UNITED STATES DISTRICT COURT
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 AMERICAN, 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,

v.

MERCURY COMPANIES, INC.

Counterdefendant.

AFFIDAVIT OF KEVIN LAGERWEY IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, Kevin Lagerwey, declare:

1. I am Head of Mergers and Acquisitions for The First American Corporation ("FACO"), a Defendant and Counterclaimant in this litigation. In that role, I also deal in depth with the corporate finance issues of First American Title Insurance Company ("FATICO"), which is also a Defendant and Counterclaimant in this action. For convenience, I will refer to FACO and FATICO collectively as "First American" in this Affidavit. I have personal

knowledge of the matters stated in this Affidavit and, if called as a witness, could and would competently testify to them.

2. I have personally been involved in extended negotiations with Jerry Hauptman, the Chief Executive Officer, and Walter Fitzsimmons, the Chief Financial Officer, of Mercury Companies, Inc. ("Mercury") since the fall of 2007. In addition to direct negotiations, I have been intimately involved in First American's internal discussions regarding its multiple relationships with Mercury and its subsidiary companies. In the course of the last year I have become very familiar with the agreements between the parties and the parties' communications regarding those agreements.

3. 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.

4. **2000 Preferred Stock Agreement**: 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 Parker Kennedy's Affidavit as Exhibit A.

5. **2003 Promissory Note**: 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. 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 Affidavit as Exhibit A.

6. **2004 Promissory Note**: 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 year on all amounts due under the note. 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. Copies of the 2004 promissory note and the Allonges to that note (together, the 2004 Promissory Note) are attached to this Affidavit as Exhibit B.

7. **2006 Preferred Stock Purchase Agreement**: 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 Affidavit as Exhibit C.

8. **Underwriting Agreements Between Mercury Subsidiaries And FATICO**: As alleged in Mercury's Complaint, at paragraphs 13-20, FATICO has entered Underwriting Agreements with Mercury's title company subsidiaries.

9. **Mercury And Its Subsidiaries Have Breached The Agreements**: Mercury and its subsidiaries have breached virtually every agreement they have with First American. Mercury has also breached obligations owing to First American under Mercury's Articles of Incorporation. True and correct copies of Mercury's relevant Articles of Incorporation, as amended, are attached as Exhibit D. The breaches are ongoing as of the date of this Declaration, and include the following:

a. Mercury has failed to pay mandatory dividends owing to FACO on Mercury's Series A Non-Voting Preferred Stock;

b. Mercury has failed to pay interest and principal due on the 2003 Promissory Note;

c. Mercury has failed to pay interest and principal due on the 2004 Promissory Note;

d. Mercury has failed to pay mandatory dividends owing to FATICO on Mercury's Series B Non-Voting Preferred Stock;

e. Mercury has failed to remit title insurance premiums owing to FATICO under the Underwriting Agreements.

10. 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.

11. I have been intimately involved in the discussions with Mercury in recent days. Late in the day on Monday, August 4, Mercury and First American reached an agreement in principle under which, *inter alia*, First American would not enforce Mercury's debt of about $20 million, and the parties would dismiss this lawsuit, Mercury would sell to FATICO the principal assets and liabilities of Mercury's Colorado subsidiaries, and FATICO would fund the payroll of Mercury's Colorado subsidiaries due on Thursday, August 7, 2008. The agreement included about $7.2 million of additional First American funding to Mercury.

12. Attached to this Declaration as Exhibit E is a copy of a press release obtained from Yahoo's Finance website on August 5, 2008. In the press release, Fidelity claims to have all of Mercury's Colorado title insurance operations. Mercury has neither sought nor obtained FACO's approval of the agreement Fidelity claims to have entered with Mercury.

13. Any such transaction would violate multiple key agreements between Mercury

and First American. Those violations would include the following:

a. Section 8.3 of Mercury December 2000 Preferred Stock Agreement with FACO – which forms the centerpiece of Mercury's pending litigation against First American – provides as follows:

> The Company [Mercury] will not acquire any business entities, wind up, liquidate or dissolve its affairs or enter into any transaction of merger or consolidation, or convey, sell, lease or otherwise dispose of (or agree to do any of the foregoing at any future time) all or any significant part of its property or assets without the written consent of FACO.

Any agreement of this type with Fidelity violates this covenant because it has not been approved in writing by FACO.

b. Under the 2006 Preferred Stock Agreement, First American Title Insurance Company (FATICO) is equitably the owner of a large share – possibly a majority – of Mercury's common stock. Mercury has breached its Articles, under which as of September 30, 2007 First American's 75,000 of Series B Preferred Stock converted to Mercury Class A Common Stock. FATICO's preferred stock holdings, as of September 30, 2007, were worth more than $75 million, including accrued and unpaid dividends. Given Mercury's financial situation at the time, and based upon financial statements Mercury sent to First American, Mercury's overall value was quite likely at or less than $75 million. Given the formula for conversion to common shares, that would arguably equate to a First American ownership above or around a majority of Mercury's common stock. Any Mercury agreement with Fidelity or other company of this type would violate FATICO's rights as a shareholder and, and would be unenforceable as entered without proper corporate authority and in violation of FATICO's corporate rights.

c. Article IV.J. of Mercury's Articles of Incorporation provide as follows:

> Unless at least Fifty-One Percent (51%) of the then holders of the Preferred Stock

> approve in writing, the corporation shall not unreasonably take any action with respect to the corporation which would have the effect of significantly diminishing the rights of said holders to receive the Preferred Dividend . . .

This provision of Mercury's Articles also requires FACO's written consent as a condition precedent to any transaction. Fidelity's ownership of Mercury's Colorado's operations will undoubtedly significantly diminish the likelihood of FACO receiving a preferred dividend. It is inconceivable that Fidelity would manage the companies to generate dividends to its competitor.

14. Attached to this Declaration as Exhibit F is a copy of a statement from the home page of Mercury's website printed on August 5, 2008, setting forth a July 31, 2008 Media Statement. In it, Mercury admits that it has closed down its non-Colorado title insurance operations. This, in turn, shows that Mercury's Colorado operations – encompassed within Security Title, First American Heritage, Title America and United Title Company – as of the present constitute substantially all of Mercury's property and assets.

15. First American stands ready, willing and able to perform the agreement it reached on Monday, August 4 with Mercury. Among other things, Mercury informed First American that it did not have the funds to make the August 7 payroll of the Colorado subsidiaries. First American's agreement with Mercury includes, as one provision, First American's funding of that payroll. This will ensure Mercury employees continue to remain in service of the Colorado operations.

16. First American would suffer immediate and irreparable injury if Fidelity were to acquire the Colorado title insurance operations of Mercury's subsidiaries. If those operations are managed by Fidelity, there will be no way to restore them to where they would be if Mercury performed its agreement with First American and sold those operations to First American. Those

operations are at a fork in the road: Their immediate and long-term futures under First American's stewardship will be very different than they will be if Fidelity is allowed to take over those operations. Fidelity's plans for business development, employee management and retention, handling of open transactions, management of branch operations, integration of systems, and integration of personnel undoubtedly are very different than those First American intends to implement. Additionally, Fidelity will undoubtedly seek to terminate or erode First American's underwriting relationship with the Mercury subsidiaries, and terminate other First American companies' business relationships with the Mercury companies in favor of Fidelity's own companies' offerings. It will not be possible to monitor or compute the damage to First American if, in violation of its rights to approval and its rights as a shareholder, Fidelity is allowed to take over operations of Mercury's Colorado subsidiaries.

I declare under PENALTY OF PERJURY under the laws of State of California that the foregoing is true and correct. Executed this 6th day of August, 2008 at Santa Ana, California.

/s/

KEVIN LAGERWEY

Address of Counterclaimants:
The First American Corporation
First American Title Insurance Company
1 First American Way
Santa Ana, CA 92707

State of California
County of Orange

On August 6, 2008 before me, Karen Dahl, notary public, personally appeared Kevin Lagerwey, who proved to me on the basis of satisfactory to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is ture and correct.

WITNESS my hand and official seal.

Notary Public

KAREN DAHL
COMM. #1515692
NOTARY PUBLIC - CALIFORNIA
ORANGE COUNTY
My Comm. Expires SEPT. 26, 2008