

Electronically Filed June 24, 2015

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Counsel for American West Development, Inc.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

11 In Re
 12 American West Development, Inc.,
 13 Debtor.

Case No. BK-S-12-12349-MKN

Chapter 11

**DECLARATION OF EDWARD LUBBERS,
 ESQ. IN SUPPORT OF AMERICAN WEST
 DEVELOPMENT, INC.’S OPPOSITION TO
 MOTION OF ZURICH AMERICAN
 INSURANCE COMPANY AND ITS
 AFFILIATE INSURERS TO DETERMINE
 AND DECLARE THAT THE DEBTOR’S
 DISCHARGE DOES NOT EXTEND TO
 CERTAIN IDENTIFIED NON-DEBTORS,
 OR, IN THE ALTERNATIVE, TO MODIFY
 DISCHARGE INJUNCTION**

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22 I, Edward Lubbers, Esq. of the law firm Lubbers Law being duly sworn, hereby depose
 23 and declare under penalty of perjury:

24 1. I am an attorney at the law firm of Lubbers Law, and one of the attorneys for
 25 American West Development, Inc. (“AWDI”).

26 2. I make this declaration in support of AWDI’s Opposition to Motion of Zurich
 27 American Insurance Company and its Affiliate Insurers to Determine and Declare that the
 28

1 Debtor's Discharge Does Not Extend to Certain Identified Non-Debtor's or, in the Alternative,
2 to Modify Discharge Injunction.

3 3. I spoke with Ann Marie Hansen, counsel for Zurich, on June 15, 2015 about a
4 possible settlement of this matter. To date, AWDI and Zurich have been unable to come to a
5 resolution.

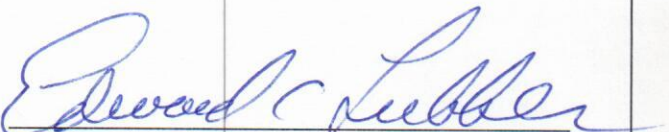
6 4. On June 16, 2015, I sent an email to Ms. Hansen stating "Ann, what I need is
7 the date Zurich received each claim or notice of claim, the date or dates alleged in each claim,
8 and if lawsuits were filed, the court case numbers. Also, we do not know what the 'DJ' claim is
9 about or whom the homeowner is. With that information we can identify the appropriate policy
10 of insurance, the entity involved and the appropriate SIR. . . ."

11 5. Neither Ms. Hansen nor anyone else representing Zurich have responded to my
12 request.

13 6. Attached hereto as Exhibit 1 is a true and correct copy of a letter that I received
14 on or about August 16, 2013 from Susan Gummow.

15 I declare under penalty of perjury of the laws of the United States of America that the
16 foregoing is true to the best of my knowledge, information and belief.

17 Dated this 24 day of June, 2015.

18
19 By: 
20 Edward Lubbers
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EXHIBIT 1

FORAN GLENNON PALANDECH PONZI & RUDLOFF

VIA EMAIL AND FIRST-CLASS MAIL

Friday, August 16, 2013

Edward C. Lubbers
Lubbers Law
8345 West Sunset Road, Suite 250
Las Vegas, NV 89113-2092
elubbers@lubberslaw.com

Re: Amounts Payable to Zurich American Insurance Company by American West Homes, Inc. Under Policy Number GL03503901-00 (Effective January 1, 2001 to January 1, 2002)

Dear Counsel:

This letter explains Zurich's position with regard to amounts owed to Zurich under the above-referenced insurance policy (the "Policy"), which was issued to American West Homes, Inc. as the First Named Insured. All of the Named Insureds under the Policy are jointly and severally liable for amounts due to Zurich. One of the Named Insureds, American West Development, Inc., has filed bankruptcy and has received a discharge under the Bankruptcy Code. Therefore Zurich is not making any attempt to collect from American West Development, Inc. In accordance with Zurich's rights under the Policy and under applicable law, however, Zurich is seeking and hereby demands payment of all amounts owed to it under the Policy by entities other than American West Development, Inc., as set forth below.

Please note that we provide this analysis to you in the context of settlement negotiations, so the use of this letter is subject to the applicable rules governing offers of compromise. Additionally, we reserve our rights to amend or alter this analysis depending on the result of discovery, should litigation be commenced, and any intervening changes in governing law.

A. The Pertinent Policy Language

The Policy has a Named Insured Schedule, which includes:

American West Homes, Inc., American West Development, Inc.,¹ Whitney Ranch, Inc., Gowan Properties, Inc., El Capitan, Inc., Federal Land Management, LLC, Cactus Sand & Gravel, Inc., Pinnacle Peaks, LLC, West Mesa, LLC, Coronado Hills, LLC, Adaven Management, Inc., Section 31, LLC, The Canarelli Family Trust dated September 14, 1990, The Lawrence and Heidi Canarelli 1993 Irrevocable Trust, The Stacia Leigh Lemke Irrevocable Trust, The Jeffrey Lawrence Graves Canarelli Irrevocable Trust, The Scott Lyle Graves Canarelli Irrevocable Trust, The Allysa Lauren Graves Canarelli Irrevocable Trust, Lawrence D. Canarelli & Heidi Canarelli, The SLG Canarelli 1993 Retained Annuity Trust, The ALG

¹ As a result of American West Development, Inc.'s bankruptcy filing, we are not pursuing it for payment.

Canarelli 1993 Retained Annuity Trust, The SL Canarelli 1993 Retained Annuity Trust, The JLG Canarelli 1993 Retained Annuity Trust, Silverado Crossing, Silverado Canyone, Silverado Terrace, Grand Island at Legacy, and American West Grandbrooke.

The words “you” and “your” in the Policy refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under the Policy.

The Policy also provides that “Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies . . . [a]s if each Named Insured were the only Named Insured.” (See Policy, Section IV at ¶ 7, p. 10.)

The Self Insured Retention deductible is \$50,000 per occurrence. (See Endorsement Number: #006 to Policy; see also Self Insured Retention Endorsement to Policy.)² The Self Insured Retention “means the amount *you* or *any Insured* must pay for all amounts which you shall become legally obligated to pay as damages because of ‘bodily injury’, ‘property damage’ ‘advertising injury’ or ‘personal injury’ sustained by one or more persons or organizations, due to an ‘occurrence.’” (See Self Insured Retention Endorsement at Definition ¶ A) (emphasis added).

The Policy provides:

with respect to any claim under this insurance which has been tendered to us and which may exceed the self insured retention amount shown in the schedule of this endorsement for ‘per occurrence’ or ‘per claim’ whichever applies, we may pay for all of the self insured retention on your behalf to defend or to effect settlement of such claim. **Such amount paid by us shall [be] reimbursed promptly by you.**

See id. at Settlement of Claim (emphasis added).

B. The Claims

This is a list of the claims at issue:

Stacy Spring Claim:

Date of Payment:	March 13, 2012. (Legal Fees and Other Expenses were paid from November 2001 through September 2012).
Claim Amount:	\$50,222.31
Expenses:	\$155,959.58
Loss Address:	8321 Antler Pines Court, Las Vegas

² The Self Insured Retention was originally \$50,000 per occurrence. Endorsement #3 & #4 amended the amount to \$250,000 in lieu of \$50,000. Endorsement #6 amended the Self Insured Retention to include a \$50,000 per occurrence deductible.

Classic Development Claim:

Date of Payment: Legal Fees and Other Expenses were paid from March 31, 2011 through September 29, 2012.
 Claim Amount: \$139,545.50
 Expenses: \$127,265
 Loss Address: Silverado Terrace

Backman Claim:³

Date of Payment: December 14, 2011
 Claim Amount: \$79,992
 Expenses: \$16,769.32
 Loss Address: Las Vegas

Medina Claim:

Date of Payment: April 27, 2011
 Expenses: \$70,000
 Loss Address: Classics

Each claim had a \$50,000 deductible that was not paid. Therefore each insured (except for the debtor in bankruptcy) is jointly and severally liable for the aggregate amount of \$200,000.

C. Legal Discussion

Courts have repeatedly interpreted the standard policy language indicated above as “clearly mak[ing] it the named insureds’ responsibility to reimburse the deductible to the insurer.” Barletta Heavy Div., Inc. v. Layne Christensen Co., No. 07-12084(DPW), 2008 WL 1399692, *7 (D. Mass. Apr. 13, 2011) (quoting DONALD S. MALECKI ET AL., THE ADDITIONAL INSURED BOOK 19-20 (5th ed. 2004)).

Moreover, a named insured is liable for deductible payments, even for claims that were not made against that particular named insured. In Northbrook Insurance Co. v. Kuljian Corp., the Third Circuit determined whether one of two “named insureds” was required to pay the outstanding deductible amount on demand. See Northbrook Ins. Co. v. Kuljian Corp., 690 F.2d 368, 373 (3rd Cir. 1982). Noting that the deductible language was unambiguous, the Court held that the policy imposed the obligation to pay the deductible on the named insureds. Id. The Court specifically rejected appellant’s interpretation limiting the obligation to claims against one particular named insured, stating that the Court was not free to rewrite otherwise clear language to incorporate those terms. Id.

Similarly, defendants in Scottsdale Insurance Co. v. Westurn Cedar, Inc., argued that they should not be responsible for deductible claims arising from claims made against other insured entities under the policy. Scottsdale Ins. Co. v. Westurn Cedar, Inc., No. 07-2674 (DWF/AJB), 2008 WL 2984729, *4 (D. Minn. July 31, 2008). The District Court rejected defendants’ theory, holding that even though the entities were separately incorporated, they were still insured under a single insurance policy, for which a single premium was paid, and the deductible was therefore the responsibility of the named insureds. Id.

³ The Classic Development Claim and the Backman Claim did not arise out of the same occurrence. The Backman Claim was set up to address a separate group of homeowner claims. There were over 50 homes involved in these disputes, sometimes there were multiple occurrences within each home. The issues for the individual home owners varied from roofing, plumbing, to the framing of the house. Occurrence is defined in the Policy as an accident, including continuous or repeated exposure to the same general harmful conditions. Accordingly, the issues related to each home are separate occurrences even if those claims were all brought under one lawsuit.

The purpose of a separation of insureds clause is to assure that each insured is provided with coverage in the event of coverage disputes that can arise when one insured is the cause of the other insured's damages that trigger the policy. Evanston Ins. Co. v. OEA, Inc., 2005 WL 1828796, *7 (E.D. Cal. Jul. 25, 2005) (summarizing the conclusions of several courts regarding the purpose of the separation of insureds clause as part of the standard insurance industry form contract). A separation of insureds clause does not mean that the clear language governing the named insureds' obligations to pay deductibles is nullified. Here, the separation of insureds clause expressly states: "Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies . . . [a]s if each Named Insured were the only Named Insured." (See Policy, Section IV at ¶ 7, p. 10.) The premium obligation under the Policy is specifically assigned to the First Named Insured. However, the SIR deductible is expressly the responsibility of all of the Named Insureds. Thus, under the express terms of the Policy each Named Insured will be treated as if it is the only Named Insured and is responsible for the SIR deductible.

With respect to American West Development, Inc. ("AWD"), AWD has obtained a discharge in connection with a Plan of Reorganization confirmed by the United States Bankruptcy Court for the District of Nevada on February 14, 2013 (case number 12-12349). Consistent with the provisions of the Bankruptcy Code, Zurich is not seeking to collect any amounts from AWD.⁴ Additionally, consistent with a settlement agreement embodied in the Confirmation Order entered as Docket Number 853 in the AWD bankruptcy case, Zurich is forgoing its right to collect amounts owed in the first instance by AWD from affiliates of AWD (i.e., from the other Named Insureds). **None of the amounts disclosed above are owed by AWD in the first instance, and therefore no aspect of the bankruptcy process precludes Zurich's collection of the debts set out above.** 11 U.S.C. § 524(e) ("[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt"); In re Lowenschuss, 67 F.3d 1394, 1401 (9th Cir. 1995) ("This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors."). Apart from AWD, neither American West Homes, Inc. nor any other of the Named Insureds disclosed above were debtors in bankruptcy or received a discharge.

D. Conclusion

For the reasons set forth above, American West Homes, Inc. and the other Named Insured under the American West Homes Policy (excluding AWD), owe Zurich \$200,000. This amount is immediately due and payable, and we therefore request that payment be remitted at your clients' earliest possible convenience. To the extent that this amount is not remitted within 10 days, Zurich reserves the right to seek fees, costs, and all other amounts that are payable under the Policy or pursuant to applicable law.

We look forward to hearing from you.

Cordially,

FORAN GLENNON PALANDECH PONZI & RUDLOFF P.C.



Susan Gummow
Partner

⁴ As you are likely aware, the United States Trustee has filed a complaint to revoke the discharge granted to American West Development (Adversary Proceeding 13-1154; Bankr. D. Nev.). To the extent that AWD's discharge is revoked, Zurich may exercise any and all rights it has pursuant to applicable law.

cc:

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