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8 United States District Court
9 District of Nevada

10 USACM Liquidating Trust,

11 Plaintiff,

12 v.

13 Placer County Land Speculators, LLC, aka
Placer County Land Investors, LLC; et al,

14 Defendants.
15

No. 2:08-cv-01276-KJD-RJJ

**Amended Motion for Appointment of
a Receiver; Memorandum of Points
and Authorities**

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1 **Motion**

2 The USACM Liquidating Trust (the “USACM Trust”) seeks the appointment of a
3 receiver for over 300 lenders (each a “Placer 1 Lender” and collectively “Placer 1
4 Lenders”) identified on **Exhibit 1**,¹ as collective owners on an undivided basis of all of the
5 beneficial interests in a Promissory Note in the ultimate principal amount of \$31.5 million
6 made by Placer County Land Speculators, LLC (the “Borrower”) originally dated
7 December 10, 2004 (as amended, the “Placer 1 Note”). The USACM Trust holds the
8 Placer 1 Note as servicing agent for the Placer 1 Lenders. This motion is made on the
9 statutory grounds set forth below and pursuant to Rule 66, Fed. R. Civ. P. The USACM
10 Trust seeks the appointment of a receiver solely with respect to the Placer 1 Lenders’
11 interest in the Placer 1 Note.

12 After consultation with certain Placer 1 Lenders, and after seeking input from all of
13 the Placer 1 Lenders, the USACM Trust received information concerning four potential
14 receiver candidates, and sought Lenders’ preferences among the candidates. Two received
15 an expression of preference, as explained below. One of the four then withdrew.

16 The receiver appointed by the Court (the “Receiver”) would be initially appointed
17 to make a prompt recommendation to the Court as to whether the lien of a Deed of Trust
18 (the “Placer 1 Deed of Trust”) (more completely described below) that secures repayment
19 of the Placer 1 Note should be foreclosed. Some Placer 1 Lenders have not consented to
20 foreclosure. One reason offered is that they do not want the Placer 1 Lenders to obtain
21 title to the unimproved real property that is subject to the Deed of Trust (the “Property”) in
22 their own names, despite the fact that that is how they hold their interest in the Placer 1
23 Note. Others do not want the Placer 1 Deed of Trust foreclosed because that foreclosure
24 will extinguish the lien of a junior deed of trust (the “Placer 2 Deed of Trust”) that secures

25 _____
26 ¹ This motion references Exhibits attached to the Declaration of Geoffrey L. Berman filed
with this Motion.

1 repayment of a Promissory Note in the original principal amount of \$6,500,000 made by
2 Borrower on December 10, 2004 (the “Placer 2 Note”) in favor of certain direct lenders
3 (the “Placer 2 Lenders”).

4 The USACM Trust anticipates the Receiver will direct foreclosure of the Placer 1
5 Deed of Trust, and that title to the Property will transfer to the Placer 1 Lenders by credit
6 bid at foreclosure. Accordingly, the USACM Trust asks the Court to authorize the
7 Receiver to manage the Property for the benefit of the Placer 1 Lenders. To address
8 Lender concerns, the USACM Trust requests that the Receiver be directed to consult with
9 or seek input from all Placer 1 Lenders before making any recommendation to the Court,
10 and to make a recommendation only with the consent of at least 51% of the beneficial
11 interests in the Placer 1 Note, absent a true emergency.

12 This Motion is explained in the following Memorandum of Points and Authorities
13 and is supported by the record, including the record to be developed at the hearing on the
14 Motion. In particular, this Motion is supported by the attached Declaration (the
15 “Declaration”) of Geoffrey L. Berman, Trustee of the USACM Trust, and the exhibits
16 thereto, as well as the verified Complaint in this action, and the exhibits thereto.

17 Dated: October 2, 2008.

18 **LEWIS AND ROCA LLP**

19
20 By /s/ Rob Charles (#6593)

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MEMORANDUM

Background

Placer 1 Loan. In December 2004, 280 Lenders agreed to loan \$27,500,000 to Borrower on an 18 month loan at 12.5% interest.² The original Placer 1 Note was secured by a deed of trust on the Property recorded on December 20, 2004 in Placer County, California.³ In successive modifications to the loan documents, with execution of new promissory notes and recording of amendments to the deed of trust, the loan balance increased to the present \$31,500,000.⁴

Each Placer 1 Lender owns a stated dollar amount of the Placer 1 Loan. Lender interests have been bought and sold from time to time. The current list of over 300 Placer 1 Lenders is Exhibit 1 to the Complaint in this action, as well as the Declaration.

USACM as Loan Servicer. The Placer 1 Loan was originated by USA Commercial Mortgage Company (“USACM”). USACM agreed to service the Placer 1 Loan, using a standard form of Loan Servicing Agreement (“LSA”).⁵

Placer 2 Loan. USACM also originated a \$6,500,000 loan to Borrower, secured by a second lien on the Property. This loan was evidenced by the Placer 2 Note. USACM was the servicer of the Placer 2 Note.

Loan Maturity; USACM Bankruptcy. The Placer 1 Note (and Placer 2 Note) matured without payment (principal or interest) in May 2006. By then USACM was a debtor in possession in a chapter 11 bankruptcy case pending in this District.⁶ USACM was managed by Mesirow Interim Financial Management in its bankruptcy case.

² Declaration of Geoffrey L. Berman, trustee, Exhibit 4.

³ Declaration, Exhibit 11.

⁴ Declaration, Exhibits 10, 17.

⁵ An example of an LSA is attached to the Declaration as Exhibit 2.

⁶ *In re USA Commercial Mortgage Company*, No. 06-10725-lbr. The USACM Trust asks this Court to take judicial notice of the Bankruptcy Court’s file.

1 **USACM Plan.** On January 8, 2007, the bankruptcy court entered its Order
2 Confirming the “Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization” as
3 Modified Herein.⁷ This Confirmation Order and Debtors’ Third Amended Joint Chapter
4 11 Plan of Reorganization⁸ established the USACM Trust and vested the assets of
5 USACM not sold to Compass Partners LLC (the Asset Purchaser under the Plan) in the
6 USACM Trust. Those assets specifically included the right to service the Placer Loans.⁹

7 **USACM Trust as Successor Servicer.** The USACM Plan became effective on
8 March 12, 2007. The USACM Trust began to attempt to collect the Placer Loans, and has
9 reported monthly to the Lenders.¹⁰ The USACM Trust made demand on Borrower for
10 repayment of the Placer 1 Note (and the Placer 2 Note). The Borrower appears to own
11 only a single asset – the undeveloped Property in Placer County, California that is subject
12 to the lien of the Placer 1 Deed of Trust, as well as the second lien for the Placer 2 Deed of
13 Trust, with no means of payment other than sale of the Property or foreclosure of the deed
14 of trust. The USACM Trust made the determination to foreclose the Placer 1 Deed of
15 Trust.

16 **Tax Advance.** The Property is part of a much larger prospective development
17 called Placer Vineyards. In the spring of 2007 Placer County was considering a proposed
18 development plan. The USACM Trust was advised that property taxes needed to be paid
19 in order for the Property to be part of the approved development plan. On June 6, 2007,
20 with the consent of the Placer 1 and 2 Direct Lenders, the USACM Trust advanced
21

22 _____
23 ⁷ *In re USA Commercial Mortgage Company*, No. 06–10725–lbr, DE 2376.

24 ⁸ *In re USA Commercial Mortgage Company*, No. 06–10725–lbr, DE 1799.

25 ⁹ Confirmation Order ¶ 28 at pp. 10-11.

26 ¹⁰ The monthly reports of the USACM Trust are mailed to Lenders and available online
from the Trust’s website, at
<http://usacmcucc.bmcgroup.com/Placer%20County/Forms/AllItems.aspx>.

1 \$678,649.19 to the Borrower and paid directly to Placer County to pay the back taxes on
2 the Property. That advance has not been repaid.

3 **Valuation.** The best information available to the USACM Trust is that the present
4 market value of the Property is by far insufficient to repay the \$31.5 million unpaid
5 principal balance, much less all of the sums owed on the Placer 1 Note.

6 **Attempted Foreclosure.** The USACM Trust hired counsel in Sacramento and
7 engaged a foreclosure trustee, which resulted in a foreclosure sale noticed for April 9,
8 2008. The sale was continued when an entity called Placer Vineyards 2nd Lenders, LLC
9 filed a chapter 11 bankruptcy petition in Reno, Nevada on April 9, 2008.¹¹ The
10 bankruptcy filing was dismissed by the bankruptcy court on May 19, 2008.

11 At the foreclosure trustee's request, the Trust began the process of verifying that it
12 had a signed LSA for each of the Placer 1 Lenders. After an exhaustive investigation into
13 the hundreds of boxes of USACM records it received, the USACM Trust was unable to
14 find signed LSAs for about 23 Placer 1 Lenders.

15 Beginning in March 2008, certain Lenders, some Placer 1 Lenders and some Placer
16 2 Lenders, argued that the Placer 1 Deed of Trust should not be foreclosed. Their core
17 themes are that foreclosure of the Placer 1 Deed of Trust would extinguish the Placer 2
18 Deed of Trust; and that the Placer 1 Lenders would own the Property as tenants in
19 common upon foreclosure of the Placer 1 Deed of Trust. At the request of FDH
20 Management, numerous Lenders advised the USACM Trust and the foreclosure trustee
21 that the Lenders did not consent to foreclosure, and did not authorize the USACM Trust to
22 act.

23 The USACM Trust has directed continuance of the foreclosure sale from time to
24 time, most recently to December 23, 2008. Without the consent of all Placer 1 Lenders,
25

26 ¹¹ *In re Placer Vineyards 2nd Lenders, LLC*, No. 08-50546.

1 the foreclosure trustee will not conduct the sale. At present, there is no hope that all Placer
2 Lenders will agree on any course of action.

3 **Risks Caused by Delay.** According to the on-line records of the Placer County
4 Assessor, the unpaid real estate taxes on the three parcels of the Property now total
5 \$389,896.82. There are no assets available to pay accruing taxes and assessments.

6 In order to develop the Property, Borrower through its managing member – USA
7 Investment Partners, LLC (“USAIP”)¹² – entered into an Operating Agreement for Placer
8 Vineyards Development Group, LLC (“Development Group”). The Development Group
9 is addressing ongoing permitting, engineering, environmental and legal issues associated
10 with the development, including pending litigation. Borrower’s unpaid share of the
11 periodic billings from the Development Group on account of development activities is
12 about \$110,000. There are no assets available to pay the Development Group billings.

13 Discussion

14 I. THIS COURT HAS THE POWER TO APPOINT A RECEIVER

15 The USACM Trust seeks the appointment of an equity receiver. Rule 66, Fed. R.
16 Civ. P., provides

17 These rules govern an action in which the appointment of a receiver is
18 sought or a receiver sues or is sued. But the practice in administering an
19 estate by a receiver or a similar court-appointed officer must accord with the
20 historical practice in federal courts or with a local rule. An action in which a
21 receiver has been appointed may be dismissed only by court order.

22 The Ninth Circuit has explained “a district court’s power to supervise an equity
23 receivership and to determine the appropriate action to be taken in the administration of
24 the receivership is extremely broad.”¹³

25 ¹² USA Investment Partners, LLC is also now a debtor in a bankruptcy proceeding in this
26 District, case number BK-S-07-11821-LBR. Lisa M. Poulin serves as the Chapter 11
trustee for USAIP.

¹³ *United States v. Alisal Water Corp.*, 431 F.3d 643, 658 (9th Cir. 2005), quoting *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986).

1 **II. THE LENDERS HAVE MANY OF THE RIGHTS OF COTENANTS UNDER**
2 **NEVADA AND CALIFORNIA LAW**

3 The several Placer 1 Lenders have an undivided interest in the Placer 1 Note in
4 proportion to their respective investments. This relationship of the Lenders as co-owners
5 of the Placer 1 Note, and of the Property upon foreclosure, implicates both Nevada and
6 California law. As to choice of law, the Placer 1 Note provides that it shall be “construed
7 according to and governed by the laws of the State of Nevada, without regard for its
8 choice of law provisions.”¹⁴ The Deed of Trust contains a similar provision, but looks to
9 California law for the procedure for enforcement of the liens.¹⁵ Accordingly, the Placer 1
10 Lenders have the rights of tenants in common under Nevada and California law.¹⁶
11 Moreover, California law should govern the procedure for appointment of a receiver for
12 the Property.

13 **III. THE COURT SHOULD APPOINT A RECEIVER**

14 **A. A Receiver Is Needed To Protect The Interests of Placer 1 Lenders**
15 ***In The Placer 1 Note***

16 **1. The Receiver could make the foreclosure decision with the**
17 **Court’s approval**

18 A receiver’s authority stems from the order of appointment. A receiver may be
19 given broad powers.¹⁷ Logically, here that power could include, at the Court’s direction,

20 ¹⁴ Placer 1 Note at ¶ 18(a).

21 ¹⁵ Placer 1 Deed of Trust at ¶ 5.7(a).

22 ¹⁶ 86 C.J.S. Tenancy in Common § 10 at 256 (Thomson/West 2006); *see also* Miller &
23 Starr, *California Real Estate, 3rd Ed.*, § 12.33 at 12-82 (**Residual cotenancy**. The
24 tenancy in common is the “residue” form of ownership for multiple interests in real
25 property; it is the form of common ownership that does not fall into one of the other
26 categories. Every interest in property created in favor of two or more persons is a tenancy
in common, unless they acquire the interest for partnership purposes, they expressly
declared it to be a joint-tenancy interest, or they acquire it as community property.) (citing
Cal. Civ. Code §§ 685, 686; *In re Horn’s Estate*, 102 Cal.App.2d 635, 640, 228 P.2d 99,
104 (1951)).

¹⁷ 13 Moore’s Federal Practice § 66.06[4][a] (Matthew Bender 3d ed.) quoted below.

1 instruction to the foreclosure trustee to complete the foreclosure of the Placer 1 Deed of
2 Trust.

3 **2. There are no practical alternatives to appointment of a**
4 **receiver for the loan**

5 There is a good argument under California law that the consent of all beneficiaries
6 of a deed of trust is required to authorize a foreclosure.¹⁸ The Placer 1 Lenders could,
7 pursuant to Cal. Civ. Code § 2941.9, all agree in writing to be governed by a majority of
8 the holders of the undivided interests in the Placer 1 Deed of Trust. Considering the
9 Lenders cannot unanimously agree to foreclose, however, it is unlikely they would
10 unanimously agree to a “Majority Action” procedure since it is evident some Lenders will
11 disagree with any majority decision.

12 Other alternatives to appointment of a receiver for all Placer 1 Lenders appear to
13 be:

14 • *Replacement servicer*

15 In accordance with Nevada Administrative Code 645B.073, the LSA provides: “if
16 for any reason USA fails to act on Lender’s behalf as authorized herein, then Lender may,
17 with approval of fifty-one percent (51%) or more of all of the holders of the beneficial
18 interest of record in the Loan, act on behalf of all such holders of beneficial interest of
19 record.”¹⁹ The USACM Trust does not believe it has failed to act on Lenders’ behalf, and
20 so this provision is inapplicable. Even if the USACM Trust could and were replaced as
21 servicer, the replacement servicer would face all of the issues identified in this motion.

22
23 ¹⁸ See, e.g. Cal. Civ. Code § 2941.9 (requiring written consent of *all* beneficiaries under
24 deed of trust to agree to be governed by beneficiaries holding more than 50 percent of
25 undivided interests in a note secured by real property equivalent to a series transaction).
This statute indicates that in the absence of such written agreement, the consent of all
beneficiaries is required to foreclose or take other action with respect to a deed of trust.

26 ¹⁹ LSA, Exhibit 2 at p. 3, § 3.

- 1 • *All lenders agree to form a new (limited liability) entity, and then*
2 *contribute their interests to that entity, and delegate decisions to*
3 *the entity's management*

4 If all of the Placer 1 Lenders do not agree on foreclosure of the Placer 1 Deed of
5 Trust, an effort to obtain consent to formation of a new entity appears hopeless. Such an
6 entity would have to be formed in light of federal and state securities laws, a daunting task
7 given the multi-state nature of the Lenders, the soft real estate market, and the uncertain
8 prospects for development without available capital.

- 9 • *Partition of the interests in the Placer 1 Note*

10 A court could order the partition of undivided interests in the Placer 1 Note,²⁰ to
11 protect the interests of the parties.²¹ Such a partition might leave the owners of the Placer
12 1 Note incapable of commencing foreclosure, again for lack of unanimous consent of the
13 beneficiaries. As the Placer 1 Lenders hold only an interest in a note secured by a lien on
14 the Property, they probably can not compel partition of the Property itself.²²

- 15 • *Suit by less than all of the Placer 1 Lenders for judicial foreclosure*
16 *of the Placer 1 Note*

17 A lawsuit by some Placer 1 Lenders to compel judicial foreclosure of the Placer 1
18 Deed of Trust may be possible, with Placer 1 Lenders joined as involuntary plaintiffs.
19 This alternative, not well developed in statute or case law according to our research, does
20 not offer clear guidance as to how decisions on such matters as credit bid at the foreclosure

21 ²⁰ See 86 C.J.S. Tenancy in Common § 17 at 260 (Thomson/West 2006) (“The
22 relationship of tenancy in common may be terminated by partitioning the property among
23 the several tenants in common, either by proceedings in partition, or by decree in some
24 other proceeding, or by agreement and division.”) (notes omitted); see Cal. Civ. Proc.
25 Code § 872.110 et seq. (partition of co-tenancy interests), Cal. Civ. Proc. Code § 872.820
26 (for partition by sale where agreed or it is more equitable than partition in kind), and Cal.
27 Civ. Proc. Code § 873.010 et seq. (for appointment of a referee (with powers akin to a
28 receiver) to handle the sale).

29 ²¹ *Heinze v. Butte & B. Consol. Min. Co.*, 126 F. 1, 7 (9th Cir. 1903).

30 ²² See 68 C.J.S. Partition § 56 at 62-3 (Thomson/West 1998).

1 sale are made. The credit bid decision is relevant for tax purposes, as well as because the
2 Trust has sued the guarantors of the Placer 1 Note for the Lenders' benefit.

3 The judicial foreclosure alternative also results in a one year post-foreclosure
4 redemption period.

5 **B. A Receiver Is Needed To Protect The Interests of Placer 1 Lenders**
6 ***In The Property***

7 **1. The Receiver could make decisions concerning the Property**
8 **with the Court's approval**

9 The Court's authority to appoint a receiver for the Property after foreclosure under
10 these circumstances is well-grounded in California law.²³ This case meets the
11 requirements of California Code of Civil Procedure § 546(b)(1).

12 The Direct Lenders qualify as three of the types of parties permitted to seek a
13 receiver under this provision. They are a "creditor"; they are "jointly ... interested in" the
14 obligation secured by the property and thus in the property itself; and their "right to or
15 interest in the property ... is probable." They are not "partners." Similarly, by virtue of its
16 claim for servicer advances and servicing fees, the USACM Trust is a creditor with an
17 interest in the property.

18 The Property is in danger of being "materially injured" in that its value has dropped
19 and will likely continue to decline, thereby reducing the extent to which sale of the
20 security will satisfy the underlying debt.²⁴ Additionally, Borrower does not have the funds
21 to pay current property taxes or its share of the development costs for the project.

22
23 ²³ California Code of Civil Procedure, § 564(b)(1). See also § 546(b)(4), which authorizes
24 a receiver to dispose of property upon a judicial foreclosure; and § 564(b)(9) (authorizes a
25 receiver if it is "necessary to preserve the property or rights of any party").

26 ²⁴ See *Marsch v. Williams*, 23 Cal. App. 4th 238, 248-49 (1994) (because property was
threatened with "waste and diminution in value," and parties were unable to cooperate in
developing property, trial court could appoint a receiver under § 564(b)(1)).

1 Assuming that the Court finds the appointment of a receiver proper,²⁵ the next issue
2 is the scope of the Receiver's authority. The broad scope of discretion that the Court may
3 exercise in a receivership is simply summarized in a leading treatise:

4 The district court has a great deal of latitude in its dealings with receivers it
5 appoints. In fact, in its supervisory role, the powers of the district court are
6 quite broad and versatile. The court may, in its discretion, provide for the
7 administration of the receivership in any way it sees appropriate.²⁶

8 This discretion could and should logically extend to decisions concerning the
9 Property, including whether to list the Property for sale, or to hold the Property and wait
10 for development approvals and market recovery; and whether to borrow funds with
11 repayment secured by the Property to pay expenses of the receivership and carrying costs,
12 including real estate taxes and assessments, insurance and development expenses.

13 **2. There are no practical alternatives to appointment of a
14 Receiver for the Property**

15 The decisions facing the owners of the Property are, as suggested above,
16 considerably more complex than the decision whether to foreclose the Placer 1 Deed of
17 Trust. If the Placer 1 Lenders are unable to agree on whether to enforce the Placer 1 Note
18 by foreclosure or not, it is hard to imagine they will ever agree on these more difficult
19 questions concerning the Property itself.

20 Lenders have asked whether title to the Property could be taken in foreclosure in
21 the name of a new entity owned by the Lenders, rather than in the Lenders' names
22 themselves. The USACM Trust believes that such a transfer would be a conversion of the
23 Lender's interest in the Note into an interest in an entity without the Lender's consent.
24 Nor would the Lender have consented to the terms of management of the entity. Nor has
25 anyone suggested how such an entity can be legally organized in compliance with
26

²⁵ See also *Baumann v. Bedford*, 115 P.2d 437 (Cal. 1941) (receivers appointed in actions involving foreclosure, partition, and unlawful detainer).

²⁶ 13 Moore's Federal Practice § 66.06[4][a] (Matthew Bender 3d ed.).

1 applicable federal and state securities laws. All of these concerns have been voiced to the
2 Placer 1 Lenders by the USACM Trust.

3 **C. The Receiver's Power Should Be Restricted**

4 The law recognizes that traditional principles of due process require notice and a
5 hearing before the Receiver sells the Property. Under California law, a receiver may only
6 sell real property pursuant to an order of the court, and a sale is not final until confirmed
7 by the court.²⁷ The receiver must also provide notice and comply with Cal. Civ. Proc.
8 Code § 701.510 (procedures for levying and selling property). The trial court has
9 discretion in deciding whether to confirm a receiver's sale:

10 Judicial confirmation of a receiver's sale rests upon the appointing court's
11 sound discretion exercised in view of all the surrounding facts and
12 circumstances and in the interest of fairness, justice and the rights of the
13 respective parties. The proper exercise of discretion requires the court to
14 consider all material facts and evidence and to apply legal principles
15 essential to an informed, intelligent, and just decision.²⁸

16 A reviewing court will reverse the trial court's decision only if it "abused its
17 discretion by confirming a fraudulent, unfair, or oppressive sale."²⁹

18 The USACM Trust respectfully suggests that the decision whether to borrow funds
19 against the Property should be treated with similar gravity.

20 Many of the Lenders literally have their life savings invested in the Placer 1 Note.
21 It is hard to imagine a more grave decision than whether to accept a distressed sale price
22 for the Property or to risk both current values and additional borrowing to obtain a better
23 return.

24 After serious consultation with numerous Lenders, the USACM Trust requests that
25 the Court require that the Receiver be directed to consult with or seek input from all
26

²⁷ Cal. Civ. Proc. Code § 568.5.

²⁸ *Cal-American Income Prop. Fund VII v. Brown Dev't Corp.*, 138 Cal. App. 3d 268, 274 (1986) (internal citations omitted).

²⁹ *Id.* at 274-75; *Lesser & Son v. Seymour*, 218 P.2d 536, 542 (Cal. 1950).

1 Placer 1 Lenders before making any recommendation to the Court, and to make a
2 recommendation only with the consent of at least 51% of the beneficial interests in the
3 Placer 1 Note, absent a true emergency, a request that is generally consistent with
4 provisions of the LSA, and Nevada and California law.

5 **D. The Lenders Have Identified Alternative Candidates To Serve As**
6 **The Receiver**

7 The USACM Trust has repeatedly asked the Placer 1 Lenders for candidates to
8 serve as the potential receiver. Four names appeared both qualified and to enjoy support
9 among the Placer 1 Lenders:

10 Beverly N. McFarland³⁰
11 The Beverly Group, Inc.
12 P. O. Box 188
13 Rocklin, CA 95677

Elli M. A. Mills, JD, MBA³¹
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Sparks, NV 89441-7256

14 John Paxton³²
15 Real Estate Advisory Services
16 155 Montgomery Street
17 Suite 610
18 San Francisco, CA 94104

Mark Kagan, Esq.³³
3013 Corte Baldre
Carlsbad, CA 92009

19 **1. Lender Preferences**

20 In August 2008, the USACM Trust asked the Placer 1 Lenders to express their
21 preference among each of the four candidates. Biographical data on each candidate was
22 made available on-line. This request followed up more informal requests for a preference
23 through a “Google on-line group” open to the Placer 1 Lenders. One candidate – Mark
24 Kagan, a lawyer – was supported by 30.97% of those voting, representing 34.96% of the
25 beneficial interests (unpaid principal balance) in the Placer 1 Note. As indicated in the
26 tabulation summarized in the attached declaration, Elli M.A. Mills received the second

³⁰ For a professional background, see Exhibit 20.

³¹ For a professional background, see Exhibit 21.

³² For a professional background, see Exhibit 22.

³³ For a professional background, see Exhibit 23.

1 largest expression of preference and The Beverly Group the third. Thereafter, Beverly
2 McFarland of The Beverly Group withdrew her name from consideration.

3 In summary, here is an overview of the three remaining candidates, as provided by
4 each of them:³⁴

5 **2. Elli M. A. Mills**

6 **a. Background**

7 Mr. Mills is a graduate of New York University School of Law and received an
8 MBA from Harvard University. He has been admitted to practice law in New York State
9 and the District of Columbia, as well on Motion, before several Federal Courts.

10 Mr. Mills has over 20 years experience in the development of real estate including
11 large land development projects, high and mid-rise condominiums, and commercial
12 properties. The current values of properties Mr. Mills has developed through his company,
13 The Mills Development Group, Inc., exceeds \$250,000,000.

14 Mr. Mills has also acquired companies which were under the supervision of a U.S.
15 Bankruptcy Court, and has served as a Chapter 11 Bankruptcy Trustee and Post
16 Confirmation CEO.

17 He led a group which acquired a shortline railroad in Minnesota and as President
18 and CEO of Dakota Rail, Inc., supervised the management of that company and the
19 repayment of all secured and unsecured creditors at 100 cents on the dollar. The company
20 was eventually sold to a publicly traded corporation. Mr. Mills also served as the Chapter
21 11 Trustee, then Post Confirmation CEO of a medical products and skin care company in
22 Reno, Nevada, administered under the auspices of the U.S. Bankruptcy Court for the
23 District of Nevada. In this proceeding, the employees and secured creditors received full
24 payment of their outstanding obligations by the effective completion of contracts which

25 _____
26 ³⁴ The USACM Trust has edited the candidates' statements to make the grammar
consistent with this motion.

1 the bankruptcy put in jeopardy. At the conclusion of those contracts, the company was
2 liquidated.

3 Mr. Mills currently holds a Broker-Salesman real estate license in the State of
4 Nevada and has previously held Real Estate Brokers licenses in the New York, Florida,
5 and the District of Columbia. Mr. Mills is a financial and business consultant. He has
6 qualified as an expert witness in business valuation in the Courts of Nevada.

7 Mr. Mills resides in the Reno, Nevada area.

8 **b. Proposed Compensation**

9 Primary Compensation: Hourly rate of \$195.00 hour, to increase 5% per year, on
10 an annual basis.

11 Expenses: Clerical Services direct billed at \$55.00 per hour; Copies and Faxes at
12 \$.15 per page; Travel: Mileage at allowed mileage rate by the IRS; lodging and meals, if
13 any, at cost to reflect efforts to minimize expenses; Materials, supplies, and miscellaneous
14 – at cost.

15 Success Fee: The Receiver shall receive a fee equal to $\frac{3}{4}$ of 1% of the total sales
16 proceeds when the Property is sold or when any portion of the Property is sold. This fee
17 incentivizes the Receiver to achieve the maximum sales price for the Property in the
18 shortest period possible.

19 Estimated Receiver Compensation:

20 It is difficult to estimate the time that will be required to perform the receiver's
21 tasks. I have been asked to estimate a budget to the best of my abilities, which follows:

	<i>Year 1</i>	<i>Monthly</i>	<i>Annual</i>
Months 1 – 4	60 hours per month	\$11,700	\$46,800
Months 5 – 8	40 hours per month	\$7,800	\$31,200
Months 9 -12	25 hours per month	\$4,875	\$19,500
			\$97,500
Estimated Expenses @10%			\$9,750
Year 1 Total			<u>\$107,250</u>

	<i>Year 1</i>	<i>Monthly</i>	<i>Annual</i>
	<i>Year 2 - 4</i>		
1	Months 1 – 12	20 hours per month	
2	Estimated Expenses @10%	\$3,900.00	\$46,800
3	Years 2 – 4 annually		<u>\$ 4,680</u>
			\$51,480

3. John Paxton

a. Background

Since learning of the Placer Vineyards situation, I have eagerly sought an opportunity to manage the project on behalf of the Placer 1 Lenders. My motivation is straightforward: the project is closely aligned with my expertise and professional interests.

The following highlights my qualifications.

- I have advised clients for over 25 years on the development of large-scale, multi-phase, mixed-use projects throughout California – many of which have striking similarity to the Placer Vineyards project. My largest clients for these projects have been Chevron Land and Shea Properties. Recently, I have worked with Bank of America, charting a course of action to maximize the value of ten foreclosed subdivisions, with over 500 lots. I have worked on many projects similar to this; I know this type of project, and understand the issues involved.
- I am adept at development, project management, and the many forms of real estate financing. I am very familiar with California real property law.
- I have never been a receiver (I have served as a Court-appointed Trustee), but that has no impact on my ability to carry out the wishes of the direct lenders. I would plan on retaining Douglas Bovin, an attorney with Reed Smith, with whom I have worked in the past. Mr. Bovin is a recognized leader in the fields of secured transactions, foreclosures, loan work-outs and creditors' rights.
- I understand the widespread concern amongst many of the Placer 1 Lenders that a receiver would unnecessarily milk the situation. Many believe that appreciation will

1 come from the natural recovery of the market, and the success of the master developer,
2 Placer Vineyards Development Group. I would plan on prudently managing my time on
3 the project, and (subject to my duty to the Court) to be responsive to the wishes of the
4 majority of the direct lenders.

5 **b. Proposed Compensation**

6 I would bill the estate \$250 per hour for the time I spend working on this project. I
7 bill my travel time at 50%. I also bill my out-of-pocket expenses at cost.

8 **4. Mark Kagan**

9 **a. Background**

10 Graduating from San Diego State in 1984 with a distinguished degree in
11 Economics, Mark Kagan's first experience in the workforce was at CB Richard Ellis,
12 where he was trained in the principles of leasing and selling commercial real estate. After
13 seven successful years as a commercial real estate broker, he returned to school to obtain a
14 law degree. Mark went to work as a litigator upon being admitted to the California bar in
15 1991. After several years of practicing law, Mark returned to the real estate industry
16 where he spent the next 15 years focusing on transactional matters. Over the course of
17 time, he has worked in-house for telecommunications companies, institutional real estate
18 companies, and brokerage companies. The body of Mr. Kagan's experience encompasses
19 the successful negotiation of over 500 leases, license agreements, and easements and the
20 acquisition and asset management of a national commercial real estate portfolio.

21 From January 1999 to February 2000, Mark served as the liquidating agent for a
22 large portfolio of real estate assets located in 7 states. He was responsible for determining
23 highest and best use, valuation, and the performance of receivership services nationwide.

24 He has also syndicated and managed investment properties since 2003.

25 **b. Proposed Compensation**

26 I will not need an assistant. My hourly rate is \$200 per hour.

1 I will hire Mr. Scott Redsun as his Development Manger (“DM”). Scott is a 26
2 year veteran of the homebuilding industry and the former owner of Avalon Homes, which
3 built communities in Orange, Riverside, San Bernardino and San Diego Counties. When,
4 Meritage Homes acquired Avalon Homes in 2004, Mr. Redsun was named the Executive
5 Vice President of the Southern California Region and was given the responsibility for all
6 land acquisition and land entitlement activities. As part of his duties, Mr. Redsun was
7 responsible for the entitlement of over 500 units at the New Model Colony (“NMC”) in
8 Ontario, CA. Mr. Redsun represented Meritage Homes in the formation and management
9 of the New Model Colony Builders, LLC, a consortium of 20 plus landowners, builders
10 and developers that was similar to the Placer Vineyard Property Owners Group
11 (“PVPOG”). A Limited Liability Company was formed to represent the various
12 developers’ interest in developing and implementing a plan to develop the major
13 infrastructure for the NMC which encompasses over 12,000 acres and 7,000 residential
14 units. This experience allows Mr. Redsun the ability to best represent the interests of the
15 Direct Lenders and utilize the experience to provide leadership within the PVPOG.

16 A DM will be required to manage the 326 acres owned by the USA Direct Lenders
17 (“DL”) to make complex development decisions regarding the development of the entire
18 Placer Vineyards Specific Plan (“PVSP”) as well as the property owned by the DL. The
19 Receiver or their DM must have years of experience developing residential properties as
20 well as experience in managing the intricacies of a multi property entity that oversees the
21 development of the major infrastructure necessary to develop each parcel of land within
22 the PVSP. The complexities created by the large development area and the 25 plus
23 property owners within PVSP demands the necessity for a seasoned professional to
24 manage the decision process for the DL.

25 During the development process there will be negotiations with varying
26 government agencies, including the County Placer, the Sewer and Water District, School

1 District, County of Sacramento, Army Corp. of Engineers, California Fish and Game to
2 mention a few. Each and every decision that is required during the development process
3 will be negotiated with a government agency and will effect the development in many
4 ways. These decisions will affect the cost to develop the property, the timing of the
5 development, when the improvements will be installed and the allocation and distribution
6 of costs. The DM must have full knowledge and understanding how each decision will
7 financially impact the property with some decisions directly affecting the costs to develop
8 the property and other decisions affecting the timing and functionality of the property.
9 The DM must understand the dynamics of each decision and pick which fights to fight
10 with the government agencies and which fight to acquiesce.

11 Major decisions impacting the development of the property include phasing of the
12 backbone infrastructure, cost of the fees to be paid to the government agencies and the
13 timing of the payments, analysis and funding of the Community Facilities District (CFD),
14 negotiating the Development Agreement with the County of Placer, negotiating the
15 Development Agreement with the School District, deciding the method to pay for the long
16 term maintenance either through a Homeowners Association or a Landscape Maintenance
17 District. Each and every decision will have a financial impact on the property. The DM
18 must analyze every decision to insure the impact will have a positive impact on the
19 financial viability of the property.

20 There are over 25 property owners within the PVSP. The decisions made and
21 negotiated by the group will affect many of the properties differently. A DM with a vast
22 array of development experience and experience in developing a multi owner Specific
23 Plan will have the ability to assert themselves as one of the leader of this group. In this
24 leadership role the DM will have the ability to ensure the decisions made the have the
25 lease impact on the DL's property and to ensure the will not be penalized by the lack of
26 good representation at the negotiation table. With previous experience in multi property

1 Specific Plans the DM utilize the experience to keep the group of property owners focused
2 on the successful completion of all negotiation and not let the group get side tracked by
3 unimportant issues or get bogged down by personality conflicts.

4 The development process can take from two to five years depending on array of
5 factors. The Receiver who is selected to manage the property for the DL must have a DM
6 who is compensated by the value of the property and ultimate sale of the property. To
7 have a Receiver hire a consultant to be the DM will be costly and the DL will have to
8 borrow the funds and pay interest on these funds to pay for this DM. As this DM is paid
9 by the hour, they will not be as motivated to see the completion of the development
10 process and the ultimate sale of the property.

11 I and the DM will be compensated 1.5% per annum on the amount ultimately
12 distributed to the Direct Lenders as a proposed commission for providing brokerage
13 services in addition to my role as receiver in the event I also serve as listing broker of
14 record representing the selling entity. The fee will be prorated for the final year and will
15 accrue and be paid from proceeds when the property is liquidated. Obviously, if an
16 independent broker is hired, my fee for this goes away, but regardless you need to
17 anticipate and plan that brokerage fees will be a cost of disposition. The 1.5% was based
18 on the fact I am a licensed real estate broker in the state of California, with the experience
19 of many years and transactions under my belt to get you to the money to make everyone
20 satisfied they achieved the highest price. It is competitive, but I am open to discuss it.

21 The out-of-pocket expenses will be paid monthly, after notice to the DL.

22 **5. Recommendation**

23 The USACM Trust believes that each of the candidates are qualified. The USACM
24 Trust however does not believe it should make any specific recommendation as to the
25 choice of potential receiver and therefore asks the Court to appoint one as the receiver
26 upon satisfaction of those conditions that the Court may impose and with input from those

1 Placer 1 Lenders who feel strongly as to the choice of such receiver. The USACM Trust
2 would respectfully suggest that those conditions include:

- 3 • a verified statement of the connections between the proposed receiver and
- 4 the Borrower, Lenders and any other party with an interest in the matter;
- 5 • disclosure of proposed terms of compensation, including travel time;
- 6 • disclosure of proposed counsel for the receiver; and
- 7 • a suitable bond.

8 **Conclusion**

9 The USACM Trust asks the Court to appoint a receiver for the Placer 1 Loan to
10 make a prompt recommendation to the Court as to whether the Placer 1 Deed of Trust
11 should be foreclosed.

12 The USACM Trust anticipates the Receiver will direct foreclosure of the Placer 1
13 Deed of Trust, and that title to the Property will transfer to the Placer 1 Lenders by credit
14 bid at foreclosure, assuming no viable bid for the property is received at the foreclosure
15 sale. Accordingly, the USACM Trust asks the Court to authorize the Receiver to manage
16 the Property for the benefit of the Placer 1 Lenders. The USACM Trust requests that the
17 Receiver be directed to consult with or seek input from all Placer 1 Lenders before making
18 any recommendation to the Court, and to make a recommendation only with the consent of
19 at least 51% of the beneficial interests in the Placer 1 Note, absent a true emergency.

20 Dated: October 2, 2008.

21 **LEWIS AND ROCA LLP**

22
23 By /s/ Rob Charles (#6593)

24 Rob Charles, NV 6593
25 3993 Howard Hughes Parkway, Suite 600
26 Las Vegas, Nevada 89169-5996
Tel: (702) 949-8320
Fax: (702) 949-8321
E-mail: RCharles@LRLaw.com
Attorneys for the USACM Liquidating Trust

VERIFICATION

Geoffrey L. Berman declares under penalty of perjury:

1. I am an adult person competent to testify in court. I make this declaration based upon my personal knowledge and the business records of the USACM Liquidating Trust as to which I am the Trustee. Those business records include records of USA Commercial Mortgage Company (“USACM”), as to which the Trust is the successor in interest.

2. I have read the foregoing Motion for Appointment of a Receiver and verify that it is accurate.

3. The preference ballots referred to in the Motion were transmitted to the Placer 1 Lenders by my employer – Development Specialists, Inc (“DSI”). A member of DSI’s staff, under my direction, tabulated the results.

4. Ninety-three Placer 1 Lenders returned ballots, representing \$11,372,000 in unpaid principal balances. The results of the balloting is as follows:

	The Beverly Group	Elli M.A. Mills	John C. Paxton	Mark Kagan, Esq.
First Place Votes	33	15	7	38
Second Place Votes	11	29	12	10
Total Votes	44	44	19	48
Percentage of Total Votes	28.39%	28.39%	12.26%	30.97%
Percentage of Total Money	22.11%	26.95%	15.98%	34.96%
Average Percentage	25.25%	27.67%	14.12%	32.96%

1 I make this declaration under penalty of perjury of the laws of the United States of
2 America in Houston, Texas on October 2, 2008.

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4 
5 Geoffrey L. Berman, Trustee

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Exhibits to the Declaration³⁵

1. Placer 1 Lenders
2. Loan Servicing Agreement and Power of Attorney (example)
3. Placer 2 Lenders
4. Promissory Note dated on or about December 10, 2004, executed by Placer County Land Speculators, LLC, a California limited liability company, in the original principal amount of \$27,500,000 (the “Placer 1 Note”)
5. First Amendment to Loan Documents dated February 17, 2005
6. Second Amendment to Loan Documents dated April 12, 2005
7. Third Amendment to Loan Documents dated June 1, 2005
8. Fourth Amendment to Loan Documents dated July 13, 2005
9. Fifth Amendment to Loan Documents dated September 19, 2005
10. Sixth Amendment to Loan Documents dated November 3, 2005
11. Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing dated as of December 10, 2004, and recorded in the Official Records of Placer County, California on December 20, 2004, as Document No. 2004-169766
12. First Amendment to Deed of Trust dated as of February 17, 2005, and recorded in the Official Records of Placer County, California on March 16, 2005, as Document No. 2005-30994
13. Second Amendment to Deed of Trust dated as of April 12, 2005, and recorded in the Official Records of Placer County, California on April 22, 2005, as Document No. 2005-50451
14. Third Amendment to Deed of Trust dated as of June 1, 2005, and recorded in the Official Records of Placer County, California on June 14, 2005, as Document No. 2005-74454
15. Fourth Amendment to Deed of Trust dated as of July 13, 2005, and recorded in the Official Records of Placer County, California on August 8, 2005, as Document No. 2005-103817

³⁵ The Exhibits are on file with the Clerk of the Court; and are available from the USACM Liquidating Trust’s counsel; and are available at the website of the USACM Liquidating Trust, <http://usacmcucc.bmcgroup.com/default.aspx>, under tab 7.

- 1 16. Fifth Amendment to Deed of Trust dated as of September 19, 2005, and recorded in
2 the Official Records of Placer County, California on October 7, 2005, as Document
No. 2005-135802
- 3 17. Sixth Amendment to Deed of Trust dated as of November 3, 2005, and recorded in
4 the Official Records of Placer County, California on November 23, 2005, as
Document No. 2005-158127
- 5 18. September 2008 Report to Direct Lenders
- 6 19. Order Confirming the “Debtors’ Third Amended Joint Chapter 11 Plan of
7 Reorganization” as Modified Herein
- 8 20. Beverly N. McFarland Information
- 9 21. Elli M. A. Mills, JD, MBA Information
- 10 22. John Paxton Information
- 11 23. Mark Kagan, Esq. Information

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Motions

[2:08-cv-01276-KJD-RJJ USACM Liquidating Trust v. Placer County Land Speculators, LLC et al](#)

United States District Court

District of Nevada

Notice of Electronic Filing

The following transaction was entered by Charles, Rob on 10/2/2008 at 3:31 PM PDT and filed on 10/2/2008

Case Name: USACM Liquidating Trust v. Placer County Land Speculators, LLC et al

Case Number: [2:08-cv-1276](#)

Filer: USACM Liquidating Trust

Document Number: [5](#)

Docket Text:

Amended MOTION to Appoint Receiver ; Memorandum of Points and Authorities by Plaintiff USACM Liquidating Trust. Motion ripe 10/2/2008. (Attachments: # (1) Exhibit 1, # (2) Exhibit 2, # (3) Exhibit 3, # (4) Exhibit 4, # (5) Exhibit 5, # (6) Exhibit 6, # (7) Exhibit 7, # (8) Exhibit 8, # (9) Exhibit 9, # (10) Exhibit 10, # (11) Exhibit 11, # (12) Exhibit 12, # (13) Exhibit 13, # (14) Exhibit 14, # (15) Exhibit 15, # (16) Exhibit 16, # (17) Exhibit 17, # (18) Exhibit 18, # (19) Exhibit 19, # (20) Exhibit 20, # (21) Exhibit 21, # (22) Exhibit 22, # (23) Exhibit 23)(Charles, Rob)

2:08-cv-1276 Notice has been electronically mailed to:

Rob Charles RCharles@LRLaw.com, cjordan@lrlaw.com

2:08-cv-1276 Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

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Original filename:n/a

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Original filename:n/a

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Original filename:n/a

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Original filename:n/a

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Document description:Exhibit 18

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1101333072 [Date=10/2/2008] [FileNumber=3991714-18] [2c6f265b0311d428df393ea3aac361927d4ee3bfc199694141c7499537cd101600da80afe960fe29cd6134da47f545d9fc35dda107b335a4505c14b064af3b79]]

Document description:Exhibit 19

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1101333072 [Date=10/2/2008] [FileNumber=3991714-19] [e5ff05c06d2d20ba755bb413dc4d7ac331e20e53d01ba3ea9790ac8bee4c7d79ea102edf80399dd68bec97b8efe17b615ef0b64812a7e37c108539ba4fd536a4]]

Document description:Exhibit 20

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1101333072 [Date=10/2/2008] [FileNumber=3991714-20] [42c09b226311f9e6d419b913f98ffe30f868a0aaa9936a2c598f26cf71487024dd1855724a6f17292947a428a8f5a3510b9c88c929d3e39aaf650de0db96eea8]]

Document description:Exhibit 21

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1101333072 [Date=10/2/2008] [FileNumber=3991714-21] [5ff9e2db89eb181285f07470a60540c1d819ca870c51bf081094e20f170a84104d975af156672159de012ffecb4b65e5bd5de3e4bce1acb554bfda9d3b20e889]]

Document description:Exhibit 22

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1101333072 [Date=10/2/2008] [FileNumber=3991714-22] [9cdc58ef642fed719ae685bb1a6d38fb2e44b55f97defc464287a44851c09a52517e89e4f33cddd566f744c4c4dc98c1d26a61ad88fc1be007321ee313e5c3d2]]

Document description:Exhibit 23

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1101333072 [Date=10/2/2008] [FileNumber=3991714-23] [1fe2912a2b1fc1b6b3eb6c7dc80a0e26940861b8cbd855cbb789b4374f1684f95ac8a16491c1515ba8b9233abd351b2106e403322e0bb7e13a223af71000a825]]

