

NO. D-1-GV-08-002014

STATE OF TEXAS,
Plaintiff

v.

AMERITRUST TITLE COMPANY,
Defendant

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

261st JUDICIAL DISTRICT

**SPECIAL DEPUTY RECEIVER'S APPLICATION FOR AUTHORITY TO
ENTER INTO AN ASSIGNMENT
(Texas Title Insurance Guaranty Association)**

TO THE HONORABLE JUDGE OF SAID COURT:

Cantilo & Bennett, L.L.P., solely in its capacity as Special Deputy Receiver of Ameritrust Title Company, (the “SDR” and “Ameritrust” respectively), files this Application for Authority to enter into an Assignment [Texas Title Insurance Guaranty Association] (the “Application”).

I. INTRODUCTION AND SUMMARY OF RELIEF

1.1 The SDR files this Application pursuant to TEX. INS. CODE § 443.154 (y) and seeks Receivership Court authority to assign certain causes of action and claims to the Texas Title Insurance Guaranty Association (“TTIGA”)

1.2 The proposed terms of the agreements have been approved by the Receiver. TTIGA supports this Application.

II. RECEIVERSHIP BACKGROUND

2.1 Ameritrust was placed in receivership on March 20, 2009 by an Agreed Order Appointing Liquidator and Permanent Injunction (the “Permanent Injunction”), which also appointed the Texas Commissioner of Insurance as Liquidator. The Liquidator

subsequently designated Cantilo & Bennett, L.L.P., as SDR of Ameritrust effective as of April 16, 2009. Ameritrust was designated an "impaired agent" on March 26, 2009, effective March 20, 2009.

2.2 The SDR is authorized to file this Application pursuant to TEX. INS. CODE § 443.151, which provides that the SDR is to conduct the business of the estate. The subject matter of this Application has been referred to the Special Master appointed in this proceeding in accordance with Paragraph III of the *Order of Reference To Master*.

III. JURISDICTION

3.1 This Court has jurisdiction over the subject matter of this Application and of the parties affected herein pursuant to TEX. INS. CODE § 443.005. The Court has exclusive jurisdiction over property of the estate pursuant to TEX. INS. CODE § 443.005(c) and personal jurisdiction over all parties in interest pursuant to TEX. INS. CODE § 443.005(d) and all claimants against the assets of the receivership estates of Ameritrust ("Claimants") pursuant to TEX. INS. CODE § 443.005 because this is a civil proceeding arising under and related to a delinquency proceeding under Chapter 443 of the Texas Insurance Code (the "Code"). The exercise of jurisdiction over any non-resident Claimant comports to customary standards of fair play and substantial justice and complies with the protections of the Constitutions of the United States of America and the State of Texas.

VI. FACTUAL BACKGROUND

4.1 Ameritrust is a plaintiff in a pre-receivership lawsuit styled *Vincent Gamal and Legacy Title Company, Ltd. d/b/a Ameritrust Title Company v. C.T. Marketing, Inc., et al.*, Cause No. 2006-67612 pending in the 61st District Court of Harris County, Texas

(the “East West Bank Case”). In summary, Ameritrust claims, *inter alia*, that East West Bank was negligent and violated contractual and statutory obligations relating to its handling of Ameritrust escrow accounts. There were a series of embezzlements from the escrow accounts. At various times, Ameritrust asserted related claims against other individuals and entities. Certain alleged victims of the embezzlement have intervened in the lawsuit.

4.2 The SDR has determined that it is not in the best interest of the estate to continue to pursue the East West Bank Case. While the SDR believes that the suit has merit, the estate lacks funds to pursue the litigation. Furthermore, given that TTIGA will be the largest and only priority claimant against the estate by virtue of its payment of escrow claims, any recovery from the suit would benefit TTIGA. . Instead, the SDR has agreed, subject to Receivership Court approval, to assign all of the estate’s causes of action and claims in East West Bank Case to TTIGA. The proposed Assignment is attached to this pleading as Exhibit 1.

4.3 TTIGA is authorized to accept the Assignment and pursue the East West Bank Case pursuant to TEX. INS. CODE § 2602.101(b), which provides that TTIGA has standing to appear before any court in Texas that has jurisdiction over an impaired title insurance agent for which TTIGA may become obligated, and TEX. INS. CODE § 443.008(l). TTIGA is a nonprofit legal entity created by the Texas Legislature and subject to the supervision of the Commissioner of Insurance. TEX. INS. CODE § 2602.051. TTIGA was created in large part to pay escrow claims made against insolvent title insurance agents. If an impaired agent such as Ameritrust has assets, TTIGA is a priority

creditor with respect to such assets to the extent that TTIGA incurs expenses and pays out funds to satisfy escrow claims against the estate of the agent. TEX. INS. CODE §443.301.

4.4 TTIGA is financially able to pursue Ameritrust's claims in the East West Bank Case and all related claims arising from the embezzlement, including claims against the bank, the fee attorney Gamal and the embezzlers. It will incur the litigation costs to investigate, litigate and presumably settle or try the case. Any net recoveries will reduce the association's claims against the estate. TTIGA's claims against the estate are classified as Class 1 (a) (2) and Class 2 (a) under the priority statute of the Insurer Receivership Act, TEX. INS. CODE § 443.303.

4.5 The proposed Assignment will ensure that estate assets-the assigned causes of action and claims - will be liquidated at a fair value and their value not reduced due to the estate's financial condition. The estate's presumed largest creditor, TTIGA, has both the financial means to pursue the claims and the financial incentive to realize the highest possible value.

V. LEGAL AUTHORITY

5.1 The SDR is authorized to enter into the Assignment pursuant to the terms of the Permanent Injunction and the provisions of TEX. INS. CODE § 443.154.

Specifically, TEX. INS. CODE § 443.154(y) provides:

(y) The liquidator may hypothecate, encumber, lease, sell, transfer, abandon or otherwise dispose of or deal with any property of the insurer, settle or resolve any claim brought by the liquidator on behalf of the insurer, or commute or settle any claim of reinsurance under any contract or reinsurance, as follows:

(1) if the property or claim has a market or settlement value that does not exceed the lesser of \$1 million or 10 percent of the general assets of the estate as shown on the receivership's financial statements, the liquidator may take action at the liquidator's discretion, provided that the receivership court may, upon petition of the liquidator, increase the threshold upon a showing that compliance with this requirement is burdensome to the liquidator in

- administering the estate and is unnecessary to protect the material interests of creditors;
- (2) in all instances other than those described in Subdivision (1), the liquidator may take the action only after obtaining approval of the receivership court as provided by Section 443.007;
 - (3) the liquidator may, at the liquidator's discretion, request the receivership court to approve a proposed action as provided by Section 443.007 if the value of the property or claim appears to be less than the threshold provided by Subdivision (1) but cannot be ascertained with certainty, or for any other reason as determined by the liquidator; and
 - (4) after obtaining approval of the receivership court as provided in Section 443.007, the liquidator may, subject to Subsection (z), transfer rights to payment under ceding reinsurance agreements covering policies to a third-party transferee.

5.2 The SDR asserts that, in its business judgment, the proposed Assignment is in the best interests of the estate and its creditors because, among other reasons, the SDR preserves the limited assets of the estate and avoids the expense, uncertainty and delay of litigation. A net recovery by TTIGA will reduce its claims against the assets of the estate.

5.3 Nothing in this Application or any related agreement or transaction nor the relief sought herein shall affect, in any way, the Receiver's or the SDR's immunities from suit or give rise to any right to sue or create any causes of action against the Receiver or the SDR. The automatic stay and the provisions of the Permanent Injunction remain in effect unless expressly modified herein. The SDR expressly does not waive, release and/or settle any claims against any parties.

VI. NOTICE

6.1 The SDR has served this Application to all known parties at interest by e-mail.

VII. OFFER OF PROOF AND VERIFICATION

7.1 This Response is verified by the affidavit and certification pursuant to TEX. INS. CODE §443.017(b) of Susan E. Salch, on behalf of Cantilo & Bennett, L.L.P., in its

capacity as Special Deputy Receiver of Ameritrust Title Company.

VIII. NOTICE OF ELECTRONIC SERVICE REQUIREMENT

8.1 Pursuant to the *Order Granting SDR's Application to Use Electronic Service of Pleadings and Notices* all pleadings filed in response to this Application or in regards to this estate shall be served by e-mail on the undersigned counsel and all parties shown in the attached Certificate of Service.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Special Deputy Receiver respectfully requests that this Court:

1. grant this Application;
2. authorize the SDR to execute such agreements as may be necessary to carry out this Court's authorization to the SDR; and
3. grant the SDR such other and further relief to which it may be justly entitled.

Respectfully submitted,

By: /s/Christopher Fuller
Christopher Fuller
Texas Bar No. 07515500
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Austin, Texas 78731
Tel. (512)470-9544
Fax (512)374-0957
cfuller@fullerlaw.org
Attorney for Cantilo & Bennett, L.L.P.,
Special Deputy Receiver of Ameritrust Title
Company

CERTIFICATE OF SERVICE

I certify that on December 3, 2009, a true and correct copy of this Application was served pursuant to the Order of Reference, the Texas Rules of Civil Procedure and TEX. INS. CODE ANN. SEC. 443.007(d) on the following by email, except as specifically noted.

/s/Christopher Fuller
Christopher Fuller

Tom Collins, Special Master
c/o Ms. Jean Sustaita
P.O. Box 149104
Mail Code 305-1D
Austin, TX 78701

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Assistant Attorney General
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Special Procedures Branch
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Austin, TX 78701

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APPLICANT'S NOTICE OF SUBMISSION

Pursuant to the terms of the *Order of Reference* to Master entered by the District Court in this cause, the Special Deputy Receiver's Application is set for written submission before the Special Master, Tom Collins, on December 28, 2009.

The Special Master has asked that the following rules be provided you:

1. Any objection must be filed with the Travis County District Clerk at least three (3) calendar days before the submission date.
2. A copy of any objection shall be served by email by such date on:
 - (a) The Special Master's Docket Clerk, Ms. Jean Sustaita at Jean.Sustaita@tdi.state.tx.us;
 - (b) The undersigned counsel, Christopher Fuller at cfuller@fullerlaw.org; and
 - (c) All interested parties, including those listed on the Applicant's Certificate of Service.
3. The objecting party shall coordinate with opposing counsel and the Docket Clerk (512) 463-6450) to obtain an oral hearing setting for argument on the Application and Objection, and complete and attach an "Objecting Party's Notice of Oral Hearing" to the objection.
4. The written objection must specifically list all reasons for objection with supporting references to and discussion of statutory and case authorities. Reasons not stated in writing will not be considered orally.
5. **Failure to file timely a written objection before the Special Master constitutes a waiver of the right to object to the Special Master's recommendation to the District Court.**
6. Any Acknowledgment of Notice and Waiver to be filed by the Guaranty Association or other interested party should be filed at least three (3) calendar days before the submission or hearing date.

/s/ Christopher Fuller
Christopher Fuller

STATE OF TEXAS,
Plaintiff

v.

AMERITRUST TITLE COMPANY
Defendant

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

261st JUDICIAL DISTRICT

**ORDER GRANTING SPECIAL DEPUTY RECEIVER'S APPLICATION
FOR AUTHORITY TO ENTER INTO AN ASSIGNMENT
(Texas Title Insurance Guaranty Association)**

The Court considered the Application for Authority to enter into an Assignment [Texas Title Insurance Guaranty Association] (the “Application”) filed by Cantilo & Bennett, L.L.P., solely in its capacity as Special Deputy Receiver of Ameritrust Title Company, (the “SDR” and “Ameritrust” respectively)

Having considered the Application, the Court finds as follows:

1. The *Order of Reference to Master* (“Order of Reference”) entered by this Court on August 22, 2008 provides that applications filed pursuant to TEX. INS. CODE § 443.007 are referred to the Special Master appointed in this proceeding;
2. The Application was submitted to the Special Master in accordance with the Order of Reference;
3. Notice of the Application was provided in accordance with TEX. INS. CODE §443.007 (d) and the *Order of Reference*, and no objections to the Application were filed;
4. The Special Master has issued a recommendation that the Application should be granted pursuant to Rule 171 of the Texas Rules of Civil Procedure;
5. The Court has jurisdiction over the Application and the parties affected

hereunder; and

6. The Application should be GRANTED in all respects.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The Application is GRANTED.
2. The Special Deputy Receiver is authorized to execute any documents and take such actions necessary to effectuate the purposes of the Application.
3. This Order constitutes a final judgment fully resolving all issues relating to the Application, provided that this Court shall retain jurisdiction to issue further orders pursuant to TEX. INS. CODE Chapter 443. This Order does not modify any of the terms or provisions of this Court's Permanent Injunction.

Signed on _____.

JUDGE PRESIDING

**SPECIAL DEPUTY RECEIVER'S CERTIFICATION PURSUANT TO
TEXAS INSURANCE CODE ANNOTATED SECTION 443.017(b)
AFFIDAVIT OF SUSAN E. SALCH**

State of Texas

County of Travis

BEFORE ME, the undersigned authority appeared Susan E. Salch, who after being by me duly sworn, stated the following under oath:

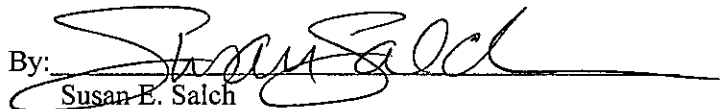
1. "My name is Susan E. Salch. I am competent to make this affidavit. The statements of fact set forth herein are true and correct, and are within my personal knowledge.

2. "I am a partner in CANTILO & BENNETT, L.L.P., Special Deputy Receiver of AmeriTrust Title Company, in receivership. (the "SDR" and "AmeriTrust"). I am duly authorized to make this certification and affidavit on behalf of the SDR.

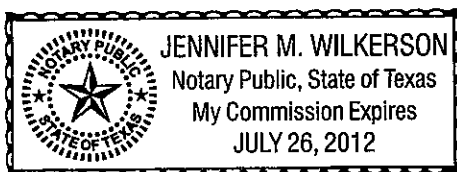
3. "I certify that the exhibits, books, accounts, records, papers, correspondence, and/or other records and documents attached hereto were produced pursuant to Texas Insurance Code Annotated Section 443.017(b), are true and correct copies of records created by and filed with the Receiver's office in connection with the receivership of this delinquent insurer, and are held by the Special Deputy Receiver in its official capacity.

4. "I further state that I have read the statements contained in the attached response and that they are true and correct based on my personal knowledge, my review of estate records, and my consultation with my staff and sub-contractors."

Further affiant sayeth not.

By: 
Susan E. Salch

SUBSCRIBED AND SWORN TO BEFORE ME on October 15, 2009, by Susan E. Salch, on behalf of CANTILO & BENNETT, L.L.P., solely in its capacity as the Special Deputy Receiver of AmeriTrust Title Company, in receivership.




Notary Public

ASSIGNMENT OF CLAIMS

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

Cantilo & Bennett, L.L.P., solely in its capacity as the duly-appointed Special Deputy Receiver (“SDR”) of Ameritrust Title Company in liquidation (“Ameritrust”), for Ten Dollars (\$10.00) and other good and valuable consideration, receipt of which is hereby acknowledged, by means of this instrument grants and conveys to the Texas Title Insurance Guaranty Association (“TTIGA”) the full right and power to maintain the SDR’s action against the defendants in the case styled *Vincent Gamal and Legacy Title Company, Ltd. d/b/a Ameritrust Title Company v. C.T. Marketing, Inc., et al.*, docketed as No. 2006-67612 in the 61st District Court of Harris County, Texas (the “Case”), including without limitation East West Bank, Vincent Gamal, Cindy Nguyen, Huan Nguyen, An Nguyen, CT Marketing, Koreem Baker d/b/a/ JC Construction, Patrick and Sylvia Torchia (owners of CT Marketing and related corporation Polar Trac), Polar Trac, Inc., and all those acting in concert with them and their successors and assigns, including all rights under any policies of insurance and/or indemnity agreements, and common law, statutory and contractual rights of subrogation and indemnity. This Assignment of Claims (the “Assignment”) specifically includes all right, title and interest in all claims, potential claims, suits, demands, causes of action, charges or grievances of any kind or character, regardless of the nature or extent held by the SDR whether arising in tort, contract, by statute or otherwise, and including claims for breach of fiduciary duty (hereinafter collectively referred to as the “Assigned Claims”). It is the intent of the Parties to this Assignment to convey all legal and equitable rights held by the SDR, whether or not specifically identified herein, to TTIGA.

This Assignment of Claims is made subject to the following terms:

1. **NO WARRANTY OR GUARANTY.** The SDR makes this assignment without any warranty, express, implied, or statutory and without any guarantees.

2. **NO SETTLEMENT BY ASSIGNOR.** The SDR has not and will not settle or compromise any of the Assigned Claims, or give any release or discharge of liability, without the express written consent of TTIGA.

3. **STATUS OF CASE.** The Case is currently pending; it has been stayed by action of statute due to the liquidation of Ameritrust. TTIGA shall file a notice of substitution or similar pleading to remove the SDR and Ameritrust as a plaintiff in the Case.

4. **LIABILITIES TO THIRD PARTIES.** TTIGA accepts no liabilities to third parties under this Assignment. The SDR accepts no liabilities to third parties under this Assignment

5. **INDEMNIFICATION.** TTIGA does not indemnify or hold harmless the SDR or Ameritrust for any liabilities whatsoever as a result of this Assignment. The SDR does not indemnify or hold harmless TTIGA for any liabilities whatsoever as a result of this Assignment.

6. **CREDIT ON CLAIM.** TTIGA agrees to and shall credit any net recovery, after deducting for the costs of prosecution, from the Assigned Claims to its claim in the Ameritrust receivership in the following order: first, to Class 1 administrative costs and then to Class 2 claims and last to claims, if any, with a lower priority. TTIGA agrees to pay the excess of any recovery net of costs of prosecution and its allowed claims in the Ameritrust receivership to the SDR.

7. **BINDING EFFECT.** This Agreement, and all of its terms and conditions, are binding on the SDR and its successors and assigns, and on TTIGA and its successors and assigns.

8. **NO RELEASES.** No Party to this Assignment releases, settles, novates or in any other manner waives any claim against any other Party to this Assignment.

9. **ADDITIONAL ACTS.** The Parties further agree to perform any further acts and execute any documents which may be reasonably necessary to carry out this Assignment, specifically including but not necessarily limited to any filing to be made in the Receivership Court in connection with obtaining the Receivership Court's approval of this Assignment.

10. **NO WAIVER.** Nothing in this Assignment or any related proceeding or filing shall affect, in any way, the Receiver's or the SDR's immunities from suit and shall not give rise to any right to sue or create any causes of action against the Receiver or the SDR other than a cause of action to enforce the terms of this Agreement. The automatic stay and the provisions of the Liquidation Order remain in affect unless expressly modified herein.

11. **VENUE.** This Assignment is made and entered into in the State of Texas, and shall in all respects be interpreted, enforced and governed under the laws of the State of Texas. The Parties hereto agree that sole and exclusive venue and jurisdiction for any disputes relating to or arising out of this Assignment will be solely in the Receivership Court, the 261st District Court of Travis County, Texas.

SIGNED AND DELIVERED effective the ____ day of _____ 2009.

Cantilo & Bennett, L.L.P.

By: _____
Susan E. Salch
Cantilo & Bennett, L.L.P. solely in its
capacity as Special Deputy Receiver of
Ameritrust Title Company
11401 Century Oaks Terrace, Suite 300
Austin, Texas 78758-8702

SUBSCRIBED AND SWORN TO BEFORE ME on December __, 2009, by Susan Salch, on behalf of Cantilo & Bennett, L.L.P., solely in its capacity as the Special Deputy Receiver of Ameritrust Title Company in receivership.

Notary Public

SIGNED AND ACCEPTED this _____ day of December 2009.

TEXAS TITLE INSURANCE GUARANTY ASSOCIATION

By: _____
Larry Parks
Attorney for TTIGA
106 East Sixth Street, Suite 300
Austin, Texas 78701