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IN THE SUPREME COURT OF THE STATE OF NEVADA

**In Re: Manhattan West Mechanic's
Lien Litigation**

No.: 61131

APCO CONSTRUCTION, A
NEVADA CORPORATION;
ACCURACY GLASS & MIRROR
COMPANY, INC.; BUCHELE, INC.;
BRUIN PAINTING CORPORATION;
CACTUS ROSE CONSTRUCTION;
FAST GLASS, INC.; HD SUPPLY
WATERWORKS, LP; HEINAMAN
CONTRACT GLAZING; HELIX
ELECTRIC OF NEVADA, LLC;
INTERSTATE PLUMBING & AIR
CONDITIONING; SWPPP
COMPLIANCE SOLUTIONS, LLC;
AND WRG DESIGN, INC.,

District Court No. 08A571228
Consolidated with:

08A574391
08A574792
08A577623
09A579963
09A580889
09A583289
09A584730
09A587168
A-09-589195-C
A-09-589677-C
A-09-590319-C
A-09-592826-C
A-09-596924-C
A-09-597089-C
A-09-606730-C
A-10-608717-C
A-10-608718-C

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK; AND THE
HONORABLE SUSAN SCANN,
DISTRICT JUDGE,,

**JOINDER AND SUPPLEMENT TO
SCOTT FINANCIAL CORPORATION'S
ANSWER TO JOINT PETITION FOR
WRIT OF MANDAMUS OR, IN THE
ALTERNATIVE, PROHIBITION**

Respondents,

and

SCOTT FINANCIAL
CORPORATION, A NORTH
DAKOTA CORPORATION; AHERN
RENTALS, INC.; ARCH
ALUMINUM AND GLASS CO.;
ATLAS CONSTRUCTION SUPPLY,
INC.; BRADLEY J. SCOTT;
CABINETEC, INC.; CELLCRETE
FIREPROOFING OF NEVADA, INC.;
CAMCO PACIFIC CONSTRUCTION
CO., INC.; CLUB VISTA
FINANCIAL SERVICES, LLC;
CONCRETE VISIONS, INC.;
CREATIVE HOME THEATRE, LLC;
CUSTOM SELECT BILLING, INC.;
DAVE PETERSON FRAMING, INC.;
E&E FIRE PROTECTION, LLC;
EZA, P.C.; FERGUSON FIRE AND
FABRICATION, INC.; GEMSTONE
DEVELOPMENT WEST, INC.;
GRANITE CONSTRUCTION
COMPANY; HARSCO
CORPORATION;
HYDROPRESSURE CLEANING;
INQUIPCO; INSULPRO PROJECTS,
INC.; JEFF HEIT PLUMBING, CO.,
LLC; JOHN DEERE LANDSCAPE,
INC.; LAS VEGAS PIPELINE, LLC;
NEVADA PREFAB ENGINEERS;
NOORDA SHEET METAL
COMPANY; NORTHSTAR
CONCRETE, INC.; PAPE
MATERIAL HANDLING; PATENT
CONSTRUCTION SYSTEMS;
PROFESSIONAL DOOR AND MILL
WORKS, LLC; READY MIX, INC.;
RENAISSANCE POOLS & SPAS,
INC.; REPUBLIC CRANE SERVICE,
LLC; STEEL ENGINEERS, INC.;
SUPPLY NETWORK, INC.;
SUNSTATE COMPANIES, INC.;
THARALDSON MOTELS II, INC.;
THE PRESSURE GROUT,
COMPANY; TRI CITY DRYWALL,
INC.; UINTAH INVESTMENTS,
LLC; AND ZITTING BROTHERS
CONSTRUCTION, INC.,

Real Parties in Interest.

Defendants Club Vista Financial Services, LLC, and Tharaldson Motels II, Inc. (collectively, “Tharaldson Parties”) through their attorneys of record, the law firm of Greenberg Traurig, LLP, hereby file this Joinder and Supplement to Scott Financial Corporation’s Answer to Joint Petition for Writ of Mandamus or, in the Alternative, Prohibition (“Joinder”).

I. INTRODUCTION

Both sides to this writ petition agree on two central points. First, the parties agree that the issue involved is an important one of first impression and clarification of the law is needed. Second, both sides agree as to the priority of the parties’ various liens prior to the execution of the Subordination Agreement.¹ The only question before the Court is what effect the Subordination Agreement executed solely by Respondent Scott Financial Corporation (“SFC”) had on the parties’ relative priorities.

Petitioners argue the subordination agreement executed by SFC effected a complete subordination (i.e., subordinated SFC’s mezzanine deeds of trust to all liens on the property, including Petitioner’s mechanics liens). Petitioners further argue that contracts for partial subordination where there are intervening mechanics’ liens can, as a matter of public policy, only effect complete subordinations. However, the clear language and intent of the Subordination Agreement was for a partial subordination and affected only the order in which SFC’s mezzanine and construction financing were to be repaid. SFC’s Answer to the Writ Petition demonstrates why this Court should join those states that recognize and enforce agreements for partial subordination given the important policies, such as freedom to contract, that are furthered by such recognition. The Tharaldson Parties join in Respondent SFC’s arguments.

Additionally, even if this Court adopts Petitioner’s position that as a matter of public policy, Nevada cannot enforce agreements for partial subordination where there are intervening mechanic’s liens, then the result is not to advance Petitioner’s mechanics liens from a second to first priority position. Rather, if this Court holds that parties cannot use partial subordination where there are

¹ The “Subordination Agreement” refers to the agreement SFC executed with itself dated as of February 7, 2008 recorded at Book 20080207, Instrument No. 001486 and attached to the Joint Petition for Writ of Mandamus or, in the Alternative, Prohibition, at Addendum A.

1 intervening mechanics liens then the Subordination Agreement would be void as against public
2 policy and the parties' respective liens would be restored to the priority positions they were in prior
3 to the execution of the Subordination Agreement. Those positions are not in dispute and place
4 SFC's mezzanine financing in first position, the mechanic's liens in second position, and SFC's
5 construction financing in third position. Thus, regardless of whether Nevada recognizes partial
6 subordination, the mechanics liens remain second in priority.

7 **II. ARGUMENT**

8 The Tharaldson Parties' join in the arguments of Respondent SFC and would like to
9 supplement the same with the following points:

10 **A. PETITIONERS' MECHANICS LIENS CANNOT DEFEAT THE PRIORITY OF SFC'S DEEDS 11 OF TRUST UNDER NEVADA STATUTE**

12 Petitioners assert that their mechanics liens are in first priority due to the statutory scheme
13 laid out in NRS 108.225. However, NRS 108.225 dictates that mechanics liens take priority over
14 "all other liens, mortgages, and encumbrances that attach after the commencement of a work of
15 improvement." *In re Fontainebleau*, 124 Nev. Adv. Op. 28, at 28 (Oct. 25, 2012) (emphasis in
16 original); NRS 108.225(1). By contrast, mechanics liens do not have statutory priority over
17 interests recorded prior to the commencement of work. Here, it is undisputed that at the time work
18 began, deeds of trust securing SFC's \$38 million mezzanine financing were recorded and enjoyed
19 priority over any potential mechanic's liens that could attach to the property.² It is also undisputed
20 that the deeds of trust securing SFC's \$38 million mezzanine financing were never paid off,
21 extinguished, or released. Therefore, the only way Petitioners can defeat SFC's \$38 million priority
22 is to enforce a subordination agreement to which Petitioners were not parties or intended
23 beneficiaries. However, Petitioners have no legal means by which to enforce an agreement to
24 which they were not parties or intended beneficiaries, and Petitioners' liens must therefore remain
25 in second position.

26 Additionally, Petitioners can only succeed if they convince the Court to enforce the

27 ² See Joint Petition for Writ of Mandamus or, in the Alternative, Prohibition, at 11, fig.1 (conceding that prior to the
28 execution of the Subordination Agreement, the mechanics liens were second in priority to \$38 million of SFC
financing).

Subordination Agreement in such a way as to defeat the entire purpose of the Subordination Agreement, i.e., as a complete rather than partial subordination. The clear language and intent of the subordination Agreement conclusively demonstrate that the Subordination Agreement executed solely by SFC was intended to benefit only SFC. Courts must give effect to the intentions of contracting parties. To the extent that this Court holds that as a matter of public policy, partial subordination will not be recognized where there are intervening mechanic's liens, then the Subordination Agreement itself will have been void as against public policy. In that event, SFC's mezzanine financing must retain its first priority position.

1. The Subordination Agreement Created a Partial Subordination and Petitioners Cannot Enforce A Subordination Agreement to Which they Were Not Parties or Intended Beneficiaries

Only an *intended* third party beneficiary may enforce a contract. *Olson v. Iacometti*, 91 Nev. 241, 246, 533 P.2d 1360, 1364 (1975) ("Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least, show that it was intended for his direct benefit.") (citations omitted). To determine whether an individual is a third-party beneficiary of a contract, the court must determine whether the contracting parties demonstrated a clear intent to benefit the third party, and whether the third party could justifiably rely on the promise. *Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 380, 566 P.2d 819, 825 (1977). There must be a promise that 1) satisfies an obligation the promisee has to the beneficiary, or 2) the circumstances show that the promisor want to give a gift to the beneficiary. *Restatement (Second) of Contracts*, § 302 (1981). If neither of these circumstances exist, then the beneficiary is an incidental beneficiary. *Id.* "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee." *Restatement (Second) of Contracts*, § 315 (1981). *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 620 (Nev. 2011). Whether or not a claimant is an intended third party beneficiary is a question of contract interpretation, and thus, is an issue of law that may be reviewed *de novo*. *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 620 (Nev. 2011) ("Interpretation of a contract is a question of law that we review *de novo*.").

The District Court properly found that the Subordination Agreement, read as a whole and in

1 the context of the circumstances under which it was executed, created a partial subordination, a
2 finding that should not be disturbed here. The Tharaldson Parties join in SFC's argument as to why
3 the Subordination Agreement clearly evidences objective intent of partial subordination.

4 Additionally, ¶ 11 of the Subordination Agreement demonstrates that the Subordination
5 Agreement was intended to benefit only SFC and the participants of SFC loans. Paragraph 11
6 provides: "This Agreement . . . shall be binding and inure to the benefit of SFC, its participants, and
7 their successors and assigns." It is a fundamental canon of construction that "to express or include
8 one thing implies the exclusion of the other" or *expressio unius est exclusio alterius* Black's Law
9 Dictionary (9th ed. 2009); *see also State v. Javier C.*, 289 P.3d 1194, 1197 (2012) (holding that
10 Nevada adopts this maxim in statutory construction). Here, because ¶ 11 of the Subordination
11 Agreement specifically lists to whom the Subordination Agreement was to benefit, it is clear the
12 Agreement was not intended to benefit parties not identified, such as Petitioners.

13 Rather than address paragraph 11 head-on, Petitioners construct a specious argument that
14 because the Subordination Agreement does not specify that it was not intended to benefit
15 Petitioners, the inference must be that it was intended to benefit them.³ This argument is ridiculous
16 on its face. It would require contracting parties to list every that they did not intend to benefit via
17 their agreement. Under such a rule, contracting would be far too arduous a process to endure. To
18 state the proposition is to prove its absurdity.

19 Quite simply, Petitioners cannot satisfy their burden of proving that the Subordination
20 Agreement's "clear intent" was to benefit them. Petitioners therefore have no basis to enforce⁴ or
21 rely upon the Subordination Agreement, especially where their interpretation of the Subordination
22 Agreement leads to an unintended result.

23 **2. Petitioners' Interpretation of the Subordination Agreement Leads to an Absurd** 24 **and Obviously Unintended Result**

25 Petitioners' interpretation of the Subordination Agreement as one for complete
26

27 ³ See Joint Petition for Writ of Mandamus or, in the Alternative, Prohibition, at 27 ("The Subordination Agreement
recorded by SFC also does not contain any language that it is not for the benefit of any third party.").

28 ⁴ Indeed, because Petitioners are not intended beneficiaries of the subordination agreement, SFC has the power to
unilaterally rescind the subordination agreement without their consent.

1 subordination was obviously not what SFC intended when it executed the agreement. Petitioners
2 argue that by executing the Subordination Agreement, SFC intended to subordinate its \$38 million
3 first priority position in favor of elevating all mechanics liens to a first priority position against the
4 property. Such an argument defies logic, as SFC could not benefit from advancing the lien priority
5 of the mechanics lien claimants and instead SFC would be subjected to huge liability as well as lost
6 priority for \$38 million of its financing.

7 It is a well-known and generally accepted rule of contract construction that a “contract
8 should not be construed so as to lead to an absurd result.” *Reno Club v. Yong Inv. Co.*, 64 Nev. 312,
9 182 P.2d 1011 (1947). Moreover, courts will disregard contract constructions that are unreasonable
10 under the facts and circumstances of the case. *See, e.g., Parman v. Petricciani*, 70 Nev. 427, 430-
11 32, 272 P.2d 492, 493-94 (1954), *abrogated on other grounds by Wood v. Safeway*, 121 Nev. 724,
12 729-32, 121 P.3d 1026, 1029-31 (2005). Here, Petitioners’ construction of the Subordination
13 Agreement so as to provide a windfall to the mechanic’s liens claimants when the mechanics lien
14 claimants provided no consideration for the same is illogical under the circumstances and cannot be
15 supported by this Court.

16 Given the plain language and surrounding circumstances of the Subordination Agreement,
17 the only logical interpretation was the one adopted by the District Court—that the Subordination
18 Agreement created a partial subordination.

19
20 **B. IF THE COURT AGREES WITH PETITIONERS THAT PARTIAL SUBORDINATION**
21 **AGREEMENTS ARE AGAINST PUBLIC POLICY, SFC’S MEZZANINE LOANS MUST BE IN**
22 **FIRST POSITION**

23 Even if this Court adopts Petitioners’ argument that Nevada should not allow partial
24 subordination contracts in the mechanic’s liens context,⁵ the result would not place the mechanic’s
25 liens in first priority as Petitioners suggest. Instead, if this Court holds that Nevada courts cannot
26 enforce agreements for partial subordination where there are intervening mechanics’ liens, then the

27 ⁵ Petitioners argue that allowing partial subordination here would violate Nevada’s public policy. *See* Joint Petition for
28 Writ of Mandamus or, in the Alternative, Prohibition, at 45 (“Adopting a rule that allows a later in time construction
lender to gain priority over space mechanic’s liens would go against the public policy of Nevada to secure payment to
contractor’s who provide work to improve property, and cannot be followed.”).

1 entire purpose and intent of the Subordination Agreement at issue here would necessarily be void
2 against public policy. The Subordination Agreement would thus be void and unenforceable. If the
3 Subordination Agreement itself is void then the priorities of the respective parties' liens would exist
4 exactly as they had prior to the execution (or recordation) of the Subordination Agreement.

5 "All contracts the purpose of which is to create a situation which tends to operate to the
6 detriment of the public interest are against public policy **and void** whether in a particular case the
7 purpose of the contract is effectuated." *Western Cab Co. v. Kellar*, 90 Nev. 240, 245, 523 P.2d 842,
8 845 (1974) (emphasis added); *Martinez v. Johnson*, 61 Nev. 125, 119 P.2d 880, 883 (1941) ("The
9 controlling factor in this case is that the contract on which plaintiff seeks to recover is against the
10 declared public policy of the statute. This court has established the rule that such contracts are
11 void.") Where a contract is void as against public policy, the court must restore the parties to the
12 positions they occupied prior to the execution of the void contract. *See Lum v. Stinnett*, 87 Nev.
13 402, 412-413, 448 P.2d 347, 353 (1971).

14 Here, it is undisputed that prior to the execution of the Subordination Agreement, SFC's
15 mezzanine financing was in first position for \$38 million. If this Court holds that partial
16 subordination violates Nevada's mechanics liens statutes or is against public policy, then the
17 Subordination Agreement which intended a partial subordination, must be deemed void and of no
18 effect.⁶ If such is the case, SFC's mezzanine financing, which the parties do not dispute was never
19 paid off or extinguished, will remain in first position.

20 **C. UNLIKE *IN RE FONTAINEBLEAU*, THE LENDERS IN THIS CASE SEEK LEGAL NOT**
21 **EQUITABLE RELIEF**

22 Petitioners are incorrect in their contention that the relief the lenders seek is equitable.
23 Rather, the lenders simply seek the enforcement of the plain language and intent of the
24 Subordination Agreement, an enforcement of a contract. Unlike *In re Fontainebleau*, where

25 ⁶ Also, if this Court holds that partial subordination is not recognized in Nevada, the Subordination Agreement's
26 purpose was frustrated, and the agreement is rescindable by SFC. Again, because SFC was the only signatory to the
27 Subordination Agreement, and the only party the agreement was intended to benefit, SFC can unilaterally rescind the
28 Subordination Agreement without consent of Petitioners. If SFC rescinds the Subordination Agreement, all parties are
restored to the positions they were in prior to the execution of the Subordination Agreement. *See e.g., Perkins v.*
Coombs, 769 P.2d 269, 271 (Utah 1988).

1 equitable subrogation was at issue, the issue here is contractual subordination. The difference
2 between contractual subordination and equitable subrogation is analogous to that between a breach
3 of contract claim (a legal claim at common law) and quantum meruit (a claim in equity). SFC
4 requests enforcement of its Subordination Agreement per the clear intent of the Agreement. This is
5 relief on the contract, legal relief. The lenders in *Fontainebleau* sought equitable relief much in the
6 same way that a party without a contract to enforce may still sue for unjust enrichment.
7 Consequently, *Fontainebleau* does not preclude the relief the lenders here seek.

8 *Fontainebleau* is also distinguishable on the basis that the first priority lien in that case was
9 actually extinguished, as it was paid off. Thus, the lenders in that case sought relief in equity to
10 “revive” the extinguished lien. Here, by contrast, it is undisputed that SFC’s Mezzanine Financing
11 was never paid off or extinguished, and thus no equitable relief is requested. Respondents simply
12 request this Court to enforce Nevada’s statutory scheme and order that Petitioner’s mechanics liens
13 are second in priority to \$38 million of SFC’s financing.

14 Additionally, Petitioners’ argument that parties cannot use partial subordination where there
15 are intervening mechanic’s liens is directly contrary to this Court’s statement in *Fontainebleau* that
16 a lender can protect itself by using contractual subordination rather than equitable subrogation. This
17 Court held in *Fontainebleau* that equitable subrogation could not be used to claim priority over
18 intervening mechanic’s liens but specifically noted that the lenders in *Fontainebleau* could have
19 protected themselves through the “proper means of contractual subordination.” *In re*
20 *Fontainebleau*, 128 Nev. Adv. Op. 53, at 29 n.13. If Nevada’s public policy dictates that
21 subordination agreements must all be construed for complete subordination, then a construction
22 lender could not protect itself against mechanics liens where work has already begun on a project.
23 Thus, this Court’s statements in *Fontainebleau* support the recognition of partial subordination
24 contracts even where there are intervening mechanic’s liens.

25 **III. CONCLUSION**

26 The Tharaldson Parties join in Respondent Scott Financial Corporation’s Answer to Joint
27 Petition for Writ of Mandamus or, in the Alternative, Prohibition and respectfully request this Court
28

1 deny the petition for writ.

2 DATED this 18TH day of March, 2013.

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6 **GREENBERG TRAURIG, LLP**

7 /s/ Mark E. Ferrario

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CERTIFICATE OF SERVICE

I hereby certify that I am employed in the law office of GREENBERG TRAURIG, and that on the 18th day of March, 2013, I served a copy of the foregoing **JOINDER AND SUPPLEMENT TO SCOTT FINANCIAL CORPORATION'S ANSWER TO JOINT PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION** by e-serving a copy on all parties listed in the Master Service List in accordance with the Electronic Filing Order entered in this matter.

/s/ S. Renee Hoban

An employee of Greenberg Traurig