

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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GENESIS MERCHANT PARTNERS, LP and GENESIS  
MERCHANT PARTNERS II, LP,

Plaintiffs,

vs.

GILBRIDE, TUSA, LAST & SPELLANE LLC,  
JONATHAN M. WELLS, KENNETH M. GAMMILL,  
JR., and CHARLES S. TUSA,

Defendants.  
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: **Motion Sequence No.: 3**  
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: Index No. 653145/2014  
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: **AFFIDAVIT OF JONATHAN**  
: **M. WELLS IN OPPOSITION**  
: **TO PLAINTIFF'S MOTION**  
: **FOR SUMMARY JUDGMENT**  
:  
:  
: X

STATE OF CONNECTICUT     )  
  ) SS.:  
COUNTY OF FAIRFIELD     )

I, Jonathan M. Wells, swear the following to be true under the penalties of perjury:

1. I am a member of the law firm of GILBRIDE, TUSA, LAST & SPELLANE LLC ("Gilbride Tusa" or the "Firm"), and am admitted to practice law in the states of New York and Connecticut.

2. I am a party to this action and I am personally familiar with the facts of this action.

3. Genesis incorrectly claims that there is no dispute the Gilbride Tusa committed malpractice. Genesis first claims that I did not properly structure each of the four loans to Progressive, allowing the loan proceeds to be disbursed prior to the perfection of the security interests. Second, Genesis asserts that I did not know how to create a security interest in life insurance policies. According to Genesis, I filed UCC-1 Forms to secure the life insurance policies as collateral without knowing that life insurance policies are excluded from the UCC.

Finally, it is alleged that I failed to take critical steps to perfect the collateral. None of these allegations are correct.

4. With regard to the first claim, Genesis negotiated and agreed, as a business concern, without any consultation with Gilbride and prior to Gilbride's retention in each loan, to allow the borrower, Progressive Capital Solutions, LLC ("Progressive"), to provide evidence that the security interest was perfected 21 days after the loan proceeds were disbursed. The reason Genesis agreed to release the funds prior to perfection of the security interests is that in most cases, Progressive was using the loan proceeds to purchase the life insurance policies that were going to be used as collateral for the loan. At the beginning of each loan transaction, Gilbride was handed a term sheet which memorialized Genesis' independent negotiations with Progressive. Gilbride was excluded from giving advice on the transaction when negotiated at the terms sheet stage and was asked solely to create loan agreements to effectuate the deal that Genesis previously agreed.

5. With regard to the second claim, Gilbride called for Collateral Assignments of Contracts to create the security interest in the life insurance policies, not the UCC-1 Form, as plaintiffs claim. Plaintiffs concede that collateral assignment of the policies is the proper manner to secure life insurance policies.

6. Genesis' third claim, that Gilbride failed to undertake the mechanical tasks of the actual filing of the assignment forms that the agreements required, is completely false. Genesis specifically restricted Gilbride from undertaking these mechanical functions. The emails discussed below confirm that agents of Genesis, including Chris Kelly retained this function with Progressive. For example, in Loan 4 I asked Kelly to confirm that he had finished the very same mechanical tasks related to the filing of the assignments, and Kelly curtly responded: "DONE."

If I were retained by the client to undertake these tasks, I would not have asked the *client* if he had taken care of it, and the client certainly would not have responded by saying it was “DONE” – rather Kelly would have told me “no, that is what I retained Gilbride to do.” However, Kelly did not say that, he said it was “done,” which totally contradicts Genesis’ claim. *See Ex. 38, G 01927.*

7. Genesis also claims that it did not know it restricted the scope of Gilbride’s services, and thus there was no “informed consent.” However, beginning with the very first loan, Loan 1, and continuing through all four loans, Genesis’ instructions were clear and unambiguous. As set forth in detail below, Genesis, its agents, and its in-house counsel Chris Kelly were informed about what tasks their lawyers were undertaking, which tasks they prohibited Gilbride from undertaking, and the consequences of such limited scope of duty.

8. Additionally, Genesis’ arguments with regard to proximate causation are without merit. Genesis specifically excluded Gilbride from undertaking the tasks that it now claims were not done or not done properly. Genesis, not Gilbride, is the cause of any purported loss here.

### **Background**

9. I began working with Genesis in October 2007 on another loan transaction and as early as May 2008, when my Firm was retained by Genesis with regard to the first of four separate loans to Progressive.

10. Sands Brothers Asset Management, LLC (“Sands Bros.”) is the investment manager to Genesis. I understand that Martin and Steven Sands, and/or their families, directly or indirectly own Sands Bros., and the general partner of Genesis, Genesis Merchant Partners GP LLC, and Mssrs. Sands are also compensated by Sands Bros. for services rendered directly or indirectly to Genesis.

11. Gilbride Tusa was not involved in or aware of the manner in which Genesis

became acquainted with Progressive.

12. During my representation of Genesis, I communicated directly with Timothy W. Doede, former Portfolio Manager of Genesis as well as Christopher Kelly, former Chief Compliance, Chief Operating Officer and General Counsel of Sands Bros. Kelly is a lawyer, licensed to practice law in New York and the District of Columbia. Doede and Kelly were authorized agents for Genesis.

13. I rarely received specific instructions from Steven Sands or Martin Sands with respect to the loans at issue in this matter. Any communications with Msrs. Sands on the loans at issue were general and focused more on how quickly they would be able to close these loans or how they may apply pressure to any principals of Progressive to try and extract greater fees, principal and/or interest.

#### **Terms of the Loans Made to Progressive from Genesis**

14. Each of the four loans Genesis made to Progressive contained the following documents: Closing Statement; Note Purchase Agreement; Senior Secured Promissory Note; Security Agreement; Collateral Assignment of Contracts; and UCC Financing Statement. Attached hereto as **Exhibit 1** are true and accurate copies of the Closing Binder Table of Content Sheets for Loan 1, 2, 3 and 4, bates stamped GIL000123; GIL000717; GIL005658; GIL005749; GIL004115; GIL004412. Some loans also had personal guarantees from principals of Progressive.

15. The Term Sheets for each of Loans 1 through 4 were pre-negotiated, agreed upon, and prepared by Progressive and Genesis prior to any involvement of Gilbride Tusa. The Term Sheets memorialized the broad terms of the loan agreements, which would then be expanded into a series of transactional agreements to be drafted by Gilbride Tusa.

16. For each of the four loans, Genesis negotiated each portion of the term sheet

before I became involved, and neither Gilbride Tusa nor my myself had any role in the negotiations of the business terms of any of the loans. Gilbride Tusa's role was primarily limited to drafting the loan documents to formally document the terms of the deal.<sup>1</sup> For each loan, the first contact I had with Genesis was the presentation of the already agreed upon Term Sheet, or a phone call from Timothy Doede or Chris Kelly indicating that a Term Sheet would be executed soon by Progressive. Attached hereto as **Exhibit 2** are true and accurate copies of The Term Sheets for all four loans, bates stamped GIL000128-GIL000129; GIL000722-GIL000724; GIL005754-GIL005758; GIL016593-GIL016597.

17. The Collateral Assignment of Contracts obligates Progressive to undertake a series of steps in order to secure the most valuable collateral, namely certain life insurance policies purportedly owned by Progressive.

18. According to the Collateral Assignment of Contracts prepared by Gilbride Tusa, at the direction of Genesis, Progressive agreed to collaterally assign its interest in the life insurance policies as security for each Loan. In Loans 1, 2 and 3, the Collateral Assignment of Contracts required Progressive, if not already owned by Progressive, to purchase existing and additional life insurance policies (previously identified, vetted and valued independently by Genesis) to be used as collateral within five business days after the closing and transfer of funds.

19. Paragraph 2 of the Collateral Assignment of Contracts for each loan assigned Progressive's rights in the policies to Genesis, providing: "[Progressive] as further security for the payment and the performance of any obligations of [Progressive] to [Genesis] pursuant to the Transaction Documents, hereby assigns, pledges, transfers and sets over unto [Genesis] all of

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<sup>1</sup> Gilbride Tusa's role with respect to securing collateral in the form of real estate as part of Loan 3 is not discussed as all claims arising from the real estate collateral have been dismissed from this action. In addition, Gilbride Tusa performed other tasks such as obtaining debtor related public record searches.

[Progressive]'s right, title, and interest in . . . the life settlement insurance policies **owned or purchased by [Progressive] subsequent to the date hereof**, further described on Schedule 1 attached hereto and made a part hereof.” See **Ex. 14**, GIL000192, GIL000200; **Ex. 17**, GIL000789, GIL000797; **Ex. 24**, GIL009306, GIL009315, GIL009396, GIL009405; and **Ex. 33**, GIL015549, GIL015557 (emphasis added). Schedule 1 was created and completed by Genesis and Progressive during their pre-funding/pre-term sheet negotiations regarding identification and valuation of subject policies. My role with regard to these policies was administrative in nature to append the identified policies or schedules to the Collateral Assignment of Contracts.

20. The Collateral Assignment of Contracts did not, in and of itself, perfect the security interest, but rather created the security interest and obligated Progressive to execute collateral assignment forms and file them with each life insurance carrier for the policies at issue to perfect the security interest. Filing of the collateral assignment forms with each life insurance carrier was one manner in which that the security interest in the life insurance policies created by the Collateral Assignment of Contracts could be perfected. To be clear, Genesis instructed Gilbride to allow Progressive and Genesis to directly handle filing collateral assignments with the respective insurance carriers from the very first loan to Progressive, Loan 1.

21. The Note Purchase Agreement worked with the other loan documents, defined terms, clarified terms of the Loans, required representations from Progressive, and established covenants, restrictions and acknowledgments of the parties thereto. Attached hereto as **Exhibit 3** are true and accurate copies of the fully executed Note Purchase Agreements for each loan, bates stamped GIL000132-GIL000151; GIL000727-GIL000746; GIL005760-GIL005779; GIL005669-GIL005688; GIL008614-GIL008633; and GIL008911-GIL008930.

22. Paragraph 8(g) of the Note Purchase Agreement complemented the Collateral

Assignment of Contracts by defining “Conditions to [Genesis]’s Obligation to Purchase.” With respect to the life insurance policies, the Note Purchase Agreement made clear that Progressive was not required to own each of these policies at the time of the closing, and indeed, in some cases they did not. Paragraph 8(g) provides:

[Progressive] understands that [Genesis]’s obligation to purchase the Notes on the Closing Date is conditioned upon: . . . .

(g) Delivery to [Genesis], within the time frames provided in the Collateral Assignment, of evidence regarding the (i) purchase by [Progressive] of, (ii) recording with the applicable insurance carrier of ownership in [Progressive]’s name of, and (iii) recording with the applicable insurance carrier of [Genesis]’s security interest in, the Secured Policies.

*See* **Ex. 3**, GIL000145; GIL000740; GIL005774; GIL005683; GIL008628; GIL008925.

23. The Security Agreement defined the security received as part of each Loan, specifically Progressive’s inventory, goods, accounts, equipment and other intangibles. The Security Agreement created the security interest in the referenced assets. Attached hereto as **Exhibit 4** are true and accurate copies of the fully executed Security Agreements for each loan, bates stamped GIL000163-GIL000171; GIL000759-GIL000767; GIL009296-GIL009304; GIL009387-GIL009394; GIL008658-GIL008665; and GIL015541-GIL015548.

24. The UCC Financing Statement (“UCC-1 Form”) identified Genesis’ inventory, goods, accounts, equipment and other intangibles in order to perfect a security interest in them when filed, for those goods in which a security interest could be perfected by the filing of a UCC-1. Attached hereto as **Exhibit 5** are true and accurate copies of the UCC-1 Forms prepared and filed in connection with Loans 1-4, bates stamped GIL001378-GIL001380; GIL001555-GIL001556; GIL005437-GIL005440; and GIL004107-GIL004108.

25. The UCC-1 Form for Loan 4 listed certain insurance policies that were being pledged as collateral for Loan 4. *See* **Ex. 5**, GIL004107-GIL004108. These policies were to be

secured by the Collateral Assignment of Contracts, and were listed on the UCC-1 Form for the sole purpose of alerting the world that these policies have been borrowed against. The UCC Statement was not meant as a security device for the life insurance policies, as the securitization of the life insurance policies was effectuated by the Collateral Assignment of Contracts and the filing of collateral assignments (or carrier specific equivalents) with the respective insurance carriers.

***Loan 1***

26. I first learned about Genesis' negotiated deal with Progressive from Tim Doede on May 16, 2008. I was asked to draft the relevant supporting loan documents referred to above. My billing entry from May 16, 2008 confirms this. Attached hereto as **Exhibit 6** is a true and accurate copy of Gilbride Tusa' invoice to Genesis, dated June 30, 2008, bates stamped GIL013952-GIL013953.

27. The loan – negotiated and agreed upon by Genesis, including Tim Doede and Progressive without my involvement, – was structured to obligate Progressive to perfect the security interest in the life insurance policies very shortly after Progressive purchased the life insurance policies with the proceeds of the loan. To my knowledge, Progressive did not own these life insurance policies prior to the closing, but had identified and perhaps obtained the right to purchase the policies prior to closing, and in fact used the loan proceeds to purchase the life insurance policies that would collateralize the loan itself. Thus, Genesis' claim that the loans should have been fully collateralized prior to the disbursement of funds does not make any sense. *See Ex. 2, GIL000128.*

28. On May 19, 2008, I received an email from Seth Gottlieb, Progressive's counsel, and subsequently had a telephone conference with Doede, Gottlieb, and John Puglisi of Progressive where they negotiated the terms of the loan documents specifically relating to



collateral securitization. Attached hereto as **Exhibit 7** is a true and accurate copy of an email exchange dated May 19, 2008, May 21, 2008, May 22, 2008 and May 23, 2008, bates stamped GIL016411-GIL016414; *see also* **Ex. 6**, GIL013952.

29. On May 21, 2008, I sent the draft loan documents to Tim Doede at Genesis. Attached hereto as **Exhibit 8** is a true and accurate copy of an email exchange dated May 21, 2008, bates stamped GIL016408-GIL016410.

30. The first draft of a Collateral Assignment of Contracts was appended to the May 21, 2008 email. Attached hereto as **Exhibit 9** is a true and accurate copy of a draft Collateral Assignment of Contracts, bates stamped GIL001089-GIL001096.

31. Paragraph 11(c) of the Collateral Assignment of Contracts specifically addressed the life insurance policies as collateral, and the manner in which Progressive shall deliver the collateral to Genesis. Paragraph 11(c) of the first draft Collateral Assignment of Contracts read:

All Contracts are or will be issued in favor of [Progressive] and are either in full force and effect on the date hereof, or shall be in force and effect within five (5) business days of the date hereof, subject to no defenses, setoffs or counterclaims whatsoever;

*See* **Ex. 9**, GIL001091.

32. The “Contracts” refers to life insurance policies, and “the date hereof” refers to the closing date, i.e. the date funds are transferred.

33. Shortly after I sent this draft, Tim Doede sent an email to me and Chris Kelly of Genesis. *See* **Ex. 8**, GIL016409. The email introduced me to Chris Kelly, Genesis’ new compliance officer and general counsel and Tim Doede confirmed to Chris Kelly the importance of the Collateral Assignment of Contracts. Doede wrote “Chris, Jonathan is my primary deal attorney. These are his first draft of the docs for the progressive deal. **Primary security comes from the assignment of contracts that are the policies being purchased.**” *See* **Ex. 8**,

GIL016409 (emphasis added).

34. At 3:28PM on May 21, 2008, I was asked by email to participate in a call with both Kelly and Doede. Tim Doede explained that he had a discussion with Kelly and that Kelly “does want to get a greater sense of our security for these assets (life insurance policies) that we discussed and I wanted you [sic] to share them with you.” *See* **Ex. 8**, GIL016408.

35. During the call, I was instructed by Doede to amend the language in the Collateral Assignment of Contracts. My billing entry from May 21, 2008 reflects this call, the purpose thereof, and the subsequent changes I made to the document. On May 21, 2008, I billed “Finalize... collateral assignment of contracts; telephone conference regarding same.” *See* **Ex. 6**, GIL013952.

36. On May 22 and May 23, I had more telephone conferences with Genesis, and Genesis and Progressive, and to my understanding Genesis had several telephonic discussions with Progressive wherein they negotiated the specific terms of the Collateral Assignment of Contracts, including Section 11(c). Attached hereto as **Exhibit 10** is a true and accurate copy of an email exchange dated May 19, 2008 – May 23, 2008, bates stamped GIL001104-GIL001107; *see also* **Ex. 6**, GIL013952. On one such call which involved, at a minimum Tim Doede and John Puglisi of Progressive, Tim Doede specifically instructed me that he and Progressive “**will handle anything related to the insurance policies**”.

37. The parties, without Gilbride Tusa’s involvement, negotiated the time in which Progressive with the assistance of Doede (and perhaps others) at Genesis were to perfect the security interest in the life insurance. *See* **Ex. 2**, GIL000128-GIL000129. I was instructed by Doede and Progressive as to the relevant dates and deliverables to be required by Section 11(c) and revised the agreement accordingly. The final version of paragraph 11(c) of the May 2008

draft Collateral Assignment of Contracts (hereinafter referred to as “Negotiated Paragraph 11(c)”) reads:

[Progressive] shall fulfill all necessary actions within its control to purchase the Contracts and to cause the Contracts to be issued in favor of [Progressive] in full force and effect within five (5) business days of the date hereof, subject to no defenses, setoffs or counterclaims whatsoever, and shall provide [Genesis] with evidence of the same within such time period. [Progressive] shall also deliver to [Genesis] evidence of the recording of [Progressive]’s outright ownership of the Contracts from the respective insurance carriers for the Contracts within fifteen (15) business days of the date hereof. Additionally, [Progressive] shall deliver to [Genesis] evidence of perfection of [Genesis]’s security interest in, and evidence of the acceptance of filing of Assignments of Policy as Collateral Security Agreements, or their equivalent, in favor of [Genesis], from the respective insurance carriers with regard to the Contracts within twenty one (21) business days of the date hereof.

Attached hereto as **Exhibit 11** is a true and accurate copy of a draft Collateral Assignment of Contracts, from May, 2008, bates stamped GIL001127-GIL001134.

38. In plain terms, the Negotiated Paragraph 11(c) revised by Genesis and Progressive provides that: (i) Progressive should purchase all insurance policies which are subject to collateral securitization within 5 business days after the closing date and transfer of funds; (ii) Progressive should also provide Genesis evidence of ownership of the life insurance policies within 5 business days after the closing date and transfer of funds; (iii) Progressive should provide Genesis with confirmations from the insurance companies that it owns the life insurance policies within 15 business days after the closing date and transfer of funds; and (iv) Progressive is to deliver to Genesis evidence of perfection of the security interest by evidencing the insurance carriers’ receipt of filing of the assignment of collateral in Genesis’ name, within 21 business days after the closing date and transfer of funds.

39. Loan 1 closed on May 23, 2008, and Genesis transferred \$873,000 to Progressive. Attached hereto as **Exhibit 12** is a true and accurate copy of the fully executed Closing

Statement for Loan 1, dated May 23, 2008, bates stamped GIL000126.

40. Without the deducted fees, this loan totaled \$900,000. Attached hereto as **Exhibit 13** is a true and accurate copy of the fully executed Secured Promissory Note for Loan 1, dated May 22, 2008, bates stamped GIL000153-GIL000161.

41. The final, executed Collateral Assignment of Contracts for Loan 1 used the Negotiated Paragraph 11(c) that was negotiated between Genesis and Progressive on May 22 and May 23, 2008, as discussed above. Attached hereto as **Exhibit 14** is a true and accurate copy of the fully executed Collateral Assignment of Contracts for Loan 1, dated May 22, 2008, bates stamped GIL000192-GIL000200.

42. Loan 1 was fully repaid as of November 19, 2008. Attached hereto as **Exhibit 15** is a true and accurate copy of a letter dated December 2, 2008, bates stamped GIL000001.

43. Following the explicit direction from Genesis regarding their assumption of filings of collateral assignments with the insurance carriers with Progressive's assistance, on November 19, 2008, I replied to Progressive counsel, Seth Gottlieb, following his email to me that Loan 1 had been repaid. Specifically, I advised Attorney Gottlieb "As Progressive facilitated the filing of any assignments of policies as collateral with the insurance carriers, hopefully they can reach out to the carriers to obtain whatever documentation the carriers require to release the collateral assignments, and return them to us [Genesis] for execution." Attached hereto as **Exhibit 45** is a true and accurate copy of an email exchange dated November 19, 2008, bates stamped GIL007903-GIL007904.

### ***Loan 2***

44. Like Loan 1, Loan 2 was collateralized with life insurance policies that Progressive may not own until after the funds had been transferred. The negotiated Term Sheet, signed on December 17 and 18, 2008 (the fully executed version of which I first saw when it was

emailed to me on December 18, 2008) provided: “[Genesis] will have a perfected 1<sup>st</sup> lien interest on the seven life settlement policies purchased within 5 business days of the Closing with an aggregate value in excess of \$850,000. These policies will be assigned to GMP within 15 business days of the Closing.” See **Ex. 2**, GIL000723. Without my assistance, Genesis **themselves** added a new requirement to the Loan 2 Term Sheet which differed from Loan 1 which provided that “the policies will be assigned to GMP within 15 business days of Closing.”

45. Loan 2 closed on December 22, 2008, wherein Genesis transferred \$878,750 to Progressive. Attached hereto as **Exhibit 16** is a true and accurate copy of the fully executed Closing Statement for Loan 2, dated December 22, 2008, bates stamped GIL000719.

46. Without the deducted fees, this loan totaled \$925,000. Attached hereto as **Exhibit 44** is a true and accurate copy of the fully executed Secured Promissory Notes for Loan 2, dated December 22, 2008, bates stamped GIL000748-GIL000757.

47. The final, executed Collateral Assignment of Contracts for Loan 2 included the same agreed upon language in Negotiated Paragraph 11(c) discussed above. Attached hereto as **Exhibit 17** is a true and accurate copy of the fully executed Collateral Assignment of Contracts for Loan 2, dated December 22, 2008, bates stamped GIL000789-GIL000797.

#### ***Loan 2 Amendments***

48. Loan 2 was amended on June 11, 2009 to extend the date the funds were to be repaid, called the Maturity Date. Genesis negotiated this extension on its own and excluded any involvement of Gilbride Tusa. Attached hereto as **Exhibit 18** are true and accurate copies of correspondence between Genesis and Progressive, amending Loan 2, dated May 28, 2009 and June 11, 2009, bates stamped G 00043-G 00047.

49. Loan 2 was then amended on November 11, 2010 to extend the Maturity Date. Attached hereto as **Exhibit 19** are true and accurate copies of the executed Amendment

documents for Loan 2, dated November 11, 2010, bates stamped GIL014901-GIL014903, which were prepared by Gilbride Tusa.

50. Loan 2 was amended again on January 31, 2011 to extend the Maturity Date. Attached hereto as **Exhibit 20** are true and accurate copies of the fully executed Amendment documents for Loan 2, dated January 31, 2011, bates stamped GIL005032-GIL005036, which were prepared by Chris Kelly. Gilbride Tusa only attached payment schedules thereto which were prepared by Genesis. Attached hereto as **Exhibit 41** is a true and accurate copy of an email from Chris Kelly to me, dated January 27, 2011, bates stamped GIL016689..

51. Loan 2 was amended once again on August 1, 2011 to extend the Maturity Date. Attached hereto as **Exhibit 21** are true and accurate copies of the fully executed Amendment documents for Loan 2, dated August 1, 2011, bates stamped GIL000377-GIL000382, which were prepared by Gilbride Tusa.

### ***Loan 3***

52. On July 31, 2009, Loan 3 closed wherein Genesis transferred \$776,000 and \$194,000 to Progressive, Attached hereto as **Exhibit 22** are true and accurate copies of the fully executed Closing Statements for Loan 3, dated July 31, 2009, bates stamped GIL005752; GIL005661. These were all prepared by Chris Kelly of Genesis. *See Ex. 41*, GIL016689.

53. Without the deducted fees, this loan totaled \$1,000,000. Attached hereto as **Exhibit 23** are true and accurate copies of the fully executed Secured Promissory Notes for Loan 3, dated July 31, 2009, bates stamped GIL005693-GIL005703; GIL005784-GIL005794.

54. The final, executed Collateral Assignment of Contracts for Loan 3 included the agreed upon language in Negotiated Paragraph 11(c) discussed above. Attached hereto as **Exhibit 24** is a true and accurate copy of the fully executed Collateral Assignment of Contracts for Loan 3, dated July 30, 2009, bates stamped GIL009306-GIL009315; GIL009396-

GIL009405.

***Loan 3 Scrivener's Error Amendment***

55. Loan 3 was amended on August 17, 2009 to correct a scrivener's error committed by Genesis' employee, Tim Doede. Attached hereto as **Exhibit 25** are true and accurate copies of the fully executed Amendments to Senior Secured Promissory Notes for Loan 3, dated August 17, 2009, bates stamped GIL005487-GIL005492; GIL005573-GIL005578.

56. Genesis was autonomous in the loan amendment. Accordingly, the scrivener's error in Loan 3 needing correction was made by Tim Doede of Genesis. In an email dated August 20, 2009, Doede writes: "Here are the note amendments I mentioned. Sorry for the inconvenience **as it was my error** that changed the last cash flow of each schedule." Attached hereto as **Exhibit 26** are true and accurate copies of an email exchange, dated August 17, 2009 and August 20, 2009, bates stamped G 01143-G 01147.

***Loan 3 Amendments***

57. Loan 3 was amended on January 31, 2011 to extend the Maturity Date. Attached hereto as **Exhibit 27** are true and accurate copies of the fully executed Amendment documents for Loan 3, dated January 31, 2011, bates stamped GIL005022-GIL005031. This amendment was drafted by Chris Kelly of Genesis.

58. Loan 3 was amended once again on August 1, 2011 to extend the Maturity Date. Attached hereto as **Exhibit 28** are true and accurate copies of the fully executed Amendment documents for Loan 3, dated August 1, 2011, bates stamped GIL000383-GIL000388; GIL000394-GIL000400.

***Loan 4***

59. On January 24, 2011, Chris Kelly of Genesis emailed me a term sheet for a new fourth loan (Loan 4). Attached hereto as **Exhibit 29** are true and accurate copies of an email

dated January 24, 2011 plus Term Sheet, bates stamped GIL016591-GIL016597.

60. The fully executed Term Sheet memorialized an agreement made between Genesis and Progressive for a loan of \$2,500,000. *See Ex. 29*, GIL016593-GIL016597.

61. While Loan 4 presented a similar loan agreement structure to loans 1, 2 and 3, there were some differences. First, Chris Kelly, as opposed to Tim Doede, took the lead for Genesis, as Tim Doede soon was leaving for another job. Next, Kelly on his own initiative drafted the first draft of the loan documents (based upon the previous loan agreements as examples). At one point Kelly asked me for word versions of the prior amendment documents so Kelly himself could draft further extensions/amendments of loans 2 and 3 as part of Loan 4. I offered to draft the amendments, but Kelly refused telling me “I will take first crack at that.” Attached hereto as **Exhibit 30** is a true and accurate copy of an email dated January 25, 2011, bates stamped GIL016403-GIL016405. I understood that Kelly was doing so to minimize spending funds on legal services, likely in response to directives of Msrs. Sands who historically avoid paying legal fees.

62. Further, Kelly gave me other specific instructions. By email dated January 24, 2011, Kelly ordered i) “John Puglisi is handling the matter on Progressive’s end and you should communicate with him;” and ii) I should “[p]lan to handle the UCC filings.” *See Ex. 29*, GIL016591-GIL016592.

63. Upon receipt of all of the draft documents from Kelly, I distributed on January 31, 2011 the draft loan documents to Progressive and Genesis.

64. As of January 31, 2011, the Negotiated Paragraph 11(c) of the draft Collateral Assignment of Contracts contained the same agreed upon language as Loans 1-3. Attached hereto as **Exhibit 31** is a true and accurate copy of a draft Collateral Assignment of Contracts



dated January 31, 2011, bates stamped GIL001783-GIL001791.

65. However, Kelly, after conversations with John Puglisi of Progressive, then proposed changes to Negotiated Paragraph 11(c) of the Collateral Assignment of Contracts. Specifically, he sought to tighten the time frame of Progressive's compliance to perfect the security interest. Additionally, Kelly specified Progressive's distinct steps required to perfect the security interest in the life insurance policies per discussions with John Puglisi on this topic; namely, submitting forms to the insurance carriers to assign the life insurance policies, and receiving the confirmation of receipt by the carriers of the assignments.

66. While the previous loans involved the purchase of some of the insurance policies after the closing as the loan proceeds themselves funded the purchases, Loan 4 presented a wholly new approach. Incredibly, ownership of the policies that Progressive was purchasing from seller CNF was transferred to Progressive by CNF four days before the closing. CNF had to wait four days to be paid, but the payment to CNF was done directly by wire from Genesis to CNF on the closing date.

67. Given the new structure in Loan 4 outlined above, Kelly, indicated to me he wanted to change Tim Doede's past practice from Loans 1-3 (thereby acknowledging how it had been done historically), directed that changes needed to be made to Negotiated Paragraph 11(c) (hereinafter referred to as "Loan 4 Paragraph 11(c)") shown in bold below:

[Progressive] represents, warrants and covenants to and with [Genesis] as follows: . . . .

[Progressive] **has purchased the Contracts and submitted forms prior to the date hereof** to cause the Contracts to be issued in favor of [Progressive] subject to no defenses, setoffs or counterclaims whatsoever, and has provided [Genesis] with evidence of the same within such time period. [Progressive] shall also deliver to [Genesis] evidence of the recording of [Progressive]'s outright ownership of the Contracts from the respective insurance carriers for the Contracts within fifteen (15) business days of the date hereof. Additionally, **[Progressive] shall deliver to**

**[Genesis] evidence of filing of [Genesis]’s security interest with the respective carriers in the Contracts within two (2) days** of the date hereof and perfection of, and evidence of the acceptance of filing of Assignments of Policy as Collateral Security Agreements, or their equivalent, in favor of [Genesis], from the respective insurance carriers with regard to the Contracts within twenty one (21) business days of the date hereof;

Attached hereto as **Exhibit 43** is a true and accurate copy of a draft Collateral Assignment of Contracts dated February 3, 2011, bates stamped GIL016583-GIL016590 (emphasis added).

68. On February 3, 2011, I advised Progressive and Genesis by email that Kelly’s changes to Loan 4 Paragraph 11(c) reflect the fact the Progressive owned the policies prior to the closing date: My email stated that “[t]he Collateral Assignment of Contract was amended to reflect that you actually own the policies currently and have submitted evidence of transfer of this ownership prior to the closing.” Attached hereto as **Exhibit 32** is a true and accurate copy of an email dated February 3, 2011, bates stamped GIL016512-GIL016513.

69. Kelly also requested changes to Loan 4 Paragraph 11(c) to provide that Progressive would file the assignment forms with each carrier and would thereafter deliver such proof to Genesis: “[Progressive] shall deliver to [Genesis] evidence of filing of [Genesis]’s security interest with the respective carriers in the Contracts.” *See* GIL015551. Attached hereto as **Exhibit 33** is a true and accurate copy of a fully executed Collateral Assignment of Contracts for Loan 4, dated February 3, 2011, bates stamped GIL015549-GIL015559. I confirmed this by email to Progressive and Genesis on February 3, 2011, writing: “The Collateral Assignment was also changed to provide that [Progressive] will fax in Assignments for GMP/GMP II to the carriers.” Attached hereto as **Exhibit 34** is a true and accurate copy of an e-mail dated February 3, 2011, bates stamped G 01491-G 01492. Genesis was fully aware that they had tasked Progressive to file collateral assignments with the insurance carriers and the above email dialogue explicitly confirms this.

70. Thus, on February 3, 2011, Genesis transferred \$90,000 and \$810,000 to Progressive . Attached hereto as **Exhibit 35** are true and accurate copies of the executed Closing Statements for Loan 4, dated February 3, 2011, bates stamped GIL008612; GIL008909.

71. Genesis also transferred \$150,000 and \$1,350,000 to third party CNF as payment for a portion of the life insurance policies that were to be collateralized as part of Loan 4. *See Ex. 35*, GIL008612; GIL008909.

72. Without the deducted fees, this loan totaled \$2,500,000. Attached hereto as **Exhibit 36** are true and accurate copies of the fully executed Secured Promissory Notes for Loan 4, dated February 3, 2011, bates stamped GIL008635-GIL008656.

#### ***Loan 4 Amendments***

73. Loan 4 was amended on August 1, 2011 to extend the Maturity Date. Attached hereto as **Exhibit 37** are true and accurate copies of the fully executed Amendment documents for Loan 4, dated August 1, 2011, bates stamped GIL000389-GIL000394; GIL000400-GIL000406.

#### **Genesis Limited the Scope of Gilbride Tusa' Representation and Thereby Consented to It**

74. Genesis specifically limited the scope of Gilbride Tusa' services for all four loans to the documentation of the loan agreements. Gilbride Tusa was never instructed, and was in fact prevented from, having any role in the perfection of the security interest in the life insurance policies themselves by filing of collateral assignments with carriers from the very beginning of the very first loan. Genesis' limitation of the scope of Gilbride Tusa' services was a knowing, informed and intentional strategy of Genesis in order to minimize its legal costs in each transaction and to attempt to speed up loan closings per past practice.

75. Genesis negotiated the terms of each deal without my involvement, included me only after the Term Sheets were fully negotiated and in most cases already signed, and did not

require that Progressive even owned the collateral it was pledging at the time of the transfer of funds (what I understand to be a common practice in the industry and one that is also the current subject of both civil and criminal legal proceedings against John Puglisi and other principals of Progressive, and Progressive).

76. Indeed, with respect to Loan 4, emails show that Genesis specifically agreed to allow Progressive to perfect the security interest in the life insurance policies without my involvement.

77. Gilbride Tusa's role in Loan 4 included the administrative function of collecting the assignments that Progressive filed with the carriers well-after the closing in order to assemble the "closing binder." In accordance with this limited instruction, I amended the standard table of contents for Loan 4's closing binders and included a line item for the assignments styled "Evidence of Ownership of Insurance Policies/Evidence of Assignments Filed with Insurance Carriers." See **Ex. 1**, GIL004115; GIL004412.

78. Pursuant to Kelly's instructions, after Loan 4 was closed Progressive prepared and sent the assignment forms that required Genesis' signature to Genesis for signature and asked that they be returned *to Progressive* so Progressive could file the forms with the carrier. Progressive explained to Chris Kelly of Genesis by email that a scan was sufficient, since "[w]e do not require originals to file with carrier." Attached hereto as **Exhibit 38** is a true and accurate copy of an email exchange between Progressive and Genesis dated February 7, 2011 and February 8, 2011 bates stamped G 01925-G 01927. Genesis was fully aware that they had tasked Progressive to file collateral assignments with the insurance carriers and the above email dialogue explicitly confirms this.

79. In response to the aforementioned email from Progressive, on which I was copied,

I asked Chris Kelly and Tim Doede whether they were “coordinating executing and delivering what [] Progressive needs regarding the assignments.” *See Ex. 38*, G 01926. Kelly’s response was reflective of the limited scope of Gilbride Tusa’s role, as he simply responded “DONE.” *See Ex. 38*, G 01927.

80. I replied to Kelly and Doede – in light of my assigned administrative task of collecting assignment forms for the closing binder – and asked Kelly to “send me a copy of what you signed for the closing books.” *See Ex. 38*, G 01925. Kelly did so at 3:56 p.m. on February 8, 2011.

81. Thus, Genesis’ argument that informed consent had not been given is disingenuous. Since Genesis entire business practice is founded in high risk lending, they were aware of all the risks associated with loans focused on this highly speculative collateral. Furthermore, it was not unreasonable for Gilbride Tusa to accept the instructions of sophisticated professionals such as Doede and or Kelly (additionally an accomplished attorney), both authorized agents for Genesis.

82. In fact, Martin Sands of Sands Bros., prior to Loan 4, specifically told me that “everyone in the industry is getting out of the life insurance business...” but “we are getting in” noting that Loan 4 was “extremely high risk” but “extremely high reward if it paid out.”

### **Genesis Habitually Minimized Attorneys’ Role to Minimize Legal Spend**

83. Mr. Sands writes in his affidavit that “[i]t is false to suggest that Genesis would ever have absolved its well-compensated attorneys of ultimate responsibility to ensure that Genesis’ security interests in the life insurance policies that constituted the vast majority of the collateral under the Loans.” *See* Affidavit of Steven Sands, dated December 30, 2015, ¶ 22.

84. However, an email exchange between Genesis’ agent, Tim Doede, Steven Sands himself, and Progressive on February 26, 2009 contradicts this. The email exchange shows that

Genesis considered legal fees to be a waste of money that could, **and should**, be circumvented by preparing and vetting documents before attorneys become involved.

85. On February 26, 2009, I was copied on an email exchange between Doede, Steven Sands and Progressive regarding a wholly different deal. The deal referred to in the e-mail, however, similarly was contemplating the use of life insurance policies as collateral for another loan.

86. Progressive writes to Doede and Steven Sands (to his personal email) “Just FYI, Goldman is lined up {just spoke to Andrew}. They want Seth {my attorney} to circulate a memo surmising how we will close {your release of [collateral assignment] etc...} **I need to vet these policies so that we don’t waste money on legal.**” Attached hereto as **Exhibit 39** is a true and accurate copy of an email exchange dated February 26, 2009, bates stamped G 00883 (emphasis added).

87. In other words, Progressive is suggesting that they personally confirm the value and existence of a life insurance policy on behalf of Genesis without paying an attorney to do so. Additionally, this fully demonstrates how Genesis relied on Progressive in connection with Collateral Assignments, as they were planning to use Progressive in the same manner on a completely different deal.

88. Tim Doede, an authorized agent for Genesis, replied to Progressive and copied me and Steven Sands. He wrote, “[s]ounds good. . . . **Once we have the forms signed, we can assess the game from there. No need to waste money with legal scenarios** over what may or may not be in place on these policies.” *See Ex. 39*, G 00883 (emphasis added).

89. Thus, Doede agreed that it would be a “waste of money” to pay an attorney to vet and confirm the value of a life insurance policy that was to be used as collateral, and further

acknowledged that Genesis would use Progressive for these purposes, which included the collateral assignments. Steven Sands was copied on all of these emails.

**My Questions to Progressive Regarding Collateralization Helped Kelly Amend Loan 4 Paragraph 11(c)**

90. Plaintiff argues that certain e-mails, showing communication between me and Progressive, either show my negligence – in that I asked questions as to the process of collateralization – or show my involvement in the task of securing the collateral with respect to Loan 4. *See* Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment (“Pl. Mem”), dated December 31, 2015, p. 18.

91. To the contrary, my January 31, 2011 emails that Plaintiffs rely upon show neither.

92. When I asked Progressive by email on January 31, 2011 “what is the best case timing to file the Assignments with carriers?” and “[w]ould carrier provide fax confirm they are processing the assignment request?” I was gathering information to be used by Chris Kelly, who wanted to revise Loan 4 Paragraph 11(c) by narrowing the time period with which Progressive should provide loan collateralization forms to Genesis. *See* Pl. Mem. p. 18-19, GIL007032-GIL007033; *see also* **Ex. 33**, GIL015551.

93. Additionally, the emails cited by Plaintiffs themselves rebut the contention that I relied exclusively on UCC-1 Forms to secure the collateral, which of course was accomplished through the Collateral Assignment of Contracts and the filing of the collateral assignments with the carriers. As I was specifically discussing the process of submitting assignment forms to carriers, this demonstrates that I had knowledge that more was necessary than a UCC-1 Form.

**Genesis was Billed for Work Performed**

94. Plaintiffs seek to argue that my billing entries either show that I was involved in

the collateralization of the loans or that Gilbride Tusa was involved in billing fraud. *See* Pl. Mem. 15. However, these claims are baseless and unsupported.

95. The billing entries referenced by plaintiffs are proper. I did not fraudulently bill Genesis or any other Gilbride Tusa client. Rather, I billed Genesis for the work I performed, and this is supported by the record.

96. My billing entries on Gilbride Tusa' invoices referencing drafting or revisions relate to the Collateral Assignment of Contracts which I either drafted or revised, as discussed above. *See* Exhibit E to Sands Aff., G 002650; G 002651; and G 002657.

97. My billing entries referencing receipt or review of change of ownership or assignment forms – the same forms that Genesis advised would be sent to carriers by Progressive – are proper and directly comport with the evidence in this matter.

98. On January 31, 2011, I exchanged several emails with Progressive attaching the ownership forms of several life insurance policies which had been transferred to Progressive from CNF II, LLC as part of agreed upon collateral for Loan 4. Attached hereto as **Exhibit 40** is a true and accurate copy of an email exchange dated January 31, 2011 and attachments thereto, bates stamped GIL006837-GIL006943; GIL006860-GIL006867.

99. As a result, my January 31, 2011 billing entry reads, in part, “review change owner forms.” *See* Ex. E to Sands Aff., G 002670.

100. On February 4, 2011, I exchanged several emails with Progressive regarding assignment forms to be sent to the carriers. I asked for copies, received and reviewed them, and suggested corrections based upon incorrect entity names referenced therein. *See* Ex. H to Neel Aff., GIL006906-GIL006907; attached hereto as **Exhibit 42** is a true and accurate copy of an email exchange dated February 4, 2011 and attachments thereto, bates stamped GIL006895-



GIL006905; GIL012146.

101. Thus, my February 4, 2011 billing entry comports directly with the evidence. My billing description reads “Finalize transaction and review assignments.” *See* Ex. E to Sands Aff., G 002671.

102. On February 8, 2011, I received an e-mail from Progressive attaching several assignment forms which had been faxed to carriers. I reviewed these, compared them to the list of life insurance policies, and reviewed Progressive’s instructions regarding certain corrections needed. *See* Ex. H to Neel Aff., GIL009937-GIL9971

103. Accordingly, my February 8, 2011 billing entry included “[r]eview final assignments of collaterally assigned insurance policies.” *See* Ex. E to Sands Aff., G 002671.

104. On February 9, 2011, I reviewed the list of life insurance policies and emailed Progressive as to the forms which had seemingly not yet been submitted to carriers. Upon receipt of these forms, I reviewed them. *See* Exhibit H to Neel Aff., GIL006875-GIL006892; GIL010228-10229.

105. I was tasked with regard to Loan 4 to collect the ownership transfer forms and collateral assignments filed by Progressive for all policies the Closing Binders. I did just that and my billing entries noted this accordingly.

106. My February 9, 2011 billing entry therefore reads, “[r]eview assignments filed with the carrier; compare to policies.” *See* Ex. E to Sands Aff., G 002671.

107. My billing entries are proper and are supported by the record.

108. GTLS is currently owed \$112,621.81 from the Plaintiffs.

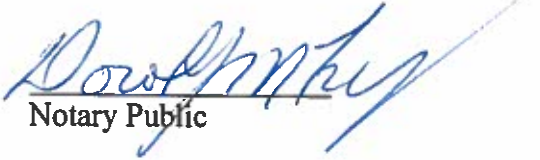
Dated: Greenwich, Connecticut  
February 8, 2016



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JONATHAN M. WELLS

Sworn to before me this 8th day of February, 2016.

  
Notary Public

**DOROTHY MATTHEWS FREEBURG**  
**NOTARY PUBLIC**  
MY COMMISSION EXPIRES MAR. 31, 2019