IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

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

Respondents

and

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

Real Parties in Interest.

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Case No.: 57784

District Court Case: A579963

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

SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S OPPOSITION TO MOTION TO STAY DISTRICT COURT PROCEEDINGS

J. Randall Jones
Nevada Bar No. 1927
Jennifer C. Dorsey
Nevada Bar No. 6456
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy. 17th Floor
Las Vegas, Nevada 89169

Attorneys for Real Parties in Interest SCOTT FINANCIAL CORPORATION and BRADLEY J. SCOTT

Docket 57784 Document 2011-17623

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

I.

INTRODUCTION

In the mid-2000s, savvy, seasoned billionaire-businessman Gary Tharaldson moved to Las Vegas and rode the skyrocketing Las Vegas real estate market to make tens of millions of dollars in several real estate ventures including the high-end condominium project called Manhattan.[1] Eager for an encore of that lucrative endeavor, he rejoined Manhattan developer Alex Edelstein and Edelstein's company Gemstone Development for the sequel project: a mixed-use residential and commercial development known as Manhattan West. For a five-million-dollar fee, Tharaldson agreed that he and one of his enterprises, Tharaldson Motels II, Inc. ("TM2I"), would guaranty the Manhattan West construction loans totaling approximately $110 million.

When the economy went into a tailspin in late 2008, the loans went into default, triggering the guaranties. Mr. Tharaldson and his companies TM2I and Club Vista Financial Services, LLC recognized they had no real defenses. In a transparent attempt to deflect the inevitable claims that were about to be initiated against them, Mr. Tharaldson, TM2I, and Club Vista employed the age-old stratagem that *the best defense is a good offense* and filed a contrived complaint against Scott Financial Corporation and other lenders involved in financing Manhattan West's construction to create confusion and to delay Tharaldson's obligation to pay on the guaranties. The lenders responded with counterclaims seeking to hold Tharaldson and TM2I to their guaranties. Since then, the Tharaldson parties have pulled out all the stops to delay the trial of this case – and thereby postpone their obligation to pay up on the $110 million guaranty obligation.

The instant motion for a stay is merely the latest of many stall attempts. Just last month the Tharaldson camp sandbagged the pre-trial process for the July 6th bench trial on their guaranty obligation by repeatedly promising that Mr. Tharaldson was filing

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[1] All of these facts are documented with references to the appendices in the Scott Parties' answers to the pending writs.

bankruptcy; they even made representations of the specific date that the filing would take place. But Tharaldson never filed bankruptcy. Instead he used this self-created lull to hire Greenberg Traurig as Petitioners' new trial counsel with just a month remaining before the July 6th bench trial of the guaranty-based claims. One of their first tasks was to seek a stay. Judge Denton rejected that request, and so should this Court.

Scott Financial Corporation and Brad Scott suspect that this request for a stay awaiting a decision on the pending writs is just a ruse to get more time for Petitioners' newly substituted-in trial counsel – their ***sixth*** hired firm to date – to get up to speed.[2] Because the Eighth Judicial District Court Rules expressly prohibit substitution "if a delay of the trial or of the hearing of any other matter in the case would result," EDCR 7.40, obviously Petitioners cannot ask for a continuance based on the real reason Petitioners want one. So, instead, they disingenuously ask this Court to "stay" the entirety of the district court proceedings (and thereby, conveniently, the impending bench trial) while this Court considers the meritless petitions before it.

But Petitioners have failed to demonstrate the ***legitimate*** need for a stay. Petitioners have not demonstrated (nor can they show) that allowing the bench trial to commence on July 6th would defeat the object of their petition or prejudice them in any way. The district court has bifurcated the trial into a bench trial and a jury trial, with only the claims for which Tharaldson waived the jury-trial right to be tried on July 6th. Even if this Court ultimately finds that those claims should have been tried to a jury despite the knowing and voluntary waiver of that right, Petitioners have not lost that opportunity because the jury trial has not even been scheduled yet. Thus, there is no need for the Court to stay the non-jury trial that has been ordered by the Court.

Postponing the bench trial with a stay of the proceedings will prejudice the Scott parties and the other parties in the district court action, however. The Scott parties have

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[2] Petitioners filed a notice in the district court on June 9, 2011, that Greenberg Traurig was being substituted "in the place and stead of the law firm of Morrill & Aronson, P.L.C." A true and correct copy of this Substitution of Counsel is attached hereto as Exhibit A.

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

diligently invested the time and effort to prepare for the scheduled bench trial, and that traction and expense will all be lost if this case is stayed. Their diligence should not be punished simply because Tharaldson scuttled his bankruptcy plans and hired new counsel on the eve of the long-scheduled bench trial.

The meritlessness of Petitioners' pending writ also militates against a stay. While Scott has no desire or ability to reproduce his entire argument here, even the case law cited by Petitioners in their motion rings hollow when compared with the legal analysis offered by Scott of this Court's own decisions, as well as the decisions of the federal courts the cases of Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835 (10th Cir. 1988) and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)). Simply put, Petitioners can satisfy none of the Hansen factors that guide this court in evaluating the propriety of a stay. This motion is just another ploy to delay justice, there is no merit to Petitioners' legal arguments, and granting a stay to allow for their consideration will only further postpone the just and efficient determination of the claims before the trial court.

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

II.

ARGUMENT

A. A Stay of the July 6, 2011, Bench Trial Is Not Warranted Because the Object of Petitioners' Pending Writ Petition Will Not Otherwise Be Defeated.

Mr. Tharaldson is a highly sophisticated, billionaire businessman who executed written guaranties of $110 million in loans for his failed real-estate-development project. Those guaranties contain conspicuous jury trial waivers, and Tharaldson is trying to escape the effect of those waivers by claiming that he – a seasoned investor who has admittedly executed billions of dollars in personal guaranties over his lifetime – didn't read them. Petitioners' Appendix, "PA" 724, 767, 771; Supplemental Appendix "SA" 74-75. Eighth Judicial District Court Judge Mark Denton rejected Mr. Tharaldson's incredible claim and is enforcing the jury trial waivers, bifurcating the jury and non-jury claims into two phases. The bench trial of the non-jury claims is scheduled to begin July 6th. On February 17, 2011, Tharaldson and his business entities petitioned this court for

mandamus relief from that bifurcation order and the enforcement of their knowing and voluntary waivers. They now ask this Court to stay the upcoming bench trial pending a ruling on their writ. But the stay is not necessary to preserve the object of the writ.

The goal of Petitioners' writ petition is to obtain a jury trial of all claims, including those that will be tried to the court on July 6th. But even if this Court were to relieve Tharaldson of his knowing and voluntary jury trial waivers, permitting the scheduled bench trial to proceed will not foreclose a full jury trial. Because the district court is taking the bench trial first with the jury trial claims to be heard at a later date, there is no imminent danger that the claims to be tried at the second, currently unscheduled, jury phase of the trial will be immediately affected by the non-jury phase of the trial going forward as scheduled. Whatever claims are involved in the jury phase of this trial, those claims will not be tried until some as-yet undetermined point in the future. It therefore would make very little sense to stay the non-jury trial in order to fight about the scope of the claims to be litigated in the jury trial. Nothing would be lost, and no violence would be done to any of Petitioners' rights, by the district court considering the non-jury issues in the bench trial commencing on July 6, 2011, as it currently plans to do. Even in the unlikely event that this Court were to reverse and set aside the bifurcation order after the bench trial, Petitioners' rights will not have been prejudiced because the issues addressed in the bench trial could just be added to the issues that are already planned to be tried to the jury.

In sum, Petitioners have nothing to lose by trying this case as ordered by the district court. The jury phase of the trial has not even been set, and the District Court's determination of the non-jury claims would potentially resolve several critical legal issues that would simplify trial of the later claims. The very worst that could happen from Petitioners' perspective is that a bench trial takes place on issues which are later revisited in the jury trial. Thus, there is no real injury that could result from a bench trial taking place as ordered and scheduled by the district court, so a stay is not justified.

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

B. A Delay of Trial Would Prejudice the Real Parties in Interest.

On the other hand, a stay would cause prejudice to the Real Parties in Interest. The proposed stay would impose a heavy and unnecessary burden on all of the other parties, who have now already prepared once for a trial that Petitioners successfully postponed, and now stand to lose the benefit and momentum of their second round of diligent trial preparation. These parties should not be punished for their diligence by forcing them to lose traction and have to power down and re-gear up for trial a third time after this Court denies the pending petitions.

Petitioners also argue that the trial cannot go forward from until the depositions of Marty Aronson and Layne Morrill (Petitioners' former trial counsel who are key witnesses to the facts supporting Petitioners' claims, which are the subject of the second pending petition) are completed, and that the non-jury trial cannot go forward "unless Defendants are willing to concede" that these depositions are not warranted or waive the ability to take them. Motion at 5:9-11. Petitioners' logic is specious. While Defendants would, of course, like to have the information in the possession of now-former-counsel Morrill and Aronson prior to trial, the fact is that the Defendants have to make a strategic decision whether to postpone the trial for that information or to try the case with the information they have. At this point the Real Parties in Interest have no choice but to proceed without those depositions because this Court has stayed them[3]. Thus, the Scott parties are proceeding to trial without these depositions not by choice, but by necessity, and without prejudice to their right to take those depositions if and when this Court denies the writ petition in that regard.

. . .

[3] *See* March 3, 2011, Order of this Court in case Number 57641, on file herein.

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

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

C. Petitioners Are Unlikely to Succeed on the Merits of Their Writ Petition.

The other Hansen factor that most militates against a stay is the Petitioners' unlikelihood of succeeding on the merits of their bifurcation petition.[4] Petitioners' arguments against the jury trial waivers were based on a misunderstanding of the standard for enforcing these waivers under Nevada law, coupled with a misunderstanding of what kind of trial they could obtain had this Court decided to have a separate trial regarding whether the jury trial waivers were knowing, intentional, and voluntary. Accordingly, their claims as to what was and was not proven regarding those jury trial waivers fall short of the standard required to invalidate the waivers under Nevada law.

1. Petitioners Could Not Meet the Standard for Overturning a Jury Trial Waiver and Failed to Rebut the Legal Presumption that the Jury Trial Waivers Are Valid.

Although Petitioners have recognized that Lowe Enterprises Residential Partners, L.P. v. Eighth Judicial District Court ex. rel. County of Clark, 118 Nev. 92, 40 P.3d 405 (2002), is the controlling case in Nevada regarding the enforceability of jury trial waivers, they misunderstand their burden to overturn a jury trial waiver under the standard set by Lowe. "Contractual jury trial waivers are **presumptively valid** unless the challenging party can demonstrate that the waiver was not entered into knowingly, voluntarily or intentionally." Lowe, 118 Nev. at 100 (emphasis added). This Court's language is not just a pretty turn of phrase; Lowe establishes a clear **presumption** for this Court that the jury trial waivers of Gary Tharaldson and TM2I are valid unless they can rebut and disprove that presumption.

Petitioners critically misunderstood this standard and have argued that they must only show "a genuine issue of material fact" that the waivers were fraudulently induced. While that may be the standard on a motion for summary judgment, the Lowe decision requires a much stronger demonstration than simply identifying an issue of fact. In order

[4] The merits of these petitions are addressed at length and with full citations to the record and applicable authority in Scott's respective Answers, which are incorporated herein by reference.

to rebut the legal presumption of the waivers' validity, Petitioners had to show this Court that the waivers were not knowing, voluntary, and intentional **by a preponderance of the evidence**. See Law Offices of Barry Levinson, P.C. v. Milko, ____ Nev. ____, 184 P.3d 378, 386 (2008) ("If reasonable people would necessarily agree that the nonexistence of the presumed fact is more probable than not, the appeals officer must find against the presumed fact's existence, meaning that the opposing party successfully rebutted the presumption.") Petitioners did not provide sufficient evidence to meet the preponderance of the evidence standard under Nevada law, since the very best the Petitioners could come up with was "a genuine issue of material fact." Accordingly, Petitioners' waivers are presumptively valid, and the district court properly enforced them.

Even if Petitioners had been able to rebut the presumption of validity under the lesser standard, the meager evidence and legal argument that they did cite was woefully inadequate. Petitioners alleged that Gary Tharaldson did not a receive a full oral explanation of the jury trial waiver, which does little to undercut the legal presumption of validity when the waiver itself was printed in bolded, capital letters on both guaranties, and situated just above where this sophisticated, billionaire businessman placed his signature. Tharaldson could easily have asked questions about the waivers; at the very least he could have consulted counsel, as the language of the waiver itself suggests. But he apparently did not. Thus, Petitioners utterly failed to rebut the legal presumption of validity of the jury trial waivers executed by Gary Tharaldson and TM2I, and the district court properly enforced them.

2. Tuxedo International, Inc. v. Rosenberg Does Not Support Petitioners' Argument that Jury Waivers are Rendered Unenforceable by Generalized Fraud-in-the-Inducement Allegations.

Petitioners further contend that this Court's recent opinion in Tuxedo International Inc. v. Rosenberg, 127 Nev. Adv. Op. 2 (Nev., Feb. 10, 2011), evidences this Court's intent to depart from its own jurisprudence and supports the conclusion that a party asserting fraud is no longer required to show particularized fraud targeted at a certain

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

contractual provision when fraud in the inducement of the entire deal is alleged. But the mere allegation of fraud is insufficient to invalidate a knowingly, intentional, and voluntary waiver of jury trial or agreement to arbitrate. See Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835 (10th Cir. 1988) and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)).

Petitioners wish to argue that Tuxedo indicates a different rule in Nevada, but Tuxedo's adoption of a hybrid approach to determining the enforceability of a forum-selection clause in the face of fraud-in-the-inducement allegations, and the opinion's footnoted discussion about the general-versus-specific allegations of fraud with respect to a forum-selection clause have no application here. The Tuxedo opinion does not even purport to abrogate Nevada's adherence to the federal rule of upholding arbitration clauses where there have been allegations of fraud; Tuxedo is solely limited to forum-selection clauses. See Tuxedo, 127 Nev. Adv. Op. 2 at p.10, n.4. Accordingly, Tuxedo is not applicable to the instant controversy, as Petitioners claim, and this Court must follow Telum and Prima Paint to arrive at the conclusion that, since Gary Tharaldson was fully aware of what he was agreeing to when he signed his jury trial waivers, he must be held to those waivers regardless of whether or not he now alleges fraud in the underlying guaranties.

III.

CONCLUSION

This Court must see Petitioners' Motion for what it is: just the latest effort in a long line of tactics designed to ensure that the trial in this matter is delayed for as long as possible. No harm will befall Petitioners from having to try their claims in the July 6th bench trial as whatever decision this Court makes will simply affect the content of the claims in the jury trial, which will be held at some as-yet-undetermined point in the future. Considering the time and resources already invested in bringing this matter to trial, both by all of the Defendants and the district court, it would be a terrible waste to stay the non-jury trial in this matter at this eleventh hour simply so that Tharaldson's new

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

lawyers can do an end run around EDCR 7.40. The parties are ready for trial, and there is no good reason for this Court to impede that process once again. Accordingly, and for all the foregoing reasons, Petitioners' motion must be denied in its entirety.

DATED this 13th day of June, 2011.

Respectfully submitted by:

KEMP, JONES & COULTHARD, LLP

/s/ *J. Randall Jones*
J. RANDALL JONES, ESQ. (1927)
JENNIFER C. DORSEY, ESQ. (6456)
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
Attorneys for Scott Financial Corporation and Bradley J. Scott

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

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2011, the foregoing **SCOTT FINANCIAL CORPORATION AND BRADLEY J. SCOTT'S OPPOSITION TO MOTION TO STAY DISTRICT COURT PROCEEDINGS** was served on the following person(s) by U.S. Mail:

Honorable Mark R. Denton
Department 13
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, Nevada 89155

Von Heinz, Esq.
LEWIS & ROCA, LLP
3993 Howard Hughes Parkway #600
Las Vegas, Nevada 89169

John D. Clayman, Esq.
Piper Turner, Esq.
FREDERIC DORWART LAWYERS
Old City Hall
124 East Fourth Street
Tulsa, Oklahoma 74103-5010

P. Kyle Smith, Esq.
SMITH LAW OFFICE
10161 Park Run Drive
Las Vegas, Nevada 89145

Martin Muckelroy, Esq.
COOKSEY, TOOLEN, GAGE, DUFFY & WOOG
3930 Howard Hughes Parkway #200
Las Vegas, Nevada 89169

Gwen Rutar Mullins, Esq.
Wade Gouchnour, Esq.
HOWARD & HOWARD
3800 Howard Hughes Parkway #1400
Las Vegas, Nevada 89169

Terry A. Coffing, Esq.
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145

Mark E. Ferrario, Esq.
Tami D. Cowden, Esq.
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89109
Co-Counsel for Plaintiffs

Robert L. Eisenberg, Esq.
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street #300
Reno, Nevada 89519

K. Layne Morrill, Esq.
Martin A. Aronson, Esq.
John T. Mossier, Esq.
MORRILL & ARONSON, P.L.C.
One East Camelback Road #340
Phoenix, Arizona 85012

/s/ Pamela Lewis
An employee of Kemp, Jones & Coulthard, LLP

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

EXHIBIT A

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06/09/2011 04:00:08 PM

CLERK OF THE COURT

SUBT

MARK E. FERRARIO, ESQ.
Nevada Bar No. 1625
TAMI D. COWDEN, ESQ.
Nevada Bar No. 8994
BRANDON E. ROOS, ESQ.
Nevada Bar No .
GREENBERG TRAURIG, LLP
3773 Howard Hughes Pkwy, #400
Las Vegas, Nevada 89169

K. LAYNE MORRILL, ESQ.
Arizona Bar No. 004591
MARTIN A. ARONSON, ESQ.
Arizona Bar No. 009005
JOHN T. MOSHIER, ESQ.
Arizona Bar No. 007460
MORRILL & ARONSON, P.L.C.
One E. Camelback Road, Suite 340
Phoenix, Arizona 85012
Telephone: (602) 263-8993
Attorneys For Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

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

SUBSTITUTION OF COUNSEL

AND RELATED COUNTERCLAIMS

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

Plaintiffs,

v.

ALEXANDER EDELSTEIN, an individual,

Defendant.

SUBSTITUTION OF COUNSEL

CLUB VISTA FINANCIAL SERVICES, L.L.C., a Nevada limited liability company; THARALDSON MOTELS II, INC., a North Dakota corporation; and GARY D. THARALDSON hereby substitutes the firm of GREENBERG TRAURIG, LLP as attorneys of record in this matter, in the place and stead of the law firm of MORRILL & ARONSON, P.L.C..

Dated this 3rd day of June, 2011.

GARY D. THARALDSON, individually

CLUB VISTA FINANCIAL SERVICES, L.L.C.
By CLUB VISTA HOLDINGS, INC..

By _____
GARY D. THARALDSON

THARALDSON MOTELS II, INC.

By _____
GARY D. THARALDSON
Its: ~~President~~

MORRILL & ARONSON, P.L.C. agrees and consents to the substitution of as attorneys of record for Plaintiffs CLUB VISTA FINANCIAL SERVICES, L.L.C., a Nevada limited liability company; THARALDSON MOTELS II, INC., a North Dakota corporation; and GARY D. THARALDSON in this matter.

Dated this 2nd day of June, 2011.

MORRILL & ARONSON, P.L.C.

R. LAYNE MORRILL, ESQ.
Arizona Bar No. 004591
MARTIN A. ARONSON, ESQ.
Arizona Bar No. 009005
JOHN T. MOSHIER, ESQ.
Arizona Bar No. 007460
One E. Camelback Road, Suite 340
Phoenix, Arizona 85012

GREENBERG TRAURIG, LLP, accepts substitution as attorneys of record for Plaintiffs in this matter.

Dated this 1st day of June, 2011.

GREENBERG TRAURIG, LLP

Mark E. Ferrario, Esq.
Nevada Bar No. 1625
Tami D. Cowden, Esq.
Nevada Bar No. 8994
Brandon E. Roos, Esq.
Nevada Bar No. _____
3773 Howard Hughes Pkwy. #400
Las Vegas, Nevada 89169