

NO. D-1-GV-08-001478

STATE OF TEXAS,	§	IN THE DISTRICT COURT OF
Plaintiff	§	
	§	
v.	§	
	§	
Guardian Fidelity Title Company, Ltd.,	§	TRAVIS COUNTY, TEXAS
Guardian Fidelity Title Company CLR, LLP,	§	
Guardian Fidelity Title Company NWR, LLP,	§	
Guardian Fidelity Title Company KTB, Ltd.,	§	
Guardian Fidelity Title Company SB, Ltd.,	§	
Guardian Fidelity Title Company DFT, Ltd.,	§	
Defendants	§	419th JUDICIAL DISTRICT

**SPECIAL DEPUTY RECEIVER’S APPLICATION FOR AUTHORITY TO
INTERPLEAD FUNDS, DETERMINE CLAIMS AND BE DISCHARGED
[DBSI/GRAND PARKWAY/TENANT-IN-COMMON OWNERS
OF PARK PLAZA RETAIN CENTER]**

TO THE HONORABLE JUDGE OF SAID COURT:

CANTILO & BENNETT, L.L.P., solely in its capacity as the Special Deputy Receiver of Guardian Fidelity Title Company, Ltd., Guardian Fidelity Title Company CLR, LLP, Guardian Fidelity Title Company NWR, LLP, Guardian Fidelity Title Company KTB, Ltd., Guardian Fidelity Title Company SB, Ltd., Guardian Fidelity Title Company DFT, Ltd. (collectively, “Guardian”), files its Application for Authority to Interplead Funds, Determine Claims and Be Discharged [DBSI /Grand Parkway/Tenant-in-Common Owners of Park Plaza Retail Center] (the “Application”).

I. INTRODUCTION

1.1 The SDR holds funds totaling \$114,677.09 in an escrow account to which the estate has no interest but is sought by several different, competing parties. As more fully described below, the SDR is subject to conflicting claims to property of the estate in which the estate has no beneficial interest. In order to provide for the orderly and cost effective administration of the estate, the SDR requests that the Court authorize it to name all known claimants to the funds, as identified herein, to

interplead the funds, to sever out the claims to the funds into a separate lawsuit, to declare the classification of each claim and, thereafter, for the Court to rule that the SDR has completed the distribution of the funds in question, that the SDR has completed the adjudication of the proofs of claim in question, and to discharge the Receiver, the SDR and the estate from any liability. The application is filed pursuant to Texas Insurance Code section 443.154(y), Texas Rules of Civil Procedure 43, and to the procedure established by this Court's *Order Granting Special Deputy Receiver's Application to Provide Notice of Liquidation, Set Claims Filing Deadline, Resolve Escrow Accounts, and Establish a Claims Processing Procedure*.

II. JURISDICTION AND VENUE

2.1 This Court has jurisdiction over the subject matter of this Application and of the parties affected herein pursuant to Texas Insurance Code section 443.005.

2.2 The Court has exclusive jurisdiction over the estate pursuant to Texas Insurance Code section 443.005(c)(i), and personal jurisdiction over all parties affected herein because this is a civil proceeding arising under and related to a delinquency proceeding under Chapter 443 of the Code, the transactions and occurrences which form the basis for the Application occurred, in whole or in part, in this state, because some of the parties affected herein reside and/or conduct business in this state that is directly related to the subject matter of this proceeding, and because the parties affected herein fall under the Court's statutory personal jurisdiction set out in Texas Insurance Code section 443.005(d) and Texas Civil Practice and Remedies Code Chapter 17. The exercise of jurisdiction over any non-resident parties affected herein comport to customary standards of fair play and substantial justice and complies with the protections of the Constitutions of the United States of

America and the State of Texas. Each of the named respondents have appeared in this delinquency

proceeding by filing one or more proofs of claim and by making demand on the SDR for the turnover of property in the possession of the SDR.

2.3 Travis County is the mandatory, sole, and exclusive venue for this proceeding. TEX. INS. CODE § 443.005.

2.4 The Special Deputy Receiver is authorized to file this Application pursuant to Texas Insurance Code section 443.151, which provides that the SDR is to conduct the business of the estate. The subject matter of this Application has not been referred to the Special Master appointed in this proceeding in accordance with Paragraph III of the *Order of Reference to Master*.

III. THE PARTIES

3.1 Applicant is the duly appointed Special Deputy Receiver designated by the Commissioner of Insurance in his capacity as Receiver of Guardian Fidelity Title Company, Ltd., Guardian Fidelity Title Company CLR, LLP, Guardian Fidelity Title Company NWR, LLP, Guardian Fidelity Title Company KTB, Ltd., Guardian Fidelity Title Company SB, Ltd., and Guardian Fidelity Title Company DFT, Ltd. The SDR is duly authorized to file this application.

3.2 DBSI Park Plaza Retail Center LLC (“DBSI”), is a Delaware Limited Liability Company and respondent to this Application and may be served pursuant to this Court’s *Order Granting SDR’s Application to Use Electronic Service of Pleadings and Notices* entered on November 24, 2008, by mailing notice to its Chief Legal Counsel, Jeffrey A. Warr, at 12426 West Explorer Drive, Suite 100; Boise, Idaho 83713-1572, or by electronic delivery to jwarr@dbsi.com. DBSI has appeared in this delinquency proceeding by filing Proof of Claim No. GUARD0116, and by making demand on the SDR for property of the estate.

3.3 Grand Parkway Katy Village, L.P. (“ Grand Parkway”) is a respondent to this SPECIAL DEPUTY RECEIVER’S APPLICATION FOR AUTHORITY TO INTERPLEAD FUNDS, DETERMINE CLAIMS AND BE DISCHARGED [DBSI/GRAND PARKWAY/ TENANT-IN-COMMON OWNERS OF PARK PLAZA RETAIL CENTER]

Application and may be served pursuant to this Court's *Order Granting SDR's Application to Use Electronic Service of Pleadings and Notices* entered on November 24, 2008, by mailing notice to its Legal Counsel, Andrew M. Caplan, at Weycer, Kaplan, Pulaski & Zuber, P.C., 1400 Summit Tower 11 Greenway Plaza, Houston, Texas 77046, or by electronic delivery to acaplan@wkpz.com. Grand Parkway has appeared in this delinquency proceeding by filing Proof of Claim No. GUARD0125, and by making demand on the SDR for property of the estate.

3.4 M. Bateman-Park Plaza Retail Center, LLC, Bovee-Park Plaza Retail Center, LLC, Clemens-Park Plaza Retail Center, LLC, Dalaya-Park Plaza Retail Center, LLC, Davies-Park Plaza Retail Center, LLC, Gardner-Park Plaza Retail Center, LLC, Herris-Park Plaza Retail Center, LLC, Jancen-Park Plaza Retail Center, LLC, Kelly-Park Plaza Retail Center, LLC, Mansfield-Park Plaza Retail Center, LLC, May-Park Plaza Retail Center, LLC, Minor-Park Plaza Retail Center, LLC, R. Morofsky-Park Plaza Retail Center, LLC, Morofsky-Park Plaza Retail Center, LLC, Parker-Park Plaza Retail Center, LLC, Segbarth-Park Plaza Retail Center, LLC, J & D-Park Plaza Retail Center, LLC, Shopbell-Park Plaza Retail Center, LLC, Tse-Park Plaza Retail Center, LLC, NRV-Park Plaza Retail Center, LLC, Webb-Park Plaza Retail Center, LLC, D. Webster-Park Plaza Retail Center, LLC, and Wildeman-Park Plaza Retail Center, LLC (collectively referred to herein as the "Tenant-in-Common Owners of Park Plaza Retail Center") are respondents to this Application and may be served pursuant to this Court's *Order Granting SDR's Application to Use Electronic Service of Pleadings and Notices* entered on November 24, 2008, by mailing notice to their Legal Counsel, Alan Halbrook at Sneed, Vine & Perry, P.C., 901 Congress Avenue, Austin, Texas 78701, or by electronic delivery to ahalbrook@sneedvine.com. Tenant-in-Common Owners of Park Plaza Retail

Center have appeared in this delinquency proceeding by filing Proof of Claim No. GUARD0128, and

by making demand on the SDR for property of the estate.

3.5 The SDR reserves the right to amend this Application to name additional respondents or to drop named respondents before a final order is entered on this Application.

IV. CONDITIONS PRECEDENT

4.1 All conditions precedent have occurred or been complied with; alternatively, conditions precedent have been waived.

V. FACTUAL BACKGROUND

5.1 Guardian was placed in receivership in this proceeding on July 11, 2008. The Court entered an *Agreed Order Appointing Liquidator and Permanent Injunction* (“Receivership Order”) on July 11, 2008, appointing the Commissioner of Insurance for the State of Texas as Liquidator and Permanent Receiver (“Receiver”). The Receiver designated CANTILO & BENNETT, L.L.P., as SDR of Guardian through a *Notice of Designation of Special Deputy Receiver* filed on October 2, 2008, and made effective as of September 15, 2008.

5.2 Guardian, as defined herein, consists of six entities in receivership, all of which operated as title insurance agents, as that term is defined in Texas Insurance Code section 2501.003(13), with offices in Webster, Houston, Spring, Katy, Friendswood, and Sugar Land, Texas. Guardian acted as an agent for several solvent title insurance companies; Southern Title Insurance Company (“Southern”) wrote the predominant share of these policies. The relevant title insurance companies continue to process and pay claims on title insurance policies issued by Guardian. As title insurance agents, the Guardian entities were not required to and did not maintain reserves or reinsurance. Initial administration of the receivership estate was financed through an operating

account, which has been depleted. Further administration of the estate has been financed by loans by

the Texas Department of Insurance from the Abandoned Property Fund in accordance with Texas Insurance Code section 443.304(c) and by funds paid to the estate pursuant to a Consent Order with Southern.

5.3 Guardian, as a title agent, maintained a number of escrow accounts (the “Escrow Accounts”). The SDR believes that the Escrow Accounts are intact and correspond to an audit conducted by the Texas Department of Insurance prior to receivership and Guardian’s financial records. The SDR has confirmed the existence of the funds in the Escrow Accounts and safeguarded the accounts by notifying the financial institutions of the liquidation and freezing all such assets.

5.4 On July 6, 2009, this Court entered its *Order Granting the Special Deputy Receiver’s Application to Provide Notice of Liquidation, Set Claims Filing Deadline, Resolve Escrow Accounts and Establish a Claims Processing Procedure* (the “POC Order”) establishing August 31, 2009, as the deadline to file all claims, including Escrow Account claims, and a deadline of September 30, 2009, for filing any late claims and for all contingent or unliquidated claims under Texas Insurance Code section 443.255(c) to become final.

5.5 The POC Order required parties claiming funds held in Guardian’s Escrow Accounts to file claims with the SDR. On the date that the POC Order was entered, the SDR held approximately 650 escrow accounts, which ranged from \$.01 (one cent) to over \$1,000,000. Over 2000 notices were sent to potential claimants to Guardian’s escrow accounts. The Guardian estate lacked sufficient financial resources and business records to make any independent determination regarding the actual ownership of or right to possess the Escrow Funds. Accordingly, the SDR was authorized to require claimants to the escrow funds to file a claim establishing an entitlement to

funds held in an Escrow Account and further authority to process claims to the escrow account to efficiently conclude the administration of the receivership estate. The POC Order authorized the SDR to process escrow accounts claims pursuant to the provisions governing the processing of unsecured claims.

5.6 As of the date of this Application, the SDR has not identified any Escrow Account shortages. Guardian, a title insurance agent, was declared insolvent pursuant to Texas Insurance Code section 443.057(2). However, it has not been designated an impaired agent pursuant to Texas Title Insurance Guaranty Act section 2602.003(5)(B), and no covered claims have been identified pursuant to section 2602.252.

5.7 At the time of its appointment, the SDR took possession of a number of guaranty files (hereinafter referred to as “GF Files”) that contain the documents relating to real estate transactions for which Guardian acted as escrow agent. Among the GF Files was GF2006114081 relating to a real estate transaction by and among Respondents DBSI and Grand Parkway. As of the date of receivership, \$114,677.09 was held in a non-interest bearing escrow account for this transaction (hereinafter referred to as the “GF2006114081 Escrow Account”).

5.8 The POC Order expressly required all parties who claimed an interest to any asset held in escrow by the SDR to file a claim by the deadlines set out in the order. The POC Order authorized the SDR to interplead any funds subject to conflicting claims into the registry of the Receivership Court.

5.9 Respondent DBSI timely filed POC number GUARD116, in connection with GF2006114081; respondent Grand Parkway timely filed POC number GUARD0125, in connection

with GF2006114081; and respondent Tenant-in-Common Owners of Park Plaza Retail Center timely filed POC number GUARD0128, in connection with GF2006114081. POCs GUARD116, GUARD0125, and GUARD0128 all make escrow claims and assert ownership and right to possess the funds held in the GF2006114081 Escrow Account.

5.10 Upon the SDR's determination that there were conflicting claims to the funds, the SDR notified each claimant and requested that they agree as to the disposition of the competing claims to the money. No settlement was presented to the SDR and DBSI, Grand Parkway, Tenant-in-Common Owners of Park Plaza Retail Center, were then notified that an Interpleader would be filed if no agreement were reached.

5.11 As of the date of filing this Application, none of the respondents has notified the SDR that an agreement between them has been achieved or that any of their claims was otherwise withdrawn.

5.12 The SDR is unable to determine who is rightfully entitled to possess the funds held in the GF2006114081 Escrow Account . The estate has no interest in the money, other than to recover the estate's expenses arising out of the need to safeguard the funds and file this Interpleader. Although the funds are "property of the estate" as defined in Texas Insurance Code section 443.004(20), they are not "general assets" as defined in section 443.004(9). The estate is cash poor and lacks the resources to make a determination regarding ownership of the funds and any such determination does not benefit the other creditors of the estate.

VI. RELIEF REQUESTED BY THE SDR

6.1 This Court's *Order Granting Special Deputy Receiver's Application to Provide*

Notice of Liquidation, Set Claims Filing Deadline, Resolve Escrow Accounts, and Establish a
SPECIAL DEPUTY RECEIVER'S APPLICATION FOR AUTHORITY TO INTERPLEAD
FUNDS, DETERMINE CLAIMS AND BE DISCHARGED [DBSI/GRAND PARKWAY/
TENANT-IN-COMMON OWNERS OF PARK PLAZA RETAIL CENTER]

Claims Processing Procedure authorizes the SDR to interplead escrow funds when there are conflicting claims to the funds. In order to fulfill the SDR's obligations under Sub-chapter F of the *Insurer Receivership Act*, the SDR files this Application.

6.2 The SDR requests that the Court authorize the interpleader of the funds held in the GF2006114081 Escrow Account and order that the SDR has fulfilled its obligations to adjudicate POC Nos. GUARD116, GUARD125, and GUARD0128. To the extent that POC Nos. GUARD116, GUARD125, and GUARD0128 assert non-escrow claims against the estate, the SDR moves the Court to find that the claims have a priority of below Class 1 of Texas Insurance Code section 443.301 and that the SDR is not required to further adjudicate such claims. The SDR further moves the Court to declare that the Receiver, the SDR, and the Receivership estate of Guardian are released from any and all liability, including but not limited to any liability related to or arising from the funds held in the GF2006114081 Escrow Account and POC Nos. GUARD0116, GUARD0125, and GUARD0128. The SDR further moves the Court to sever, from this proceeding, all claims by DBSI, Grand Parkway, and Tenant-in-Common Owners of Park Plaza Retail Center to the interplead funds held in the GF2006114081 Escrow Account into a separate lawsuit.

6.3 Rule 43 of the Texas Rule of Civil Procedure provides:

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in any other rules.

6.4 Upon entry of the order authorizing the interpleader and discharging the Receiver, the SDR and the estate, the SDR rejects any obligations under any contract relating to GF2006114081 and Respondents pursuant to Texas Insurance Code section 443.013(a).

6.5 The SDR expressly asserts its right to and prays for the recovery of reasonable and necessary attorneys fees made necessary by the need to file this Interpleading due to the conflicting demands to the funds held in the GF2006114081 Escrow Account. The SDR further expressly asserts its right to “recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of the property to the extent of any benefit to the holder of such claim” pursuant to Texas Insurance Code section 443.260 and prays for such relief.

6.6 In addition to granting the SDR’s interpleader, the SDR further moves the Court to declare that the Respondents’ POCs are denied as Escrow Claims and are classified as having a priority below class 1, without prejudice to the rights of Respondents to determine their respective rights to the interplead funds.

6.7 Nothing in this Application or any related proceeding or filing shall affect, in any way, the Receiver’s or the SDR’s immunities from suit and shall not give rise to any right to sue or create any causes of action against the Receiver or the SDR. The relief sought herein shall not affect, in any way, the Receiver’s or the SDR’s immunities from suit and shall not give rise to any right to sue or create any causes of action against the Receiver or the SDR. The automatic stay and the provisions of the Receivership Order remain in effect unless expressly modified herein. Neither this Application, nor any relief granted thereto, amends, modifies or in any manner changes or effects the terms and provisions of the POC Order as it relates to any POC filed by any Respondent

except as expressly set out herein.

VII. NOTICE

7.1 The SDR has served this application to the Respondents DBSI, Grand Parkway, and Tenant-in-Common Owners of Park Plaza Retail Center, who are all known claimants to the Funds, to the Internal Revenue Service and all known parties at interest by regular mail, e-mail, and/or overnight delivery.

VIII. NOTICE OF ELECTRONIC SERVICE REQUIREMENT

8.1 Pursuant to the *Order Granting SDR's Application to Use Electronic Service of Pleadings and Notices* entered on November 24, 2008, all pleadings filed in response to this Application or in regards to this estate shall be served by e-mail on the undersigned counsel and all parties shown in the attached Certificate of Service.

IX. OFFER OF PROOF AND VERIFICATION

9.1 This Application has been verified as required by the Texas Rules of Civil Procedure by the affidavit and certification pursuant to Texas Insurance Code section 443.017(b) by Michael Marcin, Partner in CANTILO & BENNETT, L.L.P., solely in its capacity as the Special Deputy Receiver of Guardian Fidelity Title Company, Ltd., Guardian Fidelity Title Company CLR, LLP, Guardian Fidelity Title Company NWR, LLP, Guardian Fidelity Title Company KTB, Ltd., Guardian Fidelity Title Company SB, Ltd., and Guardian Fidelity Title Company DFT, Ltd.

PRAYER

WHEREFORE, PREMISES CONSIDERED, CANTILO & BENNETT, L.L.P., solely in its capacity as the Special Deputy Receiver of Guardian Fidelity Title Company, Ltd., Guardian Fidelity

Title Company CLR, LLP, Guardian Fidelity Title Company NWR, LLP, Guardian Fidelity Title Company KTB, Ltd., Guardian Fidelity Title Company SB, Ltd., and Guardian Fidelity Title Company DFT, Ltd., respectfully requests that this Court:

1. Grant this Application;
2. Authorize the SDR to interplead the funds held in the GF2006114081 Escrow Account to the Registry of the Court;
3. Award the SDR all of its costs and expenses incurred arising from the Interpleader and for securing the GF2006114081 Escrow Account, including but not limited to the recovery of reasonable and necessary attorneys fees made necessary by the conflicting demands to the funds held in the GF2006114081 Escrow Account;
4. Confirm the SDR's rejection of any obligations under any contract relating to GF2006114081 and Respondents pursuant to Texas Insurance Code section 443.013(a);
5. Discharge and release the Receiver, the SDR, and the receivership estate from any and all liability regarding the funds held in the GF2006114081 Escrow Account;
6. Declare that DBSI POC number GUARD116 is denied as an Escrow Claim and is classified as having a priority below class 1, with prejudice to any right to object to the determination and without further order of the Receivership Court;
7. Declare that Grand Parkway POC number GUARD125 is denied as an Escrow Claim and is classified as having a priority below class 1, with prejudice to any right to object to the determination and without further order of the Receivership Court;
8. Declare that Tenant-in-Common Owners of Park Plaza Retail Center POC number

GUARD0128 is denied as an Escrow Claim and is classified as having a priority below class 1, with prejudice to any right to object to the determination and without further order of the Receivership Court

9. Sever all claims by DBSI, Grand Parkway, and Tenant-in-Common Owners of Park Plaza Retail Center to the funds held in the GF2006114081 Escrow Account into a separate lawsuit; and
10. Grant the SDR such other and further relief to which it may be justly entitled.

Respectfully submitted,

By: Christopher Fuller
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Solely in its capacity as the
Special Deputy Receiver of
Guardian Fidelity Title Co., Ltd., *et al.*

CERTIFICATE OF SERVICE

I certify that on January 14, 2011, a true and correct copy of this Application was served pursuant to the Order of Reference, the Court's order on e-service, the Texas Rules of Civil Procedure and Texas Insurance Code Annotated section 443.007(d) on the following by electronic mail, except as specifically noted.

Christopher Fuller
Christopher Fuller

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mpmarcin@cb-firm.com

APPLICANT'S NOTICE OF HEARING

The SDR's Application for Authority to Interplead, Determine Claims and Be Discharged [DBSI /Grand Parkway/Tenants in Common] is set for hearing in Travis County District Court on February 3, 2011 at 9:00 a.m.

Christopher Fuller
Christopher Fuller

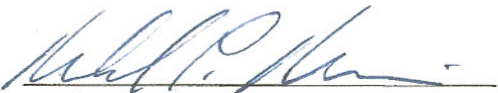
**SPECIAL DEPUTY RECEIVER'S CERTIFICATION PURSUANT TO TEXAS
INSURANCE CODE ANNOTATED SECTION 443.017(b)
AFFIDAVIT OF MICHAEL P. MARCIN**

State of Texas

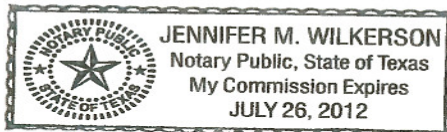
County of Travis


BEFORE ME, the undersigned authority appeared Michael P. Marcin, who after being by me duly sworn, stated the following under oath:

1. My name is Michael P. Marcin. I am competent to make this affidavit. The statements of fact set forth herein are true and correct, and are within my personal knowledge.
2. I am a partner in CANTILO & BENNETT, L.L.P., Special Deputy Receiver of Guardian Fidelity Title Company, Ltd., et al.¹ (the "SDR" and "Guardian" respectively). I am duly authorized to make this Certification and Affidavit on behalf of the SDR.
3. I have read the statements contained in the attached Pleading and they are true and correct based on my personal knowledge, my review of estate records, and my consultation with my staff and sub-contractors.
4. Further affiant sayeth not.

By: 
Michael P. Marcin

SUBSCRIBED AND SWORN TO BEFORE ME on December 17, 2010, by Michael P. Marcin, on behalf of CANTILO & BENNETT, L.L.P., Special Deputy Receiver of Guardian Title, LLC et al. in receivership.




Notary Public

¹ Guardian Fidelity Title Company, Ltd., Guardian Fidelity Title CLR, LLP, Guardian Fidelity Title NWR, LLP, Guardian Fidelity Title KTB, Ltd., Guardian Fidelity Title SB Ltd., and Guardian Fidelity Title DFT, Ltd., each and collectively in liquidation.