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LAW OFFICES
A PROFESSIONAL CORPORATION

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

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 CORP., a Nevada
corporation, dba APCO CONSTRUCTION;
DOE INDIVIDUALS 1-100; and ROE
BUSINESS ENTITIES 1-100,

Defendants.

CASE NO. A579963
DEPT NO. XI

PLAINTIFFS' FIRST AMENDED
COMPLAINT

FILED

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

1. This case for fraud and breach of fiduciary duty and breach of contract and other claims arises out of a highly unusual real estate finance deal. Defendants SFC and BoK are co-lead lenders in a 29 lender \$110 Million syndicated loan participation, which those Defendants structured to provide above market interest rates for the lenders and substantial loan origination and servicing fees for co-lead lender Defendant Scott Financial Corporation. Even though called the co-lead lender, SFC did not loan a single dollar to the developer/borrower, but did collect substantial fees. Fiduciary Defendants induced Plaintiffs Tharaldson and Tharaldson Motels II, Inc., with whom Defendants Scott and Scott Financial corporation have long had a fiduciary relationship of the highest trust and confidence, to give 100% unlimited guarantees of the performance of a wholly unrelated developer/borrower. Now that the Project has failed, Plaintiffs have learned that Fiduciary Defendants did not perform appropriate due diligence and loan administration, but instead "underwrote" (without disclosure) the Project solely on the financial strength of Plaintiffs' guarantees. While this allowed Fiduciary Defendants to obtain a sub prime rate of return on a prime rate credit, Defendants wrongfully induced Plaintiffs' participation in the financing transaction through multiple breaches of fiduciary duty, misrepresentations and omissions.

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

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

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

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

2 **THE FIDUCIARY DEFENDANTS**

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

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

14 8. Defendant Bank of Oklahoma, N.A. ("BOK") is a national bank with its principal
15 place of business in Tulsa, Oklahoma. BOK acted in a fiduciary capacity to Plaintiffs as Co-Lead
16 Lender in a \$110,000,000 loan transaction. BOK is sued on its own account and in its
17 representative capacity as Co-Lead Lender for 28 other participating lenders on the Senior Loan
18 defined below, including CVFS. It is also sued because Scott and SFC acted as its agents in
19 connection with the wrongful acts alleged herein.

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

21 **OWNER DEFENDANT**

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

CONTRACTOR DEFENDANT

11. Defendant Asphalt Products Corporation d/b/a APCO Construction ("Contractor") is a Nevada corporation which contracted and was responsible for construction of the Project on the Property. Contractor is named as a defendant in this action because it has filed liens against the Property or has caused liens to be filed against the Property directly contrary to its agreement to subordinate its claims (as set forth herein) in favor of the lender under the Senior Loan.

FICTITIOUS DEFENDANTS

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

SUBJECT MATTER JURISDICTION

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

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

GENERAL AND PERSONAL JURISDICTION

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

1 because the Senior Debt Loan Agreement out of which this action arises provides for personal
2 jurisdiction in Clark County, Nevada.

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

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

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

11 VENUE

12 19. Venue is appropriate in this Court under NRS 13.010(2)(a) and (c) because this
13 dispute involves interests in real property located in Clark County, Nevada. Venue is also
14 appropriate under NRS 13.040 as to SFC and Gemstone West Inc., because they are engaged in
15 business in Clark County, Nevada. Furthermore, the Senior Debt Loan Agreement out of which
16 this action arises provides for venue in the state and federal courts located in Clark County,
17 Nevada. Finally, the *res* of the action is real property located in Clark County, Nevada, in which
18 Plaintiffs and Defendants claim an interest.

19 GENERAL ALLEGATIONS

20 Plaintiffs' Business

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

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

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

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

Scott's and SFC's Fiduciary Relationship With Plaintiffs

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

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

26. Since 2003, Scott has advised Tharaldson concerning business and financial matters, including numerous investments in real estate loans originated, underwritten, and administered by Scott through SFC for the benefit of CVFS and Tharaldson (the "SFC Loans").

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

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

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

1 respectively of the Manhattan Project in Las Vegas, Nevada.

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

1 Lender's interest, made in September 2006 with a maturity of December 31,
2 2008, secured by land in western Maricopa County, Arizona.

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

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

14 30. In each of the SFC Loans, Plaintiffs relied entirely upon Scott and SFC to
15 underwrite and evaluate the merits of the loans and to prepare the appropriate loan documentation
16 to protect Plaintiffs' legal and financial interests in the SFC Loans, and Scott and SFC knew about
17 and encouraged this reliance. Even though it was not the actual source of loan funds, SFC
18 typically prepared the loan documents for the SFC Loans in its name as the Lender. The only
19 documentation Plaintiffs typically signed with respect to each of the SFC Loans was a separate
20 Non-Recourse Participation Agreement and related commitment acknowledging their acquisition
21 of ownership of the particular SFC Loan as the Participant. It was pursuant to these Agreements
22 that Tharaldson and his entities made loan funds available to the ultimate borrowers.

23 31. Since about 2003, Tharaldson has provided to Scott and SFC office space and
24 facilities, lodging accommodations, and transportation assistance through Tharaldson's Las Vegas
25 office on Scott's regular trips to Las Vegas.

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

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

5 34. On information and belief, Defendant BOK knew and understood at all material
6 times that Scott and SFC were acting as Plaintiffs' agents in overseeing Tharaldson's lending
7 operations.

8 35. From January through April 2006, a period during which several of the SFC loans
9 were made, Tharaldson underwent double knee replacement surgeries and back surgery. A long
10 period of recovery followed that included pain medications until February 2007, during which
11 several more of the SFC loans were made. Scott and SFC knew about Tharaldson's medical
12 condition and wrongfully took advantage of it by proposing questionable transactions to
13 Tharaldson at a time when Scott knew Tharaldson was partially incapacitated.

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

21 37. Plaintiffs' investment in each of the SFC Loans was documented by a separate
22 Nonrecourse Loan Participation Agreement (Consulting Agreements in the case of the Manhattan
23 Loans) prepared by Scott. Each participation agreement (and the Consulting Agreements in the
24 case of the Manhattan Loans) appoints SFC as the agent of CVFS or other Tharaldson affiliate with
25 respect to the loan and acknowledges the fiduciary relationship and agency between SFC and such
26 participant.

27 38. SFC and Scott have earned substantial loan origination fees and servicing fees for
28 their work on the SFC Loans in which Plaintiffs invested based upon their expert advice and

1 recommendations, and Plaintiffs' trust in Scott and SFC.

2 **The Manhattan West Project**

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

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

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

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

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

18 44. Manhattan West was designed and approved as a mixed use community featuring
19 more than 600 condominium residences in one 11 story tower and several mid-rise buildings, plus
20 200,000 square feet of shops, restaurants, and office and hotel space.

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

23 **The Manhattan West Acquisition and Development Financing**

24 **(The Prior Loan and Edelstein Loan)**

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

1 47. Pursuant to the Prior Loan Agreement, SFC agreed to loan Apache up to
2 \$25,000,000 (the "Prior Loan").

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

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

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

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

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

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

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

27 55. Part of the additional collateral for the Prior Loan and Edelstein Loan included a
28 pledge by Gemstone LVS of certain of collateral, including but not limited to the 59 then unsold

1 condominium units in the original Manhattan Project (the "Condo Units").

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

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

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

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

22 **Subsequent Modifications to Prior Loan and Edelstein Loan**

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

26 61. The First Junior DOT was amended by a First Amendment Junior Deed of Trust
27 and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) dated May
28 22, 2007 and recorded in the real property records of Clark County, Nevada on May 22, 2007 at

1 Book 20070522, Instrument No. 0004011, to increase the amount secured thereby to
2 \$18,000,000.00 to correspond to an additional \$8,000,000 advance on the Junior Deed of Trust
3 Loan.

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

11 63. The Third DOT was amended by a First Amendment to Third Deed of Trust and
12 Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) dated October
13 19, 2007 and recorded in the Clark County, Nevada land records on October 24, 2007 at Book
14 20071024, Instrument No. 0004182, amending the Third DOT to secure an additional \$10,000,000
15 advanced on the Edelstein Loan.

16 64. Pursuant to a Nonrecourse Participation Agreement dated October 9, 2007 by and
17 between SFC, as Originating Lender, and CVFS, as Participant, as amended by the Addendum to
18 Nonrecourse Participation Agreement dated October 9, 2007, as well as a Commitment to
19 Participate executed on or about October 12, 2007 (the "Construction LOC Participation
20 Agreement"), CVFS agreed to provide funds for the Construction LOC Note to Edelstein. The
21 Construction LOC Participation Agreement provided that SFC was agent for CVFS concerning the
22 Construction LOC Note and acknowledged SFC's fiduciary duties to CVFS.

23 65. As of January 22, 2008, the total outstanding balance owed to Plaintiffs under the
24 Prior Loan was approximately \$42,273,146 and under the Edelstein Loan was approximately
25 \$13,000,000, for a total owed of approximately \$55,273,146.

26 The Construction Financing Syndication

27 (The Senior Loan)

28 66. By late 2007, the Project was ready to commence vertical construction, but needed

1 an additional \$110,000,000 of construction loan funds to commence construction on Phase I.

2 67. Defendants SFC and Scott desired to broker the accumulation of \$110,000,00 in
3 construction loan funds because of the substantial loan origination fees and 50 basis point loan
4 servicing fees the construction financing would generate for SFC.

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

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

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

18 71. To induce the cooperation of Tharaldson, CVFS and TM2I, SFC and BOK offered
19 Tharaldson and TM2I a 500 basis point (5%) cut of the interest to be paid on the 14% construction
20 loan in exchange for the guarantees of Tharaldson and TM2I and in exchange for CVFS'
21 agreement to subordinate its position to the \$110,000,000 in construction financing. This
22 arrangement would still leave BOK and other participating lenders with a net 8.5% interest rate
23 after payment of 50 basis points (.5%) in loan servicing fees to SFC.

24 72. This complex structure was highly unusual for a number of reasons. First, it is
25 unusual for entities not affiliated with the developer and having no equity stake in the development
26 to be guaranteeing the development's success. Second, it is highly unusual for a subordinating
27 lender and its affiliates to take on both the risk of being subordinated and to guaranty their
28 unaffiliated borrower's performance. Third guarantees are typically given by the borrower's "side"

1 in a financing transaction, and not, as here, given by a substantial project lender.

2 73. Notwithstanding the highly unusual nature of this transaction, Tharaldson and his
3 entities were persuaded to proceed with it due to the unusual level of trust and confidence they had
4 in Scott and SFC.

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

- 7 • BOk received the guarantees of prime rate quality credits;
- 8 • BOk received an 8.5% net rate of return which was substantially above the
9 prime rate of interest;
- 10 • BOk contracted for what should have been a first lien position through
11 CVFS' agreement to subordinate the Prior Loan and the Edelstein Loan;
- 12 • BOk was able to participate in this attractive arrangement without raising the
13 loan capital necessary to take out the Prior Loan and Edelstein Loan;
- 14 • BOk did not need to worry about whether or not the actual project was
15 financially viable in what it knew were rapidly deteriorating real estate
16 market conditions because it could count on full recovery under the
17 Tharaldson and TM2I guarantees even if the actual developer never repaid a
18 nickel of the loan;
- 19 • In effect, although the loan was made to finance the Project BOk looked at
20 the loan as a loan to Tharaldson and TM2I, thereby making the Project's
21 performance virtually irrelevant to BOk.
- 22 • The transaction structure ultimately put all lending risk on the Project on the
23 shoulders of CVFS (who had made and subordinated the Prior Loan and
24 Edelstein Loan) and Tharaldson and TM2I who had guaranteed the
25 \$110,000,000 construction loan.

26 75. SFC acted as Bok's agent in procuring for it this deal which was so highly
27 beneficial to BOk and so highly detrimental to Plaintiffs.
28

The Senior Loan Documentation and the "Mezzanine Financing"

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

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

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

79. At all times while acting as Co-Lead Lenders with respect to the Senior Loan, BOK knew of the fiduciary relationship SFC occupied toward Plaintiffs due to the general relationship of trust and confidence between them and due to the CVFS Pre-Senior Participation Agreements, each of which appointed SFC as agent for CVFS and acknowledged SFC's fiduciary duties to CVFS.

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

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

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

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

1 First Junior DOT, First Senior DOT, and the Third DOT (as amended).

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

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

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

11 A. Gemstone West Inc. having aggregate pre-sale revenue of not less than
12 \$60,000,000 from: (i) Qualified Sales of condo units, (ii) the capitalized
13 value (at a 7.0% capitalization rate measured against triple net lease
14 payments) of Class A office and retail leases, and (iii) the sales price of
15 Class A office space; and

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

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

26 88. Article 7 of the Senior Loan Agreement defines an event of default under the
27 Agreement, and includes, among other things: a) if Gemstone West Inc. fails to pay principal or
28 interest under the Senior Construction Note or Senior Contingency Note and such failure continues

1 for a period of ten (10) days; b) if any representation or warranty made by Gemstone West Inc. in
2 the Senior Loan Agreement or in any certificate or document furnished pursuant to the Senior Loan
3 Agreement proves untrue; c) if Gemstone West Inc. fails to keep, enforce, perform and maintain in
4 full force and effect any provision of the Senior Loan Agreement, the Collateral Documents or
5 Construction Documents after 30 days written notice of said non-monetary default; and d) if
6 Gemstone West Inc. further encumbers the Trust Property or Improvements or an interest therein
7 without the prior written approval of SFC, except as otherwise permitted in the Collateral
8 Documents.

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

12 90. The Senior DOT requires Gemstone West Inc. to pay, 10 days before default or
13 delinquency, any obligations secured by liens, encumbrances, charges and/or claims on the
14 Property or any part thereof, which appear to have priority over the lien of the Senior DOT.

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

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

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

22 94. Neither Tharaldson nor TM2I is a shareholder, owner, officer or affiliated party of
23 Gemstone West Inc., but rather executed the Guaranty on the condition that Tharaldson receive
24 5.0% of the 14.0% interest rate on the Senior Loan regardless of who participated in funding the
25 Senior Loan.

26 95. On or about March 21, 2008, SFC, as Originating Lender, and CVFS, as Participant,
27 executed a Nonrecourse Participation Agreement as amended by the Addendum to Nonrecourse
28 Participation Agreement dated March 21, 2008, as well as a Commitment to Participate dated on or

1 about the same date, which superseded two prior CVFS Senior Participation Agreements (the
2 "CVFS Third Senior Participation Agreement"), under which CVFS agreed to provide \$400,000 of
3 the Senior Loan. Under the CVFS Third Senior Participation Agreement, CVFS was to receive
4 8.5% interest, Guarantor was to receive 5.0% interest, and SFC made a service fee of .50%. The
5 CVFS Third Senior Participation Agreement provided that SFC was agent for CVFS concerning
6 the Senior Construction Note and acknowledged SFC's fiduciary duties to CVFS.

7 96. In connection with the Senior Loan, General Contractor consented to an Assignment
8 of Construction Contract, Plans and Specifications executed by Gemstone West Inc. in favor of
9 SFC, pursuant to a Consent of General Contractor dated January 22, 2008 (the "Contractor
10 Consent"). That Contractor Consent specifically provides that "[a]ll liens, claims, rights, remedies
11 and recourses that [Asphalt Products Corporation] may have or may otherwise be entitled to assert
12 against all or any portion of the Project shall be, and they hereby are made expressly subordinate,
13 junior and inferior to the liens, claims, rights, remedies and recourses as created by the Loan
14 Agreement and the Collateral Documents." In addition, General Contractor executed a certificate
15 as to Sworn Construction Statement dated January 22, 2008 indicating that no work had been
16 completed to date on the Property or Project (the "Contractor Certificate").

17 97. At the closing of the Senior Loan on January 22, 2008, CVFS received a net
18 paydown of \$9,930,348, reducing the unpaid balance of the Prior Loan to approximately
19 \$35,278,688 and of the Edelstein Loan to approximately \$9,229,412, for a total balance then owed
20 to CVFS of \$45,342,798.

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

27 99. On or about January 22, 2008, Gemstone West Inc. and SFC executed a Fourth
28 Amendment to Mezzanine Loan Agreement [Prior Loan Agreement] whereby SFC agreed to

1 extend the maturity date of the First Junior DOT Note, First Senior DOT Note, and LOC Note
2 (collectively referred to as the "Mezzanine Notes") to December 31, 2009 and increase the total
3 principal amount of the Mezzanine Notes from \$33,000,000 to \$46,000,000, to be evidenced by a
4 new Mezzanine Note dated January 22, 2008 in the maximum principal amount of \$46,000,000.

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

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

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

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

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

105. On January 30, 2008, SFC's counsel opined to SFC that SFC was in a position to fund the Senior Loan, provided each Participant funds its pro rata share.

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

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

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

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

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

110. 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.

111. 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.

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

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

Subsequent Changes to Loans

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

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

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

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

117. The obligors on the Prior Loan, the Edelsteins Loan, the Mezzanine Loans, the

1 Senior Loan and the Rental LOC Note (collectively the "Manhattan West Loans") have not made
2 any of the required interest payments since September 2008, and all promissory notes making up
3 the Manhattan West Loans are therefore in monetary default.

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

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

10 120. The unpaid principal balances on the Manhattan West Loans, together with all
11 accrued but unpaid interest, including late penalties and default interest, are now immediately due
12 and payable.

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

16 **The Fraudulent Inducement**

17 122. Plaintiffs' decisions to modify the Prior Loan and the Edelstein Loan as provided in
18 the Senior Loan Agreement, and to agree to the Plaintiffs' Senior Loan Documents was based upon
19 the trust and confidence Plaintiffs reposed in Scott and SFC due to their longstanding business
20 relationship, and upon the Fiduciary Defendants' recommendations to Plaintiffs which Plaintiffs
21 understood to be backed up by the Fiduciary Defendants' rigorous due diligence and the Fiduciary
22 Defendants' assurances to Plaintiffs that the transaction was sound and would be in Plaintiffs' best
23 interest.

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

1 124. Before Plaintiffs agreed to the Senior Loan transactions, Scott and SFC told
2 Plaintiffs that with the advent of the Senior Loan, their business and economic position with
3 respect to construction lending on the Project, would be:

- 4 A. The Senior Loan of \$110,000,000 would become a first lien position on the
5 Project.
6 B. Plaintiffs would receive a net paydown on the Prior Loan and Edelstein
7 Loan aggregating about \$10,000,000, and the Prior Loan and the Edelstein
8 Loan, as amended, would become a second position lien on the Project.
9 C. There was a fixed price construction agreement with a viable and reputable
10 general contractor which would deliver all of the required construction for
11 the Project at a cost of approximately \$79,000,000.
12 D. There would be \$60,000,000 in "lender approved" pre-sales and/or pre-
13 leases (the "Pre-Sales Contracts") prior to closing of the Senior Loan, which
14 would provide sources of repayment of the Senior Loan in those amounts.
15 E. Based upon pro formas prepared by Developer and vetted by the Fiduciary
16 Defendants prior to the Plaintiffs making any commitments with respect to
17 the Senior Loan, the total acquisition, development, and construction costs
18 estimated for the Project were \$120,000,000 and the total revenues
19 estimated for the Project were \$154,000,000, for a projected net income of
20 \$34,000,000 from the Project. Scott and SFC provided these pro formas to
21 Plaintiffs in May, 2007.
22 F. SFC and BOK had rigorously underwritten the financial pro formas and the
23 financial viability of the Project and were relying primarily on the financial
24 viability of the Project in making the Senior Loan.
25 G. Tharaldson's exposure on the Guaranty and TM2I's exposure on the TM2I
26 Guaranty of the Senior Loan would be limited to any excess of the Senior
27 Loan balance on any given day over the fair market value of all of the
28 collateral for the Senior Loan (including the Project, the Construction

Contract, and the Pre-Sales Contracts.)

125. Communications between Plaintiffs and SFC/Scott concerning the Manhattan West Loan, and SFC/Scott's material misrepresentations and omissions relating to that loan occurred over the period between February 15, 2007 and 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:

- | | | |
|----|-------------------|----------------------------------------------------------------------------------------------------------|
| a. | February 15, 2007 | Initial presentation by Scott and Edelstein of proposed Manhattan West Loan. |
| b. | April 12, 2007 | SFC submits first Manhattan West Loan analysis summary to Plaintiffs. |
| c. | April 18, 2007 | Email communication from CVFS to Scott concerning pre-sale amounts with no mention of sales to insiders. |
| d. | April 30, 2007 | Tharaldson executes first financing commitment letter. |
| e. | May 6, 2007 | SFC discusses modifying loan. Does not mention related party pre-sales. |
| f. | May 17, 2007 | Tharaldson executes \$8 million financing commitment. |
| g. | May 21, 2007 | SFC provides project pro formas to Plaintiffs. |

- 1
2 h. October 12, 2007 Tharaldson executes modified financing
3 commitment letter.
4
5 i. October 19, 2007 Scott provides updated financial analysis
6 which has no indication project revenues
7 would drop to \$10 million and no indication
8 that developer would be relying on related
9 party sales.
10
11 j. November 19, 2007 SFC provides updated projections with no
12 indication of related party sales.
13
14 k. January 22, 2008 Tharaldson executes Senior Loan documents.
15
16 l. February 25, 2008 Tharaldson executes revised commitment
17 letter.
18

19 126. Plaintiffs understood all of the foregoing statements to be true and this
20 understanding is reflected in part in a Conditional Commitment Letter dated April 27, 2007 and a
21 modification to Conditional Commitment Letter dated October 8, 2007. The April 27, 2007
22 Conditional Commitment Letter stated that it was contingent on:

- 23 • "Subordination of Land Loan to Senior Construction Loan."
24 • "Senior Construction Loan personally guaranteed by Gary D. Tharaldson."
25 • "Monthly lender inspection and third party inspections."
26 • "Voucher control on all draws."
27 • "Acceptable abacus feasibility analysis on entire Project."
28 • "Acceptable lender approved project budget."

- 1 • "Acceptable GMP contract assigned to lender."
- 2 • "All sales must be approved by lender."
- 3 • "Lender and Participant to verify cash flow and IRR calculations."
- 4 • "Total pre-sale revenue \$60 million required to be secured before vertical
- 5 financing."
- 6 • "A minimum of monthly SFC on site inspections will be required."

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

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

15 129. The Fiduciary Defendants knew that SFC and BOK, as Co-Lead Lenders, also
16 occupied a fiduciary relationship with Plaintiffs with specific reference to the Senior Loan as a
17 participant in the Senior Loan, as the intended Guarantors of the Senior Loan, and as sole owner of
18 the Prior Loan and the Edelstein Loan to be subordinated to the Senior Loan.

19 130. The Fiduciary Defendants knew but did not identify and resolve with Plaintiffs that
20 the Senior Loan transaction presented direct and substantial conflicts between: (a) SFC's and
21 Scott's position as fiduciaries to Plaintiffs with respect to Plaintiffs 100% ownership interest in the
22 Prior Loan and the Edelstein Loan; and (b) the Fiduciary Defendants' position as fiduciaries to all
23 Senior Loan participants, including CVSF.

24 131. In connection with the Senior Loan, the Fiduciary Defendants made
25 misrepresentations to Plaintiffs and failed to disclose to Plaintiffs material information concerning
26 the Project and the Senior Loan, which are described in the following sections.

27 ***Deteriorated Financial Prospects.***

28 132. SFC, Scott and BOK attached to the Senior Loan Agreement a pro forma for the

1 Project that showed projected net income for the Project of \$10,000,000 rather than the
2 \$34,000,000 reflected in the pro forma the Fiduciary Defendants had previously provided to
3 Plaintiffs and on which Plaintiffs had relied in agreeing to the Plaintiffs' Senior Loan Documents.

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

6 134. The Fiduciary Defendants failed to disclose the revised pro forma to Plaintiffs or
7 ask Plaintiffs to initial it.

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

11 ***Primary Reliance on Guarantors.***

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

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

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

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

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

1 140. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had
2 they known that the Pre-Sale Condition was not satisfied, because bona fide, third party pre-sales
3 and pre-leases provide an assurance of true market interest in a project and a known source of
4 revenue for repayment of the loan.

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

11 142. The Fiduciary Defendants had a duty not to approve and count toward satisfaction
12 of the pre-sale condition, pre-sales that were made to insiders, affiliates or other persons or
13 entities related to the borrower. Nevertheless, the Fiduciary Defendants certified at the closing of
14 the Senior Loan that there were \$62,700,000 of "lender approved" pre-sales and/or pre-leases, and
15 that the Pre-Sale Condition had been satisfied. It was not reasonable or appropriate to make this
16 certification.

17 143. The Fiduciary Defendants certified that the lender approved pre-sales and/or pre-
18 leases consisted of \$45,000,000 in residential pre-sales and \$17,250,000 of commercial pre-sales
19 and/or pre-leases.

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

26 145. The Fiduciary Defendants knew or should have known that at the closing of the
27 Senior Loan, all \$17,250,000 of the commercial pre-sales and/or pre-leases were sales and/or
28 leases to parties closely related to the Gemstone West Inc. All three pre-leases were with

1 affiliates of the Gemstone West Inc. (Manhattan West Residential, Inc., Gemstone Coffee House,
2 LLC, and Gemstone Development LLC (1,800 square feet)). The one commercial sale
3 (\$5,500,000) was to Santa Rita Management Company, an entity owned by the Edelstein's father.

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

7 147. The certification by the Fiduciary Defendants that the Pre-Sale Condition had been
8 satisfied was false and fraudulent.

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

12 *Fraud Relating to First Lien Condition.*

13 149. A condition to the closing of the Senior Loan, and therefore to the effectiveness of
14 Plaintiffs' Senior Loan Documents, was that the Gemstone West Inc. provide a first position Deed
15 of Trust on the Project (the "First Lien Condition"). (Senior Loan Agreement §§ 3.1.1, 1.18;
16 3.1.3, 3.1.4)

17 150. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents had
18 they known that the First Lien Condition was not satisfied, because of the hassle, expense, and
19 uncertainty of resolving senior lien claims.

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

23 152. The Fiduciary Defendants knew or should have known that under NRS 108.225(1)
24 and (2) mechanics liens for any work performed prior to the recording date of the Senior Loan
25 Deed of Trust (the "Priority Construction Liens") would be prior and superior to the Senior Loan
26 Deed of Trust.

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

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

4 155. The Fiduciary Defendants certified at the closing of the Senior Loan that the First
5 Lien Condition had been satisfied.

6 156. This certification was a misrepresentation and a fraud.

7
8 ***Insurance Over Broken Priority; Switched Title Insurance Companies.***

9 157. Rather than informing Plaintiffs of any Priority Construction Liens that enjoyed
10 statutory priority over the Senior Loan Deed of Trust, Defendants chose to "insure over" the
11 Priority Construction Liens in a title policy issued by Defendants' chosen title company,
12 Commonwealth Land Title Insurance Company ("Commonwealth"). Fiduciary Defendants did
13 not disclose this decision to Plaintiffs.

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

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

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

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

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

26 163. In November 2008, the Nebraska Insurance Commissioner informed Common-
27 wealth that it was in a "hazardous financial condition" under Nebraska law and filed a petition for
28 rehabilitation against Commonwealth. Commonwealth consented to the rehabilitation petition.

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

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

7 ***Subordination Exacerbates Broken Priority.***

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

12 167. The Fiduciary Defendants failed to inform Plaintiffs of the risk that any Priority
13 Construction Liens would become senior to the Deeds of Trust securing the Prior Loan as a result
14 of the Subordination and to provide their evaluation of that risk.

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

28 169. Plaintiffs would not have agreed to the Plaintiffs' Senior Loan Documents, had

1 they known that the Fiduciary Defendants through their drafting of the Subordination had
2 substantially increased the risk of any Priority Construction Liens gaining priority over the Deeds
3 of Trust securing the Prior Loan and the Edelstein Loan.

4 170. The Fiduciary Defendants failed to inform Plaintiffs that the Subordination
5 Agreement had been drafted in a manner that substantially increased the risk that any Priority
6 Construction Liens would become senior to the Prior Loan as a result of the Subordination.

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

8 171. As Fiduciaries, Defendants Scott, SFC and BOK had a duty to disclose that they
9 were preparing legal instruments that had the effect of negating protective provisions of Nevada
10 law.

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

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

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

20 175. The Fiduciary Defendants inserted in the Guaranty of the Senior Loan a waiver of
21 all statutory rights of a guarantor under Nevada law, including the single action rule and the fair
22 market value defense. They did not disclose to Plaintiffs their insertion of this waiver provision.

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

25 177. The Fiduciary Defendants knew or should have known that North Dakota law did
26 not provide a single action rule nor extend a borrower's fair market value defense to a guarantor.
27 They did not disclose to Plaintiffs that they had selected the law of a state which substantially
28 altered their rights as they would have existed under Nevada law.

1 178. The Fiduciary Defendants advised Plaintiffs that the documents they were signing,
2 including the Guaranty and the TM2I Guaranty, were appropriate to sign and protected Plaintiffs'
3 interests, as was the Subordination Agreement relating to the Prior Loan which SFC as Lender
4 was signing.

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

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

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

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

21 **Administration of Senior Loan**

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

25 184. During the course of their administration of the Senior Loan, when the Fiduciary
26 Defendants did become aware of this problem, they failed to secure an early and appropriate
27 resolution of the scope problem with the existing contractor to maintain a fixed sum contract
28 increased by some amount to cover cost overruns.

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

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

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

13 **Defamatory Statements**

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

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

- 17 A. Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal
18 "will likely have farther reaching negative implications for his banking
19 relationships with all banks going forward."
20 B. Tharaldson's "reputation will be unquestionably damaged."
21 C. "The 29 banks stretching from North Dakota to Oklahoma that are in this
22 deal, plus banks not in this deal, will look very unfavorably on any future
23 credit request from Gary."

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

27 191. The above statements are defamatory *per se*.
28

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

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

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

Punitive Damages

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

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

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

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

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

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

FIRST CLAIM FOR RELIEF

(Fraudulent Misrepresentation)

200. Plaintiffs incorporate by reference all prior paragraphs of their Amended

1 Complaint.

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

- 4 a. Scott and SFC told Plaintiff that SFC and BOK had thoroughly
5 underwritten the Manhattan West Project and that the Project, on its
6 own merits was a viable and prudent credit risk that justified the
7 Senior Loans;
- 8 b. Scott and SFC told Plaintiffs that SFC and BOK expected the
9 Project to generate \$34,000,000 in net revenues based on project
10 pro formas and their thorough underwriting of the Project;
- 11 c. SFC and BOK, by making statements, representations and
12 warranties either expressed or necessarily implied in closing the
13 Senior Loan transaction that the pre-sale conditions to closing the
14 Senior Loan had been satisfied through bonafide arms-length pre-
15 sales to legitimate buyers or tenants who were unrelated to the
16 Project developer;
- 17 d. SFC and BOK, by making statements, representations and
18 warranties either expressed or necessarily implied in closing the
19 Senior Loan transaction that the First Lien condition to closing of
20 the Senior Loan had been satisfied;

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

24 203. General Contractor made certain representations to SFC, as agent for Plaintiffs, in
25 connection with the Senior Loan. Specifically, General Contractor represented that: A) "[a]ll
26 liens, claims, rights, remedies and recourses that [Asphalt Products Corporation] may have or may
27 otherwise be entitled to assert against all or any portion of the Project shall be, and they hereby are
28 made expressly subordinate, junior and inferior to the liens, claims, rights, remedies and recourses

1 as created by the Loan Agreement and the Collateral Documents"; and B) that no work had been
2 completed to date on the Property or the Project.

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

5 205. Scott, SFC and General Contractor made the aforementioned representations with
6 the intent that Plaintiffs rely on them.

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

9 207. Plaintiffs had a right to rely on the representations of Scott, SFC and General
10 Contractor.

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

13 209. Scott, SFC and General Contractor knew or should have known that the
14 representations were false.

15 210. Plaintiffs were ignorant of the falsity of the representations.

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

18 212. Scott and SFC acted as agents for BOK in connection with making the
19 misrepresentations alleged above, and BOK is liable as if it had made those misrepresentations
20 itself.

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

23 214. Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by
24 Fiduciary Defendants' fraud and the General Contractor's and therefore are not the valid, binding,
25 or enforceable obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment voiding
26 the Plaintiffs' Senior Loan documents. Alternatively, they are entitled to equitable reformation of
27 the Plaintiffs' Senior Loan documents.

28 215. In the alternative, the matters alleged as fraudulent misrepresentations were mutual

1 mistakes of fact or law or unilateral mistakes of fact or law induced through Defendants'
2 inequitable conduct, and Plaintiffs are entitled to equitable rescission or reformation of Plaintiffs'
3 Senior Loan documents.

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

6 SECOND CLAIM FOR RELIEF

7 (Fraudulent Concealment/Fraudulent Omissions)

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

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

- 14 a. That even though they had previously shared with Plaintiffs a pro
15 forma projecting \$34 million in net project income, Defendants
16 Scott, SFC and BOK had in their possession at the time the Senior
17 Loan closed a revised pro forma which they did not share with
18 Plaintiffs projecting only \$10 million in net project income;
- 19 b. That SFC and BOK had not underwritten the Senior Loan on the
20 basis of the financial merits and viability of the Manhattan West
21 Project, but instead had based their underwriting decision solely on
22 the strength of the guarantees of Tharaldson and TM2I;
- 23 c. That First American Title Insurance Co. had refused to issue title
24 insurance because of prior recorded liens of the General Contractor;
- 25 d. That SFC and BOK were closing the Senior Loan transaction with
26 actual and undisclosed knowledge that they were insuring over
27 known General Contractor lien claims;
- 28 e. That so-called lender approved pre-sales were not arms length sales

1 to unrelated third parties, but in many cases were to the affiliates or
2 principals of the developer or to other insiders;

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

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

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

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

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

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

22 223. Plaintiffs' agreement to the Plaintiffs' Senior Loan documents was induced by the
23 fiduciary Defendants' fraudulent concealment and omissions and therefore are not the valid,
24 binding or enforceable obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment
25 voiding Plaintiffs' Senior Loan documents. Alternatively, they are entitled to equitable
26 reformation of the Plaintiffs' Senior Loan documents.

27 224. In the alternative, the matters fraudulently concealed or omitted were mutual
28 mistakes of fact or law or were unilateral mistakes of fact or law induced by Defendants'

1 inequitable conduct and Plaintiffs are entitled to equitable rescission or reformation of Plaintiffs'
2 Senior Loan documents.

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

5 THIRD CLAIM FOR RELIEF

6 (Constructive Fraud)

7 226. Plaintiffs incorporate by reference all prior paragraphs of their Amended
8 Complaint.

9 227. The Fiduciary Defendants had a fiduciary and confidential relationship with
10 Plaintiffs.

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

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

- 16 A. The Deteriorated Financial Prospects as set forth under that heading above.
- 17 B. The Primary Reliance on Guarantors as set forth under that heading above.
- 18 C. The Insurance over Broken Priority and Switched Title Insurance
19 Companies as set forth under that heading above.
- 20 D. The Subordination Exacerbates Broken Priority as set forth under that
21 heading above.
- 22 E. The Fraud Relating to Terms of Guaranty, TM21 Guaranty and
23 Subordination as set forth under that heading above.

24 230. The Fiduciary Defendants also failed to disclose:

- 25 A. That they were underwriting the Project based solely on the Guarantees;
- 26 B. That the pro forma project profits had decreased from \$34,000,000 to
27 \$10,000,000;
- 28 C. That the pre-sale conditions were met only through significant sales to

1 insiders and affiliates;

- 2 D. That there were known lien priority problems which at least one title
3 insurer had refused to insure over;
4 E. That Scott and SFC had substantial conflicts of interest;
5 F. That SFC and BOK had prepared guaranty documents that were highly
6 disadvantageous to Plaintiffs' rights under Nevada law.

7 231. Each of the items of information described in the preceding paragraphs were
8 material to Plaintiffs' decisions to agree to the Plaintiffs' Senior Loan Documents.

9 232. The Fiduciary Defendants failed to disclose that material information to Plaintiffs.

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

12 234. Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by
13 Fiduciary Defendants' constructive fraud and therefore are not the valid, binding, or enforceable
14 obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment voiding the Senior Loan
15 documents. Alternatively, they are entitled to equitable reformation of the Plaintiffs' Senior Loan
16 documents.

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

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

23 **FOURTH CLAIM FOR RELIEF**

24 **(Negligent Misrepresentation/Negligent Omission)**

25 237. Plaintiffs incorporate by reference all prior paragraphs of their Amended
26 Complaint.

27 238. The Fiduciary Defendants had a duty to exercise due care in making
28 representations to Plaintiffs concerning the Senior Loan, to make all material disclosures, and to

1 scrupulously act in Plaintiffs' best interests.

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

4 A. That the Fiduciary Defendants were primarily relying on the financial
5 viability of the Project in underwriting the Senior Loan and that
6 Tharaldson's exposure on the Guaranty and TM2I's exposure on the TM2I
7 Guaranty would be limited.

8 B. That the Pre-Sale Condition was satisfied.

9 C. That the First Lien Condition was satisfied.

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

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

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

- 16 a. That even though they had previously shared with Plaintiffs a pro
17 forma projecting \$34 million in net project income, Defendants
18 Scott, SFC and BOK had in their possession at the time the Senior
19 Loan closed a revised pro forma which they did not share with
20 Plaintiffs projecting only \$10 million in net project income;
- 21 b. That SFC and BOK had not underwritten the Senior Loan on the
22 basis of the financial merits and viability of the Manhattan West
23 Project, but instead had based their underwriting decision solely on
24 the strength of the guarantees of Tharaldson and TM2I;
- 25 c. That First American Title Insurance Co. had refused to issue title
26 insurance because of prior recorded liens of the General Contractor;
- 27 d. That SFC and BOK were closing the Senior Loan transaction with
28 actual and undisclosed knowledge that they were insuring over

known General Contractor lien claims;

- e. That so-called lender approved pre-sales were not arms length sales to unrelated third parties, but in many cases were to affiliates or principals of the developer or to other insiders;
- f. That Scott and SFC acting as dual agents for Plaintiffs and BOK had an inherent conflict of interest that could not be waived;
- g. That Scott and BOK had prepared guaranty documentation that substantially reduced Plaintiffs' rights under Nevada law and materially enhanced BOK's position at Plaintiffs' expense and detriment.

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

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

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

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

247. Plaintiffs' agreement to the Plaintiffs' Senior Loan Documents was induced by Fiduciary Defendants' negligent misrepresentations and omissions and therefore are not the valid, binding, or enforceable obligations of Plaintiffs. Plaintiffs are entitled to a Declaratory Judgment voiding the Senior Loan documents. Alternatively, they are entitled to equitable reformation of the Plaintiffs' Senior Loan documents.

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

249. By virtue of their agencies for one another, the Fiduciary Defendants are jointly

1 and severally liable on this claim.

2 **FIFTH CLAIM FOR RELIEF**

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

4 250. Plaintiffs incorporate by reference all prior paragraphs of their Amended
5 Complaint.

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

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

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

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

- 18 a. A typical loan participation has one to four participating lenders.
19 This loan participation had 29 participants.
- 20 b. A usual seller of participation interests is a bank who sells
21 participations in a loan to avoid violating federal lending limits.
22 Here the "seller" is not an actual lender and does not advance its
23 own loan funds. Instead its entire business is to find investors to
24 invest in and fund loans.
- 25 c. Usual loan participants are banks or other lending institutions. Here
26 Plaintiff Participant CVFS as well as other participants were non-
27 bank entities.
- 28 d. In a typical participation, the participants fund only part of the loan

1 with the seller funding the balance. Here the participants funded the
2 entire loan and Plaintiff Participant funded only a small percentage
3 of the Senior Loan but its affiliates Tharaldson and TM2I gave
4 100% guarantees of the entire loan.

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

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

14 g. In a typical participation, if the project fails the participant loses no
15 more than its participation interest. Here, if the project fails,
16 Plaintiff Participants are on the hook through their guarantees for
17 100% of the Senior Loan.

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

22 256. The transaction whereby Defendants SFC and BOK induced Tharaldson and TM2I
23 to give guarantees in exchange for a 5% or 500 basis point "cut" of interest on money they did not
24 loan was an investment contract and therefore a security under Nevada law. The guarantees were
25 a passive investment of risk capital without control involving an investment of money or a
26 monetary equivalent (the guarantees) in a common enterprise (the Project and the Senior Loan
27 consortium and its 29 participating lenders) with an expectation of profits (the 500 basis point cut)
28 solely from the efforts of others (the developer's ability to retire the Senior Loan through success

1 of the Manhattan West Project and/or the co-lead lender's management of the Loan/Project). The
2 guarantors were not lenders receiving interest on money loaned.

3 257. On information and belief, both Plaintiffs and Defendants viewed (a) the
4 investment contract transaction involving the guarantees and (b) the loan participation transaction
5 as securities, and their motivation in entering into the transactions treated Plaintiffs, through their
6 guarantees, as if they had made an investment in the Manhattan West Project. All purchasers of
7 loan participation interests were motivated by investment motives.

8 258. The loan participation transaction including the guarantees given by Plaintiffs
9 involved a broad plan of distribution and common trading with 29 actual participating lenders
10 and, on information and belief, additional offerees of participation interests who chose not to
11 invest. Co-lead lender SFC made no funding investment with its own money; all the loan capital
12 came from loan participants, several of whom were not banks or financial institutions.

13 259. On information and belief, parties to the senior loan transaction and Plaintiffs'
14 senior loan documents considered participation in the senior loan transaction to be an investment,
15 and reasonably expected the participation interests to be investments.

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

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

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

22 263. The Fiduciary Defendants are civilly liable to Plaintiffs for damages as provided
23 in NRS 90.660(1)(d).

24 SIXTH CLAIM FOR RELIEF

25 (Defamation)

26 264. Plaintiffs incorporate by reference all prior paragraphs of their Amended
27 Complaint as if set forth fully herein.

28 265. SFC and BOK as Co-Lead Lenders made statements, including but not limited to,

1 that:

- 2 A. Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal
3 "will likely have farther reaching negative implications for his banking
4 relationships with all banks going forward."
5 B. Tharaldson's "reputation will be unquestionably damaged."
6 C. "The 29 banks stretching from North Dakota to Oklahoma that are in this
7 deal, plus banks not in this deal, will look very unfavorably on any future
8 credit request from Gary."

9 266. The statements made by SFC and BOK as Co-Lead Lenders were published to the
10 other 27 Senior Loan participants and potentially republished to numerous other people, including
11 but not limited to persons employed by the 27 Senior Loan participants, persons doing business
12 with the 27 Senior Loan participants, and persons in the communities in and around the Property
13 and Project.

14 267. The statements made by SFC and BOK are false and defamatory and impeached the
15 honesty and integrity of Plaintiffs.

16 268. SFC and BOK made the statements with knowledge of their falsity or with reckless
17 disregard of whether the statements were true, but at a minimum, negligently.

18 269. As a direct and proximate result of the defamation made by SFC and Bok,
19 Plaintiffs have suffered serious injury to their business reputations.

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

24 **SEVENTH CLAIM FOR RELIEF**

25 **(Breach of Fiduciary Duty)**

26 271. Plaintiffs incorporate by reference all prior paragraphs of their Amended
27 Complaint.

28 272. The Fiduciary Defendants were agents of Plaintiffs and owed to Plaintiffs fiduciary

1 duties of undivided loyalty, due care, and full disclosure of material information.

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

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

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

10 EIGHTH CLAIM FOR RELIEF

11 (BOK, Aiding and Abetting Breach of Fiduciary Duty)

12 276. Plaintiffs incorporate by reference all prior paragraphs of their Amended
13 Complaint.

14 277. The Fiduciary Defendant BOK was aware of the fiduciary duties owed to Plaintiffs
15 by the Fiduciary Defendants Scott and SFC.

16 278. The Fiduciary Defendant BOK knew or should have known that Fiduciary
17 Defendants Scott and SFC were breaching their fiduciary duties to Plaintiffs.

18 279. The Fiduciary Defendant BOK acted intentionally and/or in concert with Scott and
19 SFC and provided substantial assistance to them in their breaches of fiduciary duty toward
20 Plaintiffs.

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

23 NINTH CLAIM FOR RELIEF

24 (Acting in Concert/Civil Conspiracy)

25 281. Plaintiffs incorporate by reference all prior paragraphs of their Amended
26 Complaint.

27 282. The Defendants, and each of them, acting in concert with each of the other
28 Defendants' tortious conduct constituted a breach of their duties, including fiduciary duties, to

1 Plaintiffs.

2 283. Defendants, and each of them, knew that they were agreeing to engage in conduct
3 that involved breach of fiduciary duties and a substantial risk of harm to Plaintiffs.

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

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

9 **TENTH CLAIM FOR RELIEF**

10 **(Breach of Contract)**

11 286. Plaintiffs incorporate by reference all prior paragraphs of their Amended
12 Complaint.

13 287. The Fiduciary Defendants had contractual duties to Plaintiffs related to the Senior
14 Loan Agreement.

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

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

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

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

23 **ELEVENTH CLAIM FOR RELIEF**

24 **(Breach of Covenant of Good Faith and Fair Dealing)**

25 290. Plaintiffs incorporate by reference all prior paragraphs of their Amended
26 Complaint.

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

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

- 3 A. Making the misrepresentations concerning the Pre-Sale Condition and the
4 First Lien Condition as alleged herein.
5 B. Failing to disclose to Plaintiffs the material information related to the
6 Senior Loan and the Plaintiffs' Senior Loan Documents as alleged herein.
7 C. Failing to raise with Plaintiffs the conflicts of interest inherent in the
8 Plaintiffs' Senior Loan Documents.
9 D. Failing to advise Plaintiffs to consult with independent counsel concerning
10 the Plaintiffs' Senior Loan Documents.
11 E. Preferring their interests (to earn fees and eight and one-half per cent
12 interest per annum in a time that the prime rate was six and one half percent
13 and the interest rate environment was sharply downward) over Plaintiffs
14 interests in having the Plaintiffs' Senior Loan Documents reasonably and
15 adequately protect their reasonable expectations concerning the Senior
16 Loan based upon the discussions that occurred between Plaintiffs and the
17 Fiduciary Defendants.

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

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

24 TWELFTH CLAIM FOR RELIEF

25 (Negligence)

26 295. Plaintiffs incorporate by reference all prior paragraphs of their Amend
27 Complaint.

28 296. The Fiduciary Defendants owed to Plaintiffs a duty to exercise due care in

1 connection with the underwriting, funding, and administration of the Senior Loan.

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

- 4 A. Making the misrepresentations concerning the Pre-Sale Condition and the
5 First Lien Condition as alleged herein.
6 B. Failing to disclose to Plaintiffs the material information related to the
7 Senior Loan and the Plaintiffs' Senior Loan Documents as alleged herein.
8 C. Failing to raise with Plaintiffs the conflicts of interest inherent in the
9 Plaintiffs' Senior Loan Documents.
10 D. Failing to advise Plaintiffs to consult with independent counsel concerning
11 the Plaintiffs' Senior Loan Documents.
12 E. Failing to determine, prior to funding of the Senior Loan, that a substantial
13 amount of work required by the construction drawings for the Project was
14 not covered by the construction agreement.
15 F. Failing to determine, during the course of inspections of the Project during
16 construction, that nearly \$8,000,000 in substandard work was performed.
17 G. Failure to obtain, in connection with each draw, the necessary lien waivers
18 for work reflected in that draw.
19 H. Failure to make sure that the loan draws were spent by the contractor to pay
20 subcontractors and material suppliers.
21 I. Allowing \$26,000,000 in construction liens to be filed against the Project
22 during the course of their loan administration.

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

25 **THIRTEENTH CLAIM FOR RELIEF**

26 **(Declaratory Judgment)**

27 299. Plaintiffs incorporate by reference all prior paragraphs of their Amended
28 Complaint as if set forth fully herein.

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

3 301. As set forth herein, Contractor is the General Contractor of the Project.

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

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

12 304. Plaintiffs are entitled to a court order declaring that the Deed of Trust securing the
13 Prior Loan has a first lien position on the Property and the Project notwithstanding any other liens
14 created therein by or for the benefit of Gemstone West Inc. or Contractor.

15 305. Plaintiffs are entitled to a court order declaring that Tharaldson and TM2I have no
16 further liability relating to the Senior Loan and that as between Tharladson, TM2I and Gemstone
17 West Inc., Gemstone West Inc. is the sole party responsible for the Senior Loan.

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

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

25 308. Plaintiffs are entitled to a court order declaring that the Senior Loan Documents
26 were induced by fraud and/or mistake and are not the valid, legally binding, and/or enforceable
27 obligations of Plaintiffs.

28 309. Plaintiffs are entitled to a court order declaring that, upon CVFS's restoration to

1 the Fiduciary Defendants as agent for the Senior Loan Participants of the net \$10,000,000
2 paydown received from the Senior Loan proceeds together with interest thereon, the
3 Subordination is rescinded.

4 310. Plaintiffs are entitled to a court order declaring that the Deeds of Trust securing the
5 Prior Loan are prior and superior to the Senior Loan Deed of Trust and to any liens for
6 construction work performed on the Property after July 5, 2006, and to any and all other liens or
7 encumbrances on the Project recorded subsequent to recordation of the Deeds of Trust securing
8 the Prior Loans and constitute first lien positions on the Property.

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

12 WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

- 13 A. Declaring that CVFS has terminated all of the CVFS Pre-Senior
14 Participation Agreements and the CVFS Senior Loan Participation
15 Agreement, that SFC has no authority to act for CVFS with respect to any
16 of the loans covered thereby, and ordering SFC to execute and deliver
17 appropriate assignments of those loans and related documents to CVFS.
- 18 B. Declaring that the Senior Loan Documents were induced by fraud,
19 misrepresentation, omission and/or mistake and are not the valid, legally
20 binding, and/or enforceable obligations of Plaintiffs.
- 21 C. Declaring that, upon CVFS's restoration to the Fiduciary Defendants as
22 agent for the Senior Loan Participants of the net \$10,000,000 paydown
23 received from the Senior Loan proceeds together with interest thereon, the
24 Subordination is rescinded.
- 25 D. Declaring that the Deeds of Trust securing the Prior Loan are prior and
26 superior to the Senior Loan Deed of Trust and to any liens for construction
27 work performed on the Property after July 5, 2006, and to any and all other
28 liens or encumbrances on the Project recorded subsequent to recordation of

- 1 the Deeds of Trust securing the Prior Loans and constitute first lien
2 positions on the Property.
- 3 E. Declaring that Plaintiffs have one or more valid legal defenses to the
4 Plaintiffs' Senior Loan Documents if those documents would otherwise be
5 the valid, legally binding, or enforceable obligation of Plaintiffs.
- 6 F. In the alternative, reforming the Guaranty and the TM2I Guaranty due to
7 fraud and/or mistake to affirm the single action rule and the fair market
8 value defense that was part of Plaintiffs' understanding with the Fiduciary
9 Defendants.
- 10 G. In the alternative, ordering that the Fiduciary Defendants jointly and
11 severally, disgorge to Plaintiffs any and all direct benefit they have obtained
12 in connection with their breaches of fiduciary duty.
- 13 H. In the alternative, awarding Plaintiffs compensatory damages against the
14 Fiduciary Defendants jointly and severally, in an amount equal to all direct,
15 consequential, and other damages they have suffered, in amounts to be
16 proved at the trial of this matter.
- 17 I. In the alternative, and in addition to compensatory damages, awarding
18 Plaintiffs punitive damages against the Fiduciary Defendants jointly and
19 severally, in connection with the Predicate Claims in an amount to be
20 determined by the Court, but not to exceed three times compensatory
21 damages.
- 22 J. Awarding to Plaintiffs their costs of suit, expenses of litigation, including
23 but not limited to expert fees and reasonable attorneys fees.

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ALBRIGHT • STODDARD • WARNICK • ALBRIGHT
LAW OFFICES
A PROFESSIONAL CORPORATION

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

DATED this 25 day of July, 2009.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT


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Nevada Bar No. 004904
MARTIN A. MUCKLEROY, ESQ.
Nevada Bar No. 009634
801 S. Rancho Dr, Bldg. D
Las Vegas, Nevada 89106
Attorneys for Plaintiff

ASWA

ALBRIGHT · STODDARD · WARNICK · ALBRIGHT
LAW OFFICES
A PROFESSIONAL CORPORATION

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 15th day of July, 2009, I served the foregoing

PLAINTIFFS' FIRST AMENDED COMPLAINT by mailing a copy of the same, postage prepaid
and addressed to the following:

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Attorneys for Defendant APCO

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Frederic Dorwart Lawyers
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Attorneys for Bank of Oklahoma

Von S. Heinz, Esq.
Lewis and Roca, LLP
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Las Vegas, Nevada 89169
Attorneys for Bank of Oklahoma

Mark M. Jones, Esq.
Harrison, Kemp, Jones & Coulthard
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for Defendants Bradley Scott and
Scott Financial Corporation

Gemstone Development West, Inc.
C/o Alexander Edelstein, Registered Agent
9121 W Russell Road, Suite 117
Las Vegas, Nevada 89148

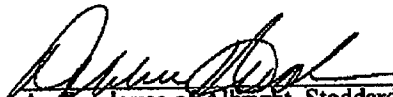

An Employee of Albright, Stoddard, Warnick
& Albright

Exhibit “2”

Exhibit “2”

Exhibit “2”

DISTRICT COURT
CLARK COUNTY, NEVADA

Allen B. 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;
and GARY D. THARALDSON,

Plaintiff(s),

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,

Defendant(s).

CASE NO. A579963-B
DEPT. NO. XIII

(Consolidated with
A608563; A609288)

Date: January 18, 2011
Time: 9:00 a.m.

DECISION

THIS MATTER having come before the Court on January 18,
2011 for hearing on, *inter alia*, Defendant/Counterclaimaint Scott
Financial Corporation's Motion for Summary Judgment Regarding
Plaintiffs' First, Second, and Third Claims for Relief and on
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), 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;

CLERK OF THE COURT

JAN 25 2011

RECEIVED

MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

1 Given the number of motions that the Court is now
2 hearing in this case and the time constraints involved and the
3 need for prompt decisions in light of the quickly approaching
4 trial date, the Court must be brief in announcing its rulings.
5 It will thus look to counsel who are directed to submit proposed
6 orders to fill in interstices consistent with briefing and
7 argument that the Court has accepted in its rulings.
8

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

11 A. Scott Financial's Motion.

12 1. The Motion is GRANTED IN PART as to the First Claim
13 for Relief, as the Court discerns no genuine issue of material
14 fact going to affirmative fraudulent misrepresentations.

15 2. The Motion is DENIED IN PART as to the Second and
16 Third Claims for Relief, as the Court is persuaded that there are
17 genuine issues regarding concealment and constructive fraud given
18 the relationship between Plaintiff Tharaldson and his entities
19 and the Scott Defendants and the expectations that relationship
20 may have engendered.
21

22 B. Bank of Oklahoma's Motion.

23 The Motion is GRANTED, as the Court is persuaded that
24 there are no genuine issues of material fact on the subjects of
25 the implicated claims and that Defendant is entitled to judgment
26 as a matter of law.
27

1 C. Conclusion.

2 Counsel for the Scott Defendants is directed to submit
3 a proposed order consistent with A(1) above.
4

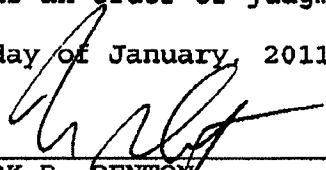
5 Counsel for Plaintiffs is directed to submit a proposed
6 order consistent with A(2) above.

7 Counsel for Defendant Bank of Oklahoma is directed to
8 submit a proposed order consistent with B. above.

9 In addition, such proposed order~~s~~ should be submitted to
10 opposing counsel for approval/disapproval. Instead of seeking to
11 litigate any disapproval through correspondence directed to the
12 Court or to counsel with copies to the Court, any such
13 disapproval should be the subject of motion practice.

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

18 DATED this 25th day of January, 2011.
19

20 
21 MARK R. DENTON
22 DISTRICT JUDGE

23 CERTIFICATE

24 I hereby certify that on or about the date filed, this
25 document was e-served or a copy of this document was placed in
26 the attorney's folder in the Clerk's Office or mailed to:
27

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28

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

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

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

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

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

HOWARD & HOWARD
Attn: Gwen Rutar Mullins, Esq.

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

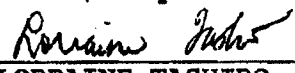

LORRAINE TASHIRO
Judicial Executive Assistant
Dept. No. XIII

Exhibit “3”

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CLERK OF THE COURT

1 **ORDR**
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17 **Arizona Bar No. 004591**
18 **MARTIN A. ARONSON, ESQ.**
19 **Arizona Bar No. 009005**
20 **JOHN T. MOSHIER, ESQ.**
21 **Arizona Bar No. 007460**
22 **MORRILL & ARONSON, PLC**
23 **One E. Camelback Road, Suite 340**
24 **Phoenix, Arizona 85012**
25 **Telephone: (602) 263-8993**
26 **Attorneys For Plaintiffs**

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

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

ORDER DENYING IN PART THE
SCOTT DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT REGARDING
PLAINTIFFS' FIRST (FRAUD)
SECOND (CONCEALMENT) AND
THIRD (CONSTRUCTIVE FRAUD)
CLAIMS FOR RELIEF

FILED

FEB 25 2011

DISTRICT COURT DEPT# 13

1 AND RELATED COUNTERCLAIMS
2

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

8 Plaintiffs,

9 v.

10 ALEXANDER EDELSTEIN, an
11 individual,

12 Defendant.
13

14 This matter having come before the Court on January 18, 2011 on Defendant Scott
15 Financial Corporation's and Defendant Bradley J. Scott's Motion For Summary Judgment
16 Regarding Plaintiffs' First (Fraud), Second (Concealment) and Third (Constructive Fraud) Claims
17 for Relief; and the Court, having considered the papers submitted in connection with such Motion
18 and heard oral arguments made on behalf of the parties and then taken the matter under
19 advisement for further consideration; and the Court, having found there are genuine issues of
20 material fact regarding concealment and constructive fraud given the relationship between
21 Plaintiffs Club Vista Financial Services, LLC, Gary D. Tharaldson and Tharaldson Motels II,
22 Inc., on the one hand, and Defendants Scott Financial Corporation and Bradley J. Scott, on the
23 other hand, and the expectations that relationship may have engendered; and good cause
24 appearing,

25 ///

26 ///

27 ///

28 ///

1 IT IS HEREBY ORDERED Defendant Scott Financial Corporation's and Defendant
2 Bradley J. Scott's Motion For Summary Judgment Regarding Plaintiffs' First (Fraud), Second
3 (Concealment) and Third (Constructive Fraud) Claims for Relief is DENIED as to Plaintiffs'
4 Second and Third Claims for Relief.

5 DATED this 2^d day of February, 2011.

6 IT IS SO ORDERED.

7
8 
9 DISTRICT COURT JUDGE 

10 Submitted by

11 COOKSEY, TOOLSEN GAGE, DUFFY & WOOG

12
13
14 By: 

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20 MARTIN A. ARONSON
21 JOHN T. MOSHIER
22 MORRILL & ARONSON, PLC
Admitted Pro Hac Vice
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24 Attorneys for Plaintiff
CLUB VISTA FINANCIAL SERVICES, L.L.C.,
25 THARALDSON MOTELS II, INC., and
GARY D. THARALDSON
26
27
28

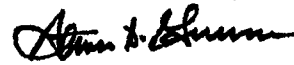
Exhibit “4”

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Exhibit “4”

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CLERK OF THE COURT

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10 Seventeenth Floor
11 Las Vegas, Nevada 89169
12 Tel. (702) 385-6000
13 *Attorneys for Scott Financial Corporation*
14 *and Bradley J. Scott*

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

AND ALL RELATED MATTERS.

Case No.: A579963
Dept. No.: XIII

**ORDER GRANTING IN PART SCOTT
FINANCIAL CORPORATION AND
BRADLEY J. SCOTT'S MOTION FOR
SUMMARY JUDGMENT REGARDING
PLAINTIFFS' FIRST, SECOND, AND
THIRD CLAIMS FOR RELIEF**

24 This matter having first come before this Court on January 20, 2011, regarding
25 Defendant/Counterclaimant Scott Financial Corporation's and Defendant Bradley J. Scott's Motion
26 for Summary Judgment Regarding Plaintiffs' First, Second, and Third Claims for Relief, the Court
27 having reviewed the pleadings and papers on file herein, and having heard the arguments of counsel
28 ...

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

RECEIVED

FEB 11 2011

DISTRICT COURT DEPT# 13

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

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

7 I.

8 FINDINGS OF FACT

9 1. Only three people associated with Plaintiffs, apart from Plaintiffs' attorneys, have knowledge
10 related to the project in this case: Gary Tharaldson, Ryan Kucker, and Kyle Newman. See Depo. of
11 Gary Tharaldson at 299:18-301:6, and Depo. of Ryan Kucker at 339:8-340:3.

12 2. Gary Tharaldson does not know the extent of alleged fraudulent representations. See Depo.
13 of Gary Tharaldson at 30:20-32:3.

14 3. Gary Tharaldson admits that he has no personal knowledge of fraud allegations. See id. at
15 425:11-22.

16 4. Gary Tharaldson did not provide any information to his attorneys about specific instances that
17 he believed he was lied to with regard to the Manhattan West project. See id. at 1198:13-17.

18 5. Kyle Newman has no knowledge of Brad Scott or Scott Financial Corporation committing
19 fraud in connection with any project. See Depo. of Kyle Newman at 134:1-19.

20 II.

21 CONCLUSIONS OF LAW

22 1. There is no genuine issue of material fact going to affirmative fraudulent misrepresentations
23 of either Scott Financial Corporation or Bradley J. Scott.

24 2. There are genuine issues regarding concealment and constructive fraud given the relationship
25 between Plaintiff Tharaldson and his entities and the Scott Defendants and the expectations that
26 relationship may have engendered.
27 ...

28 ...

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
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III.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Scott Financial Corporation and Bradley J. Scott's Motion for Motion for Summary Judgment is GRANTED IN PART as to Plaintiffs First Claim for Relief. As to the Second and Third Claims for Relief, the Motion for Summary Judgment is DENIED IN PART

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

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

DATED this 14th day of February, 2011.


DISTRICT COURT JUDGE 

Submitted by:

KEMP, JONES & COULTHARD, LLP

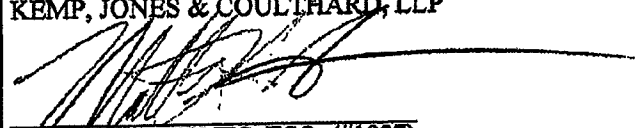

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Exhibit “5”

Exhibit “5”

Exhibit “5”

DISTRICT COURT
CLARK COUNTY, NEVADA

Alan D. Johnson
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: January 20, 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 January 20, 2011 for hearing on, *inter alia*, 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 and on Defendants/Cross-Claimants Scott Financial Corporation and Bradley J. Scott's Motion for Summary Judgment on Tharaldson's and Tharaldson Motels II Inc.'s Third and Seventh Claim for Relief, and for Partial Summary Judgment on their Eleventh Claim for Relief (Re Fiduciary Duty), and the Court, having considered the papers submitted in connection with

CLERK OF THE COURT

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(5)

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

1 such item(s) and heard the arguments made on behalf of the
2 parties and then taken the matter under advisement for further
3 consideration;

4 Given the number of motions that the Court is now
5 hearing in this case and the time constraints involved and the
6 need for prompt decisions in light of the quickly approaching
7 trial date, the Court must be brief in announcing its rulings.
8 It will thus look to counsel who are directed to submit proposed
9 orders to fill in interstices consistent with briefing and
10 argument that the Court has accepted in its rulings.

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

13
14 A. Bank of Oklahoma's Motion.

15 The Court is persuaded that there are no genuine issues
16 of material fact going to the subject causes of action and that
17 Defendant is entitled to partial judgment as a matter of law
18 relative thereto. Accordingly, the Motion is GRANTED.

19 B. Scott Defendants' Motion.

20 1. The Court agrees that the Motion relative to the
21 specific Plaintiffs against whom it is made is meritorious as to
22 the Seventh Claim for Relief regarding breach of fiduciary duty,
23 and the same is GRANTED IN PART as to that claim for relief
24 against those Plaintiffs.

25 2. However, in light of the past relationship between
26
27

1 the parties and the complexities of the transactions and
2 statements made by Scott Defendants pertaining to such
3 relationship, the Court cannot say that there are no genuine
4 issues regarding the Third (constructive fraud) and Eleventh
5 (breach of implied covenant of good faith and fair dealing)
6 Claims for Relief, and the Motion is thus DENIED IN PART as to
7 those claims.
8

9 C. Conclusion.

10 Counsel for Defendant Bank of Oklahoma is directed to
11 submit a proposed order consistent with A. above.

12 Counsel for the Scott Defendants is directed to submit
13 a proposed order consistent with B(1) above.

14 Counsel for Plaintiffs is directed to submit a proposed
15 order consistent with B(2) above.

16 In addition, such proposed order should be submitted to
17 opposing counsel for approval/disapproval. Instead of seeking to
18 litigate any disapproval through correspondence directed to the
19 Court or to counsel with copies to the Court, any such
20 disapproval should be the subject of motion practice.
21

22 This Decision is a summary of the Court's analysis of
23 the matter and sets forth the Court's intended disposition on the
24
25
26
27
28

1 subject, but it anticipates further order of the Court to make
2 such disposition effective as an order or judgment.

3 DATED this 25th day of January, 2011.

4 
5
6 MARK R. DENTON
DISTRICT JUDGE

7
8 **CERTIFICATE**

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

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18 John D. Clayman, Esq.
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21 Attn: Jennifer K. Hostetler, Esq.

22 KEMP, JONES & COULTHARD
23 Attn: J. Randall Jones, Esq.

24 HOWARD & HOWARD
25 Attn: Robert L. Rosenthal, Esq.

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

28 
LORRAINE TASHIRO
Judicial Executive Assistant
Dept. No. XIII

MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89166

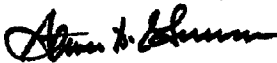
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CLERK OF THE COURT

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26 **Attorneys For Plaintiffs**

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

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

ORDER DENYING, IN PART,
DEFENDANTS SCOTT FINANCIAL
CORPORATION AND BRADLEY J.
SCOTT'S MOTION FOR SUMMARY
JUDGMENT ON THARALDSON'S
AND THARALDSON MOTEL II,
INC.'S THIRD AND SEVENTH
CLAIMS FOR RELIEF, AND FOR
PARTIAL SUMMARY JUDGMENT ON
THEIR ELEVENTH CLAIM FOR
RELIEF (RE: FIDUCIARY DUTY)

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FEB 25 2011

DISTRICT COURT DEPT #13

1 AND RELATED COUNTERCLAIMS
2

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

8 Plaintiffs,

9 v.

10 ALEXANDER EDELSTEIN, an
11 individual,

12 Defendant.

13 This matter having come before the Court on January 20, 2011, on Defendant Scott
14 Financial Corporation's and Defendant Bradley J. Scott's Motion For Summary Judgment
15 Regarding Tharaldson And Tharaldson Motels II, Inc.'s Third And Seventh Claims For Relief,
16 And For Partial Summary Judgment On Their Eleventh Claim For Relief (Re: Fiduciary Duty);
17 and the Court, having considered the papers submitted in connection with such Motion and heard
18 oral arguments made on behalf of the parties and then taken the matter under advisement for
19 further consideration; and the Court, having found that, in light of the past relationship between
20 Plaintiffs Club Vista Financial Services, LLC, Gary D. Tharaldson and Tharaldson Motels II,
21 Inc., on the one hand, and Defendants Scott Financial Corporation and Bradley J. Scott
22 (collectively, "Scott Defendants"), on the other hand, and the complexities of the transactions and
23 statements made by the Scott Defendants pertaining to such relationship, there are genuine issues
24 of material fact regarding Plaintiffs' Third (constructive fraud) and Eleventh (breach of the
25 implied covenant of good faith and fair dealing) Claims for Relief; and therefore, good cause
26 appearing,

27 ///

28 ///

1 IT IS HEREBY ORDERED Defendant Scott Financial Corporation's and Defendant
2 Bradley J. Scott's Motion For Summary Judgment Regarding Tharaldson And Tharaldson Motels
3 II, Inc.'s Third And Seventh Claims For Relief, And For Partial Summary Judgment On Their
4 Eleventh Claim For Relief (Re: Fiduciary Duty) is DENIED as to Plaintiffs' Third and Eleventh
5 Claims for Relief.

6 DATED this 2^d day of March, 2011.

7 IT IS SO ORDERED.

8
9
10 DISTRICT COURT JUDGE
11 *nk*

12 Submitted by

13 COOKSEY, TOOLSEN GAGE, DUFFY & WOOG

14
15 By:

[Signature]
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THARALDSON MOTELS II, INC., and
26 GARY D. THARALDSON
27
28

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Alan D. Johnson

CLERK OF THE COURT

ORDER

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14 Attorneys For Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

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

20 Plaintiffs,

21 v.

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

27 Defendants.
28

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

**ORDER GRANTING, IN PART, AND
DENYING, IN PART, DEFENDANT ALEX
EDELSTEIN'S MOTION FOR SUMMARY
JUDGMENT (CASE NO. A609288)**

RECEIVED

FEB 25 2011

DISTRICT COURT DIST# 13

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1 AND RELATED COUNTERCLAIMS

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

8 Plaintiffs,

9 v.

10 ALEXANDER EDELSTEIN, an individual,

11 Defendant.

12 **ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT ALEX**
13 **EDELSTEIN'S MOTION FOR SUMMARY JUDGMENT (CASE NO. A609288)**

14 This matter having come before the Court on January 27, 2011 on Defendant Alex Edelstein's
15 Motion for Summary Judgment (Case No. A609288); and the Court, having considered the papers
16 submitted in connection with such Motion and heard oral arguments made on behalf of the parties and
17 then taken the matter under advisement for further consideration; and the Court having previously found
18 there are no genuine issues of material fact regarding whether or not Plaintiff Tharaldson Motels II, Inc.
19 ("TM2I"), acting through Plaintiff Gary D. Tharaldson, was fraudulently induced to execute the "TM2I
20 Guaranty" by affirmative misrepresentations of fact; and, good cause appearing;

21 IT IS HEREBY ORDERED Defendant Alex Edelstein's Motion for Summary Judgment (Case
22 No. A609288) against Plaintiff Club Vista Financial Services, LLC is DENIED;

23 IT IS FURTHER ORDERED Defendant Alex Edelstein's Motion for Summary Judgment (Case
24 No. A609288) against Plaintiff Gary D. Tharaldson ("Tharaldson") is GRANTED only as to Plaintiff
25 Tharaldson's Third Claim for Relief ("Aiding and Abetting Breach of Fiduciary Duty") and is DENIED as
26 to Plaintiff Tharaldson's First (Fraudulent Misrepresentation), Second (Fraudulent
27 Concealment/Fraudulent Omissions) and Fourth (Aiding and Abetting Misrepresentations and
28 Omissions) Claims for Relief; and

///

405.0005 1430333.1

1 IT IS FURTHER ORDERED Defendant Alex Edelstein's Motion for Summary Judgment (Case
2 No. A609288) against Plaintiff Tharaldson Motels II, Inc. ("TM2I") is GRANTED only as to Plaintiff
3 TM2I's Third Claim for Relief ("Aiding and Abetting Breach of Fiduciary Duty") and is DENIED as to
4 Plaintiff TM2I's Second (Fraudulent Concealment/Fraudulent Omissions) and Fourth (Aiding and
5 Abetting Misrepresentations and Omissions) Claims for Relief.

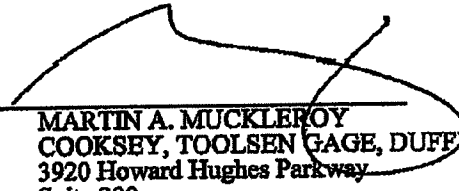
6 DATED this 1st day of February, 2011.

7 IT IS SO ORDERED.

8
9
10 DISTRICT COURT JUDGE

11 Submitted by

12 COOKSEY, TOOLSEN GAGE, DUFFY & WOOG

13
14
15 By: 
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GARY D. THARALDSON

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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Jun 22 2011 03:42 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER NRAP 27(e)
(Relief Needed Before July 6, 2011)

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Attorneys for Petitioners

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER NRAP 27(e)
(Relief Needed Before July 6, 2011)

I. INTRODUCTION

The Scott Defendants and BOK agree that this Court should consider Plaintiffs' stay motion on an expedited basis, as allowed by NRAP 27(e). However, these Defendants felt that it was necessary to lodge a response with this Court to cast accusations at Plaintiffs regarding the true state of the record in the District Court. The Scott Defendants and BOK employed a similar tactic in their respective answers to writ petition which required Plaintiffs to provide this Court with a comprehensive explanation in the reply in support of writ petition that identifies the operative orders entered by the District Court maintaining Plaintiffs' second claim for fraudulent concealment/fraudulent omissions and Plaintiffs' third claim for constructive fraud against the Scott Defendants.¹ As such, the Scott Defendants' continued representation that Plaintiffs' have no fraud claims related to the signing of the guaranties containing the jury trial waivers is without merit and should be disregarded by this Court. Mere argument in this Court cannot change the District Court orders maintaining the viability of Plaintiffs' second and third claims against the Scott Defendants.

Moreover, the fact that the District Court has awarded summary judgment to BOK on Plaintiffs' second and third claims is of no consequence since Plaintiffs do not need to prove that more than one party committed fraud in order to invalidate the jury trial waivers.² So, Defendants' arguments against a stay are not well founded in fact or law.

¹ See Reply in Support of Petition for Writ of Mandamus, or Alternatively, Petition for Writ of Prohibition filed in this case on May 26, 2011, at pages 3–5.

² Id. at pages 5–6 (discussing Hayas v. Bernhard, 85 Nev. 627, 631, 461 P.2d 857, 859–860 (1969) (stating a contract induced by fraud can be voided and rescinded, such that a contract no longer exists); see also 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)).

1 Therefore, according to Defendants' agreement, this Court should consider Plaintiffs'
2 stay motion on an expedited basis. And, based upon the briefing already filed, this Court
3 should grant a stay of the District Court proceedings pending the resolution of their
4 pending writ petition.

5 **II. PLAINTIFFS' SECOND AND THIRD CLAIMS FOR FRAUDULENT**
6 **CONCEALMENT AND CONSTRUCTIVE FRAUD WARRANTS REMAIN**
7 **VIALE.**

8 Contrary to the representations made by the Scott Defendants and BOK, Plaintiffs
9 have never claimed that their first claim for fraudulent misrepresentation remains against
10 the Scott Defendants. However, Plaintiffs' second and third claims remain completely
11 viable as set forth in District Court orders affirming that a genuine issue of material fact
12 exists.³ Instead of acknowledging these orders, the Scott Defendants and BOK focus on
13 other orders that do not completely address the true state of Plaintiffs' claims. Therefore,
14 taking into account these District Court orders, the Court should reject Defendants'
15 suggestion that Plaintiffs have no fraud claims relevant to the guaranties and the jury trial
16 waivers.

17 **A. PLAINTIFFS' SECOND AND THIRD CLAIMS FOR FRAUDULENT**
18 **CONCEALMENT AND CONSTRUCTIVE FRAUD.**

19 The District Court's order striking Plaintiffs' jury demand and bifurcating the trial
20 was based upon the background information and claims made in Plaintiffs' first amended
21 complaint.⁴ Plaintiffs' second claim for fraudulent concealment/fraudulent omissions

22 ³ For the Court's convenience, Plaintiffs attach to this reply the relevant pages of the
23 appendix already filed with this Court that demonstrate the continued viability of
24 Plaintiffs' second and third claims for fraudulent concealment and constructive fraud
against the Scott Defendants with respect to the signing of the guaranties containing the
jury trial waivers.

25 ⁴ Plaintiffs' first amended complaint was included in Petitioners' Appendix ("PA")
26 1:206–262 and is attached as **Exhibit 1**. Although Plaintiffs have filed a second amended
complaint since the time they filed their writ petition in this Court, the second and third

1 listed numerous areas in which the Scott Defendants had “a duty to speak and disclose”
2 certain material facts.⁵ And, Plaintiffs further alleged that the Scott Defendants
3 concealed and omitted facts for the purpose of inducing Plaintiffs to enter into the loan
4 documents that form the basis of this litigation.⁶ Because of the described fraud,
5 Plaintiffs asked for relief from the loan documents in the form of voiding the documents,
6 equitable rescission, or reformation.⁷

7 Plaintiffs’ third claim for constructive fraud similarly alleged that the Scott
8 Defendants⁸ had a duty to disclose to Plaintiffs “all material information” related to the
9 loan documents.⁹ In support of this claim, Plaintiffs described a variety of factors that
10 were material to their decision to sign the loan documents.¹⁰ Due to the fraud by silence,
11 Plaintiffs asked for the same relief from the loan documents in the form of voiding the
12 documents, equitable rescission, or reformation.¹¹

13 In Nevada, the law does *not* require an affirmative misrepresentation to qualify as
14 inducement.¹² Instead, silence can provide the basis for inducement, as this Court has
15 held in NOLM, LLC v. County of Clark:¹³

16 claims have remained unchanged. See the Scott Defendants’ Appendix (“SA”) 1:178–
17 183.

18 ⁵ **Exhibit 1**, page 244, ¶ 218.

19 ⁶ Id., page 245, ¶¶ 218–221.

20 ⁷ Id., pages 245–246, ¶¶ 223–224.

21 ⁸ Plaintiffs third claim for constructive fraud also made allegations against BOK which
22 has been dismissed from this claim by summary judgment.

23 ⁹ Id., page 246, ¶ 228.

24 ¹⁰ Id., page 246–247, ¶¶ 229–231.

25 ¹¹ Id., page 247, ¶¶ 234–235.

26 ¹² Plaintiffs’ first claim was for fraudulent misrepresentation dealing with affirmative
misrepresentations. See Exhibit 1, pages 241–244.

Furthermore, section 161 of the Restatement provides that a party's silence regarding a fact is tantamount to a declaration that the fact does not exist:

(b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

(c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.¹⁴

Most of the western states are in accord with these rules and allow for reformation of an instrument where one party makes a unilateral mistake and the other party knew about it but failed to bring it to the mistaken party's attention.¹⁵

Therefore, the arguments offered by the Scott Defendants and BOK that Plaintiffs have no claims for fraud under the second and third claim that would affect the guaranties and the jury trial waivers is simply untrue.

B. THE JANUARY 18, 2011 HEARING ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

After hearing the motion for partial summary judgment filed by the Scott Defendants to dismiss Plaintiffs' first, second, and third claims; and BOK's motion for

¹³ 120 Nev. 736, 740, 100 P.3d 658, 661 (2004).

¹⁴ RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981).

¹⁵ See, e.g., Belk v. Martin, 136 Idaho 652, 39 P.3d 592, 599 (2001) (holding that, where the respondents had made a typographical error in the lease and the appellant had known about the error but failed to alert the respondents to it, reformation of the lease was appropriate); Jones v. Reliable Sec. Incorporation, Inc., 29 Kan.App.2d 617, 28 P.3d 1051, 1062 (2001) ("[A] written instrument may be reformed where there is ignorance or mistake on one side and fraud or inequitable conduct on the other; this can occur where one party to an instrument has made a mistake and the other knows it and fails to inform him or her of the mistake or conceals the truth from him or her."); Oftedal v. State ex rel. Transp. Com'n, 308 Mont. 50, 40 P.3d 349, 352, 359 (2002) (allowing reformation of a contract where a contractor had underbid by such a large amount that the other party was on notice of the mistaken bid); Diamond v. Granite Falls School Dist., 117 Wash.App. 157, 70 P.3d 966, 971 (2003) (holding that, where the school district knew of appellant's mistake when the parties entered into a contract, the trial court should have relieved appellant from its unilateral mistake).

1 partial summary judgment to dismiss Plaintiffs' first and second claim, the Court granted
2 BOK's motion.¹⁶ The District Court also granted the Scott Defendants' motion in part by
3 dismissing *only* Plaintiffs' first claim.¹⁷ However, the District Court denied the Scott
4 Defendants' motion as to Plaintiffs' second claim for fraudulent concealment/fraudulent
5 omissions and Plaintiffs' third claim for constructive fraud:

6 The motion is DENIED IN PART as the Second and Third Claims for
7 Relief, as *the Court is persuaded that there are genuine issues regarding*
8 *concealment and constructive fraud* given the relationship between
9 Plaintiff Tharaldson and his entities and the Scott Defendants and the
10 expectations that relationship may have engendered.¹⁸

11 The District Court's preservation of Plaintiffs' second and third claims was based upon
12 various exhibits submitted in the summary judgment proceedings.¹⁹ In accordance with
13 the District Court decision,²⁰ Plaintiffs submitted an order maintaining their second and
14 third claims following the Scott Defendants' motion for partial summary judgment.²¹
15 Although the Scott Defendants were directed to submit an order limited to the granting of
16 Plaintiffs' first claim only,²² the Scott Defendants' separate order also reflects that

17 ¹⁶ The District Court decision from the January 18, 2011 hearing was included in various
18 locations in the appendix, including Petitioners' Reply Appendix ("PRA") 3:537-540,
19 and is attached as **Exhibit 2**. See especially Exhibit 2, page 538, ¶ B.

20 ¹⁷ Id., ¶ A.1.

21 ¹⁸ Id., ¶ A.2 (emphasis added).

22 ¹⁹ See PRA 1:129-148.

23 ²⁰ See **Exhibit 2**, page 539.

24 ²¹ The order denying in part the Scott Defendants' motion for partial summary judgment
25 was included in various locations in the appendix, including PRA 3:552-554 and is
26 attached as **Exhibit 3**.

²² See **Exhibit 2**, page 539.

1 “[t]here *are* genuine issues regarding concealment and constructive fraud . . .”²³ In light
2 of the nature of Plaintiffs’ second and third claims dealing with fraud by silence and the
3 Scott Defendants’ inducement with regard to the guaranties and the jury trial waivers, the
4 issues presented to this Court are not moot, as Defendants improperly suggest. Because
5 of the live issues before this Court, a stay is warranted on an expedited basis under NRAP
6 27(e).

7
8 **C. THE JANUARY 20, 2011 HEARING ON DEFENDANTS’ MOTIONS
FOR SUMMARY JUDGMENT.**

9 Approaching Plaintiffs’ third claim for constructive fraud from another angle, the
10 Scott Defendants once again attempted to dismiss this claim by partial summary
11 judgment.²⁴ The Scott Defendants successfully argued that they had no fiduciary duty to
12 Plaintiffs; however, the District Court once again maintained the viability of Plaintiffs’
13 third claim.²⁵ Additionally, the Court also allowed Plaintiffs’ eleventh claim for breach
14 of the covenant of good faith and fair dealing to remain:

15 However, in light of the past relationship between the parties and the
16 complexities of the transactions and statements made by Scott Defendants
17 pertaining to such relationship, *the Court cannot say that there are no*
18 *genuine issues regarding the Third (constructive fraud) and Eleventh*
19 *(breach of implied covenant of good faith and fair dealing) Claims for*
20 *relief*, and the Motion is DENIED IN PART as to those claims.²⁶

21 ²³ The order denying in part the Scott Defendants’ motion for partial summary judgment
22 on Plaintiffs’ second and third claims was included in various locations in the appendix,
23 including PRA 3:549–551 and is attached as **Exhibit 4** (emphasis added).

24 ²⁴ PRA 1:189–231.

25 ²⁵ The District Court decision from the January 20, 2011 hearing was included in various
26 locations in the appendix, including PRA 3:545–548 and is attached as **Exhibit 5**. See
especially **Exhibit 5**, pages 546–547, ¶ B.

²⁶ Id. (emphasis added).

1 In accordance with the District Court's decision,²⁷ Plaintiffs submitted an order
2 preserving their third claim for constructive fraud, as well as their eleventh claim for
3 breach of the covenant of good faith and fair dealing.²⁸ Incidentally, Plaintiffs' eleventh
4 claim also dealt in part with the Scott Defendants' fraud by silence with regard to the
5 guaranties and the jury trial waivers.²⁹ Therefore, Defendants' suggestion that Plaintiffs
6 have no fraud claims is inaccurate and does not stand as a bar to Plaintiffs' request for
7 stay relief and expedited treatment under NRAP 27(e)

8
9 **D. THE JANUARY 27, 2011 HEARING ON DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT.**

10 As further evidence that Plaintiffs maintain viable claims for fraud, the District
11 Court also denied in part a separate motion for partial summary judgment filed by
12 Defendant Alex Edelstein against Plaintiff Tharaldson, including his first claim
13 (fraudulent misrepresentation), second claim (fraudulent concealment/fraudulent
14 omissions), and fourth claim (aiding and abetting misrepresentations and omissions).³⁰
15 Moreover, in denying Edelstein's motion for partial summary judgment, the District
16 Court also preserved claims made by Plaintiff Tharaldson Motels II, Inc. including the
17 second claim (fraudulent concealment/fraudulent omissions) and the fourth claim (aiding
18 and abetting misrepresentations and omissions).³¹ So, Defendants' suggestion that

19
20 ²⁷ See **Exhibit 5**, page 547.

21 ²⁸ The order denying in part the Scott Defendants' motion for partial summary judgment
22 on Plaintiffs' third and eleventh claims was included in various locations in the appendix,
including PRA 3:555–557 and is attached as **Exhibit 6**.

23 ²⁹ See **Exhibit 1**, pages 255–256.

24 ³⁰ The order denying in part Edelstein's motion for partial summary judgment was
25 included in various locations in the appendix, including PRA 3:558–560 and is attached
as **Exhibit 7**.

26 ³¹ Id.

1 Plaintiffs have misrepresented the nature of their claims to this Court is itself a
2 misrepresentation and is in direct contradiction to the written District Court orders.
3 Therefore, Defendants' attempt to misconstrue the status of Plaintiffs' claims and the
4 proceedings of the District Court does not prevent this Court from granting stay relief on
5 an expedited basis under NRAP 27(e).

6 **III. CONCLUSION**

7 In summary, Plaintiffs' second claim for fraudulent concealment/fraudulent
8 omissions and Plaintiffs' third claim for constructive fraud against the Scott Defendants
9 remain viable. The fact that the District Court has dismissed Plaintiffs' second and third
10 claims against BOK is of no consequence because Plaintiffs only need to demonstrate
11 fraud as to a Defendant, not all Defendants, to invalidate the guaranties and the jury trial
12 waivers contained within the guaranties. Therefore, Defendants' contention that
13 Plaintiffs no longer have any fraud claims sufficient to defeat the guaranties is not only
14 inaccurate, but the bare contention does not prevent this Court from granting Plaintiffs
15 stay relief on an expedited basis, as allowed by NRAP 27(e).

16 Dated this 22nd day of June, 2011.

17 MARQUIS AURBACH COFFING

18
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REPLY IN SUPPORT OF EMERGENCY MOTION UNDER NRAP 27(e)** was filed electronically with the Nevada Supreme Court on the 22nd day of June, 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 delivering a true and correct copy thereof, according to the manner listed below, addressed to:

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