

NO. A10-1483

State of Minnesota  
In Supreme Court

Mattson Ridge, LLC,

*Respondent,*

v.

Clear Rock Title, LLP, and  
Ticor Title Insurance Co.,

*Appellants.*

APPELLANTS' REPLY BRIEF  
AND SUPPLEMENTAL APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## I. ARGUMENT

### A. **The Lower Courts' Legal Conclusions of an Ambiguous Legal Description and Unmarketable Title Must be Reversed.**

#### 1. *Trial Evidence was Not Considered on Summary Judgment.*

Mattson Ridge contends that the record contains substantial evidence that the legal description for its property was ambiguous and its title unmarketable. However, the district court made its rulings as to marketability of title on summary judgment; the evidence to which Mattson Ridge points was presented at the trial on the damages claim that followed. This Court should ignore this evidence for the purpose of reviewing the district court's legal conclusion that summary judgment was appropriate because the reference to Charles Magnuson's place was ambiguous, thereby making title to the Property unmarketable.

An appellate court "must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.'" *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quoting *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982)).<sup>1</sup> "It is well settled that an appellate court may

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<sup>1</sup> On multiple occasions, Mattson Ridge invokes *Thiele v. Stich*, claiming that Tigor is raising new issues on appeal. But Tigor is arguing the same issues it has throughout this case: Summary judgment was improper as a matter of law because the Property description containing the Magnuson reference was not ambiguous and therefore not unmarketable, and the courts' conclusions regarding damages were erroneous and that the proper measure of damages was the cost to cure the defect. Tigor's arguments on appeal do not differ from those raised throughout this litigation. *Cf. Jacobson v. \$59,900 in U.S. Currency*, 738 N.W.2d 510, 522-23 (Minn. 2007) (reviewing arguments raised on appeal that refined arguments made below where the argument on appeal is not "different in kind" from the argument below, and the argument on appeal does not rely on "key facts" never presented to the district court).

not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.” *Plowman v. Copeland, Buhl & Co., Ltd.*, 261 N.W.2d 581, 583 (Minn. 1977).

Here, Mattson Ridge argues that the Court should consider evidence and testimony presenting the opinions of Commercial Partners Title, the Chisago City attorney, and the city council. (Resp. Br. at 19-20.) This evidence cannot and does not support the district court’s conclusion as a matter of law that the Magnuson reference created an ambiguity that rendered the title to the Property unmarketable, because that evidence was not before the district court on the parties’ cross-motions for summary judgment. The district court’s factual findings at the trial on damages are irrelevant to its earlier legal conclusion regarding the marketability of the Property. Accordingly, this Court should reject the evidence and related arguments presented by Mattson Ridge.

**2. *The Shoberg Deed is not Facially Ambiguous.***

At the outset of its argument that the legal description of the Property is facially ambiguous, Mattson Ridge cites three cases it claims hold that a real estate legal description was so deficient that it rendered title to the property unmarketable. None of the cases cited is on all fours with the facts of this case, where the sole claimed deficiency in the legal description is a reference to an adjoining owner to identify the road that is the boundary of a parcel that is *carved out of* the parcel owned by Mattson Ridge. Nevertheless, each case is instructive as to the serious type of deficiency contained in a legal description that renders it impossible to determine what land is intended to be

conveyed, thereby releasing a purchaser from any obligation to buy the property, none of which is present in the case under consideration.

Mattson Ridge first cites *Egelhoff v. Simpson*, 64 N.Y.S. 336 (N.Y. App. Div. 1900). In this New York decision from 1900, the legal description began at a point on a public street, 557 feet and 10 1/2 inches from the westerly boundary of Fourth Avenue. There was no other reference in the deed to identify the beginning point in the description of the parcel. The same description was used in a series of deeds. However, after the description was first used but before Simpson contracted to buy the land, Fourth Avenue had been widened. Simpson said he did not know the correct point of beginning for the parcel, because it was unclear if the 557 feet should be measured from the old Westerly line of the street or the new Westerly line. The court held that, because there were no other calls or identifiers for the point of beginning, the description was so uncertain that it excused the buyer from his duty to purchase.

*Egelhoff* completely undermines Mattson Ridge's argument. That court specifically noted that it could have saved the description if it had contained a second reference for the point of beginning, *such as a call to the land of an adjoining owner*:

And, unfortunately, there is nothing in the description of the property to locate it aside from the distance of the point of beginning from the westerly corner of Fourth avenue and Fourteenth street. If, independently of the distance of the property from this corner, there were marks of identity in the description which would serve to locate it,--*such as its propinquity to adjoining or neighboring property*, or the identity which attends upon street numbering,--the conclusion might well be different.

64 N.Y.S. at 337-338 (emphasis added). In the present case, the boundary line of the two-acre parcel excepted from Mattson Ridge's land was described in three ways: by a

distance, by a call to the monument of the road, and the identification of that road as being the same one on which Charles Magnuson's place was located.

Likewise, in *Smith v. Turner*, 50 Ind. 367 (1875), another old case, the error was that a distance in the seller's deed was stated as being "twenty and fifteen-hundredths rods" when the seller probably meant "seventy and fifteen-hundredths rods." The court went to considerable trouble to attempt to reconcile the different boundary lines, using both distances, even including its drawing with the opinion. However, the description did not come to the correct ending point using either distance. The court was able to conclude only that "it seem[ed] most probable that" the correct distance was 70 rods rather than 20 rods. 50 Ind. at 373. As in *Egelhoff*, there were no other references such as supporting calls or identification of lands of adjoining owners that would clarify the boundary corner and allow the court to disregard the inaccurate distance by the use of the order of control.

In both of these cases, unlike the instant case, the descriptions failed because they contained incorrect elements that could not be clarified by use of other elements in the descriptions, such as a call to an adjoiner, or to a monument such as a road. In this case, by contrast, the very element of the Mattson Ridge legal description that the lower courts found to render the description ambiguous, i.e., the reference to Charles Magnuson's place on the road, was merely a reference point to further clarify the boundary line, which was identified as a distance of 30 rods to a road. Unlike *Smith v. Turner*, the Mattson Ridge deed does not contain any mistake. Thus, both *Egelhoff* and *Smith* defeat rather

than support the lower courts' rulings that this legal description in the Shoberg deed was so ambiguous that Mattson Ridge did not possess marketable title to the Property.

Finally, Mattson Ridge relies on *Collins v. Martin*, 6 S.W.2d 126 (Tex. App. 1928). In *Collins*, the property was described as “[a] certain tract or parcel of land lying in Tarrant county, Texas, consisting of about 26 2/3 acres about a half mile south of Kennedale, and being the same land heired by the same James Gertrude Brashears from the estate of her father, Monroe Scott.” *Collins*, 6 S.W.2d at 128. Unlike the Property at issue here, the property in *Collins* contained no reference to the public land survey section, township and range in which the property was located, no calls or distances, and no monuments such as roads. The land was described merely as “the same land” previously owned by certain named people, “consisting of about 26 2/3 acres about a half mile south of Kennedale.” The reference to former owners served as the *entire description* of the property, not merely one element to assist in clarifying a boundary line.

Thus, the cases cited by Mattson Ridge do not support its assertion that the description in the Shoberg deed was so deficient as to prevent the court from determining the parcel owned by Mattson Ridge, rendering that title unmarketable.

**3. *The Magnuson Reference in the Shoberg Deed is Not Susceptible to Multiple Meanings Because It Identifies a Road, Not Magnusons' "Place," Requiring Reversal and Judgment That Title Was Marketable.***

Mattson Ridge next contends that the Shoberg deed was susceptible to more than one meaning. This contention is based on an inaccurate reading of *Mollico v. Mollico*, 628 N.W.2d 637 (Minn. Ct. App. 2001). Mattson Ridge contends that *Mollico* stands for

the proposition that the district court was prohibited from reviewing extrinsic evidence to resolve the purported ambiguity of in the Property description. (Resp. Br. at 21.) By ignoring the actual holding of *Mollico*, Mattson Ridge concedes that the district court erred in its conclusion of law because issues of fact—to be resolved by extrinsic evidence—should have precluded summary judgment.<sup>2</sup>

The correct rule, as articulated in *Mollico* and elsewhere, is that where the terms of a written instrument, such as a deed, are ambiguous, parol evidence is admissible. *Mollico*, 628 N.W.2d at 640-1 (citing *Nord v. Herreid*, 305 N.W.2d 337, 340 (Minn. 1981)). It is the determination of ambiguity that is judged by the language of the written instrument alone, not the meaning of the written instrument. *Id.* at 641. If the court concludes that a written instrument is ambiguous based on its own terms, then parol evidence is admissible to arrive at the meaning of the instrument. *Id.* at 640-1. Thus, in *Mollico*, the Court of Appeals concluded that the deed at issue was not ambiguous and therefore did not permit parol evidence.

Here, the district court erred by concluding title to the Property was ambiguous and therefore unmarketable. If the district court was correct in concluding that the Magnuson reference was an inherent ambiguity, it should have denied summary judgment and ordered a trial to accept extrinsic evidence to be used to reconcile and

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<sup>2</sup> In conducting its independent review of the parties' cross-motions for summary judgment, the district court was not bound by the parties' representation regarding the absence of questions of material facts. *Yellow Mfg. Acceptance Corp. v. Handler*, 83 N.W.2d 103, 106 (Minn. 1957). "Questions of legal effect must be decided by the court uninfluenced by stipulations of the parties or counsel." *Id.* Thus, if this Court determines that summary judgment was improvidently granted because questions of material fact remain, the Court should reverse and remand for further proceedings.

interpret the description. Of course, that determination was already made by the district court in the Torrens action, which entered a judgment modernizing the legal description without contest or difficulty.

Despite Mattson Ridge's arguments to the contrary, *City of North Mankato v. Carlstrom*, 2 N.W.2d 130 (Minn. 1942), remains instructive on this point. The Court noted several principles relevant to the instant case. First, the Court noted—again, contrary to Mattson Ridge's articulation of the rule—that where a property description is insufficient to identify the property to be conveyed, the description must “afford the means of identification aided by extrinsic evidence.” *City of North Mankato*, 2 N.W.2d at 133. Next, this Court noted that

courts are extremely liberal in construing descriptions of premises conveyed by deed with the view of determining whether those descriptions are sufficiently definite and certain to identify land and make the instrument operative as a conveyance. \* \* \* and it may be laid down as a broad general principle that a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed.

*Id.* (quoting 16 Am. Jur., Deeds, § 262). Finally, the Court noted a reluctance to void deeds, preferring instead to rely on reasonable rules of construction and extrinsic evidence such as a survey to determine the property conveyed. *Id.* at 133-4. Declaring the Shoberg deed void would be a natural corollary of determining that the Property description was ambiguous and the title was unmarketable. Because such an outcome is disfavored, the district court was wrong to declare title to the Property unmarketable.

The district court erred in its analysis and entry of summary judgment on this issue and should be reversed.

Mattson Ridge asserts that the Shoberg deed is subject to more than one meaning. However, Mattson Ridge fails to demonstrate how these various meanings cause an inability to identify the land described. Notably and without reiterating them, Mattson Ridge relies on the same speculative rhetorical questions that it raised below regarding Charles Magnuson's "place." That reference did not cause "reasonable doubt" about the boundaries of the land owned by Mattson Ridge, as found by this Court in *Hedderly v. Johnson*, 44 N.W. 527, 528 (Minn. 1890), or in *Egelhoff and Smith*. Mattson Ridge has never argued that the Magnuson reference renders the rest of the operative phrase "from the county road at or near Charles Magnuson's Place in Sunrise City" ambiguous because the road-boundary for the two-acre carve out could not be determined. Indeed, the Property description excised of the Magnuson reference is complete and sufficient to determine the boundaries of the Property:

The North  $\frac{1}{2}$  of the Northwest  $\frac{1}{4}$  of Section 25, Township 34, Range 21, Chisago County, Minnesota, excepting however, two acres, more or less, in the Northwest corner of the Northwest  $\frac{1}{4}$  of Northwest  $\frac{1}{4}$  of said Section 25, described as follows: Commencing at the Northwest corner of said Section 25; thence South 30 rods to the intersection of road \_\_\_\_\_; thence along the center of the road to where said road crosses the section line; thence along the North line of said Section, 24 rods to the Northwest corner of said Northwest  $\frac{1}{4}$  of Northwest  $\frac{1}{4}$  or to the place of beginning.

(ADD-61 (as modified).) The lower courts failed to properly analyze the entirety of the Property description, choosing instead to rely on a particular phrase that identifies the road now been identified in the revised description as Ivywood Trail.

In the cases cited by Mattson Ridge, the courts were required to determine if legal descriptions were so deficient that buyers were released from the obligation to purchase the parcels. Mattson Ridge, however, asks this Court to find its legal description fatally deficient simply because, after the fact, its buyer suggests that the description might have been deficient before it was modified by the Torrens court. This Court must determine if, in fact, the legal description was ever so deficient as to have permitted Thompson Builders to rescind the purchase contract. In *Glaser v. Minnesota Federal Savings & Loan Assoc.*, 389 N.W. 2d 763 (Minn. Ct. App. 1986), for example, the court concluded that the seller conveyed marketable title: “There is no question that appellant was the actual owner of the property. There are no defects in appellant’s chain of title, no liens on the property, no easements, no one claiming ownership through adverse possession, and no other flaws which would make appellant’s title unmarketable.” *Glaser*, 389 N.W.2d at 764. Mattson Ridge’s title is equally flawless.

There is no question that both Mattson Ridge and Thompson Builders understood without ambiguity the scope of the parcel intended for development even with the reading of the Magnuson reference in the context of the entire description. The only ambiguity identified by Mattson Ridge pertains to Magnuson himself. Indeed, Mattson Ridge reaches new heights of speculation by inserting this appeal doubt as to the *very existence* of Charles Magnuson. The reference to Magnuson’s place was a call to extrinsic evidence. This court may accept that extrinsic evidence by taking judicial notice of the 1869 deed to Mr. Magnuson conveying title to 160 acres in Section 26 in

Chisago County, Minnesota. *See In re Clausen*, 289 N.W.2d 153, 157 (Minn. 1980) (“The function of judicial notice is to expedite litigation by eliminating the cost or delay of proving readily verifiable facts.”). A copy of the certified deed obtained from the county recorder’s office is provided at A.A.-302 along with a reasonable (but uncertified) transcription thereof.

Without any actual ambiguity in the description, Mattson Ridge’s arguments fail. “A title cannot be considered doubtful where there is no question of fact involved in a decision as to its validity, but one of law only, upon which the court where the controversy is litigated is competent finally to pass.” *Ladd v. Weiskopf*, 64 N.W. 99, 102 (Minn. 1895). *See also Howe v. Coates*, 107 N.W. 397, 402 (Minn. 1906) (“[T]itle is not unmarketable when no question of fact is involved, but only one of law arising exclusively upon the construction of a record muniment of title and all the parties in interest are before the court, so that its decision will be a final determination of the matter.”). Accordingly, this Court should reverse the lower courts legal conclusions of ambiguity and unmarketability and enter judgment in favor of Tigor.

**B. Mattson Ridge’s Policy Loss, If Any, Was the Cost to Cure the Purportedly Defective Legal Description.**

**1. *Olson Does Not Apply in This Context and the Court of Appeals Erred in its Application.***

Title to Mattson Ridge’s land is marketable and is not defective. Tigor was not obligated to pay Mattson Ridge any loss. However, if this Court finds that a Covered Risk of the Mattson Ridge policy was invoked, it must reverse the holdings of the lower

courts and enter judgment against Ticor in the amount of its cost to modernize the legal description.

Although the case has never been applied to title insurance before, the Court of Appeals expanded the holding of this Court's opinion in *Olson v. Rugloski*, 277 N.W.2d 385 (Minn. 1979), to find Ticor liable in an amount greater than its policy limits, contrary to the plain language of the Policy and the most fundamental principle of insurance: loss may not exceed the amount of the policy. As laid out more fully in its opening brief, Ticor contends that the Court of Appeals erred by applying *Olson* in this instance, for a different type of insurance, where there was no unreasonable delay of payment of an undisputed amount, and did not involve the policy language at issue here.

In *Olson*, this Court stated the law plainly: "The insurer is obligated to pay when the insured suffers a loss covered by the policy. When the insurer refuses to pay or unreasonably delays payment of an undisputed amount, it breaches the contract and is liable for the loss that naturally and proximately flows from the breach." *Olson*, 277 N.W.2d at 387-8. Mattson Ridge (parroting the Court of Appeals' analysis) contends that Ticor would have the Court read the word "only" at the start of the second sentence. (Resp. Br. at 32; ADD-12.) But the word "only" is not necessary to make sense of these simple declarative sentences. The first sentence articulates the general rule of insurance that an insurer must cover an actual loss. Ticor does not dispute this and, indeed, argues that Mattson Ridge's actual loss of the cost-to-cure is the entire amount of damages to which Mattson Ridge is entitled. The second sentence articulates a narrow holding

where, as in the facts in *Olson* and the case it overruled, *Independent Grocery Co. v. Sun Insurance Co.*, 178 N.W. 582 (Minn. 1920), consequential damages flowed from the insurer's delayed payment of an agreed-upon amount. The second sentence does not need the term "only" because it is organized as a logical truth (when p is true, then q is necessarily true). Because the antecedent is false, the consequent is also false. That is, because Ticor did not refuse to pay or unreasonably delay payment of an undisputed amount, it did not breach the contract with Mattson Ridge and is not liable for consequential damages, including Mattson Ridge's lost profits.

By misreading *Olson* in this way and applying the case to inapposite facts, the Court of Appeals has dramatically changed the title insurer-insured relationship. Recovery is no longer limited to actual loss, but under the Court of Appeals' new rule, is unbounded and can include consequential damages such as lost profits. The Court of Appeals must be reversed on this issue.

**2. *Mattson Ridge's Authority for an Award Above the Policy Limits is Lacking.***

In further support of its contention that *Olson* applies here, Mattson Ridge relies extensively on *Title Insurance Law* by Joyce Palomar and related cases cited in her commentary. Mattson Ridge relies on *Title Insurance Law* to support its thesis that the policy-limits cap on a title insurer's liability no longer applies if the insurer breaches the contract. (Resp. Br. at 30-37.)

Professor Palomar makes the tentative assertion that "the insured's claim *may* not be limited to the amount policy conditions provide [sic] when if [sic] the insurer is paying

the claim according to the policy's terms.” *Title Insurance Law*, § 10:18, p. 10-79 (emphasis added). Palomar cites only two cases that might support this assertion. The first is a Florida case, *La Minnesota Riviera, LLC v. Lawyers Title Insurance Corp.*, 2007 WL 3024242, at \*1 (M.D. Fla. Oct. 15, 2007),<sup>3</sup> which decided the insurer’s motion to dismiss. That opinion said only that the plaintiff had adequately pleaded a loss under the policy, and thus survived the motion to dismiss. *Id.* at \*3-4. It made no substantive rulings, and certainly did not hold that the insured could recover more than policy limits as the Court of Appeals did here.

The second case Palomar cites in support of her assertion is *Dreibelbiss Title Co., Inc. v. MorEquity, Inc.*, 861 N.E.2d 1218 (Ind. Ct. App. 2007). Dreibelbiss Title violated the instructions of the lender in the handling of a loan closing. *Dreibelbiss*, 861 N.E.2d at 1221-2. Dreibelbiss argued that the lender should not be able to collect for its closing negligence because the lender gave tardy notice that its lien had been wiped out. *Id.* at 1222. The court held that Dreibelbiss’ breach of the closing instructions relieved the lender of the duty to give prompt notice:

However, we agree with the trial court that Dreibelbiss’s own failure to follow the Bank’s payoff instructions amounted to a first material breach of [Dreibelbiss’s] obligations to [Lender], thus relieving [Lender] of its obligations under the insurance policy to give ‘notice’ to Dreibelbiss and allow it to defend its interests in the foreclosure action.

*Id.* at 1220-21 (quotation and citation omitted). Professor Barlow Burke, in his treatise *Law of Title Insurance*, accurately cites *Dreibelbiss* for its limited proposition that “a title

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<sup>3</sup> A true and correct copy is provided at A.A.-305.

company's mistake in breaching payoff instructions of an insured lender relieved the latter of the prompt notice requirement." § 6.02, Notice of Claim, n. 13.

The *Dreibelbiss* court also held that the lender could collect more than the value of the real estate, though not more than the policy limits. The lender had sued Dreibelbiss as an insurance broker, not as a title insurer. The court's damage ruling was squarely founded on the breach of insurance broker duties:

An insurance agent or broker who undertakes to procure insurance for another is an agent of the proposed insured, and thus owes his principal a duty to exercise reasonable care, skill and diligence in effecting the insurance. Thus, if an agent undertakes to procure insurance and through his fault and neglect fails to do so, he is liable to his principal for any damage resulting therefrom. The action against the agent may be for breach of contract or for negligent default in the performance of a duty imposed by contract.

*Id.* at 1222 (citations omitted). The court further notes the loan amount was less than the policy amount, making the policy limit an inapplicable damage amount. *Id.* at 1220 n.2.

*Dreibelbiss* is cited by other publications for its holding that an insurance broker is liable for losses incurred by the insured when the broker fails to exercise reasonable care in procuring insurance. *See, e.g., Couch on Insurance*, 3d ed., § 45:14 (citing *Dreibelbiss* for the proposition that "[g]enerally, courts have found that an insurer's agent is acting on behalf of the insured when the agent is given that authority by the insurer or has assumed that role through actions or representations to the insured.") *See also* Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies & Insureds*, § 6:44A n.7 (Who is the broker acting on behalf of).

The significance of *Dreibelbiss* is that the court permitted the lender to recover its full loan principal from the broker-closer, Dreibelbiss, and that Dreibelbiss was not entitled to limit damages based on the terms of the insurance policy. However, *Dreibelbiss* did not hold that the lender could recover more than the policy limits, even for breach of the closing instructions and insurance broker duties. Accordingly, Mattson Ridge's reliance on Palomar's assertion is misplaced because Palomar's related analysis does not support her proposition.

**3. *Decline Due to Market Conditions is Not a Compensable Loss; The Correct Measure of Loss is the Cost to Cure the Defect.***

Without having been divested of a single blade of grass, Mattson Ridge stands to recoup its full investment plus a premium while retaining title to the Property. Moreover, Mattson Ridge has convinced the lower courts to make Ticor the guarantor of its purchase agreement with Thompson Builders. Because this is not the function of title insurance, nor the correct measure of damages where the cost-to-cure the purported defect is known, the lower courts' damages awards must be reversed in favor of one that relies on sound legal principles.

As Ticor noted in its opening brief, if a Covered Risk were invoked, the correct measure of loss would be the lesser of the cost to cure or the diminution in value. *See, e.g., Aboussie v. Chicago Title Ins. Co.*, 949 S.W.2d 207, 209 (Mo. Ct. App. 1997); *Breck v. Moore*, 910 P.2d 599 (Alaska 1996). Here, the purported defect was removed, and the cost was \$11,169.00. (ADD-20.) Mattson Ridge stipulated and agreed that even if Ticor had accepted tender of the claim, "neither Clear Rock [nor] Ticor could have commenced

and prosecuted a title registration proceeding to cure the defect any faster than Mattson Ridge . . . commenced and prosecuted such action on its own.” (Tr. T. at 135.) After the issuance of the New Legal Description (ADD-71), Mattson Ridge and Thompson entered into the Second Amendment, which provided the same purchase price as the earlier Amendment (\$2,600,000). (ADD-67.) The Second Amendment also extended the closing to May 31, 2008. (ADD-67.) Thompson Builders backed out of the sale for its failure to “secure acceptable financing” (Tr. T. at 303), not because of the purported defect. The lower courts erred as a matter of law by awarding Mattson Ridge any damages in excess of the costs associated with the Torrens proceeding.

Given the recent economic downturn and its effects on the property market, it is unsurprising that Mattson Ridge is not the only property developer seeking to involve its title insurer as guarantor of its speculative deals. Recently, the United States District Court for the Eastern District of California in its case *Bank of Sacramento v. Stewart Title Guaranty Co.*, 2010 WL 3784096 (E.D. Cal. Sept. 27, 2010),<sup>4</sup> addressed the plaintiff’s claim to damages based on the decline in the market value of its property. *Bank of Sacramento*, 2010 WL 3784096, at \*5. The court agreed with the defendant that a decline in market value was “not considered compensable damage” under the terms of the policy. *Id.* This Court should find *Bank of Sacramento* persuasive on the issue of Mattson Ridge’s claim to consequential damages, including its lost profits.<sup>5</sup>

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<sup>4</sup> A true and correct copy is provided at A.A.-309.

<sup>5</sup> Mattson Ridge makes much ado of the fact that Ticor has not challenged the district court’s factual findings on appeal, going so far as to include a separate standard of review and several pages of argument regarding “clear error” that was not raised by Ticor.

## CONCLUSION

This Court should reverse the lower courts' conclusion that the description of the Mattson Ridge parcel is so deficient that it is impossible to determine what land it owns, rendering its title unmarketable and triggering policy coverage. If this Court finds that Mattson Ridge's title was unmarketable before the legal description was modernized, and that Ticor was required to pay to modify the description, it must reduce the amount of the judgment against Ticor to the cost to modify the legal description, which was \$11,169.00.

Respectfully submitted,

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(Resp. Br. at 42-6.) These issues are irrelevant where the lower courts made erroneous legal conclusions regarding the measure of damages.