

IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., A
NEVADA CORPORATION,

Appellant,

vs.

ZITTING BROTHERS
CONSTRUCTION, INC.,

Respondent.

Case No.: 75197

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Elizabeth A. Brown
Clerk of Supreme Court

Appeal from the Eighth Judicial District
Court, the Honorable Mark Denton
Presiding

**APPELLANT'S APPENDIX TO APPELLANT'S RESPONSE TO ORDER
TO SHOW CAUSE**
(Volume 6, Bates Nos. 1251-1500)

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S APPENDIX TO APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE, VOLUME 6,** was filed electronically with the Nevada Supreme Court on the 19th day of December, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jorge Ramirez, Esq.

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

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/s/ Leah Dell

Leah Dell, an employee of
Marquis Aurbach Coffing

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[Signature]
CLERK OF THE COURT

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Attorneys for Plaintiff-in-Intervention,

Northstar Concrete, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC., a
Nevada corporation; NEVADA
CONSTRUCTION SERVICES, a Nevada
corporation; SCOTT FINANCIAL
CORPORATION, a North Dakota corporation;
COMMONWEALTH LAND TITLE
INSURANCE COMPANY; FIRST
AMERICAN TITLE INSURANCE
COMPANY; and DOES I through X,

Defendants.

CASE NO.: A571228

DEPT.: XII

**STATEMENT OF FACTS
CONSTITUTING LIEN AND
COMPLAINT-IN-INTERVENTION**

**Exempt from Arbitration: Concerns Title to
Real Property**

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CLERK OF THE COURT

1 NORTHSTAR CONCRETE, INC., a Nevada
2 corporation,

3 Plaintiff-in-Intervention,

4 vs.

5 CAMCO PACIFIC CONSTRUCTION
6 COMPANY, INC., a California corporation;
7 FIDELITY AND DEPOSIT COMPANY OF
8 MARYLAND, a surety; CONCRETE
9 VISIONS, INC., a Nevada corporation;
10 PLATTE RIVER INSURANCE COMPANY, a
surety; GEMSTONE DEVELOPMENT WEST,
INC., a Nevada corporation; MOES 1 - 10,
inclusive; and ZOE CORPORATIONS 1 - 10,
inclusive;

11
12 Defendants-in-Intervention.
13
14

15 Plaintiff-in-Intervention, NORTHSTAR CONCRETE, INC. (hereinafter "Northstar" or
16 "Plaintiff-in-Intervention") by and through the undersigned counsel, in support of its Statement of
17 Facts Constituting Lien and Complaint-in-Intervention against the Defendants-in-Intervention stated
18 and named herein, alleges as follows:

19
20 **PARTIES, JURISDICTION AND VENUE**

21 1. Plaintiff-in-Intervention, Northstar, is a Nevada corporation duly authorized to
22 conduct business and conducting business within the State of Nevada, as a licensed contractor,
23 license no. 0032988.

24 2. Plaintiff-in-Intervention is informed and believes and based thereon alleges that
25 Defendant-in-Intervention CAMCO PACIFIC CONSTRUCTION COMPANY, INC. ("Camco") is, or
26 was at all times relevant herein, a California corporation, duly authorized to conduct business and
27 conducting business as a licensed contractor, license number 0037507.

28 3. Plaintiff-in-Intervention is informed and believes and based thereon alleges that

1 Defendant-in-Intervention, FIDELITY AND DEPOSIT COMPANY OF MARYLAND ("Fidelity"), is
2 a contractor's bond surety, authorized to conduct business in the State of Nevada, that issued a
3 contractor's license bond to Defendant-in-Intervention Camco in the amount of \$50,000.00, bond
4 number 8739721, for benefit of various public members injured by Camco's actions as a contractor,
5 including Plaintiff-in-Intervention.

6 4. Plaintiff-in-Intervention is informed and believes and based thereon alleges that
7 Defendant-in-Intervention CONCRETE VISIONS, INC. ("Visions") is, or was at all times relevant
8 herein, a Nevada corporation, duly authorized to conduct business and conducting business as a
9 licensed contractor, license number 0055221.

10 5. Plaintiff-in-Intervention is informed and believes and based thereon alleges that
11 Defendant-in-Intervention, PLATTE RIVER INSURANCE COMPANY ("Platte River"), is a
12 contractor's bond surety, authorized to conduct business in the State of Nevada, that issued a
13 contractor's license bond to Defendant-in-Intervention Visions in the amount of \$20,000.00, bond
14 number 41014418, for benefit of various public members injured by Visions' actions as a contractor,
15 including Plaintiff-in-Intervention.

16 6. Plaintiff-in-Intervention is informed and believes and based thereon alleges that
17 Defendant-in-Intervention, GEMSTONE DEVELOPMENT WEST, INC. ("Gemstone") is the owner
18 of property described as Manhattan West and located at 9205 West Russell Road, Las Vegas, Nevada,
19 and formerly identified as Assessor's Parcel Number 163-32-101-019, but now identified as 163-32-
20 101-020, 163-32-101-022, 163-32-101-023, and 163-32-112-001 through 246 (the "Project"), which
21 is subject to the lien foreclosure claims alleged herein. A copy of said liens is attached hereto as
22 Exhibit "1".

23 7. Defendants-in-Interventions sued herein under the fictitious names of MOES 1 through
24 10, inclusive, are presently unknown to Plaintiff-in-Intervention but are believed to reside in the State
25 of Nevada and are in some respect liable for the acts and omissions, whether intentional, negligent or
26 otherwise, alleged herein.

27 8. Defendants-in-Intervention sued herein under the fictitious names of ZOE
28

1 CORPORATIONS 1 through 10, inclusive, are presently unknown to Plaintiff-in-Intervention but are
2 believed to be corporations authorized to conduct business in the State of Nevada and are in some
3 respect liable for the acts and omissions, whether intentional, negligent or otherwise, alleged herein.

4 9. The obligations sued upon herein were performed in Clark County, Nevada.

5
6 **FIRST CAUSE OF ACTION**
7 **(Breach of Contract against Camco,**
8 **MOES 1-10, and ZOE CORPORATIONS 1-10, inclusive)**

9 10. Plaintiff-in-Intervention repeats with the same force and effect paragraphs 1 through 9,
10 as if set forth in full.

11 11. Plaintiff-in-Intervention and Defendant-in-Intervention entered into an agreement
12 whereby Plaintiff-in-Intervention agreed to provide labor and materials to be incorporated into and for
13 the improvement of the Project. The terms and conditions are contained in writings used to confirm
14 the agreement between Plaintiff-in-Intervention and Defendant-in-Intervention ("the Contract").

15 12. Plaintiff-in-Intervention provided labor and materials to Defendant-in-Intervention.
16 Defendant-in-Intervention agreed to pay Plaintiff-in-Intervention for the labor and materials provided
17 pursuant to the terms of the Contract.

18 13. Defendant-in-Intervention has breached the terms of the Contract by failing and
19 refusing to pay for the labor and materials provided by Plaintiff-in-Intervention, and now owes a sum
20 in excess of \$10,000.00.

21 14. Plaintiff-in-Intervention has performed all conditions and promises required on its part
22 to be performed under the Contract, except as said performance has been waived, excused or
23 prevented by Defendant-in-Intervention's breach of the Contract.

24 15. Based on Defendant-in-Intervention's breach of the Contract as described above,
25 Plaintiff-in-Intervention has been damaged in a sum in excess of \$10,000.00, together with fees, costs,
26 and interest thereon as provided in the Contract until paid in full and other such damage according to
27 proof.
28

SECOND CAUSE OF ACTION
(For a Claim against Contractor's License Bond against Camco, Fidelity,
MOES 1-10, and ZOE CORPORATIONS 1-10, inclusive)

16. Plaintiff-in-Intervention repeats with the same force and effect paragraphs 1 through 15, as if set forth in full.

17. Plaintiff-in-Intervention is informed and believes and based thereon alleges that Defendant-in-Intervention Camco, as principal, and Defendant-in-Intervention Fidelity, as surety, issued a contractor's license bond in accordance with the provisions of Chapter 624 of the Nevada Revised Statutes. Said bond is in the amount of \$50,000.00, and is conditioned upon full compliance by Camco with all of the provisions of Chapter 624 of the Nevada Revised Statutes and inures to the benefit of all persons, including Plaintiff-in-Intervention, damaged as a result of a violation of any requirements of said chapter by Camco.

18. Plaintiff-in-Intervention is informed and believes and based thereon alleges that the damages it has suffered are a direct and proximate result of violations of one or more of the following sections of Chapter 624 of Nevada Revised Statutes by Camco:

(a) Section 624.3012(1) in that Camco diverted funds which were received for a specific purpose in the prosecution of the construction of the Project and thereby deprived Plaintiff-in-Intervention of payment to which it was entitled;

(b) Section 624.3012(2) in that Camco willfully and deliberately failed to pay money due for labor and materials rendered in connection with its operation as a contractor, when it had the capacity to pay, or when it had received sufficient funds therefore as payment, for the labor and materials provided.

19. In light of Camco's willful and deliberate failure to pay Plaintiff-in-Intervention for the labor and materials Plaintiff-in-Intervention provided to Camco, Camco violated Chapter 624 of the Nevada Revised Statutes and Plaintiff-in-Intervention is entitled to recover against the license bond issued by Defendant-in-Intervention Fidelity.

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THIRD CAUSE OF ACTION
(Breach of Contract against Visions,
MOES 1-10, and ZOE CORPORATIONS 1-10, inclusive)

20. Plaintiff-in-Intervention repeats with the same force and effect paragraphs 1 through 19, as if set forth in full.

21. Plaintiff-in-Intervention and Defendant-in-Intervention entered into an agreement whereby Plaintiff-in-Intervention agreed to provide labor and materials to be incorporated into and for the improvement of the Project. The terms and conditions are contained in writings used to confirm the agreement between Plaintiff-in-Intervention and Defendant-in-Intervention ("the Contract").

22. Plaintiff-in-Intervention provided labor and materials to Defendant-in-Intervention. Defendant-in-Intervention agreed to pay Plaintiff-in-Intervention for the labor and materials provided pursuant to the terms of the Contract.

23. Defendant-in-Intervention has breached the terms of the Contract by failing and refusing to pay for the labor and materials provided by Plaintiff-in-Intervention, and now owes the sum of \$8,625.00.

24. Plaintiff-in-Intervention has performed all conditions and promises required on its part to be performed under the Contract, except as said performance has been waived, excused or prevented by Defendant-in-Intervention's breach of the Contract.

25. Based on Defendant-in-Intervention's breach of the Contract as described above, Plaintiff-in-Intervention has been damaged in the sum of \$8,625.00 together with fees, costs, and interest thereon as provided in the Contract until paid in full and other such damage according to proof.

FOURTH CAUSE OF ACTION
(For a Claim against Contractor's License Bond against Visions, Platte,
MOES 1-10, and ZOE CORPORATIONS 1-10, inclusive)

26. Plaintiff-in-Intervention repeats with the same force and effect paragraphs 1 through 25, as if set forth in full.

27. Plaintiff-in-Intervention is informed and believes and based thereon alleges that

1 Defendant-in-Intervention Visions, as principal, and Defendant-in-Intervention Platte River, as surety,
2 issued a contractor's license bond in accordance with the provisions of Chapter 624 of the Nevada
3 Revised Statutes. Said bond is in the amount of \$20,000.00, bond no. 41014418, and is conditioned
4 upon full compliance by Visions with all of the provisions of Chapter 624 of the Nevada Revised
5 Statutes and inures to the benefit of all persons, including Plaintiff-in-Intervention, damaged as a result
6 of a violation of any requirements of said chapter by Visions.

7 28. Plaintiff-in-Intervention is informed and believes and based thereon alleges that the
8 damages it has suffered are a direct and proximate result of violations of one or more of the following
9 sections of Chapter 624 of Nevada Revised Statutes by Visions;

10 (a) Section 624.3012(1) in that Visions diverted funds which were received for a
11 specific purpose in the prosecution of the construction of the Project and thereby deprived Plaintiff-in-
12 Intervention of payment to which it was entitled;

13 (b) Section 624.3012(2) in that Visions willfully and deliberately failed to pay
14 money due for labor and materials rendered in connection with its operation as a contractor, when it
15 had the capacity to pay, or when it had received sufficient funds therefore as payment, for the labor
16 and materials provided.

17 29. In light of Visions' willful and deliberate failure to pay Plaintiff-in-Intervention for the
18 labor and materials Plaintiff-in-Intervention provided to Visions, Visions violated Chapter 624 of the
19 Nevada Revised Statutes and Plaintiff-in-Intervention is entitled to recover against the license bond
20 issued by Defendant-in-Intervention Platte River.
21

22
23 **FIFTH CAUSE OF ACTION**
24 **(Foreclosure of Lien against Gemstone, MOES 1-10, and**
25 **ZOE CORPORATIONS 1-10, inclusive)**

26 30. Plaintiff-in-Intervention repeats with the same force and effect paragraphs 1 through
27 29, as if set forth in full.

28 31. Within 31 days of first supplying labor and materials to the Property, Plaintiff-in-

1 Intervention served via certified mail, return receipt requested, a certain Notice to Owner of Right to
2 Lien upon Defendants-in-Intervention or their successors in interest, as required by NRS 108.245, or
3 was exempt from the obligation to serve said Notice. Within 90 days of actual completion of the
4 Project, and within 40 days of the recordation of any valid Notice of Completion on the Property,
5 Plaintiff-in-Intervention caused to be recorded two mechanic's liens on the Project, one in the amount
6 of \$242,608.00 for work provided pursuant to Plaintiff-in-Intervention's agreement with Camco, and
7 another in the amount of \$8,625.00 for work provided pursuant to Plaintiff-in-Intervention's
8 agreement with Visions, both in compliance with the requirements of NRS 108.226 and served upon
9 the record owner in compliance with the provisions of NRS 108.227. Both liens are attached hereto as
10 Exhibit "1".

11 32. Plaintiff-in-Intervention's liens are valid liens upon the Project.

12 33. There may be other lien claimants whose liens may be subordinate to Plaintiff-in-
13 Intervention's Notices and Claims of Lien.

14 34. Plaintiff-in-Intervention was required to retain the undersigned firm of attorneys to
15 prosecute this action, and as a result has incurred and will continue to incur costs and attorneys fees in
16 preparing, recording and foreclosing its lien, which Plaintiff-in-Intervention is entitled to recover from
17 said Defendants-in-Intervention.
18

19
20 **SIXTH CAUSE OF ACTION**
21 **(Unjust Enrichment against Camco, Visions, Gemstone,**
22 **DOES 1-10, and ROE CORPORATIONS 1-10, inclusive)**

23 27. Plaintiff-in-Intervention repeats with the same force and effect paragraphs 1 through
24 34, as if set forth in full.

25 28. Plaintiff-in-Intervention is informed and believes and based thereon alleges that
26 Defendants-in-Interventions, and each of them, have been unjustly enriched by the wrongful act of
27 retaining the benefit of the labor and materials provided by Plaintiff-in-Intervention to the Project and
28 then failing to pay Plaintiff-in-Intervention for said labor and materials.

29. As such, said Defendants-in-Intervention have been unjustly enriched to the detriment

1 and damage of Plaintiff-in-Intervention in a sum in excess of \$10,000.00.

2 30. Plaintiff-in-Intervention has retained the services of an attorney to prosecute this action
3 and is entitled to an award of attorney's fees and costs incurred.
4

5 WHEREFORE, Plaintiff-in-Intervention prays for relief as follows:

6 1. For compensatory damages in an amount in excess of \$10,000.00, together with interest
7 thereon at the contractual rate or as allowed by law until paid in full and other such damage according
8 to proof;
9

10 2. For judgment declaring that Plaintiff-in-Intervention has a claim in excess of
11 \$10,000.00 against Camco's contractor's license bond, issued by Fidelity, plus interest thereon at the
12 contractual rate from the date the amounts became due until paid, and that Plaintiff-in-Intervention's
13 claim has priority over every other claim of interest on the bond;

14 2. For judgment declaring that Plaintiff-in-Intervention has a claim in the amount of
15 \$8,625.00 against Visions' contractor's license bond, issued by Platte River, plus interest thereon at
16 the contractual rate from the date the amounts became due until paid, and that Plaintiff-in-
17 Intervention's claim has priority over every other claim of interest on the bond;

18 3. For judgment declaring that Plaintiff-in-Intervention has valid liens on the Project in
19 the amounts of \$242,308.00 and \$8,625.00 respectively, plus interest from the date the amounts
20 became due until paid in full, costs and fees, that Plaintiff-in-Intervention's liens have priority over
21 every other lien or claim of interest on the Project, and that the Project be sold and proceeds from the
22 sale be applied to satisfy Plaintiff-in-Intervention's liens, together with the expenses of sale and the
23 costs and disbursements in this action;

24 3. For reasonable attorneys fees and costs; and
25
26
27
28

///

///

///

Pezzillo Robinson
6750 VIA AUSTI PARKWAY, SUITE 170
LAS VEGAS, NEVADA 89119
TEL 702 233-4225

1 4. For such other and further relief as this Court deems just and proper.
2
3

4 DATED: July 9, 2009

PEZZILLO ROBINSON

5
6 By: _____



Jennifer R. Lloyd-Robinson, Esq.
Nevada State Bar No. 9617
6750 Via Austi Parkway, Suite 170
Las Vegas, Nevada 89119
Attorneys for Plaintiff-in-Intervention,
Northstar Concrete, Inc.

EXHIBIT 1

**NOTICE REQUESTED BY
AND RETURN TO:**

**NORTHSTAR CONCRETE, INC.
CMA BUSINESS CREDIT SERVICES
3110 W CHEYENNE #100
NORTH LAS VEGAS, NV 89032**

APN: 163-32-101-019

Receipt/Conformed Copy

Requestor:
CMA BUSINESS CREDIT SERVICES
01/09/2009 14:57:56 T20090008782
Book/Instr: 20090109-0004476
Lien Page Count: 2
Fees: \$15.00 N/C Fee: \$0.00

Debbie Conway
Clark County Recorder

NOTICE OF LIEN

The undersigned claims a lien upon the property described in this notice for work, materials or equipment furnished for the improvement of property:

1. The amount of the original contract is: **\$ 242,308.00.**
2. The total amount of all additional, or changed work, materials and equipment, if any, is: **\$ 300.00.**
3. The total amount of all payments received to date is: **\$ 0.00**
4. The amount of the lien, after deducting all just credits and offsets, is **\$242,608.00.**
5. The name of the reputed owner, if known, of the property is: **GEMSTONE DEVELOPMENT WEST, INC , 9121 W RUSSELL RD #117, Las Vegas, NV 89148.**
6. The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished or agreed to furnish work, materials or equipment is: **CAMCO PACIFIC CONSTRUCTION CO, 2925 E PATRICK LN #G, Las Vegas, NV 89120**
7. A brief statement of the terms of payment of the lien claimant's contract is: **DUE UPON RECEIPT**
8. A description of the property and/or the improvements to be charged with the lien is: **MANHATTAN WEST 9275, 9205, 9265, 9255, 9215, W RUSSELL ROAD, , NV 89140, County Assessor Description: PT NE4 NW4 SEC 32 TWP 21 RNG 60 County of Clark County Assessors Parcel Number: 163-32-101-019**

VERIFICATION

I declare that I am authorized to file this MECHANICS LIEN (PRIVATE WORK) on behalf of the claimant. I have read the foregoing document and know the contents thereof, the same is true of my own knowledge. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated **January 08, 2009** for **NORTHSTAR CONCRETE, INC., 5145 SO ROGERS ST., #A, LAS VEGAS, NV 89118**

By: 

Phone: (702) 259-2622 Fax: (702) 259-9908

ELISE GUTIERREZ, REPRESENTATIVE FOR NORTHSTAR CONCRETE, INC.

ACKNOWLEDGEMENT BY NOTARY PUBLIC

STATE OF NEVADA } SS.
COUNTY OF CLARK} SS.

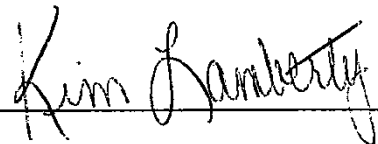
ELISE GUTIERREZ, being duly sworn on oath according to law, deposes and says:

I have read the foregoing Notice of Lien, know the contents thereof and state that the same is true of my own personal knowledge, except those matters stated upon information and belief, and, as to those matters, I believe them to be true.


ELISE GUTIERREZ

On January 08, 2009 before me, the undersigned, a Notary Public in and for said state, personally appeared ELISE GUTIERREZ [X] Personally known to me.

Proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the attached instrument, and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or their entity upon behalf for which the person(s) acted, executed the instrument.

Signature 
KIM LAMBERTY

CAPACITY CLAIMED BY SIGNER: INDIVIDUAL



Attention Notary: Although the information requested below is OPTIONAL, it could prevent fraudulent attachment of this certificate to unauthorized documents.

Title or Type of Document: MECHANICS LIEN

Date of Document: January 08, 2009

Number of Pages: 02

Receipt/Conformed Copy

Requestor:

CMA BUSINESS CREDIT SERVICES

01/09/2009 14:57:56 T20090008782

Book/Instr: 20090109-0004475

Lien Page Count: 2

Fees: \$15.00 N/C Fee: \$0.00

**NOTICE REQUESTED BY
AND RETURN TO:**

**NORTHSTAR CONCRETE, INC.
CMA BUSINESS CREDIT SERVICES
3110 W CHEYENNE #100
NORTH LAS VEGAS, NV 89032**

APN: 163-32-101-019

**Debbie Conway
Clark County Recorder**

NOTICE OF LIEN

The undersigned claims a lien upon the property described in this notice for work, materials or equipment furnished for the improvement of property:

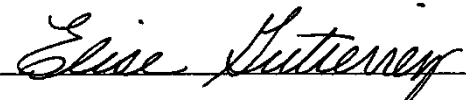
1. The amount of the original contract is: \$ 102,857.60.
2. The total amount of all additional, or changed work, materials and equipment, if any, is: \$ 300.00.
3. The total amount of all payments received to date is: \$ 94,232.60
4. The amount of the lien, after deducting all just credits and offsets, is \$8,625.00.
5. The name of the reputed owner, if known, of the property is: GEMSTONE DEVELOPMENT WEST, INC , 9121 W RUSSELL RD #117, Las Vegas, NV 89148.
6. The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished or agreed to furnish work, materials or equipment is: CONCRETE VISIONS INC, 4205 W TOMPKINS AVE #1, Las Vegas, NV 89103
7. A brief statement of the terms of payment of the lien claimant's contract is: DUE UPON RECEIPT
8. A description of the property and/or the improvements to be charged with the lien is: MANHATTAN WEST 9275, 9205, 9265, 9255, 9215, W RUSSELL ROAD, , NV 89140, County Assessor Description: PT NE4 NW4 SEC 32 TWP 21 RNG 60
County of Clark County Assessors Parcel Number: 163-32-101-019

VERIFICATION

I declare that I am authorized to file this MECHANICS LIEN (PRIVATE WORK) on behalf of the claimant. I have read the foregoing document and know the contents thereof; the same is true of my own knowledge. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated January 08, 2009 for NORTHSTAR CONCRETE, INC., 5145 SO ROGERS ST., #A, LAS VEGAS, NV 89118

By:



Phone: (702) 259-2622 Fax: (702) 259-9908

ELISE GUTIERREZ, REPRESENTATIVE FOR NORTHSTAR CONCRETE, INC.

ACKNOWLEDGEMENT BY NOTARY PUBLIC

STATE OF NEVADA } SS.
COUNTY OF CLARK } SS.

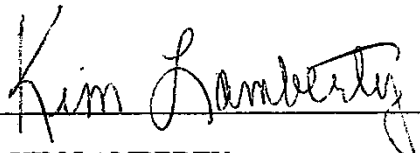
ELISE GUTIERREZ, being duly sworn on oath according to law, deposes and says:

I have read the foregoing Notice of Lien, know the contents thereof and state that the same is true of my own personal knowledge, except those matters stated upon information and belief, and, as to those matters, I believe them to be true.


ELISE GUTIERREZ

On January 08, 2009 before me, the undersigned, a Notary Public in and for said state, personally appeared ELISE GUTIERREZ [X] Personally known to me.

Proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the attached instrument, and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or their entity upon behalf for which the person(s) acted, executed the instrument.

Signature 
KIM LAMBERTY



CAPACITY CLAIMED BY SIGNER: INDIVIDUAL

Attention Notary: Although the information requested below is OPTIONAL, it could prevent fraudulent attachment of this certificate to unauthorized documents.

Title or Type of Document: MECHANICS LIEN

Date of Document: January 08, 2009

Number of Pages: 02

ORIGINAL

FILED

2009 JUL 10 P 4:19

[Handwritten signature]

1 STMT
2 STEVEN L. MORRIS, ESQ.
3 Nevada Bar No. 7454
4 **WOODBURY, MORRIS & BROWN**
5 701 N. Green Valley Parkway, Suite 110
6 Henderson, Nevada 89074
7 (702) 933-0777
8 Attorneys for Lien Claimant/
9 Plaintiff in Intervention Camco Pacific
10 Construction Company, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

11 APCO CONSTRUCTION, a Nevada
12 corporation,

13 Plaintiff,

14 vs.

15 GEMSTONE DEVELOPMENT WEST,
16 INC., a Nevada corporation; NEVADA
17 CONSTRUCTION SERVICES, a Nevada
18 corporation; SCOTT FINANCIAL
19 CORPORATION, a North Dakota
20 corporation; COMMONWEALTH LAND
21 TITLE INSURANCE COMPANY; FIRST
22 AMERICAN TITLE INSURANCE
23 COMPANY and DOES I through X,

24 Defendants.

25 CAMCO PACIFIC CONSTRUCTION
26 COMPANY, INC.,

27 Lien Claimant/
28 Plaintiff in Intervention,

vs.

29 GEMSTONE DEVELOPMENT WEST,
30 INC., a Nevada corporation; ALEX
31 EDELSTEIN, individually, and NEVADA
32 CONSTRUCTION SERVICES, a Nevada
33 corporation; SCOTT FINANCIAL
34 CORPORATION, a North Dakota
35 corporation; COMMONWEALTH LAND
36 TITLE INSURANCE COMPANY; FIRST
37 AMERICAN TITLE INSURANCE
38 COMPANY; CLUB VISTA FINANCIAL

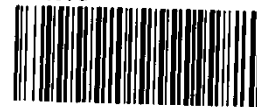
Case No. A571228
Dept. No. 13

Consolidated Cases:

A571792
A574391
A577623
A580889
A583289
A584730
A587168
A589195

CAMCO PACIFIC CONSTRUCTION
COMPANY, INC.'S
STATEMENT OF FACTS AND
COMPLAINT IN INTERVENTION

08A571228
244070



RECEIVED

JUL 10 2009

CLERK OF THE COURT

WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

SERVICES, L.L.C., a Nevada limited liability company; THARALDSON MOTELS II, INC. a North Dakota corporation; DOE LENDERS I through XX, and DOES I through XXX, inclusive,

Defendants.

Lien Claimant/Plaintiff in Intervention CAMCO PACIFIC CONSTRUCTION COMPANY, INC. by and through its attorneys, STEVEN L. MORRIS of the law firm of WOODBURY, MORRIS & BROWN hereby submits its Statement of Facts and Complaint in intervention and states as follows:

STATEMENT OF FACTS

1. On or about August 15, 2008, Lien Claimant/Plaintiff in Intervention CAMCO PACIFIC CONSTRUCTION COMPANY, INC. (hereinafter Camco) entered into a General Contract with Defendant GEMSTONE DEVELOPMENT WEST INC. (hereinafter "Gemstone") to perform general contracting for a project commonly known as the Manhattan West Condominiums located at West Russell Road and Rocky Hill Street in Clark County Nevada, APNs 163-32-101-003 through 163-32-101-005, 163-32-101-010 and 163-32-101-014 (the "Property" and/or "Project"), owned by Gemstone.

2. APCO Construction ("APCO") was the original General Contractor for the Project.

3. Camco is informed and believes and thereupon alleges that APCO was terminated by Gemstone in August 2008.

4. While APCO assumed the responsibility for the financial aspects of the Project and the proper engagement and payment of the trade contractors on the Project, Camco did not.

5. Camco was paid a basic fee plus certain expenses to serve as the General Contractor for the project; provided however, that Gemstone, not Camco, was solely responsible for selecting and negotiating the engagement of the trade contractors.

6. In the event that Camco approved the selection of the trade contractor Camco would enter into a ratified subcontract agreement if the trade contractor had been performing

1 work on the project under contract with APCO, or a new subcontract with Camco is the trade
2 contractor was new to the Project.

3 7. All decisions and communications for payment authorization and processing
4 were handled by Gemstone, without Camco's involvement. Camco's only role in the payment
5 process was to compile and submit each initial Payment Application.

6 8. Thereafter, the review, negotiation, and request for the corresponding payments
7 were handled by Gemstone. As a result, Camco never received payments on behalf of the trade
8 contractors, such payments were sent directly to the trade contractors through Nevada
9 Construction Services ("NCS").

10 9. Furthermore, Camco had no physical control over the construction proceeds.
11 The trade contractors were aware of Camco's limited role in the payment process and all
12 disbursements were completed between NCS and the trade contractors directly.

13 10. The Negotiation of each trade contractor's engagement was managed by
14 Gemstone and only subsequently ratified by Camco. However, Gemstone did not have the
15 authority or ability to enter into any contract on behalf of Camco.

16 11. Even in circumstances where Camco entered into either ratified or original
17 subcontract agreements with trade contractors, Gemstone and/or NCS remained directly
18 responsible for the payment of the work performed by said trade contractors.

19 12. On various dates thereafter, Camco entered into multiple ratification and/or
20 amendments and/or agreements with various subcontractors to furnish and provide all materials,
21 labor and trade work to the Project. The Camco subcontract agreements include the following
22 relevant language:

23 **3.4 Any payments to Subcontractor shall be conditioned upon receipt of the**
24 **actual payments by Contractor from Owner. Subcontractor herein agrees to**
25 **assume the same risk that the Owner may become insolvent that Contractor**
has assumed by entering into the Prime Contract with the Owner.

26 **II.A. Contract Price**

27 Contractor and Subcontractor expressly acknowledge that all payments due to
28 Subcontractor under this Agreement shall be made by Contractor solely out of
funds actually received by Contractor from Owner. **Subcontractor**
acknowledges that Subcontractor is sharing, as set forth herein, in the risk

1 that Owner may for at any reason, including, but not limited to, insolvency
2 or an alleged dispute, fail to make one or more payments to Contractor for
3 all or a portion of the Contract Work. Contractor's receipt of the
4 corresponding payment from Owner is a condition precedent to
5 Contractor's obligation to pay Subcontractor; it being understood that
6 Subcontractor is solely responsible for evaluating Owner's ability to pay for
7 Subcontractor's portion of the Contract Work, and Subcontractor
8 acknowledges that Contractor is not liable to Subcontractor for payment of
9 Subcontractor's invoice unless and until Contractor receives the
10 corresponding payment from Owner. . .

11 II.C. Monthly Progress Payments [sic]

12 . . . If Owner fails to make any payment to Contractor when due, Subcontractor
13 shall cooperate with Contractor in Contractor's efforts to collect all amounts due
14 from Owner and shall forbear collection efforts against Contractor until Owner
15 pays Contractor or until all reasonable efforts of collection have been exhausted.
16 Subcontractor shall be entitled to all of its mechanic's lien rights.

17 13. No payments for the work and materials furnished to the Project came through
18 Camco. While the subcontractors submitted their payment applications to Camco, all payments
19 were made directly by the Owner through NCS to the subcontractors. Therefore, Camco never
20 received any money on behalf of any of the subcontractors that performed work on the Project.

21 14. On or about December 22, 2008, Camco received the following email from the
22 Owner:

23 To all Manhattan West subcontractors and vendors:

24 Effective immediately, construction of the Manhattan West project is suspended.
25 Over the weekend, Gemstone determined that its construction lenders do not expect
26 to disperse further funds for construction. As a result, Gemstone does not have
27 funds sufficient to pay out the October draw or other obligations.

28 We apologize earnestly to all the companies to whom we currently owe money.
Gemstone procured sufficient funding to finish the Project, but was surprised by the
revelation that APCO had generated approximately seventeen million dollars in cost
overruns and defect remediation costs. In the current economic chaos, we were
unable to find a solution for generating the extra money, and as a result funding has
stopped.

Gemstone is currently working to secure new financing, but has no visibility as to
when and how this will be accomplished.

I am available to speak directly with you, face to face, if you so desire. Thank you
for your cooperation during this process.

Respectfully

Alex Edelstein
CEO

Group Gemstone
702.614.3193
www.groupgemstone.com

15. Camco forwarded the notice from the Owner to all subcontractors and vendors on or about December 22, 2008.

16. As a material inducement to enter into the General Contract Alex Adelstein and Scott Financial Corporation acknowledged that funding was available and secured for the completion of the Project.

17. Camco relied upon this representation in its decision to enter into the General Contract for the Project.

18. Alex Adelstein and/or Scott Financial Corporation knew or should have know of the alleged cost overruns and financial instability of the Project prior to contracting with Camco for the completion of the Project.

19. In addition to sending the Notice provided by the Owner, Camco provided its notice of termination of the various subcontract agreements and further reminded the subcontractors they each had contractually acknowledged and agreed that all remedies for payment resided in Gemstone and the Project pursuant to NRS 108, the Nevada Mechanic's Lien Statute.

20. Notwithstanding, many of the subcontractors and suppliers have initiated actions against Camco relative to their alleged work on the Project.

21. Camco has demanded that said claims be dismissed and that Gemstone defend and indemnify against said claims. However, the parties have failed and refused to perform under the terms and conditions of their respective contracts.

22. CAMCO has suffered damages in the amount in excess of Ten Thousand Dollars as a result of Gemstone's and the subcontractors' breach and the misrepresentations of Alex Edelstein and Scott Financial Corporation.

JURISDICTIONAL ALLEGATIONS

1. Camco was and is at all times relevant to this action, a California corporation, doing business in Clark County, Nevada as a contractor duly licensed by the Nevada State

1 Contractor's Board.

2 2. Defendant Gemstone (hereinafter referred to as Gemstone and/or "Owner")
3 is and was, at all times relevant to this action, the owner or reputed owner of certain real
4 property or portions thereof located in Clark County, Nevada, and more particularly described
5 as Manhattan West Condominiums located at West Russell Road and Rocky Hill Street in Clark
6 County Nevada, APNs 163-32-101-003 through 163-32-101-005, 163-32-101-010 and 163-32-
7 101-014 (the "Property") upon which, caused or allowed to be constructed certain improve-
8 ments. The whole of the Property is reasonably necessary for the convenient use and
9 occupation of the improvements.

10 3. Defendant ALEXANDER EDELSTEIN, (hereinafter "Edelstein") an individual,
11 at all times material hereto upon information and belief resided in Nevada while managing and
12 developing the Manhattan West Condominium Project and was and is the President, Secretary,
13 Treasurer and Director and Alter Ego of Gemstone Development West, Inc.

14 4. Defendant NEVADA CONSTRUCTION SERVICES, (hereinafter "NCS") a
15 Nevada corporation, at all times relevant to this action, is and was engaged in the control and
16 disbursement of funds payable to laborers, materialmen, material suppliers, contractors,
17 subcontractors and others who supplied labor or materials for the improvement of the Property,
18 including Camco's bills for the Work furnished to the Property.

19 5. Defendants SCOTT FINANCIAL CORPORATION, a North Dakota
20 corporation ("SCOTT FINANCIAL"); COMMONWEALTH LAND TITLE INSURANCE
21 COMPANY; FIRST AMERICAN TITLE INSURANCE COMPANY, CLUB VISTA
22 FINANCIAL SERVICES, L.L.C., a Nevada limited liability company; THARALDSON
23 MOTELS II, INC. a North Dakota corporation; DOE LENDERS I through XX (hereinafter
24 collectively referred to as "Lenders"), at all times relevant to this action were lending money
25 and/or were investors with beneficial interests in and to certain portions of the Property as
26 designated herein and are the beneficiaries secured by deeds of trusts or other security
27 instruments recorded against certain Lots, Phases and/or portions of Lots on the Property
28 located in Clark County, Nevada.

1 6. The true names and capacities, whether individual, corporate, associate or
2 otherwise of Defendants named herein as DOES DEFENDANTS I through XXX are unknown
3 to Plaintiffs. Said DOE Defendants I through XXX are responsible for damages suffered by
4 Plaintiffs or claim an interest in the Property and Leasehold Estate; therefore, Plaintiffs sue said
5 Defendants by such fictitious names. Plaintiffs will ask leave to amend this Complaint-in-
6 Intervention to show the true names and capacities of each such DOE Defendants I through
7 XXX at such time as the same have been ascertained.

8 **FIRST CAUSE OF ACTION**

9 **(Breach of Contract)**

10 7. Camco repeats and realleges each and every allegation contained in the
11 preceding paragraphs of Camco's Complaint-in-Intervention, incorporates the same at this
12 point by reference and further alleges:

13 8. On or about August 15, 2008, Camco entered into a General Contract with
14 Gemstone to perform general contracting for a project commonly known as the Manhattan West
15 Condominiums Project owned by Gemstone. Camco agreed to a "Cost Plus" contract which
16 would require Gemstone and/or NCS to pay the actual cost of the work directly to the trades and
17 suppliers and Camco would be paid a fee for its services.

18 9. The terms, time given and conditions of the parties' contract were that in
19 exchange for Camco's services, Gemstone would pay a monthly fee to Camco for its
20 supervision and project management and that Gemstone and/or its agent NCS would be directly
21 responsible for the payment of the work and materials furnished by the trades and suppliers..

22 10. Camco performed the terms and conditions of the Contract and supervised and
23 managed the Work as aforesaid for the total value of \$20,311,853.16.

24 11. The Work was furnished at the special instance and request of Gemstone, and for
25 the benefit of all the Property.

26 12. Camco demanded payment from Gemstone of the sum of \$20,311.853.16
27 (inclusive of changes and extras); to date, nothing has been paid toward the monies due and
28 owing for the Work; and a sum in excess of \$10,000.00 remains past due and owing.

1 13. Demand was made upon Gemstone for the payment of the sums due, but
2 Gemstone failed, neglected and refused to pay the sum in excess of \$10,000.00.

3 14. Camco has been required to engage the services of the law firm of
4 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
5 reasonable attorneys fees and costs therefor.

6 **SECOND CAUSE OF ACTION**

7 **(Alter Ego against Alexander Edelstein)**

8 15. Camco repeats and realleges each and every allegation contained in the
9 preceding paragraphs of this Complaint-in-Intervention, incorporates the same at this point by
10 reference and further alleges:

11 16. Defendant ALEXANDER EDELSTEIN (hereinafter collectively
12 "EDELSTEIN") is and was the President, Secretary, Treasurer, and Director of Gemstone and
13 thereby influenced and governed Gemstone.

14 17. Upon information and belief, EDELSTEIN participated in the funding and
15 financial lending with respect to the development of the Project.

16 18. There exists such a unity of interest and ownership that Defendant EDELSTEIN
17 is inseparable from Gemstone.

18 19. Adherence to the corporate fiction of Gemstone would, under the circumstances,
19 sanction a fraud or promote injustice.

20 20. Camco has been required to engage the services of the law firm of
21 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
22 reasonable attorneys fees and costs therefor.

23 **THIRD CAUSE OF ACTION**

24 **(Foreclosure of Mechanic's Lien against the Property)**

25 21. Camco repeats and realleges each and every allegation contained in the
26 preceding paragraphs of this Complaint-in-Intervention, incorporates the same at this point by
27 reference and further alleges:

28 22. Camco commenced furnishing the Work on or about August 15, 2008, Camco

1 terminated the Work on or about December 22, 2008 upon receipt Gemstone's suspension
2 letter. The Work was furnished at the special instance and request of Gemstone and Edelstein.

3 23. As provided at NRS 108.245, Gemstone the Owner of record of the
4 Property had actual knowledge of Camco's delivery of the Work.

5 24. Camco demanded payment of all sums due and owing; and the sum of
6 \$20,311,853.16 remains past due and owing on account of the Work furnished for the
7 improvement of the Property.

8 25. A Notice of Lien was timely recorded by Camco on January 15, 2009, in Book
9 20090115 of the Official Records of Clark County, Nevada, as Instrument No. 000031 (the
10 "Lien").

11 26. A true and correct copy of Camco's Lien is attached hereto as Exhibit 1 and
12 incorporated by this reference.

13 27. The Lien was in writing and was recorded against the Property for the reasonable
14 value and the total agreed-upon price of \$20,311,853.16, plus interest accruing.

15 28. The Lien was served upon the original Gemstone/Owner of record or their
16 authorized agents as required by law.

17 29. Camco is entitled to reasonable attorneys fees and costs for the preparation,
18 verification, service and recording of the Lien.

19 30. Camco has been required to engage the services of the law firm of
20 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
21 reasonable attorneys fees and costs therefor.

22 **FOURTH CAUSE OF ACTION**

23 **(Breach of Covenant of Good Faith & Fair Dealing)**

24 31. Camco repeats and realleges each and every allegation contained in the
25 preceding paragraphs of this Complaint-in-Intervention and incorporates the same at this point
26 by reference and further alleges:

27 32. There is a covenant of good faith and fair dealing implied in every contract,
28 including the contract entered into between Gemstone and Camco.

1 33. Gemstone breached its covenant of good faith and fair dealing by refusing to pay
2 monies due to Camco for the Work for the improvement of the Property.

3 34. Gemstone breached its duty to act in good faith by performing the contract in a
4 manner that was unfaithful to the purposes of the contract thereby denying Camco's justified
5 expectations.

6 35. Due to the actions of Gemstone, Camco has suffered damages in an amount to be
7 determined at trial for which Camco is entitled to judgment plus interest.

8 36. Camco has been required to engage the services of the law firm of
9 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
10 reasonable attorneys fees and costs therefor.

11 **FIFTH CAUSE OF ACTION**

12 **(Contractual Indemnity)**

13 37. CAMCO repeats and realleges each and every allegation contained in the
14 preceding paragraphs of this Statement of Facts/Complaint-in-Intervention, and
15 incorporates the same at this point by reference and further alleges:

16 38. Pursuant to the parties Agreement, Gemstone agreed to indemnify CAMCO as
17 follows, in pertinent part:

18 a. To the fullest extent permitted by law, Developer (Gemstone)
19 agrees to defend . . . indemnify and hold harmless General Contractor (Camco)
20 and General Contractor's agents and employees from any claims, demands,
21 losses and liabilities to or by any and all persons or entities (including without
22 limitation, Developer, the architect, engineers, governmental agencies, and any
23 Third-Party Service Provider and their respective employees, agents, licenses, or
24 representatives) arising out of or from the (i) any breach of this Agreement by
25 Developer; (ii) the negligence or wilful misconduct of Developer or any Third
26 Party Service Provider or any of their agents or employees, and (iii) the Work,
27 including, without limitation, any claims for design, product or construction
28 defects arising from or related to the Work of the Project. . . .

24 * * *

25 39. Gemstone is also contractually obligated to reimburse CAMCO for interest,
26 attorney's fees and costs as set forth in the parties Agreement.

27 40. Camco has been required to engage the services of the law firm of
28 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a

1 reasonable attorneys fees and costs therefor.

2 **SIXTH CAUSE OF ACTION**

3 **(Fraud Against Gemstone and Edelstein)**

4 41. Camco repeats and realleges each and every allegation contained in the preceding
5 paragraphs of this Complaint-in-Intervention, and incorporates the same at this point by reference
6 and further alleges:

7 42. Gemstone and Edelstein represented to Camco by its words and/or conduct that the
8 funding was in place and was sufficient to cover the Work performed by Camco and would be
9 submitted to and paid for by Gemstone as agreed.

10 43. Camco relied upon Gemstone and Edelstein's representations in that if it performed
11 the Work as directed that Camco and the subcontractors would be paid for such work as agreed.

12 44. Gemstone and Edelstein concealed from Camco the real reason for the previous
13 general's departure as well as the fact that the funding on the Project was clearly in jeopardy prior
14 to the contractual agreement between Camco and Gemstone.

15 45. Gemstone and Edelstein purposefully, intentionally and with wanton disregard for
16 the truth and rights of Camco, hid and concealed this information from Camco in directing Camco
17 to perform Work and organize subcontractors to furnish and deliver work and materials while
18 knowing the funding was not available to complete the Project as agreed.

19 46. Gemstone and Edelstein purposefully intended to direct Camco to perform the Work
20 with no intention of paying for said work.

21 47. Camco reasonably and justifiably relied on Gemstone and Edelstein's
22 representations that Gemstone and Edelstein would pay for the Work as agreed.

23 48. Additionally, upon information and belief Gemstone and Edelstein received funding
24 from the Lenders which included monies owed to Camco for the Work performed. Despite its
25 receipt of the funding, Gemstone and Edelstein knowingly and intentionally failed and refused to
26 pay such monies to Camco in an attempt to coerce or force Camco to accept an amount less than
27 Camco is otherwise entitled to receive under its contract.

28 49. Camco has been damaged as a direct result of Gemstone and Edelstein's conduct

1 in that Gemstone and Edelstein failed and refused, and continues to fail and refuse, to pay Camco
2 for its Work on the Project.

3 50. Camco believes, and therefore alleges, that the DOE Defendants XXI through XXX
4 acted in concert with Gemstone and Edelstein or otherwise concealed the true facts from Camco,
5 thereby contributing to Camco's damages.

6 51. As a result of the willful and intentional omissions of material facts by Gemstone
7 and Edelstein and the DOE Defendants XXI through XXX, Camco has been damaged in an amount
8 to be determined at trial, but in any event, in excess of \$10,000.00.

9 52. Further, due to the wanton, malicious and intentional conduct of Gemstone,
10 Edelstein and DOE Defendants XXI through XXX, Camco is entitled to an award of exemplary
11 and punitive damages against Gemstone, Edelstein and DOE Defendants XXI through XXX.

12 53. Camco has been required to engage the services of the law firm of WOODBURY,
13 MORRIS & BROWN to prosecute this matter and Camco is entitled to a reasonable attorneys fees
14 and costs therefor.

15 **SEVENTH CAUSE OF ACTION**

16 **(Declaratory Relief against Gemstone)**

17 54. Camco repeats and realleges each and every allegation contained in the preceding
18 paragraphs of this Complaint-in-Intervention, incorporates the same at this point by reference and
19 further alleges:

20 55. There exists a justiciable controversy between Camco and Gemstone as to the terms
21 of the Agreement, the effect of Gemstone's purported termination of the Agreement, Camco's
22 termination of the Agreement, and the legal rights and remedies of the parties.

23 56. The interests of Camco and Gemstone are adverse.

24 57. Camco has a legally protectible interest in the controversy between itself and
25 Gemstone.

26 58. The issues are ripe for judicial determination.

27 59. Camco has been required to engage the services of the law firm of WOODBURY,
28 MORRIS & BROWN to prosecute this matter and Camco is entitled to a reasonable attorneys fees

1 and costs therefor.

2 **EIGHTH CAUSE OF ACTION**

3 **(Unjust Enrichment)**

4 60. Camco repeats and realleges each and every allegation contained in the preceding
5 paragraphs of this Complaint-in-Intervention, incorporates the same at this point by reference and
6 further alleges:

7 61. Camco furnished the Work for the benefit of and at the specific instance and request
8 of Gemstone/Owner, Edelstein and Lenders.

9 62. Gemstone, Edelstein and Lenders accepted, used and enjoyed the benefit of the
10 Work.

11 63. Gemstone, Edelstein and Lenders knew or should have known that Camco expected
12 to be paid for the Work.

13 64. Camco demanded that Gemstone, Edelstein and Lenders pay the sums outstanding
14 balance for the Work in the total amount of \$20,311,853.16. To date, Gemstone, Edelstein and
15 Lenders have failed, neglected and refused to pay said sum, to the detriment of Camco in an amount
16 in excess of \$10,000.

17 65. Gemstone, Edelstein and Lenders are unjustly enriched, to the detriment of Camco,
18 in the amount of \$20,311,853.16.

19 66. Camco has been required to engage the services of the law firm of WOODBURY,
20 MORRIS & BROWN to prosecute this matter and Plaintiff is entitled to a reasonable attorneys fees
21 and costs therefor.

22 **NINTH CAUSE OF ACTION**

23 **(Construction Control Claim)**

24 67. Camco repeats and realleges each and every allegation contained in the preceding
25 paragraphs of this Complaint-in-Intervention, incorporates the same at this point by reference and
26 further alleges:

27 68. Camco relied upon the construction control of NCS, based upon that reliance,
28 furnished the Work for the improvement of the Property.

1 69. Furthermore, upon information and belief, SCOTT FINANCIAL directly provided
2 monies to be used in the payment of Project costs and fees incurred in the Work of improvement
3 on the Property.

4 70. Upon information and belief, NCS and SCOTT FINANCIAL have and retained
5 construction loan funds for the benefit of Camco and its subcontractors for the Work and Materials
6 furnished to the Project.

7 71. Camco, in reliance upon NCS and SCOTT FINANCIAL, submitted application
8 vouchers for payment for the Work and Materials, which invoices were dishonored NCS and
9 SCOTT FINANCIAL.

10 72. NCS and SCOTT FINANCIAL knew or should have known that Camco relied upon
11 NCS and SCOTT FINANCIAL for payment of the sums due Camco.

12 73. NCS and SCOTT FINANCIAL violated the provisions of NRS Chapter 627, and
13 Camco has been damaged an amount to be determined at trial, but in excess of \$10,000.

14 74. Camco is entitled to all undisbursed proceeds and the damages set forth in NRS
15 Chapter 627, including a reasonable attorneys fee.

16 **TENTH CAUSE OF ACTION**

17 **(Claim of Priority)**

18 75. Camco repeats and realleges each and every allegation contained in the preceding
19 paragraphs of this Complaint-in-Intervention, incorporates the same at this point by reference and
20 further alleges:

21 76. Camco is informed and believes and thereupon alleges that physical work of
22 improvement to the Property commenced before the recording of the Construction Deed of Trust,
23 which is the Senior Deed of Trust on the Property.

24 77. Camco's claim is superior to the claims against the Property of Defendant
25 LENDERS.

26 78. Camco has been required to engage the services of the law firm of WOODBURY,
27 MORRIS & BROWN to prosecute this matter and Camco is entitled to a reasonable attorneys fees
28 and costs therefor.

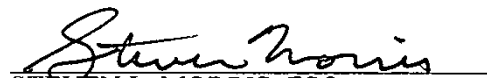
WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

1 WHEREFORE, Camco prays as follows:

- 2 1. This Court enter judgment against Defendants, and each of them, in an amount
- 3 in excess of \$10,000, plus interest at the contract rate;
- 4 2. This Court enter special damages in excess of \$10,000;
- 5 3. That this Court enter punitive or exemplary damages in excess of \$10,000
- 6 4. This Court enter judgment against Defendants, and each of them, for a
- 7 reasonable sum as and for the costs of preparation, verification, service and filing of the Lien;
- 8 5. For reasonable attorneys fees and costs of suit;
- 9 6. The Court declare the rank and priority of all lien claims and secured claims and
- 10 that the liens be ascertained and adjudged as valid liens;
- 11 7. The Lien be enforced according to law;
- 12 8. The Court direct a foreclosure sale of the Property;
- 13 9. The Property be sold and proceeds be applied to the payments of the sums found
- 14 due;
- 15 10. The Court enter such deficiency judgment against Defendants, and each of them,
- 16 as may be proper in the premises;
- 17 11. That Camco be award post-judgment interest on all amounts; and
- 18 12. For such other and further relief as the Court deems just and property in the
- 19 premises.

20 DATED this 10th day of July, 2009.

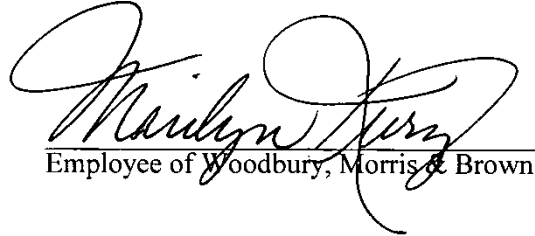
21 WOODBURY, MORRIS & BROWN

22
23 
24 STEVEN L. MORRIS, ESQ.
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CERTIFICATE OF MAILING

I hereby certify that on the 10th day of July, 2009, I served a true and correct copy of the foregoing Statement of Facts and Complaint in Intervention on the interested parties on the persons and addresses listed on the attached service list.


Employee of Woodbury, Morris & Brown

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EXHIBIT 1

Receipt/Conformed Copy

Assessor's Parcel No. 163-32-101-019

Requestor:

LEGAL WINGS

01/15/2009 08:00:25 T20090014768

Book/Instr: 20090115-0000331

Lien Page Count: 3

Fees: \$16.00 N/C Fee: \$0.00

When Recorded Return to:

Steven L. Morris, Esq.

WOODBURY, MORRIS & BROWN

701 N. Green Valley Parkway, Suite 110

Henderson, Nevada 89074

(702) 933-0777

Debbie Conway

Clark County Recorder

NOTICE OF LIEN

CAMCO PACIFIC CONSTRUCTION COMPANY, INC. claims a lien upon the property described in this notice for work, materials or equipment furnished for the improvement of the property:

1. The amount of the original contract is: *Cost, plus fee*
2. The total amount of all changes and additions, if any, is: *N/A*
3. The total amount of all payments received to date is: \$6,968,873.00
4. The amount of the lien, after deducting all just credits and offsets, is:
\$20,311,853.16
5. The name of the owner(s), if known, of the property is (are):

Gemstone Development West Inc.

9121 West Russell Road #117

Las Vegas, Nevada 89148-1238

6. The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished work, materials or equipment is:

Gemstone Development West Inc.

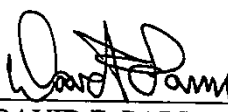
9121 West Russell Road #117

Las Vegas, Nevada 89148-1238

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

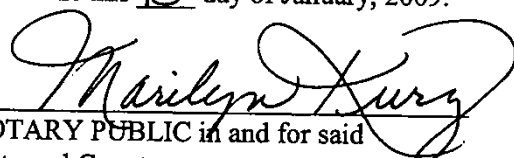
DAVID E. PARRY, being first duly sworn on oath according to law, deposes and says:

I have read the foregoing Notice of Lien, know the contents thereof and state that the same is true of my own personal knowledge, except those matters stated upon information and belief, and, as to those matters, I believe them to be true.

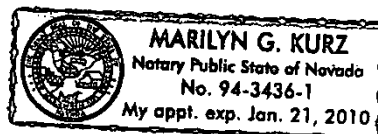


DAVID E. PARRY

SUBSCRIBED AND SWORN to
before me this 13th day of January, 2009.



NOTARY PUBLIC in and for said
State and County



8

ORIGINAL

FILED

2009 JUL 22 P 3:39

[Handwritten signature]

08A571228
266804



COMP
DAVID R. JOHNSON
Nevada Bar No. 006696
JUSTIN L. WATKINS
Nevada Bar No. 009217
WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.
3993 Howard Hughes Parkway, Suite 400
Las Vegas, NV 89169
Telephone: 702-789-3100
Facsimile: 702-822-2650

Attorneys for Intervenor/Lien Claimant
GRANITE CONSTRUCTION COMPANY

DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC.,
a Nevada corporation; NEVADA
CONSTRUCTION SERVICES, a Nevada
corporation; SCOTT FINANCIAL
CORPORATION, a North Dakota corporation;
COMMONWEALTH LAND TITLE
INSURANCE COMPANY; FIRST
AMERICAN TITLE INSURANCE
COMPANY; and DOES I through X,

Defendants.

GRANITE CONSTRUCTION COMPANY, a
California corporation,

Intervenor/Lien Claimant,

vs.

APCO CONSTRUCTION, a Nevada
corporation; GEMSTONE DEVELOPMENT
WEST, INC., a Nevada corporation and;
DOES I through X; and ROE
CORPORATIONS I through X, inclusive,

Defendants in Intervention.

CASE NO.: 08-A571228
DEPT. NO.: XVI

CONSOLIDATED WITH CASES:

- 08-A571792
- 08-A574391
- 08-A577623
- 08-A580889
- 09-A583289
- 09-A584730
- 09-A587168
- 09-A589195

**GRANITE CONSTRUCTION
COMPANY'S STATEMENT OF FACTS
CONSTITUTING LIEN CLAIM AND
COMPLAINT IN INTERVENTION**

**(Exempt from Arbitration Pursuant to
NAR 3(A) - Mechanic's Lien Foreclosure)**

RECEIVED

JUL 22 2009

CLERK OF THE COURT

1 COMES NOW, GRANITE CONSTRUCTION COMPANY ("GRANITE"), a California
2 corporation, by and through its counsel, the law firm WATT, TIEDER, HOFFAR &
3 FITZGERALD, L.L.P., and for its Statement of Facts Constituting Lien and Complaint in
4 Intervention, complains and alleges as follows:

5 **GENERAL ALLEGATIONS**

6 1. GRANITE is a California corporation duly authorized and qualified to do business
7 in Clark County, Nevada.

8 2. Upon information and belief, Defendant/Defendant in Intervention GEMSTONE
9 DEVELOPMENT WEST, INC. ("GEMSTONE") is a Nevada corporation, and is the owner of
10 9205 W. Russell Road, Clark County, Nevada, described as Clark County Assessor's Number
11 163-32-101-019, further described as PT NE4 NW4 SEC 32 31 60, SEC 32 TWP 21 RNG 60,
12 and more fully described in that certain Grant Bargain Sale Deed recorded on February 7, 2008 in
13 Book 20080207 as Instrument No. 01481 of the Official Records of Clark County, which was
14 subsequently divided into Clark County Assessor's Numbers 163-32-101-020, 163-32-101-022,
15 163-32-101-023, 163-32-101-011, and 163-32-112-001 thru 163-32-112-246 (the "Property"),
16 and commonly known as the ManhattanWest mix-use development project (the "Project").

17 3. Upon information and belief, Plaintiff/Defendant in Intervention APCO
18 Construction ("APCO") is a Nevada corporation, and at all times relevant herein was duly
19 authorized and qualified to conduct business in Clark County, Nevada.

20 4. The true names and capacities, whether individual, corporate, associate, or
21 otherwise of Defendants In Intervention Does I through X, inclusive, and Roe Corporations I
22 through X, inclusive, are unknown to GRANITE who therefore sues those Defendants by such
23 fictitious names, but are believed to be agents, contractors, servants, employees, representatives,
24 affiliates, bond companies, successors or assigns of the other Defendants in Intervention named in
25 this Complaint in Intervention. Defendants in Intervention Does I through X, inclusive, Roe
26 Corporations I through X, inclusive, Plaintiff/Defendant in Intervention APCO, and
27 Defendant/Defendant in Intervention GEMSTONE will be collectively referred to herein as "All
28

1 Defendants in Intervention”.

2 5. GRANITE is informed and believes, and thereupon alleges that each of the
3 Defendants in Intervention Does I through X, inclusive, and Roe Corporations I through X,
4 inclusive is a party claiming an interest in the Property and/or is liability for GRANITE’s
5 accounts stated. GRANITE asks leave of this Court to amend this Complaint in Intervention and
6 insert the true names and capacities of said Does I through X and Roe Corporations I through X,
7 inclusive, when the same have been ascertained by GRANITE, together with the appropriate
8 charging allegations, and to join these Defendants in this action.

9 6. Upon information and belief, APCO and GEMSTONE entered into the
10 ManhattanWest General Construction Agreement for GMP, dated September 6, 2007 (the “Prime
11 Contract”).

12 7. Pursuant to the Prime Contract, APCO was to act as the general contractor for the
13 construction of the Project.

14 8. On or about June 13, 2007, APCO and GRANITE entered into a Subcontract
15 Agreement, whereby GRANITE would provide mass excavation services on the Project (the
16 “Subcontract”).

17 9. On or about September 11, 2008, APCO served a Notice of Termination of
18 Subcontract upon GRANITE.

19 10. On or about September 25, 2008, pursuant to Section 3.7 of the Subcontract,
20 GRANITE submitted its final invoice for payment and retention funds upon APCO.

21 11. GRANITE performed its work on the Project pursuant to the APCO Subcontract.

22 **FIRST CAUSE OF ACTION**

23 **(Breach of Contract against APCO, DOES and ROES)**

24 12. GRANITE repeats and realleges each and every allegation contained in paragraphs
25 1 through 11 of this Complaint in Intervention as though fully set forth herein.

26 13. GRANITE entered into the Subcontract with APCO wherein GRANITE agreed to
27 provide services and materials for and on behalf of APCO, and APCO agreed to pay GRANITE
28

1 for said services and materials.

2 14. Pursuant to, and in reliance upon, the aforementioned Subcontract, GRANITE
3 performed the work of providing services and materials (the "Work").

4 15. Despite APCO's representations that it would pay for the Work provided by
5 GRANITE, and despite demands upon it to pay the amount owed for the Work, APCO has failed
6 and refused, and continues to fail and refuse to pay GRANITE the sums due and owing
7 GRANITE.

8 16. APCO breached the terms of the Subcontract with GRANITE and there is now due
9 and owing to GRANITE an amount in excess of \$10,000.00, together with interest accruing
10 thereon, for which judgment should now be entered against APCO in favor of GRANITE.

11 17. GRANITE has been required to engage the services of an attorney to prosecute
12 this matter and is entitled to payment of attorneys' fees and costs.

13 **SECOND CAUSE OF ACTION**

14 **(Breach of the Implied Covenant of Good Faith and Fair Dealing against**
15 **APCO, DOES and ROES)**

16 18. GRANITE repeats and realleges each and every allegation contained in paragraphs
17 1 through 17 of this Complaint in Intervention as though fully set forth herein.

18 19. The Subcontract between APCO and GRANITE contained an implied covenant of
19 good faith and fair dealing.

20 20. APCO breached the covenant of good faith and fair dealing by refusing to pay
21 money owed to GRANITE for the Work. As a result of the breach, GRANITE has sustained
22 damages in an amount in excess of \$10,000.00.

23 21. GRANITE has been required to engage the services of an attorney to prosecute
24 this matter and is entitled to payment of attorneys' fees and costs.

25 ...
26
27
28

1 31. GRANITE is entitled to judgment against APCO in the amount of \$127,822.00,
2 together with interest thereon at the highest legal rate until paid in full.

3 32. GRANITE has been required to engage the services of an attorney to prosecute
4 this matter and is entitled to payment of attorneys' fees and costs.

5 **SIXTH CAUSE OF ACTION**

6 **(Quantum Meruit against All Defendants in Intervention, DOES and ROES)**

7 33. GRANITE repeats and realleges each and every allegation contained in paragraphs
8 1 through 32 of this Complaint in Intervention as though fully set forth herein.

9 34. GRANITE performed the Work.

10 35. APCO and GEMSTONE had knowledge that GRANITE was performing the
11 Work.

12 36. APCO and GEMSTONE accepted the benefits of the Work, materials and
13 improvements, and expressly and impliedly promised to pay GRANITE a reasonable
14 compensation therefore.

15 37. The Work has a reasonable value of \$127,822.00, but GRANITE has not been paid
16 this amount. As a result, GRANITE has sustained damages in the amount of \$127,822.00.

17 38. GRANITE has been required to engage the services of an attorney to prosecute
18 this matter and is entitled to payment of attorneys' fees and costs.

19 **SEVENTH CAUSE OF ACTION**

20 **(Account Stated against APCO, DOES and ROES)**

21 39. GRANITE repeats and realleges each and every allegation contained in paragraphs
22 1 through 38 of this Complaint in Intervention as though fully set forth herein.

23 40. There was, and has been, an account stated by APCO setting forth the sums due
24 and owing to GRANITE, which account as stated by APCO is the amount of \$127,822.00.

25 41. Despite GRANITE's demands for payment, and APCO's failure to dispute the
26 amounts owing, APCO has refused to pay the account as required under the Subcontract.

42. As a result of the foregoing, and in accordance with the principles of equity and common law, GRANITE is entitled to judgment in its favor, and against APCO in the amount of \$127,822.00, together with interest thereon at the highest legal rate.

43. GRANITE has been required to engage the services of an attorney to prosecute this matter and is entitled to payment of attorneys' fees and costs.

EIGHTH CAUSE OF ACTION

(Lien Foreclosure against GEMSTONE, DOES and ROES)

44. GRANITE repeats and realleges each and every allegation contained in paragraphs 1 through 42 of this Complaint in Intervention as though fully set forth herein.

45. GRANITE is a licensed contractor in the State of Nevada. GRANITE performed the Work at the request and special instance of APCO and GEMSTONE.

46. GRANITE demanded payment of all sums due and owing for the Work. However, GRANITE has not received payment for its work and materials and as a result, the amount of \$127,822.00 remains past due and owing.

47. On May 3, 2007, GRANITE sent GEMSTONE a Notice to Owner of Right to Lien.

48. December 10, 2008, GRANITE sent APCO and GEMSTONE a 15-Day Notice of Intent to Lien (“Notice of Intent to Lien”) and demanded payment.

49. Having received no response to the Notice of Intent to Lien, on February 3, 2009, GRANITE recorded a Notice of Lien in Book Number 2009 as Instrument Number 0037438 (the “Lien”).

50. GRANITE served the Lien via certified mail.

51. GRANITE is entitled to recover in this action the costs and fees incurred in preparing, recording, and serving its Notice of Intent to Lien and its Lien.

52. GRANITE's Lien is charged against the Property and has been properly perfected pursuant to NRS 108, et seq. GRANITE is therefore entitled to an Order from this Court directing that the Property be sold and foreclosed upon and that from the proceeds of the sale,

1 GRANITE be paid the principal sum of \$127,822.00, together with interest accrued thereon, plus
2 reimbursement of the costs of suit and attorneys fees that GRANITE has incurred and continues
3 to incur in connection with this action.

4 WHEREFORE, GRANITE prays as follows:

5 1. That this Court enter a Judgment in favor of GRANITE and against Defendants,
6 jointly and severally, in the amount of \$127,822.00, plus interest thereon at the highest legal rate
7 from the date the amount became due until paid;

8 2. That this Court enter judgment against Defendants, jointly and severally, for a
9 reasonably sum as and for the costs of preparing, verifying, serving, and filing of GRANITE's
10 Lien;

11 3. That the Lien be enforced according to law;

12 4. That the Court direct a foreclosure sale of the Property;

13 5. That the Property be sold and the proceeds be applied to the payment of sums
14 found due to GRANITE;

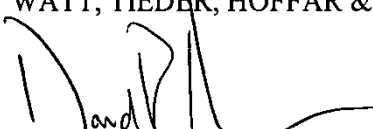
15 6. That the Court enter such deficiency judgment against Defendants, jointly and
16 severally, as may be proper in the premises;

17 7. That the Court enter judgment in favor of GRANITE and against Defendants,
18 jointly and severally, for reasonable attorney's fees and costs of suit incurred herein; and

19 8. For such other and further relief as this Court deems just and proper.

20 Dated: July 21, 2009

21 WATT, TIEDER, HOFFAR & FITZGERALD, L.L.P.

22 
23 DAVID R. JOHNSON

24 Nevada Bar No. 006696

25 JUSTIN L. WATKINS

26 Nevada Bar No. 009217

27 3993 Howard Hughes Parkway, Suite 400
28 Las Vegas, Nevada 89169

Attorneys for Intervenor/Lien Claimant
GRANITE CONSTRUCTION COMPANY

ORIGINAL

28

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8985 South Eastern Avenue, Ste. 160
Las Vegas, NV 89123
(702) 478-7770

1 **COMP**

2 MICHAEL C. VAN, ESQ.
3 Nevada Bar No. 3876
4 KEVIN R. HANSEN, ESQ.
5 Nevada Bar No. 6336
6 **SHUMWAY VAN & HANSEN**
7 8985 South Eastern Avenue, Ste. 160
8 Las Vegas, NV 89123
9 Tel (702) 478-7770
10 Fax (702) 478-7779
11 Attorney for Plaintiff
12 **HA FABRICATORS, INC.**

FILED

AUG 10 3 26 PM '09

Earl H. Smith
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

9 HA FABRICATORS, INC., a Utah
10 Corporation,

11 Plaintiff,

12 vs.

13 APCO CONSTRUCTION, a Nevada
14 Corporation, GEMSTONE APACHE, LLC, a
15 Nevada Limited Liability Company, DOES I
16 through X, inclusive and ROE
17 CORPORATIONS I through X, inclusive;

18 Defendants

Case No.: **A09596924-C**

Dept No.: **XX11**

Date: N/A

Time: N/A

Exempt from Arbitration
(Seeking Declaratory Relief)

A-09-596924-C
313256



19 COMES NOW, Plaintiff HA FABRICATORS, INC. a Nevada corporation
20 (hereinafter referred to as "Plaintiff"), by and through their counsel of record, MICHAEL
21 C. VAN, ESQ., of the law firm of SHUMWAY VAN & HANSEN, and complains and
22 avers of the Defendants as follows:
23

24 **PARTIES IN JURISDICTION**

25 1. At all times relevant to this action, HA FABRICATORS, INC. ("HA")
26 was a Nevada Corporation, doing business in Clark County, Nevada.
27
28

1 2. At all times relevant to this action, APCO CONSTRUCTION ("Apco"),
2 was a Nevada Corporation, doing business in Clark County, Nevada.

3 3. At all times relevant to this action, GEMSTONE APACHE, LLC
4 ("Gemstone"), was a Nevada Limited Liability Company, doing business in Clark
5 County, Nevada.
6

7 4. The Defendants DOES I through X, are set forth herein pursuant to Rule
8 10 of the Nevada Rules of Civil Procedure as all unknown persons or business entities
9 currently unknown to Plaintiff who have a claim to any interest in the subject matter of
10 this action, whose true name(s) is (are) unknown to Plaintiff, and who are believed to be
11 responsible for the events and happenings referred to in this Complaint, causing injuries
12 and damages to the Plaintiff, or who are otherwise interested in the subject matter of this
13 Complaint. At such time when the names of said DOES have been ascertained, Plaintiff
14 will request leave from the court to insert their true names and capacities and adjoin them
15 in this action so that the Complaint will be amended to include the appropriate names of
16 said DOES.
17

18 5. The Defendants ROES I through X, are set forth herein pursuant to Rule
19 10 of the Nevada Rules of Civil Procedure as all unknown persons or business entities
20 currently unknown to Plaintiff who have a claim to any interest in the subject matter of
21 this action, whose true name(s) is (are) unknown to Plaintiff, and who are believed to be
22 responsible for the events and happenings referred to in this Complaint, causing injuries
23 and damages to the Plaintiff, or who are otherwise interested in the subject matter of this
24 Complaint. At such time when the names of said ROES have been ascertained, Plaintiff
25 will request leave from the court to insert their true names and capacities and adjoin them
26
27
28

1 in this action so that the Complaint will be amended to include the appropriate names of
2 said ROES.

3 6. Jurisdiction is obtained and venue is properly set in the Eighth Judicial
4 District Court for the State of Nevada.
5

6 **GENERAL ALLEGATIONS**

7 7. Plaintiff repeats and realleges each and every allegation contained in the
8 preceding paragraphs 1 through 6, and incorporates the same as though set forth herein.
9

10 8. On or about May 25, 2007, Plaintiff entered into written subcontract
11 agreements with Apco wherein Plaintiff agreed to furnish labor and materials to Apco for
12 payment of the same for the project named Manhattan West Building #7 Assessors Parcel
13 Number 163-32-101-014.

14 9. Plaintiff has not received the monies owed to them per the contract with
15 Defendant Apco which, upon information and belief, was authorized, ratified, and agreed
16 to by Defendant Apco.
17

18 10. Due to the work performed by Plaintiff, Defendants Apco and Gemstone,
19 and each of them, have been unjustly enriched as no payment has been made for the
20 improvement of the property of which Defendant Gemstone was the owner at the time the
21 work was performed.
22

23 11. In addition to the amounts due and owing as of the date of the filing of this
24 Complaint, the Plaintiff reserves the right to amend this Complaint up to the time of trial
25 to include any additional amounts which are or may become due and which remain
26 unpaid as a result of additional damages caused by Plaintiff having to complete the work
27 under the Contract.
28

12. It has become necessary for the Plaintiff to retain the services of counsel to prosecute these claims and therefore Plaintiff is entitled to any and all costs incurred herein including, without limitation, any and all attorneys' fees.

FIRST CAUSE OF ACTION

Breach of Contract

As against Defendant Apco

13. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs 1 through 12, and incorporates the same as though set forth herein.

14. Plaintiff and Defendant Apco, or agents thereof, entered into valid contracts.

15. Defendant Apco, or agents thereof, agreed to pay Plaintiff for services rendered, pursuant to the terms set forth in the contracts.

16. Defendant Apco breached the contracts by failing to pay Plaintiff all monies owed to Plaintiff.

17. As a direct and proximate result of Defendant Apco's actions, Plaintiff has suffered damages in excess of ten thousand dollars (\$10,000.00).

18. As a result of Defendant Apco's actions, Plaintiff has retained an attorney and incurred attorney's fees and costs, and is entitled to recover any and all fees and costs associated therewith.

SECOND CAUSE OF ACTION

(Breach of Implied Covenant, Good Faith and Fair Dealing)

As against Defendant Apco

19. Plaintiff repeats and realleges each and every allegation contained in

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Las Vegas, NV 89123
(702) 478- 7770

1 Paragraphs 1 through 18, and incorporates the same as though fully set forth herein.

2 20. Plaintiff entered into a contractual relationship, where, by statute and in
3 every contract, under Nevada law, there contains an Implied Covenant of Good Faith and
4 Fair Dealing and the parties are required to act with good faith and fair dealing.
5

6 21. Defendant Apco or agents thereof, agreed to pay Plaintiff for services
7 rendered, pursuant to the terms set forth in the contracts.

8 22. Plaintiff is informed and believes and thereupon alleges that Defendant
9 Apco breached the Implied Covenant of Good Faith and Fair Dealing by failing to pay
10 Plaintiff all monies owed to Plaintiff.
11

12 23. As a direct and proximate result of Defendant's actions, Plaintiff has
13 suffered damages in excess of ten thousand dollars (\$10,000.00) but which amount will
14 be determined at the time of trial.

15 24. It has become necessary for Plaintiff to retain the services of an attorney to
16 prosecute this action and is entitled to recovery any and all costs expended included,
17 without limitation, any and all attorneys fees and interest thereon.
18

19 **THIRD CAUSE OF ACTION**

20 **(Unjust Enrichment)**

21 **As against both Apco and Gemstone**

22 25. Plaintiff repeats and realleges Paragraphs 1 through 24 and by this
23 reference incorporates the same as though fully set forth herein.
24

25 26. Plaintiff provided and performed work, and the work was used for the
26 benefit of Defendants.
27
28

1 27. Allowing Defendants to benefit from the work provided and performed
2 without making payment for the same would unjustly enrich Defendants to the detriment
3 of Plaintiff in an amount in excess of ten thousand dollars (\$10,000.00).
4

5 28. It has become necessary for Plaintiff to retain the services of counsel to
6 prosecute these claims and they are entitled to any and all costs incurred herein including,
7 without limitation, any and all attorneys fees.
8

9 **FOURTH CAUSE OF ACTION**

10 **Constructive Trust**

11 **Plaintiff v Apco and Gemstone**

12 29. Plaintiff repeats and realleges each and every allegation contained in
13 Paragraphs 1 through 28, and incorporates the same as though fully set forth herein.
14

15 30. Plaintiff provided and performed work, and the work was used for the
16 benefit of Defendants.
17

18 31. Defendants received the benefit of the work provided by Plaintiff, and
19 have not provided compensation for this benefit.
20

21 32. Any funds owned or in the possession of Defendants prior to the payment
22 of Plaintiff should be placed in a Constructive Trust for the repayment of Plaintiff for
23 work provided and performed by Plaintiff to Defendants and for which Defendants
24 derived a benefit.

25 33. Defendants have benefitted from their actions to the detriment of Plaintiff
26 and as a result, the outstanding balance of the funds owed or possessed by Defendants is
27 subject to a Constructive Trust for the payment for the work received by Defendants from
28

1 Plaintiff. To date, payments on the outstanding balance owed by Defendants to Plaintiff
2 have not been paid and Defendants have failed and refused to make said payment.

3 34. Upon information and belief, by reason of the wrongful manner in which
4 the Defendants, and each of them, obtained their alleged right, claim or interest in and to
5 the property, Defendants, and each of them, have no legal or equitable right, claim or
6 interest therein, but instead Defendants, and each of them, are involuntary trustees
7 holding said property and profits therefrom in constructive trust for Plaintiff with the duty
8 to convey the same to Plaintiff.
9

10 35. As a result of Defendants actions, Plaintiff has retained an attorney and
11 incurred attorney's fees and costs and is entitled to recover any and all fees and costs
12 associated therewith.
13

14 **FIFTH CLAIM FOR RELIEF**

15 **Services Performed, Account Stated, Open Book**

16 **As To Defendant Apco**

17 36. Plaintiff repeats and realleges each and every allegation contained in
18 Paragraphs 1 through 35, and incorporates the same as though fully set forth herein.
19

20 37. Within the last two years, Defendant Apco has become indebted to
21 Plaintiff in the amount of \$39,455.27 for certain labor and materials furnished by Plaintiff
22 to Defendant Apco.
23

24 38. Within the last two years, an account was stated in writing by and between
25 Plaintiff and Defendant Apco wherein it was agreed that Defendant was indebted to
26 Plaintiff for the amount of \$39,455.27.
27
28

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Las Vegas, NV 89123
(702) 478-7770

1 39. Within the last two years, Defendant Apco became indebted to Plaintiff on
2 an open book account in the amount of \$39,455.27 for certain labor and materials
3 furnished by Plaintiff to Defendant Apco at the special instance and request of Defendant
4 Apco, and which Defendant Apco agreed to pay Plaintiff.
5

6 40. Notwithstanding Plaintiff's demands, no part of the above sum has been
7 paid, and is now due owing, and unpaid from Defendant Apco.
8

9 41. As a result of Defendant Apco's actions, Plaintiff has retained an attorney
10 and incurred attorney's fees and costs.
11

12 SIXTH CAUSE OF ACTION

13 (Declaratory Relief)

14 42. Plaintiff repeats and realleges each and every allegation contained in
15 Paragraphs 1 through 41, and incorporates the same as though fully set forth herein.
16

17 43. By the Defendants' actions as enumerated herein, it is apparent that
18 Defendants are contesting the validity of the contract between the parties.
19

20 44. Pursuant to NRS 30.040 Plaintiff is entitled to declaratory relief as to the
21 validity of the contract in question and a declaration that the contract is enforceable as is
22 herein requested as to the payment of money owed to Plaintiff.
23

24 45. As a result of the actions of the Defendants, it has become necessary for
25 Plaintiff to retain the services of an attorney to prosecute the claims herein and Plaintiff is
26 entitled to any and all expenses incurred including without limitation all attorneys fees
27 and interest thereon.
28

///

///


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Las Vegas, NV 89123
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1 WHEREFORE, Plaintiff prays for relief as follows:

- 2 1. For damages for breach of contract against Defendants in an amount in excess of
3 \$10,000.00;
4
5 2. For pre-judgment and post judgment interest as provided in the Contract;
6
7 3. For reasonable attorney's fees;
8
9 4. For costs of suit;
10
11 5. For declaratory relief as herein requested; and
12
13 6. For such other and further relief as this court may deem just and proper.

14 Dated this 6 day of August, 2009

SHUMWAY VAN & HANSEN.


MICHAEL C. VAN, ESQ.
Nevada Bar No. 3876
8985 South Eastern Avenue, Ste. 160.
Las Vegas NV 89123
Attorney for Plaintiff
HA FABRICATORS, INC.

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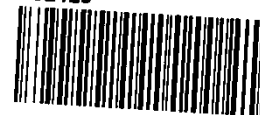
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E. T. ...
CLERK OF THE COURT

D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 004904
MARTIN A. MUCKLEROY, ESQ.
Nevada Bar No. 009634
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calbright@albrightstoddard.com

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MARTIN A. ARONSON, ESQ.
Arizona Bar No. 009005
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Arizona Bar No. 018099
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Phoenix, Arizona 85012
(602) 263-8993

08A571228
332129



Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

A571228

APCO CONSTRUCTION, a Nevada corporation)

Case No. 09-A-571228
Department No. 13

Plaintiff,

v.

CONSOLIDATED CASES: A571792;
A574391; A574792; A577623; A580889;
A583289; A584730; A587168; and
A589195

GEMSTONE DEVELOPMENT WEST, INC., a
Nevada corporation; NEVADA
CONSTRUCTION SERVICES, a Nevada
corporation; SCOTT FINANCIAL
CORPORATION, a North Dakota corporation;
COMMONWEALTH LAND TITLE
INSURANCE COMPANY; FIRST AMERICAN
TITLE INSURANCE COMPANY and DOES I
through X,

**CLUB VISTA FINANCIAL
SERVICES, L.L.C. AND
THARALDSON MOTELS II, INC.'S
ANSWER TO CAMCO PACIFIC
CONSTRUCTION COMPANY,
INC.'S STATEMENT OF FACTS
AND COMPLAINT IN
INTERVENTION AND
COUNTERCLAIM**

Defendants.

ASWA

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

CLERK OF THE COURT

AUG 18 2009

RECEIVED

1 CAMCO PACIFIC CONSTRUCTION)
2 COMPANY, INC., a California corporation,)
3 Lien Claimant/)
4 Plaintiff in Intervention,)
5 vs.)
6 GEMSTONE DEVELOPMENT WEST, INC., a)
7 Nevada corporation; ALEX EDELSTEIN,)
8 individually, and NEVADA CONSTRUCTION)
9 SERVICES, a Nevada corporation; SCOTT)
10 FINANCIAL CORPORATION, a North Dakota)
11 corporation; COMMONWEALTH LAND)
12 TITLE INSURANCE COMPANY; FIRST)
13 AMERICAN TITLE INSURANCE)
14 COMPANY; CLUB VISTA FINANCIAL)
15 SERVICES, L.L.C., a Nevada limited liability)
16 company; THARALDSON MOTELS II, INC., a)
17 North Dakota corporation; DOE LENDERS I)
18 through XX, and DOES I through XXX,)
19 inclusive,)
20 Defendants.)
21 CLUB VISTA FINANCIAL SERVICES,)
22 L.L.C., a Nevada limited liability company; and)
23 THARALDSON MOTELS II, INC., a North)
24 Dakota corporation; and GARY D)
25 THARALDSON,)
26 Counterclaimants,)
27 ASPHALT PRODUCTS CORPORATION)
28 d/b/a APCO CONSTRUCTION, a Nevada)
corporation; GEMSTONE DEVELOPMENT)
WEST, INC., a Nevada corporation; SCOTT)
FINANCIAL CORPORATION, a North Dakota)
corporation; BRADLEY J. SCOTT; BANK OF)
OKLAHOMA, N.A., a national bank;)
NEVADA CONSTRUCTION SERVICES, a)
Nevada corporation; CAMCO PACIFIC)
CONSTRUCTION, INC., a California)
corporation; INSULPRO PROJECTS INC., a)
Nevada corporation; CABINETEC INC., a)
Nevada corporation; EZA, P.C. d/b/a OZ)
ARCHITECTURE OF NEVADA INC., a)
Nevada corporation; HYDROPRESSURE)
CLEANING, INC, a California corporation;)
AHERN RENTALS INC., a Nevada)
corporation; ARCH ALUMINUM AND)
GLASS CO., a Florida corporation; CELL-)
CRETE FIREPROOFING)

ASWA

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

1 OF NEVADA INC., a Nevada corporation;)
DAVE PETERSON FRAMING INC., a Nevada)
2 corporation; E & E FIRE PROTECTION LLC,)
a Nevada corporation; GRANITE)
3 CONSTRUCTION COMPANY, a California)
corporation; HARSCO CORPORATION, a)
4 Nevada corporation; INQUIPCO, a Nevada)
corporation; NEVADA PREFAB ENGINEERS)
5 INC., a Nevada corporation; NOORDA SHEET)
METAL COMPANY, a Nevada corporation;)
6 PATENT CONSTRUCTION SYSTEMS, a)
division of HARSCO CORPORATION, a)
7 foreign corporation; THE PRESSURE GROUT)
COMPANY, a California corporation;)
8 PROFESSIONAL DOOR AND MILLWORKS,)
LLC, a Nevada limited liability company;)
9 STEEL STRUCTURES INC., a Nevada)
corporation; TRI-CITY DRYWALL INC., a)
10 Nevada corporation; ACCURACY GLASS &)
MIRROR COMPANY, INC., a Nevada)
11 corporation; CONCRETE VISIONS INC.; LAS)
VEGAS PIPELINE LLC, a Nevada limited)
12 liability company; ATLAS CONSTRUCTION)
SUPPLY INC., a corporation; FERGUSON)
13 FIRE AND FABRICATION INC., a Nevada)
corporation; JOHN DEERE LANDSCAPE,)
14 INC., a corporation; CREATIVE HOME)
THEATRE, LLC, a Nevada limited liability)
15 company; EXECUTIVE PLASTERING INC., a)
Nevada corporation; REPUBLIC CRANE)
16 SERVICE LLC, a Nevada limited liability)
company; SELECTBUILD NEVADA INC., a)
17 Nevada corporation; UINTAH INVESTMENTS)
LLC, a Nevada limited liability company; FAST)
18 GLASS, INC, a Nevada corporation;)
MASONRY GROUP NEVADA INC, a Nevada)
19 corporation; READY MIX, INC., a Nevada)
corporation; ZITTING BROTHERS)
20 CONSTRUCTION, Inc., a Utah corporation;)
SUPPLY NETWORK INC., a Michigan)
21 corporation d/b/a VIKING SUPPLYNET;)
HELIX ELECTRIC OF NEVADA LLC, a)
22 Nevada limited liability company d/b/a Helix)
Electric; HD SUPPLY WATERWORKS LP, a)
23 Florida limited partnership; HEINAMAN)
CONTRACT GLAZING, a California)
24 corporation; WRG DESIGN, INC., a Delaware)
corporation; PAPE MATERIALS HANDLING)
25 d/b/a PAPE RENTS, a company; BUCHELE,)
INC., a Nevada corporation; RENAISSANCE)
26 POOLS & SPAS, INC., a Nevada corporation;)
NORTHSTAR CONCRETE, INC., a Nevada)
27)
28)

1 corporation; BRUIN PAINTING)
2 CORPORATION, a California corporation;)
3 DOE INDIVIDUALS 1-100; and ROE)
4 BUSINESS ENTITIES 1-100.)
Counterdefendants.)

5 Defendants Club Vista Financial Services, LLC and Tharaldson Motels II, Inc., (collectively
6 “Tharaldson Defendants”) for their Answer to Camco Pacific Construction Company, Inc.’s Statement
7 of Facts and Complaint in Intervention (“Complaint”) hereby admit, deny and aver as follows:

8 **STATEMENT OF FACTS**

- 9 (a) Answering Paragraph 1 of the Complaint, the Tharaldson Defendants state that they
10 lack sufficient knowledge and information to form a belief as to the truth of these
11 allegations and therefore deny the same.
- 12 (b) Answering Paragraph 2 of the Complaint, the Tharaldson Defendants admit that APCO
13 Construction was a General Contractor on the Project commonly known as “Manhattan
14 West”. The Tharaldson Defendants lack knowledge and information sufficient to form
15 a belief as to the truth of the remaining allegations and therefore deny the same.
- 16 (c) Answering Paragraph 3 of the Complaint, the Tharaldson Defendants state that they
17 lack sufficient knowledge and information to form a belief as to the truth of these
18 allegations and therefore deny the same.
- 19 (d) Answering Paragraph 4 of the Complaint, the Tharaldson Defendants state that they
20 lack sufficient knowledge and information to form a belief as to the truth of these
21 allegations and therefore deny the same.
- 22 (e) Answering Paragraph 5 of the Complaint, the Tharaldson Defendants state that they
23 lack sufficient knowledge and information to form a belief as to the truth of these
24 allegations and therefore deny the same.
- 25 (f) Answering Paragraph 6 of the Complaint, the Tharaldson Defendants state that they
26 lack sufficient knowledge and information to form a belief as to the truth of these
27 allegations and therefore deny the same.
- 28 (g) Answering Paragraph 7 of the Complaint, the Tharaldson Defendants state that they

- 1 lack sufficient knowledge and information to form a belief as to the truth of these
2 allegations and therefore deny the same.
- 3 (h) Answering Paragraph 8 of the Complaint, the Tharaldson Defendants state that they
4 lack sufficient knowledge and information to form a belief as to the truth of these
5 allegations and therefore deny the same.
- 6 (i) Answering Paragraph 9 of the Complaint, the Tharaldson Defendants state that they
7 lack sufficient knowledge and information to form a belief as to the truth of these
8 allegations and therefore deny the same.
- 9 (j) Answering Paragraph 10 of the Complaint, the Tharaldson Defendants state that they
10 lack sufficient knowledge and information to form a belief as to the truth of these
11 allegations and therefore deny the same.
- 12 (k) Answering Paragraph 11 of the Complaint, the Tharaldson Defendants state that they
13 lack sufficient knowledge and information to form a belief as to the truth of these
14 allegations and therefore deny the same.
- 15 (l) Answering Paragraph 12 of the Complaint, the Tharaldson Defendants state that they
16 lack sufficient knowledge and information to form a belief as to the truth of these
17 allegations and therefore deny the same.
- 18 (m) Answering Paragraph 13 of the Complaint, the Tharaldson Defendants state that they
19 lack sufficient knowledge and information to form a belief as to the truth of these
20 allegations and therefore deny the same.
- 21 (n) Answering Paragraph 14 of the Complaint, the Tharaldson Defendants state that they
22 lack sufficient knowledge and information to form a belief as to the truth of these
23 allegations and therefore deny the same.
- 24 (o) Answering Paragraph 15 of the Complaint, the Tharaldson Defendants state that they
25 lack sufficient knowledge and information to form a belief as to the truth of these
26 allegations and therefore deny the same.
- 27 (p) Answering Paragraph 16 of the Complaint, the Tharaldson Defendants can neither
28 admit or deny such allegations as no allegations are made against them. In the event

1 the allegations could be construed to have been made against the Tharaldson
2 Defendants, the Tharaldson Defendants deny the allegations. To the extent said
3 allegations relate to parties other than the Tharaldson Defendants, the Tharaldson
4 Defendants state that they lack sufficient knowledge and information to form a belief
5 as to the truth of these allegations and therefore deny the same.

6 (q) Answering Paragraph 17 of the Complaint, the Tharaldson Defendants can neither
7 admit or deny such allegations as no allegations are made against them. In the event
8 the allegations could be construed to have been made against the Tharaldson
9 Defendants, the Tharaldson Defendants deny the allegations. To the extent said
10 allegations relate to parties other than the Tharaldson Defendants, the Tharaldson
11 Defendants state that they lack sufficient knowledge and information to form a belief
12 as to the truth of these allegations and therefore deny the same.

13 (r) Answering Paragraph 18 of the Complaint, the Tharaldson Defendants can neither
14 admit or deny such allegations as no allegations are made against them. In the event
15 the allegations could be construed to have been made against the Tharaldson
16 Defendants, the Tharaldson Defendants deny the allegations. To the extent said
17 allegations relate to parties other than the Tharaldson Defendants, the Tharaldson
18 Defendants state that they lack sufficient knowledge and information to form a belief
19 as to the truth of these allegations and therefore deny the same.

20 (s) Answering Paragraph 19 of the Complaint, the Tharaldson Defendants can neither
21 admit or deny such allegations as no allegations are made against them. In the event
22 the allegations could be construed to have been made against the Tharaldson
23 Defendants, the Tharaldson Defendants deny the allegations. To the extent said
24 allegations relate to parties other than the Tharaldson Defendants, the Tharaldson
25 Defendants state that they lack sufficient knowledge and information to form a belief
26 as to the truth of these allegations and therefore deny the same.

27 (t) Answering Paragraph 20 of the Complaint, the Tharaldson Defendants can neither
28 admit or deny such allegations as no allegations are made against them. In the event

1 the allegations could be construed to have been made against the Tharaldson
2 Defendants, the Tharaldson Defendants deny the allegations. To the extent said
3 allegations relate to parties other than the Tharaldson Defendants, the Tharaldson
4 Defendants state that they lack sufficient knowledge and information to form a belief
5 as to the truth of these allegations and therefore deny the same.

6 (u) Answering Paragraph 21 of the Complaint, the Tharaldson Defendants can neither
7 admit or deny such allegations as no allegations are made against them. In the event
8 the allegations could be construed to have been made against the Tharaldson
9 Defendants, the Tharaldson Defendants deny the allegations. To the extent said
10 allegations relate to parties other than the Tharaldson Defendants, the Tharaldson
11 Defendants state that they lack sufficient knowledge and information to form a belief
12 as to the truth of these allegations and therefore deny the same.

13 (v) Answering Paragraph 22 of the Complaint, the Tharaldson Defendants can neither
14 admit or deny such allegations as no allegations are made against them. In the event
15 the allegations could be construed to have been made against the Tharaldson
16 Defendants, the Tharaldson Defendants deny the allegations. To the extent said
17 allegations relate to parties other than the Tharaldson Defendants, the Tharaldson
18 Defendants state that they lack sufficient knowledge and information to form a belief
19 as to the truth of these allegations and therefore deny the same.

20 **JURISDICTIONAL ALLEGATIONS¹**

21 (a) Answering Paragraph 1 of the Complaint, the Tharaldson Defendants admit Camco is
22 a California corporation doing business in Clark County, Nevada. However, they lack
23 sufficient knowledge and information to form a belief as to the truth of the remaining
24 allegations and therefore deny the same.

25 (b) Answering Paragraph 2 of the Complaint, the Tharaldson Defendants admit the

26
27

Plaintiff began the Jurisdiction Allegations Section with Paragraph numbers that were
28 previously used in the Complaint. Thus, the Tharaldson Defendants have used the numbering
scheme used by Plaintiff in the Complaint.

- (c) Answering Paragraph 3 of the Complaint, the Tharaldson Defendants admit the allegations contained therein.
- (d) Answering Paragraph 4 of the Complaint, the Tharaldson Defendants admit that Nevada Construction Services is a Nevada corporation. However, they lack sufficient knowledge or information to form a belief as to the truth of the remaining allegations and therefore deny the same.
- (e) Answering Paragraph 5 of the Complaint, the Tharaldson Defendants admit that they provided acquisition and construction financing for the project commonly referred to as "Manhattan West." The Tharaldson Defendants further admit that Scott Financial Corporation arranged financing for the project. Defendants lack sufficient knowledge or information to form a belief as to the truth of the remaining allegations and therefore deny the same.
- (f) Answering Paragraph 6 of the Complaint, the Tharaldson Defendants can neither admit or deny such allegations as no allegations are made against them. In the event the allegations could be construed to have been made against the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the extent said allegations relate to parties other than the Tharaldson Defendants, the Tharaldson Defendants state that they lack sufficient knowledge and information to form a belief as to the truth of these allegations and therefore deny the same.

(Breach of Contract)

(g) Answering Paragraph 7 of the Complaint, the Tharaldson Defendants repeat and reallege the answers contained in the preceding paragraphs as if fully set forth herein.

(h) Answering Paragraph 8 of the Complaint, the Tharaldson Defendants can neither admit or deny such allegations as no allegations are made against the Tharaldson Defendants. In the event the allegations could be construed to have been made against the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the extent

1 said allegations relate to parties other than the Tharaldson Defendants, the Tharaldson
2 Defendants are without knowledge or information sufficient to form a belief as to the
3 truth of the allegations and therefore deny the same.

4 (i) Answering Paragraph 9 of the Complaint, the Tharaldson Defendants can neither
5 admit or deny such allegations as no allegations are made against the Tharaldson
6 Defendants. In the event the allegations could be construed to have been made against
7 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
8 extent said allegations relate to parties other than the Tharaldson Defendants, the
9 Tharaldson Defendants are without knowledge or information sufficient to form a
10 belief as to the truth of the allegations and therefore deny the same.

11 (j) Answering Paragraph 10 of the Complaint, the Tharaldson Defendants can neither
12 admit or deny such allegations as no allegations are made against the Tharaldson
13 Defendants. In the event the allegations could be construed to have been made against
14 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
15 extent said allegations relate to parties other than the Tharaldson Defendants, the
16 Tharaldson Defendants are without knowledge or information sufficient to form a
17 belief as to the truth of the allegations and therefore deny the same.

18 (k) Answering Paragraph 11 of the Complaint, the Tharaldson Defendants can neither
19 admit or deny such allegations as no allegations are made against the Tharaldson
20 Defendants. In the event the allegations could be construed to have been made against
21 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
22 extent said allegations relate to parties other than the Tharaldson Defendants, the
23 Tharaldson Defendants are without knowledge or information sufficient to form a
24 belief as to the truth of the allegations and therefore deny the same.

25 (l) Answering Paragraph 12 of the Complaint, the Tharaldson Defendants can neither
26 admit or deny such allegations as no allegations are made against the Tharaldson
27 Defendants. In the event the allegations could be construed to have been made against
28 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the

1 extent said allegations relate to parties other than the Tharaldson Defendants, the
2 Tharaldson Defendants are without knowledge or information sufficient to form a
3 belief as to the truth of the allegations and therefore deny the same.

4 (m) Answering Paragraph 13 of the Complaint, the Tharaldson Defendants can neither
5 admit or deny such allegations as no allegations are made against the Tharaldson
6 Defendants. In the event the allegations could be construed to have been made against
7 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
8 extent said allegations relate to parties other than the Tharaldson Defendants, the
9 Tharaldson Defendants are without knowledge or information sufficient to form a
10 belief as to the truth of the allegations and therefore deny the same.

11 (n) Answering Paragraph 14 of the Complaint, the Tharaldson Defendants can neither
12 admit or deny such allegations as no allegations are made against the Tharaldson
13 Defendants. In the event the allegations could be construed to have been made against
14 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
15 extent said allegations relate to parties other than the Tharaldson Defendants, the
16 Tharaldson Defendants are without knowledge or information sufficient to form a
17 belief as to the truth of the allegations and therefore deny the same.

18 SECOND CAUSE OF ACTION

19 **(Alter Ego against Alexander Edelstein)**

20 (o) Answering Paragraph 15 of the Complaint, the Tharaldson Defendants repeat and
21 reallege the answers contained in the preceding paragraphs as if fully set forth herein.

22 (p) Answering Paragraph 16 of the Complaint, the Tharaldson Defendants can neither
23 admit or deny such allegations as no allegations are made against the Tharaldson
24 Defendants. In the event the allegations could be construed to have been made against
25 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
26 extent said allegations relate to parties other than the Tharaldson Defendants, the
27 Tharaldson Defendants are without knowledge or information sufficient to form a
28 belief as to the truth of the allegations and therefore deny the same.

- 1 (q) Answering Paragraph 17 of the Complaint, the Tharaldson Defendants can neither
2 admit or deny such allegations as no allegations are made against the Tharaldson
3 Defendants. In the event the allegations could be construed to have been made against
4 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
5 extent said allegations relate to parties other than the Tharaldson Defendants, the
6 Tharaldson Defendants are without knowledge or information sufficient to form a
7 belief as to the truth of the allegations and therefore deny the same.
- 8 (r) Answering Paragraph 18 of the Complaint, the Tharaldson Defendants can neither
9 admit or deny such allegations as no allegations are made against the Tharaldson
10 Defendants. In the event the allegations could be construed to have been made against
11 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
12 extent said allegations relate to parties other than the Tharaldson Defendants, the
13 Tharaldson Defendants are without knowledge or information sufficient to form a
14 belief as to the truth of the allegations and therefore deny the same.
- 15 (s) Answering Paragraph 19 of the Complaint, the Tharaldson Defendants can neither
16 admit or deny such allegations as no allegations are made against the Tharaldson
17 Defendants. In the event the allegations could be construed to have been made against
18 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
19 extent said allegations relate to parties other than the Tharaldson Defendants, the
20 Tharaldson Defendants are without knowledge or information sufficient to form a
21 belief as to the truth of the allegations and therefore deny the same.
- 22 (t) Answering Paragraph 20 of the Complaint, the Tharaldson Defendants can neither
23 admit or deny such allegations as no allegations are made against the Tharaldson
24 Defendants. In the event the allegations could be construed to have been made against
25 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
26 extent said allegations relate to parties other than the Tharaldson Defendants, the
27 Tharaldson Defendants are without knowledge or information sufficient to form a
28 belief as to the truth of the allegations and therefore deny the same.

THIRD CAUSE OF ACTION

(Foreclosure of Mechanic's Lien against the Property)

- (u) Answering Paragraph 21 of the Complaint, the Tharaldson Defendants repeat and reallege the answers contained in the preceding paragraphs as if fully set forth herein.
- (v) Answering Paragraph 22 of the Complaint, the Tharaldson Defendants state that they lack sufficient knowledge and information to form a belief as to the truth of these allegations and therefore deny the same. The Tharaldson Defendants affirmatively aver that they have a prior and superior interest in the Property to any interest claimed by Plaintiff and foreclosure of Plaintiff's lien is subject to the Tharaldson Defendants' superior claim.
- (w) Answering Paragraph 23 of the Complaint, the Tharaldson Defendants state that they lack sufficient knowledge and information to form a belief as to the truth of these allegations and therefore deny the same. The Tharaldson Defendants affirmatively aver that they have a prior and superior interest in the Property to any interest claimed by Plaintiff and foreclosure of Plaintiff's lien is subject to the Tharaldson Defendants' superior claim.
- (x) Answering Paragraph 24 of the Complaint, the Tharaldson Defendants state that they lack sufficient knowledge and information to form a belief as to the truth of these allegations and therefore deny the same. The Tharaldson Defendants affirmatively aver that they have a prior and superior interest in the Property to any interest claimed by Plaintiff and foreclosure of Plaintiff's lien is subject to the Tharaldson Defendants' superior claim.
- (y) Answering Paragraph 25 of the Complaint, the Tharaldson Defendants state that they lack sufficient knowledge and information to form a belief as to the truth of these allegations and therefore deny the same. The Tharaldson Defendants affirmatively aver that they have a prior and superior interest in the Property to any interest claimed by Plaintiff and foreclosure of Plaintiff's lien is subject to the Tharaldson Defendants' superior claim.

- 1 (z) Answering Paragraph 26 of the Complaint, the Tharaldson Defendants state the alleged
2 copy of the mechanic's lien speaks for itself. The Tharaldson Defendants affirmatively
3 aver that they have a prior and superior interest in the Property to any interest claimed
4 by Plaintiff and foreclosure of Plaintiff's lien is subject to the Tharaldson Defendants'
5 superior claim.
- 6 (aa) Answering Paragraph 27 of the Complaint, the Tharaldson Defendants state that they
7 lack sufficient knowledge and information to form a belief as to the truth of these
8 allegations and therefore deny the same. The Tharaldson Defendants affirmatively aver
9 that they have a prior and superior interest in the Property to any interest claimed by
10 Plaintiff and foreclosure of Plaintiff's lien is subject to the Tharaldson Defendants'
11 superior claim.
- 12 (bb) Answering Paragraph 28 of the Complaint, the Tharaldson Defendants state that they
13 lack sufficient knowledge and information to form a belief as to the truth of these
14 allegations and therefore deny the same. The Tharaldson Defendants affirmatively aver
15 that they have a prior and superior interest in the Property to any interest claimed by
16 Plaintiff and foreclosure of Plaintiff's lien is subject to the Tharaldson Defendants'
17 superior claim.
- 18 (cc) Answering Paragraph 29 of the Complaint, the Tharaldson Defendants can neither
19 admit or deny such allegations as no allegations are made against the Tharaldson
20 Defendants. In the event the allegations could be construed to have been made against
21 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. The
22 Tharaldson Defendants affirmatively aver that they have a prior and superior interest
23 in the Property to any interest claimed by Plaintiff and foreclosure of Plaintiff's lien is
24 subject to the Tharaldson Defendants' superior claim.
- 25 (dd) Answering Paragraph 30 of the Complaint, the Tharaldson Defendants can neither
26 admit or deny such allegations as no allegations are made against the Tharaldson
27 Defendants. In the event the allegations could be construed to have been made against
28 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. The

1 Tharaldson Defendants affirmatively aver that they have a prior and superior interest
2 in the Property to any interest claimed by Plaintiff and foreclosure of Plaintiff's lien is
3 subject to the Tharaldson Defendants' superior claim.

4 **FOURTH CAUSE OF ACTION**

5 **(Breach of Covenant of Good Faith & Fair Dealing)**

- 6 (ec) Answering Paragraph 31 of the Complaint, the Tharaldson Defendants repeat and
7 reallege the answers contained in the preceding paragraphs as if fully set forth herein.
- 8 (ff) Answering Paragraph 32 of the Complaint, the Tharaldson Defendants can neither
9 admit or deny such allegations as no allegations are made against the Tharaldson
10 Defendants. In the event the allegations could be construed to have been made against
11 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
12 extent said allegations relate to parties other than the Tharaldson Defendants, the
13 Tharaldson Defendants are without knowledge or information sufficient to form a
14 belief as to the truth of the allegations and therefore deny the same.
- 15 (gg) Answering Paragraph 33 of the Complaint, the Tharaldson Defendants can neither
16 admit or deny such allegations as no allegations are made against the Tharaldson
17 Defendants. In the event the allegations could be construed to have been made against
18 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
19 extent said allegations relate to parties other than the Tharaldson Defendants, the
20 Tharaldson Defendants are without knowledge or information sufficient to form a
21 belief as to the truth of the allegations and therefore deny the same.
- 22 (hh) Answering Paragraph 34 of the Complaint, the Tharaldson Defendants can neither
23 admit or deny such allegations as no allegations are made against the Tharaldson
24 Defendants. In the event the allegations could be construed to have been made against
25 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
26 extent said allegations relate to parties other than the Tharaldson Defendants, the
27 Tharaldson Defendants are without knowledge or information sufficient to form a
28 belief as to the truth of the allegations and therefore deny the same.

1 (ii) Answering Paragraph 35 of the Complaint, the Tharaldson Defendants can neither
2 admit or deny such allegations as no allegations are made against the Tharaldson
3 Defendants. In the event the allegations could be construed to have been made against
4 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
5 extent said allegations relate to parties other than the Tharaldson Defendants, the
6 Tharaldson Defendants are without knowledge or information sufficient to form a
7 belief as to the truth of the allegations and therefore deny the same.

8 (jj) Answering Paragraph 36 of the Complaint, the Tharaldson Defendants can neither
9 admit or deny such allegations as no allegations are made against the Tharaldson
10 Defendants. In the event the allegations could be construed to have been made against
11 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
12 extent said allegations relate to parties other than the Tharaldson Defendants, the
13 Tharaldson Defendants are without knowledge or information sufficient to form a
14 belief as to the truth of the allegations and therefore deny the same.

15 **FIFTH CAUSE OF ACTION**

16 **(Contractual Indemnity)**

17 (kk) Answering Paragraph 37 of the Complaint, the Tharaldson Defendants repeat and
18 reallege the answers contained in the preceding paragraphs as if fully set forth herein.

19 (ll) Answering Paragraph 38 of the Complaint, the Tharaldson Defendants can neither
20 admit or deny such allegations as no allegations are made against the Tharaldson
21 Defendants. In the event the allegations could be construed to have been made against
22 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
23 extent said allegations relate to parties other than the Tharaldson Defendants, the
24 Tharaldson Defendants are without knowledge or information sufficient to form a
25 belief as to the truth of the allegations and therefore deny the same.

26 (mm) Answering Paragraph 39 of the Complaint, the Tharaldson Defendants can neither
27 admit or deny such allegations as no allegations are made against the Tharaldson
28 Defendants. In the event the allegations could be construed to have been made against

1 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
2 extent said allegations relate to parties other than the Tharaldson Defendants, the
3 Tharaldson Defendants are without knowledge or information sufficient to form a
4 belief as to the truth of the allegations and therefore deny the same.

5 (nn) Answering Paragraph 40 of the Complaint, the Tharaldson Defendants can neither
6 admit or deny such allegations as no allegations are made against the Tharaldson
7 Defendants. In the event the allegations could be construed to have been made against
8 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
9 extent said allegations relate to parties other than the Tharaldson Defendants, the
10 Tharaldson Defendants are without knowledge or information sufficient to form a
11 belief as to the truth of the allegations and therefore deny the same.

12 **SIXTH CAUSE OF ACTION**

13 **(Fraud Against Gemstone and Edelstein)**

14 (oo) Answering Paragraph 41 of the Complaint, the Tharaldson Defendants repeat and
15 reallege the answers contained in the preceding paragraphs as if fully set forth herein.

16 (pp) Answering Paragraph 42 of the Complaint, the Tharaldson Defendants can neither
17 admit or deny such allegations as no allegations are made against the Tharaldson
18 Defendants. In the event the allegations could be construed to have been made against
19 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
20 extent said allegations relate to parties other than the Tharaldson Defendants, the
21 Tharaldson Defendants are without knowledge or information sufficient to form a
22 belief as to the truth of the allegations and therefore deny the same.

23 (qq) Answering Paragraph 43 of the Complaint, the Tharaldson Defendants can neither
24 admit or deny such allegations as no allegations are made against the Tharaldson
25 Defendants. In the event the allegations could be construed to have been made against
26 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
27 extent said allegations relate to parties other than the Tharaldson Defendants, the
28 Tharaldson Defendants are without knowledge or information sufficient to form a

1 belief as to the truth of the allegations and therefore deny the same.

2 (rr) Answering Paragraph 44 of the Complaint, the Tharaldson Defendants can neither
3 admit or deny such allegations as no allegations are made against the Tharaldson
4 Defendants. In the event the allegations could be construed to have been made against
5 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
6 extent said allegations relate to parties other than the Tharaldson Defendants, the
7 Tharaldson Defendants are without knowledge or information sufficient to form a
8 belief as to the truth of the allegations and therefore deny the same.

9 (ss) Answering Paragraph 45 of the Complaint, the Tharaldson Defendants can neither
10 admit or deny such allegations as no allegations are made against the Tharaldson
11 Defendants. In the event the allegations could be construed to have been made against
12 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
13 extent said allegations relate to parties other than the Tharaldson Defendants, the
14 Tharaldson Defendants are without knowledge or information sufficient to form a
15 belief as to the truth of the allegations and therefore deny the same.

16 (tt) Answering Paragraph 46 of the Complaint, the Tharaldson Defendants can neither
17 admit or deny such allegations as no allegations are made against the Tharaldson
18 Defendants. In the event the allegations could be construed to have been made against
19 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
20 extent said allegations relate to parties other than the Tharaldson Defendants, the
21 Tharaldson Defendants are without knowledge or information sufficient to form a
22 belief as to the truth of the allegations and therefore deny the same.

23 (uu) Answering Paragraph 47 of the Complaint, the Tharaldson Defendants can neither
24 admit or deny such allegations as no allegations are made against the Tharaldson
25 Defendants. In the event the allegations could be construed to have been made against
26 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
27 extent said allegations relate to parties other than the Tharaldson Defendants, the
28 Tharaldson Defendants are without knowledge or information sufficient to form a

1 belief as to the truth of the allegations and therefore deny the same.

2 (vv) Answering Paragraph 48 of the Complaint, the Tharaldson Defendants can neither
3 admit or deny such allegations as no allegations are made against the Tharaldson
4 Defendants. In the event the allegations could be construed to have been made against
5 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
6 extent said allegations relate to parties other than the Tharaldson Defendants, the
7 Tharaldson Defendants are without knowledge or information sufficient to form a
8 belief as to the truth of the allegations and therefore deny the same.

9 (ww) Answering Paragraph 49 of the Complaint, the Tharaldson Defendants can neither
10 admit or deny such allegations as no allegations are made against the Tharaldson
11 Defendants. In the event the allegations could be construed to have been made against
12 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
13 extent said allegations relate to parties other than the Tharaldson Defendants, the
14 Tharaldson Defendants are without knowledge or information sufficient to form a
15 belief as to the truth of the allegations and therefore deny the same.

16 (xx) Answering Paragraph 50 of the Complaint, the Tharaldson Defendants can neither
17 admit or deny such allegations as no allegations are made against the Tharaldson
18 Defendants. In the event the allegations could be construed to have been made against
19 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
20 extent said allegations relate to parties other than the Tharaldson Defendants, the
21 Tharaldson Defendants are without knowledge or information sufficient to form a
22 belief as to the truth of the allegations and therefore deny the same.

23 (yy) Answering Paragraph 51 of the Complaint, the Tharaldson Defendants can neither
24 admit or deny such allegations as no allegations are made against the Tharaldson
25 Defendants. In the event the allegations could be construed to have been made against
26 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
27 extent said allegations relate to parties other than the Tharaldson Defendants, the
28 Tharaldson Defendants are without knowledge or information sufficient to form a

1 belief as to the truth of the allegations and therefore deny the same.

2 (zz) Answering Paragraph 52 of the Complaint, the Tharaldson Defendants can neither
3 admit or deny such allegations as no allegations are made against the Tharaldson
4 Defendants. In the event the allegations could be construed to have been made against
5 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
6 extent said allegations relate to parties other than the Tharaldson Defendants, the
7 Tharaldson Defendants are without knowledge or information sufficient to form a
8 belief as to the truth of the allegations and therefore deny the same.

9 (aaa) Answering Paragraph 53 of the Complaint, the Tharaldson Defendants can neither
10 admit or deny such allegations as no allegations are made against the Tharaldson
11 Defendants. In the event the allegations could be construed to have been made against
12 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
13 extent said allegations relate to parties other than the Tharaldson Defendants, the
14 Tharaldson Defendants are without knowledge or information sufficient to form a
15 belief as to the truth of the allegations and therefore deny the same.

16 **SEVENTH CAUSE OF ACTION**

17 **(Declaratory Relief against Gemstone)**

18 (bbb) Answering Paragraph 54 of the Complaint, the Tharaldson Defendants repeat and
19 reallege the answers contained in the preceding paragraphs as if fully set forth herein.

20 (ccc) Answering Paragraph 55 of the Complaint, the Tharaldson Defendants can neither
21 admit or deny such allegations as no allegations are made against the Tharaldson
22 Defendants. In the event the allegations could be construed to have been made against
23 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
24 extent said allegations relate to parties other than the Tharaldson Defendants, the
25 Tharaldson Defendants are without knowledge or information sufficient to form a
26 belief as to the truth of the allegations and therefore deny the same.

27 (ddd) Answering Paragraph 56 of the Complaint, the Tharaldson Defendants can neither
28 admit or deny such allegations as no allegations are made against the Tharaldson

1 Defendants. In the event the allegations could be construed to have been made against
2 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
3 extent said allegations relate to parties other than the Tharaldson Defendants, the
4 Tharaldson Defendants are without knowledge or information sufficient to form a
5 belief as to the truth of the allegations and therefore deny the same.

6 (eee) Answering Paragraph 57 of the Complaint, the Tharaldson Defendants can neither
7 admit or deny such allegations as no allegations are made against the Tharaldson
8 Defendants. In the event the allegations could be construed to have been made against
9 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
10 extent said allegations relate to parties other than the Tharaldson Defendants, the
11 Tharaldson Defendants are without knowledge or information sufficient to form a
12 belief as to the truth of the allegations and therefore deny the same.

13 (fff) Answering Paragraph 58 of the Complaint, the Tharaldson Defendants can neither
14 admit or deny such allegations as no allegations are made against the Tharaldson
15 Defendants. In the event the allegations could be construed to have been made against
16 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
17 extent said allegations relate to parties other than the Tharaldson Defendants, the
18 Tharaldson Defendants are without knowledge or information sufficient to form a
19 belief as to the truth of the allegations and therefore deny the same.

20 (ggg) Answering Paragraph 59 of the Complaint, the Tharaldson Defendants can neither
21 admit or deny such allegations as no allegations are made against the Tharaldson
22 Defendants. In the event the allegations could be construed to have been made against
23 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
24 extent said allegations relate to parties other than the Tharaldson Defendants, the
25 Tharaldson Defendants are without knowledge or information sufficient to form a
26 belief as to the truth of the allegations and therefore deny the same.

27 ///

EIGHTH CAUSE OF ACTION**(Unjust Enrichment)**

(hhh) Answering Paragraph 60 of the Complaint, the Tharaldson Defendants repeat and reallege the answers contained in the preceding paragraphs as if fully set forth herein.

(iii) Answering Paragraph 61 of the Complaint, the Tharaldson Defendants deny the allegations against them. To the extent the allegations relate to parties other than the Tharaldson Defendants, the Tharaldson Defendants are without sufficient knowledge and information to form a belief as to the truth of these allegations and therefore deny the same.

(ijj) Answering Paragraph 62 of the Complaint, the Tharaldson Defendants deny the allegations against them. To the extent the allegations relate to parties other than the Tharaldson Defendants, the Tharaldson Defendants are without sufficient knowledge and information to form a belief as to the truth of these allegations and therefore deny the same.

(kkk) Answering Paragraph 63 of the Complaint, the Tharaldson Defendants deny the allegations against them. To the extent the allegations relate to parties other than the Tharaldson Defendants, the Tharaldson Defendants are without sufficient knowledge and information to form a belief as to the truth of these allegations and therefore deny the same.

(lll) Answering Paragraph 64 of the Complaint, the Tharaldson Defendants deny the allegations against them. To the extent the allegations relate to parties other than the Tharaldson Defendants, the Tharaldson Defendants are without sufficient knowledge and information to form a belief as to the truth of these allegations and therefore deny the same.

(mmm) Answering Paragraph 65 of the Complaint, the Tharaldson Defendants deny the allegations contained therein.

(nnn) Answering Paragraph 66 of the Complaint, the Tharaldson Defendants deny the allegations contained therein.

NINTH CAUSE OF ACTION

(Construction Control Claim)

(ooo) Answering Paragraph 67 of the Complaint, the Tharaldson Defendants repeat and reallege the answers contained in the preceding paragraphs as if fully set forth herein.

(ppp) Answering Paragraph 68 of the Complaint, the Tharaldson Defendants can neither admit or deny such allegations as no allegations are made against the Tharaldson Defendants. In the event the allegations could be construed to have been made against the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the extent said allegations relate to parties other than the Tharaldson Defendants, the Tharaldson Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore deny the same.

(qqq) Answering Paragraph 69 of the Complaint, the Tharaldson Defendants can neither admit or deny such allegations as no allegations are made against the Tharaldson Defendants. In the event the allegations could be construed to have been made against the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the extent said allegations relate to parties other than the Tharaldson Defendants, the Tharaldson Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore deny the same.

(rrr) Answering Paragraph 70 of the Complaint, the Tharaldson Defendants can neither admit or deny such allegations as no allegations are made against the Tharaldson Defendants. In the event the allegations could be construed to have been made against the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the extent said allegations relate to parties other than the Tharaldson Defendants, the Tharaldson Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore deny the same.

(sss) Answering Paragraph 71 of the Complaint, the Tharaldson Defendants can neither admit or deny such allegations as no allegations are made against the Tharaldson Defendants. In the event the allegations could be construed to have been made against

1 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
2 extent said allegations relate to parties other than the Tharaldson Defendants, the
3 Tharaldson Defendants are without knowledge or information sufficient to form a
4 belief as to the truth of the allegations and therefore deny the same.

5 (ttt) Answer ing Paragraph 72 of the Complaint, the Tharaldson Defendants can neither
6 admit or deny such allegations as no allegations are made against the Tharaldson
7 Defendants. In the event the allegations could be construed to have been made against
8 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
9 extent said allegations relate to parties other than the Tharaldson Defendants, the
10 Tharaldson Defendants are without knowledge or information sufficient to form a
11 belief as to the truth of the allegations and therefore deny the same.

12 (uuu) Answering Paragraph 73 of the Complaint, the Tharaldson Defendants can neither
13 admit or deny such allegations as no allegations are made against the Tharaldson
14 Defendants. In the event the allegations could be construed to have been made against
15 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
16 extent said allegations relate to parties other than the Tharaldson Defendants, the
17 Tharaldson Defendants are without knowledge or information sufficient to form a
18 belief as to the truth of the allegations and therefore deny the same.

19 (vvv) Answering Paragraph 74 of the Complaint, the Tharaldson Defendants can neither
20 admit or deny such allegations as no allegations are made against the Tharaldson
21 Defendants. In the event the allegations could be construed to have been made against
22 the Tharaldson Defendants, the Tharaldson Defendants deny the allegations. To the
23 extent said allegations relate to parties other than the Tharaldson Defendants, the
24 Tharaldson Defendants are without knowledge or information sufficient to form a
25 belief as to the truth of the allegations and therefore deny the same.

26 **TENTH CAUSE OF ACTION**

27 **(Claim of Priority)**

28 (www) Answering Paragraph 75 of the Complaint, the Tharaldson Defendants repeat

1 and reallege the answers contained in the preceding paragraphs as if fully set
2 forth herein.

3 (xxx) Answering Paragraph 76 of the Complaint, the Tharaldson Defendants deny the
4 allegations contained therein.

5 (yyy) Answering Paragraph 77 of the Complaint, the Tharaldson Defendants deny the
6 allegations contained therein.

7 (zzz) Answering Paragraph 78 of the Complaint, the Tharaldson Defendants deny the
8 allegations contained therein.

9 (aaaa) The Tharaldson Defendants deny each and every allegation not specifically admitted
10 herein.

11 **AFFIRMATIVE DEFENSES**

12 (a) Plaintiff has failed to state a claim against the Tharaldson Defendants upon which relief
13 can be granted.

14 (b) Plaintiff's claims against the Tharaldson Defendants are barred, in whole or in part,
15 based on the wrongdoing alleged in the following Counterclaim, which allegations are
16 incorporated herein by reference.

17 (c) Plaintiff has suffered no damages as a result of any claim contained in the Complaint
18 against the Tharaldson Defendants.

19 (d) Plaintiff has suffered no adverse consequences as a result of the actions, if any, by the
20 Tharaldson Defendants.

21 (e) The Tharaldson Defendants are entitled to legal and equitable reformation upon any
22 contract that may exist between the parties.

23 (f) The Tharaldson Defendants are entitled to legal and equitable rescission of any contract
24 that may exist between the parties.

25 (g) Any damages, injury or loss sustained by Plaintiff was proximately and exclusively
26 caused by the acts or omissions of persons or entities other than the Tharaldson
27 Defendants, over which persons or entities the Tharaldson Defendants have no control.
28 Plaintiff's recovery, if any, should therefore be lowered, reduced or apportioned in

1 accordance with the comparative fault against those persons or entities.

2 (h) Plaintiff has failed to join indispensable parties to its Complaint and the Complaint
3 must fail as a result.

4 (i) Plaintiff has been unjustly enriched to the injury and detriment of the Tharaldson
5 Defendants and therefore is not entitled to any relief.

6 (j) Plaintiff has “unclean hands” or otherwise engaged in misconduct making equitable
7 relief inappropriate.

8 (k) Plaintiff has failed to comply with the requirements contained in NRS Chapter 108 and
9 thus does not have a valid and enforceable lien against the Property.

10 (l) The Tharaldson Defendants reserve the right to supplement their answer and their
11 affirmative defenses in accordance with the Rules of Civil Procedure and the
12 governing procedural orders of this case.

13
14 **WHEREFORE**, the Tharaldson Defendants request that the Court dismiss the Complaint in
15 its entirety, and that the Plaintiff take nothing thereunder, and that the Tharaldson Defendants be
16 awarded their attorneys’ fees and costs pursuant to applicable statutory and/or common law, and for
17 other such relief as the Court deems just and proper.

18 **COUNTERCLAIM**

19 Counterclaimants Club Vista Financial Services, Inc., Tharaldson Motels II, Inc., and Gary
20 D. Tharaldson, by and through their counsel undersigned, and for their Counterclaim against
21 Counterdefendants allege as follows:

22 **COUNTERCLAIMANTS**

- 23 1. Counterclaimant Club Vista Financial Services LLC (“CVFS”) is a Nevada limited
24 liability company with its principal place of business in Las Vegas, Nevada.
- 25 2. Counterclaimant Tharaldson Motels II, Inc. (“TM2I”), is a North Dakota global
26 corporation with its principal place of business in Las Vegas, Nevada.
- 27 3. Counterclaimant Gary D. Tharaldson (“Tharaldson”) is a resident of the State of
28 Nevada. Tharaldson indirectly owns one hundred percent of the member interests in

1 CVFS and a minority interest in TM2I.

- 2 4. CVFS, TM2I, and Tharaldson are hereinafter collectively referred to as
3 "Counterclaimants."

4 **THE FIDUCIARY COUNTERDEFENDANTS**

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

- 14 6. Counterdefendant Bradley J. Scott ("Scott"), a resident of North Dakota, is the owner,
15 director, and officer of SFC. Scott committed or was responsible for committing the
16 wrongful acts of SFC alleged herein.

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

- 24 8. SFC, Scott, and BOK are hereinafter referred to as the "Fiduciary Counterdefendants."

25 **OWNER COUNTERDEFENDANT**

- 26 9. Counterdefendant Gemstone Development West, Inc. ("Gemstone West Inc.") is a
27 Nevada corporation which is an obligor by assumption on the Prior Loan and a direct
28 obligor on the Senior Loan, both as defined below, and which owns certain real

property located in Clark County, Nevada, which is security for both the Prior Loan and the Senior Loan. Gemstone West Inc. is named in this action because it claims an interest in the Property and is therefore an appropriate party to ensure a full adjudication concerning conflicting claims and interests in the Property.

CONTRACTOR COUNTERDEFENDANT

10. Counterdefendant 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 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.

MECHANIC'S LIEN COUNTERDEFENDANTS

11. Upon information and belief, each of the following entities listed below has filed one or more mechanic's liens against the Property or has caused mechanic's liens to be filed against the Property or otherwise claims an interest in the Property. Upon information and belief, each of the entities claims a Priority Construction Lien, as defined below. Each is an appropriate party to ensure a full adjudication concerning conflicting claims and interests in the Property. Collectively these Counterdefendants are referred to herein as the "Mechanic's Lien Counterdefendants".

- A. Nevada Construction Services, a Nevada corporation;
- B. Camco Pacific Construction, Inc., a California corporation.
- C. Insulpro Projects Inc., a Nevada corporation;
- D. Cabinetec Inc., a Nevada corporation;
- E. EZA, P.C. d/b/a Oz Architecture of Nevada Inc., a Nevada corporation;
- F. Hydropressure Cleaning Inc., a California corporation;
- G. Ahern Rentals Inc., a Nevada corporation;
- H. Arch Aluminum and Glass Co., a Florida corporation;
- I. Cell-Crete Fireproofing of Nevada Inc., a Nevada corporation;

- 1 J. Dave Peterson Framing Inc., a Nevada corporation;
- 2 K. E & E Fire Protection LLC, a Nevada corporation;
- 3 L. Granite Construction Company, a California corporation;
- 4 M. Harsco Corporation, a Nevada corporation;
- 5 N. Inquipco, a Nevada corporation;
- 6 O. Nevada Prefab Engineers Inc., a Nevada corporation;
- 7 P. Noorda Sheet Metal Company, a Nevada corporation;
- 8 Q. Patent Construction Systems, a division of Harsco Corporation, a foreign
9 corporation;
- 10 R. The Pressure Grout Company, a California corporation;
- 11 S. Professional Door and Millworks, LLC, a Nevada limited liability company;
- 12 T. Steel Structures Inc., a Nevada corporation;
- 13 U. Tri-city Drywall Inc., a Nevada corporation;
- 14 V. Accuracy Glass & Mirror Company, Inc., a Nevada corporation;
- 15 W. Concrete Visions Inc., a corporation;
- 16 X. Las Vegas Pipeline LLC, a Nevada limited liability company;
- 17 Y. Atlas Construction Supply Inc., a corporation;
- 18 Z. Ferguson Fire and Fabrication Inc., a Nevada corporation;
- 19 AB. John Deere Landscape, Inc., a corporation;
- 20 AC. Creative Home Theatre, LLC, a Nevada limited liability company
- 21 AD. Executive Plastering Inc., a Nevada corporation;
- 22 AE. Republic Crane Service LLC, a Nevada limited liability company;
- 23 AF. Selectbuild Nevada Inc., a Nevada corporation;
- 24 AG. Uintah Investments LLC, a Nevada limited liability company;
- 25 AH. Fast Glass, Inc, a Nevada corporation;
- 26 AI. Masonry Group Nevada Inc, a Nevada corporation;
- 27 AJ. Ready Mix, Inc., a Nevada corporation;
- 28 AK. Zitting Brothers Construction, Inc., a Utah corporation;

1 AL. Supply Network Inc., a Michigan corporation d/b/a Viking Supplynets;
2 AM. Helix Electric of Nevada LLC, a Nevada limited liability company d/b/a Helix
3 Electric;
4 AN. HD Supply Waterworks LP, a Florida limited partnership;
5 AO. Heinaman Contract Glazing, a California corporation;
6 AP. WRG Design, Inc., a Delaware corporation;
7 AQ. Pape Materials Handling d/b/a Pape Rents, a company;
8 AR. Buchele, Inc., a Nevada corporation;
9 AS. Renaissance Pools & Spas, Inc., a Nevada corporation;
10 AT. Northstar Concrete, Inc., a Nevada corporation;
11 AU. Bruin Painting Corporation, a California corporation,

FICTITIOUS COUNTERDEFENDANTS

12
13
14 12. Counterclaimants are informed and believe and therefore allege that the true names
15 and capacities whether individuals, corporate entities, associates or otherwise of DOE
16 1-100 and ROE 101-200 are presently unknown to Counterclaimants and therefore sue
17 said Counterdefendants by said fictitious names. Counterclaimants are informed and
18 believe and therefore allege that each of the Counterdefendants designated as DOE
19 and ROE is responsible in some manner for the events and happenings described in
20 this Counterclaim, which proximately caused the damages to Counterclaimants as
21 alleged herein, or claim some interest in the Project, over which Counterclaimants'
22 claims have priority. Counterclaimants will seek leave of this Court to amend their
23 Counterclaim to insert the true names and capacities of the DOE and ROE parties and
24 state appropriate charging allegations when that information has been ascertained.

SUBJECT MATTER JURISDICTION

25
26 13. This Court has subject matter jurisdiction under Article 6, Section 6 of the Nevada
27 Constitution and under NRS 4.370(1), because the amount in controversy exceeds
28 \$10,000 and under NRS 4.370(2) because the case involves title to real property and

1 is not a forcible entry and detainer action.

- 2 14. Counterclaimants also invoke the Nevada Uniform Declaratory Judgment Act, NRS
3 30.010 to 30.160.

4 **GENERAL AND PERSONAL JURISDICTION**

- 5 15. SFC is qualified to do business in, and does business in, Clark County, Nevada. In
6 addition, SFC is subject to personal jurisdiction in this Court under NRS 14.065
7 because it has caused events to occur in Las Vegas, Nevada, which are the subject
8 matter of this action; and because the Senior Debt Loan Agreement out of which this
9 action arises provides for personal jurisdiction in Clark County, Nevada.

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

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

- 18 18. Gemstone West Inc. and APCO Construction are subject to general jurisdiction in this
19 Court because their principal place of business is in Clark County, Nevada.

- 20 19. The Mechanic's Lien Counterdefendants are subject to jurisdiction in this action
21 because they filed or caused to be filed mechanic's liens or other interests against
22 and/or claim an interest in the Property located in Clark County, Nevada.

23 **VENUE**

- 24 20. Venue is appropriate in this Court under NRS 13.010(2)(a) and ©) because this
25 dispute involves interests in real property located in Clark County, Nevada. Venue
26 is also appropriate under NRS 13.040 as to SFC and Gemstone West Inc., because
27 they are engaged in business in Clark County, Nevada. Furthermore, the Senior Debt
28 Loan Agreement out of which this action arises provides for venue in the state and

1 federal courts located in Clark County, Nevada. Finally, the *res* of the action is real
2 property located in Clark County, Nevada, in which Counterclaimants and
3 Counterdefendants claim an interest.

4 GENERAL ALLEGATIONS

5 Counterclaimants' Business

- 6 21. Counterclaimant Tharaldson is a successful real estate entrepreneur who has had
7 substantial success in the motel and lodging business.
- 8 22. Counterclaimant TM2I is an owner and operator of motel and lodging properties.
- 9 23. Tharaldson and TM2I have very substantial assets and net worth. They are highly
10 credit worthy and routinely obtain credit and credit facilities at or near the prime rate
11 of interest.
- 12 24. Counterclaimant CVFS is an entity owned by Tharaldson which is involved in making
13 or participating as a lender in acquisition, development and construction loans for
14 third party developers' real estate projects.

15 Scott's and SFC's Fiduciary Relationship With Counterclaimants

- 16 25. Tharaldson's business relationship with Scott began in about 1992. Scott was
17 employed by Bismark National Bank in Bismark, North Dakota. Scott arranged
18 several loans to Tharaldson to finance acquisition or construction of motel properties.
19 In about 2000, Scott, through Bismark National Bank, arranged a \$50,000,000 loan
20 to facilitate Tharaldson's sale of motel properties. Scott also arranged some unsecured
21 lines of credit for Tharaldson.
- 22 26. In 2003, Scott left Bismark National Bank and founded his own company, SFC, a
23 firm specializing in corporate lending and lending services. SFC does not actually
24 loan its own moneys. Instead it acts as a "lead lender" in syndicating participation
25 interests to other lenders who actually supply loan funds. In addition to earning
26 origination fees on such loans, SFC typically also earns a loan servicing fee equal to
27 0.5% interest (fifty "basis points") on each loan it originates.
- 28 27. Since 2003, Scott has advised Tharaldson concerning business and financial matters,

1 including numerous investments in real estate loans originated, underwritten, and
2 administered by Scott through SFC for the benefit of CVFS and Tharaldson (the "SFC
3 Loans").

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

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

15 A. \$65,600,000 construction loan and \$38,900,000 construction loan to Gemstone LVS,
16 LLC made in June, 2004 in which Tharaldson Financial Group, Inc. was lender and
17 SFC was its financial consultant in the underwriting, documentation and servicing,
18 secured by Phase 1 and Phase 2 respectively of the Manhattan Project in Las Vegas,
19 Nevada.

20 B. \$10,000,000 construction loan made October 2005 and subsequently modified and
21 extended, \$2,000,000 second loan made in March 2006, and \$3,750,000 inventory
22 loan made in September 2008, in all of which Mesquite Investor Group is the
23 borrower, SFC is lender, and Tharaldson Financial Group, L.L.C. is the 100%
24 participant and owner of the Lender's interest, secured by a condominium project in
25 Mesquite, Nevada.

26 C. \$2,400,000 subordinate loan and \$4,000,000 senior loan to 40th Street and Baseline,
27 LLC made in March, 2006, in which SFC is the Lender and CVFS is the 100%
28 participant and owner of the Lender's interest, secured by real property located in

1 Phoenix, Arizona.

2 D. \$2,250,000 subordinate loan and \$3,750,000 senior loan to El Mirage and Camelback,
3 LLC made March, 2006, in which SFC is the Lender and CVFS is the 100%
4 participant and owner of the Lender's interest, secured by real property located in
5 Phoenix, Arizona.

6 E. \$46,000,000 land loan to Desert Springs Partners, L.L.C. and Ave. 48 Investment
7 Group, L.L.C. made in August 2006 with a maturity of January 1, 2009, in which
8 SFC is the Lender and CVFS is the majority participant and majority owner of the
9 Lender's interest, secured by land located in Palm Springs, California.

10 F. \$10,000,000 subordinate and \$20,000,000 senior land loan to Torrey Pines
11 Development, LLC, ABCDW, LLC, and Vanderbilt Farms, LLC with SFC as the
12 Lender and CVFS as the 100% participant and owner of the Lender's interest, made
13 in September 2006 with a maturity of December 31, 2008, secured by land in western
14 Maricopa County, Arizona.

15 G. \$20,000,000 subordinate and \$82,000,000 senior land loan to Vanderbilt Farms,
16 Vineyard Farms, ABCDS, and Gillespie Properties with SFC as Lender and CVFS as
17 the majority participant and majority owner of the Lender's interest, made in
18 September 2006 with a maturity of December 31, 2008, secured by land in western
19 Maricopa County, Arizona.

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

24 30. A special relationship of trust and confidence developed between Scott and
25 Tharaldson. Scott and SFC became intimately aware of and advised Tharaldson on
26 Tharaldson's businesses, assets, income, cash flows, and manner of operation. Indeed,
27 throughout this relationship Scott reviewed Tharaldson's internal personal financial
28 statements and provided presentation and formatting suggestions. Also, Scott

1 routinely reformatted Tharaldson financial information for banks with whom
2 Tharaldson deals and acted as Tharaldson's agent in dealing directly with banks who
3 sought to remain current on Tharaldson's financial information.

- 4 31. In each of the SFC Loans, Counterclaimants relied entirely upon Scott and SFC to
5 underwrite and evaluate the merits of the loans and to prepare the appropriate loan
6 documentation to protect Counterclaimants' legal and financial interests in the SFC
7 Loans, and Scott and SFC knew about and encouraged this reliance. Even though it
8 was not the actual source of loan funds, SFC typically prepared the loan documents
9 for the SFC Loans in its name as the Lender. The only documentation
10 Counterclaimants typically signed with respect to each of the SFC Loans was a
11 separate Non-Recourse Participation Agreement and related commitment
12 acknowledging their acquisition of ownership of the particular SFC Loan as the
13 Participant. It was pursuant to these Agreements that Tharaldson and his entities
14 made loan funds available to the ultimate borrowers.
- 15 32. Since about 2003, Tharaldson has provided to Scott and SFC office space and
16 facilities, lodging accommodations, and transportation assistance through
17 Tharaldson's Las Vegas office on Scott's regular trips to Las Vegas.
- 18 33. SFC is licensed by the Mortgage Lending Division of the Nevada Department of
19 Business and Industry. Its license with the Mortgage Lending Division lists
20 Tharaldson's son, Matt Tharaldson, as SFC's "licensed employee" in Las Vegas.
- 21 34. Scott has regularly described his role as overseeing Tharaldson's lending division and
22 third parties have in turn referred to Scott as overseeing Tharaldson's lending
23 operations. Tharaldson has relied exclusively on Scott and SFC to protect
24 Tharaldson's interests in these transactions, and Scott and SFC knew about and
25 encouraged this reliance.
- 26 35. On information and belief, Counterdefendant BOk knew and understood at all
27 material times that Scott and SFC were acting as Counterclaimants' agents in
28 overseeing Tharaldson's lending operations.

- 1 36. From January through April 2006, a period during which several of the SFC loans
2 were made, Tharaldson underwent double knee replacement surgeries and back
3 surgery. A long period of recovery followed that included pain medications until
4 February 2007, during which several more of the SFC loans were made. Scott and
5 SFC knew about Tharaldson's medical condition and wrongfully took advantage of
6 it by proposing questionable transactions to Tharaldson at a time when Scott knew
7 Tharaldson was partially incapacitated.
- 8 37. In connection with each of the SFC Loans, Scott through SFC has performed the
9 credit underwriting, due diligence investigation, negotiated the loan terms with the
10 borrower, hired the same counsel to represent both SFC and CVFS as the participant
11 in documenting the loan, selected the title insurer for obtaining lenders title insurance
12 policies on the real estate loan collateral, sold participations in the loans to
13 Counterclaimants, and then performed all loan administration and servicing, including
14 collection of interest and principal from the borrower and remitting those payments,
15 less SFC's fees, to Counterclaimants and any other participants.
- 16 38. Counterclaimants' investment in each of the SFC Loans was documented by a
17 separate Nonrecourse Loan Participation Agreement (Consulting Agreements in the
18 case of the Manhattan Loans) prepared by Scott. Each participation agreement (and
19 the Consulting Agreements in the case of the Manhattan Loans) appoints SFC as the
20 agent of CVFS or other Tharaldson affiliate with respect to the loan and acknowledges
21 the fiduciary relationship and agency between SFC and such participant.
- 22 39. SFC and Scott have earned substantial loan origination fees and servicing fees for
23 their work on the SFC Loans in which Counterclaimants invested based upon their
24 expert advice and recommendations, and Counterclaimants' trust in Scott and SFC.

25 **The Manhattan West Project**

- 26 40. Based on SFC's recommendations, a Tharaldson entity named Tharaldson Financial
27 Group, Inc. had previously made a successful loan through SFC on a mixed use
28 project known as the Manhattan Project in Las Vegas, Nevada. The Developer of the

Manhattan Project was Alexander Edelstein.

41. Following the success of the Manhattan Project, SFC through Scott approached Tharaldson about making a loan on a sister project called Manhattan West which is located on 21 acres of land on Russell Road in Las Vegas, Nevada. Manhattan West was being developed by Alexander Edelstein, the same principal who had developed the Manhattan Project.
42. An Edelstein entity known as Gemstone Apache, LLC, ("Apache") acquired the land in June 2006 for \$31,540,000.
43. The development entity for the Project was Gemstone Development West, LLC, a Nevada limited liability company ("Developer") which owned 100% of the equity interests in Apache.
44. Gemstone Development, L.L.C., a Nevada limited liability company ("Gemstone Development") is wholly owned by Edelstein and serves as manager to Gemstone LVS.
45. Manhattan West was designed and approved as a mixed use community featuring more than 600 condominium residences in one 11 story tower and several mid-rise buildings, plus 200,000 square feet of shops, restaurants, and office and hotel space.
46. The Project, Phase 1 of Manhattan West, involves approximately 228 residential condominium units and approximately 195,350 square feet of retail and office space.

The Manhattan West Acquisition and Development Financing

(The Prior Loan and Edelstein Loan)

47. On or about June 26, 2006, SFC, as lender, entered into a Loan Agreement with Apache, as borrower (the "Prior Loan Agreement") for the purpose of acquisition and preconstruction development of the Manhattan West Project. Although SFC was the named lender under the Prior Loan Agreement, all loan funds came from CVFS.
48. Pursuant to the Prior Loan Agreement, SFC agreed to loan Apache up to \$25,000,000 (the "Prior Loan").
49. The Prior Loan was composed of two parts represented by two separate notes and

deeds of trust: a "junior loan" in the maximum amount of \$10,000,000 (the "First Junior DOT Note"), and a "senior loan" in the maximum amount of \$15,000,000 (the "First Senior DOT Note").

50. The First Junior DOT is dated June 26, 2006 and was recorded on July 5, 2006 in the real property records of Clark County, Nevada at Book 20060705, Instrument No. 0004265.
51. The First Senior DOT is dated June 26, 2006, and was recorded on July 5, 2006 in the real property records of Clark County, Nevada at Book 20060705, Instrument No. 0004264.
52. In addition, the Prior Loan Agreement provided that a Third Deed of Trust on the Property and the Project (the "Third DOT") would be executed by Apache in favor of SFC to secure a \$13,000,000 note made by Edelstein payable to SFC (the "Edelstein Note"). As with the Prior Loan Agreement, the loan funds actually came from CVFS and not SFC, even though SFC was named as the lender.
53. The Third DOT is dated June 26, 2006, and was recorded on July 5, 2006 in the real property records of Clark County, Nevada at Book 20060705, Instrument No. 0004266.
54. The Edelstein Note was executed in connection with a Loan Agreement between Edelstein and SFC dated June 26, 2006 (the "Edelstein Loan Agreement"), the funds of which were to be used solely for the purpose of contributing the Owner's Equity to Apache as needed under the Prior Loan Agreement.
55. In addition to the First Junior DOT, First Senior DOT, and Third DOT on the Project, the Prior Loan Agreement also provided for the pledging of additional collateral by Apache, Edelstein, Gemstone LVS, L.L.C., a Delaware limited liability company ("Gemstone LVS") and Gemstone Development West, L.L.C., as developer as security for the Prior Loan and/or the Edelstein Loan.
56. Part of the additional collateral for the Prior Loan and Edelstein Loan included a pledge by Gemstone LVS of certain of collateral, including but not limited to the 59

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

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

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

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

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

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

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

28 62. The First Junior DOT was amended by a First Amendment Junior Deed of Trust and

Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) dated May 22, 2007 and recorded in the real property records of Clark County, Nevada on May 22, 2007 at Book 20070522, Instrument No. 0004011, to increase the amount secured thereby to \$18,000,000.00 to correspond to an additional \$8,000,000 advance on the Junior Deed of Trust Loan.

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

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

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

66. As of January 22, 2008, the total outstanding balance owed to Counterclaimants under the Prior Loan was approximately \$42,273,146 and under the Edelstein Loan was

approximately \$13,000,000, for a total owed of approximately \$55,273,146.

The Construction Financing Syndication

(The Senior Loan)

67. By late 2007, the Project was ready to commence vertical construction, but needed an additional \$110,000,000 of construction loan funds to commence construction on Phase I.
68. Counterdefendants SFC and Scott desired to broker the accumulation of \$110,000,00 in construction loan funds because of the substantial loan origination fees and 50 basis point loan servicing fees the construction financing would generate for SFC.
69. On information and belief, the credit markets had begun to tighten and the real estate market had begun to deteriorate significantly and it was not feasible to obtain a construction loan to fund Phase I construction and also “take out” and pay off the Prior Loan and the Edelstein Loan as was anticipated when those Loans were made.
70. On information and belief, Counterdefendants BOK and SFC or Scott had communications about BOK being a lender or participating lender on the construction loan. BOK was not interested in loaning on the Project on its own merits but had a strong interest in making a loan guaranteed by Tharaldson and TM2I because this would allow BOK to receive a subprime rate of return on a prime rate quality credit.
71. On information and belief SFC and BOK as co-lead lenders were unable to generate sufficient loan funds to take out the Prior Loan and the Edelstein Loan. So SFC and BOK needed to arrange for CVFS to agree that those loans would be subordinated to the new construction financing.
72. To induce the cooperation of Tharaldson, CVFS and TM2I, SFC and BOK offered Tharaldson and TM2I a 500 basis point (5%) cut of the interest to be paid on the 14% construction loan in exchange for the guarantees of Tharaldson and TM2I and in exchange for CVFS’ agreement to subordinate its position to the \$110,000,000 in construction financing. This arrangement would still leave BOK and other participating lenders with a net 8.5% interest rate after payment of 50 basis points

1 (.5%) in loan servicing fees to SFC.

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

9 74. Notwithstanding the highly unusual nature of this transaction, Tharaldson and his
10 entities were persuaded to proceed with it due to the unusual level of trust and
11 confidence they had in Scott and SFC.

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

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

shoulders of CVFS (who had made and subordinated the Prior Loan and Edelstein Loan) and Tharaldson and TM2I who had guaranteed the \$110,000,000 construction loan.

76. SFC acted as Bok's agent in procuring for it this deal which was so highly beneficial to BOk and so highly detrimental to Counterclaimants.

The Senior Loan Documentation and the "Mezzanine Financing"

77. On or about January 22, 2008, SFC, as lender, entered into a Loan Agreement with Gemstone West Inc., as borrower (the "Senior Loan Agreement").
78. 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.
79. SFC and BOk are, and since the inception of the Senior Loan have been, Co-Lead Lenders on the Senior Loan.
80. At all times while acting as Co-Lead Lenders with respect to the Senior Loan, BOk knew of the fiduciary relationship SFC occupied toward Counterclaimants 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.
81. 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").
82. 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").

- 1 83. The Senior Loan Agreement refers to the Prior Loan and the Edelstein Loan, as
2 amended, as the "Mezzanine Financing" and the documents relating to the Prior Loan
3 and the Edelstein Loan, as amended, as the "Mezzanine Financing Documents."
- 4 84. The Senior Loan Agreement provides that Gemstone West Inc. would assume the
5 obligations of Apache under and in regards to the Mezzanine Financing as set forth
6 in the Mezzanine Financing Documents, including but not limited to the obligations
7 with respect to the First Junior DOT, First Senior DOT, and the Third DOT (as
8 amended).
- 9 85. The Senior Loan Agreement provides that the First Junior DOT, First Senior DOT,
10 and the Third DOT would subordinate to the Senior DOT.
- 11 86. Pursuant to Section 2.2 of the Senior Loan Agreement, the initial advance under the
12 Senior Construction Note was to be used to pay the Mezzanine Financing with the
13 exception of: a) land costs, b) loan fees or interest expense paid the Mezzanine
14 Financing participant, or c) required equity as defined in the Section 3.1.10 of the
15 Senior Loan Agreement.
- 16 87. Advances under the Senior Loan for the Construction of Improvements were subject
17 to the satisfaction of several conditions precedent set forth in Article 4 of the Senior
18 Loan Agreement, including but not limited to:
- 19 A. Gemstone West Inc. having aggregate pre-sale revenue of not less than \$60,000,000
20 from: (i) Qualified Sales of condo units, (ii) the capitalized value (at a 7.0%
21 capitalization rate measured against triple net lease payments) of Class A office and
22 retail leases, and (iii) the sales price of Class A office space; and
- 23 B. Gemstone West Inc. obtaining and maintaining certain nonrefundable cash deposits
24 or deposit bonds on condominium units sold but not yet closed and square footage
25 leased.
- 26 88. Section 6.2 of the Senior Loan Agreement requires, among other things, that: a)
27 Gemstone West Inc. construct the Improvements free from any mechanic's, laborer's
28 and materialman's liens; b) Gemstone West Inc. further covenants and agrees not to

1 create, permit to be created, or allow to exist any liens, charges or encumbrances on
2 the Trust Property and Improvements other than certain Permitted Encumbrances (as
3 defined therein) or than those otherwise allowed by the Collateral Documents; and c)
4 not encumber any interest of Gemstone West Inc. in the Property and Improvements
5 without the prior written approval of Lender.

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

18 90. The Senior DOT provides that it shall secure future advances as if made on the date
19 of the Senior DOT, up to the maximum amount of 150% of the principal amount of
20 the Senior Construction Note and Senior Contingency Note.

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

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

- 1 93. As part of the Senior Loan Agreement, Tharaldson agreed to guarantee the Senior
2 Loan pursuant to Guaranty, and Addendum thereto, each dated January 22, 2008.
- 3 94. In connection with the Senior Loan Agreement, TM2I agreed to guaranty the Senior
4 Loan pursuant to a separate Guaranty dated January 22, 2008.
- 5 95. Neither Tharaldson nor TM2I is a shareholder, owner, officer or affiliated party of
6 Gemstone West Inc., but rather executed the Guaranty on the condition that
7 Tharaldson receive 5.0% of the 14.0% interest rate on the Senior Loan regardless of
8 who participated in funding the Senior Loan.
- 9 96. On or about March 21, 2008, SFC, as Originating Lender, and CVFS, as Participant,
10 executed a Nonrecourse Participation Agreement as amended by the Addendum to
11 Nonrecourse Participation Agreement dated March 21, 2008, as well as a
12 Commitment to Participate dated on or about the same date, which superseded two
13 prior CVFS Senior Participation Agreements (the "CVFS Third Senior Participation
14 Agreement"), under which CVFS agreed to provide \$400,000 of the Senior Loan.
15 Under the CVFS Third Senior Participation Agreement, CVFS was to receive 8.5%
16 interest, Guarantor was to receive 5.0% interest, and SFC made a service fee of .50%.
17 The CVFS Third Senior Participation Agreement provided that SFC was agent for
18 CVFS concerning the Senior Construction Note and acknowledged SFC's fiduciary
19 duties to CVFS.
- 20 97. In connection with the Senior Loan, General Contractor consented to an Assignment
21 of Construction Contract, Plans and Specifications executed by Gemstone West Inc.
22 in favor of SFC, pursuant to a Consent of General Contractor dated January 22, 2008
23 (the "Contractor Consent"). That Contractor Consent specifically provides that "[a]ll
24 liens, claims, rights, remedies and recourses that [Asphalt Products Corporation] may
25 have or may otherwise be entitled to assert against all or any portion of the Project
26 shall be, and they hereby are made expressly subordinate, junior and inferior to the
27 liens, claims, rights, remedies and recourses as created by the Loan Agreement and the
28 Collateral Documents." In addition, General Contractor executed a certificate as to

- 1 Sworn Construction Statement dated January 22, 2008 indicating that no work had
2 been completed to date on the Property or Project (the "Contractor Certificate").
- 3 98. At the closing of the Senior Loan on January 22, 2008, CVFS received a net paydown
4 of \$9,930,348, reducing the unpaid balance of the Prior Loan to approximately
5 \$35,278,688 and of the Edelstein Loan to approximately \$9,229,412, for a total
6 balance then owed to CVFS of \$45,342,798.
- 7 99. On or about January 22, 2008, Gemstone West Inc., Gemstone Apache and SFC
8 entered into an Assumption Agreement whereby SFC consented to: a) a sale of the
9 Trust Property under the First Senior DOT, First Junior DOT and Third DOT
10 (collectively referred to as the "Mezzanine Deeds of Trust") from Apache to
11 Gemstone West Inc.; and b) Gemstone West Inc.'s assumption of all liability
12 pertaining to the Mezzanine Notes and Mezzanine Loans; and c) the lien of the
13 Mezzanine Deeds of Trust on the Trust Property.
- 14 100. On or about January 22, 2008, Gemstone West Inc. and SFC executed a Fourth
15 Amendment to Mezzanine Loan Agreement [Prior Loan Agreement] whereby SFC
16 agreed to extend the maturity date of the First Junior DOT Note, First Senior DOT
17 Note, and LOC Note (collectively referred to as the "Mezzanine Notes") to December
18 31, 2009 and increase the total principal amount of the Mezzanine Notes from
19 \$33,000,000 to \$46,000,000, to be evidenced by a new Mezzanine Note dated January
20 22, 2008 in the maximum principal amount of \$46,000,000.
- 21 101. On or about January 22, 2008, Gemstone West Inc executed a Mezzanine Note in the
22 principal amount of \$46,000,000 bearing interest at the fixed rate of 14.5% per
23 annum. The Mezzanine Note calls for monthly interest payments only, with the entire
24 principal balance, and all unpaid accrued interest, due in full on the maturity date of
25 December 31, 2009.
- 26 102. On or about January 22, 2008, Gemstone West Inc. and SFC executed a First
27 Amendment to Senior Deed of Trust and Security Agreement with Assignment of
28 Rents and Fixture Filing (Line of Credit) (Mezzanine) ("First Senior DOT

- 1 Amendment”), to confirm that the First Senior DOT secured \$28,000,000 of the
2 refinanced Mezzanine Note. The First Senior DOT Amendment was recorded in the
3 real property records of Clark County, Nevada on February 7, 2008 at Book
4 20080207, Instrument No. 0001484.
- 5 103. On or about January 22, 2008, Gemstone West Inc. and SFC executed a Second
6 Amendment to Junior Deed of Trust and Security Agreement with Assignment of
7 Rents and Fixture Filing (Line of Credit) (Mezzanine) (“First Junior DOT Second
8 Amendment”), to confirm that the First Junior DOT secured \$18,000,000 of the
9 refinanced Mezzanine Note. The First Junior DOT Second Amendment was recorded
10 in the real property records of Clark County, Nevada on February 7, 2008 at Book
11 20080207, Instrument No. 0001485.
- 12 104. Pursuant to a Nonrecourse Participation Agreement dated January 21, 2008 by and
13 between SFC, as Originating Lender, and CVFS, as Participant and Loan Participation
14 Certificate attached thereto (the “Mezzanine Participation Agreement”), CVFS agreed
15 to provide funds for the Mezzanine Loans, primarily by refinancing the outstanding
16 balances on the Prior Loan and the Edelstein Loan. Under the Mezzanine
17 Participation Agreement, CVFS was to receive 14.0% interest and SFC made a service
18 fee of .50%. The Mezzanine Loan Participation Agreement provided that SFC was
19 agent for CVFS concerning the Mezzanine Note and acknowledged SFC’s fiduciary
20 duties to CVFS.
- 21 105. On February 6, 2008, Apache conveyed the Property under the Senior DOT to
22 Gemstone West Inc. via a Grant, Bargain, Sale Deed recorded in the real property
23 records of Clark County, Nevada on February 7, 2008 at Book 20080207, Instrument
24 No. 0001480.
- 25 106. On January 30, 2008, SFC’s counsel opined to SFC that SFC was in a position to fund
26 the Senior Loan, provided each Participant funds its pro rata share.

27 **The Senior Loan Agreement Signature, the Subordination, the Guaranty, the TM2I**

28 **Guaranty and the CVFS Participation**

- 1 107. In connection with the Senior Loan, Tharaldson executed the Senior Loan Agreement
2 under the heading "acknowledgment of guarantor" and the Guaranty.
3 108. In connection with the Senior Loan, TM2I executed the TM2I Guaranty,
4 109. In connection with the Senior Loan, CVFS executed the CVFS Senior Participation
5 Agreement.
6 110. The Senior Loan Agreement, the CVFS Participation, the Guaranty, and the TM2I
7 Guaranty are hereafter collectively referred to as the "Counterclaimants' Senior Loan
8 Documents."
9 111. In connection with the Senior Loan, SFC executed a Mezzanine Deeds of Trust
10 Subordination Agreement dated January 22, 2008, and recorded in the real property
11 records of Clark County, Nevada on February 7, 2008, at Book 20080207, Instrument
12 No. 0001486, purporting to subordinate the Prior Loan Deeds of Trust to the Senior
13 Loan Deed of Trust.
14 112. SFC expressed its intent that the Prior Loan Deeds of Trust and the indebtedness
15 secured thereby be subordinate to the \$110,000,000 Senior Deed of Trust and
16 indebtedness secured thereby.
17 113. At the time the Counterclaimants' Senior Loan Documents were agreed to, and at all
18 times thereafter, the Fiduciary Counterdefendants owed to Counterclaimants fiduciary
19 duties of undivided loyalty; due care, competence, and diligence; and the duty to
20 provide to Counterclaimants all material information.
21 114. At the time the Counterclaimants' Senior Loan Documents agreed to were executed
22 and at all times thereafter, the Fiduciary Counterdefendants owed to Counterclaimants
23 a duty not to deal with Counterclaimants on behalf of an adverse party in a transaction
24 connected with their fiduciary duty to Counterclaimants.

25 **Subsequent Changes to Loans**

- 26 115. On August 11, 2008, Edelstein and SFC executed a Fourth Amendment to Loan
27 Agreement (Edelstein) to provide for, among other things: 1) SFC's agreement to lend
28 Edelstein and Gemstone Manhattan Holdings I, LLC, a Nevada limited liability

1 company ("Gemstone Manhattan") an additional sum of \$9,000,000 to enable
2 Edelstein to refinance the Condo Units; 2) to provide that the first \$6,000,000 of the
3 LOC Note be used to permanently repay the Edelstein Note; 3) to advance funds on
4 the Edelstein Note to make the interest payment for August 2008 but to then convert
5 the Edelstein Note to a closed-end note with no further advances; and 4) to release the
6 lien of the Gemstone LVS DOT on the remaining 17 Condo Units.

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

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

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

27 118. The obligors on the Prior Loan, the Edelsteins Loan, the Mezzanine Loans, the Senior
28 Loan and the Rental LOC Note (collectively the "Manhattan West Loans") have not

made any of the required interest payments since September 2008, and all promissory notes making up the Manhattan West Loans are therefore in monetary default.

119. The obligors on the Manhattan West Loans are in material breach of various covenants in the loan documents relating to the Manhattan West Loans, including the Deeds of Trust securing those loans.
120. More than sixty (60) days have expired after SFC's written notice of default to the obligors on the Manhattan West Loans dated October 28, 2008, and none of the defaults has been cured within any applicable cure periods.
121. The unpaid principal balances on the Manhattan West Loans, together with all accrued but unpaid interest, including late penalties and default interest, are now immediately due and payable.
122. On January 9, 2009, the Fiduciary Counterdefendants threatened to commence private trustee sales under the Deeds of Trust securing the Manhattan West Loans, all to Counterclaimants' detriment.

The Fraudulent Inducement

123. Counterclaimants' decisions to modify the Prior Loan and the Edelstein Loan as provided in the Senior Loan Agreement, and to agree to the Counterclaimants' Senior Loan Documents was based upon the trust and confidence Counterclaimants reposed in Scott and SFC due to their longstanding business relationship, and upon the Fiduciary Counterdefendants' recommendations to Counterclaimants which Counterclaimants understood to be backed up by the Fiduciary Counterdefendants' rigorous due diligence and the Fiduciary Counterdefendants' assurances to Counterclaimants that the transaction was sound and would be in Counterclaimants' best interest.
124. Counterdefendants SFC and BOK as lead lenders co-underwrote and performed all due diligence investigations on the Senior Loan transaction. SFC's April 27, 2007 conditional financing commitment letter to Gemstone Apache states "The Construction Financing Proposal would be followed (sic) executed only after

1 acceptable due diligence is completed inclusive of an industry review, appraisal,
2 underwriting as well as complete Project analysis by the Lender.”

3 125. Before Counterclaimants agreed to the Senior Loan transactions, Scott and SFC told
4 Counterclaimants that with the advent of the Senior Loan, their business and
5 economic position with respect to construction lending on the Project, would be:

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

126. Communications between Counterclaimants 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 Counterclaimants. |
| 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 Counterclaimants. |
| h. | October 12, 2007 | Tharaldson executes modified financing commitment letter. |
| i. | October 19, 2007 | Scott provides updated financial analysis which has no indication project revenues would drop to \$10 million and no indication that developer would be relying on related party sales. |
| j. | November 19, 2007 | SFC provides updated projections with no indication of related party sales. |
| k. | January 22, 2008 | Tharaldson executes Senior Loan documents. |

1. February 25, 2008

Tharaldson executes revised commitment letter.

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

- "Subordination of Land Loan to Senior Construction Loan."
- "Senior Construction Loan personally guaranteed by Gary D. Tharaldson."
- "Monthly lender inspection and third party inspections."
- "Voucher control on all draws."
- "Acceptable abacus feasibility analysis on entire Project."
- "Acceptable lender approved project budget."
- "Acceptable GMP contract assigned to lender."
- "All sales must be approved by lender."
- "Lender and Participant to verify cash flow and IRR calculations."
- "Total pre-sale revenue \$60 million required to be secured before vertical financing."
- "A minimum of monthly SFC on site inspections will be required."

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

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

130. The Fiduciary Counterdefendants knew that SFC and BOK, as Co-Lead Lenders, also occupied a fiduciary relationship with Counterclaimants with specific reference to the Senior Loan as a participant in the Senior Loan, as the intended Guarantors of the

1 Senior Loan, and as sole owner of the Prior Loan and the Edelstein Loan to be
2 subordinated to the Senior Loan.

3 131. The Fiduciary Counterdefendants knew but did not identify and resolve with
4 Counterclaimants that the Senior Loan transaction presented direct and substantial
5 conflicts between: (a) SFC's and Scott's position as fiduciaries to Counterclaimants
6 with respect to Counterclaimants 100% ownership interest in the Prior Loan and the
7 Edelstein Loan; and (b) the Fiduciary Counterdefendants' position as fiduciaries to all
8 Senior Loan participants, including CVSF.

9 132. In connection with the Senior Loan, the Fiduciary Counterdefendants made
10 misrepresentations to Counterclaimants and failed to disclose to Counterclaimants
11 material information concerning the Project and the Senior Loan, which are described
12 in the following sections.

13 ***Deteriorated Financial Prospects.***

14 133. SFC, Scott and BOK attached to the Senior Loan Agreement a pro forma for the
15 Project that showed projected net income for the Project of \$10,000,000 rather than
16 the \$34,000,000 reflected in the pro forma the Fiduciary Counterdefendants had
17 previously provided to Counterclaimants and on which Counterclaimants had relied
18 in agreeing to the Counterclaimants' Senior Loan Documents.

19 134. The Fiduciary Counterdefendants knew about and initialed the revised pro forma
20 showing estimated net income from the Project less than one-third of the amount
21 represented to Counterclaimants.

22 135. The Fiduciary Counterdefendants failed to disclose the revised pro forma to
23 Counterclaimants or ask Counterclaimants to initial it.

24 136. The revised pro forma was highly material and Counterclaimants never would have
25 agreed to the Counterclaimants' Senior Loan Documents had they known of the
26 substantial deterioration in the projected financial viability of the Project.

27 ***Primary Reliance on Guarantors.***

28 137. The Fiduciary Counterdefendants failed to disclose to Counterclaimants that their

underwriting of the Senior Loan relied solely on the Guaranty and the TM2I Guaranty, not on the financial viability of the Project. Instead they misled Counterclaimants into believing that SFC, Scott and BOk had found the Senior Loan to be credit worthy on the basis of the merits and projected performance of the Manhattan West Project.

138. Counterclaimants never would have agreed to the Counterclaimants' Senior Loan Documents had they known that the Fiduciary Counterdefendants were not relying primarily on the financial viability of the Project in underwriting the Senior Loan.

139. The Fiduciary Counterdefendants later admitted to Counterclaimants orally in October 2008 and in writing in December 2008, that their underwriting of the Senior Loan had relied solely on the financial resources of the Guarantors and not primarily on the financial viability of the Project as Counterclaimants had understood.

Fraud Relating to the Pre-sale Condition.

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

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

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

143. The Fiduciary Counterdefendants had a duty not to approve and count toward

1 satisfaction of the pre-sale condition, pre-sales that were made to insiders, affiliates
2 or other persons or entities related to the borrower. Nevertheless, the Fiduciary
3 Counterdefendants certified at the closing of the Senior Loan that there were
4 \$62,700,000 of "lender approved" pre-sales and/or pre-leases, and that the Pre-Sale
5 Condition had been satisfied. It was not reasonable or appropriate to make this
6 certification.

7 144. The Fiduciary Counterdefendants certified that the lender approved pre-sales and/or
8 pre-leases consisted of \$45,000,000 in residential pre-sales and \$17,250,000 of
9 commercial pre-sales and/or pre-leases.

10 145. The Fiduciary Counterdefendants knew or should have known that at the closing of
11 the Senior Loan, at least \$2,500,000 of the "lender approved" residential pre-sales
12 (5.6%) were sales to parties closely related to Gemstone West Inc., including but not
13 limited to family members of Gemstone West Inc.'s principal Alex Edelstein (Alex
14 Edelstein, Charles Edelstein, Sara Edelstein), Peter Smith (Gemstone West Inc.'s
15 COO), and Counterdefendant Scott. Other "lender approved" residential pre-sales
16 may also be questionable related party sales.

17 146. The Fiduciary Counterdefendants knew or should have known that at the closing of
18 the Senior Loan, all \$17,250,000 of the commercial pre-sales and/or pre-leases were
19 sales and/or leases to parties closely related to the Gemstone West Inc. All three pre-
20 leases were with affiliates of the Gemstone West Inc. (Manhattan West Residential,
21 Inc., Gemstone Coffee House, LLC, and Gemstone Development LLC (1,800 square
22 feet)). The one commercial sale (\$5,500,000) was to Santa Rita Management
23 Company, an entity owned by the Edelstein's father.

24 147. The Fiduciary Counterdefendants failed to disclose to Counterclaimants that highly
25 questionable related party sales and leases made up nearly one third of the entire
26 \$60,000,000 in "lender approved" pre-sales.

27 148. The certification by the Fiduciary Counterdefendants that the Pre-Sale Condition had
28 been satisfied was false and fraudulent.

1 149. After the closing of the Senior Loan, many of the related party condominium sales and
2 the \$5.5 million office sale were cancelled. The office sale was then “replaced” by a
3 lease to Gemstone West Inc.’s affiliate Gemstone Development, L.L.C. (19,861 square
4 feet).

5 ***Fraud Relating to First Lien Condition.***

6 150. A condition to the closing of the Senior Loan, and therefore to the effectiveness of
7 Counterclaimants’ Senior Loan Documents, was that the Gemstone West Inc. provide
8 a first position Deed of Trust on the Project (the “First Lien Condition”). (Senior Loan
9 Agreement §§ 3.1.1, 1.18; 3.1.3, 3.1.4)

10 151. Counterclaimants would not have agreed to the Counterclaimants’ Senior Loan
11 Documents had they known that the First Lien Condition was not satisfied, because
12 of the hassle, expense, and uncertainty of resolving senior lien claims.

13 152. The Fiduciary Counterdefendants were aware prior to the closing of the Senior Loan
14 of any construction work that had been performed on the Project prior to recording of
15 the Senior Loan Deed of Trust, that might cause a broken priority with respect to the
16 Senior Loan.

17 153. The Fiduciary Counterdefendants knew or should have known that under NRS
18 108.225(1) and (2) mechanics liens for any work performed prior to the recording date
19 of the Senior Loan Deed of Trust (the “Priority Construction Liens”) would be prior
20 and superior to the Senior Loan Deed of Trust.

21 154. The Fiduciary Counterdefendants also knew that the Deeds of Trust securing the Prior
22 Loan were prior and superior to any Priority Construction Liens.

23 155. The Fiduciary Counterdefendants failed to inform Counterclaimants prior to the
24 closing of the Senior Loan of the existence or amount of any Priority Construction
25 Liens and the fact that they enjoyed a statutory preference over the Deed of Trust
26 securing the Senior Loan.

27 156. The Fiduciary Counterdefendants certified at the closing of the Senior Loan that the
28 First Lien Condition had been satisfied.

157. This certification was a misrepresentation and a fraud.

Insurance Over Broken Priority; Switched Title Insurance Companies.

158. Rather than informing Counterclaimants of any Priority Construction Liens that enjoyed statutory priority over the Senior Loan Deed of Trust, Counterdefendants chose to “insure over” the Priority Construction Liens in a title policy issued by Counterdefendants’ chosen title company, Commonwealth Land Title Insurance Company (“Commonwealth”). Fiduciary Counterdefendants did not disclose this decision to Counterclaimants.

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

160. The Fiduciary Counterdefendants failed to inform Counterclaimants prior to the closing of the Senior Loan that they had chosen to “insure over” any Priority Construction Liens or that they had switched from First American to Commonwealth.

161. The Fiduciary Counterdefendants knew or should have known that Commonwealth was financially troubled and that First American was not.

162. The Fiduciary Counterdefendants failed to inform Counterclaimants prior to the closing of the Senior Loan, of Commonwealth’s questionable financial condition.

163. Counterclaimants would not have agreed to the Counterclaimants’ Senior Loan Documents had they known that the Fiduciary Counterdefendants were insuring over the Priority Construction Liens and were switching from First American to Commonwealth.

164. In November 2008, the Nebraska Insurance Commissioner informed Commonwealth that it was in a “hazardous financial condition” under Nebraska law and filed a petition for rehabilitation against Commonwealth. Commonwealth consented to the rehabilitation petition.

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

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

Subordination Exacerbates Broken Priority.

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

168. The Fiduciary Counterdefendants failed to inform Counterclaimants of the risk that any Priority Construction Liens would become senior to the Deeds of Trust securing the Prior Loan as a result of the Subordination and to provide their evaluation of that risk.

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

170. Counterclaimants would not have agreed to the Counterclaimants' Senior Loan

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

171. The Fiduciary Counterdefendants failed to inform Counterclaimants that the Subordination Agreement had been drafted in a manner that substantially increased the risk that any Priority Construction Liens would become senior to the Prior Loan as a result of the Subordination.

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

172. As Fiduciaries, Counterdefendants Scott, SFC and BOK had a duty to disclose that they were preparing legal instruments that had the effect of negating protective provisions of Nevada law.
173. The Fiduciary Counterdefendants caused to be prepared and submitted to Tharaldson for signature a form of Guaranty of the Senior Loan that contained a Nevada choice of law provision.
174. The Fiduciary Counterdefendants knew or should have known that Nevada law provided a single action rule and also accorded to a guarantor of a real estate loan a fair market value defense, insuring that the guarantor's exposure for a deficiency judgment was limited to the excess of the loan over the fair market value of the loan collateral for a deficiency judgment.
175. The Fiduciary Counterdefendants knew that Nevada law permitted a guarantor in a commercial loan over \$500,000 to waive the single action rule and the guarantor's fair market value defense.
176. The Fiduciary Counterdefendants inserted in the Guaranty of the Senior Loan a waiver of all statutory rights of a guarantor under Nevada law, including the single action rule and the fair market value defense. They did not disclose to Counterclaimants their insertion of this waiver provision.
177. The Fiduciary Counterdefendants caused to be prepared and submitted to TM2I for

- signature a form of guaranty that adopted North Dakota law.
178. The Fiduciary Counterdefendants knew or should have known that North Dakota law did not provide a single action rule nor extend a borrower's fair market value defense to a guarantor. They did not disclose to Counterclaimants that they had selected the law of a state which substantially altered their rights as they would have existed under Nevada law.
179. The Fiduciary Counterdefendants advised Counterclaimants that the documents they were signing, including the Guaranty and the TM2I Guaranty, were appropriate to sign and protected Counterclaimants' interests, as was the Subordination Agreement relating to the Prior Loan which SFC as Lender was signing.
180. The Fiduciary Counterdefendants failed to advise Counterclaimants that under the Guaranty and the TM2I Guaranty as presented, Tharaldson's exposure on the Guaranty and TM2I's exposure on the TM2I Guaranty would be far greater than Counterclaimants intended or understood because of the waivers contained in the Guaranty and the choice of law in the TM2I Guaranty.
181. The provisions the Fiduciary Counterdefendants inserted into the Guaranty instruments were one sided and greatly benefitted BOK and the other participating lenders to the substantial detriment of Tharaldson and TM2I. The Fiduciary Counterdefendants failed to advise Counterclaimants to consult with independent counsel concerning the Counterclaimants' Senior Loan Documents due to the Fiduciary Counterdefendants' conflicting duties of undivided loyalty with respect thereto.
182. In agreeing to Counterclaimants' Senior Loan Documents, Counterclaimants were unaware of Nevada law permitting waiver of the fair market value defense, the legal effect of the waiver provisions inserted in the Guaranty, that North Dakota law did not extend a Borrower's fair market value defense to a guarantor, or the legal risks inherent in the Subordination in light of the undisclosed Priority Construction Liens.
183. Counterclaimants would not have agreed to the Senior Loan Documents had they

known any of the matters alleged in the preceding paragraph.

Administration of Senior Loan

184. During their due diligence review of the Senior Loan, the Fiduciary Counterdefendants failed to detect that the \$79,000,000 fixed sum construction contract for the Project failed to cover about \$3,800,000 in work required by the construction drawings for completion of the Project.
185. During the course of their administration of the Senior Loan, when the Fiduciary Counterdefendants did become aware of this problem, they failed to secure an early and appropriate resolution of the scope problem with the existing contractor to maintain a fixed sum contract increased by some amount to cover cost overruns.
186. During the course of their administration of the Senior Loan, the Fiduciary Counterdefendants in their inspections of construction progress, failed to detect that about \$7,900,000 in work on the Project was not properly performed in accordance with the construction documents and would have to be redone.
187. During their administration of the Senior Loan, the Fiduciary Counterdefendants failed to take appropriate action to avert approximately \$25.8 million in construction liens against the Project.
188. As the direct and proximate result of these actions and omissions by the Fiduciary Counterdefendants, Counterclaimants and the other participants in the Senior Loan are left with an unfinished Project on which construction has ceased, encumbered by \$25.8 million in construction liens, and with virtually all pre-sale purchasers of residential condominiums and lessees of commercial office space having fled from the Project.

Defamatory Statements

189. From at least December 15, 2008, SFC and BOK as Co-Lead Lenders have engaged in oral and written communications with the other participants in the Senior Loan.
190. These communications have included, but are not limited to, such statements as:
- A. Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal

“will likely have farther reaching negative implications for his banking relationships with all banks going forward.”

B. Tharaldson’s “reputation will be unquestionably damaged.”

C. “The 29 banks stretching from North Dakota to Oklahoma that are in this deal, plus banks not in this deal, will look very unfavorably on any future credit request from Gary.”

191. In light of the Fiduciary Counterdefendants’ fraud, constructive fraud, breach of fiduciary duty, breaches of contract, and negligence which caused the problems now facing Counterclaimants and the other participants in the Senior Loan, the above statements are false and misleading.

192. The above statements are defamatory *per se*.

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

193. On or about January 12, 2009, Counterclaimants 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.

194. On or about January 12, 2009, Counterclaimants 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

195. As set forth more fully in the following claims for relief, Counterclaimants’ claims against the Fiduciary Counterdefendants 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.

196. The Fiduciary Counterdefendants' actions giving rise to the Predicate Claims make them guilty of "oppression, fraud or malice, express or implied."
197. The Fiduciary Counterdefendants' actions giving rise to the Predicate Claims constituted conduct intended to injure Counterclaimants.
198. The Fiduciary Counterdefendants' actions giving rise to the Predicate Claims constituted "despicable conduct which is engaged in with a conscious disregard of the rights of others"
199. The Fiduciary Counterdefendants acted intentionally and/or in concert and are subject to joint and several liability for all damages resulting therefrom.
200. Counterclaimants are entitled to an award of punitive damages against the Fiduciary Counterdefendants in an amount not more than three times the compensatory damages proved at trial.

FIRST CLAIM FOR RELIEF

(Fraudulent Misrepresentation)

201. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.
202. Counterdefendants Scott and SFC, in connection with inducing Counterclaimants to enter into the Senior Loan transaction made the following misrepresentations of material fact:
 - a. Scott and SFC told Counterclaimants that SFC and BOK had thoroughly underwritten the Manhattan West Project and that the Project, on its own merits was a viable and prudent credit risk that justified the Senior Loans;
 - b. Scott and SFC told Counterclaimants that SFC and BOK expected the Project to generate \$34,000,000 in net revenues based on project pro formas and their thorough underwriting of the Project;
 - c. SFC and BOK, by making statements, representations and warranties either expressed or necessarily implied in closing the Senior Loan transaction that the pre-sale conditions to closing the Senior Loan had

1 been satisfied through bonafide arms-length pre-sales to legitimate
2 buyers or tenants who were unrelated to the Project developer;

- 3 d. SFC and BOk, by making statements, representations and warranties
4 either expressed or necessarily implied in closing the Senior Loan
5 transaction that the First Lien condition to closing of the Senior Loan
6 had been satisfied;

7 203. Counterclaimants are informed and believe that Scott and SFC made additional
8 misrepresentations of fact which Counterclaimants have not yet discovered and
9 reserve the right to prove additional misrepresentations at trial.

10 204. General Contractor made certain representations to SFC, as agent for
11 Counterclaimants, in connection with the Senior Loan. Specifically, General
12 Contractor represented that: A) "[a]ll liens, claims, rights, remedies and recourses that
13 [Asphalt Products Corporation] may have or may otherwise be entitled to assert
14 against all or any portion of the Project shall be, and they hereby are made expressly
15 subordinate, junior and inferior to the liens, claims, rights, remedies and recourses as
16 created by the Loan Agreement and the Collateral Documents"; and B) that no work
17 had been completed to date on the Property or the Project.

18 205. Scott, SFC and General Contractor made the aforementioned representations with
19 either knowledge or belief that they were false or without sufficient foundation.

20 206. Scott, SFC and General Contractor made the aforementioned representations with the
21 intent that Counterclaimants rely on them.

22 207. The representations by Scott, SFC and General Contractor were material to
23 Counterclaimants' actions with respect to the Senior Loan.

24 208. Counterclaimants had a right to rely on the representations of Scott, SFC and General
25 Contractor.

26 209. Counterclaimants did detrimentally rely upon those representations by agreeing to the
27 Counterclaimants' Senior Loan Documents.

28 210. Scott, SFC and General Contractor knew or should have known that the

representations were false.

211. Counterclaimants were ignorant of the falsity of the representations.
212. As the direct and proximate result of the representations, Scott, SFC and General Contractor induced Counterclaimants to agree to the Counterclaimants' Senior Loan Documents.
213. Scott and SFC acted as agents for BOK in connection with making the misrepresentations alleged above, and BOK is liable as if it had made those misrepresentations itself.
214. As the result of the Fiduciary Counterdefendants' conduct and General Contractor's conduct, Counterclaimants were substantially damaged in an amount to be proven at trial.
215. Counterclaimants' agreement to the Counterclaimants' Senior Loan Documents was induced by Fiduciary Counterdefendants' fraud and the General Contractor's and therefore are not the valid, binding, or enforceable obligations of Counterclaimants. Counterclaimants are entitled to a Declaratory Judgment voiding the Counterclaimants' Senior Loan documents. Alternatively, they are entitled to equitable reformation of the Counterclaimants' Senior Loan documents.
216. In the alternative, the matters alleged as fraudulent misrepresentations were mutual mistakes of fact or law or unilateral mistakes of fact or law induced through Counterdefendants' inequitable conduct, and Counterclaimants are entitled to equitable rescission or reformation of Counterclaimants' Senior Loan documents.
217. By virtue of their agencies for one another, the Fiduciary Counterdefendants are jointly and severally liable on this claim.

SECOND CLAIM FOR RELIEF

(Fraudulent Concealment/Fraudulent Omissions)

218. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.
219. By making the misrepresentations and reliance-inducing statements alleged herein,

1 Counterdefendants Scott and SFC had a duty to speak and disclose the following
2 material facts, which they knew and which were necessary to make the statements
3 which Scott and SFC did make not misleading:

- 4 a. That even though they had previously shared with Counterclaimants
5 a pro forma projecting \$34 million in net project income,
6 Counterdefendants Scott, SFC and BOk had in their possession at the
7 time the Senior Loan closed a revised pro forma which they did not
8 share with Counterclaimants projecting only \$10 million in net project
9 income;
- 10 b. That SFC and BOk had not underwritten the Senior Loan on the basis
11 of the financial merits and viability of the Manhattan West Project, but
12 instead had based their underwriting decision solely on the strength of
13 the guarantees of Tharaldson and TM2I;
- 14 c. That First American Title Insurance Co. had refused to issue title
15 insurance because of prior recorded liens of the General Contractor;
- 16 d. That SFC and BOk were closing the Senior Loan transaction with
17 actual and undisclosed knowledge that they were insuring over known
18 General Contractor lien claims;
- 19 e. That so-called lender approved pre-sales were not arms length sales to
20 unrelated third parties, but in many cases were to the affiliates or
21 principals of the developer or to other insiders;
- 22 f. That Scott and SFC acting as dual agents for Counterclaimants and
23 BOk had an inherent conflict of interest that could not be waived;
- 24 g. That Scott and BOk had prepared guaranty documentation that
25 substantially reduced Counterclaimants' rights under Nevada law and
26 materially enhanced BOk's position at Counterclaimants' expense and
27 detriment.

28 220. On information and belief, Scott and SFC concealed and omitted to state additional

- 1 material facts which Counterclaimants have not yet discovered. Counterclaimants
2 reserve the right to prove such additional concealment and omissions at trial.
- 3 221. Counterdefendants Scott and SFC knew the truth of the foregoing facts, knew that
4 Counterclaimants were ignorant of the truth of those facts and knew that they were
5 material to Counterclaimants' decision to enter into the Senior Loan transaction.
6 Counterdefendants Scott and SFC concealed and omitted to state these material facts
7 for the purpose of inducing Counterclaimants to enter into the Senior Loan
8 transaction.
- 9 222. Counterdefendants Scott and SFC were acting as agent for Counterdefendant BOK in
10 connection with these concealed and omitted facts and BOK is liable to
11 Counterclaimants for the actions of Scott and SFC as if BOK itself had concealed
12 material facts and made material omissions.
- 13 223. Counterclaimants have been damaged and are entitled to recover their damages
14 according to proof at trial.
- 15 224. Counterclaimants' agreement to the Counterclaimants' Senior Loan documents was
16 induced by the Fiduciary Counterdefendants' fraudulent concealment and omissions
17 and therefore are not the valid, binding or enforceable obligations of
18 Counterclaimants. Counterclaimants are entitled to a Declaratory Judgment voiding
19 Counterclaimants' Senior Loan documents. Alternatively, they are entitled to
20 equitable reformation of the Counterclaimants' Senior Loan documents.
- 21 225. In the alternative, the matters fraudulently concealed or omitted were mutual mistakes
22 of fact or law or were unilateral mistakes of fact or law induced by
23 Counterdefendants' inequitable conduct and Counterclaimants are entitled to equitable
24 rescission or reformation of Counterclaimants' Senior Loan documents.
- 25 226. By virtue of their agencies for one another, the Fiduciary Counterdefendants are
26 jointly and severally liable on this claim.
- 27
28

THIRD CLAIM FOR RELIEF**(Constructive Fraud)**

227. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.
228. The Fiduciary Counterdefendants had a fiduciary and confidential relationship with Counterclaimants.
229. Given the nature of their relationship, the Fiduciary Counterdefendants were under a duty to disclose to Counterclaimants on a timely basis all material information relating to their decisions to agree to the Counterclaimants' Senior Loan Documents.
230. The Fiduciary Counterdefendants were aware of all of the following prior to the closing of the Senior Loan:
- A. The Deteriorated Financial Prospects as set forth under that heading above.
 - B. The Primary Reliance on Guarantors as set forth under that heading above.
 - C. The Insurance over Broken Priority and Switched Title Insurance Companies as set forth under that heading above.
 - D. The Subordination Exacerbates Broken Priority as set forth under that heading above.
 - E. The Fraud Relating to Terms of Guaranty, TM2I Guaranty and Subordination as set forth under that heading above.
231. The Fiduciary Counterdefendants also failed to disclose:
- A. That they were underwriting the Project based solely on the Guarantees;
 - B. That the pro forma project profits had decreased from \$34,000,000 to \$10,000,000;
 - C. That the pre-sale conditions were met only through significant sales to insiders and affiliates;
 - D. That there were known lien priority problems which at least one title insurer had refused to insure over;
 - E. That Scott and SFC had substantial conflicts of interest;
 - F. That SFC and BOK had prepared guaranty documents that were highly

disadvantageous to Counterclaimants' rights under Nevada law.

232. Each of the items of information described in the preceding paragraphs were material to Counterclaimants' decisions to agree to the Counterclaimants' Senior Loan Documents.
233. The Fiduciary Counterdefendants failed to disclose that material information to Counterclaimants.
234. As the direct and proximate result of the Fiduciary Counterdefendants' misrepresentations and omissions, Counterclaimants were substantially damaged in an amount to be proven at trial.
235. Counterclaimants' agreement to the Counterclaimants' Senior Loan Documents was induced by Fiduciary Counterdefendants' constructive fraud and therefore are not the valid, binding, or enforceable obligations of Counterclaimants. Counterclaimants are entitled to a Declaratory Judgment voiding the Senior Loan documents. Alternatively, they are entitled to equitable reformation of the Counterclaimants' Senior Loan documents.
236. In the alternative, the matters alleged as constructively fraudulent were mutual mistakes of fact or law or were unilateral mistakes of fact or law induced by Counterdefendants' inequitable conduct, and Counterclaimants are entitled to equitable rescission or reformation of Counterclaimants' Senior Loan documents.
237. By virtue of their agencies for one another, the Fiduciary Counterdefendants are jointly and severally liable on this claim.

FOURTH CLAIM FOR RELIEF

(Negligent Misrepresentation/Negligent Omission)

238. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.
239. The Fiduciary Counterdefendants had a duty to exercise due care in making representations to Counterclaimants concerning the Senior Loan, to make all material disclosures, and to scrupulously act in Counterclaimants' best interests.
240. The Fiduciary Counterdefendants' made certain representations to Counterclaimants

in connection with the Senior Loan, including but not limited to:

- A. That the Fiduciary Counterdefendants were primarily relying on the financial viability of the Project in underwriting the Senior Loan and that Tharaldson's exposure on the Guaranty and TM2I's exposure on the TM2I Guaranty would be limited.
 - B. That the Pre-Sale Condition was satisfied.
 - C. That the First Lien Condition was satisfied.
241. On information and belief, Fiduciary Counterdefendants made other negligent misrepresentations which Counterclaimants have not yet discovered. Counterclaimants reserve the right to prove such other negligent misrepresentations at trial.
242. The Fiduciary Parties had a duty to exercise due care in not omitting to state material facts, to make all material disclosures, and to scrupulously act in Counterclaimants' best interest.
243. The Fiduciary Counterdefendants breached this duty by omitting to state:
- a. That even though they had previously shared with Counterclaimants a pro forma projecting \$34 million in net project income, Counterdefendants Scott, SFC and BOK had in their possession at the time the Senior Loan closed a revised pro forma which they did not share with Counterclaimants projecting only \$10 million in net project income;
 - b. That SFC and BOK had not underwritten the Senior Loan on the basis of the financial merits and viability of the Manhattan West Project, but instead had based their underwriting decision solely on the strength of the guarantees of Tharaldson and TM2I;
 - c. That First American Title Insurance Co. had refused to issue title insurance because of prior recorded liens of the General Contractor;
 - d. That SFC and BOK were closing the Senior Loan transaction with

1 actual and undisclosed knowledge that they were insuring over known
2 General Contractor lien claims;

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

- 12 244. On information and belief, Fiduciary Counterdefendants made additional negligent
13 omissions which Counterclaimants have not yet discovered. Counterclaimants
14 reserve the right to prove such additional negligent omissions at trial.
15 245. In making these negligent misrepresentations, and negligent omissions the Fiduciary
16 Counterdefendants breached their duty of care.
17 246. The representations were false, and the facts omitted were material.
18 247. As the direct and proximate result of the Fiduciary Counterdefendants'
19 misrepresentations and omissions, Counterclaimants were substantially damaged in
20 an amount to be proven at trial.
21 248. Counterclaimants' agreement to the Counterclaimants' Senior Loan Documents was
22 induced by Fiduciary Counterdefendants' negligent misrepresentations and omissions
23 and therefore are not the valid, binding, or enforceable obligations of
24 Counterclaimants. Counterclaimants are entitled to a Declaratory Judgment voiding
25 the Senior Loan documents. Alternatively, they are entitled to equitable reformation
26 of the Counterclaimants' Senior Loan documents.
27 249. In the alternative, the matters identified as misrepresentations or omissions were
28 mutual mistakes of fact or law or unilateral mistakes of fact or law induced by

Counterdefendants' inequitable conduct, and Counterclaimants are entitled to equitable rescission or reformation of Counterclaimants' Senior Loan documents.

250. By virtue of their agencies for one another, the Fiduciary Counterdefendants are jointly and severally liable on this claim.

FIFTH CLAIM FOR RELIEF

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

251. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.

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

253. The Senior Loan Agreement, including the Counterclaimants' Senior Loan Documents and Loan Participation, are all "securities" within the meaning of NRS 90.295.

254. The Loan Participation transaction and Senior Loan Agreement were unique and were made in reliance on the unusual relationship of trust and confidence that existed between Counterclaimants and Scott and SFC.

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

- a. A typical loan participation has one to four participating lenders. This loan participation had 29 participants.
- b. A usual seller of participation interests is a bank who sells participations in a loan to avoid violating federal lending limits. Here the "seller" is not an actual lender and does not advance its own loan funds. Instead its entire business is to find investors to invest in and fund loans.
- c. Usual loan participants are banks or other lending institutions. Here

Counterclaimant Participant CVFS as well as other participants were non-bank entities.

- d. In a typical participation, the participants fund only part of the loan with the seller funding the balance. Here the participants funded the entire loan and Counterclaimant Participant funded only a small percentage of the Senior Loan but its affiliates Tharaldson and TM2I gave 100% guarantees of the entire loan.
- e. In a typical participation, guarantees are provided by affiliates of the borrower. Here, Counterclaimants who had no interest in the borrower provided 100% guarantees.
- f. In a typical loan participation, the loan is underwritten and collateralized on the value of a first position lien on the project property, with guarantees serving as potential and additional supplemental collateral. Here, the co-lead lenders admit that the loan was underwritten not based on the real property collateral, but based solely on the guarantees provided by Counterclaimant Participant.
- g. In a typical participation, if the project fails the participant loses no more than its participation interest. Here, if the project fails, Counterclaimants are on the hook through their guarantees for 100% of the Senior Loan.

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

257. The transaction whereby Counterdefendants SFC and BOK induced Tharaldson and TM2I to give guarantees in exchange for a 5% or 500 basis point "cut" of interest on money they did not loan was an investment contract and therefore a security under

- 1 Nevada law. The guarantees were a passive investment of risk capital without control
2 involving an investment of money or a monetary equivalent (the guarantees) in a
3 common enterprise (the Project and the Senior Loan consortium and its 29
4 participating lenders) with an expectation of profits (the 500 basis point cut) solely
5 from the efforts of others (the developer's ability to retire the Senior Loan through
6 success of the Manhattan West Project and/or the co-lead lender's management of the
7 Loan/Project). The guarantors were not lenders receiving interest on money loaned.
- 8 258. On information and belief, both Counterclaimants and Counterdefendants viewed (a)
9 the investment contract transaction involving the guarantees and (b) the loan
10 participation transaction as securities, and their motivation in entering into the
11 transactions treated Counterclaimants, through their guarantees, as if they had made
12 an investment in the Manhattan West Project. All purchasers of loan participation
13 interests were motivated by investment motives.
- 14 259. The loan participation transaction including the guarantees given by Counterclaimants
15 involved a broad plan of distribution and common trading with 29 actual participating
16 lenders and, on information and belief, additional offerees of participation interests
17 who chose not to invest. Co-lead lender SFC made no funding investment with its
18 own money; all the loan capital came from loan participants, several of whom were
19 not banks or financial institutions.
- 20 260. On information and belief, parties to the senior loan transaction and Counterclaimants'
21 senior loan documents considered participation in the senior loan transaction to be an
22 investment, and reasonably expected the participation interests to be investments.
- 23 261. There is no effective regulatory scheme outside of the securities laws to protect
24 Counterclaimants or the loan participants.
- 25 262. Counterclaimants did not know that a statement of material fact was untrue or that
26 there was an omission of a statement of material fact.
- 27 263. The Fiduciary Counterdefendants knew or in the exercise of reasonable care could
28 have known of the untrue statements or misleading omissions.

1 264. The Fiduciary Counterdefendants are civilly liable to Counterclaimants for damages
2 as provided in NRS 90.660(1)(d).

3 **SIXTH CLAIM FOR RELIEF**

4 **(Defamation)**

5 265. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim
6 as if set forth fully herein.

7 266. SFC and BOK as Co-Lead Lenders made statements, including but not limited to, that:

8 A. Tharaldson's failure to agree to the Co-Lead Lenders' restructure proposal
9 "will likely have farther reaching negative implications for his banking
10 relationships with all banks going forward."

11 B. Tharaldson's "reputation will be unquestionably damaged."

12 C. "The 29 banks stretching from North Dakota to Oklahoma that are in this deal,
13 plus banks not in this deal, will look very unfavorably on any future credit
14 request from Gary."

15 267. The statements made by SFC and BOK as Co-Lead Lenders were published to the
16 other 27 Senior Loan participants and potentially republished to numerous other
17 people, including but not limited to persons employed by the 27 Senior Loan
18 participants, persons doing business with the 27 Senior Loan participants, and persons
19 in the communities in and around the Property and Project.

20 268. The statements made by SFC and BOK are false and defamatory and impeached the
21 honesty and integrity of Counterclaimants.

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

24 270. As a direct and proximate result of the defamation made by SFC and BOK,
25 Counterclaimants have suffered serious injury to their business reputations.

26 271. Further, in light of the Fiduciary Counterdefendants' fraud, constructive fraud, breach
27 of fiduciary duty, breaches of contract, and negligence which caused the problems
28 now facing Counterclaimants and the other participants in the Senior Loan, the above

statements are false and misleading and defamatory *per se* and are actionable irrespective of special harm.

SEVENTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty)

272. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.
273. The Fiduciary Counterdefendants were agents of Counterclaimants and owed to Counterclaimants fiduciary duties of undivided loyalty, due care, and full disclosure of material information.
274. The Fiduciary Counterdefendants breached their fiduciary duties to Counterclaimants by making misrepresentations, concealing and failing to disclose material facts and failing to inform Counterclaimants of material information related to their agency, and by acting for their own benefit and the benefit of others which actions conflicted with the best interests of Counterclaimants.
275. As the direct and proximate result of the Fiduciary Counterdefendants' breaches of fiduciary duty, Counterclaimants have been substantially damaged.
276. The Fiduciary Counterdefendants acted intentionally and/or in concert and are subject to joint and several liability for all damages resulting therefrom.

EIGHTH CLAIM FOR RELIEF

(BOK, Aiding and Abetting Breach of Fiduciary Duty)

277. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.
278. BOK was aware of the fiduciary duties owed to Counterclaimants by the Fiduciary Counterdefendants Scott and SFC.
279. BOK knew or should have known that Fiduciary Counterdefendants Scott and SFC were breaching their fiduciary duties to Counterclaimants.
280. BOK acted intentionally and/or in concert with Scott and SFC and provided substantial assistance to them in their breaches of fiduciary duty toward Counterclaimants.
281. As the direct and proximate result of the actions of BOK, the Counterclaimants have

1 been substantially damaged in an amount to be proven at trial.

2 **NINTH CLAIM FOR RELIEF**

3 **(Acting in Concert/Civil Conspiracy)**

- 4 282. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.
- 5 283. The Counterdefendants, and each of them, acting in concert with each of the other
- 6 Counterdefendants' tortious conduct constituted a breach of their duties, including
- 7 fiduciary duties, to Counterclaimants.
- 8 284. Counterdefendants, and each of them, knew that they were agreeing to engage in
- 9 conduct that involved breach of fiduciary duties and a substantial risk of harm to
- 10 Counterclaimants.
- 11 285. The Counterdefendants, and each of them, knowingly or recklessly gave substantial
- 12 assistance or encouragement to each of the other Counterdefendants in committing
- 13 their tortious acts against Counterclaimants in breach of their duties to
- 14 Counterclaimants.
- 15 286. As a direct and proximate result of Counterdefendants' wrongful conduct,
- 16 Counterclaimants have suffered substantial damages in an amount to be proven at
- 17 trial.

18 **TENTH CLAIM FOR RELIEF**

19 **(Breach of Contract)**

- 20 287. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.
- 21 288. The Fiduciary Counterdefendants had contractual duties to Counterclaimants related
- 22 to the Senior Loan Agreement.
- 23 289. The Fiduciary Counterdefendants breached those duties to Counterclaimants in many
- 24 ways, including but not limited to the following:
- 25 A. Certifying that the Pre-Sale Condition was satisfied when it was not, in
- 26 violation of the CVFS Senior Participation Agreement.
- 27 B. Certifying that the First Lien Condition was satisfied when it was not in
- 28

violation of the CVFS Senior Participation Agreement

290. As the direct and proximate result of the Fiduciary Counterdefendants' breaches of contract, Counterclaimants have been substantially damaged in an amount to be proven at trial.

ELEVENTH CLAIM FOR RELIEF

(Breach of Covenant of Good Faith and Fair Dealing)

291. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.
292. Implied in all of the contractual relations between Counterclaimants and the Fiduciary Counterdefendants is a covenant of good faith and fair dealing.
293. The Fiduciary Counterdefendants breached the implied covenant of good faith and fair dealing in many ways, including but not limited to the following:
- A. Making the misrepresentations concerning the Pre-Sale Condition and the First Lien Condition as alleged herein.
 - B. Failing to disclose to Counterclaimants the material information related to the Senior Loan and the Counterclaimants' Senior Loan Documents as alleged herein.
 - C. Failing to raise with Counterclaimants the conflicts of interest inherent in the Counterclaimants' Senior Loan Documents.
 - D. Failing to advise Counterclaimants to consult with independent counsel concerning the Counterclaimants' Senior Loan Documents.
 - E. Preferring their interests (to earn fees and eight and one-half per cent interest per annum in a time that the prime rate was six and one half percent and the interest rate environment was sharply downward) over Counterclaimants interests in having the Counterclaimants' Senior Loan Documents reasonably and adequately protect their reasonable expectations concerning the Senior Loan based upon the discussions that occurred between Counterclaimants and the Fiduciary Counterdefendants.

1 294. Due to the fiduciary and confidential nature of the parties' relationship, the breach of
2 the covenant of good faith and fair dealing by the Counterdefendants gives rise to tort
3 liability.

4 295. As the direct and proximate result of the Fiduciary Parties' breaches of the implied
5 covenant of good faith and fair dealing, Counterclaimants have been substantially
6 damaged and Counterdefendants are responsible for all natural and probable
7 consequences of their wrong in an amount to be proven at trial.

8 TWELFTH CLAIM FOR RELIEF

9 (Negligence)

10 296. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim.

11 297. The Fiduciary Counterdefendants owed to Counterclaimants a duty to exercise due
12 care in connection with the underwriting, funding, and administration of the Senior
13 Loan.

14 298. The Fiduciary Counterdefendants breached their duty of due care in many ways,
15 including but not limited to the following:

- 16 A. Making the misrepresentations concerning the Pre-Sale Condition and the
17 First Lien Condition as alleged herein.
- 18 B. Failing to disclose to Counterclaimants the material information related to the
19 Senior Loan and the Counterclaimants' Senior Loan Documents as alleged
20 herein.
- 21 C. Failing to raise with Counterclaimants the conflicts of interest inherent in the
22 Counterclaimants' Senior Loan Documents.
- 23 D. Failing to advise Counterclaimants to consult with independent counsel
24 concerning the Counterclaimants' Senior Loan Documents.
- 25 E. Failing to determine, prior to funding of the Senior Loan, that a substantial
26 amount of work required by the construction drawings for the Project was not
27 covered by the construction agreement.
- 28 F. Failing to determine, during the course of inspections of the Project during

construction, that nearly \$8,000,000 in substandard work was performed.

G. Failure to obtain, in connection with each draw, the necessary lien waivers for work reflected in that draw.

H. Failure to make sure that the loan draws were spent by the contractor to pay subcontractors and material suppliers.

I. Allowing \$26,000,000 in construction liens to be filed against the Project during the course of their loan administration.

299. As the direct and proximate result of the Fiduciary Counterdefendants' negligence, Counterclaimants have been substantially damaged.

THIRTEENTH CLAIM FOR RELIEF

(Declaratory Judgment)

300. Counterclaimants incorporate by reference all prior paragraphs of their Counterclaim as if set forth fully herein.

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

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

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

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

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

- 1 Inc., Contractor and/or the Mechanic's Lien Counterdefendants.
- 2 306. Counterclaimants are entitled to a court order declaring that Tharaldson and TM2I
- 3 have no further liability relating to the Senior Loan and that as between Tharladson,
- 4 TM2I and Gemstone West Inc., Gemstone West Inc. is the sole party responsible for
- 5 the Senior Loan.
- 6 307. Counterclaimants are entitled to a court order declaring that the Deeds of Trust
- 7 relating to the Prior Loan have priority over the Construction Liens due to recordation
- 8 date, and a court order declaring that the Senior Loan DOT has priority over the
- 9 Construction Liens due to the Consent signed by the Contractor, wherein the
- 10 Contractor specifically agreed to subordinate any and all claims to SFC.
- 11 308. In addition, the Contractor executed the Contractor Certificate indicating that no work
- 12 had been completed on the Property or the Project to date.
- 13 309. Counterclaimants are entitled to a court order declaring that the Senior Loan
- 14 Documents were induced by fraud and/or mistake and are not the valid, legally
- 15 binding, and/or enforceable obligations of Counterclaimants.
- 16 310. Counterclaimants are entitled to a court order declaring that, upon CVFS's restoration
- 17 to the Fiduciary Counterdefendants as agent for the Senior Loan Participants of the net
- 18 \$10,000,000 paydown received from the Senior Loan proceeds together with interest
- 19 thereon, the Subordination is rescinded.
- 20 311. Counterclaimants are entitled to a court order declaring that the Deeds of Trust
- 21 securing the Prior Loan are prior and superior to the Senior Loan Deed of Trust and
- 22 to any liens for construction work performed on the Property after July 5, 2006, and
- 23 to any and all other liens or encumbrances on the Project recorded subsequent to
- 24 recordation of the Deeds of Trust securing the Prior Loans and constitute first lien
- 25 positions on the Property.
- 26 312. Counterclaimants are entitled to a court order declaring that Counterclaimants have
- 27 one or more valid legal defenses to the Counterclaimants' Senior Loan Documents if
- 28 those documents would otherwise be the valid, legally binding, or enforceable

obligation of Counterclaimants.

WHEREFORE, Counterclaimants pray for judgment against Counterdefendants as follows:

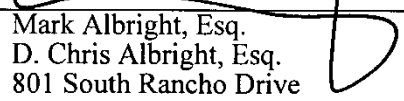
- A. Declaring that CVFS has terminated all of the CVFS Pre-Senior Participation Agreements and the CVFS Senior Loan Participation Agreement, that SFC has no authority to act for CVFS with respect to any of the loans covered thereby, and ordering SFC to execute and deliver appropriate assignments of those loans and related documents to CVFS.
- B. Declaring that the Senior Loan Documents were induced by fraud, misrepresentation, omission and/or mistake and are not the valid, legally binding, and/or enforceable obligations of Counterclaimants.
- C. Declaring that, upon CVFS's restoration to the Fiduciary Counterdefendants as agent for the Senior Loan Participants of the net \$10,000,000 paydown received from the Senior Loan proceeds together with interest thereon, the Subordination is rescinded.
- D. Declaring that the Deeds of Trust securing the Prior Loan are prior and superior to the Senior Loan Deed of Trust and to any liens for construction work performed on the Property after July 5, 2006, and to any and all other liens or encumbrances on the Project recorded subsequent to recordation of the Deeds of Trust securing the Prior Loans and constitute first lien positions on the Property.
- E. Declaring that Counterclaimants have one or more valid legal defenses to the Counterclaimants' Senior Loan Documents if those documents would otherwise be the valid, legally binding, or enforceable obligation of Counterclaimants.
- F. In the alternative, reforming the Guaranty and the TM2I Guaranty due to fraud and/or mistake to affirm the single action rule and the fair market value defense that was part of Counterclaimants' understanding with the Fiduciary Counterdefendants.

- 1 G. In the alternative, ordering that the Fiduciary Counterdefendants jointly and
2 severally, disgorge to Counterclaimants any and all direct benefit they have
3 obtained in connection with their breaches of fiduciary duty.
- 4 H. In the alternative, awarding Counterclaimants compensatory damages against
5 the Fiduciary Counterdefendants jointly and severally, in an amount equal to
6 all direct, consequential, and other damages they have suffered, in amounts to
7 be proved at the trial of this matter.
- 8 I. In the alternative, and in addition to compensatory damages, awarding
9 Counterclaimants punitive damages against the Fiduciary Counterdefendants
10 jointly and severally, in connection with the Predicate Claims in an amount to
11 be determined by the Court, but not to exceed three times compensatory
12 damages.
- 13 J. Awarding to Counterclaimants their costs of suit, expenses of litigation,
14 including but not limited to expert fees and reasonable attorneys fees.
- 15 K. Granting such other and further relief as the Court may deem just and proper.

16 RESPECTFULLY SUBMITTED this 17TH day of August, 2009.

17 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, P.C.

18 By

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CERTIFICATE OF MAILING

I hereby certify that on the 17 day of August, 2009, the foregoing **CLUB VISTA FINANCIAL SERVICES, L.L.C., AND THARALDSON MOTELS II, INC.'S ANSWER TO CAMCO PACIFIC CONSTRUCTION COMPANY, INC.'S STATEMENT OF FACTS AND COMPLAINT IN INTERVENTION AND COUNTERCLAIM** was served on the following persons by mailing a copy thereof, first class mail, postage prepaid, to:

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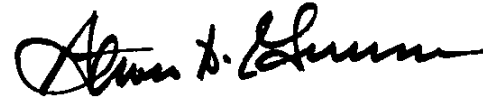
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10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 APCO CONSTRUCTION, a Nevada
13 corporation,

14 Plaintiff,

15 vs.

16 GEMSTONE DEVELOPMENT WEST, INC.,
17 a Nevada corporation; NEVADA
18 CONSTRUCTION SERVICES, a Nevada
19 corporation; SCOTT FINANCIAL
20 CORPORATION, a North Dakota
21 corporation; COMMONWEALTH LAND
22 TITLE INSURANCE COMPANY; FIRST
23 AMERICAN TITLE INSURANCE
24 COMPANY; and DOES I through X,

25 Defendants.

26 CUSTOM SELECT BILLING, INC., a Utah
27 corporation,

28 Lien Claimant/Intervenor,

GEMSTONE DEVELOPMENT WEST, INC.,
a Nevada corporation; SCOTT FINANCIAL
CORPORATION, a North Dakota

CASE NO.: 08-A-571228

DEPT. NO.: XIII

Consolidated with: A574391, A574792,
A577623, A583289, A584730, A587168,
A580889 and A589195

**CUSTOM SELECT BILLING, INC.'S
STATEMENT OF FACTS
CONSTITUTING LIEN AND
COMPLAINT IN INTERVENTION**

HOWARD & HOWARD ATTORNEYS PLLC
3800 Howard Hughes Pkwy., Suite 1400
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corporation; DOES I through X, inclusive,
Defendants in Intervention.

AND ALL RELATED CASES AND
MATTERS.

**CUSTOM SELECT BILLING, INC.'S STATEMENT OF FACTS CONSTITUTING
LIEN AND COMPLAINT IN INTERVENTION**

Date: N/A
Time: N/A

Lien claimant/Plaintiff-in-Intervention, Custom Select Billing, Inc. (hereinafter
"Custom Select"), by and through their attorneys, Howard & Howard Attorneys PLLC, hereby
brings its Statement of Facts Constituting Lien and Complaint in Intervention ("Complaint")
and complains and alleges as follows:

GENERAL ALLEGATIONS

1. Upon information and belief, Gemstone Development West, Inc. ("Gemstone")
is a Nevada corporation and is the owner of the Manhattan West Mixed-Use Development
Project, commonly referred to as 9205 W. Russell Road, 9215 W. Russell Road, 9255 W.
Russell Road, 9265 W. Russell Road, and 9275 W. Russell Road, Clark County, Nevada and
described in the contract with APCO as being located on Assessors Parcel Numbers 163-32-
101-003, 163-32-101-004, 163-32-101-005, 163-32-101-010 and 163-32-101-014 but initially
listed by the Clark County Assessors Office as APN #163-32-101-019, and then well after
commencement of construction was subdivided into 163-32-101-019; 163-32-101-020; 163-
32-101-022; 163-32-101-023 and 163-32-112-001 through 163-32-112-246, inclusive together
with an undivided allocated fractional interest in and to any common elements on said property
("Property"). Lots identified as 163-32-112-001 through 163-32-112-246 consist of Buildings
2, 3, 7, 8 and 9 of Manhattan West, Phase 1. Each separate condominium unit in Buildings 2, 3,
7, 8 and 9 is more fully identified in Exhibit 1 attached hereto and incorporated herein by this

1 reference). The entire Property subject to this lien is described by the Clark County Assessor's
2 Office as PT NE4 NW4 SEC 32 21 60, SEC 32 TWP 21 RNG 60 and more fully described in
3 that certain Grant Bargain Sale Deed recorded on February 7, 2008 in Book 20080207 as
4 Instrument No. 01481 of the Official Records of Clark County Recorder (hereinafter the
5 "Property" and/or the "Project").

6 2. Upon information and belief, Defendant Scott Financial Corporation ("SFC"), a
7 North Dakota corporation duly qualified to do business in the State of Nevada, provided
8 monies to be used in the payment of the bills incurred in the construction, repair, alteration or
9 improvement of the Property and is a holder of various deeds of trust on the Property.

10 3. That the true names and capacities, whether individual, corporate, associate or
11 otherwise of those Defendants named herein as Does I through X, are Defendants presently
12 unknown to Custom Select, who therefore sues said Defendants by such fictitious names and
13 Custom Select will seek leave to amend this Complaint to show their true names and capacities
14 when the same has been ascertained. Custom Select believes that the Doe Defendants are
15 individuals or entities within the jurisdiction of this Court, who may be holders of promissory
16 notes secured by deeds of trust recorded against the subject property, an ownership or leasehold
17 interest of the property, may be responsible for monies due and owing to Custom Select, may
18 be interfering with payments due to Custom Select, or are otherwise negligent or responsible in
19 some manner for events referred to in this Complaint, and caused damages approximately
20 thereby to Custom Select as alleged herein.

21 4. On or about July 31, 2008, per the request of Gemstone, Custom Select agreed
22 to furnish 237 natural gas sub meters and fittings, 237 coldwater meters and fittings, 474 hot
23 water meters and fittings, 25 spare fitting sets, and 948 radio frequency heads on the Project
24 ("Material").

25 5. The terms of the agreement provided that Custom Select was to receive payment
26 upon delivery and submittal of the invoices for Material.

27 6. Custom Select delivered Material and submitted invoices to Gemstone; payment
28 on such invoices became due upon receipt.

7. Gemstone failed to pay the invoices that Custom Select submitted and a principal sum of \$153,765.25 remains due Custom Select.

8. Custom Select recorded a Notice of Lien on Project on March 3, 2009, in the office of the Clark County Recorder, in Book 20090303, as Instrument No. 03785. Custom Select recorded an Amended and Restated Notice of Lien on the Project on August 13, 2009, in the office of the Clark County Recorder, in Book 20090813, as Instrument No. 004380 ("Lien").

9. The Lien was duly served as required under Nevada law.

FIRST CAUSE OF ACTION

(Breach of Contract against Gemstone)

10. Custom Select repeats and realleges each and every allegation contained in paragraphs 1 through 9 of this Complaint as though fully set forth herein.

11. There was a valid and enforceable contract between Custom Select and Gemstone for the Material supplied by Custom Select on the Project.

12. Custom Select complied with the material terms of the agreement.

13. Custom Select performed all of the terms and conditions required of Custom Select under the agreement, or is otherwise excused from performance by Gemstone's breach of contract, or by other acts or omissions of Gemstone.

14. Gemstone breached the agreement, by, among other things, failing to timely and faithfully pay Custom Select for the Material furnished by Custom Select on the Project.

15. Gemstone's breach of the agreement is material.

16. To date, Gemstone has failed, neglected, and refused to pay, and continues to refuse to pay, the principal sums that remains due to Custom Select to the detriment of Custom Select.

17. As a direct and proximate result of Gemstone's material breach, Custom Select has been damaged in an amount that exceeds \$10,000.

18. Custom Select is entitled to pre-judgment and post-judgment interest on all amounts found due and owing.

1 19. Custom Select has been forced to retain the services of an attorney in this
2 matter, and Custom Select is entitled to an award of attorney's fees and costs incurred.

3 **SECOND CAUSE OF ACTION**

4 **(Breach of the Duty of Good Faith and Fair Dealing against Gemstone)**

5 20. Custom Select repeats and realleges each and every allegation contained in
6 paragraphs 1 through 19 of this Complaint as though fully set forth herein.

7 21. There is an implied duty of good faith and fair dealing implied in all contracts
8 in the state of Nevada.

9 22. Gemstone has breached the duty of good faith and fair dealing by performing in
10 a manner that was unfaithful to the purpose of the contract

11 23. As a result of Gemstone's breach of the duty of good faith and fair dealing,
12 Custom Select has been damaged in an amount in excess of \$10,000.

13 24. Custom Select is entitled to pre-judgment and post-judgment interest on all
14 amounts found due and owing.

15 25. Gemstone's actions were intentional and malicious and evidence a wanton and
16 reckless disregard of Custom Select's rights and Custom Select is therefore entitled to punitive
17 damages in excess of \$10,000.

18 26. Custom Select has been forced to retain the services of an attorney in this
19 matter, and Custom Select is entitled to an award of attorney's fees and costs incurred.

20 **THIRD CAUSE OF ACTION**

21 **(Violation of NRS 624 Prompt Payment Act against Gemstone)**

22 27. Custom Select repeats and realleges each and every allegation contained in
23 paragraphs 1 through 26 as though fully set forth herein.

24 28. Gemstone violated NRS 624.609 by improperly withholding payments due to
25 Custom Select.

26 29. Custom Select is entitled to pre-judgment and post-judgment interest on all
27 amounts found due and owing.

30. Custom Select has been forced to retain the services of an attorney in this matter, and Custom Select is entitled to an award of attorney's fees and costs incurred.

SEVENTH CAUSE OF ACTION

(Unjust Enrichment against All Defendants)

31. Custom Select repeats and realleges each and every allegation contained in paragraphs 1 through 30 as though fully set forth herein.

32. Custom Select furnished work on the Project for the benefit of the Defendants, the owners, reputed owners or those parties that may have an interest in the Property at the specific instance and request of Gemstone.

33. Defendants, owners, reputed owners and those parties that may have an interest in the Property accepted, used and enjoyed the benefit of the work that Custom Select provided on the Project.

34. Defendants, owners, reputed owners and those parties that may have an interest in the Property knew, or should have known, that Custom Select expected to be paid for the work that Custom Select furnished on the Project.

35. Custom Select has demanded that Gemstone pay the sums outstanding for the Work furnished by Custom Select on the Project in the total sum of \$153,765.25.

36. To date, Defendants, owners, reputed owners and those parties that may have an interest in the Property, and each of them, have failed, neglected and refused to pay said sums to the detriment of Custom Select.

37. Defendants, owners, reputed owners and those parties that may have an interest in the Property have been unjustly enriched to the detriment of Custom Select.

38. It has been necessary for Custom Select to engage the services of an attorney, and Custom Select is entitled to reasonable attorneys' fees and costs as damages.

EIGHTH CAUSE OF ACTION

(Monies Due and Owing Against Gemstone)

39. Custom Select repeats and realleges each and every allegation contained in paragraphs 1 through 38 as though fully set forth herein.

1 40. Custom Select has performed all terms and conditions of the agreement
2 executed between the parties and has not been paid for all sums justly due and owing.

3 41. The monies due and owing to Custom Select by Gemstone are in excess of
4 \$10,000.00 according to proof at trial.

5 42. It has been necessary for Custom Select to engage the services of an attorney
6 and Custom Select is entitled to reasonable attorneys' fees and costs as damages.

7 **NINTH CAUSE OF ACTION**

8 **(Lien Foreclosure)**

9 43. Custom Select repeats and realleges each and every allegation contained in
10 paragraphs 1 through 42 as though fully set forth herein.

11 44. The whole of the property of the Project is reasonably necessary for the
12 convenient use and occupation of all of the improvements.

13 45. The terms, time given and conditions of the contract are: Custom Select
14 furnished Material on the Project, pursuant to an agreement with Gemstone. The terms of the
15 contract provided that Custom Select was to receive payment upon delivery and immediately
16 upon submittal of invoice(s).

17 46. Gemstone failed to pay Custom Select for the Material furnished on the Project
18 and as such Custom Select recorded its Lien.

19 47. Lien was duly recorded in the official records of Clark County.

20 48. The Lien was served upon the owners of record of the Property or their
21 authorized agents as required by Nevada law.

22 49. Custom Select has complied with all requirements of the Nevada Revised
23 Statutes to perfect the Lien on the Property.

24 50. There may be other claimants whose liens may be subordinate to Custom Select
25 Lien.

26 51. Custom Select is entitled to foreclose on its Lien against the Property pursuant
27 to the Nevada law and against the interests held by Defendants and any of them.

1 52. It has become necessary for Custom Select to retain the services of an attorney
2 to commence this lien action and Custom Select is therefore entitled to reasonable attorneys'
3 fees for the preparation, verification, service and recording of the lien and costs of suit.

4 **TENTH CAUSE OF ACTION**

5 **(Declaratory Relief)**

6 53. Custom Select repeats and realleges each and every allegation contained in
7 paragraphs 1 through 52 as though fully set forth herein.

8 54. Upon information and belief, Gemstone is the Trustor and SFC is the
9 beneficiary under the following deeds of trust covering the real property at issue:

10 a. Senior Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at
11 Book 20060705, Instrument No. 0004264;

12 b. Junior Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at
13 Book 20060705, Instrument No. 0004265;

14 c. Third Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at
15 Book 20060705, Instrument No. 0004266; and,

16 d. Senior Debt Deed of Trust dated and recorded February 7, 2008, at
17 Book 20080207, Instrument No. 01482.

18 55. On February 7, 2008, SFC executed a Mezzanine Deeds of Trust Subordination
19 Agreement that expressly subordinated the Senior, Junior, and Third Deeds of Trust to the
20 Senior Debt Deed of Trust "in all respects", "for all purposes", and, " regardless of any priority
21 otherwise available to SFC by law or agreement".

22 56. The Mezzanine Deeds of Trust Subordination Agreement contains a provision
23 that it shall not be construed as affecting the priority of any other lien or encumbrances in favor
24 of SFC. Thus, no presumptions or determinations are to be made in SFC's favor concerning the
25 priority of competing liens or encumbrances on the property, such as Custom Select's
26 mechanics' lien.

27 57. Pursuant to the a Mezzanine Deeds of Trust Subordination Agreement, SFC
28 was to cause the Senior, Junior, and Third Deeds of Trust to contain specific statements thereon

1 that they were expressly subordinated to the Senior Debt Deed of Trust and SFC was to mark
2 its books conspicuously to evidence the subordination of the Senior, Junior, and Third Deeds of
3 Trust to the Senior Debt Deed of Trust.

4 58. Custom Select is informed and believes and therefore alleges that construction
5 on the Property commenced at least before the recording of the Senior Debt Deed of Trust and
6 that by law, all mechanics' liens, including Custom Select's, enjoy a position of priority over the
7 Senior Debt Deed of Trust.

8 59. Because the Mezzanine Deeds of Trust Subordination Agreement renders the
9 Senior, Junior, and Third Deeds of Trust expressly subordinate to the Senior Debt Deed of
10 Trust, it also renders, as a matter of law, the Senior, Junior, and Third Deeds of Trust expressly
11 subordinate to all mechanics' liens, including Custom Select's.

12 60. A dispute has arisen, and an actual controversy now exists over the priority issue
13 of Custom Select's mechanics' lien over other encumbrances on the Property.

14 61. Custom Select is entitled to a court order declaring that its Lien has a superior
15 lien position on the Property over any other lien or encumbrance created by or for the benefit of
16 SFC or any other entity.

17 62. It has been necessary for Custom Select to engage the services of an attorney
18 and Custom Select is entitled to reasonable attorneys' fees and costs as damages.

19 **ELEVENTH CAUSE OF ACTION**

20 **(Priority over Deeds of Trust)**

21 63. Custom Select repeats and realleges each and every allegation contained in
22 paragraphs 1 through 62 as though fully set forth herein.

23 64. Upon information and belief, the work of improvement to the Property
24 commenced prior to the recording of any deed(s) of trust and/or other interest(s) in the
25 Property, including the deeds of trust recorded by SFC.

26 65. Upon information and belief, even in the event that deeds of trust and/or other
27 interests on the Property were recorded before construction on the Property commenced, those
28 deeds of trust, including SFC's, were thereafter expressly subordinated to Custom Select's

1 statutory mechanic's lien elevating Custom Select's Lien to a position superior to those deeds
2 of trust and/or other interests in the Property.

3 66. Custom Select's claim against the Property is superior to the claims of
4 Defendants.

5 67. It has been necessary for Custom Select to engage the services of an attorney
6 and Custom Select is entitled to reasonable attorneys' fees and costs as damages.

7 **WHEREFORE**, Custom Select prays for the following relief:

8 1. That this Court enters judgment against the Defendants, and each of them,
9 jointly and severally, in the sum in excess of \$10,000;

10 2. That this Court enters a judgment against Defendants, and each of them, jointly
11 and severally, for Custom Select's reasonable costs and attorney's fees incurred in the collection
12 of the monies due Custom Select for the Materials, as well as an award of interest thereon;

13 3. That this Court enter a judgment declaring that Custom Select has valid and
14 enforceable mechanic's liens against the Property, with priority over all Defendants, in an
15 amount of its outstanding balance;

16 4. That this Court award Custom Select pre-judgment on all amounts found due
17 and owing;

18 5. That this Court award Custom Select a reasonable sum as and for the costs of
19 preparation, verification, service and recording of the Lien;

20 6. That this Court adjudge a lien upon the Property for the outstanding balance,
21 plus reasonable attorneys fees, costs and interest thereon, and that this Honorable Court enter
22 an Order that the Property, and improvements, such as may be necessary, be sold pursuant to
23 the laws of the State of Nevada, and that the proceeds of said sale be applied to the payment of
24 sums due Custom Select herein;

25 7. That this Court enter a judgment declaring that Custom Select's Lien enjoys a
26 position of priority superior to any lien or encumbrance created by or for the benefit of SFC or
27 any other entity;

28 . . .

8. That the Court enter such deficiency judgment against Defendants as the Court deems proper in the premises;

9. That Custom Select be awarded post-judgment interest on all amounts; and

10. For such other and further relief as this Honorable Court deems just and proper in the premises.

DATED this 21 day of August, 2009.

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CERTIFICATE OF MAILING

On the 27th day of August, 2009, the undersigned served a true and correct copy of the foregoing CUSTOM SELECT BILLING, INC.'S STATEMENT OF FACTS CONSTITUTING LIEN AND COMPLAINT IN INTERVENTION, by U.S. Mail, postage prepaid, upon the following:

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 MUIJE & VARRICCHIO
 1320 S. Casino Center Blvd.
 Las Vegas, NV 89104
Attorneys for John Deere Landscaping, Inc.

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 701 N. Green Valley Parkway, #110
 Henderson, NV 89074
Attorneys for CAMCO Pacific

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 GERRARD, COX & LARSEN
 2450 St. Rose Parkway, Ste. 200
 Henderson, Nevada 89074
Attorneys for Las Vegas Pipeline, LLC

Nicholas M. Wieczorek, Esq.
 Brian K. Walters, Esq.
 MORRIS POLICH & PURDY
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 Michael J. Davidson, Esq.
 Dallin T. Wayment, Esq.
 PEEL BRIMLEY
 3333 E. Serene Avenue, Ste. 200
 Henderson, Nevada 89074-6571
*Attorneys for HD Supply Waterworks, LP;
 Accuracy Glass & Mirror Company, Inc.;
 Bruin Painting Corporation; Helix Electric
 of Nevada, LLC; and WRG Design, Inc.*

HOWARD & HOWARD ATTORNEYS PLLC
3800 Howard Hughes Pkwy., Suite 1400
Las Vegas, NV 89169
(702) 257-1483

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Becky A. Pinter, Esq.
Gibbs, Gideon, Locher, Turner & Senet, LLP
3993 Howard Hughes Pkwy., Ste. 530
Las Vegas, NV 89169-5994



An employee of Howard and Howard Attorneys PLLC

EXHIBIT “1”

Inst #: 200908130004380

Fees: \$24.00

N/C Fee: \$0.00

08/13/2009 03:45:30 PM

Receipt #: 14466

Requestor:

PARADIGM ATTORNEY SERVICE
INC

Recorded By: CYV Pgs: 11

DEBBIE CONWAY

CLARK COUNTY RECORDER

APN#

11-di
http

APN: 163-32-112-001 through 163-32-
112-246; 163-32-101-020; 163-32-101-
022; 163-32-101-023; (formally known
as 163-32-101-019)

ined at:
r.aspx

Amended and Restated Notice of Lien

Type of Document

(Example: Declaration of Homestead, Quit Claim Deed, etc.)

Recording Requested By:

Gwen Rutar Mullins

Return Documents To:

Name Gwen Rutar Mullins

Address 3800 Howard Hughes Pkwy., Suite 1400

City/State/Zip Las Vegas, NV 89169

This page added to provide additional information required by NRS 111.312 Section 1-2

(An additional recording fee of \$1.00 will apply)

This cover page must be typed or printed clearly in black ink only.

**APN: 163-32-112-001 through
163-32-112-246; 163-32-101-020;
163-32-101-022; 163-32-101-023,
(formerly known as 163-32-101-019**

After Recording Mail to:

**CUSTOM SELECT BILLING, INC.
c/o Gwen Rutar Mullins, Esq.
Howard & Howard
3800 Howard Hughes Pkwy., Ste. 1400
Las Vegas, Nevada 89169**

AMENDED AND RESTATED NOTICE OF LIEN

The undersigned claims a lien upon the property described in this notice for work, materials or equipment furnished or to be furnished for the improvement of the property:

1. The amount of the original contract is: \$123,240.00.
2. The total amount of all additional or changed work, materials and equipment, if any, is: \$48,485.25.
3. The total amount of all payments received to date is: \$18,960.00.
4. The amount of the lien, after deducting all just credits and offsets, is: \$153,765.25.
5. The name of the owner, if known, of the property is: Gemstone Development West, Inc.
6. The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished or agreed to furnish work, materials or equipment is: Gemstone Development West, Inc. and/or Camco Pacific Construction Company, Inc.

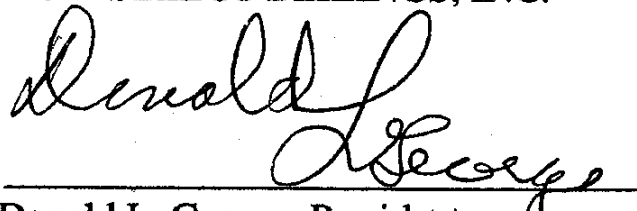
#555345-v1

7. A brief statement of the terms of payment of the lien claimant's contract is: Payments were to be made to the undersigned upon delivery, to wit: on or before November 17, 2008.

8. A description of the property to be charged with the lien is: Manhattan West Mixed-Use Development Project, commonly referred to as 9205 W. Russell Road, 9215 W. Russell Road, 9255 W. Russell Road, 9265 W. Russell Road, and 9275 W. Russell Road, Clark County, Nevada and described in the contract with APCO as being located on Assessors Parcel Numbers 163-32-101-003, 163-32-101-004, 163-32-101-005, 163-32-101-010 and 163-32-101-014 but initially listed by the Clark County Assessors Office as APN #163-32-101-019, and then well after commencement of construction was subdivided into 163-32-101-019; 163-32-101-020; 163-32-101-022; 163-32-101-023 and 163-32-112-001 through 163-32-112-246, inclusive together with an undivided allocated fractional interest in and to any common elements on said property ("Property"). Lots identified as 163-32-112-001 through 163-32-112-246 consist of Buildings 2, 3, 7, 8 and 9 of Manhattan West, Phase 1. Each separate condominium unit in Buildings 2, 3, 7, 8 and 9 is more fully identified in Exhibit 1 attached hereto and incorporated herein by this reference). The entire Property subject to this lien is described by the Clark County Assessor's Office as PT NE4 NW4 SEC 32 21 60, SEC 32 TWP 21 RNG 60 and more fully described in that certain Grant Bargain Sale Deed recorded on February 7, 2008 in Book 20080207 as Instrument No. 01481 of the Official Records of Clark County Recorder.

9. Although the lien is against two or more separate buildings that are owned by the same person and that are currently located on separate legal parcels, the Lien Claimant is not required to apportion the amount of its lien pursuant to NRS 108.231 as separate legal parcels did not exist at the commencement of construction on the Property.

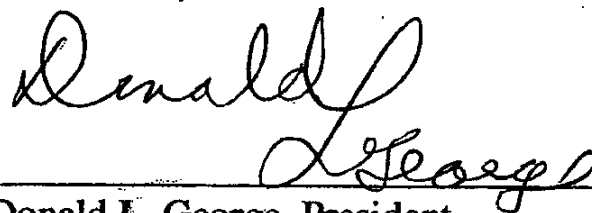
CUSTOM SELECT BILLINGS, INC.

By: 
Donald L. George, President

STATE OF UTAH)
)ss.:
COUNTY OF SALT LAKE)

Donald L. George, the President of CUSTOM SELECT BILLINGS, INC., being first duly sworn on oath according to law, deposes and says:

I have read the foregoing Amended and Restated Notice of Lien, know the contents thereof and state that the same is true of my own personal knowledge, except those matters stated upon the information and belief, and, as to those matters, I believe them to be true.



Donald L. George, President
Custom Select Billings, Inc.

SUBSCRIBED AND SWORN to before me
this 11th day of August, 2009.


NOTARY PUBLIC in and for said
County and State

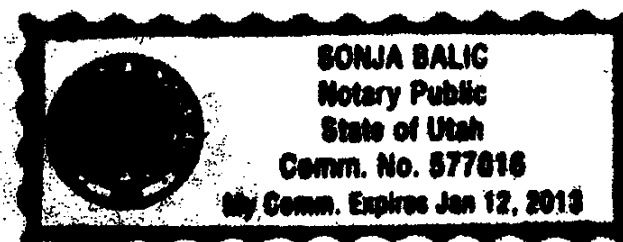


EXHIBIT 1

Condominium units identified as APN 163-32-112-001 through 163-32-112-246, inclusive are further broken down per separate buildings as follows:

Building 2

9275 W. Russell Road, Las Vegas Nevada consisting of the following:

APN: 163-32-112-001 (Unit 101) owned by Gemstone Development West, Inc.
163-32-112-002 (Unit 102) owned by Gemstone Development West, Inc.
163-32-112-003 (Unit 201) owned by Gemstone Development West, Inc.
163-32-112-004 (Unit 301) owned by Gemstone Development West, Inc.
163-32-112-005 (Unit 401) owned by Gemstone Development West, Inc.

Building 3

9205 W. Russell Road, Las Vegas, Nevada consisting of the following:

APN: 163-32-112-006 (Unit 101) owned by Gemstone Development West, Inc.
163-32-112-007 (Unit 102) owned by Gemstone Development West, Inc.
163-32-112-008 (Unit 201) owned by Gemstone Development West, Inc.
163-32-112-009 (Unit 301) owned by Gemstone Development West, Inc.
163-32-112-010 (Unit 401) owned by Gemstone Development West, Inc.

Building 7

9215 W. Russell Road, Las Vegas, Nevada consisting of the following:

APN: 163-32-112-011 (Unit 101) owned by Gemstone Development West, Inc.
163-32-112-012 (Unit 102) owned by Gemstone Development West, Inc.
163-32-112-013 (Unit 103) owned by Gemstone Development West, Inc.
163-32-112-014 (Unit 201) owned by Gemstone Development West, Inc.
163-32-112-015 (Unit 202) owned by Gemstone Development West, Inc.
163-32-112-016 (Unit 203) owned by Gemstone Development West, Inc.
163-32-112-017 (Unit 204) owned by Gemstone Development West, Inc.
163-32-112-018 (Unit 205) owned by Gemstone Development West, Inc.
163-32-112-019 (Unit 206) owned by Gemstone Development West, Inc.
163-32-112-020 (Unit 207) owned by Gemstone Development West, Inc.
163-32-112-021 (Unit 208) owned by Gemstone Development West, Inc.

[illegible]

163-32-112-066 (Unit 703) owned by Gemstone Development West, Inc.
163-32-112-067 (Unit 704) owned by Gemstone Development West, Inc.
163-32-112-068 (Unit 705) owned by Gemstone Development West, Inc.
163-32-112-069 (Unit 706) owned by Gemstone Development West, Inc.
163-32-112-070 (Unit 707) owned by Gemstone Development West, Inc.
163-32-112-071 (Unit 708) owned by Gemstone Development West, Inc.
163-32-112-072 (Unit 709) owned by Gemstone Development West, Inc.
163-32-112-073 (Unit 710) owned by Gemstone Development West, Inc.
163-32-112-074 (Unit 801) owned by Gemstone Development West, Inc.
163-32-112-075 (Unit 802) owned by Gemstone Development West, Inc.
163-32-112-076 (Unit 803) owned by Gemstone Development West, Inc.
163-32-112-077 (Unit 804) owned by Gemstone Development West, Inc.
163-32-112-078 (Unit 805) owned by Gemstone Development West, Inc.
163-32-112-079 (Unit 806) owned by Gemstone Development West, Inc.
163-32-112-080 (Unit 807) owned by Gemstone Development West, Inc.
163-32-112-081 (Unit 808) owned by Gemstone Development West, Inc.
163-32-112-082 (Unit 809) owned by Gemstone Development West, Inc.
163-32-112-083 (Unit 810) owned by Gemstone Development West, Inc.
163-32-112-084 (Unit 902) owned by Gemstone Development West, Inc.
163-32-112-085 (Unit 903) owned by Gemstone Development West, Inc.
163-32-112-086 (Unit 904) owned by Gemstone Development West, Inc.

Building 8

9265 W. Russell Road, Las Vegas, Nevada consisting of the following:

APN: 163-32-112-087 (Unit 101) owned by Gemstone Development West, Inc.
163-32-112-088 (Unit 102) owned by Gemstone Development West, Inc.
163-32-112-089 (Unit 103) owned by Gemstone Development West, Inc.
163-32-112-090 (Unit 104) owned by Gemstone Development West, Inc.
163-32-112-091 (Unit 105) owned by Gemstone Development West, Inc.
163-32-112-092 (Unit 106) owned by Gemstone Development West, Inc.
163-32-112-093 (Unit 107) owned by Gemstone Development West, Inc.
163-32-112-094 (Unit 108) owned by Gemstone Development West, Inc.
163-32-112-095 (Unit 109) owned by Gemstone Development West, Inc.
163-32-112-096 (Unit 110) owned by Gemstone Development West, Inc.
163-32-112-097 (Unit 111) owned by Gemstone Development West, Inc.
163-32-112-098 (Unit 112) owned by Gemstone Development West, Inc.
163-32-112-099 (Unit 113) owned by Gemstone Development West, Inc.
163-32-112-100 (Unit 114) owned by Gemstone Development West, Inc.
163-32-112-101 (Unit 115) owned by Gemstone Development West, Inc.
163-32-112-102 (Unit 116) owned by Gemstone Development West, Inc.
163-32-112-103 (Unit 117) owned by Gemstone Development West, Inc.

163-32-112-148 (Unit 402) owned by Gemstone Development West, Inc.
163-32-112-149 (Unit 403) owned by Gemstone Development West, Inc.
163-32-112-150 (Unit 404) owned by Gemstone Development West, Inc.
163-32-112-151 (Unit 405) owned by Gemstone Development West, Inc.
163-32-112-152 (Unit 406) owned by Gemstone Development West, Inc.
163-32-112-153 (Unit 407) owned by Gemstone Development West, Inc.
163-32-112-154 (Unit 408) owned by Gemstone Development West, Inc.
163-32-112-155 (Unit 409) owned by Gemstone Development West, Inc.
163-32-112-156 (Unit 410) owned by Gemstone Development West, Inc.
163-32-112-157 (Unit 411) owned by Gemstone Development West, Inc.
163-32-112-158 (Unit 412) owned by Gemstone Development West, Inc.
163-32-112-159 (Unit 413) owned by Gemstone Development West, Inc.
163-32-112-160 (Unit 414) owned by Gemstone Development West, Inc.
163-32-112-161 (Unit 415) owned by Gemstone Development West, Inc.
163-32-112-162 (Unit 416) owned by Gemstone Development West, Inc.
163-32-112-163 (Unit 417) owned by Gemstone Development West, Inc.
163-32-112-164 (Unit 418) owned by Gemstone Development West, Inc.
163-32-112-165 (Unit 419) owned by Gemstone Development West, Inc.
163-32-112-166 (Unit 420) owned by Gemstone Development West, Inc.

Building 9

9255 W. Russell Road, Las Vegas, Nevada consisting of the following:

APN: 163-32-112-167 (Unit 101) owned by Gemstone Development West, Inc.
163-32-112-168 (Unit 102) owned by Gemstone Development West, Inc.
163-32-112-169 (Unit 103) owned by Gemstone Development West, Inc.
163-32-112-170 (Unit 104) owned by Gemstone Development West, Inc.
163-32-112-171 (Unit 105) owned by Gemstone Development West, Inc.
163-32-112-172 (Unit 106) owned by Gemstone Development West, Inc.
163-32-112-173 (Unit 107) owned by Gemstone Development West, Inc.
163-32-112-174 (Unit 108) owned by Gemstone Development West, Inc.
163-32-112-175 (Unit 109) owned by Gemstone Development West, Inc.
163-32-112-176 (Unit 110) owned by Gemstone Development West, Inc.
163-32-112-177 (Unit 111) owned by Gemstone Development West, Inc.
163-32-112-178 (Unit 112) owned by Gemstone Development West, Inc.
163-32-112-179 (Unit 113) owned by Gemstone Development West, Inc.
163-32-112-180 (Unit 114) owned by Gemstone Development West, Inc.
163-32-112-181 (Unit 115) owned by Gemstone Development West, Inc.
163-32-112-182 (Unit 116) owned by Gemstone Development West, Inc.
163-32-112-183 (Unit 117) owned by Gemstone Development West, Inc.
163-32-112-184 (Unit 118) owned by Gemstone Development West, Inc.
163-32-112-185 (Unit 119) owned by Gemstone Development West, Inc.

163-32-112-230 (Unit 404) owned by Gemstone Development West, Inc.
163-32-112-231 (Unit 405) owned by Gemstone Development West, Inc.
163-32-112-232 (Unit 406) owned by Gemstone Development West, Inc.
163-32-112-233 (Unit 407) owned by Gemstone Development West, Inc.
163-32-112-234 (Unit 408) owned by Gemstone Development West, Inc.
163-32-112-235 (Unit 409) owned by Gemstone Development West, Inc.
163-32-112-236 (Unit 410) owned by Gemstone Development West, Inc.
163-32-112-237 (Unit 411) owned by Gemstone Development West, Inc.
163-32-112-238 (Unit 412) owned by Gemstone Development West, Inc.
163-32-112-239 (Unit 413) owned by Gemstone Development West, Inc.
163-32-112-240 (Unit 414) owned by Gemstone Development West, Inc.
163-32-112-241 (Unit 415) owned by Gemstone Development West, Inc.
163-32-112-242 (Unit 416) owned by Gemstone Development West, Inc.
163-32-112-243 (Unit 417) owned by Gemstone Development West, Inc.
163-32-112-244 (Unit 418) owned by Gemstone Development West, Inc.
163-32-112-245 (Unit 419) owned by Gemstone Development West, Inc.
163-32-112-246 (Unit 420) owned by Gemstone Development West, Inc.

Allen D. Linn

CLERK OF THE COURT

1 ANS/CTCM
2 STEVEN L. MORRIS
3 Nevada Bar No. 7454
4 **WOODBURY, MORRIS & BROWN**
5 701 N. Green Valley Parkway, Suite 110
6 Henderson, Nevada 89074
7 (702) 933-0777
8 slmorris@wmb-law.net

9 Attorneys for
10 Camco Pacific Construction Company, Inc.

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 APCO CONSTRUCTION, a Nevada
14 corporation,

15 Plaintiff,

16 vs.

17 **GEMSTONE DEVELOPMENT WEST,**
18 **INC.,** a Nevada corporation; and DOES I
19 through X, inclusive,

20 Defendants.

21 **LAS VEGAS PIPELINE, LLC.,**

22 Intervenor/Lien Claimant,

23 vs.

24 APCO CONSTRUCTION, a Nevada
25 corporation; GEMSTONE DEVELOPMENT
26 WEST, INC.; CAMCO PACIFIC
27 CONSTRUCTION COMPANY, INC., a
28 California corporation; DOES 1-40; ROE
CORPORATIONS 1-40; DOE BONDING
COMPANIES 1-10; DOE SURETIES 1-10;
DOE LENDERS 1-10; and DOE TENANTS
1-10; inclusive,

Defendants.

Case No: A571228
Dept. No: X

Consolidated with:

A571792 A583289
A574391 A584730
A577623 A587168

**ANSWER TO LAS VEGAS PIPELINE,
LLC'S STATEMENT OF FACTS
CONSTITUTING LIEN AND
COMPLAINT IN INTERVENTION AND
CAMCO PACIFIC CONSTRUCTION
COMPANY INC.'S COUNTERCLAIM**

09A587168
385293



WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

1 CAMCO PACIFIC CONSTRUCTION
2 COMPANY, INC., a California corporation

3 Counterclaimant,

4 vs.

5 LAS VEGAS PIPELINE, LLC., a Nevada
6 limited liability company; and DOES 1-10,
7 inclusive

8 Counterdefendant.

9 Defendant in Intervention CAMCO PACIFIC CONSTRUCTION COMPANY, INC.

10 (hereinafter "Camco" or "Defendant"), by and through its counsel, Steven L. Morris, Esq. of the
11 law firm of Woodbury, Morris & Brown, hereby answers the Complaint of LAS VEGAS
12 PAVING, LLC (hereinafter "LVP" or "Plaintiff"), on file herein, and admits, denies and alleges
13 as follows:

14 1. Camco is without information or knowledge sufficient to ascertain the truth of
15 the allegations contained in Paragraphs 5, 6, 41, 42, and 45 of Plaintiff's Complaint, and
16 therefore denies each and every allegation contained therein.

17 2. Camco admits the allegations contained in Paragraphs 1, 2, 3, 11, 12, and 19 of
18 Plaintiff's Complaint.

19 3. Camco denies each and every allegation contained in Paragraphs 4, 7, 8, 9, 13,
20 14, 15, 16, 17, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 43, 44, 46,
21 48, 49, 50, 51, and 52 of Plaintiff's Complaint.

22 4. As to Paragraphs 10, 18, 23, 34, 40, and 47 of Plaintiff's Complaint, Camco
23 repeats and realleges its answers to paragraphs 1 through 52 as though fully set forth herein.

24 5. To the extent that any allegations set forth in Plaintiff's Complaint have not been
25 answered, this answering Defendant denies each and every allegation or inference thereof not
26 expressly set forth hereinabove.

27 6. It has become necessary for this answering Defendant to retain the services of
28 WOODBURY, MORRIS, & BROWN, attorneys at law, to defend this action, and as a result,

1 this answering Defendant has been damaged by the Plaintiff, and this answering Defendant is
2 accordingly entitled to its attorney fees and costs incurred herein.

3 AFFIRMATIVE DEFENSES

4 1. The Complaint on file herein fails to state a claim against Camco upon which
5 relief can be granted.

6 2. That any or all negligence or fault on the part of the Plaintiff, if any, would be
7 active and primary, and any negligence or fault of Camco, if any, would be secondary and
8 passive.

9 3. Any and all damages sustained by Plaintiff are the result of its own negligence
10 and breach of contract.

11 4. Camco is not negligent with respect to the transactions which are the subject of
12 the Complaint, and is and was not in breach of contract.

13 5. At the time and place under the circumstances alleged by the Plaintiff, Plaintiff
14 had full and complete knowledge and information in regard to the conditions and circumstances
15 then and there existing, and through Plaintiff's own knowledge, conduct, acts and omissions,
16 assume the risk attendant to any condition there or then present.

17 6. The liability, if any, of Camco must be reduced by the percentage of fault of
18 others, including the Plaintiff.

19 7. The claims, and each of them, are barred by the failure of the Plaintiff to plead
20 those claims with particularity.

21 8. The claims of Plaintiff have been waived as a result of the acts and the conduct
22 of the Plaintiff.

23 9. The claim for breach of contract is barred as a result of the failure to satisfy
24 conditions precedent.

25 10. Plaintiff has failed to mitigate its damages.

26 11. It has been necessary for Camco to retain the services of the law offices of
27 Woodbury, Morris & Brown, attorneys at law, for the purpose of defending this action, and
28

1 Camco is entitled to payment of all costs, fees and expenses associated with and/or arising out
2 of the defense of this action.

3 12. Pursuant To NRCP 8, all possible affirmative defenses may not have been
4 alleged herein, inasmuch as sufficient facts were not available after reasonable investigation and
5 inquiry upon the filing of Defendant's Answer and, therefore, Defendant reserves the right to
6 amend its Answer to allege additional affirmative defenses if subsequent investigation warrants.

7 WHEREFORE, Defendant Camco prays as follows:

- 8 1. That Plaintiff take nothing by way of its Complaint;
9 2. For an award of reasonable attorneys' fees and costs for having to defend this
10 action; and
11 3. For such other and further relief as the Court deems just and proper.

12 **COUNTERCLAIM**

13 Counterclaimant CAMCO PACIFIC CONSTRUCTION COMPANY, INC. (hereinafter
14 "Camco") by and through its attorney, Steven L. Morris, Esq. of the law firm of Woodbury,
15 Morris & Brown complains as follows:

16 **JURISDICTIONAL ALLEGATIONS**

17 1. Camco was and is at all times relevant to this action, a California corporation,
18 doing business in Clark County, Nevada as a contractor duly licensed by the Nevada State
19 Contractor's Board.

20 2. Counterdefendant LAS VEGAS PIPELINE, LLC. (hereinafter referred to as
21 "LVP") is and was at all times relevant to this action, a corporation conducting business in
22 Clark County, Nevada.

23 3. The true names and capacities, whether individual, corporate, associate or
24 otherwise of Defendants named herein as DOES I through X are unknown to Counterclaimant.
25 Said DOE Defendants are responsible for damages suffered by Counterclaimant; therefore,
26 Counterclaimants sue Defendants by such fictitious names. Counterclaimants will ask leave to
27 amend this Counterclaim to show the true names and capacities of each such DOE Defendants
28

1 at such time as the same have been ascertained.

2 **FIRST CAUSE OF ACTION**

3 **(Breach of Contract)**

4 4. Camco repeats and realleges each and every allegation contained in the
5 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by
6 reference and further allege:

7 5. Camco is informed and believes and thereupon alleges that LVP entered into a
8 Subcontract Agreement ("Subcontract Agreement") with APCO Construction related to the
9 Manhattan West Condominiums project, located in Clark County, Nevada (the "Project").

10 6. On or about August 26, 2008, Camco and LVP entered into a Ratification
11 and Amendment of Subcontract Agreement ("Ratification Agreement") wherein Camco and
12 LVP acknowledged, ratified, and agreed to the terms of the Subcontract Agreement.

13 7. Section 3.4 of the Subcontract Agreement states: "Any payments to
14 Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from
15 Owner. Subcontractor herein agrees to assume the same risk that the Owner may become
16 insolvent that Contractor has assumed by entering into the Prime Contract with the Owner."

17 8. All payments made to subcontractors and suppliers on the Project were made
18 directly by Gemstone through Nevada Construction Services.

19 9. Camco never received payment on behalf of the subcontractors, including
20 LVP, and was therefore, not responsible nor liable for payment to the subcontractors,
21 including LVP. (See Exhibit A, attached hereto and incorporated herein by this reference).

22 10. LVP agreed and expressly acknowledged that it assumed the risk of non-
23 payment by the Owner.

24 11. LVP breached its contract with Camco by demanding payment from Camco
25 and by bringing claims against Camco and its License Bond Surety relative to payment for
26 the work allegedly performed by LVP on the Project.

27 12. Camco is entitled to all of its attorneys fees and costs pursuant to the terms and
28 conditions of the Ratification Agreement.

WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

13. Camco has been required to engage the services of the law firm of
WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
reasonable attorneys fees and costs therefor.

SECOND CAUSE OF ACTION

(Breach of Covenant of Good Faith and Fair Dealing)

14. Camco repeats and realleges each and every allegation contained in the
preceding paragraphs of Counterclaimant's Counterclaim, incorporate the same at this point by
reference and further allege:

15. The law imposes upon LVP, by virtue of the contract, a covenant to act in good
faith and deal fairly with Counterclaimant;

16. Despite this covenant, LVP's intentional failure to abide by the terms of the
parties written contract, LVP breached its covenant to act in good faith and deal fairly;

17. As a result of its breach of the covenant of good faith and fair dealing, LVP has
injured Camco in an amount in excess of \$10,000.00.

18. Camco has been required to engage the services of the law firm of
WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
reasonable attorneys fees and costs therefor.

WHEREFORE, Counterclaimant Camco prays as follows:

1. This Court enter judgment against Counterdefendants, and each of them, in an
amount in excess of \$10,000.00, plus interest at the contract rate;

2. For an award of reasonable attorneys' fees and costs for having to prosecute this
action; and

3. For such other and further relief as the Court deems just and proper.

DATED this 9th day of September 2009.

WOODBURY, MORRIS & BROWN

David L. Morris #11059 for

STEVEN L. MORRIS, ESQ.
Nevada Bar No. 7454
701 N. Green Valley Pkwy., Suite 110
Henderson, NV 89074-6178
Attorneys for Camco


WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of September 2009, I served a copy of the
ANSWER TO LAS VEGAS PIPELINE, LLC'S STATEMENT OF FACTS
CONSTITUTING LIEN AND COMPLAIN IN INTERVENTION AND CAMCO
PACIFIC CONSTRUCTION COMPANY INC.'S COUNTERCLAIM by facsimile and by
enclosing a true and correct copy of the same in a sealed envelope upon which first-class
postage was fully prepaid, and addressed to the following:

James E. Shapiro, Esq.
GERRARD, COX & LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074

and that there is regular communication by mail between the place of mailing and the place so
addressed.



An Employee of Woodbury, Morris & Brown

EXHIBIT A



Date: April 28, 2009
To: Nevada State Contractor's Board
From: Scott Financial Corporation
Subject: ManhattanWest Project

I am the President of Scott Financial Corporation ("SFC"), which is a seasoned commercial finance company located in Bismarck, North Dakota and licensed in Nevada.

SFC is the lender for ManhattanWest Buildings 2, 3, 7, 8, and 9 located at West Russell Road and Rocky Hill Street in Las Vegas, Nevada (the "Project"). No other ManhattanWest buildings were funded or constructed. The Project consisted of condominiums developed by Gemstone Development West, Inc. ("Gemstone").

The purpose of this letter is to explain the payment process for the Project and to demonstrate that Camco Pacific Construction Company, Inc. ("Camco") had no direct responsibility to pay the trade contractors or any other contracting parties on the Project.

As the Project's lender, SFC established a credit facility between SFC (with its network of participating community banks) and Gemstone. As the loan originator and lead lender, SFC established both the Senior and Mezzanine Credit Facilities that were forecasted to fund the entire construction cost to complete the Project; provided however, that an adequate level of condominium sales were closed by Gemstone in a timely manner.

In connection with its funding of the Project, SFC required a very detailed and disciplined payment procedure, which it has used successfully and extensively in the past. This payment procedure was developed collectively between SFC, Gemstone, and Nevada Construction Services ("NCS") to execute the monthly construction funding on the Project in a proper and timely manner.

This payment procedure was communicated to the general contractors and the trade contractors through them and was used to facilitate the payment structure for all trade contractors/vendors.

Prior to the commencement of the Project, SFC entered into a voucher control contract with NCS. First, pursuant to such agreement, NCS managed the voucher control and served as the third party disbursement agent. Second, as part of such agreement, NCS also performed third party site construction inspections for SFC prior to each disbursement. Please note that NCS is a disbursement agent for SFC and does not "approve funding", that is a role of SFC and our participating banks exclusively.

APCO Construction ("APCO") was the original General Contractor for the Project. The protocol for issuing payment involved APCO submitting a monthly payment application to Gemstone based on a schedule of values and materials delivered by the vendors and trade contractors (the "Payment Application").

Next, Gemstone would review the Payment Application and approve or reject its contents based upon the work completed as of the submission of such Payment Application. Upon the final agreement and approval of the Payment Application by Gemstone and APCO, Gemstone would send the Payment Application and any supporting documents to NCS. NCS

15010 Sundown Drive • Bismarck, ND 58503
Office: 701.255.2215 • Fax: 701.223.7289

A licensed and bonded corporate finance company.

would review the Payment Application and the supporting documents and compare them with its payment records. Thereafter, NCS would order a formal NCS inspection of the jobsite to verify that sufficient progress was made to warrant the amount in the Payment Application. After completing such inspection, NCS submitted its request for funding to SFC.

Upon receiving such approval, SFC conducted its final monthly creditor review and completed the funding approval process by taking the following steps: (a) formally signing-off on the Payment Application and (b) obtaining final approval of the Payment Application from the co-lead bank.

Finally, after the Payment Application was properly approved and verified, the corresponding funds were requested by SFC from its participating lenders and advanced into the SFC Project Control Account. Thereafter, the respective (a) soft costs in the Payment Application were advanced directly to Gemstone and (b) the hard costs in the Payment Application were wired directly to NCS for controlled disbursement.

Upon receiving such hard cost funds, NCS would send the corresponding payment directly to APCO for disbursement to the trade contractors. This was the payment process throughout the period that APCO remained on the Project, except for the June and July 2008 Pay Applications where NCS was notified by Gemstone to issue joint checks to the sub contractors.

APCO was terminated by Gemstone for cause in August 2008. After such termination, Gemstone engaged Camco to serve as the General Contractor for the Project. When this substitution occurred, the payment process used during the APCO engagement was continued with some alterations.

The most important of these alterations was based on the shift from a Guaranteed Maximum Price to a simple monthly fee. APCO had agreed to deliver the Project for a Guaranteed Maximum Price and received a fee for its services based on a percentage of each Payment Application. Consequently, APCO assumed responsibility for the financial aspects of the Project and the proper engagement and payment of the trade contractors.

In contrast, Camco was paid a basic fee of \$100,000 per month plus certain expenses to serve as the General Contractor for the project; provided however, that Gemstone, not Camco, was solely responsible for selecting and negotiating the engagement of the trade contractors by Camco. Because of this shift in responsibility, all decisions and communications for payment authorization and processing were handled by Gemstone, without Camco's ongoing involvement.

In addition, Gemstone provided the financial management component of the Project and was responsible for (a) establishing and maintaining the budget and (b) keeping full and detailed accounts on the Project.

Furthermore, NCS's protocol also changed to effectively limit Camco's involvement. Because Camco was not responsible for establishing or maintaining the budget, Camco's only role in the payment process was to compile and submit each initial Payment Application.

Thereafter, the review, negotiation, and request for the corresponding payments were handled by Gemstone. As a result, NCS never sent payment for trade contractors to Camco. Instead, such payments were sent directly to the trade contractors.

Furthermore, Camco (a) as a rule did not communicate directly with SFC; (b) only occasionally communicated with NCS regarding the payment process; and (c) did not make any decisions related to the Payment Application or the corresponding payments to Camco or the trade contractors. Payments decisions were all made by Gemstone because they were responsible for the budget and as they pertained to credit decisions reviewed by SFC.

In addition, Camco had no physical control over the funds, and all disbursements were completed between NCS and the trade contractors directly. We understand the trade contractors were aware of Camco's limited role in this payment process. First, the negotiation of each trade contractor's engagement was managed by Gemstone employees and only subsequently ratified by Camco. Second, the terms of the engagement contracts between Camco and each trade contractor and Camco and Gemstone described this relationship. Third, on several occasions when a particular trade contractor expressed concern regarding the timing of a forthcoming payment, Gemstone and Camco repeatedly and consistently explained that all lending decisions regarding funding (credit issues specifically) were ultimately made by SFC and that neither Gemstone nor Camco had the ability, authority, or resources to make any payments that did not come from SFC approval.

To this end, on occasion, trade contractors demanded that they be provided with some evidence of payment in order to continue working. In response, Camco could not, and to our understanding did not, promise that any payment was forthcoming.

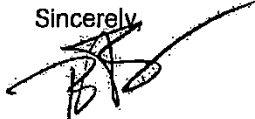
SFC delivered on a limited basis, letters to such disgruntled trade contractors informing them that all credit decisions on payment funding must be approved by SFC and that such funds would be only paid once SFC had completed its required approval process and determined that such payments were appropriate. Attached to this letter as Exhibit A are two such letters executed by SFC and delivered to certain trade contractors.

In December 2008, SFC sent correspondence to NCS that due to uncured loan defaults by Gemstone, a decision was made to cease all funding on the Project. The communications regarding this decision are attached to this letter as Exhibit B. SFC further requested that NCS return funds in the amount of \$993,866.72. NCS returned the funds requested and no additional payment for previous work performed was disbursed to Gemstone, Camco, or any of the trade contractors for the Project. Camco was not a part of these transactions, was not a participant in these decisions, and was unaware of such decisions until the above notice was sent to NCS.

Upon learning of SFC's decision to cease funding, we understand Camco terminated its engagement contract with Gemstone based on Gemstone's failure to pay Camco pursuant to the terms of such contract. As a result of changed circumstances on the Project after APCO's termination, Camco's role was limited with regard to payment.

As a result, SFC does not believe Camco or for that matter NCS can be held responsible for payment of any outstanding applications of the trade contractors.

Sincerely,



Brad Scott
President
Scott Financial Corporation

Exhibit A

Payment Status Letters from SFC to Trade Contractors

Exhibit A



November 4, 2008

Mr. Mike Evans

~~E&E Fire Protection LLC~~

6380 South Valley View, Suite 110
Las Vegas, NV 89118

RE: ManhattanWest Funding

Mr. Evans:

I have been asked by Gemstone to provide you with an update on the status of the September Draw.

As you may likely know Scott financial Corporation is the Creditor of record and has been funding the vertical construction through the various credit facilities established.

The September Draw was submitted to Scott Financial Corporation late last week. We are currently completing the final review of the ~~September Payment Application~~. However, in light of the complications related to the termination of the former general contractor, the approval of the September Payment Application has required more investigation and time than generally typical or expected.

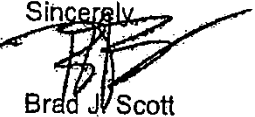
Despite this temporary delay, the funding necessary to satisfy the outstanding amounts due pursuant to the September Payment Application are in final stages of approval and ~~are anticipated to be processed and funded to MWS~~ (voucher control) by November 13, 2008.

The amount in processing includes a payment of \$1,092,121.34 to E&E Fire Protection LLC and its corresponding suppliers.

I trust this letter assists you with your questions on the timing of the funding.

Please feel free to contact me directly if you have any questions.

Sincerely,


Brad J. Scott
President

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

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AA 001433



Exhibit A

December 1, 2008

Leo Duckstein

~~CabineTec Inc~~

2711 E. Craig Road, Suite A
North Las Vegas, NV 89030

RE: ManhattanWest Funding

Mr. Duckstein:

I have been asked by Gemstone to provide you with an update on the status of the October Draw.

As you may likely know Scott financial Corporation (SFC) is the Creditor of record and has been funding the vertical construction through the various credit facilities established.

The October Draw was submitted to SFC late last week.

We are currently completing the final review of the ~~October Payment Application~~. However, in light of the complications related to in large part to the termination of the former general contractor, the approval of the October Payment Application has required more review, investigation and time than in the past.

Despite this delay, the funding necessary to satisfy the outstanding amounts due pursuant to the October Payment Application are in being reviewed and a determination of approval is being considered by our team.

Clearly approval of the draw is subject to our complete review process.

~~Although we cannot guarantee the approval, SFC anticipates the draw request to be processed and funded to NCS (Young & Rubicam) in December.~~

I understand the MHW draw which is in the review process at SFC includes a payment amount of approximately \$598,475.00 to CabineTec Inc. and its corresponding suppliers. I believe the Developer approved payment amount is \$483,664.32.

I trust this letter assists you with your questions on the timing of the funding.

Please feel free to contact me directly if you have any questions.

Sincerely,


Brad J. Scott
President

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Office: 701.255.2215 • Fax: 701.223.7299

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AA 001434

Exhibit B

Jennifer Olivares

From: Brad Scott [mailto:brad@scottfinancialcorp.com]

Sent: Tuesday, December 16, 2008 9:38 AM

To: Jennifer Olivares

Cc: 'Margo Scott'; 'Jason Ulmer'; Patricia Curtis; 'Tim James'

Subject: ManhattanWest Status

Importance: High

Jen:

As of right now 11AM CST 12/16/08 the October Draw is still on permanent hold.

A final decision confirming the lender's direction on Project was expected yesterday. It did not happen.

I anticipate this final decision will however likely lead to ~~the October draw being approved~~

Foreclosure options and discussion on how we will proceed have been explored.


SFC has requested our legal counsel to address the return wire from NCS to SFC discussed yesterday.

Those funds will be held in the SFC escrow account at NSB for the time being, until further direction is provided to SFC.

SFC will keep you posted as a final determination is made.

Thanks.

Brad J. Scott
Scott Financial Corporation
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Bismarck, ND 58503
W: 701.255.2215
M: 701.220.3999
F: 701.223.7299
brad@scottfinancialcorp.com

	
Brad J. Scott, CRE President brad@scottfinancialcorp.com	15010 Sundown Drive Bismarck, ND 58503 Office: 701.255.2215 Fax: 701.228.7299 Cell: 701.220.3999
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4/1/2009

AA 001435

Exhibit B

Jennifer Olivares

From: Brad Scott [brad@scottfinancialcorp.com]

Sent: Monday, December 15, 2008 3:00 PM

To: Anne Dwyer; Jennifer Olivares

Cc: 'Alex Edelstein'; 'Peter Smith'; 'Jim Horning'; dparry@camcopacific.com

Subject: FW: ManhattanWest

Importance: High

Attachments: Document.pdf; 09004-20-04 Billing #4 2008-12-12.pdf; Wiring Instructions TO SFC at NSB.XLS

Jennifer & Anne:

NCS is hereby instructed by SFC to wire the previously advanced but undisposed funds held on account at NCS in the amount of \$93,886.72 back to SFC using the attached wiring instructions.


This amount includes the correct Manhattan Payment request of \$93,827.29 as it has not been approved by SFC or its participants.

These funds will be held at SFC until further notice.

Please call with any questions.

Thanks.

Brad J. Scott
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W: 701.255.2215
M: 701.220.3999
F: 701.223.7299
brad@scottfinancialcorp.com



Scott
Financial Corporation

Brad J. Scott, CRE 15010 Sundown Drive
President Bismarck, ND 58503
brad@scottfinancialcorp.com Office: 701.255.2215
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 Cell: 701.220.3999

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Email is not always a secure transmission medium. Caution should always be used to communicate "confidential information". If you elect to send or receive information via email, Scott Financial Corporation cannot assure its security and will not be liable if it is intercepted or viewed by another party. By continuing to use e-mail, you are agreeing to accept this risk.

4/1/2009

AA 001436

Exhibit B

SFC Notice to NCS Regarding the Decision to Stop Funding the Project

WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

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ANS/CTCM
STEVEN L. MORRIS
Nevada Bar No. 7454
WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777
slmorris@wmb-law.net

Attorneys for
Camco Pacific Construction Company, Inc. and
Fidelity and Deposit Company of Maryland

DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST,
INC., a Nevada corporation; NEVADA
CONSTRUCTION SERVICES, a Nevada
corporation; SCOTT FINANCIAL
CORPORATION, a North Dakota
corporation; COMMONWEALTH LAND
TITLE INSURANCE COMPANY; FIRST
AMERICAN TITLE INSURANCE
COMPANY; and DOES I through X,

Defendants.

DAVE PETERSON FRAMING, INC., a
Nevada corporation,

Lien Claimant,

vs.

GEMSTONE DEVELOPMENT WEST,
INC., a Nevada corporation; DOES I through
X, inclusive; and ROE CORPORATIONS I
through X, inclusive;

Defendants.

Case No: A571228
Dept. No: XV

Consolidated with:
A571792 A583289
A574391 A584730
A577623 A587168

**ANSWER TO DAVE PETERSON
FRAMING, INC.'S STATEMENT OF
FACTS CONSTITUTING LIEN AND
COMPLAINT IN INTERVENTION AND
CAMCO PACIFIC CONSTRUCTION
COMPANY INC.'S COUNTERCLAIM**

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386241



FILED
SEP 10 4 09 PM '09
Ed [Signature]
CLERK OF THE COURT

WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

1 DAVE PETERSON FRAMING, INC., a
2 Nevada corporation,

3 Lien Claimant,

4 vs.

5 CAMCO PACIFIC CONSTRUCTION
6 COMPANY, INC., a California corporation;
7 FIDELITY AND DEPOSIT COMPANY OF
8 MARYLAND,

9 Third Party Defendants.

10 CAMCO PACIFIC CONSTRUCTION
11 COMPANY, INC., a California corporation,

12 Counterclaimant,

13 vs.

14 DAVE PETERSON FRAMING, INC., a
15 Nevada corporation, and DOES I - X,
16 inclusive,

17 Counterdefendants.

18 Third Party Defendants CAMCO PACIFIC CONSTRUCTION COMPANY, INC.
19 (hereinafter "Camco") and FIDELITY AND DEPOSIT COMPANY OF MARYLAND
20 (hereinafter "Fidelity") (Camco and Fidelity are sometimes collectively referred to herein as
21 "Defendants"), by and through their counsel, Steven L. Morris, Esq. of the law firm of
22 Woodbury, Morris & Brown, hereby answer the Third Party Complaint of DAVE PETERSON
23 FRAMING, INC., (hereinafter "Plaintiff" or "DPF"), on file herein, and admit, deny, and allege
24 as follows:

25 1. Camco and Fidelity are without information or knowledge sufficient to ascertain
26 the truth of the allegations contained in Paragraphs 5 of Plaintiff's Complaint, and therefore
27 deny each and every allegation contained therein.

28 2. Camco and Fidelity admit the allegations contained in Paragraph 1 of Plaintiff's
Complaint.

3. Camco and Fidelity deny each and every allegation contained in Paragraphs 4, 6,

1 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 26, 27, 30, 31, 32, 33, 35, 36, 38, and
2 39 of Plaintiff's Complaint.

3 4. As to Paragraph 2 of Plaintiff's Complaint, Camco admits that Gemstone is a
4 Nevada corporation licensed to and doing business in the County of Clark, State of Nevada;
5 Camco further admits that Gemstone is the owner of the Manhattan West Project, but denies
6 each and every remaining allegation contained therein.

7 5. As to Paragraph 3 of Plaintiff's Complaint, Camco admits that Camco is a
8 foreign corporation active and authorized to and doing business in the State of Nevada, Clark
9 County during the time of the allegations set forth in Plaintiff's complaint, and is licensed by
10 the Nevada State Contractor's Board under license number 0037507, but denies each and every
11 remaining allegation contained therein.

12 6. As to Paragraph 29 of Plaintiff's Complaint, Camco admits that implied by law
13 in every agreement in Nevada is a covenant of good faith and fair dealing and further admits
14 that Camco acted in good faith and dealt fairly in regards to the Project, but denies that there
15 was an agreement between Plaintiff and Camco.

16 7. As to Paragraphs 14, 21, 25, 28, 34, and 37 of Plaintiff's Complaint, Camco and
17 Fidelity repeat and reallege the answers to paragraphs 1 through 39 as though fully set forth
18 herein.

19 8. To the extent that any allegations set forth in Plaintiff's Complaint have not been
20 answered, these answering Defendants deny each and every allegation or inference thereof not
21 expressly set forth hereinabove.

22 9. It has become necessary for these answering Defendants to retain the services of
23 WOODBURY, MORRIS, & BROWN, attorneys at law, to defend this action, and as a result,
24 these answering Defendants have been damaged by the Plaintiff, and these answering
25 Defendants are accordingly entitled to their attorney fees and costs incurred herein.

26 **AFFIRMATIVE DEFENSES**

27 1. The Complaint on file herein fails to state a claim against Camco and Fidelity
28

- 1 upon which relief can be granted.
- 2 2. That any or all negligence or fault on the part of the Plaintiff would be active and
- 3 primary, and any negligence or fault of Camco, if any, would be secondary and passive.
- 4 3. Any and all damages sustained by Plaintiff are the result of its own negligence
- 5 and breach of contract.
- 6 4. Camco is not negligent with respect to the transactions which are the subject of
- 7 the Complaint, and is and was not in breach of contract.
- 8 5. At the time and place under the circumstances alleged by the Plaintiff, Plaintiff
- 9 had full and complete knowledge and information in regard to the conditions and circumstances
- 10 then and there existing, and through Plaintiff's own knowledge, conduct, acts and omissions,
- 11 assume the risk attendant to any condition there or then present.
- 12 6. The liability, if any, of Camco must be reduced by the percentage of fault of
- 13 others, including the Plaintiff.
- 14 7. The claims, and each of them, are barred by the failure of the Plaintiff to plead
- 15 those claims with particularity.
- 16 8. The claims of Plaintiff have been waived as a result of the acts and the conduct
- 17 of the Plaintiff.
- 18 9. The claim for breach of contract is barred as a result of the failure to satisfy
- 19 conditions precedent.
- 20 10. The claims for breach of contract and breach of implied covenant of good faith
- 21 and fair dealing are barred by the statute of frauds.
- 22 11. Plaintiff brought the case at bar without reasonable grounds upon which to base a
- 23 claim for relief.
- 24 12. Plaintiff maintained the present action without reasonable grounds upon which to
- 25 base a claim for relief.
- 26 13. Plaintiff's claims are not well grounded in fact.
- 27 14. Plaintiff's claims are not warranted by existing law.
- 28

15. Plaintiff is barred from recovering by the doctrine of unclean hands.

16. Plaintiff's claims are barred by the doctrine of laches, waiver, and estoppel.

17. To the extent that Plaintiff's work was substandard, not workmanlike, defective, incomplete, or untimely, Plaintiff is not entitled to recover for said work.

18. Plaintiff has approved and ratified the alleged acts of Camco for which Plaintiff now complains.

19. There is no justiciable case or controversy as between Plaintiff and Camco and/or Fidelity.

20. Plaintiff lacks standing to assert all or part of the causes of action contained in their complaint.

21. Camco's performance on any contract was excused by Plaintiff's material breach thereof.

22. Plaintiff failed to comply with the requirements of NRS Chapter 108 to perfect its mechanic's lien and therefore would not be entitled to any recovery on its lien foreclosure claim.

23. Plaintiff has failed to mitigate its damages.

24. Defendant Fidelity is informed and believes that it is entitled to assert all of the defenses available to its principal, and Fidelity hereby incorporates by reference all defenses raised, or that could have been raised, by Fidelity's principal.

25. Fidelity alleges that its liability, if any exists, which is expressly denied, is limited to the penal sum of the applicable Contractor's License Bond.

26. Any license or surety bond executed by Fidelity was limited to the classification of contracting activities as set forth in its Nevada State Contractor's License Bond.

27. The liability of Fidelity if any, is limited to its obligations as set forth in its surety bond agreement.

28. The liability of Fidelity if any, is limited to the statutory liability as set forth in NRS 624.273.

1 29. Fidelity is not liable for the acts or omissions of persons, individuals, firms,
2 partnerships, corporations, associations, or other organizations that are not its named principal.

3 30. The damages sustained by Plaintiff, if any, were caused by the acts of third
4 persons who were not agents, servants, or employees of Fidelity, or its principal, and who were
5 not acting on behalf of Fidelity or its principal in any manner or form, and as such, Fidelity or
6 its principal are not liable in any manner to the Plaintiff.

7 31. Fidelity is not liable for the acts or omissions of persons, individuals, firms,
8 partnerships, corporations, associations, or other organizations that are not its named principal.

9 32. Plaintiff's suit against Fidelity is not timely brought under the terms of the bond
10 because no judgment or court decree has been entered against its principal.

11 33. It has been necessary for Camco and Fidelity to retain the services of the law
12 offices of Woodbury, Morris & Brown, attorneys at law, for the purpose of defending this
13 action, and Camco is entitled to payment of all costs, fees, and expenses associated with and/or
14 arising out of the defense of this action.

15 34. Pursuant To NRCP 8, all possible affirmative defenses may not have been
16 alleged herein, inasmuch as sufficient facts were not available after reasonable investigation and
17 inquiry upon the filing of Defendants' Answer and, therefore, Defendants reserves the right to
18 amend their Answer to allege additional affirmative defenses if subsequent investigation
19 warrants.

20 WHEREFORE, Third Party Defendants Camco and Fidelity pray as follows:

21 1. That Plaintiff take nothing by way of its Complaint;

22 2. For an award of reasonable attorneys' fees and costs for having to defend this
23 action; and

24 3. For such other and further relief as the Court deems just and proper.
25
26
27
28

1 **COUNTERCLAIM**

2 Counterclaimant CAMCO PACIFIC CONSTRUCTION COMPANY, INC. (hereinafter
3 "Camco") by and through its attorney, Steven L. Morris, Esq. of the law firm of Woodbury,
4 Morris & Brown complains as follows:

5 **JURISDICTIONAL ALLEGATIONS**

6 1. Camco was and is at all times relevant to this action, a California corporation,
7 doing business in Clark County, Nevada as a contractor duly licensed by the Nevada State
8 Contractor's Board.

9 2. Counterdefendant DAVE PETERSON FRAMING, INC., a Nevada corporation
10 (hereinafter referred to as "DPF") is and was at all times relevant to this action, a corporation
11 conducting business in Clark County, Nevada.

12 3. The true names and capacities, whether individual, corporate, associate or
13 otherwise of Defendants named herein as DOES I through X are unknown to Counterclaimant.
14 Said DOE Defendants are responsible for damages suffered by Counterclaimant; therefore,
15 Counterclaimants sue Defendants by such fictitious names. Counterclaimants will ask leave to
16 amend this Counterclaim to show the true names and capacities of each such DOE Defendants
17 at such time as the same have been ascertained.

18 **FIRST CAUSE OF ACTION**

19 **(Abuse of Process)**

20 4. Camco repeats and realleges each and every allegation contained in the
21 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by
22 reference and further alleges:

23 5. Camco was a general contractor for the Manhattan West Condominiums
24 project, located in Clark County, Nevada (the "Property," and/or "Project").

25 6. GEMSTONE DEVELOPMENT WEST, INC. ("Gemstone") was the owner of
26 the Project.

27 7. Camco did not request proposals from any subcontractor on the Project and
28

1 Camco did not negotiate or enter into a contract with DPF.

2 8. DPF was selected by Gemstone and furnished its respective work and materials
3 at Gemstone's direction and request.

4 9. No payments for the work and materials furnished to the Project came through
5 Camco.

6 10. There was no contract between DPF and Camco with regard to the Project.

7 11. The only viable claims DPF has, if any, are against Gemstar and/or the Property.

8 12. Lacking a basis for relief against Camco, DPF has an ulterior purpose, other than
9 resolving a legal dispute, in bringing this lawsuit against Camco.

10 13. DPF has engaged in a willful act in the use of the legal process not proper in the
11 regular conduct of the proceeding.

12 14. Camco has been required to engage the services of the law firm of
13 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
14 reasonable attorneys' fees and costs therefor.

15 **SECOND CAUSE OF ACTION**

16 **(Breach of Contract - In the Alternative)**

17 15. Camco repeats and realleges each and every allegation contained in the
18 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by
19 reference and further alleges:

20 16. Apco Construction ("Apco") was initially the general contractor for the Project.

21 17. DPF and Apco entered into a Subcontract Agreement (the "Agreement")
22 relative to the Project.

23 18. Section 3.4 of the Agreement states: "Any payments to Subcontractor shall be
24 conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor
25 herein agrees to assume the same risk that the Owner may become insolvent that Contractor
26 has assumed by entering into the Prime Contract with the Owner."

27 19. If any contract existed at all between Camco and DPF, it was an implied
28

1 contract based on the terms of the Agreement.

2 20. All payments made to subcontractors and suppliers on the Project were made
3 directly by Gemstone through Nevada Construction Services. (See Exhibit A, attached hereto
4 and incorporated herein by this reference).

5 21. Camco never received payment on behalf of the subcontractors, including DPF,
6 and was therefore not responsible nor liable for payment to the subcontractors, including DPF.

7 22. DPF agreed and expressly acknowledged that it assumed the risk of non-payment
8 by the Owner.

9 23. DPF breached its contract with Camco by demanding payment from Camco and
10 by bringing claims against Camco and its License Bond Surety relative to payment for the work
11 allegedly performed by DPF on the Project.

12 24. Camco is entitled to all of its attorneys fees and costs pursuant to the terms and
13 conditions of the Ratification Agreement.

14 25. Camco has been required to engage the services of the law firm of
15 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
16 reasonable attorneys fees and costs therefor.

17 **THIRD CAUSE OF ACTION**

18 **(Breach of Covenant of Good Faith and Fair Dealing - In the Alternative)**

19 26. Camco repeats and realleges each and every allegation contained in the
20 preceding paragraphs of Counterclaimant's Counterclaim, incorporates the same at this point by
21 reference and further allege:

22 27. The law imposes upon DPF, by virtue of the contract, a covenant to act in good
23 faith and deal fairly with Counterclaimant;

24 28. Despite this covenant, DPF's intentional failure to abide by the terms of the
25 parties written contract, DPF breached its covenant to act in good faith and deal fairly;

26 29. As a result of its breach of the covenant of good faith and fair dealing, DPF has
27 injured Camco in an amount in excess of \$10,000.00.

28

1 30. Camco has been required to engage the services of the law firm of
2 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
3 reasonable attorneys fees and costs therefor.

4 **FOURTH CAUSE OF ACTION**

5 **(Declaratory Relief)**

6 31. Camco repeats and realleges each and every allegation contained in the
7 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by
8 reference and further alleges:

9 32. Pursuant to Nevada Revised Statutes ("NRS") Chapter 30, the Uniform
10 Declaratory Judgment Act, and more particularly, NRS 30.030 and NRS 30.040, Camco asks
11 this Court to utilize its power to interpret the Agreement and declare the respective rights and
12 obligations of the parties, if any, under the Agreement, including, without limitation, the
13 complete or partial validity or invalidity of the Agreement, the terms and conditions, if any,
14 under which DPF would be entitled to a commission thereunder, the duration or term of the
15 Agreement, and the extent to which the Agreement is unconscionable and/or unenforceable.

16 33. It has become necessary for Camco to retain the services of the law firm of
17 Woodbury, Morris & Brown to defend against the Complaint and to bring counterclaims against
18 DPF, and Camco is therefore entitled to an award of attorneys' fees and costs incurred herein.

19 **FIFTH CAUSE OF ACTION**

20 **(Attorneys' Fees)**

21 34. Camco repeats and realleges each and every allegation contained in the
22 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by
23 reference and further alleges:

24 35. NRS 30.120 provides that "in any proceeding under NRS 30.010 to 30.160,
25 inclusive, the Court may make such award of costs as may seem equitable and just."

26 36. In this case, pursuant to NRS Chapter 30, the Uniform Declaratory Judgment
27 Act, and more particularly, NRS 30.030 and NRS 30.040, Camco has requested that this Court
28

1 declare the rights, status and relationships between the parties under the Agreement. Camco has
2 been forced to retain the services of an attorney and has incurred costs in seeking such
3 declaratory relief from this Court.

4 37. Therefore, Camco asks this Court, pursuant to NRS 30.120, to award Camco the
5 attorney's fees and costs that it incurs in the defense and prosecution of this litigation.

6 38. It has become necessary for Camco to retain the services of the law firm of
7 Woodbury, Morris & Brown to defend against the Complaint and to bring counterclaims against
8 DPF, and Camco is therefore entitled to an award of attorneys' fees and costs incurred herein.

9 WHEREFORE, Counterclaimant Camco prays as follows:

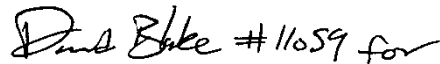
10 1. For this Court to enter judgment against Counterdefendant in an amount in
11 excess of \$10,000.00, plus interest at the contract rate;

12 2. For an award of reasonable attorneys' fees and costs for having to prosecute this
13 action; and

14 3. For such other and further relief as the Court deems just and proper.

15 Dated this 9th day of September 2009.

16
17 WOODBURY, MORRIS & BROWN

18 
19 _____
20 Steven L. Morris, Esq.
21 Nevada Bar No. 7454
22 701 North Green Valley Parkway, Suite 110
23 Henderson, Nevada 89074
24 Attorneys for Camco and Fidelity
25
26
27
28

WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of September 2009, I served a copy of the
ANSWER TO DAVE PETERSON FRAMING, INC.'S STATEMENT OF FACTS
CONSTITUTING LIEN AND COMPLAINT IN INTERVENTION AND CAMCO
PACIFIC CONSTRUCTION COMPANY INC.'S COUNTERCLAIM by facsimile and by
enclosing a true and correct copy of the same in a sealed envelope upon which first-class
postage was fully prepaid, and addressed to the following:

T. James Truman, Esq.
Stephen M. Dixon, Esq.
T. JAMES TRUMAN & ASSOCIATES
3654 North Rancho Drive
Las Vegas, Nevada 89130
Fax: 256-0156

and that there is regular communication by mail between the place of mailing and the place so
addressed.



An Employee of Woodbury, Morris & Brown

EXHIBIT A



Date: April 28, 2009
To: Nevada State Contractor's Board
From: Scott Financial Corporation
Subject: ManhattanWest Project

I am the President of Scott Financial Corporation ("SFC"), which is a seasoned commercial finance company located in Bismarck, North Dakota and licensed in Nevada.

SFC is the lender for ManhattanWest Buildings 2, 3, 7, 8, and 9 located at West Russell Road and Rocky Hill Street in Las Vegas, Nevada (the "Project"). No other ManhattanWest buildings were funded or constructed. The Project consisted of condominiums developed by Gemstone Development West, Inc. ("Gemstone").

The purpose of this letter is to explain the payment process for the Project and to demonstrate that Camco Pacific Construction Company, Inc. ("Camco") had no direct responsibility to pay the trade contractors or any other contracting parties on the Project.

As the Project's lender, SFC established a credit facility between SFC (with its network of participating community banks) and Gemstone. As the loan originator and lead lender, SFC established both the Senior and Mezzanine Credit Facilities that were forecasted to fund the entire construction cost to complete the Project; provided however, that an adequate level of condominium sales were closed by Gemstone in a timely manner.

In connection with its funding of the Project, SFC required a very detailed and disciplined payment procedure, which it has used successfully and extensively in the past. This payment procedure was developed collectively between SFC, Gemstone, and Nevada Construction Services ("NCS") to execute the monthly construction funding on the Project in a proper and timely manner.

This payment procedure was communicated to the general contractors and the trade contractors through them and was used to facilitate the payment structure for all trade contractors/vendors.

Prior to the commencement of the Project, SFC entered into a voucher control contract with NCS. First, pursuant to such agreement, NCS managed the voucher control and served as the third party disbursement agent. Second, as part of such agreement, NCS also performed third party site construction inspections for SFC prior to each disbursement. Please note that NCS is a disbursement agent for SFC and does not "approve funding", that is a role of SFC and our participating banks exclusively.

APCO Construction ("APCO") was the original General Contractor for the Project. The protocol for issuing payment involved APCO submitting a monthly payment application to Gemstone based on a schedule of values and materials delivered by the vendors and trade contractors (the "Payment Application").

Next, Gemstone would review the Payment Application and approve or reject its contents based upon the work completed as of the submission of such Payment Application. Upon the final agreement and approval of the Payment Application by Gemstone and APCO, Gemstone would send the Payment Application and any supporting documents to NCS. NCS

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

A licensed and bonded corporate finance company.

would review the Payment Application and the supporting documents and compare them with its payment records. Thereafter, NCS would order a formal NCS inspection of the jobsite to verify that sufficient progress was made to warrant the amount in the Payment Application. After completing such inspection, NCS submitted its request for funding to SFC.

Upon receiving such approval, SFC conducted its final monthly creditor review and completed the funding approval process by taking the following steps: (a) formally signing-off on the Payment Application and (b) obtaining final approval of the Payment Application from the co-lead bank.

Finally, after the Payment Application was properly approved and verified, the corresponding funds were requested by SFC from its participating lenders and advanced into the SFC Project Control Account. Thereafter, the respective (a) soft costs in the Payment Application were advanced directly to Gemstone and (b) the hard costs in the Payment Application were wired directly to NCS for controlled disbursement.

Upon receiving such hard cost funds, NCS would send the corresponding payment directly to APCO for disbursement to the trade contractors. This was the payment process throughout the period that APCO remained on the Project, except for the June and July 2008 Pay Applications where NCS was notified by Gemstone to issue joint checks to the sub contractors.

APCO was terminated by Gemstone for cause in August 2008. After such termination, Gemstone engaged Camco to serve as the General Contractor for the Project. When this substitution occurred, the payment process used during the APCO engagement was continued with some alterations.

The most important of these alterations was based on the shift from a Guaranteed Maximum Price to a simple monthly fee. APCO had agreed to deliver the Project for a Guaranteed Maximum Price and received a fee for its services based on a percentage of each Payment Application. Consequently, APCO assumed responsibility for the financial aspects of the Project and the proper engagement and payment of the trade contractors.

In contrast, Camco was paid a basic fee of \$100,000 per month plus certain expenses to serve as the General Contractor for the project; provided however, that Gemstone, not Camco, was solely responsible for selecting and negotiating the engagement of the trade contractors by Camco. Because of this shift in responsibility, all decisions and communications for payment authorization and processing were handled by Gemstone, without Camco's ongoing involvement.

In addition, Gemstone provided the financial management component of the Project and was responsible for (a) establishing and maintaining the budget and (b) keeping full and detailed accounts on the Project.

Furthermore, NCS's protocol also changed to effectively limit Camco's involvement. Because Camco was not responsible for establishing or maintaining the budget, Camco's only role in the payment process was to compile and submit each initial Payment Application.

Thereafter, the review, negotiation, and request for the corresponding payments were handled by Gemstone. As a result, NCS never sent payment for trade contractors to Camco. Instead, such payments were sent directly to the trade contractors.

Furthermore, Camco (a) as a rule did not communicate directly with SFC; (b) only occasionally communicated with NCS regarding the payment process; and (c) did not make any decisions related to the Payment Application or the corresponding payments to Camco or the trade contractors. Payments decisions were all made by Gemstone because they were responsible for the budget and as they pertained to credit decisions reviewed by SFC.

In addition, Camco had no physical control over the funds, and all disbursements were completed between NCS and the trade contractors directly. We understand the trade contractors were aware of Camco's limited role in this payment process. First, the negotiation of each trade contractor's engagement was managed by Gemstone employees and only subsequently ratified by Camco. Second, the terms of the engagement contracts between Camco and each trade contractor and Camco and Gemstone described this relationship. Third, on several occasions when a particular trade contractor expressed concern regarding the timing of a forthcoming payment, Gemstone and Camco repeatedly and consistently explained that all lending decisions regarding funding (credit issues specifically) were ultimately made by SFC and that neither Gemstone nor Camco had the ability, authority, or resources to make any payments that did not come from SFC approval.

To this end, on occasion, trade contractors demanded that they be provided with some evidence of payment in order to continue working. In response, Camco could not, and to our understanding did not, promise that any payment was forthcoming.

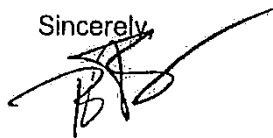
SFC delivered on a limited basis, letters to such disgruntled trade contractors informing them that all credit decisions on payment funding must be approved by SFC and that such funds would be only paid once SFC had completed its required approval process and determined that such payments were appropriate. Attached to this letter as Exhibit A are two such letters executed by SFC and delivered to certain trade contractors.

In December 2008, SFC sent correspondence to NCS that due to uncured loan defaults by Gemstone, a decision was made to cease all funding on the Project. The communications regarding this decision are attached to this letter as Exhibit B. SFC further requested that NCS return funds in the amount of \$993,866.72. NCS returned the funds requested and no additional payment for previous work performed was disbursed to Gemstone, Camco, or any of the trade contractors for the Project. Camco was not a part of these transactions, was not a participant in these decisions, and was unaware of such decisions until the above notice was sent to NCS.

Upon learning of SFC's decision to cease funding, we understand Camco terminated its engagement contract with Gemstone based on Gemstone's failure to pay Camco pursuant to the terms of such contract. As a result of changed circumstances on the Project after APCO's termination, Camco's role was limited with regard to payment.

As a result, SFC does not believe Camco or for that matter NCS can be held responsible for payment of any outstanding applications of the trade contractors.

Sincerely,



Brad Scott
President
Scott Financial Corporation

Exhibit A

Payment Status Letters from SFC to Trade Contractors



November 4, 2008

Mr. Mike Evans

~~E&E Fire Protection, LLC~~

6380 South Valley View, Suite 110
Las Vegas, NV 89118

RE: ManhattanWest Funding

Mr. Evans:

I have been asked by Gemstone to provide you with an update on the status of the September Draw.

As you may likely know Scott financial Corporation is the Creditor of record and has been funding the vertical construction through the various credit facilities established.

The September Draw was submitted to Scott Financial Corporation late last week. We are currently completing the final review of the ~~September Payment Application~~. However, in light of the complications related to the termination of the former general contractor, the approval of the September Payment Application has required more investigation and time than generally typical or expected.

Despite this temporary delay, the funding necessary to satisfy the outstanding amounts due pursuant to the September Payment Application are in final stages of approval and ~~are anticipated to be processed and funded to NCS~~ (voucher control) by November 13, 2008.

The amount in processing includes a payment of \$1,092,121.34 to E&E Fire Protection LLC and its corresponding suppliers.

I trust this letter assists you with your questions on the timing of the funding.

Please feel free to contact me directly if you have any questions.

Sincerely,


Brad J. Scott
President

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

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Exhibit A



December 1, 2008

Leo Duckstein

~~CabineTec Inc.~~

2711 E. Craig Road, Suite A
North Las Vegas, NV 89030

RE: ManhattanWest Funding

Mr. Duckstein:

I have been asked by Gemstone to provide you with an update on the status of the October Draw.

As you may likely know Scott financial Corporation (SFC) is the Creditor of record and has been funding the vertical construction through the various credit facilities established.

The October Draw was submitted to SFC late last week.

We are currently completing the final review of the ~~October Payment Application~~. However, in light of the complications related to in large part to the termination of the former general contractor, the approval of the October Payment Application has required more review, investigation and time than in the past.

Despite this delay, the funding necessary to satisfy the outstanding amounts due pursuant to the October Payment Application are in being reviewed and a determination of approval is being considered by our team.

Clearly approval of the draw is subject to our complete review process.

~~Although we cannot guarantee the approval, SFC anticipates the draw request to be processed and funded to NCS (voucher control) in December.~~

I understand the MHW draw which is in the review process at SFC includes a payment amount of approximately \$598,475.00 to CabineTec Inc. and its corresponding suppliers. I believe the Developer approved payment amount is \$483,664.32.

I trust this letter assists you with your questions on the timing of the funding.

Please feel free to contact me directly if you have any questions.

Sincerely,


Brad J. Scott
President

15010 Sundown Drive • Bismarck, ND 58503
Office: 701.255.2215 • Fax: 701.223.7299
A licensed and bonded corporate finance company.

AA 001456

Exhibit B

SFC Notice to NCS Regarding the Decision to Stop Funding the Project

Exhibit "B"

Jennifer Olivares

From: Brad Scott [brad@scottfinancialcorp.com]
Sent: Tuesday, December 16, 2008 9:38 AM
To: Jennifer Olivares
Cc: 'Margo Scott'; 'Jason Ulmer'; Patricia Curtis; 'Tim James'
Subject: ManhattanWest Status
Importance: High

Jen:

As of right now 11AM CST 12/16/08 the October Draw is still on permanent hold.

A final decision confirming the lender's direction on Project was expected yesterday. It did not happen.

I anticipate this final decision will however likely lead to ~~no further draws being approved~~.

Foreclosure options and discussion on how we will proceed have been explored.


SFC has requested our legal counsel to address the return wire from NCS to SFC discussed yesterday.

Those funds will be held in the SFC escrow account at NSB for the time being, until further direction is provided to SFC.

SFC will keep you posted as a final determination is made.

Thanks.

Brad J. Scott
Scott Financial Corporation
15010 Sundown Drive
Bismarck, ND 58503
W: 701.255.2215
M: 701.220.3999
F: 701.223.7299
brad@scottfinancialcorp.com

	
Brad J. Scott, CRE President brad@scottfinancialcorp.com	15010 Sundown Drive Bismarck, ND 58503 Office: 701.255.2215 Fax: 701.223.7299 Cell: 701.220.3999
A licensed and bonded corporate finance company.	

4/1/2009

AA 001458

Exhibit B

Jennifer Olivares

From: Brad Scott [brad@scottfinancialcorp.com]
Sent: Monday, December 15, 2008 3:00 PM
To: Anne Dwyer; Jennifer Olivares
Cc: 'Alex Edelstein'; 'Peter Smith'; 'Jim Horning'; dparry@camcopacific.com
Subject: FW: ManhattanWest
Importance: High
Attachments: Document.pdf; 09004-20-04 Billing #4 2008-12-12.pdf; Wiring Instructions TO SFC at NSB.XLS

Jennifer & Anne:

NCS is hereby instructed by SFC to wire the previously advanced, but undispersed funds held on account at NCS in the amount of \$993,866.72 back to SFC using the attached wiring instructions.

This amount includes the current Heimeman Payment request of \$66,827.29 as it has not been approved by SFC of its participants.

These funds will be held at SFC until further notice.

Please call with any questions.

Thanks.

Brad J. Scott
Scott Financial Corporation
15010 Sundown Drive
Bismarck, ND 58503
W: 701.255.2215
M: 701.220.3999
F: 701.223.7299
brad@scottfinancialcorp.com



Brad J. Scott, CRE 15010 Sundown Drive
President Bismarck, ND 58503
brad@scottfinancialcorp.com Office: 701.255.2215
Fax: 701.223.7299
Cell: 701.220.3999

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Email is not always a secure transmission medium. Caution should always be used to communicate "confidential information". If you elect to send or receive information via email, Scott Financial Corporation cannot assure its security and will not be liable if it is intercepted or viewed by another party. By continuing to use e-mail, you are agreeing to accept this risk.

4/1/2009

AA 001459

ORIGINAL

FILED

SEP 11 11 09 AM '09

E. J. [Signature]
CLERK

1 RLS

2 Marquis & Aurbach

3 FRANK M. FLANSBURG III, ESQ.

4 Nevada Bar No. 6974

5 10001 Park Run Drive

6 Las Vegas, Nevada 89145

7 Telephone: (702) 382-0711

8 Facsimile: (702) 382-5816

9 fflansburg@marquisaurbach.com

10 Attorneys for THYSSENKRUPP SAFWAY, INC. f/k/a SAFWAY SERVICES, INC.

11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

13 THYSSENKRUPP SAFWAY, INC. f/k/a
14 SAFWAY SERVICES, INC.,

15 Plaintiff,

16 vs.

17 T-BEAU, a Nevada corporation; WMB X, LLC,
18 a foreign limited liability company; OLD
19 REPUBLIC INSURANCE COMPANY, a
20 foreign corporation; INTERNATIONAL
21 FIDELITY INSURANCE COMPANY, a foreign
22 corporation; DOES 1-10, inclusive; ROE
23 CORPORATIONS 1-10, inclusive,

24 Defendants.

Case No.: A587582
Dept. No.: XX

RELEASE OF LIS PENDENS

25 Plaintiff Thyssenkrupp Safway, Inc. f/k/a Safway Services, Inc., through the law firm of
26 Marquis & Aurbach, hereby releases, cancels and expunges the Lis Pendens recorded in the
27 above-referenced action on the 22nd day of April, 2009, as Book No. 20090422 in the official
28 records of Clark County, Nevada as Instrument No. 0003674 against real property in Clark
County, Nevada, and more particularly described as:

//

//

//

//

//

RECEIVED
SEP 11 2009
CLERK OF THE COURT

MARQUIS & AURBACH

10001 Park Run Drive

Las Vegas, Nevada 89145

(702) 382-0711 FAX: (702) 382-5816

MARQUIS & AURBACH

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 **Assessor Parcel Number:** 162-09-703-020 f/k/a 162-09-703-008;
2 **Common Description:** 2989 Paradise Road, Winchester, Las Vegas, Nevada;
3 **Assessor Description:** PT SE4 SEC 09 21 61; SEC 09 TWP 21 RNG 61.

4 Dated this 10 day of September, 2009.

MARQUIS & AURBACH

By

Frank M. Flansburg III, Esq.
Nevada Bar No. 6974
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney(s) for THYSENKRUPP
SAFWAY, INC.

86

FILED

SEP 10 4 10 PM '09

Ernest
CLERK OF THE COURT

1 ANS/CTCM
2 STEVEN L. MORRIS
3 Nevada Bar No. 7454
4 **WOODBURY, MORRIS & BROWN**
5 701 N. Green Valley Parkway, Suite 110
6 Henderson, Nevada 89074
7 (702) 933-0777
8 slmorris@wmb-law.net

9 Attorneys for
10 Camco Pacific Construction Company, Inc. and
11 Fidelity and Deposit Company of Maryland

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 **APCO CONSTRUCTION**, a Nevada
15 corporation,

16 Plaintiff,

17 vs.

18 **GEMSTONE DEVELOPMENT WEST,**
19 **INC.,** a Nevada Corporation; **NEVADA**
20 **CONSTRUCTION SERVICES,** a Nevada
21 Corporation; **SCOTT FINANCIAL**
22 **CORPORATION,** a North Dakota
23 Corporation; **COMMONWEALTH LAND**
24 **TITLE INSURANCE COMPANY;** **FIRST**
25 **AMERICAN TITLE INSURANCE**
26 **COMPANY;** and **DOES I through X,**

27 Defendants.

Case No: A571228
Dept. No: XV

Consolidated with:
A571792 A583289
A574391 A584730
A577623 A587168

**ANSWER TO NORTHSTAR
CONCRETE INC.'S STATEMENT OF
FACTS CONSTITUTING LIEN AND
COMPLAINT IN INTERVENTION AND
CAMCO PACIFIC CONSTRUCTION
COMPANY INC.'S COUNTERCLAIM**

09A587168
386207



WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

RECEIVED
CLERK OF THE COURT
SEP 10 2009

1 NORTHSTAR CONCRETE INC., a Nevada
2 corporation,

3 Plaintiff-in-Intervention,

4 vs.

5 CAMCO PACIFIC CONSTRUCTION
6 COMPANY, INC., a California corporation;
7 FIDELITY AND DEPOSIT COMPANY OF
8 MARYLAND, a surety; CONCRETE
9 VISIONS, INC., a Nevada corporation;
10 PLATTE RIVER INSURANCE
11 COMPANY, a surety; GEMSTONE
12 DEVELOPMENT WEST, INC., a Nevada
13 corporation; MOES 1 - 10, inclusive; and
14 ZOE CORPORATIONS 1 - 10, inclusive;

15 Defendants-in-Intervention.

16 CAMCO PACIFIC CONSTRUCTION
17 COMPANY, INC., a California corporation,

18 Counterclaimant,

19 vs.

20 NORTHSTAR CONCRETE, INC., a Nevada
21 corporation, and DOES I through X,

22 Counterdefendant.

23 Third Party Defendants CAMCO PACIFIC CONSTRUCTION COMPANY, INC.
24 (hereinafter "Camco") and FIDELITY AND DEPOSIT COMPANY OF MARYLAND
25 (hereinafter "Fidelity") (Camco and Fidelity are sometimes collectively referred to herein as
26 "Defendants"), by and through their counsel, Steven L. Morris, Esq. of the law firm of
27 Woodbury, Morris & Brown, hereby answer the Third Party Complaint of NORTHSTAR
28 CONCRETE, INC., (hereinafter "Plaintiff" or "Northstar"), on file herein, and admit, deny, and
allege as follows:

1. Camco and Fidelity are without information or knowledge sufficient to ascertain
the truth of the allegations contained in Paragraphs 1, 4, 5, 7, 8, 9, 21, 22, 23, 24, 25, 27, 28, 29,
31, 32, and 33 of Plaintiff's Complaint, and therefore deny each and every allegation contained

1 therein.

2 2. Camco and Fidelity admit the allegations contained in Paragraph 2 of Plaintiff's
3 Complaint.

4 3. Camco and Fidelity deny each and every allegation contained in Paragraphs 3,
5 11, 12, 13, 14, 15, 17, 18, 19, 34, 36 (labeled 28 in error), 37 (labeled 29 in error), and 38
6 (labeled 30 in error) of Plaintiff's Complaint.

7 4. As to Paragraph 6, Camco and Fidelity admit that Gemstone Development West,
8 Inc. is the owner of the property described as Manhattan West, but denies the remaining
9 allegations contained therein.

10 5. As to Paragraphs 10, 16, 20, 26, 30, and 35 (labeled 27 in error) of Plaintiff's
11 Complaint, Camco and Fidelity repeat and reallege the answers to paragraphs 1 through 38 as
12 though fully set forth herein.

13 6. To the extent that any allegations set forth in Plaintiff's Complaint have not been
14 answered, these answering Defendants deny each and every allegation or inference thereof not
15 expressly set forth hereinabove.

16 7. It has become necessary for these answering Defendants to retain the services of
17 WOODBURY, MORRIS, & BROWN, attorneys at law, to defend this action, and as a result,
18 these answering Defendants have been damaged by the Plaintiff, and these answering
19 Defendants are accordingly entitled to their attorney fees and costs incurred herein.

20 **AFFIRMATIVE DEFENSES**

21 1. The Complaint on file herein fails to state a claim against Camco and Fidelity
22 upon which relief can be granted.

23 2. That any or all negligence or fault on the part of the Plaintiff would be active and
24 primary, and any negligence or fault of Camco, if any, would be secondary and passive.

25 3. Any and all damages sustained by Plaintiff are the result of its own negligence
26 and breach of contract.

27 4. Camco is not negligent with respect to the transactions that are the subject of the
28

1 Complaint, and is and was not in breach of contract.

2 5. At the time and place under the circumstances alleged by the Plaintiff, Plaintiff
3 had full and complete knowledge and information in regard to the conditions and circumstances
4 then and there existing, and through Plaintiff's own knowledge, conduct, acts and omissions,
5 assume the risk attendant to any condition there or then present.

6 6. The liability, if any, of Camco must be reduced by the percentage of fault of
7 others, including the Plaintiff.

8 7. The claims, and each of them, are barred by the failure of the Plaintiff to plead
9 those claims with particularity.

10 8. The claims of Plaintiff have been waived as a result of the acts and the conduct
11 of the Plaintiff.

12 9. The claim for breach of contract is barred as a result of the failure to satisfy
13 conditions precedent.

14 10. The claim for breach of contract is barred by the statute of frauds.

15 11. Plaintiff brought the case at bar without reasonable grounds upon which to base a
16 claim for relief.

17 12. Plaintiff maintained the present action without reasonable grounds upon which to
18 base a claim for relief.

19 13. Plaintiff's claims are not well grounded in fact.

20 14. Plaintiff's claims are not warranted by existing law.

21 15. Plaintiff is barred from recovering by the doctrine of unclean hands.

22 16. Plaintiff's claims are barred by the doctrine of laches, waiver, and estoppel.

23 17. To the extent that Plaintiff's work was substandard, not workmanlike, defective,
24 incomplete, or untimely, Plaintiff is not entitled to recover for said work.

25 18. Plaintiff has approved and ratified the alleged acts of Camco for which Plaintiff
26 now complains.

27 19. There is no justiciable case or controversy as between Plaintiff and Camco
28

1 and/or Fidelity.

2 20. Plaintiff lacks standing to assert all or part of the causes of action contained in
3 their complaint.

4 21. Camco's performance on any contract was excused by Plaintiff's material breach
5 thereof.

6 22. Plaintiff has failed to mitigate its damages.

7 23. Defendant Fidelity is informed and believes that it is entitled to assert all of the
8 defenses available to its principal, and Fidelity hereby incorporates by reference all defenses
9 raised, or that could have been raised, by Fidelity's principal.

10 24. Fidelity alleges that its liability, if any exists, which is expressly denied, is
11 limited to the penal sum of the applicable Contractor's License Bond.

12 25. Any license or surety bond executed by Fidelity was limited to the classification
13 of contracting activities as set forth in its Nevada State Contractor's License Bond.

14 26. The liability of Fidelity if any, is limited to its obligations as set forth in its surety
15 bond agreement.

16 27. The liability of Fidelity if any, is limited to the statutory liability as set forth in
17 NRS 624.273.

18 28. Fidelity is not liable for the acts or omissions of persons, individuals, firms,
19 partnerships, corporations, associations, or other organizations that are not its named principal.

20 29. The damages sustained by Plaintiff, if any, were caused by the acts of third
21 persons who were not agents, servants, or employees of Fidelity, or its principal, and who were
22 not acting on behalf of Fidelity or its principal in any manner or form, and as such, Fidelity or
23 its principal are not liable in any manner to the Plaintiff.

24 30. Fidelity is not liable for the acts or omissions of persons, individuals, firms,
25 partnerships, corporations, associations, or other organizations that are not its named principal.

26 31. Plaintiff's suit against Fidelity is not timely brought under the terms of the bond
27 because no judgment or court decree has been entered against its principal.

28 32. It has been necessary for Camco and Fidelity to retain the services of the law

1 offices of Woodbury, Morris & Brown, attorneys at law, for the purpose of defending this
2 action, and Camco is entitled to payment of all costs, fees, and expenses associated with and/or
3 arising out of the defense of this action.

4 33. Pursuant To NRCP 8, all possible affirmative defenses may not have been
5 alleged herein, inasmuch as sufficient facts were not available after reasonable investigation and
6 inquiry upon the filing of Defendants' Answer and, therefore, Defendants reserves the right to
7 amend their Answer to allege additional affirmative defenses if subsequent investigation
8 warrants.

9 WHEREFORE, Third Party Defendants Camco and Fidelity pray as follows:

- 10 1. That Plaintiff take nothing by way of its Complaint;
11 2. For an award of reasonable attorneys' fees and costs for having to defend this
12 action; and
13 3. For such other and further relief as the Court deems just and proper.

14 **COUNTERCLAIM**

15 Counterclaimant CAMCO PACIFIC CONSTRUCTION COMPANY, INC. (hereinafter
16 "Camco") by and through its attorney, Steven L. Morris, Esq. of the law firm of Woodbury,
17 Morris & Brown complains as follows:

18 **JURISDICTIONAL ALLEGATIONS**

19 1. Camco was and is at all times relevant to this action, a California corporation,
20 doing business in Clark County, Nevada as a contractor duly licensed by the Nevada State
21 Contractor's Board.

22 2. Counterdefendant NORTHSTAR CONCRETE, INC., a Nevada corporation
23 (hereinafter referred to as "Northstar") is and was at all times relevant to this action, a
24 corporation conducting business in Clark County, Nevada.

25 3. The true names and capacities, whether individual, corporate, associate or
26 otherwise of Defendants named herein as DOES I through X are unknown to Counterclaimant.
27 Said DOE Defendants are responsible for damages suffered by Counterclaimant; therefore,
28 Counterclaimants sue Defendants by such fictitious names. Counterclaimants will ask leave to

1 amend this Counterclaim to show the true names and capacities of each such DOE Defendants
2 at such time as the same have been ascertained.

3 **FIRST CAUSE OF ACTION**

4 **(Abuse of Process)**

5 4. Camco repeats and realleges each and every allegation contained in the
6 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by reference
7 and further alleges:

8 5. Camco was a general contractor for the Manhattan West Condominiums project,
9 located in Clark County, Nevada (the "Property," and/or "Project").

10 6. GEMSTONE DEVELOPMENT WEST, INC. ("Gemstone") was the owner of
11 the Project.

12 7. Camco did not request proposals from any subcontractor on the Project and
13 Camco did not negotiate or enter into a contract with Northstar.

14 8. Northstar was selected by Gemstone and furnished its respective work and
15 materials at Gemstone's direction and request.

16 9. No payments for the work and materials furnished to the Project came through
17 Camco.

18 10. There was no contract between Northstar and Camco with regard to the Project.

19 11. The only viable claims Northstar has, if any, are against Gemstone and/or the
20 Property.

21 12. Lacking a basis for relief against Camco, Northstar has an ulterior purpose, other
22 than resolving a legal dispute, in bringing this lawsuit against Camco.

23 13. Northstar has engaged in a willful act in the use of the legal process not proper in
24 the regular conduct of the proceeding.

25 14. Camco has been required to engage the services of the law firm of
26 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
27 reasonable attorneys fees and costs therefor.
28

SECOND CAUSE OF ACTION

(Breach of Contract - In the Alternative)

15. Camco repeats and realleges each and every allegation contained in the preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by reference and further alleges:

16. Apco Construction ("Apco") was initially the general contractor for the Project.

17. Northstar and Apco entered into a Subcontract Agreement (the "Agreement") relative to the Project.

18. Section 3.4 of the Agreement states: "Any payments to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor herein agrees to assume the same risk that the Owner may become insolvent that Contractor has assumed by entering into the Prime Contract with the Owner."

19. If any contract existed at all between Camco and Northstar, it was an implied contract based on the terms of the Agreement.

20. All payments made to subcontractors and suppliers on the Project were made directly by Gemstone through Nevada Construction Services. (See Exhibit A, attached hereto and incorporated herein by this reference).

21. Camco never received payment on behalf of the subcontractors, including Northstar, and was therefore, not responsible nor liable for payment to the subcontractors, including Northstar.

22. Northstar agreed and expressly acknowledged that it assumed the risk of non-payment by the Owner.

23. Northstar breached its contract with Camco by demanding payment from Camco and by bringing claims against Camco and its License Bond Surety relative to payment for the work allegedly performed by Northstar on the Project.

24. Camco is entitled to all of its attorneys fees and costs pursuant to the terms and conditions of the Ratification Agreement.

25. Camco has been required to engage the services of the law firm of

1 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
2 reasonable attorneys fees and costs therefor.

3 **THIRD CAUSE OF ACTION**

4 **(Breach of Covenant of Good Faith and Fair Dealing - In the Alternative)**

5 26. Camco repeats and realleges each and every allegation contained in the
6 preceding paragraphs of Counterclaimant's Counterclaim, incorporates the same at this point by
7 reference and further allege:

8 27. The law imposes upon Northstar, by virtue of the contract, a covenant to act in
9 good faith and deal fairly with Counterclaimant;

10 28. Despite this covenant, Northstar's intentional failure to abide by the terms of the
11 parties written contract, Northstar breached its covenant to act in good faith and deal fairly;

12 29. As a result of its breach of the covenant of good faith and fair dealing, Northstar
13 has injured Camco in an amount in excess of \$10,000.00.

14 30. Camco has been required to engage the services of the law firm of
15 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
16 reasonable attorneys fees and costs therefor.

17 **FOURTH CAUSE OF ACTION**

18 **(Declaratory Relief)**

19 31. Camco repeats and realleges each and every allegation contained in the
20 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by reference
21 and further alleges:

22 32. Pursuant to Nevada Revised Statutes ("NRS") Chapter 30, the Uniform
23 Declaratory Judgment Act, and more particularly, NRS 30.030 and NRS 30.040, Camco asks
24 this Court to utilize its power to interpret the Agreement and declare the respective rights and
25 obligations of the parties, if any, under the Agreement, including, without limitation, the
26 complete or partial validity or invalidity of the Agreement, the terms and conditions, if any,
27 under which Northstar would be entitled to a commission thereunder, the duration or term of the
28 Agreement, and the extent to which the Agreement is unconscionable and/or unenforceable.

1 33. It has become necessary for Camco to retain the services of the law firm of
2 Woodbury, Morris & Brown to defend against the Complaint and to bring counterclaims against
3 Northstar, and Camco is therefore entitled to an award of attorneys' fees and costs incurred
4 herein.

5 **FIFTH CAUSE OF ACTION**

6 **(Attorneys' Fees)**

7 34. Camco repeats and realleges each and every allegation contained in the
8 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by reference
9 and further alleges:

10 35. NRS 30.120 provides that "in any proceeding under NRS 30.010 to 30.160,
11 inclusive, the Court may make such award of costs as may seem equitable and just."

12 36. In this case, pursuant to NRS Chapter 30, the Uniform Declaratory Judgment
13 Act, and more particularly, NRS 30.030 and NRS 30.040, Camco has requested that this Court
14 declare the rights, status and relationships between the parties under the Agreement. Camco has
15 been forced to retain the services of an attorney and has incurred costs in seeking such
16 declaratory relief from this Court.

17 37. Therefore, Camco asks this Court, pursuant to NRS 30.120, to award Camco the
18 attorney's fees and costs that it incurs in the defense and prosecution of this litigation.

19 38. It has become necessary for Camco to retain the services of the law firm of
20 Woodbury, Morris & Brown to defend against the Complaint and to bring counterclaims against
21 Northstar, and Camco is therefore entitled to an award of attorneys' fees and costs incurred
22 herein.

23 WHEREFORE, Counterclaimant Camco prays as follows:

24 1. For this Court to enter judgment against Counterdefendant in an amount in
25 excess of \$10,000.00, plus interest at the contract rate;

26 2. For an award of reasonable attorneys' fees and costs for having to prosecute this
27 action; and

28 3. For such other and further relief as the Court deems just and proper.

WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

1 DATED this 9th day of September 2009.

2 WOODBURY, MORRIS & BROWN

3 *Steven L. Morris* #11059 for
4 STEVEN L. MORRIS, ESQ.
5 Nevada Bar No. 7454
6 701 N. Green Valley Pkwy., Suite 110
7 Henderson, NV 89074-6178
8 Attorneys for Camco and Fidelity

9 **CERTIFICATE OF MAILING**

10 I hereby certify that on the 9th day of September 2009, I served a copy of the
11 **ANSWER TO NORTHSTAR CONCRETE INC.'S STATEMENT OF FACTS**
12 **CONSTITUTING LIEN AND COMPLAINT IN INTERVENTION AND CAMCO**
13 **PACIFIC CONSTRUCTION COMPANY INC.'S COUNTERCLAIM** by facsimile and by
14 enclosing a true and correct copy of the same in a sealed envelope upon which first-class
15 postage was fully prepaid, and addressed to the following:

16 Jennifer R. Lloyd-Robinson, Esq.
17 PEZZILLO ROBINSON
18 6750 Via Austi Parkway, Suite 170
19 Las Vegas, Nevada 89119

20 and that there is regular communication by mail between the place of mailing and the place so
21 addressed.

22 *Rubina Snow-Jeppe*
23 An Employee of Woodbury, Morris & Brown
24
25
26
27
28

EXHIBIT A



Date: April 28, 2009
To: Nevada State Contractor's Board
From: Scott Financial Corporation
Subject: ManhattanWest Project

I am the President of Scott Financial Corporation ("SFC"), which is a seasoned commercial finance company located in Bismarck, North Dakota and licensed in Nevada.

SFC is the lender for ManhattanWest Buildings 2, 3, 7, 8, and 9 located at West Russell Road and Rocky Hill Street in Las Vegas, Nevada (the "Project"). No other ManhattanWest buildings were funded or constructed. The Project consisted of condominiums developed by Gemstone Development West, Inc. ("Gemstone").

The purpose of this letter is to explain the payment process for the Project and to demonstrate that Camco Pacific Construction Company, Inc. ("Camco") had no direct responsibility to pay the trade contractors or any other contracting parties on the Project.

As the Project's lender, SFC established a credit facility between SFC (with its network of participating community banks) and Gemstone. As the loan originator and lead lender, SFC established both the Senior and Mezzanine Credit Facilities that were forecasted to fund the entire construction cost to complete the Project; provided however, that an adequate level of condominium sales were closed by Gemstone in a timely manner.

In connection with its funding of the Project, SFC required a very detailed and disciplined payment procedure, which it has used successfully and extensively in the past. This payment procedure was developed collectively between SFC, Gemstone, and Nevada Construction Services ("NCS") to execute the monthly construction funding on the Project in a proper and timely manner.

This payment procedure was communicated to the general contractors and the trade contractors through them and was used to facilitate the payment structure for all trade contractors/vendors.

Prior to the commencement of the Project, SFC entered into a voucher control contract with NCS. First, pursuant to such agreement, NCS managed the voucher control and served as the third party disbursement agent. Second, as part of such agreement, NCS also performed third party site construction inspections for SFC prior to each disbursement. Please note that NCS is a disbursement agent for SFC and does not "approve funding", that is a role of SFC and our participating banks exclusively.

APCO Construction ("APCO") was the original General Contractor for the Project. The protocol for issuing payment involved APCO submitting a monthly payment application to Gemstone based on a schedule of values and materials delivered by the vendors and trade contractors (the "Payment Application").

Next, Gemstone would review the Payment Application and approve or reject its contents based upon the work completed as of the submission of such Payment Application. Upon the final agreement and approval of the Payment Application by Gemstone and APCO, Gemstone would send the Payment Application and any supporting documents to NCS. NCS

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

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would review the Payment Application and the supporting documents and compare them with its payment records. Thereafter, NCS would order a formal NCS inspection of the jobsite to verify that sufficient progress was made to warrant the amount in the Payment Application. After completing such inspection, NCS submitted its request for funding to SFC.

Upon receiving such approval, SFC conducted its final monthly creditor review and completed the funding approval process by taking the following steps: (a) formally signing-off on the Payment Application and (b) obtaining final approval of the Payment Application from the co-lead bank.

Finally, after the Payment Application was properly approved and verified, the corresponding funds were requested by SFC from its participating lenders and advanced into the SFC Project Control Account. Thereafter, the respective (a) soft costs in the Payment Application were advanced directly to Gemstone and (b) the hard costs in the Payment Application were wired directly to NCS for controlled disbursement.

Upon receiving such hard cost funds, NCS would send the corresponding payment directly to APCO for disbursement to the trade contractors. This was the payment process throughout the period that APCO remained on the Project, except for the June and July 2008 Pay Applications where NCS was notified by Gemstone to issue joint checks to the sub contractors.

APCO was terminated by Gemstone for cause in August 2008. After such termination, Gemstone engaged Camco to serve as the General Contractor for the Project. When this substitution occurred, the payment process used during the APCO engagement was continued with some alterations.

The most important of these alterations was based on the shift from a Guaranteed Maximum Price to a simple monthly fee. APCO had agreed to deliver the Project for a Guaranteed Maximum Price and received a fee for its services based on a percentage of each Payment Application. Consequently, APCO assumed responsibility for the financial aspects of the Project and the proper engagement and payment of the trade contractors.

In contrast, Camco was paid a basic fee of \$100,000 per month plus certain expenses to serve as the General Contractor for the project; provided however, that Gemstone, not Camco, was solely responsible for selecting and negotiating the engagement of the trade contractors by Camco. Because of this shift in responsibility, all decisions and communications for payment authorization and processing were handled by Gemstone, without Camco's ongoing involvement.

In addition, Gemstone provided the financial management component of the Project and was responsible for (a) establishing and maintaining the budget and (b) keeping full and detailed accounts on the Project.

Furthermore, NCS's protocol also changed to effectively limit Camco's involvement. Because Camco was not responsible for establishing or maintaining the budget, Camco's only role in the payment process was to compile and submit each initial Payment Application.

Thereafter, the review, negotiation, and request for the corresponding payments were handled by Gemstone. As a result, NCS never sent payment for trade contractors to Camco. Instead, such payments were sent directly to the trade contractors.

Furthermore, Camco (a) as a rule did not communicate directly with SFC; (b) only occasionally communicated with NCS regarding the payment process; and (c) did not make any decisions related to the Payment Application or the corresponding payments to Camco or the trade contractors. Payments decisions were all made by Gemstone because they were responsible for the budget and as they pertained to credit decisions reviewed by SFC.

In addition, Camco had no physical control over the funds, and all disbursements were completed between NCS and the trade contractors directly. We understand the trade contractors were aware of Camco's limited role in this payment process. First, the negotiation of each trade contractor's engagement was managed by Gemstone employees and only subsequently ratified by Camco. Second, the terms of the engagement contracts between Camco and each trade contractor and Camco and Gemstone described this relationship. Third, on several occasions when a particular trade contractor expressed concern regarding the timing of a forthcoming payment, Gemstone and Camco repeatedly and consistently explained that all lending decisions regarding funding (credit issues specifically) were ultimately made by SFC and that neither Gemstone nor Camco had the ability, authority, or resources to make any payments that did not come from SFC approval.

To this end, on occasion, trade contractors demanded that they be provided with some evidence of payment in order to continue working. In response, Camco could not, and to our understanding did not, promise that any payment was forthcoming.

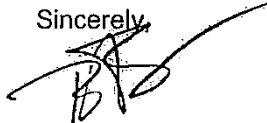
SFC delivered on a limited basis, letters to such disgruntled trade contractors informing them that all credit decisions on payment funding must be approved by SFC and that such funds would be only paid once SFC had completed its required approval process and determined that such payments were appropriate. Attached to this letter as Exhibit A are two such letters executed by SFC and delivered to certain trade contractors.

In December 2008, SFC sent correspondence to NCS that due to uncured loan defaults by Gemstone, a decision was made to cease all funding on the Project. The communications regarding this decision are attached to this letter as Exhibit B. SFC further requested that NCS return funds in the amount of \$993,866.72. NCS returned the funds requested and no additional payment for previous work performed was disbursed to Gemstone, Camco, or any of the trade contractors for the Project. Camco was not a part of these transactions, was not a participant in these decisions, and was unaware of such decisions until the above notice was sent to NCS.

Upon learning of SFC's decision to cease funding, we understand Camco terminated its engagement contract with Gemstone based on Gemstone's failure to pay Camco pursuant to the terms of such contract. As a result of changed circumstances on the Project after APCO's termination, Camco's role was limited with regard to payment.

As a result, SFC does not believe Camco or for that matter NCS can be held responsible for payment of any outstanding applications of the trade contractors.

Sincerely,



Brad Scott
President
Scott Financial Corporation

Exhibit A

Payment Status Letters from SFC to Trade Contractors



November 4, 2008

Mr. Mike Evans

~~E&E Fire Protection, LLC~~

6380 South Valley View, Suite 110
Las Vegas, NV 89118

RE: ManhattanWest Funding

Mr. Evans:

I have been asked by Gemstone to provide you with an update on the status of the September Draw.

As you may likely know Scott financial Corporation is the Creditor of record and has been funding the vertical construction through the various credit facilities established.

The September Draw was submitted to Scott Financial Corporation late last week. We are currently completing the final review of the ~~September Payment Application~~. However, in light of the complications related to the termination of the former general contractor, the approval of the September Payment Application has required more investigation and time than generally typical or expected.

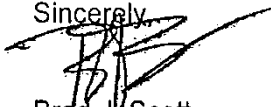
Despite this temporary delay, the funding necessary to satisfy the outstanding amounts due pursuant to the September Payment Application are in final stages of approval and ~~are anticipated to be processed and funded to NCS~~ (voucher control) by November 13, 2008.

The amount in processing includes a payment of \$1,092,121.34 to E&E Fire Protection LLC and its corresponding suppliers.

I trust this letter assists you with your questions on the timing of the funding.

Please feel free to contact me directly if you have any questions.

Sincerely,


Brad J. Scott
President

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

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Exhibit 'A'



December 1, 2008

Leo Duckstein

~~CabineTec Inc.~~

2711 E. Craig Road, Suite A
North Las Vegas, NV 89030

RE: ManhattanWest Funding

Mr. Duckstein:

I have been asked by Gemstone to provide you with an update on the status of the October Draw.

As you may likely know Scott financial Corporation (SFC) is the Creditor of record and has been funding the vertical construction through the various credit facilities established.

The October Draw was submitted to SFC late last week.

We are currently completing the final review of the ~~October Payment Application~~. However, in light of the complications related to in large part to the termination of the former general contractor, the approval of the October Payment Application has required more review, investigation and time than in the past.

Despite this delay, the funding necessary to satisfy the outstanding amounts due pursuant to the October Payment Application are in being reviewed and a determination of approval is being considered by our team.

Clearly approval of the draw is subject to our complete review process.

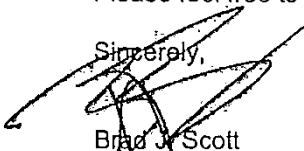
~~Although we cannot guarantee the approval, SFC anticipates the draw request to be processed and funded for NCS (voucher control) in December.~~

I understand the MHW draw which is in the review process at SFC includes a payment amount of approximately \$598,475.00 to CabineTec Inc. and its corresponding suppliers. I believe the Developer approved payment amount is \$483,664.32.

I trust this letter assists you with your questions on the timing of the funding.

Please feel free to contact me directly if you have any questions.

Sincerely,


Brad J. Scott
President

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Office: 701.255.2215 • Fax: 701.223.7299

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AA 001479

Exhibit B

SFC Notice to NCS Regarding the Decision to Stop Funding the Project

Exhibit "B"

Jennifer Olivares

From: [REDACTED] brad@scottfinancialcorp.com]
Sent: Tuesday, December 16, 2008 9:38 AM
To: [REDACTED] Jennifer.Olivares
Cc: 'Margo Scott'; 'Jason Ulmer'; Patricia Curtis; 'Tim James'
Subject: ManhattanWest Status
Importance: High

Jen:

As of right now 11AM CST 12/16/08 the October Draw is still on permanent hold.

A final decision confirming the lender's direction on Project was expected yesterday. It did not happen.

I anticipate this final decision will however likely lead to ~~no further draws being approved.~~

Foreclosure options and discussion on how we will proceed have been explored.


SFC has requested our legal counsel to address the return wire from NCS to SFC discussed yesterday.

Those funds will be held in the SFC escrow account at NSB for the time being, until further direction is provided to SFC.

SFC will keep you posted as a final determination is made.

Thanks.

Brad J. Scott
Scott Financial Corporation
15010 Sundown Drive
Bismarck, ND 58503
W: 701.255.2215
M: 701.220.3999
F: 701.223.7299
brad@scottfinancialcorp.com

	
Brad J. Scott, CRE President brad@scottfinancialcorp.com	15010 Sundown Drive Bismarck, ND 58503 Office: 701.255.2215 Fax: 701.223.7299 Cell: 701.220.3999
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4/1/2009

AA 001481

Exhibit B

Jennifer Olivares

From: Brad Scott [brad@scottfinancialcorp.com]

Sent: Monday, December 15, 2008 3:00 PM

To: Anne Dwyer; Jennifer Olivares

Cc: 'Alex Edelstein'; 'Peter Smith'; 'Jim Horning'; dparry@camcopacific.com

Subject: FW: ManhattanWest

Importance: High

Attachments: Document.pdf; 09004-20-04 Billing #4 2008-12-12.pdf; Wiring Instructions TO SFC at NSB.XLS

Jennifer & Anne:

NCS is hereby instructed by SFC to wire the previously advanced, but undispersed funds held on account at NCS in the amount of \$993,866.72 back to SFC using the attached wiring instructions.

This amount includes the current Heimenath Payment request of \$66,827.29 as it has not been approved by SFC or its participants.

These funds will be held at SFC until further notice.

Please call with any questions.

Thanks.

Brad J. Scott
Scott Financial Corporation
15010 Sundown Drive
Bismarck, ND 58503
W: 701.255.2215
M: 701.220.3999
F: 701.223.7299
brad@scottfinancialcorp.com



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Cell: 701.220.3999

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Email is not always a secure transmission medium. Caution should always be used to communicate "confidential information". If you elect to send or receive information via email, Scott Financial Corporation cannot assure its security and will not be liable if it is intercepted or viewed by another party. By continuing to use e-mail, you are agreeing to accept this risk.

4/1/2009

AA 001482

WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

CLERK OF THE COURT

SEP 10 2009

RECEIVED

1 ANS/CTCM
2 STEVEN L. MORRIS
3 Nevada Bar No. 7454
4 **WOODBURY, MORRIS & BROWN**
5 701 N. Green Valley Parkway, Suite 110
6 Henderson, Nevada 89074
7 (702) 933-0777
8 slmorris@wmb-law.net

9 Attorneys for
10 Camco Pacific Construction Company, Inc. and
11 Fidelity and Deposit Company of Maryland

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 APCO CONSTRUCTION, a Nevada
15 corporation,

16 Plaintiff,

17 vs.

18 GEMSTONE DEVELOPMENT WEST,
19 INC., a Nevada Corporation; NEVADA
20 CONSTRUCTION SERVICES, a Nevada
21 Corporation; SCOTT FINANCIAL
22 CORPORATION, a North Dakota
23 Corporation; COMMONWEALTH LAND
24 TITLE INSURANCE COMPANY; FIRST
25 AMERICAN TITLE INSURANCE
26 COMPANY; and DOES I through X,

27 Defendants.

28 TRI-CITY DRYWALL, INC., a Nevada
corporation,

Plaintiff-in-Intervention,

vs.

APCO CONSTRUCTION, a Nevada
corporation; CAMCO PACIFIC
CONSTRUCTION COMPANY, INC., a
California corporation; FIDELITY AND
DEPOSIT COMPANY OF MARYLAND, a
surety; GEMSTONE DEVELOPMENT

80
FILED

SEP 10 4 08 PM '09

Erin D. Smith
CLERK OF THE COURT

Case No: A571228
Dept. No: XV

Consolidated with:

A571792 A583289
A574391 A584730
A577623 A587168

**ANSWER TO TRI-CITY DRYWALL
INC.'S STATEMENT OF FACTS
CONSTITUTING LIEN AND
COMPLAINT IN INTERVENTION AND
CAMCO PACIFIC CONSTRUCTION
COMPANY INC.'S COUNTERCLAIM**

09A587168
386232



1 WEST, INC., a Nevada corporation; MOES
2 1 - 10, inclusive; and ZOE
3 CORPORATIONS 1- 10, inclusive,

4 Defendants-in-Intervention.

5 CAMCO PACIFIC CONSTRUCTION
6 COMPANY, INC., a California corporation,

7 Counterclaimant,

8 vs.

9 TRI-CITY DRYWALL, INC., a Nevada
10 corporation, and DOES I through X

11 Counterdefendants.

12 Third Party Defendants CAMCO PACIFIC CONSTRUCTION COMPANY, INC.
13 (hereinafter "Camco") and FIDELITY AND DEPOSIT COMPANY OF MARYLAND
14 (hereinafter "Fidelity") (Camco and Fidelity are sometimes collectively referred to herein as
15 "Defendants"), by and through their counsel, Steven L. Morris, Esq. of the law firm of
16 Woodbury, Morris & Brown, hereby answer the Third Party Complaint of TRI-CITY
17 DRYWALL, INC., (hereinafter "Plaintiff" or "Tri-City"), on file herein, and admit, deny, and
18 allege as follows:

19 1. Camco and Fidelity are without information or knowledge sufficient to ascertain
20 the truth of the allegations contained in Paragraphs 1, 2, 6, 7, 8, 26, 27, and 28 Plaintiff's
21 Complaint, and therefore deny each and every allegation contained therein.

22 2. Camco and Fidelity admit the allegations contained in Paragraph 3 of Plaintiff's
23 Complaint.

24 3. Camco and Fidelity deny each and every allegation contained in Paragraphs 4,
25 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 22, 23, 24, 29, 31 (labeled 28 in error), 32 (labeled 29 in
26 error), and 33 (labeled 30 in error) of Plaintiff's Complaint.

27 4. As to Paragraph 5, Camco and Fidelity admit that Gemstone Development West,
28 Inc. is the owner of the property described as Manhattan West, but denies the remaining

1 allegations contained therein.

2 5. As to Paragraphs 9, 15, 21, 25, and 30 (labeled 27 in error) of Plaintiff's
3 Complaint, Camco and Fidelity repeat and reallege the answers to paragraphs 1 through 33 as
4 though fully set forth herein.

5 6. To the extent that any allegations set forth in Plaintiff's Complaint have not been
6 answered, these answering Defendants deny each and every allegation or inference thereof not
7 expressly set forth hereinabove.

8 7. It has become necessary for these answering Defendants to retain the services of
9 WOODBURY, MORRIS, & BROWN, attorneys at law, to defend this action, and as a result,
10 these answering Defendants have been damaged by the Plaintiff, and these answering
11 Defendants are accordingly entitled to their attorney fees and costs incurred herein.

12 **AFFIRMATIVE DEFENSES**

13 1. The Complaint on file herein fails to state a claim against Camco and Fidelity
14 upon which relief can be granted.

15 2. That any or all negligence or fault on the part of the Plaintiff would be active and
16 primary, and any negligence or fault of Camco, if any, would be secondary and passive.

17 3. Any and all damages sustained by Plaintiff are the result of its own negligence
18 and breach of contract.

19 4. Camco is not negligent with respect to the transactions that are the subject of the
20 Complaint, and is and was not in breach of contract.

21 5. At the time and place under the circumstances alleged by the Plaintiff, Plaintiff
22 had full and complete knowledge and information in regard to the conditions and circumstances
23 then and there existing, and through Plaintiff's own knowledge, conduct, acts and omissions,
24 assume the risk attendant to any condition there or then present.

25 6. The liability, if any, of Camco must be reduced by the percentage of fault of
26 others, including the Plaintiff.

27 7. The claims, and each of them, are barred by the failure of the Plaintiff to plead
28

1 those claims with particularity.

2 8. The claims of Plaintiff have been waived as a result of the acts and the conduct
3 of the Plaintiff.

4 9. The claim for breach of contract is barred as a result of the failure to satisfy
5 conditions precedent.

6 10. The claim for breach of contract is barred by the statute of frauds.

7 11. Plaintiff brought the case at bar without reasonable grounds upon which to base a
8 claim for relief.

9 12. Plaintiff maintained the present action without reasonable grounds upon which to
10 base a claim for relief.

11 13. Plaintiff's claims are not well grounded in fact.

12 14. Plaintiff's claims are not warranted by existing law.

13 15. Plaintiff is barred from recovering by the doctrine of unclean hands.

14 16. Plaintiff's claims are barred by the doctrine of laches, waiver, and estoppel.

15 17. To the extent that Plaintiff's work was substandard, not workmanlike, defective,
16 incomplete, or untimely, Plaintiff is not entitled to recover for said work.

17 18. Plaintiff has approved and ratified the alleged acts of Camco for which Plaintiff
18 now complains.

19 19. There is no justiciable case or controversy as between Plaintiff and Camco
20 and/or Fidelity.

21 20. Plaintiff lacks standing to assert all or part of the causes of action contained in
22 their complaint.

23 21. Camco's performance on any contract was excused by Plaintiff's material breach
24 thereof.

25 22. Plaintiff has failed to mitigate its damages.

26 23. Defendant Fidelity is informed and believes that it is entitled to assert all of the
27 defenses available to its principal, and Fidelity hereby incorporates by reference all defenses
28

1 raised, or that could have been raised, by Fidelity's principal.

2 24. Fidelity alleges that its liability, if any exists, which is expressly denied, is
3 limited to the penal sum of the applicable Contractor's License Bond.

4 25. Any license or surety bond executed by Fidelity was limited to the classification
5 of contracting activities as set forth in its Nevada State Contractor's License Bond.

6 26. The liability of Fidelity if any, is limited to its obligations as set forth in its surety
7 bond agreement.

8 27. The liability of Fidelity if any, is limited to the statutory liability as set forth in
9 NRS 624.273.

10 28. Fidelity is not liable for the acts or omissions of persons, individuals, firms,
11 partnerships, corporations, associations, or other organizations that are not its named principal.

12 29. The damages sustained by Plaintiff, if any, were caused by the acts of third
13 persons who were not agents, servants, or employees of Fidelity, or its principal, and who were
14 not acting on behalf of Fidelity or its principal in any manner or form, and as such, Fidelity or
15 its principal are not liable in any manner to the Plaintiff.

16 30. Fidelity is not liable for the acts or omissions of persons, individuals, firms,
17 partnerships, corporations, associations, or other organizations that are not its named principal.

18 31. Plaintiff's suit against Fidelity is not timely brought under the terms of the bond
19 because no judgment or court decree has been entered against its principal.

20 32. It has been necessary for Camco and Fidelity to retain the services of the law
21 offices of Woodbury, Morris & Brown, attorneys at law, for the purpose of defending this
22 action, and Camco is entitled to payment of all costs, fees, and expenses associated with and/or
23 arising out of the defense of this action.

24 33. Pursuant To NRCP 8, all possible affirmative defenses may not have been
25 alleged herein, inasmuch as sufficient facts were not available after reasonable investigation and
26 inquiry upon the filing of Defendants' Answer and, therefore, Defendants reserves the right to
27 amend their Answer to allege additional affirmative defenses if subsequent investigation
28 warrants.

1 WHEREFORE, Third Party Defendants Camco and Fidelity pray as follows:

- 2 1. That Plaintiff take nothing by way of its Complaint;
- 3 2. For an award of reasonable attorneys' fees and costs for having to defend this
- 4 action; and
- 5 3. For such other and further relief as the Court deems just and proper.

6 **COUNTERCLAIM**

7 Counterclaimant CAMCO PACIFIC CONSTRUCTION COMPANY, INC. (hereinafter

8 "Camco") by and through its attorney, Steven L. Morris, Esq. of the law firm of Woodbury,

9 Morris & Brown complains as follows:

10 **JURISDICTIONAL ALLEGATIONS**

- 11 1. Camco was and is at all times relevant to this action, a California corporation,
- 12 doing business in Clark County, Nevada as a contractor duly licensed by the Nevada State
- 13 Contractor's Board.
- 14 2. Counterdefendant TRI-CITY DRYWALL CONCRETE, INC., a Nevada
- 15 corporation (hereinafter referred to as "Tri-City") is and was at all times relevant to this action,
- 16 a corporation conducting business in Clark County, Nevada.
- 17 3. The true names and capacities, whether individual, corporate, associate or
- 18 otherwise of Defendants named herein as DOES 1 through 10 are unknown to Counterclaimant.
- 19 Said DOE Defendants are responsible for damages suffered by Counterclaimant; therefore,
- 20 Counterclaimants sue Defendants by such fictitious names. Counterclaimants will ask leave to
- 21 amend this Counterclaim to show the true names and capacities of each such DOE Defendants
- 22 at such time as the same have been ascertained.

23 **FIRST CAUSE OF ACTION**

24 **(Abuse of Process)**

- 25 4. Camco repeats and realleges each and every allegation contained in the
- 26 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by reference
- 27 and further alleges:
- 28 5. Camco was a general contractor for the Manhattan West Condominiums project,

- 1 project, located in Clark County, Nevada (the "Property," and/or "Project").
- 2 6. GEMSTONE DEVELOPMENT WEST, INC. ("Gemstone") was the owner of
- 3 the Project.
- 4 7. Camco did not request proposals from any subcontractor on the Project and
- 5 Camco did not negotiate or enter into a contract with Tri-City.
- 6 8. Tri-City was selected by Gemstone and furnished its respective work and
- 7 materials at Gemstone's direction and request.
- 8 9. No payments for the work and materials furnished to the Project came through
- 9 Camco.
- 10 10. There was no contract between Tri-City and Camco with regard to the Project.
- 11 11. The only viable claims Tri-City has, if any, are against Gemstone and/or the
- 12 Property.
- 13 12. Lacking a basis for relief against Camco, Tri-City has an ulterior purpose, other
- 14 than resolving a legal dispute, in bringing this lawsuit against Camco.
- 15 13. Tri-City has engaged in a willful act in the use of the legal process not proper in
- 16 the regular conduct of the proceeding.
- 17 14. Camco has been required to engage the services of the law firm of
- 18 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
- 19 reasonable attorneys fees and costs therefor.
- 20 **SECOND CAUSE OF ACTION**
- 21 **(Breach of Contract - In the Alternative)**
- 22 15. Camco repeats and realleges each and every allegation contained in the
- 23 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by
- 24 reference and further alleges:
- 25 16. Apco Construction ("Apco") was initially the general contractor for the Project.
- 26 17. Tri-City and Apco entered into a Subcontract Agreement (the "Agreement")
- 27 relative to the Project.
- 28 18. Section 3.4 of the Agreement states: "Any payments to Subcontractor shall be

1 conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor
2 herein agrees to assume the same risk that the Owner may become insolvent that Contractor
3 has assumed by entering into the Prime Contract with the Owner.”

4 19. If any contract existed at all between Camco and Tri-City, it was an implied
5 contract based on the terms of the Agreement.

6 20. All payments made to subcontractors and suppliers on the Project were made
7 directly by Gemstone through Nevada Construction Services. (See Exhibit A, attached hereto
8 and incorporated herein by this reference).

9 21. Camco never received payment on behalf of the subcontractors, including Tri-
10 City, and was therefore, not responsible nor liable for payment to the subcontractors, including
11 Tri-City.

12 22. Tri-City agreed and expressly acknowledged that it assumed the risk of non-
13 payment by the Owner.

14 23. Tri-City breached its contract with Camco by demanding payment from Camco
15 and by bringing claims against Camco and its License Bond Surety relative to payment for the
16 work allegedly performed by Tri-City on the Project.

17 24. Camco is entitled to all of its attorneys fees and costs pursuant to the terms and
18 conditions of the Ratification Agreement.

19 25. Camco has been required to engage the services of the law firm of
20 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
21 reasonable attorneys fees and costs therefor.

22 **THIRD CAUSE OF ACTION**

23 **(Breach of Covenant of Good Faith and Fair Dealing - In the Alternative)**

24 26. Camco repeats and realleges each and every allegation contained in the
25 preceding paragraphs of Counterclaimant's Counterclaim, incorporates the same at this point by
26 reference and further allege:

27 27. The law imposes upon Tri-City, by virtue of the contract, a covenant to act in
28 good faith and deal fairly with Counterclaimant;

1 28. Despite this covenant, Tri-City's intentional failure to abide by the terms of the
2 parties written contract, Tri-City breached its covenant to act in good faith and deal fairly;

3 29. As a result of its breach of the covenant of good faith and fair dealing, Tri-City
4 has injured Camco in an amount in excess of \$10,000.00.

5 30. Camco has been required to engage the services of the law firm of
6 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
7 reasonable attorneys fees and costs therefor.

8 **FOURTH CAUSE OF ACTION**

9 **(Declaratory Relief)**

10 31. Camco repeats and realleges each and every allegation contained in the
11 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by
12 reference and further alleges:

13 32. Pursuant to Nevada Revised Statutes ("NRS") Chapter 30, the Uniform
14 Declaratory Judgment Act, and more particularly, NRS 30.030 and NRS 30.040, Camco asks
15 this Court to utilize its power to interpret the Agreement and declare the respective rights and
16 obligations of the parties, if any, under the Agreement, including, without limitation, the
17 complete or partial validity or invalidity of the Agreement, the terms and conditions, if any,
18 under which Tri-City would be entitled to a commission thereunder, the duration or term of the
19 Agreement, and the extent to which the Agreement is unconscionable and/or unenforceable.

20 33. It has become necessary for Camco to retain the services of the law firm of
21 Woodbury, Morris & Brown to defend against the Complaint and to bring counterclaims against
22 Tri-City, and Camco is therefore entitled to an award of attorneys' fees and costs incurred
23 herein.

24 **FIFTH CAUSE OF ACTION**

25 **(Attorneys' Fees)**

26 34. Camco repeats and realleges each and every allegation contained in the
27 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by
28 reference and further alleges:

1 35. NRS 30.120 provides that "in any proceeding under NRS 30.010 to 30.160,
2 inclusive, the Court may make such award of costs as may seem equitable and just."

3 36. In this case, pursuant to NRS Chapter 30, the Uniform Declaratory Judgment
4 Act, and more particularly, NRS 30.030 and NRS 30.040, Camco has requested that this Court
5 declare the rights, status and relationships between the parties under the Agreement. Camco has
6 been forced to retain the services of an attorney and has incurred costs in seeking such
7 declaratory relief from this Court.

8 37. Therefore, Camco asks this Court, pursuant to NRS 30.120, to award Camco the
9 attorney's fees and costs that it incurs in the defense and prosecution of this litigation.

10 38. It has become necessary for Camco to retain the services of the law firm of
11 Woodbury, Morris & Brown to defend against the Complaint and to bring counterclaims against
12 Tri-City, and Camco is therefore entitled to an award of attorneys' fees and costs incurred
13 herein.

14 WHEREFORE, Counterclaimant Camco prays as follows:

15 1. For this Court to enter judgment against Counterdefendant in an amount in
16 excess of \$10,000.00, plus interest at the contract rate;

17 2. For an award of reasonable attorneys' fees and costs for having to prosecute this
18 action; and

19 3. For such other and further relief as the Court deems just and proper.

20 DATED this 9th day of September 2009.

21 WOODBURY, MORRIS & BROWN

22 *Steven L. Morris* #11059 for
23 STEVEN L. MORRIS, ESQ.

24 Nevada Bar No. 7454
25 701 N. Green Valley Pkwy., Suite 110
26 Henderson, NV 89074-6178
27 Attorneys for Camco and Fidelity
28

WOODBURY, MORRIS & BROWN
701 N. Green Valley Parkway, Suite 110
Henderson, Nevada 89074
(702) 933-0777 ♦ Fax (702) 933-0778

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of September 2009, I served a copy of the
ANSWER TO TRI-CITY DRYWALL INC.'S STATEMENT OF FACTS
CONSTITUTING LIEN AND COMPLAINT IN INTERVENTION AND CAMCO
PACIFIC CONSTRUCTION COMPANY INC.'S COUNTERCLAIM CONSTRUCTION
COMPANY INC.'S COUNTERCLAIM by facsimile and by enclosing a true and correct
copy of the same in a sealed envelope upon which first-class postage was fully prepaid, and
addressed to the following:

Jennifer R. Loyd-Robinson, Esq.
PEZZILLO ROBINSON
6750 Via Austi Parkway, Suite 170
Las Vegas, Nevada 89119

and that there is regular communication by mail between the place of mailing and the place so
addressed.

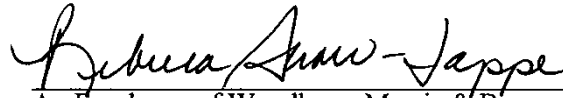

An Employee of Woodbury, Morris & Brown

EXHIBIT A



Date: April 28, 2009
To: Nevada State Contractor's Board
From: Scott Financial Corporation
Subject: ManhattanWest Project

I am the President of Scott Financial Corporation ("SFC"), which is a seasoned commercial finance company located in Bismarck, North Dakota and licensed in Nevada.

SFC is the lender for ManhattanWest Buildings 2, 3, 7, 8, and 9 located at West Russell Road and Rocky Hill Street in Las Vegas, Nevada (the "Project"). No other ManhattanWest buildings were funded or constructed. The Project consisted of condominiums developed by Gemstone Development West, Inc. ("Gemstone").

The purpose of this letter is to explain the payment process for the Project and to demonstrate that Camco Pacific Construction Company, Inc. ("Camco") had no direct responsibility to pay the trade contractors or any other contracting parties on the Project.

As the Project's lender, SFC established a credit facility between SFC (with its network of participating community banks) and Gemstone. As the loan originator and lead lender, SFC established both the Senior and Mezzanine Credit Facilities that were forecasted to fund the entire construction cost to complete the Project; provided however, that an adequate level of condominium sales were closed by Gemstone in a timely manner.

In connection with its funding of the Project, SFC required a very detailed and disciplined payment procedure, which it has used successfully and extensively in the past. This payment procedure was developed collectively between SFC, Gemstone, and Nevada Construction Services ("NCS") to execute the monthly construction funding on the Project in a proper and timely manner.

This payment procedure was communicated to the general contractors and the trade contractors through them and was used to facilitate the payment structure for all trade contractors/vendors.

Prior to the commencement of the Project, SFC entered into a voucher control contract with NCS. First, pursuant to such agreement, NCS managed the voucher control and served as the third party disbursement agent. Second, as part of such agreement, NCS also performed third party site construction inspections for SFC prior to each disbursement. Please note that NCS is a disbursement agent for SFC and does not "approve funding", that is a role of SFC and our participating banks exclusively.

APCO Construction ("APCO") was the original General Contractor for the Project. The protocol for issuing payment involved APCO submitting a monthly payment application to Gemstone based on a schedule of values and materials delivered by the vendors and trade contractors (the "Payment Application").

Next, Gemstone would review the Payment Application and approve or reject its contents based upon the work completed as of the submission of such Payment Application. Upon the final agreement and approval of the Payment Application by Gemstone and APCO, Gemstone would send the Payment Application and any supporting documents to NCS. NCS

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

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would review the Payment Application and the supporting documents and compare them with its payment records. Thereafter, NCS would order a formal NCS inspection of the jobsite to verify that sufficient progress was made to warrant the amount in the Payment Application. After completing such inspection, NCS submitted its request for funding to SFC.

Upon receiving such approval, SFC conducted its final monthly creditor review and completed the funding approval process by taking the following steps: (a) formally signing-off on the Payment Application and (b) obtaining final approval of the Payment Application from the co-lead bank.

Finally, after the Payment Application was properly approved and verified, the corresponding funds were requested by SFC from its participating lenders and advanced into the SFC Project Control Account. Thereafter, the respective (a) soft costs in the Payment Application were advanced directly to Gemstone and (b) the hard costs in the Payment Application were wired directly to NCS for controlled disbursement.

Upon receiving such hard cost funds, NCS would send the corresponding payment directly to APCO for disbursement to the trade contractors. This was the payment process throughout the period that APCO remained on the Project, except for the June and July 2008 Pay Applications where NCS was notified by Gemstone to issue joint checks to the sub contractors.

APCO was terminated by Gemstone for cause in August 2008. After such termination, Gemstone engaged Camco to serve as the General Contractor for the Project. When this substitution occurred, the payment process used during the APCO engagement was continued with some alterations.

The most important of these alterations was based on the shift from a Guaranteed Maximum Price to a simple monthly fee. APCO had agreed to deliver the Project for a Guaranteed Maximum Price and received a fee for its services based on a percentage of each Payment Application. Consequently, APCO assumed responsibility for the financial aspects of the Project and the proper engagement and payment of the trade contractors.

In contrast, Camco was paid a basic fee of \$100,000 per month plus certain expenses to serve as the General Contractor for the project; provided however, that Gemstone, not Camco, was solely responsible for selecting and negotiating the engagement of the trade contractors by Camco. Because of this shift in responsibility, all decisions and communications for payment authorization and processing were handled by Gemstone, without Camco's ongoing involvement.

In addition, Gemstone provided the financial management component of the Project and was responsible for (a) establishing and maintaining the budget and (b) keeping full and detailed accounts on the Project.

Furthermore, NCS's protocol also changed to effectively limit Camco's involvement. Because Camco was not responsible for establishing or maintaining the budget, Camco's only role in the payment process was to compile and submit each initial Payment Application.

Thereafter, the review, negotiation, and request for the corresponding payments were handled by Gemstone. As a result, NCS never sent payment for trade contractors to Camco. Instead, such payments were sent directly to the trade contractors.

Furthermore, Camco (a) as a rule did not communicate directly with SFC; (b) only occasionally communicated with NCS regarding the payment process; and (c) did not make any decisions related to the Payment Application or the corresponding payments to Camco or the trade contractors. Payments decisions were all made by Gemstone because they were responsible for the budget and as they pertained to credit decisions reviewed by SFC.

In addition, Camco had no physical control over the funds, and all disbursements were completed between NCS and the trade contractors directly. We understand the trade contractors were aware of Camco's limited role in this payment process. First, the negotiation of each trade contractor's engagement was managed by Gemstone employees and only subsequently ratified by Camco. Second, the terms of the engagement contracts between Camco and each trade contractor and Camco and Gemstone described this relationship. Third, on several occasions when a particular trade contractor expressed concern regarding the timing of a forthcoming payment, Gemstone and Camco repeatedly and consistently explained that all lending decisions regarding funding (credit issues specifically) were ultimately made by SFC and that neither Gemstone nor Camco had the ability, authority, or resources to make any payments that did not come from SFC approval.

To this end, on occasion, trade contractors demanded that they be provided with some evidence of payment in order to continue working. In response, Camco could not, and to our understanding did not, promise that any payment was forthcoming.

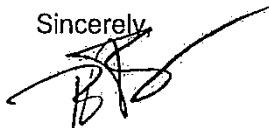
SFC delivered on a limited basis, letters to such disgruntled trade contractors informing them that all credit decisions on payment funding must be approved by SFC and that such funds would be only paid once SFC had completed its required approval process and determined that such payments were appropriate. Attached to this letter as Exhibit A are two such letters executed by SFC and delivered to certain trade contractors.

In December 2008, SFC sent correspondence to NCS that due to uncured loan defaults by Gemstone, a decision was made to cease all funding on the Project. The communications regarding this decision are attached to this letter as Exhibit B. SFC further requested that NCS return funds in the amount of \$993,866.72. NCS returned the funds requested and no additional payment for previous work performed was disbursed to Gemstone, Camco, or any of the trade contractors for the Project. Camco was not a part of these transactions, was not a participant in these decisions, and was unaware of such decisions until the above notice was sent to NCS.

Upon learning of SFC's decision to cease funding, we understand Camco terminated its engagement contract with Gemstone based on Gemstone's failure to pay Camco pursuant to the terms of such contract. As a result of changed circumstances on the Project after APCO's termination, Camco's role was limited with regard to payment.

As a result, SFC does not believe Camco or for that matter NCS can be held responsible for payment of any outstanding applications of the trade contractors.

Sincerely,



Brad Scott
President
Scott Financial Corporation

Exhibit A

Payment Status Letters from SFC to Trade Contractors



November 4, 2008

Mr. Mike Evans

~~E&E Fire Protection LLC~~

6380 South Valley View, Suite 110
Las Vegas, NV 89118

RE: ManhattanWest Funding

Mr. Evans:

I have been asked by Gemstone to provide you with an update on the status of the September Draw.

As you may likely know Scott financial Corporation is the Creditor of record and has been funding the vertical construction through the various credit facilities established.

The September Draw was submitted to Scott Financial Corporation late last week. We are currently completing the final review of the ~~September Payment Application~~. However, in light of the complications related to the termination of the former general contractor, the approval of the September Payment Application has required more investigation and time than generally typical or expected.

Despite this temporary delay, the funding necessary to satisfy the outstanding amounts due pursuant to the September Payment Application are in final stages of approval and ~~are anticipated to be processed and funded to NCS~~ (voucher control) by November 13, 2008.

The amount in processing includes a payment of \$1,092,121.34 to E&E Fire Protection LLC and its corresponding suppliers.

I trust this letter assists you with your questions on the timing of the funding.

Please feel free to contact me directly if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'BJ Scott', written over a horizontal line.

Brad J. Scott
President

15010 Sundown Drive • Bismarck, ND 58503

Office: 701.255.2215 • Fax: 701.223.7299

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Exhibit A



December 1, 2008

Leo Duckstein

~~CabineTec Inc.~~

2711 E. Craig Road, Suite A
North Las Vegas, NV 89030

RE: ManhattanWest Funding

Mr. Duckstein:

I have been asked by Gemstone to provide you with an update on the status of the October Draw.

As you may likely know Scott financial Corporation (SFC) is the Creditor of record and has been funding the vertical construction through the various credit facilities established.

The October Draw was submitted to SFC late last week.

We are currently completing the final review of the ~~October Payment Application~~. However, in light of the complications related to in large part to the termination of the former general contractor, the approval of the October Payment Application has required more review, investigation and time than in the past.

Despite this delay, the funding necessary to satisfy the outstanding amounts due pursuant to the October Payment Application are in being reviewed and a determination of approval is being considered by our team.

Clearly approval of the draw is subject to our complete review process.

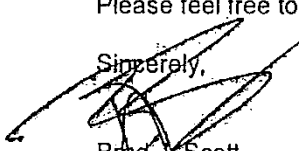
~~Although we cannot guarantee the approval SFC anticipates the draw request to be processed and funded to NCS (voucher control) in December.~~

I understand the MHW draw which is in the review process at SFC includes a payment amount of approximately \$598,475.00 to CabineTec Inc. and its corresponding suppliers. I believe the Developer approved payment amount is \$483,664.32.

I trust this letter assists you with your questions on the timing of the funding.

Please feel free to contact me directly if you have any questions.

Sincerely,


Brad J. Scott
President

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AA 001500