

Gerald H. Suniville (3160)
(gsuniville@vancott.com)
Scott M. Lilja (4231)
(slilja@vancott.com)
Mary Jane Galvin-Wagg (11973)
(mgalvin@vancott.com)
VAN COTT, BAGLEY, CORNWALL & MCCARTHY, P.C.
36 South State Street, Suite 1900
Salt Lake City, UT 84111-1478
Telephone: 801.532.3333
Facsimile: 801.534.0058

*Attorneys for Lennard W. Stillman,
Special Deputy Liquidator of Western Insurance Company*

**IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH**

In Re:

WESTERN INSURANCE COMPANY

**RESPONSE TO OBJECTION
TO NOTICE OF CLAIM
DETERMINATION TO CLAIMANT
(CITY OF GRIDLEY, CALIFORNIA)**

Case No. 110917050

Judge Robin Reese

Lennard W. Stillman (the “Liquidator”), Special Deputy Liquidator of Western Insurance Company, in Liquidation (“Western”), submits the following response to the Objection Notice of Claim Determination to Claimant filed by the City of Gridley, California (the “Objection,” and “Claimant”).

BACKGROUND

1. In June 2009, Claimant commenced a civil action in the Superior Court of California, County of Butte (No. 147353) against PMP at Gridley, LLC (“PMP”) and Western to compel performance of a Subdivision Improvement Agreement (the “California Lawsuit”). Western allegedly executed a performance bond, as PMP’s surety, in the sum of \$881,973 to secure PMP’s performance under the agreement; PMP became insolvent and allegedly failed to perform.

2. On April 9, 2010, Western entered into a settlement agreement with Claimant, which was subsequently amended on August 12, 2011 (the “Amended Takeover Agreement”).

3. Shortly thereafter, on August 25, 2011, the Court entered Rehabilitation Order and Restraining Orders concerning Western; among other things, the orders (a) appointed the Utah Insurance Commissioner as the Rehabilitator of Western Under Utah Code Ann. § 31A-27a-30a, (b) directed the Rehabilitator to take possession of and administer the assets of Western under supervision of the Court, and (c) stayed all actions and proceedings against Western, in Utah and elsewhere, pursuant to Utah Code Ann. § 31A-27a-108(4)(b).

4. On September 13, 2011, the Court entered a Liquidation Order, Declaration of Insolvency, and Restraining Orders concerning Western that, among other things, (a) appointed the Liquidator as Special Deputy Liquidator of Western, (b) fixed the rights and liabilities of Western, its creditors, policyholders, shareholders, members, and all other persons, and (c) stayed all actions and proceedings against Western in Utah and elsewhere in accordance with Utah Code Ann. § 31A-27a-108.

5. On or about December 1, 2011, the Liquidator caused a Notice of Stay of Proceedings to be filed in the California Lawsuit. A Minute Order was subsequently entered vacating hearings and staying proceedings in the California Lawsuit.

6. Despite the statutory stay under § 31A-27a-108 and notice of the same, Claimant moved pursuant to California Code of Civil Procedure § 664.6 on February 13, 2012 for entry of judgment against Western for alleged breach of the Amended Takeover Agreement.

7. On or about March 8, 2012, Claimant filed a Proof of Claim in this liquidation proceeding in the amount of \$50,000.00 (Claim No. 401056) (the "Claim"). A true and correct copy of the Claim is attached as Exhibit A and incorporated herein.

8. The Claim seeks liquidated damages under the Amended Takeover Agreement in the amount of \$500 per day for each day the project is not complete. Under "Claim Type," Claimant selected "Other, Breach of Contract," and under "The Particulars of the Claim (dates, nature, etc.) and the consideration (amount given) for the claim," Claimant wrote "Breach of settlement agreement. See attached motion [to enforce settlement and for entry of judgment]." *See Ex. A.*

9. On or about October 8, 2013, the Liquidator sent a Notice of Determination to Claimant, a true and correct copy of which is attached as Exhibit B and incorporated herein (the "NOD").

10. In the NOD, the Liquidator informed Claimant that the Claim was approved as a Class 7 claim under Utah Code Ann. § 31A-27a-701(2)(g), subject to review and approval by the Court in accordance with Utah Code Ann. § 31A-27a-608. The Liquidator took the position that the Claim, as a claim on a settlement agreement as opposed to the underlying bond, is a contract claim.

11. In its Objection, Claimant asserts that its Claim was misclassified and should fall under Class 3, Utah Code Ann. § 31A-27a-701(2)(c)(i)(D), as a “claim of an obligee . . . under a surety bond or surety undertaking.”

RESPONSE TO CLAIMANT’S “ARGUMENT” AND DETERMINATION OF CLAIM

After review of the Claim in accordance with Utah Code Ann. § 31A-27a-602, the Liquidator issued the NOD allowing the Claim in full as a Class 7 contract claim. A review of the Claim shows that Claimant voluntarily described its own claim as “Other, Breach of Contract” and “Breach of Settlement Agreement.” *See* Ex. A. Now, however, Claimant disputes the classification of its claim as a contract claim under Class 7, Utah Code Ann. § 31A-17a-602(2)(g), and argues that it should be given higher priority as a Class 3 “claim of an obligee ... under a surety bond or surety undertaking,” Utah Code Ann. § 31A-27a-701(2)(c)(i)(D). There is simply no basis for the requested reclassification.

Based on Claimant’s own submissions, the Claim arises out of Western’s breach of the Amended Takeover Agreement, not an underlying performance bond. *See* Ex. A. The Claim amount was computed simply by multiplying the daily penalty (\$500) under the Amended Takeover Agreement’s liquidated damages provision by the number of pre-liquidation days Western was allegedly in breach. *See id., passim*. Although Western was initially named as a defendant in the California Lawsuit due to its surety relationship with PMP, any obligation of Western to Claimant became a contractual one as soon as the Amended Takeover Agreement was reduced to writing. Neither Claimant’s attempts to place itself ahead of other claimants by aggressively pursuing the California Lawsuit in knowing violation of the statutory stay, nor Claimant’s belated attempt to revise its Claim mandates a different result.

CONCLUSION

For the foregoing reasons, the Liquidator finds that the Claim of the City of Gridley, California arises out of and is calculated under the Amended Takeover Agreement. Therefore, as set forth in Claimant's own submissions to the Liquidator, the Claim is contractual in nature and was properly classified under Class 7.

Dated this 18th day of December, 2013

VAN COTT, BAGLEY, CORNWALL
& MCCARTHY, P.C.

By: /s/ Scott M. Lilja
Gerald H. Suniville
Scott M. Lilja
Mary Jane E. Galvin-Wagg

*Attorneys for Lennard W. Stillman,
Special Deputy Liquidator of
Western Insurance Company*

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2013, I mailed true and correct copies of the foregoing **RESPONSE TO OBJECTION OF TO NOTICE OF CLAIM DETERMINATION TO CLAIMANT (CITY OF GRIDLEY, CALIFORNIA)** upon the persons who have elected to receive notices in this liquidation proceeding under Utah Code Ann. § 31A-27a-107(c). In addition, I served the following by placing the foregoing in the United States Mail, postage prepaid, addressed as follows:

Landon T. Little, Esq.
RICH FUIDGE MORRIS & LANE
1129 D Street
Marysville, California 95901

Rob Hickey
City of Gridley
655 Kentucky Street
Gridley, California 95948

/s/ Scott M. Lilja _____

EXHIBIT A

**PROOF OF CLAIM AGAINST
WESTERN INSURANCE COMPANY IN LIQUIDATION**
READ THIS INSTRUCTION SHEET CAREFULLY
LAST DAY TO FILE A PROOF OF CLAIM IS MARCH 9, 2012 AT 5:00 P.M.
MOUNTAIN TIME

Attach Documentation to Support Your Claim

Claimant Type	Claim Amount
<input type="checkbox"/> Secured Creditor	
<input type="checkbox"/> Policy or Third Party Policy Claim	
<input type="checkbox"/> Obligee	
<input type="checkbox"/> Bail Bond	
<input type="checkbox"/> Claim for Collateral	
<input type="checkbox"/> Financial Guaranty	
<input type="checkbox"/> Claim by a Principal	
<input type="checkbox"/> Unearned Premium	
<input type="checkbox"/> Reinsurance	
<input checked="" type="checkbox"/> Other Breach of Contract	
	Total \$50,000 ⁰⁰

The Particulars of the Claim (dates, nature, etc.) and the consideration (amount given) for the claim (attach an additional sheet if needed). If the claim has been assigned, so state:
Breach of settlement agreement. see attached motion.

Identity and Amount of Security for the Claim, if any:

Identify any Payments Made Against the Debt:

CLAIMANT NAME (PRINT) City of Gridley Name 685 Kentucky Street Address Gridley CA 95948 City, State and Zip	ATTORNEY (IF ANY) Brant Bordsen Name 1129 D St., PO Box "A" Address Marysville, CA 95901 City, State and Zip
-------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------

The undersigned affirms that the claim is justly owing and there is no setoff, counterclaim or defense.


SSN or Tax ID.
Date
3-8-12

EXHIBIT B



IN LIQUIDATION

Brant Bordsen
Rich, Fudge, Morris & Lane, Inc.
P.O. Box A
Marysville, CA 95901

Jerry Ann Fichter, Mayor
City of Gridley
685 Kentucky Street
Gridley, CA 95948

Re: Claimant: City of Gridley
Claim No.: 401056
Claimed Amount: \$50,000.00

NOTICE OF DETERMINATION TO CLAIMANT

The Liquidator of Western Insurance Company in Liquidation (WIC) of Salt Lake City, Utah has reviewed the above stated claim(s). Based upon review of the documents that were submitted and the records of WIC, the Liquidator has APPROVED the claim as follows: \$50,000.00 is approved as a Class 7 (contract) claim. The Liquidator's claim determination must be reviewed and approved by the Court pursuant to Utah Code Annotated Section 31A-27a-608. Distribution will be based on a pro-rata percentage of assets available for distribution to each class of claim approved by the Court and shall be paid as directed by the Court. The Liquidator is currently unable to estimate the timing or amount of any distribution.

Please review this letter and your records for accuracy. **If you agree** with the approved claim amount and priority classification(s) assigned, please have the enclosed Release and Waiver form signed and notarized and return it to this office located at 215 South State Street, Suite 650, Salt Lake City, UT 84111 within 45 days from the date of this letter.

If you disagree with the Liquidator's determination of your claim either in full or in part you have the right to object to the determination of your claim. To object to the determination you must file a written objection carrying the heading, In re Western Insurance Company in Liquidation, Civil Case No. 110917050, Judge Robin Reese, Third Judicial District Court, 450 South State Street, Salt Lake City, Utah 84111, within **forty five days** from the date of this notice. You must also send a copy of the objection to the Liquidator at the address on this letterhead. If you fail to file a written objection with the Court and with the Liquidator, within the specified time, you will have waived your right to object and the Liquidator's determination will stand and you will have no further right of appeal.

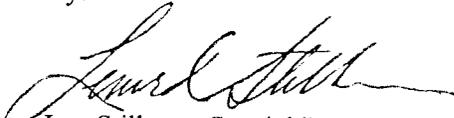
215 SOUTH STATE STREET, SUITE 650
SALT LAKE CITY, UTAH 84111
PHONE: 801-595-8222

If you file a written objection you must file detailed documentation supporting your objection. The Liquidator may review your claim again and if the determination is not changed, you will be notified of a hearing date before the Court in Salt Lake City, Utah. You will have the opportunity in the hearing to present the evidence submitted to the Liquidator in support of your claim and objection and to hear the evidence or other basis from the Liquidator in support of the determination.

Dated this 8th day of October, 2013, Salt Lake City, Utah.

Todd E. Kiser
Utah Insurance Commissioner Liquidator

By:


Len Stillman, Special Deputy Liquidator

RELEASE AND WAIVER

City of Gridley (hereinafter "Claimant"), a claimant in the Western Insurance Co. (WIC) liquidation proceeding, in consideration of the recommendation of the Liquidator of WIC to the supervising court, agrees that its claim number 401056 in the liquidation proceeding be allowed as follows: the amount of \$50,000.00 with the assigned priority classification of Class 7. It is expressly agreed that a pro rata distribution based on assets available for distribution shall be paid as directed by the Court. Claimant does hereby for itself, its successors and assigns, remise, release and forever discharge the Liquidator of WIC, individually and in his official capacity, his heirs, executors, administrators, assigns and successors in office, Special Deputies, employees and agents; the estate of WIC and the State of Utah from any and all right, cause of action, claim or demand of whatsoever kind, nature or description at law or inequity or created by statute which it now has or which it or its successors and assigns shall or may hereafter have in relation to this claim relating to this matter (claim number 401056).

Claimant expressly waives all rights, including but not limited to rights to notice, and hearings either to court or before the Liquidator of WIC to which it is entitled under Utah Code 31A-27a-607 or otherwise and in any way connected with related to or arising from the WIC liquidation relating to the referenced claim. Claimant understands and agrees that this claim as stated above is fully compromised and settled and is not in dispute.

It is expressly understood and agreed that Claimant's claim will be recommended for payment to the Third District Court in the Liquidation proceeding in the amounts stated above and that it shall receive a pro rata distribution on said amounts as the Liquidator is authorized or permitted to pay.

IN WITNESS WHEREOF, _____ has caused this release and waiver to be signed its duly authorized officer, director or agent the ___ day of _____, 2013.

State of _____)

County of _____)

On the _____ day of _____, 2013, before me personally appeared _____ who by me being duly sworn did depose and say that he/she resides in _____ is the _____ of _____ and is authorized to execute this document on its behalf.

NOTARY PUBLIC