

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
May 04 2021 05:32 p.m.
Elizabeth A. Brown

VINCENT HESSER

Case No. 81383 of Supreme Court

Petitioner,

vs.

District Court

KENNEDY FUNDING, INC.

Case No. 09A582746

Respondent

APPEAL

From the Eighth Judicial District Court

Department XI

Clark County Nevada

HONORABLE ELIZABETH GONZALEZ

APPELLANT'S APPENDIX VOL III

LAW OFFICES OF BYRON THOMAS

BYRON THOMAS, ESQ.

BAR NO: 8906

Attorney for

VINCENT HESSER

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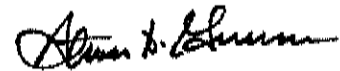
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CLERK OF THE COURT

1 **ORDR**

2
3
4
5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**

7 *****

8 KENNEDY FUNDING INC

CASE NO.: 09A582746

9 VS

10 ONECAP PARTNERS MM INC,

DEPARTMENT 11

VINCENT HESSER

11 **CIVIL ORDER TO STATISTICALLY CLOSE CASE**

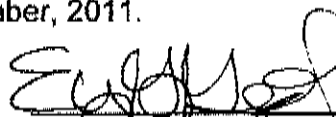
12 Upon review of this matter and good cause appearing,

13 IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to
14 statistically close this case for the following reason:

15 **DISPOSITIONS:**

- 16 ☐ Voluntary Dismissal
17 ☐ Transferred (before/during trial)
18 ☐ Involuntary (statutory) Dismissal
19 ☐ Judgment on Arbitration Award
20 ☐ Stipulated Dismissal
21 ☐ Stipulated Judgment
22 ☐ Default Judgment
23 ☒ Motion to Dismiss (by Defendant)
24 ☐ Summary Judgment
25 ☐ Non-Jury (bench) Trial
26 ☐ Jury Trial

27 DATED this 27th day of September, 2011.



28 ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

VH000476

SEP 28 2011

40

IN THE SUPREME COURT OF THE STATE OF NEVADA

ONECAP PARTNERS MM, INC., A NEVADA
CORPORATION AND VINCENT W. HESSER,
AN INDIVIDUAL,
Appellants,
vs.
KENNEDY FUNDING, INC., A NEW JERSEY
CORPORATION,
Respondent.

Supreme Court No. 55654
District Court Case No. A582746

FILED

MAR 16 2012

Tracie Lindeman
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

""ORDER the judgment of the district court AFFIRMED.""

Judgment, as quoted above, entered this 10th day of February, 2012.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
March 07, 2012.

Tracie Lindeman, Supreme Court Clerk

By: Tiffany Maccagno
Deputy Clerk



08A682746
CCJA
NV Supreme Court Clerks Certificate/Judgm
1799988



IN THE SUPREME COURT OF THE STATE OF NEVADA

ONECAP PARTNERS MM, INC., A
NEVADA CORPORATION; AND
VINCENT W. HESSER, AN
INDIVIDUAL,
Appellants,
vs.
KENNEDY FUNDING, INC., A NEW
JERSEY CORPORATION,
Respondent.

No. 55654

FILED

FEB 10 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a guaranty contract action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

On appeal, appellants challenge the district court's order granting summary judgment in favor of respondent based on the guaranty contract. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Once the movant has properly supported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth, by affidavit or otherwise, specific facts demonstrating the existence of a genuine issue of material fact for trial to avoid summary judgment. NRCP 56(e); Wood, 121 Nev. at 731, 121 P.3d at 1030-31. This court reviews an order granting summary judgment de novo. Wood, 121 Nev. at 729, 121 P.3d at 1029.

Having reviewed the briefs and appendices on appeal, we conclude that the district court properly granted summary judgment. The district court properly concluded that appellants failed to set forth sufficient facts to demonstrate a material issue of fact to avoid summary judgment.¹ Id. at 729, 731, 121 P.3d at 1029, 1030-31.

Additionally, appellants seek to raise on appeal several statutory arguments that they assert require reversal of the district court's summary judgment and final judgment. These arguments are waived, however, because appellants failed to first raise them in the district court. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that this court will not consider an issue raised for the first time on appeal). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

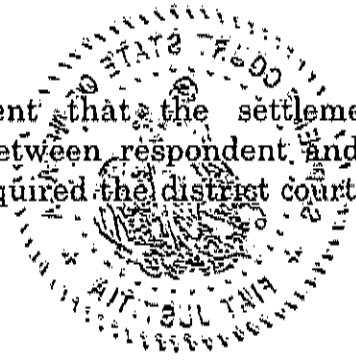
Cherry, J.
Cherry

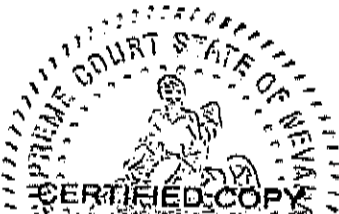
Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Robert F. Saint-Aubin, Settlement Judge
Harold P. Gewerter, Esq., Ltd.
Santoro, Driggs, Walch, Kearney, Holley & Thompson/Las Vegas
Eighth District Court Clerk

¹We conclude that appellants' argument that the settlement agreement in a separate bankruptcy action between respondent and a third party precluded summary judgment or required the district court to stay this case lacks merit.





This document is a full, true and correct copy of the original on file and of record in my office.

DATE: March 7, 2012

Supreme Court Clerk, State of Nevada

By Maccagno Deputy

VH000480

IN THE SUPREME COURT OF THE STATE OF NEVADA

ONECAP PARTNERS MM, INC., A NEVADA
CORPORATION AND VINCENT W. HESSER,
AN INDIVIDUAL,
Appellants,
vs.
KENNEDY FUNDING, INC., A NEW JERSEY
CORPORATION,
Respondent.

Supreme Court No. 55654
District Court Case No. A582746

REMITTITUR

TO: Steven Grierson, Clark County District Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: March 07, 2012

Tracie Lindeman, Clerk of Court

By: Tiffany Maccagno
Deputy Clerk

cc (without enclosures):

Hon. Elizabeth Goff Gonzalez, District Judge
Harold P. Gewerter, Esq., Ltd.
Santoro, Driggs, Walch, Kearney, Holley & Thompson/Las Vegas

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on MAR 16 2012

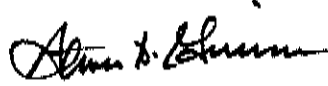
HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED

MAR 16 2012

CLERK OF THE COURT


CLERK OF THE COURT

1 **EXPM**
2 RICHARD F. HOLLEY, ESQ.
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5 OGONNA M. ATAMOH, ESQ.
6 Nevada Bar No. 7589
7 E-mail: oatamoh@nevadafirm.com
8 HOLLEY, DRIGGS, WALCH,
9 PUZEY & THOMPSON
10 400 South Fourth Street, Third Floor
11 Las Vegas, Nevada 89101
12 Telephone: 702/791-0308
13 Facsimile: 702/791-1912

14 *Attorneys for Kennedy Funding, Inc.*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 KENNEDY FUNDING, INC., a New Jersey
18 corporation,

19 Plaintiff,

20 v.

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

25 Defendants.

Case No.: A582746
Dept. No.: XI

**EX PARTE MOTION FOR ORDER
ALLOWING JUDGMENT DEBTOR
EXAMINATION OF VINCENT W.
HESSER**

26 **EX PARTE MOTION FOR ORDER ALLOWING**
27 **JUDGMENT DEBTOR EXAMINATION OF VINCENT W. HESSER**

28 Plaintiff Kenney Funding, Inc. ("Plaintiff" or alternatively, the "Judgment Creditor"), by
and through its attorneys RICHARD F. HOLLEY, ESQ. and OGONNA M. ATAMOH, ESQ. of
the law firm of HOLLEY, DRIGGS, WALCH, PUZEY & THOMPSON, files this *Ex Parte*
Motion for Order Allowing a Judgment Debtor Examination of Vincent W. Hesser ("Motion").

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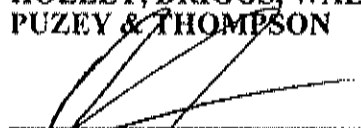
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...

1 This Motion is based upon the Points and Authorities attached hereto, and the pleadings
2 and papers on file herein.

3 Dated this 9th day of March, 2015.

4 **HOLLEY, DRIGGS, WALCH,
5 PUZEY & THOMPSON**

6 
7 RICHARD F. HOLLEY, ESQ.
8 Nevada Bar No. 3077
9 OGONNA M. ATAMOH, ESQ.
10 Nevada Bar No. 7589
11 400 South Fourth Street, Third Floor
12 Las Vegas, Nevada 89101

13 *Attorneys for Kennedy Funding, Inc.*

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. STATEMENT OF FACTS**

16 **THE LOAN**

17 1. On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or
18 "OneCap") and Kennedy Funding, as agent of the lenders, entered into a Loan and Security
19 Agreement ("Loan Agreement"), pursuant to which Kennedy Funding made a \$12 million loan
20 to OneCap to facilitate the purchase of unimproved real property consisting of 78.74± acres of
21 raw land located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark
22 County Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property").

23 2. The loan is evidenced by a Promissory Note dated June 15, 2006 in the original
24 principal sum of \$12 million ("Note"), made by OneCap to pay to the order of Kennedy Lending,
25 as agent of the lenders.

26 3. Under the Note, OneCap promised to pay Kennedy Funding monthly interest only
27 payments at a rate of 11.5% per annum, to accrue from July 1, 2006 to June 1, 2007. Beginning
28 August 1, 2007, OneCap promised to pay Kennedy Funding monthly interest only payments at a
rate of 18% per annum, to accrue from July 1, 2007 through to the maturity date of June 30,
2009.

1 4. OneCap agreed to pay all principal, interest and other sums due under the Note in
2 full on the maturity date of June 30, 2009.

3 5. In the event of a late payment under the Note, OneCap agreed to pay a late charge
4 equal to 10% of the overdue payment.

5 6. In the event of a default under the Note, OneCap agreed to pay a default rate of
6 25% per annum.

7 7. As security for the Note, OneCap executed and delivered to Kennedy Funding a
8 Deed of Trust with Security Agreement, Financing Statement for Fixture Filing and Assignment
9 of Rents ("Deed of Trust") against the Property, which was recorded on June 15, 2006 with the
10 Clark County Recorder's Office as Instrument No. 20060615-0005324.

11 8. On June 15, 2006, Kennedy Funding, Gary Owen II, LLC ("Option Holder"), and
12 OneCap executed a Subordination and Attornment Agreement ("Subordination Agreement") in
13 which the Option Holder agreed to subordinate its limited option to purchase the Property to
14 Kennedy Funding's Deed of Trust.

15 9. As additional security for the loan, OneCap executed and delivered to Kennedy
16 Funding, as agent for the lenders, an Assignment of Leases and Rents, dated June 14, 2006, and
17 recorded June 15, 2006, with the Clark County Recorder's Office as Instrument No. 20060615-
18 0005325, and an Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings
19 and Report, dated June 15, 2006 ("Assignment of Licenses").

20 10. To further secure payment of the Note, on June 14, 2006, Defendant Vincent
21 Hesser ("Hesser") and Defendant OneCap Partners MM, Inc. ("OneCap MM" and together with
22 Hesser the "Defendants") executed personal unconditional guaranties of the loan to Kennedy
23 Funding ("Guaranty"). At the time of the transaction between OneCap and Kennedy Funding,
24 Hesser was the President of OneCap and OneCap MM.

25 11. OneCap also granted a properly perfected security interest to Kennedy Funding
26 by way of a UCC-1 Financing Statement ("UCC-1") filed with the Clark County Recorder's
27 Office on June 15, 2006 as Instrument No. 20060615-0005326.

28 ...

1 12. Finally, OneCap and Defendants executed an Environmental Indemnity
2 Agreement in favor of Kennedy Funding, under which they agreed to indemnify Kennedy
3 Funding for noncompliance of environmental laws.

4 13. Kennedy Funding received all money to fund the loan in New Jersey, and
5 disbursed those funds from New Jersey. Kennedy Funding also received all payments made by
6 OneCap on the loan in New Jersey, and disbursed those payments to lenders from New Jersey.

7 **ONECAP DEFAULTS**

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

10 15. In addition, OneCap is in default under the Deed of Trust for failure to provide
11 Kennedy Funding with current proof of liability insurance, and for failure to timely pay its tax
12 obligations relating to the Property. State and County Taxes are outstanding for the fiscal period
13 2008 to 2009 in the total amount of \$41,093.18 on the Property.

14 16. Based on those defaults, Kennedy Funding Accelerated the Note and instituted
15 Foreclosure Proceedings on the Property. The Notice of Breach and Election to Sell Under Deed
16 of Trust was Recorded with the Clark County Recorder's Office on August 20, 2008 as
17 Instrument No. 20080820-00597; and The Notice of Trustee's Sale, with a sale date of December
18 29, 2008, was recorded on December 8, 2008 as Instrument No. 20081208-00882.

19 17. On December 26, 2008, three days before the foreclosure sale, Nevada Ueno
20 Mita, LLC ("Nevada Ueno"), filed a Chapter 11 Bankruptcy Petition in the United States
21 Bankruptcy for the District of Nevada, Case No. BK-S-08-25487-BAM (the "Bankruptcy
22 Petition").

23 18. Based upon information obtained from the Bankruptcy Petition, OneCap
24 transferred its interest in the Property to Nevada Ueno. A Deed from OneCap to Nevada Ueno
25 was recorded with the Clark County Recorder's Office on November 3, 2008 as Instrument No.
26 20081103-0002469.

27 ...

28 ...

1 19. Under the Deed of Trust and Loan Agreement, OneCap's transfer of the Property
2 to Nevada Ueno was deemed an event of default.

3 **DEFENDANTS DEFAULT ON THE GUARANTY**

4 20. As a result of OneCap's default under the Note, including failure to make timely
5 payments, and OncCap's improper transfer and Nevada Ueno's bankruptcy petition, which
6 halted the foreclosure action, Kennedy Funding demanded performance from Defendants under
7 the Guaranty.

8 21. However, Defendants have failed and refused to perform under the Guaranty.

9 **JUDGMENT**

10 22. On February 13, 2009, Plaintiff filed a complaint against Defendants.

11 22. On September 22, 2009, the Plaintiff filed a Motion for Summary Judgment
12 ("Motion for Summary Judgment"). After considering the parties' papers, evidence and oral
13 argument, the Court granted the Plaintiff's Motion for Summary Judgment on November 4,
14 2009.

15 23. Thereafter, on February 17, 2009, the Court entered Judgment against each of the
16 Defendants in the amount of \$16,802,025.64, excluding attorneys' fees and costs which amount
17 was to be determined (the "Judgment"). The Plaintiff provided Defendants with notice of entry
18 of judgment on February 23, 2009.

19 24. On February 18, 2010, the Court entered an Order Awarding Damages Pursuant
20 to Plaintiff's Motion for Summary Judgment in the amount of \$39,755.00 and costs in the
21 amount of \$2,131.45 (the "Attorneys' Fees Order"), for a new total Judgment in favor of Plaintiff
22 and against Defendants in the amount of \$18,843,912.09.

23 25. Judgment Creditor seeks to examine Vincent W. Hesser (the "Judgment Debtor")
24 to satisfy the Judgment against Judgment Debtors.

25 **II. LEGAL ANALYSIS**

26 NRS 21.270 provides in pertinent part:

27 1. A judgment creditor, at any time after the judgment is entered,
28 is entitled to an order from the judge of the court requiring the

1 judgment debtor to appear and answer upon oath or affirmation
2 concerning his property, before:

3 (a) The judge or a master appointed by him; or

4 (b) An attorney representing the judgment creditor, at a time
5 and place specified in the order. No judgment debtor may be
6 required to appear outside the county in which he resides.

7 * * * * *

8 3. A judgment debtor who is regularly served with an order issued
9 pursuant to this section, and who fails to appear at the time and
10 place specified in the order, may be punished for contempt by the
11 judge issuing the order.

12 Judgment Creditor is informed and believes that Judgment Debtor Vincent W. Hesser is
13 in possession of property or other non-exempt assets with which the judgment may be satisfied
14 and therefore, Judgment Creditor is entitled to an Order requiring the Judgment Debtor Vincent
15 W. Hesser to appear at the offices of Judgment Creditor's counsel, on **April 24, 2014 at**
16 **10:00 a.m.**, and to answer questions under oath concerning his property and other assets.

17 Dated this 9th day of March, 2015.

18 **HOLLEY, DRIGGS, WALCH,**
19 **PUZEY & THOMPSON**

20 
21 RICHARD F. HOLLEY, ESQ.

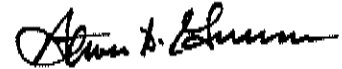
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24 Nevada Bar No. 7589

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26 Las Vegas, Nevada 89101

27 *Attorneys for Kennedy Funding, Inc.*
28



CLERK OF THE COURT

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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 FOR EXAMINATION OF
JUDGMENT DEBTOR VINCENT W.
HESSER**

05-10-149, 1111 KCYD

ORDER FOR EXAMINATION OF JUDGMENT DEBTOR VINCENT W. HESSER

TO: VINCENT W. HESSER

**THIS PLEADING IS A COMMUNICATION BEING MADE IN AN EFFORT TO
COLLECT A DEBT AND SEEK COMPLIANCE WITH A JUDGMENT. ANY
INFORMATION OBTAINED INCIDENT HERETO WILL BE USED FOR THAT
PURPOSE.**

It appearing to the Court that a *Judgment* (the "Judgment") was entered on February 17,
2009, in favor of Plaintiff and against Defendant Vincent W. Hesser ("Hesser") for damages in
the amount of \$16,802,025.64, excluding attorneys' fees and costs, consisting of the principle
balance of \$12,000,000.00 due under the Loan and Security Agreement, accruing interest as of
October 31, 2009, in the amount of \$4,768,000.00, foreclosure costs in the amount of

1 \$19,024.50, appraisal fees in total amount of \$9,500.00 (CBRE in the amount of \$7,500.00 and
2 Vernon Martin \$2,000.00), and miscellaneous costs in the amount of \$5,501.14. Post-judgment
3 interest continues to accrue on the principal balance at a default rate of twenty-five percent
4 (25%) per annum, or \$8,333.33 per diem. It further appearing that on February 18, 2010, the
5 Court entered an Order Awarding Damages Pursuant to Plaintiff's Motion for Summary
6 Judgment in the amount of \$39,755.00 and costs in the amount of \$2,131.45 (the "Attorneys'
7 Fees Order"), for a new total Judgment in favor of Plaintiff and against Defendants in the amount
8 of \$18,843,912.09.

9 Hesser has failed to satisfy any amount of the Judgment by paying in full the monetary
10 damages set forth in the Judgment; and whereas NRS §21.270 provides for an Examination of
11 Judgment Debtor under such circumstances;

12 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment Debtor
13 VINCENT W. HESSER ("Judgment Debtor"), appear at the law offices of Holley, Driggs,
14 Walch, Puzey & Thompson, located at 400 South Fourth Street, Third Floor, Las Vegas, Nevada
15 89101, on the 24th day of April, 2015, at the hour of 10:00 a.m., to be examined under oath
16 concerning any property which may be used to satisfy said Judgment ("Judgment Debtor
17 Examination");

18 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment Debtor
19 shall produce prior to the Judgment Debtor Examination the documents listed in the Subpoena
20 Duces Tecum served concurrently herewith.

21 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this Order
22 be forthwith served upon said Judgment Debtor personally in the manner provided for by law for
23 the service of a Summons.

24 IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the date
25 and time of the Judgment Debtor Examination may be continued at the Judgment Creditor's
26 discretion so as to accommodate any conflict of schedule which may arise.

27 ...

28 ...

1 FAILURE TO APPEAR AT THE TIME AND PLACE OF THE SCHEDULED
2 JUDGMENT DEBTOR EXAMINATION MAY RESULT IN A BENCH WARRANT BEING
3 ISSUED FOR YOUR ARREST.

4 Dated this 17th day of MARCH, 2015.

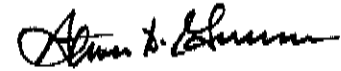
6
7 
8 DISTRICT COURT JUDGE
9 

10 Submitted by:

11 **HOLLEY, DRIGGS, WALCH,**
12 **PUZEY & THOMPSON**

13 By 

14 Richard F. Holley, Esq. (NV Bar No. 3077)
15 Ogonna M. Atamoh, Esq. (NV Bar No. 7589)
16 400 S. Fourth Street, Third Floor
Las Vegas, NV 89101
Attorneys for Kennedy Funding, Inc.



CLERK OF THE COURT

1 **NEOJ**
2 RICHARD F. HOLLEY, ESQ.
3 Nevada Bar No. 3077
4 E-mail: rholley@nevadafirm.com
5 OGONNA M. ATAMOH, ESQ.
6 Nevada Bar No. 7589
7 E-mail: oatamoh@nevadafirm.com
8 HOLLEY, DRIGGS, WALCH,
9 PUZEY & 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

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

Plaintiff,

v.

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

Defendants.

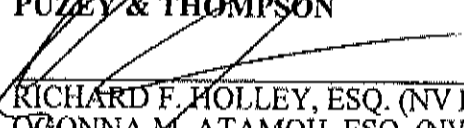
Case No: A582746
Dept. No.: XI

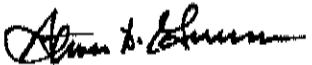
**NOTICE OF ENTRY OF ORDER FOR
EXAMINATION OF JUDGMENT
DEBTOR VINCENT W. HESSER**

18 YOU, and each of you, will please take notice that an **Order for Examination of**
19 **Judgment Debtor Vincent W. Hesser** in the above entitled matter was filed and entered by the
20 Clerk of the above-entitled Court on the 12th day of March, 2015, a copy of which is attached
21 hereto.

22 Dated this 13th day of March, 2015.

**HOLLEY, DRIGGS, WALCH,
PUZEY & THOMPSON**

25 
26 RICHARD F. HOLLEY, ESQ. (NV Bar 3077)
27 OGONNA M. ATAMOH, ESQ. (NV Bar 7589)
28 400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Kennedy Funding, Inc.



CLERK OF THE COURT

OJDE
RICHARD F. HOLLEY, ESQ.
Nevada Bar No. 3077
E-mail: rholley@nevadafirm.com
OGONNA M. ATAMOH, ESQ.
Nevada Bar No. 7589
E-mail: oatomoh@nevadafirm.com
HOLLEY, DRIGGS, WALCH,
PUZEY & 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 FOR EXAMINATION OF
JUDGMENT DEBTOR VINCENT W.
HESSER**

03-10-15P04:11 RCV0

ORDER FOR EXAMINATION OF JUDGMENT DEBTOR VINCENT W. HESSER

TO: VINCENT W. HESSER

**THIS PLEADING IS A COMMUNICATION BEING MADE IN AN EFFORT TO
COLLECT A DEBT AND SEEK COMPLIANCE WITH A JUDGMENT. ANY
INFORMATION OBTAINED INCIDENT HERETO WILL BE USED FOR THAT
PURPOSE.**

It appearing to the Court that a *Judgment* (the "Judgment") was entered on February 17, 2009, in favor of Plaintiff and against Defendant Vincent W. Hesser ("Hesser") for damages in the amount of \$16,802,025.64, excluding attorneys' fees and costs, consisting of the principle balance of \$12,000,000.00 due under the Loan and Security Agreement, accruing interest as of October 31, 2009, in the amount of \$4,768,000.00, foreclosure costs in the amount of

1 \$19,024.50, appraisal fees in total amount of \$9,500.00 (CBRE in the amount of \$7,500.00 and
2 Vernon Martin \$2,000.00), and miscellaneous costs in the amount of \$5,501.14. Post-judgment
3 interest continues to accrue on the principal balance at a default rate of twenty-five percent
4 (25%) per annum, or \$8,333.33 per diem. It further appearing that on February 18, 2010, the
5 Court entered an Order Awarding Damages Pursuant to Plaintiff's Motion for Summary
6 Judgment in the amount of \$39,755.00 and costs in the amount of \$2,131.45 (the "Attorneys'
7 Fees Order"), for a new total Judgment in favor of Plaintiff and against Defendants in the amount
8 of \$18,843,912.09.

9 Hesser has failed to satisfy any amount of the Judgment by paying in full the monetary
10 damages set forth in the Judgment; and whereas NRS §21.270 provides for an Examination of
11 Judgment Debtor under such circumstances;

12 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment Debtor
13 VINCENT W. HESSER ("Judgment Debtor"), appear at the law offices of Holley, Driggs,
14 Walch, Puzey & Thompson, located at 400 South Fourth Street, Third Floor, Las Vegas, Nevada
15 89101, on the 24th day of April, 2015, at the hour of 10:00 a.m., to be examined under oath
16 concerning any property which may be used to satisfy said Judgment ("Judgment Debtor
17 Examination");

18 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment Debtor
19 shall produce prior to the Judgment Debtor Examination the documents listed in the Subpoena
20 Duces Tecum served concurrently herewith.

21 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this Order
22 be forthwith served upon said Judgment Debtor personally in the manner provided for by law for
23 the service of a Summons.



24 IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the date
25 and time of the Judgment Debtor Examination may be continued at the Judgment Creditor's
26 discretion so as to accommodate any conflict of schedule which may arise.

27 ...

28 ...

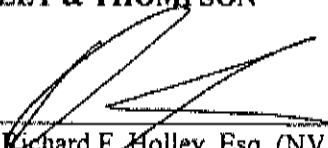
1 FAILURE TO APPEAR AT THE TIME AND PLACE OF THE SCHEDULED
2 JUDGMENT DEBTOR EXAMINATION MAY RESULT IN A BENCH WARRANT BEING
3 ISSUED FOR YOUR ARREST.

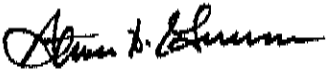
4 Dated this 12th day of MARCH, 2015.

5
6
7 
8 DISTRICT COURT JUDGE
9 

10 Submitted by:

11 **HOLLEY, DRIGGS, WALCH,**
12 **PUZEY & THOMPSON**

13 By 
14 Richard F. Holley, Esq. (NV Bar No. 3077)
15 Ogoana M. Atamoh, Esq. (NV Bar No. 7589)
16 400 S. Fourth Street, Third Floor
Las Vegas, NV 89101
Attorneys for Kennedy Funding, Inc.


CLERK OF THE COURT

AFFT
RICHARD F. HOLLEY, ESQ.
Nevada Bar No. 3077
E-mail: rholley@nevadafirm.com
OGONNA M. ATAMOH, ESQ.
Nevada Bar No. 7589
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HOLLEY DRIGGS WALCH
FINE WRAY PUZEY & 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

AFFIDAVITS OF DUE DILIGENCE AND ATTEMPTED SERVICE

Plaintiff, through its undersigned counsel, Ogonna M. Atamoh, Esq. of the law firm
Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson, attaches hereto the following:

Affidavit of Due Diligence by Norma P. McMahan, as **Exhibit "A"**;

Affidavit of Attempted Service by Myla Carson, process server, as **Exhibit "B"**;

Affidavit of Attempted Service by Lana Paige, process server, as **Exhibit "C"**;

Affidavit of Attempted Service by Loenard Jay Hirschhorn, process server, as
Exhibit "D";

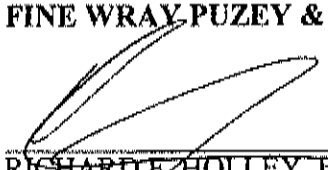
Affidavit of Attempted Service by Joe Ricando, process server, as **Exhibit "E"**;

Affidavit of Attempted Service by Lana Paige, process server, as **Exhibit "F"**, and

1 Affidavit of Attempted Service by Lana Paige, process server, as Exhibit "G".

2 Dated this 5th day of May, 2015.

3 **HOLLEY DRIGGS WALCH**
4 **FINE WRAY PUZEY & THOMPSON**

5 
6 **RICHARD F. HOLLEY, ESQ.**
7 Nevada Bar No. 3077
8 **OGONNA M. ATAMOH, ESQ.**
9 Nevada Bar No. 7589
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101

10 *Attorneys for Kennedy Funding, Inc.*

EXHIBIT “A”

1 **AFFT**
 2 Holley, Driggs Walch, Puzey & Thompson
 3 Richard F. Holley, Esq.
 4 400 South 4th St., 3rd Floor
 5 Las Vegas, NV 89101
 6 State Bar No.: 3077
 7 Attorney(s) for: Plaintiff(s)

8 **DISTRICT COURT**
 9 **CLARK COUNTY, NEVADA**

Case No.: A582746

Dept. No.: XI

10 **Kennedy Funding, Inc., a New Jersey corporation**

11 **vs**

Plaintiff(s)

12 **Onecap Partners MM, Inc., a Nevada corporation; et al**

Defendant(s)

Date: April 24, 2015

Time: 10:00 am

13 **AFFIDAVIT OF**
 14 **DUE DILIGENCE**

15 Norma P. McMahan, being duly sworn deposes and says: That Affiant is and was on the day when she received
 16 the within action, a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of
 17 Nevada under license #604, and not a party to or interested in, the within action: That the affiant received the within
 18 Subpoena - Civil Duces Tecum; Notice of Entry of Order for Examination of Judgment Debtor Vincent W.
 19 Hesser; Notice of Examination of Judgment Debtor Vincent W. Hesser, on the 23rd day of March,
 20 2015 and that attempts were made to locate the Defendant, Vincent W. Hesser, within the County of
 21 Clark, State of Nevada.

22
 23 Affiant affirms that efforts to serve the defendant, Vincent W. Hesser, at his last known residence, 6242 Coley
 24 Ave., Las Vegas, NV 89146, and his place of business, Royal Union of Nevada, 3275 S. Jones Blvd. #104, Las
 25 Vegas, NV 89146, were to no avail. See Affidavits of Attempted Service.

26 Inquiries with local phone and Nevada cross reference directories show a listing for the subject, Vincent Hesser,
 27 at 10176 Juniper Creek Ln, LV 89145. An inquiry with the Clark County Assessor shows no record of the subject nor
 28 anyone named Hesser ever having owned the residence at 10176 Juniper Creek Ln, LV 89145. Inquiries
 29 with various national search engines are reporting the address at 10176 Juniper Creek Ln, to be previous address.

30 Inquiries with the Clark County Assessor were to no avail. Affiant could find no record of the defendant owning a
 31 residence in Clark County. Records show that the residence at 6242 Coley Ave., Las Vegas, NV, is owned by
 32 Michael Hesser. Clark County Assessor shows historical data related to properties that defendant and ex-spouses
 33 held ownership to and that are now owned by different parties. Voter Registration records were also checked and no
 34 match could be found. A record of a marriage between Vincent Hesser and Dunesa Saraga Paglinawan (dated
 35 1/14/2012) was found.

36 ///

VH000498

Inquiries were also run with various national search engines. Results of these inquiries are reporting the most current addresses for the defendant to be 5440 W. Sahara Ave. #300, Las Vegas, NV 89146; and 10176 Juniper Creek Ln, Las Vegas, NV 89145. Information was also obtained indicating that the defendant holds and/or has held many professional licenses. The types of licenses vary from mortgage and real estate related to advertising, publishing, and non profit organizations. Information was obtained indicating that a Dunesa Hesser and VHDHAH Revocable Trust hold the registration for 1990 Kawasaki ZX600 motorcycle; and the VHDHA Revocable Trust holds the registration for a 2000 Ducati Model 996 motorcycle. The registrations show expiration dates (respectively) of 6/24/2015 and 6/02/2015. Dunesa Saraga Hesser is also showing to hold the registration for a 2009 Mercedes Benz 450 GL, SUV. The registration shows an expiration date of 6/24/2015 and address on record of 6242 Coley Ave., Las Vegas, NV 89146. A registration for a 2006 BMW 750 sedan was also found. The registration shows the prior name of the registrant to be Dunesa Saraga Paglinawan. Currently the vehicle is registration to the Boracay 1985 Family Trust at 6242 Coley Ave., Las Vegas, NV 89146. The registration on the BMW expires 8/07/2015. Additional inquiries with the Clark County Assessor for VHDHA Revocable Trust and Boracay 1985 Family Trust were to no avail.

NV DMV provided 1 match for Vincent William Hesser, date of birth, 10/27/1965. DMV shows he holds a valid class C license (#1501781775). The license shows a very recent last transaction date of 3/7/2015 and expiration date of 10/27/2018. DMV shows the most current mailing and physical address for the defendant to be 6242 Coley Ave., Las Vegas, NV 89146. DMV shows no record of the defendant holding a vehicle registration.

Inquiries with the Nevada Secretary of State were also made and to no avail in securing a more current address. Lastly, Affiant affirms that she personally called the defendant's place of business, Royal Union of Nevada, 702 948 1212. Affiant spoke with female employee, Jennifer, who said that the subject was not in presently. Affiant left a message with Jennifer advising of the delivery of legal documents. Affiant asked that defendant call to coordinate delivery and/or to provide the name of an attorney who could accept the delivery on his behalf. The phone message has yet to elicit a response.

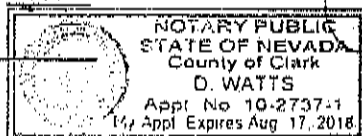
Affiant affirms that a due and diligent effort was made to serve and to locate a current address for the defendant, Vincent W. Hesser, within Clark County, Nevada. Affiant affirms that defendant has refused to make himself available to take service at his place of business, Royal Union Nevada, 3275 S. Jones Blvd., Las Vegas, NV; and at 6242 Coley Ave, Las Vegas, 89146, which is the most current residence address to date.

State of Nevada, County of Clark

SUBSCRIBED AND SWORN to before me on this

1st day of May 2015

Notary Public D. Watts



Affiant - Norma P. McMahan, #: R-003875
Legal Process Service - License # 604

WorkOrderNo 1502144

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 07/21/2015 BY 60322

EXHIBIT “B”

1 AFFT

2 Holley, Driggs Walch, Puzey & Thompson
3 Richard F. Holley, Esq.
4 400 South 4th St., 3rd Floor
5 Las Vegas, NV 89101
6 State Bar No.: 3077
7 Attorney(s) for: Plaintiff(s)

8
9
10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

Case No.: A582746

Dept. No.: XI

12 Kennedy Funding, Inc., a New Jersey corporation

13 vs

Plaintiff(s)

14 Onecap Partners MM, Inc., a Nevada corporation; et al

Defendant(s)

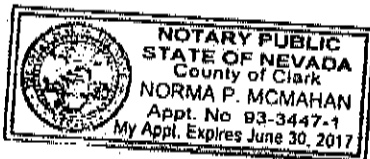
Date: April 24, 2015

Time: 10:00 am

15 AFFIDAVIT OF
16 ATTEMPTED SERVICE

17 I, Myla Carson, being duly sworn deposes and says: That Affiant is and was on the day when she attempted to serve
18 the within action, a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of
19 Nevada under license #804, and not a party to or interested in, the within action: That the affiant received the within
20 Subpoena - Civil Duces Tecum: Notice of Entry of Order for Examination of Judgment Debtor Vincent W. Hessner; Notice of Examination of Judgment Debtor Vincent W. Hessner on the 16th day of March, 2015 and
21 attempted to effect service on Vincent W. Hessner at the following address(es): 5440 W. Sahara Ave. #3, Las Vegas,
22 NV 89146; and 3275 S. Jones Blvd., #104, Las Vegas, NV 89146. Below are listed the date(s) and time(s) of
23 attempted service:

<u>Date</u>	<u>Time</u>	<u>Address</u>	<u>Outcome</u>
3/17/2015	11:35am	5440 W. Sahara Ave.	Address corresponds to office of Royal Union. Female employee advised that subject has not been at this location since May.
3/17/2015	12:07pm	3275 S. Jones Blvd.	Receptionist said that subject was out to lunch and to try back later that afternoon.
3/17/2015	3:20pm	3275 S. Jones Blvd.	Affiant returned and was told that subject had left for a meeting. Affiant left a delivery notice.
3/18/2015	1:16pm	3275 S. Jones Blvd.	Affiant was told that subject was not in the office. Subject has yet to respond to the delivery notice.



34 State of Nevada, County of Clark

35 SUBSCRIBED AND SWORN to before me on this
36 31st day of March 2015

Notary Public Norma P. McMahan

Affiant - Myla Carson # R-067968
Legal Process Service - License # 604

Work Order No 1502144000501



EXHIBIT “C”

1 AFFT
2 Holley, Driggs Walch, Puzey & Thompson
3 Richard F. Holley, Esq.
4 400 South 4th St., 3rd Floor
5 Las Vegas, NV 89101
6 State Bar No.: 3077
7 Attorney(s) for: Plaintiff(s)

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DISTRICT COURT
CLARK COUNTY, NEVADA

Case No.: A582746

Dept. No.: XI

Kennedy Funding, Inc., a New Jersey corporation

vs

Plaintiff(s)

Onecap Partners MM, Inc., a Nevada corporation; et al

Defendant(s)

Date: April 24, 2015

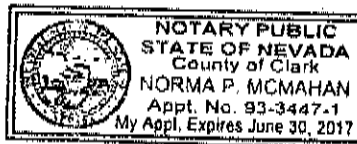
Time: 10:00 am

AFFIDAVIT OF
ATTEMPTED SERVICE

I, Lana Paige, being duly sworn deposes and says: That Affiant is and was on the day when she attempted to serve the within action, a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in, the within action: That the affiant received the within Subpoena - Civil Duces Tecum; Notice of Entry of Order for Examination of Judgment Debtor Vincent W. Hesser; Notice of Examination of Judgment Debtor Vincent W. Hesser on the 1st day of April, 2015 and attempted to effect service on Vincent W. Hesser at the following address(es): 6242 Coley Ave., Las Vegas, NV

89146. Below are listed the date(s) and time(s) of attempted service:

Date	Time	Address	Outcome
4/03/2015	8pm	As above	Address is a large 2 story residence. Residence is secured and access to the residence is only possible if the gate is open and/or entry is allowed by the resident. There were vehicles parked at the residence (within the gates). Affiant was unable to get anyone to respond to car honking. There is no intercom at the gate.
4/04/2015	9am	As above	Affiant was not able to access the residence due to locked gates. Affiant saw two women exit the residence. Affiant shouted out asking for the defendant and one of the women returned the house and then came back out and said that subject was not home. They would not allow affiant access.
4/05/2015	11am	As above	Affiant was not able to access the residence due to locked gate. Affiant honked her vehicle's horn and was not able to get anyone at the residence to respond.



State of Nevada, County of Clark

SUBSCRIBED AND SWORN to before me on this

30th day of April, 2015

Notary Public Norma P. McMahan

Affiant Lana Paige

#: R-067806

Legal Process Service License # 604

WorkOrderNo 10000503

EXHIBIT “D”

1 AFFT
 2 Holley, Driggs Walch, Puzey & Thompson
 3 Richard F. Holley, Esq.
 4 400 South 4th St., 3rd Floor
 5 Las Vegas, NV 89101
 6 State Bar No.: 3077
 7 Attorney(s) for: Plaintiff(s)

DISTRICT COURT
 CLARK COUNTY, NEVADA

Case No.: A582746

Dept. No.: XI

Kennedy Funding, Inc., a New Jersey corporation

vs

Plaintiff(s)

Date: April 24, 2015

Onecap Partners MM, Inc., a Nevada corporation; et al

Time: 10:00 am

Defendant(s)

AFFIDAVIT OF
 ATTEMPTED SERVICE

I, Leonard Jay Hirschhorn, being duly sworn deposes and says: That Affiant is and was on the day when he attempted to serve the within action, a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in, the within action; That the affiant received the within Subpoena - Civil Duces Tecum: Notice of Entry of Order for Examination of Judgment Debtor Vincent W. Hesser; Notice of Examination of Judgment Debtor Vincent W. Hesser on the 14th day of April, 2015 and attempted to effect service on Vincent W. Hesser at the following address(es): Royal Union of Nevada, 3275 S. Jones Blvd. #104, Las Vegas, NV 89146, and 6242 Coley Ave.,

Las Vegas, NV 89146. Below are listed the date(s) and time(s) of attempted service:

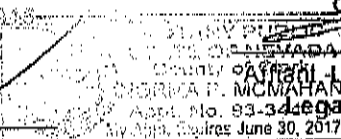
Date	Time	Address	Outcome
4/14/2015	6:40pm	6242 Coley Ave.	Address is a 2 story residence and is surrounded by a private security fence. Gates were open. Affiant spoke with housekeeper (female, Filipino, 30-35yrs, small build) who said that the Hessers were in China and due back in a week.
4/20/2015	6:30pm	6242 Coley Ave.	Affiant spoke with a male who identified himself as "Marty" (Caucasian, 40-45yrs, black hair) a friend. He said the subject is back from China and that he was not home presently.
4/21/2015	10:40am	Royal Union of Nevada	Receptionist advised that subject was "out of state".
4/21/2015	7:15pm	6242 Coley Ave.	Gate to residence was locked and entry was not possible.
4/22/2015	8:55am	6242 Coley Ave.	There was a black Mercedes SUV and a black BMW 750 sedan parked at the residence. Affiant spoke with a different housekeeper (female, Filipino about 25yrs, about 5'2") who said that the Hessers were still travelling.
4/23/2015	12:45pm	Royal Union of Nevada	Affiant saw the black BMW 700 sedan parked at the business. Receptionist said that subject was at lunch. Affiant said that his car was in the parking lot and receptionist stepped away and said he was not there and would take a message. Affiant left message for defendant and to date he has failed to call.

State of Nevada, County of Clark

SUBSCRIBED AND SWORN to before me on this

27th day of April, 2015

Notary Public Norma P. McMahan



Affiant: Leonard Jay Hirschhorn # R-070386
 Process Service License # 604
 WorkOrderNo 16600505

EXHIBIT “E”

1 AFFT
 2 Holley, Driggs Walch, Puzey & Thompson
 3 Richard F. Holley, Esq.
 4 400 South 4th St., 3rd Floor
 5 Las Vegas, NV 89101
 6 State Bar No.: 3077
 7 Attorney(s) for: Plaintiff(s)

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DISTRICT COURT
CLARK COUNTY, NEVADA

Case No.: A582746

Dept. No.: XI

Date: April 24, 2015

Time: 10:00 am

Kennedy Funding, Inc., a New Jersey corporation

vs

Plaintiff(s)

Onecap Partners MM, Inc., a Nevada corporation; et al

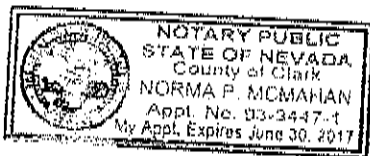
Defendant(s)

AFFIDAVIT OF
ATTEMPTED SERVICE

I, Joe Ricondo, being duly sworn deposes and says: That Affiant is and was on the day when he attempted to serve the within action, a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in, the within action: That the affiant received the within Subpoena - Civil Duces Tecum; Notice of Entry of Order for Examination of Judgment Debtor Vincent W. Hesser; Notice of Examination of Judgment Debtor Vincent W. Hesser on the 14th day of April, 2015 and attempted to effect service on Vincent W. Hesser at the following address(es): Royal Union, 3275 S. Jones Blvd., #104, Las Vegas, NV 89146; and 6242 Coley Ave., Las Vegas, NV 89146. Below are listed the date(s) and time(s)

of attempted service:

Date	Time	Address	Outcome
4/14/2015	1:25pm	Royal Union	Affiant spoke with employee, Melissa, who said that the subject was out of town. She said he was not due back until some time Monday or Tuesday.
4/24/2015	3:08pm	Royal Union	Affiant spoke with Melissa again who said that the defendant was not in the office.
4/24/2015	3:18pm	6242 Coley	Affiant was not able to access the residence due to a locked gate. There was no visible activity.



State of Nevada, County of Clark

SUBSCRIBED AND SWORN to before me on this
 30th day of April, 2015

Notary Public Norma P. McMahan

Joe Ricondo
 Affiant - Joe Ricondo

R-053662

Legal Process Service License # 604

Work Order No. 1370340507



EXHIBIT “F”

Holley, Driggs Walch, Puzey & Thompson
Richard F. Holley, Esq.
400 South 4th St., 3rd Floor
Las Vegas, NV 89101
State Bar No.: 3077
Attorney(s) for: Plaintiff(s)

I, Lana Palge, being duly sworn deposes and says: That Affiant is and was on the day when she attempted to serve the within action, a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in, the within action: That the affiant received the within Subpoena - Civil Duces Tecum: Notice of Entry of Order for Examination of Judgment Debtor Vincent W. Hessner: Notice of Examination of Judgment Debtor Vincent W. Hesser on the 23rd day of April, 2015 and attempted to effect service on Vincent W. Hesser at the following address(es): 6242 Coley Ave., Las Vegas, NV 89146; Royal Union of Nevada, 3275 S. Jones Blvd., #104, Las Vegas, NV 89146. Below are listed the date(s)

<u>Date</u>	<u>Time</u>	<u>Address</u>	<u>Outcome</u>
4/23/2015	8am	6242 Coley Ave.	There were no vehicles visible at the residence. Gates were locked. Affiant proceeded to the business address.
4/23/2015	8:10am	Royal Union	There was a black BMW sedan parked at the business. Affiant spoke with a female employee (Caucasian, 45yrs, brunette, short hair, 5'4"). Affiant asked for the defendant. She stepped away and a tall blonde woman came out (about 50yrs). She instructed Affiant to have a seat and said she would check to see if subject was in the office. She returned and said he was out of town. Affiant said his car was in the parking lot. She then responded that the defendant's father was driving the vehicle. Affiant left a delivery notice.
4/24/2015	7am - 8:55am	6242 Coley Ave.	There was a dark colored SUV parked at the house, but no sign of the BMW. Affiant saw 2 women exit the house (1 appeared to be Filipino with red hair; and the other was about 18-20yrs, dark hair). They were carrying a young child about 4 yrs. of age. Affiant shouted out to them but they would not respond. The gate locked behind them Affiant could not gain entry.
4/24/2015	9am	Royal Union	No sign of BMW at the business. Door to business was locked. Affiant knocked and the same blonde female from prior try said that defendant was not there.

11-11-68

EXHIBIT “G”

1 AFFT
 2 Holley, Driggs Walch, Puzey & Thompson
 3 Richard F. Holley, Esq.
 4 400 South 4th St., 3rd Floor
 5 Las Vegas, NV 89101
 6 State Bar No.: 3077
 7 Attorney(s) for: Plaintiff(s)

DISTRICT COURT
 CLARK COUNTY, NEVADA

Case No.: A582746

Dept. No.: XI

Kennedy Funding, Inc., a New Jersey corporation

vs

Plaintiff(s)

Onecap Partners MM, Inc., a Nevada corporation; et al

Defendant(s)

Date: April 24, 2015

Time: 10:00 am

AFFIDAVIT OF
 ATTEMPTED SERVICE

I, Lana Paige, being duly sworn deposes and says: That Affiant is and was on the day when she attempted to serve the within action, a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in, the within action: That the affiant received the within Subpoena - Civil Duces Tecum; Notice of Entry of Order for Examination of Judgment Debtor Vincent W. Hesser; Notice of Examination of Judgment Debtor Vincent W. Hesser on the 24th day of April, 2015 and attempted to effect service on Vincent W. Hesser at the following address(es): 6242 Coley Ave., Las Vegas, NV 89146 and Royal Union of Nevada, 3275 S. Jones Blvd. #104, Las Vegas, NV 89146. Below are listed the date

(s) and time(s) of attempted service:

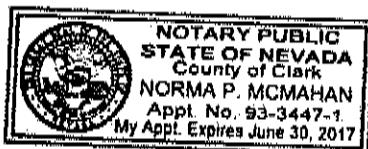
Date Time Address
 4/26/2015 5:30pm 6242 Coley

Outcome

There was no BMW sedan parked at residence. Affiant was not able to gain access to residence as gates were locked.

4/27/2015 7:40am- Royal Union
 9am

Affiant positioned herself at the business in an effort to catch defendant when arrived at work. There was no BMW in the parking lot. Affiant waited and the only person she saw during this time was the blonde female employee Affiant had spoken to on previous attempts. Affiant saw no one matching the defendant's description arrive and/or exit the building during this time.



State of Nevada, County of Clark

SUBSCRIBED AND SWORN to before me on this

30th day of April, 2015.

Notary Public Norma P. McMAHAN

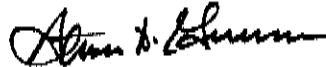
Affiant - Lana Paige

R-067806

Legal Process Service License # 604

WorkOrderNo 1502100511





CLERK OF THE COURT

EXMT
RICHARD F. HOLLEY, ESQ.
Nevada Bar No. 3077
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OGONNA M. ATAMOH, ESQ.
Nevada Bar No. 7589
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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

**EX PARTE MOTION TO SERVE JUDGMENT DEBTOR
VINCENT W. HESSER VIA CERTIFIED MAIL PURSUANT TO NRS 14.090(1)(b)**

Plaintiff Kenney Funding, Inc. ("Plaintiff" or alternatively, the "Judgment Creditor"), by
and through its attorneys RICHARD F. HOLLEY, ESQ. and OGONNA M. ATAMOH, ESQ. of
the law firm of HOLLEY, DRIGGS, WALCH, FINE, WRAY, PUZEY & THOMPSON, hereby
respectfully requests that this Court grant Plaintiff's request to serve Defendant Vincent W.
Hesser via certified mail pursuant to NRS 14.090(1)(b) ("Motion").

...


...

...

1 This Motion is based upon the Points and Authorities attached hereto, and the pleadings
2 and papers on file herein.

3 Dated this 6th day of May, 2015.

4 **HOLLEY, DRIGGS, WALCH,
5 FINE, WRAY, PUZEY & THOMPSON**

6 
7 RICHARD F. HOLLEY, ESQ.
8 Nevada Bar No. 3077
9 CONNIE M. ATAMOH, ESQ.
Nevada Bar No. 7589
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101

10 *Attorneys for Kennedy Funding, Inc.*

11
12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. STATEMENT OF FACTS**

14 **THE LOAN**

15 1. On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or
16 "OneCap") and Kennedy Funding, as agent of the lenders, entered into a Loan and Security
17 Agreement ("Loan Agreement"), pursuant to which Kennedy Funding made a \$12 million loan
18 to OneCap to facilitate the purchase of unimproved real property consisting of 78.74± acres of
19 raw land located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark
20 County Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property").

21 2. The loan is evidenced by a Promissory Note dated June 15, 2006 in the original
22 principal sum of \$12 million ("Note"), made by OneCap to pay to the order of Kennedy Lending,
23 as agent of the lenders.

24 3. Under the Note, OneCap promised to pay Kennedy Funding monthly interest only
25 payments at a rate of 11.5% per annum, to accrue from July 1, 2006 to June 1, 2007. Beginning
26 August 1, 2007, OneCap promised to pay Kennedy Funding monthly interest only payments at a
27 rate of 18% per annum, to accrue from July 1, 2007 through to the maturity date of June 30,
28 2009.

1 4. OneCap agreed to pay all principal, interest and other sums due under the Note in
2 full on the maturity date of June 30, 2009.

3 5. In the event of a late payment under the Note, OneCap agreed to pay a late charge
4 equal to 10% of the overdue payment.

5 6. In the event of a default under the Note, OneCap agreed to pay a default rate of
6 25% per annum.

7 7. As security for the Note, OneCap executed and delivered to Kennedy Funding a
8 Deed of Trust with Security Agreement, Financing Statement for Fixture Filing and Assignment
9 of Rents ("Deed of Trust") against the Property, which was recorded on June 15, 2006 with the
10 Clark County Recorder's Office as Instrument No. 20060615-0005324.

11 8. On June 15, 2006, Kennedy Funding, Gary Owen II, LLC ("Option Holder"), and
12 OneCap executed a Subordination and Attornment Agreement ("Subordination Agreement") in
13 which the Option Holder agreed to subordinate its limited option to purchase the Property to
14 Kennedy Funding's Deed of Trust.

15 9. As additional security for the loan, OneCap executed and delivered to Kennedy
16 Funding, as agent for the lenders, an Assignment of Leases and Rents, dated June 14, 2006, and
17 recorded June 15, 2006, with the Clark County Recorder's Office as Instrument No. 20060615-
18 0005325, and an Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings
19 and Report, dated June 15, 2006 ("Assignment of Licenses").

20 10. To further secure payment of the Note, on June 14, 2006, Defendant Vincent
21 Hesser ("Hesser") and Defendant OneCap Partners MM, Inc. ("OneCap MM") and together with
22 Hesser the "Defendants") executed personal unconditional guaranties of the loan to Kennedy
23 Funding ("Guaranty"). At the time of the transaction between OneCap and Kennedy Funding,
24 Hesser was the President of OneCap and OneCap MM.

25 11. OneCap also granted a properly perfected security interest to Kennedy Funding
26 by way of a UCC-1 Financing Statement ("UCC-1") filed with the Clark County Recorder's
27 Office on June 15, 2006 as Instrument No. 20060615-0005326.

28 ...

1 12. Kennedy Funding received all money to fund the loan in New Jersey, and
2 disbursed those funds from New Jersey. Kennedy Funding also received all payments made by
3 OneCap on the loan in New Jersey, and disbursed those payments to lenders from New Jersey.

4 **ONECAP DEFAULTS**

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

7 14. In addition, OneCap is in default under the Deed of Trust for failure to provide
8 Kennedy Funding with current proof of liability insurance, and for failure to timely pay its tax
9 obligations relating to the Property. State and County Taxes are outstanding for the fiscal period
10 2008 to 2009 in the total amount of \$41,093.18 on the Property.

11 15. Based on those defaults, Kennedy Funding Accelerated the Note and instituted
12 Foreclosure Proceedings on the Property. The Notice of Breach and Election to Sell Under Deed
13 of Trust was Recorded with the Clark County Recorder's Office on August 20, 2008 as
14 Instrument No. 20080820-00597; and The Notice of Trustee's Sale, with a sale date of December
15 29, 2008, was recorded on December 8, 2008 as Instrument No. 20081208-00882.

16 16. On December 26, 2008, three days before the foreclosure sale, Nevada Ueno
17 Mita, LLC ("Nevada Ueno"), filed a Chapter 11 Bankruptcy Petition in the United States
18 Bankruptcy for the District of Nevada, Case No. BK-S-08-25487-BAM (the "Bankruptcy
19 Petition").

20 17. Based upon information obtained from the Bankruptcy Petition, OneCap
21 transferred its interest in the Property to Nevada Ueno. A Deed from OneCap to Nevada Ueno
22 was recorded with the Clark County Recorder's Office on November 3, 2008 as Instrument No.
23 20081103-0002469.

24 18. Under the Deed of Trust and Loan Agreement, OneCap's transfer of the Property
25 to Nevada Ueno was deemed an event of default.

26 **DEFENDANTS DEFAULT ON THE GUARANTY**

27 19. As a result of OneCap's default under the Note, including failure to make timely
28 payments, and OneCap's improper transfer and Nevada Ueno's bankruptcy petition, which

1 halted the foreclosure action, Kennedy Funding demanded performance from Defendants under
2 the Guaranty.

3 20. However, Defendants failed and refused to perform under the Guaranty.

4 **JUDGMENT**

5 21. On February 13, 2009, Plaintiff filed a complaint against Defendants.

6 22. On September 22, 2009, the Plaintiff filed a Motion for Summary Judgment
7 ("Motion for Summary Judgment"). After considering the parties' papers, evidence and oral
8 argument, the Court granted the Plaintiff's Motion for Summary Judgment on November 4,
9 2009.

10 23. Thereafter, on February 17, 2009, the Court entered Judgment against each of the
11 Defendants in the amount of \$16,802,025.64, excluding attorneys' fees and costs which amount
12 was to be determined (the "Judgment"). The Plaintiff provided Defendants with notice of entry
13 of judgment on February 23, 2009.

14 24. On February 18, 2010, the Court entered an Order Awarding Damages Pursuant
15 to Plaintiff's Motion for Summary Judgment in the amount of \$39,755.00 and costs in the
16 amount of \$2,131.45 (the "Attorneys' Fees Order"), for a new total Judgment in favor of Plaintiff
17 and against Defendants in the amount of \$18,843,912.09.

18 **JUDGMENT DEBTOR EXAMINATION**

19 25. Judgment Creditor seeks to examine Vincent W. Hesser (the "Judgment Debtor")
20 to satisfy the Judgment against Judgment Debtors.

21 26. On March 9, 2015, Plaintiff filed an Ex Parte Motion for Order Allowing
22 Examination of Judgment Debtor Vincent W. Hesser.

23 27. On March 13, 2015, an Order for Judgment Debtor Examination of Judgment
24 Debtor Vincent W. Hesser was entered.

25 28. Plaintiff has been unable to effectuate service on Defendant Vincent W. Hesser.

26 29. Plaintiff, through its attorneys, engaged Legal Process Service of Nevada
27 ("LPS"), a process server company, to serve Judgment Debtor with the Notice of Entry of Order
28

1 for Examination of Judgment Debtor Vincent W. Hesser, the Subpoena – Civil Duces Tecum and
2 the Notice of Examination of Judgment Debtor Vincent W. Hesser.

3 30. On twenty-two (22) separate occasions over the period of six (6) weeks, which
4 included two (2) stakeouts, LPS attempted to serve process on Vincent W. Hesser by serving at
5 his last known residence and place of employment for Judgment Debtor Hesser, at 6242 Coley
6 Ave., Las Vegas, Nevada 89146, at his last known residence address and 3275 South Jones
7 Boulevard, Las Vegas, Nevada 89146, his current employment address. On each of those
8 occasions LPS attempted to serve Mr. Hesser at his residence, persons were at the residence and
9 either would not answer the door or claimed that Mr. Hesser was not present. On each of the
10 numerous occasions LPS attempted to serve Mr. Hesser at his place of employment, persons at
11 Mr. Hesser's place of employment informed the process servers: (i) on March 17, 2015, that
12 Vincent W. Hesser has not been at this location since May 2014; (ii) Vincent W. Hesser was out
13 to lunch and to try back later that afternoon, (iii) Vincent W. Hesser had left for a meeting; and
14 (iv) on March 18, 2015, Vincent W. Hesser was not in the office.

15 31. LPS attempted service again at Mr. Hesser's place of employment on April 14,
16 2015 and was told by a person at Vincent W. Hesser's place of employment that he was out of
17 town until the following week. When LPS attempted service again on April 24, 2015, the
18 process server was informed that Vincent W. Hesser was not in the office. More often than not,
19 Mr. Hesser's place of employment acknowledged that Vincent W. Hesser is in fact employed at
20 that location. See Affidavits of Due Diligence and Attempted Service filed on May 5, 2015 (the
21 "Affidavits").

22 32. As set forth in greater detail in the Affidavits, Judgment Debtor Vincent W.
23 Hesser is evading service of the Notice of Entry of Order for Examination of Judgment Debtor
24 Vincent W. Hesser, the Subpoena – Civil Duces Tecum and the Notice of Examination of
25 Judgment Debtor Vincent W. Hesser.

26 33. Pursuant to the Order for Judgment Debtor Examination of Judgment Debtor
27 Vincent W. Hesser, Mr. Hesser's Judgment Debtor Examination was scheduled for April 24,
28

1 2015 at 10:00 a.m., and the production of documents requested pursuant to the Subpoena Duces
2 Tecum was due on April 17, 2015.

3 34. Plaintiff therefore requests to personally serve Judgment Debtor, Vincent W.
4 Hesser, via certified mail as it appears that he is actively avoiding service.

5 II. LEGAL ARGUMENT

6 Plaintiff's attorneys seek leave of the Court to serve Judgment Debtor pursuant to NRS
7 14.090(1)(b) as personal service cannot be made due to Judgment Debtor's continues efforts to
8 successfully evade service. NRS 14.090(1)(b) states "No guard posted at the gate and entry
9 through the gate is not reasonably available, the court may, if it is satisfied by affidavit that those
10 facts are true, allow service of process by mailing a copy thereof to the residence by certified or
11 registered mail". Norma P. McMahan of LPS affirms in her Affidavit of Due Diligence that LPS
12 made a due and diligent effort to locate a current address for the defendant, Vincent W. Hesser,
13 within Clark County, Nevada. Ms. McMahan also affirmed that Vincent W. Hesser has refused
14 to make himself available to take service at his place of business, Royal Union Nevada, 3275 S.
15 Jones Boulevard, Las Vegas, Nevada and at 6242 Coley Avenue, Las Vegas, Nevada 89146,
16 which is the most current residence address to date and is a gated home with no guard. See
17 Affidavits.

18 Based upon the inability of counsel or professional process servers to serve said
19 Judgment Debtor, Plaintiff respectfully requests that this Court order service of the Order for
20 Judgment Debtor Examination of Judgment Debtor Vincent W. Hesser and the accompanying
21 Subpoena Duces Tecum for documents and the appearance for the Judgment Debtor
22 Examination of Judgment Debtor Vincent W. Hesser on Vincent W. Hesser via certified mail
23 pursuant to NRS 14.090(1)(B). In addition to the service by certified mail, in an abundance of
24 caution, Plaintiff will likewise hand deliver the Order and Subpoena, and mail the same to Mr.
25 Hesser's place of employment and residence.

26 Additionally, as a result of Mr. Hesser's efforts to evade service, the scheduled
27 production date of April 17, 2015, and deposition date of April 24, 2015, at 10:00 a.m. have
28 lapsed. As a result, Plaintiff will re-notice the production deadline under the Subpoena Duces

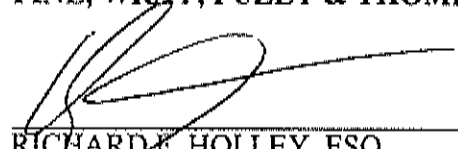
1 Tecum and the Judgment Debtor Examination date upon the entry of the order from this Court
2 permitting service by certified mail, and include the new production deadline and deposition date
3 in the certified mailing containing the order approving this Motion.

4 **III. CONCLUSION**

5 Based upon Judgment Debtor Vincent W. Hesser's continued efforts to evade service as
6 detailed in the attached affidavits of the process servers, Plaintiff respectfully requests that this
7 Court grant Plaintiff's request to serve Judgment Debtor Vincent W. Hesser via certified mail.
8 The proposed Order allowing service via certified mail is attached hereto as **Exhibit "1"**.

9 Dated this 6th day of May, 2015.

10 **HOLLEY, DRIGGS, WALCH,**
11 **FINE, WRAY, PUZEY & THOMPSON**

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

19 *Attorneys for Kennedy Funding, Inc.*
20
21
22
23
24
25
26
27
28

EXHIBIT “1”

1 **OGM**
2 RICHARD F. HOLLEY, ESQ.
3 Nevada Bar No. 3077
4 E-mail: rholley@nevadafirm.com
5 OGONNA M. ATAMOH, ESQ.
6 Nevada Bar No. 7589
7 E-mail: oatamoh@nevadafirm.com
8 HOLLEY, DRIGGS, WALCH,
9 FINE, WRAY, PUZEY & THOMPSON
10 400 South Fourth Street, Third Floor
11 Las Vegas, Nevada 89101
12 Telephone: 702/791-0308
13 Facsimile: 702/791-1912

14 *Attorneys for Kennedy Funding, Inc.*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 KENNEDY FUNDING, INC., a New Jersey
18 corporation,

19 Plaintiff,

20 v.

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

25 Defendants.

Case No.: A582746
Dept. No.: XI

26 **[PROPOSED]**

27 **ORDER GRANTING EX PARTE MOTION TO SERVE JUDGMENT DEBTOR**
28 **VINCENT W. HESSER VIA CERTIFIED MAIL PURSUANT TO NRS 14.090(1)(b)**

29 Plaintiff Kenney Funding, Inc. ("Plaintiff" or alternatively, the "Judgment Creditor"),
30 having submitted an Ex Parte Motion to Serve Judgment Debtor Vince W. Hesser via Certified
31 Mail pursuant to NRS 14.090(1)(b) (the "Ex Parte Motion") to the Court on May 5, 2015, by and
32 through their counsel of record, the law firm of Holley, Driggs, Walch, Fine, Wray, Puzey &
33 Thompson, and upon the Court's review of the pleadings and papers on file herein, and good
34 cause appearing therefore:

35 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Plaintiffs' Ex Parte
36 Motion is **GRANTED** in its entirety;

1 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
2 Plaintiff shall serve the Notice of Entry of Order for Examination of Judgment Debtor Vincent
3 W. Hesser and the accompanying subpoena for Judgment Debtor Examination of Judgment
4 Debtor Vincent W. Hesser via Certified Mail;

5 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
6 Plaintiff shall mail the Notice of Entry of Order for Examination of Judgment Debtor Vincent W.
7 Hesser and the accompanying subpoena for Judgment Debtor Examination of Judgment Debtor
8 Vincent W. Hesser to Judgment Debtor VINCENT W. HESSER, via Certified Mail, at his
9 following last known addresses: 6242 Coley Ave., Las Vegas, Nevada 89146 as his last known
10 residence address and 3275 South Jones Boulevard, Las Vegas, Nevada 89146 as his current
11 employment address;

12 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
13 Plaintiff shall also hand deliver and mail via regular first class mail the Notice of Entry of Order
14 for Examination of Judgment Debtor Vincent W. Hesser and the accompanying subpoena for
15 Judgment Debtor Examination of Judgment Debtor Vincent W. Hesser to Mr. Hesser's place of
16 employment and residence;

17 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
18 Plaintiff shall prepare and serve along with the Notice of Entry of Order for Examination of
19 Judgment Debtor Vincent W. Hesser and the accompanying subpoena for Judgment Debtor
20 Examination of Judgment Debtor Vincent W. Hesser, a Notice of Continued Examination of
21 Judgment Debtor Vincent W. Hesser which will have a new Judgment Debtor Examination date
22 and a new deadline to produce documents pursuant to the accompanying subpoena for Judgment
23 Debtor Examination of Judgment Debtor Vincent W. Hesser; and

24 ...

25 ...

26 ...

27 ...

28 ...

1 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
2 Plaintiff shall file an Affidavit of Service when service has been completed.

3 **IT IS SO ORDERED.**

4 Dated this _____ day of _____, 2015.

5
6 _____
DISTRICT COURT JUDGE

7 Submitted by:

8 **HOLLEY, DRIGGS, WALCH,**
9 **FINE, WRAY, PUZEY & THOMPSON**

10 By _____
11 Richard F. Holley, Esq. (NV Bar No. 3077)
12 Ogonna M. Atamoh, Esq. (NV Bar No. 7589)
13 400 S. Fourth Street, Third Floor
14 Las Vegas, NV 89101
15 *Attorneys for Kennedy Funding, Inc.*

1 **OGM**

2 RICHARD F. HOLLEY, ESQ.

3 Nevada Bar No. 3077

4 E-mail: rholley@nevadafirm.com

5 OGONNA M. ATAMOH, ESQ.

6 Nevada Bar No. 7589

7 E-mail: oatomoh@nevadafirm.com

8 HOLLEY, DRIGGS, WALCH,

9 FINE, WRAY, PUZEY & THOMPSON

10 400 South Fourth Street, Third Floor

11 Las Vegas, Nevada 89101

12 Telephone: 702/791-0308

13 Facsimile: 702/791-1912

14 *Attorneys for Kennedy Funding, Inc.*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 KENNEDY FUNDING, INC., a New Jersey
18 corporation,

19 Plaintiff,

20 v.

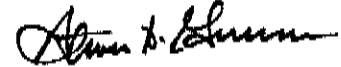
21 ONECAP PARTNERS MM, INC, a Nevada
22 corporation; VINCENT W. HESSER, an
23 individual; DOE INDIVIDUALS I through X;
24 and ROE CORPORATIONS I through X,

25 Defendants.

Case No.: A582746

Dept. No.: XI

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CLERK OF THE COURT

26 **ORDER GRANTING EX PARTE MOTION TO SERVE JUDGMENT DEBTOR**
27 **VINCENT W. HESSER VIA CERTIFIED MAIL PURSUANT TO NRS 14.090(1)(b)**

28 Plaintiff Kenney Funding, Inc. ("Plaintiff" or alternatively, the "Judgment Creditor"),
having submitted an Ex Parte Motion to Serve Judgment Debtor Vince W. Hesser via Certified
Mail pursuant to NRS 14.090(1)(b) (the "Ex Parte Motion") to the Court on May 5, 2015, by and
through their counsel of record, the law firm of Holley, Driggs, Walch, Fine, Wray, Puzey &
Thompson, and upon the Court's review of the pleadings and papers on file herein, and good
cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Ex Parte
Motion is **GRANTED** in its entirety;

1 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
2 Plaintiff shall serve the Notice of Entry of Order for Examination of Judgment Debtor Vincent
3 W. Hesser and the accompanying subpoena for Judgment Debtor Examination of Judgment
4 Debtor Vincent W. Hesser via Certified Mail;

5 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
6 Plaintiff shall mail the Notice of Entry of Order for Examination of Judgment Debtor Vincent W.
7 Hesser and the accompanying subpoena for Judgment Debtor Examination of Judgment Debtor
8 Vincent W. Hesser to Judgment Debtor VINCENT W. HESSER, via Certified Mail, at his
9 following last known addresses: 6242 Coley Ave., Las Vegas, Nevada 89146 as his last known
10 residence address and 3275 South Jones Boulevard, Las Vegas, Nevada 89146 as his current
11 employment address;

12 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
13 Plaintiff shall also hand deliver and mail via regular first class mail the Notice of Entry of Order
14 for Examination of Judgment Debtor Vincent W. Hesser and the accompanying subpoena for
15 Judgment Debtor Examination of Judgment Debtor Vincent W. Hesser to Mr. Hesser's place of
16 employment and residence;

17 **IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that
18 Plaintiff shall prepare and serve along with the Notice of Entry of Order for Examination of
19 Judgment Debtor Vincent W. Hesser and the accompanying subpoena for Judgment Debtor
20 Examination of Judgment Debtor Vincent W. Hesser, a Notice of Continued Examination of
21 Judgment Debtor Vincent W. Hesser which will have a new Judgment Debtor Examination date
22 and a new deadline to produce documents pursuant to the accompanying subpoena for Judgment
23 Debtor Examination of Judgment Debtor Vincent W. Hesser; and

24 ...

25 ...

26 ...

27 ...

28 ...

1 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that
2 Plaintiff shall file an Affidavit of Service when service has been completed.

3 **IT IS SO ORDERED.**

4 Dated this 13th day of May, 2015.

5
6 
DISTRICT COURT JUDGE

7 Submitted by:

8 **HOLLEY, DRIGGS, WALCH,**
9 **FINE, WRAY, PUZEY & THOMPSON**

10 By 

11 Richard F. Holley, Esq. (NV Bar No. 3077)
12 Ogonna M. Atamoh, Esq. (NV Bar No. 7589)
13 400 S. Fourth Street, Third Floor
14 Las Vegas, NV 89101
15 *Attorneys for Kennedy Funding, Inc.*
16
17
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19
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21
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27
28

1 **NJJ**

2 RICHARD F. HOLLEY, ESQ.

3 Nevada Bar No. 3077

4 E-mail: rholley@nevadafirm.com

5 OGONNA M. ATAMOH, ESQ.

6 Nevada Bar No. 7589

7 E-mail: oatomoh@nevadafirm.com

8 HOLLEY, DRIGGS, WALCH,

9 FINE, WRAY, PUZEY & THOMPSON

10 400 South Fourth Street, Third Floor

11 Las Vegas, Nevada 89101

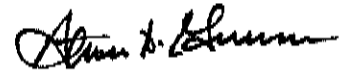
12 Telephone: 702/791-0308

13 Facsimile: 702/791-1912

14 *Attorney for Kennedy Funding, Inc.*

Electronically Filed

05/14/2015 03:39:20 PM



CLERK OF THE COURT

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
16 corporation; VINCENT W. HESSER, an
individual; DOE INDIVIDUALS I through X;
and ROE CORPORATIONS I through X,

17 Defendants.

Case No: A582746

Dept. No.: XI

**NOTICE OF CONTINUED
EXAMINATION OF JUDGMENT
DEBTOR VINCENT W. HESSER**

19 TO: VINCENT W. HESSER

20 YOU, and each of you, will please take notice that the Judgment Debtor Examination of
21 Vincent W. Hesser ("Judgment Debtor Exam") previously scheduled for 10:00 a.m. on the 24th
22 day of April, 2015, at the offices of Holley, Driggs, Walch, Puzey & Thompson, 400 South
23 Fourth Street, Third Floor, Las Vegas, Clark County, Nevada, 89101, has been **continued** and
24 shall now take place on **June 16, 2015 at 1:00 p.m.** at the law offices of Holley, Driggs, Walch,
25 Fine, Wray, Puzey & Thompson, 400 South Fourth Street, Third Floor, Las Vegas, Nevada
26 89101, 702-791-0308. At the Judgment Debtor Exam, Judgment Creditor Kennedy Funding,
27 Inc., will take the Judgment Debtor Exam of Vincent W. Hesser, upon oral examination,
28 pursuant to Rule 30 of the Nevada Rules of Civil Procedure, before a Notary Public, or before


1 some other officer authorized by law to administer oaths. Oral examination will continue from
2 day to day until completed.

3 Furthermore, the subpoena and accompanying exhibits to be served upon Mr. Hesser via
4 certified mail, regular mail and hand delivery pursuant to the Order Granting Ex Parte Motion to
5 Serve Judgment Debtor Vincent W. Hesser via Certified Mail Pursuant to NRS 14.090(1)(b)
6 dated May 13, 2015, shall remain in full force and effect. You are required to provide any items
7 set forth in the subpoena **no later than Friday, June 5, 2015**. If you fail to comply with the
8 subpoena or attend your Judgment Debtor Examination, you may be deemed guilty of contempt
9 of Court and liable to pay all losses and damages caused by your failure to appear.

10 You are invited to attend and cross-examine.

11 Dated this 13th day of May, 2015.

12 **HOLLEY, DRIGGS, WALCH,**
13 **FINE, WRAY, PUZEY & THOMPSON**

14 
15 **RICHARD F. HOLLEY, ESQ. (NV Bar 3077)**
16 **OGONNA M. ATAMOH, ESQ. (NV Bar 7589)**
17 400 South Fourth Street, Third Floor
18 Las Vegas, Nevada 89101
19 *Attorneys for Kennedy Funding, Inc.*
20
21
22
23
24
25
26
27
28


CLERK OF THE COURT

AOS
RICHARD F. HOLLEY, ESQ.
Nevada Bar No. 3077
E-mail: rholley@nevadafirm.com
OGONNA M. ATAMOH, ESQ.
Nevada Bar No. 7589
E-mail: oatomoh@nevadafirm.com
HOLLEY DRIGGS WALCH
FINE WRAY PUZEY & 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 SERVICE BY HAND DELIVERY

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

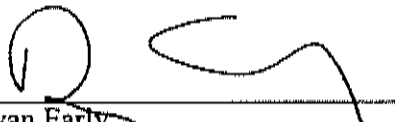
I, Ryan Early, being duly sworn or under penalty of perjury, state that at all times relevant, I was over 18 years of age and not a party to or interested in the above-captioned case; that I received a copy of the following documents:

[1] Notice of Entry of Order Granting Ex Parte Motion to Serve Judgment Debtor Vincent W. Hesser via Certified Mail Pursuant to NRS 14.090(1)(b); [2] Notice of Continued Examination of Judgment Debtor Vincent W. Hesser; [3] Notice of Entry of Order for Examination of

Judgment Debtor Vincent W. Hesser; [4] Subpoena – Civil Duces Tecum
to Vincent W. Hesser,
on May 15, 2015; and that I served the same on Defendant VINCENT W. HESSER on May 15,
2015, by the following methods:

- ✓ Delivering by hand and leaving a copy with M. Burazyk, at Defendant's current
employment address, at 3275 South Jones Boulevard, Las Vegas Nevada 89146, and by
- ✓ Delivering by hand and leaving a copy at the mail box of the Defendant's dwelling house
or usual place of abode, at 6242 Coley Avenue, Las Vegas, Nevada 89146. Attached is a
copy of the picture showing the mailbox where the documents were hand delivered.

Executed on: May 15, 2015

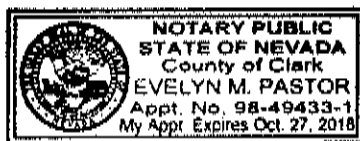


Ryan Early
An employee of Holley Driggs Walch
Fine Wray Puzey & Thompson
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Telephone: 702-791-0308

SUBSCRIBED AND SWORN to before me this
15th day of MAY, 2015, by Ryan Early.



NOTARY PUBLIC in and for the
County of Clark, State of Nevada.



MAIL

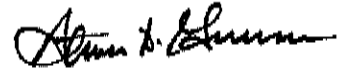
THE STATE OF NEVADA SENDS GREETINGS TO:

VINCENT W. HESSER, an individual

YOU ARE HEREBY COMMANDED that all and singular, business and casual, be

added, you appear and stand on the 28th day of April, 2015 at the hour of 10:00 a.m. at the
office of Meloy, Dilger, Wenz, Patten & Thompson, 400 South Fourth Street, Third Floor, Las
Vegas, Clark County, Nevada, 89101. Your attendance is required to give testimony and/or to
produce and permit inspection and copying of designated books, documents or tangible things in
your possession, custody or control, or to permit inspection of premises. You are required to
provide any items set forth below **no later than Friday, April 17, 2015**. If you fail to attend,
you may be deemed guilty of contempt of Court and liable to pay all costs and expenses caused
by your failure to appear.

WATSON/COURT/08



CLERK OF THE COURT

AOS
RICHARD F. HOLLEY, ESQ.
Nevada Bar No. 3077
E-mail: rholley@nevadafirm.com
OGONNA M. ATAMOH, ESQ.
Nevada Bar No. 7589
E-mail: oatamoh@nevadafirm.com
HOLLEY DRIGGS WALCH
FINE WRAY PUZEY & 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 SERVICE BY MAIL

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, Olivia Swibies, being duly sworn or under penalty of perjury, state that at all times relevant, I was over 18 years of age and not a party to or interested in the above-captioned case; that I received a copy of the following documents [1] Notice of Entry of Order Granting Ex Parte Motion to Serve Judgment Debtor Vincent W. Hesser via Certified Mail Pursuant to NRS 14.090(1)(b); [2] Notice of Continued Examination of Judgment Debtor Vincent W. Hesser; [3] Notice of Entry of Order for Examination of Judgment Debtor Vincent W. Hesser; [4] Subpoena

1 - Civil Duces Tecum to Vincent W. Hesser, May 15, 2015; and that I served the same on
2 Defendant VINCENT W. HESSER May 15, 2015, by the following method:

3 Pursuant to *Order Granting Ex Parte Motion to Serve Judgment Debtor Vincent W.*
4 *Hesser via Certified Mail Pursuant to NRS 14.090(1)(b)*, entered May 13, 2015:

5 to Judgment Debtor VINCENT W. HESSER, mail via regular first class mail and
6 via certified mail:

7 addressed to his last known residence address:
8 6242 Coley Avenue, Las Vegas, Nevada 89146

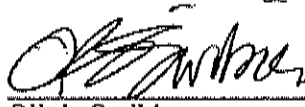
9 addressed to his current employment address:
3275 South Jones Boulevard, Las Vegas, Nevada 89146,

10 by depositing a copy of the above-referenced documents for mailing in the United
11 States Mail, first class postage prepaid, for certified mail, return receipt requested,
12 and by regular first class mail, at Las Vegas, Nevada, on the date below written.

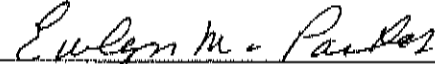
13 See certified mail USPS forms, attached hereto.

14 I am not required to be licensed under chapter 648 of the Nevada Revised Statutes or another
15 provision of law because I am not engaged in the business of serving legal process within the State of
16 Nevada.

17 Date: May 15, 2015.

18 
19 Olivia Swibies
20 An employee of Holley Driggs Walch
21 Fine Wray Puzey & Thompson
22 400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Telephone: 702-791-0308

23 **SUBSCRIBED AND SWORN** to before me this
15th day of MAY, 2015, by Olivia Swibies.

24 
25 **NOTARY PUBLIC** in and for the
26 County of Clark, State of Nevada.



28

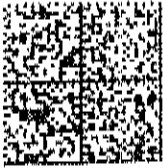
049J82035687

\$07.110

03/13/2015

Mailed From: 89146
US POSTAGE

Postage



7007 2560 0001 6642 2916
7007 2560 0001 6642 2916

U.S. Postal ServiceTM
CERTIFIED MAILTM RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	

Postmark
Here

Total Post: Vincent W. Hesser
6242 Coley Avenue
Las Vegas, Nevada 89146

Sent To
Street, Apt.
or PO Box
City, State

PS Form 3811, August 2004

WALCH
HOMPSON
FLOOR

VINCENT W. HESSER
6242 COLEY AVENUE
LAS VEGAS, NEVADA 89146

6209-00

SENDER: COMPLETE THIS SECTION		PS Form 3811, February 2004	
1. Article Addressed to: Vincent W. Hesser 6242 Coley Avenue Las Vegas, Nevada 89146		2. Article Number 7007 2560 0001 6642 2916	
3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Registered Mail <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D. <input type="checkbox"/> Return Receipt for Merchandise		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes <input type="checkbox"/> No	
5. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below:		6. Received by (Printed Name) C. Date of Delivery	
7. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee		8. COMPLETE THIS SECTION ON DELIVERY	

949J2036687

\$07.11

05/15/2015

Mailed From 89146

US POSTAGE



CH
MPSON
DOR

U.S. Postal ServiceTM
CERTIFIED MAILTM RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com.

OFFICIAL USE

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage	

Postmark
Here

Sent To
Vincent W. Hesser
3275 South Jones Boulevard
Las Vegas, Nevada 89146

City, State, ZIP

PS Form 3811

VINCENT W. HESSER
3275 SOUTH JONES BOULEVARD
LAS VEGAS, NEVADA 89146

06209-04

SENDER: COMPLETE THIS SECTION

1. Article Addressed to:
 Vincent W. Hesser
 3275 South Jones Boulevard
 Las Vegas, Nevada 89146

2. Article Number
 7007 2560 0001 6442 2923

3. Service Type
☒ Certified Mail
☐ Registered
☐ Insured Mail
☐ Return Receipt for Merchandise

4. Restricted Delivery? (Extra Fee)
☐ Yes
☐ No

5. Is delivery address different from item 1? ☐ Yes ☐ No

6. Received By (Printed Name)
☐ Addressee
☐ Agent

7. Date of Delivery

8. Signature

9. Attach this card to the back of the mailpiece, so that we can return the card to you.

10. Print your name and address on the reverse item 4 if Restricted Delivery is desired.

11. Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.

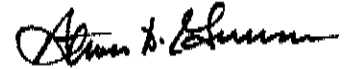
12. Attach this card to the back of the mailpiece, or on the front if space permits.

13. PS Form 3811, February 2004

14. Domestic Return Receipt

15. 102595-02-M-1540

535000H



CLERK OF THE COURT

1 **AFFT**
2 **RICHARD F. HOLLEY, ESQ.**
3 Nevada Bar No. 3077
4 E-mail: rholley@nevadafirm.com
5 **OGONNA M. ATAMOH, ESQ.**
6 Nevada Bar No. 7589
7 E-mail: oatamoh@nevadafirm.com
8 **HOLLEY DRIGGS WALCH**
9 **FINE WRAY PUZEY & THOMPSON**
10 400 South Fourth Street, Third Floor
11 Las Vegas, Nevada 89101
12 Telephone: 702/791-0308
13 Facsimile: 702/791-1912

14 *Attorneys for Kennedy Funding, Inc.*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 **KENNEDY FUNDING, INC., a New Jersey**
18 **corporation,**

19 **Plaintiff,**

20 **v.**

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

25 **Defendants.**

Case No.: A582746
Dept. No.: XI

26 **AFFIDAVITS OF SERVICE BY POSTING AND MAILING; OF CERTIFIED MAILING**

27 Plaintiff, through its undersigned counsel, Ogonna M. Atamoh, Esq. of the law firm
28 Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson, attaches hereto the following:

Affidavit of Service and Mailing by Leonard Jay Hirschhorn, as **Exhibit "A"**;

Affidavit of Service by Posting and Mailing by Leonard Jay Hirschhorn, as **Exhibit "B"**;

Affidavit of Certified Mailing (3275 South Jones Boulevard, Las Vegas, Nevada 89146)
by Norma P. McMahan, as **Exhibit "C"**, and

...

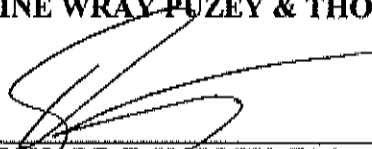
...

...

1 Affidavit of Certified Mailing (6242 Coley Avenue, Las Vegas, Nevada 89146) by
2 Norma P. McMahan, as **Exhibit "D"**.

3 Dated this 18th day of May, 2015.

4 **HOLLEY DRIGGS WALCH**
5 **FINE WRAY PUZEY & THOMPSON**

6 
7 RICHARD F. HOLLEY, ESQ.
8 Nevada Bar No. 3077
9 OGONNA M. ATAMOH, ESQ.
10 Nevada Bar No. 7589
11 400 South Fourth Street, Third Floor
12 Las Vegas, Nevada 89101
13 *Attorneys for Kennedy Funding, Inc.*
14
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Legal Process Service, 724 S. 8th Street, Las Vegas, NV 89101 (702) 471-7255

VH000538

1 AFFT
 2 Holley, Driggs Walch, Puzey & Thompson
 3 Richard F. Holley, Esq.
 4 400 South 4th St., 3rd Floor
 5 Las Vegas, NV 89101
 6 State Bar No.: 3077
 7 Attorney(s) for: Plaintiff(s)

DISTRICT COURT
 CLARK COUNTY, NEVADA

10 Kennedy Funding, Inc., a New Jersey corporation
 11 vs Plaintiff(s)
 12 ONECAP PARTNERS MM, INC., a Nevada corporation; et al
 13 Defendant(s)

Case No.: A582746

Depl. No.: XI

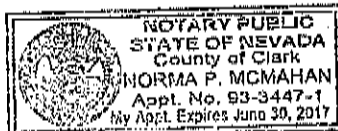
Date:

Time:

AFFIDAVIT OF SERVICE
 BY POSTING AND MAILING

15 I, Leonard J. Hirschhorn, being duly sworn says: That at all times herein Affiant was and is a citizen of the
 16 United States, over 18 years of age, licensed to serve civil process in the state of Nevada under license 604, and
 17 not a party to nor interested in the proceeding in which this affidavit is made. That Affiant received the: Notice of
 18 Entry of Order Granting Ex Parte Motion to Serve Judgment Debtor Vincent W. Hesser via Certified Mail
 19 Pursuant to NRS 14.090(1)(b): Notice of Entry of Order for Examination of Judgment Debtor Vincent W.
 20 Hesser; Notice of Continued Examination of Judgment Debtor Vincent W. Hesser; Subpoena Duces
 21 Tecum on the 15th day of May 2015, and served a true copy of the same to
 22 Vincent W. Hesser by posting a copy at his residence, 6242 Coley Ave., Las Vegas, NV 89146, on the 15th
 23 day of May, 2015 at 11:30am.

26 Affiant additionally affirms that a true copy of the same was mailed from Las Vegas, NV, first class postage
 27 prepaid and addressed to: Vincent Hesser at 6242 Coley Ave., Las Vegas, NV 89146, on the 15th day
 28 of May, 2015.



31 State of Nevada, County of Clark

32 SUBSCRIBED AND SWORN to before me on this

33 15th day of May, 2015

34 Notary Public Norma P. McMahon

35 Affiant - Leonard Jay Hirschhorn #: R-070386
 36 Legal Process Service - License # 604

WorkOrderNo 1503929

VH000539

AOM
Holley, Driggs Walch, Puzey & Thompson
Richard F. Holley, Esq.
400 South 4th St., 3rd Floor
Las Vegas, NV 89101
State Bar No.: 3077
Attorney(s) for: Plaintiff(s)

DISTRICT COURT
CLARK COUNTY, NEVADA

Kennedy Funding, Inc., a New Jersey corporation

vs

Plaintiff(s)

ONECAP PARTNERS MM, INC., a Nevada corporation; et al

Defendant(s)

Case No.: A582746

Dept. No.: XI

Date:

Time:

AFFIDAVIT OF
CERTIFIED MAILING

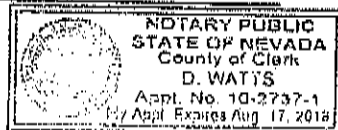
I, Norma P. McMahan, being first duly sworn deposes and says: That Affiant is and was on the day when she delivered the within action, a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada, and not a party to nor interested in, the within action. That Affiant received the: Notice of Entry of Order Granting Ex Parte Motion to Serve Judgment Debtor Vincent W. Hesser via Certified Mail Pursuant to NRS 14.090(1)(b): Notice of Entry of Order for Examination of Judgment Debtor Vincent W. Hesser; Notice of Continued Examination of Judgment Debtor Vincent W. Hesser; Subpoena Duces Tecum and personally deposited a true copy of the same at the US Post Office, Las Vegas, NV certified fees prepaid and addressed to: Vincent W. Hesser at Royal Union, 3275 S. Jones Blvd., Las Vegas, NV 89146 on the 15th day of May, 2015. Affiant affirms under penalty of perjury that the affirmations of this affidavit are true.

State of Nevada, County of Clark

SUBSCRIBED AND SWORN to before me on this

15th day of May 2015

Notary Public D. Watts



Affiant Norma P. McMahan

#: R-003875

Legal Process Service - , License # 604

WorkOrderNo.: 1503929



VH000540

Legal Process Service, 724 S. 8th Street, Las Vegas, NV 89101 (702) 471-7255

AOM
Holley, Driggs Walch, Puzey & Thompson
Richard F. Holley, Esq.
400 South 4th St., 3rd Floor
Las Vegas, NV 89101
State Bar No.: 3077
Attorney(s) for: Plaintiff(s)

DISTRICT COURT
CLARK COUNTY, NEVADA

Kennedy Funding, Inc., a New Jersey corporation
vs
ONECAP PARTNERS MM, INC., a Nevada corporation; et al
Plaintiff(s)
Defendant(s)

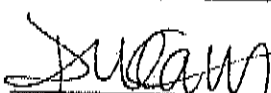
Case No.: A582746
Dept. No.: XI
Date:
Time:

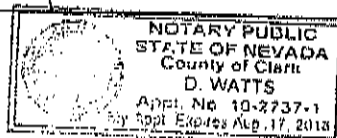
AFFIDAVIT OF
CERTIFIED MAILING


I, Norma P. McMahan, being first duly sworn deposes and says: That Affiant is and was on the day when she delivered the within action, a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada, and not a party to nor interested in, the within action. That Affiant received the: Notice of Entry of Order Granting Ex Parte Motion to Serve Judgment Debtor Vincent W. Hesser via Certified Mail Pursuant to NRS 14.090(1)(b); Notice of Entry of Order for Examination of Judgment Debtor Vincent W. Hesser; Notice of Continued Examination of Judgment Debtor Vincent W. Hesser; Subpoena Duces Tecum and personally deposited a true copy of the same at the US Post Office, Las Vegas, NV certified fees prepaid and addressed to: Vincent W. Hesser at 6242 Coley Ave., Las Vegas, NV 89146 on the 15th day of May, 2015. Affiant affirms under penalty of perjury that the affirmations of this affidavit are true.

State of Nevada, County of Clark

SUBSCRIBED AND SWORN to before me on this
15th day of May 2015


Notary Public D. Watts

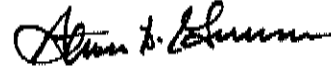



Affiant Norma P. McMahan #: R-003875

Legal Process Service - License # 604
WorkOrderNo.: 1503929



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CLERK OF THE COURT

5 ANTONY M. SANTOS, ESQ.
Nevada Bar No. 11265
6 A.M. SANTOS LAW, CHTD.
3275 S. Jones Blvd. Ste. 104
7 Las Vegas, Nevada 89146
Phone: (702) 749-4594
8 tony@amsantoslaw.com

9 Attorneys for Vincent Hesser

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

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

Case No.: A582746
Dept. No.: XI

13
14 Plaintiff,

15 vs.

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

18 Defendants.

19 EX-PARTE MOTION FOR PROTECTIVE ORDER

20 Defendant Vincent Hesser, by and through his counsel, Antony M. Santos, Esq., hereby
21 moves this Court for an order barring the Judgment Debtor Examination of Vincent Hesser on the
22 grounds that the judgment against Hesser has been satisfied, released, or discharged, or it is no
23 longer equitable that the order for judgment should have prospective application as it would result
24 in double recovery and a windfall to Plaintiff.

25 ///

26 ///

27 ///

28

1 This Motion is based upon the pleadings on file herein, the Declarations attached hereto,
2 and any argument or other evidence produced at the time of the hearing on this matter.

3 Dated this 15th day of June 2015.

4 A.M. SANTOS LAW, CHTD.

5 

6 ANTONY M. SANTOS, ESQ.
7 Nevada Bar No. 11265
8 3275 S. Jones Blvd. Ste. 104
9 Las Vegas, Nevada 89146

10 **DECLARATION OF ANTONY M. SANTOS, ESQ.**
11 **IN SUPPORT OF EX-PARTE MOTION FOR PROTECTIVE ORDER**

12 I, Antony M. Santos declare under penalty of perjury as follows:

13 1. I am an attorney licensed to practice law in the State of Nevada and I am admitted to
14 practice law before this Court. I am counsel for Vincent Hesser in this matter.

15 2. I make this declaration of facts from my personal knowledge which are known to me.
16 Except those matters stated on information and belief and as to those matters I believe same to be
17 true. If I were to be called as a witness, I could competently testify as to those matters.

18 3. That on June 15, 2015, Defendant Vincent Hesser filed a Motion for Relief pursuant to
19 NRCP 60(b). That the purpose of said Motion is to demonstrate that the judgment against Mr.
20 Hesser has been satisfied, released, or discharged, or is no longer equitable.

21 4. That Plaintiffs have an Order to take the Judgment Debtor Exam of Mr. Hesser on June
22 16, 2015.

23 5. That based on the facts set forth in the Motion for Relief a Judgment Debtor Examination
24 at this time would be improper.

25 6. Defendant Vincent Hesser requests that this Court rule on his Motion for Relief prior to
26 allowing any Judgment Debtor Examination to occur.

27 ///

28

1 7. That this motion is made in good faith and not with the intent to delay.

2 Dated this 15th day of June, 2015.

3 
4 Antony M. Santos

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 Plaintiff Kennedy secured a judgment against Defendant Vincent Hesser on a guaranty
8 Defendant executed in favor of Kennedy relating to a real estate loan transaction. Said judgment
9 against Hesser was in and amount of approximately \$18 Million Dollars. Subsequently, Kennedy
10 foreclosed on the underlying subject property and took title to same. Kennedy foreclosed at a full
11 credit bid. Moreover, the owner/borrower of the subject property had recently conducted a MAI
12 certified appraisal valuing said property in excess of \$27 Million Dollars. Given the subsequent
13 foreclosure, no deficiency could have resulted and any judgment against Hesser under these
14 circumstances has been satisfied in full. Hesser now seeks relief pursuant to NRCP Rule 60(b)(5)
15 in the form of an order dictating that the judgment has been satisfied in full or mandating a stay
16 pending a fair market value hearing determining what if any deficiency results in light of the
17 foreclosure and amending the judgment accordingly.

18 **II. STATEMENT OF FACTS**

19 1. On September 22, 2009, Kennedy filed a Motion for Summary Judgment against
20 the Defendants in the Guarantor Action.

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

23 3. On November 4, 2009, the Court granted the Plaintiff s Motion for Summary
24 Judgment.

25 4. Thereafter, on February 17, 2009, the Court entered Judgment against each of the
26 Defendants in the amount of \$16,802,025.64, excluding attorneys' fees and costs which amount
27 was to be determined (the "Judgment"). The Plaintiff provided Defendants with notice of entry of
28

1 judgment on February 23, 2009.

2 5. On February 18, 2010, the Court entered an Order Awarding Damages Pursuant to
3 Plaintiff's Motion for Summary Judgment in the amount of \$39,755.00 and costs in the amount
4 of \$2,131.45 (the "Attorneys' Fees Order"), for a new total Judgment in favor of Plaintiff and
5 against Defendants in the amount of \$18,843,912.09.

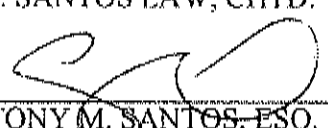
6 6. Kennedy now seeks to examine Vincent W. Hesser (the "Judgment Debtor") to
7 satisfy the Judgment against Judgment Debtors.

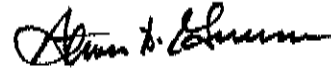
8 7. On June 15, 2015 Vincent Hesser filed a Motion for Relief Pursuant to NRC
9 60(b) demonstrating that the judgment against Mr. Hesser have been satisfied, released, or
10 discharged, or is no longer equitable.

11 Mr. Hesser should not be subjected to a Judgment Debtor's Examination if there is no
12 judgment to be collected. As such, Mr. Hesser respectfully requests that this Court enter an order
13 barring the Judgment Debtor Examination scheduled for June 16, 2015 and continuing such bar
14 until a date after a determination by the Court on his Motion for Relief Pursuant to NRC 60(b).

15 Dated this 15th day of June 2015.

16 A.M. SANTOS LAW, CHTD.

17 
18 ANTONY M. SANTOS, ESQ.
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16 ONECAP PARTNERS MM, INC, a Nevada
corporation; VINCENT W. HESSER, an
individual; DOE INDIVIDUALS 1 through
17 X; and ROE CORPORATIONS 1 through X,

18 Defendants.

19 DEFENDANT HESSER'S MOTION PURSUANT TO NRCP 60(b)
20 TO VACATE JUDGMENT

21 Comes Now Defendant Vincent Hesser, by and through his attorneys Timothy Cory and
22 Antony Santos and hereby moves this Court for relief from judgment pursuant to NRCP 60(b)(5).

23 This Motion is made and based upon the attached memorandum of points and authorities,
24 the Declaration of Vincent Hesser (attached hereto as Exhibit "A"), the pleadings and papers on
25 file herein, of which this Court is requested to take Judicial Notice, and any other arguments of
26 counsel that the Court may allow.
27

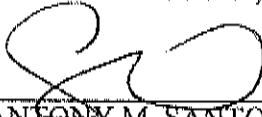
1 NOTICE OF MOTION

2 TO: All Parties and their Counsel of Record:

3 Please take notice that a hearing on the DEFENDANT HESSER' MOTION PURSUANT
4 TO NRCP 60(b) TO VACATE JUDGMENT will be held before the Eight Judicial District Court
5 located at 200 Lewis Avenue, Las Vegas, Nevada 89101 on the 17 day of
6 July, 2015, at the hour of _____ m., in Department XI.
In Chambers

7 Dated this 15th day of June, 2015.

8 A.M. SANTOS LAW, CHTD.

9 
10 ANTHONY M. SANTOS, ESQ.
11 Nevada Bar No. 11265
12 3275 S. Jones Blvd. Ste. 104
13 Las Vegas, Nevada 89146
14 Phone: (702) 749-4594
15 tony@amsantoslaw.com

14 MEMORANDUM OF POINTS AND AUTHORITIES

15 I. INTRODUCTION

16 Plaintiff Kennedy secured a judgment against Defendant Vincent Hesser on a guaranty
17 Defendant executed in favor of Kennedy relating to a real estate loan transaction. Said judgment
18 against Hesser was in and amount of approximately \$18 Million Dollars. Subsequently, Kennedy
19 foreclosed on the underlying subject property and took title to same. Kennedy foreclosed at a full
20 credit bid. Moreover, the owner/borrower of the subject property had recently conducted a MAI
21 certified appraisal valuing said property in excess of \$27 Million Dollars. Given the subsequent
22 foreclosure no deficiency could have resulted and any judgment against Hesser under these
23 circumstance has been satisfied in full. Hesser now seeks relief pursuant to NRCP Rule 60(b)(5)
24 in the form of an order dictating that the judgment has been satisfied in full or mandating a stay
25 pending a fair market value hearing determining what if any deficiency results in light of the
26 foreclosure and amending the judgment accordingly.

II. STATEMENT OF FACTS

The Loan

1. Kennedy Funding is a New Jersey Corporation that is located and headquartered in New Jersey.¹

2. On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or "OneCap") and Kennedy, as agent of the Kennedy Co-Lenders², entered into a Loan and Security Agreement ("Loan Agreement"), pursuant to which Kennedy made a \$12 million loan 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").³

3. Exhibit D to the Loan Agreement identifies the Co-Lenders to the \$12,000,000 Loan.⁴

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

5. The loan is evidenced by a Promissory Note dated June 15, 2006, in the original principal sum of \$12 million ("Note"), made by OneCap to pay to the order of Kennedy as agent of the lenders.

¹ See, Exhibit "B" Kennedy Answering Brief before the Nevada Supreme Court (Case No. 55654) electronically filed, September 3, 2010, referring to Loan and Security Agreement. E.R. Appendix 1, at 1-47/KF-00026-KF00073.

² The Kennedy Co-Lenders are: The Simes Family Limited Partnership, M&M Funding, Inc., TLC Funding, Inc. (1.00% portion of the Loan is solely funded by 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&G Investment, Inc., Evergreen CMF Funding, Inc., The Hampshire Generational Fund, LP, JWJ Financial, Inc., MMR Funding, LP, M.I. Beer Investments, Inc., Wilson Kaplan, The Kaplen Foundation and Valley National Bank.

³ See Exhibit "B" - Kennedy Answering Brief before the Nevada Supreme Court (Case No. 55654) electronically filed, September 3, 2010, referring to Loan and Security Agreement. E.R. Appendix 1, at 1-47/KF-00026-KF00073.

⁴ Id.

1 6. Under the Note, OneCap promised to pay Kennedy monthly interest only
2 payments at a rate of 11.5% per annum, to accrue from July 1, 2006 to June 1, 2007. Beginning
3 August 1, 2007, OneCap promised to pay Kennedy monthly interest only payments at a rate of
4 18% per annum, to accrue from July 1, 2007, through the maturity date of June 30, 2009.

5 7. OneCap agreed to pay all principal, interest and other sums due under the Note in
6 full on the maturity date of June 30, 2009.

7 8. In the event of a late payment under the Note, OneCap agreed to pay a late charge
8 equal to 10% of the overdue payment.

9 9. In the event of a default under the Note, OneCap agreed to pay a default rate of
10 25% per annum.

11 10. As security for the Note, OneCap executed and delivered to Kennedy a Deed of
12 Trust with Security Agreement, Financing Statement for Fixture Filing and Assignment of Rents
13 ("Deed of Trust") against the Property, which was recorded on June 15, 2006, with the Clark
14 County Recorder's Office as Instrument No. 20060615-0005324, attached hereto as Exhibit C.

15 11. On June 15, 2006, Kennedy, Gary Owen II, LLC ("Option Holder"), and OneCap
16 executed a Subordination and Attornment Agreement ("Subordination Agreement") in which the
17 Option Holder agreed to subordinate its limited option to purchase the Property to Kennedy's Deed
18 of Trust.

19 12. As additional security for the loan, OneCap executed and delivered to Kennedy,
20 as agent for the lenders, an Assignment of Leases and Rents, dated June 14, 2006, and recorded
21 June 15, 2006, with the Clark County Recorder's Office as Instrument No. 20060615-0005325,
22 and an Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Report,
23 dated June 15, 2006 ("Assignment of Licenses").

24 13. To further secure payment of the Note, on June 14, 2006, Hesser and
25 OneCap MM executed personal unconditional guaranties of the loan to Kennedy ("Guaranty").⁵
26

27 ⁵ See, Exhibit "B" -Kennedy Answering Brief before the Nevada Supreme Court (Case No.
28 55654) electronically filed, September 3, 2010 referring to E.R. Appendix 3 at 111 —
149/KF00139 — KF00149, Appellants' Opening Brief.

1 At the time of the transaction between OneCap and Kennedy, Hesser was the President of OneCap
2 and OneCap MM.

3 14. Under the express language of the Guaranty, the Defendant Hesser agreed to waive
4 the need to foreclose against the real property before pursuing the Guarantors as follows:

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

7 ***

8 (g) The failure of Lender to commence an action
9 against 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.

10 15. OneCap also granted a properly perfected security interest to Kennedy by way of
11 a UCC-1 Financing Statement ("UCC-1") filed with the Clark County Recorder's Office on June
12 15, 2006, as Instrument No. 20060615-0005326, attached hereto as Exhibit D.

13 16. Kennedy received all money to fund the loan in New Jersey and disbursed those
14 funds from New Jersey. Kennedy also received all payments made by OneCap on the loan in New
15 Jersey and disbursed those payments to lenders from New Jersey.

16 **OneCap Defaults**

17 18. On April 1, 2008, OneCap defaulted under the Note and Deed of Trust.

18 19. Kennedy accelerated the note and instituted foreclosure proceedings on the
19 property. The notice of breach and election to sell under deed of trust was recorded with the Clark
20 County Recorder's Office on August 20, 2008, as Instrument No. 20080820-00597; and the Notice
21 of Trustee's Sale, with a sale date of December 29, 2008, was recorded on December 8, 2008 as
22 Instrument No. 20081208-00882, evidence of the filing is attached hereto as Exhibit E.

23 20. On December 26, 2008 OneCap Partners 2 LLC, which had previous changed
24 its name to Nevada Ueno Mita, LLC ("Nevada Ueno"), filed a Chapter 11 Bankruptcy Petition
25 in the United States Bankruptcy for the District of Nevada, Case No. BK-S-08-25487-BAM
26 (the "Bankruptcy Petition").⁶

27
28 ⁶ In light of the name change, a Deed from OneCap to Nevada Ueno was recorded with the Clark
County Recorder's Office on November 3, 2008, as Instrument No. 20081103-0002469.

1 **Defendants Default on the Guaranty**

2 21. Kennedy demanded performance from Hesser as guarantor under the Guaranty.⁷

3 26. Hesser did not or could not perform under the Guaranty.

4 27. On February 13, 2009, Kennedy filed a Complaint against Hesser for breach of
5 the Guaranty.

6 **Nevada Ueno Bankruptcy**

7 28. In the Nevada Ueno Bankruptcy matter, on May 27, 2009, Kennedy filed a
8 Motion to Terminate the Automatic Stay Pursuant to 11 U.S.C. § 362(d)(1)-(3), or in the
9 Alternative, Convert or Dismiss Bankruptcy Case and Waiver of the 10-Day Stay Under FRBP
10 4001(a)(3) with Certificate of Service.⁸ ("Motion to Terminate Stay."),

11 29. On June 11, 2009, Nevada Ueno filed an opposition to Motion to Terminate
12 the Automatic Stay Pursuant to 11 U.S.C. § 362 (d)(1)-(3) or in the Alternative, Convert or
13 Dismiss Case and Waiver of the 10-Day Stay Under FRBP 4001(a)(3) and on June 26, 2009,
14 Kennedy filed a Reply in Support of Motion to Terminate the Automatic Stay Pursuant to 11
15 U.S.C. §362(d)(1)-(3), or in the Alternative, Convert or Dismiss Bankruptcy Case and Waiver
16 of the 10-Day Stay Under FRBP 4001(a)(3) with Certificate of Service.⁹

17 30. Ultimately, Kennedy and Nevada Ueno reached an agreement wherein the
18 parties agreed that Kennedy would grant Nevada Ueno a six-month extension to allow the
19 Debtor to refinance or market and sell the Property and pay Kennedy.¹⁰

20 31. Section 1.01(f) of the Settlement Agreement provides that "Kennedy Funding
21 agrees to give Debtor up through and until six (6) months after entry of the Order approving
22 this Settlement Agreement ('the Deadline') to pay Kennedy Funding in full before Kennedy
23 Funding forecloses on the Property."

24 32. Under the terms of the settlement agreement, in the event the Property is not
25

26 ⁷ E.R. Appendix 3 at 111 - 149/KF00139 - KF00149, Appellants' Opening Brief.

27 ⁸ [Bankruptcy Dkt. No. 54]

28 ⁹ [Bankruptcy Dkt. No. 68] and [Bankruptcy Dkt. No. 70], respectively.

¹⁰ Section 1.01(f) of the Settlement Agreement.

1 sold within six (6) months of the entry of the Order approving the proposed Settlement
2 Agreement, or in the event Kennedy is not paid within six (6) months of the entry of the Order
3 approving the proposed Settlement Agreement, the Debtor agreed to terminate of the
4 automatic stay as to Kennedy without further hearing.

5 33. At the time the Debtor Borrower and Kennedy entered into the Settlement
6 Agreement in August 2009, Kennedy had already commenced the present action against the
7 Guarantors, which action commenced before this Court on February 13, 2009.

8 34. On August 18, 2009, Kennedy filed a Motion to Approve Compromise and
9 Settlement Pursuant to Bankruptcy Rule 9019 Approving Settlement Between Debtor and
10 Kennedy Funding, Inc., with Certificate of Service and the Order Granting Motion to Approve
11 Compromise and Settlement Pursuant to Bankruptcy Rule 9019 Between Debtor and Kennedy
12 Funding, Inc., was entered on September 18, 2009.¹¹

13 35. Based upon the entry of the Settlement Order and pursuant to the terms of the
14 Settlement Agreement, the Debtor was required to pay Kennedy no later than March 18, 2010
15 [Bankruptcy Dkt. No. 82].

16 36. Kennedy received no payoff from the Debtor Nevada Ueno by the deadline
17 agreed upon in the Settlement Agreement, and, as a result, an Ex Parte Order Terminating the
18 Automatic Stay was entered by the Bankruptcy court on March 29, 2010 [Bankruptcy Dkt.
19 No. 96], terminating the automatic stay under 11 U.S.C. § 362 and allowing Kennedy to
20 foreclose on the Property.

21 36. A foreclosure sale went forward on June 17, 2010, and Kennedy credit bid
22 against the Property¹². See Notice of Trustee's Sale dated May 25, 2010, recorded in Clark
23 County Recorder's Office on May 27, 2010, as Instrument No. 201005270000200. E.R. Tab 9 at
24 00228-29; see also Trustee's Deed Upon Sale recorded July 16, 2010, recorded in the Clark
25 County Recorder's Office as Instrument No. 20107160000364. E.R. Tab 10 at 00230-00234.

26
27 ¹¹ Bankruptcy Dkt. Nos. 82 and 91 respectively.

28 ¹² Counsel for Defendant Hesser has requested from Counsel to Kennedy what was the amount
of the credit bid. To date this information has not been forthcoming.

1 37. On September 22, 2009, Kennedy filed a Motion for Summary Judgment against
2 the Defendants in the Guarantor Action.

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

5 39. On November 4, 2009, the Court granted the Plaintiff's Motion for Summary
6 Judgment.

7 40. Thereafter, on February 17, 2009, the Court entered Judgment against each of the
8 Defendants in the amount of \$16,802,025.64, excluding attorneys' fees and costs which amount
9 was to be determined (the "Judgment"). The Plaintiff provided Defendants with notice of entry of
10 judgment on February 23, 2009.

11 41. On February 18, 2010, the Court entered an Order Awarding Damages Pursuant
12 to Plaintiff's Motion for Summary Judgment in the amount of \$39,755.00 and costs in the amount
13 of \$2,131.45 (the "Attorneys' Fees Order"), for a new total Judgment in favor of Plaintiff and
14 against Defendants in the amount of \$18,843,912.09.

15 42. Kennedy now seeks to examine Vincent W. Hesser (the "Judgment Debtor") to
16 satisfy the Judgment against Judgment Debtors.

17 III. LEGAL ARGUMENT

18 NRCP Rule 60(b) provides for the following:

19 RULE 60. RELIEF FROM JUDGMENT OR ORDER

20 Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud,
21 Etc. On motion and upon such terms as are just, the court may relieve a party or a
22 party's legal representative from a final judgment, order, or proceeding for the
23 following reasons: Mistakes; Inadvertence; Excusable Neglect; Newly Discovered
Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve
a party or a party's legal representative from a final judgment, order, or proceeding
for the following reasons:

24 ...

25 (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon
26 which it is based has been reversed or otherwise vacated, or it is no longer equitable
that an injunction should have prospective application.

1 Here, subsequent to securing judgment against Hesser, Kennedy foreclosed on the subject
2 property and now seeks to double recover. Generally, "there may be but one action for the recovery
3 of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real
4 estate. That action must be in accordance with the provisions of NRS 40.430 to 40.459, inclusive."
5 NRS 40.430(1). The Nevada Supreme Court has interpreted this statute to require an obligee, who
6 seeks to recover a debt secured by real property, to recover on the property through foreclosure
7 before attempting to recover from the loan's guarantor personally. *See, McDonald v. D.P.*
8 *Alexander & Las Vegas Boulevard, L.L.C.*, 121 Nev. 812, 816, (2005).

9 If a guarantor waives the NRS 40.430 protections, the obligee may maintain an action to
10 recover from the guarantor prior to completing the foreclosure process. *See* NRS 40.495(2).
11 But, the Supreme Court in *Lavi v. Eighth Judicial Dist. Court*, 325 P.3d 1265 (Nev. 2014) has
12 determined that waiving the one-action rule does NOT free an obligee from complying with the
13 provisions of NRS 40.455. NRS 40.495(2) focuses on maintaining a separate action; nothing
14 in the subsection implies that it also terminates the procedural requirements for that action.

15 Additionally, NRS 40.495(3) allows a guarantor to assert any defenses provided under NRS
16 40.451 to 40.4639 if an "obligee maintains an action to foreclose or otherwise enforce a mortgage
17 or lien and the indebtedness or obligations secured thereby."

18 If an obligee seeks a deficiency judgment from a guarantor in an action separate from a
19 foreclosure action, the two actions are undeniably and inextricably connected because the
20 foreclosure sale necessarily impacts the deficiency judgment award. *See, Carrillo v. Valley Bank*
21 *of Nev.*, 103 Nev. 157, 159, 734 P.2d 724, 725 (1987) (a party who buys a property at foreclosure
22 may seek a deficiency judgment only to the extent that the debts exceed the property's fair market
23 value). If we disregard this fact, a party could possibly receive an excess recovery. *See id.* Also,
24 the Legislature has shown a strong inclination towards protecting an obligor's rights under the
25 anti-deficiency statutes. *See, Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist.*
26 *Court*, 118 Nev. 92, 103-04, 40 P.3d 405, 412-13 (2002).

1 Allowing a guarantor to assert a defense to a deficiency action is consistent with both
2 legislative intent and NRS 40.495(2) because it preserves the obligor's rights under the anti-
3 deficiency statutes and it does not prevent an obligee from maintaining that action separately from
4 a foreclosure action. Further, as the Lavi Court ruled, this interpretation can be fairly harmonized
5 with NRS 40.495's 2011 amendment adding subsection 4. The subsection does not deny
6 applicability of the deficiency judgment defenses; rather, it governs the amount due from the
7 guarantor and implements a fair market value determination regardless of whether the property
8 has been foreclosed. *See*, 2011 Nev. Stat., ch. 311, § 5.5, at 1743-44.

9 When Hesser waived the one-rule action, Kennedy was allowed to bring an action against him
10 prior to completing the foreclosure on the secured property, but that waiver did not terminate the
11 procedural requirements for asserting that separate action.

12 Although Kennedy commenced an action on the guaranty first under NRS 40.495(2), once it
13 foreclosed on the property and sought a deficiency judgment, it was required to satisfy NRS
14 40.455.

15 While the guaranty action WAS being maintained separately from any other action to recover
16 the debt, the defenses against a deficiency judgment nonetheless apply after the property is sold
17 at foreclosure. So, under NRS 40.495(3), Hesser is entitled to raise any defenses to Kennedy's
18 attempt to recover a deficiency judgment.

19 Two statutes are implicated in calculating a deficiency judgment against a guarantor when
20 the guarantor waives the One Action Rule: NRS 40.459 and 40.495(4)(b). Read separately,
21 these statutes seem to hinge on the date the creditor files its complaint. If the creditor maintains
22 an action to foreclose or otherwise enforce its mortgage, then the guarantor is entitled to all the
23 FVDS, including the limitations on the amount of the deficiency judgment under NRS 40.459.
24 On the other hand, if the creditor files its complaint against the guarantor and then forecloses,
25 then seemingly both NRS 40.495(3) and 40.495(4) apply. Read together, the court must make
26 all the calculations under NRS 40.459 and 40.495, and enter a deficiency judgment for the least
27 amount.

1 To prevent double recovery, the 1969 Nevada Legislature enacted the FVDS to ensure that
2 any amount owed was offset by the fair market value of the property. The FVDS today provide
3 a panoply of protections related to deficiency judgments, including a fair market value hearing
4 (NRS 40.457), fair market value credit for the property (NRS 40.459, 40.495) and limitations
5 on the amount of deficiency judgments (NRS 40.459).

6 In the instant matter, Kennedy ultimately foreclosed on the property making a full credit
7 bid. Ostensibly, it placed a value on the property in the full amount it was owed or
8 \$18,843,912.09. Kennedy got the property and now seeks to double recover.

9 The June 26, 2009 a formal appraisal was conducted as to the subject property. The
10 Appraiser reported as follows:

11 We have made an inspection of the property and investigated and analyzed all
12 necessary data. The supporting data, analyses, and conclusions used to form
13 an opinion of market value of the subject property are contained in the
14 accompanying report and addenda. This letter by itself should not be construed
15 as a complete report.

16 The purpose of this s appraisal report is to form an opinion of the market value
17 of the fee simple interest of the subject property. Nevada Ueno Mita, LLC is
18 the client and intended user of this report. The intended use of the report is to
19 establish value for a Chapter 11 Bankruptcy.

20 This is a Summary Appraisal Report which is intended to comply with the
21 reporting requirements set forth under Standards Rule 2-2 (b) of the Uniform
22 Standards of Professional Appraisal Practice (USPAP), for a Summary Report.
23 The appraisers are not responsible for unauthorized use of this report.

24 Based upon an analysis of the market data and subject to the assumptions and
25 limiting conditions contained within this report, we have formed an opinion of the
26 market value of the fee simple interest of the subject property.

27 The Appraisal valued the subject property at \$27,600,000.¹³

28 Said appraisal is a fair indication of fair market value. Together with Kennedy's credit bid,
it is abundantly clear that the judgment against Defendant Hesser has been otherwise satisfied in
full and that no deficiency therefore exists. The judgment should be deemed as satisfied, vacated

¹³ Kennedy prepared a competing appraisal valuing the property at approximately \$4 Million, yet
on its property transfer tax form, Kennedy represented the value of the subject property to be
\$1,000. This is despite its appraisal and the fact that Kennedy credit bid at foreclosure. The
Amount then owed at *full* credit bit was in excess of 18 million dollars.

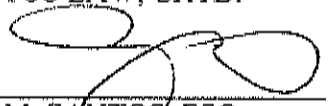
1 or expunged. Any other outcome would be antithetical to Nevada's statutory mandate, case law,
2 legislative intent as Kenny would double recover far in excess of what is fair and equitable

3 **IV. CONCLUSION**

4 For the reasons set forth herein, Defendant Vincent Hesser moves this Court for an order
5 dictating that the judgment has been satisfied in full or mandating a stay pending a fair market
6 value hearing determining what if any deficiency results in light of the foreclosure and amending
7 the judgment accordingly.

8 Dated this 15th day of June, 2015.

9
10 A.M. SANTOS LAW, CHTD.

11 
12 ANTONY M. SANTOS, ESQ.
13 Nevada Bar No. 11265
14 A.M. SANTOS LAW, CHTD.
15 3275 S. Jones Blvd. Ste. 104
16 Las Vegas, Nevada 89146
17 Phone: (702) 749-4594
18 tony@amsantoslaw.com

19 **CERTIFICATE OF SERVICE**

20 I hereby certify that service of the forgoing DEFENDANT HESSER' MOTION
21 PURSUANT TO NRCP 60(b) TO VACATE JUDGMENT' was made this 15th day of June 2015,
22 via electronic service to the Parties on the Master List and, if necessary, in the manner(s) indicated
23 below:

24 **Holley Driggs Walch Fine Wray Puzey & Thompson**

25 Alejandro apestonit@nevadafirm.com
26 Ogonna M. Atamoh oatomoh@nevadafirm.com
27 Olivia oswibies@nevadafirm.com
28 Richard F. Holley rholley@nevadafirm.com

29 
30 An Employee of A.M. Santos Law, Chtd.

EXHIBIT “A”

1 **VINCENT HESSER'S DECLARATION IN SUPPORT OF MOTION PURSUANT TO**
2 **NRCP 60(b) AND PROTECTIVE ORDER**

3 1. I am over the age of 18 and competent to testify as to these matter below.

4 2. I have personal knowledge of the facts below except as otherwise set forth.

5 3. I was an officer and manager of OneCap Partners 2, LLC at all times relevant
6 herein.

7 4. Upon information and belief, Kennedy Funding is a New Jersey Corporation that
8 is located and headquartered in New Jersey.

9 5. On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or
10 "OneCap") and Kennedy, as agent of the Kennedy Co-Lenders, entered into a Loan and Security
11 Agreement ("Loan Agreement"), pursuant to which Kennedy made a \$12 million loan to OneCap
12 to facilitate the purchase of unimproved real property consisting of 78.74± acres of raw land
13 located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark County
14 Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property").

15 6. The loan is evidenced by a Promissory Note dated June 15, 2006, in the original
16 principal sum of \$12 million ("Note"), made by OneCap to pay to the order of Kennedy as agent
17 of the lenders.

18 7. Under the Note, OneCap promised to pay Kennedy monthly interest only
19 payments at a rate of 11.5% per annum, to accrue from July 1, 2006 to June 1, 2007. Beginning
20 August 1, 2007, OneCap promised to pay Kennedy monthly interest only payments at a rate of
21 18% per annum, to accrue from July 1, 2007, through the maturity date of June 30, 2009.

22 8. OneCap agreed to pay all principal, interest and other sums due under the Note in
23 full on the maturity date of June 30, 2009.

24 9. In the event of a late payment under the Note, OneCap agreed to pay a late charge
25 equal to 10% of the overdue payment.

26 10. In the event of a default under the Note, OneCap agreed to pay a default rate of
27 25% per annum.

1 11. As security for the Note, OneCap executed and delivered to Kennedy a Deed of
2 Trust with Security Agreement, Financing Statement for Fixture Filing and Assignment of Rents
3 ("Deed of Trust") against the Property, which was recorded on June 15, 2006, with the Clark
4 County Recorder's Office as Instrument No. 20060615-0005324.

5 12. On June 15, 2006, Kennedy, Gary Owen II, LLC ("Option Holder"), and OneCap
6 executed a Subordination and Attornment Agreement ("Subordination Agreement") in which the
7 Option Holder agreed to subordinate its limited option to purchase the Property to Kennedy's Deed
8 of Trust.

9 13. As additional security for the loan, OneCap executed and delivered to Kennedy,
10 as agent for the lenders, an Assignment of Leases and Rents, dated June 14, 2006, and recorded
11 June 15, 2006, with the Clark County Recorder's Office as Instrument No. 20060615-0005325,
12 and an Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Report,
13 dated June 15, 2006 ("Assignment of Licenses").

14 14. To further secure payment of the Note, on June 14, 2006, OneCap MM and I
15 executed personal unconditional guaranties of the loan to Kennedy ("Guaranty"). At the time of
16 the transaction between OneCap and Kennedy, I was the President of OneCap and OneCap MM.

17 15. Under the express language of the Guaranty, I agreed to waive the need to foreclose
18 against the real property before pursuing the Guarantors.

19 16. OneCap also granted a properly perfected security interest to Kennedy by way of
20 a UCC-1 Financing Statement ("UCC-1") filed with the Clark County Recorder's Office on June
21 15, 2006, as Instrument No. 20060615-0005326.

22 17. Upon information and belief, Kennedy received all money to fund the loan in New
23 Jersey and disbursed those funds from New Jersey. Kennedy also received all payments made by
24 OneCap on the loan in New Jersey and disbursed those payments to lenders from New Jersey.

25 18. On April 1, 2008, OneCap defaulted under the Note and Deed of Trust.

26 19. Kennedy accelerated the note and instituted foreclosure proceedings on the
27 property. The notice of breach and election to sell under deed of trust was recorded with the Clark
28

1 County Recorder's Office on August 20, 2008, as Instrument No. 20080820-00597; and the Notice
2 of Trustee's Sale, with a sale date of December 29, 2008, was recorded on December 8, 2008 as
3 Instrument No. 20081208-00882.

4 20. On December 26, 2008 OneCap Partners 2 LLC, which had previous changed
5 its name to Nevada Ueno Mita, LLC ("Nevada Ueno"), filed a Chapter 11 Bankruptcy Petition
6 in the United States Bankruptcy for the District of Nevada, Case No. BK-S-08-25487-BAM
7 (the "Bankruptcy Petition").

8 21. Kennedy demanded performance from me as guarantor under the Guaranty.

9 22. I could not perform under the Guaranty.

10 23. On February 13, 2009, Kennedy filed a Complaint against me for breach of the
11 Guaranty.

12 24. In the Nevada Ueno Bankruptcy matter, on May 27, 2009, Kennedy filed a
13 Motion to Terminate the Automatic Stay Pursuant to 11 U.S.C. § 362(d)(1)-(3), or in the
14 Alternative, Convert or Dismiss Bankruptcy Case and Waiver of the 10-Day Stay Under FRBP
15 4001(a)(3) with Certificate of Service. ("Motion to Terminate Stay."),

16 25. On June 11, 2009, Nevada Ueno filed an opposition to Motion to Terminate
17 the Automatic Stay Pursuant to 11 U.S.C. § 362 (d)(1)-(3) or in the Alternative, Convert or
18 Dismiss Case and Waiver of the 10-Day Stay Under FRBP 4001(a)(3) and on June 26, 2009,
19 Kennedy filed a Reply in Support of Motion to Terminate the Automatic Stay Pursuant to 11
20 U.S.C. §362(d)(1)-(3), or in the Alternative, Convert or Dismiss Bankruptcy Case and Waiver
21 of the 10-Day Stay Under FRBP 4001(a)(3) with Certificate of Service.

22 26. Ultimately, Kennedy and Nevada Ueno reached an agreement wherein the
23 parties agreed that Kennedy would grant Nevada Ueno a six-month extension to allow the
24 Debtor to refinance or market and sell the Property and pay Kennedy.

25 27. Section 1.01(f) of the Settlement Agreement provides that "Kennedy Funding
26 agrees to give Debtor up through and until six (6) months after entry of the Order approving
27 this Settlement Agreement ('the Deadline') to pay Kennedy Funding in full before Kennedy

28

1 Funding forecloses on the Property."

2 28. Under the terms of the settlement agreement, in the event the Property is not
3 sold within six (6) months of the entry of the Order approving the proposed Settlement
4 Agreement, or in the event Kennedy is not paid within six (6) months of the entry of the Order
5 approving the proposed Settlement Agreement, the Debtor agreed to terminate of the
6 automatic stay as to Kennedy without further hearing.

7 29. At the time the Debtor Borrower and Kennedy entered into the Settlement
8 Agreement in August 2009, Kennedy had already commenced the present action against the
9 Guarantors, which action commenced before this Court on February 13, 2009.

10 30. On August 18, 2009, Kennedy filed a Motion to Approve Compromise and
11 Settlement Pursuant to Bankruptcy Rule 9019 Approving Settlement Between Debtor and
12 Kennedy Funding, Inc., with Certificate of Service and the Order Granting Motion to Approve
13 Compromise and Settlement Pursuant to Bankruptcy Rule 9019 Between Debtor and Kennedy
14 Funding, Inc., was entered on September 18, 2009.

15 31. Based upon the entry of the Settlement Order and pursuant to the terms of the
16 Settlement Agreement, the Debtor was required to pay Kennedy no later than March 18, 2010.

17 32. Kennedy received no payoff from the Debtor Nevada Ueno by the deadline
18 agreed upon in the Settlement Agreement, and, as a result, an Ex Parte Order Terminating the
19 Automatic Stay was entered by the Bankruptcy court on March 29, 2010 [Bankruptcy Dkt.
20 No. 96], terminating the automatic stay under 11 U.S.C. § 362 and allowing Kennedy to
21 foreclose on the Property.

22 33. A foreclosure sale went forward on June 17, 2010, and Kennedy credit bid
23 against the Property. See Notice of Trustee's Sale dated May 25, 2010, recorded in Clark County
24 Recorder's Office on May 27, 2010, as Instrument No. 201005270000200; see also Trustee's
25 Deed Upon Sale recorded July 16, 2010, recorded in the Clark County Recorder's Office as
26 Instrument No. 20107160000364.

27 34. On September 22, 2009, Kennedy filed a Motion for Summary Judgment against
28

1 the Defendants in the Guarantor Action.

2 35. On or around October 6, 2009, the Defendants filed an Opposition to the Motion
3 for Summary Judgment.

4 36. On November 4, 2009, the Court granted the Plaintiff's Motion for Summary
5 Judgment.

6 37. Thereafter, on February 17, 2009, the Court entered Judgment against each of the
7 Defendants in the amount of \$16,802,025.64, excluding attorneys' fees and costs which amount
8 was to be determined. The Plaintiff provided Defendants with notice of entry of judgment on
9 February 23, 2009.

10 38. On February 18, 2010, the Court entered an Order Awarding Damages Pursuant
11 to Plaintiff's Motion for Summary Judgment in the amount of \$39,755.00 and costs in the amount
12 of \$2,131.45 (the "Attorneys' Fees Order"), for a new total Judgment in favor of Plaintiff and
13 against Defendants in the amount of \$18,843,912.09.

14 39. Kennedy now seeks to examine me to satisfy the Judgment against Judgment
15 Debtors.

16 40. The June 26, 2009 a formal appraisal was conducted as to the subject property.

17 41. The Appraiser reported as follows:

18 We have made an inspection of the property and investigated and analyzed all
19 necessary data. The supporting data, analyses, and conclusions used to form an
20 opinion of market value of the subject property are contained in the accompanying
report and addenda. This letter by itself should not be construed as a complete report.

21 The purpose of this s appraisal report is to form an opinion of the market value of
22 the fee simple interest of the subject property. Nevada Ueno Mita, LLC is the client
and intended user of this report. The intended use of the report is to establish value
23 for a Chapter 11 Bankruptcy.

24 This is a Summary Appraisal Report which is intended to comply with the reporting
25 requirements set forth under Standards Rule 2-2 (b) of the Uniform Standards of
Professional Appraisal Practice (USPAP), for a Summary Report. The appraisers are
26 not responsible for unauthorized use of this report.

27 Based upon an analysis of the market data and subject to the assumptions and limiting
conditions contained within this report, we have formed an opinion of the market value of
28

1 the fee simple interest of the subject property.

2 42. The Appraisal valued the subject property at \$27,600,000.

3 43. It is my belief that said appraisal is a fair indication of fair market value.

4 44. I declare under penalty of perjury that the forgoing is true and correct.

5 Dated this 15th day of June 2015.

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VINCENT HESSER

EXHIBIT “B”



IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Sep 03 2010 08:45 a.m.
Tracie K. Lindeman

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

Appellants,

v.

KENNEDY FUNDING, INC., a New Jersey
Corporation,

Respondent.

Supreme Court Case No. 55654

District Court Case No.: A582746

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

KENNEDY FUNDING, INC.'S ANSWERING BRIEF

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TABLE OF AUTHORITIES**Cases**

<u>Alberter v. McDonald's Corp.</u> , 70 F.Supp.2d 1138, 1141 (D.Nev. 1999)	16
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242, 248 (1986)	16
<u>Bird v. Casa Royale W.</u> , 97 Nev. 67, 624 P.2d 17 (1981)	16
<u>Boland v. Nevada Rock and Sand Co.</u> , 111 Nev. 608, 614, 894 P.2d 988, 990 (1995)	16
<u>Borgerson v. Scanlon</u> , 117 Nev. 216, 19 P.3d 236 (2001)	16
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317 (1986)	16
<u>Collins v. Union Fed. Sav. & Loan Ass'n.</u> , 99 Nev. 284, 302, 662 P.2d 610 (1983)	16
<u>Dictor v. Creative Management Services, LLC</u> , 223 P.3d 332, 334 (Nev. 2010) (citing <u>Ozawa v. Vision Airlines</u> , 125 Nev. ---, ---, 216 P.3d 788, 791 (2009))	11
<u>Ellison v. Cal. State Auto Ass'n</u> , 106 Nev. 601, 797 P.2d 975 (1990)	17
<u>Havas v. Long</u> , 85 Nev. 260, 263, 454 P.2d 30 (1969)	16
<u>Kahn v. Morse & Mowbray</u> , 121 Nev. 464, 480 n. 24, 117 P.3d 227, 238 n. 24 (2005)	11
<u>Margrave v. Dermody Props., Inc.</u> , 110 Nev. 824, 878 P.2d 291 (1994)	17
<u>Masonry and Tile Contractors Ass'n v. Jolley</u> , 113 Nev. 737, 740, 941 P.2d 486 (1997)	16
<u>Matsushita Electric Industrial Co. v. Zenith Radio</u> , 475 U.S. 574, 586 (1986)	15
<u>McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC</u> , 121 Nev. Adv. Op. 79, at 3, 123 P.3d 748, 750 (2005) (per curiam)	19
<u>Nelson v. Cal. State Auto. Ass'n Inter-Ins. Bureau</u> , 114 Nev. 345, 956 P.2d 803 (1998)	17
<u>Parman v. Petricciani</u> , 70 Nev. 427, 431-32, 272 P.2d 492, 494 (1954)	17
<u>Tucker v. Action Equip. and Scaffold Co.</u> , 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997)	15
<u>U.S. v. Cail</u> , 746 F.Supp. 1035, 1038 (Dist. Nev. 1990) (citing <u>McMillan v. United Mortgage Co.</u> , 84 Nev. 99, 101-02, 437 P.2d 878 (1968))	19
<u>Wood v. Safeway, Inc.</u> , 121 Nev. 724, 121 P.3d 1026, 1029 (2005) (citing NRCP 56(c))	15

Statutes

11 U.S.C. § 362	1, 9, 13, 19, 22
11 U.S.C. § 362(d)(1)-(3)	8
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Rules

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1 **I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

2 The four issues raised on appeal as set forth in Appellants OneCap Partners MM, Inc.
3 ("OneCap MM") and Vincent W. Hesser's ("Hesser") (collectively "Appellants") Docketing
4 Statement Civil Appeals are:

5 (1) Whether the District Court erred in granting Summary Judgment while material facts
6 remained in dispute;

7 (2) Whether the District Court erred in granting Summary Judgment in violation of
8 Nevada's One Action rule;

9 (3) Whether the District Court erred in granting Summary Judgment when no deficiency
10 on the underlying deed of trust was ever established; and

11 (4) Whether the property, the subject of the deed of trust, is no longer subject to the deed
12 of trust and belongs to the Defendants because the District Court erred in granting Summary
13 Judgment under the Promissory Note.

14 **PRELIMINARY STATEMENT**

15 Appellants appeal from the lower court's Order Granting Plaintiff's Motion for Summary
16 Judgment entered by the Eighth Judicial District Court, Clark County, Nevada, on November 4,
17 2009 (the "Order"), and Judgment Against OneCap Partners MM, Inc. and Vincent W. Hesser, in
18 favor of Kennedy, entered by the Eighth Judicial District Court, Clark County, Nevada on
19 February 18, 2010 (the "Judgment"). E.R. Tab 6 at 00213 - 00216, Respondent's Answering
20 Brief; and E.R. Tab 7 at 00217 - 00225, Respondent's Answering Brief.

21 In this Brief "E.R." denotes excerpts of record designated by Appellants or Respondents
22 as identified.

23 **II. STATEMENT OF THE CASE**

24 **A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS**

25 The appeal before this Court is moot. Since the appeal was filed, there are a number of
26 procedural developments that must be brought to the attention of the Nevada Supreme Court,
27 because the events moot the pending appeal. This appeal is moot for two reasons: (1) the
28 bankruptcy stay under 11 U.S.C. § 362 that is the subject of this appeal expired on March 29,

1 2010, pursuant to the Ex Parte Order Terminating Automatic Stay. E.R. Tab 8 at 00226 - 00227,
2 Respondent's Answering Brief. Thus, Appellants' request for any collection action against the
3 Guarantors to be stayed by the bankruptcy stay under Section 362 pursuant to the Settlement
4 Agreement is therefore moot; and (2) since the appeal was taken, Kennedy Funding, Inc.
5 ("Kennedy") foreclosed on the Property on June 17, 2010. The Trustee's Deed Upon Sale was
6 recorded July 16, 2010, with the Clark County Recorder's Office as Instrument No.
7 20107160000364. E.R. Tab 11 at 00230 - 00234, Respondent's Answering Brief. Appellants'
8 request to stay the case pending foreclosure is therefore moot.

9 In this appeal, Appellants seek reversal of the district court's ruling on Kennedy's Motion
10 for Summary Judgment, resulting in the lower court's order that Respondent Kennedy was
11 entitled to recovery of over \$16 million from the Guarantors arising from a default of the
12 \$12 million loan to OneCap Partners 2, LLC, the predecessor-in-interest to Nevada Ueno Mita,
13 LLC.

14 On September 22, 2009, Kennedy filed a Motion for Summary Judgment. On or about
15 October 6, 2009, Harold P. Gewerter, Esq., counsel for Appellants, filed Defendants' Opposition
16 to Plaintiff's Motion for Summary Judgment, and on October 20, 2009, Kennedy filed a Reply in
17 Support of Motion for Summary Judgment. Hearing on Kennedy's Motion for Summary
18 Judgment went forward on October 27, 2009, at which time the lower court granted Kennedy's
19 Motion for Summary Judgment as to liability only. A damages hearing was thereafter scheduled
20 for November 5, 2009, at 9:30 a.m.

21 On February 18, 2010, the lower court entered a Judgment Against OneCap Partners,
22 MM and Vincent W. Hesser, the guarantors, in the amount of \$16,802,025.64 (the "Judgment").
23 The Judgment expressly provides that to the extent the real property securing Kennedy's Loan is
24 sold or refinanced and such proceeds are paid to Kennedy, any such proceeds shall be deducted
25 from the judgment amount and accruing interest entered against the Guarantors in favor of
26 Kennedy.

27 In addition to the reasons enumerated above relating to the mootness of the pending
28 appeal, Appellants' appeal should further be denied for the following reasons: (1) Appellants fail

1 to present any credible evidence that there is a genuine issue of material fact regarding the
2 Guarantors' waiver of the One-Action Rule. Appellants wholly disregard the express waiver of
3 the One-Action Rule as set forth in the Guaranty, E.R. Appendix 3 at 111 – 121/KF00139 –
4 KF00149, Appellants' Opening Brief, which allows lenders to pursue guarantors, such as
5 Appellants, upon the Borrower's bankruptcy filing under NRS 40.430(4)(i). The Borrower filed
6 for Bankruptcy on December 26, 2008, and Kennedy commenced the action that is the subject of
7 the appeal against the Guarantors after the bankruptcy case was filed on February 13, 2009, and
8 in compliance with the exclusion to the One-Action Rule; (2) under Sections 2 and 4 of the
9 Guaranty, E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief, the
10 Appellant Guarantors waived the application of the One-Action Rule, allowing Kennedy to
11 pursue the action against the Guarantors pursuant to NRS 40.495(2). Under the Guaranty, E.R.
12 Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief, the Guarantors
13 expressly waived any defense based upon Kennedy's failure to first commence an action against
14 the Borrower, or to proceed against or exhaust any security held by Lender at any time; (3) the
15 Order that is the subject of this appeal ensures that Kennedy does not recover a windfall, in that
16 it provides that the proceeds of the sale or refinance of the Property are to be deducted from the
17 judgment amount and accruing interest entered against the Guarantors; and (4) Appellants fail to
18 present any credible evidence that there is a genuine issue of material fact that the Settlement
19 Agreement stayed the State Court Action against the Guarantors. Section 1.01(g) of the
20 Settlement Agreement approved by the Bankruptcy Court expressly states that Kennedy is not
21 precluded from pursuing the Guarantors under the Guaranty. E.R. Appendix 3 at 111 –
22 149/KF00139 – KF00149, Appellants' Opening Brief.

23 **B. STATEMENT OF RELEVANT FACTS**

24 **Loan Documents**

25 1. Kennedy Funding is a New Jersey Corporation that is located and headquartered
26 in New Jersey.

27 2. On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or
28 "OneCap") and Kennedy, as agent of the Co-Lenders, entered into a Loan and Security

Agreement ("Loan Agreement"), pursuant to which Kennedy made a \$12 million loan 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 Loan and Security Agreement. E.R. Appendix 1, at 1-47/KF-00026-KF00073.

3. Exhibit D to the Loan Agreement identifies the Co-Lenders to the \$12,000,000 Loan.¹

4. On or about June 15, 2006, the Co-Lenders and Kennedy executed the Co-Lenders Agreement, under which the Co-Lenders expressly authorized Kennedy 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.

5. Kennedy has the express authority to act on behalf of the Co-Lenders pursuant to the Co-Lenders Agreement, and it has kept the Co-Lenders apprised of the status of the Borrower's bankruptcy case and the Guarantor action.

...

...

¹ The Co-Lenders are The Simes Family Limited Partnership, M&M Funding, Inc., TLC Funding, Inc. (1.00% portion of the Loan is solely funded by 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&G Investment, Inc., Evergreen CMF Funding, Inc., The Hampshire Generational Fund, LP, JWJ Financial, Inc., MMR Funding, LP, M.I. Beer Investments, Inc., Wilson Kaplen, The Kaplen Foundation and Valley National Bank.

1 6. The loan is evidenced by a Promissory Note dated June 15, 2006, in the original
2 principal sum of \$12 million ("Note"), made by OneCap to pay to the order of Kennedy as agent
3 of the lenders.

4 7. Under the Note, OneCap promised to pay Kennedy monthly interest only
5 payments at a rate of 11.5% per annum, to accrue from July 1, 2006 to June 1, 2007. Beginning
6 August 1, 2007, OneCap promised to pay Kennedy monthly interest only payments at a rate of
7 18% per annum, to accrue from July 1, 2007, through the maturity date of June 30, 2009.

8 8. OneCap agreed to pay all principal, interest and other sums due under the Note in
9 full on the maturity date of June 30, 2009.

10 9. In the event of a late payment under the Note, OneCap agreed to pay a late charge
11 equal to 10% of the overdue payment.

12 10. In the event of a default under the Note, OneCap agreed to pay a default rate of
13 25% per annum.

14 11. As security for the Note, OneCap executed and delivered to Kennedy a Deed of
15 Trust with Security Agreement, Financing Statement for Fixture Filing and Assignment of Rents
16 ("Deed of Trust") against the Property, which was recorded on June 15, 2006, with the Clark
17 County Recorder's Office as Instrument No. 20060615-0005324.

18 12. On June 15, 2006, Kennedy, Gary Owen II, LLC ("Option Holder"), and OneCap
19 executed a Subordination and Attornment Agreement ("Subordination Agreement") in which the
20 Option Holder agreed to subordinate its limited option to purchase the Property to Kennedy's
21 Deed of Trust.

22 13. As additional security for the loan, OneCap executed and delivered to Kennedy,
23 as agent for the lenders, an Assignment of Leases and Rents, dated June 14, 2006, and recorded
24 June 15, 2006, with the Clark County Recorder's Office as Instrument No. 20060615-0005325,
25 and an Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Report,
26 dated June 15, 2006 ("Assignment of Licenses").

27 14. To further secure payment of the Note, on June 14, 2006, Appellants Hesser and
28 OneCap MM executed personal unconditional guaranties of the loan to Kennedy ("Guaranty").

1 E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief. At the time of
2 the transaction between OneCap and Kennedy, Hesser was the President of OneCap and OneCap
3 MM.

4 15. Under the express language of the Guaranty, the Defendants agreed to waive the
5 need to foreclose against the real property before pursuing the Guarantors as follows:

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

8 (g) The failure of Lender to commence an action against
9 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;

10 E.R. Appendix 3 at 111-121/KF00139-KF00149, Appellants' Opening Brief.

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

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

24 E.R. Appendix 3 at 111-121/KF00139-KF00149, Appellants' Opening Brief (emphasis added).

25 17. OneCap also granted a properly perfected security interest to Kennedy by way of
26 a UCC-1 Financing Statement ("UCC-1") filed with the Clark County Recorder's Office on June
27 15, 2006, as Instrument No. 20060615-0005326.

28 ...

1 18. Kennedy received all money to fund the loan in New Jersey and disbursed those
2 funds from New Jersey. Kennedy also received all payments made by OneCap on the loan in
3 New Jersey and disbursed those payments to lenders from New Jersey.

4 **OneCap Defaults**

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

7 20. In addition, OneCap was in default under the Deed of Trust for failure to provide
8 Kennedy with current proof of liability insurance, and for failure to timely pay its tax obligations
9 relating to the Property. State and County Taxes are outstanding for the fiscal period 2008 to
10 2009 in the total amount of \$41,093.18 on the Property.

11 21. Based on those defaults, Kennedy accelerated the note and instituted foreclosure
12 proceedings on the property. The notice of breach and election to sell under deed of trust was
13 recorded with the Clark County Recorder's Office on August 20, 2008, as Instrument No.
14 20080820-00597; and the Notice of Trustee's Sale, with a sale date of December 29, 2008, was
15 recorded on December 8, 2008 as Instrument No. 20081208-00882.

16 22. On December 26, 2008, three days before the foreclosure sale, Nevada Ueno
17 Mita, LLC ("Nevada Ueno"), filed a Chapter 11 Bankruptcy Petition in the United States
18 Bankruptcy for the District of Nevada, Case No. BK-S-08-25487-BAM (the "Bankruptcy
19 Petition").

20 23. Based upon information obtained from the Bankruptcy Petition, OneCap had
21 transferred its interest in the Property to Nevada Ueno. A Deed from OneCap to Nevada Ueno
22 was recorded with the Clark County Recorder's Office on November 3, 2008, as Instrument No.
23 20081103-0002469.

24 24. Under the Deed of Trust and Loan Agreement, OneCap's transfer of the Property
25 to Nevada Ueno is a default.

26 **Defendants Default on the Guaranty**

27 25. Because of OneCap's default under the Note, including failure to make timely
28 payments, OneCap's improper transfer and Nevada Ueno's bankruptcy petition—which halted

1 the foreclosure action, Kennedy demanded performance from Appellants under the Guaranty.
2 E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief.

3 26. However, Appellants failed and refused to perform under the Guaranty.

4 27. As a result of Defendants' refusal to meet their obligations under the Guaranty, on
5 February 13, 2009, Kennedy filed a Complaint against the Appellants for breach of the Guaranty.

6 **Nevada Ueno Bankruptcy**

7 28. In the Nevada Ueno Bankruptcy matter, on May 27, 2009, Kennedy filed a
8 Motion to Terminate the Automatic Stay Pursuant to 11 U.S.C. § 362(d)(1)-(3), or in the
9 Alternative, Convert or Dismiss Bankruptcy Case and Waiver of the 10-Day Stay Under FRBP
10 4001(a)(3) with Certificate of Service [Bankruptcy Dkt. No. 54] ("Motion to Terminate Stay"),
11 an filed a Declaration of Steven Evans [Bankruptcy Dkt. No. 56] and Declaration of Matthew
12 Cole [Dkt. No. 57] .

13 29. Hearing on Kennedy's Motion to Terminate Stay was originally scheduled for
14 June 30, 2009, and was rescheduled to July 6, 2009 [Bankruptcy Dkt. No. 64].

15 30. On June 11, 2009, Nevada Ueno filed an opposition to Motion to Terminate the
16 Automatic Stay Pursuant to 11 U.S.C. § 362 (d)(1)-(3) or in the Alternative, Convert or Dismiss
17 Case and Waiver of the 10-Day Stay Under FRBP 4001(a)(3) [Bankruptcy Dkt. No. 68], and on
18 June 26, 2009, Kennedy filed a Reply in Support of Motion to Terminate the Automatic Stay
19 Pursuant to 11 U.S.C. §362(d)(1)-(3), or in the Alternative, Convert or Dismiss Bankruptcy Case
20 and Waiver of the 10-Day Stay Under FRBP 4001(a)(3) with Certificate of Service [Bankruptcy
21 Dkt. No. 70].

22 31. Ultimately, Kennedy and Nevada Ueno reached an agreement wherein the parties
23 agreed that Kennedy would grant Nevada Ueno a six-month extension to allow the Debtor to
24 refinance or market and sell the Property and pay Kennedy. See Section 1.01(f) of the
25 Settlement Agreement, E.R. Appendix 5 at 209-212, Appellants' Opening Brief.² Under the

26
27 ² Section 1.01(f) of the Settlement Agreement provides that "Kennedy Funding agrees to give Debtor up through
28 and until six (6) months after entry of the Order approving this Settlement Agreement ('the Deadline') to pay
Kennedy Funding in full before Kennedy Funding forecloses on the Property." *Id.*

1 terms of the settlement agreement, in the event the Property is not sold within six (6) months of
2 the entry of the Order approving the proposed Settlement Agreement, or in the event Kennedy is
3 not paid within six (6) months of the entry of the Order approving the proposed Settlement
4 Agreement, the Debtor agreed to terminate of the automatic stay as to Kennedy without further
5 hearing. Id.

6 32. At the time the Debtor Borrower and Kennedy entered into the Settlement
7 Agreement in August 2009, Kennedy had already commenced the action against the Guarantors,
8 which action commenced before the lower court on February 13, 2009. The Debtor Borrower
9 and Kennedy, the only parties to the Settlement Agreement, agreed that the Settlement
10 Agreement would have no impact on the continuation of the Guarantor Action. See Settlement
11 Agreement, p. 3, Section 1.01(g), E.R. Appendix 5 at 209-212, Appellants' Opening Brief
12 (stating that "[t]he Parties agree that this Settlement Agreement shall not preclude, limit or
13 abridge Kennedy's rights to pursue any deficiency actions against the Guarantors of Debtor's
14 obligations owing to Kennedy Funding").

15 33. On August 18, 2009, Kennedy filed a Motion to Approve Compromise and
16 Settlement Pursuant to Bankruptcy Rule 9019 Approving Settlement Between Debtor and
17 Kennedy Funding, Inc., with Certificate of Service [Bankruptcy Dkt. No. 82], and the Order
18 Granting Motion to Approve Compromise and Settlement Pursuant to Bankruptcy Rule 9019
19 Between Debtor and Kennedy Funding, Inc., was entered on September 18, 2009 [Bankruptcy
20 Dkt. No. 91].

21 34. Based upon the entry of the Settlement Order and pursuant to the terms of the
22 Settlement Agreement, the Debtor was required to pay Kennedy no later than March 18, 2010
23 [Bankruptcy Dkt. No. 82].

24 35. Kennedy received no payoff from the Debtor Nevada Ueno by the deadline
25 agreed upon in the Settlement Agreement, and, as a result, an Ex Parte Order Terminating the
26 Automatic Stay was entered by the Bankruptcy court on March 29, 2010 [Bankruptcy Dkt. No.
27 96], terminating the automatic stay under 11 U.S.C. § 362 and allowing Kennedy to foreclose on
28 the Property. E.R. Tab 8 at 00226-27, Respondent's Answering Brief.

1 36. After proper notice, a foreclosure sale went forward on June 17, 2010, and
2 Kennedy credit bid against the Property. See Notice of Trustee's Sale dated May 25, 2010,
3 recorded in Clark County Recorder's Office on May 27, 2010, as Instrument No.
4 201005270000200. E.R. Tab 9 at 00228-29, Respondent's Answering Brief; see also Trustee's
5 Deed Upon Sale recorded July 16, 2010, recorded in the Clark County Recorder's Office as
6 Instrument No. 20107160000364. E.R. Tab 10 at 00230-00234, Respondent's Answering Brief

7 37. On September 22, 2009, Kennedy filed a Motion for Summary Judgment against
8 the Defendants in the Guarantor Action.

9 38. On or around October 6, 2009, the Defendants filed an Opposition to the Motion
10 for Summary Judgment (the "Opposition"). See Opposition, E.R. Tab 11, Respondent's
11 Answering Brief.

12 39. In the Opposition, the Defendants concede that they guarantied OneCap's
13 indebtedness owing to Kennedy, stating as follows:

14 To further secure payment of the Note, on June 14, 2006, Vincent
15 Hesser and OneCap Partners MM, Inc. (the "Guarantors")
16 executed a personal unconditional guaranty of the Note to
17 Kennedy Funding (the "Guaranties"). On April 1, 2008, OneCap
18 defaulted under the Loan and Deed of Trust, including, but not
19 limited to, OneCap's failure to make monthly installment
20 payments under the Note in the amount of Two Hundred Fifty
21 Thousand Dollars (\$250,000.00) due April 1, 2008.

22 See Opposition, p. 2, ll. 22-27, E.R. Tab 11 at 00235 - 00244, Respondent's Answering Brief.

23 40. Thus, there is no genuine issue of material fact that the Defendant Guarantors are
24 liable for the outstanding indebtedness due and owing to Kennedy arising from the Debt and the
25 Borrower's default.

26 41. In Appellants' Opposition to the Motion for Summary Judgment, Appellants
27 never refuted that they waived the One-Action Rule, and they never demonstrated that there was
28 a genuine issue of material fact that Section 4(g) of the Guaranty did not require Kennedy to
foreclose against the real property before pursuing the Guarantors as a result of the waiver of the
One-Action Rule. E.R. Appendix 3 at 111 - 149/KF00139 - KF00149, Appellants' Opening
Brief.

1 **C. STANDARD OF REVIEW**

2 An order granting summary judgment is reviewed by this court de novo. See Dictor v.
3 Creative Management Services, LLC, 223 P.3d 332, 334 (Nev. 2010) (citing Ozawa v. Vision
4 Airlines, 125 Nev. ---, ---, 216 P.3d 788, 791 (2009)). Summary judgment is appropriate when
5 the moving party is entitled to judgment as a matter of law and there is no genuine dispute of any
6 material fact. Id. The Nevada Supreme Court will not consider an argument raised for the first
7 time on appeal. See Kahn v. Morse & Mowbray, 121 Nev. 464, 480 n. 24, 117 P.3d 227, 238 n.
8 24 (2005).

9 **D. SUMMARY OF ARGUMENT**

10 The lower court properly found that there were no genuine issues of material fact that the
11 Guarantors waived Nevada's One-Action Rule under Paragraph 4(g) of the Guaranty, and that
12 the judgment against the Guarantors for the outstanding indebtedness owing under the Note was
13 therefore proper. The lower court also properly found that the Settlement Agreement entered into
14 between Kennedy on one hand and the borrower, and Nevada Ueno Mita—the Debtor in
15 bankruptcy—on the other hand, did not preclude Kennedy from commencing the action against
16 the Guarantors. The lower court properly found that Section 1.01(g) of the Settlement
17 Agreement expressly permitted Kennedy to continue its action against the Guarantors, and that
18 the Bankruptcy Stay as set forth in Section 1.01(f) of the Settlement Agreement did not extend to
19 the Guarantors. As a result, Kennedy is entitled to summary judgment.

20 In its Brief, Appellants identify the Statement of Issues, but in the body of Appellants'
21 Opening Brief, Appellants fail to address all of the discrete Statement of the Issues. For
22 instance, the first Statement of the Issues relates to the lower court's purported error in granting
23 summary judgment while material facts remained in dispute. However, the Appellant's Brief
24 fails to identify which material facts remained in dispute. See Appellants' Brief. Appellants'
25 appeal must be limited to the record before the lower court on the Opposition to Kennedy's
26 Motion for Summary Judgment, and the inclusion of arguments beyond the scope of the
27 Opposition to the Motion for Summary Judgment should not be entertained.

28 ...

As to the second and third issue identified in the Statement of the Issues, Appellant misleads this Court regarding the lower court's alleged error in relation to the One-Action Rule and the need to establish a deficiency notwithstanding the waiver. Appellants' Brief omits Section 4(g) of the Guaranty, which provides for an express waiver of the One-Action Rule. E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief. It was upon this basis, the Guarantors' express waiver of the One-Action Rule, that the lower court entered the judgment. At the time the Motion for Summary Judgment was before the lower court, Appellants conceded that "the action was commenced prior to a foreclosure..." See Appellants' Brief, p. 8, l. 12. Moreover, the foreclosure was stayed by the automatic stay under Section 362 of the Bankruptcy Code, which was still in place at the time of the Summary Judgment proceedings. In light of Kennedy's inability to foreclose on the Property when it commenced the Guarantor Action and during the Summary Judgment proceedings, the Appellants were not entitled to stay the proceedings until a deficiency was established, nor were Appellants entitled to invoke NRS 40.495(3) or NRS 30.435(2) in light of the Guarantors' express waiver of the One-Action Rule. The fourth issue identified in Appellants' Statement of Issues, whether the Property is no longer subject to the Deed of Trust and belongs to Kennedy because the lower court erred in granting summary judgment, is wholly unsupported by law and hinges entirely on the success of the first three issues. Thus, the fourth issue lacks merit. See Appellants' Brief.

1. Appeal Must be Dismissed as Moot, because the Bankruptcy Stay has Terminated, and Kennedy has Foreclosed on the Property.

This appeal is moot, and should be dismissed because the basis for Appellants' appeal is no longer at issue. First, Appellants assert that the lower court erred because the collection action should be stayed under Section 1.01(g) of the Settlement Agreement filed in the Bankruptcy Court. See Appellants' Brief, p. 6, l. 11. The basis of Appellants' argument rests upon a Settlement Agreement approved by the Bankruptcy Court, which provided that the foreclosure of the Property would be stayed until March 18, 2010. See Settlement Agreement, Section 1.01(f), E.R. Appendix 5, at 209 - 212, Appellants' Opening Brief. However, this appeal is moot because pursuant to the deadlines set forth under the Settlement Agreement, the bankruptcy stay

1 under 11 U.S.C. § 362 expired on March 29, 2010. E.R. Tab 8 at 226 - 227, Respondent's
2 Answering Brief. Thus, Appellants' request for any collection action against the Guarantors to
3 be stayed as long as the bankruptcy stay under Section 362 is in place pursuant to the Settlement
4 Agreement is moot.

5 Second, Appellants posit that because the action commenced by Kennedy was
6 commenced prior to foreclosure, either the case should have been stayed pending any such
7 foreclosure or the judgment entered should release the Respondent's lien on the property. See
8 Appellants' Brief, p. 8, ll. 12-14. However, the appeal on this basis is moot, because since the
9 appeal was taken, Kennedy foreclosed on the Property on June 17, 2010. See the Trustee Deed
10 Upon Sale, recorded July 16, 2010, recorded in the Clark County Recorder's Office as
11 Instrument No. 20107160000364. E.R. Tab 10 at 00230 - 00234, Respondent's Answering
12 Brief. Appellants' request to stay the case pending foreclosure is therefore likewise moot.

13
14 **2. Appellants Raise Issues Not Raised Before Lower Court and Should Not be
Entertained.**

15 One of the issues on appeal Appellants raise is whether the "District Court Erred in
16 Granting Summary Judgment While Material Facts Remained in Dispute." See Appellants'
17 Brief, p. 4, Item A. However, the section entitled "Statement of Issues" is the only place in
18 Appellants' Brief that makes mention of material facts that remain in dispute. Specifically, the
19 body of Appellants' Opening Brief fails to identify which issues of material fact exist.
20 Appellant's Brief fails to identify any citation to the excerpts of the record that the lower record
21 erred in determining there were no genuine issues of material fact.

22 The only issues identified in Appellants' Brief relate to legal issues arising under NRS
23 40.457, NRS 40.459 and NRS 40.435(2). NRS 40.435(2) was never raised in Appellants'
24 Opposition to the Motion for Summary Judgment, and NRS 40.457 and NRS 40.459 were raised
25 only in connection with the damages hearing, not the hearing as to liability, which Order as to
26 liability was entered on November 4, 2009. There is no specificity in the Appellants' Brief
27 identifying which material facts, if any, remain in dispute. See Appellants' Brief. To the
28 contrary, Appellants concede in their Brief that the Guarantors "executed a personal

1 unconditional guaranty of the Note to Kennedy Funding". See Appellants' Brief, p. 5, ll. 11-12.
2 Appellants' Brief makes no mention of, nor any dispute regarding, the Guarantors' waiver of
3 Nevada's One-Action Rule.

4 This is a glaring omission, especially where the waiver of the One-Action Rule was the
5 crux of lower court's ruling. Appellants' appeal must be limited to the record before the lower
6 court as set forth in the Opposition to Kennedy's Motion for Summary Judgment, filed on or
7 around October 6, 2009. The sole argument raised in Appellants' Opposition to the Kennedy's
8 Motion for Summary Judgment was that Section 1.09(g) of the Settlement Agreement filed in the
9 Bankruptcy Court raised a genuine issue of material fact that required a stay of the Guarantor
10 Action. See Opposition, E.R. Tab 11, Respondent's Answering Brief. Thus, inclusion of
11 arguments in Appellants' Brief beyond the scope of the Opposition to the Motion for Summary
12 Judgment should not be entertained.

13 All of the arguments raised in the Appellant's Brief, with the exception of the argument
14 regarding the applicability of the Settlement Agreement filed in Bankruptcy Court, are beyond
15 the scope of the evidence Appellants presented to the lower court when Appellants filed their
16 Opposition to the Motion for Summary Judgment. See Appellants' Brief. As no additional
17 discovery was conducted, and no supplemental pleadings were timely filed with the lower court
18 in connection with the Motions for Summary Judgment, Appellant's Brief impermissibly seeks
19 to introduce new arguments on appeal that were not properly raised before the lower court. See
20 Appellant's Brief.

21 Because the Nevada Supreme Court will not consider an argument raised for the first
22 time on appeal, see Kahn v. Morse & Mowbray, 121 Nev. at 480 n. 24, 117 P.3d at 238 n. 24,
23 this Court's de novo review is limited to the arguments raised below in Appellants' Opposition
24 to the Motion for Summary Judgment. Appellants' Brief is nothing more than an attempt to cure
25 the shortcomings of the Opposition below by now making the arguments that were absent in the
26 Opposition. Appellants' Brief also makes an argument raised on appeal that was never raised in
27 the Opposition below in connection with NRS 40.435(2), and should not be considered on
28 appeal, as it is beyond the scope of the record on appeal.

1 Appellants' efforts to use Appellants' Brief as a vehicle by which to raise arguments for
2 the first time on appeal should not be entertained by this Court on appeal. De novo review is
3 limited to the pleadings before the lower court and does not enable Appellants to expand the
4 record on appeal.

5
6 **3. Appellants fail to Demonstrate that Material Issues of Disputed Fact
Preclude a Finding of Summary Judgment.**

7 NRCP 56(c) provides in relevant part as follows:

8 [T]he judgment sought shall be rendered forthwith if the
9 pleadings, depositions, answers to interrogatories, and admissions
10 on file, together with the affidavits, if any, show that there is no
genuine issue as to any material fact and that the moving party is
entitled to a judgment as a matter of law.

11 See Nev. R. Civ. P. 56(c).

12 Summary judgment is appropriate and shall be rendered forthwith when the pleadings
13 and other evidence on file demonstrate that no genuine issue as to any material fact remains and
14 that the moving party is entitled to a judgment as a matter of law. See Wood v. Safeway, Inc.,
15 121 Nev. 724, 121 P.3d 1026, 1029 (2005) (citing NRCP 56(c); Tucker v. Action Equip. and
16 Scaffold Co., 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997)). The Nevada Supreme Court
17 has made abundantly clear that when a motion for summary judgment is made and supported as
18 required by NRCP 56, the non-moving party may not rest upon general allegations and
19 conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the
20 existence of a genuine factual issue. Id. at 1030-31. The United States Supreme Court employed
21 similar language in *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).
22 The Nevada Supreme Court enunciated the discontinued viability of the "slightest doubt"
23 standard, and expressly adopted the standard employed in *Liberty Lobby*, *Celotex*, and
24 *Matsushita*:

25 Summary judgment is appropriate under NRCP 56 when the
26 pleadings, depositions, answers to interrogatories, admissions, and
27 affidavits, if any, that are properly before the court demonstrate
that no genuine issue of material fact exists, and the moving party
is entitled to judgment as a matter of law. . . when reviewing a
28

1 motion for summary judgment, the evidence, and any reasonable
2 inferences drawn from it, must be viewed in a light most favorable
to the nonmoving party.

3 Id. at 1031 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v.
4 Catrett, 477 U.S. 317 (1986)). In order to defeat a motion for summary judgment, the
5 nonmoving party must show specific facts demonstrating the existence of a genuine issue for
6 trial. See Boland v. Nevada Rock and Sand Co., 111 Nev. 608, 614, 894 P.2d 988, 990 (1995).

7 Summary judgment is appropriate where there is no legally sufficient evidentiary basis
8 for a reasonable jury to find for the nonmoving party. See Alberter v. McDonald's Corp., 70
9 F.Supp.2d 1138, 1141 (D.Nev. 1999). Conversely, if a reasonable jury could find for the non-
10 moving party, summary judgment is appropriate. See Borgerson v. Scanlon, 117 Nev. 216, 19
11 P.3d 236 (2001). To avoid summary judgment, **specific facts, rather than general allegations**
12 **and conclusions**, presenting a genuine issue of material fact **must be shown by competent**
13 **evidence** (emphasis added). Bird v. Casa Royale W., 97 Nev. 67, 624 P.2d 17 (1981).
14 Furthermore, when a motion for summary judgment is made and properly supported, the party
15 opposing the summary judgment may not rest on "mere allegations" of the pleadings, but must,
16 by affidavit or otherwise, establish through admissible evidence facts demonstrating the
17 existence of a genuine issue of material fact for trial. Id.

18 A party opposing a motion for summary judgment is not entitled to build a case on mere
19 gossamer threads of whimsy, speculation and conjecture. Collins v. Union Fed. Sav. & Loan
20 Ass'n., 99 Nev. 284, 302, 662 P.2d 610 (1983). Only material facts on genuine issues will
21 preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
22 (1986); Masonry and Tile Contractors Ass'n v. Jolley, 113 Nev. 737, 740, 941 P.2d 486 (1997).
23 Only disputes of material facts that could affect the outcome of the suit under the governing law
24 will properly preclude entry of summary judgment. Anderson, 477 U.S. at 247. Factual disputes
25 which are immaterial or unnecessary will not be considered. Finally, conclusory statements do
26 not create an issue of material fact. See Havas v. Long, 85 Nev. 260, 263, 454 P.2d 30 (1969).

27 ...

28 ...

1 a. **Summary Judgment on a Contract is Proper, Where Appellant**
2 **Submits No Competent Evidence that Raises Genuine Issue of**
3 **Fact.**

4 When the question before the trial court is the meaning or effect of a written instrument
5 between the parties, and the instrument is unambiguous, it speaks for itself and the "true intent"
6 of the parties cannot be said to constitute a "genuine" issue of fact. See Parman v. Petricciani, 70
7 Nev. 427, 272 P.2d 492 (1954). Rather, issues of unambiguous contractual construction present
8 questions of law for the court and are suitable for determination by summary judgment. See
9 Nelson v. Cal. State Auto. Ass'n Inter-Ins. Bureau, 114 Nev. 345, 956 P.2d 803 (1998);
10 Margrave v. Dermody Props., Inc., 110 Nev. 824, 878 P.2d 291 (1994); Ellison v. Cal. State
11 Auto Ass'n, 106 Nev. 601, 797 P.2d 975 (1990). When the questions before the trial court is the
12 meaning and effect of a written instrument between the parties, a construction by one party
13 which is unreasonable under all of the facts and circumstances of the case may be disregarded
14 and may not create a "genuine" issue of fact. If one construction is reasonable and the other
15 unreasonable, the trial court may enter summary judgment in favor of the reasonable
16 construction. See Parman v. Petricciani, 70 Nev. at 431-32, 272 P.2d at 494.

17 b. **Appellants Present No Genuine Issue of Material Fact**
18 **Regarding Guarantors' Waiver of One-Action Rule, and**
19 **Summary Judgment on Breach of Contract against Appellants**
20 **is Supported by the Record**

21 On de novo review, there is no new evidence before this Court that warrants overturning
22 the District Court's findings, because Appellants submit no competent evidence that rises to a
23 genuine issue of material fact that Appellants waived Nevada's One-Action Rule. Therefore, the
24 lower court properly allowed the commencement of an action by Kennedy before the foreclosure
25 of the Property.

26 Appellants failed to present specific facts below and again before this Court to defeat
27 summary judgment on the issue that the Settlement Agreement required the lower court to stay
28 the Guarantor Action against Appellants. Rather, Appellants impermissibly relied below and
again here upon general allegations and conclusions, presenting no competent evidence to create
a genuine issue of material fact, E.R. Tab 11, at 00235 - 00244, Respondent's Answering Brief,

1 which is contrary to this Court's well established ruling in *Bird v. Casa Royale W.*, 97 Nev. 67,
2 624 P.2d 17.

3 On appeal, Appellants still cannot defeat the Motion for Summary Judgment, because
4 Appellants offer only conclusory statements based upon the record below that do not create an
5 issue of material fact relating to the scope of the Settlement Agreement filed before the
6 Bankruptcy Court. Appellants present no competent evidence to overcome the language of the
7 Settlement Agreement when read as a whole.

8 There is no genuine issue of material fact set forth in the Opposition reviewed by the
9 Court below that Appellants waived the One-Action Rule. Thus, this Court should affirm the
10 lower court's Order granting Kennedy's Motion for Summary Judgment.

11 There is no genuine issue of material fact that the Appellants executed the Guaranties,
12 and that Sections 2 and 4(g) of the Guaranties contain the express waiver of the One-Action
13 Rule. There is no genuine issue of material fact that at the time Kennedy commenced the action
14 against the Guarantors that the Borrower had filed for bankruptcy relief under Chapter 11 of the
15 Bankruptcy Code. There is also no genuine issue of material fact that Section 1.01(g) of the
16 Settlement Agreement does not operate to extend the automatic stay to the Guarantors.

17
18 Under NRS 40.430(4)(i), Secured Creditor May Pursue Guarantors before
Foreclosure if Borrower is in Bankruptcy

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

21 [T]here may be but one action for the recovery of any debt, or for
22 the enforcement of any right secured by a mortgage or other lien
23 upon real estate. That action must be in accordance with the
24 provisions of this section and NRS 40.433 to 40.459, inclusive. In
25 that action, the judgment must be rendered for the amount found
due the plaintiff, and the court, by its decree or judgment, may
direct a sale of the encumbered property, or such part thereof as is
necessary, and apply the proceeds of the sale as provided in NRS
40.462.

26 Nevada's One-Action Rule, NRS 40.430(1), applies to guarantors or surety of a debt
27 secured by an interest in real property, requiring that a creditor must seek recovery against the
28 property through judicial foreclosure before recovering from the guarantor personally. See

1 McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC, 121 Nev. Adv. Op. 79, at 3, 123
2 P.3d 748, 750 (2005) (per curiam). The purpose of this Rule "is to compel one who has taken a
3 special lien to secure his debt to exhaust the secured property before having recourse to the
4 general assets of the debtor." See U.S. v. Cail, 746 F.Supp. 1035, 1038 (Dist. Nev. 1990) (citing
5 McMillan v. United Mortgage Co., 84 Nev. 99, 101-02, 437 P.2d 878 (1968)).

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

14 The commencement of an action against the guarantor after the borrower files for
15 bankruptcy does not constitute an "action" under the One-Action Rule. Thus, there is no genuine
16 issue of material fact that Appellants' waiver of the One-Action Rule under their Guaranty
17 permits the entry of a judgment against the Guarantors arising from the Guarantor Action. Thus,
18 the lower court did not err in the entry of the judgment in light of the Guarantors' waiver of the
19 One-Action Rule. E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening
20 Brief.

21
22 **Under NRS 40.495, Secured Creditor May Pursue Guarantors Before
Foreclosure if Guarantor Waives One-Action Rule.**

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

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

1 secured by a mortgage or lien upon real property may be
2 maintained separately and independently from:

3 (a) An action on the debt;

4 (b) The exercise of any power of sale;

5 (c) Any action to foreclose or otherwise enforce a mortgage or
6 lien and the indebtedness or obligations secured thereby; and

7 (d) Any other proceeding against a mortgagor or grantor of a
8 deed of trust.

9 The Guaranty falls within the ambit of the exceptions of the One-Action Rule because the
10 waiver language contained in Sections 2 and 4 of the Guaranty uses the key words as set forth
11 under NRS 40.495(2), resulting in the waiver of the One-Action Rule. Namely, under Section 2,
12 the Defendant Guarantors expressly agreed that Kennedy did not have to bring an action against
13 the Borrower or the Property before suing the Guarantors. See Guaranty, p. 1, ¶ 2. E.R.
Appendix 3 at 111-121/KF00139-KF00149, Appellants' Opening Brief.

14 As for the waiver under Section 4 of the Guaranty, the Guarantors expressly waived any
15 defense based upon Kennedy's failure to commence an action against the Borrower, or to
16 proceed against or exhaust any security held by Lender at any time, in this case the Property. See
17 Guaranty, p. 3, ¶ 4(g). E.R. Appendix 3 at 111-121/KF00139-KF00149, Appellants' Opening
18 Brief. Both before the lower court and again in this appeal, Appellants wholly disregard the
19 express exclusion in the One-Action Rule provided under NRS 40.430(4)(i), which allows
20 lenders to pursue guarantors, such as Appellants, upon the Borrower's bankruptcy filing.

21 Due to the procedural posture of the case at the time the hearing on the Motion for
22 Summary Judgment was heard by the lower court, the defenses under the anti-deficiency statute
23 afforded under NRS 40.495(3)³ are inapplicable, because there was no foreclosure pending at the
24 time of the proceedings before the lower court. At the time the Motion for Summary Judgment
25 was before the lower court, the Borrower had already filed for Bankruptcy on December 26,

26
27 ³ Subsection 3 provides that "If the obligee maintains an action to foreclose or otherwise enforce a mortgage or lien
28 and the indebtedness or obligations secured thereby, the guarantor, surety or other obligor may assert any legal or
equitable defenses provided pursuant to the provisions of NRS 40.451 to NRS 40.463, inclusive."

1 2008. Kennedy commenced the action that is the subject of this appeal, against the Guarantors
2 on February 13, 2009, after the bankruptcy case was filed and in compliance with the exclusion
3 to the One-Action Rule. Under the Guaranty, the Guarantors expressly waived any defense
4 based upon Kennedy's failure to first commence an action against the Borrower, or to proceed
5 against or exhaust any security held by Lender at any time. E.R. Appendix 3 at 111 --
6 149/KF00139 – KF00149, Appellants' Opening Brief.

7 Because of the timing of the bankruptcy filing and the waiver of the One-Action Rule, the
8 lower court did not err in proceeding with the hearing on the Motion for Summary Judgment,
9 because NRS 40.495(3) was not triggered, as there was no foreclosure. The lower court
10 contemplated the timing issues relating to the commencement of the Guarantor Action under the
11 waiver of the One-Action Rule, and the future foreclosure or sale of the Property, as evidenced in
12 the Judgment that is the subject of this appeal. The Judgment ensures that Kennedy does not
13 recover a windfall, in that it provides that the proceeds of the sale or refinance of the Property are
14 to be deducted from the judgment amount and accruing interest entered against the Guarantors.
15 See Judgment, p. 2, ll. 22-25. E.R. Tab 7 at 00217 - 00225, Respondent's Answering Brief.
16 Thus, the District Court's finding of summary judgment in favor of Kennedy should be affirmed.

17 **4. There is No Genuine Issue of Material Fact that the Settlement Agreement**
18 **Filed in the Bankruptcy Court Does Not Operate to Stay the Guarantor**
Action.

19 The lower court properly found that there is no genuine issue of material fact regarding
20 the applicability of the stay under Section 362 Settlement Agreement to the Appellants. First,
21 the Settlement Agreement makes express reference to the Guarantor Action pending before this
22 Court and makes clear that the Settlement Agreement approved by the Bankruptcy Court in no
23 way precludes Kennedy from continuing to pursue its State Court Action against the Defendant
24 Guarantors. The Settlement Agreement expressly stayed Kennedy's foreclosure of the Property
25 for six (6) months, and does not purport to stay any actions, including the Guarantor Action, for
26 any period of time. See Settlement Agreement, Sections 1.01(f) & (g), E.R. Appendix 5 at 209-
27 212, Appellants' Opening Brief.

1 The timing of the Settlement Agreement is also telling. At the time the Debtor Borrower
2 and Kennedy entered into the Settlement Agreement in August 2009, Kennedy had already
3 commenced the action against the Guarantors six (6) months prior. The Debtor Borrower and
4 Kennedy, the only parties to the Settlement Agreement, agreed that the Settlement Agreement
5 would have no impact on the continuation of the Guarantor Action. See Settlement Agreement,
6 p. 3, Section 1.01(g), E.R. Appendix 5 at 209-212, Appellants' Opening Brief (stating that "[t]he
7 Parties agree that this Settlement Agreement shall not preclude, limit or abridge Kennedy
8 Funding's rights to pursue any deficiency actions against the Guarantors of Debtor's obligations
9 owing to Kennedy Funding.").

10 Secondly, Appellants were not a party to the Settlement Agreement filed in the
11 Bankruptcy Court, see Settlement Agreement, E.R. Appendix 5 at 209-212, Appellants' Opening
12 Brief, and, therefore, there is no privity of contract between the Guarantors and Kennedy as to
13 the stay protection afforded exclusively to the Debtor under Section 362 of the Bankruptcy Code.
14 Third, the Borrower Debtor and Kennedy were the only parties to the Settlement Agreement,
15 and, thus, the Bankruptcy Court lacked jurisdiction regarding applicability of the bankruptcy stay
16 over the non-debtor guarantors as it relates to the Guarantor Action.

17 Fourth, Appellants espouse a hyper-technical reading of the Settlement Agreement
18 focusing on two words of the Settlement Agreement, namely "deficiency action", instead of
19 reading the Settlement Agreement as a whole. Appellants' reading is inconsistent with the rest
20 of the Settlement Agreement, namely Section 1.01(f), which provides that under Section 362 of
21 the Bankruptcy Code, the parties agreed that automatic stay of the foreclosure would be extended
22 six (6) months by agreement of the parties. The stay of the foreclosure under the Settlement
23 Agreement by necessity precludes a deficiency from arising. Thus, the use of the term
24 "deficiency action" was used to refer to the Guarantor Action, and was not a label for the nature
25 of the underlying Guarantor Action as defined under Chapter 40 of the Nevada Revised Statutes.
26 The terms "deficiency action", "collection action" and "guarantor action" all relate to the
27 underlying State Court action against the Guarantors, none of which are defined terms that would
28 bind Kennedy to a legal meaning under Chapter 40 of the Nevada Revised Statutes.

1 Regardless of the characterization of the action pending against the Guarantors before the
2 District Court as the "deficiency action", when the Settlement Agreement is read as a whole,
3 Section 1.01(g), when read in conjunction with Section 1.01(f), operates to ensure the action
4 against the Guarantors would not be stayed as a result of the Settlement Agreement in the
5 Bankruptcy. Appellants fail to meet their burden that there is genuine issue of material fact
6 regarding the meaning of the Settlement Agreement. Accordingly, the lower court properly
7 granted Kennedy's Motion for Summary Judgment and did not err in finding that the State Court
8 Action against the Guarantors was not stayed under Section 1.01(g) of the Settlement
9 Agreement.

10 E. CONCLUSION

11 The District Court's Order and Judgment should be affirmed.

12 DATED this 2nd day of September, 2010.

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

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16 400 South Fourth Street, Third Floor
17 Las Vegas, Nevada 89101
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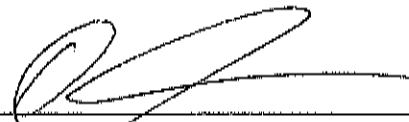
20 *Attorneys for Respondent Kennedy Funding, Inc.*

III. CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of September, 2010.

SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON



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Nevada Bar No. 7589
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Las Vegas, Nevada 89101
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Facsimile: (702) 791-1912

Attorneys for Respondents

CERTIFICATE OF MAILING

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

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



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

EXHIBIT “C”

Receipt/Conformed Copy

Requestor:

NEVADA TITLE COMPANY

06/15/2006 14:05:45 T20060106320

Book/Instr: 20060615-0005324

Trust Deed Page Count: 53

Fees: \$65.00 N/C Fee: \$0.00

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

006-06-0235-BB

WHEN RECORDED, RETURN TO:

Cole, Schotz, Meisel, Forman & Leonard, P.A.
Court Plaza North
25 Main Street
P.O. Box 800
Hackensack, New Jersey 07602-0800
Attention: Michael R. Leighton, Esq.

Frances Deane
Clark County Recorder

**DEED OF TRUST WITH SECURITY
AGREEMENT, FINANCING STATEMENT FOR FIXTURE
FILING AND ASSIGNMENT OF RENTS**

THIS DEED OF TRUST, made as of the 15th day of June, 2006, by ONECAP PARTNERS 2, LLC, a Nevada limited liability company, having an address at 5440 W. Sahara Avenue, Third Floor, Las Vegas, Nevada 89146 ("Trustor"), in consideration of the debt and trust hereinafter mentioned does hereby GRANT, BARGAIN, SELL, TRANSFER, ASSIGN and CONVEY and WARRANT in trust unto NEVADA TITLE COMPANY, Trustee (as hereinafter defined), with Power of Sale, located at 2500 N. Buffalo Drive, Suite 150, Las Vegas Nevada 89128, the following described property (all of which is sometimes referred to collectively herein as the "Property") for the benefit of KENNEDY FUNDING, INC., a New Jersey corporation, having an office at Two University Plaza, Hackensack, New Jersey 07601, and their respective successors and assigns, as agent for the lenders identified in the Note defined hereinbelow, in each case having an address in care of the above identified agent (all such lenders being collectively referred to herein as "Beneficiary"):

(i) the real property situated in the County of Clark, State of Nevada (the "State"), which is more particularly described in Exhibit A attached hereto and made a part hereof for all purposes the same as if set forth herein verbatim, together with all right, title and interest Trustor may have or acquire in and to (a) all streets, roads, alleys, easements, rights-of-way, licenses, rights of ingress and egress, vehicle parking rights and public places, existing or proposed, abutting, adjacent, used in connection with or pertaining to the real property or the Improvements (as hereinafter defined); (b) any strips or gores between the real property and abutting or adjacent properties; and (c) all water and water rights, timber, crops and mineral interests pertaining to the real property (such real estate and other rights, titles and interests being hereinafter sometimes called the "Land");

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(ii) all buildings, structures and other improvements (such buildings, structures and other improvements being hereinafter sometimes called the "Improvements") now or hereafter situated on the Land;

(iii) all fixtures, systems, and articles of personal property, of every kind and character, now owned or hereafter acquired by Trustor (Trustor's successors or assigns), which are now or hereafter attached to the Land or the Improvements, or used in or necessary to the complete and proper planning, development, use, occupancy or operation thereof, or acquired (whether delivered to the Land or stored elsewhere) for use or installation in or on the Land or the Improvements, and all renewals and replacements of, substitutions for and additions to the foregoing, including, but without limiting the foregoing, all of the following items now owned or hereafter acquired by Trustor, any and all fixtures, systems, heating, ventilating, air conditioning, refrigerating, plumbing, sewer, lighting, generating, cleaning, storage, incinerating, waste disposal, sprinkler, fire extinguishing, communications, transportation (of people or things, including, but not limited to, stairways, elevators, escalators and conveyors), data processing, security and alarm, laundry, food or drink preparation, storage or serving, gas, electrical and electronic, water, and recreational uses or purposes; all tanks, pipes, wiring, conduits, ducts, doors, partitions, rugs and other floor coverings, wall coverings, windows, drapes, window screens and shades, awnings, fans, motors, engines and boilers; decorative items and art objects; and files, records and books of account (all of which are herein sometimes referred to together as the "Accessories");

(iv) all (a) plans and specifications for the Improvements; (b) contracts relating to the Land or the Improvements or the Accessories or any part thereof; (c) deposits including, but not limited to, Trustor's rights in tenants' security deposits (if any), deposits with respect to utility services to the Land or the Improvements or the Accessories or any part thereof, and any deposits or reserves hereunder or under any other Loan Document (as hereinafter defined) for taxes, insurance or otherwise, funds, accounts, contract rights, instruments, documents, commitments, general intangibles, notes and chattel paper used in connection with or arising from or by virtue of any transactions related to the Land or the Improvements or the Accessories or any part thereof; (d) permits, licenses, franchises, certificates and other rights and privileges obtained in connection with the Land or the Improvements or the Accessories or any part thereof; (e) leases, rents, royalties, bonuses, issues, profits, revenues and other benefits of the Land, the Improvements and the Accessories; and (f) other properties, rights, titles and interests, if any, specified in any Section or any Article of this Deed of Trust as being part of the Property;

(v) all proceeds, products, consideration, compensation and recoveries, direct or consequential, cash and noncash, of or arising from, as the case may be, (a) the properties, rights, titles and interests referred to above in paragraphs (i), (ii), (iii) and (iv); (b) any sale, lease or other disposition thereof, subject, however, to paragraph 2.20(d)

hereof; (c) each policy of insurance relating thereto (including premium refunds); (d) the taking thereof or of any rights appurtenant thereto by eminent domain or sale in lieu thereof for public or quasi-public use under any law; and (e) any damage thereto whether caused by such a taking (including change of grade of streets, curb cuts or other rights of access) or otherwise caused; and

(vi) other interests of every kind and character, and proceeds thereof, which Trustor now has or hereafter acquires in, to or for the benefit of the properties, rights, titles and interests referred to above in paragraphs (i), (ii), (iii), (iv), and (v) and all property used or useful in connection therewith, including, but not limited to, remainders, reversions and reversionary rights or interests.

TO HAVE AND TO HOLD the Property, unto Trustee and Trustee's successors, substitutes or assigns, in trust and for the uses and purposes herein set forth, forever, together with all rights, privileges, hereditaments and appurtenances in anywise appertaining or belonging thereto, subject only to the Permitted Exceptions (herein so called) listed on Exhibit B attached hereto to the extent that the same are valid, subsisting and affect the Property), and Trustor, for Trustor and Trustor's successors, hereby agrees to warrant and forever defend, all and singular, the Property unto Trustee and Trustee's successors or substitutes in this trust against the claim or claims of all persons claiming or to claim the same or any part thereof, subject, however, as aforesaid.

ARTICLE I THE OBLIGATION

Section 1.01. Deed of Trust. The expression "this Deed of Trust," as used herein, shall mean this Deed of Trust, With Security Agreement and Financing Statement for Fixture Filing and Assignment of Rents, and all rights, title, interest, liens, security interests, powers and privileges created hereby or arising by virtue hereof. This Deed of Trust is given to secure payment and performance of the Obligation (as hereinafter defined), including the indebtedness described in Section 1.2.

Section 1.02. Obligation. The word "Obligation," as used herein, shall mean all of the indebtedness, obligations and liabilities described as follows:

(a) the indebtedness, obligations and liabilities of the Trustor arising under that certain Promissory Note of even date herewith ("Note") in the principal amount of TWELVE MILLION and 00/100 (\$12,000,000.00) DOLLARS, executed by Trustor (sometimes also hereinafter referred to as "Borrower") and payable to Beneficiary, evidencing a loan in that principal amount (the "Loan") that Beneficiary has made to Trustor, bearing interest as therein specified, containing an attorneys' fee clause, interest and principal being payable as therein specified, or arising under this Deed of Trust or under any document identified in the Schedule of Principal Loan Documents annexed

hereto or under any other documents evidencing, securing or now or hereafter executed in connection with the Loan (each a "Loan Document," collectively, "Loan Documents");

(b) all other and additional indebtedness, liabilities and obligations, of every kind and character, of Trustor now or hereafter existing in favor of Beneficiary, regardless of whether they are direct, indirect, primary, secondary, joint, several, joint and several, liquidated, unliquidated, fixed or contingent, and regardless of whether the same may, prior to their acquisition by Beneficiary, be or have been payable to some other person or entity, it being the intention and contemplation of Trustor and Beneficiary that future advances may be made to Trustor by Beneficiary for a variety of purposes, that Trustor may guarantee the obligations of others to Beneficiary, and that Beneficiary may, from time to time, acquire from others obligations of Trustor to such others, or that Trustor may otherwise hereafter be or become further indebted to Beneficiary, and that payment and repayment of all of the foregoing are intended to and shall be part of the indebtedness secured hereby up to a principal amount of TWELVE MILLION and 00/100 DOLLARS (\$12,000,000). Trustor grants to Beneficiary the right to record notice that this Deed of Trust is security for additional amounts and obligations not specifically mentioned herein but that constitute indebtedness or obligations of the Trustor for which Beneficiary may claim this Deed of Trust as security. This provision is to be governed by NRS 106.300 to 106.400 as amended or supplemented; and

(c) any and all renewals, replacements, modifications, rearrangements, amendments or extensions of all or any part of the indebtedness, obligations and liabilities described or referred to in Subsections 1.2(a) and 1.2(b) preceding.

Trustor, and each party at any time claiming an interest in or lien or encumbrance against the Property, agrees that all advances made by Beneficiary from time to time under any of the Loan Documents, and all other portions of the Obligation herein referred to, shall be secured by this Deed of Trust with priority as if all of the same had been advanced, had arisen or become owing or performable on the date of this Deed of Trust, no reduction of the outstanding principal balance under the Loan Agreement shall extinguish, release or subordinate any rights, titles, interests, liens, security interests, powers or privileges intended, created or arising hereunder or under any other Loan Document, and this Deed of Trust shall remain in full force and effect as to any subsequent advances or subsequently arising portions of the Obligation without loss of priority until the Obligation is fully paid, performed and satisfied, all agreements and obligations, if any, of Beneficiary for further advances have been terminated and this Deed of Trust has been released of record by Beneficiary.

ARTICLE II
CERTAIN REPRESENTATIONS, WARRANTIES
AND COVENANTS OF TRUSTOR

Section 2.01. Payment and Performance of Obligations. The Trustor shall pay and perform the Obligations when due in accordance with the provisions of the Loan Documents; and if any Default (hereinafter defined) shall be made in the performance of any of the Obligations, the Beneficiary shall have the remedies granted to the Beneficiary under the Loan Documents and under applicable law.

Section 2.02. Indebtedness Secured. This Deed of Trust has been given and is intended to secure the full and prompt payment and performance of each and all of the Obligations. This Deed of Trust shall remain in full force and effect with respect to all of the Property until all the Obligations shall have been paid and performed in full. If the Trustor shall well and truly pay and perform the Obligations at the time and times, and in the manner mentioned in the Loan Documents and shall well and truly abide by and comply with each and every term, covenant and condition set forth in the Loan Documents, then this conveyance shall be and become null and void and shall be released and reconveyed at the expense of the Trustor but if there shall be any Default, then the Obligations shall become immediately due and payable at the option of the Beneficiary, without any notice to Trustor or any other party (other than notice of intention to accelerate as set forth in the Note), all of which notices of Default, intent to accelerate or acceleration hereby are waived.

Section 2.03. Title to Property.

(a) The Trustor represents and warrants that: (i) it has an indefeasible estate in fee simple in the Land and Improvements and Accessories (subject to the Permitted Exceptions); (ii) it has the good and unrestricted right, full power and lawful authority to mortgage the Property; (iii) it has obtained any and all consents and approvals necessary or required for the making of this Deed of Trust; and (iv) the making of this Deed of Trust will not violate any contract or agreement to which the Trustor is a party.

(b) The Trustor does hereby and shall forever warrant and defend its title to and fee simple interest in the Property (subject to the Permitted Exceptions) and the validity and priority of the lien of this Deed of Trust to the Beneficiary and its successors and assigns, against all claims and demands whatsoever of any Person (hereinafter defined). There are no defenses or offsets to this Deed of Trust or to any of the Obligations as of the date hereof.

(c) The Trustor represents and warrants to the Beneficiary that any building hereafter constructed on the Land (while such Land is owned by Trustor and remains subject to this Deed of Trust) shall be in compliance with all applicable zoning and

building codes, ordinances and regulations, shall lie wholly within the boundaries of the Land, and shall be an independent and self-contained operating unit:

(d) The Trustor shall execute, acknowledge and deliver to the Beneficiary any documents and instruments which the Beneficiary may reasonably request from time to time for the better assuring, conveying, assigning, transferring, confirming or perfecting the Beneficiary's security and rights under this Deed of Trust.

Section 2.04. Liens. The Trustor shall not, directly or indirectly, create or suffer or permit to be created, or to stand, against the Property or any portion thereof, or against the rents, issues and profits therefrom, any lien, charge, mortgage, deed of trust, adverse claim or other encumbrance (herein collectively referred to as a "lien"), whether senior or junior in lien to this Deed of Trust, other than the lien of this Deed of Trust and the Permitted Exceptions; provided, however, that nothing contained in this Paragraph 2.04 shall require the Trustor to pay any real estate taxes or other Impositions (as hereinafter defined) prior to the time when same are required to be paid under this Deed of Trust. The Trustor will keep and maintain the Property free from all liens arising in connection with the supply of labor or materials relating to the construction, alteration, modification or repair of the Improvements or the Property. The Trustor agrees to discharge the same of record by payment or bond within thirty (30) days after the filing thereof. Notwithstanding anything to the contrary contained herein, in no event shall the Trustor do or permit to be done, or omit to do or permit the omission of, any act or thing, where such act or omission would impair the security of this Deed of Trust.

Section 2.05. Impositions. The Trustor shall pay, at least five days before the date due, all real estate taxes, personal property taxes, assessments, water and sewer rates and charges, license fees, all charges which may be imposed for the use of vaults, chutes, areas and other space beyond the lot line and abutting the public sidewalks in front of or adjoining the Land, and all other governmental levies and charges (collectively, the "Impositions"), of every kind and nature whatsoever, general and special, ordinary and extraordinary, foreseen and unforeseen, which shall be assessed, levied, confirmed, imposed or become a lien upon or against the Property or any part thereof, or which shall become payable with respect thereto. The Trustor shall deliver to the Beneficiary, within twenty (20) days after the due date of each payment in connection with the Impositions or any assessment for local improvements ("Assessment"), the original or a true photostatic copy of the official receipt evidencing such payment or other proof of payment satisfactory to the Beneficiary.

Section 2.06. Insurance.

(a) The Trustor shall provide, at its sole cost and expense, and keep in force for the benefit of itself and the Beneficiary, with respect to the Land, Improvements and Accessories: (i) comprehensive general liability insurance against claims for bodily injury, death or property damage; (ii) workers' compensation insurance as required by

law; and (iii) special form property insurance (including loss of rents for a minimum period of one year) and endorsements for coverages for flood, earthquake, windstorm, earth movement, sinkholes, demolition, increased cost of construction and contingent operation of building laws coverages, on a replacement cost basis to cover the full insurable value of the Improvements, Accessories and other insurable improvements; and (iv) such other insurance with respect to the Property or any part thereof or any replacements or substitutions therefor, as the Beneficiary may reasonably require.

(b) The policies of insurance required by Subparagraph 2.06(a) hereof shall be with companies, in forms and amounts, and for such reasonable periods as the Beneficiary shall require from time to time, and shall insure the respective interests of the Trustor and the Beneficiary. The full amount of the proceeds of any insurance covering real property or tangible personal property subject to a lien or security interest in favor of the Beneficiary granted pursuant to any of the Loan Documents in the case of each separate loss in excess of \$10,000 (a "Major Loss") required under clause (iii) of Subparagraph 2.06(a) hereof, shall be payable to the Beneficiary pursuant to a non-contributing loss payee endorsement satisfactory to the Beneficiary. Certificates of Insurance and true photocopies of the original policies and renewals thereof covering the risks required to be insured against in accordance with this Deed of Trust, bearing satisfactory evidence of payment of all premiums thereon for the succeeding one year period, shall be delivered to and held by the Beneficiary, and within five (5) days of demand by the Beneficiary the Trustor shall deliver to the Beneficiary the original policies and renewals, replacements or endorsements thereof and shall assign to the Beneficiary said policies of insurance as additional security for the indebtedness and other obligations secured hereby. At least twenty (20) days prior to the expiration of each policy required to be provided by the Trustor, the Trustor shall deliver Certificates of Insurance evidencing renewal or replacement thereof along with true photocopies of any endorsements or any renewal or replacement policies to the Beneficiary with satisfactory evidence of payment of all premiums thereon.

(c) All insurance policies required in accordance with this Deed of Trust shall: (1) include effective waivers by the insurer of all rights of subrogation against the Trustor, the Beneficiary, any lessee or other occupant of all or any part of the Property, or any other Person which controls, is controlled by or is under common control with any of the foregoing; (2) provide that the full amount of the proceeds of such insurance (other than the proceeds from the insurance required under clause (iii) of Subparagraph 2.06(a) hereof) shall, in the case of each separate Major Loss, be payable notwithstanding: (A) any act, failure to act or negligence of or violation of warranties, declarations or conditions contained in such policy by any named insured; (B) the occupation or use of the Improvements or the Land for purposes more hazardous than permitted by the terms thereof; (C) any foreclosure or other action or proceeding taken by the Beneficiary pursuant to any provision of this Deed of Trust; or (D) any change in title to or ownership of the Property; (3) provide that no cancellation, reduction in amount or material change

in coverage thereof shall be effective until at least thirty (30) days after receipt by the Beneficiary of written notice thereof, and (4) be reasonably satisfactory to the Beneficiary in all other respects. The Trustor shall not permit any condition to exist with respect to the Property which would wholly or partially invalidate any of the insurance thereon.

(d) The Beneficiary shall have the right but not the obligation, on behalf of the Trustor, to adjust and compromise any claims under such insurance in the case of a Major Loss, collect and receive the proceeds thereof and execute and deliver all proofs of loss, receipts, vouchers, checks, drafts, releases and other documents in connection with such claims. The Beneficiary is hereby irrevocably appointed attorney-in-fact for the Trustor (which appointment is coupled with an interest) for such purposes, and the Trustor shall, upon request of the Beneficiary, promptly execute any proofs of loss, receipts, vouchers, checks, drafts, releases, and other documents in connection with such claims.

(e) The Beneficiary may deduct from the proceeds of the insurance required to be obtained by the Trustor pursuant to Subparagraph 2.06(a) hereof, other than the insurance required under clauses (i) and (ii) thereof, any expenses (including, without limitation, reasonable attorneys' fees and disbursements) incurred by it in connection with obtaining such proceeds, and the Beneficiary may, at its option, release the balance of such proceeds to the Trustor for the restoration of the Property ("Restoration") or apply the balance of such proceeds in reduction or satisfaction of all or part of the Obligations, whether or not then due and payable (in such order of priority as is stipulated in the Note). Upon the occurrence of any Default all of the Trustor's right, title and interest in and to all such policies, including unearned premiums thereon, shall be deemed assigned to the Beneficiary. The application of such insurance proceeds toward the payment or performance of the Obligations shall not be deemed a waiver by the Beneficiary of its right to receive payment or performance of the remainder of the Obligations and the interest thereon in accordance with the provisions of the Loan Documents.

(f) In the event of a sale, transfer or other disposition by the Beneficiary of any of the property of the Trustor, the purchaser, assignee or transferee of such property shall succeed to all of the rights of the Trustor, including any right to unearned premiums, in and to all policies of insurance which the Trustor is required to maintain under this Paragraph 2.06 and to all proceeds of such insurance.

(g) The Trustor's policies of insurance may be maintained under "blanket policies" insuring the Property and other property owned by the Trustor, provided that such blanket policies shall: (i) separately set forth the amount of the insurance applicable to the Property (except as to the insurance required under clauses (i) and (ii) of Subparagraph 2.06(a) hereof), (ii) otherwise comply with the provisions of this Paragraph 2.06, and (iii) afford the same protection to the Beneficiary as, in the

Beneficiary's judgment, would be provided by policies individually applicable to the Property.

(h) Trustor shall not obtain or permit to be obtained separate insurance concurrent in form or contributing in the event of loss with the insurance the Trustor is required to maintain under the provisions of this Paragraph 2.06.

Section 2.07. Condemnation.

(a) The Trustor shall give notice to the Beneficiary immediately upon the Trustor's learning of the commencement of any action or proceeding to take all or any part of the Property by exercise of the right of condemnation or eminent domain or of any action or proceeding to close or to alter the grade of any street on or adjoining the Land. The Beneficiary may participate together with the Trustor in any such actions or proceedings in the name of the Beneficiary or, whenever necessary, in the name of the Trustor, and the Trustor shall deliver to the Beneficiary such instruments as the Beneficiary shall request to permit such participation. The Trustor shall not settle any such action or proceeding or agree to accept any award or payment without the prior consent of the Beneficiary (which consent Beneficiary may deny in its sole discretion), and the total of all awards made or allowed with respect to all right, title and interest in and to the Property or the portion or portions thereof taken or affected by such condemnation or eminent domain proceeding and any interest thereon (hereinafter collectively called the "Award") is hereby assigned to and shall be paid to the Beneficiary and the amount received shall be retained and applied as provided in Subparagraph 2.07(b) hereof.

(b) The Obligations may be accelerated at the option of the Beneficiary after giving notice of intention to accelerate as set forth in the Note as a result of the exercise of the right of condemnation or eminent domain (sometimes hereinafter referred to as a "Taking"): (I) in respect of any part of the Property that causes any of the results described in the next sentence hereof or (II) in respect of all of the Property. With respect to a partial Taking, the right of acceleration described in the preceding sentence shall be applicable if as a result of such partial Taking so much of the balance of the Property is taken as will, in the Beneficiary's reasonable opinion, materially and adversely affect the extent to which the Collateral (defined in the Loan Agreement) secures the Obligations, in which event the Beneficiary shall retain and apply the Award toward payment and performance of the Obligations (in such order of priority as is stipulated in the Note); provided, however, that to the extent that the net amount of the Award actually received by the Beneficiary shall exceed the amount required to satisfy in full the then total amount of the Obligations, the Beneficiary shall pay over to the Trustor the amount of such excess and provided, further, that until Beneficiary actually receives payment of the net amount of the Award in an amount equal to the then total amount of the Obligations, the Obligations shall continue unimpaired. If there is a Taking of a portion of the Property in any such proceeding and the Beneficiary does not accelerate the Obligations,

then at the option of the Beneficiary, the Award shall be: (i) retained and applied by the Beneficiary toward the payment of the Obligations in such order of priority as is stipulated in the Note; or (ii) disbursed by the Beneficiary, in accordance with the Project Completion Reserve disbursement provisions set forth in the Loan Agreement, to pay the cost to restore any Improvements existing on the portion of the Property not Taken as nearly as practicable to the condition that existed prior to such Taking. In no event shall the Beneficiary be required to discharge this Deed of Trust and reconvey the Property until the Obligations are fully paid and the Beneficiary shall not be required to release from the lien of this Deed of Trust until the Obligations are fully paid any portion of the Property so Taken until the Beneficiary receives the entire amount of Award for the portion so Taken.

(c) The application of the Award toward payment of the Obligations or restoration of Improvements shall not be deemed a waiver by the Beneficiary of its right to receive payment or performance of the balance of the Obligations in accordance with the provisions of the Loan Documents. The Beneficiary shall have the right, but shall be under no obligation, to question the amount of the Award, and the Beneficiary may accept same without prejudice to the rights that the Beneficiary may have to question such amount. In any such condemnation or eminent domain action or proceeding the Beneficiary may be represented by attorneys selected by the Beneficiary, and all sums paid by the Beneficiary in connection with such action or proceeding (including, without limitation, reasonable attorneys' fees and disbursements) shall, on demand, be immediately due from the Trustor to the Beneficiary and the same shall be added to the Obligations and shall be secured by this Deed of Trust.

(d) Notwithstanding any Taking by condemnation or eminent domain, closing of, or alteration of the grade of, any street or other injury to or decrease in value of the Property by any public or quasi-public authority or corporation, the Obligations shall continue to bear interest at the rate payable pursuant to the Note until the Award shall have been actually received by the Beneficiary, and any reduction in the Obligations resulting from the application by the Beneficiary of the Award shall be deemed to take effect only on the date of such receipt.

Section 2.08. Restoration. If: (a) the Property includes Improvements or Accessories (whether now existing or hereafter made), and such Improvements or Accessories shall be damaged or destroyed, in whole or in part, by fire or other casualty, or by any Taking in condemnation proceedings or the exercise of any right of eminent domain; and (b) the Beneficiary releases or agrees to release to the Trustor the proceeds of any insurance payable to the Beneficiary or the proceeds of the Award, less any expenses (including, without limitation, reasonable attorneys' fees and disbursements) incurred by the Beneficiary in obtaining same, and upon conditions satisfactory to the Beneficiary; then the Trustor shall promptly restore, replace or rebuild the same to as nearly as possible the value, quality and condition they were in immediately prior to such

fire or other casualty or Taking, with such alterations or changes as may be approved in writing by the Beneficiary. The Trustor shall give immediate notice to the Beneficiary of any damage or destruction to the Property by fire or other casualty.

Section 2.09. Deposits for Impositions and Insurance. Notwithstanding anything to the contrary contained in any of the Loan Documents, upon demand by the Beneficiary at any time and from time to time, the Trustor shall deposit with the Beneficiary on the first day of each month an amount equal to one twelfth (1/12th) of the sum of (collectively, the "Annual Payments"): (i) the aggregate annual payments for the Impositions; (ii) the annual insurance premiums on the policies of insurance required to be obtained and kept in force by the Trustor under this Deed of Trust; and (iii) all other periodic charges (other than interest and principal under the Note) arising out of the ownership of the Property or any portion thereof which are or with notice or the passage of time or both will become a lien against the Property or any part thereof. In addition, upon demand by the Beneficiary at any time and from time to time, the Trustor shall deposit with the Beneficiary such sum of money which, together with such monthly installments, shall be sufficient to pay all of the Annual Payments at least forty-five (45) days prior to the due date thereof. If the amount of any of the Annual Payments are not ascertainable at the time any deposit is required to be made, the deposit shall be made on the basis of the Beneficiary's estimate thereof, which the Beneficiary may change from time to time. The funds so deposited with the Beneficiary shall, provided that no Default shall have occurred under this Deed of Trust, be applied in payment of all of the Annual Payments when due to the extent that the Trustor shall have deposited funds with the Beneficiary for such purpose. In the event of any Default the funds deposited with the Beneficiary may, at the option of the Beneficiary, be retained and applied toward the payment of any or all of the Obligations, in such order of priority as is stipulated in the Note, but no such application shall be deemed to have been made by operation of law or otherwise until actually made by the Beneficiary. The whole of the Obligations shall become due and payable at the option of the Beneficiary after the giving of notice of intention to accelerate as set forth in the Note and the failure of the Trustor to deliver payment of any of such deposits or after the failure of the Trustor to deliver to the Beneficiary, within ten (10) days after request by the Beneficiary, a statement certified by an authorized officer of the Trustor, specifying the current amounts of all of the Annual Payments. At any time when deposits are required to be made under this Paragraph 2.09, the Trustor shall furnish the Beneficiary with a bill for each of the Annual Payments and/or such other documents necessary for their payment at least twenty (20) days prior to the date they first become due. Upon an assignment of this Deed of Trust, the Beneficiary shall have the right to pay over the balance of such deposits in its possession which have not been applied to the Obligations to the assignee, and thereupon the Beneficiary shall be completely released from all liability with respect to such deposits and the Trustor shall look solely to the assignee in reference thereto. The provisions of the preceding sentence shall apply to each and every assignment or transfer of such deposits to a new assignee.

Beneficiary agrees not to exercise its rights under this Section 2.09 provided that no Default has occurred and provided that Trustor has at all times fully, faithfully and timely complied with all of the provisions of Sections 2.05 and 2.06 of this Deed of Trust. Nothing contained herein shall be deemed to extend the Maturity Date for the Loan established in the Note.

Section 2.10. Maintenance and Alterations.

(a) If the Property includes Improvements and Accessories (whether now existing or hereafter made), the Trustor shall put, keep and maintain such Improvements and Accessories in the same or better order, condition and repair as they were in upon original installation, and the Trustor shall make or cause to be made, as and when the same shall become necessary, all structural and non-structural repairs, whether exterior or interior, ordinary or extraordinary, foreseen or unforeseen in a good and workmanlike manner. The Trustor shall not commit or suffer any waste or abandonment of the Land, the Improvements or Accessories, and shall not demolish or remove or permit the demolition or removal of the Improvements or Accessories, or any part thereof, without the prior written consent of the Beneficiary in each instance.

(b) The Trustor shall not make any alterations to all or any part of the Improvements or Accessories, or construct additions to all or any part of the Improvements or construct any new or additional buildings on the Property without the prior written consent of the Beneficiary in each instance, which consent shall not be unreasonably withheld or delayed, and then only upon terms and conditions satisfactory to the Beneficiary.

Section 2.11. Compliance with Laws.

(a) The Trustor shall promptly comply with, or cause to be complied with, all present and future laws, statutes, ordinances, rules, regulations and other requirements of all governmental authorities whatsoever having jurisdiction of or relating to all or any part of the Property and the sidewalks, curbs and alleys adjoining or abutting the Land, and the condition, repair, maintenance, use and occupation thereof if non-compliance therewith would result in imposition of any fine, penalty, lien or criminal liability on Trustor or the Property, or would result in commencement of proceedings for foreclosure or forfeiture of Trustor's interest in the Property; and the Trustor shall promptly make, or cause to be made, all changes, alterations and improvements to the Property necessary to comply with all such present and future laws, statutes, ordinances, rules, regulations and other requirements to the extent aforesaid. Except as otherwise set forth in the next sentence hereof, the Trustor shall not initiate, support, assist or acquiesce in any change in the zoning classification of the Property or any part thereof without the prior written consent of the Beneficiary.

(b) The Trustor shall promptly perform and observe, or cause to be performed and observed, all of the terms, covenants and conditions of all instruments of record affecting the Property, non-compliance with which may affect the security of this Deed of Trust, or shall impose any duty or obligation upon the Trustor, and the Trustor shall do or cause to be done all things necessary to preserve intact and unimpaired any and all easements, appurtenances and other interests and rights in favor, or of constituting any portion of, the Property.

(c) Notwithstanding anything to the contrary contained herein, the Trustor shall not use or permit the use of the Property in any manner which would impair or adversely affect the value or utility of the Property or increase the risk of fire or other casualty.

Section 2.12. Leasing.

(a) The Trustor shall not, without the prior written approval of the Beneficiary in each instance, which approval shall not be unreasonably withheld or delayed: (i) enter into or change, amend or modify, in any manner whatsoever, any Lease; (ii) terminate or cancel, or accept a surrender or suffer or permit any cancellation, termination or surrender of, any Lease, in any manner whatsoever or (iii) receive, collect or accept, or permit the receipt, collection or acceptance of, any prepayment of rent or other charges under any Lease for more than one month, except that the Trustor may, at the time of the execution of any Lease, accept rent security deposits, which shall be held by the Trustor in accordance with Subparagraph 2.12(b) hereof.

(b) The Trustor shall at all times fully and promptly comply with, keep and perform all of the terms, covenants, provisions and conditions of any and all Leases on the part of the landlord thereunder to be complied with, kept and performed, and will not do or permit anything to be done which will constitute a breach of any of the terms, covenants, provisions and conditions of any of such Leases. The Trustor shall enforce the performance and observance of each and every term, covenant, provision and condition of each and every Lease to be performed or observed on the part of the tenant thereunder. The Trustor shall give prompt notice to the Beneficiary of: (i) any notice received by the Trustor of any default by the landlord under any Lease; (ii) the commencement of any action or proceeding by any tenant the purpose of which shall be the cancellation of any Lease or a diminution or abatement of the rent payable thereunder; or (iii) the interposition by any tenant of any defense or counterclaim in any action or proceeding brought by the Trustor against such tenant; and the Trustor will cause a copy of any process, pleading or notice received or served by the Trustor in reference to any such action, defense or claim to be promptly delivered to the Beneficiary. The Trustor shall hold in trust all security deposits and advance rent given on account of any Lease, and deposit such security in a bank or trust company and shall not mingle such funds with other funds. The Trustor shall repay or apply such funds only in accordance with the provisions of the applicable Leases.

Section 2.13. Assignment of Rents. The Trustor hereby absolutely and unconditionally assigns to the Beneficiary the rents, issues and profits of the Property as further security for the payment and performance of the Obligations, and the Trustor grants to the Beneficiary the right to enter the Property for the purpose of collecting the same and to let the Property, or any part thereof, and to apply said rents, issues and profits, after payment of all necessary charges and expenses, on account of the Obligations. This assignment and grant shall continue in effect until the Obligations are fully paid and performed. The Beneficiary hereby waives the right to enter the Property for the purpose of collecting said rents, issues and profits, and the Trustor shall be entitled to collect, receive and use said rents, issues and profits, until the occurrence of a Default under this Deed of Trust. The Trustor shall, from time to time upon request by the Beneficiary, execute, acknowledge and deliver to the Beneficiary, in form satisfactory to the Beneficiary, separate assignments confirming the foregoing assignment. The Beneficiary shall not be obligated to perform or discharge any obligation or duty to be performed or discharged by the Trustor under any Lease or other agreement affecting all or any part of the Property, and the Trustor hereby agrees to indemnify the Beneficiary for and save it harmless from, any and all liability arising from any such Lease or other agreement or any assignments thereof, and no assignment of any such Lease or other agreement shall place the responsibility for the control, care, management or repair of all or any part of the Property upon the Beneficiary, nor make the Beneficiary liable for any negligence in the management, operation, upkeep, repair or control of all or any part of the Property resulting in injury, death or property damage. The Beneficiary or the receiver shall be liable to account only for rents and profits actually received by the Beneficiary or the receiver as the case may be. Concurrently herewith, Trustor has executed and delivered an Assignment of Leases and Rents in favor of Beneficiary, identified in the Schedule of Principal Loan Documents attached hereto, with respect to the Property. The terms of such Assignment of Leases and Rents shall control in the event of any conflict with the terms of this Paragraph 2.13.

Section 2.14. No Claims Against Beneficiary.

(a) Nothing contained in this Deed of Trust shall constitute any consent or request by the Beneficiary, express or implied, for the performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof, or be construed to permit the making of any claim against the Beneficiary in respect of labor or services or the furnishing of any materials or other property or any claim that any lien based on the performance of such labor or services or the furnishing of any such materials or other property is prior to the lien of this Deed of Trust.

(b) If the Trustor shall request the Beneficiary's approval or consent to any matter and the Beneficiary shall fail or refuse to give such consent or approval, the Trustor shall not be entitled to any damages for any withholding or delay of such

approval or consent by the Beneficiary, it being intended that the Trustor's sole remedy shall be an action for injunction or specific performance and that such remedy shall be available only in those cases where the Beneficiary shall have expressly agreed in writing not to unreasonably withhold its consent or approval or where as a matter of law the Beneficiary may not unreasonably withhold its consent or approval.

Section 2.15. Beneficiary's Right to Perform Trustor's Covenants.

(a) If the Trustor shall fail to fully and promptly pay, perform or observe any of the Obligations prior to the expiration of any applicable grace period, then, in any such event, the Beneficiary may, at its option, but without any obligation to do so, and without waiving or releasing the Trustor from any of the Obligations, pay any Obligation or cost or perform any Obligation or act or take such action as the Beneficiary deems necessary or desirable in order to cause such Obligation to be paid, performed or observed, as the case may be. The Trustor hereby expressly grants to the Beneficiary, and agrees that the Beneficiary shall have, the absolute and immediate right to enter in and upon the Property or any part thereof to such extent and as often as the Beneficiary, in its sole discretion, deems necessary or desirable for such purpose. The Beneficiary may pay and expend such sums of money as the Beneficiary, in its sole discretion, deems necessary or desirable for any such purpose, and the Trustor hereby agrees to pay to the Beneficiary, on demand, all such sums so paid or expended by the Beneficiary, together with interest thereon from the date of each such payment or expenditure at the Default Rate established in the Note (hereinafter, the "Default Rate"). Any interest which has been paid by the Trustor to the Beneficiary pursuant to this Paragraph 2.15 in excess of the maximum interest rate permitted by law shall be deemed payment in reduction of the principal amount of the Obligations. All sums paid or expended by the Beneficiary pursuant to this Paragraph 2.15, and the interest thereon, shall be added to and included in the Obligations and shall be secured by the lien of this Deed of Trust.

(b) The Trustor hereby irrevocably appoints the Beneficiary its true and lawful attorney-in-fact in its name or otherwise, to do any and all acts and to execute any and all documents which may be reasonably necessary or, in the opinion of the Beneficiary, desirable to preserve any rights of the Trustor in, to or under the Leases or to effectuate any rights of the Beneficiary under this Paragraph 2.15 or contained elsewhere in this Deed of Trust. The foregoing power of attorney is coupled with an interest.

Section 2.16. Certificates of Trustor. The Trustor, upon request of the Beneficiary, shall certify to the Beneficiary or to any proposed assignee of this Deed of Trust, by an instrument in form satisfactory to the Beneficiary, duly acknowledged, the amount then owing on the obligations, the date to which any interest thereon has been paid, and whether any offsets or defenses exist against payment thereof or performance of any Obligation, within five (5) days if the request is personally delivered, or within seven (7) days if the request is made by mail. The Beneficiary and any proposed assignee of this Deed of Trust shall have the right to rely on such certification.

Section 2.17. Inspection and Financial Reports. The Beneficiary and its authorized agents and employees shall have the right, at the Beneficiary's option, to enter into the Property at all reasonable times for the purpose of inspecting the same. The Trustor will furnish to the Beneficiary, within thirty (30) days after a request therefor, but not more than once a year, a detailed statement in writing, covering the period of time specified in such request, showing all income derived from the operation of the Property, and all disbursements made in connection therewith, and containing a list of the names of all tenants and occupants of the Property, the portion or portions of the Property occupied by each such tenant and occupant, the rent and other charges payable under the terms of their leases or other agreements and the period covered by such leases or other agreements.

Section 2.18. Accounting and Other Information. The Trustor will keep books and records of account in accordance with generally accepted accounting principles, consistently applied, in which full, true and correct entries shall be made of all dealings and transactions relative to the Trustor and the Property. Upon request of Beneficiary made from time to time, a copy of said books and records of account, certified by a general partner of Trustor, Trustor shall make available to the Beneficiary, at an office of the Beneficiary within the State of New Jersey, and the originals of such books and records shall be open to the inspection of the Beneficiary and its accountants and its other duly authorized representatives at Trustor's principal place of business within the state in which the Property is located during regular business hours. The Trustor further covenants that it will, within a reasonable time after any request by the Beneficiary, furnish or cause to be furnished to the Beneficiary such other information with respect to the Trustor or the Property as the Beneficiary may from time to time reasonably request.

Section 2.19. Assignment. This Deed of Trust is assignable by the Beneficiary without notice to the Trustor, and any assignment of the same by the Beneficiary shall operate to vest in such assignee the same right, title and interest as was vested in the Beneficiary and all rights and powers herein conferred.

Section 2.20. Due on Sale.

(a) To the extent permitted by law, except as otherwise set forth in Paragraph 2.20(d) and in Paragraph 2.20(e) below, the Property shall not be sold, transferred or conveyed, in whole or in part, whether voluntarily or involuntarily, by operation of law or otherwise, or lease the entire premises, without, in each instance, the prior written consent of Beneficiary. No mortgage, deed of trust, lien or other encumbrance shall be made or filed against or with respect to the Property, without the prior written consent of Beneficiary. In the event any such mortgage, deed of trust, lien or other encumbrance shall be made or filed and Beneficiary elects not to accelerate, such forbearance may be predicated on such terms and conditions as Beneficiary may, in its sole discretion, require, including, but not limited to, Beneficiary's approval of the transferee's creditworthiness and management ability, the execution and delivery to Beneficiary by

transferee prior to the sale, transfer, assignment, lease or conveyance of a written assumption agreement containing such terms as Beneficiary may require, including, but not limited to, a payment of a part of the principal amount of the Obligation, an increase in the rate of interest payable on the Obligation, the payment of an assumption fee, a modification of the terms of the Obligation and such other terms as Beneficiary may require, or Beneficiary may require any of such modifications of the terms of the Obligation without requiring an assumption thereof by the transferee. Should the Property be sold, traded, transferred, assigned, exchanged, leased or otherwise disposed of without the prior written consent of Beneficiary and should payment of any portion of the Obligation thereafter be accepted by Beneficiary, such acceptance shall not be deemed a waiver of the requirement of Beneficiary's consent in writing thereto or with respect to any other sale, trade, transfer, assignment, exchange, lease or other disposition. No conditional bill of sale or chattel mortgage shall be made or filed against any Accessories without the prior written consent of Beneficiary. If any such conditional bill of sale or chattel mortgage is made or filed with or without Beneficiary's prior written consent, then after the occurrence of a Default all right, title and interest of Trustor in and to all deposits and payments made thereon are hereby assigned to Beneficiary.

(b) If the Trustor enters into an installment sale contract or sells, conveys, alienates, assigns, mortgages or transfers the Property, or any part thereof or interest therein in any manner, or leases all or substantially all of the Property or the Improvements, whether voluntary or involuntary, or by operation of law or otherwise, then the Beneficiary shall have the right, at its option, at any time thereafter to declare the Obligations immediately due and payable. No waiver of this right or delay in the exercise thereof shall operate as a waiver thereof unless the Beneficiary shall have executed and delivered to the Trustor a written waiver of such right. Trustor shall give Beneficiary monthly reports summarizing in reasonable detail all Builder Contracts entered into during the preceding month.

(c) Any sale, assignment, lease, transfer, pledge, or other disposition, whether voluntary or involuntary, by operation of law or otherwise, of any partnership, membership or other ownership interest or shares of stock in the Trustor, shall be deemed to be a transfer of the Property for the purposes of this Section 2.20; provided, however, that Trustor shall be permitted to sell, assign or transfer any membership or other ownership interest in the Trustor if such sale, assignment or transfer does not change the control, management or majority ownership of Trustor.

ARTICLE III
RESPECTING DEFAULTS AND REMEDIES OF BENEFICIARY

Section 3.01. Default. The term "Default," as used herein, shall mean the occurrence of any one or more of the following events:

- (a) a default in the payment of any installment of principal or interest when due under the Note; or
- (b) a default in the payment of any other sum when due hereunder or under the Note or any other Loan Document; or
- (c) default in (i) keeping in force the insurance which the Trustor is required to maintain under Paragraph 2.06 hereof or (ii) delivering or assigning the insurance policies or renewals or certificates thereof, or in reimbursing the Beneficiary for premiums paid by it on such insurance; or
- (d) upon the actual or threatened waste, removal, alteration or demolition of any part of the Property; or
- (e) default in complying with Trustor's obligations under Paragraph 2.12 hereof or upon the assignment by the Trustor of any Lease or of the whole or any part of the rents, income or profits arising from the Property without the prior written consent of the Beneficiary; or
- (f) if the Trustor or any guarantor of all or part of the Obligations (a "Guarantor") becomes insolvent; or
- (g) if the Trustor or any Guarantor generally does not pay its debts as they become due; or
- (h) if the Trustor or any Guarantor makes an assignment for the benefit of creditors; or
- (i) if the Trustor or any Guarantor calls or causes to be called a meeting of creditors for the composition of debts; or
- (j) if there shall be filed by or with the consent or authorization of the Trustor 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 the Trustor or any Guarantor authorizes any such action; or
- (k) if there shall be filed against the Trustor 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 the Trustor or such Guarantor,

as the case may be, has not consented to or authorized such action and such action is not dismissed within sixty (60) days; or

(l) the exercise of the right of condemnation or eminent domain in respect of all of the Property or so much of the Property as gives Trustee the right of acceleration as set forth in Paragraph 2.07(b) hereof; or

(m) upon the Trustor directly or indirectly creating, suffering or permitting to be created or to stand against the Property or any portion thereof or against the rents, issues and profits therefrom, any other lien (other than any mechanic's or materialmen's liens that are discharged within the time and in accordance with Section 2.04 hereof), charge, mortgage, deed of trust or other encumbrance (other than the Permitted Exceptions), without in each instance obtaining the Beneficiary's prior written consent thereto; or

(n) upon the filing of a lien by the United States so as to affect all or any part of the Property and such lien not being discharged (by bond or otherwise) within ten (10) days after Trustor receives notice of the filing thereof; or

(o) upon the merger, consolidation, liquidation or dissolution or sale or lease or transfer of all or substantially all of the assets of the Trustor or any Guarantor or the filing of any notice of intention to do so; or

(p) upon the Trustor entering into an installment sales contract or selling, conveying, transferring, mortgaging, leasing or otherwise alienating or encumbering the Property or any portion thereof or any interest therein in any manner, whether voluntary or involuntary or by operation of law or otherwise, without the prior written consent of the Beneficiary, except as otherwise provided in Paragraph 2.20(d), or upon the title or equity of redemption in the Property being acquired, in whole or in part, by voluntary or involuntary transfer, grant or assignment by any person, firm, corporation or entity other than the Trustor or the Beneficiary; or

(q) if any representation or warranty of the Trustor set forth in this Deed of Trust or in any other Loan Document or in any other writing given to the Beneficiary in connection with the Obligations shall have been incorrect in any material respect as of the time when the same shall have been made; or

(r) default in the performance of the Trustor's obligations under Paragraph 2.16 hereof; or

(s) upon the occurrence of an Event of Default under the Loan Agreement or any other Loan Document; or

(t) upon the failure of Trustor or any Guarantor to comply with, satisfy or perform or observe any other term, covenant, condition or agreement of such party

contained in the Note or any other Loan Document within the applicable cure period, if any, provided therefor in such document; or

(u) upon the failure of Trustor to comply with, satisfy, perform or observe any other term, covenant, condition or agreement of Trustor herein (i.e., any term, covenant, condition or agreement not referred to in any other subparagraph of this Paragraph 3.01), and such failure continues without cure for thirty (30) days after Trustee gives Trustor notice thereof, or if such failure, by its nature, cannot be cured within thirty (30) days, Trustor fails to commence such cure within thirty (30) days after Trustee gives Trustor notice thereof and thereafter to diligently prosecute cure to completion within sixty (60) days.

(v) Vincent Hesser ceases to be the sole shareholder of, or ceases to retain and exercise management and control of OneCap Partners MM Inc., the Manager of Trustor or any transfer of any ownership interest (directly or indirectly) in Trustor occurs in violation of Paragraph 2.20(c) hereof;

(w) OneCap Partners MM Inc. ceases to be the Manager of Trustor; or

(x) any material breach or acceleration or commencement of proceedings (whether non-judicial, judicial, public or private) to foreclose any other lien upon the Property, whether or not such lien is permitted or unpermitted hereunder or prior or subordinate to the lien of this Deed of Trust.

Section 3.02. Beneficiary's Remedies Upon Default. Upon a default, Beneficiary may, at Beneficiary's option, do any one or more of the following:

(a) If Trustor has failed to keep or perform any covenant whatsoever contained in this Deed of Trust, Beneficiary may, but shall not be obligated to any person to do so, perform or attempt to perform said covenant, and any payment made or expense incurred in the performance or attempted performance of any such covenant shall be and become a part of the Obligation, and Trustor promises, upon demand, to pay to Beneficiary, at the place where the Obligation is payable, all sums so advanced or paid by Beneficiary, with interest from the date when paid or incurred by Beneficiary at the rate provided in the Loan Agreement, the Note or the Guaranty for past due payment. No such payment by Beneficiary shall constitute a waiver of any default. In addition to the liens and security interests hereof, Beneficiary shall be subrogated to all rights, titles, liens and security interests securing the payment of any debt, claim, tax or assessment for the payment of which Beneficiary may make an advance, or which Beneficiary may pay.

(b) Beneficiary may, without notice, demand, presentment, notice of nonpayment or nonperformance, protest, notice of protest, notice of intent to accelerate (except as otherwise expressly provided in the Note), notice of acceleration or any other notice or any other action, all of which are hereby waived by Trustor and all other parties

obligated in any manner whatsoever on the Obligation, declare the entire unpaid balance of the Obligation immediately due and payable, and upon such declaration, the entire unpaid balance of the Obligation shall be immediately due and payable.

(c) Irrespective of whether Beneficiary exercises the right provided in Paragraph 3.02(b) above, Beneficiary in person or by agent or by court-appointed receiver may enter upon, take possession of, manage and operate the Property or any part thereof and do all things necessary or appropriate in Beneficiary's sole discretion in connection therewith, including without limitation making and enforcing, and if the same be subject to modification or cancellation, modifying or canceling Leases upon such terms or conditions as Beneficiary deems proper, obtaining and evicting tenants, and fixing or modifying Rents, contracting for and making repairs and alterations, and doing any and all other acts which Beneficiary deems proper to protect the security thereof, including taking any remedial measures resulting from the actual or threatened release of Hazardous Substances on the Property, in which event the decision of Beneficiary as to whether there exists an actual or threatened release of Hazardous Substances shall be deemed reasonable and conclusive; and either with or without so taking possession, in its own name or in the name of Trustor, sue for or otherwise collect and receive the rents, issues and profits including those past due and unpaid, and apply the same less costs and expenses of operation and collection, including reasonable attorneys' fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine. Upon request of Beneficiary, Trustor shall assemble and make available to Beneficiary at the site of the real property encumbered hereby any of the Property which has been removed therefrom. The entering upon and taking possession of the Property, or any part thereof, and the collection of any rents, issues and profits and the application thereof as aforesaid shall not cure or waive any default theretofore or thereafter occurring or affect any notice or default hereunder or invalidate any act done pursuant to any such default or notice. Notwithstanding continuance in possession of the Property or any part thereof by Beneficiary, Trustor or a receiver, and notwithstanding the collection, receipt and application of the Rents, Beneficiary shall be entitled to exercise every right provided for in this Deed of Trust, any other Loan Document or by law or in equity upon or after the occurrence of a Default, including without limitation the right to exercise the power of sale. Any of the actions referred to in this Paragraph 3.02(c) may be taken by Beneficiary irrespective of whether any notice of default or election to sell has been given hereunder and without regard to the adequacy of the security for the indebtedness hereby secured.

(d) Beneficiary may bring an action in any court of competent jurisdiction to foreclose this instrument or to enforce any of the covenants and agreements hereof.

(e) Beneficiary shall have the right, with the irrevocable consent of Trustor hereby given and evidenced by the execution of this Deed of Trust, to appoint itself as receiver or to obtain appointment of a receiver by any court of competent jurisdiction without further notice to Trustor, which receiver shall be authorized and empowered to

enter upon and take possession of the Property, including all personal property used upon or in connection with the real property herein conveyed and all bank accounts encumbered by this Deed of Trust or the Loan Documents and containing funds associated with the Property, to let the Property, to receive all the rents, issues and profits due or to become due, and apply the rents, issues and profits after payment of all necessary charges and expenses to reduction of the Obligation. Trustor hereby assigns the rents, issues and profits to Beneficiary as additional security for the Obligation, together with the Leases and all other documents evidencing the rents, issues and profits bank accounts, and any and all deposits held as security under the Leases. At the option of Beneficiary, the receiver shall accomplish such entry and taking possession of the Property by actual entry and possession or by notice to Trustor. The receiver so appointed by a court of competent jurisdiction shall be empowered to issue receiver's certificates for funds advanced by Beneficiary for the purpose of protecting the value of the Property as security for the Obligation. The amounts evidenced by receiver's certificates shall bear interest at the Default Rate specified in the Note and may be added to the cost of redemption if the owners of the Property, Trustor, or a junior lienholder redeems at the Trustee's Sale.

(f) If any Event of Default occurs, Beneficiary is authorized and empowered, without further notice, to execute or cause the Trustee to execute a written notice of default and of election to cause the Property to be sold as required by law or as otherwise provided herein, and the Trustee shall file such notice for record in each county wherein the Property or any part thereof is situated. After such filing, the Trustee may lawfully foreclose and shall foreclose the lien of this Deed of Trust, and sell and dispose of the Property in masse or in separate parcels (as Beneficiary may elect) and all the right, title, and interest of Trustor therein, at a public auction at any place then authorized by law as may be specified in the notice of such sale, for the price permitted by law (the "Trustee's Sale"), legally required public notice having previously been given of the time and place of such sale. The Trustee, without demand on Trustor, shall sell the Property on the date and at the time and place designated in the notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such Property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient in accordance with applicable law, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given as required by law. Trustee shall execute and deliver to the purchaser its deed conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorneys' fees; (2) cost of any evidence of title procured in connection with such sale; (3)

all sums expended under the terms hereof, not then repaid, with accrued interest as provided herein from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

(g) Upon the occurrence of a Default, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable upon notice of intent to accelerate as set forth in the Note, and to foreclose this Deed of Trust in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including reasonable attorneys' fees in such amount as shall be fixed by the court. Trustor hereby waives all rights to the marshalling of Trustor's assets encumbered by this Deed of Trust to the fullest extent permitted by law, including the Property, and all rights to require the Property to be sold in several parcels. The proceeds or avails of such a sale pursuant to the foreclosure of this Deed of Trust as a mortgage shall first be applied to pay all reasonable fees, charges, costs of conducting such sale and advertising the Property, and attorneys' fees as herein provided, second to pay to Beneficiary the then outstanding amount of the Obligation with interest at the rate set forth in the Note, and third to the person so entitled, subject to applicable law. Beneficiary may purchase all or any part of the Property at such sale. Any purchaser at such sale shall not be responsible for the application of the purchase money. During any redemption period subsequent to the such sale, the amount of Beneficiary's bid entered at such sale shall bear interest at the maximum lawful rate of interest.

(h) Upon the occurrence of an Event of Default as a result of any of the representations or warranties concerning Hazardous Substances set forth in the Loan Agreement or any other Loan Document being untrue, Beneficiary may commence and maintain an action or actions in any court of competent jurisdiction for breach of contract, whether commenced prior to foreclosure of the Property or after foreclosure of the Property, and to seek the recovery of any and all costs, damages, expenses, fees, penalties, fines, judgments, indemnification payments to third parties, and other out-of-pocket costs or expenses actually incurred by Beneficiary (the "Environmental Costs") incurred or advanced by Beneficiary relating to the cleanup, remediation or other response action required by any applicable law relating to Hazardous Substances or to which Beneficiary believes necessary to protect the Property, it being conclusively presumed between Beneficiary and Trustor that all such Environmental Costs incurred or advanced by Beneficiary relating to the cleanup, remediation or other response action of or to the Property were made by Beneficiary in good faith. All Environmental Costs incurred by Beneficiary under this Section (including without limitation court costs, consultant fees and attorneys' fees, whether incurred in litigation or not and whether before or after judgment) shall be considered Obligation and shall bear interest at the Default Rate established in the Note from the date of expenditure until paid in full.

Beneficiary shall have the right to bid, at the sale of the Property held under Section 6.6 the amount of the Environmental Costs, plus interest at the Default Rate established in the Note, in addition to any other amounts comprising the Obligation.

(i) If this Deed of Trust is foreclosed by the Trustee, the Trustee shall allow a reasonable amount of attorneys' fees for services rendered in the supervision of such foreclosure proceedings as a part of the cost of foreclosure. If the foreclosure proceedings are made through court proceedings, attorneys' fees in an amount determined by the court to be reasonable shall be taxed by the court as a part of the cost of such foreclosure proceedings.

(j) Trustor, for itself and for all persons hereafter claiming through or under it or who may at any time hereafter become holders of liens junior to the lien of this Deed of Trust, hereby expressly waives and releases all rights to direct the order in which any of the Property shall be sold and to have the Property and any other property now or hereafter constituting security for the Obligation marshaled upon any foreclosure of the lien of this Deed of Trust. Beneficiary shall have the right to sell the Property as a whole or in separate parcels.

(k) Each right, power, and remedy herein conferred upon Beneficiary or the Trustee is cumulative of every other right or remedy of Beneficiary or the Trustee, whether conferred herein or by law, and may be enforced concurrently.

(l) Beneficiary may, or Trustee may upon written request of Beneficiary, proceed by suit or suits, at law or in equity, to enforce the payment and performance of the Obligation in accordance with the terms hereof and of the Loan Documents, to foreclose the liens and security interests of this Deed of Trust as against all or any part of the Property, and to have all or any part of the Property sold under the judgment or decree of a court of competent jurisdiction.

(m) After notification, if any, hereafter provided in this Subsection, Beneficiary may sell, lease or otherwise dispose of, at the office of Beneficiary or on the Land or elsewhere, as chosen by Beneficiary, all or any part of the Accessories, in their then condition, or following any commercially reasonable preparation or processing, and each Sale (as used in this Subsection, the term "Sale" means any sale, lease, or other disposition made pursuant to this Subsection) may be as a unit or in parcels, by public or private proceedings, and by way of one or more contracts, and, at any Sale it shall not be necessary to exhibit the Accessories or part thereof being sold. The Sale of any part of the Accessories shall not exhaust Beneficiary's power of sale, but Sales may be made from time to time until the Obligation is paid and performed in full. Reasonable notification of the time and place of any public Sale pursuant to this Subsection, or reasonable notification of the time after which any private Sale is to be made pursuant to this Subsection, shall be sent to Trustor and to any other person entitled under the Code (as hereinafter defined) to notice; provided that if the Accessories or part thereof being

sold are perishable, or threaten to decline rapidly in value, or are of a type customarily sold on a recognized market, Beneficiary may sell, lease or otherwise dispose of the Accessories, or part thereof, without notification, advertisement or other notice of any kind. It is agreed that notice sent or given not less than five (5) calendar days prior to the taking of the action to which the notice relates, is reasonable notification and notice for the purposes of this Subsection.

(n) INTENTIONALLY OMITTED.

(o) Beneficiary may retain the Accessories in satisfaction of the Obligation whenever the circumstances are such that Beneficiary is entitled to do so under the Code.

(p) Beneficiary may buy the Property or any part thereof at any public sale or judicial sale.

(q) Beneficiary may buy the Accessories or any part thereof at any private sale, if the Accessories or part thereof being sold are a type customarily sold in a recognized market or a type subject to widely distributed standard price quotations.

(r) If any payment under this Deed of Trust shall not be received by Beneficiary when due, a late charge of ten cents for each dollar of such payment shall become due to the Beneficiary. Such charge shall be payable with the payment next due and shall be added to the Obligations and be secured by this Deed of Trust.

(s) Beneficiary shall have and may exercise any and all other rights and remedies which Beneficiary may have at law or in equity, or by virtue of any Loan Document, or under the Code, or otherwise.

Section 3.03. Beneficiary as Purchaser. If Beneficiary is the purchaser of the Property or any part thereof, at any sale thereof, whether such sale be under the power of sale hereinabove vested in Trustee or upon any other foreclosure of the liens and security interests hereof, or otherwise, Beneficiary shall, upon any such purchase, acquire good title to the Property so purchased, free of the liens and security interests hereof.

Section 3.04. Other Rights of Beneficiary. Should any part of the Property come into the possession of Beneficiary, whether before or after Default, Beneficiary may use or operate the Property for the purpose of preserving it or its value, pursuant to the order of a court of appropriate jurisdiction or in accordance with any other rights held by Beneficiary in respect of the Property. Trustor covenants promptly to reimburse and pay to Beneficiary on demand, at the place where the Obligation is payable, the amount of all reasonable expenses (including the cost of any insurance, taxes or other charges) incurred by Beneficiary in connection with Beneficiary's custody, preservation, use or operation of the Property, together with interest thereon from the date incurred by Beneficiary at the rate provided in the Note for past-due principal, and all such expenses, costs, taxes,

interest and other charges shall be and become a part of the Obligation. It is agreed, however, that the risk of loss or damage to the Property is on Trustor, and Beneficiary shall have no liability whatsoever for decline in value of the Property, for failure to obtain or maintain insurance, or for failure to determine whether insurance in force is adequate as to amount or as to the risks insured.

Section 3.05. Possession After Foreclosure. If the liens or security interests hereof shall be foreclosed by power of Trustee's sale, by judicial action or otherwise, the purchaser at any such sale shall receive, as an incident to Trustee's ownership, immediate possession of the property purchased, and if Trustor or Trustor's successors shall hold possession of said property or any part thereof, subsequent to foreclosure, Trustor and Trustor's successors shall be considered as tenants at sufferance of the purchaser at foreclosure sale (without limitation of other rights or remedies, at a reasonable rental per day, due and payable daily, based upon the value of the portion of the Property so occupied), and anyone occupying such portion of the Property after demand is made for possession thereof shall be guilty of forcible detainer and shall be subject to eviction and removal, forcible or otherwise, with or without process of law, and all damages by reason thereof are hereby expressly waived.

Section 3.06. Application of Proceeds. The proceeds from any sale, lease or other disposition made pursuant to this Article, or any rental collected by Beneficiary from the Property, or sums received pursuant to Section 5.01 hereof, or proceeds from insurance which Beneficiary elects to apply to the Obligation, shall be applied by Trustee, or by Beneficiary, as the case may be, as follows: first, to the payment of all expenses of advertising, selling and conveying the Property or part thereof, including reasonable attorneys' fees and reasonable fees and expenses of the Trustee commission; second, to repay any sums expended by Beneficiary or Trustee pursuant to the terms hereof, with interest at the applicable rate hereunder; third, to late charges; fourth, to accrued interest on the Obligation; fifth, to principal on the matured portion of the Obligation; fifth, to prepayment of the unmatured portion, if any, of the Obligation applied to installments of principal in inverse order of maturity; and seventh, the balance, if any, remaining after the full and final payment and performance of the Obligation to the person or persons legally entitled thereto.

Section 3.07. Abandonment of Sale. In the event a foreclosure hereunder is commenced by Trustee in accordance with Subsection 3.02(c) hereof, Beneficiary may, at any time before the sale, direct Trustee to abandon the sale, and (to the extent thereon permitted under then applicable law) may then institute suit for the collection of the Obligation and for the foreclosure of the liens and security interests hereof. If Beneficiary should institute a suit for the collection of the Obligation and for a foreclosure of the liens and security interests hereof, Beneficiary may, at any time before the entry of a final judgment in said suit, dismiss the same and require Trustee to sell the Property or any part thereof in accordance with the provisions of this Deed of Trust.

Section 3.08. Payment of Fees. If any part of the Obligation shall be collected or enforced by legal proceedings, whether through a probate or bankruptcy court or otherwise, or shall be placed in the hands of an attorney for collection after maturity, whether matured by the expiration of time or by an option given to the Beneficiary to mature same, or if Beneficiary becomes a party to any suit where this Deed of Trust or the Property or (to the extent thereon permitted under then applicable law) any part thereof is involved, Trustor agrees to pay Beneficiary's reasonable attorneys' and collection fees, and such fees shall be and become a part of the Obligation.

Section 3.09. Indemnification of Trustee. Except for gross negligence or willful misconduct, Trustee shall not be liable for any act or omission or error of judgment. Trustee may rely on any document believed by Trustee in good faith to be genuine. All money received by Trustee shall, until used or applied as herein provided, be held in trust, but need not be segregated (except to the extent required by law), and Trustee shall not be liable for interest thereon. Trustor shall indemnify Trustee against all liability and expenses which Trustee may incur in the performance of Trustee's duties hereunder.

Section 3.10. Substitute Trustee. Beneficiary may appoint a substitute Trustee (a) if Trustee herein named or any substitute Trustee shall die, resign, or fail, refuse or be unable, for any reason, to make any such sale or to perform any of the trusts herein declared; or (b) at the option of Beneficiary from time to time as often and whenever Beneficiary prefers and with or without any reason or cause. Each appointment shall be in writing, but without the necessity of recordation, notice to Trustor, or any other action or formality. Each substitute Trustee so appointed shall thereupon by such appointment become Trustee and succeed to all the estates, titles, rights, powers, trusts and duties of predecessor Trustee. Any such appointment may be executed by Beneficiary or any authorized representative of Beneficiary, and such appointment shall be presumed conclusively to have been executed with due and proper authority. Without limiting the generality of the foregoing, if Beneficiary is a corporation, bank or association, of any type or character, such appointment may be executed in its behalf by any officer of Beneficiary and shall be presumed conclusively to have been executed with due and proper authority without necessity of proof of any action by the board of directors or any superior officer. Wherever herein the word "Trustee" is used, the same shall mean the duly appointed trustee or substitute trustee hereunder at the time in question. Trustee may resign by written notice to Beneficiary.

Section 3.11. INTENTIONALLY OMITTED.

Section 3.12. Release of Collateral. The Beneficiary 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 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 Trustor under the

Loan Documents, the remainder of the security of this Deed of Trust or the priority of the rights created by this Deed of Trust.

Section 3.13. Partial Foreclosure. The Beneficiary may from time to time, to the extent permitted by law, take action to recover any sums, whether interest, principal or any other sums required to be paid under the Loan Documents, as the same become due, without prejudice to the right of the Beneficiary thereafter to bring an action of foreclosure, or any other action, for a Default or Defaults by the Trustor existing when such earlier action was commenced. The Beneficiary may, to the extent permitted by law, at the Mortgage's option, cause this Deed of Trust to be foreclosed for any portion of the Obligations or any other sums secured hereby which are then due and payable subject to the continuing lien of this Deed of Trust for the balance of the secured Obligations not then due.

ARTICLE IV SECURITY AGREEMENT

Section 4.01. Security Agreement. This Deed of Trust is also a security agreement between Trustor, as debtor, and Beneficiary, as secured party. Trustor hereby grants to Beneficiary and Beneficiary's successors and assigns, a security interest in those portions of the Property which constitute Accessories and each and every part thereof, and in all proceeds from the sale, lease or other disposition thereof, and in all sums, proceeds, funds and reserves described or referred to in Sections 2.06 and 2.07 hereof. However, the grant of a security interest in proceeds shall not be deemed to authorize any action otherwise prohibited herein. The security interest created hereby is specifically intended to cover and include all leases of the Property, if any, presently existing or hereafter entered into (herein, together with all amendments and supplements thereto made as provided therein, called the "Leases"), between Trustor (or parties acting on behalf of Trustor), as lessor or as successor to or assignee from the lessor, and tenants which occupy the Property under the Leases, including all extended terms and all extensions and renewals of the terms thereof, as well as any amendments to or replacements of said Leases, together with all the right, title and interest of Trustor, as lessor thereunder, including, without limiting the generality of the foregoing, the present and continuing right to make claim for, collect, receive and receipt for any and all of the rents, income, revenues, issues and profits and moneys payable as damages or in lieu of rent and moneys payable as the purchase price of the Property or any part thereof or of awards or claims for money and other sums of money payable or receivable thereunder howsoever payable, and to bring actions and proceedings thereunder or for the enforcement thereof, and to do any and all things which Trustor or any lessor is or may become entitled to do under the Leases, provided, that this provision shall not impair or diminish any obligation of Trustor under the Leases, nor shall any obligation be imposed upon Beneficiary. In addition to Beneficiary's rights hereunder or otherwise, Beneficiary shall have all of the rights of a secured party under the Uniform Commercial Code of the State, (the "Code").

Trustor, from time to time, upon each request of Beneficiary, promptly shall (a) execute and deliver to Beneficiary all financing statements as required by Beneficiary in order to establish or maintain the validity, perfection or priority of the security interest with respect to the Accessories or fixtures; (b) pay to Beneficiary on demand all costs of preparation and filing of financing statements pursuant hereto and all costs of Code searches reasonably required by Beneficiary; and (c) give to Beneficiary a certificate in form satisfactory to Beneficiary listing all trade names of Trustor and under which Trustor operates or intends to operate the Property or any part thereof, and give to Beneficiary advance written notice of any proposed change of any such trade name and of any change of name (or trade name or assumed name), identity or structure of Trustor. A carbon, photographic or other reproduction of this Deed of Trust or of a financing statement executed pursuant hereto is sufficient as a financing statement. This Deed of Trust is, without limitation, intended to be a financing statement filed as a fixture filing with respect to the portions of the Property which are or are to become fixtures, and as a mineral and timber filing. The address of Trustor (debtor) is set forth on the first page hereof and the address of Beneficiary (secured party) from whom information concerning the security interest may be obtained, is set forth on the first page hereof. Trustor is the record owner of the Land, the Improvements and the Accessories.

ARTICLE V SPECIAL PROVISIONS

Section 5.01. Subordinate Financing. In the event of consent by Beneficiary to the granting of a subordinate mortgage, or in the event the above-described right of Beneficiary to declare the Obligation to be immediately due and payable upon the granting of a subordinate mortgage without the prior written consent of Beneficiary is determined by a court of competent jurisdiction to be unenforceable under the provisions of any applicable law, Trustor will not execute or deliver any subordinate mortgage unless (i) it shall contain express covenants to the effect: (a) that the subordinate mortgage is in all respects unconditionally subject and subordinate to the lien and security interest evidenced by this Deed of Trust and each term and provision hereof; (b) that if any action or proceeding shall be instituted to foreclose the subordinate mortgage (regardless of whether the same is a judicial proceeding or pursuant to a power of sale contained therein), no tenant of any portion of the Property will be named as a party defendant, nor will any action be taken with respect to the Property which would terminate any occupancy or tenancy of the Property without the prior written consent of Beneficiary; (c) that the rents and profits, if collected through a receiver or by the holder of the subordinate mortgage, shall be applied first to the obligations secured by this Deed of Trust, including principal and interest due and owing on or to become due and owing under the Loan Agreement and the other indebtedness secured hereby, and then to the payment of maintenance, operating charges, taxes, assessments, and disbursements incurred in connection with the ownership, operation and maintenance of the Property; and (d) that if any action or proceeding shall be brought to foreclose the subordinate

mortgage (regardless of whether the same is a judicial proceeding or pursuant to a power of sale contained therein), written notice of the commencement thereof will be given to Beneficiary contemporaneously with the commencement of such action or proceeding; and (ii) a copy thereof shall have been delivered to Beneficiary not less than ten (10) days prior to the date of the execution of such subordinate mortgage.

Section 5.02. Change in Taxation. Upon passage after the date of this Deed of Trust of any law applicable to this Deed of Trust, the Property or the Beneficiary, deducting from the value of real property or from the value of a lien on real property for the purposes of taxation or lien any indebtedness secured by mortgages or changing in any way the laws for the taxation or mortgages or debts secured by mortgages for State or local purposes or the manner of the collection of any such taxes, and imposing a tax, either directly or indirectly, on this Deed of Trust or all or any part of the sum secured hereby or the interest thereon, the Beneficiary may declare the whole of the Obligations and the interest accrued thereon, due on a date to be specified by not less than sixty (60) days' written notice to the Trustor, but such declaration shall be ineffective if the Trustor is permitted by law to pay such tax in addition to all other payments required hereunder, without any penalty or charge thereby accruing to the Beneficiary, and if the Trustor pays such tax within such sixty (60) day period.

Section 5.03. Taxes Imposed on Beneficiary. The Trustor shall pay any taxes (except any federal, state, or local income taxes measured by the income of Beneficiary from all sources) imposed on the Beneficiary by reason of its ownership of this Deed of Trust and the Note.

Section 5.04. Recording, Filing and Other Fees. The Trustor shall pay all recording and filing fees, all recording taxes and all other costs and expenses in connection with the preparation, execution and recordation and other manner of perfection of the Loan Documents, and shall reimburse the Beneficiary on demand for all costs and expenses of any kind incurred by the Beneficiary in connection therewith (including, without limitation, attorneys' fees). The Trustor will, at any time on request of the Beneficiary, execute or cause to be executed financing statements, continuation statements, security agreements, or the like, in respect of any Accessories. The Trustor shall pay all filing fees, including fees for filing continuation statements, in connection with such financing statements.

Section 5.05. No Release. The Trustor and any other Person now or hereafter obligated for the payment or performance of all or any part of the Obligations shall not be released from paying and performing such Obligations and the lien of this Deed of Trust shall not be affected by reason of: (a) the failure of the Beneficiary to comply with any request of Trustor, or of any other Person so obligated, to take action to foreclose this Deed of Trust or otherwise enforce any of the provisions of this Deed of Trust or of any of the Obligations secured by this Deed of Trust; (b) the release, regardless of consideration, of the obligations of any Person or Persons liable for payment or

performance of the Obligations or any part thereof; or (c) any agreement or stipulation extending the time of payment or modifying the terms of the Note, and in the event of such agreement or stipulation, the Trustor and all such other Persons shall remain liable under the Loan Documents, as amended by such agreement or stipulation unless expressly released and discharged in writing by the Beneficiary.

Section 5.06. Interest After Maturity. The principal amount of the Obligations and any other amounts secured by this Deed of Trust and, to the extent permitted by law, any accrued interest thereon, shall bear interest from and after maturity of the Obligations, whether or not resulting from acceleration, at the Default Rate, but this shall not constitute an extension of time for payment of the Obligations or such other amounts or accrued interest.

Section 5.07. Indemnification Against Liabilities. To the extent not caused by the gross negligence or willful misconduct of Beneficiary, the Trustor will protect, indemnify, save harmless and defend the Beneficiary from and against any and all liabilities, obligations, claims, damages, penalties, causes of action, costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) imposed upon or incurred by or asserted against Beneficiary by reason of: (a) any accident or injury to or death of Persons or loss of or damage to or loss of the use of property occurring on or about the Property or any part thereof or the adjoining sidewalks or curbs, if any, streets, alleys or ways; (b) any use, non-use or condition of the Property or any part thereof or the adjoining sidewalks or curbs, if any, streets, alleys or ways; (c) any failure on the part of the Trustor to perform or comply with any of the terms of the Mortgage; (d) performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof made or suffered to be made by or on behalf of the Trustor; (e) any negligence or tortious act on the part of the Trustor or any of its agents, contractors, lessees, licensees or invitees; or (f) any work in connection with any alterations, changes, new construction or demolition of the Property. The Trustor will pay and save Beneficiary harmless against any and all liability with respect to any intangible personal property tax or similar imposition of the Governing Jurisdiction or any subdivision or authority thereof now or hereafter in effect, to the extent that the same may be payable by Beneficiary in respect of this Deed of Trust, the Note or the indebtedness secured thereby. All amounts payable to Beneficiary under this Paragraph 5.10 shall be payable on demand and shall be deemed indebtedness secured by this Deed of Trust and any such amounts which are not paid within ten (10) days after demand therefor by the Beneficiary shall bear interest at the Default Rate from the date of such demand. If any action, suit or proceeding is brought against Beneficiary by reason of any such occurrences, the Trustor, upon request of Beneficiary, will, at the Trustor's expense, resist and defend such action, suit or proceeding or cause the same to be resisted or defended by counsel designated by the Trustor and approved by the Beneficiary, as the case may be.

Section 5.08. Notice of Acceleration. Whenever the Beneficiary in this Deed of Trust is given the option to accelerate the maturity of all or part of the Obligation upon a Default, the Beneficiary may, to the extent permitted by law, do so without prior notice or demand to or upon the Trustor except for notice of intention to accelerate as set forth in the Note.

Section 5.09. Trustor's Representations. The Trustor represents and warrants that: (a) it is duly organized, validly existing and in good standing under the laws of the State of Nevada, and is duly authorized to do business and is in good standing under the laws of the State of Nevada, and has the right and power and has obtained all necessary authorization to execute and deliver this Deed of Trust and the Note and other Loan Documents to which it is a party and to perform its obligations thereunder in accordance with the terms thereof; (b) the consent of any governmental body, agency or entity is not required (or if required has been obtained) in connection with the execution and delivery of this Deed of Trust; (c) the execution, delivery, and performance by the Trustor of the Loan Documents does not: (i) violate: (A) any existing provision of law, rule, or regulation; (B) Trustor's certificate of formation or limited partnership agreement; (C) any provision of any indenture, agreement or other instrument of which the Trustor is a party or by which it or the Property is bound; or (D) any order of any court or other agency of government binding upon the Trustor; or (ii) result in the creation of any lien, charge, or encumbrance other than the lien created by this Deed of Trust; and (d) the Obligations are not also secured, directly or indirectly, by "margin securities" or "stock" as defined, respectively, in Regulation G and Regulation U issued by the Board of Governors of the Federal Reserve System.

Section 5.10. After Acquired Property. To the extent permitted by law, all personal property and appurtenances to the Property now or hereafter attached to, adjoining or used for or in connection with the Property or any part thereof which is acquired by the Trustor on or after the date hereof shall, immediately upon the acquisition thereof by the Trustor, and without any further mortgage, conveyance, assignment, security agreement or transfer, become subject to the lien of this Deed of Trust. The Trustor shall execute, acknowledge and deliver to the Beneficiary any documents and instruments which the Beneficiary may reasonably request from time to time for better assuring, conveying, assigning, transferring, confirming or perfecting the Beneficiary's security and rights under this Deed of Trust.

Section 5.11. Further Assurances. The Trustor will, at its sole cost and expense, within ten (10) days of a request by the Beneficiary for the same, do, execute, acknowledge and deliver and appropriately file and record, all and every such further acts, conveyances, mortgages, assignments, financing statements, supplemental mortgages, notices, estoppel certificates and assurances as the Beneficiary shall, from time to time, reasonably require for accomplishing the purposes of this Deed of Trust and shall pay the expenses of the filing or recording of the same and reimburse the

Beneficiary for its reasonable legal expenses incurred in connection with the preparation or review thereof. In default of any such execution, acknowledgement, delivery, filing or recording, the Beneficiary may, without limitation, exercise the rights conferred upon it in Paragraph 2.15 hereof to execute, acknowledge and file or record any such instrument for and on behalf of the Trustor, as attorney-in-fact of the Trustor (which appointment is coupled with an interest and irrevocable), and shall be entitled to reimbursement for its reasonable expenses in connection therewith.

ARTICLE VI MISCELLANEOUS

Section 6.01. Release and Reconveyance. If all of Trustor's obligations under the Loan Documents are paid in full in accordance with the terms of the Loan Documents, no Default then exists hereunder and no Event of Default then exists under any other Loan Document, and if Trustor shall well and truly perform all of Trustor's covenants contained herein, then this conveyance shall become null and void and be released, and the Property (or so much thereof not previously released pursuant to Paragraph 2.20(d) hereof) shall be reconveyed to Trustor, at Trustor's request and expense.

Section 6.02. Rights Cumulative. Beneficiary shall have all rights, remedies and recourses granted in the Loan Documents and available at law or in equity (including, without limitation, those granted by the Code and applicable to the Property or any portion thereof), and the same (a) shall be cumulative and concurrent; (b) may be pursued separately, successively or concurrently against Trustor or others obligated for the Obligation or any part thereof, or against any one or more of them, or against the Property, at the sole discretion of Beneficiary; (c) may be exercised as often as occasion therefor shall arise, it being agreed by Trustor that the exercise, discontinuance of the exercise of or failure to exercise any of the same shall in no event be construed as a waiver or release thereof or of any other right, remedy or recourse; and (d) are intended to be, and shall be, nonexclusive. All rights and remedies of Beneficiary hereunder and under the other Loan Documents shall extend to any period after the initiation of foreclosure proceedings, judicial or otherwise, with respect to the Property.

Section 6.03. Waiver. Any and all covenants in this Deed of Trust may, from time to time, by instrument in writing signed by Beneficiary and delivered to Trustor, be waived to such extent and in such manner as Beneficiary may desire, but no such waiver shall ever affect or impair Beneficiary's rights, remedies, powers, privileges, liens, titles and security interests hereunder except to the extent so specifically stated in such written instrument. No waiver of any Default on the part of Trustor or a breach of any of the provisions of this Deed of Trust or of any Loan Document shall be considered a waiver of any other or subsequent Default or breach, and no delay or omission in exercising or enforcing the rights and powers herein granted shall be construed as a waiver of such rights and powers, and likewise no exercise or enforcement of any rights or powers hereunder shall be held to exhaust such rights and powers, and every such right and

power may be exercised from time to time. No notice to or demand on Trustor in any case shall of itself entitle Trustor to any other or further notice or demand in similar or other circumstances. The granting of any consent or approval by Beneficiary shall be limited to the specific instance and shall not waive or exhaust the requirement of consent or approval in any other instance. Except as otherwise specified herein, in any instance hereunder where Beneficiary's approval or consent is required or the exercise of Beneficiary's judgment is required, the granting or denial of such approval or consent and the exercise of such judgment shall be within the sole discretion of Beneficiary, and Beneficiary shall not for any reason or to any extent, be required to grant such approval or consent or exercise such judgment in any particular manner regardless of the reasonableness of the request or of Beneficiary's judgment.

Section 6.04. Payments. Remittances in payment of any part of the Obligation other than in the required amount in funds immediately available at the place where the Obligation is payable shall not, regardless of any receipt or credit issued therefor, constitute payment until the required amount is actually received by Beneficiary in funds immediately available at the place where the Obligation is payable (or such other place as Beneficiary, in Beneficiary's sole discretion, may have established by delivery of written notice thereof to Trustor) and shall be made and accepted subject to the condition that any check or draft may be handled for collection in accordance with the practice of the collecting bank or banks. Acceptance by Beneficiary of any payment in an amount less than the amount then due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due shall be and continue to be a Default.

Section 6.05. INTENTIONALLY OMITTED.

Section 6.06. Change of Security. Any part of the Property may be released, regardless of consideration, by Beneficiary from time to time without impairing, subordinating or affecting in any way the lien, security interest and other rights hereof against the remainder. The lien, security interest and other rights granted hereby shall not be affected by any other security taken for the Obligation or any part thereof. The taking of additional security, or the extension, renewal or rearrangement of the Obligation or any part thereof, shall not release or impair the lien, security interest and other rights granted hereby, or affect the liability of any endorser or guarantor or improve the right of any junior lienholder, and this Deed of Trust, as well as any instrument given to secure any renewal, extension or rearrangement of the Obligation or any part thereof, shall be and remain a first and prior lien, except as otherwise provided herein, on all of the Property not expressly released until the Obligation is fully paid and performed.

Section 6.07. Controlling Agreement. The parties hereto intend to conform strictly to the applicable usury laws. All agreements between Trustor (and any other party liable for any part of the Obligation) and Beneficiary, whether now existing or hereafter arising and whether written or oral, are expressly limited so that in no event whatsoever, whether by reason of acceleration of the maturity of the Obligation or

otherwise, shall the interest contracted for, charged or received by Beneficiary hereunder or otherwise exceed the maximum amount permissible under applicable law. If from any circumstances whatsoever interest would otherwise be payable to Beneficiary in excess of the maximum lawful amount, the interest payable to Beneficiary shall be reduced automatically to the maximum amount permitted under applicable law. If Beneficiary shall ever receive anything of value deemed interest under applicable law which would apart from this provision be in excess of the maximum lawful amount, the amount which would have been excessive interest shall be applied to the reduction of the principal amount owing on the Obligation and not to the payment of interest, or if such amount which would have been excessive interest exceeds the unpaid principal balance of the Obligation, such excess shall be refunded to Trustor, or to the maker of the Note or other evidence of indebtedness if other than Trustor. All interest paid or agreed to be paid to Beneficiary shall, to the extent permitted by applicable law, be amortized, prorated, allocated and spread throughout the full stated term, including any renewal or extension, of such indebtedness so that the amount of interest on account of such indebtedness does not exceed the maximum permitted by applicable law. The terms and provisions of this Section shall control and supersede every other provision of all existing and future agreements between Trustor, the maker of the Note or other evidence of indebtedness if other than Trustor, and Beneficiary.

Section 6.08. Effect of Transfer on Trustor's Liability. If the ownership (legal or beneficial) of the Property or any part thereof becomes vested in a person other than Trustor, or in the event of a change in ownership (legal or beneficial) (except as expressly permitted by and in compliance with Section 2.20(e) hereof) of any Trustor other than an individual, Beneficiary may, without notice to or consent of Trustor or Trustor's successors, deal with such successor or successors in interest with reference to this Deed of Trust and the Obligation either by way of forbearance on the part of Beneficiary, or extension of time of payment of the Obligation, or release of all or any part of the Property or any other property securing payment of the Obligation, or otherwise, without in any way modifying or affecting Beneficiary's rights and liens hereunder or the liability of Trustor or any other party liable for payment of the Obligation, in whole or in part.

Section 6.09. Waiver of Right to Marshal. Trustor hereby waives all rights of marshaling in event of any foreclosure of the liens and security interests hereby created.

Section 6.10. Subrogation. To the extent that proceeds of the Obligation are used to renew, extend or pay any outstanding debt or to perform any obligation, such proceeds have been advanced by Beneficiary at Trustor's request, and Beneficiary shall be subrogated to all liens, security interests, rights, priorities, powers, titles, equities and interests owned or held by any owner or holder of such outstanding debt or obligation, however remote, irrespective of whether the same are released of record, and all of the same are recognized as valid and subsisting and are renewed, continued and preserved in force to secure the Obligation; provided, however, that if and to the extent Beneficiary.

desires in each case, the terms and provisions hereof and of the other Loan Documents shall govern the rights and remedies of Beneficiary and shall supersede the terms, provisions, rights, and remedies under any lien, security interest, charge or other encumbrance to which Beneficiary is subrogated hereunder.

Section 6.11. Covenant to Perform. Trustor and each subsequent owner of the Property, or any part thereof, covenants and agrees that Trustor and any subsequent owner will perform or cause to be performed, each and every condition, term, provision and covenant of this Deed of Trust.

Section 6.12. 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 Beneficiary: Kennedy Funding, Inc.
Two University Plaza, Suite 402
Hackensack, New Jersey 07601
Attention: Jeffrey Wolfer
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 Trustor: OneCap Partners 2, LLC
5440 W. Sahara Avenue, 3rd Floor
Las Vegas, Nevada 89146
Attn: Mr. Vincent Hesser

With a copy to: Harold Gewertter, 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.

Section 6.13. No Representations by Beneficiary. By accepting or approving anything required to be observed, performed or fulfilled, or to be given to the Beneficiary pursuant to this Deed of Trust, including, without limitation, any certificate, balance sheet, statement of profit and loss or other financial statement, survey, appraisal or insurance policy, the Beneficiary shall not be deemed to have warranted or represented the sufficiency, legality, effectiveness or legal effect of the same, or of any term, provision or condition thereof, and such acceptance or approval thereof shall not be or constitute any warranty or representation with respect thereto by the Beneficiary.

Section 6.14. Certain Definitions. The following terms shall, for all purposes of this Deed of Trust, have the respective meanings herein specified unless the context otherwise requires:

(a) the "Trustor" shall mean the Trustor herein named any and subsequent owner or owners of the Property and its or their respective heirs, legal representatives, successors and assigns;

(b) the "Beneficiary" shall mean the Beneficiary herein named and any subsequent holder or holders of this Deed of Trust, and its or their respective heirs, legal representatives, successors and assigns;

(c) "Person" (whether or not capitalized) shall mean an individual, corporation, limited liability company, partnership, joint venture, trust, unincorporated organization or government, or any agency or political subdivision thereof, or any business or legal entity; and

(d) "Lease" shall mean every lease, license or occupancy agreement for the use or hire of all or any portion of the Property which shall be in effect at the date hereof, or which shall hereafter be entered into by or on behalf of the Trustor. Capitalized terms used herein but not defined herein shall have the meaning ascribed thereto in the Loan Agreement.

Section 6.15. Miscellaneous.

(a) This Deed of Trust and its provisions cannot be changed, waived, discharged or terminated orally but only by an agreement in writing, signed by the party against whom enforcement of the change, waiver, discharge or termination is sought, and the same shall then be effective only for the period and on the conditions and for the specific instances and purposes specified in such writing. No notice to or demand on the

Trustor in any case shall entitle the Trustor to any other or further notice or demand in similar or other circumstances. No course of dealing between the Trustor and Beneficiary or any failure or delay on the part of the Beneficiary in exercising any rights or remedies hereunder shall operate as a waiver of any rights or remedies of the Beneficiary 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.

(b) Wherever pursuant to this Deed of Trust, the Beneficiary exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to the Beneficiary, the decision of the Beneficiary to approve or disapprove or to decide that arrangements or terms are satisfactory or not satisfactory shall, except as otherwise set forth herein, be in the sole discretion of the Beneficiary and shall be final and conclusive.

(c) This Deed of Trust 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.

(d) All terms and words used in this Deed of Trust, regardless of the number or gender in which they are used, shall be deemed to include any other number and any other gender as the context may require.

(e) The section and paragraph headings in this Deed of Trust are for convenience of reference only and shall not limit or otherwise affect any of the terms hereof.

(f) If any words or phrases in this Deed of Trust have been stricken out or otherwise eliminated, this Deed of Trust shall be construed as if the words or phrases so stricken out or otherwise eliminated were never included in this Deed of Trust and no implication or inference shall be drawn from the fact that said words or phrases were so stricken out or otherwise eliminated.

(g) The words "herein," "hereby," "hereunder," and words of similar import shall be construed to refer to this Deed of Trust as a whole, and not to any particular Paragraph, unless expressly so stated.

(h) All covenants contained herein shall run with the Property until the Obligations have been, satisfied.

(i) The Trustor is hereby prohibited from exercising against the Beneficiary 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 the Beneficiary, including, without limitation, any right of set-off or any defense.

Section 6.16. Trustor's Waivers. The Trustor, for itself and its successors and assigns, hereby irrevocably waives and releases to the extent permitted by law, and whether now or hereafter in force, (a) the benefit of any and all valuation and appraisal laws; (b) any right of redemption after the date of any sale of the Property upon foreclosure, whether statutory, common law or otherwise, in respect of the Property; (c) all exemption laws whatsoever and all moratoriums, extensions or stay laws or rules, or orders of Court in the nature of any one or more of them; and (d) any right to have the Property marshaled upon any foreclosure of this Deed of Trust.

Section 6.17. Intentionally Omitted.

Section 6.18. Environmental Matters.

(a) Trustor represents and warrants that there are no Hazardous Substances (hereinafter defined) in or on the Property other than such as may have been disclosed to Beneficiary in writing prior to the date hereof.

(b) Without Beneficiary's prior written consent which may be granted or withheld in Beneficiary's sole discretion, Trustor shall make or permit no use of the Property that would involve the generation, storage, treatment, discharge, handling, refining, release or disposal of any Hazardous Substances (as defined below).

(c) At its sole cost and expense, Trustor shall, and shall cause any tenant or occupant of the Property to, comply with all applicable federal, state and local laws, rules, regulations and orders with respect to the discharge, generation, removal, transportation, storage, treatment and handling of Hazardous Substances, including but not limited to the federal Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended by the Superfund Amendment and Reauthorization Act of 1986, the federal Resource Conservation and Recovery Act, as amended, the federal Water Pollution Control Act, the federal Clean Air Act, the federal regulations promulgated pursuant to any of the foregoing, together with all rules and regulations promulgated thereunder, as amended from time to time, pay immediately when due the cost of removal of Hazardous Substances, and keep the Property free and clear of any lien imposed pursuant to such laws, rules, regulations or orders. In the event Trustor fails to do so, Beneficiary may declare this Deed of Trust to be in Default.

(d) Trustor shall indemnify Beneficiary and hold Beneficiary harmless from and against all loss, cost, damage and expense (including, without limitation, reasonable attorneys' fees and costs incurred in the investigation, defense and settlement of claims) that Beneficiary may incur as a result of or in connection with the assertion against Beneficiary or the Property of any claim relating to the presence or removal of any hazardous waste or substance referred to in this paragraph, or compliance with any federal, state or local laws, rules, regulations or orders relating thereto unless such claim arises solely from Beneficiary's gross negligence or willful misconduct.

(e) The term "Hazardous Substances" as used in this Deed of Trust shall include, without limitation, gasoline, petroleum products, explosives, radioactive materials, polychlorinated biphenyls or related or similar materials, or any other substance or material defined as a hazardous or toxic substance or material by any federal, state or local law, ordinance, rule, or regulation.

(f) Trustor shall notify Beneficiary immediately in writing upon learning of:

(i) any spill, discharge or release of any Hazardous Substances on or near the Property that may involve a cleanup cost of One Thousand and 00/100 (\$1,000.00) Dollars or more;

(ii) any circumstances that may result in a violation of this Section 6.18;

(iii) any governmental inquiry or inspection is undertaken or notice issued by any governmental agency or any source whatsoever with respect to Hazardous Substances on, from, affecting, or used, stored or discharged by any occupant of, the Property.

(g) If any investigation, environmental report or governmental investigation or order indicates that there may exist any damage or risk to the Property, or any liability of Trustor relating to any Hazardous Substances, or other environmental conditions with respect to the Property, then unless the holder of the Prior Mortgage, if any, has made a similar demand which Trustor has complied with, and has supplied Beneficiary with evidence of said compliance, Beneficiary may require Trustor to furnish immediately an indemnity bond in an amount determined by Beneficiary, in its discretion, to be sufficient to pay all actual and estimated cleanup costs and to protect against any liens that may arise with respect to such potential cleanup costs. Beneficiary's demand that Trustor post any bond or other security shall not be a waiver of any Default or of any other right or remedy available to Beneficiary.

(h) The obligations and liabilities of Trustor under this Paragraph 6.18 shall survive any entry of a judgment of foreclosure or the delivery of a deed in lieu of foreclosure of this Deed of Trust.

Section 6.19. Asbestos.

(a) Trustor represents and warrants that, to the actual knowledge of Trustor, there is no friable asbestos or any material containing asbestos and deemed hazardous by federal, state or local laws, rules, regulations or orders respecting such material ("Asbestos") on the Property.

(b) Trustor shall not install or permit to be installed Asbestos in the Property. With respect to any such material currently present in the Property, Trustor shall promptly comply with such federal, state or local laws, rules, regulations or orders at

Trustor's sole cost and expense. If Trustor shall fail to comply with any such law, rule, regulation or order such failure shall constitute a Default.

(c) Trustor (x) shall protect, defend, indemnify and hold Beneficiary harmless from and against all loss, cost, damage and expense (including, without limitation, reasonable attorneys' fees and costs incurred in the investigation, defense and settlement of claims) that Beneficiary may incur as a result of or in connection with the assertion against Beneficiary or the Property of any claim relating to (i) the presence or removal of any asbestos or asbestos containing substance, including, without limitation, the cost of such removal, or (ii) compliance with any federal, state or local laws, rules, regulations or orders relating thereto, and (y) guarantees to Beneficiary the payment of all costs and expenses which may be incurred by Beneficiary in performing any Asbestos remedial action not performed (or caused to be performed) by Trustor as required under this Deed of Trust.

(d) The obligations and liabilities of Trustor under this Paragraph 6.19 shall survive any entry of a judgment of foreclosure or the delivery of a deed in lieu of foreclosure of this Deed of Trust.

Section 6.20. Modifications. This Deed of Trust, the Note and all other Obligations are subject to Modification (as defined below). To the extent permitted by law, this Deed of Trust secures all Modifications from the date upon which this Deed of Trust was originally recorded, including future loans and extensions of credit and changes in the interest rate, due date, amount or other terms and conditions of any Obligations.

"Modification" shall have the meaning set forth in N.J.S.A. 46:9-8.2 et seq., which statute relates, inter alia, to changes in the interest rate, due date or other terms or conditions of a "mortgage loan", or future advances pursuant to a "line of credit", as defined in that statute.

Section 6.21. No Cooperative or Condominium. Trustor shall not operate the Property, or permit same to be operated as a cooperative or condominium building(s) in which the tenants or occupants participate in the ownership, control, or management of the Property or any part thereof, as tenants, stockholders or otherwise.

Section 6.22. Severability. If any provision of this Deed of Trust or the application thereof to any person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Deed of Trust nor the application of such provision to any other person or circumstances shall be affected thereby, but rather the same shall be enforced to the greatest extent permitted by law. If the rights and liens created by this Deed of Trust shall be held by a court of competent jurisdiction to be invalid or unenforceable as to any part of the Obligation, the portion of the Obligation which as the result of such invalidity or unenforceability is no longer

secured by the liens and security interests herein granted shall be completely paid prior to the payment of the portion, if any, of the Obligation which shall continue to be secured hereunder, and all payments made on the Obligation shall be considered to have been paid on and applied first to the complete payment of the unsecured portion of the Obligation.

Section 6.23. Binding Effect. The covenants herein contained shall bind, and the benefits and advantages shall inure to, the respective heirs, executors, administrators, personal representatives, successors, and assigns of the parties hereto and shall be covenants running with the Land. The term "Trustor" shall include in their individual capacities and jointly all parties hereinabove named a Trustor. The duties, covenants, conditions, obligations, and warranties of Trustor in this Deed of Trust shall be joint and several obligations of Trustor and, if more than one, of each party named a Trustor hereinabove, and each such party's heirs, personal representatives, successors and assigns. Each party who executes this Deed of Trust and each subsequent owner of the Property, or any part thereof (other than Beneficiary), covenants and agrees that it will perform, or cause to be performed, each term, provision, covenant and condition of this Deed of Trust.

Section 6.24. Counterparts. This Deed of Trust has simultaneously been executed in a number of identical counterparts, each of which, for all purposes, shall be deemed an original. If any Trustor is a corporation, this instrument is executed, acknowledged and delivered by Trustor's officers hereto duly authorized.

Section 6.25. Choice of Law. THE LOAN SECURED BY THIS DEED OF TRUST WAS NEGOTIATED IN THE STATE OF NEW JERSEY, THIS DEED OF TRUST WAS NEGOTIATED IN THE STATE OF NEW JERSEY, WAS EXECUTED AND DELIVERED BY TRUSTOR AND ACCEPTED BY BENEFICIARY 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 DEED OF TRUST 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, WITHOUT REGARD TO CONFLICTS OF LAWS CONSIDERATIONS 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 HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE,

IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH STATE, 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, AND THAT THIS SECTION SHALL IN NO EVENT BE CONSTRUED TO PROVIDE THAT THE SUBSTANTIVE LAW OF THE STATE SHALL APPLY TO THE INDEBTEDNESS SECURED BY THIS DEED OF TRUST, OR EVIDENCED BY THE NOTE, THE LOAN AGREEMENT OR THE OTHER LOAN DOCUMENTS, INCLUDING THE CHARGING AND COLLECTION OF INTEREST UNDER THE NOTE OR WITH RESPECT TO THE OTHER OBLIGATIONS AND TO THE ENFORCEMENT OF ALL RIGHTS UNDER THE GUARANTY, WHICH ARE AND SHALL CONTINUE TO BE GOVERNED BY THE SUBSTANTIVE LAW OF THE STATE OF NEW JERSEY. THE PARTIES FURTHER AGREE THAT TRUSTEE AND BENEFICIARY MAY ENFORCE ITS RIGHTS UNDER THE NOTE, THIS DEED OF TRUST, AND THE OTHER LOAN DOCUMENTS INCLUDING ITS RIGHTS TO SUE TRUSTOR TO COLLECT ANY OUTSTANDING INDEBTEDNESS OR TO OBTAIN A JUDGMENT FOR ANY DEFICIENCY FOLLOWING FORECLOSURE IN ACCORDANCE WITH NEW JERSEY LAW AND TRUSTOR HEREBY WAIVES TO THE MAXIMUM EXTENT PERMITTED BY LAW ANY RIGHTS WHICH IT MAY HAVE WITH RESPECT THERETO.

Section 6.26. Jurisdiction. AT BENEFICIARY'S ELECTION, TO BE EXERCISED IN ITS SOLE DISCRETION, ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST TRUSTOR OR BENEFICIARY ARISING OUT OF OR RELATING TO THIS DEED OF TRUST (OTHER THAN AN ACTION FOR JUDICIAL FORECLOSURE OR TO APPOINT A RECEIVER), THE NOTE AND THE OTHER LOAN DOCUMENTS SHALL BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN NEW JERSEY, AND TRUSTOR WAIVES ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND TRUSTOR HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. TRUSTOR 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 ACCEPT AND ACKNOWLEDGE 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 OF TRUSTOR MAILED OR DELIVERED TO TRUSTOR IN THE MANNER PROVIDED IN THE DEED OF TRUST, SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON TRUSTOR IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW JERSEY. TRUSTOR SHALL GIVE

PROMPT NOTICE TO THE BENEFICIARY OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, 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 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. NOTHING CONTAINED HEREIN SHALL BE DEEMED TO RESTRICT IN ANY MANNER OR IMPOSE ANY CONDITIONS UPON GRANTEE'S OR BENEFICIARY'S RIGHT TO COMMENCE ANY LEGAL SUIT, ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS DEED OF TRUST, THE NOTE OR THE OTHER LOAN DOCUMENTS IN THE FEDERAL OR STATE COURTS LOCATED IN THE STATE OF NEVADA.

Section 6.27. Waiver Of Jury Trial. TRUSTOR AND GRANTEE AGREE THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY TRUSTOR OR GRANTEE ON OR WITH RESPECT TO THIS DEED OF TRUST 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. GRANTEE AND TRUSTOR EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. FURTHER, TRUSTOR 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. TRUSTOR ACKNOWLEDGES AND AGREES THAT THIS SECTION IS A SPECIFIC AND MATERIAL ASPECT OF THIS DEED OF TRUST AND THAT GRANTEE WOULD NOT EXTEND CREDIT TO TRUSTOR IF THE WAIVERS SET FORTH IN THIS SECTION WERE NOT A PART OF THIS DEED OF TRUST.

ARTICLE VII SPECIAL STATE PROVISIONS

In the event of any conflict between the terms and provisions of this Article and any other provision of this Deed of Trust, the terms and provisions of this Article shall govern and control.

Section 7.01. Instrument. This Deed of Trust shall be deemed to be and shall be enforceable as a deed of trust, leasehold deed of trust, security agreement and financing statement.

Section 7.02. Foreclosure. Upon the occurrence of any Default, Beneficiary may request Trustee to proceed with foreclosure under the power of sale which is hereby

conferred, such foreclosure to be accomplished in accordance with the following provisions:

(a) Public Sale. Trustee is hereby authorized and empowered, and it shall be Trustee's special duty, upon such request of Beneficiary to sell the Property, or any part thereof, at public auction to the highest bidder for cash, with or without having taken possession of same. Any such sale (including notice thereof) shall comply with the applicable requirements, if any, governing sales of Nevada real property under powers of sale, conferred by deeds of trust. If there is no statute in force at the time of the sale governing sales of Nevada real property under powers of sale conferred by deeds of trust, such sale shall comply with applicable law, at the time of the sale governing sales of Nevada real property under powers of sale conferred by deeds of trust.

(b) Right to Require Proof of Financial Ability and/or Cash Bid. At any time during the bidding, the Trustee may require a bidding party: (A) to disclose its full name, state and city of residence, occupation, and specific business office location, and the name and address of the principal the bidding party is representing (if applicable), and (B) to demonstrate reasonable evidence of the bidding party's financial ability (or, if applicable, the financial ability of the principal of such bidding party), as a condition to the bidding party submitting bids at the foreclosure sale. If any such bidding party (the "Questioned Bidder") declines to comply with the Trustee's requirement in this regard, or if such Questioned Bidder does respond but the Trustee, in Trustee's sole and absolute discretion, deems the information or the evidence of the financial ability of the Questioned Bidder (or, if applicable, the principal of such bidding party) to be inadequate, then the Trustee may continue the bidding with reservation; and in such event (1) the Trustee shall be authorized to caution the Questioned Bidder concerning the legal obligations to be incurred in submitting bids, and (2) if the Questioned Bidder is not the highest bidder at the sale, or if having been the highest bidder the Questioned Bidder fails to deliver the cash purchase price payment promptly to the Trustee, all bids by the Questioned Bidder shall be null and void. The Trustee may, in Trustee's sole and absolute discretion, determine that a credit bid may be in the best interest of the Trustor and Beneficiary, and elect to sell the Property for credit or for a combination of cash and credit; provided, however, that the Trustee shall have no obligation to accept any bid except an all cash bid. In the event the Trustee requires a cash bid and cash is not delivered within a reasonable time after conclusion of the bidding process, as specified by the Trustee, but in no event later than 3:45 p.m. local time on the day of sale, then said contingent sale shall be null and void, the bidding process may be recommenced, and any subsequent bids or sale shall be made as if no prior bids were made or accepted.

(c) Sale Subject to Unmatured Obligation. In addition to the rights and powers of sale granted under the preceding provisions of this subsection, if default is made in the payment of any installment of the Obligation, Beneficiary may, at Beneficiary's option, at once or at any time thereafter while any matured installment remains unpaid, without

declaring the entire Obligation to be due and payable, orally or in writing direct Trustee to enforce this trust and to sell the Property subject to such unmatured Obligation and to the rights, powers, liens, security interests, and assignments securing or providing recourse for payment of such unmatured Obligation in the same manner, all as provided in the preceding provisions of this subsection. Sales made without maturing the Obligation may be made hereunder whenever there is a default in the payment of any installment of the Obligation, without exhausting the power of sale granted hereby, and without affecting in any way the power of sale granted under this subsection, the unmatured balance of the Obligation or the rights, powers, liens, security interests, and assignments securing or providing recourse for payment of the Obligation.

(d) Partial Foreclosure. Sale of a part of the Property shall not exhaust the power of sale, but sales may be made from time to time until the Obligation is paid in full. It is intended by each of the foregoing provisions of this subsection that Trustee may, after any request or direction by Beneficiary, sell not only the Land and the Improvements, but also the Accessories and other interests constituting a part of the Property or any part thereof, along with the Land and the Improvements or any part thereof, as a unit and as a part of a single sale, or may sell at any time or from time to time any part or parts of the Property separately from the remainder of the Property. It shall not be necessary to have present or to exhibit at any sale any of the Property.

(e) Trustee's Deeds. After any sale under this subsection, Trustee shall make good and sufficient deeds, assignments, and other conveyances to the purchaser or purchasers thereunder in the name of Trustor, conveying the Property or any part thereof so sold to the purchaser or purchasers with general warranty of title by Trustor. It is agreed that in any deeds, assignments or other conveyances given by Trustee, any and all statements of fact or other recitals therein made as to the identity of Beneficiary, the occurrence or existence of any Default, the notice of intention to accelerate, or acceleration of, the maturity of the Obligation, the request to sell, notice of sale, time, place, terms and manner of sale, and receipt, distribution, and application of the money realized therefrom, the due and proper appointment of a substitute trustee, and without being limited by the foregoing, any other act or thing having been duly done by or on behalf of Beneficiary or by or on behalf of Trustee, shall be taken by all courts of law and equity as prima facie evidence that such statements or recitals state true, correct and complete facts and are without further question to be so accepted, and Trustor does hereby ratify and confirm any and all acts that Trustee may lawfully do in the Property by virtue hereof.

Section 7.03. Receiver. Beneficiary, as a matter of right and without regard to the sufficiency of the security for repayment of the Obligation and performance and discharge of the obligations hereunder, without notice to Trustor and without any showing of insolvency, fraud, or mismanagement on the part of Trustor, and without the necessity of filing any judicial or other proceeding other than the proceeding for

appointment of a receiver, shall be entitled to the appointment of a receiver or receivers of the Property or any part thereof, and of the Rents, and Trustor hereby irrevocably consents to the appointment of a receiver or receivers. Any receiver appointed pursuant to the provisions of this subsection shall have the usual powers and duties of receivers in such matters.

Section 7.04. INTENTIONALLY DELETED.

Section 7.05. Entire Agreement. THIS DEED OF TRUST AND THE OTHER LOAN DOCUMENTS EMBODY THE FINAL, ENTIRE AGREEMENT AMONG THE PARTIES HERETO AND SUPERSEDE ANY AND ALL PRIOR COMMITMENTS, AGREEMENTS, REPRESENTATIONS AND UNDERSTANDINGS, WHETHER WRITTEN OR ORAL, RELATING TO THE SUBJECT MATTER HEREOF AND THEREOF AND MAY NOT BE CONTRADICTED OR VARIED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OR DISCUSSIONS OF THE PARTIES HERETO. THERE ARE NO ORAL AGREEMENTS AMONG THE PARTIES HERETO.

Section 7.06. Notice of Indemnification. TRUSTOR ACKNOWLEDGES THAT THIS DEED OF TRUST PROVIDES FOR INDEMNIFICATION OF BENEFICIARY BY TRUSTOR.

Section 7.07. Maturity Date. The original stated Maturity Date of the Note is June 30, 2009.

Section 7.08. Due on Sale. The entire Obligation shall be due and payable in full in the event of any sale, conveyance, alienation, Deed of Trust, encumbrance, pledge or other transfer of the Property (or any part thereof) unless expressly permitted by the terms of this Deed of Trust or otherwise consented to in writing by Beneficiary.

Section 7.09. Covenants of NRS 107.030. When not inconsistent with the above, covenant numbers 1, 2 (full replacement value), 3, 4 (Note rate), 5, 6, 7 (a reasonable percentage), 8, and 9 of NRS 107.030 are hereby adopted and made a part of this Deed of Trust.

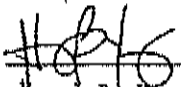
TRUSTOR HEREBY ACKNOWLEDGES THAT IT HAS RECEIVED
WITHOUT CHARGE A TRUE COPY OF THIS DEED OF TRUST.

EXECUTED as of the date first above written.

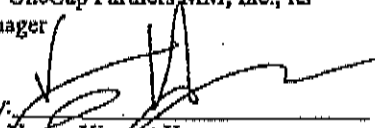
WITNESS:

OneCap Partners 2, LLC,
a Nevada limited liability company

By: OneCap Partners MM, Inc., its
Manager



Hazel B. Yeong

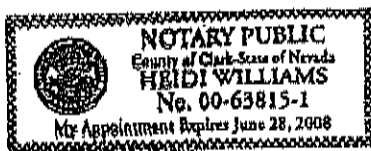
By: 

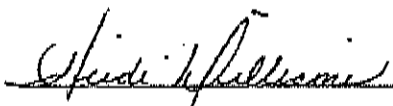
Name: Vincent Hesser
Title: President

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.





NOTARY PUBLIC

EXHIBITS:

- A - Property Description
- B - Permitted Exceptions
- C - Leases

SCHEDULES:

Schedule of Principal Loan Documents

EXHIBIT "A"

PROPERTY DESCRIPTION

PARCEL ONE (1):

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

APN No.: 264-25-101-001

PARCEL TWO (2):

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

APN No.: 264-25-201-001

EXHIBIT "B"

PERMITTED EXCEPTIONS

Those items listed in Schedule B, Section II of the title commitment/proforma issued by
Commonwealth Land Title Insurance Company under Escrow No. 06-06-0235-BB.

B-1

3139270400-1438033v3

KF00125

VH000646

EXHIBIT "C"

LEASES

None.

C-1

11392/0400-1432033vJ

KF00126

VII000647

SCHEDULE OF 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. Deed of Trust and with Security Agreement, Financing Statement for Fixture Filing and Assignment of Rents dated as of the date hereof;
5. Document Re-Execution Agreement dated as of the date hereof;
6. Affidavit and Indemnity of Borrower and Guarantors 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; and
10. UCC-1 Financing Statements dated as of the date hereof; and
11. Closing Statement dated as of the date hereof.

EXHIBIT “D”

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

Receipt/Conformed Copy

Requestor:

NEVADA TITLE COMPANY

06/15/2006 14:05:45 T20060106320

Book/Instr: 20060615-0005326

OR-UCC Page Count: 5

Fees: \$10.00 N/C Fee: \$0.00

Frances Deane

THE AS Clark County Recorder

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

Cole, Schotz, Meisel, Forman & Leonard, P.A.
Court Plaza North
25 Main Street
Hackensack, New Jersey 07601
Attn: Michael R. Leighton, Esq.

L #06-06-0235-BB

1. DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME		FIRST NAME		MIDDLE NAME	SUFFIX
OR OneCap Partners 2, LLC					
1b. INDIVIDUAL'S LAST NAME		FIRST NAME		MIDDLE NAME	SUFFIX
1c. MAILING ADDRESS		CITY	STATE	POSTAL CODE	COUNTRY
5440 W. Sahara Avenue, 3 rd Floor		Las Vegas	Nevada	89146	USA
1d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	1e. TYPE OF ORGANIZATION		1f. JURISDICTION OF ORGANIZATION	1g. ORGANIZATIONAL ID#, IF ANY
		Limited Liability Company		Nevada	E0417052006-8

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME		FIRST NAME		MIDDLE NAME	SUFFIX
OR					
2b. INDIVIDUAL'S LAST NAME		FIRST NAME		MIDDLE NAME	SUFFIX
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE	COUNTRY
2d. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	2e. TYPE OF ORGANIZATION		2f. JURISDICTION OF ORGANIZATION	2g. ORGANIZATIONAL ID#, IF ANY
					<input type="checkbox"/> NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE or ASSIGNOR S/P) - Insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME		FIRST NAME		MIDDLE NAME	SUFFIX
OR KENNEDY FUNDING, INC.					
3b. INDIVIDUAL'S LAST NAME		FIRST NAME		MIDDLE NAME	SUFFIX
3c. MAILING ADDRESS		CITY	STATE	POSTAL CODE	COUNTRY
TWO UNIVERSITY PLAZA, SUITE 402		HACKENSACK	NJ	07601	USA

4. THIS FINANCING STATEMENT covers the following collateral:

SEE SCHEDULE "A" ATTACHED HERETO AND MADE A PART HEREOF.

5. ALTERNATIVE DESIGNATION (if applicable): <input type="checkbox"/> LESSOR <input type="checkbox"/> COMPLETION/CONSIGNOR <input type="checkbox"/> BAILOR/BALOR <input type="checkbox"/> SELLER/BUYER <input type="checkbox"/> AGENT <input type="checkbox"/> NON-UCC FILING	
6. <input checked="" type="checkbox"/> This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum (if applicable)	7. CHECK & REQUEST SEARCH REPORT(S) on Debtor(s) (ADDITIONAL FEE) (optional)
8. OPTIONAL FILER REFERENCE DATA	

TO BE FILED IN Clark County, Nevada

FILING OFFICE COPY - NATIONAL UCC FINANCING STATEMENT (FORM UCC1) (REV.05/22/02)

313820400-1430111v1

KF00187

VH000650

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

9. NAME OR FIRST DEBTOR (11a or 11b) ON RELATED FINANCING STATEMENT

9a. ORGANIZATION'S NAME		
OR OneCap Partners 2, LLC		
9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME, SUFFIX

10. MISCELLANEOUS:

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

11. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME — Insert only one debtor name (11a or 11b) — do not abbreviate or combine names

11a. ORGANIZATION'S NAME				
OR				
11b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX	

11c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

11g. SEE INSTRUCTIONS	ADD'L INFO RE ORGANIZATION DEBTOR	11i. TYPE OF ORGANIZATION	11f. JURISDICTION OF ORGANIZATION	11g. ORGANIZATIONAL ID#, if any
				<input type="checkbox"/> NONE

12. ADDITIONAL SECURED PARTY'S or ASSIGNOR S/P'S NAME — Insert only one name (12a or 12b)

12a. ORGANIZATION'S NAME				
OR				
12b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX	

12c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

13. This FINANCING STATEMENT covers ☐ timber to be cut or ☐ ex-extracted collateral, or is filed as a ☒ fixture filing.
14. Description of real estate:

SEE EXHIBIT A ATTACHED HERETO AND MADE A PART HEREOF.

15. Name and address of a RECORD OWNER of above-described real estate (if Debtor does not have a record interest):

16. Additional collateral description

17. Check <u>only</u> if applicable and check <u>only</u> one box. Debtor is a <input type="checkbox"/> Trust or <input type="checkbox"/> Trustee acting with respect to property held in trust or <input type="checkbox"/> Decedent's Estate
18. Check <u>only</u> if applicable and check <u>only</u> one box: <input type="checkbox"/> Debtor is a TRANSMITTING UTILITY <input type="checkbox"/> Filed in connection with a Manufactured-Home Transaction — effective 30 years <input type="checkbox"/> Filed in connection with a Public-Finance Transaction — effective 30 years

FILING OFFICE COPY — NATIONAL UCC FINANCING STATEMENT ADDENDUM (FORM UCC1A0) (REV. 05/22/02)

31392/0400-1438111v1

KF00188

VII000651

SCHEDULE A TO UCC-1 FINANCING STATEMENT

OneCap Partners 2, LLC
a Nevada limited liability company, as Debtor,
and
KENNEDY FUNDING, INC., as Secured Party

All Debtor's right, title and interest in and to:

(i) the real property situated in the County of Clark and State of Nevada, which is more particularly described in Exhibit A attached hereto and made a part hereof for all purposes the same as if set forth herein verbatim, together with all right, title and interest of Debtor in and to (a) all streets, roads, alleys, easements, rights-of-way, licenses, rights of ingress and egress, vehicle parking rights and public places, existing or proposed, abutting, adjacent, used in connection with or pertaining to the real property or the Improvements (as hereinafter defined); (b) any strips or gores between the real property and abutting or adjacent properties; and (c) all water and water rights, timber, crops and mineral interests pertaining to the real property (such real estate and other rights, titles and interests being hereinafter sometimes called the "Land");

(ii) all buildings, structures and other improvements or any part thereof, now or hereafter situated on or under the Land and all restorations and replacements thereof "Improvements";

(iii) all fixtures, systems, and articles of personal property, of every kind and character, now owned or hereafter acquired by Debtor (or Debtor's successors or assigns), which are now or hereafter attached to the Land or the Improvements, or which are located on the Land and used in or necessary to the complete and proper planning, development, use, occupancy or operation thereof, or acquired for use or installation in or on the Land or the Improvements, and all renewals and replacements of, substitutions for and additions to the foregoing, including, but without limiting the foregoing, all of the following items now owned or hereafter acquired by Debtor and located on the Land, any and all fixtures, systems, heating, ventilating, air conditioning, refrigerating, plumbing, sewer, lighting, generating, cleaning, storage, incinerating, waste disposal, sprinkler, fire extinguishing, communications, transportation (of people or things, including, but not limited to, stairways, elevators, escalators and conveyors), data processing, security and alarm, laundry, food or drink preparation, storage or serving, gas, electrical and electronic, water, and recreational uses or purposes; all tanks, pipes, wiring, conduits, ducts, doors, partitions, rugs and other floor coverings, wall coverings, windows, drapes, window screens and shades, awnings, fans, motors, engines and boilers; decorative items and art objects; and files, records and books of account (all of which are herein sometimes referred to together as the "Accessories");

(iv) all (a) plans and specifications for the Improvements; (b) contracts relating to the Land or the Improvements or the Accessories or any part thereof; (c) deposits including, but not limited to, Debtor's rights in tenants' security deposits (if any), deposits with respect to utility services to the Land or the Improvements or the Accessories or any part thereof, and any deposits or reserves hereunder or under any other document evidencing, securing, or now or hereafter executed in connection with that certain loan from Secured Party to Debtor in the principal sum of \$12,000,000 (the "Loan") for taxes, insurance or otherwise, funds, accounts, contract rights, instruments, documents, commitments, general intangibles, notes and chattel paper used in connection with or arising from or by virtue of any transactions related to the Land or the Improvements or the Accessories or any part thereof; (d) permits, licenses, franchises, bonds, certificates and other rights and privileges obtained in connection with the Land or the Improvements or the Accessories or any part thereof and assignable without third party consents; (e) leases, rents, room rents, royalties, bonuses, issues, profits, revenues and other benefits of the Land, the Improvements and the Accessories; and (f) other properties, rights, titles and interests, if any, specified in any section or any article of that certain Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing, dated as of June __, 2006, made by Debtor in favor of Secured Party and intended to be recorded in the Public Records of Clark County, Nevada;

(v) all proceeds, products, consideration, compensation and recoveries, direct or consequential, cash and noncash, of or arising from, as the case may be, (a) the properties, rights, titles and interests referred to above in paragraphs (i), (ii), (iii) and (iv) above; (b) any sale, lease or other disposition thereof; (c) each policy of insurance relating thereto (including premium refunds); (d) the taking thereof or of any rights appurtenant thereto by eminent domain or sale in lieu thereof for public or quasi-public use under any law; and (e) any damage thereto whether caused by such a taking (including change of grade of streets, curb cuts or other rights of access) or otherwise caused; and

(vi) all other interests of every kind and character, and proceeds thereof, which Debtor now has or hereafter acquires in, to or for the benefit of the properties, rights, titles and interests referred to above in paragraphs (i), (ii), (iii), (iv), and (v) and all property used or useful in connection therewith, including, but not limited to, remainders, reversions and reversionary rights or interests.

EXHIBIT A TO UCC-1 FINANCING STATEMENT

LEGAL DESCRIPTION

PARCEL ONE (1):

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

APN No.: 264-25-101-001

PARCEL TWO (2):

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

APN No.: 264-25-201-001

EXHIBIT “E”

**Clark County Recorder's Office**

Record Date: 12/8/2008 8:52 AM
Number of Pages: 2
Book Type: OR
Document Type: (NTS) NOTICE OF TRUSTEE SALE
1st Party: ONECAP PARTNERS 2 LLC
2nd Party: KENNEDY FUNDING INC
NEVADA TITLE COMPANY
Parcel #: 264-25-101-001

VH000656

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Business Court

COURT MINUTES

June 16, 2015

09A582746

Kennedy Funding Inc

vs

Onecap Partners MM Inc, Vincent Hesser

June 16, 2015

1:00 PM

Telephonic Conference

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 14C

COURT CLERK: Dulce Romea

RECORDER: Patti Slattery

PARTIES

PRESENT:

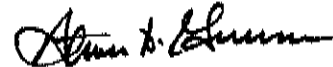
Atamoh, Ogonna M.

Attorney for Plaintiff

JOURNAL ENTRIES

- Also participating telephonically: Attorney Timothy S. Cory and Attorney Anthony M. Santos for Defendant Vincent Hesser.

Court NOTED the reason for this call is an ex parte application for protective order to preclude a judgment debtor examination from going forward today. Objection by Ms. Atamoh as to the request being untimely and lacking merit. Response by Mr. Santos regarding fair market determination of the property. Mr. Cory noted if the judgment has gone away or has been satisfied they are not entitled to a judgment debtor exam. Mr. Atamoh advised she has a court reporter waiting, she did write opposing counsel a letter, and they elected to wait until the eve of the examination. Court stated, it understands the issues that are being raised; however, that does not alleviate the judgment debtor examination; the motion for protective order is DENIED and the judgment debtor examination is PERMITTED to go forward.



CLERK OF THE COURT

1 **SAO**
2 OGONNA M. BROWN, ESQ.
3 Nevada Bar No. 7589
4 E-mail: obrown@nevadafirm.com
5 HOLLEY DRIGGS WALCH
6 FINE WRAY PUZEY & THOMPSON
7 400 South Fourth Street, Third Floor
8 Las Vegas, Nevada 89101
9 Telephone: 702/791-0308
10 Facsimile: 702/791-1912
11 *Attorneys for Kennedy Funding, Inc.*

7
8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

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

12 Plaintiff,

13 v.

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

Date of Hearing: July 17, 2015

Time of Hearing: In Chambers

19 **STIPULATION AND ORDER TO EXTEND TIME FOR PLAINTIFF TO FILE AN**
20 **OPPOSITION TO DEFENDANT HESSER'S MOTION PURSUANT TO NRCP 60(b)**
21 **TO VACATE JUDGMENT**

22 Plaintiff Kenney Funding, Inc. ("Plaintiff" or alternatively, the "Judgment Creditor"), by
23 and through its attorneys OGONNA M. BROW, ESQ. of the law firm of HOLLEY DRIGGS
24 WALCH FINE WRAY PUZEY & THOMPSON, and Defendant Vincent W. Hesser
25 ("Defendant" or alternatively, the "Debtor") (together, the "Parties"), by and through his
26 attorneys, TIMOTHY S. CORY, ESQ. of the law Firm of TIMOTHY S. CORY &
27 ASSOCIATES and ANTHONY M. SANTOS, ESQ. of the law firm of A.M. SANTOS LAW,
28 CHTD., hereby stipulate and agree as follows:

1. On June 15, 2015, Defendant filed Defendant Hesser's Motion Pursuant to NRCP
60(b) to Vacate Judgment (the "Motion to Vacate Judgment");

...

2. The Parties are involved in ongoing settlement discussions which may vacate the hearing on the Motion to Vacate Judgment.

3. Plaintiff's Opposition to Defendant's Motion to Vacate Judgment was due on June 29, 2015; and

3. The Parties agree that the Plaintiff shall have until July 8, 2015, to file an Opposition to the Motion to Vacate Judgment.

IT IS SO STIPULATED.

DATED this 29th day of June, 2015.

DATED this 29th of June, 2015.

**HOLLEY DRIGGS WALCH
FINE WRAY PUZEY & THOMPSON**

A.M. SANTOS LAW, CHTD.

By 

Richard F. Holley, ESQ. (NBN 3077)
Ogonna M. Brown, ESQ. (NBN 7589)
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Kennedy Funding, Inc.

By 

Anthony M. Santos, ESQ. (NBN 11265)
3275 South Jones Boulevard, Suite 104
Las Vegas, Nevada 89146
Attorney for Vincent Hesser

ORDER

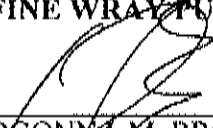
UPON STIPULATION of the Parties, and good cause appearing therefore,

IT IS HEREBY ORDERED that the Plaintiff shall have until July 8, 2015, to file an Opposition to Defendant Hesser's Motion Pursuant to NRCP 60(b) to Vacate Judgment.

IT IS SO ORDERED.


DISTRICT COURT JUDGE

Prepared and Submitted by:
**HOLLEY DRIGGS WALCH
FINE WRAY PUZEY & THOMPSON**


OGONNA M. BROWN, ESQ. (NBN 7589)
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Kennedy Funding, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 30th day of June, 2015, and pursuant to EDCR 8.05 and NRCP 5(b), I caused to be served electronically the foregoing STIPULATION AND ORDER TO EXTEND TIME FOR PLAINTIFF TO FILE AN OPPOSITION TO DEFENDANT HESSER'S MOTION PURSUANT TO NRCP 60(b) TO VACATE JUDGMENT addressed to:

A.M. SANTOS LAW, CHTD.
Antony Santos tony@amsantoslaw.com
Melissa Burczyk melissa@amsantoslaw.com

TIMOTHY S. CORY & ASSOCIATES
Timothy S. Cory tim.cory@corylaw.us

Attorneys for Vincent Hesser



An employee of Holley Driggs Walch
Fine Wray Puzey & Thompson