David Lawyerly [name changed]
[attorney info redacted]
[attorney info redacted]
[attorney info redacted]

Attorney for Plaintiffs

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES

CENTRAL DISTRICT, MOSK COURTHOUSE - UNLIMITED

WEST LUTHERAN CHURCH, INC., a California Corporation; THOMAS CLARK; SHIRLEY CLARK,
Plaintiff
[names changed]

vs.

VICTOR TALLY, an individual; JANICE TALLY, an Individual; FIRST RESURRECTION CHURCH a California Corporation; SECOND RESURRECTION CHURCH a California Corporation; FIRST TITLE INSURANCE COMPANY; all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint, adverse to Plaintiffs' ownership or any cloud on Plaintiffs' title thereto; and DOEs 2 to 10, inclusive,

Defendants
[names changed]

Case Number: [redacted]
Dept.: [redacted]
Judge: [redacted]
Trial Date: [redacted]

PLAINTIFFS' NOTICE OF APPLICATION AND APPLICATION TO RECONSIDER AND TO REVOKE ORDER SUSTAINING DEMURRER, OR ALTERNATIVELY, TO MODIFY THE ORDER WITH LEAVE TO AMEND [CCP 1008(a)]; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; DECLARATION BY ATTORNEY IN SUPPORT

Hearing Date: _____
Hearing Time: _____

/ / / /

/ / / /

TO THE ABOVE-ENTITLED COURT, ALL INTERESTED PARTIES HEREIN, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on _____ at _____, or as soon thereafter as the matter may be heard, in Department [redacted] of the above-entitled Court, located at 111 North Hill Street, Los Angeles, CA 90012, Plaintiffs WEST LUTHERAN CHURCH, INC., a California Corporation, THOMAS CLARK, and SHIRLEY CLARK will make the accompanying Application.

Dated: _____

David Lawyerly

_____

Attorney for Plaintiffs

Table of Contents

Table of Authorities 4

Table of Exhibits 5

Application 6

Memorandum of Points and Authorities 12

1. Introduction 12

2. The Court Has Authority to Reconsider and to Revoke or to Modify the ORDER. 13

3. The Application Is Timely. 13

4. The Application Is Based Upon New Facts and Different Law. 13

5. The Court Should GRANT the ALTERNATIVE REQUEST. 15

5.1. The Defect in the Complaint Can Be Cured by the Amendment of a Negligence Cause of Action and Should Therefore Be Allowed. 16

5.2. The NEW EVIDENCE Supports a Negligence Cause of Action against FIRST TITLE and Other Defendants. 17

6. The Court should GRANT the MAIN REQUEST. 21

7. Conclusion 23

Affidavit by Attorney David Lawyerly 24

Proof of Service 35

Table of Authorities

Cases

Berman v. Bromberg (1997, 2nd Dist.) 56 Cal.App.4th 936 @945 [65 Cal.Rptr.2d 777] *14*

Blank v. Kirwan (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58..... *16*

Delair v. McAdoo (Pa. 1936) 324 Pa. 392 @ 399 [188 A. 181] *20*

Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074 @ 1080 [79 P.3d 569]..... *16*

Sharp v. Lumley (1868) 34 Cal. 611 @ 615, [1868 WL 736 ..... *8, 22*

Statutes

***CCP** § 1008*..... *passim*

CCP § 405.24..... *17*

CCP § 405.4..... *15, 17*

Table of Exhibits

Exhibit 1 Subpoena Duces Tecum served on EVERETT on Sept. 14, 2006.

Exhibit 2 Lender's Supplemental Title Report by Second Title dated Feb. 8, 2006.

Exhibit 3 Fax from SECOND TITLE to EVERETT dated March 13, 2006.

Exhibit 4 Letter dated March 29, 2006 from attorney James Fisk (FISK LETTER).

Exhibit 5 Updated Preliminary Report by SECOND TITLE dated June 6, 2006.

Exhibit 6 Fax from SECOND TITLE to EVERETT dated June 7, 2006.

Exhibit 7 Notice of Entry of Order Sustaining Demurrer Without Leave to Amend served on Jan. 30, 2007 (NOTICE OF ORDER).

Exhibit 8 Stipulation and Order for Settlement of Claims among All Parties dated April 21, 2006.

Application

Plaintiffs WEST LUTHERAN CHURCH, INC., a California Corporation, THOMAS CLARK, and SHIRLEY CLARK (hereinafter collectively the "**PLAINTIFFS**") will and hereby do apply for reconsideration of the order made in open court on [redacted] and signed by the Court on [redacted] (hereinafter the "**ORDER**") sustaining the Demurrer (hereinafter the "**DEMURRER**") by Defendant FIRST TITLE INSURANCE COMPANY, formerly Doe 1, (hereinafter "**FIRST TITLE**") to the Fourth, Fifth and Sixth causes of action as alleged against FIRST TITLE (hereinafter collectively the "**THREE AFFECTED COAS**") in the PLAINTIFFS' First Amended Complaint (hereinafter "**FAC**") without leave to amend. The Court determined that the Lis Pendens recorded by Plaintiffs on [redacted] (hereinafter the "**LIS PENDENS**") was "defective as a matter of law and not curable" (ORDER, p. 2, line 11). The PLAINTIFFS do not herein seek any reconsideration as to the status of the LIS PENDENS, but do preserve that question in the event of an appeal. PLAINTIFFS instead seek reconsideration of the Court's decisions to overrule the DEMURRER and to deny leave to amend. Specifically, the PLAINTIFFS request that the Court revoke the ORDER and overrule the DEMURRER (hereinafter the "**MAIN REQUEST**"), or alternatively that the Court modify the ORDER so that "without leave to amend" is changed to "WITH leave to amend" (hereinafter the "**ALTERNATIVE REQUEST**"). The Application will be made on the grounds set forth in the following subparagraphs, which are incorporated within this first paragraph:

Ground 1: The PLAINTIFFS have a new cause of action for negligence to allege against FIRST TITLE and other defendants based on new

evidence (hereinafter the "**NEW EVIDENCE**") set forth *post* that was discovered after the FAC was filed;

Ground 2: The negligence cause of action will not be a "real property claim" and will therefore not be subject to demurrer based on the status of the LIS PENDENS;

Ground 3: The PLAINTIFFS did not present the NEW EVIDENCE in their Opposition to, or at the hearing on, the DEMURRER because attorney David Lawyerly (hereinafter "**LAWYERLY**") believed in the good faith he was prohibited from doing so because a demurrer must be argued exclusively on the face of the pleadings and matters judicially noticed;

Ground 4: The NEW EVIDENCE is highly relevant to the Court's decision on leave to amend;

Ground 5: The Court erred in concluding, solely on the basis of the status of the LIS PENDENS, that the THREE AFFECTED COAS do not state a cause of action against FIRST TITLE, and, while this error (hereinafter the "**ERROR**") would more properly be addressed in the Court of Appeal, given the context of the foregoing Grounds 1 through 4, all of which are quite properly before this trial Court as to its denial of leave to amend, the PLAINTIFFS believe the cost of litigation and the burden on the taxpayers and the courts will be lessened by bringing the ERROR to

the attention of this trial Court herein so it has the opportunity to correct it by revoking the ORDER;

Ground 6: The NEW EVIDENCE will help the Court to understand the ERROR; and

Ground 7: FIRST TITLE cited *Sharp v. Lumley* (1863) 34 Cal. 611 in the DEMURRER (at p. 6, line 18), but *Sharp* clearly supports overruling the DEMURRER.

The FAC was filed on [redacted]. It sets forth in ¶ 34 (p. 7), "On or about June 16, 2006, defendants Victor Tally and Janice Tally, as officers of FIRST RESURRECTION CHURCH [hereinafter collectively the "**TALLY DEFENDANTS**"], borrowed the sum of $89,000 [hereinafter the "**LOAN**"], and as security for the repayment of this loan, executed a deed of trust [hereinafter the "**TRUST DEED**"] purporting to place an encumbrance upon the subject property." That money was loaned by prior defendants [several names redacted] (hereinafter the "**LENDERS**"). A copy of the TRUST DEED is set forth in Exhibit M attached to the FAC.

The bulk of the NEW EVIDENCE consists of a five documents obtained in response to discovery. As supported by the accompanying Affidavit by Attorney David Lawyerly (hereinafter the "**LAWYERLY AFFIDAVIT**"), on Sept. 14, 2006 LAWYERLY served a Subpoena Duces Tecum on Bill Everett (hereinafter "**EVERETT**"), who was the broker in the LOAN transaction. A true and correct copy of the Subpoena Duces Tecum is attached hereto as **Exhibit 1**. In response thereto, on or about Oct. 11, 2006 LAWYERLY received the following five documents from EVERETT:

Document 1. A Lender's Supplemental Title Report by Second Title Insurance company (hereinafter "**SECOND TITLE**") dated Feb. 8, 2006, a true and correct copy of which is attached hereto as **Exhibit 2**. The report is addressed to "Bill Everett" and concerns this issuance of an American Land Title Association ("ALTA") loan policy on the land where "There is located on said land A Church Known as [redacted address] ... Los Angeles County, California" (p. 1). The report contains a Schedule B which lists "exclusions" to the proposed title insurance coverage. One such "exception" is this litigation listed in Item 3 (on page 5), and it states (a) the names of the parties, including the TALLY DEFENDANTS, (b) the nature of the action as "a real property claim affecting real property and seeks cancellation of a certain Quitclaim Deed and seeks to quiet title," (c) the recording date ([redacted]) and instrument number ([redacted]) of the LIS PENDENS, and (d) LAWYERLY'S name, address and telephone number.

Document 2. A fax from SECOND TITLE to EVERETT dated March 13, 2006, a true and correct copy of which is attached hereto as **Exhibit 3**. The fax references item "#3" and contains a copy of the LIS PENDENS, including its recording date ([redacted]) and instrument number ([redacted]), and on the said copy of the LIS PENDENS there are several hand-written markings and initials that are absent in the recorded LIS PENDENS—*compare* with Exhibit A of FIRST TITLE'S Request for Judicial Notice (filed concurrently with and in support of the DEMURRER) which contains no such markings or initials—

and the markings and initials indicate the LIS PENDENS was carefully examined by a knowledgeable person at SECOND TITLE.

Document 3. A letter dated March 29, 2006 from attorney James Fisk (hereinafter "**FISK**"), who was the attorney for the TALLY DEFENDANTS, to Defendant Victor Tally, a true and correct copy of which is attached hereto as **Exhibit 4** (hereinafter the "**FISK LETTER**"). The letter states that the PLAINTIFFS agreed to dismiss a separate unlawful detainer action against the TALLY DEFENDANTS as a part of the ORIGINAL SETTLEMENT. But why did EVERETT have a copy of this letter? It appears that the TALLY DEFENDANTS used this letter to intentionally misrepresent to EVERETT that the LIS PENDENS was as to the unlawful detainer case, rather than as to the above-entitled case, so that EVERETT would naively believe the LIS PENDENS had been dismissed and would so inform the LENDERS.

Document 4. An Updated Preliminary Report by SECOND TITLE dated June 6, 2006, a true and correct copy of which is attached hereto as **Exhibit 5**. The report is a formal response to a request for a policy of title insurance on the subject property. In its Schedule B of "exceptions" it does not cite this litigation, which means SECOND TITLE had, by that time, decided to eliminate this litigation, as confirmed by Document 5 below.

Document 5. A fax from SECOND TITLE to EVERETT dated June 7, 2006 a true and correct copy of which is attached hereto as **Exhibit 6**. The fax was apparently sent in response to an inquiry by EVERETT as to why this

litigation (Item #3 on the Feb. 8, 2006 report) had been removed from the "exceptions" list on the above-cited June 6, 2006 report. The fax contains a letter from SECOND TITLE and dated June 7, 2006 that states, "Our Preliminary Report of February 8, 2006 is supplemented as follows: Item No. 3 is eliminated."

Additional NEW EVIDENCE consists of the following two facts. First, as supported by the LAWYERLY AFFIDAVIT, on or about October 27, 2006 LAWYERLY was informed by FIRST TITLE that it had bought out the LENDERS, who had assigned the TRUST DEED to it. Consequently, FIRST TITLE appeared in this action as Defendant Doe 1, and the LENDERS were dismissed. Second, as supported by the LAWYERLY AFFIDAVIT, on Feb. 6, 2007 LAWYERLY learned that FIRST TITLE is an underwriter for SECOND TITLE.

The Application will be made pursuant to Code of Civil Procedure (hereinafter "**CCP**") § 1008(a). The Application is based upon the accompanying Notice, the accompanying Memorandum of Points and Authorities, the accompanying LAWYERLY AFFIDAVIT, all pleadings and papers on file in the above-captioned action, and other evidence that may be presented by the Plaintiffs prior to or at the hearing hereon.

Dated: _____

David Lawyerly

_____

Attorney for Plaintiffs

Memorandum of Points and Authorities

The definitions set forth *ante* in the Application are incorporated herein to avoid repetition.

The Court should GRANT the Application for the following reasons.

1. Introduction

On Oct. 5, 2007 the Court determined that the LIS PENDENS was "defective as a matter of law and not curable" (ORDER, p. 2, line 11, emphasis added). The PLAINTIFFS are not herein disputing the Court's decision concerning the status of the LIS PENDENS but do preserve that question in the event of an appeal.

The Court then sustained the DEMURRER as to THREE AFFECTED COAS by deciding that, in order to state a cause of action against FIRST TITLE, it (FIRST TITLE) had to have been notified by means of the LIS PENDENS but was not so notified because of the defect, which defect is not curable. This conclusion was an ERROR, discussed *post*. Because of the ERROR, the Court should revoke the ORDER and overrule the DEMURRER (the MAIN REQUEST).

Finally, the Court denied leave to amend. Because of the NEW EVIDENCE, the Court should modify the ORDER with leave to amend. (the ALTERNATIVE REQUEST).

After addressing preliminary matters (authority, timeliness, and the requirement of "new or different facts, circumstances, or law"), the PLAINTIFFS present their two requests in reverse order—first discussing the ALTERNATIVE REQUEST followed by the MAIN REQUEST—because, given the circumstances, that presentation will be the more natural, logical, and clear.

2. The Court Has Authority to Reconsider and to Revoke or to Modify the ORDER.

The Application to reconsider is based on CCP § 1008(a), which provides: "When an application for an order has been ... granted ... any party affected by the order may ... make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. CCP § 1008(e) provides: "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders ..." And no entry of judgment has been entered as to FIRST TITLE.

Therefore, The Court has the authority to reconsider and to amend the ORDER.

3. The Application Is Timely.

A true and correct copy of a Notice of Entry of Order Sustaining Demurrer Without Leave to Amend (hereinafter the "**NOTICE OF ORDER**"), which includes a copy of the ORDER, is attached hereto has **Exhibit 7**. The NOTICE OF ORDER was served on Jan. 30, 2007.

CCP § 1008(a) provides that a motion to reconsider must be filed "within 10 days after service upon the party of written notice of entry of the order ..." Using calendar days, the deadline for filing this Application is Feb. 9, 2007, and it has been filed on or before that date.

Therefore, the Application is timely.

4. The Application Is Based Upon New Facts and Different Law.

A motion to reconsider must be "based upon new or different facts, circumstances, or law" CCP § 1008(a). The statute also provides, "The party making the application shall state by affidavit ... what new or different facts, circumstances, or law are claimed to be shown."

As supported by the LAWYERLY AFFIDAVIT, at the time the FAC was filed, the PLAINTIFFS were not in a position to allege negligence against FIRST TITLE. The NEW EVIDENCE was subsequently discovered. As discussed *post*, the NEW EVIDENCE supports a negligence cause of action that cannot be demurred on the basis of a defect in the LIS PENDENS.

As supported by the LAWYERLY AFFIDAVIT, when opposing the DEMURRER, both in writing and orally at hearing, LAWYERLY believed the NEW EVIDENCE was irrelevant, because a demurrer must be decided on the basis of the face of the pleadings and matters judicially noticed. LAWYERLY reasonably believed the DEMURRER would be overruled—because FIRST TITLE had actual notice of the pending action—and that he would continue to proceed against FIRST TITLE on the basis of the THREE AFFECTED COAS. But even if the DEMURRER were sustained, LAWYERLY reasonably believed it would be with leave to amend because of the strong policy in this state in favor of allowing amendment to pleadings. "There is a policy of great liberality in permitting amendments to the pleadings at any stage of the proceeding." *Berman v. Bromberg* (1997, 2nd Dist.) 56 Cal.App.4th 936 @945 [65 Cal.Rptr.2d 777]. Consequently, LAWYERLY did not bring the NEW EVIDENCE to the hearing on the DEMURRER.

While the NEW EVIDENCE is irrelevant to demurrer, it is highly relevant to the question of amendment of the complaint. The Court denied leave to amend without considering it. It is therefore appropriate to count the NEW EVIDENCE as new facts for purposes of CCP § 1008(a).

Also, as supported by the LAWYERLY AFFIDAVIT, in the aftermath of the adverse ruling on the DEMURRER, LAWYERLY realized that the NEW EVIDENCE supports a negligence cause of action against FIRST TITLE. Sounding in tort (rather than in real property) comprises different law for purposes of CCP § 1008(a).

Therefore, the Application is based upon new facts and different law.

5. The Court Should GRANT the ALTERNATIVE REQUEST.

The Court sustained the DEMURRER "without leave to amend" because the LIS PENDENS was "defective as a matter of law and not curable" (ORDER, p. 2, line 11, emphasis added). Evidently, the Court was considering potential amendments to the FAC that might be directed at "curing" the difficulties imposed by the defect in LIS PENDENS. The Court evidently reasoned that such potential amendments would still be subject to demurrer on the same grounds.

The PLAINTIFFS respectfully suggest that the Court over-generalized. The Court apparently reasoned that, given the action concerns real property, and given a non-curable defect in the LIS PENDENS, it would be a legal impossibility for the PLAINTIFFS to allege any cause of action against FIRST TITLE. Such conclusion would hold if the potential causes of action were restricted to "real property claims" as defined in CCP § 405.4. They are not so restricted. Real property claims do not generalize to all claims. With all due respect, the Court apparently overlooked the possibility of other causes of action that are not "real property claims." On the basis of the NEW EVIDENCE, the PLAINTIFFS wish to add a negligence cause of action against FIRST TITLE that is not a "real property claim." A

defect in the LIS PENDENS is irrelevant thereto and could not form any grounds for demurrer.

5.1. The Defect in the Complaint Can Be Cured by the Amendment of a Negligence Cause of Action and Should Therefore Be Allowed.

Amendment of a negligence cause of action against FIRST TITLE would not be subject to demurrer on the grounds that the LIS PENDENS is defective. Such an amendment is beyond the ambit of the arguments in the DEMURRER'S memorandum of points and authorities. It is beyond the ambit of the arguments in FIRST TITLE'S Reply brief in support of the DEMURRER. And it is beyond the ambit of the grounds stated in the ORDER. "[T]he demurrer ... is sustained without leave to amend upon the grounds that the Lis Pendens ... was defective as a matter of law and not curable." ORDER p. 2 lines 8-11, emphasis added.

The California Supreme Court has indicated that if an amendment could cure the complaint, it should be allowed. "When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58.) ... If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Ibid*.) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid*.) The plaintiff has the burden of proving that an amendment would cure the defect." *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074 @ 1080 [79 P.3d 569], emphasis added.

Here, the PLAINTIFFS meet the said burden by (a) setting forth in the following section that the NEW EVIDENCE supports a negligence cause of action, and (b) pointing out that, as a matter of law, a cause of action sounding in tort is not subject to demurrer on principles that apply exclusively to real property law. The purpose of a lis pendens notice is to reserve a real property claim as of a particular date pending the outcome of litigation. "The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, shall relate back to the date of the recording of the notice." CCP § 405.24. In order to record a lis pendens, the law requires that a real property claim be asserted in the complaint. "'Real property claim' means the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement ..." CCP § 405.4.

A negligence cause of action does not meet the said statutory definition of a "real property claim" because it alleges monetary damages rather than a "title to, or the right to possession of, specific real property." If a lis pendens were recorded on the sole basis of a negligence cause of action, it could be expunged. This means the defect in the LIS PENDENS would have no impact whatsoever on a negligence cause of action.

Therefore, the defect in the complaint can be cured by the amendment of a negligence cause of action, which should be allowed.

5.2. The NEW EVIDENCE Supports a Negligence Cause of Action against FIRST TITLE and Other Defendants.

The NEW EVIDENCE indicates a close relationship among the LENDERS, EVERETT, FIRST TITLE, and SECOND TITLE (collectively the "**FINANCE PARTIES**"). EVERETT was an agent for the LENDERS and for either FIRST TITLE or SECOND

TITLE. The LENDERS obtained their title insurance from SECOND TITLE. The title insurance was underwritten by FIRST TITLE. And in direct response to the LENDERS being served with the Summons and FAC in this action, FIRST TITLE bought them out and appeared in their behalf as Defendant Doe 1. Additional discovery is needed to more precisely determine the relationships among the FINANCE PARTIES.

At the time the FAC was filed, (a) no evidence had been discovered to allege negligence against the LENDERS or against EVERETT, and (b) FIRST TITLE and SECOND TITLE were both unknown to the PLAINTIFFS. But the NEW EVIDENCE supports a cause of action for negligence against all of them (except to the extent that the liability of the LENDERS has been assumed by FIRST TITLE).

The NEW EVIDENCE irrefutably shows the following. By Feb. 8, 2006 (which was more than four months before LOAN funding) the FINANCE PARTIES had actual notice of this pending litigation and that it involved title to the real property described in the anticipated TRUST DEED. Notwithstanding that the Court determined the LIS PENDENS to be defective, by March 13, 2006 the FINANCE PARTIES had a copy of the LIS PENDENS in their possession. And this litigation was not taken lightly by them, because (a) they engaged in multiple correspondences about it spanning four months, and (b) someone among them carefully examined the LIS PENDENS making markings and initials thereon. This litigation was not removed from SECOND TITLE'S title insurance "exceptions" list until on or about June 6, 2006, and it was the last of 12 exceptions to be removed. The FINANCE PARTIES therefore knew, or should have known, that if this litigation were to determine such title to be invalid, then the TRUST DEED they recorded would injure the true

owner of the property. Therefore, the FINANCE PARTIES, including FIRST TITLE, had a duty to investigate the "exception" that sat on SECOND TITLE'S list for four months to determine the nature of the pending litigation and whether its plaintiffs might be injured by negligent recording of the TRUST DEED.

The plain, simple, reasonable and most obvious means of such investigation would have been for one of the FINANCE PARTIES, including FIRST TITLE, to telephone LAWYERLY whose name and phone number were on the copy of the LIS PENDENS that they had in their possession. As supported by the LAWYERLY AFFIDAVIT, they did not. As supported by the LAWYERLY AFFIDAVIT, if any of the FINANCE PARTIES had contacted his office, then LAWYERLY would have informed them of the details of the present litigation, and LAWYERLY would have taken immediate action to stop the LOAN from moving forward. If they had contacted his office at any time on or after April 21, 2006, then, in addition, LAWYERLY would have immediately sent them a copy of the Stipulation and Order for Settlement of Claims among All Parties (hereinafter the "**ORIGINAL SETTLEMENT**") wherein the TALLY DEFENDANTS concede that they do not hold any ownership interest in the property.

A true and correct copy of the ORIGINAL SETTLEMENT appears in Exhibit K attached to the FAC, and it is also attached hereto as **Exhibit 8**. It states "Reborn Church, Victor Tally and Janice Tally acknowledge that neither they, nor any of them, hold any ownership interest in the Subject Property, the extent of their interest in the Subject Property is possessory only" ORIGINAL SETTLEMENT ¶ 8 (pp. 4-5), where "Reborn Church" is defined as "First Resurrection Church a California corporation" ORIGINAL SETTLEMENT

p. 2, line 18. It is signed by FISK. It is signed three times by defendant VICTOR TALLY—once as an individual, once as an officer of defendant FIRST RESURRECTION CHURCH, and once as an officer of defendant SECOND RESURRECTION CHURCH. And it is signed by JANICE TALLY.

On receipt of the ORIGINAL SETTLEMENT, the FINANCE PARTIES, including FIRST TITLE, would have known that the contemplated TRUST DEED would have been invalid and, unless criminal misconduct was involved, they would have cancelled the pending LOAN.

In addition to failing to contact LAWYERLY, it appears that the FINANCE PARTIES, including FIRST TITLE, may have relied on the FISK LETTER to conclude that the above-entitled action had been dismissed. Such reliance would have been grossly misplaced. FISK is the attorney for the TALLY DEFENDANTS who were applying for the LOAN. FISK had attorney fees to collect from them, and could easily have been motivated to conceal information adverse to the LOAN, because some portion of its proceeds would undoubtedly have been used to pay his attorney fees.

The duty to investigate is supported in negligence law. "The law requires drivers and owners of motor vehicles to know the condition of those parts which are likely to become dangerous where the flaws or faults would be disclosed by a reasonable inspection. It will assume they do know of the dangers ascertainable by such examination. *Delair v. McAdoo* (Pa. 1936) 324 Pa. 392 @ 399 [188 A. 181], emphasis added. In *Delair* the defendant, whose automobile tires were badly worn, had a had a duty to visually investigate the condition of his tires prior to the blowout that injured the plaintiff. Here, the FINANCE PARTIES,

including FIRST TITLE, who had actual notice of this action for more than four months before recording the TRUST DEED, had a duty to investigate the credibility of the TALLY DEFENDANTS' representations that they owned the property prior to recording the TRUST DEED thereby injuring the PLAINTIFFS.

The FINANCE PARTIES, including FIRST TITLE, breached their duty to investigate by failing to telephone LAWYERLY or to otherwise determine that recording the TRUST DEED would injure the PLAINTIFFS. On or about June 16, 2006, the LOAN was funded to parties who had (on April 21, 2006) acknowledged in writing that they had no ownership in the property and who had therefore executed the TRUST DEED unlawfully, which TRUST DEED the FINANCE PARTIES then recorded.

This breach of the duty to investigate comprised negligence and proximately caused injury to the PLAINTIFFS whose property was unlawfully encumbered by a TRUST DEED in the amount of an $89,000 when they received none of those funds. Therefore, the NEW EVIDENCE supports a negligence cause of action against the FINANCE PARTIES, including FIRST TITLE.

And therefore, the Court should GRANT the ALTERNATIVE REQUEST by modifying the ORDER with leave to amend.

6. The Court should GRANT the MAIN REQUEST.

The ERROR made by the Court was to conclude that if the LIS PENDENS is defective then the THREE AFFECTED COAS do not state a cause of action against FIRST TITLE.

In the DEMURRER, FIRST TITLE paradoxically cites an unfettered 1868 case that undermines its entire argument. "It does not appear that a notice of lis pendens was in fact filed. But the object of filing such a notice, is, to afford constructive notice of the pendency of the action. This is the only effect indicated by the statute. (Pr. Act, Sec. 27.) The object being to afford notice, actual notice must certainly be as effectual as constructive notice under the statute. We can perceive no good reason why a party taking an interest in a tract of land pending a proceeding to foreclose a mortgage upon it, with actual notice of the action, should not be bound by the judgment, although no notice of lis pendens had been filed. We think he is, and so hold the law to be." *Sharp v. Lumley* (1868) 34 Cal. 611 @ 615, [1868 WL 736], emphasis added.

In the FAC, the Fifth cause of action alleges that the PLAINTIFFS recorded the LIS PENDENS "giving notice of a claim...." FAC p. 11, lines 19, emphasis added. And the NEW EVIDENCE shows that FIRST TITLE thereby received notice in the form of actual notice. The pleading does not allege "constructive notice" which would have required perfection of the LIS PENDENS. The defect in the LIS PENDENS does not nullify the NEW EVIDENCE or the fact of actual notice. And according to *Sharp*, FIRST TITLE can be bound by judgement herein on the basis of the actual notice.

The Fourth and Sixth causes of action allege nothing about the LIS PENDENS, and indeed, allege nothing about notice at all. They cannot be demurred on the basis of lack of notice pursuant to any defect in the LIS PENDENS. If FIRST TITLE wishes to raise an affirmative defense that it had no constructive notice, it can certainly do so, but that defense will be defeated by the NEW EVIDENCE that it had actual notice.

Therefore, the Court should GRANT the MAIN REQUEST by revoking the ORDER.

7. Conclusion

For the foregoing reasons, the Court should GRANT the Application to reconsider by revoking the ORDER, or alternatively modifying the ORDER with leave to amend.

Dated: _____

David Lawyerly

_____

Attorney for Plaintiffs

Affidavit by Attorney David Lawyerly

I, David Lawyerly, declare:

1. The following is based on my own personal knowledge and if called to testify, I could, and would, testify competently thereto.
2. I am the attorney for Plaintiffs Attorney for Plaintiffs West Lutheran Church, Inc., Thomas Clark, and Shirley Clark in the above-entitled action.
3. To avoid repetition, I am incorporating herein the definitions set forth *ante* in the Application, and in the Memorandum of Points and Authorities.
4. On Nov. 21, 2006, FIRST TITLE filed the DEMURRER, which was heard on [redacted] by the Honorable [redacted], who issued the ORDER sustaining the DEMURRER without leave to amend on the grounds that the LIS PENDENS was defective as a matter of law and could not be cured. Judge [redacted] signed the ORDER on [redacted], and the NOTICE OF ORDER was served on Jan. 30, 2007.
5. The FAC was filed on Aug. 28, 2006. At that time I did not have sufficient evidence to support a negligence cause of action against any of the FINANCE DEFENDANTS.
6. On Sept. 14, 2006 I served a Subpoena Duces Tecum on EVERETT, a true and correct copy of which is attached hereto as **Exhibit 1**. On or about Oct. 11, 2006 I received a response thereto that included the documents set forth in **Exhibits 2 through 6** attached hereto, which comprise the bulk of the NEW EVIDENCE. The documents clearly indicate that FIRST TITLE had actual notice of this litigation at least four months before funding the $89,000 LOAN to the TALLY DEFENDANTS and recording the TRUST DEED. At no time prior to the TRUST DEED recordation was my office ever contacted by any of the FINANCE PARTIES. I was never given the opportunity to explain to any

of them the nature of this litigation and the reasons why they the TALLY DEFENDANTS had no authority to execute the TRUST DEED. Had my office been so contacted by any of them, I would have immediately taken action to halt the LOAN from moving forward. And if such contact had been at any time on or after April 21, 2006, then, in addition, I would have immediately transmitted to them a copy of the ORIGINAL SETTLEMENT in which the TALLY DEFENDANTS expressly admit they hold no ownership interest in the property encumbered in the TRUST DEED.

7. On or about October 27, 2006 I was informed by FIRST TITLE that it had bought out the LENDERS, who had assigned the TRUST DEED to it. Consequently, FIRST TITLE appeared in this action as Defendant Doe 1, and the LENDERS were dismissed.

8. I did not mention the NEW EVIDENCE in my Opposition to the DEMURRER or at that hearing on the DEMURRER because I believed in good faith I was prohibited from doing so in that a demurrer must be argued exclusively on the face of the pleadings and matters judicially noticed. I reasonably believed the DEMURRER would be overruled—because FIRST TITLE had actual notice of the pending action—and that I would continue to proceed against FIRST TITLE on the basis of the THREE AFFECTED COAS. Even if the DEMURRER were sustained, I reasonably believed it would be <u>with</u> leave to amend because of the strong policy in this state in favor of allowing amendment to pleadings.

9. I did not even remotely anticipate that the Court might deny leave to amend, and consequently I did not bring the NEW EVIDENCE with me to the hearing on the DEMURRER.

10. In the aftermath of the adverse ruling on the DEMURRER, I realized that the NEW EVIDENCE supports a <u>negligence</u> cause of action against FIRST TITLE.

11. On Feb. 6, 2007 I telephoned SECOND TITLE and was informed that FIRST TITLE is an underwriter for SECOND TITLE.

12. I hereby claim that the NEW EVIDENCE constitutes new facts for purposes of CCP § 1008(a).

13. I hereby claim that alleging a negligence cause of action against FIRST TITLE, thereby sounding in tort rather than in real property, a constitutes different law for purposes of CCP § 1008(a).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

David Lawyerly

_____

EXHIBIT 1

Subpoena Duces Tecum served on EVERETT on Sept. 14, 2006

EXHIBIT 2

Lender's Supplemental Title Report by SECOND TITLE dated Feb. 8, 2006

EXHIBIT 3

Fax from SECOND TITLE to EVERETT dated March 13, 2006

EXHIBIT 4

Letter dated March 29, 2006 from attorney James Fisk (FISK LETTER)

EXHIBIT 5

Updated Preliminary Report by SECOND TITLE dated June 6, 2006

EXHIBIT 6

Fax from SECOND TITLE to EVERETT dated June 7, 2006

EXHIBIT 7

Notice of Entry of Order Sustaining Demurrer Without Leave to Amend served on Jan. 30, 2007 (NOTICE OF ORDER)

EXHIBIT 8

Stipulation and Order for Settlement of Claims among All Parties dated April 21, 2006

Proof of Service

I, the undersigned, declare:

I am a citizen of the United States of America, am over the age of eighteen (18) years, and am not a party to the within action. My business address is [redacted].

On _____, I caused to be served the following document(s): **PLAINTIFFS' NOTICE OF APPLICATION AND APPLICATION TO RECONSIDER AND TO REVOKE ORDER SUSTAINING DEMURRER, OR ALTERNATIVELY, TO MODIFY THE ORDER WITH LEAVE TO AMEND [CCP 1008(a)]; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; DECLARATION BY ATTORNEY IN SUPPORT,** on the parties involved, enclosed in one or more envelopes addressed as follows:

[redacted]

__XX__ BY MAIL: I caused each envelope, with postage fully prepaid, to be placed in the United States mail at Santa Monica, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _____, at _____, California,

_____

David Lawyerly (SBA 075836)
1211 Fourth St. Suite 200
Santa Monica, CA 90401-1338
310-451-8678

Attorney for Plaintiffs West Lutheran Church, Inc., Thomas Clark, and Shirley Clark

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES

CENTRAL DISTRICT, MOSK COURTHOUSE - UNLIMITED

WEST LUTHERAN CHURCH, INC., a California Corporation; THOMAS CLARK; SHIRLEY CLARK,
Plaintiff

vs.

VICTOR TALLY, an individual; JANICE TALLY, an Individual; FIRST RESURRECTION CHURCH a California Corporation; SECOND RESURRECTION CHURCH a California Corporation; FIRST TITLE INSURANCE COMPANY; all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint, adverse to Plaintiffs' ownership or any cloud on Plaintiffs' title thereto; and DOEs 1 to 10, inclusive,

Defendants

Case Number: [redacted]
Dept.: [redacted]
Judge: [redacted]
Trial Date: [redacted]

[PROPOSED] ORDER ON APPLICATION TO RECONSIDER

Hearing Date: _____
Hearing Time: _____

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GOOD CAUSE BEING SHOWN, IT IS ORDERED THAT:

Plaintiffs' motion for reconsideration of the order issued by this Court on Jan. 5, 2007 and signed by this Court on [redacted] (hereinafter the "**ORDER ON DEMURRER**") is GRANTED as follows:

☐ The ORDER ON DEMURRER is revoked.

☐ The Demurrer to First Amended Complaint by Defendant FIRST TITLE INSURANCE COMPANY is overruled.

☐ The ORDER ON DEMURRER is modified so that "without leave to amend" is changed to "WITH leave to amend."

IT IS SO ORDERED.

Dated: _____

_____
Judge (or Judicial Officer)