

1 Louis E. Garfinkel, Esq.  
Nevada Bar. No. 3416  
2 Brent C. Eckersley, Esq.  
Nevada Bar No. 6962  
3 LEVINE, GARFINKEL & KATZ  
4 3441 S. Eastern Avenue  
Suite 600  
5 Las Vegas, Nevada 89169  
Telephone: (702) 735-0451  
6 Facsimile: (702) 735-2198

7 William A. Brewer III, Esq.  
Texas Bar No. 02967035  
8 Michael J. Collins, Esq.  
Texas Bar No. 00785495  
9 BICKEL & BREWER  
10 1717 Main Street, Suite 4800  
Dallas, Texas 75201  
11 Telephone: (214) 653-4000  
Facsimile: (214) 653-1015

12 *Attorneys For Proposed Intervenors Cross Equities*  
13 *Partners, LLC, Cross Servicing Group, LLC,*  
*And Cross Litigation Management Company, LLC*

14  
15 **UNITED STATES DISTRICT COURT**  
16 **DISTRICT OF NEVADA**

17 **3685 SAN FERNANDO LENDERS, LLC,**  
18 **et al.,**

19 **Plaintiffs,**

20 **COMPASS USA SPE LLC, et al.,**

21 **Defendants.**

**Case No. 2:07-CV-892-RCJ-GWF-BASE**  
**Case No. 3:07- CV-241-RCJ-GWF**

**Bankruptcy Case No. BK-S-06-10725 LBR**  
**[Chapter 11]**

**MOTION OF PROPOSED INTERVENORS**  
**CROSS EQUITIES PARTNERS, LLC,**  
**CROSS SERVICING GROUP, LLC, AND**  
**CROSS LITIGATION MANAGEMENT**  
**COMPANY, LLC TO INTERVENE AND**  
**TO REHEAR AND VACATE ORDER**  
**DATED MAY 14, 2008**

**TABLE OF CONTENTS**

	<u>Page</u>
I. PRELIMINARY STATEMENT .....	1
II. PROCEDURAL BACKGROUND.....	2
III. FACTUAL BACKGROUND .....	3
A. Cross And Its Business .....	3
B. The Direct Lenders’ Initial Contact With Cross .....	4
1. Cross was first contacted by the Direct Lenders in December 2007.....	4
2. The Direct Lenders ask Cross to provide additional funding proposals aimed at facilitating settlement of the Direct Lenders’ lawsuit against Compass.....	5
C. The Direct Lenders Request Litigation Management And Alternative Loan Servicing Proposals From Cross.....	7
1. The litigation funding and management proposal .....	8
2. The loan servicing proposal .....	10
3. Cross has fully and completely disclosed the terms of its litigation management and loan servicing proposals to the Direct Lenders.....	14
D. Each Direct Lender Must Consent To The Proposals From Cross, And Donna Cangelosi Is Not Being Compensated By Cross.....	15
IV. SUMMARY Of ARGUMENT .....	16
V. ARGUMENT AND AUTHORITIES.....	17
A. Cross Should Be Allowed To Intervene. ....	17
1. Applicable standards.....	17
2. Cross is entitled to intervene in this action. ....	17
B. The Order Should Be Vacated. ....	18
1. The Order should be vacated because the Court did not have jurisdiction over Cross. ....	18

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

2. The Order should be vacated because it violates Cross’s due process rights. ....19

3. The Order should be vacated because it is an improper mandatory injunction. ....20

4. The Order should be vacated because it is based on clearly erroneous findings of fact. ....23

VI. CONCLUSION AND REQUEST FOR RELIEF .....24

1 Proposed Intervenors Cross Equities Partners, LLC, Cross Servicing Group, LLC, And  
2 Cross Litigation Management Company, LLC (collectively "Cross") file this Motion To  
3 Intervene And To Rehear And Vacate Order Dated May 14, 2008 ("Motion").  
4

5 I.

6 **PRELIMINARY STATEMENT**

7 By order dated May 14, 2008, the Court purports to exercise jurisdiction over Cross, a  
8 non-party, and impose significant limitations and restraints on Cross to communicate and  
9 contract with other non-parties.<sup>1</sup> In particular, the Order purports to impose a mandatory  
10 injunction on Cross prohibiting Cross, a non-party, from communicating or contracting with any  
11 of the Direct Lenders,<sup>2</sup> also non-parties to this action. Cross respectfully submits that it should  
12 be allowed to intervene in this proceeding to protect its rights. In addition, the Order should be  
13 vacated because: (1) the Court did not have jurisdiction over Cross, (2) Cross was not provided  
14 with proper notice and opportunity to be heard, (3) the Order is an improper mandatory  
15 injunction, (4) the Order is based on erroneous findings of fact, and (5) Section 645B.073 of the  
16 Nevada Administrative Code specifically allows a lender to designate "a servicing agent or other  
17 person to act on the behalf of the holders of the beneficial interest in the loan" upon obtaining the  
18 consents of 51% of the beneficial interests in the loan.  
19  
20  
21  
22  
23

24  
25 <sup>1</sup> See Order Denying LLCs' Emergency Motion for Order Authorizing Encumbrance of Beneficial Interests  
("Order") (Doc. # 516).

26 <sup>2</sup> Throughout this Motion, the term "Direct Lenders" refers to the holders of beneficial interests under the  
27 deeds of trust or mortgages securing the obligations now being serviced by Compass and that are the subjects of this  
28 action.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**II.**

**PROCEDURAL BACKGROUND**

On April 21, 2008, Plaintiff LLCs<sup>3</sup> filed their Emergency Motion For Order Authorizing Encumbrances Of Beneficial Interests Pursuant To Preliminary Injunction Order (“Encumbrance Motion”).<sup>4</sup>

On April 24, 2008, defendants Compass Financial Partners LLC and Compass USA SPE LLC (collectively, “Compass”) filed their Response Of Compass To Emergency Motion For Order Authorizing Encumbrances Of Beneficial Interests Pursuant To Preliminary Injunction Order (“Response”).<sup>5</sup>

On Monday, April 28, 2008, the Court held a hearing and denied the Encumbrance Motion.

On April 30, 2008, Compass filed its [Proposed] Order Denying LLC’s Encumbrance Motion (“Proposed Order”).<sup>6</sup>

On May 7, 2008, Plaintiff LLCs objected to the proposed order submitted by Compass.<sup>7</sup>

On May 15, 2008, the Court entered the Order.

---

<sup>3</sup> Throughout this Motion, the term “Plaintiff LLCs” or “LLCs” refers to all plaintiff LLCs with the exception of Hesperia Lenders, LLC, and the two SVRB entities.

<sup>4</sup> See Encumbrance Motion (Doc. # 478).

<sup>5</sup> See Response (Doc. # 485).

<sup>6</sup> See Proposed Order (Doc. # 492).

<sup>7</sup> See Objection to Form of [Proposed] Order Denying LLCs’ Emergency Motion for Order Authorizing Encumbrance of Beneficial Interests (Doc. # 506).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

III.

**FACTUAL BACKGROUND**

Compass's Response is replete with mischaracterizations, misrepresentations, and misinformation about Cross. Cross seeks to set the record straight both about its business and its involvement with the Direct Lenders.

A. **Cross And Its Business**

Cross, which is based in Dallas, Texas, is a real estate equity placement, investment, loan portfolio servicing, and development firm founded by its principals Patrick T. Gillean, McAlan W. Duncan, and Cory Emerson (collectively, the "Principals").<sup>8</sup> Among them, they have years of experience in commercial real estate financing, acquisition, development, management, and disposition.<sup>9</sup> This expertise includes commercial loan portfolio servicing, which is provided through Cross Servicing Group, LLC ("Cross Servicing").<sup>10</sup>

The Principals of Cross have been involved in financing and loan resolution for distressed commercial real estate projects and loan portfolios for the last ten years.<sup>11</sup> They have been involved in a number of major markets in the United States.<sup>12</sup> As a result, Cross has the experience, expertise, and financial capacity to provide customized, innovative, and portfolio-wide solutions to owners of commercial real estate related investments.<sup>13</sup>

---

<sup>8</sup> See Declaration of McAlan W. Duncan in Support of Motion to Intervene and to Rehear and Vacate Order Dated May 14, 2008 ("Duncan Decl.") ¶¶ 4, 7, 8.

<sup>9</sup> See *id.* ¶ 5.

<sup>10</sup> See *id.* ¶ 7.

<sup>11</sup> See *id.* ¶ 6.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.* ¶ 7.

1 **B. The Direct Lenders' Initial Contact With Cross**

2 **1. Cross was first contacted by the Direct Lenders in December 2007.**

3 Cross was first approached by a representative of the Direct Lenders during the week of  
4 December 17, 2007, prior to the effective date of the Standstill Agreement.<sup>14</sup> Cross was told that  
5 the Direct Lenders had a pending action against their current servicer, Compass, seeking to  
6 terminate their loan servicing agreement (the "Lawsuit"), and that, if the termination was  
7 successful, the Direct Lenders would need funding to reimburse Compass for servicing advances  
8 and accrued fees.<sup>15</sup> Cross was also advised that Compass had failed to make property protection  
9 advances, and as result some of the underlying properties securing the loans were more than two  
10 years in arrears on property taxes.<sup>16</sup> Finally, Cross was told that many of the Direct Lenders  
11 were interested in selling their interests to obtain immediate liquidity.<sup>17</sup> Cross was, therefore,  
12 asked to provide proposals for financing, liquidity, and servicing solutions as an alternative to  
13 those being provided by Compass.<sup>18</sup>

14  
15  
16 Cross promptly conducted preliminary due diligence on the underlying loan assets held  
17 by the Direct Lenders and, on January 9, 2008, provided the Direct Lenders with a term sheet  
18 summarizing its proposals for: (1) servicing the loans if the Direct Lenders terminated Compass;  
19 (2) financing the ongoing maintenance of the underlying assets, and (3) providing liquidity to  
20 those Direct Lenders that wished to sell their interests in the short term.<sup>19</sup> This proposal included  
21

---

22 <sup>14</sup> See *id.* ¶ 13.

23 <sup>15</sup> See *id.* ¶ 14.

24 <sup>16</sup> See *id.* ¶ 15.

25 <sup>17</sup> See *id.* ¶ 16.

26 <sup>18</sup> See *id.* ¶ 17.

27 <sup>19</sup> See *id.* ¶ 18.

1 the stipulation that any future servicing of the loans by Cross Servicing would be sub-contracted  
2 to Midland Loan Services (“Midland”), one of the top rated servicers in the country.<sup>20</sup>

3  
4 **2. The Direct Lenders ask Cross to provide additional funding proposals aimed  
at facilitating settlement of the Direct Lenders’ lawsuit against Compass.**

5 It was not until after Cross submitted its initial term sheet to the Direct Lenders that it  
6 was first introduced, via telephone, to Donna Cangelosi.<sup>21</sup> On or about the first week of  
7 February 2008, Ms. Cangelosi contacted Cross and asked if Cross would be willing to advance  
8 the Direct Lenders approximately \$20 million.<sup>22</sup> Cross was informed that the funds would be  
9 used to facilitate a settlement of the lawsuit, *i.e.*, paying Compass the full amount it was  
10 currently owed for advances and service fees.<sup>23</sup> The Direct Lenders would then be free to  
11 transfer loan servicing to Midland through Cross Servicing.<sup>24</sup> Cross agreed to this proposal.<sup>25</sup>  
12 Several days later, Ms. Cangelosi again contacted Cross, stating that she was in New York, New  
13 York, attending meetings with Compass aimed at settling the Lawsuit.<sup>26</sup> Ms. Cangelosi asked  
14 Cross if, in addition to providing funds permitting the Direct Lenders to pay off Compass’s  
15 outstanding advances and service fees, it would further facilitate settlement of the Lawsuit by  
16 purchasing all of the assets of the First Trust Deed Fund (“FTDF”) from Compass.<sup>27</sup> Cross  
17  
18  
19  
20

---

21 <sup>20</sup> *See id.*

22 <sup>21</sup> *See id.* ¶ 19.

23 <sup>22</sup> *See id.* ¶ 20.

24 <sup>23</sup> *See id.*

25 <sup>24</sup> *See id.*

26 <sup>25</sup> *See id.*

27 <sup>26</sup> *See id.* ¶ 21.

28 <sup>27</sup> *See id.*

1 agreed to this proposal, but was subsequently informed that a settlement of the Lawsuit could not  
2 be reached at that time.<sup>28</sup>

3 Cross was then asked by the Direct Lenders to attend the court-ordered mediation in the  
4 Lawsuit held in February 2008.<sup>29</sup> It was believed that Cross's presence would facilitate  
5 settlement because Cross was willing to provide the necessary funding to (1) permit the Direct  
6 Lenders to pay Compass its outstanding advances and service fees, and (2) purchase the assets of  
7 the FTDF.<sup>30</sup> Indeed, at the mediation, counsel for Direct Lenders made it clear that they wanted  
8 Cross in attendance at the mediation for two reasons.<sup>31</sup> First, Cross was to provide the Direct  
9 Lenders with the necessary funding to effectuate a settlement to the extent a settlement could be  
10 reached.<sup>32</sup> Second, if a settlement could not be reached, Cross would be asked to provide  
11 litigation funding because Compass sued approximately 39 individual Direct Lenders (many of  
12 which were served during the standstill period) and the time to answer the counterclaims would  
13 begin the moment the standstill period expired.<sup>33</sup>

14  
15  
16 With full knowledge of Cross's attendance at mediation, no objections were raised by  
17 Compass, or any of the other parties, to Cross's attendance at the mediation.<sup>34</sup> It was at this  
18 mediation that Cross representatives first met Ms. Cangelosi in person.<sup>35</sup> During the first day of  
19

---

20 <sup>28</sup> *See id.*

21 <sup>29</sup> *See id.* ¶ 22.

22 <sup>30</sup> *See id.*

23 <sup>31</sup> *See id.* ¶ 23.

24 <sup>32</sup> *See id.*

25 <sup>33</sup> *See id.*

26 <sup>34</sup> *See id.* ¶ 24.

27 <sup>35</sup> *See id.* ¶ 25.

28

1 the mediation, it became clear to Cross that Compass would never agree to a settlement that  
2 provided for its removal as the loan servicer and as a result the prospects for the parties agreeing  
3 to a mutually agreeable settlement seemed highly unlikely.<sup>36</sup> Accordingly, Cross did not attend  
4 the second day of the mediation held in February 2008, or the subsequent mediation held in  
5 March 2008.<sup>37</sup>

6  
7 **C. The Direct Lenders Request Litigation Management And Alternative Loan**  
8 **Servicing Proposals From Cross.**

9 Later in March 2008, Cross was informed by numerous Direct Lenders that they believed  
10 Compass's pending settlement proposal was unacceptable.<sup>38</sup> Cross was also told that, because a  
11 great majority of the Direct Lenders did not wish to continue with Compass as their loan  
12 servicer, it was highly unlikely that any settlement of the Lawsuit could be reached given  
13 Compass's insistence that it remain the servicer.<sup>39</sup> Finally, Cross was informed that the  
14 Standstill Agreement in the Lawsuit was set to expire on April 30, 2008, and that the LLCs'  
15 current legal counsel, Fulbright & Jaworski, would be withdrawing as counsel for the LLCs if a  
16 settlement was not reached.<sup>40</sup> Accordingly, time was of the essence for the Direct Lenders to put  
17 together a plan of action in the, seemingly likely, event that a settlement with Compass could not  
18 be achieved.<sup>41</sup>

19  
20 Accordingly, these Direct Lenders asked Cross to put together yet another proposal  
21 aimed at providing them with funding to continue the Lawsuit should a settlement not be

---

22 <sup>36</sup> See *id.* ¶ 26.

23 <sup>37</sup> See *id.*

24 <sup>38</sup> See *id.* ¶ 27.

25 <sup>39</sup> See *id.* ¶ 28.

26 <sup>40</sup> See *id.* ¶ 29.

27 <sup>41</sup> See *id.*

1 reached.<sup>42</sup> In addition, the Direct Lenders asked Cross to prepare a proposal for servicing their  
2 loans in the event that fifty-one percent (51%) of the lenders on any particular loan elected to  
3 exercise their rights under Nevada law, N.A.C. § 645B.073(1), to terminate Compass as the  
4 servicer.<sup>43</sup> Cross did so.<sup>44</sup>

5  
6 **1. The litigation funding and management proposal**

7 Cross's litigation funding and management proposal provides, among other things, that  
8 Cross will: (i) fully fund the continued prosecution of the Direct Lenders' contractual and tort  
9 claims against Compass; (ii) fully fund the defense of all pending counterclaims by Compass  
10 against individual Direct Lenders, as well as fund the defense of any future counterclaims filed  
11 against the Direct Lenders in the Lawsuit; (iii) retain counsel to represent the Direct Lenders in  
12 the Lawsuit; and (iv) manage any continued litigation on a day-to-day basis as the agent of the  
13 Direct Lenders.<sup>45</sup>

14  
15 The proposal also unambiguously commits Cross to taking the same position in the  
16 Lawsuit as to the "waterfall" issue that has been taken by the USA Commercial Mortgage  
17 Company ("USACM") Liquidating Trust in the Hotel Marquis bankruptcy matter, which is  
18 governed by the very same form of LSA that was assigned to Compass.<sup>46</sup> Cross takes the  
19

---

20 <sup>42</sup> See *id.* ¶ 30.

21 <sup>43</sup> See *id.* ¶ 31.

22 <sup>44</sup> See *id.*

23 <sup>45</sup> See *id.* ¶ 32.

24 <sup>46</sup> See *In re USA Commercial Mortgage Co., et al.*, Case No. 06-10725, in the United States Bankruptcy  
25 Court, District of Nevada. On February 6, 2008 the Bankruptcy Court (with Judge Riegle presiding) entered an  
26 order in the Hotel Marquis bankruptcy case, confirming that the lenders were to receive 100% of principal and  
27 interest before default interest and late fees were to be paid. Under the very same form of LSA, Compass contends  
28 that it is entitled to receive millions of dollars in default interest, late fees, and extension fees before the lenders  
receive their principal and interest. As a result, a lender that invested in the Hotel Marquis loan would receive vastly  
different treatment than if the same lender invested in a loan whereby he had the misfortune of having Compass as  
their servicer even though both loans are governed by the exact same LSA.

1 position that, under the current loan servicing agreements (“LSAs”) held by Compass, the Direct  
2 Lenders are to receive 100% of their principal and interest payments before the loan servicer is to  
3 be paid non-servicing fees, such as default interest.<sup>47</sup>

4  
5 Under the proposal, Cross’s litigation funding commitment is to be secured by one of two  
6 options to be taken by the Direct Lenders at their option. Under the “fixed-pledge option,” a  
7 Direct Lender shall pledge 2.5% of the unpaid balance of its loan regardless of the outcome of  
8 the Lawsuit (“Fixed-Pledge Option”).<sup>48</sup> Cross, however, was also mindful that a significant  
9 number of Direct Lenders had expressed dissatisfaction with their past payment for legal services  
10 in the Lawsuit that were not, in any way, tied to the performance of the law firm in the  
11 litigation.<sup>49</sup> Accordingly, Cross’s proposal also provided a “success fee option” to the Direct  
12 Lenders as an alternative. Under this option, a Direct Lender agrees to pledge 5% of the unpaid  
13 balance of its loan, but such amount is payable only if Cross is successful in obtaining a ruling in  
14 the Lawsuit that the Direct Lenders are to be paid 100% of their principal and interest on each  
15 loan before Compass is paid default fees, late fees, and other non-servicing fees (“Success Fee  
16 Option”).<sup>50</sup>

17  
18 Finally, in addition to the pledged amounts, the Direct Lenders agreed to share with Cross  
19 50% of any recovery received from Compass in the Lawsuit in the form of tort damages,  
20  
21

22 <sup>47</sup> See Duncan Decl. ¶ 33.

23 <sup>48</sup> See Pledge Agreement dated April 8, 2008 (“Pledge Agreement”), attached as Ex. B to Declaration of  
24 Gabriel Weaver (“Weaver Decl.”) (Doc. # 486-3).

25 <sup>49</sup> See Duncan Decl. ¶ 36.

26 <sup>50</sup> See Pledge Agreement ¶ 1. Compass erroneously contends that the terms of the Success Fee Option are  
27 ambiguous. See Response at 14-15. The terms of the Pledge Agreement in this regard are clear – Cross cannot  
28 collect the “success fee” if the Court determines in the Lawsuit that Compass is entitled to collect non-servicing  
related fees (e.g. default interest and late fees) before 100% of the principal and interest on a serviced loan is paid.

1 extracontractual awards, forfeitures, and disgorgement.<sup>51</sup> Of course, such “awards” do not  
2 include any principal and interest due a Direct Lender under the current LSAs and loan  
3 documents.<sup>52</sup>

4  
5 **2. The loan servicing proposal**

6 Cross Servicing’s proposed loan servicing agreement seeks to provide the Direct Lenders  
7 with a more cost-effective and stable alternative to the services, or lack thereof, that they are  
8 receiving from Compass. One of the most important features of Cross Servicing’s proposal is  
9 that it will sub-contract the actual loan servicing to Midland, one of the nation’s largest and  
10 highest rated commercial real estate loan servicers.<sup>53</sup> This will obviate many of the problems  
11 that the Direct Lenders have told Cross they are experiencing with Compass, such as unreturned  
12 phone calls, lack of regular financial disclosures, failure to provide acceptable loan resolution  
13 alternatives, and failure to pay property taxes on the underlying assets.<sup>54</sup> While Midland would  
14

15  
16 <sup>51</sup> See Duncan Decl. ¶ 37. Compass erroneously contends that any such recovery by Cross will be in  
17 addition to the recovery of 30% of such awards by FDH Asset Resolution Company, d/b/a FDH Management  
18 (“FDH”). See Response at 13-14. The Election to Exercise Rights, to be signed by each Direct Lender, clearly  
19 specifies that the Direct Lender, in choosing to appoint Cross as the new litigation manager for the Lawsuit, thereby  
20 also “revokes and withdraws any . . . litigation rights previously granted to FDH . . .” See Election to Exercise  
21 Rights To: (i) Terminate Existing Servicer and Litigation Manager & (ii) Designate New Litigation Manager With  
22 Power of Attorney (“Election of Rights”) dated April 28, 2008, attached as Ex. H to Weaver Decl. (Doc. # 486-9).

23 <sup>52</sup> As part of the Compass’s attempt to discredit the Cross proposal and to undermine the Direct Lenders’  
24 ability to determine the best proposal for their loans, Compass disseminated false and misleading information to the  
25 Direct Lenders claiming that Cross’s recovery based on tort claims would be taken out of the Direct Lenders’  
26 principal and interest.

27 <sup>53</sup> See Duncan Decl. ¶ 38; see also Servicing Agreement ¶ 5; Cross Proposal: Frequently Asked Questions  
28 (“FAQ”) at Nos. 6, 14, attached as Ex. G to Weaver Decl. (Doc. # 486-8). In its Response, Compass alleges that  
Cross has not actually obligated itself to retain Midland to service the Direct Lenders’ loans. See Response at 11-12.  
As proof of this assertion, Compass points to Paragraph 5 of the Servicing Agreement, which states that Cross  
“may” delegate loan servicing to sub-servicer, “including but not limited to Midland Loan Services . . .” As stated  
in the FAQ document distributed to the Direct Lenders, however, Cross Servicing has, in fact, obtained a  
commitment from Midland to service the loans at issue in the Lawsuit. See FAQ at Nos. 6, 14. The Servicing  
Agreement, however, is a binding contract with the Direct Lenders, and because Cross cannot absolutely guarantee  
that Midland will not, in the future, decline to further act as the sub-servicer of the loans, the language of Paragraph  
5 is necessary and appropriate.

<sup>54</sup> See Duncan Decl. ¶ 38.

1 normally not agree to service a loan portfolio with nearly 3,000 fractional owners, it has agreed  
2 to do so in this case because of the Cross Principals' long-standing relationship with Midland,  
3 and Cross's willingness to handle all direct communications with the Direct Lenders about their  
4 loans.<sup>55</sup> The proposal also obligates Cross to provide the Direct Lenders with written quarterly  
5 status reports, which will include monthly account statements detailing the fees and expenses  
6 incurred and sums collected for each loan.<sup>56</sup>

7  
8 As compensation for its services, Cross would receive an annual Servicing Fee of 2% of  
9 the unpaid principal loan balance, to be accrued until the final disposition of the loan, and an  
10 Asset Disposition Fee of 3% of the actual proceeds recovered on a loan.<sup>57</sup> These amounts are in  
11 contrast to the 1.5-3% annual servicing fees, and newly assessed 9% asset disposition fees, being  
12 demanded by Compass.<sup>58</sup> As a result, Compass's "settlement" proposal would provide Compass  
13 with an additional 9% in servicing fees from the Direct Lenders which would make Compass's  
14 total servicing fees 10.5 - 12% (assuming a payoff of a loan at par) while the LSAs limit the  
15 servicer's fees to 1.5 - 3%.<sup>59</sup> Another important difference between Cross's proposal and the  
16 current litigation position of Compass is that Cross expressly acknowledges that the loan servicer  
17  
18

19 \_\_\_\_\_  
<sup>55</sup> See *id.*

20 <sup>56</sup> See Servicing Agreement ¶¶ 2(a)-(b).

21 <sup>57</sup> See Commercial Real Estate Loan Servicing Agreement ("Servicing Agreement") ¶ 3(b)-(c), attached as  
22 Ex. C to Weaver Decl. (Doc. # 486-4). Cross is also entitled to an Asset Disposition Fee of 3% of the outstanding  
23 loan principal balance of the loan if a majority of the Direct Lenders on a loan terminate the Servicing Agreement  
without cause. *Id.* ¶ 4(b).

24 <sup>58</sup> In its Response to the Emergency Motion, Compass alleges that the Direct Lenders have not been told  
25 that such fees will be collected in priority to payments of principal and interest. See Response at 2. That allegation  
26 is false. The Servicing Agreement clearly states that the Servicing and Asset Disposition Fees – as well as Property  
Protection Advances and reimbursements to Compass that are required by a Court Order – are to be paid "from the  
first proceeds recovered on the Loan" or "in priority to lender's beneficial interest." See Servicing Agreement ¶¶  
3(a)-(d).

27 <sup>59</sup> See Duncan Decl. ¶ 40.  
28

1 cannot collect any default interest, late fees, or other non-servicing fees until after the Direct  
2 Lenders receive 100% of their principal and interest, as well as all the accrued contract rate of  
3 interest on a loan.<sup>60</sup>

4 Specifically, Cross proposes to offer the following services to the Direct Lenders:

5  
6 Development of a comprehensive due diligence plan that provides a customized solution  
7 for each loan asset, and which is delivered by e-mail to each lender when it is  
8 ready for publication;

9 Collection of all pertinent data and documents;

10 Detailed property inspections and appraisals;

11 Compilation of relevant market data (including historical performance of similar assets);

12 Historical comparable data analysis for each property;

13 Collection and analysis of broker interviews and market trends;

14 Investigation of the credit quality and financial performance of borrowers, principals, and  
15 major tenants;

16 Completion of a detailed loan file review and property valuation model designed to  
17 determine underlying collateral value and projected performance of each asset;

18 Recommendations as to exit strategies, resolution timing, anticipated costs of resolution,  
19 and loss modeling;

20 Compilation of such information into a comprehensive final package customized to each  
21 lender's particular requirements, and transmitted electronically;

22 A customized servicer advance funding program, which is immediately available to meet  
23 cash needs for property taxes, property insurance, property assessments, and  
24 borrower/property litigation; and

25 Comprehensive management and communication of the entire process to the direct  
26 lenders in order to ensure desired results within the specified and agreed-upon  
27 timeframe. This includes conference calls on a loan-by-loan basis, and monthly  
28 reports delivered to each direct lender on a loan.<sup>61</sup>

---

<sup>60</sup> See Servicing Agreement, ¶ 3(e).

<sup>61</sup> See *id.* ¶ 10.

1 In addition, in order to provide Direct Lenders with the highest level of loan servicing  
2 expertise, Cross Servicing intends to retain Midland as its sub-servicing agent for portfolio  
3 work.<sup>62</sup> Midland, which is a subsidiary of PNC Financial Services Group, is one of the largest  
4 commercial real estate loan servicers in the United States, with a portfolio totaling more than  
5 \$266 billion as of March 31, 2008.<sup>63</sup> Midland is currently the only commercial real estate loan  
6 servicer in the United States that both Fitch Ratings and Standard & Poor's have given their  
7 highest master, primary, and special service ratings.<sup>64</sup>

9 Moreover, Cross is committed to operating at the highest level of fiduciary standards.<sup>65</sup>  
10 To that end, it intends to work strictly on an "open book" basis, meaning that the Direct Lenders  
11 will always have complete access to any and all information about the loans being serviced.<sup>66</sup>

12 Finally, Cross's proposal would not become effective until: (i) 51% of the Direct  
13 Lenders owning an initial beneficial interest in a particular loan elect to exercise their right,  
14 under N.A.C. § 645B.073(1), to lawfully terminate Compass as the servicer; and (ii) this Court  
15 approves the termination.<sup>67</sup> Accordingly, Cross's proposal does not interfere with any legal or  
16 contractual rights that Compass may have as the current servicer, or as the purchaser of the assets  
17 of the USACM and the FTDF.  
18  
19  
20

---

21 <sup>62</sup> See *id.* ¶ 11.

22 <sup>63</sup> See [http://www.midlandls.com/mdh/web/MLSWeb.nsf/webpages/about\\_overview.htm](http://www.midlandls.com/mdh/web/MLSWeb.nsf/webpages/about_overview.htm), (last visited May  
23 5, 2008).

24 <sup>64</sup> See [http://www.midlandls.com/mdh/web/MLSWeb.nsf/webpages/about\\_rating.htm](http://www.midlandls.com/mdh/web/MLSWeb.nsf/webpages/about_rating.htm), (last visited May 5,  
2008).

25 <sup>65</sup> See Duncan Decl. ¶ 12.

26 <sup>66</sup> See *id.*

27 <sup>67</sup> See Servicing Agreement at Recital C.  
28

1           **3. Cross has fully and completely disclosed the terms of its litigation**  
2           **management and loan servicing proposals to the Direct Lenders.**

3           In its Response, Compass repeatedly makes general allegations that the terms of the  
4 Cross proposals for litigation funding and management, and alternative loan servicing, have not  
5 been properly disclosed to the Direct Lenders, or that they have been misrepresented. Those  
6 contentions are completely unfounded.

7           The terms of Cross's litigation management proposal were detailed in plain, easy-to-  
8 understand language, in documents that were provided directly to all Direct Lenders in April  
9 2008.<sup>68</sup> Cross also provided the Direct Lenders with a Letter of Intent summarizing the terms of  
10 its proposal, as well as a seven-page Frequently Asked Questions document ("FAQ") covering  
11 all aspects of the proposal in detail.<sup>69</sup> These documents were also posted on the website of FDH  
12 Management so that Direct Lenders could also have online access to the information.<sup>70</sup> In  
13 addition, the principals of Cross participated in numerous telephone conference calls, direct calls,  
14 e-mail, and other direct communications with Direct Lenders, including lenders who are not  
15 members of the LLCs that are parties to the Lawsuit, that had questions about the proposal.<sup>71</sup>

16           Finally, Cross is fully aware of the Preliminary Injunction Order. Accordingly, while the  
17 documents noted above have been made available to the Direct Lenders for their review, no  
18 lender has yet been asked to sign any Pledge Agreement, Servicing Agreement, or Election of  
19  
20  
21  
22  
23

24           <sup>68</sup> See Duncan Decl. ¶ 43; see also Pledge Agreement; Election to Exercise Rights.

25           <sup>69</sup> See Letter from McAlan Duncan to Donna Cangelosi dated April 8, 2008, attached as Ex. A to Weaver  
26 Decl. (Doc. # 486-2); see also FAQ.

27           <sup>70</sup> See Duncan Decl. ¶ 45.

28           <sup>71</sup> See *id.* ¶ 46.

1 Rights.<sup>72</sup> Thus, to the extent the Court has any concerns regarding the disclosures made in the  
2 documents, they can be addressed before they are executed by the Direct Lenders.

3 **D. Each Direct Lender Must Consent To The Proposals From Cross, And Donna**  
4 **Cangelosi Is Not Being Compensated By Cross.**

5 Compass's Response also implies that Ms. Cangelosi will somehow receive financial  
6 benefits from Cross's pending proposals.<sup>73</sup> That is simply not the case. Cross has never agreed  
7 to compensate Ms. Cangelosi, or FDH, in any way.<sup>74</sup> Also, neither the proposed litigation  
8 management nor loan servicing agreements provide for any compensation to Ms. Cangelosi, or  
9 any entity related to her.<sup>75</sup>

10  
11 Moreover, Cross is mindful of the Court's previously expressed concerns with the  
12 formation and structure of the LLCs that are parties to the Lawsuit, and which are made up of the  
13 different Direct Lenders that have beneficial interests in the separate loans now at issue.  
14 Accordingly, the various agreements purporting to make Cross either the litigation manager of  
15 the Lawsuit on behalf of the Direct Lenders, or the replacement for Compass as the loan servicer,  
16 are required to be executed by each Direct Lender, and not the Managing Member of the LLCs.<sup>76</sup>  
17 Accordingly, Cross is offering to enter into direct contractual relationships, as litigation manager  
18 and/or loan servicer, with each individual Direct Lender. Ms. Cangelosi, FDH, and the LLCs  
19 will not be parties to these contracts. Thus, Compass's contention that the proposals seek to  
20

21 <sup>72</sup> See *id.* ¶ 48.

22 <sup>73</sup> See Response at 2, 13-16.

23 <sup>74</sup> See Duncan Decl. ¶ 49.

24 <sup>75</sup> See *id.* ¶ 50. The Direct Lenders did participate in a vote as to whether they would accept the pending  
25 settlement offer from Compass, or instead pursue the litigation management and loan servicing proposals put  
26 forward by Cross. Of the Direct Lenders that voted, approximately 96% voted to reject the Compass offer and  
27 accept Cross's proposals. See *id.* Such a change will not occur, however, until this Court approves it.

28 <sup>76</sup> See Servicing Agreement, Pledge Agreement, and Election of Remedies; see also Designation of  
Servicing Agent, attached as Ex. K to Weaver Decl. (Doc. # 486-12).

1 “allo[w] Ms. Cangelosi further to substantially encumber Direct Lenders’ beneficial interests” is  
2 patently false.<sup>77</sup>

3  
4 **IV.**

5 **SUMMARY OF ARGUMENT**

6 Cross should be allowed to intervene for two reasons. First, Cross should be allowed to  
7 intervene as a matter of right because the Court’s Order severely impedes Cross’s ability to  
8 protect its interests, the existing parties to this action will not protect Cross’s rights, and this  
9 request to intervene is timely. Second, and in the alternative, Cross should be allowed to  
10 intervene on a permissive basis because the Order purports to impose significant restrictions on  
11 Cross, but Cross has not had the opportunity to contest those provisions or otherwise defend  
12 itself.

13  
14 The Court should vacate the Order for four reasons. First, the Court did not have  
15 jurisdiction over Cross and, therefore, did not have jurisdiction to prohibit Cross from speaking  
16 or contracting with the Direct Lenders. Second, the Order violates Cross’s rights to procedural  
17 due process under the Fifth Amendment to the United States Constitution because it imposes  
18 significant limitations and restrictions on Cross’s rights to contract and access to the courts even  
19 though Cross was not noticed that such impediments might be imposed on it at the hearing on  
20 April 28, 2008, and thus has had no opportunity to be heard and defend itself. Third, the Order  
21 imposes an improper mandatory injunction on Cross. Fourth, the Order is based on clearly  
22 erroneous findings of fact and fails to take into account that Section 645B.073 of the Nevada  
23 Administrative Code specifically allows a lender to designate “a servicing agent or other person  
24

25  
26  
27 

---

<sup>77</sup> See Response at 19.

1 to act on the behalf of the holders of the beneficial interest in the loan” upon obtaining the  
2 consents of 51% of the beneficial interests in the loan.

3  
4 V.

5 **ARGUMENT AND AUTHORITIES**

6 **A. Cross Should Be Allowed To Intervene.**

7 **1. Applicable standards**

8 Pursuant to Rule 24 of the Federal Rules of Civil Procedure, an applicant may intervene  
9 as a matter of right when he claims an interest in property or a transaction that is the subject of  
10 the pending action, disposition of the action may impair or impede his rights, and his interests  
11 will not be adequately protected by the existing parties.<sup>78</sup> In addition to satisfying these  
12 requirements, the moving party must file a motion on a timely basis.<sup>79</sup>

13 Rule 24(b) also provides for permissive intervention.<sup>80</sup> An applicant is entitled to  
14 intervene under Rule 24(b) when he files a timely motion and his “claim or defense and the main  
15 action have a question of law or fact in common.”<sup>81</sup>

16  
17 **2. Cross is entitled to intervene in this action.**

18 Cross should be allowed to intervene as a matter of right. First, this motion is timely  
19 because it was filed within 30 days of the hearing on April 28, 2008, and within 10 days of the  
20 entry of the Order. Second, the requirements of Rule 24(a) are satisfied because the Order  
21 purports to impose significant limitations and restrictions on Cross’s interests in the underlying  
22

23  
24 <sup>78</sup> See FED. R. CIV. P. 24(a); see also *Sagebrush Rebellion, Inc. v. Wyatt*, 713 F.2d 525, 527 (9th Cir. 1983).

25 <sup>79</sup> See *Kootenac Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107 (9th Cir. 2002); *Sagebrush Rebellion, Inc.*, 713 F.2d at 527.

26 <sup>80</sup> See FED. R. CIV. P. 24(b).

27 <sup>81</sup> See *id.*; see also *Fidelity Bankers Life Ins. Co. v. Wedco, Inc.*, 102 F.R.D. 41, 44 (D. Nev. 1984).  
28

1 transactions – specifically its ability to freely communicate and contract with the Direct Lenders  
2 – and its interests will not be adequately protected by any existing party to this action.<sup>82</sup>

3 Accordingly, Cross should be allowed to intervene as a matter of right.

4  
5 In the alternative, Cross should be allowed to intervene on a permissive basis. As stated  
6 above, this motion is timely. In addition, because the Order purports to limit and restrict Cross's  
7 rights and interests,<sup>83</sup> this action involves questions of fact and law already at issue in this action  
8 and that will materially affect Cross. Cross should be allowed to intervene to defend itself.

9 **B. The Order Should Be Vacated.**

10 **1. The Order should be vacated because the Court did not have jurisdiction**  
11 **over Cross.**

12 The Order submitted by Compass erroneously assumed that the Court could exercise  
13 jurisdiction over Cross. The Order, however, should be vacated because the Court does not have  
14 jurisdiction over Cross. At the time the Order was entered, Cross was not a party to this action.  
15 Cross was neither a plaintiff nor a defendant in the Lawsuit. Cross had not appeared in this  
16 action. Cross had not consented to this Court exercising jurisdiction over it. Cross had not  
17 waived its right to contest the Court exercising jurisdiction over it. Cross was not served with  
18 process before entry of the Order. Cross was not served with an order to show cause before the  
19 Order was entered. Accordingly, the Court did not have jurisdiction over Cross at the time it  
20 entered the Order.<sup>84</sup>

---

21  
22  
23  
24  
25 <sup>82</sup> See Order ¶ 7.

26 <sup>83</sup> See *id.*

27 <sup>84</sup> See *S.E.C. v. Ross*, 504 F.3d 1130, 1139 (9th Cir. 2007) (vacating disgorgement order against intervenors  
28 because the court lacked jurisdiction without service of process).

1 Based on the fact that the Court did not have jurisdiction over Cross, the Court did not  
2 have the discretion, jurisdiction, or power to enter an Order affecting any rights of Cross.  
3 Accordingly, the Court should vacate all provisions of the Order concerning Cross.

4  
5 **2. The Order should be vacated because it violates Cross's due process rights.**

6 Based on the Fifth Amendment to the United States Constitution, Cross has fundamental  
7 due process rights to notice and an opportunity to be heard before the Court attempts to affect  
8 Cross's substantive rights.<sup>85</sup> The Order provides that "Cross is prohibited from appearing in this  
9 litigation," and then also provides that "Cross shall be held accountable to this Court for taking  
10 an action inconsistent with the prior rulings of this Court and the U.S. Bankruptcy Court for the  
11 District of Nevada in this proceeding. . . ."<sup>86</sup> This is a clear violation of Cross's rights to  
12 procedural due process and access to the Courts.

13  
14 The only matters properly noticed for the hearing on April 28, 2008, were Plaintiff  
15 LLCs's motion for leave to pledge certain of their interests to obtain funds necessary to continue  
16 this litigation and any objections to the stipulation and order concerning the payoff of the so-  
17 called San Fernando loan. No party to this litigation, including Compass, sought injunctive relief  
18 against Cross to prohibit Cross from contacting or contracting with third parties. Cross  
19 respectfully objects to (i) the Court's *sua sponte* imposition of injunctive relief; and (ii) the Order  
20 to the extent it impacts Cross. Cross submits that the Order should be vacated because it violates  
21 Cross's rights to procedural due process under the Fifth Amendment.  
22

23  
24  
25 <sup>85</sup> See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("Many controversies have  
26 raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum  
they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for  
hearing appropriate to the nature of the case.").

27 <sup>86</sup> See Order ¶ 7.  
28

1           **3. The Order should be vacated because it is an improper mandatory**  
2           **injunction.**

3           The Order purports to deprive Compass of its rights under the First and Fifth  
4 Amendments. In particular, the Order provides that “Cross is prohibited from appearing this  
5 litigation.”<sup>87</sup> It then provides that Cross, a non-party, is prohibited from speaking with other  
6 non-parties, the Direct Lenders.<sup>88</sup> The Order should be vacated because it is an improper  
7 mandatory injunction that:

8           1.       violates Cross’s rights to free speech and association protected under the First  
9 Amendment of the United States Constitution;

10           2.       violates Cross’s rights against unreasonable seizures of property protected under  
11 the Fourth Amendment of the United States Constitution;

12           3.       violates Cross’s rights to due process under the Fifth Amendment to the United  
13 States Constitution including, but not limited to, the right to notice and opportunity to be heard;

14           4.       violates Cross’s rights to trial by jury under the Seventh Amendment to the  
15 United States Constitution; and  
16

17           5.       violates Cross’s rights to freedom of contract and access to the courts protected  
18 under the United States Constitution.  
19

20           Before an individual or entity’s rights are affected, he or it is entitled to the full range of  
21 rules and protections embodied in the Federal Rules of Civil Procedure,<sup>89</sup> including fundamental  
22 due process protections of notice and opportunity to be heard. For example, Rule 6(c) provides,  
23

---

24           <sup>87</sup> *See id.*

25           <sup>88</sup> *See id.*

26           <sup>89</sup> *See Jones v. Bock*, 127 S. Ct. 910, 919 (2007) (“[W]e have explained that courts should generally not  
27 depart from the usual practice under [FRCPs] on the basis of perceived policy concerns. . . . [A revision of the  
28 FRCPs] must be obtained by the process of amending the [FRCPs], and not by judicial interpretation.”) (internal  
citations omitted).

1 unless otherwise allowed by a specific rule or order of the court, the party that schedules a  
2 hearing must serve its written motion, any supporting evidence, and notice of the hearing on all  
3 parties at least five days before the hearing.<sup>90</sup> Here, no party filed a motion seeking the broad  
4 and sweeping injunctive relief granted by the Order. In particular, Compass did not file a motion  
5 seeking any of the mandatory and prohibitory injunctive relief set forth in the Order.  
6

7 In any event, Compass did not satisfy the mandatory requirements for entry of an  
8 injunction against Cross, a non-party. Based on established precedent, injunctive relief may be  
9 granted only when a party has pleaded and demonstrated that it has a substantial likelihood of  
10 success on the merits and that it will suffer irreparable and imminent harm in circumstances  
11 where there is no adequate remedy at law.<sup>91</sup> In addition, the moving party must allege and  
12 establish that the injury it faces outweighs the injuries that would be sustained by any other party  
13 or non-party as a result of the injunctive relief.<sup>92</sup> He also must plead and prove that the requested  
14 injunctive relief would not adversely affect public policy or the public interest.<sup>93</sup>  
15

16 Here, no party filed a motion requesting injunctive relief. No party provided proper  
17 notice that they intended to seek injunctive relief at the hearing on April 28, 2008. Instead, the  
18 Court, *sua sponte*, entered a mandatory injunction imposing broad mandates, prohibitions, and  
19 restrictions on Cross, a non-party. Before the Court can grant injunctive relief, the movant must  
20

---

21 <sup>90</sup> See FED. R. CIV. P. 6(c).

22 <sup>91</sup> See FED. R. CIV. P. 65; see also *Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*,  
23 944 F.2d 597, 602 (9th Cir. 1991) (“In this circuit, the party moving for a preliminary injunction may meet its  
burden by demonstrating . . . a combination of probable success on the merits and the possibility of irreparable  
injury.”) (internal citations omitted).

24 <sup>92</sup> See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (“A plaintiff must demonstrate . . .  
25 that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted.”).

26 <sup>93</sup> See *Sammartano v. First Judicial Dist. Ct., in & for the County of Carson City*, 303 F.3d 959, 974 (9th  
27 Cir. 2002) (“[O]ur precedent requires that we examine the public interest in determining the appropriateness of a  
preliminary injunction . . . The public interest inquiry primarily addresses impact on non-parties rather than  
28 parties.”) (emphasis added).

1 join all indispensable parties under Rule 19,<sup>94</sup> and an injunction may be issued only after notice  
2 to the adverse affected party,<sup>95</sup> so that he had a fair opportunity to oppose the request for  
3 injunctive relief.<sup>96</sup> Compliance with the notice provision is mandatory.<sup>97</sup> Cross received no  
4 notice that the Court would consider imposing broad and sweeping injunctive relief against it.  
5 Accordingly, the Court should vacate the Order because Cross was not provided with proper  
6 notice and did not receive a fair opportunity to defend itself.  
7

8 Moreover, the Order should be vacated because the Court did not make any findings of  
9 fact.<sup>98</sup> When issuing an injunction, the Court must make findings of fact and conclusions of law  
10 based on a full and complete evidentiary record.<sup>99</sup> At the hearing on April 28, 2008, Compass  
11 did not present any evidence that would support the issuance of an injunction.<sup>100</sup> Accordingly,  
12 the Order should be vacated because there is no factual basis to support it and the Court failed to  
13 make proper findings of fact to support an injunction.  
14

15  
16 <sup>94</sup> See *Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 234-35 (9th Cir. 1975) (vacating an injunction and an order  
17 because the district court failed to join indispensable parties and because of plaintiff's failure to give notice to those  
18 parties as required by Federal Rule of Civil Procedure 65(a)(1)).

19 <sup>95</sup> See FED. R. CIV. P. 65(a)(1).

20 <sup>96</sup> See *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70*, 415  
21 U.S. 423, 433 n. 7 (1974) ("The notice required by *Rule 65(a)* before a preliminary injunction can issue implies a  
22 hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such  
23 opposition.").

24 <sup>97</sup> See *Federal Trade Comm'n v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1217 (9th Cir. 2004);  
25 *Parker v. Ryan*, 960 F.2d 543, 544 (5th Cir. 1992).

26 <sup>98</sup> See FED. R. CIV. P. 65(d)(1); see *Farrell v. Danielson*, 296 F.2d 39, 41 (9th Cir. 1961) (setting aside  
27 decree of preliminary injunction and remanding to district court for failure to comply with Rule 65(d)).

28 <sup>99</sup> See FED. R. CIV. P. 52(a)(2); see also *Federal Trade Comm'n*, 362 F.3d at 1212 ("A district court must  
set forth findings of fact and conclusions of law supporting an order granting an injunction."); *TEC Eng'g Corp. v.*  
*Budget Molders Sup., Inc.*, 82 F.3d 542, 544-45 (1st Cir. 1996); *Williams v. McKeithen*, 939 F.2d 1100, 1105-06 (5th  
Cir. 1991) ("Not only were there no legally sufficient findings or reasons for the injunction, see *Fed. R. Civ. P.*  
*65(d)*, but none of the foregoing matters were established by any evidence.").

<sup>100</sup> See Transcript of Hearing on April 28, 2008.

1           Moreover, the Order should be vacated because Compass was not required to post a  
2 bond. In general, an injunction cannot be issued unless a bond is posted because the bond  
3 provides a mechanism for reimbursing an enjoined party for the harm it suffers as a result of an  
4 improperly issued injunction.<sup>101</sup> The bond must be in an amount that is enough to pay the  
5 damages sustained by any party found to have been wrongfully enjoined or restrained.<sup>102</sup> The  
6 Order should be vacated because Compass has not posted a bond to support the injunctive relief  
7 it received.  
8

9           For all the above-described reasons, the Order should be vacated.

10           **4. The Order should be vacated because it is based on clearly erroneous**  
11           **findings of fact.**

12           Compass' motivation to eliminate Cross's involvement is transparent. Compass has  
13 committed flagrant breaches of its contractual and fiduciary duties to the Direct Lenders on  
14 numerous occasions. Despite owing the Direct Lenders the highest, strictest, and most solemn  
15 duties recognized under the law, Compass has taken every opportunity to mislead this Court in  
16 its selfish scheme to abuse and take advantage of the Direct Lenders. Compass hopes to  
17 whitewash these transgressions by bullying the Direct Lenders into a one-sided settlement.  
18

19           On the other hand and as described above, Cross has dealt with the Direct Lenders in the  
20 utmost good faith. Despite Cross's good intentions, the Order purports to deprive Cross of its  
21 right to negotiate with the Direct Lenders, contract with the Direct Lenders, or otherwise  
22 communicate with the Direct Lenders. For example, Paragraph 7 of the Order, entitled "Cross Is  
23 Prohibited From Acting On Behalf Of Direct Lenders," expressly provides that "Cross is  
24

---

25           <sup>101</sup> See FED. R. CIV. P. 65(c).

26           <sup>102</sup> See FED. R. CIV. P. 65(c); *see, e.g.*, 11A Wright, Miller & Kane, Federal Practice and Procedure §  
27 2954. The amount of the bond should at cover potential incidental and consequential costs as well as the losses the  
28 enjoined party may suffer during the period of the preliminary injunction.

1 prohibited from appearing in this litigation.” The Court was not presented with any evidence to  
2 support these draconian restrictions. The Order should be vacated because Compass has clearly  
3 led the Court into error for its own selfish purposes.

4 In the Order, the Court purports to determine that there was a “failure to make  
5 appropriate disclosures” in connection with the proposal that the Direct Lenders solicited from  
6 Cross.<sup>103</sup> There is absolutely no factual basis for this conclusion. The Court also erroneously  
7 determined the “Cross Transfer and Pledge Proposal . . . were contrary to the Standstill  
8 Agreement so ordered by this Court and impeded the mediation and settlement of the  
9 litigation.”<sup>104</sup> There is no factual basis for these conclusions. Accordingly, the Order should be  
10 vacated because it is based on erroneous findings of fact.<sup>105</sup>

11  
12  
13 **VI.**

14 **CONCLUSION AND REQUEST FOR RELIEF**

15 For all the reasons stated above, Cross requests that the Court allow Cross to intervene,  
16 vacate the Order, and grant Cross all other appropriate relief.

17 ///

18 ///

19 ///

20 ///

21 ///

22  
23  
24 

---

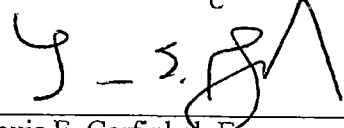
<sup>103</sup> See Order ¶ 1.

25 <sup>104</sup> See *id.*

26 <sup>105</sup> In addition, the Order fails to take into account that Section 645B.073 of the Nevada Administrative  
27 Code specifically allows a lender to designate “a servicing agent or other person to act on behalf of the holders of  
28 the beneficial interests in the loan” upon obtaining consents of 51% of the beneficial interests in the loan.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Respectfully submitted,

By:  \_\_\_\_\_

Louis E. Garfinkel, Esq.  
Nevada Bar No. 3416  
Brent C. Eckersley, Esq.  
Nevada Bar No. 6962  
LEVINE, GARFINKEL & KATZ  
3441 S. Eastern Avenue, Suite 600  
Las Vegas, Nevada 89169  
Telephone: (702) 735-0451  
Facsimile: (702) 735-2198

- and -

William A. Brewer III, Esq.  
Texas State Bar No. 02967035  
Michael J. Collins, Esq.  
Texas State Bar No. 00785493  
BICKEL & BREWER  
1717 Main Street, Suite 4800  
Dallas, Texas 75201  
Telephone: (214) 653-4000  
Facsimile: (214) 653-1015

*Attorneys For Proposed Intervenors Cross  
Equities Partners, LLC, Cross Servicing  
Group, LLC, And Cross Litigation  
Management Company, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Motion Of Proposed Intervenors Cross Equities Partners, LLC, Cross Servicing Group, LLC, and Cross Litigation Management Company, LLC to Intervene and to Rehear and Vacate Order Dated May 14, 2008, and the Declaration of McAlan Duncan were served via ECF and regular mail upon the following counsel of record on this 27<sup>th</sup> day of May, 2008.

Michael W. Anglin, Esq.  
Norlynn B. Price, Esq.  
Walter A. Herring, Esq.  
**FULBRIGHT & JAWORSKI, L.L.P.**  
2200 Ross Avenue  
Dallas, Texas 75201  
Telephone: (214) 855-8000  
Facsimile: (214) 855-8200

David S. Cohen, Esq.  
**MILBANK, TWEED, HADLEY & MCCLOY, LLP**  
1850 K Street, NW  
Washington, DC 20006  
Telephone: (202) 835-7517  
Facsimile: (202) 263-7517

Stanely W. Parry, Esq.  
**BALLARD SPAHR ANDREWS & INGERSOLL, LLP**  
100 City Parkway, Suite 1750  
Las Vegas, NV 89106  
Telephone: (702) 471-7000  
Facsimile: (702) 41-7007

Tyson Lomazow, Esq.  
**MILBANK, TWEED, HADLEY & MCCLOY, LLP**  
1 Chase Manhattan Plaza  
New York, NY 10005  
Telephone: (212-530-5000

Janet L. Chubb, Esq.  
**JONES VARGAS**  
100 W. Liberty Street, 12<sup>th</sup> Floor  
P. O. Box 281  
Reno, NV 89501

Georgeanne Bradley, Esq.  
Joseph P. Hardy, Esq.  
Tina Yan, Esq.  
**BULLIVANT HOUSER BAILEY, P.C.**  
3980 Howard Hughes Parkway, Suite 550  
Las Vegas, NV 89109  
Telephone: (702) 650-6565  
Facsimile: (702) 650-2995

Daniel Perry, Esq.  
Gabriel M. Weaver, Esq.  
Linda Dakin-Grimm, Esq.  
Robert J. Moore, Esq.  
Paul Torres, Esa.  
**MILBANK, TWEE, HADLEY & MCCLOY**  
601 S. Figueroa Street, 30<sup>th</sup> Floor  
Los Angeles, CA 90017  
Telephone: (775) 726-5000  
Facsimile: (775) 786-1177

Randolph L. Howard, Esq.  
**KOLESAR & LEATHAM, CHTD.**  
3320 w. Sahara Avenue  
Suite 380  
Las Vegas, NV 89102  
Telephone: (702) 362-7800  
Facsimile: (702) 362-9472

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Louis A. Curcio, Esq.  
**THACHER PROFFITT & WOOD LLP**  
Two World Financial Center  
New York, NY 10281  
Telephone: (212) 913-7400

Christine Pajak, Esq.  
**STUTMAN, TREISTER & GLATT**  
1901 Avenue of the Stars  
12<sup>th</sup> Floor  
Los Angeles, CA 9067  
Telephone: (310) 228-5600



---

Lillian Jordan, an Employee of  
LEVINE, GARFINKEL & KATZ