

1 MR. JONES: Object to the form.

2 THE WITNESS: No. He's a very sophisticated
3 borrower. He can make that determination himself.

4 BY MR. ARONSON:

5 Q. Did you ever give him advice to do so?

6 A. I said no.

7 Q. Okay. Did Bank of Oklahoma, to your knowledge,
8 ever give Mr. Tharaldson any such advice?

9 MR. CLAYMAN: Object to form.

10 MR. JONES: I'll join.

11 THE WITNESS: I don't think anybody felt they
12 needed to babysit Gary Tharaldson. He's probably one of the
13 most sophisticated borrowers that we have, in the sense he's
14 borrowed in excess of \$3 billion in his lifetime with
15 multiple, probably in excess of a hundred banks. He's seen
16 lots of loan documents and had attorneys at his disposal if
17 he needed them or wanted them to look at documents.

18 BY MR. ARONSON:

19 Q. Was it your view that, if Gary Tharaldson didn't,
20 specifically, ask you to send him drafts of any of the
21 ManhattanWest senior loan documents, you didn't need to send
22 them drafts?

23 MR. JONES: Object to the form of the question.
24 Calls for speculation.

25 THE WITNESS: I don't think he wanted to be in the

* CONFIDENTIAL *

1 A. Yeah. Like I said, I identified some of the
2 changes that were made in the documents previously.

3 Q. Okay.

4 (Deposition Exhibit Number 911
5 was marked for identification.)

6 BY MR. ARONSON:

7 Q. Would you confirm, Mr. Scott, that Exhibit 911 is
8 an e-mail you wrote and sent dated January 23rd of 2008 to
9 Jim Horning and Alex Edelstein? Actually, it's part of a
10 chain. There's a Penny Heaberlin e-mail before that on the
11 second page.

12 A. The question is, is it an E-mail from me to Jim
13 Horning and Alex Edelstein?

14 Q. Right. You see the second line of the e-mail
15 where you write to Mr. Edelstein: Please make sure your
16 attorney reviews them; meaning these documents, also?

17 A. Yes, I do.

18 Q. Did you feel you needed to give such advice or
19 make such a statement to Mr. Edelstein and, if so, why?

20 MR. JONES: Object to the form of the question.

21 THE WITNESS: Well, this particular document flow
22 here had to do with the passing on of ownership from one
23 entity to the next and, primarily, for tax reasons to
24 identify what was capital gains, and so on and so forth.

25 So it required the input of their attorneys to

* CONFIDENTIAL *

1 review it, so on, so forth.

2 BY MR. ARONSON:

3 Q. My question is: ~~Do you remember a specific reason~~
4 ~~why you felt you should be advising Mr. Edelstein to make~~
5 ~~sure his attorney reviews these documents that are~~
6 ~~attachments to Exhibit 911?~~

7 MR. CLAYMAN: Object to the form.

8 MR. JONES: I'll join. Asked and answered.

9 THE WITNESS: ~~Complicated transaction that was~~
10 ~~devised by his accountants and attorneys, and then their~~
11 ~~input was necessary to weigh in on it to make sure we had~~
12 ~~everything in order.~~

13 BY MR. ARONSON:

14 Q. Wouldn't that same description apply to the
15 ManhattanWest senior loan, itself, complicated transaction?

16 MR. CLAYMAN: Object to form.

17 MR. JONES: I'll join.

18 THE WITNESS: I don't think this is even remotely
19 close to the same as what the Manhattan loan closing is.
20 This is a transfer of ownership and it's got implications of
21 taxable events. It's got implications of IRS potential
22 challenges to it.

23 I mean, there's lots of reasons for their
24 attorneys and accountants to be informed of these documents
25 that they had asked Scott Financial to assist in

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1 Q. Do you recall any testimony by Ms. Heaberlin that
2 she expected you would go over the ManhattanWest draft
3 documents with Mr. Tharaldson?

4 MR. JONES: Object to the form of the question.

5 THE WITNESS: I don't recall if she commented on
6 that or if the question was asked. I don't recall.

7 MR. ARONSON: Let's mark this as 912, please.

8 (Deposition Exhibit Number 912
9 was marked for identification.)

10 BY MR. ARONSON:

11 Q. Would you confirm for the record that Exhibit 912
12 is an e-mail from you to others dated January 23rd of 2008?

13 A. Yes, it is.

14 Q. Is there any particular reason you can recall that
15 this e-mail, Exhibit 912, was not sent to Gary Tharaldson?

16 A. No.

17 Q. Let me show you what has previously been marked as
18 Exhibit 234 in this case.

19 MR. CLAYMAN: Are we leaving the same exhibit
20 number on that?

21 MR. ARONSON: Yeah, we can leave the same exhibit
22 number on it.

23 BY MR. ARONSON:

24 Q. Would you confirm that Exhibit 234 is an e-mail
25 from you to yourself -- actually, this is an e-mail that you

* CONFIDENTIAL *

1 sent out to all the other ManhattanWest loan participants;
2 is that correct?

3 A. That's correct.

4 Q. The second sentence indicates, the second
5 paragraph rather, indicates that the loan documents have
6 been reviewed by the borrower and legal counsel as well as
7 the Bank of Oklahoma; is that right?

8 A. And Bank of Oklahoma's legal counsel, that's
9 correct.

10 Q. And then the next paragraph refers to the
11 documents being delivered -- have now been executed by the
12 borrower and the guarantor; is that right?

13 A. That's correct.

14 Q. So to your knowledge, as of January 30th, no legal
15 counsel on behalf of the guarantor, meaning Gary Tharaldson
16 or TMI2, had ever reviewed any of these documents, correct?

17 A. I have no knowledge of whether or not he had his
18 internal on-staff legal counsel review the closing documents
19 or not.

20 Q. By that phrase, you're referring to Mr. Spiry?

21 A. Yeah, that was his internal counsel. I think he
22 had Tom Divine and others at his disposal to review
23 documents if he felt it was necessary.

24 Q. To your knowledge, Mr. Spiry may have been
25 involved in some aspect of the Manhattan Serene transaction

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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.)

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 D/B/A APCO CONSTRUCTION, a Nevada)
corporation; DOES INDIVIDUALS 1-100; and)
ROE BUSINESS ENTITIES 1-100,)

Defendants.)

SCOTT FINANCIAL CORPORATION, a foreign)
corporation,)

Counterclaimant,)

v.)

GARY D. THARALDSON,)

Counterdefendant.)

CONFIDENTIAL

VIDEOTAPED DEPOSITION OF BRADLEY J. SCOTT

VOLUME V

PAGES 832-997

LAS VEGAS, NEVADA

NOVEMBER 18, 2010

REPORTED BY: HOLLY LARSEN, CCR NO. 680, RPR, CSR
LST JOB NO. 130596

1 execution, do you know, do you recall one way or the other,
2 whether the club visit participation document had ever been
3 provided to Gary Tharaldson, or anyone working for him,
4 before that January 30th FedEx delivery?

5 A. I don't recall.

6 Q. Do you recall if the Gary Tharaldson personal
7 guaranty, or the TMT2 guaranty, had been provided to Gary
8 Tharaldson or anyone working directly for him before the
9 January 30th FedEx delivery?

10 A. Again, I don't recall. I've sent stuff out earlier
11 for not.

12 Q. Do you recall if the final version of the senior
13 loan agreement, or any draft of the senior loan agreement
14 had been provided to Gary Tharaldson, or anyone working
15 directly for him, before the FedEx delivery to Gary
16 Tharaldson on January 30th?

17 A. I don't recall off the top of my head.

18 Q. If those were delivered, there would be some
19 e-mail record or FedEx record of some type; is that correct?

20 MR. JONES: Object to the form of the question.

21 THE WITNESS: I don't know. There may or may not
22 be. I don't know. I don't remember if we delivered them in
23 person or if we went over them on the phone and walked
24 through the terms of the agreement and covered it that way,
25 or if we sent them an e-mail, or we just knew everybody was

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EXHIBIT 3
FILED UNDER SEAL
EXCERPTS
DEPONENT TIM JAMES

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,
Plaintiff,

vs.

Case No. A579963
Department No. 13
Consolidated With
Case No. A-10-609288C

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 D/B/A APCO
CONSTRUCTION; a Nevada
corporation; DOE INDIVIDUALS
1-100; and ROE BUSINESS
ENTITIES 1-100,
Defendants.

AND RELATED COUNTERCLAIMS

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.

ALEXANDER EDELSTEIN, an
individual,
Defendant.

~~VIDEOTAPED DEPOSITION OF TIM JAMES, VOLUME 2~~

TAKEN ON BEHALF OF THE PLAINTIFFS
ON JULY 22, 2010, BEGINNING AT 9:02 A.M.
IN TULSA, OKLAHOMA
REPORTED BY: Lacy Antle, CSR, RPR

1 Q Did Brad Scott ever give you specific
2 information as to when the TM-11 guaranty was
3 actually signed?

4 A My belief was it was executed at the time
5 that other documents were executed.

6 Q I understand that's your belief. My
7 question is a little bit more specific than that.
8 Did Brad Scott ever specifically tell you when the
9 TM-11 guaranty was signed?

10 A I don't recall.

11 Q And obviously you were not present when
12 the TM-11 guaranty was signed in the original;
13 correct?

14 A Unfortunately, correct.

15 Q Did you review the final version of the TM-
16 11 guaranty before it was signed?

17 A I believe I did along with an outside
18 counsel.

19 Q Okay. So you approved the form of the TM-
20 11 guaranty?

21 A Basically, yes.

22 Q Did you ever send a copy of the Bank of
23 Oklahoma December 20th commitment letter to Gary
24 Tharaldson?

25 A I did not.

1 Q Did you -- and when I say "Gary"
2 Tharaldson, I mean Gary Tharaldson or anyone in his
3 office, you understand that?

4 A Yes.

5 Q Okay. And your answer is still you did
6 not?

7 A I did not.

8 Q My understanding is you met with Gary
9 Tharaldson and Ryan Kucker on -- at the January 11th
10 bank -- at the January 11th meeting in Las Vegas in
11 that breakout meeting that you described?

12 A Yes.

13 Q Other than that breakout meeting, have you
14 ever met Ryan Kucker?

15 A I think he may have been in the November
16 meeting as well. I failed to mention him yesterday,
17 I think he was there.

18 Q November 2007 meeting --

19 A Yes.

20 Q -- in Las Vegas?

21 A I can't say with --

22 Q You're just not sure?

23 A -- certainty, I'm not positive.

24 Q Do you --

25 A I don't recall whether that was my first

1 of videotape number two in volume two in the
2 deposition of Tim James. We're back on the record
3 at 10:15 a.m.

4 Q (BY MR. ARONSON) Mr. James, I --
5 regarding Manhattan West, I understand you attended
6 a meeting on November 27th, 2007 in Las Vegas in
7 which Gary Tharaldson was present, you've already
8 told me about that meeting, right?

9 A Correct.

10 Q And then you attended a meeting and a
11 dinner on January 11th, 2008 in which Gary
12 Tharaldson was present?

13 A Correct.

14 Q And you've told me about that already,
15 correct?

16 MR. CLAYMAN: Object to the form.

17 THE WITNESS: Well, I have told you things
18 that I have thought further about during that --
19 those meetings and that's part of my additional
20 comments.

21 Q (BY MR. ARONSON) All right.

22 A So I don't -- I don't feel like I told you
23 everything that I recollected -- everything that I
24 recollected at the time yesterday, I told you I
25 recollected further things last night that I've made

1 notes on.

2 Q Okay. We'll come back to those.

3 And I understand you had a meeting at
4 which Gary Tharaldson was present in Tulsa sometime
5 in the last quarter of 2007 dealing with the ethanol
6 plant?

7 A Approximate time -- timeline, yes.

8 Q Okay. At that ethanol plant meeting was
9 there any discussion about Manhattan West?

10 A No.

11 Q So other than the November 27th and the
12 January 11th meetings, I'm going to break this down
13 because I know you had some other meetings with
14 Mr. Tharaldson in the second half of 2008, so I want
15 you to focus on through the first half of 2008.

16 A Okay.

17 Q Understood?

18 A Understood.

19 Q Okay. Through the first half of 2008,
20 other than the November 27th and the January 11th
21 meetings, did you -- were you at any meetings with
22 Mr. Tharaldson at which Manhattan West was
23 discussed?

24 A Other than November and January, I don't
25 believe I was at any other meetings with

1 Mr. Tharaldson:

2 Q Okay. Again, up through the first half of
3 2008, do you recall having any telephone
4 conversations with Mr. Tharaldson regarding
5 Manhattan West?

6 A No.

7 Q Have you ever had a telephone conversation
8 with Gary Tharaldson?

9 A Yes.

10 Q Regarding Manhattan West?

11 A Yes.

12 Q And that would have been in the second
13 half of 2008?

14 A Correct.

15 Q Was that more than one conversation or
16 just one?

17 A More than one.

18 Q How many, approximately?

19 A Three or four.

20 Q And would those all have been in the
21 second half of 2008 or were any in 2009?

22 A All in 2008.

23 Q Okay. And all in the second half of 2008?

24 A Correct.

25 Q Did you ever have any conversations with

DISTRICT COURT
CLARK COUNTY, NEVADA

CLUB VISTA FINANCIAL SERVICES,
L.L.C., a Nevada limited
liability company; THARALDSON
MOTELS II, INC., a North
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D. THARALDSON,
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Case No. A579963
Department No. 13
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SCOTT FINANCIAL CORPORATION, a
North Dakota Corporation;
BRADLEY J. SCOTT; BANK OF
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CORPORATION D/B/A APCO
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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.

ALEXANDER EDELSTEIN, an
individual,
Defendant.

~~EXHIBIT DEPOSITED DEPOSITION OF TIM JAMES, MAY 13, 2010~~

TAKEN ON BEHALF OF THE PLAINTIFF
ON SEPTEMBER 21, 2010, BEGINNING AT 9:08 A.M.
IN TULSA, OKLAHOMA
REPORTED BY: Lacy Antle, CSR, RPR

1 MR. CLAYMAN: Object to form.

2 THE WITNESS: Ultimately, yes.

3 Q (BY MR. ARONSON) Yeah. Everything has to
4 be signed, all the documents have to be -- create
5 the binding obligations that the commitment report
6 that was approved by the senior loan committee
7 basically authorized, right?

8 A Right.

9 Q Do you recall, did you ever see any draft
10 of a corporate resolution for TMI II on the
11 guarantee regarding Manhattan West?

12 A I don't recall.

13 Q Now, your commitment letter dated
14 December 20th regarding the TMI II guarantee had
15 a provision once certain performance
16 standards were made, right?

17 A Yes.

18 Q And that provision was not in the
19 final form of the TMI II guarantee, right?

20 A Right.

21 Q Did you discuss that issue at all with
22 Brad Scott?

23 A We did, I don't recall when the
24 timeline -- when in the timeline of the transaction
25 we discussed it.

1 Q Was it before closing or after closing?

2 A I don't recall.

3 Q Okay. What was the nature of the
4 discussion that you seem to remember? What was the
5 substance of it?

6 A Very little. Very vaguely, I recall
7 asking Brad whether or not the burn-off provisions
8 had to be included in the guarantee, and his
9 indication was that they were not included in the
10 language, that's all I remember.

11 Q So having stated that, does it make sense
12 to you that you had that discussion before closing
13 on the senior loan?

14 A Likely.

15 Q So it would be fair to say that you reviewed the
16 final form of the TM-IT guarantee and then asked
17 Brad why the burn-off provision was not in there or
18 there was some discussion regarding that subject?

19 A I think so, I believe that's correct.

20 Q Anything else you recall about that
21 conversation?

22 A No.

23 Q Did you ever discuss that issue with Penny
24 Haeberlin at the Maslon law firm?

25 A No, I never discussed any documents with

1 Penny.

2 Q Who drafted the IMF, II guarantee, was it
3 Penny Haeberlin?

4 A I believe so.

5 Q Not -- not Bank of Oklahoma counsel, Penny
6 Haeberlin?

7 A Correct.

8 Q It was at least the lawyer for Scott
9 Financial and it's debated whether she was a lawyer
10 for anyone else, but she was clearly the lawyer for
11 Scott Financial, right?

12 A Correct.

13 MR. ARONSON: Let's mark this as Exhibit
14 262, please.

15 MR. CLAYMAN: You said 262?

16 MR. ARONSON: 262, yes.

17 MR. CLAYMAN: Thank you.

18 Q (BY MR. ARONSON) Just please confirm for
19 the record, Mr. Scott [sic], that Exhibit 262 is --
20 appears to consist of a couple of e-mails with the
21 bottom e-mail dated January 23rd, 2008. Do you see
22 that?

23 (Plaintiff's Exhibit 262 marked for
24 identification.)

25 A Yes.

1 **A** It does not make me recall anything else.

2 **Q** You would agree that this is the type of
3 information that you would need to fill in a
4 corporate resolution form on a corporate guarantee,
5 right?

6 **A** I suspect that's correct.

7 **Q** Okay. I've got one more exhibit to go
8 over with you quickly and then we can take our next
9 break.

10 MR. ARONSON: Let's mark this as Exhibit
11 704, please.

12 MR. CLAYMAN: I'm sorry?

13 **Q** (BY MR. ARONSON) 704. Would you verify
14 for the record that Exhibit 704 is the
15 December 20th, Bank of Oklahoma commitment letter
16 with some handwritten items on it?

17 (Plaintiff's Exhibit 704 marked for
18 identification.)

19 **A** Yes.

20 **Q** Okay. Is any of that handwriting yours?

21 **A** No.

22 **Q** Okay. There's two -- and I just want to
23 verify, there's two different forms of handwriting,
24 is either one yours?

25 **A** No.

1 Q Okay. Have you seen this document
2 previously, not the underlying commitment letter,
3 but this version of it with handwritten comments on
4 it?

5 A No.

6 Q Okay. We can take our break now. Thanks.
7 THE VIDEOGRAPHER: We're off the record.
8 11:22 a.m.

9 (Break taken from 11:22 a.m. to
10 11:33 a.m.)

11 THE VIDEOGRAPHER: We're back on the
12 record, 11:33 a.m.

13 Q (BY MR. ARONSON) Mr. James, on the TMI II
14 guarantee, you left the fact of getting the signature
15 on that guarantee to Brad Scott, right?

16 A Yes.

17 Q Yeah, he -- he was -- it was his
18 responsibility to take care of that on behalf of the
19 Bank of Oklahoma, is that right?

20 MR. CARTER: Object to the form.

21 MR. CLAYMAN: Object to the form.

22 THE WITNESS: I think that's correct.

23 Q (BY MR. ARONSON) Okay. So the Scott
24 Financial Lawyer, Penny Haeblerin at Maslon, drafted
25 the TMI II guarantee and then Brad Scott assumed the

1 responsibility of getting signature on the TMI II
2 guarantee; correct?

3 A: I believe that's correct.

4 Q: Okay. And the TMI II guarantee was not
5 for the benefit of the larger group of participants,
6 it was only for the benefit of Bank of Oklahoma,
7 right?

8 A: Correct.

9 MR. CARTER: Object to form.

10 Q: (BY MR. ARONSON) And what Brad Scott was
11 doing for Scott Financial was doing, regarding the
12 TMI II guarantee in terms of its lawyer drafting it
13 and then assuming the responsibility of getting the
14 signature, was something Bok wanted Scott Financial
15 to do, right?

16 MR. CLAYMAN: Object to form.

17 MR. CARTER: Joined.

18 THE WITNESS: I don't -- I think that just
19 occurred out of the momentum of the creation of
20 documents, the flow of work at that time, we --
21 that's what -- that's what occurred.

22 Q: (BY MR. ARONSON) Was Scott Financial
23 authorized either explicitly or implicitly by Bank
24 of Oklahoma to have the TMI II guarantee drafted and
25 then presented for signature and get it signed by

1 Gary Tharaldson?

2 MR. CLAYMAN: Object to the form.

3 MR. CARTER: Joined.

4 THE WITNESS: Not authorized. I don't --

5 Q (BY MR. ARONSON) Was it an unauthorized
6 action on his part?

7 A No.

8 MR. CLAYMAN: Object to form.

9 MR. CARTER: Joined.

10 THE WITNESS: The document was created --
11 I don't recall if -- whether we specifically
12 instructed or requested Penny to draft the document.
13 The communication occurred between myself and our
14 counsel and Brad and our counsel and -- between
15 Penny and -- and Harley Thomas, the ultimate result
16 of that was Penny's drafting the document.

17 Q (BY MR. ARONSON) Let me rephrase the
18 question then, because the lawyers are getting
19 worried about the word "authorized." You understood
20 and knew that Scott Financial's lawyer, Penny
21 Haebertin at Maston, was -- had drafted the TMI II
22 guarantee and then Brad Scott and Scott Financial
23 would assume the responsibility for getting Gary
24 Tharaldson's signature on the TMI II guarantee, is
25 that right?

1 MR. CLAYMAN: Object to form.

2 THE WITNESS: I believe that's correct.

3 Q (BY MR. ARONSON) Okay. So in your
4 business sense, was Scott Financial acting as the
5 agent of BOK regarding this TMI II guarantee?

6 MR. CLAYMAN: Object to form.

7 MR. CARTER: Object to form.

8 THE WITNESS: NO.

9 Q (BY MR. ARONSON) Turn to Exhibit 164,
10 your commitment report on the Manhattan West loan.
11 It's the thicker document right there. Turn to page
12 two of the commitment report. Under Source of
13 Repayment, do you see that the -- what you have
14 written as the primary source of repayment is,
15 "Condominium and commercial sales proceeds and
16 refinance of debt associated with the leased
17 commercial space"?

18 A Yes.

19 Q And that the secondary source of repayment
20 was the resources of the guarantor; correct?

21 A Yes.

22 Q And you believed that when you wrote this
23 commitment report in December of 2007, right?

24 A Yes.

25 Q You would agree it's very important in

1 A I just don't know when I received the --
2 CD number three.

3 Q Okay.

4 MR. ARONSON: Mark this as Exhibit 250,
5 please.

6 Q (BY MR. ARONSON) Would you identify for
7 the record that Exhibit 250 is the first amendment
8 to the senior debt loan agreement?

9 (Plaintiff's Exhibit 250 marked for
10 identification.)

11 A Yes.

12 Q And if you'll look on the fourth page, it
13 is signed by Alexander Edelstein on behalf of the
14 borrower and by Scott Financial on behalf of the
15 lender --

16 A Yes.

17 Q Correct?

18 And this was an amendment that you
19 requested of Brad Scott, is that right? In regards
20 to the prepayment issue.

21 A Yes.

22 Q Did you specifically ask Brad Scott to try
23 to get this accomplished for you in terms of this
24 internal cost of funds issue that you had at Bank of
25 Oklahoma?

1

A: Yes.

2

Q: So Brad Scott was explicitly authorized to do so by you, to get this first amendment, correct?

3

MR. CLAYMAN: Object to form.

4

MR. CARTER: Form.

5

THE WITNESS: He was -- I requested that he do that.

6

Q (BY MR. ARONSON) Right. And you specifically authorized him to get it done for Bank of Oklahoma, if he could?

7

8

MR. CLAYMAN: Object to form --

9

MR. CARTER: Form.

10

Q (BY MR. ARONSON) -- correct?

11

A: Authorized? I don't know.

12

Q: Was this an unauthorized signature by Brad Scott on this first amendment document, as far as Bank of Oklahoma was concerned?

13

MR. CLAYMAN: Object to the form.

14

MR. CARTER: Joined.

15

THE WITNESS: Not authorized or unauthorized. Authorization -- I requested that he attempt to get the prepayment prohibited during year one because of our internal pricing scenerio and he accomplished that.

16

Q (BY MR. ARONSON) Right. And you wanted

1 ~~Brad Scott to go out and do that at your request?~~

2 ~~A [REDACTED]~~

3 Q So as far as you were concerned, it was a
4 good thing that he got Exhibit 250 signed on?

5 A Correct.

6 Q Were there any other amendments to the
7 senior loan, to your knowledge?

8 A Not that I recall.

9 Q Okay. Were any others ever requested?

10 A Not by Bank of Oklahoma.

11 Q How about by any other participant, by any
12 participant bank?

13 A I don't know.

14 MR. ARONSON: Let's mark this next exhibit
15 as 231, please.

16 Q (BY MR. ARONSON) Would you confirm that
17 Exhibit 231 is an e-mail from Brad Scott to you
18 regarding the first amendment to the senior loan?

19 (Plaintiff's Exhibit 231 marked for
20 identification.)

21 A Yes.

22 Q And it's dated February 5, 2008?

23 A Yes.

24 Q Okay. So this e-mail is one day before
25 the initial draw on the senior loan; correct?

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
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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.

ALEXANDER EDELSTEIN, an
individual,
Defendant.

VERIFIED REPORT OF DEPOSITION OF JAMES, TIM, VOLUME 1

TAKEN ON BEHALF OF THE PLAINTIFFS

ON SEPTEMBER 22, 2010, BEGINNING AT 9:07 A.M.

IN TULSA, OKLAHOMA

REPORTED BY: Lacy Antle, CSR, RPR

1 Scott to you regarding Manhattan West; is that
2 correct?

3 (Plaintiff's Exhibit 229 marked for
4 identification.)

5 A It looks like it's regarding Gary
6 Tharaldson and financial matters of his.

7 Q [REDACTED] Well, why don't you turn to
8 page three, Scott 10709, on this, because that's
9 nearly what I want to ask you about. What remains
10 from Brad Scott to you dated December 14th to 5, 2007,
11 [REDACTED]

12 A Yes.

13 Q Okay. And this is a few days before
14 you're going to appear in front of your senior loan
15 committee, right?

16 A I believe that's correct.

17 Q And you -- you'll see that there are two
18 different type faces on this, and, please, note that
19 it appears that the smaller type is your question
20 and the larger type is Brad Scott's response.

21 A Yes.

22 Q Okay. Turn to the second page of that
23 e-mail, paragraph five, and apparently you had asked
24 before December 14th if TMT it would guarantee the
25 debt, even if it's a side deal for Bank of Oklahoma.

1 Do you see that?

2 A Yes.

3 Q And the response is that possibly. Now
4 did you understand that Brad Scott had spoken to
5 Gary Thanadorn about the TMR II guarantee when he
6 responded to your question in this e-mail?

7 A I don't know if I knew whether or not he
8 had spoken to Gary, because of the words, "May be
9 able to get Gary."

10 Q Right. So that would indicate he may not
11 have, but you didn't know one way or the other.

12 A Correct.

13 Q Okay. And then Brad Scott is saying, "If
14 you become the largest participant and if you become
15 the colead, it may be possible." Right?

16 A Yes.

17 Q That's that one of the reasons that -- that
18 you and Bank of Oklahoma agreed to become the colead
19 on this Manhattan West loan?

20 MR. CLAYMAN: Object to form.

21 Q (BY MR. ARONSON) -- that is in order to
22 facilitate getting the TMR II guarantee.

23 A I think we viewed it reverse, that if we
24 stepped into that large position, we wanted the TMR
25 II guarantee.

1 Q This e-mail response by Brad Scott seems
2 to be saying, "If you become colead, then you may
3 get the TMI II guarantee." Don't you read it that
4 way, or didn't you, at the time?

5 MR. CARTER: Object to form.

6 THE WITNESS: I don't know if I read it
7 that way. I think my position was that Brad and I
8 were negotiating with each other at that moment.

9 Q (BY MR. ARONSON) The language of Brad's
10 response seems to indicate that you -- that Bank of
11 Oklahoma becoming a colead would be some sort of
12 condition or qualification for -- for him getting or
13 trying to get the TMI II guarantee. Isn't that what
14 the language of this e-mail seems to indicate?

15 MR. CLAYMAN: Object to form.

16 MR. CARTER: Joined.

17 THE WITNESS: It may.

18 Q (BY MR. ARONSON) Okay. Turn to the next
19 page of this e-mail, please. And this is in
20 response to your question, oh, in the -- about a
21 third of the way down the page about, "What are the
22 approval criteria?"

23 A Yes.

24 Q And you see that one of their approval
25 criteria under Residential is that buyers get

EXHIBIT 4
FILED UNDER SEAL
EXCERPTS
DEPONENT PENNY HAEBERLIN

DISTRICT COURT OF 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,

Case No. A579963

v.

Dept. No. XIII

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 D/B/A
APCO CONSTRUCTION, a Nevada
corporation; DOE INDIVIDUALS 1-100;
and ROE BUSINESS ENTITIES 1-100,
Defendants.

VIDEOTAPED DEPOSITION OF

PENNY HEABERLIN

Taken September 29, 2010

Scheduled for 9:00 a.m.

Reported By: Lori Morrow, RPR, CRR, CLR LST JOB NO. 127445

1 A I did not draft the participation agreements as
2 we discussed earlier.

3 Q Okay. But you did draft -- you're saying you
4 drafted the senior loan agreement?

5 A Yes.

6 Q And you drafted the guarantees?

7 A Yes.

8 Q Both the TMI II guaranty and the Gary
9 Tharaldson personal guaranty?

10 A Yes.

11 Q Okay. And we'll get later into whatever
12 involvement you may have had with the participation
13 agreements. I have a few documents on that to show you.
14 Are there other documents regarding the senior loan
15 package that you recall drafting?

16 A There are quite a few, including deeds of
17 trust, resolutions. I'm not sure -- I can't recall
18 exactly, but there would be numerous documents.

19 Q So you drafted the corporate resolutions that
20 needed to be signed by Gemstone, for example?

21 A I generally do.

22 Q Okay. And you drafted the deeds of trust?

23 A Correct.

24 Q You know, in terms of what we're going to go
25 through -- and again, I have some documents to show you

1 in a moment. Other than the participation agreements,
2 are there any other typical documents included within the
3 senior loan package of documents that you were not the
4 primary draftsman on?

5 A As we discussed before, I would not have been
6 involved in drafting the voucher control agreement. Some
7 of those third-party -- there would be some third-party
8 documents that I would not have drafted.

9 Q And generally -- well, let me be specific about
10 this. You've already told me that you had some
11 negotiations or back and forth with Bank of Oklahoma's
12 attorney regarding their participation agreement,
13 correct?

14 A I don't recall specifically, but I believe I
15 did.

16 Q Okay. Is it your recollection as to whether
17 there were any other negotiations with any other parties
18 or attorneys regarding the form of the participation
19 agreements for the Manhattan senior loan?

20 A The form of the participation agreements? I
21 don't recall any other participant having any comments or
22 questions or anything.

23 Q Okay. Was there any negotiation or discussion
24 with attorneys or other parties -- and I'm excluding
25 Scott Financial from this question --

1 A Correct.

2 Q -- regarding either the -- for the Manhattan
3 senior loan regarding either the Gary Tharaldson personal
4 guaranty or the TMI II corporate guaranty?

5 A No.

6 Q Were there any negotiations or discussions with
7 any of the other parties or with any other lawyers,
8 again, excluding Scott Financial, regarding the senior
9 loan agreement that you recall on the Manhattan West
10 transaction?

11 A Yes.

12 Q Okay. And were those discussions with Gemstone
13 attorneys and Bank of Oklahoma attorneys or parties or
14 whom?

15 A There were discussions with Gemstone's internal
16 counsel.

17 Q And that was Peter Smith, if you recall?

18 A Peter Smith, and then also, I believe, Jim
19 Horning, who -- he may or may not be an attorney. He had
20 comments. He may be a financial person. Also, I believe
21 the Bank of Oklahoma provided comments to Brad that I
22 would have, you know, addressed. But I don't recall
23 whether or not I discussed the senior loan documents
24 directly with anyone from Bank of Oklahoma.

25 Q Well, and in terms of Gemstone comments, I

1 don't want to --

2 A I got those directly, I believe, from Gemstone.

3 Q And would that have been email or telephone
4 conversations, if you recall?

5 A Probably both.

6 Q Okay. And I don't want to mislead you. I
7 think Holland & Hart was representing Gemstone as well,
8 and were there some communications --

9 A Yes.

10 Q -- there as well?

11 A Yes. That was mainly in regard to a legal
12 opinion.

13 Q Okay. Were there any negotiations or
14 discussions at all that you were aware of with anyone at
15 Club Viata or on behalf of Gary Tharaldson regarding
16 the -- or any attorneys representing Gary Tharaldson for
17 the Manhattan West senior loan regarding the senior loan
18 agreement?

19 A Not that I was aware of that. I was a part of

20 Q Okay. And the same would be true again for
21 the Gary Tharaldson personal guaranty and the PMI II
22 guaranty, correct?

23 A Correct.

24 Q And would the same be true in terms of no
25 discussions, negotiations, lawyer representative, that

1 ~~you're aware of for Club Vista or Gary Tharaldson~~
2 ~~regarding any of the other senior loan documents such as~~
3 ~~the deeds of trust or any of the other documents?~~

4 ~~A Right. I was not involved in any discussions~~
5 ~~with anybody.~~

6 Q And were there any, to your knowledge?

7 A I'm not -- I don't know of specific.

8 Q Do you know of any general such discussions?

9 A I would assume that my client had discussions
10 with them.

11 Q Okay. Other than Brad Scott --

12 A Other than my client, no.

13 Q -- or Scott Financial --

14 A No.

15 Q -- are you aware of any --

16 A No.

17 Q -- such discussions?

18 A No.

19 Q Okay.

20 MR. REMELE: Penny, you have to wait until he
21 finishes his question. Otherwise, the court
22 reporter will kill us.

23 THE WITNESS: I'm sorry.

24 MR. REMELE: That's okay.

25 BY MR. ARONSON:

EXHIBIT 5

**DECLARATION OF
GARY D. THARALDSON**

I, Gary D. Tharaldson, hereby state and declare, under penalty of perjury, as follows:

1. I have personal knowledge of all matters set forth herein.
2. On or about January 30, 2008, I executed the Tharaldson Personal Guaranty relating to the ManhattanWest Senior Loan and also the TM2I Guaranty relating to the ManhattanWest Senior Loan.
3. Prior to January 30, 2008, I had not been provided for review drafts of any of the documents presented to me for signature on January 30, 2008.
4. When I signed the Tharaldson Personal Guaranty and the TM2I Guaranty on January 30, 2008, I was not aware that either document contained a waiver of jury trial. No one from Scott Financial Corporation or Bank of Oklahoma ever called my attention to the issue of waiver of jury trial on either guaranty.
5. Given my unawareness that either guaranty document contained a jury trial waiver, I did not knowingly or intentionally agree to waive jury trial with respect to either the Tharaldson Personal Guaranty or the TM2I Guaranty.


GARY D. THARALDSON

EXHIBIT 6
FILED UNDER SEAL
EXCERPTS
DEPONENT GARY THARALDSON

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,)

) Case No. A579963
) Dept. No. XIII

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 CORPORATION D/B/A)
APCO CONSTRUCTION, a)
Nevada corporation; DOES)
INDIVIDUALS 1-100; and ROE)
BUSINESS ENTITIES 1-100,)

Defendants.)

AND RELATED CROSS-CLAIMS.)

CONFIDENTIAL
VIDEOTAPED DEPOSITION OF GARY THARALDSON
VOLUME I
Pages 1 - 294
LAS VEGAS, NEVADA
MAY 11, 2010

LST JOB NO. 121867
Reported By: LISA MAKOWSKI, CCR 345, CA CSR 13400

1 A. Did I sign -- did I sign all -- go ahead. 11:05
 2 Repeat the question. 11:05
 3 Q. Yes. Did you sign the commitment letters 11:05
 4 that relate to this case, to your knowledge? 11:05
 5 A. Yes, I did. 11:05
 6 Q. Did you sign -- did you sign on behalf of 11:05
 7 Club Vista Financial Services on the senior debt, 11:05
 8 the \$400,000 of senior debt that Club Vista 11:06
 9 committed to? 11:06
 10 A. I would think -- I -- I don't know, but I 11:06
 11 would assume I signed them. 11:06
 12 Q. Did you sign the guarantee? The 11:06
 13 guarantee 11:06
 14 A. For Club Vista? 11:06
 15 Q. No. For Gary Tharaldson's guarantee for 11:06
 16 the ManhattanWest project? 11:06
 17 A. You know, what I did was I signed the 11:06
 18 signature pages that were put in front of me. I 11:06
 19 don't know if they're a guarantee or not a 11:06
 20 guarantee. 11:06
 21 Q. Now, isn't it true that Ryan Kucker put 11:06
 22 those pages in front of you to sign? 11:06
 23 A. That's correct. 11:06
 24 Q. And so Mr. Kucker had possession and 11:06
 25 control of those documents, at least at some point 11:06

* CONFIDENTIAL *

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,)

) Case No. A579963

) Dept. No. XIII

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 CORPORATION)
D/B/A APCO CONSTRUCTION, a)
Nevada corporation; DOES)
INDIVIDUALS 1-100; and ROE)
BUSINESS ENTITIES 1-100,)

Defendants.)

AND RELATED CROSS-CLAIMS.)

CONFIDENTIAL
VIDEOTAPED DEPOSITION OF GARY THARALDSON
VOLUME II
PAGES 295 - 587
LAS VEGAS, NEVADA
MAY 12, 2010

LST JOB NO. 121869

Reported By: LISA MAKOWSKI, CCR 345, CA CSR 13400

1 A. Yeah. I didn't -- I didn't negotiate it. 02:31
2 Q. All right. 02:31
3 A. I mean, I -- I negotiated part of this, 02:31
4 the 5 points and the 14 percent. I never 02:31
5 negotiated the TMI2 guarantee with Bank of 02:31
6 Oklahoma. I think Brad did that. 02:31
7 Q. Did -- did Brad have authority to commit 02:31
8 TMI2 to guaranteeing any loans? 02:31
9 A. No. He -- you -- you said negotiate. 02:31
10 Q. Okay. 02:31
11 A. Yeah. So I said he -- he negotiated 02:31
12 that. 02:31
13 Q. All right. Fair enough. All right. 02:31
14 So it's -- but did you agree to have TMI2 02:31
15 guarantee the Bank of Oklahoma portion of the 02:31
16 construction loan? 02:31
17 A. No, I did not. 02:31
18 Q. Never at any time, you never agreed to 02:31
19 that? 02:31
20 A. No. 02:31
21 Q. And did you sign a guarantee to that 02:31
22 effect? 02:32
23 A. I never seen the guarantee. I signed the 02:32
24 signature pages to the guarantee, it looks like. 02:32
25 But I never agreed -- I never seen the guarantee. 02:32

* CONFIDENTIAL *

1 ~~I didn't even know about the guarantee. Nobody~~ 02:32
2 ~~ever told me about the guarantee on Bank of~~ 02:32
3 ~~Oklahoma that -- with TMI2 because I -- I didn't~~ 02:32
4 ~~even get approval from TMI2 to do it.~~ 02:32
5 Q. So let me -- let me ask you: Do you -- 02:32
6 who do you think put that signature page in front 02:32
7 of you? 02:32
8 A. Ryan Kucker. 02:32
9 Q. And do you know if Ryan had the rest of 02:32
10 the guarantee or just the signature page? 02:32
11 A. I don't know. 02:32
12 Q. And why do you think Ryan did it as 02:32
13 opposed to -- 02:32
14 A. Well, I don't -- I don't know. That -- 02:32
15 that -- that would be the only -- maybe Brad Scott 02:32
16 did it. I'm not sure. I don't know who did it. 02:32
17 Q. So -- 02:32
18 A. We don't know -- because it wasn't in the 02:32
19 closing documents, so we know it wasn't there. So 02:32
20 I guess I made a mistake. I don't know -- I don't 02:32
21 know when it was signed or where it was signed and 02:32
22 I -- and nobody ever told me anything about it. 02:33
23 Q. And you don't know if -- if -- if you 02:33
24 ever talked to Ryan Kucker about that guarantee; is 02:33
25 that your testimony? 02:33

* CONFIDENTIAL *

1 A. He was not aware of it either. 02:33
2 Q. He told you that? 02:33
3 A. Yes. 02:33
4 Q. ~~Did you ever negotiate at any time with~~ 02:33
5 ~~Bank of Oklahoma about anything to do with the~~ 02:33
6 ~~Manhattan West loan?~~ 02:33
7 A. ~~No, I did not.~~ 02:33
8 Q. Next paragraph, 72, reads: 02:33
9 "This complex structure was highly unusua 02:33
10 for a number of reasons." 02:33
11 Now, let me -- before I get to the rest 02:33
12 of that paragraph, let me ask you first: The -- 02:33
13 the structure I assume they're referring to as 02:34
14 being referred to in the complaint is the one 02:34
15 that's in paragraph 71. 02:34
16 Is that your -- also your understanding? 02:34
17 A. It sounds logical. 02:34
18 Q. All right. Do you know whether or not 02:34
19 the loan structure referred to in paragraph 71 is 02:34
20 highly unusual, or would that be somebody else's 02:34
21 language? 02:34
22 A. That would be the attorney's language. 02:34
23 Q. All right. The -- the next part of that 02:34
24 paragraph reads: 02:34
25 "First, it is unusual for entities not 02:34

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COPY

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,

vs.

Case No.: A579963
Dept. No.: XIII

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 D/B/A APCO
CONSTRUCTION, a Nevada corporation; DOES
INDIVIDUALS 1-100; and ROE BUSINESS
ENTITIES 1-100,

Defendants.

V I D E O T A P E D
D E P O S I T I O N

of

GARY D. THARALDSON

July 8, 2010

Vol III

9:00 O'clock A.M.

Taken at: HOTEL DONALDSON
101 Broadway
Fargo, North Dakota

REPORTER: DOUGLAS T. KETCHAM

(PURSUANT TO NOTICE)

DOUG KETCHAM & ASSOCIATES

1 back to that Complaint letter and read them back
2 to you, I mean, they were all listed in the
3 Complaint letter --

4 Q. All right.

5 A. -- very clearly, I believe.

6 Q. Well, okay. I won't belabor that
7 point for either of us because I think that call
8 for a legal conclusion so there is no point in
9 talking about that.

10 On the fourth page of the personal
11 guaranty, again, is there any question in your
12 mind that that's your signature on the signature
13 line?

14 A. It looks like it.

15 Q. All right. Let me ask you about on
16 that same page, paragraph 13, would you, first of
17 all, agree with me that everything in that
18 paragraph is in bold and capitalized?

19 A. In 13?

20 Q. Yes, sir.

21 A. It's bold and capitalized.

22 Q. All right. And this is on the same
23 page as the page that you signed, correct?

24 A. Yes.

25 Q. So even if you didn't look at any

DOUG KETCHAM & ASSOCIATES

1 other pages when you signed it, you certainly
2 could have seen this language when you signed
3 your name, correct?

4 A. Correct. Yeah. I knew that my
5 attorney had looked at it, Maslon.

6 Q. All right. Well, let me just make
7 sure I'm clear. Is it, is it your contention in
8 this case that Maslon represented Club Vista
9 Financial Services?

10 A. They represented all of our entities,
11 whatever had to do with me. If it was me or my
12 entities.

13 Q. Did they, well, okay. Now Club Vista
14 Financial Services, did it pay a fee to have all
15 of the, as part of its participation in the
16 participation group with the other 28 banks,
17 whatever it was, they paid a pro rata share of
18 any costs related to the loan, is that correct?

19 A. Legal fees?

20 Q. Any kind of fees.

21 A. The participation group? I'm not
22 aware of that.

23 Q. Well, then let me put it another way.
24 Did the participation agreement require the
25 borrower to pay all fees associated with the cost

—DOUG KETCHAM & ASSOCIATES—

1 ManhattanWest case, you didn't pay the Maslon Law
2 Firm personally any fees, correct?

3 A. No.

4 Q. And Club Vista didn't pay the Maslon
5 Law Firm any fees, correct?

6 A. No, they did not.

7 ~~Q. And with respect to your position as~~
8 ~~a guarantor, the Maslon Law Firm never spoke to~~
9 ~~you about the guaranty or talk to you in any way~~
10 ~~shape or form about the guaranty, did they?~~

11 ~~A. They talked to my representative~~
12 ~~which was Brad Scott and Brad Scott sent us an~~
13 ~~e-mail saying Maslon was representing us.~~

14 Q. Maslon was representing you
15 individually or as a guarantor?

16 A. No. No. Representing us over the
17 period, course of the time that they were
18 representing us.

19 Q. Have those e-mails been produced in
20 this case?

21 A. Yeah. I believe they have, yes.

22 Q. All right. Have you ever seen an
23 e-mail related to the ManhattanWest project that
24 says from Brad Scott suggest that Maslon Law Firm
25 was representing you as a guarantor?

—DOUG KETCHAM & ASSOCIATES—

1 in bold and all capital letters that tell you,
 2 told you that as the guarantor had the right to
 3 consult with your own lawyer, lawyer of your
 4 choosing regarding the prudence, if you will, of
 5 signing this guaranty, right?

6 MR. ARONSON: Objection. Form. Go
 7 ahead.

8 A. I don't know what you said.

9 ~~Q. Well, you just said it was right there~~
 10 ~~in front of you when you signed this guaranty,~~
 11 ~~that in bold capital letters that~~

12 ~~A. Well, I don't know is that Brad, you~~
 13 ~~know she put it in the mail and to Perry and that~~
 14 ~~Marion was looking out for our best interests and~~
 15 ~~that we didn't have to go get an outside~~

16 ~~attorney.~~ In fact, I don't believe this lady, or
 17 firm ever sent it to a different lawyer than
 18 that. If they weren't going to represent us they
 19 should have sent it to another lawyer or asked if
 20 we, asked which lawyer, which lawyer we would
 21 want to sign off on it. Typically you ask for an
 22 opinion letter on it.

23 Q. Did you ever tell Brad Scott or
 24 anybody else that you wanted to have your own
 25 lawyer look at these documents?

DOUG KETCHAM & ASSOCIATES

1 A. He told us that Maslon would handle
2 it for us so. We thought she was a very good
3 attorney. So I was hoping that you know she did
4 it properly.

5 Q. ~~Well, is there anything improper~~
6 ~~about this guaranty?~~

7 MR. ARONSON: Form. Go ahead.

8 A. ~~I believe that this is the type what it~~
9 ~~would discuss with the lawyers is that, that~~
10 ~~there, and I don't know exactly what they said,~~
11 ~~but there is some problems with the guaranty.~~
12 And I don't remember what the problems are.

13 Q. Okay. Did you ever, did anybody ever
14 tell you you couldn't get your own lawyer to look
15 at any of these documents?

16 A. Well, I don't think anybody would
17 ever tell you that under any circumstances, so --

18 Q. So would you agree that you had --

19 A. Doesn't sound logical.

20 Q. ~~Did you have, if you had the opportunity,~~
21 ~~you have your own lawyers look at these documents,~~
22 ~~don't you agree with that?~~

23 MR. ARONSON: Form.

24 A. ~~I thought we had our own lawyer look~~
25 ~~at them.~~

DOUG KETCHAM & ASSOCIATES

COPY¹

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,

vs.

Case No.: A579963
Dept. No.: XIII

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 D/B/A APCO
CONSTRUCTION, a Nevada corporation; DOES
INDIVIDUALS 1-100; and ROE BUSINESS
ENTITIES 1-100,

Defendants.

V I D E O T A P E D
D E P O S I T I O N

of

GARY D. THARALDSON

July 9, 2010

9:10 O'clock A.M.

vol IV

Taken at: HOTEL DONALDSON
101 Broadway
Fargo, North Dakota

REPORTER: DOUGLAS T. KETCHAM

(PURSUANT TO NOTICE)

DOUG KETCHAM & ASSOCIATES

118 BROADWAY, SUITE 200, FARGO, ND 58102 (701) 237-0275

12019-001 00738

1 first of all, this is all just one page where
2 your signature appears on the page with all the
3 language from the addendum, correct?

4 A. Yes.

5 Q. And right before the witness line
6 there is a paragraph that's in capital letters,
7 it's in, well, all capital letters, correct?

8 A. Yes.

9 Q. Says quote, "The waiver of
10 subrogation and other rights set forth in
11 paragraph 8 of the guaranty is hereby expressly
12 made notwithstanding the provisions of N.R.S.
13 section 40.475 and 40.485 or any other statutory
14 or common law or procedural rule to the
15 contrary," end quote. And then there are other
16 references to N.R.S. 40.430 in the document,
17 correct?

18 A. Yes.

19 Q. All right. Now in this case are you
20 complaining the, that to your knowledge are you
21 complaining that the one action rule was waived?

22 MR. ARONSON: Form.

23 Q. To your knowledge?

24 A. My complaint I guess is that the,
25 Brad Scott and Scott Financial and Maslon when

DOUG KETCHAM & ASSOCIATES

1 they reviewed this for me they didn't, didn't
 2 point it out and not only that I didn't have a
 3 chance to read it but because by the time we got
 4 there, we were instructed to get them over to
 5 Alex within a short time after I received them.
 6 So I signed them with knowing the fact that
 7 they'd already been review by the attorneys that
 8 Brad had returned, reviewed them for us, and so
 9 one of our issues is the one action rule. If I'd
 10 have known the One Action Rule my, Maslon's
 11 attorneys would have explained it to me they'd
 12 have never, they'd advise me not to, not to, to
 13 sign it.

14 Q. All right. So it's your belief that a
 15 lawyer looking out for your interests would have
 16 advised you not to sign a waiver of the one
 17 action rule?

18 A. That's what I have been told now. I
 19 mean, the last year or so.

20 Q. All right. So I ask you whether that
 21 the waiver of the one action rule has hurt you in
 22 your position in this case as a guarantor?

23 A. Yes.

24 Q. Do you know how it hurt you or
 25 compromised your rights?

DOUG KETCHAM & ASSOCIATES

1 since this lawsuit has been filed and maybe
2 before the lawsuit was filed and they have
3 explained to you how the one action rule affects
4 your rights, is that generally true?

5 A. Yes, they tried to, yes.

6 Q. And after that explanation you still
7 really don't understand how it affects your
8 rights, is that right?

9 A. Not exactly, no.

10 Q. All right. And so it's your testimony
11 here today, though, that if some other lawyer
12 would have explained this to you before, you
13 would have not signed the document even though
14 now you're in a lawsuit based in part on a
15 Complaint over signing this document and you
16 don't even understand what the --

17 MR. ARONSON: Form.

18 ~~A. Okay, you have to realize I signed~~
19 ~~this after my lawyers Maslon and Brad Scott told~~
20 ~~me that this was okay to sign. Okay.~~

21 ~~Q. Did the Maslon Law Firm ever talk~~
22 ~~to you about this guaranty?~~

23 ~~A. No. No.~~

24 ~~Q. So they didn't tell --~~

25 ~~A. They should have but they did not.~~

-----DOUG KETCHAM & ASSOCIATES-----

118 BROADWAY, SUITE 200. FARGO, ND 58102 (701) 237-0275

1 Q. ~~The reason I asked you that because~~
2 ~~you said the Maslon Law Firm told you about the~~
3 ~~signing?~~

4 A. ~~They should have told me. They~~
5 ~~should have advised me on this guaranty.~~

6 Q. All right. So --

7 A. I had a second opinion from another
8 lawyer and they told me that also.

9 Q. My point is is that even after a
10 lawyer has explained the one action rule to you,
11 you still have no idea how it would affect your
12 rights, correct? Exactly, other than exposure --

13 A. Not exactly. It's one action instead
14 of two actions I would imagine. Whatever that
15 means.

16 Q. And so I guess my question is to you,
17 is that your testimony is that even though you
18 don't understand why it harms you after you've
19 had a full explanation from now it sounds like
20 two different law firms, you would not sign this
21 had the Maslon Law Firm actually sat down and
22 explained it to you?

23 MR. ARONSON: Form, go ahead.

24 A. I believe the lawyers would have
25 advised me not to sign it.

 DOUG KETCHAM & ASSOCIATES

1 Q. Yes.

2 A. Yeah, I think that would be correct. Then you
3 would have about a \$25 million a year cash flow after it was
4 paid off, average.

5 Q. What's the life of an ethanol plant?

6 A. Ours is an industrial ethanol plant. It's not
7 like a typical ethanol plant. They've told me 50, 60 years.

8 Q. Mr. Tharaldson, did you have any responsibility to
9 review information involving the ManhattanWest transaction
10 before you executed your personal guaranty in the
11 ManhattanWest transaction?

12 MR. ARONSON: Objection. Form.

13 ~~THE WITNESS: You know, we got the documents about~~
14 ~~two hours before they were to be delivered to Alex~~
15 ~~Edelstein. There was no time to review the documents. The~~
16 ~~idea was that Brad Scott had fully reviewed the documents~~
17 ~~and he was sending it to me for my signatures. So, no, we~~
18 ~~did not have time to review them.~~

19 ~~He said he was going to send it out earlier and he~~
20 ~~didn't. So we relied on him based on -- in order to get~~
21 ~~them signed, in order to get his draw done or whatever.~~

22 BY MR. CLAYMAN:

23 Q. You focused on documents. There was a lot of the
24 information exchanged between Mr. Edelstein and Mr. Scott
25 and your office between February of '07 and January of '08.

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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.

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 D/B/A APCO CONSTRUCTION, a Nevada
corporation; DOES INDIVIDUALS 1-100; and
ROE BUSINESS ENTITIES 1-100,

Defendants.

SCOTT FINANCIAL CORPORATION, a foreign
corporation,

Counterclaimant,

v.

GARY D. THARALDSON,

Counterdefendant.

CONFIDENTIAL

VIDEOTAPED DEPOSITION OF GARY D. THARALDSON

VOLUME V

PAGES 1115-1315

LAS VEGAS, NEVADA

SEPTEMBER 9, 2010

REPORTED BY: HOLLY J. PIKE, CCR NO. 680, RPR, CSR
LST JOB NO.: 126488

1 it.

2 If you look at it, that's a year, almost a year
3 after the senior loan was in place before we realized we
4 didn't have -- that there was a TMI2 guaranty. Nobody in
5 our company knew.

6 Q. I'm trying to figure out what the issue is on the
7 TMI2 guaranty. First let me make clear.

8 So it's your testimony today that no one in your
9 company had knowledge of the TMI2 guaranty?

10 A. Correct.

11 Q. ~~You didn't, personally, have knowledge of the TMI2~~
12 ~~guaranty?~~

13 ~~A. Correct.~~

14 Q. When it was executed. Once this TMI2 guaranty
15 sort of came to your attention -- I take it at this point
16 you've had a chance to look at the TMI2 guaranty?

17 A. Whenever he sent it to us. I assume that he sent
18 it to me on Sunday, the next day. A couple hours later, I
19 guess, he sent it to me. Needless to say, I was very angry
20 and really felt cheated to have something like this happen.
21 The shareholders didn't even have a chance to approve it or
22 not approve it.

23 There was no need for the -- I had already
24 personally guaranteed it. He shouldn't have needed a TMI2
25 guaranty. If he needed a TMI2 guaranty, he needed to

* CONFIDENTIAL *

1 discuss it and work it out. I would have never gave the
2 thing.

3 Q. Fair enough.

4 A. Because there was no need to give it.

5 Q. That kind of gets to my next question. What is
6 your contention about the TMI2 guaranty? Is that you signed
7 it by accident or that it was forged?

8 ~~A. No, I signed it through deception. If I signed~~
9 ~~it, it was through deception. It's dishonesty, crookedness,~~
10 ~~lying, whatever. It was fraudulently gotten.~~

11 Q. What I'm trying to understand is, is it your
12 belief that you signed it through deception or that it was
13 forged?

14 A. I don't know if it's forged. We asked to see the
15 guaranty to see if it was my signature. The signature looks
16 a little bit funny. We want to make sure through an expert
17 if it is mine or not. There were some differences and I
18 want to make sure.

19 ~~If I did sign it, it was done through deception~~
20 ~~because it was never discussed, or it was not supposed to be~~
21 ~~part of the agreement.~~

22 ~~Q. All right. So you've never thought that TMI2 was~~
23 ~~one of the parties to the ManhattanWest project?~~

24 ~~A. No, it never was.~~

25 MR. SMITH: It's 11:50 My next questions are

* CONFIDENTIAL *

1 BY MR. SMITH:

2 Q. Actually, my specific question is just -- I'll
3 tell you what. Let me work through some other questions and
4 we'll get back to that. Okay? Because we don't have a ton
5 of time left. I want to make best use of it.

6 MR. ARONSON: Okay.

7 BY MR. SMITH:

8 Q. I guess a better way to say it is as a personal
9 guarantor, you individually signed off on the Senior Debt
10 Loan Agreement. Specifically what I'm referring to is, if
11 you turn to page 22 -- it's actually 23. Pardon me.
12 There's no number on it, but it's the page after 22?

13 A. What I understand I did is I acknowledged that I
14 was the personal guarantor.

15 Q. I guess that's my question. What does this
16 signature mean to you as we sit here today? You're simply
17 acknowledging that you had executed a personal guaranty, or
18 by signing this document -- did you review this document
19 before you signed it?

20 A. ~~I didn't get it -- by the time I got it, I had to~~
21 ~~move it on. No, I didn't get a chance to review it.~~

22 Q. ~~You had to move it on?~~

23 A. ~~Yeah. Well --~~

24 Q. ~~Did Brad Scott force you --~~

25 A. ~~It had already been reviewed by Scott Financial~~

* CONFIDENTIAL *

1 and the attorneys. When I got it, I was asked to sign it
2 and get it over to Alex within a short period of time. So I
3 didn't review it, no.

4 Q. Did Brad Scott, Bank of Oklahoma for that matter I
5 guess, did they prevent you from reading this document
6 before you signed it?

7 A. Well, if I was going to comply with what Brad had
8 asked, I would not have been able to read the documents.

9 Q. My question specifically is, did Brad Scott
10 prevent you from reading this document before you signed it?

11 A. Well, I don't know if he prevented. It made it
12 very difficult to try to --

13 Q. I recognize --

14 A. What do you mean by the word "prevent"?

15 Q. I'm saying did he hold --

16 A. I'm not following.

17 Q. Let's just spell it out. Did he hold you down and
18 keep you from reading this document even though you wanted
19 to?

20 A. No, he did not hold me down.

21 Q. Did he tell you not to read it?

22 A. No, he didn't tell me not to read it.

23 Q. Did you tell him that you would have liked a
24 little more time so you could read it and review it before
25 you signed it?

* CONFIDENTIAL *

EXHIBIT 7

Unknown

From: Brad Scott [brad@scottfinancialcorp.com]
Sent: Tuesday, January 29, 2008 8:15 PM
To: Ryan Kucker; 'Jim Horning'; Gary D. Tharadson; 'Alex Edelstein'
Cc: 'Penny Heaberlin'; 'Margo L. Scott'; 'Peter Smith'; 'Jason Ulmer'
Subject: Closing Documents MHW
Importance: High

UPDATE

ManhattanWest Closing:

We are finally nearly completed with the Projects closing.

SFC, ManhattanWest & Bank of Oklahoma, and all parties attorneys, have finally approved and signed off on all the MHW Closing Loan Documents.

As previously discussed with you, the documents were UPS tonight to Gary's Vegas Office for Wednesday 1/30/08 morning delivery.

The document package includes a return UPS label to SFC:

- Senior Loan Docs
- Mezzanine Loan Docs
- CVFS Participation Agreements

Ryan & Gary for your convenience we have identified and designated your required signature by the "flagged by red color post-it".

Please deliver all documents to Jim or Alex at ManhattanWest by 1 PM (or as soon as executed) on Wednesday.

MHW will execute, copy recording documents for SFC, obtain other signatures as required, and have Title (Trish Glatt) pick up all original recording documents.

Jim please re-check all documents to be sure all have been properly executed before returning.

MHW will then UPS executed original Closing Loan Documents to SFC for Thursday morning delivery.

SFC will get them assembled for the Banks and delivered Friday.

We hope to have all Participation Documents returned to SFC along with the initial Draw approval by Tuesday.

With all Conditions Precedent First Advance met by MHW.....SFC will plan to fund on Wednesday 2/6/08.

I should have Closing Statements and the Initial Draw Summary emailed to all of you by late tomorrow.

Finally, we will send all of you a Closing Documents DISC next week.

Thanks for everyone's timely cooperation.

Call me if you have any questions.

Take care.

Brad J. Scott
Scott Financial Corporation
15010 Sundown Drive
Bismarck, ND 58503

9/7/2009

CVFS-RK001994

EXHIBIT 8

From: Brad Scott
To: Brad Scott
CC: Jason Ulmer; Margo L. Scott
Sent: 1/30/2008 4:59:01 PM
Subject: ManhattanWest Closing Update
Attachments: Image002.jpg

ManhattanWest Participants:

Loan Closing Update

SFC has timely and successfully navigated our way through all the Loan Closing Documentation and loan funding requirements for ManhattanWest.

We appreciated the cooperation in the process which included the review and approval of all documents by the Borrower & Legal Counsel as well as the Bank of Oklahoma (Co-Lead) & their respective Legal Counsel.

All documents have now been executed by the Borrower and Guarantor and are respectively being delivered to Title today.

SFC will UPS for Friday morning delivery to each of you the following items to complete your Credit File:

1. Participation Documents (hard copy to be executed and returned UPS)
2. ManhattanWest Initial Draw Information (hard copy)
3. Sales Report Summary (hard copy)
4. All Loan Closing Documents (Disc)
5. Wiring Instructions & Participation Breakdown (hard copy)
6. Legal Counsel acknowledging achievement of all Conditions Precedent First Advance Letter

Please note you will receive item #2 above with each Project Draw anticipated monthly.

SFC plans to fund by 11 AM CST on Wednesday February 6, 2008.

The initial advance from the Senior Note will be for \$24,549,923.02.

Please be available to timely review and execute the information delivered Friday, returning it to SFC as requested.

Feel free to call me if you have any questions.

We look forward to working with you on this dynamic project.

Thanks.

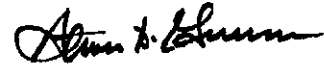
Brad J. Scott
Scott Financial Corporation
15010 Sundown Drive
Bismarck, ND 58503
W: 701.255.2215
M: 701.220.3089
F: 701.223.7299
brad@scottfinancialcorp.com

SCOTT-144839

12019-001 00753

ORIGINAL

Electronically Filed
01/10/2011 03:27:16 PM



CLERK OF THE COURT

1 J. RANDALL JONES, ESQ. (#1927)
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3 MATTHEW S. CARTER, ESQ. (#9524)
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4 KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
5 Seventeenth Floor
Las Vegas, Nevada 89169
6 Tel. (702) 385-6000
Attorneys for Scott Financial Corporation
7 and Bradley J. Scott

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

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

13 Plaintiffs,

14 v.

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

21 Defendants.

Case No.: A579963
Dept. No.: XIII

**SCOTT FINANCIAL CORPORATION,
BRADLEY J. SCOTT AND BANK OF
OKLAHOMA, N.A.'S MOTION (1) TO
BIFURCATE TRIAL, AND (2) TO
EXTEND DEADLINE FOR FILING
MOTIONS IN LIMINE; AND (3)
RENEWED MOTION TO STRIKE JURY
DEMAND ON ORDER SHORTENING
TIME**

Hearing Date:
Hearing Time:

22
23 COME NOW Defendants SCOTT FINANCIAL CORPORATION ("SFC") BRADLEY J.
24 SCOTT ("Scott"), by and through their attorneys of record, Kemp, Jones & Coulthard, LLP, and
25 Defendant Bank of Oklahoma, N.A. by and through its attorneys of record Lewis & Roca, LLP and
26 Frederic Dorwart, Lawyers, and move this Court for (1) bifurcation of the trial in this matter into two
27 parts – one for claims related to the guarantor Plaintiffs Gary Tharaldson and Tharaldson Motels II,
28 Inc. ("TM2I"), and one for claims related to Plaintiff Club Vista Financial Services ("CVFS"); and

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
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(702) 385-6000
Fax (702) 385-6001

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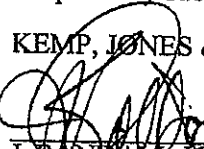
KEMP, JONES & COULTHARD, LLP
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(702) 385-6000
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1 (2) an order striking the jury demand of guarantors, which this Court previously indicated it would
2 rule on at a later stage in this case. In connection with this motion, Moving Defendants also request
3 this Court hear the non-jury portion of the trial first, and extend the deadlines for filing motions in
4 limine commensurate with the beginning of the jury portion of the trial. This motion is made and
5 based upon the attached Memorandum of Points and Authorities, any attached exhibits, all pleadings
6 and papers on file in this action, and any oral argument that this Court might entertain at the hearing
7 on this motion.

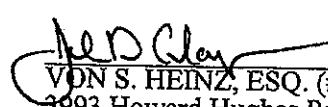
8 Dated this 10th day of January, 2011.

Respectfully submitted,

KEMP, JONES & COULTHARD


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ORDER SHORTENING TIME

Good cause appearing therefore, IT IS HEREBY ORDERED that the time for hearing of SCOTT FINANCIAL CORPORATION, BRADLEY J. SCOTT, AND BANK OF OKLAHOMA, N.A.'S MOTION (1) TO BIFURCATE TRIAL, AND (2) TO EXTEND DEADLINE FOR FILING MOTIONS IN LIMINE; AND (3) RENEWED MOTION TO STRIKE JURY DEMAND ON ORDER SHORTENING TIME will come on for hearing before the District Court Judge, Department XIII, on the 31st day of January, 2011, at the hour of 9:00 o'clock a m, or as soon thereafter as counsel may be heard.


DISTRICT COURT JUDGE

Dated: January 10, 2011

KEMP JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000
Fax (702) 385-6001

**AFFIDAVIT OF J. RANDALL JONES IN SUPPORT OF APPLICATION FOR
ORDER SHORTENING TIME**

STATE OF NEVADA }
COUNTY OF CLARK } ss.

J. Randall Jones, being first duly sworn, deposes and says:

1. I am a partner at the law firm of Kemp, Jones & Coulthard, LLP and I represent the Scott Defendants in the above-entitled action. I am an attorney admitted to practice before all courts in the State of Nevada.

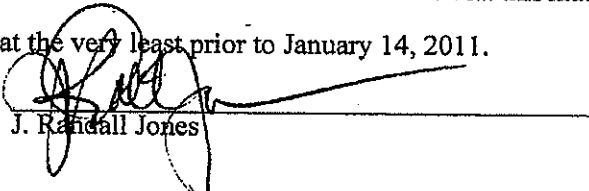
2. I make this affidavit under penalty of perjury. I have personal knowledge of the facts and circumstances set forth in this affidavit and can testify thereto in a court of law.

3. Pursuant to EDCR 2.26, SFC and Brad Scott submit that good cause exists to justify shortening time of a hearing on this motion.

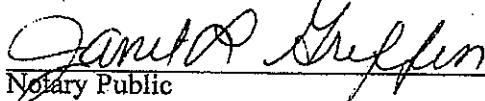
4. This motion addresses an issue that was previously set aside by the Court: whether or not to enforce the jury trial waivers contained in the guaranties of Gary D. Tharaldson and Tharaldson Motels II, Inc. ("TM2I"). Defendants SFC and Brad Scott are renewing that request and asking that, as a consequence of the jury trial waivers by Gary Tharaldson and TM2I, this Court bifurcate the trial in this matter into two parts: one regarding the claims relating to the guarantors, and one regarding claims relating to Club Vista Financial Services ("CVFS").

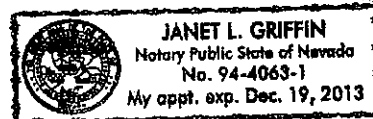
5. The Court has set a firm trial date in this matter of March 8, 2011. Motions in limine are currently due on January 14, 2011. It is therefore vital for the parties to know as soon as possible which claims, if any, will be tried in front of a jury.

6. Accordingly, good cause exists to issue the Order to Shorten Time so that this matter may be heard prior as soon as possible, and at the very least prior to January 14, 2011.


J. Randall Jones

SUBSCRIBED and SWORN to before me
this 7th day of January, 2011.


Notary Public



KEMP, JONES & ULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000
Fax (702) 385-6001

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On October 5, 2009, this Court denied Defendants' motion to strike the jury demands of Gary Tharaldson and TM2I without prejudice. See Order Denying Motion to Strike Jury Demand Without prejudice, attached hereto as Exhibit A. At the hearing, the Court stated that the issues of the jury trial waivers and whether the portions of the case subject to those jury trial waivers should be severed should be reserved for a later time in the case, presumably once more discovery had taken place. See Court Minutes dated October 5, 2009, attached hereto as Exhibit B, at 3. The time for this Court to make those determinations has now come.

As this Court will recall, Plaintiffs argued at the hearing on the original motion to strike that the jury trial waivers in the guaranties were ineffective because the guaranties were procured through fraud. Apart from the fact that any evidence Plaintiffs have of any fraud is paper-thin at best (and therefore not provable under the clear and convincing evidence standard) and non-existent at worst, this argument fails on a more basic level. Regardless of what this Court ends up ruling on any fraud allegations, there is simply no evidence that Tharaldson or TM2I were fraudulently induced into waiving their rights to a jury trial. In fact, all indications point to the fact that both Tharaldson and TM2I were fully aware of the jury trial waivers in their guaranties executed them intentionally, knowingly, and voluntarily as required by Nevada law, which means that the presumptive validity of those waivers must stand. Because neither Gary Tharaldson nor TM2I can meet their burden to show that those waivers were not knowing, voluntary, or intentional, the jury trial waivers must be enforced by this Court.

The enforcement of the jury waivers leads the Court to next question, which is how to properly bifurcate the proceedings. A firm trial date is currently set for March 8, 2011. Moving Defendants submit that the bench trial of the guarantor-related claims should happen before the jury trial of CVFS claims. There are several reasons for this: judicial economy (since the resolution of the claims related to the guarantors will resolve Club Vista's claims by compensating Club Vista for its damages), simplification of issues (as there are far less legal and factual determinations relative

1 to the guarantor claims), and less time and expense for the Defendants who are not directly involved
2 in the claims related to the guarantors.

3 In conjunction with this request, SFC and Scott also ask this Court to extend the deadline for
4 filing motions in limine (currently January 14, 2011), until the issue regarding what claims will be
5 tried, and when, is resolved. Obviously, it makes little sense to file motions in limine if a bench trial
6 is to be the first matter heard, and it would be a waste of the parties and this Court's resources to hear
7 those motions if, in fact, due to the results of the bench trial they are rendered unnecessary.

8 II.

9 ARGUMENT

10 A. **Neither Gary Tharaldson Nor TM2I Can Demonstrate That Their Respective Jury
11 Trial Waivers Were Not Agreed to Knowingly, Voluntarily, and Intentionally.**

12 As pointed out by SFC and Brad Scott in their earlier Motion to Strike Jury Demand,
13 "contractual jury trial waivers are presumptively valid unless the challenging party can demonstrate
14 that the waiver was not entered into knowingly, voluntarily or intentionally." See Lowe Enterprises
15 Residential Partners, L.P. v. Eighth Judicial District Court ex. rel. County of Clark, 118 Nev. 92,
16 100,40 P.3d 405,410 (2002) (emphasis added). Here, it is undisputed that both Gary Tharaldson and
17 Tharaldson Motels II, Inc. ("TM2I") both signed guaranties with contained, in bold and capitalized
18 letters, waivers of their respective rights to jury trial. **Under Nevada law, the burden is therefore**
19 **on Plaintiff to show that the waiver was unknowing, involuntary, or unintentional.** As of the
20 filing of this motion, with scarcely two months remaining before trial, Plaintiffs have shown no
21 evidence that the waiver was anything other than knowing, voluntary, and intentional.

22 In their opposition to the original motion to strike the jury demands, Plaintiffs argued that
23 the guaranties had been procured through fraud, and that that allegation entitled them to a jury trial
24 on all claims. The case law, however, only stood for the considerably more limited proposition that
25 the guarantor Plaintiffs may be entitled to a limited trial on the issue of **whether the waiver itself**
26 **was induced by fraud.** See, e.g., Bank of New York v. Royal Athletic Industries, Ltd., 224 A.D.2d
27 380, 380 637 N.Y.S.2d 478, 479 (N.Y.A.D. 2 Dept. 1996). Considering, though, that Plaintiffs have
28 introduced no evidence that the waiver was induced by fraud, it would be impossible for them to

1 obtain a jury trial on this point.

2 Gary Tharaldson and TM2I will doubtless argue that, because they allege that the guaranties
3 themselves were induced by fraud, then they must be entitled to a jury trial. This argument
4 improperly conflates the question posed by the Lowe and Bank of New York cases with the more
5 case-specific allegations made by Plaintiffs in their complaint. If Plaintiffs' argument were correct,
6 then all any party would ever have to do to get out of a jury trial waiver would be to simply allege
7 some kind of fraud in relation to the contract. This idea that the mere allegation of fraud can always
8 trump a knowing, voluntary, and intentional jury trial waiver is completely at odds with the Nevada
9 Supreme Court's holding in Lowe that such waivers are presumptively valid.

10 While there may be an issue of fact as to whether there is fraud surrounding the execution
11 of the Manhattan West guaranties (which Moving Defendants vigorously dispute), there is no issue
12 that Gary Tharaldson signed those guaranties, or that he agreed to the jury trial waivers knowingly,
13 voluntarily, and intentionally, as required by the Supreme Court in the Lowe decision. To put it
14 another way, **there is zero evidence that either Gary Tharaldson or TM2I were fraudulently**
15 **induced into waiving their right to trial by jury.** They therefore cannot rebut the presumption that
16 these jury trial waivers are valid under Nevada law, and are not entitled to a jury trial on that limited
17 point.

18 **B. This Court Should Bifurcate the Trial of This Matter Into Two Phases, Hearing the**
19 **Claims Relating to the Guaranties First.**

20 This Court has the discretion to bifurcate the issues before it, hold a bench trial on the
21 appropriate issues, and dispose of the remaining legal and equitable issues in the action, so long as
22 the disposal of those issues is available under Nevada law. See Awada v. Shuffle Master, Inc., 123
23 Nev. 613, 624, 173 P.3d 707, 714 (2007). The Supreme Court in Awada held that a district court
24 may properly hold a bench trial on equitable issues, while reserving the legal issues for a jury. See
25 id. If, under Nevada law, the Court's decision in the bench trial properly resolves the legal issues
26 prior to consideration by the jury, that is a valid resolution of those claims under Nevada law. See
27 id.

28 ...

1 Here, the situation is even more clear cut than the one described in Awada: the court has a
2 set of claims which the parties have agreed to try without a jury, and a set of claims that are subject
3 to the jury demand of Plaintiff CVFS. The only remaining question for this Court is the order in
4 which it should conduct the jury and non-jury trials. Under the Supreme Court's holding in Awada
5 It makes the most sense for this Court to hear the guarantor-related claims first for several reasons,
6 not the least of which is that it provides for greater judicial economy, with no prejudice to any of the
7 parties.

8 ***1. Hearing the Guarantor-Related Claims First in a Bench Trial Would Promote***
9 ***Judicial Economy, Since If SFC and Brad Scott Prevail on the Guaranty Claims,***
10 ***Club Vista Will Have No Damages.***

11 Combined with SFC and Scott's counterclaim for enforcement of Gary Tharaldson's
12 guaranty, the claims relating to the guaranties signed by Gary Tharaldson and TM2I are the largest
13 claims, financially speaking, in this litigation. The Gary Tharaldson guaranty applies to the entire
14 \$100 million Manhattan West project, and the TM2I Guaranty covers the \$24 million contribution
15 by Defendant Bank of Oklahoma. Comparatively, Plaintiff CVFS only has a claim up to the amount
16 of its participation, which is \$400,000 out of the \$100 million loan. Clearly, the more significant
17 issues lie with the claims regarding the guaranties of Gary Tharaldson and TM2I.

18 What's more, if the guarantor-related claims resolve in favor of Defendants, the claims of
19 CVFS will be moot, and trial on those issue will not be necessary. As a participant in the Manhattan
20 West Senior Loan, CVFS stands to recoup its entire \$400,000 contribution to the Senior Loan if the
21 personal guaranty of Gary Tharaldson is enforced. In that situation, CVFS would no longer have any
22 damages for its claims, and trial on the CVFS-related claims would no longer be necessary. Because
23 the CVFS trial consists of the jury claims, it would undoubtedly be more time-consuming and
24 complex, as it involves many more claims than those of the guarantors. The chance that the CVFS
25 trial could be rendered unnecessary by the result of the guarantor trial means that the guarantor trial
26 absolutely should be heard first in order to maximize judicial economy.

27 ***2. The Issues Relating to Club Vista Involve More Parties and Have More Complex***
28 ***Facts, and Therefore the Determination of Those Issues Should Be Postponed***
While The Simpler Issues (Which Are Determinative of The Complex Issues) Are
Determined.

1 The trial of the claims related to guarantors Gary D. Tharaldson and TM2I should take place
2 first because the issues contained in that trial are considerably simpler than the issues that will need
3 to be discussed in the jury trial. The jury trial will focus on Club Vista's status as a participant in
4 the Manhattan West loan, which doubles the amount of contract claims in this litigation and will also
5 involve the determination of claims arising from the lead lender-participant relationship. Those
6 claims will involve allegations of negligence, fiduciary duty, and numerous other claims arising from
7 the participations agreements that were executed by all of the Manhattan West lenders. It will also
8 involve the litigation of Bank of Oklahoma's status as the co-lead, and Club Vista's allegations as
9 to what that status ultimately means to all of the participants on the loan. All of these claims – all
10 of them – will come back to Club Vista's claim of damages for this loan, which only comes to
11 \$400,000, or 0.4% of the Manhattan West Senior Loan.

12 On the other hand, the guarantors' issues really boil down to a single question: whether the
13 unconditional guaranties (which comprise \$100,000,000) can be enforced. The guarantors' claims
14 are all essentially designed to thwart enforcement of those guaranties. As the determination of these
15 issue does not significantly involve as many Defendants as Club Vista's claims would (such as
16 APCO and Alex Edelstein), or as many legal issues, the Court and the parties would be able to focus
17 more on the critical, central issues in a more efficient and less costly forum prior to the jury trial.
18 This, in turn, would streamline the issues to be heard by the jury (or, as noted supra, possibly
19 eliminate them completely). And this Court should also note that, regardless of the results of the
20 bench trial, hearing the guarantor-related claims first will streamline the later proceedings. Even
21 assuming that the guarantors prevailed and were successful in rescinding their guaranties, that would
22 remove a significant and contentious portion of the jury trial, significantly reducing the amount of
23 time that a jury is required to sit for this case.

24 However this Court sees the other issues, there is no dispute that Gary Tharaldson and TM2I
25 knowingly, voluntarily, and intentionally agreed to waive the right to a jury trial in this case. They
26 cannot escape that legal presumption. The purpose of such a waiver is to simplify the proceedings,
27 reduce costs of the Court and parties, and allow this Court to make informed, correct rulings on
28 complex, legally significant issues in this case. All of those goals will be fulfilled by this Court

1 taking the simple step of hearing the guarantor-related issues first. If it does not, the purpose of the
2 waiver, though it will not be completely thwarted, will be significantly undercut by a lengthy, costly
3 jury trial which may not have even been necessary in the first place. Accordingly, this Court should
4 use its discretion to bifurcate the proceedings and hear the guarantor-related issues first in a bench
5 trial.

6 **C. This Court Should Also Extend the Deadline To File Motions in Limine.**

7 Finally, in view of the fact that these proceedings should be bifurcated between bench and
8 jury trials, Moving Defendants submit that it would make sense for this Court to extend the deadline
9 for the filing of the motions in limine to the time immediately before the jury trial is heard in this
10 matter. As it stands, this Court's Case Management Order, on file herein, provides that the deadline
11 for the filing of motions in limine is January 14. However, in the event that the bench trial portion
12 of this case is tried first, it makes little sense to hear motions in limine prior to that trial, when there
13 will be no jury. Additionally, since a possible result of the bench trial would be that CVFS is shown
14 to have to damages (and thus a jury trial would be unnecessary), the drafting of motions in limine
15 for the jury portion of the trial would be a waste of time and resources. Accordingly, Moving
16 Defendants also ask as part of this motion that this Court extend the deadline for filing motions in
17 limine until such time as the claims relating to Gary D. Tharaldson and TM2I have been adjudicated
18 and this Court determines that a trial on the issues relating to CVFS is necessary.

19 **III.**

20 **CONCLUSION**

21 Whatever other allegations they may come up with, there can be no dispute that Gary
22 Tharaldson and TM2I knew what they were doing when they signed the jury trial waivers in this
23 matter. They cannot be allowed to escape the consequences of that undisputed fact simply by
24 uttering the word "fraud" in their pleadings. Therefore, there is a large segment of this case (in fact,
25 the majority of it) that must be separated from the portion that will be tried in front of a jury.
26 Because the claims related to the guaranties in this case are so integral that they may even solve the
27 problems of Plaintiff CVFS's damages, the only rational result is for the bench trial to take place
28 first. Accordingly, and for all the foregoing reasons, Moving Defendants respectfully request that


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1 this Court grant the instant motion in its entirety and bifurcate the trial of this matter into two
2 separate parts: first, a bench trial of all claims related to the guarantor Plaintiffs Gary Tharaldson and
3 TM2I; and second, a jury trial of the remaining claims. Finally, Moving Defendants ask this Court
4 to extending the deadline for filing motion in limine to coincide with the beginning of the jury trial,
5 whenever this Court deems that that portion of the trial may begin.

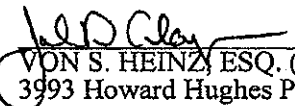
6 DATED this 10th day of January, 2011.

7 Respectfully submitted,

8 KEMP, JONES & COULTHARD

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

19 LEWIS AND ROCA, LLP

20 
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Attorneys for Bank of Oklahoma, N.A.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 2011, the foregoing **SCOTT FINANCIAL CORPORATION, BRADLEY J. SCOTT AND BANK OF OKLAHOMA, N.A.'S MOTION (1) TO BIFURCATE TRIAL, AND (2) TO EXTEND DEADLINE FOR FILING MOTIONS IN LIMINE; AND (3) RENEWED MOTION TO STRIKE JURY DEMAND ON ORDER SHORTENING TIME** was served on the following persons by e-mailing to the e-mail addresses listed as follows:

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WOOG
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Counsel for Alex Edelstein

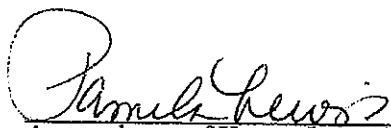

An employee of Kemp, Jones & Coulthard

EXHIBIT A

ORIGINAL

45

1 **ORDD**
2 J. RANDALL JONES, ESQ.
3 Nevada Bar No. 1927
4 MARK M. JONES, ESQ.
5 Nevada Bar No. 267
6 MATTHEW S. CARTER, ESQ.
7 Nevada Bar No. 9524
8 KEMP, JONES & COULTHARD, LLP
9 3800 Howard Hughes Parkway
10 Seventeenth Floor
11 Las Vegas, Nevada 89169
12 Tel. (702) 385-6000
13 Attorneys for Scott Financial Corporation
14 and Bradley J. Scott

FILED

NOV 06 2009

John A. Blum
CLERK OF COURT

FILED

NOV 06 2009

John A. Blum
CLERK OF COURT

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.

AND ALL RELATED MATTERS.

Case No.: A579963

Dept. No.: XIII

**ORDER DENYING MOTION TO
STRIKE JURY DEMAND WITHOUT
PREJUDICE**

09A579963
518776



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3800 Howard Hughes Parkway
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Las Vegas, Nevada 89169
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CLERK OF TRUST

NOV 06 2009

25 This matter having first come before this Court on October 5, 2009, regarding
26 Defendant/Counterclaimant Scott Financial Corporation's and Defendant Bradley J. Scott's Motion
27 to Strike Jury Demand, the Court having reviewed the pleadings and papers on file herein, and
28 having heard the arguments of counsel for Plaintiffs, Martin A. Aronson, Esq., and Mark Albright,

2

KEMP, JONES & COULTHARD, LLP
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Fax (702) 385-6001

1 Esq.; and of counsel for Defendants Scott Financial Corporation and Bradley J. Scott, J. Randall
2 Jones, Esq.; Bank of Oklahoma, N.A., Von Heinz, Esq.; and APCO Construction, Gwen Rutar
3 Mullins, Esq.; and with good cause appearing and there being no just cause for delay,

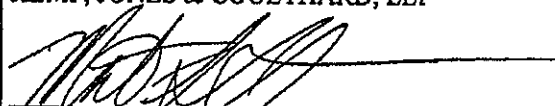
4 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial
5 Corporation's and Bradley J. Scott's Motion to Strike Jury Demand is DENIED WITHOUT
6 PREJUDICE.

7 DATED this 4th day of November, 2009.


DISTRICT COURT JUDGE 76

10 Submitted by:

11 KEMP, JONES & COULTHARD, LLP

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

18 Approved as to form and content:

19 MORRILL & ARONSON

20
21 MARTIN A. ARONSON, ESQ.
22 (admitted *pro hac vice*)
23 One E. Camelback Road, Suite 340
24 Phoenix, AZ 85012

25 and

26
27 COOKSEY, TOOLEN, GAGE, DUFFY
28 & WOOG, APC


27 MARTIN MUCKELROY, ESQ. (#9637)
28 3930 Howard Hughes Parkway, Suite 200
Las Vegas, NV 89169
Attorneys for Plaintiffs

EXHIBIT B

Logout My Account Search Menu New District Civil/Criminal Search Refine Search Back

Location : District Court Civil/Criminal Help

REGISTER OF ACTIONS**CASE NO. 09A579963****Club Vista Financial Services LLC, Tharaldson Motels II Inc, et al**
vs Scott Financial Corp, Bradley Scott, et alCase Type: **Business Court**
Subtype: **Other Business Court**
Date Filed: **01/13/2009**
Location: **Department 13**
Conversion Case Number: **A579963****RELATED CASE INFORMATION****Related Cases**

A-10-608563-C (Consolidated)

A-10-609288-C (Consolidated)

PARTY INFORMATION

		Lead Attorneys
Cross Claimant	APCO Construction	Gwen Rutar Mullins <i>Retained</i> 7024747557(W)
Cross Claimant	Asphalt Products Corporation	Gwen Rutar Mullins <i>Retained</i> 7024747557(W)
Cross Defendant	Gemstone Development West Inc	
Cross Defendant	Scott Financial Corporation	Jon Randall Jones <i>Retained</i> 7023856000(W)
Defendant	Asphalt Products Corporation	Gwen Rutar Mullins <i>Retained</i> 7024747557(W)
Defendant	Bank Of Oklahoma NA	Abran E. Vigil <i>Retained</i> 702-471-7000(W)
Defendant	Gemstone Development West Inc	
Defendant	Scott Financial Corp	Jon Randall Jones <i>Retained</i> 7023856000(W)

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6689268&Hearing...> 1/7/2011

Defendant **Scott, Bradley J**

Jon Randall Jones

Retained

7023856000(W)

Doing **APCO**
Business As

Robert L. Rosenthal

Retained

7022571483(W)

Doing **APCO**
Business As

Gwen Rutar Mullins

Retained

7024747557(W)

Doing **APCO Construction**
Business As

Gwen Rutar Mullins

Retained

7024747557(W)

Plaintiff **Club Vista Financial Services LLC**

Griffith H. Hayes

Retained

7029493100(W)

Plaintiff **Tharaldson Motels II Inc**

John T. Moshier

Retained

602-650-4123(W)

Plaintiff **Tharaldson, Gary D**

Griffith H. Hayes

Retained

7029493100(W)

EVENTS & ORDERS OF THE COURT

10/05/2009 **Motion to Dismiss** (9:00 AM) (Judicial Officer Denton, Mark R.)
10/05/2009, 10/12/2009
Deft APCO Construction's Motion to Dismiss Pltfs' First Amended Complaint

Minutes

09/14/2009 9:00 AM

10/05/2009 9:00 AM

10/12/2009 9:00 AM

10/12/2009 10:15 AM

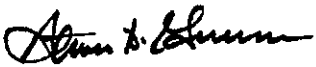
10/12/2009 10:15 AM

Mr. Gochmour referred to the First Amended Complaint, the allegations to APCO as to fraud, and the allegation of paragraph 96, which is then repeated in the fraud allegation as to APCO. Arguments by counsel as to Rule 9; that APCO was not involved in anything with Scott or Bank of Oklahoma; no allegations as to APCO being part of a conspiracy; and

no fiduciary obligations as to Club Vista and Scott. Mr. Jones stated he wants to be clear on the record that he agrees with APCO to the extent of this motion. Mr. Moshier stated Mr. Jones' client did not join in the motion and will address his comments to APCO. Further arguments as to the 13th claim for relief for declaratory relief, which would include declaration for lien priority, and another claim for civil conspiracy fraud. Mr. Moshier stated he would be willing to file a Second Amended Complaint beefing up the allegations against APCO. Further arguments. COURT ORDERED, Motion to Dismiss DENIED but will require a More Definite Statement to more specifically address the fraud, noting that if a Second Amended Complaint were filed, it would supersede this one; and the Court will leave the First Amended Complaint for the time being with the caveat as to a More Definite Statement as to Fraud; once filed, APCO can file an Answer as to same. Upon Mr. Gochmour's inquiry, COURT ORDERED, Pltff to have 15 days to File the More Definite Statement from and after Notice of Entry of the Order on the proceedings today, and then APCO may have 20 days from and after service to answer or otherwise plead to the More Definite Statement, and that is WITHOUT PREJUDICE to further motions.

Parties Present

Return to Register of Actions



CLERK OF THE COURT

1 JNDR

2 GWEN RUTAR MULLINS, ESQ.

3 Nevada Bar No. 3146

4 ROBERT L. ROSENTHAL, ESQ.

5 Nevada Bar No. 6476

6 **Howard & Howard Attorneys PLLC**

7 3800 Howard Hughes Parkway, Ste. 1400

8 Las Vegas, Nevada 89169

9 Telephone: (702) 257-1483

10 Fax: (702) 567-1568

11 Email: grm@h2law.com

12 rlr@h2law.com

13 *Attorneys for Defendant APCO CONSTRUCTION*

14 *formerly ASPHALT PRODUCTS CORPORATION*

15 *d/b/a APCO Construction*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

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

18 Plaintiffs,

19 vs.

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

Defendants.

26 AND ALL RELATED CASES AND
27 MATTERS.

CASE NO.: A579963
DEPT. NO.: XIII
Consolidated With
Case No. A-10-609288-C

**APCO CONSTRUCTION'S JOINDER
TO SCOTT FINANCIAL
CORPORATION, BRADLEY J. SCOTT,
AND BANK OF OKLAHOMA, N.A.'S
MOTION (1) TO BIFURCATE TRIAL;
AND (2) TO EXTEND DEADLINES FOR
FILING MOTIONS IN LIMINE; AND (3)
RENEWED MOTION TO STRIKE
JURY DEMAND ON ORDER
SHORTENING TIME**

**Date of Hearing: January 31, 2011
Time of Hearing: 9:00 a.m.**

HOWARD & HOWARD ATTORNEYS PLLC
3800 Howard Hughes Parkway
Wells Fargo Tower, Suite 1400
Las Vegas, Nevada 89169
(702) 257-1483

#1735885.v1

HOWARD & HOWARD ATTORNEYS PLLC
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Wells Fargo Tower, Suite 1400
Las Vegas, Nevada 89169
(702) 257-1483

1 **APCO CONSTRUCTION'S JOINDER TO SCOTT FINANCIAL CORPORATION,**
2 **BRADLEY J. SCOTT, AND BANK OF OKLAHOMA, N.A.'S MOTION (1) TO**
3 **BIFURCATE TRIAL; AND (2) TO EXTEND DEADLINES FOR FILING MOTIONS IN**
4 **LIMINE; AND (3) RENEWED MOTION TO STRIKE JURY DEMAND ON ORDER**
5 **SHORTENING TIME**

6 **Date of Hearing: January 31, 2011**

7 **Time of Hearing: 9:00 a.m.**

8 Defendant, APCO Construction ("APCO"), by and through its attorneys Howard &
9 Howard Attorneys PLLC, hereby joins in the arguments of Scott Financial Corporation ("SFC"),
10 Bradley J. Scott ("Scott") and Bank of Oklahoma, N.A. ("BOK") in their Motion (1) to
11 Bifurcate Trial; (2) to Extend Deadlines for Filing Motions in Limine; and (3) Renewed Motion
12 to Strike Jury Demand on Order Shortening Time. APCO incorporates all arguments as set forth
13 therein, and respectfully requests this Court to grant the Motion in its entirety and bifurcate the
14 trial of this matter into two separate parts, first, a bench trial of all claims related to the guarantor
15 Plaintiffs Gary Tharaldson and Tharaldson Motels II, Inc., and second, a jury trial of any claims
16 that may remain after the Court's adjudication of the pending motions for summary judgment.
17 APCO further joins in SFC, Scott, and BOK's request that this Court extend the deadline for
18 filing any motions in limine to a time which coincides with the beginning of a jury trial portion
19 of this case.

20 DATED this 17th day of January 2011.

21 /s/ Gwen Rutar Mullins

22 Gwen Rutar Mullins, Esq.

23 Nevada Bar No. 3146

24 Robert L. Rosenthal

25 Nevada Bar No. 6476

26 3800 Howard Hughes Parkway

27 Wells Fargo Tower, Ste. 1400

28 Las Vegas, NV 89169

Attorneys for Defendant APCO Construction

#1735885.v1

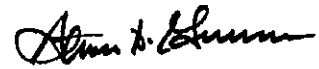
HOWARD & HOWARD ATTORNEYS PLLC
3800 Howard Hughes Parkway
Wells Fargo Tower, Suite 1400
Las Vegas, Nevada 89169
(702) 257-1483

CERTIFICATE OF SERVICE

I do hereby certify that on the 17th day of January 2011, I served a copy of the foregoing APCO CONSTRUCTION'S JOINDER TO SCOTT FINANCIAL CORPORATION, BRADLEY J. SCOTT, AND BANK OF OKLAHOMA, N.A.'S MOTION (1) TO BIFURCATE TRIAL; AND (2) TO EXTEND DEADLINES FOR FILING MOTIONS IN LIMINE; AND (3) RENEWED MOTION TO STRIKE JURY DEMAND ON ORDER SHORTENING TIME by e-serving a copy of on all counsel of record as well as e-mailing a copy as agreed among the parties and their respective counsel.

/s/ Kellie Piet
An employee of Howard & Howard Attorneys PLLC

#1735885.v1



CLERK OF THE COURT

OPPS

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Nevada Bar No. 7374

MARTIN A. MUCKLEROY, ESQ.

Nevada Bar No. 009634

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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.

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 D/B/A APCO
CONSTRUCTION, a Nevada corporation;
DOE INDIVIDUALS 1-100; and ROE
BUSINESS ENTITIES 1-100,

Defendants.

AND RELATED COUNTERCLAIMS

Case No. A579963
Department No. 13
Consolidated With
Case No. A-10-609288-C

**PLAINTIFFS' OPPOSITION TO
FIDUCIARY DEFENDANTS' MOTION
TO BIFURCATE TRIAL AND STRIKE
JURY DEMAND**

AND

**PLAINTIFFS' COUNTER-MOTION
UNDER RULE 39(c) FOR ADVISORY
JURY ON ALL CLAIMS NOT
TRIABLE OF RIGHT BY JURY**

**Date: January 31, 2011
Time: 9:00 a.m.**

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

6 Plaintiffs,

7 v.

8 ALEXANDER EDELSTEIN, an
9 individual,

10 Defendant.

11 Club Vista Financial Services, L.L.C., Tharaldson Motels II, Inc. and Gary D. Tharaldson
12 (collectively referred to herein as "Plaintiffs") hereby respectfully submit this Memorandum of
13 Points and Authorities in opposition to Defendants' Motion to Bifurcate Trial and Strike Jury
14 Demand (the "Motion"). Plaintiffs also make their Counter-Motion Under Rule 39(c) for
15 Advisory Jury on all Claims Not Triable of Right by Jury. As part of this Opposition and
16 Counter-Motion, Plaintiffs adopt and incorporate by reference the undisputed facts and legal
17 authorities Plaintiffs have submitted to this Court in their other motions and briefs. As shown
18 in this Opposition, the Motion should be denied..

19 MEMORANDUM OF POINTS AND AUTHORITIES

20 I. INTRODUCTION.

21 Fiduciary Defendants' requests to strike the jury demands of Mr. Tharaldson and TM2I
22 and to bifurcate the trial were bad ideas when this Court rejected them the first time, on October
23 5, 2009. Today, less than 60 days before trial and after fifteen months of intensive discovery,
24 depositions, and motion practice, both ideas are absurd.

25 Plaintiffs contend that the entire Senior Loan Transaction, including the Tharaldson
26 Personal Guaranty, the TM2I Guaranty, the CVFS \$46 million Subordination, and the CVFS
27 Participant Interest purchase, were all induced by fraud, constructive fraud, fiduciary abuse,
28 negligent misrepresentation, and other invalidating causes (all of which are hereinafter referred
to as the "Fraudulent Inducement Claims"). Fiduciary Defendants admit that CVFS has not
waived jury trial on the Fraudulent Inducement Claims concerning its \$46 million Subordination

1 or its Participant Interest purchase. As to the Tharaldson Guaranty and the TM2I Guaranty, even
2 if the jury trial waivers are valid (and there are genuine issues of material fact on invalidity under
3 Nevada law and legal issues under North Dakota law), such a waiver cannot eliminate a jury trial
4 on the Fraudulent Inducement Claims relating to the Tharaldson Guaranty and the TM2I
5 Guaranty. And it is beyond dispute that Mr. Tharaldson was the sole decision maker for all three
6 Plaintiffs and that he made the decision to go forward with the Senior Loan Transaction for all
7 three Plaintiffs at the same time and based upon all the same facts and circumstances, including
8 the misrepresentations and omissions of Fiduciary Defendants.

9 Fiduciary Defendants' arguments on jury trial waiver are wrong. First, even if the jury
10 trial waivers in the two guaranties are otherwise valid, Mr. Tharaldson and TM2I still have a
11 constitutional right to a jury trial on their Fraudulent Inducement Claims relating to the
12 guaranties. Second, to avoid a jury trial waiver in a document that is voidable by fraudulent
13 inducement or other cause, it is not necessary to prove that the jury waiver itself was specifically
14 induced by fraud. Third, there is a genuine issue of material fact on the validity of the jury waiver
15 in the two guaranties under Nevada law. Finally, if (as Fiduciary Defendants contend) North
16 Dakota law applies to the TM2I Guaranty, then the waiver of jury trial in that document is legally
17 invalid.

18 As to bifurcation, the Motion is a transparent attempt to achieve through procedural
19 posturing what Fiduciary Defendants have been denied on their substantive motions. It is an end
20 run around the Court's succinctly stated ruling that it will not focus on certain documents that are
21 part of the Senior Loan Transaction in isolation, but rather will look to "the entire Senior Loan
22 Transaction as a whole and the economic realities of the transaction." [11/23/10 Decision, Ex.
23 1, at 3:9-14.]

24 Fiduciary Defendants are asking this Court to separate the inseparable. The decision
25 maker for all the Plaintiffs was Gary Tharaldson. His decision on behalf of all Plaintiffs to
26 proceed with the Senior Loan Transaction was based upon all the facts and circumstances,
27 including all of Fiduciary Defendants' misrepresentations and omissions. Any trial of the
28 Fraudulent Inducement claims relative to the two guaranties will require all the same proof as will

1 trial of the Fraudulent Inducement Claims relative to CVFS's \$46 million Subordination and
2 Participant Interest purchase claims.

3 Fiduciary Defendants' arguments on bifurcation do not address the specific requirements
4 of Rule 42(b). None of those requirements is met here. No prejudice to Fiduciary Defendants
5 would be "avoided" by bifurcation; bifurcation will not further the interests of "convenience;"
6 and it runs completely counter to the interests of "expedition" and "economy." Finally, because
7 CVFS's Fraudulent Inducement Claims as to the \$46 million Subordination and its Participant
8 Interest purchase are based on the same facts as the similar claims concerning the two guaranties,
9 a first trial to the court on the "guarantor related claims" would violate Plaintiffs' (including
10 CVFS's) constitutional right to jury trial and is therefore precluded by Rule 42(b).

11 If, notwithstanding that the factors of Rule 42(b) do not support bifurcation, the Court
12 were inclined to bifurcate, then the only logical course would be to try first the Fraudulent
13 Inducement Claims, as to which a jury trial is required. If those claims are resolved in Plaintiffs'
14 favor, as a practical matter, the case may be over. If those claims are resolved against Plaintiffs,
15 it might be a relatively short trial on the breach of contract, breach of fiduciary duty, and other
16 claims. Because the facts relating to the Fraudulent Inducement Claims relative to the two
17 guaranties are inextricably intertwined with the facts relating to the Fraudulent Inducement
18 Claims with respect to the CVFS Subordination and Participant Interest purchase, those claims
19 would have to be included in the first trial also.

20 The Court should deny the Motion in its entirety as completely unjustified under Rule
21 42(b).¹

22 **II. THE COURT SHOULD DENY FIDUCIARY DEFENDANTS' MOTION TO**
23 **STRIKE THE JURY DEMANDS OF THARALDSON AND TM21.**

24 Even if the jury trial waivers in the two guaranties were otherwise valid, they do not
25 negate a jury trial on any issue other than alleged liability on the guarantee: issues of fraudulent
26

27 ¹ Even if there were a basis under Rule 42(b) for a separate trial on the Guarantor Claims, if the Court
28 did order bifurcation, it should also grant Plaintiffs Motion under Rule 39(c) for an advisory jury. See
Part V below.

1 inducement, failure of condition precedent to effectiveness, breach of fiduciary duty, are all
2 claims beyond the scope of the jury trial waivers.

3 Plaintiffs do not disagree that "generally" under Nevada law waivers of jury trial in
4 commercial guaranties are enforceable if they were entered into knowingly, intentionally, and
5 voluntarily. *Lowe Ent. Residential Partners LP v. Eighth Judicial District Court ex rel. County*
6 *of Clark*, 118 Nev. 92, 100, 40 P.3d 405, 410 (2002). Nor do Plaintiffs assert that under Nevada
7 law Fiduciary Defendants have the burden of proving that a jury trial waiver contained in a
8 guaranty was not entered into knowingly, intentionally, and voluntarily. *Id.* But Plaintiffs
9 strenuously disagree with Fiduciary Defendants' unsupported assertion that the evidence obtained
10 through discovery in this case does not create a genuine issue of material fact on whether both
11 guaranties (including their jury trial waivers) were improperly induced. Abundant evidence
12 requires a jury trial on those issues.

13 Finally, Defendants contend that North Dakota law applies to the TM2I Guaranty and the
14 North Dakota Supreme Court has not upheld contractual waivers of jury trial. In fact, relevant
15 North Dakota case law indicates the North Dakota Supreme Court would invalidate a lender's
16 attempt to secure a pre-default jury trial waiver.

17 A. *Even if Otherwise Valid, the Jury Trial Waivers do not Extend to Guarantors'*
18 *Fraudulent Inducement Claims.*

19 A waiver of jury trial contained in a guaranty does not apply to defenses to formation of
20 the guaranty, such as fraud in the inducement, fiduciary abuse, or failure of conditions precedent.
21 In *Bank of N.Y. v. Royal Athletic Ind., Ltd.*, 637 N.Y.S.2d 478, 479 (App.Div. 1996), cited by
22 Fiduciary Defendants in support of their separate trial argument, the court held that,
23 notwithstanding a jury trial waiver in a guaranty, the guarantor is "entitled to a jury trial" on a
24 defense that "challenges the validity" of the guaranty. Many other cases have reached the same
25 result. E.g., *Howard v. Bank South, N.A.*, 433 S.E.2d 625, 627-28 (Ga.App. 1993);² *Chase*

26 ² In *Lowe*, the Nevada Supreme Court declined to follow the Georgia Supreme Court's decision in *Bank*
27 *South, NA v. Howard*, 444 SE.2d 799, 800 (Ga. 1994) which affirmed the Georgia Court of Appeals in
28 *Howard* but more broadly held that pre-litigation jury trial waivers are never enforceable under Georgia
law. *Lowe* declined to follow *Bank South's* broader rule, 40 P.3d at 409-410, but *Lowe* did not reach

1 *Commercial Corp. v. Owen*, 588 N.E.2d 705, 708 (Mass.App. 1992); *C & C Wholesale, Inc. v.*
2 *Fusco Management Corp.*; 564 So.2d 1259, 1261 (Fla.App. 1990); *Bank of New York v. Cheng*
3 *Yu Corp.*, 67 A.D.2d 961, 413 N.Y.S.2d 471, 472 (App.Div. 1979).

4 Because of the importance of the constitutional right to jury trial courts apply a "rule of
5 strict construction [to] limit the scope of operation of a jury waiver agreement to those
6 controversies directly related to and arising out of the terms and conditions" of the document
7 containing the jury waiver provisions. *North Charleston Joint Venture v. Kitchens of Island*
8 *Fudge Shoppe, Inc.*, 416 S.E.2d 637, 638 (S.C. 1992); *Mall, Inc. v. Robbins*, 412 So.2d 1198,
9 1200 (Ala. 1982).

10 B. *If the Guaranties Were Fraudulently Induced, the Jury Trial Waivers Are Invalid.*

11 In Nevada, an agreement induced by fraud or misrepresentation never came into being and
12 there is no contract to enforce. *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 623, 173 P.3d 707,
13 713 (2007); *Havas v. Bernhard*, 85 Nev. 627, 631, 461 P.2d 857, 859-60 (1969). The facts that
14 vitiate the guaranty must also vitiate the waiver of jury trial term of the guaranty.

15 State courts have consistently held that a claim for fraud in the inducement of a contract
16 as a whole invalidates the jury trial waiver along with the rest of the contract. *E.g., Bank of N.Y.*
17 *v. Royal Athletic Ind. Ltd.*, 637 N.Y.S.2d 478, 479 (App.Div. 1996); *Cupps v. South Trust Bank*,
18 782 So.2d 772, 776-77 (Ala. 2000); *cf. C & C Wholesale, Inc. v. Fusco Management Corp.*, 564
19 So.2d 1259, 1261 (Fla.App. 1990) (jury trial waiver enforced because "there are no allegations
20 that the lease is not legally enforceable as a whole"). Fiduciary Defendants assert that the *Bank*
21 *of N.Y.* case requires a guarantor to show that "the waiver itself was induced by fraud." Motion
22 at 6:25-26. That assertion is clearly false. The defense asserted in *Bank of N.Y.* went to the
23 "validity of the guaranty" not to the "validity of the jury trial waiver." Only federal courts,
24 applying a different rule of federal common law, have held that a party must prove fraud specific

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26
27 the Georgia Court of Appeals' more narrow holding in *Howard* that in the presence of fraud in the
28 inducement of an agreement containing a jury trial waiver, that fraud vitiates the waiver just as it vitiates
the balance of the agreement.

1 to the jury trial waiver provision itself in order to avoid its impact.³ As a State Court not bound
2 by any federal common law of jury waiver, this Court should hold that if a guaranty as a whole
3 is induced by fraud or other invalidating cause, the jury trial waiver is also invalidated.

4 Fiduciary Defendants assert that there is “zero evidence that either Gary Tharaldson or
5 TM2I were fraudulently induced into waiving their right to trial by jury.” Motion at 7:10-17.
6 As shown above, that is not the applicable legal standard. The Guarantor is entitled to a jury trial
7 on the Fraudulent Inducement Claims relative to the two guarantees.

8 Even if specific fraud with respect to the jury waiver provision had to be proved, it has
9 been proved here. The Tharaldson Guaranty is a contract between Mr. Tharaldson and SFC; and
10 the TM2I Guaranty is a contract negotiated and prepared by SFC and provided by SFC to Mr.
11 Tharaldson for signature and sent by SFC to BOK after it was signed. [Brad Scott Depo., Ex. 2,
12 Vol. II, at 382:11 to 384:2; Vol. III, at 550:8 to 552:4; Tim James Depo, Ex. 3, Vol. II, at 44:1
13 to 45:7; Vol. III, at 80:13 to 82:12, 84:13 to 87:7, 87:20 to 88:8, 196:6 to 198:2; Vol IV, at 49:7
14 to 51:17.] The Court has ruled that if Plaintiffs prove at trial that Mr. Tharaldson (individually
15 and as a representative of TM2I) had a “right to expect trust and confidence in the integrity and
16 fidelity of [SFC],” then a fiduciary relationship exists. [11/23/10 Decision, Ex. 1, at 4:2-11.] In
17 that event, both guaranties are contracts between a fiduciary and the fiduciary’s principal.

18 Under those circumstances, SFC had a duty not to enter into either contract until it had
19 first assured itself that Mr. Tharaldson’s assent to those contracts was “with full understanding
20 of his legal rights and of all relevant facts [SFC] knows or should know.” *Restatement (Second)*
21 *Contracts* § 173. Mr. Scott has admitted that he took no steps to assure that Mr. Tharaldson’s
22 assent to these documents was with “full understanding of his legal rights” with respect to jury
23 trial waiver (or any of the other unfair provisions of the two guaranties). [Brad Scott Depo., Ex.
24 2, Vol. III, at 577:4 to 590:1.] Nor did he advise Mr. Tharaldson that he should consult with
25 independent legal counsel to review those important matters. [*Id.*, Vol. III, at 590:2 to 598:19.]

26 ³ E.g., *Allyn v. Western United Life Assur. Co.*, 347 F.Supp2d 1246, 1251, 1254-55 (M.D. Fla. 2004).

1 BOK, Co-Lead in the transaction in which it required the TM2I Guaranty, had no conversations
2 at all with Mr. Tharaldson about any aspect of the TM2I Guaranty. [Tim James Depo., Ex. 3,
3 Vol. II, at 50:4 to 52:24.]

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

6 C. *The Tharaldson Personal Guaranty Waiver of Jury Trial Was not Knowing,*
7 *Intentional, and Voluntary.*

8 For the Tharaldson Personal Guaranty jury trial waiver to be valid under Nevada Law, Mr.
9 Tharaldson needs to prove *either* that the *jury trial waiver* was not "intentional," *or* that it was
10 not "voluntary," *or* that it was not "knowing." Contrary to the assertions of Fiduciary
11 Defendants, a genuine issue of fact preclude any determination that as a matter of law Mr.
12 Tharaldson and TM2I voluntarily, knowingly and intentionally waived their rights to a jury trial.

13 It is undisputed that Mr. Tharaldson was not provided advance copies of any drafts of any
14 of the Senior Loan Documents, including any guarantees, during the two week or so drafting
15 process. [B. Scott Depo., Ex. 2, Vol. V, at 969:1-17; P. Heaberlin Depo., Ex. 4, at 61:6-10, 62:23-
16 63:5, 64:13-65:5; Gary Tharaldson Declaration, Ex. 5, ¶ 3]. It is also undisputed that Mr.
17 Tharaldson received the Senior Loan Documents on Wednesday, January 30, 2008, with each
18 signature page "flagged by rose color post it" and with instructions from SFC to deliver them to
19 Gemstone as soon as possible so they could be returned that same day. [Gary Tharaldson Depo.,
20 Ex. 6, Vol. I, 92:12-20 ("You know what I did was I signed the signature pages that were put in
21 front of me."); Vol. V (9/8/10), at 1034:13-21 ("You know we got the documents about two hours
22 before the were to be delivered to Alex Edelstein. There was no time to review the documents.
23 The idea was that Brad Scott had fully reviewed the documents and he was sending it to me for
24 my signatures."); B. Scott Email dated 1/29/08, Ex. 7, at CVFS-RK001994 and B. Scott email
25 dated 1/30/08, Ex. 8, at SCOTT-144839.] Further, by the time Mr. Tharaldson saw the
26 documents, SFC's time deadline was imminent. [G. Tharaldson Depo., Ex. 6, Vol. V, at 1290-
27 1291 ("It had already been reviewed by Scott Financial and the attorneys. When I got it, I was
28

1 asked to sign it and get it over to Alex within a short period of time. So I didn't review it, no.")]

2
3 Mr. Tharaldson also testified that he believed that Scott, Scott Financial and the Maslon
4 law firm had reviewed the documents he was asked to sign and they were protecting his interests
5 in doing so. [*Id.*, Vol. III, at 233:22-234:5, 237:7-13.] According to Mr. Tharaldson, "Brad, you
6 know, he put in emails and told Ryan that Maslon was looking out for our best interests and that
7 we didn't have to go get an outside attorney." [*Id.*, at 240:12-16; *see, also*, 241:24-25 ("I thought
8 we had our own lawyer look at them.")] Mr. Tharaldson further explained,

9
10 My complaint I guess is that Brad Scott and Scott Financial and Maslon when they
11 reviewed this for me they didn't. Didn't point it out and not only that I didn't have
12 a chance to read it, we were instructed to get them over to Alex within a short time
13 after I received them. So I signed them with knowing the fact that they's already
14 been review by the attorneys that Brad had returned, reviewed them for us, and so
15 one of our issues is the one action rule. If I'd have known the One Action Rule
16 my, Maslon's attorneys would have explained it to me they'd have never, they's
17 advise me not to, not to, to sign it.

18 [*Id.*, Vol. IV, at 19:23-20:13.] In short, they should have advised him on the guarantees, but did
19 not. [*Id.*, at 22:18-23:5.]

20 The evidence also supports TM2I's contention that TM2I did not knowingly, intentionally
21 or voluntarily waive its right to a jury trial. There is no corporate resolution establishing that
22 TM2I authorized Mr. Tharaldson to execute the TM2I Guaranty in the first place. Moreover, Mr.
23 Tharaldson testified he did not agree to have TM2I guarantee the BOK portion of the Senior
24 Loan, he does not recall signing the TM2I Guaranty, and he did not know about it until early
25 2009. [*Id.*, Vol. II, at 487:14-488:4, 489:4-7.] Mr. Tharaldson also testified he did not have
26 personal knowledge of the TM2I Guaranty, but that if he did sign it, his signature was obtained
27 "fraudulently" and "through deception" since it was never discussed and was not supposed to be
28 part of the agreement." [*Id.*, Vol. V (9/9/10), at 1203:11-1, 1204:8-10, 19-24.]

29 Mr. Scott did not communicate to Mr. Tharaldson that the two guaranties contained jury
30 trial waivers or discuss the scope of the waivers or their possible implications. [B. Scott Depo.,
31 Ex. 2, Vol. III, at 577:4 to 590:1.] As a result of these circumstances, Mr. Tharaldson did not

1 have actual knowledge that the two guaranties contained waivers of jury trial. [Gary Tharaldson
2 Declaration, Ex. 5, ¶ 4.] Although he signed the two guaranties at Mr. Scott's direction, being
3 unaware of the jury trial provision he did not knowingly and intentionally waive jury trial rights
4 or any other rights. [*Id.*, ¶ 5.]

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

9 *D. The TM2I Waiver of Jury Trial is Unenforceable Under North Dakota Law.*

10 Fiduciary Defendants contend that the TM2I Guaranty is governed by North Dakota Law.
11 Opposition by BOK, SFC, and Scott filed January 6, 2011 to Plaintiffs' Motion for Partial
12 Summary Judgment on Choice of Law, at 8-10.⁴ No North Dakota case has validated a
13 contractual waiver of jury trial in bank financing documents. Cases of the North Dakota Supreme
14 Court have, however, made clear that the right of jury trial in civil cases is a "basic and
15 fundamental part of our system of jurisprudence;" and other cases have held that important
16 statutory rights of debtors cannot be contractually waived in advance of default on a loan. Thus,
17 presented with this question, the North Dakota Supreme Court would conclude that the jury
18 waiver in the TM2I Guaranty is invalid as a matter of law.

19 The North Dakota Constitution provides that "the right of trial by jury shall be secured to
20 all, and remain inviolate. . . . All verdicts must be unanimous." N.D. Const. Art. 1 § 13. The
21 North Dakota Supreme Court has repeatedly held that "the right to trial by jury in actions at law
22 is a basic and fundamental part of our system of jurisprudence." *C.I.T. Corp. v. Hetland*, 143

23
24 ⁴ Plaintiffs have argued that, because no effective and uniform choice of law agreement was reached
25 for the overall, integrated Senior Loan Transaction, Nevada Law should apply to all contract claims,
26 including those relating to the TM2I Guaranty, as well as to all tort claims. Plaintiffs' Motion for Partial
27 Summary Judgment on Choice of Law filed December 14, 2010, at 21-26. Plaintiffs raise the invalidity
28 of the TM2I Guaranty jury trial waiver under North Dakota law, without waiving any of their arguments
in the Choice of Law Motion.

1 N.W.2d 94, 100 (N.D. 1966); *Cook v. Hansen*, 499 N.W.2d 94, 97 (1993). Further, the Court has
2 noted that "This State has been more liberal than most in construing the guarantee of jury trial,
3 indicating the high regard with which we value the right to a jury trial." *E.g., Dobervich v.*
4 *Central Cass Pub. Sch. Dist. No. 17*, 283 N.W.2d 187, 190 (N.D. 1979); *Cook v. Hansen*, 499
5 N.W.2d at 97.

6 Its "high regard [for] the right to a jury trial" led the North Dakota Supreme Court to hold
7 that, before a debtor can be deprived of a jury trial on the ground that the action is "equitable"
8 in nature, the lender must "clearly and unambiguously" show that "he is seeking an equitable
9 remedy and that he is clearly entitled to it if he proves the facts as alleged in his complaint."
10 *General Elec. Credit Corp. v. Richman*, 338 N.W.2d 814, 818 (N.D. 1983). In *Richman* the
11 Court held that the complaint sought money damages on a promissory note and recovery of
12 specific property, not foreclosure (an equitable proceeding), and therefore the defendant must be
13 accorded a jury trial.

14 The same "high regard" for a right to civil jury trial articulated by the North Dakota
15 Supreme Court has led other courts to hold that pre-litigation contractual jury trial waivers are
16 entirely unenforceable. *Grafton Partners L.P. v. Superior Court*, 116 P.3d 479, 483-84 (Cal.
17 2005) (California's "unwavering commitment" to the right to jury trial cited as a reason for
18 invalidating all pre-litigation, contractual jury trial waivers); *Bank South, NA v. Howard*, 444
19 S.E.2d 799, 800-801 (Ga. 1994).

20 When it comes to overreaching by lenders attempting to secure advance contractual
21 waivers of a debtor's rights, the North Dakota Supreme Court has resolutely invalidated pre-
22 default waivers. In *First Interstate Bank of New Rockford v. Anderson*, 452 N.W.2d 90, 92 (N.D.
23 1990), the Court reaffirmed its earlier holdings that there can be no pre-default waiver by a
24 mortgagor of his statutory right of redemption which right the Court "zealously guards."
25 Similarly, the Court has held that a debtor's rights under the anti-deficiency statute cannot be

1 waived prior to default. *Borsheim v. Owan*, 467 N.W.2d 95, 98 (N.D. 1991); *Brunson v.*
2 *Scarlett*, 465 N.W.2d 162, 167 (N.D. 1991).

3 A right to a jury trial entailing a unanimous verdict held to be "fundamental and sacred"
4 under the North Dakota Constitution, is at least as important as whether the statutory redemption
5 period is one year or six months; and at least as important as a guarantor's rights under the anti-
6 deficiency statutes. Accordingly, if North Dakota Law applies to the TM2I Guaranty, this Court
7 should hold that the jury trial waiver is unconstitutional and invalid.

8 *E. Conclusion on Jury Demand.*

9 Even if the jury trial waivers are valid, Mr. Tharaldson and TM2I are still entitled to a jury
10 trial on their Fraudulent Inducement Claims related to the guaranties. Plaintiffs' Fraudulent
11 Inducement Claims are sufficient to invalidate the jury trial waivers that are part of those
12 documents. There is a genuine issue of material fact on the validity under Nevada Law of the
13 jury waiver in the two guaranties. Finally, the TM2I jury trial waiver is invalid and
14 unenforceable under North Dakota law.

15 **III. THE PROPOSED BIFURCATION NEEDLESSLY INCREASES COSTS,**
16 **IMPOSES UNDUE BURDENS ON THE COURT, PARTIES, AND WITNESSES;**
AND CONTRAVENES THE POLICIES REFLECTED IN RULE 42(b).

17 *A. The Rule 42(b) Standards.*

18 The starting point for a proper analysis of the relief Fiduciary Defendants have requested
19 must be Rule 42(b) itself, which Fiduciary Defendants do not bother to quote in full. That Rule
20 provides:

21 The court, in furtherance of convenience or to avoid prejudice, or when separate
22 trials will be conducive to expedition and economy, may order a separate trial of
23 any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue
or of any number of claims, cross-claims, counterclaims, third-party claims, or
issues, always preserving inviolate the right of trial by jury. (Emphasis added.)

24 Learned commentators have noted that "It is the interest of efficient judicial administration that
25 is to be controlling under the rule, rather than the wishes of the parties." 9A Wright & Miller,
26

1 *Fed. Prac. & Proc. Civ.* § 2388; *E.g., Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1301 (11th Cir.
2 2001) *cert den.* 535 U.S. 1033, 1034 (2002).

3 Fiduciary Defendants have made clear, in a series of motions, their “wishes” in this
4 litigation. They wish to slice and dice the individual components of the complex and integrated
5 Senior Loan Transaction, including Fiduciary Defendants’ hopelessly conflicting fiduciary duties,
6 and argue that by isolating the guaranties the Court is “simply looking at arms-length commercial
7 guaranties without any ‘right to expect’ more than what such a posture would entail.” Of course,
8 this Court has already rejected this argument by holding that “determining whether or not that is
9 so will require a trial.” [11-23-10 Decision, Ex. 1, at 3-4.] As it has done previously, the Court
10 should reject Fiduciary Defendants’ most recent attempt to escape the collective impacts of the
11 complex Senior Loan Transaction they engineered and executed in breach of contractual and
12 fiduciary duties.

13 Under Rule 42(b) “The piecemeal trial of separate issues in a single suit is not to be the
14 usual course.” *Hangarter v. Paul Revere Life Ins. Co.*, 236 F.Supp. 1069, 1095 (N.D. Cal. 2002)
15 (facts relating to bad faith claim “inextricably linked” to punitive damages facts precluded
16 bifurcation). Rather, bifurcation is appropriate only if the movant “**demonstrates that a**
17 **bifurcated trial is clearly necessary to lessen costs and expedite the litigation.**” *Verner v.*
18 *Nevada Power Co.*, 101 Nev. 551, 554, 706 P.2d 147, 150 (1985) (no bifurcation because facts
19 relating to liability for accident “inextricably interrelated” with facts supporting damages).

20 Fiduciary Defendants fail to demonstrate that bifurcation is “clearly necessary” to lessen
21 costs and expedite the litigation of the entire case. Their ill-conceived proposal inevitably entails
22 needless duplication of effort and cost, and violates every one of the factors listed in Rule 42(b).

23 *B. The Bifurcation Requested by Fiduciary Defendants Is Ill-Defined and*
24 *Unworkable.*

25 Fiduciary Defendants request that the “guarantor related claims” be separated from the rest
26 of the case and tried first to the court; with everything else to be tried to a jury in a second trial.
27 Motion at 5:24-25; 8:5. Fiduciary Defendants, however, do not clearly and unambiguously define

1 the "guarantor related claims," further confirming that Fiduciary Defendants' "wishes," not the
2 interests of judicial administration, are driving this Motion.

3 Are Fiduciary Defendants arguing that only the non-jury "guarantor related claims" should
4 be tried separately and first? Or are they arguing that all "guarantor related claims" – even those
5 on which a jury trial is required – should be tried separately and first? The latter, of course,
6 makes no sense, because two jury trials would still be required. The former makes no sense
7 because the jury "guarantor related claims" by definition have common factual issues with the
8 non-jury "guarantor related claims."

9 Although Fiduciary Defendants' language in the body of the Motion is less than clear on
10 the definition of "guarantor related claims," their statement of the motion itself clearly suggests
11 that the proposed "first trial" would include all "claims related to the guarantor Plaintiffs," Gary
12 Tharaldson and TM2I; and the second trial would be for all "claims related to CVFS. Motion at
13 1:26-28. So Plaintiffs proceed on the understanding that the proposed "first trial" would include
14 all claims and defenses asserted in the litigation by or against Mr. Tharaldson and all claims and
15 defenses asserted in the litigation by or against TM2I (collectively, the "Guarantor Claims").

16 C. *The Fiduciary Defendants' Proposed Bifurcation Does Not Meet Rule 42(b)*
17 *Standards.*

18 The separate trials Fiduciary Defendants request would not further the interests of efficient
19 judicial administration as reflected in the language of Rule 42(b). None of the three tests for
20 separate trials reflected in that Rule is satisfied in this case. Moreover, the bifurcation proposed
21 by Fiduciary Defendants would not preserve "inviolable" Plaintiffs' right to jury trial. So the
22 Court should exercise its discretion by denying the Motion for bifurcation.

23 1. The Proposed Bifurcation is not Required to "Avoid Prejudice;" It Will Create
24 Prejudice.

25 Of the Rule 42(b) factors, the avoidance of prejudice is the most compelling justification
26 for bifurcation. *Cox v. E.I. duPont de Nemours and Co.*, 39 F.R.D. 56, 58 (D.S.C. 1965). So
27
28

1 how would Fiduciary Defendants be prejudiced by a single trial of all of the claims and
2 counterclaims in this case? Fiduciary Defendants do not even attempt to make a case that they
3 would be prejudiced by a failure to bifurcate. Fiduciary Defendants fail even to cite any cases
4 identifying the types of "prejudice" that have been accepted, or rejected, by courts under Rule
5 42(b).⁵ So Fiduciary Defendants concede that bifurcation is not required to avoid prejudice to
6 them.

7 Where a proposed bifurcation would create prejudice to any party, granting a separate trial
8 is an abuse of discretion. *Angelo v. Armstrong World Industries, Inc.*, 11 F.3d 957, 964 (10th Cir.
9 1993) ("regardless of efficiency and separability, however, bifurcation is an abuse of discretion
10 if it is unfair or prejudicial to a party.") *Guedry v. Marino*, 164 F.R.D. 181, 186 (Ed.La. 1995)
11 ("even if bifurcation might somehow promote judicial economy, courts should not order separate
12 trials when bifurcation would result in unnecessary delay, additional expense, or some other form
13 of prejudice.")

14 The prejudice to Plaintiffs from Fiduciary Defendants' proposed bifurcation is obvious
15 and far reaching. First, as described below (See Part III.C.4), the proposed bifurcation would
16 unconstitutionally impair the Plaintiffs' right to jury trial. Beyond that, however, the same
17 decision maker, under the same facts and circumstances, including Fiduciary Defendants'
18 misrepresentations and omissions, simultaneously decided to agree to all aspects of the Senior
19 Loan Transaction including two guaranties, a \$46 million Subordination, and the purchase of a
20 Participant Interest. So the facts of both sets of claims are "inextricably intertwined" requiring
21 the same proof at both proposed trials, clearly a prejudicial waste of resources.

23 ⁵ Cases in which courts have rejected bifurcation requests over assertions of prejudice are legion. *E.g.*,
24 *Tuttle v. Sears, Roebuck and Co.*, 2009 WL 2916864 *2-3 (N.D. Ohio) (refusal to order separate trial
25 on punitive damages). *Tri-R systems, Ltd. I.e. Friedman & Son, Inc.*, 94 F.R.D. 726, 728-29 (D.Colo.
26 1982) (refusal to order separate trials due to "spill over effect" of testimony against one defendant on
27 other defendants). *Guedry v. Marino*, 164 F.R.D. 181, 185-86 (E.D.La. 1995) (refusal to order separate
28 trials where the claims of some plaintiffs against the only defendant differed from those of other
plaintiffs).

1 2. The Proposed Bifurcation Will Not "Further Convenience."

2 The "convenience" factor in Rule 42(b) as distinct from the "expedition" and "economy"
3 factors discussed below, goes to logistical issues of "parties" and non-party "witnesses" in
4 connection with the litigation. *State of Montana v. District Court*, 467 P.2d 145, 147 (Mont.
5 1970). The Parties reside in Nevada, North Dakota, and Oklahoma. The fact witnesses reside
6 in California, Colorado, North Dakota, Oklahoma, Texas, Nevada, and perhaps others. The
7 expert witnesses reside in Arizona, Texas, Montana, and Nevada. It is hardly "convenient" for
8 all these out of state fact witnesses and expert witnesses to testify at two trials in Las Vegas rather
9 than one. Indeed, counsel for the parties reside in Oklahoma, Arizona, and Nevada. It is much
10 more "convenient" for out of state witnesses and counsel to participate in one trial of all claims
11 in Las Vegas rather than two.

12 3. The Proposed Bifurcation is not "Conducive to Expedition and Economy."

13 Fiduciary Defendants have not demonstrated, and cannot demonstrate, that the proposed
14 bifurcation will result in a quicker or less expensive resolution of all of the claims in this
15 litigation.

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

24 ///

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26 ///

27 ///

1 Where a single defense, such as laches, statute of limitations, or release would be case
2 dispositive and can be tried in a relatively short time period, bifurcation makes sense.⁶ In this
3 case, however, the proposed first trial would not be short, as it would require trial of the same
4 Fraudulent Inducement Claims as to the Tharaldson Guaranty and the TM2I Guaranty as are
5 involved in the CVFS Subordination and Participant Interest purchase claims. And the proposed
6 first trial will not be case dispositive. If the Court at the first trial were to hold that the guaranties
7 are enforceable, the Plaintiffs' affirmative tort claims for fraud, constructive fraud, and breach
8 of fiduciary duty, and their statutory claim for securities fraud, would still have to be tried, but
9 the damages on those claims would increase from the \$46 million subordinated debt to include
10 also the amount required to be paid on the guaranties.⁷

11 The Court understands better than the parties the state of its trial calendar for the next year.
12 Based upon what Plaintiffs understand, however, if both trials could not be concluded in the time
13 the Court has allotted for trial beginning March 8, then the second trial could be delayed for 6-12
14 months simply because of the Court's calendar and recent orders relating to shortage of
15 courtrooms. That would not favor an expeditious resolution of this case.

16 The "economy" factor in Rule 42(b) goes to conservation of resources, including both the
17 Court's available time and the dollars and cents costs to the parties of concluding the litigation.
18 The two trials proposed by Fiduciary Defendants would waste, not conserve, judicial resources.

19
20 ⁶ *West v. Devitt*, 311 F.2d 787, 788 (8th Cir. 1963) (issue of laches independent of the merits of
21 Plaintiff's claim could be tried to the court first); *State of Montana v. District Court*, 467 P.2d 145, 147-
22 48 (Mont. 1970) (issue whether post-death release of claims by surviving spouse barred the claim
23 bifurcated and tried first; facts of release occurred long after the events creating liability, and trial on
24 release issue would be short); *Granite State Insurance Co. v. Smart Modular Technologies, Inc.*, 76 F.3d
25 1023, 1027-28 (9th Cir. 1996) (issues of equitable estoppel to assert a breach of contract claim are
26 "distinct rather than common issues" therefore permitting bifurcation.) *Angelo v. Armstrong World*
27 *Industries, Inc.*, 11 F.3d 957, 964-65 (10th Cir. 1993) (reverse bifurcation of asbestos injury claim; first
28 try whether there is a disease caused by asbestos and if so damages; then try the more complex and
29 separate issues of exposure and whose asbestos was involved).

30 ⁷ This is reflected in Plaintiffs' Supplemental Disclosure on Damages, Exhibit 1 to Plaintiffs'
31 Opposition to Motion to Strike Kyle Newman filed December 7, 2010, at 15:25 to 16:2; 17:20-27;
32 19:11-16; 20:23 to 21:1.

1 They would also be more costly to Plaintiffs than a single, simultaneous trial of all jury and non-
2 jury claims. Under these circumstances, "bifurcation of claims is not warranted, as it would
3 hamper judicial economy, rather than promoting it as defendants contend." *Tuttle v. Sears*
4 *Roebuck & Co.*, 2009 WL 2916894 *3 (N.D. Ohio 2009).

5 4. The Proposed Bifurcation Would Not Preserve Inviolate Plaintiffs' Right to
6 Jury Trial.

7 A jury trial in civil cases is guaranteed by Article 1, § 3 of the Nevada Constitution and
8 Article I, § 13 of the North Dakota Constitution. Where claims triable to a jury and claims triable
9 to the court involve common questions of fact, it is unconstitutional to try the non-jury claims
10 first, as the doctrines of res judicata or collateral estoppel could effectively eliminate the right to
11 jury trial. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*,
12 359 U.S. 500 (1959). In *Wood* the plaintiff had a breach of contract claim for damages as well
13 as claims for trade-mark infringement, for injunctive relief, and for an accounting. The Supreme
14 Court reversed the District Court's refusal to grant the plaintiff's jury demand. The Court held
15 that because the "factual issues related to the question of whether there has been a breach of
16 contract" are "common with those upon which respondents' claim to equitable relief is based, the
17 legal claims involved in the action must be determined prior to any final court determination of
18 respondents' equitable claims." 369 U.S. at 479-80.

19 In the decades since *Wood*, both federal and state courts have consistently held that claims
20 triable to a jury must be tried first whenever those claims have common factual issues with the
21 claims not triable to a jury. *E.g., Kolstad v. American Dental Ass'n*, 108 F.3d 1431, 1440 (D.C.
22 Cir. 1997) (jury claims tried first; court bound by jury's fact finding in later deciding non-jury
23 claims); *Zions First Nat'l Bank v. Rocky Mtn. Irrigation, Inc.*, 795 P.2d 548, 662 (Ut. 1990)
24 (fraud issue must be resolved by jury first; court is bound by jury's factual determinations on the
25 "parallel equitable issue.") Indeed, a guaranty case cited by Fiduciary Defendants holds that,
26 even if bifurcation between jury issues and non-jury issues were to occur, the jury claims must
27 be tried first. *Bank of N.Y. v. Royal Athletic Ind., Ltd.*, 637 N.Y.S.2d 478, 479 (App.Div. 1996)

1 (jury trial first on defenses going to validity of guaranty; if defenses are rejected, then a non-jury
2 trial would be held on the guaranty liability).

3 Only where the claims triable to the jury do not involve common factual issues with claims
4 triable only to the court can the court exercise discretion to try the non-jury claims first. *Granite*
5 *State Ins. Co. v. Smart Modular Technologies, Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996) (facts
6 related to equitable estoppel defense are “distinct rather than common issues” with the breach of
7 contract and negligence claims.); *West v. Devitt*, 311 F.2d 787, 788 (8th Cir. 1963) (issue of laches
8 independent of the merits of Plaintiff’s claim could be tried to the court first).

9 In light of these authorities, it is obvious that Mr. Tharaldson’s decision under all the facts
10 and circumstances, to sign the Tharaldson Guaranty and the TM2I Guaranty have “common
11 factual issues” with his simultaneous decision, under all the same facts and circumstances, to sign
12 CVFS’s \$46 million Subordination and its Participant Interest purchase. Because the facts giving
13 rise to the Fraudulent Inducement Claims relative to the Guarantor Claims are the same as the
14 facts giving rise to the Fraudulent Inducement Claims relative to CVFS’s claims, the facts are
15 not distinct, but are common. Therefore, proceeding with Fiduciary Defendants’ proposed
16 bifurcation would be unconstitutional as to CVFS and therefore is precluded by Rule 42(b)’s
17 savings provision.⁸

18 Fiduciary Defendants cite *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 624, 173 P.3d 707,
19 714 (2007) in an argument that their proposed bifurcation would not impair Plaintiffs’
20 constitutional right to jury trial (Motion at 7:25-27). *Awada* does not support Fiduciary
21 Defendants’ argument for two separate and independently sufficient reasons. First, the
22 Distributor in *Awada* had no jury-triable claims that could possibly have been adversely affected
23 by trying the rescission claim first, resulting in an order of rescission. Second, the Distributor in

24 ⁸ Under Nevada law, because Mr. Tharaldson is the manager and 100% owner of CVFS, and the
25 president and sole director of TM2I, CVFS would be deemed to be in privity with Mr. Tharaldson and
26 TM2I, and thereby subject to collateral estoppel from a hypothetical first trial to the court. *Kahn v.*
27 *Morse & Mobray*, 121 Nev. 464, 474, 117 P.3d 227, 234-35 (2005); *Restatement (Second) of Judgments*
28 § 59 (business entities and their closely held owners, officers and directors are in “privity” for collateral
estoppel purposes).

1 *Awada* voluntarily made an early election of remedies, which has not occurred in this case, and
2 which Plaintiffs are entitled to delay until a jury verdict is rendered.

3 In *Awada* the Distributor filed a counterclaim which sought the equitable remedy of
4 rescission of a licensing agreement with Developer. There is no indication that the Distributor
5 asserted a tort claim for fraud, a contract claim for damages, or any other claim that might have
6 had common issues of fact with the rescission claim. 123 Nev. at 617-18, 173 P.3d at 710.⁹ In
7 the absence of such claims having been asserted, there was no risk that trying the equitable claim
8 first could intrude on the Distributor's right to a jury trial on any other claims. In this case,
9 however, CVFS's claims that the Mezzanine Deeds of Trust Subordination Agreement in which
10 it subordinated \$46 million in first position liens, and the Nonrecourse Participation Agreement
11 through which it also purchased a loan participation, were induced by the very same acts and
12 omissions by the very same Fiduciary Defendants as the claims of Tharaldson and TM2I to avoid
13 the Tharaldson Guaranty and the TM2I Guaranty.

14 Also in *Awada* prior to the litigation the Distributor sent a letter to the Developer notifying
15 that it was rescinding the licensing agreement due to fraud and returned to the Developer
16 everything he had provided to the Distributor in connection with the licensing agreement. *Id.*,
17 123 Nev. 617, 173 P.3d at 709. In its counterclaim, the Distributor sought rescission, not
18 damages, thereby confirming its early election not to sue for damages. See Note 4. Under
19 Nevada law, such an election does not have to be made prior to obtaining a jury verdict. *J. A.*
20 *Jones Construction Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 289, 89 P.3d 1009, 1017
21 (2004); *May v. Watt*, 822 F.2d 896 (9th Cir. 1987) (a party is not required to make an election
22 between breach of contract remedies and rescission prior to a jury verdict); *Restatement (Second)*
23 *of Contracts*, § 378, Comment a. (no "particular time" limit for electing between rescission and
24

25 ⁹ After ruling in favor of Distributor on its rescission claim, the contract was at an end, so any breach
26 of contract claims Distributor might have asserted in its counterclaim were moot; and the court thereafter
27 "entered a written order dismissing [Developer's] remaining claims with prejudice." 123 Nev. at 618,
28 173 P.3d at 710. That the written order dismissed only Developer's claims, indicates that there were no
Distributor claims other than for rescission.

1 damages.) Trial of the “guarantor related claims” first, to the court, would force Plaintiffs to elect
2 pre-maturely whether to affirm the guarantees and seek breach of contract and tort damages, or
3 whether to elect the equitable remedy of rescission, without the benefit of a jury verdict.

4 Where, as here, the jury claims and the alleged non-jury claims are “inextricably
5 intertwined” an order of bifurcation with trial first of the non-jury claims violates the fundamental
6 right of jury trial. *Shum v. Intel Corp.*, 499 F.3d 1272, 1278-79 (Fed.Cir. 2007) (plaintiff’s claim
7 of inventorship has common factual issues with claim defendant misrepresented his claim of
8 inventorship.)

9 5. The Considerations Asserted by Fiduciary Defendants Do Not Justify Bifurcation.

10 Fiduciary Defendants’ arguments on “simplification,” “streamlining,” and judicial
11 “economy” as a basis for bifurcation boil down to several points, which are either demonstrably
12 wrong, unsupported, unlikely to occur, or all of the above.

13 First, Fiduciary Defendants assert that the Guarantor Claims involve “less time and
14 expense for the Defendants who were not directly involved in the claims related to the
15 guarantors.” Motion at 6:1-2. That is not true. Both guarantors have asserted fraud and
16 misrepresentation claims against APCO and Edelstein, as well as against Fiduciary Defendants.
17 The misrepresentations by APCO and Edelstein in connection with the closing and funding were
18 part and parcel of the same Senior Loan Transaction in which the two guaranties were issued.
19 Moreover, Fiduciary Defendants’ failure to detect and rectify the misrepresentations of APCO
20 and Edelstein is a significant part of the claims against the Fiduciary Defendants.

21 Second, Fiduciary Defendants assert that first trial will involve “fewer claims” than would
22 the second trial. Motion at 9:1-11. Plaintiffs contend that both Tharaldson and TM2I had a
23 “right to expect trust and confidence in the integrity and fidelity of [SFC].” [11/23/10 Decision,
24 Ex. 1 at 4:2-11.] So Fiduciary Defendants are incorrect in their assertion that the hypothetical
25 first trial would not have a breach of fiduciary duty claim.

26 Third, Fiduciary Defendants assert that the Guarantor Claims have a dollar value far
27 higher than the \$400,000 value of CVFS’s claim on purchase of its Participant Interest. Motion

1 at 8:10-16. Fiduciary Defendants' conspicuously omit to mention CVFS's \$46 million
2 Subordination claim, which is twice as large as the BOK guaranty claim.

3 Finally, Fiduciary Defendants assert that if they prevail at the first trial on the Guarantor
4 Claims that "the claims of CVFS will be moot and trial on those issues would not be necessary."
5 This is true, Fiduciary Defendants argue, because "CVFS stands to recoup its entire \$400,000
6 contribution to the Senior Loan if the personal guaranty of Gary Tharaldson is enforced." Motion
7 at 8:17-25. But CVFS also has Fraudulent Inducement Claims relating to the \$46 million
8 Subordination, which would still have to be tried in a jury trial, which would necessitate all the
9 same evidence that had to be presented in the hypothetical first trial.

10 *D. Conclusion on Bifurcation.*

11 The bifurcation proposed by Fiduciary Defendants is not necessary to avoid any prejudice
12 to Fiduciary Defendants and would create prejudice to Plaintiffs. The proposal would make the
13 complete resolution of the litigation less convenient not more; less expeditious, not more; and less
14 economical, not more. It would also violate Plaintiffs' rights to jury trial under Article 1, Section
15 3 of the Nevada Constitution and Article 1, Section 13 of the North Dakota Constitution. The
16 Motion to bifurcate should be denied.

17 **IV. CONCLUSION ON PLAINTIFFS' OPPOSITION TO THE MOTION.**

18 The Motion must be denied as to striking the jury demands of Mr. Tharaldson and TM2I
19 for all the reasons set forth in Part II. The Motion must also be denied as to bifurcation because
20 the requirements of Rule 42(b) for separate trials are not met in this case as demonstrated in Part
21 III.

22 **V. MOTION UNDER RULE 39(c) FOR ADVISORY JURY ON ALL CLAIMS NOT**
23 **TRIALABLE TO A JURY.**

24 For the reasons detailed in Part IV, there is no legal or factual basis for bifurcation under
25 Rule 42(b). In the unlikely event, however, that the Court were to bifurcate the case for trial,
26 Plaintiffs hereby move pursuant to NRCPP Rule 39(c) for an advisory jury on the claims not triable
27 to a jury of right. This approach may avoid a long retrial if the Nevada Supreme Court were to

1 reverse the Court's decision on the validity of jury trial waivers or the scope of the jury trial
2 waivers.

3 A. Rule 39(c) Standard.

4 The Nevada Rules allow the District Court "upon motion" to "try any issue with an
5 advisory jury" that is not "triable of right by a jury." NRCP Rule 39(c). Such a request is within
6 the broad discretion of the District Court. *Harmon v. Tanner Motor Tours of Nev., Ltd.*, 79 Nev.
7 4, 377 P.2d 622 (1963). The purpose of Rule 39(c) is to perfect the "complete fusion of law and
8 equity" and to permit "the time-saving trial of common jury and non-jury issues at one time
9 without the loss or surrender of any substantive rights by the parties." Note 1 to F.R.C.P Rule
10 39(c); *Bruckman v. Hollzer*, 152 F.2d 730, 732-33 (9th Cir. 1946). Nevada courts have often
11 taken this approach where a case involves both equitable claims and legal claims. *E.g., Anderson*
12 *v. Weise*, 95 Nev. 540, 543, 598 P.2d 1144, 1147 (1979) (action to reform legal description on
13 a deed and to recover damages; jury was advisory on the reformation action and Court decided
14 to follow its recommendation; but mandatory on the damages claim.)

15 B. Jury Trial Waiver Does Not Preclude Advisory Jury.

16 That a trial by jury of right on some issues may have been waived does not preclude the
17 District Court from empaneling an advisory jury to assist in its determinations of those and other
18 non-jury claims. *American Lumbermens Mut. Cas. Co v. Timms & Howard, Inc.*, 108 F.2d 497,
19 499-500 (2d Cir 1939) (advisory jury is the "discretionary right of the court to have its
20 'conscience enlightened.'"); *Cudmore v. Smith*, 260 F.Supp. 760 (D. Conn. 1966) (jury trial
21 waived by lack of timely demand; court empaneled advisory jury anyway); *Computer Sys.*
22 *Engineering, Inc. v. Qantel Corp.*, 571 F.Supp .1365, 1372-73 (D.Mass. 1983) (jury advisory on
23 statutory unfair business practice claim, but mandatory on fraud claim tried concurrently). Any
24 other interpretation of Rule 39(c) is "undesirable" because "the use of an advisory jury is of no
25 binding legal significance, and the responsibility for the decision remains with the judge, he or
26 she should be allowed whatever help in reaching the decision he or she thinks desirable." 9
27 Wright & Miller, *Fed. Prac. & Proc. Civ.* § 2335 (3rd Ed.).

1 C. *The Court Should Order That Any Non-Jury Claims be Tried to the Court with an*
2 *Advisory Jury.*

3 If the Court were inclined to bifurcate, prudence would suggest empaneling an advisory
4 jury on all claims that are not triable to a jury of right.

5 Fiduciary Defendants would still preserve their right to a determination by the Court
6 (which would be free to follow or not follow the jury's advisory recommendations) on the issues
7 not triable to a jury as a matter of right.

8 Plaintiffs' rights to jury trial on all issues triable of right to a jury are held inviolate thereby
9 hopefully avoiding a retrial if the Nevada Supreme Court disagrees with this Court on the
10 validity, or scope, of the jury trial waivers.

11 D. *Conclusion on Rule 39(c) Counter-Motion*

12 If the Court were to decide (in error Plaintiffs would suggest), to bifurcate the case,
13 empanelling an advisory jury on all issues not triable of right to a jury would be a prudent step
14 to mitigate substantial prejudice to all parties entailed by a retrial in the event the Nevada
15 Supreme Court reverses this Court's decision on validity or scope of jury waivers.

16 RESPECTFULLY SUBMITTED this 24th day of January, 2011.

17 COOKSEY, TOOLEN, GAGE, DUFFY & WOOG

18 /s/ Martin Muckleroy

19 By _____

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AND

MARQUIS & AUERBACH, P.C.
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10001 Park run Drive
Las Vegas, Nevada 89145
Counsel for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 24th day of January, 2011, the foregoing **PLAINTIFFS'**
3 **OPPOSITION TO FIDUCIARY DEFENDANTS' MOTION TO BIFURCATE TRIAL**
4 **AND STRIKE JURY DEMAND AND PLAINTIFFS' COUNTER-MOTION UNDER**
5 **RULE 39(c) FOR ADVISORY JURY ON ALL CLAIMS NOT TRIABLE OF RIGHT BY**
6 **JURY** was e-served and emailed on the following persons:

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/s/ Valeria Maridon

Employee of Cooksey, Toolen, Gage, Duffy & Woog

EXHIBIT 1

DISTRICT COURT
CLARK COUNTY, NEVADA

Anna L. Johnson
CLERK OF THE COURT

CLUB VISTA FINANCIAL SERVICES,)
L.L.C.; THARALDSON MOTELS II, INC.;)
and GARY D. THARALDSON)

Plaintiff(s),)

vs.)

SCOTT FINANCIAL CORPORATION;)
BRADLEY J. SCOTT; BANK OF)
OKLAHOMA, N.A.; GEMSTONE)
DEVELOPMENT WEST, INC.; and)
ASPHALT PRODUCTS CORPORATION)
D/B/A/ APCO CONSTRUCTION,)

Defendant(s).)

CASE NO. A579963
DEPT. NO. XIII

Date: November 15, 2010
Time: 9:00 a.m.

DECISION

THIS MATTER having come before the Court on November 22,
2010 for hearing on Plaintiffs' Motion for Partial Summary Judgment
and on Defendants' [Scott Financial Corporation and Bradley Scott]
Counter-motion for Partial Summary Judgment on Claims Brought by
Gary Tharaldson and Tharaldson Motels II, Inc. relating to
Enforcement of Presales Conditions, and the Court having heard the
arguments of counsel and having considered the papers submitted on
behalf of the parties and then taken the matter under advisement
for further consideration;

NOW, THEREFORE, the Court decides the submitted issues as
follows:

RECEIVED
NOV 23 2010
CLERK OF THE COURT

MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

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1 ...

2 ... SFC's argument completely ignores the economic
3 reality of the transaction, how the transaction was
4 structured and the relationship between the parties. (at
5 p. 23, ll. 1-3)
6

7 ...

8 ...

9 SFC wants the Court to look at just the Senior Loan
10 Agreement. SFC's approach is not appropriate, and is
11 contrary to Nevada law. But the Court should not look at
12 the Senior Loan Agreement in a vacuum. Rather, the Court
13 should look at the entire Senior Loan transaction as a
14 whole and the economic realities of the transaction. (at
15 p. 24, ll. 6-9)

16 The Court DENIES Plaintiffs' Motion.

17 B. Defendants' Countermotion.

18 By the same token, the Court is not persuaded that there
19 are no genuine issues of material fact concerning what the
20 Tharaldson Plaintiffs had the right to expect of the Scott
21 Defendants relative to a heightened standard on account of their
22 past relationship. Thus, the Scott Defendants' similarly recognize
23 the intricacies of the factual inquiry on the subject of fiduciary
24 or other confidential relationship when they quote from *Powers v.*
25 *United Services Auto. Association*, 115 Nev. 38, 42, 979 P.2d 1286,
26

1 1288 (1999) at page 7 of their Reply in Support of Counter-Motion,
2 11. 11-12: "Under Nevada law, it would be more accurate to say that
3 '[a] fiduciary relationship exists when one **has the right to expect**
4 trust and confidence in the integrity and fidelity of another."
5 (emphasis in original)
6

7 The Court appreciates Defendants' contention that we are
8 simply looking at an arms-length commercial guaranties without any
9 "right to expect" more than what such a posture would entail.
10 Still, determining whether or not that is so will require a trial.
11 Accordingly, the Counter-Motion is DENIED as well.

12 C. Conclusion.

13 Counsel for the Scott Defendants is directed to submit a
14 proposed order concerning Plaintiffs' Motion consistent with part
15 A above and with the briefing and argument of the Defendants. Such
16 proposed order should be submitted for review to Plaintiffs'
17 counsel and to counsel for the other Defendants. If counsel
18 disapprove the proposed order, such disapproval should not be the
19 subject of correspondence to the Court. Instead, counsel can seek
20 relief from any order processed by the Court by appropriate motion
21 practice.
22

23 Counsel for Plaintiffs is directed to submit a proposed
24 order concerning Defendants' Counter-Motion consistent with part B
25 above and with the briefing and argument of Plaintiffs. Such
26 proposed order should be submitted for review to Defendants'
27

1 counsel. If counsel disapprove the proposed order, such
2 disapproval should not be the subject of correspondence to the
3 Court. Instead, counsel can seek relief from any order processed
4 by the Court by appropriate motion practice.

5
6 This Decision is a summary of the Court's analysis of the
7 matter and sets forth the Court's intended disposition on the
8 subject, but it anticipates further order of the Court to make such
9 disposition effective as an order or judgment.

10 DATED this 23rd day of November, 2010.

11
12
13 
14 MARK R. DENTON
DISTRICT JUDGE

15 CERTIFICATE

16 I hereby certify that on or about the date filed, this
17 document was e-served or a copy of this document was placed in the
18 attorney's folder in the Clerk's Office or mailed to:

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EXHIBIT 2
FILED UNDER SEAL
EXCERPTS
DEPONENT BRADLEY J. SCOTT

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.

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 D/B/A APCO CONSTRUCTION, a Nevada
corporation; DOES INDIVIDUALS 1-100; and
ROE BUSINESS ENTITIES 1-100,

Defendants.

SCOTT FINANCIAL CORPORATION, a foreign
corporation,

Counterclaimant,

v.

GARY D. THARALDSON,

Counterdefendant.

CONFIDENTIAL

VEDECTAPED DEPOSITION OF BRADLEY J. SCOTT

VOLUME II

PAGES 207-408

LAS VEGAS, NEVADA

SEPTEMBER 2, 2010

REPORTED BY: HOLLY J. PIKE, CCR NO. 680, RPR, CSR
LST JOB NO.: 127285

1 to interpret into -- related to closing and pay back the
2 loan.

3 BY MR. ARONSON:

4 Q. Right. You want to get the loan paid back; right?

5 A. Yes.

6 MR. ARONSON: Let's mark this as 700, please.

7 (Deposition Exhibit Number 700
8 was marked for identification.)

9 BY MR. ARONSON:

10 Q. Actually before we get into 700 -- nevermind.

11 ~~Would you identify Exhibit 700, please, as some~~
12 ~~emails between you and Tim James?~~

13 A. Yeah. They appear to be questions asked by Tim
14 James to Scott Financial on December 14. I responded back
15 to him.

16 Q. I want to direct your attention to the second page
17 of Exhibit 700, please.

18 A. Okay.

19 Q. It's item Number 5, towards the bottom of the
20 page. Why don't you take a minute to read that, please.

21 A. Okay.

22 Q. ~~This is concerning the TMI2 guaranty, is that~~
23 ~~right?~~

24 ~~A. Right.~~

25 Q. ~~You are telling Tim here in response to his email~~

* CONFIDENTIAL *

1 question that a TMI2 guaranty might be something that you
2 could agree to if BOK committed to \$24 million participation
3 and was the co-lead on the transaction; is that right?

4 A: Right.

5 Q: You already told me that you regarded Bank of
6 Oklahoma or some other bank as the co-lead as being
7 important to the transaction; correct?

8 MR. JONES: Object to the form.

9 MR. JONES: I'll join.

10 THE WITNESS: Yeah, having a co-lead in a
11 transaction is important to all parties in the transaction.

12 BY MR. ARONSON:

13 Q. At this point in time -- and the date of this
14 e-mail is December 14, 2007 -- had you ever spoken to Gary
15 Tharaldson about a TMI2 guaranty as a part of ManhattanWest
16 financing?

17 A: I don't know exactly the date I talked to Gary
18 about the guaranty requirement. I think it was shortly
19 after we were aware that that's the direction the Bank of
20 Oklahoma is going with their approval, I mean for the first
21 time. I talked to them more than once about it.

22 Q. There's an indication here on this exhibit, it at
23 least appears, that you are the one that suggested the
24 burn-out -- the burn-off rather, at \$100 million sales
25 level.

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1 ~~Do you see that?~~

2 A. ~~Yeah, I threw that out there.~~

3 Q. Does that refresh your recollection? Was that
4 your idea, that \$100 million number?

5 A. I don't know if we had a conversation on the phone
6 before this and Tim brought this up or if he was trying to
7 have me weigh in on it, or if it was my idea that we have
8 some parameters in there that, if I had difficulty
9 convincing Gary to execute the additional guaranty, that
10 there would be a way to have an exit strategy on that
11 guaranty. I just don't recall.

12 Q. Does this refresh your recollection at all as to
13 how you arrived at the \$100 million number?

14 A. Arrived at what?

15 Q. At this \$100 million trigger for the burn-off of
16 the proposed TMI2 guaranty.

17 MR. JONES: Object to the form.

18 THE WITNESS: Can you explain the question? I'm
19 not sure --

20 BY MR. ARONSON:

21 Q. I'll rephrase it. It appears you're suggesting a
22 \$100 million threshold for the burn-off on this TMI2
23 guaranty

24 A. Are you referring to land sales?

25 Q. Oh, I see. This is land sales of other assets,

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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
)

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 D/B/A APCO CONSTRUCTION, a Nevada)
corporation; DOES INDIVIDUALS 1-100; and)
ROE BUSINESS ENTITIES 1-100,)

Defendants.)

SCOTT FINANCIAL CORPORATION, a foreign)
corporation,)

Counterclaimant,)

v.)

GARY D. THARALDSON,)

Counterdefendant.)

CONFIDENTIAL

VIDEOTAPED DEPOSITION OF BRADLEY J. SCOTT

VOLUME III

PAGES 409-630

LAS VEGAS, NEVADA

NOVEMBER 16, 2010

REPORTED BY: HOLLY LARSEN, CCR NO. 680, RPR, CSR
LST JOB NO. 130592

1 presented to me that identifies that conversation.

2 BY MR. ARONSON:

3 Q. Well, the approved cap rate of 7 percent was
4 established back in May of 2007; right?

5 A. Whenever it was established. That was one of the
6 criterias, because the building was designed to be leased
7 and sold, not just sold.

8 Q. Is there any particular reason why you did not
9 send the Bank of Oklahoma commitment letter to Gary
10 Tharaldson?

11 MR. CLAYMAN: Object to form.

12 MR. JONES: I'll join.

13 THE WITNESS: There were items in the Bank of
14 Oklahoma commitment letter, as I recall, that I didn't feel
15 I wanted to have in the underwriting or the framework of the
16 guaranty, that was being requested by Bank of Oklahoma.

17 BY MR. ARONSON:

18 Q. So, you did not want to include a burn-off
19 provision in the TMT2 guaranty, is that what you're saying?

20 A. That's correct.

21 Q. So, you didn't -- and that's why you did not send
22 the Bank of Oklahoma commitment letter to Gary Tharaldson?

23 A. That's correct.

24 Q. Any other reason?

25 A. No.

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1 Q. If I remember your testimony correctly from a
2 previous deposition session, you never discussed a potential
3 burn-off provision on a TMI2 guaranty with Mr. Tharaldson;
4 correct?

5 MR. JONES: Object to the form.

6 THE WITNESS: No. I did not want the burn-off
7 provision to be --

8 MR. JONES: You've answered the question.

9 THE WITNESS: As part of the transaction.

10 BY MR. ARONSON:

11 Q. Why did you not want the burn-off provision as
12 part of the transaction?

13 A. Because I didn't think it was necessary.

14 Q. Do you recall if you had originally suggested the
15 burn-off provision?

16 A. If I had originally suggested it to who?

17 Q. To Bank of Oklahoma?

18 A. No. I didn't even want it in the document. Tim
19 James offered it as a way to reduce the timing of the TMI2
20 guaranty being exposed in the transaction. And I wanted to
21 keep it simple.

22 Q. And that's why you never sent the commitment
23 letter to Mr. Tharaldson?

24 A. That's correct. I walked through all of the
25 balance of the terms of that commitment letter with

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1 [REDACTED] Parardson.

2 Q. [REDACTED] But you didn't show him the Bank of Oklahoma
3 [REDACTED] commitment letter?

4 A. [REDACTED] That's correct, because of that provision.

5 MR. ARONSON: We only have five minutes left on
6 the tape, so we better take our break now.

7 MR. JONES: Sure.

8 THE VIDEOGRAPHER: Off the record at 2:21.

9 (A short break was taken.)

10 BY MR. ARONSON:

11 Q. Mr. Scott, in connection with the ManhattanWest
12 vertical financing, did you talk to Business Bank of Nevada,
13 ever, about being co-lead?

14 A. No.

15 Q. Did you talk to City National Bank, ever, about
16 being co-lead?

17 A. No, not that I can recall.

18 Q. Did you talk to Bank of The West about being
19 co-lead?

20 A. I don't think so.

21 Q. By "talk," I mean communicate in any way?

22 A. Some of those banks we may have sent a credit
23 display about being a participant in the transaction. As
24 far as being co-lead, I don't recall a conversation with any
25 of them about co-leading.

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1 alleged he didn't. Now it's been proven that he did, so I
2 guess he changed his mind.

3 BY MR. ARONSON:

4 Q. Did you ever sit down with Gary Tharaldson and go
5 over the paragraphs of the TMI2 guaranty with him before it
6 was signed?

7 A. No. I don't recall sitting down and going over
8 the paragraphs of the TMI2 guaranty.

9 Q. Did you ever go over in detail the TMI2 guaranty
10 the provisions of the TMI2 guaranty with Gary Tharaldson
11 over the telephone before he signed it?

12 A. Basically, yes. I recall talking to him about the
13 guaranty and it was going to be the same format of the
14 guaranty he was going to be signing, personally.

15 Q. That's the extent of what you told him, as you
16 recall?

17 A. Yeah. A guaranty he had signed multiple times on
18 previous engagements, previous loans.

19 Q. Other deals?

20 A. Other transactions.

21 Q. In any time in January of 2008, did you sit down
22 with Gary Tharaldson or talk to him over the telephone
23 regarding the TMI2 guaranty, whether TMI2 as guarantor would
24 get credit for the collateral against any guarantor
25 potential liability?

* CONFIDENTIAL *

1 MR. JONES: Object to the form of the question.

2 THE WITNESS: I'm not sure I understand your
3 question.

4 BY MR. ARONSON:

5 Q. You're aware that, under certain circumstances,
6 guarantors get a fair market value credit for the collateral
7 on a real estate loan that reduces potential guarantor
8 liability, right?

9 MR. CLAYMAN: Object to form.

10 THE WITNESS: Not necessarily.

11 BY MR. ARONSON:

12 Q. You're not aware of that?

13 MR. JONES: Object. That misstates his
14 testimony.

15 THE WITNESS: Not necessarily. That doesn't
16 always happen.

17 BY MR. ARONSON:

18 Q. Sometimes it happens, right?

19 A. I don't know. It may. In this transaction it was
20 never considered.

21 Q. Did you ever, specifically, discuss with Gary
22 Tharaldson regarding the TMI2 guaranty that there would be
23 no credit against any potential TMI2 guarantor liability for
24 the fair market value of the improvement in real estate
25 collateral?

* CONFIDENTIAL *

1 A. We had a pointed discussion that there would be a
2 guaranty from TMI in the amount of the Bank of Oklahoma loan
3 in the full amount. And we had a discussion that the
4 personal guaranty would be for the entire amount of the
5 senior debt loan, \$100 million.

6 Q. And was that the extent of your discussions, that
7 you can recall, with Gary Tharaldson on the guaranty?

8 A. Yes. To my knowledge, at no point, was there ever
9 a question asked or a representation made that there would
10 be some discount in the guaranty given the fact that the
11 project, itself, had a real estate established value.

12 Q. So that issue was not discussed?

13 A. Never has been on any transaction I've done with
14 Gary Tharaldson.

15 Q. Was the Nevada single transaction rule on the Gary
16 Tharaldson personal guaranty ever discussed by you,
17 specifically, and Gary Tharaldson, specifically, on the
18 ManhattanWest loan before that guaranty was signed?

19 A. The discussion with Gary Tharaldson was it was the
20 same guaranty that he's been required to sign in the past on
21 other transactions.

22 Q. So the single action rule was not specifically
23 discussed, then?

24 A. I don't recall if it was discussed in great length
25 or if it was just discussed that it was the same guaranty.

* CONFIDENTIAL *

1 format that had previously been used.

2 Again, I don't recall all of the dialogue that
3 took place in the guaranty. It was not an issue. He was
4 willing to guaranty a hundred percent of the debt.

5 Q. Did you go over the Gary Tharaldson personal
6 guaranty with him paragraph-by-paragraph before it was
7 signed?

8 A. No, I did not.

9 Q. Did you, specifically, talk to Gary Tharaldson
10 before he signed either the personal guaranty or the TMI2
11 guaranty about the waiver of a jury trial?

12 A. I don't recall any questions he had about the
13 guaranties because they were the same format that he signed
14 on previous loans.

15 Q. Whether Mr. Tharaldson had questions or not, my
16 question to you, Mr. Scott, is whether you, specifically,
17 remember talking to Gary Tharaldson before he signed both
18 the personal guaranty and the TMI2 guaranty about waiver of
19 jury trials?

20 A. I don't think the topic came up.

21 Q. Was there any discussion about Nevada law applying
22 to the Gary Tharaldson personal guaranty and North Dakota
23 law applying to the TMI2 guaranty?

24 A. I believe that was discussed because we had to get
25 -- because TMI2 was a North Dakota corporation and that's

* CONFIDENTIAL *

1 why we had to use the jurisdiction in North Dakota.

2 Q. So it was discussed, and it was your
3 understanding, that North Dakota law would apply to the TMI2
4 guaranty?

5 A. Correct.

6 Q. Was there any discussion that you had with Gary
7 Tharaldson before he signed the guaranties on the
8 ManhattanWest vertical senior loans about on the personal
9 guaranty there being no credit against any guarantor
10 liability for the value of the real estate and improvement
11 collateral?

12 MR. JONES: Objection. Asked and answered. At
13 least I thought it was.

14 THE WITNESS: Right.

15 BY MR. ARONSON:

16 Q. It was asked as to the TMI2 guaranty, I believe
17 I just want to make certain you did not have that discussion
18 with Mr. Tharaldson on his personal guaranty, either

19 A. I've never had that discussion with Mr. Tharaldson
20 on any guaranty I've ever done with him in 15 years.

21 Q. Did you go over, either in person or on the
22 telephone, with Gary Tharaldson page-by-page the senior loan
23 agreement for ManhattanWest before he signed it?

24 A. No, I did not go through the entire loan agreement
25 page-by-page, paragraph-by-paragraph with him.

* CONFIDENTIAL *

1 He is very capable of going through loan
2 agreements and guaranteeing himself. He's got handlers that
3 review all those documents before he signs them, and he's
4 got internal counsel at his disposal.

5 Q. Did you, yourself, go over any what you regarded
6 as the key provisions of the senior loan agreement document,
7 after it was drafted sometime in January of 2008, with
8 Mr. Tharaldson, either in person or over the telephone?

9 A. With Mr. Tharaldson, personally, or with Ryan
10 Kucker? I know we talked about the loan agreement with Ryan
11 about the key components of the terms of our agreement -- or
12 terms of his agreement.

13 Basically, it's his financing. All we're doing is
14 making sure we're getting the documents closed according to
15 the terms that he's laid out, and I represented to him that
16 the terms in the loan closing documents, I've accomplished
17 that.

18 Q. So, you told Ryan Kucker that the senior loan
19 agreement accomplished the terms of the commitment letter?

20 A. Or of the financing transaction. Not necessarily
21 the commitment letter because there were things that were
22 changing since that original commitment letter.

23 MR. JONES: As soon as your line of questioning --
24 I apparently have an emergency I need to deal with, and need
25 to take a short break.

* CONFIDENTIAL *

1 MR. ARONSON: Sure. If I could have a couple more
2 minutes, I could finish that line.

3 BY MR. ARONSON:

4 Q. Let me break it down. You didn't talk to Gary
5 Tharaldson about specific provisions in January of 2008
6 about the senior loan agreement --

7 A. I didn't say I didn't. I don't remember if he was
8 involved in the conversation or if it was just Ryan and Ryan
9 communicated to Gary. I don't recall if that happened.

10 Q. You seem to believe you did have a conversation
11 with Ryan Kucker about the senior loan agreement; correct?

12 A. Yeah. All the documents go to Ryan. He combs
13 through them. Makes sure everything is there for Gary to
14 sign them.

15 Q. Are you saying Ryan Kucker told you he had read
16 the senior loan agreement?

17 A. I know Ryan looked at the documents before Gary
18 signed them, yes. They were sent to him.

19 Q. Did Ryan Kucker tell you he had read the final
20 version of the senior loan agreement?

21 A. Yeah. He told me he looked through the documents
22 and Gary is ready to sign them.

23 Q. Now, other than you telling Ryan in a fairly
24 general sense that the senior loan agreement was consistent
25 with the commitment letter, and other communications of some

* CONFIDENTIAL *

1 type which you previously had with Ryan Kucker or Gary
2 Tharaldson, did you go over any specific provisions, that
3 you recall, of the final senior loan agreement document in
4 any detail with Ryan Kucker before Gary Tharaldson signed
5 that senior loan agreement document?

6 A. I don't know if there's anything specific. We
7 just went through the general, Here's the documents. Here's
8 what you've got. Here is what we have to execute.
9 Everything's in order. The components of the term sheets
10 and, as adjusted and modified and approved, either verbally
11 or in writing, are incorporated into that. The parameters
12 of the changes in the presales and that they wanted into the
13 final documents were all there.

14 I think the only things I remember talking about
15 probably were just the presales and there's one other area.
16 I can't remember what it was right now. I can't remember.
17 There's a couple areas.

18 Q. And what did you talk to Mr. Kucker about in
19 terms of presales in the senior loan agreement in January of
20 2008, before Gary Tharaldson signed the document?

21 A. The only one that I specifically recall is the
22 change of the cap rate that occurred through some of the
23 documents, making sure that got done correctly.

24 Then there was one discussion about the change
25 in clarifying the change in the deposit criteria because

1 we increased it from the original commitment letter, to make
2 sure that that got done correctly.

3 Q. Anything else?

4 A. There might have been some others. I don't
5 remember.

6 Q. On the various participation agreements, we have
7 the Club Vista participation agreement on the senior loan.
8 We have the participation agreement on the Alex Edelstein
9 \$13 million loan. We have the participation agreement on
10 the \$46 million mezzanine loan.

11 Did you go over those documents in detail with
12 Mr. Tharaldson before he signed them in January of 2008?

13 A. Yeah. We talked about the level of participation
14 on the senior loan had been brought down from \$25 million
15 all the way down to about \$400,000. I think it was \$400,000
16 by the time we closed, or maybe it was \$1.4 million. I
17 don't remember off the top of my head anymore.

18 Q. Other than the numbers, did you go over the
19 language provisions paragraph-by-paragraph or page-by-page
20 of the participation agreements?

21 A. Just the ones that he changed.

22 Q. What do you mean, "just the ones that he changed"?

23 A. Well, the ones he changed, like the split of the
24 late charges 50/50. Normally a hundred percent go to Scott
25 Financial. Participants got 50 percent of the late charges.

* CONFIDENTIAL *

1 Q. Any other issues you discussed?

2 A. The default fee, typically, is 50 percent to Scott
3 Financial, 50 percent to the participants. Gary required it
4 be two-thirds to the participants, one-third to Scott
5 Financial. Then the default rate is typically 50/50. Gary
6 Tharaldson required two-thirds of it go to the participants
7 and one-third go to Scott Financial.

8 Those are the three components of the
9 participation agreement that's not standard language.

10 Q. That's what you discussed with whom,
11 Mr. Tharaldson or Mr. Kucker?

12 A. I don't remember if the conference call included
13 Gary sitting in the room or not. I don't recall.

14 Q. Other than those issues and the dollar amount of
15 the participations, I take it, you did not go over other
16 language in the participation agreement?

17 ~~A. The rest of it is pretty much static language.~~
18 It's been the same in all the documents.

19 Q. So, you did not go over that language with
20 Mr. Tharaldson regarding the ManhattanWest transaction?

21 A. It would have been repetitive to go over them
22 again. We've signed multiple loans with those participation
23 agreements.

24 Q. Did you ever, with Gary Tharaldson years ago or
25 whenever --

* CONFIDENTIAL *

1 A. Sure.

2 Q. ~~Was~~ before ManhattanWest, go over
3 paragraph-by-paragraph on the participation agreement?

4 A. Well, when we first started doing business, we
5 went through our document profile with him. With Kyle
6 primarily, yeah.

7 Gary is not one to sit through a discussion about
8 a hundred pages of documents. That's what he has his people
9 for.

10 Q. Is Gary one to sit through discussions on five
11 pages of documents, in your opinion?

12 A. Depending on how important the deal was. Our
13 deals tended to be very important because they were large
14 numbers to him, large exposure numbers. So I think he paid
15 attention to a lot of the detail relative to the key and
16 critical path terms.

17 MR. ARONSON: We can take our break now.

18 THE VIDEOGRAPHER: Off the record at 3:23.

19 (A short break was taken.)

20 THE VIDEOGRAPHER: Back on the record at 3:42.

21 BY MR. ARONSON:

22 Q. Mr. Scott, let me show you what's been previously
23 marked as Exhibit 82. You can leaf through it, if you'd
24 like, but I'm really only going to ask you about the cover
25 page.

* CONFIDENTIAL *

1 Would you just confirm for the record that this
2 appears to be a January 15, 2008, e-mail with attachments
3 from the Maslon law firm to several other parties?

4 A. That's right.

5 Q. This is regarding at least drafts of the senior
6 loan documents for ManhattanWest as of January 15th of 2008.

7 Does that appear to be the case to you?

8 A. Yeah, some of them.

9 Q. The Maslon law firm was your lawyer, the Scott
10 Financial lawyer in your view, in this ManhattanWest
11 transaction; correct?

12 A. They've been my lawyer throughout the life of our
13 company and then, probably, five to seven years previously
14 at BNC National Bank when I was employed there.

15 Q. This is getting sent to Alex Edelstein and
16 Mr. Barton at Holland & Hart. Do you recognize that name as
17 Gemstone's attorney on the deal?

18 A. I believe that's correct.

19 Q. And to Jim Horning and Peter Smith at Gemstone.

20 You would agree that these draft documents are not
21 being sent to Gary Tharaldson or anybody on behalf of
22 Mr. Tharaldson?

23 A. It doesn't appear that they are at this juncture,
24 no.

25 Q. Do you have any specific recollection that you

* CONFIDENTIAL *

1 forwarded this Exhibit 821 to Gary Tharaldson or Ryan
2 Kucker?

3 A. I don't have any specific recollection.

4 Q. Do you have any specific recollection of dealing
5 directly with any attorney that was representing Gary
6 Tharaldson on the ManhattanWest senior loan documents?

7 A. No, not to my knowledge. I don't know if he had
8 attorneys looking at documents, we would have done that on
9 his own and we wouldn't have sent it directly to him. We
10 were sending it directly to this attorney on behalf of the
11 borrower because he was writing a borrower's opinion on
12 behalf of the transaction.

13 Q. Do you have a specific recollection as to whether
14 Gary Tharaldson was sent or saw any drafts of the senior
15 loan documents at Manhattan before he signed the final
16 version?

17 A. I don't recall.

18 Q. Do you have any specific recollection that you
19 sent any drafts, or you had Jason Ulmer send any drafts of
20 any of the senior loan agreements to Gary Tharaldson before
21 he signed the senior loan documents?

22 A. Again, I don't recall.

23 Q. Would you expect there would be an e-mail record
24 if you did, in fact, forward these documents to
25 Mr. Tharaldson?

* CONFIDENTIAL *

1 A. I would expect there would be.

2 Q. Do you have any specific recollection as to
3 whether Penny Heaberlin, or anyone else at the Maslon firm,
4 had any direct contact with an attorney representing
5 Mr. Tharaldson's interests or Club Vista's interests on the
6 ManhattanWest senior loan documents?

7 A. I don't recall in this transaction. If she sent
8 documents to Bill Spiry, I believe, in Manhattan. She
9 possibly did, but I don't remember about ManhattanWest.

10 Q. Did you ever advise, if you recall, did you ever
11 advise Gary Tharaldson or Ryan Kucker that Gary or Club
12 Vista or TMI2 needed to get its own attorney to review
13 matters regarding the ManhattanWest senior loan documents?

14 MR. JONES: Object to the form.

15 MR. CLAYMAN: Object to form.

16 THE WITNESS: Gary is a big boy. He's borrowed
17 over \$3 billion worth of money. I think he knows when he
18 needs to have somebody else look at loan documents on his
19 behalf.

20 BY MR. ARONSON:

21 Q. All right. My question to you, Mr. Scott, is do
22 you, specifically, recall ever advising Gary Tharaldson or
23 Ryan Kucker that Mr. Tharaldson needed to get his own
24 attorney for himself or TMI2 or Club Vista to review any of
25 the ManhattanWest senior loan documents?

* CONFIDENTIAL *

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CLERK OF THE COURT

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Attorneys For Plaintiffs

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.

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 D/B/A APCO)
CONSTRUCTION, a Nevada corporation; DOE)
INDIVIDUALS 1-100; and ROE BUSINESS)
ENTITIES 1-100,)

Defendants.

AND RELATED COUNTERCLAIMS

Case No. A579963
Department No. 13

**PLAINTIFFS' MORE DEFINITE
STATEMENT OF FRAUD CLAIMS
AGAINST DEFENDANT APCO
CONSTRUCTION**

405.0005 1036903.1

12019-001 00539

1 In accordance with the Court's Order denying Defendant APCO Construction's Motion to
2 Dismiss, Plaintiffs respectfully submit their more definite statement of their fraud claims against
3 Defendant APCO. The following allegations against Defendant APCO should be inserted between
4 paragraphs 203 and 204 of Plaintiffs' First Amended Complaint, the balance of which First Amended
5 Complaint is incorporated in its entirety.

6 203.A. The misrepresentations General Contractor APCO made to SFC as agent and fiduciary
7 for Plaintiffs included the "Contractor Consent" and "Contractor Certificate" both dated January 22,
8 2008, and both more fully described in Paragraph 96 hereof.

9 203.B. In the January 22, 2008, Contractor Consent, APCO falsely stated that "[a]ll liens,
10 claims, rights, remedies and recourses that [APCO] may have or may otherwise be entitled to assert
11 against all or any portion of the Project shall be, and they hereby are made expressly subordinate,
12 junior and inferior to the liens, claims, rights, remedies and recourses as created by the loan Agreement
13 and the Collateral Documents." In truth, APCO now claims that its lien claims are senior and superior
14 to the Loan Agreement and the Collateral Documents, and APCO knew the basis for such contentions
15 when it signed the Construction Consent.

16 203.C. In the January 22, 2008 Contractor Certificate, APCO falsely executed a Certificate as
17 to Sworn Construction Statement expressly representing that as of January 22, 2008, no work had been
18 completed on the Property or the Project. In truth, APCO knew and now claims that it performed work
19 on the Property and on the Project prior to January 22, 2008, and that its statements were false at the
20 time they were made.

21 203.D. APCO made its misrepresentations to SFC as agent and fiduciary for Plaintiffs.
22 Misrepresentations made to an agent about matters within the scope of the agency are equivalent to
23 representations made directly to a principal, in this case, to the Plaintiffs. APCO intended or had
24 reason to believe SFC would communicate the misrepresentations to third parties such as Plaintiffs.

25 ///

26 ///

27 ///

28 ///

1 203.E. In addition to the direct misrepresentations APCO made to SFC in the Contractor
2 Consent and Contractor Certificate, such misrepresentations constituted indirect misrepresentations to
3 Plaintiffs. APCO participated directly in the Senior Loan transaction and issued its Contractor Consent
4 and Contractor Certificate for the purpose of inducing the closing of the Senior Loan transaction. It was
5 foreseeable to APCO that the misrepresentations it communicated to SFC would be communicated by
6 SFC to others such as Plaintiffs.

7 203.F. In the Contractor Consent and Contractor Certificate, APCO represented that it did not
8 have a claim of lien priority against Plaintiffs when, on information and belief, APCO knew it would
9 have a lien priority claim if Plaintiffs signed the Senior Loan Agreement and agreed to subordinate their
10 first lien position. Alternatively, APCO knew it might have a lien priority claim at the time it made the
11 Contractor Consent and Contractor Certificate and APCO falsely represented that it presently intended to
12 waive and would waive and not assert any claim for lien priority that might exist. On information and
13 belief, APCO made its representation that it would not assert or would waive any lien priority claim it
14 might have with the present intention not to perform the promise to waive such lien priority claims, and
15 instead to assert any lien priority claims it might have, particularly after Plaintiffs signed the Senior Loan
16 Agreement.

17 203.G. Plaintiffs were misled by and rightfully relied on APCO's misrepresentation. APCO's
18 misrepresentations to SFC induced Plaintiffs to enter into the Senior Loan Agreement, under which,
19 among other things, Plaintiff CVFS agreed to subordinate its \$56 million of first position loan funds
20 secured by the Project and the Property. The Senior Loan Agreement provided the loan funds from
21 which APCO was to be paid for its work on the Project and the Property.

22 203.H. APCO's misrepresentations, coupled with CVFS's subordination of its position on its \$56
23 million in loan funds, has led to a claimed broken priority. APCO claims that CVFS, which was
24 originally in first position on the Project and Property is now in a lien priority position junior to APCO's
25 claimed lien (and incidently also junior to the claims of other providers of labor and materials to the
26 Project and Property).

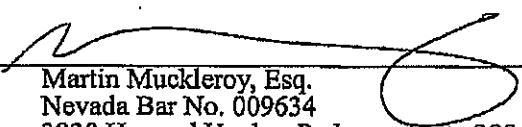
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1 203.I. The misrepresentations APCO made to SFC as agent for Plaintiffs were justifiably relied
2 and acted upon by SFC to Plaintiffs' damage and detriment. Among other things, SFC caused Plaintiffs
3 to close the Senior Loan transaction in reliance on the truth of APCO's misrepresentations.

4 RESPECTFULLY SUBMITTED this 24th day of November, 2009.
5

6 COOKSEY, TOOLEN, GAGE, DUFFY & WOOG
7

8 By 
9 Martin Muckleroy, Esq.
10 Nevada Bar No. 009634
11 3930 Howard Hughes Parkway, Suite 200
12 Las Vegas, Nevada 89169

13 *Local Counsel for Plaintiffs*

14 AND

15 MORRILL & ARONSON, P.L.C.
16 K. Layne Morrill
17 Martin A. Aronson
18 John T. Moshier
19 One East Camelback Road, Suite 340
20 Phoenix, AZ 85012
21 Counsel for Plaintiffs
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CERTIFICATE OF MAILING

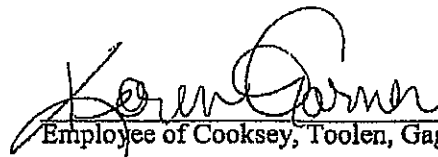
I hereby certify that on the 24th day of November, 2009, the foregoing **PLAINTIFFS' MORE DEFINITE STATEMENT OF FRAUD CLAIMS AGAINST DEFENDANT APCO CONSTRUCTION** was served on the following persons by mailing a copy thereof, first class mail, postage prepaid, to:

J. Randall Jones
Mark M. Jones
Matthew S. Carter
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
Attorneys for Scott Financial Corporation and
Bradley L. Scott

Von S. Heinz
Abran E. Vigil
Ann Marie McLoughlin
Lewis and Roca LLP
Suite 600
3993 Howard Hughes Parkway
Las Vegas, Nevada 89169
Attorneys for Bank of Oklahoma

John D. Clayman, Esq.
Frederic Dorwart Lawyers
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Tulsa, Oklahoma 74103-5010
Attorneys for Bank of Oklahoma

Gwen Rutar Mullins, Esq.
Howard & Howard
3800 Howard Hughes Parkway
Suite 1400
Las Vegas, Nevada 89169
Attorneys for Defendant APCO



Employee of Cooksey, Toolen, Gage, Duffy & Woog

ORIGINAL
DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
DEC 11 2009

John J. Blum
CLERK OF COURT

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CLUB VISTA FINANCIAL SERVICES, LLC, et al.,

Plaintiff(s),

vs.

SCOTT FINANCIAL CORPORATION, et al.,

Defendant(s).

AND ALL RELATED CLAIMS.

CASE NO. A579963-B
DEPT. NO. XIII

ORDER SETTING CIVIL JURY TRIAL,
PRE-TRIAL, AND CALENDAR CALL

IT IS HEREBY ORDERED THAT:

A. A jury trial of the above-entitled case has been given a firm setting on a three week stack to begin, **Tuesday, March 8, 2011** at 9:00 a.m. The actual date and time during the stack will be determined at the calendar call

B. In accordance with EDCR 2.68, a pre-trial conference with the designated attorneys and/or parties in proper person will be held on **February 14, 2011** at 2:00 p.m. In addition to the matters referred to in such rule, the items to be brought to the calendar call (see below) with reference to EDCR 2.69 will be discussed.

C. A calendar call will be held on **February 28, 2011 at 2:00 p.m.**

D. All parties (attorneys and parties in proper person) MUST comply with ALL REQUIREMENTS of EDCR 2.67 prior to the pre-trial conference except that the due date for the Pre-Trial Memorandum will be established at the pre-trial conference. As to the Pre-trial Memorandum, counsel should be particularly attentive to their exhibit lists and objections to exhibits, as exhibits not listed or objections not made will not be

CLERK OF THE COURT

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RECEIVED

MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

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1 admitted/allowed over objection based on non-compliance with the Rule's
2 requirements. (Also, it is helpful to the Court when counsel list pertinent pre-trial
3 motions and orders pertaining thereto if it is likely that they will be focused on during
4 trial.)

5
6 E. All discovery deadlines, deadlines for filing dispositive motions and
7 motions to amend the pleadings or add parties are controlled by the previously issued
8 Case Management Order and/or any amendments or subsequent orders.

9 F. Counsel are also directed to abide by EDCR 2.47 concerning the time for
10 filing and noticing motions *in limine*. Except upon a showing of unforeseen
11 extraordinary circumstances, the Court will not shorten time for the hearing of any such
12 motions.

13
14 Failure of the designated trial attorney or any party appearing in proper
15 person to appear for any court appearances or to comply with this Order will
16 result in any of the following: (1) dismissal of the action; (2) default judgment; (3)
17 monetary sanctions; (4) vacation of trial date; and/or any other appropriate
18 remedy or sanction.

19
20 Counsel are required to advise the Court immediately when the case settles or is
21 otherwise resolved prior to trial. A stipulation which terminates a case by dismissal
22 shall also indicate whether a Scheduling Order has been filed and, if a trial date has
23 been set, the date of that trial.

24 DATED this 11th day of December, 2009.

25
26 
27 MARK R. DENTON
DISTRICT JUDGE

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CERTIFICATE

I hereby certify that on the date filed, I placed a copy of this Order in the attorney's folder in the Clerk's Office or mailed a copy to:

COOKSEY TOOLLEN GAGE DUFFY & WOOG
Attn: Martin A. Muckleroy, Esq.

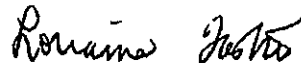
Martin A. Aronson, Esq.
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KEMP, JONES & COULTHARD
Attn: Mark M. Jones, Esq.

HOWARD & HOWARD
Attn: Wade B. Gochmour, Esq.

LEWIS AND ROCA
Attn: Von S. Heinz, Esq.

John D. Clayman, Esq.
Old City Hall
124 E. Fourth Street
Tulsa, OK 74103



LORRAINE TASHIRO
Judicial Executive Assistant
Dept. No. XIII

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CLERK OF THE COURT

HOWARD & HOWARD
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1 ANS
2 **HOWARD & HOWARD**
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10 Fax: (702) 567-1568
11 Email: grm@h2law.com
12 wbg@h2law.com
13 Attorneys for Defendant
14 APCO CONSTRUCTION formerly
15 ASPHALT PRODUCTS CORPORATION
16 d/b/a APCO Construction

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

CASE NO.: A579963
DEPT. NO.: XI

**APCO CONSTRUCTION'S ANSWER
TO PLAINTIFF'S FIRST AMENDED
COMPLAINT and PLAINTIFFS' MORE
DEFINITE STATEMENT OF FRAUD
CLAIMS; and CROSS-CLAIM**

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Las Vegas, Nevada 89169
(702) 257-1483

1 APCO CONSTRUCTION, a Nevada
2 Corporation formerly named as ASPHALT
3 PRODUCTS CORPORATION, dba APCO,

4 Cross-Claimant,

5 vs.

6 GEMSTONE DEVELOPMENT WEST,
7 INC., a Nevada corporation; SCOTT
8 FINANCIAL CORPORATION, a North
9 Dakota corporation; DOES I through X,
10 inclusive,

11 Cross-Defendants.

12 **APCO CONSTRUCTION'S ANSWER TO PLAINTIFF'S FIRST AMENDED**
13 **COMPLAINT and PLAINTIFFS' MORE DEFINITE STATEMENT OF FRAUD**
14 **CLAIMS; and CROSS-CLAIM**

15 **Date: N/A**
16 **Time: N/A**

17 Defendant APCO CONSTRUCTION, formerly known as ASPHALT PRODUCTS
18 CORPORATION, dba APCO, a Nevada Corporation ("APCO") by and through their counsel,
19 Gwen Rutar Mullins, Esq., and Wade B. Gochmour, Esq., of the law firm of HOWARD &
20 HOWARD hereby files this Answer to the Plaintiff's First Amended Complaint and to
21 Plaintiffs' More Definite Statement Of Fraud Claims Against APCO Construction (Collectively
22 "Amended Complaint") and alleges as follows:

23 **NATURE OF THE ACTION**

24 1. Answering Paragraph 1 of the Amended Complaint, APCO does not have
25 sufficient knowledge or information upon which to base a belief as to the truth of the
26 allegations contained therein, and upon said grounds, denies them.

27 ///

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///

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Las Vegas, Nevada 89169
(702) 257-1483

PLAINTIFFS

2. Answering Paragraphs 2, 3 and 4 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies them.

3. Answering Paragraph 5 of the Amended Complaint, APCO, upon information and belief, admits the allegations of Paragraph 5 of the Amended Complaint.

FIDUCIARY DEFENDANTS

4. Answering Paragraphs 6, 7 and 8 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies them.

5. Answering Paragraph 9 of the Amended Complaint, APCO, upon information and belief, admits the allegations of Paragraph 9 of the Amended Complaint.

OWNER DEFENDANT

6. Answering Paragraph 10 of the Amended Complaint, APCO, upon information and belief, admits that Gemstone Development West Inc, ("Gemstone West, Inc.") is a Nevada corporation and that Gemstone West, Inc. is named as a defendant in this action. As to the remaining allegations of Paragraph 10 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

CONTRACTOR DEFENDANT

7. Answering Paragraph 11 of the Amended Complaint, APCO admits that it is a Nevada corporation, that its prior corporate name was Asphalt Products Corporation, and that it was doing business as "APCO" and/or "APCO Construction." APCO further admits that APCO contracted with Gemstone West, Inc. to perform work on the Project commonly referred to as the Manhattan West Project. As to the remaining allegations of Paragraph 11 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

///

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Las Vegas, Nevada 89169
(702) 257-1483

FICTITIOUS DEFENDANTS

8. Answering Paragraph 12 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies them.

SUBJECT MATTER JURISDICTION

9. Answering Paragraphs 13 and 14 of the Amended Complaint, APCO admits that the above referenced Court has a subject matter jurisdiction of this action. As to the remaining allegations of Paragraphs 13 and 14 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

GENERAL AND PERSONAL JURISDICTION

10. Answering Paragraphs 15, 16 and 17 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies them.

11. Answering Paragraph 18 of the Amended Complaint, APCO admits that this Court has general jurisdiction over APCO and, upon information and belief, admits that this Court has general jurisdiction over Gemstone West, Inc. APCO further admits that both APCO and Gemstone West, Inc. have their principal place of business in Clark County, Nevada. APCO denies all remaining allegations of Paragraph 18 of the Amended Complaint.

VENUE

12. Answering Paragraph 19 of the Amended Complaint, APCO admits that venue is appropriate in this Court under NRS 13.010(2)(a) and (c) because the dispute set forth in the Amended Complaint involves an interest in real property located in Clark County, Nevada and that the res of the action is the real property located in Clark County, Nevada. As to the remaining allegations of Paragraph 19 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

///

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GENERAL ALLEGATIONS

Plaintiffs' Business

13. Answering Paragraphs 20, 21, 22, and 23 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

Scott's and SFC's Fiduciary Relationship with Plaintiffs

14. Answering Paragraphs 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

The Manhattan West Project

15. Answering Paragraphs 39, 40, and 41 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies them.

16. Answering Paragraph 42 of the Amended Complaint, APCO, upon information and belief, admits that Gemstone Development West, LLC was the development entity for the Manhattan West Project. As to the remaining allegations of Paragraph 42 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

17. Answering Paragraphs 43, 44 and 45 of the Amended Complaint, APCO, upon information and belief, admits the allegations contained therein.

The Manhattan West Acquisition and Development Financing

(The Prior Loan and Edelstein Loan)

18. Answering Paragraphs 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

///

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Subsequent Modifications to Prior Loan and Edelstein Loan

19. Answering Paragraphs 60, 61, 62, 63, 64 and 65 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

The Construction Financing Syndication

(The Senior Loan)

20. Answering Paragraphs 66, 67, 68, 69, 70, 71, 72, 73, 74, and 75 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

The Senior Loan Documentation and the "Mezzanine Financing"

21. Answering Paragraph 76 of the Amended Complaint, APCO, upon information and belief, admits that on or about January 22, 2008, SFC as a lender entered into a Loan Agreement with Gemstone Development West, Inc., as a borrower. As to the remaining allegations of Paragraph 76 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

22. Answering Paragraphs 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104 and 105 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

The Senior Loan Agreement Signature, the Subordination, the Guaranty, the TM21

Guaranty and the CVFS Participation

23. Answering Paragraphs 106, 107, 108, 109, 110, 111, 112, and 113 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

///

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HOWARD & HOWARD
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Wells Fargo Tower, Suite 1400
Las Vegas, Nevada 89169
(702) 257-1483

Subsequent Changes to Loans

24. Answering Paragraphs 114, 115, and 116 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

Default under the Prior Loan, the Edelstein Note, the Mezzanine Loans, the Senior Loan and the Rental LOC Notes

25. Answering Paragraphs 117, 118, 119, 120 and 121 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

The Fraudulent Inducement

26. Answering Paragraphs 122, 123, 124, 125, 126, 127, 128, 129, 130 and 131 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

Deteriorated Financial Prospects.

27. Answering Paragraphs 132, 133, 134 and 135 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

Primary Reliance on Guarantors.

28. Answering Paragraphs 136, 137 and 138 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

Fraud Relating to the Pre-sale Condition.

29. Answering Paragraphs 139, 140, 141, 142, 143, 144, 145, 146, 147 and 148 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

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HOWARD & HOWARD
3900 Howard Hughes Parkway
Wells Fargo Tower, Suite 1400
Las Vegas, Nevada 89169
(702) 257-1483

Fraud Relating to First Lien Condition.

30. Answering Paragraph 149, 150, 152, 153, 154, 155 and 156 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

31. Answering Paragraph 151 of the Amended Complaint, APCO, upon information and belief, admits that SFC was aware that work had been performed on the Project prior to the recording of the construction loan Deed of Trust. As to the remaining allegations of Paragraph 151 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

Insurance Over Broker Priority; Switched Title Insurance Companies.

32. Answering Paragraphs 157, 158, 159, 160, 161, 162, 163, 164 and 165 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

Subordination Exacerbates Broken Priority

33. Answering Paragraphs 166, 167, 168, 169 and 170 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

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

34. Answering Paragraphs 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181 and 182 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

Administration of Senior Loan

35. Answering Paragraphs 183, 184, and 185 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

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1 36. Answering Paragraph 186 of the Amended Complaint, APCO admits that
2 Gemstone Development West, Inc. failed to attempt to resolve the payment issues for the work
3 performed by APCO and its subcontractors on the Project or otherwise address the change
4 orders that increased the contract amount to pay for such additional work. As to the remaining
5 allegations of Paragraph 186 of the Amended Complaint, APCO does not have sufficient
6 knowledge or information upon which to base a belief as to the truth of these remaining
7 allegations and upon said grounds, denies them.

8 37. Answering Paragraph 187 of the Amended Complaint, APCO admits that
9 Gemstone Development West, Inc. failed to pay for the work performed by APCO and the
10 subcontractors which resulted in construction liens filed against the Project, including that of
11 APCO. As to the remaining allegations of Paragraph 187 of the Amended Complaint, APCO
12 does not have sufficient knowledge or information upon which to base a belief as to the truth of
13 these remaining allegations and upon said grounds, denies them.

14 **Defamatory Statements**

15 38. Answering Paragraphs 188, 189, 190 and 191 of the Amended Complaint,
16 APCO does not have sufficient knowledge or information upon which to base a belief as to the
17 truth of these allegations and upon said grounds, denies them.

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

20 39. Answering Paragraphs 192 and 193 of the Amended Complaint, APCO does not
21 have sufficient knowledge or information upon which to base a belief as to the truth of these
22 allegations and upon said grounds, denies them.

23 **Punitive Damages**

24 40. Answering Paragraphs 194, 195, 196, 197, 198 and 199 of the Amended
25 Complaint, APCO does not have sufficient knowledge or information upon which to base a
26 belief as to the truth of these allegations and upon said grounds, denies them.

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FIRST CLAIM OF RELIEF

(Fraudulent Misrepresentation)

41. Answering Paragraph 200 of the Amended Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 40 of this Answer to the Amended Complaint as though fully set forth herein.

42. Answering Paragraph 201, 202, 212 and 216 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

43. Answering Paragraphs 203, including Paragraphs 203.A through 203.I of Plaintiff's More Definite Statement of Fraud Claims, and 210 of the Amended Complaint, APCO denies each and every allegation contained therein.

44. Answering Paragraphs 204, 205, 206, 207, 208, 209, 211, 213, 214, and 215 of the Amended Complaint, APCO denies each and every allegation contained therein as they are asserted against or otherwise relate to APCO. As to the remaining allegations of Paragraphs 204, 205, 206, 207, 208, 209, 211, 213, 214, and 215 of the Amended Complaint as they are made or relate to the Fiduciary Defendants as defined in the Amended Complaint or any other Defendant in this action, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

SECOND CLAIM FOR RELIEF

(Fraudulent Concealment/Fraudulent Omissions)

45. Answering Paragraph 217 of the Amended Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 44 of this Answer to the Amended Complaint as though fully set forth herein.

46. Answering Paragraphs 218, 219, 220, 221, 223 and 225 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

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1 47. Answering Paragraphs 222 and 224 of the Amended Complaint, APCO denies
2 each and every allegation contained therein as they are asserted against or otherwise relate to
3 APCO. As to the remaining allegations of Paragraphs 222 and 224 of the Amended Complaint
4 as they are made or relate to any other Defendants in this action, APCO does not have
5 sufficient knowledge or information upon which to base a belief as to the truth of these
6 remaining allegations and upon said grounds, denies them.

7 **THIRD CLAIM OF RELIEF**

8 **(Constructive Fraud)**

9 48. Answering Paragraph 226 of the Amended Complaint, APCO repeats and
10 realleges each and every answer and allegation contained in paragraphs 1 through 47 of this
11 Answer to the Amended Complaint as though fully set forth herein.

12 49. Answering Paragraphs 227, 228, 229, 230, 231, 232, 233, 234 and 236 of the
13 Amended Complaint, APCO does not have sufficient knowledge or information upon which to
14 base a belief as to the truth of these allegations and upon said grounds, denies them.

15 50. Answering Paragraph 235 of the Amended Complaint, APCO denies each and
16 every allegation contained therein as they are asserted against or otherwise relate to APCO. As
17 to the remaining allegations of Paragraph 235 of the Amended Complaint as they are made or
18 relate to any other Defendants in this action, APCO does not have sufficient knowledge or
19 information upon which to base a belief as to the truth of these remaining allegations and upon
20 said grounds, denies them.

21 **FOURTH CLAIM OF RELIEF**

22 **(Negligent Misrepresentation/Negligent Omission)**

23 51. Answering Paragraph 237 of the Amended Complaint, APCO repeats and
24 realleges each and every answer and allegation contained in paragraphs 1 through 50 of this
25 Answer to the Amended Complaint as though fully set forth herein.

26 52. Answering Paragraphs 238, 239, 240, 241, 242, 243, 244, 245, 246, 247 and 249
27 of the Amended Complaint, APCO does not have sufficient knowledge or information upon
28 which to base a belief as to the truth of these allegations and upon said grounds, denies them.

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1 58. Answering Paragraphs 265, 266, 267, 268, 269 and 270 of the Amended
2 Complaint, APCO does not have sufficient knowledge or information upon which to base a
3 belief as to the truth of these allegations and upon said grounds, denies them.

4 **SEVENTH CLAIM OF RELIEF**

5 **(Breach of Fiduciary Duty)**

6 59. Answering Paragraph 271 of the Amended Complaint, APCO repeats and
7 realleges each and every answer and allegation contained in paragraphs 1 through 58 of this
8 Answer to the Amended Complaint as though fully set forth herein.

9 60. Answering Paragraphs 272, 273, 274 and 275 of the Amended Complaint,
10 APCO does not have sufficient knowledge or information upon which to base a belief as to the
11 truth of these allegations and upon said grounds, denies them.

12 **EIGHTH CLAIM OF RELIEF**

13 **(Damages –BOK, Aiding and Abetting Breach of Fiduciary Duty)**

14 61. Answering Paragraph 276 of the Amended Complaint, APCO repeats and
15 realleges each and every answer and allegation contained in paragraphs 1 through 60 of this
16 Answer to the Amended Complaint as though fully set forth herein.

17 62. Answering Paragraphs 277, 278, 279 and 280 of the Amended Complaint,
18 APCO does not have sufficient knowledge or information upon which to base a belief as to the
19 truth of these allegations and upon said grounds, denies them.

20 **NINTH CLAIM OF RELIEF**

21 **(Acting in Concert/Civil Conspiracy)**

22 63. Answering Paragraph 281 of the Amended Complaint, APCO repeats and
23 realleges each and every answer and allegation contained in paragraphs 1 through 62 of this
24 Answer to the Amended Complaint as though fully set forth herein.

25 64. Answering Paragraphs 282, 283, 284 and 285 of the Amended Complaint,
26 APCO denies each and every allegation contained therein as they are asserted against or
27 otherwise relate to APCO. As to the remaining allegations of Paragraphs 282, 283, 284 and
28 285 of the Amended Complaint as they are made or relate to other Defendants in this action,

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1 APCO does not have sufficient knowledge or information upon which to base a belief as to the
2 truth of these remaining allegations and upon said grounds, denies them.

3 **TENTH CLAIM OF RELIEF**

4 **(Breach of Contract)**

5 65. Answering Paragraph 286 of the Amended Complaint, APCO repeats and
6 realleges each and every answer and allegation contained in paragraphs 1 through 64 of this
7 Answer to the Amended Complaint as though fully set forth herein.

8 66. Answering Paragraphs 287, 288, and 289 of the Amended Complaint, APCO
9 does not have sufficient knowledge or information upon which to base a belief as to the truth of
10 these allegations and upon said grounds, denies them.

11 **ELEVENTH CLAIM OF RELIEF**

12 **(Damages—Breach of Covenant of Good Faith and Fair Dealing)**

13 67. Answering Paragraph 290 of the Amended Complaint, APCO repeats and
14 realleges each and every answer and allegation contained in paragraphs 1 through 66 of this
15 Answer to the Amended Complaint as though fully set forth herein.

16 68. Answering Paragraphs 291 and 292 of the Amended Complaint, APCO does not
17 have sufficient knowledge or information upon which to base a belief as to the truth of these
18 allegations and upon said grounds, denies them.

19 69. Answering Paragraphs 293 and 294 of the Amended Complaint, APCO denies
20 each and every allegation contained therein as they are asserted against or otherwise relate to
21 APCO. As to the remaining allegations of Paragraphs 293 and 294 of the Amended Complaint
22 as they are made or relate to other Defendants in this action, APCO does not have sufficient
23 knowledge or information upon which to base a belief as to the truth of these remaining
24 allegations and upon said grounds, denies them.

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TWELFTH CLAIM OF RELIEF

(Negligence)

70. Answering Paragraph 295 of the Amended Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 69 of this Answer to the Amended Complaint as though fully set forth herein.

71. Answering Paragraphs 296, 297 and 298 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

THIRTEENTH CLAIM OF RELIEF

(Declaratory Judgment)

72. Answering Paragraph 299 of the Amended Complaint, APCO repeats and realleges each and every answer and allegation contained in paragraphs 1 through 71 of this Answer to the Amended Complaint as though fully set forth herein.

73. Answering Paragraph 300 of the Amended Complaint, APCO, upon information and belief, admits that Gemstone Development West, Inc. is the owner of the Property and Project subject to this action. As to the remaining allegations of Paragraph 300 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

74. Answering Paragraph 301 of the Amended Complaint, APCO admits that APCO was the initial contractor of the Manhattan West Project. As to the remaining allegations of Paragraph 301 of the Amended Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these remaining allegations and upon said grounds, denies them.

75. Answering Paragraphs 302, 303, 304, 305, 306, 307, 308, 309, 310, and 311 of the Amended Complaint, APCO denies each and every allegation contained therein.

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GENERAL DENIALS

Any and all allegations in the Amended Complaint not expressly admitted or otherwise responded to by APCO in this Answer are hereby denied.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim against APCO upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The claims of the Plaintiffs have been waived as a result of their acts and conduct.

THIRD AFFIRMATIVE DEFENSE

APCO's notice of lien against the Property or the Project has priority over any deeds of trusts or mortgages on the Property pursuant to Nevada law.

FOURTH AFFIRMATIVE DEFENSE

Any and all damages sustained by the Plaintiffs are the result of negligence, breach of contract and breach of warranty, express and/or implied, of a third-party over whom APCO has no control.

FIFTH AFFIRMATIVE DEFENSE

At the time and place under the circumstances alleged by the Plaintiffs, Plaintiffs had full and complete knowledge and information in regard to the conditions and circumstances then and there existing, and through Plaintiffs' own knowledge, conduct, acts and omissions, assumed the risk attendant to any condition there or then present.

SIXTH AFFIRMATIVE DEFENSE

Whatever damages, if any, were sustained by the Plaintiffs, were caused in whole or in part or were contributed to by reason of Plaintiffs' own actions.

SEVENTH AFFIRMATIVE DEFENSE

The liability, if any, of APCO must be reduced by the percentage of fault of others, including the Plaintiffs.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs are estopped from pursuing any claim against APCO.

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NINTH AFFIRMATIVE DEFENSE

The alleged damages complained of by the Plaintiffs were caused in whole or in part by a new, independent and intervening cause over which APCO had no control. Said independent, intervening cause was the result of any alleged damages resulting to the Plaintiffs.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to name indispensable parties.

ELEVENTH AFFIRMATIVE DEFENSE

APCO is not liable to the Plaintiffs.

TWELFTH AFFIRMATIVE DEFENSE

The damages, if any, were caused in whole or in part, or were contributed to by reason of the negligence of the Plaintiffs.

THIRTEENTH AFFIRMATIVE DEFENSE

APCO alleges that its or its subcontractor's work, products, materials and services on the Project were performed in compliance with all applicable laws, building codes and/or governmental regulations enacted by the State of Nevada, and any applicable political subdivision of the State of Nevada.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to plead with sufficient specificity any fraud against APCO.

FIFTEENTH AFFIRMATIVE DEFENSE

APCO denies that it was a joint tort-feasor or acting in concert with the remaining Defendants in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

APCO has been forced to retain the services of an attorney to defend this action and therefore, is entitled to reasonable attorneys' fees.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs failed to mitigate their damages.

EIGHTEENTH AFFIRMATIVE DEFENSE

The doctrine of unclean hands prevents any recovery by Plaintiffs.

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NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to the declaratory relief or other remedies requested.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiffs had full knowledge of all of the actions alleged against APCO through their authorized agent(s).

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs lack standing to bring these actions against APCO.

TWENTY-SECOND AFFIRMATIVE DEFENSE

APCO alleges that APCO performed no acts or omissions relevant to the subject matter of the Plaintiffs' Amended Complaint such as would create any liability or duty whatsoever on the part of APCO.

TWENTY-THIRD AFFIRMATIVE DEFENSE

The incident alleged in the Plaintiffs' Amended Complaint, and the resulting damage, if any, to Plaintiffs, was proximately caused or contributed to by its own negligence, and such negligence was greater than the negligence, if any, of APCO.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims against APCO are barred for failure of consideration.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred due to the intervening, vested rights of APCO and third parties.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Any term of a contract that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier is void pursuant to Nevada law, including but not limited to NRS 108.2453 and NRS 108.2457.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

The alleged agreement referred to in the Amended Complaint was void for want of any consideration whatsoever.

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TWENTY-EIGHTH AFFIRMATIVE DEFENSE

The damages, if any, suffered by Plaintiffs were avoidable to them prior to, contemporaneously with, and subsequent to, all acts or omissions allegedly committed by APCO.

TWENTY-NINTH AFFIRMATIVE DEFENSE

APCO is not liable to Plaintiffs for any damages claimed in the Amended Complaint.

THIRTIETH AFFIRMATIVE DEFENSE

Because the Amended Complaint is couched in conclusory and vague terms, APCO cannot fully anticipate all affirmative defenses that may be applicable to this case. Accordingly, APCO reserves the right to assert additional affirmative defenses.

THIRTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred under the doctrines of estoppel and/or waiver.

THIRTY-SECOND AFFIRMATIVE DEFENSE

The damages, if any, suffered by Plaintiffs were avoidable by Plaintiffs prior to, contemporaneously with, and subsequent to all of the acts or omissions allegedly committed by APCO.

THIRTY-THIRD AFFIRMATIVE DEFENSE

Pursuant to NRCP Rule 8 and 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of this Answer to the Amended Complaint, and therefore, APCO reserves the right to amend its Answer to allege additional affirmative defenses if subsequent investigation so warrants.

WHEREFORE, APCO prays for judgment as follows:

1. That Plaintiffs take nothing by way of their Amended Complaint on file herein and that the same be dismissed with prejudice;
2. For an award of attorneys' fees and costs incurred herein by APCO; and
3. For such other and further relief as this Court may deem just and proper.

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CROSS-CLAIM

APCO CONSTRUCTION ("APCO"), by and through its attorneys, the law firm of Howard and Howard, and hereby alleges as follows:

1. Upon information and belief, Cross-Defendant GEMSTONE DEVELOPMENT WEST, INC. ("Gemstone") is a Nevada corporation, and is the owner of the Manhattan West Mixed-Use Development Project, commonly referred to as 9205 W. Russell Road, 9215 W. Russell Road, 9255 W. Russell Road, 9265 W. Russell Road, and 9275 W. Russell Road, Clark County, Nevada and described in the contract with APCO as being located on Assessors Parcel Numbers 163-32-101-003, 163-32-101-004, 163-32-101-005, 163-32-101-010 and 163-32-101-014 but initially listed by the Clark County Assessors Office as APN #163-32-101-019, and then well after commencement of construction was subdivided into 163-32-101-019; 163-32-101-020; 163-32-101-022; 163-32-101-023 and 163-32-112-001 through 163-32-112-246, inclusive together with an undivided allocated fractional interest in and to any common elements on said property ("Property"). Lots identified as 163-32-112-001 through 163-32-112-246 consist of Buildings 2, 3, 7, 8 and 9 of Manhattan West, Phase 1. Each separate condominium unit in Buildings 2, 3, 7, 8 and 9 is more fully identified in **Exhibit 1** attached hereto and incorporated herein by this reference). The entire Property is described by the Clark County Assessor's Office as PT NE4 NW4 SEC 32 21 60, SEC 32 TWP 21 RNG 60 and more fully described in that certain Grant Bargain Sale Deed recorded on February 7, 2008 in Book 20080207 as Instrument No. 01481 of the Official Records of Clark County Recorder.

2. That the true names and capacities, whether individual, corporate, associate or otherwise of those Cross-Defendants (jointly referred to as "Defendants") named herein as Does I through X, are Defendants presently unknown to APCO, who therefore sues said Defendants by such fictitious names and APCO will seek leave to amend this Amended Complaint to show their true names and capacities when the same has been ascertained. APCO believes that the Doe Defendants are individuals or entities within the jurisdiction of this Court, who may be holders of promissory notes secured by deeds of trust recorded against the subject property, an ownership or leasehold interest of the property, may be responsible for monies due

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1 and owing to APCO, may be interfering with payments due to APCO, or are otherwise
2 negligent or responsible in some manner for events referred to in this Amended Complaint, and
3 caused damages approximately thereby to APCO as alleged herein.

4 3. APCO and Gemstone entered into the ManhattanWest General Construction
5 Agreement for GMP, dated September 6, 2007 (the "Agreement").

6 4. The Agreement was drafted by Gemstone.

7 5. Pursuant to the Agreement, APCO was to act as the General Contractor for the
8 construction of the Manhattan West Mixed-Use development project located on the Property
9 (the "Project").

10 6. The Project was to be constructed in two phases, with the first Phase consisting
11 of the construction of five (5) buildings.

12 7. APCO performed its work on the Project pursuant to the Agreement.

13 8. Almost from the beginning of the Project, APCO had difficulty obtaining
14 required information from Gemstone.

15 9. Gemstone also began making changes to the plans and specifications from the
16 beginning of APCO's work on the Project.

17 10. During the course of the construction of the Project, Gemstone continued to
18 make changes in the plans and specifications, including changes to the electrical, plumbing and
19 HVAC plans.

20 11. As changes were made, APCO would submit requests for change orders to
21 Gemstone.

22 12. Many of the changes made by Gemstone affected the timing and sequence of the
23 Project. As a result, APCO also made several requests for an extension of time to complete the
24 buildings, which were part of Phase I of the Project.

25 13. With very limited exceptions, Gemstone would find excuses to ignore or
26 otherwise refuse to approve the change orders submitted by APCO.

27 14. This included a refusal to approve requests for extensions of the Agreement
28 schedule.

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15. In order to keep the Project moving, APCO continued to work on the Project and incorporate the changes made despite Gemstone's refusal to approve the change orders.

16. On or about June 20, 2008, APCO submitted its Application and Certification For Payment for the month ending May 31, 2008, requesting a total amount of \$3,230,671.71 (the "May Application").

17. Without prior warning, on or about July 2, 2008, Gemstone sent a letter to APCO, giving APCO notice of Gemstone's intent to withhold the sum of \$226,360.88 from APCO's May Application, which represented APCO's fee for the billing period.

18. On or about July 8, 2008, APCO provided Gemstone its written notice of APCO's dispute of the intended withholding.

19. As of July 17, 2008, Gemstone still had not paid APCO any sums due for the May Application.

20. As a result of Gemstone's failure to make any payment, APCO provided Gemstone with written notice of APCO's intent to stop work pursuant to NRS 624.610, if APCO was not paid in full for the May Application, by July 28, 2008.

21. After receiving the stop work notice, Gemstone paid APCO all amounts under the May Application except for the sum of \$226,360.88.

22. As a result of Gemstone's failure to make full payment, APCO stopped work on the Project.

23. After APCO stopped work on the Project, Gemstone paid APCO the outstanding sum of \$226,360.88 from the May Application, and as a result, APCO returned to work on the Project.

24. During this time, APCO and Gemstone exchanged correspondence regarding many of the change order requests submitted by APCO, and Gemstone's failure and/or refusal to act upon or otherwise respond to the change order requests.

25. NRS 624.610(1)(d) provides:

(d) Within 30 days after the date that a written request for a change order is submitted by the prime contractor to the owner, the owner fails to:

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- (1) Issue the change order; or
- (2) If the request for a change order is unreasonable or does not contain sufficient information to make a determination, give written notice to the prime contractor of the reasons why the change order is unreasonable or explain that additional information and time are necessary to make a determination . . .

26. NRS 624.610(3) provides:

3. If an owner fails to issue a change order or give written notice to the prime contractor pursuant to the provisions of paragraph (d) of subsection 1:

(a) The agreement price must be increased by the amount sought in the request for a change order;

(b) The time for performance must be extended by the amount sought in the request for a change order;

(c) The prime contractor may submit to the owner a bill or invoice for the labor, materials, equipment or services that are the subject of the request for a change order; and

(d) The owner shall pay the prime contractor for such labor, materials, equipment or services with the next payment made to the prime contractor.

27. On or about July 18, 2008, APCO submitted its Application and Certification For Payment for the month ending June 30, 2008, requesting a total amount of \$6,566,720.38 (the "June Application").

28. Because Gemstone had simply not responded to several change order requests submitted by APCO, the June Application included these undisputed change order requests as provided for in NRS 624.610.

29. After submission of the June Application, some discussions were held between APCO and Gemstone, and APCO agreed to accept less than all of the undisputed change orders.

30. Even after this agreement, on or about August 6, 2008, Gemstone provided APCO with notice of its intent to withhold the additional sum of \$1,770,444.28, representing "all unapproved change order requests included in the June Progress Payment."

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1 31. As of August 8, 2008, the date payment was due for the June Application,
2 Gemstone had not made any payment for the June Application.

3 32. As a result of Gemstone's failure to make any payment on the June Application,
4 APCO sent its notice of intent to stop work on Monday, August 11, 2008, noting that if APCO
5 was not paid by August 21, 2008, APCO would stop work on the Project.

6 33. After receipt of APCO's written notice of intent to stop work for non-payment,
7 Gemstone sent a letter on Friday, August 15, 2008, claiming that APCO was in breach of the
8 contract and that Gemstone would terminate the Agreement for cause if the alleged breaches
9 were not cured by Sunday, August 17, 2008 (the "Termination Letter").

10 34. The Termination Letter actually set out what Gemstone stated were "Immediate
11 Termination Breaches" and the "Curable Breaches."

12 35. As part of the "Immediate Termination Breaches," Gemstone included several
13 items of work that had been completed by APCO months before, as Gemstone's grounds for
14 termination of the Agreement. More specifically, Gemstone claimed APCO to be in breach for
15 failure to supply rebar and concrete workers for concrete work. APCO and its subcontractors
16 completed this work months before the Gemstone's notice.

17 36. APCO, through its counsel, responded to each of the alleged grounds for
18 termination on August 15, 2008, the same day that APCO received the Termination Letter, and
19 noted that APCO would continue to work on the Project.

20 37. Also on August 15, 2008, despite the cure period still being in effect, Gemstone
21 improperly contacted several of APCO Subcontractors for the Project, notifying them that
22 Gemstone was terminating its Agreement with APCO as of Monday, August 18, 2008, and that
23 Gemstone already had a replacement general contractor in place.

24 38. On Monday, August 18, 2008, while at the Project site, Gemstone's CEO, Alex
25 Edelstein, asked the APCO site personnel why they were still on the Project since they had
26 been terminated.

27 39. As a result of these statements, APCO asked for written confirmation of
28 Gemstone's position, and noted that APCO intended to continue to work on the Project until

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1 Gemstone no longer allowed APCO on the Project site, or until the deadline for APCO's stop
2 work notice had run.

3 40. Ultimately, APCO was not paid for the June Application and stopped work on
4 the Project on August 21, 2008, and provided Gemstone with written notice of APCO's intent
5 to terminate the Agreement on September 5, 2008.

6 41. Gemstone, without valid cause or reason, informed APCO that it was
7 proceeding with its improper termination and ordered APCO off of the Project by Saturday,
8 August 23, 2008.

9 42. Since payment for the June Application was not made in full by Gemstone, the
10 Agreement terminated pursuant to APCO's notice of termination on September 5, 2008,
11 pursuant to NRS 624.610.

12 43. After improperly removing APCO from the Project, Gemstone agreed to issue
13 joint checks to some of the subcontractors in an effort to induce the subcontractors to return to
14 work on the Project for the replacement General Contractor.

15 44. Gemstone has further notified APCO of Gemstone's intent to withhold any
16 further payment to APCO.

17 **FIRST CAUSE OF ACTION**

18 **(Breach of Contract - Gemstone)**

19 45. APCO repeats and realleges each and every allegation contained in paragraphs 1
20 through 44 as though fully set forth herein.

21 46. There was a valid and enforceable contract between APCO and Gemstone.

22 47. APCO complied with the material terms of the Agreement.

23 48. Gemstone materially breached the Agreement by, among other things:

- 24 a. Failing to make payments due to APCO;
- 25 b. Interfering with APCO's relationships with its subcontractors;
- 26 c. Refusing to review, negotiate or consider change order requests in good
- 27 faith;
- 28 d. Failing to timely provide fully approved construction documents;

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1 e. Removing APCO from the Project without valid or appropriate grounds;
2 and

3 f. Otherwise breaching the terms of the Agreement.

4 49. As a result of Gemstone's material breach of the Agreement, APCO has been
5 damaged in an amount in excess of \$10,000.

6 50. APCO is entitled to pre-judgment and post-judgment interest on all amounts
7 found due and owing.

8 51. APCO has been forced to retain the services of an attorney in this matter, and
9 APCO is entitled to an award of attorney's fees and costs incurred.

10 **SECOND CAUSE OF ACTION**

11 **(Breach of the Duty of Good Faith and Fair Dealing - Gemstone)**

12 52. APCO repeats and realleges each and every allegation contained in paragraphs 1
13 through 51 as though fully set forth herein.

14 53. There is an implied duty of good faith and fair dealing implied in all contracts in
15 the state of Nevada.

16 54. Gemstone has breached the duty of good faith and fair dealing by performing in
17 a manner that was unfaithful to the purpose of the contract by among other things:

18 a. Refusing to consider change order requests seeking additional time due
19 to Gemstone's changes of the Project plans and specifications;

20 b. Insisting, that the despite the many changes made by Gemstone, that the
21 original schedule be followed, and by attempting to use the original
22 schedule to justify withholding sums due to APCO;

23 c. Creating a pretext for the alleged termination of APCO for cause after
24 receiving APCO's notice of intent to stop work for non-payment;

25 d. Citing items of work that had been completed for months as a basis for
26 the alleged termination of the contract; and

27 e. Employing another General Contractor and notifying APCO's
28 subcontractors of Gemstone's intent to replace APCO on the same day

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1 that Gemstone provided APCO notice of its right to cure the alleged
2 breaches of the Agreement.

3 55. As a result of Gemstone's breach of the duty of good faith and fair dealing,
4 APCO has been damaged in an amount in excess of \$10,000.

5 56. APCO is entitled to pre-judgment and post-judgment interest on all amounts
6 found due and owing.

7 57. Gemstone's actions were intentional and malicious and evidence a wanton and
8 reckless disregard of APCO's rights and APCO is therefore entitled to punitive damages in
9 excess of \$10,000.

10 58. APCO has been forced to retain the services of an attorney in this matter, and
11 APCO is entitled to an award of attorney's fees and costs incurred.

12 **THIRD CAUSE OF ACTION**

13 **(Violation of NRS 624 Prompt Payment Act - Gemstone)**

14 59. APCO repeats and realleges each and every allegation contained in paragraphs 1
15 through 58 as though fully set forth herein.

16 60. Gemstone violated NRS 624.609 by improperly withholding payments due to
17 APCO.

18 61. Gemstone violated NRS 624.610 by failing to approve or give written notice of
19 the reasons why change order requests were not being approved within 30 days.

20 62. Gemstone further violated NRS 624.610 by failing to pay for change order
21 requests that were deemed approved pursuant to the statute.

22 63. APCO provided Gemstone with written notice of APCO's intent to stop work if
23 payment was not made, and stopped work after payment was not made.

24 64. After stopping work, APCO provided Gemstone with written notice of APCO's
25 intent to terminate the Agreement.

26 65. APCO has now terminated the Agreement in accordance with the terms of NRS
27 624.610.

28 66. APCO is entitled to the remedies set forth in NRS 624.610.

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1 67. APCO is entitled to pre-judgment and post-judgment interest on all amounts
2 found due and owing.

3 68. APCO has been forced to retain the services of an attorney in this matter, and
4 APCO is entitled to an award of attorney's fees and costs incurred.

5 **FOURTH CAUSE OF ACTION**

6 **(Defamation - Gemstone)**

7 69. APCO repeats and realleges each and every allegation contained in paragraphs 1
8 through 68 as though fully set forth herein.

9 70. Gemstone has made false and defamatory statements about APCO, including,
10 but not limited to:

- 11 a. That Gemstone has "recorded Over (sic) 60 distinct contract breaches"
12 by APCO;
13 b. That subcontractor change orders were not being approved because
14 APCO commingled the subcontractor change order with illegitimate
15 change order requests from APCO;
16 c. That APCO owes Gemstone a great deal of damages;
17 d. That APCO "squandered" time on the Project; and
18 e. That APCO was more interested in "CYA activities and unjustified
19 change order requests" than the Project schedule.

20 71. Gemstone published these and other false and defamatory statements to third
21 parties.

22 72. The publication by Gemstone was not privileged.

23 73. Gemstone knew, or should have known, that the statements were false and
24 defamatory.

25 74. The statements by Gemstone would tend to injure APCO in its trade, business
26 and/or profession, and therefore are defamation *per se*.

27 75. As a result of Gemstone's defamatory statements, APCO has been damaged in
28 an amount to be determined at trial, which sum is in excess of \$10,000.00.

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1 76. Gemstone's actions were intentional and malicious and evidence a wanton and
2 reckless disregard of APCO, and APCO is therefore entitled to punitive damages in excess of
3 \$10,000.

4 77. APCO has been forced to retain the services of an attorney in this matter, and
5 APCO is entitled to an award of attorney's fees and costs incurred.

6 **FIFTH CAUSE OF ACTION**

7 **(Declaratory Relief - Gemstone)**

8 78. APCO repeats and realleges each and every allegation contained in paragraphs 1
9 through 77 as though fully set forth herein.

10 79. There exists a justiciable controversy between APCO and Gemstone as to the
11 terms of the Agreement, the effect of Gemstone's purported termination of the Agreement,
12 APCO's termination of the Agreement, and the legal rights and remedies of the parties.

13 80. The interests of APCO and Gemstone are adverse.

14 81. APCO has a legally protectible interest in the controversy between itself and
15 Gemstone.

16 82. The issues are ripe for judicial determination.

17 83. APCO has been forced to retain the services of an attorney in this matter, and
18 APCO is entitled to an award of attorney's fees and costs incurred.

19 **SIXTH CAUSE OF ACTION**

20 **(Unjust Enrichment against Gemstone and SFC)**

21 84. APCO repeats and realleges each and every allegation contained in paragraphs 1
22 through 83 as though fully set forth herein.

23 85. APCO furnished work on the Project for the benefit of Gemstone, Scott
24 Financial Corporation ("SFC"), the owners, reputed owners or those parties that may have an
25 interest in the Property at the specific instance and request of Gemstone.

26 86. Gemstone, SFC, owners, reputed owners and those parties that may have an
27 interest in the Property accepted, used and enjoyed the benefit of the work that APCO provided
28 on the Project.

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1 87. Gemstone, SFC, owners, reputed owners and those parties that may have an
2 interest in the Property knew, or should have known, that APCO expected to be paid for the
3 work that APCO furnished on the Project.

4 88. APCO has demanded that Gemstone pay the sums outstanding for the Work
5 furnished by APCO on the Project through the date of termination in the total sum of
6 \$20,782,659.95.

7 89. To date, Gemstone, owners, reputed owners and those parties that may have an
8 interest in the Property, and each of them, have failed, neglected and refused to pay said sums
9 to the detriment of APCO.

10 90. Gemstone, SFC, owners, reputed owners and those parties that may have an
11 interest in the Property have been unjustly enriched to the detriment of APCO.

12 91. It has been necessary for APCO to engage the services of an attorney, and
13 APCO is entitled to reasonable attorneys' fees and costs as damages.

14 **SEVENTH CAUSE OF ACTION**

15 **(Monies Due and Owing Against - Gemstone)**

16 92. APCO repeats and realleges each and every allegation contained in paragraphs 1
17 through 91 as though fully set forth herein.

18 93. Up to the date of termination by APCO for Gemstone's failure to pay, APCO
19 has performed all terms and conditions of the agreement executed between the parties and has
20 not been paid for all sums justly due and owing.

21 94. The monies due and owing to APCO by Gemstone are in excess of \$10,000.00
22 according to proof at trial.

23 95. It has been necessary for APCO to engage the services of an attorney and APCO
24 is entitled to reasonable attorneys' fees and costs as damages.

25 **EIGHTH CAUSE OF ACTION**

26 **(Interference with Contractual Relations against - Gemstone)**

27 96. APCO repeats and realleges each and every allegation contained in paragraphs 1
28 through 95 as though fully set forth herein.

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1 97. There exists a valid contract between APCO and its subcontractors for the work
2 on the Project.

3 98. Gemstone knew of the contracts between APCO and subcontractors.

4 99. Gemstone committed intentional acts intended or designed to disrupt or interfere
5 with the contractual relationship that existed between APCO and its subcontractors.

6 100. Gemstone caused substantial interference and delay in APCO's ability to
7 perform under the contacts between APCO and its subcontractors.

8 101. There was an actual disruption of the contracts.

9 102. As a result of Gemstone's interference with APCO's contractual relations with
10 its subcontractors and disruption of APCO's ability to perform thereunder, APCO has suffered
11 substantial damages, in an amount in excess of \$10,000.00.

12 103. Gemstone's actions were intentional and malicious and evidence a wanton and
13 reckless disregard of APCO and APCO is therefore entitled to exemplary and/or punitive
14 damages in excess of \$10,000.

15 104. It has been necessary for APCO to engage the services of an attorney and APCO
16 is entitled to reasonable attorneys' fees and costs as damages.

17 **NINTH CAUSE OF ACTION**

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

19 105. APCO repeats and realleges each and every allegation contained in paragraphs 1
20 through 104 as though fully set forth herein.

21 106. Gemstone approached APCO to be the general contractor on the Project.

22 107. The original contract price for the work on the Project to be performed by
23 APCO and its subcontractor was the sum of \$153,472,300.00.

24 108. Prior to the execution of the agreement, Gemstone and SFC, through their
25 agents, made certain representations that were material and induced APCO to execute the
26 agreement.

27

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1 109. More specifically, Gemstone and SFC represented to APCO that there was
2 sufficient funding to pay for all the work to be performed by APCO and its subcontractors to
3 complete the Project on the Property.

4 110. Gemstone and SFC further represented that they had the ability to pay for all the
5 work performed by APCO and its subcontractors on the Project and that funding for the Project
6 was in place.

7 111. Gemstone and SFC knew or should have known that the conditions for financing
8 were not properly met and the representations made by Gemstone and SFC to APCO were false
9 and Gemstone and SFC knew them to be false when they were made.

10 112. In reliance upon those representations, APCO entered into a contract for
11 construction with Gemstone.

12 113. APCO would not have entered into the agreement had APCO known that those
13 representations were false and untrue.

14 114. As a result of those false representations, which caused and induced APCO to
15 enter into the agreement with Gemstone, APCO has been damaged in excess of \$10,000.00.

16 115. Gemstone and SFC misrepresentations warrant the imposition of exemplary
17 and/or punitive damages in excess of \$10,000.00.

18 116. It has been necessary for APCO to engage the services of an attorney and APCO
19 is entitled to reasonable attorneys' fees and costs as damages.

20 **TENTH CAUSE OF ACTION**

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

23 117. APCO repeats and realleges each and every allegation contained in paragraphs 1
24 through 116 as though fully set forth herein.

25 118. Gemstone and SFC were negligent in their representations as set forth in
26 paragraphs 105 through 116, above.

27 119. As a result of Gemstone and SFC's negligent representations, APCO executed
28 the agreement.

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120. As a direct, proximate and foreseeable result of APCO's reliance upon Gemstone and SFC negligent representations, APCO has been damaged in an amount in excess of \$10,000.00.

121. It has been necessary for APCO to engage the services of an attorney and APCO is entitled to reasonable attorneys' fees and costs as damages.

ELEVENTH CAUSE OF ACTION

(Priority over Deeds of Trust)

122. APCO repeats and realleges each and every allegation contained in paragraphs 1 through 121 as though fully set forth herein.

123. Upon information and belief, Gemstone Apache, LLC was the Trustor on the Deeds of Trust recorded on July 5, 2006 in Book 20060705 as Instrument Nos. 04264, 04265 and 04266, in the office of the County Recorder for Clark County, Nevada, as amended ("Mezzanine Deed of Trust").

124. Upon information and belief, First American Title Insurance Company ("First American") is the trustee of the Deeds of Trust recorded on July 5, 2006 in Book 20060705 as Instrument Nos. 04264, 04265 and 04266, in the office of the County Recorder for Clark County, Nevada, as amended, on February 7, 2008 as Instruments Nos. 01484 and 01485 and the Second Amendment to Third Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing Line of Credit, recorded on September 9, 2008 against the Property, in Book 20080909 as Instrument No. 03943 of the Official Records of Clark County Nevada.

125. Upon information and belief, Gemstone acquired the Property from Gemstone Apache, LLC on or around February 7, 2007 and assumed the Mezzanine Deeds of Trust, which have been amended to secure payment of the restructured mezzanine note.

126. Upon information and belief, Gemstone is the Trustor on the Senior Debt Deed of Trust, recorded on February 7, 2008 against the Property, in Book No. 20080207 as Instruments No. 01482 ("Construction Deed of Trust") as well as the Mezzanine Deed of Trust, as amended on February 7, 2008 by Instruments Nos. 01484 and 01485 and the Second Amendment to Third Deed of Trust and Security Agreement with Assignment of Rents and

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1 Fixture Filing Line of Credit, recorded on September 9, 2008 against the Property, in Book
2 20080909 as Instrument No. 03943 of the Official Records of Clark County Nevada.

3 127. Upon information and belief, Commonwealth Land Title Insurance Company
4 ("Land Title") is the trustee of the Construction Deed of Trust recorded on the Property on
5 February 7, 2008 the Property, in Book No. 20080207 as Instrument No. 01482.

6 128. Upon information and belief, SFC is the beneficiary on the Mezzanine Deed of
7 Trust, as amended, and the Construction Deed of Trust.

8 129. SFC subordinated the Mezzanine Deeds of Trust to the Construction Deed of
9 Trust per the Mezzanine Deeds of Trust Subordination Agreement which SFC signed and
10 recorded on February 7, 2008 in Book No. 20080207 as Instrument No. 001486 of the Official
11 Records of Clark County Nevada.

12 130. The work of improvement to the Property commenced prior to the recording of
13 the Construction Deed of Trust, which is the senior deed of trust on the Property.

14 131. APCO's claim is superior to the claims against the Property of Gemstone, SFC,
15 and other Defendants.

16 132. It has been necessary for APCO to engage the services of an attorney and APCO
17 is entitled to reasonable attorneys' fees and costs as damages.

18 TWELFTH CAUSE OF ACTION

19 (Indemnification)

20 133. APCO repeats and realleges each and every allegation contained in paragraphs 1
21 through 132 as though fully set forth herein.

22 134. The construction work performed by APCO's subcontractors was performed on
23 the Property being developed by Gemstone.

24 135. Pursuant to the agreement between APCO and Gemstone, Gemstone agreed to
25 pay for all labor and materials performed by APCO's subcontractors on the Property.

26 136. Gemstone obtained any benefit that would have been conferred by the
27 construction work performed by APCO's subcontractor on the Property.

28

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1 137. Gemstone should indemnify APCO for any and all losses, damages or expenses
2 APCO sustains as a result of any Amended Complaint or action that is brought and filed against
3 APCO by any of its subcontractors for non-payment or otherwise for work performed on the
4 Project and for any monies that APCO may be forced to otherwise pay as a result of any such
5 actions, including, but not limited, any judgment award and the attorney's fees and costs
6 incurred by APCO in defending the action filed by any such subcontractor.

7 138. It has been necessary for APCO to engage the services of an attorney and APCO
8 is entitled to reasonable attorneys' fees and costs as damages.

9 WHEREFORE, APCO prays for the following relief:

- 10 1. That APCO be awarded general and consequential damages in excess of
11 \$10,000;
12 2. That APCO be awarded special damages in excess of \$10,000;
13 3. That APCO be awarded punitive or exemplary damages in excess of \$10,000;
14 4. That APCO be awarded pre-judgment on all amounts found due and owing;
15 5. For an award of reasonable attorneys fees;
16 6. That the Court declare the rank and priority of all lien claims and secured
17 claims, including those of SFC, and that APCO's Lien be ascertained and adjudged as a valid
18 lien having priority over the interests and deeds of trust, including those of SFC and Plaintiffs;
19 7. That APCO be awarded post-judgment interest on all amounts; and
20 8. For such other and further relief as the Court deems just and proper.

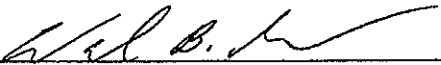
21 DATED this 25 day of January 2010.

22

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23

24

By: 

25

GWEN RUTAR MULLINS, ESQ.

26

Nevada Bar No. 3146

27

WADE B. GOCHNOUR, ESQ.

28

Nevada Bar No. 6314

3800 Howard Hughes Pkwy., Suite 1400

Las Vegas, Nevada 89169

Attorneys for APCO Construction

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EXHIBIT 1

Condominium units identified as APN 163-32-112-001 through 163-32-112-246, inclusive are further broken down per separate buildings as follows:

Building 2

9275 W. Russell Road, Las Vegas Nevada consisting of the following:

APN: 163-32-112-001 (Unit 101) owned by Gemstone Development West, Inc.
163-32-112-002 (Unit 102) owned by Gemstone Development West, Inc.
163-32-112-003 (Unit 201) owned by Gemstone Development West, Inc.
163-32-112-004 (Unit 301) owned by Gemstone Development West, Inc.
163-32-112-005 (Unit 401) owned by Gemstone Development West, Inc.

Building 3

9205 W. Russell Road, Las Vegas, Nevada consisting of the following:

APN: 163-32-112-006 (Unit 101) owned by Gemstone Development West, Inc.
163-32-112-007 (Unit 102) owned by Gemstone Development West, Inc.
163-32-112-008 (Unit 201) owned by Gemstone Development West, Inc.
163-32-112-009 (Unit 301) owned by Gemstone Development West, Inc.
163-32-112-010 (Unit 401) owned by Gemstone Development West, Inc.

Building 7

9215 W. Russell Road, Las Vegas, Nevada consisting of the following:

APN: 163-32-112-011 (Unit 101) owned by Gemstone Development West, Inc.
163-32-112-012 (Unit 102) owned by Gemstone Development West, Inc.
163-32-112-013 (Unit 103) owned by Gemstone Development West, Inc.
163-32-112-014 (Unit 201) owned by Gemstone Development West, Inc.
163-32-112-015 (Unit 202) owned by Gemstone Development West, Inc.
163-32-112-016 (Unit 203) owned by Gemstone Development West, Inc.
163-32-112-017 (Unit 204) owned by Gemstone Development West, Inc.
163-32-112-018 (Unit 205) owned by Gemstone Development West, Inc.
163-32-112-019 (Unit 206) owned by Gemstone Development West, Inc.
163-32-112-020 (Unit 207) owned by Gemstone Development West, Inc.
163-32-112-021 (Unit 208) owned by Gemstone Development West, Inc.
163-32-112-022 (Unit 209) owned by Gemstone Development West, Inc.
163-32-112-023 (Unit 210) owned by Gemstone Development West, Inc.
163-32-112-024 (Unit 301) owned by Gemstone Development West, Inc.
163-32-112-025 (Unit 302) owned by Gemstone Development West, Inc.
163-32-112-026 (Unit 303) owned by Gemstone Development West, Inc.

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- 1 163-32-112-027 (Unit 304) owned by Gemstone Development West, Inc.
- 2 163-32-112-028 (Unit 305) owned by Gemstone Development West, Inc.
- 3 163-32-112-029 (Unit 306) owned by Gemstone Development West, Inc.
- 4 163-32-112-030 (Unit 307) owned by Gemstone Development West, Inc.
- 5 163-32-112-031 (Unit 308) owned by Gemstone Development West, Inc.
- 6 163-32-112-032 (Unit 309) owned by Gemstone Development West, Inc.
- 7 163-32-112-033 (Unit 310) owned by Gemstone Development West, Inc.
- 8 163-32-112-034 (Unit 401) owned by Gemstone Development West, Inc.
- 9 163-32-112-035 (Unit 402) owned by Gemstone Development West, Inc.
- 10 163-32-112-036 (Unit 403) owned by Gemstone Development West, Inc.
- 11 163-32-112-037 (Unit 404) owned by Gemstone Development West, Inc.
- 12 163-32-112-038 (Unit 405) owned by Gemstone Development West, Inc.
- 13 163-32-112-039 (Unit 406) owned by Gemstone Development West, Inc.
- 14 163-32-112-040 (Unit 407) owned by Gemstone Development West, Inc.
- 15 163-32-112-041 (Unit 408) owned by Gemstone Development West, Inc.
- 16 163-32-112-042 (Unit 409) owned by Gemstone Development West, Inc.
- 17 163-32-112-043 (Unit 410) owned by Gemstone Development West, Inc.
- 18 163-32-112-044 (Unit 501) owned by Gemstone Development West, Inc.
- 19 163-32-112-045 (Unit 502) owned by Gemstone Development West, Inc.
- 20 163-32-112-046 (Unit 503) owned by Gemstone Development West, Inc.
- 21 163-32-112-047 (Unit 504) owned by Gemstone Development West, Inc.
- 22 163-32-112-048 (Unit 505) owned by Gemstone Development West, Inc.
- 23 163-32-112-049 (Unit 506) owned by Gemstone Development West, Inc.
- 24 163-32-112-050 (Unit 507) owned by Gemstone Development West, Inc.
- 25 163-32-112-051 (Unit 508) owned by Gemstone Development West, Inc.
- 26 163-32-112-052 (Unit 509) owned by Gemstone Development West, Inc.
- 27 163-32-112-053 (Unit 510) owned by Gemstone Development West, Inc.
- 28 163-32-112-054 (Unit 601) owned by Gemstone Development West, Inc.
- 163-32-112-055 (Unit 602) owned by Gemstone Development West, Inc.
- 163-32-112-056 (Unit 603) owned by Gemstone Development West, Inc.
- 163-32-112-057 (Unit 604) owned by Gemstone Development West, Inc.
- 163-32-112-058 (Unit 605) owned by Gemstone Development West, Inc.
- 163-32-112-059 (Unit 606) owned by Gemstone Development West, Inc.
- 163-32-112-060 (Unit 607) owned by Gemstone Development West, Inc.
- 163-32-112-061 (Unit 608) owned by Gemstone Development West, Inc.
- 163-32-112-062 (Unit 609) owned by Gemstone Development West, Inc.
- 163-32-112-063 (Unit 610) owned by Gemstone Development West, Inc.
- 163-32-112-064 (Unit 701) owned by Gemstone Development West, Inc.
- 163-32-112-065 (Unit 702) owned by Gemstone Development West, Inc.
- 163-32-112-066 (Unit 703) owned by Gemstone Development West, Inc.
- 163-32-112-067 (Unit 704) owned by Gemstone Development West, Inc.
- 163-32-112-068 (Unit 705) owned by Gemstone Development West, Inc.
- 163-32-112-069 (Unit 706) owned by Gemstone Development West, Inc.
- 163-32-112-070 (Unit 707) owned by Gemstone Development West, Inc.
- 163-32-112-071 (Unit 708) owned by Gemstone Development West, Inc.
- 163-32-112-072 (Unit 709) owned by Gemstone Development West, Inc.

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- 1 163-32-112-073 (Unit 710) owned by Gemstone Development West, Inc.
- 2 163-32-112-074 (Unit 801) owned by Gemstone Development West, Inc.
- 3 163-32-112-075 (Unit 802) owned by Gemstone Development West, Inc.
- 4 163-32-112-076 (Unit 803) owned by Gemstone Development West, Inc.
- 5 163-32-112-077 (Unit 804) owned by Gemstone Development West, Inc.
- 6 163-32-112-078 (Unit 805) owned by Gemstone Development West, Inc.
- 7 163-32-112-079 (Unit 806) owned by Gemstone Development West, Inc.
- 8 163-32-112-080 (Unit 807) owned by Gemstone Development West, Inc.
- 9 163-32-112-081 (Unit 808) owned by Gemstone Development West, Inc.
- 10 163-32-112-082 (Unit 809) owned by Gemstone Development West, Inc.
- 11 163-32-112-083 (Unit 810) owned by Gemstone Development West, Inc.
- 12 163-32-112-084 (Unit 902) owned by Gemstone Development West, Inc.
- 13 163-32-112-085 (Unit 903) owned by Gemstone Development West, Inc.
- 14 163-32-112-086 (Unit 904) owned by Gemstone Development West, Inc.

Building 8

9265 W. Russell Road, Las Vegas, Nevada consisting of the following:

- 15 APN: 163-32-112-087 (Unit 101) owned by Gemstone Development West, Inc.
- 16 163-32-112-088 (Unit 102) owned by Gemstone Development West, Inc.
- 17 163-32-112-089 (Unit 103) owned by Gemstone Development West, Inc.
- 18 163-32-112-090 (Unit 104) owned by Gemstone Development West, Inc.
- 19 163-32-112-091 (Unit 105) owned by Gemstone Development West, Inc.
- 20 163-32-112-092 (Unit 106) owned by Gemstone Development West, Inc.
- 21 163-32-112-093 (Unit 107) owned by Gemstone Development West, Inc.
- 22 163-32-112-094 (Unit 108) owned by Gemstone Development West, Inc.
- 23 163-32-112-095 (Unit 109) owned by Gemstone Development West, Inc.
- 24 163-32-112-096 (Unit 110) owned by Gemstone Development West, Inc.
- 25 163-32-112-097 (Unit 111) owned by Gemstone Development West, Inc.
- 26 163-32-112-098 (Unit 112) owned by Gemstone Development West, Inc.
- 27 163-32-112-099 (Unit 113) owned by Gemstone Development West, Inc.
- 28 163-32-112-100 (Unit 114) owned by Gemstone Development West, Inc.
- 163-32-112-101 (Unit 115) owned by Gemstone Development West, Inc.
- 163-32-112-102 (Unit 116) owned by Gemstone Development West, Inc.
- 163-32-112-103 (Unit 117) owned by Gemstone Development West, Inc.
- 163-32-112-104 (Unit 118) owned by Gemstone Development West, Inc.
- 163-32-112-105 (Unit 119) owned by Gemstone Development West, Inc.
- 163-32-112-106 (Unit 120) owned by Gemstone Development West, Inc.
- 163-32-112-107 (Unit 201) owned by Gemstone Development West, Inc.
- 163-32-112-108 (Unit 202) owned by Gemstone Development West, Inc.
- 163-32-112-109 (Unit 203) owned by Gemstone Development West, Inc.
- 163-32-112-110 (Unit 204) owned by Gemstone Development West, Inc.
- 163-32-112-111 (Unit 205) owned by Gemstone Development West, Inc.
- 163-32-112-112 (Unit 206) owned by Gemstone Development West, Inc.

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- 1 163-32-112-113 (Unit 207) owned by Gemstone Development West, Inc.
- 2 163-32-112-114 (Unit 208) owned by Gemstone Development West, Inc.
- 3 163-32-112-115 (Unit 209) owned by Gemstone Development West, Inc.
- 4 163-32-112-116 (Unit 210) owned by Gemstone Development West, Inc.
- 5 163-32-112-117 (Unit 211) owned by Gemstone Development West, Inc.
- 6 163-32-112-118 (Unit 212) owned by Gemstone Development West, Inc.
- 7 163-32-112-119 (Unit 213) owned by Gemstone Development West, Inc.
- 8 163-32-112-120 (Unit 214) owned by Gemstone Development West, Inc.
- 9 163-32-112-121 (Unit 215) owned by Gemstone Development West, Inc.
- 10 163-32-112-122 (Unit 216) owned by Gemstone Development West, Inc.
- 11 163-32-112-123 (Unit 217) owned by Gemstone Development West, Inc.
- 12 163-32-112-124 (Unit 218) owned by Gemstone Development West, Inc.
- 13 163-32-112-125 (Unit 219) owned by Gemstone Development West, Inc.
- 14 163-32-112-126 (Unit 220) owned by Gemstone Development West, Inc.
- 15 163-32-112-127 (Unit 301) owned by Gemstone Development West, Inc.
- 16 163-32-112-128 (Unit 302) owned by Gemstone Development West, Inc.
- 17 163-32-112-129 (Unit 303) owned by Gemstone Development West, Inc.
- 18 163-32-112-130 (Unit 304) owned by Gemstone Development West, Inc.
- 19 163-32-112-131 (Unit 305) owned by Gemstone Development West, Inc.
- 20 163-32-112-132 (Unit 306) owned by Gemstone Development West, Inc.
- 21 163-32-112-133 (Unit 307) owned by Gemstone Development West, Inc.
- 22 163-32-112-134 (Unit 308) owned by Gemstone Development West, Inc.
- 23 163-32-112-135 (Unit 309) owned by Gemstone Development West, Inc.
- 24 163-32-112-136 (Unit 310) owned by Gemstone Development West, Inc.
- 25 163-32-112-137 (Unit 311) owned by Gemstone Development West, Inc.
- 26 163-32-112-138 (Unit 312) owned by Gemstone Development West, Inc.
- 27 163-32-112-139 (Unit 313) owned by Gemstone Development West, Inc.
- 28 163-32-112-140 (Unit 314) owned by Gemstone Development West, Inc.
- 163-32-112-141 (Unit 315) owned by Gemstone Development West, Inc.
- 163-32-112-142 (Unit 316) owned by Gemstone Development West, Inc.
- 163-32-112-143 (Unit 317) owned by Gemstone Development West, Inc.
- 163-32-112-144 (Unit 318) owned by Gemstone Development West, Inc.
- 163-32-112-145 (Unit 319) owned by Gemstone Development West, Inc.
- 163-32-112-146 (Unit 320) owned by Gemstone Development West, Inc.
- 163-32-112-147 (Unit 401) owned by Gemstone Development West, Inc.
- 163-32-112-148 (Unit 402) owned by Gemstone Development West, Inc.
- 163-32-112-149 (Unit 403) owned by Gemstone Development West, Inc.
- 163-32-112-150 (Unit 404) owned by Gemstone Development West, Inc.
- 163-32-112-151 (Unit 405) owned by Gemstone Development West, Inc.
- 163-32-112-152 (Unit 406) owned by Gemstone Development West, Inc.
- 163-32-112-153 (Unit 407) owned by Gemstone Development West, Inc.
- 163-32-112-154 (Unit 408) owned by Gemstone Development West, Inc.
- 163-32-112-155 (Unit 409) owned by Gemstone Development West, Inc.
- 163-32-112-156 (Unit 410) owned by Gemstone Development West, Inc.
- 163-32-112-157 (Unit 411) owned by Gemstone Development West, Inc.
- 163-32-112-158 (Unit 412) owned by Gemstone Development West, Inc.

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- 1 163-32-112-159 (Unit 413) owned by Gemstone Development West, Inc.
- 2 163-32-112-160 (Unit 414) owned by Gemstone Development West, Inc.
- 3 163-32-112-161 (Unit 415) owned by Gemstone Development West, Inc.
- 4 163-32-112-162 (Unit 416) owned by Gemstone Development West, Inc.
- 5 163-32-112-163 (Unit 417) owned by Gemstone Development West, Inc.
- 6 163-32-112-164 (Unit 418) owned by Gemstone Development West, Inc.
- 7 163-32-112-165 (Unit 419) owned by Gemstone Development West, Inc.
- 8 163-32-112-166 (Unit 420) owned by Gemstone Development West, Inc.

9 **Building 9**

10 9255 W. Russell Road, Las Vegas, Nevada consisting of the following:

- 11 APN: 163-32-112-167 (Unit 101) owned by Gemstone Development West, Inc.
- 12 163-32-112-168 (Unit 102) owned by Gemstone Development West, Inc.
 - 13 163-32-112-169 (Unit 103) owned by Gemstone Development West, Inc.
 - 14 163-32-112-170 (Unit 104) owned by Gemstone Development West, Inc.
 - 15 163-32-112-171 (Unit 105) owned by Gemstone Development West, Inc.
 - 16 163-32-112-172 (Unit 106) owned by Gemstone Development West, Inc.
 - 17 163-32-112-173 (Unit 107) owned by Gemstone Development West, Inc.
 - 18 163-32-112-174 (Unit 108) owned by Gemstone Development West, Inc.
 - 19 163-32-112-175 (Unit 109) owned by Gemstone Development West, Inc.
 - 20 163-32-112-176 (Unit 110) owned by Gemstone Development West, Inc.
 - 21 163-32-112-177 (Unit 111) owned by Gemstone Development West, Inc.
 - 22 163-32-112-178 (Unit 112) owned by Gemstone Development West, Inc.
 - 23 163-32-112-179 (Unit 113) owned by Gemstone Development West, Inc.
 - 24 163-32-112-180 (Unit 114) owned by Gemstone Development West, Inc.
 - 25 163-32-112-181 (Unit 115) owned by Gemstone Development West, Inc.
 - 26 163-32-112-182 (Unit 116) owned by Gemstone Development West, Inc.
 - 27 163-32-112-183 (Unit 117) owned by Gemstone Development West, Inc.
 - 28 163-32-112-184 (Unit 118) owned by Gemstone Development West, Inc.
 - 163-32-112-185 (Unit 119) owned by Gemstone Development West, Inc.
 - 163-32-112-186 (Unit 120) owned by Gemstone Development West, Inc.
 - 163-32-112-187 (Unit 201) owned by Gemstone Development West, Inc.
 - 163-32-112-188 (Unit 202) owned by Gemstone Development West, Inc.
 - 163-32-112-189 (Unit 203) owned by Gemstone Development West, Inc.
 - 163-32-112-190 (Unit 204) owned by Gemstone Development West, Inc.
 - 163-32-112-191 (Unit 205) owned by Gemstone Development West, Inc.
 - 163-32-112-192 (Unit 206) owned by Gemstone Development West, Inc.
 - 163-32-112-193 (Unit 207) owned by Gemstone Development West, Inc.
 - 163-32-112-194 (Unit 208) owned by Gemstone Development West, Inc.
 - 163-32-112-195 (Unit 209) owned by Gemstone Development West, Inc.
 - 163-32-112-196 (Unit 210) owned by Gemstone Development West, Inc.
 - 163-32-112-197 (Unit 211) owned by Gemstone Development West, Inc.
 - 163-32-112-198 (Unit 212) owned by Gemstone Development West, Inc.

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- 1 163-32-112-199 (Unit 213) owned by Gemstone Development West, Inc.
- 2 163-32-112-200 (Unit 214) owned by Gemstone Development West, Inc.
- 3 163-32-112-201 (Unit 215) owned by Gemstone Development West, Inc.
- 4 163-32-112-202 (Unit 216) owned by Gemstone Development West, Inc.
- 5 163-32-112-203 (Unit 217) owned by Gemstone Development West, Inc.
- 6 163-32-112-204 (Unit 218) owned by Gemstone Development West, Inc.
- 7 163-32-112-205 (Unit 219) owned by Gemstone Development West, Inc.
- 8 163-32-112-206 (Unit 220) owned by Gemstone Development West, Inc.
- 9 163-32-112-207 (Unit 301) owned by Gemstone Development West, Inc.
- 10 163-32-112-208 (Unit 302) owned by Gemstone Development West, Inc.
- 11 163-32-112-209 (Unit 303) owned by Gemstone Development West, Inc.
- 12 163-32-112-210 (Unit 304) owned by Gemstone Development West, Inc.
- 13 163-32-112-211 (Unit 305) owned by Gemstone Development West, Inc.
- 14 163-32-112-212 (Unit 306) owned by Gemstone Development West, Inc.
- 15 163-32-112-213 (Unit 307) owned by Gemstone Development West, Inc.
- 16 163-32-112-214 (Unit 308) owned by Gemstone Development West, Inc.
- 17 163-32-112-215 (Unit 309) owned by Gemstone Development West, Inc.
- 18 163-32-112-216 (Unit 310) owned by Gemstone Development West, Inc.
- 19 163-32-112-217 (Unit 311) owned by Gemstone Development West, Inc.
- 20 163-32-112-218 (Unit 312) owned by Gemstone Development West, Inc.
- 21 163-32-112-219 (Unit 313) owned by Gemstone Development West, Inc.
- 22 163-32-112-220 (Unit 314) owned by Gemstone Development West, Inc.
- 23 163-32-112-221 (Unit 315) owned by Gemstone Development West, Inc.
- 24 163-32-112-222 (Unit 316) owned by Gemstone Development West, Inc.
- 25 163-32-112-223 (Unit 317) owned by Gemstone Development West, Inc.
- 26 163-32-112-224 (Unit 318) owned by Gemstone Development West, Inc.
- 27 163-32-112-225 (Unit 319) owned by Gemstone Development West, Inc.
- 28 163-32-112-226 (Unit 320) owned by Gemstone Development West, Inc.
- 163-32-112-227 (Unit 401) owned by Gemstone Development West, Inc.
- 163-32-112-228 (Unit 402) owned by Gemstone Development West, Inc.
- 163-32-112-229 (Unit 403) owned by Gemstone Development West, Inc.
- 163-32-112-230 (Unit 404) owned by Gemstone Development West, Inc.
- 163-32-112-231 (Unit 405) owned by Gemstone Development West, Inc.
- 163-32-112-232 (Unit 406) owned by Gemstone Development West, Inc.
- 163-32-112-233 (Unit 407) owned by Gemstone Development West, Inc.
- 163-32-112-234 (Unit 408) owned by Gemstone Development West, Inc.
- 163-32-112-235 (Unit 409) owned by Gemstone Development West, Inc.
- 163-32-112-236 (Unit 410) owned by Gemstone Development West, Inc.
- 163-32-112-237 (Unit 411) owned by Gemstone Development West, Inc.
- 163-32-112-238 (Unit 412) owned by Gemstone Development West, Inc.
- 163-32-112-239 (Unit 413) owned by Gemstone Development West, Inc.
- 163-32-112-240 (Unit 414) owned by Gemstone Development West, Inc.
- 163-32-112-241 (Unit 415) owned by Gemstone Development West, Inc.
- 163-32-112-242 (Unit 416) owned by Gemstone Development West, Inc.
- 163-32-112-243 (Unit 417) owned by Gemstone Development West, Inc.
- 163-32-112-244 (Unit 418) owned by Gemstone Development West, Inc.

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- 1 163-32-112-245 (Unit 419) owned by Gemstone Development West, Inc.
- 2 163-32-112-246 (Unit 420) owned by Gemstone Development West, Inc.
- 3
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CERTIFICATE OF SERVICE

I do hereby certify that on the 25th day of January 2010, I served a copy of the foregoing
**APCO CONSTRUCTION'S ANSWER TO PLAINTIFF'S FIRST AMENDED
COMPLAINT and PLAINTIFFS' MORE DEFINITE STATEMENT OF FRAUD
CLAIMS; and CROSS-CLAIM,** by the method stated to the following:

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Financial Corporation*
**Email to m.jones@kempjones.com,
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Gemstone Development West., Inc.
c/o Alexander Edelstein, registered Agent
9121 W. Russell Road, Ste. 117
Las Vegas, Nevada 89148
Prepaid 1st class mail


An employee of HOWARD & HOWARD

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CLERK OF THE COURT

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

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

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

13 Plaintiffs,

14 v.

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

21 Defendants.

22 AND ALL RELATED CLAIMS.
23

Case No.: A579963
Dept. No.: XIII

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

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

27 1. With respect to the allegations contained in paragraph 1 of the cross-claim, Scott
28 is without sufficient information to form a belief as to the truth or falsity of said allegations and
therefore denies said allegations.

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1 2. With respect to the allegations contained in paragraph 2 of the cross-claim, 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 3. With respect to the allegations contained in paragraph 3 of the cross-claim, Scott
5 admits said allegations.

6 4. With respect to the allegations contained in paragraph 4 of the cross-claim, 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 5. With respect to the allegations contained in paragraph 5 of the cross-claim, Scott
10 admits said allegations.

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

15 7. With respect to the allegations contained in paragraph 7 of the cross-claim, Scott
16 denies said allegations.

17 8. With respect to the allegations contained in paragraph 8 of the cross-claim, 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 9. With respect to the allegations contained in paragraph 9 of the cross-claim, 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 10. With respect to the allegations contained in paragraph 10 of the cross-claim, 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 11. With respect to the allegations contained in paragraph 11 of the cross-claim, Scott
27 is without sufficient information to form a belief as to the truth or falsity of said allegations and
28 therefore denies said allegations.

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1 12. With respect to the allegations contained in paragraph 12 of the cross-claim, 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 13. With respect to the allegations contained in paragraph 13 of the cross-claim, Scott
5 denies said allegations.

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

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

19 18. With respect to the allegations contained in paragraph 18 of the cross-claim, 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 19. With respect to the allegations contained in paragraph 19 of the cross-claim, 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 20. With respect to the allegations contained in paragraph 20 of the cross-claim, 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 21. With respect to the allegations contained in paragraph 21 of the cross-claim, 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 22. With respect to the allegations contained in paragraph 22 of the cross-claim, 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 23. With respect to the allegations contained in paragraph 23 of the cross-claim, 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 24. With respect to the allegations contained in paragraph 24 of the cross-claim, 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 25. With respect to the allegations contained in paragraph 25 of the cross-claim, Scott
13 admits said allegations.

14 26. With respect to the allegations contained in paragraph 26 of the cross-claim, Scott
15 admits said allegations.

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

19 28. With respect to the allegations contained in paragraph 28 of the cross-claim, 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 29. With respect to the allegations contained in paragraph 29 of the cross-claim, 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 30. With respect to the allegations contained in paragraph 30 of the cross-claim, 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 31. With respect to the allegations contained in paragraph 31 of the cross-claim, 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 32. With respect to the allegations contained in paragraph 32 of the cross-claim, 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 33. With respect to the allegations contained in paragraph 33 of the cross-claim, 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 34. With respect to the allegations contained in paragraph 34 of the cross-claim, Scott
10 admits said allegations.

11 35. With respect to the allegations contained in paragraph 35 of the cross-claim, Scott
12 denies said allegations.

13 36. With respect to the allegations contained in paragraph 36 of the cross-claim, 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 37. With respect to the allegations contained in paragraph 37 of the cross-claim, Scott
17 is without sufficient information to form a belief as to the truth or falsity of said allegations and
18 therefore denies said allegations.

19 38. With respect to the allegations contained in paragraph 38 of the cross-claim, 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 39. With respect to the allegations contained in paragraph 39 of the cross-claim, 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 40. With respect to the allegations contained in paragraph 40 of the cross-claim, 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 41. With respect to the allegations contained in paragraph 41 of the cross-claim, Scott

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1 denies said allegations.

2 42. With respect to the allegations contained in paragraph 42 of the cross-claim, Scott
3 denies said allegations.

4 43. With respect to the allegations contained in paragraph 43 of the cross-claim, 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 44. With respect to the allegations contained in paragraph 44 of the cross-claim, 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 **FIRST CAUSE OF ACTION**

11 **(Breach of Contract - Gemstone)**

12 45. Answering paragraph 45 of the cross-claim, Scott repeats and realleges herein all
13 of its answers set forth above.

14 46. With respect to the allegations contained in paragraph 46 of the cross-claim, Scott
15 admits said allegations.

16 47. With respect to the allegations contained in paragraph 47 of the cross-claim, Scott
17 denies said allegations.

18 48. With respect to the allegations contained in paragraph 48 of the cross-claim, Scott
19 denies said allegations.

20 49. With respect to the allegations contained in paragraph 49 of the cross-claim, Scott
21 denies said allegations.

22 50. With respect to the allegations contained in paragraph 50 of the cross-claim, Scott
23 denies said allegations.

24 51. With respect to the allegations contained in paragraph 51 of the cross-claim, Scott
25 denies said allegations.

26 **SECOND CAUSE OF ACTION**

27 **(Breach of Duty of Good Faith and Fair Dealing - Gemstone)**

28 52. Answering paragraph 52 of the cross-claim, Scott repeats and realleges herein all

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1 of its answers set forth above.

2 53. With respect to the allegations contained in paragraph 53 of the cross-claim, Scott
3 admits said allegations.

4 54. With respect to the allegations contained in paragraph 54 of the cross-claim, Scott
5 denies said allegations.

6 55. With respect to the allegations contained in paragraph 55 of the cross-claim, Scott
7 denies said allegations.

8 56. With respect to the allegations contained in paragraph 56 of the cross-claim, Scott
9 denies said allegations.

10 57. With respect to the allegations contained in paragraph 57 of the cross-claim, Scott
11 denies said allegations.

12 58. With respect to the allegations contained in paragraph 58 of the cross-claim, Scott
13 denies said allegations.

14 **THIRD CAUSE OF ACTION**

15 **(Violation of NRS 624 Prompt Payment Act - Gemstone)**

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

18 60. With respect to the allegations contained in paragraph 60 of the cross-claim, Scott
19 denies said allegations.

20 61. With respect to the allegations contained in paragraph 61 of the cross-claim, Scott
21 denies said allegations.

22 62. With respect to the allegations contained in paragraph 62 of the cross-claim, Scott
23 denies said allegations.

24 63. With respect to the allegations contained in paragraph 63 of the cross-claim, 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 64. With respect to the allegations contained in paragraph 64 of the cross-claim, 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 65. With respect to the allegations contained in paragraph 65 of the cross-claim, 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 66. With respect to the allegations contained in paragraph 66 of the cross-claim, Scott
6 denies said allegations.

7 67. With respect to the allegations contained in paragraph 67 of the cross-claim, Scott
8 denies said allegations.

9 68. With respect to the allegations contained in paragraph 68 of the cross-claim, Scott
10 denies said allegations.

11 **FOURTH CAUSE OF ACTION**

12 **(Defamation - Gemstone)**

13 69. Answering paragraph 69 of the cross-claim, Scott repeats and realleges herein all
14 of its answers set forth above.

15 70. With respect to the allegations contained in paragraph 70 of the cross-claim, 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 71. With respect to the allegations contained in paragraph 71 of the cross-claim, 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 72. With respect to the allegations contained in paragraph 72 of the cross-claim, 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 73. With respect to the allegations contained in paragraph 73 of the cross-claim, 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 74. With respect to the allegations contained in paragraph 74 of the cross-claim, 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 75. With respect to the allegations contained in paragraph 75 of the cross-claim, Scott
3 denies said allegations.

4 76. With respect to the allegations contained in paragraph 76 of the cross-claim, Scott
5 denies said allegations.

6 77. With respect to the allegations contained in paragraph 77 of the cross-claim, Scott
7 denies said allegations.

8 **FIFTH CAUSE OF ACTION**

9 **(Declaratory Relief - Gemstone)**

10 78. Answering paragraph 78 of the cross-claim, Scott repeats and realleges herein all
11 of its answers set forth above.

12 79. With respect to the allegations contained in paragraph 79 of the cross-claim, 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 80. With respect to the allegations contained in paragraph 80 of the cross-claim, Scott
16 admits said allegations.

17 81. With respect to the allegations contained in paragraph 81 of the cross-claim, 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 82. With respect to the allegations contained in paragraph 82 of the cross-claim, 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 83. With respect to the allegations contained in paragraph 83 of the cross-claim, Scott
24 denies said allegations.

25 **SIXTH CAUSE OF ACTION**

26 **(Unjust Enrichment against Gemstone and SFC)**

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

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1 85. With respect to the allegations contained in paragraph 85 of the cross-claim, 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 86. With respect to the allegations contained in paragraph 86 of the cross-claim, Scott
5 is without sufficient information to form a belief as to the truth or falsity of said allegations and
6 therefore denies said allegations.

7 87. With respect to the allegations contained in paragraph 87 of the cross-claim, 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 88. With respect to the allegations contained in paragraph 88 of the cross-claim, 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 89. With respect to the allegations contained in paragraph 89 of the cross-claim, Scott
14 denies that it has failed, neglected, and refused to pay any sums to APCO. With respect to the
15 balance of the allegations contained in paragraph 89 of the cross-claim, Scott is without
16 sufficient information to form a belief as to the truth or falsity of said allegations and therefore
17 denies said allegations.

18 90. With respect to the allegations contained in paragraph 90 of the cross-claim, Scott
19 denies said allegations.

20 91. With respect to the allegations contained in paragraph 91 of the cross-claim, Scott
21 denies said allegations.

22 **SEVENTH CAUSE OF ACTION**

23 **(Monies Due and Owing - Gemstone)**

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

26 93. With respect to the allegations contained in paragraph 93 of the cross-claim, Scott
27 denies said allegations.

28 94. With respect to the allegations contained in paragraph 94 of the cross-claim, Scott

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1 denies said allegations.

2 95. With respect to the allegations contained in paragraph 95 of the cross-claim, Scott
3 denies said allegations.

4 **EIGHTH CAUSE OF ACTION**

5 **(Interference with Contractual Relations - Gemstone)**

6 96. Answering paragraph 96 of the cross-claim, Scott repeats and realleges herein all
7 of its answers set forth above.

8 97. With respect to the allegations contained in paragraph 97 of the cross-claim, 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 98. With respect to the allegations contained in paragraph 98 of the cross-claim, 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 99. With respect to the allegations contained in paragraph 99 of the cross-claim, Scott
15 denies said allegations.

16 100. With respect to the allegations contained in paragraph 100 of the cross-claim,
17 Scott denies said allegations.

18 101. With respect to the allegations contained in paragraph 101 of the cross-claim,
19 Scott is without sufficient information to form a belief as to the truth or falsity of said allegations
20 and therefore denies said allegations.

21 102. With respect to the allegations contained in paragraph 102 of the cross-claim,
22 Scott denies said allegations.

23 103. With respect to the allegations contained in paragraph 103 of the cross-claim,
24 Scott denies said allegations.

25 104. With respect to the allegations contained in paragraph 104 of the cross-claim,
26 Scott denies said allegations.

27
28 ...

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NINTH CAUSE OF ACTION

(Fraud Against Gemstone and SFC)

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

106. With respect to the allegations contained in paragraph 106 of the cross-claim, Scott denies said allegations.

107. With respect to the allegations contained in paragraph 107 of the cross-claim, Scott admits said allegations.

108. With respect to the allegations contained in paragraph 108 of the cross-claim, Scott denies said allegations.

109. With respect to the allegations contained in paragraph 109 of the cross-claim, Scott denies said allegations.

110. With respect to the allegations contained in paragraph 110 of the cross-claim, Scott denies said allegations.

111. With respect to the allegations contained in paragraph 111 of the cross-claim, Scott denies said allegations.

112. With respect to the allegations contained in paragraph 112 of the cross-claim, Scott denies said allegations.

113. With respect to the allegations contained in paragraph 113 of the cross-claim, Scott denies said allegations.

114. With respect to the allegations contained in paragraph 114 of the cross-claim, Scott denies said allegations.

115. With respect to the allegations contained in paragraph 115 of the cross-claim, Scott denies said allegations.

116. With respect to the allegations contained in paragraph 116 of the cross-claim, Scott denies said allegations.

...

TENTH CAUSE OF ACTION

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

117. Answering paragraph 117 of the cross-claim, Scott repeats and realleges herein all of its answers set forth above.

118. With respect to the allegations contained in paragraph 118 of the cross-claim, Scott denies said allegations.

119. With respect to the allegations contained in paragraph 119 of the cross-claim, Scott denies said allegations.

120. With respect to the allegations contained in paragraph 120 of the cross-claim, Scott denies said allegations.

121. With respect to the allegations contained in paragraph 121 of the cross-claim, Scott denies said allegations.

ELEVENTH CAUSE OF ACTION

(Priority over Deeds of Trust)

122. Answering paragraph 122 of the cross-claim, Scott repeats and realleges herein all of its answers set forth above.

123. With respect to the allegations contained in paragraph 123 of the cross-claim, Scott admits said allegations.

124. With respect to the allegations contained in paragraph 124 of the cross-claim, Scott admits said allegations.

125. With respect to the allegations contained in paragraph 125 of the cross-claim, Scott denies said allegations to the extent that the date should be February 7, 2008. With respect to the balance of the allegations contained in paragraph 125 of the cross-claim, Scott admits said allegations.

126. With respect to the allegations contained in paragraph 126 of the cross-claim, Scott admits said allegations.

127. With respect to the allegations contained in paragraph 127 of the cross-claim, Scott admits said allegations.

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1 128. With respect to the allegations contained in paragraph 128 of the cross-claim,
2 Scott admits said allegations.

3 129. With respect to the allegations contained in paragraph 129 of the cross-claim,
4 Scott admits said allegations.

5 130. With respect to the allegations contained in paragraph 130 of the cross-claim,
6 Scott is without sufficient information to form a belief as to the truth or falsity of said allegations
7 and therefore denies said allegations.

8 131. With respect to the allegations contained in paragraph 131 of the cross-claim,
9 Scott denies said allegations.

10 132. With respect to the allegations contained in paragraph 132 of the cross-claim,
11 Scott denies said allegations.

12 **TWELFTH CAUSE OF ACTION**

13 **(Indemnification)**

14 133. Answering paragraph 133 of the cross-claim, Scott repeats and realleges herein all
15 of its answers set forth above.

16 134. With respect to the allegations contained in paragraph 134 of the cross-claim,
17 Scott admits said allegations.

18 135. With respect to the allegations contained in paragraph 135 of the cross-claim,
19 Scott is without sufficient information to form a belief as to the truth or falsity of said allegations
20 and therefore denies said allegations.

21 136. With respect to the allegations contained in paragraph 136 of the cross-claim,
22 Scott is without sufficient information to form a belief as to the truth or falsity of said allegations
23 and therefore denies said allegations.

24 137. With respect to the allegations contained in paragraph 137 of the cross-claim,
25 Scott denies said allegations.

26 138. With respect to the allegations contained in paragraph 138 of the cross-claim,
27 Scott denies said allegations.

28

AFFIRMATIVE DEFENSES

- 1
- 2 1. APCO Construction has failed to state a claim for which relief may be granted.
- 3 2. APCO Construction has failed to commence this action within the time required by the
- 4 applicable statutes of limitations and APCO Construction's claims are therefore barred.
- 5 3. APCO Construction lacks standing to bring this action.
- 6 4. APCO Construction's claims are barred by the doctrines of laches, waiver and estoppel.
- 7 5. APCO Construction has failed to mitigate its damages, if any, after discovery of the
- 8 alleged injury, if any.
- 9 6. APCO Construction is guilty of unclean hands and therefore is not entitled to any relief
- 10 from Scott.
- 11 7. Any damages which APCO Construction may have sustained were proximately caused
- 12 by the acts of persons other than Scott, and therefore, APCO Construction is not entitled
- 13 to any relief from Scott.
- 14 8. Alternatively, should Scott be found liable, the fault of all parties, joined and nonjoined,
- 15 including that of APCO Construction must be evaluated and liability apportioned among
- 16 all persons and entities appropriate to respective fault.
- 17 9. APCO Construction's recovery, if any, must be offset by any compensation already
- 18 received.
- 19 10. If APCO Construction has incurred any injury or damage, which Scott denies, the risk of
- 20 such injury or damage was not foreseeable.
- 21 11. APCO Construction failed to give requisite notice as required by statute, contract or other
- 22 rule.
- 23 12. By its own actions, APCO Construction has ratified, approved and adopted the actions of
- 24 Scott in connection with the allegations contained in the Counterclaim.
- 25 13. By reason of its own acts, APCO Construction has released and discharged Scott from
- 26 the claims alleged.
- 27 14. APCO Construction has failed to do equity towards Scott and therefore is not entitled to
- 28 any relief.

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- 1 15. APCO Construction's claims are barred by the statute of frauds.
- 2 16. APCO Construction's claims are not well grounded in fact and are not warranted by
- 3 existing law or a good faith argument for the extension or modification of existing law,
- 4 but are initiated only for purposes of harassment, unnecessary delay and the occurrence
- 5 of needless costs of litigation to Scott.
- 6 17. The claims of APCO Construction are barred in whole or in part to the extent that APCO
- 7 Construction has not suffered any injury in fact.
- 8 18. Any damages that APCO Construction alleges to have suffered from the matters alleged
- 9 in the Counterclaim are too remote or speculative to allow recovery.
- 10 19. Any injuries APCO Construction claims to have suffered were not proximately or
- 11 materially caused by Scott's alleged acts, conduct, or omissions, and APCO Construction
- 12 is therefore barred from recovery.
- 13 20. The acts alleged were performed by an employee or representative lacking authority and
- 14 acting outside the scope of his or her employment.
- 15 21. There is no privity of contract nor any other type of privity between APCO Construction
- 16 and Scott.
- 17 22. APCO Construction's claims are barred due to a lack of consideration.
- 18 23. Scott hereby reserves the right to allege additional defenses as they
- 19 may become known, or as they evolve during the litigation, and to amend its Answer
- 20 accordingly.
- 21 WHEREFORE, Scott Financial Corporation and Bradley J. Scott pray for judgment on
- 22 the crossclaim as follows:
- 23 1. That APCO take nothing and that the crossclaim be dismissed with prejudice;
- 24 2. That they be awarded their attorney's fees and costs of suit in defending the
- 25 crossclaim; and
- 26 ...
- 27
- 28 ...

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3. For such other and further relief as this Court may deem just and proper.

DATED this 23rd day of February, 2010.

KEMP, JONES & COULTHARD, LLP

/s/ Matthew S. Carter

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CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of February, 2010, the foregoing **SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S AMENDED ANSWER TO APCO CONSTRUCTION'S CROSS-CLAIM** 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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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. A579963
Electronically Filed
Feb 18 2011 08:25 a.m.
Tracie K. Lindeman

PETITIONERS' APPENDIX
(VOLUME 3 BATES NUMBERS 00500-00753)

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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
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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
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Gary D. Tharaldson's Reply to Bank of Oklahoma N.A.'s Counterclaim (filed 08/31/09)	Vol. 2, Bates No. 00484–00492
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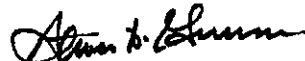
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17 Attorneys for Plaintiff

18 **DISTRICT COURT**
19 **CLARK COUNTY, NEVADA**

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

21 Plaintiffs,

22 vs.

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

Defendants.

AND RELATED COUNTERCLAIMS

CASE NO. A579963
DEPT NO. XIII

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

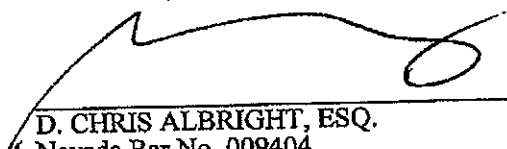
1 **OPPOSITION TO DEFENDANTS SCOTT FINANCIAL CORPORATION AND**
2 **BRADLEY J. SCOTT'S MOTION TO STRIKE JURY DEMAND**

3 Plaintiffs Club Vista Financial Services, L.L.C. ("CVFS"), Tharaldson Motels II, Inc. ("TM2I")
4 and Gary D. Tharaldson ("Tharaldson") respectfully submit that the Motion to Strike Jury Demand of
5 Defendants Scott Financial Corporation and Bradley J. Scott (the "Scott Defendants") should be
6 denied. The Motion is based on jury trial waivers in guaranty instruments signed by TM2I and
7 Tharaldson. CVFS has signed no jury trial waiver and is entitled to a jury trial on all claims.
8 Furthermore, the guaranty instruments Defendants rely on were induced by fraud, breach of fiduciary
9 duty and other misconduct. Therefore the guaranties and the purported jury trial waivers contained
10 in them are void, if so determined by the jury.

11 This Response is supported by the following Memorandum of Points and Authorities.

12 DATED this 8th day of September, 2009.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND FACTUAL BACKGROUND

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 Scott Financial Corporation ("SFC") and Bank of Oklahoma ("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 SFC. Even though called the co-lead lender, SFC did not loan a single dollar to the developer/borrower, but did collect substantial fees. The Scott Defendants induced Plaintiffs Tharaldson and TM2I, with whom they 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 the Scott Defendants and co-lead lender BOK 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 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, misrepresentation and omissions.

Plaintiff Tharaldson is a successful real estate entrepreneur who has had substantial success in the motel and lodging business. Plaintiff CVFS is a Tharaldson owned company that is involved in the business of making real estate development loans. Plaintiff TM2I is a Tharaldson affiliate that is engaged in the business of owning and operating motel and lodging properties.

The Scott Defendants' business relationship with Tharaldson dates back to about 1992. Over the years, a fiduciary relationship of trust and confidence developed under which Brad Scott and Scott Financial Corporation acted as Tharaldson's in-house lending division. The Scott Defendants became intimately familiar with Tharaldson's business, operations and finances, and Tharaldson has relied exclusively on the Scott Defendants to protect Tharaldson's interests, including the interests of CVFS and TM2I, in lending transactions the Scott Defendants have promoted or been involved in.

1 The Scott Defendants initially induced Tharaldson affiliate CVFS to loan some \$56 million of
2 first position loan funds for the Manhattan West real estate development which was being built by an
3 unrelated third party developer. The Scott Defendants, acting with co-lead lender BOK then induced
4 CVFS, Tharaldson and TM2I to enter into a transaction known as the Senior Loan Agreement whereby
5 a consortium of 29 participant lenders (one of whom was CVFS for a \$400,000 participation share)
6 agreed to provide another \$110,000,000 of financing to the Project. Under the Senior Loan
7 transaction:

- 8 A) CVFS agreed to subordinate its first position project funding to the position of
9 the Senior Loan Agreement participants;
- 10 B) \$10 million of CVFS' previously advanced \$56 million was repaid leaving
11 CVFS with an outstanding balance owed of \$46 million which was now in a
12 subordinated position rather than a first lien position;
- 13 C) Tharaldson and TM2I gave guaranties of the \$110,000,000 Senior Loan even
14 though they were not borrowers or affiliated in any way with the borrower on,
15 or developer of, the Project;
- 16 D. CVFS participated as a lender in the Senior Loan in the amount of \$400,000.

17 As detailed at length in the Amended Complaint, Plaintiffs' consent to the Senior Loan
18 transaction was induced by Defendants' wrongful conduct including fraud, misrepresentation, material
19 omission and breach of fiduciary duty. The Senior Loan transaction, including the subordination of
20 CVFS' prior first lender position, and the issuance of the Tharaldson and TM2I guaranties was highly
21 prejudicial to Plaintiffs and conferred unwarranted and undeserved benefits to Defendants. The
22 Second Amended Complaint seeks, *inter alia*, to rescind the Senior Loan transaction and void the
23 Tharaldson and TM2I guaranties on the basis of fraudulent inducement, breach of fiduciary duty and
24 other misconduct. The Second Amended Complaint also seeks damages arising out of those
25 transactions.

26 The fiduciary duty is the highest duty recognized by the law. Because of the long term
27 fiduciary relationship between the Scott Defendants and Plaintiffs, this is not a typical lender borrower
28 case. Here Guarantors Tharaldson and TM2I signed documents based on the recommendation of the

1 Scott Defendants that the documents were fair, appropriate and adequately protected their rights. The
2 Amended Complaint alleges that waiver provisions and other terms in the guaranties were unfair, one-
3 sided and inserted in breach of the Scott Defendants' fiduciary duties to Tharaldson and TM2I.
4 Plaintiffs have properly demanded a jury trial pursuant to NRCP 38(b).

5 The Scott Defendants' Motion to Strike Jury Demand ignores what this case is really about.
6 First, the Scott Defendants take the position that CVFS' only interest in the case is as a \$400,000
7 participant in the Senior Loan. Defendants completely overlook the unpaid \$46 million CVFS
8 advanced as a project lender and that CVFS' principal claims are to invalidate the Senior Loan
9 transaction including the purported subordination of CVFS' first lender position. The Scott
10 Defendants wrongfully contend that CVFS is a Plaintiff on only a very few of the Amended
11 Complaints' thirteen claims for relief. In truth, however, CVFS is a Plaintiff on every count but the
12 Sixth Claim for Relief for Defamation.

13 Second, the Scott Defendants' agreement that the Tharaldson and TM2I guaranties contain jury
14 trial waivers and that contractual jury trial waivers are enforceable fails to address what happens when
15 the agreement containing the jury trial waiver is invalid due to fraud, breach of fiduciary duty or other
16 misconduct. Here, TM2I's and Tharaldson's core arguments are that the guaranties are void. Because
17 the guaranties themselves are void, the terms contained within them, including the jury trial waiver
18 provisions, are also void.

19 Furthermore, the law is clear that the scope of jury trial waiver provisions should be strictly
20 construed to avoid impinging on the constitutional right to a trial by jury. The jury trial waiver
21 provisions at issue only purport to address claims relating to the guaranties. In no event can they be
22 expanded to include the claims of Tharaldson and TM2I for defamation, which claims do not arise
23 under or out of the guaranties.

24 Finally, Defendants have asserted that the claims of Tharaldson and TM2I should be severed
25 for a separate non jury trial from the claims of CVFS which Defendants admit are triable to a jury.
26 This wasteful and unnecessary suggestion makes no practical sense. The claims of CVFS, Tharaldson
27 and TM2I arise out of identical facts and are completely intertwined. There is no need for the judicial
28 burden and expense to the parties of trying the case more than once. The best solution is a single trial

1 with the Court deciding any issues that it ultimately finds should not be submitted to the jury.

2 The Motion to Strike Jury Demand should be denied as it relates to CVFS. As relates to TM2I
3 and Tharaldson, the jury should determine those parties' claims that the guaranties are unenforceable
4 and those parties' defamation claims. Only if the jury determines that the guaranties are enforceable
5 should the guaranty issues be taken from the jury and decided by the Court.

6 **II. CVFS NEVER SIGNED A JURY TRIAL WAIVER AND ALL OF ITS CLAIMS ARE
7 ALL TRIABLE TO A JURY.**

8 The Scott Defendants take an ambiguous and apparently incorrect position on the jury trial
9 rights of CVFS. While recognizing that CVFS is the signatory to no document purporting to contain
10 a jury trial waiver, and conceding that CVFS' claims are all triable to a jury, the Scott Defendants
11 incorrectly suggest that CVFS is not a claimant on most of the claims in the Complaint. In truth, all
12 of the claims for relief, except the Sixth Claim for Relief for Defamation, have been brought by CVFS.

13 The Scott Defendants mischaracterize CVFS' interest as being only the interest of a loan
14 participant for its \$400,000 investment in the Senior Loan financing at issue in the case. The Scott
15 Defendants conveniently ignore the unpaid \$46 million CVFS has itself loaned on the project and they
16 ignore CVFS' primary allegations that CVFS was induced through the fraud and misconduct of
17 Defendants to enter into the Senior Loan Agreement which had the purported effect of subordinating
18 the \$46 million CVFS previously had loaned to the project to a position junior to the Senior Loan debt.

19 It is CVFS' position that the Senior Loan Agreement and attendant subordination was
20 wrongfully induced and therefore void. As discussed below, Defendants' wrongful acts in connection
21 with the Senior Loan Agreement are part and parcel of every claim in the Complaint CVFS asserts and
22 include every claim for relief except the Sixth for Defamation.

23 **First Claim for Relief (Fraudulent Misrepresentation)**

24 **Second Claim for Relief (Fraudulent Concealment/Fraudulent Omission)**

25 **Third Claim for Relief (Constructive Fraud)**

26 **Fourth Claim for Relief (Negligent Misrepresentation/Negligent Omission)**

1 On each of these claims, CVFS seeks to invalidate the Senior Loan transaction and purported
2 subordination to the Senior Debt of CVFS' \$46 million lending position based on the wrongful
3 misrepresentations and omissions of Defendants. None of these claims is premised on or limited by
4 CVFS' position as a \$400,000 loan participant. All four claims address the core validity of the
5 transaction at issue in the case

6 **Fifth Claim for Relief (Securities Fraud-Violation of NRS 90.211 et seq.)**

7 CVFS' position on this claim is based on CVFS' status as a loan participant. It should be
8 noted, however, that both TM2I and Tharaldson allege that the Guaranty transaction they sue on is an
9 investment contract and therefore a security. Hence, the securities fraud claim implicates the entire
10 Senior Loan transaction even though CVFS on the one hand and TM2I/Tharaldson on the other hand
11 base their claims on different aspects of the transaction.

12 **Sixth Claim for Relief (Defamation)**

13 On this claim only, the Scott Defendants are correct. CVFS does not assert a right of recovery
14 for defamation.

15 **Seventh Claim for Relief (Breach of Fiduciary Duty)**

16 CVFS asserts this claim as a lender of \$46 million that was wrongfully subordinated to the
17 Senior Debt. CVFS is not claiming merely as a loan participant.

18 **Eighth Claim for Relief (BOK, Aiding and Abetting Breach of Fiduciary Duty)**

19 **Ninth Claim for Relief (Acting in Concert/Civil Conspiracy)**

20 These claims, like the Seventh Claim for Relief, are brought because of CVFS' status as the
21 lender of \$46 million on the project.

22 **Tenth Claim for Relief (Breach of Contract)**

23 **Eleventh Claim for Relief (Breach of Covenant of Good Faith and Fair Dealing)**

24 **Twelfth Claim for Relief (Negligence)**

25 CVFS brings these claims for damages in the alternative to its claims to invalidate the Senior
26 Loan Agreement and the subordination of CVFS' \$46 million in loan funds. These claims are not
27 based on CVFS' status as a loan participant, but rather on the Agreement CVFS as a major project
28 lender made to subordinate its \$46 million position to the Senior Debt.

Thirteenth Claim For Relief (Declaratory Judgment)

This omnibus claim seeks declaratory relief invalidating the Senior Loan Agreement and subordination transaction and establishing CVFS' lien priority as the first position lien holder on the project for its \$46 million in project financing. The claim is independent of CVFS' position as a \$400,000 loan participant in the Senior Loan financing.

All of the Scott Defendants' suggestions that CVFS is a Plaintiff merely because it was a \$400,000 participant in the Senior Loan ignore the heart of CVFS' case challenging the validity of, and Defendants' performance under, the Senior Loan Agreement. The suggestion that CVFS is not a Plaintiff on most of the claims in the Amended Complaint is just plain wrong. In truth, the only claim which CVFS does not assert is the Sixth Claim for Relief for Defamation.

The Scott Defendants acknowledge that CVFS has jury trial rights on all of its claims. To the extent they suggest that CVFS is not a Plaintiff on most of the claims in the case, Defendants are incorrect and rely on a mischaracterization of CVFS' role in the transactions at issue as being a mere \$400,000 participant in the Senior Loan transaction, while ignoring that CVFS financed the first \$46 million on the project. All claims for relief in the Amended Complaint except the Sixth Claim for Defamation are claims of CVFS and all of CVFS' claims are triable to a jury as a matter of right.

III. THE GUARANTIES ARE VOID FOR FRAUDULENT INDUCEMENT, BREACH OF FIDUCIARY DUTY AND OTHER MISCONDUCT. THEREFORE THE JURY TRIAL WAIVERS IN THE GUARANTIES ARE ALSO VOID.

The only case Defendants rely on, *Lowe Enterprises Residential Partners L.P. v. Eighth Judicial District Court ex rel. County of Clark*, 118 Nev. 92, 40 P.3d 405 (2002) establishes that pre-litigation contractual jury trial waivers are valid in Nevada if entered into knowingly, voluntarily and intentionally. 118 Nev. at 101, 40 P.3d at 411. Neither *Lowe* nor any other Nevada case addresses the situation where the agreement containing a jury trial waiver is itself void for fraud, misrepresentation, omission, breach of fiduciary duty or some other formation defense. In such cases, the entire underlying agreement is void. *Awada v. Shuffle Master, Inc.*, 173 P.3d 707, 713 (Nev. 2007); *Havas v. Bernhard*, 85 Nev. 627, 631, 461 P.2d 857, 859-60 (1969).

Here, guarantors TM2I and Tharaldson claim that the Guaranty instruments in which the jury

1 trial waivers appear are void for, *inter alia* fraud, misrepresentation, material omission and breach of
2 fiduciary duty. TM2I and Tharaldson have specifically alleged that the Scott Defendants breached
3 fiduciary duties by including in the guaranties a variety of terms including waivers of the guarantors'
4 rights, disadvantageous choice of law provisions and other provisions that were contrary to the
5 guarantors' best interests.¹ The Amended Complaint alleges that it was a breach of fiduciary duty to
6 submit to Tharaldson and TM2I unfair and one-sided guaranty instruments which detrimentally
7 effected their rights and which gave the Scott Defendants rights and benefits which they, as fiduciaries,
8 had no right to request or insist upon.

9 While the issue has not been addressed in Nevada, courts in other states have recognized that
10 where a party alleges an agreement containing a jury trial waiver is entirely invalid, that party is
11 entitled to a jury trial on the validity of the Agreement notwithstanding the presence of a jury trial
12 waiver provision within the void document. Numerous New York cases so hold,² as do cases from
13 other states. *C&C Wholesale, Inc. v. Fusco Management Corp.*, 564 S.2d 1259 (Fla.App. 1990);
14 *Chase Commercial Corp. v. Owen*, 32 Mass App. 248, 588 NE.2d 705, 708 (1992); *Howard v. Bank*
15 *South*, 209 Ga.App. 407, 433 SE.2d 625, 627-28 (1993).³

16 Here, guarantors TM2I and Tharaldson claim that their signatures on the guaranty instruments

17
18 The Amended Complaint does not specifically allege the jury trial waivers in the guaranties were the
19 specific result of fraud, breach of fiduciary duty or other wrongful conduct. If the Court believes such
20 an allegation is necessary, and Plaintiffs believe that it is not, Plaintiffs respectfully request leave of
21 Court to file a Second Amended Complaint directly asserting that the jury trial waivers were the product
22 of fraud, breach of fiduciary duty and other wrongful conduct.

23 *Bank of New York v. Royal Athletic Inds.*, 637 NYS 2d 478 (App. Div. 1996); *Wesley v. Brinkly*, 198
24 Misc. 783, 100 NYS 2d 996 (1950); *Federal Housecraft, Inc. v. Faria*, 28 Misc 2d 155, 216 NYS 2d
25 113 (1961); *International Roofing Corp. v. Van der Veer*, 43 Misc 2d 93, 250 NYS 2d 387 (1964);
26 *Gardner v. North Roofing & siding Corp.*, 55 Misc 2d 413, 285 NYS 2d 693 (1967); *Gothan Credit*
27 *Corp. v. Brancaccio*, 83 NYS 2d 341 (1948); *Brevoort, Inv. v. Meredith*, 154 NYS 2d 398 (1956).

28 ³ In *Lowe*, the Nevada Supreme Court declined to follow the Georgia Supreme Court's decision in *Bank*
South, NA v. Howard, 264 GA 339, 444 SE.2d 799, 800 (1994) which affirmed the Georgia Court of
29 Appeals in *Howard* but more broadly held that pre-litigation jury trial waivers are never enforceable
30 under Georgia law. *Lowe* declined to follow *Bank South's* broader rule, 40 P.3d at 409-410, but *Lowe*
31 did not reach the Georgia Court of Appeals' more narrow holding in *Howard* that in the presence of
32 fraud in the inducement of an agreement containing a jury trial waiver, that fraud vitiates the waiver just
33 as it vitiates the balance of the agreement.

1 containing the jury trial waivers were wrongfully induced through fraud, misrepresentation, material
2 omission and breach of fiduciary duty. They also claim that the Scott Defendants breached fiduciary
3 duties in presenting Tharaldson and TM2I with guaranty instruments containing prejudicial, unfair and
4 inequitable terms. Tharaldson and TM2I are entitled to a jury trial on their claims that the instruments
5 containing the jury trial waivers are void for misrepresentation, omission and breach of fiduciary duty.
6 As the guaranties are vitiated by fraud, breach of fiduciary duty and other misconduct, so also are the
7 jury trial waivers vitiated by the same fraud or misconduct.

8
9 **IV. THE DEFAMATION CLAIMS ARE NOT SUBJECT TO THE JURY TRIAL
WAIVERS.**

10
11 The right to a trial by jury being a fundamental constitutional right, contractual waivers of jury
12 trial rights are strictly construed and are not to be expanded beyond their necessary scope. *Medical*
13 *Air Technology Corp. v. Marwan Investment, Inc.*, 303 F.3d 11, 18-19 (1st Cir. 202); *Gaylord Dep't*
14 *Stores, Inc. v. Stephens*, 404 So.2d 586, 588 (Ala 1981); *Cantor v. TechLease, Inc.*, 398 N.Y.S.2d 286,
15 287-88 (App.Div. 1977); *North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307
16 S.C. 533, 416 SE.2d 637, 638 (1992). The waiver provisions at issue here by their terms apply to
17 claims related to the guaranties. The Defamation Claims do not arise under, involve or implicate the
18 guaranties but are entirely independent of the guaranties. Plaintiffs Tharaldson and TM2I are entitled
19 to a jury trial on their defamation claims.

20
21 **V. THE COURT SHOULD NOT SEVER THE CVFS AND TMS2I/THARALDSON
CLAIMS FOR SEPARATE TRIALS.**

22
23 Defendants court judicial mismanagement and a procedural nightmare by suggesting that the
24 claims of CVFS on the one hand and TM2I/Tharaldson on the other hand should be severed for
25 separate jury and non jury trials. The claims of all Plaintiffs arise out of the same identical operative
26 facts and are completely intertwined. Having two separate trials on exactly the same facts would be
27 a horrible waste of judicial resources and would cost the litigants a vast amount of otherwise
28 unnecessary attorneys' fees and litigation expenses. Two trials instead of one on the same issues also

1 raises the risk of inconsistent results and inconsistent case postures for purposes of potential appellate
2 review. Assuming arguendo that any claims turn out not to be triable to a jury, the Court should hold
3 a single trial with jury triable issues being decided by the jury and non jury issues being decided by the
4 bench. *See In Re Credit Suisse First Boston Mortgage Capital, L.L.C.*, 273 S.W.3d 843, 846
5 (Tex.App. 2008).

6 VI. CONCLUSION

7 CVFS is party to no instrument purporting to waive jury trial rights and CVFS is entitled to a
8 trial by jury for every claim in the Amended Complaint except for the defamation claim in the Sixth
9 Claim for Relief which claim is not brought on behalf of CVFS.

10 The guaranty instruments containing the jury trial wavier provisions Defendants contend are
11 applicable to TM2I and Tharaldson are void for fraud, breach of fiduciary duty and other misconduct
12 in the inducement of the guaranty instruments. Tharaldson and TM2I are entitled to a jury trial on the
13 invalidity of the guaranty instruments. Only if the jury finds the guaranties to be valid should the
14 guaranty claims be taken from the jury for decision by the Court.

15 The defamation claim (Sixth Claim for Relief) is outside the purported scope of the jury trial
16 waiver provisions and the defamation claims should be tried to a jury in any event.

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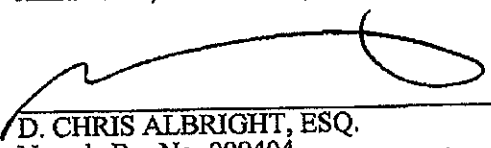
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1 In no event should the Court permit the waste and expense of separate jury and non jury trials
2 for CVFS on the one hand and TM2I/Tharaldson on the other hand. The factual underpinnings of each
3 of the Plaintiffs' cases are identical and the claims are wholly intertwined. The Court should hold a
4 single trial on all issues and submit to the jury the question whether the guaranties are void for fraud,
5 breach of fiduciary duty, or other misconduct. Only if the jury finds the guaranties to be valid should
6 the Court take issues relating to the guaranties from the jury for decision by the bench.

7 DATED this 8th day of September, 2009.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8 day of September, 2009, I served the foregoing
**OPPOSITION TO DEFENDANTS SCOTT FINANCIAL CORPORATION AND BRADLEY
J. SCOTT'S MOTION TO STRIKE JURY DEMAND** by mailing a copy of the same, postage
prepaid and addressed to the following:

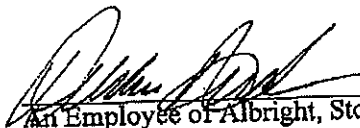
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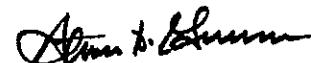
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DISTRICT COURT
CLARK COUNTY, NEVADA

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.

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,

26 Defendants.

Case No.: A579963
Dept. No.: XIII

DEFENDANTS SCOTT FINANCIAL
CORPORATION AND BRADLEY J.
SCOTT'S REPLY IN SUPPORT OF
MOTION TO STRIKE JURY DEMAND

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

I.

INTRODUCTION

Plaintiffs' opposition mixes apples and oranges. While they correctly argue that the claims of Club Vista Financial Services ("CVFS") are not subject to any jury trial waivers, the fact is that the waivers signed by Gary D. Tharaldson ("Tharaldson") and Tharaldson Motels II, Inc. ("TM2I") are presumptively valid under Nevada law and must therefore be enforced by this Court unless and

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1 until Plaintiffs can prove that those waivers were not entered into intentionally, knowingly, and
2 voluntarily. Because none of the arguments offered by Plaintiffs can satisfy the burden placed on
3 them by *Lowe Enterprises Residential Partners, L.P. v. Eighth Judicial District Court ex. rel.*
4 *County of Clark*, 118 Nev. 92, 40 P.3d 405, (2002), Scott's instant motion to strike the jury demand
5 with regard to Tharaldson and TM2I should be granted in its entirety.

6 Plaintiffs argue that, because they have alleged fraud in their First Amended Complaint, the
7 guaranties containing the jury waivers are completely invalid and therefore cannot properly be
8 enforced by this Court. This argument, however, puts the cart before the horse: the fact that CVFS
9 or either of the other Plaintiffs has alleged fraud does not render a jury trial waiver invalid in Nevada
10 (nor, actually, does the allegation of fraud automatically render any agreement invalid), since the
11 Nevada Supreme Court has set forth its own test for determining the validity of such a waiver.
12 Simply alleging fraud is not enough to invalidate a waiver because the party challenging the waiver
13 has an **evidentiary burden** to demonstrate fraud, which is not the same as simply throwing out an
14 allegation. Because no such demonstration has been made, voiding the jury trial waivers of
15 Tharaldson and TM2I on these grounds would be highly improper.

16 Also, Plaintiffs' contention that the claims in this case are simply too intertwined for multiple
17 trials is unconvincing. If this Court accepts the outline of the claims offered in plaintiff's opposition
18 – that there are (1) CVFS claims related to the subordination of the original deeds of trust and its
19 participation in the Senior Loan, and (2) guarantor claims related to the Senior Loan, then there is
20 no compelling reason why those sets of claims cannot be tried separately. Scott would further submit
21 that, in the light of the presumptively valid jury trial waivers of Tharaldson and TM2I, this Court
22 must do all it can to try and accommodate Scott's enforcement of the jury trial waivers. Scott
23 submits that this Court would otherwise be setting a bad precedent for future cases in Nevada, where
24 any plaintiff who wants to disavow his own agreed-to jury trial waiver need only join another
25 plaintiff with related claims who has not signed such a waiver. Because of the strong public policy
26 of this State that parties and courts honor contracts, this must not be allowed to happen.
27 Accordingly, and for all the foregoing reasons, Scott hereby requests that the instant motion to strike
28 Plaintiffs' jury demand be granted in its entirety.

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II.

ARGUMENT

A. **The Number of Claims CVFS has in This Action is Immaterial to Whether the Jury Trial Waivers Should Be Enforced Against Tharaldson and TM2I.**

Plaintiffs spend a large amount of their opposition discussing how CVFS is a Plaintiff on several of the claims asserted in the First Amended Complaint. Regardless of whether this is true, Scott submits that it is irrelevant to the question of whether the jury trial waivers agreed to by both Tharaldson and TM2I should be enforced. The opposition helpfully lays out the basis of the CVFS claims, and it appears that the bases of those claims (either the participation in the Senior Loan or the subordination of the prior deeds of trust) are conceptually separate from the claims that relate to the guarantors.

According to the opposition, CVFS brings its claims for relief not only as a participant in the Senior Loan, but also as the lender of \$46 million on the project, an interest which Plaintiffs claim has been wrongfully and fraudulently subordinated. This set of claims, however, is factually and legally distinct from the claims of Tharaldson and TM2I, which allege that they were wrongfully and fraudulently induced into guarantying the Senior Loan. Though there are similar facts and theories in both cases, there is no compelling reason for them to be tried together, particularly where all of the evidence indicates that Tharaldson and TM2I knowingly, intentionally, and voluntarily agreed to this arrangement after having had the opportunity to consult with independent counsel on the matter.

In other words, though CVFS and the guarantor defendants (Tharaldson and TM2I) may both be suing on fraud and other similar legal theories, the exact claims that each Plaintiff is alleging are substantively different as to the elements of each respective fraud claim. Plaintiffs offer no specific reason why the claims of the guarantor defendants and the CVFS are so similar that they must be tried together in front of a jury. Therefore, simply pointing out that the Plaintiffs all sue on similar legal theories and concluding that the claims are "intertwined" is just not enough for this Court to disregard the express agreements of the parties that the claims of Tharaldson and TM2I relating to the loan documents should be tried separately from those of CVFS.

1 B. Under Nevada Law, the Jury Trial Waivers are Presumptively Valid. Plaintiffs Cannot
2 Avoid Them Simply by Alleging Fraud.

3 As discussed in Scott's original motion, the Nevada Supreme Court in *Lowe* held that jury
4 trial waivers are presumptively valid.¹ The only way that a jury trial waiver can be invalidated is if
5 the party challenging the waiver can prove that the waiver was not entered into knowingly,
6 intentionally, and voluntarily.² Here, Plaintiffs assert that because they have alleged fraud in their
7 First Amended Complaint, the agreements that they allege they were fraudulently induced into (i.e.,
8 the Senior Loan documents) are invalid. Therefore, they speciously reason, the jury trial waivers
9 must be invalid as well.

10 I. *There is no authority for Plaintiffs' contention that the mere allegation of fraud*
11 *instantly negates a jury waiver as to all claims in a litigation.*

12 First and foremost, the cases cited by Plaintiffs do not stand for the proposition that party
13 may merely allege fraud to get out of its jury trial waivers. Rather, they state that a party who asserts
14 the defense of fraud to invalidate an agreement is entitled only to a jury trial on the issue of whether
15 the agreement was fraudulently induced. If the jury finds fraudulent inducement, then and only
16 then may the waived claims be tried before a jury; if not, then the claims must proceed in a non-jury
17 trial. The court in *Bank of New York v. Royal Athletic Industries, Ltd.*, made this perfectly clear:

18 By asserting this [fraud] defense, the respondents are challenging the
19 validity of those guarantees, and therefore, they are entitled to a jury
20 trial on this defense. [citations omitted] If the respondents are found
21 to have effectively revoked their guarantees, then the complaint will
22 be dismissed insofar as it is asserted against them; if not, they must
23 proceed on the remainder of the complaint in a nonjury trial.³

24
25 The *Bank of New York* court was not alone in this distinction. Plaintiffs' other cited authority also
26 holds that, in the case of a challenge to the agreement on the basis of fraud, only a limited trial on
27

28 ¹ See *Lowe Enterprises Residential Partners, L.P. v. Eighth Judicial District Court ex. Rel. County of Clark*, 118 Nev. 92, 100, 40 P.3d 405, 410 (2002).

² *Id.*

³ 224 A.D.2d 380, 380-637 N.Y.S.2d 478, 479 (N.Y.A.D. 2 Dept. 1996) (emphasis added).

1 that alleged fraud is allowed, not a full jury trial on all claims. In fact, the New York Superior Court
2 specifically held that:

3 "This court does not, however, conclude that the defendants are
4 entitled to a jury trial, generally, upon all the issues. Such a
determination would be in contravention to the agreement sued upon,
if it is subsequently decided to be a binding contract."⁴

5 Accord, *Federal Housecraft, Inc. v. Faria*, 28 Misc.2d 155, 156, 216 N.Y.S.2d 113, 114 (N.Y. Sup.
6 1961) (holding that "the party resisting the contract should be afforded the privilege of a
7 preliminary trial by jury on the defense of fraud."); and *Gardner & North Roofing & Siding*
8 *Corporation v. Champagne*, 55 Misc.2d 413, 414-15, 285 N.Y.S.2d 693, 695 (N.Y. Co. Ct. 1967)
9 (holding that the party alleging fraudulent inducement was "entitled to a trial by jury solely on the
10 issue of fraud. The enforceability of the plaintiff's claim under the contract would then depend upon
11 the determination of the fraud issue."). Furthermore, the non-New York authority cited by Plaintiffs
12 does not directly address the issue of fraudulent allegations, and certainly does not stand for the
13 novel proposition that the mere allegation of fraud will invalidate a willful, intentional, and knowing
14 waiver of the right to a jury trial.

15 In sum, none of this so called persuasive authority cited by Plaintiffs changes any part of the
16 analysis set down by the Nevada Supreme Court in *Lowe*, and this Court should therefore follow the
17 *Lowe* test in determining the validity of the waiver. And, since there is no evidence to indicate that
18 the jury trial waiver itself, which was bolded and capitalized in both documents, was agreed to
19 because of any fraud or misrepresentation, it should be allowed to stand as a matter of fairness and
20 Nevada law.

21 Even if, however, this Court were inclined to follow the authority cited by Plaintiffs, the most
22 that it could possibly grant would be a limited jury trial solely on the issue of whether Tharaldson's
23 and/or TM21's consent to their guaranties was fraudulently induced. Under no circumstances would
24 the mere allegation of fraud entitle them to a full jury trial on all claims; fraud in the inducement
25 would have to be proven through a separate "mini-trial" as per the authority cited by Plaintiffs in
26

27 ⁴ *International Roofing Corp. v. Van Der Veer*, 43 Misc.2d 93, 94, 250 N.Y.S.2d 387, 388 (N.Y. Sup.
28 1964) (emphasis added).

1 their opposition.

2 2. *Plaintiffs should be estopped from asserting that the loan documents are invalid,*
3 *since they have already accepted benefits under them, and have tried to use them*
4 *to improperly circumvent the discovery process.*

5 Plaintiffs are contradicting themselves. They seem to believe that, while they may enforce
6 any of the Senior Loan documents as they please (and, in fact, to improperly circumvent the
7 oversight and protection of the discovery procedures of this Court), those documents are nonetheless
8 invalid when Scott attempts to enforce a valid provision of the guaranties that Tharaldson and TM21
9 knowingly, intentionally, and voluntarily agreed to. Scott would refer to Court to Plaintiffs'
10 opposition to Scott's pending motion for declaratory relief, on file herein, in which Plaintiffs assert
11 that they are able to use the Senior Loan documents to flaunt the rules of civil procedure and
12 propound rogue discovery requests outside of the jurisdiction of this Court. Surely this behavior
13 implies that Plaintiffs do not really believe the Senior Loan documents are invalid; otherwise, they
14 would not be using them to make an end-run around the Nevada Rules of Civil Procedure.

15 C. **The Jury Trial Waivers Apply to All Claims Related to the Senior Loan (Including the**
16 **Defamation Claims), Not Just Claims Regarding the Guaranties.**

17 The opposition's claim that the jury trial waivers in the Tharaldson and TM21 guaranties only
18 apply to claims directly involving the guaranties themselves is false. As this Court can see from the
19 guaranty agreements, the language of the jury trial waivers is far broader than Plaintiffs represent.
20 Specifically, both jury trial waivers state that they apply to "LITIGATION REGARDING THE
21 PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO, THIS
22 GUARANTY, ANY RELATED AGREEMENTS, OR OBLIGATIONS THEREUNDER."⁵

23 Scott submits that the unambiguous language of these waivers encompasses all claims related
24 to the guaranty in addition to all claims relating to any documents having to do with the Senior Loan.
25 Because all of Plaintiffs' claims relate to the Senior Loan documents, therefore, all of the claims of
26 Tharaldson and TM21 are subject to the jury trial waivers contained in their respective guaranties.

27 ...

28 ⁵ See Exhibits 1 and 2 to the original motion at paragraphs 13 and 11, respectively. (Emphasis original.)

1 **D. Principles of Fairness and Nevada Law Require that Tharaldson's and TM2I's Jury**
2 **Waivers Must Be Enforced Despite Plaintiffs' Concerns About the Inconvenience of**
3 **Separate Trials.**

4 According to the Nevada Supreme Court's decision in *Lowe*, the relative convenience of
5 severing a claims to be tried is not a factor that this Court should consider in determining whether
6 to enforce the jury trial waivers of Tharaldson and TM2I. It is the policy of Nevada Courts, in the
7 absence of a violation of public policy, to enforce contracts as they are written.⁶ It would be a
8 violation of Nevada public policy as set down by the Supreme Court for this Court to simply choose
9 not to enforce the jury trial waiver for the simple reason that it would be too inconvenient for
10 Plaintiffs. Additionally, the opposition's argument that having both jury and non-jury trials is a
11 waste of resources is just as applicable to Plaintiffs' jury demand as it is to the jury trial waivers;
12 Scott could just as easily argue that judicial economy and Nevada's public policy favoring
13 enforcement of contracts dictate that the waiver should be enforced as to all claims in this litigation,
14 rather than just those of Tharaldson and TM2I. Scott is, however, arguing for the most reasonable
15 position: that the written agreements of Tharaldson and TM2I be honored, and CVFS be allowed to
16 have a jury, or not, as it pleases.

17 **III.**

18 **CONCLUSION**

19 Plaintiffs are attempting to over-generalize their way out of the knowing, intentional, and
20 voluntary contractual agreements made by Tharaldson and TM2I to waive their respective rights to
21 a jury trial. Regardless of any fraud allegations (or any other allegations for that matter) the truth is
22 that both Tharaldson and TM2I knew what they were doing when they agreed to waive their right
23 to a jury trial, and they are simply trying to get out of that promise now. Even if this Court accepts
24 their persuasive authority over the authority of the Nevada Supreme Court, they still cannot force
25 a single jury trial on all issues, because the fraud in the inducement they allege would have to be

26
27 ⁶ See *Nelson v. California State Auto. Ass'n Inter-Insurance Bureau*, 114 Nev. 345, 347-48, 956 P.2d
28 803, 805 (1998); see also *Ellison v. California State Auto. Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977
(1990) ("It has long been the policy in Nevada that absent some countervailing reason, contracts will be
construed from the written language and enforced as written.").

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1 determined in a separate trial. This Court must hold Tharaldson and TM2I to their promises.
2 Accordingly, and for all the foregoing reasons, Scott respectfully requests that this Court grant the
3 instant motion in its entirety and strike the jury demand of Plaintiffs Tharaldson and TM2I. In the
4 alternative, if this Court wishes to have a trial regarding whether there was fraud in the inducement
5 as to one or both of the guaranties, Scott requests that this Court sever the trial issue of fraud in the
6 inducement and conduct that trial first, in order to determine whether Tharaldson's and/or TM2I's
7 jury trial waivers are valid under Nevada law.

8 DATED this 28 day of September, 2009.

9 Respectfully submitted,

10 KEMP, JONES & COULTHARD

11 

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CERTIFICATE OF MAILING

I hereby certify that on the 30th day of September, 2009, the foregoing **DEFENDANTS**
SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S REPLY IN SUPPORT
OF 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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19 Attorneys for Defendant
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21 DISTRICT COURT
22 CLARK COUNTY, NEVADA

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

28 Plaintiff,

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 CORPORATION
D/B/A APCO CONSTRUCTION, a Nevada
corporation; DOE INDIVIDUALS 1-100; and
ROE BUSINESS ENTITIES 1-100,

Defendants.

Case No. A579963
Dept. No. XIII

**DEFENDANT BANK OF
OKLAHOMA'S JOINDER IN
DEFENDANTS SCOTT FINANCIAL
CORPORATION AND BRADLEY J.
SCOTT'S MOTION TO STRIKE JURY
DEMAND**

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

Defendant Bank of Oklahoma, N.A. ("BOK") joins the Motion to Strike Jury Demand
made by defendants Scott Financial Corporation and Bradley J. Scott (together, "the Scott

1 Defendants”), as filed August 6, 2009 and set for hearing on October 5, 2009. BOK incorporates
2 by reference the arguments presented by the Scott Defendants in their Motion to Strike Jury
3 Demand and submits that it should be granted.

4 DATED this 29th day of September, 2009.

5 LEWIS AND ROCA LLP

6
7 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'S JOINDER IN DEFENDANTS SCOTT
FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S SUBMISSION OF
PROPOSED CASE MANAGEMENT ORDER** was made this date by electronic filing and by
depositing in the U.S. Mail, at Las Vegas, Nevada, addressed to the following:

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D. Chris Albright
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Dustin A. Johnson
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DATED this 29th day of September, 2009.

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

09A579963

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Business Court

COURT MINUTES

October 05, 2009

09A579963

Club Vista Financial Services LLC, Tharaldson Motels II Inc, et al
vs
Scott Financial Corp, Bradley Scott, et al

October 05, 2009

9:00 AM

All Pending Motions

All Pending Motions
(10-05-09)

HEARD BY: Denton, Mark R.

COURTROOM: RJC Courtroom 12A

COURT CLERK: Susan Burdette

RECORDER: Debbie Winn

REPORTER:

PARTIES

PRESENT: Jones, Jon Randall Attorney
McLoughlin, Ann Attorney
Marie
Muckleroy, Martin Attorney
A.

JOURNAL ENTRIES

- Defts Scott Financial and B Scott's Motion for Declaration of Rights Under Participation Agreement of Club Vista Financial Services, L.L.C., Dated March 21, 2008 ... Defts Scott Financial and B Scott's Motion for Firm Trial Setting ... Deft Bank of Oklahoma's Joinder in Defts Scott Financial Corporation and Bradley J. Scott's Motion for Firm Trial Setting ... Defts Scott Financial and B Scott's Motion to Strike Jury Demand ... Deft Bank of Oklahoma's Joinder in Defts Scott Financial and B Scott's Motion to Strike Jury Demand ... Deft APCO Construction's Motion to Dismiss Pltf's First Amended Complaint

Also present: Martin Aronson, Arizona pro hac vice counsel, on behalf of Pltfs.

As to Defts Scott Financial and B Scott's Motion for Declaration of Rights Under Participation Agreement of Club Vista Financial Services, L.L.C., Dated March 21, 2008: Mr. Jones referred to work product and attorney/client information because of a contractor's relationship, that would give them a technical advantage when suing the same party, and argued as to obtaining information that is not

PRINT DATE: 10/08/2009

Page 1 of 3

Minutes Date: October 05, 2009

12019-001 00526

privileged pursuant to the rules of civil procedure. Mr. Aronson stated they do not have a privilege log from Deft; stated he is willing to make all requests through RFP; noted he does not want to waive any rights under the Participation Agreement or waive any rights as to what is privileged; and requested that Deft respond to the RFP and they will meet and confer, noting he is not trying to circumvent the Court's supervision; and referred to the privilege and rights. Court read from the motion; and upon Court's inquiry, Mr. Aronson stated he has no objection to a declaration. Further arguments by Mr. Jones, noting he has been served with the RFPs and plans to have them out in the next day or so; he will provide a privilege log as bound to do so, and will try to work this out. COURT ORDERED, motion GRANTED. Court noted he finalized the Case Management Order Friday.

Defts Scott Financial and B Scott's Motion for Firm Trial Setting and Deft Bank of Oklahoma's Joinder in Defts Scott Financial Corporation and Bradley J. Scott's Motion for Firm Trial Setting: Mr. Jones stated his secretary advised him this morning that the Scheduling Order indicates the discovery deadline is October 15. Court stated he left the deadlines but did not schedule a trial date. Mr. Jones stated that if the discovery deadline is October 15, he would request a firm trial date as most of the witnesses and experts are from out-of-state. Upon Court's inquiry, Mr. Aronson stated he has no objection to the concept but thinks it is way too early. Court stated he could grant the motion in part without setting the date, but reserve setting it until the appropriate time. Further statements by Mr. Aronson. Court stated that at appears there is no objection to the concept of a firm setting. Mr. Aronson concurred.

Court stated he could grant the motion in part and say it should be given a firm trial setting, but is not sure when he can give a firm date; he would have to discuss the date with the JEA. Statements by Mr. Jones as to the discovery deadline and a firm trial setting as that it will make the parties get their discovery done and if they do not have a trial date, the parties tend to get busy with other things; if it suits the Court's calendar, he would ask for that rather than wait.

Upon Court's inquiry, Mr. Jones stated this trial will take 15 trial days, noting there is no dispute as to the number of trial days. Mr. Aaronson stated he is amenable to a firm trial setting as there are over 100 witnesses and there will be expert witnesses; noting the attempts to obtain discovery from 27 participating banks who are out-of-state and the earliest would be mid-November, noting he needs additional time. Following colloquy, Mr. Aaronson stated that setting it in mid-2011 would be fine, and requested that another Rule 16 Conference or a trial setting conference sometime in the Spring or middle of next year; referred to document production; and requested a follow-up conference in January to see if all the documents have been produced, and then can schedule the depositions. COURT ORDERED, motion GRANTED, and if persuaded it is not a practical setting the Court will reset it. Mr. Jones to prepare the Order granting the Motion; and the Court will issue a trial order.

As to Defts Scott Financial and B Scot's Motion to Strike Jury Demand and Deft Bank of Oklahoma's Joinder in Defts Scott Financial and B Scott's Motion to Strike Jury Demand: Mr. Jones referred to the fraud in the inducement claim. Court stated it will have to be determined, down the road, how the case will be tried. Mr. Jones noted that Pltfs Theraldson and Theraldson Motels II signed the waiver of the Jury trial but Club Vista did not; this motion is to strike and identify the other individuals and


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entities. Mr. Aronson referred to the Reply as to the case management and property management, which are intertwined for all three (3) Pltfs; and argued this should be denied. Upon Court's inquiry, Mr. Jones concurred that Pltfs Theraldson and Theraldson Motels II waived the right to have a jury trial. Court stated the other parties who did not waive it can rely on the demand for purposes of having their issues tried by a J; and read from page 6 of the Reply brief. Further arguments.

COURT ORDERED, motion DENIED, noting a Jury Demand can specifically serve a function by allowing those entitled to it to have a jury demand; and stated the ruling is WITHOUT PREJUDICE to contentions of damages as to the order in which the case is to be tried and whether portions should be severed; as far as the Court is concerned some of this case may or may not be tried by the jury but that will be determined later on; and noted there may be another Rule 16 Conference next year to discuss the trial; noted there may be a motion to sever and all contentions relative to sever are preserved. Further statements by Mr. Jones. Court concurred the motion is DENIED WITHOUT PREJUDICE to later consideration by the Court.

As to Deft APCO Construction's Motion to Dismiss Pltf's First Amended Complaint: Upon Court's inquiry, counsel concurred, and the COURT ORDERED, matter CONTINUED.

10-12-09 9:00 AM Deft APCO Construction's Motion to Dismiss Pltf's First Amended Complaint



CLERK OF THE COURT

1 NOEJ
2 J. RANDALL JONES, ESQ. (#1927)
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10 Attorneys for Scott Financial Corporation
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants,

AND ALL RELATED MATTERS.

Case No.: A579963
Dept. No.: XIII

**NOTICE OF ENTRY OF ORDER
GRANTING MOTION FOR FIRM
TRIAL SETTING**

NOTICE OF ENTRY OF ORDER

YOU WILL PLEASE TAKE NOTICE that the **ORDER GRANTING MOTION FOR
FIRM TRIAL SETTING**, a copy of which is attached hereto, was entered in the above-entitled

...

...

...


KEMP, JONES & COULTHARD, LLP
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(702) 385-6000
Fax (702) 385-6001

1 matter on the 6th day of November, 2009.

2 DATED this 9th day of November, 2009.

3 Respectfully submitted by:

4 KEMP, JONES & COULTHARD, LLP

5 
6 J. RANDALL JONES, ESQ. (#1927)
7 MARK M. JONES, ESQ. (#267)
8 MATTHEW S. CARTER, ESQ. (#9524)
9 3800 Howard Hughes Parkway
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CERTIFICATE OF MAILING

I hereby certify that on the 9th day of November, 2008, the foregoing **NOTICE OF ENTRY OF ORDER** was served on the following parties by mailing a copy thereof, first class mail, postage prepaid to:

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Counsel for Plaintiffs

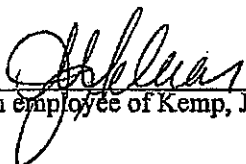
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Development West, Inc*


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FILED

NOV 06 2009

John J. Sullivan
CLERK OF COURT

1 **ORDG**
2 J. RANDALL JONES, ESQ.
3 Nevada Bar No. 1927
4 MARK M. JONES, ESQ.
5 Nevada Bar No. 267
6 MATTHEW S. CARTER, ESQ.
7 Nevada Bar No. 9524
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10 Seventeenth Floor
11 Las Vegas, Nevada 89169
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,

14 Plaintiffs,

15 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,

22 Defendants.

23 AND ALL RELATED MATTERS.

Case No.: A579963
Dept. No.: XIII

**ORDER GRANTING MOTION FOR
FIRM TRIAL SETTING**

24 This matter having first come before this Court on October 5, 2009, regarding
25 Defendant/Counterclaimant Scott Financial Corporation's and Defendant Bradley J. Scott's Motion
26 for Firm Trial Setting, the Court having reviewed the pleadings and papers on file herein, and having
27 heard the arguments of counsel for Plaintiffs, Martin A. Aronson, Esq., and Mark Albright, Esq.; and
28 of counsel for Defendants Scott Financial Corporation and Bradley J. Scott, J. Randall Jones, Esq.;
Bank of Oklahoma, N.A., Von Heinz, Esq.; and APCO Construction, Gwen Rutar Mullins, Esq.;

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1 and with good cause appearing and there being no just cause for delay,

2 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial
3 Corporation's and Bradley J. Scott's Motion for Firm Trial Setting is GRANTED. The Court will
4 set a trial date by separate order of the Court.

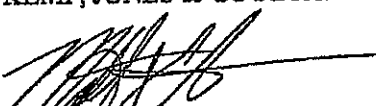
5 DATED this 4th day of ^{November} ~~October~~, 2009.

MARK R. DENTON

DISTRICT COURT JUDGE

8 Submitted by:

9 KEMP, JONES & COULTHARD, LLP

10 
11 J. RANDALL JONES, ESQ. (#1927)
12 MARK M. JONES, ESQ. (#267)
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15 Las Vegas, Nevada 89169
16 Attorneys for Defendants Scott Financial
17 Corporation and Bradley J. Scott

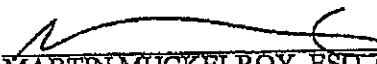
16 Approved as to form and content:


17 MORRILL & ARONSON

18
19 MARTIN A. ARONSON, ESQ.
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21 Phoenix, AZ 85012

22 and

23 COOKSEY, TOOLEN, GAGE, DUFFY
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25 MARTIN MUCKELROY, ESQ. (#9632)
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27 Las Vegas, NV 89169
28 Attorneys for Plaintiffs


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Attorneys for Scott Financial Corporation
6 and Bradley J. Scott

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9
10 CLUB VISTA FINANCIAL SERVICES,
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11 THARALDSON MOTELS II, INC., a North
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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
BUSINESS ENTITIES 1-100,

20 Defendants.

21 AND ALL RELATED MATTERS.

Case No.: A579963
Dept. No.: XIII

NOTICE OF ENTRY OF ORDER
DENYING MOTION TO STRIKE
JURY DEMAND WITHOUT
PREJUDICE

22
23 NOTICE OF ENTRY OF ORDER

24 YOU WILL PLEASE TAKE NOTICE that the ORDER DENYING MOTION TO
25 STRIKE JURY DEMAND WITHOUT PREJUDICE, a copy of which is attached hereto, was

26 ...

27 ...

28 ...

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1 entered in the above-entitled matter on the 6th day of November, 2009.

2 DATED this 9th day of November, 2009.

3 Respectfully submitted by:

4 KEMP, JONES & COULTHARD, LLP

5 
6 J. RANDALL JONES, ESQ. (#1927)
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CERTIFICATE OF MAILING

I hereby certify that on the 9th day of November, 2008, the foregoing **NOTICE OF ENTRY OF ORDER** was served on the following parties by mailing a copy thereof, first class mail, postage prepaid to:

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D. Chris Albright, Esq.
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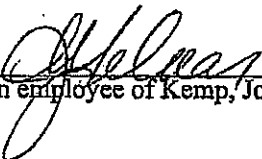
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DISTRICT COURT

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.

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 D/B/A APCO
CONSTRUCTION, a Nevada corporation;
DOES INDIVIDUALS 1-100; and ROE
BUSINESS ENTITIES 1-100,

Defendants.

AND ALL RELATED MATTERS.

FILED

NOV 06 2009

John A. Williams
CLERK OF COURT

Case No.: A579963

Dept. No.: XIII

ORDER DENYING MOTION TO
STRIKE JURY DEMAND WITHOUT
PREJUDICE

This matter having first come before this Court on October 5, 2009, regarding Defendant/Counterclaimant Scott Financial Corporation's and Defendant Bradley J. Scott's Motion to Strike Jury Demand, the Court having reviewed the pleadings and papers on file herein, and having heard the arguments of counsel for Plaintiffs, Martin A. Aronson, Esq., and Mark Albright,

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1 Esq.; and of counsel for Defendants Scott Financial Corporation and Bradley J. Scott, J. Randall
2 Jones, Esq.; Bank of Oklahoma, N.A., Von Heinz, Esq.; and APCO Construction, Gwen Rutar
3 Mullins, Esq.; and with good cause appearing and there being no just cause for delay,

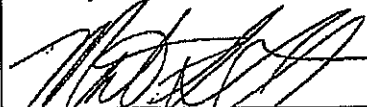
4 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial
5 Corporation's and Bradley J. Scott's Motion to Strike Jury Demand is DENIED WITHOUT
6 PREJUDICE.

7 DATED this 4th ^{November} day of October, 2009.

8 MARK R. DENTON
9 DISTRICT COURT JUDGE

10 Submitted by:

11 KEMP, JONES & COULTHARD, LLP

12 
13 J. RANDALL JONES, ESQ. (#1927)
14 MARK M. JONES, ESQ. (#267)
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18 Attorneys for Defendants Scott Financial
19 Corporation and Bradley J. Scott


20 Approved as to form and content:

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