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6 Attorney for Lenders Protection Group  
7 and Donna Cangelosi

8  
9 UNITED STATES BANKRUPTCY COURT

10 DISTRICT OF NEVADA

11 —ooOoo—

12 In Re:  
13 USA COMMERCIAL MORTGAGE  
COMPANY, et al.  
14 Debtors.

Case Nos.:  
BK-S-06-10725-LBR  
BK-S-06-10726-LBR  
BK-S-06-10727-LBR  
BK-S-06-10728-LBR  
BK-S-06-10729-LBR

15  
16 JOINTLY ADMINISTERED  
Chapter 11

17 Affects:  
 All Debtors  
 USA Commercial Mortgage Company  
18  USA Capital Realty Advisors, LLC  
 USA Capital Diversified Trust Deed Fund, LLC  
19  USA Capital First Trust Deed Fund, LLC  
20  USA Securities, LLC

**OPPOSITION TO EMERGENCY  
MOTION OF COMPASS FINANCIAL  
PARTNERS LLC FOR ORDER  
PURSUANT TO 11 USC §§ 105 AND  
1141 ENFORCING CONFIRMATION  
ORDER AND FOR CIVIL  
CONTEMPT SANCTIONS**

21 Hearing Date: May 31, 2007  
22 Hearing Time: 2:30 p.m.

23 Donna Cangelosi (“Cangelosi”) and the Lenders Protection Group (the “LPG”), a  
24 group of investors/lenders in USA Commercial Mortgage Company (“USACM”) which  
25 represent 60% of the outstanding beneficial interests in USACM loans and 62% of the total  
26 number of investors, through their counsel, Alan R. Smith, Esq., hereby oppose the  
27 *Emergency Motion of Compass Financial Partners LLC For Order Pursuant To 11*  
28 *U.S.C. §§ 105 and 1141 Enforcing Confirmation Order And For Civil Contempt Sanctions*

1 (the “Motion”). In addition, the Cangelosi and the LPG move to strike the improper Notice  
2 of Removal filed herein on May 25, 2007, which purportedly removes United States  
3 District Court, District of Nevada, Case No. 07-CV-00241-ECR-VAC (the “District Court  
4 Action”) to this Court.

5  
6 **I.  
INTRODUCTION**

7 Compass’ Motion must be denied because: (1) Compass lacks standing to obtain the  
8 relief sought in its Motion; and (2) this Court lacks subject matter jurisdiction to adjudicate  
9 the issues Compass has raised.

10 Compass’ Motion seeks injunctive relief against the LPG and Cangelosi under 11  
11 U.S.C. § 105. However, Ninth Circuit case law is clear that Compass, as a non-debtor  
12 party, lacks standing to seek and obtain injunctive relief under § 105. Therefore, Compass’  
13 Motion should be summarily denied by this Court based on a lack of standing.

14 Moreover, this Court lacks subject matter jurisdiction to entertain the Motion  
15 because: (1) Compass has not properly initiated an adversary proceeding, which is  
16 universally recognized prerequisite to obtaining injunctive relief; and (2) Compass raises  
17 issues that do not have the requisite “close nexus” to the Debtor’s Chapter 11 Plan.

18 The essence of the issue raised in Compass’ Motion is whether an overwhelming  
19 majority of direct lenders properly terminated the Loan Servicing Agreements with  
20 Compass based on: (1) direct lenders’ post-confirmation and post-closing contractual and  
21 state law rights; and (2) post-confirmation and post-closing acts of Compass, and Compass  
22 alone. Specifically, an overwhelming majority of direct lenders (60% of beneficial interests  
23 and 62% of direct lenders in number) exercised their rights under NAC 645B.073 and the  
24 Loan Servicing Agreements to terminate Compass by executing written elections. The  
25 termination of Compass based on its post-confirmation conduct was not the work of a  
26 “dissident minority group” as portrayed by Compass. It was the action of the majority of  
27 direct lenders on an loan-by-loan basis.

28 The termination was not based upon, and had absolutely nothing to do with, any

1 prior act of USACM. Rather termination was, among other things, based upon: (1) post-  
2 confirmation misrepresentations and material concealments by Compass; and (2) numerous  
3 post-confirmation violations of Nevada law by Compass, which culminated in a cease and  
4 desist order being entered by against Compass by the Nevada State Mortgage Lending  
5 Commission.

6 The determination of whether direct lenders properly terminated the Loan Servicing  
7 Agreements based on their **post-confirmation** rights and the **post-confirmation** acts of  
8 Compass is well beyond the limited jurisdiction retained by this Court in the Debtor's Plan  
9 Confirmation Order. The Confirmation Order is clear that this Court only retained  
10 jurisdiction to hear disputes regarding termination of Compass based on pre-petition acts  
11 of USACM, defined as "Surviving Section 3 Rights." Compass entirely misplaces reliance  
12 on an overly broad interpretation of the limited jurisdiction retained by this Court over  
13 "Surviving Section 3 Rights." Those rights have been narrowly defined as "any right that  
14 existed and was matured and exercisable, as of the Petition Date, to effect a substitution of  
15 USACM as loan servicer..." based on the pre-petition actions or inactions of USACM.  
16 Here, direct lenders did not terminate Compass based upon any pre-petition acts of  
17 USACM. USACM and its prior actions or inactions are entirely irrelevant to the actions  
18 of the direct lenders. Compass was terminated based on its own post-confirmation conduct,  
19 as well as independent rights that direct lenders enjoy under state law.

20 The LPG and Cangelosi have not interfered with implementation of the Debtors'  
21 Plan. In fact, contrary to Compass' claims, it is impossible at this point for direct lenders  
22 to interfere with the provisions of the Plan involving Compass (i.e. the asset transfer  
23 provisions). The Plan simply provided for the transfer of an asset, the Loan Servicing  
24 Agreements, by the USACM Estate to Compass. That transfer has been completed and,  
25 thus, that portion of the Plan has been implemented. It is impossible for direct lenders to  
26 interfere with the transfer because it is already complete. In fact, even the Debtors have  
27 taken the position that the asset transfer portion of their Plan has been fully performed and  
28 implemented.

1 Compass mistakenly believes this Court or the Debtors' Plan has somehow  
2 foreclosed the direct lenders' ability to exercise post-transfer rights under the Loan  
3 Servicing Agreements. In reality, this Court did not, and could not, guarantee Compass  
4 that direct lenders would not exercise their rights based on Compass' post-confirmation  
5 conduct, or otherwise exercise their rights (non-Surviving Section 3 Rights). On many,  
6 many occasions this Court reiterated that the Loan Servicing Agreements were not being  
7 modified and that the Agreements "are what they are." Compass assumed certain risks  
8 when it acquired the Loan Servicing Agreements, including the risk direct lenders would  
9 exercise their right to terminate the Agreements based on Compass' post-transfer conduct  
10 and independent state law right under NAC 645B.073.

11 As detailed below, Compass is improperly attempting to bring a post-confirmation  
12 dispute between two non-debtor parties before this Court. Simply put, this Court cannot  
13 and should not monitor the relationship between Compass and direct lenders forever. Ninth  
14 Circuit case law is clear that this Court's jurisdiction to adjudicate disputes arising under  
15 the Loan Servicing Agreements ended when the transfer to Compass was complete (except  
16 for Surviving Section 3 Rights). If Compass believes the direct lenders breached the Loan  
17 Servicing Agreements or improperly exercised their rights to terminate the Agreement,  
18 Compass must go to a Court with proper jurisdiction over such a dispute. Indeed, a proper  
19 forum is already available to Compass, as various direct lenders have properly brought  
20 these issues before the United States District Court, District of Nevada, in a Complaint filed  
21 by various direct lenders on May 21, 2007 (the "District Court Action").

22 Compass has improperly attempted to "remove" the District Court Action to this  
23 Court. However, Compass' attempted removal must be stricken because: (1) §1452 does  
24 not provide a mechanism to remove a district court action down to bankruptcy court; and  
25 (2) even if it did, this Court lacks subject matter jurisdiction to hear direct lenders' claims  
26 against Compass based on Compass' post-confirmation conduct and direct lenders' post-  
27 confirmation rights. If Compass believes the District Court Action can be heard by this  
28 Court, it must follow proper procedure and file a motion in the District Court seeking to

1 to refer the District Court Action to this Court.

2  
3 **II.**  
**FACTUAL BACKGROUND**

4 1. On September 22, 2006, USACM filed a *Motion For Order Scheduling An*  
5 *Auction For The Sale Of Certain Assets, Appointing SPCP Group , LLC, As Lead Bidder,*  
6 *and Approving Bid Procedures And Protections* herein, in which it sought to establish the  
7 parameters for the sale of certain assets in the USA Bankruptcy Cases, primarily consisting  
8 of valuable assets of the First Trust Deed Fund.

9 2. On November 8, 2006, this Court entered an *Order: (A) Scheduling An*  
10 *Auction For The Sale Of Certain Assets; (B) Appointing SPCP Group, LLC, As Lead*  
11 *Bidder; And (C) Approving Bid Procedures And Protections, Approving Bidding*  
12 *Procedures.* The stalking horse bidder agreed to take on the obligations of USACM under  
13 the Loan Servicing Agreements as part of the sale, but did not attribute any of its initial bid  
14 price to the Agreements.

15 3. After the Order Scheduling Auction was entered, but prior to the auction  
16 being conducted, Mesirow Financial Interim Management (“MFIM”), the Bankruptcy  
17 Court appointed management for USACM, prepared calculations of the default interest to  
18 be charged to third-party borrowers on monthly invoices or at the time of payoff. MFIM  
19 determined that default interest could be charged for substantially all of the loans, and as  
20 a result, prepared default interest calculations.

21 4. After the Order Scheduling Auction was entered, but prior to the auction  
22 being conducted, Compass submitted a revised Asset Purchase Agreement, which included  
23 the sale of additional assets that were not included in the original asset purchase agreement  
24 submitted by the stalking horse bidder, specifically, the sale of loan servicing rights, the  
25 default rate interest calculated by MFIM, accrued servicing fees, late charges, success fees  
26 and other fees due to the loan servicer under the Loan Servicing Agreements.

27 5. This Court conducted an auction of various assets of the USA Bankruptcy  
28 Cases on December 7, 2006.

1           6.       Compass was the successful bidder at auction for substantially all of the assets  
2 of USACM and related debtors in exchange for at \$67 Million. The Compass bid was  
3 broken down by an initial bid of \$48 million for the FTDF assets and \$8 million for the loan  
4 servicing rights and fees under the Loan Servicing Agreements (“Purchased Assets”). The  
5 remaining amounts were to be allocated by an over-bid agreement between FTDF and  
6 USCM, which was filed under seal, and a break-up fee of \$1.5 million to the stalking horse  
7 bidder. The sale was expressly conditioned upon confirmation of the USACM’s Chapter  
8 11 Plan of Reorganization. At the hearings on Plan Confirmation the following points  
9 were clarified regarding the sale of the Loan Servicing Agreements:

10           Mr. Merola: These agreements are what they are. I don’t think anyone in this room  
11 as an investor would have signed these agreements now if they knew  
12 then what they know now, but this is not a place to get declaratory  
13 relief as to all of the provisions of these agreements in the hands of a  
14 successor. All we’re doing here is transferring some of these assets.  
15 We shouldn’t be in the business of interpreting every provision  
16 prospectively on these. There’s just not a declaratory-relief action...  
The mantra we had in this sales process that has been drilled through  
our head by Mr. Gordon and Mr. Garmen is don’t touch the  
agreements. We can’t touch the agreements. There are things that are  
good, and there are things that are bad for the direct lenders in these  
agreements. They can’t pick and choose. We have elected not to  
touch the agreements. They are what they are.

17 See *Transcript of Auction Hearing, p.84, lns. 14-25; and p. 85, lns. 1-10*, filed herein on  
18 January 29, 2007, as Docket # 2593.

19           Mr. Gordon: As Mr. Merola said, the mantra of the Direct Lenders Committee was  
20 from the very beginning of this case and became more strident as we  
21 went as we do not mess around with the loan-servicing agreements.  
22 We understand that there are issues involving interpretation or issues  
23 that direct lenders have been told. There are issues that they have with  
24 regard to the statements they have received from the debtor in  
25 possession, but those are interpretation. Those are administrative.  
26 They need to work those out. The very essence of the transactions  
27 before the Court is the loan servicing agreements are taken as is.  
28 They’re being transferred. They’re not being mucked around with.  
Provisions are not being changed. If they start to change, we have  
other problems.

29 *Id.*, p. 86, lns. 12-25; p. 87, lns. 1-5.

30           Mr. Gordon There was a lot of statements made, but the documents speak for  
31 themselves. This is not the time or place to deal with interpretation,  
32 et cetera. We want them transferred in their entirety subject to their  
33 terms. That’s the deal.

1 *Id.*, p. 87, *Ins.* 18-22.

2 Court: Well, but the point is the contract says what it is, and its being  
3 transferred.... The contract says what it says about – and I think the  
4 plan suggests – does not the plan say that after – I mean, there is no  
5 stay after confirmation, and they’re free to do whatever their remedies  
are under the contract. The contract is what it is. There is no stay  
post confirmation. It’s the new entity. I mean, there’s no stay to  
prevent the enforcement of the servicing agreements.

6 *Id.*, p. 89, *Ins.* 10-25.

7 7. On January 8, 2007, this Court entered an Order confirming the Debtors’  
8 Joint Chapter 11 Plan (the “Confirmation Order”).

9 8. In the Confirmation Order, this Court reserved very limited jurisdiction to  
10 adjudicate any attempt by direct lenders to terminate the Loan Servicing Agreements based  
11 on pre-petition conduct of USACM. *Confirmation Order*, ¶ 14. The Confirmation did not  
12 retain jurisdiction to adjudicate a termination of the Loan Servicing Agreements based on  
13 post-confirmation conduct of Compass and independent state law rights under NAC  
14 645B.073. Compass never received a guarantee that direct lenders would never attempt to  
15 terminate the Agreements, and this Court never asked and never offered to retain  
16 jurisdiction over all post-confirmation disputes between Compass and direct lenders.

17 9. On February 16, 2007 (the “Closing Date”), the transfer of the Debtors’  
18 assets, including the Loan Servicing Agreements closed and the transfer to Compass was  
19 completed.

20 10. As noted by this Court on numerous occasions, the Loan Servicing  
21 Agreements were transferred to Compass without any other modification whatsoever.

22 11. On February 16, 2007, Compass issued a press release in which it stated that  
23 the actual value of the assets purchased from USACM and FTDF was more than \$150  
24 million. A copy of the Press Release is attached to the *Declaration of Donna A. Cangelosi*  
25 as Exhibit A. Compass through their own actions causing this press released to be issued  
26 is what created the initial concerns for the direct lenders and the actions of Compass are  
27 now causing the fears of direct lenders to be realized.

28 12. On the very first loan addressed by Compass as loan servicer, the “Standard

1 Property Loan”, Compass struck an undisclosed deal with the borrower to receive a secret  
2 payment of \$859,368.14, while direct lenders received none of their accrued interest. *See*  
3 *Declaration of Robert Bender*, filed contemporaneously herewith. Specifically:

4 a. Prior to Compass talking over as servicer, the borrower on the  
5 USACM loan commonly known as the Standard Property Loan offered to pay direct lenders  
6 100% of their principal investment in full satisfaction of the Loan. *See Declaration of*  
7 *Robert Bender*, filed contemporaneously herewith.

8 b. On February 2, 2007, Compass sent a letter to direct lenders, which  
9 sought investors approval to accept 90% of their principal investment in full satisfaction of  
10 the Standard Property Loan, while the borrower remained willing to pay 100% of principal.  
11 See Exhibit A to Declaration of Robert Bender. Evidently, Compass planned to pocket  
12 10% of the buyers payoff for itself. However, direct lenders voted to reject this offer.

13 c. As a result of the direct lenders’ rejection a 90% payoff, Compass  
14 chose to disclose all money actually offered by the borrower and, on March 7, 2007,  
15 Compass sent a letter to all direct lenders in the Standard Property Loan. See Exhibit B to  
16 Declaration of Robert bender, filed contemporaneously herewith. In this letter, Compass  
17 sought the approval of 100% of the direct lenders in the Standard Property Loan of an  
18 agreement Compass reached with Standard Property to pay off the Standard Property Loan.  
19 According to that letter, the terms of the payoff were:

20 i. The Direct Lenders in the loan receive 100% of their unpaid  
21 Standard Property Principal Balance;  
22 ii. The Direct Lenders do not receive any accrued interest; and  
23 iii. Compass shall release the security interest against Standard  
Property’s real property.

24 d. In reliance on the representations of Compass, direct lenders  
25 constituting 100% of the beneficial interest in the Standard Property Loan approved the  
26 payoff in accordance with the specific terms of the March 7, 2007, letter. See Declaration  
27 of Robert Bender, filed contemporaneously herewith.

28 e. On or about March 13, 2007, USACM, through Mark L. Olson, COO,

1 issued a Payoff Statement to Standard Property (the “Standard Property Payoff Statement”).  
2 See Exhibit C to Declaration of Robert Bender. The Standard Property Payoff Statement  
3 directs Standard Property to make a payoff, as of March 15, 2007, in the amount of  
4 \$10,499,068 with a per diem interest accrual of \$2,205.74 for every day after March 15,  
5 2007. The \$10,499,068.15 payoff consisted of:

- 6 i. Standard Property Principal Balance: \$9,640,000.00
- 7 ii. Late Fees: \$ 47,694.43
- 8 iii. Other Fees: \$ 267,164.11
- 9 iv. Default Interest \$ 544,509.60

10 f. The Standard Property Payoff Statement revealed that Compass had a  
11 secret agreement with Standard Property, undisclosed to the Standard Property Loan Direct  
12 Lenders, whereby Compass received Late Fees, Other Fees and Default Interest from  
13 Standard Property, without collecting accrued contractual interest owed to the Direct  
14 Lenders.

15 g. On or about March 15, 2007, Standard Property paid off the Standard  
16 Property Loan pursuant to the terms of the Standard Property Payoff Statement. At the  
17 time the Standard Loan was paid off, Compass did not pay the Standard Property Loan  
18 direct lenders any of the accrued interest they were owed, but took the available funds pay  
19 themselves default interest, late fees and other fees totaling \$859,368.14. See Declaration  
20 of Robert Bender.

21 13. As detailed in the Complaint filed in the District Court Action, direct lenders  
22 have filed a suit for damages against Compass and sought declaratory relief based on,  
23 among other reasons, Compass has committed numerous violations of Nevada law since  
24 taking over as servicer under the Loan Servicing Agreements, including:

25 a. Compass has refused to disclose any money it is receiving, in violation  
26 of Nevada law. *See Declaration of Donna Cangelosi.*

27 b. Compass is not acting under a valid power of attorney as required by  
28 NRS 645B.330 because the power of attorneys granted by direct lenders to USACM

1 expired by operation of law when the underlying loans fully matured. At the time the Loan  
2 Servicing Agreements were transferred to Compass, many of the loans in the USACM loan  
3 portfolio were in term default, and others have since gone into term default. Compass has  
4 not obtained a written extension of the expired powers of attorney. *See Declaration of*  
5 *Donna Cangelosi.*

6 c. In the three months have passed since Compass closed on the asset  
7 purchase transaction, Compass has failed to failed to provide monthly reports as required  
8 by Nevada law and has only generated a total of seven (7) loan status reports. *See*  
9 *Declaration of Donna Cangelosi.*

10 d. Compass has negotiated with borrowers for its own benefit, and to the  
11 detriment of Direct Lenders, in violation of Nevada law and its fiduciary duties. *See*  
12 *Declaration of Robert Bender, filed contemporaneously herewith.*

13 e. Compass has taken the position that it is entitled to be paid default  
14 interest and other fees, prior to Direct Lenders being paid principal and interest, which is  
15 in direct conflict with the terms of the promissory notes and other loan documents. *See*  
16 *Email from Compass, attached to the Declaration of Donna Cangelosi as Exhibit B.*

17 f. Compass has applied principal and interest payments made by  
18 borrowers to pay itself so-called loan origination fees, which is in direct conflict with the  
19 terms of the promissory notes and other loan documents.

20 g. Compass has engaged in reckless conduct, which has subjected  
21 Plaintiffs and other direct lenders to an increased exposure to lender liability lawsuits.

22 h. Compass has refused to process direct lender/borrower settlement  
23 agreements.

24 i. Compass has initiated legal proceedings in 21 loans, on behalf of direct  
25 lenders, without a valid power of attorney, subjecting lenders to legal fees, borrower  
26 defenses and lender liability claims.

27 14. On May 9, 2007, the State of Nevada, Division of Mortgage Lending, entered  
28 a formal *Order Imposing Fine And Order To Cease And Desist And Notice of Right To*

1 *Request Hearing*, pursuant to which Compass was ordered to cease and desist all mortgage  
2 lending/agent activities in Nevada, a copy of which is attached to the Declaration of Donna  
3 Cangelosi as Exhibit C. According to that Order, an investigation by the State of Nevada  
4 revealed that Compass had “engaged in a minimum (of) seven (7) distinct instances of  
5 escrow agency activity in the State of Nevada without a license to do so, thereby violating  
6 NRS 645A.020 and NRS 645A.210.” *Id.*, *Exhibit C*, p. 8.

7 15. Based on independent rights under NAC 645B.073, and various acts by  
8 Compass, and Compass alone, Direct Lenders constituting over 51% of the beneficial  
9 interests in loans serviced by Compass have executed written elections to: (1) terminate any  
10 rights that Compass may have to service their various Loan; and (2) to appoint an alternate  
11 servicing agent for loans. *See Declaration of Donna Cangelosi, Exhibit D.* Specifically  
12 60% of all outstanding beneficial interests, and 62% of the total number of direct lenders  
13 executed written elections to terminate Compass. The percentage of beneficial interests  
14 voting to terminate Compass on a loan-by-loan basis exceed 96% on certain loans. *Id.*

15 16. On May 3, 2007, Compass acknowledged jurisdiction lies elsewhere when it  
16 filed a lawsuit against six (6) direct lenders/LPG members in the District Court for the State  
17 of Nevada, County of Clark as Case No. 07-A-540604-C, which sought damages and  
18 injunctive relief against those direct lenders based on their communications with fellow  
19 direct lenders about Compass. A copy of the Complaint is attached to the Declaration of  
20 Donna Cangelosi as Exhibit E.

21 17. On May 18, 2007, Compass again Compass acknowledged jurisdiction lies  
22 elsewhere when it filed a lawsuit against Donna Cangelosi in the District Court for the State  
23 of Nevada, County of Clark as Case No. 07-A-541428-C, which sought damages and  
24 injunctive relief her based on her communications with fellow direct lenders. A copy of  
25 the Complaint is attached hereto as Exhibit F.

26 18. On May 18, 2007, the direct lenders sent Notices of Termination to Compass  
27 and its attorneys, which were delivered on May 21, 2007. A sample copy of a Notice of  
28 Termination, which is identical to all other Notices, is attached to the Declaration of Donna

1 Cangelosi as Exhibit G.

2 19. On May 18, 2007, the direct lenders also sent Notices To Borrowers  
3 informing them that Compass had been terminated as loan servicer and directing them to  
4 forward future payments to direct lenders new loan servicer, as permitted in the promisory  
5 notes and loan documents between direct lenders and borrowers.

6 20. On May 21, 2007, various direct lenders filed a *Complaint For Declaratory*  
7 *Relief and Damages* in the United States District Court, District of Nevada, as case No. 07-  
8 CV-0224-ECR-VAC (the “District Court Action”). That District Court Action seeks  
9 declaratory relief regarding certain post-confirmation rights of direct lenders under the Loan  
10 Servicing Agreements and damages against Compass and other parties, based on their post-  
11 confirmation conduct and actions. A copy of the Complaint is attached to the Declaration  
12 of Donna Cangelosi as Exhibit H.

13 21. On May 23, 2007, Compass voluntarily dismissed its state court action against  
14 LPG members and Cangelosi. *See Exhibit I* to the Declaration of Donna Cangelosi.

15 22. On May 25, 2007, after abandoning its State Court cases two (2) days prior,  
16 Compass filed its instant Motion in this Court.

17 **III.**  
18 **LEGAL AUTHORITY AND ANALYSIS**

19 **A. Compass Lacks Standing To Obtain The Relief Sought In Its Motion.**

20 Only a debtor, debtor in possession or a trustee has standing to seek and obtain an  
21 injunction under 11 U.S.C. §105. In re Consolidated Pioneer Mortg. Ent., 205 B.R. 422  
22 (9<sup>th</sup> Cir. B.A.P. 1997). A non-debtor third-party lacks standing to bring a motion for  
23 injunctive relief under §105(a). *Id.* Indeed, the purpose of §105(a) is to empower  
24 injunctive relief for the purpose of protecting the debtor, not third parties, such as  
25 Compass. In re Rohnert Park Auto Parts, Inc., 113 B.R. 610, 614 (9<sup>th</sup> Cir. B.A.P. 1990).

26 Here, Compass’ Motion seeks various forms of mandatory and prohibitive  
27 injunctions against Cangelosi and the LPG purportedly under 11 U.S.C. §105. Compass  
28 has cited no authority under which it has standing to obtain such relief. Instead, Compass

1 ignores on point case law from within the Ninth Circuit, such as Consolidated Pioneer,  
2 which expressly holds that a non-debtor, such as Compass, has no such standing to seek and  
3 obtain an injunction under §105. As Compass is not the debtor in this case, it lacks standing  
4 to bring the instant Motion and, in turn, this Court lacks the power to enter the relief  
5 Compass' requests. Moreover, as detailed below, Compass has failed to properly initiate  
6 an adversary proceeding under FRCP 7001, et. seq., which is a prerequisite to obtaining  
7 injunctive relief under §105. In re Graves, 279 B.R. 266, 272 (9<sup>th</sup> Cir. B.A.P. 2002). For  
8 these reasons, Compass' Motion should be summarily denied based on a lack of standing  
9 under §105.

10 **C. The Bankruptcy Court Lacks Jurisdiction To Decide The Issues Raised In**  
11 **Compass' Motion, Which Boil Down To Whether Direct Lenders Properly**  
12 **Terminated Compass Based On: (1) Post-Confirmation/Post-Closing**  
13 **Contractual And State Rights; And (2) Post-Confirmation/Post-Closing Conduct**  
14 **Of Compass.**

15 Bankruptcy courts are courts of limited jurisdiction. In re Valdez Fisheries  
16 Development Assoc., 439 F.3d 545, 549 (9<sup>th</sup> Cir. 2006). The source of the bankruptcy  
17 court's subject matter jurisdiction is neither the Bankruptcy Code, nor the express terms of  
18 a Chapter 11 Plan, but, rather, is 28 U.S.C. §§ 1334 and 157. In re Kroy Ltd., 222 B.R.  
19 345, 347 (D. Ariz. 1998). Pursuant to 28 U.S.C. § 1334(b), a bankruptcy court has  
20 jurisdiction of "all civil proceedings arising under title 11, or arising in or related to cases  
21 under title 11. Here, the only potentially relevant jurisdiction to consider is "related to"  
22 jurisdiction.

23 The Ninth Circuit has adopted the "Pacor test" for determining the scope of "related  
24 to" jurisdiction, which focuses on whether "the outcome of the proceeding could  
25 conceivably have any effect on the estate being administrated in bankruptcy." In re Pegasus  
26 Gold Corp., 394 F.3d 1189, 1193 (9<sup>th</sup> Cir. 2005). An action is related to bankruptcy if the  
27 outcome could alter the **debtor's** rights, liabilities, options, or freedom of action. *Id.*  
28 Bankruptcy courts have no jurisdiction at all over proceedings that have no effect on the  
estate of the debtor. Celotex Corp. v. Edwards, 514 U.S. 300, 309 (1995).

The Ninth Circuit has further held that "post-confirmation bankruptcy court

1 jurisdiction is necessarily more limited than pre-confirmation jurisdiction...” Pegasus,  
2 1194. In this regard, the Ninth Circuit applies a more narrow “close nexus” test to  
3 determine a bankruptcy court’s post-confirmation jurisdiction. *Id.* Under this test, only  
4 matters affecting the “interpretation, implementation, consummation, execution or  
5 administration of the confirmed plan will typically have the requisite close nexus.” *Id.*

6 It has long been a settled principle of bankruptcy law that when a Chapter 11 plan  
7 involves the sale of the debtor’s assets, the jurisdiction of the bankruptcy court over the  
8 asset ends once the sale has closed and the unconditional transfer has been executed. In re  
9 Paddock of California, 226 F.Supp. 43 (S.D. Cal. 1964); see also Nixon v. Michaels, 38  
10 F.2d 420 (8th Cir. 1930) (once a fund had been paid out to a claimant further disputes over  
11 it were outside the interest and jurisdiction of the court.); Henrie v. Henderson, 145 F. 316  
12 (4th Cir. 1906), cert. denied, 206 U.S. 563, 27 S.Ct. 795, 51 L.Ed. 1190 (1907) (once  
13 certain lands had been sold and the sale was confirmed, the court stated that disputes as to  
14 the land were simply not of concern to the bankrupt estate, and there was no jurisdiction.);  
15 In re Wesley Corp., 18 F.Supp. 347 (E.D.Ky.1937) (The court said that it simply had no  
16 jurisdiction over the matter once the property was sold. The bankruptcy court would not  
17 follow property into the hands of purchasers for the purpose of settling equities in it. The  
18 rule of caveat emptor applied, and further disputes were between the buyer and the creditor.  
19 It was no longer property of the bankrupt, and the court had no further interest in it.); In  
20 re Oak Park Cleaners & Dryers, 125 F.2d 420 (7<sup>th</sup> Cir. 1942) (When bankruptcy estate  
21 assets are sold and delivered, the bankruptcy court has no duty to protect the purchaser  
22 thereafter. The bankruptcy court has no power or authority to extend its protection beyond  
23 the sale and delivery of the property.); In re Krull, 295 F.520 (E.D.N.Y. 1923) (Once  
24 rights are assigned, the bankruptcy court has no further control over them, and if the title  
25 of the purchaser is attacked in another tribunal, a bankruptcy court has no jurisdiction to  
26 prevent that tribunal from proceeding to an orderly determination of the rights of the  
27 parties.).

28 Paddock, cited above, involved the transfer of the debtor’s franchise agreements.

1 The Paddock Court held that once the sale was confirmed and title passed to the buyer “this  
2 left the court without subject matter jurisdiction” and, thus, “it could not proceed to  
3 adjudicate disputes which later arose over the franchise agreements.” Paddock, 226  
4 F.Supp. at 48. In this regard, the court lacked jurisdiction to protect the asset purchaser  
5 against interference with the rights it obtained. *Id.* More recently, the Ninth Circuit held  
6 that a bankruptcy court has no jurisdiction over post-confirmation disputes regarding rights  
7 under contracts approved by the court. Valdez, cited above, at 548.

8 Here, the dispute Compass attempts to bring before this Court in its Motion has no  
9 close nexus to this bankruptcy case or the Debtors’ Plan. The dispute boils down to  
10 whether an overwhelming majority of direct lenders properly terminated Compass based  
11 on: (1) direct lenders’ post-confirmation and post-closing contractual and state law rights;  
12 and (2) post-confirmation and post-closing acts of Compass, and Compass alone. Even  
13 applying the broader Pacor test, the determination of this issue could not conceivably have  
14 any effect on USACM’s estate. This dispute arises from the ongoing post-confirmation  
15 contractual relationship between direct lenders and Compass. It is impossible that this  
16 action would in anyway alter the debtor’s rights, liabilities, options, or freedom of action.  
17 Indeed, USACM has not reorganized and is no longer in business. Thus, the dispute  
18 between direct lenders and Compass cannot interfere with Debtors’ “reorganized business.”

19 The relevant provisions of the Debtors’ Plan only involved a transfer of the Loan  
20 Servicing Agreements by USACM to Compass, together with certain assurances under 11  
21 U.S.C. § 363 that the Agreements would be transferred to Compass free and clear of claims  
22 direct lenders may have against USACM. The Plan did not provide Compass any guarantee  
23 that direct lenders would not, or could not, exercise either: (1) rights under the Agreements  
24 to terminate Compass based on Compass’ own post-transfer conduct; or (2) rights under  
25 state law to terminate Compass with or without cause. When Compass acquired the Loan  
26 Servicing Agreements, it assumed the risk that it could perform its duties and obligations  
27 under the Agreements, and, in turn, assumed the risk that direct lenders would terminate  
28 Compass if Compass did not, or could not, perform.

1 As detailed in the *Declaration of Donna Cangelosi*, on average over **60%** of direct  
2 lenders in some 50 loans have simply exercised their contractual and state law rights, which  
3 Compass was well aware existed at the time it acquired the rights of USACM under the  
4 Loan Servicing Agreements. This Court has emphasized in open court on countless  
5 occasions, including at the Plan Confirmation hearing, that the Loan Servicing Agreements  
6 are what they are, and they were not modified by the Debtor's Plan. In other words, all  
7 contractual terms, conditions and rights continue to exist. This Court never promised  
8 Compass any protection beyond what was in the Loan Servicing Agreements. In fact, as  
9 shown above, this Court could not guarantee any such protection to Compass. At the point  
10 the transfer of the Loan Servicing Agreements To Compass was complete, the jurisdiction  
11 of this Court over the ongoing relationship between Compass and direct lenders, two non-  
12 debtor parties, also ended. Therefore, Compass' Motion must be denied and Compass must  
13 seek relief from a court with subject matter jurisdiction over the ongoing post-confirmation  
14 relationship between direct lenders and Compass.

15 **D. This Court's Limited Surviving Section 3 Right Jurisdiction Is Not Triggered**  
16 **By The Direct Lenders Termination of Compass Based Upon Post-Confirmation**  
**Rights and Post-Confirmation Acts By Compass.**

17 \_\_\_\_\_ This Court's Confirmation Order narrowly limits its post-confirmation jurisdiction  
18 to "any right that existed and was matured and exercisable, as of the Petition Date, to effect  
19 a substitution of **USACM** as loan servicer under Section 3 of any Loan Servicing  
20 Agreement," (*emphasis added.*) which the Confirmation Order defined as a "Surviving  
21 Section 3 Right." Confirmation Order, ¶ 14. The Order then provides:

22 ...in connection with any attempted post-Closing exercise of a Surviving  
23 Section 3 Right : (a) the Direct Lenders must provide Compass at least thirty  
24 (30) days prior written notice before exercise of such right in accordance with  
25 section 8 of the Loan Servicing Agreement. (b) Compass shall have the right  
26 to challenge the exercise of such Surviving Section 3 Right by filing a motion  
with this Court prior to the expiration of such thirty (30) day period to  
determine whether such Surviving Section 3 Right has been properly and  
validly exercised and the Court shall retain jurisdiction to adjudicate any such  
disputes...

27 *Id.* As is made clear in the Confirmation Order, this Court only retained jurisdiction to  
28 adjudicate the exercise of "Surviving Section 3 Rights", which are expressly defined as a

1 termination based on pre-petition conduct of USACM. It makes sense that this Court  
2 reserved jurisdiction on this issue since the Court was familiar with the acts of USACM,  
3 and there was a legitimate concern that the Loan Servicing Agreements could be terminated  
4 based on USACM'S previous activities. The Court did not retain any jurisdiction over  
5 post-confirmation (non-Surviving Section 3 Rights) disputes among non-debtor parties,  
6 including a termination of the Loan Servicing Agreements based on Compass' post-  
7 confirmation conduct, or based on independent state law rights.

8 Here, Compass has not been terminated based on "Surviving Section 3 Rights."  
9 Rather, Compass has been terminated based on its own post-confirmation conduct and  
10 direct lenders' independent state law right to terminate Compass. These issue have been  
11 put before Judge Reed in the District Court Action filed in the Untied States District Court  
12 for the State of Nevada. That Court has jurisdiction over these issues.

13 Underlying the District Court Action are various post-petition actions and inactions  
14 by Compass, which are not within the realm of this Court's jurisdiction. The issues raised  
15 in the District Court Action include:

- 16
- 17 1. As Asserted By The Plaintiffs In The District Court Action, Direct Lenders  
18 Have An Absolute Right Under NAC 645B.073 To Terminate Compass If  
19 51% Of Direct Lenders Elect To Do So And This Court Has No Jurisdiction  
20 To Adjudicate Whether Compass Has Been Properly Terminated Under NAC  
21 645B.073.

22 As submitted to the District Court in the District Court Action, Nevada  
23 Administrative Code section 645B.073(1) provides:

24 Except as otherwise provided in subsection 3, if a mortgage broker acts on  
25 behalf of investors on a matter related to a mortgage loan, and if the  
26 beneficial interest in the loan belongs to more than one natural person, the  
27 documentation of the matter must include provisions to allow the holders of  
28 51 percent or a greater specified percentage of the beneficial interests of  
record to act on behalf of all the holders of the beneficial interests of record  
in the event of a default or foreclosure for matters that require the direction  
or approval of the holders of the beneficial interests in the loan, including,  
without limitation:

- (a) The designation of the mortgage broker, servicing agent or other person to act on the behalf of the holders of the beneficial interests in the loan; and

1 (b) The sale, encumbrance or lease of real property  
2 owned by the holders resulting from a foreclosure or the  
receipt of a deed in lieu of a foreclosure.

3 Nevada law is clear that where a statute requires that a certain provision be included in a  
4 contract, provisions which are inconsistent with that requirement cannot be enforced. See,  
5 e.g., *Federated American Ins. Co. v. Granillo*, 108 Nev. 560, 562, 835 P.2d 803 (1992);  
6 *Neal's Estate v. Farmers Ins. Exchange*, 93 Nev. 348, 350, 566 P.2d 81 (1977). Here, the  
7 Loan Servicing Agreements have purportedly modified direct lenders right to terminate the  
8 loan servicer under NAC 645B.073 by conditioning direct lenders rights to terminate based  
9 only upon a “failure to act” by the servicer. Such a requirement, however, is  
10 unenforceable because there is no “cause” element contained in NAC 645B.073. Rather,  
11 NAC 645B.073 allows termination with consent of 51% of direct lenders with or without  
12 cause.

13 As Compass acknowledges in its Motion, the termination of Compass in this case  
14 was based on NAC 645B.073, not a “Surviving Section 3 Right.” Because direct lenders  
15 exercised their rights to terminate Compass entirely independent of any Surviving Section  
16 3 Right, they were not required to provide Compass thirty (30) days notice of the  
17 termination, or comply with any other provision of ¶ 14 of the Confirmation Order.

18 2. Even If Cause To Terminate Compass Under Section 3 Of the Loan Servicing  
19 Agreements Is Required, Compass Has Been Terminated Based On Its Own  
20 Post-Confirmation Conduct, Not Any Pre-Petition Conduct Of USACM,  
Which Is An Issue That This Has Been Brought Before Judge Reed In The  
District Court Action.

21 As asserted and alleged in the District Court Action, Compass has also been  
22 terminated based on its own post-confirmation conduct, independent of any pre-petition  
23 conduct of USACM. The District Court Action seeks declaratory relief and damages based  
24 on various post-confirmation conduct by Compass including, but is not limited to, the  
25 following:

26 a. Compass Is Unlawfully Holding Itself Out As Direct Lenders’ Agent  
27 Without A Valid Power of Attorney.

28 As asserted in the District Court Action as a basis for damages and declaratory

1 relief, Compass has unlawfully held itself out as Direct Lenders' Agent in violation of  
2 Nevada State law. Section 13 of the Loan Servicing Agreements specifically provides:

3 This Agreement shall be construed in accordance with the laws of the State  
4 of Nevada, without regard to conflict of laws or rules thereof, and the  
5 obligations, rights and remedies of the parties hereunder shall be determined  
6 in accordance with such laws.

6 Under Nevada Law, when a mortgage broker acts as a servicing agent, it is indeed  
7 acting as the agent of the lenders. *See generally, Young v. Nevada Title Company*, 103  
8 Nev. 436, 439, 744 P.2d 902 (1987). "An agent owes to the principal the highest duty of  
9 fidelity, loyalty and honesty in the performance of the duties by the agent on behalf of the  
10 principal." *LeMon v. Landers*, 81 Nev. 329, 402 P.2d 648 (1965). A mortgage broker "is  
11 charged with the duty of fullest disclosure of all material facts concerning the transaction  
12 that might affect the principal's decision." *Holland Realty Investment Co. v. Nevada*, 84  
13 Nev. 91, 97, 436 P.2d 422 (1968); Accord, *Jory v. Bennight*, 91 Nev. 763, 542 P.2d 1400  
14 (1975).

15 Pursuant to NRS 645B.330, a mortgage broker/agent must act on behalf of direct  
16 lenders pursuant to a valid power of attorney, approved by the State of Nevada. In this  
17 regard, Plaintiff executed a power of attorney in favor of USACM when making  
18 investments/loans. NRS 645B.330 requires that the power of attorney "Expressly provide  
19 that the power of attorney is effective only for the term of the specific loan unless the  
20 mortgage broker obtains written approval from the private investor to extend the term of  
21 the power of attorney..." and "a power of attorney which designates a mortgage broker  
22 or mortgage agent as the attorney-in-fact or the agent of a private investor and which  
23 violates the provisions of this section is void and must not be given effect with regard to any  
24 act or transaction that occurs on or after October 1, 1999, whether or not the power of  
25 attorney is or has been executed by the private investor before, on or after October 1,  
26 1999." The Loan Servicing Agreements in this case codify NRS 645B.330 and expressly  
27 provide that the powers of attorney expire on the maturity date of each related loan.

28 Here, numerous loans have matured. Compass has not obtained a written extension

1 of any of Powers of Attorney as required by NRS 645B.330. Thus, as a result of the term  
2 maturity of various loans in the USACM portfolio, Compass no longer has a valid power  
3 of attorney to act on behalf of direct lenders as required under NRS 645B.330.

4 Despite the fact no valid power of attorney exists that authorizes Compass to act on  
5 behalf of Plaintiffs and other direct lenders, Compass continues to hold itself out as a  
6 representative/agent of Plaintiffs (and other direct lenders) to borrowers, title companies  
7 and others. Such conduct gave direct lenders further cause to terminate Compass as the  
8 loan servicer.

9 b. Compass Has Adopted A Position Unprecedented In The Industry That  
10 It Is Entitled To Receive Default Interest And Late Fees Before Direct  
Lenders Receive Principal and Interest.

11 As asserted in the District Court Action, since taking over under the Loan Servicing  
12 Agreements, Compass adopted a strategy to extract value from the collateral pledged by  
13 third-party borrowers to direct lenders, by attempting to deduct unpaid default interest, late  
14 fees, extension fees, and other undisclosed fees, from the collateral proceeds before  
15 remitting amounts due to Plaintiffs and other direct lenders, which is in direct conflict with  
16 the loan documentation (Notes, deeds of trust and loan agreements), the Loan Servicing  
17 Agreements, the intent of the parties to the loans and various related agreements, the  
18 historical practices of USACM and long established lending industry standards and  
19 practices.

20 As set forth in the April 24, 2007, email from Compass to LPG members, attached  
21 to the *Declaration of Donna Cangelosi* as Exhibit B, Compass maintains the Debtors' Plan  
22 gave them the first priority to receive default interest from borrowers payments, despite the  
23 fact the loan documents give the direct lenders the right to dictate the priority of payment  
24 applications, despite the fact that the Court repeatedly said the Loan Servicing Agreements  
25 were not modified. Specifically, in that email Compass states:

26 Principal gets repaid last, hence our point about a shortfall. I assumed Direct  
27 Lenders were familiar with the Reorganization Plan they approved that  
28 provides for that, but you make a point I will be happy to consider for future  
Loan Status Reports. - Mark Olson

1 Compass' strategy and approach for servicing the Loans has created a conflict of interest  
2 between Compass and direct lenders, to whom Compass owes fiduciary duties. This gave  
3 direct lenders further cause to terminate Compass based on its own post-confirmation  
4 conduct.

5 c. Compass Has Failed To Make Disclosures To Direct Lenders That  
6 Are Required Under Nevada Law.

7 Pursuant to NRS 645B.185, a mortgage broker/agent is required to provide each  
8 investor a Mortgage Investment Disclosure Form, approved by the Nevada Mortgage  
9 Lending Division. As detailed in the Mortgage Investment Disclosure Form, a mortgage  
10 broker/agent operating in Nevada is required to inform investors that:

- 11 a. "Before you invest in a promissory note by an interest in real  
12 property, you should know... the knowledge, experience and integrity  
of the mortgage broker with whom you are dealing."
- 13 b. "You are entitled to receive information regarding the mortgage  
14 broker you are dealing with" more specifically the most recent  
financial statements.
- 15 c. "You have a right to ascertain from the Division of Mortgage Lending  
16 the results of any investigation against the mortgage broker"
- 17 d. "In many cases, including those cases where the investments consist  
18 of "fractionalized" interests, the loan requires servicing by an  
authorized agent... The mortgage broker with whom you are dealing  
is authorized by Nevada law to act as the servicing agent."
- 19 e. "A Mortgage Broker performing loan servicing has an obligation to  
20 account to the borrower and every investor for money collected and  
disbursed in the exercise of that function".
- 21 f. When the borrower on a mortgage loan fails to make required  
22 payments, the actions and investor can take, or that a servicing agent  
23 can take on behalf of an investor, are determined by provisions of  
Nevada Law and the documents and instruments evidencing the  
mortgage loan.

24 Compass has failed and refused to provide direct lenders the information required in the  
25 Mortgage Investment Disclosure Form, which established further cause for direct lenders  
26 to terminate Compass. *See Declaration of Donna Cangelosi.*

27 ///  
28 ///

1 d. Compass Has Been Ordered By The Nevada Division of Mortgage  
2 Lending To Cease And Desist Escrow Activities In Nevada.

3 The fact the Nevada Division of Mortgage Lending has formally ordered Compass  
4 to cease and desist certain activities it is required to perform under the Loan Servicing  
5 Agreement also establishes cause for direct lenders to terminate the Agreements for reasons  
6 entirely unrelated to the pre-petition conduct of USACM. According to the State of  
7 Nevada, an investigation revealed that Compass had “engaged in a minimum (of) seven (7)  
8 distinct instances of escrow agency activity in the State of Nevada without a license to do  
9 so, thereby violating NRS 645A.020 and NRS 645A.210.” *See Exhibit C to Cangelosi*  
10 *Declaration*, p. 8.

11 Compass has since moved to New York in an attempt to escape regulation by the  
12 State of Nevada. However, Compass still violates the Cease and Desist Order by servicing  
13 loans for Nevada residents, who make up a large contingency of the Direct Lenders.  
14 Moreover, because Section 13 of the Loan Servicing Agreements expressly provides that  
15 Compass’ duties and obligations are governed by Nevada Law, Compass cannot avoid  
16 complying with Nevada Law by relocating to New York.

17 **E. The LPG and Cangelosi Have Not Interfered With The Implementation Of The**  
18 **Debtors’ Plan And, In Fact, The Only Provisions Relevant To Compass Have**  
**Been Fully Consummated and Implemented.**

19 While Compass fashions its Motion as an effort to enforce the Debtors’ Plan, in  
20 reality, the relevant Plan provisions have been fully implemented. The Plan simply  
21 provided for the transfer of an asset, the Loan Servicing Agreements, by USACM to  
22 Compass. The transfer of the Loan Servicing Agreements by USACM to Compass has  
23 closed, and thus, the Plan has been fully implemented as it relates to Compass. As the only  
24 relevant Plan provisions have been fully performed and implemented, it is impossible for  
25 LPG, Cangelosi or any other party to interfere with those Plan provisions.

26 Moreover, the law is clear that, beyond the very limited jurisdiction retained over  
27 Surviving Section 3 Rights, this Court’s only role is to ensure the asset transfer is  
28 effectuated. Once effectuated, the Court’s jurisdiction ends and this Court cannot proceed

1 to adjudicate disputes which later arise over the Loan Servicing Agreements. *See Paddock*,  
2 226 F.Supp. at 48. The issues raised in Compass' Motion do not involve any Debtor and  
3 will have no impact on the Debtors' bankruptcy cases.

4  
5 **F. Compass' "Notice Of Removal" of the District Court Action Is Improper And  
Should Be Stricken From The Record In This Case.**

6 Compass has improperly attempted to "remove" the District Court Action to this  
7 Court under 28 U.S.C. § 1452(a). As acknowledged by the only Court within the Ninth  
8 Circuit to address this issue, such a removal "defies logic and common sense." *See In re*  
9 *Mitchell*, 206 B.R. 204, 209-212 (Bankr. D. Cal. 1997). *Mitchell* involved an attempted  
10 § 1452 removal of an action filed United States District Court to the bankruptcy court  
11 sitting in the same district, which was in essence the same court, according to *Mitchell*.  
12 The *Mitchell Court* held that "as a matter of logic and common sense, it would not seem  
13 to be possible to 'remove' a lawsuit to the very court where the lawsuit is already pending.  
14 Removal, both under the nonbankruptcy removal statute, 28 U.S.C. § 1441-1448, and  
15 under the bankruptcy removal statute, 28 U.S.C. § 1452, involves moving the lawsuit from  
16 the court where it was originally brought--which is usually a state court--to a federal district  
17 court. It seems to be a tautology to talk about 'removing' an action already pending in a  
18 federal district court to that same federal district court where the action is already pending."  
19 *Mitchell*, at 209-10.

20 28 U.S.C. § 1452(a) speaks of removing a proceeding "to district court". It violates  
21 the plain language of 28 U.S.C. § 1452(a) to say that an action can be removed "to district  
22 court" when it is already pending in district court, because the words "to district court" by  
23 necessity involve the concept of bringing the action to district court from some other forum.

24 The *Mitchell Court* held "that proper procedure for a party to use to request a district  
25 court to transfer a lawsuit pending in that district court to a bankruptcy judge of the same  
26 district is for the party seeking the transfer to move the district court to refer that lawsuit  
27 to the bankruptcy court for further handling." *Mitchell*, at 210, *citing* *Thomas Steel Corp.*  
28 *v. Bethlehem Rebar Indus.*, 101 Bankr. 16, 19 (Bankr. N.D. Ill. 1989); *In re Watson-*

1 Mahaney, Inc., 70 Bankr. 578, 581 (Bankr. N.D. Ill. 1987). The *Mitchell* Court expressly  
2 held “that 28 U.S.C. § 1452(a) cannot be used to remove a lawsuit pending in federal  
3 district court to the same district court where the lawsuit is already pending.” Id. The  
4 Court explained that “such a reading of Section 1452(a) gives meaning to all parts of that  
5 section, and avoids the logically idiotic result of claiming that a lawsuit can be removed  
6 from the district court where it is already pending to that very same court.” Id. at 211.

7 Compass has attempted to do exactly what was prohibited in *Mitchell*, namely  
8 attempting to use § 1452(a) to remove a case from a District Court for the District of  
9 Nevada to the same District Court sitting as this Bankruptcy Court for the District of  
10 Nevada. This is not a proper procedural use of § 1452(a) and, therefore, Compass’ Notice  
11 of Removal of the District Court Action filed in this Court should be stricken from the  
12 record in this case and any “removal” should be nullified. If Compass has grounds for the  
13 District Court to refer the District Court Action to this Court, it must pursue its goals in the  
14 District Court through a motion to refer the case to this Court.

15 **IV.**  
16 **CONCLUSION**

17 For the reasons detailed above, Compass Motion must be denied because: (1)  
18 Compass lacks standing to seek and obtain the relief sought in the Motion; and (2) this  
19 Court lacks subject matter jurisdiction over the dispute. In addition, Compass’ Notice of  
20 Removal of the District Court Action, filed herein, should be stricken from the record and  
21 any resulting “removal” of the District Court Action to this Court must be nullified.

22 DATED this 30<sup>th</sup> day of May, 2007.

23 LAW OFFICES OF ALAN R. SMITH

24 /s/ Alan R. Smith

25 By \_\_\_\_\_  
26 ALAN R. SMITH, ESQ.  
27 Attorney for the Lenders Protection Group

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ELECTRONICALLY FILED -5/30/07

6 Attorney for Lenders Protection Group  
7

8 UNITED STATES BANKRUPTCY COURT  
9 DISTRICT OF NEVADA

10 —ooOoo—

11 In Re:  
12 USA COMMERCIAL MORTGAGE  
COMPANY,  
13 Debtor.

Case Nos.:  
BK-S-06-10725-LBR  
BK-S-06-10726-LBR  
BK-S-06-10727-LBR  
BK-S-06-10728-LBR  
BK-S-06-10729-LBR

14 In Re:  
15 USA CAPITAL REALTY ADVISORS,  
LLC,  
16 Debtor.

JOINTLY ADMINISTERED  
Chapter 11

17 In Re:  
18 USA CAPITAL DIVERSIFIED TRUST  
DEED FUND, LLC,  
19 Debtor.

**DECLARATION OF DONNA  
CANGELOSI IN SUPPORT OF  
OPPOSITION TO EMERGENCY  
MOTION OF COMPASS FINANCIAL  
PARTNERS LLC FOR ORDER  
PURSUANT TO 11 USC §§ 105 AND  
1141 ENFORCING CONFIRMATION  
ORDER AND FOR CIVIL  
CONTEMPT SANCTIONS**

20 In re:  
21 USA CAPITAL FIRST TRUST DEED  
FUND, LLC,  
22 Debtor.

Hearing Date: May 31, 2007  
Hearing Time: 2:30 p.m.

23 In re:  
24 USA SECURITIES, LLC,  
25 Debtor.

- 26 Affects:  
27  All Debtors  
 USA Commercial Mortgage Company  
 USA Capital Realty Advisors, LLC  
 USA Capital Diversified Trust Deed Fund, LLC  
 USA Capital First Trust Deed Fund, LLC  
 USA Securities, LLC  
28

1 I, DONNA CANGELOSI, being first duly sworn, do depose and say under the penalty of  
2 perjury:

3 1. I am an investor in certain loan brokered by USA Commercial Mortgage Company,  
4 and am the chairperson of the Lenders Protection Group (the "LPG") and support moving loan  
5 servicing to a new loan servicer.

6 2. I have knowledge of and am competent to testify to the matters stated herein.

7 3. On or about February 16, 2007, I received a press release issued by Compass  
8 Partners ("Compass"), a copy of which is attached hereto as Exhibit A, in which Compass  
9 stated that the actual value of the assets purchased from USACM and FTDF was more than  
10 \$150 million.

11 4. Upon request of the LPG and other direct lenders, Compass has refused to  
12 disclose any compensation they are receiving or have received for their services under the  
13 Loan Servicing Agreements.

14 5. Neither I, nor any other member of the LPG, executed a written extension  
15 of their USACM powers of attorney in favor of Compass.

16 6. In the three months that have passed since Compass closed on the asset  
17 purchase transaction, LPG members have received only a total of seven (7) individual loan  
18 status reports, but has provided no loan summaries or cash collection reports.

19 7. Compass has taken the position that it is entitled to be paid default interest  
20 and other fees, prior to Direct Lenders being paid principal and interest, which is in direct  
21 conflict with the terms of the promissory notes and other loan documents. *See Email from*  
22 *Compass*, attached hereto as Exhibit B.

23 8. On May 9, 2007, the State of Nevada, Division of Mortgage Lending,  
24 entered a formal *Order Imposing Fine And Order To Cease And Desist And Notice of Right*  
25 *To Request Hearing*, pursuant to which Compass was ordered to cease and desist all  
26 mortgage lending/agent activities in Nevada, a copy of which is attached hereto as Exhibit  
27 C. Compass has never notified direct lenders of their move to New York, leaving  
28 telephone calls unanswered, email with no response and failing to show up for conference

1 calls they scheduled with direct lenders.

2 9. Based on NAC 645B.073, and the various acts on Compass, and Compass  
3 alone, Direct Lenders constituting over 51% of the beneficial interests in loans serviced  
4 by Compass have executed written elections to: (1) terminate any rights that Compass may  
5 have to service their various Loan; and (2) to appoint an alternate servicing agent for  
6 loans. *See Exhibit D, hereto, which summarizes the elections to terminate Compass, which*  
7 *are too voluminous to attach to this Declaration.* Specifically **60%** of all outstanding  
8 beneficial interests, and **62%** of the total number of direct lenders executed written  
9 elections to terminate Compass.

10 10. On May 3, 2007, Compass filed a lawsuit against six (6) direct lenders/LPG  
11 members in the District Court for the State of Nevada, County of Clark as Case No. 07-A-  
12 540604-C, which sought damages and injunctive relief against those direct lenders based  
13 on their communications with fellow direct lenders about Compass. A copy of the  
14 Complaint is attached hereto as Exhibit E.

15 11. On May 18, 2007, Compass filed a lawsuit against me in the District Court  
16 for the State of Nevada, County of Clark as Case No. 07-A-541428-C, which sought  
17 damages and injunctive relief her based on her communications with fellow direct lenders.  
18 A copy of the Complaint is attached hereto as Exhibit F.

19 12. On May 18, 2007, the direct lenders sent Notices of Termination to Compass  
20 and its attorneys, which were delivered on May 21, 2007. A sample copy of a Notice of  
21 Declaration, which is identical to all other Notices, is attached to the Declaration of Donna  
22 Cangelosi as Exhibit G.

23 13. On May 18, 2007, the direct lenders also sent Notices To Borrowers  
24 informing them that Compass had been terminated as loan servicer and directing them to  
25 forward future payments to direct lenders new loan servicer, as permitted in the  
26 promissory notes and loan documents between direct lenders and borrowers.

27 14. On May 21, 2007, various direct lenders filed a *Complaint For Declaratory*  
28 *Relief and Damages* in the United States District Court, District of Nevada, as case No.

1 07-CV-0224-ECR-VAC (the “District Court Action”). That District Court Action seeks  
2 declaratory relief regarding certain post-confirmation rights of direct lenders under the  
3 Loan Servicing Agreements and damages against Compass and other parties, based on  
4 their post-confirmation conduct and actions. A copy of the Complaint is attached hereto  
5 as Exhibit H.

6 15. On May 23, 2007, Compass voluntarily dismissed its state court action  
7 against LPG members and Cangelosi. *See Exhibit I*, hereto.

8 16. On May 25, 2007, after abandoning its State Court cases two (2) days prior,  
9 Compass filed its instant Motion in this Court. I hereby swear under penalty of perjury  
10 that the assertions of this Declaration are true.

11 DATED: May 30, 2007

12 /s/ Donna Cangelosi  
13 Donna Cangelosi  
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6 Attorney for Lenders Protection Group and  
7 Donna Cangelosi

8 UNITED STATES BANKRUPTCY COURT  
9 DISTRICT OF NEVADA

10 —ooOoo—

11 In Re:  
12 USA COMMERCIAL MORTGAGE  
COMPANY,  
13 Debtor.

Case Nos.:  
BK-S-06-10725-LBR  
BK-S-06-10726-LBR  
BK-S-06-10727-LBR  
BK-S-06-10728-LBR  
BK-S-06-10729-LBR

14 In Re:  
15 USA CAPITAL REALTY ADVISORS,  
LLC,  
16 Debtor.

JOINTLY ADMINISTERED  
Chapter 11

17 In Re:  
18 USA CAPITAL DIVERSIFIED TRUST  
DEED FUND, LLC,  
19 Debtor.

**DECLARATION OF ROBERT BENDER  
IN SUPPORT OF OPPOSITION TO  
EMERGENCY MOTION OF  
COMPASS FINANCIAL PARTNERS  
LLC FOR ORDER PURSUANT TO 11  
USC §§ 105 AND 1141 ENFORCING  
CONFIRMATION ORDER AND FOR  
CIVIL CONTEMPT SANCTIONS**

20 In re:  
21 USA CAPITAL FIRST TRUST DEED  
FUND, LLC,  
22 Debtor.

Hearing Date: May 31, 2007  
Hearing Time: 2:30 p.m.

23 In re:  
24 USA SECURITIES, LLC,  
25 Debtor.

26 Affects:  
27  All Debtors  
 USA Commercial Mortgage Company  
 USA Capital Realty Advisors, LLC  
 USA Capital Diversified Trust Deed Fund, LLC  
 USA Capital First Trust Deed Fund, LLC  
 USA Securities, LLC

1 I, ROBERT BENDER, being first duly sworn, do depose and say under the penalty of  
2 perjury:

3 1. I am an investor in certain loans brokered by USA Commercial Mortgage Company,  
4 including the loan commonly known as the Standard Property Loan. I have a \$250,000 principal  
5 investment in the Standard Property Loan, which at all times relevant hereto had a total outstanding  
6 principal balance of \$9,640,000.

7 2. I have knowledge of and am competent to testify to the matters stated herein, except  
8 for those matters stated on information and belief and as to those matters I believe them to be true.

9 3. I am informed and believe that prior to Compass Partners taking over as loan  
10 servicer, Spencer Judd, attorney for direct lenders in the Standard Property Loan, was in negotiations  
11 with the Standard Property borrower for repayment of the Standard Property Loan. In this regard,  
12 I was informed by Mr. Judd that Standard Property was willing to offer to pay direct lenders 100%  
13 of their principal investment (i.e. \$9,640,000) in full satisfaction of the Loan.

14 4. Thereafter, but prior to Compass taking over as servicer, I contacted Mr. George  
15 Venturela, the borrower on the Standard Property Loan, who informed me that he was negotiating  
16 with Compass, not USACM, regarding an offer to payoff the loan.

17 5. On or about February 2, 2007, Compass sent a letter to direct lenders, which sought  
18 investors' approval to accept 90% of their principal investment in full satisfaction of the Standard  
19 Property Loan, a copy of which is attached as Exhibit A. This letter greatly concerned me because  
20 I knew the borrower was willing to pay 100% of principal based upon information provided by our  
21 counsel.

22 6. In response to the February 2, 2007, letter from Compass, I and other direct lenders  
23 rejected the 90% payoff communicated by Compass. In this regard, I am informed and believe that  
24 Counsel for direct lenders in the Standard Property Loan sent a letter to Compass demanding that  
25 Compass accept the payoff of 100% and waive all other accrued interest and fees. In addition, I am  
26 informed and believed that letter informed Compass that they would be terminated if such an offer  
27 was not accepted.

28 7. Thereafter, on or about March 7, 2007, Compass sent a letter to all direct lenders in

1 the Standard Property Loan, a copy of which is attached as Exhibit B. In this letter, Compass sought  
2 the approval of 100% of the direct lenders in the Standard Property Loan of an agreement Compass  
3 reached with Standard Property to pay off the Standard Property Loan. According to that letter, the  
4 terms of the payoff were:

- 5 i. The Direct Lenders in the loan receive 100% of their unpaid Standard
- 6 Property Principal Balance; and
- 7 ii. The Direct Lenders do not receive any accrued interest.

8 8. In reliance on the representations of Compass, I and other direct lenders constituting  
9 100% of the beneficial interest in the Standard Property Loan approved the payoff in accordance with  
10 the specific terms of the March 7, 2007.

11 9. I am informed and believed that on or about March 13, 2007, Compass issued a  
12 Payoff Statement to Standard Property (the "Standard Property Payoff Statement"), a copy of which  
13 is attached as Exhibit C. The Standard Property Payoff Statement directs Standard Property to make  
14 a payoff, as of March 15, 2007, in the amount of \$10,499,068 with a per diem interest accrual of  
15 \$2,205.74 for every day after March 15, 2007. The \$10,499,068.15 payoff consisted of:

- 16 i. Standard Property Principal Balance: \$9,640,000.00
- 17 ii. Late Fees: \$ 47,694.43
- 18 iii. Other Fees: \$ 267,164.11
- 19 iv. Default Interest \$ 544,509.60

20 10. The Standard Property Payoff Statement revealed that the borrower had agreed to pay  
21 significantly more than just 100% of the \$9,640,000 principal loan balance. It revealed Compass had  
22 a secret agreement with Standard Property, undisclosed to the Standard Property Loan Direct  
23 Lenders, whereby Compass received Late Fees, Other Fees and Default Interest from Standard  
24 Property, without collecting accrued contractual interest owed to the Direct Lenders.

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