

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

Electronically Filed  
May 04 2021 05:27 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

VINCENT HESSER

Petitioner,

vs.

KENNEDY FUNDING, INC.

Respondent

Case No. 81383

District Court

Case No. 09A582746

**APPEAL**

From the Eighth Judicial District Court

Department XI

Clark County Nevada

HONORABLE ELIZABETH GONZALEZ

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**APPELLANT'S APPENDIX VOL II**

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LAW OFFICES OF BYRON THOMAS

BYRON THOMAS, ESQ.

BAR NO: 8906

*Attorney for*

*VINCENT HESSER*

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OCT 07 2009

*[Signature]*  
CLERK OF COURT

09A582746  
447692



DISTRICT COURT

CLARK COUNTY, NEVADA

OPPS  
HAROLD P. GEWERTER, ESQ.  
Nevada Bar No. 499  
HAROLD P. GEWERTER, ESQ. LTD.  
2705 Airport Drive  
North Las Vegas, Nevada 89032  
Telephone: (702) 382-1714  
Fax: (702) 382-1759  
Attorney for Defendants

KENNEDY FUNDING, INC., a New Jersey  
corporation,

Plaintiff,

vs.

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

DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT

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

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

DATED this 6 day of October, 2009.

HAROLD P. GEWERTER, ESQ., LTD.

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

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CLERK OF THE COURT

VH000244

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.

26 The burden of proving the absence of triable facts allowing the entry of a summary  
27 judgment is upon the party moving for summary judgment. NRCP Rule 56(a). In addition, in  
28 deciding whether summary judgment is appropriate, evidence must be viewed in light most  
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 "I" 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.  
28

1 CONCLUSION

2 For the foregoing reasons, the Court should deny the Plaintiff's Motion for Summary  
3 Judgment in its entirety and allow this case to be tried before the trier of fact.

4 DATED this 6 day of October, 2009.

5 HAROLD P. GEWERTER, ESQ., LTD.

6  
7   
8 HAROLD P. GEWERTER, ESQ.  
9 Nevada Bar No. 499  
10 2705 Airport Drive  
11 North Las Vegas, Nevada 89032  
12 Attorney for Defendants

13 CERTIFICATE OF MAILING

14 Certification is hereby made that a true and correct copy of the foregoing Defendant's  
15 Opposition to Plaintiff's Motion for Summary Judgment was served this 6<sup>th</sup> day of October,  
16 2009, in the following manner:

17 X By being placed into an envelope bearing First Class Postage and placed into the  
18 U.S. Mails, this same date, addressed to the following individuals; and/or

19            By being hand delivered to the following individuals at their last known address,  
20 this same date, as follows; and/or

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

23 Richard F. Holley, Esq.  
24 Ogonna M. Atamoh, Esq.  
25 Santoro, Driggs, Walch,  
26 Kearney, Holley & Thompson  
27 400 South Fourth Street, Third Floor  
28 Las Vegas, NV 89101  
Fax: (702) 791-1912

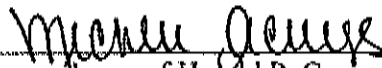
  
An employee of Harold P. Gewerter, Esq., Ltd.

Exhibit "1"

VH000249



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 payoff in 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 \$16,040,147.65 as of July 24, 2008, consisting of principal in the amount of \$12,000,000.00, \$3,968,000.00 in accrued interest, \$18,000.00 in late fees, \$29,046.50 in foreclosure costs and appraisal fees, and \$31,101.15 in attorney's fees and costs, accounting interest at the rate of 9.99% 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 restrict 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 obtain payment in full to Kennedy Funding of Debtor's outstanding obligation.

(d) The 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 allow for foreclosure on the Property immediately after the entry of the Order of Terminating the Stay, and the Parties agree to waive the 10-day stay under Rule 4001(c)(3), including but not limited to, publishing and recording the Notice of Intended 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 "Deadlines" to pay of Kennedy Funding in full before Kennedy Funding forecloses on the Property.

(g) The Parties agree that this Settlement Agreement shall not exclude, limit or abridge Kennedy Funding's right 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

3.

Plan, 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 the Plan of Reorganization be continued to a date set by the Court six (6) months after entry of the Order approving this 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' representatives 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' representatives 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.



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 to any extent, 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 DEFENSES 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 this headings.

2.09 PREPARATION OF SETTLEMENT AGREEMENT. The Parties acknowledge that this Settlement Agreement has been negotiated and arranged by an arm's-length transaction and that the Parties are deemed to have drafted the 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 express 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 effect the purposes and intent of this Settlement Agreement.

2.12 SUCCESSORS AND ASSIGNS. THIS AGREEMENT shall be deemed 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 CONTINUED ENTIRE AGREEMENT. This Agreement supersedes any and all other agreements and constitutes 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 not specifically set forth herein.

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

(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 its 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.

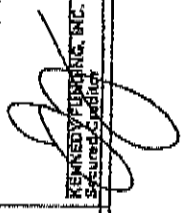
(d) Has carefully read each of the provisions of this Agreement.

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

2.16 REPRESENTATION BY COUNSEL. The Parties each warrant and acknowledge that (a) they have read and understood the terms of this Settlement Agreement; (b) 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 AUTO RENTAL, LLC  
Director  
KIMBERLY PUGH, INC.  
Signed/Clerk

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Santoro, Driggs, Welch, Kearney, Holley & Thompson, and that on the 19<sup>th</sup> 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 03-1 (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

ORIGINAL

14

FILED

OCT 12 2009

CLERK OF COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

KENNEDY FUNDING, )  
 )  
Plaintiff, )  
 )  
ONECAP PARTNERS, ET AL, )  
 )  
Defendant(s), )  
 )

Case No 09 A582746  
Dept. XI

ORDER SETTING CIVIL NON-JURY TRIAL  
AND CALENDAR CALL

IT IS HEREBY ORDERED that:

This matter is set to be tried on a Ten week stack to begin on **Monday, February 8, 2010, at 1:30pm**, with a calendar call on **Thursday, February 4, 2010, at 9:15am**. All parties must bring to calendar call the following:

- (1) Typed exhibit lists;
- (2) List of depositions;
- (3) List of equipment needed for trial;

The Pre-trial Memorandum must be filed no later than **4:00pm on Wednesday, February 3, 2010** with a courtesy copy delivered to Department XI. Parties are to appear on **Thursday, November 19, 2009, at 9:00am**, for a Status Check on the matter. All parties, (attorneys and parties in proper person) MUST comply with ALL REQUIREMENTS of E.D.C.R. 2.67 and 2.69.

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CLERK OF THE COURT

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1 Failure of the designated trial attorney or any party appearing in proper  
2 person to appear for any court appearances or to comply with this Order shall  
3 result in any of the following: (1) dismissal of the action (2) default judgment; (3)  
4 monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy  
5 or sanction.

6 Counsel is required to advise the Court immediately when the case settles or is  
7 otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall  
8 also indicate whether a Scheduling Order has been filed and, if a trial date has been set,  
9 the date of that trial. A copy should be given to Chambers.

10 DATED this 9<sup>th</sup> day of October, 2009

11  
12   
13 DISTRICT JUDGE, ELIZABETH GONZALEZ  
14

15 I hereby certify that on the date filed, I mailed to the following proper persons or  
16 placed a copy of this Order in the attorney's folder in the Clerk's Office as  
17 follows:

18 Harold P Gewerter, Esq.

19 Ogonna M Atamoh, Esq. (Santoro, Driggs, et al)

20   
21 Dan Kutinac  
22  
23  
24  
25  
26  
27  
28

ORIGINAL

42

RPLY  
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

FILED

OCT 20 2009

*John J. Thompson*  
CLERK OF 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

09A582746  
475549



REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff KENNEDY FUNDING, INC. ("Kennedy Funding"), by and through its counsel of record, the law firm of Santoro, Driggs, Walch, Kearney, Holley & Thompson, hereby files this Reply in Support of Motion for Summary Judgment (the "Reply"). Plaintiff respectfully requests that this Court grant it summary judgment on its claims for breach of contract against the Defendants. Kennedy Funding's Reply is based upon the following grounds and the following reasons: (1) Defendants wholly disregard the express exclusion in the One-Action Rule provided under NRS 40.430(4)(i), which allows lenders to pursue guarantors such as Defendants upon the borrower's bankruptcy filing. The Borrower filed for Bankruptcy on December 26, 2008, and Kennedy Funding commenced this action against the Guarantors on

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SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

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OCT 20 2009

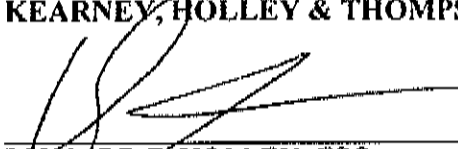
CLERK OF THE COURT

1 February 13, 2009, after the bankruptcy case was filed and in compliance with the exclusion to  
2 the One-Action Rule; (2) the Guaranty waives the application of the One-Action Rule under  
3 Sections 2 and 4 of the Guaranty, allowing Kennedy Funding to pursue the action against the  
4 Guarantors pursuant to NRS 40.495(2). Under the Guaranty, the Guarantors expressly waived  
5 any defense based upon Kennedy Funding's failure to first commence an action against the  
6 Borrower, or to proceed against or exhaust any security held by Lender at any time; (3) Kennedy  
7 Funding does not seek to recover a windfall. In the event Kennedy Funding cannot locate assets  
8 of the Defendant Guarantors to satisfy a judgment from this Court, Kennedy Funding will  
9 foreclose on the Property in the event the six-month period under the Settlement Agreement  
10 expires in the Bankruptcy Case. In the event the Debtor in bankruptcy satisfies the indebtedness  
11 owing to Kennedy, then Kennedy Funding will cease its efforts to enforce the judgment against  
12 the Defendant Guarantors; and (4) Section 1.01(g) of the Settlement Agreement approved by the  
13 Bankruptcy Court expressly states that Kennedy Funding is not precluded from pursuing the  
14 Guarantors under the Guaranty.

15 This Reply is further made and based upon the pleadings and papers on file herein, the  
16 Memorandum of Points and Authorities below, and any oral argument of counsel as may be  
17 heard on this matter.

18 Dated this 20<sup>th</sup> day of October, 2009.

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

21   
22 **RICHARD P. HOLLEY, ESQ.**  
23 Nevada Bar No. 3077  
24 **OGONNA M. ATAMOH, ESQ.**  
25 Nevada Bar No. 7589  
26 400 South Fourth Street, Third Floor  
27 Las Vegas, Nevada 89101

28 *Attorneys for Kennedy Funding, Inc.*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. STATEMENT OF RELEVANT FACTS

#### Bankruptcy Action and Settlement

1. On April 1, 2008, OneCap defaulted under the Loan and Security Agreement dated June 15, 2006, entered into between OneCap Partners 2, LLC (alternatively "Borrower" or "OneCap") and Kennedy Funding, as agent of the lenders, entered into a Loan and Security Agreement ("Loan Agreement"), pursuant to which Kennedy Funding made a \$12 million loan (the "Debt") to OneCap to facilitate the purchase of unimproved real property consisting of 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"). See Wolfer Declaration previously filed with this Court in connection with Kennedy Funding's Motion for Summary Judgment (the "Wolfer Decl.").

2. OneCap's default arose from, among other things, OneCap's failure to timely make its monthly installment payment of \$250,000 under the Note. *Id.*

3. OneCap transferred its interest in the Property to Nevada Ueno Mita, LLC ("Nevada Ueno"), and on December 26, 2008, three days before Kennedy Funding's scheduled foreclosure sale, Nevada Ueno filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy for the District of Nevada, Case No. BK-S-08-25487-BAM (the "Bankruptcy Petition"). *Id.*

4. In the Bankruptcy Case, on May 27, 2009, Kennedy Funding filed the Motion to Terminate the Automatic Stay Pursuant to 11 U.S.C. § 362(d)(1)-(3), or in the alternative, Convert or Dismiss Bankruptcy Case and Waiver of the 10-Day Stay Under FRBP 4001(a)(3) with Certificate of Service [Dkt. Nos. 54-55].

5. On June 29, 2009, Kennedy Funding filed its Objection to Chapter 11 Plan of Reorganization of Nevada Ueno Mita, LLC with Certificate of Service [Dkt. No. 71].

6. The hearing on the Debtor's Plan Confirmation and the evidentiary hearing on Kennedy Funding's Motion to Terminate Stay were scheduled for August 18, 2009.

...

1           7.     On August 18, 2009, Kennedy Funding filed a Motion to Approve Compromise  
2 and Settlement Pursuant to Bankruptcy Rule 9019 Between Debtor and Kennedy Funding, Inc.  
3 [Dkt. No. 82], under which the Debtor had six (6) months to payoff Kennedy Funding's  
4 outstanding balance of \$16,046,147.65 as of July 24, 2009, consisting of principal in the amount  
5 of \$12,000,000.00, \$3,968,000.00 in accrued interest, \$18,000.00 in late fees, \$29,046.50 in  
6 foreclosure costs and appraisal fees, and \$31,101.15 in attorney's fees and costs, plus accruing  
7 interest. The Settlement Agreement provided that the payoff for Kennedy Funding could be by  
8 refinance, sale of the Property, or other means.

9           8.     On September 18, 2009, the Bankruptcy Court entered an Order Granting Motion  
10 to Approve Compromise and Settlement Pursuant to Bankruptcy Rule 9019 Between Debtor and  
11 Kennedy Funding, Inc. [Dkt. No. 91].

12           State Court Action Against Guarantors

13           9.     On February 13, 2009, almost two (2) months after the Borrower filed for  
14 bankruptcy, Kennedy Funding filed the above-captioned Complaint against OneCap Partners  
15 MM, Inc. ("OneCap MM") and Vincent M. Hesser ("Hesser") arising from their guaranties of  
16 OneCap's Debt (the "State Court Action"). See Wolfer Decl.

17           10.    Defendants Hesser and OneCap MM executed personal unconditional guaranties  
18 of the loan to Kennedy Funding (the "Guaranty"). A true and correct copy of the Guaranty is  
19 attached as Exhibit "7" to the Wolfer Declaration previously filed with this Court in connection  
20 with Kennedy Funding's Motion for Summary Judgment.

21           11.    Under the express language of the Guaranty, the Defendants agreed to waive the  
22 need to foreclose against the real property before pursuing the Guarantors as follows:

23                   4. Guarantor Waivers. The undersigned hereby waives and agrees  
24 not to assert or take advantage of any defense based upon:

25                   (g) The failure of Lender to commence an action against  
26 Borrow and/or Guarantor or to proceed against or exhaust any  
security held by Lender at any time, or to pursue any other remedy  
whatsoever at any time;

27           See Guaranty, p. 3, ¶ 4(g), Exhibit "7" to the Wolfer Decl.

28           ...



1           12. The Guaranty further provides that Defendants Hesser and OneCap MM are  
2 guarantors and primary obligors, without the need for Kennedy Funding to commence an action  
3 against the Borrower:

4           2. Guaranty Clause. The Guarantors hereby absolutely,  
5 irrevocably and unconditionally guaranties to Lender the full,  
6 prompt and unconditional payment of the Debt, when and as the  
7 same shall become due, whether as the stated maturity date, by  
8 acceleration or otherwise, and the full, prompt and unconditional  
9 performance of each and every term and condition of every  
10 transaction to be kept and performed by Borrower under the Note.  
11 This Guaranty is a **primary obligation of Guarantor** and shall be  
12 a continuing inexhaustible guaranty. Lender may require  
13 Guarantor to pay and perform any or all of the Guarantor's  
14 liabilities and obligations under this Guaranty **without being  
15 required or obligated to bring any proceeding or take any  
16 action against Borrower, any other guarantor or any other person,  
17 entity or property prior thereto.** The liability of the Guarantors  
18 hereunder is joint and several with all other guarantors, and is  
19 independent of and separate from the liability of Borrower, and  
20 other guarantor, person or entity, and is independent of the  
21 availability of any collateral security for and/or under any  
22 documents granting Lender security for the Loan.

23           See Guaranty, p. 1, ¶ 2 (emphasis added), Exhibit "7" to the Wolfer Decl.

24           13. On September 22, 2009, Kennedy Funding filed a Motion for Summary Judgment  
25 against the Defendants.

26           14. On or around October 6, 2009, the Defendants filed an Opposition to the Motion  
27 for Summary Judgment (the "Opposition").

28           15. In the Opposition, the Defendants concede that they guarantied OneCap's  
indebtedness owing to Kennedy Funding, stating as follows:

To further secure payment of the Note, on June 14, 2006, Vincent  
Hesser and OneCap Partners MM, Inc. (the "Guarantors")  
executed a personal unconditional guaranty of the Note to  
Kennedy Funding (the "Guaranties"). 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  
payments under the Note in the amount of Two Hundred Fifty  
Thousand Dollars (\$250,000.00) due April 1, 2008.

See Opposition, p. 2, ll. 22-27.

...

...

1           16.     Thus, there is no genuine issue of material fact that the Defendant Guarantors are  
2     liable for the outstanding indebtedness due and owing to Kennedy Funding arising from the Debt  
3     and the Borrower's default.

4           17.     In the Opposition, Defendants assert that the Settlement Agreement, entered into  
5     between Kennedy Funding and Nevada Ueno Mita, formerly OneCap, provides that the Kennedy  
6     Funding would cease its efforts to terminate the stay to allow the Debtor six (6) months to pay  
7     off Kennedy Funding (the "Payoff Deadline") by way of the sale of the Property, refinancing, or  
8     otherwise. See Settlement Agreement, p. 3, § 1.01(a) [Dkt. No. 82], attached to the Opposition  
9     as Exhibit "1".

10          18.     The Settlement Agreement further provided that in the event the Kennedy  
11     Funding Debt was not satisfied by the Payoff Deadline, then the automatic stay would be  
12     terminated. *Id.*

13          19.     Defendants are not a party to the Settlement Agreement. See Settlement  
14     Agreement, p.1, ll. 2-3, p. 6, attached to the Opposition as Exhibit "1".

15          20.     Defendants admit in their Opposition that Section 1.01(g) of the Settlement  
16     Agreement expressly provides that Kennedy Funding is not precluded from pursuing the  
17     Defendant Guarantors in connection with their Guaranties of OneCap's obligations of the Debt  
18     owing to Kennedy Funding. See Opposition, p. 3, ll. 7-10.

19          21.     The Defendants' waiver set forth in the Guaranty expressly allows Kennedy  
20     Funding to pursue an action for repayment of the Debtor against the Guarantors.

## 21                               II.     LEGAL ARGUMENT

### 22           A.     Under NRS 40.430(4)(i), Secured Creditor May Pursue Guarantors before 23                   Foreclosure if Borrower is in Bankruptcy

24           Nevada's "One-Action Rule" is contained in NRS 40.430, which provides in pertinent  
25     part:

26                   [T]here may be but one action for the recovery of any debt, or for  
27                   the enforcement of any right secured by a mortgage or other lien  
28                   upon real estate. That action must be in accordance with the  
                 provisions of this section and NRS 40.433 to 40.459, inclusive. In  
                 that action, the judgment must be rendered for the amount found

1 due the plaintiff, and the court, by its decree or judgment, may  
2 direct a sale of the encumbered property, or such part thereof as is  
3 necessary, and apply the proceeds of the sale as provided in NRS  
40.462.

4 Nevada's one-action statute, NRS 40.430(1), applies to guarantors or surety of a debt  
5 secured by an interest in real property, requiring that a creditor must seek recovery against the  
6 property through judicial foreclosure before recovering from the guarantor personally. See  
7 McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC, 121 Nev. Adv. Op. 79, at 3, 123  
8 P.3d 748, 750 (2005) (per curiam). The purpose of this Rule "is to compel one who has taken a  
9 special lien to secure his debt to exhaust the secured property before having recourse to the  
10 general assets of the debtor." See U.S. v. Cail, 746 F.Supp. 1035, 1038 (Dist. Nev. 1990) (citing  
11 McMillan v. United Mortgage Co., 84 Nev. 99, 101-02, 437 P.2d 878 (1968)).

12 Subsection 4 of Nevada's One-Action Rule enumerates a number of acts and proceedings  
13 that do not constitute an "action" for purposes of the One-Action Rule. Among the exceptions to  
14 the One-Action Rule and excluded from the definition of an "action" under the One-Action Rule  
15 is any act or proceeding to enforce an agreement with a surety or guarantor if enforcement of the  
16 mortgage or other lien has been automatically stayed pursuant to 11 U.S.C. § 362 or pursuant to  
17 an order of a federal bankruptcy court under any other provision of the United States Bankruptcy  
18 Code for not less than 120 days following the mailing of notice to the surety or guarantor  
19 pursuant to subsection 1 of NRS 107.095. See NEV. REV. STAT. § 40.430(4)(i). Thus, the  
20 commencement of an action against the guarantor after the borrower files for bankruptcy does  
21 not constitute an "action" under the One-Action Rule.

22 **B. Under NRS 40.495, Secured Creditor May Pursue Guarantors Before Foreclosure**  
23 **if Guarantor Waives One-Action Rule.**

24 NRS 40.495 governs the waiver of rights relating to the One-Action Rule, and provides in  
25 pertinent part as follows:

26 2. Except as otherwise provided in subsection 4, a guarantor,  
27 surety or other obligor, other than the mortgagor or grantor of a  
28 deed of trust, may waive the provisions of NRS 40.430. If a  
guarantor, surety or other obligor waives the provisions of NRS  
40.430, an action for the enforcement of that person's obligation to

1 pay, satisfy or purchase all or part of an indebtedness or obligation  
2 secured by a mortgage or lien upon real property may be  
3 maintained separately and independently from:

- 4 (a) An action on the debt;  
5 (b) The exercise of any power of sale;  
6 (c) Any action to foreclose or otherwise enforce a mortgage or  
7 lien and the indebtedness or obligations secured thereby; and  
8 (d) Any other proceeding against a mortgagor or grantor of a  
9 deed of trust.

10 The Guaranty falls within the ambit of the exceptions of the One-Action Rule because the  
11 language contained in Sections 2 and 4 of the Guaranty uses the key words as set forth under  
12 NRS 40.495(2). Namely, under Section 2, the Defendant Guarantors expressly agreed that  
13 Kennedy Funding did not have to bring an action against the Borrower or the Property before  
14 suing the Guarantors. See Guaranty, p. 1, ¶ 2, Exhibit "7" to the Wolfer Decl. Under Section 4  
15 of the Guaranty, the Guarantors expressly waived any defense based upon Kennedy Funding's  
16 failure to commence an action against the Borrower, or to proceed against or exhaust any  
17 security held by Lender at any time, in this case the Property. See Guaranty, p. 3, ¶ 4(g), Exhibit  
18 "7" to the Wolfer Decl.

19 Kennedy Funding does not seek a windfall by collecting against the Defendant  
20 Guarantors. In the event the Guarantors fully satisfy the outstanding indebtedness owing to  
21 Kennedy Funding in the amount in excess of \$16,000,000, then Kennedy Funding will not  
22 foreclose on the Property after the expiration of the six (6) months set forth in the Bankruptcy  
23 Settlement Agreement. If Kennedy Funding does not satisfy the indebtedness from a judgment  
24 arising against the Defendant Guarantors, then Kennedy Funding is free to foreclose on the  
25 Property in the event the stay is lifted to recover the balance of the Debt, minus any funds  
26 recovered from the Defendant Guarantors, if any. In the event the Property is sold or the Debtor  
27 refinances to repay Kennedy Funding the Debt, then Kennedy Funding will not continue to  
28 enforce the judgment against the Guarantors, because Kennedy Funding is not entitled to, nor  
does it seek, a windfall.

1           However, the Guaranty's express waiver of the One-Action Rule as a defense, coupled  
2 with the statutory exclusion of the Guarantor action from the One-Action Rule as a result of the  
3 Borrower filing for Bankruptcy, requires that this Court rule in favor of Kennedy Funding for  
4 liability and damages for the outstanding Debt. Defendants cite to no case law or any statutory  
5 support for the proposition that Kennedy Funding must stay the State Court Action against  
6 Defendants until the six-month period under the Settlement Agreement expires.

7           Defendants' attempt to use the Settlement Agreement in Bankruptcy Court as a defense  
8 to the pending Motion for Summary Judgment is misplaced for two reasons. First, the  
9 Settlement Agreement makes express reference to the Guarantor Action pending before this  
10 Court and makes clear that the Settlement Agreement approved by the Bankruptcy Court in no  
11 way precludes Kennedy Funding from continuing to pursue its State Court Action against the  
12 Defendant Guarantors. Secondly, Nevada's statutory scheme entitles Kennedy Funding to  
13 pursue the Defendant Guarantors because the Borrower filed for Bankruptcy, which is an  
14 exception to the One-Action Rule, and the Defendant Guarantors waived the One-Action Rule.

15       There is no genuine issue of material facts that Defendants Hesser and OneCap MM breached  
16 the Guaranty, especially where Defendants conceded liability in their statement of facts, and they  
17 never dispute that they executed the Guaranty and that the Borrower defaulted on April 1, 2008.

18       See Opposition, p. 2, ll. 22-27.

19       Accordingly, this Court should grant Kennedy Funding summary judgment on the issue  
20 liability, which was conceded by Defendants, and on the issue of damages, and award Kennedy  
21 Funding \$16,046,147.65 as a joint and several obligation of Hesser and OneCap MM.

22     ...

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III. CONCLUSION

Based on the foregoing, Kennedy Funding respectfully requests that this Court grant its Motion for Summary Judgment and enter a judgment for Kennedy Funding and against Hesser and OneCap MM, as a joint and several obligors, in the amount of \$16,046,147.65.

Dated this 20<sup>th</sup> day of October, 2009.

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  
*Attorneys for Kennedy Funding, Inc.*

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON


SDW

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 20th day of October, 2009 and pursuant to NRCP 5(b),  
I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing REPLY IN  
SUPPORT OF MOTION FOR SUMMARY JUDGMENT, postage prepaid and addressed to:

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

*Attorneys for Defendants*

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

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

09A582746

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Business Court**

**COURT MINUTES**

**October 27, 2009**

---

09A582746

Kennedy Funding Inc

vs

Onecap Partners MM Inc, Vincent Hesser

---

October 27, 2009

9:00 AM

Motion for Summary  
Judgment

Pltf's Motion for  
Summary Judgment

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 14C

COURT CLERK: Kathy Klein

RECORDER: Jill Hawkins

**PARTIES**

**PRESENT:** Atamoh, Ogonna M. Attorney  
Gewerter, Harold Attorney  
Phillip

**JOURNAL ENTRIES**

- Colloquy regarding Bankruptcy Court delay. Arguments by Counsel. COURT stated its findings and ORDERED, Plaintiff's Motion for Summary Judgment, GRANTED IN PART as to the Liability and Court will set a hearing on the damages. Counsel to agree on a date certain.

PRINT DATE: 10/28/2009

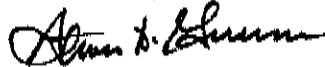
Page 1 of 1

Minutes Date:

October 27, 2009

VH000267





CLERK OF THE COURT

**AFFT**  
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

**AFFIDAVIT OF OGONNA M. ATAMOH, ESQ.**

STATE OF NEVADA       )  
                                  )ss.  
COUNTY OF CLARK     )

I, Ogonna M. Atamoh, Esq., being duly sworn, depose and say:

1. I am a Shareholder with the firm Santoro, Driggs, Walch, Kearney, Holley & Thompson ("Santoro, Driggs"), counsel of record for Plaintiff in the above-captioned case.

2. I have personal knowledge of the facts set forth in this Affidavit except as to those matters based upon information and belief, and as to those matters, I believe them to be true and correct. If called as a witness to testify, I could and would truthfully testify to the facts set forth herein.

1           3.       On or about February 13, 2009, Plaintiff filed the above-captioned Complaint  
2 against Defendants in connection with Defendants' default of payments under the Loan  
3 Agreement and Note as more fully set forth in the Declaration of Kevin Wolfer filed with this  
4 Court on September 22, 2009.

5           4.       The attorney's fees incurred by Santoro, Driggs in this action from January 2009  
6 to November 3, 2009, calculated according to the normal billing rates of Santoro, Driggs, are  
7 \$39,755.00.

8           5.       The \$39,755.00 in fees includes, but is not limited to, Plaintiff's involvement in  
9 preparing the complaint in the above-captioned State Court litigation against Defendants,  
10 locating the defendants for service, preparation of disclosures, attending numerous hearings  
11 before the Discovery Commissioner for defendants' failure to participate in mandatory  
12 disclosure and discovery processes, preparation of Plaintiff's motion for summary judgment and  
13 all supporting documents, attendance at the hearing on Plaintiff's motion for summary judgment,  
14 preparation of the order granting plaintiff's motion for summary judgment as to liability only,  
15 preparation of the Declaration of Kim Vaccarella in support of the upcoming evidentiary hearing  
16 to determine damages assessed against Defendants, and preparation of the Memorandum of  
17 Costs and Disbursements, filed concurrently herewith. Plaintiff anticipates incurring additional  
18 fees regarding the attendance at the evidentiary hearing scheduled for November 5, 2009, and  
19 preparation of the subsequent Order and Judgment.

20           6.       Plaintiff has also incurred attorney's fees in connection with Plaintiff's  
21 participation as a creditor in the Chapter 11 bankruptcy matter filed by Nevada Ueno Mita<sup>1</sup>,  
22 attending the 341 Meeting of Creditors, obtaining a current appraisal on the property in question,  
23 filing the motion for relief from stay and supporting documents, attending hearing on the motion  
24 for relief from stay, objecting to the Disclosure Statement accompanying the Plan of  
25 Reorganization and the Plan of Reorganization filed by Nevada Ueno Mita, attending the  
26 Confirmation Hearing, negotiating the settlement of the bankruptcy case, and preparation of a

27           <sup>1</sup> OneCap transferred its interest in the Property which is the subject of this litigation to Nevada Ueno Mita on or  
28 about November 3, 2008.

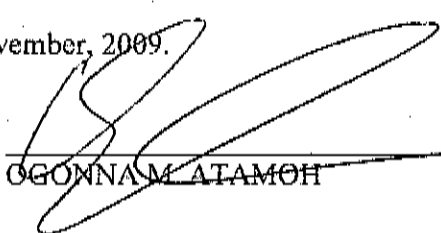
1 Settlement Agreement and Motion to Approve Settlement Agreement approved by the  
2 Bankruptcy Court.

3 7. The costs incurred by Santoro, Driggs are \$2,131.45 as set forth in the  
4 Memorandum of Costs and Disbursements on file. A true and correct copy of the Memorandum  
5 of Costs and Disbursements is attached as **Exhibit "1."**

6 8. As a result of Defendants' default, Plaintiff has enforced its rights and remedies  
7 under the Agreement and respective Guaranties, and in doing so has incurred the above  
8 attorney's fees (\$39,755.00) and costs (\$2,131.45) in the total amount of \$41,886.45.

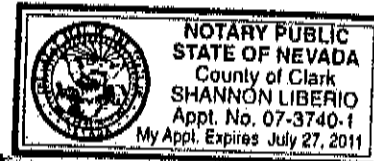
9 Therefore, the attorney's fees and costs in the amount of \$41,886.45 should be added to the  
10 amount due to Plaintiff, which amount is to be determined by this Court on November 5, 2009.

11 DATED this 3<sup>rd</sup> day of November, 2009.

12  
13   
OGONNA M. ATAMOH

14 SUBSCRIBED and SWORN to before  
15 me this 3<sup>rd</sup> day of November, 2009.

16   
17 NOTARY PUBLIC



# **EXHIBIT “1”**

1 **CC10**  
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.

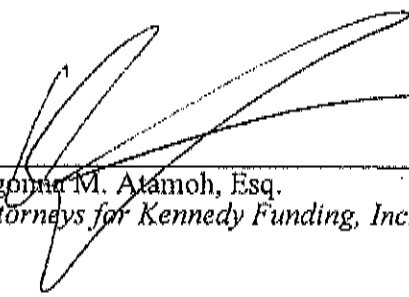
Case No: A582746  
Dept. No.: XI

24 **MEMORANDUM OF COSTS  
25 AND DISBURSEMENTS**

26 Filing.....	\$ 522.00
27 Service of Process.....	\$ 213.00
28 Delivery Charges .....	\$ 170.00
Postage.....	\$ 446.32
Facsimile.....	\$ 5.50
Photocopies.....	\$ 663.45
Online Research.....	111.18
TOTAL \$	2,131.45 Total

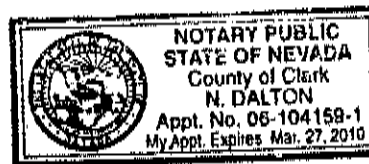
1 STATE OF NEVADA )  
2 COUNTY OF CLARK ) ss.

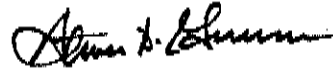
3 Ogonna M. Atamoh, Esq. being duly sworn, states: that affiant is the attorney for the  
4 Plaintiff and has personal knowledge of the above costs and disbursements expended; that the  
5 items contained in the above memorandum are true and correct to the best of this affiant's  
6 knowledge and belief; and that the said disbursements have been necessarily incurred and paid in  
7 this action.

8  
9  
10   
11 Ogonna M. Atamoh, Esq.  
Attorneys for Kennedy Funding, Inc.

12 SIGNED AND SWORN to before me this  
13 3<sup>rd</sup> day of NOVEMBER, 2009.

14   
15 NOTARY PUBLIC





CLERK OF THE COURT

1 **DECL**  
2 RICHARD F. HOLLEY, ESQ.  
3 Nevada Bar No. 3077  
4 OGDONNA 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,

Case No.: A582746  
Dept. No.: XI

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.

24 **DECLARATION OF KIM VACCARELLA**

25 I, Kim Vaccarella, do hereby swear under penalty of perjury that the following assertions  
26 are true to the best of my knowledge and belief.

27 1. I am the Controller for Kennedy Funding, Inc. (alternatively "Kennedy Funding"  
28 or "Lender").

2. I have personal knowledge of the matters set forth below based upon my personal  
review of the books and records maintained by Kennedy Funding in the ordinary course of  
business and based upon my involvement in monitoring the history of the transaction giving rise  
to the evidentiary hearing set for November 5, 2009, at 9:30 a.m. on damages against Defendants  
Vincent Hesser ("Hesser") and Defendant OneCap Partners MM, Inc. ("OneCap MM" and

1 together with Hesser, the "Defendants") in connection with the loan guarantied for Nevada Ueno  
2 Mita, LLC, formerly known as OneCap Partners 2, LLC ("Nevada Ueno"). With respect to  
3 matters based upon information and belief, I believe the statements made to be true and correct.

4 3. As part of my duties as Controller at Kennedy Funding, I am responsible for  
5 monitoring the inflows and outflows of funds to and from the Kennedy Funding checking  
6 accounts, managing the Kennedy Funding checking accounts and quickbooks, and  
7 communicating with the various banks. I perform bookkeeping activities for Kennedy Funding,  
8 and interface with the accounting firms to reconcile the books and records of Kennedy Funding.  
9 I was involved in preparing the spreadsheet relating in connection with the damages incurred by  
10 Kennedy Funding relating to the loan extended by Kennedy Funding to OneCap, subsequently  
11 assigned to Nevada Ueno, in connection with that certain \$12 million Promissory Note and first  
12 deed of trust on real property dated June 15, 2006 (the "Loan"). In that capacity I am personally  
13 familiar with the manner in which Kennedy Funding's documents, books, files and records are  
14 prepared and maintained.

15 4. It is Kennedy Funding's practice and procedure to maintain records and to record  
16 transactions, acts, conditions and events concerning Kennedy Funding and its various loans,  
17 including the Loan, at or about the time such transactions, acts, conditions, or events occur.  
18 Kennedy Funding relies upon these records in connection with its business dealings with  
19 borrowers.

20 5. I am competent to testify to the matters contained in this declaration, and if called,  
21 could and would so testify.

22 6. I have personally reviewed the business records of Kennedy Funding concerning  
23 the Loan made by Kennedy Funding to OneCap.

24 7. I have personal knowledge of the matters set forth below, except as to those  
25 matters based upon information and belief. With respect to the matters based upon information  
26 and belief, I believe the assertions to be true and correct.

27 8. Kennedy Funding is a New Jersey corporation that is located and headquartered in  
28 New Jersey.



1           9.     On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or  
2     "OneCap") and Kennedy Funding, as agent of the lenders, entered into a Loan and Security  
3     Agreement ("Loan Agreement"), pursuant to which Kennedy Funding made a \$12 million loan  
4     to OneCap to facilitate the purchase of unimproved real property consisting of 78.74± acres of  
5     raw land located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark  
6     County Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property"). A true  
7     and correct copy of the Loan Agreement is attached as **Exhibit "1"**.

8           10.    The loan is evidenced by a Promissory Note dated June 15, 2006 in the original  
9     principal sum of \$12 million ("Note"), made by OneCap to pay to the order of Kennedy Lending,  
10    as agent of the lenders. A true and correct copy of the Note is attached as **Exhibit "2"**.

11          11.    Under the Note, OneCap promised to pay Kennedy Funding monthly interest only  
12     payments at a rate of 11.5% per annum, to accrue from July 1, 2006 to June 1, 2007. Ex. 2, p.2  
13     (¶ b). Beginning August 1, 2007, OneCap promised to pay Kennedy Funding monthly interest  
14     only payments at a rate of 18% per annum, to accrue from July 1, 2007 through to the maturity  
15     date of June 30, 2009. See Note, Exhibit "2", p.2 (¶ d).

16          12.    OneCap agreed to pay all principal, interest and other sums due under the Note in  
17     full on the maturity date of June 30, 2009. See Note, Exhibit "2", p.1.

18          13.    In the event of a late payment under the Note, OneCap agreed to pay a late charge  
19     equal to 10% of the overdue payment. See Note, Exhibit "2", p.1.

20          14.    In the event of a default under the Note, OneCap agreed to pay a default rate of  
21     25% per annum. See Note, Exhibit "2", p.1.

#### 22       **OneCap Defaults**

23          15.    On April 1, 2008, OneCap defaulted under the Note and Deed of Trust by failing  
24     to make its monthly installment payment of \$250,000 under the Note.

25          16.    Based on those defaults, Kennedy Funding accelerated the Note.

26     ...

27     ...

28     ...

**Damages**

17. As of November 3, 2009, the outstanding balance owed to Kennedy Funding under the Loan Agreement and Note is \$16,802,025.64 as of October 31, 2009, plus attorney's fees in the amount of \$39,755.00 and costs in the amount of \$2,131.45 as of November 3, 2009, for the total outstanding balance in the amount of \$16,843,912.09 consisting of the following:

Description	Amount
Principal	\$12,000,000.00
Accrued Interest (as of October 31, 2009)	\$4,768,000.00
Foreclosure costs	\$19,024.50
Appraisal fees for CBRE (\$7,500) and Vernon Martin (\$2,000)	\$9,500.00
Miscellaneous Costs	\$5,501.14
Attorney's Fees as of November 3, 2009	\$39,755.00
Costs as of November 3, 2009	\$2,131.45
<b>TOTAL:</b>	<b>\$16,843,912.09</b>

A true and correct copy of the updated Account Summary is attached as **Exhibit "3"**.

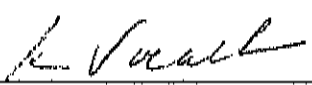
18. The miscellaneous costs in the amount of \$5,501.14 consists of the costs for production from Nevada Ueno Mita's Appraiser Lubawy in the amount of \$3,250, copy costs for Legal Document Solutions in the amount of \$1,949.14, formation of entity in connection with foreclosure with Capital Information Services ("CIS") in the amount of \$302

19. Interest accrues at a default of rate of 25.00% per annum, or \$8,333.33 per diem.

20. I am over the age of eighteen (18) and have personal knowledge of and am competent to testify as to each of the matters set forth herein.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this \_\_\_\_ day of November, 2009, in Hackensack, New Jersey.

  
Kim Vaccarella

## **EXHIBIT "1"**

VH000278

**LOAN AND SECURITY AGREEMENT**

**Between**

**ONECAP PARTNERS 2, LLC**  
**a Nevada limited liability company**  
**as Borrower,**

**AND**

**KENNEDY FUNDING, INC.**  
**as Agent for the**  
**lenders named herein**

**Date: as of June 15, 2006**

31392/6406-(438005v)

KF00026  
VH000279

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### Schedules

- Schedule A - Description of the Collateral
- Schedule B - Principal Loan Documents
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- Schedule D - Lenders

## LOAN AND SECURITY AGREEMENT

THIS LOAN AND SECURITY AGREEMENT ("Agreement"), dated as of June 15, 2006, between ONECAP PARTNERS 2, LLC, a Nevada limited liability company, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146 ("Borrower"), and KENNEDY FUNDING, INC. ("Agent"), a New Jersey corporation having an address at Two University Plaza, Suite 402, Hackensack, New Jersey 07601, as agent for the lenders identified on Schedule D attached hereto and incorporated herein by reference, in each case having an address care of Kennedy Funding, Inc., Two University Plaza, Suite 402, Hackensack, New Jersey 07601 (the aforesaid Agent and lenders are hereinafter collectively referred to as "Lender").

### WITNESSETH

WHEREAS, Borrower has requested that Lender make a loan to Borrower in the amount of TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS (the "Loan"), subject to and upon the terms and conditions hereinafter contained, which Loan shall be evidenced by a Promissory Note as of even date herewith from Borrower to Lender (the "Note");

WHEREAS, the Loan is to be secured by certain instruments, agreements and documents, including, but not limited to, those items identified in the Principal Loan Documents as set forth on Schedule B hereto and made a part hereof, and payment and performance of the Loan is to be guaranteed pursuant to that certain guaranty of even date herewith from Guarantor (as hereinafter defined) to Lender ("Guaranty");

WHEREAS, capitalized terms not otherwise defined herein shall have those meanings assigned to them in the Loan Documents (as hereinafter defined); and

WHEREAS, Lender has agreed to make the Loan to Borrower on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the foregoing and of the covenants and conditions hereinafter set forth, Borrower and Lender hereby agree as follows:

1. **Definitions.** As used herein:

(a) "Account" or "Accounts Receivable" means, in addition to the definition of account as contained in the Uniform Commercial Code, the right of Borrower to receive payment for goods sold or leased or for services rendered which are not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

(b) "Account Debtor" means, in addition to the definition of account debtor as contained in the Uniform Commercial Code, the person or persons obligated to Borrower on an Account, or who is represented by Borrower to be so obligated.

(c) "Affiliate" of any Person (as hereinafter defined) shall mean any other Person which, directly or indirectly, controls or is controlled by, or is under common control with such Person. For the purposes of this definition, "controls" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or by contract or otherwise.

(d) "Business Day" shall mean any day upon which banks located in the State of New Jersey generally are open to conduct regular banking business.

(e) "Closing Date" shall mean the date on which this Agreement is executed by the parties hereto and the conditions set forth in Paragraph 5 are fulfilled to the satisfaction of Lender.

(f) the "Collateral" shall mean the Real Property Collateral, the Collateral described in Paragraph 4 hereof, any other collateral described in any Loan Document and any other property of Borrower and/or Guarantor now or hereafter subject to a security agreement, mortgage, pledge, assignment or other document granting Lender a security interest therein and/or securing the Loan.

(g) the "Default Rate" shall have the meaning ascribed thereto in the Note.

(h) "Dollar" or "\$" or "dollar" or any other terms of similar import shall mean United States Dollars, it being understood and agreed that all advances of the Loan shall be made in U.S. Dollars and repaid or reimbursed in U.S. Dollars without reduction for currency exchange fluctuation.

(i) "Environmental Laws" shall mean a collective reference when and as applicable to (i) the Comprehensive Environmental Response, Compensation & Liability Act, as amended, 42 U.S.C. Section 9601 et seq., (ii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 6901 et seq., and (iii) any and all other federal, state and local statutes, laws, rules, ordinances, regulations and executive orders pertaining to environmental matters applicable to the Borrower's business and/or properties, as the same may be amended or supplemented from time to time.

(j) "Governmental Authority" or "Governmental Authorities" shall mean any federal, state, county or municipal governmental agency, board, commission,

officer, official or entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government and having jurisdiction over Borrower, the Guarantor (as hereinafter defined) or the Collateral.

(k) the "Guarantor" shall mean collectively Vincent Hesser ("Hesser") and OneCap Partners MM, Inc., a Nevada corporation.

(l) the "Indemnified Party" and "Indemnified Parties" shall mean Agent and Lender as well as their directors, officers, trustees, partners, employees, agents, attorneys and shareholders.

(m) the "Loan Documents" shall mean this Agreement, the Note, the Mortgage (as hereinafter defined), the Guaranty and any other documents or agreements given to Lender by Borrower or the Guarantor in connection with the Loan whether or not specifically set forth herein.

(n) "Mortgage" shall mean that certain Deed of Trust and Security Agreement, given by Borrower, as Trustor, in trust unto Nevada Title Company, as Trustee, for the benefit of Lender in connection with the Mortgaged Property, which Mortgage is given as security for the due payment of Borrower's obligations under the Note.

(o) "Person" or "Persons" shall mean any one or more individuals, partnerships, corporations (including a business trust), joint stock companies, limited liability company, trusts, unincorporated associations, joint ventures or other entities, or a foreign state or political subdivision thereof or any agency of such state or subdivision.

(p) "Personalty" shall mean all Accounts, Accounts Receivable, Equipment, Inventory, Goods (as such terms are defined in the Uniform Commercial Code) and other personal property of the Borrower, as more particularly described herein.

(q) "Real Property Collateral" or "Mortgaged Property" shall mean that certain real property owned or leased by Borrower, situated in Laughlin, Nevada as more particularly described in Schedule A attached hereto and made a part hereof.

(r) "Uniform Commercial Code" shall mean the Uniform Commercial Code, as enacted in the State of Nevada and amended from time to time.

## 2. The Loan.

(a) Provided that no default shall have occurred and be continuing hereunder, Lender agrees, subject to the terms and conditions hereinafter set forth, to advance to Borrower up to TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS.



(b) Subject to a final closing statement prepared by Lender's counsel and executed by Borrower (the "Closing Statement"), the Loan proceeds shall be disbursed as follows and used only for the following purposes:

(1) The sum of Two Hundred Forty Thousand and 00/100 (\$240,000.00) Dollars shall be disbursed on behalf of Borrower on the Closing Date and simultaneously paid to Lender as a fully earned, non-refundable fee (the "Fee") in consideration of Lender's commitment to make the Loan on the terms and conditions stated herein. In no event shall the Fee be applied or credited in reduction of any principal, interest or other sum payable hereunder; and

(2) The sum of One Hundred Eighty Thousand and 00/100 (\$180,000) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to Lender as the balance of the commitment fee ("Commitment Fee") due to Lender pursuant to the loan commitment letter entered into by and between Borrower and Lender, dated June 6, 2006;

(3) The sum of Fifty Five Thousand and 00/100 (\$55,000) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to Cole, Schotz, Meisel, Forman & Leonard, P.A., in payment of its legal fees;

(c) The foregoing disbursements may be made, notwithstanding contrary directions from Borrower, and for such purpose Borrower agrees that:

A. The foregoing constitutes an irrevocable direction or authorization to so disburse the funds (said authorization being coupled with an interest) and no further direction or authorization from Borrower shall be necessary to warrant any such disbursements; and

B. All such disbursements shall satisfy the obligations of Lender to advance funds to Borrower notwithstanding any other agreement or document to the contrary and shall be secured by the Mortgage as fully as if made by Borrower, regardless of the disposition by the party to whom such disbursements are so made.

3. The Note. The obligation of the Borrower to repay all monies advanced by Lender to Borrower in connection with the Loan shall be evidenced by this Agreement and the Note. The Loan shall bear interest at the rate(s) set forth in the Note and shall be payable as provided in the Note with final payment due on the Maturity Date (as defined in the Note). All of Borrower's obligations hereunder and under the Note are secured by the Mortgage and the other Loan Documents. Should the principal of or interest on the Loan become due and payable on a day other than a Business Day, the maturity thereof shall be extended to the next succeeding Business Day and, in the case of principal,

interest shall be payable thereon at the rate per annum specified in the Note during such extension.

4. Grant of Security Interest.

(a) Borrower hereby assigns and pledges to Lender, and hereby grants to Lender a security interest in all property of the following types, wherever located and whether now owned or hereafter owned or acquired by Borrower, whether or not affixed to the Mortgaged Property, in all proceeds (including, without limitation, amounts payable under any policies of insurance with respect thereto), and Products (as such term is defined in the Uniform Commercial Code) thereof in any form, in all parts, accessories, attachments, special tools, additions, replacements, substitutions and accessions thereto or therefor, and in all increases or profits received therefrom:

(1) all Accounts, to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(2) all Equipment (as such term is defined in the Uniform Commercial Code), and in all of Borrower's machinery and equipment of every kind, nature and description, as well as trucks and vehicles of every kind and description, including, but not limited to, trailers, cranes and hoisting equipment, whether presently owned by Borrower or hereafter acquired, and wherever located to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(3) all Inventory (as such term is defined in the Uniform Commercial Code);

(4) all General Intangibles (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(5) all deposit accounts of Borrower with Lender, now or hereafter existing, and all money, instruments, securities, documents, chattel paper, credits, claims, performance bonds, payment bonds, all other forms of surety to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, and other property of Borrower now or hereafter in the possession or custody of Lender or any of its agents;

(6) all Chattel Paper (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, including, but not limited to, all such Chattel Paper now or hereafter left in the possession of Lender for any purpose;

(7) all Instruments (as such term is defined in the Uniform Commercial Code), including any negotiable instruments or a securities, or any other

writing which evidences a right to the payment of money and is of the type which is, in the ordinary course of business, transferred by delivery with any necessary endorsement or assignment whether presently owned by Borrower or hereafter acquired, to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, including, but not limited to, all such Instruments now or hereafter left in the possession of Lender for any purpose;

(8) all Documents (as such term is defined in the Uniform Commercial Code);

(9) all Goods (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property whether presently owned by Borrower or hereafter acquired; and

(10) all books and records, including, without limitation, customer lists, credit files, computer programs, print-outs and other computer materials and records of Borrower pertaining to all of the Collateral.

(b) Borrower will perform any and all steps requested by Lender to create and maintain in Lender's favor a first and valid lien on and security interest in the Collateral or pledges of Collateral, including, without limitation, the execution, delivery, filing and recording of financing statements and continuation statements, supplemental security agreements, notes, filings with federal government offices and any other documents necessary, in the opinion of Lender, to protect its interest in the Collateral which liens shall be exclusive except for those liens expressly permitted elsewhere herein. Lender and its designated officer are hereby appointed Borrower's attorney-in-fact to do all acts and things which Lender may deem necessary to perfect and continue perfected the security interests and Liens provided for in this Agreement, including, but not limited to, executing financing statements on behalf of Borrower.

5. Conditions Precedent to Lender's Obligations. Lender shall not be obligated to make the Loan hereunder unless Lender shall have received the following, all in form and substance satisfactory to the Lender in all respects:

- (a) the Note, duly executed by Borrower;
- (b) the Mortgage, duly executed by Borrower;
- (c) this Agreement, duly executed by Borrower;
- (d) the Guaranty, duly executed by Guarantor;
- (e) the Assignment of Leases and Rents, duly executed by Borrower;

- (f) the Assignment of Licenses, Contracts, Plans, etc., duly executed by Borrower;
- (g) the Environmental Indemnity Agreement, duly executed by Borrower and Guarantor;
- (h) the Document Re-Execution Agreement, duly executed by Borrower and Guarantor;
- (i) the Closing Statement, duly executed by Borrower;
- (j) certificates of insurers, or other evidence satisfactory to Lender, indicating that Borrower and Guarantor have obtained the policies of insurance as are required under the terms of the Mortgage;
- (k) a paid title insurance policy (without survey exception) in the full amount of the Loan issued by a title insurance company acceptable to Lender and insuring the Mortgage as a valid first lien on the Mortgaged Property, with such endorsements as Lender shall require and subject to the Permitted Exceptions identified in the Mortgage;
- (l) UCC-1 financing statements required to evidence or perfect Lender's security interest in the personal property now or hereafter owned by the Borrower and located on or used in connection with the Mortgaged Property and UCC-1 financing statements required to perfect Lender's security interest in the Collateral;
- (m) an appraisal of the Mortgaged Property;
- (n) financial statements and tax returns for Borrower, and the Guarantor;
- (o) evidence of a search of the public records which discloses no conditional sales contracts, chattel mortgages, leases of personalty, financing statements or title retention agreements filed or recorded against the Borrower or the Mortgaged Property;
- (p) a survey of the Mortgaged Property prepared in accordance with the "Minimum Standard Detail Requirements for ALTA and ACSM Land Title Surveys" jointly established by ALTA and ACSM in 2005, as updated, and certified to Lender by a registered land surveyor acceptable to the Lender ("Survey");
- (q) copies of all permits or approvals required by Governmental Authorities to such date with respect to Borrower or the Mortgaged Property, to the extent the same are necessary and appropriate to operate and develop the Mortgaged Property.

- (e) an environmental audit of the Mortgaged Property (Phase I and, if necessary Phase II);
- (s) the operating agreement of Borrower certified by the Manager of Borrower;
- (t) an incumbency certificate of Borrower which shall certify the names and titles of the members of the limited liability company authorized to sign, in the name and on behalf of Borrower this Agreement and each other Loan Document to be delivered pursuant to this Agreement by Borrower, together with the true signatures of such officers, upon which certificate the Lender may conclusively rely;
- (u) consents of the limited liability company authorizing the transactions to be entered into by Borrower in connection with this Agreement;
- (v) evidence that the Mortgaged Property is not located in a federal or state flood hazard area;
- (w) certification regarding debts and liens, executed by the owner of the Mortgaged Property;
- (x) payment of the Short Interest, the Fee (as such terms are defined herein and in the Note) and other fees and expenses required to be paid to or on behalf of Lender in connection with the Loan;
- (y) opinions of legal counsel to the Borrower with respect to such matters as the Lender may reasonably request including, but not limited to, opinions from Borrower's local Nevada counsel and Borrower's New Jersey counsel;
- (z) an opinion of legal counsel to the Guarantor with respect to such matters as the Lender may reasonably request including, but not limited to, opinions from Guarantor's local Nevada counsel and Guarantor's New Jersey counsel; and
- (aa) evidence of the appointment of a New Jersey agent to accept service of process on behalf of the Borrower and Guarantor, pursuant to the requirements of the Loan Documents;
- (bb) evidence demonstrating current full compliance with all applicable zoning, health, environmental and safety laws, ordinances and regulations (including, without limitation, approval of local, private or public sewage or water utility);
- (cc) certification from Borrower that Borrower is not a party to any existing or pending or threatened litigation, except as previously disclosed to Lender; and

(dd) evidence demonstrating receipt of all appropriate approvals meeting all applicable requirements of all Governmental Authorities having jurisdiction including, but not limited to, subdivision and site plan approvals, potable water supply, sewage discharge and sewage connection, use of septic tanks or alternatives.

(ee) satisfactory evidence that all roads and utilities necessary for the full utilization of the Collateral for its intended purposes have been completed or the presently installed and proposed roads and utilities will be sufficient for the full utilization of Collateral for its intended purposes.

(ff) such other agreements, certificates or other documents as Lender or Title Insurance Company may reasonably request;

6. **Representations and Warranties of Borrower.** To induce Lender to make the Loan pursuant to this Loan Agreement, Borrower hereby represents and warrants to Lender as follows:

(a) By its acceptance of Lender's funds and execution of the Loan Documents, Borrower acknowledges, agrees and confirms that it has no defense, offset or counterclaim for any occurrence in relation to this Loan and Borrower acknowledges that Lender has complied with all of its obligations under the Loan Documents as of the date hereof.

(b) Borrower is a limited liability company, duly organized under the laws of the State of Nevada and has all requisite power and authority and legal right to own its property, to carry on its business as it is now being conducted, to enter into this Agreement and the other Loan Documents entered into by it and to perform all of its obligations hereunder and thereunder.

(c) The execution and delivery by Borrower of the Loan Documents, and the performance of its obligations thereunder, have been duly authorized by all necessary action, corporate or otherwise, and do not and will not: (i) require any further action, consent or approval on the part of the members of Borrower; (ii) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to Borrower, or the members of Borrower; or (iii) result in any breach of or constitute a default under any indenture or loan or credit agreement or any other agreement, lease or instrument to which the Borrower is a party or by which the Borrower or its properties may be bound or affected, and the Borrower is not in default under any such law, rule, regulation, order, writ, judgment, injunction, decree, determination or award or any such indenture, agreement, lease or instrument.

(d) The Loan Documents have been duly executed and delivered by Borrower and are legal, valid and binding obligations of Borrower, enforceable against Borrower in accordance with their respective terms.

(e) Except as previously disclosed to Lender, there is no material action, suit, proceeding, inquiry or investigation, at law or in equity, or before any court, governmental instrumentality, public board or arbitrator pending or threatened against or affecting Borrower or any of its properties or rights, wherein an unfavorable decision, ruling or finding would (i) to the extent not covered by insurance as to which the insurer has not disclaimed coverage, result in any material adverse change in the financial condition, business, properties or operations of Borrower; (ii) materially or adversely effect the transactions evidenced by the Loan Documents; (iii) materially impair the right of either to carry on its business substantially as now conducted; or (iv) adversely effect the validity or enforceability of the Loan Documents.

(f) To the best of Borrower's knowledge, Borrower is in compliance with all laws applicable to Borrower or its properties or assets.

(g) Borrower is a pre-existing limited liability company and is actively engaged in the operation of its business. The proceeds of the Loan will be used by Borrower for the purposes set forth in Paragraph 6(o) in connection with the operation of Borrower's business, and the proceeds of the Loan will not be paid over or diverted by Borrower to any member, manager, officer, director, trustee, shareholder of Borrower, any Guarantor or any other person.

(h) The following persons constitute the members of Borrower and their respective ownership units:

Ascendant Universal Fund I, LLC	25 Units
Namale Limited Partnership	74 Units
OneCap Partners MM Inc.	1 Unit

(i) There has been no material adverse change in the condition, financial or otherwise, of Borrower or the Guarantor since the date of its financial statements furnished to Lender.

(j) Borrower's properties and assets reflected on its financial statements referred to above, and all such properties and assets are free and clear of all mortgages, pledges, liens, charges or other encumbrances, except as reflected on such financial statements which have been previously provided to Agent.

(k) Borrower and the Guarantor have each filed all federal, state and other income or franchise tax returns which are required to be filed and have paid all

taxes due or which may become due pursuant to such returns or pursuant to any assessment received by it.

(l) All timely authorizations, permits, approvals and consents of Governmental Authorities which may be required in connection with the valid execution and delivery of this Agreement and the other Loan Documents and the carrying out or performance of any of the activities or transactions required or contemplated hereunder or thereunder have been obtained (and remain in full force and effect).

(m) All financial statements, information and other financial data furnished by Borrower and the Guarantor to Lender in connection with the Agreement (i) were true, correct and complete in all material respects, as of the date of said financial statements, information and other data, (ii) such financial statements present fairly the financial condition of Borrower and the Guarantor at the respective dates thereof and the results of operations and changes in financial position for the periods to which they apply, and (iii) there have been no material adverse changes in the financial condition of Borrower or any Guarantor since the delivery by Borrower or the Guarantor, as the case may be, to Lender of the most recent financial statements.

(n) Borrower's assets, at a fair valuation, exceed Borrower's liabilities (including, without limitation, contingent liabilities). Borrower is paying its debts as they become due and Borrower anticipates the continuing ability to pay its debts as they become due. Borrower has capital and assets sufficient to carry on its business.

(o) Proceeds from the Loan shall be used only as set forth in this Agreement, the Closing Statement, and for other proper corporate/limited liability company purposes. No part of the proceeds of the Loan shall be used, directly or indirectly, for the purpose of purchasing or carrying any margin stock within the meaning of Regulation U of the Board of Governors of the Federal Reserve System, or for the purpose of purchasing or carrying or trading in any stock under such circumstances as to involve Borrower in a violation of Regulation U of the Board of Governors of the Federal Reserve System. In particular, without limitation of the foregoing, no part of the proceeds from the Loan are intended to be used to acquire any publicly-held stock of any kind. As used in this subparagraph (o), the terms "margin stock" and "purpose of purchasing or carrying" shall have the meanings assigned to them in the aforesaid Regulation U, and the term "publicly-held," in respect to securities, shall have the meaning assigned to it in Section 220.7(a) of Regulation T of the Board of Governors of the Federal Reserve System.

(p) Borrower is not in violation of or in default under (nor on the Closing Date is there any waiver in effect which, if not in effect, would result in a violation or default under) any provision of Borrower's bylaws/operating agreement, or under any provision of any agreement, indenture, evidence of indebtedness, loan or financing agreement, certificate, lease or other instrument to which it is a party, or by



which it is bound, or of any law, governmental order, rule or regulation, in any such case under this subparagraph (p) so as to affect adversely in any material manner its business, assets or financial conditions.

(q) All statements, representations and warranties made by Borrower or any other person in this Agreement, any other Loan Document and any other agreement, document, certificate or instrument previously furnished or to be furnished by said person to Lender under this Agreement or in connection with the Loan: (i) are and shall be true, correct and complete in all material respects at the time they were made and, in the case of those made prior to the Closing Date, on and as of the Closing Date, (ii) do not and shall not contain any untrue statement of a material fact at the time made, and (iii) do not and shall not omit to state a material fact at the time made necessary in order to make the information contained herein or therein not misleading or incomplete. Borrower understands that all such statements, representations and warranties shall be deemed to have been relied upon by Lender as a material inducement to provide the Loan.

(r) No person is entitled to receive from Borrower any brokerage commission, finder's fee or similar fee or payment in connection with the consummation of the transactions contemplated by this Agreement except as provided in Section 2 of this Agreement. No brokerage or other fee, commission or compensation is to be paid by Lender by reason of any act, alleged act or omission of Borrower with respect to the transaction contemplated hereby.

(s) Borrower has no knowledge of any of the following:

(i) The release or threatened release of any hazardous substance, pollutant or contaminant as each such term is presently defined in any applicable Environmental Laws resulting from any activity by or on behalf of Borrower or any predecessor in interest to the Mortgaged Property, including, without limitation, the generation, handling, storage, treatment, transportation or disposal of any hazardous substance, pollutant or contaminant at any of the past or present business locations and facilities of Borrower; or

(ii) Any past or future action taken or to be taken by any federal, state, county or municipal Governmental Authority or by any other person under any applicable Environmental Laws concerning the release of any hazardous substance, pollutant or contaminant into the soil, air, surface or subsurface water or the environment in general from any of the past or present business locations and facilities of Borrower; or

(iii) Any claims or actions brought or which are threatened to be brought by any Person against Borrower for damages occurring at or outside of any of the past or present business locations and facilities of Borrower resulting from the alleged release or threatened release of any hazardous substance, pollutant or contaminant by

Borrower or any predecessor in interest, including, without limitation, claims for health effects to Persons, property damage and/or damage to natural resources.

(t) (A) Borrower's address set forth above is the location of Borrower's chief executive office, and is the only location where Borrower keeps its records concerning its Accounts, and its inventory and equipment. (B) Within four (4) months of the date of this Agreement, none of Borrower's assets have been moved from any jurisdiction or other locations than the present location of assets set forth above except for inventory or equipment purchased or sold by Borrower in the ordinary course of business from persons or entities customarily selling such inventory or equipment. (C) As of the date hereof, no inventory is now stored with a bailee, warehouseman or similar party. (D) As of the date hereof, Borrower does not hold any goods belonging to third parties or in which other parties have an interest, including any goods sold on a bill and hold basis. (E) Borrower does not presently purchase or otherwise hold goods on a consignment basis. (F) None of Borrower's inventory is of a nature that contains any labels, trademarks, trade names, or other identifying characteristics which are the properties of third parties, and the use of which by Borrower is in violation of the rights of such third parties or under license, royalty or similar agreements with any third parties. (G) No persons hold any goods of Borrower. (H) Borrower has not purchased any inventory or equipment except in the ordinary course of business for value and from persons customarily in the business of selling such inventory or equipment. (I) Borrower does not hold any instrument or chattel paper connected with any Account. (J) Borrower does not own any trademarks, trade names, patents or copyrights. (K) No surety bonds have been issued on behalf of Borrower with respect to any contracts or purchase orders out of which Accounts Receivable have arisen or are expected to arise.

(u) Borrower is the owner and the operator of the Mortgaged Property.

7. Survival of Representations and Warranties. The foregoing representations and warranties shall survive the execution of this Loan Agreement and the closing of the Loan.

8. Affirmative Covenants. To induce Lender to make the Loan pursuant to this Agreement, Borrower hereby covenants and agrees that so long as the Loan shall remain outstanding hereunder, Borrower shall comply with the following covenants:

(a) Borrower shall keep and maintain complete and accurate books, accounts and records. Borrower shall permit access thereto and examination thereof by Lender and any authorized representatives of Lender, at all reasonable times and places during normal business hours (including the right to make copies thereof at the cost and expense of Borrower).

(b) Borrower shall comply in all material respects with all applicable federal, state, county and municipal laws, rules, regulations and orders of any

Governmental Authority having jurisdiction over Borrower, subject to the limitations expressly set forth in the Mortgage, except to the extent contested in good faith and by proper proceedings or where the failure to so comply would not have a material adverse effect on Borrower, including, without limitation, all Environmental Laws and health and safety laws.

(c) Borrower shall promptly notify Lender of the occurrence of any Event of Default or an event which, with the giving of notice or passage of time or both, would constitute an Event of Default and of the occurrence of any event or the commencement of any action, suit or proceeding which, if adversely determined, would adversely affect the condition, financial or otherwise, of Borrower or Guarantor.

(d) Borrower shall indemnify, protect, defend and save harmless the Indemnified Parties from and against (i) any and all losses, damages, expenses or liabilities of any kind or nature and from any suits, claims, or demands, by third parties including reasonable counsel fees incurred in investigating or defending such claim, suffered by any of them and caused by, relating to, arising out of, resulting from, or in any way connected with the Loan and the transactions contemplated herein, and (ii) any and all losses, damages, expenses or liabilities sustained by Lender in connection with any environmental sampling or cleanup relating to any properties or assets owned or otherwise used by Borrower in the operation of its business, or mandated by any Environmental Law; provided, however, Borrower shall not be obligated to indemnify, protect, defend and save harmless an Indemnified Party, if the loss, damage, expense or liability was caused by or resulted from the gross negligence or willful misconduct of that Indemnified Party. In case any action shall be brought against an Indemnified Party based upon any of the above and in respect to which indemnity may be sought against Borrower, the Indemnified Party against whom such action was brought, shall promptly notify Borrower in writing, and Borrower shall assume the defense thereof, including the employment of counsel selected by Borrower and reasonably satisfactory to the Indemnified Party, the payment of all costs and expenses and the right to negotiate and consent to settlement. Upon reasonable determination made by the Indemnified Party, the Indemnified Party shall have the right to employ separate counsel in any such action and to participate in the defense thereof at the Indemnified Party's cost and expense. Borrower shall not be liable for any settlement of any such action effected without its consent, but if settled with Borrower's consent, or if there be a final judgment for the claimant in any such action, Borrower agrees to indemnify and save harmless said Indemnified Party against whom such action was brought from and against any loss or liability by reason of such settlement or judgment. The provisions of this subparagraph (d) shall survive the termination of this Agreement and the final repayment of the Loan.

(e) If Lender shall so require, Borrower agrees to establish and maintain at a banking institution of Lender's choice a lockbox, in accordance with Lender's standard lockbox agreement in effect from time to time, and to direct all Account Debtors

to make remittances on all Accounts to said lockbox. Any and all remittances received in said lockbox may be applied to the Obligations of Borrower to Lender in accordance with Paragraph (g) hereof.

(f) If, notwithstanding the notices to Account Debtors to remit payments on Accounts to the lockbox referred to above, Borrower receives any payments on Accounts or other Collateral, Borrower agrees to receive any and all payments and remittances on Accounts and Inventory and other Collateral, including cash, checks, drafts, notes, acceptances or other forms of payment in trust for Lender and to deliver such payments in the identical form in which they were received, together with collection reports in form satisfactory to Lender.

(g) All proceeds of any Account(s) and inventory and other Collateral which are delivered to or otherwise received by Lender for application to the Loan provided for herein shall be deemed received as of the date of actual receipt by Lender, and shall be applied by Lender on account of the Obligations upon Lender's receipt of same; provided, however, that no checks, drafts, or other Instruments received by Lender shall constitute payment to Lender unless and until such item of payment has actually been collected by Lender. For the sole purpose of calculation of interest due to Lender from Borrower, all such proceeds and other payments on account of the Loan provided for in this Agreement, irrespective of the type or form of payment thereof shall not be considered applied on account of the Obligations until actual clearance of such funds.

(h) Borrower shall maintain all of its property in good working condition, ordinary wear and tear excepted (including obsolete and abandoned property).

(i) Borrower shall, within ten (10) days of the end of each month, deliver to Lender an aging of its Accounts and report of its inventory, and an aging of its accounts payable in such form as may be reasonably acceptable to Lender, and within thirty (30) days of the end of each month, a duly completed accounts receivable reconciliation report in such form as may be reasonably acceptable to Lender.

(j) Borrower will continue to hold all necessary licenses and permits for the operations of their business, including but not limited to contract vendor registrations and account numbers.

(k) Lender (by any of its officers, employees and agents) shall have the right, at any time or times during Borrower's usual business hours (provided reasonable prior notice is given except if an Event of Default has occurred and is continuing), to inspect the Collateral, all records related thereto (and to make extracts from such records) and the premises upon which any of the Collateral is located, to discuss Borrower's affairs and finances with any person and to verify the amount, quality, quantity, value and condition of, or any other matter relating to, the Collateral.

(l) (A) Lender shall have the right at any time and from time to time, without notice, to notify Account Debtors to make payments to Lender, to endorse all items of payment which may come into its hands payable to Borrower, to take control of any cash or non-cash proceeds of Accounts and of any returned or repossessed goods; to compromise, extend or renew any Account or deal with it as it may deem advisable, and to make exchanges, substitutions or surrenders of Collateral, to notify the postal authorities, after an Event of Default, to deliver all mail, correspondence or parcels addressed to Borrower to Lender at such address as Lender may choose. (B) Borrower herewith appoints Lender or its designee as Attorney-in-Fact to endorse Borrower's name on any checks, notes, acceptances, drafts or any other instrument or document requiring said endorsement and to sign Borrower's name on any invoice or bills of lading relating to any Account, or drafts against its customers, or schedules or confirmatory assignment on Accounts, or notices of assignment, financing statements under the Uniform Commercial Code, and other public records, and in verification of Accounts and in notices to Account Debtors. (C) Lender shall have no obligation to preserve any rights against any Person obligated on any Account, chattel paper, instrument or other item of Collateral. Lender shall not be permitted to exercise the rights granted to it under the foregoing clauses (A) and (B) prior to an Event of Default.

(m) Borrower will furnish Lender with at least ten (10) days' prior written notice of any change in location of or addition to its chief executive office, the office where it keeps its records concerning its Accounts, its location of Inventory, Equipment and other assets, and other business locations.

(n) Pay and discharge, and require its subsidiaries to pay and discharge, when due, all taxes, assessments or other governmental charges imposed on them or any of their respective properties, unless the same are currently being contested in good faith by appropriate proceedings and adequate reserves are maintained therefor.

(o) Operate its properties, and cause those of its subsidiaries to be operated in compliance with all applicable orders, rules and regulations promulgated by the jurisdictions and agencies thereof where such properties are located and duly file or cause to be filed such reports and/or information returns as may be required or appropriate under applicable orders, regulations or law.

(p) Permit the Lender's representatives and/or agents full and complete access to any or all of the Borrower's and its subsidiaries' properties and financial records, to make extracts from and/or audit such records and to examine and discuss the Borrower's properties, business, finances and affairs with the Borrower's officers and outside accountants.

(q) Obtain lien releases and lien waivers, in a statutory standard form, as and when Borrower pays contractors, materialmen, laborers providing labor, equipment, or materials to the Mortgaged Property and submit copies of the same to Lender.

(r) Hesser shall retain and exercise management and control of OneCap Partners MM, Inc., the Manager of Borrower and OneCap Partners MM, Inc. shall continue to be the Manager of Borrower.

(s) Borrower and/or Guarantor shall, no later than June 30, 2006, provide Lender with evidence to Lender's sole satisfaction, that The Corporation Trust Company has been appointed as Guarantor's New Jersey Agent for service of process.

9. Negative Covenants of Borrower. To induce Lender to make the Loan pursuant to this Agreement, Borrower hereby covenants and agrees that so long as the Loan shall remain outstanding, Borrower shall not:

(a) Except for Permitted Encumbrances as set forth in the Mortgage, at any time: (i) create, incur, assume or suffer to exist any mortgage, deed of trust, pledge, security interest, encumbrance, lien or charge of any nature upon or with respect to Borrower's assets and properties or (ii) sign or file under the Uniform Commercial Code of any jurisdiction a financing statement which names Borrower as a debtor or (iii) sign any security agreement authorizing any secured party thereunder to file such financing statement. Borrower further covenants and agrees not to grant any similar negative pledge to any other lender.

(b) Except as to the sale or disposition of assets which are obsolete or worn out and are no longer used or useful in the conduct of its business, convey, sell, lease, assign, transfer, hypothecate or otherwise dispose of any of its now or hereafter acquired property, business or assets.

(c) Create, incur, suffer to exist, assume, guaranty, endorse, become a surety, or otherwise become liable for the debt or other obligations of any other Person whether directly or indirectly, or make or incur any advance, purchase commitment, other obligation or loan for the direct or indirect purpose of paying or discharging any such obligations.

(d) Make any advance, loan, extension of credit or capital contribution to, or purchase any stock, bonds, notes, debentures or other securities of or any assets constituting a business unit of, or make any other investment income, any Person.

(e) Enter into any merger or consolidation or liquidate or wind-up or dissolve itself (or suffer any liquidation or dissolution) or convey, sell, lease, assign, transfer or otherwise dispose (directly or indirectly) of all or substantially all of its property, business or assets or make any material change in its present method of conducting business or permit any corporate guarantor to do any of the foregoing.

- (f) Materially change, amend, alter or modify the bylaws/operating agreement or other governing documents of Borrower or permit any corporate guarantor to do any of the foregoing.
- (g) Enter into or permit any Guarantor to enter into any transaction, including, without limitation, the purchase, sale or exchange of property or the rendering of any service, with any officer, director, shareholder or partner of Borrower or any Guarantor or Affiliate of any of the foregoing.
- (h) Declare or pay any dividends on, distributions on or make any payment on account of, or set apart assets or a sinking fund for the purchase, redemption, defeasance, retirement or other acquisition of, any interest, shares or any class of stock or any warrant or option to purchase any such stock whether now or hereafter outstanding or make any other distribution in respect thereof, directly or indirectly whether in cash or property or obligations.
- (i) Create, incur, suffer to exist any indebtedness, except (i) indebtedness in respect of the Loan; and (ii) indebtedness, if any, outstanding as of the date of this Agreement and shown on the financial statements previously delivered to Lender.
- (j) Transfer, sell, lease or otherwise convey (directly or indirectly) any interest or shares of capital stock or membership or ownership interest in any guarantor.
- (k) Purchase any Inventory or Equipment except in the ordinary course of business from persons customarily in the business of selling such Inventory or Equipment.
- (l) Without prior written consent of Lender, remove the Collateral from its present location, except for the removal of Inventory upon its sale.
- (m) Sell or transfer any Inventory to any Affiliate or subsidiary of Borrower except on arms length terms in the ordinary course of business.
- (n) Sell, lease or transfer any of its equipment (except for abandoned or obsolete equipment) or other assets without the prior written consent of Lender except for sales of inventory in the ordinary course of business to good faith purchasers for value.
- (o) Allow its existence of as a corporation/limited liability company to be other than in good standing and will not, without the prior written consent of Lender, dissolve or liquidate, or merge or consolidate with or acquire or affiliate with any other business entity or form any subsidiary.
- (p) Change its name without furnishing to Lender at least ten (10) days' prior written notice thereof.

(q) Utilize any trade name, and will not in the future utilize any trade name without furnishing to Lender at least ten (10) days prior written notice thereof.

(r) Change the nature of its business.

(s) Sell, assign, transfer or dispose of any of its accounts or notes receivable, with or without recourse, except to the Lender.

(t) Except after notice to Lender and with Lender's prior written consent, partition or subdivide the Mortgaged Property.

10. Events of Default. The occurrence of any of the following shall constitute an Event of Default hereunder:

(a) failure of Borrower to make any payment of any installment of principal or interest when due under the Note;

(b) failure of Borrower to pay any other sum when due hereunder or under the Note or any other Loan Document;

(c) any representation or warranty of Borrower or the Guarantor made herein or in any other Loan Document or in any other writing given to Lender in connection with the Loan shall have been incorrect in any material respect as of the time when the same shall have been made or is not accurate when a further disbursement is to be made to Borrower;

(d) the occurrence of an Event of Default under the Mortgage or any other Loan Document;

(e) the sale, conveyance, assignment, transfer or other disposition or divestiture of Borrower's title to any of the Collateral, or the mortgage or other conveyance of a security interest in, or other encumbrance on any of the Collateral or any interest therein, whether voluntary or involuntary, except as provided herein;

(f) any merger, consolidation, liquidation or dissolution, or the sale or transfer of all or substantially all of the assets, of the Borrower;

(g) the transfer (directly or indirectly) of any of the stock or other ownership interest of Borrower, provided, however, that such transfer shall not constitute an Event of Default if it does not change the control, management or majority ownership of Borrower.

(h) any default in the performance or observance of any term, covenant or agreement to be performed by Borrower or Guarantor in this Loan Agreement or in any Loan Document;



(i) the use of proceeds of the Loan for any purpose other than the purpose described in Paragraph 6(o);

(j) any Loan Documents for any reason shall cease to be in full force and effect, the liens on the Collateral purported to be created thereby shall cease to be or are not valid and perfected liens having priority over all other liens except any encumbrances specifically permitted under such Loan Documents, or any Guarantor shall assert that it has no liability under the Guaranty to which it is a party;

(k) one or more judgments or decrees shall be entered against Borrower or any Guarantor (not paid or fully covered by insurance) and all such judgments or decrees shall not have been vacated or discharged, stayed or bonded pending appeal within sixty (60) days from the entry thereof;

(l) if Borrower or any Guarantor becomes insolvent;

(m) if Borrower or any Guarantor generally does not pay its debts as they become due and Borrower has failed to make any payment to Lender required by the Loan Documents;

(n) if Borrower or any Guarantor makes an assignment for the benefit of creditors;

(o) if Borrower or any Guarantor calls or causes to be called a meeting of creditors for the composition of debts;

(p) if there shall be filed by or with the consent or authorization of Borrower or any Guarantor a petition in bankruptcy for liquidation or for reorganization, or a custodian, receiver or agent is appointed or authorized to take charge of its properties, or Borrower or any Guarantor authorizes any such action;

(q) if there shall be filed against Borrower or any Guarantor a petition in bankruptcy, for liquidation, or for reorganization, or a custodian, receiver, or agent is appointed or authorized to take charge of its properties and Borrower or any Guarantor, as the case may be, has not consented to or authorized such action and such action is not dismissed within sixty (60) days; and

(r) if any license, permit, registration, vendor account or other approval required for the normal operation of Borrower's business or any of the Collateral shall be suspended or shall cease to be in full force and effect.

#### 11. Remedies.

(a) Upon the occurrence of an Event of Default and at any time thereafter during the continuance of such Event of Default, in addition to any remedies

available to Lender under applicable law, Lender may take one or more of the following remedial steps in any order of priority:

(i) Declare immediately due and payable the outstanding principal balance of the Note, together with all accrued and unpaid interest, fees and other sums or expenses payable thereunder and hereunder and accordingly accelerate payment thereof without presentment, demand, notice of intention to accelerate, notice of acceleration or notice of any other kind, all of which are expressly waived;

(ii) Take any action at law or in equity against Borrower or the Guarantor (a) to collect the payments then due and thereafter to become due under the Loan Documents, or (b) to enforce performance and observance of any obligation, agreement or covenant of Borrower or such other parties under the Loan Documents;

(iii) Exercise any and all rights and remedies provided for in the other Loan Documents as they relate to Borrower or any Guarantor.

(iv) Proceed with or without judicial process to take possession of all or any part of the Collateral provided for herein not already in the possession of Lender and Borrower agrees that upon receipt of notice of Lender's intention to take possession of all or any part of said Collateral, Borrower will do everything reasonably necessary to assemble the Collateral and make same available to Lender at a place to be designated by Lender. Borrower hereby waives any and all rights it may have, by statute, constitution or otherwise to notice from Lender, for Lender to obtain possession, by Court proceedings or otherwise, of the Collateral provided for in this or in any other agreement with Lender;

(v) So long as Lender acts in a commercially reasonable manner, assign, transfer and deliver at any time or from time to time the whole or any portion of the Collateral or any rights or interest therein in accordance with the Uniform Commercial Code, and without limiting the scope of Lender's rights thereunder, Lender may sell the Collateral at public or private sale, or in any other manner, at such price or prices as Lender may deem best, and either for cash or credit, or for future delivery, at the option of Lender, in bulk or in parcels and with or without having the Collateral at the sale or other disposition. Lender shall have the right to be the purchaser at any public sale. Lender shall have the right to conduct such sales on Borrower's premises or elsewhere and shall have the right to use Borrower's premises without charge for such sales for such time or times as Lender may see fit. Lender is hereby granted license or other right to use, without charge, Borrower's labels, patents, copyrights, rights of use of any name, trade secrets, trade names, trademarks and advertising matter, or any property of a similar nature, as it pertains to the collateral, in advertising for sale and selling any collateral and Borrower's rights under all licenses and franchise agreements shall inure to Lender's benefit. Borrower agrees that a reasonable means of disposition of Accounts shall be for Lender to hold and liquidate any and all Accounts. In the event of a sale of

the Collateral, or any other disposition thereof, Lender shall apply all proceeds first to all costs and expenses of disposition, including reasonable attorneys' fees, and then to the Obligations of Borrower to Lender;

(vi) Elect to retain the Collateral or any part thereof in satisfaction of all Obligations due from Borrower to Lender upon notice of such proposed election to Borrower and any other party as may be required by the Uniform Commercial Code; and

(vii) Lender shall have the right immediately, and without notice or other action to set-off against any of any Borrower's Obligations to Lender any sum owed by Lender in any capacity to any Borrower whether due or not, and Lender shall be deemed to have exercised such right of set-off and to have made a charge against any such sum immediately upon the occurrence of a Default, even though the actual book entries may be made at some time subsequent thereto.

(b) No remedy conferred in this Agreement or the other Loan Documents is intended to be exclusive of any other remedy, and each and every such remedy shall be cumulative and shall be in addition to every other remedy conferred herein or now or hereafter existing at law or equity or by statute or otherwise.

## 12. Payment of Expenses.

(a) Borrower agrees that it shall pay, within five (5) days after demand, all out-of-pocket expenses incurred by Lender in connection with this transaction including, without limitation, fees and expenses for any title searches required hereunder, recording and filing fees, and reasonable attorneys' fees incurred by Lender in connection with the Loan (including any amendments and waivers), the preparation of the Loan Documents, the administration of the Loan, inspection of the Mortgaged Property during the course of the Project and the enforcement Lender's rights and remedies under the Loan Documents.

(b) If Borrower should fail to perform or observe, or to cause to be performed or observed, any covenant or obligation under this Agreement or any of the other Loan Documents, then the Lender, may (but shall be under no obligation to) take such steps as are necessary to remedy any such nonperformance or nonobservance and provide for payment thereof, if any (which shall include, without limitation, steps necessary to cure any defaults of Borrower under any lease).

(c) All amounts expended or advanced by the Lender pursuant to this Paragraph 12 shall become part of the outstanding principal balance of the Loan and the Note, shall be secured by, among other things, the Mortgage, shall become due and payable by the Borrower upon demand by Lender, and shall bear interest at the Default Rate (such interest to be calculated from the date of such advance by Lender to the date of repayment thereof by Borrower).

13. Lender's Right to Assign. Lender shall have the right to sell, assign, transfer or dispose of all or any part of its interest in the Loan without the consent or approval of Borrower or Guarantor.

14. Default Interest Rate. All sums advanced and all expenses incurred by Lender pursuant to any provision of this Agreement or of the other Loan Documents which are not paid when due shall bear interest at the Default Rate set forth in the Note from the date such sum was due until such sum is paid in full and shall be secured by the Mortgage.

15. Usury Savings. Notwithstanding anything to the contrary contained herein, under no circumstances shall the aggregate amount paid or agreed to be paid hereunder or under the Note exceed the highest lawful rate permitted under applicable usury law (the "Maximum Rate") and the payment obligations of Borrower under this Agreement and the Note are hereby limited accordingly. If under any circumstances, whether by reason of advancement or acceleration of the maturity of the unpaid principal balance hereof or otherwise, the aggregate amounts paid hereunder or under the Note shall include amounts which by law are deemed interest and which would exceed the Maximum Rate, Borrower stipulates that payment and collection of such excess amounts shall have been and will be deemed to have been the result of a mistake on the part of both Borrower and Lender or the holder of the Note, and the party receiving such excess payments shall promptly credit such excess (only to the extent such payments are in excess of the Maximum Rate) against the unpaid principal balance hereof and any portion of such excess payments not capable of being so credited shall be refunded to Borrower.

16. Notices. All notices, consents, approvals and requests required or permitted hereunder or under any other Loan Document shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, return receipt requested or (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, and by telecopier (with answer back acknowledged), addressed as follows (or at such other address and a person as shall be designated from time to time by any party hereto, as the case may be, in a written notice to the other parties hereto in the manner provided for in this Section):

If to Lender: Kennedy Funding, Inc.  
Two University Plaza, Suite 402  
Hackensack, New Jersey 07601  
Attention: \_\_\_\_\_  
Facsimile No. (201) 342-8373

With a copy to: Cole, Schotz, Meisel, Forman & Leonard P.A.  
25 Main Street  
Hackensack, New Jersey 07602-0800

Attention: Michael R. Leighton, Esq.  
Facsimile No.: (201) 489-1536

If to Borrower: OneCap Partners 2, LLC  
5440 W. Sahara Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89146  
Attn: Mr. Vincent Hesser

With a copy to: Harold Gewerter, Esq.  
5440 W. Sahara Ave., Suite #202  
Las Vegas, NV 89146  
Facsimile No. (702) 382-1759

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, when delivered or the first attempted delivery on a business day; or in the case of expedited prepaid delivery and telecopy, upon the first attempted delivery on a business day.

17. **No Waiver.** No course of dealing between Borrower and Lender or any failure or delay on the part of Lender in exercising any rights or remedies hereunder shall operate as a waiver of any rights or remedies of Lender and no single or partial exercise of any rights or remedies hereunder shall operate as a waiver or preclude the exercise of any other rights or remedies hereunder. In the event any agreement contained in this Agreement or the other Loan Documents should be breached and thereafter waived by Lender, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder or thereunder.

18. **Failure to Exercise Rights.** Nothing herein contained shall impose upon Lender any obligation to enforce any terms, covenants or conditions contained in this Agreement and the other Loan Documents. Failure of Lender, in any one or more instances, to insist upon strict performance of any terms, covenants or conditions of this Agreement and the other Loan Documents, shall not be considered or taken as a waiver or relinquishment by Lender of its right to insist upon and to enforce in the future, by injunction or other appropriate legal or equitable remedy, strict compliance with all the terms, covenants and conditions of this Agreement and the other Loan Documents. The consent of Lender to any act or omission by Borrower shall not be construed to be a consent to any other or subsequent act or omission or a waiver of the requirement for Lender's consent to be obtained in any future or other instance.

19. **Prohibition Against Exercise of Rights Applicable Only to Individual Lenders.** Borrower is hereby prohibited from exercising against Lender or Agent any right or remedy which it might otherwise be entitled to exercise against any one or more

(but less than all) of the individual parties constituting Lender, including, without limitation, any right of set-off or any defense.

20. Miscellaneous.

(a) Choice of Law. THE LOAN WAS NEGOTIATED IN THE STATE OF NEW JERSEY, THIS AGREEMENT WAS NEGOTIATED IN THE STATE OF NEW JERSEY, WAS EXECUTED AND DELIVERED BY BORROWER AND ACCEPTED BY LENDER IN THE STATE OF NEW JERSEY, AND THE PROCEEDS OF THE NOTE WERE DISBURSED FROM THE STATE OF NEW JERSEY, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE. THIS AGREEMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW JERSEY APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION, PRIORITY, ENFORCEMENT AND FORECLOSURE OF THE LIENS AND SECURITY INTERESTS CREATED IN THE REAL PROPERTY COLLATERAL UNDER THE LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE JURISDICTION IN WHICH THE REAL PROPERTY COLLATERAL IS LOCATED, IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH JURISDICTION, THE LAW OF THE STATE OF NEW JERSEY SHALL GOVERN THE VALIDITY AND ENFORCEABILITY OF ALL LOAN DOCUMENTS, AND THE DEBT OR OBLIGATIONS ARISING HEREUNDER.

(b) Jurisdiction. AT LENDER'S ELECTION, TO BE ENTERED IN ITS SOLE DISCRETION, ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST BORROWER OR LENDER ARISING OUT OF OR RELATING TO THIS NOTE OR THE OTHER LOAN DOCUMENTS SHALL BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN NEW JERSEY, AND BORROWER WAIVES ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER DOES HEREBY DESIGNATE AND APPOINT THE CORPORATION TRUST COMPANY, HAVING AN ADDRESS AT 820 BEAR TAVERN ROAD, WEST TRENTON, NEW JERSEY 08628, AS ITS

**AUTHORIZED AGENT TO RECEIVE AND FORWARD ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW JERSEY, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE MANNER PROVIDED IN THE MORTGAGE, SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON BORROWER IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW JERSEY. BORROWER (1) SHALL GIVE PROMPT NOTICE TO THE LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (2) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW JERSEY (WHICH OFFICE SHALL BE DESIGNATED AS THE ADDRESS FOR SERVICE OF PROCESS), AND (3) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW JERSEY OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR.**

(c) Borrower and/or Guarantor (as applicable) agrees if Borrower and/or Guarantor is required to make any deduction or withholding of foreign taxes (or taxes imposed because Borrower and/or Guarantor is a foreign person or entity) from any payment due to Lender herein, then the amount payable to Lender upon which such deduction or withholding is based, shall be increased to the extent necessary to ensure that, after all deductions or withholdings, Lender is paid a net amount equal to the amount Lender would have been paid in the absence of such deduction or withholding. At Lender's request, Borrower and/or Guarantor shall provide Lender with documentation adequate to demonstrate payment of such deduction or withholding by Borrower and/or Guarantor under this provision.

(d) No modification or waiver of any provision of the Note or of this Agreement and no consent by Lender to any departure therefrom by the Borrower shall be effective unless such modification or waiver shall be in writing and signed by a duly authorized officer of Lender, and the same shall then be effective only for the period and on the conditions provided therein.

(e) Any condition of this Agreement or any other Loan Document which requires the submission of evidence of the existence or non-existence of a specified fact or facts implies as a condition the existence or non-existence, as the case may be, of such fact or facts, and Lender shall, at all times, be free independently to establish to its reasonable satisfaction and in its absolute discretion such existence or non-existence.

(f) Borrower and each Guarantor, as the case may be, shall execute and deliver, or cause to be executed and delivered to Lender, all other instruments, certificates

and agreements as Lender or Lender's counsel may reasonably require, including, but not limited to, estoppel certificates stating that the Loan is in full force and effect and that there are no defenses or offsets thereto, to effect, confirm or assure the rights, remedies and liens intended to be granted or conveyed to Lender under this Agreement or any other Loan Document.

(g) A determination that any portion of this Agreement or any of the Loan Documents is unenforceable or invalid shall not affect the enforceability or validity of any other provision, and any determination that the application of any provisions of this Agreement or any Loan Document to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provisions it may apply to other persons or circumstances.

(h) Without the consent of, or notice to Borrower, Lender may add one or more additional co-agents to this Loan.

21. Successors and Assigns.

(a) Borrower may not assign its rights under this Agreement without the prior written consent of Lender. Any such attempted assignment in violation of this Agreement shall be void and of no effect.

(b) All covenants and agreements in this Agreement shall bind and inure to the benefit of the respective permitted successors and assigns of the parties hereto and any holder or holders of the Note or any portion thereof.

22. Waiver of Jury Trial. BORROWER AND LENDER AGREE THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY BORROWER OR LENDER ON OR WITH RESPECT TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT OR THE DEALINGS OF THE PARTIES WITH RESPECT HERETO OR THERETO, SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. BORROWER AND LENDER EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. FURTHER, BORROWER WAIVES ANY RIGHT IT MAY HAVE TO CLAIM OR RECOVER, IN ANY SUCH SUIT, ACTION OR PROCEEDING, ANY SPECIAL, EXEMPLARY, PUNITIVE, CONSEQUENTIAL OR OTHER DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES. BORROWER ACKNOWLEDGES AND AGREES THAT THIS SECTION IS A SPECIFIC AND MATERIAL ASPECT OF THIS AGREEMENT AND THAT LENDER WOULD NOT EXTEND CREDIT TO BORROWER (AS APPLICABLE) IF THE WAIVERS SET FORTH IN THIS SECTION WERE NOT A PART OF THIS AGREEMENT.



23. Releases of Collateral.

(a) The Lender may release, regardless of consideration, the obligation of any Person or Persons liable for payment of any of the Obligations secured hereby, or may release any part of the Mortgaged Property or any other collateral now or hereafter given to secure the payment of the Obligations or any part thereof, without impairing, reducing or affecting the obligations of the Borrower or Guarantors under the Loan Documents.

(b) Within thirty (30) days of Borrower's request, provided: (i) Borrower is not in default hereunder or under any other Loan Document(s); and (ii) no event has occurred which with the passage of time and/or the giving of notice would constitute a default hereunder or under any other Loan Document(s), Lender shall release portions of the Mortgaged Property from the lien created by this Mortgage ("Released Property") subject to: (i) Borrower's payment to Lender of the Release Price (as hereinafter defined) for the Released Property and (ii) Borrower's delivery to Lender of documentation evidencing an arms length transaction for the sale of the Released Property. The Release Price for the Released Property shall be equal to the greater of: (i) Eighty percent (80.0%) of the net sale price of the Released Property (subject to reasonable and customary closing adjustments and sales commissions [to be approved by Lender in Lender's reasonable discretion]); (ii) Seventy-Five percent (75.0%) of the gross sale price of the Released Property; and (iii) the minimum Release Price acceptable to Lender in its sole discretion.

24. Publicity.

(a) Lender shall have the right to issue news releases, and publicize and/or advertise the fact that it has provided financing with respect to the project and/or the Mortgaged Property and in connection therewith Lender shall have the right to photograph and use pictures of the Mortgaged Property in any such advertisements, brochures, print, media and other copy.

(b) At Lender's request, Borrower, at Lender's cost and expense, shall erect a suitable sign or signs at the Mortgaged Property in a location which is clearly visible to the public and otherwise reasonably acceptable to Lender. The Sign shall be prepared by Lender and may contain, among other things, that financing for the Mortgaged Property is being provided by Lender and otherwise publicize Lender's role in the financing. Lender shall coordinate the placement and maintenance of such signs on the Mortgaged Property with Borrower.

25. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be effective only upon delivery and thereafter shall be deemed an original, and all of which shall be taken to be one and the same instrument, for the same effect as if all parties hereto had signed the same signature page. Any signature

page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures thereon and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more additional signature pages.

IN WITNESS WHEREOF, the undersigned have executed this Loan and Security Agreement as of the day and year first set forth above.

WITNESS:

Yanina Rosario  
Print Name: Rosario

WITNESS:

Michael P. Young  
Print Name: Michael P. Young

LENDER:

KENNEDY FUNDING, INC., as Agent

By: [Signature]  
Name:  
Title:

BORROWER:

OneCap Partners 2, LLC  
a Nevada limited liability company

By: OneCap Partners MM, Inc., its  
Manager

By: [Signature]  
Name: Vincent Hesser  
Title: President

IN WITNESS WHEREOF, the undersigned have executed this Loan and Security Agreement as of the day and year first set forth above.

WITNESS:

LENDER:

KENNEDY FUNDING, INC., as Agent

\_\_\_\_\_  
Print Name:

By: \_\_\_\_\_

Name:

Title:

WITNESS:

BORROWER:

OneCap Partners 2, LLC,  
a Nevada limited liability company

By: OneCap Partners MM, Inc., its  
Manager

\_\_\_\_\_  
Print Name:

*Israel B. Young*

By: \_\_\_\_\_

Name: Vincent Hesser

Title: President

STATE OF NEW JERSEY)

) ss.:

COUNTY OF BERGEN )

I certify that on June 14, 2006, Tineke Tilley Wolff personally came before me and this person acknowledged under oath, to my satisfaction, that he:

(a) executed the attached Loan and Security Agreement; and

(b) was authorized to and did execute the attached Loan and Security Agreement on behalf of and as P.R.S. of Kennedy Funding, Inc., the entity named in this instrument, by virtue of authority granted by its bylaws and board of directors.

K. Vanecko

~~NOTARY PUBLIC~~  
Notary Public of New Jersey

ID # 2198182

My Commission Expires 2/26/08

STATE OF Nevada )

) ss.:

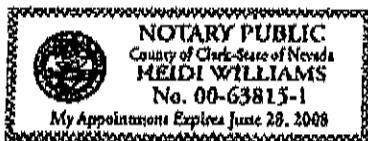
COUNTY OF Clark )

I certify that on June 14, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.

Heidi Williams  
NOTARY PUBLIC



STATE OF NEW JERSEY )  
 ) ss.:  
COUNTY OF BERGEN )

I certify that on \_\_\_\_\_, 2006, \_\_\_\_\_ personally came before me and this person acknowledged under oath, to my satisfaction, that he:

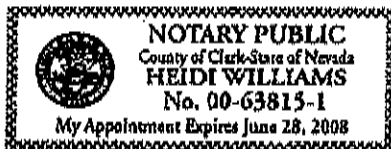
- (a) executed the attached Loan and Security Agreement; and
- (b) was authorized to and did execute the attached Loan and Security Agreement on behalf of and as \_\_\_\_\_ of Kennedy Funding, Inc., the entity named in this instrument, by virtue of authority granted by its bylaws and board of directors.

\_\_\_\_\_  
NOTARY PUBLIC

STATE OF *Nevada* )  
 ) ss.:  
COUNTY OF *Clark* )

I certify that on June 14, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

- (a) made the attached instrument; and
- (b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.



*Heidi Williams*  
\_\_\_\_\_  
NOTARY PUBLIC

**SCHEDULE A**  
**DESCRIPTION OF THE COLLATERAL**

31392/0400-1438005v3

A-1

VH000314 KF00061

**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.

**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.



**SCHEDULE B**

**PRINCIPAL LOAN DOCUMENTS**

1. Loan Commitment dated June 6, 2006;
2. Loan and Security Agreement dated as of the date hereof;
3. Promissory Note dated as of the date hereof;
4. Mortgage and Security Agreement dated as of the date hereof;
5. Document Re-Execution Agreement dated as of the date hereof;
6. Environmental Indemnity Agreement dated as of the date hereof;
7. Assignment of Leases and Rents dated as of the date hereof;
8. Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Reports dated as of the date hereof;
9. Guaranty dated as of the date hereof;
10. Loan Closing Statement dated as of the date hereof;
11. UCC-1 Financing Statements.

**SCHEDULE C**  
**INTENTIONALLY OMITTED**

**C-1**

31392/0400-1438005v3

VH000317 KF00064

## **SCHEDULE D**

### **LENDERS**

The Simes Family Limited Partnership  
M&M Funding, Inc.  
TLC Funding, Inc.  
Josh Duitz  
CB&M Funding, LLC  
Lawton Enterprises, Inc. M/P/P  
STC Funding, Inc. M/P/P  
Bruce Berger  
Solomon Berger  
Charles Ira Epstein  
Jeffrey A. Mayer  
Howard Brown  
Presidential Investments, Inc.  
G&C Investment, Inc.  
Evergreen CMF Funding, LLC  
The Hampshire Generational Fund, LP  
JWI Financial, Inc.  
Flug Funding, Inc.  
MMR Funding, LP  
M.L. Beer Investments, Inc.  
Wilson Kaplen  
The Kaplen Foundation  
Valley National Bank

## **EXHIBIT "2"**

VH000319

PROMISSORY NOTE

\$12,000,000

June 15, 2006

FOR VALUE RECEIVED, the undersigned, ONECAP PARTNERS 2, LLC, a Nevada limited liability company, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146 (the "Borrower"), promises to pay to the order of KENNEDY FUNDING, INC. ("Agent"), with an office at Two University Plaza, Suite 402, Hackensack, New Jersey 07601, as agent for the lenders identified on Schedule A annexed hereto (Agent and the lenders identified on Schedule A are hereinafter collectively referred to as "Lender"), the principal sum of TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS, or so much thereof as may be advanced by Lender to Borrower from time to time (the "Principal Amount"), together with interest on the unpaid Principal Amount thereof computed from the date advanced (the "Commencement Date"), at the rates provided herein until June 30, 2009 or such earlier date on which the Principal Amount becomes due and payable as provided herein (the "Maturity Date"); provided, however, that from and after (i) the Maturity Date, whether upon stated maturity, acceleration or otherwise, or (ii) the date on which the interest rate hereunder is increased to the Default Rate (as hereinafter defined) as provided herein, such additional interest shall be computed at the Default Rate.

As used herein, the term "Default Rate" shall mean a rate of interest of twenty-five percent (25.0%) per annum, but in no event shall the Default Rate be in excess of the Maximum Rate (as hereinafter defined).

If any payment of interest is not paid within five (5) days after the due date for such payment, a late charge equal to the lesser of ten percent (10%) of such overdue payment or the maximum amount permitted by applicable law shall automatically become due to the holder of this promissory note (the "Note"), subject, however, to the limitation that late charges may be assessed only once on each overdue payment. Said late charges do not constitute interest and shall constitute compensation to the holder of this Note for collection and co-lender administration costs incurred hereunder. In addition, if any payment of principal or interest is not paid when due, the holder of this Note shall have the right, upon notice to Borrower, to increase the rate of interest per annum on all amounts outstanding to the Default Rate and, upon said notice, such rate increase shall be effective retroactively as of the date from which the interest component of such overdue payment began to accrue and shall remain in force and effect for so long as such default shall continue. This paragraph shall not be construed as an agreement or privilege to extend the due date of any payment, nor as a waiver of any other right or remedy accruing to the holder of this Note by reason of any default.

Principal and interest hereunder shall be payable as follows:

(a) From the Commencement Date, interest on the Principal Amount outstanding hereof shall accrue at the rate of Eleven and One Half (11 1/2%) percent per annum, for the period beginning on and including the Commencement Date to the last day of the month in which the Commencement Date occurs ("Short Interest"), and shall be payable at the closing (the "Closing") of the Loan.

(b) Interest only at the rate of Eleven and One Half (11 1/2%) percent per annum on the Principal Amount outstanding hereof shall accrue from July 1, 2006 through June 1, 2007 and be paid monthly at an amount equal to (1) the product of (y) the principal balance of the loan outstanding on the last day of the month prior to when the interest rate is due (assuming no prepayment of principal has occurred in such month) and (z) Eleven and One Half (11 1/2%) percent; (2) divided by Twelve (12), in arrears, commencing on August 1, 2006 and continuing on the first day of each month thereafter through and including July 1, 2007.

(c) Interest only at the rate of (i) Eighteen (18.0%) percent per annum, or (ii) the Prime Rate (as defined below), as adjusted from time to time, plus Ten Percent (10%) per annum, whichever is greater, on the Principal Amount outstanding hereof shall accrue from July 1, 2007 through the Maturity Date and be paid monthly, in arrears, in an amount as determined by Lender equal to one-twelfth (1/12<sup>th</sup>) of the annual interest payment for such period commencing on August 1, 2007 and continuing on the first day of each month thereafter until the Maturity Date.

(d) All principal, interest and other sums due hereunder shall be due and payable in full on the Maturity Date.

(e) Prepaid Interest (as defined in the Loan and Security Agreement of even date herewith, hereinafter, the "Loan Agreement"), if any, shall be utilized in accordance with the terms of the Loan Agreement.

For purposes of this Note, "Prime Rate" shall mean the rate of interest published in The Wall Street Journal from time to time as the "Prime Rate." If more than one "Prime Rate" is published in The Wall Street Journal for a day, the average of such "Prime Rate" shall be used, and such average shall be rounded up to the nearest one-eighth of one percent (0.125%). If The Wall Street Journal ceases to publish the "Prime Rate," the Agent shall select an equivalent publication that publishes such "Prime Rate," and if such "Prime Rate" is no longer generally published or is limited, regulated or administered by a governmental or quasi-governmental body, then Agent shall elect a comparable interest rate index.

Each payment hereunder shall be credited first to Lender's collection expenses, next to late charges, next to unpaid interest, and the balance, if any, to the reduction of the Principal Amount. The interest on this Note shall be calculated on the basis of a 30-day month and a 360-day year.

This Note may be prepaid in whole or in part at any time, without penalty or premium, it being understood and agreed that, except as expressly provided herein, Borrower shall not be entitled, by virtue of any prepayment or otherwise, to a refund of the Fee (as defined in the Loan Agreement), interest, any other fees, points, charges and the like paid by Borrower to Lender in connection with the loan hereunder (the "Loan") and for fees and expenses incurred by Lender in making the Loan, all of which payments shall be retained by Lender from and after the date each such payment is made hereunder.

Borrower and each surety, endorser and guarantor hereof hereby waive all demands for payment, presentations for payment, notices of intention to accelerate maturity, notices of acceleration of maturity, demand for payment, protest, notice of protest and notice of dishonor, to the extent permitted by law. Borrower further waives trial by jury. No extension of time for payment of this Note or any installment hereof, no alteration, amendment or waiver of any provision of this Note and no release or substitution of any collateral securing Borrower's obligations hereunder shall release, modify, amend, waive, extend, change, discharge, terminate or affect the liability of Borrower under this Note.

Any forbearance by the holder of this Note in exercising any right or remedy hereunder or under any other agreement or instrument in connection with the Loan or otherwise afforded by applicable law, shall not be a waiver or preclude the exercise of any right or remedy by the holder of this Note. The acceptance by the holder of this Note of payment of any sum payable hereunder after the due date of such payment shall not be a waiver of the right of the holder of this Note to require prompt payment when due of all other sums payable hereunder or to declare a default for failure to make prompt payment.

If this Note is placed in the hands of an attorney for collection, Borrower shall pay all costs incurred and reasonable attorneys' fees for legal services in the collection effort, whether or not suit be brought.

At the election of the holder of this Note, all payments due hereunder may be accelerated, and this Note shall become immediately due and payable without notice or demand, upon the occurrence of any of the following events (each an "Event of Default"): (1) Borrower fails to pay on or before the date due, any amount payable hereunder; (2) Borrower fails to perform or observe any other term or provision of this Note with respect to payment; (3) Borrower fails to perform or observe any other term or provision of this Note; or (4) there exists a default under the Mortgage (as hereinafter defined), a default under any Guaranty (as hereinafter defined) or a default under or misrepresentation contained in any other agreement, document or certificate of Borrower or any Guarantor (as hereinafter defined) in connection with the Loan, which default is not cured within any grace period expressly provided therefor in such document. In addition to the rights and remedies provided herein, the holder of this Note may exercise any other right or remedy in any other document, instrument or agreement evidencing, securing or otherwise relating to the indebtedness evidenced hereby in accordance with

the terms thereof, or under applicable law, all of which rights and remedies shall be cumulative.

If this Note is transferred in any manner, the right, option or other provisions herein shall apply with equal effect in favor of any subsequent holder hereof.

Notwithstanding anything to the contrary contained herein, under no circumstances shall the aggregate amount paid or agreed to be paid hereunder exceed the highest lawful rate permitted under applicable usury law (the "Maximum Rate") and the payment obligations of Borrower under this Note are hereby limited accordingly. If under any circumstances, whether by reason of advancement or acceleration of the maturity of the unpaid principal balance hereof or otherwise, the aggregate amounts paid on this Note shall include amounts which by law are deemed interest and which would exceed the Maximum Rate, Borrower stipulates that payment and collection of such excess amounts shall have been and will be deemed to have been the result of a mistake on the part of both Borrower and the holder of this Note, and the party receiving such excess payments shall promptly credit such excess (to the extent only of such payments in excess of the Maximum Rate) against the unpaid principal balance hereof and any portion of such excess payments not capable of being so credited shall be refunded to Borrower.

This Note is secured by, among other things, that certain Deed of Trust and Security Agreement (the "Mortgage"), an assignment of leases and rents ("Assignment"), an assignment of licenses, contracts, plans, specifications, surveys, drawings and reports (the "Assignment of Licenses"), all of the foregoing being of even date herewith and a first lien on the certain real estate collateral (the "Collateral") identified in the Mortgage, and is entitled to the benefits and security thereof. Reference is made to the Mortgage, Assignment and Assignment of Licenses for descriptions of the respective rights and obligations of the Borrower and Lender thereunder. This Note is guaranteed by the separate guaranty of even date herewith (the "Guaranty") of Vincent Hesser and OneCap Partners M/M, Inc., a Nevada corporation (collectively, the "Guarantor") and reference is made to the Guaranty for the respective rights of the parties thereunder. Borrower hereby agrees to indemnify, defend and hold harmless Lender from and against any and all claims, loss, cost, damage or expense (including, without limitation, reasonable attorneys' fees) which may be incurred by Lender in connection with or as a result of any default (following notice and the opportunity to cure provided for in such document) by Borrower or Guarantor under the Mortgage, Assignment, or Assignment of Licenses, or by the Guarantor (following notice and the opportunity to cure provided for in such document) under the Guaranty, or a default (following notice and the opportunity to cure provided for in such document) under or misrepresentation contained in any other agreement, document or certificate of Borrower or any Guarantor executed or delivered in connection with the Loan (collectively, the "Loan Documents").



All payments of principal and interest hereunder are payable in lawful money of the United States of America and shall be made by wire transfer to the account of Agent at Valley National Bank, pursuant to wiring instructions to be provided to Borrower at Closing or to such other accounts as may be instructed by Agent.

Borrower is hereby prohibited from exercising against Lender (as a group) or Agent, any right or remedy which it might otherwise be entitled to exercise against any one or more (but less than all) of the parties constituting Lender, including, without limitation, any right of setoff or any defense. Any other claim that Borrower may have, arising from or related to, the transaction evidenced by this Note and the other Loan Documents shall be asserted only against the Agent and not against any of the individual parties constituting Lender.

This Note shall be binding on the parties hereto and their respective heirs, legal representatives, executors, successors and assigns.

This Note shall be construed without any regard to any presumption or rule requiring construction against the party causing such instrument or any portion thereof to be drafted.

This Note shall be governed by the laws of the State of New Jersey without regard to choice of law consideration. Borrower hereby irrevocably consents to the jurisdiction of the courts of the State of New Jersey and of any federal court located in such State in connection with any action or proceeding arising out of or relating to this Note or the other Loan Documents. Borrower and Guarantor hereby designate The Corporation Trust Company, located at 820 Bear Tavern Road, West Trenton, New Jersey 08628, as their duly appointed agent to accept service of process within the State of New Jersey on their behalf.

This Note may not be changed or terminated orally.

A determination that any portion of this Note is unenforceable or invalid shall not affect the enforceability or validity of any other provision, and any determination that the application of any provision of this Note to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provision to the extent legally permissible and otherwise as it may apply to other persons or circumstances.

**JURY TRIAL WAIVER. BORROWER AGREES THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY BORROWER OR THE HOLDER OF THIS NOTE ON OR WITH RESPECT TO THIS NOTE OR ANY OTHER LOAN DOCUMENT OR THE DEALINGS OF THE PARTIES WITH RESPECT HERETO OR THERETO, SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. BORROWER AND LENDER EACH HEREBY KNOWINGLY, VOLUNTARILY AND**

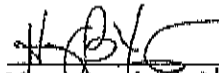
INTENTIONALLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. BORROWER ACKNOWLEDGES AND AGREES THAT AS OF THE DATE HEREOF THERE ARE NO DEFENSES OR OFFSETS TO ANY AMOUNTS DUE IN CONNECTION WITH THE LOAN. FURTHER, BORROWER WAIVES ANY RIGHT IT MAY HAVE TO CLAIM OR RECOVER, IN ANY SUCH SUIT, ACTION OR PROCEEDING, ANY SPECIAL, EXEMPLARY, PUNITIVE, CONSEQUENTIAL OR OTHER DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES. BORROWER ACKNOWLEDGES AND AGREES THAT THIS PARAGRAPH IS A SPECIFIC AND MATERIAL ASPECT OF THIS NOTE AND THAT LENDER WOULD NOT EXTEND CREDIT TO BORROWER IF THE WAIVERS SET FORTH IN THIS PARAGRAPH WERE NOT A PART OF THIS NOTE.

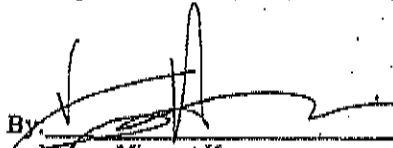
IN WITNESS WHEREOF, the undersigned has executed this Note this 14<sup>th</sup> day of June, 2006.

WITNESS:

OneCap Partners 2, LLC,  
a Nevada limited liability company

By: OneCap Partners MM, Inc., its Manager

  
Name: Heidi B. Young

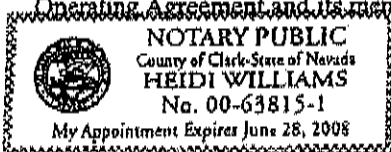
By:   
Name: Vincent Hesser  
Title: President

STATE OF Nevada )  
 ) ss.:  
COUNTY OF Clark )

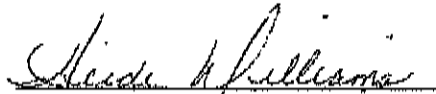
I certify that on June 14, 2006, Vincent Hesser came before me in person and stated to my satisfaction that he:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as President of OneCap Partners MM, Inc. the Manager of OneCap Partners 2, LLC, a Nevada limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.



313920400-1438036v2



## SCHEDULE A

### LENDERS

The Simes Family Limited Partnership  
M&M Funding, Inc.  
TLC Funding, Inc.  
Josh Duitz  
CB&M Funding, LLC  
Lawton Enterprises, Inc. M/P/P  
STC Funding, Inc. M/P/P  
Bruce Berger  
Solomon Berger  
Charles Ira Epstein  
Jeffrey A. Mayer  
Howard Brown  
Presidential Investments, Inc.  
G&C Investment, Inc.  
Evergreen CMF Funding, LLC  
The Hampshire Generational Fund, LP  
JWJ Financial, Inc.  
Flug Funding, Inc.  
MMR Funding, LP  
M.L. Beer Investments, Inc.  
Wilson Kaplen  
The Kaplen Foundation  
Valley National Bank

## **EXHIBIT “3”**



1 **CC10**

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 &amp; 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,

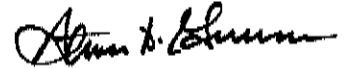
18 v.

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

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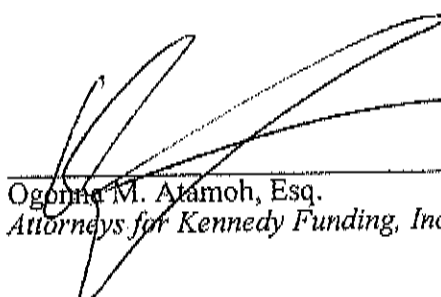
CLERK OF THE COURT

24 **MEMORANDUM OF COSTS  
AND DISBURSEMENTS**

25 Filing.....	\$ 522.00
26 Service of Process.....	\$ 213.00
27 Delivery Charges .....	\$ 170.00
28 Postage.....	\$ 446.32
Facsimile.....	\$ 5.50
Photocopies.....	\$ 663.45
Online Research.....	111.18
TOTAL \$	2,131.45 Total

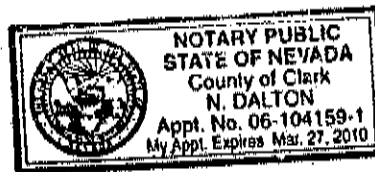
1 STATE OF NEVADA )  
2 COUNTY OF CLARK ) ss.

3 Ogonna M. Atamoh, Esq. being duly sworn, states: that affiant is the attorney for the  
4 Plaintiff and has personal knowledge of the above costs and disbursements expended; that the  
5 items contained in the above memorandum are true and correct to the best of this affiant's  
6 knowledge and belief; and that the said disbursements have been necessarily incurred and paid in  
7 this action.

8  
9  
10   
11 Ogonna M. Atamoh, Esq.  
Attorneys for Kennedy Funding, Inc.

12 SIGNED AND SWORN to before me this  
13 3<sup>RD</sup> day of NOVEMBER, 2009.

14   
15 NOTARY PUBLIC



ORIGINAL

FILED

NOV - 4 2009

*John J. Sullivan*  
CLERK OF COURT

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.*

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

09A582746  
504394



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

06209-09/519467

11-25-09 PDS:31 RCVD

VH000331

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

CLERK OF THE COURT

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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 ...

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.

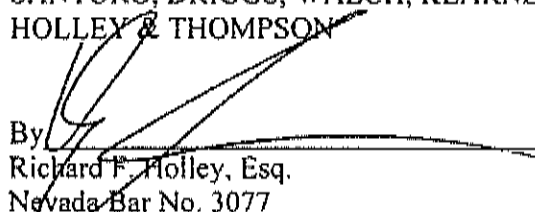
4 IT IS SO ORDERED.

5 Dated this 4 day of November, 2009.

6  
7   
8 DISTRICT COURT JUDGE *ee*

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

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Business Court

COURT MINUTES

November 05, 2009

---

09A582746

Kennedy Funding Inc

vs

Onecap Partners MM Inc, Vincent Hesser

---

November 05, 2009

9:30 AM

Hearing

Summary Judgment Hearing on  
Damages

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 14C

COURT CLERK: Kathy Klein

RECORDER: Jill Hawkins

**PARTIES**

**PRESENT:** Atamoh, Ogonna M. Attorney  
Gewerter, Harold Attorney  
Phillip

**JOURNAL ENTRIES**

- Testimony and exhibits presented. (See worksheets). Court noted it heard sufficient testimony and reviewed paragraph 5 of the guarantee. Colloquy regarding exhibit one to the opposition containing the agreement of the settlement in the Bankruptcy Court. Court directed Ms. Atamoh to submit a supplemental declaration regarding the lenders, within two weeks. COURT ORDERED, matter CONTINUED to chambers for decision and Counsel to notify chambers if requesting arguments.

12/04/09 (CHAMBERS) SUMMARY JUDGMENT HEARING/DECISION

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FILED

NOV - 5 2009

*John T. Holley*  
CLERK OF COURT

09A582746  
508020



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.*

DISTRICT COURT

CLARK COUNTY, NEVADA

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

15 Plaintiff,

16 v.

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

21 Defendants.

Case No: A582746  
Dept. No.: XI

NOTICE OF ENTRY ORDER

22 YOU, and each of you, will please take notice that an Order Granting Plaintiff's Motion  
23 for Summary Judgment in the above entitled matter was filed and entered by the Clerk of the  
24 above-entitled Court on the 4th day of November, 2009, a copy of which is attached hereto.

25 Dated this 5<sup>th</sup> day of November, 2009.

26 SANTORO, DRIGGS, WALCH,  
27 KEARNEY, HOLLEY & THOMPSON

28 *Richard F. Holley*  
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

*Attorneys for Kennedy Funding, Inc.*

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NOV 5 2009

CLERK OF THE COURT

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

**ORDR**

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 L. Williams*  
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  
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15 Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property") for a purchase  
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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 ...

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.

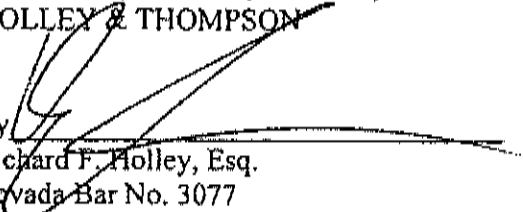
4 IT IS SO ORDERED.

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

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 5th day of November, 2009, and pursuant to NRC  
5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing NOTICE  
OF ENTRY OF SUMMARY JUDGMENT ON LIABILITY ONLY, postage prepaid and  
addressed to:

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

*Attorneys for Defendants*



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

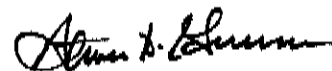
SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

ORIGINAL

1 ROC  
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

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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

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing DECLARATION OF KIM VACCARELLA;  
DECLARATION OF OGONNA M. ATAMOH, ESQ.; AND MEMORANDUM OF COSTS  
AND DISBURSEMENTS is hereby acknowledged this 4th day of November, 2009.

HAROLD P. GEWERTER, ESQ., LTD.

  
For  
Harold P. Geworter, Esq.  
2705 Airport Drive  
North Las Vegas, NV 89032

Attorneys for Defendants

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Business Court**

**COURT MINUTES**

**November 19, 2009**

---

09A582746

Kennedy Funding Inc

vs

Onecap Partners MM Inc, Vincent Hesser

---

November 19, 2009      9:00 AM      Status Check

HEARD BY:    Gonzalez, Elizabeth

COURTROOM:    RJC Courtroom 14C

COURT CLERK:    Kathy Klein

RECORDER:    Jill Hawkins

**PARTIES**

**PRESENT:**      Atamoh, Ogonna M.    Attorney  
                 Gewerter, Harold      Attorney  
                 Phillip

**JOURNAL ENTRIES**

- Colloquy regarding the future hearing date for decision on the summary judgment hearing on damages, and the supplemental affidavit to be provided. Court noted all dates stand.

54

DECL  
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 19 2009

*John J. Williams*  
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

In Chambers Hearing Date:  
December 4, 2009

09A582746  
534651



SUPPLEMENTAL DECLARATION OF KEVIN WOLFER

I, Kevin Wolfer, do hereby swear under penalty of perjury that the following assertions  
are true to the best of my knowledge and belief:

1. I am Chief Executive Officer of Kennedy Funding, Inc. (alternatively "Kennedy  
Funding" or "Lender").

2. I have personal knowledge of the matters set forth below based upon my personal  
review of the books and records maintained by Kennedy Funding in the ordinary course of  
business and based upon my involvement in monitoring the history of the transaction giving rise  
to the Motion for Summary Judgment against Defendant in connection with the loan guaranteed  
for Nevada Ueno Mita, LLC, formerly known as OneCap Partners 2, LLC ("Nevada Ueno").

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

CLERK OF THE COURT

RECEIVED  
NOV 19 2009

1 With respect to matters based upon information and belief, I believe the statements made to be  
2 true and correct.

3 3. As part of my duties at Kennedy Funding, I monitor the performance of loans,  
4 such as that certain loan extended by Kennedy Funding to OneCap, subsequently assigned to  
5 Nevada Ueno, in connection with that certain \$12,000,000 Promissory Note and first deed of  
6 trust on real property dated June 15, 2006 (the "Loan"). In that capacity I am personally familiar  
7 with the manner in which Kennedy Funding's documents, books, files and records are prepared  
8 and maintained.

9 4. It is Kennedy Funding's practice and procedure to maintain records and to record  
10 transactions, acts, conditions and events concerning Kennedy Funding and its various loans,  
11 including the Loan, at or about the time such transactions, acts, conditions, or events occur.  
12 Kennedy Funding relies upon these records in connection with its business dealings with  
13 borrowers.

14 5. I am competent to testify to the matters contained in this declaration, and if called,  
15 could and would so testify.

16 6. I have personally reviewed the business records of Kennedy Funding concerning  
17 the Loan made by Kennedy Funding to OneCap.

18 7. I have personal knowledge of the matters set forth below, except as to those  
19 matters based upon information and belief. With respect to the matters based upon information  
20 and belief, I believe the assertions to be true and correct.

21 8. I make this Supplemental Declaration in support of Kennedy Funding's Motion  
22 for Summary Judgment as it relates to the evidentiary hearing on damages sought against  
23 Defendant Guarantors Vincent W. Hesser and OneCap Partners MM, Inc.

24 Evidentiary Hearing on Damages

25 9. On November 5, 2009, this Court held an evidentiary hearing on the damages  
26 sought by Kennedy Funding against the Guarantors, which hearing arose from the Motion for  
27 Summary Judgment, for which the Court found liability against the Guarantors, but reserved the  
28 adjudication of damages subject to an evidentiary hearing to establish damages.



1           10. During the evidentiary hearing on damages, the Guarantors raised for the first  
2 time the basis for Kennedy Funding's authorization from the Co-Lenders to the Loan to  
3 commence the action against the Guarantors, to participate in the bankruptcy proceedings of the  
4 Borrower, and to foreclose on the Property.

5           11. By way of this Supplemental Declaration, Kennedy Funding submits  
6 documentary evidence to support its authorization to commence the above-captioned action,  
7 among other things.

8           **Co-Lender Agreement Expressly Authorizes Kennedy to Commence Action**

9           12. Kennedy Funding Kennedy Funding is a New Jersey corporation that is located  
10 and headquartered in New Jersey.

11           13. On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or  
12 "OneCap") and Kennedy Funding, as agent of the Co-Lenders, entered into a Loan and Security  
13 Agreement ("Loan Agreement"), pursuant to which Kennedy Funding made a \$12 million loan  
14 to OneCap to facilitate the purchase of unimproved real property consisting of 78.74± acres of  
15 raw land located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark  
16 County Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property"). A true  
17 and correct copy of the Loan Agreement is attached as Exhibit "1" to my declaration previously  
18 filed with this Court on September 22, 2009, in support of the Motion for Summary Judgment.

19           14. Exhibit D to the Loan Agreement identifies the following Co-Lenders to the  
20 \$12,000,000 Loan:

CO-LENDERS
The Simes Family Limited Partnership
M&M Funding, Inc.
TLC Funding, Inc. <sup>1</sup>
Josh Duitz
CB&M Funding, LLC

21  
22  
23  
24  
25  
26  
27  
28           <sup>1</sup> TLC Funding, Inc.'s 1.00% portion of the Loan is solely funded by John Prescott.

1	Lawton Enterprises, Inc. M/P/P
2	STC Funding, Inc. M/P/P
3	Bruce Berger
4	Solomon Berger
5	Charles Ira Epstein
6	Jeffrey A. Mayer
7	Howard Brown
8	Presidential Investments, Inc.
9	G&G Investment, Inc.
10	Evergreen CMF Funding, Inc.
11	The Hampshire Generational Fund, LP
12	JWJ Financial, Inc.
13	MMR Funding, LP
14	M.I. Beer Investments, Inc.
15	Wilson Kaplen
16	The Kaplen Foundation
17	Valley National Bank

15. On or about June 15, 2006, the Co-Lenders and Kennedy Funding executed the Co-Lenders Agreement, under which the Co-Lenders expressly authorized Kennedy Funding to enforce the Loan on behalf of the Co-Lenders as follows:

3. Agent shall service and enforce the Loan and in so doing shall exercise due care...

\*\*\*

7. Upon default in the payment of performance of the Loan Agreement, Lender shall take such appropriate legal action for the enforcement thereof as Agent deems advisable in its sole discretion.

\*\*\*

9. Agent shall have full and complete authorization and shall not be liable to the Lender for any action taken or suggested by it hereunder in good faith and in accordance with the opinion of counsel provided it has complied with the requirement of consent hereunder.

See Co-Lenders Agreement, ¶¶ 3, 7, 9, a true and correct copy which is attached hereto as Exhibit "11".

16. The Co-Lenders Agreement further contemplates that Kennedy Funding, as the Agent for the Co-Lenders, will incur attorneys' fees and costs in any actions the Agent Kennedy Funding commences on behalf of the Co-Lenders, and provides in pertinent part as follows:

8. All expenses, including, but not limited to, counsel fees and court costs paid or incurred by Agent in any such action shall be borne pro rate by the parties hereto in proportion to their respective Lender's Percentage to the extent not paid by Borrower...

See Co-Lenders Agreement, ¶ 8, a true and correct copy which is attached hereto as Exhibit "11".

**Quarterly Reports Apprised Co-Lenders of Guarantor Action**

17. Kennedy Funding also sends Quarterly Reports to its Co-Lenders. I oversee the preparation and dissemination of the Quarterly Reports to the Co-Lenders, including the Quarterly Reports Matthew Cole, the Senior Vice President of Kennedy Funding, and Jordan DeFlora, New Jersey counsel for Kennedy Funding, sent to the Co-Lenders each quarter in 2009 regarding the efforts to foreclose on the Property securing the Loan, the Borrower's subsequent voluntary bankruptcy proceedings which stayed the foreclosure sale, and the commencement of the litigation against the Guarantors, among other things.

18. The First Quarterly Report provided the Co-Lenders with an update on the foreclosure sale that was stayed as a result of the Borrower's Chapter 11 Bankruptcy Petition. A true and correct copy of the First Quarterly Report dated January 23, 2009, is attached hereto as Exhibit "12".

MSD

*Kevin Wolf*  
Kevin Wolf

# EXHIBIT "11"

## CO-LENDERS AGREEMENT

**CO-LENDERS AGREEMENT** dated as of June 15, 2006, between The Simes Family Limited Partnership, M&M Funding, Inc., John Prescott, Josh Duitz, CB&M Funding, LLC, Lawton Enterprises, Inc. M/P/P, STC Funding, Inc. M/P/P, Bruce Berger, Solomon Berger, Charles Ira Epstein, Jeffrey A. Mayer, Howard Brown, Presidential Investments, Inc., G&C Investments, Inc., Evergreen CMF Funding, LLC, The Hampshire Generational Fund, LP, JWJ Financial, Inc., Flug Funding, Inc., MMR Funding, LP, M.L. Beer Investments, Inc., Wilson Kaplen, The Kaplen Foundation, Valley National Bank having the addresses as set forth in Exhibit "A" attached hereto (hereafter collectively referred to as "Lender") and Kennedy Funding, Inc., having its principal place of business at Two University Drive, Suite 402, Hackensack, New Jersey 07601, ("Agent").

### WITNESSETH

Whereas, pursuant to a Loan Agreement and related documents (the "Loan Agreement") between One Cap Partners 2, LLC ("Borrower") and various guarantors ("Guarantors") of Borrower's obligations to Lender, the Lender will make or has made a Loan of Twelve Million Dollars (\$12,000,000) to the Borrower, the ("Loan") and;

Whereas, pursuant to the Loan Agreement the Borrower has executed and delivered to Lender a Promissory Note (the "Note") in the amount of (exclusive of interest) Twelve Million Dollars (\$12,000,000), other security agreements covering certain assets of the Borrower and Guarantors (the "Agreements"), and other instruments and documents.

### NOW THEREFORE IT IS AGREED

1. A. Each Lender hereto irrevocably agrees to participate in the Loan in the amount of and/or at percentage of the Loan, as set forth below ("Lender's Percentage"):

<u>LENDER</u>	<u>LENDER'S PERCENTAGE</u>
The Simes Family Limited Partnership	0.500%
M&M Funding, Inc.	0.500%
John Prescott	1.000%
Josh Duitz	1.000%
CB&M Funding, LLC	1.000%
Lawton Enterprises, Inc. M/P/P	1.000%
STC Funding, Inc. M/P/P	2.000%

CoLender/yrOneCap

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

Bruce Berger	2.000%
Solomon Berger	2.000%
Charles Ira Epstein	2.000%
Jeffrey A. Mayer	2.000%
Howard Brown	2.000%
Presidential Investments, Inc.	2.000%
G&C Investment, Inc.	3.000%
Evergreen CMF Funding, LLC	3.000%
The Hampshire Generational Fund, LP	3.000%
JWJ Financial, Inc.	3.000%
Flug Funding, Inc.	6.000%
MMR Funding, LP	11.333%
M.L. Beer Investments, Inc.	10.000%
Wilson Kaplen	10.000%
The Kaplen Foundation	15.000%
Valley National Bank	16.667%

- B. Each Lender has delivered to Agent its certified check or equivalent good funds for its respective share of the amount of the Loan.
2. Each Lender shall own an undivided fractional interest in the Loan, in its respective Lender's Percentage, and in all documents, instruments and collateral issued by the Borrower or the Guarantors (collectively referred to as "Obligors") to the Lender, and in all payments made thereon and in any recoveries or distribution in connection therewith. Notwithstanding anything else contained herein to the contrary, each Lender shall only be entitled to receive the benefits of its individual fractional interest in the Loan in accordance with this Agreement from and after the date Agent receives all of such Lender's funds which are readily available to be drawn and which equals the Lender's Lender Percentage in the Loan.
3. Agent shall service and enforce the Loan and in so doing shall exercise due care. Neither Agent, nor its officers, employees, and attorneys shall be liable except for fraud or willful misconduct. Agent does not make and has not made any warranty or representation, express or implied, with respect to the Loan, existing or future solvency or financial worth of the Obligors, the ability of the Borrower to repay the Loan, or with respect to the Loan Agreement or any other document or instrument received by Agent in connection with the loan. All information, data, projections and other material heretofore supplied by Agent to the Lender have been extrapolated from material supplied to Agent by or on behalf of the Borrower. Agent has not made and does not make any representations or warranties with respect thereto. Lender has had an opportunity to make and have made such investigation as they deem necessary under the circumstances.

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

4. Promptly upon final clearance of any payments received by Agent on account of the Loan, Agent shall distribute the same to the Lender in accordance with their Lender's Percentage.
5. Agent shall act as agent for the Lender in all matters dealing with the servicing of the Loan, and as trustee solely for purposes of collecting and distributing the amounts received by it. Agent's records shall, at all times, reflect the interest of the Lender in accordance with their Lender's Percentage. Agent shall be permitted to assign or transfer its duties as Agent hereunder to another person or entity to serve as agent for the Loan.
6. There shall be required consent of the Agent and Fifty Percent (50%) of the Lender as determined by their Lender's Percentage of this agreement to do any of the following:
  - (a) Consent to or permit any substitution, withdrawal or release of any collateral or other security securing the payment of the Loan except in accordance with the terms of the Notes and Agreements and other related documents.
  - (b) Amend or modify the terms of the Note or the Loan Agreement and/or other documents delivered in connection therewith.
7. Upon a default in the payment or performance of the Loan Agreement, Lender shall take such appropriate legal action for the enforcement thereof as Agent deems advisable in its sole discretion.
8. All expenses including, but not limited to, counsel fees and court costs paid or incurred by Agent in any such action shall be borne pro rata by the parties hereto in proportion to their respective Lender's Percentage to the extent not paid by Borrower. Payment shall be made by the Lender within five (5) days after receipt of notice from Agent in accordance with their pro rata shares. Any such payment not made shall accrue interest at the interest rate applicable to the Loan or in the event that we own the property the interest rate would be at Twenty Four Percent (24%). Said payment and interest shall be deducted by Agent from the next payment(s) due said Lender hereunder.
9. Agent shall have full and complete authorization and shall not be liable to the Lender for any action taken or suggested by it hereunder in good faith and in accordance with the opinion of counsel provided it has complied with the requirement of consent hereunder.
10. The parties hereto may sell their respective interest of the Loan among themselves at any price agreed upon between buyer and seller. Notwithstanding the foregoing, the parties hereto shall not offer to sell or sell their interest in the Loan to any person that is not already a Lender. Each party hereto represents, warrants and agrees that it is acquiring its interest in



CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

the Loan for its own account (or for the joint account of the undersigned and the undersigned's spouse either in joint tenancy, tenancy by the entirety or tenancy in common) for itself and not with the view to the sale or distribution thereof or the guaranty of any participation therein, and has no present intention of selling to others any of its interest or granting any participation therein.

Lender acknowledges that each individual Lender has different interests and each individual Lender agrees to hold each other Lender harmless and free of liability in the exercise of their rights under this Agreement except for fraud or willful misconduct.

11. Any notice required hereunder shall be sent, via fax or regular mail, to the address of the party set forth on Exhibit "A", attached hereto, or as otherwise designated in writing. In the event consent is required hereunder then the failure of a party to respond in writing, via fax or regular mail, to Lender within ten (10) days of the date of mailing by Lender shall be deemed consent to the action.
12. This agreement has been entered into in New Jersey and shall be construed in accordance with and governed by the laws of the State of New Jersey.
13. This agreement may be executed in any number of counterparts at one time or at different times, all of which taken together shall constitute one and the same instrument, and any of the parties hereto may execute this agreement by signing any such counterpart, and this agreement shall be deemed executed as of the date first above written.
14. This agreement shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns.
15. This agreement embodies the entire agreement and understanding between the parties and supersedes all prior agreements and understandings relating to the subject matter hereof. This Agreement is meant to embody the entire agreement and understanding between the parties whether or not: Agent, Agent's nominee, or any other person forecloses on or otherwise becomes the owner of the collateral which is the security for the Loan.
16. Any and all disputes, differences or controversies arising out of, under or in connection with this agreement or the breach thereof, shall be submitted to arbitration to be held in New Jersey under the rules and regulations of the American Arbitration Association, and all of the parties hereto agree to be bound by the determination of the arbitrators.
17. Each of the Lenders hereby represent and warrant that the statements set forth on Exhibit "B", attached hereto, are true and correct as to itself, as of the date hereof.

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

18. Each of the Lenders hereby represents, warrants and agrees that it is an "Accredited Investor" as that term is defined in Rule 501(a) of Regulation D promulgated under the Securities Act, and as specifically identified on Exhibit "C".

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

**KENNEDY FUNDING, INC. AS AGENT**

BY: \_\_\_\_\_

Name: Kevin Wolfer

Title: Co-Chief Executive Officer

**THE SIMES FAMILY LIMITED PARTNERSHIP**

BY: \_\_\_\_\_

Name:

Title:

**M&M FUNDING, INC.**

BY: \_\_\_\_\_

Name: Steven Reichel

Title: President

**JOHN PRESCOTT**

BY: \_\_\_\_\_

Name: John Prescott

Title:

**JOSH & SHERRI DUITZ**

BY: \_\_\_\_\_

Name: Josh Duitz

Title:

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

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IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

KENNEDY FUNDING, INC. AS AGENT

BY: Kevin Wolfer  
Name: Kevin Wolfer  
Title: Co-Chief Executive Officer

THE SIMES FAMILY LIMITED PARTNERSHIP

BY: [Signature]  
Name:  
Title:

M&M FUNDING, INC.

BY: [Signature]  
Name: Steven Reichel  
Title: President

JOHN PRESCOTT

BY: [Signature]  
Name: John Prescott  
Title:

JOSH & SHERRI DUITZ

BY: [Signature]  
Name: Josh Duitz  
Title:



CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

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KENNEDY FUNDING, INC. AS AGENT

BY: Kevin Wolfer  
Name: Kevin Wolfer  
Title: Co-Chief Executive Officer

THE SIMES FAMILY LIMITED PARTNERSHIP

BY: \_\_\_\_\_  
Name:  
Title:

M&M FUNDING, INC.

BY: \_\_\_\_\_  
Name: Steven Reichel  
Title: President

JOHN PRESCOTT

BY: John Prescott  
Name: John Prescott  
Title:

JOSH & SHERRI DUITZ

BY: \_\_\_\_\_  
Name: Josh Duitz  
Title:

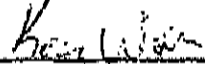


CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

18. Each of the Lenders hereby represents, warrants and agrees that it is an "Accredited Investor" as that term is defined in Rule 501(a) of Regulation D promulgated under the Securities Act, and as specifically identified on Exhibit "C".

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

KENNEDY FUNDING, INC. AS AGENT

BY:   
Name: Kevin Wolfer  
Title: Co-Chief Executive Officer

THE SIMES FAMILY LIMITED PARTNERSHIP

BY: \_\_\_\_\_  
Name:  
Title:

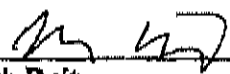
M&M FUNDING, INC.

BY:   
Name: Steven Reichel  
Title: President

JOHN PRESCOTT

BY: \_\_\_\_\_  
Name: John Prescott  
Title:

JOSH & SHERRI DUITZ

BY:   
Name: Josh Duitz  
Title:

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006


**JOSH & SHERRI DUITZ**

BY: \_\_\_\_\_  
Name: Sherri Duitz  
Title:

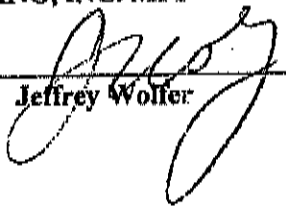
**CB&M FUNDING LLC**

BY: \_\_\_\_\_  
Name: Marvin Simes  
Title:

**LAWTON ENTERPRISES, INC. MPP**

BY:  \_\_\_\_\_  
Name: Matthew C. Cole  
Title: Trustee

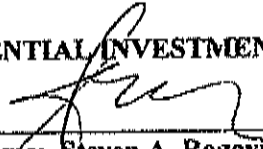
**S.T.C. FUNDING, INC. MPP**

BY:  \_\_\_\_\_  
Name: Jeffrey Woller  
Title:

**HOWARD L. BROWN**

BY: \_\_\_\_\_  
Name: Howard L. Brown  
Title:

**PRESIDENTIAL INVESTMENTS, INC.**

BY:  \_\_\_\_\_  
Name: Steven A. Rogovich  
Title:

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

**JOSH & SHERRI DUITZ**

BY: *Sherri Duitz*  
Name: Sherri Duitz  
Title:

**CB&M FUNDING LLC**

BY: \_\_\_\_\_  
Name: Marvin Simes  
Title:

**LAWTON ENTERPRISES, INC. MPP**

BY: *Matthew C. Cole*  
Name: Matthew C. Cole  
Title: Trustee

**S.T.C. FUNDING, INC. MPP**

BY: *Jeffrey Wolfer*  
Name: Jeffrey Wolfer  
Title:

**HOWARD L. BROWN**

BY: \_\_\_\_\_  
Name: Howard L. Brown  
Title:

**PRESIDENTIAL INVESTMENTS, INC.**

BY: *Steven A. Rogovich*  
Name: Steven A. Rogovich  
Title:

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

**JOSH & SHERRI DUITZ**

BY: \_\_\_\_\_  
Name: Sherri Duitz  
Title:

**CB&M FUNDING LLC**

BY: \_\_\_\_\_  
Name: Marvin Simes  
Title:

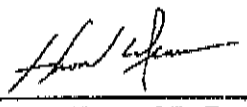
**LAWTON ENTERPRISES, INC. MPP**

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Name: Jeffrey Wolfer  
Title:

**HOWARD L. BROWN**

BY:  \_\_\_\_\_  
Name: Howard L. Brown  
Title:

**PRESIDENTIAL INVESTMENTS, INC.**

BY: \_\_\_\_\_



CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

**JOSH & SHERRI DUITZ**

BY: \_\_\_\_\_

Name: Sherri Duitz  
Title:

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BY: \_\_\_\_\_

Name: Marvin Simes  
Title:

**LAWTON ENTERPRISES, INC. MPP**

BY: \_\_\_\_\_

Name: Matthew C. Colo  
Title: Trustee

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BY: \_\_\_\_\_

Name: Jeffrey Wolfer  
Title:

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BY: \_\_\_\_\_

Name: Howard L. Brown  
Title:

**PRESIDENTIAL INVESTMENTS, INC.**

BY: \_\_\_\_\_

Name: Steven A. Rogovich  
Title:

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

G&C INVESTMENT, INC.

BY: \_\_\_\_\_

Name: Gregg Wolfer

Title: \_\_\_\_\_

EVERGREEN CME FUNDING, LLC

BY: \_\_\_\_\_

Name: Murray Beer

Title: \_\_\_\_\_

THE HAMPSHIRE GENERATIONAL FUND, LLC

BY: \_\_\_\_\_

Name: William A. Scully

Title: \_\_\_\_\_

JWJ FINANCIAL CORP.

BY: \_\_\_\_\_

Name: Jonathan Weiner

Title: President

FLUG FUNDING, INC.

BY: \_\_\_\_\_

Name: Kevin Wolfer

Title: President

BRUCE BERGER

BY: \_\_\_\_\_

Name: Bruce Berger

Title: \_\_\_\_\_

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

G&C INVESTMENT, INC.

BY: \_\_\_\_\_

Name: Gregg Wolfer  
Title:

EVERGREEN CMF FUNDING, LLC

BY: \_\_\_\_\_

Name: Murray Beer  
Title:

THE HAMPSHIRE GENERATIONAL FUND, LLC

BY: \_\_\_\_\_

Name: William A. Scully  
Title: V.P.

JWJ FINANCIAL CORP.

BY: \_\_\_\_\_

Name: Jonathan Weiner  
Title: President

FLUG FUNDING, INC.

BY: \_\_\_\_\_

Name: Kevin Wolfer  
Title: President

BRUCE BERGER

BY: \_\_\_\_\_

Name: Bruce Berger  
Title:

09-12-06 10:27am From-BERGER ORGANIZATION  
3rd SEP. 12, 2006 12:01PM KENNEDY FUNDING  
Berger

+9736239942

T-856 P.002/002 F-470  
RV. JVL

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

G&C INVESTMENT, INC.

BY:

Name: Gregg Wolfer  
Title:

EVERGREEN CME FUNDING, LLC

BY:

Name: Murray Boer  
Title:

THE HAMPSHIRE GENERATIONAL FUND, LLC

BY:

Name: William A. Scally  
Title:

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Title: President

FLUG FUNDING, INC.

BY:

Name: Kevin Wolfer  
Title: President

\* BRUCE BERGER

BY:

Name: Bruce Berger  
Title:

7

CoLenders/OneCap

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To-BERGER ORGANIZATION Page 001

VH000367

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

**SOLOMON BERGER**

BY: \_\_\_\_\_  
Name: Solomon Berger  
Title:

**CHARLES IRA EPSTEIN**

BY: \_\_\_\_\_  
Name: Charles Ira Epstein  
Title:

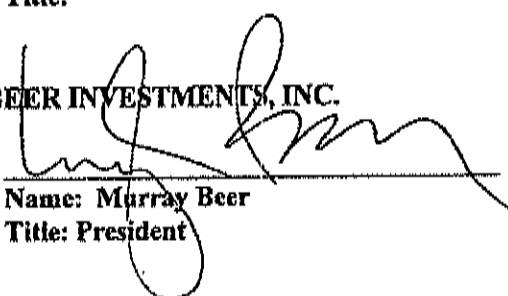
**JEFFREY MAYER**

BY: \_\_\_\_\_  
Name: Jeffrey Mayer  
Title:

**MMR FUNDING, LP**

BY: \_\_\_\_\_  
Name: Rob Wofchuck  
Title:

**M.L. BEER INVESTMENTS, INC.**

BY:  \_\_\_\_\_  
Name: Murray Beer  
Title: President

**KAPLEN FOUNDATION**

BY: \_\_\_\_\_  
Name: Wilson Kaplen  
Title:

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

**SOLOMON BERGER**

BY: \_\_\_\_\_  
Name: Solomon Berger  
Title:

**CHARLES IRA EPSTEIN**

BY: \_\_\_\_\_  
Name: Charles Ira Epstein  
Title:

**JEFFREY MAYER**

BY: \_\_\_\_\_  
Name: Jeffrey Mayer  
Title:

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Name: Rob Wofchuck  
Title:

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Title:

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

**SOLOMON BERGER**

BY: \_\_\_\_\_  
Name: Solomon Berger  
Title:

**CHARLES IRA EPSTEIN**

BY: \_\_\_\_\_  
Name: Charles Ira Epstein  
Title:

**JEFFREY MAYER**

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Name: Jeffrey Mayer  
Title:

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CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

SOLOMON BERGER

BY: 

Name: Solomon Berger  
Title:

CHARLES IRA EPSTEIN

BY: \_\_\_\_\_

Name: Charles Ira Epstein  
Title:

JEFFREY MAYER

BY: \_\_\_\_\_

Name: Jeffrey Mayer  
Title:

MMR FUNDING, LP

BY: \_\_\_\_\_

Name: Rob Wofchuck  
Title:

ML. BEER INVESTMENTS, INC.

BY: \_\_\_\_\_

Name: Murray Beer  
Title: President

KAPLEN FOUNDATION

BY: \_\_\_\_\_

Name: Wilson Kaplen  
Title:

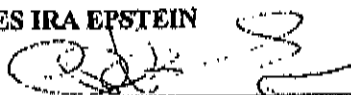


CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

**SOLOMON BERGER**

BY: \_\_\_\_\_  
Name: Solomon Berger  
Title:

**CHARLES IRA EPSTEIN**

BY:  \_\_\_\_\_  
Name: Charles Ira Epstein  
Title:

**JEFFREY MAYER**

BY: \_\_\_\_\_  
Name: Jeffrey Mayer  
Title:

**MMR FUNDING, LP**

BY: \_\_\_\_\_  
Name: Rob Wofchuck  
Title:

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Title: President

**KAPLEN FOUNDATION**

BY: \_\_\_\_\_  
Name: Wilson Kaplen  
Title:

8

CoLenders/OneCap

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

**SOLOMON BERGER**

BY: \_\_\_\_\_  
Name: Solomon Berger  
Title:

**CHARLES IRA EPSTEIN**

BY: \_\_\_\_\_  
Name: Charles Ira Epstein  
Title:

**JEFFREY MAYER**

BY: \_\_\_\_\_  
Name: Jeffrey Mayer  
Title:

**MMR FUNDING, LP**

BY: \_\_\_\_\_  
Name: Rob Wofchuck  
Title:

**M.L. BEER INVESTMENTS, INC.**

BY: \_\_\_\_\_  
Name: Murray Beer  
Title: President

The **KAPLEN FOUNDATION**

BY: *Wilson Kaplen* \_\_\_\_\_  
Name: Wilson Kaplen  
Title: Pres

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

**WILSON KAPLEN**

**BY:** \_\_\_\_\_

**Name:** Wilson Kaplen

**Title:**

**VALLEY NATIONAL BANK**

**BY:** \_\_\_\_\_

**Name:** Robert Chase

**Title:**

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

WILSON KAPLEN

BY: x *Wilson R Kaplen*  
Name: Wilson Kaplen  
Title:

VALLEY NATIONAL BANK

BY: \_\_\_\_\_  
Name: Robert Chase  
Title:

CoLenders Agreement  
One Cap Partners 2, LLC  
June 15, 2006

WILSON KAPLEN

BY: *Wilson Kaplen*

Name: Wilson Kaplen

Title:

VALLEY NATIONAL BANK

BY: *Robert Chase*

Name: Robert Chase

Title:

EXHIBIT A

The Simes Family Limited Partnership  
CB&M Funding LLC  
Marvin Simes  
1460 Shoreline Way  
Hollywood, FL 33019  
(954) 458-3010  
(631) 288-0113  
(954) 239-7255 Fax

Steven Reichel  
M&M Funding, Inc.  
Two University Plaza, Ste 402  
Hackensack, NJ 07601  
(201) 342-8500  
(201) 342-8373 Fax

John Prescott  
360 E. 72nd Street  
New York, NY 10021  
(212) 249-3422  
(212) 249-3429 Fax

Josh & Sherri Duitz  
94 Aberfoyle Road  
New Rochelle, NY 10804  
(212) 272-4581

Marvin Simes  
CB&M Funding LLC  
1460 Shoreline Way  
Hollywood, FL 33019  
(954) 458-3010  
(631) 288-0113  
(954) 239-7255 Fax

Matthew C. Cole  
Lawton Enterprises, Inc. MPP  
2 University Plaza, Ste 402  
Hackensack, NJ 07601  
(201) 342-8500  
(201) 342-8373 Fax

Jeffrey Wolfer  
S.T.C. Funding, Inc. MPP  
Two University Plaza, Ste 402  
Hackensack, NJ 07601  
(201) 342-8500  
(201) 342-8373 Fax

Howard L. Brown  
Allied Office Products  
100 Delawanna Avenue  
Clifton, NJ 07014  
(973) 594-3200  
(973) 594-3620

Steven A. Rogovich  
Presidential Investments, Inc.  
Two University Plaza, Ste 402  
Hackensack, NJ 07601  
(201) 342-8500  
(201) 342-8373 Fax

Gregg Wolfer  
G&C Investment, Inc.  
Two University Plaza, Ste 402  
Hackensack, NJ 07601  
(201) 342-8500  
(201) 342-8373 Fax

Murray Beer  
Evergreen CMF Funding, LLC  
Two University Plaza, Ste 402  
Hackensack, NJ 07601  
(201) 996-6000  
(201) 489-1865 Fax

William A. Scully  
The Hampshire Generational Fund, LLC  
15 Maple Avenue  
Morristown, NJ 07960  
(973) 898-7296  
(973) 993-2993 Fax

Jonathan Weiner  
JWJ Financial Corp.  
Two University Plaza, Ste 402  
Hackensack, NJ 07601  
(201) 342-8500  
(201) 342-8373 Fax

Kevin Wolfer  
Flug Funding, Inc.  
Two University Plaza, Ste 402  
Hackensack, NJ 07601  
(201) 342-8500  
(201) 342-8373 Fax

Bruce Berger  
50 Park Place  
Newark, NJ 07102  
(973) 623-3300  
(973) 623-8942 Fax

Solomon Berger  
505 E. 175th Street  
Bronx, NY 10457  
(718) 731-1000  
(718) 731-1018 Fax

Charles Ira Epstein  
378 Gloucester Street  
Englewood, NJ 07631  
(201) 489-7600  
(201) 489-2128 Fax

Jeffrey Mayer  
383 Madison Avenue -7th Floor  
New York, NY 10179  
(212) 272-6554  
(212) 272-9978 Fax

Rob Wolfchuck  
MMR Funding, LP  
92 Portsmouth Avenue, Ste 15  
Exeter, NH 03833  
(603) 773-0080  
(603) 773-0090 Fax

Murray Beer  
M.L. Beer Investments, Inc.  
Two University Plaza, Ste 402  
Hackensack, NJ 07601  
(201) 996-6000  
(201) 489-1865 Fax

Wilson Kaplan  
Kaplan Foundation  
PO Box 792  
Tenafly, NJ 07670  
(201) 227-0722  
(201) 227-0724 Fax

Wilson Kaplan  
PO Box 792  
Tenafly, NJ 07670  
(201) 227-0722  
(201) 227-0724 Fax

Robert Chase  
Valley National Bank  
1455 Valley Road  
Wayne, NJ 07470  
(973) 305-4024  
(973) 305-1609 Fax

## EXHIBIT "B"

(i) Lender's execution and delivery of this Agreement has been duly authorized, (ii) Lender's participation in the Loan does not constitute a violation by Lender of any agreement, law, statute, decree or decision (including any legal lending limit) which is binding on Lender, (iii) Lender has made its own independent investigation and evaluation of the financial condition and affairs of Borrower, and of the nature and value of the collateral securing the Loan, in connection with Lender's execution and delivery of this Agreement and has not relied on any information or evaluation provided by Agent in connection with any of the foregoing (including information provided by Borrower to Agent, as to the accuracy of which Agent makes no representations or warranties), (iv) Lender is fully aware of and familiar with the status of the Loan and the terms and conditions of this Agreement, the Loan Agreement and the other loan documents executed and delivered in connection with the Loan, (v) Lender is not now an individual, corporation, partnership, joint venture, association, joint stock company, trust, trustee, estate, limited liability company, unincorporated organization, real estate investment trust, government or any agency or political subdivision thereof, or any other form of entity (collectively, a "Person") with whom a United States citizen, entity organized under the laws of the United States or its territories or entity having its principal place of business within the United States or any of its territories (collectively, a "U.S. Person"), is prohibited from transacting business of the type contemplated by this Agreement, whether such prohibition arises under United States law, regulation, executive orders and lists published by the Office of Foreign Assets Control, Department of the Treasury ("OFAC") (including those executive orders and lists published by OFAC with respect to Persons that have been designated by executive order or by the sanction regulations of OFAC as Persons with whom U.S. Persons may not transact business or must limit their interactions to types approved by OFAC ("Specially Designated Nationals and Blocked Persons")) or otherwise, (vi) No Lender nor any Person who owns an interest in Lender (collectively, a "Lender Party") is now nor shall be at any time prior to or at the Closing a Person with whom a U.S. Person, including a "financial institution" as defined in 31 U.S.C. 5312 (a)(z), as periodically amended ("Financial Institution"), is prohibited from transacting business of the type contemplated by this Agreement, whether such prohibition arises under United States law, regulation, executive orders and lists published by the OFAC (including those executive orders and lists published by OFAC with respect to Specially Designated Nationals and Blocked Persons) or otherwise, (viii) That the funds used to fund the Loan are derived: (a) from transactions that do not violate United States law nor, to the extent such funds originate outside the United States, do not violate the laws of the jurisdiction in which they originated; and (b) from permissible sources under United States law and to the extent such funds originate outside the United States, under the laws of the jurisdiction in which they originated, and (ix) Lender is in compliance with any and all provisions of the USA PATRIOT Act of 2001, Pub. L. No. 107-56, as re-authorized/adopted.

CoLender\yr\OneCap

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EXHIBIT "C"  
ACCREDITED INVESTOR STATUS FOR ONE CAP PARTNERS 2, LLC

The undersigned Lender represents that it is an Accredited Investor on the basis that it is (check one):

\_\_\_\_\_ (i) A bank as defined in Section 3(a)(2) of the Securities Act of 1933 (the "Act"), or a savings and loan association or other institution as defined in Section 3(a)(5)(A) of the Act, whether acting in its individual or fiduciary capacity; a broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934; an insurance company as defined in Section 2(13) of the Act; an investment company registered under the Investment Company Act of 1940 (the "Investment Company Act") or a business development company as defined in Section 2(a)(48) of the Investment Company Act; a Small Business Investment Company licensed by the U.S. Small Business Administration under Section 301(c) or (d) of the Small Business Investment Act of 1958; a plan established and maintained by a state, its political subdivisions or any agency or instrumentality of a state or its political subdivisions for the benefit of its employees, if such plan has total assets in excess of \$5,000,000; an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), if the investment decision is made by a plan fiduciary, as defined in Section 3(21) of ERISA, which is either a bank, savings and loan association, insurance company, or registered investment advisor, or if the employee benefit plan has total assets in excess of \$5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors.

\_\_\_\_\_ (ii) A private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940.

\_\_\_\_\_ (iii) An organization described in Section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the loan participation offered, with total assets in excess of \$5,000,000.

\_\_\_\_\_ (iv) A natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his or her purchase exceeds \$1,000,000. (California and Massachusetts residents: please see (viii) below.)

\_\_\_\_\_ (v) A natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year. (California and Massachusetts residents: please see (viii) below.)

\_\_\_\_\_ (vi) A trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the loan participation offered, whose purchase is directed by a sophisticated person as described in Rule 506(b)(2)(ii) (i.e., a person who has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the loan participation).

CoLenderAyrOneCap

\_\_\_\_\_ (vii) An entity in which all of the equity owners are accredited investors.

\_\_\_\_\_ (viii) For California and Massachusetts individuals: If the Lender is a California resident, such Lender's interest in the Loan will not exceed 10% of such Lender's net worth (or joint net worth with his spouse). If the Lender is a Massachusetts resident, such Lender's investment in the Loan will not exceed 25% of such Lender's joint net worth with his spouse (exclusive of principal residence and its furnishings).

\_\_\_\_\_  
Name:

Title:

**\* Kindly return a copy of this certification to Kennedy Funding, Inc. making sure you have indicated which clause (i) through (vii) is applicable.**

CoLenderAyrOneCap

VH000381

# EXHIBIT "12"

TWO UNIVERSITY PLAZA  
SUITE 402  
HACKENSACK, NEW JERSEY 07601  
TEL: (201) 342-8500  
FAX: (201) 342-8373  
matt@kennedyfunding.com

---

MEMORANDUM

---

**TO:** Co-Lenders (One Cap Partners 2, LLC)  
**FROM:** Matthew C. Cole  
**RE:** Update  
**DATE:** January 23, 2009

---

Our foreclosure sale scheduled in January 2009 was stayed by a Chapter 11 bankruptcy filing by the Borrower. We are making all prudent and timely motions to attempt to resolve this as quickly as possible. The Borrower has several times requested that we enter a work-out agreement, but they offered only that we accrue interest for a year to give them time to sell the property. We obviously refused that offer.

I will keep you advised of future developments.

VH000383

# EXHIBIT "13"



KENNEDY FUNDING, INC.

TWO UNIVERSITY PLAZA  
SUITE 402  
HACKENSACK, NEW JERSEY 07601  
TEL: (201) 342-8500  
FAX: (201) 342-8373  
malt@kennedyfunding.com

---

MEMORANDUM

---

**TO:** Co-Lenders (One Cap Partners 2, LLC)  
**FROM:** Matthew C. Cole  
**RE:** Update  
**DATE:** April 1, 2009

---

Our foreclosure sale in January 2009 was stayed by the Borrower's bankruptcy. We have also filed a lawsuit on the personal guaranty. We will aggressively move to lift the stay and proceed with foreclosure.

I will keep you advised of future developments.

VH000385

# EXHIBIT "14"

TWO UNIVERSITY PLAZA  
SUITE 402  
HACKENSACK, NEW JERSEY 07601  
TEL: (201) 342-8500  
FAX: (201) 342-8373  
matt@kennedyfunding.com

---

## MEMORANDUM

---

**TO:** Co-Lenders (One Cap Partners 2, LLC)  
**FROM:** Matthew C. Cole  
**RE:** Update  
**DATE:** July 1, 2009

---

Our foreclosure sale in January 2009 was stayed by the Borrower's bankruptcy. We have objected to the Borrowers plan in the bankruptcy and have moved to lift the stay or convert the proceeding to a Chapter 7 liquidation.

I will keep you advised of future developments.



# EXHIBIT "15"



KENNEDY FUNDING, INC.

TWO UNIVERSITY PLAZA  
SUITE 402  
HACKENSACK, NEW JERSEY 07601  
TEL: (201) 342-8500  
FAX: (201) 342-6373

---

MEMORANDUM

---

TO: Co-Lenders (One Cap Partners 2, LLC)

FROM: Jordan B. DeFlora, Esq.

RE: Update

DATE: October 1, 2009

---

A settlement has been approved by the Court whereby the Borrower will have until March 2010 to pay the loan off in full or relief from the automatic stay will be granted.

I will keep you advised of future developments.

VH000389

**ORIGINAL**

**FILED**

**DEC 03 2009**

*John J. [Signature]*  
**CLERK OF COURT**

1 **SUPP**  
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**

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

**09A582746**  
**560127**



\*\*\*\*\*

10 **KENNEDY FUNDING, INC., a New Jersey**  
11 **corporation,**

12 **Plaintiff,**

13 **vs.**

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

18 **Defendants.**

**CASE NO.: A582746**  
**DEPT. NO.: XI**

**DEFENDANTS' CLARIFIED**  
**SUPPLEMENTAL DAMAGES**  
**SUBMISSION**

**Date of Hearing: November 19, 2009**  
**Time of Hearing: 9:00 am**

19 **Defendants, ONECAP PARTNERS MM, INC. and VINCENT W. HESSER, by and**  
20 **through their attorney of record, HAROLD P. GEWERTER, ESQ., of the law firm of HAROLD**  
21 **P. GEWERTER, ESQ., LTD., hereby files their clarified Supplemental Damages Submission.**

22 **///**

23 **///**

24 **///**

25 **///**

26 **///**

27 **///**

28 **///**

**RECEIVED**  
**DEC 03 2009**  
**CLERK OF THE COURT**

1 This Submission is based upon the attached points and authorities, all pleadings and  
2 papers on file herein, attached hereto, and any arguments that may be adduced at the time of  
3 hearing on this matter, if any.

4 DATED this 2 day of December, 2009.

5  
6 HAROLD P. GEWERTER, ESQ., LTD.

7   
8 HAROLD P. GEWERTER, ESQ.

9 Nevada Bar No. 499

10 2705 Airport Drive

11 North Las Vegas, Nevada 89032

12 Attorney for Defendants

13 **POINTS AND AUTHORITIES**

14 By way of clarity, the Court should not grant any type of deficiency judgment amount  
15 against the Guarantor pursuant to the *Settlement Agreement* (the "Agreement") entered into by  
16 and between Kennedy Funding, Inc. ("Kennedy Funding") and Nevada Ueno Mita, LLC (the  
17 "Debtor") on August 7, 2009 in The United States Bankruptcy Court, District of Nevada, Case  
18 No. BK-S-08-25487-BAM. The Agreement states in paragraph 1.01 subsection (g) "*The Parties*  
19 *agree that the Settlement Agreement shall not preclude, limit or abridge Kennedy Funding's*  
20 *rights to pursue any deficiency actions against the Guarantors of Debtor's obligations owing to*  
21 *Kennedy Funding.*"

22 Therefore, Kennedy may obtain a judgment based upon the settlement agreement in  
23 Bankruptcy Court, but ONLY for any deficiency as the parties agreed and stipulated to. Any  
24 other collection action would be stayed by Bankruptcy Court Agreement.

25 To first determine deficiency under Nevada Law, the court must review the appraised  
26 value based on NRS 40.457, which states:

27 **NRS 40.457 Hearing before award of deficiency judgment; appraisal of**  
28 **property sold.**

1. Before awarding a deficiency judgment under NRS 40.455, the court shall  
hold a hearing and shall take evidence presented by either party

1 concerning the fair market value of the property sold as of the date of  
2 foreclosure sale or trustee's sale. Notice of such hearing shall be served  
3 upon all defendants who have appeared in the action and against whom a  
4 deficiency judgment is sought, or upon their attorneys of record, at least  
5 15 days before the date set for hearing.

- 6 2. Upon application of any party made at least 10 days before the date set for  
7 the hearing the court shall, or upon its own motion the court may, appoint  
8 an appraiser to appraise the property sold as of the date of foreclosure sale  
9 or trustee's sale. Such appraiser shall file with the clerk his appraisal,  
10 which is admissible in evidence. The appraiser shall take an oath that he  
11 has truly, honestly and impartially appraised the property to the best of his  
12 knowledge and ability. Any appraiser so appointed may be called and  
13 examined as a witness by any party or by the court. The court shall fix a  
14 reasonable compensation for the appraiser, but his fee shall not exceed  
15 similar fees for similar services in the county where the encumbered land  
16 is situated.

17 The Guarantor has submitted to the Court an appraisal of the collateral property at the  
18 hearing on November 5, 2009 as well as supportive testimony from the appraiser in compliance  
19 with NRS 40.457, which concluded that the fair market value of the property is Twenty Seven  
20 Million Six Hundred Thousand Dollars (\$27,600,000.00). Nevada law also only allows a  
21 deficiency judgment if the amount the debt exceeds the fair market value in accordance with  
22 NRS 40.459 as follows:

23 **NRS 40.459 Limitations on amount of money judgment.** After the hearing,  
24 the court shall award a money judgment against the debtor, guarantor or surety  
25 who is personally liable for the debt. The court shall not render judgment for more  
26 than:

- 27 1. The amount by which the amount of the indebtedness which was secured  
28 exceeds the fair market value of the property...

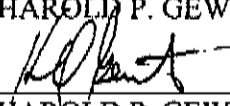
1 Since Kennedy Funding admitted that the secured debt due and owing was less than  
2 Seventeen Million (\$17,000,000.00), which is less than the fair market value of the property,  
3 which is Twenty Seven Million Six Hundred Thousand Dollars (\$27,600,000.00), under Nevada  
4 law there can be award for a monetary judgment against the guarantor. Therefore, under NRS  
5 40.459, the judgment amount must be zero dollars (\$0.00) under the Nevada Statutes.

6 CONCLUSION

7 For the foregoing reasons, the Court should deny Plaintiff any damages in this matter.

8 DATED this 2 day of December, 2009.

9  
10 HAROLD P. GEWERTER, ESQ., LTD.

11   
12 HAROLD P. GEWERTER, ESQ.  
13 Nevada Bar No. 499  
14 2705 Airport Drive  
15 North Las Vegas, Nevada 89032  
16 Attorney for Defendants  
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CERTIFICATE OF MAILING

Certification is hereby made that a true and correct copy of the foregoing Defendant's Supplemental Damages Submission was served this 7<sup>th</sup> day of December, 2009, in the following manner:

X By being placed into an envelope bearing First Class Postage and placed into the U.S. Mails, this same date, addressed to the following individuals; and/or

\_\_\_\_\_ By being hand delivered to the following individuals at their last known address, this same date, as follows; and/or

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

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

Melinda Adams  
An employee of Harold P. Gewerter, Esq., Ltd.

ORIGINAL

FILED

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*John D. Sullivan*  
CLERK OF COURT

1 **REQT**  
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.*

09A582746  
557797



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

Hearing Date: December 4, 2009  
(In Chambers)

24 **REQUEST TO STRIKE DEFENDANTS' CLARIFIED SUPPLEMENTAL DAMAGES**  
25 **SUBMISSION**

26 Plaintiff KENNEDY FUNDING, INC. ("Kennedy Funding"), by and through its counsel  
27 of record, the law firm of Santoro, Driggs, Walch, Kearney, Holley & Thompson, hereby files  
28 this Request to Strike Defendants' Clarified Supplemental Damages Submission based upon the  
following grounds and the following reasons: (1) Defendants' Clarified Supplemental Damages  
Submission ("Defendants' Supplement") must be stricken because the Defendants are estopped  
from relitigating issues previously ruled upon by this Court during the hearing on the Motion for  
Summary Judgment; and (2) Defendants' Supplement must be stricken because the scope of the  
issues raised in Defendants' Supplement exceed this Court's ruling regarding supplemental

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

CLERK OF THE COURT

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1 briefing relating strictly to the issue raised by Defendants during the evidentiary hearing on  
2 damages relating to the propriety of Kennedy Funding's authorization to commence an action  
3 against the Defendants on behalf of the co-lenders.

4 This Request based upon the Affidavit of Ogonna M. Atamoh, Esq. (the "Atamoh  
5 Affidavit"), counsel for Kennedy Funding, attached hereto as **Exhibit "A"**, and is further made  
6 and based upon the pleadings and papers on file herein, the Memorandum of Points and  
7 Authorities below, and any oral argument of counsel as may be heard on this matter.

8 Dated this 3<sup>rd</sup> day of December, 2009.

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

11   
12 RICHARD F. HOLLEY, ESQ.  
13 Nevada Bar No. 3077  
14 OGONNA M. ATAMOH, ESQ.  
15 Nevada Bar No. 7589  
16 400 South Fourth Street, Third Floor  
17 Las Vegas, Nevada 89101

18 *Attorneys for Kennedy Funding, Inc.*

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. STATEMENT OF RELEVANT FACTS**

21 **State Court Action Against Guarantors**

22 1. On February 13, 2009, almost two (2) months after the Borrower filed for  
23 bankruptcy, Kennedy Funding filed the above-captioned Complaint against OneCap Partners  
24 MM, Inc. ("OneCap MM") and Vincent M. Hesser ("Hesser") arising from their guaranties of  
25 OneCap's Debt (the "State Court Action"). See Wolfer Declaration previously filed with this  
26 Court in connection with Kennedy Funding's Motion for Summary Judgment.

27 2. Defendants Hesser and OneCap MM executed personal unconditional guaranties  
28 of the loan to Kennedy Funding (the "Guaranty"). A true and correct copy of the Guaranty is

1 attached as Exhibit "7" to the Wolfer Declaration previously filed with this Court in connection  
2 with Kennedy Funding's Motion for Summary Judgment.

3 **Kennedy Funding Motion for Summary Judgment**

4 3. On September 22, 2009, Kennedy Funding filed a Motion for Summary Judgment  
5 against the Defendants.

6 4. On or around October 6, 2009, the Defendants filed an Opposition to the Motion  
7 for Summary Judgment (the "Opposition").

8 5. On October 20, 2009, Kennedy Funding filed a Reply in Support of the Motion  
9 for Summary Judgment (the "Reply").

10 6. On October 27, 2009, the Court held a hearing on Kennedy Funding's Motion for  
11 Summary Judgment, during which time the Court entertained arguments by counsel, including  
12 Defendants' argument that the Motion for Summary Judgment should be denied because the  
13 Settlement Agreement entered into between the Debtor Nevada Ueno Mita and Kennedy  
14 Funding provided the Debtor six (6) months to satisfy Kennedy Funding's indebtedness before  
15 the bankruptcy stay would be terminated. See Atamoh Affidavit.

16 7. The Court reviewed the Settlement Agreement included as an exhibit to the  
17 papers filed in connection with the Motion for Summary Judgment, and at the conclusion of the  
18 hearing, the Court ordered summary judgment in favor of Kennedy Funding as to liability only,  
19 reserving the ruling on the issue of the amount of damages for an evidentiary hearing.<sup>1</sup> A true  
20 and correct copy of the Order Granting Plaintiff's Motion for Summary Judgment is attached to  
21 the Atamoh Affidavit as **Exhibit "1"**.

22 8. On November 5, 2009, the Court held an evidentiary hearing to the determine the  
23 amount of damages, at which time the Defendants raised for the first time the propriety of  
24 Kennedy Funding's authority to commence an action against the co-lenders. See Atamoh  
25 Affidavit.

26 . . .

27 <sup>1</sup> The Order reserved the issue of the "amount of damages", and found that liability was properly ordered against the  
28 Defendants after reviewing the Bankruptcy Settlement Agreement and Defendants' argument that a ruling on  
liability should stayed until the six (6) month period expired under the Bankruptcy Settlement Agreement.

1           9. In response to the issue raised by the Defendants, the Court ordered supplemental  
2 briefing solely on the issue of Kennedy Funding's authorization to commence the above-  
3 captioned action on behalf of the co-lenders, setting the deadline for any such supplement 2-  
4 weeks after the November 5, 2009, evidentiary hearing. A true and correct copy of the Minutes  
5 of the November 5, 2009, evidentiary hearing are attached to the Atamoh Affidavit as Exhibit  
6 "2".

7           10. The Court further instructed Defendants that they were permitted to file a  
8 response to the supplement filed by Kennedy Funding addressing Kennedy Funding's  
9 authorization to commence an action against the Defendants on behalf of the co-lenders. *Id.*

10           11. On November 19, 2009, Kennedy Funding filed the Supplemental Declaration of  
11 Kevin Wolfer (the "Wolfer Declaration"), solely addressing the issue raised by Defendants  
12 relating to Kennedy Funding's authorization to commence the above-captioned action against the  
13 Defendants. *See* Atamoh Affidavit.

14           12. On or around December 2, 2009, Defendants filed Defendants' Supplement,  
15 wherein Defendants make not a single reference to the Wolfer Declaration, but rather use the  
16 supplemental briefing ordered by the Court as an opportunity to take a second bite of the apple  
17 and use the supplement to reargue issues previously presented to the Court and ruled upon by the  
18 Court relating to the Bankruptcy Settlement Agreement. *See* Defendants' Supplement.

19           13. Defendants are estopped from relitigating issue previously ruled upon by the  
20 Court.

21           14. Defendants' Supplement should be stricken as it wholly disregards the Court's  
22 ruling that the parties are to brief the issue of Kennedy Funding's authorization from the co-  
23 lenders to commence the action against the Defendants.

24           15. It was Defendants who raised the issue of Kennedy Funding's authorization from  
25 the co-lenders to commence an action against the Defendants for the first time, and the Court  
26 gave Kennedy Funding an opportunity to present evidence of authority to file the action against  
27 the Defendants. Kennedy Funding presented appropriate evidence of the co-lenders'  
28 authorization extended to Kennedy Funding by way of the Supplemental Wolfer Declaration.

1 Defendants Supplement not only exceeds the scope of this Court's ruling on the supplemental  
2 briefing schedule, but also impermissibly seeks to relitigate issues already entertained and  
3 considered by this Court. Defendants' Supplement is improperly before this Court and should be  
4 stricken from the record.

## 5 II. CONCLUSION

6 Based on the foregoing, Kennedy Funding respectfully requests that this Court strike  
7 Defendants' Clarified Supplemental Damages Submission on the basis that the Defendants are  
8 estopped from raising issues previously litigated and ruled upon by the Court, and/or that the  
9 Defendants have exceeded the scope of the Court's ruling at the conclusion of the evidentiary  
10 hearing, ordering the parties to brief the issue of Kennedy Funding's authority from the co-  
11 lenders to commence the above-captioned action against the Defendants.

12 Dated this 3rd day of December, 2009.

13 SANTORO, DRIGGS, WALCH,  
14 KEARNEY, HOLLEY & THOMPSON

15   
16 RICHARD F. HOLLEY, ESQ.

17 Nevada Bar No. 3077

18 GONNA M. ATAMOH, ESQ.

19 Nevada Bar No. 7589

20 400 South Fourth Street, Third Floor

21 Las Vegas, Nevada 89101

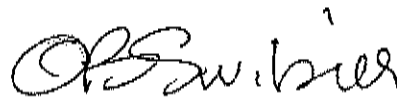
22 Attorneys for Kennedy Funding, Inc.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 20th day of October, 2009 and pursuant to NRCP 5(b),  
I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing REQUEST TO  
STRIKE DEFENDANTS' SUPPLEMENTAL DAMAGES SUBMISSION, postage prepaid and  
addressed to:

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

*Attorneys for Defendants*



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

# EXHIBIT "A"

**AFFT**  
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

**AFFIDAVIT OF OGONNA M. ATAMOH, ESQ.**

STATE OF NEVADA       )  
                                  )ss.  
COUNTY OF CLARK     )

I, Ogonna M. Atamoh, Esq., being duly sworn, depose and say:

1. I am a Shareholder with the firm Santoro, Driggs, Walch, Kearney, Holley & Thompson ("Santoro, Driggs"), counsel of record for Plaintiff in the above-captioned case.

2. I have personal knowledge of the facts set forth in this Affidavit except as to those matters based upon information and belief, and as to those matters, I believe them to be true and correct. If called as a witness to testify, I could and would truthfully testify to the facts set forth herein.

1           3.     I make this Affidavit in support of Kennedy Funding, Inc.'s Request to Strike  
2 Defendants' Clarified Supplemental Damages Submission

3           **Kennedy Funding Motion for Summary Judgment**

4           4.     On September 22, 2009, Kennedy Funding filed a Motion for Summary Judgment  
5 against the Defendants.

6           5.     On or around October 6, 2009, the Defendants filed an Opposition to the Motion  
7 for Summary Judgment (the "Opposition").

8           6.     On October 20, 2009, Kennedy Funding filed a Reply in Support of the Motion  
9 for Summary Judgment (the "Reply").

10          7.     On October 27, 2009, the Court held a hearing on Kennedy Funding's Motion for  
11 Summary Judgment, during which time the Court entertained arguments by counsel, including  
12 Defendants' argument that the Motion for Summary Judgment should be denied because the  
13 Settlement Agreement entered into between the Debtor Nevada Ueno Mita and Kennedy  
14 Funding provided the Debtor six (6) months to satisfy Kennedy Funding's indebtedness before  
15 the bankruptcy stay would be terminated. See Atamoh Affidavit.

16          8.     The Court reviewed the Settlement Agreement included as an exhibit to the  
17 papers filed in connection with the Motion for Summary Judgment, and at the conclusion of  
18 which the hearing, the Court ordered summary judgment in favor of Kennedy Funding as to  
19 liability only, reserving the ruling on the issue of the amount of damages for an evidentiary  
20 hearing.<sup>1</sup> A true and correct copy of the Order Granting Plaintiff's Motion for Summary  
21 Judgment is attached hereto as **Exhibit "1"**.

22          9.     On November 5, 2009, the Court held an evidentiary hearing to determine the  
23 amount of damages, at which time the Defendants raised for the first time the propriety of  
24 Kennedy Funding's authority to commence an action against the co-lenders.

25          10.    In response to the issue raised by the Defendants, the Court ordered supplemental  
26 briefing solely on the issue of Kennedy Funding's authorization to commence the above-

27           <sup>1</sup> The Order reserved the issue of the "amount of damages", and found that liability was properly ordered against the  
28 Defendants after reviewing the Bankruptcy Settlement Agreement and Defendants' argument that a ruling on  
liability should be stayed until the six (6) month period expired under the Bankruptcy Settlement Agreement.



1 captioned action on behalf of the co-lenders, setting the deadline for any such supplement 2-  
2 weeks after the November 5, 2009, evidentiary hearing. A true and correct copy of the Minutes  
3 of the November 5, 2009, evidentiary hearing are attached hereto as Exhibit "2".

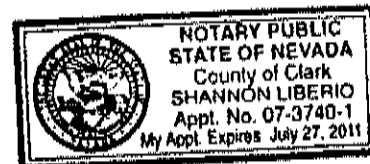
4 11. The Court further instructed Defendants that they were permitted to file a  
5 response to the supplement filed by Kennedy Funding addressing Kennedy Funding's  
6 authorization to commence an action against the Defendants on behalf of the co-lenders. *Id.*  
7 On November 19, 2009, Kennedy Funding filed the Supplemental Declaration of Kevin Wolfer  
8 (the "Wolfer Declaration"), solely addressing the issue raised by Defendants relating to Kennedy  
9 Funding's authorization to commence the above-captioned action against the Defendants.

10 DATED this 3<sup>rd</sup> day of December, 2009.

11  
12 OGONNA M. ATAMOH

13 SUBSCRIBED and SWORN to before  
14 me this 3<sup>rd</sup> day of December, 2009.

15  
16   
17 NOTARY PUBLIC



# EXHIBIT "1"

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

**ORDR**

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

*John A. 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 ...

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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.

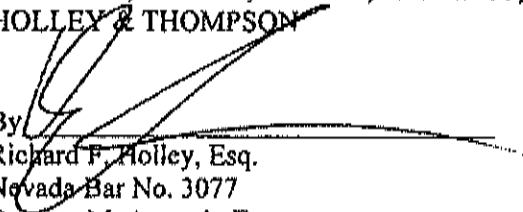
IT IS SO ORDERED.

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*

# EXHIBIT "2"



**REGISTER OF ACTIONS**  
CASE No. 09A582746

**Kennedy Funding Inc vs Onecap Partners MM Inc, Vincent Hesser**

Case Type: **Business Court**  
 Subtype: **Other Business Court**  
 Date Filed: **02/13/2009**  
 Location: **Department 11**  
 Case Number: **A582746**

Conversion Case Number: A562746

## PARTY INFORMATION

Conversion ENo Convert Value @ 09A582746  
Removed: 04/24/2009  
Converted From Blackstone

### Lead Attorneys

Defendant Hesser, Vincent W

Gewerter, Harold Phillip

Retained

**Defendant**    **Onecap Partners MM Inc**

Gewerter, Harold Phillip

Retained

**Plaintiff      Kennedy Funding Inc**

Holley, Richard F.

Retained

## EVENTS & ORDERS OF THE COURT

11/05/2009 Hearing (9:30 AM) (Judicial Officer Gonzalez, Elizabeth)  
11/05/2009, 12/04/2009  
Summary Judgment hearing on Damages

## Minutes

11/05/2009 9:30 AM

• Testimony and exhibits presented. (See worksheets). Court noted it heard sufficient testimony and reviewed paragraph 5 of the guarantee. Colloquy regarding exhibit one to the opposition containing the agreement of the settlement in the Bankruptcy Court. Court directed Ms. Atamoh to submit a supplemental declaration regarding the lenders, within two weeks. COURT ORDERED, matter CONTINUED to chambers for decision and Counsel to notify chambers if requesting arguments. 12/04/09 (CHAMBERS) SUMMARY JUDGMENT HEARING/DECISION

12/04/2009 3:00 AM

Parties Present  
Return to Register of Actions

09A582746

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Business Court**

**COURT MINUTES**

**December 04, 2009**

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09A582746

Kennedy Funding Inc

vs

Onecap Partners MM Inc, Vincent Hesser

---

**December 04, 2009**

**Chambers**

**Hearing**

**Summary Judgment  
hearing on Damages**

**HEARD BY:** Gonzalez, Elizabeth

**COURTROOM:** RJC Courtroom 14C

**COURT CLERK:** Kathy Klein

**PARTIES** None

**PRESENT:**

**JOURNAL ENTRIES**

- The Court having considered the Plaintiffs request to strike supplement and all related briefing DENIES the request. Mr. Gewerter to prepare and submit a proposed order consistent with the foregoing within ten (10) days and distribute a filed copy to all parties involved in this matter. Such order should set forth a synopsis of the supporting reasons proffered to the Court in briefing. This Decision sets forth the Court's intended disposition on the subject but anticipates further order of the Court to make such disposition effective as an order or judgment.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: H. Gewerter, Esq.

ORIGINAL

FILED

DEC 22 2009

*Alfonso J. Salazar*  
CLERK OF COURT

1 ORDR

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

DISTRICT COURT

CLARK COUNTY, NEVADA

10 KENNEDY FUNDING, INC., a New Jersey  
11 corporation,

12 Plaintiff,

13 vs.

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

18 Defendants.

CASE NO.: A582746

DEPT. NO.: XI

ORDER DENYING PLAINTIFF'S  
REQUEST TO STRIKE

Date of Hearing: December 4, 2009

Time of Hearing: In Chambers

09A582746  
595647



19 This matter having come on for hearing in chambers on Plaintiffs' Request to Strike  
20 Defendants' Clarified Supplemental Damages Submission, the Court having reviewed the papers  
21 and pleadings on file herein, now therefore,

22 THE COURT HEREBY FINDS THAT the Defendants' Clarified Supplemental  
23 Damages Submission is not redundant, immaterial, impertinent or scandalous and thus not  
24 subject to being stricken under Rule 12(f):

25 ///

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RECEIVED  
DEC 22 2009  
CLERK OF THE COURT

VH000414

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's Request  
2 to Strike Defendants' Clarified Supplemental Damages Submission is hereby DENIED.

3 DATED this 18 day of December, 2009.

4  
5   
6 DISTRICT COURT JUDGE EKC

7 Submitted by:

8 HAROLD P. GEWERTER, ESQ., LTD.

9   
10 HAROLD P. GEWERTER, ESQ.

11 Nevada Bar No. 499

12 2705 Airport Drive

13 North Las Vegas, Nevada 89032

14 Attorney for Defendants  
15  
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**ORIGINAL**

**FILED**

JAN 05 2010

*Ann L. Hines*  
CLERK OF COURT

1 **NOTC**

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

09A582746  
612229



\*\*\*\*\*

10 KENNEDY FUNDING, INC., a New Jersey  
11 corporation,

12 Plaintiff,

13 vs.

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

18 Defendants.

CASE NO.: A582746

DEPT. NO.: XI

**NOTICE OF ENTRY OF ORDER  
DENYING PLAINTIFF'S REQUEST TO  
STRIKE**

**Date of Hearing: December 4, 2009**

**Time of Hearing: In Chambers**

19 PLEASE TAKE NOTICE that an Order Denying Plaintiff's Request to Strike  
20 Defendants' Clarified Supplemental Damages Submission was entered on the 22<sup>nd</sup> day of  
21 December, 2009. A true and correct copy of said Order is attached hereto.

22 DATED this 23 day of December, 2009.

23 HAROLD P. GEWERTER, ESQ., LTD.

24 *[Signature]*

25 HAROLD P. GEWERTER, ESQ.

26 Nevada Bar No. 499

27 2705 Airport Drive

28 North Las Vegas, Nevada 89032

Attorney for Defendants

**RECEIVED**

JAN - 5 2010

CLERK OF THE COURT  
VH000416

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**CERTIFICATE OF MAILING**

Certification is hereby made that a true and correct copy of the foregoing Notice of Entry of Order Denying Plaintiff's Request to Strike Defendants' Clarified Supplemental Damages Submission was served this 20th day of December, 2009, in the following manner:

X By being placed into an envelope bearing First Class Postage and placed into the U.S. Mails, this same date, addressed to the following individuals; and/or

Richard F. Holley, Esq.  
Ogonna M. Atamoh, Esq.  
400 S. 4<sup>th</sup> Street, Third Floor  
Las Vegas, Nevada 89101  
Attorneys for Plaintiff

Michelle Gouss  
An employee of Harold P. Gewerter, Esq., Ltd.

**FILED**

**DEC 22 2009**

*Ann L. Johnson*  
CLERK OF COURT

1 **ORDR**

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

Telephone: (702) 382-1714

Fax: (702) 382-1759

Attorney for Defendants

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

7  
8  
9 KENNEDY FUNDING, INC., a New Jersey  
corporation,

10 Plaintiff,

11 vs.

12  
13 ONECAP PARTNERS MM, INC., a Nevada  
corporation; VINCENT W. HESSER, an  
14 individual; DOE INDIVIDUALS I through X;  
15 and ROE CORPORATIONS I through X,

16 Defendants.

CASE NO.: A582746

DEPT. NO.: XI

**ORDER DENYING PLAINTIFF'S  
REQUEST TO STRIKE**

**Date of Hearing: December 4, 2009**

**Time of Hearing: In Chambers**

17 This matter having come on for hearing in chambers on Plaintiffs' Request to Strike  
18 Defendants' Clarified Supplemental Damages Submission, the Court having reviewed the papers  
19 and pleadings on file herein, now therefore,

20 THE COURT HEREBY FINDS THAT the Defendants' Clarified Supplemental  
21 Damages Submission is not redundant, immaterial, impertinent or scandalous and thus not  
22 subject to being stricken under Rule 12(f):

23 ///

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1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's Request  
2 to Strike Defendants' Clarified Supplemental Damages Submission is hereby DENIED.

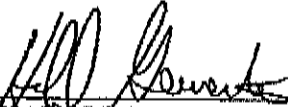
3 DATED this 18 day of December, 2009.

4  
5 ELIZABETH GOFF GONZALEZ

6 DISTRICT COURT JUDGE

7 Submitted by:

8 HAROLD P. GEWERTER, ESQ., LTD.

9 

10 HAROLD P. GEWERTER, ESQ.

11 Nevada Bar No. 499

12 2705 Airport Drive

13 North Las Vegas, Nevada 89032

14 Attorney for Defendants



**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Business Court

COURT MINUTES

February 04, 2010

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09A582746

Kennedy Funding Inc

vs

Onecap Partners MM Inc, Vincent Hesser

---

February 04, 2010

9:15 AM

Calendar Call

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 14C

COURT CLERK: ; Melissa Benson; Nicole McDevitt/mb

RECORDER: Jill Hawkins

REPORTER:

**PARTIES**

**PRESENT:** Atamoh, Ogonna M. Attorney  
Gewerter, Harold Attorney  
Phillip

**JOURNAL ENTRIES**

- Counsel advised there was already a hearing for Summary Judgment and damages. Further, court has not given a ruling as to authority issue. Colloquy regarding briefings filed. Ms. Atamoh advised they are awaiting money for damages. COURT ORDERED, as their is an issue for authority, matter SET for Status Check.

2/5/10 3:00 AM STATUS CHECK: DETERMINATION OF AUTHORITY (CHAMBERS)

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Business Court

COURT MINUTES

February 05, 2010

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09A582746

Kennedy Funding Inc

vs

Onecap Partners MM Inc, Vincent Hesser

---

February 05, 2010

3:00 AM

Status Check

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 14C

COURT CLERK: Nicole McDevitt

RECORDER:

REPORTER:

PARTIES

PRESENT:

**JOURNAL ENTRIES**

- The court having reviewed the supplemental briefing on the authority to proceed finds that the Plaintiff has authority to proceed on behalf of the coLenders. The Court has previously determined that the action against the guarantors is not limited due to the inability of the lender to proceed with foreclosure as a result of the settlement in the Bankruptcy proceeding with the Debtor in bankruptcy. Further the Court having previously granted partial summary judgment on liability for the obligation and having heard evidence of the amount of the deficiency awards damages in the amount of \$16,802,025.64 including attorneys fees of \$39,755 00 and costs \$2,131.45 totaling \$16.843.912.09 pursuant to the guaranty. In the event the Debtor in bankruptcy satisfies the indebtedness owing to Plaintiff, then Plaintiff will cease its efforts to enforce the judgment against the Defendants. Additionally this order does not impede Defendants ability to make a claim against Debtor in bankruptcy as a result of the satisfaction of the obligation. Counsel for Plaintiff is directed to submit proposed findings of fact and conclusions of law and a proposed judgment consistent with the foregoing within ten (10) days and distribute a filed copy to all parties involved in this matter. Such order should set forth a synopsis of the supporting reasons proffered to the Court in briefing, the evidentiary hearing, and argument. This Decision sets forth the Court's intended disposition on the subject but anticipates further order of the Court to make such disposition effective as an order or judgment. All future dates are ordered vacated.

CLERK'S NOTE: Clerk notified parties telephonically of vacated trial and the above minute order has

PRINT DATE: 02/05/2010

Page 1 of 2

Minutes Date:

February 05, 2010

VH000421

09A582746

been distributed to: Ognna Attamoh, Esq. (Santoro, Driggs et el) and Harold Phillip Gewerter, Esq. (Gewerter Law Offices)

ORIGINAL

Electronically Filed  
02/18/2010 03:05:18 PM

**JUDGE**  
**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

CLERK OF THE COURT

*Attorneys for Kennedy Funding, Inc.*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

KENNEDY FUNDING, INC., a New Jersey corporation,

Plaintiff,

Case No.: A582746  
Dept. No.: XI

$$\mathbf{v}_-$$

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

**Defendants.**

## 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.

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SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON




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

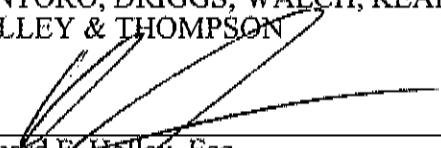
IT IS SO ORDERED.

Dated this 17 day of February, 2009.

  
DISTRICT COURT JUDGE *ENE*

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*

# **EXHIBIT “1”**



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**ORDR**  
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

*Cliff A. Blum*  
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.



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

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

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

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

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

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

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

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

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26 ...

27 ...

28 ...

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.

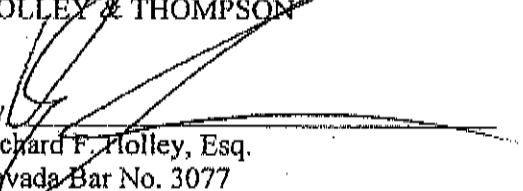
4 IT IS SO ORDERED.

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

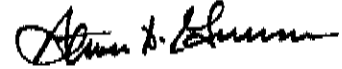
12 By   
13 Richard F. Holley, Esq.  
14 Nevada Bar No. 3077  
15 Ogonna M. Atamoh, Esq.  
16 Nevada Bar No. 7589  
17 400 S. Fourth Street, Third Floor  
18 Las Vegas, NV 89101  
19 Attorneys for Plaintiff  
20  
21  
22  
23  
24  
25  
26  
27  
28

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**ORDR**

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



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

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

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

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

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


15 **IT IS SO ORDERED.**

16 Dated this 17 day of February, 2010.

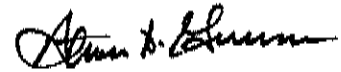
17  
18   
DISTRICT COURT JUDGE *zkc*

19  
20 Submitted by:

21 SANTORO, DRIGGS, WALCH, KEARNEY,  
22 HOLLEY & THOMPSON

23 By   
24 Richard F. Holley, Esq.  
Nevada Bar No. 3077  
25 Ogonna M. Atamoh, Esq.  
Nevada Bar No. 7589  
26 400 S. Fourth Street, Third Floor  
27 Las Vegas, NV 89101  
28 *Attorneys for Plaintiff*





CLERK OF THE COURT

NEO  
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

*Attorney 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

**NOTICE OF ENTRY OF ORDER**

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

Dated this 22nd day of February.

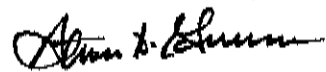
**SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON**

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,  
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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 NRC  
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

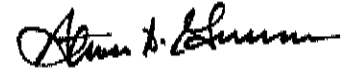
*Attorneys for Defendants*



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

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW



CLERK OF THE COURT

**NEOJ**  
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

*Attorney 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

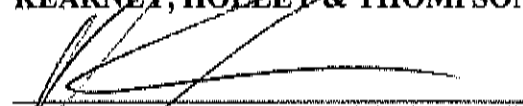
Dept. No.: XI

**NOTICE OF ENTRY OF JUDGMENT**

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

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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**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. Lawrence

CLERK OF THE COURT

*Attorneys for Kennedy Funding, Inc.*

**CLARK COUNTY, NEVADA**

KENNEDY FUNDING, INC., a New Jersey corporation,

Plaintiff,

Case No.: A582746

Dept. No.: XI

**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.**

## 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.

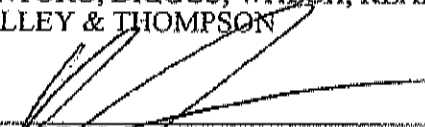
3 IT IS SO ORDERED.

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

5  
6   
DISTRICT COURT JUDGE *ENC*

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  
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21  
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23  
24  
25  
26  
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28

# EXHIBIT “1”

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON



**ORDR**

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**

*John A. Adams*  
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

06209-09/519467

VH000447



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.



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

### CONCLUSIONS OF LAW

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

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

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

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

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

### 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 as to liability only.

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SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY & THOMPSON



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.

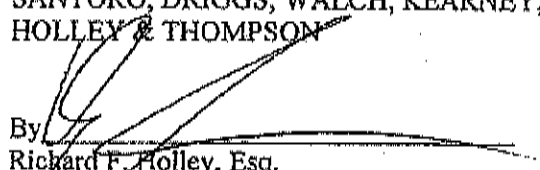
4           **IT IS SO ORDERED.**

5                     Dated this 4 day of November, 2009.

6  
7                                     ELIZABETH GOTT 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

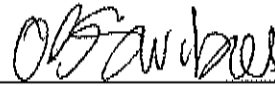


1 CERTIFICATE OF MAILING

2 I HEREBY CERTIFY that, on the 22nd day of February, 2010, and pursuant to NRCP  
3 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **NOTICE**  
4 **OF ENTRY OF JUDGMENT**, postage prepaid and addressed to:

5 Harold P. Gewerter  
6 Harold P. Gewerter, Esq., Ltd.  
7 2705 Airport Drive  
8 North Las Vegas, NV 89032

9 *Attorneys for Defendants*

10 

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

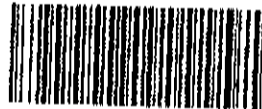
SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

*Anna L. Quinn*

CLERK OF THE COURT

09A582746  
718988



1 NOTC

2 HAROLD P. GEWERTER, ESQ.

3 Nevada Bar No. 499

4 HAROLD P. GEWERTER, ESQ., LTD.

5 2705 Airport Drive

6 North Las Vegas, NV 89032

7 Office: (702) 382-1714

8 Fax: (702) 382-1759

9 Attorneys for Defendant

10 Vincent Hesser

DISTRICT COURT

CLARK COUNTY, NEVADA

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

13 Plaintiff,

14 vs.

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

19 Defendants.

CASE NO.: A582746  
DEPT. NO.: XI

ONECAP PARTNERS MM, INC. and  
VINCENT HESSER'S NOTICE OF  
APPEAL

Hearing Date: N/A

Hearing Time: N/A

20 NOTICE is hereby given that ONECAP PARTNERS MM, INC. and VINCENT  
21 HESSER, Defendants above named, hereby appeal to the Supreme Court of Nevada from the  
22 Judgment entered in this action on the 18<sup>th</sup> day of February, 2010, attached hereto as Exhibit "1",  
23 and that certain Order granting Plaintiff KENNEDY FUNDING, INC.'s Motion for Summary  
24 Judgment, attached hereto as Exhibit "2".

25 DATED this 15 day of March, 2010.

26 HAROLD P. GEWERTER, ESQ., LTD.

27 *Harold P. Geworter*  
28 HAROLD P. GEWERTER, ESQ.

Nevada Bar No. 499

2705 Airport Drive

North Las Vegas, NV 89032

Attorney for Defendants OneCap Partners  
MM, Inc. and Vincent Hesser

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**CERTIFICATE OF SERVICE**


Certification is hereby made that a true and correct copy of the foregoing Notice of Appeal was served this 15<sup>th</sup> day of March, 2010, in the following manner:

  X   By being placed into an envelope bearing First Class Postage and placed into the U.S. Mails, this same date, addressed to the following individuals; and/or

       By being hand delivered to the following individuals at their last known address, this same date, as follows; and/or

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

Richard F. Holley, Esq.  
Ogonna M. Atamoh, Esq.  
Santoro, Driggs, Walch,  
Kearney, Holley & Thompson  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101  
Attorney for Plaintiff

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

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

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.

ORIGINAL

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Allen L. Linn

**CLERK OF THE COURT**

**JUDG**

**RICHARD F. HOLLEY, ESQ.**  
New York, N. Y.

Nevada Bar No. 3077

OGONNA M. ATAMOH, ESQ.  
Newark, N.J. 07102

Nevada Bar No. 7589

SANTORO, DRIGGS, WALCH,  
KEARNEY

KEARNEY, HOLLEY & THOMPSON  
400 South Fourth Street, St. Paul, Minn.

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

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 1 through X; and ROE CORPORATIONS 1 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

06209-09/553899.doc

VH000459

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 ...

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON




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

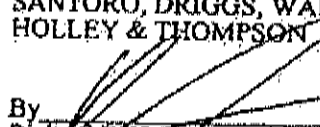
IT IS SO ORDERED.

Dated this 17 day of February 2009.

  
DISTRICT COURT JUDGE *ere*

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

# EXHIBIT "1"



SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

5:11 PM

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.*

**FILED**

NOV - 4 2009

*John 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. ("Onccap") 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 Wolfert, filed

06209-09/11/2009

VH000463

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.

SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SW

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 ...

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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.

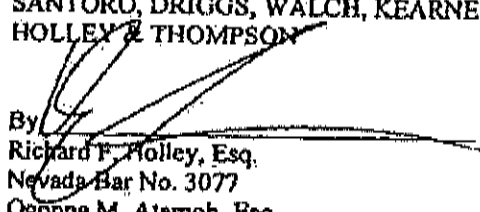
4 IT IS SO ORDERED.

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  
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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

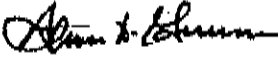
*Attorneys for Defendants*

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

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

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02/18/2010 02:59:38 PM

  
CLERK OF THE COURT

1 ORDR

2 RICHARD F. HOLLEY, ESQ.  
Nevada Bar No. 3077

3 OGONNA M. ATAMOH, ESQ.  
Nevada Bar No. 7589

4 SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON  
400 South Fourth Street, Third Floor

5 Las Vegas, Nevada 89101  
Telephone: 702/791-0308

6 Facsimile: 702/791-1912

7 Attorneys for Kennedy Funding, Inc.

8  
9 DISTRICT COURT

10 CLARK COUNTY, NEVADA

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

13 Plaintiff,

14 v.

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

17 Defendants.

Case No.: A582746  
Dept. No.: XI

18  
19  
20 ORDER AWARDING DAMAGES PURSUANT TO PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

21 Plaintiff KENNEDY FUNDING, INC.'s ("Plaintiff's") evidentiary hearing for damages  
22 arising from Plaintiff's Motion for Summary Judgment ("Motion for Summary Judgment") came  
23 before the Court on November 5, 2009, at 9:00 a.m. Harold P. Gewerter, Esq. of the law firm  
24 Harold P. Gewerter, Esq., Ltd., appeared on behalf of Defendants ONECAP PARTNERS MM,  
25 INC. ("Onecap") and VINCENT W. HESSER ("Hesser") (collectively "Defendants"), and  
26 Ogonna M. Atamoh, Esq. of the law firm of Santoro, Driggs, Walch, Kearney, Holley &  
27 Thompson appeared on behalf of Plaintiff, with no other appearances having been made.  
28

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SANTORO, DRIGGS, WALCH,  
KEARNEY, HOLLEY & THOMPSON

SDW

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.

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

ORDER GRANTING SUMMARY JUDGMENT

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

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

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

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


15 IT IS SO ORDERED.

16 Dated this 17 day of February, 2010.

17  
18   
19 DISTRICT COURT JUDGE *zxc*

20 Submitted by:

21 SANTORO, DRIGGS, WALCH, KEARNEY,  
22 HOLLEY & THOMPSON

23 By   
24 Richard F. Holley, Esq.  
25 Nevada Bar No. 3077  
26 Ogonna M. Atamoh, Esq.  
27 Nevada Bar No. 7589  
28 400 S. Fourth Street, Third Floor  
Las Vegas, NV 89101  
Attorneys for Plaintiff



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CERTIFICATE OF MAILING

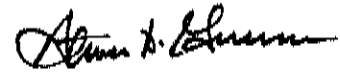
I HEREBY CERTIFY that, on the 22nd day of February 2010, and pursuant to NRCP  
5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing NOTICE  
OF ENTRY OF ORDER, postage prepaid and addressed to:

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

*Attorneys for Defendants*

A handwritten signature in cursive script, appearing to read 'O. Santoro', written over a horizontal line.

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



CLERK OF THE COURT

1 ASTA  
2 HAROLD P. GEWERTER, ESQ.  
3 Nevada Bar No. 499  
4 HAROLD P. GEWERTER, ESQ., LTD.  
5 2705 Airport Drive  
6 North Las Vegas, NV 89032  
7 Telephone: (702) 382-1714  
8 Fax: (702) 382-1759  
9 Attorneys for Defendants  
10 OneCap Partners MM, Inc. and  
11 Vincent W. Hesser

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 KENNEDY FUNDING, INC., a New Jersey  
11 Corporation,

CASE NO.: A582746  
DEPT. NO.: XI

12 Plaintiff,

13 vs.

14  
15 ONECAP PARTNERS MM, INC., a Nevada  
16 corporation; VINCENT W. HESSER; an  
17 individual, DOE INDIVIDUALS I through X,  
18 and ROE CORPORATIONS I through X,

CASE APPEAL STATEMENT

Hearing Date: N/A  
Hearing Time: N/A

Defendants.

19 1. Name of Appellant filing this Case Appeal Statement: OneCap Partners MM, Inc.  
20 and Vincent W. Hesser.

21 2. Identify the Judge issuing the decision, judgment, or order appealed from:  
22 Honorable Judge Elizabeth Gonzalez.

23 3. Identify all parties to the proceedings in the District Court (the use of et al. to  
24 denote parties is prohibited): Plaintiff: Kennedy Funding, Inc. Defendant: OneCap Partners  
25 MM, Inc. and Vincent W. Hesser.

26 4. Identify all parties involved in this appeal (the use of et al. to denote parties is  
27 prohibited): Plaintiff: Kennedy Funding, Inc. Defendant/Appellant: OneCap Partners MM, Inc.  
28 and Vincent W. Hesser.

1           5.       Set forth the name, law firm, address, and telephone number of all counsel on  
2 appeal and identify the party or parties whom they represent:

3           Counsels for Appellant:     Harold P. Gewerter, Esq.  
4   Harold P. Gewerter, Esq., Ltd.  
5   2705 Airport Drive  
6   North Las Vegas, NV 89032  
7   Telephone: (702) 382-1714

8           Counsel for Respondents:   Richard F. Holley, Esq.  
9   Ogonna M. Atamoh, Esq.  
10    Santoro Driggs Walch Kearney Holley & Thompson  
11    400 S. Fourth Street, Third Floor  
12    Las Vegas, NV 89101  
13    Telephone: (702) 791-0308

14           6.       Indicate whether Appellant was represented by appointed or retained counsel in  
15 the District Court: The Appellant Vincent Hesser was represented by retained counsel in the  
16 District Court.

17           7.       Indicate whether Appellant is represented by appointed or retained counsel on  
18 appeal: The Appellant is being represented by retained counsel on appeal.

19           8.       Indicate whether Appellant was granted leave to proceed in forma pauperis, and  
20 the date of entry of the District Court Order granting such a leave: Leave was not granted to  
21 proceed *in forma pauperis*.

22           9.       Indicate the date the proceedings commenced in the District Court (e.g., date  
23 complaint, indictment, information, or petition was filed): Complaint filed February 13, 2009.

24           DATED this 15 day of March, 2010.

25   HAROLD P. GEWERTER, ESQ., LTD.

26     
27   HAROLD P. GEWERTER, ESQ.

28   Nevada Bar No. 499  
29   2705 Airport Drive  
30   North Las Vegas, NV 89032  
31   Attorney for Defendants OneCap Partners  
32   MM, Inc. and Vincent Hesser

1 CERTIFICATE OF SERVICE

2 Certification is hereby made that a true and correct copy of the foregoing Case Appeal  
3 Statement was served this 15<sup>th</sup> day of March, 2010, in the following manner:

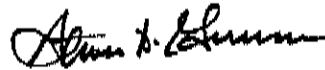
4 X By being placed into an envelope bearing First Class Postage and placed into the  
5 U.S. Mails, this same date, addressed to the following individuals; and/or

6 \_\_\_\_\_ By being hand delivered to the following individuals at their last known address,  
7 this same date, as follows; and/or

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

10  
11 Richard F. Holley, Esq.  
12 Ogonna M. Atamoh, Esq.  
13 Santoro Driggs Walch Kearney Holley &  
14 Thompson  
15 400 S. Fourth Street, Third Floor  
16 Las Vegas, NV 89101

17 Michelle M. Acelus  
18 An employee of Harold P. Gewerter, Esq., Ltd.  
19  
20  
21  
22  
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26  
27  
28



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,

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

**POST-JUDGMENT MEMORANDUM OF COSTS  
AND DISBURSEMENTS**

Filing.....	\$	24.00
Photocopies.....	\$	108.00
Delivery Charges .....	\$	40.00
Postage .....	\$	0.88
Record & Certify Judgment.....	\$	25.00

**TOTAL \$ \$ 197.88**

STATE OF NEVADA )  
COUNTY OF CLARK ) <sup>ss.</sup>

Ogonna M. Atamoh, Esq. being duly sworn, states: that affiant is the attorney for the Plaintiff and has personal knowledge of the above costs and disbursements expended; that the items contained in the above memorandum are true and correct to the best of this affiant's knowledge and belief; and that the said disbursements have been necessarily incurred and paid in this action.

Ogonna M. Atamoh, Esq.

*Attorneys for Kennedy Funding, Inc.*

SUBSCRIBED AND SWORN to before me  
this 28<sup>th</sup> day of April, 2010.

*Shannon Liberio*  
NOTARY PUBLIC in and for said  
County and State

