

1 NORLYNN B. PRICE, ESQ.
Texas State Bar No. 02499050
2 *Admitted Pro Hac Vice*
Fulbright & Jaworski L.L.P.
3 2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
4 Telephone: (214) 855-8000
Facsimile: (214) 855-8200
5 Email: nprice@fulbright.com

6 STANLEY W. PARRY, ESQ.
Nevada Bar No. 1417
7 Ballard Spahr Andrews & Ingersoll, LLP
300 South Fourth Street, Suite 1201
8 Las Vegas, Nevada 89101
9 Telephone: (702) 471-7000
Facsimile: (702) 471-7070
10 Email: ParryS@ballardspahr.com

11 Attorneys for all Plaintiff LLCs [with the
12 exception of Hesperia Lenders, LLC]

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14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF NEVADA**
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18 **In re:**)
19 **USA COMMERCIAL MORTGAGE**) **Case No. 2:07-cv-892-RCJ-GWF-BASE**
COMPANY,) **and**
20) **Case No. 3:07-cv-241-RCJ-VPC**
21 **Debtor.**) **MOTION TO WITHDRAW AS COUNSEL**
FOR CERTAIN PLAINTIFF LLCs

22 Fulbright & Jaworski L.L.P. (“Fulbright”) and Ballard Spahr Andrews & Ingersoll, LP
23 (“Ballard Spahr”)¹ request that this Court grant an Order permitting them to withdraw as counsel
24 for Plaintiff LLCs (with the exception of Hesperia Lenders, LLC, SVRB 2.325 Lenders, LLC and
25 SVRB 4.5 Lenders, LLC, which entities Fulbright does not represent). An Order granting
26 withdrawal is warranted because the Court, on April 28, 2008, pronounced that the Court was

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28 ¹ Ballard Spahr is local counsel for the LLCs represented by Fulbright. Use of the word “Fulbright” throughout this document is inclusive of local counsel, Ballard Spahr, where appropriate by context.

1 dismembering and dissolving Plaintiff LLCs, with 100% of the assets of Plaintiff LLCs to be
2 reassigned, or reconveyed, to the individual lender members of the LLCs. Moreover, the Court has
3 declared that the sole representative or managing member of the LLCs, Ms. Donna Cangelosi,
4 must immediately cease to speak or act, or purport to speak or act, on behalf of anyone other than
5 herself.² The Court's directives of April 28, 2008 have rendered Fulbright without functional
6 clients in this matter. Finally, Plaintiff LLCs have not fulfilled their financial obligations to
7 Fulbright for legal services performed and expenses incurred on behalf of Plaintiff LLCs in this
8 matter. For all of these reasons, Fulbright urges that this Motion be granted and Fulbright be
9 permitted to withdraw as counsel in this case.

10 I. STATEMENT OF FACTS

11 A. **The Court Has Declared That Plaintiff LLCs be Dismembered and Dissolved.**

12 At the April 28, 2008 hearing on Plaintiff LLCs' motion to obtain approval of a pledge of
13 their assets to, in part, pay Fulbright's legal bills, the Court stated "I am dismembering them" and
14 "[w]e are dissolving them" in reference to Plaintiff LLCs.³ Additionally, the Court directed
15 counsel for Compass Defendants to prepare an order which requires the managing member of
16 Plaintiff LLCs (FDH Management d/b/a "FDH") and its spokesperson and representative (Ms.
17 Cangelosi) to reassign, or reconvey, all legal and beneficial interests in the underlying promissory
18 notes made the subject of this litigation back to the individual direct lender members of the LLCs
19 within 30 days.⁴ The proposed order submitted by counsel for Compass would further order
20 Plaintiff LLCs, FDH, and Ms. Cangelosi to revoke and return any power of attorney previously
21 granted by any LLC Member and would further require the reassignment, to each individual
22 lender member of each LLC, the beneficial interest or interests held by the LLC that were

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24 ² While Fulbright had previously communicated to Plaintiff LLCs its intention to file a motion to withdraw as
25 counsel if its unpaid fees and expenses were not paid, Fulbright was unable to consult with Plaintiff LLCs
26 specifically about the filing of this Motion, given the fact that as of 9:34 a.m. on April 28, 2008 the LLCs' sole
27 managing member, representative and spokesperson, Ms. Donna Cangelosi, was prohibited (among other things)
28 from directing the legal representation of the LLCs. See argument *infra*.

³ Declaration of Lindsay Nicole Alleman in Support of Motion to Withdraw as Counsel ("Alleman Dec."), Exhibit A
at Attachment 1 (Transcript of Proceedings of Hearing re: Emergency Motion Regarding Encumbrance of Beneficial
Interests and Objection re: San Fernando Loan Payoff, dated April 28, 2008 ("Transcript of April 28, 2008
Hearing")) at 16:18, 20.

⁴ See Alleman Dec., Exhibit A at Attachment 1 (Transcript of April 28, 2008 Hearing) at 13:16-19.

1 originally assigned to it by the lender member.⁵ In compliance with the directives of the Court as
2 expressed at the April 28th proceeding, Fulbright has prepared and has delivered to Ms.
3 Cangelosi documents whereby the LLCs reassign to their individual, direct lender members the
4 beneficial interests in the notes, as well as the claims and causes of action associated therewith
5 held and previously pursued in this case by Plaintiff LLCs.⁶

6 Because Fulbright represents *only* Plaintiff LLCs, and *not* FDH, and *not* any direct lender
7 individually,⁷ the Court's April 28th pronouncements end Fulbright's representation in this case.
8 The LLCs now have neither a human "voice" to provide direction to Fulbright as counsel, nor any
9 capacity to take, consider, and act upon advice of counsel. Fulbright also understands from the
10 Court's pronouncements at the April 28th proceedings that the Court's preference is that
11 Fulbright should no longer appear in this action — the Court stating at the April 28th proceeding
12 that "I strongly suggest that you start seeking other counsel to substitute for you. Okay?"⁸

13 **B. Plaintiff LLCs Have Failed to Meet Their Financial Obligations to Fulbright.**

14 Fulbright agreed to represent Plaintiff LLCs in August of 2007 after the representative for
15 Plaintiff LLCs signed an engagement agreement containing a description of legal services to be
16 performed and setting forth Plaintiff LLCs' monetary obligations in exchange for such services.
17 As of August 2007, it was Plaintiff LLCs' intention to obtain third-party financing for legal fees
18 and expenses they would incur in connection with this litigation using lender-member approved
19 pledge of one percent (1%) of beneficial interests held by Plaintiff LLCs in the various loans made
20 the subject of this case as collateral for the repayment of such financing. Plaintiff LLCs, however,
21 have continually and repeatedly encountered obstacles to obtaining litigation financing, resulting in
22 their inability to pay Fulbright and Ballard Spahr the fees and expenses owed. The most recent of

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⁵ See Cause No. 2:07cv892, Doc. 492 at ¶¶ 4-5.

24 ⁶ See Declaration of Mark Weibel in Support of Motion to Withdraw as Counsel ("Weibel Dec."), Exhibit B at ¶ 5.

25 ⁷ Fulbright has repeatedly emphasized to the individual members of Plaintiff LLCs that Fulbright does *not* represent,
26 and at no point has ever represented, the members in their individual capacities. Fulbright clearly reiterated that point
during the April 28, 2008 proceeding. See Alleman Dec., Exhibit A at Attachment 1 (Transcript of April 28, 2008
Hearing) at 18:11-19:2.

27 ⁸ Alleman Dec., Exhibit A at Attachment 1 (Transcript of April 28, 2008 Hearing) at 20:10-11. Fulbright has
28 attempted, without success, to identify any attorney or law firm willing or able to "substitute" for Fulbright as
counsel for Plaintiff LLCs in view of the fact that the LLCs have no spokesperson or representative and no assets
with which to pay for or finance legal fees and expenses.

1 these obstacles, of course, is the Court's April 28, 2008 directive that the LLCs reassign the
2 individual members' beneficial interests in the subject loans. Without assets of any sort,
3 obviously, Plaintiff LLCs utterly cannot pay for or otherwise finance the litigation going forward.

4 As of May 6, 2008, Plaintiff LLCs' outstanding invoices from Fulbright total
5 \$3,029,406.92.⁹ Plaintiff LLCs' outstanding and unpaid invoices from Ballard Spahr total
6 \$111,195.23.¹⁰ Fulbright and Ballard Spahr have continued to incur fees and expenses on behalf of
7 Plaintiff LLCs. Despite these very large outstanding receivables and the corresponding debt
8 Fulbright and Ballard Spahr have incurred, Fulbright has worked with and has sought to
9 accommodate Plaintiff LLCs in hopes that delinquent payment problems could be resolved without
10 the need for Fulbright to withdraw from representing Plaintiff LLCs.

11 Over the past several months, Fulbright has had numerous written and oral
12 communications with Plaintiff LLCs about Fulbright's unpaid invoices and the Plaintiff LLCs'
13 obligation to satisfy their financial obligation to Fulbright. In particular, on January 11, 2008,
14 March 10, 2008, and April 11, 2008, respectively, Fulbright sent letters to the Plaintiff LLCs, by
15 and through Ms. Cangelosi as managing member, noting the delinquent payment, requesting
16 payment-in-full, and notifying Plaintiff LLCs that Fulbright would be compelled to withdraw
17 from the case if its outstanding fees and expenses were not promptly brought current.¹¹ At this
18 time, of course, given the Court's April 28, 2008 pronouncements stripping them of their assets,
19 there is no way Fulbright's clients (the LLCs) will ever be in a position to honor their financial
20 obligations to the law firms they engaged to represent them in this case.¹²

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25 ⁹ See Weibel Dec., Exhibit B at ¶ 3. To date, Fulbright has received only \$51,500 (in the form of a retainer collected
at the commencement of the representation and a small \$1,500.00 payment) of the outstanding balance of legal fees
and expenses owed by Plaintiff LLCs. See *id.*

26 ¹⁰ See Affidavit of Stanley W. Parry in Support of Motion to Withdraw as Counsel ("Parry Aff."), Exhibit C at ¶ 4.

27 ¹¹ See Weibel Dec., Exhibit B at ¶ 4.

28 ¹² Fulbright acknowledges that Plaintiff LLCs have worked diligently to obtain needed financing from third-party
lending sources to pursue their claims and rights in these proceedings, unfortunately, to no avail in light of the
developments in the case referenced above.

II. ARGUMENTS AND AUTHORITIES

A. **Fulbright's Motion is Authorized Under Governing Case Law and Professional Conduct Rules.**

It is inherent in the Nevada Rules of Professional Conduct that legal counsel cannot represent a non-entity. While there appears to be no Ninth Circuit case law concerning a situation where a court has *sua sponte* disempowered an LLC manager and directed an LLC client to “dissolve” and “dismember,” it would appear that continuing legal representation in such a scenario could be in violation of, *inter alia*, NEV. R. OF PROF'L CONDUCT 1.1 and 1.2, which require that a lawyer provide competent representation “to a client” and abide by a “client’s decision concerning the objectives of the representation.” Without a “client” and with no human being to act as a representative or spokesperson of the “client” with whom Fulbright can communicate and from whom Fulbright can take instruction on the handling of the litigation, Fulbright simply cannot provide effective representation. Thus, this Motion to Withdraw should be granted.

Further, federal courts have found that a client’s failure to pay the attorney’s fees or expenses is adequate grounds for an attorney to withdraw from a case. *See e.g., Statute of Liberty-Ellis Island Found., Inc. v. Int'l Indus., Inc.*, 110 F.R.D. 395, 397 (S.D.N.Y. 1986) (granting law firm’s motion to withdraw as counsel for nonpayment of legal services); *see Silver Peak Gold Min. Co. v. Harris*, 116 F. 439, 441 (D. Nev. 1902) (attorney allowed to withdraw from case because legal fees not paid by client as agreed). The Ninth Circuit has also found that a client’s failure to pay attorney’s fees may serve as a basis for a motion to withdraw. *See Ringgold Corp. v. Worrall*, 880 F.2d 1138, 1140 (9th Cir. 1989).

Similarly, under the NEVADA RULES OF PROFESSIONAL CONDUCT and the MODEL RULES OF PROFESSIONAL CONDUCT (collectively, the “Rules of Professional Conduct”), a lawyer may withdraw from representing a client if “[t]he client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.” NEV. R. OF PROF'L CONDUCT 1.16(b)(5); MODEL R. OF PROF'L CONDUCT 1.16(b)(5). In this case, Plaintiff LLCs’ failure (albeit largely because of

1 circumstances beyond their control) to fully pay for legal services rendered on their behalf
2 constitutes a breach of an obligation and presents grounds for withdrawal under the Rules of
3 Professional Conduct, as well as federal case law. For these reasons, this Court should grant this
4 Motion and permit Fulbright to withdraw.

5 **B. The Parties Will Not be Prejudiced by Withdrawal.**

6 Importantly, because the Court stated that Plaintiff LLCs are to be dissolved and
7 dismembered,¹³ Plaintiff LLCs cannot be prejudiced by Fulbright's withdrawal because the LLCs
8 will no longer exist or, at the very least, will be devoid of assets or members upon whose behalf
9 they can further participate in this litigation.

10 Additionally, it is apparent from actions taken and comments made by the Court during
11 the April 28, 2008 proceeding that (for reasons known only to the Court) the Court is displeased
12 with Plaintiff LLCs' counsel's continuing in the case, therefore, said counsel's mere continued
13 presence in this case may be leading this Court to view Plaintiff LLCs (to whatever extent those
14 entities continue to exist, even in name only, in the litigation) in a negative light, thus, potentially
15 engendering a risk of unfair prejudice as to both the LLCs and to their individual constituent
16 members and former members.¹⁴

17 Moreover, this case is in its infancy – there has been no Rule 26(f) conference, no
18 scheduling order has been entered, numerous named parties have not yet appeared and answered
19 (and the deadlines for the filing of such answers have not yet passed), and discovery on the merits
20 of the parties' claims and defenses has not yet commenced. In light of these circumstances, no
21 party will be prejudiced by Fulbright's withdrawal as counsel in this case.

22 **III. FULBRIGHT HAS ATTEMPTED TO ASSIST PLAINTIFF LLCs IN**
23 **THE FULFILLMENT OF THE COURT'S APRIL 28, 2008 DIRECTIVES**

24 Although Fulbright is requesting withdrawal as counsel, Fulbright has put considerable
25 effort into assisting Plaintiff LLCs in fulfilling the commandments the Court set out during the
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¹³ See Alleman Dec., Exhibit A at Attachment 1 (Transcript of April 28, 2008 Hearing) at 16:18, 20.

28 ¹⁴ See Alleman Dec., Exhibit A at Attachment 1 (Transcript of April 28, 2008 Hearing) at 20:19-21:1.

1 April 28, 2008 hearing.¹⁵ To that end, as referenced above Fulbright has prepared and has
2 provided to the LLCs documents to be executed by the managing member of Plaintiff LLCs
3 which will effectively reassign all direct lender beneficial interests back to their individual direct
4 lender members.¹⁶

5 **IV. REQUEST FOR ABATEMENT**

6 Plaintiff LLCs and Fulbright respectfully request that this Court suspend all proceedings
7 in this matter so that the individual direct lender members of the LLCs may have adequate time to
8 secure alternative counsel and to reorganize themselves and intervene in this action, either
9 individually or collectively, as they see fit, so that their new counsel will be best able to represent
10 their interests in this case. Suspension of all proceedings is necessary in order to protect the
11 rights and interests of the individual direct lenders until they are able to finalize arrangements
12 with new counsel and counsel is able to appear as counsel of record. Accordingly, Fulbright
13 respectfully requests that the Court enter an order granting this Motion and then suspend all
14 proceedings in this matter for at least ninety (90) days, consider no previously filed motions (*e.g.*,
15 the motions made by Defendant Silar that are presently on the Court's calendar for June 2, 2008)
16 and suspended all pending deadlines for at least ninety (90) days.

17 **V. CONCLUSION, PRAYER, AND RESERVATIONS**

18 For the foregoing reasons, Fulbright & Jaworski L.L.P. and Ballard Spahr Andrews &
19 Ingersoll, LP respectfully request that this Court grant their Motion to Withdraw as Counsel for
20 Certain Plaintiff LLCs (all LLC Plaintiffs with the exception of Hesperia Lenders, LLC, SVRB
21 2.325 Lenders, LLC and SVRB 4.5 Lenders, LLC, which entities neither firm represents), that the
22 Court grant the requested abatement of no less than ninety (90) days, and for such other and
23 further relief to which they may be entitled. Fulbright and Ballard Spahr, and their clients,
24 Plaintiff LLCs, respectfully reserve, and do not waive, any and all rights, remedies, challenges,
25 legal and factual positions, and objections in or related to these proceedings.

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¹⁵ See Alleman Dec., Exhibit A at Attachment 1 (Transcript of April 28, 2008 Hearing) at 13:16-19.

¹⁶ See Weibel Dec., Exhibit B at ¶ 5.

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DATED this 6th day of May, 2007.

FULBRIGHT & JAWORSKI L.L.P.

By: 
NORLYNN B. PRICE, ESQ.

Attorneys for all Plaintiff LLCs [with the exception of Hesperia Lenders, LLC, SVRB 2.325 Lenders, LLC and SVRB 4.5 Lenders, LLC,]

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

STANLEY W. PARRY, ESQ.

Attorney for all Plaintiff LLCs [with the exception of Hesperia Lenders, LLC, SVRB 2.325 Lenders, LLC and SVRB 4.5 Lenders, LLC,]

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CERTIFICATE OF SERVICE

This certifies that, pursuant to Rule 5 of the FEDERAL RULES OF CIVIL PROCEDURE, on the 6th day of May, 2008, a true and correct copy of the foregoing Motion to Withdraw as Counsel for Certain Plaintiff LLCs was served on all counsel of record via the Court's CM/ECF System, as well as FDH, through Ms. Donna Cangelosi, as the managing member of Plaintiff LLCs via certified mail, return receipt requested.

FDH Asset Resolution Company, d/b/a FDH Management
c/o Donna Cangelosi
5860 Lausanne Drive
Reno, Nevada 89511

By: Norlynn B. Price
Norlynn B. Price