

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,)	
)	
Plaintiff,)	Civil Action No. 18-cv-5587
)	
v.)	Hon. John Z. Lee
)	
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,)	Mag. Judge Young B. Kim
)	
Defendants.)	
)	

MOTION FOR PROTECTIVE ORDER

The Mortgagees,¹ by their attorneys and pursuant to Fed. R. Civ. P. 26(c), move the Court to enter an order that bars Kevin B. Duff, as the receiver (“Receiver”) for the Estate of

¹ The Mortgagees are Freddie Mac; Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB30; U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB41; U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB50; Wilmington Trust, National Association, as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Trust 2014-LC16, Commercial Mortgage Pass-Through Certificates, Series 2014-LC16; Wilmington Trust, National Association, as Trustee for the benefit of the registered holders of UBS Commercial Mortgage Trust 2017-C1, Commercial Mortgage Pass-Through Certificates, Series 2017-C1; Federal National Mortgage Association (“Fannie Mae”); BMO Harris Bank N.A.; Midland Loan Services, a Division of PNC Bank, National Association; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Colony American Finance 2015-1; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Registered Holders of Corevest American Finance 2017-2 Trust, Mortgage Pass-Through Certificates, Series 2017-2; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Benefit of Corevest American Finance 2017-1 Trust Mortgage Pass-Through Certificates; BC57, LLC; UBS AG; Thorofare Asset Based Lending REIT Fund IV, LLC; and Liberty EBCP, LLC.

Defendants EquityBuild, Inc., EquityBuild Finance, LLC, their affiliates, and the affiliates of Jerome Cohen and Shaun Cohen (the “Estate”), the United States Securities And Exchange Commission, and the so-called “investor-lenders” from discovering any communications made after the commencement of this action between the Mortgagees, or anyone acting on their behalf, and the title insurance companies that insured the Mortgagees’ interest in any of the Estate properties, or anyone acting on their behalf, because they are protected by the attorney-client privilege, the insurer-insured privilege, and the “common defense” privilege and, to the extent not protected, are not relevant.

I. PROPOSED STANDARD DISCOVERY DIRECTED TO THE MORTGAGEES.

As part of the dispute resolution process proposed by the Receiver, and pursuant to directions from the Court that the Receiver and the Mortgagees prepare standard discovery requests (Doc. 801), the Mortgagees conferred to prepare standard discovery, but could not reach an accord concerning the Receiver’s proposal that the standard discovery directed to the Mortgagees include the following document production request:

5. Provide the following documents related to the loan against the property in the Tranche that is the subject of your Proof of Claim, as well as all documents evidencing, reflecting, or constituting internal communications, or communications between you, or anyone acting on your behalf, and any title company, regarding:
 - (1) the origination of the loan;
 - (2) the closing of the loan (including all pre-closing communications including but not limited to communications regarding the title commitment and all amendments thereto, any special exceptions to title (and any recorded documents provided or obtained related to those special exceptions), drafts of and final settlement statements, escrow instructions and escrow agreements)
 - (2 [sic]) the priority of the loan;
 - (3 [sic]) any due diligence undertaken prior to funding;
 - (4 [sic]) any communications with EquityBuild or the Cohens;

- (5 [sic]) knowledge of and investigation regarding prior encumbrances;
- (6 [sic]) whether the investor-lenders released their mortgages on a property;
- (7 [sic]) whether the investor-lenders were paid in connection with the release of their mortgages on a property;
- (8 [sic]) whether EquityBuild or its affiliates were authorized by the investor lenders to release their mortgages on the property;
- (9 [sic]) exchanges with the title company for coverage under title insurance policies and related communications, including but not limited to all coverage communications.

[Doc. 807, Ex. 4.]

The Mortgagees objected to the inclusion of this request to the extent it seeks communications originated after the commencement of this action and coverage correspondence because the communications are protected by the insured-insurer privilege, an extension of the attorney-client privilege, *Holland v. Schwan's Home Serv., Inc.*, 2013 IL App (5th) 110560, ¶¶ 195, 992 N.E.2d 43, 372 Ill. Dec. 504 (2013), and the common-defense privilege, and, to the extent not protected, are not relevant. (Doc. 807.) The Court requested the Mortgagees to present their position in a motion for a protective order. (Doc. 836.)

II. STANDARD FOR A PROTECTIVE ORDER.

Federal Rule of Civil Procedure 26(c) permits a party to move for a protective order forbidding disclosure or discovery of certain materials. Fed. R. Civ. P. 26(c). The court has discretion to determine whether a protective order should be entered and, if so, what degree of protection is appropriate. *Nieves v. OPA, Inc.*, 948 F. Supp. 2d 887, 891 (N.D. Ill. 2013). The court may grant such a motion where there is “good cause” to enter the protective order. *Clark v. City of Chicago*, 2010 U.S. Dist. LEXIS 144529, 2010 WL 9941375, at *1 (N.D. Ill. Oct. 13, 2010) (quoting Fed. R. Civ. P. 26(c)).

Rule 26(b)(5) provides that a party claiming a privilege (1) expressly claim the privilege, Fed. R. Civ. P. 26(b)(5)(A)(i), and (2) “describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim,” Fed. R. Civ. P. 26(b)(5)(A)(ii). The Federal Rules do not require the party claiming a privilege to furnish a privilege log to support its position. *Banks v. Office of the Senate Sergeant-At-Arms & Doorkeeper*, 222 F.R.D. 7, 21 (D.D.C., 2004) (“A party can comply with the requirement of Rule 26(b)(5) by otherwise communicating sufficient information to ‘enable other parties to assess the applicability of the privilege or protection’”).

III. ALL COMMUNICATIONS BETWEEN THE INSURERS AND INSURED COMMENCING WITH THE INSURED’S TENDERING OF A DEFENSE ARE PRIVILEGED.

All of the communications between the Mortgagees and their title insurers originating after the commencement of this action are privileged. In support of this claim, the Mortgagees describe the nature of the documents and communications instead of submitting a privilege log because the description of the nature of the documents and communications enables the parties and the Court to assess these privilege claims and the creation of a privilege log at this time would be an extremely burdensome task given the number of Mortgagees and properties at issue. If the Court requires a privilege log, the Mortgagees request that the Court defer ruling on this motion to permit the Mortgagees to assert these claims when the standard discovery is served in conjunction with the dispute resolution process.

A. The Title Insurance Companies.

There are four title companies that insured Mortgagees in these proceedings. Chicago Title Insurance Company retained Michael Gilman to represent its insured mortgagees identified

in his appearances. (See Docs. 706 & 707.) First American Title Insurance Company and Old Republic Insurance Company retained Ronald Damashek to represent their insured mortgagees identified in his appearances. (See Docs. 671, 672, 686 & 761.) WFG National Title Insurance Company retained Scott Mueller to represent its insured mortgagees identified in his appearances. (See Docs. 666 & 667.)

B. The Title Insurance Policies.

The title insurance policies issued to the Mortgagees were written on the American Land Title Association loan policy form adopted on June 17, 2006, a copy of which is attached as Exhibit 1, which was download from <https://www.alta.org>.² In the policy, the insurer, subject to exclusions, exceptions, and conditions, insures the insured against loss or damage sustained or incurred by one of the specified risks. The policy's conditions provide that upon written request by the insured, the insurer will defend in litigation where a third party asserts a claim covered by the policy adverse to the insured's interest. Ex. 1, Condition 5(a). The policy gives the insurer the right to select counsel of its choice to represent the insured for the actions alleging matters insured against by the policy. *Id.* If the title company is prejudiced by the failure of the insured claimant to provide prompt notice to it, the title company's liability to the claimant under the policy shall be reduced to the extent of the prejudice. Ex. Condition 3.

C. Insurance Coverage Communications.

Where there is litigation, an insurer, generally, has a duty to defend its insured where the allegations in the underlying complaint fall within, or potentially within, the policy's coverage

² The Mortgagees have not attached each title insurance policy to this motion because, in the aggregate, they are voluminous. If the Court requires copies of them, the Mortgagees will furnish copies of each policy to support this motion or request that the Court defer ruling on this motion until after actual discovery is served upon the Mortgagees, at which time this motion can be supplemented.

provisions. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 393, 620 N.E.2d 1073, 189 Ill. Dec. 756 (1993); *Sabatino v. First Am. Title Ins. Co.*, 308 Ill. App. 3d 819, 721 N.E. 2d 693, 242 Ill. Dec 414 (1999). The insurer's duty to defend is much broader than its duty to indemnify its insured. *Crum & Foster*, 156 Ill. 2d at 393-94. "Thus, an insurer is required to defend its insured whenever the alleged conduct is potentially within the policy's coverage, even if the insurer discovers that the allegations are groundless, false, or fraudulent." *Perry v. Fid. Nat'l Title Ins. Co.*, 2015 IL App (2d) 150168, ¶ 12, 48 N.E.3d 1168, 200 Ill. Dec. 728 (2015).

Consequently, a prudent insured will notify its title insurer of litigation that could adversely affect its insured interest in property and tender the defense of an adverse claim as soon as possible to protect its rights under the title insurance policy. The title insurer reviews the allegations of the adverse claim to assess whether they state facts, without regard to their validity or truth, that are potentially within the policy's coverage.

The commencement of this action constitutes litigation concerning the Estate properties that could prompt a Mortgagee to tender a claim to its title insurer. The insurer's response to the tender – acceptance of the tender, denial of the tender, or something in between – and the reasoning for that response, are issues solely between the insurer and the insured.

D. The Insured-Insurer Privilege and the Common Defense Privilege Protect From Disclosure All Communications Between The Insurers And Insureds Origination With the Insureds' Tendering of the Defense.

The substance of communications between an insured and its insurer is protected under the insurer-insured privilege, and the attorney-client privilege, because they arise from the insured's request that the insurer retain counsel to defend the insured's interest. Although the insurer's representative may not be an attorney, the underlying purpose of the communications is

to defend against the adverse claim, with the title company retaining counsel and participating in the defense.

The attorney-client privilege extends to communications between an insurer and an insured where the insurer is under an obligation to defend the insured. *People v. Ryan*, 30 Ill. 2d 456, 460-61, 197 N.E.2d 15 (1964):

We think the rationale of those cases upholding the privileged nature of communications between insured and insurer where the insurer is under an obligation to defend is more persuasive. We concede that such communications are normally made by the insured to a layman and in many cases no lawyer will actually be retained for the purpose of defending the insured. Nevertheless, by the terms of the common liability insurance contract, the insured effectively delegates to the insurer the selection of an attorney and the conduct of the defense of any civil litigation. The insured is ordinarily not represented by counsel of his own choosing either at the time of making the communication or during the course of litigation. Under such circumstances we believe that the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured. We believe that the same salutary reasons for the privilege as exist when the communication is directly between the client and attorney were present when [the insured] made her statement to the investigator for her insurer. We therefore conclude that public policy dictates that the statement given by [the insured] to her insurance carrier was clothed with the attorney-client privilege while in control of the insurer.

Here, the Mortgagees tendered the defense of this litigation to their title insurers. By doing so, they effectively delegated to the insurers the selection of counsel and the conduct of the defense as to potentially covered matters. The Mortgagees may properly assume that their communications are made to the insurer for the primary purpose of the insurer's retention of counsel and transmitting information to the retained counsel to protect the interests of the insured and, because the insurer may need to indemnify the insured for covered losses, the insurer. *See R.C. Wegman Constr. Co. v. Admiral Ins. Co.*, 629 F.3d 724, 728 (7th Cir. 2011); *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill. App. 3d 467, 392 N.E.2d 1365, 30 Ill. Dec. 320 (1979) (when insurer retains attorney to defend insured, attorney represents both insured and insurer in furthering interests of each). Further, those communications are similar to a client

meeting with a prospective attorney for possible retention. Regardless of whether the client ultimately retains counsel, the communications are protected by the attorney-client privilege. *See* Ill. R. PC. 1.18(b) (“Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client”).

The communications are also protected under the common defense, joint defense or common interest doctrine, which some courts call a privilege while other courts call an exception to a rule of waiver of the attorney-client privilege. The common defense privilege protects communication between an attorney, the client and a third-party made with respect to the defense in which the client and third-party have a common interest. *Selby v. O’Dea*, 2017 IL App (1st) 151572, ¶40. “The joint defense privilege enables counsel for clients facing a common litigation opponent to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege.” *United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979); *see IBJ Whitehall Bank & Trust Co. v. Cory & Assocs.*, 1999 U.S. Dist. LEXIS 12440. It applies to communications between and insured and insurer because they have a common interest in defeating the adverse claim. *See Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 193-94, 579 N.E.2d 322 (1991).

In this case, communications between the Mortgagees and the title companies concerning the claims raised in this action served to present a defense in their common interest. Those communications are therefore protected by the common defense privilege.

IV. TO THE EXTENT COMMUNICATIONS BETWEEN THE INSURERS AND MORTGAGES ARE NOT PROTECTED BY A PRIVILEGE, THEY ARE NOT RELEVANT.

Communications between the Mortgagees and the title insurers are not relevant. As set forth above, the title policies provide that the Mortgagees are to request promptly that the title insurer defend claims in which any third party asserts a claim covered by this policy adverse to the Mortgagees. Thus the content of the communications are Mortgagees' requests to the title insurers to defend litigation based upon the title policy and the title insurers' responses based upon an analysis of whether the allegations in the pleadings, regardless of their validity, potentially fall within the policy's coverage provisions. Thus, the scope of those communications, by their very nature, do not constitute relevant information as to the priority of the Mortgagees' mortgages.

CONCLUSION

WHEREFORE, the Mortgagees request that the Court enter an order that bars the Receiver, the SEC and the investor-lenders from discovering any communications made after the commencement of this action between the Mortgagees, or anyone acting on their behalf, and the title insurance companies that insured the Mortgagees' interest in any of the Estate properties or anyone acting on their behalf because they are protected by the attorney-client privilege, the insurer-insured privilege, and the "common defense" privilege and, to the extent not protected, not relevant. In the event the Court deems a privilege log required to assess whether the documents are protected by a privilege, the Mortgagees request that the Court defer ruling on this motion until the proposed discovery is served upon a Mortgagee, at which time the Mortgagee can prepare a privileged log.

Dated: November 10, 2020

Respectfully submitted,

<p><u>/s/ Michael Gilman</u> mgilman@dykema.com Dykema Gossett PLLC 10 S. Wacker Dr., Suite 2300 Chicago, Illinois 60606 312-627-5675 Counsel for Federal National Mortgage Association; U.S. Bank National Association, as Trustee for the registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB50; U.S. Bank National Association, as Trustee for the registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB50; Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; U.S. Bank National Association, as Trustee for the registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB41; Freddie Mac; U.S. Bank National Association, as Trustee for the registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB30; Sabal TL1 LLC; UBS AG; BC57 LLC; Wilmington Trust, National Association, as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Trust 2014-LC16, Commercial Mortgage Pass-Through Certificates, Series 2014-LC16; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Benefit of Corevest American Finance 2017-2 Trust Mortgage Pass-Through Certificates, Series 2017-2; Midland Loan</p>	<p><u>/s/ Ronald Damashek</u> rdamashek@stahlcowen.com Stahl Cowen Crowley Addis LLC 55 West Monroe Street – Suite 1200 Chicago, Illinois 60603 PH: (312) 377-7858 Fax: (312) 423-8160 Counsel for Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; Midland Loan Services, a Division of PNC Bank, National Association; Thorofare Asset Based Lending REIT Fund IV, LLC; and Liberty EBCP, LLC</p> <p><u>/s/ Scott B. Mueller</u> Stinson LLP 7700 Forsyth Blvd., Ste 100 St. Louis, MO 63105 (714) 863-0800 Counsel for BMO Harris Bank, N.A., and Midland Loan Services, a Division of PNC Bank, N.A.</p>
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Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Benefit of Corevest American Finance 2017-1 Trust Mortgage Pass-Through Certificates; 1111 Crest Dr., LLC, Pakravan Living Trust, Hamid Esmail, and Farsaa, Inc.; Direct Lending Partner LLC, successor to Arena DLP Lender LLC and DLP Lending Fund LLC; Thorofare Asset Based Lending REIT Fund IV LLC	
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CERTIFICATION

The undersigned certifies that after consultation by telephone and e-mail and good faith attempts to resolve differences, the parties were unable to reach an accord concerning the document request described above. There were numerous e-mail communications and a telephonic discussion on September 25, 2020 starting at 10 a.m. among the undersigned, Michael Napoli, counsel for one of the Mortgagees, Michael Rachlis and Jodi Wine for the Receiver, Benjamin J Hanauer in an effort to resolve differences.

/s/ Michael Gilman
mgilman@dykema.com
Dykema Gossett PLLC
10 S. Wacker Dr., Suite 2300
Chicago, Illinois 60606
312-627-5675

LOAN POLICY OF TITLE INSURANCE

Issued By

BLANK TITLE INSURANCE COMPANY

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 17 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company") insures as of Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
 - (a) A defect in the Title caused by
 - (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - (ii) failure of any person or Entity to have authorized a transfer or conveyance;
 - (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
 - (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
 - (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
 - (vii) a defective judicial or administrative proceeding.
 - (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
 - (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
 - (a) the occupancy, use, or enjoyment of the Land;
 - (b) the character, dimensions, or location of any improvement erected on the Land;



- (c) the subdivision of land; or
- (d) environmental protection
- if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured Mortgage
- (a) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - (b) failure of any person or Entity to have authorized a transfer or conveyance;
 - (c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
 - (d) failure to perform those acts necessary to create a document by electronic means authorized by law;
 - (e) a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - (f) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
 - (g) a defective judicial or administrative proceeding.
10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.
11. The lack of priority of the lien of the Insured Mortgage upon the Title
- (a) as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either
 - (i) contracted for or commenced on or before Date of Policy; or
 - (ii) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance; and
 - (b) over the lien of any assessments for street improvements under construction or completed at Date of Policy.
12. The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.
13. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title

- (a) resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or
 - (b) because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
 - (i) to be timely, or
 - (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY: PRESIDENT

BY: SECRETARY

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
 - (i) the occupancy, use, or enjoyment of the Land;
 - (ii) the character, dimensions, or location of any improvement erected on the Land;
 - (iii) the subdivision of land; or
 - (iv) environmental protection;or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.
- (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
 - (a) created, suffered, assumed, or agreed to by the Insured Claimant;
 - (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
 - (c) resulting in no loss or damage to the Insured Claimant;
 - (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 13, or 14); or
 - (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.
5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.
6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is
 - (a) a fraudulent conveyance or fraudulent transfer, or
 - (b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.
7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records. This Exclusion does not modify or limit the coverage provided under Covered Risk 11(b).

SCHEDULE A

Name and Address of Title Insurance Company:

[File No.:] Policy No.:
Loan No.:
Address Reference:
Amount of Insurance: \$ [Premium: \$]
Date of Policy: [at a.m./p.m.]

- 1. Name of Insured:
- 2. The estate or interest in the Land that is encumbered by the Insured Mortgage is:
- 3. Title is vested in:
- 4. The Insured Mortgage and its assignments, if any, are described as follows:
- 5. The Land referred to in this policy is described as follows:

[6. This policy incorporates by reference those ALTA endorsements selected below:

- 4-06 (Condominium)
- 4.1-06
- 5-06 (Planned Unit Development)
- 5.1-06
- 6-06 (Variable Rate)
- 6.2-06 (Variable Rate--Negative Amortization)
- 8.1-06 (Environmental Protection Lien) Paragraph b refers to the following state statute(s):
- 9-06 (Restrictions, Encroachments, Minerals)
- 13.1-06 (Leasehold Loan)
- 14-06 (Future Advance-Priority)
- 14.1-06 (Future Advance-Knowledge)
- 14.3-06 (Future Advance-Reverse Mortgage)
- 22-06 (Location) The type of improvement is a _____, and the street address is as shown above.]



SCHEDULE B

[File No.] Policy No.

EXCEPTIONS FROM COVERAGE

[Except as provided in Schedule B - Part II,] t[or T]his policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

[PART I

PART II

In addition to the matters set forth in Part I of this Schedule, the Title is subject to the following matters, and the Company insures against loss or damage sustained in the event that they are not subordinate to the lien of the Insured Mortgage:]

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

- (a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b) or decreased by Section 10 of these Conditions.
- (b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.
- (c) "Entity": A corporation, partnership, trust, limited liability company, or other similar legal entity.
- (d) "Indebtedness": The obligation secured by the Insured Mortgage including one evidenced by electronic means authorized by law, and if that obligation is the payment of a debt, the Indebtedness is the sum of
 - (i) the amount of the principal disbursed as of Date of Policy;
 - (ii) the amount of the principal disbursed subsequent to Date of Policy;
 - (iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance;
 - (iv) interest on the loan;
 - (v) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law;
 - (vi) the expenses of foreclosure and any other costs of enforcement;
 - (vii) the amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title;
 - (viii) the amounts to pay taxes and insurance; and
 - (ix) the reasonable amounts expended to prevent deterioration of improvements;but the Indebtedness is reduced by the total of all payments and by any amount forgiven by an Insured.
- (e) "Insured": The Insured named in Schedule A.
 - (i) The term "Insured" also includes
 - (A) the owner of the Indebtedness and each successor in ownership of the Indebtedness, whether the owner or successor owns the Indebtedness for its own account or as a trustee or other fiduciary, except a successor who is an obligor under the provisions of Section 12(c) of these Conditions;
 - (B) the person or Entity who has "control" of the "transferable record," if the Indebtedness is evidenced by a "transferable record," as these terms are defined by applicable electronic transactions law;
 - (C) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;
 - (D) successors to an Insured by its conversion to another kind of Entity;
 - (E) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

- (1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,
 - (2) if the grantee wholly owns the named Insured, or
 - (3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity;
- (F) any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not;
- (ii) With regard to (A), (B), (C), (D) , and (E) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, or other matter insured against by this policy.
- (f) "Insured Claimant": An Insured claiming loss or damage.
- (g) "Insured Mortgage": The Mortgage described in paragraph 4 of Schedule A.
- (h) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.
- (i) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.
- (j) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.
- (k) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.
- (l) "Title": The estate or interest described in Schedule A.
- (m) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title or a prospective purchaser of the Insured Mortgage to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured or after conveyance by an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i)

an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured of any claim of title or interest that is adverse to the Title or the lien of the Insured Mortgage, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title or the lien of the Insured Mortgage, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

- (a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.
- (b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.
- (c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

- (a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the

Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose.

Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title, the lien of the Insured Mortgage, or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

- (b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

- (a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.
- (i) To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay; or
- (ii) To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay.

When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security.

Upon the exercise by the Company of either of the options provided for in subsections (a)(i) or (ii), all liability and obligations of the Company to the Insured under this policy, other than to make the

payment required in those subsections, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

- (i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or
- (ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

- (a) The extent of liability of the Company for loss or damage under this policy shall not exceed the least of
 - (i) the Amount of Insurance,
 - (ii) the Indebtedness,
 - (iii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy, or
 - (iv) if a government agency or instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage in satisfaction of its insurance contract or guaranty.
- (b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured,
 - (i) the Amount of Insurance shall be increased by 10%, and
 - (ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.
- (c) In the event the Insured has acquired the Title in the manner described in Section 2 of these Conditions or has conveyed the Title, then the extent of liability of the Company shall continue as set forth in Section 8(a) of these Conditions.
- (d) In addition to the extent of liability under (a), (b), and (c), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY

- (a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, or establishes the lien of the Insured Mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.
- (b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title or to the lien of the Insured Mortgage, as insured.
- (c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

- (a) All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment. However, any payments made prior to the acquisition of Title as provided in Section 2 of these Conditions shall not reduce the Amount of Insurance afforded under this policy except to the extent that the payments reduce the Indebtedness.
- (b) The voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions.

11. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

12. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) The Company's Right to Recover

Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title or Insured Mortgage and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Insured's Rights and Limitations

- (i) The owner of the Indebtedness may release or substitute the personal liability of any debtor or guarantor, extend or otherwise modify the terms of payment, release a portion of the Title

from the lien of the Insured Mortgage, or release any collateral security for the Indebtedness, if it does not affect the enforceability or priority of the lien of the Insured Mortgage.

- (ii) If the Insured exercises a right provided in (b)(i), but has Knowledge of any claim adverse to the Title or the lien of the Insured Mortgage insured against by this policy, the Company shall be required to pay only that part of any losses insured against by this policy that shall exceed the amount, if any, lost to the Company by reason of the impairment by the Insured Claimant of the Company's right of subrogation.

(c) The Company's Rights Against Noninsured Obligors

The Company's right of subrogation includes the Insured's rights against non-insured obligors including the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

The Company's right of subrogation shall not be avoided by acquisition of the Insured Mortgage by an obligor (except an obligor described in Section 1(e)(i)(F) of these Conditions) who acquires the Insured Mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond, and the obligor will not be an Insured under this policy.

13. ARBITRATION

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is \$2,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of \$2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

- (a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.
- (b) Any claim of loss or damage that arises out of the status of the Title or lien of the Insured Mortgage or by any action asserting such claim shall be restricted to this policy.
- (c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.
- (d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

15. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

16. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title or the lien of the Insured Mortgage that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

17. NOTICES, WHERE SENT

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at [fill in].

NOTE: Bracketed [] material optional