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UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re MORTGAGES LTD., an Arizona corporation, Debtor.	Chapter 11 Case No. 2:08-bk-07465-RJH **LIMITED OBJECTION TO, AND RESERVATION OF RIGHTS REGARDING, MOTION FOR APPROVAL OF SETTLEMENT BETWEEN ML MANAGER AND JEFFREY C. STONE, INC., DBA SUMMIT BUILDERS (PROCEEDS FROM SALE OF OSBORN III/TEN LOFTS)**

OBJECTION

Fidelity National Title Insurance Company, in its corporate capacity and as successor by merger to Lawyers Title Insurance Corporation ("Fidelity"), by and through its counsel, hereby submits this Limited Objection and Reservation of Rights relating to the *Motion for Approval of Settlement Between ML Manager and Jeffrey C. Stone, Inc., DBA Summit Builders (Proceeds From Sale of Osborn III/Ten Lofts)* [Docket No. 3218] filed on May 16, 2011

("Settlement Motion") by ML Manager, LLC ("ML Manager"). As set out in more detail below, the Settlement Motion is a procedurally and substantively improper attempt by ML Manager to secure adjudication by this Court of issues that are already before the Superior Court of Arizona, in and for Maricopa County ("State Court"). This Limited Objection and Reservation of Rights is supported by the following Memorandum of Points and Authorities and the Declaration of Homer Duvall III, which is attached hereto as Exhibit 1 ("*Duvall Declaration*"), along with the exhibits attached thereto.

RESERVATION OF RIGHTS

Fidelity was never served with the Settlement Motion nor with any prior papers or process from this Court, including, without limitation, the *Notice of Hearing on Motion for Approval of Settlement Between ML Manager and Jeffrey C. Stone, Inc., DBA Summit Builders (Proceeds From Sale of Osborn III/Ten Lofts)* [Docket No. 3219] ("Notice") or the *Order Granting Motion to Shorten Notice and Accelerate Hearing on Various Motions* [Docket No. 3222]. Indeed, Fidelity only learned of these proceedings by letter dated May 20, 2011 [*Duvall Declaration*, ¶2] and has endeavored to prepare and file this Limited Objection and Reservation of Rights on shortened time. By doing so, Fidelity specifically reserves all objections to any prior proceedings ML Manager has brought before this Court without notice to Fidelity and further reserves the right to seek the continuance or adjournment of the hearing on the Settlement Motion in the event that the Court is inclined to grant any of the relief ML Manager seeks therein and to supplement these papers.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. The Property and the Policy

On August 22, 2006, Lawyers Title Insurance Company (Fidelity's predecessor) issued in favor of Mortgages Ltd. ("Debtor") a Loan Policy of Title Insurance, No. H23-Z025296 ("Policy") pertaining to a loan secured by a development known as Osborn III/Ten Wine

Lofts, located at 7116 and 7126 East Osborn Road (the "Property"). [A copy of the Policy is attached as Exhibit A to the *Duvall Declaration*.] Subject to the terms, conditions, and exclusions therein, the Policy insured the Debtor and certain other entities (collectively, the "ML Parties") against certain defects of title to the Property, including the lack of priority of the lien of the insured deed of trust over certain mechanic's liens.

Following the commencement of these bankruptcy proceedings in June 2008, certain mechanic's lien claimants (collectively referred to as "Summit") filed actions in State Court that were eventually consolidated under the caption *Jeffrey C. Stone, Inc. d/b/a Summit Builders v. Osborn III Partners LLC*, Case No. CV2008-033080 ("State Case"). The Debtor tendered the defense of the State Case to Fidelity under the Policy, and Fidelity accepted defense of the claims therein under reservation of rights. Fidelity appointed Scott Malm of Gust Rosenfeld P.L.C. to defend the ML Parties in the State Case, and the State Case proceeded forward, and remains pending, in State Court.

Meanwhile, *The Official Committee of Investors' First Amended Plan of Reorganization Dated March 12, 2009* [Docket No. 1532] ("Plan") was confirmed by this Court on May 20, 2009, pursuant to its *Order Confirming Investors Committee's First Amended Plan of Reorganization Dated March 12, 2009* [Docket No. 1755] ("Confirmation Order"). The Plan created a series of separate limited liability companies to hold loans that the Debtor had issued to various borrowers. One such entity was Osborn III Loan, LLC (the "Loan LLC"), which is a party to the settlement agreement the Court is being asked to approve pursuant to the Settlement Motion. ML Manager, which was also created pursuant to the Plan, is the manager of Loan LLC.

Following confirmation of the Plan, Fidelity-provided counsel continued to actively defend the ML Parties in the State Case. Cross-motions for summary judgment were filed in October and November 2010, and – contrary to the assertion in the Settlement Motion that

Fidelity has terminated defense of the State Case – Mr. Malm and his law firm continue to represent the ML Parties and continue to be paid by Fidelity.[1]

B. The Sale Order

In late 2010, ***without any notice to Fidelity***, ML Manager sought, and this Court ultimately issued, the *Order Approving Motion to Sell Real Property Free and Clear of Liens, Claims Encumbrances, and Interests* [Docket No. 2976] entered October 1, 2010 ("Sale Order"). ML Manager procured the Sale Order, even though neither the Plan nor the Confirmation Order requires or contemplates such approval and even though the Court did not retain jurisdiction to approve sales by the Loan LLC. To the contrary, the Loan LLC's decisions with respect to the sale of property appear to rest entirely with the holders of a majority in dollar amount of membership interests in the Loan LLC, and in no event require Court approval:

> The Reorganized Debtor will *not* do the workout or settlements or foreclosures on the Loans but may assist ML Manager LLC and its portfolio or asset managers as requested. All Major Decisions (which is defined in the Loan LLC operating agreement) on a Loan (such as the sale of the loan, the refinancing of the loan, any settlements or loan modifications affecting major terms) must be approved ***by a written vote of a majority in dollar amount of the members of the applicable Loan LLC***.

[Disclosure Statement [Docket No. 1531] § II(D) (emphasis added)][2]

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[1] Indeed, Fidelity has paid Gust Rosenfeld's fees for work performed in regard to the Lien Claims as recently as April 29, 2011 [*Duval Declaration* ¶6].

[2] In its *Motion to Sell Real Property Free and Clear of Liens, Claims, Encumbrances, and Interests* [Docket No. 2923] filed September 3, 2010 (the "Sale Motion"), ML Manager asserted that it "believes it is prudent and necessary to seek Bankruptcy Court approval of the sale" to "insure a smooth closing" and "aid in the implementation of the Plan." Sale Motion at 3:17-20. In support of the Court's jurisdiction, ML Manager relied on "sections 9.1(e), (g), and (h) of the Plan . . . ." *Id.* at 4:11-13. Section 9.1(e) of the Plan vests the Court with continuing jurisdiction to "determine all controversies and disputes arising under, or in connection with, the Plan and all agreements or releases referred to in the Plan, and any disputes regarding the administration of the Estate by the Liquidating Trustee." Section 9.1(g) of the Plan vests the Court with continuing jurisdiction to "effectuate payments under, and performance of, the provisions of the Plan." Section 9.1(h) vests the Court with continuing jurisdiction to "determine such other matters and for such other purposes as

The Sale Order recites that "notice to creditors, interested parties and the non-transferring pass-through investors of the Motion and the hearing date was served," [Sale Order at 1:26-2:2] and states that the Court "has jurisdiction over the issues presented in the [Sale] Motion and the Court's hearing thereon were [*sic*] duly and properly noticed." [*Id*. at 2:11-12] The Sale Order authorized ML Manager to sell the Property for $19.5 million, and included the following proviso:

> Nothing in this Order, including, without limitation, the escrowing of the Sale Proceeds, shall waive, release or impact the coverage or liability of the title insurance policy for the payment of the alleged mechanic's liens.

Id. at 4:2-5. Again, Fidelity had ***no notice whatsoever*** that ML Manager sought the Sale Order or that the Court was being asked to make findings related to whether the Sale Order had any "impact" on "the coverage or liability of the title insurance policy . . . ." *Id*.

Under the Sale Order, a portion of the sale proceeds was placed in escrow ("Escrowed Sale Proceeds") to address the Summit mechanic's liens that are the subject of the State Case:

> To address the Summit Objection to the extent necessary to permit the sale as provided in this Order, . . . the sum of $3,445,095.79 shall be deposited and held in escrow (the "Escrowed Sale Proceeds") for the sole benefit of Summit Builders and ML Manager, free from any other claims or interests . . . , with the alleged liens and interests of Summit Builders and ML Manager to attach to the Escrowed Sale Proceeds in the same manner, extent and priority that such liens and interests held in the Property . . . immediately prior to the sale of the Property provided for in this Order.

[Sale Order at 3:13-22.]

Fidelity did not learn of the sale of the Property or the existence of the Escrowed Sale Proceeds until months later, when it received a letter from ML Manager stating that the Property had been sold [*Duvall Declaration* ¶7 & Exhibit B]. Although the legal effect of the sale will ultimately be determined in State Court, where Fidelity has commenced a

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may be provided in the Confirmation Order." ML Manager's assertion that any of these provisions support the relief sought in the Sale Motion is without merit.

declaratory judgment action regarding its obligations (if any) under the Policy, it is Fidelity's position that the sale vitiated any coverage that may have existed. In particular, the Policy provides that coverage will "continue in force . . . in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants or warranty made by the insured in any transfer or conveyance of the estate or interest." [*Duvall Declaration* ¶12 & Exhibit A (Conditions & Stipulations § 2(b)).]

C. The Summit Settlement

On January 10, 2011, ML Manager notified Fidelity for the first time -- and nearly three months after the sale of the Property had occurred -- that the Property had been sold and explained that ML Manager was negotiating a *Morris*-type settlement[3] with Summit in the State Case. ML Manager informed Fidelity that the ML Parties intended to settle the State Case, with or without Fidelity's consent.

Fidelity responded by explaining that ML Manager had failed to provide adequate information regarding the proposed settlement with Summit, and that based on the information currently available to Fidelity, the settlement with Summit was not reasonable given the viable defenses on the merits of the claims. Fidelity further noted that the sale of

[3] The term "*Morris* agreement" is generally used to describe a settlement agreement in which an insured defendant, being defended under a reservation of rights, admits to liability, stipulates to a judgment, and assigns to the plaintiff his or her rights against the liability insurer in exchange for a promise by the plaintiff not to execute the judgment against the insured. *United Services Auto. Ass'n v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987). In such cases, the insurer is entitled to intervene in the case to contest the "reasonableness" of the settlement (i.e., the plaintiff must show that there was no fraud or collusion against the insurer, and that, based on "the merits of the case," a reasonably prudent person would enter into the settlement and stipulated judgment if they were paying the judgment with their own funds). *Id*. at 121, 741 P.2d at 254. Fidelity does not believe that the proposed settlement with Summit is even a *Morris*-type settlement. As discussed below, Fidelity has in fact intervened in the State Case to address the proposed settlement with Summit. The State Court is the appropriate court to determine the reasonableness of the settlement and to apply, if appropriate, the *Morris* standards.

the Property (without the consent of or even notice to Fidelity) appeared to have vitiated any coverage under the Policy.[4] [*Duvall Declaration* ¶10 & Exhibit E]

Tellingly, the settlement struck between the ML Parties and Summit (which this Court is being asked to approve) appears to be designed to prejudice Fidelity and its rights under the Policy and in State Court. It provides, among other things, that Summit will receive $1.75 million, denominated the "Lien Settlement Amount" – yet rather than actually compromising and releasing the mechanic's liens, Summit will transfer them to ML Manager. ML Manager, in turn, purports to "preserve" those claims for prosecution against Fidelity:

> Nothing contained in this Agreement or the Escrow Instructions shall prejudice, impair, or affect in any way any claims that ML Manager may hold arising under any policy of title or other insurance, . . . all of which claims are specifically preserved for the benefit of ML Manager. . . . Summit has no right or interest therein, or to any recoveries thereon.

With the coverage issues under the Policy coming to a head, Fidelity moved to intervene in the State Case -- where it anticipated such issues would arise and where they properly belong -- to contest the reasonableness of the settlement the ML Parties had reached without Fidelity's consent on April 19, 2011. Fidelity's motion to intervene was granted. Additionally, Fidelity commenced a declaratory judgment action in State Court regarding coverage under the Policy [*Duvall Declaration* ¶12 & Exhibit G]. Also, and contrary to the assertion in the Settlement Motion, Fidelity has ***not*** withdrawn its defense of the ML Parties in the State Case. [*Duvall Declaration* ¶6] Accordingly, and pursuant to both the State Case and the declaratory judgment action, the rights and obligations of the parties vis-à-vis the

[4] In that same letter, Fidelity also stated that: (1) the proposed settlement did not fall within the parameters of a *Morris* agreement and (2) consummating the settlement would breach the insurance contract created under the Policy. Additionally, Fidelity requested more information concerning the sale of the Property and the proposed agreement with Summit, which was never provided by ML Manager.

Policy and the Property sit squarely before the State Court, where they belong and where they will be adjudicated in due course.

D. The Settlement Motion

ML Manager, however, seems to have other plans. On May 16, 2011, ***without prior notice to Fidelity*** and without the State Court's consideration of the settlement with Summit, ML Manager filed the Settlement Motion with this Court. Apparently attempting to bootstrap a perceived jurisdictional hook from the Sale Order (which provided that the Escrowed Sale Proceeds "shall be disbursed only pursuant to further Order of this Court"), ML Manager now asks the Court to rule on the reasonableness of the settlement between the ML Parties and Summit in the State Case. ML Manager makes this highly irregular request even though (1) the State Case was filed in State Court after the petition date and has never been before this Court; and (2) the Plan was confirmed in this case over two years ago, and nothing in the Plan or the Confirmation Order purports to retain jurisdiction to approve settlements like this. Notably, unlike the Sale Motion (which at least purported to identify a jurisdictional basis), the Settlement Motion makes no pretense of falling within the retained jurisdiction provisions of the Plan or Confirmation Order.

Aside from the release of the Escrowed Sale Proceeds, which could be accomplished by a simple stipulation between ML Manager and Summit, presented for this Court's approval, the sole purpose of the Settlement Motion appears to be ML Manager's attempt to prejudice Fidelity's rights under the Policy and in State Court. If that were not the purpose of the Settlement Motion, then:

- Why is ML Manager asking the Court to specifically find that the settlement of litigation between two non-debtors, which has never been before the Court, "is fair and reasonable in all respects" [Settlement Motion at 6]?
- Why is ML Manager asking the Court to enter an order providing that "the payment to Summit from the Escrowed Sale Proceeds" does not "waive,

release, or impact the coverage or liability of the Title Policy for payment of the alleged mechanic's liens" [*Id.*].

Finally, given that the primary, if not sole, purpose of the Settlement Motion is to prejudice Fidelity's rights in State Court and under the Policy, ML Manager's failure to serve Fidelity with the Settlement Motion is particularly suspicious – especially where the Settlement Motion is being heard on shortened time. ML Manager sent the Settlement Motion to Fidelity's counsel as an enclosure to a letter on May 20, 2011 – just five business days before the scheduled hearing. Such "notice" accords with neither the letter nor the spirit of the Bankruptcy Code and the Bankruptcy Rules.

II. THE SETTLEMENT MOTION IS PROCEDURALLY IMPROPER AND WHOLLY UNNECESSARY

If all that ML Manager wanted from this Court was authorization to release the Escrowed Sale Proceeds created under the Sale Order, then ML Manager could simply have sought approval of a stipulation between ML Manager and Summit (the only two entities with any rights to the Escrowed Sale Proceeds under the terms of the Sale Order), or by a motion brought under Section 105 of the Bankruptcy Code.[5] Instead, however, ML Manager asks the Court to substantively approve – ***over two years after confirmation of the Plan*** – a settlement of claims between non-debtors relating to litigation that was commenced post-petition and has long been pending in State Court. ML Manager's request should be rejected out-of-hand. It is procedurally, substantively, and jurisdictionally improper.

As a threshold matter, "all courts that have addressed the question have ruled that once confirmation occurs, the bankruptcy court's jurisdiction shrinks." *In re Gen. Media, Inc.*, 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005), citing, *inter alia*, *N. Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F.2d 938, 940 (2d Cir. 1944) ("We have had occasion before to

[5] It is worth reiterating that this minimal level of involvement by the Bankruptcy Court is only required due to ML Manager's needlessly involving this Court in the sale of the Property over 18 months after the Plan was confirmed.

deplore the tendency of District Courts to keep reorganized concerns in tutelage indefinitely by orders purporting to retain jurisdiction for a variety of purposes . . . . Since the purpose of reorganization clearly is to rehabilitate the business and start it off on a new and to-be-hoped-for more successful career, it should be the objective of courts to cast off as quickly as possible all leading strings which may limit and hamper its activities and throw doubt upon its responsibility.")); *see, e.g., Sw. Marine, Inc. v. Danzig*, 217 F.3d 1128, 1140 (9th Cir. 2000) ("[O]nce the bankruptcy court confirms a plan of reorganization, the debtor is free to go about its business without further supervision or approval of the court, and concomitantly, without further protection of the court.").

As ML Manager recognized when it filed the Sale Motion (which, unlike the Settlement Motion, at least "went through the motions" of identifying a jurisdictional basis for the relief sought [Sale Motion at 2:16-20 & 3:11-22]), post-confirmation jurisdiction requires a showing that (a) the Court retained jurisdiction over the particular matter at issue, and (b) there is a "close nexus" to the bankruptcy plan or proceeding. *Id.*, citing *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005). Here, Fidelity can find nothing in the Plan, the Confirmation Order, or any other order of this Court requiring or even permitting any of the Loan LLCs created pursuant to the Plan to seek the Court's approval of settlements reached with third parties. To the contrary, the decision to settle a suit to which any of the Loan LLCs is a party appears to rest entirely with the affected Loan LLC:

> The Reorganized Debtor will *not* do the workout or settlements or foreclosures on the Loans but may assist ML Manager LLC and its portfolio or asset managers as requested. All Major Decisions (which is defined in the Loan LLC operating agreement) on a Loan (such as the sale of the loan, the refinancing of the loan, any settlements or loan modifications affecting major terms) must be approved by a written vote of a majority in dollar amount of the members of the applicable Loan LLC.

[Disclosure Statement [Docket No. 1531] § II(D)]. Unless the various Loan LLCs are to remain "in tutelage indefinitely" [*N. Am. Car Corp.*, 143 F.2d at 940], there would appear to be no basis for this Court to pass on the reasonableness of post-confirmation settlements by ML Manager or the Loan LLC of claims pending in other courts. Nor does it appear that any other settlement approval motions of this sort have ever been brought by ML Manager.

And beyond the subject-matter-jurisdiction infirmities of the Settlement Motion, the fact remains that courts cannot modify the rights of affected parties without affording proper notice and opportunity to be heard. *E.g.*, *In re Johns-Manville Corp.*, 600 F.3d 135, 158 (2d Cir. 2010) (holding that order was "jurisdictionally void" and violated due process where it purported to determine insurer's rights in action to which insurer had not received service of process). *See also* 11 U.S.C. § 102(1) (providing that the phrase "after notice and a hearing," which is used in Bankruptcy Rule 9019, means "after such notice as is appropriate in the particular circumstances"); Bankruptcy Rule 2002 (generally providing for not less than 21 days' notice of a hearing on a settlement).

On this record, where (a) the Settlement Motion was filed over two years after confirmation of the Plan, (b) nothing in the Plan or the Confirmation Order authorizes or requires the approval by the Bankruptcy Court of settlements that may be entered into by the various Loan LLCs, (c) the particular settlement at issue here pertains to claims filed post-petition and pending in State Court, and (d) the Settlement Motion attempts to modify the rights of a party (Fidelity) not before the Court, the Settlement Motion is not a proper invocation of this Court's jurisdiction and should be denied.

To anticipate the counter-argument that this Court is required to approve the disbursement of the funds in accordance with the Sale Order, Fidelity would reiterate that such a procedure is necessary only because ML Manager involved this Court in the sale of the Property in the first instance. To coin a phrase, this is "double-bootstrapping" – creating the problem via an improper Sale Order, only to "solve" it via an improper Settlement Motion.

Additionally, the Settlement Motion is procedurally improper to the extent that Rule 9019 of the Federal Rules of Bankruptcy Procedure is used as the basis for ML Manager to obtain relief from the Bankruptcy Court. ML Manager cites Bankruptcy Rule 9019 in support of the Settlement Motion; however, Rule 9019(a) does not apply here:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

(Emphasis added.)

Clearly, Rule 9019 does not apply to ML Manager or to the Settlement Motion. The citation to Rule 9019 is merely ML Manager's blatant and overreaching attempt to use the well-recognized standards for a Bankruptcy Court's approval of settlements involving a trustee or a debtor in order to have this Court apply those standards to the settlement with Summit, thereby hoping to impose those standards on Fidelity and the State Court and to avoid the State Court's consideration of the *Morris* standards, if applicable.[6]

Having entered the Sale Order that directed that the Escrowed Sale Proceeds "be disbursed only pursuant to further Order of this Court" [Sale Motion at 3], the Court may have the power, outside of any granted or provided by Rule 9019, to authorize the disbursement of the Escrowed Settlement Proceeds. For example, Section 105 of the Bankruptcy Code may provide power for this Court to carry out the terms of the Sale Order and direct the disbursement of the Escrowed Settlement Proceeds. However, ML Manager's citation to -- or the Court's reliance on -- Rule 9019 is neither appropriate nor needed here.

[6] The *Morris* standards and the Rule 9019 approval standards are not co-extensive, and Fidelity will strongly contest any attempt by ML Manager to attempt to use the Rule 9019 approval standards (if applied by this Court), by estoppel or issue preclusion, to address or avoid the *Morris* standards and the consideration thereof yet to be made by the State Court.

III. THE SETTLEMENT MOTION IMPROPERLY ATTEMPTS TO BIND FIDELITY TO AN ADJUDICATION OF ISSUES THAT ARE NOT BEFORE THIS COURT

ML Manager would have this Court enter an order providing that the payment of the Escrowed Settlement Proceeds does not "impact the coverage or liability of the Title Policy." In the declaratory judgment action filed in State Court, Fidelity has asserted several reasons why coverage does not exist under the Policy, including that (a) the ML Parties no longer "[retain] an estate or interest in the land, or [hold] an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or . . . have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest," [*Duvall Declaration* ¶12 & Exhibit A (Conditions & Stipulations §2(b)]; and (b) Fidelity has no obligation to pay any settlement amounts under the terms of the Policy because it has not approved any settlement [*Duvall Declaration* ¶13 & Exhibit G].

Contrary to relief sought by and assertions made by ML Manager in the Settlement Motion, the settlement and the disbursement of the Escrowed Sale Proceeds very likely will "impact" coverage under the Policy. That impact should properly be decided in and by the State Court, where the State Case has been long pending, and not by this Court. In particular, this Court need not and should not enter any order that could be used by ML Manager or others to negatively impact Fidelity's rights under the Policy. Indeed, and we say this respectfully but firmly, this Court has no jurisdiction to enter an order that could be construed as "rewriting" the Policy or modifying or impacting the rights and defenses of Fidelity. To do so even during a case would be questionable; two years after plan confirmation, such a strategem is plainly improper.

Furthermore, this Court has not made, and should not make, any findings that the settlement is "fair and reasonable" in any *Morris* or other context. Any such a finding is not necessary in order for the Escrowed Sale Proceeds to be released, as referenced in the Sale Order. The only apparent reason for ML Manager's request that this Court opine on the

reasonableness of the settlement is to prejudice Fidelity's rights in State Court by attempting to assert issue preclusion or estoppel, under the guise that the settlement has been approved as "fair and reasonable."

The determinations as to whether the settlement is a *Morris*-type settlement and as to whether the settlement is "fair and reasonable" should be made by the State Court. As noted above, Fidelity has already intervened in the State Case for the purpose of litigating those issues and has initiated a declaratory judgment action in State Court regarding the Policy and its coverage. As such, this Court need not and should not address those issues.

IV. IN ANY EVENT, THERE IS NO EVIDENTIARY BASIS UPON WHICH THIS COURT COULD ASSESS THE FAIRNESS OR REASONABLENESS OF THE SETTLEMENT

Finally, in addition to the numerous procedural and substantive infirmities identified above, the Settlement Motion fails at the most basic level: it provides no evidentiary basis upon which this Court can make the determination requested. Unlike Rule 9019 motions in cases over which the Court is presiding, the State Case has never been before this Court. The competing summary judgment motions were brought in State Court and would have been decided by the State Court absent the proposed settlement. Nor is there any other evidence (*e.g.*, declarations or documentary evidence) regarding the merits or possible outcomes of the claims in the State Case. There is, in short, no possible basis upon which the Court could assess the fairness or reasonableness of the settlement.

V. THE COURT SHOULD ABSTAIN FROM MAKING THE REQUESTED FINDINGS REGARDING THE SETTLEMENT BECAUSE THOSE ISSUES ARE PROPERLY BEFORE THE STATE COURT.

Coverage issues under the Policy and the reasonableness of the settlement should be decided in and by the State Court. Even if matters impacting those issues were properly before this Court, this Court should abstain from exercising jurisdiction. See *In re Titan Energy, Inc.*, 837 F.2d 325 (8th Cir. 1988) (holding that the bankruptcy court should abstain

from hearing action to determine liability of insurer). This Court should *sua sponte* abstain from hearing and considering the relief requested by Settlement Motion, "in the interests of justice," "in the interest of comity" with the State Court, and based on the "respect for State law." 28 U.S.C. § 1334(c)(1).

VI. CONCLUSION

For all the reasons set out above, the Settlement Motion should be denied. To the extent the Court is inclined to entertain the merits of the Settlement Motion, Fidelity respectfully requests a full and fair opportunity to demonstrate why the Settlement Motion is not properly before the Court and why it cannot be granted.

Dated this 27th day of May, 2011.

MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.

WN/4239

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EXHIBIT 1

DECLARATION OF HOMER DUVALL, III

I, Homer Duvall, III, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

1. I am a senior major claims counsel for Fidelity National Title Insurance Company ("Fidelity"). I have personal knowledge of the matters set forth herein or have obtained the same from records maintained in Fidelity's course of business.

2. Fidelity first learned of the pending "Motion for Approval of Settlement between ML Manager and Jeffery C. Stone, Inc., d/b/a Summit Builders" filed in the matter *In re: Mortgages Ltd.,* Case No. 2:08-bk-07465-RJH filed in the U.S. Bankruptcy Court, District of Arizona (the "Bankruptcy") by virtue of a letter dated May 20, 2011 from Richard Lorenzen to Timothy J. Thomason. I first received a copy of that letter on Monday, May 23, 2011. Fidelity did not retain the law firm of Mariscal, Weeks, McIntyre & Friedlander ("Mariscal Weeks") to represent Fidelity in the Bankruptcy until after I received this letter. Fidelity had previously retained Mariscal Weeks to represent it in the State Court regarding certain actions between Fidelity and persons or entities claiming to be insureds under a certain loan policy of title insurance, all as hereinafter more particularly described. Mariscal

Weeks is not designated as Fidelity's registered agent for service of process in Arizona or in any other state.

3. Fidelity's predecessor in interest, Lawyers Title Insurance Corporation, issued a loan policy of title insurance number H23-Z025296 ("Policy"), in favor of Mortgages, Ltd., pertaining to a loan on a development known as Osborn III/Ten Wine Lofts, located at 7116 and 7126 East Osborn Road ("Property"). A copy of the Policy is attached hereto as Exhibit "A". Subject to the terms, conditions and exclusions therein, the Policy insured Mortgages, Ltd. against potential defects in the title to the Property, including the priority of the lien of the insured mortgage over certain mechanics' liens.

4. Following commencement of the Bankruptcy in June of 2008, certain mechanic lien claimants (collectively referred to as "Summit") filed actions in the Superior Court of Maricopa County, Arizona ("State Court"), that were consolidated into the caption "*Jeffrey C. Stone, Inc., d/b/a Summit Builders v. Osborn III Partners, LLC,* Case No: CV-2008-033080" (the "State Case").

5. Counsel for Mortgages Ltd. tendered the State Case to Fidelity under the Policy. Fidelity accepted defense of the claims therein, under a reservation of rights. Fidelity appointed Scott Malm of Gust Rosenfeld P.L.C. to defend Mortgages Ltd. and certain parties claiming to be insureds under the Policy (collectively the "ML Parties") in the State Case and the matter proceeded in state court.

6. In the State Case, cross motions for summary judgment were filed in October and November of 2010 and, contrary to ML Manager's assertion that Fidelity has terminated defense of the State Case, the firm of Gust Rosenfeld, and attorney Scott Malm, continue to represent the ML Parties and continue to be paid by Fidelity. Indeed, Fidelity has paid Gust Rosenfeld's fees relative to the State Case for services performed as recently as April 29, 2011, and continues to process bills submitted by Gust Rosenfeld relative to the State Case. Moreover, I have personally confirmed with Scott Malm of Gust Rosenfeld, that he has received no correspondence from Fidelity terminating his engagement to represent the ML Parties in the State Case.

7. Fidelity did not learn of the sale of the Property or the existence of the escrowed sale proceeds until months after ML Manager sought, and this Court issued, the Order Approving Motion to Sell Real Property Free and Clear of Liens. Fidelity first learned about these events when I received a copy of a letter, dated January 10, 2011, from ML Manager's counsel stating that the Property had been sold, and informing Fidelity that ML Manager was in the process of negotiating a settlement of the State Case it characterized as a "*Morris* Agreement." A copy of the January 10, 2011 letter is attached hereto as Exhibit "B". Fidelity responded by letter dated January 25, 2011. In that letter, Fidelity requested more information concerning the proposed settlement, explained several provisions of the Policy that may preclude or terminate coverage, and explained that ML Manager's

proposal was not a "Morris Agreement." A copy of the January 25, 2011 letter is attached hereto as Exhibit "C".

8. By letter dated January 31, 2011 ML Manager informed Fidelity that the ML Parties intended to settle the State Case, with or without Fidelity's consent. A copy of the January 31, 2011 letter is attached hereto as Exhibit "D".

9. In February 2011 I retained Mariscal Weeks to represent Fidelity's interests relating to the State Case.

10. By letter dated March 8, 2011, Fidelity responded to ML Manager explaining that ML Manager had still failed to provide adequate information regarding the proposed settlement and that, based on the information currently available to Fidelity, the settlement was not reasonable given the viable defenses on the merits of the claims. Fidelity further noted that the sale of the Property without the consent or even notice to Fidelity appeared to have vitiated any coverage under the Policy. A copy of that letter is attached as Exhibit "E".

11. On March 25, 2011 Fidelity moved to intervene in the State Case to contest the reasonableness of the settlement the ML Parties reached without Fidelity's consent. On April 19, 2011, Fidelity's motion was granted. On May 6, 2011 Fidelity filed its Complaint In Intervention in the State Case. A copy of Fidelity's Complaint In Intervention is attached as Exhibit "F".

12. Fidelity has filed a declaratory judgment action regarding its obligations (if any) under the Policy. It is Fidelity's position that the sale vitiated any coverage that may have existed. In particular, the Policy provides that coverage will "continue in force...in favor of an insured only so long as the insured retains an estate or interest in the land or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants or warranty made by the insured in any transfer or conveyance of the interest or estate". A copy of the complaint for declaratory judgment filed in State Court is attached hereto as Exhibit "G".

13. In the declaratory judgment action filed in State Court, Fidelity has asserted several reasons why coverage does not exist under the Policy, including, without limitation, (i) that the ML Parties no longer retain an interest in the land or hold an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or have liability by reason of the covenants or warranty made by the insured in any transfer or conveyance of the estate or interest; and (ii) Fidelity has no obligation to pay any settlement amount under the terms of the Policy because it had not approved any settlement.

5/27/11
Date

Homer Duvall, III

EXHIBIT A

851106

LOAN POLICY OF TITLE INSURANCE

Issued by Lawyers Title Insurance Corporation

POLICY NUMBER
H23-Z025296

LandAmerica Lawyers Title

Lawyers Title Insurance Corporation is a member of the LandAmerica family of title insurance underwriters.

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land;
5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
   (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;
8. Any assessments for street improvements under construction or completed at Date of Policy not excepted in Schedule B which now have gained or hereafter may gain priority over the lien of the insured mortgage.
9. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

IN WITNESS WHEREOF, LAWYERS TITLE INSURANCE CORPORATION has caused its corporate name and seal to be hereunto affixed by its duly authorized officers, the Policy to become valid when countersigned by an authorized officer or agent of the Company.

LAWYERS TITLE INSURANCE CORPORATION

Attest: _____ Secretary

LAWYERS TITLE INSURANCE CORPORATION SEAL 1925 RICHMOND, VA

By: _____ President

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance or governmental regulations (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy. (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
3. Defects, liens, encumbrances, adverse claims or other matters: (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material); or (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage.
4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated.
5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.
6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.
7. Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
   (a) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
   (b) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
   (c) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
      (i) to timely record the instrument of transfer; or
      (ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

Lawyers Title Insurance Corporation
Magnus Title Agency, Issuing agent

SCHEDULE A

Amount of Insurance: $41,400,000.00

Date of Policy: August 22, 2006

Order No. 02-02006017-711-VE

Policy No. H23-Z025296

To Instrument No. 2006-1116312

Loan Ref: 851106

Type of Coverage: ALTA Extended Coverage Loan Policy

1. **Name of Insured:**
   MORTGAGES LTD., an Arizona corporation, its successors and/or assigns

2. **The estate or interest in the land covered by this Policy is:**
   Fee

3. **Title to the estate herein described is vested in:**
   OSBORN III PARTNERS, L.L.C., an Arizona limited liability company

4. **The insured mortgage and assignments thereof, if any, are described as follows**

a. Deed of Trust, Assignment of Rents and Security Agreement given to secure an indebtedness in the original principal amount shown therein, together with any and all other obligations secured thereby

Dated:	AUGUST 14, 2006
Trustor:	OSBORN III PARTNERS, LLC, an Arizona limited liability company
Trustee:	SCOTT M. COLES, a licensed real estate broker
Beneficiary:	MORTGAGES LTD., an Arizona corporation
Amount:	$41,400,000.00
Recorded:	AUGUST 22, 2006
In:	RECORDING NO. 2006-1116307

Thereafter, 44.086% of the beneficial interest under said Deed of Trust was assigned by Instrument:

Recorded	AUGUST 22, 2006
Document No.	2006-1116309
Assignee	RONALD M. ANATOLE, Trustee of The Ronald M. Anatole Family Trust Agreement dated September 25, 1979, as to an undivided 0.194% interest; MERLE R. ARLEN, Trustee of the Merle and Norma Arlen Family Trust dated January 6, 1997, and any amendments thereto as to an undivided 0.611% interest; ALAN BANDLER AND TERRI L. BANDLER, husband and wife as joint tenants with right of survivorship, as to an undivided 1.908% interest; MARCELLE BIJOU-SHACKNAI, wife of Gideon Shacknai, as her sole and separate property as to an undivided 0.947% interest; RICHARD M. BRENNER, a single man as to an undivided 0.569% interest; DAVID MORELAND AND KRISTY MORELAND, husband and wife, as joint tenants with right of survivorship, as to an undivided 0.382% interest; MP122009 L.L.C., an Arizona limited liability company, as to an undivided 9.148% interest; MP062011 L.L.C., an Arizona limited liability company, as to an undivided 3.284% interest; MP122030 L.L.C., an Arizona limited liability company, as to an undivided 23.685% interest; MORTGAGES LTD. OPPORTUNITY FUND MP12 L.L.C., an Arizona limited liability company, as to an undivided 1.145% interest; MORTGAGES LTD. OPPORTUNITY FUND MP13 L.L.C., an Arizona limited liability company, as to an undivided 0.992% interest; MORTGAGES LTD. OPPORTUNITY FUND MP14 L.L.C., an Arizona limited liability company, as to an undivided 1.145% interest; NECHELLE E. WIMMER, a single woman as to an undivided 0.076% interest;

5. The land referred to in this policy is located in Maricopa County, Arizona, and is described as follows:

See Exhibit A attached hereto and made a part thereof

Order No. 02-02006017
Policy No. H23-Z025296
Loan Ref: 851106

Exhibit A

PARCEL NO. 1:

Lot 8, ORANGE ACRES, a subdivision recorded in Book 31 of Maps, page 14, records of Maricopa County, Arizona;

EXCEPT the North 22.00 feet; and

EXCEPT the South 40.00 feet thereof.

PARCEL NO. 2:

Lot 6, ORANGE ACRES, a subdivision recorded in Book 31 of Maps, page 14, records of Maricopa County, Arizona;

EXCEPT the following described property:

BEGINNING at the Northwest corner of said Lot 6;

thence South along the West line of said Lot 6, a distance of 22.00 feet to a point;

thence East along a line 22.00 feet South of and parallel with the North line of said Lot 6, a distance of 16.66 feet to the beginning of a tangent curve concave Southwesterly and having a radius of 70.00 feet;

thence Southeasterly along the arc of said curve, through a central angle of 90 degrees 56 minutes 41 seconds, a distance of 111.1 feet to a point of tangency with a line lying 22.00 feet West of and parallel with the East line of said Lot 6;

thence South along said parallel line, a distance of 161.07 feet to the beginning of a tangent curve concave Northwesterly and having a radius of 15.00 feet;

thence Southwesterly along the arc of said curve, through a central angle of 89 degrees 04 minutes 00 seconds, a distance of 23.3 feet to a point of tangency with a line lying 40.00 feet North of and parallel with the South line of said Lot 6;

thence West along said parallel line to a point on the West line of said Lot 6;

thence South along the West line of said Lot 6 to the Southwest corner thereof;

thence East along the South line of said Lot 6 to a point of intersection with the East line of the West 24.18 feet of said Lot 6;

thence North along said East line, a distance of 33.00 feet to a point;

thence East along a line 33.00 feet North of and parallel with the South line to a point on the East line of said Lot 6;

thence North along the East line of said Lot 6 to the Northeast corner thereof;

thence West along the North line of said Lot 6 to the Northwest corner thereof and the TRUE POINT OF BEGINNING; and

EXCEPT the South 33.00 feet of the South half of Lot 6, ORANGE ACRES, except the West 24.18 feet thereof.

PARCEL NO. 3:

Lot 10, ORANGE ACRES, a subdivision recorded in Book 31 of Maps, page 14, records of Maricopa County, Arizona;

EXCEPT the South 40.00 feet thereof; and

EXCEPT the North 22.00 feet thereof.

PARCEL NO. 4:

The West half of Lot 12, ORANGE ACRES, a subdivision recorded in Book 31 of Maps, page 14, records of Maricopa County, Arizona;

EXCEPT the North 22.00 feet; and

EXCEPT the North 7.00 feet of the South 40.00 feet thereof.

PARCEL NO. 5:

The East half of Lot 12, ORANGE ACRES, a subdivision recorded in Book 31 of Maps, page 14, records of Maricopa County, Arizona;

EXCEPT the North 22.00 feet; and

EXCEPT the South 40.00 feet thereof.

This policy does not insure against loss or damage, nor against costs, attorneys' fees or expenses, any or all of which arise by reason of the following:

SCHEDULE B, Part I

1. TAXES AND ASSESSMENTS collectible by the County Treasurer, a lien not yet due and payable for the following year:

   2006

2. WATER RIGHTS, claims or title to water, and agreements, covenants, conditions or rights incident thereto, whether or not shown by the public records.
   This exception is not limited by reason of the disclosure of any matter relating to Water Rights as may be set forth elsewhere in Schedule B.

3. Reservations or exceptions in Patents or in Acts authorizing the issuance thereof.

4. THE LIABILITIES, OBLIGATIONS AND BURDENS imposed upon said land by reason of inclusion within the Salt River Project Agricultural Improvement and Power District and Agricultural Improvement Districts. (All liabilities and obligations due to date are paid)

5. RESTRICTIONS, CONDITIONS, COVENANTS, RESERVATIONS, including but not limited to any recitals creating easements, liabilities, obligations or party walls, omitting, if any, from the above, any restrictions based on race, color, religion sex, handicap, familial status or national origin contained in instrument:

Recorded In Book	68 of Miscellaneous
Page	243

6. All matters set forth on DISCLOSURE AGREEMENT recorded April 13, 2004 In Recording No. 2004-0389652.

7. EASEMENT and rights incident thereto, as set forth in instrument:

Recorded in Docket	3661
Page	551
Purpose	road and highway (Affects Parcel 2)

8. EASEMENT and rights incident thereto, as set forth in instrument:

Recorded in Docket	8013
Page	426
Purpose	communication facilities (Affects Parcel 5)

9. EASEMENT and rights incident thereto, as set forth in instrument:

Recorded In Document No.	2006-0496752
Purpose	access (Affects Parcel 2)

10. EASEMENT and rights incident thereto, as set forth in instrument:

Recorded in Document No.	2006-0496753
Purpose	sight distance (Affects Parcel 2)

11. All matters as disclosed by RECORD OF SURVEY recorded in Book 791 of Maps, page 34

Order No. 02-02006017
Policy No. H23-Z025296
Loan Ref: 851106

SCHEDULE B, Part II

In addition to the matters as set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule A is subject to the following matters, if any be shown, but the Company insures that such matters are subordinate to the lien or charge of the insured mortgage upon the estate or interest.

1. **ASSIGNMENT OF RIGHTS executed:**

By OSBORN III PARTNERS, LLC, an Arizona limited liability company
To MORTGAGES LTD., an Arizona corporation
Dated AUGUST 14, 2006
Recorded AUGUST 22, 2006
Document No. 2006-1116308
as collateral security for indebtedness secured by Deed of Trust
Recorded In Document No. 2006-1116307

Thereafter, 44.086% interest under said Assignment of Rights was assigned by instrument:

Recorded	AUGUST 22, 2006
Document No.	2006-1116310
Assignee	RONALD M. ANATOLE, Trustee of The Ronald M. Anatole Family Trust Agreement dated September 25, 1979, as to an undivided 0.194% interest; MERLE R. ARLEN, Trustee of the Merle and Norma Arlen Family Trust dated January 6, 1997, and any amendments thereto as to an undivided 0.611% interest; ALAN BANDLER AND TERRI L. BANDLER, husband and wife as joint tenants with right of survivorship, as to an undivided 1.908% interest; MARCELLE BIJOU-SHACKNAI, wife of Gideon Shacknai, as her sole and separate property as to an undivided 0.947% interest; RICHARD M. BRENNER, a single man as to an undivided 0.569% interest; DAVID MORELAND AND KRISTY MORELAND, husband and wife, as joint tenants with right of survivorship, as to an undivided 0.382% interest; MP122009 L.L.C., an Arizona limited liability company, as to an undivided 9.148% interest; MP062011 L.L.C., an Arizona limited liability company, as to an undivided 3.284% interest; MP122030 L.L.C., an Arizona limited liability company, as to an undivided 23.685% interest; MORTGAGES LTD. OPPORTUNITY FUND MP12 L.L.C., an Arizona limited liability company, as to an undivided 1.145% interest; MORTGAGES LTD. OPPORTUNITY FUND MP13 L.L.C., an Arizona limited liability company, as to an undivided 0.992% interest; MORTGAGES LTD. OPPORTUNITY FUND MP14 L.L.C., an Arizona limited liability company, as to an undivided 1.145% interest; NECHELLE E. WIMMER, a single woman as to an undivided 0.076% interest;

2. **FINANCING STATEMENT between:**

Debtor OSBORN III PARTNERS, LLC, an Arizona limited liability company
Secured Party MORTGAGES LTD., an Arizona corporation, and/or its assigns
Recorded AUGUST 22, 2006
Document No. 2006-1116311

3. THE RIGHTS OF Optionee under the terms of unrecorded Option to Purchase:

Dated	MARCH 23, 2006
Optionor	OSBORN III PARTNERS, LLC, an Arizona limited liability company
Optionee	TEN LOFTS, LLC, an Arizona limited liability company
Disclosed by	MEMORANDUM OF ROLLING OPTION AGREEMENT
Recorded	MARCH 27, 2006
Document No.	2006-0404192

The lien of said Option was subordinated to the lien of the Deed of Trust recorded in Recording No. 2006-1116307 by Subordination Agreement recorded August 22, 2006 in Recording No. 2006-1116312

END OF SCHEDULE B

PRIVACY POLICY NOTICE
(15 U.S.C. 6801 and 16 CFR PART 313)

We Are Committed to Safeguarding Customer Information

In order to better serve your needs now and in the future, we may ask you to provide us with certain information. We understand that you may be concerned about what we will do with such information-particularly information you provide to us. Therefore, together with our **Lawyers Title Insurance Corporation** we have adopted this Privacy Policy to govern the use and handling of your personal information.

Applicability

This Privacy Policy governs our use of the information which you provide to us. It does not govern the manner in which we may use information we have obtained from any other source, such as information obtained from public records or from another person or entity.

Types of Information

Depending on which of our services you are utilizing, the types of nonpublic personal information that we may collect include:

- Information we receive from you on application, forms and other communications to us, whether in writing, in person, by telephone or any other means;
- Information about your transactions with us, our affiliated companies, or others;
- Information we receive from a consumer reporting agency; and
- Information we receive from other people such as your Lender, Real Estate Agent, Attorney, etc.

Use of Information

We request information from you for our own legitimate business purposes and not for the benefit of any nonaffiliated party. Therefore, we will not release your information to nonaffiliated parties except: (1) as necessary for us to provide the product or service you have requested of us; or (2) as permitted by law. We may, however, store such information indefinitely, including the period after which any customer relationship has ceased. Such information may be used for any internal purposed, such as quality control efforts or customer analysis. We may also provide all of the types of nonpublic personal information listed above to one or more of our affiliated companies. Such affiliated companies include financial services providers, such as title insurers, property and casualty insurers, and trust and investment advisory companies, or companies involved in real estate services, such as appraisal companies, home warranty companies, and escrow companies. Furthermore, we may also provide all information we collect, as described above, to companies that perform marketing services on our behalf, on behalf of our affiliated companies, or to other financial institutions with whom we or our affiliated companies have joint marketing agreements.

Former Customers

Even if you are no longer our customer, our Privacy Policy will continue to apply.

Confidentiality and Security

We will use our best efforts to ensure that no unauthorized parties have access to any of your information. We restrict access of nonpublic information about you to those individuals and entities who need to know that information to provide products and services to you. We will use our best efforts to train and oversee our employees and agents to ensure that your information will be handled responsibly. We currently maintain physical, electronic, and procedural safeguard that comply with federal regulations to guard your nonpublic personal information.

This notice is provided and adopted by Magnus Title Agency, as policy issuing agent for Lawyers Title Insurance Corporation, a Member of the Landamerica Financial Group, Inc.

Order No.: 02-02006017-711-VE
Customer Ref: 851106

ENDORSEMENT

ATTACHED TO POLICY NO. H23-Z025296

ISSUED BY

Lawyers Title Insurance Corporation

The Company hereby insures against loss which said Insured shall sustain by reason of any of the following matters:

1. Any incorrectness in the assurance which the Company hereby gives:
   (a) That there are no covenants, conditions or restrictions under which the lien of the mortgage referred to in Schedule A can be cut off, subordinated, or otherwise impaired;
   (b) That there are no present violations on said land of any enforceable covenants, conditions or restrictions.
   (c) That, except as shown in Schedule B, there are no encroachments of buildings, structures or improvements located on said land onto adjoining lands, nor any encroachments onto said land of buildings, structures or improvements located on adjoining lands.
2. (a) Any future violations on said land of any covenants, conditions or restrictions occurring prior to acquisition of title to said estate or interest by the Insured, provided such violations result in impairment or loss of title to said estate or interest if the Insured shall acquire such title in satisfaction of the indebtedness secured by such mortgage;
   (b) Unmarketability of the title to said estate or interest by reason of any violations on said land, occurring prior to acquisition of title to said estate or interest by the Insured, of any covenants, conditions or restrictions.
3. Damage to existing improvements, including lawns, shrubbery or trees:
   (a) which are located or encroach upon that portion of the land subject to any easement shown in Schedule B, which damage results from the exercise of the right to use or maintain such easement for the purposes for which the same was granted or reserved.
   (b) resulting from the exercise of any right to use the surface of said land for the extraction or development of the minerals excepted from the description of said land or shown as a reservation in Schedule B.
4. Any final court order or judgment requiring removal from any land adjoining said land of any encroachment shown in Schedule B.

Wherever in this endorsement any or all the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants and conditions contained in any lease referred to in Schedule A.

As used herein, the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection, except to the extent that a notice of a violation has been recorded or filed in the public records and not excepted in Schedule B.

The total liability of the Company under said policy and any endorsements therein shall not exceed, in the aggregate, the face amount of said policy and costs which the Company is obligated under the Conditions and Stipulations thereof to pay.

This Endorsement is made a part of said policy and is subject to the Exclusions from Coverage, Schedules, Conditions and Stipulations therein, except as modified by the provisions hereof.

This Endorsement is not to be construed as insuring the title to said estate or interest as of any later date than the date of this policy, except as herein expressly provided as to the subject matter hereof.
Dated: August 22, 2006

Lawyers Title Insurance Corporation
By:

Chuck Korkhoff

Authorized Signatory

Endorsement LTAA.3R
(Restrictions, Easements, Minerals)
Entaa3R

Order No.: 02-02006017-711-VE
Customer Ref: 851106

ENDORSEMENT

ATTACHED TO POLICY NO. H23-Z025296

ISSUED BY

Lawyers Title Insurance Corporation

The Company insures the Insured that as of the effective date hereof there is located on said land the improvements described as under construction, commonly known as 7116 & 7126 E. Osborn, Scottsdale, AZ 852516327, and that the map attached to this policy shows the correct location and dimensions of the land described in Schedule A as disclosed by those records which under the recording law impart constructive notice as to said land.

The Company hereby insures the Insured against loss which said Insured shall sustain in the event that the assurance herein shall prove to be incorrect.

The total liability of the Company under said policy and any endorsements therein shall not exceed, in the aggregate, the face amount of this policy and costs which the Company is obligated under the Conditions and Stipulations hereof to pay.

This endorsement is made a part of said policy and is subject to the Exclusions from Coverage, Schedules, Conditions and Stipulations therein, except as modified by the provisions hereof.

This endorsement is not to be construed as insuring the title as of any later date than the date of said policy, except as herein expressly provided as to the subject matter hereof.

Dated: August 22, 2006

Lawyers Title Insurance Corporation
By:

Chuck Kerkhoff

Authorized Signatory

Endorsement LTAA 5
(Type of Improvement)
EnLtaa5

Order No.: 02-02006017-711-VE
Customer Ref: 851106

ENDORSEMENT

ATTACHED TO POLICY NO. H23-Z025296

ISSUED BY

Lawyers Title Insurance Corporation

The provisions of said policy are hereby modified and amended as of the date hereof as to the following matters and none other:

"Exclusion from Coverage" No. 7 is hereby deleted.

The total liability of the Company under said policy and any endorsements therein shall not exceed, in the aggregate, the face amount of said policy and costs which the Company is obligated under the Conditions and Stipulations thereof to pay.

This endorsement is made a part of said policy and is subject to the Exclusions from Coverage, Schedules, Conditions and Stipulations therein, except as modified by the provisions hereof.

This endorsement is not to be construed as insuring the title as of any later date than the date of said policy, except as herein expressly provided as to the subject matter hereof.

Dated: August 22, 2006

Lawyers Title Insurance Corporation
By:

Chuck Kirkhoff

Authorized Signatory

CredRor's Rights – Exclusion Deleted
(Endorsement LTAA7.MOD)
EnCredtr

Order No.: 02-02006017-711-VE
Customer Ref: 851106

ENDORSEMENT

ATTACHED TO POLICY NO. H23-Z025296

ISSUED BY

Lawyers Title Insurance Corporation

The Company insures the insured against loss or damage sustained by reason of lack of priority of the lien of the insured mortgage over:

(a) Any environmental protection lien which, at Date of Policy, is recorded in those records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge, or filed in the records of the Clerk of the United States District Court for the District in which the land is located, except as set forth in Schedule B; or

(b) Any environmental protection lien provided for by any state statute in effect at Date of Policy, except environmental protection liens provided for by the following statutes:

NONE

This endorsement is made a part of said policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

Dated: August 22, 2006

Lawyers Title Insurance Corporation
By:

Chuck Horkhoff

Authorized Signatory

Endorsement ALTA Form 8.1 (Mod.)
(Environmental Protection Lien – Non-residential)
En8-1M

Order No.: 02-02006017-711-VE
Customer Ref: 851106

ENDORSEMENT

ATTACHED TO POLICY NO. H23-Z025296

ISSUED BY

Lawyers Title Insurance Corporation

The Company hereby insures against loss which said Insured shall sustain by reason of any of the following matters:

1. Any incorrectness in the assurance which the Company hereby gives:
   (a) That there are no covenants, conditions or restrictions under which the lien of the mortgage referred to in Schedule A can be cut off, subordinated, or otherwise impaired;
   (b) Unless expressly excepted in Schedule B:
      (1) There are no present violations on said land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the land violate any building setback lines shown on a plat of subdivision recorded or filed in the public records.
      (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land does not, in addition, (i) establish an easement on the land; (ii) provide for liquidated damages; (iii) provide for a private charge or assessment; (iv) provide for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.
      (3) There is no encroachment of existing improvements located on the land onto adjoining land, nor any encroachment of existing improvements located on adjoining land.
      (4) There is no encroachment of existing improvements located on the land onto that portion of the land subject to any easement excepted in Schedule B.
      (5) There are no notices of violation of covenants, conditions and restrictions relating to environmental protection recorded or filed in the public record.
2. Any future violations on said land of any existing covenants, conditions or restrictions occurring prior to acquisition of title to said estate or interest by the Insured, provided such violations result in:
   (a) Invalidity, loss of priority, or unenforceability of the lien of the Insured mortgage; or
   (b) loss of title to the estate or interest in the land if the Insured shall acquire title in satisfaction of the indebtedness secured by the insured mortgage.
3. Damage to existing improvements, including lawns, shrubbery or trees:
   (a) which are located or encroach upon that portion of the land subject to any easement shown in Schedule B, which damage results from the exercise of the right to maintain such easement for the purpose for which the same was granted or reserved;
   (b) resulting from the future exercise of any right to use the surface of said land for the extraction or development of minerals excepted from the description of said land or excepted in Schedule B.
4. Any final court order or judgment requiring removal from any land adjoining the land of any encroachment excepted in Schedule B.
5. Any final court order or judgment denying the right to maintain any existing improvements on the land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the public records.

Endorsement ALTA 9
(Comprehensive)
En9

Order No.: 02-02006017-711-VE
Customer Ref: 851106

Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1(b)(1) and 5, the words "covenants, conditions or restrictions" shall not be deemed to refer any covenants, conditions or restrictions relating to environmental protection.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, not does it increase the face amount thereof.

Wherever in this endorsement any or all the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants and conditions contained in any lease referred to in Schedule A.

As used herein, the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection, except to the extent that a notice of a violation has been recorded or filed in the public records and not excepted in Schedule B.

The total liability of the Company under said policy and any endorsements therein shall not exceed, in the aggregate, the face amount of said policy and costs which the Company is obligated under the Conditions and Stipulations thereof to pay.

This Endorsement is made a part of said policy and is subject to the Exclusions from Coverage, Schedules, Conditions and Stipulations therein, except as modified by the provisions hereof.

This Endorsement is not to be construed as insuring the title to said estate or interest as of any later date than the date of this policy, except as herein expressly provided as to the subject matter hereof.

Dated: August 22, 2006

Lawyers Title Insurance Corporation
By:

Chuck Kerkhoff

Authorized Signatory

Endorsement ALTA 9
(Comprehensive)
En9

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS.

The following terms when used in this policy mean:

(a) "insured": the Insured named in Schedule A. The term "insured" also includes:

(i) the owner of the indebtedness secured by the Insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the Insured mortgage, or any part thereof, whether named as an Insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations.

(b) "insured claimant": an Insured claiming loss or damage.

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an Insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule A, and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the Insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE.

(a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an Insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the Insured mortgage; (ii) a transferee of the estate or interest so acquired from an Insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the Insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the Insured mortgage.

(b) After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured only so long as the Insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of covenants of warranty made by the Insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the Insured.

(c) Amount of Insurance: The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

(i) the Amount of Insurance stated in Schedule A;

(ii) the amount of the principal of the indebtedness secured by the Insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the Insured mortgage to assure compliance with laws or to protect the lien of the Insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or

(iii) the amount paid by any governmental agency or governmental instrumentality, if the agency or instrumentality is the Insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an Insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the Insured mortgage, as Insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the Insured mortgage, as Insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the Insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any Insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the Insured and subject to the options contained in Section 8 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim adverse to the title or interest as Insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the Insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the Insured mortgage, as Insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the Insured mortgage, as Insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the Insured claimant shall be furnished to the Company within 90 days after the Insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the Insured claimant to provide the required proof of loss or damage, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the Insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company the Insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the Insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulations, shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) to pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the Insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or

(ii) to purchase the indebtedness secured by the Insured mortgage for the amount owing thereon together with any costs, attorneys' fees and expenses incurred by the Insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer, assign, and convey the indebtedness and the Insured mortgage, together with any collateral security, to the Company upon payment therefor. Upon the exercise by the Company of either of the options provided for in paragraphs (a)(i) or (a)(ii), all liability and obligations to the Insured under this policy, other than to make the payment required in those paragraphs, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

continued on next page of cover sheet

CONDITIONS AND STIPULATIONS – CONTINUED

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs (b)(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time of loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Condition and Stipulations.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title or to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

(d) The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts extended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of the insurance afforded under this policy except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

10. LIABILITY NONCUMULATIVE.

It the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

11. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

12. SUBROGATION UPON PAYMENT OR SETTLEMENT.

(a) The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest, and costs of collection.

(b)The Insured's Rights and Limitations.

Notwithstanding the foregoing, the owner of the indebtedness secured by the insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of the insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(c) The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of the insured mortgage by an obligor (except an obligor described in Section 1 (a)(i) of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1 (a)(i) of these Conditions and Stipulations.

13. ARBITRATION.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or a validating officer or authorized signatory of the Company.

15. SEVERABILITY.

In the event any provision of this policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. NOTICES WHERE SENT.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to: Consumer Affairs Department, P.O. Box 27567, Richmond, Virginia 23261-7567.

LOAN POLICY OF TITLE INSURANCE

American Land Title Association (10/17/92)
With ALTA Endorsement Form 1
(Street Assessment)

Issued by

Lawyers Title Insurance Corporation

Lawyers Title Insurance Corporation
is a member of the LandAmerica family of title insurance underwriters.

LandAmerica Financial Group, Inc.
101 Gateway Centre Parkway
Richmond, Virginia 23235-5153
www.landam.com

THANK YOU.

Title insurance provides for the protection of your real estate investment. We suggest you keep this policy in a safe place where it can be readily available for future reference.

If you have questions about title insurance or the coverage provided by this policy, contact the office that issued this policy, or you may call or write:

Lawyers Title Insurance Corporation
Consumer Affairs
P.O. Box 27567
Richmond, Virginia 23261-7567
telephone, toll free: 800 446-7086
web: www.landam.com

We thank you for choosing to do business with Lawyers Title Insurance Corporation, and look forward to meeting your future title insurance needs.

Lawyers Title Insurance Corporation
is a member of the LandAmerica family of title insurance underwriters.

Form B 1192-10Z

EXHIBIT B

FENNEMORE CRAIG, P.C.

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Phoenix, Arizona 85012-2913
(602) 916-5000

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Las Vegas (702) 692-8000
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January 10, 2011

VIA EMAIL AND US MAIL

Steven Freeman
Glaser, Weil, Fink, Jacobs,
Howard & Shapiro, LLP
10250 Constellation Blvd.
Los Angeles, CA 90067
sfreeman@glaserweil.com

Re:		
	Policy No.:	**851106 (the "Policy")**
	Insured:	**Mortgages, Ltd.**
	Claim No.:	**330613**
	Associated Claim No.:	**938213**
	Property:	**Ten Lofts Project, Scottsdale, AZ (the "Project")**

Dear Steve:

This letter relates to the Ten Lofts (or Osborne III) Project where Lawyers Title Insurance Corporation is defending mechanic lien claims. As you know, mechanic lien claims are currently pending in the litigation pending before Judge Burke, in the Maricopa County Superior Court captioned: *Jeffrey C Stone Inc d/b/a Summit Builders v. Osborn III Partners LLC*, Case No CV2008-033080. Lawyers' Title has accepted defense of the claims. *See* Letter dated September 28, 2009 attached hereto as Exhibit 1 (the "Coverage Letter"). The Coverage Letter advises our "The Company [Lawyers Title] has accepted defense of this lawsuit with a reservation of rights."

The reservation of rights provisions was stated as follows:

> The Company reserves its right to continue its independent investigation of this matter and reserves the right to assert any defense, which though not apparent at this time, becomes apparent at a later date. If at some point in the future the Company concludes that it has no actual or potential obligation under the policy to indemnify or provide legal representation to the insured in this matter, the Company expressly reserves the right to decide,

> after giving reasonable notice, to discontinue indemnification and/or discontinue providing the insured with a defense of the above-referenced action. The Company also reserves the right to seek a judicial declaration determining that it has no obligation to indemnify or provide a defense of the above referenced action.

As Lawyers' Title is aware, Summit Construction has asserted the largest mechanic lien claim, and its claim includes most of the other claims on the project. The project has been acquired by the investors or assignees of the lender through a trustee's sale, and subsequently sold to a third party buyer. Counsel with Lawyers' Title retained to represent ML Manager, LLC negotiated an agreement with Summit Construction whereby Summit agreed to release its lien on the real property in exchange for an agreement to escrow approximately $3.5 million and the attachment of its lien on that escrow fund.

As you know from all of the correspondence related to other projects involving Mortgages Ltd., ML Manager and the investors it represents owes substantial money is to the "Exit Lender," Universal-SCP 1, L.P, and the outstanding loan is accruing interest at approximately the effective rate of 20% per annum. As such, the fact that this money is tied up in an escrow and not available to pay the Exit Lender is damaging our clients.

At the present time, Summit Construction has indicated that their liens can be compromised and settled for $2.4 million. It is our understanding that this offer has been conveyed to Lawyers' Title with a recommendation from the counsel that Lawyers' Title retained to accept this offer. Demand is hereby made that Lawyers' Title either accept the offer and resolve the mechanic liens so that the sale can go forward, or withdraw its reservation of rights. If Lawyers' Title does not either settle the matter or withdraw its reservation of rights, our client will take and any and all actions necessary to protect itself, including, without limitation, approaching the mechanic lien holders and negotiating what is referred to in Arizona as a "Morris Agreement." *See United Servs. Auto. Ass'n v. Morris*, 154 Ariz. 113, 119, 741 P.2d 246, 252 (1987).

Notice is hereby given that ML Manager, on behalf of the owners of the Project, may take any action that it deems necessary to protect its rights and the rights of the investors and entities that it represents including, without limitation, negotiating and entering into a *Morris Agreement* with the mechanic lien holders. For example, this may include negotiating directly with the mechanic lien claimants for an agreement whereby, among other things, there would be a (1) stipulated judgment for the entire amount claimed, all accrued interest at the interest rate set forth in Arizona's prompt pay statute (which may be as much as 18%), and a stipulated amount for attorneys' fees, (2) an agreement that the mechanic lien holder would not execute on the

judgment against ML Manager, any of the investors, or any buyer purchasing the Project and would subordinate their interests to that of a buyer, (3) other agreements necessary to complete the sale of the Project, and (4) assign to the mechanic lien holders all rights created by the stipulated judgment and bad faith claims against Fidelity. The amount is the full $3.5 million that is in escrow. Delay damages and other bad faith claims would simply add to that amount.

We understand from your prior letter related to the Centerpoint project that you take the position that a *Morris Agreement* does not apply in the title insurance context. You cited no case law to support that specific proposition and your argument is based solely on an attempt to distinguish the title insurance context from the type of insurance at issue in *Morris*. We understand your argument, but disagree with your conclusion. There is nothing that substantially differentiates the risks to the insured that justified the agreement in *Morris* than what exists in this case. Refusal to accept a settlement or withdraw the reservation of rights solely on the hope that a future court may distinguish the rights of an insurance company in this context from the insurance company in the *Morris* situation would seem to be unwarranted. Moreover, there is no evidence that we know of in this case to justify the assertion of a coverage defense. As such, there is no valid basis for a reservation of rights. However, given the conduct of Fidelity and its affiliates in other matters where a new reservation of rights was asserted on the eve of the transaction, ML Manager must have assurances of its rights and coverages.

Summit Construction has indicated that their offer expires by January 24, 2011. As such, we must have Lawyers' Title's response on whether it will accept the offer, or withdraw the reservation of rights before then. If we do not hear from you or Lawyers' Title before January 24, 2011 with an affirmative confirmation that it is accepting the settlement, or agreeing to withdraw the reservation of rights, we will deem such non-response to be a refusal to withdraw the reservation of rights and will take whatever action is necessary to protect our clients' rights.

Based on the foregoing, notice is hereby given that if the reservation is not immediately withdrawn, ML Manager, in its role as authorized agent, will take whatever measures are necessary to protect the owners' interests. This may include, among other things, further negotiations and entering into a *Morris Agreement.* Please let me know if you have any questions.

Sincerely,

FENNEMORE CRAIG, P.C.

Keith L. Hendricks

KLH/lcs

EXHIBIT C

Glaser Weil Fink Jacobs
Howard Avchen & Shapiro LLP

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January 25, 2011

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VIA EMAIL AND U.S. MAIL

Keith L. Hendricks, Esq.
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khendric@fclaw.com

Re:	**Policy No.:**	**H23-Z025296 (the "Policy")**
	Insured:	**Mortgages, Ltd.**
	Claim No.:	**330613**
	Property:	**Ten Lofts Project, Scottsdale, AZ (the "Project")**

Dear Mr. Hendricks:

As you are aware, this firm is coverage counsel for Fidelity National Title Insurance Company, successor by merger to Lawyers Title Insurance Corporation ("Fidelity") in connection with the above-captioned claim (the "Lien Action"). Your January 10, 2011 letter states, among other things,[1] that the parties represented by ML Manager (the "ML Parties") may enter into a *Morris* Agreement unless (1) Fidelity agrees to settle Summit Construction's portion of the Lien Action for $2.4 million; or (2) Fidelity withdraws its reservation of rights.

We write to (a) provide notice that Fidelity believes that the proposed settlement is unreasonable in light of defenses available in the Lien Action; (b) restate Fidelity's position that "*Morris* agreements" are not effective in the context of title insurance; (c) identify certain provisions of the Policy that may exclude or limit coverage; (d) reserve all of Fidelity's rights under the Policy and applicable law; and (e) explain that, while Fidelity's coverage investigation is ongoing, Fidelity will, subject to a complete reservation of Fidelity's rights, continue to retain counsel to represent by ML Parties in the Lien Action. Once Fidelity's coverage investigation is complete, you will receive a written statement explaining, the coverage available, if any, under the Policy for the Lien Action.

[1] The failure to address any issue in your letter should not be taken as any indication of acquiescence. Fidelity reserves all rights and will address other issues as or if necessary in the future.

THE PROPOSED SETTLEMENT IS UNREASONABLE DUE TO DEFENSES AVAILABLE IN THE LIEN ACTION

Your letter states your understanding that Scott Malm, the counsel Fidelity retained to defend the ML Parties, has recommended to Fidelity that it accept Summit Construction's $2.4 million settlement offer. To the contrary, Mr. Malm has informed Fidelity that the ML Parties have viable defenses in the Lien Action and Mr. Malm has not recommended that Fidelity accept Summit Construction's offer. Accordingly, Fidelity does not consent to the proposed $2.4 million settlement with Summit Construction.

"*MORRIS* AGREEMENTS" ARE NOT EFFECTIVE IN THE CONTEXT OF TITLE INSURANCE

As we informed you in our attached December 7, 2010 email, it is Fidelity's position that "*Morris* agreements" are not effective in the context of title insurance. Below is a short explanation of the basis of Fidelity's understanding.

In *United Services Automobile Association v. Morris*, 741 P.2d 246 (Ariz. 1987), the Arizona Supreme Court explained the general rule that "[w]hen an insurer performs its contractual obligation to defend, the policy requires the insured to cooperate with the insurer" and the insured "may not settle with the claimant without breaching the cooperation clause." *Id.* at 250. But the *Morris* court articulated an exception for insureds that "need to act reasonably to protect themselves from 'the sharp thrust of personal liability.'" *Id.* at 251 (citation omitted). Specifically, in order to permit the insured under a liability policy to "take reasonable measures to protect himself against the danger of personal liability," an insured being defended under a reservation of rights may settle without a liability insurer's consent without breaching the cooperation clause. *Id.* at 252.

The Arizona Supreme Court has recognized that "'permitting the insured to settle with the claimant presents a great danger to the insurer.'" *Parking Concepts, Inc. v. Tenney*, 83 P.3d 19, 22 (Ariz. 2004) (citation omitted). "The insured entering into a *Morris* agreement will, by virtue of the standard covenant not to execute, usually face no personal liability for the stipulated judgment. He will therefore have little incentive to minimize the amount of the judgment. . . . The claimant, on the other hand, has every incentive to obtain the largest judgment possible. Thus, neither party to the standard *Morris* agreement has any compelling reason to act reasonably in setting the settlement amount." *Id.*

However, in the "limited circumstance" where an insured under a liability policy is being defended subject to a reservation of rights, "*Morris* permits the insured to step into the insurer's shoes for purposes of settlement negotiations." 83 P.3d at 24.

We disagree with the statement, on page 3 of your letter, that "[t]here is nothing that substantially differentiates the risks to the insured that justified the agreement in *Morris* [from] what exists in this case." The Policy of title insurance at issue here provides *first party coverage*

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which is substantially different from the *third party liability coverage* provided by the liability policy at issue in *Morris*. Because the Policy at issue here does not insure against the "sharp thrust of personal liability," the "limited circumstances" allowing a *Morris* agreement are not present and the cooperation provisions of the Policy preclude the insured from settling without Fidelity's prior written consent. (See Condition 4.)

Assuming arguendo that the title insurance Policy did insure personal liability (though it clearly does not), the mechanic's liens at issue in the Lien Action do not create any danger of personal liability at all for the ML Parties, but rather are limited as claims against the land described in the Policy. Therefore, any *Morris* agreement entered into by your clients would not be enforceable against Fidelity.

POLICY PROVISIONS MAY PRECLUDE OR LIMIT COVERAGE

Exclusion 3(a) May Preclude Coverage

Exclusion 3(a) precludes coverage for "defects, liens, encumbrances, adverse claims, or other matters created, suffered, assumed, or agreed to by the insured claimant."

The leading cases interpreting Exclusion 3(a) in the context of an insured lender's failure to fund, *Brown v. St. Paul Title Ins. Co.*, 634 F.2d 1103 (8th Cir. 1980) and *Banker's Trust Co. v. Transamerica Title Ins. Co.*, 594 F.2d 231 (10th Cir. 1979), found that an insured lender is considered to have "created" or "suffered" a lien when it fails to disburse the full amount of the loan commitment to pay for work which was performed prior to default.

To the extent that the mechanic's liens at issue result from Mortgages Ltd.'s failure to disburse committed construction loan funds, coverage under the Policy would be precluded by Exclusion 3(a).

Exclusion 3(b) May Preclude Coverage

Exclusion 3(b) excludes from the coverage of the Policy:

> 3. Defects, liens, encumbrances, adverse claims, or other matters
>
> * * *
>
> (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;

To the extent that the mechanic's liens at issue result from Mortgages Ltd.'s inability to disburse committed construction loan funds, that it knew it did not have available to fund the loan, coverage under the Policy may be precluded by Exclusion 3(b).

Exclusion 3(e) May Preclude Coverage

Exclusion 3(e) excludes from the coverage of the Policy:

> 3. Defects, liens, encumbrances, adverse claims, or other matters
>
> * * *
>
> (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage.

Also, the Policy does not afford coverage for losses sustained due to the lack of an existing indebtedness or the invalidity of the note secured by the insured deed of trust. *First American Title Insurance Company v. XWarehouse Lending Corp.*, 177 Cal. App. 4th106, 117-18 (2009). Further, the Policy does not afford coverage for claims that the insured's title is invalid due to the insured's breach or tortious conduct in acquiring that title. *Rosen v. Nations Title Ins. Co.*, 56 Cal. App. 4th 1489, 1501 (1997).

Coverage for claims that the insured Deed of Trust is invalid or voidable due to lack of consideration or the conduct of Mortgages Ltd. may be precluded by, among other things, Exclusion 3(e).

Coverage May be Limited or Precluded to the Extent Any ML Party Fails to Qualify as an Insured

Condition 1(a) defines "insured, in part, as follows:

> (a) "insured": the insured named in Schedule A. The term "insured" also includes:
>
> (i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);
>
> * * *

The burden is on each putative insured to establish that it qualifies as an insured under the Policy. Any party that fails to establish its status as an owner of the indebtedness secured by the

insured mortgage will not have any rights under the Policy. *See Property Asset Management, Inc. v. Chicago Title Insurance Co., Inc.*, 173 F.3d 84, 88 (2d Cir. 1999)(where a putative assignee cannot prove that it "own[s] the loan, it has no claim under the insurance policy issued on that loan").

Any Limitations, Exclusions, or Defenses Applicable to a Predecessor Insured May Limit or Preclude Coverage for the ML Parties

As quoted above, Condition 1(a) preserves against each successor in ownership of the indebtedness secured by the insured mortgage all rights and defenses that Fidelity would have had against any predecessor insured "unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien [etc.]." Accordingly, any present owner of the indebtedness secured by the insured Deed of Trust may have acquired its interest subject to coverage limitations and exclusions applicable to prior owners of that indebtedness.

Coverage May Be Limited or Terminated to the Extent Fidelity Is Prejudiced by Late Notice

Condition 3 of the Policy provides that

> 3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT
>
> The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

It appears that no notice was provided to Fidelity until approximately nine months after Mortgages Ltd. was forced into involuntary bankruptcy proceedings. Any coverage that may otherwise have been available may be terminated or limited to the extent that Fidelity has been prejudiced by a failure to provide prompt notice.

RESERVATION OF RIGHTS

Subject to a complete reservation of all of Fidelity's rights, Fidelity is investigating whether coverage is available for the ML Parties under the Policy for the Lien Action. Fidelity's reserved rights include, but are not limited to, the right to prorate and/or seek reimbursement of defense costs for uncovered claims to the extent allowed by Arizona or other applicable law; the right to deny indemnity benefits; the right to recover any defense costs and/or indemnity benefits which might be incurred should Fidelity incur them and it is later determined that Fidelity did not have a duty to pay such amounts; and the right to commence a declaratory relief action to determine any coverage issues and to seek reimbursement of any payments made. In addition, Fidelity reserves its right to withdraw from the defense if it is later determined that there is no coverage under the Policy for the Lien Action.

Nothing in this letter or any prior acts or communications by Fidelity, including retaining defense counsel, should be interpreted as a waiver or deemed to estop Fidelity from asserting the coverage provisions or any of the terms, conditions, stipulations, exclusions, exceptions, policy defenses, or limits of liability contained in its Policy. Furthermore, Fidelity recognizes that the ML Parties do not waive any rights they may have by cooperating in the investigation and defense of any claim.

Fidelity also reserves its right to require the ML Parties to furnish signed proofs of loss.

Finally, Fidelity reserves the right to take the examination under oath of the ML Parties' authorized representatives should Fidelity need additional information in order to properly evaluate the coverage available, if any, whether there has been a loss compensable under the Policy, or the amount of the loss if there was one.

FIDELITY WILL CONTINUE TO RETAIN COUNSEL TO DEFEND THE ML PARTIES

Subject to Fidelity's complete reservation of its rights, Fidelity will continue to retain the law firm of Gust Rosenfeld P.L.C. to represent ML Parties in the Lien Action. The contact information for this firm is:

Scott A. Malm
Gust Rosenfeld P.L.C.
One E. Washington, Suite 1600
Phoenix, AZ 85004-2553
602.257.7481 (direct)
602.254.4878 (fax)
samalm@gustlaw.com]

Gust Rosenfeld P.L.C. has been retained to represent the ML Parties with respect to the Lien Action, but will not represent the ML Parties regarding any questions or issues concerning coverage under the Policy. Please address those questions to my attention.

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Fidelity's provision of a defense is also subject to Condition 4 which states that:

4. DEFENSE AND PROSECUTION OF ACTIONS: DUTY OF INSURED CLAIMANT TO COOPERATE

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own costs, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding,

> and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid, (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

Fidelity's investigation and action in hiring Gust Rosenfeld P.L.C. are subject to the full reservation of rights referenced above in this letter

CONCLUSION

Fidelity's coverage investigation is ongoing, and while it conducts its investigation under the complete reservation of rights discussed in this letter, Fidelity will continue to retain Gust Rosenfeld P.L.C. to defend the ML Parties in the Lien Action. By referring to specific provisions of the Policy in this letter, Fidelity does not waive or modify any term, condition, or exclusion under the Policy and reserves the right to deny defense or indemnity on any ground under the Policy, whether or not specifically referred to in this letter. Accordingly, nothing contained in this letter is intended as, nor should it be deemed to constitute, a waiver or relinquishment of any of Fidelity's rights or remedies, whether legal or equitable, all of which are hereby expressly reserved.

If you have any additional information you would like Fidelity to consider as part of its coverage investigation or evaluation of this claim, please provide it to us at your earliest convenience. Also, if there is any aspect of this claim that you would like to discuss, please call me.

Very truly yours,

Steven A. Freeman
for GLASER, WEIL, FINK,
JACOBS, HOWARD, AVCHEN & SHAPIRO, LLP

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EXHIBIT D

FENNEMORE CRAIG, P.C.

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January 31, 2011

VIA EMAIL AND US MAIL

Steven Freeman
Glaser, Weil, Fink, Jacobs,
Howard & Shapiro, LLP
10250 Constellation Blvd.
Los Angeles, CA 90067
sfreeman@glaserweil.com

Re:	**Policy No.:**	**851106 (the "Policy")**
	Insured:	**Mortgages, Ltd.**
	Claim No.:	**330613**
	Associated Claim No.:	**938213**
	Property:	**Ten Lofts Project, Scottsdale, AZ (the "Project")**

Dear Steve:

This letter is to inform Fidelity National Title Insurance Company, successor by merger to Lawyers Title Insurance Corporation ("Fidelity") that because of the various reservations of rights that have been issued in connection with the above policy, ML Manager on behalf of the owners of the project including Osborn III Loan LLC and other investors (collectively, the "Investors") have entered into negotiations with and intend to consummate agreements with the mechanic lien holder, Jeffrey C. Stone, Inc., dba Summit Builders ("Summit") on the Ten Lofts Project in Scottsdale Arizona and related parcels (the "Project").

On January 10, 2011, we provided notice to Fidelity that because of a generic and vague reservation of rights that had been issued by Fidelity with regard to the Project, ML Manager intended to enter into negotiations with Summit unless the reservation of rights was withdrawn. That prior notice is incorporated herein. On January 25, 2011, you responded on behalf of Fidelity wherein you indicated that Fidelity would not withdraw its reservation of rights and then identified, for the first time, six additional bases for a reservation of rights. Indeed, you stated: "Subject to a complete reservation of all of Fidelity's rights, Fidelity is investigating whether coverage is available for the ML Parties under the Policy for the Lien Action."

Because of this reservation of rights, the Investors' interests are at risk. As Fidelity knows, the Project was sold in October. As part of the Order from the bankruptcy court that allowed the sale of the Project, Scott Malm (the counsel retained by Fidelity to represent the Investors) negotiated an agreement whereby an escrow would be created and Summit's lien would attach to the escrow. Accordingly, an escrow of $3,445,095.79 was established. As you and Fidelity know from all of the discussion with regard to the Centerpoint project, the Investors, among others, are required to repay a loan and other costs (the "Exit Loan") that were incurred in connection with the Mortgages Ltd. bankruptcy. The interest on the Exit Loan accrues at an effective rate of over 20% per annum. The fact that Fidelity was unable to remove Summit's liens and this escrow had to be established meant that the money could not be used to repay the Exit Loan. As a result, the Investors have been and continue to be substantially damaged by the inability to use the proceeds in the escrow.

In addition, given Fidelity's prior and newly asserted reservation of rights, the Investors' interest in the escrow is substantially at risk. As Fidelity knows, the judge assigned to the Summit lien claim is the same judge that is assigned to the lien claims in the Centerpoint project. Our understanding is that in the litigation that Fidelity is directing, Mr. Malm has asserted two primary defenses to the Summit lien claims. One is a technical; defense, however, as Fidelity knows, the trial court judge rejected that same technical defense in the Centerpoint case. The second defense is an equitable subrogation claim. Again, the same trial court judge has issued a ruling in the Centerpoint case that severely questions the application of that defense. Moreover, the value of an equitable subrogation claim in this case is questionable because the amount bid at a trustee's sale was substantially more than equitable subrogation amount. As such, equitable subrogation, by itself, will not defeat the Summit lien. Accordingly, there is a substantial risk that Fidelity will lose on the merits of its defenses to the Summit lien claim, which is likely the reason why Fidelity has now asserted so many additional potential reservations of rights.

At the present time, there is uncertainty on all sides, which is likely why Summit is willing to negotiate. This is similar to the situation that existed in the Centerpoint case prior to the trial court's ruling on summary judgment. As Fidelity knows, prior to the summary judgment ruling in Centerpoint, the lien holders there expressed on several occasions that they were willing to make substantial concessions toward a negotiated settlement, but became very emboldened after the summary judgment ruling. Following the summary judgment ruling, settlement negotiations in Centerpoint became much more difficult and expensive. If an adverse ruling is issued here on the pending motion for summary judgment, Summit is likely to become much less willing to compromise.

Summit has agreed that it will accept a payment of $1,750,000 to resolve all of its claims. This is about half the amount of the escrow. It will free up money that can be used to pay the

Exit Loan and make other distributions. More important, it will substantially limit the Investors' exposure to adverse judgments and risks created by Fidelity's newly asserted complete reservation of rights. Accordingly, notice is hereby given unless a response is received as described below, ML Manager on behalf of the Investors intends to enter into a settlement agreement with Summit for $1.75 million to be funded from the proceeds currently held in escrow and that this settlement may include a *Morris Agreement*. Arizona law permits an insured to negotiate with a plaintiff or claimant when its insurer is defending under a reservation of rights. *United Services Automobile Ass'n v. Morris*, 154 Ariz. 113, 119, 741 P.2d 246, 252 (1987)("[T]he cooperation clause prohibition against [an insured] settling without the insurer's consent forbids an insured from settling **only** claims for which the insurer **unconditionally assumes liability under the policy**.") (emphasis added). Fidelity is hereby put on notice that it may waive its reservation of rights and provide an unqualified defense to the mechanic lien claims, or defend solely on coverage and reasonableness grounds against the settlement or a judgment resulting from a *Morris Agreement*.

As stated, ML Manager is negotiating an agreement with the Summit whereby ML Manager will use $1.75 million from the escrow to satisfy or acquire all of the rights of the Summit. If ML Manager determines that it will take an assignment of Summit's rights under the Liens, ML Manager may enter into a settlement or a *Morris Agreement* that would include a stipulated judgment in Summit's lawsuit, *Jeffrey C Stone Inc d/b/a Summit Builders v. Osborn III Partners LLC*, Case No CV2008-033080 (the "Lawsuit") for at least $1.75 million, plus interest and attorneys' fees. If Fidelity wanted to pay the $1.75 million, then the liens could simply be released, and there would be no need for the settlement, stipulated judgment or a *Morris Agreement*. In other words, Fidelity could agree to pay no more than $1.75 million now to completely resolve the liens and avoid the settlement agreement, the stipulated judgment and the *Morris Agreement*. This is an option that is available until the bankruptcy court agrees to release the money from the escrow, or until February 14, 2011, which ever is later.

We understand that Fidelity has taken the position that a *Morris Agreement* does not apply in the title insurance context, but Fidelity has failed to cite any case law or authority other than your own analysis to support this proposition. We disagree with your analysis. The principles of *Morris* that allow an insured being defended under a reservation of rights to protect its own interests after giving the insurance company notice and an opportunity to withdraw the reservation of rights applies equally to this context. *See, e.g., A Tumbling-T Ranches v. Flood Control District of Maricopa County*, 220 Ariz. 202, 204 P.3d 1051 (App. 2008)(*Morris Agreement* may be entered into based on an indemnity and hold-harmless agreement contained within a property easement; *Morris Agreements* are based on "general principles of indemnification law) *citing Restatement (Second) of Judgments*, § 57(1) (1982). Indeed, *A Tumbling* expressly states: **"[W]e reject the contention that there was no ability to enter into**

a *Damron/Morris Agreement* in a context other than an insurance case." *Id.* at 208, 204 P.3d at 1057 (emphasis added). If the *Morris Agreement* is not limited to just the insurance context, it certainly is not limited to just a "liability insurance context." In fact, *A Tumbling* makes it clear that the doctrine is not even based on insurance law. It is based on indemnity law, which is clearly applicable to the title insurance context. As such, we do not find your argument that a *Morris Agreement* is limited to only the liability insurance context to be persuasive, or a correct statement of the law. *See also Cunningham v. Goettl Air Conditioning Inc.*, 194 Ariz. 236, 980 P.2d 489 (1999)(Damron/*Morris Agreement* based on indemnity clause in a lease agreement). Indeed, a ***title insurance*** case from another jurisdiction reached a similar result. In *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 530 F. Supp. 1110 (1982), the title insurance company insured a condo conversion project, including tenant protests to the conversion. After a group of tenants protested the planned conversion, the title insurance company delayed acceptance of coverage and denied ultimate liability under the policy. Given various financial constraints, the insured could not wait for the title company to defend and entered into a settlement without the insurance company's consent. The *Eureka* Court found that because the title insurance company "wrongfully denied liability under the policy, [Insured] may recover the costs of the settlement with the tenants despite its failure to obtain CTI's consent provided the settlement was reasonable." *Id.* at ¶ 14. This is the functional equivalent of a *Morris Agreement* in the title insurance context.

Fidelity has asserted several new reservations of rights based on potential exclusions to coverage. Not only are they untimely and Fidelity should or will be estopped in asserting them, we do not believe that any apply. First, Fidelity has asserted a reservation due to an alleged failure to fund. Our understanding is that the loan in this instance was almost fully funded, that the amount of the liens were more than the outstanding loan balance because the project was over-budget, and all loan disbursements were made until a notice of default was issued by the lender. Moreover, the Investors had no obligation to further fund the loan. Indeed, our understanding is that Summit has not clearly articulated a failure to fund defense response to the pending motions for summary judgment. As such, Exclusion 3(a) does not apply. Under Exclusion 3(b), you assert that Mortgages Ltd. lacked the ability to disburse committed construction loan funds. This claim is not supported. Indeed, at the relevant time there were escrows and impound accounts set up for this loan. Our understanding is that loan disbursements were made until the lender declared a default on the part of the borrower. Exclusion 3(e) does not apply. There is no claim that there was a breach by the insured or tortious conduct in acquiring title. There is no contention that Mortgages Ltd.'s deed of trust was invalid or voidable. Indeed, the deed of trust was foreclosed upon after a settlement agreement was approved by the bankruptcy court and all claims against Mortgages Ltd. were released. Fidelity's claim about a "putative insured" makes no sense and is without merit on its face. The policy clearly covers Mortgages Ltd. and its successors or assigns. There has never been any

assertion that the Investors are not assigns from Mortgages Ltd. Moreover, the Investors clearly gave value for their interest and did take their interest without knowledge of any asserted defect or lien. Indeed, they were repeatedly informed in the prospectus and elsewhere that their interest was a first position deed of trust backed by title insurance. Finally, there is an assertion that Fidelity was not told of the bankruptcy for nine months. The fact that Fidelity is raising this issue for the first time almost two years after the claim was tendered and the bankruptcy was referenced shows the lack of merit of this claim. The bankruptcy did not cause the mechanic liens. The issue was the notice provided to Fidelity of the mechanic liens, and there is no assertion that this was untimely. The only untimely notice in this case is the belated and newly asserted reservations of rights. This is not full response to the newly asserted reservation of rights. ML Manager reserves the right to carefully consider and assert any additional claims, facts or responses to the newly asserted reservation of rights.

In any event, ML Manager intends to undertake the aforementioned course of action unless, prior to February 14, 2011, they receive notice from Fidelity that (1) Fidelity has withdrawn all of the reservation of rights that have been issued, or (2) agreed to pay the amount necessary to resolve Summit's liens or that would otherwise be paid by ML Manager from the escrow proceeds. ML Manager is undertaking this course of action solely because of Fidelity's conduct. ML Manager would much prefer to simply obtain a timely release of the money from the escrow, use the proceeds necessary to repay the obligations under the Exit Loan and make other distributions, but cannot do so because of Fidelity handling of the Lien litigation, its refusal to settle the Liens, and its assertion of the reservations of rights. If you have any questions about the structure of the deal that is being contemplated or any other suggestions on how this transaction can be successfully closed, please let us know.

Sincerely,

Fennemore Craig

/s/ Keith L. Hendricks

Keith L. Hendricks

KLH/lcs

EXHIBIT E

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March 8, 2011

Keith L. Hendricks, Esq.
FENNEMORE CRAIG, P.C.
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012-2913

Re: Policy: H23-Z025296 (the "Policy")
Insured: Mortgages, Ltd.
Claim No.: 330613
Property: Ten Lofts Project, Scottsdale, AZ (the "Project")

Dear Keith:

This letter is in response to your letter to Steven Freeman dated January 31, 2011, regarding the above-referenced Policy of title insurance. This firm has been retained to represent the interests of Fidelity National Title Insurance Company, successor by merger to Lawyers Title Insurance Corporation ("Fidelity"), in connection with the above-captioned claim (the "Lien Action"). You referenced policy number 851106, but appear to have intended to refer to the Policy referenced above, which concerns loan 851106.

Your request that Fidelity withdraw its reservation of rights, or agree to pay $1,750,000.00 to resolve the Lien Action, is rejected for several reasons. First, the settlement is not reasonable, given the viable defenses which have a high chance of success on the merits.

Second, the proposed settlement is not a valid *Morris* agreement. Third, insufficient information has been provided about the proposed settlement in order for the title insurer to be able to fully assess the settlement.

Payment of $1,750,000.00 to resolve the claims is patently unreasonable. The defenses that have been asserted have a high chance of success. Payment of $1,750,000.00 to resolve claims that are likely to fail is not reasonable.

If your client completes the settlement, it will have violated the cooperation clause in the Policy. The Policy provides at Paragraph 4(d):

> Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, or affecting settlement; and (ii) in any other lawful act which in the opinion of the Company shall be necessary or desirable to establish the title to the estate or interest or the lien of the insured of the mortgage, as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligation required under the policy shall terminate, including any liability or obligation to defend, prosecute or continue the litigation with regard to the matter or matters requiring such cooperation.

In addition, that Policy provides at Paragraph 8(c):

> The company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the company.

United Services Automobile Ass'n v. Morris, 741 P.2d 246, 252 (Ariz. 1987), does not obviate these policy provisions. Under certain circumstances, an insured may enter into a settlement agreement without breaching the cooperation clause of the insurance contract. *Id.* *Morris* held that a reservation of rights "narrows the reach" of the cooperation clause only with respect to a limited type of settlement—it does not allow an insured free reign to breach the cooperation clause whenever an insurer defends under a reservation of rights. *Id.*

The Arizona Court of Appeals recently clarified the limits of the *Morris* holding in *Leflet v. Redwood Fire and Casualty Insurance Co.*, 600 Ariz. Adv. Rep. 6, 8 (App. 2011):

> The overarching goal of Morris is to permit the insured and the insurer to balance their competing interests in an atmosphere of fairness and defined risk -- not to promote the transformation of underlying contract and tort claims into bad faith claims at inflated values. Morris likewise does not penalize insurers for properly

> reserving the right to contest coverage -- even under a valid Morris agreement, an insurer may defend on the ground that the loss was not covered.
>
> Underscoring the point that Morris agreements can exist only within the confines of the doctrine that created them, the supreme court has observed: Plaintiff's counsel . . . have every incentive to avoid creating Morris agreements outside the permitted parameters. If counsel negotiate such agreements, the result will be that their clients can collect neither from the defendant . . . nor from the insurer.

Id. (internal citations and quotation marks omitted). The proposed settlement falls outside the parameters of a valid Morris agreement. *Morris* involved a claim for damages where the insured faced potential personal liability. *Morris* did not involve a claim against title to property, like the situation presented here. *Morris* permitted an insured to stipulate to judgment and assign claims against the carrier to the plaintiff. *Morris* did not involve the purchase of adverse claims by an entity related to the insured. The proposed settlement here is not an enforceable *Morris* agreement.

We also disagree that *Morris* agreements are valid in the context of title insurance which does not insure against personal liability to the insured. *Morris* allowed an insured to settle without its liability insurer's consent when that insurer's reservation of the right to deny coverage exposed to the insured to the "sharp thrust of personal liability." *United Services Automobile Assoc. v. Morris*, 741 P.2d 246, 251 (Ariz. 1987) (citation omitted). Because a contract of title insurance does not protect the insured against personal liability, a title insurer's reservation of rights has no impact on whether or not the insured faces the "sharp risk of personal liability." Moreover, where, as in the present case, the insured faces no risk of personal liability, a *Morris* agreement would not be justified under any insurance policy.

Your reliance on *Eureka Investment Corp. v. Chicago Title Insurance Co.*, 530 F. Supp. 1110 (1982) *rev'd in part on other grounds,* 743 F.2d 932 (D.C. Cir. 1984) is misplaced. Contrary to your characterization of *Eureka* as "the functional equivalent of a *Morris Agreement* in the title insurance context," *Eureka* (a) did not involve a *Morris* fact pattern; and (b) applied unique manuscript language unlike any of the standard title insurance provisions found in the Policy at issue here. *Eureka* does nothing to diminish our belief that *Morris* agreements are not valid in the context of title insurance.

You have also failed to provide the specific details of the proposed settlement. Please provide the details of the settlement agreement you propose, including the form of proposed stipulated judgment, how all sale proceeds will be used and the other specific terms of settlement. The limited information provided does not enable the title insurer to fully analyze the settlement terms.

As such, the title insurer does not consent to the proposed settlement described in your January 31, 2011 letter. If the alleged insured completes that transaction, it will be putting its coverage at risk.

Very truly yours,

Timothy J. Thomason
For the Firm

TJT/mae
cc: Homer Duvall

U:\ATTORNEYS\TJT\Fidelity - 11754\Lawyers Title adv. Gould, et al. - 307\Correspondence\Letter to Hendricks re Ten Lofts Project (03.08.11).doc

EXHIBIT F

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SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR MARICOPA COUNTY

JEFFREY C. STONE, INC. d/b/a SUMMIT BUILDERS, an Arizona corporation, Plaintiff, v. OSBORN III PARTNERS LLC, an Arizona limited liability company, et al., Defendants.	NO. CV2008-033080 (consolidated) **COMPLAINT IN INTERVENTION** (Assigned to the Honorable Edward O. Burke)
FIDELITY NATIONAL TITLE INSURANCE COMPANY, successor by merger to LAWYER'S TITLE INSURANCE COMPANY, Intervenor; Plaintiff, v. OSBORN III PARTNERS LLC, an Arizona limited liability company, et al., Defendants.	**(Mandatory E-Filing)**

Intervenor/plaintiff Fidelity National Title Insurance Company ("Fidelity"), in its corporate capacity and as successor by merger to Lawyers Title Insurance Company ("Lawyers Title")(collectively, the "Title Insurer"), for its Complaint against Jeffrey C. Stone, Inc. d/b/a Summit Builders ("Summit"), Trine Holdings, L.L.C., Robert L. Barnes, Jr., Barness

Investment Limited Partnership, Yuval Caine and Mirit Caine, Shirley A. Cannon, Melvin L. Dunsworth, Jr., Trustee of the Revocable Living Trust of Melvin Dunsworth, Jr., dated December 23, 2003, Evertson Oil Company, Inc., First Trust Company of Onaga, Custodian FBO Robert Facciola IRA #41021XXXXX, Delery Guillory, Golden Lending Group, LLC, Bear Tooth Mountain Holdings Limited Partnership, William L. Hawkins Family L.L.P., Pueblo Sereno Mobile Home Park L.L.C., Michael Johnson Investments II, L.L.C., Ronald L. Kohner, L.L.J. Investments, L.L.C., Maurice J. Lazarus, WCL851106 LLC, Leah L. Lewis, Trustee of The Leah L. Lewis Trust dated February 23, 2000, Carol A. Mahakian, Brett M. McFadden, Maurice J. Mintzer, Robert J. Nimmer and Diana M. Nimmer, John P. Putnam and Maricele Putnam, Robert K. Rader and Katalin A.V. Rader, Trustees of The Rader Family Trust dated September 6, 2002, Morley Rosenfield, Trustee of The Morley Rosenfield, M.D.P.C. Restated Profit Sharing Plan, W. Scott Schirmer, Trustee of The WSS 048 Trust dated September 17, 2004, Jayesh K. Shah and Vaishali Shah, Trustees of The Jayesh K. & Vaishali Shah Family Trust dated August 16, 2000, Verma Kataria Mortgage Investment L.L.C., and Osborn III Loan LLC ("Osborn"), and all other lien claimants in this consolidated litigation ("Lien Claimants")(all defendants other than Summit and Lien Claimants, collectively, "Alleged Insureds"), hereby alleges as follows.

PARTIES AND JURISDICTION

1. Intervenor/plaintiff Title Insurer is a title insurance company authorized and doing business in the state of Arizona.

2. Upon information and belief, defendant Summit is an entity authorized and doing business in Arizona, which claims an interest in certain real property known as Ten Lofts (the "Property") located in Maricopa County, Arizona.

3. Defendants are individuals and entities claiming an interest in the Property and/or claiming to have an interest in that certain title insurance policy issued by Lawyers Title No. H23-Z025296 (the "Policy").

4. This Court has jurisdiction and venue is proper in this Court.

GENERAL ALLEGATIONS

5. Lawyers Title issued the Policy to Mortgages, Ltd., as insured, insuring a deed of trust in favor of Mortgages, Ltd. (the "DOT"). Fidelity is successor by merger to Lawyer's Title.

6. Summit has asserted a mechanics' lien (the "Summit Lien") encumbering the Property.

7. The Lien Claimants have asserted liens encumbering the Property ("Junior Liens") (Summit Lien, Junior Liens and related claims, collectively, the "Lien Claims").

8. In 2009, ML Manager, LLC ("ML Manager"), purportedly acting on behalf of the Alleged Insureds under the Policy, tendered defense of the Lien Claims to the Title Insurer. Upon receiving notice of the Lien Claims, the Title Insurer retained counsel to represent the Alleged Insureds and defend their interests.

9. On Information and belief, on October 25, 2010 the Alleged Insureds conveyed all their rights, title, and interest in the Property to Connell Wine Lofts LLC, as part of a settlement or contingent settlement (the "Settlement").

10. On information and belief, as part of the Settlement, Summit agreed to release the Summit Lien. In exchange, a portion of the proceeds from the sale were placed in an escrow account, out of which any judgment relating to the Summit Lien would be paid.

11. Upon information and belief, the Alleged Insureds later stipulated to judgment on the Summit Lien (the "Judgment").

12. The Settlement was ostensibly done for purposes of facilitating collection under the Policy pursuant to the *Morris* decision. *United Services Automobile Ass'n v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987) ("*Morris*").

13. Under the circumstances, the settlement was not reasonable and prudent.

14. In addition, the Settlement is not binding and enforceable against the Title Insurer under *Morris*.

15. The Title Insurer also contends that the *Morris* doctrine does not apply in the title insurance context.

16. The Title Insurer further contends that binding the Title Insurer to the settlement is against public policy and would impair the Title Insurer's contractual rights.

17. The Title Insurer was not provided adequate and fair notice of the terms of settlement.

18. A real and justiciable controversy exists between the parties.

19. The Title Insurer is entitled to a declaration that the settlement is not valid and enforceable under *Morris*.

20. The Title Insurer is also entitled to a declaration that the settlement is a not a reasonable and prudent settlement under relevant Arizona law.

21. This action arises out of contract. The Title Insurer is thereby entitled to an award of its reasonable attorneys' fees pursuant to A.R.S. § 12-341.01.

WHEREFORE, the Title Insurer requests that this Court enter an Order declaring that the settlement is not valid and enforceable under Morris, that the settlement is not a reasonable and prudent settlement, and/or that the settlement is not binding on the Title Insurer. The Title Insurer further requests that it be awarded its costs, expenses and attorneys fees, together with interest thereon at the highest rate allowed by law from the date of entry of judgment until paid, and such other orders as the Court deems just and proper.

DATED this 6th day of May, 2011.

MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.

By: /s/ Jonathan S. Batchelor
Timothy J. Thomason
Jonathan S. Batchelor
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Attorneys for Intervenor Title Insurer

ORIGINAL of the foregoing efiled this 6th day of May, 2011, with a copy transmitted via eFiling system via the Clerk's office to the Honorable Edward O. Burke

COPIES mailed this same date to:

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/s/ Lillian M. Woods

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SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR MARICOPA COUNTY

FIDELITY NATIONAL TITLE INSURANCE COMPANY, successor by merger to LAWYER'S TITLE INSURANCE COMPANY,

Plaintiff,

v.

OSBORN III LOAN LLC, an Arizona limited liability company; TRINE HOLDINGS, L.L.C., an Arizona limited liability company; ROBERT L. BARNES, JR., a single man; BARNESS INVESTMENT LIMITED PARTNERSHIP, an Arizona limited partnership; YUVAL CAINE AND MIRIT CAINE, husband and wife; SHIRLEY A. CANNON, a married woman; MELVIN L. DUNSWORTH, JR., Trustee Of The Revocable Living Trust Of Melvin Dunsworth, Jr., Dated December 23, 2003; EVERTSON OIL COMPANY, INC., a Utah corporation; FIRST TRUST COMPANY OF ONAGA, CUSTODIAN FBO ROBERT FACCIOLA IRA #41021XXXXX; DELERY GUILLORY, a married man; GOLDEN LENDING GROUP, LLC, an Arizona limited liability company; BEAR TOOTH MOUNTAIN HOLDINGS LIMITED PARTNERSHIP, an Arizona limited liability partnership; WILLIAM L. HAWKINS FAMILY L.L.P., an Arizona limited liability partnership;

CASE NO. CV2011-001213

COMPLAINT

(Breach of Contract; Declaratory Judgment)

PUEBLO SERENO MOBILE HOME PARK L.L.C., an Arizona limited liability company; MICHAEL JOHNSON INVESTMENTS II, L.L.C., an Arizona limited liability company; RONALD L. KOHNER, an unmarried man; L.L.J. INVESTMENTS, L.L.C., an Arizona limited liability company; MAURICE J. LAZARUS, a married man; WCL851106 LLC, an Arizona limited liability company; LEAH L. LEWIS, Trustee Of The Leah L. Lewis Trust Dated February 23, 2000; CAROL A. MAHAKIAN, a married woman; BRETT M. MCFADDEN, a single man; MAURICE J. MINTZER, a single man; ROBERT J. NIMMER AND DIANA M. NIMMER, husband and wife; JOHN P. PUTNAM AND MARICELE PUTNAM, husband and wife; ROBERT K. RADER AND KATALIN A.V. RADER, Trustees Of The Rader Family Trust Dated September 6, 2002; MORLEY ROSENFIELD, Trustee Of The Morley Rosenfield, M.D.P.C. Restated Profit Sharing Plan; JAMES C. SCHNECK, Trustee of The James C. Schneck Revocable Trust dated October 1, 1999; W. SCOTT SCHIRMER, Trustee Of The Wss 048 Trust Dated September 17, 2004; JAYESH K. SHAH AND VAISHALI SHAH, Trustees Of The Jayesh K. & Vaishali Shah Family Trust Dated August 16, 2000; VERMA KATARIA MORTGAGE INVESTMENT L.L.C., an Arizona limited liability company; JOHN DOES 1-10; JANE DOES 1-10; and ABC CORPORATIONS 1-10,

Defendants.

Plaintiff Fidelity National Title Insurance Company ("Fidelity"), in its corporate capacity and as successor by merger to Lawyers Title Insurance Company ("Lawyers Title")(collectively, the "Title Insurer"), for its Complaint against defendants Osborn III Loan LLC, Trine Holdings, L.L.C., Robert L. Barnes, Jr., Barness Investment Limited Partnership, Yuval Caine and Mirit Caine, Shirley A. Cannon, Melvin L. Dunsworth, Jr., Trustee of the Revocable Living Trust of Melvin Dunsworth, Jr., dated December 23, 2003, Evertson Oil

Company, Inc., First Trust Company of Onaga, Custodian FBO Robert Facciola IRA #41021XXXXX, Delery Guillory, Golden Lending Group, LLC, Bear Tooth Mountain Holdings Limited Partnership, William L. Hawkins Family L.L.P., Pueblo Sereno Mobile Home Park L.L.C., Michael Johnson Investments II, L.L.C., Ronald L. Kohner, L.L.J. Investments, L.L.C., Maurice J. Lazarus, WCL851106 LLC, Leah L. Lewis, Trustee of The Leah L. Lewis Trust dated February 23, 2000, Carol A. Mahakian, Brett M. McFadden, Maurice J. Mintzer, Robert J. Nimmer and Diana M. Nimmer, John P. Putnam and Maricele Putnam, Robert K. Rader and Katalin A.V. Rader, Trustees of The Rader Family Trust dated September 6, 2002, Morley Rosenfield, Trustee of The Morley Rosenfield, M.D.P.C. Restated Profit Sharing Plan, W. Scott Schirmer, Trustee of The WSS 048 Trust dated September 17, 2004, Jayesh K. Shah and Vaishali Shah, Trustees of The Jayesh K. & Vaishali Shah Family Trust dated August 16, 2000, Verma Kataria Mortgage Investment L.L.C., John Does 1-10, Jane Does 1-10, and ABC Corporations 1-10 (all defendants collectively, "Alleged Insureds"), hereby alleges as follows.

PARTIES AND JURISDICTION

1. Plaintiff Title Insurer is a title insurance company authorized and doing business in the state of Arizona.

2. Defendants are individuals and entities claiming an interest in certain property commonly known as Ten Lofts, located at 7126 E. Osborn Road, Scottsdale, Arizona (the "Property") and/or claiming to have an interest in that certain title insurance policy issued by Lawyers Title No. H23-Z025296 (the "Policy").

3. This Court has jurisdiction and venue is proper in this Court.

GENERAL ALLEGATIONS

4. Upon information and belief, beginning by at least 2004, and continuing until June 2008, Scott M. Coles ("Coles"), president and CEO of Mortgages Ltd. ("MLtd."),

solicited investors for MLtd. Upon information and belief, MLtd. was a private lender that raised money to fund loans by offering "Loan Participations" to investors, which consisted of an unsecured right to receive portions of payments MLtd. expected to receive from borrowers as loans were repaid.

5. The United States Securities and Exchange Commission ("SEC") has found that MLtd.'s affiliate, Mortgages Ltd. Securities, LLC ("MLS"), "made oral and written misrepresentations to investors concerning the safety and liquidity of the investment and risks associated with the investment," and "led investors to believe that the loans MLtd. had underwritten were safer than they actually were, and investors were unaware that MLtd. was taking on larger and riskier loans."

6. The SEC also found that Radical Bunny, LLC ("RB") raised money by selling unregistered securities, and made substantial unsecured loans or investments to MLtd. totaling about $197 million.

7. The SEC further found that MLtd. knew, at least as early as January 2007, that the money it received from RB was illegally obtained through RB's sale of unregistered securities to unaccredited investors.

8. The SEC found: "MLS willfully violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities."

9. On March 9, 2006 Osborn III Partners, LLC ("Osborn") acquired title to the Property by warranty deed, recorded at instrument number 2006-0352756 in the Official Records of Maricopa County (MCR).

10. On March 27, 2006 Osborn recorded a deed of trust at instrument number 2006-0435705 MCR (the "First DOT") to secure a loan from MLtd. in the amount of $8,500,000.00 (the "Initial Indebtedness").

11. Upon information and belief, on or about April 24, 2006, Jeffrey C. Stone d/b/a Summit Builders ("Summit") and Osborn entered into an agreement pursuant to which Summit was to provide labor and materials to develop the Property.

12. Summit claims to have commenced work on the Property on July 21, 2006.

13. On August 14, 2006, Osborn executed a deed of trust encumbering its interest in the Property in favor of MLtd., as beneficiary (the "Second DOT"), to secure up to $41,400,000.00 of indebtedness (the "Second Loan"). Coles was named as trustee of the Second DOT.

14. From the proceeds of the Second Loan secured by the Second DOT, $5,623,993.61 was used to satisfy the Initial Indebtedness and First DOT.

15. On August 22, 2006 the Second DOT was recorded at instrument number 2006-1116307 MCR.

16. On August 22, 2006 Lawyers Title issued the Policy to MLtd., as insured, insuring the Second DOT. Fidelity is successor by merger to Lawyer's Title.

17. On August 22, 2006 an Assignment of Beneficial Interest Under Deed of Trust (the "DOT Assignment") was recorded, purporting to assign fractional interests, totaling approximately 44% of the beneficial interest under the Second DOT, to more than a dozen individuals and entities. Other similar documents, which purported to make hundreds of assignments of fractional interests in the Second DOT, were filed between August 2006 and July 2007.

18. On or about June 2, 2008, Coles committed suicide.

19. On or about June 20, 2008, MLtd. was placed in involuntary bankruptcy, in case number 2:08-bk-07465-RJH.

20. On July 3, 2008, Summit Builders recorded a mechanic's lien against the Property at instrument number 2008-0588970 MCR (the "Lien").

21. Upon information and belief, the loan secured by the Second DOT was never fully funded by MLtd.

22. Upon information and belief, prior to August 2006, MLtd. knew it did not have funds available to fully fund the Second Loan, and did not disclose this information to Lawyers Title.

23. Upon information and belief, as a result of MLtd.'s failure to fund the loans, Summit was not paid for work performed on the Property.

24. On December 30, 2008 Summit filed a complaint against Osborn in Maricopa County Superior Court assigned case number CV2008-033080 (the "Lawsuit") alleging breach of contract, unjust enrichment, breach of the prompt pay act, and lien foreclosure (the "Lien Claim").

25. In 2009, ML Manager, LLC ("ML Manager"), purportedly acting as assignee of MLtd. under the Policy, tendered defense of the Lien Claim to the Title Insurer.

26. On September 28, 2009, Lawyers Title sent a letter advising the Alleged Insureds that Lawyers Title had accepted defense of the claim, with a reservation of rights, and had retained Scott Malm of the law firm Gust Rosenfeld to represent the Alleged Insureds.

27. On July 27, 2010, the Alleged Insureds acquired title to the Property at a trustee's sale for a credit bid of $8,000,000.00. On August 10, 2010, a trustee's deed was recorded at instrument number 20100682112 MCR.

28. On October 25, 2010 the Alleged Insureds recorded a Special Warranty Deed conveying all their rights, title, and interest in the Property to Connell Wine Lofts LLC (the "Sale").

29. Upon information and belief, the Sale was conducted, as part of a settlement or contingent settlement (the "Settlement").

30. Upon information and belief, as part of the Settlement, Summit agreed to release the Lien. In exchange, a portion of the proceeds from the Sale were placed in an escrow account, out of which any judgment or payment in settlement of Summit's claims would be paid.

31. Upon information and belief, the Alleged Insureds later agreed to pay, or stipulated to a money judgment in the amount of, $1,750,000.00 (the "Judgment") to Summit.

32. The Title Insurer was not provided adequate and fair notice of the terms of the Settlement.

33. The Alleged Insureds purport to be insureds under the Policy.

34. The Alleged Insureds have not, however, established that they are insureds under the Policy. Specifically, they have not demonstrated that they are owners of the indebtedness secured by the Second DOT, as provided at Condition 1(a) of the Policy.

35. If the Alleged Insureds had any rights under the Policy, they forfeited coverage by breaching the insurance contract.

36. Any coverage the Alleged Insureds may have otherwise been entitled to is precluded by their failure to provide timely notice of the Lien Claim, as provided in the Policy at Condition 3.

37. The Alleged Insureds did not cooperate in their defense when they failed to timely provide the information about the Lien Claim to the Title Insurer. Accordingly, coverage is precluded as provided at Condition 4(d) of the Policy.

38. The Second Loan secured by the Second DOT was never fully funded.

39. The Lien Claim arose from MLtd.'s failure to fund the Second Loan.

40. Coverage is excluded by Exclusion 3(a) because the Lien Claim was created by MLtd.'s failure to fund the Second Loan.

41. Coverage is excluded by Exclusion 3(b) because the Lien Claim was the direct result of MLtd.'s inability to fund the Second Loan and that inability was known to MLtd., not disclosed in writing to Lawyers Title, not discoverable through review of documents recorded in the public records, and not known to Lawyers Title.

42. Coverage is excluded by Exclusion 3(e) to the extent that the Lien Claim would not have arisen if the insured claimant had paid value for the Second DOT.

43. The Settlement constituted an additional breach of Condition 4(d) and terminated any coverage to which the Alleged Insureds may have otherwise been entitled.

44. Any coverage to which the Alleged Insureds may have otherwise been entitled was lost when they breached Condition 8(c) by voluntarily assuming liability for the Judgment without the Title Insurer's consent.

45. Any obligation the Title Insurer may have had under the Policy was extinguished by the Sale as provided at Condition 2(b).

46. The Title Insurer is entitled to recoup from the Alleged Insureds fees paid to defend the Alleged Insureds in the Lawsuit.

47. This action arises out of contract. The Title Insurer is thereby entitled to an award of its reasonable attorneys' fees pursuant to A.R.S. § 12-341.01.

48. A real and justiciable controversy exists between the parties.

49. By reason of the foregoing, a declaratory judgment is necessary and proper in order to determine the rights, obligations, and liabilities of the parties.

50. The Title Insurer is entitled to a declaration that the Alleged Insureds are not insureds under the Policy.

51. The Title Insurer is entitled to a declaration that, if the Alleged Insureds were insureds under the Policy, no coverage exists.

52. The Title Insurer is entitled to a declaration that, if any of the Alleged Insureds were otherwise entitled to coverage, the coverage was lost by consummating the Sale and/or Settlement.

53. The Title Insurer is entitled to a declaration that there is no coverage for liability related to the Judgment and/or the Settlement because the Alleged Insureds voluntarily assumed the Judgment.

WHEREFORE, the Title Insurer requests that this Court enter an Order providing that:

a. The Alleged Insureds are not insureds under the terms of the Policy;

b. Coverage is precluded under the terms of the Policy;

c. Coverage for the Lien Claim is excluded because the Lien Claim was the result of MLtd.'s failure to fully fund the Second Loan;

d. Any coverage or obligation of the Title Insurer under the Policy was extinguished by the Sale and/or Settlement;

e. The Title Insurer is not obligated to pay the Judgment because it was voluntarily assumed;

f. Awarding the Title Insurer its fees and costs incurred in providing the Alleged Insureds a defense, together with interest thereon at the highest rate allowed by law until paid;

g. Awarding the Title Insurer its reasonable attorneys' fees, expenses and costs associated with this action together with interest thereon at the highest rate allowed by law until paid; and

h. Such other relief as the Court deems just and proper.

DATED this 26th day of May, 2011.

MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.

By: _____

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