

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAR 18 2010

INDICATE FULL CAPTION:

KENNEDY FUNDING, INC. a New Jersey corporation,

Plaintiff,

vs.

ONECAP PARTNERS MM, INC. a Nevada corporation;
VINCENT W. HESSER, an individual;

No. 55654

**DOCKETING STATEMENT
CIVIL APPEALS**

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

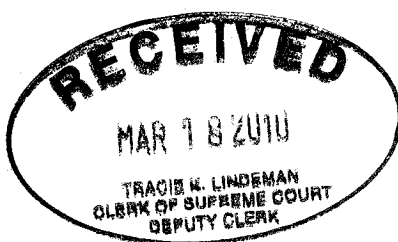
GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to attach requested documents, fill out the statement completely, or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See *KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.



1. Judicial District 8th Department XI
County Clark Judge Elizabeth Gonzalez
District Ct. Case No. A582746

2. Attorney filing this docketing statement:

Attorney Harold P. Gewerter, Esq. Telephone 702-382-1714
Firm Harold P. Gewerter, Esq.

Address

2705 Airport Drive
N. Las Vegas, NV 89032

Client(s) Onecap Partners MM, Inc. and Vincent W. Hesser

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondent(s):

Attorney Richard F. Holley, Esq. Telephone 702-791-1912
Firm Santoro, Driggs, Walch, Kearney, Holley & Thompson

Address

400 South Fourth Street, Third Floor
Las Vegas, NV 89101

Client(s) Kennedy Funding, Inc.

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☒ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination

- ☐ Dismissal:
 - ☐ Lack of jurisdiction
 - ☐ Failure to state a claim
 - ☐ Failure to prosecute
 - ☐ Other (specify): _____
- ☐ Divorce decree:
 - ☐ Original ☐ Modification
- ☐ Other disposition (specify): _____

5. Does this appeal raise issues concerning any of the following?

☐ Child custody

☐ Venue

☐ Adoption

☐ Termination of parental rights

☐ Grant/Denial of injunction or TRO

☐ Juvenile matters

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None.

8. Nature of the action. Briefly describe the nature of the action, including a list of the causes of action pleaded, and the result below:

Plaintiff filed a Complaint alleging Breach of Contract relating to alleged guarantees of a certain alleged Note.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether the District Court erred in granting Summary Judgment while material facts remained in dispute?

Whether the District Court erred in granting Summary Judgment in violation of Nevada's One Action rule?

Whether the District Court erred in granting Summary Judgment when no deficiency on the underlying deed of trust was ever established?

Whether the property, the subject of the deed of trust, is no longer subject to the deed of trust and belongs to the Defendants because the District Court erred in granting Summary Judgment under the Promissory Note?

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised:

None.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. **Other issues.** Does this appeal involve any of the following issues?

- ☐ Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))
- ☐ An issue arising under the United States and/or Nevada Constitutions
- ☐ A substantial issue of first impression
- ☐ An issue of public policy
- ☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

If so, explain:

13. **Trial.** If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? _____

14. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

15. **Date of entry of written judgment or order appeal from** February 18, 2010.
Attach a copy. If more than one judgment or order is appealed from, attach copies of each judgment or order from which this appeal is taken.

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. **Date written notice of entry of judgment or order served** February 23, 2010.
Attach a copy, including proof of service, for each order or judgment appealed from.

Was service by:

- ☐ Delivery
- ☒ Mail

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59),

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date served _____ By delivery ☐ or by mail ☐ Date of filing _____
☐ NRCP 52(b) Date served _____ By delivery ☐ or by mail ☐ Date of filing _____
☐ NRCP 59 Date served _____ By delivery ☐ or by mail ☐ Date of filing _____

Attach copies of all post-trial tolling motions.

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration do not toll the time for filing a notice of appeal.

(b) Date of entry of written order resolving tolling motion _____.

Attach a copy.

(c) Date written notice of entry of order resolving tolling motion served _____.

Attach a copy, including proof of service.

Was service by:

☐ Delivery

☐ Mail

18. Date notice of appeal filed March 9, 2010.

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a), NRS 155.190, or other NRAP 4(a).

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

- ☒ NRAP 3A(b)(1) ☐ NRS 155.190 (specify subsection) _____
☐ NRAP 3A(b)(2) ☐ NRS 38.205 (specify subsection) _____
☐ NRAP 3A(b)(3) ☐ NRS 703.376 _____
☐ Other (specify) _____

Explain how each authority provides a basis for appeal from the judgment or order:

In the instant case a final Judgment has been entered in the Court in which an action was commenced.

COMPLETE THE FOLLOWING SECTION ONLY IF MORE THAN ONE CLAIM FOR RELIEF WAS PRESENTED IN THE ACTION (WHETHER AS A CLAIM, COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM) OR IF MULTIPLE PARTIES WERE INVOLVED IN THE ACTION.

Attach separate sheets as necessary.

21. List all parties involved in the action in the district court:

KENNEDY FUNDING, INC., ONECAP PARTNERS MM, INC., VINCENT W. HESSER.

If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims, and the trial court's disposition of each claim, and how each claim was resolved (i.e., order, judgment, stipulation), and the date of disposition of each claim. Attach a copy of each disposition.

CLAIMS AGAINST THE DEFENDANTS FOR BREACH OF CONTRACT OF ALLEGED GUARANTEES OF ALLEGED NOTE.

23. Attach copies of the last-filed version of all complaints, counterclaims, and/or cross-claims filed in the district court.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action below?

- ☒ Yes
☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

If "Yes", attach a copy of the certification or order, including any notice of entry and proof of service.

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

VINCENT W. HESSER AND ONECAP PA

Name of appellant

3-9-10

Date

Clark County, NV
State and county where signed

HAROLD P. GEWERTER, ESQ., LTD.

Name of counsel of record

[Signature]
Signature of counsel of record

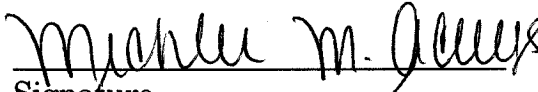
CERTIFICATE OF SERVICE

I certify that on the ~~9th~~ 15th day of MARCH, 2010, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Richard F. Holley, Esq.
Ogonna M. Atamoh, Esq.
Santoro, Driggs, Walch,
Kearney, Holley & Thompson
400 South Fourth Street, Third Floor
Las Vegas, NV 89101
Fax: (702) 791-1912

Dated this ~~9th~~ 15th day of MARCH, 2010.


Signature

1 **NEOJ**
2 RICHARD F. HOLLEY, ESQ.
3 Nevada Bar No. 3077
4 OGONNA M. ATAMOH, ESQ.
5 Nevada Bar No. 7589
6 SANTORO, DRIGGS, WALCH,
7 KEARNEY, HOLLEY & THOMPSON
8 400 South Fourth Street, Third Floor
9 Las Vegas, Nevada 89101
10 Telephone: 702/791-0308
11 Facsimile: 702/791-1912

12 *Attorney for Kennedy Funding, Inc.*

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 KENNEDY FUNDING, INC., a New Jersey
16 corporation,

17 Plaintiff,

18 v.

19 ONECAP PARTNERS MM, INC, a Nevada
20 corporation; VINCENT W. HESSER, an
21 individual; DOE INDIVIDUALS I through X;
22 and ROE CORPORATIONS I through X,

23 Defendants.

Case No: A582746
Dept. No.: XI

NOTICE OF ENTRY OF JUDGMENT

24 YOU, and each of you, will please take notice that a JUDGMENT AGAINST ONECAP
25 PARTNERS MM, INC. AND VINCENT W. HESSER in the above-entitled matter was filed and
26 entered by the Clerk of the above-entitled Court on the 18th day of February, 2010, a copy of
27 which is attached hereto

28 Dated this 22nd day of February, 2010.

**SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON**

RICHARD F. HOLLEY, ESQ. (NVSB #3077)
OGONNA M. ATAMOH, ESQ. (NVSB #7589)
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Kennedy Funding, Inc.

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JUDG

RICHARD F. HOLLEY, ESQ.

Nevada Bar No. 3077

OGONNA M. ATAMOH, ESQ.

Nevada Bar No. 7589

SANTORO, DRIGGS, WALCH,

KEARNEY, HOLLEY & THOMPSON

400 South Fourth Street, Third Floor

Las Vegas, Nevada 89101

Telephone: 702/791-0308

Facsimile: 702/791-1912

Allen D. Lamm

CLERK OF THE COURT

Attorneys for Kennedy Funding, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

KENNEDY FUNDING, INC., a New Jersey corporation,

Plaintiff,

V.

ONECAP PARTNERS MM, INC, a Nevada corporation; VINCENT W. HESSER, an individual; DOE INDIVIDUALS I through X; and ROE CORPORATIONS I through X,

Defendants.

Case No.: A582746

Dept. No.: XI

JUDGMENT AGAINST ONECAP PARTNERS MM, INC. AND VINCENT W. HESSER

This matter came before the Court on Plaintiff Kennedy Funding, Inc.'s ("Plaintiff") evidentiary hearing on damages arising from the Motion for Summary Judgment Against Defendants ONECAP PARTNERS MM, INC. ("Onecap") and VINCENT W. HESSER ("Defendants") (the "Motion"), filed with the Court on September 22, 2009, and came on for evidentiary hearing as to damages on November 5, 2009, at 9:30 a.m. before the Honorable Elizabeth Gonzalez.

The Court having read and considered the papers and pleadings on file herein and having heard the testimony of Kim Vaccarella, Controller for Plaintiff, and the testimony of Matthew Lubway, appraiser for Defendants, and consistent with the Order Granting Motion for Summary

1 Judgment as to liability entered November 4, 2009, against Defendants, attached hereto as
2 Exhibit "1", and the subsequent Order Awarding Damages Pursuant to Plaintiff's Motion for
3 Summary Judgment entered concurrently herewith, and the Court being fully advised, and good
4 cause appearing therefor,

5 IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiff shall recover
6 from DEFENDANTS ONECAP PARTNERS MM, INC. and VINCENT W. HESSER, jointly
7 and severally, the amount of \$16,802,025.64, excluding attorney's fees and costs, consisting of
8 the principle balance of \$12,000,000.00 due under the Loan and Security Agreement, accruing
9 interest as of October 31, 2009 in the amount of \$4,768,000.00, foreclosure costs in the amount
10 of \$19,024.50, appraisal fees in total amount of \$9,500.00 (CBRE in the amount of \$7,500.00
11 and Vernon Martin \$2,000.00), miscellaneous costs in the amount of \$5,501.14. Post-judgment
12 interest continues to accrue on the principal balance at a default rate of twenty-five percent
13 (25%) per annum, or \$8,333.33 per diem.

14 IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiff shall recover
15 from DEFENDANTS ONECAP PARTNERS MM, INC. and VINCENT W. HESSER attorney's
16 fees as of November 3, 2009 in the amount of \$39,755.00, and costs as of November 3, 2009 in
17 the amount of \$2,131.45 incurred by Santoro, Driggs, Walch, Kearney, Holley & Thompson.

18 IT IS FURTHER ORDERED that Plaintiff is entitled to recover post-judgment attorney's
19 fees and costs incurred in executing and enforcing the Judgment.

20 IT IS FURTHER ORDERED that Plaintiff is entitled to recover post-judgment interest
21 on the principal balance of \$16,802,025.64 at the rate of 25% per annum or \$8,333.33 per diem.

22 IT IS FURTHER ORDERED that to the extent the real property securing Plaintiff's Loan
23 is sold or refinanced and such proceeds are paid to Plaintiff, any such proceeds shall be deducted
24 from the judgment amount and accruing interest entered herein against DEFENDANTS
25 ONECAP PARTNERS MM, INC. and VINCENT W. HESSER in favor of Plaintiff.

26 ...

27 ...

28 ...

1 IT IS FURTHER ORDERED that the Court expressly directs the entry of a final
2 judgment, as there is no just reason for delay.

3 IT IS SO ORDERED.

4 Dated this 17 day of February, 2009.¹⁰

5
6 
DISTRICT COURT JUDGE EKE

7
8 Submitted by:

9 SANTORO, DRIGGS, WALCH, KEARNEY,
10 HOLLEY & THOMPSON

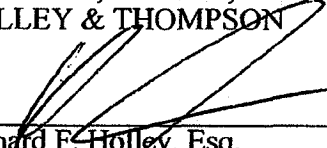
11 By 
12 Richard F. Holley, Esq.
13 Nevada Bar No. 3077
14 Ogonna M. Atamoh, Esq.
15 Nevada Bar No. 7589
16 400 S. Fourth Street, Third Floor
17 Las Vegas, NV 89101
18 Attorneys for Plaintiff
19
20
21
22
23
24
25
26
27
28

EXHIBIT “1”

SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON

SDW

1 **ORDR**

2 RICHARD F. HOLLEY, ESQ.
3 Nevada Bar No. 3077
4 OGONNA M. ATAMOH, ESQ.
5 Nevada Bar No. 7589
6 SANTORO, DRIGGS, WALCH,
7 KEARNEY, HOLLEY & THOMPSON
8 400 South Fourth Street, Third Floor
9 Las Vegas, Nevada 89101
10 Telephone: 702/791-0308
11 Facsimile: 702/791-1912

12 *Attorneys for Kennedy Funding, Inc.*

FILED

NOV - 4 2009

Alfred A. Johnson
CLERK OF COURT

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 KENNEDY FUNDING, INC., a New Jersey
16 corporation,

17 Plaintiff,

18 v.

19 ONECAP PARTNERS MM, INC, a Nevada
20 corporation; VINCENT W. HESSER, an
21 individual; DOE INDIVIDUALS I through X;
22 and ROE CORPORATIONS I through X,

23 Defendants.

Case No.: A582746
Dept. No.: XI

24 **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

25 Plaintiff KENNEDY FUNDING, INC.'s, ("Plaintiff") Motion for Summary Judgment
26 ("Motion for Summary Judgment"), having come on for hearing on October 27, 2009, at 9:00
27 a.m. Harold P. Gewerter, Esq. of the law firm Harold P. Gewerter, Esq., Ltd., appeared on
28 behalf of Defendants ONECAP PARTNERS MM, INC. ("Onecap") and VINCENT W.
HESSER ("Defendants"), and Ogonna M. Atamoh, Esq. of the law firm of Santoro, Driggs,
Walch, Kearney, Holley & Thompson appeared on behalf of Plaintiff, with no other appearances
having been made. The Court having heard the argument of counsel and having reviewed and
examined the papers, pleadings and records on file in the above-entitled matter, including
Plaintiff's Motion for Summary Judgment and the supporting Affidavit of Kevin Wolfer, filed

1 September 22, 2009, Defendants' Opposition to Motion for Summary Judgment, filed on or
2 about October 6, 2009, and Plaintiff's Reply in Support of the Motion for Summary Judgment,
3 filed October 20, 2009, and good cause appearing therefore;

4 Pursuant to the findings of fact and conclusions of law placed on the record at the hearing
5 and incorporated herein pursuant to Rule 52 of the Nevada Rules of Civil Procedure, and good
6 cause appearing, this Court enters summary judgment against Defendants and rules as follows:

7 **FINDINGS OF UNDISPUTED FACTS**

8 1. The Court makes these findings of fact by construing the pleadings and proof in
9 the light most favorable to the non-moving party, drawing all reasonable inference in their favor.

10 2. There is no genuine issue of material fact that there was a binding contract
11 between Plaintiff Kennedy Funding, Inc. and OneCap Partners 2, LLC ("OneCap Partners"),
12 entitled the "Loan and Security Agreement" (the "Loan Agreement") dated June 15, 2006, for
13 OneCap Partners' purchase of unimproved real property consisting of 78.74+ acres of raw land
14 located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark County
15 Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property") for a purchase
16 price of TWELVE MILLION DOLLARS (\$12,000,000.00).

17 3. There is no genuine issue of material fact that the Loan Agreement is evidenced
18 by a Promissory Note dated June 15, 2006, in the amount of \$12,000,000.00, made by OneCap
19 Partners payable to Kennedy Funding as agent of the Lenders.

20 4. There is no genuine issue of material fact that OneCap Partners executed and
21 delivered to Kennedy Funding a Deed of Trust with Security Agreement, Financing Statement
22 for Fixture Filing and Assignment of Rents ("Deed of Trust") against the Property, which was
23 recorded on June 15, 2006, with the Clark County Recorder's Office as Instrument No.
24 20060615-0005324.

25 5. There is no genuine issue of material fact that Kennedy Funding, Gary Owen II,
26 LLC ("Option Holder") and OneCap Partners executed a Subordination and Attornment
27 Agreement ("Subordination Agreement") in which the Option Holder agreed to subordinate its
28 limited option to purchase the Property to Kennedy Funding's Deed of Trust.

1 6. There is no genuine issue of material fact that as additional security for the loan,
2 OneCap Partners executed and delivered to Kennedy Funding, an Assignment of Leases and
3 Rents dated June 14, 2006 and recorded June 15, 2006, with the Clark County Recorder's Office
4 as Instrument No. 20060615-0005325, and an Assignment of Licenses, Contracts, Plans,
5 Specifications, Surveys, Drawings and Report dated June 15, 2006 (Assignment of Licenses").

6 7. There is no genuine issue of material fact that to further secure payment of the
7 Note, on June 14, 2006, Defendant Vincent Hesser ("Hesser") and Defendant OneCap Partners
8 MM, Inc. ("OneCap Partners MM") ("collectively "Defendants") executed personal
9 unconditional guaranties of the loan to Kennedy Funding.

10 8. There is no genuine issue of material fact that at the time of the transaction
11 between OneCap Partners, Hesser was the President of OneCap Partners and OneCap Partners
12 MM.

13 9. There is no genuine issue of material fact that OneCap Partners also granted a
14 properly perfected security interest to Kennedy Funding by way of a UCC-1 Financing
15 Statement filed with the Clark County Recorder's Office on June 15, 2006 as Instrument No.
16 20060615-0005326.

17 10. There is no genuine issue of material fact that OneCap Partners and Defendants
18 executed an Environmental Indemnity Agreement in favor of Kennedy Funding, under which
19 they agreed to indemnify Kennedy Funding for noncompliance of environmental laws.

20 11. There is no genuine issue of material fact that OneCap Partners defaulted under
21 the Note and Deed of Trust by failing to make its monthly installment payment of \$250,000.00.

22 12. There is no genuine issue of material fact that OneCap Partners is in default under
23 the Deed of Trust for failure to provide Kennedy Funding with current proof of liability
24 insurance and for failure to timely pay its tax obligations relating to the Property.

25 13. There is no genuine issue of material fact that OneCap Partners transferred its
26 interest in the Property to Nevada Ueno Mita, LLC ("Nevada Ueno"), and under the Deed of
27 Trust and Loan Agreement, OneCap Partner's transfer of the Property to Nevada Ueno was a
28 default.

1 14. Plaintiff's Motion for Summary Judgment was properly served on September 23,
2 2009, Defendants' Opposition to Plaintiff's Motion for Summary Judgment was properly served
3 on or about October 6, 2009, and Plaintiff's Reply in Support of Motion for Summary Judgment
4 was properly served on October 20, 2009.

5 **CONCLUSIONS OF LAW**

6 1. Nevada law requires that to show a breach of contract, one must show (1) the
7 existence of a valid contract, (2) a breach, and (3) damages as a result of the breach. See
8 Richardson v. Jones, 1 Nev. 405 (Nev. 1865); see also Saini v. Int'l Game Tech, 434 F.Supp.2d
9 913, 923 (D. Nev. 2006) (holding that "the failure to perform one's obligations within the
10 express terms of an agreement constitutes a literal breach of contract.").

11 2. In this case, the contract was clear and unambiguous, and Defendants breached
12 the contract entered into with Defendants OneCap Partners MM and Hesser.

13 3. The contract between Plaintiff and Defendants was valid, binding, and
14 enforceable.

15 4. Defendants breached the contract by failing to make the April 2008 payment, and
16 failing to make any payments since defaulting on the Note in satisfaction of the Loan
17 Agreement..

18 5. Defendants' conduct was a material breach of the contract and Plaintiff has been
19 damaged by said breaches.

20 **ORDER GRANTING SUMMARY JUDGMENT**

21 1. Based upon the foregoing, IT IS HEREBY ORDERED, ADJUDGED, AND
22 DECREED THAT Plaintiff's Motion for Summary Judgment is GRANTED as to liability only.

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SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY & THOMPSON



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2. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT an evidentiary hearing will be scheduled to address the exact amount of damages to be assessed against Defendants and in favor of Plaintiff.

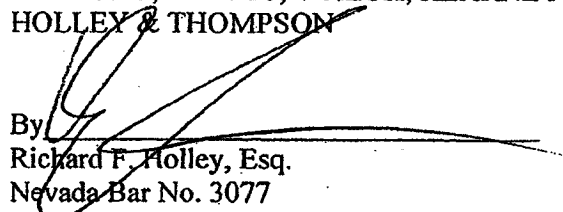
IT IS SO ORDERED.

Dated this 4 day of November, 2009.

ELIZABETH GOFF GONZALEZ
DISTRICT COURT JUDGE

Submitted by:

SANTORO, DRIGGS, WALCH, KEARNEY,
HOLLEY & THOMPSON

By 
Richard F. Holley, Esq.
Nevada Bar No. 3077
Ogonna M. Atamoh, Esq.
Nevada Bar No. 7589
400 S. Fourth Street, Third Floor
Las Vegas, NV 89101
Attorneys for Plaintiff



CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 22nd day of February, 2010, and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT**, postage prepaid and addressed to:

Harold P. Gewerter
Harold P. Gewerter, Esq., Ltd.
2705 Airport Drive
North Las Vegas, NV 89032

Attorneys for Defendants

A handwritten signature in dark ink, appearing to read 'O. B. Anderson', written over a horizontal line.

An employee of Santoro, Driggs, Walch,
Kearney, Holley & Thompson

1 **NEO**
2 RICHARD F. HOLLEY, ESQ.
3 Nevada Bar No. 3077
4 OGONNA M. ATAMOH, ESQ.
5 Nevada Bar No. 7589
6 SANTORO, DRIGGS, WALCH,
7 KEARNEY, HOLLEY & THOMPSON
8 400 South Fourth Street, Third Floor
9 Las Vegas, Nevada 89101
10 Telephone: 702/791-0308
11 Facsimile: 702/791-1912

12 *Attorney for Kennedy Funding, Inc.*

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 KENNEDY FUNDING, INC., a New Jersey
16 corporation,

17 Plaintiff,

18 v.

19 ONECAP PARTNERS MM, INC, a Nevada
20 corporation; VINCENT W. HESSER, an
21 individual; DOE INDIVIDUALS I through X;
22 and ROE CORPORATIONS I through X,

23 Defendants.

Case No: A582746

Dept. No.: XI

NOTICE OF ENTRY OF ORDER

24 YOU, and each of you, will please take notice that an ORDER AWARDING
25 DAMAGES PURSUANT TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT in the
26 above-entitled matter was filed and entered by the Clerk of the above-entitled Court on the 18th
27 day of February, 2010, a copy of which is attached hereto.

28 Dated this 22nd day of February.

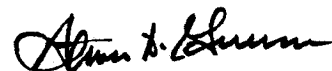
**SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON**

RICHARD F. HOLLEY, ESQ. (NVSB #3077)
OGONNA M. ATAMOH, ESQ. (NVSB #7589)
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101

Attorneys for Kennedy Funding, Inc.

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CLERK OF THE COURT

ORDER

RICHARD F. HOLLEY, ESQ.
Nevada Bar No. 3077
OGONNA M. ATAMOH, ESQ.
Nevada Bar No. 7589
SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Telephone: 702/791-0308
Facsimile: 702/791-1912

Attorneys for Kennedy Funding, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

KENNEDY FUNDING, INC., a New Jersey
corporation,

Plaintiff,

v.

ONECAP PARTNERS MM, INC, a Nevada
corporation; VINCENT W. HESSER, an
individual; DOE INDIVIDUALS I through X;
and ROE CORPORATIONS I through X,

Defendants.

Case No.: A582746
Dept. No.: XI

**ORDER AWARDING DAMAGES PURSUANT TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

Plaintiff KENNEDY FUNDING, INC.'s ("Plaintiff's") evidentiary hearing for damages arising from Plaintiff's Motion for Summary Judgment ("Motion for Summary Judgment") came before the Court on November 5, 2009, at 9:00 a.m. Harold P. Gewerter, Esq. of the law firm Harold P. Gewerter, Esq., Ltd., appeared on behalf of Defendants ONECAP PARTNERS MM, INC. ("Onecap") and VINCENT W. HESSER ("Hesser") (collectively "Defendants"), and Ogonna M. Atamoh, Esq. of the law firm of Santoro, Driggs, Walch, Kearney, Holley & Thompson appeared on behalf of Plaintiff, with no other appearances having been made.

1 Kim Vaccarella testified at the evidentiary hearing on behalf of Plaintiff regarding
2 Plaintiff's calculations of damages, and Defendants cross-examined Ms. Vaccarella. Matthew
3 Lubawy testified on behalf of Defendants and Plaintiff cross-examined Mr. Lubawy. During
4 oral argument at the hearing, Defendants raised for the first time the propriety of Plaintiff's
5 authorization to commence the above-captioned action on behalf of the Co-Lenders. At the
6 conclusion of the hearing, this Court ordered further briefing on the issue of Plaintiff's authority
7 to proceed on behalf of the Co-Lenders and ordered supplemental briefing on that issue to be
8 filed by Plaintiff no later than November 19, 2009, and any responsive pleading on that issue
9 from Defendants no later than December 3, 2009. This Court scheduled an in-chambers hearing
10 for December 4, 2009, to address the issue of Plaintiff's authority to proceed on behalf of the Co-
11 Lenders.

12 On November 19, 2009, Plaintiff filed the Supplemental Declaration of Kevin Wolfer in
13 support of its position that Plaintiff had authority to proceed on behalf of the Co-Lenders, and on
14 or about December 2, 2009, Defendants filed their Clarified Supplemental Damages Submission.

15 The Court having heard the argument of counsel and testimony of witnesses, and having
16 reviewed and examined the papers, pleadings and records on file in the above-entitled matter,
17 including Plaintiff's Motion for Summary Judgment and the supporting Affidavit of Kevin
18 Wolfer, filed September 22, 2009, Defendants' Opposition to Motion for Summary Judgment,
19 filed on or about October 6, 2009, Plaintiff's Reply in Support of the Motion for Summary
20 Judgment, filed October 20, 2009, the Affidavit of Ogonna M. Atamoh, Esq., filed November 3,
21 2009, the Declaration of Kim Vaccarella filed November 3, 2009, the memorandum of Costs and
22 Disbursements filed November 3, 2009, the Supplemental Declaration of Kevin Wolfer filed
23 November 19, 2009, and Defendants Clarified Supplemental Damages Submission filed on or
24 about December 2, 2009, and good cause appearing therefore;

25 Pursuant to the findings of fact and conclusions of law placed on the record at the
26 Evidentiary Hearing and incorporated herein pursuant to Rule 52 of the Nevada Rules of Civil
27 Procedure, and good cause appearing, and this Court having previously entered an Order
28

1 Granting Plaintiff's Motion for Summary Judgment as to liability only on November 4, 2009,
2 this Court enters summary judgment against Defendants as to damages and rules as follows:

3 **FINDINGS OF FACTS**

4 1. The Court makes these findings of fact by construing the pleadings and proof in
5 the light most favorable to the non-moving party, drawing all reasonable inference in their favor.

6 2. This order incorporates by reference the Findings of Undisputed Facts previously
7 entered by this Court on November 4, 2009, pursuant to the Order Granting Motion for Summary
8 Judgment in favor of Plaintiff.

9 3. There is no genuine issue of material fact that Plaintiff has the express authority to
10 act on behalf of the Co-Lenders pursuant to the respective Co-Lenders Agreements as referenced
11 in and submitted with the Supplemental Declaration of Ken Wolfer filed on November 19, 2009,
12 and that Plaintiff has kept the Co-Lenders apprised of the status of the Borrower's bankruptcy
13 case and the above-captioned Guarantor Action.

14 4. This order incorporates the Court's previous determination that the above-
15 captioned action against the Defendants is not limited due to the inability of the lender to proceed
16 with foreclosure as a result of the settlement in the bankruptcy proceeding with Debtor Nevada
17 Ueno Mita, LLC ("Debtor in bankruptcy"), Bankruptcy Case No. 08-25487-BAM.

18 5. There is no genuine issue of material fact that the deficiency damages to be
19 awarded to plaintiff consist of general damages in the amount of \$16,802,025.64, attorneys fees
20 in the amount of \$39,755.00 and costs in the amount of \$2,131.45, for a total judgment in favor
21 of Plaintiff and against Defendants in the amount of \$16,843,912.09.

22 **CONCLUSIONS OF LAW**

23 1. Plaintiff established the amount of damages due and owing from Defendants in
24 the amount of \$16,802,025.64, attorneys fees in the amount of \$39,755.00 and costs in the
25 amount of \$2,131.45, for a total amount of \$16,843,912.09.

26 2. Plaintiff has the express authority to act on behalf of the Co-Lenders pursuant to
27 the Co-Lenders Agreement as referenced in the Supplemental Declaration of Ken Wolfer filed
28 on November 19, 2009.

ORDER GRANTING SUMMARY JUDGMENT

1. Based upon the foregoing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT Plaintiff's Motion for Summary Judgment is GRANTED in its entirety.

2. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Plaintiff is awarded monetary damages against Defendants and in favor of Plaintiff consisting of damages in the amount of \$16,802,025.64, attorneys fees in the amount of \$39,755.00 and costs in the amount of \$2,131.45, for a total judgment in favor of Plaintiff and against Defendants in the amount of \$16,843,912.09.

3. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT in the event the Debtor in bankruptcy satisfies the indebtedness owing to Plaintiff, Plaintiff will cease its efforts to enforce the judgment against Defendants.

4. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Defendants' ability to make a claim against the Debtor in bankruptcy is not impeded as a result of the Defendants' satisfaction of the obligation to Plaintiff.

IT IS SO ORDERED.

Dated this 17 day of February, 2010.


DISTRICT COURT JUDGE

zkc

Submitted by:

SANTORO, DRIGGS, WALCH, KEARNEY,
HOLLEY & THOMPSON

By 

Richard F. Holley, Esq.
Nevada Bar No. 3077

Ogonna M. Atamoh, Esq.

Nevada Bar No. 7589

400 S. Fourth Street, Third Floor

Las Vegas, NV 89101

Attorneys for Plaintiff



CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 22nd day of February 2010, and pursuant to NRCP
5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **NOTICE**

OF ENTRY OF ORDER, postage prepaid and addressed to:

Harold P. Gewerter
Harold P. Gewerter, Esq., Ltd.
2705 Airport Drive
North Las Vegas, NV 89032

Attorneys for Defendants

A handwritten signature in dark ink, appearing to read 'O. S. Santoro', written over a horizontal line.

An employee of Santoro, Driggs, Walch,
Kearney, Holley & Thompson