies them.

9 70. BOk denies the allegations of paragraph 70. To the extent the allegations of
10 paragraph 70 are asserted against defendants other than BOk, BOk lacks sufficient information
11 so as to form a belief as to the truthfulness of them and therefore denies them.

12 71. BOk denies the allegations of paragraph 71 except for the last sentence. To the
13 extent the allegations of paragraph 71 are asserted against defendants other than BOk, BOk lacks
14 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
15 them.

16 72. BOk denies the allegations of paragraph 72.

17 73. BOk alleges that the allegations of paragraph 73 do not purport to state a cause of
18 action against it and therefore denies them.

19 74. BOk denies the allegations of paragraph 74. To the extent the allegations of
20 paragraph 74 are asserted against defendants other than BOk, BOk lacks sufficient information
21 so as to form a belief as to the truthfulness of them and therefore denies them.

22 75. BOk denies the allegations of paragraph 75. To the extent the allegations of
23 paragraph 75 are asserted against defendants other than BOk, BOk lacks sufficient information
24 so as to form a belief as to the truthfulness of them and therefore denies them.

25 76. Answering the allegations of paragraph 76, BOk admits the existence of the Senior

1 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
2 is required neither to admit nor to deny further.

3 77. Answering the allegations of paragraph 77, BOK admits the existence of the Senior
4 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
5 is required neither to admit nor to deny further.

6 78. Answering the allegations of paragraph 78, BOK admits the existence of the Senior
7 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
8 is required neither to admit nor to deny further.

9 79. BOK denies the allegations of paragraph 79.

10 80. Answering the allegations of paragraph 80, BOK admits the existence of the Senior
11 Loan Agreement, the Senior Debt Construction Note, and the Senior Debt Contingency Note, the
12 terms and provisions of which speak for themselves and about which BOK is required neither to
13 admit nor to deny further.

14 81. Answering the allegations of paragraph 81, BOK admits the existence of the Senior
15 Debt Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing
16 (Construction), the terms and provisions of which speak for themselves and about which BOK is
17 required neither to admit nor to deny further.

18 82. Answering the allegations of paragraph 82, BOK admits the existence of the Senior
19 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
20 is required neither to admit nor to deny further.

21 83. Answering the allegations of paragraph 83, BOK admits the existence of the Senior
22 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK
23 is required neither to admit nor to deny further.

24 84. Answering the allegations of paragraph 84, BOK admits the existence of the Senior
25 Loan Agreement, the terms and provisions of which speak for themselves and about which BOK

1 is required neither to admit nor to deny further.

2 85. Answering the allegations of paragraph 85, BOk admits the existence of the Senior
3 Loan Agreement, the terms and provisions of which speak for themselves and about which BOk
4 is required neither to admit nor to deny further.

5 86. Answering the allegations of paragraph 86, BOk admits the existence of the Senior
6 Loan Agreement, the terms and provisions of which speak for themselves and about which BOk
7 is required neither to admit nor to deny further.

8 87. Answering the allegations of paragraph 87, BOk admits the existence of the Senior
9 Loan Agreement, the terms and provisions of which speak for themselves and about which BOk
10 is required neither to admit nor to deny further.

11 88. Answering the allegations of paragraph 88, BOk admits the existence of the Senior
12 Loan Agreement, the terms and provisions of which speak for themselves and about which BOk
13 is required neither to admit nor to deny further.

14 89. Answering the allegations of paragraph 89, BOk admits the existence of the Senior
15 Deed of Trust, the terms and provisions of which speak for themselves and about which BOk is
16 required neither to admit nor to deny further.

17 90. Answering the allegations of paragraph 90, BOk admits the existence of the Senior
18 Deed of Trust, the terms and provisions of which speak for themselves and about which BOk is
19 required neither to admit nor to deny further.

20 91. Answering the allegations of paragraph 91, BOk admits the existence of the Senior
21 Deed of Trust, the terms and provisions of which speak for themselves and about which BOk is
22 required neither to admit nor to deny further.

23 92. Answering the allegations of paragraph 92, BOk admits the existence of the Senior
24 Loan Agreement, the Senior Loan, the Guaranty, and the Addendum, the terms and provisions of
25 which speak for themselves and about which BOk is required neither to admit nor to deny

1 further.

2 93. Answering the allegations of paragraph 93, BOk admits the existence of the Senior
3 Loan Agreement and the Guaranty, the terms and provisions of which speak for themselves and
4 about which BOk is required neither to admit nor to deny further.

5 94. BOk alleges that the allegations of paragraph 94 do not purport to state a cause of
6 action against it and that it therefore is required neither to admit nor to deny them in response.

7 95. Answering the allegations of paragraph 95, BOk admits the existence of the
8 Nonrecourse Participation Agreement, the Addendum to Nonrecourse Agreement, the
9 Commitment to Participate, and the CVFS Third Senior Participation Agreement, the terms and
10 provisions of which speak for themselves and about which BOk is required neither to admit nor
11 to deny further.

12 96. Answering the allegations of paragraph 96, BOk admits the existence of the Senior
13 Loan, the Assignment of Construction Contract, Plans and Specifications, the Consent of
14 General Contractor, and the Sworn Construction Statement, the terms and provisions of which
15 speak for themselves and about which BOk is required neither to admit nor to deny further.

16 97. BOk alleges that the allegations of paragraph 97 do not purport to state a cause of
17 action against it and that it therefore is required neither to admit nor to deny them in response.

18 98. Answering the allegations of paragraph 98, BOk admits the existence of the
19 Assumption Agreement, the terms and provisions of which speak for themselves and about
20 which BOk is required neither to admit nor to deny further.

21 99. Answering the allegations of paragraph 99, BOk admits the existence of the Fourth
22 Amendment to Mezzanine Loan Agreement, the terms and provisions of which speak for
23 themselves and about which BOk is required neither to admit nor to deny further.

24 100. Answering the allegations of paragraph 100, BOk admits the existence of the
25 Mezzanine Note, the terms and provisions of which speak for themselves and about which BOk

1 is required neither to admit nor to deny further.

2 101. Answering the allegations of paragraph 101, BOk admits the existence of the
3 First Amendment to Senior Deed of Trust and Security Agreement, the terms and provisions of
4 which speak for themselves and about which BOk is required neither to admit nor to deny
5 further.

6 102. Answering the allegations of paragraph 102, BOk admits the existence of the First
7 Junior DOT Second Amendment, the terms and provisions of which speak for themselves and
8 about which BOk is required neither to admit nor to deny further.

9 103. Answering the allegations of paragraph 103, BOk admits the existence of the
10 Mezzanine Participation Agreement, the terms and provisions of which speak for themselves and
11 about which BOk is required neither to admit nor to deny further.

12 104. Answering the allegations of paragraph 104, BOk admits the existence of the
13 Grant, Bargain, Sale Deed recorded February 7, 2008, the terms and provisions of which speak
14 for themselves and about which BOk is required neither to admit nor to deny further.

15 105. BOk alleges that the allegations of paragraph 105 do not purport to state a cause
16 of action against it and that it therefore is required neither to admit nor to deny them in response.

17 106. Answering the allegations of paragraph 106, BOk admits the existence of the
18 Senior Loan, the terms and provisions of which speak for themselves and about which BOk is
19 required neither to admit nor to deny further.

20 107. BOk admits the allegations of paragraph 107.

21 108. Answering the allegations of paragraph 108, BOk admits the existence of the
22 Senior Loan and the CVFS Senior Participation Agreement, the terms and provisions of which
23 speak for themselves and about which BOk is required neither to admit nor to deny further.

24 109. Answering the allegations of paragraph 109, BOk admits that plaintiffs refer to
25 the Senior Loan Agreement, the CVFS participation, the Guaranty, and the TM21 Guaranty

1 collectively in their complaint as "Plaintiffs Senior Loan Documents," the terms and provisions
2 of which speak for themselves and about which they are required neither to admit nor to deny
3 further.

4 110. Answering the allegations of paragraph 110, BOk admits the existence of the
5 Senior Loan and the Mezzanine Deeds of Trust Subordination Agreement, the terms and
6 provisions of which speak for themselves and about which BOk is required neither to admit nor
7 to deny further.

8 111. BOk alleges that the allegations of paragraph 111 do not purport to state a cause
9 of action against it and that it therefore is required neither to admit nor to deny them in response.

10 112. BOk denies the allegations of paragraph 112. To the extent the allegations of
11 paragraph 112 are asserted against defendants other than BOk, BOk lacks sufficient information
12 so as to form a belief as to the truthfulness of them and therefore denies them.

13 113. BOk denies the allegations of paragraph 113. To the extent the allegations of
14 paragraph 113 are asserted against defendants other than BOk, BOk lacks sufficient information
15 so as to form a belief as to the truthfulness of them and therefore denies them.

16 114. Answering the allegations of paragraph 114, BOk admits the existence of the
17 Fourth Amendment to Loan Agreement (Edelstein), the terms and provisions of which speak for
18 themselves and about which BOk is required neither to admit nor to deny further.

19 115. Answering the allegations of paragraph 115, BOk admits the existence of the
20 First Amendment and Assumption Agreement to Gemstone LVS DOT, the terms and provisions
21 of which speak for themselves and about which BOk is required neither to admit nor to deny
22 further.

23 116. Answering the allegations of paragraph 116, BOk admits the existence of the
24 August 18, 2008 Nonrecourse Participation Agreement and the August 18, 2008 Addendum to
25 Nonrecourse Participation Agreement, the terms and provisions of which speak for themselves

1 and about which BOk is required neither to admit nor to deny further.

2 117. BOk admits the allegations of paragraph 117.

3 118. BOk admits the allegations of paragraph 118

4 119. BOk admits the allegations of paragraph 119.

5 120. BOk admits the allegations of paragraph 120.

6 121. BOk denies the allegations contained in paragraph 121. To the extent the
7 allegations of paragraph 121 are asserted against defendants other than BOk, BOk lacks
8 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
9 them.

10 122. BOk denies all allegations contained in paragraph 122. To the extent the
11 allegations of paragraph 122 are asserted against defendants other than BOk, BOk lacks
12 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
13 them.

14 123. BOk denies the allegations contained in paragraph 123. To the extent the
15 allegations of paragraph 123 are asserted against defendants other than BOk, BOk lacks
16 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
17 them.

18 124. BOk denies the allegations contained in paragraph 124. To the extent the
19 allegations of paragraph 124 are asserted against defendants other than BOk, BOk lacks
20 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
21 them.

22 125. BOk denies the allegations contained in paragraph 125. To the extent the
23 allegations of paragraph 125 are asserted against defendants other than BOk, BOk lacks
24 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
25 them.

1 126. BOk denies the allegations contained in paragraph 126. To the extent the
2 allegations of paragraph 126 are asserted against defendants other than BOk, BOk lacks
3 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
4 them.

5 127. BOk denies the allegations contained in paragraph 127. To the extent the
6 allegations of paragraph 127 are asserted against defendants other than BOk, BOk lacks
7 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
8 them.

9 128. BOk denies the allegations contained in paragraph 128. To the extent the
10 allegations of paragraph 128 are asserted against defendants other than BOk, BOk lacks
11 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
12 them.

13 129. BOk denies the allegations contained in paragraph 129. To the extent the
14 allegations of paragraph 129 are asserted against defendants other than BOk, BOk lacks
15 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
16 them.

17 130. BOk denies the allegations contained in paragraph 130. To the extent the
18 allegations of paragraph 130 are asserted against defendants other than BOk, BOk lacks
19 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
20 them.

21 131. BOk denies the allegations contained in paragraph 131. To the extent the
22 allegations of paragraph 131 are asserted against defendants other than BOk, BOk lacks
23 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
24 them.

25 132. BOk denies the allegations contained in paragraph 132. To the extent the

1 allegations of paragraph 132 are asserted against defendants other than BOk, BOk lacks
2 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
3 them.

4 133. BOk denies the allegations contained in paragraph 133. To the extent the
5 allegations of paragraph 133 are asserted against defendants other than BOk, BOk lacks
6 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
7 them.

8 134. BOk denies the allegations contained in paragraph 134. To the extent the
9 allegations of paragraph 134 are asserted against defendants other than BOk, BOk lacks
10 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
11 them.

12 135. BOk alleges that the allegations of paragraph 135 call for speculation, and
13 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

14 136. BOk denies the allegations contained in paragraph 136. To the extent the
15 allegations of paragraph 136 are asserted against defendants other than BOk, BOk lacks
16 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
17 them.

18 137. BOk denies the allegations contained in paragraph 137. To the extent the
19 allegations of paragraph 137 are asserted against defendants other than BOk, BOk lacks
20 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
21 them.

22 138. BOk denies the allegations contained in paragraph 138. To the extent the
23 allegations of paragraph 138 are asserted against defendants other than BOk, BOk lacks
24 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
25 them.

1 139. Answering the allegations of paragraph 139, BOk admits the existence of the
2 Senior Loan, the terms and provisions of which speak for themselves and about which BOk is
3 required neither to admit nor to deny further.

4 140. BOk alleges that the allegations of paragraph 140 call for speculation, and
5 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

6 141. BOk denies the allegations contained in paragraph 141. To the extent the
7 allegations of paragraph 141 are asserted against defendants other than BOk, BOk lacks
8 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
9 them.

10 142. BOk denies the allegations contained in paragraph 142. To the extent the
11 allegations of paragraph 142 are asserted against defendants other than BOk, BOk lacks
12 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
13 them.

14 143. BOk denies the allegations contained in paragraph 143. To the extent the
15 allegations of paragraph 143 are asserted against defendants other than BOk, BOk lacks
16 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
17 them.

18 144. BOk denies the allegations contained in paragraph 144. To the extent the
19 allegations of paragraph 144 are asserted against defendants other than BOk, BOk lacks
20 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
21 them.

22 145. BOk denies the allegations contained in paragraph 145. To the extent the
23 allegations of paragraph 145 are asserted against defendants other than BOk, BOk lacks
24 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
25 them.

1 146. BOk denies the allegations contained in paragraph 146. To the extent the
2 allegations of paragraph 146 are asserted against defendants other than BOk, BOk lacks
3 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
4 them.

5 147. BOk denies the allegations contained in paragraph 147. To the extent the
6 allegations of paragraph 147 are asserted against defendants other than BOk, BOk lacks
7 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
8 them.

9 148. BOk admits the allegations of paragraph 148 of the Amended Complaint.

10 149. Answering the allegations of paragraph 149, BOk admits the existence of the
11 Senior Loan, the terms and provisions of which speak for themselves and about which BOk is
12 required neither to admit nor to deny further.

13 150. BOk alleges that the allegations of paragraph 150 call for speculation, and
14 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

15 151. BOk denies the allegations contained in paragraph 151. To the extent the
16 allegations of paragraph 151 are asserted against defendants other than BOk, BOk lacks
17 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
18 them.

19 152. BOk denies the allegations contained in paragraph 152. To the extent the
20 allegations of paragraph 152 are asserted against defendants other than BOk, BOk lacks
21 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
22 them.

23 153. BOk denies the allegations contained in paragraph 153. To the extent the
24 allegations of paragraph 153 are asserted against defendants other than BOk, BOk lacks
25 sufficient information so as to form a belief as to the truthfulness of them and therefore denies

1 them.

2 154. BOk denies the allegations contained in paragraph 154. To the extent the
3 allegations of paragraph 154 are asserted against defendants other than BOk, BOk lacks
4 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
5 them.

6 155. BOk denies the allegations contained in paragraph 155. To the extent the
7 allegations of paragraph 155 are asserted against defendants other than BOk, BOk lacks
8 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
9 them.

10 156. BOk denies the allegations contained in paragraph 156. To the extent the
11 allegations of paragraph 156 are asserted against defendants other than BOk, BOk lacks
12 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
13 them.

14 157. BOk denies the allegations contained in paragraph 157. To the extent the
15 allegations of paragraph 157 are asserted against defendants other than BOk, BOk lacks
16 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
17 them.

18 158. BOk admits the allegations of paragraph 158.

19 159. BOk denies the allegations contained in paragraph 159. To the extent the
20 allegations of paragraph 159 are asserted against defendants other than BOk, BOk lacks
21 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
22 them.

23 160. BOk denies the allegations contained in paragraph 160. To the extent the
24 allegations of paragraph 160 are asserted against defendants other than BOk, BOk lacks
25 sufficient information so as to form a belief as to the truthfulness of them and therefore denies

1 them.

2 161. BOk denies the allegations contained in paragraph 161. To the extent the
3 allegations of paragraph 161 are asserted against defendants other than BOk, BOk lacks
4 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
5 them.

6 162. BOk alleges that the allegations of paragraph 162 call for speculation, and
7 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

8 163. BOk alleges that the allegations of paragraph 163 do not purport to state a claim
9 for relief against BOk and therefore denies them.

10 164. BOk alleges that the allegations of paragraph 164 do not purport to state a claim
11 for relief against BOk and therefore denies them.

12 165. BOk alleges that the allegations of paragraph 165 do not purport to state a claim
13 for relief against BOk and therefore denies them.

14 166. BOk denies the allegations contained in paragraph 166. To the extent the
15 allegations of paragraph 166 are asserted against defendants other than BOk, BOk lacks
16 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
17 them.

18 167. BOk denies the allegations contained in paragraph 167. To the extent the
19 allegations of paragraph 167 are asserted against defendants other than BOk, BOk lacks
20 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
21 them.

22 168. BOk denies the allegations contained in paragraph 168. To the extent the
23 allegations of paragraph 168 are asserted against defendants other than BOk, BOk lacks
24 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
25 them.

1 169. BOk alleges that the allegations of paragraph 169 call for speculation, and
2 specifically speculation as to plaintiffs' state of mind, and therefore denies them. BOk denies
3 any assertion that it was a "Fiduciary Defendant" to the plaintiffs.

4 170. BOk denies the allegations contained in paragraph 170. To the extent the
5 allegations of paragraph 170 are asserted against defendants other than BOk, BOk lacks
6 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
7 them.

8 171. BOk denies the allegations contained in paragraph 171. To the extent the
9 allegations of paragraph 171 are asserted against defendants other than BOk, BOk lacks
10 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
11 them.

12 172. BOk denies the allegations contained in paragraph 172. To the extent the
13 allegations of paragraph 172 are asserted against defendants other than BOk, BOk lacks
14 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
15 them.

16 173. BOk denies the allegations contained in paragraph 173. To the extent the
17 allegations of paragraph 173 are asserted against defendants other than BOk, BOk lacks
18 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
19 them.

20 174. BOk denies the allegations contained in paragraph 174. To the extent the
21 allegations of paragraph 174 are asserted against defendants other than BOk, BOk lacks
22 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
23 them.

24 175. BOk denies the allegations contained in paragraph 175. To the extent the
25 allegations of paragraph 175 are asserted against defendants other than BOk, BOk lacks

1 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
2 them.

3 176. BOk denies the allegations contained in paragraph 176. Subject to this denial,
4 BOk admits that TM2I executed a guaranty that adopted North Dakota law. To the extent the
5 allegations of paragraph 176 are asserted against defendants other than BOk, BOk lacks
6 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
7 them.

8 177. BOk denies the allegations contained in paragraph 177. To the extent the
9 allegations of paragraph 177 are asserted against defendants other than BOk, BOk lacks
10 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
11 them.

12 178. BOk denies the allegations contained in paragraph 178. To the extent the
13 allegations of paragraph 178 are asserted against defendants other than BOk, BOk lacks
14 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
15 them.

16 179. BOk denies the allegations contained in paragraph 179. To the extent the
17 allegations of paragraph 179 are asserted against defendants other than BOk, BOk lacks
18 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
19 them.

20 180. BOk denies the allegations contained in paragraph 180. To the extent the
21 allegations of paragraph 180 are asserted against defendants other than BOk, BOk lacks
22 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
23 them.

24 181. BOk denies the allegations contained in paragraph 181. To the extent the
25 allegations of paragraph 181 are asserted against defendants other than BOk, BOk lacks

1 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
2 them.

3 182. BOk alleges that the allegations of paragraph 182 call for speculation, and
4 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

5 183. BOk denies the allegations contained in paragraph 183. To the extent the
6 allegations of paragraph 183 are asserted against defendants other than BOk, BOk lacks
7 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
8 them.

9 184. BOk denies the allegations contained in paragraph 184. To the extent the
10 allegations of paragraph 184 are asserted against defendants other than BOk, BOk lacks
11 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
12 them.

13 185. BOk denies the allegations contained in paragraph 185. To the extent the
14 allegations of paragraph 185 are asserted against defendants other than BOk, BOk lacks
15 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
16 them.

17 186. BOk denies the allegations contained in paragraph 186. To the extent the
18 allegations of paragraph 186 are asserted against defendants other than BOk, BOk lacks
19 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
20 them.

21 187. BOk denies the allegations contained in paragraph 187. To the extent the
22 allegations of paragraph 187 are asserted against defendants other than BOk, BOk lacks
23 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
24 them.

25 188. BOk admits the allegations of paragraph 188 of the Amended Complaint.

1 189. BOk admits the allegations of paragraph 189 of the Amended Complaint.

2 190. BOk denies the allegations contained in paragraph 190. To the extent the
3 allegations of paragraph 190 are asserted against defendants other than BOk, BOk lacks
4 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
5 them.

6 191. BOk denies the allegations contained in paragraph 191. To the extent the
7 allegations of paragraph 191 are asserted against defendants other than BOk, BOk lacks
8 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
9 them.

10 192. BOk alleges that the allegations of paragraph 192 do not purport to state a claim
11 for relief against BOk and therefore denies them.

12 193. BOk alleges that the allegations of paragraph 193 do not purport to state a claim
13 for relief against it and therefore denies them.

14 194. BOk denies the allegations contained in paragraph 194. To the extent the
15 allegations of paragraph 194 are asserted against defendants other than BOk, BOk lacks
16 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
17 them.

18 195. BOk denies the allegations contained in paragraph 195. To the extent the
19 allegations of paragraph 195 are asserted against defendants other than BOk, BOk lacks
20 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
21 them.

22 196. BOk denies the allegations contained in paragraph 196. To the extent the
23 allegations of paragraph 196 are asserted against defendants other than BOk, BOk lacks
24 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
25 them.

1 197. BOk denies the allegations contained in paragraph 197. . To the extent the
2 allegations of paragraph 197 are asserted against defendants other than BOk, BOk lacks
3 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
4 them.

5 198. BOk denies the allegations contained in paragraph 198. To the extent the
6 allegations of paragraph 198 are asserted against defendants other than BOk, BOk lacks
7 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
8 them.

9 199. BOk denies the allegations contained in paragraph 199. To the extent the
10 allegations of paragraph 199 are asserted against defendants other than BOk, BOk lacks
11 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
12 them.

13 200. Answering the allegations of paragraph 200, BOk repeats and realleges its
14 responses to paragraphs 1 through 199, inclusive, as if fully stated here.

15 201. BOk alleges that the allegations of paragraph 201 do not purport to state a claim
16 against it and that it is required neither to admit nor to deny them in response.

17 202. BOk alleges that the allegations of paragraph 202 do not purport to state a claim
18 against it and that it is required neither to admit nor to deny them in response.

19 203. BOk alleges that the allegations of paragraph 203 do not purport to state a claim
20 against it and that it is required neither to admit nor to deny them in response.

21 204. BOk alleges that the allegations of paragraph 204 do not purport to state a claim
22 against it and that it is required neither to admit nor to deny them in response.

23 205. BOk alleges that the allegations of paragraph 205 do not purport to state a claim
24 against it and that it is required neither to admit nor to deny them in response.

25 206. BOk alleges that the allegations of paragraph 206 do not purport to state a claim

1 against it and that it is required neither to admit nor to deny them in response.

2 207. BOk alleges that the allegations of paragraph 207 do not purport to state a claim
3 against it and that it is required neither to admit nor to deny them in response.

4 208. BOk alleges that the allegations of paragraph 208 do not purport to state a claim
5 against it and that it is required neither to admit nor to deny them in response.

6 209. BOk alleges that the allegations of paragraph 209 do not purport to state a claim
7 against it and that it is required neither to admit nor to deny them in response.

8 210. BOk alleges that the allegations of paragraph 210 call for speculation, and
9 specifically speculation as to plaintiffs' state of mind, and therefore denies them.

10 211. BOk denies the allegations contained in paragraph 211. To the extent the
11 allegations of paragraph 211 are asserted against defendants other than BOk, BOk lacks
12 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
13 them.

14 212. BOk denies the allegations contained in paragraph 212. To the extent the
15 allegations of paragraph 212 are asserted against defendants other than BOk, BOk lacks
16 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
17 them.

18 213. BOk denies the allegations contained in paragraph 213. To the extent the
19 allegations of paragraph 213 are asserted against defendants other than BOk, BOk lacks
20 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
21 them.

22 214. BOk denies the allegations contained in paragraph 214. To the extent the
23 allegations of paragraph 214 are asserted against defendants other than BOk, BOk lacks
24 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
25 them.

1 215. BOk denies the allegations contained in paragraph 215. To the extent the
2 allegations of paragraph 215 are asserted against defendants other than BOk, BOk lacks
3 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
4 them.

5 216. BOk denies the allegations contained in paragraph 216. To the extent the
6 allegations of paragraph 216 are asserted against defendants other than BOk, BOk lacks
7 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
8 them.

9 217. Answering the allegations of paragraph 217, BOk repeats and realleges its
10 responses to paragraphs 1 through 216, inclusive, as if fully stated here.

11 218. BOk denies the allegations contained in paragraph 218. To the extent the
12 allegations of paragraph 218 are asserted against defendants other than BOk, BOk lacks
13 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
14 them.

15 219. BOk denies the allegations contained in paragraph 219. To the extent the
16 allegations of paragraph 219 are asserted against defendants other than BOk, BOk lacks
17 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
18 them.

19 220. BOk denies the allegations contained in paragraph 220. To the extent the
20 allegations of paragraph 220 are asserted against defendants other than BOk, BOk lacks
21 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
22 them.

23 221. BOk denies the allegations contained in paragraph 221. To the extent the
24 allegations of paragraph 221 are asserted against defendants other than BOk, BOk lacks
25 sufficient information so as to form a belief as to the truthfulness of them and therefore denies

1 them.

2 222. BOk denies the allegations contained in paragraph 222. To the extent the
3 allegations of paragraph 222 are asserted against defendants other than BOk, BOk lacks
4 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
5 them.

6 223. BOk denies the allegations contained in paragraph 223. To the extent the
7 allegations of paragraph 223 are asserted against defendants other than BOk, BOk lacks
8 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
9 them.

10 224. BOk denies the allegations contained in paragraph 224. To the extent the
11 allegations of paragraph 224 are asserted against defendants other than BOk, BOk lacks
12 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
13 them.

14 225. BOk denies the allegations contained in paragraph 225. To the extent the
15 allegations of paragraph 225 are asserted against defendants other than BOk, BOk lacks
16 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
17 them.

18 226. Answering the allegations of paragraph 226, BOk repeats and realleges its
19 responses to paragraphs 1 through 225, inclusive, as if fully stated here.

20 227. BOk denies the allegations contained in paragraph 227. To the extent the
21 allegations of paragraph 227 are asserted against defendants other than BOk, BOk lacks
22 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
23 them.

24 228. BOk denies the allegations contained in paragraph 228. To the extent the
25 allegations of paragraph 228 are asserted against defendants other than BOk, BOk lacks

1 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
2 them.

3 229. BOk denies the allegations contained in paragraph 229. To the extent the
4 allegations of paragraph 229 are asserted against defendants other than BOk, BOk lacks
5 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
6 them.

7 230. BOk denies the allegations contained in paragraph 230. To the extent the
8 allegations of paragraph 230 are asserted against defendants other than BOk, BOk lacks
9 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
10 them.

11 231. BOk denies the allegations contained in paragraph 231. To the extent the
12 allegations of paragraph 231 are asserted against defendants other than BOk, BOk lacks
13 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
14 them.

15 232. BOk denies the allegations contained in paragraph 232. To the extent the
16 allegations of paragraph 232 are asserted against defendants other than BOk, BOk lacks
17 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
18 them.

19 233. BOk denies the allegations contained in paragraph 233. To the extent the
20 allegations of paragraph 233 are asserted against defendants other than BOk, BOk lacks
21 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
22 them.

23 234. BOk denies the allegations contained in paragraph 234. To the extent the
24 allegations of paragraph 234 are asserted against defendants other than BOk, BOk lacks
25 sufficient information so as to form a belief as to the truthfulness of them and therefore denies

1 them.

2 235. BOk denies the allegations contained in paragraph 235. To the extent the
3 allegations of paragraph 235 are asserted against defendants other than BOk, BOk lacks
4 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
5 them.

6 236. BOk denies the allegations contained in paragraph 236. To the extent the
7 allegations of paragraph 236 are asserted against defendants other than BOk, BOk lacks
8 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
9 them.

10 237. Answering the allegations of paragraph 237, BOk repeats and realleges its
11 responses to paragraphs 1 through 236, inclusive, as if fully stated here.

12 238. BOk denies the allegations contained in paragraph 238. To the extent the
13 allegations of paragraph 238 are asserted against defendants other than BOk, BOk lacks
14 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
15 them.

16 239. BOk denies the allegations contained in paragraph 239. To the extent the
17 allegations of paragraph 239 are asserted against defendants other than BOk, BOk lacks
18 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
19 them.

20 240. BOk denies the allegations contained in paragraph 240. To the extent the
21 allegations of paragraph 240 are asserted against defendants other than BOk, BOk lacks
22 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
23 them.

24 241. BOk denies the allegations contained in paragraph 241. To the extent the
25 allegations of paragraph 241 are asserted against defendants other than BOk, BOk lacks

1 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
2 them.

3 242. BOk denies the allegations contained in paragraph 242. To the extent the
4 allegations of paragraph 242 are asserted against defendants other than BOk, BOk lacks
5 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
6 them.

7 243. BOk denies the allegations contained in paragraph 243. To the extent the
8 allegations of paragraph 243 are asserted against defendants other than BOk, BOk lacks
9 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
10 them.

11 244. BOk denies the allegations contained in paragraph 244. To the extent the
12 allegations of paragraph 244 are asserted against defendants other than BOk, BOk lacks
13 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
14 them.

15 245. BOk denies the allegations contained in paragraph 245. To the extent the
16 allegations of paragraph 245 are asserted against defendants other than BOk, BOk lacks
17 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
18 them.

19 246. BOk denies the allegations contained in paragraph 246. To the extent the
20 allegations of paragraph 246 are asserted against defendants other than BOk, BOk lacks
21 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
22 them.

23 247. BOk denies the allegations contained in paragraph 247. To the extent the
24 allegations of paragraph 247 are asserted against defendants other than BOk, BOk lacks
25 sufficient information so as to form a belief as to the truthfulness of them and therefore denies

1 them.

2 248. BOk denies the allegations contained in paragraph 248. To the extent the
3 allegations of paragraph 248 are asserted against defendants other than BOk, BOk lacks
4 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
5 them.

6 249. BOk denies the allegations contained in paragraph 249. To the extent the
7 allegations of paragraph 249 are asserted against defendants other than BOk, BOk lacks
8 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
9 them.

10 250. Answering the allegations of paragraph 250, BOk repeats and realleges its
11 responses to paragraphs 1 through 249, inclusive, as if fully stated here.

12 251. BOk denies the allegations contained in paragraph 251. To the extent the
13 allegations of paragraph 251 are asserted against defendants other than BOk, BOk lacks
14 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
15 them.

16 252. BOk denies the allegations contained in paragraph 252. To the extent the
17 allegations of paragraph 252 are asserted against defendants other than BOk, BOk lacks
18 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
19 them.

20 253. BOk denies the allegations contained in paragraph 253. To the extent the
21 allegations of paragraph 253 are asserted against defendants other than BOk, BOk lacks
22 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
23 them.

24 254. BOk denies the allegations contained in paragraph 254. To the extent the
25 allegations of paragraph 254 are asserted against defendants other than BOk, BOk lacks

1 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
2 them.

3 255. BOk denies the allegations contained in paragraph 255. To the extent the
4 allegations of paragraph 255 are asserted against defendants other than BOk, BOk lacks
5 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
6 them.

7 256. BOk denies the allegations contained in paragraph 256. To the extent the
8 allegations of paragraph 256 are asserted against defendants other than BOk, BOk lacks
9 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
10 them.

11 257. BOk denies the allegations contained in paragraph 257. To the extent the
12 allegations of paragraph 257 are asserted against defendants other than BOk, BOk lacks
13 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
14 them.

15 258. BOk denies the allegations contained in paragraph 258. To the extent the
16 allegations of paragraph 258 are asserted against defendants other than BOk, BOk lacks
17 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
18 them.

19 259. BOk denies the allegations contained in paragraph 259. To the extent the
20 allegations of paragraph 259 are asserted against defendants other than BOk, BOk lacks
21 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
22 them.

23 260. BOk denies the allegations contained in paragraph 260. To the extent the
24 allegations of paragraph 260 are asserted against defendants other than BOk, BOk lacks
25 sufficient information so as to form a belief as to the truthfulness of them and therefore denies

1 them.

2 261. BOk denies the allegations contained in paragraph 261. To the extent the
3 allegations of paragraph 261 are asserted against defendants other than BOk, BOk lacks
4 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
5 them.

6 262. BOk denies the allegations contained in paragraph 262. To the extent the
7 allegations of paragraph 262 are asserted against defendants other than BOk, BOk lacks
8 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
9 them.

10 263. BOk denies the allegations contained in paragraph 263. To the extent the
11 allegations of paragraph 263 are asserted against defendants other than BOk, BOk lacks
12 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
13 them.

14 264. Answering the allegations of paragraph 264, BOk repeats and realleges its
15 responses to paragraphs 1 through 263, inclusive, as if fully stated here.

16 265. BOk admits the allegations of paragraph 265 on information and belief.

17 266. BOk lacks sufficient information so as to form a belief as to the truthfulness of the
18 allegations of paragraph 266 and therefore denies them.

19 267. BOk denies the allegations contained in paragraph 267. To the extent the
20 allegations of paragraph 267 are asserted against defendants other than BOk, BOk lacks
21 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
22 them.

23 268. BOk denies the allegations contained in paragraph 268. To the extent the
24 allegations of paragraph 268 are asserted against defendants other than BOk, BOk lacks
25 sufficient information so as to form a belief as to the truthfulness of them and therefore denies

1 them.

2 269. BOk denies the allegations contained in paragraph 269. To the extent the
3 allegations of paragraph 269 are asserted against defendants other than BOk, BOk lacks
4 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
5 them.

6 270. BOk denies the allegations contained in paragraph 270. To the extent the
7 allegations of paragraph 270 are asserted against defendants other than BOk, BOk lacks
8 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
9 them.

10 271. Answering the allegations of paragraph 271, BOk repeats and realleges its
11 responses to paragraphs 1 through 270, inclusive, as if fully stated here.

12 272. BOk denies the allegations contained in paragraph 272. To the extent the
13 allegations of paragraph 272 are asserted against defendants other than BOk, BOk lacks
14 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
15 them.

16 273. BOk denies the allegations contained in paragraph 273. To the extent the
17 allegations of paragraph 273 are asserted against defendants other than BOk, BOk lacks
18 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
19 them.

20 274. BOk denies the allegations contained in paragraph 274. To the extent the
21 allegations of paragraph 274 are asserted against defendants other than BOk, BOk lacks
22 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
23 them.

24 275. BOk denies the allegations contained in paragraph 275. To the extent the
25 allegations of paragraph 275 are asserted against defendants other than BOk, BOk lacks

1 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
2 them.

3 276. Answering the allegations of paragraph 276, BOk repeats and realleges its
4 responses to paragraphs 1 through 275, inclusive, as if fully stated here.

5 277. BOk denies the allegations contained in paragraph 277. To the extent the
6 allegations of paragraph 277 are asserted against defendants other than BOk, BOk lacks
7 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
8 them.

9 278. BOk denies the allegations contained in paragraph 278. To the extent the
10 allegations of paragraph 278 are asserted against defendants other than BOk, BOk lacks
11 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
12 them.

13 279. BOk denies the allegations contained in paragraph 279. To the extent the
14 allegations of paragraph 279 are asserted against defendants other than BOk, BOk lacks
15 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
16 them.

17 280. BOk denies the allegations contained in paragraph 280. To the extent the
18 allegations of paragraph 280 are asserted against defendants other than BOk, BOk lacks
19 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
20 them.

21 281. Answering the allegations of paragraph 281, BOk repeats and realleges its
22 responses to paragraphs 1 through 280, inclusive, as if fully stated here.

23 282. BOk denies the allegations contained in paragraph 282. To the extent the
24 allegations of paragraph 282 are asserted against defendants other than BOk, BOk lacks
25 sufficient information so as to form a belief as to the truthfulness of them and therefore denies

1 them.

2 283. BOk denies the allegations contained in paragraph 283. To the extent the
3 allegations of paragraph 283 are asserted against defendants other than BOk, BOk lacks
4 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
5 them.

6 284. BOk denies the allegations contained in paragraph 284. To the extent the
7 allegations of paragraph 284 are asserted against defendants other than BOk, BOk lacks
8 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
9 them.

10 285. BOk denies the allegations contained in paragraph 285. To the extent the
11 allegations of paragraph 285 are asserted against defendants other than BOk, BOk lacks
12 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
13 them.

14 286. Answering the allegations of paragraph 286, BOk repeats and realleges its
15 responses to paragraphs 1 through 285, inclusive, as if fully stated here.

16 287. BOk denies the allegations contained in paragraph 287. To the extent the
17 allegations of paragraph 287 are asserted against defendants other than BOk, BOk lacks
18 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
19 them.

20 288. BOk denies the allegations contained in paragraph 288. To the extent the
21 allegations of paragraph 288 are asserted against defendants other than BOk, BOk lacks
22 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
23 them.

24 289. BOk denies the allegations contained in paragraph 289. To the extent the
25 allegations of paragraph 289 are asserted against defendants other than BOk, BOk lacks

1 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
2 them.

3 290. Answering the allegations of paragraph 290, BOk repeats and realleges its
4 responses to paragraphs 1 through 289, inclusive, as if fully stated here.

5 291. The allegations contained in paragraph 291 call for a legal conclusion, therefore
6 BOk is required neither to admit nor to deny them in response.

7 292. BOk denies the allegations contained in paragraph 292. To the extent the
8 allegations of paragraph 292 are asserted against defendants other than BOk, BOk lacks
9 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
10 them.

11 293. BOk denies the allegations contained in paragraph 293. To the extent the
12 allegations of paragraph 293 are asserted against defendants other than BOk, BOk lacks
13 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
14 them.

15 294. BOk denies the allegations contained in paragraph 294. To the extent the
16 allegations of paragraph 294 are asserted against defendants other than BOk, BOk lacks
17 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
18 them.

19 295. Answering the allegations of paragraph 295, BOk repeats and realleges its
20 responses to paragraphs 1 through 294, inclusive, as if fully stated here.

21 296. BOk denies the allegations contained in paragraph 296. To the extent the
22 allegations of paragraph 296 are asserted against defendants other than BOk, BOk lacks
23 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
24 them.

25 297. BOk denies the allegations contained in paragraph 297. To the extent the

1 allegations of paragraph 297 are asserted against defendants other than BOk, BOk lacks
2 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
3 them.

4 298. BOk denies the allegations contained in paragraph 298. To the extent the
5 allegations of paragraph 298 are asserted against defendants other than BOk, BOk lacks
6 sufficient information so as to form a belief as to the truthfulness of them and therefore denies
7 them.

8 299. Answering the allegations of paragraph 299, BOk repeats and realleges its
9 responses to paragraphs 1 through 298, inclusive, as if fully stated here.

10 300. BOk alleges that the allegations of paragraph 300 do not purport to state a claim
11 against it and that it is required neither to admit nor to deny them in response.

12 301. BOk alleges that the allegations of paragraph 301 do not purport to state a claim
13 against it and that it is required neither to admit nor to deny them in response.

14 302. BOk alleges that the allegations of paragraph 302 do not purport to state a claim
15 against it and that it is required neither to admit nor to deny them in response.

16 303. BOk alleges that the allegations of paragraph 303 do not purport to state a claim
17 against it and that it is required neither to admit nor to deny them in response.

18 304. BOk alleges that the allegations of paragraph 304 do not purport to state a claim
19 against it and that it is required neither to admit nor to deny them in response.

20 305. BOk alleges that the allegations of paragraph 305 do not purport to state a claim
21 against it and that it is required neither to admit nor to deny them in response.

22 306. BOk alleges that the allegations of paragraph 306 do not purport to state a claim
23 against it and that it is required neither to admit nor to deny them in response.

24 307. BOk alleges that the allegations of paragraph 307 do not purport to state a claim
25 against it and that it is required neither to admit nor to deny them in response.

1 308. BOk alleges that the allegations of paragraph 308 do not purport to state a claim
2 against it and that it is required neither to admit nor to deny them in response.

3 309. BOk alleges that the allegations of paragraph 309 do not purport to state a claim
4 against it and that it is required neither to admit nor to deny them in response.

5 310. BOk alleges that the allegations of paragraph 310 do not purport to state a claim
6 against it and that it is required neither to admit nor to deny them in response.

7 311. BOk alleges that the allegations of paragraph 311 do not purport to state a claim
8 against it and that it is required neither to admit nor to deny them in response.

9
10 AFFIRMATIVE DEFENSES

11 FIRST AFFIRMATIVE DEFENSE

12 The Court lacks jurisdiction to reach a determination as to the guaranty executed by
13 Plaintiff Tharaldson Motels II, Inc. as the guaranty provides that North Dakota is the exclusive
14 jurisdiction to resolve the dispute.

15 SECOND AFFIRMATIVE DEFENSE

16 Any claim relating to the TMII Guaranty should be resolved in the United States District
17 Court for the District of North Dakota, Case No. 1:09-cv-30.

18 THIRD AFFIRMATIVE DEFENSE

19 Each cause of action fails to state a claim upon which relief can be granted.

20 FOURTH AFFIRMATIVE DEFENSE

21 Each cause of action lacks the essential element of causation and proximate causation as
22 to BOk, including but not limited to the fact that the losses to the plaintiffs were caused by the
23 actions of others and that such superseding, intervening causes break the chain of causation.

24 FIFTH AFFIRMATIVE DEFENSE

25 Any damage, injury or loss sustained by the plaintiffs was proximately and exclusively

1 caused by the acts or omissions of persons or entities other than BOk, over which persons or
2 entities BOk had no control. The plaintiffs' recovery, if any, should therefore be barred, reduced
3 or apportioned in accordance with the comparative fault of those persons or entities.

4 SIXTH AFFIRMATIVE DEFENSE

5 All actions by BOk were in good faith and do not constitute any grounds for punitive or
6 exemplary damages.

7 SEVENTH AFFIRMATIVE DEFENSE

8 Any application of punitive damages in this matter is prohibited as excessive fines,
9 deprivation of property without due process, and a denial of fair and due process.

10 EIGHTH AFFIRMATIVE DEFENSE

11 BOk's actions are fully excused under the doctrine of legal compulsion.

12 NINTH AFFIRMATIVE DEFENSE

13 The plaintiffs' claims against BOk are barred in whole or in part as BOk has strictly or
14 substantially complied with all applicable laws, statutes and regulations and has fully performed
15 any and all statutory or other duties owed plaintiffs.

16 TENTH AFFIRMATIVE DEFENSE

17 The plaintiffs' claims are barred, in whole or in part, by the contributory and/or
18 comparative negligence of plaintiffs, plaintiffs' agents, other defendants, or third parties.

19 ELEVENTH AFFIRMATIVE DEFENSE

20 BOk owed no legal duty to the plaintiffs. If BOk did owe such a legal duty, BOk did not
21 breach that duty.

22 TWELFTH AFFIRMATIVE DEFENSE

23 The plaintiffs' cause of action for mistake is insufficient pursuant to Fed. R. Civ. P. 9(b).

24 THIRTEENTH AFFIRMATIVE DEFENSE

25 The plaintiffs' claim for punitive damages is insufficient pursuant to Fed. R. Civ. P. 9(b).

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FOURTEENTH AFFIRMATIVE DEFENSE

The statements, if any, made by BOk were opinions, and not statements of fact.

FIFTEENTH AFFIRMATIVE DEFENSE

The statements, if any, made by BOk are subject to a privilege, a qualified privilege, common interest privilege and/or were made during a privileged occasion.

SIXTEENTH AFFIRMATIVE DEFENSE

The statements, if any, made by BOk were truthful.

SEVENTEENTH AFFIRMATIVE DEFENSE

The statements, if any, made by BOk were not false and Plaintiffs' negligent misrepresentation claim is barred as a matter of law.

EIGHTEENTH AFFIRMATIVE DEFENSE

The statements, if any, made by BOk were not material and Plaintiffs' negligent misrepresentation claim is barred as a matter of law.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs lack standing to bring this action.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrines of laches, waiver and estoppel.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to mitigate their damages, if any, after discovery of the alleged injury, if any.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Plaintiffs are guilty of unclean hands and therefore are not entitled to any relief from BOk.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs have failed to join indispensable parties and their complaint fails as a result.

1 TWENTY-FOURTH AFFIRMATIVE DEFENSE

2 Plaintiffs have been unjustly enriched to the injury and detriment of BOK and therefore
3 are not entitled to any relief.

4 TWENTY-FIFTH AFFIRMATIVE DEFENSE

5 Plaintiffs' claims are barred, in whole or in part, to the extent that Plaintiffs have not
6 suffered any injury in fact.

7 TWENTY-SIXTH AFFIRMATIVE DEFENSE

8 Any damages that Plaintiffs allege to have suffered are too remote or speculative as to
9 allow recovery.

10 TWENTY-SEVENTH AFFIRMATIVE DEFENSE

11 BOK adopts and incorporates by reference all other defenses asserted or to be asserted by
12 any other defendant in this proceeding to the extent that BOK may share in such defenses.

13 TWENTY-EIGHTH AFFIRMATIVE DEFENSE

14 BOK reserves the right to supplement its affirmative defenses in accordance with the
15 Rules of Civil Procedure and the governing procedural orders of this case.

16 TWENTY-NINTH AFFIRMATIVE DEFENSE

17 Venue is not proper with this Court.

18 THIRTIETH AFFIRMATIVE DEFENSE

19 Proper venue for these claims lies in the federal court located in Burleigh County, North
20 Dakota in Case No. 1:09-CV-30.

21 THIRTY-FIRST AFFIRMATIVE DEFENSE

22 Venue is improper in this Court because the parties agreed in writing that TM2I
23 "consents to the exclusive personal and venue jurisdiction of the state and federal courts located
24 in Burleigh County, North Dakota in connection with any controversy related in any way to this
25 Guaranty, and waives any argument that venue in such forums is not convenient."

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THIRTY-SECOND AFFIRMATIVE DEFENSE

Plaintiffs have waived their claims in this litigation by virtue of the terms and conditions of the guaranties executed in the loan transaction.

DATED this 21st day of July, 2009.

LEWIS AND ROCA LLP

By /s/ Von S. Heinz

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing
DEFENDANT BANK OF OKLAHOMA, N.A.'S ANSWER TO PLAINTIFFS' FIRST
AMENDED COMPLAINT was made this date by electronic notification, addressed to each of
the following:

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DATED this 21st day of July, 2009.

/s/ Judith A. Vienneau
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