

**COPY**

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October 3, 2008

**RECEIVED**

OCT 20 2008

CANTILLO, BENNETT

Ms. Amalia Rodriguez-Mendoza  
Travis County District Clerk  
P.O. Box 679003  
Austin, TX 78767-9003

Re: Cause No. D-I-GV-08-001478; *The State of Texas vs. Guardian Fidelity Title Company, Ltd., et al*; In the 419<sup>th</sup> Judicial District Court of Travis County, Texas

Dear Clerk:

Enclosed is the original and one copy of a *Motion to Lift Stay; For Order Determining Status of Third Party Claims and Funds; and for Injunctive Relief* for filing in the above referenced cause.

Please file stamp the extra copies and return them to me in the envelope provided for same.

Please feel free to contact me should you have any questions regarding same. Thank you for your attention to this matter.

Sincerely,



Robert A. Kouts

Encls.

**RECEIVED**

OCT 20 2008

CANTILLO, BENNETT

Cause No. D-1-GV-08-001487

THE STATE OF TEXAS,	§	IN THE DISTRICT COURT OF
Plaintiff	§	
	§	
vs.	§	TRAVIS COUNTY, TEXAS
	§	
GUARDIAN FIDELITY TITLE	§	
COMPANY, LTD., et al,	§	
Defendants	§	419 <sup>th</sup> JUDICIAL DISTRICT

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**MOTION TO LIFT STAY;  
FOR ORDER DETERMINING STATUS  
OF THIRD PARTY CLAIMS AND FUNDS;  
AND FOR INJUNCTIVE RELIEF**

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Movant SOUTHERN TITLE INSURANCE COMPANY will show the following in support of this Motion to Lift the Stay; for Order Determining Status of Third Party Claims and Funds; and For Injunctive Relief:

**I.**

In this insurance receivership case, an automatic stay is in effect, prohibiting certain acts set out in Tex. Ins. Code §443.008(f). In addition, certain acts are stayed pursuant to the Agreed Order Appointing Liquidator and Permanent Injunction entered on July 11, 2008. The acts stayed include acts to obtain possession of property of the insurer and acts to recover claims against the insurer that arose before commencement of this case. Tex. Ins. Code § 443.008(c). In this Motion, Movant requests that the Court: (1) lift the automatic stay to allow Movant to pursue certain liability insurance proceeds; (2) declare the status of certain funds held by or in the name of Defendants, the Receiver and/or the Special Deputy Receiver; and (3) order Defendants, the Receiver and/or the

Special Deputy Receiver to make available certain electronic data and information required by Movant in order for Movant to fulfill its duties to the Department of Insurance and to the public.

## II.

### **Factual Background**

Movant is a title insurance underwriter, domiciled in Virginia and qualified to do and doing business in the State of Texas through agents. Defendants are title insurance agents licensed in Texas. True copies of Issuing Agency Contracts (the "Agency Agreements") between Movant and Defendants and their affiliates referenced in such Agreements are attached as Exhibits "A" through "E" respectively. In accordance with the Agency Agreements, Defendants acted as title insurance agents on behalf of Plaintiff for the purpose of transacting the business of title insurance in the State of Texas. Defendants' activities included processing applications for title insurance; closing real estate transactions; acting as escrow agents for escrowed funds; collecting fees from clients for closing and escrow services; and collecting title insurance premiums from clients on behalf of Plaintiff. Movant acted as insurance underwriter for parties to real estate transactions closed by Defendants, including the insuring of title to the various properties involved ("title policies"), and including the insuring of Defendants' activities related to closing such transactions ("insured closing letters"). Defendants contractually agreed to keep safely in trust accounts separate from Defendants' personal or operating accounts all funds received by Defendants from any source in connection with transactions involving Movant's title insurance, and to disburse such funds only for the purposes for which they were entrusted.

### III.

#### Claims Paid by Movant

As of the filing of this Motion, Movant has paid three claims stemming from the negligence of Defendants:

Roqumore: On April 12, 2007, Movant paid Claim No. 2006-168 to Mary Roqumore, discharging claims of Mary Roqumore based on a Defendant's negligence in disbursing funds from a real estate transaction which failed to close.

Berringer: In or around December, 2006, Movant paid a claim on behalf of Stephen Berringer in the amount of \$57,868.00 to discharge claims resulting from negligence on the part of a Defendant in connection with the examination of title in a real estate transaction.

Khan: In or around August, 2008, Movant paid a claim on behalf of Mohammad Khan's lender in the amount of \$ 2,898.79 to discharge a claim of the lender resulting from negligence on the part of Defendant in connection with examination of title in a real estate transaction.

At all relevant times, Defendants maintained errors and omissions insurance, insuring Defendants against claims based on Defendants' negligence in the conduct of their business operations. Movants are the parties for whom the proceeds of such insurance are intended, and the proceeds therefore are not property of the insurer or property of the estate.<sup>1</sup> In addition, having paid claims resulting from Defendants' negligence, Movant is subrogated to the rights of the above claimants against Defendants and their insurance proceeds, and Movant is further subrogated to the rights of Defendants themselves against their errors and omissions insurer. Movant requests that

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<sup>1</sup> Although there do not appear to be any reported cases directly on point, in analogous circumstances, the federal courts consistently hold that the proceeds of a liability insurance policy, being intended for the benefit of the injured party, are not property of a bankruptcy estate. The injured party is therefore entitled to have the automatic stay lifted to proceed on its claim against the debtor in order to recover the liability insurance proceeds. See, e.g., Houston v. Edgeworth, M.D., 993 F.2d 51 (5<sup>th</sup> Cir. 1993).

the Court lift the stay in this case in order to allow Movant to proceed with its claims against Defendants in order to recover proceeds from Defendants' errors and omissions liability insurance carrier.

#### IV.

##### **Escrow Funds: Sanchez**

During and in the usual course of Movant's and Defendants' business dealings, with respect to a particular title order, and in connection with Defendant Guardian Fidelity Title Company, Ltd. transaction "GF No. 2005042475," Movant issued an Insured Closing Service Letter, whereby Movant assumed liability for losses suffered by a lender who made a loan to Diana Marie Sanchez (an employee of Defendants) and her spouse. In the course of the transaction, and before closing on the transaction was finalized, Defendants discovered that the employee had embezzled money from Defendants in one or more separate transactions. Defendants accepted in excess of \$200,000.00 in funding from the employee's new lender for purposes of closing on the refinance transaction, but then, due to the discovered embezzlement, Defendants refused to disburse the funds to satisfy the first lienholder on the property securing the loan, and further refused to return the funds to the new lender. As a result, Movant was forced to pay \$220,000.00 to General Motors Acceptance Corporation ("GMAC") in accordance with the Insured Closing Services Letter issued in connection with the transaction. Movant is subrogated to the rights of GMAC in the escrowed funds, and requests that the Court enter an Order determining that any such funds are not property of the insurer, are not property of the estate, and are not property from which costs of administration or

claims may be paid. Movant has been unable to determine the amount of money currently held in Defendants' escrow accounts as of the filing of this Motion.

V.

**Request for Injunctive and Mandatory Injunctive Relief: Soft Pro Data**

As set out above, Movant is underwriting insurer for countless policies of title insurance and insured closing letters issued to property owners, former property owners and lenders over an extended and significant period of time. Defendants, the Receiver and the Special Deputy Receiver are in possession of or have subject to their control, electronic data<sup>2</sup> containing information urgently needed by Movant in order to respond to mounting inquiries by members of the public and lenders relating to the issued title insurance policies and insured closing letters. Movant has made efforts to gain access to such information from Defendants and the Receiver, but has not been able to access much of the information needed. Movant is under obligation with the Texas Department of Insurance to fulfill its duties as insurer in order to protect the public, but Movant is unable to adequately do so without the data and information it has been unable to obtain from Defendants and the Receiver. Movant requests that this Court enter an Order compelling Defendants, the Receiver and the Special Deputy Receiver to forthwith take whatever steps are necessary to make such data available to Movant, whether it be by online access, imaged server hard drives or otherwise.

WHEREFORE, Movant requests:

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<sup>2</sup> The data is in stored electronically in "Soft Pro" software files.

1. That the automatic stay be lifted to allow Movant to pursue its claims described in Paragraph III against Defendants for the purpose of recovering any errors and omissions liability insurance proceeds available based upon such claims;

2. That Defendants, the Receiver and the Special Deputy Receiver be ordered to forward all such claims to Defendants' errors and omissions insurance carrier;

3. That the Court declare Movant's interest in any funds, as appropriate, held by or in the name of Defendants, the Receiver and the Special Deputy Receiver based on the above described "Sanchez" transaction or otherwise;

4. That Defendants, the Receiver and the Special Deputy Receiver be ordered to provide prompt access to the Soft Pro data as set out above; and

5. Such other and further relief to which Movant may be entitled.

Respectfully submitted,

SCHEINTHAL & KOUTS, L.L.P.

by: 

TB#: 11694560

Federal ID #11070

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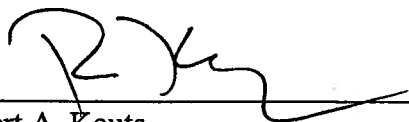
(713) 871-8040

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CERTIFICATE OF SERVICE

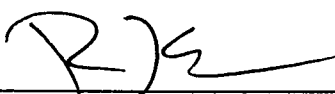
I certify that a true copy of this document was served on the following person(s) on the 16<sup>th</sup> day October, 2008 in accordance with Rule 21a, Texas Rules of Civil

Procedure:

  
\_\_\_\_\_  
Robert A. Kouts

CERTIFICATE OF CONFERENCE

I certify that I have contacted counsel for the Special Deputy Receiver and we have discussed this matter, but that as of the filing of this Motion, we have not been able to reach agreement on the relief requested.

  
\_\_\_\_\_  
Robert A. Kouts

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