

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-00911-WYD-CBS

MERCURY COMPANIES, INC., AMERICAN HERITAGE TITLE AGENCY, INC. D/B/A/
FIRST AMERICAN HERITAGE TITLE COMPANY OF DENVER, SECURITY TITLE
GUARANTY CO., TITLE AMERICA, INC., and UNITED TITLE COMPANY, INC.

Plaintiffs,

v.

THE FIRST AMERICAN CORPORATION and FIRST AMERICAN TITLE INSURANCE
COMPANY,

Defendants.

THE FIRST AMERICAN CORPORATION and FIRST AMERICAN TITLE INSURANCE
COMPANY,

Counterclaimants,

v.

MERCURY COMPANIES, INC.

Counterdefendant.

THE FIRST AMERICAN CORPORATION'S AND FIRST AMERICAN TITLE INSURANCE
COMPANY'S ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL
AND COUNTERCLAIM AND DEMAND FOR JURY TRIAL

Defendants First American Corporation ("FACO") and First American Title Insurance
Company ("FATICO") (collectively, "Defendants") hereby answer the Complaint of Plaintiffs
Mercury Companies, Inc. ("Mercury"), American Heritage Title Agency, Inc. d/b/a First
American Heritage Title Company of Denver also d/b/a First American Title Company of

Denver also d/b/a First American Heritage Title Company, Inc. ("American Heritage"), Security Title Guaranty Co. ("Security Title"), Title America, Inc. ("Title America"), and United Title Company, Inc. ("United Title") and also submit their Counterclaims against Plaintiff/ Counterdefendant Mercury:

ANSWER TO PLAINTIFFS' ALLEGATIONS

1. Defendants admit that FACO and Mercury entered into an Agreement dated December 29, 2000 ("2000 Preferred Stock Agreement"), and that FACO and Mercury entered into Agreements of Amendment, and admit the language of those agreements. Defendants further admit that American Heritage, Security Title, Title America, and United Title, entered into Underwriting Agreements with FATICO and admit the language of those agreements. Defendants further admit that American Heritage entered into an Underwriting Agreement with FATICO, First American Title Insurance Company of New York, and First American Title Insurance Company of Kansas and admit the language of that agreement. Except as specifically admitted herein, Defendants deny the allegations of paragraph 1 of the Complaint.

2. Defendants admit the material allegations of paragraph 2 of the Complaint.
3. Defendants admit the material allegations of paragraph 3 of the Complaint.
4. Defendants admit the material allegations of paragraph 4 of the Complaint.
5. Defendants admit the material allegations of paragraph 5 of the Complaint.
6. Defendants admit the material allegations of paragraph 6 of the Complaint.
7. Defendants admit the material allegations of paragraph 7 of the Complaint.
8. Defendants admit the material allegations of paragraph 8 of the Complaint.
9. Defendants admit the material allegations of paragraph 9 of the Complaint.

10. Defendants deny the allegations of paragraph 10 of the Complaint.

11. Defendants admit the material allegations of paragraph 11 of the Complaint.

12. Defendants admit American Heritage, Security Title, Title America, and United Title (collectively, "Colorado Subsidiaries") provide title insurance and escrow services in Colorado, and that Financial Title Company ("Financial"), Investors Title Company ("Investors"), and Lenders Choice Title Company ("Lenders Choice") (collectively, "California Subsidiaries") provide title insurance and escrow services in California. Defendants further admit the Colorado Subsidiaries and California Subsidiaries derive income from selling title insurance policies, and providing title and closing services. Defendants lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 12 of the Complaint and on that basis, deny each and every such allegation.

13. Defendants admit the Colorado Subsidiaries and California Subsidiaries are appointed agents of FATICO, which is one of the world's largest title insurers and a subsidiary of FICO. Except as specifically admitted herein, Defendants deny the allegations of paragraph 13 of the Complaint.

14. Defendants admit the material allegations of paragraph 14 of the Complaint.

15. Defendants admit the 2000 Preferred Stock Agreement contains Paragraph 9.1, and admits the language quoted in paragraph 15 of the Complaint. Except as specifically admitted herein, Defendants deny the allegations of paragraph 15 of the Complaint.

16. Defendants admit the 2000 Preferred Stock Agreement contains Paragraph 9.2, and admits the language quoted in paragraph 16 of the Complaint. Except as specifically admitted herein, Defendants deny the allegations of paragraph 16 of the Complaint.

17. Defendants admit that FACO and Mercury entered into “Agreements of Amendment” and admit the language of such agreements. Defendants also admit that FATICO has Underwriting Agreements with all of the California and Colorado Subsidiaries, except that American Heritage has an Underwriting Agreement with FATICO, First American Title Insurance Company of New York, and First American Title Insurance Company of Kansas. Defendants further admit the language of the 2000 Stock Agreement. Except as specifically admitted herein, Defendants deny the allegations of paragraph 17 of the Complaint.

18. Defendants admit that American Heritage, Security Title, Title America, and Financial executed Agreements of Amendment. Defendants further admit that Lenders Choice and Investors Title did not sign any Agreements of Amendment. Except as specifically admitted herein, Defendants deny the allegations of paragraph 18 of the Complaint.

19. Defendants admit that American Heritage, Security Title, Title America, and Financial executed Agreements of Amendment and admit the language of such agreements. Except as specifically admitted herein, Defendants deny the allegations of paragraph 19 of the Complaint.

20. Defendants admit that American Heritage, Security Title, Title America, and Financial executed Agreements of Amendment and admit the language of such agreements. Except as specifically admitted herein, Defendants deny the allegations of paragraph 20 of the Complaint.

21. Defendants admit that American Heritage, Security Title, Title America, and Financial executed Agreements of Amendment and admit the language of such agreements. Except as specifically admitted herein, Defendants deny the allegations of paragraph 21 of the Complaint.

22. Defendants deny the allegations of paragraph 22 of the Complaint.
23. Defendants admit the material allegations of paragraph 23 of the Complaint.
24. Defendants deny the allegations of paragraph 24 of the Complaint.

Answer To First Claim For Relief

25. As to paragraph 25 of the Complaint, Defendants incorporate by reference their responses to paragraphs 1 through 24 above as if fully set forth herein.

26. Defendants admit the language of the 2000 Stock Agreement. Except as specifically admitted herein, Defendants deny the allegations of paragraph 26 of the Complaint.

27. Defendants deny the allegations of paragraph 27 of the Complaint.

28. Defendants admit the material allegations of paragraph 28 of the Complaint.

29. Defendants admit the material allegations of paragraph 29 of the Complaint but deny that the controversy referred to in paragraph 29 may be adjudicated in this action.

30. Defendants admit the material allegations of paragraph 30 of the Complaint but deny that the controversy referred to in paragraph 30 may be adjudicated in this action.

31. Defendants deny the allegations of paragraph 31 of the Complaint.

32. Defendants deny the allegations of paragraph 32 of the Complaint.

Answer To Second Claim For Relief

33. As to paragraph 33 of the Complaint, Defendants incorporate by reference their responses to paragraphs 1 through 32 above as if fully set forth herein.

34. Defendants admit the material allegations of paragraph 34 of the Complaint.

35. Defendants admit the language of the 2000 Stock Agreement. Except as specifically admitted herein, Defendants deny the allegations of paragraph 35 of the Complaint.

36. Defendants deny the allegations of paragraph 36 of the Complaint.

37. Defendants deny the allegations of paragraph 37 of the Complaint.

38. Defendants deny the allegations of paragraph 38 of the Complaint.

Answer To Third Claim For Relief

39. As to paragraph 39 of the Complaint, Defendants incorporate by reference their responses to paragraphs 1 through 38 above as if fully set forth herein.

40. Defendants admit that FACO and Mercury entered into Agreements of Amendment and admit the language of such agreements. Except as specifically admitted herein, Defendants deny the allegations of paragraph 40 of the Complaint.

41. Defendants admit that American Heritage, Security Title, Title America, and Financial executed Agreements of Amendment and admit the language of such agreements. Except as specifically admitted herein, Defendants deny the allegations of paragraph 41 of the Complaint.

42. Defendants deny the allegations of paragraph 42 of the Complaint.

43. Defendants deny the allegations of paragraph 43 of the Complaint.

44. Defendants deny the allegations of paragraph 44 of the Complaint.

Answer To Fourth Claim For Relief

45. As to paragraph 45 of the Complaint, Defendants incorporate by reference their responses to paragraphs 1 through 44 above as if fully set forth herein.

46. Defendants deny the allegations of paragraph 46 of the Complaint.
47. Defendants deny the allegations of paragraph 47 of the Complaint.
48. Defendants deny the allegations of paragraph 48 of the Complaint.
49. Defendants deny the allegations of paragraph 49 of the Complaint.
50. Defendants deny the allegations of paragraph 50 of the Complaint.
51. Defendants deny the allegations of paragraph 51 of the Complaint.
52. Defendants deny the prayer for relief and each and every material allegation not expressly admitted herein.

Answer to Prayer for Relief

Defendants deny that Plaintiffs are entitled to any judgment or relief alleged in the Prayer for Relief.

AFFIRMATIVE AND SPECIAL DEFENSES

Defendants assert the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

1. Plaintiffs' Complaint and every claim in the Complaint fail to state facts sufficient to constitute a claim for relief or cause of action against Defendants.

SECOND AFFIRMATIVE DEFENSE

(Lack of Standing)

2. Plaintiffs' Complaint and every claim in the Complaint are barred because Plaintiffs do not have standing to bring the claims alleged.

THIRD AFFIRMATIVE DEFENSE

(No Jurisdiction)

3. Plaintiffs' Complaint and every claim in the Complaint regarding the California Subsidiaries are barred because this Court does not have jurisdiction over the California Subsidiaries or jurisdiction over any disputes involving the California Subsidiaries.

FOURTH AFFIRMATIVE DEFENSE

(Failure to Join Necessary And Indispensable Parties)

4. Plaintiffs' Complaint and every claim in the Complaint are barred because Plaintiffs have failed to join necessary and indispensable parties.

FIFTH AFFIRMATIVE DEFENSE

(Privilege and Justification)

5. Plaintiffs' Complaint and every claim in the Complaint are barred because Defendants' acts were privileged and justified.

SIXTH AFFIRMATIVE DEFENSE

(Real Party In Interest)

6. Plaintiffs' Complaint and every claim in the Complaint are barred because Plaintiffs are not the real parties in interest.

SEVENTH AFFIRMATIVE DEFENSE

(Plaintiffs' Breaches)

7. Plaintiffs' Complaint and every claim in the Complaint are barred because Plaintiffs breached the agreements alleged and other agreements between the parties.

EIGHTH AFFIRMATIVE DEFENSE

(Ratification and Acquiescence)

8. Plaintiffs' Complaint and every claim in the Complaint are barred by the ratification and acquiescence of Plaintiffs.

NINTH AFFIRMATIVE DEFENSE

(Waiver)

9. Plaintiffs' Complaint and every claim in the Complaint are barred because Plaintiffs by their words, conduct and agreement, have waived the claims set forth in the Complaint.

TENTH AFFIRMATIVE DEFENSE

(Mitigation of Damages)

10. Plaintiffs' Complaint and every claim in the Complaint are barred because Plaintiffs failed to take reasonable and necessary steps to mitigate their alleged damage.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure To Comply With Articles And Other Corporate Requirements)

11. Plaintiffs' Complaint and every claim in the Complaint are barred because Plaintiffs have failed to comply with their Articles of Incorporation and other governing corporate requirements.

TWELFTH AFFIRMATIVE DEFENSE

(Failure of Contractual Performance)

12. Plaintiffs' Complaint and every claim in the Complaint are barred because Plaintiffs have not performed conditions, duties, and obligations precedent to Defendants' performance under the contracts on which Plaintiffs sue.

THIRTEENTH AFFIRMATIVE DEFENSE

(Relief Unavailable)

13. Plaintiffs cannot obtain any relief from First American Corporation because it is not a party to the underwriting agreements between Mercury's California and Colorado Subsidiaries and First American Title Insurance Company.

FOURTEENTH AFFIRMATIVE DEFENSE

(Estoppel)

14. Plaintiffs' Complaint and each claim in the Complaint are barred by the doctrine of estoppel.

FIFTEENTH AFFIRMATIVE DEFENSE

(Breach of the Covenant of Good Faith and Fair Dealing)

15. Plaintiffs' Complaint and every claim in the Complaint are barred by Plaintiffs' breaches of the covenant of good faith and fair dealing.

SIXTEENTH AFFIRMATIVE DEFENSE

(Accord and Satisfaction, Modification, and/or Novation)

16. Plaintiffs' Complaint and every claim in the Complaint are barred by the doctrines of accord and satisfaction, modification, and/or novation.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Offset)

17. Defendants are entitled to an offset against and eliminating any damages awardable to Plaintiff.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Public Policy)

18. Plaintiff's Complaint and each claim in the Complaint are barred by public policy.

NINETEENTH AFFIRMATIVE DEFENSE

(Failure of Consideration)

19. Plaintiffs' Complaint and every claim in the Complaint are barred for failure of consideration.

TWENTIETH AFFIRMATIVE DEFENSE

(Unclean Hands)

20. Plaintiffs' Complaint and every claim in the Complaint are barred by the doctrine of unclean hands.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Laches)

21. Plaintiffs' Complaint and every claim in the Complaint are barred by the doctrine of laches.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Misrepresentation and Nondisclosure)

22. Plaintiffs' Complaint and every claim in the Complaint are barred by Plaintiffs' misrepresentation and nondisclosure of material facts.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Failure of Conditions Precedent)

23. Plaintiffs' Complaint and every claim in the Complaint are barred by Plaintiffs' because of the failure of conditions precedent to Defendants' performance.

Defendants reserve the right to amend their Answer to include any other defenses that may be discovered or available as the case proceeds.

WHEREFORE, Defendants pray for judgment as follows:

1. That Plaintiffs take nothing by way of this action.
2. For Defendants' costs of suit, including attorneys' fees incurred, and
3. For such other relief as the Court may deem proper.

DEMAND FOR JURY TRIAL

Defendants demand trial by jury on all matters encompassed within the Complaint and Defendants' Answer.

COUNTERCLAIMS

Counterclaimants FACO and FATIC for their Counterclaim against Mercury allege as follows:

PARTIES

1. Counterclaimant FACO is, and at all times relevant to this action was, a California corporation with its principal place of business in Santa Ana, California.

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2. Counterclaimant FATICO is, and at all times relevant to this action was, a California corporation with its principal place of business in Santa Ana, California.

3. Counterdefendant Mercury, formerly known as United Title Companies, Inc., is, and at all times relevant to this action was, a Colorado corporation with its principal place of business in Colorado.

JURISDICTION AND VENUE

4. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(i) in that Counterclaimants are citizens of California, Counterdefendant is a citizen of Colorado, and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a) because the sole Counterdefendant resides in the State of Colorado, the contracts alleged below have forum selection clauses by which the parties have consented to venue in this district, the contracts were to be performed, in part, in this district, and Mercury has filed the Complaint against Counterclaimants in this district.

AGREEMENTS BETWEEN COUNTERCLAIMANTS AND MERCURY

6. Over the past decade, Counterclaimants have provided financing to Mercury and companies owned by Mercury in multiple transactions. The parties have documented those transactions in written contracts. Those contracts include the following.

2000 Preferred Stock Agreement

7. On or about December 29, 2000, FACO and Mercury (under its former name, United Title Companies, Inc.) entered into an agreement (the 2000 Preferred Stock Agreement) pursuant to which, among other things, on January 8, 2001 Mercury issued 5,000 shares of Mercury Participating Redeemable Non-Voting Preferred Stock to FACO for valid

consideration. A copy of the 2000 Preferred Stock Agreement is attached to this Counterclaim as Exhibit A and incorporated into this Counterclaim.

8. In the 2000 Preferred Stock Agreement Mercury agreed to pay FACO an annual mandatory cumulative dividend of 8 percent and agreed to multiple other obligations, as set forth in Exhibit A. Pursuant to the 2000 Preferred Stock Agreement, Mercury issued to FACO Participating Redeemable Non-Voting Preferred Stock obligating Mercury to pay FACO “an annual mandatory cumulative dividend equal to 8% of the par value and having the rights, preferences and privileges set forth in the Articles.” Exhibit A at 3-4.

9. Pursuant to Mercury’s Articles of Incorporation, as amended by Articles of Amendment, “Each share of Non-Voting Preferred Stock shall receive an annual mandatory cumulative dividend equal to eight percent (8%) of the par value (\$1,000.00) of each share of Non-Voting Preferred Stock for each calendar year.” Copies of relevant Articles of Amendment obtained from the Colorado Secretary of State are attached to this Counterclaim as Exhibit B and incorporated into this Counterclaim.

10. In 2006, Mercury and FACO agreed that FACO’s 5,000 shares of Participating Redeemable Non-Voting Preferred Stock were exchanged for 5,000 shares of Mercury Series A Non-Voting Preferred Stock, and Mercury issued 5,000 shares of Mercury Series A Non-Voting Preferred Stock to FACO. Mercury further agreed that its Series A Non-Voting Preferred Stock would pay FACO an annual divided rate of 8 percent. *See* Exhibit E. Under Mercury’s Articles, as amended by Articles of Amendment, “Each share of Series A Non-Voting Preferred Stock shall receive an annual mandatory cumulative dividend equal to eight percent (8%) of the par value (\$1,000.00) of each share of Series A Non-Voting Preferred Stock for each calendar year.”

Exhibit B, Articles of Amendment (adopted June 21, 2006) at 2.

2003 Promissory Note

11. On or about October 31, 2003, Mercury issued a promissory note to FATICO. That promissory note, as more specifically set forth therein, provided that Mercury would pay the sum of \$2,600,000 to FATICO on October 31, 2004.

12. On or about October 31, 2004, Mercury and FATICO executed an Allonge to the 2003 promissory note which, as more specifically set forth therein, (1) extended the maturity date of the note to February 1, 2014; (2) memorialized Mercury's agreement to pay FATICO interest on unpaid sums at the rate of 4.84%; and (3) required Mercury to make annual payments of accrued interest and principal on the 2003 promissory note to FATICO on or before February 1 of each calendar year in the amount of \$363,192.42. Copies of the 2003 promissory note and the Allonge to that Note (together, the 2003 Promissory Note) are attached to this Counterclaim as Exhibit C and incorporated into this Counterclaim.

2004 Promissory Note

13. On or about November 1, 2004, Mercury issued a promissory note which, as more specifically set forth therein, provided that Mercury would pay the sum of \$15,000,000 to FATICO on October 31, 2005, and would pay FATICO interest of four percent per annum on all amounts due under the note.

14. Mercury and FATICO executed an Allonge to the note effective October 31, 2005, and a Second Allonge to the note effective April 30, 2006, in each instance extending the maturity date of the note.

15. On or about October 5, 2006, Mercury and FATICO executed a Third Allonge to the note which, as more specifically set forth therein, extended the maturity date of the note to September 30, 2007, and required payment in full inclusive of all accrued interest and principal

at maturity. The note, as amended, provides that if the note is not paid in full at maturity, then Mercury shall pay FATICO interest of 12 percent per annum on all sums due. FATICO has elected, and FATICO elects, to impose such interest on Mercury. Copies of the 2004 promissory note and the Allonges to that note (together, the 2004 Promissory Note) are attached to this Counterclaim as Exhibit D and incorporated into this Counterclaim.

2006 Preferred Stock Purchase Agreement

16. On or about June 23, 2006, FATICO and Mercury entered into an agreement (the 2006 Preferred Stock Agreement) providing, as more specifically set forth therein, for Mercury's issuance of 75,000 shares of Series B Non-Voting Preferred Stock to FATICO in exchange for FATICO's payment to Mercury of a purchase price of \$75,000,000. FATICO performed its obligations under that agreement by transferring \$75,000,000 to Mercury. By letter agreement dated October 5, 2006, FATICO and Mercury agreed to extend the Cutoff Date under the 2006 Preferred Stock Agreement to September 30, 2007. Copies of the 2006 Preferred Stock Agreement (not including Exhibit B thereto) and the October 5, 2006 letter agreement are attached to this Counterclaim as Exhibit E and incorporated into this Counterclaim.

17. In the 2006 Preferred Stock Agreement Mercury agreed to issue to FATICO Mercury Series B Participating Redeemable Non-Voting Preferred Stock which would pay FATICO an annual mandatory cumulative dividend equal to 5% of the par value on each share, and which would grant FATICO the rights, preferences, and privileges set forth in the Articles for Series B Participating Redeemable Non-Voting Preferred Stock. Mercury issued such Series B Participating Redeemable Non-Voting Preferred Stock to FATICO.

18. Mercury's Articles, as amended, provide in relevant part as follows:

A. Series B Non-Voting Preferred Stock. Each share of Series B Non-Voting Preferred Stock shall receive an annual mandatory cumulative dividend equal to five percent (5%) of the par value (\$1,000.00) of each share of Series B Non-Voting Preferred Stock for each calendar year. The dividend shall be paid in arrears with respect to each calendar year on or before the 15th day of January following the end of such calendar year. With respect to any calendar year in which any share of Series B Non-Voting Preferred Stock has been outstanding for less than the entire calendar year, the dividend shall be prorated based upon a fraction, the numerator of which shall be the number of days the Series B Non-Voting Preferred Stock was outstanding during the year and the denominator of which shall be the number of days in said calendar year. [Exhibit B, Articles of Amendment to the Articles of Incorporation of Mercury Companies, Inc. filed June 29, 2007, ARTICLE X.A.]

C. Automatic Conversion.

1. If on or prior to September 30, 2007 the corporation shall not have given a Redemption Notice with respect to all of the outstanding Series B Non-Voting Preferred Stock pursuant to Paragraph B of Article X, the outstanding shares of Series B Non-Voting Preferred Stock with respect to which a Redemption Notices has not been given shall be automatically converted into Class A Common Stock in accordance with this Paragraph C (the "Series B Conversion"). [*Id.* at ARTICLE X.C.1]

19. Mercury did not give FATICO a Redemption Notice with respect to any Series B Non-Voting Preferred Stock.

20. Each of Mercury's agreements with Counterclaimants included Mercury's implied covenant of good faith and fair dealing.

21. Some of the agreements between FACO and Mercury provide that the prevailing party in litigation arising out of the agreements shall be entitled to receive from the losing party all costs and expenses, including reasonable counsel fees, incurred by the prevailing party.

22. Mercury and Mercury's subsidiary companies have additional agreements with Counterclaimants, and Counterclaimants' subsidiary companies, which are beyond the scope of this action, and are not part of this action.

MERCURY'S BREACHES

23. Under the agreements alleged in this action, including the agreements set forth in Mercury's Articles, Mercury owes Counterclaimants substantial sums of money and other performance. Despite repeated demands by Counterclaimants, Mercury has breached its agreements with Counterclaimants by, *inter alia*, refusing to pay dividends, principal, interest, and other sums owing to Counterclaimants, failing to perform key obligations under the agreements and Mercury's Articles, and by failing to provide other performance required under the agreements, including conversion of FATICO's Series B Non-Voting Preferred Stock to Class A Common Stock. Counterclaimants have demanded that Mercury cure its breaches and perform in accord with its agreements, but Mercury has failed and continues to fail to do so. Counterclaimants accordingly have been compelled to bring this action to enforce their rights in the following claims for relief.

FIRST CLAIM FOR RELIEF

(By The First American Corporation For Breach Of The 2000 Preferred Stock Agreement
And Mercury's Articles Of Incorporation)

24. FACO incorporates by reference each of the allegations in Paragraphs 1 through 23 of this Counterclaim, as though fully set forth herein.

25. Under the 2000 Preferred Stock Agreement and Mercury's Articles, Mercury was obligated to pay dividends to FACO based on FACO's ownership of 5,000 shares of Participating Redeemable Non-Voting Preferred Stock, and after exchange, 5,000 shares of Series A Non-Voting Preferred Stock, and was obligated to perform multiple key agreements, as set forth above and in the Exhibits. Mercury has breached the 2000 Preferred Stock Agreement and violated its Articles, as amended, because, *inter alia*, (a) Mercury failed to pay the dividends

and other amounts owing to FACO under such agreements; (b) Mercury has disposed of a significant part of its property and assets without the written approval of FACO; (c) Mercury, on information and belief, has expanded its title and escrow business into counties where it was not operating as of the Effective Date, without the written approval of FACO; (d) Mercury has failed to provide FACO the financial reports set forth in paragraph 8.7 of the 2000 Preferred Stock Agreement; (e) Mercury has wrongfully declared FACO in breach of the 2000 Preferred Stock Agreement and sued FACO; (f) Mercury has caused its subsidiaries to breach their obligations to remit premiums to FATICO and affiliates, and otherwise to breach Underwriting Agreements; and (g) Mercury has breached its covenant of good faith and fair dealing. FACO is informed and believes that it will discover additional breaches by Mercury, and FACO reserves the rights to amend this Counterclaim and introduce evidence of such breaches.

26. FACO has performed all conditions, covenants and promises required of it in accordance with the terms and conditions of the 2000 Preferred Stock Agreement and Mercury's Articles.

27. FACO has demanded that Mercury pay the amounts due to FACO, and perform Mercury's other obligations under those agreements. Despite FACO's demands, Mercury has failed to pay the amounts owing to FACO and continues to breach its other obligations to FACO.

28. As a result of Mercury's failure and refusal to perform its obligations under the 2000 Preferred Stock Agreement and Mercury's Articles, Mercury has repudiated the 2000 Preferred Stock Agreement, and FACO has suffered and will continue to suffer damages in an amount to be proved in this action.

FACO therefore demands the relief set forth in the Prayer.

SECOND CLAIM FOR RELIEF

(By The First American Corporation for Declaratory Relief Terminating The First American Corporation's Obligations Under The 2000 Preferred Stock Agreement)

29. FACO incorporates by reference each of the allegations in Paragraphs 1 through 28 of this Counterclaim, as though fully set forth herein.

30. There presently exists a controversy between FACO and Mercury, in that FACO contends that, by all of breaches of its agreements with FACO and FATICO, including Mercury's breaches of the 2000 Preferred Stock Agreement, Mercury has repudiated the 2000 Preferred Stock Agreement, and the 2000 Preferred Stock Agreement and all of FACO's obligations and covenants under that agreement have terminated; whereas Mercury denies these allegations and contends that it has rights and FACO has obligations, including a right to put preferred stock, a right to underwriting by FATICO, and a right to exclusivity in Colorado, under the 2000 Preferred Stock Agreement.

31. Alternatively, there presently exists a controversy between FACO and Mercury in that FACO contends that conditions precedent to its obligations under the 2000 Preferred Stock Agreement have failed, including the truth of Mercury's representations and warranties, Mercury's performance and compliance with each of the covenants and agreements in the 2000 Preferred Stock Agreement, Mercury's performance and compliance with its Articles, including its obligations to pay dividends on preferred stock and its obligation to effectuate the Series B Conversion, and Mercury's compliance with its covenant of good faith and fair dealing, so that First American has no obligation to perform any agreement under the 2000 Preferred Stock Agreement, including any obligations relating to any put right, exclusivity or underwriting; whereas Mercury denies First American's contentions and asserts that First American must

perform all of its obligations under the 2000 Preferred Stock Agreement, even though Mercury has breached and continues to breach its own obligations.

32. FACO therefore seeks a judicial determination that Mercury has breached and repudiated the 2000 Preferred Stock Agreement or, alternatively, that Mercury has not satisfied conditions precedent to FACO's obligations, and that FACO's obligations under that Agreement have terminated.

33. A judicial determination and declaration is appropriate and necessary at this time so that the parties may proceed with their relationships and affairs with the understanding and adjudication that the 2000 Preferred Stock Agreement is and has been terminated.

FACO therefore demands the relief set forth in the Prayer.

THIRD CLAIM FOR RELIEF

(By First American Title Insurance Company for Breach of 2003 Promissory Note)

34. FATICO incorporates by reference each of the allegations in Paragraphs 1 through 33 of this Counterclaim, as though fully set forth herein.

35. Mercury was obligated to pay FATICO the amounts due under the 2003 Promissory Note. Mercury has breached the Promissory Note by failing to pay the amounts due.

36. FATICO performed all conditions, covenants and promises required of it in accordance with the terms and conditions of the 2003 Promissory Note.

37. Despite FATICO's demands to Mercury to cure its breaches and to pay the amounts due under the 2003 Promissory Note, Mercury has failed and refused to pay amounts due, and continues to refuse to do so.

38. As a result of Mercury's failure and refusal to perform its obligations under the 2003 Promissory Note, FATICO has suffered and will continue to suffer damages in an amount to be proved in this action. The amount owed to FATICO is precisely ascertainable, entitling FATICO to pre-judgment interest.

FATICO therefore demands the relief set forth in the Prayer.

FOURTH CLAIM FOR RELIEF

(By First American Title Insurance Company for Breach of 2004 Promissory Note)

39. FATICO incorporates by reference each of the allegations in Paragraphs 1 through 38 of this Counterclaim, as though fully set forth herein.

40. Mercury was obligated to pay FATICO the amounts due under the 2004 Promissory Note. Mercury has breached the 2004 Promissory Note by failing to pay the amounts due.

41. FATICO performed all conditions, covenants and promises required of it in accordance with the terms and conditions of the 2004 Promissory Note.

42. Despite FATICO's demands to Mercury to cure its breaches and to pay the amounts due under the 2004 Promissory Note, Mercury has failed and refused to do either, and continues to refuse to do so.

43. As a result of Mercury's failure and refusal to perform its obligations under the 2004 Promissory Note, FATICO has suffered and will continue to suffer damages in an amount to be proved in this action. The amount owed is precisely ascertainable, entitling FATICO to pre-judgment interest.

FATICO therefore demands the relief set forth in the Prayer.

FIFTH CLAIM FOR RELIEF

(By First American Title Insurance Company For Breach of 2006 Preferred Stock Agreement
And Mercury's Articles, Specific Performance, Injunction, and Additionally and Alternatively,
for Damages)

44. FATICO incorporates by reference each of the allegations in Paragraphs 1 through 43 of this Counterclaim, as though fully set forth herein.

45. In the 2006 Preferred Stock Agreement, and its Articles, as amended, Mercury agreed that FATICO's Series B Non-Voting Preferred Stock automatically converted to Mercury Class A Common Stock if on or before September 30, 2007 Mercury had not given FATICO a Redemption Notice. As of September 30, 2007, Mercury had not given FATICO any Redemption Notice or any funds for redemption of Series B Non-Voting Preferred Stock. Accordingly, as of September 30, 2007 the Series B Non-Voting Preferred Stock automatically converted to Mercury Class A Common Stock, with, *inter alia*, full voting privileges.

46. FATICO has demanded that Mercury perform the steps set out in the Articles, as amended, to perfect and formalize the conversion of FATICO's Series B Non-Voting Preferred Stock to Class A Common Stock, but Mercury has refused to do so. Mercury's Articles, as amended, require Mercury to carry out the conversion process "as soon as reasonably practicable after September 30, 2007," and further provide that "The Board of Directors and the holder of the Series B Non-Voting Preferred Stock will act promptly and diligently to appoint appraisers and to ensure that the appraisal process is completed in a timely manner, it being acknowledged that time is of the essence with respect to the appraisal and determination of the Company Value." Mercury's Board of Directors has not acted in accord with these agreements, and

Mercury continues to refuse to take the steps required by the Articles, as amended, to carry out the conversion.

47. In addition and in the alternative, Mercury was and is obligated to pay dividends to FATICO based on FATICO's ownership of 75,000 shares of Series B Non-Voting Preferred Stock. Despite FATICO's demands, Mercury has failed to pay the amounts owing to FATICO and continues to breach its obligations to FATICO.

48. Accordingly, Mercury has breached the 2006 Preferred Stock Agreement, violated its Articles of Incorporation, as amended, and breached its agreement to FATICO to convert the Series B Non-Voting Preferred Stock to Class A Common Stock. Mercury's breaches continue because Mercury continues to fail to pay the amounts owing to FATICO, and continues to refuse to convert FATICO's Series B Non-Voting Preferred Stock to Class A Common Stock.

49. FATICO performed all conditions, covenants and promises required of it in accordance with the terms and conditions of the 2006 Stock Purchase Agreement and Mercury's Articles.

50. As a result of Mercury's failure and refusal to perform its obligations under the 2006 Preferred Stock Agreement and its Articles, FATICO has been and continues to be deprived of the rights and benefits of Class A Common Stock, including the right to vote, the right to participate in corporate governance, the right to elect directors, the right to receive information, the right to receive dividends, the right to participate in shareholder meetings, and other rights and benefits. Because it is being deprived of these rights and benefits, FATICO has been and is being irreparably injured by Mercury's breaches, and FATICO has no adequate legal remedy for Mercury's breaches. FATICO will prevail on the merits of this claim, and the

equities overwhelmingly favor FATICO. Prompt specific performance of the conversion according to the procedure set forth in the Articles, as amended, is necessary to confer upon FATICO the rights and benefits to which it is entitled.

51. As a result of Mercury's failure and refusal to perform its obligations under the 2006 Preferred Stock Agreement and its Articles, as amended, FATICO is entitled to temporary, preliminary, and permanent injunctions specifically enforcing FATICO's rights under the 2006 Preferred Stock Agreement, and Mercury's Articles, as more particularly set forth in the Prayer.

52. As a result of Mercury's failure and refusal to perform its obligations under the 2006 Preferred Stock Agreement and its Articles, as amended, FATICO is entitled to an order, judgment and decree directing Mercury to specifically perform its obligations under the 2006 Preferred Stock Agreement and its Articles.

53. In addition and in the alternative, as a result of Mercury's failure and refusal to perform its obligations under the 2006 Preferred Stock Agreement and Mercury's Articles, as amended, including the failure to carry out the conversion process and failure to pay dividends and other amounts owed, FATICO has suffered and will continue to suffer damages in an amount to be proved in this action.

54. Mercury also threatens to create irreparable injury to FATICO by holding shareholder meetings, taking corporate actions, and distributing dividends or other funds in derogation of FATICO's rights as a shareholder. Therefore, pending the final determination of FATICO's Common Stock ownership, FATICO seeks an order and decree enjoining Mercury to notify FATICO of any shareholder meeting, enjoining Mercury from holding any shareholder meeting or taking any shareholder action, vote, or consent without notice to and consent by FATICO, enjoining Mercury from holding or taking any Board of Directors action, vote or

consent without notice to and consent by FATICO, and enjoining Mercury from distributing any dividend, money, property, stock or other interest other than in the ordinary course of business without notice to and consent by FATICO.

SIXTH CLAIM FOR RELIEF

(Declaratory Relief In Favor Of First American Title Insurance Company)

55. FATICO incorporates by reference each of the allegations in Paragraphs 1 through 54 of this Counterclaim, as though fully set forth herein.

56. There presently exists a controversy between FATICO on the one hand and Mercury on the other hand, in that FATICO contends that as of September 30, 2007, its Series B Preferred Stock automatically converted to Mercury Class A Common Stock, and FATICO is entitled to all rights and privileges associated with Mercury Class A Common Stock as of and after September 30, 2007; whereas Mercury contends that the conversion did not occur, FATICO has no right to Mercury common stock, and FATICO has no rights or privileges associated with Mercury common stock.

57. FATICO therefore seeks a judicial determination that: (1) All of FATICO's Series B Preferred Stock converted to Mercury Class A Common Stock as of September 30, 2007; and (2) FATICO is entitled to all rights, privileges, benefits and payments associated with Mercury Class A Common Stock, as of and from September 30, 2007.

58. In the event that Mercury fails to comply with the conversion process set out in Article X.C. of Mercury's Articles, as amended, FATICO seeks a declaration of the number of shares of Mercury Class A Common Stock FATICO has owned as of and since September 30, 2007.

59. A judicial determination and declaration is appropriate and necessary at this time so that FATICO may immediately receive the benefits of its ownership of Mercury Class A Common Stock and exercise its rights and privileges as an owner of Mercury Class A Common Stock.

RELIEF REQUESTED

Based upon the foregoing allegations, FACO and FATICO request that the Court enter a judgment in their favor and against Mercury containing the following relief:

1. An award of all direct, indirect, consequential and other damages.
2. An award of all recoverable costs and attorneys' fees.
3. An award of prejudgment interest at the maximum legal rate.
4. An award of post-judgment interest at the maximum legal rate.
5. Temporary, preliminary and permanent injunctions directing Mercury, its Board of Directors, its officers, and all persons acting in concert with them, to specifically perform, without delay, the conversion process set forth in Article X.C. of Mercury's Articles of Incorporation, as amended.
6. A declaration from this Court that: (1) All of FATICO's Series B Preferred Stock converted to Mercury Class A Common Stock as of September 30, 2007; and (2) FATICO is entitled to all rights, privileges, benefits and payments associated with Mercury Class A Common Stock, as of and from September 30, 2007, and in the future.
7. In the event that Mercury fails to comply with the conversion process set out in Article X.C. of Mercury's Articles, as amended, a declaration from this Court of the number of

shares of Mercury Class A Common Stock FATICO has owned as of and since September 30, 2007.

8. A temporary, preliminary and permanent injunction, order, judgment and decree that Mercury issue FATICO Class A Common Stock share certificates in the appropriate number, record FATICO as a holder of the appropriate number of shares of Class A Common Stock in Mercury's share register, and otherwise take all appropriate steps to recognize FATICO as the owner of Mercury Class A Common Stock in the number of shares determined pursuant to Mercury's Articles or determined by this Court.

9. A judgment, order and decree enjoining Mercury to notify FATICO of any shareholder meeting, enjoining Mercury from holding any shareholder meeting or taking any shareholder action, vote, or consent without notice to and consent by FATICO, enjoining Mercury from holding or taking any Board of Directors action, vote or consent without notice to and consent by FATICO, and enjoining Mercury from distributing any dividend, money, property, stock or other interest other than in the ordinary course of business without notice to and consent by FATICO.

10. A judgment, order and decree that the 2000 Preferred Stock Agreement is terminated, and declaring that FACO has no further obligations pursuant to that Agreement.

11. A judgment, order and decree that FACO has no obligation to purchase any preferred stock from Mercury.

12. Such other relief as may be just.

DEMAND FOR JURY TRIAL

The First American Corporation and First American Title Insurance Company demand trial by jury of all matters encompassed within this Counterclaim.

Respectfully submitted this 17th day of July, 2008.

ROTHGERBER JOHNSON & LYONS LLP

s/Joy Allen Woller

Joy Allen Woller
One Tabor Center, Suite 3000
1200 17th Street
Denver, Colorado 80202-5839
Telephone: (303) 623-9000
Facsimile: (303) 623-9222
jwoller@rothgerber.com

Attorneys for Counterclaimants The First American Corporation and First American Title Insurance Company

Address of Counterclaimants:

The First American Corporation
First American Title Insurance Company
1 First American Way
Santa Ana, CA 92707

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2008, I electronically filed the foregoing COUNTERCLAIM AND DEMAND FOR JURY TRIAL with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address, and that I also caused the foregoing to be hand-delivered:

Lisa Hogan, Esq.
Jeanine M. Anderson, Esq.
Christopher C. Zenisck, Esq.
Brownstein Hyatt Farber Schreck, LLP
410 17th Street, #2200
Denver, CO 80202
lhogan@bhfs.com

s/ Joy Allen Woller

Joy Allen Woller
ROTHGERBER JOHNSON & LYONS LLP
1200 17th Street, Suite 3000
Denver, Colorado 80202
Telephone: (303) 623-9000
Facsimile: (303) 623-9222
E-mail: jwoller@rothgerber.com

*Attorneys for Defendants The First American
Corporation and First American Title Insurance
Company*