

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_\_

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.

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**COMPLAINT AND JURY DEMAND**

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Plaintiffs, Mercury Companies, Inc. ("Mercury"), American Heritage Title Agency, Inc. d/b/a First American Heritage Title Company of Denver ("Heritage Title"), Security Title Guaranty Co. ("Security Title"), Title America, Inc. ("Title America"), and United Title Company, Inc. ("United Title"), by and through their attorneys, Brownstein Hyatt Farber Schreck, LLP, for their Complaint against Defendants The First American Corporation ("FACO") and First American Title Insurance Company ("FATCO"), allege as follows:

**NATURE OF THE ACTION**

1. This is an action for declaratory judgment and breach of contract. FACO and FATCO entered into several agreements with Mercury and its affiliates, under which the parties agreed that Mercury and its affiliates would (1) be FACO's and FATCO's exclusive agents in the

State of Colorado; and (2) issue policies of title insurance exclusively on FACO or its designated affiliate. Despite these agreements, FACO and FATCO have used – and continue to use – multiple agents other than Mercury and its affiliates in Colorado. Moreover, FACO and FATCO have threatened to seek to prevent some of Mercury's affiliates, particularly its California affiliates, from issuing title insurance policies on FATCO and its other affiliates. Accordingly, Plaintiffs bring this action seeking a declaratory judgment, compensatory damages, costs, attorneys' fees, a constructive trust, and an injunction, and such other relief as may be allowed by law.

### **PARTIES**

2. Mercury is a Colorado corporation with its principal place of business in Denver, Colorado.

3. Heritage Title is a Colorado corporation with its principal place of business in Denver, Colorado.

4. Security Title is a Colorado corporation with its principal place of business in Denver, Colorado.

5. Title America is a Colorado corporation with its principal place of business in Lakewood, Colorado.

6. United Title is a Colorado corporation with its principal place of business in Denver, Colorado.

7. FACO is a California corporation with its principal place of business in California. At all relevant times, FACO was doing business in the State of Colorado.

8. FATCO is a California corporation with its principal place of business in California. At all relevant times, FATCO was doing business in the State of Colorado.

### **JURISDICTION AND VENUE**

9. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1332 based on diversity of citizenship and amount in controversy: neither defendant is incorporated, resides, or has a principal place of business in the same state as any of Plaintiffs, and the amount in controversy (exclusive of interest and costs) exceeds the sum of \$75,000.

10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events giving rise to the claims occurred in this district.

### **GENERAL ALLEGATIONS**

#### **A. The Mercury Companies' Business.**

11. Mercury is a holding company. Its wholly-owned operating subsidiaries include Plaintiffs Heritage Title, Security Title, Title America, and United Title (collectively, the "Colorado Subsidiaries"), as well as non parties Financial Title Company ("Financial Title"), Investors Title Company ("Investors Title"), and Lenders Choice Title Company ("Lenders Choice") (collectively, the "California Subsidiaries"). Mercury, its Colorado Subsidiaries, and its California Subsidiaries are collectively referred to herein as the "Mercury Companies."

12. The Colorado Subsidiaries and the California Subsidiaries provide title insurance and escrow services throughout the country. Their income is derived primarily through selling title insurance policies and performing title and closing services for residential and commercial real estate transactions.

**B. The Mercury Companies Contractual Relationship with Defendants.**

13. The Mercury Companies are agents for Defendant FATCO, one of the world's largest title insurers. Defendant FATCO is a subsidiary of Defendant FACO.

14. On December 29, 2000, Plaintiff United Title Companies, Inc. n/k/a Mercury and Defendant FACO entered into an Agreement (the "Agreement").

15. Under the Agreement, FACO and its affiliates agreed to use Mercury and its affiliates as their exclusive agents in the State of Colorado. In particular, Paragraph 9.1 provides:

**9.1 Colorado Agent.** During the term of this Agreement, the Company [Mercury] and its subsidiaries shall be the exclusive agent of FACO in the State of Colorado.

(Agreement at ¶ 9.1.)

16. In addition, Mercury agreed to use FACO exclusively to issue title insurance policies:

**9.2 Exclusive Underwriter.** During the term of this Agreement and for so long thereafter as FACO or an affiliate thereof owns shares of stock in the Company [Mercury], the Company and its subsidiaries will issue policies of title insurance exclusively on FACO or its designated affiliates; provided, however, that the Company and its subsidiaries shall have the right to issue policies of title insurance on other underwriters at the written request of a customer...

(Id. at ¶ 9.2.)

17. To effectuate Paragraph 9 of the Agreement, Mercury and FACO agreed to execute (and cause their subsidiaries to execute) an Agreement of Amendment to amend the

preexisting underwriting agreements<sup>1</sup> so that those agreements reflected the exclusivity provisions contained in Paragraph 9 of the Agreement. (Id. at ¶ 4.2(e).)

18. In accordance with this provision, the Colorado Subsidiaries and California Subsidiaries each executed and delivered to FATCO a separate Agreement of Amendment (together, the "Agreements of Amendment").<sup>2</sup>

19. Under the Agreements of Amendment, the parties amended the Underwriting Agreements to provide that the Mercury Companies could not represent any competitor of FACO in issuing title insurance policies, unless the customer specifically requested, in writing, that Mercury Companies issue policies of title insurance on underwriters other than FACO.

20. In addition, per the Agreements of Amendment the term of the Underwriting Agreements was extended to match the term of the Agreement. Therefore, the term of each of the Underwriting Agreements was changed to be in effect until the later to occur of January 8, 2011 or the date on which FACO no longer owns any shares of the capital stock of Mercury.

21. Moreover, under the Agreements of Amendment executed by the Colorado Subsidiaries, the parties specifically agreed that Mercury and its Colorado Subsidiaries would be FACO's and FATCO's exclusive agents in the State of Colorado.

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<sup>1</sup> The preexisting underwriting agreements include an Underwriting Agreement between Heritage Title and FATCO, an Underwriting Agreement between Security Title and FATCO, an Underwriting Agreement between Title America and FATCO, and an Underwriting Agreement between Financial Title and FATCO. These underwriting agreements are referred to collectively herein as the "Underwriting Agreements."

<sup>2</sup> Lenders Title and Investors Title did not exist at the time and therefore did not sign an Agreement of Amendment. They are, however, subject to the same terms with respect to exclusivity as contained in the Agreements of Amendment.

22. Despite FACO's and FATCO's express agreement that Mercury and its Colorado Subsidiaries would be their exclusive agents in the State of Colorado, FACO and FATCO have used, and are continuing to use, multiple agents in Colorado other than the Mercury Companies.

23. Moreover, FACO and FATCO has taken the position that they are no longer obligated to issue policies of title insurance to the California Subsidiaries.

24. All conditions precedent have occurred, been performed, or been waived.

**FIRST CLAIM FOR RELIEF**  
**(Declaratory Judgment against Defendant FACO)**

25. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 24 above as if fully set forth herein.

26. The Agreement requires that the Mercury Companies issue policies of title insurance exclusively on FACO or its designated affiliates, through the term of the Agreement.

27. The Agreement does not expire until the later to occur of January 8, 2011 or the date on which FACO no longer owns any shares of the capital stock of Mercury.

28. FACO still owns shares of the capital stock of Mercury.

29. Nevertheless, FACO and FATCO have taken the position that they no longer have to allow the California Subsidiaries to issue policies of title insurance on FACO and/or its subsidiaries.

30. There exists an actual and substantial controversy between Mercury and Defendants as to whether Defendants can prevent the California Subsidiaries from issuing policies of title insurance on FACO and its subsidiaries.

31. A declaration from this Court on this issue will resolve the controversy.

32. Accordingly, pursuant to Fed. R. Civ. P. 57, Mercury is entitled to a judgment declaring that Defendants must continue to allow the California Subsidiaries to issue policies of title insurance on FACO and its subsidiaries.

**SECOND CLAIM FOR RELIEF**  
**(Breach of Contract Against FACO)**

33. Plaintiffs incorporates by reference the allegations of paragraphs 1 through 32 above as if fully set forth herein.

34. On December 29, 2000, Defendant FACO entered into the Agreement with Mercury.

35. Under the Agreement, FACO is obligated to use Mercury and its Colorado Subsidiaries as its exclusive agents in the State of Colorado, for the term of the Agreement.

36. FACO has repeatedly and materially breached the Agreement, and continues to breach the Agreement, by using and/or appointing multiple agents in Colorado other than Mercury and its Colorado Subsidiaries, during the term of the Agreement.

37. As a direct result of FACO's multiple and continuing breaches, Mercury has suffered damages in an amount to be determined at trial.

38. Mercury is entitled to all costs, expenses, and reasonable attorneys' fees incurred in this action.

**THIRD CLAIM FOR RELIEF**  
**(Breach of Contract Against FACO and FATCO)**

39. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 38 above as if fully set forth herein.

40. On or about December 8, 2001, Defendants FACO and FATCO entered into Agreements of Amendment with Mercury, Heritage, Security, and Title America.

41. Under those Agreements of Amendment and the Underwriting Agreements they amended, FACO and FATCO agreed that Mercury and its Colorado Subsidiaries would be the exclusive agents of FATCO and its affiliates in the State of Colorado, for the term of the Agreement.

42. FACO and FATCO have repeatedly and materially breached the Agreements of Amendment and the Underwriting Agreements, and continue to breach those agreements, by using and/or appointing multiple agents in Colorado other than Mercury and its Colorado Subsidiaries, during the term of the Agreement.

43. As a direct result of Defendants' multiple and continuing breaches, Mercury and its Colorado Subsidiaries have suffered damages in an amount to be determined at trial.

44. Plaintiffs are entitled to all costs, expenses, and reasonable attorneys' fees incurred in this action.

**FOURTH CLAIM FOR RELIEF**  
**(Permanent Injunction)**

45. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 44 above as if fully set forth herein.

46. An injunction preventing FACO, FATCO, and their affiliates from using and/or appointing any agents in Colorado other than Mercury and its Colorado Subsidiaries, for the remaining term of the Agreement, is necessary to prevent future harm to Mercury.

47. Mercury and its Colorado Subsidiaries will achieve actual success on the merits of their Breach of Contract claims.

48. Irreparable harm will result to Mercury and its Colorado Subsidiaries unless the injunction is issued because, by its nature, the exclusivity agreement affects what businesses will occupy the Colorado market and what business relationships with the parties' competitors and customers can or cannot be established.

49. The threatened injury to Mercury and its Colorado Subsidiaries outweighs the harm that the injunction may cause to FACO, FATCO, and their affiliates.

50. The injunction, if issued, will not adversely affect the public interest.

51. Plaintiffs are also entitled to all costs, expenses, and reasonable attorneys' fees incurred in this action.

#### **PRAYER FOR RELIEF**

ACCORDINGLY, Plaintiffs pray for entry of judgment in its favor and against Defendants as follows:

- a. For entry of judgment against Defendants for all actual and compensatory damages incurred by Plaintiffs and its subsidiaries.

- b. For injunctive relief, enjoining Defendants from using and/or appointing any agents in Colorado other than Plaintiffs, for the remaining term of the Agreement.
- c. For a declaration that FACO and FATCO can not prevent the California Subsidiaries from issuing policies of title insurance on FACO or its subsidiaries.
- d. For a constructive trust attaching to monies that Defendants will continue to receive after a judgment is entered in this case, from Defendants' existing agreements with other agents in Colorado in violation of the Agreement.
- e. For all costs, expenses, and reasonable attorneys' fees incurred by Mercury in this action.
- f. For pre- and post-judgment interest.
- g. For such other and further relief as this Court deems proper.

**JURY DEMAND**

**PLAINTIFFS DEMAND A JURY TRIAL ON ALL CLAIMS SO TRIABLE.**

Respectfully submitted this 1st day of May, 2008.

BROWNSTEIN HYATT FARBER SCHRECK,  
LLP

By: /s/ Lisa Hogan on file

Lisa Hogan, #14132

Jeanine M. Anderson, #28206

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ATTORNEYS FOR PLAINTIFFS

**Plaintiffs' Addresses:**

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**United Title Company, Inc.**

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