

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

Electronically Filed  
Sep 03 2010 09:04 a.m.  
Tracie K. Lindeman

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

Appellants,

vs.

KENNEDY FUNDING, INC., a New Jersey  
Corporation,

Respondent.

**Supreme Court Case No.: 55654**

District Court Case No.: A582746

On Appeal from Department XI, the  
Honorable Elizabeth Gonzalez, Eighth Judicial  
District Court, Clark County, Nevada

**RESPONDENT KENNEDY FUNDING, INC.'S APPENDIX**

**SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON**  
RICHARD F. HOLLEY, ESQ.  
Nevada Bar No. 3077  
OGONNA M. ATAMOH, ESQ.  
Nevada Bar No. 7589  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: (702) 791-0308  
Facsimile: (702) 791-1912  
*Attorneys for Respondent Kennedy Funding, Inc.*

## RESPONDENT KENNEDY FUNDING, INC.'S APPENDIX

### Index of Exhibits

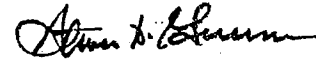
No.	Title	Date	Document Nos.
6.	Order Awarding Damages Pursuant to Plaintiff's Motion for Summary Judgment	2/18/2010	00213 - 00216
7.	Judgment Against OneCap Partners MM, Inc. and Vincent W. Hesser	2/18/2010	00217 - 00225
8.	Ex Parte Order Terminating Automatic Stay	3/29/2010	00226 - 00227
9.	Notice of Trustee's Sale	5/27/2010	00228 - 00229
10.	Trustee's Deed Upon Sale	7/16/2010	00230 - 00234
11.	Defendants' Opposition to Plaintiff's Motion for Summary Judgment	10/6/2009	00235 - 00244

**TAB 6**

**TAB 6**

ORIGINAL

Electronically Filed  
02/18/2010 02:59:38 PM



CLERK OF THE COURT

1 **ORDER**  
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.*

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

26 Plaintiff KENNEDY FUNDING, INC.'s ("Plaintiff's") evidentiary hearing for damages  
27 arising from Plaintiff's Motion for Summary Judgment ("Motion for Summary Judgment") came  
28 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.

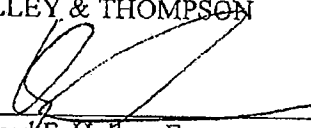
IT IS SO ORDERED.

Dated this 17 day of February, 2010.

  
DISTRICT COURT JUDGE

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

**TAB 7**

**TAB 7**



[illegible]

*Allen B. Glavin*  
CLERK OF THE COURT

**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,

y.

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.

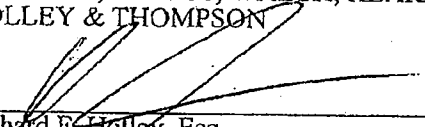
3 IT IS SO ORDERED.

4 Dated this 17 day of February, 2009.<sup>10</sup>

5  
6   
DISTRICT COURT JUDGE *ake*

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

**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.*

**FILED**

NOV - 4 2009

*Alvin H. Johnson*  
CLERK OF COURT

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

Plaintiff KENNEDY FUNDING, INC.'s, ("Plaintiff") Motion for Summary Judgment ("Motion for Summary Judgment"), having come on for hearing on October 27, 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 ("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.

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...



SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

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

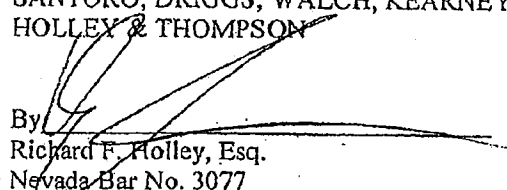
4 IT IS SO ORDERED.

5 Dated this 4 day of November, 2009.

6  
7 ELIZABETH GOFF GONZALEZ  
8 DISTRICT COURT JUDGE

9 Submitted by:

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

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

**TAB 8**

**TAB 8**



Entered on Docket  
March 29, 2010

A handwritten signature in cursive script, reading "Bruce A. Markell".

Hon. Bruce A. Markell  
United States Bankruptcy Judge

Ogonna M. Atamoh, Esq. (NV Bar No. 7589)  
Email: oatomoh@nevadafirm.com  
Dean S. Bennett, Esq. (NV Bar No. 6221)  
Email: dbennett@nevadafirm.com  
SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorney for Kennedy Funding, Inc.*

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re:  
NEVADA UENO MITA, LLC,,  
Debtor.

Case No. BK-S-08-25487-BAM  
Chapter 11

**EX PARTE ORDER TERMINATING  
AUTOMATIC STAY**

Date of Hearing: September 15, 2009  
Time of Hearing: 3:00 p.m.

On March 26, 2010, an Affidavit of Ogonna M. Atamoh, Esq. was filed [Dkt. No. 95]. Pursuant to the terms of the Order Granting Motion to Approve Compromise and Settlement Pursuant to Bankruptcy Rule 9019 Between Debtor and Kennedy Funding, Inc. [Dkt. No. 91], which incorporates by reference the Motion to Approve Compromise and Settlement Pursuant to Bankruptcy Rule 9019 Approving Settlement Between Debtor and Kennedy Funding, Inc. [Dkt. No. 82], the Automatic Stay in effect pursuant to 11 U.S.C. § 362 as to the 78.74+ acres of raw land located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark

County Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property"), is hereby terminated as to Creditor Kennedy Funding, Inc. ("Kennedy Funding").

Kennedy Funding may exercise its contractual and state law remedies with respect to the Property including, but not limited to, Kennedy Funding's foreclosure and sale of the Property.

**IT IS SO ORDERED.**

Prepared and submitted by:

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

Ogonna M. Atamoh, Esq. (NV Bar No. 7589)  
Email: [oatamoh@nevadafirm.com](mailto:oatamoh@nevadafirm.com)  
Dean S. Bennett, Esq. (NV Bar No. 6221)  
Email: [dbennett@nevadafirm.com](mailto:dbennett@nevadafirm.com)  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
*Attorneys for Kennedy Funding, Inc.*

###

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON



**TAB 9**

**TAB 9**

Inst #: 201005270000200

Fees: \$15.00

N/C Fee: \$0.00

05/27/2010 08:02:32 AM

Receipt #: 387277

Requestor:

NEVADA TITLE LAS VEGAS

Recorded By: CDE Pgs: 2

DEBBIE CONWAY

CLARK COUNTY RECORDER

APN: 264-25-101-001, 264-25-201-001

When recorded return to:  
Nevada Title Company  
2500 N. Buffalo Drive, #150  
Las Vegas, NV 89128

**NOTICE OF TRUSTEE'S SALE**

**ORDER NUMBER: A8-08-0014 FCL**

**DATED: May 25, 2010**

On JUNE 17, 2010 at 9:30 AM, Nevada Title Company, as duly appointed or substituted Trustee under and pursuant to Deed of Trust dated JUNE 15, 2006 recorded in book 20060615, as document number 0005324, in the Office of the County Recorder of CLARK County, Nevada executed by ONECAP PARTNERS 2, LLC, A NEVADA LIMITED LIABILITY COMPANY in favor of KENNEDY FUNDING, INC., A NEW JERSEY CORPORATION, AS AGENT FOR THE LENDERS IDENTIFIED IN THE NOTE by reason of now continuing default in the payment of performance of obligations secured by said Deed of Trust, including the Breach of Default Notice which was recorded in the Office of the County Recorder of CLARK County, Nevada, by the beneficiaries and the undersigned more than three months prior to the date thereof, WILL CAUSE TO BE SOLD AT PUBLIC AUCTION TO THE HIGHEST BIDDER FOR CASH (payable at the time of sale in lawful money of the United States of America) at the front entrance to Nevada Legal News located at 930 S. Fourth Street, Las Vegas, Nevada, 89101, all right, title and interest conveyed to and now held by it under said Deed of Trust in the property situated in said County and State described as:

PARCEL ONE (1):

LOT TWO (2) AS SHOWN ON THAT CERTAIN PARCEL MAP IN FILE 53 OF PARCEL MAPS, PAGE 93, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

APN No.: 264-25-101-001

PARCEL TWO (2):

THE SOUTH 1000 FEET OF THE NORTH 2000 FEET (MEASURED AT A RIGHT ANGLE TO THE NORTH LINE) OF SECTION 25, TOWNSHIP 32 SOUTH, RANGE 66 EAST, M.D.B. & M.

APN No.: 264-25-201-001

Together with any and all improvements, personal property and fixtures located thereon or otherwise described in the Deed of Trust and in any other instruments in favor of the Beneficiary, and all singular tenements, hereditaments and appurtenances thereunto belonging or appertaining, rents, issues and profits thereof. All special declarant's rights now held by Trustor and any and all other declarant's rights encumbered by the Deed of Trust and now held by Trustor to be sold in connection with, and at the same time and place as, the real property described above.

Commonly known as: 264-25-101-001, 264-25-201-001

If a street address or common designation of property is shown, no warranty is given as to its completeness or correctness.

Said sale will be made, but without covenant or warranty, expressed or implied, regarding title, possession, or encumbrances, to pay the remaining principal sum of the note secured by said Deed of Trust, to wit: \$12,000,000.00 with interest thereon, as provided in said note, advances, if any, under the terms of said Deed of Trust, fees, charges and expenses of Trustee and of the Trusts created by said Deed of Trust.

NEVADA TITLE COMPANY, A NEVADA CORPORATION

By: Michele Dobar  
Michele Dobar, Trustee Sale Officer

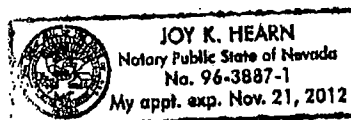
Published in Nevada Legal News on the following dates:  
MAY 27, 2010, JUNE 3, 2010, JUNE 10, 2010

STATE OF: NEVADA  
COUNTY OF: CLARK

This instrument was acknowledged before me on May 25, 2010 by Michele Dobar as Trustee Sale Officer of Nevada Title Company.

Signature

Joy K. Hearn  
(Notary Public)



**TAB 10**

**TAB 10**



APN: 264-25-101-001  
264-25-201-001

RETURN/MAIL TAX STATEMENTS TO:

ONE CAP LOAN ASSOCIATES, LLC  
TWO UNIVERSITY PLAZA  
SUITE 402  
HACKENSACK, NJ. 07601

Inst #: 201007160000364  
Fees: \$17.00 N/C Fee: \$0.00  
RPTT: \$5.10 Ex: #  
07/16/2010 08:04:05 AM  
Receipt #: 427906  
Requestor:  
NEVADA TITLE LAS VEGAS  
Recorded By: BGN Pgs: 5  
DEBBIE CONWAY  
CLARK COUNTY RECORDER

TRUSTEE'S DEED UPON SALE

FCL NO. A8-08-0014 FCL R.P.T.T \$ 5.10

THIS INDENTURE, made JUNE 17, 2010 between NEVADA TITLE COMPANY a Nevada corporation, as Trustee as hereinafter stated, herein called Trustee, and

ONE CAP LOAN ASSOCIATES, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY  
herein called Grantee, WITNESSETH:

WHEREAS, ONECAP PARTNERS 2, LLC, A NEVADA LIMITED LIABILITY COMPANY, by Deed of Trust dated JUNE 15, 2006, and recorded on JUNE 15, 2006, in Book 20060615, as Document No. 0005324, in the Office of the County Recorder of CLARK County, State of Nevada as modified or amended, if applicable (the "Deed of Trust"), did grant and convey to said Trustee, upon the trusts therein expressed, the property hereinafter described, among other uses and purposes to secure the payment of that certain promissory note and interest according to the terms thereof, and other sums of money advanced, with interest thereon, to which reference is hereby made; and,

WHEREAS, breach and default was made under the terms of said Deed of Trust in the particulars set forth in the Notice of Breach and Election to Sell Under Deed of Trust hereinafter referred to, to which reference is hereby made; and,

WHEREAS, the Beneficiary or holder of said note did execute and deliver to the Trustee written Declaration of Default and made demand for sale and thereafter there was filed for record on AUGUST 20, 2008 in the Office of the County Recorder of CLARK County, Nevada, a Notice of Breach and Election to Sell Under Deed of Trust to cause the Trustee to sell said property to satisfy the obligation secured by said Deed of Trust, which said Notice was recorded as Instrument No. 200808200000597 in the Office of the County Recorder of CLARK County, Nevada; and,

WHEREAS, Trustee, in consequence of said election, declaration of default, and demand for sale, and in compliance with said

Deed of Trust and with the statutes in such cases made and provided, made and published three (3) times, once each week for three (3) consecutive weeks, before the date of sale therein fixed in a newspaper of general circulation in the county and state in which the premises to be sold are situated, Notice of Sale as required by law, containing a correct description of the property to be sold and stating that the Trustee would under the provisions of said Deed of Trust sell the property therein and herein described at public auction to the highest bidder for cash in lawful money of the United States on JUNE 17, 2010, at the hour of 9:30 AM of said day, at the front entrance to Nevada Legal News, 930 S. Fourth Street, in the city of Las Vegas, County of Clark, State of Nevada; and,

WHEREAS, three (3) true and correct copies of said Notice of Sale were posted in three (3) public places in the township or city where the property is situated and where the property is to be sold, for not less than twenty (20) days successively before the date of sale therein fixed; and,

WHEREAS, compliance having been made with all of the statutory provisions of the State of Nevada and with all of the provisions of said Deed of Trust as to the acts to be performed and notices to be given, and in particular, full compliance having been made with all requirements of law regarding the service of notices required by statute, and with the Servicemembers Civil Relief Act (108 P.L. 189; 117 Stat. 2835; 2003 Enacted H.R. 100), said Trustee, at such time and place did then and there at public auction sell the property hereinafter described to the said Grantee for the sum of ONE THOUSAND AND NO/100 DOLLARS (\$1,000.00), said Grantee being the highest and best bidder therefore.

NOW, THEREFORE, Trustee, in consideration of the premises recited and the sum herein mentioned bid and paid by the Grantee, the receipt whereof is hereby acknowledged, and by virtue of these premises, does GRANT AND CONVEY, but without warranty or covenants, express or implied, unto said Grantee all right and interest under said Deed of Trust in that certain property situated in the County of CLARK, State of Nevada, described as follows:


SEE EXHIBIT "A" ATTACHED HERETO AND BY REFERENCE MADE A PART HEREOF

Together with any and all singular improvements, fixtures, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

IN WITNESS WHEREOF the said NEVADA TITLE COMPANY, has this day, caused its corporate name to be affixed hereto and this instrument to be executed by its authorized officers.

DATED: JUNE 17, 2010

NEVADA TITLE COMPANY, Trustee

BY:   
SUE DUDZINSKI, SR VICE PRESIDENT  
SR

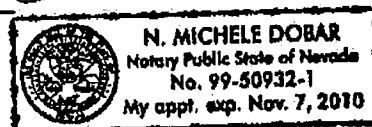
BY:   
TROY LOCHHEAD, SR VICE PRESIDENT

STATE OF: NEVADA

COUNTY OF: CLARK

This instrument was acknowledged before me on  
JUNE 17, 2010 by SUE DUDZINSKI AND TROY  
LOCHHEAD AS SR VICE PRESIDENTS OF NEVADA TITLE COMPANY

Signature: N. Michele Dobar  
(Notary Public)



n. michele Dobar  
no. 99-50932-1  
Exp. Nov. 7, 2010

(A8-08-0014 FCL / TRUSTEE'S DEED)

Escrow No.: A8-08-0014-FCL

**EXHIBIT "A"**

**LEGAL DESCRIPTION**

**PARCEL ONE (1):**

**LOT TWO (2) AS SHOWN ON THAT CERTAIN PARCEL MAP IN FILE 53 OF  
PARCEL MAPS, PAGE 93, IN THE OFFICE OF THE COUNTY RECORDER OF  
CLARK COUNTY, NEVADA.**

**APN No.: 264-25-101-001**

**PARCEL TWO (2):**

**THE SOUTH 1000 FEET OF THE NORTH 2000 FEET (MEASURED AT A RIGHT  
ANGLE TO THE NORTH LINE) OF SECTION 25, TOWNSHIP 32 SOUTH,  
RANGE 66 EAST, M.D.B. & M.**

**APN No.: 264-25-201-001**

**TOGETHER WITH ANY AND ALL IMPROVEMENTS, PERSONAL PROPERTY  
AND FIXTURES LOCATED THEREON OR OTHERWISE DESCRIBED IN THE  
DEED OF TRUST AND IN ANY OTHER INSTRUMENTS IN FAVOR OF THE  
BENEFICIARY, AND ALL SINGULAR TENEMENTS, HEREDITAMENTS AND  
APPURTENANCES THEREUNTO BELONGING OR APPERTAINING, RENTS,  
ISSUES AND PROFITS THEREOF. ALL SPECIAL DECLARANT'S RIGHTS NOW  
HELD BY TRUSTOR AND ANY AND ALL OTHER DECLARANT'S RIGHTS  
ENCUMBERED BY THE DEED OF TRUST AND NOW HELD BY TRUSTOR**

**State of Nevada  
Declaration of Value Form**

**1. Assessor Parcel Number(s)**

a) 264-25-101-001, 264-25-201-001

b) \_\_\_\_\_  
c) \_\_\_\_\_  
d) \_\_\_\_\_

**2. Type of Property:**

- a. ☒ Vacant Land      b. ☐ Sgl. Fam. Residence  
c. ☐ Condo/Twnhse      d. ☐ 2-4 Plex  
e. ☐ Apt. Bldg.      f. ☐ Comm'l/Ind'l  
g. ☐ Agricultural      h. ☐ Mobile Home  
i. ☐ Other

**FOR RECORDERS'S OPTIONAL USE ONLY**

Book: \_\_\_\_\_ Page \_\_\_\_\_  
Date of Recording: \_\_\_\_\_  
Notes: \_\_\_\_\_

**3. a. Total Value/Sales Price of Property**

\$1,000.00

**b. Deed in Lieu of Foreclosure Only (value of property)**

**c. Transfer Tax Value:**

\$1,000.00

**d. Real Property Transfer Tax Due**

\$5.10

**4. If Exemption Claimed:**

a. Transfer Tax Exemption, per NRS 375.090, Section: \_\_\_\_\_

b. Explain Reason for Exemption: \_\_\_\_\_

**5. Partial Interest: Percentage being transferred: 100 %**

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature: Nicholas D. Dobar

Capacity: Trustee Sale Officer

Signature: \_\_\_\_\_

Capacity: Foreclosing Beneficiary

**SELLER (GRANTOR) INFORMATION  
(REQUIRED)**

**BUYER (GRANTEE) INFORMATION  
(REQUIRED)**

Print Name: Nevada Title Company  
Address: 2500 N. Buffalo Drive, Suite 150  
City: Las Vegas,  
State: NV Zip: 89128

Print Name: One Cap Loan Associates, LLC  
Address: Two University Plaza Suite 402  
City: Hackensack  
State: NJ Zip: 07601

**COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)**

Print Name: Nevada Title Company Esc. #: A8-08-0014-FCL  
Address: 2500 N. Buffalo Drive, Suite 150  
City: Las Vegas State: NV Zip: 89128

(AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED)

**TAB 11**

**TAB 11**

1 **OPPS**

2 HAROLD P. GEWERTER, ESQ.  
3 Nevada Bar No. 499  
4 HAROLD P. GEWERTER, ESQ. LTD.  
5 2705 Airport Drive  
6 North Las Vegas, Nevada 89032  
7 Telephone: (702) 382-1714  
8 Fax: (702) 382-1759  
9 Attorney for Defendants

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

12 KENNEDY FUNDING, INC., a New Jersey  
13 corporation,

14 Plaintiff,

15 vs.

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

20 Defendants.

CASE NO.: A582746  
DEPT. NO.: XI

**DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT**

**Date of Hearing: October 27, 2009**  
**Time of Hearing: 9:00 a.m.**

21 Defendants, ONECAP PARTNERS MM, INC. and VINCENT W. HESSER, by and  
22 through their attorney of record, HAROLD P. GEWERTER, ESQ., of the law firm of HAROLD  
23 P. GEWERTER, ESQ., LTD., hereby files their Opposition to Plaintiff's Motion for Summary  
24 Judgment. This Opposition is based upon the attached points and authorities, all pleadings and  
25 papers on file herein, attached hereto, and any arguments that may be adduced at the time of  
26 hearing on this matter, if any.

27 DATED this 6 day of October, 2009.

28 HAROLD P. GEWERTER, ESQ., LTD.



HAROLD P. GEWERTER, ESQ.  
Nevada Bar No. 499  
2705 Airport Drive  
North Las Vegas, Nevada 89032  
Attorney for Defendants

1 **FACTS**

2 On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or "OneCap") and  
3 Kennedy Funding, Inc. ("Kennedy Funding") entered into a Loan and Security Agreement  
4 ("Loan Agreement"), pursuant to which Kennedy Funding (sometimes "Lender") made the Loan  
5 to OneCap to facilitate the purchase of the Property. The Loan is evidenced by a Promissory  
6 Note dated June 15, 2006 in the original principal sum of Twelve Million and 00/100 Dollars  
7 (\$12,000,000.00) ("Note"), from Lender to Borrower.

8 Pursuant to the Note, OneCap agreed to pay all principal, interest and other sums due  
9 under the Note in full on the Maturity Date of June 30, 2009, with a late charge equal to ten  
10 percent (10%) of the overdue payment, and a default rate of twenty five percent (25%) per  
11 annum. As further security for the Loan, Borrower executed and delivered to Lender that  
12 certain unimproved real property consisting of 78.74+ acres of raw land located in and along  
13 Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark County Assessor Parcel  
14 Number 264-25-101-001 and 264-25-201-001 (the "Property"), dated June 15, 2006, and  
15 recorded on June 15, 2006, with the Clark County Recorder's Office ("Recorder") as Instrument  
16 No. 20060615-0005324.

17 As security for the Loan, Borrower executed and delivered to Lender that certain  
18 Assignment of Leases and Rents on the Property dated June 14, 2006, and recorded on June 15,  
19 2006, with the Recorder as Instrument No. 20060615-0005325. As additional security for the  
20 Loan, OneCap executed in favor of Kennedy Funding that certain Assignment of Licenses,  
21 Contracts, Plans, Specifications, Surveys, Drawings and Reports ("Assignment of Licenses")  
22 dated June 15, 2006. To further secure payment of the Note, on June 14, 2006, Vincent Hesser  
23 and OneCap Partners MM, Inc. (the "Guarantors") executed a personal unconditional guaranty of  
24 the Note to Kennedy Funding (the "Guaranties").

25 On April 1, 2008, OneCap defaulted under the Loan and Deed of Trust, including, but not  
26 limited to, OneCap's failure to make monthly installment payments under the Note in the amount  
27 of Two Hundred Fifty Thousand Dollars (\$250,000.00) due April 1, 2008. OneCap subsequently  
28 transferred its interest in the Property to Nevada Ueno Mita, LLC. On December 26, 2008



1 Nevada Ueno Mita, LLC filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy  
2 Court for the District of Nevada, Case No. BK-S-08-25487-BAM.

3 On August 7, 2009, Nevada Ueno Mita, LLC and Kennedy Funding entered into a  
4 Settlement Agreement (see Exhibit "1" attached hereto) which states in Section 1.01 (f) that  
5 "Kennedy Funding agrees to give Debtor up through and until six (6) months after entry of the  
6 Order approving this Settlement Agreement (the "Deadline") to pay off Kennedy Funding in full  
7 before Kennedy Funding forecloses on the property. Section 1.01 (g) states "The Parties agree  
8 that this Settlement Agreement shall not preclude, limit or abridge Kennedy Funding's rights to  
9 pursue any deficiency actions against the Guarantors of Debtor's obligations owing to Kennedy  
10 Funding.

11 **POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO**  
12 **MOTION FOR SUMMARY JUDGMENT**

13 **1. Standard for Summary Judgment. There remain Triable Facts in Dispute in**  
14 **Plaintiff's Case.**

15 Motions for Summary Judgment are governed by NRCP 56, which states in pertinent  
16 part:

17 (c) Motions for summary judgment and responses thereto shall include a concise  
18 statement setting forth each fact material to the disposition of the motion which  
19 the party claims is or is not genuinely in issue, citing the particular portions of any  
20 pleading, affidavit, deposition, interrogatory, answer, admission, or other  
21 evidence upon which the party relies. The judgment sought shall be rendered  
22 forthwith if the pleadings, depositions, answers to interrogatories, and admissions  
23 on file, together with the affidavits, if any, show that there is no genuine issue as  
24 to any material fact and that the moving party is entitled to a judgment as a matter  
25 of law. A summary judgment, interlocutory in character, may be rendered on the  
26 issue of liability alone although there is a genuine issue as to the amount of  
27 damages. An order granting summary judgment shall set forth the undisputed  
28 material facts and legal determinations on which the court granted summary  
judgment.

29 The burden of proving the absence of triable facts allowing the entry of a summary  
30 judgment is upon the party moving for summary judgment. NRCP Rule 56(a). In addition, in  
31 deciding whether summary judgment is appropriate, evidence must be viewed in light most  
32 favorable to party against whom summary judgment is sought, and factual allegations, evidence,

1 and all reasonable inferences in favor of that party must be presumed correct. *NGA #2, LLC v.*  
2 *Robert O. Rains*, 113 Nev. 1151, 946 P.2d 163 (1997). In considering a motion for summary  
3 judgment, district courts must construe evidence presented in light most favorable to the party  
4 against whom summary judgment is sought; all of non-movant's statements must be accepted as  
5 true, and district courts may not pass on credibility of affidavits. *Walker v. American Bankers*  
6 *Ins. Group*, 108 Nev. 533, 836 P.2d 59 (1992).

7 The central factual issues of this case remain unresolved, and therefore, this matter is not  
8 a proper subject for summary judgment.

9 **2. The Bankruptcy Petition and Settlement Agreement create genuine issues of**  
10 **Material Fact.**


11 On August 7, 2009, Nevada Ueno Mita, LLC and Kennedy Funding entered into a  
12 Settlement Agreement (see Exhibit "1" attached hereto) which states in Section 1.01 (f) that  
13 "Kennedy Funding agrees to give Debtor up through and until six (6) months after entry of the  
14 Order approving this Settlement Agreement (the "Deadline") to pay off Kennedy Funding in full  
15 before Kennedy Funding forecloses on the property. Section 1.01 (g) states "The Parties agree  
16 that this Settlement Agreement shall not preclude, limit or abridge Kennedy Funding's rights to  
17 pursue any deficiency actions against the Guarantors of Debtor's obligations owing to Kennedy  
18 Funding.

19 Thus with the automatic bankruptcy stay in place on the property and the six (6) month  
20 hold period of the Settlement Agreement, Summary Judgment cannot be granted against the  
21 Guarantors at this time as there remain issues as to whether there will be a deficiency upon the  
22 sale of the Property which sale cannot be held for at least six (6) months under the Settlement  
23 Agreement. As the terms of the Settlement Agreement, namely 1.01(g), limit the actions against  
24 the Guarantors to deficiency actions, the Guaranties are no longer unconditional and are subject  
25 to the prior sale of the property which may or may not result in a deficiency.

26 Therefore, there remain material genuine issues of fact in this matter and Summary  
27 Judgment is not appropriate in this matter.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

DATED this 6 day of October, 2009.

  
HAROLD P. GEWERTER, ESQ.  
Nevada Bar No. 499  
2705 Airport Drive  
North Las Vegas, Nevada 89032  
Attorney for Defendants

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

  X   By being served via facsimile to the following individuals at their last known facsimile number, this same date, as follows:

Martin J. J. J.  
An employee of Harold P. Gewerter, Esq., Ltd.

Exhibit “1”

**SETTLEMENT AGREEMENT**

This SETTLEMENT AGREEMENT (the "AGREEMENT") dated August 7, 2009, is made and entered into by and between NEVADA UENO MTA, LLC (the "Debtor") and KENNEDY FUNDING, INC. ("Kennedy Funding") (collectively, the "Parties").

**RECITALS**

WHEREAS, on June 15, 2008, OneCap Partners 2, LLC (alternatively, "Borrower" or "OneCap") and Kennedy Funding entered into a Loan and Security Agreement ("Loan Agreement"), pursuant to which Kennedy Funding made the Loan to OneCap to facilitate the purchase of the Property. A true and correct copy of the Loan Agreement is attached as Exhibit "A";

WHEREAS, the Loan is evidenced by a Promissory Note dated June 15, 2008 in the original principal sum of Twelve Million and 00/100 Dollars (\$12,000,000.00) ("Note"), from Lender to Borrower. A true and correct copy of the Note is attached as Exhibit "B";

WHEREAS, under the Note, OneCap promised to pay Kennedy Funding monthly installments of accrued interest only at a rate of Eleven and One Half (11 1/2%) percent per annum, to accrue from July 1, 2008 through June 1, 2007, to be paid monthly on the last day of the month prior to when the interest is due;

WHEREAS, under the Note, OneCap promised to pay Kennedy Funding monthly installments of accrued interest only at a rate of Eighteen (18%) percent per annum, to accrue from July 1, 2007 through its Maturity Date, to be paid monthly commencing August 1, 2007, and continuing on the first day of each month thereafter until the Maturity Date;

WHEREAS, pursuant to the Note, OneCap agreed to pay all principal, interest and other sums due under the Note in full on the Maturity Date. Pursuant to extensions and amendments to the Loan Documents, the Maturity Date is June 30, 2009 (the "Maturity Date");

WHEREAS, the Note provided that in the event of a late payment under the Note, OneCap agreed to pay a late charge equal to ten percent (10%) of the overdue payment;

WHEREAS, the Note provided that in the event of a default, OneCap agreed to pay a default rate of twenty-five percent (25.0%) per annum;

WHEREAS, as further security for the Loan, Borrower executed and delivered to Lender that certain Deed of Trust with Security Agreement, Financing Statement for Fixture Filing and Assignment of Rights (the "Deed of Trust") against 76.74% acres of raw land located in Inland along Carson Drive and the Colorado River in Laughlin, Nevada (the "Property"), and the Deed of Trust was recorded on August 15, 2008, with the Clark County Assessor's Office (the "Assessor's Office") and recorded on August 15, 2008, with the Clark County Recorder's Office (the "Recorder's Office") as Instrument No. 2008001530005224. A true and correct copy of the Deed of Trust is attached as Exhibit "C";

WHEREAS, as further security for the Loan, Borrower executed and delivered to Lender that certain Assignment of Leases and Rents on the Property dated June 14, 2008, and recorded on June 15, 2008, with the Recorder as Instrument No. 2008061530005225. A true and correct copy of the Assignment of Leases and Rents is attached as Exhibit "D";

98-309-4643170-00

0005325. A true and correct copy of the Assignment of Leases and Rents is attached as Exhibit "E";

WHEREAS, as additional security for the Loan, OneCap executed in favor of Kennedy Funding that certain Assignment of Leases, Contracts, Plans, Specifications, Surveys, Drawings and Report ("Assignment of Leases") dated June 15, 2008. A true and correct copy of the Assignment of Leases is attached as Exhibit "F";

WHEREAS, on April 1, 2008, OneCap defaulted under the Loan and Deed of Trust, including, but not limited to, OneCap's failure to make monthly installment payment under the Note in the amount of \$250,000.00 due April 1, 2008;

WHEREAS, OneCap transferred its interest in the Property to the Debtor, and the Clark County Recorder certifies the Debtor as holding a fee simple interest in the Property;

WHEREAS, on December 26, 2008 ("Petition Date"), three (3) days before the December 29, 2008, foreclosure sale, Nevada Ueno filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy for the District of Nevada, Case No. BIC-08-25487-BAM (the "Bankruptcy") (Dkt. No. 1);

WHEREAS, Debtor's bankruptcy case is a single-asset real estate case consisting of the Property;

WHEREAS, as of the date of the Bankruptcy, the outstanding balance Debtor owed to Kennedy Funding under the Loan Agreement and Note was \$15,011,111.62;

WHEREAS, the Debtor maintains control of its affairs as debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code;

WHEREAS, no trustee or examiner has been appointed in this case. As of this writing, an official committee of unsecured creditors (the "Committee") has been appointed by the Office of the United States Trustee (the "U.S. Trustee");

WHEREAS, on March 26, 2009, Debtor filed the Debtor's Disclosure Statement (Dkt. No. 40), and an Amended Disclosure Statement on May 18, 2009 (Dkt. No. 50);

WHEREAS, on March 26, 2009, Debtor filed the Debtor's Plan of Reorganization (Dkt. No. 39);

WHEREAS, on May 27, 2009, Kennedy Funding filed a Motion to Terminate Automatic Stay Pursuant to 11 U.S.C. § 362(d)(4)-(5) and Waiver of the 10-Day Stay under FRBP 4007(a)(9), or in the alternative, Motion to Convert to Dismiss Case;

WHEREAS, it is the desire of the Parties to resolve and settle the contested confirmation of the Plan of Reorganization and the Motion to Terminate Stay, both set for hearing on August 19, 2009, at 3:00 p.m.; and

WHEREAS, the Parties have negotiated and reached this Agreement in good faith;

REMANDER OF PAGE LEFT BLANK INTENTIONALLY

THE AGREEMENT

NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

1.01 TERMINATION OF AUTOMATIC STAY AS TO KENNEDY FUNDING

The automatic stay shall terminate as to Kennedy Funding if no sale or payment is made within six (6) months.

- (a) In the event the Property is not sold within six (6) months of the entry of the Order approving this Settlement Agreement, or in the event Kennedy Funding is not paid within six (6) months of the entry of the Order approving this Settlement in an amount equal to or greater than Kennedy Funding's secured claim or a lesser amount agreed to by Kennedy Funding, which amount Kennedy Funding alleges is currently at an outstanding balance of \$18,046,747.65 as of July 24, 2009, consisting of principal in the amount of \$12,000,000.00, \$3,953,000.00 in accrued interest, \$18,000.00 in late fees, \$23,045.50 in foreclosure costs and agreed-upon fees, and \$34,104.15 in attorney's fees and costs, accruing interest at the rate of 12.31% per annum, subject to final calculations, the Debtor hereby agrees to the termination of the automatic stay as to Kennedy Funding without further hearing.
- (b) Debtor shall not transfer title to the Property absent payment in full to Kennedy Funding of its outstanding obligation.
- (c) Debtor shall not change the name of the Debtor with the Nevada Secretary of State or otherwise absent payment in full to Kennedy Funding of Debtor's outstanding obligation.
- (d) This Bankruptcy Court shall enter an Order immediately terminating the automatic stay as to Kennedy Funding without need for further hearing upon the filing of an Affidavit of No Sale of the Property submitted by Kennedy Funding with the Bankruptcy Court at the expiration of six (6) months after the entry of the Order approving this Settlement Agreement.
- (e) Upon termination of the automatic stay pursuant to this Settlement Agreement, the Parties agree that Kennedy Funding may take the necessary steps to show for foreclosure on the Property immediately after the entry of the Order Terminating the Stay, and the Parties agree to waive the 10-day stay under Rule 6001(e)(3), including but not limited to, publishing and recording the Notice of Trustee's Sale, any time after termination of the automatic stay.
- (f) Kennedy Funding agrees to give Debtor up, through and until six (6) months after entry of the Order approving this Settlement Agreement (the "Deadline"), to pay of Kennedy Funding in full before Kennedy Funding forecloses on the Property.
- (g) The Parties agree that this Settlement Agreement shall not preclude, limit, or abridge Kennedy Funding's rights to pursue any deficiency actions against the Guarantors of Debtor's obligations owing to Kennedy Funding.
- (h) The Parties agree that the August 14, 2009, discovery deadline shall be stayed, and the hearings set for confirmation of the Plan of Reorganization and the Motion to Terminate Stay, both set for August 18, 2009, at 3:00

0370-BA-13776-56

p.m., shall be taken off calendar and reset for hearing pending Bankruptcy Court approval of the Motion to Approve Settlement Agreement, and that the hearing on the confirmation of this Plan of Reorganization be continued to a date set by the Court six (6) months after entry of the Order approving the Settlement.

1.02 KENNEDY FUNDING'S REPRESENTATIONS. Kennedy Funding warrants to Debtor as follows:

- (a) That it has entered into this AGREEMENT in good faith and fully expects to perform under this AGREEMENT to the best of its ability.
- (b) That no promise or inducement has been offered except as set forth herein.
- (c) That this AGREEMENT has been carefully read in its entirety by Kennedy Funding, which has had the benefit and advice of counsel of its choosing.
- (d) That in entering into this AGREEMENT and the settlement contained herein, Kennedy Funding is acting freely and voluntarily, without influence, coercion or duress of any kind, from any source, including but not limited to, any other party or parties, their attorneys' representations or anyone acting or purporting to act on behalf of any party.

1.03 DEBTOR'S REPRESENTATIONS. Debtor represents, and warrants to Kennedy Funding:

- (a) That it has entered into this AGREEMENT in good faith and fully expects to perform under this AGREEMENT to the best of its ability.
- (b) That it is competent to sign this AGREEMENT.
- (c) That no promise or inducement has been offered except as set forth herein.
- (d) That this AGREEMENT contained herein has been carefully read in its entirety by Debtor, which has had the benefit and advice of counsel of its choosing.
- (e) That in entering into this AGREEMENT and the settlement contained herein, Debtor is acting freely and voluntarily, without influence, coercion or duress of any kind, from any source, including but not limited to, any other party or parties, their attorneys' representations or anyone acting or purporting to act on behalf of any party.

2.01 ATTORNEY FEES. If any action is commenced to enforce the terms of this AGREEMENT, the prevailing party shall be entitled to recover all of its expenses relating to such action, including without limitation, its reasonable attorneys' fees and costs.

2.02 INTEGRATION AND AMENDMENT. This AGREEMENT represents the full and complete integration of the AGREEMENT between the parties and is the complete expression thereof.

2.03 AMENDMENTS. This AGREEMENT may not be modified or amended except in writing signed by the Parties.

-4-

0370-BA-13776-56

2.04 SEVERABILITY. If any portion of this AGREEMENT or the application thereof to any person or circumstance shall be deemed invalid, illegal or unenforceable in any state, the remainder of this AGREEMENT and the application thereof shall not be affected and shall be enforceable to the fullest extent permitted by law.

2.05 GOVERNING LAW. This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of Nevada, except as such laws may be preempted or superseded by the laws of the United States.

2.06 SETTLEMENT AGREEMENT AS DEFENSE TO FUTURE ACTIONS. This Settlement Agreement may be pled as a full and complete defense to, and the Parties hereby consent that it may be used as the basis for, an injunction against any action, suit, or other proceeding based on the claims released by this Settlement Agreement.

2.07 COUNTERPARTS. This Settlement Agreement may be executed in one or more counterparts, confirmed by facsimile signatures transmitted by telephone, each of which shall be deemed a duplicate original, but all of which together shall constitute but one and the same instrument. A facsimile signature shall also constitute an original signature of this Settlement Agreement.

2.08 HEADINGS FOR CONVENIENCE ONLY. The Parties acknowledge that the paragraph headings contained herein are only for the convenience of the Parties. The substance and provisions hereof control without regard to the headings.

2.09 PREPARATION OF SETTLEMENT AGREEMENT. The Parties acknowledge that this Settlement Agreement has been negotiated and prepared in an arm's length transaction and that all Parties are deemed to have drafted this Settlement Agreement and this Settlement Agreement shall not be interpreted against any Party as the drafter.

2.10 AUTHORITY TO EXECUTE SETTLEMENT AGREEMENT. Each Party represents and warrants that it has the authority to execute this Settlement Agreement and that it has not assigned such rights, or any of its claims released herein, to any other Party by way of explicit assignment, subrogation, operation of law, or otherwise.

2.11 OTHER ACTS AND DOCUMENTS. The Parties agree to undertake such other acts and execute such other documents as may be reasonably necessary to affect the purpose and intent of this Settlement Agreement.

2.12 SUCCESSORS AND ASSIGNS. This AGREEMENT shall be binding upon and shall inure to the benefit of the Parties hereto, and their respective personal representatives, successors or assigns, such as the case may be.

2.13 WAIVER OF BREACH. The waiver by one party of any breach of this Agreement by the other party will not be deemed a waiver of a future breach of the same provision, or a waiver of any other provision of this Agreement.

2.14 CONTINENT OF ENTIRE AGREEMENT. This Agreement supersedes any and all other agreements and contains the entire Agreement of the parties except as otherwise provided for herein. This Agreement is not subject to any condition precedent with respect to formation or performance, written, oral or otherwise implied, but specifically set forth herein.

08/18/09 15:17:09

2.15 AGREEMENT VOLUNTARILY AND CLEARLY UNDERSTOOD. Each party to this agreement acknowledges and declares that:

(a) is fully and completely informed as to the facts relating to the subject matter of this Agreement and as to the rights, duties and liabilities of all parties;

(b) enters into this Agreement voluntarily, free from undue influence, coercion or duress of any kind;

(c) has given careful thought to the making of this Agreement;


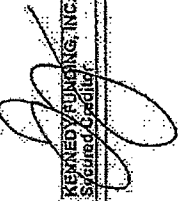
(d) has carefully read each of the provisions of this Agreement;

(e) fully and completely understands each provision of this Agreement.

2.16 REPRESENTATION BY COUNSEL. The Parties each warrant and acknowledge that (i) they have read and understood the terms of this Settlement Agreement; (ii) they have had the opportunity to retain legal counsel of their choice throughout the negotiations which preceded the signing of this Settlement Agreement; and rely solely on their counsel's representations.

IN WITNESS WHEREOF, the Parties execute this Settlement Agreement as of the day and year first written above.

Dated this 7th day of August, 2009.

 NEVADA JUENO NITA, LLC Debtor	 KENNEDY FUNDING, INC. Steven Cordier
---	--

-5-

**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Santoro, Driggs, Welch, Kearney, Holley & Thompson, and that on the 18 day of August, 2009, I caused to be served a true and correct copy of MOTION TO APPROVE COMPROMISE AND SETTLEMENT PURSUANT TO BANKRUPTCY RULE 9019 WITH CERTIFICATE OF SERVICE in the following manner:

☒ (ELECTRONIC SERVICE) Under Administrative Order 02-1 (Rev. 8-31-04) of the United States Bankruptcy Court for the District of Nevada, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities.

☐ (UNITED STATES MAIL) By depositing a copy of the above-referenced document for mailing in the United States Mail, first class postage prepaid, at Las Vegas, Nevada, to the parties listed on the attached service list, at their last known mailing addresses, on the date above written.

☐ (OVERNIGHT COURIER) By depositing a true and correct copy of the above-referenced document for overnight delivery via Federal Express, at a collection facility maintained for such purpose, addressed to the parties on the attached service list, at their last known delivery address, on the date above written.

☐ (FACSIMILE) That I served a true and correct copy of the above-referenced document via facsimile, to the facsimile numbers indicated, to those persons listed on the attached service list, on the date above written.

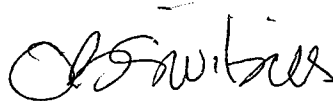
  
An employee of Santoro, Driggs, Welch, Kearney, Holley & Thompson



## CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 2nd day of September, 2010, and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **RESPONDENT KENNEDY FUNDING, INC.'S APPENDIX**, postage prepaid and addressed to:

Harold P. Gewerter, Esq.  
HAROLD P. GEWERTER, ESQ., LTD  
2705 Airport Drive  
North Las Vegas, NV 89032  
*Attorneys for Appellants*



---

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