

## IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT FOR THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF CLARK,  
AND THE HONORABLE MARK R.  
DENTON, DISTRICT JUDGE,

Respondents.

and

SCOTT FINANCIAL CORPORATION, A  
North Dakota corporation; BRADLEY J.  
SCOTT; BANK OF OKLAHOMA, N.A., a  
national bank; GEMSTONE  
DEVELOPMENT WEST, INC., a Nevada  
corporation; ASPHALT PRODUCTS  
CORPORATION, dba APCO  
CONSTRUCTION, a Nevada Corporation

Real Parties in Interest.

Case No.: 57784

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**REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, OR  
ALTERNATIVELY, PETITION FOR WRIT OF PROHIBITION**

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## I. INTRODUCTION

In an attempt to avoid the effect of this Court invalidating the ill-gotten jury trial waivers, the Scott Defendants suggest that the District Court's previous finding of factual issues with regard to Plaintiffs' claims of concealment and constructive fraud relating to the guaranties, as well as the jury trial waivers, somehow no longer exists.<sup>1</sup> However, the Scott Defendants' assertion is simply incorrect. It is true that the District Court has entered partial summary judgment to Defendants on a variety of Plaintiffs' claims not before this Court, as both the Scott Defendants and Bank of Oklahoma ("BOK") have pointed out. But, the District Court has not disturbed its previous finding with regard to the Scott Defendants that "there are genuine issues regarding concealment and constructive fraud . . ." despite numerous attempts by the Defendants to overcome this language.<sup>2</sup> So, the Scott Defendants' argument that Plaintiffs have no proof of concealment or constructive fraud is without merit.

Although the District Court has entered summary judgment in favor of BOK *only* on Plaintiffs' claims for concealment and constructive fraud, Plaintiffs do not need to show that each Defendant engaged in fraudulent inducement of Plaintiffs' signing of the guaranties containing the jury trial waivers.<sup>3</sup> Instead, once the jury trial waivers are deemed invalid and void, they cannot be relied upon by any party.<sup>4</sup> The narrow jury trial waiver issue before this Court focuses upon the notion that a plaintiff seeking to

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<sup>1</sup> Petitioners' Appendix ("PA") 4:754–757; Petitioners' Reply Appendix ("PRA") 3:550–551; PRA 3:552–554; PRA 3:555–557; PRA 3:558–560.

<sup>2</sup> Id.

<sup>3</sup> See Awada v. Shuffle Master, Inc., 123 Nev. 613, 623, 173 P.3d 707, 713 (2007); Havas v. Bernhard, 85 Nev. 627, 631, 461 P.2d 857, 859–860 (1969) (stating that an agreement induced by fraud or misrepresentation never came into being, and there is no contract to enforce).

<sup>4</sup> Id.

1 invalidate a jury trial waiver only has to prove fraud as it relates to the entire contract, not  
2 particularized fraud as it relates to the specific jury trial waiver provisions. Surprisingly,  
3 the Scott Defendants and BOK largely ignore the “fraud” aspect of this entire argument  
4 and instead argue that inapposite cases dealing with general contract principles are  
5 controlling. And, Defendants completely ignore Plaintiffs’ reference to Rosenberg and  
6 claim that this case can only be applied within a fiduciary relationship—a limitation not  
7 stated in the portions relied upon by Plaintiffs.<sup>5</sup> Notably, Lowe is not controlling in this  
8 matter because it did not involve concealment and fraud with respect to the contract that  
9 are present in this case.<sup>6</sup> Moreover, Defendants rely heavily upon federal cases  
10 construing arbitration provisions as an analogy to jury trial waivers, but many of these  
11 rules for construing arbitration provisions are not followed in Nevada. And, Rosenberg  
12 has already implicitly rejected Defendants’ argument dealing with arbitration provisions.

13 As such, this Court should order the District Court to hold a preliminary jury trial  
14 to determine the sole issue of whether the jury trial waivers and the guaranties as a whole  
15 were procured by concealment or constructive fraud.<sup>7</sup> If the Court grants this relief of a  
16 preliminary jury, the bifurcation issues will likely become moot. However, if this Court  
17 chooses not to order a preliminary jury, the Court should, alternatively, order a single  
18 jury trial, with all issues of this case and with the jury being an advisory jury as to issues

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20 <sup>5</sup> See Tuxedo Int’l Inc. v. Rosenberg, 127 Nev. Adv. Op. No. 2, at 10–11, n. 4 (Feb. 10,  
21 2011) (stating that this Court disagrees with United States Supreme Court law on the  
22 presumption of contractual waivers in that it is not “good policy for Nevada regarding  
general forum selection clauses, as we do not believe, in reality, a party is likely to be  
defrauded only in the inclusion of a forum selection clause but not defrauded by the  
contract as a whole.”).

23 <sup>6</sup> See Lowe Enters. Residential Partners, L.P. v. Dist. Ct., 118 Nev. 92, 40 P.3d 405  
24 (2002).

25 <sup>7</sup> See, e.g., Federal Housecraft, Inc. v. Faria, 216 N.Y.S.2d 113, 114 (N.Y. App. Term  
26 1961) (“[T]he party resisting the contract should be afforded the privilege of a  
preliminary trial by jury on the defense of fraud.”).

1 not triable before a jury by right. Although the Defendants refer to Awada as a  
2 “template” for bifurcating all types of cases, Awada dealt with the bifurcation of  
3 equitable and legal claims, not supposedly-waived claims and non-waived claims.<sup>8</sup>  
4 Therefore, Awada does not govern the outcome of this alternative bifurcation issue  
5 presented to the Court.

6 In summary, Plaintiffs request that this Court grant them extraordinary relief by  
7 ordering a preliminary jury to decide the issue of whether the jury trial waivers are  
8 invalid in light of the District Court’s finding that a factual issue exists with respect to  
9 Plaintiffs’ concealment and constructive fraud claims. Alternatively, Plaintiffs request  
10 that this Court order this case to be tried a single time before a jury, with the jury being  
11 advisory as to certain issues that are not triable before a jury as a matter of right.

## 12 **II. LEGAL ARGUMENT**

### 13 **A. THE DISTRICT COURT’S FINDING OF A GENUINE ISSUE OF** 14 **MATERIAL FACT WITH REGARD TO PLAINTIFFS’ CLAIMS** 15 **FOR CONCEALMENT AND CONSTRUCTIVE FRAUD AGAINST** 16 **THE SCOTT DEFENDANTS HAS NOT BEEN DISTURBED.**

17 The Scott Defendants incorrectly suggest that the District Court’s finding that  
18 “there are genuine issues regarding concealment and constructive fraud . . .”<sup>9</sup> no longer  
19 exists because the District Court has ordered summary judgment on some of Plaintiffs’  
20 separate claims. However, recent District Court orders confirm that any separate claims  
21 that have been dealt with have not disturbed the District Court’s finding of a factual issue  
22 with respect to Plaintiffs’ claims for concealment and constructive fraud against the Scott  
23 Defendants. First, the two orders entered in accordance with the District Court’s decision  
24 denying the Scott Defendants’ motion for partial summary judgment on Plaintiffs’

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25 <sup>8</sup> Awada v. Shuffle Master, Inc., 123 Nev. 613, 173 P.3d 707 (2007).

26 <sup>9</sup> PA 4:755.



1 concealment and constructive fraud claims accurately represent the continuing existence  
2 of these claims.<sup>10</sup>

3 Second, the Scott Defendants subsequently attempted to dismiss Plaintiffs' third  
4 claim for constructive fraud based upon the argument that they owed Plaintiffs no  
5 fiduciary duty. While the District Court dismissed one claim relating to fiduciary duty,  
6 the District Court once again allowed Plaintiffs to maintain their third claim related to  
7 constructive fraud.<sup>11</sup>

8 Finally, Defendant Alex Edelstein also moved the District Court for partial  
9 summary judgment on a variety of Plaintiffs' claims, and the District Court denied the  
10 motion as to Plaintiffs' claims for fraudulent misrepresentation, fraudulent concealment,  
11 aiding and abetting misrepresentations and omissions.<sup>12</sup> So, the Scott Defendants'  
12 suggestion that Plaintiffs no longer have any proof to support their claims for fraudulent  
13 concealment and constructive fraud with regard to the guaranties and the jury trial  
14 waivers is without merit and not supported by the District Court's orders. To the  
15 contrary, when Plaintiffs opposed the Scott Defendants' first summary judgment motion  
16 seeking to dismiss Plaintiffs' first, second, and third claims, Plaintiffs supplied the  
17 District Court with more than sufficient evidence to defeat summary judgment.<sup>13</sup>  
18 Similarly, Plaintiffs again provided the District Court with sufficient evidence to defeat  
19 the Scott Defendants' subsequent attempt to dismiss Plaintiffs' third claim for  
20 constructive fraud.<sup>14</sup> Therefore, this Court can disregard the Scott Defendants' argument

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22 <sup>10</sup> PRA 3:550–551; PRA 3:552–554.

23 <sup>11</sup> PRA 3:546–549; PRA 3:555–557.

24 <sup>12</sup> PRA 3:558–560.

25 <sup>13</sup> PRA 1:129–148.

26 <sup>14</sup> PRA 2:232–486.

1 that there is supposedly no evidence to support Plaintiffs' claim for fraudulent  
2 inducement of signing the guaranties containing the jury trial waivers.

3 **B. PLAINTIFFS DO NOT NEED TO PROVE THAT MORE THAN**  
4 **ONE PARTY COMMITTED FRAUD IN ORDER TO INVALIDATE**  
5 **THE JURY TRIAL WAIVERS.**

6 In its separate answer to writ petition, BOK takes the position that because the  
7 District Court granted it summary judgment with respect to Plaintiffs' concealment and  
8 constructive fraud claims, the jury trial waivers should be upheld for all purposes and for  
9 all parties. Aside from the fact that BOK offers no legal authority to support this  
10 proposition, Nevada law has squarely rejected such a notion. In Awada v. Shuffle  
11 Master, Inc., this Court held that the fraudulent inducement of a contract would result in  
12 rescission of the contract, and "there is no longer any contract to enforce . . ."<sup>15</sup> This  
13 Court also held in Havas v. Bernhard that a contract induced by fraud can be voided and  
14 rescinded, such that a contract no longer exists.<sup>16</sup> So, Plaintiffs only need to demonstrate  
15 that the guaranties were fraudulently induced by a single Defendant in order for the jury  
16 trial waivers to become void.

17 Once the jury trial waivers are declared void, BOK can no longer rely upon them  
18 to avoid a jury trial. As such, Plaintiffs' showing of a genuine issue of material fact, on  
19 various occasions, with respect to some of the Defendants is sufficient for this Court to  
20 determine the issues presented in this original proceeding. The fact that BOK received

21 <sup>15</sup> 123 Nev. 613, 623–624, 173 P.3d 707, 713–714 (2007) (citing Great Am. Ins. v. Gen.  
22 Builders, 113 Nev. 346, 354, n. 6, 934 P.2d 257, 262, n. 6 (1997) (implying that the rule  
23 would apply to claims for both breach of contract and breach of the covenant of good  
24 faith and fair dealing); see also Pac. Ins. Co. v. Kent, 120 F.Supp.2d 1205, 1214 (C.D.  
25 Cal.2000) ("Where an insurer prevails on its rescission claim, any breach of contract and  
26 bad faith counterclaims brought by the insured are necessarily precluded.")).

<sup>16</sup> 85 Nev. 627, 631, 461 P.2d 857, 859–860 (1969) (citing Bishop v. Stewart, 13 Nev. 25,  
42 (1878); Friendly Irishman v. Ronnow, 74 Nev. 316, 330 P.2d 497 (1958); Lovato v.  
Catron, 20 N.M. 168, 148 P. 490 (1915); C.I.T. Corp. v. Panac, 25 Cal.2d 547, 154 P.2d  
710 (1944)).

summary judgment on the particular issue of concealment and constructive fraud is of no effect, and this Court should ignore such claims by BOK that the jury trial waivers can be upheld as written in the face of Plaintiffs' surviving claims for fraudulent concealment and constructive fraud as to other Defendants in this litigation.

C. **DEFENDANTS IGNORE THE REFERENCES IN ROSENBERG STATING THAT PARTICULARIZED FRAUD AS TO SPECIFIC PROVISIONS OF A CONTRACT IS NOT REQUIRED TO SET ASIDE THE PROVISIONS.**

1. **Rosenberg Correctly States this Court's Policy That Fraud with Respect to Particular Provisions Within a Contract Is Not Necessary When Fraud with Respect to the Entire Contract Is Shown.**

In their writ petition, Plaintiffs cited to footnote 4 of Tuxedo International Inc. v. Rosenberg for this Court's disagreement with United States Supreme Court law on the presumption of contractual waivers stating that it is not "good policy for Nevada regarding general forum selection clauses, as we do not believe, in reality, a party is likely to be defrauded only in the inclusion of a forum selection clause but not defrauded by the contract as a whole."<sup>17</sup> Plaintiffs also argued that there is no material difference between a jury trial waiver provision and a forum selection clause. Instead of squarely addressing this argument, which goes to the heart of the main issue in this original proceeding, the Scott Defendants and BOK largely ignore it. And, these Defendants even go so far as to claim that the rule only applies when there is a fiduciary relationship. But, their citations to Rosenberg are to pages 7 and 8 of the opinion, not to this Court's stated policy in footnote 4.<sup>18</sup> Surprisingly, this distinction of fraud as to a particular provision

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<sup>17</sup> 127 Nev. Adv. Op. No. 2, at 10–11, n. 4 (Feb. 10, 2011).

<sup>18</sup> Although the Court referenced the existence of a fiduciary duty as serving as grounds to *avoid* a forum selection clause, nothing in Rosenberg limits the setting aside of such a provision to a fiduciary relationship. In any event, Plaintiffs' citation to Rosenberg had nothing to do with analysis set forth in the body of the opinion, only the policy stated in footnote 4.

1 versus fraud as to the entire contract is the very issue upon which the District Court ruled  
2 that the jury trial waivers could be enforced.<sup>19</sup> As such, Defendants have conceded the  
3 correctness of Plaintiffs' argument on this point by failing to directly address it.<sup>20</sup>

4 **2. Defendants' Entire Argument That the Jury Trial Waivers**  
5 **Should Be Upheld, Based Upon an Analogy to Arbitration**  
6 **Provisions, Has Already Been Implicitly Rejected by This Court.**

7 Aside from Defendants' failure to address the substance of Plaintiffs' Rosenberg  
8 argument, Defendants incorrectly argue that the jury trial waivers should be upheld based  
9 upon various federal cases discussing arbitration provisions. The essence of the Scott  
10 Defendants' position on this point is that fraudulent inducement of a contract as a whole  
11 is not sufficient to invalidate an arbitration clause within that contract. The Scott  
12 Defendants then cite a series of federal cases analogizing jury trial waiver provisions to  
13 arbitration provisions within contracts. However, the very authorities relied upon by the  
14 Scott Defendants have been implicitly rejected by this Court in Rosenberg.

15 In footnote 4 of Rosenberg, this Court prefaced its announcement that there should  
16 be no distinction between fraud as to a contract and fraud as to a provision within the  
17 contract by citing to footnote 14 of Scherk v. Alberto-Culver Co.<sup>21</sup> Footnote 14 of  
18 Scherk contains a similar argument to the position offered by the Scott Defendants:

19 In The Bremen<sup>22</sup> we noted that forum-selection clauses 'should be given  
20 full effect' when 'a freely negotiated private international agreement (is)  
21 unaffected by fraud . . .'.<sup>23</sup> This qualification does not mean that any time a

22 <sup>19</sup> PA 4:809–812; PA 4:818–820.

23 <sup>20</sup> See, e.g., Kahn v. Morse & Mowbray, 121 Nev. 464, 480, 117 P.3d 227, 238, n. 24  
(2005) (stating that an issue is waived by failing to raise the issue in briefing, and  
24 inferring that the failure to dispute an issue is a concession of the issue); see also Edwards  
25 v. Emperor's Garden Restaurant, 122 Nev. 317, 130 P.3d 1280, 1288, n. 38 (2006).

26 <sup>21</sup> 417 U.S. 506, 519, n. 14 (1974).

<sup>22</sup> Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907 (1972).

<sup>23</sup> Id., 407 U.S. at 13, 92 S.Ct. at 1915.

1 dispute arising out of a transaction is based upon an allegation of fraud, as  
2 in this case, the clause is unenforceable. Rather, it means that ***an***  
3 ***arbitration or forum-selection clause*** in a contract is not enforceable if the  
inclusion of that clause in the contract was the product of fraud or  
coercion.<sup>24</sup> (emphasis added).

4 As Scherk already related forum selection clauses to arbitration clauses, the Scott  
5 Defendants have correctly related arbitration clauses to jury trial waiver provisions, such  
6 that the Scott Defendants agree that there is no material difference between forum  
7 selection clauses and jury trial waiver provisions for purposes of Plaintiffs' fraud  
8 argument. Notably, in Rosenberg this Court also cited to Prima Paint, which was  
9 referenced in Scherk, for the proposition that a specific claim of fraud in the inducement  
10 of an arbitration clause itself is for the courts to decide and not an arbitrator.<sup>25</sup> As such,  
11 this Court has already implicitly rejected the Scott Defendants' arguments regarding  
12 adherence to principles of arbitration provisions to uphold the jury trial waivers in the  
13 instant case.

14 Therefore, the Scott Defendants' reliance upon various federal cases construing  
15 arbitration clauses actually supports Plaintiffs' position and solidifies this Court's  
16 announced policy in Rosenberg that it is not "good policy for Nevada regarding general  
17 forum selection clauses, as we do not believe, in reality, a party is likely to be defrauded  
18 only in the inclusion of a forum selection clause but not defrauded by the contract as a  
19 whole."<sup>26</sup> Therefore, Plaintiffs request that this Court's policy also be formally extended  
20 to jury trial waivers when, as in the instant case, there are at least issues of fact regarding

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22 <sup>24</sup> Cf. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801 (1967).

23 <sup>25</sup> See Sentry Systems, Inc. v. Guy, 98 Nev. 507, 654 P.2d 1008 (1982).

24 <sup>26</sup> 127 Nev. Adv. Op. No. 2, at 10–11, n. 4 (Feb. 10, 2011) (citing Hoffman v.  
25 Minuteman Press Intern., Inc., 747 F.Supp. 552, 557, n. 3 (W.D. Mo. 1990) to support  
26 this Court's policy in rejecting the Scherk footnote's division between fraud in the  
inducement of a forum selection clause and fraud in the inducement of the contract as a  
whole).

1 fraudulent inducement of the contract as a whole containing the jury trial waiver  
2 provisions.<sup>27</sup>

3 **D. LOWE DID NOT INVOLVE FRAUD IN OBTAINING JURY TRIAL**  
4 **WAIVERS AND IS NOT CONTROLLING.**

5 Both the District Court and the Defendants misconstrue the scope of the holding of  
6 Lowe as applied to this case.<sup>28</sup> Defendants argue that Lowe is controlling because it  
7 involved this Court's decision to uphold jury trial waivers in contracts as a general  
8 matter. However, Lowe involved an interpretation of the jury trial waiver provisions  
9 themselves based upon contract principles since there was no allegation or proof that the  
10 contract itself was procured by fraud. Nevertheless, this Court should not even reach the  
11 language of the guaranties until after the fraudulent concealment and constructive fraud  
12 claims are resolved which focus on the circumstances under which the guaranties and  
13 jury trial waivers were signed.

14 Noticeably absent from Defendants' answers to Plaintiffs' writ petition is any  
15 response to Plaintiffs' argument that fraud defeats a contract.<sup>29</sup> In that regard, the Court  
16 does not even need to reach the Lowe factors to determine whether the jury trial waivers  
17 should be upheld until after the circumstances surrounding the signing of the guaranties  
18 have been resolved by a preliminary jury trial. Yet, even if the Court applies the Lowe

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20 <sup>27</sup> PA 4:754–757; PRA 3:550–551; PRA 3:552–554; PRA 3:555–557; PRA 3:558–560.

21 <sup>28</sup> See Lowe Enters. Residential Partners, L.P. v. Dist. Ct., 118 Nev. 92, 40 P.3d 405 (2002).

22 <sup>29</sup> See Oh v. Wilson, 112 Nev. 38, 910 P.2d 276 (1996) (identifying factors to be weighed  
23 in determining whether fraud defeats a contract: include: (1) the haste with which the  
24 contract was obtained; (2) the amount of consideration; (3) the circumstances  
25 surrounding the contract, including the intelligence of all parties involved; and (4) the  
26 actual presence of an issue of liability); Pacific Maxon, Inc. v. Wilson, 96 Nev. 867, 619  
P.2d 816 (1980) (stating that it is enough that the misrepresentation is part of the  
inducement to enter into the transaction); Violin v. Fireman's Fund Ins. Co., 81 Nev. 456,  
406 P.2d 287 (1965) (explaining that one has an obligation not to speak falsely when  
inducing another to make a bargain).

1 factors to this case, the District Court's analysis was incomplete, as it did not contemplate  
2 all the factors adopted in Lowe, including: (1) the parties' negotiations concerning the  
3 waiver provision, if any, (2) the conspicuousness of the provision, (3) the relative  
4 bargaining power of the parties and (4) whether the waiving party's counsel had an  
5 opportunity to review the agreement.<sup>30</sup> Therefore, because fraud defeats a contract, this  
6 Court should not apply the Lowe factors to the issues presented in this case as a contract  
7 cannot be construed until after the evidence of fraud on the waiver issue has been  
8 weighed by a jury.

9  
10 **E. PLAINTIFFS HAVE MADE A SUFFICIENT SHOWING FOR THIS**  
11 **COURT TO ORDER A PRELIMINARY JURY TRIAL TO DECIDE**  
12 **THE ISSUE OF WAIVER PRIOR TO REACHING THE**  
13 **SUBSTANCE OF THIS CASE.**

14 In their writ petition, Plaintiffs cited to a variety of cases holding that the proper  
15 procedure for dealing with fraud in the inducement of a jury trial waiver is to first hold a  
16 preliminary jury trial to determine whether the jury trial waiver will be invalidated.<sup>31</sup> As  
17 Plaintiffs have already demonstrated, they have set forth sufficient triable evidence of  
18 fraudulent concealment and constructive fraud to have this issue tried before a  
19 preliminary jury.<sup>32</sup> The Scott Defendants resist such a procedure by claiming that the  
20 New York cases cited by Plaintiffs "have departed from this approach."<sup>33</sup> For its

21 <sup>30</sup> See Writ Petition, pgs. 24–26 (referencing the Whirlpool Fin. Corp. v. Sevaux, 866 F.  
22 Supp. 1102, 1105 (N.D. Ill. 1994) factors adopted by this Court in Lowe). While BOK  
23 offers testimony for its argument that Plaintiffs supposedly waived their right to a jury  
24 trial, the testimony offered by Plaintiffs creates a factual issue for the other Defendants in  
25 this case. See id.

26 <sup>31</sup> See Writ Petition, pgs. 29–30 & 36–37.

<sup>32</sup> PA 4:754–757; PRA 3:550–551; PRA 3:552–554; PRA 3:555–557; PRA 3:558–560.

<sup>33</sup> Scott's Answer, pg. 17, n. 6.

1 argument, Scott cites to Russell-Stanley Holdings, Inc. v. Buonanno.<sup>34</sup> However, this  
2 case does **not** actually reject the preliminary jury trial rule proposed by Plaintiffs.<sup>35</sup>  
3 Instead, Buonanno chose not to apply the Faria and Champagne precedents because  
4 “plaintiff does not allege in its complaint or elsewhere that it was fraudulently induced to  
5 waive its right to a jury trial.”<sup>36</sup> Therefore, Faria and Champagne were not overruled;  
6 they were just not applied to the particular facts of the Buonanno case. As such, these  
7 authorities provide sound reasoning that the circumstances surrounding a contract, and  
8 any specific provisions contained therein, must first be resolved by a preliminary jury  
9 before the actual provisions of the contract can be examined at trial. In addition to  
10 ordering that Plaintiffs only need to demonstrate fraudulent inducement of the guaranty  
11 as a whole at issue in this case, as opposed to the specific jury trial waiver, the Court  
12 should also order a preliminary jury to decide the waiver issue prior to any proceedings  
13 on the substance of Plaintiffs’ claims.

14 **F. AWADA DOES NOT ADDRESS BIFURCATION IN THE**  
15 **CONTEXT OF JURY TRIAL WAIVERS PROCURED BY**  
16 **FRAUDULENT MEANS AND IS, THEREFORE, NOT**  
17 **CONTROLLING.**

18 Plaintiffs’ challenge to bifurcation only becomes applicable if this Court denies  
19 any extraordinary relief as to Plaintiffs’ waiver issue, or if the preliminary jury

20 <sup>34</sup> 327 F.Supp.2d 252 (S.D. N.Y. 2002).

21 <sup>35</sup> See Federal Housecraft, Inc. v. Faria, 216 N.Y.S.2d 113, 114 (N.Y. App. Term 1961)  
22 (“I think there should be a reappraisal of our position in respect to a situation, such as this  
23 one, involving a defense which challenges the validity of the writing wherein the jury  
24 waiver clause appears. In such a case, it seems to me that the party resisting the contract  
25 should be afforded the privilege of a preliminary trial by jury on the defense of fraud.”);  
26 Gardner and North Roofing and Siding Corp. v. Champagne, 285 N.Y.S.2d 693, 415  
(1967) (“One who disaffirms for fraud a writing which contains a jury waiver clause  
should not be required to proceed to trial without a jury until there has been a  
determination as to the validity of the disputed instrument.”).

<sup>36</sup> Id., 327 F.Supp. at 257.



1 determines that the jury trial waiver provisions must be upheld. Of course, the  
2 determination of bifurcation in the latter instance cannot be determined until after the  
3 preliminary jury renders a verdict. As such, if the Court grants Plaintiffs' requested  
4 relief on the first issue presented in this writ petition, the Court does not need to deal with  
5 the bifurcation issues in any amount of detail—only that bifurcation should be reassessed  
6 following the verdict of the preliminary jury.

7 Interestingly, the Scott Defendants refer to Awada<sup>37</sup> as a “template” for how all  
8 bifurcations should be performed in Nevada, including this case.<sup>38</sup> However, Awada  
9 involved a bifurcation of equitable issues triable by the Court and legal issues triable by a  
10 jury. Nothing in Awada suggested that the very basis of the distinction of non-jury and  
11 jury trial claims was affected by fraud. Instead, Awada made the distinction based upon  
12 how claims alleged in the plaintiff's complaint were classified under Nevada law—either  
13 equitable or legal. Thus, Awada is not applicable until after a preliminary jury has  
14 determined the validity of the jury trial waivers.<sup>39</sup> And even then, Awada does not  
15 provide a “template” on how to deal with claims subject to a jury trial waiver and other  
16 claims that are not.

17 Only if a preliminary jury determines that the jury trial waivers are valid, then can  
18 the District Court even consider whether bifurcation is necessary. The proper method for  
19 the District Court to perform bifurcation is not to simply distribute non-waived claims to  
20 the jury and reserve waived claims for itself, which is essentially the District Court's

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21 <sup>37</sup> Awada v. Shuffle Master, Inc., 123 Nev. 613, 173 P.3d 707 (2007).

22 <sup>38</sup> See Scott's Answer, pg. 5.

23 <sup>39</sup> The Scott Defendants suggest in their Answer that this Court has previously rejected  
24 the notion of trying a case before a jury and holding a non-jury trial in a subsequent  
25 proceeding on a per se basis based upon arguments made in the Awada briefs. Of course,  
26 the Court never articulated any such legal rule and is free to determine this case based  
upon its facts and applicable law, which is distinct from the Awada situation.

1 ruling.<sup>40</sup> Instead, the District Court should have considered the relevant factors of NRCP  
2 42, including whether there are common questions of law or fact, whether there will be  
3 unnecessary costs or delay, whether the parties will be inconvenienced or prejudiced, and  
4 whether judicial economy will be maintained.

5 In their answers, the Scott Defendants and BOK claim that all issues will only be  
6 tried once, in either a non-jury trial or a jury trial. However, even this bare representation  
7 conflicts with the Scott Defendants' own representation made in the District Court that  
8 there possibly may need to be *three trials* to resolve all the issues pending in the District  
9 Court.<sup>41</sup> Additionally, Defendants completely ignore the realities of this case with  
10 witnesses, counsel, and parties who all reside in various other jurisdictions outside of  
11 Nevada. At a minimum, the District Court was required to take into account and  
12 articulate how multiple trials could possibly be convenient and non-prejudicial to  
13 Plaintiffs. If this Court reaches the question of bifurcation, or simply instructs the  
14 District Court, the District Court should be required at a minimum to consider and  
15 articulate the NRCP 42 reasons for granting or denying bifurcation.

16 **G. ALTERNATIVELY, THERE IS NO REASON WHY AN ADVISORY**  
17 **JURY CANNOT HEAR THE CASE IN A SINGLE TRIAL.**

18 On the issue of an advisory jury authorized by NRCP 39(c), Defendants  
19 essentially argue that there can be no advisory jury because the jury trial waivers must be  
20 upheld. Of course, that determination cannot be made until after the preliminary jury has  
21 rendered a verdict upon the invalidity of the jury trial waivers. In the event that the jury  
22 trial waivers are found to be invalid, the entire case will be tried before a jury.  
23 Alternatively, if the preliminary jury finds that the jury trial waivers should be upheld, the

24 \_\_\_\_\_  
25 <sup>40</sup> PA 4:809–812; PA 4:818–820.

26 <sup>41</sup> PA 3:849.

1 District Court is then tasked with reassessing bifurcation based upon the factors outlined  
2 in NRCP 42. At that point, the District Court must then consider NRCP 39(c) to empanel  
3 a jury to hear all issues in the case, with the jury's verdict on the non-triable issues being  
4 simply advisory.

5 Since the District Court erred in construing the jury trial waivers on the grounds of  
6 requiring particularized fraud as to the jury trial provisions themselves and failing to  
7 allow a preliminary jury, the District Court's decision on both bifurcation and an advisory  
8 jury was similarly erroneous. In the end, there is simply no benefit under an NRCP 42  
9 analysis to allow this case to be tried two or three times.<sup>42</sup> Instead, the more desirable  
10 approach is to try the case *once* before a jury, with the jury being merely advisory as to  
11 the claims not triable by right—if that issue is ever reached.<sup>43</sup> Therefore, this Court  
12 should instruct the District Court to properly consider the NRCP 42 factors for finding  
13 against bifurcation and whether an advisory jury would promote judicial economy only in  
14 the event the preliminary jury validates the jury trial waivers.

### 15 **III. CONCLUSION**

16 Plaintiffs request that this Court grant them extraordinary relief by ordering a  
17 preliminary jury to decide the issue of whether the jury trial waivers are valid in light of  
18 the District Court's finding that a factual issue exists with respect to concealment and  
19 constructive fraud. Moreover, this Court should also instruct the District Court that fraud  
20 in the inducement of the guaranties as a whole is sufficient without any requirement that  
21 fraud be shown as to the specific jury trial waiver provisions.

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22  
23 <sup>42</sup> See id.

24 <sup>43</sup> See, e.g., Anderson v. Weise, 95 Nev. 540, 543, 598 P.2d 1144, 1147 (1979) (action to  
25 reform legal description on a deed and to recover damages; jury was advisory on the  
26 reformation action and Court decided to follow its recommendation; but mandatory on  
the damages claim).

1 Alternatively if the jury trial waiver provisions are upheld, Plaintiffs request that  
2 this Court order the District Court to consider the relevant NRCP 42 factors to find  
3 against bifurcation and have the case tried a single time, including whether an advisory  
4 jury under NRCP 39 will promote judicial economy as to certain issues that are not  
5 triable before a jury as a matter of right.

6 Dated this 25th day of May, 2011.

7  
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1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this **REPLY IN SUPPORT OF PETITION**  
3 **FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, PETITION FOR WRIT**  
4 **OF PROHIBITION**, and to the best of my knowledge, information and belief, it is not  
5 frivolous or interposed for any improper purpose. I further certify that this Brief  
6 complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP  
7 28(e), which requires every assertion in the Brief regarding matters in the record to be  
8 supported by a reference to the page and volume number of the transcript or appendix  
9 where the matter relied on is to be found. I understand that I may be subject to sanctions  
10 in the event that the accompanying Brief is not in conformity with the requirements of the  
11 Nevada Rules of Appellate Procedure.

12 Dated this 25th day of May, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, PETITION FOR WRIT OF PROHIBITION** was filed electronically with the Nevada Supreme Court on the 25th day of May, 2011. Electronic Service of the foregoing documents shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of these documents by mailing a true and correct copy thereof, postage prepaid, addressed to:

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