No. 14-___

IN THE

Supreme Court of the United States

FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR WASHINGTON MUTUAL BANK,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether "prudential standing" principles bar a defendant from contending that the plaintiff has assigned its claim to a third party.

CORPORATE DISCLOSURE STATEMENT

Petitioner First American Title Insurance Company is a wholly owned subsidiary of its parent corporation First American Financial Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner First American Title Insurance Company ("First American") respectfully requests that this Court grant certiorari to review the final judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The original opinion of the Sixth Circuit (Pet. App. 29a-51a) is reported at 750 F.3d 573. The Sixth Circuit's unreported, amended opinion (Pet. App. 5a-28a) is available at 2014 U.S. App. LEXIS 12519. The Sixth Circuit's unreported order denying rehearing *en banc* (Pet. App. 3a-4a) is available at 2014 U.S. App. LEXIS 16356. The summary judgment decision of the District Court for the Eastern District of Michigan (Pet. App. 63a-81a) is reported at 795 F. Supp. 2d 624. The district court's final judgment, included here at Pet. App. 61a-62a, was not reported. Nor was the district court's decision denying First American's motion for relief from judgment (Pet. App. 52a-60a).

JURISDICTION

The Sixth Circuit issued its original opinion on April 24, 2014. (Pet. App. 29a.) After First American moved for panel rehearing or rehearing *en banc*, the Sixth Circuit issued an amended opinion on July 2, 2014. (Pet. App. 5a.) The Sixth Circuit denied First American's amended petition for rehearing *en banc* on August 13, 2014. (Pet. App. 4a.) On October 23, 2014, Justice Kagan granted an extension of time to file a petition for certiorari up to and including January 12, 2014. (Pet. App. 1a.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

INTRODUCTION

Respondent Federal Deposit Insurance Corporation contends that petitioner First American is liable to it pursuant to a closing protection letter ("CPL") provided by First American to the FDIC's predecessor-in-interest, a failed bank for which the FDIC had become the receiver. In the litigation below, First American sought to defend on the ground that the FDIC had assigned its rights under the CPL to a successor-in-interest—namely, an acquiring bank that had agreed to assume the failed bank's assets and liabilities pursuant to a standard purchase and assumption agreement ("Purchase Agreement") with the FDIC. The Sixth Circuit held that "prudential standing" principles barred First American from raising the assignment and defending this case on the ground that the FDIC *did not own the claim* it asserted against First American.

The Sixth Circuit's decision is clearly wrong and will, if left undisturbed, produce various sweeping and startling consequences. For starters, the decision below revolutionizes settled and garden-variety rules of assignment, under which defendants routinely contend that the plaintiff no longer owns the claim it seeks to assert against the defendant. The decision below also improperly reduces a federal court's obligation to ensure its own Article III subject-matter jurisdiction to merely accepting the plaintiff's say-so. What is more, it does all this through an unprecedented expansion of "prudential standing" law, despite this Court's repeated narrowing of and increasing skepticism about that doctrine. And it gives the FDIC carte blanche to re-write, for litigation advantage, hundreds of standard agreements by which

it transfers assets and liabilities of failed banks to acquiring banks.

STATEMENT OF THE CASE

A. The 2008 financial crisis resulted in the failure of more than 500 banks. *See* FDIC, Failed Bank List, http://www.fdic.gov/bank/individual/failed/banklist.html (last visited Jan. 7, 2015). In most every instance, the FDIC was appointed receiver for the failed bank pursuant to 12 U.S.C. § 1821(c). In turn, the FDIC typically transferred the assets and liabilities of the failed bank to a solvent acquiring bank, pursuant to a standard purchase and assumption agreement between the FDIC and the acquiring bank. The interpretation of those agreements—which involve a federal government agency—presents a question of federal law. *See*, *e.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); (*see also* Pet. App. 18a (noting FDIC Purchase Agreement expressly invokes federal law)).

These various transfers have prompted an outbreak of litigation over whether the FDIC or the acquiring bank owns particular claims, or is responsible for particular liabilities, of the failed bank. Every one of these disputes turns on the question whether the FDIC, through its customary purchase and assumption agreement, transferred the relevant claim or liability to the acquiring bank or retained the claim or liability for itself. Remarkably, the FDIC has argued that its litigation opponents are powerless to contest—and that Article III courts are powerless to decide—whether the FDIC or the acquiring bank owns the relevant claim or liability. Thus, when a third party sues on a claim that it previously held against the failed bank, the FDIC contends that

it and the acquiring bank may unilaterally determine which of them is the proper defendant—with no input from the plaintiff and no review by the court. Similarly, the FDIC contends that when it sues a third party on a claim previously held by the failed bank, the FDIC alone may determine whether it or the acquiring bank is the proper plaintiff—again with no adversary testing or judicial review. The FDIC bases these wildly counterintuitive conclusions on the premise that third parties lack "prudential standing" to ask the courts to construe such assignments and delegations, even for the limited purpose of determining which party owns the claim or liability at issue.

Litigation over these issues has already produced a series of appellate decisions adopting the FDIC's basic position. For instance, when third parties have sued an assuming bank arising from some claim against the failed bank, courts have held that the third party lacks standing, *as a plaintiff*, to contend that the purchase and assumption agreement transferred the relevant liability from the FDIC to the assuming bank. In the proceedings below, however, the Sixth Circuit not only embraced that line of cases, but also extended it to hold that *a defendant* sued by the FDIC lacks "prudential standing" to assert that the FDIC, in its purchase and assumption agreement, had assigned to the acquiring bank the very claims that it is attempting to assert against the defendant.

B. This case arises from the 2008 collapse of Washington Mutual Bank ("WaMu"), the largest bank failure in American history. Sewell Chan, *U.S. Faults Regulators Over a Bank*, N.Y. Times, Apr. 11, 2010, http://www.nytimes.com/2010/04/12/business/

12wamu.html. In 2007, WaMu loaned a purported homebuyer $4.5 million. (Pet. App. 7a.) First American's agent, Patriot Title, served as closing agent. (*Id.*) Unbeknownst to First American, Patriot Title faked the transaction, then converted the loan proceeds to its own use. (*Id.* at 8a.) As a result, WaMu never received a valid mortgage on the property.

Prior to closing, First American issued a closing protection letter ("CPL") and title insurance to WaMu for the loan. (*Id.* at 7a; Pet. App. 65a.) Both CPLs and title insurance are standard instruments in the real estate industry. CPLs protect lenders against wrongdoing before closing: the title insurance company agrees to indemnify the lender for its losses if the closing agent commits fraud or fails to follow the lender's closing instructions. *See Walsh Secs., Inc. v. Cristo Prop. Mgmt., Ltd.*, 858 F. Supp. 2d 402, 417-18 (D.N.J. 2012). Title insurance, in contrast, protects lenders from title deficiencies following a real estate closing. *See* 43 Am. Jur. 2d *Insurance* § 518 (2014).

When WaMu failed, the FDIC took over as receiver and transferred WaMu's assets and liabilities to JP Morgan Chase Bank ("Chase") pursuant to the FDIC's standard Purchase Agreement. (Pet. App. 9a.) Following that transaction, Chase sued First American under the title policy, which First American satisfied by tendering the property at issue. (*Id.* at 9a-10a; Pet. App. 121a.) The FDIC then intervened to assert a CPL claim it purports to have retained. (Pet. App. 127a-129a.)

The district court had subject-matter jurisdiction based on the diversity of the original parties to the litigation, Chase and First American. *See* 28 U.S.C. § 1332; (Pet. App. 132a-133a). The district court also

had subject-matter jurisdiction over the FDIC's intervenor complaint based on its status as an agency of the United States, and its claims arising under federal law, 12 U.S.C. § 1819(b)(2)(A), as well as on the diversity of the parties and the district court's supplemental jurisdiction. *See* 28 U.S.C. §§ 1331, 1345, 1332, 1367(a); (Pet. App. 123a).

C. After the close of discovery, First American moved for summary judgment on the FDIC's CPL claim, asserting that the FDIC had sold that claim (along with the rest of WaMu's assets) to Chase, and thus lacked standing to pursue the CPL claim. (Pet. App. 103a-114a.) According to the terms of the Purchase Agreement, Chase purchased all of WaMu's "Loans," defined to include rights arising out of those loans, and "Credit Documents," defined to include "agreements . . . executed in connection with" loans. (Pet. App. 117a-119a.) By this language, First American argued, Chase acquired not only the loan and the title policy at issue (which the FDIC concedes, (Pet. App. 97a.)), but also the CPL.

In response, the FDIC submitted a just-prepared stipulation from Chase stating that the FDIC owned the CPL. (Pet. App. 94a; Pet. App. 90a.) Based on that stipulation, and without even considering the terms of the Purchase Agreement, the district court held that the FDIC owned the CPL and granted the FDIC summary judgment on the question of liability. (Pet. App. 77a, 81a.) A jury subsequently awarded the FDIC $2.2 million in damages. (Pet. App. 88a.)

First American then discovered new evidence contradicting the stipulation. (Pet. App. 83a-86a.) In two lawsuits, including one in the same jurisdiction, *Chase* asserted ownership of WaMu CPLs pursuant

to the same Purchase Agreement. (*Id.*) First American filed a Rule 60(b) motion for relief from judgment, which the district court denied. (Pet. App. 52a-59a.)

D. The Sixth Circuit affirmed the district court. (Pet. App. 30a.) In denying First American any opportunity to contest whether the FDIC owned the claim it sought to assert, the Sixth Circuit described First American's argument—which bears on the FDIC's own standing to sue—as an "affirmative defense." (*Id.* at 40a, 43a.)

First American moved for rehearing, in part on the ground that the plaintiff's standing is not an affirmative defense. In an amended opinion, the Sixth Circuit acknowledged as much, but nonetheless adhered to its conclusion that First American could not contest the FDIC's own standing. (Pet. App. 19a-21a.) The amended opinion began by noting that First American is neither a party to, nor a third-party beneficiary of, the Purchase Agreement. (*Id.* at 19a.) The court then looked to decisions from other circuits holding that *plaintiffs* who were neither parties to, nor third-party beneficiaries of, FDIC purchase and assumption agreements could not challenge the FDIC's assertion about whether it or the assuming bank owned the relevant liability, which these courts characterized as the third party seeking to "enforce" the purchase and assumption agreement. (*See id.* at 19a-20a.) The Sixth Circuit also analogized to a case where intervenors affirmatively sought to "enforce" a purchase and assumption agreement in the same sense. (*Id.* at 20a.)

The Sixth Circuit adopted and extended this line of decisions. It reasoned that these decisions address-

ing the rights of plaintiffs and intervenors were "persuasive and equally applicable to a defendant." (*Id.*) The court characterized First American as "attempt[ing] to defend against a claim by asserting a legal right belonging to a third party." (*Id.*) Allowing First American to put the terms of the Purchase Agreement at issue, the Sixth Circuit reasoned, "would allow it to assert Chase's right to claim ownership of the CPL." (*Id.* at 21a.) Thus, according to the Sixth Circuit, First American "lack[ed] prudential standing to challenge the FDIC's and Chase's understanding of their own contract." (*Id.*)

Like the district court, the Sixth Circuit explicitly refused to consider the terms of the Purchase Agreement. Instead, the court deferred to the stipulation made by Chase and the FDIC, concluding on that basis that the FDIC had standing to sue on the CPL. (*See id.* at 11a, 17a, 21a.)

REASONS FOR GRANTING THE PETITION

For several reasons, the Court should grant First American's petition *First*, the Sixth Circuit's decision imposes unprecedented limits on a civil defendant's right to challenge a plaintiff's standing—a threshold requirement in every action brought in federal court. In response to First American's argument that the FDIC had contractually assigned the claim it seeks to assert here, the Sixth Circuit elevated this run-of-the-mill contract question into an issue of the defendant's "prudential standing," and on that ground precluded First American from challenging the FDIC's standing. In so doing, the Sixth Circuit not only extended the prudential standing doctrine far beyond this Court's precedent, but also reduced an Article III court's duty to conduct an independent ex-

amination of its own subject-matter jurisdiction merely to accepting the plaintiff's word that it has standing.

Second, the "prudential standing" question presented here is frequently recurring. It already has arisen in dozens of cases, and it could arise in any case involving any claim by or against any of more than 500 failed banks, so long as there is a colorable dispute over whether the FDIC or the acquiring bank owns the relevant claim or liability. The specific question of whether "prudential standing" principles bar a *defendant* from contesting who owns the relevant claim is currently pending in the Eleventh Circuit, *see FDIC v. First American Title Insurance Co.*, No. 13-15058 (11th Cir.) (argued October 7, 2014), and the Tenth Circuit recently followed the Sixth Circuit in a similar case involving a failed credit union and the National Credit Union Administration. *Security Serv. FCU v. First Am. Mortg. Funding, LLC*, 771 F.3d 1242, 1245-46 (10th Cir. 2014) (court is "persuaded that [the Sixth Circuit] has analyzed this point correctly"). Further, even beyond litigation over assignments or delegations in contracts with banking regulators, the "prudential standing" issue framed by the Sixth Circuit arises in any case involving an assignment of a claim or a delegation of a duty.

Third, this case provides an ideal vehicle for reviewing the question presented. The Sixth Circuit embraced the FDIC's theory in its broadest possible terms, thereby precluding *both* plaintiffs and defendants from contesting any assertions by the FDIC or the acquiring bank about which of them owns the relevant claim or liability. Moreover, both the Sixth

Circuit and the district court here expressly refused to consider the terms of the underlying Purchase Agreement, leaving no doubt that the case turned solely on the FDIC's sweeping new theory of "prudential standing."

I. THE SIXTH CIRCUIT INDEFENSIBLY LIMITED A DEFENDANT'S ABILITY TO CHALLENGE A PLAINTIFF'S STANDING, A THRESHOLD ISSUE IN ALL CIVIL LITIGATION.

The decision below invokes principles of "prudential standing" to prevent a civil defendant from contesting whether the plaintiff owns the claim it seeks to assert, and is thus a proper plaintiff in the case. It does so based on the premise that a defendant cannot contend, and a court cannot decide, that the plaintiff has contractually assigned its claim to a third party. This reasoning would extend "prudential standing" principles far beyond any prior decisions, even as this Court repeatedly has contracted and outright called into question that doctrine. At the same time, it would rewrite basic contract principles known to any first-year law student, under which defendants routinely argue, and courts routinely decide, whether or not the plaintiff has contractually assigned its putative claim. And because the ultimate question here is about proof of the FDIC's own standing to pursue its claim, the decision below would reduce the federal courts' independent duty to ensure their own subject-matter jurisdiction to merely accepting the plaintiff's say-so, without regard to the defendant's evidence or argument about the plaintiff's lack of Article III standing.

The decision below is indefensible not only doctrinally, but also practically. It gives the FDIC carte blanche to re-write its contracts with assuming banks on an entirely unprincipled and *ad hoc* basis, to secure litigation advantage against third parties. And in so doing, it exposes obligor defendants (here, First American) to double liability to putative assignors and assignees (here, the FDIC and Chase), without any ability in any individual case to challenge strategic assertions about which of them owns the claim at issue.

Further, the decision below expressly adopts a related line of decisions holding that a plaintiff obligee, in choosing to sue either the FDIC or an acquiring bank, cannot contest the defendant's assertion about whether it is the proper defendant in light of a possible delegation of the relevant contractual duty. So, a plaintiff suing the FDIC will predictably be told that the acquiring bank is the proper defendant, and a plaintiff suing the acquiring bank will predictably be told that the FDIC is the proper defendant. With dozens of active cases presenting these issues, this Court should move promptly to end this litigation shell-game.

A. It is hornbook law that a defendant can "question a plaintiff's lack of title or the right to sue." 6A C.J.S. *Assignments* § 132. This rule serves to protect "an obligor who has contracted to render a performance" from being "required to render it twice because of uncertainties of law and fact relating to the person entitled to receive it." Restatement (Second) of Contracts § 339 cmt. a (1981).

Applying this settled rule, courts routinely review assignment contracts to determine the duties of obli-

gors who are neither parties to, nor third-party beneficiaries of, the assignment contract. In the foreclosure context, for example, courts review putative mortgage assignments challenged by third-party homeowners seeking to avoid foreclosure. *See, e.g.*, *Slorp v. Lerner, Sampson & Rothfuss*, No. 13-3402, 2014 U.S. App. LEXIS 18816, at *12 (6th Cir. Sept. 29, 2014) (homeowner may contend that mortgage assignee was barred from foreclosing by invalid assignment; rejecting district court's conclusion that plaintiff "lacked standing to assert his claims because an individual who is not a party to an assignment may not attack the assignment's validity"); *Woods v. Wells Fargo Bank, N.A.*, 733 F.3d 349, 354 (1st Cir. 2013) ("[M]ortgagors . . . have standing to bring certain challenges to assignments in order to protect their 'legally cognizable right' to be secure from unlawful foreclosures." (quoting *Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282, 290 (1st Cir. 2013))); *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 225 (5th Cir. 2013) (explaining "majority rule that the obligor *may* defend on any ground which renders the assignment void" (quotation omitted)); *Isbell v. DM Records Inc.*, 586 F.3d 334, 336-38 (5th Cir. 2009) (analyzing terms of agreement in rejecting argument that plaintiff "did not own or hold valid rights to the copyright infringement claims because the Assignment [Agreement] transferred those rights to a third party").

In other contexts too, courts construe contracts to determine the rights and duties of strangers to the contract. *See, e.g.*, *Lemke v. Sears, Roebuck & Co.*, 853 F.2d 253, 254-55 & n.4 (4th Cir. 1988) (defendants may contend that they were released from liability in plaintiff's settlement agreement with third par-

ty, even though the court "strongly question[ed]" whether defendants could be third-party beneficiaries of that agreement); *J.R. Fulton v. L&N Consultants, Inc.*, 715 F.2d 1413, 1418-21 (10th Cir. 1982) (real estate broker sued for commission may contend that property sale agreement, to which broker was not a party, occurred within time frame of brokerage agreement); *United States v. Ivey*, 414 F.2d 199, 203 (5th Cir. 1969) (government as plaintiff may invoke taxpayer's contract with agent to show nature of funds paid to taxpayer) ("when . . . the contract is executed as the final embodiment of the agreement and the parties abide by the instrument as they made it, the law and not their wish or understanding must control its legal effect on the incidence of taxation"); *Clark v. United States*, 341 F.2d 691, 693-95 (9th Cir. 1965) (government as defendant may invoke terms of taxpayer's employment agreement to show whether payment was ordinary income or capital gain); *Pugh v. Comm'r*, 49 F.2d 76, 79 (5th Cir. 1931) ("when an instrument is executed as the final embodiment of an agreement, and becomes the act of the parties, and where the parol evidence is offered merely to vary the legal effect of its terms, the [parol evidence] rule operates to protect *all whose rights depend upon the instrument though not parties to it*" (emphasis added)). Indeed, the parol evidence rule is routinely applied "even as against" non-parties to the contract. 9 John Henry Wigmore, Wigmore on Evidence § 2446 (4th ed. 1985) (if contracting parties "have determined a particular document shall be the sole embodiment of their legal act for certain legal purposes, . . . so far as that effect and those purposes are concerned they must be found in that writing and nowhere else, no matter who may desire to avail himself of it").

As all of these authorities make plain, a non-party to an assignment contract may dispute whether the plaintiff owns the claim that it seeks to assert.

B. Not only does a defendant have the right to raise this issue, but the plaintiff is independently obligated—by the Constitution itself—to prove that it owns the claims at issue, thus giving it standing to pursue those claims.

"Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Id.* Thus, "[t]he party invoking federal jurisdiction bears the burden of establishing" its standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Indeed, standing is "an indispensable part of the plaintiff's case" that "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* at 560-61. And even if the defendant fails to challenge the plaintiff's standing, the court itself must raise the issue *sua sponte*. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998).

The FDIC's standing to sue was a critical issue in this case. One of First American's principal arguments below was that the FDIC, through the Purchase Agreement, had sold to Chase the CPL claim that it sought to assert against First American. And because the FDIC had assigned that claim to someone else, it no longer had Article III standing to pursue it. *See, e.g.*, *C & A Constr. Co. v. DHC Dev.*, 501 F. App'x 763, 774-75 (10th Cir. 2012); *AtlantiGas*

Corp. v. Columbia Gas Transmission Corp., 210 F. App'x 244, 250 (4th Cir. 2006) (per curiam).

Yet the Sixth Circuit avoided this standing argument altogether. Rather than reviewing the terms of the Purchase Agreement, the courts below silenced First American and blindly accepted the FDIC's representation that it retained the relevant claim. By precluding First American from invoking the Purchase Agreement to disprove the FDIC's standing, the Sixth Circuit reduced "the irreducible constitutional minimum of standing," *Lujan*, 504 U.S. at 560, to merely taking the plaintiff at its word. Even worse, it did so despite a compelling textual argument that the FDIC had transferred to Chase all WaMu "agreements . . . executed in connection with" its "loans" (Pet. App. 117a-119a), and despite compelling extrinsic evidence—based on Chase's litigating position in other cases—that *Chase* owned the CPLs issued to WaMu (Pet. App. 83a-86a).

Article III demands more. Where the plaintiff's standing turns on the interpretation of a contract, a federal court is not relieved of resolving this threshold jurisdictional issue simply because the defendant is a stranger to the contract. We are aware of no Article III standing case supporting the decision below.

C. The Sixth Circuit contorted the question of whether the FDIC owned its claim into an issue of First American's "prudential standing." The court cited no decision arguably suggesting that a *defendant* cannot contest whether the plaintiff owns its putative claim. Instead, it relied entirely on decisions addressing the circumstances in which a *plaintiff* may seek to enforce or otherwise invoke an agree-

ment to which it is not a party. This reasoning is both unsound and unworkable.

1. The Sixth Circuit's holding (Pet. App. 19a, 21a) rested on the premise that "[a] person who is neither a party to the contract nor in privity with the parties, and who is not a third-party beneficiary of the contract, is said to lack 'standing' to enforce the contract's terms." *Slorp*, 2014 U.S. App. LEXIS 18816, at *10. For support, the Sixth Circuit relied entirely on cases in which a *plaintiff* or *intervenor*, holding a claim that previously would have run against the failed bank, invoked the relevant purchase and assumption agreement (all essentially identical to the Purchase Agreement here) to prove that either the FDIC or the acquiring bank was the proper defendant. These cases characterize this limited use of the purchase and assumption agreement—to determine the proper defendant in the case—as suing "to enforce" that agreement, and they hold that plaintiffs or intervenors lack standing to seek such enforcement. *Interface Kanner, LLC v. JPMorgan Chase Bank, N.A.*, 704 F.3d 927, 933 (11th Cir. 2013) (plaintiff cannot "sue to enforce" purchase and assumption agreement); *GECCMC 2005-C1 Plummer St. Office LP v. JPMorgan Chase Bank, N.A.*, 671 F.3d 1027, 1031-34 (9th Cir. 2012) (same); *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, N.A.*, 747 F.3d 44, 50 (2d Cir. 2014) (same); *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193-94 (D.C. Cir. 2013) (intervenor cannot sue "to enforce the terms of the Agreement").

These cases are both wrong and inapplicable. They are wrong because the plaintiff (or intervenor) was suing to enforce an antecedent claim that it previous-

ly held against the failed bank, and thus was using the purchase and assumption agreement only to determine whether the FDIC or the acquiring bank became the proper defendant. That cannot fairly be described as suing "to enforce" the purchase and assumption agreement.

In any event, even if accepted, these cases provide no support for the Sixth Circuit's ruling. For one thing, First American is neither a plaintiff nor an intervenor. It is a defendant contesting whether the *plaintiff* owns, and thus has standing to pursue, the relevant claim. Nor does First American seek in any sense to "enforce" the Purchase Agreement. "Enforcement" is a term of art that refers to collecting damages or obtaining specific performance. *See* Restatement (Second) of Contracts, § 345 cmt. b (1981). First American, instead, sought to cite the agreement merely as evidence to support its contention that, regardless of whatever it may owe to Chase, it owes nothing to the FDIC.

Precluding First American from raising such an argument not only misunderstands settled law of assignments and standing, but also contravenes basic due process principles, including the right "to present every available defense," *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotation omitted), as well as to contest the plaintiff's assertions about its own standing and other essential elements of its claims.

2. The Sixth Circuit's holding also creates practical difficulties for both litigants and courts. For instance, if forced to accept the plaintiff's word over the explicit terms of an assignment contract, courts could be conscripted into basing both jurisdiction and a merits decision on a fiction. To put it bluntly, the

FDIC's position is that it may recover on the claim against First American *no matter how strong the evidence that it does not own the claim*. This is anomalous as well as unfair: As one court explained in the foreclosure context, such a rule "would lead to the odd result that [the plaintiff bank] could foreclose on the [defendant homeowners's] property though it is not a valid party to the deed of trust or promissory note, which . . . should mean that it lacks 'standing' to foreclose." *Reinagel*, 735 F.3d at 225.

The decision below likewise threatens obligors such as First American with having to pay twice on the same claim. If the obligor (First American) is powerless to contest whether the obligee (the FDIC) or the assignee (Chase) owns the claim asserted, then the obligee and the assignee could each bring its own cause of action on the identical claim. The obligor, unable to challenge either party's ownership of the claim in either case, could be forced to pay twice on the same claim.

Previously, the FDIC suggested that these problems would be avoided if the obligor simply added the missing party to the case and then sought a declaratory judgment. But if First American lacked standing to invoke the FDIC's assignment contract as a *defendant*, how could it possibly do so as a declaratory-judgment *plaintiff?* And even if it could, obligors such as First American still could face personal jurisdiction, venue, or other procedural barriers to adding the missing party in any particular case. Moreover, either as plaintiffs or defendants, parties like First American could inappropriately face any number of doctrines that afford distinctive litigation advantages to the federal government—ranging from sovereign

immunity to presumptions of correctness to discovery limitations—if forced on the say-so of the FDIC and the acquiring bank to litigate against the government agency rather than against the private party, regardless of the contractual terms establishing which of them actually owns the relevant claims or liabilities.

D. In rewriting numerous fundamental legal rules, the Sixth Circuit invoked the doctrine of "prudential standing." (Pet. App. 21a.) According to that court, "[b]ecause First American is neither a party to nor a third-party beneficiary of the [Purchase] Agreement, it lacks prudential standing to challenge the FDIC's and Chase's understanding of their own contract." (*Id.*) Ironically, that holding effects an unprecedented *expansion* of "prudential standing" principles at the very same time this Court repeatedly has *narrowed* that doctrine. *See, e.g., Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-87 (2014) (referring to "prudential standing . . . label" as "misleading" and "a misnomer" in some contexts (quotations omitted)).

1. Constitutional and prudential standing doctrines are distinct. Constitutional standing rests firmly on the text of Article III of the Constitution, which limits the federal courts' jurisdiction to cases or controversies. And it is well settled that "[t]he party invoking federal jurisdiction"—*i.e.*, the *plaintiff*—"bears the burden of establishing" Article III standing. *Lujan*, 504 U.S. at 559-61. Thus, Article III standing is simply irrelevant to the question of whether a *defendant* can raise particular defenses. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 624 (1989) ("Because [the petitioners] are the parties first invoking the authority of the federal courts in this

case, and an actual case or controversy is before the Court, there is no jurisdictional bar to review.").

Prudential standing, on the other hand, is a textually ungrounded doctrine about which this Court has expressed increasing skepticism. Indeed, just last Term, the Court referred to "prudential standing" as a "label" that is often either "misleading" or a "misnomer." *Lexmark*, 134 S. Ct. at 1386-87. The Court, moreover, clarified that two of the "three broad principles" that it had previously described as comprising the "prudential standing" doctrine—(1) "the rule barring adjudication of generalized grievances," and (2) "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked"—are actually different legal principles addressed respectively to Article III standing and the availability of particular causes of action. *Id.* (quotation omitted).

2. The Sixth Circuit invoked the only remaining principle of prudential standing: "'the general prohibition on a litigant's raising another person's legal rights.'" *Id.* (quoting *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004)). But even that principle is likewise "hard[] to classify." *Id.* at 1387 n.3. Thus, in *Lexmark*, this Court left "consideration of that doctrine's proper place in the standing firmament [for] another day." *Id.* Given that tenuous and hedged reaffirmation, one might have expected the lower courts to be cautious about extending this doctrine. Yet the Sixth Circuit embraced "prudential standing" as a means to rewrite settled law regarding the assignment and delegation of contractual rights and duties. That unprecedented expansion of "pru-

dential standing" law affords yet another compelling basis for review.

Properly understood, "prudential standing" should be irrelevant to this case. This Court's previous third-party standing decisions have involved litigants asserting a claim or defense that invokes the substantive *rights of a third party*. *See, e.g., Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) ("Ordinarily, of course, a litigant 'must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982)). For example, *Triplett*, which the Sixth Circuit relied on below (Pet. App. 21a.), involved an attorney disciplined for violating a prohibition on certain types of fee arrangements. 494 U.S. at 717-20. In defense, the attorney argued that the law unconstitutionally violated *his clients'* due-process rights. *Id.* at 720. Despite the general "prudential standing" rule against invoking the rights of others, this Court recognized an exception because the law prevented the clients from enjoying their legal entitlement to enter a contractual relationship with the attorney. *Id.* at 720-21.

Relatively few cases have applied "prudential standing" rules to actually bar arguments raised by defendants, but these cases likewise involve the attempted assertion of others' substantive rights. For example, the Court has held that individuals charged with unlawfully selling goods on Sundays cannot raise the Free Exercise rights of third parties. *McGowan v. Maryland*, 366 U.S. 420, 429 (1961). Similarly, it has held that a defendant cannot sup-

press evidence on the ground that the search at issue violated the Fourth Amendment rights of a third party. *See*, *e.g.*, *United States v. Payner*, 447 U.S. 727, 731-32 (1980).

3. This case is entirely different. Here, First American did not seek to invoke Chase's substantive legal rights, under the Purchase Agreement or otherwise. Rather, it merely asked the lower courts to determine *First American's own* obligations—namely, whether *it* was liable to the FDIC on its CPL claim. In other words, First American did not argue that the imposition of liability on it would violate some right of Chase. Rather, it merely sought to avoid liability *because it owes no obligation to the FDIC*.

Prior to the decision below, no court, to our knowledge, had held that any principle of "prudential standing" bars a defendant from arguing that the plaintiff does not own its putative claim. Tellingly, while the assignment of claims has been a common practice for more than a century, *see Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275-85 (2008), the Sixth Circuit's decision was the first to develop this unprecedented expansion of "prudential standing."

Making matters worse, the Sixth Circuit's sweeping rationale has ramifications far beyond the specific context of assignments. Initially, the Sixth Circuit characterized First American's argument that the FDIC lacks standing as an "affirmative defense." (Pet. App. 40a, 43a.) While the amended opinion corrects that obvious error, the revised rule of law is even worse. After all, by requiring prudential standing for *all* defenses (not just affirmative defenses), the Sixth Circuit's decision threatens to preclude de-

fendants from arguing that a plaintiff has failed to prove essential elements of its claim—including constitutional standing. That remarkable conclusion is plainly at odds with due process, which "requires that a party have the opportunity to present evidence on the allegations of the complaint and the contested factual issues." *Girardi v. Heep*, No. 98-2617, 1999 U.S. App. LEXIS 34309, at *11 (4th Cir. Dec. 30, 1999); *see Lindsey*, 405 U.S. at 66.

E. As explained above, the Sixth Circuit relied entirely on decisions addressing whether plaintiffs or intervenors may invoke an FDIC purchase and assumption agreement to determine, and whether the Article III courts may decide, whether the FDIC or the acquiring bank is the proper defendant. Those cases are not only inapposite and wrongly decided, but they are also themselves hedged and confused.

For one thing, the circuit courts disagree on whether the plaintiff should be able to argue the issue whether the FDIC or the acquiring bank is the proper defendant. When faced with a question whether Chase or the FDIC was the proper defendant on a claim arising from certain WaMu leases, the Fifth Circuit "reluctantly" held that the plaintiffs lacked standing to argue that, under the Purchase Agreement, Chase was the proper defendant. *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat'l Ass'n*, 758 F.3d 592, 598-99 (5th Cir. 2014). Critically, however, the court reached that conclusion only "in the interest of maintaining uniformity" with other recent appellate decisions, stating explicitly that, had it been "writing on a blank slate," it would have held that the plaintiff could "enforce Chase's promise to assume the Leases." *Id.*

Judge Clement's concurring opinion aptly highlights the problems with the FDIC's core theory in all of these cases: "The FDIC's []argument that non-third-party beneficiaries cannot interpret and enforce a contract against the understanding of the contracting parties improperly tries to stretch a question of contract law into a dubious principle of constitutional law. . . . [W]hen jurisdiction is otherwise proper, there is no inherent bar prohibiting a stranger to a contract from asking the court to interpret a contract that has bearing on its case." *Id.* at 604 (Clement, J., concurring) (collecting cases).

Moreover, the cases involving third-party plaintiffs seeking to invoke an FDIC purchase and assumption agreement are divided on the relevant doctrinal analysis: Two of these cases, *Interface Kanner* and *GECCMC*, relied on *constitutional* standing. Two other cases, *Hillside Metro and Deutsche Bank*, relied on *prudential* standing. And as noted above, a fifth, *Excel Willowbrook*, went along only to paper over significant judicial disagreement about whether the FDIC's approach to these cases makes any sense.

Underscoring that point, the weight of district-court authority had flatly rejected the FDIC's position prior to these recent appellate decisions. *See Weichsel Farm Ltd., P'ship v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 09-CV-00672-L, 2012 U.S. Dist. LEXIS 43162, at *15-16, 24 (N.D. Tex Mar. 28, 2012) (third-party lessor had standing to dispute the FDIC's and Chase's proposed interpretation of the Purchase Agreement, which court held was unambiguously wrong), *aff'd on other grounds in consolidated appeal by Excel Willowbrook*, 758 F.3d 592 (5th Cir. 2014); *Hillside Metro Assocs., LLC v. JPMorgan*

Chase Bank, Nat'l Ass'n, 10-CV-1772, 2011 U.S. Dist. LEXIS 121565, at *16-31 (E.D.N.Y. Oct. 20, 2011) (plaintiff had standing to pursue claim against Chase based on plain language of Purchase Agreement), *vacated by Hillside Metro*, 747 F.3d 44; *Excel Willowbrook, LLC v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 09-CV-2988, 2011 U.S. Dist. LEXIS 151383, at *17-18 (S.D. Tex. July 11, 2011) (same), *aff'd on other grounds in consolidated appeal by Excel Willowbrook*, 758 F.3d 592; *Skillman-Eastridge, Ltd. v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 09-CV-01988, 2011 U.S. Dist. LEXIS 112291, at *19-29 (N.D. Tex. Sep. 29, 2011) (interpreting Purchase Agreement to determine standing); *SR Partners Highway 26, LLC v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 10-CV-438, 2011 U.S. Dist. LEXIS 156093, at *14-23 (N.D. Tex. Sep. 2, 2011) (same); *290 at 71, L.L.C. v. JPMorgan Chase Bank*, No. 09-CA-576, 2009 U.S. Dist. LEXIS 104197, at *13 (W.D. Tex. Nov. 9, 2009) (precluding third-party interpretation of Purchase Agreement presents "a catch-22 that would keep Plaintiffs from asserting [their] rights"); *see also FDIC v. Floridian Title Grp., Inc.*, No. 12-21890, 2013 U.S. Dist. LEXIS 136000, at *26 n.5 (S.D. Fla. July 24, 2013) (Magistrate Judge's recommendation interpreting purchase agreement to determine standing), *adopted on other grounds in* 2013 U.S. Dist. LEXIS 135650 (S.D. Fla. Sept. 23, 2013). These courts rejected the FDIC's position because to preclude a third party from offering an interpretation of the purchase agreement, "even if [that] interpretation . . . were legally sound," would allow "the assuming bank [to] freely breach any contract assigned to it, and the other party would have no recourse." *SR Partners Hulen, LLC v. JPMorgan Chase Bank, NA*,

No. 10-CV-437, 2011 U.S. Dist. LEXIS 79409, at *15-17 (N.D. Tex. July 21, 2011) (quotation omitted).

* * * * *

The Sixth Circuit's decision is contrary to basic rules of standing and contract law. It finds no support in this Court's "prudential standing" decisions. And, in an area of law where predictability is important, it enables the FDIC and its assuming banks to game the system, to the detriment of all litigants with the misfortune to have previously done business with a failed bank. Review of the sweeping and aberrant decision below is essential.

II. THE SIXTH CIRCUIT'S DECISION ADDRESSES A RECURRING LEGAL ISSUE.

As the discussion above makes clear, the question whether third parties may invoke an FDIC purchase and assumption agreement to determine whether the FDIC or the assuming bank is a proper plaintiff or defendant arises with considerable frequency. In just six years from the 2008 financial crisis, most federal courts of appeals already have addressed the question in one form or another: At least five circuits (D.C., Second, Fifth, Ninth, and Eleventh) have addressed whether a plaintiff may invoke an FDIC purchase agreement to determine the proper defendant; two circuits (Sixth and Tenth) have addressed whether a defendant may do so to determine the proper plaintiff; and the latter question is currently also pending in the Eleventh Circuit, in a case argued last October. These appellate decisions, moreover, build on a significant body of district-court decisions. Notably, the most recent decision, that of the Tenth Circuit in *Security Service*, was little more than a wholesale adoption of the Sixth Circuit's opinion. *See*

771 F.3d at 1245-46. This flawed understanding of "prudential standing" unfortunately has taken root, and thus is ripe for review.

The vast number of past and pending cases addressing these issues is hardly surprising. After all, they arise in any case involving a claim by or against hundreds of recently failed banks, so long as there is a colorable dispute over whether the FDIC or the acquiring bank owns the relevant claim or liability. In all of these cases, the same threshold "prudential standing" issue decided here will arise.

Confirming the critical need for review by this Court, dozens of pending cases involve the precise factual scenario at issue here: CPL claims asserted by the FDIC against title insurers of failed banks. And in each case, the FDIC has sought, or no doubt will seek, to preclude any judicial review of the terms in its standard purchase and assumption agreement that, according to First American and various other defendants, unambiguously transferred the CPL claim to the acquiring bank. *See, e.g.*, *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 5:14-cv-13706-JCO-MKM (E.D. Mich. filed Sept. 24, 2014); *FDIC v. Stewart Title Guar. Co.*, No. 0:14-cv-62205-BB (S.D. Fla. filed Sept. 24, 2014); *FDIC v. First Am. Title Ins. Co.*, No. 2:14-cv-13624-GAD-MKM (E.D. Mich. filed Sept. 18, 2014); *FDIC v. Prof'l Nat'l Title Network, Inc.*, No. 1:14-cv-05227 (N.D. Ill. filed July 9, 2014); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 2:14-cv-04317-WJM-MF (D.N.J. filed July 9, 2014); *FDIC v. First Am. Title Ins. Co.*, No. 1:14-cv-22535-KMM (S.D. Fla. filed July 9, 2014); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 0:14-cv-61574-WPD (S.D. Fla. filed July 9, 2014); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 1:14-cv-22529-JAL (S.D.

Fla. filed July 9, 2014); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 9:14-cv-80909-JIC (S.D. Fla. filed July 9, 2014); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 0:14-cv-61564-FAM (S.D. Fla. filed July 9, 2014); *FDIC v. Stewart Title Guar. Co.*, No. 1:14-cv-22542-MGC (S.D. Fla. filed July 9, 2014); *FDIC v. Attorneys Title Ins. Fund, Inc.*, No. 9:14-cv-80915-DMM (S.D. Fla. filed July 9, 2014); *FDIC v. Commw. Land Title Ins. Co.*, No. 2:14-cv-05295-SVW-PJW (filed July 8, 2014); *FDIC v. Commw. Land Title Ins. Co.*, No. 1:14-cv-22511-FAM (S.D. Fla. filed July 8, 2014); *FDIC v. Commw. Land Title Ins. Co.*, No. 1:14-cv-22512-KMW (S.D. Fla. filed July 8, 2014); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 1:14-cv-22513-FAM (S.D. Fla. filed July 8, 2014); *FDIC v. Stewart Title Guar. Co.*, No. 1:14-cv-22514-KMW (S.D. Fla. filed July 8, 2014); *FDIC v. Attorneys Title Ins. Fund, Inc.*, No. 1:14-cv-22517-MGC (S.D. Fla. filed July 8, 2014); *FDIC v. First Am. Title Ins. Agency*; No. 8:14-cv-00617-AG-JPR (C.D. Cal. filed Apr. 18, 2014); *FDIC v. U.S. Titles, Inc.,* No. 1:12-cv-01946-JEB (D.D.C. filed Dec. 3, 2012); *FDIC v. Old Republic Nat'l Title Ins. Co.*, No. 9:12-cv-81172-WJZ (S.D. Fla. filed October 23, 2012); *FDIC v. First Am. Title Co.,* No. 8:12-cv-02245-MSS-MAP (M.D. Fla. filed Oct. 3. 2012); *FDIC v. Stewart Title Guaranty Co.*, No. 8-12-cv-02244-CEH-TBM (M.D. Fla. filed Oct. 3, 2012); *see also FDIC v. Commw. Land Title Ins. Co.*, No. 6:14-cv-00408 (M.D. Fla. filed Mar. 14, 2014) (stipulated dismissal July 28, 2014); *FDIC v. Commw. Land Title Ins. Co.*, No. 8:12-cv-02247-JSM-TGW (M.D. Fla. filed Oct. 4, 2012) (dismissed per settlement Sept. 12, 2013); *FDIC v. Gil*, No. 1:12-cv-22939 (S.D. Fla. filed Aug. 10, 2012) (dismissed per settlement Jan. 23, 2014); *FDIC v. Stewart Title Guar. Co.*, No. 4:12-cv-10062-JLK (S.D.

Fla. filed July 9, 2012) (stipulated dismissal Dec. 20, 2013); *FDIC v. Heritage Title & Escrow, Inc.*, No. 0:12-cv-60944-RNS (S.D. Fla. filed May 18, 2012) (stipulated dismissal May 21, 2013); *FDIC v. Creative Title Servs., Inc.*, No. 1:12-cv-21860-JLK (S.D. Fla. filed May 17, 2012) (stipulated dismissal July 17, 2013).

Yet the Sixth Circuit's decision below is not remotely limited to those precise factual circumstances. As explained above, it covers assignments of rights as well as delegations of duties. Likewise, it covers the ability of defendants as well as plaintiffs to invoke contractual assignments or delegations to which they are not a party. It covers all assignments and delegations, not just those of the FDIC. And it covers all issues that a defendant may wish to raise, not just formal affirmative defenses. Simply put, the decision below could not have been written more broadly.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

This case cleanly raises the question presented. Not only did the Sixth Circuit adopt the FDIC's "prudential standing" theory in its broadest possible terms, but neither the district court nor the Sixth Circuit even arguably considered the terms of the Purchase Agreement, given those courts' understanding of the relevant standing principles. Thus, the decisions below rest entirely and unambiguously on the "prudential standing" questions addressed in this petition. The question whether the Purchase Agreement did in fact transfer the CPL claim from the FDIC to Chase is not presented, and this Court would have no need to address it. Rather, it would need on-

ly decide whether First American was properly barred from raising that threshold, potentially dispositive argument.

Equally true, the underlying concern over double liability is sharply presented here. After the FDIC obtained a favorable judgment based on its supposedly unchallengeable claim to own a WaMu CPL, First American discovered that Chase had likewise asserted ownership of WaMu CPLs in two different cases, including one in the *same jurisdiction*. (Pet. App. 83a-86a.) But the Purchase Agreement does not even arguably distinguish among the CPLs held by WaMu—the agreement either transferred all of them from the FDIC to Chase, or it transferred none of them. Remarkably, however, the Sixth Circuit brushed aside this evidence because it did "not call into question the FDIC's consistent position . . . that it owned the CPL." (Pet. App. 28a.) Thus, under the reasoning below, so long as the putative assignor and assignee each maintains a "consistent" claim of ownership, the obligor is left powerless to resist either of those mutually contradictory claims, and, thus, to resist the inconsistent or even double liability that inevitably and unfairly would ensue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 12, 2014

Counsel for Petitioner

APPENDIX

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 23, 2014

Mr. Matthew A. Kairis
325 J.H. McConnell Blvd.
Suite 600
Columbus, OH 43215-2673

Re: First American Title Insurance Company v. Federal Deposit Insurance Corporation
Application No. 14A433

Dear Mr. Kairis:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on October 23, 2014, extended the time to and including January 12, 2015.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by /s/ Clayton Higgins

Clayton Higgins
Case Analyst

NOTIFICATION LIST

Mr. Matthew A. Kairis
325 J.H. McConnell Blvd.
Suite 600
Columbus, OH 43215-2673

Clerk
United States Court of Appeals for the Sixth Circuit
524 Potter Stewart Courthouse
100 East Fifth Street
Cincinnati, OH 45202

APPENDIX B

JP MORGAN CASE BANK, N.A., PLAINTIFF, FEDERAL DEPOSIT INSURANCE CORPORATION, INTERVENOR PLAINTIFF-APPELLEE, V. FIRST AMERICAN TITLE INSURANCE COMPANY, DEFENDANT-APPELLANT.

NOS. 12-2094/13-1172

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2014 U.S. APP. LEXIS 16356

AUGUST 13, 2014, FILED

PRIOR HISTORY: *JPMorgan Chase Bank, N.A. v. First Am. Title Ins. Co.*, 2014 U.S. App. LEXIS 12519 (6th Cir.) (6th Cir. Mich., 2014)

COUNSEL: For FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Washington Mutual Bank, Plaintiff - Appellee (12-2094, 13-1172): Jerome A. Madden, FDIC, Appellate Litigation Unit, Arlington, VA.

For FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation, Defendant - Appellant (12-2094, 13-1172): Matthew A. Kairis, Kenneth Grose, Leslie E. McCarthy, Chad A. Readler, Jones Day, Columbus, OH.

JUDGES: BEFORE: COLE, GILMAN, and DONALD, Circuit Judges. Judge White recused herself from participation in this ruling.

OPINION

ORDER

The court received a petition for rehearing en banc and additional petition for rehearing en banc in support of the original petition. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petitions then were circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

* Judge White recused herself from participation in this ruling.

Therefore, the petitions are denied.

APPENDIX C

JPMORGAN CHASE BANK, N.A., PLAINTIFF, FEDERAL DEPOSIT INSURANCE CORPORATION, INTERVENOR PLAINTIFF-APPELLEE, V. FIRST AMERICAN TITLE INSURANCE COMPANY, DEFENDANT-APPELLANT.

14A0140P.06

NOS. 12-2094; 13-1172

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2014 U.S. APP. LEXIS 12519; 2014 FED APP. 0140P (6TH CIR.)

JANUARY 23, 2014, ARGUED
JULY 2, 2014, DECIDED
JULY 2, 2014, FILED

SUBSEQUENT HISTORY:

Rehearing denied by, Rehearing, en banc, denied by *JP Morgan Case Bank, N.A. v. First Am. Title Ins. Co.*, 2014 U.S. App. LEXIS 16356 (6th Cir., Aug. 13, 2014)

PRIOR HISTORY:

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. Nos. 2:09-cv-14891; 2:09-cv-14915--Marianne O. Battani, District Judge. *JPMorgan Chase Bank, N.A. v. First Am. Title Ins. Co.*, 750 F.3d 573, 2014 U.S. App. LEXIS 7660 (6th Cir. Mich., 2014)

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-District court properly granted summary judgment to the FDIC on the issue of a title insurance company's liability for breach of a closing protection letter (CPL) issued to a mortgage lender because CPLs and title policies protected against different risks; [2]-FDIC stepped into the mortgage lender's shoes by operation of *12 U.S.C.S. § 1821(d)(2)(A)(i)* and thus, it had the same rights as the lender in the CPL and could bring a breach of contract claim based on that document; [3]-In opposing summary judgment, title insurance company lacked standing to rely on a purchase and assumption agreement between the FDIC and a bank that acquired the mortgage lender's assets; [4]-District court properly applied Michigan law when it reasoned that the FDIC's damages included pre-complaint interest as a matter of right where the amount of damages was easily calculable.

OUTCOME: The court affirmed the judgment.

COUNSEL: ARGUED: Matthew A. Kairis, JONES DAY, Columbus, OH, for Appellant.

Jerome A. Madden, FEDERAL DEPOSIT INSURANCE CORPORATION, Arlington, Virginia, for Appellee.

ON BRIEF: Matthew A. Kairis, Chad A. Readler, JONES DAY, Columbus, OH, for Appellant.

Jerome A. Madden, FEDERAL DEPOSIT INSURANCE CORPORATION, Arlington, Virginia, for Appellee.

JUDGES: Before: COLE, GILMAN, and DONALD, Circuit Judges.

OPINION BY: BERNICE B. DONALD

OPINION

AMENDED OPINION

BERNICE B. DONALD, Circuit Judge. First American Title Insurance Company ("First American") appeals the $2,263,510.78 final judgment entered in favor of the Federal Deposit Insurance Corporation ("FDIC") after a jury trial on the issue of damages in this diversity breach of contract action. First American contends the district court erred by granting summary judgment to the FDIC on the issue of liability for breach of a closing protection letter, by upholding the jury's verdict over First American's various objections, and by denying First American's motion for relief from judgment under *Federal Rule of Civil Procedure 60(b)(2).* We disagree and now **AFFIRM** the judgment of the district court.

I.

First American underwrites title insurance policies for property owners and mortgage lenders. Patriot Title Agency, LLC ("Patriot") formerly was an agent authorized to issue title commitments and policies underwritten by First American in Michigan. In September of 2007, Patriot closed a real estate transaction in which Washington Mutual Bank ("WaMu") loaned $4,543,593.07 to Ha Truong ("the Truong transaction") for the purchase of property in Grosse Ile, Michigan ("the Bellerive property"). WaMu secured the loan with a first-priority mortgage on the property. Patriot issued a commitment to provide title insurance, underwritten by First American, to WaMu in connection with the transaction, as well as a closing protection letter ("CPL").

In the CPL, First American agreed to indemnify WaMu for actual losses arising from Patriot's fraud or dishonesty in connection with the closing. Specifically, the CPL provided:

> When title insurance of First American Title Insurance Company is specified for your protection or the protection of a purchase from you in connection with closings of real estate transactions on land located in the state of Michigan in which you are to be the seller or purchaser of an interest in the land or a lender secured by a mortgage (including any other security instrument) of an interest in land, the Company . . . hereby agrees to reimburse you for actual loss incurred by you in connection with such closing when conducted by the Issuing Agent (an Agent authorized to issue title insurance for the Company), referenced herein and when such loss arises out of:
>
> . . .
>
> 2. Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closing.

In March of 2008, First American discovered that the Truong transaction was a sham. Randy Saylor, Patriot's owner, had orchestrated a fraud in order to retain the proceeds of the WaMu loan and purchase the Bellerive property for himself. In June 2008, First American obtained title to the Bellerive property and negotiated with WaMu to sell it in order to cover losses WaMu suffered due to Saylor's fraud. On September 25, 2008, however, federal regulators closed WaMu, and the FDIC became its Receiver.

That same day, the FDIC entered into a Purchase and Assumption Agreement ("P & A Agreement") with JPMorgan Chase Bank ("Chase") whereby the FDIC sold nearly all of WaMu's assets to Chase. Section 3.1 of the P & A Agreement provides that, subject to Section 3.5, "the Assuming Bank [Chase] hereby purchases from the Receiver [FDIC], and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank [Chase], all right, title, and interest of the Receiver in and to all of the assets . . . of the Failed Bank [WaMu]." Section 3.5, in turn, incorporates the attached Schedule 3.5 to identify the assets that Chase did not purchase. Section (2) of Schedule 3.5 provides in pertinent part that Chase did not purchase the following:

> (2) any interest, right, action, claim, or judgment against . . . (iv) any other Person whose action or inaction may be related to any loss (exclusive of any loss resulting from such Person's failure to pay on a Loan made by the Failed Bank) incurred by the Failed Bank; provided, that for the purposes hereof, the acts, omissions or other events giving rise to any such claim shall have occurred on or before Bank Closing, regardless of when any such claim is discovered . . . .

Under the P & A Agreement, Chase purchased the title insurance commitment Patriot issued to WaMu in connection with the Truong transaction and had the right to bring a claim against First American, the underwriter, on that commitment. Attempting to resolve this outstanding claim, First American tendered a quitclaim deed for the Bellerive property

to Chase on December 4, 2009. Chase, however, refused to accept that deed.

First American then filed suit against Chase in the Wayne County Circuit Court on December 16, 2009, seeking a declaration that First American had fulfilled its obligations under the title insurance commitment by tendering a deed to the Bellerive property. Chase, in turn, filed suit against First American in the United States District Court for the Eastern District of Michigan the next day, requesting a declaration that the deed was void and seeking money damages. On December 18, 2009, Chase removed the state court suit to the Eastern District of Michigan, and the district court consolidated the actions.

In early 2010, the FDIC notified First American that it intended to intervene in the lawsuit to state a claim for breach of the CPL. The district court granted the motion to intervene over First American's objection. The FDIC filed its complaint in intervention on June 14, 2010, alleging one count of breach of contract against First American based on the CPL.

Subsequently, on September 24, 2010, First American and Chase agreed to appoint a Receiver to sell the Bellerive property. After the Receiver accepted a third-party offer to purchase that property, on April 11, 2011, First American and Chase stipulated to an order of dismissal with prejudice of both Chase's claims against First American and First American's claims against Chase. Thereafter, only the FDIC and First American remained parties to the suit.

Just before Chase's dismissal from the suit, but after discovery closed on February 1, 2011, Chase and the FDIC entered into a stipulation concerning ownership of the CPL. That stipulation stated:

> 1. On September 25, 2008, Chase and the FDIC/Receiver entered into a Purchase and Assumption Agreement . . . . Pursuant to the Purchase and Assumption Agreement, Chase acquired certain assets of the Washington Mutual Bank ("WaMu"); and
>
> 2. Chase did not acquire the CPL claim that the FDIC/Receiver is purs[u]ing in this action pursuant to the Purchaser and Assumption Agreement, and Chase claims no interest in that CPL claim.

Two weeks after Chase's dismissal from the action, on April 28, 2011, the district court held a hearing on the FDIC's and First American's cross-motions for summary judgment. First American argued in its two motions that the FDIC did not have standing to assert a claim under the CPL and, even if the FDIC did have standing, it did not incur any "actual loss" due to the Truong transaction and therefore could not recover under the CPL. The FDIC argued in its motion that First American had admitted facts establishing liability and that the FDIC suffered an "actual loss" of at least $1.7 million.

On June 10, 2011, the district court denied First American's motions for summary judgment and granted the FDIC's motion as to liability but denied it as to damages. The parties then proceeded to trial on the issue of damages, and a jury awarded the FDIC $2,263,510.78 on December 1, 2011. After trial, First American filed a renewed motion for judgment

as a matter of law, an alternative motion for a new trial, and a motion to alter or amend the judgment. The district court denied those motions on June 20, 2012, and First American filed a timely Notice of Appeal from the final judgment on August 15, 2012.

While its initial appeal was pending in this Court, on November 20, 2012, First American filed a *Federal Rule of Civil Procedure 60(b)(2)* ("*Rule 60(b)(2)*") motion for relief from judgment based on newly discovered evidence. The district court denied this motion on January 31, 2013, and First American filed another timely Notice of Appeal. This consolidated appeal followed.

II.

First American argues that the district court committed multiple reversible errors. Its primary argument is that the lower court improperly granted summary judgment to the FDIC on the issue of liability for breach of the CPL. First American also contends that the district court erred when it upheld the jury's verdict over First American's objections that the verdict was based on an inadmissible hearsay document, imposed double liability, and incorrectly included a jury-determined amount of pre-complaint interest. Finally, First American asserts that the district court improperly denied its *Rule 60(b)(2)* motion for relief from judgment. We address each argument in turn.

A.

We begin with the argument that the district court erred when it granted summary judgment to the FDIC on the issue of liability. We review de novo a district court's grant of summary judgment. *Flagg v. City of Detroit, 715 F.3d 165, 178 (6th Cir. 2013).*

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a).* We must view facts in the record and reasonable inferences that can be drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).* This Court does not weigh evidence, assess credibility of witnesses, or determine the truth of matters in dispute. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* If there are no disputed material facts, we review de novo "whether the district court properly applied the substantive law." *Farhat v. Jopke, 370 F.3d 580, 588 (6th Cir. 2004).*

First American attacks the district court's grant of summary judgment to the FDIC on several grounds. First American argues that (1) CPLs cannot be severed from related title insurance commitments; (2) the district court erred by relying on the FDIC-Chase stipulation as to ownership of the CPL; and (3) the FDIC has no right to bring a claim on the CPL because it sold that claim to Chase. None of these arguments, however, merits reversal of the district court's grant of summary judgment.

1.

The district court found that, in general, a party can bring a breach of contract claim on a CPL independent of the related title insurance commitment because "closing protection letters and title policies protect against entirely different risks." First American argues that this decision was error.

The Michigan Court of Appeals described the role of a CPL in *New Freedom Mortgage Corp. v. Globe Mortgage Corp., 281 Mich. App. 63, 761 N.W.2d 832 (Mich. Ct. App. 2008).* Generally, companies that issue title insurance commitments also issue CPLs "[t]o verify the agent's authority to issue the underwriter's policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agent's errors or dishonesty with escrow or closing funds." *Id. at 842* (quoting 2 Joyce Palomar, Title Ins. Law, § 20:11 (2010)) (internal quotation marks omitted). CPLs are incidental to title insurance, used "to persuade customers to trust their agents, so that their policies can be sold." *Id. at 842-43* (quoting Palomar, § 20:13) (internal quotation marks omitted). Even though CPLs are incidental, consideration supports them, namely the purchase of the insurance policy. *Id. at 843.* Accordingly, "a breach of contract action [on a CPL] may be maintained independent of the title insurance policy." *Id.*; *see also Lehman Bros. Holdings, Inc. v. Hirota, No. 8:06-cv-2030-T-24MSS, 2007 U.S. Dist. LEXIS 36818, 2007 WL 1471690, at *6 (M.D. Fla. May 21, 2007); Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp., 288 Ga. App. 642, 655 S.E.2d 269, 274 (Ga. Ct. App. 2007).*

The Michigan Court of Appeals' observation that a CPL may support a breach of contract claim independent of any related title insurance policy is logical, especially considering that the parties agree that a CPL is an indemnity agreement and not an insurance policy. In a CPL, "the underwriter agrees to indemnify the lender for any problems that arise from the closing agent's failure to properly apply the

funds, as set forth in the closing instructions, and the title insurance commitment." *Bergin Fin., Inc. v. First Am. Title Co., 397 F. App'x 119, 125 (6th Cir. 2010)* (quoting *Ticor Title Ins. Co. v. Nat'l Abstract Agency, Inc., No. 05-CV-73709-DT, 2008 U.S. Dist. LEXIS 40855, 2008 WL 2157046, at *5 (E.D. Mich. May 22, 2008)).* Conversely, a title insurance policy "insures only that the title to such property is unencumbered by unknown liens, easements, and the like which might affect the property's value." *First Fed. Sav. & Loan Ass'n v. Transamerica Title Ins. Co., 19 F.3d 528, 530 (10th Cir. 1994).* The district court was thus correct that "closing protection letters and title policies protect against entirely different risks."

After making this finding, the district court acknowledged that the *New Freedom, Hirota, and Lawyer's Title* courts "were never specifically asked to rule on whether an addressee could bring a closing protection letter claim independent of a claim under a related title policy." The district court nonetheless found those cases "persuasive because they establish that the coverage afforded under the letter is wholly separate from the coverage under a title policy." We agree with the district court that the "protections under the instant CPL are not supplemental or ancillary to the Title Policy." The district court therefore did not err when it found that, in general, a party can bring a breach of contract claim on a CPL independent of the related title insurance policy.

First American argues, however, that the plain language of the CPL at issue here "expressly dictates that its rights can only be held by the owner of the title policy." Appellant Br. at 35. To support this

argument, First American relies on the following language in the opening paragraph of the CPL:

> When title insurance of First American Title Insurance Company is specified for your protection or the protection of a purchase from you in connection with closings of real estate transactions on land located in the state of Michigan in which you are to be the seller or purchaser of an interest in the land or a lender secured by a mortgage (including any other security instrument) of an interest in land . . . .

We disagree that this language prohibits the FDIC from bringing a claim for breach of the CPL.

The introductory language on which First American relies does not prevent the FDIC from bringing a claim for breach of the CPL because WaMu satisfied the requirements identified there, and the FDIC stepped into WaMu's shoes by operation of law. At the time First American issued the CPL to WaMu, a First American title policy was "specified for [WaMu's] protection." WaMu was also "to be . . . a lender secured by a mortgage . . . of an interest in land." Subsequently, when the FDIC took WaMu into receivership, the FDIC "succeed[ed] to . . . all rights, titles, powers, and privileges of" WaMu. *12 U.S.C. § 1821(d)(2)(A)(i)*. The FDIC accordingly had all the same rights as WaMu in the CPL, and it may bring a breach of contract claim based on that document.

The FDIC's subsequent sale of the loan and title insurance commitment from the Truong transaction to Chase likewise does not prevent the FDIC from bringing a breach of contract claim on the CPL. The

CPL explicitly grants rights to WaMu and "its successors and/or assigns as their interest may appear." As WaMu's Receiver and successor, this language grants rights to the FDIC. No language in the CPL "provides that WaMu would lose its indemnification rights if it subsequently sold the Truong Loan and Title Policy," so the sale of the loan and title insurance commitment did not change the FDIC's rights under the CPL. *See* P & A Agreement, Schedule 3.5, § 2. The district court therefore did not err when it found that the FDIC is eligible to recover under the CPL at issue here.

2.

We will consider First American's second and third attacks on the district court's grant of summary judgment together because those arguments are closely related. First American contends that the district court erred by relying on the FDIC-Chase stipulation concerning ownership of the CPL rather than interpreting the P & A Agreement. It also argues that the P & A Agreement unambiguously transferred the CPL at issue here from the FDIC to Chase, depriving the FDIC of standing to sue on the CPL.

Addressing First American's defense that the FDIC lacked standing to sue on the CPL in its order granting in part and denying in part the FDIC's motion for summary judgment, the district court reasoned:

> Based on its own interpretation of the P & A Agreement, First American contends that FDIC sold the CPL claim to Chase and FDIC has no standing to bring suit. The Court declines to visit the interpretation

> issues because First American has not shown how it escapes the well-established rule that a stranger to a contract has no standing to challenge the parties' mutual understanding of their own contract. *See City of Grosse Pointe Park v. Michigan Municipal Liability and Property Pool, 473 Mich. 188, 702 N.W.2d 106, 114 (2005)*. FDIC and Chase agree that FDIC retained the CPL claim and have signed a Stipulation acknowledging the same. (Doc. 108 Ex. A). The Court will not interfere with the parties' intent. *See Rasheed, 517 N.W.2d at 29 n. 28*; *UAW-GM Human Resource Center v. KSL Recreation Corp., 228 Mich. App. 486, 579 N.W.2d 411, 414 (1998).*

But the district court should not have relied on Michigan law because the P & A Agreement expressly provides: "THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE FEDERAL LAW OF THE UNITED STATES OF AMERICA . . . ." This Court follows *section 187 of the Restatement (Second) of Conflicts of Laws* when determining whether to give effect to a choice-of-law provision in a contract. *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden, 448 F.3d 918, 922-23 (6th Cir. 2006)* ("In the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflicts of Law[s] . . . ." (quoting *Med. Mutual of Ohio v. deSoto, 245 F.3d 561, 570 (6th Cir. 2001)* (internal quotation marks omitted))). Because "the particular issue is one which the parties could have

resolved by an explicit provision in their agreement" and there is a "reasonable basis for the parties' choice" of federal law, the district court should have followed the choice-of-law provision and applied federal law when considering the P & A Agreement. *Restatement (Second) Conflicts of Laws § 187(1), (2)(a).* The district court's error in applying Michigan law is not a reversible one, however, because applying federal law yields the same result. *See City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 251 (6th Cir. 1994)* (citing *Hilliard v. U.S. Postal Serv., 814 F.2d 325, 326 (6th Cir. 1987))* ("[W]e may affirm on any grounds supported by the record, even though they may be different from the grounds relied on by the district court.").

Section 13.5 of the P & A Agreement expressly provides that the contract should not be construed "to give any Person other than the Receiver, the Corporation and the Assuming Bank any legal or equitable right, remedy or claim under or with respect to this Agreement or any provisions contained herein." Based on this language, our sister circuits uniformly have held that parties attempting to rely on the P & A Agreement to invoke a court's jurisdiction lack prudential standing to do so because they are neither parties to nor third-party beneficiaries of the agreement. *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, Nat'l Ass'n, 747 F.3d 44, 2014 WL 401303, at *3-5 (2d Cir. 2014)* ("We conclude that Hillside does not have prudential standing in this case because it cannot enforce the terms of the [P & A Agreement], as to which it is neither a party nor a third-party beneficiary, but the enforcement of which is a necessary component of its claim."); *Excel Willowbrook, LLC v. JP Morgan Chase*

Bank, Nat'l Ass'n, 740 F.3d 972, 979 (5th Cir. 2014) (reasoning that "the interest of maintaining uniformity in the construction and enforcement of federal contracts--an area where uniformity is critical--" required holding that plaintiffs were not intended beneficiaries of the P & A Agreement); *Interface Kanner, LLC v. JPMorgan Chase Bank, N.A., 704 F.3d 927, 933 (11th Cir. 2013)* ("We . . . find that the P & A Agreement does not provide a 'clear intent' to benefit Interface. Thus, we conclude that Interface is not an intended third-party beneficiary to the P & A Agreement and cannot sue to enforce it."); *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JPMorgan Chase Bank, Nat'l Ass'n, 671 F.3d 1027, 1036 (9th Cir. 2012)* ("Because GE is not an intended third-party beneficiary of the P & A Agreement, GE has no enforceable rights under that contract.").

More analogous to the present case, however, is the D.C. Circuit's decision in *Deutsche Bank National Trust Co. v. FDIC, 717 F.3d 189, 405 U.S. App. D.C. 130 (D.C. Cir. 2013)*, where the court addressed the prudential standing of a proposed intervenor rather than a plaintiff. *Id. at 194* ("Of course, appellants are seeking to intervene, not to bring a cause of action under the Agreement itself."). The D.C. Circuit reasoned that the intervenors lacked prudential standing because "[i]nsofar as the Proposed Intervenors wish to be heard on the specific question of contract interpretation, they are effectively seeking to enforce the rights of third parties (here, the FDIC), which the doctrine of prudential standing prohibits." *Id.* We find this reasoning persuasive and equally applicable to a defendant who attempts to defend against a claim by asserting a legal right belonging to a third party. The Supreme Court repeatedly has

recognized that "a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990)* (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982))* (internal quotation marks omitted) (inquiring into the standing of both the petitioners and the respondent). Accepting First American's argument that it may be heard on the issue of contract interpretation here would allow it to assert Chase's right to claim ownership of the CPL under the P & A Agreement.

Because First American is neither a party to nor a third-party beneficiary of the P & A Agreement, it lacks prudential standing to challenge the FDIC's and Chase's understanding of their own contract. *See Deutsche Bank, 717 F.3d at 194.* The district court therefore did not commit reversible error when it granted summary judgment to the FDIC on the issue of liability for breach of the CPL.

B.

We now turn to First American's arguments attacking the jury's verdict. First American alleges that the verdict was the product of speculation based on an inadmissible hearsay document, that it imposed double liability on First American, and that it improperly included a jury-determined amount of pre-complaint interest.

1.

During the jury trial, the FDIC relied heavily on a spreadsheet containing WaMu loan data, Plaintiff's Exhibit 7 ("PX7"), to prove its actual loss. The

district court admitted the spreadsheet into evidence as a self-authenticating business record under *Federal Rule of Evidence 902(11)* and as an exception to the rule against hearsay under *Federal Rule of Evidence 803(6).* First American argues that the FDIC did not properly certify the record and that the record does not have the required indicia of trustworthiness to qualify as a hearsay exception. We review a district court's evidentiary rulings for abuse of discretion. *Harlamert v. World Finer Foods, Inc., 489 F.3d 767, 773 (6th Cir. 2007).* We will reverse only if "the ruling is based on 'an erroneous view of the law or a clearly erroneous assessment of the evidence.'" *United States v. Dotson, 715 F.3d 576, 582 (6th Cir. 2013)* (quoting *United States v. Semrau, 693 F.3d 510, 520 (6th Cir. 2012)).*

The district court considered the contents of the declaration of Matthew C. Horvat, Vice President and Applications Developer for Chase, that the FDIC presented as certification of the business record--as well as the trial testimony of Horvat's former supervisor, Jean Wojciechowski, a Vice President of Finance at Chase--and found the declaration sufficient to establish that the loan data in PX7 was a business record first of WaMu and then of the FDIC. The district court properly considered *Rules 902(11)* and *803(6)*, and its assessment of Horvat's declaration and Wojciechowski's testimony was not clearly erroneous. *See Dotson, 715 F.3d at 582* (quoting *Semrau, 693 F.3d at 520*). Accordingly, the district court did not abuse its discretion when it admitted PX7 into evidence.

Additionally, PX7 constitutes adequate proof of the FDIC's "actual loss" based on Patriot's fraud. The

parties do not dispute that WaMu wired $4,543,593.07 to Patriot in connection with the Truong transaction or that Patriot's owner, Saylor, diverted those funds for his own benefit. PX7 shows that at the time the FDIC took WaMu into receivership, the "book value" of the loan from the Truong was $2,677,500. After the FDIC received "book value" for the loan from Chase under the P&A Agreement, the FDIC was still $1,866,093.07 short of the amount Saylor fraudulently misappropriated. The district court therefore did not err when it found that "Patriot Title's fraud was the most direct, natural, and foreseeable cause of WaMu's loss," and that the jury's verdict was based on more than speculation.

2.

First American next argues that the district court committed a clerical error that subjects First American to double liability; namely, miscalculating the value that Chase received from First American following the court-appointed Receiver's sale of the Bellerive property involved in the Truong transaction. This argument lacks merit.

The court-appointed Receiver transferred $1,909,732.90 to Chase after selling the Bellerive property. The jury verdict entered by the district court in favor of the FDIC was for $2,263,510.78. First American's total liability to both parties, then, was $4,173,243.68, which is less than the $4,543,593.07 that WaMu transferred to Patriot for the Truong transaction. The district court therefore did not commit a clerical error that subjects First American to double liability.

3.

First American's final attack on the jury's verdict concerns the calculation of pre-complaint interest. According to First American, pre-complaint interest is an issue committed to the discretion of the trial judge, and the district court's decision to place responsibility for calculating pre-complaint interest in the hands of the jury constitutes reversible error.

Initially, we must address the FDIC's contention that First American forfeited this argument on appeal by not developing it fully in the briefing. Although First American's briefing includes only a few paragraphs discussing pre-complaint interest, First American did cite to and address the district court's actions as well as assert an argument, however limited, for reversal. *Cf. Langley v. DaimlerChrysler Corp., 502 F.3d 475, 483 (6th Cir. 2007)* ("In her briefs, Langley failed to discuss or cite to the district court's analysis in any detail. . . . As Langley has not addressed the controlling issues or only 'adverted to [them] in a perfunctory manner, unaccompanied by some effort at developed argumentation,' she has waived them." (quoting *Indeck Energy Servs., Inc. v. Consumers Energy Co., 250 F.3d 972, 979 (6th Cir. 2000))).* We therefore disagree with the FDIC that First American forfeited this argument.

In its primary brief, First American cites cases involving the application of only federal law, rather than cases applying Michigan law. *See Wickham Contracting Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 955 F.2d 831, 833-34 (2d Cir. 1992)* (stating that "discretionary awards of prejudgment interest . . . under federal law" are based on a four-factor analysis); *EEOC v. Wooster Brush Co. Emps.*

Relief Ass'n, 727 F.2d 566, 579 (6th Cir. 1984) (reasoning that awards of prejudgment interest in Title VII cases are within the discretion of the trial court "in the absence of a statutory provision to the contrary"); *Goldman v. Healthcare Mgmt. Sys., Inc.*, 559 F. Supp. 2d 853, 865 (W.D. Mich. 2008) (addressing the availability of prejudgment interest under the Copyright Act). This Court's precedents, however, clearly state:

"[P]rejudgment interest is a substantive aspect of damages in a diversity case and is thus properly viewed as a matter of state law." *Diggs v. Pepsi-Cola Metro. Bottling Co., 861 F.2d 914, 924 (6th Cir. 1988)* (quoting *Bailey v. Chattem, Inc., 838 F.2d 149, 150 (6th Cir. 1988))* (internal quotation marks omitted); *see also Jack Henry & Assocs. v. BSC, Inc., 487 F. App'x 246, 257 (6th Cir. 2012)* (same).

We therefore look to Michigan law, "the law of the state that governs the cause of action," *Jack Henry & Assocs., 487 F. App'x at 257* (citing *FDIC v. First Heights Bank, FSB, 229 F.3d 528, 542-43 (6th Cir. 2000))*, to determine whether the district court erred when it allowed the jury to determine the amount of pre-complaint interest. We review de novo the district court's application of state law in a diversity suit. *Salve Regina Coll. v. Russell, 499 U.S. 225, 231, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* ("We conclude that a court of appeals should review *de novo* a district court's determination of state law.").

"Generally, Michigan courts have included [pre-complaint] interest as an element of damages as a matter of right where the amount claimed is liquidated." *Jones v. Lothamer., 819 F. Supp. 1382, 1383 (W.D. Mich. 1993)* (citing *Cree Coach Co. v.*

Wolverine Ins. Co., 366 Mich. 449, 115 N.W.2d 400 (Mich. 1962); *Gordon Sel-Way, Inc. v. Spence Bros., Inc., 177 Mich. App. 116, 440 N.W.2d 907 (Mich. Ct. App. 1989)*; *Banish v. City of Hamtramck, 9 Mich. App. 381, 157 N.W.2d 445 (Mich. Ct. App. 1968))*. Damages are liquidated "where 'the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law.'" *Kenneth Henes Special Projects Procurement v. Cont'l Biomass Indus., 86 F. Supp. 2d 721, 738 (E.D. Mich. 2000)* (quoting *Holland v. Earl F. Graves Publ'g Co., 33 F. Supp. 2d 581, 583 (E.D. Mich. 1998))*.

The district court overruled First American's objection "to the issue of pre-complaint interesting being presented to the jury or being considered by the jury." In overruling that objection, the district court stated:

> The Court finds that the actual loss which is given a very expansive reading -- or expansive definition would include the pre-complaint interest. I also believe that under Michigan law, at least from my experience, and as a trial judge in Michigan, that this is clearly a case where pre-complaint interest may be awarded because it is easily calculable, there really is not much of a math situation here, and I do think if this were a state court case it would be allowed, and I think I should allow it here, so I'm going allow the issue to go to the jury.

The district court correctly applied Michigan law when it reasoned that the FDIC's damages would

include pre-complaint interest as a matter of right if the amount of damages were easily calculable, or liquidated. *See Jones, 819 F. Supp. at 1383.* We agree with the district court that the amount of damages in this case was easily calculable. The lower court determined the maximum amount of First American's liability to the FDIC based on simple arithmetic: damages equal the total amount of the loan from the Truong transaction minus the book value WaMu received from Chase. Because the damages in this case are liquidated, the district court did not err when it submitted the issue of pre-complaint interest to the jury.

C.

Finally, First American argues that the district court erred when it denied First American's *Rule 60(b)(2)* motion for relief from judgment based on newly discovered evidence. We review for abuse of discretion a district court's decision to deny a *Rule 60(b)* motion for relief from judgment. *Doe v. Lexington-Fayette Urban Cnty. Gov't, 407 F.3d 755, 760 (6th Cir. 2005).* This Court will reverse only if we have "a definite and firm conviction that the trial court committed a clear error of judgment." *Id.* (quoting *Davis v. Jellico Comm. Hosp., Inc., 912 F.2d 129, 133 (6th Cir. 1990)).* To prevail on a *Rule 60(b)(2)* motion, "a 'movant must demonstrate (1) that it exercised due diligence in obtaining the information and (2) [that] the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment.'" *HDC, LLC v. City of Ann Arbor, 675 F.3d 608, 615 (6th Cir. 2012)* (alteration in original) (quoting *Good v. Ohio Edison Co., 149 F.3d 413, 423 (6th Cir. 1998)).* First

American thus has the burden to prove its entitlement to relief under *Rule 60(b)* by clear and convincing evidence. *Info-Hold, Inc. v. Sound Merch., Inc., 538 F.3d 448, 454 (6th Cir. 2008).*

Even assuming that it satisfies the first requirement for *Rule 60(b)(2)* relief, First American cannot meet the second requirement that the "evidence [be] material and controlling and clearly would have produced a different result." *HDC, 675 F.3d at 615* (quoting *Good, 149 F.3d at 423*). In its *Rule 60(b)(2)* motion, First American relied on evidence that Chase had taken inconsistent positions *in pleadings* in other federal and state court cases regarding ownership of WaMu CPLs. The evidence submitted with the *Rule 60(b)(2)* motion is not controlling because it is not mandatory authority and does not call into question the FDIC's consistent position throughout this litigation that it owned the CPL. Such evidence therefore would not have produced a different result at the summary judgment stage. Because we do not "have 'a definite conviction that the [district] court committed a clear error of judgment,'" *Doe, 407 F.3d at 760* (quoting *Davis, 912 F.2d at 133*), the district court did not abuse its discretion when it denied First American's *Rule 60(b)(2)* motion.

III.

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JPMORGAN CHASE BANK, N.A., *Plaintiff,* FEDERAL DEPOSIT INSURANCE CORPORATION, *Intervenor Plaintiff-Appellee,* *v.* FIRST AMERICAN TITLE INSURANCE COMPANY, *Defendant-Appellant,*	Nos. 12-2094:13-1172

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
Nos. 2:09-cv-14891: 2:09-cv-14915-
Marianne O.Battani, District Judge
Argued: January 23, 2014-12-30

Decided and Filed: April 24, 2014-12-30

Before: COLE, GILMAN, and DONALD, Circuit Judges

COUNSEL

ARGUED: Matthew A. Kairis, JONES DAY, Columbus, OH, for Appellant. Jerome A. Madden, FEDERAL DEPOSIT INSURANCE CORPORATION,

Arlington, Virginia, for Appellee. **ON BRIEF**: Matthew A. Kairis, Chad A. Readler, JONES DAY, Columbus, OH for Appellant. Jerome A. Madden, FEDERAL DEPOSIT INSURANCE CORPORATION, Arlington, Virginia, for Appelle.

OPINION

BERNICE B. DONALD, Circuit Judge. First American Title Insurance Company ("First American") appeals the $2,263,510.78 final judgment entered in favor of the Federal Deposit Insurance Corporation ("FDIC") after a jury trial on the issue of damages in this diversity breach of contract action. First American contends the district court erred by granting summary judgment to the FDIC on the issue of liability for breach of a closing protection letter, by upholding the jury's verdict over First American's various objections, and by denying First American's motion for relief from judgment under *Federal Rule of Civil Procedure 60(b)(2).* We disagree and now **AFFIRM** the judgment of the district court.

I.

First American underwrites title insurance policies for property owners and mortgage lenders. Patriot Title Agency, LLC ("Patriot") formerly was an agent authorized to issue title commitments and policies underwritten by First American in Michigan. In September of 2007, Patriot closed a real estate transaction in which Washington Mutual Bank ("WaMu") loaned $4,543,593.07 to Ha Truong ("the Truong transaction") for the purchase of property in Grosse Ile, Michigan ("the Bellerive property"). WaMu secured the loan with a first-priority mortgage

on the property. Patriot issued a commitment to provide title insurance, underwritten by First American, to WaMu in connection with the transaction, as well as a closing protection letter ("CPL").

In the CPL, First American agreed to indemnify WaMu for actual losses arising from Patriot's fraud or dishonesty in connection with the closing. Specifically, the CPL provided:

> When title insurance of First American Title Insurance Company is specified for your protection or the protection of a purchase from you in connection with closings of real estate transactions on land located in the state of Michigan in which you are to be the seller or purchaser of an interest in the land or a lender secured by a mortgage (including any other security instrument) of an interest in land, the Company . . . hereby agrees to reimburse you for actual loss incurred by you in connection with such closing when conducted by the Issuing Agent (an Agent authorized to issue title insurance for the Company), referenced herein and when such loss arises out of:
>
> . . .
>
> 2. Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closing.

In March of 2008, First American discovered that the Truong transaction was a sham. Randy Saylor, Patriot's owner, had orchestrated a fraud in order to retain the proceeds of the WaMu loan and purchase the Bellerive property for himself. In June 2008, First American obtained title to the Bellerive

property and negotiated with WaMu to sell it in order to cover losses WaMu suffered due to Saylor's fraud. On September 25, 2008, however, federal regulators closed WaMu, and the FDIC became its Receiver.

That same day, the FDIC entered into a Purchase and Assumption Agreement ("P & A Agreement") with JPMorgan Chase Bank ("Chase") whereby the FDIC sold nearly all of WaMu's assets to Chase. Section 3.1 of the P & A Agreement provides that, subject to Section 3.5, "the Assuming Bank [Chase] hereby purchases from the Receiver [FDIC], and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank [Chase], all right, title, and interest of the Receiver in and to all of the assets . . . of the Failed Bank [WaMu]." Section 3.5, in turn, incorporates the attached Schedule 3.5 to identify the assets that Chase did not purchase. Section (2) of Schedule 3.5 provides in pertinent part that Chase did not purchase the following:

> (2) any interest, right, action, claim, or judgment against . . . (iv) any other Person whose action or inaction may be related to any loss (exclusive of any loss resulting from such Person's failure to pay on a Loan made by the Failed Bank) incurred by the Failed Bank; provided, that for the purposes hereof, the acts, omissions or other events giving rise to any such claim shall have occurred on or before Bank Closing, regardless of when any such claim is discovered . . . .

Under the P & A Agreement, Chase purchased the title insurance commitment Patriot issued to WaMu in connection with the Truong transaction and had the right to bring a claim against First American, the

underwriter, on that commitment. Attempting to resolve this outstanding claim, First American tendered a quitclaim deed for the Bellerive property to Chase on December 4, 2009. Chase, however, refused to accept that deed.

First American then filed suit against Chase in the Wayne County Circuit Court on December 16, 2009, seeking a declaration that First American had fulfilled its obligations under the title insurance commitment by tendering a deed to the Bellerive property. Chase, in turn, filed suit against First American in the United States District Court for the Eastern District of Michigan the next day, requesting a declaration that the deed was void and seeking money damages. On December 18, 2009, Chase removed the state court suit to the Eastern District of Michigan, and the district court consolidated the actions.

In early 2010, the FDIC notified First American that it intended to intervene in the lawsuit to state a claim for breach of the CPL. The district court granted the motion to intervene over First American's objection. The FDIC filed its complaint in intervention on June 14, 2010, alleging one count of breach of contract against First American based on the CPL.

Subsequently, on September 24, 2010, First American and Chase agreed to appoint a Receiver to sell the Bellerive property. After the Receiver accepted a third-party offer to purchase that property, on April 11, 2011, First American and Chase stipulated to an order of dismissal with prejudice of both Chase's claims against First American and First American's claims against Chase. Thereafter, only

the FDIC and First American remained parties to the suit.

Just before Chase's dismissal from the suit, but after discovery closed on February 1, 2011, Chase and the FDIC entered into a stipulation concerning ownership of the CPL. That stipulation stated:

> 1. On September 25, 2008, Chase and the FDIC/Receiver entered into a Purchase and Assumption Agreement . . . . Pursuant to the Purchase and Assumption Agreement, Chase acquired certain assets of the Washington Mutual Bank ("WaMu"); and
>
> 2. Chase did not acquire the CPL claim that the FDIC/Receiver is purs[u]ing in this action pursuant to the Purchaser and Assumption Agreement, and Chase claims no interest in that CPL claim.

Two weeks after Chase's dismissal from the action, on April 28, 2011, the district court held a hearing on the FDIC's and First American's cross-motions for summary judgment. First American argued in its two motions that the FDIC did not have standing to assert a claim under the CPL and, even if the FDIC did have standing, it did not incur any "actual loss" due to the Truong transaction and therefore could not recover under the CPL. The FDIC argued in its motion that First American had admitted facts establishing liability and that the FDIC suffered an "actual loss" of at least $1.7 million.

On June 10, 2011, the district court denied First American's motions for summary judgment and granted the FDIC's motion as to liability but denied it as to damages. The parties then proceeded to trial on the issue of damages, and a jury awarded the

FDIC $2,263,510.78 on December 1, 2011. After trial, First American filed a renewed motion for judgment as a matter of law, an alternative motion for a new trial, and a motion to alter or amend the judgment. The district court denied those motions on June 20, 2012, and First American filed a timely Notice of Appeal from the final judgment on August 15, 2012.

While its initial appeal was pending in this Court, on November 20, 2012, First American filed a *Federal Rule of Civil Procedure 60(b)(2)* (*"Rule 60(b)(2)"*) motion for relief from judgment based on newly discovered evidence. The district court denied this motion on January 31, 2013, and First American filed another timely Notice of Appeal. This consolidated appeal followed.

II.

First American argues that the district court committed multiple reversible errors. Its primary argument is that the lower court improperly granted summary judgment to the FDIC on the issue of liability for breach of the CPL. First American also contends that the district court erred when it upheld the jury's verdict over First American's objections that the verdict was based on an inadmissible hearsay document, imposed double liability, and incorrectly included a jury-determined amount of pre-complaint interest. Finally, First American asserts that the district court improperly denied its *Rule 60(b)(2)* motion for relief from judgment. We address each argument in turn.

A.

We begin with the argument that the district court erred when it granted summary judgment to the FDIC on the issue of liability. We review de novo a

district court's grant of summary judgment. *Flagg v. City of Detroit,* 715 F.3d 165, 178 (6th Cir. 2013). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a).* We must view facts in the record and reasonable inferences that can be drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, (1986). This Court does not weigh evidence, assess credibility of witnesses, or determine the truth of matters in dispute. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, (1986). If there are no disputed material facts, we review de novo "whether the district court properly applied the substantive law." *Farhat v. Jopke,* 370 F.3d 580, 588 (6th Cir. 2004).

First American attacks the district court's grant of summary judgment to the FDIC on several grounds. First American argues that (1) CPLs cannot be severed from related title insurance commitments; (2) the district court erred by relying on the FDIC-Chase stipulation as to ownership of the CPL; and (3) the FDIC has no right to bring a claim on the CPL because it sold that claim to Chase. None of these arguments, however, merits reversal of the district court's grant of summary judgment.

1.

The district court found that, in general, a party can bring a breach of contract claim on a CPL independent of the related title insurance commitment because "closing protection letters and title policies protect against entirely different risks." First American argues that this decision was error.

The Michigan Court of Appeals described the role of a CPL in *New Freedom Mortgage Corp. v. Globe Mortgage Corp.,* 281 Mich. App. 63*,* 761 N.W.2d 832 (Mich. Ct. App. 2008). Generally, companies that issue title insurance commitments also issue CPLs "[t]o verify the agent's authority to issue the underwriter's policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agent's errors or dishonesty with escrow or closing funds." *Id.* at 842 (quoting 2 Joyce Palomar, Title Ins. Law, § 20:11 (2010)) (internal quotation marks omitted). CPLs are incidental to title insurance, used "to persuade customers to trust their agents, so that their policies can be sold." *Id.* at 842-43 (quoting Palomar, § 20:13) (internal quotation marks omitted). Even though CPLs are incidental, consideration supports them, namely the purchase of the insurance policy. *Id.* at 843. Accordingly, "a breach of contract action [on a CPL] may be maintained independent of the title insurance policy." *Id.*; *see also Lehman Bros. Holdings, Inc. v. Hirota,* No. 8:06-cv-2030-T-24MSS*,* 2007 WL 1471690, at *6 (M.D. Fla. May 21, 2007); *Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.,* 655 S.E.2d 269, 274 (Ga. Ct. App. 2007).

The Michigan Court of Appeals' observation that a CPL may support a breach of contract claim independent of any related title insurance policy is logical, especially considering that the parties agree that a CPL is an indemnity agreement and not an insurance policy. In a CPL, "the underwriter agrees to indemnify the lender for any problems that arise from the closing agent's failure to properly apply the funds, as set forth in the closing instructions, and the

title insurance commitment." *Bergin Fin., Inc. v. First Am. Title Co.,* 397 F. App'x 119, 125 (6th Cir. 2010) (quoting *Ticor Title Ins. Co. v. Nat'l Abstract Agency, Inc.,* No. 05-CV-73709-DT, 2008 WL 2157046, at *5 (E.D. Mich. May 22, 2008)). Conversely, a title insurance policy "insures only that the title to such property is unencumbered by unknown liens, easements, and the like which might affect the property's value." *First Fed. Sav. & Loan Ass'n v. Transamerica Title Ins. Co.,* 19 F.3d 528, 530 (10th Cir. 1994). The district court was thus correct that "closing protection letters and title policies protect against entirely different risks."

After making this finding, the district court acknowledged that the *New Freedom*, *Hirota*, and *Lawyer's Title* courts "were never specifically asked to rule on whether an addressee could bring a closing protection letter claim independent of a claim under a related title policy." The district court nonetheless found those cases "persuasive because they establish that the coverage afforded under the letter is wholly separate from the coverage under a title policy." We agree with the district court that the "protections under the instant CPL are not supplemental or ancillary to the Title Policy." The district court therefore did not err when it found that, in general, a party can bring a breach of contract claim on a CPL independent of the related title insurance policy.

First American argues, however, that the plain language of the CPL at issue here "expressly dictates that its rights can only be held by the owner of the title policy." Appellant Br. at 35. To support this argument, First American relies on the following language in the opening paragraph of the CPL:

> When title insurance of First American Title Insurance Company is specified for your protection or the protection of a purchase from you in connection with closings of real estate transactions on land located in the state of Michigan in which you are to be the seller or purchaser of an interest in the land or a lender secured by a mortgage (including any other security instrument) of an interest in land . . . .

We disagree that this language prohibits the FDIC from bringing a claim for breach of the CPL.

The introductory language on which First American relies does not prevent the FDIC from bringing a claim for breach of the CPL because WaMu satisfied the requirements identified there, and the FDIC stepped into WaMu's shoes by operation of law. At the time First American issued [*580] the CPL to WaMu, a First American title policy was "specified for [WaMu's] protection." WaMu was also "to be . . . a lender secured by a mortgage . . . of an interest in land." Subsequently, when the FDIC took WaMu into receivership, the FDIC "succeed[ed] to . . . all rights, titles, powers, and privileges of" WaMu. *12 U.S.C. § 1821(d)(2)(A)(i)*. The FDIC accordingly had all the same rights as WaMu in the CPL, and it may bring a breach of contract claim based on that document.

The FDIC's subsequent sale of the loan and title insurance commitment from the Truong transaction to Chase likewise does not prevent the FDIC from bringing a breach of contract claim on the CPL. The CPL explicitly grants rights to WaMu and "its successors and/or assigns as their interest may appear." As WaMu's Receiver and successor, this

language grants rights to the FDIC. No language in the CPL "provides that WaMu would lose its indemnification rights if it subsequently sold the Truong Loan and Title Policy," so the sale of the loan and title insurance commitment did not change the FDIC's rights under the CPL. *See* P & A Agreement, Schedule 3.5, § 2. The district court therefore did not err when it found that the FDIC is eligible to recover under the CPL at issue here.

2.

We will consider First American's second and third attacks on the district court's grant of summary judgment together because those arguments are closely related. First American contends that the district court erred by relying on the FDIC-Chase stipulation concerning ownership of the CPL rather than interpreting the P & A Agreement. It also argues that the P & A Agreement unambiguously transferred the CPL at issue here from the FDIC to Chase, depriving the FDIC of standing to sue on the CPL.

Addressing First American's affirmative defense that the FDIC lacked standing to sue on the CPL in its order granting in part and denying in part the FDIC's motion for summary judgment, the district court reasoned:

> Based on its own interpretation of the P & A Agreement, First American contends that FDIC sold the CPL claim to Chase and FDIC has no standing to bring suit. The Court declines to visit the interpretation issues because First American has not shown how it escapes the well-established rule that a stranger to a contract has no standing to challenge the parties'

> mutual understanding of their own contract. *See City of Grosse Pointe Park v. Michigan Municipal Liability and Property Pool,* 473 Mich. 188, 702 N.W.2d 106, 114 (2005). FDIC and Chase agree that FDIC retained the CPL claim and have signed a Stipulation acknowledging the same. (Doc. 108 Ex. A). The Court will not interfere with the parties' intent. *See Rasheed*, 517 N.W.2d at 29 n. 28; *UAW-GM Human Resource Center v. KSL Recreation Corp.,* 228 Mich. App. 486, 579 N.W.2d 411, 414 (1998).

But the district court should not have relied on Michigan law because the P & A Agreement expressly provides: "THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE FEDERAL LAW OF THE UNITED STATES OF AMERICA . . . ." This Court follows *section 187 of the Restatement (Second) of Conflicts of Laws* when determining whether to give effect to a choice of law provision in a contract. *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden,* 448 F.3d 918, 922-23 (6th Cir. 2006) ("In the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflicts of Law[s] . . . ." (quoting *Med. Mutual of Ohio v. deSoto,* 245 F.3d 561, 570 (6th Cir. 2001) (internal quotation marks omitted))). Because "the particular issue is one which the parties could have resolved by an explicit provision in their agreement" and there is a "reasonable basis for the parties' choice" of federal law, the district court should have followed the choice of law provision and applied federal law when considering the P & A Agreement. *Restatement (Second) Conflicts of Laws § 187(1), (2)(a).* The

district court's error in applying Michigan law is not a reversible one, however, because applying federal law yields the same result. *See City Mgmt. Corp. v. U.S. Chem. Co.,* 43 F.3d 244, 251 (6th Cir. 1994) (citing *Hilliard v. U.S. Postal Serv.,* 814 F.2d 325, 326 (6th Cir. 1987)) "[W]e may affirm on any grounds supported by the record, even though they may be different from the grounds relied on by the district court.").

Section 13.5 of the P & A Agreement expressly provides that the contract should not be construed "to give any Person other than the Receiver, the Corporation and the Assuming Bank any legal or equitable right, remedy or claim under or with respect to this Agreement or any provisions contained herein." Based on this language, our sister circuits uniformly have held that parties attempting to rely on the P & A Agreement to invoke a court's jurisdiction lack prudential standing to do so because they are neither parties to nor third-party beneficiaries of the agreement. *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, Nat'l Ass'n,* No. 12-3302-CV, 2014 WL 401303, at *3-5 (2d Cir. Feb. 4, 2014) ("We conclude that Hillside does not have prudential standing in this case because it cannot enforce the terms of the [P & A Agreement], as to which it is neither a party nor a third-party beneficiary, but the enforcement of which is a necessary component of its claim."); *Excel Willowbrook, LLC v. JP Morgan Chase Bank, Nat'l Ass'n,* 740 F.3d 972, 979 (5th Cir. 2014) (reasoning that "the interest of maintaining uniformity in the construction and enforcement of federal contracts–an area where uniformity is critical–" required holding that plaintiffs were not intended beneficiaries of the

P & A Agreement); *Interface Kanner, LLC v. JPMorgan Chase Bank, N.A.,* 704 F.3d 927, 933 (11th Cir. 2013) ("We . . . find that the P & A Agreement does not provide a 'clear intent' to benefit Interface. Thus, we conclude that Interface is not an intended third-party beneficiary to the P & A Agreement and cannot sue to enforce it."); *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JP Morgan Chase Bank, Nat'l Ass'n,* 671 F.3d 1027, 1036 (9th Cir. 2012) ("Because GE is not an intended third-party beneficiary of the P & A Agreement, GE has no enforceable rights under that contract.").

More analogous to the present case, however, is the D.C. Circuit's decision in *Deutsche Bank National Trust Co. v. FDIC,* 717 F.3d 189, 405 U.S. App. D.C. 130 (D.C. Cir. 2013), where the court addressed the prudential standing of a proposed intervenor rather than a plaintiff. *Id.* at 194 ("Of course, appellants are seeking to intervene, not to bring a cause of action under the Agreement itself."). The D.C. Circuit reasoned that the intervenors lacked prudential standing because "[i]nsofar as the Proposed Intervenors wish to be heard on the specific question of contract interpretation, they are effectively seeking to enforce the rights of third parties (here, the FDIC), which the doctrine of prudential standing prohibits." *Id.* We find this reasoning persuasive and equally applicable to a defendant asserting an affirmative defense. Accepting First American's argument that it has standing to be heard on the issue of contract interpretation here would allow it to assert Chase's right to claim ownership of the CPL under the P & A Agreement. Because First American is neither a party to nor a third-party beneficiary of the P & A

Agreement, it lacks prudential standing to challenge the FDIC's and Chase's understanding of their own contract. *See id*. The district court therefore did not commit reversible error when it granted summary judgment to the FDIC on the issue of liability for breach of the CPL.

B.

We now turn to First American's arguments attacking the jury's verdict. First American alleges that the verdict was the product of speculation based on an inadmissible hearsay document, that it imposed double liability on First American, and that it improperly included a jury-determined amount of pre-complaint interest.

1.

During the jury trial, the FDIC relied heavily on a spreadsheet containing WaMu loan data, Plaintiff's Exhibit 7 ("PX7"), to prove its actual loss. The district court admitted the spreadsheet into evidence as a self-authenticating business record under *Federal Rule of Evidence 902(11)* and as an exception to the rule against hearsay under *Federal Rule of Evidence 803(6).* First American argues that the FDIC did not properly certify the record and that the record does not have the required indicia of trustworthiness to qualify as a hearsay exception. We review a district court's evidentiary rulings for abuse of discretion. *Harlamert v. World Finer Foods, Inc.,* 489 F.3d 767, 773 (6th Cir. 2007). We will reverse only if "the ruling is based on 'an erroneous view of the law or a clearly erroneous assessment of the evidence.'" *United States v. Dotson,* 715 F.3d 576, 582 (6th Cir. 2013) (quoting *United States v. Semrau,* 693 F.3d 510, 520 (6th Cir. 2012)).

The district court considered the contents of the declaration of Matthew C. Horvat, Vice President and Applications Developer for Chase, that the FDIC presented as certification of the business record-as well as the trial testimony of Horvat's former supervisor, Jean Wojciechowski, a Vice President of Finance at Chase--and found the declaration sufficient to establish that the loan data in PX7 was a business record first of WaMu and then of the FDIC. The district court properly considered Rules 902(11) and 803(6), and its assessment of Horvat's declaration and Wojciechowski's testimony was not clearly erroneous. *See Dotson,* 715 F.3d at 582 (quoting *Semrau,* 693 F.3d 520). Accordingly, the district court did not abuse its discretion when it admitted PX7 into evidence.

Additionally, PX7 constitutes adequate proof of the FDIC's "actual loss" based on Patriot's fraud. The parties do not dispute that WaMu wired $4,543,593.07 to Patriot in connection with the Truong transaction or that Patriot's owner, Saylor, diverted those funds for his own benefit. PX7 shows that at the time the FDIC took WaMu into receivership, the "book value" of the loan from the Truong was $2,677,500. After the FDIC received "book value" for the loan from Chase under the P&A Agreement, the FDIC was still $1,866,093.07 short of the amount Saylor fraudulently misappropriated. The district court therefore did not err when it found that "Patriot Title's fraud was the most direct, natural, and foreseeable cause of WaMu's loss," and that the jury's verdict was based on more than speculation.

2.

First American next argues that the district court committed a clerical error that subjects First American to double liability; namely, miscalculating the value that Chase received from First American following the court-appointed Receiver's sale of the Bellerive property involved in the Truong transaction. This argument lacks merit.

The court-appointed Receiver transferred $1,909,732.90 to Chase after selling the Bellerive property. The jury verdict entered by the district court in favor of the FDIC was for $2,263,510.78. First American's total liability to both parties, then, was $4,173,243.68, which is less than the $4,543,593.07 that WaMu transferred to Patriot for the Truong transaction. The district court therefore did not commit a clerical error that subjects First American to double liability.

3.

First American's final attack on the jury's verdict concerns the calculation of pre-complaint interest. According to First American, pre-complaint interest is an issue committed to the discretion of the trial judge, and the district court's decision to place responsibility for calculating pre-complaint interest in the hands of the jury constitutes reversible error.

Initially, we must address the FDIC's contention that First American forfeited this argument on appeal by not developing it fully in the briefing. Although First American's briefing includes only a few paragraphs discussing pre-complaint interest, First American did cite to and address the district court's actions as well as assert an argument, however limited, for reversal. *Cf. Langley v.*

DaimlerChrysler Corp., 502 F.3d 475, 483 (6th Cir. 2007) ("In her briefs, Langley failed to discuss or cite to the district court's analysis in any detail. . . . As Langley has not addressed the controlling issues or only 'adverted to [them] in a perfunctory manner, unaccompanied by some effort at developed argumentation,' she has waived them." (quoting *Indeck Energy Servs., Inc. v. Consumers Energy Co.,* 250 F.3d 972, 979 (6th Cir. 2000))). We therefore disagree with the FDIC that First American forfeited this argument.

In its primary brief, First American cites cases involving the application of only federal law, rather than cases applying Michigan law. *See Wickham Contracting Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers,* 955 F.2d 831, 833-34 (2d Cir. 1992) (stating that "discretionary awards of prejudgment interest . . . under federal law" are based on a four-factor analysis); *EEOC v. Wooster Brush Co. Emps. Relief Ass'n,* 727 F.2d 566, 579 (6th Cir. 1984) (reasoning that awards of prejudgment interest in Title VII cases are within the discretion of the trial court "in the absence of a statutory provision to the contrary"); *Goldman v. Healthcare Mgmt. Sys., Inc.,* 559 F. Supp. 2d 853, 865 (W.D. Mich. 2008) (addressing the availability of prejudgment interest under the Copyright Act). This Court's precedents, however, clearly state: "[P]rejudgment interest is a substantive aspect of damages in a diversity case and is thus properly viewed as a matter of state law." *Diggs v. Pepsi-Cola Metro. Bottling Co.,* 861 F.2d 914, 924 (6th Cir. 1988) (quoting *Bailey v. Chattem, Inc.,* 838 F.2d 149, 152 (6th Cir. 1988)) (internal quotation marks omitted); *see also Jack Henry & Assocs. v. BSC, Inc.,* 487 F. App'x 246, 257 (6th Cir. 2012) (same).

We therefore look to Michigan law, "the law of the state that governs the cause of action," *Jack Henry & Assocs.,* 487 F. App'x at 257 (citing *FDIC v. First Heights Bank, FSB,* 229 F.3d 528, 542-43 (6th Cir. 2000)), to determine whether the district court erred when it allowed the jury to determine the amount of pre-complaint interest. We review de novo the district court's application of state law in a diversity suit. *Salve Regina Coll. v. Russell,* 499 U.S. 225, 231, (1991) ("We conclude that a court of appeals should review *de novo* a district court's determination of state law.").

"Generally, Michigan courts have included [pre-complaint] interest as an element of damages as a matter of right where the amount claimed is liquidated." *Jones v. Lothamer.*, 819 F. Supp. 1382, 1383 (W.D. Mich. 1993) (citing *Cree Coach Co. v. Wolverine Ins. Co.,* 115 N.W.2d 400 (Mich. 1962); *Gordon Sel-Way, Inc. v. Spence Bros., Inc.,* 177 Mich. App. 116, 440 N.W.2d 907 (Mich. Ct. App. 1989); *Banish v. City of Hamtramck,* 9 Mich. App. 381, 157 N.W.2d 445 (Mich. Ct. App. 1968)). Damages are liquidated "where 'the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law.'" *Kenneth Henes Special Projects Procurement v. Cont'l Biomass Indus.,* 86 F. Supp. 2d 721, 738 (E.D. Mich. 2000) (quoting *Holland v. Earl F. Graves Publ'g Co.,* 33 F. Supp. 2d 581, 583 (E.D. Mich. 1998)).

The district court overruled First American's objection "to the issue of pre-complaint interesting being presented to the jury or being considered by the jury." In overruling that objection, the district court stated:

> The Court finds that the actual loss which is given a very expansive reading -- or expansive definition would include the pre-complaint interest. I also believe that under Michigan law, at least from my experience, and as a trial judge in Michigan, that this is clearly a case where pre-complaint interest may be awarded because it is easily calculable, there really is not much of a math situation here, and I do think if this were a state court case it would be allowed, and I think I should allow it here, so I'm going allow the issue to go to the jury.

The district court correctly applied Michigan law when it reasoned that the FDIC's damages would include pre-complaint interest as a matter of right if the amount of damages were easily calculable, or liquidated. *See Jones*, 819 F. Supp. at 1383. We agree with the district court that the amount of damages in this case was easily calculable. The lower court determined the maximum amount of First American's liability to the FDIC based on simple arithmetic: damages equal the total amount of the loan from the Truong transaction minus the book value WaMu received from Chase. Because the damages in this case are liquidated, the district court did not err when it submitted the issue of pre-complaint interest to the jury.

C.

Finally, First American argues that the district court erred when it denied First American's *Rule 60(b)(2)* motion for relief from judgment based on newly discovered evidence. We review for abuse of discretion a district court's decision to deny a *Rule 60(b)* motion for relief from judgment. *Doe v.*

Lexington-Fayette Urban Cnty. Gov't, 407 F.3d 755, 760 (6th Cir. 2005). This Court will reverse only if we have "a definite and firm conviction that the trial court committed a clear error of judgment." *Id.* (quoting *Davis v. Jellico Comm. Hosp., Inc.,* 912 F.2d 129, 133 (6th Cir. 1990)). To prevail on a *Rule 60(b)(2)* motion, "a 'movant must demonstrate (1) that it exercised due diligence in obtaining the information and (2) [that] the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment.'" *HDC, LLC v. City of Ann Arbor,* 675 F.3d 608, 615 (6th Cir. 2012) (alteration in original) (quoting *Good v. Ohio Edison Co.,* 149 F.3d 413, 423 (6th Cir. 1998)). First American thus has the burden to prove its entitlement to relief under *Rule 60(b)* by clear and convincing evidence. *Info-Hold, Inc. v. Sound Merch., Inc.,* 538 F.3d 448, 454 (6th Cir. 2008).

Even assuming that it satisfies the first requirement for *Rule 60(b)(2)* relief, First American cannot meet the second requirement that the "evidence [be] material and controlling and clearly would have produced a different result." *HDC*, 675 F.3d at 615 (quoting *Good,* 149 F.3d at 423). In its *Rule 60(b)(2)* motion, First American relied on evidence that Chase had taken inconsistent positions *in pleadings* in other federal and state court cases regarding ownership of WaMu CPLs. The evidence submitted with the *Rule 60(b)(2)* motion is not controlling because it is not mandatory authority and does not call into question the FDIC's consistent position throughout this litigation that it owned the CPL. Such evidence therefore would not have produced a different result at the summary judgment stage. Because we do not "have 'a definite conviction

that the [district] court committed a clear error of judgment,'" *Doe*, 407 F.3d at 760 (quoting *Davis,* 912 F.2d at 133), the district court did not abuse its discretion when it denied First American's *Rule 60(b)(2)* motion.

III.

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JP MORGAN CHASE BANK, N.A.,

Plaintiff,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,

Intervenor Plaintiff,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant.

_______________________________/

CASE NO. 09-14891

HON. MARIANNE O. BATTANI

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT BASED ON NEW EVIDENCE

This matter is before the Court on Defendant First American Title Insurance Company's ("FATICO") Rule 60(b) Motion for Relief from Judgment Based on Newly Discovered Evidence. (Doc. 179). FATICO argues JP Morgan Chase's ("Chase") attempts to recover under similar closing protection letters ("CPLs") in subsequent litigation is evidence

inconsistent with the stipulation between Chase and Plaintiff Federal Deposit Insurance Corporation ("FDIC") indicating that FDIC owned the CPL at issue. For the reasons stated below, the Court **DENIES** Defendant's motion.

I. STATEMENT OF FACTS

A. Condensed Facts from Court's Opinion Dated June 10, 2011

FATICO is a title insurance carrier authorized to issue title policies in Michigan. FATICO issues policies through a network of "issuing agents" authorized to bind it to policies. Patriot Title Agency LLC ("Patriot Title") was one of FATICO's issuing agents during the relevant period.

On September 10, 2007, Patriot Title closed a real estate transaction in which Washington Mutual Bank ("WaMu") loaned Ha Truong $4.5 Million ("the Truong Loan") for the purchase of a luxury home in Grosse Ile Township, Michigan ("the Property"). FATICO authorized Patriot Title to issue FATICO title insurance commitments and acted as FATICO's "issuing" agent during this transaction. Patriot Title also acted as the "closing agent."

FATICO issued a CPL to WaMu in connection with the Truong Loan. The CPL contained FATICO's promise that if Patriot Title engaged in fraud with respect to WaMu's loan funds, then FATICO would "reimburse" WaMu for its "actual loss." In March 2008, FATICO discovered that Patriot Title fraudulently procured and closed the Truong Loan. After an investigation prompted by numerous complaints regarding Patriot Title, FATICO learned that Patriot Title, via its principal officer Randy Saylor, created a fictitious entity to act as the "seller,"

recruited Truong to act as a sham "buyer," and absconded with more than $4.5 million after WaMu wired the funds into Patriot Title's escrow account. As a result of Patriot Title's fraud, WaMu did not obtain an effective mortgage lien on the Property, there was no recorded deed vesting title in Truong, and a prior mortgage on the Property had not been discharged. In order to remedy the apparent title defects, FATICO acquired title and possession of the Property in June 2008.

In September 2008, the Office of Thrift Supervision took over WaMu for lack of adequate liquidity. FDIC was appointed as WaMu's receiver and immediately sold a majority of WaMu's assets to JP Morgan Chase Bank. The agreement between FDIC and Chase was set forth in a single form document known as the Purchase & Assumption Agreement ("P&A Agreement"). (Doc. 67 Ex. D). Chase acquired the Truong Loan and related Title Policy under the P&A Agreement. To extinguish any possible claims that Chase could bring under the Title Policy, FATICO tendered a quitclaim deed for the Property to Chase. Chase refused to accept, maintaining that it was entitled to monetary damages under the Policy.

On December 16, 2009, FATICO filed suit against Chase in the Wayne County Circuit Court seeking a declaration that it had fulfilled its obligations under the Title Policy, and redress for Chase's alleged breach of contract. (09-14915 Doc.1). The next day, Chase sued FATICO in this Court for breach of contract, fraud, misrepresentation, and sought declaratory relief as to FATICO's obligations under the Title Policy. (Doc. 1). Chase removed FATICO's

state court action to this Court and the two actions were consolidated.

In April 2010, FDIC moved to intervene and filed suit against FATICO to enforce the CPL. (Doc. 25). Chase and FDIC stipulated ("Ownership Stipulation") that Chase did not acquire WaMu's CPL claim under the P&A Agreement. (Doc. 108 Ex. A). On June 16, 2011, the Court issued an Opinion in which it found that FATICO was liable to FDIC under the CPL, but found there was a fact question on the amount of FDIC's damages. The Court entered a Judgment in favor of the FDIC on January 30, 2012 for $2,263,510.78 after a jury trial regarding damages. (Doc. 150).

B. Additional Facts Pertinent to 60(b) Motion

FATICO filed the instant Rule 60(b) motion asserting that Chase's subsequent attempts to recover under similar CPLs acquired from WaMu prove the Ownership Stipulation invalid. FATICO cites two situations:

(1) *Murillo v. Wash. Mut. Bank*, Case No. 10-13100 (E.D. Mich), in which FATICO received a letter from Chase requesting FATICO to "defend and indemnify" Chase pursuant to a CPL that FATICO issued to WaMu, and

(2) *JP Morgan Chase Bank v. Attorneys' Title Ins. Fund*, (Florida), in which Chase attempts to enforce a CPL that Attorneys' Title issued to WaMu.

(Doc. 179 Exs. A, B). Thus, contrary to the Ownership Stipulation, FATICO asserts FDIC does not own the CPL at issue in this case, thereby entitling FATICO to relief from the Court's judgment.

II. ANALYSIS

Federal Rule of Civil Procedure 60(b) permits a court to "relieve a party . . . from final judgment, order, or proceeding" as a result of "newly discovered evidence." In order to succeed on a Rule 60(b) motion, the moving party must demonstrate that the newly discovered evidence "clearly would have produced a different result," and that it exercised due diligence in discovering the evidence. *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998). The party must also demonstrate that the evidence existed at the time of trial and is admissible. *See Davis v. Jellico Cmty. Hosp.*, 912 F.2d 129, 136 (6th Cir. 1990).

Perhaps the most important question is whether the two cases discovered by FATICO would have resulted in a different outcome if presented before the summary judgment proceedings. FATICO argues these subsequent cases provide evidence that FDIC did not retain ownership of the CPLs in the P&A Agreement; therefore, the Court would not have granted summary judgment in favor of FDIC. Conversely, FDIC argues that even if this evidence was presented to the Court during its determination of summary judgment, the Court's decision would stand based on the consistent position of FDIC in numerous other cases.

Significantly, neither case cited by FATICO affects the controlling language of the P&A Agreement between Chase and FDIC. Although the P&A specifically lists certain assets not purchased by Chase (Doc. 108 Ex. A, p. 37), the Court has previously declined to interfere with the parties' intent, noting the general rule that a nonparty to a contract has "no standing to challenge the parties'

mutual understanding of their own contract." (Doc. 118 at 13) (citing *City of Grosse Pointe Park v. Michigan Mun. Liab. And Prop. Pool*, 702 N.W.2d 106, 114 (Mich. 2005)). In addition, the assistant director for the Strategic Operations Department of FDIC testified at his deposition that as receiver, the FDIC always retains claims involving fraud, such as the CPL at issue. (Doc. 99 Ex. E, p. 55-57).

At the hearing, counsel for FATICO argued that the inconsistent positions by Chase in subsequent litigation cannot be ignored by the Court, especially since the same firm has represented Chase in these actions. He maintained that this demonstrates Chase's state of mind when entering into the Ownership Stipulation; namely, that FDIC retained ownership only for purposes of the instant action. This argument is flawed for several reasons.

First, FDIC provided evidence of its consistent position that it retained CPLs in the P&A Agreement. On November 5, 2009 (before this case was filed), FDIC filed a joint motion with JP Morgan Chase in *Attorneys' Title Insurance Fund v. Washington Mutual Bank* (Florida) asserting that "JP Morgan [Chase] agrees with the FDIC that the claims involving the CPLs are excluded from the assets purchased by JP Morgan [Chase] and that the FDIC, not JP Morgan [Chase], is the real party in interest as it pertains to those claims." (Doc. 95 Ex. F, p. 4, ¶ 7). Moreover, Chase took the same position when filing the complaint in the case at hand: "The FDIC owns the rights of a certain closing protection letter claim against [FATICO]. Upon information and belief, the FDIC will be pursuing the [CPL] claim in these proceedings or separately." (Doc. 1 at ¶ 2 n.1).

In fact, this has been the consistent position of the FDIC throughout this case and many others. *See FDIC v. Attorneys' Title Ins. Fund, Inc.*, Case No. 12-23599 (S.D. Fla. 2012); *FDIC v. Stewart Title Guar. Co.*, Case No. 12-2244 (M.D. Fla. 2012); *FDIC v. First Am. Title Ins. Co.*, Case No. 12-2245 (M.D. Fla. 2012); *FDIC v. Old. Republic Nat'l Title Ins. Co.*, Case No. 12-81172 (S.D. Fla. 2012). At the hearing, counsel for FDIC stressed at least thirty-one other cases in which FDIC has pursued similar CPL claims.

Second, FATICO's evidence of Chase's inconsistent positions regarding ownership of the CPLs is not dispositive on the issue of FDIC's position. FDIC has been consistent in its assertion that it retained the WaMu CPLs in the P&A Agreement, and its actions demonstrate this fact. Moreover, there is evidence indicating that it is standard practice for the FDIC to retain ownership of this type of CPL when negotiating a P&A Agreement. The mere fact Chase has filed suits attempting to recover under similar CPLs does not call into question FDIC's intent regarding the P&A Agreement.

Third, FATICO's assertion that the same law firm has been complicit in carrying out Chase's inconsistent litigation position is overstated. Specifically, FATICO asserts this constitutes evidence that the two cited cases are not merely mistakes on the part of Chase, as suggested by FDIC. Only *Murillo* involved the same firm that represented Chase in this matter, and involves a suit against Chase for breach of contract arising out of WaMu's failure to provide plaintiff with closing documents. (10-13100 Doc. 1) In its Motion for Judgment on the Pleadings, Chase asserts that FDIC

was the proper defendant because in the P&A Agreement, Chase did not assume liability for misconduct of WaMu. (10-13100 Doc. 44). It would be bizarre if FDIC retained certain liabilities of WaMu, but chose to preclude itself from protection under CPLs surrounding those liabilities by transferring them to Chase. Moreover, the demand letter sent in connection with *Murillo*, although questionable, is not sufficient evidence to vitiate the Ownership Stipulation entered into here. (Doc. 179 Ex. A). It appears FDIC may be the proper defendant in *Murillo*, as well as the proper party to demand indemnification from FATICO.

Even with the Court's knowledge of these inconsistent cases filed by Chase, the Court would not have changed its decision regarding FDIC's ownership of the CPLs given its history of consistent intervention in similar actions. In light of the frequency in which parties endorse inconsistent positions coupled with the constant threat of never-ending litigation, Rule 60(b) motions are purposefully "circumscribed by interests in finality and the termination of litigation." *Park West Galleries, Inc. v. Hochman*, 692 F.3d 539, 545 n.3 (6th Cir. 2012) (citing *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 468 (6th Cir. 2007)). Consequently, FATICO fails to meet a necessary element of Rule 60(b), and the Court finds it unnecessary to continue its inquiry.

III. CONCLUSION

Accordingly, the Court **DENIES** Defendant's motion.

IT IS SO ORDERED.

s/Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES
DISTRICT JUDGE

DATE: January 31, 2013

CERTIFICATE OF SERVICE

I hereby certify that on the above date a copy of this Order was served upon all parties of record, electronically.

s/Bernadette M. Thebolt
Case Manager

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JP MORGAN CHASE BANK, N.A.,

Plaintiff,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,

Intervenor Plaintiff,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant / Intervenor Defendant.

_____________________________/

CASE NO. 09-14891

HON. MARIANNE O. BATTANI

JUDGMENT

The Court having held a jury trial to determine damages in the matter between Plaintiff Federal Deposit Insurance Corporation and Defendant First American Title Insurance Company, and on December 1, 2011, the jury having returned a unanimous verdict in favor of Plaintiff Federal Deposit Insurance Corporation, as receiver for Washington Mutual Bank, in the amount of $2,263,510.78,

IT IS HEREBY ORDERED that Defendant First American Title Insurance Company pay Plaintiff Federal Deposit Insurance Corporation $2,263,510.78 as damages in this case.

IT IS FURTHER ORDERED that Defendant First American Title Insurance Company pay Plaintiff Federal Deposit Insurance Corporation for all costs pursuant to Fed. R. Civ. P. 54(d)(1) and Eastern District of Michigan Local Rule 54.1.

IT IS FURTHER ORDERED that Defendant First American Title Insurance Company pay Plaintiff Federal Deposit Insurance Corporation post-complaint pre-judgment interest pursuant to the rate set forth in 28 U.S.C. § 1961, plus accruing post-judgment interest on the total judgment under 28 U.S.C. § 1961.

IT IS FURTHER ORDERED that this Court will retain jurisdiction of this matter to effectuate the terms of this Judgment.

s/Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES
DISTRICT JUDGE

DATE: January 30, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the above date a copy of this Order was served upon all parties of record, via the Court's ECF System.

s/Bernadette M. Thebolt
Case Manager

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

JP MORGAN CHASE BANK, N.A., Plaintiff, and FEDERAL DEPOSIT INSURANCE CORPORATION, Intervenor Plaintiff, v. FIRST AMERICAN TITLE INSURANCE COMPANY Defendant / Intervenor Defendant	Case No. 09-14891 HON. MARIANNE O. BATTANI

OPINION AND ORDER DENYING FIRST AMERICAN'S FIRST AND SECOND MOTIONS FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART FEDERAL DEPOSIT INSURANCE CORPORATION'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Intervening Defendant American Title Insurance Company's ("First American") First and Second Motions for Summary Judgment (Doc. 67; Doc. 97) and Intervening Plaintiff Federal Deposit Insurance Corporation's ("FDIC") Motion for Summary

Judgment (Doc. 99). As receiver for Washington Mutual ("WaMu"), FDIC brings an indemnification claim against First American pursuant to a Closing Protection Letter ("CPL") that First American issued to WaMu in connection with a residential loan WaMu made to Ha Truong. First American argues that FDIC does not have standing to assert a claim under that CPL, and even if it did, it has not suffered any indemnifiable "actual loss." FDIC contends that it has standing, First American has admitted facts that establish liability, and WaMu has suffered "actual loss" in excess of $1.7 million. For the reasons that follow, the Court **DENIES** First American's motions and **GRANTS IN PART and DENIES IN PART** FDIC's motion. Specifically, FDIC's motion is granted as to liability, but denied as to damages.

I. STATEMENT OF FACTS

First American is a title insurance carrier that is authorized to issue title policies in Michigan. First American issues policies through a network of "issuing agents" authorized to bind it to policies. Patriot Title Agency LLC ("Patriot Title") was one of First American's issuing agents during the relevant period.

On September 10, 2007, Patriot Title closed a real estate transaction in which WaMu loaned Ha Truong $4.5 Million ("the Truong Loan") for the purchase of a luxury home in Grosse Ile Township, Michigan ("the Property"). First American authorized Patriot Title to issue First American title insurance commitments and acted as First American's "issuing" agent during this transaction. Patriot Title also acted as the "closing agent."

First American issued a CPL to WaMu in connection with the Truong Loan. The CPL contained First American's promise that if Patriot Title engaged in fraud with respect to WaMu's loan funds, then First American would "reimburse" WaMu for its "actual loss." Addressed to WaMu and "its successors and/or assigns as their interest may appear," the CPL provides:

> When title insurance of First American Title Insurance Company is specified for your protection . . . in connection with closings of real estate transactions on land located in the state of Michigan in which you are to be . . . a lender secured by a mortgage . . . the Company, subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with such closings when conducted by the Issuing Agent. . . referenced herein and when such loss arises out of: . . .
>
> 2. Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings.

(Doc. 99 Ex. A). In addition to the CPL, Patriot Title also issued to WaMu a Commitment to provide it with a First American Title Insurance Policy ("Title Policy").[1]

In March 2008, First American discovered that Patriot Title fraudulently procured and closed the

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[1] First American explains that it never issued a title policy to WaMu pursuant to the Commitment. For the purposes of this motion, the parties, and the Court, assume a policy should have been issued. (Doc. 107 at 4 n.2).

Truong Loan. After an investigation that was prompted by numerous complaints regarding Patriot Title, First American learned that Patriot Title, via its principal officer Randy Saylor, created a fictitious entity to act as the "seller," recruited Truong to act as a sham "buyer," and absconded with more than $4.5 million after WaMu wired the funds into Patriot Title's escrow account. As a result of Patriot Title's fraud, WaMu did not obtain an effective mortgage lien on the Property, there was no recorded deed vesting title in Truong, and a prior mortgage on the Property had not been discharged. In order to remedy the apparent title defects, First American acquired title and possession of the Property in June 2008.

In September 2008, the Office of Thrift Supervision took over WaMu for lack of adequate liquidity. FDIC was appointed as WaMu's receiver and immediately sold a majority of WaMu's assets to J.P. Morgan Chase Bank ("Chase"). The agreement between FDIC and Chase was set forth in a single form document known as the Purchase & Assumption Agreement (the "P&A Agreement"). (Doc. 67 Ex. D). Chase acquired the Truong Loan and related Title Policy under the P&A Agreement. To extinguish any possible claims that Chase could bring under the Title Policy, First American tendered a quitclaim deed for the Property to Chase. Chase refused to accept, maintaining that it was entitled to monetary damages under the Policy.

On December 16, 2009, First American filed suit against Chase in the Wayne County Circuit Court seeking a declaration that it had fulfilled its obligations under the Title Policy, and redress for

Chase's alleged breach of contract. (09-14915 Doc.1). The next day, Chase sued First American in this Court for breach of contract, fraud, misrepresentation, and sought declaratory relief as to First American's obligations under the Title Policy. (Doc. 1). Chase removed First American's state court action to this Court and the two actions were consolidated.

In April 2010, FDIC moved to intervene and filed suit against First American to enforce the CPL. (Doc. 25). Chase and FDIC have stipulated that Chase did not acquire WaMu's CPL claim under the P&A Agreement. (Doc. 108 Ex. A). On April 11, 2011, the Court entered a Stipulated Order of Dismissal With Prejudice Of Claims Between Chase and First American. (Doc. 116). The Stipulation did not resolve FDIC's CPL claim against First American. The parties' cross motions for summary judgment are now before the Court.

II. STANDARD OF REVIEW

Summary judgment is appropriate only when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. Pro*. 56(a). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-52, (1986). Rule 56 mandates summary judgment against a party who fails to establish the existence of an element essential to the party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, (1986).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The Court "must lend credence" to the non-moving party's interpretation of the disputed facts. *Marvin v. City of Taylor*, 509 F.3d 234, 238 (6th Cir. 2007) (citing *Scott v. Harris*, 127 S.Ct. 1769, 1775 (2007)). The non-moving party may not rest upon its mere allegations, but rather must set out specific facts showing a genuine issue for trial. *Fed. R. Civ. P.* 56(c)(1). The mere existence of a scintilla of evidence in support of the non-moving party's position will not suffice. Rather, there must be evidence on which the jury could reasonably find for the non-moving party. *Hopson v. DaimlerChrysler Corp.*, 306 F. 3d 427, 432 (6th Cir. 2002).

III. ANALYSIS

A. Standing

First American contends that FDIC lacks standing to bring a claim under the CPL because it no longer owns the related Title Policy. First American explains that its obligations under the CPL and Title Policy are integrated, and therefore, FDIC cannot "sever" the CPL from the Title Policy and maintain an independent CPL claim. The Court disagrees.

Title insurance underwriters generally issue title insurance policies through local "issuing agents." 2 JOYCE PALOMAR, TITLE INSURANCE LAW, § 20:11 (2010). The "issuing agents" typically close the underlying real estate sale and also act as the parties' "closing agents." *Id*. As is customary in the industry, the title insurance underwriter usually issues a closing protection letter in connection with the transaction "'[t]o verify the agent's authority to issue the underwriter's policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agent's errors or dishonesty with escrow or closing funds.'" *New Freedom Mortg. Corp. v. Globe Mortg. Corp*.("*New Freedom*"), 761 N.W.2d 832, 842 (Mich. App. 2008) (quoting PALOMAR, § 20:11). The closing protection letter is designed to persuade the underwriter's customers to trust their agents, thereby increasing policy sales. *Id*. at 842-43.

A closing protection letter is an indemnity agreement, not an insurance policy.[2] In a closing protection letter, "the underwriter agrees to indemnify the lender for any problems that arise from the closing agent's failure to properly apply the funds, as set forth in the closing instructions, and the title insurance commitment. *Bergin Financial, Inc. v. First American Title Co*. ("*Bergin*"), 397 Fed. Appx. 119, 125 (6th Cir. 2010) (quoting *Ticor Title Ins. Co. v. Nat'l Abstract Agency, Inc*., 2008 WL 2157046, at *5 (E.D. Mich. May 22, 2008); *see also*, *Freedom Mortg. Corp. v. Burnham Mortg., Inc*., 720 F. Supp.2d 978, 1003 (N.D. Ill. 2010) ("[T]he [closing protection letter]

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[2] FDIC and First American agree that a closing protection letter is a contract of indemnity. (Doc. 97 at 10; Doc. 108 at 11).

is a contract of indemnification and specific liability, not an insurance policy."). Consequently, the closing protection letter provides the addressee with certain additional assurances independent of the underwriter's duties under the title policy. J. BUSHNELL NIELSEN, TITLE & ESCROW CLAIMS GUIDE, § 14.1 (2d ed. 2007).

The additional assurances in a closing protection letter are separate and distinct from the coverage afforded under a title policy. A title policy "is merely a contract to indemnify the insured for any losses incurred as a result of later found defects in title . . . it insures only that the title to such property is unencumbered by unknown liens, easements, and the like which might affect the property's value." *First Fed. Sav. and Loan Assoc. v. Transamerica Title Ins. Co.*, 19 F.3d 528 (10th Cir. 1994); *see also Focus Inv. Assocs., Inc. v. American Title Ins. Co.*, 992 F.2d 1231, 1236-37 (1st Cir. 1993); *Gibraltar Sav. v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203, 1205 (8th Cir. 1990). Comparatively, the closing protection letter contains the underwriters promise to reimburse the addressee if loss results from an agent's failure to follow closing instructions or to apply settlement funds in a honest fashion. *New Freedom*, 761 N.W.2d at 842; *see also*, PALOMAR, § 20:16. The main purpose of a closing protection letter is to make underwriters contractually responsible for loss caused by their agent's misconduct at closing. *Bergin*, 397 F. App'x. at 125; *see also*, *Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co.*, 645 So.2d 295, 297 (Ala. 1993); PALOMAR, § 20:11. Thus, closing protection letters and title policies protect against entirely different risks.

The Michigan Court of Appeals recognized the coverage distinctions between a closing protection letter and a title policy in *New Freedom*. The plaintiff in *New Freedom*, a lender who held both a closing protection letter and the related title policy, sued the title insurer under the closing letter for losses sustained in connection with the issuing agent's failure to follow the plaintiff's closing instructions. *New Freedom*, 761 N. W.2d at 835. The appellate court affirmed the trial court's dismissal of the claim because the plaintiff failed to establish that the issuing agent's conduct at closing created liability under the terms of the letter. *Id*. at 845-46. In so holding, the court acknowledged that an aggrieved addressee can bring a closing protection letter claim independent of title policy issued in connection with the letter. *Id*. at 843. The court flatly stated that since the purchase of a title policy is the consideration that supports the insurer's promise in the letter, "a breach of contract action may be maintained independent of the title insurance policy." *Id*.

In addition to *New Freedom*, other courts have allowed an addressee to bring a closing protection letter claim independent of the title policy. In *Lehman Bros. Holdings, Inc. v. Hirota ("Hirota"),* 2007 WL 1471690 (M.D. Fla. 2007), the court held that the plaintiff, a lender holding both a closing protection letter and the related title policy, could proceed under the closing letter to collect losses sustained in connection with the title company's closing agents' alleged mortgage fraud scheme in which they induced the plaintiff to fund thirteen loans based on false information. Similarly, in *Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.*

("Lawyers Title"), 655 S.E.2d 269, 274 (Ga. App. 2007), the appellate court found that a title insurer is required to indemnify the addressee under a closing protection for losses incurred as a result of the title agent closing a sham transaction, provided the adressee can establish at trial that the agent acted with an intent to deceive. In both of these cases, neither plaintiff brought a claim against the title insurer under the related title policy. With the above discussion in mind, the Court returns to First American's argument.

The CPL is not integrated into the Title Policy because First American's indemnification obligations under the letter are separate and distinct from its duties under the Title Policy. *New Freedom*, *Hirota*, and *Lawyers Title* stand for the proposition that an addressee can bring a closing protection letter claim independent of the related title policy. The Court acknowledges that those courts were never specifically asked to rule on whether an addressee could bring a closing protection letter claim independent of a claim under the related title policy. The Court also notes that the plaintiffs in those cases held both a closing protection letter and a title policy. However, the opinions are nevertheless persuasive because they establish that the coverage afforded under the letter is wholly separate from the coverage under a title policy. *See also*, *Lawyers Title Ins. Corp. v. Edmar Const. Co., Inc.*, 294 A.2d 865 (D.C. 1972) (underwriter liable under a closing protection letter for its agent's embezzlement of closing funds even though underwriter never issued a title policy). The protections under the instant CPL are not supplemental or ancillary to the Title Policy, they cover an entirely different category of loss. "The

primary protection of the Letter remains as to the risk that the title agent or approved attorney will steal the money delivered to closing." NIELSEN, § 14.1. The protection offered in the CPL has nothing to do with title defects.

New Freedom precludes First American's contention that the CPL is not supported by consideration. The court in *New Freedom* expressly recognized that the purchase of a title policy is the consideration that supports the insurer's indemnification promise in a closing protection letter. *New Freedom*, 761 N.W.2d at 835. Accordingly, WaMu's purchase of the Title Policy is the consideration that supports First American's promise in the CPL to indemnify WaMu. The consideration does not evaporate simply because FDIC sold the Title Policy to Chase. First American could have tethered the CPL's protection to the Title Policy in the "Conditions and Exclusions" section of the letter, but it did not.

Contrary to its position, First American is not exposed to double liability under the circumstances presented. To satisfy its obligations to Chase under the Title Policy, First American acquired the Property from the record owner for $2,082,852.60 and tendered it to Chase. (Doc. 1 at 5; Doc. 84). Although Chase initially disputed whether First American could discharge its duties by tendering a quitclaim deed, after Chase sold the Property for $1,909,732.90, First American and Chase resolved the Title Policy claim. (Doc. 116). Under the CPL, FDIC is seeking $1,771,593.07 (plus interest), which is the difference between the book value of the Truong loan on the date of the sale to Chase and the original loan

amount. (Doc. 99 at 20). Assuming FDIC recovers this amount, First American's total liability would be $3,854,445.67, which is less than the $4.5 million its agent stole. (Doc. 99 at 3-5). Under the circumstances presented, there is no risk of double recovery because First American's aggregate liability under both the Title Policy and the CPL does not exceed the amount that WaMu entrusted to Patriot Title.

B. First American's Liability Under the CPL

1. FDIC's Eligibility

The parties dispute whether FDIC is eligible to receive indemnification offered under the terms of the CPL. "An indemnity contract is construed in the same manner as other contracts." *DaimlerChrysler Corp. v. G Tech Professional Staffing, Inc.*, 678 N.W.2d 647, 649 (Mich. App. 2003) (citations omitted). "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v. Chrysler Corp.*, 517 N.W.2d 19, 29 n. 28 (Mich. 1994). The intent of the parties is gleaned from the words used in the instrument. *UAW-GM Human Resource Center v. KSL Recreation Corp.*, 579 N.W.2d 411, 414 (Mich. App. 1998) (citation omitted). "[A]n unambiguous written indemnity contract must be enforced according to the plain and ordinary meaning of the words used in the instrument." *DaimlerChrysler*, 678 N.W.2d at 649 (citation omitted).[3]

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[3] FDIC and First American agree that the CPL is unambiguous. (Doc. 97 at 10; Doc. 108 at 10).

Seizing on the phrase "[w]hen title insurance of First American Title Insurance Company is specified for your protection . . . in connection with closings of real estate transactions . . . in which you are to be . . . a lender secured by a mortgage," First American argues that the CPL only protects a lender currently holding a mortgage that is insured under a First American policy. Since FDIC sold both the Truong Loan and Title Policy, it lost coverage under the CPL. FDIC responds by arguing that once the CPL's protections apply, nothing in the language of the CPL divests WaMu of indemnification rights because it sold the Loan and Title Policy to Chase. The Court agrees with FDIC.

First American issued the CPL to persuade WaMu to trust Patriot Title with over $4.5 million in connection with the closing of the Truong Loan. The CPL was executed *prior* to closing. The language of the CPL provides that coverage attached upon execution because WaMu was "to be" a lender holding a mortgage and the Commitment "specified" that First American would issue WaMu a title policy if certain conditions were satisfied. FDIC subsequently stepped into WaMu's shoes by operation of law and acquired WaMu's rights under the CPL. There is no provision in the CPL which provides that WaMu would lose its indemnification rights if it subsequently sold the Truong Loan and Title Policy. Consequently, FDIC did not forfeit WaMu's protections under the CPL. Moreover, even after the transfer, FDIC continues to have a significant interest in the underlying transaction because it sold the Loan to Chase at a loss attributable to Patriot Title's admitted fraud.

2. "Actual Loss"

The Court rejects First American's argument that WaMu has not suffered any "actual loss" as a result of Patriot Title's fraud. The CPL obligates First American to "reimburse" FDIC for its "actual loss" that "arises out of" the "[f]raud or dishonesty" of Patriot Title in handling the Loan funds. (Doc. 99 Ex. A). "It is well settled that an action for indemnity accrues when liability of the indemnitee becomes fixed (contract of indemnity against liability), or when the indemnitee has suffered an actual loss or damages (contract of indemnity against loss or damage). *Rouge Steel Co v. Suli & Sons Cartage Inc.*, 2004 WL 1621191, *2 (Mich. App. 2004) (citing *Sherman v. Spalding*, 132 Mich. 249, 251; 93 N.W. 613 (Mich. 1903).

First American admits that Patriot Title committed fraud by diverting WaMu's loan funds for the benefit of its principal. (Doc. 107 at 10). WaMu's "actual loss" was the $4,543,593.07 which was misappropriated. It recognized this loss pre-receivership. FDIC is willing to agree it recovered $2,772,000.00 of this amount from Chase under the P&A Agreement, which represents the "book value" for the Truong Loan. (Doc. 99 at 14). FDIC explains it reduced the Loan's "book value" by $1,771,593.07 because it discovered the fraud. *Id*. For the purposes of this motion, it seeks to collect the difference between the "book value" and original disbursement under the CPL. The CPL was designed to cover this type of loss.

To avoid this conclusion, First American asks the Court to shift the point at which the loss is measured. First American claims the "actual loss" occurred

when WaMu sold the Truong Loan to Chase for less than the original loan amount. Thus, WaMu's "actual loss" was of its own making and not caused by Patriot Title's fraud. The Court rejects First American's position and finds Patriot Title's fraud was the most direct, natural, and foreseeable cause of WaMu's loss.

C. First American's Affirmative Defenses

1. The CPL and The P&A Agreement

Based on its own interpretation of the P&A Agreement, First American contends that FDIC sold the CPL claim to Chase and FDIC has no standing to bring suit. The Court declines to visit the interpretation issues because First American has not shown how it escapes the well-established rule that a stranger to a contract has no standing to challenge the parties' mutual understanding of their own contract. *See City of Grosse Pointe Park v. Michigan Municipal Liability and Property Pool*, 702 N.W.2d 106, 114 (Mich. 2005). FDIC and Chase agree that FDIC retained the CPL claim and have signed a Stipulation acknowledging the same. (Doc. 108 Ex. A). The Court will not interfere with the parties' intent. *See Rasheed*, 517 N.W.2d at 29 n. 28; *UAW-GM Human Resource Center v. KSL Recreation Corp.*, 579 N.W.2d 411, 414 (Mich. App. 1998).

2. Negligent Underwriting

First American contends that had WaMu's underwriting been more stringent, it would have discovered the fraud. It cites *Powers v. Apcoa Standard Parking, Inc.*, 259 F. Supp.2d 606 (E.D. Mich. 2003) in support of its position. The court in *Powers* reviewed the standard to be applied when construing a contract of indemnity that purports to

indemnify against the consequences of ones own negligence. The court noted that such a contract "is subject to strict construction and will not be so construed unless it clearly appears that it was intended to cover the indemnitee's own negligence." *Id.* at 609 (citation omitted).

First American cannot avoid its indemnification obligations by arguing that WaMu was negligent in underwriting the Truong Loan. Even if the CPL fails to expressly cover losses arising from WaMu's own negligence, in light of *Foodland Distributors v. Al-Naimi*, 559 N.W.2d 379, 382 (Mich. App. 1996), WaMu's negligence is irrelevant. In *Foodland*, the appellate court stated "one accused of fraud may not raise as a defense the carelessness of the party defrauded." *Id.* (citing *Rood v. Midwest Matrix Mart, Inc.*, 87 N. W.2d 186, 191-92 (Mich. 1957)). Additionally, as correctly argued by FDIC, contributory negligence is not a valid defense in a breach of contract case. *Nelson v. Nw. Sav. & Loan Ass'n*, 381 N.W.2d 757, 759 (1985). Thus, WaMu's failure to discover the fraud does not provide a basis for First American to avoid its indemnity duty under the CPL. *See also*, *Lawyers Title Ins. Corp. v. New Freedom Mtg. Corp.*, 285 Ga. App. 22, 645 S.E.2d 536 (2007) (rejecting a contributory negligence defense raised in response to a closing protection letter claim).

Furthermore, even assuming that First American could raise a contributory negligence defense, it has failed to establish a prima facie case of negligence. Specifically, First American has not offered testimony on the applicable standard of care and has presented no evidence the WaMu breached that standard.

Absent this evidentiary support, First American's critique of WaMu's underwriting process falls flat.

3. Impairment of Subrogation Rights

FDIC's sale of the Truong Loan did not impair the value of First American's subrogation claim. The CPL's subrogation clause provides:

> When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company for such reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of such right of subrogation.

(Doc. 97 Ex. A). First American acknowledges that FDIC retained WaMu's fraud claims under the P&A Agreement (Doc. 97 at 17). By operation of the subrogation clause, if First American compensates FDIC for Truong and Patriot Title's fraud, "[First American] shall be subrogated to all rights and remedies which [FDIC] would have had against [Truong and Patriot Title] had [FDIC] not been so reimbursed." Even though FDIC sold the Truong Loan to Chase, and along with it the ability to seek a deficiency judgment against Truong, FDIC did not impair the value of First American's subrogation claim. First American is allowed to "step into the shoes" of FDIC and sue Truong and Patriot Title for fraud if it pays FDIC under the CPL.

4. Late Notice

First American argues the CPL claim is barred because FDIC did not promptly notify First American of its intent to make a separate claim under the CPL.

The CPL provides that "[w]hen the failure to give prompt notice shall prejudice [First American], then liability of [First American] shall be reduced to the extent of such prejudice." (Doc. 97 Ex. A). First American explains it did not receive notice that FDIC would be filing a *CPL* claim until April 2010, but admits that it received notice of WaMu's *Title Policy* claim on April 18, 2008.

The Court rejects First American's "failure to give timely notice" defense. The record shows First American discovered Patriot Title's fraud well before WaMu had any knowledge that the fraud had occurred. (Doc. 99 at 18). There can be no doubt that First American was preparing to defend the case, whether the claims were brought under the Title Policy or the CPL. Accordingly, First American suffered no prejudice that warrants any lessening of its liability under the CPL.

D. Damages

Although FDIC is entitled to summary judgment on liability, the Court finds there is a genuine issue of material fact on FDIC's damages. For the purposes of this motion, FDIC is willing to give First American a $2,772,000.00 credit on its liability under the CPL. (Doc. 99 at 14). FDIC explains that WaMu reduced its "actual loss" by $2,772,000.00 when it sold the Truong Loan for book value to Chase. Therefore, First American remains liable for the difference between the book value and the original loan amount, which is $1,771,593.07. FDIC claims that WaMu reduced the book value due to Patriot Title's fraud. (Doc. 112 at 2). First American rejects FDIC's concession and persuasively argues that no one can say with any certainty how much Chase paid for the

Truong Loan. (Doc. 107 at 14-17). What WaMu received from Chase is material because that amount reduces WaMu's "actual loss," which directly affects the amount of First American's liability under the CPL. Consequently, there is a genuine issue of material fact on FDIC's damages.

IV. CONCLUSION

For the reasons discussed above, **IT IS HEREBY ORDERED** that First American's First and Second Motions For Summary Judgment (Doc. 67; Doc. 97) are **DENIED** and FDIC's Motion for Summary Judgment (Doc. 97) is **GRANTED IN PART** (as to liability) and **DENIED IN PART** (as to damages).

IT IS SO ORDERED.

/s/ Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES
DISTRICT JUDGE

DATED: June 10,2011

CERTIFICATE OF SERVICE

Copies of this Order were mailed to counsel of record on this date by ordinary mail and electronic filing.

s/ Bernadette M. Thebolt
CASE MANAGER

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

JP MORGAN CHASE BANK, N.A., Plaintiff, and FEDERAL DEPOSIT INSURANCE CORPORATION, Intervenor Plaintiff, v. FIRST AMERICAN TITLE INSURANCE COMPANY Defendant / Intervenor Defendant	CASE NO. 209-4891-MOB-VMM JUDGE MARIANNE O. BATTANI

FIRST AMERICAN TITLE INSURANCE COMPANY'S RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT BASED ON NEWLY DISCOVERED EVIDENCE

Intervenor Defendant First American Title Insurance Company ("First American") hereby moves the Court for relief from judgment under Fed. Rule Civ. P. 60(b)(2) and for an indicative ruling pursuant to Fed. R. Civ. P. 62.1.

Under Rule 60(b)(2), "the court may relieve a party . . . from a final judgment" based on "newly

discovered evidence that, with reasonable diligence, could not have been discovered in time for a new trial under Rule 59(b)." Rule 60(b)(2) relief is warranted when a party demonstrates that the newly discovered evidence "is material and controlling and clearly would have produced a different result if presented before the original judgment." *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998) (footnote, internal quotation marks and citations omitted).

First American recently discovered new evidence that shows JP Morgan Chase Bank ("Chase"), not the Federal Deposit Insurance Company ("FDIC"), owns the closing protection letter ("CPL") at issue in this case and that clearly and completely eviscerates the stipulation

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[Page 7]

judgment to the FDIC on the issue of CPL ownership. (Doc. 118, at 13.) First American was thus left unable to challenge the stipulation.

The case proceeded to trial solely on the issue of damages in late November 2011 (Doc. 154-157), and a jury found First American liable for $2,263,510.78 in damages (Doc. 143). The Court denied First American's post-trial motions, and First American appealed. (Doc. 166, 170.)

E. First American Discovers New Evidence That Chase, Not The FDIC, Owns The CPL

Very recently, First American became aware of credible, substantial evidence that Chase *did* in fact acquire WaMu's CPLs and any claims arising under them when it purchased WaMu's assets. Specifically, First American has learned that Chase is asserting

claims for indemnity in at least two separate lawsuits based on its ownership of CPLs acquired under the same Purchase agreement as the CPL at issue here. In these cases, directly contrary to the stipulation filed in this Court, Chase is unequivocally asserting that Chase purchased the CPLs, and that the FDIC did *not* retain ownership of the CPLs.

First, in *Murillo v. Wash. Mut. Bank*, No. 10-13100, pending here in the Eastern District of Michigan, a WaMu borrower sued Chase for failure to provide closing documents at a loan closing. On October 23, 2012, First American received a letter from Chase's counsel—an attorney from the same law firm as the Chase lawyer who signed the stipulation in this case—requesting that First American "defend and indemnify" Chase "pursuant to a closing protection letter" that First American had issued to WaMu. (Ex. A, at 2; *see also* Declaration of Jeffrey T. Heintz, at ¶¶ 5-6, 8 ("Heintz Dec") (attached as Exhibit C).) Chase's counsel expressly noted in the letter that "The FDIC, as receiver transferred the assets . . . of Washington Mutual Bank to Chase, including" the loan at issue in *Murillo*. (Ex. A, at 1; Heintz Dec, at ¶ 7.) By demanding indemnity, Chase confirms that it considers itself the rightful owner of the CPL that First American issued to WaMu in connection with the *Murillo* loan. (Heintz Dec, at ¶ 7.)

Second, based on Chase's assertion of CPL ownership in *Murillo*, First American undertook efforts to see whether *Murillo* was an isolated occurrence. (Heintz Dec, at ¶ 9.) Through industry contacts, First American learned that it was not. (*Id.*) Specifically, Chase filed a complaint in Florida state court against Attorneys' Title Insurance Fund, Inc.

("Attorneys' Title"), alleging that Attorneys' Title breached a CPL issued to WaMu. (Ex. B; *see also* Declaration of Robert A. Cohen ("Cohen Dec"), at ¶¶ 5-9 (attached as Exhibit D.)), In that complaint, Chase minced no words about its ownership rights, stating that "[a]s a successor of Washington Mutual, Chase is entitled to enforce the CPL Agreement against [Attorneys' Title]." (Ex. B, at ¶ 46; Heintz Dec, at ¶ 10; Cohen Dec, at ¶ 9.) The CPL claim that Chase asserts in the Attorney's Title litigation was acquired pursuant to the very same Purchase Agreement at issue here, which transferred all of WaMu's assets to Chase. (Heintz Dec., at ¶ 11.)

The FDIC is well aware of the position that Chase has taken in the Attorneys' Title litigation. Indeed, Counsel for Attorneys' Title spoke to the FDIC's counsel about Chase's claim of CPL ownership not once, but twice. (Cohen Dec, at ¶¶ 13-14.) First, Attorneys' Title notified the FDIC's counsel on September 11, 2012 that Chase had asserted a claim under a CPL it had acquired in the sale of WaMu's assets. (Cohen Dec, at ¶ 13.) Then, on October 18, 2012, counsel for Attorneys' Title and the FDIC again discussed Chase's assertion of WaMu's CPL rights. (Cohen Dec, at ¶ 14.) And when counsel for Attorney's Title sought to depose a representative of the FDIC on the issue of CPL ownership, the FDIC filed a motion for a protective order to prevent that deposition from taking place. (Cohen Dec, at ¶ 15.)

Since the second conversation, the FDIC has done nothing, by intervention in the Attorneys' Title litigation or otherwise, to refute Chase's claim of CPL ownership, or to assert that it, not Chase, owns

WaMu's CPLs and all rights flowing from them. (Cohen Dec., at ¶¶ 14-15.)

This newly discovered evidence of Chase's CPL ownership eviscerates the stipulation that Chase signed at the FDIC's behest. Because that stipulation served as the foundation for the Court's summary-judgment decision, First American seeks relief from judgment in accordance with Federal Rule of Civil Procedure 60(b)(2).

III. ARGUMENT

Under Rule 60(b)(2), "the court may relieve a party . . . from a final judgment" based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time for a new trial under Rule 59(b)." Rule 60(b)(2) relief is warranted when a party demonstrates that the newly discovered evidence "is material and controlling and clearly would have produced a different result if presented before the original judgment." *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998) (footnote and citations omitted). The evidence in question must be admissible, *Wilson v. Upjohn Co.*, 808 F. Supp. 1321, 1323 (S.D. Ohio 1992), and must "pertain to evidence which existed at the time of trial," *Davis v. Jellico Cmty. Hosp., Inc.*, 912 F.2d 129, 136 (6th Cir. 1990) (citation omitted).

The newly discovered evidence that First American offers—that Chase is the owner of WaMu's CPL claims—satisfies all of the requirements for obtaining relief under Rule 60(b). The evidence (1) is material and would have resulted in a different outcome if it had been presented prior to summary-judgment proceedings; (2) could not have been discovered with

reasonable diligence prior to trial; (3) is admissible; and (4) relates to facts that existed at the

***

APPENDIX I

VERDICT FORM

FORM OF VERDICT

1. Has the FDIC proven by a preponderance of the evidence that it has suffered an actual loss as the term is used in the Closing Protection Letter?

______✓______ Yes

____________ No

(If your answer to Question 1 is "Yes", go on to Question 2. If your answer is "No," do not answer any more questions.)

Go on to Question 2.

2. What is the amount of the FDIC's actual loss?

$ 2,263,510.78

/s/ Jury Foreperson

In compliance with the Privacy Policy Adopted by the Judicial Conference, the verdict form with the original signature has been filed under seal.

APPENDIX J

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J.P. MORGAN CHASE BANK, N.A., a national banking association,

Plaintiff,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Washington Mutual Bank,

Plaintiff in Intervention,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation,

Defendant/In Intervention.

Case No. 2:09-cv-14891-MOB-VMM

Hon. Marianne O. Battani

Consolidated with

FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation,

<table>
<tr><td></td><td>Plaintiff,</td><td>Case No. 2:09-cv-14915-MOB-VMM</td></tr>
<tr><td>v.</td><td></td><td>Hon. Marianne O. Battani</td></tr>
<tr><td>J.P. MORGAN CHASE BANK, N.A., a national banking association,</td><td></td><td></td></tr>
<tr><td></td><td>Defendant.</td><td></td></tr>
</table>

STIPULATION REGARDING OWNERSHIP OF THE CPL

Plaintiff JPMorgan Chase, N.A. ("Chase") and the Federal Deposit Insurance Corporation, in its capacity as the Receiver for the Washington Mutual Bank (the "FDIC/Receiver"), by their undersigned counsel, hereby stipulate and agree as follows with respect to the closing protection letter (the "CPL") that the FDIC/Receiver has sued to enforce in connection with this action, and that is attached to its Complaint in Intervention (Doc. 33) as Exhibit I:

1. On September 25, 2008, Chase and the FDIC/Receiver entered into a Purchase and Assumption Agreement that is attached hereto as Exhibit 1 (the "Purchase and Assumption Agreement'). Pursuant to the Purchase and Assumption Agreement, Chase acquired certain assets of the Washington Mutual Bank ("WaMu"); and

2. Chase did not acquire the CPL claim that the FDIC/Receiver is pursing in this action pursuant to the Purchase and Assumption Agreement, and Chase claims no interest in that CPL claim.

	STIPULATED AND AGREED:
DATED: March 4, 2011	/s/ Robert C. Feldmeier Robert C. Feldmeier SCHIFF HARDIN LLP 233 S. Wacker Dr., 66th Floor Chicago Illinois 60606-6473 Tel: (312) 258-5500 rfeldmeier@shiffhardin.com Attorneys for FDIC/Receiver
DATED: March 4, 2011	/s/ Brian M. Moore Brian M. Moore (P58584) DYKEMA GOSSETT PLLC 39577 Woodward Avenue Bloomfield Hills, Michigan 48304-5082 Tel: (248) 203-0772 bmoore@dykema.com Attorneys for JPMorgan Chase Bank, N.A

APPENDIX K

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J.P. MORGAN CHASE BANK, N.A., a national banking association,

Plaintiff,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Washington Mutual Bank,

Plaintiff in Intervention,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation,

Defendant/In Intervention.

Case No. 2:09-cv-14891-MOB-VMM

Hon. Marianne O. Battani

Consolidated with

FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation,

Plaintiff,

Case No. 2:09-

cv-14915-MOB-VMM

v. Hon. Marianne O. Battani

J.P. MORGAN CHASE BANK, N.A., a national banking association,

Defendant.

FDIC/RECEIVER'S OPPOSITION TO FIRST AMERICAN'S SECOND MOTION FOR SUMMARY JUDGMENT

Antony S. Burt (admission pending)
Robert C. Feldmeier
Joshua D. Lee
SCHIFF HARDIN LLP
233 S. Wacker Dr., 66th Floor
Chicago, IL 60606-6473
Tel: 312-258-5500
Fax: 312-258-5700

Counsel for the Federal Deposit Insurance Corporation as Receiver for Washington Mutual Bank

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[Page 14]

Patriot Title fraud. However, First American, has offered no evidence that in pursuing its own claim against Truong, it has found the claim to have any value.

Nor has First American lost its right to subrogation under the CPL. Upon payment of the CPL claim based on the fraud of Truong and Patriot

Title, First American will be subrogated to the FDIC/Receiver's fraud claims against Truong pursuant to the provision quoted above, and could pursue a claim up to the full amount of its payment to the FDIC/Receiver. (CPL, Doc. 99, Ex. A, p. 2). In its Motion, First American even concedes that the FDIC/Receiver retained its claims for fraud or tort against Truong and Patriot Title. (Motion, Doc. 97, pp. 11-12). There is simply no basis for a defense based on impairment of subrogation rights.

III. THE FDIC/RECEIVER OWNS THE CPL

First American's final argument is that the FDIC/Receiver does not own the CPL because the P&A transferred the CPL to Chase shortly after the FDIC's appointment as receiver. (Motion, Doc. 97, pp. 12-19). To put this issue to rest, Chase has now signed the attached Stipulation which expressly states that it did not acquire the CPL claim being asserted in this case, and that it has no interest in the claim the FDIC/Receiver is asserting. (Stipulation Regarding Ownership of the CPL, copy attached as **Ex. A**). This is Chase's second Stipulation to this effect. Prior to seeking to intervene in this proceeding, the FDIC/Receiver and Chase stipulated in separate litigation that the FDIC/Receiver retained all of WaMu's closing protection letter claims under the Purchase and Assignment Agreement. *See* Joint Motion of JP Morgan and FDIC to Substitute FDIC as Defendant/Counterplaintiff as to CPL claims in *Attorneys' Title Insurance Fund v. Washington Mutual Bank*, Case No. 07-08681 (Miami Dade County, Florida). (See Doc. 95, Ex. F). ("JP Morgan

agrees with the FDIC that the claims involving the CPLs are

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APPENDIX L

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

<table>
<tr><td>J.P. MORGAN CHASE BANK, N.A., a national banking association,

Plaintiff,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Washington Mutual Bank,

Plaintiff in Intervention,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation,

Defendant/ In Intervention.</td><td>Case No. 2:09-cv-14891-MOB-VMM

Hon. Marianne O. Battani</td></tr>
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<tr><td>FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation,

Plaintiff,

v.

J.P. MORGAN CHASE BANK, N.A., a national banking</td><td>Case No. 2:09-cv-14915-MOB-VMM

Hon. Marianne O. Battani</td></tr>
</table>

association,

Defendant.

FDIC/RECEIVER'S MOTION FOR SUMMARY JUDGMENT

Plaintiff in Intervention, the Federal Deposit Insurance Corporation, as Receiver for Washington Mutual Bank (the "FDIC/Receiver"), and in accordance with Rule 56 of the Federal Rules of Civil Procedure, respectfully moves this Court for the entry of Summary Judgment on the only Count contained in its Complaint in Intervention against the First American Title Insurance Company ("First American"). The FDIC/Receiver is entitled to summary judgment because First American has admitted all of the material facts that establish liability under the

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[Page 7]

disbursing the remaining assets of the WaMu receivership according to a priority scheme established under federal law. 12 U.S.C. §1821(d), *et seq*.

The agreement between Chase and the FDIC/Receiver was set forth in a single form document known as a Purchase & Assumption Agreement (the "P&A Agreement"). (Doc. 67, Ex. D). Chase and the FDIC/Receiver agree that under the P&A Agreement, the Loan and the Commitment were transferred to Chase, but that the CPL continued to be owned by the FDIC/Receiver. To the extent additional issues have arisen which were not explicitly addressed in the P&A Agreement, Chase

and the FDIC/Receiver have attempted to work these issues out based on the intent of the parties.[3]

D. First American Discovers Patriot Title's Fraud

While WaMu was in the process of failing and, ultimately, being placed in receivership, First American was in the process of identifying and unraveling the massive fraud that had been committed by its agent Patriot Title. By early 2008, First American began receiving numerous complaints regarding Patriot Title and, upon investigation, determined that Patriot Title had ceased operations and that its principals could not be located. (First American Amended Complaint, **Ex. C**, ¶¶ 20-23). First American terminated its contract with Patriot Title and then

***

[3] First American has raised the argument that the P&A does not expressly indicate that FDIC-Receiver retained all CPL claims. This argument is easily addressed – all parties to the P&A agree that the CPL claims remained with the FDIC-Receiver and were not transferred to Chase. *See* Joint Motion of JP Morgan and FDIC to Substitute FDIC as Defendant/Counterplaintiff as to CPL claims in *Attorneys' Title Insurance Fund v. Washington Mutual Bank*, Case No. 07-08681 (Miami Dade County, Florida). (See Doc. 95, Ex. F). Under Schedule 3.5 of the P&A, FDIC/Receiver retained, among other things, any claim against any insurance policy of WaMu or any other entity whose actions may be related to any loss incurred by WaMu. It is undisputed that FDIC/Receiver intended to retain all claims that are in any way based on fraud. (Deposition of Robert Schoppe, **Ex. E**, pp. 55-57). Moreover, First American has no standing to raise alternative interpretations of the applicable language when all parties to the contract agree with the intent and meaning of these terms

APPENDIX M

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J.P. MORGAN CHASE BANK, N.A., a national banking association, Plaintiff, and FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Washington Mutual Bank, Plaintiff in Intervention, vs. FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation, Defendant/Defendant in Intervention.	Case No. 2:09-cv-14891-MOB-VMM Hon. Marianne O. Battani

Consolidated with

FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation, Plaintiff, vs.	Case No. 2:09-cv-14915-MOB-VMM Hon. Marianne O. Battani

J.P. MORGAN CHASE BANK,
N.A., a national banking
association,

Defendant.

____/

FIRST AMERICAN TITLE INSURANCE COMPANY'S SECOND MOTION FOR SUMMARY JUDGMENT AGAINST THE FDIC/RECEIVER

First American Title Insurance Company ("First American Title") respectfully moves, under Fed. R. Civ. P. 56(b), for summary judgment in its favor as to the Federal Deposit

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[Page 2]

STATEMENT OF FACTS

A. The Closing Protection Letter.

First American underwrites policies of title insurance for property owners and mortgage lenders. On September 10, 2007, First American's former agent, Patriot Title Agency LLC ("Patriot Title") closed a real estate transaction in which WaMu loaned Ha Truong $4.5 Million for the purchase of a mansion on Grosse Ile (the "Property"). The Truong Loan was secured by a mortgage (the "Insured Mortgage") on the Property. Patriot Title issued a commitment for a lender's policy of title insurance (the "Commitment"), underwritten by First American, with WaMu as the proposed insured.[1] Patriot Title

[1] Patriot Title never actually issued a policy pursuant to the Commitment. For purposes of this motion, only, First American

also caused to be issued the CPL, under which First American agreed to indemnify WaMu for actual losses arising from the "fraud or dishonesty" of its agent in connection with the closing. The CPL is addressed to "Washington Mutual, ISAOA, its successors and/or assigns as their interest may appear." The opening paragraph of the CPL explicitly states that protection is extended only "When *title insurance* of First American Title Insurance Company *is specified for your protection* * * * in connection with the closing of real estate transaction * * * in which you are to be the seller or purchaser of an interest in land or a *lender secured by a mortgage*." (Emphasis added.)

B. WaMu's Title Claim.

In March 2008, First American began receiving complaints from its insureds regarding transactions closed by Patriot Title, and began an investigation into its activities. First American discovered there was no recorded deed vesting title to the Property in Truong, a prior mortgage on the Property had not been discharged, and the Insured Mortgage had not yet been recorded. In June 2008, First American obtained title to the Property and negotiated with WaMu for an agreement to maintain the Property and sell it to recover any potential loss.

C. JP Morgan Chase Purchased the Truong Loan, Insured Mortgage, Title Commitment and all related "Credit Documents."

WaMu failed in September 2008. The FDIC was appointed as its receiver and immediately entered

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assumes that a policy, in the form of the 2006 ALTA Loan Policy, should have been issued to WaMu.

into the Purchase Agreement whereby all assets and liabilities of WaMu, except those specifically excluded, were sold to Chase. *Purchase Agreement* at ¶3.1, p 9. Specifically, Chase purchased all of WaMu's "Loans" and the liens, rights and remedies accruing to the benefit of the holder of the Loan, including rights arising under "Credit Documents" and mortgagee title insurance policies and binders. *Id.* at 5. "Credit Documents" include "the agreements, instruments, certificates or other documents at any time evidencing or otherwise relating to, governing or executed in connection with or as security for, a Loan." *Id.* at 3. Thus, Chase obtained the Truong Loan and all related documents, including the Insured Mortgage, the Commitment and other Credit Documents, and all rights and remedies arising thereunder. As the holder of the Insured Mortgage, Chase also obtained WaMu's title claim. To resolve that claim, First American tendered a quit claim deed for the Property to Chase. Chase refused to accept the quit claim deed in settlement of the claim, demanding instead that First American pay money damages. Neither WaMu nor Chase ever made a claim under the CPL. In December 2009, First American and Chase filed competing Complaints, seeking a declaration as to whether First American had fulfilled its obligations under the Commitment by tendering the Deed. The cases were eventually consolidated in this court.

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[Page 12]

be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company

for such reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of such right of subrogation." If the FDIC/Receiver still held the Truong Loan, it would be able to pursue a deficiency judgment against Truong to offset any purported loss; and First American, through subrogation, would be able to pursue this remedy to recoup the amount, if any, paid out under the CPL. When it sold the Truong Loan to Chase, the FDIC/Receiver voluntarily impaired First American's right of subrogation, because the FDIC/Receiver no longer has the right to pursue Truong for recovery, nor can it assign the Note to First American. Under the CPL, First American's liability is thereby reduced by the full amount of the Truong Loan.

E. The unambiguous terms of the Purchase Agreement show clearly that any rights that might exist under the CPL are part of the "Loan" that the FDIC/Receiver sold to Chase.

The FDIC/Receiver's contention that the CPL was severed from the underlying mortgage and title policy (which were transferred to Chase) and "retained" by the FDIC/Receiver is contradicted by the unambiguous terms of the Purchase Agreement. The Court must read the agreement as a whole and apply the plain language used by the parties. *Dobbelaere v. Auto-Owners Ins. Co.*, 275 Mich. App. 527, 740 N.W.2d 503 (2007). Absent ambiguity, the terms of Purchase Agreement are not open to construction and must be enforced as written. *City of Flint v. Lexington Ins. Co.*, 293 F.3d 956, 958 (6th Cir 2002).

The Purchase Agreement is not ambiguous. It broadly transferred *all assets* to Chase, except for certain specified assets. When the Purchase Agreement provisions are examined, the Court will conclude that the CPL is an asset that was acquired by Chase as part of the Truong Loan, and not retained by the FDIC/Receiver. Even the FDIC/Receiver's own witnesses could not adequately explain its claim that it "retained" the CPL under the Purchase Agreement. The term "closing protection letter" does not appear anywhere in the document. If, as the FDIC/Receiver contends, the CPL is a wholly separate agreement that stands on its own and is severable from the title policy, it is reasonable to expect that it would be separately and specifically referenced in the Purchase Agreement, and explicitly exempted from the sale. It is not.[5]

1. Chase acquired all assets of WaMu, including "Credit Documents" such as the CPL.

---

[5] The FDIC/Receiver has suggested that the actual terms of the Purchase Agreement are irrelevant because it and Chase have apparently agreed (long after the deal was closed) that the CPL belongs to the FDIC/Receiver. However, the parties' own interpretation of an agreement is relevant only if the agreement is ambiguous. *L&S Bearing Co. v. Morton Bearing Co.*, 355 Mich. 219, 93 N.W.2d 899 (1959). The clear and unambiguous language of an agreement cannot be impeached by the parties' performance. *John Harris & Assoc, Inc. v Day*, 916 F. Supp. 651 (E.D. Mich. 1996). Here, the terms of the Purchase Agreement are quite clear and not in doubt; the CPL is an asset that was transferred to Chase as part of the Truong Loan, and not retained by the FDIC/Receiver under any provision. The FDIC/Receiver and Chase cannot simply agree that the Purchase Agreement means something that it clearly does not.

Under Section 3.1 of the Purchase Agreement, Chase acquired "all right, title and interest of the Receiver in and to **all of the assets** (real, personal and mixed, wherever located and however acquired) . . . of the Failed Bank," except as provided in Section 3.5, 3.6 and 4.8. It is undisputed that the CPL was a WaMu asset. Therefore, the presumption must be that the CPL was transferred to Chase, unless it was unambiguously withheld under one of these provisions of the Purchase Agreement. That is not the case. To the contrary, it is clear from the express and unequivocal language of the Purchase Agreement that Chase necessarily acquired the CPL when it acquired the Truong Loan and all of the lender's related rights and remedies.

The Purchase Agreement explicitly transferred all "Loans" to Chase. Under the Purchase Agreement, "Loans" is broadly defined to include not only the obligation or instrument representing a loan, but also the entire bundle of rights and documents related to or executed in connection with the loan, and all of the lender's privileges arising thereunder:

> "Loans" means all of the following owed to or held by the Failed Bank as of Bank Closing:
>
> (i) loans (including loans which have been charged off the Accounting Records of the Failed Bank in whole or in part prior to Bank Closing)....
>
> (ii) **all Liens, rights (including rights of set-off), remedies, powers, privileges, claims, priorities, equities and benefits owned or held by, or accruing or to accrue to or for the benefit of, the holder of the obligations** or instruments referred to in clause (i) above, **including but not limited to those arising**

> **under or based upon Credit Documents**, casualty insurance policies and binders, standby letters of credit, mortgagee title insurance policies and binders, payment bonds and performance bonds at any time and from time to time existing with respect to any of the obligations or instruments referred to in clause (i) above.

Purchase Agreement at 5; (emphasis added).

Thus, in connection with the Truong Loan, Chase acquired *all* of the rights and remedies accruing for the benefit of the holder of the Truong Loan, including rights arising under "Credit Documents." The term "Credit Documents" is defined in the Purchase Agreement:

> "Credit Documents" mean the agreements, instruments, certificates or other documents at any time *evidencing or otherwise relating to, governing or executed in connection with or as security for, a Loan*, including without limitation notes, bonds, loan agreements, letter of credit applications, lease financing contracts, banker's acceptances, drafts, interest protection agreements, currency exchange agreements, repurchase agreements, reverse repurchase agreements, guarantees, deeds of trust, mortgages, assignments, security agreements, pledges, subordination or priority agreements, lien priority agreements, undertakings, security instruments, certificates, documents, legal opinions, participation agreements and intercreditor agreements, and all amendments, modifications, renewals, extension, rearrangements, and substitutions with respect to any of the foregoing.

See, Exhibit B (emphasis added).

The term "closing protection letter" fits squarely within the definition of "Credit Documents," as it is an agreement that relates to, and was executed in connection with the Truong Loan,[6] and confers certain rights and remedies upon the lender. As a Credit Document, the CPL was an inseparable component of the large bundle of documents and rights transferred to Chase as part of the Truong Loan. The foregoing provisions of the Purchase Agreement are clear and unambiguous. The conclusion is inescapable: when Chase acquired the Truong Loan, it automatically acquired the CPL, along with the Note, Insured Mortgage and Commitment.

2. The CPL was not explicitly retained by the FDIC/Receiver under any provision of the Purchase Agreement.

The CPL is an asset of WaMu that was transferred to Chase under the broad provisions of Section 3.1, unless it was explicitly retained by the FDIC/Receiver under Section 3.5, 3.6 and 4.8. Of these three sections, only Section 3.5 has been identified by the FDIC/Receiver as support for its claim that it "retained" the CPL[7]. In fact, Section 3.5

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[6] The CPL was issued specifically for this transaction. It is dated a few days before closing, and references "BUYER: HA TRUONG, 19517PARKE LN."

[7] *See FDIC/Receiver's Responses to Interrogatories*, at No. 1, **Ex. D.** Neither Section 3.6 (Assets Essential to Receiver) nor Section 4.8 (Agreement with Respect to Certain Existing Agreements) could remotely support a contention that the FDIC/Receiver retained the CPL. According to William Smith's testimony, under Section 3.6 the FDIC withheld from the sale certain

offers no support for the FDIC/Receiver whatsoever. Section 3.5 states:

> **Assets Not Purchased by Assuming Bank**. The Assuming Bank does not purchase, acquire or assume, or (except as otherwise expressly provided in this Agreement) obtain an option to purchase, acquire or assume under this Agreement the assets or Assets listed on the attached Schedule 3.5.

Schedule 3.5 describes four categories of "Certain Assets Not Purchased." The term "closing protection letter" does not appear anywhere on Schedule 3.5. The first category includes WaMu's surety bonds and professional liability insurance, but explicitly *excludes* "insurance policies, proceeds and collateral related to, held or issued with respect to or in connection with any Asset . . . acquired by the Assuming Bank under this Agreement." The third category includes leased premises, furniture, equipment and fixtures. The fourth category covers "any criminal/restitution orders issued in favor of the Failed Bank." Obviously, none of the foregoing categories of assets retained by the FDIC/Receiver includes the CPL.

Therefore, the FDIC/Receiver must contend that the CPL falls within the second category of "Certain Assets Not Purchased," which can be generally described as causes of action against specified persons. Specifically, the Purchase Agreement

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existing fidelity bond and professional liability matters only. *Smith Deposition Transcript* at 70 - **Ex. F.** Section 4.8 is inapplicable on its face.

provides that the following "assets" were not purchased by Chase:

> (2) any interest, right, action, claim or judgment against (i) any officer, director, employee, accountant, attorney, or any other Person employed or retained by the Failed Bank or any Subsidiary of the Failed Bank on or prior to Bank Closing arising out of any act or omission of such Person in such capacity; (ii) any underwriter of financial institution bonds, banker's blanket bonds or any other insurance policy of the Failed Bank; (iii) any shareholder or holding company of the Failed Bank; or (iv) any other Person whose action or inaction may be related to any loss (exclusive of any loss resulting from such Person's failure to pay on a Loan made by the Failed Bank) incurred by the Failed Bank; *provided that*, for purposes hereof, the acts, omissions or other events giving rise to any such claim shall have occurred on or before Bank Closing, regardless of when any such claim is discovered and regardless of whether any such claim is made with respect to a financial institution bond, banker's blanket bond, or any other insurance policy of the Failed Bank in force as of Bank Closing.

Because this section does not explicitly provide that any interest, right, action, claim or judgment *under a closing protection letter* was not purchased by Chase, the Court must determine whether "the plain and ordinary meaning" of this section can be construed to include the CPL. It cannot. When this

language is carefully examined, it is apparent that rights and claims that the FDIC/Receiver retained under Schedule 3.5(2) are in the nature of professional liability or fraud claims, and does *not* include the right to assert a contractual claim for indemnity under the CPL.

- The CPL claim clearly is not a claim against an officer, director or employee of WaMu as described in (2)(i).
- The CPL claim is not a claim against the underwriter of a bond or insurance policy as described in (2)(ii). Smith testified that this is the provision under which the FDIC/Receiver "retained" the CPL, because it is like a fidelity bond or insurance policy. However, it is well-established that a closing protection letter is an indemnity contract, *not* an insurance policy. "The [Closing Protection] Letter has been determined not to be an insurance policy." *Title & Escrow Claims Guide*, *supra* at 14-3 (collecting authorities).[8] Because the scope of this section is limited to the actual terms employed ("financial institution bonds, bankers bond, and any other insurance policy"), it does not include closing protection letters.
- The CPL claim is clearly not a claim against or a shareholder or holding company of WaMu as described in (2)(iii).

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[8] *See Freedom Mortg. Corp. v. Burnham Mortg., Inc.*, *supra*; *Metmor Financial Inc. v. Commonwealth Land Title Ins. Co.*, 645 So 2d. 295, 297 (Ala. 1992)(no bad faith action as to CPL, because indicia of insurance policy missing); *Lawyers Title Ins. Corp. v. New Freedom Mortgage Corp.*, 655 S.E.2d 269 (Ga. App. 2007)(accord).

- The CPL claim is not a claim "against a Person[9] whose action or inaction may be related to any loss . . . incurred by the Failed Bank" as described in (2)(iv). The plain and ordinary meaning of this language - and that which is "apparent to a reader of the instrument"[10] - is that the FDIC/Receiver retained actions against persons who, through negligence or fraud ("action or inaction") caused a loss to WaMu. In fact, Robert Schoppe, the "receiver in charge" at the time of WaMu's closing, testified that the FDIC/Receiver retained fraud claims pursuant to this provision. *Schoppe Deposition Transcript* at 42-43 - **Ex. G**. Therefore, the FDIC/Receiver may have retained a cause of action against Truong, Saylor and Patriot Title for fraud in connection with the Truong Loan, because those are Persons "whose action or inaction may be related to" a loss incurred by WaMu. However, it is far from apparent that the language of (2)(iv) includes this claim under the CPL, which is *not* a fraud or tort claim, but a claim for breach of an indemnity agreement. First American is not accused of causing the alleged loss to WaMu; it is accused of failing to indemnify the FDIC/Receiver for a loss caused by others. First American's own actions or inactions are not related to that loss in any way. In fact, First American's liability under the CPL does not even arise until the addressee has suffered an actual loss arising from the fraud

[9] A "Person" is defined in the Purchase Agreement as "any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof . . . ."

[10] *Aqua Group*, *supra*, 620 F.Supp.2d at 820.

of First American's agent."[11] Interpreting this section to include claims under closing protection letters would be a strained construction of the actual contract language, which the Court is admonished to avoid. *In re Big Buck Brewery & Steakhouse, Inc.*, 399 B.R. 820 (E.D. Mich. 2009).

The CPL more closely fits the definition of a "Credit Document" than it does any of the retained assets described on Schedule 3.5. Had the FDIC intended to retain CPL claims, it should have expressly provided for that in the Purchase Agreement[12]. It did not, because it obviously had no intent for CPL claims to be "retained" at the time the

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[11] First American's pending Motion for Summary Judgment contends that the FDIC/Receiver has not established an actual loss. Even if the book value of the Truong Loan was written down before it was sold the Chase, there is no evidence that it caused a real, tangible loss to the FDIC/Receiver, because *all* of WaMu's assets - even those that had not been written down - were sold for a fraction of their value in the bulk sale to Chase. Any loss incurred in the sale is not compensable under the CPL. *See, e.g, New Freedom, supra*, 281 Mich. App. at 86 (plaintiff not entitled to indemnification, because any loss was the result of a full credit bid at foreclosure sale, which had nothing to do with agent's acts or omissions.)

[12] Schoppe testified that the Purchase Agreement was a "shelf" document from the FDIC "made to fit the transaction." *Schoppe Depo* at 25. However, even an express reservation of the CPL claim may have been ineffective. *See, Resolution Trust Corporation*, *supra*, 901 F.Supp. at 1125, wherein the court granted summary judgment in favor of the defendant title insurer against the receiver for failed bank, because the receiver was no longer insured under title policy covering the loan transaction after it transferred the failed bank's note and mortgage to another party without retaining any interest. The court held that, after the assignment, the RTC was no longer an insured with rights against the insurer.

Purchase Agreement was executed. This is clear from the fact that the experienced FDIC personnel charged with overseeing the receivership and pursuing its claims had no knowledge of closing protection letters generally, and no knowledge of any FDIC history of pursuing CPL claims.[13] Schoppe testified that he has seen "over a hundred" purchase and assumption agreements during his career and that assets retained in Schedule 3.5 of this Purchase Agreement are typical of such agreements. *Schoppe Depo* at 55. Yet he is not, even now, familiar with the term "closing protection letter," does not know what a closing protection letter is for, and he would not be able to testify as to whether the FDIC/Receiver retained the right to sue First American under the CPL. *Id.* at 32-33, 36-37. He is not familiar with any previous FDIC claim under a CPL. *Id.* at 54. He could state only that the FDIC retained "fraud claims." *Id.* at 56. William Smith is the "resolution and receivership specialist" assigned to the WaMu receivership. He has over 24 years of experience in that position, yet his knowledge of the CPL was limited to what he has acquired in connection with this case. *Smith Depo* at 75-76. The claims that he pursues on behalf of receiverships are "primarily professional liability claims." *Id.* at 8. He testified that the FDIC has no formal policy regarding the retention and prosecution of CPL claims, and that he was not aware of any other court case involving the FDIC and a CPL. *Id.* at 76, 78.

The Purchase Agreement must be read as a whole. In the absence of language that unambiguously

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[13] The only witnesses identified on the FDIC/Receiver's initial disclosures or preliminary witness list are Schoppe and Smith.

retained the rights under the CPL for the FDIC/Receiver, the provisions of the Purchase Agreement that transferred to Chase all assets, including "Loans" and rights and remedies under "Credit Documents" must control. Therefore, under the plain language of the Purchase Agreement, the CPL is an asset that was transferred to Chase, not retained by the FDIC/Receiver.

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APPENDIX N

PURCHASE AND ASSUMPTION AGREEMENT

WHOLE BANK

AMONG

**FEDERAL DEPOSIT INSURANCE CORPORATION,
RECEIVER OF WASHINGTON MUTUAL BANK, HENDERSON, NEVADA**

FEDERAL DEPOSIT INSURANCE CORPORATION

and

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION

DATED AS OF

SEPTEMBER 25, 2008

"***Book Value***" means, with respect to any Asset and any Liability Assumed, the dollar amount thereof stated on the Accounting Records of the Failed Bank. The Book Value of any item shall be determined as of Bank Closing after adjustments made by the Assuming Bank for normal operational and timing differences in accounts, suspense items, unposted debits and credits, and other similar adjustments or corrections and for setoffs, whether voluntary or involuntary. The Book Value of a Subsidiary of the Failed Bank acquired by the Assuming Bank shall be determined from the investment in subsidiary and related accounts on the "bank only" (unconsolidated) balance sheet of the Failed Bank based on the equity method of accounting. Without limiting the generality of the foregoing, (i) the Book Value of a Liability Assumed shall include all accrued and unpaid interest thereon as of Bank Closing, and (ii) the Book Value of a Loan shall reflect adjustments for earned interest, or unearned interest (as it relates to the "rule of 78s" or add-on-interest loans, as applicable), if any, as of Bank Closing, adjustments for the portion of earned or unearned loan-related credit life and/or disability insurance premiums, if any, attributable to the Failed Bank as of Bank Closing, and adjustments for Failed Bank Advances, if any, in each case as determined for financial reporting purposes. The Book Value of an Asset shall not include any adjustment for loan premiums, discounts or any related deferred income or fees, or general or specific reserves on the Accounting Records of the Failed Bank.

"***Business Day***" means a day other than a Saturday, Sunday, Federal legal holiday or legal holiday under the laws of the State where the Failed

Bank is located, or a day on which the principal office of the Corporation is closed.

"***Chartering Authority***" means (i) with respect to a national bank, the Office of the Comptroller of the Currency, (ii) with respect to a Federal savings association or savings bank, the Office of Thrift Supervision, (iii) with respect to a bank or savings institution chartered by a State, the agency of such State charged with primary responsibility for regulating and/or closing banks or savings institutions, as the case may be, (iv) the Corporation in accordance with 12 U.S.C. Section 1821(c), with regard to self appointment, or (v) the appropriate Federal banking agency in accordance with 12 U.S.C. 1821(c)(9).

"***Commitment***" means the unfunded portion of a line of credit or other commitment reflected on the books and records of the Failed Bank to make an extension of credit (or additional advances with respect to a Loan) that was legally binding on the Failed Bank as of Bank Closing, other than extensions of credit pursuant to the credit card business and overdraft protection plans of the Failed Bank, if any.

"***Credit Documents***" mean the agreements, instruments, certificates or other documents at any time evidencing or otherwise relating to, governing or executed in connection with or as security for, a Loan, including without limitation notes, bonds, loan agreements, letter of credit applications, lease financing contracts, banker's acceptances, drafts, interest protection agreements, currency exchange agreements, repurchase agreements, reverse repurchase agreements, guarantees, deeds of trust,

mortgages, assignments, security agreements, pledges, subordination or priority agreements, lien priority agreements, undertakings, security instruments, certificates, documents, legal opinions, participation agreements and intercreditor agreements, and all amendments, modifications, renewals, extensions, rearrangements, and substitutions with respect to any of the foregoing.

"***Initial Payment***" means the payment made pursuant to Article VII, the amount of which shall be either (i) if the Bid Amount is positive, the Bid Amount plus the Required Payment or (ii) if the Bid Amount is negative, the Required Payment minus the Bid Amount. The Initial Payment shall be payable by the Corporation to the Assuming Bank if the Initial Payment is a negative amount. The Initial Payment shall be payable by the Assuming Bank to the Corporation if the Initial Payment is positive.

"***Legal Balance***" means the amount of indebtedness legally owed by an Obligor with respect to a Loan, including principal and accrued and unpaid interest, late fees, attorneys' fees and expenses, taxes, insurance premiums, and similar charges, if any.

"***Liabilities Assumed***" has the meaning provided in Section 2.1.

"***Lien***" means any mortgage, lien, pledge, charge, assignment for security purposes, security interest, or encumbrance of any kind with respect to an Asset, including any conditional sale agreement or capital lease or other title retention agreement relating to such Asset.

"***Loans***" means all of the following owed to or held by the Failed Bank as of Bank Closing:

(i) loans (including loans which have been charged off the Accounting Records of the Failed Bank in whole or in part prior to Bank Closing), participation agreements, interests in participations, overdrafts of customers (including but not limited to overdrafts made pursuant to an overdraft protection plan or similar extensions of credit in connection with a deposit account), revolving commercial lines of credit, home equity lines of credit, Commitments, United States and/or State-guaranteed student loans, and lease financing contracts;

(ii) all Liens, rights (including rights of set-off), remedies, powers, privileges, demands, claims, priorities, equities and benefits owned or held by, or accruing or to accrue to or for the benefit of, the holder of the obligations or instruments referred to in clause (i) above, including but not limited to those arising under or based upon Credit Documents, casualty insurance policies and binders, standby letters of credit, mortgagee title insurance policies and binders, payment bonds and performance bonds at any time and from time to time existing with respect to any of the obligations or instruments referred to in clause (i) above; and

(iii) all amendments, modifications, renewals, extensions, refinancings, and refundings of or for any of the foregoing;

provided, *that* there shall be excluded from the definition of "Loans" amounts owing under Qualified Financial Contracts.

"***Obligor***" means each Person liable for the full or partial payment or performance of any Loan, whether such Person is obligated directly, indirectly, primarily, secondarily, jointly, or severally.

APPENDIX O

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JP MORGAN CHASE BANK, N.A., Plaintiff, v. FIRST AMERICAN TITLE INSURANCE COMPANY, Defendant.	Case No. 09-14891 HON. MARIANNE O. BATTANI

Consolidated with,

FIRST AMERICAN TITLE INSURANCE COMPANY, Plaintiff, v. JP MORGAN CHASE BANK, N.A., Defendant.	Case No. 09-14915 HON. MARIANNE O. BATTANI

______________________________/

OPINION AND ORDER GRANTING FIRST AMERICAN TITLE INSURANCE COMPANY'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Before the Court are First American Title Insurance Company's ("First American") Motion for Partial Judgment on the Pleadings, (doc. 16), and the Federal Deposit Insurance Corporation / Receiver's ("FDIC") Motion to Intervene, (doc. 25). As stated

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[Page 8]

because the purchase of the Property by Truong was a sham. In such a situation, the Court finds that tendering full title to the Property to the Insured "establishes the Title" under the Title Policy's Limitation of Liability Provision.

Chase argues that "Title" must be established in accordance with the definition of the term "Title" in the Title Policy; the Title Policy defines Title as vesting in Truong, with Chase possessing a mortgage lien on the Property. The Court does not find, however, that in a situation such as this — where the purchase of the property was a sham and the purported purchaser has failed to satisfy their mortgage payment obligations — that the Limitation of Liability provision of the Title Policy requires that the title be vested in Truoung with a mortgage interest to Chase. As such, the Court finds that by tendering the title to the Property to Chase, First American established the title; thereby fully performing its obligations under the Title Policy.

V. CONCLUSION

Accordingly, Plaintiff's Motion for Partial Judgment on the Pleadings is **GRANTED**.

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APPENDIX P

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JP MORGAN CHASE BANK, N.A., a national banking association, Plaintiff, and FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Washington Mutual Bank, Plaintiff in Intervention, v. FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation, Defendant/Defendant in Intervention.	Case No. 2:09-cv-14891 - MOB-VMM Hon. Marianne O. Battani

Consolidated with

FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation, Plaintiff, v. JP MORGAN CHASE BANK, N.A., a national banking association,	Case No. 2:09-cv-14915-MOB-VMM Hon. Marianne O. Battani

Defendant.

FDIC/RECEIVER'S COMPLAINT IN INTERVENTION

The Federal Deposit Insurance Corporation ("FDIC"), as Receiver for Washington Mutual Bank ("FDIC/Receiver"), through its undersigned counsel, and for its Complaint in

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[Page 3]

4. Plaintiff, Chase, is a national banking association organized under the laws of Ohio, with its principal place of business in Ohio. Chase has initiated this action in its capacity as the acquirer of certain of WaMu's assets and liabilities other than the CPL. The FDIC seeks no relief against Chase.

5. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345 because it is a civil action commenced by the FDIC, which, for the purpose of § 1345, is an agency of the United States, and pursuant to 28 U.S.C. § 1331 because all cases to which the FDIC is a party are deemed to arise under the laws of the United States, by virtue of 12 U.S.C. § 1819(b)(2)(A). The Court also has jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1367(a).

6. Venue is proper in this forum pursuant to 28 U.S.C. § 1391(b) and (c) because a substantial part of the events giving rise to the claim occurred in this District.

III. FACTS

A. The Underlying Fraud

7. The fraud committed by Patriot and Saylor involved an 11,000 square foot luxury home located at 19517 Parke Lane, Grosse Ile, Michigan (the "Property"). Prior to September 17, 2007, the Property was owned by Bellerive Estates, LLC, a Michigan limited liability company, and Charles R. and Linda Frizzell, husband and wife (collectively, "Bellerive").

8. On September 17, 2007, Saylor entered into a Land Contract with Bellerive wherein he agreed to purchase the Property for $5.4 million (the "Land Contract"). The Land Contract required Saylor to make an immediate down payment of $2.4 million, and to then pay the remaining $3.0 million in monthly installments over a twenty-four month period.

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APPENDIX Q

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JP MORGAN CHASE	)	Case No. 2:09-cv-14891-
BANK, N.A., a	)	MOB-VMM
national banking	)	Hon. Marianne O. Battani
association,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FIRST AMERICAN	)	
TITLE INSURANCE	)	
COMPANY, a	)	
California	)	
Corporation,	)	
	)	
Defendant	)	

Consolidated with

FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation, Plaintiff, v. JP MORGAN CHASE BANK, N.A., a national banking association, Defendant	)	Case No. 2:09-cv-14915-MOB-VMM Hon. Marianne O. Battani

FDIC/RECEIVER'S MOTION TO INTERVENE

The Federal Deposit Insurance Corporation ("FDIC"), as Receiver for Washington Mutual Bank ("FDIC/Receiver"), through its undersigned counsel, and for all of the reasons stated in the accompanying Memorandum of Law, respectfully moves this Court for permission to intervene in this matter pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 24(b). A copy of the FDIC/Receiver's proposed Complaint in Intervention is attached to this Motion as **Exhibit A.**

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[Page 3]

I. INTRODUCTION

The FDIC/Receiver moves for permission to intervene pursuant to Rule 24(b) of the Federal Rules

of Civil Procedure. Rule 24(b) provides that permissive intervention should be allowed when a proposed claim to be raised in intervention shares "a common question of law or fact" with the claims already pending. Fed. R. Civ. P. 24(b). As discussed throughout this Memorandum, the FDIC/Receiver's proposed claim shares numerous common factual and legal issues with the claims that are already before this Court. In fact, the FDIC/Receiver's claims arise from the very same real estate closing that is already the subject of this action. It would be a waste judicial resources if the FDIC/Receiver's claim and the factually-related claims that have already been raised in this case were adjudicated in separate proceedings. Permissive intervention under Rule 24(b) is to be liberally allowed, and should certainly be permitted here.

II. STATEMENT OF FACTS

The FDIC/Receiver seeks to intervene in order to assert a claim for breach of a Closing Protection Letter (the "CPL") that was issued by First American. First American issued the CPL in connection with a closing (the "Closing") involving the sale of Property commonly known as 19517 Parke Lane, Grosse-Ile, Michigan (the "Property") that is the focus of the competing claims that are already before the Court. (JP Morgan Amended Complaint, ¶¶ 8-18; First American Complaint, ¶¶ 13-25). JP Morgan initiated this action to enforce a title commitment issued by First American in connection with the Closing (the "Commitment"). (JP Morgan Amended Complaint, Count I). The FDIC/Receiver now seeks to enforce the CPL that was also issued by First American. (FDIC/Receiver Complaint in Intervention, Count I).

The Closing involved the purported sale of the Property to Mr. Ha Truong for $6 million with financing provided by the Washington Mutual Bank ("WaMu") as mortgagee. (JP Morgan Amended Complaint, ¶ 9; First American Complaint, ¶ 22). The Closing was conducted by the Patriot Title Agency, LLC ("Patriot Title"), which was an authorized issuing agent of First American. (JP Morgan Amended Complaint, ¶¶ 9-13; First American Complaint, ¶¶ 13-25). WaMu wired in excess of $4.5 million of Patriot Title's escrow account in connection with the Closing. (First American Complaint, ¶ 23). First American, through Patriot Title, then issued the Commitment to insure WaMu's purported interest in the Property, and also provided WaMu with the CPL. (JP Morgan Amended Complaint, ¶ 10; First American Complaint, ¶ 19; FDIC Complaint in Intervention, Ex. A).

First American ultimately determined that the Closing was part of a fraud committed by Patriot's principal, Mr. Randy Saylor. (First American Complaint, ¶¶ 29-32). First American learned that Patriot Title had not used the proceeds of the WaMu loan to retire the existing mortgage on the Property, and that the loan funds had instead been directed elsewhere for the benefit of Saylor or others. (First American Complaint, ¶ 23-24 & 31). As a result of the fraud, WaMu did not obtain an effective mortgage on the Property, and the prior mortgage on the Property remained in place. (JP Morgan Amended Complaint, ¶¶ 23-24; First American Complaint, ¶¶ 29-32).

In September, 2008, the Office of Thrift Supervision closed WaMu and appointed the FDIC as its receiver. (JP Morgan Amended Complaint, ¶ 2).

JP Morgan then acquired many of WaMu's assets, including WaMu's rights under the Commitment. (*Id.*). JP Morgan has initiated this action to recover on the Commitment because WaMu never obtained a first mortgage on the Property as a result of the fraud. (JP Morgan Amended Complaint, Count I).

The FDIC/Receiver has retained WaMu's rights under the CPL. It provides that First American must indemnify WaMu (and, by extension, the FDIC/Receiver) for damages resulting from exactly the type of fraud that has occurred. The CPL states that First American:

> hereby agrees to reimburse you for actual loss incurred by you in connection with . . . closings . . . conducted by the Issuing Agent (an agent authorized to issue title insurance for the Company), referenced herein and when such loss arises out of: ...
>
> 2. Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings.

(FDIC Complaint in Intervention, ¶ 13). The FDIC/Receiver seeks to intervene to enforce the CPL. (FDIC Complaint in Intervention, Count I).

III. THE FDIC/RECEIVER SHOULD BE PERMITTED TO INTERVENE

A. The Applicable Legal Standard Permits Intervention

Rule 24(b) of the Federal Rules of Civil Procedure states that upon a "timely motion," the "court may permit anyone to intervene" who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). A party seeking to intervene pursuant to Rule 24(b)

must "prove that the motion for intervention is timely, there is at least one common question of law or fact, and the balancing of undue delay, prejudice to the original parties, and any other relevant factors favors intervention." *Coalition to Defend Affirmative Action v. Granholm*, 240 F.R.D. 368, 377 (E.D. Mich. 2006) *aff'd*, 501 F.3d 775 (6th Cir. 2007) (citing *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997)).

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APPENDIX R

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JP MORGAN CHASE BANK, N.A., a national banking association, Plaintiff, v. FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation, Defendant.	Case No. 2:09-cv-14891-MOB-VMM Hon. Marianne O. Battan

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Attorneys for Defendant

FIRST AMENDED COMPLAINT

Plaintiff JP Morgan Chase, N.A., for itself and in its capacity as acquirer of certain assets and liabilities of Washington Mutual Bank, F.A. from the Federal Deposit Insurance Corporation, by its attorneys, Dykema Gossett PLLC, for its First Amended Complaint against Defendant First American Title Insurance Company, states as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff JP Morgan Chase, N.A., for itself and in its capacity as acquirer of certain assets and liabilities of Washington Mutual Bank, F.A. ("WaMu") from the Federal Deposit Insurance Corporation (the "FDIC") ("Chase"), is a national banking association organized under the laws of the state of Ohio, with its principal place of business in Ohio.

2. The subject mortgage transaction described below was funded by WaMu. WaMu ceased operating as of September 25, 2008. Pursuant to a September 25, 2008 agreement with the FDIC, Chase

acquired certain assets of WaMu, including the claims asserted against Defendant First American Title Insurance Company here.[1]

3. Chase and WaMu will hereinafter be referred to as "Chase."

4. Defendant First American Title Insurance Company ("First American") is a California corporation with its principle place of business in Santa Ana, California.

5. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because complete diversity exists between Chase and First American, and because the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs.

6 Venue in this district is proper under 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

7. This court has personal jurisdiction over First American because First American, with its numerous business locations within this judicial district alone, has engaged in business in the state of Michigan, and therefore has sufficient contacts.

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[1] The FDIC owns the rights of a certain closing protection letter claim and any and all tort claims against First American Title Company. Upon information and belief, the FDIC will be pursuing theses claims in these proceedings or separately.