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ASSESSED
ENTERED
VERIFIED

CAUSE NO. 2000-57149

THOSE CERTAIN UNDERWRITERS
AT LLOYD'S, LONDON SUBSCRIBING
TO INSURANCE POLICY NO.
BWB 20-0138

VS.

CORNERSTONE PROPERTIES, INC.,
NEW SUN COAST APARTMENTS, LLC
D/B/A VISTA BONITA APARTMENTS,
V.E.B. REAL ESTATE INVESTMENTS,
LLC D/B/A PHOENIX NORTH APART-
MENTS, NEW LAFAYETTE PLACE, LLC
D/B/A VILLA DE CANCOON APART-
MENTS, NEW HIGHLAND TERRACE
APARTMENTS, LLC D/B/A HIGHLAND
TERRACE APARTMENTS, 7520 COOK
ROAD INVESTMENTS D/B/A
WEATHEREDGE APARTMENTS,
GLENWOOD FOREST APARTMENTS,
SANDALWOOD VILLA APARTMENTS,
FIRST UNION NATIONAL BANK,
GMAC COMMERCIAL MORTGAGE
CORPORATION, MIDLAND LOAN
SERVICES, INC., FIRST UNION
NATIONAL BANK AS MASTER ON
BEHALF OF STATE STREET BANK AND
TRUST AS TRUSTEE MORTGAGE, AND
OMNI BANK

IN THE DISTRICT COURT OF

RECORDER'S MEMORANDUM
This instrument is of poor quality
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HARRIS COUNTY, TEXAS

55TH JUDICIAL DISTRICT

PLAINTIFF'S THIRD AMENDED PETITION
AND CLAIM FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Those Certain Underwriters at Lloyd's, London Subscribing to Insurance Policy No. BWB 20-0138 ("Underwriters" or "Plaintiffs"), the terms and conditions of which are fully and completely incorporated herein by reference, and file this their Third Amended Petition

FILE STAMP
ORIGINAL

and Claim for Declaratory Judgment against the Defendants, and for their causes of action would show as follows:

I.

PARTIES

1.1 Plaintiffs are English citizens and business entities, each bringing this action separately for themselves and not jointly and severally, who are those Underwriters Subscribing to Insurance Policy No. BWB 20-0138. Underwriters delete Graham Morris as a party from this case as authorized by Rules 41 and 63 of the Texas Rules of Civil Procedure.

1.2 Defendant Cornerstone Properties, Inc. ("Cornerstone") is a Texas corporation with its principal place of business in Harris County, Texas. Cornerstone has appeared and may be served through its counsel of record.

1.3 Defendant New Sun Coast Apartments, LLC d/b/a Vista Bonita Apartments ("New Sun Coast") is a limited liability corporation formed under the laws of the State of Texas. New Sun Coast has appeared and may be served through its counsel of record.

1.4 Defendant V.E.B. Real Estate Investments, LLC d/b/a Phoenix North Apartments ("V.E.B. Real Estate") is a Texas corporation with its principal place of business in Harris County, Texas. V.E.B. Real Estate has appeared and may be served through its counsel of record.

1.5 Defendant New Lafayette Place Apartments, LLC d/b/a New Lafayette Place LLC d/b/a Lafayette Apartments, LLC d/b/a Villa De Cancoon Apartments ("New Lafayette") is a Texas corporation with its principal place of business in Harris County, Texas. New Lafayette has appeared and may be served through its counsel of record.

1.6 Defendant New Highland Terrace Apartments, LLC d/b/a New Highland Terrace Apartments d/b/a Highland Terrace Apartments ("New Highland") is a Texas corporation with its

principal place of business in Harris County, Texas. New Highland has appeared and may be served through its counsel of record.

1.7 Defendant 7520 Cook Road Investments, LLC d/b/a 7520 Cook Road Partnership d/b/a Weatheredge Apartments ("7520 Cook Road") is a limited liability corporation formed under the laws of the State of Texas. 7520 Cook Road has appeared and may be served through its counsel of record.

1.8 Defendant North Houston Investment Properties, LLC d/b/a Glenwood Forest Apartments ("Glenwood Forest") is a Texas corporation with its principal place of business in Harris County, Texas. Glenwood Forest has appeared and may be served through its counsel of record.

1.9 Defendant Sandalwood Apartments, Inc. d/b/a/ Sandalwood Villa Apartments ("Sandalwood Villa") is a Texas corporation with its principal place of business in Harris County, Texas. Sandalwood has appeared and may be served through its counsel of record.

1.10 Defendants 1.2 through 1.9 are collectively referred in this Original Petition as "the Insureds." The Insureds own and/or operate apartment buildings and associated structures situated in Harris County, Texas at the locations indicated below:

Vista Bonita Apartments, 9313 TallyHo, Houston, Texas 77017;
Phoenix North Apartments, 2 Goodson Drive, Houston, Texas 77060;
Villa De Cancoon Apartments, 9450 Woodfair, Houston, Texas 77060;
Highland Terrace Apartments, 4000 Hollister, Houston, Texas 77080;
Weatheredge Apartments, 7520 Cook Rd., Houston, Texas 77099;
Glenwood Forest Apartments, 8600 Sterlingshire, Houston, Texas 77078; and
Sandalwood Villa Apartments, 8308 Gulf Freeway, Houston, Texas 77017.

1.11 Defendants First Union National Bank, GMAC Commercial Mortgage Corporation, First Union National Bank as Master on behalf of State Street Bank and Trust as Trustee Mortgage, and Omni Bank were "Loss Payees/Mortgage Holders" listed in the Policy as having interests in one or more of the above referenced locations as shown in Policy Change Number E and O1.

1.12 Defendant First Union National Bank Corporation d/b/a First Union National Bank, 301 South Tryon Street, Charlotte, North Carolina ("First Union") is a Delaware corporation authorized to do business in Texas. First Union has appeared and may be served through its counsel of record.

1.13 Defendant GMAC Commercial Mortgage Corporation ("GMAC Commercial") is a California corporation authorized to do business in Texas. GMAC Commercial has appeared and may be served through its counsel of record.

1.14 Defendant First Union National Bank Corporation d/b/a First Union National Bank, 301 South Tryon Street, Charlotte, North Carolina as Master on behalf of State Street Bank and Trust as Trustee Mortgage ("First Union") is a Delaware corporation authorized to do business in Texas. First Union has appeared and may be served through its counsel of record.

1.15 Defendant OmniBank Center Business Condominiums Owners Association d/b/a OmniBank ("Omni Bank") is a Texas corporation with its principal place of business in Harris County, Texas. Omni Bank has appeared and may be served through its counsel of record.

1.16 Defendant Mid Continental Insurance Agency, Inc. ("MIA") is a Texas corporation with its principal place of business in Houston, Harris County, Texas. MIA may be served with process through its registered agent for service of process, John R. Duffy, 1717 Montrose Blvd, Houston, Texas 77006.

1.17 Defendant John R. Duffy is an individual residing in Houston, Harris County, Texas. Mr. Duffy may be served with process at his home office address, 1717 Montrose Blvd., Houston, Texas 77006.

1.18 Defendant Theoginia Duffy is an individual residing in Houston, Harris County, Texas. Ms. Duffy may be served with process at her home office address, 1717 Montrose Blvd., Houston, Texas 77006.

II.

JURISDICTION AND VENUE

2.1 This Court has jurisdiction of this cause as it relates to a policy of insurance issued to cover real and personal property and apartment buildings located in Harris County, Texas that are have allegedly sustained certain losses where the potential amount in controversy is within the jurisdictional limits of this Court.

2.2 Plaintiffs also bring this action under Chapter 37 of the Texas Civil Practices & Remedies Code seeking a declaratory judgment by this Court of the parties' rights and obligations, if any, under the Policy, a commercial property insurance policy, under the circumstances described hereinbelow.

III.

FACTS

3.1 Underwriters, through USA Special Risks, Inc. of Yardley, Pennsylvania, effected the issuance of Commercial Property Policy Number BWB 20-0138 (the "Policy") to the Insureds with an effective policy period from July 31, 2000 to July 31, 2001. Underwriters issued the Policy to the Insureds through Defendants' agent, MIA, based on misrepresentations by and on behalf of the Insureds in the application for the Policy that there had been only one (1) \$67,000 loss in the five (5) preceding years in the seven (7) locations that coverage was applied for and that all locations had copper wiring or aluminum wiring that had been retrofitted with Kolar or pigtailed wiring that made it safer than untreated aluminum wiring.

3.2 The Insureds' statements as referred to in 3.1 above were intentional, material misrepresentations made by the Insureds to the Underwriters to induce the Underwriters to issue the Policy. The Underwriters relied on the Insureds' intentional, material misrepresentations in issuing the Policy and would not have done so, but for these misrepresentations. Subsequently, however, Underwriters discovered that, contrary to the misrepresentations made by the Insureds and/or their agents, among other things, the subject properties had in truth actually sustained at least three (3) fire losses totaling more than \$768,000 in damages and three (3) wind and windstorm losses totaling more than \$88,800 in damages all during the three (3) years immediately preceding the period of the Policy, and further that the wiring at one of the locations where two (2) of these fire losses occurred in truth contained untreated aluminum wiring, all contrary to the affirmative representations made by the insureds to Underwriters. That said statements were material misrepresentations of facts that the Defendant Insureds made with intent to deceive Underwriters, who would and did rely on those misrepresentations and but for said misrepresentations, Underwriters would never have issued the Policy to Defendants. Further, the Insureds have never paid or attempted to pay any of the premiums due on the Policy. For the foregoing reasons, Underwriters have canceled the Policy pursuant to the Policy Terms and Conditions and now bring this action to void and rescind the Policy from inception as prayed for below.

3.3 Further, Underwriters would show that in addition to purposefully misstating their true loss history, the Insureds and/or their agents never paid or offered payment of the premiums due under the Policy, which caused the Policy to sustain a complete failure of consideration.

3.4 Plaintiffs would show that since the filing of this lawsuit, two of the Insureds have filed a third-party action against MIA and the Duffys. The two Insureds claim that MIA and the Duffys were solely responsible for the completion and filing of the application for insurance with

Underwriters in this matter. They claim that MIA and/or the Duffys neither requested, nor were provided, with any information requested on the application for insurance. Specifically, MIA and the Duffys did not request, nor were they provided, with the prior lost history or the type of wiring installed in the apartments. The two Insureds claim that either the application for insurance was simply devoid of such information or the information was inaccurately set forth by MIA and the Duffys. Furthermore, the two Insureds claim that MIA and the Duffys completed, executed, and filed the application for insurance with Underwriters without obtaining or confirming any information regarding the respective apartments with the two Insureds or their management company, Cornerstone.

IV.

DECLARATORY JUDGMENT

4.1 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. Pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code, Underwriters request that the Court declare that the Policy issued to the Insureds is void from its inception as a result of the intentional, material misrepresentations made by the Insureds directly and/or through their agents, during the application process for the Policy. Underwriters further request that the Court declare that the Policy issued to the Insureds is void due to failure of consideration. Underwriters additionally request that the Court enter a declaratory judgment that Underwriters have no duty to indemnify or pay any loss currently alleged by the Insureds or that may be alleged to be due under the Policy in the future, and for the recovery of attorneys' fees and costs as provided in Tex. Civ. Prac. & Rem. Code § 37.009.

V.

RECISSION

5.1 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. In the alternative, Plaintiffs pray that they are entitled to the rescission of the Policy due to the intentional, material misrepresentations made by the Insureds and their agents which caused the Underwriters to issue the Policy. Underwriters and USA Special Risks, Inc., Plaintiffs' underwriting agent on this risk, would never have approved or issued the Policy to Defendants had they been truthfully told the facts concerning the loss history of the premises Defendants sought to insure under the Policy and had these facts and information been properly disclosed to Underwriters in the application process.

VI.

FRAUD

6.1 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. In the alternative, and only in the unlikely event that the Policy is not set aside and rescinded from inception, then Plaintiffs pray that they are entitled to an affirmative recovery against the Insureds for their fraud. Plaintiffs would show that the Insureds made material misrepresentations, that the misrepresentations were made with knowledge of their falsity or made recklessly without any knowledge of the truth and as positive assertions, the misrepresentations were made with the intention that they should be acted upon by Plaintiffs, and the Plaintiffs acted in reliance upon the misrepresentations and thereby suffered injury. Further and in the alternative, Plaintiffs would show that the Insureds concealed or failed to disclose material facts within the knowledge of the Insureds and/or their agents, that the Insureds knew that the Plaintiffs were ignorant of the facts and did not have an equal opportunity to discover the truth, the Insureds intended to induce the Plaintiffs to take

action by concealing or failing to disclose the facts, and the Plaintiffs suffered injury as a result of acting without the knowledge of the undisclosed facts. Plaintiffs would show that they have been damaged because they never would have approved or issued the Policy to the Insureds had they been given the true facts concerning the loss history of the premises, and had these facts been truthfully and properly disclosed to Plaintiffs in the application process. Plaintiffs thus alternatively pray for recovery from Insureds in an amount equal to the premiums they would have been entitled to obtain had the loss history been truthfully disclosed, and had Plaintiffs approved or issued the Policy with such knowledge. Alternatively, Plaintiffs pray for the amount of money they are required to pay out under the Policy.

6.2 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. Plaintiffs have prayed for rescission of the Policy due to the fraud committed in the application process. In the alternative, Plaintiffs pray that they are entitled to an affirmative recovery against MIA and the Duffys for their fraud. Plaintiffs would show that the Insureds, and/or MIA and/or the Duffys, made material misrepresentations, that the misrepresentations were made with knowledge of their falsity or made recklessly without any knowledge of the truth and as positive assertions, the misrepresentations were material and made with the intention that they should be acted upon by Plaintiffs, and the Plaintiffs acted in reliance upon the misrepresentations and thereby suffered injury. Further and in the alternative, Plaintiffs would show that the Insureds, and MIA and the Duffys, concealed or failed to disclose material facts within their knowledge, that they knew that the Plaintiffs were ignorant of the facts and did not have an equal opportunity to discover the truth, the Insureds, and MIA and the Duffys, intended to induce the Plaintiffs to take action by concealing or failing to disclose the facts, and the Plaintiffs suffered injury as a result of acting without the knowledge of the undisclosed facts. Plaintiffs would show that they have been damaged because

they never would have approved or issued the Policy to the Insureds had they known the true facts concerning the loss history of the premises, and had these facts been properly disclosed to Plaintiffs in the application process. Alternatively, Plaintiffs pray for recovery in the amount of the premiums they would have been entitled to obtain under their underwriting guidelines had the loss history been truthfully disclosed, and had Plaintiffs approved or issued the Policy with such knowledge. Alternatively, Plaintiffs pray for the amount of money they are required to pay out under the Policy together with all attorneys' fees and costs Plaintiffs have been required to incur in this lawsuit.

VII.

NEGLIGENT MISREPRESENTATION

7.1 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. In the alternative, Plaintiffs pray that they are entitled to affirmative recovery against the Insureds for their negligent misrepresentations. Plaintiffs would show that the Insureds made representations in the course of their business or in a transaction in which they had a pecuniary interest, that the representations supplied false information for the guidance of others in their business, and that the Insureds did not exercise reasonable care or competence in obtaining or communicating the information. Plaintiffs would show that they have been damaged because they never would have approved or issued the Policy to the Insureds had they been given the true facts concerning the loss history of the premises, and had these facts been truthfully and properly disclosed to Plaintiffs in the application process. Plaintiffs pray for recovery in the amount of the premiums that they would have been entitled to obtain had the loss history been truthfully disclosed, and had Plaintiffs approved or issued the Policy with such knowledge. Alternatively, Plaintiffs pray for the amount of money they are required to pay out under the Policy.

7.2 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. Plaintiffs have prayed for rescission of the Policy due to the fraud committed in the application process. However, in the alternative, Plaintiffs pray that they are entitled to affirmative recovery against the Insureds, and MIA and the Duffys, for their negligent misrepresentations. Plaintiffs would show that the Insureds, and MIA and the Duffys, made representations in the course of their business or in a transaction in which they had a pecuniary interest, that the representations supplied false information for the guidance of others in their business, and that if the Insureds, and MIA and the Duffys, did not intend to defraud Plaintiffs, they did not exercise reasonable care or competence in obtaining or communicating the information, which constituted negligence. Plaintiffs would show that they have been damaged because they never would have approved or issued the Policy to the Insureds had they known the true facts concerning the loss history of the premises, and had these facts been properly disclosed to Plaintiffs in the application process. Plaintiffs pray for recovery in the amount of the premiums that they would have been entitled to obtain had the loss history been truthfully disclosed, and had Plaintiffs approved or issued the Policy with such knowledge. Alternatively, Plaintiffs pray for the amount of money they are required to pay out under the Policy against MIA and/or the Duffys as a proximate result of their negligence.

VIII.

BREACH OF CONTRACT

8.1 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. In the alternative, Plaintiffs pray that they are entitled to affirmative recovery against the Insureds for their breach of contract. Plaintiffs would show that the Insureds were required under the Policy that was issued to pay premiums. The premiums were never paid. This constituted a failure of consideration so as to properly allow Underwriters to avoid the contract of insurance represented by the Policy.

However, alternatively, should the Plaintiffs somehow be required to pay under the Policy, then Plaintiffs are entitled to recover against the Insureds the full premiums required to be paid under the Policy. Further in the alternative, Plaintiffs are entitled to recover the full premiums that they would have otherwise been entitled to charge under their underwriting guidelines.

IX.

CONSPIRACY

9.1 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. In the alternative, Plaintiffs pray that they are entitled to affirmative recovery against the Insureds for the damages that resulted from their conspiracy. Plaintiffs would show that the Insureds had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to Plaintiffs. Plaintiffs would show that one or more persons involved in a conspiracy performed some act or acts to further the conspiracy. Plaintiffs would show that they would not have approved or issued the Policy to the Insureds had they not entered the conspiracy. Plaintiffs pray for recovery of the premiums that they would have been entitled to had the loss history been truthfully disclosed, and had Plaintiffs approved or issued the Policy with such knowledge. Alternatively, Plaintiffs pray for the amount of money they are required to pay out under the Policy.

X.

PROMISSORY ESTOPPEL

10.1 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. In the alternative, Plaintiffs pray that they are entitled to affirmative recovery against the Insureds pursuant to promissory estoppel. Plaintiffs would show that they substantially relied to their detriment on the Insureds' false promises, and that the reliance was foreseeable by the Insureds. Plaintiffs would show that they would not have approved or issued the Policy to the Insureds had the false promises

not been made. Plaintiffs pray for recovery of the premiums that they would have been entitled to had the loss history been truthfully and correctly disclosed, and had Plaintiffs approved or issued the Policy with such knowledge. Alternatively, Plaintiffs pray for the amount of money they are required to pay out under the Policy.

10.2 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. Plaintiffs have prayed for rescission of the Policy due to the fraud committed in the application process. However, in the alternative, Plaintiffs pray that they are entitled to affirmative recovery against the Insureds, and MIA and the Duffys, pursuant to promissory estoppel. Plaintiffs would show that they substantially relied to their detriment on the Insureds', and MIA's and the Duffys', false promises and/or material misrepresentations of fact, and that the reliance was foreseeable by the Insureds, and MIA and the Duffys. Plaintiffs would show that they would not have approved or issued the Policy to the Insureds had the false promises not been made. Plaintiffs pray for recovery of the premiums that they would have been entitled to had the loss history been truthfully disclosed, and had Plaintiffs approved or issued the Policy with such knowledge. Alternatively, Plaintiffs pray for a recovery against MIA and/or the Duffys for the amount of money they are required to pay out under the Policy.

XI.

CONSTRUCTIVE TRUST

11.1 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. In the alternative, Plaintiffs pray that due to the fraud by the Insureds, that a constructive trust be applied to any proceeds paid under the Policy as the only remedy that will prevent the unjust enrichment of the Insureds at the Plaintiffs' expense.

XII.

ATTORNEYS' FEES

12.1 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. As a result of the Insured's breach of contract, Plaintiffs have been required to retain counsel and prosecute this action, at least in part. Plaintiffs are entitled to recover their reasonable and necessary attorneys' fees pursuant to Tex. Civ. Prac. & Rem. Code § 38.001 et seq. Plaintiffs are also entitled to reasonable and necessary attorneys' fees and costs pursuant to Tex. Civ. Prac. & Rem. Code § 37.009 under the Declaratory Judgment Act.

XIII.

EXEMPLARY DAMAGES

13.1 Plaintiffs incorporate the preceding paragraphs as if fully set forth herein. Plaintiffs allege that the acts complained of herein were committed knowingly, fraudulently, with gross negligence, intent, and/or malice, and as a result thereof, Plaintiffs are entitled to receive additional exemplary damages.

XIV.

JURY DEMAND

14.1 Plaintiffs demand a trial by jury.

XV.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Those Certain Underwriters at Lloyd's, London Subscribing to Insurance Policy No. BWB 20-0138, pray that the Court grant them relief as follows:

- 1) a Declaratory Judgment in favor of Plaintiffs and against the Defendants that the Policy issued by Underwriters to the Insureds is void from its inception and, therefore, does not provide coverage to the Insureds for the claims made;
- 2) a Declaratory Judgment in favor of Plaintiffs and against the Defendants that Underwriters are under no obligation to indemnify the Insureds for any claims made on the Policy;
- 3) a Declaratory Judgment that the Defendants have no rights under the Policy issued to Defendants;
- 4) judgment in favor of the Plaintiffs and against the Defendants for Underwriters' reasonable and necessary attorneys' fees and court costs incurred by Underwriters in prosecuting this declaratory judgment action;
- 5) in the alternative to the above, Judgment in favor of the Plaintiffs and against the Insureds for Plaintiffs' actual damages, exemplary damages, attorneys' fees, pre-judgment interest, post-judgment interest, and costs of court;
- 6) in the alternative to the above, Judgment in favor of the Plaintiffs and against MIA and the Duffys for Plaintiffs' actual damages, exemplary damages, attorneys' fees, pre-judgment interest, post-judgment interest, and costs of court; and
- 7) that Underwriters have such other and further relief, both general and special, at law or in equity, to which he may show himself justly entitled.

Respectfully submitted,

STRASBURGER & PRICE, L.L.P.

By: _____

WILLIAM A. HARRISON

Texas Bar No. 09125000

JACK M. MURCHISON

Texas Bar No. 14681950

1301 McKinney St., Suite 3200

Houston, Texas 77010

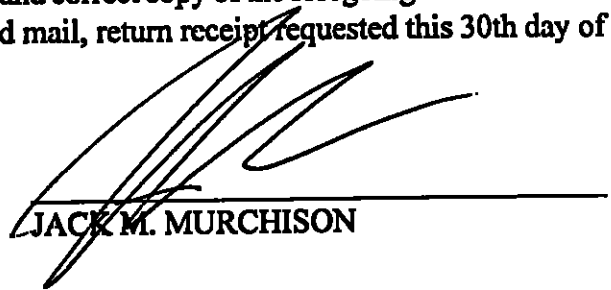
(713) 951-5600 – Telephone

(713) 951-5660 – Facsimile

**Attorneys for Plaintiff, Those Certain
Underwriters at Lloyd's, London
Subscribing to Insurance Policy No. BWB 20-0138**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served upon all counsel of record via certified mail, return receipt requested this 30th day of October, 2001.



JACK M. MURCHISON