

aggregating about \$10,000,000, and the Prior Loan and the Edelstein Loan, as amended, would become a second position lien on the Project.

- C. There was a fixed price construction agreement with a viable and reputable general contractor which would deliver all of the required construction for the Project at a cost of approximately \$79,000,000.
- D. There would be \$60,000,000 in Alender approved@ pre-sales and/or pre-leases (the "Pre-Sales Contracts") prior to closing of the Senior Loan, which would provide sources of repayment of the Senior Loan in those amounts.
- E. Based upon pro formas prepared by Developer and vetted by the SFC, Scott, and BOK 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 TM2I's exposure on the TM2I Guaranty of the Senior Loan 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.)

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

- | | | | |
|----|----|-------------------|---|
| 1 | a. | February 15, 2007 | Initial presentation by Scott and Edelstein of proposed Manhattan West Loan. |
| 2 | b. | April 12, 2007 | SFC submits first Manhattan West Loan analysis summary to Plaintiffs. |
| 3 | c. | April 18, 2007 | Email communication from CVFS to Scott concerning pre-sale amounts with no mention of sales to insiders. |
| 4 | | | |
| 5 | d. | April 30, 2007 | Tharaldson executes first financing commitment letter. |
| 6 | | | |
| 7 | e. | May 6, 2007 | SFC discusses modifying loan. Does not mention related party pre-sales. |
| 8 | | | |
| 9 | f. | May 17, 2007 | Tharaldson executes \$8 million financing commitment. |
| 10 | g. | May 21, 2007 | SFC provides project pro formas to Plaintiffs. |
| 11 | h. | October 12, 2007 | Tharaldson executes modified financing commitment letter. |
| 12 | i. | 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. |
| 13 | | | |
| 14 | | | |
| 15 | j. | November 19, 2007 | SFC provides updated projections with no indication of related party sales. |
| 16 | k. | January 22, 2008 | Tharaldson executes Senior Loan documents. |
| 17 | l. | February 25, 2008 | Tharaldson executes revised commitment letter. |
| 18 | | | |

133. 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."

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

135. 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.

136. Consistent with their prior course of dealing, Plaintiffs relied upon the legal advice and counsel of Defendant Maslon and on its expertise in drafting appropriate loan documentation and providing competent legal advice.

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

138. Defendant Maslon knew or should have known but did not identify and disclose to Plaintiffs that the Senior Loan transaction presented direct and substantial conflicts between: (a) SFC's and Scott's position as fiduciaries to Plaintiffs with respect to Plaintiffs' 100% ownership interest in the Prior Loan and the Edelstein Loan; (b) Scott's, SFC's and BOK's position as fiduciaries to all Senior Loan participants, including CVSF; and (c) Scott's SFC's and BOK's position as fiduciaries to Plaintiffs with respect to the guarantees from Tharaldson and TM2.

139. In connection with the Senior Loan, Scott, SFC, BOK and Defendant Maslon made misrepresentations to Plaintiffs and failed to disclose to Plaintiffs material information concerning the

1 Project and the Senior Loan, which are described in the following sections.

2 ***Deteriorated Financial Prospects.***

3 140. SFC, Scott and BOK attached to the Senior Loan Agreement a pro forma for the Project
4 that showed projected net income for the Project of \$10,000,000 rather than the \$34,000,000 reflected in
5 the pro forma SFC, Scott, and BOK had previously provided to Plaintiffs and on which Plaintiffs had
6 relied in agreeing to the Plaintiffs' Senior Loan Documents.

7 141. SFC, Scott and BOK knew about and initialed the revised pro forma showing estimated
8 net income from the Project less than one-third of the amount represented to Plaintiffs.

9 142. SFC, Scott and BOK failed to disclose the revised pro forma to Plaintiffs or ask Plaintiffs
10 to initial it.

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

14 ***Primary Reliance on Guarantors.***

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

19 145. Plaintiffs never would have agreed to the Plaintiffs' Senior Loan Documents had they
20 known that SFC, Scott and BOK were not relying primarily on the financial viability of the Project in
21 underwriting the Senior Loan.

22 146. SFC, Scott and BOK later admitted to Plaintiffs orally in October 2008 and in writing in
23 December 2008 that their underwriting of the Senior Loan had relied solely on the financial resources of
24 the Guarantors and not primarily on the financial viability of the Project as Plaintiffs had understood.

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

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

148. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had they known that the Pre-Sale Condition was not satisfied, because 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.

149. SFC, Scott, BOK and Defendant Maslon 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 commercial loans, by not expressly requiring that Pre-Sales be bona fide sales to parties unrelated to the borrower 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. Defendant Maslon, as counsel for Plaintiffs, knew or should have known when it drafted this provision that it did not adequately protect Plaintiffs' legal and financial interests. Defendant Maslon had a duty to draft the Pre-Sale Condition in such a way as to protect Plaintiffs' interests or advise Plaintiffs if it did not.

150. SFC, Scott, BOK and Defendant Maslon 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 the borrower. Nevertheless, SFC, Scott and BOK certified at the closing of 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. Defendant Maslon opined that the conditions precedent had been met. It was not reasonable or appropriate to give this opinion.

151. SFC, Scott and BOK certified that the lender approved pre-sales and/or pre-leases consisted of \$45,000,000 in residential pre-sales and \$17,250,000 of commercial pre-sales and/or pre-leases.

152. SFC, Scott, BOK and Defendant Maslon 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.

153. SFC, Scott, BOK and Defendant Maslon 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 Edelstein's father.

154. SFC, Scott, BOK and Defendant Maslon 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.

155. The certification by SFC, Scott, and BOK that the Pre-Sale Condition had been satisfied was false and fraudulent. The opinion by Defendant Maslon that the conditions precedent had been satisfied was incorrect, and Defendant Maslon did not have a reasonable basis for making the opinion.

156. 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.

157. 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)

158. 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 senior lien claims.

159. SFC, Scott, BOK and Defendant Maslon 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.

160. SFC, Scott, BOK and Defendant Maslon knew or should have known that under NRS 108.225(1) and (2) mechanics liens for any work performed prior to the recording date of the Senior Loan Deed of Trust (the "Priority Construction Liens") would be prior and superior to the Senior Loan Deed of Trust.

161. SFC, Scott, BOK and Defendant Maslon also knew that the Deeds of Trust securing the Prior Loan were prior and superior to any Priority Construction Liens.

162. SFC, Scott, BOK and Defendant Maslon 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.

163. SFC, Scott, and BOK certified at the closing of the Senior Loan that the First Lien Condition had been satisfied.

164. This certification was a misrepresentation and a fraud.

165. Defendant Maslon issued its expert legal opinion stating affirmatively that the conditions precedent has been satisfied. Defendant Maslon knew or should have known that its opinion was incorrect and that it did not have a reasonable basis for giving the opinion.

Insurance Over Broken Priority; Switched Title Insurance Companies.

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

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

168. SFC, Scott, BOK and Defendant Maslon 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.

169. Defendant Maslon, SFC, Scott and BOK knew or should have known that Commonwealth was financially troubled and that First American was not.

170. Defendant Maslon, SFC, Scott and BOK failed to inform Plaintiffs prior to the closing of the Senior Loan, of Commonwealth's questionable financial condition.

171. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had they known that Defendant Maslon, SFC, Scott and BOK were insuring over the Priority Construction Liens and were switching from First American to Commonwealth.

172. 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.

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

174. 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.

175. Defendant Maslon, SFC, Scott and BOK 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.

176. Defendant Maslon, SFC, Scott and BOK failed to inform Plaintiffs 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 Subordination and to provide their evaluation of that risk.

177. Defendant Maslon, SFC, Scott and BOK caused the Subordination Agreement 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 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 this Subordination Agreement "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.

178. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents, had they

1 known that Defendant Maslon, SFC, Scott and BOK through their drafting of the Subordination had
2 substantially increased the risk of any Priority Construction Liens gaining priority over the Deeds of
Trust securing the Prior Loan and the Edelstein Loan.

3 179. Defendant Maslon, SFC, Scott and BOK failed to inform Plaintiffs that the Subordination
4 Agreement had been drafted in a manner that substantially increased the risk that any Priority
5 Construction Liens would become senior to the Prior Loan as a result of the Subordination.

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

7 180. As Fiduciaries, Defendant Maslon, Scott, SFC and BOK had a duty to disclose that they
8 were preparing legal instruments that had the effect of negating protective provisions of Nevada law.

9 181. Defendant Maslon, SFC, Scott and BOK caused to be prepared and submitted to
10 Tharaldson for signature a form of Guaranty of the Senior Loan that contained a Nevada choice of law
11 provision.

12 182. Defendant Maslon, SFC, Scott and BOK knew or should have known that Nevada law
13 provided a single action rule and also accorded to a guarantor of a real estate loan a fair market value
14 defense, insuring that the guarantor's exposure for a deficiency judgment was limited to the excess of the
15 loan over the fair market value of the loan collateral for a deficiency judgment.

16 183. Defendant Maslon, SFC, Scott and BOK knew that Nevada law permitted a guarantor in a
17 commercial loan over \$500,000 to waive the single action rule and the guarantor's fair market value
18 defense.

19 184. Defendant Maslon, SFC, Scott and BOK inserted in the Guaranty of the Senior Loan a
20 waiver of all statutory rights of a guarantor under Nevada law, including the single action rule and the
21 fair market value defense. They did not disclose to Plaintiffs their insertion of this waiver provision.

22 185. Defendant Maslon, SFC, Scott, and BOK caused to be prepared and submitted to TM2I
23 for signature a form of guaranty that adopted North Dakota law.

24 186. Defendant Maslon, SFC, Scott and BOK knew or should have known that North Dakota
25 law did not provide a single action rule nor extend a borrower's fair market value defense to a guarantor.
26 They did not disclose to Plaintiffs that they had selected the law of a state which substantially altered
27 their rights as they would have existed under Nevada law.

28 187. Defendant Maslon, SFC, Scott and BOK advised Plaintiffs that the documents they were

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

4 188. Defendant Maslon, SFC, Scott and BOK failed to advise Plaintiffs that under the
5 Guaranty and the TM2I Guaranty as presented, Tharaldson's exposure on the Guaranty and TM2I's
6 exposure on the TM2I Guaranty would be far greater than Plaintiffs intended or understood because of
7 the waivers contained in the Guaranty and the choice of law in the TM2I Guaranty.

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

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

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

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

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

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

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Punitive Damages

1 194. As set forth more fully in the following claims for relief, Plaintiffs' claims against
2 Defendant Maslon for breach of fiduciary duty, aiding and abetting, and negligence to the extent such
3 negligence rises to the level of gross negligence (the "Predicate Claims") may give rise to a claim for
4 punitive damages against Defendant Maslon.

5 195. Defendant Maslon may be liable for punitive damages to the extent the evidence shows
6 that Defendant Maslon is guilty of "oppression, fraud or malice, express or implied", Defendant
7 Maslon's actions constituted conduct intended to injure Plaintiffs, and/or Defendant Maslon's actions
8 constitute "despicable conduct which is engaged in with a conscious disregard of the rights of others"

9 196. To the extent that Defendant Maslon acted intentionally and/or in concert with SFC, Scott
10 and/or BOK, Defendant Maslon is subject to joint and several liability for all damages resulting
11 therefrom.

FIRST CLAIM FOR RELIEF

(Professional Malpractice/Negligence)

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14 197. Plaintiffs incorporate by reference all prior paragraphs of this Complaint.

15 198. Plaintiffs and Defendant Maslon had a long-standing attorney/client relationship.
16 Defendant Maslon was counsel for Plaintiffs with respect to the Manhattan West project, as well as
17 many other prior transactions.

18 199. Defendant Maslon owed a duty to Plaintiffs to render legal advice and services to Plaintiffs
19 with competence and diligence, consistent with the ethical requirements and standard of care of the legal
20 profession and to make complete disclosure to Plaintiffs of all material matters. Defendant Maslon owed
21 Plaintiffs a duty to exercise due care in connection with the drafting the Senior Loan Documents and the
22 Plaintiffs' Senior Loan Documents, including the guarantees, in a manner to protect Plaintiffs' interests.

23 200. Defendant Maslon knew or should have known that Plaintiffs were relying on its legal
24 advice and expertise in preparing the loan documentation and on its opinion that the conditions precedent
25 to loan funding had been satisfied.

26 201. Defendant Maslon breached its duty of due care in many ways, including but not limited to
27 the following:

28 A. Making the misrepresentations concerning the Pre-Sale Condition and the First

Lien Condition as alleged herein.

- B. Failing to disclose to Plaintiffs 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 that Defendant Maslon had conflicts of interest, and therefore Maslon could not ethically represent Plaintiffs in the transaction and failing to insist and require that Plaintiffs retain independent counsel concerning the Plaintiffs' Senior Loan Documents and the Manhattan West transaction.

202. As the direct and proximate result of Defendant Maslon's negligence, Plaintiffs have been substantially damaged.

SECOND CLAIM FOR RELIEF

(Negligent Misrepresentation/Negligent Omission)

203. Plaintiffs incorporate by reference all prior paragraphs of this Complaint.

204. Defendant Maslon 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.

205. Defendant Maslon made certain representations to Plaintiffs in connection with the Senior Loan, including but not limited to:

- A. That the Pre-Sale Condition was satisfied.
- B. That the First Lien Condition was satisfied.

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

207. Defendant Maslon 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.

208. Defendant Maslon breached this duty by omitting to state:

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

- 1 b. That SFC and BOK were closing the Senior Loan transaction with actual
2 and undisclosed knowledge that they were insuring over known General
3 Contractor lien claims;
4 c. That so-called lender approved pre-sales were not arms length sales to
5 unrelated third parties, but in many cases were to affiliates or principals of
6 the developer or to other insiders;
7 d. That Scott and SFC acting as dual agents for Plaintiffs and BOK had an
8 inherent conflict of interest that could not be waived;
9 e. That the guaranty documentation drafted by Defendant Maslon that
10 substantially reduced Plaintiffs' rights under Nevada law and materially
11 enhanced BOK=s position at Plaintiffs' expense and detriment;
12 f. That Defendant Maslon had conflicts of interest, and therefore Maslon
13 could not ethically represent Plaintiffs in the transaction and failed to insist
14 and require that Plaintiffs retain independent counsel concerning the
15 Plaintiffs' Senior Loan Documents and the Manhattan West transaction.

16 209. On information and belief, Defendant Maslon made additional negligent omissions which
17 Plaintiffs have not yet discovered. Plaintiffs reserve the right to prove such additional negligent
18 omissions at trial.

19 210. In making these negligent misrepresentations and negligent omissions, Defendant Maslon
20 breached its duty of care.

21 211. The representations were false, and the facts omitted were material.

22 212. As the direct and proximate result of Defendant Maslon's misrepresentations and
23 omissions, Plaintiffs were substantially damaged in an amount to be proven at trial.

24 **THIRD CLAIM FOR RELIEF**

25 **(Breach of Fiduciary Duty)**

26 213. Plaintiffs incorporate by reference all prior paragraphs of this Complaint.

27 214. Defendant Maslon had a fiduciary relationship with and owed fiduciary duties to Plaintiffs,
28 including, but not limited to, fiduciary duties of undivided loyalty, due care, and full disclosure of
29 material information.

215. As described herein, Defendant Maslon breached its fiduciary duties to Plaintiffs by making misrepresentations, concealing and failing to disclose material facts and failing to inform Plaintiffs of material information, and by acting for their own benefit and the benefit of others which actions conflicted with the best interests of Plaintiffs.

216. As the direct and proximate result of Defendant Maslon's breaches of fiduciary duty, Plaintiffs have been substantially damaged.

FOURTH CLAIM FOR RELIEF

(Aiding and Abetting Breach of Fiduciary Duty)

217. Plaintiffs incorporate by reference all prior paragraphs of this Complaint.

218. SFC, Scott and BOK each had a fiduciary relationship with and owed fiduciary duties to Plaintiffs.

219. SFC, Scott and BOK breached their fiduciary duties to Plaintiffs, as alleged herein.

220. Defendant Maslon was aware of the fiduciary relationship SFC, Scott and BOK had with Plaintiffs and the fiduciary duties they owed to Plaintiffs.

221. Defendant Maslon knew or should have known that SFC, Scott and BOK breached their fiduciary duties to Plaintiffs.

222. Defendant Maslon provided substantial assistance to SFC, Scott and BOK in breaching their fiduciary duties by, among other things, aiding, abetting, participation in and/or assisting in their fraudulent activity and other wrongful conduct.

223. Defendant Maslon acted intentionally and/or in concert with SFC, Scott and BOK and provided substantial assistance to them in breaching their fiduciary duty toward Plaintiffs.

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

FIFTH CLAIM FOR RELIEF

(Aiding and Abetting Misrepresentations and Omissions)

225. Plaintiffs incorporate by reference all prior paragraphs of this Complaint.

226. Scott and SFC, in connection with inducing Plaintiffs to enter into the Senior Loan transaction, knowingly, recklessly and/or negligently made misrepresentations of material fact and/or omitted to state material facts they were under a duty to disclose to Plaintiffs, as detailed herein.

1 227. Defendant Maslon was aware of SFC and Scott's relationship with Plaintiffs and that SFC
2 and Scott owed duties to Plaintiffs. Defendant Maslon knew that Scott and SFC knowingly, recklessly
3 and/or negligently made misrepresentations of material fact and/or omitted to state material
4 misrepresentations to Plaintiffs, in connection with inducing Plaintiffs to enter into the Senior Loan
5 transaction.

6 228. Defendant Maslon provided substantial assistance to SFC and Scott in making the material
7 misrepresentations to and/or omitting material facts from Plaintiffs by, among other things, aiding,
8 abetting, participating in and/or assisting in their wrongful conduct, as described in this Complaint.

9 229. As the result of Defendant Maslon's aiding and abetting, Plaintiffs were substantially
10 damaged in an amount to be proven at trial.

11 WHEREFORE, Plaintiffs pray for judgment against Defendant Maslon as follows:

- 12 A. For compensatory damages against Defendant Maslon, jointly and severally, in an
13 amount equal to all direct, consequential, and other damages Plaintiffs have
14 suffered, in amounts to be proved at the trial of this matter.
- 15 B. For punitive damages against the Defendant Maslon, jointly and severally, in
16 connection with the Predicate Claims in an amount to be determined by the Court,
17 but not to exceed three times compensatory damages.
- 18 C. Awarding to Plaintiffs their costs of suit, expenses of litigation, including but not
19 limited to expert fees and reasonable attorneys fees.

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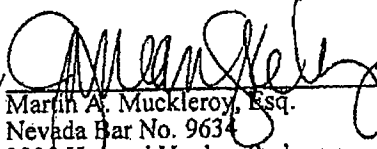
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1 D. Granting such other and further relief as the Court may deem just and proper

2 RESPECTFULLY SUBMITTED this 21st day of January, 2010.

3 COOKSEY, TOOLEN, GAGE, DUFFY & WOOG, P.C.

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EXHIBIT A

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Penny.Heaberlin@mason.com

March 22, 2005

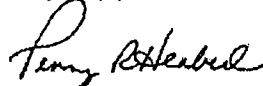
Gemstone LVS, LLC
7700 Las Vegas Boulevard #5
Las Vegas, Nevada 89123
Attention: Alex Edelstein, CEO

Re: Loans From Tharaldson Financial Group, Inc.

Dear Alex:

As you know, I have represented TFG and Scott Financial Group in connection with loans from TFG to Gemstone LVS, LLC. The purpose of this letter is to confirm that, based on my review of TFG's loan accounting, TFG has transferred \$4,500,000 of the original \$9,000,000 principal balance of the 12.5% land loan made by TFG on March 30, 2004 to the 14% construction loan secured by a \$104,500,000 deed of trust dated July 30, 2004. Accordingly, the amount that Gemstone LVS, LLC is legally obligated to pay to TFG under the \$9,000,000 land loan and related deed of trust has been reduced to a principal amount of \$4,500,000.

Very truly yours,



Penny R. Heaberlin

cc: Brad J. Scott
Gary D. Tharaldson

385332v1

EXHIBIT B

From: Brad J. Scott [brad@scottfinancialcorp.com]
Sent: Monday, August 02, 2004 11:32 AM
To: alex@gemstonedev.com; 'Philippe Pageau-Goyette'
Cc: Kyle Newman; Bill Spiry; 'Penny Heaberlin'
Subject: FW: Complete Set of Manhattan Documents
Attachments: Scott Financial Manhattan Condo Document Checklist_v2.DOC

Importance: High

Alex and Philippe:

Attached is an updated checklist of documents we need to have at the closing or shortly after as determined by the key.

Also I need to know who Alliance Mortgage, LLC is and why they have a lien filed on the land. This is showing up in the lien search.

Call me if you have any questions.

Thanks.

Brad J. Scott
President
Scott Financial Corporation
15010 Sundown Drive
Bismarck, ND 58503
701-255-2215 Office
701-223-7299 Fax
701-220-3999 Mobile
brad@scottfinancialcorp.com

-----Original Message-----

From: Penny Heaberlin [mailto:Penny.Heaberlin@maslon.com]
Sent: Monday, August 02, 2004 12:33 PM
To: brad@scottfinancialcorp.com
Subject: Complete Set of Manhattan Documents

Penny R. Heaberlin
Maslon Edelman Borman & Brand, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Phone: (612) 672-8315
Fax: (612) 642-8315
email: Penny.Heaberlin@maslon.com

LENDER'S LOAN DOCUMENT CHECKLIST

Our File No.: _____

BORROWER:

Gemstone LVS, LLC
7700 Las Vegas Blvd., #5
Las Vegas, NV 89123

LOAN AMOUNT: \$104,500,000 (\$65,600,000 Phase I and \$38,900,000 Phase II)

GUARANTORS: NONE

BORROWER'S COUNSEL:

Telephone: _____
Fax: _____
Email: _____

BORROWER CONTACT:

Alexander Edelstein
Email: _____

LENDER:

Tharaldson Financial Group, Inc.
45 Club Vista Drive
Henderson, NV 89052
Telephone: (701) 235-1167
Fax: (701) _____
Email: _____

LENDER'S COUNSEL:

Penny Heaberlin
Maslon Edelman Borman & Brand, LLP
Telephone: (612) 672-8315
Fax: (612) 642-8315
Email: penny.heaberlin@maslon.com

CLOSING DATE: July 30, 2004

TITLE: Nevada Title Company

PRECLOSING ITEMS		RESPONSIBLE PARTY		DRAFT	REVIEWED	COMPLETED/AVOIDED
1.	Organizational Documents a. Gemstone LVS, LLC: Articles of Organization and Operating Agreement	Borrower			X	X
2.	Certificate of Good Standing	Ordered by Lender Counsel			X	X
3.	Title Commitment/Exception Documents (including Zoning, Endorsement, Comprehensive Endorsement and Endorsement Deleting Creators Rights Exclusion)	Title Company				
4.	Tax and Judgment Lien Searches, Assessment Searches	Title Company/Lender Counsel				
5.	UCC Search, Secretary of State	Lender Counsel			X	X
6.	Appraisals (with Assignment Letter)	Bank				
7.	Survey/Equal Plat	Borrower			X	
8.	Zoning Letter	Borrower			X	
9.	Floodplain or Insurance	Lender			X	
10.	Environmental Reports (Phase I and, if required by Lender, Phase II)	Borrower				
11.	Insurance Policies a. Casualty/ Liability (Lender named as Additional Insured) b. Hazard (Lender named as Mortgagee) c. Business Interruption d. Worker's Compensation e. Builder's Risk	Borrower				
12.	LOSS PAYEE TO THE LENDER	Borrower			X	
13.	Construction Contracts	Borrower				

14. Sworn Construction Contract and Project Cost Statement—AIA FORM

Borrower

CLOSING DOCUMENTS

1. Notes	Lender Counsel		
a. \$65,600,000 Phase I			
b. \$38,909,000 Phase II			
2. \$104,500,000 Deed of Trust and Security Agreement with Assignment Rents and Fixture Financing Statement (Construction)	Lender Counsel		
3. Loan Agreement	Lender Counsel		
4. UCC-1—Delaware Secretary of State	Lender Counsel		
5. Environmental and Toxic Mold Indemnity	Lender Counsel		
6. AIA Indemnity	Lender Counsel		
7. Opinion of Counsel	Borrower Counsel	(form provided by Lender Counsel)	
8. Assignment of Construction Contracts Plans and Specification	Lender Counsel		
9. Consent of Architect	Lender Counsel		X
10. Consent of Contractor	Lender Counsel		X
11. Borrowers' Resolution	Borrower		
12. Marked up Title Commitment	Title Company		
13. Fees and expenses: Loan fees Legal title and other closing expenses	Borrower Borrower Borrower		

14. Closing Statements

Title Company

33855973
CLOSING STATEMENTS REQUIRED TO BE EXECUTED AND ORDERED DELIVERED TO THE LENDER OR
LENDER AT OR PRIOR TO ANY FUNDING AVAILABLE AFTER THE CLOSING.

POST CLOSING DOCUMENTS REQUIRED TO BE DELIVERED TO THE LENDER.

EXHIBIT C

MASLON

MAULDER PILLER FISHBEIN & GARDNER, LLP

F 612.672.8200
F 612.672.8397
www.maslon.com

3300 WELLS FARGO CENTER
90 SOUTH SEVENTH STREET
MINNEAPOLIS, MINNESOTA
55402-4140

Penny Heaberlin
Direct Phone: 612-672-8315
Direct Fax: 612-642-8315
Penny.Heaberlin@maslon.com

January 30, 2008

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

Re: \$110,000,000 Senior Debt Loan Agreement with Gemstone Development
West, Inc. dated January 22, 2008 (the "Senior Debt Loan Agreement")

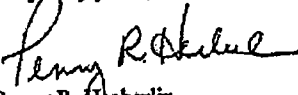
Dear Brad:

I have represented Scott Financial Corporation (the "Lender") in connection with the Senior Debt Loan Agreement and the loans to be made thereunder (the "ManhattanWest Vertical Loans"). The purpose of this letter is to advise you that I have reviewed the conditions precedent status for the advances under the Senior Debt Loan Agreement. Based on my review, the Lender is in position to fund the ManhattanWest Vertical Loans, provided that each Participant funds its pro rata share.

With respect to whether the required documents have been duly authorized, executed or delivered by the Borrower or its related parties, or that any such document is the legal, valid, binding or enforceable obligation of the Borrower or its related party, I have relied on the Opinion of Counsel that has been delivered to the Lender by the Borrower's legal counsel, Holland & Hart, dated January 22, 2008.

If you have any questions or comments regarding the matters set forth herein, or with respect to any other aspect of this transaction, please so advise.

Very truly yours,


Penny R. Heaberlin

569649v1

2009-03-20 BOK - Club Vista 000028

EXHIBIT D

AFFIDAVIT OF PENNY R. HEABERLIN

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

Penny R. Heaberlin, being first duly sworn on oath, deposes and states:

I am a partner in the Financial Services Group at Maslon Edelman Borman & Brand, LLP.

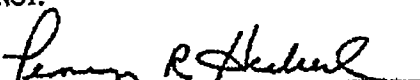
I frequently represent Scott Financial Corporation in drafting its loan documentation. I drafted the attached Guaranty executed by Tharaldson Motels II, Inc. (the "Corporate Guaranty"). I also drafted the other loan documents related to the Manhattan West condo project, including Gary Tharaldson's personal Guaranty (the "Personal Guaranty").

Like most lenders, Scott Financial Corporation generally uses the law of its home state (North Dakota) to govern its loan documents unless there is some significant reason not to do so. Some of those reasons involve enforcement of local real estate laws, residence of individual guarantors, or in some cases the preference of participating banks or their counsel.

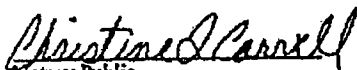
North Dakota law was chosen to govern the Corporate Guaranty because both Scott Financial Corporation and Tharaldson Motels II, Inc. are incorporated and located in North Dakota and no real estate was involved that would require use of another state's real property laws for enforcement.

Nevada law was chosen to govern the Personal Guaranty because Gary Tharaldson is a resident of the state of Nevada.

FURTHER YOUR AFFIANT SAYETH NOT.


Penny R. Heaberlin

Subscribed and sworn to before me
this 16th day of August, 2009


Notary Public



669617.1



Financial Corporation

**LAND, PRE-DEVELOPMENT & CONSTRUCTION
CONDITIONAL FINANCING COMMITMENT**

April 27, 2007

Alexander Edelstein
Gemstone Apache, LLC
7700 Las Vegas Blvd. Suite #5
Las Vegas, NV 89123

RE: ManhattanWest Phase 1
Land, Pre-Development & Construction Conditional Financing Commitment

Dear Alex:

Scott Financial Corporation (SFC) "Lender" is pleased to offer this Land, Pre-Development & Construction 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 Phase 1 plans to further continue the pre-development and vertical construction of 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 all collectively making up the proposed multiphase mixed-use project defined as ManhattanWest located at Russell and Interstate I-215 in Las Vegas.

The following terms and conditions within this letter are provided to establish the framework for both the financing structures and may not be selected independent of each other.

The Construction Financing Proposal would be followed executed only after acceptable due diligence is completed inclusive of an industry review, appraisal, underwriting as well as complete Project analysis by the Lender.

This comprehensive financing effectively compliments your existing Land financing currently in place and timely extends additional financing as Mezzanine Debt for further marketing, architect and design development work on the Project.

15010 Sundown Drive • Bismarck, ND 58503
Office: 701.255.2215 • Fax: 701.223.7299

A licensed and bonded corporate finance company.

SCOTT-012474

MANHATTAN WEST DEVELOPMENT CORPORATION FINANCIAL SUMMARY

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 Types: 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

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: Assignment of Manhattan Distributions
Project vertical construction financing
Secondary: Other Investor Equity
Tertiary: Liquidation of assets

Maturity:

November 1, 2007
Note(s) are to be restructured into one credit facility
after the collection of Manhattan condo sales proceeds and distributions

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
Earned and paid in April at loan closing to CVFS
(applied to the \$2,300,000 in credit facility below)
Note: SFC Origination Fee(s) must be negotiated directly with the Borrower
and are not included in the fees above paid to CVFS

Transaction Costs:

All Transaction Costs will be paid 100% by Borrower with a reasonable
estimated deposit of \$10,000 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: 2% until maturity based on Commitment Amount
Split 50% CVFS & 50% SFC

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 due to Alex Edelstein

Secondary Repayment: Restructuring with vertical Construction Financing

Tertiary Repayment: Liquidation of all Collateral and Security

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 \$75 MM)
CVFS (Maximum \$25 MM)
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 September 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:

September 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

* Note CVFS receives the 14% on any of the \$25 million it funds

Origination Fee:

\$ 46 Million @ 5% \$2,300,000
Less fee collected on 4/07 for the \$8 Million (\$400,000)
100% earned and paid at loan closing to CVFS
SFC Origination Fee(s) must be negotiated directly with the Borrower and
are not included in the fees above
Upon the first draw anniversary date of the note the greater of 5% of the
Loan Commitment or the Outstanding Loan Balance is accessed again and
prorata monthly thereafter until the Loan Commitment has expired.
Borrower will get monthly credit for Project applied sales and reductions in
the outstanding Loan Commitment required for the project.

**Guarantor &
Subordination Fee:**

\$100 Million Loan Commitment @ 5% \$5,000,000
100% earned at loan closing to CVFS
Upon the first draw anniversary date of the note the greater of 5% of the
Loan Commitment or the Outstanding Loan Balance is accessed again and
prorata monthly thereafter until the Loan Commitment has expired.
Borrower will get monthly credit for Project applied sales and reductions in
the outstanding Loan Commitment required for the project.

Transaction Costs:

All Transaction Costs will be paid 100% by Borrower with a reasonable estimated deposit of \$150,000 required upfront.

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:

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 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 are applied as follows:
Senior Debt Note: First to be paid back
Mezzanine Note(s): Second to be paid back
Personal Loan: Third to be paid back

Primary Repayment:

ManhattanWest Sales Proceeds
Assignment of Manhattan Distributions controlled by Alex Edelstein

Secondary Repayment:

Liquidation of all Collateral and Security.

**THE DEVELOPMENT OF ADDITIONAL FINANCIAL COMMITMENTS
UNDER WRITING OF LENDERS**

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.

Key Man Life Insurance on Alex Edelstein in the amount of \$25 million will be required and must be 100% assigned to SFC.

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 LOAN AGREEMENT CONDITIONS AND UNDERTAKINGS

SFC will attempt to secure 100% of the Construction Loan from third party commercial bank Participants at an interest rate that allows for Tharaldson to secure a 5% Subordination and Guarantor spread.

SFC however must secure a minimum of \$75 Million of the \$100 Million in Participations prior to closing the loan on or before September 2007.

CVFS will receive 14% yield on any funds deployed/advanced from the \$25 million that is not yet participated out.

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 sales and must generate minimum pre-sale revenue as presented below:

Commercial/Retail space: Approximately 25% of gross square footage
Buildings 2 & 3 but not less than 25% (\$15 Million) of forecasted revenues

Element House: Approximately 35% of the units (27)
Building 7 (76 units) but not less than 35% (\$13 Million) of forecasted revenue

Mid-Rise: 55% of the units (84)
Buildings 8 & 9 (152 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: 5% upon signing contract
Buildings 2 & 3 2.5% additional at start of construction (less Broker 1% fee)
Total 6.5% @ \$15 Million is \$1 Million deposit

Element House: \$1,000 signing reservation
Building 7 (76 units) 10% upon signing contract (June)
10 additional at start of construction (August)
Total 20% @ \$13 Million is \$2.6 Million deposit

Mid-Rise: \$1,000 signing reservation
Buildings 8 & 9 (152 units) \$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

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. Must be sold out of all Manhattan units before the personal loan is paid in full
6. Deferred Phase 1 Developer Fee (5%) and Management Fee (1%) approximately \$6 Million
7. Commitment is for Phase 1 financing only
8. Monthly Lender Inspection and qualified third party inspections
9. Voucher Control on all Draws
10. Proper Insurances all assigned to Lender
11. Acceptable Abacus feasibility analysis on entire project
12. Acceptable Lender approved Project Budget
13. Acceptable GMP Contract assigned to Lender
14. Assignment of all contracts
15. Assignment of all existing Profit Sharing Agreements between TFG and Gemstone
16. Lender approved deposit control account
17. First draw to occur on or before November 2007
18. 2006 & 2007 tax liability event for Manhattan 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. Lender & Participant verify cash flow and IRR calculations

This Conditional Financing Commitment 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 Worksheet

The terms as presented to the Participant are accepted.

Club Vista Financial Services, LLC

By: Gary D. Tharaldson
Gary D. Tharaldson
Its Managing Member

Date: 4-30-07

1
COPY

1 DISTRICT COURT
2 CLARK COUNTY, NEVADA

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

8 Plaintiffs,

9 vs.

Case No.: A579963
Dept. No.: XIII

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

19 Defendants.

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

22 of

23 GARY D. THARALDSON

24 July 9, 2010

25 9:10 O'clock A.M.

Taken at: HOTEL DONALDSON
101 Broadway
Fargo, North Dakota

REPORTER: DOUGLAS T. KETCHAM

(PURSUANT TO NOTICE)

DOUG KETCHAM & ASSOCIATES

1 Q. What kind of limitations did Mr.
2 Scott have in terms of being your agent with
3 respect to the ManhattanWest transaction?

4 A. What kind of, Brad Scott, he said he
5 could handle everything from start to finish and
6 so that he would make sure that all of these
7 things were done and done properly and so that
8 gave, not only as an agent, but as a fiduciary to
9 me on the loan he said that I could rely on him
10 and he knows how to do it and he does it, he's
11 never had a bad loan in his life and so I
12 believed him and I trusted him and unfortunately
13 today, I probably wouldn't, today I wouldn't
14 trust him.

15 Q. Well, that's clear. One of the things
16 that Scott Financial was tasked with doing was
17 attempt to secure 100 percent of the construction
18 loan financing from third party commercial banks,
19 is that correct?

20 A. Yes.

21 Q. And so Mr. Scott had authority from
22 you in order to syndicate out to other
23 participating banks as much of CVFS loan
24 commitment, didn't he?

25 MR. ARONSON: Form. Go ahead.

—DOUG KETCHAM & ASSOCIATES—

1 A. He could syndicate it out if he
2 wanted, yes.

3 Q. And as far as you were concerned on
4 behalf of CVFS if all \$25 million was syndicated
5 out to third party commercial banks, you were
6 going to be happy with that?

7 A. That would have been okay with me,
8 yes.

9 Q. And with regard to his efforts to
10 secure financing from these third party
11 commercial banks, did you, Mr. Tharaldson, or any
12 of your entities that are a party of this case
13 say these are things you can't do, Mr. Scott?

14 A. I think the thing is in the
15 commitment letter, basically laid out what he
16 could do here so he should have. It was, he was
17 going to follow this commitment letter in placing
18 that debt.

19 Q. Okay. Looking at page 11 of 11, Mr.
20 Tharaldson, on Exhibit 1095, that is your
21 signature on the last page, is it not?

22 A. Yes.

23 Q. Do you see on the third paragraph
24 from the top it says, "This document supersedes
25 all other verbal or written correspondence and

—DOUG KETCHAM & ASSOCIATES—

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

SCOTT FINANCIAL CORPORATION, a foreign
corporation,

Counterclaimant,

v.

GARY D. THARALDSON,

Counterdefendant.

CONFIDENTIAL

VIDEOTAPED DEPOSITION OF BRADLEY J. SCOTT

VOLUME III

PAGES 409-630

LAS VEGAS, NEVADA

NOVEMBER 16, 2010

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

1 In this situation, Gary Tharaldson controlled the
2 assets of all of the family, so this probably was not a high
3 priority.

4 Q. Are you saying, you didn't believe it was
5 necessary to get a corporate resolution for TMI2?

6 MR. JONES: Object to the form of the question to
7 the extent it calls for a legal conclusion.

8 THE WITNESS: I don't recall discussion about it
9 at all. I don't recall the topic coming up.

10 BY MR. ARONSON:

11 Q. Did you ever consider an amendment to the April
12 27th, 2007, commitment letter to add the TMI2 guaranty as
13 part of the commitment?

14 A. No.

15 Q. Why not?

16 A. Because it wasn't applicable to the borrower.

17 Q. The commitment letter that Gary Tharaldson signed,
18 did you ever consider amending that to include the TMI2
19 guaranty?

20 MR. CLAYMAN: Object to form.

21 MR. JONES: I'll join that.

22 THE WITNESS: No. It was required for the
23 closing. Tharaldson was well aware of it and we presented
24 the terms of the guaranty to him and he approved them.

25 We sent him a guaranty and he signed it, which he

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

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

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

12 Q. So that issue was not discussed?

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

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

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

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

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

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

3 Q. Anything else?

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

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

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

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

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

21 A. Just the ones that he changed.

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

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

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Bank of Oklahoma Tower
P.O. Box 2300
Tulsa, Oklahoma 74102-2300

TIM JAMES
Senior Vice President
Commercial Real Estate
Phone (918) 588-6840
Fax (918) 588-6716
tjames@bokf.com

December 20, 2007

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

Re: Gemstone Development West, Inc.
Manhattan West Project

Dear Brad:

I am pleased to advise you that Bank of Oklahoma, N.A. (Bank) has formally approved financing for the above referenced note, subject to the following terms and conditions:

Borrower:	Gemstone Development West, Inc.
Project:	Manhattan West Project Las Vegas, NV
Loan Amount:	\$24,000,000, in a \$110,000,000 senior debt facility.
Maturity:	12/31/09
Interest Rate:	8.5%, Fixed.
Terms & Conditions:	
Co-Lead:	Bank of Oklahoma (BOK) will act as co-lead on the subject credit facility with Scott Financial Corporation (SFC). SFC will act as administrative lead on the credit, with BOK concurrence required on all advances and any changes in the terms or conditions of the credit.
Repayment:	Interest due monthly beginning the first of each month following a full 30 days from the first advance. Principal due from 100% of all condominium sale proceeds until paid in full.
Collateral:	Senior deed of trust on 21 acres at Highway 215 and Russell Road in Las Vegas, NV and Phase I improvements to be built consisting of 228 condominium units and 2 commercial buildings consisting of 195,000 square feet. First security interest in all non-refundable deposit accounts and all upgrade deposit accounts. Assignment of \$25,000,000 life insurance policy on the developer, Alex Edelstein.

SCOTT-114825

BOK App. 125

Prepayment Penalty: 50 basis point fee if the loan is prepaid from an outside lender. BOK would strongly recommend a prohibition against any prepayment of the loan during the construction funding period from any source except sales proceeds, or permanent lender refinancing leased commercial space.

Guaranty: Unlimited guaranty from Mr. Gary D. Tharaldson for the life of the subject loan. ~~Unlimited guaranty from Tharaldson Mobile II, Inc. (TMI II) until such time that residential condominium sales contracts (loan approved buyers with 5% deposit) have reached a minimum of \$75,000,000; and office condominium sales contracts plus capitalized net-lease space revenue (net lease revenue capitalized at 7.5%) have reached a minimum of \$25,000,000; for a total pre-sale / pre-leased value of \$100,000,000; and Tharaldson Family land sales of \$150,000,000 have been closed or the ESOP notes receivable of \$331,000,000 have been collected. The TMI II guaranty is for the benefit of Bank of Oklahoma exclusively and will be part of a separate agreement between TMI II and Bank of Oklahoma.~~

Covenants: Mr. Tharaldson must maintain a minimum net worth of \$500,000,000 measured annually until all loans are paid in full. Conditions precedent to the first advance will require \$60,000,000 in revenue from presale / leases. Release price is 100% of residential or office condominium sales.

Financial Reports: Borrower will provide monthly construction progress reports, sales reports, and advance requests. Year-end financials will be provided on the borrower and guarantor.

Hazard Insurance: Borrower will maintain hazard insurance on the collateral properties.

Expenses: Borrower shall pay any legal expenses associated with the documentation related to the credit facility.

Other Requirements: Other customary terms and conditions associated with a construction line of credit.

Closing: To occur prior to January 31, 2008, unless mutually extended.

Sincerely,

Tim James

**DECLARATION OF BRADLEY J. SCOTT IN SUPPORT OF BANK OF OKLAHOMA'S
MOTION FOR SUMMARY JUDGMENT ON COUNTS ONE AND TWO**

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 the owner and primary officer of Scott Financial Corporation ("Scott Financial").

3. I was never an agent for the Bank of Oklahoma, N.A. ("BOK") or for Tim James in my individual capacity.

4. Scott Financial's relationship with BOK was fully and accurately set forth in the Participation Agreement between BOK and Scott Financial dated January 22, 2008, (the "Participation Agreement").

5. BOK never appointed Scott Financial as its agent except for the limited administrative purposes described in the Participation Agreement.

6. BOK never gave Scott Financial the authority to speak for BOK or to bind BOK on any matters.

7. BOK never directed Scott Financial or me with regard to the syndication of the Manhattan West loan.

8. One of the conditions of BOK's participation in the Manhattan West loan was a guaranty from Tharaldson Motels II, Inc.

9. I discussed this condition extensively with Gary Tharaldson in Scott Financial's role as the loan originator of the Manhattan West loan.

10. Mr. Tharaldson agreed to furnish the guaranty from Tharaldson Motels II, Inc. in part because it relieved Club Vista Financial Services, Inc. from a substantial part of its participation agreement contained in the April 27, 2007, financing commitment.

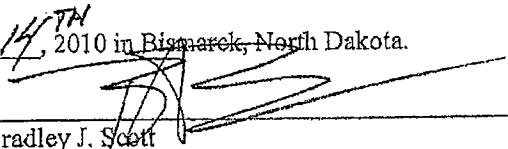
11. BOK never gave me the authority to speak for BOK or to bind BOK on any matters. The Participation Agreement is the exclusive agreement governing the relationship between Scott and BOK in regard to the closing of the Manhattan West transaction.

12. Scott Financial's efforts to fully originate and find the requisite participants for the Manhattan West loan did not make it an agent for BOK in any manner except for the terms and conditions set forth in the Participation Agreement.

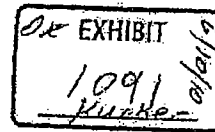
13. I never told Gary Tharaldson or any of his employees that Scott Financial or I was authorized to take actions on behalf of BOK or to speak for BOK.

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 14TH, 2010 in Bismarck, North Dakota.



Bradley J. Scott
Individually and as Owner of Scott Financial Corporation



From: Ryan Kucker
Sent: Tuesday, December 11, 2007 10:01 PM
To: Brad Scott
Subject: RE: ESOP Notes receivable
Attachments: Image002.jpg

See my comments below.

Ryan Kucker, CPA
Tharaldson Companies
10421 Hostage Circle
Las Vegas, NV 89135
Ph: 702-463-0666
Fax: 702-977-7184
Cell: 702-469-2514

From: Brad Scott [mailto:brad@scottfinancialcorp.com]
Sent: Tuesday, December 11, 2007 7:07 PM
To: Ryan Kucker
Subject: RE: ESOP Notes receivable

Ryan,

Tim has made it through the first screening level of review.

They gave him a lot of input and questions to work through before he goes to the Loan Committee as you can see below.

Can you respond to these as best you can and then let's discuss these and the Cash Flow in detail on Thursday before I get back to Tim.

Thanks.

Brad J. Scott
Scott Financial Corporation
15010 Sundown Drive
Barnack, MD 55503
W: 701.255.2215
M: 701.223.3999
F: 701.223.7299
brad@scottfinancialcorp.com



Email is not always a secure communication system. Caution should always be given to confidential information. If you are in doubt, please contact the sender. Scott Financial Corporation cannot be held responsible for any loss or damage caused by the use of email. If you are in doubt, please contact the sender.

From: James, Tim [mailto:James@mall.bok.com]
Sent: Tuesday, December 11, 2007 5:54 PM
To: Jason Ulmer
Cc: Brad J. Scott
Subject: RE: ESOP Notes receivable

Brad

Bad news and Good news. I had a detailed discussion with several of the key approvers for our credit request. Due to the size of the transaction and the related issues, Las Vegas housing, sub-prime, and the complexity of Gary's financial statement, in addition to the ethanol exposure, my submission for this week's loan committee got tabled until next week, so I can answer further questions. I think we made real progress towards getting an approval though, but we've got to address everyone's questions:

Cash/cash flow

1. What is Gary's and the "Family" cash position right now? So, we have approx \$40M in available funds as of today. I have attached the current projected BS as of today and the next 4 months. Depending on what Gary decides to do with the Fort Worth Proceeds and other potential deals this could change tomorrow.
2. What are the main sources of the interest on the cash flow projections? Brad these are your loans we participate in, ESOP interest paid semi annually and several small loans.
3. What are the primary loan maturities that comprise the sources of cash on the cash flow projections. Does he want a schedule with all the maturities? I could probably put something together if that's what he's looking for.
4. I know you've said Gary is holding cash in order to keep some powder dry for various events, but would he agree to hold some amount for some performance posted on the project. We don't have any cash today and not likely even if we did.
5. Or, would he allow some other entity like (TMI II) to guarantee the debt (even if it's side debt for Bank of Oklahoma) until one of his liquidity events occurs, ie ESOP note payoff, or several land sales. Gary may be willing to do this as he is usually open to guarantees.

Real Estate Held for Sale

1. Please clarify what properties are under contract and the contract sales price from the 9/30/07 BCL. It looks like \$160mm to \$180mm.

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CVFS-RK022223

BOK App. 129

Under Contract as of today with Escrow opened:
Fort Worth 67M they closed on 2004 in November balance to close Dec'don
Atlanta 34M first qtr 2005
Houston 46M first qtr 2005
Baseline 5.2M first qtr 2005
Total 146.2M

There are 2 LOI's on Urban Village with a purchase price around \$120M

Deposit Bonds

1. How many of the existing sales are using deposit bonds.
2. What is the loan approval criteria for the buyers that are notes as bank approved on the sales list (sub-prime loans)
3. The issuer of the bond is QBE Specialty Insurance Company, which must be a sub or one of many entities in the QBE Group of Companies. Are there any assurances or any other evidence of the bond issuer's ability to perform. We pulled the "Group's" financial statements, which are very strong, but the typical cynical question is that the parent isn't obligated on the debt and the sub (issuer) of the bond may not be able to perform. I know this is a stretch, but...

ESOP

1. What is the NOI on the ESOP properties, in the event the sale goes sideways and the ESOP started paying Gary principal, how much cushion is there in that cash flow. The ESOP is very cash heavy, but are not required to pay principal until 2050 only interest until then.
2. What's Gary's fall back a sale doesn't happen? We'll continue to collect our interest. We are not counting on the sale.

Co-Agent

1. Didn't NSA share in the fee or some skim of the take as co-agent in Manhattan.

Please think about these and let's talk Wednesday or Thursday.

From: Jason Ulmer [mailto:jason@scottfinancialcorp.com]
Sent: Tuesday, December 11, 2007 4:37 PM
To: James, Tim
Cc: Brad J. Scott
Subject: RE: ESOP Notes receivable
Importance: High

Tim

To answer your email questions from today:

1. There is no debt against the ESOP Notes and they are not assigned/pledged to anybody.
2. Contingent liabilities consist of: (See attachment for details)
 - a. Lines of Credit that have not been drawn upon
 - b. Personal Guarantees on Family Hotel Debt (Little exposure - hotels are profitable and have low 55% LTV)
 - c. Personal Guarantees on Condo Debt (Little exposure - Manhattan debt \$46.5MM completely paid off as of 11-1-07)
 - d. Personal Guarantees on Airplane Debt

Please let me know if you would like anything further

Jason Ulmer
Scott Financial Corporation
15010 Sundown Drive
Bismarck, ND 58503
W: 701.255.2215
F: 701.223.7209
jason@scottfinancialcorp.com

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From: James, Tim [mailto:James@mail.bokd.com]
Sent: Tuesday, December 11, 2007 2:36 PM
To: Brad Scott (brad@scottfinancialcorp.com)
Subject: ESOP Notes receivable

Brad

Are the ESOP notes receivable unencumbered?

.....
The company reserves the right to amend statements made herein in the event of a mistake. Unless expressly stated herein to the contrary
.....
The company reserves the right to amend statements made herein in the event of a mistake. Unless expressly stated herein to the contrary
.....

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CVFS-RK022224

BOK App. 130

1	straightened this out."	03:55
2	You see that?	03:55
3	A. Yes.	03:55
4	Q. So it would appear, would it not, that	03:55
5	Mr. Kucker clearly had a discussion about the TM2	03:55
6	guarantee with Mr. Jason Ulmer before closing;	03:55
7	correct?	03:55
8	A. No. No, not according to this e-mail.	03:55
9	Q. And why do you say that?	03:55
10	A. Well, if you look at the e-mail, what it	03:55
11	says is, SFC is drafting the TMI conditional	03:55
12	guarantee for the ManhattanWest project. Can you	03:55
13	please forward me the signature block.	03:56
14	And then you have Tharaldson Motels,	03:56
15	Incorporated, below and the signature block.	03:56
16	Q. Right. And -- and it says -- and Ryan	03:56
17	says, "What is this for?" --	03:56
18	A. Uh-huh.	03:56
19	Q. -- to Jason. And Jason then informs Brad	03:56
20	that he's spoken with Ryan, and that they've	03:56
21	straightened out the -- the issue; correct?	03:56
22	A. Uh-huh. I don't know why TMI would	03:56
23	guarantee it.	03:56
24	Q. I understand that you -- you don't know	03:56
25	why that would be the case, but the fact is it	03:56

1 appears that Ryan Kucker was -- had a discussion 03:56
2 about need for this guarantee with Jason Ulmer; 03:56
3 correct? 03:56
4 MR. ARONSON: Form. 03:56
5 Go ahead. 03:56
6 THE WITNESS: Yes, it would appear that. 03:56
7 BY MR. JONES: 03:56
8 Q. Okay. 03:56
9 A. But -- 03:56
10 Q. That's my only question. 03:56
11 A. Okay. 03:56
12 Q. All right. If we can, let's go back to 03:56
13 the complaint at paragraph -- 03:56
14 (A brief off-the-record discussion was 03:56
15 held.) 03:56
16 THE WITNESS: Yeah. It's TMI, yeah, 03:57
17 right. 03:57
18 BY MR. JONES: 03:57
19 Q. Right. It says TMI. 03:57
20 A. Yeah. 03:57
21 Q. Right. 03:57
22 A. And they -- and they never gave the 03:57
23 guarantee, right. 03:57
24 Q. So let me go back to paragraph 124, and 03:57
25 looking at paragraph -- subparagraph (f), on 03:57

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,)

) Case No. A579963

) Dept. No. XIII

vs)

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

Defendants.)

AND RELATED CROSS-CLAIMS.)

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

LST JOB NO. 121867

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

* CONFIDENTIAL *



1 A. And he seemed more relaxed. I mean, he 09:47
2 was just really nervous once -- once I said -- told 09:47
3 him it was in default, you know. 09:47

4 Q. And by the way -- 09:47

5 A. And the thing is -- you know, the thing 09:47
6 is, I said, you know, Brad's going to have to 09:47
7 notify the banks at that time that they're in 09:47
8 default. 09:47

9 Q. By the way, why was it in default, in 09:47
10 your opinion? 09:47

11 A. Because according to the loan covenants, 09:47
12 they had to have 60 million in qualified sales, and 09:47
13 it's a violation of a loan covenant. 09:47

14 Q. Had to have how much in sales? 09:47

15 A. 60 million. That was on the commitment 09:47
16 letter to me too. 09:47

17 Q. And -- and -- well, I was going to say, I 09:48
18 thought you didn't read the loan documents. 09:48

19 A. I didn't read the loan documents. 09:48

20 Q. So how did you know about that 09:48
21 \$60 million covenant? 09:48

22 A. No, that -- that I assumed. I assumed 09:48
23 that Brad -- the covenants he put in any letter, 09:48
24 that he would have put in the loan document. 09:48

25 Q. You assumed that. 09:48

1 Q. But your testimony is here today to -- to 09:49
2 the jury is, you don't know any of this; right? 09:49
3 You're just -- you're just supposing because you 09:49
4 didn't read any of the documents; correct? 09:49

5 A. That's correct. 09:49

6 MR. ARONSON: Form. 09:49

7 Go ahead. 09:49

8 THE WITNESS: That's correct. 09:49

9 BY MR. JONES: 09:49

10 Q. Okay. All right. So you believe there 09:49
11 was a default because of a \$60 million presale 09:49
12 requirement in the loan documents; is that my -- is 09:49
13 that -- 09:49

14 A. I -- I know in my commitment letter there 09:49
15 was. So I know that if -- if -- if Brad did what 09:50
16 he said he was going to do and put that 09:50
17 information -- and -- and did the loan documents 09:50
18 according to what he -- he said he would protect 09:50
19 me, then it should have been in the -- in the 09:50
20 loan -- loan document. 09:50

21 Q. Okay. By the way, did you have a -- you 09:50
22 never signed a -- any kind of a fee agreement with 09:50
23 the Maslon law firm, did you? 09:50

24 A. Did I sign a fee agreement? 09:50

25 Q. Yes, sir. 09:50

1 understanding of the -- of the guarantee once you 11:04
2 read it, irrespective of any conversations you had 11:04
3 with counsel. 11:04

4 In other words, once you read it, did you 11:04
5 understand it? 11:04

6 A. Not really. 11:04

7 Q. All right. So why -- why not? Was it 11:04
8 incomprehensible? 11:05

9 A. You know, that's a -- that's a -- you 11:05
10 know, I know how to build motels and I know how to 11:05
11 finance them. But when you get to the legal 11:05
12 documents, it -- it -- I really have a difficult 11:05
13 time understanding them. And that's why I've 11:05
14 elected not to read legal documents, because all it 11:05
15 does is it frustrates me. So I hire great people 11:05
16 to do that stuff for me. 11:05

17 Q. Okay. Just to be clear, too, with 11:05
18 respect to the ManhattanWest loan documents, did 11:05
19 you -- did you sign -- as far as you know, did you 11:05
20 sign all those documents? 11:05

21 A. The ManhattanWest? 11:05

22 Q. Yes, sir. 11:05

23 A. I'm not sure. 11:05

24 Q. Have you looked at them all? Have you 11:05
25 looked -- 11:05

1 A. Did I sign -- did I sign all -- go ahead. 11:05
2 Repeat the question. 11:05

3 Q. Yes. Did you sign the commitment letters 11:05
4 that relate to this case, to your knowledge? 11:05

5 A. Yes, I did. 11:05

6 Q. Did you sign -- did you sign on behalf of 11:05
7 Club Vista Financial Services on the senior debt, 11:05
8 the \$400,000 of senior debt that Club Vista 11:06
9 committed to? 11:06

10 A. I would think -- I -- I don't know, but I 11:06
11 would assume I signed them. 11:06

12 Q. Did you sign the guarantee? The 11:06
13 guarantee -- 11:06

14 A. For Club Vista? 11:06

15 Q. No. For Gary Tharaldson's guarantee for 11:06
16 the ManhattanWest project. 11:06

17 A. You know, what I did was I signed the 11:06
18 signature pages that were put in front of me. I 11:06
19 don't know if they're a guarantee or not a 11:06
20 guarantee. 11:06

21 Q. Now, isn't it true that Ryan Kucker put 11:06
22 those pages in front of you to sign? 11:06

23 A. That's correct. 11:06

24 Q. And so Mr. Kucker had possession and 11:06
25 control of those documents, at least at some point 11:06

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MORRILL & ARONSON P.L.C.
ATTORNEYS AT LAW

K. LAYNE MORRILL
MARTIN A. ARONSON
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November 15, 2010

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*Re: Club Vista Financial Services, L.L.C., et al. v. Scott Financial Corporation, et al.
Nevada District Court Cause No. A 579963*

Dear Counsel:

Based on her examination and work last week, Sandra Lines has promptly advised us over the telephone that the signature on the TMII Guarantee appears to be the signature of Gary Tharaldson.

Therefore, there will be no need for the hand-delivery of additional original documents to Sandra Lines on Friday, November 19th, as had originally been contemplated; and, there will be no expert report filed on this issue.

H:\10004.DIR\THARALDSON\226 Counsel ltr.wpd

November 15, 2010

Page 2

Thank you for your attention to this matter.

Very truly yours,

MORRILL & ARONSON, P.L.C.

A handwritten signature in cursive script, appearing to read "Martin Aronson", with a long horizontal flourish extending to the right.

Martin A. Aronson

MAA/lk

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.) Case No.
THARALDSON,) A579963

Plaintiffs,) Dept. No.
v.) XIII

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

Defendants.)

SCOTT FINANCIAL CORPORATION, a foreign)
corporation,)

Counterclaimant,)

v.)

GARY D. THARALDSON,)

Counterdefendant.)

CONFIDENTIAL

VIDEOTAPED DEPOSITION OF GARY D. THARALDSON

VOLUME IV

PAGES 950 THROUGH 1114

LAS VEGAS, NEVADA

SEPTEMBER 8, 2010

REPORTED BY: HOLLY J. PIKE, CCR NO. 680, RPR, CSR
LST JOB NO.: 126486

* CONFIDENTIAL *

1 BY MR. CLAYMAN:

2 Q. Okay.

3 A. Or have it revised, which he did one time.

4 Q. Did Club Vista have any role with respect to the
5 revision that you just described for your commitment letter?

6 A. You know, I would have to take a look at the
7 commitment letter to determine that.

8 Q. I don't think we've talked about this -- and I
9 know you dispute that anyone executed, that you executed the
10 Tharaldson Motels II guaranty which is the subject of this
11 litigation.

12 But in this time period of late '07, early 2008,
13 were you an officer of Tharaldson Motels II, Inc.?

14 A. Yes.

15 Q. What was your title?

16 A. President.

17 Q. Who were the other officers in this particular
18 time period of late 2007, early 2008, of Tharaldson Motels
19 II, Inc.?

20 A. I'd have to look and see. I don't know for sure.

21 Q. Who were the board members in this period of late
22 2007, early 2008 of Tharaldson Motels II, Inc.?

23 A. Other than myself, I don't know.

24 Q. Do you recall in 2007 or 2008 having a meeting of
25 the shareholders of Tharaldson Motels II, Inc.?

BY-LAWS

OF

THARALDSON MOTELS II, INC.

Adopted by Resolution

of the

Board of Directors

on

January 14, 1998

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BY-LAWS
OF
THARALDSON MOTELS II, INC.

ARTICLE ONE

OFFICES

Section 1. Registered Office. The registered office of the Corporation required by the North Dakota Business Corporation Act to be maintained in the State of North Dakota is as provided and designated in the Articles of Incorporation. The Board of Directors of the Corporation may, from time to time, change the location of the registered office. On or before the day that such change is to become effective, a certificate of such change and of the location and post office address of the new registered office shall be filed with the North Dakota Secretary of State.

Section 2. Other Offices. The Corporation may establish and maintain such other offices, within or without the State of North Dakota, as are from time to time authorized by the Board of Directors. (NDCC Sec. 10-19.1-15 and 10-19.1-16)

ARTICLE TWO

MEETING OF SHAREHOLDERS

Section 1. Place of Meeting. All meetings of the shareholders shall be at the registered office of the Corporation in the State of North Dakota or at such place within or without the state as may be fixed from time to time by the Board of Directors or by written consent of all the shareholders entitled to vote thereat. (NDCC Sec. 10-19.1-71)

Section 2. Date of Annual Meeting. The annual meeting of the shareholders shall be held on the second Tuesday in October at 2:00 o'clock in the afternoon in each year, beginning with the year 1999, for the purpose of electing directors and for transaction of any other business as may come before the meeting. However, no business with respect to which special notice is required shall be transacted unless such notice shall have been given. If for any reason the annual meeting is not held, or the directors are not elected thereat, directors may be elected at the special meeting held for that purpose, and it shall be the duty of the President, the Vice President or Secretary, upon demand of any shareholder entitled to vote, to call such special meeting. Should none of the said officers call such meeting upon demand, the shareholders shall have the right and power to call such meeting. (NDCC Sec. 10-19.1-71)

Section 3. Special Meetings. Special Meetings of the shareholders, for any purpose or purposes, unless otherwise prescribed by statute or by the Articles of Incorporation, may be called by the President, two or more directors, or a shareholder or shareholders holding ten percent (10%) or more of the voting power of all shares entitled to vote. A shareholder or shareholders holding five percent (5%) or more of the voting power of all shares entitled to vote may demand a special meeting of shareholders by written notice of demand given to the President or Secretary of the Corporation and containing the purposes of the meeting. (NDCC Sec. 10-19.1-72)

Section 4. Notice of Meetings. Written notice of the date, time and place of the meeting and, in the case of a special meeting, the purpose of purposes for which the meeting is called, shall be mailed, postage prepaid, at least ten (10) days and not more than fifty (50) days before such meeting, to each shareholder at his address as the same appears upon the books of the Corporation. (NDCC Sec. 10-19.1-73)

Section 5. Business to be Transacted. No business shall be transacted at any special meeting of shareholders except that stated in the notice of the meeting. (NDCC Sec. 10-19.1-72)

Section 6. Waiver of Notice. Notice of the time, place and purpose of any meeting of shareholders may be waived in writing, by any shareholder. Such waiver may be given before or after the meeting and shall be filed with the Secretary or entered upon the records of the meeting. (NDCC Sec. 10-19.1-73)

Section 7. Quorum and Adjournment. The holders of a majority of the stock issued and outstanding and entitled to vote thereat, present in person or represented by proxy, shall constitute a quorum at all meetings of the shareholders for the transaction of business except as otherwise provided by statute or by the Articles of Incorporation. If, however, such quorum shall not be present or represented at any meeting of the shareholders, the shareholders entitled to vote thereat, present in person or represented by proxy, shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present or represented. At such adjourned meeting at which a quorum shall be present or represented, any business may be transacted which might have been transacted at the meeting as originally noticed. The shareholders present at a duly called or held meeting at which a quorum is present, may continue to transact business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum. (NDCC Sec. 10-19.1-76)

Section 8. Voting Rights. A shareholder may cast his vote in person or through proxy. When a quorum is present at the time a meeting is convened, the vote of the holders of a majority of the shares entitled to vote at the meeting present in person or through proxy shall decide any question before the meeting unless the question is one upon which, by express provision of statute or

the Article of Incorporation, a different vote is required, in which case such express provision shall govern and control the decision of such question. (NDCC 10-19.1-74)

Section 9. Manner of Voting. Each shareholder shall at every meeting of the shareholders be entitled to one vote in person or by proxy for each share of the capital stock having voting power held by such shareholder, but no proxy shall be voted after eleven (11) months from the date, unless the proxy provides for a longer period. Where the transfer books of the Corporation have been closed or a date has been fixed as a record date for the determination of its shareholders entitled to vote, no shares of stock shall be voted on at any election for directors which has been transferred on the books of the Corporation within twenty (20) days next preceding such election of directors. (NDCC 10-19.1-77 and 10-19.1-80)

Section 10. Record Date. The Board of Directors may fix a time, not exceeding fifty (50) days preceding the date of any meeting of shareholders, as a record date for the determination of the shareholders entitled to notice of and to vote at such meeting, and in such case only shareholders of record on the date so fixed, or their legal representatives, shall be entitled to notice of and to vote at such meeting, notwithstanding any transfer of any shares on the books of the Corporation after any record date so fixed. The Board of Directors may close the books of the Corporation against transfer of shares during the whole or any part of such period. (NDCC 10-19.1-77)

Section 11. Organization of Meeting. At all meetings of the shareholders the President shall act as Chairman and in his absence any person appointed by the President shall act as Chairman, and the Secretary, or in his absence any person appointed by the Chairman shall act as Secretary.

Section 12. Action Without a Meeting. Any action which may lawfully be taken at a shareholders' meeting may be taken without a meeting if authorized by a writing or writings signed

by all of the holders of shares who would be entitled to a notice of a meeting for such purpose. Such action shall be effective on the date on which the last signature is placed on such writing or writings, or such earlier effective date as is set forth therein. If any action so taken requires a certificate to be filed in the office of the Secretary of State, the officer signing the same shall state therein that the action was effected in the manner aforesaid. (NDCC 10-19.1-75)

ARTICLE THREE

BOARD OF DIRECTORS

Section 1. General Powers. The business of the Corporation shall be managed by its Board of Directors which may exercise all such powers of the Corporation and do all such lawful acts and things as are not by statute or by the Articles of Incorporation or by these By-laws required to be exercised or done by the shareholders. (NDCC Sec. 10-19.1-32)

Section 2. Number and Term of Office. The Board must consist of one or more directors. Except as otherwise permitted by statute, the directors shall be elected at the annual meeting of the Corporation's shareholders (or at any special meeting of the shareholders called for the purpose) by a majority vote, and each director shall be elected to serve for one year or until his successor shall have been duly elected and qualified. (NDCC Sec. 10-19.1-33 and 10-19.1-35)

Section 3. Resignation and Removal. Any director of the Corporation may resign at any time by giving written notice to the Secretary of the Corporation. Such resignation shall take effect at the date of the receipt of such notice, or at any later time specified therein, and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective. Any director may be removed with or without cause, by a majority vote of shareholders entitled to

vote at an election of directors at any special meeting thereof. (NDCC Sec. 10-19.1-40 and 10-19.1-41)

Section 4. Vacancies. Except with respect to the initial election of a director to fill a newly created directorship resulting from an increase in the number of directors by action of the Board of Directors in the manner as permitted by statute, if the office of any director becomes vacant by reason of death, resignation, retirement, disqualification, removal from office or otherwise, the directors then in office, although less than a quorum, by a majority vote, may choose a successor who shall hold office for the unexpired term in respect of which such vacancy occurred. The initial election of a director to fill a newly created directorship shall occur at an annual meeting or at a special meeting of shareholders called for that purpose. (NDCC Sec. 10-19.1-42)

Section 5. Place of Meetings. The Board of Directors of the Corporation may hold meetings, both regular and special, either within or without the State of North Dakota at such place as a majority of the members of the Board may from time to time appoint. (NDCC Sec. 10-19.1-43)

Section 6. Annual Meeting of Directors. An annual meeting of the directors for the purpose of electing officers shall be held immediately following the annual meeting of the shareholders. Notice of such meeting need not be given. Such meeting may be held at any other time or place which shall be specified in a notice, as hereinafter provided for special meetings of the Board of Directors.

Section 7. Director's Meetings. Meetings of the Board of Directors may be called by a director by giving ten (10) days' notice to all directors of the date, time and place of the meeting.

If the date, time and place of the board meeting have been announced at a previous meeting of the board, no notice is required. (NDCC Sec. 10-19.1-43)

Section 8. Quorum. At all meetings of the Board a majority of the directors shall constitute a quorum for the transaction of business. The act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the Board of Directors, except as may be otherwise specifically provided by statute or by the Articles of Incorporation. If a quorum shall not be present at any meeting of the Board of Directors, the directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present. If a quorum is present at the call of a meeting, the directors may continue to transact business until adjournment, notwithstanding the withdrawal of enough directors to leave less than a quorum. (NDCC Sec 10-19.1-45)

Section 9. Organization of Meetings. At all meetings of the Board of Directors the President, or in his absence any person appointed by the President, shall act as Chairman, and the Secretary, or in the absence, any person appointed by the Chairman, shall act as Secretary.

Section 10. Committees. A resolution approved by the affirmative vote of the majority of the Board may establish committees having the authority of the Board in the management of the business of the corporation only to the extent provided in the resolution. Any such Committee shall: Act only in the interval between meetings of the Board; be subject at all times to the control and director of the Board; and keep regular minutes of all its meetings and report the same to the Board of Directors when required. (NDCC 10-19.1-48)

Section 11. Compensation of Directors. By resolution of the Board of Directors, each director may be paid his expenses, if any, of attendance at each meeting of the Board of

Directors, and may be paid a stated amount as director or a fixed sum for attendance at each meeting of the Board of Directors, or both. No such payment shall preclude a director from serving the corporation in any other capacity and receiving compensation therefor. Members of special or standing committees may be allowed, pursuant to resolution of the Board of Directors, like compensation for attending committee meetings. (NDCC Sec. 10-19.1-37)

ARTICLE FOUR

OFFICERS

Section 1. Number. The officers of the Corporation shall be chosen by the Board of Directors and shall include a President, a Vice President, a Secretary and a Treasurer. The Board of Directors may also choose additional Vice Presidents. Any number of offices or functions of those offices may be held or exercised by the same person. (NDCC Sec. 10-19.1-52 and 10-19.1-55)

Section 2. Election. The Board of Directors at its first meeting after each annual meeting of shareholders shall choose a President, a Vice President, a Secretary and a Treasurer. (NDCC Sec. 10-19.1-52)

Section 3. Other Officers and Agents. The Board of Directors may appoint such other officers and agents as it shall deem necessary, who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board of Directors. (NDCC Sec. 10-19.1-54)

Section 4. Salaries. The salaries of all officers of the Corporation shall be fixed by the Board of Directors.

✱

Section 5. Term of Office. The officers of the Corporation shall hold office until their successors are chosen and qualify. Any officer elected or appointed by the Board of Directors may be removed with or without cause at any time by the affirmative vote of a majority of the Board of Directors. Any officer may resign at any time by giving written notice to the President or the Secretary of the Corporation. Any vacancy occurring in any office of the Corporation shall be filled by the Board of Directors. (NDCC Sec. 10-19,1-58)

Section 6. The President.

- a. Powers. The President shall be the chief executive officer of the Corporation, shall preside at all meetings of the shareholders and the Board of Directors, shall have general and active management of the business of the Corporation and shall see that all orders and resolutions of the Board of Directors are carried into effect.
- b. Duties. The President shall execute bonds, mortgages, and other contracts except where required or permitted by law to be otherwise signed and executed except where the signing and execution thereof shall be expressly delegated by the Board of Directors to some other officer or agent of the Corporation.

Section 7. Powers and Duties of the Vice President. The Vice President, if any, or if there shall be more than one, the Vice Presidents in the order determined by the Board of Directors, shall, in the absence of disability of the President, perform the duties and exercise the powers of the President and shall perform such other duties and have such other powers as the Board of Directors may from time to time prescribe.

Section 8. Duties and Powers of the Secretary. The Secretary shall attend all meetings of the Board of Directors and all meetings of the shareholders and record all the proceedings of the meetings of the Corporation and of the Board of Directors in a book to be kept for that purpose and shall perform like duties for the standing committees when required. The Secretary shall

give, or cause to be given, notice of all meetings of the shareholders and meetings of the Board of Directors, and shall perform such other duties as may be prescribed by the Board of Directors or President, under whose supervision the Secretary shall be.

Section 9. The Treasurer.

- a. **Duties.** The Treasurer shall have the custody of the corporate funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation and shall deposit all moneys and other valuable effects in the name and to the credit of the Corporation in such depositories as may be designated by the Board of Directors.
- b. **Accounting.** The Treasurer shall disburse such funds of the Corporation as may be ordered by the Board of Directors, taking proper vouchers for such disbursements, and shall render to the President and the Board of Directors as required, an account of all his or her transactions as treasurer and of the financial condition of the Corporation.
- c. **Bond.** If required by the Board of Directors, the Treasurer shall give the Corporation a bond (which shall be renewed every six (6) years) in such sum and with such surety or sureties as shall be satisfactory to the Board of Directors for the faithful performance of the duties of his or her office and for the restoration to the Corporation, in case of his or her death, resignation, retirement or removal from office, of all books, papers, vouchers, money and other property of whatever kind in his possession or under his or her control belonging to the Corporation.

ARTICLE FIVE

CERTIFICATES OF STOCK

Section 1. Certificates of Stock. Every holder of stock in the Corporation shall be entitled to have a certificate of the Corporation, signed by, or in the name of, the President or a Vice President and the Secretary of the Corporation, certifying the number of shares owned by

the shareholder in the Corporation. The certificates of stock shall be numbered in the order of their issue. (NDCC Sec. 10-19.1-66)

Section 2. Lost or Destroyed Certificates. The Board of Directors may direct a new certificate or certificates to be issued in place of any certificate or certificates theretofore issued by the Corporation alleged to have been lost or destroyed, upon the making of an affidavit of that fact by the person claiming the certificate of stock to be lost or destroyed. When authorizing such issue of a new certificate or certificates, the Board of Directors may, in its discretion and as a condition precedent to the issuance thereof, require the owner of such lost or destroyed certificate or certificates, or his legal representative, to advertise the same in such manner as it shall require and/or to give the Corporation a bond in such sum as it may direct as indemnity against any claim that may be made against the Corporation with respect to the certificate alleged to have been lost or destroyed. (NDCC Sec. 10-19.1-67)

Section 3. Transfer of Stock. Upon surrender to the Corporation or the transfer agent of the Corporation of a certificate for shares duly endorsed or accompanied by proper evidence of succession, assignment or authority to transfer, it shall be the duty of the Corporation to issue a new certificate to the person entitled thereto, cancel the old certificate and record the transaction upon its books.

Section 4. Registered Shareholders. The Corporation shall be entitled to recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, and to hold liable for calls and assessments a person registered on its books as the owner of shares, and shall not be bound to recognize any equitable or other claim to

or interest in such share or shares on the part of any other person, whether or not it shall have express or other notice thereof, except as otherwise provided by the laws of North Dakota.

ARTICLE SIX

GENERAL PROVISIONS

Section 1. Dividends. Subject to provisions of applicable law and the Article of Incorporation, dividends upon the capital stock of the Corporation may be declared by the Board of Directors at any regular or special meeting, and may be paid in cash, in property, or in shares of the capital stock. (NDCC Sec. 10-19.1-92)

Section 2. Reserves. Before payment of any dividend, there may be set aside out of any funds of the Corporation available for dividends such sum or sums as the directors from time to time, in their absolute discretion, think proper as a reserve or reserves to meet contingencies, or for equalizing dividends, or for repairing or maintaining any property of the Corporation, or for such other purposes as the directors shall think conducive to the interest of the Corporation, and the directors may modify or abolish any such reserve in the manner in which it was created.

Section 3. Checks. All checks or demands for money and notes of the Corporation shall be signed by such officer or officers or such other person or persons as the Board of Directors may from time to time designate.

Section 4. Fiscal Year. The fiscal year of the Corporation shall be fixed by resolution of the Board of Directors.

Section 5. Seal. The Corporation shall adopt a seal at the discretion of the Board of Directors.

ARTICLE SEVEN

AMENDMENTS

Section 1. Amendments. These By-Laws may be altered or repealed by the affirmative vote of the holders or record of a majority of the outstanding stock of the Corporation at any regular meeting of the shareholders or at any special meeting of the shareholders if notice of the proposed alteration or repeal be contained in the notice of such special meeting. (NDCC Sec. 10-19.1-19 and 10-19.1-20)

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT, 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

Electronically Filed
Apr 08 2011 04:57 p.m.
Tracie K. Lindeman

Case No. 57641

District Court Case No.: A579963

**APPENDIX OF THE
REAL PARTY IN INTEREST BANK OF OKLAHOMA, N.A.**

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*Attorneys for Real Parties in Interest
BANK OF OKLAHOMA, N.A.*

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DOCUMENT DESCRIPTION	DATE	PAGE
Notice of Entry of Order Granting Defendant Bank of Oklahoma, N.A.'s Motion for Partial Summary Judgment on Plaintiffs' First Claim for Relief (Fraudulent Misrepresentation) and Second Claim for Relief (Fraudulent Concealment/Fraudulent Omissions)	03/17/2011	BOK 1
Notice of Entry of Order Granting Defendant Bank of Oklahoma, N.A.'s Motion for Partial Summary Judgment on Plaintiffs' Third (Constructive Fraud), Seventh (Breach of Fiduciary Duty), and Eleventh (Breach of the Covenant of Good Faith and Fair Dealing) Claims for Relief	03/17/2011	BOK 10
Notice of Entry of Order Granting Defendant Bank of Oklahoma, N.A.'s Motion for Partial Summary Judgment on Plaintiffs' Fifth Claim for Relief (Securities Fraud)	03/17/2011	BOK 20
Notice of Entry of Order Granting 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)		BOK 28
Decision – 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)	02/16/2011	BOK 36
Notice of Entry of Order Granting Defendant Bank of Oklahoma, N.A.'s Motion for Partial Summary Judgment on Plaintiffs' Twelfth Claim for Relief (Negligence)	03/17/2011	BOK 40
Videotaped Deposition Transcript of Gary D. Tharaldson taken in Fargo, North Dakota	07/08/2010	BOK 52
Complaint – Club Vista Financial Services, LLC, Tharaldson Motels II, Inc., and Gary D. Tharaldson vs. Maslon Edelman Borman & Brand, LLP, District Court, Clark County, Nevada, Case No. A-10-608563-C, Department No. XII	01/21/2010	BOK 55
Club Vista's Commitment Letter	04/27/2007	BOK 107
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Videotaped Deposition Transcript of Bradley J. Scott taken in Las Vegas, Nevada	11/16/2010	BOK 121
Bank of Oklahoma, N.A.'s Conditional Commitment Letter	12/20/2007	BOK 125
Declaration of Bradley J. Scott in Support of Bank of Oklahoma's Motion for Summary Judgment on Counts One and Two	12/14/2010	BOK 127
Emails between Brad Scott, Ryan Kucker, Tim James, and Jason Ulmer	12/11/2007	BOK 129

1	Videotaped Deposition Transcript of Gary Tharaldson taken in Las Vegas, Nevada	05/12/2010	BOK 131
2	Videotaped Deposition Transcript of Gary Tharaldson taken in Las Vegas, Nevada	05/11/2010	BOK 134
3	Letter addressed to Counsel advising that based on the examination of Sandra Lines that the signature on the TMII Guarantee appears to be the signature of Gary Tharaldson	11/15/2010	BOK 140
4	Videotaped Deposition Transcript of Gary Tharaldson taken in Las Vegas, Nevada	09/08/2010	BOK 142
5	By-Laws of Tharaldson Motels II, Inc.	01/14/1998	BOK 144
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CLERK OF THE COURT

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18 Attorneys for Defendant
19 BANK OF OKLAHOMA, N.A.

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

Case No. A579963
Dept. No. XIII

Hearing Date: N/A
Hearing Time: N/A

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT BANK OF
OKLAHOMA N.A.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON PLAINTIFFS' FIRST CLAIM FOR
RELIEF (FRAUDULENT
MISREPRESENTATION) AND
SECOND CLAIM FOR RELIEF
(FRAUDULENT
CONCEALMENT/FRAUDULENT
OMISSIONS)**

Please take notice that on the 15th day of March, 2011, an Order Granting Defendant Bank of Oklahoma N.A.'s Motion for Partial Summary Judgment on Plaintiffs' First Claim for Relief (Fraudulent Misrepresentation) and Second Claim for Relief (Fraudulent Concealment/Fraudulent Omissions) was entered in the above-captioned action, a copy of said Order is attached hereto.

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28

DATED this 17th day of March, 2011.

LEWIS AND ROCA LLP

By /s/ Von S. Heinz
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Las Vegas, Nevada 89169

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Admitted Pro Hac Vice
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124 East Fourth Street
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Attorneys for Defendant
BANK OF OKLAHOMA, N.A.

1 CERTIFICATE OF SERVICE

2 Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing NOTICE
3 OF ENTRY OF ORDER GRANTING DEFENDANT BANK OF OKLAHOMA N.A.'S
4 MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' FIRST CLAIM
5 FOR RELIEF (FRAUDULENT MISREPRESENTATION) AND SECOND CLAIM FOR
6 RELIEF (FRAUDULENT CONCEALMENT/FRAUDULENT OMISSIONS) was made this
7 date by e-service to the following:

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11 Las Vegas, Nevada 89169
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12 K. Layne Morrill
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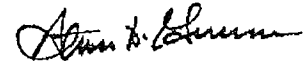
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21 Scott Financial Corporation and
Bradley J. Scott

22 Gwen Mullins
23 Wade Gochnour
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25 Attorneys for APCO Construction

26 DATED this 17th day of March, 2011.

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



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24 BANK OF OKLAHOMA, N.A.

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

29 SCOTT FINANCIAL CORPORATION, a
30 North Dakota corporation; BRADLEY J.
31 SCOTT; BANK OF OKLAHOMA, N.A., a
32 national bank; GEMSTONE DEVELOPMENT
33 WEST, INC., a Nevada corporation;
34 ASPHALT PRODUCTS CORPORATION
35 D/B/A APCO CONSTRUCTION, a Nevada
36 corporation; DOE INDIVIDUALS 1-100; and
37 ROE BUSINESS ENTITIES 1-100,

Defendants.

Case No.: A579963
Dept. No.: XIII

ORDER GRANTING DEFENDANT
BANK OF OKLAHOMA, N.A.'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON PLAINTIFFS' FIRST
CLAIM FOR RELIEF (FRAUDULENT
MISREPRESENTATION) AND SECOND
CLAIM FOR RELIEF (FRAUDULENT
CONCEALMENT/FRAUDULENT
OMISSIONS)

RECEIVED

MAR 04 2011

DISTRICT COURT DEPT. 13

Lewis and Roca LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

1 This matter came before this Court for hearing on January 18, 2011 on Defendant Bank of
2 Oklahoma N.A.'s Motion for Partial Summary Judgment on Plaintiffs' First Claim for Relief
3 (Fraudulent Misrepresentation) and Second Claim for Relief (Fraudulent Concealment/Fraudulent
4 Omissions).

5 Martin A. Aronson of Morrill & Aronson, P.L.C., Terry A. Coffing of Marquis Aurbach
6 Coffing, and Martin A. Muckleroy of Cooksey, Toolen, Gage, Duffy & Woog appeared on behalf
7 of Plaintiffs Club Vista Financial Services, L.L.C., Tharaldson Motels II, Inc., and Gary D.
8 Tharaldson. J. Randall Jones of Kemp, Jones & Coulthard, LLP appeared on behalf of Defendants
9 Scott Financial Corporation and Bradley J. Scott. John D. Clayman of Frederic Dorwart Lawyers
10 and Jennifer K. Hostetler of Lewis and Roca LLP appeared on behalf of Defendant Bank of
11 Oklahoma, N.A. P. Kyle Smith of Smith Law Office appeared on behalf of Defendant Alex
12 Edelstein. Gwen Rutar Mullins of Howard & Howard appeared on behalf of Asphalt Products
13 Corporation.

14 Having considered the parties' briefs, pleadings and other court filings in this matter, and
15 having considered argument of counsel, and good cause appearing, the Court makes the following
16 findings of fact and conclusions of law:

17 I.

18 FINDINGS OF FACT

19 1. The only individuals who have personal knowledge about the Manhattan West
20 transaction are Gary Tharaldson, Ryan Kucker, and Kyle Newman.¹

21 2. Through their sworn testimony, each of these individuals has admitted that he does
22 not have personal knowledge about the factual allegations contained in the Complaint.²

23 3. BOK did not give Plaintiffs advice with respect to the Loan.³ Mr. Tharaldson did
24

25 ¹Deposition of Gary Tharaldson, Vol. II, pp. 299-301, Exhibit A; Deposition of Ryan Kucker, Vol.
II, p. 339, l. 8 - p. 340, l. 3.

26 ²Deposition of Gary Tharaldson, Vol. III, p. 632, ll. 11-20, p. 678, l. 23 - p. 679, l. 15; Vol. II, p.
27 425, ll. 11-22. Deposition of Kyle Newman, p. 134, ll. 1-19. Deposition of Ryan Kucker, Vol. II, p.
28 292, l. 16-p. 293, l. 15; p. 339, l. 8 - p. 340, l. 3.

³Deposition of Gary Tharaldson, Vol. II, p. 510, l. 22 - p. 511, l. 9; Vol. III, p. 654, ll. 21-24.

1 not negotiate any aspect of the Loan with BOK, and never had conversations with BOK with
2 respect to the Loan.⁴

3 4. BOK did not directly give Mr. Tharaldson or Club Vista or TM2I any specific
4 assurances or any assurances of any kind that the transaction was sound.⁵

5 5. Before BOK was contacted about participating in the Manhattan West transaction,
6 all of the monetary terms had already been established.⁶

7 6. Mr. Tharaldson has no personal knowledge or evidence that BOK knew anything
8 about fraud related to the TM2I guaranty.⁷

9 7. Mr. Tharaldson has no evidence that the proper inspections were not done on
10 Manhattan West.⁸

11 8. With respect to the subordination issue, Mr. Tharaldson never discussed this deal
12 point with anyone from BOK.⁹

13 9. BOK never talked to Plaintiffs about what activities or duties BOK would
14 undertake as the co-lead.¹⁰

15 10. Plaintiffs have no knowledge or evidence that BOK failed to disclose the pro forma
16 to Plaintiffs.¹¹

17 11. BOK never undertook any actions with the intention of injuring any of the
18 Plaintiffs.

19
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21 ⁴*Deposition of Gary Tharaldson*, Vol. II, p. 571, ll. 4-8; Vol. IV, p. 1084, ll. 11-24; p. 1093, ll. 3-21; p. 1095, ll. 5-22.

22 ⁵*Deposition of Gary Tharaldson*, Vol. II, p. 517, l. 22 – p. 518, l. 7.

23 ⁶*Deposition of Gary Tharaldson*, Fargo, N.D., July 9, 2010, p. 137, l. 24 – p. 138, l. 4.

24 ⁷*Deposition of Gary Tharaldson*, Vol. III, p. 659, l. 14 – p. 660, l. 12.

25 ⁸*Deposition of Gary Tharaldson*, Vol. I, p. 70, ll. 19-21.

26 ⁹*Deposition of Gary Tharaldson*, Vol. IV, p. 993, l. 25 – p. 994, l. 101.

27 ¹⁰*Deposition of Gary Tharaldson*, Vol. IV, p. 997, ll. 1-10.

28 ¹¹*Deposition of Gary Tharaldson*, Vol. II p. 570, ll. 10-16.

1 12. BOK never knowingly or unintentionally assisted Scott Financial or Mr. Scott in
2 making fraudulent or negligent misrepresentations or omissions to the Plaintiffs.

3 13. BOK never told Plaintiffs that Brad Scott or Scott Financial could speak for
4 BOK.¹²

5 14. Neither Brad Scott nor Scott Financial ever told Plaintiffs that they had the power
6 to make representations on behalf of BOK.¹³

7 II.

8 CONCLUSIONS OF LAW

9 1. To prevail on a fraudulent misrepresentation claim, Plaintiffs are required to prove
10 that:

- 11 (1) BOK made a false representation;
12 (2) That BOK knew or believed that the representation was false or that BOK
13 had an insufficient basis of information for making the misrepresentation;
14 (3) BOK's intention to induce the Plaintiffs to act or refrain from acting in
15 reliance upon the misrepresentation;
16 (4) Plaintiffs' justifiable reliance on upon the misrepresentation; and
17 (5) Damage to the Plaintiffs as a result of relying on the misrepresentation.

18 *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110, 825 P.2d 588, 592 (1992).

19 2. BOK did not make any false representations or fraudulently conceal or omit
20 information, including information related to: (1) pre-sales, (2) subordination of prior loans, (3)
21 the General Contractor Agreement, and (4) the TM2I Guaranty.

22 3. BOK did not intend to "deliberately cause harm or to deliberately deceive"
23 Plaintiffs. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110, 825 P.2d 588, 592 (1992).

24
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27 ¹²*Deposition of Gary Tharaldson*, Vol. IV, p. 997, ll. 11-17.

28 ¹³*Deposition of Gary Tharaldson*, Vol. IV, p. 998, ll. 2-16.

1 4. BOK never induced Plaintiffs to rely on representations made by BOK because
2 Plaintiffs were unaware of any representations at the time they acted. *Chen v. Nev. State Gaming*
3 *Control Bd.*, 116 Nev. 282, 285-86, 994 P.2d 1151, 1152 (2000).

4 5. Accordingly, Plaintiffs did not justifiably rely upon any misrepresentation by BOK.
5 "Reliance on alleged misrepresentations presumes that [Plaintiffs have] actually read or heard
6 those alleged misrepresentations in order to plead a cause of action for deceit." *Nev. Power Co. v.*
7 *Monsanto Co.*, 891 F. Supp. 1406, 1413-14 (D. Nev. 1995).

8 6. BOK is not liable for any alleged fraudulent misrepresentations or fraudulent
9 concealment/omissions based upon an agency or apparent authority theory related to SFC because
10 BOK's appointment of SFC as its agent was strictly limited to servicing the Loan as set forth in
11 Paragraph 6(d) of the Participation Agreement.

12 8. BOK is not responsible for the actions and inactions of SFC that occurred before
13 the alleged agency relationship occurred.

14 9. Accordingly, the Court finds that there are no genuine issues of material fact as to
15 Plaintiffs' First Claim for Relief (Fraudulent Misrepresentation) and Second Claim for Relief
16 (Fraudulent Concealment/Fraudulent Omissions) such that Bank of Oklahoma, N.A. is entitled to
17 judgment as a matter of law on each of these claims, pursuant to Nev. R. Civ. P. 56.

18
19 **III.**

20 **CONCLUSION**

21 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Bank of Oklahoma,
22 N.A.'s Motion For Partial Summary Judgment on Plaintiffs' First Claim for Relief (Fraudulent
23 Misrepresentation) and Second Claim for Relief (Fraudulent Concealment/Fraudulent Omissions)
24 is GRANTED IN FULL.

25 IT IS SO ORDERED.

26 Honorable Mark R. Denton
27 DISTRICT COURT JUDGE *MR*

28 Dated: *March 11, 2011*

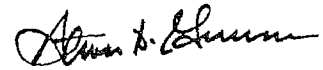
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2 Submitted by

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19 BANK OF OKLAHOMA, N.A.

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

Case No. A579963
Dept. No. XIII

Hearing Date: N/A
Hearing Time: N/A

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT BANK OF
OKLAHOMA N.A.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON PLAINTIFFS' THIRD
(CONSTRUCTIVE FRAUD),
SEVENTH (BREACH OF FIDUCIARY
DUTY), AND ELEVENTH (BREACH
OF THE COVENANT OF GOOD
FAITH AND FAIR DEALING)
CLAIMS FOR RELIEF**

24 Please take notice that on the 15th day of March, 2011, an Order Granting Defendant Bank
25 of Oklahoma N.A.'s Motion for Partial Summary Judgment on Plaintiffs' Third (Constructive
26 Fraud), Seventh (Breach of Fiduciary Duty), and Eleventh (Breach of the Covenant of Good Faith
27 and Fair Dealing) Claims for Relief was entered in the above-captioned action, a copy of said
28 Order is attached hereto.

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DATED this 17th day of March, 2011.

LEWIS AND ROCA LLP

By /s/ Von S. Heinz
VON S. HEINZ
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Admitted Pro Hac Vice
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Attorneys for Defendant
BANK OF OKLAHOMA, N.A.

1 CERTIFICATE OF SERVICE

2 Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing NOTICE
3 OF ENTRY OF ORDER GRANTING DEFENDANT BANK OF OKLAHOMA N.A.'S
4 MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' THIRD
5 (CONSTRUCTIVE FRAUD), SEVENTH (BREACH OF FIDUCIARY DUTY), AND
6 ELEVENTH (BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING)
7 CLAIMS FOR RELIEF was made this date by e-service to the following:

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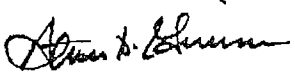
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23 Wade Gochmour
Howard & Howard Attorneys PLLC
24 3800 Howard Hughes Parkway, Suite 1400
Las Vegas, Nevada 89169
25 Attorneys for APCO Construction

26 DATED this 17th day of March, 2011.

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


CLERK OF THE COURT

1 **ORDER**
2 VON S. HEINZ
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24 BANK OF OKLAHOMA, N.A.

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

30 SCOTT FINANCIAL CORPORATION, a
31 North Dakota corporation; BRADLEY J.
32 SCOTT; BANK OF OKLAHOMA, N.A., a
33 national bank; GEMSTONE DEVELOPMENT
34 WEST, INC., a Nevada corporation;
35 ASPHALT PRODUCTS CORPORATION
36 D/B/A APCO CONSTRUCTION, a Nevada
37 corporation; DOE INDIVIDUALS 1-100; and
38 ROE BUSINESS ENTITIES 1-100,

Defendants.

Case No.: A579963
Dept. No.: XIII

**ORDER GRANTING DEFENDANT
BANK OF OKLAHOMA, N.A.'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON PLAINTIFFS' THIRD
(CONSTRUCTIVE FRAUD), SEVENTH
(BREACH OF FIDUCIARY DUTY), AND
ELEVENTH (BREACH OF THE
COVENANT OF GOOD FAITH AND
FAIR DEALING) CLAIMS FOR RELIEF**

RECEIVED

MAR 04 2011

DISTRICT COURT DEPT#13

Lewis and Roca LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

1 This matter came before this Court for hearing on January 20, 2011 on Defendant Bank of
2 Oklahoma, N.A.'s Motion For Partial Summary Judgment on Plaintiffs' Third (Constructive
3 Fraud), Seventh (Breach of Fiduciary Duty), and Eleventh (Breach of the Covenant of Good Faith
4 and Fair Dealing) Claims For Relief.

5 Martin A. Aronson of Morrill & Aronson, P.L.C., Terry A. Coffing of Marquis Aurbach
6 Coffing, and Martin A. Muckleroy of Cooksey, Toolen, Gage, Duffy & Woog appeared on behalf
7 of Plaintiffs Club Vista Financial Services, L.L.C., Tharaldson Motels II, Inc., and Gary D.
8 Tharaldson. J. Randall Jones of Kemp, Jones & Coulthard, LLP appeared on behalf of Defendants
9 Scott Financial Corporation and Bradley J. Scott. John D. Clayman of Frederic Dorwart Lawyers
10 and Jennifer K. Hostetler of Lewis and Roca LLP appeared on behalf of Defendant Bank of
11 Oklahoma, N.A. P. Kyle Smith of Smith Law Office appeared on behalf of Defendant Alex
12 Edelstein. Robert L. Rosenthal of Howard & Howard appeared on behalf of Asphalt Products
13 Corporation.

14 Having considered the parties' briefs, pleadings and other court filings in this matter, and
15 having considered argument of counsel, and good cause appearing, the Court makes the following
16 findings of fact and conclusions of law:

17 I.

18 FINDINGS OF FACT

19 1. Mr. Tharaldson is "a successful real estate entrepreneur with very substantial assets
20 and net worth."¹

21 2. TM2I is an owner and operator of motel and lodging properties. TM2I also has
22 "very substantial assets and net worth."²

23 3. Club Vista is a corporation that was formed for the purpose of making loans.³

24 4. Club Vista is wholly owned by Mr. Tharaldson.⁴

25 5. Club Vista is a participant in the Senior Loan.

26
27 ¹ Plaintiffs' First Amended Complaint, ¶¶ 20 and 22.

28 ² Plaintiffs' First Amended Complaint ¶¶ 21 and 22.

³ Deposition of Gary Tharaldson, Vol. IV, p. 1023, ll. 22-24.

⁴ Deposition of Gary Tharaldson, Vol. IV, p. 1024, ll. 13-14.

1 6. Club Vista committed to participate in the Loan in the spring of 2007 and agreed to
2 participate up to \$25 million in the construction loan.⁵

3 7. Bank of Oklahoma, N.A. ("BOK") committed to participate in the Loan in
4 December 2007.⁶

5 8. Plaintiffs learned that BOK was considering participating in the Loan and assuming
6 the role of co-lead several months after Plaintiffs committed to the Loan.⁷

7 9. Mr. Tharaldson personally provided an absolute, unconditional guaranty of the
8 Loan for the benefit of all the participants.⁸

9 10. TM2I provided an absolute, unconditional guaranty of the Loan for the benefit of
10 BOK.⁹

11 11. BOK never gave the Plaintiffs advice with respect to the Loan.¹⁰

12 12. Plaintiffs' reliance on BOK was in their position as co-lead.¹¹

13 13. The Participation Agreement sets forth BOK's rights and obligations in connection
14 with its role as co-lead lender in connection with the Loan.¹²

15 14. BOK never represented to any of the Plaintiffs that BOK was Plaintiffs' fiduciary.¹³

16 15. BOK never talked to the Plaintiffs "about what activities or duties [BOK] would
17 undertake as the co-lead."¹⁴ Further, Scott Financial never told the Plaintiffs what BOK was
18 going to do in terms of BOK's underwriting of the Loan prior to its decision to participate in the
19 Loan.¹⁵

20 ⁵ Club Vista's Commitment Letter, dated April 30, 2007.

21 ⁶ BOK's Commitment Letter, dated December 20, 2007.

22 ⁷ Deposition of Gary Tharaldson, Vol. I, p. 64, l. 23 – p. 65, l. 5.

23 ⁸ Guaranty by Gary Tharaldson benefiting Scott Financial dated January 21, 2008; Plaintiffs
24 Objections and Responses to Scott Financial Corporation and Bradley J. Scott's First Set of
25 Requests for Admission to Club Vista Financial Services, L.L.C.; Tharaldson Motels II, Inc.; and
26 Gary D. Tharaldson, Request No. 8; Deposition of Gary Tharaldson, Vol. IV, p. 1015, ll. 2-7; N.D.
27 July 8, 2010, p. 121, ll. 12-18.

28 ⁹ Guaranty by TM2I benefitting BOK dated January 21, 2008.

¹⁰ Deposition of Gary Tharaldson, Vol. II, p. 511, ll. 1-9; p. 571, ll. 4-8.

¹¹ Deposition of Gary Tharaldson, Vol. IV, p. 1017, ll. 3-7. See also Deposition of Gary
Tharaldson, Vol. II, p. 508, ll. 14-20; Vol. III, p. 649, ll. 11-13; N.D. July 8, 2010, p. 13, l. 1 – p.
14, l. 18; N.D. July 9, 2010, p. 112, ll. 19-25.

¹² Nonrecourse Participation Agreement at ¶¶ 6(f) and 8.

¹³ Deposition of Gary Tharaldson, Vol. IV, p. 1086.

¹⁴ Deposition of Gary Tharaldson, Vol. IV, p. 997, ll. 1-10.

¹⁵ Deposition of Gary Tharaldson, Vol. IV, p. 969, ll. 4-10; p. 998, ll. 18-20.

1 16. Plaintiffs basis for its claim is that BOK's relationship with the Plaintiffs was
2 fiduciary in nature stems from a discussion that Mr. Tharaldson had with Scott Financial that may
3 have preceded this transaction. During this conversation, Mr. Tharaldson reported that Mr. Scott
4 told him that when a bank became a co-lead on a loan it assumed a fiduciary obligation to
5 Plaintiffs. No one ever specifically told the Plaintiffs that BOK had a fiduciary obligation to
6 them.¹⁶

7 17. Mr. Tharaldson and his business entities relied exclusively on Brad Scott and Scott
8 Financial to protect his interests and the interests of his entities and for credit underwriting, due
9 diligence and feasibility analysis associated with Scott Financial related transactions.¹⁷

10 18. Although Mr. Tharaldson relied on the due diligence conducted by everyone
11 involved in the Manhattan West transaction, including all 29 participating banks, he made his own
12 independent decision to engage in the transaction.¹⁸

13 19. Plaintiffs never sought to review BOK or any of the other participating banks' due
14 diligence related to the Manhattan West transaction.¹⁹

15 20. Further, none of the Plaintiffs sought BOK's advice or consultation regarding any
16 of its transactions.²⁰

17 21. BOK did not have a role in the day-to-day affairs of any of the Plaintiffs.²¹

18 22. BOK did not exercise any influence over any of the Plaintiffs' other transactions.²²

19 23. Aside from Plaintiffs' own attorneys, no one has ever told Mr. Tharaldson that
20 BOK "tried to influence Scott Financial or Brad Scott to do something that was not in [P]laintiffs'
21 best interests."²³

22
23
24 ¹⁶ Deposition of Gary Tharaldson, Vol. IV, p. 1086, l. 16 – p. 1087, l. 9. See also Deposition of
Gary Tharaldson, Vol. II, p. 508, l. 14 – p. 509, l. 6.

25 ¹⁷ Plaintiffs First Amended Complaint, ¶¶ 27, 33; Plaintiffs' Objections and Responses to Scott
Financial Corporation and Bradley J. Scott's First Set of Requests for Admission to Club Vista
26 Financial Services, L.L.C.; Tharaldson Motels II, Inc.; and Gary D. Tharaldson's Response No. 3.

27 ¹⁸ Deposition of Gary Tharaldson, Vol. IV, p. 1037, l. 20 – p. 1039, l. 23.

¹⁹ Deposition of Gary Tharaldson, Vol. IV, p. 960, l. 20 – p. 962, l. 7; p. 968, ll. 6-10.

²⁰ Deposition of Gary Tharaldson, Vol. IV, p. 1087, l. 24 – p. 1088, l. 4.

²¹ Deposition of Gary Tharaldson, Vol. IV, p. 1087, l. 12 – p. 1088, l. 4.

²² Deposition of Gary Tharaldson, Vol. IV, p. 1088, ll. 5-18.

²³ Deposition of Gary Tharaldson, Vol. IV, p. 1089, ll. 19-23.

1 II.

2 CONCLUSIONS OF LAW

3 1. Plaintiffs claims for (1) constructive fraud [count 3]; (2) breach of fiduciary duty
4 [count 7]; and (3) breach of the covenant of good faith and fair dealing [count 11] each require
5 Plaintiffs to establish the existence of a fiduciary relationship.

6 2. A fiduciary duty under Nevada law "is not created by a unilateral decision to repose
7 trust and confidence; it derives from the conduct or undertaking of the purported fiduciary."
8 *Yerington Ford, Inc., v. Gen. Motors Acceptance Corp.*, 359 F. Supp. 2d 1075, 1091 (D. Nev.
9 2004).

10 3. As a matter of law, the Nevada Supreme Court has refused to recognize a fiduciary
11 relationship between a lender and borrower or between a lender and guarantor. *Giles v. Gen.*
12 *Motors Acceptance Corp.*, 494 F.3d 865, 882 (9th Cir. 2007). Therefore, there is no fiduciary
13 relationship between BOK (as lender) and TM2I (as guarantor) or between BOK (as lender) and
14 Mr. Tharaldson (as guarantor).

15 4. A fiduciary relationship also does not exist between BOK (as co-lead lender) and
16 CVFS (as participant). "In the context of loan participation agreements among sophisticated
17 lending institutions...[a] fiduciary relationship should not be inferred absent unequivocal
18 contractual language." 2 LAW OF REAL ESTATE FINANCING § 11:15 (quoting in part, *First Citizens*
19 *Fed. Sav. & Loan Ass'n. v. Worthen Bank & Trust Co., N.A.*, 919 F.2d 510 (9th Cir. 1990)). This
20 unequivocal language is not present in the Nonrecourse Participation Agreement(s) at issue this
21 case.

22 5. None of the Plaintiffs were in a position of inequality, dependence, weakness or
23 lacked knowledge regarding the Manhattan West transaction. Instead, the Plaintiffs and BOK
24 dealt with each other on equal terms.

25 6. BOK did not exercise influence, domination, or control over Plaintiffs' affairs
26 because BOK was not involved in the "actual day-to-day...management and operations of"
27 Plaintiffs. *Union State Bank v. Woell*, 434 N.W.2d 712, 721 (N.D. 1989).

7. Plaintiffs did not depend on BOK and even if they had, such dependence was not supported under the law because participants to a loan participation agreement have a “duty to rely on their own independent evaluation of the loans.” *Leonard v. Dorsey & Whitney, LLP*, 553 F.3d 609, 626 (8th Cir. 2008)(*reh’g denied*, 2009).

8. Because BOK does not owe any fiduciary duties to any of the Plaintiffs, Plaintiffs' claims for: (1) constructive fraud [count 3]; (2) breach of fiduciary duty [count 7]; and (3) breach of the covenant of good faith and fair dealing [count 11] must fail.

9. Accordingly, the Court finds that there are no genuine issues of material fact as to Plaintiffs' Third (Constructive Fraud), Seventh (Breach of Fiduciary Duty), and Eleventh (Breach of the Covenant of Good Faith and Fair Dealing) Claims For Relief such that Bank of Oklahoma, N.A. is entitled to judgment as a matter of law on each of these claims pursuant to Nev. R. Civ. P. 56.

III.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Bank of Oklahoma, N.A.'s Motion For Partial Summary Judgment on Plaintiffs' Third (Constructive Fraud), Seventh (Breach of Fiduciary Duty), and Eleventh (Breach of the Covenant of Good Faith and Fair Dealing) Claims For Relief is GRANTED IN FULL.

IT IS SO ORDERED.

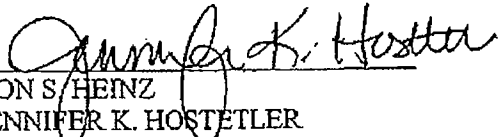
Honorable Mark R. Denton
DISTRICT COURT JUDGE

Dated: March 11, 2011

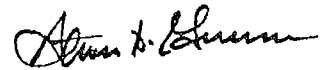
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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

Case No. A579963
Dept. No. XIII

Hearing Date: N/A
Hearing Time: N/A

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT BANK OF
OKLAHOMA N.A.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON PLAINTIFFS' FIFTH CLAIM FOR
RELIEF (SECURITIES FRAUD)**

24 Please take notice that on the 15th day of March, 2011, an Order Granting Defendant Bank
25 of Oklahoma N.A.'s Motion for Partial Summary Judgment on Plaintiffs' Fifth Claim for Relief
26 (Securities Fraud) was entered in the above-captioned action, a copy of said Order is attached
27 hereto.

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DATED this 17th day of March, 2011.

LEWIS AND ROCA LLP

By /s/ Von S. Heinz
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1 CERTIFICATE OF SERVICE

2 Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing NOTICE
3 OF ENTRY OF ORDER GRANTING DEFENDANT BANK OF OKLAHOMA N.A.'S
4 MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' FIFTH CLAIM
5 FOR RELIEF (SECURITIES FRAUD) was made this date by e-service to the following:

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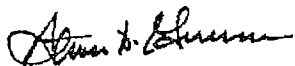
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Attorneys for APCO Construction

24 DATED this 17th day of March, 2011.

25 /s/ Judith A. Vienneau
26 An Employee of Lewis and Roca, LLP
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24 **BANK OF OKLAHOMA, N.A.**

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

29 **SCOTT FINANCIAL CORPORATION, a**
30 **North Dakota corporation; BRADLEY J.**
31 **SCOTT; BANK OF OKLAHOMA, N.A., a**
32 **national bank; GEMSTONE DEVELOPMENT**
33 **WEST, INC., a Nevada corporation;**
34 **ASPHALT PRODUCTS CORPORATION**
35 **D/B/A APCO CONSTRUCTION, a Nevada**
36 **corporation; DOE INDIVIDUALS 1-100; and**
37 **ROE BUSINESS ENTITIES 1-100,**

Defendants.

Case No.: A579963
Dept. No.: XIII

ORDER GRANTING DEFENDANT
BANK OF OKLAHOMA, N.A.'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON PLAINTIFFS' FIFTH
CLAIM FOR RELIEF (SECURITIES
FRAUD)

1 This matter came before this Court pursuant to Defendant Bank of Oklahoma N.A.'s
2 Motion for Partial Summary Judgment on Plaintiffs' Fifth Claim for Relief (Securities Fraud) filed
3 on December 6, 2010. Having considered the parties' briefs, pleadings and other court filings in
4 this matter, and with good cause appearing pursuant to EDCR 2.23(c), the Court makes the
5 following findings of fact and conclusions of law:

6 I.

7 FINDINGS OF FACT

8 1. Plaintiffs allege a violation by BOK of Nevada's Securities Act (the "Act").¹
9 Specifically, they allege that BOK, "directly or indirectly, made certain untrue statements of
10 material fact and/or omitted to state certain material facts necessary to make the statements made
11 not misleading to Plaintiffs in connection with an offer to sell and/or the sale of a security."²

12 2. The Plaintiffs are experienced in lending transactions. Club Vista is a corporation
13 that was formed for the purpose of making loans,³ and it was a participant in the Loan.⁴ Mr.
14 Tharaldson has engaged in "hundreds and hundreds" of loan transactions.⁵

15 3. Scott Financial contacted somewhere between 50 and 75 banks to participate in the
16 Loan and ultimately, 29 entities participated in the Loan.⁶

17 4. Club Vista committed to participate in the Loan before BOK became involved in
18 the Loan. Club Vista committed to participate in the spring of 2007.⁷ BOK first became involved
19 in approximately November of 2007, and only committed to participate in the Loan in the latter
20 part of December 2007.⁸

21 5. Plaintiffs only learned that BOK was assuming the role of co-lead several months
22

23 ¹ Plaintiffs' First Amended Complaint, ¶¶ 250 – 263. Note that the Act is modeled on the Uniform
Securities Act, like the majority of other states' acts.

24 ² Plaintiffs' First Amended Complaint, ¶ 251. This is the language of NRS 90.570.

25 ³ *Deposition of Gary Tharaldson*, Vol. IV, p. 1023, ll. 22-24, Exhibit A.

26 ⁴ Nonrecourse Participation Agreement between Scott Financial and Club Vista dated January 21,
2008.

27 ⁵ *Deposition of Gary Tharaldson*, Vol. IV, p. 989, ll. 10-11, Exhibit A.

28 ⁶ *Deposition of Brad Scott*, p. 222, ll. 18-20; p. 227, ll. 17-22, Exhibit B.

⁷ Club Vista's Commitment Letter, dated April 27, 2007 (Club Vista modified their commitment
on October 8, 2007).

⁸ *Deposition of Gary Tharaldson*, Vol. II, p. 482, ll. 8-21, Exhibit A; BOK's Commitment Letter,
dated December 20, 2007.

1 after Plaintiffs committed to the Loan, some time in December of 2007.⁹

2 6. BOK never gave the Plaintiffs advice with respect to the Loan.¹⁰ Mr. Tharaldson
3 never negotiated at any time with BOK about anything to do with the Loan, and never had
4 conversations with BOK.¹¹

5 7. Of the Loan documents at issue in this case, BOK is only party to two of them.
6 BOK is a party to a Nonrecourse Participation Agreement with Scott Financial. And, BOK is the
7 beneficiary of the TM2I Guaranty. BOK is not party to any Manhattan West Loan documents
8 with Plaintiffs Club Vista or Gary Tharaldson.¹²

9 II.

10 CONCLUSIONS OF LAW

11 1. NRS 90.280 defines "sale" and "sell" as follows:

12 "Sale" includes every contract of sale, contract to sell, or other
13 disposition, of a security or interest in a security for value. "Sell" has a
14 corresponding meaning. In this context: 1. "Offer to sell" includes
15 every attempt or offer to dispose of, or solicitation of an offer to
16 purchase, a security or interest in a security for value.

17 NRS 90.280 goes on to state in subsection (6):

18 The terms defined in this section do not include: (a) The creation of a
19 security interest or a loan....

20 The express terms of the Act specifically excludes loans from the definition of "offer to sell."
21 Therefore, the Senior Loan transaction in this case does not involve an offer to sell or sale of a
22 security.

23 4. BOK is not a "seller" either under a strict privity test or under a substantial
24 contributive factor test as Plaintiffs agreed to participate in the loan before BOK became involved
25 and without ever communicating with BOK.

26 5. The Club Vista Loan Participation agreement, Gary Tharaldson Guaranty, TM2I
27 Guaranty, and subordination agreement are not securities because loan participations and

28 ⁹Deposition of Gary Tharaldson, Vol. I, pp. 64-66, Exhibit A.

¹⁰Deposition of Gary Tharaldson, Vol. II, pp. 510-11; Vol. III, p. 654, Exhibit A.

¹¹Deposition of Gary Tharaldson, Vol. II, p. 571; Vol. IV, pp. 1084, 1093, 1095, Exhibit A.

¹²Loan Agreement dated January 22, 2008; Nonrecourse Participation Agreement between Scott Financial and BOK dated January 21, 2008; Tharaldson Guaranty dated January 22, 2008; TM2I Guaranty dated January 22, 2008.

1 guaranties are not included in the definition of security under NRS 90.295, and each is not
2 considered an investment contract under *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

3 6. The Senior Loan Agreement and associated note as well as the loan transaction as a
4 whole are not securities because they fail to meet the requirements set forth in *State of Nevada v.*
5 *Friend*, 118 Nev. 115, 40 P.3d 436 (2002), and *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

6 7. Pursuant to N.R.S. § 90.570, a claim for securities fraud requires a material
7 misrepresentation or omission. BOK made no misrepresentation, nor did it omit to state facts
8 necessary to make other statements not misleading.

9 8. BOK cannot be found liable for securities fraud as: (1) there was no "offer to sell"
10 or "sale" of a security and BOK was not a seller; (2) there was no "security"; and (3) BOK neither
11 made untrue statements of material fact nor omitted to state necessary material facts.

12 9. Accordingly, the Court finds that there are no genuine issues of material fact as to
13 Plaintiffs' Fifth Claim for Relief (Securities Fraud) such that Bank of Oklahoma, N.A. is entitled
14 to judgment as a matter of law on this claim, pursuant to Nev. R. Civ. P. 56.

15 III.

16 CONCLUSION

17 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Bank of Oklahoma,
18 N.A.'s Motion For Partial Summary Judgment on Plaintiffs' Fifth Claim for Relief (Securities
19 Fraud) is GRANTED IN FULL.

20
21 IT IS SO ORDERED.

22
23 Honorable Mark R. Denton
24 DISTRICT COURT JUDGE

25 Dated: March 11, 2011

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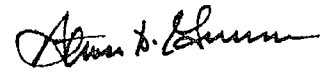
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DISTRICT COURT
CLARK COUNTY, NEVADA

CLUB VISTA FINANCIAL SERVICES,
L.L.C., a Nevada limited liability company;
THARALDSON MOTELS II, INC., a North
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THARALDSON,

Plaintiff,

vs.

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

Defendants.

Case No. A579963
Dept. No. XIII

Hearing Date: N/A
Hearing Time: N/A

**NOTICE OF ENTRY OF ORDER
GRANTING 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)**

Please take notice that on the 15th day of March, 2011, an Order Granting 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) was entered in the above-captioned action, a copy of said Order is attached hereto.

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DATED this 17th day of March, 2011.

LEWIS AND ROCA LLP

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BANK OF OKLAHOMA, N.A.

1 CERTIFICATE OF SERVICE

2 Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing NOTICE
3 OF ENTRY OF ORDER GRANTING DEFENDANT BANK OF OKLAHOMA N.A.'S
4 MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' THIRD AND
5 ELEVENTH CLAIMS FOR RELIEF (CONSTRUCTIVE FRAUD), (BREACH OF
6 CONTRACT AND BREACH OF THE COVENANT OF GOOD FAITH AND FAIR
7 DEALING) was made this date by e-service to the following:

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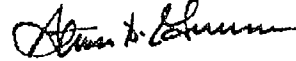
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26 DATED this 17th day of March, 2011.

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



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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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31 **North Dakota corporation; BRADLEY J.**
32 **SCOTT; BANK OF OKLAHOMA, N.A., a**
33 **national bank; GEMSTONE DEVELOPMENT**
34 **WEST, INC., a Nevada corporation;**
35 **ASPHALT PRODUCTS CORPORATION**
36 **D/B/A APCO CONSTRUCTION, a Nevada**
37 **corporation; DOE INDIVIDUALS 1-100; and**
38 **ROE BUSINESS ENTITIES 1-100,**

Defendants.

Case No.: A579963
Dept. No.: XIII

ORDER GRANTING 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)

RECEIVED

MAR 04 2011

DISTRICT COURT DEPT XIII

Lewis and Roca LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

1 This matter came before this Court for hearing on February 7, 2011 on Defendant Bank of
2 Oklahoma N.A.'s Motion for Partial Summary Judgment on Plaintiffs' Tenth and Eleventh Claims
3 for Relief (Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing).

4 Martin A. Aronson of Morrill & Aronson, P.L.C., Terry A. Coffing of Marquis Aurbach
5 Coffing, and Martin A. Muckleroy of Cooksey, Toolen, Gage, Duffy & Woog appeared on behalf
6 of Plaintiffs Club Vista Financial Services, L.L.C., Tharaldson Motels II, Inc., and Gary D.
7 Tharaldson. J. Randall Jones of Kemp, Jones & Coulthard, LLP appeared on behalf of Defendants
8 Scott Financial Corporation and Bradley J. Scott. John D. Clayman and Piper W. Turner of
9 Frederic Dorwart Lawyers and Jennifer K. Hostetler of Lewis and Roca LLP appeared on behalf
10 of Defendant Bank of Oklahoma, N.A.P. Kyle Smith of Smith Law Office appeared on behalf of
11 Defendant Alex Edelstein. Robert L. Rosenthal of Howard & Howard appeared on behalf of
12 Asphalt Products Corporation.

13 Having considered the parties' briefs, pleadings and other court filings in this matter, and
14 having considered argument of counsel, and good cause appearing, the Court makes the following
15 findings of fact and conclusions of law:

16 I.

17 FINDINGS OF FACT

18 1. Plaintiffs allege that Bank of Oklahoma, N.A. ("BOK") had contractual duties to
19 Plaintiffs related to the Senior Loan Agreement and the Club Vista Financial Services
20 Participation Agreement ("CVFS Participation Agreement") including the approval of the
21 following "conditions precedent":¹

- 22 1) Certifying that the Pre-Sale Condition was satisfied when it was not, in
23 violation of the CVFS Senior Participation Agreement.²
24 2) Certifying that the First Lien Condition was satisfied when it was not in
25 violation of the CVFS Senior Participation Agreement.³

26
27
28 ¹ (Plaintiffs' First Amended Complaint ("FAC") at ¶ 287.)

² (FAC ¶ 288(A))

³ (FAC ¶ 288(B))

1 2. BOK's involvement with Manhattan West first started when it began negotiations
2 to enter into a Nonrecourse Participation Agreement with SFC which was executed on January 21,
3 2008 ("BOK Participation Agreement").⁴ The only parties to the BOK Participation Agreement
4 are BOK and SFC.

5 3. BOK is not a party to the Senior Loan Agreement.⁵

6 4. BOK is not a party to the CVFS Senior Participation Agreement.⁶

7 5. The CVFS Participation Agreement states that the rights and duties outlined in the
8 agreement do not extend to any parties other than the Originating Lender and Participant:

9 This Agreement constitutes a sale of Participant's interest by Originating
10 Lender to Participant without recourse and shall in no way be construed...as
11 creating any relationship other than as provided in this Agreement.

12 ...
13 This Agreement and the duties and obligations contained in this Agreement
14 shall be, except as otherwise provided in Section 12 of this Agreement
15 (Assignments) solely for the benefit of the parties to this Agreement and no
16 third party shall have any rights under this Agreement as a third party
17 beneficiary or otherwise.⁷

18 7. The CVFS Participation Agreement describes BOK's limited review and approval
19 rights:

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

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

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

28 (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.⁸

⁴ (See January 21, 2008 Nonrecourse Participation Agreement between SFC and BOK.)

⁵ (See Senior Loan Agreement; see also FAC at ¶¶ 76-77.)

⁶ (See CVFS Participation Agreements dated January 22, 2008 and February 21, 2008 and March 21, 2008 Revised Participation Agreements; see also CVFS Rental Participation Agreement dated August 18, 2008.)

⁷ (See CVFS Participation Agreements at ¶¶ 2(a) & 14(e)).

⁸ (See CVFS Participation Agreements at ¶ 6(f)).

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II.

CONCLUSIONS OF LAW

1. The elements required to prove a breach of contract are:
- 1) Plaintiff and Defendant entered into a valid and existing contract,
 - 2) Plaintiff performed or was excused from performance,
 - 3) Defendant breached the contract, and
 - 3) Plaintiff sustained damages as a result of the breach.

Abdullah v. State, 771 N.W.2d 246, 253 (N.D. 2009).

2. The Court finds that there is no contract between Bank of Oklahoma, N.A., and Club Vista Financial Services. Accordingly, the Court finds that there are no genuine issues of material fact as to Plaintiffs' Tenth and Eleventh Claims for Relief (Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing) as to Club Vista Financial Services such that Bank of Oklahoma, N.A. is entitled to judgment as a matter of law on this claim, pursuant to Nev. R. Civ. P. 56.

3. The Court also finds that there is not a contractual relationship between Bank of Oklahoma, N.A., and Gary Tharaldson. Accordingly, the Court finds that there are no genuine issues of material fact as to Plaintiffs' Tenth and Eleventh Claims for Relief (Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing) as to Gary Tharaldson such that Bank of Oklahoma, N.A. is entitled to judgment as a matter of law on this claim, pursuant to Nev. R. Civ. P. 56.

III.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that 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) as to Club Vista Financial Services is GRANTED IN FULL.

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Bank of Oklahoma,
2 N.A.'s Motion For Partial Summary Judgment on Plaintiffs' Tenth and Eleventh Claims for Relief
3 (Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing) as to Gary
4 Tharaldson is GRANTED IN FULL.
5

6 IT IS SO ORDERED.

7
8 Honorable Mark R. Denton
9 DISTRICT COURT JUDGE

10 Dated: March 11, 2011

11
12 Submitted by

13 LEWIS AND ROCA LLP

14
15 By: Jennifer K. Hostetler

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17 JENNIFER K. HOSTETLER
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21 Las Vegas, Nevada 89169

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27 124 East Fourth Street
28 Tulsa, Oklahoma 74103
Attorneys for Defendant
BANK OF OKLAHOMA, N.A.

DISTRICT COURT
CLARK COUNTY, NEVADA

Steven L. Shuman
CLERK OF THE COURT

CLUB VISTA FINANCIAL SERVICES,)
L.L.C., a Nevada limited liability)
company; THARALDSON MOTELS II,)
INC., a North Dakota corporation;) CASE NO. A579963-B
and GARY D. THARALDSON,) DEPT. NO. XIII
Plaintiff(s),)
vs.) (Consolidated with
SCOTT FINANCIAL CORPORATION, a) A608563; A609288)
North Dakota corporation; BRADLEY)
J. SCOTT; BANK OF OKLAHOMA, N.A., a)
national bank; GEMSTONE DEVELOPMENT)
WEST, INC., a Nevada corporation;) Date: February 7, 2011
ASPHALT PRODUCTS CORPORATION D/B/A) Time: 9:00 a.m.
APCO CONSTRUCTION, a Nevada)
corporation,)
Defendant(s).)

DECISION

THIS MATTER having come before the Court on February 7,
2011 for hearing on 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), and the Court, having considered the
papers submitted in connection with such item(s) and heard the
arguments made on behalf of the parties and then taken the matter
under advisement for further consideration;

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

50
CLERK OF THE COURT

FEB 16 2011

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MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

1 A. As to Club Vista

2 The Motion is GRANTED, as there is no contract between
3 BOK and Club Vista.

4 B. As to TM2I

5 The Motion is DENIED IN PART regarding the breach of
6 contract claim, as there is a contractual relationship between
7 TM2I and BOK in the form of TM2I's guaranty. The fact that BOK
8 has shown that it has no express obligations under the guaranty
9 does not rule out implied obligations that may run from creditor
10 to guarantor under guaranty law apart from a general implied
11 covenant of good faith and fair dealing that may or may not be
12 applicable under the law of a given state. *Williams Products,*
13 *Inc. v. Stadel*, 214 N.W. 2d 368, 374-375 (N.D. 1973); see also
14 e.g. *Dorsy v. Maryland Nat. Bank*, 334 So.2d 273 (Fla. App. 1976)
15 (guaranty contract determines rights of guarantor against
16 creditor, but the "...law imposes on the creditor an obligation
17 not to deal with the debtor or any security for the debt in such
18 a manner as to harm the interests of the guarantor[.]"); see gen.
19 63 ALR 4th 678 *Creditor's Duty of Disclosure*, but see also 38 Am.
20 JUR. 2D *Guaranty* §98.
21

22 However, on the subject of such a general contractual
23 breach of an implied covenant of good faith and fair dealing, the
24 Motion is GRANTED IN PART because North Dakota, whose law is
25 applicable, does not recognize such an implied covenant. *WFND*,
26
27

1 LLC v. Fargo Marc, LLC, 730 N.W.2d 841, 848 (ND 2007).

2 C. As to Gary Tharaldson

3 The Motion is GRANTED as to both aspects (breach of
4 contract and contractual breach of implied covenant of good faith
5 and fair dealing), as there is no contractual relationship
6 between BOK and Mr. Tharaldson.
7

8 Conclusion

9 Counsel for BOK is directed to submit a proposed order
10 consistent with A and C above. Counsel for Plaintiffs is
11 directed to submit a proposed order consistent with B above.
12 Such proposed orders should be first submitted to opposing
13 counsel for approval/disapproval. Instead of seeking to litigate
14 any disapproval through correspondence directed to the Court or
15 to counsel with copies to the Court, any such disapproval should
16 be the subject of motion practice.
17

18 This Decision is a summary of the Court's analysis of
19 the matter and sets forth the Court's intended disposition on the
20 subject, but it anticipates further order of the Court to make
21 such disposition effective as an order or judgment.

22 DATED this 15th day of February, 2011.

23
24 MARK R. DENTON
DISTRICT JUDGE

25
26 CERTIFICATE

27 I hereby certify that on or about the date filed, this

28
MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

1 document was e-served or a copy of this document was placed in
2 the attorney's folder in the Clerk's Office or mailed to:

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6 Attn: Terry A. Coffing, Esq.

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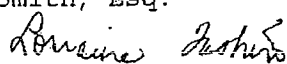
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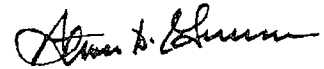
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14 Attn: J. Randall Jones, Esq.

15 HOWARD & HOWARD
Attn: Robert L. Rosenthal, Esq.

16 SMITH LAW OFFICE
17 Attn: P. Kyle Smith, Esq.

18 
19 LORRAINE TASHIRO
20 Judicial Executive Assistant
21 Dept. No. XIII
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CLERK OF THE COURT

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18 Attorneys for Defendant
19 BANK OF OKLAHOMA, N.A.

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

18 vs.

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

Defendants.

Case No. A579963
Dept. No. XIII

Hearing Date: N/A
Hearing Time: N/A

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT BANK OF
OKLAHOMA N.A.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON PLAINTIFFS' TWELFTH CLAIM
FOR RELIEF (NEGLIGENCE)**

28 Please take notice that on the 15th day of March, 2011, an Order Granting Defendant Bank
of Oklahoma N.A.'s Motion for Partial Summary Judgment on Plaintiffs' Twelfth Claim for
Relief (Negligence) was entered in the above-captioned action, a copy of said Order is attached
hereto.

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DATED this 17th day of March, 2011.

LEWIS AND ROCA LLP

By /s/ Von S. Heinz
VON S. HEINZ
3993 Howard Hughes Parkway #600
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JOHN D. CLAYMAN
Admitted Pro Hac Vice
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Attorneys for Defendant
BANK OF OKLAHOMA, N.A.

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT BANK OF OKLAHOMA N.A.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' TWELFTH CLAIM FOR RELIEF (NEGLIGENCE) was made this date by e-service to the following:

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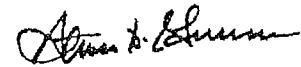
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Bradley J. Scott

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

DATED this 17th day of March, 2011.

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



CLERK OF THE COURT

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23 Attorneys for Defendant

24 **BANK OF OKLAHOMA, N.A.**

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

30 **SCOTT FINANCIAL CORPORATION, a**
31 **North Dakota corporation; BRADLEY J.**
32 **SCOTT; BANK OF OKLAHOMA, N.A., a**
33 **national bank; GEMSTONE DEVELOPMENT**
34 **WEST, INC., a Nevada corporation;**
35 **ASPHALT PRODUCTS CORPORATION**
36 **D/B/A APCO CONSTRUCTION, a Nevada**
37 **corporation; DOE INDIVIDUALS 1-100; and**
38 **ROE BUSINESS ENTITIES 1-100,**

Defendants.

Case No.: A579963

Dept. No.: XIII

**ORDER GRANTING DEFENDANT
BANK OF OKLAHOMA, N.A.'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON PLAINTIFFS'
TWELFTH CLAIM FOR RELIEF
(NEGLIGENCE)**

RECEIVED

MAR 04 2011

DISTRICT COURT DEPT#13

**Lewis and Roca LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169**

1 This matter came before this Court pursuant to Defendant Bank of Oklahoma N.A.'s
2 Motion for Partial Summary Judgment on Plaintiffs' Twelfth Claim for Relief (Negligence) filed
3 on December 15, 2010. Having considered the parties' briefs, pleadings and other court filings in
4 this matter, and with good cause appearing pursuant to EDCR 2.23(c), the Court makes the
5 following findings of fact and conclusions of law:

6 I.

7 FINDINGS OF FACT

8 1. Plaintiffs' negligence claim alleges that Bank of Oklahoma, N.A. ("BOK") owed
9 Plaintiffs a duty to exercise due care in connection with the underwriting, funding, and
10 administration of the Senior Loan.¹

11 2. Plaintiffs also claim that BOK as the co-lead on the Manhattan West project
12 placed itself into a special relationship to Plaintiffs and subsequently BOK owed duties to
13 Plaintiffs' as their fiduciary.²

14 3. BOK never gave Mr. Tharaldson any advice with respect to the Manhattan West
15 loan.³

16 4. BOK never made any direct representations to Plaintiffs regarding the soundness of
17 the transaction.⁴

18 5. The CVFS Senior Participation Agreement⁵ sets forth the duties required of the
19 originating lender, co-lead, and participant and provides:

20 This Agreement constitutes a sale of Participant's interest by Originating Lender
21 [Scott Financial] to Participant [CVFS] without recourse and shall in no way be
22 construed...as creating any relationship other than as provided in this Agreement.⁶

23
24
25
26 ¹ (Plaintiffs' First Amended Complaint at ¶ 297 ("FAC")).

27 ² (See Opposition at p. 21).

28 ³ (Tharaldson Depo. Vol. III, at p. 654, ll. 21-24).

⁴ (Tharaldson Depo. Vol. II, at p. 517, l. 22 to p. 518, l. 1).

⁵ (See CVFS Participation Agreements dated January 21, 2008, and February 21, 2008 and March 21, 2008 Revised Participation Agreements).

⁶ (See CVFS Nonrecourse Participation Agreement at ¶ 2(a)).

6. BOK's duties, apart from the CVFS Participation Agreement, included an obligation to make sure the guaranties that Mr. Tharaldson and TM2I executed were not induced by fraud, negligence, and breach of contract.⁷

6. Mr. Tharaldson has no personal knowledge or evidence that BOK knew about any fraud relating to the guaranty.⁸

II.

CONCLUSIONS OF LAW

1. To state a negligence claim, Plaintiffs must establish:

- (1) that BOK owed Plaintiffs a duty of care;
- (2) that BOK breached this duty of care;
- (3) that the breach was the legal cause of Plaintiffs' injury; and
- (4) that Plaintiffs suffered damages.

Scialabba v. Brandise Constr. Co., 112 Nev. 965, 968, 921 P.2d 928, 930 (1996) (internal citation omitted).

2. As a matter of law, the Nevada Supreme Court has refused to recognize a fiduciary relationship between a lender and borrower or between a lender and guarantor. *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 882 (9th Cir. 2007). Therefore, there is no fiduciary relationship between BOK (as lender) and TM2I (as guarantor) or between BOK (as lender) and Mr. Tharaldson (as guarantor).

3. A fiduciary relationship also does not exist between BOK (as co-lead lender) and CVFS (as participant). A fiduciary duty should not be inferred between sophisticated parties absent unequivocal language in an agreement stating that an institution owes fiduciary duties to the other. *First Citizens Fed. Sav. and Loan Ass'n v. Worthen Bank and Trust Co.*, 919 F.2d 510, 513 (9th Cir. 1990). This unequivocal language is not present in the Nonrecourse Participation Agreements at issue this case.

⁷ (Tharaldson Depo. Vol. III, at p. 658, l. 17 to p. 659, l. 2.)

⁸ (Tharaldson Depo. Vol. III, at p. 659, l. 4 to p. 660 l. 12.)

1 4. A confidential relationship giving rise to a duty to act did not exist between BOK
2 and any Plaintiff. The evidence fails to demonstrate that "[BOK] gained the confidence of the
3 [Plaintiffs] and purport[ed] to act or advise with the [Plaintiffs'] interest in mind." *Giles*, 494 F.3d
4 at 881.

5 5. The circumstances in this case demonstrate a special relationship did not exist
6 between BOK and any Plaintiff that gave rise to a duty on the part of BOK. A special relationship
7 exists when "the conditions would cause a reasonable person to impart special confidence" and the
8 "trusted party should have known of that confidence." *Id.*

9 6. CVFS, as a loan participant, did not owe a duty to BOK outside of the rights and
10 obligations delineated in the CVFS Participation Agreement. *See First Citizens* 919 F.2d at 513
11 (finding parties to a loan participation agreement find their rights and duties solely in the express
12 terms of the loan participation agreement).

13 7. BOK did not owe a duty of care nor breach any alleged duties of care owed to Mr.
14 Tharaldson or TM2I as guarantors of the Senior Loan. *See Yerington Ford, Inc. v. Gen. Motors*
15 *Acceptance Corp.*, 359 F. Supp. 2d 1075, 1092 (D. Nev. 2004) (affirmed in part, reversed in part
16 by *Giles*, 494 F.3d 865); *see also Larson v. Homecomings Fin., LLC*, 680 F. Supp. 2d 1230, 1235
17 (D. Nev. 2009).

18 8. BOK is not liable for negligence under a theory of breach of the implied covenant
19 of good faith and fair dealing.

20 9. Therefore, as Plaintiffs cannot establish that BOK owed any duty to them, there can
21 be no breach, causation, and damages resulting from the breach.

22 10. Plaintiffs claims of negligence are also barred because the alleged loss is purely
23 economic, and economic interests, if at all, are protected by contract, not tort, principles.
24 *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000), superseded by statute, NRS
25 40.635(2), *as recognized in Olson v. Richard*, 120 Nev. 240, 243, 89 P.3d 31, 33 (2004).

26 11. The professional negligence exception to the economic loss rule does not apply in
27 this instance.
28

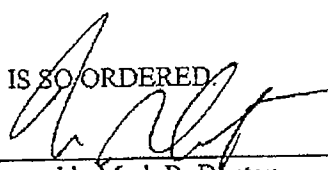
1 12. Accordingly, the Court finds that there are no genuine issues of material fact as to
2 Plaintiffs' Twelfth Claim for Relief (Negligence) such that Bank of Oklahoma, N.A. is entitled to
3 judgment as a matter of law on each of these claims pursuant to Nev. R. Civ. P. 56.
4

5 III.

6 CONCLUSION

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Bank of Oklahoma,
8 N.A.'s Motion For Partial Summary Judgment on Plaintiffs' Twelfth Claim for Relief
9 (Negligence) is GRANTED IN FULL.

10 IT IS SO ORDERED.

11 
12 Honorable Mark R. Denton
13 DISTRICT COURT JUDGE *dk*

14 Dated: March 11, 2011

15 Submitted by

16 LEWIS AND ROCA LLP

17 By: 

18 JENNIFER K. HOSTETTLER

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Attorneys for Defendant

BANK OF OKLAHOMA, N.A.


CLERK OF THE COURT

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;) CASE NO. A579963-B
and GARY D. THARALDSON,) DEPT. NO. XIII

Plaintiff(s),)

vs.) (Consolidated with
A608563; A609288)

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;) Date: February 14, 2011
ASPHALT PRODUCTS CORPORATION D/B/A) Time: 9:00 a.m.
APCO CONSTRUCTION, a Nevada)
corporation,)

Defendant(s).)

DECISION

THIS MATTER having come before the Court on
February 14, 2011 for hearing on, *inter alia*, Defendant's [Bank
of Oklahoma, N.A.] Motion for Partial Summary Judgment on
Plaintiffs' Ninth Claim for Relief (Acting in Concert/Civil
Conspiracy) and Plaintiffs' Eighth Claim for Relief (Aiding and
Abetting Breach of Fiduciary Duty), with Partial Joinders by the
Scott Defendants and Defendant APCO, and the Court, having
considered the papers submitted in connection with such item(s)
and heard the arguments made on behalf of the parties and then
taken the matter under advisement for further consideration;

RECEIVED

FEB 24 2011

CLERK OF THE COURT

MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

BOK App. 048

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

3 A. Ninth Claim for Relief (Acting in Concert/Civil
4 Conspiracy).

5 The Motion and Scott Defendants' Joinder are DENIED as
6 to the Ninth Claim for Relief, as there are genuine issues of
7 material fact concerning the extent of BOK's knowledge of what
8 Plaintiffs were led to believe by Scott Financial and what their
9 reasonable expectations were, and whether it knowingly and
10 improperly acted or omitted to act to abridge those
11 expectations.¹

12 B. Eighth Claim for Relief (Aiding and Abetting
13 Breach of Fiduciary Duty.

14 1. The Motion is GRANTED IN PART as to Plaintiffs Gary
15 Tharaldson and TM21, as it has previously been determined herein
16 that the Scott Defendants owed no fiduciary duty to those
17 Plaintiffs even under the assumption that a non-fiduciary,
18 special relationship might exist.

19 2. However, the Motion is DENIED IN PART as it relates
20 to Club Vista, as the existence of an agency relationship between
21 Scott Financial and Club Vista would bring about a fiduciary
22 relationship the breach of which by Scott Financial could
23

24
25
26 ¹The Court previously denied APCO's Motion relative to the
27 Ninth Claim for Relief on February 7, 2011 and its Joinder is
28 thus DENIED as well.

1 conceptually be the subject of aiding and abetting activities by
2 BOK, as to which there are genuine issues of material fact.

3 C. Conclusion.

4 Counsel for Plaintiffs is directed to submit a proposed
5 order consistent with A and B(2) above.

6 Counsel for BOK is directed to submit a proposed order
7 consistent with B(1) above.

8 Such proposed orders should be first submitted to
9 opposing counsel for approval/disapproval. Instead of seeking to
10 litigate any disapproval through correspondence directed to the
11 Court or to counsel with copies to the Court, any such
12 disapproval should be the subject of motion practice.

13 This Decision is a summary of the Court's analysis of
14 the matter and sets forth the Court's intended disposition on the
15 subject, but it anticipates further order of the Court to make
16 such disposition effective as an order or judgment.

17 DATED this 24th day of February, 2011.

18
19
20
21 MARK R. DENTON
DISTRICT JUDGE

22 CERTIFICATE

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

26 COOKSEY, TOOLLEN, GAGE, DUFFY & WOOG
27 Attn: Martin A. Muckleroy, Esq.
28

MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

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MARQUIS & AURBACH
Attn: Terry A. Coffing, Esq.

Martin A. Aronson, Esq.
One E. Camelback Road, Suite 340
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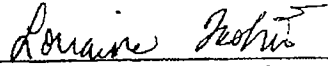
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124 E. Fourth Street
Tulsa, OK 74103

LEWIS AND ROCA
Attn: Jennifer K. Hostetler, Esq.

KEMP, JONES & COULTHARD
Attn: J. Randall Jones, Esq./Mark M. Jones, Esq.

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

SMITH LAW OFFICE
Attn: P. Kyle Smith, Esq.


LORRAINE TASHIRO
Judicial Executive Assistant
Dept. No. XIII

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

Case No.: A579963
Dept. No.: XIII

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

Defendants.

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

of

GARY D. THARALDSON

July 8, 2010

9:00 O'clock A.M.

Taken at: HOTEL DONALDSON
101 Broadway
Fargo, North Dakota

REPORTER: DOUGLAS T. KETCHAM

(PURSUANT TO NOTICE)

DOUG KETCHAM & ASSOCIATES

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

4 Q. All right.

5 A. -- very clearly, I believe.

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

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

14 A. It looks like it.

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

19 A. In 13?

20 Q. Yes, sir.

21 A. It's bold and capitalized.

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

24 A. Yes.

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

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

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

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

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

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

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

19 A. Legal fees?

20 Q. Any kind of fees.

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

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

—DOUG KETCHAM & ASSOCIATES—

ORIGINAL

3

330

COMP

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A-10-608563-C
644263



FILED
JAN 21 5 21 PM '10
John A. Quinn
CLERK OF THE COURT

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.

MASLON EDELMAN BORMAN & BRAND,
LLP, a Minnesota limited liability partnership,

Defendant.

Case No. A-10-608563-C

Department No. XII

COMPLAINT

RECEIVED
JAN 21 2010
CLERK OF THE COURT

1 Plaintiffs, by and through their counsel undersigned, for their Complaint against Defendant allege
2 as follows:

3 NATURE OF THE ACTION

4 1. This is case of legal malpractice, negligent misrepresentation, breach of fiduciary duty,
5 and aiding and abetting against Defendant Maslon Edelman Borman & Brand, LLP ("Maslon"), arising
6 out of a highly unusual real estate finance deal. Defendant Maslon is a law firm specializing in complex
7 real estate financing transactions. At all times relevant to the events described in this Complaint,
8 Defendant Maslon was counsel to Plaintiffs and may have also been counsel for Scott Financial
9 Corporation ("SFC"). Defendant Maslon did not disclose to Plaintiffs any of its conflicts of interest or
10 advise Plaintiffs to seek the advice of independent legal counsel. Defendant Mason provided expert
11 legal advice to Plaintiffs and drafted and reviewed the documents for every aspect of this complex
12 transaction.

13 2. SFC and its principal, Bradley Scott ("Scott") have had a long-standing relationship with
14 Plaintiff Gary Tharaldson and his related entities, including the Plaintiffs in this case. Over the years,
15 Tharaldson, through various business entities, has participated in numerous real estate financing
16 transactions with Scott and SFC and came to rely exclusively on Scott and SFC for all of the
17 underwriting, due diligence and feasibility analysis for all of the projects. Defendant Maslon was hired to
18 represent Tharaldson and his business entities in documenting and providing legal advice on each of
19 these transactions.

20 3. SFC and Bank of Oklahoma ("BOK") are co-lead lenders in a 29 lender \$110 million
21 syndicated loan participation, in connection with the project in Las Vegas, Nevada, known as the
22 Manhattan West project. SFC, Scott and BOK induced Plaintiffs Tharaldson and Tharaldson Motels II,
23 Inc., with whom Scott and SFC have long had a fiduciary relationship of the highest trust and
24 confidence, to give 100% unlimited guarantees of the performance of a wholly unrelated
25 developer/borrower. SFC, Scott and BOK also induced Plaintiff CVFS to subordinate its prior \$46
26 million loan to the new \$110 million loan.

27 4. SFC, Scott and BOK wrongfully induced Plaintiffs' participation in the financing
28 transaction through multiple breaches of fiduciary duty, misrepresentations and omissions. Defendant

1 Maslon knew of these breaches and misrepresentations and omissions and aided and abetted in SFC's,
2 Scott's and BOK's breaches of duties and misrepresentations and omissions. Defendant Maslon, as
3 counsel for Plaintiffs, breached its duties to Plaintiffs and contributed to the wrongful inducement of
4 Plaintiffs in this transaction. For example, Defendant Maslon opined that all of the preconditions to
5 Senior Loan had been satisfied. Defendant Maslon knew or should have known that this representation
6 was incorrect because the pre-sales and pre-leasing requirements had not been met. Defendant Maslon
7 also failed to advise Plaintiffs that there were lien priority problems. Further, Defendant failed to
adequately advise Plaintiffs on their rights under the guarantees.

8 5. Defendant Maslon breached its duties to Plaintiffs and caused Plaintiffs to enter into the
9 Manhattan West transaction, which they would not have done had Defendant Maslon fulfilled its duties
10 to Plaintiffs. As a result of Defendant Maslon's wrongdoing, Plaintiffs have suffered substantial
11 damages.

12 PLAINTIFFS

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

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

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

20 9. CVFS, TM2I, and Tharaldson are hereinafter collectively referred to as Plaintiffs.

21 DEFENDANT MASLON

22 10. Defendant Maslon Edelman Borman & Brand, LLP ("Maslon") is a Minnesota limited
23 liability partnership with its principal place of business in Minneapolis, Minnesota. Maslon is a full
24 service business and real estate law firm. Maslon's real estate attorneys are recognized for their work on
25 major local and national real estate financing projects.

26 SUBJECT MATTER JURISDICTION

27 11. This Court has subject matter jurisdiction under Article 6, Section 6 of the Nevada
28 Constitution and under NRS 4.370(1), because the amount in controversy exceeds \$10,000.

JURISDICTION

1 12. Maslon is subject to personal jurisdiction in this Court under NRS 14.065 because it has
2 caused events to occur in Las Vegas, Nevada, which are the subject matter of this action, including, but
3 not limited to, representing Gary Tharaldson, a resident of Nevada, and representing CVFS, a Nevada
4 limited liability company, and a real estate financing transaction involving real property located in Clark
5 County, Nevada. Defendant Maslon also drafted and reviewed the loan documents required for the
6 Manhattan West project located in Clark County, Nevada, and providing expert legal advice to Plaintiffs
7 concerning this transaction. Defendant Maslon drafted the various deeds of trust required for the
8 financing transactions on the Manhattan West project, which deeds of trust were recorded in the Clark
9 County, Nevada recorder's office. The loan documents drafted by Defendant Maslon included venue
10 provisions identifying Clark County, Nevada as the appropriate venue and choice of law provisions
11 identifying Nevada law as the applicable law.

12 13. On January 11, 2008, prior to the closing of the loan, Defendant Maslon attended and
13 participated in a lenders' meeting in Clark County, Nevada, concerning the loan on the Manhattan West
14 project. On information and belief, Defendant Maslon participated in other meetings in Clark County,
15 Nevada, concerning the Manhattan West project and its work in preparing and drafting the loan
16 documents. In addition, Defendant Maslon sent and received numerous communications via mail, email,
17 facsimile, and telephone to and from Clark County, Nevada, Plaintiffs, Scott, SFC, the title insurance
18 company, the developer/borrower, and/or the general contractor concerning the financing of the
19 Manhattan West project in Clark County, Nevada.

VENUE

20 14. Venue is appropriate in this Court under NRS 13.040. Defendant Maslon caused events
21 to occur in Clark County, Nevada, described in the preceding paragraph. In addition, the Senior Debt
22 Loan Agreement, which Defendant drafted and out of which this action arises, provides for venue in the
23 state and federal courts located in Clark County, Nevada.
24

GENERAL ALLEGATIONS

Plaintiffs= Business

25
26 15. Plaintiff Tharaldson is a successful real estate entrepreneur who has had substantial
27 success in the motel and lodging business.
28

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

17. 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.

18. 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

19. 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.

20. In 2003, Scott left Bismark National Bank and founded his own company, SFC, a firm specializing in corporate lending and lending services. SFC does not actually loan its own moneys. Instead, it acts as a "lead lender" in syndicating participation interests to other lenders who actually supply loan funds.

21. 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").

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

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

A. \$65,600,000 construction loan and \$38,900,000 construction loan to Gemstone

1 LVS, LLC made in June, 2004 in which Tharaldson Financial Group, Inc. was
2 lender and SFC was its financial consultant in the underwriting, documentation
3 and servicing, secured by Phase 1 and Phase 2 respectively of the Manhattan
4 Project in Las Vegas, Nevada.

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

1 Vineyard Farms, ABCDS, and Gillespie Properties with SFC as Lender and
2 CVFS as the majority participant and majority owner of the Lender's interest,
3 made in September 2006 with a maturity of December 31, 2008, secured by land
4 in western Maricopa County, Arizona.

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

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

16 25. In each of the SFC Loans, Plaintiffs relied entirely upon Scott and SFC to underwrite and
17 evaluate the merits of the loans and to prepare the appropriate loan documentation to protect Plaintiffs'
18 legal and financial interests in the SFC Loans. Scott and SFC knew about and encouraged this reliance.

19 26. Even though it was not the actual source of loan funds, SFC typically had the loan
20 documents prepared for the SFC Loans in its name as the Lender. The only documentation Plaintiffs
21 typically signed with respect to each of the SFC Loans was a separate Non-Recourse Participation
22 Agreement and related commitment acknowledging their acquisition of ownership of the particular SFC
23 Loan as the Participant. It was pursuant to these Agreements that Tharaldson and his entities made loan
24 funds available to the ultimate borrowers.

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

28 28. In connection with each of the SFC Loans, Scott through SFC has performed the credit

1 underwriting, due diligence investigation, negotiated the loan terms with the borrower, hired counsel to
2 represent Tharaldson, CVFS and his related business entities, as the participants, in documenting the
3 loan, selected the title insurer for obtaining lenders title insurance policies on the real estate loan
4 collateral, sold participations in the loans to Plaintiffs, and then performed all loan administration and
5 servicing, including collection of interest and principal from the borrower and remitting those payments,
6 less SFC's fees, to Plaintiffs and any other participants.

7 29. Plaintiffs' investment in each of the SFC Loans was documented by a separate
8 Nonrecourse Loan Participation Agreement (Consulting Agreements in the case of the Manhattan Loans)
9 prepared by Scott. Each participation agreement (and the Consulting Agreements in the case of the
10 Manhattan Loans) appoints SFC as the agent of CVFS or other Tharaldson affiliate with respect to the
11 loan and acknowledges the fiduciary relationship and agency between SFC and such participant.

12 **Defendant Maslon's Attorney/Client Relationship With Plaintiffs**

13 30. Defendant Maslon is a law firm specializing in complex real estate financing transactions,
14 both locally in Minnesota and nationally. Over the course of several years, Defendant Maslon
15 represented Plaintiffs, including Gary Tharaldson, CVFS and related business entities, in drafting loan
16 documentation on numerous projects, including the SFC loans.

17 31. Defendant Maslon represented CVFS as the participant in connection with each of the
18 SFC loans. Throughout these transactions, Defendant Maslon represented Plaintiffs (Tharaldson and
19 CVFS) and provided expert legal advice to Plaintiffs.

20 32. Defendant Maslon was aware of the fiduciary relationship Scott and SFC had with
21 Plaintiffs and the trust and confidence Plaintiffs reposed in Scott and SFC. Defendant Maslon knew or
22 should have known that Plaintiffs relied entirely upon Scott and SFC to underwrite and evaluate the
23 merits of the loans and to prepare the appropriate loan documentation to protect Plaintiffs' legal and
24 financial interests.

25 33. Tharaldson and his business entities relied exclusively on Defendant Maslon for its expert
26 legal opinions and advice in these real estate financing transactions and its expertise in drafting the
27 appropriate documentation of the transactions to protect Plaintiffs and accurately reflect Plaintiffs'
28 understanding and expectations of the deal.

34. Tharaldson and his business entities believed and understood that Defendant Maslon was

1 acting as their lawyers with respect to each of the SFC Loans. Based on this understanding, Tharaldson
2 and his business entities relied on the expert advice and counsel of Defendant Maslon. In fact,
3 throughout this relationship, Plaintiffs relied exclusively on Defendant Maslon for legal advice for every
4 transaction involving Scott and SFC. Defendant Maslon knew or should have known that Tharaldson
5 and his business entities viewed Maslon as their counsel on these transactions and were relying on the
6 firm's advice and expertise.

7 35. Over the course of time, a special relationship of trust and confidence developed between
8 Defendant Maslon and Tharaldson and his business entities. Defendant Maslon knew about and
9 encouraged this reliance and trust and confidence.

10 36. Because it drafted all of the documentation, Defendant Maslon knew that SFC was not
11 the source of loan funds for any of the transactions, but that Tharaldson, through one or more of his
12 business entities, was the source of most, if not all, of the funding. Defendant Maslon knew or should
13 have known that Tharaldson and his business entities were relying on their counsel Defendant Maslon to
14 give them competent legal advice and draft the loan documentation in such a way as to protect their
15 interests. Thus, Defendant Maslon knew that the transaction documents needed to be drafted in such a
16 way as to protect Plaintiffs' legal and financial interests.

17 37. Defendant Maslon did not disclose its conflicts of interest in these transactions to
18 Plaintiffs. Defendant Maslon did not advise Plaintiffs that because of its conflicts of interest the firm
19 could not represent Plaintiffs and insist or require that Plaintiffs consult with independent counsel.
20 Instead, Defendant Maslon fostered a relationship of trust with Tharaldson and encouraged Plaintiffs to
21 rely on its expertise and legal advice.

22 The Manhattan Project

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

27 39. Defendant Maslon represented Tharaldson Financial Group, Inc. on the Manhattan
28 Project and provided expert legal advice and counsel to Tharaldson Financial Group, Inc. in connection
with all aspects of this transaction, as Maslon had done in connection with the many other projects for

Tharaldson and his business entities. Defendant Maslon expressly acknowledged its representation of Tharaldson and his entities in a letter dated March 22, 2005 to Gemstone LVS, LLC, in which Penny Heaberlin, a member and/or partner of Defendant Maslon, stated "As you know, I have represented TFG [Tharaldson Financial Group, Inc.] and Scott Financial Group in connection with loans from TFG to Gemstone, LVS, LLC." (March 22, 2005 letter is attached hereto as Exhibit A). Scott and SFC also recognized that Defendant Maslon represented Tharaldson Financial Group in connection with the Manhattan Project by identifying Defendant Maslon as counsel for the Lender Tharaldson Financial Group in the Lender's Loan Document Checklist they prepared for the Manhattan Project. (See Exhibit B, Lender's Loan Document Checklist).

The Manhattan West Project

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

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

42. 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.

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

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

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

The Manhattan West Acquisition and Development Financing

(The Prior Loan and Edelstein Loan)

46. 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 Manhattan West Project. Although SFC was the named lender under the Prior Loan Agreement, all loan funds came from Plaintiff CVFS.

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

48. 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").

49. 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.

50. 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.

51. 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.

52. 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.

53. 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.

54. 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.

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

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

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

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

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

19 60. Defendant Maslon drafted and/or reviewed all of the transaction documents generated in
20 connection with the Prior Loan and the Edelstein Loan. Defendant Maslon represented Tharaldson in
21 connection with the Prior Loan and the Edelstein Loan.

22 61. Defendant Maslon knew that CVFS and Tharaldson were providing 100% of the loan
23 funds and were relying exclusively on Maslon for legal advice in connection with these loans and on
24 Maslon's expertise in properly documenting the transactions to protect their legal and financial interests.

25 62. Defendant Maslon failed to disclose to CVFS and Tharaldson that it had a conflict of
26 interest and could not properly represent Tharaldson's and CVFS' interests in this transaction.
27 Defendant Maslon did not insist or require that Tharaldson and CVFS seek independent legal advice, but
28 instead encouraged Tharaldson and CVFS to look to Maslon for legal advice and counsel on the

Manhattan West financing.

Subsequent Modifications to Prior Loan and Edelstein Loan

63. 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.

64. 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 to correspond to an additional \$8,000,000 advance on the Junior Deed of Trust Loan.

65. 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 for CVFS concerning the Additional LOC Note and acknowledged SFC's fiduciary duties to CVFS.

66. 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.

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

68. 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 \$55,273,146.

69. Defendant Maslon drafted and/or reviewed all of the transaction documents generated in connection with the modifications to Prior Loan and the Edelstein Loan. Again, Maslon represented CVFS and Tharaldson in connection with modifications of the Prior Loan and the Edelstein Loan.

70. Defendant Maslon knew that CVFS and Tharaldson were providing 100% of the loan funds and were relying exclusively on Maslon for legal advice in connection with these loans and on Maslon's expertise in properly documenting the transactions to protect their legal and financial interests.

71. Defendant Maslon failed to disclose to CVFS and Tharaldson that it had a conflict of interest and could not properly represent Tharaldson's and CVFS' interests in this transaction. Defendant Maslon did not insist or require that Tharaldson and CVFS seek independent legal advice, but instead encouraged Tharaldson and CVFS to look to Maslon for legal advice and counsel on the Manhattan West financing.

The Construction Financing Syndication

(The Senior Loan)

72. By late 2007, the Project was ready to commence vertical construction, but needed an additional \$110,000,000 of construction loan funds to commence construction on Phase I.

73. SFC and Scott desired to broker the accumulation of \$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.

74. 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 Phase I construction and also "take out" and pay off the Prior Loan and the Edelstein Loan as was anticipated when those Loans were made.

75. On information and belief, 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 TM2I because this would allow BOK to receive a subprime rate of return on a prime rate quality credit.

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

4 77. To induce the cooperation of Plaintiffs Tharaldson, CVFS and TM2I, SFC and BOK
5 offered Tharaldson and TM2I a 500 basis point (5%) cut of the interest to be paid on the 14%
6 construction loan in exchange for the guarantees of Tharaldson and TM2I and in exchange for CVFS=
7 agreement to subordinate its position to the \$110,000,000 in construction financing. This arrangement
8 would still leave BOK and other participating lenders with a net 8.5% interest rate after payment of 50
9 basis points (.5%) in loan servicing fees to SFC.

10 78. This complex structure was highly unusual for a number of reasons. First, it is unusual for
11 entities not affiliated with the developer and having no equity stake in the development to be
12 guaranteeing the development's success. Second, it is highly unusual for a subordinating lender and its
13 affiliates to take on both the risk of being subordinated and to guaranty their unaffiliated borrower's
14 performance. Third, guarantees are typically given by the borrower's "side" in a financing transaction,
15 and not, as here, given by a substantial project lender.

16 79. Notwithstanding the highly unusual nature of this transaction, Tharaldson and his entities
17 were persuaded to proceed with it due to the unusual level of trust and confidence they had in Scott and
18 SFC and Defendant Maslon.

19 80. Defendant Maslon represented Plaintiffs in this vertical phase of the financing of the
20 Manhattan West project. Defendant Maslon knew or should have known the transaction was fraught
21 with conflicts of interest. For example, Scott and SFC were agents and fiduciaries of Plaintiffs, and
22 Scott and SFC owed Plaintiffs the highest duties of loyalty and care. Defendant Maslon was aware of
23 SFC's and Scott's fiduciary and agent relationship with Plaintiffs. Defendant Maslon was also aware
24 that Scott and SFC were also agents and fiduciaries to BOK and the other participating lenders in the
25 loan syndicate. Defendant Maslon did not disclose to Plaintiffs the many conflicts of interest or the
26 conflicts of interest and failed to insist or require that Plaintiffs seek the advice of independent counsel.

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

- BOK received the guarantees of prime rate quality credits;

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

18 82. SFC acted as BOK's agent in procuring for it this deal which was so highly beneficial to
19 BOK and so highly detrimental to Plaintiffs. Defendant Maslon did not disclose to Plaintiffs the
20 lopsided nature of this transaction and the fact that the structure of the transaction was highly beneficial
21 to BOK, but highly detrimental to Plaintiffs.

22 **The Senior Loan Documentation and the AMezzanine Financing@**

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

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

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

86. Defendant Maslon drafted the Senior Loan Agreement and all related documents as counsel for Plaintiffs. At all times while acting as counsel for Plaintiffs with respect to the Senior Loan, Defendant Maslon knew of the fiduciary relationship SFC occupied toward Plaintiffs due to the general relationship of trust and confidence between them and due to the CVFS Pre-Senior Participation Agreements, each of which Defendant Maslon had drafted and which appointed SFC as agent for CVFS and acknowledged SFC's fiduciary duties to CVFS.

87. 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").

88. 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").

89. 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."

90. 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).

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

92. 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 expenses paid the Mezzanine Financing participant, or c) required equity as defined in the Section 3.1.10 of the Senior Loan Agreement.

93. 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:

- 1 A. Gemstone West Inc. having aggregate pre-sale revenue of not less than
- 2 \$60,000,000 from: (i) Qualified Sales of condo units, (ii) the capitalized value (at
- 3 a 7.0% capitalization rate measured against triple net lease payments) of Class A
- 4 office and retail leases, and (iii) the sales price of Class A office space; and
- 5 B. Gemstone West Inc. obtaining and maintaining certain nonrefundable cash
- 6 deposits or deposit bonds on condominium units sold but not yet closed and
- 7 square footage leased.

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

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

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

28 97. 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.

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

99. 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.

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

101. Neither Tharaldson nor TM2I is a shareholder, owner, officer or affiliated party of Gemstone West Inc., but rather executed the 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.

102. 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 for CVFS concerning the Senior Construction Note and acknowledged SFC's fiduciary duties to CVFS.

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

104. 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.

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

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

11 107. On or about January 22, 2008, Gemstone West Inc. and SFC executed a First Amendment
12 to Senior Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of
13 Credit) (Mezzanine) ("First Senior DOT Amendment"), to confirm that the First Senior DOT secured
14 \$28,000,000 of the refinanced Mezzanine Note. The First Senior DOT Amendment was recorded in the
15 real property records of Clark County, Nevada on February 7, 2008 at Book 20080207, Instrument No.
16 0001484.

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

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

for CVFS concerning the Mezzanine Note and acknowledged SFC's fiduciary duties to CVFS.

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

Defendant Maslon's Misrepresentations Concerning The Satisfaction of Conditions Precedent

111. On January 30, 2008, Defendant Maslon, as Plaintiffs counsel, issued an opinion representing that it had reviewed the conditions precedent status for the advances under the Senior Debt Loan Agreement. Based on [its] review, the Lender is in position to fund the Senior Loan, provided each Participant funds its pro rata share. Defendant Maslon knew or should have known at the time it issued this opinion that the statements were untrue and misleading, that it did not have a reasonable basis for its opinion, and that the conditions precedent in the Senior Loan Agreement had not been met. (A copy of the January 30, 2008 letter from Defendant Maslon to Brad Scott and SFC is attached hereto as Exhibit C).

112. At the time it issued its January 30, 2008 opinion, Defendant Maslon knew or should have known:

- a. That First American Title Insurance Co. had refused to issue title insurance because of prior recorded liens of the General Contractor;
- b. 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;
- c. That so-called lender approved pre-sales and pre-leases were not arms length sales and lease to unrelated third parties, but in many cases were to the affiliates or principals of the developer or to other insiders;
- d. That Scott and SFC acting as dual agents for Plaintiffs and BOK had an inherent conflict of interest that could not be waived.

113. Although Defendant Maslon knew or should have known the foregoing matters were material to Plaintiffs, Defendant Maslon did not disclose this information to Plaintiffs, despite its duty to Plaintiffs to do so. Defendant Maslon did not disclose to Plaintiffs that its opinion that the loan preconditions had been met was incorrect and that it did not have a reasonable basis for its opinion.

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

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

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

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

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

118. 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.

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

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

121. At the time the Plaintiffs' Senior Loan Documents agreed to were executed and at all times thereafter, Scott, SFC and BOK 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.

122. Defendant Maslon drafted the Plaintiffs' Senior Loan Documents, including the guarantees. Penny Heaberlin, a member and/or partner of Defendant Maslon, admitted in an affidavit dated as of August 12, 2009, that she drafted the Senior Loan Documents and the Plaintiffs' Senior Loan Documents, including the guarantees. (A copy of Penny Heaberlin's affidavit is attached hereto as Exhibit D). At the time the Plaintiffs' Senior Loan Documents were drafted, agreed to, executed and at all times thereafter, Defendant Maslon was counsel for Plaintiffs and had a fiduciary relationship with Plaintiffs. Defendant owed Plaintiffs a duty to draft the Plaintiffs' Senior Loan Documents, including the guarantees, in such a way as to protect Plaintiffs' legal and financial interests and properly and

1 throughly advise Plaintiffs on their legal rights with respect to every aspect of the transaction, including
2 the legal significance of the guarantees.

3 Subsequent Changes to Loans

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

12 124. On or about August 11, 2008, Gemstone Manhattan and SFC executed a First
13 Amendment and Assumption Agreement to the Gemstone LVS DOT, which was recorded on September
14 9, 2008 in the public real property records of Clark County, Nevada at Book 20080909, Instrument No.
15 0003944 (the "Gemstone LVS DOT Amendment"). Under the Gemstone LVS DOT Amendment,
16 Gemstone Manhattan assumed the obligations of Apache under the Gemstone LVS DOT and the
17 principal amount secured under the Gemstone LVS DOT was increased to include the Rental LOC Note.

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

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

27 the Senior Loan and the Rental LOC Notes

28 126. 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") have not made any of the

1 required interest payments since September 2008, and all promissory notes making up the Manhattan
2 West Loans are therefore in monetary default.

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

6 **The Fraudulent Inducement And Defendant Maslon's Aiding and Abetting The Fraudulent**

7 **Inducement**

8 128. Plaintiffs' decisions to modify the Prior Loan and the Edelstein Loan as provided in the
9 Senior Loan Agreement, and to agree to the Plaintiffs' Senior Loan Documents was based upon the trust
10 and confidence Plaintiffs reposed in Scott and SFC and Defendant Maslon due to their longstanding
11 relationship, and upon the Scott's, SFC's and BOK's recommendations to Plaintiffs which Plaintiffs
12 understood to be backed up by the rigorous due diligence of Scott, SFC and BOK and their assurances to
13 Plaintiffs that the transaction was sound and would be in Plaintiffs' best interest. Plaintiffs' decision
14 was also based upon the trust and confidence Plaintiffs placed in Defendant Maslon, their trusted legal
15 advisor and counselor.

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

21 130. Defendant Malson represented Plaintiffs in all aspects of the transaction, and Plaintiffs
22 relied on Defendant Malson to properly draft the loan documentation and give them appropriate and
23 competent legal advice to protect their legal and financial interests.

24 131. Before Plaintiffs agreed to the Senior Loan transactions, Scott and SFC told Plaintiffs that
25 with the advent of the Senior Loan, their business and economic position with respect to construction
26 lending on the Project, would be:

- 27 A. The Senior Loan of \$110,000,000 would become a first lien position on the
28 Project.
B. Plaintiffs would receive a net paydown on the Prior Loan and Edelstein Loan