Scott's position as fiduciaries to Plaintiffs with respect to Plaintiffs 100% ownership interest in the Prior Loan and the Edelstein Loan; and (b) the Fiduciary Defendants' position as fiduciaries to all Senior Loan participants, including CVSF.

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

Deteriorated Project and Financial Prospects at October 15, 2007.

132. SFC and Scott attached to the Senior Loan Agreement, and BOk approved, a pro forma for the Project that showed projected net income for the Project of $10,000,000 rather than the $34,000,000 reflected in the pro forma that SFC and Scott had previously provided to Plaintiffs and on which Plaintiffs had relied in making additional pre-construction loans secured by the Property and in executing the Senior Loan Documents.

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

134. The Fiduciary Defendants failed to properly disclose to Plaintiffs in accordance with standards of fiduciary disclosure the material adverse change between the May 2007 pro forma and the October 15, 2007 pro forma.

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

Primary Reliance on Guarantors.

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

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

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

Fraud Relating to the Pre-Sale Condition.

139. A condition to the funding of the Senior Loan, and therefore to any liability of Plaintiffs for any sum under the Senior Loan Documents, was that $60,000,000 in "lender approved" pre-sales and/or pre-leases must have occurred (the "Pre-Sale Condition"). (Senior Loan Agreement §§ 4.1.3, 1.16.)

140. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had they known that the Pre-Sale Condition was not satisfied, because: (a) bona fide, third party pre-sales and pre-leases provide an assurance of true market interest in a project and a known source of revenue for repayment of the loan; and (b) specific terms of the definition of Qualified Sale were not met with respect to many of the alleged pre-sales.

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

142. The Fiduciary Defendants had a duty not to approve and count toward satisfaction of the Pre-Sale Condition, pre-sales that were made to insiders, affiliates or other persons or entities related to Gemstone West Inc. Nevertheless, Gemstone West, Inc. and SFC certified at the closing of the Senior Loan, and BOk accepted in approving advances under the Senior Loan, that there were $62,700,000 of "lender approved" pre-sales and/or

pre-leases, and that the Pre-Sale Condition had been satisfied. It was not reasonable or appropriate to make this certification.

143. Gemstone West, Inc. and SFC certified, and BOk accepted in approving advances under the Senior Loan, that the lender approved pre-sales and/or pre-leases consisted of approximately $45,000,000 in residential pre-sales and approximately $17,250,000 of commercial pre-sales and/or pre-leases.

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

145. The Fiduciary Defendants knew or should have known that at the closing of the Senior Loan, all $17,250,000 of the commercial pre-sales and/or pre-leases were sales and/or leases to parties closely related to the Gemstone West Inc. All three pre-leases were with affiliates of the Gemstone West Inc. (Manhattan West Residential, Inc., Gemstone Coffee House, LLC, and Gemstone Development LLC (1,800 square feet)). The one commercial sale ($5,500,000) was to Santa Rita Management Company, an entity owned by the Edelstein's father.

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

147. The certification by SFC that the Pre-Sale Condition had been satisfied, and Bok's acceptance of the certificate in approving advances under the Senior Loan, was false and fraudulent.

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

feet).

Fraud Relating to First Lien Condition.

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

150. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had they known that the First Lien Condition was not satisfied, because of the hassle, expense, and uncertainty of resolving mechanics lien claims and collecting on title insurance policies.

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

152. The Fiduciary Defendants knew or should have known that under NRS 108.225(1) and (2), the Senior Debt Deed of Trust was legally subordinate to any and all mechanics liens for any and all work performed from inception through the completion of the Project the "Priority Construction Liens").

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

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

155. SFC and Scott certified at the closing of the Senior Loan that the First Lien Condition had been satisfied, and BOk accepted that certification in approving all advances under the Senior Loan.

156. This certification, and BOk's action thereon, was a misrepresentation and a fraud.

Insurance Over Broken Priority; Switched Title Insurance Companies.

157. Fiduciary Defendants' decision to use Commonwealth was a change from First American Title Insurance Co. ("First American") which had provided the title work and title insurance on the Prior Loan and the Edelstein Loan.

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

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

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

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

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

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

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

Subordination Exacerbates Broken Priority.

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

Prior Loan.

166. The Fiduciary Defendants failed to inform Plaintiffs or other Loan Participants of the risk that any Priority Construction Liens would become senior to the Deeds of Trust securing the Prior Loan as a result of the DOT Subordination and to provide their evaluation of that risk.

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

168. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents, had they known that the Fiduciary Defendants through their drafting of the DOT Subordination had substantially increased the risk of any Priority Construction Liens gaining priority over the Deeds of Trust securing the Prior Loan and the Edelstein Loan.

169. The Fiduciary Defendants failed to inform Plaintiffs and other Loan Participants that the DOT Subordination Agreement had been drafted in a manner that substantially increased the risk that any Priority Construction Liens would become senior to the Prior Loan as a result of the DOT Subordination.

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

170. As Fiduciaries, Defendants Scott, SFC and BOk had a duty to disclose that they were preparing legal instruments that had the effect of negating protective provisions of Nevada law.

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

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

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

174. The Fiduciary Defendants inserted in the Guaranty of the Senior Loan a waiver of all statutory rights of a guarantor under Nevada law, including the single action rule and the fair market value defense. They did not properly disclose to Plaintiffs their insertion of this waiver provision or explain its practical and legal ramifications.

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

176. The Fiduciary Defendants knew or should have known that North Dakota law did not provide a single action rule nor extend a borrower's fair market value defense to a guarantor. They did not properly disclose to Plaintiffs that they had selected the law of a state which substantially altered their rights as they would have existed under Nevada law or explain its practical and legal ramifications.

177. The Fiduciary Defendants advised Plaintiffs that the documents they were

signing, including the Guaranty, and the TM2I Guaranty, were appropriate to sign and protected Plaintiffs' interests, as was the DOT Subordination relating to the Prior Loan which SFC as Lender was signing.

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

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

180. In agreeing to Plaintiff's Senior Loan Documents, Tharaldson, CVFS and TM2I, if TM2I in fact validly authorized the TM2I Guaranty, were unaware of Nevada law permitting waiver of the fair market value defense, the legal effect of the waiver provisions inserted in the Guaranty, that North Dakota law did not extend a borrower's fair market value defense to a guarantor, or the legal risks inherent in the DOT Subordination in light of the undisclosed Priority Construction Liens.

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

Administration of Senior Loan

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

183. During the course of their administration of the Senior Loan, when the Fiduciary Defendants did become aware of this problem, they failed to secure an early and

appropriate resolution of the scope problem with the existing contractor to maintain a fixed sum contract increased by some amount to cover cost overruns.

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

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

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

Defamatory Statements

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

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

A. Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal "will likely have farther reaching negative implications for his banking relationships with all banks going forward."

B. Tharaldson's "reputation will be unquestionably damaged."

C. "The 29 banks stretching from North Dakota to Oklahoma that are in this deal, plus banks not in this deal, will look very unfavorably on any future credit request from Gary."

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

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

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

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

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

Punitive Damages

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

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

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

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

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

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

FIRST CLAIM FOR RELIEF

(Fraudulent Misrepresentation)

199. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended Complaint.

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

A. Scott and SFC told Plaintiff that SFC and BOk had thoroughly underwritten the Project and that the Project, on its own merits was a viable and prudent credit risk that justified the Senior Loans;

B. Scott and SFC told Plaintiffs that SFC expected the Project to generate $34,000,000 in net revenues based on project pro formas and their thorough underwriting of the Project;

C. SFC and BOk, by making statements, representations and warranties either expressed or necessarily implied in funding advances under the Senior Loan that all of the conditions precedent to funding of the Senior Loan had been satisfied.

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

202. Contractor made certain representations to SFC, as agent for Plaintiffs, in connection with the Senior Loan. Specifically, Contractor represented that:

A. "All liens, claims, rights, remedies and recourses that [Asphalt Products Corporation] may have or may otherwise be entitled to assert against all or any portion of the Project shall be, and they hereby are made expressly subordinate, junior and inferior to the liens, claims, rights, remedies and recourses as created by the Loan Agreement and the Collateral Documents";

B. That no work had been completed to date on the Property or the Project;

C. That the Contractor Certification and Sworn Statement were complete, when in fact they did not identify every subcontractor and supplier, the dollar amount that was

payable to each such subcontractor and supplier, nor all of the costs required to complete the Project, all of which were required to be set forth; and

D. That the Contractor Certification and Sworn Statement were correct, when in fact both Contractor and Gemstone West Inc. well knew that due to changes made by several different sets of "Delta" drawings, that the total cost for the Project would substantially exceed $78.9 million.

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

204. Scott, SFC and Contractor made the aforementioned representations with the intent that Plaintiffs rely on them.

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

206. Plaintiffs had a right to rely on the representations of Scott, SFC and Contractor.

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

208. Scott, SFC and Contractor knew or should have known that the representations were false.

209. Plaintiffs were ignorant of the falsity of the representations.

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

211. Scott and SFC acted as agents for BOk in connection with making the misrepresentations alleged above, and BOk is liable as if it had made those misrepresentations itself.

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

213. Plaintiffs' execution of the Senior Loan Documents (including but not limited to the waivers of jury trial in the Guaranty and the unauthorized TM2I Guaranty) was induced by the fraud of Fiduciary Defendants. Gemstone West, Inc., and the Contractor, and therefore are

not the valid, binding, or enforceable obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment voiding the Plaintiffs' Senior Loan documents. Alternatively, they are entitled to equitable reformation of the Plaintiffs' Senior Loan documents.

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

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

216. By virtue of their action in concert, Gemstone West, Inc. and Contractor are jointly and severally liable on this claim.

SECOND CLAIM FOR RELIEF

(Fraudulent Concealment/Fraudulent Omissions)

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

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

a. That even though they had previously shared with Plaintiffs a pro forma projecting $34 million in net project income, Defendants Scott, SFC and BOk had in their possession at the time the Senior Loan closed a revised pro forma which they did not share with Plaintiffs projecting only $10 million in net project income;

b. That SFC and BOk had not underwritten the Senior Loan on the basis of the financial merits and viability of the Manhattan West Project, but instead had based their underwriting decision solely on the strength of the guarantees of Tharaldson and TM2I;

c. That First American Title Insurance Co. had refused to issue title insurance because of prior recorded liens of the General Contractor;

d. That SFC and BOk were closing the Senior Loan transaction with actual and undisclosed knowledge that they were insuring over known General Contractor lien claims;

e. That so-called lender approved pre-sales were not arms length sales to unrelated third parties, but in many cases were to the affiliates or principals of the developer or to other insiders;

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

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

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

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

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

222. By making the misrepresentations and reliance-inducing statements alleged herein, Defendants Gemstone West Inc. and Contractor had a duty to speak and disclose the following material facts, which they knew and which were necessary to make the statements which Gemstone West Inc. and Contractor did make not misleading:

A. That the Abacus report had estimated construction costs for the Project to be approximately $6 million higher than the purported $78.9 million guaranteed maximum price for the Project.

B. That more than a month after signing the Construction Contract, Contractor had disputed the assertion of Gemstone West, Inc. and of SFC to Plaintiffs and that there was a guaranteed maximum price of $78.9 million for the Project, and in fact had demanded an additional $6 million for the Project.

C. That Gemstone West, Inc. and Contractor had negotiated a "side agreement" in order to accelerate between $1.3 million and $4.0 million of funding for later ManhattanWest phases into the cost for the Project.

D. That prior to first funding of the Senior Loan, Contractor had submitted to Gemstone West Inc. change orders totaling approximately $2,500,000 based in part upon several sets of "Delta" drawings making changes to the plans and specifications from the plans that were the basis for the purported $78.9 million guaranteed maximum price.

E. That prior to the first funding of the Senior Loan, Contractor had submitted, and Gemstone West, Inc. had approved and submitted to Nevada Construction Services, a "Reallocation of Funds" which eliminated the $2 million cost of the fire sprinkler system from the schedule of values for the Project, apparently pursuant to the "side agreement" under which Gemstone West Inc. and Contractor agreed to get funds to Contractor in excess of the purported $78.9 million guaranteed maximum price.

F. That prior to the first funding of the Senior Loan, Contractor had not secured complete "buy out" of the job from subcontractors and suppliers, and in fact had scope gaps of approximately $3.8 million between the work required under the Construction Contract and the work required from certain key subcontractors.

G. That prior to the first funding of the Senior Loan, Contractor had steadfastly refused to provide copies of all subcontracts to Gemstone West, Inc. and to SFC, notwithstanding repeated requests for those documents, because Contractor was concerned that providing the contracts would make Contractor "look bad" and would reveal that Contractor

rather than Gemstone West, Inc. was responsible for substantial project delays that were then known.

H. That prior to the first funding of the Senior Loan, the two commercial buildings at Manhattan West, which the pro forma indicated would provide the first revenue from the Project, were 60 days behind schedule and the nine story Element House residential building was 90 days behind schedule.

223. On information and belief, Gemstone West Inc. and Contractor concealed and omitted to state additional material facts which Plaintiffs have not yet discovered. Plaintiffs reserve the right to prove such additional concealment and omissions at trial.

224. Defendants Gemstone West Inc. and Contractor knew the truth of the foregoing facts, knew that Plaintiffs were ignorant of the truth of those facts and knew that they were material to Plaintiffs' decision to enter into the Senior Loan transaction. Defendants Gemstone West Inc. and Contractor concealed and omitted to state these material facts for the purpose of inducing Plaintiffs to enter into the Senior Loan transaction.

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

226. Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents (including but not limited to the waivers of jury trial in the Guaranty and the purported TM2I Guaranty) was induced by the fiduciary Defendants' fraudulent concealment and omissions and therefore are not the valid, binding or enforceable obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment voiding any and all of Plaintiffs' obligations under the Senior Loan documents. Alternatively, they are entitled to equitable reformation of the Plaintiffs' Senior Loan documents.

227. In the alternative, the matters fraudulently concealed or omitted were mutual mistakes of fact or law or were unilateral mistakes of fact or law induced by Defendants' inequitable conduct and Plaintiffs are entitled to equitable rescission or reformation of Plaintiffs' obligations under the Senior Loan documents.

228. By virtue of their agencies for one another, the Fiduciary Defendants, Gemstone

West, Inc., and Contractor are jointly and severally liable on this claim.

229. By virtue of their action in concert, Gemstone West, Inc. and Contractor are jointly and severally liable on this claim.

THIRD CLAIM FOR RELIEF

(Constructive Fraud)

230. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended Complaint.

231. The Fiduciary Defendants had a fiduciary and confidential relationship with Plaintiffs.

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

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

A. The Deteriorated Financial Prospects as set forth under that heading above.

B. The Primary Reliance on Guarantors as set forth under that heading above.

C. The Insurance over Broken Priority and Switched Title Insurance Companies as set forth under that heading above.

D. The Subordination Exascerbates Broken Priority as set forth under that heading above.

E. The Fraud Relating to Terms of Guaranty, TM2I Guaranty and Subordination as set forth under that heading above.

234. The Fiduciary Defendants also failed to disclose:

A. That they were underwriting the Project based solely on the Guarantees;

B. That the pro forma project profits had decreased from $34,000,000 to $10,000,000;

C. That the pre-sale conditions were met only through significant sales to insiders and affiliates;

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

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

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

235. Each of the items of information described in the preceding paragraphs were material to Plaintiffs' decisions to agree to the Plaintiffs' Senior Loan Documents, including the TM2I Guaranty.

236. The Fiduciary Defendants failed to disclose that material information to Plaintiffs.

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

238. Plaintiffs' execution of the Senior Loan Documents (including but not limited to the waivers of jury trial in the Guaranty and the unauthorized TM2I Guaranty) was induced by Fiduciary Defendants' constructive fraud and therefore are not the valid, binding, or enforceable obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment voiding the Senior Loan documents. Alternatively, they are entitled to equitable reformation of the Plaintiffs' Senior Loan documents.

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

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

FOURTH CLAIM FOR RELIEF

(Negligent Misrepresentation/Negligent Omission)

241. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended Complaint.

242. The Fiduciary Defendants had a duty to exercise due care in making

representations to Plaintiffs concerning the Senior Loan, to make all material disclosures, and to scrupulously act in Plaintiffs' best interests.

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

A. That the Fiduciary Defendants were primarily relying on the financial viability of the Project in underwriting the Senior Loan and that Tharaldson's exposure on the Guaranty and TM2I's exposure on the TM2I Guaranty, if TM2I properly authorized that Guaranty, would be limited.

B. That the Pre-Sale Condition was satisfied.

C. That the other conditions precedent to funding were satisfied.

D. That Fiduciary Defendants had performed reasonable and prudent due diligence and underwriting for the Project.

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

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

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

A. That even though they had previously shared with Plaintiffs a pro forma projecting $34 million in net project income, Defendants Scott, SFC and BOk had in their possession at the time the Senior Loan closed a revised pro forma which they did not share with Plaintiffs projecting only $10 million in net project income;

B. That SFC and BOk had not underwritten the Senior Loan on the basis of the financial merits and viability of the Manhattan West Project, but instead had based their underwriting decision solely on the strength of the guarantees of Tharaldson and TM2I;

C. That First American Title Insurance Co. had refused to issue title insurance because of prior recorded liens of the General Contractor;

D. That SFC and BOk were closing the Senior Loan transaction with actual and undisclosed knowledge that they were insuring over known General Contractor lien claims;

E. That so-called lender approved pre-sales were not arms length sales to unrelated third parties, but in many cases were to affiliates or principals of the developer or to other insiders;

F. That Scott and SFC acting as dual agents for Plaintiffs and BOk had an inherent conflict of interest that could not be waived;

G. That Scott and BOk had prepared guaranty documentation that substantially reduced Plaintiffs' rights under Nevada law and materially enhanced BOk's position at Plaintiffs' expense and detriment.

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

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

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

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

251. Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents (including but not limited to the waivers of jury trial in the Guaranty and the unauthorized TM2I Guaranty) was induced by the negligent misrepresentations and omissions and therefore are not the valid, binding, or enforceable obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment voiding the Senior Loan documents. Alternatively, they are entitled to equitable reformation of the Plaintiffs' Senior Loan documents.

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

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

FIFTH CLAIM FOR RELIEF

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

254. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended Complaint.

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

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

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

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

A. A typical loan participation has one to four participating lenders. This loan participation had 29 participants.

B. A usual seller of participation interests is a bank who sells participations in a loan to avoid violating federal lending limits. Here the "seller" is not an actual lender and does not advance its own loan funds. Instead its entire business is to find investors to invest in and fund loans.

C. Usual loan participants are banks or other lending institutions. Here Plaintiff Participant CVFS as well as other participants were non-bank entities.

D. In a typical participation, the participants fund only part of the loan with the seller funding the balance. Here the participants funded the entire loan and Plaintiff Participant CVFS funded only a small percentage of the Senior Loan but its affiliate Tharaldson gave a 100% guaranty of the entire loan (and TM2I signed the unauthorized Guaranty as part of the Loan).

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

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

G. In a typical participation, if the project fails the participant loses no more than its participation interest. Here, if the Project fails, Plaintiff Participants lose their $46 million of subordinated debt, and are on the hook through their guarantees for 100% of the Senior Loan.

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

260. The transaction whereby Fiduciary Defendants, Gemstone West, Inc., and Contractor induced CVFS to subordinate $46 million of debt to the Senior Loan, and induced Tharaldson and TM2I to give guarantees in exchange for fees and a 5% or 500 basis point "cut" of interest on money they did not loan, was an investment contract and therefore a security. The $46 million of subordinated debt, the Guaranty, and the unauthorized TM2I Guaranty were a passive investment of risk capital without control involving an investment of money or a

monetary equivalent in a common enterprise (the Project and the Senior Loan consortium and its 29 participating lenders) with an expectation of profits (the 500 basis point cut) solely from the efforts of others (the developer's ability to retire the Senior Loan through success of the Project, the Fiduciary Defendants' management of the Loan/Project, and the ability and willingness of Gemstone West Inc. and Contractor to construct the Project for a $78.9 guaranteed maximum price).

261. The transaction whereby CVFS's Prior Loan, the Edelstein Loan, and the Deeds of Trust securing those Loans were purportedly subordinated to the Senior Loan in connection with issuance of the Guaranty and the Senior Loan Participation was an investment contract which created equity in the Project for the Senior Loan. Defendants' Credit Display treats the mezzanine financing as equity both in its narrative description of the transaction and in the Source and Use of Funds portion of the Credit Display.

262. On information and belief, both Plaintiffs and Defendants viewed (a) the investment contract transaction involving the guarantees and (b) the loan participation transaction and (c) the investment contract under which $46 million of CVFS debt was subordinated and treated as equity, as securities, and their motivation in entering into the transactions treated Plaintiffs, through the Guarantees and DOT Subordination, as if they had made an equity investment in the Project. All purchasers of loan participation interests were motivated by investment motives.

263. The Senior Loan participation transaction including the subordination of $46 million in debt and the Guaranty given by Plaintiffs involved a broad plan of distribution and common trading with 29 actual participating lenders and, on information and belief, additional offerees of participation interests who chose not to invest. Co-lead lender SFC made no funding investment with its own money; all the loan capital came from loan participants, several of whom were not banks or financial institutions.

264. On information and belief, parties to the Senior Loan transaction and Plaintiffs' Senior Loan Documents considered participation in the Senior Loan transaction to be an investment, and reasonably expected the participation interests to be investments.

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

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

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

268. Scott is a control person with respect to SFC.

269. BOk provided material assistance to SFC and Scott in their violations of the Nevada Securities Act.

270. The Fiduciary Defendants are civilly liability to Plaintiffs for damages as provided in NRS 90.660(1)(d).

SIXTH CLAIM FOR RELIEF

(Defamation)

271. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended Complaint as if set forth fully herein.

272. SFC and BOk as Co-Lead Lenders made statements, including but not limited to, that:

A. Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal "will likely have farther reaching negative implications for his banking relationships with all banks going forward."

B. Tharaldson's "reputation will be unquestionably damaged."

C. "The 29 banks stretching from North Dakota to Oklahoma that are in this deal, plus banks not in this deal, will look very unfavorably on any future credit request from Gary."

273. The statements made by SFC and BOk as Co-Lead Lenders were published to the other 27 Senior Loan participants and potentially republished to numerous other people, including but not limited to persons employed by the 27 Senior Loan participants, persons doing business with the 27 Senior Loan participants, and persons in the communities in and around the

Property and Project.

274. The statements made by SFC and BOk are false and defamatory and impeached the honesty and integrity of Plaintiffs.

275. SFC and BOk made the statements with knowledge of their falsity or with reckless disregard of whether the statements were true, but at a minimum, negligently.

276. As a direct and proximate result of the defamation made by SFC and BOk, Plaintiffs have suffered serious injury to their business reputations.

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

SEVENTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty)

278. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended Complaint.

279. The Fiduciary Defendants were agents of Plaintiffs and owed to Plaintiffs fiduciary duties of undivided loyalty, due care, and full disclosure of material information.

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

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

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

EIGHTH CLAIM FOR RELIEF

(BOk, Aiding and Abetting Breach of Fiduciary Duty)

283. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended

Complaint.

284. The Fiduciary Defendant BOk was aware of the fiduciary duties owed to Plaintiffs by Scott and SFC.

285. The Fiduciary Defendant BOk knew or should have known that Fiduciary Defendants Scott and SFC were breaching their fiduciary duties to Plaintiffs.

286. The Fiduciary Defendant BOk acted intentionally and/or in concert with Scott and SFC and provided substantial assistance to them in their breaches of fiduciary duty toward Plaintiffs.

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

NINTH CLAIM FOR RELIEF

(Acting in Concert/Civil Conspiracy)

288. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended Complaint.

289. The Defendants, and each of them, acting in concert with each of the other Defendants' tortious conduct constituted a breach of their duties, including but not limited to fiduciary duties, to Plaintiffs.

290. Defendants, and each of them, knew that they were agreeing to engage in conduct that involved misrepresentations of material fact, omissions to state material facts, and/or breach of fiduciary duties and a substantial risk of harm to Plaintiffs.

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

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

TENTH CLAIM FOR RELIEF

(Breach of Contract)

293. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended

Complaint.

294. The Fiduciary Defendants had contractual duties to Plaintiffs related to the Senior Loan Agreement.

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

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

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

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

ELEVENTH CLAIM FOR RELIEF

(Breach of Covenant of Good Faith and Fair Dealing)

297. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended Complaint.

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

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

A. Making the misrepresentations concerning the Pre-Sale Condition and the First Lien Condition as alleged herein.

B. Failing to disclose to Plaintiffs the material information related to the Senior Loan and the Plaintiffs' Senior Loan Documents as alleged herein.

C. Failing to raise with Plaintiffs the conflicts of interest inherent in the Plaintiffs' Senior Loan Documents.

D. Failing to advise Plaintiffs to consult with independent counsel concerning the Plaintiffs' Senior Loan Documents.

E. Preferring their interests (to earn fees and eight and one-half per cent interest per

annum in a time that the prime rate was six and one half percent and the interest rate environment was sharply downward) over Plaintiffs interests in having the Plaintiffs' Senior Loan Documents reasonably and adequately protect their reasonable expectations concerning the Senior Loan based upon the discussions that occurred between Plaintiffs and the Fiduciary Defendants.

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

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

TWELFTH CLAIM FOR RELIEF

(Negligence)

302. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended Complaint.

303. The Fiduciary Defendants owed to Plaintiffs a duty to exercise due care in connection with the underwriting, funding, and administration of the Senior Loan.

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

A. Making the misrepresentations concerning the Pre-Sale Condition and the First Lien Condition as alleged herein.

B. Failing to disclose to Plaintiffs the material information related to the Senior Loan and the Plaintiffs' Senior Loan Documents as alleged herein.

C. Failing to raise with Plaintiffs the conflicts of interest inherent in the Plaintiffs' Senior Loan Documents.

D. Failing to advise Plaintiffs to consult with independent counsel concerning the Plaintiffs' Senior Loan Documents.

E. Failing to determine, prior to funding of the Senior Loan, that a substantial

amount of work required by the construction drawings for the Project was not covered by the construction agreement.

F. Failing to determine, during the course of inspections of the Project during construction, that nearly $8,000,000 in substandard work was performed.

G. Failure to obtain, in connection with each draw, the necessary lien waivers for work reflected in that draw.

H. Failure to make sure that the loan draws were spent by the contractor to pay subcontractors and material suppliers.

I. Allowing $26,000,000 in construction liens to be filed against the Project during the course of their loan administration.

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

THIRTEENTH CLAIM FOR RELIEF

(Declaratory Judgment)

306. Plaintiffs incorporate by reference all prior paragraphs of their Second Amended Complaint as if set forth fully herein.

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

308. As set forth herein, Contractor is the general contractor of the Project.

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

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

311. Plaintiffs are entitled to a court order declaring that the Deed of Trust securing the

Prior Loan has a first lien position on the Property and the Project notwithstanding any other liens created therein by or for the benefit of Gemstone West, Inc. or Contractor.

312. Plaintiff TM2I is entitled to a court order declaring that the TM2I Guaranty was never authorized by necessary corporate action of TM2I as a North Dakota corporation and is therefore invalid and unenforceable.

313. Plaintiffs are entitled to a court order declaring that Tharaldson and TM2I (if the TM2I Guaranty was ever validly authorized and enforceable) have no liability relating to the Senior Loan and that as between Tharaldson, TM2I and Gemstone West, Inc., Gemstone West, Inc. is the sole party responsible for the Senior Loan.

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

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

316. Plaintiffs are entitled to a court order declaring that the Senior Loan Documents (including but not limited to the jury trial waivers in the Guaranty and the unauthorized TM2I Guaranty) were induced by fraud and/or mistake and are not the valid, legally binding, and/or enforceable obligations of Plaintiffs.

317. Plaintiffs are entitled to a court order declaring that, upon an appropriate tender of rescission under NRS 90.660 and 90.700 and other applicable law, their obligations under the Senior Loan Participation Agreement, the Guaranty, and the TM2I Guaranty (if found to have been properly authorized) are rescinded.

318. Plaintiffs are entitled to a court order declaring that the Deeds of Trust securing the Prior Loan are prior and superior to the Senior Loan Deed of Trust and to any liens for construction work performed on the Property after July 5, 2006, and to any and all other liens or encumbrances on the Project recorded subsequent to recordation of the Deeds of Trust

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

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

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

A. Declaring that CVFS has terminated all of the CVFS Pre-Senior Participation Agreements and the CVFS Senior Loan Participation Agreement, that SFC has no authority to act for CVFS with respect to any of the loans covered thereby, and ordering SFC to execute and deliver appropriate assignments of those loans and related documents to CVFS.

B. Declaring that the TM2I Guaranty is invalid and unenforceable against TM2I because it was not authorized by the required corporate action of TM2I as a North Dakota corporation.

C. Declaring that the Plaintiffs' execution of Senior Loan Documents (including but not limited to the waivers of jury trial in the Guaranty and the unauthorized TM2I Guaranty) were induced by fraud, misrepresentation, omission and/or mistake and are not the valid, legally binding, and/or enforceable obligations of Plaintiffs.

D. Declaring that, upon an appropriate tender of rescission under NRS 90.660 and 90.700 and other applicable law, Plaintiffs' obligations under the Senior Loan Participation Agreement, the Guaranty, and the TM2I Guaranty (if properly authorized and executed) are rescinded and that Plaintiffs are entitled to recover damages incident to the rescission.

E. Declaring that the Deeds of Trust securing the Prior Loan are prior and superior to the Senior Loan Deed of Trust and to any liens for construction work performed on the Property after July 5, 2006, and to any and all other liens or encumbrances on the Project recorded subsequent to recordation of the Deeds of Trust securing the Prior Loans and constitute first lien

positions on the Property.

F. Declaring that Plaintiffs have one or more valid legal defenses to the Plaintiffs' Senior Loan Documents if those documents would otherwise be the valid, legally binding, or enforceable obligation of Plaintiffs.

G. In the alternative, reforming the Guaranty and the TM2I Guaranty due to fraud and/or mistake to affirm the single action rule and the fair market value defense that was part of Plaintiffs' understanding with the Fiduciary Defendants.

H. Ordering that the Fiduciary Defendants jointly and severally, disgorge to Plaintiffs any and all direct benefit they have obtained in connection with their breaches of fiduciary duty.

I. In the alternative, awarding Plaintiffs compensatory damages for breaches of tort, fiduciary, and contractual duties against the Fiduciary Defendants jointly and severally, in an amount equal to all direct, consequential, and other damages they have suffered, in amounts to be proved at the trial of this matter.

J. In the alternative, and in addition to compensatory damages, awarding Plaintiffs punitive damages against the Fiduciary Defendants jointly and severally, in connection with the Predicate Claims in an amount to be determined by the Court, but not to exceed three times compensatory damages.

K. Awarding Plaintiffs compensatory damages for breaches of tort duties against Gemstone West, Inc. and Contractor jointly and severally.

L. Awarding to Plaintiffs their costs of suit, expenses of litigation, including but not limited to expert fees and reasonable attorneys fees.

M. Awarding Plaintiffs prejudgment and post judgment interest.

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

RESPECTFULLY SUBMITTED this 10th day of March, 2011.

COOKSEY, TOOLEN, GAGE, DUFFY & WOOG

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2011, the foregoing **SECOND AMENDED COMPLAINT** was e-served and emailed on the following persons:

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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.	Case No.: A579963 Dept. No.: XIII Consolidated with Case No.: A609288 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Granting Motion For Summary Judgment Regarding the Issue of Alleged Agency Relationships Between the Scott Defendants and Tharaldson Plaintiffs

was entered in the above-entitled matter on the 16th day of March, 2011, a copy of which is attached hereto.

DATED this 17th day of March, 2011.

Respectfully submitted,

KEMP, JONES & COULTHARD

/s/ Matthew S. Carter

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I hereby certify that on the 17th day of March, 2011, the foregoing **NOTICE OF ENTRY OF ORDER** was served on the following persons by e-mailing to the e-mail addresses listed as follows:

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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.	Case No.: A579963 Dept. No.: XIII Consolidated with Case No.: A609288 **ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING THE ISSUE OF ALLEGED AGENCY RELATIONSHIPS BETWEEN THE SCOTT DEFENDANTS AND THARALDSON PLAINTIFFS**

This matter having come before this Court for oral argument on February 3, 2011, regarding Defendant/Counterclaimants Scott Financial Corporation's and Bradley J. Scott's (the "Scott Defendants") Motion for Partial Summary Judgment Regarding the Issue of Alleged Agency Relationships Between the Scott Defendants and Tharaldson Plaintiffs, the Court having considered

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the arguments from Counsel, and reviewed the pleadings and papers on file herein, with good cause appearing and there being no just cause for delay, the Court makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. Plaintiffs Gary Tharaldson and Tharaldson Motels II, Inc. ("TM2I") repeatedly make the sweeping allegations in their complaint that Scott and SFC "acted as agents" for all of the Plaintiffs with respect to the events that led to this lawsuit. See e.g. First Amended Complaint at ¶¶ 6, 8, 28, 29, 34, 203, 218(f), 242(f), and 272.

2. Brad Scott never told Tharaldson that he or SFC would be acting as Tharaldson's or TM2I's agent in the Manhattan West project. See Depo. Of Gary Tharaldson at Vol. II, 428:6-23 (May 12, 2010).

3. Neither the Gary Tharaldson Guaranty nor the TM2I Guaranty stated that Brad Scott or SFC was either Tharaldson's or TM2I's agent for any purpose. See Tharaldson Guaranty and TM2I Guaranty, attached hereto as Exhibits A and B, respectively.

4. Tharaldson has testified that his theory that Brad Scott and SFC were his agents is based on his belief that Brad Scott never disclaimed that he was Tharaldson's agent, and not because Brad Scott affirmatively did anything to manifest his assent to enter into an agency relationship. See Depo. of Gary Tharaldson at 428:6-11.

5. Neither Brad Scott nor SFC were ever given the authority to sign documents on behalf of Tharaldson. Id. at 242:25-243:11.

6. Neither Brad Scott, nor SFC, nor anybody working for SFC has ever signed Tharaldson's name to any agreement binding him or TM2I. Id. at 88:18-23.

7. The terms of the relationship between Scott Financial and Club Vista Financial Services, Inc. ("CVFS") regarding the Manhattan West project are governed by their Participation Agreement for the Senior Loan.

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. . .

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II.

CONCLUSIONS OF LAW

1. "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act." Restatement (Third) of Agency § 1.01 (2006).

2. An agency relationship is formed when one who hires another retains a contractual right to control the other's manner of performance." Grand Hotel Gift Shop v. Granite State Ins. Co., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992).

3. Absent evidence of an agreement or other manifestation of consent from which to find a principal-agent relationship, one does not exist. See id.

4. There is no evidence of any agreement, verbal, written or otherwise, that any of the Scott Defendants and Tharaldson Plaintiffs entered into an agency relationship. No matter what relationship there might have been between Club Vista and Scott Financial, there is not an agency relationship between either of the Scott Defendants and Gary Tharaldson, individually, or TM2I.

5. Accordingly, there is no genuine issue of material fact regarding the issue of agency and no such agency relationships exist in this case.

III.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial Corporation and Bradley J. Scott's Motion for Partial Summary Judgment Regarding the Issue of Agency is GRANTED.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the Court's findings of fact is to be construed as a conclusion of law, and each of the Court's conclusions of law is to be construed as a finding of fact, as may be necessary or appropriate to carry out this Order.

DATED this 15th day of March, 2011.

DISTRICT COURT JUDGE

Submitted by:

KEMP, JONES & COULTHARD, LLP

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security (NRS 90.280(6));

b. The notes underlying the subject loan transactions are not securities under NRS 90.295 because they fail to meet the requirements set forth in *State of Nevada v. Friend*, 118 Nev. 115, 40 P.3d 436 (2002), and *Reves v. Ernst & Young*, 494 U.S. 56 (1990); and

c. The subject loan participation agreement, loan guaranties, and subordination agreement cannot be securities unless they are found to be investment contracts, and they do not meet the tests for investment contracts under Ninth Circuit law. See *Danner v. Himmelfarb*, 858 F.2d 515 (9th Cir. 1988).

2. In addition, even if the subject loan transactions could be considered securities under Nevada law, Plaintiffs failed to meet their burden under NRCP 56(e) to present specific facts showing that in issue for trial exists as to whether Scott made untrue or misleading statements or omissions in connection with the subject loan transactions.

3. Discovery is now closed, and Plaintiffs have come forward with insufficient evidence to support their allegations that Scott made material, factual misrepresentations in connection with entering into subject loan transactions, and that these misrepresentations induced Plaintiffs to enter into the transactions.

4. Accordingly, there is no genuine issue of material fact regarding Plaintiffs' securities fraud claim, and Scott Financial Corporation, Bradley J. Scott are entitled to judgment as a matter of law on their Motion.

III.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial Corporation and Bradley J. Scott's Motion for Summary Judgment Regarding Plaintiffs' Fifth Claim for Relief is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a Judgment in favor of Scott Financial Corporation and Bradley J. Scott and against Plaintiffs in hereby entered as to Plaintiffs' Fifth Claim for Relief.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the Court's findings of fact is to be construed as a conclusions of law, and each of the Court's conclusion of law is to be construed as a finding of fact, as may be necessary or appropriate to carry out this Order.

DATED this 16th day of February, 2011.

DISTRICT COURT JUDGE

Submitted by:

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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.

Case No.: A579963
Dept. No.: XIII

NOTICE OF ENTRY OF ORDER GRANTING IN PART SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION FOR SUMMARY JUDGMENT REGARDING STANDING OF PLAINTIFFS TO PURSUE CERTAIN CLAIMS

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NOTICE OF ENTRY OF ORDER GRANTING IN PART SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION FOR SUMMARY JUDGMENT REGARDING STANDING OF PLAINTIFFS TO PURSUE CERTAIN CLAIMS

PLEASE TAKE NOTICE that an ORDER GRANTING IN PART SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION FOR SUMMARY JUDGMENT REGARDING STANDING OF PLAINTIFFS TO PURSUE CERTAIN CLAIMS was entered in the above-entitled matter on March 3, 2011, a copy of which is attached hereto.

DATED this 4th day of March, 2011.

Respectfully submitted,

KEMP, JONES & COULTHARD

/s/ Matthew S. Carter

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2011, the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION FOR SUMMARY JUDGMENT REGARDING STANDING OF PLAINTIFFS TO PURSUE CERTAIN CLAIMS** was served on the following persons by e-mailing to the e-mail addresses listed as follows:

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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.	Case No.: A579963 Dept. No.: XIII **ORDER GRANTING IN PART SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION FOR SUMMARY JUDGMENT REGARDING STANDING OF PLAINTIFFS TO PURSUE CERTAIN CLAIMS**

This matter having first come before this Court on February 10, 2011, regarding Defendant/Counterclaimant Scott Financial Corporation's and Defendant Bradley J. Scott's Motion for Summary Judgment Regarding Standing of Plaintiffs to Pursue Certain Claims, the Court having reviewed the pleadings and papers on file herein, and having heard the arguments of counsel for Plaintiffs, Martin A. Aronson, Esq., Martin Muckleroy, Esq., and Terry A. Coffing, Esq.; and of

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counsel for Defendants Scott Financial Corporation and Bradley J. Scott, J. Randall Jones, Esq.; Bank of Oklahoma, N.A., John Clayman, Esq., and Jennifer Hostetler, Esq.; APCO Construction, Gwen Rutar Mullins, Esq., and Alex Edelstein, Kyle Smith, Esq.; and with good cause appearing and there being no just cause for delay, the Court makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. Plaintiff Club Vista Financial Services, LLC ("Club Vista") was not a party to the $100 million guaranty of the Manhattan West Senior Loan given by Plaintiff Gary Tharaldson.

2. Club Vista was not a party to the $24 million guaranty of Bank of Oklahoma's share of the Senior Loan.

II.

CONCLUSIONS OF LAW

1. The doctrine of standing requires that "the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized . . .and (b) actual or imminent, not conjectural or hypothetical . . . ." See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotes omitted).

2. Club Vista does not have standing to assert fraud as to either of the guaranty contracts because it was not a party to either of those contracts. Accordingly, it did not have a concrete or particularized legally protected interest in those contracts; nor did it suffer any actual or imminent injury as a result of those contracts.

III.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial Corporation and Bradley J. Scott's Motion for Motion for Summary Judgment is GRANTED IN PART in that Club Vista has no standing to assert fraud as to the guaranty contracts.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a Judgment in favor of Scott Financial Corporation, and Bradley J. Scott and against Plaintiff CVFS is hereby entered as to the fraud claims asserted by CVFS based on the guaranties executed by Gary Tharaldson and Tharaldson Motels II, Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the Court's findings of fact is to be construed as a conclusion of law, and each of the Court's conclusion of law is to be construed as a finding of fact, as may be necessary or appropriate to carry out this Order.

DATED this 1st day of February, 2011.

DISTRICT COURT JUDGE

Submitted by:

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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.	Case No.: A579963 Dept. No.: XIII Consolidated with Case No.: A609288 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Granting in Part Scott Financial Corporation and Bradley J. Scott's Motion For Summary Judgment On Tharaldson Motels II, Inc. and Gary D. Tharaldson's Third and Seventh Claims for Relief was entered in the above-entitled matter on the

4th day of March, 2011, a copy of which is attached hereto.

DATED this 9th day of March, 2011.

Respectfully submitted,

KEMP, JONES & COULTHARD

/s/ Matthew S. Carter

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 2011, the foregoing **NOTICE OF ENTRY OF ORDER** was served on the following persons by e-mailing to the e-mail addresses listed as follows:

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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.	Case No.: A579963 Dept. No.: XIII **ORDER GRANTING IN PART SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION FOR SUMMARY JUDGMENT ON THARALDSON MOTELS II, INC. AND GARY D. THARALDSON'S THIRD AND SEVENTH CLAIMS FOR RELIEF**

This matter having first come before this Court on January 20, 2011, regarding Defendant/Counterclaimant Scott Financial Corporation's and Defendant Bradley J. Scott's Motion for Summary Judgment regarding Tharaldson Motels II, Inc. and Gary D. Tharaldson's (collectively "the Guarantor") Third (Constructive Fraud) and Seventh (Fiduciary Duty) Claims for Relief, the Court having reviewed the pleadings and papers on file herein, and having heard the arguments of

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counsel for Plaintiffs, Martin A. Aronson, Esq., Martin A. Muckleroy, Esq., and Terry A. Coffing, Esq.; and of counsel for Defendants Scott Financial Corporation and Bradley J. Scott, J. Randall Jones, Esq.; Bank of Oklahoma, N.A., John Clayman, Esq. and Jennifer K. Hostetler, Esq.; APCO Construction, Robert L. Rosenthal, Esq.; and Alex Edelstein, Kyle Smith, Esq.; and with good cause appearing and there being no just cause for delay, the Court makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. The Tharaldson Plaintiffs' Claim for Fiduciary Duty in their First Amended Complaint is founded upon the theory that Scott Defendants "owed to Plaintiffs fiduciary duties of undivided loyalty, due care, and full disclosure of material information." See Plaintiffs' First Amended Complaint, on file herein, at ¶ 272

2. On or about January 22, 2008, Tharaldson, in his individual capacity, entered into a Guaranty with Lender Scott Financial Corporation. See Tharaldson Guaranty, Bates labeled Scott-009115 to Scott-009119, attached as Exhibit A.

3. On or about January 22, 2008, Tharaldson, as president for Tharaldson Motels II, Inc., entered into a Guaranty with Lender Bank of Oklahoma, N.A. See TM2I Guaranty, Bates labeled P001207 to P001210, attached as Exhibit B.

4. Neither Guaranty explicitly mentions imposing a fiduciary obligation upon the Scott Defendants See Exhibits A & B.

5. On or about January 21, 2008, Plaintiff Club Vista Financial Services entered into a Participation Agreement with Scott Financial Corporation. See Participation Agreement, Bates labeled Scott-005131 to Scott-005140, attached as Exhibit C.

6. Neither of the Guarantor Plaintiffs is a party to the Participation Agreement. See Exhibit C.

II.

CONCLUSIONS OF LAW

1. The Guarantor Plaintiffs have failed to overcome the presumption that no fiduciary relationship exists between a lender and a guarantor, as a matter of law. *See* Giles v. GMAC,

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494 F.3d 865, 882 (9th Cir. 2007).

2. The Guarantor Plaintiffs have failed to demonstrate they had a right to expect trust and confidence in the integrity and fidelity of the Scott Defendants and have failed to demonstrate that the Scott Defendants were or should have been aware of such trust and confidence, such that a fiduciary duty would arise. See Powers v. United Services Auto Ass'n., 115 Nev. 38, 979 P.2d 1286, 1288 (1999)("A fiduciary relationship arises when one party has the right to expect trust and confidence in the integrity and fidelity of another."); Giles, supra, at 882 (a fiduciary relationships can arise because of the "specific actions and particular situations of the parties").

3. There is no genuine issue of material fact regarding the Guarantor Plaintiffs' fiduciary duty claim, and Scott Financial Corporation and Bradley J. Scott are entitled to judgment as a matter of law on their motion in this regard.

III.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial Corporation and Bradley J. Scott's Motion for Summary Judgment Regarding Plaintiffs' Seventh and Eleventh Claims for Relief is GRANTED, IN PART, as to Guarantor Plaintiffs' claims against the Scott Defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a Judgment in favor of Defendants Scott Financial Corporation, and Bradley J. Scott and against the Guarantor Plaintiffs is hereby entered as to Plaintiffs' Seventh Claim for Relief regarding Fiduciary Duty.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the Court's findings of fact is to be construed as a conclusion of law, and each of the Court's conclusion of law is to be construed as a finding of fact, as may be necessary or appropriate to carry out this Order.

DATED this 21 day of March, 2011.

DISTRICT COURT JUDGE

Submitted by:

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EXHIBIT A

ORIGINAL

Scott Financial Corporation

EXHIBIT 1099 Rucker 01/9/19

GUARANTY
($100,000,000 Senior Debt Construction Note)
(Unlimited—Gary D. Tharaldson, Individually)

WHEREAS SCOTT FINANCIAL CORPORATION, a North Dakota corporation (the "Lender") has agreed to loan up to $110,000,000.00 (the "Loan") to GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation (the "Borrower");

WHEREAS the Loan will be evidenced by the Borrower's promissory notes of even date herewith payable to the order of the Lender consisting of a $100,000,000 Senior Debt Construction Note and a $10,000,000 Senior Debt Contingency Note (collectively, the "Senor Notes");

WHEREAS, to secure payment of the Senior Notes and all other Obligations in connection with the Loan, the Borrower has executed and delivered to the Lender a Senior Debt Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Construction) of even date herewith (the "Senior Debt Deed of Trust");

WHEREAS the Lender, as a condition to making the Loan, has required the execution of this Guaranty of the $100,000,000 Senior Construction Note;

NOW, THEREFORE, the undersigned (hereinafter the "Guarantor"), in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby agrees as follows:

1. The Guarantor hereby absolutely, unconditionally and jointly and severally guarantees to the Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of (i) the repayment of all funds disbursed under and evidenced by the $100,000,000 Senior Debt Construction Note (and all interest thereon) and any extensions or renewals thereof and substitutions therefor; and (ii) each and every sum secured by the Security Documents; and (iii) each and every other of the Obligations in connection with the $100,000,000 Senior Debt Construction Note or sum now or hereafter owing under any agreement now or hereafter entered into between the Lender and the Borrower in connection with the $100,000,000 Senior Debt Construction Note or the Property encumbered therein, including, without limitation, the indemnification provisions of the Senior Debt Deed of Trust (all of said sums being hereinafter called the "Indebtedness"); and the Guarantor agrees to pay all reasonable costs, expenses and attorneys' fees paid or incurred by the Lender in endeavoring to collect the Indebtedness and in enforcing this Guaranty. The obligations of the Guarantor shall be joint and several with all other parties liable for the Indebtedness.

2. Indebtedness of the Borrower under the Note or otherwise may be created and

continued in any amount without affecting or impairing the liability of the Guarantor hereunder.

3. No act or thing need occur to establish the liability of the Guarantor hereunder, and with the exception of full payment, no act or thing (including, but not limited to, a discharge in bankruptcy of the Indebtedness, and/or the running of the statute of limitations) relating to the Indebtedness which but for this provision could act as a release of the liabilities of the Guarantor hereunder, shall in any way exonerate the Guarantor, or affect, impair, reduce or release this Guaranty and the liability of the Guarantor hereunder; and this shall be a continuing, absolute, unconditional and joint and several guaranty and shall be in force and be binding upon the Guarantor until the Indebtedness is fully paid.

4. The liability of the Guarantor hereunder shall not be affected or impaired in any way by any of the following acts or things (which the Lender is hereby expressly authorized to do, omit or suffer from time to time without notice to or consent of anyone): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all Indebtedness; (ii) any extension or renewal of any Indebtedness (whether or not for longer than the original period) or any modification of the interest rate, maturity or other terms of any Indebtedness; (iii) any waiver or indulgence granted to the Borrower, any delay or lack of diligence in the enforcement of the Note or any other Indebtedness, or any failure to institute proceedings, file a claim, give any required notices or otherwise protect any Indebtedness; (iv) any full or partial release of, compromise or settlement with, or agreement not to sue, the Borrower or any other guarantor or other person liable on any Indebtedness or the death of any other guarantor or obligor on any Indebtedness; (v) any release, surrender, cancellation or other discharge of any Indebtedness or the acceptance of any instrument in renewal or substitution for any instrument evidencing Indebtedness; (vi) any failure to obtain collateral security (including rights of setoff) for any Indebtedness, or to see to the proper or sufficient creation and perfection thereof, or to establish the priority thereof, or to preserve, protect, insure, care for, exercise or enforce any of the Security Documents or any other collateral security for any of the Indebtedness; (vii) any modification, alteration, substitution, exchange, surrender, cancellation, termination, release or other change, impairment, limitation, loss or discharge of any of the Security documents or any other collateral security for any of the Indebtedness; (viii) any assignment, sale, pledge or other transfer of any of the Indebtedness; or (ix) any manner, order or method of application of any payments or credits on any Indebtedness. The Guarantor waives any and all defenses and discharges available to a surety, guarantor, or accommodation co-obligor, dependent on their character as such.

5. The Guarantor waives any and all defenses, claims, setoffs, and discharges of the Borrower, or any other obligor, pertaining to the Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Guarantor will not assert against the Lender any defense of waiver, release, discharge in bankruptcy, res judicata, statute of frauds, anti-deficiency statute, fraud, ultra vires acts, usury, illegality or unenforceability which may be available to the Borrower in respect of the Indebtedness, or any setoff available against the Lender to the Borrower, whether or not on account of a related transaction, and the Guarantor expressly agrees that he shall be and remain liable for any deficiency remaining after foreclosure of the Deed of Trust or other security interest securing any Indebtedness, notwithstanding provisions of law that may prevent the Lender from enforcing such deficiency against the Borrower. The liability of the Guarantor shall not be affected or impaired by any voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all the assets, marshalling of

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assets and liabilities, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition or readjustment of, or other similar event or proceeding affecting, the Borrower or any of its assets. The Guarantor will not assert against the Lender any claim, defense or setoff available to the Guarantor against the Borrower.

6. The Guarantor also hereby waives: (i) presentment, demand for payment, notice of dishonor or nonpayment, and protest of the Indebtedness; (ii) notice of the acceptance hereof by the Lender and of the creation and existence of all Indebtedness; and (iii) notice of any amendment to or modification of any of the terms and provisions of the Note, the Security Documents or any other agreement evidencing any Indebtedness. The Lender shall not be required to first resort for payment of the indebtedness to the Borrower or other persons or corporations, their properties or estates, or to any collateral, property, liens or other rights or remedies whatsoever.

7. Whenever, at any time or from time to time, the Guarantor shall make any payment to the Lender hereunder, the Guarantor shall notify the Lender in writing that such payment is made under this Guaranty for such purpose. If any payment applied by the Lender to the Indebtedness is thereafter set aside, recovered, rescinded or required to be returned for any reason (including, without limitation, the bankruptcy, insolvency or reorganization of the Borrower or any other obligor), the Indebtedness to which such payment was applied shall for the purposes of this Guaranty be deemed to have continued in existence, notwithstanding such application, and this Guaranty shall be enforceable as to such Indebtedness as fully as if such application had never been made.

8. No payment by the Guarantor pursuant to any provision hereof shall entitle the Guarantor, by subrogation to the rights of the Lender or otherwise, to any payment by the Borrower or out of the property of the Borrower until all of the Indebtedness (including interest) and all costs, expenses and attorneys' fees paid or incurred by the Lender in endeavoring to collect the Indebtedness and enforcing this Guaranty have been fully paid. The Guarantor will not exercise or enforce any right or contribution, reimbursement, recourse or subrogation available to the Guarantor as to any Indebtedness, or against any person liable therefor, or as to any collateral security therefor, unless and until all such Indebtedness shall have been fully paid and discharged.

9. The Guarantor hereby represents and warrants to Lender that there is no action, proceeding or investigation pending or threatened (or any basis therefor) which involves the Property encumbered by the Senior Debt Deed of Trust or which may materially adversely affect the condition, business or prospects of the Borrower or the Guarantor or any of Borrower's or the Guarantor's properties or assets, or which might adversely affect the Borrower's or the Guarantor's ability to perform their obligations under the Security Documents.

10. The Guarantor shall maintain a minimum personal net worth of not less than $500,000,000 and liquidity (defined as cash and available lines of credit) of at least $25,000,000, measured annually at each December 31. The Guarantor shall provide to Lender annual financial statements and tax returns in a timely manner

11. This Guaranty shall be binding upon the heirs, legal representatives, successors and assigns of the Guarantor, and shall inure to the benefit of the successors and assigns of the Lender.

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

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

IN WITNESS WHEREOF, the Guarantor has executed this Guaranty as of this 22nd day of January, 2008.

GUARANTOR:

Gary D. Tharaldson, Individually

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Scott Financial Corporation

ADDENDUM TO GUARANTY
(Nevada Law Provisions)

This Addendum is incorporated into the Guaranty dated January 22, 2008 (the "Guaranty") executed by **GARY D. THARALDSON** ("Guarantor") in favor of **SCOTT FINANCIAL CORPORATION** ("Lender").

In addition the waivers set forth in the Guaranty, the Guarantor hereby expressly waives the following:

(a) any and all rights or defenses arising by reason of election of remedies by Lender that destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's right to proceed against Borrower for reimbursement, including, without limitation, loss of rights Guarantor may suffer by reason of any law limiting, qualifying or discharging the Obligations; and (b) any "one action" or "antideficiency" law (including, without limitation, N.R.S. §40.430) or any other law that may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of power of sale.

Guarantor warrants and agrees that each of the waivers set forth above and in the Guaranty above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law. If such waiver are determined to be contrary to any applicable law or public policy, such waivers shall be effective only to the extent permitted by law or public policy. Guarantor waives: (to the full extent permitted by N.R.S. ¶ 40-495, the benefits of the one-action rule under N.R.S. §40.430; and (ii) to the full extent permitted by N.R.S. §§ 104.3605 and 104.3419, discharge under N.R.S. §§ 104.3605(8) and/or 104.3419.

THE WAIVER OF SUBROGATION AND OTHER RIGHTS SET FORTH IN PARAGRAPH 8 OF THE GUARANTY IS HEREBY EXPRESSLY MADE NOTWITHSTANDING THE PROVISIONS OF N.R.S. §§ 40.475 AND 40.485 OR ANY OTHER STATUTORY OR COMMON LAW OR PROCEDURAL RULE TO THE CONTRARY.

IN WITNESS WHEREOF, the Guarantor has executed this Addendum to Guaranty as of this 22nd day of January, 2008.

GUARANTOR:

Gary D. Tharaldson, Individually

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EXHIBIT B

ORIGINAL

GUARANTY
(Unlimited—Tharaldson Motels II, Inc.)

DR EXHIBIT 1096 Bueker 11/01/19

WHEREAS SCOTT FINANCIAL CORPORATION, a North Dakota corporation (the "Originating Lender") has agreed to loan up to $110,000,000.00 (the "Loan") to GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation(the "Borrower");

WHEREAS, the Loan will be evidenced by the Borrower's two promissory notes of even date herewith payable to the order of the Originating Lender in the principal amount of $100,000,000 (the "Senior Debt Construction Note") and the principal amount of $10,000,000 (the "Senior Debt Contingency Note");

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

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

NOW, THEREFORE, the undersigned, a North Dakota corporation (hereinafter the "Guarantor"), in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby agrees as follows:

1. The Guarantor hereby absolutely, unconditionally and jointly and severally guarantees to Bank OK the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of (i) the repayment of all funds disbursed by Bank OK under the Participation and under and evidenced by the Note (and all interest thereon) and any extensions or renewals thereof and substitutions therefor; and (ii) Bank OK's Participation share of (a) each and every sum secured by the Security Documents; and (b) each and every other of the Obligations in connection with the Loan or sum now or hereafter owing under any agreement now or hereafter entered into between the Originating Lender and the Borrower in connection with the Loan or the Property encumbered therein, including, without limitation, the indemnification provisions of the Deed of Trust (all of said sums being hereinafter called the "Indebtedness"); and the Guarantor agrees to pay all reasonable costs, expenses and attorneys' fees paid or incurred by Bank OK in endeavoring to collect the Indebtedness and in enforcing this Guaranty. The obligations of the Guarantor shall be joint and several with all other parties liable for the Indebtedness.

2. Indebtedness of the Borrower under the Note or otherwise may be created and continued in any amount without affecting or impairing the liability of the Guarantor hereunder.

3. No act or thing need occur to establish the liability of the Guarantor hereunder, and with the exception of full payment, no act or thing (including, but not limited to, a discharge in bankruptcy of the Indebtedness, and/or the running of the statute of limitations) relating to the Indebtedness which but for this provision could act as a release of the liabilities of the Guarantor

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hereunder, shall in any way exonerate the Guarantor, or affect, impair, reduce or release this Guaranty and the liability of the Guarantor hereunder; and this shall be a continuing, absolute, unconditional and joint and several guaranty and shall be in force and be binding upon the Guarantor until the Indebtedness is fully paid.

4. The liability of the Guarantor hereunder shall not be affected or impaired in any way by any of the following acts or things (which the Originating Lender is hereby expressly authorized to do, omit or suffer from time to time without notice to or consent of anyone): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all Indebtedness; (ii) any extension or renewal of any Indebtedness (whether or not for longer than the original period) or any modification of the interest rate, maturity or other terms of any Indebtedness; (iii) any waiver or indulgence granted to the Borrower, any delay or lack of diligence in the enforcement of the Note or any other Indebtedness, or any failure to institute proceedings, file a claim, give any required notices or otherwise protect any Indebtedness; (iv) any full or partial release of, compromise or settlement with, or agreement not to sue, the Borrower or any other guarantor or other person liable on any Indebtedness or the death of any other guarantor or obligor on any Indebtedness; (v) any release, surrender, cancellation or other discharge of any Indebtedness or the acceptance of any instrument in renewal or substitution for any instrument evidencing Indebtedness; (vi) any failure to obtain collateral security (including rights of setoff) for any Indebtedness, or to see to the proper or sufficient creation and perfection thereof, or to establish the priority thereof, or to preserve, protect, insure, care for, exercise or enforce any of the Security Documents or any other collateral security for any of the Indebtedness; (vii) any modification, alteration, substitution, exchange, surrender, cancellation, termination, release or other change, impairment, limitation, loss or discharge of any of the Security documents or any other collateral security for any of the Indebtedness; (viii) any assignment, sale, pledge or other transfer of any of the Indebtedness; or (ix) any manner, order or method of application of any payments or credits on any Indebtedness. The Guarantor waives any and all defenses and discharges available to a surety, guarantor, or accommodation co-obligor, dependent on their character as such.

5. The Guarantor waives any and all defenses, claims, setoffs, and discharges of the Borrower, or any other obligor, pertaining to the Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Guarantor will not assert against Bank OK any defense of waiver, release, discharge in bankruptcy, res judicata, statute of frauds, anti-deficiency statute, fraud, ultra vires acts, usury, illegality or unenforceability which may be available to the Borrower in respect of the Indebtedness, or any setoff available against the Originating Lender to the Borrower, whether or not on account of a related transaction, and the Guarantor expressly agrees that he shall be and remain liable for any deficiency remaining after foreclosure of the Deed of Trust or other security interest securing any Indebtedness, notwithstanding provisions of law that may prevent the Originating Lender from enforcing such deficiency against the Borrower. The liability of the Guarantor shall not be affected or impaired by any voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all the assets, marshalling of assets and liabilities, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition or readjustment of, or other similar event or proceeding affecting, the Borrower or any of its assets. The Guarantor will not assert against the Originating Lender or Bank OK any claim, defense or setoff available to the Guarantor against the Borrower.

6. The Guarantor also hereby waives: (i) presentment, demand for payment, notice of dishonor or nonpayment, and protest of the Indebtedness; (ii) notice of the acceptance hereof by Bank OK and of the creation and existence of all Indebtedness; and (iii) notice of any amendment to or modification of any of the terms and provisions of the Note, the Security Documents or any other agreement evidencing any Indebtedness. Neither the Originating Lender nor Bank OK shall be required to first resort for payment of the Indebtedness to the Borrower or other persons or corporations, their properties or estates, or to any collateral, property, liens or other rights or remedies whatsoever.

7. Whenever, at any time or from time to time, the Guarantor shall make any payment to Bank OK hereunder, the Guarantor shall notify Bank OK in writing that such payment is made under this Guaranty for such purpose. If any payment applied by Bank OK to the Indebtedness is thereafter set aside, recovered, rescinded or required to be returned for any reason (including, without limitation, the bankruptcy, insolvency or reorganization of the Borrower or any other obligor), the Indebtedness to which such payment was applied shall for the purposes of this Guaranty be deemed to have continued in existence, notwithstanding such application, and this Guaranty shall be enforceable as to such Indebtedness as fully as if such application had never been made.

8. No payment by the Guarantor pursuant to any provision hereof shall entitle the Guarantor, by subrogation to the rights of the Bank OK or otherwise, to any payment by the Borrower or out of the property of the Borrower until all of the Indebtedness (including interest) and all costs, expenses and attorneys' fees paid or incurred by the Originating Lender and Bank OK in endeavoring to collect the Indebtedness and enforcing this Guaranty have been fully paid. The Guarantor will not exercise or enforce any right or contribution, reimbursement, recourse or subrogation available to the Guarantor as to any Indebtedness, or against any person liable therefor, or as to any collateral security therefor, unless and until all such Indebtedness shall have been fully paid and discharged.

9. This Guaranty shall be binding upon the heirs, legal representatives, successors and assigns of the Guarantor, and shall inure to the benefit of the successors and assigns of Bank OK.

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

11. WAIVER OF JURY TRIAL. THE GUARANTOR ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED AND THAT THE TIME AND EXPENSE REQUIRED FOR TRIAL BY A JURY MAY EXCEED THE TIME AND EXPENSE REQUIRED FOR TRIAL WITHOUT A JURY. THE GUARANTOR, AFTER CONSULTING (OR HAVING HAD THE OPPORTUNITY TO CONSULT) WITH COUNSEL OF GUARANTOR'S CHOICE, KNOWINGLY AND VOLUNTARILY, AND FOR THE MUTUAL BENEFIT OF LENDER AND GUARANTOR, WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING THE

PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO, THIS GUARANTY, ANY RELATED AGREEMENTS, OR OBLIGATIONS THEREUNDER. THE GUARANTOR HAS READ ALL OF THIS GUARANTY AND UNDERSTANDS ALL OF THE PROVISIONS OF THIS GUARANTY. THE GUARANTOR ALSO AGREES THAT COMPLIANCE BY THE LENDER WITH THE EXPRESS PROVISIONS OF THIS GUARANTY SHALL CONSTITUTE GOOD FAITH AND SHALL BE CONSIDERED REASONABLE FOR ALL PURPOSES.

IN WITNESS WHEREOF, the Guarantor has executed this Guaranty as of this 22nd day of January, 2008.

GUARANTOR:

THARALDSON MOTELS II, INC.

By Gary D. Tharaldson
Gary D. Tharaldson
Its President

EXHIBIT C

EXHIBIT 1069 01/14/10 Kuehler

Scott Financial Corporation

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NONRECOURSE PARTICIPATION AGREEMENT

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

1. Definitions.

(a) "Participant's Interest" means the percentage interest of Participant in the principal amount of and interest on the Loan, the Loan Documents and the Collateral. The percentage interest of Participant in the Loan is 3.4%

(b) "Banking Day" means a day on which the Federal Reserve Bank of Minneapolis is open for business.

(c) "Borrower" means Gemstone Development West, Inc. a Nevada Corporation.

(d) "Certificate" means the Loan Participation Certificate, in the form of Exhibit A to this Agreement, issued by Originating Lender to Participant evidencing Participant's Interest in the Loan to Borrower.

(e) "Co-Lead" means Bank of Oklahoma, N.A.

(f) "Collateral" means all collateral securing payment of the indebtedness evidenced by the note or the performance of the Borrower's obligations under the Loan Documents or the performance of any guaranty.

(g) "Loan" means the certain $100,000,000 loan that Originating Lender has made to the Borrower and in which Participant has agreed to participate under the terms of this Agreement.

(h) "Loan Documents" means all documents evidencing, securing and/or relating to the Loan, including, but not limited to, the note, financing statements, security agreements, deed of trust, mortgage, assignments, certificates, powers, filings, agreements and all other writings executed or to be executed in connection with the Loan and all credit displays and modifications to credit displays, appraisals, environmental site assessments, geotechnical reports, surveys, title insurance policies, and other documents delivered in connection with the Loan.

(i) "Loss" means any and all liabilities, claims, damages, actions, costs, expenses, settlements or penalties, including, without limitation, attorneys' fees, which may be incurred by either Originating Lender or Participant with respect to the Loan.

(j) "Originating Lender's Interest" means the percentage interest of Originating Lender in the principal amount of and interest on the Loan and the Collateral, which is 0%.

2. Sale and Participation.

(a) Subject to the terms and conditions of this Agreement and all related documents including Participation Certificates, Originating Lender sells and assigns to Participant, and Participant purchases and accepts from Originating Lender Participant's Interest in the Loan. This Agreement constitutes a sale of Participant's Interest by Originating Lender to Participant without recourse and shall in no way be construed as a loan by Participant to Originating Lender or as creating any relationship other than as provided in this Agreement.

(b) Originating Lender's Interest and Participant's Interest and the rights and powers contained in and in connection with these interests shall be ratably concurrent and neither shall have priority over the other.

(c) Originating Lender shall hold the Loan Documents as trustee for Participant to the extent of Participant's Interest; provided that the Loan Documents shall be kept offsite in safekeeping at the Bank of North Dakota, in Bismarck, North Dakota.

(d) Originating Lender warrants that it owns the percentage interest in the Loan, the Loan Documents and the Collateral that it has sold and assigned to Participant under the terms and provisions of this Agreement.

3. Loan.

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

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

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

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

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

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

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

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

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

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

4. Additional Covenants.

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

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

5. Receipts, Collections and Expenses.

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

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

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

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

6. Servicing.

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

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

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

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

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

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

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

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

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

7. Modification and Waiver.

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

(a) Make or consent to any change in the maturity date of the Loan;

(b) Make or consent to any change in the interest rate of the Loan;

(c) Make or consent to any change in the time of payment of interest;

(d) Make or consent to any change in the maximum principal amount of the Loan or the priority of the lien of the Deed of Trust;

(e) Compromise any claim against the Borrower or Guarantor or any amount due under the Loan Documents;

(f) Release any of the collateral other than upon payment of release consideration in the ordinary course of Borrower's business; or

(g) Approve any material modifications to approved project budgets.

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

8. Default and Enforcement.

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

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

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

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

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

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

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

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

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

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

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

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

9. Collection After Acceleration.

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

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

10. Additional Terms.

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

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

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

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

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

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

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

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

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

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

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

11. Risks and Standard of Care.

(a) Participant acknowledges that it has become a party to this Agreement with the understanding and expectation that it will rely upon its own independent analysis of the Borrower's financial condition and creditworthiness to the extent deemed necessary or advisable by Participant. Participant further acknowledges that Participant is solely responsible for meeting all bank regulatory and compliance requirements, including but no limited to independent appraisal review and Patriot Act compliance.

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

12. Assignments.

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

13. Indemnification.

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

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

14. Miscellaneous.

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

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

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

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

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

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

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

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

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

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

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

ORIGINATING LENDER:

SCOTT FINANCIAL CORPORATION

By_____
Brad J. Scott, Its President

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

PARTICIPANT:

CLUB VISTA FINANCIAL SERVICES, LLC

By_____
Gary D. Tharaldson, Its President

10421 Nostalgia Circle
Las Vegas, NV 89135
Email: gdtharaldson@tharaldson.com
Telephone: (702) 463-8666

Attachments: Exhibit A - Loan Participation Certificate

Scott Financial Corporation

ORIGINAL

EXHIBIT A

LOAN PARTICIPATION CERTIFICATE

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

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

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

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

ORIGINATING LENDER:

SCOTT FINANCIAL CORPORATION

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

PARTICIPANT:

CLUB VISTA FINANCIAL SERVICES, LLC

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

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Attorneys for Scott Financial Corporation and 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. AND ALL RELATED MATTERS.	Case No.: A579963 Dept. No.: XIII Consolidated with Case No.: A609288 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Granting Motion For Summary Judgment On Plaintiffs' Twelfth Claim for Relief (Negligence) and Judgment was entered in the above-entitled

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matter on the 4th day of March, 2011, a copy of which is attached hereto.

DATED this 9th day of March, 2011.

Respectfully submitted,

KEMP, JONES & COULTHARD

/s/ Matthew S. Carter

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 2011, the foregoing **NOTICE OF ENTRY OF ORDER** was served on the following persons by e-mailing to the e-mail addresses listed as follows:

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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.	Case No.: A579963 Dept. No.: XIII **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' TWELFTH CLAIM FOR RELIEF (NEGLIGENCE) AND JUDGMENT**

This matter having first come before this Court without oral argument pursuant to EDCR 2.23, regarding Defendant/Counterclaimants Scott Financial Corporation's and Bradley J. Scott's Motion for Summary Judgment Regarding Plaintiffs' Twelfth Claim for Relief (Negligence), the Court having reviewed the pleadings and papers on file herein, and with good cause appearing and

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there being no just cause for delay, the Court makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. Plaintiffs' claim for negligence in their First Amended Complaint is based on Defendants Scott Financial Corporation ("SFC") and Bradley J. Scott's ("Brad Scott") alleged breach of their respective duties of care in connection with the underwriting, funding, and administration of the Senior Loan for the Manhattan West project. See Plaintiffs' First Amended Complaint, on file herein, at ¶ 296.

2. Plaintiffs Gary Tharaldson and Tharaldson Motels II, Inc. ("TM2I") are the Guarantors of the Senior Loan agreement, and are not parties to the Senior Loan Agreement. Plaintiff Club Vista Financial Services purchased a participation in the Manhattan West Senior Loan from the lender on the project, SFC. See Guaranties of Gary Tharaldson and TM2I, Bates labeled Scott-009115 to Scott-009119 and P001207 to P001210, respectively, attached hereto as Exhibits A and B. See also Participation Agreement of Club Vista Financial Services, Bates labeled Scott-005131 to Scott-005140, attached hereto as Exhibit C.

3. The Guaranty Contracts executed by Tharaldson and TM2I unambiguously provide that, "[t]he Guarantor waives any and all defenses, claims, setoffs, and discharges of the Borrower, or any other obligor, pertaining to the indebtedness, except the defense of discharge by payment in full." See Guaranties of Gary Tharaldson and TM2I, Bates labeled Scott-057631 to Scott-057635 and P001207 to P001210, respectively, attached hereto as Exhibits A and B.

4. Plaintiffs' negligence claim is a claim of the Borrower pertaining to the indebtedness.

5. There is no evidence that Plaintiffs' negligence claim is based on any other duty except for those pertaining to the Senior Loan Agreement.

II.

CONCLUSIONS OF LAW

1. To prevail on a negligence theory, a plaintiff must demonstrate that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal

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cause of the plaintiff's injury; and (4) the plaintiff suffered damages. Wiley v. Redd, 110 Nev. 1310, 1315, 885 P.2d 592, 595 (1994) (citing Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 864 P.2d 796 (1993)). Whenever a defendant can show that one of the elements of the plaintiff's prima facie case is "lacking as a matter of law," summary judgment is required. Id.

2. Plaintiffs' negligence claim fails because they have failed to demonstrate that any Defendant owed a duty of care to Plaintiffs. The duties that form the basis for Plaintiffs' negligence allegations are contractual – not legal – in nature. As a matter of law, they do not give rise to tort liability under a negligence theory. With "no legal duty to breach, there can be no talk of negligence," and summary judgment is required. Foronda v. Hawaii Intern. Boxing Club, 25 P.3d 826, 836 (Hawaii App. 2001); accord, Butler v. Bayer, 168 P.3d 1055, 1063 (Nev. 2007) ("Because the existence of duty is a question of law, if this court determines that no duty exists, it will affirm summary judgment for the defendant in a case involving negligence").

3. Plaintiffs' alleged breaches of contractual duty does not give rise to tort liability. See Walser v. Moran, 180 P. 492, 494 (Nev. 1919) ("If there be no legal duty except as arising from the contract . . . there is no tort").

4. Furthermore, there is no genuine issue of material fact as to Plaintiffs' negligence claim as to Tharaldson and TM2I because neither of those guarantors are parties to the Senior Loan Agreement, and in general, no one "is liable upon a contract except those who are parties to it." Albert H. Wohlers and Co. v. Bartgis, 969 P.2d 949, 959 (Nev. 1998) (quoting County of Clark v. Bonanza No. 1, 615 P.2d 939, 943 (Nev. 1980)).

5. Additionally, a guarantor's rights against the creditor are determined by the terms of the guaranty, and Tharaldson and TM2I waived any negligence claim under the terms of their guaranty. See Behlen Mfg. Co. v. First National Bank of Engelwood, 28 Colo.App. 300, 472 P.2d 703 (1970).

6. Accordingly, there is no genuine issue of material fact regarding Plaintiffs' negligence claim, and Scott Financial Corporation and Bradley J. Scott are entitled to judgment as a matter of law on that claim.

. . .

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III.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial Corporation and Bradley J. Scott's Motion for Summary Judgment Regarding Plaintiffs' Twelfth Claim for Relief is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a Judgment in favor of Defendants Scott Financial Corporation and Bradley J. Scott and against Plaintiffs is hereby entered as to Plaintiffs' Twelfth Claim for Relief of the First Amended Complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the Court's findings of fact is to be construed as a conclusion of law, and each of the Court's conclusion of law is to be construed as a finding of fact, as may be necessary or appropriate to carry out this Order.

DATED this 2nd day of February, 2011.

DISTRICT COURT JUDGE

Submitted by:

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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 X1No. A-10-609288-C

SECOND AMENDED COMPLAINT

Exemption From Arbitration
Claim: Matter Involves Title to Real Estate

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.

ALEXANDER EDELSTEIN, an individual,

Defendant.

SECOND AMENDED COMPLAINT

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

NATURE OF THE ACTION

1. This case for fraud and breach of fiduciary duty and breach of contract and other claims arises out of a highly unusual real estate finance deal. Defendants Scott Financial Corporation ("SFC") owned and operated by Defendant Brad Scott ("Scott") and Bank of Oklahoma, N.A. ("BOk") are co-lead lenders in a 29 lender $110 million participation loan, which those Defendants structured to provide above market interest rates for BOk and the other lenders and substantial loan origination and servicing fees for SFC. Even though called the co-lead lender, SFC did not loan a single dollar to the developer/borrower, but SFC did collect substantial fees. Defendants Scott and SFC have long had a fiduciary relationship of the highest trust and confidence with Plaintiffs. SFC, Scott, and BOk (hereinafter "Fiduciary Defendants"), induced Plaintiff Tharaldson and Plaintiff Tharaldson Motels II, Inc., to give 100% unlimited guarantees of the performance of a wholly unrelated developer/borrower. Now that the Project has failed, Plaintiffs have learned that Fiduciary Defendants did not perform appropriate due diligence and loan administration, but by their own admission, "underwrote" (without proper fiduciary disclosure to Plaintiffs) the Project solely on the financial strength of Plaintiffs' guarantees and funded the loan notwithstanding that conditions precedent to funding were never satisfied. While this allowed Fiduciary Defendants to obtain a sub prime rate of return on a prime rate credit, Defendants wrongfully induced Plaintiffs' participation in the financing

transaction through multiple breaches of fiduciary duty, misrepresentations, and omissions.

PLAINTIFFS

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

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

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

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

THE FIDUCIARY DEFENDANTS

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

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

8. Defendant Bank of Oklahoma, N.A. ("BOk") is a national bank with its principal place of business in Tulsa, Oklahoma. BOk acted in a fiduciary capacity to Plaintiffs as Co-Lead Lender in the $110,000,000 loan. BOk is sued on its own account and in its representative capacity as Co-Lead Lender for 28 other participating lenders on the Senior Loan defined below,

including CVFS. It is also sued because Scott and SFC acted as its agents in connection with the wrongful acts alleged herein.

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

OWNER DEFENDANT

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

CONTRACTOR DEFENDANT

11. Defendant Asphalt Products Corporation d/b/a APCO Construction ("Contractor") is a Nevada corporation which contracted and was responsible for construction of the Project on the Property pursuant to a "guaranteed maximum price" contract. Contractor is named as a defendant in this action because it has filed liens against the Property or has caused liens to be filed against the Property directly contrary to its agreement to subordinate its claims (as set forth herein) in favor of the Lender under the Senior Loan and because it made certain misrepresentations of material fact and omitted to state material facts in connection with the funding of the Senior Loan.

FICTITIOUS DEFENDANTS

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

Plaintiffs will seek leave of this Court to amend its Complaint to insert the true names and capacities of the DOE and ROE parties and state appropriate charging allegations when that information has been ascertained.

SUBJECT MATTER JURISDICTION

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

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

GENERAL AND PERSONAL JURISDICTION

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

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

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

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

VENUE

19. Venue is appropriate in this Court under NRS 13.010(2)(a) and (c) because this dispute involves interests in real property located in Clark County, Nevada. Venue is also appropriate under NRS 13.040 as to SFC, Gemstone West Inc., and Contractor because they are

engaged in business in Clark County, Nevada. Furthermore, the Senior Debt Loan Agreement out of which this action arises provides for venue in the state and federal courts located in Clark County, Nevada. Finally, the *res* of the action is real property located in Clark County, Nevada, in which Plaintiffs and Defendants claim an interest.

GENERAL ALLEGATIONS

Plaintiffs' Business

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

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

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

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

Scott's and SFC's Fiduciary Relationship With Plaintiffs

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

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

26. Since 2003, Scott has advised Tharaldson concerning business and financial matters, including numerous investments in real estate loans originated, underwritten, and

administered by Scott through SFC for the benefit of CVFS and Tharaldson (the "SFC Loans").

27. Tharaldson and his business entities have relied exclusively on Scott and SFC for credit underwriting, due diligence and feasibility analysis for the SFC Loans. Scott and SFC knew of and encouraged this exclusive reliance. Tharaldson only invested in SFC Loans that Scott represented SFC had thoroughly underwritten, investigated and concluded were prudent credit risks based on the financial merits of the underlying projects.

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

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

B. $10,000,000 construction loan made October 2005 and subsequently modified and extended, $2,000,000 second loan made in March 2006, and $3,750,000 inventory loan made in September 2008, in all of which Mesquite Investor Group is the borrower, SFC is lender, and Tharaldson Financial Group, L.L.C. is the 100% participant and owner of the Lender's interest, secured by a condominium project in Mesquite, Nevada.

C. $2,400,000 subordinate loan and $4,000,000 senior loan to 40th Street and Baseline, LLC made in March, 2006, in which SFC is the Lender and CVFS is the 100% participant and owner of the Lender's interest, secured by real property located in Phoenix, Arizona.

D. $2,250,000 subordinate loan and $3,750,000 senior loan to El Mirage and Camelback, LLC made March, 2006, in which SFC is the Lender and CVFS is the 100% participant and owner of the Lender's interest, secured by real property located in Phoenix, Arizona.

E. $46,000,000 land loan to Desert Springs Partners, L.L.C. and Ave. 48 Investment Group, L.L.C. made in August 2006 with a maturity of January 1, 2009, in which SFC is the Lender and CVFS is the majority participant and majority owner of the Lender's interest, secured by land located in Palm Springs, California.

F. $10,000,000 subordinate and $20,000,000 senior land loan to Torrey Pines Development, LLC, ABCDW, LLC, and Vanderbilt Farms, LLC with SFC as the Lender and CVFS as the 100% participant and owner of the Lender's interest, made in September 2006 with a maturity of December 31, 2008, secured by land in western Maricopa County, Arizona.

G. $20,000,000 subordinate and $82,000,000 senior land loan to Vanderbilt Farms, Vineyard Farms, ABCDS, and Gillespie Properties with SFC as Lender and CVFS as the majority participant and majority owner of the Lender's interest, made in September 2006 with a maturity of December 31, 2008, secured by land in western Maricopa County, Arizona.

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

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

30. In each of the SFC Loans, Plaintiffs relied entirely upon Scott and SFC to underwrite and evaluate the merits of the loans and to prepare the appropriate loan documentation to protect Plaintiffs' legal and financial interests in the SFC Loans, and Scott and SFC knew about and encouraged this reliance. Even though it was not the actual source of loan

funds, SFC typically prepared the loan documents for the SFC Loans in its name as the Lender. The only documentation Plaintiffs typically signed with respect to each of the SFC Loans was a separate Non-Recourse Participation Agreement and related commitment acknowledging their acquisition of ownership of the particular SFC Loan as the Participant. It was pursuant to these Agreements that Tharaldson and his entities made loan funds available to the ultimate borrowers.

31. From about 2003 through 2008, Tharaldson provided to Scott and SFC office space and facilities, lodging accommodations, and transportation assistance through Tharaldson's Las Vegas office on Scott's regular trips to Las Vegas.

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

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

34. On information and belief, Defendant BOk knew and understood at all material times that Scott and SFC were acting as Plaintiffs' agents and fiduciaries in operating Tharaldson's commercial real estate lending operations.

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

36. Plaintiffs' investment in each of the SFC Loans was documented by a separate Nonrecourse Loan Participation Agreement (Consulting Agreements in the case of the Manhattan Loans) prepared by Scott. Each participation agreement (and the Consulting

Agreements in the case of the Manhattan Loans) appoints SFC as the agent of CVFS or other Tharaldson affiliate with respect to the loan and acknowledges the fiduciary relationship and agency between SFC and such participant.

37. SFC and Scott have earned substantial loan origination fees and servicing fees for their work on the SFC Loans in which Plaintiffs invested based upon their expert advice and recommendations, and Plaintiffs' trust in Scott and SFC.

The ManhattanWest Project

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

39. Following the success of the Manhattan Project, SFC through Scott approached Tharaldson about making a loan on a sister project called ManhattanWest to be located on 21 acres of land on Russell Road in Las Vegas, Nevada (the "Property"). ManhattanWest was being developed by Edelstein, the same principal who had developed the Manhattan Project.

40. An Edelstein entity known as Gemstone Apache, LLC, ("Apache") acquired the Property in June 2006 for $31,540,000.

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

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

43. ManhattanWest was designed and approved as a mixed use community featuring 700 condominium residences in one nine-story tower and several mid-rise buildings, plus 195,350 square feet of retail and office space.

44. Phase 1 of ManhattanWest (the "Project"), involves approximately 228 of the 700 residential condominium units and all of the 195,350 square feet of retail and office space.

The Project Acquisition and Development Financing

(The Prior Loan and Edelstein Loan)

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

46. Pursuant to the Prior Loan Agreement, SFC agreed to loan Apache up to $25,000,000 (the "Prior Loan").

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

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

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

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

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

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

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

54. Part of the additional collateral for the Prior Loan and Edelstein Loan included a pledge by Gemstone LVS of certain of collateral, including but not limited to the then 59 unsold condominium units in the original Manhattan Project (the "Condo Units")..

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

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

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

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

Subsequent Modifications to Prior Loan and Edelstein Loan

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

60. The First Junior DOT was amended by a First Amendment Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) dated May 22, 2007 and recorded in the real property records of Clark County, Nevada on May 22, 2007 at Book 20070522, Instrument No. 0004011, to increase the amount secured thereby to $18,000,000.00 to correspond to an additional $8,000,000 advance on the Junior Deed of Trust Loan.

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

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

63. Pursuant to a Nonrecourse Participation Agreement dated October 9, 2007 by and between SFC, as Originating Lender, and CVFS, as Participant, as amended by the Addendum to Nonrecourse Participation Agreement dated October 9, 2007, as well as a Commitment to Participate executed on or about October 12, 2007 (the "Construction LOC Participation Agreement"), CVFS agreed to provide funds for the Construction LOC Note to Edelstein. The Construction LOC Participation Agreement provided that SFC was agent and fiduciary for

CVFS concerning the Construction LOC Note and acknowledged SFC's fiduciary duties to CVFS.

64. The Prior Loan Participation Agreement, the Edelstein Loan Participation Agreement, the LOC Participation Agreement, and the Construction LOC Participation Agreement, all of which had CVFS as the 100% participant and SFC as agent and fiduciary, are hereinafter collectively referred to as the "Pre-Senior Participation Agreements."

65. As of January 22, 2008, the total outstanding balance owed to Plaintiffs under the Prior Loan was approximately $42,273,146 and under the Edelstein Loan was approximately $13,000,000, for a total owed of approximately $55,273,055.

The Construction Financing Participation

(The Senior Loan)

66. By late 2007, Apache began vertical construction on the Project, but needed an additional $110,000,000 of construction loan funds to complete the Project.

67. Defendants SFC and Scott desired to structure and originate the $110,000,00 in construction loan funds because of the substantial loan origination fees and 50 basis point loan servicing fees the construction financing would generate for SFC.

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

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

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

construction financing.

71. To induce the cooperation of Tharaldson and CVFS, SFC and BOk offered Tharaldson a 500 basis point (5%) cut of the interest to be paid on the 14% construction loan in exchange for the guaranty of Tharaldson and in exchange for CVFS's agreement to subordinate approximately $46,000,000 of the Prior Loan and the Edelstein Loan, to the $110,000,000 in construction financing. This arrangement would still leave BOk and other participating lenders with a net 8.5% interest rate after payment of 50 basis points (.5%) in loan servicing fees to SFC. That rate was "highly profitable" to BOk.

72. This complex structure was highly unusual for a number of reasons. First, it is unusual for entities not affiliated with the developer and having no equity stake in the development to be guaranteeing the development's success. Second, it is unusual for a lender and its affiliates to take on both the risk of subordinating $46,000,000 and guarantying the performance of an unaffiliated borrower on a $110,000,000 construction loan. Third, guarantees are typically given by the borrower's "side" in a financing transaction, and not, as here, given by a substantial project lender.

73. Notwithstanding the highly unusual nature of this transaction, Tharaldson, CVFS and purportedly TM2I were persuaded to proceed with it due to the unusual level of trust and confidence they had in Scott and SFC.

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

- BOk received the guaranty of Tharaldson and the unauthorized guaranty of TM2I who were prime rate quality credits;
- BOk received an 8.5% net rate of return which was 2.5 percentage points above the prime rate at the first funding of the Senior Loan;
- BOk contracted for what should have been a first lien position through CVFS' agreement to subordinate the Prior Loan and the Edelstein Loan;
- BOk was able to participate in this attractive arrangement without taking out the Prior Loan and Edelstein Loan;

- BOk did not need to worry about whether or not the project was financially viable in what it knew were rapidly deteriorating real estate market conditions because it could count on full recovery under the Tharaldson and the unauthorized TM2I guarantees even if the actual developer never repaid a nickel of the loan;
- In effect, although the loan was made to finance the Project, BOk looked at the loan as a loan to Tharaldson and TM2I, thereby making the Project's performance virtually irrelevant to BOk.
- The transaction structure ultimately put all lending risk on the Project on the shoulders of CVFS (who had made and was being asked to subordinate $46,000,000 of the Prior Loan and the Edelstein Loan), and on Tharaldson and TM2I who had signed the unauthorized TM2I Guaranty of the $110,000,000 construction loan.

75. SFC acted as BOk's agent in procuring for it this deal which was highly beneficial to BOk and highly detrimental to Plaintiffs in the absence of appropriate due diligence which SFC and BOk were supposed to provide.

The Senior Loan Documentation and the "Mezzanine Financing"

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

77. Pursuant to the Senior Loan Agreement, SFC agreed to loan Gemstone West Inc. up to the amount of $110,000,000 (the "Senior Loan"). Funding for this Loan was ultimately provided by 29 participating lenders.

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

79. Prior to becoming Co-Lead Lender and at all times while acting as Co-Lead Lender with respect to the Senior Loan, BOk knew of the fiduciary relationship SFC occupied toward Plaintiffs due to the general relationship of trust and confidence between them and due to the SFC's status as agent and fiduciary to CVFS under the Pre-Senior Participation

Agreements, each of which appointed SFC as agent and fiduciary for CVFS and acknowledged SFC's fiduciary duties to CVFS on the loans, secured by the Property, to which they related.

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

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

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

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

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

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

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

A. Gemstone West Inc. having aggregate pre-sale revenue of not less than

$60,000,000 from: (i) Qualified Sales of condo units, (ii) the capitalized value (at a 7.0% capitalization rate measured against triple net lease payments) of Class A office and retail leases, and (iii) the sales price of Class A office space; and

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

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

88. Article 7 of the Senior Loan Agreement defines an event of default under the Agreement, and includes, among other things, if Gemstone West, Inc.: a) fails to pay principal or interest under the Senior Construction Note or Senior Contingency Note and such failure continues for a period of ten (10) days; b) makes any representation or warranty in the Senior Loan Agreement or in any certificate or document furnished pursuant to the Senior Loan Agreement which proves to be untrue; c) fails to keep, enforce, perform and maintain in full force and effect any provision of the Senior Loan Agreement, the Collateral Documents or Construction Documents after 30 days written notice of said non-monetary default; and d) further encumbers the Trust Property or Improvements or an interest therein without the prior written approval of SFC, except as otherwise permitted in the Collateral Documents.

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

90. The Senior DOT requires Gemstone West Inc. to pay, 10 days before default or

delinquency, any obligations secured by liens, encumbrances, charges and/or claims on the Property or any part thereof, which appear to have priority over the lien of the Senior DOT.

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

92. In connection with the Senior Loan Agreement, Defendants allege that TM2I agreed to guaranty the Senior Loan pursuant to a separate Guaranty dated January 22, 2008. On information and belief, although Gary Tharaldson signed the TM2I Guaranty, Gary Tharaldson does not remember discussing such a guaranty and it was not part of the closing binder when the Senior Loan transaction closed. Even though Tharaldson is a minority shareholder in TM2I, there are no corporate resolutions of TM2I approving or authorizing execution of the TM2I Guaranty. Gary Tharaldson has no recollection or record of receiving a copy of the unauthorized TM2I Guaranty until it was provided to him by SFC after this dispute arose.

93. Neither Tharaldson nor TM2I is a shareholder, owner, officer or affiliated party of Gemstone West Inc., but rather Tharaldson executed the Guaranty (and TM2I executed the unathorized TM2I Guaranty) on the condition that Tharaldson receive 5.0% of the 14.0% interest rate on the Senior Loan regardless of who participated in funding the Senior Loan.

94. On or about March 21, 2008, SFC, as Originating Lender, and CVFS, as Participant, executed a Nonrecourse Participation Agreement as amended by the Addendum to Nonrecourse Participation Agreement dated March 21, 2008, as well as a Commitment to Participate dated on or about the same date, which superseded two prior CVFS Senior Participation Agreements (the "CVFS Third Senior Participation Agreement"), under which CVFS agreed to provide $400,000 of the Senior Loan. Under the CVFS Third Senior Participation Agreement, CVFS was to receive 8.5% interest, Guarantor was to receive 5.0% interest, and SFC made a service fee of .50%. The CVFS Third Senior Participation Agreement provided that SFC was agent and fiduciary for CVFS concerning the Senior Construction Note and acknowledged SFC's fiduciary duties to CVFS.

95. In connection with the Senior Loan, Contractor consented to an Assignment of Construction Contract, Plans and Specifications executed by Gemstone West Inc. in favor of

SFC, pursuant to a Consent of General Contractor dated January 22, 2008 (the "Contractor Consent"). That Contractor Consent specifically provides that "[a]ll liens, claims, rights, remedies and recourses that [Asphalt Products Corporation] may have or may otherwise be entitled to assert against all or any portion of the Project shall be, and they hereby are made expressly subordinate, junior and inferior to the liens, claims, rights, remedies and recourses as created by the Loan Agreement and the Collateral Documents."

96. In connection with the closing of the Senior Loan Contractor and Gemstone West Inc. executed a Certificate as to Sworn Construction Statement dated January 22, 2008 (the "Contractor Certificate") in which they "acknowledge and agree that the Lender will be providing financial accommodations to the Borrower in connection with the construction of the project in reliance upon, among other things, the truth, accuracy and completeness of the warranties, representations, and certifications . . . set forth herein." In that Contractor Certification, both Gemstone West Inc. and Contractor each "warrants, represents, and certifies," among other things, the following:

A. That an attached Sworn Construction Statement (the "Sworn Statement") sets forth a "true, correct, and complete listing of (a) the names of all parties having contracts or subcontracts for specific portions of work on the Project or for the provision of materials for the Project, (b) the amounts due and to become due to each of said persons, and (c) all items of labor and material required to complete the Project in accordance with the plans and specifications therefor."

B. That except as set forth on the Sworn Statement, "there are no amounts due or to become due to any person for material, labor for work of any kind done or to be done in connection with the Project."

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

and c) the lien of the Mezzanine Deeds of Trust on the Trust Property.

98. On or about January 22, 2008, Gemstone West Inc. and SFC executed a Fourth Amendment to Mezzanine Loan Agreement [Prior Loan Agreement] whereby SFC agreed to extend the maturity date of the First Junior DOT Note, First Senior DOT Note, and LOC Note (collectively referred to as the "Mezzanine Notes") to December 31, 2009 and increase the total principal amount of the Mezzanine Notes from $33,000,000 to $46,000,000, to be evidenced by a new Mezzanine Note dated January 22, 2008 in the maximum principal amount of $46,000,000.

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

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

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

102. Pursuant to a Nonrecourse Participation Agreement dated January 21, 2008 by and between SFC, as Originating Lender (with BOk named as Co-Lead), and CVFS, as Participant and Loan Participation Certificate attached thereto (the "Mezzanine Participation Agreement"),

CVFS agreed to provide funds for the Mezzanine Loans, primarily by refinancing the outstanding balances on the Prior Loan and the Edelstein Loan. Under the Mezzanine Participation Agreement, CVFS was to receive 14.0% interest and SFC made a service fee of .50%. The Mezzanine Loan Participation Agreement provided that SFC was agent and fiduciary for CVFS concerning the Mezzanine Note and acknowledged SFC's fiduciary duties to CVFS.

103. On January 30, 2008, counsel for lenders engaged by SFC stated that counsel had "reviewed the conditions precedent status for advances under the Senior Debt Loan Agreement" and opined that "Based upon my review, the Lender is in a position to fund the Manhattan West vertical loans, provided that each Participant funds its pro rata share."

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

105. At the funding of the Senior Loan on February 6, 2008, CVFS received a paydown on the Prior Loan of approximately $15,406,013 and a paydown on the Edelstein Loan of approximately $3,770,588. After the paydown on the Prior Loan it was converted into the Mezzanine Loan and CVFS advanced approximately $8,411,646 on the Mezzanine Loan, bringing the then unpaid balance of the Mezzanine Loan to approximately $31,508,100.

The Senior Loan Agreement Signature, the Subordination, the Guaranty, the Purported TM2I Guaranty and the CVFS Participation

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

107. Defendants contend that in connection with the Senior Loan, TM2I executed the TM2I Guaranty. As alleged in Paragraph 92 above, Plaintiffs contend on information and belief that neither SFC nor BOk obtained the necessary corporate action of TM2I to authorize the TM2I Guaranty.

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

109. In connection with the Senior Loan, SFC executed a Mezzanine Deeds of Trust

Subordination Agreement dated January 22, 2008, and recorded in the real property records of Clark County, Nevada on February 7, 2008, at Book 20080207, Instrument No. 0001486, purporting to subordinate the Prior Loan Deeds of Trust to the Senior Loan Deed of Trust (the "DOT Subordination").

110. SFC expressed its intent that the indebtedness secured by the Prior Loans' Deeds of Trust be subordinate to the $110,000,000 Senior Deed of Trust and indebtedness secured thereby pursuant to a Debt Subordination Agreement dated January 22, 2008 (the "Subordination").

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

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

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

Subsequent Changes to Loans

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

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

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

Default under the Prior Loan, the Edelstein Loan, the Mezzanine Loans, the Senior Loan and the Rental LOC Notes

117. The obligors on the Prior Loan, the Edelstein Loan, the Mezzanine Loans, the Senior Loan and the Rental LOC Note (collectively the "Manhattan West Loans") failed to make any of the required interest payments since September 2008, and all promissory notes making up the Manhattan West Loans therefore went into monetary default.

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

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

120. The unpaid principal balances on the ManhattanWest Loans, together with all accrued but unpaid interest, including late penalties and default interest, became immediately due and payable.

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

The Fraudulent Inducement

122. Plaintiffs' decisions to modify, extend and subordinate the Prior Loan and the Edelstein Loan as provided in the Senior Loan Agreement, and to agree to the Plaintiffs' Senior Loan Documents was based upon the trust and confidence Plaintiffs reposed in Scott and SFC due to their longstanding business relationship, upon the Fiduciary Defendants' recommendations to Plaintiffs which Plaintiffs understood to be backed up by the Fiduciary Defendants' rigorous due diligence and the Fiduciary Defendants' assurances to Plaintiffs that the transaction was sound and would be in Plaintiffs' best interest, and upon express representations, warranties, and certifications of Gemstone West Inc. and Contractor in the Contractor Certification and the Sworn Statement.

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

124. Prior to the closing and funding of the Senior Loan transactions, Scott and SFC told Plaintiffs that with the advent of the Senior Loan, their business and economic position with respect to construction lending on the Project, would be:

A. The Senior Loan of $110,000,000 would become a first lien position on the Project.

B. Plaintiffs would receive a paydown on the Prior Loan and Edelstein Loan, the Prior Loan would be converted to the Mezzanine Loan, CVFS would make a substantial

advance under the Mezzanine Loan, and the Mezzanine Loan would become a second position lien on the Project.

C. There was a guaranteed maximum price construction agreement with a viable and reputable general contractor which would deliver all of the required vertical construction for the Project at a cost of approximately $78,900,000.

D. There would be $60,000,000 in "lender approved" pre-sales and/or pre-leases (the "Pre-Sales Contracts") prior to funding of the Senior Loan, which pre-sales would provide the primary source of repayment of the Senior Loan in those amounts.

E. Based upon pro formas prepared by Developer and vetted by the Fiduciary Defendants prior to the Plaintiffs making any commitments with respect to the Senior Loan, the total acquisition, development, and construction costs estimated for the Project were $120,000,000 and the total revenues estimated for the Project were $154,000,000, for a projected net income of $34,000,000 from the Project. Scott and SFC provided these pro formas to Plaintiffs in May, 2007.

F. SFC and BOk had rigorously underwritten the financial pro formas and the financial viability of the Project and were relying primarily on the financial viability of the Project in making the Senior Loan.

G. Tharaldson's exposure on the Guaranty and in if the TM2I Guaranty was properly authorized, TM2I's exposure on the TM2I Guaranty, would be limited to any excess of the Senior Loan balance on any given day over the fair market value of all of the collateral for the Senior Loan (including the Project, the Construction Contract, and the Pre-Sales Contracts.)

125. Communications between Plaintiffs and SFC/Scott concerning the Manhattan West Loan, and SFC/Scott's material misrepresentations and omissions relating to that loan occurred over the period between February 15, 2007 and through first funding of the Loan on February 6, 2008 and continued at each subsequent funding when representations were again made that the Pre-Sale Condition and all other Failed Conditions were satisfied. The communications were numerous. They were oral and written, formal and informal, in person and telephonic.

Sometimes they were no more formal than Scott dropping into Tharaldson's office to chat, and most communications were undocumented. Among the many communications were the following:

a.	February 15, 2007	Initial presentation by Scott and Edelstein of proposed Manhattan West Loan.
b.	April 12, 2007	SFC submits first Manhattan West Loan analysis summary to Plaintiffs.
c.	April 18, 2007	Email communication from CVFS to Scott concerning pre-sale amounts with no mention of sales to insiders.
d.	April 30, 2007	Tharaldson executes first financing commitment letter, delivered to SFC in May after SCF provided the pro formas.
e.	May 6, 2007	SFC discusses modifying loan. Does not mention related party pre-sales.
f.	May 17, 2007	Tharaldson executes $8 million financing commitment.
g.	May 21, 2007	SFC provides project pro formas to Plaintiffs.
h.	May 25, 2007	Tharaldson provides signed conditional commitment letter to SFC.
i.	October 12, 2007	Tharaldson executes modified financing commitment letter.
j.	October 19, 2007	Scott provides updated financial analysis which has no indication project revenues would drop to $10 million and no indication that developer would be relying on related party sales.
k.	November 19, 2007	SFC provides updated projections with no indication of related party sales.
l.	January 30, 2008	Tharaldson executes Senior Loan documents dated as of January 22, 2008.
m.	February 25, 2008	Tharaldson executes revised commitment letter.

126. Plaintiffs understood all of the foregoing statements to be true and this understanding is reflected in part in a Conditional Commitment Letter dated April 27, 2007 and a modification to Conditional Commitment Letter dated October 8, 2007. The April 27, 2007

Conditional Commitment Letter stated that it was contingent on:

- "Subordination of Land Loan to Senior Construction Loan."
- "Senior Construction Loan personally guaranteed by Gary D. Tharaldson."
- "Monthly lender inspection and third party inspections."
- "Voucher control on all draws."
- "Acceptable Abacus feasibility analysis on entire Project."
- "Acceptable lender approved Project budget."
- "Acceptable GMP contract assigned to lender."
- "All sales must be approved by lender."
- "Lender and Participant to verify cash flow and IRR calculations."
- "Total pre-sale revenue $60 million required to be secured before vertical financing."
- "A minimum of monthly SFC on site inspections will be required."

127. Scott, SFC and BOk knew that Scott and SFC occupied a fiduciary relationship with Plaintiffs based on the overall longstanding business advisory relationship and specifically with reference to the Pre-Senior Participation Agreements relating to loans secured by the Property.

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

129. The Fiduciary Defendants knew that SFC and BOk, as Co-Lead Lenders, also occupied a fiduciary relationship with Plaintiffs with specific reference to the Senior Loan as a participant in the Senior Loan, as the intended Guarantors of the Senior Loan, and as sole owner of the loans related to the Pre-Senior Participation Agreements that were to be subordinated to the Senior Loan.

130. The Fiduciary Defendants knew but did not identify and resolve with Plaintiffs that the Senior Loan transaction presented direct and substantial conflicts between: (a) SFC's and

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA, 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 D/B/A APCO CONSTRUCTION, a Nevada corporation,

Real Parties in Interest.

Case No.: 57784

District Court Case: A579963

APPENDIX OF THE SCOTT REAL PARTIES IN INTEREST

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INDEX TO SCOTT APPENDIX

Notice of Entry of Order Granting Motion for Summary Judgment Regarding the Issue of Alleged Agency Relationships Between the Scott Defendants and Tharaldson Plaintiffs	3/17/11	SA 200

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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.	Case No.: A579963 Dept. No.: XIII **OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS BROUGHT BY GARY THARALDSON AND THARALDSON MOTELS II, INC., RELATING TO ENFORCEMENT OF PRESALES CONDITIONS** Hearing Date: November 15, 2010 Hearing Time: 9:00 a.m.

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I.

INTRODUCTION

The motion before this Court is the latest in a long line of attempts to confuse and distort the issues so that no one is talking about what really happened at the Manhattan West project: Gary Tharaldson negotiated and made a business deal that didn't turn out as well as he hoped. When the real estate and financial markets began to decline with increasing speed in the late fall of 2008 and

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other circumstances threatened to cut into his expected windfall, Tharaldson panicked, reneged on his prior guaranties of the project, and completely derailed any chance of Manhattan West's success. Now, standing in the wreckage of the destruction that was caused by his own reckless behavior, Tharaldson's only remaining ploy is to desperately point fingers and lay blame for this particular train wreck at the feet of his fellow passengers, all of whom ***he*** had invited along for the ride. To say that Plaintiff's motion for summary judgment is unwarranted is an understatement. It is a shameless *post facto* attempt to blame the people who put their best efforts into making Gary Tharaldson's project work out for him, and were ultimately thwarted in their goals by the machinations of none other than Tharaldson himself.

At its core, Plaintiffs' Motion for Partial Summary Judgment is just an improper attempt to get the Court to make a factual determination – whether Gemstone Development West, the developer on the Manhattan West project ("Developer") complied with a term of the subject Senior Loan Agreement – prior to Scott Financial Corporation ("SFC") and Bradley Scott getting to present any evidence to the contrary at trial, or indeed getting to defend themselves at all. Even if this Court assumes *arguendo* that the performance of a contractual term is a legal question (which it is not), or that all three Plaintiffs are properly parties to this motion (they are not), practically every fact that the instant motion cites in support of its requested finding is a disputed fact. The "evidence" cited by the motion, far from being undisputed, is the result of a superficial and slipshod discovery process by Plaintiffs, who have selectively cherry-picked favorable "facts," ignored conflicting evidence, and misinterpreted the testimony of countless witnesses who have nearly unanimously told Plaintiffs that they are wrong. Nevada's legal standard on a motion for summary judgment is very high: Plaintiffs must conclusively demonstrate to this Court that **there is no genuine issue of material fact** as to the subject of the motion. Given the fact that the discovery which has occurred is, at best, conflicting on these points, summary judgment simply cannot be granted.

The first, and most obvious flaw in Plaintiffs' argument is that only one Plaintiff, Club Vista Financial Services, LLC ("CVFS") is even remotely qualified to take issue with the quality of the Manhattan West presales. As the only Plaintiff to have executed a participation agreement with SFC, only CVFS has any arguable standing to enforce any of the terms of the Senior Loan

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Agreement.

Gary Tharaldson and Tharaldson Motels II, Inc. ("TM2I") were guarantors in this deal, as such, no fiduciary duty whatsoever was owed them by SFC. And as for a contractual duty, any contractual obligations between Gary Tharaldson and TM2I is clearly laid out in, and limited to, the unconditional guarantees they signed with SFC. Those guarantees give them no rights whatsoever to make any claims based upon the Senior Loan Agreement as a matter of law. Since Plaintiffs' entire argument in their motion for summary judgment is premised upon the terms and conditions, rights and obligations found in the Senior Loan Agreement, and since the terms and conditions of the Senior Loan Agreement do not apply to Gary Tharaldson and TM2I, and neither of them have any rights under the Senior Loan Agreement, then Gary Tharaldson & TM2I can not, under any stretch of the imagination,[1] prevail in this summary judgment motion.

With respect to CVFS, SFC and Scott asserts that it does not have the legal right to assert claims either, based upon its self-serving, and unsupported interpretation of the Senior Loan Agreement for several reasons.

1. While CVFS may be a beneficiary of the Senior Loan Agreement as it was a participant in the loan, it is not a party to the agreement. SFC is.

2. Not only does the Senior Loan Agreement spell out the requirements of a qualified sale, CVFS and Gary Tharaldson specifically agreed that SFC would have final approval of what constituted qualified sales.[2]

The point here is that even CVFS had no right to determine what constituted a qualified pre-sale, and the mere fact that a purchaser may be related to the Developer in some way does not in any way invalidate those presales, so long as the actual requirements for those purchases are met pursuant to the terms of the Senior Loan Agreement. And the evidence shows that those terms were

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[1] SFC and Scott concede that Plaintiff's are willing and able to stretch their imaginations to new heights, but even so this stretch is just too far.

[2] See Senior Loan Agreement ¶1.16, attached hereto as Exhibit D, at (defining qualified sale) ¶ 6.2.13. See also Exhibit C at SCOTT-448394 (with handwritten note from Ryan Kucker indicating that SFC had the right to approve sales, but not mentioning Gary Tharaldson or CVFS).

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negotiated and accepted by none other than Gary Tharaldson, who had numerous opportunities to prohibit sales to related parties had he wanted to do so, but he did not make any such changes. The basis of Plaintiffs' arguments is cobbled together from emails and documents which, quite simply, have no legal bearing on the obligations that were approved by Gary Tharaldson and clearly outlined in the Senior Loan Agreement. While SFC asserts that the related party presales clearly met the requirements of the Senior Loan Agreement, at the very least there is a genuine issue of material fact which would preclude summary judgment on this point. And again, irrespective of whether or not the presales met the criteria in the Senior Loan Agreement, Gary Tharaldson and TM2I, as guarantors, have no right whatsoever to even make the argument.

The merits of Plaintiffs' motion, though, simply fail because the record is rife with disputed issues of material fact regarding the presales and preleases at Manhattan West. The first part of Plaintiffs' argument is that the Manhattan West Senior Loan Agreement between the Developer and SFC was breached by one or both parties because several of the presales on the Manhattan West project allegedly did not fit the criteria set forth for such transactions under the Senior Loan Agreement. Specifically, Plaintiffs argue that the commercial and residential sales to Santa Rita Management Company ("SRMC") and any person related to the Developer are not "Qualified Presales" under the terms of the Senior Loan Agreement. However, as discussed above, there is no contractual prohibition of such sales, and all of the Senior Loan requirements for those sales were met.

Plaintiffs next make the argument that, because there were four commercial preleases with affiliate companies of the Developer, those leases cannot be counted as bona fide preleases. This argument is based on nothing more than Plaintiffs' ignorance of the true facts. In fact, the deposits for each of these entities was made into a bank account in January of 2008, prior to the execution of the Senior Loan Agreement. That Plaintiffs were unable to discern this information from discovery only reveals how Plaintiffs, in their zeal to bring a motion for summary judgment, have overlooked, or chosen to ignore, critical facts that completely undermine this particular argument.

The final issue presented by Plaintiffs' motion is their contention that the prequalification letters issued to the residential purchasers at Manhattan West did not have the underwriting that

Plaintiffs believe is required by the Senior Loan Agreement. Plaintiffs cannot demonstrate, however, what specific part of the Senior Loan Agreement is supposedly violated by the prequalification letters. In fact, the testimony thus far has indicated that any further underwriting on the prequalification letters would have been worthless, since the purchasers' financial situation would have to be examined again once the Manhattan West units were complete anyway. This position substantiated by the testimony of Jim Sheppard, a mortgage lender with First Horizon Mortgage Company, the preferred lender on the Manhattan West Project. Mr. Sheppard is an industry expert and independent third party, whom Plaintiffs' counsel, Layne Morrill, has admitted was a very honest person. Mr. Sheppard testified in part as follows:

> Q. You believe that is well understood as to what it means to be prequalified in the lending industry?
>
> A. Everybody in the industry knows, yes, yes.
>
> Q. Would you disagree if somebody suggested to you that a prequalification letter was the same thing as an actual loan approval letter? Would you disagree that anybody in the lending industry would think that?
>
> MR. ARONSON: Objection to form.
>
> THE WITNESS: I would disagree, yes. . . . In this particular example when you're at least two years out from completion of a project, completion of units to close.
>
> Q. By the way, just to clarify that, you're now referring to the ManhattanWest project?
>
> A. I am. I am.
>
> Q. All right.
>
> A. There's no approval letter that meets any criteria beyond prequalification approval letter if that's what you want to call it. I mean they're just very basic. They're full of conditions because they have to be. You're too far out. That's part of the process and everybody knows that and it's standard.
>
> Q. Would you believe, based on your 18 years of experience, it would be impossible for a lender to say I'm going to approve this particular buyer for a loan and actually say I'm going to actually fund this loan or excuse me, agree to fund this loan now even though the building's not built, it may never get built, the buyer may lose their job in the next two years or there may be a massive recession in the U.S. economy? Do you understand my question?

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> . . .
>
> A. Is there any lender that's going to be in a position to offer or submit a commitment, a loan commitment to anybody. The answer is absolutely not. Can't do it.

See Depo. of Jim Sheppard, the rough transcript of which is attached hereto as hereto as Exhibit R, at 19:17-21:13.

Therefore, apart from the fact that bringing a motion for summary judgment on a purely factual issue is legally questionable at best, and apart from the fact that two out of the three Plaintiffs, as guarantors, cannot sue to enforce the Senior Loan Agreement anyway (the subject of SFC's counter-motion), there are simply too many genuine disputes of material fact for this Court to even begin thinking about granting summary judgment in favor of Plaintiffs. Therefore, the instant motion must to be denied.

II.

STATEMENT OF FACTS

Plaintiffs' complaint, originally filed in January of 2009, is and always has been nothing more than a preemptive strike by Gary Tharaldson to prevent Defendants SFC and Bank of Oklahoma from calling on the guaranty contracts of Tharaldson and TM2I relating to the Manhattan West Project. That complaint, which alleges in 57 pages all kinds of *nefarious* acts and supposed dirty deeds by SFC and others, is simply a smokescreen designed to hide the fact that Manhattan West was in fact Gary Tharaldson's project. The real facts are that Gary Tharaldson made a bundle of money off of Alex Edelstein – more than $20,000,000 in net profits in the first Manhattan condominium project, and he was itching to make an even bigger score with the Manhattan West project. What Mr. Tharaldson doesn't tell this Court, because it ruins his whole contrived argument, is that he worked with Alex Edelstein several years before the Manhattan West project, in or around 2004, and followed the exact same game plan as he would eventually duplicate in Manhattan West. A Gary Tharaldson financial entity called Tharaldson Financial Group ("TFG") played the same role in the Manhattan deal as CFVS would play in the Manhattan West deal. And Gary Tharaldson was happy to personally guarantee the Senior Loan in the Manhattan deal for a substantial fee, just as he would propose to do in the Manhattan West deal.

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The truth is, rather than Brad Scott manipulating Gary Tharaldson into getting on board with the Manhattan deal, Tharaldson brought the Manhattan deal to Scott and asked Scott if SFC would be the lead lender, just as he would do in the Manhattan West deal.

Only after realizing he would make millions in profit on the Manhattan deal did Gary Tharaldson again ask SFC to become the lead lender in the Manhattan West deal. Contrary to the claims of Gary Tharaldson, he negotiated the terms of the deal from the start, and he decided how the Manhattan West Senior Loan would be crafted. A brief history of the Manhattan West project and the presale and prelease activity is recounted below.

A. The Manhattan West Project and the Senior Loan.

As the Court is aware, Manhattan West was a mixed-used condominium project which featured residential, commercial, and retail spaces for sale and lease. As mentioned above, Manhattan West was a follow up to Manhattan, which was another Las Vegas condominium project that Alex Edelstein, the principal of the Developer, had completed in Las Vegas with Gary Tharaldson. SFC had been brought to Las Vegas by Gary Tharaldson to serve as the lead lender for the original Manhattan project. Because of SFC's success in handling both the mezzanine and senior loans with Manhattan, both Gary Tharaldson and Alex Edelstein wanted to have SFC serve as the lead lender for the Manhattan West acquisition and development loans. All of this was done by Tharaldson with the expectation that the success of the Manhattan project would be replicated with Manhattan West. See Declaration of Brad Scott, attached hereto as Exhibit A, at ¶4.

A potential problem for Gary Tharaldson was that Manhattan West would be quite expensive to build, particularly after Tharaldson's entity, CVFS, had loaned approximately $46 million to the Developer simply to acquire the land. Tharaldson stated to Brad Scott that he wanted as many banks as possible to participate in the vertical construction loan, so Tharaldson's lending company, CVFS would be responsible for as little of the Senior Loan as possible. Id. at ¶5. Scott and Tharaldson therefore began the process of seeking participants for the vertical construction loan for Manhattan West. Exhibit A at ¶6.

Not only did Gary Tharaldson plan from the start to provide the necessary personal guaranty of the Senior Loan, for an outrageous guarantor's fee of 5%, in order to solicit participating banks

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for the vertical construction loan, Tharaldson indicated to potential participants that he was the driving force behind the Manhattan West project, and that he would stand behind it. Id. at ¶6. And participate they did. Over the course of time, the number of participating banks grew, and CVFS's share of the vertical construction loan dwindled to$400,000 out of $100 million. As promised, Tharaldson personally signed an unconditional guaranty of the entire Manhattan West project.[3] That Guaranty is attached hereto as Exhibit B. See also Exhibit A.

B. The Presale Requirements of the Senior Loan.

When the parties, (meaning Gary Tharaldson, Developer and SFC) were negotiating the terms of the Manhattan West financing in 2007, the issue of presales on the Manhattan West project became the specific subject of negotiation between Tharaldson on behalf of CVFS, Alex Edelstein on behalf of Developer, and Brad Scott on behalf of SFC. The parties worked through several drafts of CVFS's financing commitment for the Manhattan West project and the Senior Loan. Those negotiations established the intent of the parties and created the foundation for the terms of the Senior Loan.

Scott, Edelstein and Tharaldson went through several drafts of Tharaldson's commitment letter in which the terms of the Senior Loan were hammered out. As this Court can see from a redline draft of that document, attached hereto as Exhibit C, CVFS's commitment letter explicitly required that the lead lender (SFC) have the approval authority on qualified presales at the project. See Exhibit C at SCOTT-448394. CVFS's representatives, Ryan Kucker and Kyle Newman, made handwritten changes to the terms of the commitment, which included terms regarding presales. See Exhibit C at SCOTT-448393. Therefore, under the terms set forth by CVFS's Commitment Letter and the Senior Loan Agreement, the validity of the presales was to be determined by SFC. The negotiations surrounding the Commitment Letter referenced above show that Gary Tharaldson, his representatives, and CVFS were specifically aware of the presale/sale issue, had the opportunity to address it, and actually did address it and for whatever reason they chose SFC as the entity with

[3] As an incentive for Bank of Oklahoma, the largest participant in the loan, to get on board, Tharaldson's company TM2I signed a separate guaranty of Bank of Oklahoma's $24 million contribution.

exclusive control over sales.

After the Commitment Letter was negotiated, the Manhattan West Senior Loan closed on February 6, 2008. With regard to presales, the Senior Loan Agreement between SFC and the Developer required as a condition of funding that the Developer "has aggregate pre-sale revenue of not less than Sixty Million Dollars ($60,000,000) from (a) Qualified Sales of condo units, (b) the capitalized value (at a 7.0% capitalization rate measured against triple net lease payments) of Class A office and retail leases, and (c) the sales price of Class A office space." See Senior Loan Agreement, attached hereto as Exhibit D, at 9. Furthermore, the Senior Loan document defined "Qualified Sales" as follows:

> 1.16. "Qualified Sales" means, for any sale of residential, office or retail units, a sale that meets the following requirements:
>
> > 1.16.1. Lender has received the executed purchase agreement.
> >
> > 1.16.2. The entire nonrefundable deposit is deposited with TitleOne of Las Vegas or any other title company acceptable to Lender (the "Deposit Escrow Agent") confirmed by the Deposit Escrow Agent, and controlled by Lender.
> >
> > 1.16.3. A financing prequalification letter, or, in the case of a cash buyer, satisfactory evidence of the availability of cash as determined by the Lender, has been provided to Lender.
> >
> > 1.16.4. If the purchaser is using a deposit bond, a copy of the deposit bond has been received by the Deposit Escrow Agent and the original deposit bond, together with an assignment of the deposit bond to Lender, is held by the Lender.

Exhibit D at 5. As per the terms that had already been worked out with CVFS, the Senior Loan Agreement also provided that all residential, commercial, and retail sales were to be approved by SFC. Id. at 16.

Therefore, all of the terms of the presales had been negotiated and memorialized in the Commitment Letter by all parties, including CVFS, prior to the execution of the Senior Loan Agreement, which accurately reflected those terms. It should be noted that all of the above terms were stricter than Tharaldson's and the Developer's successful prior project, Manhattan, which did

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not require prequalification letters for residential purchasers. See Exhibit A at ¶8.

C. The Residential Prequalification and Presales Process.

Sales of residential, commercial, and retail space in the Manhattan West project began in late 2007. With regard to the residential sales, the Developer interviewed several different mortgage lenders and ultimately decided that the preferred lender for Manhattan West would be First Horizon. The relationship managers for First Horizon, Jim and Vicki Sheppard, were responsible for providing the prequalification letters for the perspective buyers pursuant to paragraph 1.16.3 of the Senior Loan Agreement, which they did. See First Horizon residential prequalification letters for the Manhattan West project, attached collectively hereto as Exhibit E. Although these letters were not based on extensive underwriting of each particular borrower, they were not required to do so by the terms of the Senior Loan Agreement, contrary to the assertions of Plaintiffs. Nor is extensive underwriting required for a pre-qualification letter. And finally, such underwriting would essentially be meaningless anyway, since the completion of the units was so far in the future, which is why mortgage lenders do not require it for pre-qualification letters for prospective buyers. See Exhibit R at 14:17-21:13, and Exhibit N at 61:21-63:1.

D. The Purchase of and Commercial Units by Parties Related to Alex Edelstein.

Among the residential unit purchasers that were prequalified at this time were Charles Edelstein, Sara Edelstein, Elizabeth Edelstein, and Santa Rita Management Company ("SRMC"), which were all related to Alex Edelstein, the principal of the Developer. Alex Edelstein ensured that all parties, including Gary Tharaldson, were aware of his relationship with these purchasers. See Depo. of Jim Horning, a condensed transcript of which is attached hereto as Exhibit F, at ¶32:25-33:16. Also purchased by Santa Rita Management Company was approximately 18,888 square feet of commercial space, of which Tharaldson was also apparently aware. See id. Valid purchase agreements were signed for each of these transactions. Also, for each sale, either a full deposit or a deposit bond was received pursuant to the Senior Loan Agreement. In addition, there is nothing in the Commitment Letter of CVFS or the Senior Loan Agreement which would in any way prohibit such sales or leases. And to the extent that Plaintiffs claim that these related party sales are in violation of some industry standard, SFC and Scott assert such a standard does not exist. Regardless,

this is a question of fact precluding summary judgment.

E. Leases to Developer-Affiliated Companies.

As noted in Plaintiffs' motion, part of the pre-closing activity on the Manhattan West project consisted of four leases to companies related to the Developer: Gemstone Coffee House, LLC; Manhattan West Residential, LLC; and Gemstone Development, LLC, which had two separate leases. Each of these leases was memorialized by a signed lease agreement. See Commercial Lease Agreements, attached collectively hereto as Exhibit G. On January 14, 2008, the required deposit of $6,132 for the Manhattan West Residential, Inc., lease was made to a Nevada State Bank account controlled by SFC. See Declaration of Jason Ulmer, attached hereto as Exhibit H, at ¶5, and Nevada State Bank Account statement, attached hereto as Exhibit I. On January 15, 2008. the required deposit of $12,600 was made to same account on behalf of Gemstone Development, LLC. See id. On that same day, a combined deposit of $118,105.70 was made to the same account, comprised of the $93,346.70 deposit for Gemstone Development, LLC, and the $24,759.00 deposit for Gemstone Coffee House, LLC. See id. As this Court can plainly see, therefore, all lease deposits were made prior to the closing of the Senior Loan on February 6, 2008. This account was always in the control of SFC, not the Developer.[4] See Exhibit H at ¶6. The Gemstone lease deposits mentioned above were all eventually deposited into an upgrade account, but that account took some additional time to set up, and was therefore not established before the closing of the Senior Loan. See id. at ¶4. Regardless, all of the commercial lease deposits for the Gemstone entities were eventually transferred to the Nevada State Bank account that is referenced in Plaintiffs' motion on April 22, 2008. See Exhibit 18 to Plaintiffs' Motion, Exhibit I, and Exhibit H at ¶7. The point, however, is that all required Gemstone deposits were made prior to the closing of the Senior Loan.

[4] While the account was controlled by SFC, the Developer did also have limited access. Developer's access, however, did not allow Developer to withdraw funds. See Exhibit H at ¶6.

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III.

ARGUMENT

A. Plaintiffs' Instant Motion for Summary Judgment Should Be Denied as an Improper Attempt to Have this Court Determine Issues of Disputed Fact Before Trial.

Summary judgment is a drastic remedy, and the Nevada Supreme Court has many times cautioned the trial courts to exercise great care in granting motions for summary judgment. See, e.g., Pine v. Leavitt, 84 Nev. 507, 445 P.2d 942 (1968); Charles v. J. Steven Lemons & Assoc., 104 Nev. 388, 760 P.2d 118 (1988); Carr-Bricken v. First Interstate Bank, 105 Nev. 570, 779 P.2d 967 (1989). When considering a motion for summary judgment, the Court must view all evidence in the light most favorable to the non-moving party. Wood v. Safeway, Inc., 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). Plaintiffs may only obtain summary judgment where they can demonstrate that "no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." Id.; accord, Simonian v. University & Commun. College Sys. of Nev., 122 Nev. 187, 190 128 P.3d 1057, 1059 (2006). "A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party." Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

"Summary judgment may not be used as a shortcut to the resolving of disputes upon facts material to the determination of the legal rights of the parties." Parman v. Petricciani, 70 Nev. 427, 436, 272 P.2d 492, 496 (1954) (overruled on other grounds by Wood v. Safeway, Inc., supra). In fact, where a claim turns on a dispute of whether a loan agreement has been breached by a party, that claim turns on an issue of fact, and the granting of summary judgment is reversible error. See Collins v. Union Federal Sav. & Loan Ass'n, 99 Nev. 284, 304-05, 662 P.2d 610, 623 (1983); see also Miller Farms Nursery, Inc. v. Nedegaard Const. Co. Inc., 68 Fed.Appx. 845, 847-48 (9th Cir. 2003) (where there were issues regarding whether there had been performance on a contract for the delivery of gravel).

Accordingly, in order for this Court to grant Plaintiffs' request, it must find that (1) the satisfaction of the presale and prelease conditions by the Developer of the Manhattan West project is a legal issue that may properly be decided by this Court upon a motion for summary judgment, and

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(2) there is no genuine issue of material fact among the parties regarding the presales condition. Plaintiffs can satisfy neither of these requirements.

First, whether or not a contract has been properly performed is an issue of fact, not law, that is properly determined by the trier of fact after weighing all of the available evidence at trial. See, e.g., Parman and Collins, supra. Therefore, for this Court to weigh the evidence and make a determination, trial and not summary judgment would be the proper mechanism.

Even if it were not the case that Plaintiffs' motion improperly seeks a ruling on an issue more properly reserved for the finder of fact, discovery in this matter has provided numerous examples of places where Plaintiffs' "undisputed facts" are in fact either hotly disputed or just plain contrary to the actual facts of the case. Despite Plaintiffs' attempts to rewrite the language of the Senior Loan Agreement, SFC, Bank of Oklahoma, Alex Edelstein, and the majority of the witnesses that have been deposed on this subject all fervently disagree with Plaintiffs' contention that the requirements of the Senior Loan Agreement regarding presales and preleases of residential, commercial, and retail spaces were not met. If anything, the documents and testimony offered thus far indicate the opposite – the Senior Loan Agreement requirements **were** met, and verified by independent third parties. Because Plaintiffs cannot meet their heavy burden under NRCP 56(c), the instant Motion for Partial Summary Judgment should therefore be denied in its entirety by this Court.

B. All Presales and Preleases Were Valid Under the Terms of the Senior Loan Agreement. At the Very Least, There Exist Genuine Issues of Material Fact Regarding Each of the Presale and Prelease Issues Addressed by Plaintiffs' Motion.

Even if this Court accepts that the performance by the Developer of a term from the Senior Loan Agreement is a valid basis for a motion for summary judgment, and that all Plaintiffs were entitled to move for summary judgment against SFC and Brad Scott, Plaintiffs' motion should still be denied pursuant to the plain language of NRCP 56(c).

1. The Presales of the Residential Units to SRMC and/or Members of the Edelstein Family Were Proper Under the Senior Loan Agreement.

Plaintiffs state several times in their Motion that, for presales of units at the Manhattan West project to be "Qualified Presales" under the Senior Loan Agreement, they had to be supported by "'written approval or proof of financing from [the buyer's own] bank' or, in the absence of that, the

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Preferred Lender must provide 'proof of their financial ability (with full underwriting).'" See e.g., Motion at 4:20-23. The Court cannot be blamed for wondering from where this requirement springs, since this language is not to be found in any contract, let alone the Senior Loan Agreement. Rather, it was taken from an email written by Brad Scott in late 2007, which is attached to Plaintiffs' motion as Exhibit 1. The fact that Brad Scott suggested the Developer go beyond the requirements of the controlling documents is admirable, but doesn't change the fact that the controlling documents have no such requirement.

However, as this Court can no doubt surmise, the terms of the Senior Loan Agreement were not cobbled together from random emails. Instead, they were negotiated and finalized in the Senior Loan Agreement, which was finalized and executed on February 6, 2008. What Plaintiffs fail to quote in their Motion, then, is the actual term from the Senior Loan Agreement which defines the concept of a "Qualified Presale," which reads as follows:

> 1.16. "Qualified Sales" means, for any sale of residential, office or retail units, a sale that meets the following requirements:
>
> > 1.16.1. Lender has received the executed purchase agreement.
> >
> > 1.16.2. The entire nonrefundable deposit is deposited with TitleOne of Las Vegas or any other title company acceptable to Lender (the "Deposit Escrow Agent") confirmed by the Deposit Escrow Agent, and controlled by Lender.
> >
> > 1.16.3. A financing prequalification letter, or, in the case of a cash buyer, satisfactory evidence of the availability of cash as determined by the Lender, has been provided to Lender.
> >
> > 1.16.4. If the purchaser is using a deposit bond, a copy of the deposit bond has been received by the Deposit Escrow Agent and the original deposit bond, together with an assignment of the deposit bond to Lender, is held by the Lender.

Exhibit B at 5.

As the Court can see, while Plaintiffs are fond of mentioning this "absolute requirement" under the Senior Loan Agreement, they have drastically misstated what the Senior Loan requirements actually are. Plaintiffs argue to this Court that "written approval of proof of financing

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from [the buyer's own bank" should be provided, or in the absence of that, "proof of [the buyer's] financial ability (with full underwriting)." Their problem is simply that **there is no such requirement** in paragraph 1.16 of the Senior Loan Agreement; the closest thing to what Plaintiff describes is in paragraph 1.16.2, which discusses the requirement of a prequalification letter, without any reference to what bank issues the letter. See id. Nor does paragraph 1.16 of the Senior Loan Agreement make any reference to proof of financial ability or full underwriting. Therefore, Plaintiffs' "facts" are not only simply incorrect, they are blatantly misleading. In essence, what Plaintiffs' argument demonstrates is not only that Plaintiffs want to rewrite the Senior Loan Agreement, but also that by attempting to do so they tacitly acknowledge that they can't win this argument unless the terms they wish to add to this Agreement are indeed added.

In truth, all of the presales made by the Developer, including presales to members of the Edelstein family and SRMC, did comply to the letter and spirit of the Senior Loan Agreement between SFC and the Developer. Plaintiffs do not dispute that purchase agreements were signed for each of the units that are in controversy, nor do they dispute that the full deposits were made, or in the alternative that deposit bonds were arranged pursuant to paragraph 1.16.4 of the Senior Loan Agreement. See, e.g., Deposit Report from First American Title Company, Bates numbers SCOTT-450180 through 450191, attached hereto as Exhibit J. Prequalification letters exist for every single one of the disputed Edelstein residential units. See First Horizon prequalification letters for the Manhattan West project, attached collectively hereto as Exhibit E.[5] Therefore, under the plain language of the Senior Loan Agreement, the presales that were made to SRMC and/or other members of the Edelstein family were clearly and unequivocally valid.

Plaintiffs further argue that the addenda to the SRMC/Edelstein family units "negated" the presales of the units because control over them was somehow still vested in the Developer. However, an examination of that addendum indicates the opposite – it did not "undo" the sales contract. Instead, it simply allowed the Developer to re-sell the unit at a higher price if possible, and

[5] It should be noted for the purposes of this opposition that other financial institutions also prequalified buyers for Manhattan West, but those letters have not been attached as they are apparently not in dispute.

split the profits from that sale with the first potential buyer. See, e.g., sample addendum attached to Plaintiffs' motion as Exhibit 38. When asked about this particular addendum, Charles Edelstein testified as follows:

> This is consistent with -- this was consistent with my understanding with Alex was that if the market was strong and there was demand for the unit well above what we were paying for it, we'd go ahead and let him sell the unit.

See Depo. of Charles Edelstein, selected portions of which are attached hereto as Exhibit K, at 108:1-5. The clear intent of this provision was to benefit the project should real estate prices increase. However, nothing about the language of the addenda themselves absolved any of the Edelsteins or SRMC from their responsibilities under each of their respective purchase contracts. Therefore, Plaintiffs' conclusory statement that the addenda to the contracts for the Edelstein and SRMC units negated these contracts is unwarranted by the facts ascertained through discovery. At the very least, it can be said that a genuine dispute of material fact exists on this point, and therefore summary judgment must be denied.

2. The Sale of Commercial Space to SRMC Was Valid Under the Senior Loan Agreement; Plaintiffs Are Only Disputing the Intent of SRMC and the Developer to Close, Which is at Least a Disputed Question of Fact.

With regard to SRMC's purchase of 18,888 square feet of commercial space in Manhattan West, Plaintiffs suggest several issues of fact regarding Developer's and SRMC's intent to close on the commercial sale. First, Plaintiffs contend that no escrow was opened for the SRMC purchase, and that it was therefore not a valid presale. This argument is based upon a misinterpretation of Brad Scott's deposition testimony, who testified that he believed that an escrow had in fact been opened for this transaction. See Depo. of Brad Scott, selected portions of which are attached collectively hereto as Exhibit L, at 395:13-396:22.

Plaintiffs' contention that the SRMC commercial sale was not valid is also flawed in that the Senior Loan Agreement does not require an escrow to be opened up for a commercial sale to be considered valid. Additionally, this argument also overlooks the critical fact that a bond for the full deposit amount had been deposited in accordance with the requirements of the Senior Loan Agreement prior to the closing of the Senior Loan on February 6, 2008. See Deposit Bond dated

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January 8, 2008, attached hereto as Exhibit M. Therefore, for Plaintiff to blankly assert that there is no dispute as to the validity of this particular presale is blatantly false.

Plaintiffs also maintain that because (1) Alex Edelstein asked his father Charles whether SRMC would make the purchase, (2) SRMC's owners were retired, and (3) the Developer made the deposit on behalf of SRMC for the sale, there was no intent of SRMC to close on this commercial presale, and therefore no valid presale of this commercial space. See Motion at 6-7. First, it should be noted by the Court that intent of the parties to close any given transaction is not a requirement of the definition of "Qualified Presale" as set forth in the Senior Loan Agreement. See Exhibit D at 5. However, the intent of the parties to close the SRMC commercial transaction is at least an issue of disputed fact. In his testimony on this issue, Charles Edelstein pointed out in his deposition that, at the time he entered in the contract for commercial space at the Manhattan West project, he was considering leasing the space, through SRMC, to prospective tenants:

> Q. In November or December of 2007 or January of 2008, did you have any tenants lined up for the commercial office space?
>
> A. I wouldn't have anyone lined up, no.
>
> Q. Did you have any prospects for tenants for the commercial office space?
>
> A. I don't know. I asked Alex to identify a quality leasing agent, and I was in discussion with at least one leasing agent on, on getting going on marketing that space.
>
> Q. Okay. And we'll come back to that in a moment. Obviously you did not intend, because you didn't have any employees, to use the space for Santa Rita –
>
> A. No.
>
> Q. -- Management Company?
>
> A. No.
>
> Q. You did not intend to use it yourself?
>
> A. No.
>
> Q. And you did not intend to use it for any business that you owned yourself?
>
> A. No.

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Q. So, you were looking at the office space as space that you would lease out, after you bought it that you would lease out to others?

A. Yes.

See Exhibit K at 120:23-121:23. Because the testimony of Charles Edelstein himself contradicts Plaintiffs' assertions as to Mr. Edelstein's intent to use the commercial property, there is a genuine issue of material fact regarding this presale which cannot be resolved on summary judgment. See Koland v. Johnson, 163 N.W.2d 330, 333 (N.D. 1968) (holding that "[t]he credibility of the witnesses and the weight to be given to their testimony are questions of fact for the jury to determine"); accord, J.C. Penney Co. v. Gravelle, 62 Nev. 434, 455, 155 P.2d 477, 484 (1945). Summary judgment is therefore inappropriate in light of this genuinely disputed issue of material fact.

3. The Leases to Gemstone Affiliate Companies Were All Supported by Pre-Closing Deposits, Which Were Kept in a Separate Bank Account By Scott Financial Corporation.

Plaintiffs' next argument is that the four leases to three Developer-related entities (Gemstone Coffee House, LLC, Gemstone Development, LLC, and Manhattan West Residential, Inc.) were not valid because deposits were not made for each of those leases prior to the loan closing. This is simply not true. Once again, Plaintiffs' have demonstrated their inability or unwillingness to actually conduct discovery to determine the truth of the matter, which is that deposits for each of the Gemstone-related leases were in fact made to an account controlled by SFC on January 14 and 15 of 2008. See Declaration of Jason Ulmer attached hereto as Exhibit H, and Nevada State Bank records attached hereto as Exhibit I. Accordingly, the undisputed facts (which Plaintiffs, for whatever reason, could not be bothered to discover) conclusively demonstrate that the full deposits actually were paid for these units, and held by the lender. Thus, the documents indicate that the Senior Loan Agreement was not violated by these transactions (or at least, there is a genuine issue of material fact as to whether they did) and summary judgment is inappropriate.

4. The Pre-Qualification Letters for the Residential Condominiums Conformed to the Requirements of the Senior Loan Agreement, as Well as the Custom of the Industry in Las Vegas.

Plaintiffs also apparently feel entitled to summary judgment on the basis of the

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prequalification letters issued by the Manhattan West project's preferred lender, First Horizon, to potential buyers of residential condominium units at the project. Plaintiffs maintain, with next to no evidentiary support and a hotly-disputed expert opinion, that the First Horizon letters did not meet the standards of the Senior Loan Agreement, or, more broadly, the Las Vegas mortgage industry in 2007 and 2008. Both contentions are the subjects of genuine disputes of material fact, and therefore may not properly be resolved with a motion for summary judgment. Nowhere is this more apparent than in Plaintiffs' own motion, where they cite their own expert witness's testimony as "undisputed fact" on this issue.[6]

In considering the matter of the prequalification letters, it would serve the Court well to bear in mind the actual requirements of the Senior Loan Agreement. In its discussion of Manhattan West presales and the accompanying prequalification letters, the Agreement required only a "financing prequalification letter, or, in the case of a cash buyer, satisfactory evidence of the availability of cash as determined by the Lender, has been provided to Lender." Exhibit D at 5. Nothing in the Senior Loan Agreement itself states that the prequalification process must include a certain level of underwriting before a letters are issued to prospective buyers/borrowers. The only document upon which Plaintiffs purport to rely in establishing this onerous, decidedly not-in-the-Senior Loan Agreement underwriting requirement is an email from Brad Scott from December 2007, before the Senior Loan Agreement was finalized. That email, attached as Exhibit 1 to Plaintiffs' motion, states that SFC wanted qualified buyers for the Manhattan West residential units (which of course it did), and that written approval or proof of financing could be used to show that they were qualified buyers. See Exhibit 1 to Plaintiffs' Motion for Summary Judgment. This email indicates at best a willingness of SFC to go beyond the boundaries of what was stated in the Senior Loan Agreement, the terms of which did not require such strict underwriting standards. In reality, Plaintiffs also misinterpret Brad Scott's words, since Scott intended when he wrote this email that a

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[6] As will be seen below, SFC and Brad Scott have retained an expert on this same point that directly refutes Plaintiffs' contention. If this does not qualify as an issue of disputed fact, then SFC and Scott are at a loss to say what is. In addition, First Horizon relationship manager, and an independent witness with nearly 20 years of mortgage lending experience in the Las Vegas valley, directly refutes Plaintiff's contention. (See Exhibit R at 19:17-21:13).

prequalification letter from either First Horizon or another bank would be sufficient. See Exhibit A, at ¶9.

The correct interpretation of Scott's email is supported not only by the Senior Loan Agreement and the sales records, but also by the testimony offered by the preferred lender. Vicki Sheppard, one of the First Horizon relationship managers who issued prequalification letters to purchasers of residential units at Manhattan West, testified that the prequalification process used was proper and in line with industry standards. Specifically, Ms. Sheppard stated that a prequalification letter is the result of a process by which borrowers have to meet "minimum guideline criteria for the occupancy type they were qualifying for." See Depo. of Vicki Sheppard, selected portions of which are attached hereto as Exhibit N, at 38:9-39:25. Further analysis beyond those minimum criteria is generally not helpful with the prequalification process, because as Ms. Sheppard explained, Manhattan West buyers were "18 months to two years out on a project like this. Credit expires, documentation expires." Id. at 56:15-18. When pressed to explain the process as it squared with the industry as a whole, Ms. Sheppard testified as follows:

> Q. Prior to issuing the 46 letters, as to each of those recipients, had you received documentary evidence proving that they had the down payment available that would be required for their loan?
>
> . . .
>
> A. **Of course not, but however, no lender 18 months to two years out is going to do that.** That is standard in the industry that far out is -- I think again that's where we've been splitting hairs in our discussions. Is the fact that when you're that far out in a project, credit expires, documentation expires.
>
> You can call the letters whatever you want to call them, preapproval, and **I think I even told you fluff. Because what I mean by that is things expire. People's lives change.**
>
> And so when you do the initial letters up front, based on what my facts are, to the best of my ability, can those people have a loan at that time? **Do they meet guidelines? Would I stand behind those preapproval letters if they were to close that loan before that documentation expired? Absolutely I would stand by on that. I don't do loans that aren't going to close.**
>
> But again, **when you're 18 months to two years out, there's no lender that's going to tell me they can fund on a loan two years out on a property that isn't even built yet. You can call it whatever you want, you can call it late for dinner. It is what it is.**

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It's a preapproval process.

Exhibit N at 61:21-63:1 (emphasis added). See also, Jim Sheppard's testimony in Exhibit R at 17:17-21:13.

Ms. Sheppard and her husband are not the only lending professionals who share this opinion that the Manhattan West/First Horizon preapproval process was entirely proper. In preparing for trial, SFC and Brad Scott have designated as an expert witness in this matter John Christie, who opines that the prequalification process and letters of First Horizon were sufficient and satisfied the presales requirements for the Manhattan West Project. See Expert Report of John Christie, attached hereto as Exhibit O, at 3. And if anyone would know, it would be Mr. Christie: he is the former vice president of sales and marketing for Trump International Hotel and Tower, and in that capacity successfully marketed and sold out all 1282 residential units in the Trump Tower between 2004 and 2007. See C.V. of John Christie, attached hereto as Exhibit P. Furthermore, John Christie will testify that, with his vast experience, he genuinely believes that SFC "**went above and beyond the standard practice of what developers do in confirming pre-sales** by following up with buyers and title companies after the purchase agreements were executed, and the deposits funded and/or bonds obtained by continuing to review the qualified buyer lists, and seeking additional assurances from those buyers of their continuing ability to close escrow upon completion of construction." See Exhibit O at 4 (emphasis added).

Therefore, among real estate professionals in Las Vegas familiar with the business of marketing and selling condominium projects, it is undisputed that First Horzion, SFC, and the Developer were doing exactly what needed to be done, in a way that went above and beyond the standards of the industry as they existed in Las Vegas at the time. Given the agreement on this issue by local professionals in the field, it seems difficult to arrive at any conclusion other than the one that SFC's and First Horizon's work on the presales and prequalification letters was anything but superior. At the very least, this testimony and evidence presents a triable issue of material fact which would prohibit summary judgment by this Court.

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IV.

COUNTER-MOTION FOR SUMMARY JUDGMENT AGAINST GARY THARALDSON AND TM2I ON ALL CLAIMS RELATING TO ENFORCEMENT OF TERM OF THE SENIOR LOAN AGREEMENT

EDCR 2.20(d) provides as follows:

> An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion. A counter-motion will be heard and decided at the same time set for the hearing of the original motion and no separate notice of motion is required.

Pursuant to EDCR 2.20(d) Defendants Scott Financial Corporation and Brad Scott hereby bring a counter-motion for summary judgment against Plaintiffs Gary Tharaldson individually and Tharaldson Motels II, Inc. ("TM2I") on all claims being asserted by those two Plaintiffs based on the terms of the Senior Loan Agreement. As guarantors, neither Tharaldson nor TM2I were parties to the Senior Loan Agreement, nor were they participating lenders like Plaintiff Club Vista Financial Services. Because the relevant case law further provides that there is not any special or fiduciary relationship between a lender such as SFC and a guarantor such as Tharaldson or TM2I, it is impossible as a matter of law for Tharaldson or TM2I to assert claims based upon any interpretation of the Senior Loan Agreement.

Even if Plaintiffs' motion had any substantive merits whatsoever, two of the moving Plaintiffs (Gary Tharaldson personally and TM2I) simply do not have any relationship with either Brad Scott or Scott Financial Corporation to prevail on any claims regarding satisfaction of the presale condition. Gary Tharaldson was the guarantor of the Senior Loan, and TM2I was an entity that guaranteed a portion of the loan for Bank of Oklahoma in order to induce Bank of Oklahoma's participation, and otherwise had no connection whatsoever to SFC. Even assuming *arguendo* that Plaintiffs' motion is correct on every other point, the only Plaintiff that even might make a credible argument for summary judgment, or indeed any judgment, regarding the enforcement of terms of the Senior Loan Agreement against SFC would be Club Vista Financial Services, the only Plaintiff that was participating in the Senior Loan. Because these facts cannot be disputed by the Plaintiffs or anyone else, summary judgment is warranted against Gary Tharaldson and TM2I in favor of Scott

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Financial Corporation and Brad Scott with regard to all claims they assert that relate to the enforcement of the Senior Loan Agreement.

A. Standard for Summary Judgment.

Rule 56(c) of the Nevada Rules of Civil Procedure specifically authorizes the granting of summary judgment when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." NEV. R. CIV. PROC. 56(c); Mullen v. Clark County, 89 Nev. 308, 511 P.2d 1036, 1039 (1973). The purpose of summary judgment is to obviate the necessity of a trial as to a specific party or certain issue. See Short v. Hotel Riviera, Inc., 79 Nev. 94, 378 P.2d 979 (1963); it is not to decide any particular issue of fact, but to decide whether any particular issue of fact exists. Dougherty v. Wabash Life Ins. Co., 87 Nev. 32, 482 P.2d 814 (1971). A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party. Riley v. Opp. IV, L.P., 112 Nev. 826, 919 P.2d 1071, 1074 (1996). Summary judgment should be granted when it clearly appears that there is no reasonable probability that the party moved against could prevail on that issue. Lach v. Deseret Bank, 746 P.2d 613, 618 (Utah App. 1987); Wilson v. Steinbach, 808 P.2d 758, 762 (Wash. App. 1991).

Here, there is no dispute as to the role of either Gary Tharaldson or TM2I with regard to the Manhattan West project: both were guarantors. Neither was a party to the Senior Loan Agreement. There are no facts in the record which indicate otherwise.

B. SFC and Scott are Entitled to Summary Judgment Against Plaintiffs Gary Tharaldson and TM2I, Because Neither of Those Entities Has Any Claim Against SFC or Scott With Regard to Manhattan West Presales or the Senior Loan Agreement.

Of the three Plaintiffs, only one of those Plaintiffs has a participation agreement whereby SFC represented it in connection with the Manhattan West Senior Loan: CVFS. Neither of the other two parties had this relationship with SFC. Gary Tharaldson was the personal guarantor of the entire $100 million Senior Loan. As the guarantor, he was allied with the borrower and not owed any duty by SFC, who was acting as the lender. What's more, TM2I is a step further removed from this analysis because TM2I had no contract with SFC or Brad Scott. TM2I guaranteed Bank of Oklahoma's portion of the Senior Loan in order to induce Bank of Oklahoma to participate and relieve CVFS from further participation in the Senior Loan. Therefore, neither Tharaldson

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personally nor TM2I can recover from SFC or Brad Scott on any legal theory regarding the presales and preleases at the Manhattan West project.

1. Gary Tharaldson is the Guarantor, Not a Lender, on the Manhattan West Project and Therefore Cannot Maintain a Legal Claim Against Either SFC or Brad Scott Regarding Performance of the Presale and Prelease Conditions, Which Were Terms of the Senior Loan Agreement.

Apart from the contractual relationship of the guaranty, there is no relationship between a lender and a guarantor, let alone a "special" relationship. See Yerington Ford, Inc. v. General Motors Acceptance Corp., 359 F. Supp. 2d 1075, 1092 (D. Nev. 2004); accord, Giles v. General Motors Acceptance Corporation, 494 F.3d 865, 882 (9th Cir. 2007) (affirming the Yerington Ford court's holding on this point and reversing it on others), and Labasan v. Countrywide Mortgage Ventures, 2010 WL 3810008 at *3 (D. Nev. September 20, 2010) (reaffirming the holding in both Yerington and Giles). "The legal relationship between a borrower and a bank is a contractual one of a debtor and creditor and does not create a fiduciary relationship between the bank and its borrower **or its guarantors.**" Marine Midland Bank, N.A., v. Hallman's Budget Rent-A-Car of Rochester, Inc., 204 A.D.2d 1007, 1008, 613 N.Y.S.2d 92, 92 (1994) (emphasis added). "A guarantor's obligations 'rest on the guaranty rather than the underlying obligation...,'" and therefore a guarantor is entitled to sue on a guaranty rather than the underlying loan. See Lee v. Yano, 997 P.2d 68, 74 (Hawaii App. 2000). This is because, much like the borrower, the guarantor "sits on the other side of the table" from the lender in a loan transaction. Where a borrower relies upon a personal relationship with a lender, rather than his own business sense, that reliance is unreasonable as a matter of law; in other words, the lender in such a transaction could not be expected to be looking out for the borrower's interests in the transaction. See id.; see also Yerington, supra, 359 F. Supp. 2d at 1091. Upon an examination of the borrower's relationship with a guarantor, the Yerington court indicated that that relationship would be even farther removed than the relationship between a lender and a borrower, indicating even less of a duty towards the guarantor than the borrower. Id. at 1092. Indeed, the Yerington Court characterized the lender-guarantor relationship as "inherently antagonistic." Id.

Here, it is not disputed by any of the parties that neither SFC nor Brad Scott had any special

relationship, fiduciary or otherwise, with the borrower/developer, Gemstone Development West, in this matter. Therefore, it would be an even greater leap to assume that there was any duty between SFC and Gary Tharaldson, who was the personal guarantor for the project. Unlike Tharaldson's company, CVFS, Tharaldson did not have a participation agreement with SFC relating to the administration of the Senior Loan, or any terms of the Senior Loan agreement. The one document detailing Gary Tharaldson's contractual obligations in this matter, his guaranty, imparts no obligations upon SFC towards Tharaldson with regard to enforcement of terms from the Senior Loan. See Guaranty, attached hereto as Exhibit B.

In reality, Gary Tharaldson and Alex Edelstein were working in concert in the Manhattan project, only bringing SFC on as the lead lender after beginning their relationship. This dynamic was also present in the Manhattan West project, and rightfully so: Tharaldson sought to make money not only on the success of the Manhattan West project, through his financing entity CVFS, but also as the guarantor of the project (in which capacity he obtained a 5% guarantor's fee due annually). In the capacity of a guarantor, as a matter of law, there is no relationship between SFC and Tharaldson which would give rise to claims against SFC.

This is a critical point. While it cannot reasonably be disputed that there is a participation agreement between SFC and CVFS, no such agreement exists with regard to Tharaldson personally, whose only relationship to the project is that he was a guarantor. In that capacity, he is owed no duties by SFC, and therefore would have no recourse regarding the quality of the presales.

While Tharaldson may (and will) assert that he has a prior relationship with Brad Scott which could create a duty, this line of argument was specifically cut off by the court in Yerington (which was affirmed on this point on appeal by the Giles court). That Court held that, where a borrower or guarantor such as Tharaldson "is an experienced businessman, capable of taking adequate precautions to protect his business and its business transactions," reliance on a representation of the lender is simply unreasonable. Yerington, supra, 359 F. Supp. 2d. at 1091. Here, Tharaldson has admitted that he has signed between $3 billion and $4 billion worth of guaranties in his professional life. See Depo. of Gary Tharaldson, selected portions of which are attached hereto as Exhibit Q, at 86:6-87:5. In this situation, it is clear that any reliance by Tharaldson on SFC is unreasonable as a

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matter of law. Furthermore, Tharaldson could (and did) make several changes to the terms of the Commitment Letter which was the foundation for this Senior Loan Agreement prior to the Agreement being signed. See Exhibit C. The unreasonableness of reliance on SFC only becomes more apparent when one considers this fact.

Accordingly, under no circumstances could Gary Tharaldson plausibly make a claim against SFC or Brad Scott regarding the presales of residential and commercial properties at Manhattan West. For this reason, not only should Plaintiffs' motion be denied, but summary judgment should be granted in favor of SFC and Brad Scott with regard to all claims by Tharaldson against SFC and Brad Scott regarding the Manhattan West presale requirements.

2. TM2I Has No Relationship, Contractual or Otherwise, With SFC In Regard to the Manhattan West Project.

If Gary Tharaldson has no relationship with SFC for the purposes of a claim regarding presales, then it logically follows that TM2I cannot have any such claim. Since TM2I did not even make a guaranty to SFC, there is no contractual relationship between these parties relating to Manhattan West. Therefore, summary judgment should also be granted in favor of SFC and Brad Scott against TM2I on any claims regarding the Manhattan West presales.

V.

CONCLUSION

Plaintiffs' Motion for Summary Judgment is a waste of this Court's and the parties' time and resources. The undisputed facts and documents indicate that neither Gary Tharaldson nor TM2I, as guarantors, have the standing to enforce terms of the Senior Loan Agreement against SFC. Apart from the fact that this Motion is a procedural non-starter on that basis (which also justifies summary judgment in SFC and Brad Scott's favor on the counter-motion), Plaintiffs cannot dispute the terms of the Senior Loan Agreement or the fact that ***all*** of the presale and prelease activity on the Manhattan West project strictly complied with the terms of the Senior Loan Agreement (which, it should always be remembered, were specifically agreed to by none other than Gary Tharaldson).

Since the inception of this litigation, the one consistent thread in Gary Tharaldson's narrative is that he was drawn into the Manhattan West project and bamboozled by SFC, Brad Scott, Alex

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Edelstein, Bank of Oklahoma, and anyone else unfortunate enough to be hanging around when the Manhattan West project took a turn for the worse. Tharaldson's claims have no basis in law or fact, were filed for an improper purpose as a means to delay and avoid his obligations as a guarantor and constitute bad faith. This Court must not countenance such behavior by entertaining Tharaldson's unsupported legal theories which, in fact, do not match the evidence that has been obtained as a result of discovery in this case. That evidence forms a tsunami of reality that is set to drown the none-too-neatly constructed narrative set in motion by Tharaldson's attorneys. Even if the Court does not entirely agree with that conclusion, it must at least agree that there are very serious disputes of material fact which prevent the relief that the instant Motion requests. Accordingly, and for all the foregoing reasons, SFC and Brad Scott respectfully request that this Court deny Plaintiffs' instant motion in its entirety, and grant the counter-motion for summary judgment against Plaintiffs Gary Tharaldson and TM2I.

DATED this 2nd day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2010, the foregoing **OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS BROUGHT BY GARY THARALDSON AND THARALDSON MOTELS II, INC., RELATING TO ENFORCEMENT OF PRESALES CONDITIONS** was served on the following persons by overnighting via Fed Ex and e-mailing to the e-mail addresses listed as follows:

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Counsel for Alex Edelstein

An employee of Kemp, Jones & Coulthard

Exhibits B, D-P & R Deleted
to Conserve Space

EXHIBIT A

DECLARATION OF BRADLEY J. SCOTT IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, BRADLEY J. SCOTT, declare as follows:

1. I am over the age of eighteen (18) and competent to testify to the matters set forth herein.

2. I am the president of Scott Financial Corporation ("SFC"), which was the lead lender for the Manhattan and Manhattan West projects. In this capacity, SFC obtained loan participations from various banks for each project, and administered the loans for the projects.

3. SFC was originally brought to the Manhattan project by Gary Tharaldson, who indicated that it was a good opportunity for both himself and SFC.

4. Because the Manhattan project was administered by SFC as the lead lender and a success for Tharaldson (yielding over $20 million), both he and the Developer, Gemstone Development West, wanted SFC to be the lead lender again on the Manhattan West project.

5. Manhattan West represented a significant investment for Gary Tharaldson. With the loan administered by SFC, Tharaldson's company, Club Vista Financial Services ("Club Vista"), loaned approximately $46 million to acquire the land on which Manhattan West would be built and fund pre-development costs. Because of this significant investment on the part of Club Vista, Tharaldson stated to me that he would prefer to have other participant banks fund the majority of the Manhattan West Senior Loan for vertical construction.

6. Pursuant to this discussion, both Gary Tharaldson and myself collectively sought to

obtain loan participations from various banks. Gary Tharaldson personally told nearly every participant that he would stand behind the project regardless of what happened and personally guaranty the project in order to secure their participation in the Manhattan West construction Senior Loan.

7. Gary Tharaldson agreed to guaranty the Manhattan West Senior Loan, and earned a 5% up-front fee, which was due annually thereafter as well as a 5% interest rate spread on the outstanding loan balance. Another company of his, TM2I, also guaranteed Bank of Oklahoma's portion of the Senior Loan.

8. With regard to the prequalification of residential buyers at Manhattan West, the requirements of the Manhattan West Senior Loan were even more stringent than the requirements of the Manhattan Senior Loan. Among those requirements was a prequalification letter, which was not previously required for Manhattan buyers.

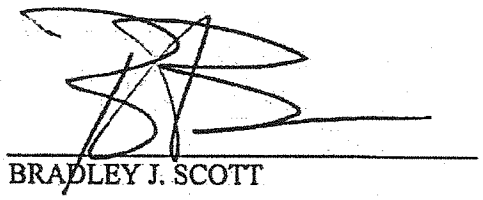
9. The Senior Loan agreement executed on February 6, 2008, correctly reflects the requirements regarding prequalification letters for residential buyers. SFC was not free to alter the requirements of that agreement, nor did it ever attempt to do so. In that sense, my email attached to Plaintiffs's Motion as Exhibit 1 is being taken out of context by Plaintiffs.

I declare under penalty of perjury under laws of the of the United States of America and the State of Nevada that the foregoing is true and correct and that this declaration was executed

. . .

. . .

on November 1ST, 2010, at 8PM CST.



BRADLEY J. SCOTT

EXHIBIT C

Scott
Financial Corporation

PRE-DEVELOPMENT CONDITIONAL FINANCING COMMITMENT
&
CONSTRUCTION FINANCING PROPOSAL

April 16, 2007

$8M Contingent on Construction Financing

Alexander Edelstein
Gemstone Development West, LLC
7700 Las Vegas Blvd. Suite #5
Las Vegas, NV 89123

EXHIBIT
1022
R. Kucker
5-6-10 HF

RE: ManhattanWest
Pre-Development Conditional Financing Commitment
Construction Financing Proposal

Dear Alex:

Scott Financial Corporation (SFC) "Lender" is pleased to offer this Pre-Development Conditional Financing Commitment subject to the conditions herein to assist Gemstone Development West, LLC "Developer" and Gemstone Apache, LLC "Borrower" with the required financing for its plans to further continue the Pre-Development inclusive of architect, permitting and design for the proposed multiphase mixed-use project defined as ManhattanWest located at Russell and Interstate 215 in Las Vegas.

Furthermore this letter will also outline general terms and conditions represented as the Construction Financing Proposal for assisting with the vertical construction of Phase 1 ManhattanWest defined as 195,000 square feet of retail & office space; as well as 228 Condo Units located in Building #7: defined as the Element House 76 units; Building #8: 76 units; Building #9: 76 units as well as other site infrastructure.

The following terms and conditions within this letter are provided to establish the framework for the financing structure that SFC will deliver to you at closing upon execution of all loan documents anticipated to be April 2007 for the Pre-Development Conditional Financing Commitment.

The Construction Financing Proposal if accepted would be followed up by a Conditional Financing Commitment only after acceptable due diligence is completed inclusive of and appraisal, industry underwriting as well as complete Project analysis by the Lender.

This attractive comprehensive financing effectively coordinates your existing Land Financing currently in place and extends additional financing as Mezzanine Debt for further marketing, architect and design development work on the Project.

PRE-DEVELOPMENT CONDITIONAL FINANCING COMMITMENT

Lender: Scott Financial Corporation

Borrower: Gemstone Apache, LLC
A Nevada Limited Liability Company
Gemstone Development West, LLC, Managing Member

Developer: Gemstone Development West, LLC
A Nevada Limited Liability Company
Alexander Edelstein, Managing Member

Participant: Club Vista Financial Services (CVFS)

Project: ManhattanWest

Purpose: Finance additional development costs to facilitate the marketing, architect, design, permitting, carrying costs, and other developer overhead hard costs of the 19 acre parcel property in Las Vegas

Loan Type: Line of Credit: Multiple advance, closed end note

Financing Summary:

Personal Equity (SFC Financed)	$13 Million
Borrower Financing	$33 Million
Project Financing	$46 Million

Note Amount:

Note #1: Senior Financing

$15 Million maximum but not to exceed 50% of purchase price or appraisal

Note #2: Mezzanine Financing

$10 Million or more but maximum funding not to exceed 80% of "AS PLATTED" Appraisal

Point Out

Note #3: Additional New Mezzanine Financing

$8 Million additional Development funding

Developer Equity: All Manhattan Net Cash Flows available to Alex Edelstein
Assigned $24 Million (pre-tax) reduced to $15 Million (after-tax on 4/08)
Alex Edelstein personal SFC $13 Million loan until paid in full

Terms: Monthly Development Costs excluding Developer Fees
Funding Date estimated April 2007

Payments: Monthly Interest Payments funded from Line of Credit

Repayment:	Primary: Project vertical construction financing Secondary: Assignment of Manhattan Distributions to Developer Tertiary: Other Investor Equity
Maturity:	November 1, 2007
Note Rates:	Note #1: Senior Financing 10.50% Fixed to maturity .50% Net to SFC Note #2: Mezzanine Financing 16.50% Fixed to maturity .50% Net to SFC Note #3: Additional New Mezzanine Financing 14.50% Fixed to maturity .50% Net to SFC
Origination Fee:	$8 Million @ 5% $400,000 (applied to the $2,300,000) Earned and paid at loan closing to CVFS
Transaction Costs:	All Transaction Costs will be paid 100% by Borrower with a reasonable estimated deposit of $5,000 required upfront for contracts entered into by the Lender on behalf of Manhattan West. Transaction Costs to be paid are including but not limited to: All SFC hard costs to obtain the financing commitment, title insurance (endorsements), appraisals, any environmental studies, (phase 1), surveys, attorney fees, other underwriting fees, and costs of SFC site inspections, Nevada Construction Services monthly disbursement and inspections, Abacus project review, all filing fees, printing, mailing, and all other officer related travel expenses and hard costs associated directly with the project underwriting and due diligence during the life of the project until paid in full.
Extension:	One 30 day extension beyond maturity will be granted for $25,000 Other extensions, if required, must be approved by SFC
Security:	Senior Deed of Trust on Senior Note Junior Deed of Trust on Mezzanine Note(s) Perfected first lien assignment of Manhattan Phase 1 and Phase 2 Net Profit distributions (all pre-tax cash flows, with tax payments refunded when paid) owned and controlled by Mr. Edelstein (excludes other investors share) pledged first to Borrowers Notes then secondly to Alex Edelstein Personal Note. Senior and Junior Liens respectively covering all Furniture, Fixtures, Equipment, Inventory, Accounts, Intangibles, Deposit Accounts and All other Business Assets of the Developer which are now owned or hereafter acquired.
Personal Guarantors:	Non-recourse

Pre-payment Penalty: None

Manhattan Payments: Phase 1 & 2 Net Profit distributions will be applied at the discretion of the Lender but may be as follows:

Senior Debt Note #1:	First to be paid back
Mezzanine Note #2:	Second to be paid back
Additional Mezzanine Note #3:	Third to be paid back
Personal Loan:	Last to be paid back

Primary Repayment: Assignment of Manhattan Distributions to Alex Edelstein

Secondary Repayment: Refinancing from Vertical Construction Financing

Tertiary Repayment: Repayment from Phase 1 of the Project (if financed by SFC)
Liquidation of all Collateral and Security

CONSTRUCTION FINANCING PROPOSAL

TERM SHEET DETAIL

Lender:	Scott Financial Corporation
Borrower:	Gemstone Apache, LLC A Nevada Limited Liability Company Gemstone Development West, LLC, Managing Member
Developer:	Gemstone Development West, LLC A Nevada Limited Liability Company Alexander Edelstein, Managing Member
Participant:	Club Vista Financial Services (CVFS) Subordinated Restructured Land /Pre-Development Financing
Participants:	SFC Participating Banks (primary) Senior Construction Financing
Project:	Phase 1 ManhattanWest
Purpose:	Vertical construction of Phase 1 ManhattanWest defined as 195,000 square feet of retail & office space; as well as 228 Condo Units located in Building #7: defined as the Element House 76 units; Building #8: 76 units; Building #9: 76 units as well as other site infrastructure of the 19 acre parcel property in Las Vegas
Loan Type:	Line of Credit: Multiple advance, closed end note

Financing Summary:

Borrower Cash Equity	$ 15 Million
Borrower Deferred Developer/Mngt. Fees	$ 7 Million
Borrower Equity All Sources	$ 22 Million
SFC Land/Pre-Development Financing	$ 46 Million
SFC Senior Construction Financing	$100 Million
SFC Project Total Financing	$146 Million

Note Amount:

Note #1: Subordinated Restructured Land /Pre-Development Financing

$46 Million with assigned $15 Million reduction from Manhattan
Funded by CVFS as 100% SFC Participant

Note #2: Senior Construction Financing

$100 Million
Funded by other SFC Bank Participants
Not to exceed 65% of Forecasted Phase 1 Revenue
Not to exceed 75% of "As Completed" MAI Appraisal

Developer Equity: All Manhattan Net Cash Flows available to Alex Edelstein
Assigned $24 Million (pre-tax) reduced to $15 Million (after-tax on 4/08)
Alex Edelstein personal SFC $13 Million loan remains in place until paid out from Assigned Manhattan Cash Flows

Terms: Lender approved monthly Project development costs
Excluding Phase 1 Developer and Management Fees ($7 Million)
Funding Date estimated August 2007

Payments: Capitalized monthly interest Payments funded from Lines of Credit

Repayment:
Primary: Phase 1 Sales
Secondary: Assignment of Manhattan Distributions to Developer
Tertiary: Other Phase cash flows or Investor Equity

Maturity: June 1, 2009

Note Rates:

Note #1: Subordinated Restructured Land /Pre-Development Financing

14.50% Fixed to maturity
14.00% Net to CVFS
.50% SFC Service Fee

Note #2: Senior Construction Financing

14.00% Fixed to maturity
5.00% Net to CVFS
8.50% Net to Participating Banks
.50% SFC Service Fee

Origination Fee: $ 46 Million @ 5% $2,300,000 5% Annual Prorated Monthly
Less fee collected on 4/07 for the $8 Million ($400,000) After yr 1
100% earned and paid at loan closing to CVFS

7 Commitment or outstanding

Subordination & Guarantor Fee: $100 Million @ 5% $5,000,000
100% earned and paid at loan closing to CVFS

Transaction Costs: All Transaction Costs will be paid 100% by Borrower with a reasonable estimated deposit of $100,000 required upfront for contracts entered into by the Lender on behalf of Manhattan West.

Transaction Costs to be paid are including but not limited to:
All SFC hard costs to obtain the financing commitment, title insurance (endorsements), appraisals, any environmental studies, (phase 1), surveys, attorney fees, other underwriting fees, transaction costs, and costs of SFC site inspections, Nevada Construction Services monthly disbursement and inspections, Abacus project review, all filing fees, printing, mailing, and all other officer related travel expenses and hard costs associated directly with the project underwriting and due diligence during the life of the project until paid in full.

Extension: TBD if required, must be approved by SFC

Security:	Senior DOT on Senior Construction Financing Junior DOT on Subordinated Restructured Land/Pre-Development Financing Perfected first lien assignment of Manhattan Phase 1 and Phase 2 Net Profit distributions (all pre-tax cash flows, with tax payments refunded when paid) owned and controlled by Mr. Edelstein (excludes other investors share) pledged and applied at the discretion of the Lender Alex Edelstein Personal Note is finally retired when all but 15 Condo unit sales proceeds have been received by SFC. Senior and Junior Liens respectively covering all Furniture, Fixtures, Equipment, Inventory, Accounts, Intangibles, Deposit Accounts and All other Business Assets of the Developer which are now owned or hereafter acquired.
Personal Guarantors:	Gary D. Tharaldson 100% of the loan amount Minimum Net Worth required $400 Million
Pre-payment Penalty:	Established at closing 3% of combined Loan Commitment Amounts paid to Lender/Participants Applicable and enforced only if refinancing occurs by an outside creditor. All owner equity raised Manhattan Phase 1 & 2 distributions, personal cash flows and other sources of personal funds are allowed to pay down Senior Debt without penalty.
Manhattan Payments:	Phase 1 & 2 Net Profit distributions will be applied at the discretion of the Lender but may be as follows: Mezzanine Note(s): First to be paid back Personal Loan: Second to be paid back Senior Debt Note: Third to be paid back
Primary Repayment:	ManhattanWest Sales Proceeds Assignment of Manhattan Distributions controlled by Alex Edelstein
Secondary Repayment:	Refinancing from other Phase 2 Vertical Construction Financing
Tertiary Repayment:	Liquidation of all Collateral and Security

PRE-DEVELOPMENT CONDITIONAL FINANCING COMMITMENT

The MODIFIED credit agreements and underwriting will provide for certain covenants and conditions all of which will be outlined in detail within those documents.

Other:

The last Note funded will be the Additional New Mezzanine Financing

Developer Fees may be accrued but will not be funded in loans established until loans are repaid.

Developer overhead costs are acceptable but must be approved by Lender.

Note must be paid in full at maturity, no partial releases.

Cross Default to Manhattan Phase 1 & 2

SFC will be named loss payee or assignee on all insurance policies.

A minimum of monthly SFC on site inspections will be required.

All Participants must perform on their formal written "Commitments to Participate" secured by SFC.

All Participants must have adequate time to review and approve the loan closing documents.

The Participants commitment(s) are conditioned and subject to all other standard industry commitment closing conditions including, but not limited to, appraisal review, title review, environmental review, engineering report review and assurances of proper zoning and permitting.

Any material adverse change either financial or otherwise by the Developer/Owner or assignees may revoke this commitment prior to funding.

Reporting:

Project financials prepared by qualified in-house staff; and progress reports from the Project Manager and Developer must be in a format and quality acceptable to SFC.

Provide monthly internal Financial Statements of the Developer.
Developer will provide all other financial reports requested by SFC.

Guarantor shall provide all financial information reasonably requested by SFC.

CONSTRUCTION FINANCING PROPOSAL CONDITIONS AND UNDERWRITING DETAIL

SFC will attempt to secure 100% of the Construction Loan from third party commercial bank Participants at a interest rate that allows for Tharaldson to secure a 5% Subordination and Guarantor spread.

However, SFC must secure a minimum of $75 Million of the $100 Million in Participation prior to closing the loan on August 1, 2007.

PHASE 1 PRE-SALES

Pre-sale requirements to began vertical construction will be measured and determined by two factors, they must both exceed the percentage square footage/units and sales to revenue must be achieved as presented below:

Commercial/Retail space: Buildings 2 & 3	Approximately 25% of gross square footage but not less than 25% ($15 Million) of forecasted revenues
Element House: Building 7 (76 units)	Approximately 35% of ~~gross square footage~~ Units but not less than 35% ($13 Million) of forecasted revenue
Mid-Rise: Buildings 8 & 9 (152 units)	55% of ~~gross square footage~~ Units 55% ($32 Million) of forecasted revenue
Total Pre-sale Revenue	$60 Million required to be secured before Vertical Financing

DEPOSITS AND DOWN PAYMENTS

Minimum Sales Contracts must have the following non refundable deposits:

Commercial/Retail space: Buildings 2 & 3	5% upon signing contract 2.5% additional at start of construction (less Broker 1% fee) Total 6.5% @ $15 Million is $1 Million deposit
Element House: Building 7 (76 units)	$1,000 signing reservation 5% upon signing contract (June) 5% additional at start of construction (August) Total 10% @ $13 Million is $1.3 Million deposit
Mid-Rise: Buildings 8 & 9 (152 units)	$1,000 signing reservation $5,000 upon signing contract (June) Balance due up to 5% at start of construction (August) Total 5% @ $32 Million is $1.6 Million deposit
Upgrades:	T&I: 100% prepaid upon selection Residential: 25% prepaid upon selection
Deposits:	All deposits collected and controlled by TITLE Released by SFC in monthly draws Used by the Borrower for construction costs only

SCOTT-448393

Additional Conditions and Terms

1. Subordination of Land Loan to Senior Construction Loan
2. Senior Construction Loan Personally Guaranteed by Gary D. Tharaldson
3. Borrower Minimum Equity required is $15 Million
4. Manhattan must be sold out at 98% (685 of the 700) units sold before funding
5. Deferred Developer Fee (5%) and Management Fee (1%) approximately $6 Million
6. Commitment is for Phase 1 financing only
7. Monthly Lender inspection and qualified third party inspections
8. Voucher Control on all Draws
9. Proper insurances all assigned to Lender
10. Acceptable Abacus feasibility analysis on entire project
11. Acceptable Lender approved Project Budget
12. Acceptable GMP Contract assigned to Lender
13. Assignment of all contracts
14. Phase 1 updated
15. Assignment of all Profit Sharing Agreements between TFG and Gemstone
16. Lender approved deposit control account
17. First draw to occur on or before November 2007
18. Financial reporting acceptable to the Lender
19. Cross Defaulted with Manhattan
20. All sales must be approved by the Lender
21. Alex Edelstein must remain in control and 100% ownership of the Project
22. Any material adverse change either financial, or otherwise by the Developer/Owner may revoke this Proposal
23. Satisfactory Evidence of ~~[illegible]~~ 2007 Taxable event for Manhattan
24. Lender Participant to verify Cash Flow / IRR Calc

This Conditional Financing Commitment and Financing Proposal is not intended to be an inclusive statement of all the loan provisions that will be required in the loan documents.

All financing is subject to the final closing terms presented by the Lender upon successful delivery by the Borrower of all required information and execution loan documents.

This document supersedes all other verbal or written correspondence and makes any other previous agreements or commitments verbal or written between the Developer and SFC null and void.

We have attempted to provide you a framework of the most significant items that will be presented in the closing documents for the financing as requested.

SFC we will make every effort to execute this financing for you with courtesy, professionalism and unsurpassed service.

Thank you for this opportunity to serve you.

Sincerely,

Brad J. Scott
President

Participant Commitment Written Acceptance

The terms as presented to the Participant are accepted.

SFC Additional Mezzanine Financing Only

Club Vista Financial Services, LLC

By: _____
Gary D. Tharaldson
Its Managing Member

Date: _____

EXHIBIT Q

Gary Tharaldson

Vol. 1

05/11/2010

Litigation Services

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

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 ENTITES 1-100,

Defendants.

AND RELATED CROSS-CLAIMS.

Case No. A579963
Dept. No. XIII

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

A. I have no idea.
Q. Would it be more than 20?
A. I -- I have no idea. I mean, my finance guys would have put it all together, and I don't know.
Q. Okay. By the way, how many hotels have you or your company developed over the years, total?
A. About 430 or 40, somewhere in there.
Q. And what's the total value of those properties?
A. Total value?
MR. ARONSON: Form.
Go ahead.
BY MR. JONES:
Q. Best you understand.
A. Somewhere between 3 and 4 billion.
Q. All right. And were -- were all of those properties financed in one way or the other?
A. Yeah, I think they were.
Q. And on how many of those properties did you give personal guarantees?
MR. ARONSON: Form.
THE WITNESS: I believe I guaranteed them all.

BY MR. JONES:

Q. So that would be 3 to $4 billion worth of guarantees that you've signed in your career?

MR. ARONSON: Form.

THE WITNESS: Somewhere in there, yes.

BY MR. JONES:

Q. I -- I take it from what you've testified before that you didn't read any of those guarantees either, those 3 to $4 billion in guarantees?

MR. ARONSON: Form.

Go ahead.

THE WITNESS: I don't -- I don't recall reading those guarantees, no.

BY MR. JONES:

Q. So in other words, just to be clear, you -- basically, as you recall, you just signed those guarantees without reading them; correct?

A. Typically what happens is the finance guy brings the documents -- and now sometimes the finance guys just sign the document, okay, and just sign my name to the documents. But if I would have got the document, I'd have had the signatures pages tabbed, and -- and I would just sign the signature pages.

Q. Without reading them; correct?

J. RANDALL JONES, ESQ. (#1927)
jrj@kempjones.com
MARK M. JONES, ESQ. (#267)
mmj@kempjones.com
MATTHEW S. CARTER, ESQ. (#9524)
msc@kempjones.com
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000
Attorneys for Scott Financial Corporation and Bradley J. Scott

FILED
DEC 13 2010
CLERK OF COURT

FUS

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.	Case No.: A579963 Dept. No.: XIII **SCOTT FINANCIAL CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON BREACH OF CONTRACT COUNTERCLAIM** **(Filed Under Seal)** Hearing Date: Hearing Time:

COMES NOW Defendant/Counterclaimant SCOTT FINANCIAL CORPORATION, by and through its attorneys of record, Kemp, Jones & Coulthard, LLP, and moves this Court for summary judgment in its favor on its counterclaim for Breach of Contract against Gary D. Tharaldson. This motion is made and based upon the attached Memorandum of Points and Authorities, any attached exhibits, all pleadings and papers on file in this action, and any oral argument that this Court might

. . .

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

MCJ

entertain at the hearing on this motion.

Dated this 13 day of December, 2010.

Respectfully submitted,

KEMP, JONES & COULTHARD, LLP

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

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **MOTION FOR SUMMARY JUDGMENT** on for hearing before the above-entitled Court on the 13 day of JAN, 2011, at 9:00 a.m., or as soon thereafter as counsel may be heard.

Dated this 13 day of Decem 2010.

Respectfully submitted,

KEMP, JONES & COULTHARD, LLP

J. RANDALL JONES, ESQ. (#1927)
MARK M. JONES, ESQ. (#267)
MATTHEW S. CARTER, ESQ. (#9524)
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

At the heart of this case lie two guaranty contracts that obligate Plaintiffs Gary D. Tharaldson and Tharaldson Motels II, Inc. ("TM2I") to repay approximately $100 million in loans incurred to build the Manhattan West mixed-use condominium project. When the project floundered, instead of performing their contractual repayment obligations to the commercial-lending syndicate of 27 banks and financial institutions that collectively funded the loan, Plaintiffs initiated this lawsuit as a preemptive strike against lenders Scott Financial Corporation and Bank of Oklahoma. The lenders countersued for breach of the guaranty contracts.

Scott Financial moves this Court for summary judgment on its breach of contract counterclaim against Tharaldson[1] because the undisputed facts establish his liability for nonperformance of his repayment duty under the guaranty contract. Tharaldson admittedly signed the unambiguous personal guaranty and unconditionally guaranteed Gemstone Development West, Inc.'s ("Gemstone") repayment of $100,000,000 in construction loans that Gemstone defaulted on. As Tharaldson's contractual obligations are clear and overdue, summary judgment is now required.

II.

STATEMENT OF UNDISPUTED FACTS

1. On January 22, 2008, Scott Financial loaned Gemstone $110 million for the development and construction of the Manhattan West project. The loan was secured by a first position Senior Debt Deed of Trust with Assignment of Rents and Fixture Filing recorded against the Manhattan West property. *See* Senior Debt Loan Agreement, attached as Exhibit A.

2. The Loan is evidenced by a loan agreement (the "Loan") entered into by and between Gemstone and Scott Financial Corporation and executed by Alexander Edelstein as Gemstone's Chief Executive Officer and Brad Scott as Scott Financial's President. Exhibit A, p. 23. The Loan

---

[1] The other guaranty contract executed by TM2I to repay $24 million lent by the Bank of Oklahoma is not the subject of this motion by Scott Financial.

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is also evidenced by a promissory note executed by Gemstone ("the Note"). *Id.*

3. The Note is secured by Tharaldson's individual guaranty contract ("the Guaranty"), in which Tharaldson agreed to "absolutely, unconditionally and jointly and severally guarant[y] to the Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of [] the repayment of all funds disbursed under and evidenced by the $110,000,000 Senior Construction Note (and all interest thereon). . . ." Guaranty at ¶ 1, attached as Exhibit B.

4. Tharaldson also signed – in his individual capacity – an "Acknowledgment of Personal Guarantor," which is located on the Senior Loan Agreement's signatory page. *See* Exhibit A at 23

5. As consideration for his guaranty of Gemstone's repayment obligation, Tharaldson earned a fee of five percent (5%) of the Senior Loan amount annually, resulting in an initial payment to Tharladson of $5.5 million.[2] *See* Lender's Closing Statement, attached as Exhibit C; Transcr. Depo. Tharaldson at Vol. 1 16:1-7 (May 11, 2010), relevant pages of which are attached as Exhibit D.

6. Scott funded the Loan on February 6, 2008. *See* Exhibit C. By October 2008, Gemstone had failed to comply with numerous covenants and warranties under the Senior Loan Agreement, which constituted defaults of Gemstone's obligations. On or about October 28, 2008, Scott sent Gemstone a letter notifying it of these multiple defaults under the Senior Loan Agreement. *See* Correspondence dated October 28, 2008, attached as Exhibit E.

7. On or about December 16, 2008, Scott received correspondence from Tharaldson's attorneys, Morrill & Aronson, P.L.C. purporting to terminate Tharaldson's Guaranty as to any future advances of the Senior Loan proceeds. *See* Correspondence dated December 16, 2008, attached as Exhibit F. Gemstone's default and the announcement that Tharaldson intended to dishonor his obligations under the Guaranty essentially halted the project. By that time, Gemstone had drawn down $87,038,393.33 of the total loan amount. *See* Manhattan West Senior Debt Default Summary, attached as Exhibit G.

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[2] Tharaldson had negotiated the exceedingly generous fee of 5% per year on the outstanding balance of the Senior Loan. Had this project not floundered, Tharaldson would have earned another $5.5 million in January 2009 and many more millions in guaranty fees before the Loan was fully repaid.

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7. Among its many defaults under the Loan, Gemstone did not make all of the payments required pursuant to the terms of the Note. And Tharaldson did not make any payments on behalf of Gemstone after its default under the Note as required by the terms of his Guaranty of Payment Agreement. *See* Exhibit E.

8. Rather than honoring his obligations under the Guaranty, Tharaldson initiated the instant action. Scott Financial responded with a Counterclaim against Tharaldson. Scott Financial's first counterclaim for relief is entitled "breach of contract," and it "arises from Tharaldson's guaranty" and Tharaldson's "refus[al] to fulfill and honor his obligations as guarantor. . . ."

9. Tharaldson has failed and refused to repay any portion of Gemstone's debt obligation.

III.

ARGUMENT

Rule 56(c) of the Nevada Rules of Civil Procedure specifically authorizes the granting of summary judgment when there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law. NEV. R. CIV. PROC. 56(c); *Sustainable Growth Initiative Committee v. Jumpers, LLC*, 122 Nev. 53, 128 P.3d 452, 458 (2006). The purpose of summary judgment is to obviate the necessity of a trial as to a specific party or certain issue when no reasonable jury could return a verdict for the non-moving party. *See Short v. Hotel Riviera, Inc.*, 79 Nev. 94, 378 P.2d 979 (1963); *Riley v. Opp. IX, L.P.*, 112 Nev. 826, 919 P.2d 1071, 1074 (1996). Tharaldson entered into a binding and unambiguous guaranty, unconditionally promising to repay Gemstone's debt in the event of Gemstone's default. Gemstone defaulted, and Tharaldson is legally obligated to repay the loan. His refusal to do so is a clear, unequivocal, and indefensible breach of his Guaranty, and Scott Financial is entitled to summary judgment on its breach of contract counterclaim.

A. A Guaranty is an Independently Enforceable Contractual Obligation.

Nevada law has established that "the contract of a guarantor is his own separate contract; it is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done. . . ." *Short v. Sinai*, 50 Nev. 346, 259 P. 417, 418 (1927); *accord Gross v. Lamme*, 77 Nev. 200, 205, 361 P.2d 114, 116 (1961) (providing that "a contract . . . of guaranty [is a] separate and

distinct obligation[] from the obligation contained in the note itself."). As an obligation separate from the primary debt, the extent of a guarantor's liability is determined by the terms of the contract of guaranty. *See Thomas v. Valley Bank of Nevada*, 97 Nev. 320, 322-23, 629 P.2d 1205, 1207 (1981), *overruled on other grounds*, *First Interstate Bank of Nev.*, 102 Nev. 616, 618-19, 730 P.2d 429 (1986). Indeed, "**if the [guaranty's] maker fails to pay, the guarantor remains liable upon his own obligation, which is absolute and independent of the note itself.**" (emphasis added) *Randono v. Turk*, 86 Nev. 123, 131, 466 P.2d 218, 223 (1970) (quoting *Swenson v. Stoltz*, 36 Wash. 318, 78 P. 999 (Wash. 1904)).

B. Summary Judgment is Required Because Tharaldson Has Breached His Unambiguous Guaranty Contract.

Tharaldson's Guaranty, entitled, "GUARANTY ($100,000,000 Senior Debt Construction Note) (Unlimited – Gary D. Tharaldson)" unambiguously promises that Tharaldson will repay "**all funds disbursed** under and evidenced by the $100,000,000 Senior Debt Construction Note (and all interest thereon) and any extensions or renewals thereof and substitutions therefor," plus "all reasonable costs, expenses and attorneys' fees paid or incurred by [Scott Financial] in endeavoring to collect the Indebtedness and in enforcing this Guaranty." Exhibit B at ¶ 1 (emphasis added). This Guaranty is made "absolutely, unconditionally and jointly and severally" and promises to make "the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise." *Id.*

The Guaranty also states that:

- Only full repayment can operate as a release of Tharaldson's liability: "No act or thing need occur to establish the liability of the Guarantor hereunder, and with the exception of full payment, no act or thing . . . relating to the Indebtedness which but for this provision could act as a release of the liabilities of the Guarantor hereunder, shall in any way exonerate the Guarantor, or affect, impair, reduce or release this Guaranty and the liability of the Guarantor hereunder." Exhibit B at ¶ 3;
- Tharaldson's repayment obligation is absolute and unconditional: "[T]his shall be a continuing, absolute, unconditional and joint and several guaranty and shall be in

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force and be binding upon the Guarantor until the Indebtedness is fully paid." *Id.*;

- Tharaldson waives all defenses available to a guarantor: "The Guarantor waives any and all defenses and discharges available to a surety, guarantor, or accommodation co-obligor, dependent on their character as such." *Id.* at ¶ 4;
- Tharaldson waives all defenses available to Gemstone as Borrower: "The Guarantor waives any and all defenses, claims, setoffs, and discharges of the Borrower, or any other obligor, pertaining to the Indebtedness, except the defense of discharge by payment in full." *Id.* at ¶ 5;
- This waiver of defenses broadly includes the defenses of fraud, illegality and unenforceability: "Without limiting the generality of the foregoing, the Guarantor will not assert against the Lender any defense of waiver, release, discharge in bankruptcy, res judicata, statute of frauds, anti-deficiency statue, fraud, ultra vires acts, usury, illegality or unenforceability which may be available to the Borrower in respect of the Indebtedness, or any setoff available against the Lender to the Borrower, whether or not on account of a related transaction." *Id.*; and
- Tharaldson waived the right to jury trial for claims related to this Guaranty. *Id.* at ¶13.

Tharaldson's subsequent Addendum to Guaranty emphasizes that his waivers were "made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law." *See* final page of Exhibit A.

When Gemstone defaulted on the Note, Tharaldson disavowed his clear and unambiguous promise of "the full and prompt payment" of Gemstone's debt obligation and has paid nothing under his Guaranty. Like a contract breach, the breach of a guaranty is the "material failure of performance of a duty arising under or imposed by agreement." *Calloway v. City of Reno*, 116 Nev. 250, 256, 933 P.1259, 1263 (2000), *overruled on other grounds, Jordan v. State ex rel. Dept. of Motor Vehicles and Public Safety*, 121 Nev. 44, 110 P.3d 30 (2005). To prevail on a breach of guaranty, the evidence must establish: 1) a valid contract existed and was entered into by the parties; 2) the claimant performed or was excused from performance; 3) the defendant breached by failing to

perform any promise which forms a whole or part of the contract; and 4) the claimant sustained damages as a result of the breach. *Reichert v. General Insurance Co. of Amer.*, 442 P.2d 377 (Cal.1968).

Scott Financial is entitled to summary judgment in its favor on its breach of guaranty claim against Tharaldson because the evidence unequivocally establishes Tharaldson's liability to repay Gemstone's debt. Tharaldson executed the unambiguous Guaranty that unconditionally obligates him to repay the tens of millions of dollars loaned to Gemstone. Scott Financial fully performed all of its obligations under the Note by tendering the $100 million Loan, of which more than $87 million has been drawn upon. *See* Exhibit C. It is undisputed that Gemstone defaulted under the Note by, inter alia, failing to tender all of the payments as scheduled. Exhibit E. And, despite Scott's demand, Tharaldson has categorically refused to repay a single cent of the Loan he guarantied. *See* Exhibit F. Tharaldson's failure to pay all of the amounts due by Gemstone under the Note is a clear breach of the Guaranty that has caused Scott to suffer damages in the outstanding principal amount of $87,038,393.33, plus interest at the default rate of 11.00% from the November 29, 2008, default date through the present (for a total of $18,247,662.85 in interest as of November 15, 2010, alone), and contractual "default" fees in the amount of $250,000, for total damages exceeding $105 million. *See* Exhibit G. Tharaldson's refusal to uphold his unconditional obligation under the Guaranty to repay Gemstone's debt entitles Scott Financial to summary judgment on its breach of guaranty counterclaim as a matter of law.

IV.

CONCLUSION

Tharaldson has refused to honor his obligations under the subject Guaranty of Payment agreement without excuse or justification, and the comprehensive and unambiguous language of the Guaranty precludes any reasonable jury from finding in favor of Tharaldson on this claim. Accordingly, Scott Financial asks this Court to enter summary judgment in its favor on its First Claim for Relief for breach of contract in the principal amount of $87,038,393.33, plus interest at the default rate of 11.00% , contractual "default" fees in the amount of $250,000.00, and "all reasonable costs, expenses and attorneys' fees paid or incurred by" Scott Financial to prosecute

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this claim against Tharaldson.

DATED this 13 day of December, 2010.

Respectfully submitted,

KEMP, JONES & COULTHARD, LLP

J. RANDALL JONES, ESQ. (#1927)
MARK M. JONES, ESQ. (#267)
MATTHEW S. CARTER, ESQ. (#9524)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
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Attorneys for Scott Financial Corporation and Bradley J. Scott

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DECLARATION OF BRADLEY J. SCOTT IN SUPPORT OF SCOTT FINANCIAL CORPORATION'S MOTION FOR SUMMARY JUDGMENT ON BREACH OF CONTRACT COUNTERCLAIM

I, Bradley J. Scott, declare as follows:

1. I have personal knowledge of the following facts and, if called as a witness, could competently testify regarding these facts.

2. I am an owner, director, and the President of Scott Financial Corporation. In that capacity, I have personal knowledge regarding all of the loan documents associated with the Manhattan West project.

3. Attached to the above-referenced motion as Exhibit A is a true and correct copy of the Senior Debt Loan Agreement between Gemstone Development West, Inc., and Scott Financial Corporation, dated January 22, 2008.

4. Attached to the above-referenced motion as Exhibit B is a true and correct copy of the personal guaranty signed by Gary D. Tharaldson for the Manhattan West senior loan.

5. Attached to the above-referenced motion as Exhibit C is a true and correct copy of the Lender's Closing Statement for the Manhattan West senior loan dated January 20, 2008.

6. Attached to the above-referenced motion as Exhibit E is a true and correct copy of the October 28, 2008, letter of default sent by myself to Alex Edelstein.

7. Attached to the above-referenced motion as Exhibit F is a true and correct copy of a letter I received from K. Layne Morrill on December 16, 2008.

8. Attached to the above-referenced motion as Exhibit G is a true and correct copy os a Manhattan West Senior Debt Default summary prepared by Scott Financial Corporation on

November 5, 2010.

I declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct.

Executed on December 10TH, 2010 in BISMARCK, NORTH DAKOTA

Bradley J. Scott

P:\USERS\MM\Open Files\Scott Financial\Theraldson (Club Vista v. Scott Financial) - DC Case No. A579943\Pleadings\Declaration - Brad- in support of MSJ re Guaranty.wpd

Exhibits A-B & F-G Deleted
to Conserve Space

EXHIBIT C

Financial Corporation

Lender's Closing Statement

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

Closing Date: January 22, 2008
Funding Date: February 6, 2008

Gemstone Development West, Inc.
ManhattanWest Mezzanine Note
Loan Proceed Summary

Funding Summary: Scott Financial Corporation			
Alexander Edelstein	**Equity Note**	**($13 Million)**	**$13,000,000.00**
LESS: Paydown from Senior Const Note reflecting Manhattan Closings		07/05/07	($529,411.76)
LESS: Paydown from Senior Const Note reflecting Manhattan Closings		11/12/07	($1,300,000.00)
LESS: Paydown from Senior Const Note reflecting Manhattan Closings		12/17/07	($588,235.29)
LESS: Paydown from Senior Const Note reflecting Manhattan Closings		01/03/08	($882,352.94)
LESS: Paydown from Senior Const Note reflecting Manhattan Closings		01/22/08	($470,588.24)
Equity Loan Balance			**$9,229,411.77**
Gemstone Development West, Inc.	**Mezzanine Note**	**($46 Million)**	**$42,273,055.27**
LESS: Paydown from Senior Construction Note		02/06/08	($15,406,013.37)
1st Advance under Restructured Notes*			**$8,411,645.73**
Mezzanine Loan Balance			**$35,278,687.63**
TOTAL Sources: First Advance			**$8,411,645.73**

Closing Fee Summary	
CVFS Origination Fee Due (5% of $46MM $2,300,000; previously paid $400,000)	$1,900,000.00
Scott Consulting	$115,000.00
$10 MM Foundation Note (Activity Usage Fee 5%)	$89,191.09
$110 MM Senior Note (GDT Guarantor 5% Fee)	$5,500,000.00
TOTAL Due to SFC at Closing	**$7,604,191.09**

Pre-Development Financing Interest Schedule			Interest Thru 2/6/08
Gemstone Apache, LLC	Senior Loan	($15 Million)	$141,905.61
Gemstone Apache, LLC	Junior Loan	($10 Million)	$174,166.67
Gemstone Apache, LLC	Additional Loan	($8 Million)	$122,444.44
Alexander Edelstein	Equity Note	($13 Million)	$226,416.67
Alexander Edelstein	Inventory Note	($10 Million)	$142,521.25
TOTAL Interest Due			**$807,454.64**
TOTAL Uses: First Advance			**$8,411,645.73**

GEMSTONE DEVELOPMENT WEST, INC.

By: Alexander Edelstein, Its President

SCOTT FINANCIAL CORPORATION

By: Brad J. Scott, Its President

1/30/08
Date

EXHIBIT D

Q. Okay. So did you know what your return was going to be?

A. Yes.

Q. What do you believe your return was going to be?

A. Well, I know that it was going to be five points on -- on the money that was lent.

Q. And what was your interest rate?

A. Well, my interest rate was 14, so I would get the spread between it, between what the banks charged and what I charged.

Q. Which was a substantial amount of money, wasn't it?

MR. ARONSON: Form.

THE WITNESS: In my world, I -- it was -- it was okay. It was good.

BY MR. JONES:

Q. So tell me what it was.

A. I don't know.

Q. You -- you don't know what that actual dollar amount was?

A. No.

Q. Okay. Getting back to my -- my other question -- well, by the way, what would -- what would -- would it have to be in your world to be a

EXHIBIT E

By E-Mail, Overnight Delivery and Certified Mail

October 28, 2008

Gemstone Development West, Inc.
9121 West Russell Road, Suite 117
Las Vegas, Nevada 89148
Attention: Alexander Edelstein

Alexander Edelstein
9121 West Russell Road, Suite 117
Las Vegas, Nevada 89148

Re: Events of Default Under Loans Agreement with Scott Financial Corporation ("SFC")

Dear Mr. Edelstein:

Gemstone Development West, Inc. ("Gemstone") and SFC are parties to a certain Senior Debt Loan Agreement (the "Senior Loan Agreement") dated January 22, 2008, relating to the ManhattanWest Project, consisting of approximately 228 Condo Units in Buildings 7, 8, and 9 (also referred to as Element House, Roosevelt House and Lennox House), and retail and office space in Buildings 2 and 3 (known as Union Square), and other site infrastructure on an approximately 21 acre parcel (the "Trust Property"). Gemstone's obligations to SFC under the Senior Loan Agreement are secured by, among other things, deeds of trust on the Trust Property.

Gemstone has also assumed the obligations of Gemstone Apache, LLC under its Loan Agreement (the "Mezzanine Loan Agreement") with SFC dated June 26, 2006, which obligations are also secured by deeds of trust on the Trust Property.

Alexander Edelstein ("Edelstein") and SFC are parties to a certain Edelstein Loan Agreement (the "Edelstein Loan Agreement") dated June 26, 2006, and Gemstone has granted and assumed deeds of trust on the Trust Property to secure Edelstein's obligations thereunder.

15010 Sundown Drive ♦ Bismarck, ND 58503
Office: 701.255.2215 ♦ Fax: 701.223.7299

The Senior Loan Agreement, the Mezzanine Loan Agreement and the Edelstein Loan Agreement are referred to herein collectively as the "Loan Agreements" and each as a "Loan Agreement," and the Collateral Documents defined in each of the Loan Agreements are referred to herein collectively as the "Collateral Documents." Each of the Loan Agreements contains cross-default provisions.

Gemstone has informed SFC that it discovered in early October 2008 that it had subcontractor cost overruns of approximately $11.7 million and potential mechanics' liens of approximately $25.8 million. Several subcontractors have already filed mechanics' liens against the Trust Property. Gemstone has also terminated its contract with APCO and has potential liability for the termination, which it disputes.

As a result of this situation, SFC reasonably believes that Gemstone is unable to complete construction of the Project under the terms of the Senior Agreement and is insolvent, as that term is defined in the Loan Agreements. This letter is notice of numerous defaults and failure to comply with covenants and warranties (the "Defaults") under the Senior Loan Agreement, the Mezzanine Loan Agreement and the Edelstein Loan Agreement as follows:

SENIOR LOAN AGREEMENT DEFAULTS

Section	Default
6.1.5	Lawsuits Threatened That Would Have a Material Adverse Affect on Gemstone or the Project
6.2.2	Failure to Keep Construction Documents in Full Force and Termination of Construction Documents
6.2.4	Existence of Mechanic's Liens on the Trust Property
6.2.9	Change Orders Over $200,000
6.2.17	Cross Defaults with the Mezzanine Loan Agreement
6.2.19	Failure to Fund Project Cost Overruns
7.1.2	Delay in Construction
7.1.3	Failure of Gemstone and APCO to Maintain Construction Documents
7.1.5	Insolvency of Gemstone
7.1.9	Insufficient undisbursed Senior Loans proceeds to complete the Improvements and pay the remaining Total Project Costs

In addition to the Defaults listed above, SFC has no further obligation to make any advances under the Senior Loan Agreement due to Gemstone's failure to comply with Section 4.1.3 relating to Qualified Sales of at least $60,000,000 and under Section 3.1.13 due to SFC's participant's unwillingness to fund.

MEZZANINE LOAN AGREEMENT DEFAULTS

Section	Default
6.1.1 and 6.1.2	Cross Defaults with Edelstein Loan Agreement and Senior Loan Agreement
6.1.6	Insolvency of Gemstone
6.1.11	Material Adverse Change to Prospects of Development of the Project
6.1.17	Existence of Mechanic's Liens on the Trust Property

EDELSTEIN LOAN AGREEMENT DEFAULTS

Section	Default
6.1.1 and 6.1.2	Cross Defaults with Mezzanine Loan Agreement and Senior Loan Agreement
6.1.6	Insolvency of Gemstone
6.1.11	Material Adverse Change to Prospects of Development of the Project
6.1.17	Existence of Mechanic's Liens on the Trust Property
6.1.22	Defaults under Contracts over $50,000

SFC reserves the right to identify additional Defaults, and failure to identify any Default shall not be deemed a waiver. The above-referenced Defaults are Events of Default under the Respective Loan Agreements or will become Events of Default upon the expiration of any applicable cure periods as set forth in the Loan Agreements. SFC's remedies for Events of Default include, without limitation, to refrain from making advances, assess Default Fees and enforce its rights under the Collateral Documents, including but not limited to foreclosure of its deeds of trust.

Each Loan Agreement and the respective Collateral Documents remain in full force and effect in accordance with their original terms. Nothing in this letter, any other correspondence, any oral communications between the Lender and Gemstone or Edelstein, or the making of any Advances to Gemstone or Edelstein under any Loan Agreement should be construed to be a waiver, modification or release of any breach, default or Event of Default, whether now existing or hereafter arising, or any of the Lender's rights and remedies under the Collateral Documents.

Yours truly,

SCOTT FINANCIAL CORPORATION

Brad J. Scott, President

617243v1

REGISTER OF ACTIONS
CASE NO. 09A579963

Club Vista Financial Services LLC, Tharaldson Motels II Inc, et al vs Scott Financial Corp, Bradley Scott, et al	Case Type:	**Business Court**
	Subtype:	**Other Business Court Matters**
	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** *Retained* 702-257-1483(W)
Cross Claimant	**Asphalt Products Corporation**	~~**Gwen Rutar Mullins**~~ ~~*Retained*~~ ~~702-257-1483(W)~~
Cross Defendant	**Gemstone Development West Inc**	
Cross Defendant	**Scott Financial Corporation**	**Jon Randall Jones** *Retained* 7023856000(W)
Defendant	**Asphalt Products Corporation**	**Gwen Rutar Mullins** *Retained* 702-257-1483(W)
Defendant	**Bank Of Oklahoma NA**	**Abran E. Vigil** *Retained* 702-471-7000(W)
Defendant	**Gemstone Development West Inc**	
Defendant	**Scott Financial Corp**	**Jon Randall Jones** *Retained* 7023856000(W)

Defendant	**Scott, Bradley J**	**Jon Randall Jones** *Retained* 7023856000(W)
Doing Business As	**APCO**	**Robert L. Rosenthal** *Retained* 7022571483(W)
Doing Business As	**APCO**	**Gwen Rutar Mullins** *Retained* 702-257-1483(W)
Doing Business As	**APCO Construction**	**Gwen Rutar Mullins** *Retained* 702-257-1483(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

02/07/2011 **All Pending Motions** (9:00 AM) (Judicial Officer Denton, Mark R.)
All Pending Motions (02-07-2011)

Minutes
02/07/2011 9:00 AM

- Defendant/Counter Claimant Bradley J Scott's Motion for Summary Judgment on Plaintiffs' Tenth and Eleventh Claims for Relief (Breach of Contract) ... Defendant/Counter Claimant Scott Financial Corporation's Motion for Summary Judgment on Breach of Contract Counterclaim ... Defendant Bank of Oklahoma, N.A.'s Motion for Partial Summary Judgment on Plaintiffs' Tenth and Eleventh Claims for Relief (Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing) ... Defendant/Cross Claimant APCO Construction's Motion for Summary Judgment on Plaintiff's First Claim for Relief (Fraudulent Misrepresentation) and Ninth Claim for Relief (Action in Concert/Civil Conspiracy) ... Defendants/Cross Claimants Scott Financial Corporation and Bradley J Scott's Motion for Summary Judgment on Plaintiffs' Eleventh Claim ... Defendant Bank of Oklahoma, N.A.'s Motion for Partial Summary Judgment on Plaintiffs' Twelfth Claim for Relief (Negligence) ... Defendant/Counter Claimants Bradley J Scott's and Scott Financial Corporation's Motion for Summary Judgment Regarding the Standing of Plaintiffs to Pursue Certain Claims ... Defendant/Counter Claimants Scott Financial Corporation and Bradley J Scott's Motion for Summary Judgment Regarding Plaintiffs' Twelfth Claim for Relief (Negligence) Colloquy regarding the order in which the motions will be

heard. As to Defendant/Counter Claimant Bradley J Scott's Motion for Summary Judgment on Plaintiffs' Tenth and Eleventh Claims for Relief (Breach of Contract): Mr. Jones stated this motion is limited to the claim for Bradley Scott individually, noting he is named as a Defendant individually in addition to his company; these are claims for Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing; cited Hilton Hotel vs Bruce Wilson; referred to Plaintiffs' new theory of implied contract; and argued that one cannot have a written contract and an implied contract; in this case Plaintiffs have sued on the express contract; there is no evidence that his client, Bradley Scott, committed any acts as to alter-ego between him and his company; he cannot be sued individually when he is not a party to that contract. Mr. Aronson referred to Count 10, the Breach of Contract, and Count 11, the Breach of Implied Covenant of Good Faith and Fair Dealing, noting one can be a tort claim and the other can be a contract claim; referred to the Court's January 20 Decision as to there being a question of fact as to Implied Covenant of Good Faith and Fair Dealing on the tort law; and read from the Court's Decision of January 20. Court noted this motion is as to Bradley Scott individually; the other motion was as to the Scott Defendants; there were also contentions made as to aiding and abetting, and this motion only involves where Bradley Scott can be held liable for breach of contract when he is not a part of the contract. Further arguments by Mr. Aronson. Court noted they were not really differentiated and were lumped together. Following further arguments, COURT finds he agrees with Defendant that the Breach of any Implied Covenant of Good Faith and Fair Dealing is a contract to which the covenant is implied, and that a contract breach of it is one thing; a tortious breach under our case law depends on a specific relationship; and ORDERED, motion GRANTED as to Bradley Scott, noting it does not affect Scott Financial; the Court finds there is no contract and no breach on which, either contractually or tortious, the breach of implied covenant, can be brought. As to Defendant/Counter Claimant Scott Financial Corporation;s Motion for Summary Judgment on Breach of Contract Counterclaim: Mr. Aronson stated he is not prepared for this motion.

- As to Defendant Bank of Oklahoma, N.A.'s Motion for Partial Summary Judgment on Plaintiffs' Tenth and Eleventh Claims for Relief (Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing): Mr. Clayman referred to the Court's January 25 Decision and noted he is only talking about the Breach of Contract. Mr. Clay referred to the agreement between Scott Financial and Gemstone, of which Bank of Oklahoma is not a party; referred to the Participation Agreement, noting there are 29 different parties in this loan, and to a reference in Article I that Bank of Oklahoma is the co-lead; and argued there cannot be a breach of contract unless you are a party to the contract; there is no evidence that what they were called to do under the Participation Agreement was violated. Mr. Aronson lodged documents with Court and counsel; referred to the 10th claim for relief; and noted the First Amended Complaint was filed July, 2009. Upon Court's inquiry, Mr. Aronson stated it is the operative pleading; referred to the Court giving them leave to file a Second Amended Complaint and noted they have not done so yet. Court read from the Complaint; and upon Court's inquiry, Mr. Aronson concurred that the term "Fiduciary Defendants" also included Bank of Oklahoma. Further arguments by Mr. Aronson referring to the definition of loan documents; that this is an integrated transaction and of the need to look at the whole; pre-conditions to funding; the Participation Agreement and Senior Loan Agreement; the Guarantees and the Credit Displays; and that the Senior Loan Agreement requires that Bank of Oklahoma sign off and the co-lead sign off. During further arguments, Mr. Clayman noted that they did not even sign the Senior Loan. COURT finds he will look at this a little further before he rules on it; and ORDERED, motion taken UNDER ADVISEMENT. As to Defendant/Cross Claimant APCO Construction's Motion for Summary Judgment on Plaintiff's First Claim for Relief (Fraudulent Misrepresentation) and Ninth Claim for Relief (Action in Concert/Civil Conspiracy): Court noted that we are not dealing with a cross claim but with a direct claim. Mr. Rosenthal concurred; lodged documents with the Court and counsel; and noted that Summary Judgment was granted as to Scott Financial, Edelstein, and Bank of Oklahoma with regard to TM2 regarding the fact that Scott Financial was not Plaintiffs' agent; referred to the Consent Agreement and the disputed facts; and argued that there is no contractual obligation between APCO and any of the Plaintiffs; there is no evidence of damages or conspiracy that APCO engaged in a conspiracy with others to defraud; Plaintiffs have not told who they conspired with and on what basis. Mr. Rosenthal argued further as to Side Agreements, Pre Sales; fraud; and account feasibility. Upon Court's inquiry, Mr. Aronson stated APCO acted in concert with Gemstone and was with Scott Financial; and argued as to lack of damages; acting in concert; and civil conspiracy, noting they have not requested fraudulent misrepresentation; it was added in the Second Complaint and is not part of this motion.
- Mr. Smith referred to the depositions of Cramer and Crawford, which happened after the briefing of these motions, which is directly relevant to APCO; and argued Gemstone had a duty to disclose; that both these experts stated there was no duty to disclose except to Gemstone to the lender; and read from the deposition transcript. Mr. Aronson argued there are contract duties and tort duties. Following further arguments, COURT finds that whether Plaintiffs can make those issues at time of trial remains to be seen although there are genuine issues on this motion; and accordingly, ORDERED, motion DENIED. Mr. Aronson to prepare the Order and have counsel review. Colloquy regarding the remaining motions. Court directed counsel to confer and let the JEA know the order in which they are agreed upon; and if cannot arrive at an agreement, let her know and the Court will determine the order in which to hear the motions.

Parties Present
Return to Register of Actions

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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.	Case No.: A579963 Dept. No.: XIII

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Granting Motions For Summary Judgment On Plaintiff' Sixth Claim For Relief (Defamation) And Judgment was entered in the above-entitled

. . .

. . .

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matter on the 8th day of February, 2011, a copy of which is attached hereto.

DATED this 9 day of February, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2011, the foregoing **NOTICE OF ENTRY OF ORDER** was served on the following persons by e-mailing to the e-mail addresses listed as follows:

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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.	Case No.: A579963 Dept. No.: XIII **ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT ON PLAINTIFFS' SIXTH CLAIM FOR RELIEF (DEFAMATION) AND JUDGMENT**

This matter having first come before this Court on January 10, 2011, regarding Defendant/Counterclaimant Scott Financial Corporation's and Defendant Bradley J. Scott's Motion for Summary Judgment Regarding Plaintiffs' Sixth Claim for Relief, and Defendant Bank of Oklahoma, N.A.'s Motion For Summary Judgment on Plaintiffs' Sixth Claim for Relief (Defamation), 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 Martin Muckleroy, Esq.; and of counsel for Defendants Scott Financial Corporation and Bradley J. Scott, J. Randall Jones, Esq.; Bank of Oklahoma, N.A., John Clayman, Esq.; APCO Construction, Gwen Rutar Mullins, Esq.; and Alex Edelstein, Kyle Smith, Esq.; and with good cause appearing and there being no just cause for delay, the Court makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. Plaintiffs' Claim for Defamation in their First Amended Complaint is based on three allegedly defamatory statements, which were allegedly made to the participating banks on the Manhattan West Senior Loan:

A. Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal "will likely have farther reaching negative implications for his banking relationships with all banks going forward."

B. Tharaldson's "reputation will be unquestionably damaged."

C. "The 29 banks stretching from North Dakota to Oklahoma that are in this deal, plus banks not in this deal, will look very unfavorably on any future credit request from Gary."

See Plaintiffs' First Amended Complaint, on file herein, at 48:2-8.

2. No other defamatory statements have been alleged by Plaintiff, with the exception of their attempt to amend their complaint, after the instant motions were filed. See Deposition of Gary Tharaldson, selected portions of which is attached hereto as Exhibit A, at 666:1-16. See also id. at 672:6-21 (indicating that Tharaldson is not aware of any other allegedly defamatory statements). See also Depo. of Ryan Kucker, selected portions of which are attached hereto as Exhibit B, at 87:23-88:10 (in which Ryan Kucker, when questioned about the defamation allegations, repeats this same information).

3. Plaintiffs' attempt to file new defamation allegations in the Second Amended Complaint was denied by this Court as untimely.

4. There is no evidence to indicate that any of the statements Plaintiffs allege were defamatory were made to anybody who is not employed by a bank or other financial institution that is

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participating in the Manhattan West Senior Loan.

II.

CONCLUSIONS OF LAW

1. None of the statements alleged by Plaintiffs are defamatory, because they are statements of evaluative opinion. Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 714, 57 P.3d 82, 87 (2002). "Statements of opinion cannot be defamatory because there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Id.

2. Even if the statements alleged in the First Amended Complaint were defamatory, the fact that they were made to other banks and financial institutions in the Manhattan West Senior Loan indicates that those statements were privileged under Nevada law, because a "qualified or conditional privilege exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if it is in reference to a person with a corresponding interest or duty." Bank of America Nevada v. Bourdeau, 115 Nev. 263, 266-67, 982 P.2d 474, 476 (1999)

3. There are no genuine issues of material fact as to the alleged defamatory statements, set out in the First Amended Complaint, and Defendants Scott Financial Corporation, Bradley J. Scott, and Bank of Oklahoma, N.A., are entitled to as a matter of law on those statements. This order does not address whether the statements in the proposed amendment to the defamation claim (Sixth Claim for Relief) as set forth in the proposed Second Amended Complaint are defamatory as they are not at issue as the pleading stands.

4. Accordingly, there is no genuine issue of material fact regarding Plaintiffs' defamation claim, and Scott Financial Corporation, Bradley J. Scott, and Bank of Oklahoma, N.A., are entitled to judgment as a matter of law on their respective motions.

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III.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial Corporation and Bradley J. Scott's Motion for Summary Judgment Regarding Plaintiffs' Sixth Claim for Relief is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Bank of Oklahoma, N.A.'s Motion for Summary Judgment Motion For Summary Judgment on Plaintiffs' Sixth Claim for Relief (Defamation) is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a Judgment in favor of Defendants Bank of Oklahoma, N.A., Scott Financial Corporation, and Bradley J. Scott and against Plaintiffs in hereby entered as to Plaintiffs' Sixth Claim for Relief of the First Amended Complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the Court's findings of fact is to be construed as a conclusion of law, and each of the Court's conclusion of law is to be construed as a finding of fact, as may be necessary or appropriate to carry out this Order.

DATED this 4th day of February, 2011.

DISTRICT COURT JUDGE

Submitted by:

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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.	Case No.: A579963 Dept. No.: XIII

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Granting in Part Scott Financial Corporation and Bradley J. Scott's Motion For Summary Judgment Regarding Plaintiffs' First, Second and Third Claims for Relief was entered in the above-entitled matter on the 16th day of February, 2011, a copy

of which is attached hereto.

DATED this 17 day of February, 2011.

Respectfully submitted,

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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.

Case No.: A579963
Dept. No.: XIII

ORDER GRANTING IN PART SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S MOTION FOR SUMMARY JUDGMENT REGARDING PLAINTIFFS' FIRST, SECOND, AND THIRD CLAIMS FOR RELIEF

This matter having first come before this Court on January 20, 2011, regarding Defendant/Counterclaimant Scott Financial Corporation's and Defendant Bradley J. Scott's Motion for Summary Judgment Regarding Plaintiffs' First, Second, and Third Claims for Relief, the Court having reviewed the pleadings and papers on file herein, and having heard the arguments of counsel . . .

for Plaintiffs, Martin A. Aronson, Esq., Martin Muckleroy, Esq., and Terry A. Coffing, Esq.; and of counsel for Defendants Scott Financial Corporation and Bradley J. Scott, J. Randall Jones, Esq.; Bank of Oklahoma, N.A., John Clayman, Esq., and Jennifer Hostetler, Esq.; APCO Construction, Gwen Rutar Mullins, Esq., and Alex Edelstein, Kyle Smith, Esq.; and with good cause appearing and there being no just cause for delay, the Court makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. Only three people associated with Plaintiffs, apart from Plaintiffs' attorneys, have knowledge related to the project in this case: Gary Tharaldson, Ryan Kucker, and Kyle Newman. See Depo. of Gary Tharaldson at 299:18-301:6, and Depo. of Ryan Kucker at 339:8-340:3.

2. Gary Tharaldson does not know the extent of alleged fraudulent representations. See Depo. of Gary Tharaldson at 30:20-32:3.

3. Gary Tharaldson admits that he has no personal knowledge of fraud allegations. See id. at 425:11-22.

4. Gary Tharaldson did not provide any information to his attorneys about specific instances that he believed he was lied to with regard to the Manhattan West project. See id. at 1198:13-17.

5. Kyle Newman has no knowledge of Brad Scott or Scott Financial Corporation committing fraud in connection with any project. See Depo. of Kyle Newman at 134:1-19.

II.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact going to affirmative fraudulent misrepresentations of either Scott Financial Corporation or Bradley J. Scott.

2. There are genuine issues regarding concealment and constructive fraud given the relationship between Plaintiff Tharaldson and his entities and the Scott Defendants and the expectations that relationship may have engendered.

. . .

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III.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial Corporation and Bradley J. Scott's Motion for Motion for Summary Judgment is GRANTED IN PART as to Plaintiffs First Claim for Relief. As to the Second and Third Claims for Relief, the Motion for Summary Judgment is DENIED IN PART

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a Judgment in favor of Scott Financial Corporation, and Bradley J. Scott and against Plaintiffs in hereby entered as to Plaintiffs' First Claim for Relief of the First Amended Complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the Court's findings of fact is to be construed as a conclusion of law, and each of the Court's conclusion of law is to be construed as a finding of fact, as may be necessary or appropriate to carry out this Order.

DATED this 14th day of February, 2011.

DISTRICT COURT JUDGE

Submitted by:

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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.	Case No.: A579963 Dept. No.: XIII

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Granting Motion For Summary Judgment Regarding Plaintiffs' Fifth Claim for Relief (Securities Fraud) and Judgment was entered in the above-entitled

matter on the 17th day of February, 2011, a copy of which is attached hereto.

DATED this 24 day of February, 2011.

Respectfully submitted,

KEMP, JONES & COULTHARD

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2011, the foregoing **NOTICE OF ENTRY OF ORDER** was served on the following persons by e-mailing to the e-mail addresses listed as follows:

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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.	Case No.: A579963 Dept. No.: XIII **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT REGARDING PLAINTIFFS' FIFTH CLAIM FOR RELIEF (SECURITIES FRAUD) AND JUDGMENT**

This matter having come before this Court pursuant to Defendant/Counterclaimant Scott Financial Corporation's and Defendant Bradley J. Scott's (hereinafter collectively referred to as "Scott") Motion for Summary Judgment Regarding Plaintiffs' Fifth Claim for Relief (Securities Fraud)("Motion") filed on December 14, 2010, the Court having reviewed the pleadings and papers on file herein; and with good cause appearing and there being no just cause for delay, pursuant to

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EDCR 2.23(c), the Court makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

1. Plaintiffs' Fifth Claim for Relief alleges that Scott violated Section 90.570 of Nevada's Securities Act by making untrue or misleading statements or omissions of material fact in connection with the loan transactions funding the Manhattan West Project. *See* Plaintiffs' First Amended Complaint, on file herein, at ¶ 251.

2. Plaintiffs' Fifth Claim for Relief is premised on Plaintiffs' allegation that the subject loan transactions constitute "securities" within the meaning of Nevada's Act and federal securities laws. *See* Plaintiffs' First Amended Complaint, on file herein, at ¶ 252.

3. Plaintiffs' factual allegations related to securities fraud as stated in Plaintiffs' First Amended Complaint are that Scott misrepresented, and failed to disclose, material information concerning the Manhattan West Project and the subject loan transactions to Plaintiffs, and that Plaintiffs would not have entered into the transactions if such information and/or omissions were known to Plaintiffs. *See* Plaintiffs' First Amended Complaint, on file herein, at ¶¶ 122-135.

4. Discovery is now closed, and Plaintiffs have offered no witness testimony or other evidence sufficiently substantiating these allegations, particularly failing to offer any specific evidence regarding the particulars of how these alleged untrue statements or omissions of material fact were made to Plaintiffs.

5. Plaintiffs have further failed to offer evidence tending to establish that any of the misrepresentations alleged by Plaintiffs actually induced Plaintiffs to enter into the subject loan transactions.

II.

CONCLUSIONS OF LAW

1. The subject loan transactions, including their underlying notes and other agreements, are not securities within the meaning of Nevada's Securities Act because:

a. Nevada's Act specifically excludes a loan creation transaction from the definition of

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA, 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 D/B/A APCO CONSTRUCTION, a Nevada corporation,

Real Parties in Interest.

Case No.: 57784

District Court Case: A579963

SCOTT FINANCIAL CORPORATION and BRADLEY J. SCOTT'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION (regarding Jury Waiver and Bifurcation)

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COUNTERSTATEMENT OF THE ISSUES

I. Petitioners' Jury Waivers Are Enforceable. Contractual jury-trial waivers are presumed valid under *Lowe Enterprises Residential Partners, L.P. v. Eighth Judicial District Court* unless the challenging party can demonstrate the waiver was not entered into knowingly, voluntarily, or intentionally. This rule broadly governs all jury-waiver scenarios, and allegations that a contract was generally induced by fraud do not vitiate the jury waiver in that contract. The district court properly held that sophisticated, billionaire businessman Gary Tharaldson failed to rebut the presumption that the bold, upper-case, jury-trial waivers just above his signature on two guaranties promising repayment of $110 million in loans were valid and enforceable.

II. No Abuse of Discretion in Bifurcation of the Bench- and Jury-trial Issues. *Awada v. Shuffle Master, Inc.* gives Nevada's district courts discretion to bifurcate bench and jury claims, start with the bench trial, and use the bench findings and conclusions to dispose of the remaining jury issues without violating the right to a jury trial. The district court properly exercised its discretion when it separated out the issues surrounding Tharaldson's jury-trial-waiver-containing guaranties and ordered them to be tried in a bench trial, followed by a jury trial of the remaining claims.

STATEMENT OF FACTS

In the mid-2000s, savvy, seasoned, billionaire-businessman, Petitioner Gary Tharaldson, moved to Las Vegas and rode the skyrocketing Las Vegas real estate market to make tens of millions of dollars in several real estate ventures including the high-end condominium project called Manhattan. Scott Appendix ("SA") 31-32. Eager for an encore of that lucrative endeavor, he rejoined Manhattan developer Alex Edelstein and Edelstein's company Gemstone Development for the sequel project: a mixed-use residential and commercial development known as Manhattan West. *Id*. For a five-million-dollar fee, Tharaldson agreed that he and one of his enterprises, Tharaldson Motels II, Inc. ("TM2I"), would guaranty the Manhattan West construction loans totaling approximately $110 million. PA 354, 360 & SA 32, 64 & 68.

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When the economy went into a tailspin in the Fall of 2008, the loans went into default, triggering the guaranties. SA 68. Mr. Tharaldson, TM2I, and Club Vista Financial Services, LLC (Tharaldson's lending entity and one of the participating lenders in the Manhattan West loans) recognized they had no real defenses. In a transparent attempt to deflect the inevitable claims that were about to be initiated against them, Mr. Tharaldson, TM2I, and Club Vista (collectively "Petitioners" or "Tharaldson") employed the age-old stratagem that *the best defense is a good offense* and filed a complaint against Scott Financial Corporation and others involved in the construction and financing of Manhattan West to create confusion and to delay Tharaldson's obligation to pay on the guaranties. PA 1. At the heart of Tharaldson's claims is the elaborate allegation that Scott Financial and its principal, Brad Scott (collectively, "the Scott Parties"), fraudulently induced Tharaldson – a highly successful and sophisticated businessman who had admittedly personally guaranteed billions of dollars in loans in his career[1] – to enter into the Manhattan West financing arrangements, including the two guaranties that now require Tharaldson to pay the defaulted loans in full, and which contain bold and prominent jury-trial waivers.

I. THARALDSON WAS THE MASTERMIND OF THE MANHATTAN WEST DEAL AND ITS FINANCING STRUCTURE, ACTING AS GUARANTOR AND LENDER.

Contrary to the impression given by the Petitioners, Mr. Tharaldson was the mastermind of the Manhattan West project, and the absurd irony in this case is that the mastermind of the deal claims to be the naive and uninformed victim of the lenders who merely put up the money under the deal that Tharaldson designed.

This highly complex project came about as a result of a series of meetings with Gemstone in early 2007, in which Tharaldson and Gemstone agreed to utilize the same scheme that worked so well for Tharaldson in the Manhattan project. Just as with the original project, Tharaldson's lending entity, Club Vista, would loan money through Scott

[1] SA 49-50.

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Financial, which would then loan that money to Gemstone for the purchase of the Manhattan West land. SA 32. Club Vista made loans of approximately $38 million in 2006 alone under that plan. SA 40. Since Gemstone paid top dollar for the land, the only way that Tharaldson could recover the $38 million Club Vista loan was for Gemstone to actually build out and sell the Manhattan West project; otherwise, Tharaldson's $38 million would simply languish as a loan secured by real property that was worth at most the debt held against it. Tharaldson had calculated that Club Vista would earn a 69.9% rate of return on its investment – which was substantially higher than the developer itself was expected to realize from the project – if Manhattan West performed consistently with the pro forma that Gemstone had prepared.

Knowing that Gemstone did not have a sufficient net worth to convince institutional lenders to provide the construction financing necessary to build ManhattanWest, Tharaldson agreed to guaranty the loan, but only if he was paid a $5 million guarantor fee for his pledge. With the security provided by Tharaldson's and TM2I's guaranties, Scott Financial was able to arrange a $110 million construction-loan package with approximately 28 commercial lenders participating in the loan including Club Vista, which kept a toehold in the lender-side of the deal by loaning just $400,000 of the $110 million. SA 35; PA 365. Mr. Tharaldson executed a personal guaranty of $100 million and obligated TM2I for the specific repayment of Bank of Oklahoma's $24 million share of the financing package. PA 354 & 360.

II. THE JURY WAIVERS ARE CONSPICUOUSLY LOCATED DIRECTLY ABOVE THARALDSON'S SIGNATURE ON EACH OF THE GUARANTIES HE EXECUTED FOR THE MANHATTAN WEST LOANS.

Both guaranty documents contain an identical, unconditional jury waiver, which provides:

> **13. <u>WAIVER OF JURY TRIAL</u>. THE GUARANTOR ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED AND THAT THE TIME AND EXPENSE REQUIRED FOR TRIAL BY A JURY EXCEED THE TIME AND EXPENSE REQUIRED FOR TRIAL WITHOUT A JURY. THE GUARANTOR, AFTER CONSULTING (OR HAVING HAD THE**

OPPORTUNITY TO CONSULT) WITH COUNSEL OF GUARANTOR'S CHOICE, KNOWINGLY AND VOLUNTARILY, AND FOR THE MUTUAL BENEFIT OF LENDER AND GUARANTOR, WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING THE PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO, THIS GUARANTY, AND RELATED AGREEMENTS, OR OBLIGATIONS THEREUNDER. THE GUARANTOR HAS READ ALL OF THIS GUARANTY AND UNDERSTANDS ALL OF ALL OF THE PROVISIONS OF THIS GUARANTY. THE GUARANTOR ALSO AGREES THAT COMPLIANCE BY THE LENDER WITH THE EXPRESS PROVISIONS OF THIS GUARANTY SHALL CONSTITUTE GOOD FAITH AND SHALL BE CONSIDERED REASONABLE FOR ALL PURPOSES.

PA 357; 362-363. In each guaranty, the waiver is located immediately above Mr. Tharaldson's signature in **BOLD, UPPER CASE** type. *Id*. Tharaldson also executed an addendum to his personal guaranty, which reiterates the waivers in the original guaranty, adds some new ones, and affirms, "**Guarantor warrants and agrees that each of the waivers set forth above and in the Guaranty above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law.**" PA 358 (emphasis added).

III. WHEN THE LOANS WENT INTO DEFAULT, THARALDSON SUED TO EVADE HIS $110 MILLION REPAYMENT OBLIGATION UNDER THE GUARANTIES, GENERALLY ALLEGING THAT HIS PARTICIPATION IN THE DEAL WAS INDUCED BY FRAUD.

The economic downturn drastically changed the climate in the Las Vegas real estate market, and Manhattan West would never know the success of its predecessor, Manhattan. The loans went into default, putting Mr. Tharaldson and TM2I ("the Guarantors") on the hook for their repayment. PA 354, 360, SA 68.

Unbeknownst to Scott Financial and the participating banks, Tharaldson and his lawyers were furiously drafting a complaint that they sprung on the real parties in interest to obtain the coveted plaintiffs' side of the *v.* in the inevitable lawsuit to collect this debt. The complaint elaborately alleges that the Scott Parties failed to tell Tharaldson numerous things about *Tharaldson's own project* that impacted the financing decisions and, as a

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result of not having this information, Tharaldson and his related entities were "fraudulently induced" to enter into the lending relationship and all of the documents that memorialized and secured it. *See e.g.* PA 36-40. Petitioners' First Amended Complaint, filed on July 1, 2009, elaborates upon the fraud theory, but continues to allege that the entire deal was induced by fraud. PA 206. Indeed, the section headed "Fraud Relating to Terms of Guaranty, the TM2I Guaranty and the Subordination" makes various allegations about the misunderstandings between the parties with respect to specific terms in the guaranties. The jury waiver is not one of those terms. PA 238-39.

IV. UPON THE REAL PARTIES' MOTION, THE DISTRICT COURT ENFORCED THE JURY WAIVERS, STRUCK THE GUARANTORS' JURY DEMAND, AND BIFURCATED THE TRIAL USING THE *AWADA*-ENDORSED TRIAL PLAN.

In August 2009, the Scott Parties moved to enforce the jury-trial waivers in Tharaldson's and TM2I's guaranties by striking their jury demand. PA 343. The district court denied the motion without prejudice, presumably to allow more discovery on the fraud allegations. PA 534-538. At the hearing, Judge Denton specifically "preserved" the issue for future consideration and noted, "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." PA 528. Thus, the district court ruled that the motion was "DENIED WITHOUT PREJUDICE to later consideration by the Court." *Id*.

In January 2011, after discovery ended, the time for that later consideration had arrived. The Scott Parties and Bank of Oklahoma renewed their motion to strike Tharaldson's and TM2I's jury demand and to bifurcate the bench and jury issues into two trials, following the template endorsed by this Court in *Awada v. Shuffle Master, Inc.* PA 608. Petitioners opposed the motion by arguing that Mr. Tharaldson did not knowingly assent to the jury-trial waiver because he never read the guaranties that obligate him and TM2I to repay the Manhattan West loans; and since nobody "ever called [his] attention to the issue of waiver of jury trial on either guaranty," and he did not have "an adequate opportunity to review the specific provisions," he was unaware of their bold and

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ALLCAPS presence immediately above his signature. PA 724.

Petitioners made an alternate countermotion for an advisory jury to assist the district court in deciding the issues for which Tharaldson waived his and TM2I's jury-trial right. PA 630. The district court found this sophisticated businessman's attempts to disclaim his knowing, voluntary, and intentional execution of the jury waiver less than credible, however, and enforced the jury waiver, reasoning:

> **The Court determines that the conspicuous upper case jury waivers just above the signature lines for use by the obviously sophisticated Mr. Tharaldson are valid and enforceable as to all issues surrounding the validity and enforceability of the guaranties.** *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).

PA 819 (emphasis added); *see also* PA 807, 811 & 858:19-20 (wherein Judge Denton asked Tharaldson's counsel, "we do know that the language is in upper case, and it's just above his signature, right?"). And having determined that the guaranty-related issues and claims will be decided by the court, not a jury, Judge Denton bifurcated the bench and jury trials, ordering:

> [B]y bringing this action, the guarantor plaintiffs can hardly complain that the Court would attend to the guaranty issues first. The Court will thus try the guaranty issues first in a bench trial.
>
> In making this decision, the Court notes that confusion and prejudice can best be avoided by such a bifurcation, and it believes that issues will likely be narrowed with concomitant judicial economy. *Awada v. Shuffle Master, Inc*, 123 Nev. 613, 624, 173 P.3d 707, 714 (2007).

PA 819 ("the Bifurcation Order"). He also denied Tharaldson's countermotion for an advisory jury. PA 807, 811 & 819.

V. THE DISTRICT COURT HAS DISPOSED OF THE MAJORITY OF PETITIONERS' CLAIMS FOR LACK OF EVIDENTIARY SUPPORT.

The Bifurcation Order is just one of many dispositive rulings that Judge Denton has made in this case since the close of discovery. Throughout this case, the Real Parties

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in Interest have repeatedly argued that Tharaldson's case is nothing but a smoke-and-mirrors, diversionary tactic to evade (or at least delay the day of reckoning on) his tens of millions of dollars in repayment obligations, thus, Tharaldson's elaborate allegations are unsupportable by hard facts. The district court has recognized this dearth of evidence by granting summary judgment on many of Petitioners' claims and theories, which has resulted in the elimination of Petitioners' following causes of action:

Claim	**Theory**	**Dismissed as to**	**Cite**
First	Fraudulent Misrepresentation	All	SA 81, 101
Second	Fraudulent Omission/Concealment	Bank of Oklahoma	*Id.*
Third	Constructive Fraud	Bank of Oklahoma	*Id.*
Fifth	Securities Fraud	All	SA 87
Sixth	Defamation	All	SA 74
Seventh	Breach of Fiduciary Duty	All, except for Club Vista's claim against Scott Financial (who did not move for summary judgment on this claim)	SA 101
Tenth	Breach of Contract	Bank of Oklahoma (as to claims by Tharaldson and Club Vista; and Brad Scott (completely)	SA 71
Eleventh	Breach of Covenant of Good Faith and Fair Dealing	Brad Scott and Bank of Oklahoma (completely); All others (as to contract-based theory)	*Id.*
Twelfth	Negligence	All	SA 130

The fraudulent misrepresentation and fiduciary duty orders are of particular relevance to this petition. The order granting summary judgment on Petitioners' fraudulent misrepresentation allegations and claim contains the findings that "Tharaldson admits that he has no personal knowledge of fraud allegations" and "did not provide any information to his attorneys about specific instances that he believed he was lied to with regard to the Manhattan West project," SA 85, and concludes that "there is no genuine

issue of material fact going to affirmative fraudulent misrepresentations of either Scott Financial Corporation or Bradley J. Scott." *Id*. The fiduciary duty order provides, "The Tharaldson Plaintiffs' Claim for Fiduciary Duty in their First Amended Complaint is founded upon the theory that Scott Defendants 'owed to Plaintiffs fiduciary duties of undivided loyalty, due care, and full disclosure of material information.'" SA 105 (quoting PA 44). And it concludes, "The Guarantor Plaintiffs have failed to overcome the presumption that no fiduciary relationship exists between a lender and a guarantor, as a matter of law" or "demonstrate they had a right to expect trust and confidence in the integrity and fidelity of the Scott Defendants and have failed to demonstrate that the Scott Defendants were or should have been aware of such trust and confidence, such that a fiduciary duty would arise." SA 105-106.[2] As a result, the Guarantors can no longer argue that they relied on and trusted the Scott Parties to protect their interests. The bench trial on the Guarantors' remaining claims is scheduled to begin July 6, 2011.

SUMMARY OF ARGUMENT

In Nevada, jury-trial waivers are presumptively valid and enforceable unless the challenging party can demonstrate that the waiver was not entered into knowingly, voluntarily, and intentionally. This simple, straightforward test established in *Lowe Enterprises Residential Partners v. Eighth Judicial District Court* governs all jury-trial-waiver scenarios, including those in which fraud in the inducement is alleged. Petitioners failed to demonstrate that the jury waivers in Tharaldson's guaranties, written in bold, upper case letters directly above the signature of this sophisticated and seasoned guarantor, were invalid under *Lowe*. And because Petitioners allege fraud generally in the inducement of the entire relationship (not specifically in the inducement of the jury waiver), the overwhelming authority on jury waivers in contracts allegedly induced by

[2] On March 10, 2011, Petitioners filed a Second Amended Complaint. SA 138. Despite the fact that the majority of their claims have been gutted by summary judgment, the new pleading reasserts these adjudicated claims and issues, including the fiduciary duty allegations. A motion to strike is pending.

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fraud also fails to save the guarantors from being bound by their jury-trial waivers. Strong Nevada public policy favoring the freedom to contract, enforcement of contractual promises, and judicial economy requires the court to enforce jury-trial waivers like these entered knowingly, voluntarily, and intentionally. Writ relief from Judge Denton's order striking the Guarantors' jury demands is not available.

Having determined that the Guarantors' issues would be decided without a jury, the district court acted well within its discretion when bifurcating the bench and jury trials and ordering the bench trial to proceed first. This Court held in *Awada v. Shuffle Master, Inc.*, that Nevada's district courts have the discretion to bifurcate bench and jury claims into separate trials, conduct the bench trial first, and use its findings and conclusions to dispose of the remaining jury issues and claims. Judge Denton's Bifurcation Order follows the *Awada*-approved trial paradigm, which this Court already determined passes Seventh Amendment muster, and this petition should be denied in its entirety.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ENFORCED THE GUARANTORS' KNOWING, INTENTIONAL, AND VOLUNTARY JURY-TRIAL WAIVERS BY STRIKING THEIR JURY DEMAND AND ORDERING A BENCH TRIAL ON ALL ISSUES SURROUNDING THE VALIDITY AND ENFORCEABILITY OF THE GUARANTIES.

A. *Lowe* Is the Controlling Authority for Determining the Enforceability of the Jury Waiver, and the District Court Properly Applied It.

This Court need not adopt any special rule for determining whether a jury-trial waiver is enforceable when fraud in the inducement is alleged because the holding in *Lowe Enterprises Residential Partners v. Eighth Jud. Dist. Ct.* establishes the only analysis necessary in any jury-waiver scenario. In *Lowe*, this Court answered the simple question of when a jury trial waiver is enforceable in Nevada with this simple answer: "Contractual jury trial waivers are . . . presumptively valid unless the challenging party can demonstrate that the waiver was not entered into knowingly, voluntarily or intentionally." *Lowe*, 40 P.3d 405, 410 (Nev. 2002). This straightforward rule can be easily applied in any case, even in one with fraudulent-inducement allegations. The

district court must simply evaluate whether the facts demonstrate that the jury waiver itself was "entered into knowingly, voluntarily and intentionally." *Id*.

And that is precisely what the district court did in this case. After full briefing and a hearing, Judge Denton cited *Lowe* and held that "the conspicuous upper case jury waivers just above the signature lines for use by the obviously sophisticated Mr. Tharaldson are valid and enforceable as to all issues surrounding the validity and enforceability of the guaranties." PA 819.

1. The District Court Conducted a Proper Lowe Analysis to Conclude that the Guarantors Knowingly, Voluntarily, and Intentionally Waived Jury Trial in the Event of Litigation.

Tharaldson's contention that Judge Denton failed to conduct a proper analysis of these jury waivers under *Lowe* is unsupportable by the record. The briefs offered by the parties discussed *Lowe* as the central authority, *see e.g.* PA 17:19-20; 35:11-36; 38:6-39:15; 43-46, and both sides focused on *Lowe* in their oral arguments. *See e.g* PA 858:15-859:2 (wherein Tharaldson's counsel argues about which prongs under "the four-part analysis under the *Lowe* case" he believes are satisfied and asks Judge Denton to "look at all four parts of the *Lowe* analysis").

The district court properly applied *Lowe* to conclude that the Guarantors failed to meet their burden of overcoming the *Lowe* presumption that the jury waivers were entered into knowingly, voluntarily, and intentionally, and are therefore valid and enforceable. *See Lowe*, 40 P.3d at 410.[3] In the underlying briefs, Tharaldson understated his burden of proof in this regard, arguing that he must only show "a genuine issue of material fact" surrounding the waivers' inception. PA 766. But by rebuttably presuming all jury

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[3] Tharaldson contends that the *Whirlpool Finance Corp. v. Seveaux* factors identified in *Lowe* are the "minimum elements to be considered in determining whether a jury trial waver was entered into knowingly, voluntarily, and intentionally." Petition at 24. This is a gross overstatement of the significance that *Lowe* put on these factors. In fact, the *Lowe* decision states, "a court ***may consider, but is not limited to***, [the *Whirlpool*] factors when determining whether a jury trial waiver should be enforced." *Lowe*, 40 P.3d at 411 (emphasis added). Thus, Judge Denton was not required to scrutinize any particular factor, and his decision was well within his discretion.

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waivers valid, *Lowe* put the burden on Tharaldson to prove, by a preponderance of the evidence, that he did not enter into the two jury trial waivers in the two, separate guaranties knowingly, voluntarily, or intentionally. *See Law Offices of Barry Levinson, P.C. v. Milko*, 184 P.3d 378, 386 (Nev. 2008) (describing Nevada's general rules for rebutting a presumption); NEV. REV. STAT. § 47.180(1) ("A presumption ... imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."). The facts of this case make it impossible for Tharaldson to satisfy that burden.

2. The Conspicuousness of the Waivers and the Sophistication of Tharaldson Made it Impossible for Petitioners to Rebut the Lowe Presumption that the Waivers are Enforceable.

Tharaldson's offered proof that the jury waiver was not entered into knowingly, voluntarily, and intentionally was his incredible claim that he – a seasoned guarantor and billionaire – didn't know the guaranties (which obligated him and TM2I to repay more than $100 million in loans) contained jury waivers because nobody pointed the provisions out to him. PA 724, ¶ 4 ("When I signed the Tharaldson Personal Guaranty and theTM2I 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."). He claims that, because he was willfully unaware of these provisions, he "did not knowingly or intentionally agree to waive jury trial." *Id*. at ¶ 5.

But it is a fundamental tenet of contract law that ignorance of a contractual provision is no defense to its enforceability. *Pentax Corp. v. Boyd*, 904 P.2d 1024, 1299 (Nev. 1995) (failure to read guaranty is no defense to its enforcement); *Campanelli v. Conservas Altamira, S.A.*, 477 P.2d 870, 872 (Nev. 1970) (ignorance of contractual provision is no defense). Particularly when that provision is as conspicuous as Tharaldson's jury trial waivers and the guarantor negotiated – and was paid – a $5 million fee to stake his personal wealth to guarantee this debt. SA 40, 64 & 66.

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a. Tharaldson concedes the waivers are visibly conspicuous.

The waivers in the guaranties are situated just above Mr. Tharaldson's signature line. PA 357; 363. Whereas the rest of the four-page agreement is in normal text, the waiver is in ALL CAPS and **bold**. PA 357; 362-63. As Judge Denton noted during the hearing, it was impossible for Tharaldson to have missed the waivers in the document because "we know that the language is in upper case, and it's just above his signature." PA 858:19-20. Even Thraldson's own counsel "concede[d]" he could not refute the "conspicuousness" of the provision. PA 858:24-25. Thus, Judge Denton properly concluded that "the conspicuous upper case jury waivers just above the signature lines for use by the obviously sophisticated Mr. Tharaldson are valid and enforceable as to all issues surrounding the validity and enforceability of the guaranties." PA 819:8-10; *see also Lowe*, 40 P.3d at 411 (noting as a significant factor in finding the jury waiver enforceable, "the parties do not dispute the conspicuousness of the waivers or the fact that their loan documents contained these waivers").

b. Tharadson's claim that he signed $100 million in personal guaranties without reading them and relied on non-fiduciaries to protect his interests could not overcome the Lowe presumption.

Unable to make a straight-faced argument that Tharaldson missed the bold, upper case words directly above his signature, the Tharaldson team argued instead that he did not have "an adequate opportunity to review" the documents before signing them. PA 858:16-18. But, as the district court realized, Gary Tharaldson is no rube. This sophisticated, billionaire businessman, who had just made millions on Manhattan and was about to make another $5 million on this sequel project for his personal guaranty alone, had extensive experience in real estate and construction loans and had executed personal guaranties totaling billions of dollars in loans over his lifetime. PA 767 & 771; SA 49-50. He could have easily asked questions about the waivers or any other provision in the contracts. *Id*. He chose not to. The law infers that sophisticated businessmen read and know the contents of the documents they put their signatures on, and they are bound by

their terms. *See e.g. Leasetec Corp. v. Orient Sys., Inc.*, 85 F. Supp. 1310 (S.D. Fla. 1999) (finding sophisticated businessmen's claim that they did not read documents "of no consequence," because "the law infers that they read the documents, knew the contents, and are responsible for performance of the contract"; and rejecting as "not credible" their claim that they did not read the large type provisions located "just above the signature lines."); *National Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 667 (S.D. N.Y. 1991) (rejecting as "frivolous" sophisticated businessman's attempt to avoid obligations under guaranty when, inter alia, he had "years of experience negotiating complex financial transactions which, in the aggregate, totaled several billion dollars" and claimed that he did not read the guaranty); *see also Lowe*, 40 P.3d at 411& n.36 (emphasizing the contracting parties' "prior experience in real estate" and status as "sophisticated and experienced business people" as factors supporting the conclusion that their jury-trial waivers were knowing, voluntary, and intentional).

Mr. Tharaldson's claim that he was relying upon the Scott Parties to review the terms of these complex, high-dollar financing documents for him or "look[] out for [his] best interests" is of no consequence, either, because the district court has ruled that the Scott Parties did not have a fiduciary relationship with these guarantors. *See* PA 760; SA 105 (finding that "the Guarantor Plaintiffs have failed to demonstrate they had a right to expect trust and confidence in the integrity and fidelity of the Scott Defendants" or that the Scott Defendants "were or should have been aware of such trust and confidence, such that a fiduciary duty would arise," and granting summary judgment with respect to all fiduciary duty claims). His contention that he "did not have personal knowledge of the TM2I Guaranty" and, "if he did sign it, his signature was obtained 'fraudulently' and 'through deception' since it was never discussed and was not supposed to be part of the agreement," Petition at 26, is even more outrageous. After denying in his deposition that he signed the TM2I guaranty, Tharaldson about-faced and admitted through counsel on

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November 15, 2010, that he did, in fact, sign the document. PA 771; 795.[4] TM2I's corporate records also indicate that the signing of the guaranty, along with all of the other business conducted by TM2I in 2008, was ratified by TM2I. PA 771, 798. With no credible evidence to support his claim that the waivers were not knowingly, intentionally, and voluntarily entered into, Tharaldson could not overcome the *Lowe* presumption, and Judge Denton properly enforced the waivers by striking the Guarantors' jury demand.

B. Allegations that the Entire Contractual Relationship was Induced by Fraud Are Insufficient to Invalidate a Knowing, Voluntary, and Intentional Jury Waiver.

Even if this Court does not find that *Lowe* provides the only test that needs to be satisfied to enforce a jury waiver in the face of fraud-in-the-inducement allegations, the district court's decision was still proper. The vast majority of the courts that have specifically addressed this issue have consistently held that sophisticated businessmen like Tharaldson cannot avoid their contractual jury-trial waivers by alleging that the contracts containing the waivers were induced by fraud.

1. The overwhelming authority on jury waivers in contracts allegedly induced by fraud was cited with approval in Lowe and supports Judge Denton's decision to strike Tharaldson's jury demand.

Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835 (10th Cir. 1988), relied upon by this Court in *Lowe*, 40 P.3d at 408 n.13, is the seminal case on jury waivers in contracts allegedly induced by fraud. "Sophisticated parties," Telum's owners signed a drilling-rig lease and personal guaranties, which contained jury trial waivers. Two years into the lease, when its sublessee stopped making the lease payments, Telum sued for rescission, claiming that Hutton "made a number of misrepresentations which wrongfully induced Telum to enter the lease." *Telum*, 859 F. 2d at 836. The district court refused to enforce the jury waiver, and the jury returned a verdict in favor of Telum. *Id.*

The Tenth Circuit Court of Appeals vacated the judgment and remanded the case

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[4] Disingenuously, Tharaldson cites only to his deposition testimony in this regard, conveniently failing to advise this Court that he ultimately conceded through counsel that he signed the document. *See* Petition at 26.

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for a bench trial after rejecting the notion "that Telum's allegations of fraud in the inducement relating to the contract as a whole were sufficient to vitiate the provision." *Id*. The court analogized jury waivers to arbitration agreements and applied the *Prima Paint* approach to conclude that general allegations of fraud are insufficient to invalidate a jury waiver provision, reasoning, "this analogy is especially appropriate here because submission of a case to arbitration involves a greater compromise of procedural protections than does the waiver of the right to trial by jury." *Id*. at 838.

The Supreme Court of Texas followed *Telum* in *In re the Prudential Insurance Co. of America*, 148 S.W.3d 124 (2004).[5] In *Prudential*, Mr. & Mrs. Secchi, tenants under a commercial lease and personal guarantors of the lease payments, sued landlord Prudential to get out of the lease because noxious odors on the premises made it impossible for them to do business, and they filed a jury demand. *Prudential*, 148 S.W.3d at 128. Among other theories, they claimed that the lease and guaranties were induced by fraud. Prudential moved to strike the jury demand and enforce the contractual jury waiver; the trial court denied the motion and the intermediate appellate court refused to grant mandamus relief. *Id*. at 129.

Like Tharaldson, "the Secchis argued that. . . . A jury waiver should not be enforced when it is part of an agreement that is alleged to have been fraudulently induced" because "it would be anomalous . . . to conclude that" they were "entitled to rescission and yet enforce the jury waiver the lease contains." *Id*. The Texas Supreme Court disagreed:

> Prudential and the Secchis agreed that any disputes that might arise between them should be resolved without a jury. They

[5] This state court case undermines Tharaldson's argument that "state courts have consistently held that a claim for fraud in the inducement of a contract as a whole invalidates the jury trial waiver along with the rest of the contract," and "only federal courts, applying a different rule of federal common law, have held that a party must prove fraud specific to the jury trial waiver provision itself in order to avoid its impact." Petition at 22. Moreover, Tharaldson does not identify this "different rule of federal common law," and ignores the fact that this Court relied on federal cases including *Telum* in *Lowe*. *See Lowe*, 40 P.3d at 409 n.13.

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> did not except disputes over whether the lease was fraudulently induced. The Secchis do not argue that the jury waiver itself was fraudulently induced. Accordingly, their claim for rescission does not preclude enforcement of the jury waiver.

Id. at 135.

The Second Circuit Court of Appeals reached the same conclusion in *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171 (2007). Rejecting the claims of the purchaser of an energy-commodities-trading business that its fraudulent-inducement allegations prevented the enforcement of the jury waiver in its purchase agreement, the Second Circuit "join[ed] the Tenth Circuit in holding that unless a party alleges that its agreement to waive its right to a jury trial was itself induced by fraud, the party's contractual waiver is enforceable vis-a-vis an allegation of fraudulent inducement relating to the contract as a whole." *Merrill Lynch*, 500 F.3d at 188. The court elaborated, "we are concerned that deciding this issue in favor of appellant makes it too easy for a litigant to avoid its contractual promise to submit a case to a judge by alleging fraud." *Id.*; *see also Chesterfield Exchg., LLC v. Sportsman's Warehouse, Inc.*, 528 F. Supp.2d 710, 715 (E. D. Mich. 2007) (concluding that the Sixth Circuit would also follow *Telum* and enforcing jury waiver despite claim that contractual relationship was induced by fraud). Thus, the fraud-in-the-inducement jurisprudence overwhelmingly holds that general allegations that a contractual relationship was induced by fraud cannot invalidate a jury waiver in the contract.

2. Petitioners' Authority for Invalidating Jury Waivers Where Fraud is Alleged is Unpersuasive or Inapposite.

Tharaldson contends that "state courts have consistently held that a claim for fraud in the inducement of a contract as a whole invalidates the jury trial waiver along with the rest of the contract," Petition at 22, and offers three state court cases for this proposition. *See* Petition at 22 n. 114. But this authority categorically fails to support Tharaldson's argument.

Although a New York appellate court allowed the fraud-in-the-inducement defense

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to be tried before a jury in *Bank of N.Y. v. Royal Athletic Ind. Ltd*, 637 N.Y.S.2d 478 (App. Div. 1996), the *Bank of N.Y.* approach has been repeatedly rejected – even in New York. *See e.g. Chesterfield Exchg.*, 528 F. Supp. 2d at 715 (rejecting the *Bank of New York* approach because, inter alia, "their failure to recognize that an agreement as to the mode of resolving a controversy may be completely unaffected by a general claim of fraud in the inducement, and the fact that an *allegation* of fraud in the inducement should not be treated as *proof* of such fraud"); *Russell-Stanley Holdings, Inc. v. Buonanno*, 327 F. Supp.2d 252, 257 (S.D.N.Y. 2002) (dismissing the idea that "a general allegation of fraud in the inducement of the contract" can invalidate "a knowing and intentional waiver" and enforcing jury waiver by a "sophisticated business entity").[6]

Cupps v. South Trust Bank, 782 So.2d 772 (Ala. 2000), fails to support Tharaldson's argument because, in that case, the court *enforced* the jury waiver clause. Indeed, *Cupps* is not an enforceability case but rather a scope-of-the-waiver case that adds nothing to the instant discussion. *See Cupps*, 782 So.2d at 777. *C&C Wholesale, Inc. v. Fusco Mgmt. Corp.*, 564 So.2d 1259 (Fla. Ct. App. 1990), is equally inapposite. The *C&C* court likewise enforced the waiver clause, and because the case did not involve fraud at all, the court's off-hand comment about that topic is obiter dicta. *C&C Wholesale*, 564 So.2d at 1261. Thus, Tharaldson's claim that state courts depart from the majority approach articulated in *Telum* and its progeny is just false. The vast majority of courts that have addressed this issue have held that a jury trial waiver cannot be invalidated by generalized allegations that the contract was induced by fraud.

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[6] Tharaldson also argues that this Court should follow the approach of *Bank of New York* and its progeny, which requires a jury trial on the fraud in the inducement issues to determine the enforceability of the jury waiver. As even the New York courts have departed from this approach, it should not be considered as a viable one for Nevada. *See Russell-Stanley Holdings*, 327 F. Supp.2d at 257 (specifically rejecting the approach in *Gardner & North Roofing & Siding Corp. v. Champagne*, 285 N.Y.S.2d 693 (N.Y. Ct. App. 1967) and *Federal Houscraft, Inc. v. Faria*, 216 N.Y.S.2d 113 (N.Y. Ct. App. 1961), relied upon by Tharaldson on pages 29-30 of the Petition).

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3. Nevada Should Follow the Telum Rule as a Matter of Public Policy.

The rule that generalized fraud-in-the-inducement allegations are insufficient to vitiate a jury trial waiver are rooted in arbitration-clause jurisprudence, which holds that allegations of fraud in the inducement going to the contract generally do not impact the agreement to arbitrate. *See Telum*, 859 F.2d at 837-37 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 403-04 (1967)). This Court has repeatedly followed the *Prima Paint* rule to enforce arbitration agreements despite fraud allegations. *See, e.g., Sentry Systems, Inc. v. Guy*, 654 P.2d 1008, 1009 (Nev. 1982) (applying the *Prima Paint* rule and rejecting argument that "where there is an allegation that fraud permeates an agreement, the issue must be determined judicially and not by arbitration"); *Graber v. Comstock Bank*, 905 P.2d 1112, 1117 (Nev. 1995) ("because Graber is not asserting fraud in the inducement of the arbitration clause itself, we conclude that Graber's challenge to the district court's order to arbitrate is without merit").

Courts have reasoned that jury-trial waivers are sufficiently analogous to arbitration clauses to apply the same rules when faced with fraud-in-the-inducement claims. Indeed, the rule is even more appropriate in the jury trial waiver context because the rights being waived are greater with an arbitration clause than with a jury trial waiver. As the *Telum* court expressed, the arbitration clause/jury waiver analogy "is especially appropriate here because submission of a case to arbitration involves a greater compromise of procedural protections than does the waiver of the right to trial by jury." *Telum*, 859 F.2d at 838.[7] The *Merrill Lynch* court found "the analogy persuasive as a matter of logic":

> A promise to bring proceedings before a judge, not a jury, is akin to an agreement to arbitrate in that both express the parties' consent as to how to handle differences that may

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[7] This Court touted *Telum* among the jury-waiver cases that take the "more reasoned position" that "contractual jury trial waivers can be enforceable when they are entered into knowingly, voluntarily and intentionally." *Lowe*, 40 P.3d at 410.

> arise. Indeed, arbitration represents a more dramatic departure from the judicial forum than does a bench trial from a jury trial. If one litigant alleges that an agreement's dispute resolution provision itself was procured by fraud, the fairest course is to afford that litigant the protections he would have enjoyed had he never been fraudulently induced to forsake them by contract. If, on the contrary, the litigant does not challenge the provision as being the product of fraud, we see no reason to replace the agreed upon mode of dispute resolution with another.

500 F.3d at 188. And the Texas Supreme Court concluded that the rule should be the same for all similar dispute-resolution agreements because "[p]ublic policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury." *Prudential*, 148 S.W.3d at 131.

Tharaldson's argument that allegations of fraud in the inducement of the contract in general render jury-trial waivers unenforceable should be rejected for the additional reason that "deciding this issue in favor of [Tharaldson] makes it too easy for a litigant to avoid its contractual promise to submit a case to a judge by alleging fraud." *Merrill Lynch*, 500 F.3d at 188. "Any provision relating to the resolution of future disputes, included as part of a larger agreement, would rarely be enforced if the provision could be avoided by a general allegation of fraud directed at the entire agreement." *Prudential*, 148 S.W.3d at 134. "The purpose of such provisions – to control resolution of future disputes – would be almost entirely defeated if the assertion of fraud common to such disputes were enough to bar enforcement." *Id*.

It was Nevada's public policy favoring the enforceability of contracts that caused this Court to hold in *Lowe* that jury trial waivers are "presumptively valid." *Lowe*, 40 P.3d at 409 & 410 ("The underlying policies favoring the enforcement of contractual jury trial waivers include the freedom to contract and concerns of judicial economy."). Applying the *Telum* rule to allegations that a contract containing a jury-waiver clause was induced by fraud will protect the freedom of contract and judicial-economy concerns, fostering the public policies articulated by this Court in *Lowe*. *See also* Nicole Mitchell, *Pre-dispute Contractual Jury Waivers: the New Arbitration in Texas? A Case Note on in*

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Re Prudential Insurance Company of America, 58 BAYLOR L. REV. 243, 255 (2006) ("It is true that if the parties are sophisticated and agree to a waiver, and if the waiver is freely bargained for, then the policy favoring freedom of contract should prevail.").

4. Tuxedo International, Inc. v. Rosenberg Does not Support a Rule that Jury Waivers are Rendered Unenforceable by Generalized Fraud-in-the-Inducement Allegations.

Tharaldson contends that this Court's recent opinion in *Tuxedo International Inc. v. Rosenberg*, 127 Nev. Adv. Op. 2 (Nev., Feb. 10, 2011), evidences this Court's intent to depart from its own arbitration jurisprudence and supports the conclusion that a party asserting fraud is no longer required to show particularized fraud targeted at a certain contractual provision when fraud in the inducement of the entire deal is alleged. But *Tuxedo*'s adoption of a hybrid approach to determining the enforceability of a forum-selection clause in the face of fraud-in-the-inducement allegations, and the opinion's footnoted discussion about the general-versus-specific allegations of fraud with respect to a forum-selection clause have no application here. The *Tuxedo* opinion does not even purport to abrogate Nevada's adherence to the *Prima Paint* rule in the arbitration context, and it is limited to forum-selection clauses. *See Tuxedo*, 127 Nev. Adv. Op. 2 at p.10, n.4.

The facts of this case also materially distinguish it from *Tuxedo*. The *Tuxedo* test for determining the enforceability of forum selection clauses in allegedly fraudulently induced contracts was adopted to strike "the proper balance" between the competing concerns of not allowing parties "to disingenuously back out of their contractual obligations through attempts at artful pleading" and not holding a defrauded individual to a forum-selection clause when a "when a fiduciary relationship is created by a fraudulent contract." *Tuxedo*, 127 Nev. Adv. Op. 2 at 7. But there is no fiduciary duty between the Guarantors and the Scott Parties, as Judge Denton adjudicated all fiduciary duty allegations against the Guarantors just weeks ago. PA 758-760; SA 101. With no fiduciary duty to point to in the instant case, the concerns articulated by this Court in *Tuxedo* are simply not present, and *Tuxedo* is not implicated.

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5. Tharaldson Failed to Offer Proof That the Jury Waiver Provision Itself Was Induced by Fraud.

As a fallback argument, Tharaldson claims that "even if specific fraud with respect to the jury waiver provision had to be proved, it has been proved here." Petition at 23. The sole "proof" they offer is that the Scott Parties breached their fiduciary duties to these guarantors by failing to make sure that Tharaldson had a "full understanding of his legal rights" with respect to the jury trial waivers. *Id*.

But this proof went *poof* when Judge Denton granted summary judgment on the guarantors' fiduciary duty allegations and ruled, as a matter of law, that none of the Real Parties had a fiduciary relationship with the Guarantors. PA 759; SA 1016. Thus, there is not a shred of viable evidence to support Tharaldson's argument that, in addition to being defrauded into entering into all of the Manhattan West-related loan and guaranty documents, Tharaldson and TM2I were specifically defrauded into waiving their jury-trial rights.[8]

C. North Dakota Law Does Not Compel a Different Result.

Petitioners also contend that the District Court should have applied North Dakota law to preclude the parties from waiving the right to a jury trial. They cite no North Dakota case that addresses this issue, so the thrust of their argument is that the North Dakota Constitution provides that "the right of trial by jury shall be secured to all, and remain inviolate," and this "high regard" for the jury-trial right should make it non-waivable and the waiver provisions "unconstitutional and invalid." Petition at 28-29.

There is, however, nothing in North Dakota law that suggests that parties cannot

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[8] Tharaldson's first attempt to plead fraud in the inducement of the jury waiver itself appears in the Second Amended Complaint filed on March 10, 2011 – two years after the original complaint, *and only after Petitioners lost the motion to bifurcate*. Whereas all earlier versions of the complaint make no mention of the jury-trial waivers in the guaranties, this new pleading alleges, "[Petitioners'] execution of the Senior Loan Documents (including but not limited to the waivers of jury trial in the Guaranty and the unauthorized TM2I Guaranty) was induced by the fraud of Fiduciary Defendants." SA 177. The theory remains, however, that the alleged fraud induced every aspect of the lending and guarantor relationship, not merely the jury-trial waivers.

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contractually agree to waive the right to a jury trial. In fact, just the opposite is now true. On March 3, 2011, the United States District Court for North Dakota recognized in *County 20 Storage & Transfer, Inc. v. Wells Fargo Bank, NA*, 2011 WL 826349 at *10-11, that "a party may contractually waive its Seventh Amendment right to a jury trial," if the waiver is made "knowingly and voluntarily." The court even cited the same types of factors suggested by *Lowe*.

Petitioners' logic is also unsound. Nevada's constitution protects the jury-trial right to an equal or greater degree, *see Awada v. Shuffle Master, Inc.*, 173 P.3d 707, 711 (Nev. 2007), yet contractual, pre-dispute waivers are still allowed. Tharaldson cites to the Georgia case of *Bank South, NA v. Howard*, 444 S.E.2d 799 (Ga. 1994), as the authority for the proposition that North Dakota could break with the vast majority of the states, which all uphold such waivers. Petition at 28 & n. 145. But this Court expressed its disagreement with *Bank South* and Georgia's unique perspective in *Lowe*, "agree[ing] with the dissent's analysis rather than the majority's" and "not[ing] that several commentators have criticized the majority's position because Georgia as the only jurisdiction to hold that pre-litigation contractual jury trial waivers are invalid and unenforceable." *Lowe*, 40 P.3d at 410 & n.29 (collecting anti-*Bank South* authority).

Even the North Dakota cases cited by Petitioners contain no suggestion that North Dakota would follow *Bank South*. *General Electric Credit Corporation v. Richman*, 338 N.W. 2d 814 (N.D. 1983), relates to non-jury trials where equitable claims are made, rather than the situation in which a party voluntarily waives the right to jury trial, as Petitioners did here. In *First Interstate Bank of New Rockford v. Anderson*, 452 N.W. 2d 30 (N.D. 1990), the North Dakota Supreme Court concerned itself not with a jury trial waiver, but with a mortgagor's right of redemption. The vastly unequal bargaining power associated with that right is very different from the sophisticated, business relationship in

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this case.[9] The district court did not "overlook" these cases, which Tharaldson offered and the Real Parties in Interest distinguished during the motion to strike proceeding; it correctly concluded that Tharaldson failed to direct the court "to any North Dakota case law to the effect that the right to a jury trial cannot be waived." PA 818. Petitioners have not remedied that failure in their Petition.

The district court properly applied *Lowe* and reasonably concluded that Petitioners failed to rebut the presumption that their admittedly conspicuous jury-trial waivers were made knowingly, intentionally, and voluntarily. Even if additional analysis was required because the contract that contains the waiver is alleged to have been induced by fraud, Judge Denton's decision still must stand because there is no credible proof that the waiver itself was induced by fraud. Accordingly, the district court properly applied the controlling law to the facts of this case and struck the Guarantors' jury demand. Mandamus relief is not available.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION UNDER *AWADA v. SHUFFLE MASTER, INC.* AND ORDERED THE BENCH TRIAL OF THE GUARANTY-RELATED ISSUES TO PRECEDE THE JURY TRIAL ON THE REMAINING CLAIMS.

Petitioners challenge the district court's decision to bifurcate the trial of the non-jury claims from the jury claims and try the non-jury, guaranty issues first on three grounds. They contend that the district court's reliance on *Awada v. Shuffle Master, Inc*., was misplaced because *Awada* is factually distinct from this situation. They argue that the district court abused its discretion by bifurcating these claims because it "severely prejudices them," violates their right to jury trial, and fails to promote judicial economy. And they conclude with the alternative argument that, even if the claims are bifurcated into a bench and jury trial, the district court should be required to empanel an advisory

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[9] The anti-deficiency cases of *Borsheim v. Owan*, 467 N.W. 2d 95 (N.D. 1991), and *Brunosman v. Scarlett*, 465 N.W.2d 162 (N.D. 1991), cited without discussion in footnote 147 of the Petition, are inapplicable because they have nothing to do with the waiving of a jury trial, and Petitioners offer no analogy between the waiver of the anti-deficiency statute and the waiver of a jury trial.

jury to assist in it determination of the non-jury issues. The district court properly weighed, considered, and rejected each of these arguments, and no writ relief is available.

A. *Awada v. Shuffle Master, Inc.* Gives the District Court the Discretion to Bifurcate Bench Claims and Try Them First, and Judge Denton Properly Applied that Rule in his Bifurcation Order.

"NRCP 42(b) generally provides the district court with discretion" to bifurcate claims into separate trials. *Awada*, 173 P.3d at 710; NEV. R. CIV. PROC. 42(b). This Court's decision in *Awada v. Shuffle Master, Inc.*, is the beginning and the end of the bifurcation analysis, and the district court properly used it as the authority for bifurcating Petitioners' non-jury claims. *Awada* established the rule that Nevada district courts have the discretion to bifurcate non-jury and jury claims into separate trials, conducting the bench trial first. *Awada*, 173 P.3d at 708. "Furthermore, a district court that exercises such discretion may then use its findings of fact and conclusions of law as a basis for disposing of claims remaining in the case." *Id*. This Court applied these rules in *Awada* to conclude that "when the district court bifurcated the claims, conducted a bench trial on Shuffle Master's counterclaim for rescission, and used its findings of fact and conclusions of law to dispose of Awada's contract-based claims," eliminating the jury trial altogether, "it did so without abusing its discretion." *Id*. at 713. Thus, *Awada* stands for the proposition that the district court has wide discretion to bifurcate the bench and jury trials, start with the bench trial, and use the conclusions of law from that bench trial to dispose of the remaining jury issues. *See id*. at 713.

1. Application of Awada Causes No Prejudice to Petitioners.

The district court's Bifurcation Order squares with *Awada*. Like District Court Judge Glass in *Awada*, Judge Denton ordered the bench trial (on the guaranty issues for which the jury trial was waived) to proceed first, followed by the jury phase for any remaining issues. PA 819. Tharaldson argues that *Awada* is not dispositive here because its facts are distinguishable as the claims in that case were not inextricably intertwined such that the claimant would ultimately be deprived of his right to a jury trial of the remaining claims. But that is exactly the scenario presented by – and adjudicated in –

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Awada. Because of the overlap in the issues among the claims and counterclaims, the district court's findings and conclusions during the bench trial of Shuffle Master's rescission claim mooted all of Awada's contract-based claims. This Court approved of that situation, holding, "When the district court bifurcated the claims in this case, conducted a bench trial on Shuffle Master's counterclaim for rescission, and used its findings of fact and conclusions of law to dispose of Awada's contract-based claims, it did so without abusing its discretion." *Awada*, 173 P.3d at 713. To the extent that the issues and elements of certain claims overlap with the guaranty issues, there will be no duplication of evidence or unnecessary delay or expense because *Awada* recognizes the district court's authority to utilize the findings of fact and conclusions of law from the bench trial to dispose of remaining jury trial issues. Thus, contrary to Petitioners' suggestion, judicial economy will be served because, whether by bench or jury, all issues will be tried just once. Although the same witnesses may need to testify, the subject of their testimony will be largely different.

And just as this Court recognized in *Awada*, proceeding in this manner causes no prejudice to the remaining, unrelated tort claims, for which a jury trial will still be provided. The claims "not eliminated automatically" by applying the findings and conclusions from the bench trial should proceed to jury trial. *Id*. at 714. Thus, any jury trial right as to those remaining issues and claims would be preserved inviolate. *See id*. at 712 & n. 25 (noting that the bench-trial-then-jury-trial procedure preserves the jury trial right as required by NRCP 42(b), as "Nevada's jury trial right . . . does not require the district court always to proceed first" with the jury trial). Thus, the procedure established by the Bifurcation Order has already passed muster with this Court and been held **not** to violate the right to jury trial.

2. Petitioners Have Failed to Demonstrate that the District Court Abused its Discretion with any Aspect of the Bifurcation Order.

Because the district court, "in the exercise of its sound discretion, may order a separate trial of any claim to further convenience or avoid prejudice," writ relief is only

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available when discretion has been abused. *California State Auto. Ass'n Inter-Ins. Bureau v. Eighth Jud. Dist. Ct.*, 788 P.2d 1367, 1368-69 (Nev. 1990). The district court abuses its discretion if its "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *American Sterling Bank v. Johnny Management LV, Inc.*, 245 P.3d 535, 539 (Nev. 2010) (quoting *Crawford v. State*, 121 P.3d 582, 585 (Nev. 2005)). Judge Denton's decision to bifurcate these claims was reasonable and logical, and it does not even begin to approach the bounds of law or reason. Tharaldson finds a dozen ways to say that Petitioners will be prejudiced by bifurcation and that their jury trial right will be impaired, but they offer no practical example of why or how. They also claim that bifurcation will result in as many as three trials, forcing all of the witnesses to give repeat performances and wasting judicial resources, and they make the sweeping, conclusory argument that separation of the tort claims from the contract claims is "simply impossible."

But no such duplication would occur, and separation of the claims in this case is not just possible, it's preferable. As the district court properly recognized, there are two, easily separable parts of Petitioners' case: (1) the issues and claims surrounding Club Vista's role as a participating lender in the Manhattan West construction loans, and (2) Tharaldson's and TM2I's guaranties that they would repay those loans. Parsing the claims in this manner will force Petitioners to untangle the wild mess of allegations and prove their respective cases on a claim-by-claim basis. This will allow for a cleaner, more streamlined, and judicially economical evidence presentation. For example, the Guarantors, who have been adjudicated to have no fiduciary relationship with the Real Parties in Interest, will not be able to confuse the issues and artificially inflate their claims by mixing in fiduciary duty allegations that, at this point, can only relate to Club Vista. The bright-line separation of these claims and issues will result in less jury confusion because the jury will only hear the issues relevant to the claims it must decide. As a result, the decisions rendered in these respective trials will likely be better reasoned and clearer than a verdict from a non-bifurcated trial.

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a. Verner v. Nevada Power Co., a liability-damages bifurcation case, has no application here.

Tharaldson cites *Verner v. Nevada Power Co.*, 706 P.2d 147 (Nev. 1985), for the proposition that the real inquiry is not the one under *Awada* nor whether, as NRCP 42(b) requires, the jury-trial right is preserved inviolate, but whether the issues in the case "are inextricably interrelated," in which case there can be no bifurcation. But *Verner* addresses the propriety of bifurcating liability and damages, not separate claims – two situations that present very different challenges. And the conclusion that the intra-claim bifurcation in *Verner* was an abuse of discretion was based on the resulting *limitation* of the evidence, which prejudiced the plaintiff's ability to present his liability case, not the *duplication* of evidence that Tharaldson forecasts would result from the bifurcation here. *See Verner*, 706 P.2d at 150 ("Due to the bifurcation of trials, the trial court allowed only limited medical testimony. These limitations resulted in a cursory, almost cryptic, presentation of Verner's injuries. In its final argument, Nevada Power used this restricted review of Verner's injuries to challenge the limited medical testimony"; thus, "[t]he bifurcation of trial prejudiced Verner's ability to present his case on the issue of liability."). Thus, *Verner* is inapposite.

b. This Court rejected Petitioners' Beacon Theatres/Dairy Queen argument in Awada.

For their final argument about the folly of bifurcation, Petitioners cite Eisenhower-era case law suggesting that the jury trial must happen before the bench trial, otherwise the right to a jury trial is violated. Petition at 36-37. The Awada appellants made the same argument, citing the same case law, and it was so thoroughly rejected by this Court that it was not even mentioned in the *Awada* decision, which held instead that Nevada's district courts have the full discretion to conduct the bench trial first and use the resulting findings and conclusions to dispose of the remaining claims without violating the jury trial right. *See Awada*, 173 P.3d at 708; *Awada v. Shuffle Master, Inc.*, Case No. 46174, Appellant's Opening Brief at 7-11, attached hereto as Exhibit A (urging that *Beacon*

Theatres, Inc. v. Westover, 359 U.S. 500 (1959), and *Dairy Queen v. Wood*, 369 U.S. 469 (1962), require the jury trial to precede the bench trial). Thus, Nevada law specifically rejects the *Beacon Theatres* and *Dairy Queen* argument advanced by Tharaldson, and no writ relief is available.

B. The District Court Did Not Abuse its Discretion by Denying Tharaldson's Request to Impanel an Advisory Jury to Assist the Court in its Determination of the Bench Trial of the Guaranty Issues.

Finally, the Guarantors contend that, if the jury waivers are enforced and the guaranty issues are going to be decided by the court, not a jury, the district court should have ordered that *a second, advisory jury* be impaneled "to assist in [the district court's] determinations of those and other non-jury claims." Petition at 38. In essence they argue: because we waived our right to a jury trial, the district court should have given us a second jury to separately decide all the claims for which we waived our jury-trial right in the first place. The absurdity of this claim is exceeded only by its audacity.

A litigant who has waived his jury-trial right does not get an advisory jury to advise the court in deciding the bench trial issues; he gets no jury because that is what he contracted for. *See Calloway v. City of Reno*, 993 P.2d 1259, 1265 (Nev. 2000) ("Contract law is designed to enforce the expectancy interests created by agreement between the parties"). And although NRCP 39(c) gives the district court full discretion to decide whether to allow an advisory jury "in all actions not triable of right by a Jury," *Harmon v. Tanner Motor Tours of Nevada, Ltd.*, 377 P.2d 622, 630-31 (Nev. 1963), the Guarantors offer no reason why Judge Denton's decision not to reward the Guarantors with the jury trial they knowingly, intentionally, and voluntarily waived was arbitrary, capricious, or exceeds the bounds of law or reason. *American Sterling Bank*, 245 P.3d at 539; NEV. R. CIV. PROC. 39(c). Indeed, they do not even attempt to make this point and instead argue meekly (and without supporting authority) that this Court should "require the District Court to analyze NRCP 42 and 39 to maintain the integrity of Plaintiffs' jury trial claims." Petition at 39. The District Court did analyze these provisions, and its Bifurcation Order maintains the integrity of the jury-trial right in the manner required by

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Nevada law. Accordingly, this petition for writ relief must be denied in its entirety.

CONCLUSION

Mr. Tharaldson is a sophisticated, billionaire real estate developer and guarantor. His willful failure to read the documents that obligated him and his company TM2I to repay more than $100 million in construction loans for Manhattan West and earned him $5 million in guarantor fees could not vitiate his knowing, intentional, and voluntary waiver of his and TM2I's jury-trial right. The district court properly enforced those conspicuous waivers under *Lowe* and bifurcated the bench trial of the Guarantors' claims from the jury trial of Club Vista's claims in the manner expressly approved in *Awada*. Accordingly, Tharaldson's request for writ relief must be denied in its entirety.

DATED this 30th day of March, 2011.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answer to Petition for Writ of Mandamus or Prohibition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying

brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2011, the foregoing **ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION AND Scott Parties' APPENDIX** was served on the following person(s) by U.S. Mail:

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EXHIBIT A
Appellants' Opening Brief in
Awada v. Shuffle Master, Inc.

IN THE SUPREME COURT OF THE STATE OF NEVADA

YEHIA AWADA, an individual; and GAMING ENTERTAINMENT, INC., a Nevada corporation,

Appellants,

v.

SHUFFLE MASTER, INC., a Minnesota corporation; MARK YOSELOFF, an individual,

Respondents.

Case No.: 46174

APPELLANTS' OPENING BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the District Court violate Appellants' constitutional right to a jury trial when, with a timely-demanded jury trial impending and in contravention of the principles articulated by the United States Supreme Court in *Beacon Theatres* and its progeny, it selected a single, equitable counterclaim for bench trial then applied the doctrine of collateral estoppel to grant summary judgment on all remaining legal claims?

2. Did the District Court abuse its discretion by granting rescission on fraudulent inducement grounds when Respondents' own evidence demonstrated their knowledge of the allegedly omitted facts at the time of contracting, Respondents attempted to ratify the contract with admitted knowledge of the alleged omission, and Respondents acknowledged that the omitted information was not material to the agreement?

3. Did the District Court abuse its discretion by granting rescission on material failure of performance grounds when it was Respondents who failed to perform their obligations under this unilateral agreement and that failure prevented Appellants' performance obligations from even ripening?

4. Was summary judgment available on the causes of action remaining after the bench trial of the rescission claim when the District Court had only recently denied summary judgment, and the findings of fact supporting the rescission judgment were irrelevant to Appellants' unrelated tort claims?

STATEMENT OF THE CASE

This case presents a textbook violation of the constitutional right to a civil jury trial. With Appellants' legal and equitable claims approaching a timely-demanded jury trial, the District Court cherry-picked a single equitable counterclaim, tried it without a jury, entered judgment in favor of the Respondents, and applied her findings and conclusions to grant summary judgment in favor of the Respondents on all remaining claims. The District Court's actions deprived Appellants Yehia Awada and Gaming

Entertainment, Inc.,[1] of their constitutionally-guaranteed right to a jury trial and constitute an egregious abuse of discretion for which complete reversal and remand is the only cure.

STATEMENT OF FACTS

Respondent Shuffle Master, Inc.,[2] manufactures automatic card shufflers and table games for the casino industry. In the late 1990s, Shuffle Master devised a business plan for neutralizing its competition. When the company's CEO got wind of a new, competing game, he would get control of the game, copy it, and then promote the Shuffle Master knock-off to prevent the competitor from establishing any presence in the market.[3]

A. Shuffle Master Targeted Awada's Table Game *3 Way Action* for Elimination as a Competitive Threat.

Awada is an entrepreneurial casino game developer whose rising star was nearly extinguished when his popular new table game "*3 Way Action*" became the target of Shuffle Master's unscrupulous strategy to squelch competition.[4] Developed and patented by Awada and approved by the Nevada Gaming Control Board, this card game – deemed by Shuffle Master a "hot idea" and "unique concept" – combines War, Blackjack, and Poker for three stages of play.[5]

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[1] Hereinafter, "Gaming."

[2] Hereinafter, "Shuffle Master."

[3] *See* Transcript of Proceedings, vol.II, p. 176 (cited as "Tr. vol. __ at __"); AA 790-92.

[4] Awada came to Las Vegas as a performer at Circus-Circus and has made a name for himself in the highly-competitive World Series of Poker. Tr. vol. II at 11-15.

[5] Tr. vol. I at 133 & 134.

In December, 1999, unaware of Shuffle Master's nefarious competitive strategy, Awada entered into a Game Option Agreement with Shuffle Master ("the Agreement").[6] *3 Way Action* was the main focus of the Agreement, which essentially allowed Shuffle Master to tie up the rights to the game for a six-month period during which it had the exclusive rights to promote and test-market the game with the help of Awada as a contracted employee.[7] The Agreement gave Shuffle Master the "option" to purchase a license for the *3 Way Action* game at the end of that test period by tendering the $50,000 option price at any time during July of 2000.[8] Awada had previously given IGT the right to use the name "3 Way Action" for an unrelated video game.[9] But IGT's use of the name was not a material concern for Shuffle Master[10] as its business "focused exclusively in the area of table games."[11]

At first, due primarily to the efforts of Awada, *3 Way Action* promised to be a great success as it was well-received by casino operators and their customers, and game

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[6] AA 669.

[7] AA 670; Tr. vol. I at 17-18; 121.

[8] AA 671.

[9] The IGT game is the subject of a separate and unrelated patent; Awada's table game and the IGT video game merely share the trademark for the game name.

[10] Tr. vol. I at 37, 84-86, 93, 93-98, 141-44, 157, 201 and 239 ("From my standpoint [IGT] wasn't material.").

[11] Tr. vol. I at 11.

placements and revenues increased each month.[12] But Awada's promotional efforts could not overcome Shuffle Master's secret and simultaneous counteroffensive. Shuffle Master used the time in which it had control of *3 Way Action* to develop a copycat version of the game. As the Agreement was merely part of its plan to squelch this competition, Shuffle Master had no intention of actually exercising its option and paying for *3 Way Action*, and – not surprisingly – Shuffle Master did not exercise the option by tendering to Awada the $50,000 in July 2000. But, as its plan to shut out *3 Way Action* had not been fully executed before the option period expired, Shuffle Master purported to enter into negotiations with Awada for an extension of the option period.[13] When Awada declined the request for an extension, Shuffle Master refused to return any of the game assets to Awada.[14]

Shuffle Master continued to hold itself out as the owner of *3 Way Action* for the next sixteen months during which it completed, filed a patent application for, and began the promotion of, *Triple Shot*, an "adaptation"[15]of Awada's game (referenced by Shuffle Master employees internally as "a *3 Way Action* overhaul"[16]), that was so similar to

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[12] Plaintiffs' Trial Exhibits ("PTE") 4-6, at AA 281-82 & 563-65.

[13] PTE 8, 9 & 17, at AA 546, 1485, and 1495, respectively.

[14] Tr. vol. II at 71-97.

[15] AA 437.

[16] PTE 14 at AA 1494; Tr. vol. I at 180-81.

Awada's product that its patent application was rejected.[17] Once *3 Way Action*'s momentum was irretrievably lost to *Triple Shot*, Shuffle Master returned the assets to Awada.[18]

B. Awada's Opportunity for Vindication Was Destroyed by the Trial Court's Denial of Awada's Constitutional Right to a Jury Trial.

Awada sued Shuffle Master in September, 2002, asserting various legal and equitable claims,[19] and timely demanded "a jury trial of all claims so triable."[20] Shuffle Master counterclaimed with legal and equitable causes.[21] Those equitable causes included a claim for rescission which sought to unwind the Agreement on fraudulent inducement grounds. After denying cross motions for summary judgment based on the existence of fact issues,[22] the Eighth Judicial District Court, Judge Jackie Glass presiding, conducted a bench trial of Shuffle Master's rescission counterclaim and ruled in its favor.[23]

Evidently disappointed that her efforts to force a settlement of the remainder of the

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[17] Tr. vol. I at 173-74.

[18] Tr. vol. I at 185.

[19] AA 1438. The Complaint was amended in January, 2005. AA 1031.

[20] AA 1.

[21] AA 1455. Shuffle Master's Answer to Amended Complaint and Counterclaim was filed on January 27, 2005. AA 1045.

[22] *See* AA 4, 518, 1028, and 1043.

[23] *See* AA 134,1028, 1420, and 1433.

case had failed, Judge Glass then "directed the parties to quit wasting their time."[24] And with no motion for summary judgment pending,[25] she ruled that, as a result of her adjudication of the single rescission claim in Shuffle Master's favor, "***everything*** in this case ha[d] been dealt with and the case [wa]s over."[26] Judge Glass then summarily dismissed all remaining legal and equitable claims, trampling Awada's constitutionally-protected right to a jury trial.[27] Awada's motions to amend the findings of facts and conclusions of law and for a new trial were denied on September 29, 2005.[28] On October 25, 2005, Awada timely appealed.[29]

ARGUMENT

A. THE TRIAL COURT VIOLATED AWADA'S CONSTITUTIONAL RIGHT TO A JURY TRIAL BY ADJUDICATING THE RESCISSION COUNTERCLAIM AND SUMMARILY DISPOSING OF ALL REMAINING CAUSES OF ACTION.

When equitable and legal claims are combined in a single action, the trial court

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[24] AA 1103. *See also* Tr. vol. III at 25 (reflecting an "off-record in chambers" discussion from 1:24 p.m., until 2:58 p.m., and wherein the Court states, "That was a nice little couple of hours we took off to have a discussion about this case...Can't say I didn't try [to get the case resolved]."); Tr vol. III at 40 (wherein Judge Glass indicates that she "still [has] hope" for settlement of the remaining claims before she addresses them, *sans* briefing, at an upcoming status check).

[25] Judge Glass indicated that she did not want any more briefs but permitted the parties to submit informal letters to her addressing the viability of the remaining claims. *See* AA 1104.

[26] *Id.* (emphasis added).

[27] *See* AA 1415.

[28] *See* AA 1116, 1153, and 1411.

[29] AA 1406.

must submit the legal claims to a jury before adjudicating any equitable ones. The District Court ignored this rule when it conducted a bench trial on Shuffle Master's rescission counterclaim and deemed that ruling dispositive of all remaining legal and equitable claims. The decision twice violated Awada's constitutional right to a jury trial, and a new trial of all claims is required.

1. When Legal and Equitable Claims Are Brought in the Same Action, the Legal Claims Must be Tried First.

The Nevada Constitution guarantees civil litigants the right to a jury trial for all legal claims and "provides that the right shall remain inviolate forever."[30] No similar constitutional importance attaches to purely equitable claims.[31] The merger of courts of law and equity created some confusion as to the method of trial and order of claims when both legal and equitable claims are presented in a single action.[32] The United States Supreme Court recognized and resolved this problem in *Beacon Theatres, Inc. v. Westover*,[33] articulating the bright-line rule that the trial court must submit legal claims to

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[30] *Aftercare of Clark County v. Justice Ct.*, 120 Nev. 1, 4, 82 P.3d 931, 932 (2004); NEV. CONST. art. I, § 3.

[31] *Close v. Isbell Const. Co.*, 86 Nev. 524, 471 P.2d 257, 261 (1970) (citing *State ex rel. Fletcher v. Ruhe*, 24 Nev. 251, 52 P.274 (1898)); *see also Harmon v. Tanner Motor Tours of Nevada, Ltd.*, 79 Nev. 4, 377 P.2d 622, 630 (1963); *Building Trades Council of Reno v. Thompson*, 68 Nev. 384, 234 P.2d 581, 592 (1951).

[32] Nevada's courts of law and equity were merged with the adoption of Rule 1 of the Nevada Rules of Civil Procedure in 1953. *See Schmidt v. Sadri*, 95 Nev. 702, 601 P.2d 713 (1979).

[33] 359 U.S. 500 (1959).

a jury ***before*** trying the equitable claims.[34] The High Court felt so strongly about the priority of the legal claims in order to preserve the right to jury trial that it could not even "anticipate" a situation in which "the right to a jury trial of legal issues" should ever "be lost through prior determination of equitable claims."[35]

The *Beacon Theatres* rule was further honed by the Supreme Court in *Dairy Queen, Inc. v. Wood.*[36] The Court reiterated, "*Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." It also emphasized that the jury trial must precede the determination of the equitable claims regardless of the prevalence of the equitable issues:

> It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of *Beacon Theatres*. . . .[37]

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[34] *Beacon Theatres*, 359 U.S. at 510. The *Beacon Theatres* decision is based on the Seventh Amendement, which guarantees the right to a jury trial for all legal claims in federal litigation. *See Granfinanciera v. Nordberg*, 492 U.S. 33, 41 (1989). Although the Seventh Amendment does not apply to the states, *see Aftercare*, 82 P.3d at 933 (citing *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996)), the analogous nature of the Seventh Amendment and Nevada's promise that the jury trial right shall remain "inviolate" was recognized by this Court in *Aftercare*, in which it was noted that Nevada's jury trial right is "in line with federal . . . . case law." *See id* at 932 & 934. The Court in *Aftercare* also acknowledged that the framers of the Nevada Constitution were "undoubtedly aware of" the Seventh Amendment when "craft[ing]" this State's "jury trial guarantee." *Id.* at 934.

[35] *Beacon Theatres*, 359 U.S. at 511.

[36] 369 U.S. 469 (1962). The *Dairy Queen* holding was cited with approval in *Harmon v. Tanner Motor Tours of Nevada, Ltd.*, 377 P.2d at 630.

[37] *Dairy Queen*, 369 U.S. at 473 n.8 (quoting *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961).

"That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not."[38] "Even an equitable main claim cannot preclude a jury trial on a legal []claim."[39]

Beacon Theatres also addressed the logistics of trying a hybrid action without abrogating the right to a jury trial:

> The same court may try both legal and equitable causes in the same action . . . . [The equitable relief] could, of course, be given by the court after the jury renders its verdict. In this way the issues between these parties could be settled in one suit giving [the plaintiff] a full jury trial of every [legal] issue.[40]

The Ninth Circuit acknowledged the *Beacon Theatres* paradigm as the proper model for adjudicating legal and equitable claims in *GTE Sylvania Inc. v. Continental T.V., Inc.*, noting, "When issues common to both legal and equitable claims are to be tried together, the legal issues are to be tried first, and the findings of the jury are binding on the trier of the equitable claims."[41]

The Nevada Supreme Court articulated a similar approach in *Sanguinetti v.*

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[38] *Id.* at 473.

[39] *Amoco Oil Co. v. Torcomian*, 722 F.2d 1099, 1104 (3rd Cir. 1983). "A rule to the contrary would enable the preemptive filing of a complaint by the holder of an equitable claim, coupled with the doctrine of res judicata, to deprive the holder of a legal claim of his Seventh Amendment right to a jury trial." *Id.*

[40] *Beacon Theatres*, 359 U.S. at 508.

[41] 537 F.2d 980, 986 n.7 (9th Cir. 1976).

Strecker.[42] The plaintiffs sued Sanguinetti for cancellation of deeds based on allegations of fraud. Sanguinetti counterclaimed for specific performance, damages based on the value of services he provided, and return of his personal property.[43] The case was tried to a jury, a verdict was entered in favor of the plaintiffs, and the trial court canceled the deeds.[44] Sanguinetti appealed, questioning the availability of a jury trial. The Nevada Supreme Court concluded that the trial court acted properly by permitting the action to go to the jury first and *only thereafter* awarding equitable relief:

> Although the original posture of the Streckers' suit undoubtedly invoked the equitable jurisdiction of the court, legal issues were also raised by their claim for damages and by Sanguinetti's counterclaim upon the alleged oral agreement. In these circumstances it was permissible for the court to allow a jury to decide the legal issues, NRCP 38 and 39(b), and to reserve for court determination all equitable issues. This is precisely what occurred. The equitable claim for cancellation of the deed was not submitted to the jury, but was decided by the court after receiving the jury verdict on the legal issues.[45]

NRCP 38 and 39 similarly support the *Beacon Theatres* trial model. Rule 38 of the Nevada Rules of Civil Procedure reinforces the Nevada Constitution's protection of the jury trial right, stating, "The right of trial by jury as declared by the constitution of the State or as given by a statute of the State ***shall be preserved to the parties inviolate***."[46]

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[42] 94 Nev. 200, 577 P.2d 404 (1978).

[43] *Sanguinetti*, 577 P.2d at 406-07.

[44] *Id.* at 407.

[45] *Id.* at 409-10.

[46] NEV. R. CIV. PROC. 38(a) (emphasis added).

The rule broadly safeguards the right by providing that a jury demand shall be deemed a demand as to all issues so triable.[47] NRCP 39 fortifies the right to a civil jury trial on any legal issue, providing:

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties . . . [stipulate] to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury . . . does not exist under the Constitution or statues of the State.[48]

The prioritization of the jury trial right in the Nevada Rules of Civil Procedure dictates that legal claims be tried before equitable claims, as there is no better way to ensure the preservation of this "inviolate" right.

2. The District Court's Failure to Allow a Jury Trial on the Legal Claims Before Resolving the Rescission Claim was Constitutional Error.

Awada was entitled to have any of the legal claims presented in this action tried to a jury before the trial court adjudicated the equitable claims. To determine whether an action is based in law or equity, the courts look to the practice at common law.[49] As the Nevada Supreme Court recognized in *Aftercare of Clark County v. Justice Court*, "Tort actions involving a claim for money damages were generally triable to a jury at common

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[47] NEV. R. CIV. PROC. 38(c).

[48] NEV. R. CIV. PROC. 39(a). Rule 39 further protects the jury trial right by authorizing a trial court to order a trial by jury even when a party has failed to demand one. NEV. R. CIV. PROC. 39(b).

[49] *Aftercare*, 82 P.2d at 936.

law."[50] The United States Supreme Court has repeatedly acknowledged that actions requesting "a money judgment" present claims that are "unquestionably legal."[51] And the High Court has noted that "it would be difficult to conceive of an action of a more traditionally legal character" than "an action on a debt allegedly due under a contract."[52]

The following table illustrates the overwhelming prevalence of Awada's legal claims:

Awada's Claim	Relief Sought	Legal/Equitable?
Breach of Contract	Monetary Damages	Legal
Fraud	Monetary Damages	Legal
Civil Conspiracy	Monetary Damages	Legal
Tortious Interference with Contract	Monetary Damages	Legal
Breach of Implied Covenant	Monetary Damages	Legal
Unjust Enrichment	Restitution	Equitable
Conversion	Monetary Damages	Legal
Injunctive Relief	Mandatory Injunction	Equitable
Accounting	Accounting of profits	Legal[53]

This action unquestionably presented legal claims. Awada pled nine claims for

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[50] *Id.* at 936-37.

[51] *Dairy Queen*, 369 U.S. at 476; *see also City of Monterey v. Del Monte Dunes at Monterery, Ltd.*, 526 U.S. 687, 711 (1999) ("We have recognized the general rule that monetary relief is legal"); *accord*, *Granfinanciera*, 492 U.S. at 48; *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974); *Ross v. Bernhard*, 396 U.S. 531, 542 (1970).

[52] *Dairy Queen*, 369 U.S. at 477.

[53] *Source: Amended Complaint* at AA 1031; *see also Dairy Queen*, 369 U.S. at 476 (reversing bench ruling on accounting claim for retrial by jury).

relief. The same contract which Shuffle Master sought to rescind gave rise to Appellants' damages claims for breach of contract, fraudulent inducement, and breach of the implied covenant of good faith and fair dealing. The Amended Complaint also contains monetary damage claims for civil conspiracy, tortious interference with contract, and conversion. The only equitable claims asserted were unjust enrichment (for which Awada sought restitution damages) and injunctive relief. In addition to general, special, consequential, and punitive damages, Awada prayed for the legal relief of "money damages according to proof in the amount of all lost past and future profits resulting from defendants' tortious conduct."[54]

Awada timely demanded a jury trial on all of these issues. By granting Shuffle Master's request to try its rescission claim in a bench trial prior to the jury trial of any legal claim, the District Court violated Awada's "inviolate" right to a jury trial as guaranteed by the Nevada Constitution and Rules 38 and 39 of the Nevada Rules of Civil Procedure.[55]

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[54] *See* AA 1042. Shuffle Master, too, pled clearly legal causes of action in its Counterclaim including breach of contract, breach of the implied covenant of good faith and fair dealing, intentional interference with contractual relations, intentional interference with prospective contractual relations, and business defamation. For each of these claims, Shuffle Master sought only monetary damages, not equitable relief. *See* AA 1045; 1063 (praying for "a sum in excess of $10,000," and "a sum, the exact amount of which will be proven at the time of trial, for Shuffle Master's lost earnings, both past and future.").

[55] This violation was only compounded by the Court's denial of the Motion for New Trial. As the original decision to lead with the equitable claim was unconstitutional, the District Court's failure to recognize this violation was an abuse of discretion and an additional, reversible error. *See, e.g., Langon v. Matamoros*, 121 Nev. 142, 111 P.3d 1077, 1078 (2005) (order denying new trial is reviewed for abuse of discretion).

3. Application of the Doctrine of Collateral Estoppel to Summarily Dispose of the Legal Claims Was Also Unconstitutional.

Judge Glass's conclusion that her rescission findings were summarily dispositive of Awada's remaining seven legal claims and two equitable claims only compounded the constitutional violation caused by the bench trial. "*Beacon Theatres* prohibits a trial judge from depriving a party of its constitutional right to a jury trial by ruling on the equitable claims first with the result that the legal claims become barred by the operation of collateral estoppel principles."[56] But that is exactly what happened here.

The bifurcation of the rescission claim from the rest of the action did not merely have *the effect* of barring the remaining claims and depriving Awada of the right to a jury trial, it was *designed* for that purpose. Shuffle Master's introduction to the Motion to Set Bench Trial states, "The granting of rescission here would entirely eliminate the need for a jury trial because such a holding would necessarily dispose of the parties' remaining claims. . . ."[57] As Judge Glass had already bought into the idea that a bench trial on rescission would end the entire case, the fate of Awada's remaining claims was a foregone conclusion.

Judge Glass did not entertain any formal motion on the issue of the viability of the remaining claims after the bench trial but permitted the parties to proffer letters

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[56] *Wallace Motor Sales, Inc. v. American Motors Sales Corp.*, 780 F.2d 1049, 1066 (1st Cir. 1985).

[57] AA 141.

explaining their respective positions. The gist of Shuffle Master's submission is that summary disposition of the remaining claims was required under the doctrine of collateral estoppel:

> [T]he doctrine of collateral estoppel prohibits Plaintiffs from relitigating these factual issues, which were actually litigated at the rescission trial and necessary to the Court's decision there, during a subsequent proceeding in this case or at any other time. Plaintiffs therefore cannot proffer evidence, through witness testimony or otherwise, that is contrary to the Court's factual findings.[58]

Shuffle Master further argued the myriad ways that Judge Glass's findings of fact as to the rescission claim bar a jury trial on each of Awada's remaining causes of action. Concluding that the District Court's rescission findings and conclusions "fully and finally resolved and disposed of all of the Plaintiffs' Claims for Relief," the June 3, 2005, Order adopts Shuffle Master's collateral estoppel theory in its entirety.[59]

Awada timely demanded a jury trial on all legal issues. The District Court lacked the discretion to abrogate that right simply because Shuffle Master included among its nine counterclaims a rescission claim. As the trial court denied Shuffle Master's motion for summary judgment on Awada's claims after finding genuine issues of fact which

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[58] AA 1108 (internal citations omitted). Collateral estoppel should not even apply here. The general rule of collateral estoppel or "issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive *in a subsequent action* between the parties." *Executive Mgmt. v. Ticor Title Ins. Co.*, 114 Nev. 823, 963 P.2d 465, 473 (1998) (emphasis added). The doctrine was improperly employed in this case to preclude claims adjudicated not in prior litigation, but in the same litigation.

[59] AA 1415.

precluded judgment as a matter of law mere months before the trial,[60] these litigants were entitled "to a jury's determination, at a minimum," of their contract and tort claims praying for monetary damages. Nothing short of complete reversal and remand for a new trial can cure these constitutional violations. Accordingly, this Court must: 1) reverse and set aside the Findings of Fact and Conclusions of Law; 2) reverse and set aside the Order Regarding Rescission; 3) reverse and set aside the June 3, 2005, Order deeming the adjudication of the rescission claim final and dispositive of all remaining claims; and 4) order a new trial of all claims in which the legal claims will be tried to a jury before any remaining equitable claims are decided.[61]

B. THE DISTRICT COURT ABUSED ITS DISCRETION BY RULING IN FAVOR OF SHUFFLE MASTER ON THE RESCISSION CLAIM BECAUSE IT LACKED SUBSTANTIAL EVIDENCE OF FRAUD OR A MATERIAL FAILURE OF PERFORMANCE.

For more than 150 years, the United States Supreme Court has held steadfast to the idea that it is an "extraordinary power in a court . . .[of equity] to rescind contracts at all, instead of leaving [the] parties to a suit at law for their damages."[62] Although the question of whether rescission shall be granted rests largely in the discretion of the court,[63] great caution is required as rescission allows an aggrieved party to completely

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[60] *Ross*, 396 U.S. at 542. *See* Shuffle Master's Motion for Partial Summary Judgment at AA 4; 12/13/04 Order denying same at AA 1028.

[61] *See, e.g., Amoco Oil Co.*, 722 F.2d at 1103.

[62] *Samuel Veazie v. Williams*, 24 U.S. 134, 157 (1850).

[63] *Canepa v. Durham*, 62 Nev. 417, 153 P.2d 899, 904 (1944).

abrogate an otherwise valid agreement.[64]

No legitimate basis for rescission was demonstrated here. The trial court granted rescission after finding that Awada "failed to disclose" that he had "licensed to IGT a[n unrelated] video poker game [also] known as *3 Way Action*.[65] However, the evidence demonstrated that: 1) Shuffle Master knew about the IGT/Awada Contract *before* it executed the Agreement; 2) even if it did not know about the IGT deal prior to the Awada contract, Shuffle Master's ratification of the Awada contract with knowledge of the IGT relationship precluded any rescission claim; and 3) regardless, IGT's use of the name for an unrelated game was not important to Shuffle Master and could not be considered a "material" omission.

The second basis for the District Court's rescission ruling was the conclusion that "Plaintiffs materially failed to perform their obligations under the Game Option Agreement" by refusing to execute a separate license agreement.[66] But this finding was also unsupported by the evidence. The Agreement was unilateral and imposed obligations only on Shuffle Master, the optionee. Shuffle Master did not exercise the option by paying the $50,000 option price prior to the expiration of the option period. Thus, the

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[64] *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 934 P.2d 257, 262 (Nev. 1997); *Havas v. Bernhard*, 461 P.2d 857, 860 (Nev. 1969).

[65] AA 1420. This finding is also factually erroneous. Awada did not license to IGT a video game, just the name "3 Way Action."

[66] AA 1428.

option expired, and Awada had no obligations under the Agreement. With no evidence to support its findings of fraud or material failure of performance, the District Court abused its discretion by granting rescission.[67]

1. Shuffle Master's Evidence of Fraud Fell Short of "Substantial."

To establish fraud in the inducement, Shuffle Master was required to prove by clear and convincing evidence: (1) a false representation or material omission by Awada; (2) Awada's knowledge or belief that the representation was false or that the omitted information was material; (3) Awada's intention to induce Shuffle Master to consent to the contract's formation; (4) Shuffle Master's justifiable reliance upon the misrepresentation or omission; and (5) damage.[68] The evidence failed to establish either of the first two prongs.

a. Shuffle Master Knew about the IGT Deal before Executing the Game Option Agreement.

Awada specifically disclosed and discussed his IGT contract with Shuffle Master prior to entering into the Game Option Agreement. On December 10, 1999, Awada and Shuffle Master's (then) CEO, Joseph Lahti, met to discuss the Agreement. Lahti made

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[67] *See Gepford v. Gepford*, 116 Nev. 1033, 1036, 13 P.3d 47, 49 (2000).

[68] *See J.A. Jones Construction Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 89 P.3d 1009, 1018 (2004); *Pacific Maxon, Inc. v. Wilson*, 96 Nev. 867, 619 P.2d 816, 818 (1980) (the party seeking rescission has the burden of establishing that a representation is false, and that it was material to the transaction, that it was actually relied on). Fraud may not be presumed. *Havas v. Alger*, 85 Nev. 627, 461 P.2d 857, 860 (1969).

notes of this meeting.[69] These notes reflect that Awada disclosed an "existing relationship with IGT" for a "video poker game"[70] at this meeting and confirm that Shuffle Master had knowledge of IGT's interest in the "3 Way Action" name *before* it executed the Agreement.[71]

Shuffle Master was so completely aware of Awada's deal with IGT[72] that it even took the time and energy to disclose it in the employee newsletter. On January 3, 2000, Awada started work as an employee of Shuffle Master.[73] When the company newsletter came out the following month, it introduced Awada as a game developer with "a video poker game also called 3 Way Action in production by IGT":

> [Awada] enjoyed working in gaming and worked his way to shift manager and then department manager. His casino experience includes the pit, poker and slots. His true passion, however, is creating and developing games. **Currently, [Awada] has several games being developed. There is a**

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[69] Tr. vol. I at 84, 214, 236-39; PTE 6-8 at AA 282, 720, and 546, respectively.

[70] AA 543 and 546.

[71] AA 542-43, lines 18-25; 1-12.

[72] Mark Yoseloff, Shuffle Master's CEO at the time of trial, testified that he likely had someone at Shuffle Master conduct due diligence regarding any *3 Way Action* trademarks ***before*** executing the Agreement with Awada. Tr. vol. I at 85.Thus, even if Awada did not tell Shuffle Master about the IGT deal as Mr. Lahti's notes reflect, at the very least, the evidence established that Shuffle Master was on constructive notice. *See Howard v. Howard*, 69 Nev. 12, 239 P.2d 584, 589 (1952) ("it is said that knowledge by the defrauded person of facts which in the exercise of proper prudence would enable him to learn of the fraud is usually deemed equivalent to discovery").

[73] AA 568, ¶ 2.

video poker game also called 3 Way Action in production by IGT.[74]

Even the testimony of Shuffle Master's own witnesses as to this alleged misrepresentation seriously missed the "clear and convincing" mark as it was luke warm at best. Shuffle Master's own CEO could not say that Awada "intentionally concealed" the fact that the IGT game shared the "3 Way Action" name; he testified only that Awada was just "a bit vague" on the subject.[75]

Although Awada disclosed his IGT relationship to Shuffle Master (who also had and appreciated the opportunity to conduct due diligence and discover IGT's trademark rights to the "3 Way Action" name) and Shuffle Master disclosed it to the world in its company newsletter, Judge Glass determined that Awada so affirmatively concealed the IGT deal that rescission was in order.[76] Judge Glass's Findings of Fact and Conclusions of Law and all of the orders it engendered must be reversed because the first element of fraud – a false representation or omission – was not established at all, let alone with clear and convincing evidence.[77]

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[74] AA 867.

[75] Tr. vol. I at 86.

[76] AA 1423-32.

[77] If Awada made no "false representation" then the second element necessary for rescission – knowledge or belief that the representation was false – is also lacking. *See J.A. Jones Construction Co.*, 89 P.3d at 1018.

b. *Long After Admittedly Acquiring Full Knowledge of IGT's Interest, Shuffle Master Ratified the Awada Agreement.*

Rescission was also unavailable because Shuffle Master ratified the Agreement after it unquestionably knew that IGT had the right to use the "3 Way Action" name. Ratification may be express or implied,[78] and the right to rescind for fraud may be waived.[79] Where, after discovery of fraud entitling a party to rescind a contract for the exchange of property, the defrauded party continues to treat the property as his own or acts inconsistently with the right to rescind, he will be held to have elected to ratify the contract.[80]

Even if Shuffle Master's witnesses took the position at trial that they were not expressly told in December 1999 about IGT's rights to the game name, they expressly admitted full knowledge as of February or March 2000 – months before the period for exercising the option even commenced.[81] Shuffle Master contacted IGT directly to discuss its trademark, and IGT had no objection to Shuffle Master's use of the "3 Way Action" name.[82] And despite knowledge that it would have to share the name with IGT, Shuffle Master still pursued Awada's table game. At trial, Yoseloff admitted that he never

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[78] *Poweroil Mfg. Co. v. Carstensen*, 419 P.2d 793 (Wash 1966).

[79] *Vanier v. Ponsoldt*, 833 P.2d 949 (Kan. 1992).

[80] *Beebe v. James*, 8 P.2d 803 (Mont. 1932); *Milton v. Hare*, 280 P. 511 (Or. 1929).

[81] Tr. vol. I at 34-36. Shuffle Master's trial counsel also conceded that the company had "institutional knowledge" of the IGT deal in February 2000. *Id.* at 88.

[82] *Id.* at 31, 142-144, and 192.

told Awada that Shuffle Master did not want to go forward with the deal or attempted to revise the Game Option Agreement after learning of IGT's rights. Shuffle Master was not going to "throw away [this] business opportunity."[83]

With full knowledge of IGT's rights to the "3 Way Action" name, Shuffle Master continued to go forward with its plan to acquire the table game. Shuffle Master's actions ratified the Agreement, cleansed it of any fraud, and precluded Shuffle Master from obtaining rescission.

c. *Even If Concealed, IGT's Right to the Game Name Was Not Sufficiently Material to Shuffle Master to Warrant Rescission.*

To warrant equitable relief from a contract induced by fraud, a misrepresentation or omission must be material. It must have animated and controlled the conduct of the parties,[84] gone to the essence of the agreement, and not have been merely incidental.[85] The fact is that no one at Shuffle Master cared about IGT's rights to the name until Awada sued and Shuffle Master had to scramble for a defense.

The irrelevancy of the IGT deal was demonstrated by the complete ambivalence of Shuffle Master executives about the topic. Yoseloff, upon learning of the IGT deal, had no intention to "abandon the table game at that point."[86] Brooke Dunn, who contacted

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[83] *Id.* at p. 98; *see also id.* at p. 95-97, 195, 199, and 201.

[84] *See, e.g., Canepa*, 153 P.2d at 899.

[85] *See id.*

[86] Tr. vol. I at 37.

IGT at Yoseloff's direction to discuss the situation, testified that IGT declared, "no harm no foul" and for Shuffle Master, that was the "end of the discussion" about IGT.[87] Most importantly, however, when asked at trial whether knowledge of the IGT rights in the name in December 1999 "would . . . have made a difference," former CEO Lahti candidly admitted, ***"from my standpoint it wasn't material."***[88] The immateriality of IGT's interest made it impossible for Shuffle Master to prove fraud, and rescission should not have been granted.

2. The District Court Abused its Discretion in Concluding that Awada Materially Failed to Perform the Agreement.

The second legal basis cited by the District Court in support of its rescission order is that Awada's refusal to execute a separate license agreement once Shuffle Master declared its desire to exercise the option to purchase *3 Way Action* constituted a material breach of the Agreement warranting rescission.[89] To reach this conclusion, the District Court had to insert a new term into this unambiguous option agreement in contravention of Nevada's rules of contract interpretation.

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[87] Tr. vol. I at 141-44.

[88] *Id.* at 239 (emphasis added). Shuffle Master's continued interest in, and pursuit of, the game after admitted knowledge of the IGT deal, *see supra*, is additional evidence of its immateriality.

[89] AA 1420.

a. Only Shuffle Master Had Obligations under this Unilateral Agreement.

The Agreement, like all option contracts, is a unilateral contract.[90] Only one party had obligations. That party was the optionee, Shuffle Master. The only obligation on Awada's part as the optionor was "a mere offer, requiring unconditional acceptance [by Shuffle Master in order that a contract may be created."[91] Until that unconditional acceptance was tendered, Awada had no obligation that he *could* fail to perform.

b. The District Court Abused its Discretion by Writing a Separate License Document Requirement into the Unambiguous Agreement.

The Nevada Supreme Court acknowledged in *Gartland v. Giesler*, "It is axiomatic that a court will not rewrite a contract for the parties."[92] But that is exactly what Judge Glass did in this case. There is no mention in the Agreement of a requirement for a separate license agreement – particularly as a condition to Shuffle Master's obligation to pay the $50,000 option price. To the contrary, read according to its plain meaning, the Agreement required Shuffle Master to pay the option price in order to exercise the option and give rise to any obligation on the part of Awada.[93] Since it is undisputed that the

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[90] *McCall v. Carlson*, 63 Nev. 390, 172 P.2d 171, 185 (1946).

[91] *Id.*; *see also, Finnell v. Bromberg,* 79 Nev. 211, 220-21, 381 P.2d 221, 225-26 (1963) ("[A]n option must be unequivocally accepted according to its terms in order to constitute a legal and binding acceptance. Many authorities are cited in support of this proposition. [Optionee] does not contest this rule and it is undeniably good law").

[92] 96 Nev. 53, 604 P.2d 1238, 1239 (1980).

[93] AA 1006 (stating that the option price is "payable upon exercise of the option").

$50,000 was not paid by Shuffle Master, that triggering event never occurred, and Awada's obligation to license the game to Shuffle Master never ripened.

The only performance obligation that Awada could have had under the Agreement was the obligation to sell the game *had Shuffle Master actually exercised the option.* Shuffle Master's failure to exercise that option by paying the option fee stopped that obligation from ever arising and made it legally impossible for Awada to breach the Agreement. Judge Glass's conclusion that Awada had the additional obligation to execute a separate license agreement before Shuffle Master had to pay the option price was an abuse of discretion. As there was no legally valid basis for rescission, reversal and remand is required.

C. THE DISTRICT COURT ERRED WHEN GRANTING SUMMARY JUDGMENT ON AWADA'S REMAINING CLAIMS.

The District Court's June 3, 2006, Order is flawed for two additional reasons, either of which independently compel reversal. The first deficiency is one of form: The Order lacks the requisite statement of undisputed facts and legal grounds on which summary judgment was granted.[94] The second defect is substantive: Adjudication of the

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[94] The language in the June 3, 2005, Order indicating that all of Awada's claims were "dismissed with prejudice" is misleading. *See* AA 1415. The actual effect of the decision was to grant summary judgment, not dismissal. When a trial court considers matters outside of the pleadings, its "dismissal" is treated as a summary judgment. *Meyer v. Sunrise Hosp.*, 117 Nev. 313, 22 P.3d 1142 (2001). The District Court based the disposal of the entirety of Awada's Amended Complaint on its findings of fact and conclusions of law from the bench trial of the rescission claim. *See* AA 1415. Shuffle Master's letter setting forth its argument for "dismissal" of Awada's Amended Complaint argues the summary judgment standard. *See* AA 1108 ("***Plaintiffs cannot show the existence of a genuine issue of material fact*** warranting a trial on

rescission claim did not resolve all the issues presented by these widely varied causes of action. Accordingly, the District Court could not have reasonably concluded that the record, viewed in the light most favorable to Awada, presented no genuine issues of material fact, particularly when summary judgment on these claims had been denied mere months earlier.

1. The Summary Disposition of Awada's Claims Was Erroneous because the Order Lacks the Required Statement of Grounds.

Rule 56(c) of the Nevada Rules of Civil Procedure provides, "An order granting summary judgment shall set forth the undisputed material facts and legal determination on which the court granted summary judgment."[95] The rule clearly and unambiguously requires a district court granting summary judgment to state the undisputed facts and legal grounds upon which that judgment is founded.

The District Court completely ignored this requirement when granting summary judgment on Awada's Amended Complaint. The June 3, 2005, Order disposes of nine claims but does not identify a single undisputed fact or provide any legal analysis of why summary judgment is required as a matter of law on those claims. Such a casual disposal

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the merits of any of the nine claims set forth in their Amended Complaint.") (emphasis added). After pages of argument about the effect of various evidentiary items on Awada's claims, Shuffle Master concludes by alternatively requesting the opportunity "to fully brief these issues ***through a motion for summary judgment*** and/or to dismiss." AA 1112. This Court reviews orders granting summary judgment de novo. *Wood v. Safeway, Inc.*, ___ Nev. __, 121 P.3d 1026, 1031 (2005).

[95] NEV. R. CIV. PROC. 56(c).

of serious claims violates NRCP 56(c) and must not be condoned.

2. Summary Judgment on the Entirety of Awada's Amended Complaint Was Not Available.

Summary judgment is available only when the evidence, viewed in the light most favorable to the non-moving party, demonstrates the existence of "no genuine issue of material fact . . . and the moving party is entitled to judgment as a matter of law."[96] Judge Glass summarily adjudicated all nine of Awada's claims on the basis that "the Findings of Fact and Conclusions of Law filed on May 18, 2005, fully and finally resolved and disposed of all of the Plaintiffs' Claims for Relief," leaving "no remaining triable issues before the Court."[97] This ruling was flatly incorrect.

The Court's adjudication of Shuffle Master's rescission claim did not resolve every claim asserted in this case. The only issue before the District Court when it undertook to try the rescission claim was whether Shuffle Master was induced to enter into the Agreement based upon false representations by Awada.[98] The focus of this claim was *Awada's* actions or inactions. The Amended Complaint, however, contains claims that do not hinge on the validity of the Agreement and focus on *Shuffle Master's* actions.

Awada's fraud and civil conspiracy claims allege that Shuffle Master's act of executing the Agreement and representing to Awada good faith intentions of promoting *3*

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[96] *Wood*, 121 P.2d at 1029 & 1031.

[97] AA 1415.

[98] AA 1045.

Way Action was part of a secret corporate scheme to squelch competition. This claim was not dependent upon the enforceability of the Agreement, just Shuffle Master's act of negotiating that Agreement. The Court's Findings of Fact on rescission are irrelevant to the fraud and conspiracy claims.

The tortious interference claim was similarly divorced from the contract facts. Awada alleged that, by employing the business strategy that killed *3 Way Action* and copying it with *Triple Shot*, Shuffle Master interfered with Awada's ability to place the game in casinos. Again, none of the Findings of Fact or Conclusions of Law had any bearing upon – let alone completely resolved – this claim.

The injunctive relief claim was also not dependent upon the contract findings. Awada sought an injunction to keep Shuffle Master from exploiting *Triple Shot* because it was the product of fraudulent and unlawful appropriation of the *3 Way Action* game concept. The District Court had no factual basis for the summary disposal of this injunctive relief claim, particularly when she affirmatively acknowledged on the record that *Triple Shot* is "a variation" of *3 Way Action.*[99]

In December, 2004, the District Court denied Shuffle Master's motion for summary judgment on these claims, finding "there are still factual issues in dispute."[100] The District Court was presented with no additional evidence on these non-contract

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[99] Tr. vol. III at 34.

[100] *See* Motion at AA 4-136, 12/13/04 Order at AA 1028, and Minutes of Hearing at AA 1029.

claims before disposing of them without analysis a few months later. The "factual issues in dispute" did not evaporate, they were just ignored by a judge who was evidently frustrated that her attempts to help the parties to a settlement of their claims were fruitless. The minutes of the hearing preceding the final adjudication of Awada's claims project this frustration:

> Court stated it presided over the trial; it attempted to settle the matter; everything in this case has been dealt with and the case is over and DIRECTED the parties to quit wasting their time as there is nothing else left.[101]

Frustration at the inability to bring litigants to settlement, however, is not a valid basis for the summary adjudication of viable claims for which a jury trial has been timely demanded. Genuine issues of material fact – unresolved by the rescission trial – precluded the District Court from the wholesale dismissal of Awada's Amended Complaint as a matter of law. At the very least, the June 3, 2005, Order must be set aside, and a new trial on the non-rescission claims must be ordered.

CONCLUSION

The District Court ordered rescission without substantial evidence and ignored genuine issues of material fact to summarily adjudicate nine disparate claims, violating Awada's and Gaming's constitutional right to a jury trial. This Court must: 1) reverse and set aside the Findings of Fact and Conclusions of Law; 2) reverse and set aside the Order Regarding Rescission; 3) reverse and set aside the June 3, 2005, Order deeming the

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[101] AA 1103.

adjudication of the rescission claim final and dispositive of all remaining claims; and 4) order a new trial of all claims in which the legal claims will be tried to a jury before any remaining equitable claims may be decided.

DATED this 14th day of August, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Appellants' Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of August, 2006.

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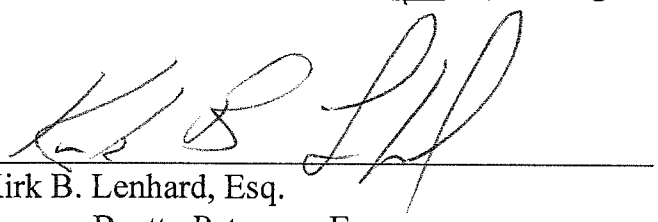
RECEIPT OF COPY

RECEIPT OF COPY of the foregoing APPELLANTS' OPENING BRIEF is hereby acknowledged on this 15th day of August, 2006.



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