

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10-CVS-5415

BANK OF AMERICA, N.A.)
)
Plaintiff,)

vs.)

UNITED GENERAL TITLE)
INSURANCE COMPANY and FIRST)
AMERICAN TITLE INSURANCE)
COMPANY,)
)
Defendants.)

UNITED GENERAL TITLE)
INSURANCE CO., a California)
corporation, and FIRST AMERICAN)
TITLE INSURANCE CO., a California)
corporation,)

Counterclaimant and)
Third-Party Defendant,)

vs.)

FISERV SOLUTIONS, INC., d/b/a)
INTEGRATED LOAN SERVICES;)
FISERV FULFILLMENT AGENCY,)
LLC, f/k/a/ ILS TITLE AGENCY, LLC;)
FISERV FULFILLMENT AGENCY OF)
ALABAMA, LLC, f/k/a ILS TITLE)
AGENCY OF ALABAMA, LLC; BANK)
OF AMERICA CORPORATION,)
BANK OF AMERICA, N.A.; and)
ROES 1 TO 100,)

Third-Party Defendants and)
Counterclaim Defendant.)

ANSWER, COUNTERCLAIM AND THIRD)
PARTY COMPLAINT OF UNITED)
GENERAL TITLE INSURANCE COMPANY)
AND FIRST AMERICAN TITLE)
INSURANCE COMPANY; DEMAND FOR)
JURY TRIAL)

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BY: [Signature]

APR 23 2010

ANSWER

First American Title Insurance Company ("FATIC") and United General Title Insurance Company ("UGT"); (FATIC and UGT are sometimes referred to collectively and severally as "First American") respond to the separately enumerated allegations of Bank of America's ("BOA") Complaint filed in this matter on March 5, 2010 as set forth below. First American denies the unspecific and general allegations of the "Preliminary Statement" which are not separately numbered.

1. First American admits the allegations of paragraph no. 1 of the Complaint.
2. First American admits the allegations of paragraph no. 2 of the Complaint.
3. First American admits the allegations of paragraph no. 3 of the Complaint.

4. In answer to the allegations of paragraph no. 4 of the Complaint, First American admits that UGT became a wholly owned subsidiary of FATIC in a stock purchase transaction and that on or about September 30, 2008 assets of UGT were, with appropriate regulatory consents, assigned to FATIC. Except as admitted, First American denies the allegations of this paragraph.

5. In answer to the allegations of paragraph no. 5 of the Complaint, First American admits that UGT and FATIC are subject to personal jurisdiction in North Carolina and admit that both defendants issued a limited number of certificates of insurance at issue in this lawsuit to BOA in North Carolina and that they have sent letters denying claims to BOA in North Carolina. Except as admitted, First American denies the allegations of this paragraph.

6. In answer to the allegations of paragraph no. 6 of the Complaint, First American admits it has sold thousands of policies to policy holders in North Carolina in addition to the certificates issued to BOA that are at issue in this lawsuit. Except as admitted, First American denies the allegations of this paragraph.

7. In answer to the allegations of paragraph no. 7 of the Complaint, First American admits that grounds for personal jurisdiction over First American exist under N.C.G.S. § 1-75.4(1). First American affirmatively asserts that the websites of UGT and FATIC include the statements therein contained and that they speak for themselves. Except as admitted, First American denies the allegations of this paragraph.

8. In answer to the allegations of paragraph no. 8 of the Complaint, First American admits that grounds for personal jurisdiction over First American exist under N.C.G.S. § 1-75.4(1). Except as admitted, First American denies the allegations of this paragraph.

9. In answer to the allegations of paragraph no. 9 of the Complaint, First American admits that grounds for personal jurisdiction over First American exist under

N.C.G.S. § 1-75.4(1). First American denies that grounds for the exercise of personal jurisdiction over First American exist under N.C.G.S. § 1-75.4(10).

10. First American admits the allegations of paragraph no. 10 of the Complaint.

11. In answer to the allegations of paragraph no. 11 of the Complaint, First American is informed and believes and on that basis admits that BOA acquired FleetBoston Financial Corp., including Fleet National Bank. First American is without sufficient information to form a belief as to the truth of the remaining allegations of the Complaint and on that basis denies them.

12. First American admits the allegations of paragraph no. 12 of the Complaint.

13. In answer to the allegations of paragraph no. 13 of the Complaint, First American admits the existence of a written agreement ("Agency Agreement") between, among others, First American, Fiserv Solutions, Inc. d/b/a/ Integrated Loan Services, ILS Title Agency, LLC, and ILS Title Agency of Alabama, LLC effective February 1, 2004 and that the Agency Agreement was amended in writing several times. The written terms of the Agency Agreement are those set forth therein and speak for themselves. While the Agency Agreement imposed numerous obligations on Fiserv, which included, without limitation, mandates that it was to comply with all instructions, guidelines and directives from First American, and that it was to conduct or participate in the closings of transactions in which First American policies were to be issued in accordance with prudent practice requirements and instructions of the parties, Section 8, captioned "Limitation of AGENT's Authority" limited the circumstances under which Fiserv was authorized to act on First American's behalf by stating that "notwithstanding any provision [t]hereof, [Fiserv's] authority under th[e] agreement [wa]s expressly limited to the issuance of Policies and the collection of premiums as set forth hereinabove." Except as admitted or asserted, First American denies the allegations of this paragraph.

14. In answer to the allegations of paragraph no. 14 of the Complaint, First American admits that it and other title insurers developed a product known as a Lien Protection Insurance Policy ("LPI Policy") and that there was a difference in how First American mitigated its risk of loss under the new product. First American admits that LPI Policies were issued without performing a traditional full and complete search of the public title records or issuing a commitment identifying matters to be cleared from record title, but, instead, because the HELOC loans were based significantly on the borrowers' personal credit, the lenders applying for the insurance agreed to adopt and implement appropriate and required underwriting standards that would minimize the risk of the borrowers' defaulting and concurrently would minimize the risk of claims and losses under the LPI Policies, which underwriting procedures were to include, without limitation, the lender reviewing credit reports, reviewing a borrower's loan application, interviewing the borrower, and analyzing this and other information obtained to confirm, among other matters, the borrower's ability to repay, the ownership of the real property collateral, and what liens encumbered it. First American further admits that it relied on

the lender's due diligence when the lender was underwriting the HELOCs, and that this was a cornerstone for controlling FATIC's and UGT's risks under the LPI Program. Except as admitted or asserted, First American denies the allegations of this paragraph.

15. In answer to the allegations of paragraph no. 15 of the Complaint, First American admits that the QuickClose LPI Program with Fleet National Bank and BOA employed written insurance policy forms including: a Residential Home Equity Mortgage Master Loan Policy Issued by United General Title Insurance Company Policy No: 22000002 issued to BOA with a stated effective date of January 1, 2005; a First American FACT Master Loan Policy For Residential Junior Mortgages Issued By First American Title Insurance Company to BOA with a stated effective date of August 1, 2004 and a stated Policy Number of 100101; a First American FACT Master Loan Policy For Residential Junior Mortgages Issued By First American Title Insurance Company to Fleet National Bank with a stated effective date of May 1, 2004 and a stated Policy Number of 100067. First American will refer to these as the Master Policy Forms or singularly as a Master Policy Form. Contrary to BOA's assertions in paragraph no. 25 of the Complaint, the First American FACT Master Loan Policy For Residential Junior Mortgages Issued by FATIC with a stated Policy Number of 100066 and an effective date of May 1, 2004 was not issued to BOA or Fleet and First American is informed and believes and on that basis asserts that BOA has no interest therein. First American admits that the written terms of the Master Policy Forms are those therein contained and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

16. In answer to the allegations of paragraph no. 16 of the Complaint, First American admits the existence of the Master Policy Forms as described above in paragraph no. 15. Except as admitted, First American denies the allegations of this paragraph.

17. In answer to the allegations of paragraph no. 17 of the Complaint, First American admits the existence of the Master Policy Forms as described above in paragraph no. 15. Except as admitted, First American denies the allegations of this paragraph.

18. In answer to the allegations of paragraph no. 18 of the Complaint, First American admits the existence of the Master Policy Forms as described above in paragraph no. 15. Except as admitted, First American denies the allegations of this paragraph.

19. First American denies the allegations of paragraph no. 19 of the Complaint (and the identical paragraph no. 137).

20. Because of the unreasonable vagueness and generality of the allegations of paragraph no. 20 of the Complaint, First American is unable to respond to them, and on that basis denies them. In further response, First American affirmatively asserts that Fiserv had no authority to modify the coverage afforded under the Master Policy Forms

and Certificates issued in connection with the LPI Program. Except as admitted or asserted, First American denies the allegations of this paragraph.

21. In answer to the allegations of paragraph no. 21 of the Complaint, First American admits that Fiserv and BOA entered into a written agreement entitled "Statement of Work" ("SOW") that governed aspects of the relationship between Fiserv and BOA in connection with the HELOC loan transactions and the LPI Program and affirmatively asserts that this document contains the terms set forth therein and speaks for itself. In further response to this paragraph, First American asserts that its relationship with Fiserv in connection with the LPI Program was memorialized by an Agency Agreement (as described in paragraph no. 13 above) and the terms are those set forth therein and speak for themselves. Except as previously admitted or denied, First American denies the allegations of this paragraph.

22. In answer to the allegations of paragraph no. 22 of the Complaint, First American admits that it received a premium on the LPI Policy Certificates Fiserv issued on its behalf as part of the LPI Program. Except as admitted, First American does not have sufficient information or belief to enable it to answer the allegations of this paragraph and on that basis denies them.

23. In answer to the allegations of paragraph no. 23 of the Complaint, First American admits that if BOA closed and funded a loan and later discovered that it did not have an enforceable mortgage in the intended lien position when it made the loan, that, subject to the terms, conditions, stipulations and exclusions of the applicable Master Policy Form and Certificate, and assuming BOA had met the preconditions to obtain a valid Certificate and had performed the requirements to receive payments under a valid policy of title insurance, BOA was potentially entitled to coverage under an LPI Master Policy Form and Certificate, and First American affirmatively asserts that the terms of the Master Policy Forms, Certificates and SOW are those set forth therein and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

24. In answer to the allegations of paragraph no. 24 of the Complaint, First American admits that there is a Master Policy Form issued by UGT No. 220000002 and affirmatively asserts that the terms are set forth therein and speak for themselves. In further answer to the allegations, First American denies that this Master Policy Forms, or any other Master Policy Form, were "insurance policies" because they did not contain all of the terms necessary to form a contract of title insurance and in particular did not include the borrower's loan number, the real property serving as collateral for the loan, the intended priority of BOA's lien, and the amount of insurance. Except as admitted or asserted, First American denies the allegations of this paragraph.

25. In answer to the allegations of paragraph no. 25 of the Complaint, First American admits the existence of the Master Policy Forms identified in this paragraph, including the existence of a document with the caption "First American FACT" Master Loan Policy for Residential Junior Mortgages issued by First American Title Insurance Company" with the stated policy number 100066 and an effective date of May 1, 2004,

which First American asserts was not issued to BOA or Fleet and, based on information and belief, First American denies that BOA has any interest in named insured under this policy. Except as admitted or asserted, First American denies the allegations of this paragraph.

26. First American is without sufficient information to form a belief as to the truth of the allegations of paragraph no. 26 of the Complaint and on that basis denies them.

27. In answer to the allegations of paragraph no. 27 of the Complaint, First American admits that under certain circumstances, in part set forth in the Agency Agreement and the SOW, Fiserv was authorized to issue Certificates under the LPI Program and affirmatively asserts that the legal enforceability and effect of the issuance of the Certificate was subject to the terms, conditions, stipulations, exceptions and exclusions of these documents, the Master Policy Forms, and applicable law. Except as admitted or asserted, First American denies the allegations of this paragraph.

28. In answer to the allegations of paragraph no. 28 of the Complaint, First American admits the existence of the Master Policy Forms and affirmatively asserts that they are not an "insurance policy" because they do not contain all of the requisite and material terms to form a policy of insurance. First American further asserts that the terms of the Master Policy Form and the Certificate are those set forth therein and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

29. In answer to the allegations of paragraph no. 29 of the Complaint, First American admits the existence of the Master Policy Forms and Certificates issued in connection with the LPI Program and asserts that they set forth the terms therein contained and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

30. In answer to the allegations of paragraph no. 30 of the Complaint, First American admits the existence of the Master Policy Forms and Certificates issued in connection with the LPI Program and asserts that they set forth the terms therein contained and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

31. In answer to the allegations of paragraph no. 31 of the Complaint, First American admits the denial of over 2,000 of BOA's claims. Except as admitted, First American denies the allegations of paragraph no. 31 and specifically, but without limitation, denies that either FATIC or UGT breached the terms of any relevant policy of title insurance and denies that either has acted in bad faith.

32. In answer to the allegations of paragraph no. 32 of the Complaint, First American admits that beginning in 2005, and continuing for an extended period thereafter, First American paid BOA millions of dollars under LPI Policies evidenced by Master Policy Forms and Certificates based on the premise that BOA and Fiserv had

complied with the SOW and other preconditions and requirements for the issuance of valid Certificates of insurance and on the premise that BOA and Fiserv were producing all relevant portions of BOA's loan files and other required documents as part of its claims submittal and that the representations and certifications BOA made as part of its claims submittal were accurate. As the volume of claims increased some claims submittals included additional materials which had not be submitted with earlier claims causing First American concern that other BOA submittals had not been complete. First American then began requesting additional information regarding BOA's agreed upon, contractual and required lending practices and became aware the BOA's earlier submittals and many of its most recent submittals did not contain all of the necessary information in BOA's possession concerning the underlying HELOC loans. First American responded by requesting additional information from BOA that was relevant to First American's determination of whether BOA was entitled to have a Certificate issued, to evidence the formation of an LPI Policy in the first instance, whether there was a covered loss and, if so, the amount of the loss that First American owed BOA under the LPI Policies, if any. The information that First American requested included BOA's underwriting guideline procedures and documents confirming BOA had followed them. First American affirmatively asserts that BOA has not responded by providing the necessary information in a substantial number of claims and, as a result, those claims remain outstanding. Except as admitted or asserted, First American denies the allegations of this paragraph.

33. In answer to the allegations of paragraph no. 33 of the Complaint, First American admits that BOA and other lenders experienced a dramatic increase in borrowers defaulting on their home mortgages and that thereafter BOA submitted a higher volume of claims under the LPI Program than it historically had submitted. Except as admitted or asserted, First American denies the allegations of this paragraph.

34. In answer to the allegations of paragraph no. 34 of the Complaint, First American admits that BOA's claim volume increased in 2007 through 2009 in comparison to what it previously had been and that First American requested information that was relevant and necessary to determine whether BOA was entitled to have Certificates issued to evidence the formation of the LPI Policies in the first instance, whether there was a covered loss and, if so, the amount that First American owed BOA, if any. Except as admitted or asserted, First American denies the allegations of this paragraph.

35. In answer to the allegations of paragraph no. 35 of the Complaint, First American admits that in some instances after BOA's borrower defaulted on a home equity loan where there had been an LPI Certificate issued, BOA, directly or through Fiserv, discovered instances where they contended there was coverage, and that BOA thereafter submitted claims to UGT and/or FATIC. Except as admitted or asserted, First American denies the allegations of this paragraph.

36. In answer to the allegations of paragraph no. 36 of the Complaint, First American is informed and believes and on that basis admits that the claims at issue in this lawsuit arise from home equity loans or lines of credit made by BOA that are now in

default and that BOA has submitted claims under an LPI Policy Certificate for an alleged loss. First American is informed and believes and on that basis alleges that in those instances where First American has denied an obligation to pay policy benefits, First American has concluded that, based on the information submitted, BOA was not entitled to policy benefits. First American further admits that there are a substantial number of pending claims that are unresolved because, in significant part, BOA has not submitted sufficient information that would allow First American to determine whether BOA was entitled to have valid Certificates issued to evidence the formation of LPI Policies in the first instance, whether there was a covered loss and, if so, the amount that First American owes under the LPI Policies, if any. Except as admitted or asserted, First American denies the remaining allegations of this paragraph.

37. In answer to the allegations of paragraph no. 37 of the Complaint, First American admits that BOA's claims under the LPI Policy Certificates include purported lien position claims, vesting claims, and legal description claims, among others, and that these claims constitute a significant percentage of those submitted by BOA under the LPI Program. Except as admitted or asserted, First American denies the allegations of this paragraph.

38. First American denies the allegations of paragraph no. 38 of the Complaint.

39. In answer to the allegations of paragraph no. 39 of the Complaint, First American admits that Exhibit 1 is a report that contains some claims that BOA submitted under the LPI Program and that First American has denied and that it also may contain some matters which are not claims that fall in that category. First American does not have sufficient information to form a belief regarding who prepared the report and, if and to the extent it was prepared by Fiserv, First American denies that Fiserv had authority to act on First American's behalf in connection with the preparation of the list or in the claims process. Except as admitted or asserted, First American denies the allegations of this paragraph.

40. First American denies the allegations of paragraph no. 40 of the Complaint.

41. In answer to the allegations of paragraph no. 41 of the Complaint, First American affirmatively asserts that the terms of the Master Policy Forms and Certificates are those therein contained and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph and specifically denies that BOA's charge-off amount is always its actual compensable loss under any lender's policy of title insurance, including but not limited to those that are part of the LPI Program. Except as admitted or asserted, First American denies the allegations of this paragraph.

42. First American denies the allegations of paragraph no. 42 of the Complaint.

43. In answer to the allegations of paragraph no. 43 of the Complaint, First American admits that the SOW executed by BOA and Fiserv set forth claims submission forms and information required in the event of a claim under the LPI Program and affirmatively asserts that the terms of the SOW are those set forth therein and speak for themselves. First American admits that Exhibit 6.0 to the SOW which is captioned "Lien Protection Claim Submission Checklist" contains a "Section Four – Calculation of Loss" which requires BOA to disclose its "Chargeoff Amount/Loss" and affirmatively asserts that unless BOA suffered a chargeoff amount it would not be entitled to any payment under the LPI Policy or Certificate but, in the event there was a covered loss, and BOA had suffered a chargeoff, the loss payable under the policy was to be governed by the policy's terms, conditions and stipulations, and established law, which is set forth in more detail in First American's counterclaim and third party complaint, which is incorporated by reference, and that the actual loss under the title policies is not always BOA's charge-off amount as alleged by BOA. Except as admitted or asserted, First American denies the allegations of this paragraph.

44. In answer to the allegations of paragraph no. 44 of the Complaint, First American denies that Fiserv was authorized to act on behalf of First American in creating the SOW and admits the existence of the Agency Agreement (as described in paragraph no. 13 above), and asserts that the terms are those therein contained and speak for themselves. First American does not have sufficient information to form a belief to enable it to respond to the remaining allegations of this paragraph and on that basis denies them.

45. First American denies the allegations of paragraph no. 45 of the Complaint.

46. First American denies the allegations of paragraph no. 46 of the Complaint.

47. In answer to the allegations of paragraph no. 47 of the Complaint, First American admits that it considers BOA's chargeoff amount, the diminution in equity caused by the alleged insured title defect, and other factors, as part of its determination of whether BOA has suffered a loss compensable under the LPI policy and, if so, its amount. Except as express admitted or asserted, First American denies the allegations of this paragraph.

48. First American denies the allegations of paragraph no. 48 of the Complaint.

49. First American denies the allegations of paragraph no. 49 of the Complaint.

50. First American denies the allegations of paragraph no. 50 of the Complaint.

51. First American does not have sufficient information to form a belief as to the truth of the allegations of paragraph no. 51 of the Complaint and on that basis denies them.

52. In answer to the allegations of paragraph no. 52 of the Complaint, First American admits the existence of the Master Policy Forms (as described in paragraph no. 15 above) and asserts that the Master Policy Forms contain the terms set forth therein and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

53. In answer to the allegations of paragraph no. 53 of the Complaint, First American admits that in some circumstances BOA was told by UGT that foreclosure would not be required in order to pursue a claim under an LPI Policy Certificate. Except as admitted, First American denies the allegations of this paragraph.

54. In answer to the allegations of paragraph no. 54 of the Complaint, First American admits that in some instances it refused to pay BOA's claims unless BOA foreclosed on the loan at issue. Except as admitted or asserted, First American denies the allegations of this paragraph.

55. First American denies the allegations of paragraph no. 55 of the Complaint.

56. In answer to the allegations of paragraph no. 56 of the Complaint (and the identical paragraph no. 110), First American admits the existence of the Master Policy Forms (as described in paragraph no. 15 above) and asserts that the terms are those therein contained and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

57. First American denies the allegations of paragraph no. 57 of the Complaint.

58. In answer to the allegations of paragraph no. 58 of the Complaint, First American admits the existence of the Master Policy Forms (as described in paragraph no. 15 above) and Certificates and asserts that they include the terms therein contained and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

59. In answer to the allegations of paragraph no. 59 of the Complaint, First American has been unable to locate any letter of the described nature dated November 5, 2005. First American admits the existence of a letter from Steven H. Winkler addressed to Mr. Wayne B. Bzdula, the Director, Risk Management, Integrated Loan Services/Fiserv Lending Solutions dated November 9, 2005 and admits the existence of letter from Mr. Winkler also addressed to Mr. Bzdula dated July 10, 2006, which contain the quoted text, and both also state: "The Borrower's statement may be either in writing or oral and contemporary record of same clearly made within the Insured's credit file for said Borrower(s)," text which is not set forth in paragraph no. 59 of Plaintiff's Complaint. Except as admitted or asserted, First American denies the allegations of this paragraph.

60. First American denies the allegations of paragraph no. 60 of the Complaint.

61. In answer to the allegations of paragraph no. 61 of the Complaint, First American denies breaching the terms of any title insurance policy at issue herein and denies acting in bad faith. In answer to the remaining allegations of paragraph no. 61, First American is without sufficient information to form a belief as to whether First American denied a claim in the circumstance described and if so what other circumstances existed in connection with that claim that were relevant to its decision and on that basis denies the allegations of this paragraph.

62. In answer to the allegations of paragraph no. 62 of the Complaint, First American admits that it has denied some of BOA's lien position claims on the basis of exclusions contained in the Master Policy Forms, which include those quoted in this paragraph. Except as admitted or asserted, First American denies the allegations of this paragraph.

63. In answer to the allegations of paragraph no. 63 of the Complaint (and the identical paragraph no. 74), First American admits the existence of the Master Policy Forms and affirmatively asserts that they contain the terms stated therein and that they speak for themselves. First American further admits and asserts that as a condition precedent to the issuance of a valid Certificate evidencing the existence of a contract of title insurance, and as a precondition to the entitlement to the payment of any loss thereunder, BOA was required under the SOW and perhaps otherwise, to certify that, to the best of its knowledge and belief, it had followed certain agreed upon, contractual, and required underwriting guidelines procedures and that none of its directors, trustees, managers, senior officers, underwriters, originators or loan officers involved in the specific mortgage upon which the claim was being made had actual knowledge of or could reasonably be expected to have knowledge of the existence of the prior ranked liens or any other title defect reasonably expected to render the real property unmarketable or significantly lessen the value of the real property security. First American asserts that it is a third party beneficiary of this SOW and that the SOW, including its exhibits, contains preconditions, terms and warranties that govern BOA's entitlement to the issuance of a valid Certificate in the first instance and to its entitlement to the payment of a loss thereunder, if any. Except as admitted or asserted, First American denies the allegations of this paragraph.

64. In answer to the allegations of paragraph no. 64 of the Complaint, First American admits that it has applied the "knowledge exclusion" contained in the Master Policy Form and the SOW when making decisions concerning whether BOA was entitled to the issuance of a valid Certificate, whether the Certificate was null and void, and, in the event it was enforceable, whether there was a compensable loss that was not excepted or excluded under the policy terms. Except as admitted or asserted, First American denies the allegations of this paragraph.

65. In answer to the allegations of paragraph no. 65 of the Complaint, First American admits that it has denied some of BOA's lien position claims on a variety of

valid grounds and, in some of those circumstances, BOA's loan underwriting notes contained an affirmative statement that there were no liens on the collateral property other than those disclosed by the borrower when applying for the loan. Except as admitted or asserted, First American denies the allegations of this paragraph.

66. First American denies the allegations of paragraph no. 66 of the Complaint.

67. First American denies the allegations of paragraph no. 67 of the Complaint.

68. First American denies the allegations of paragraph no. 68 of the Complaint.

69. First American denies the allegations of paragraph no. 69 of the Complaint.

70. In answer to the allegations of paragraph no. 70 of the Complaint (and the identical paragraph no. 112), First American admits the existence of the Master Policy Forms (described in paragraph no. 15 above) and the Certificates and asserts that they contain the terms set forth therein and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

71. In answer to the allegations of paragraph no. 71 of the Complaint, First American admits that Vesting Claims can arise from the circumstances set forth therein. Except as admitted, First American denies the allegations of this paragraph.

72. In answer to the allegations of paragraph no. 72 of the Complaint, First American admits that it expected BOA to comply with the terms of the SOW (as described in paragraph no. 21 above) and other agreed upon terms and conditions and that, if BOA had performed, it could and should have had knowledge concerning the proper vesting before closing an insured loan and of the existence of title defects which could reasonably be expected to render the real property unmarketable or significantly lessen its value. Except as admitted or asserted, First American denies the allegations of this paragraph.

73. First American denies the allegations of paragraph no. 73 of the Complaint.

74. In answer to the allegations of paragraph no. 74 of the Complaint, which is identical paragraph no. 63, First American incorporates its response to paragraph no. 63 as though set forth in full herein.

75. First American denies the allegations of paragraph no. 75 of the Complaint.

76. First American denies the allegations of paragraph no. 76 of the Complaint.

77. In answer to the allegations of paragraph no. 77 of the Complaint, First American acknowledges the existence of Master Policy Forms and Certificates and asserts that they contain the terms stated therein and speak for themselves. First American further affirmatively asserts that a premise of the LPI Program was that BOA would act in compliance with the SOW and other agreed upon terms and conditions that were preconditions to the issuance of a valid Certificate and that were requirements to BOA's qualification for a payment under any Certificate that was validly issued and not rescinded, which included a certification that to the best of BOA's knowledge and belief it had followed agreed upon, contractual and required underwriting guideline procedures that included a certification that none of BOA's directors, trustees, manager, senior officers, underwriters, originators, or loan officers involved in the specific mortgage upon which the claim is being made had actual knowledge of or could reasonably be expected to have knowledge of the existence of any title defect reasonably expected to render the real property collateral unmarketable or significantly lessen its value. Except as admitted or asserted, First American denies the allegations of this paragraph.

78. First American denies the allegations of paragraph no. 78 of the Complaint.

79. First American denies the allegations of paragraph no. 79 of the Complaint.

80. First American denies the allegations of paragraph no. 80 of the Complaint.

81. In answer to the allegations of paragraph no. 81 of the Complaint, First American acknowledges the existence of the Master Policy Forms and Certificates and asserts that they contain the terms set forth therein and speak for themselves. Except as admitted, First American denies the allegations of this paragraph.

82. First American denies the allegations of paragraph no. 82 of the Complaint.

83. First American denies the allegations of paragraph no. 83 of the Complaint.

84. First American denies the allegations of paragraph no. 84 of the Complaint.

85. First American denies the allegations of paragraph no. 85 of the Complaint.

86. First American denies the allegations of paragraph no. 86 of the Complaint.

87. In answer to the allegations of paragraph no. 87 of the Complaint, First American admits that it has refused to pay certain claims in reliance on an exclusion relating to purchase money mortgages contained in some of the Master Policy Forms

(described in paragraph no. 15 above) and asserts that they contain the terms set forth therein and speak for themselves. Except as admitted and asserted, First American denies the allegations of this paragraph.

88. In answer to the allegations of paragraph no. 88 of the Complaint, First American answers by admitting the existence of the Master Policy Forms (described in paragraph no. 15 above) and asserts they contain the terms set forth therein and speak for themselves. First American further answers that as a condition precedent to the issuance of a valid certificate evidencing the formation of an enforceable contract of title insurance, BOA was to comply with the SOW and other agreed upon terms and conditions in connection with the origination and underwriting of the loan in which the Certificate was issued that include, among other provisions, Section 5.2, which in ¶¶ ii. & iv. provide that: "Certificates shall only be issued pursuant to the LPI and with and only with respect to equity mortgages and deeds of trust . . . for which Bank of America has obtained a executed Borrower's Limited Title Agreement in the form of the attached hereto as SOW 5.0 and . . . which Equity Loan, secured by such mortgage or deed of trust, Bank of America is in good faith originating, based upon the information contained in Bank of America's credit report and Borrower's Limited Title Agreement, and any other information of which BOA has knowledge, as an equity lien mortgage." In the absence of compliance with these terms and conditions precedent there was no valid Certificate and no valid contract of insurance on the terms stated in the Master Policy Forms and that BOA was not entitled to the payment of any alleged loss thereunder. Because of these factors and otherwise, First American admits it has refused to pay some claims based on the lack of a Borrower's Limited Title Agreement. Except as admitted or asserted, First American denies the allegations of this paragraph.

89. In answer to the allegations of paragraph no. 89 of the Complaint, First American acknowledges the existence of the Master Policy Forms (as described in paragraph no. 15 above) and asserts that they contain the terms set forth therein, and speak for themselves, but affirmatively asserts that as a condition precedent to the issuance of a valid Certificate evidencing the formation of an enforceable contract of title insurance BOA was obligated to comply with the SOW, which includes among other provisions that: "Certificates shall only be issued pursuant to the LPI and with and only with respect to mortgages and equity deeds of trust . . . for which Bank of America has obtained an executed Borrower's Limited Title Agreement in the form of the attached hereto as SOW 5.0 and . . . which Equity Loan, secured by such mortgage or deed of trust, Bank of America is in good faith originating, based upon the information contained in Bank of America's credit report and Borrower's Limited Title Agreement and any other information of which Bank of America has knowledge, as an equity lien mortgage." In the absence of compliance with these terms and/or conditions precedent there was no valid Certificate, no valid contract of insurance on the terms stated in the Master Policy Forms or otherwise, and no obligation to the payment of any alleged loss thereunder. Except as admitted or asserted, First American denies the allegations of this paragraph.

90. First American denies the allegations of paragraph no. 90 of the Complaint.

91. First American denies the allegations of paragraph no. 91 of the Complaint.

92. In answer to the allegations of paragraph no. 92 of the Complaint, First American admits the existence of the Master Policy Forms (described in paragraph no. 15 above) and admits that the terms are those therein contained and that the documents speak for themselves. Except as admitted or asserted, First American denies the allegation of this paragraph.

93. First American denies the allegations of paragraph no. 93 of the Complaint.

94. In answer to the allegations of paragraph no. 94 of the Complaint, First American admits that as of approximately March 18, 2010, BOA had submitted approximately 4,832 claims of which First American was able to make a claim determination as to thousands, but for thousands of which BOA has yet to submit the requisite information to enable First American to determine whether BOA was entitled to have a valid Certificate issued in the first instance, whether there was coverage for the alleged claim, whether BOA fulfilled the contractual requirements that entitled it to coverage that was not excepted or excluded, and whether BOA suffered a compensable loss, if any. First American does not have sufficient information or to form a belief to enable it to admit or deny that Exhibit 2 was a report prepared by Fiserv and on that basis denies the allegation. First American further denies that Fiserv was First American's agent in connection with issuing any reports pertaining to BOA's claims and affirmatively asserts that Fiserv's authority to act on behalf of First American was expressly limited by the Agency Agreement executed by First American and Fiserv. Except as admitted, asserted or denied, First American denies the allegations of this paragraph.

95. In answer to the allegations of paragraph no. 95 of the Complaint, First American answers that Exhibit 2 contains the information set forth therein and that it speaks for itself, but First American does not admit the accuracy of the information set forth in Exhibit 2. Except as admitted or asserted, First American denies the allegations of this paragraph.

96. First American denies the allegations of paragraph no. 96 of the Complaint.

97. First American denies the allegations of paragraph no. 97 of the Complaint.

98. In answer to the allegations of paragraph no. 98 of the Complaint, First American admits that it has sent a substantial number of letters to BOA requesting additional documents and information concerning BOA's pending claims during the alleged time period and on information and belief admits that the number of letters are in the approximate sum alleged. Except as admitted or denied, First American denies the allegations of this paragraph.

99. First American denies the allegations of paragraph no. 99 of the Complaint.

100. First American denies the allegations of paragraph no. 100 of the Complaint.

101. First American denies the allegations of paragraph no. 101 of the Complaint.

102. In answer to the allegations of paragraph no. 102 of the Complaint, First American admits the existence of the SOW (as described in paragraph no. 21 above), and admits that the SOW sets forth some of the information and documents BOA was required to submit in connection with a claim and asserts that Section 7.8 of the SOW, subparagraph 4, provides that BOA maintain procedures identified in Exhibit 4.0 which states, in paragraph 7 thereof, that if First American has "questions about the existence or amount of the loss, [First American] may review the lender's files relating to the loss." First American asserts that it has the right to request documentation to confirm the existence and occurrence of the preconditions to the valid issuance of a policy Certificate and to request documents to confirm the accuracy of the contractually required and agreed upon representations and warranties, including, without limitation, those set forth in SOW Exhibit 6. First American further asserts that the terms of the Master Policy and Certificate require that BOA submit a proof of loss or damage setting forth the facts giving rise to any claimed loss and the basis of calculating the amount of the loss and that if the proof of loss fails to state facts sufficient to enable First American to determine its liability, BOA, at First American's request, shall furnish additional information as may be reasonably necessary to make the determination and in addition, upon First American's request, BOA is required to produce for examination and copying all documents and evidence which may, in First American's opinion, pertain to the alleged loss or damage. Except as admitted or asserted, First American denies the allegations of this paragraph.

103. First American denies the allegations of paragraph no. 103 of the Complaint.

104. In answer to the allegations of paragraph no. 104 of the Complaint, First American admits the existence of the SOW (as described in paragraph no. 21 above), admits that Section 7.8 of the SOW, subparagraph 5 provides in part that "in the event of a claim, BOA will complete SOW Exhibit 6.0, Supplier's Claims Submission Form, and forward the form and documentation to Supplier [Fiserv]. Supplier [Fiserv] shall then file the claim with the insurance carriers," admits that the SOW has an Exhibit 6.0 which is captioned "Lien Protection Claim Submission Checklist," and admits that Section Five of Exhibit 6.0 calls for BOA to certify as "true and accurate to the best of its knowledge and belief" a variety of matters pertinent to the claim including that the lender complied with certain underwriting procedures and that none of the lenders, directors, trustees, managers, senior officers, underwriters, originators or loan officers involved in the mortgage upon which the claim was being made had actual knowledge of or could reasonably be expected to have knowledge of the existence of the prior

ranked liens or any other title defect reasonably expected to render the real property unmarketable or significantly lessen its value. Except as admitted or asserted, First American denies the allegations of this paragraph.

105. First American denies the allegations of paragraph no. 105 of the Complaint.

106. First American denies the allegations of paragraph no. 106 of the Complaint.

107. First American denies the allegations of paragraph no. 107 of the Complaint.

108. In answer to the allegations of paragraph no. 108 of the Complaint, First American admits, denies, avers and otherwise answers as set forth above in paragraph nos. 1 through 107, inclusive.

109. In answer to the allegations of paragraph no. 109 of the Complaint, First American denies that the Master Policy Forms constitute valid contracts of insurance and First American answers that valid contracts of insurance have been formed only for those Certificates which have been validly issued after the occurrence of all conditions precedent to the issuance thereof imposed in the SOW and by other agreements of the parties and further answers that BOA is not entitled to be paid for its alleged losses until it has supplied the information and other documentation contractually required, including, without limitation, the certification by the insured lender set forth as an exhibit to the SOW, and, upon request, documentation from which First American can affirm that the matters subject to the claim, including without limitation the lender's certification in the SOW, are true and correct. First American asserts that the provisions of the Master Policy Forms, the Certificates, the SOW, and other agreements are those therein contained and speak for themselves. First American further affirmatively asserts that the terms of the Master Policy and Certificate require that BOA submit a proof of loss or damage setting forth the facts giving rise to any claimed loss and the basis of calculating the amount of the loss and that should the proof of loss fail to state facts sufficient to enable First American to determine its liability, BOA, at First American's request, shall furnish additional information as may be reasonably necessary to make the determination and in addition, upon First American's request, BOA is required to produce for examination and copying all documents and evidence which may, in First American's opinion, pertain to the alleged loss or damage. Except as admitted or asserted, First American denies the allegations of this paragraph.

110. In answer to the allegations of paragraph no. 110 of the Complaint, which is identical to paragraph no. 56, First American incorporates its response to paragraph no. 56 as though set forth in full herein.

111. In answer to the allegations of paragraph no. 111 of the Complaint, First American admits the existence of the Master Policy Forms (described in paragraph no. 15 above) and asserts that they contain the terms set forth therein and speak for

themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

112. In answer to the allegations of paragraph no. 112 of the Complaint (which is identical to paragraph no. 70), First American incorporates its response to paragraph no. 70 as though set forth herein.

113. In answer to the allegations of paragraph no. 113 of the Complaint (which is identical to paragraph no. 71), First American incorporates its response to paragraph no. 71 as though set forth herein.

114. In answer to the allegations of paragraph no. 114 of the Complaint, First American admits the existence of the Master Policy Forms (described in paragraph no. 15 above) and the Certificates and asserts that they contain the terms set forth therein and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

115. In answer to the allegations of paragraph no. 115 of the Complaint, First American admits to the existence of the Master Policy Forms (described in paragraph no. 15 above) and to the Certificates and asserts that they contain the terms set forth therein and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

116. In answer to the allegations of paragraph no. 116 of the Complaint, First American admits the existence of the Master Policy Forms (described in paragraph no. 15 above) and to the Certificates and asserts that they contain the terms set forth therein and speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

117. First American denies the allegations of paragraph no. 117 of the Complaint.

118. First American denies the allegations of paragraph no. 118 of the Complaint.

119. First American denies the allegations of paragraph no. 119 of the Complaint.

120. First American denies the allegations of paragraph no. 120 of the Complaint.

121. First American denies the allegations of paragraph no. 121 of the Complaint.

122. In answer to the allegations of paragraph no. 122 of the Complaint, First American admits, denies, avers and otherwise answers as set forth above in paragraph nos. 1 through 121, inclusive.

123. In answer to the allegations of paragraph no. 123 of the Complaint, First American answers that whether in those instances in which a valid contract of title insurance was formed those contracts of title insurance contain an implied covenant of good faith and fair dealing depends on which state's law governs that contract of title insurance and asserts that some, but not all, of the valid and enforceable contracts of title insurance at issue in this case contain these implied covenants. Except as expressly answered or asserted, First American denies the allegations of this paragraph.

124. First American denies the allegations of paragraph no. 124 of the Complaint.

125. First American denies the allegations of paragraph no. 125 of the Complaint.

126. First American denies the allegations of paragraph no. 126 of the Complaint.

127. In answer to the allegations of paragraph no. 127 of the Complaint, First American admits, denies, avers and otherwise answers as set forth above in paragraph nos. 1 through 126, inclusive.

128. In answer to the allegations of paragraph no. 128 of the Complaint, First American denies that N.C. Gen. Stat. § 58-63-15(11) has extraterritorial application and alleges that the statute has potential application to less than one-hundred of the claims at issue in this dispute. Except as expressly admitted or denied, First American denies the allegations of this paragraph.

129. First American denies the allegations of paragraph no. 129 of the Complaint.

130. In answer to the allegations of paragraph no. 130 of the Complaint, First American answers that the allegations are so vague and general as to not have a discernable meaning and First American on that bases denies them.

131. First American denies the allegations of paragraph no. 131 of the Complaint.

132. First American denies the allegations of paragraph no. 132 of the Complaint.

133. First American denies the allegations of paragraph no. 133 of the Complaint.

134. In answer to the allegations of paragraph no. 134 of the Complaint, First American admits, denies, avers and otherwise answers as set forth above in paragraph nos. 1 through 133, inclusive. Except as admitted or asserted, First American denies the allegations of this paragraph.

135. In answer to the allegations of paragraph no. 135 of the Complaint, First American admits to the existence of the Agency Agreement (as described in paragraph no. 13), and asserts that the Agency Agreement contains the written terms set forth therein and which speak for themselves. Except as admitted or asserted, First American denies the allegations of this paragraph.

136. In answer to the allegations of paragraph no. 136 of the Complaint, First American admits that Fiserv solicited applications for title insurance in connection with LPI Program and that FATIC and UGT underwrote contracts of title insurance without first performing a traditional full and complete search of the public records because the HELOC loans were based in significant part on the borrower's personal credit and the lenders agreed to adopt and implement acceptable and contractually required underwriting standards that would minimize the risk of the borrowers defaulting, which would concurrently minimize the risk of loss under the LPI Policies, and that these were to include the lender reviewing credit reports, reviewing a borrower's loan application, interviewing the borrower, and analyzing this and other information to confirm who owned the real property collateral and what liens encumbered it, among other matters. Except as admitted or asserted, First American denies the allegations of this paragraph.

137. In answer to the allegations of paragraph no. 137 of the Complaint, which is identical to paragraph no. 19, First American incorporates its response to paragraph no. 19 as though set forth herein.

138. In answer to the allegations of paragraph no. 138 of the Complaint, which is identical to paragraph no. 20, First American incorporates its response to paragraph no. 20 as though set forth herein.

139. First American denies the allegations of paragraph no. 139 of the Complaint.

140. First American denies the allegations of paragraph no. 140 of the Complaint.

141. First American denies the allegations of paragraph no. 141 of the Complaint.

142. First American denies the allegations of paragraph no. 142 of the Complaint.

143. First American denies the allegations of paragraph no. 143 of the Complaint.

144. First American denies the allegations of paragraph no. 144 of the Complaint.

145. In answer to the allegations of paragraph no. 145 of the Complaint, First American admits, denies, avers and otherwise answers as set forth above in paragraph nos. 1 through 144, inclusive.

146. First American admits the allegations of paragraph no. 146 of the Complaint.

147. First American denies the allegations of paragraph no. 147 of the Complaint.

**FIRST SEPARATE DEFENSE
(Failure to State A Claim)**

148. The Complaint, and each Count stated therein, fails to state a claim against First American upon which relief may be granted.

**SECOND SEPARATE DEFENSE
(Illegality)**

149. As a defense to all or to portions of each of the Counts stated in the Complaint First American answers and alleges that if the alleged contracts between BOA and First American are construed in the manner asserted by BOA then the alleged contracts would be illegal and unenforceable.

**THIRD SEPARATE DEFENSE
(No Extraterritorial Application)**

150. As a defense to the Complaint's Count III, and those to parts of Counts III, IV and V which may be based on the allegations in the Complaint's Count III which are incorporated therein, First American answers and alleges that North Carolina's Unfair Claims Settlement Practices has no extraterritorial application.

**FOURTH SEPARATE DEFENSE
(Application of Foreign Law)**

151. As a defense to the Complaint, and each Count stated in the Complaint, First American answers and alleges that North Carolina substantive law has no extraterritorial application.

**FIFTH SEPARATE DEFENSE
(Failure Of Condition Precedent To Formation Of Contract)**

152. As a defense to the Complaint, and each Count stated therein, First American answers and alleges that conditions precedent to the formation of the contracts of insurance allegedly evidenced by the issuance of Certificates were not satisfied, that no valid Certificate was issued, that the Certificates that were issued were of no effect and/or are entitled to be rescinded, and that no enforceable contract of title insurance was formed or is evidenced by such Certificates, and/or any such contract of title insurance as may have been formed thereby ought to be rescinded.

SIXTH SEPARATE DEFENSE
(Failure of Condition Precedent To First American's Duty Of Performance)

153. As a defense to the Complaint, and each Count stated therein, First American answers and alleges conditions precedent to First American's duty of performance under the alleged contracts of title insurance have not occurred.

SEVENTH SEPARATE DEFENSE
(Material Breach of the Contracts of Title Insurance)

154. As a defense to the Complaint, and to each Count stated therein, First American answers and alleges that BOA's material breaches of contracts of title insurance have suspended or excused First American's duty of performance thereunder.

EIGHTH SEPARATE DEFENSE
(Material Breaches Of The SOW And Other Agreements)

155. As a defense to the Complaint, and to each Count stated therein, First American answers and alleges that material breaches of the SOW (described in paragraph no. 21 above) and other agreements have suspended or excused First American's duty of performance under alleged contracts of title insurance.

NINTH SEPARATE DEFENSE
(Unclean Hands)

156. As a defense to the Complaint, and to each Count stated therein, First American answers and alleges that BOA's claims are barred by application of the doctrine of unclean hands in connection with the same transactions comprising the alleged bases of BOA's claims.

TENTH SEPARATE DEFENSE
(Failure to Mitigate)

157. As a defense to the Complaint, and to each Count stated therein, First American answers and alleges that BOA has failed to exercise reasonable care and diligence to avoid, minimize or mitigate the damages it asserts and thus it is barred from recovering for those losses avoidable by its reasonable efforts.

ELEVENTH SEPARATE DEFENSE
(Laches)

158. As a defense to the Complaint, and to each Count stated therein, First American answers and alleges that BOA's claims, in whole in part, are barred by the reason of the doctrine of laches.

**TWELFTH SEPARATE DEFENSE
(Waiver)**

159. As a defense to the Complaint, and to each Count stated therein, First American answers and alleges that BOA has waived any right to seek or obtain the relief by acts and omissions that include, without limitation, those set forth in First American's counterclaim, which is incorporated by reference.

**THIRTEENTH SEPARATE DEFENSE
(Proportionate Fault)**

160. As a defense to the Complaint, and to each Count stated therein, First American answers and alleges that if it is found in any manner legally responsible for all or any portion of the damages purportedly sustained by BOA, which liability is denied, the damages were proximately caused or contributed to by BOA, or by persons or entities acting on its behalf, and it is necessary that the proportionate degree of fault of each and every such person or entity be determined and prorated and that any judgment which might be rendered against First American be reduced by that degree of fault found to exist as to BOA and by the degree of fault found to exist as to all other persons or entities acting on its behalf of otherwise.

**FOURTEENTH SEPARATE DEFENSE
(Superseding Cause)**

161. As a defense to the Complaint, and to each Count stated therein, First American asserts that the alleged acts or omissions of First American were superseded by the acts, conduct or omissions of other persons or entities and that such acts or omissions were independent, intervening and superseding proximate causes of the injury, damage or loss purportedly sustained by BOA.

**FIFTEENTH SEPARATE DEFENSE
(Matters Stated In Accompanying Counterclaim)**

162. As a defense to the Complaint, and to each Count stated therein, First American answers and alleges that BOA's claims are barred legally and equitably as a result of the matters alleged and stated in First American's accompanying Counterclaim and Third-Party Complaint.

COUNTERCLAIM AND THIRD PARTY CLAIM

PARTIES, JURISDICTION AND VENUE

1. Counterclaimants and Third Party Plaintiffs United General Title Insurance Company and First American Title Insurance Company were and now are corporations duly authorized and existing under the laws of California. United General Title Insurance Company ("UGT") is a wholly owned subsidiary of First American Title Insurance Company and thus both entities are collectively referred to as "First American."

2. First American is informed and believes and on that basis alleges that counter-defendant Bank of America, N.A. ("BOA") was and now is a national bank doing business in most states of the United States, and at all times relevant had and now has its principal place of business in Charlotte, North Carolina. First American is informed and believes and on that basis alleges that BOA is a successor by merger to Fleet Boston Financial Corp. and Fleet National Bank (collectively "Fleet").

3. First American is informed and believes and on that basis alleges that third party defendant Fiserv Solutions, Inc., d/b/a Integrated Loan Services, was and now is a corporation existing under the laws of Wisconsin, and at all times relevant was and now is doing business in Charlotte, North Carolina; third party defendant Fiserv Fulfillment Agency, LLC, f/k/a ILS Title Agency, LLC, was and now is a limited liability company existing under the laws of Delaware, and at all relevant times was and now is doing business in Charlotte, North Carolina; and third party defendant Fiserv Fulfillment Agency of Alabama, LLC, f/k/a ILS Title Agency Of Alabama, LLC, was and now is a limited liability company existing under the laws of Alabama, and at all times relevant was and now is doing business in Charlotte, North Carolina. All of these entities will be collectively referred to as "Fiserv."

4. First American is unaware of the true names and capacities of the parties sued as Roes 1 through 100, and therefore sues these individuals and entities by such fictitious names. First American will amend this pleading to allege the true names and capacities of the fictitiously named Roes when they have been ascertained. First American alleges that these Roes are parties to the contracts at issue in this litigation and/or are subject to the relief requested in this pleading.

5. This Court has jurisdiction over the subject matter and the parties, and venue is proper in this Court by virtue of N.C.G.S. § 1-80 or 1-82.

BACKGROUND FACTS

6. First American is an industry leader in the business of title insurance. Title insurance includes issuing policies insuring against loss or damage caused by the insured property being owned by someone other than the owner identified in the policy or by liens encumbering the insured property that are not disclosed in the policy. First

American's policy forms, like those of other title insurers, generally do not cover losses caused by liens attaching after the date the policy issues (the Policy Date). First American, also like other title insurers, traditionally mitigates its risk by conducting a full and complete search of the public records before it issues a title policy to confirm the identity of the record owner and to identify liens of record encumbering title as of the Policy Date. Title insurance is thus fundamentally different from many other forms of insurance, such as casualty insurance, because it primarily covers losses caused by matters that exist on the Policy Date rather than losses caused by unforeseen future events, such as a fire or an automobile accident, that occur after the Policy Date.

7. First American has separate policy forms that insure owners of real property and that insure lenders who make loans secured by real property. The amount of the loss compensable to the insureds in these policy forms are different.

8. An owner usually acquires an owner's policy of title insurance to insure he has valid and unencumbered title. Under an owner's policy, a covered loss generally occurs when an owner does not have valid title or there are liens encumbering the property on the Policy Date that were not listed in the policy and excepted from coverage.

9. An insured owner who suffers a total loss of title generally may recover the lesser of the value of the property or policy limits. When an owner's policy fails to except from coverage a lien that encumbers the property on the Policy Date, the owner's loss is usually the expense necessary to pay or otherwise remove the lien policy limits. When an owner's title is subject to some other defect, such as an easement or encroachment, the loss is usually measured by the decline in the fair market value of the property caused by the insured defect up to policy limits.

10. A lender usually acquires title insurance to insure the validity and priority of a deed of trust, mortgage or other lien (sometimes collectively "Deed of Trust") that a property owner signs to collateralize a loan. A lender's policy insures the validity of the Deed of Trust, but not its value or the value of the real property security. A covered loss generally occurs when the borrower defaults and did not have title to the real property at the time the lender's Deed of Trust was created or there were liens encumbering the property that had priority senior to the insured Deed of Trust that were not listed in the policy and excepted from coverage.

11. Under a lender's policy, if the insured Deed of Trust is invalid and unenforceable, then the loss under the policy is generally the amount the lender would have received if it had been able to foreclose and resell the property, or the amount the borrower owed on the note, or policy limits, whichever is less.

12. Under a lender's policy, if the insured Deed of Trust was intended to be a junior lien subject to a disclosed senior lien that was excepted from coverage, and it is discovered that there was another senior lien that was not excepted from coverage, then the lender's policy loss is generally the difference between the amount it would have received if it had foreclosed and resold the property if it had been in the insured

condition (if there had been no undisclosed senior lien) or the amount the borrower owed on the note, or policy limits, whichever is less.

13. Thus a lender's policy of title insurance is not mortgage guaranty insurance or credit insurance and does not obligate the title insurer to repay the borrower's promissory note, even if there is an insured defect in title. Instead, the loss payable under the lender's title policy is limited to the loss caused by the title defect. For example, if the lender makes a loan secured by a junior Deed of Trust, and the borrower defaults, and the property has declined in value so that there would not be sufficient equity in the real property to repay the disclosed senior lien, even if there were another undisclosed senior lien, there would be no loss caused by the insured defect in title, and there would be no loss payable under the title policy. Further, if there is an insured title defect, but the insured lender is able to foreclose and resell the real property collateral for an amount that fully satisfies the borrower's note, then there is no loss caused by a title defect, and no amount due under the lender's policy, and this is true even if the defect in title decreased the property's fair market value.

14. The insurance industry is highly regulated. At all times First American was authorized to issue only title insurance and its approved rate structure and reserve requirements were based on this limitation. At no time could First American lawfully issue any other category of insurance, including, without limitation, mortgage insurance, ~~mortgage guarantee insurance, surety insurance, liability insurance, insolvency~~ insurance or credit insurance, each of which have separate and different regulatory structures and mandates.

15. In the last decade, the largest residential lenders in the United States increased their volume of lines of credit that were backed by residential real property. These home equity lines of credit, or HELOCs, were attractive to borrowers because they provided a way to take advantage of their home equity by drawing down on a credit line, up to the maximum set forth in their HELOC promissory note, because the interest rate on the debt was lower than unsecured loans and because the interest on the loans was frequently tax deductible.

16. To facilitate these HELOC's, the title insurers developed a new product that would provide limited coverage to the lenders, take less time to issue than a traditional lender's policy of title insurance and that would be less expensive than a traditional lender's policy. This new product was a HELOC Lien Protection Insurance Policy ("LPI Policy"), and it was available to lenders who made loans secured by residential real property.

17. Like traditional lender's policies, the LPI Policy covered against losses caused by certain title defects in the real property collateralizing the borrower's loan and the measure of loss under the LPI Policy was the same as a traditional lender's policy.

18. Significantly, there was a fundamental difference in how First American and the other title insurers mitigated their risk of loss under the new LPI product. LPI Policies were issued without performing a traditional full and complete search of the

public title records or issuing a commitment identifying matters to be cleared from record title before a policy of title insurance would issue. Instead, because the HELOC loans were based significantly on the borrowers' personal credit, the lenders agreed to adopt and implement appropriate underwriting standards that would minimize the risk of the borrowers' defaulting and concurrently would thus minimize the risk of claims and losses under the LPI Policies. These lenders' were to adopt and apply loan underwriting procedures were to include, without limitation, the lender reviewing credit reports, reviewing a borrower's loan application, interviewing the borrower, and analyzing this and other information obtained to confirm who owned the real property collateral and what liens encumbered it. The lender's due diligence in underwriting the HELOCs was a cornerstone for controlling the title insurer's risk under the LPI Program.

19. First American's written contracts of title insurance issued in the LPI Programs use Master Policy Forms and transaction certificates ("Certificates"). In some instances these forms bear only First American's own name and in some instances they bear the names of other title insurance companies now owned by or affiliated with First American, including UGT.

20. Under the LPI Program, the title insurer and the insured lender would agree to some of the terms for contracts of title insurance which would be included in a written Master Policy Form. These Master Policy Forms were not complete and enforceable written contracts of insurance because they did not include all of the requisite material terms, such as identifying the insured property and the amount of the insurance. As each HELOC loan closed, the lender would request that the insurer or its agent issue a Certificate identifying the borrower's loan number, the real property serving as collateral for the loan, and the amount of insurance. Only when a valid Certificate issued, which incorporated the Master Policy Form terms, would there be an enforceable contract of insurance. Unlike a traditional lender's policy, the priority of the lender's lien would not be set forth in the LPI Policy or Certificate. Rather, the lender's intended lien priority, the borrower's representations, the lender's investigation, and the lender's underwriting, would all be memorialized in the lender's loan underwriting documents.

21. First American issues its insurance policies directly and also through authorized agents. At all times relevant, third party defendant Fiserv, the Roes, and each of them, were, under certain terms and conditioned, authorized to issue First American's title insurance policies, including Master Policy Forms and Certificates evidencing the LPI Policies involved in the LPI Program.

22. First American is informed and believes and on that basis alleges that during the first years of the LPI Program BOA adopted and was following agreed upon, contractual and required standards for its HELOC loan origination and loan closings and BOA submitted less than 300 claims to First American under LPI Policy Certificates issued in HELOC loan transactions that closed during this time.

23. First American is informed and believes and on that basis alleges that by the last quarter of 2005, residential real estate prices were escalating and lenders,

including defendant BOA, were seeking to increase their share of the expanding HELOC mortgage business. First American is informed and believes and on that basis alleges that because of the unprecedented volume of HELOC's, BOA closed loan transactions without following the agreed upon, contractual and required underwriting standards.

24. First American is informed and believes and on that basis alleges that BOA's failure to adhere to the agreed upon, contractual and required underwriting standards in its loan origination and loan closings increased the risk of its HELOC loan portfolio and that thousands of borrowers defaulted.

25. BOA entered into a written contract with Fiserv in which BOA authorized Fiserv to submit claims under First American's LPI Policies and Certificates. BOA was obligated to provide Fiserv with information regarding the HELOC loan, the title defect that allegedly triggered coverage under the title policy, and claims submission materials that included BOA's certification that, to the best of its knowledge and belief, none of BOA's authorized agents, including its loan originators and loan officers, had actual knowledge or could reasonably be expected to have knowledge of the existence of any prior ranked liens or other title defects that would lessen the value of the real property collateral. BOA's certification also required it to affirm that, to the best of its knowledge and belief, it had followed prudent underwriting guidelines and procedures with respect to the mortgage that was the subject of the claim for benefits under the title policy.

26. As BOA's losses on its HELOC loan portfolio rapidly increased, it had Fiserv submit over one hundred claims in a month, and sometimes several hundred, to First American under the LPI Policy Certificates without first determining whether BOA was entitled to have a Certificate issued in the first instance, or whether there was a covered loss, or whether it had correctly calculated the amount of the loss compensable under the LPI Policy, or even determining that there was one.

27. Starting in 2005, and continuing for a period of time thereafter, First American paid BOA substantial sums to resolve claims under LPI Policies evidenced by Master Policy Forms and Certificates. First American made these payments pursuant to settlement agreements that acknowledged the parties were resolving claims that were in dispute. As the volume of claims increased, First American began requesting additional information regarding BOA's agreed upon, contractual and required lending practices and became aware that BOA's submittals did not contain all of the information in BOA's possession concerning the underlying HELOC loans. First American responded by requesting additional information from BOA that was relevant to First American's determination of whether BOA was entitled to have a Certificate issued to evidence the formation of an LPI Policy in the first instance, whether there was a covered loss and, if so, the amount of the loss that First American owed BOA under the LPI Policies, if any. The information that First American requested included BOA's underwriting guideline procedures and documents confirming BOA had followed them. BOA has not responded by providing the necessary information in thousands of claims (the "Pending Claims") and, as a result, the Pending Claims remain unresolved.

RELEVANT CONTRACTS

A. National Agency Agreement between First American and Fiserv.

28. Entities authorized to issue First American policies of title insurance included Fiserv, the Roes, and each of them. The First American/Fiserv relationship was memorialized by the written National Agency Agreement ("Agency Agreement") effective February 1, 2004 and amended several times. A photocopy is attached as Exhibit A. By addendums dated June 25, 2004, September 30, 2004 and February 14, 2005, Fiserv was authorized to issue policies involving HELOCs in connection with the QuickClose Program or similar products, which included the LPI Policies. Photocopies of these addendums are attached as Exhibits B, C and D, respectively. By addendum dated August 10, 2005, Fiserv was authorized to issue UGT policies. A photocopy of this addendum is attached as Exhibit E. All of these exhibits are incorporated by reference.

29. The Agency Agreement expressly provided that Fiserv was not to issue any First American policy unless Fiserv had determined the insurability of the title in accordance with the instructions, guidelines, and standards First American and stated that Fiserv was not to assume any extraordinary risk or undertaking on behalf of First American without First American's express written consent.

30. The Agency Agreement obligated Fiserv to comply with all instructions, requirements, directives, and guidelines promulgated by the insurer and to conduct or participate in any closings of transactions in which the insurer's policies were issued in accordance with prudent practice and requirements established by the insurer. The Agency Agreement expressly limited Fiserv's authority to act on behalf of First American to the issuance of policies and the collection of premiums under certain terms and conditions.

31. The Agency Agreement did not authorize Fiserv to act as an agent for First American in the receipt of any notice of loss or proof of claim under any policy of title insurance. It did, however, obligate Fiserv to immediately forward all claims, claims materials, and demands it received in connection with any First American policy.

32. The Agency Agreement further stated Fiserv was liable to First American and was to indemnify First American, against any loss, cost or expense, including attorneys' fees, incurred by First American arising from Fiserv's failure to comply with the terms of the Agency Agreement or with the rules, regulations or instructions given to Fiserv by First American.

B. Statement of Work Entered Into Between Fiserv and BOA.

33. As part of the LPI Program, effective October 4, 2005, Fiserv and the Roes (referred to as "Supplier") and BOA entered into a written agreement entitled Statement of Work ("SOW"). The claims at issue in this litigation are on LPI Policy

Certificates issued before the SOW's expiration date. A photocopy of the SOW is attached as Exhibit F and is incorporated by reference.

34. First American is informed and believes and on that basis alleges that Fiserv and BOA entered into the SOW to memorialize, in part, the requirements that BOA had to fulfill to obtain an enforceable Certificate under the LPI Program and to memorialize in part certain requirements that BOA had to fulfill under a policy issued as part of the LPI Program before First American was obligated to pay a loss.

35. The SOW recites it became effective October 4, 2005. First American is informed and believes and on that basis alleges that either it, or other written and oral agreements between Fiserv and BOA with substantially the same provisions as this SOW, were in effect at the time of the transactions that are involved in the present dispute.

36. BOA and Fiserv knew that First American expected that both BOA and Fiserv would comply with the provisions set forth in the written SOW. Based on this expectation, First American permitted Fiserv to act as First American's agent in issuing the Master Policy Forms and the Certificates under the LPI Program. First American is informed and believes and on that basis alleges that Fiserv, when acting as First American's agent when issuing the LPI Policies to BOA, believed that BOA would and had complied with the standards, guidelines and provisions of the SOW and other related agreements.

37. Section 5.2 of the SOW was included to fulfill some of the requirements imposed on Fiserv in the Agency Agreement and provides:

5.2 Lien Protection Insurance Underwriting Guidelines:

1. LPI product is available for all Equity Loans or Lines of Credit lines/loans with line/loan amounts up to \$500,000 approved by Bank of America based on its underwriting guidelines and in accordance with this SOW.
2. Supplier shall provide the LPI in accordance with the Insurance Underwriter's policies, procedures and guidelines.
3. Within fifteen (15) calendar days following a request by Bank of America, Supplier shall provide its or its Insurance Underwriter's policies, procedures and guidelines, as applicable to Bank of America for Bank of America's review.
4. Effective upon the full execution of this SOW, Supplier shall promptly notify Bank of America

upon becoming aware that the Insurance Underwriter has made material changes to its underwriting policies, procedures and guidelines. Bank of America may, at its sole discretion, provide Supplier with feedback, or comments, on the Insurance Underwriter's policies, procedures and guidelines.

5. Certificates shall be issued pursuant to the LPI only with respect to equity mortgages and deeds of trust originated by Bank of America:
 - i. which encumber an [sic] one to four family home including PUD and Condo, but excluding: (a) any cooperative housing interest, (b) mobile home or manufactured housing property, (c) interests in an installment or land sales contract, (d) Native American lands, (e) leaseholds, or (f) purchase money mortgage;
 - ii. for which the Bank of America has obtained a [sic]executed Borrower's Limited Title Agreement in the form of the [sic] attached hereto as SOW Exhibit 5.0;
 - iii. for which Bank of America tenders in accordance with Section 10 the applicable fees;
 - iv. which Equity Loan, secured by such mortgage or deed of trust, Bank of America is in good faith originating, based upon the information contained in Bank of America's credit report and Borrower's Limited Title Agreement, and any other information of which Bank of America has knowledge, as a equity lien mortgage loan;
 - v. which secure a principal amount of indebtedness to Bank of America not exceeding, with respect to any single mortgage, the sum of \$500,000; and
 - vi. in a state listed on SOW Exhibit 11.0.

38. The SOW clearly stated the effect of BOA's failure to follow these mandates:

Any Certificate issued in connection with an equity mortgage or deed of trust originated by Bank of America which does not comply with each of the provisions of section 5.2.5 shall be considered null and void, and no coverage for such mortgage or deed of trust shall be provided by the LPI." (Emphasis supplied.)

39. As further required by the Agency Agreement and the issuing guidelines, section 8 of the SOW provided:

8. Bank of America Responsibilities:

1. Bank of America, or its Representatives will ask the Borrower(s) a series of questions, set forth in SOW Exhibit 9.0, Borrower Questions.
2. Bank of America, or its Representatives, will perform due diligence procedures to compare mortgages disclosed during the application process and any open mortgage trade line on the credit bureau report used to evaluate the Borrower(s). Per SOW Exhibit 10.0, Bank of America due diligence procedures, Bank of America associates will clarify all open mortgages with the Borrower either verbally, or in writing, in an effort to determine lien position, and document its file accordingly.
3. Bank of America, or its Representatives, will provide Borrower with required Supplier document, SOW Exhibit 5.0, Borrower's Limited Title Agreement ("BLTA") at closing and require Borrower(s)/identified property owner(s) signature to acknowledge approval of the LPI process.
4. Bank of America will review closing documents to insure receipt of properly executed documents, including the Insured Mortgage, the BLTA, and will attempt to cure any missing or incomplete documents that it discovers prior to sending the Mortgage to Supplier to be recorded.

40. The SOW also imposed obligations on both BOA and Fiserv in connection with BOA's claims under the LPI Program. BOA was responsible for the timely identification of claims. (SOW, ¶ 7.8(1).) Fiserv was to establish a "clearly defined

process" for claims submission. (SOW, ¶ 7.8.) Fiserv was to provide a form template outlining some of the information to be provided to the insurer (e.g., SOW, Ex. 6, which is a Lien Protection Claim Submission Checklist) and was to review BOA's procedures to confirm that they met First American's eligibility criteria for the LPI Policies.

41. The SOW described information that BOA was to submit with any claim under the LPI Policy Certificate. This included the borrower's loan application, the credit report that was run at the time of the application, the loan repayment schedule, the actual loan repayment history, documents detailing the unpaid balance, and an identification of any intervening liens or title ownership discrepancies. The SOW further provided that, upon request, BOA was to provide First American with a copy of BOA's loan file.

42. The SOW further stated that "In the event of a claim, Bank of America will complete SOW 6.0 and will forward the form and documentation to Fiserv. Exhibit 6.0, Section 5, is a "Certification by Insured Lender" in which BOA represented and warranted that BOA's agents, including its originators and loan officers who were involved in the mortgage upon which the claim was being made, did not have actual knowledge and could not reasonably be expected to have had knowledge of the existence of the prior ranked liens or any other title defect that would reasonably be expected to render the real property unmarketable or would significantly lessen its value. BOA was further required to certify that to the best of its knowledge and belief it had followed "prudent underwriting guideline procedures" with respect to the mortgage involved in the claim.

43. Section 2(b)(ii) of the Master Policy Conditions and Stipulations obligate BOA to send notices under UGT's Master Policies to UGT's claims department in Denver, Colorado. Other Master Policy Forms direct that notices be sent to First American's claims department in Santa Ana, California. Fiserv, acting on BOA's behalf, sent BOA's claim information to the specified locations. Although the SOW attached as an Exhibit references UGT Master Policies, First American is informed and believes and on that basis alleges that BOA and Fiserv entered into substantively identical agreements that applied to claims under policies issued by First American Title Insurance Company and, consistent therewith, the claims Fiserv submitted on BOA's behalf on First American policies use the templates and forms set forth in the written SOW First American attached as an Exhibit to this pleading.

44. First American was an intended third party beneficiary of the SOW and any related or additional agreements between Fiserv and BOA that applied to First American's LPI Program, First American's LPI Policies and Certificates, and claims submitted by BOA to First American requesting policy benefits.

C. The Residential Home Equity Mortgage Master Loan Policy.

45. There were multiple Master Policy Forms used when insuring BOA under the LPI Program. The claims at issue in this litigation, including the Pending Claims, arose under UGT Policy Form No. 22000002 issued to BOA, First American Policy

Form No. 100101 issued to BOA, and First American Policy Form No. 100067 issued to Fleet National Bank, which First American is informed and believes and on that basis alleges is now a wholly owned subsidiary of BOA. Photocopies of these Master Policy Forms and certain relevant endorsements or addendums are attached as Exhibits G, H and I and are incorporated.

46. The LPI Policy covers, in accordance with the Policy's terms, conditions, exclusions, covenants and stipulations, risks for actual loss or damage, as specified in the Policy and by controlling case law ("Actual Loss"), caused by title defects and by monetary liens affecting title recorded in the public records. The LPI Policy excludes from coverage defects, liens, encumbrances or other matters, created, suffered, assumed or agreed to by the insured claimant and further excludes any loss or damage caused by a monetary lien securing an obligation disclosed by the Mortgagors Affidavit or any credit information obtained by the insured. A "Mortgagors Affidavit" is defined as an affidavit or other document provided to the lender by the borrower which provides information relevant to the loan approval process or which includes information concerning title or any monetary lien.

47. To establish an indemnifiable Actual Loss under the LPI Policy, the insured was obligated to provide information setting forth the facts giving rise to any claimed loss and the basis of calculating the loss and, should the initial submittal fail to state facts sufficient to enable First American to determine its liability, the insured lender, at First American's request, had the obligation to furnish additional information that was reasonably necessary for First American to make this determination and, in addition, upon First American's request, the insurer was required to produce for examination and copying all documents and evidence which may, in First American's opinion, pertain to the alleged loss or damage.

48. As previously alleged, as BOA closed each HELOC loan, it would request that a Certificate issue. The Certificate would identify the amount of the coverage, the real property that served as collateral for the HELOC, and would incorporate the terms of the Master LPI Policy form by reference.

FIRST CAUSE OF ACTION

(For Breach of Contract and Contractual Indemnity Against Fiserv and Roes)

49. First American incorporates paragraphs 1 through 48 of the Counterclaim and Third Party Claim as though set forth in full.

50. The Agency Agreement by and between plaintiff First American and Fiserv, the Roes, and each of them, obligated these third party defendants, among other things, to maintain adequate personnel to originate and service the business authorized by the Agency Agreement (§ 2(a)), to comply with all instructions, requirements, directives and guidelines promulgated by First American (§ 2(b)), participate in any settlements and closings of transactions in which First American policies were issued in accordance with prudent practice and requirements established

by First American (¶ 2(j)), not to issue any policy binding First American unless it had determined the insurability of the subject title in accordance with the instructions, guidelines and standards established by First American and communicated to Fiserv (¶ 14), to immediately forward to First American, by express or overnight delivery, all claims or demands of any kind received by defendants with respect to the business of First American or in connection with any First American policies (¶ 2(g)), and to provide reasonable assistance in the defense of any claim in which First American was involved either directly or as an insurer (¶ 2(i)).

51. The Agency Agreement provides that Fiserv, the Roes, and each of them, are liable to First American for, and are to indemnify First American against, any loss, cost or expense, including attorneys' fees and costs of litigation, sustained or incurred by First American, arising from their failure to comply with the terms of the Agency Agreement, with the rules, regulations or instructions given to them by First American, or by their negligence or misconduct, whether or not the loss, cost or expense resulted from any policy issued by them (¶ 13).

52. First American has performed all of the terms of the Agency Agreement to be performed by it, with the exception of those that have been waived or excused.

53. The Agency Agreement prohibits Fiserv from issuing any policy binding ~~First American without first determining the insurability of the subject title in accordance~~ with First American's instruction, guidelines and standards. As part of this obligation, Fiserv and the Roes entered into the SOW with BOA. The SOW stated that Fiserv would verify the ownership and legal description of the borrower's real property (¶ 7.1(2)), would conduct a preliminary review of documents to be signed to determine their recordability (¶ 7.1(4)), would handle discrepancies in the vesting or title information (¶¶ 7.2 and 7.3), would take actions in connection with recording issues (¶¶ 7.4 and 7.5), and would take actions in connection with execution errors (¶ 7.6). The SOW also stated Fiserv would conduct or participate in any settlements and closing transactions in which title policies were issued in accordance with prudent practice, the insurer's requirements, and governmental regulations. Although the SOW applies expressly to UGT Policies, First American is informed and believes and on that basis alleges that Fiserv and the Roes assumed these same responsibilities in connection with policies they issued for First American Title Insurance Company.

54. First American has been named as a defendant in the action by BOA and BOA's Complaint is incorporated herein by reference. This is done without acknowledging the truth of the matters alleged by BOA, many of which are disputed, but rather to evidence the allegations BOA has made against First American.

55. First American alleges that if it is held liable to BOA in this action on any of BOA's claims set forth in BOA's Count IV for Misrepresentation and False Advertising, BOA's Count III for Unfair Claims Settlement Practices/Unfair and Deceptive Trade Practices, BOA's Count II for Breach of the Duty of Good Faith and Fair Dealing or BOA's Count I for Breach of Insurance Policies then, to the extent that First America's liability was the result of, in whole or in part, said Fiserv's or the Roes' failure to perform

pursuant the Agency Agreement, the SOW, or applicable rules, regulations, standards or guidelines, or the fraud, negligence or misconduct of these parties, who therefore should indemnify and hold First American harmless of and from such liability, and additionally should pay all of First American's losses, costs and expenses, including attorneys' fees and costs of litigation, sustained or incurred by First American. The precise amount of these sums are presently unknown, but exceed the jurisdiction minimum of this Court, and will be subject to proof at the time of trial.

SECOND CAUSE OF ACTION

(For Equitable Indemnity Against Fiserv and Roes)

56. First American incorporates paragraphs 1 through 48, and 50 through 55 of the Counterclaim and Third Party Claim as though set forth in full.

57. In the alternative to First American's first cause of action for contractual indemnity, First American asserts this second cause of action against Fiserv and the Roes for equitable indemnification.

58. BOA's Count IV for Misrepresentation and False Advertising, parts of BOA's Count III for Unfair Claims Settlement Practices/Unfair and Deceptive Trade Practices and parts of BOA's Count II for Breach of the Duty of Good Faith and Fair Dealing state claims based against First American not for contractual liability but rather for liability better characterized as tortious ("BOA's Tort Claims").

59. If First American is held liable to BOA on any or all of BOA's Tort Claims, First American's liability will result from technical fault imposed by law resulting from the acts and omissions of Fiserv and the Roes and such liability would result from First American's passive negligence and by the active negligence or other wrongdoing of Fiserv and the Roes causing injury to BOA for which First American is derivatively liable.

60. Under these circumstances Fiserv and the Roes are equitably obligated to indemnify and hold First American for liability in connection with BOA's Tort Claims.

THIRD CAUSE OF ACTION

(For Equitable Contribution Against Fiserv and Roes)

61. First American incorporates paragraphs 1 through 48, 50 through 55, and 57 through 60 of the Counterclaim and Third Party Claim as though set forth in full.

62. In the alternative to First American's first cause of action for contractual indemnity and second cause of action for equitable indemnity, First American asserts this third cause of action against Fiserv and the Roes for equitable contribution.

63. If First American is held liable for BOA's Tort Claims and First American is not entitled to contractual or equitable indemnity from Fiserv and the Roes then First

American's liability will arise from matters as to which First American and Fiserv and the Roes are jointly or severally liable and First American will be entitled to equitable contribution from Fiserv and the Roes under N.C.G.S. § 1B-1(a) and otherwise.

FOURTH CAUSE OF ACTION

(For Rescission of Certificates and Associated LPI Policies Against BOA)

64. First American incorporates paragraphs 1 through 48, 50 through 55, 57 through 60, and 63 through 64 of the Counterclaim and Third Party Claim as though set forth in full.

65. BOA's compliance with representations, warranties and promises made in connection with the LPI Programs and the LPI Policies to be formed thereunder were conditions precedent to the issuance of enforceable Certificates to evidence the LPI Policies. Where these conditions precedent have failed, Certificates were issued to BOA which should not have been issued, which are void and of no effect, which do not evidence the existence of an enforceable policy of title insurance, and which should be rescinded.

66. In those instances where BOA has materially breached the with representations, warranties and promises made in connection with the LPI Programs and the LPI Policies to be formed thereunder, the material breaches have excused First American's obligation of counter-performance, if any, and also justifies First American's rescission of the Certificates issued in connection with the HELOC loans which are the subject of BOA's claims.

FIFTH CAUSE OF ACTION

(For Declaratory Judgment Against BOA, Fiserv, and All Roes)

67. First American incorporates paragraphs 1 through 48, 50 through 55, 57 through 60, 62 through 63, and 65 through 66 as though set forth in full.

68. Pursuant to N.C. Gen. Stat. § 1-253 et seq. and Rule 57 of the North Carolina Rules of Civil Procedure, First American seeks judgment declaring the rights and obligations as requested hereinbelow.

69. An actual controversy now exists between and among plaintiff First American, BOA, Fiserv, and the Roes, and each of them. These disputes include but are not limited to the following contentions by First American that arise out of the LPI Program, including the Pending Claims, among others.

a. BOA failed to adopt and implement agreed upon, contractual, and required underwriting guidelines and procedures in connection with the HELOC loans that are the subject of this action;

b. BOA did not analyze and consider the information contained in the borrower's credit report, the borrower's limited title agreement and other information of which BOA had knowledge in the agreed upon, contractually required manner, when it originated the loan and when it submitted its claims under the LPI Program to First American;

c. BOA had actual knowledge of or could reasonably be expected to have knowledge of the existence of prior ranked liens or other title defects which rendered the real property collateral for the HELOC loans which are the subject of this action unmarketable or which significantly lessened the value of the real property;

d. BOA consummated HELOC loans without performing the agreed upon and contractually required analysis regarding the borrower's ability to repay and in circumstances where BOA knew or should have known of the existence of prior ranked liens or other title defects that would have rendered the title unmarketable or would have significantly lessened the value of the real property that collateralized the HELOC note;

e. First American is a third party beneficiary of the SOW that was signed by BOA and Fiserv and any comparable or related agreements;

f. BOA failed to submit its entire loan file in numerous transactions involving claims under the LPI Program notwithstanding First American's request;

g. BOA, Fiserv and the Roes regularly failed to submit claims under the LPI Program to First American in accordance with the time periods set forth in the SOW, or on a reasonable or regular schedule, but instead would accumulate claims and then inundate First American by submitting hundreds of claims in concentrated time periods;

h. BOA, Fiserv and the Roes regularly failed to submit information necessary for First American to administer the claims on a timely basis or to conclude the claims administration process, which would include determining whether BOA was entitled to be issued an LPI Certificate in the first instance, whether there was coverage for the alleged loss that was not excepted or excluded under the terms of the LPI Policy, or whether BOA incurred an actual loss compensable under the Policy and, if so, the amount;

i. BOA, Fiserv and the Roes submitted numerous claims in transactions that did not meet preconditions to the issuance of an LPI Policy Certificate and in these instances the Certificates are null and void or alternatively should be rescinded;

j. BOA has failed to submit its equity analysis and other information required and necessary to calculate its compensable loss under the Policy, if any;

k. BOA, Fiserv and the Roes submitted numerous claims where BOA had not suffered a loss compensable under the LPI Policy or Certificate;

l. Because of the above-mentioned acts and omissions, and others, BOA has breached express and implied covenants and the implied covenant of good faith and fair dealing implicit in contracts governing the LPI Program, including the SOW and the LPI Policy;

m. Because of the above-mentioned acts and omissions, and others, Fiserv, the Roes, and each of them, have breached express covenants and the implied covenant of good faith and fair dealing implicit in contracts governing the LPI Program, including without the limitation the Agency Agreement, the SOW, and related documents; and

n. In numerous instances, and subject to proof, First American is entitled to be indemnified by Fiserv, the Roes, and each of them, under the terms of the Agency Agreement for losses, costs and expenses, including attorneys' fees and costs, sustained by First American arising from their failure to comply with the terms thereof, including their failure to participate in the BOA HELOC loan closings to insure BOA was adhering to agreed upon and contractually required underwriting practices in transactions where they issued First American LPI Policy Certificates, by failing to timely and adequately submit BOA's claims, by failing to adequately participate in First American's defense, and that First American is entitled to damages, indemnification and/or contribution against these parties based on their breach of their obligations under the terms of the Agency Agreement, the SOW, and otherwise.

70. First American is informed and believes and on that basis alleges that BOA, Fiserv, the Roes, and each of them, dispute First American's contentions. First American thus seeks a judicial declaration of the rights and duties of the parties that arise out of the relevant contracts, including the Agency Agreement, the SOW, the LPI Policy, the LPI Policy Certificates and related matters. Resolving these controversies herein would promote the interests of justice by avoiding a multiplicity of actions involving the same subject matters and the same parties.

WHEREFORE, plaintiff First American requests that judgment be entered as follows:

1. For monetary sums subject to proof against Fiserv and the Roes pursuant to the First, Second and Third Causes of Action;
2. For rescission of Certificates and any policies of title insurance ostensibly evidenced thereby pursuant to the Fourth Cause of Action;
3. For a declaration of rights as requested pursuant to the Fifth Cause of Action;
4. For such other further relief as the Court deems just and proper.

REQUEST FOR JURY TRIAL

UGT and FATIC each request a trial by jury on all issues so triable.

Dated: March 31st, 2010

JAMES MCELROY AND DIEHL P.A.

By: Bruce M. Simpson
Edward T. Hinson, Jr., Esquire
Bruce M. Simpson, Esquire
Adam L. Ross, Esquire
Attorneys for Defendants,
Counterclaimants and Third Party
Claimants, United General Title
Insurance Co. and First American Title
Insurance Co.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer, Counterclaim and Third Party Complaint has this date been served upon the Plaintiff by depositing a copy of same in the United States Mail, sufficient postage prepaid, addressed to the Plaintiff's attorney of record as follows:

L.D. Simmons, II, Esquire
McGuire Woods, LLP
100 North Tryon Street, Suite 2900
Charlotte, NC 28202

and to the Third Party Defendants by depositing a copy of same in the United States Mail, certified mail, return receipt requested, addressed to the Third Party Defendants as follows:

Fiserv Solutions, Inc.
c/o CSC-Lawyers Incorporating Service
Company, Registered Agent
~~25 West Main Street~~
Madison, WI 53703

Fiserv Fulfillment Agency of Alabama, LLC
c/o CSC-Lawyers Incorporating Service
Company, Registered Agent
~~150 South Perry Street~~
Montgomery, AL 36104

Fiserv Fulfillment Agency, LLC
c/o Corporation Service Company,
Registered Agent
327 Hillsborough Street
Raleigh, NC 27603

THIS 1st day of April 2010.

JAMES, McELROY & DIEHL, P.A.

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