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7 successor in interest to Bank of America, National
Association, as successor by merger to LaSalle
8 Bank National Association, as Trustee for Bear
Stearns Commercial Mortgage Securities Inc.,
9 Commercial Mortgage Pass-Through Certificates,
Series 2006-TOP22

10
11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 LOS ANGELES DIVISION

14
15 SECURITIES AND EXCHANGE
COMMISSION,

16 Plaintiff,

17 v.

18 CHARLES P. COPELAND,
19 COPELAND WEALTH
MANAGEMENT, A FINANCIAL
20 ADVISORY CORPORATION, and
COPELAND WEALTH
21 MANAGEMENT, A REAL ESTATE
CORPORATION,

22 Defendants.
23
24

Case No. 11-08607-R-DTB

NOTICE OF MOTION AND MOTION
FOR ORDER APPROVING
AGREEMENT BETWEEN
RECEIVER AND CREDITOR
REGARDING DISPOSITION OF
CERTAIN COMMERCIAL
PROPERTY WITHIN JURISDICTION
OF RECEIVER; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

Date: November 5, 2012
Time: 10:00 a.m.
Ctrm: 8, 2nd Floor
Judge: Hon. Manuel L. Real

1 **TO ALL INTERESTED PARTIES:**

2 **PLEASE TAKE NOTICE** that on November 5, 2012, at 10:00 a.m., in
3 Courtroom 8 of the above-entitled Court located at 312 N. Spring Street, Los
4 Angeles, California 90012, a hearing will be held on the motion of creditor U.S.
5 Bank National Association, as Trustee, successor in interest to Bank of America,
6 National Association, as successor by merger to LaSalle Bank National Association,
7 as Trustee for Bear Stearns Commercial Mortgage Securities Inc., Commercial
8 Mortgage Pass-Through Certificates, Series 2006-TOP22 (“Movant”) for an Order
9 approving the agreement reached with the Receiver appointed by this Court with
10 respect to the release of the commercial property located at 455 Park Place,
11 Lexington, Kentucky (the “Property”) from the jurisdiction of the Receiver and
12 Permanent Injunction entered in this case.

13 This Motion is based on the attached Memorandum of Points and Authorities
14 and the Declaration of Mark L. Heller filed herewith. The Motion and other
15 supporting papers are available by contacting counsel for Movant by email at
16 JGoodfried@perkinscoie.com or telephone at (310) 788-9900, or may be reviewed
17 at the Clerk’s Office during normal business hours at 312 N. Spring Street, Los
18 Angeles, California 90012.

19 **Procedural Requirements:** If you oppose this Motion, you are required to
20 file your written opposition with the Office of the Clerk, United States District
21 Court, 312 N. Spring Street, Los Angeles, CA 90012, and serve the same on the
22 undersigned not later than twenty-one (21) days prior to the hearing.

23 **IF YOU FAIL TO FILE AND SERVE A WRITTEN OPPOSITION** by the
24 above date, the Court may grant the requested relief without further notice.

25 **Requested Relief:** The relief requested is discussed in detail in the
26 Memorandum of Points and Authorities below. To summarize, the Court appointed
27 the Receiver in this case to liquidate the Defendants’ assets for the benefit of
28 Defendants’ creditors. One of these assets is the Property. Movant is the first

1 secured creditor of the Property and is owed more than Six Million Dollars
2 (\$6,000,000) on the loan (the "Loan"). Movant and the Receiver (collectively, the
3 "Consenting Parties") agree that the Property's value falls substantially below the
4 amount owed on the Loan. Therefore, the Consenting Parties agree that even if the
5 Receiver liquidates the Property, there will be no proceeds for Defendants'
6 creditors other than Movant. In fact, Defendants' creditors would likely face a net
7 loss if the Property is not excised from the Receiver's jurisdiction since the
8 Receiver would incur administrative costs in managing and liquidating the Property
9 while the creditors receive nothing. Accordingly, on September 12, 2012, the
10 Consenting Parties agreed to resolve all issues with respect to the Property as set
11 forth below and, by this Motion, Movant seeks the Court's order approving their
12 agreement and directing the disposition of the Property as follows:

13 (a) Within seven (7) days of entry of the Order on this Motion, Movant shall
14 pay to the Receiver a total of \$46,913.27 representing the amounts the Receiver
15 contends were overpaid under the Reserve and Security Agreement less the
16 amounts advanced by Movant for emergency repairs to the Property (the
17 "Payment"). If the Payment is not made within seven (7) days of entry of the
18 Order, Movant stipulates to the Receiver applying ex parte with notice for the Court
19 to vacate the Order. The Order shall not take effect until the Payment is received
20 by the Receiver. Movant's payment of the Payment shall fully satisfy its
21 obligations, if any, to the Receiver and/or the Borrower, or any of their affiliates or
22 subsidiaries, including but not limited to, to refund, return, or pay any sums for any
23 alleged overpayments or deposits to impounds or reserves.

24 (b) The Property shall temporarily remain in the possession and under the
25 management of the Receiver until the earlier of (i) receipt of written notice from the
26 Movant of appointment of a new receiver under the loan documents, or (ii) ninety
27 (90) days from the effective date of the Order (as set forth in (a), above), at which
28 time the Property shall be transferred to the newly appointed receiver or, if no

1 receiver is appointed within that time, abandoned by the Receiver.

2 and

3 (c) The Receiver shall use all rents, issues and/or profits from the Property
4 received from September 12, 2012 until the Property is released from the Receiver's
5 jurisdiction (the "Interim Period") toward the reasonable and customary costs and
6 expenses of the Property (including the expense of \$3,750 per month in
7 receivership fees from the effective date of the Order until the Property is released
8 under (b), above,) and Movant shall be responsible, according to proof, to fund to
9 the Receiver any deficit for the payment of such costs and expenses during the
10 Interim Period (including the payment of receivership fees set forth above).

11 Notwithstanding the foregoing, the Receiver is holding approximately \$8,000 as of
12 the date of the agreement, and does not have to use such amount towards the costs
13 and expenses of the Property.

14 This Motion is made following several conferences of counsel pursuant to
15 L.R. 7-3. The Motion is consensual and therefore unopposed by the Receiver.

16 WHEREFORE, Movant requests that the Court grant the relief requested
17 herein and any such other relief as may be appropriate under the circumstances.

18 DATED: October 5, 2012.

PERKINS COIE LLP

19
20 By: _____

Michael B. Garfinkel

21 Attorneys for Creditor
22 U.S. Bank National Association, as
23 Trustee, successor in interest to Bank
24 of America, National Association, as
25 successor by merger to LaSalle Bank
26 National Association, as Trustee for
27 Bear Stearns Commercial Mortgage
28 Securities Inc., Commercial
Mortgage Pass-Through Certificates,
Series 2006-TOP22

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction.**

3 In October 2011, this Court issued a Permanent Injunction which, among
4 other things, appointed Thomas C. Hebrank as permanent equity receiver (the
5 “Receiver”) to manage, possess and control the assets of Defendants for the best
6 interests of Defendants’ creditors. One such asset is an office building in
7 Lexington, Kentucky (the “Property”). Creditor U.S. Bank National Association, as
8 Trustee, successor in interest to Bank of America, National Association, as successor
9 by merger to LaSalle Bank National Association, as Trustee for Bear Stearns
10 Commercial Mortgage Securities Inc., Commercial Mortgage Pass-Through
11 Certificates, Series 2006-TOP22 (“Movant”) is the first secured creditor for the
12 Property. By this motion, Movant seeks approval and implementation of an
13 agreement reached between Movant and the Receiver (collectively, the “Consenting
14 Parties”) to remove the Property from the receivership.

15 The reason for the Motion is that the Property not only has no value to the
16 Defendants' creditors but also that its retention will only serve to deplete the
17 receivership assets. The Consenting Parties agree that any liquidation of the
18 Property by the Receiver would leave no proceeds for any of the Defendants’
19 creditors besides Movant. According to a recent appraisal of the Property (the
20 “Appraisal”),¹ the amount due and owing on Movant’s loan far surpasses the value
21 of the Property. Additionally, the Property is a drain on the receivership assets. It
22 has been operating at a net loss and, if it were to remain under the receivership, the
23 Receiver would continue to incur administrative costs and time in managing,
24 maintaining, and liquidating the Property while the creditors would receive nothing.

25 Accordingly, on September 12, 2012, the Consenting Parties agreed, in good
26 faith and subject to this Court's approval, to resolve all issues with respect to the

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28 ¹ The Receiver and his counsel have reviewed the Appraisal pursuant to a confidentiality agreement. A true and complete copy of the Appraisal will be brought to the hearing on the Motion and upon request provided to the Court for review, preferably *in camera*.

1 Property in a manner that releases the Property from the Receiver's jurisdiction and
2 the Permanent Injunction issued in the case, while resolving any and all claims or
3 issues by and between them with respect to the Property. To that end, the
4 Consenting Parties' agreement would (a) require Movant to pay the Receiver
5 \$46,913.27, representing the amounts the Receiver contends were overpaid under
6 the Reserve and Security Agreement less the amounts advanced by Movant for
7 emergency repairs to the Property (the "Payment"); (b) allow Movant a reasonable
8 amount of time to have a new receiver over the Property appointed; and (c) allow
9 Receiver to use all rents, issues and/or profits from the Property, from the date of
10 the agreement through the release of the Property, toward the reasonable and
11 customary costs and expenses of the Property (including the expense of \$3,750 per
12 month in receivership fees from the effective date of the Order until the Property is
13 released under (b), above,), while obligating Movant to fund any deficit.

14 By this Motion, Movant seeks an order approving the Consenting Parties'
15 agreement and implementing its terms to effectuate the release of the Property from
16 the jurisdiction of the Receiver and the Permanent Injunction.

17 **II. Background.**

18 **A. The Loan and Loan Documents.**

19 On or about December 21, 2005, Morgan Stanley Mortgage Capital Inc., a
20 New York corporation ("Original Lender") made a \$5,600,000 loan (the "Loan") to
21 Defendants by its affiliate Copeland Properties Nine, L.P. (the "Borrower"). The
22 Loan is evidenced by, among other instruments, that certain Promissory Note (the
23 "Note"), dated December 21, 2005, executed by the Borrower in favor of Original
24 Lender in the original principal sum of \$5,600,000. *See* concurrently filed
25 Declaration of Mark L. Heller ("Heller Decl."), ¶ 3 & Ex. B [Note].

26 The Loan is secured by an office building located at 455 Park Place,
27 Lexington, Kentucky, which is more particularly described in **Exhibit A** to the
28 Heller Declaration. The security is evidenced by, among other things, that certain

1 Mortgage and Security Agreement (the “Mortgage”) dated December 21, 2005,
2 executed by the Borrower, as mortgagor, for the benefit of Original Lender, as
3 mortgagee. The Mortgage was recorded in the Official Records of Fayette County
4 (the “Official Records”) on December 30, 2005 in Mortgage Book 5585, pages
5 445-504. Heller Decl., ¶ 4 & Ex. C [Mortgage].

6 The Note, the Mortgage, and all other documents evidencing, securing or
7 relating to the Loan are sometimes collectively referred to herein as the “Loan
8 Documents.”

9 **B. Movant Became the Owner of the Note and Beneficiary of the Mortgage.**

10 Through a sequence of assignments (the “Assignments”), Movant is now the
11 owner of the Note, beneficiary under the Mortgage, and secured party and/or
12 assignee under all other Loan Documents to the extent Original Lender held such
13 capacity. *See* Heller Decl., ¶¶ 6-7.

14 Movant acknowledges that the Receiver has entered into the agreement based
15 upon this representation that Movant is the owner of the Note, beneficiary under the
16 Mortgage, and secured party and/or assignee under all other Loan Documents to the
17 extent Original Lender held such capacity.²

18 **C. The TI/LC Reserve Account.**

19 Under Section 2.3(a)(ii) of the Mortgage, Borrower agreed to four years of
20 monthly payments of \$3,333.33 into a New Tenant Reserve (“TI/LC Reserve
21 Account”). *See* Heller Decl., Ex. C [Mortgage]. It appears that Borrower made 19
22 additional payments to the TI/LC Reserve Account beyond the four year period,
23 which equals \$63,333.27. Heller Decl., ¶ 12. The Consenting Parties have agreed
24 that if the Motion is granted, these overpayments will be turned over to the
25 Receiver, but shall be reduced by \$16,420 since Movant previously advanced that
26 amount to the Receiver to operate the Property. *See, infra*, Section II.E.

27 _____
28 ² Copies of the Assignments will be made available to any interested party upon request by contacting counsel for
Movant by email JGoodfried@perkinscoie.com or telephone at (310) 788-9900.

1 **D. The Complaint Against Copeland.**

2 On October 18, 2011, the Securities and Exchange Commission filed its
3 Complaint for Violations of The Federal Securities Laws, and the Proposed
4 Judgment of Permanent Injunction and Other Relief as to Defendants. *See* Docket
5 Nos. 1 and 2.

6 The Court entered Judgment of Permanent Injunction and Other Relief as to
7 Defendants and its subsidiaries and affiliates (the “Permanent Injunction”), and also
8 appointed Thomas C. Hebrank as the Receiver. *See* Docket No. 3.

9 As part of the Permanent Injunction, the Court appointed the Receiver with
10 full powers of an equity receiver, including the full power over all assets and other
11 property belonging to or in the possession of Defendant and its subsidiaries and
12 affiliates. *See* Docket No. 3 [4:2-9]. The Receiver contends that the Property falls
13 within the scope of the Receiver’s jurisdiction and the Permanent Injunction.

14 **E. The Property.**

15 The Consenting Parties agree that the Property’s value falls below the
16 indebtedness on the Loan and any liquidation by the Receiver would not result in
17 any proceeds for the Defendants’ creditors besides Movant. In fact, the amount due
18 and owing from the Borrower to Movant on the Loan equals \$6,313,600.29 as of
19 June 30, 2012, meanwhile, the Property’s appraised value falls below that amount.
20 *Heller Decl.*, ¶ 9.

21 The Consenting Parties further agree that the Property should be excised
22 from the Receivership. At this point, the Property is barely able to generate enough
23 income to cover its expenses and has operated at a net loss for the period from
24 January through May 2012. *Heller Decl.*, ¶ 10 & Ex. D. Also, Movant has been
25 asked by the Receiver to advance funds for maintenance of the Property, and
26 pursuant to such request, on or about June 13, 2012, the special servicer for Movant
27 transferred \$16,420 to the Receiver out of the TI/LC Reserve Account. *Id.*

1 **F. The Agreement Reached Between Movant and the Receiver.**

2 On September 12, 2012, the Consenting Parties agreed, in good faith and
3 subject to this Court's approval, to resolve all issues with respect to the Property in
4 a manner that releases the Property from the Receiver's jurisdiction while resolving
5 any and all claims or issues by and between them with respect to the Property.

6 Specifically, the Consenting Parties agreed to resolve all issues with respect
7 to the Property as set forth below and, by this Motion, Movant seeks the Court's
8 order approving their agreement and directing the disposition of the Property as
9 follows:

10 (a) Within seven (7) days of entry of the Order on this Motion, Movant shall
11 pay to the Receiver a total of \$46,913.27 representing the amounts the Receiver
12 contends were overpaid under the Reserve and Security Agreement less the
13 amounts advanced by Movant for emergency repairs to the Property (the
14 "Payment"). If the Payment is not made within seven (7) days of entry of the
15 Order, Movant stipulates to the Receiver applying ex parte with notice for the Court
16 to vacate the Order. The Order shall not take effect until the Payment is received
17 by the Receiver. Movant's payment of the Payment shall fully satisfy its
18 obligations, if any, to the Receiver and/or the Borrower, or any of their affiliates or
19 subsidiaries, including but not limited to, to refund, return, or pay any sums for any
20 alleged overpayments or deposits to impounds or reserves.

21 (b) The Property shall temporarily remain in the possession and under the
22 management of the Receiver until the earlier of (i) receipt of written notice from the
23 Movant of appointment of a new receiver under the loan documents, or (ii) ninety
24 (90) days from the effective date of the Order (as set forth in (a), above), at which
25 time the Property shall be transferred to the newly appointed receiver or, if no
26 receiver is appointed within that time, abandoned by the Receiver.

27 and

28 (c) The Receiver shall use all rents, issues and/or profits from the Property

1 received from September 12, 2012 until the Property is released from the Receiver's
2 jurisdiction (the "Interim Period") toward the reasonable and customary costs and
3 expenses of the Property (including the expense of \$3,750 per month in
4 receivership fees from the effective date of the Order until the Property is released
5 under (b), above,) and Movant shall be responsible, according to proof, to fund to
6 the Receiver any deficit for the payment of such costs and expenses during the
7 Interim Period (including the payment of receivership fees set forth above).
8 Notwithstanding the foregoing, the Receiver is holding approximately \$8,000 as of
9 the date of the agreement, and does not have to use such amount towards the costs
10 and expenses of the Property.

11 **III. Argument.**

12 “It is a recognized principle of law that the district court has broad powers
13 and wide discretion to determine the appropriate relief in an equity receivership.”
14 *S.E.C. v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). “A primary purpose of
15 equity receiverships is to promote orderly and efficient administration of the estate
16 by the district court for the benefit of creditors.” *Id.* at 1038.

17 District courts have the broad powers of a court of equity to determine the
18 appropriate relief in an equity receivership.” *S.E.C. v. Capital Consultants, LLC*,
19 397 F.3d 733, 738 (9th Cir. 2005). The basis for this broad deference is that it best
20 serves the receivership’s purpose of orderly and efficient administration of the
21 assets for the benefit of creditors. *Commodities Futures Trading Comm’n v.*
22 *Topworth Int’l, Ltd.*, 205 F.3d 1107, 1115 (9th Cir. 1999). A district court’s
23 decision while supervising equity receiverships is reviewed for abuse of discretion.
24 *Capital Consultants*, 397 F.3d at 738.

25 The district court in its supervisory role over a receivership has the power to
26 order the disposition of any real property within the receivership. *See, e.g., S.E.C.*
27 *v. American Capital Invest., Inc.*, 98 F.3d 1133, 1144 (9th Cir. 1996), *cert. denied*
28 520 U.S. 1185 (decision abrogated on other grounds) (“The power of sale

1 necessarily follows the power to take possession and control of and to preserve
2 property.”); *see also Elliott*, 953 F.2d at 1566 (the District Court has broad powers
3 and wide discretion to determine relief in an equity receivership). To that end, a
4 federal court receivership is not limited or deprived of any of its equity powers by
5 state statute. *Beet Growers Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th
6 Cir. 1925). Accordingly, the Court has broad equitable powers and discretion in
7 granting ancillary relief in its supervisory role over equity receiverships.

8 Here, the Movant and the Receiver agree that the most equitable resolution
9 for the Defendants' creditors is release the Property from the jurisdiction of the
10 Receiver and the Permanent Injunction. This is because the Consenting Parties
11 agree that any liquidation of the Property by the Receiver would leave no proceeds
12 for any of the Defendants' creditors besides Movant. Additionally, Defendants'
13 creditors would likely face a net loss since the Property is operating at a net loss
14 and the Receiver would incur administrative costs and time in managing,
15 maintaining, and liquidating the Property while the creditors would receive nothing.

16 In order to fairly and efficiently effectuate the release of the Property, and
17 fully resolve any and all issues between them relating to the Property, the
18 Consenting Parties entered into an agreement on September 12, 2012, subject to the
19 Court's approval, setting forth the terms of the disposition of the Property from the
20 Receiver's jurisdiction and the Permanent Injunction. Specifically, the Consenting
21 Parties agreed to the following terms:

22 (a) Within seven (7) days of entry of the Order on this Motion, Movant shall
23 pay to the Receiver a total of \$46,913.27 representing the amounts the Receiver
24 contends were overpaid under the Reserve and Security Agreement less the
25 amounts advanced by Movant for emergency repairs to the Property (the
26 “Payment”). If the Payment is not made within seven (7) days of entry of the
27 Order, Movant stipulates to the Receiver applying ex parte with notice for the Court
28 to vacate the Order. The Order shall not take effect until the Payment is received

1 by the Receiver. Movant's payment of the Payment shall fully satisfy its
2 obligations, if any, to the Receiver and/or the Borrower, or any of their affiliates or
3 subsidiaries, including but not limited to, to refund, return, or pay any sums for any
4 alleged overpayments or deposits to impounds or reserves.

5 (b) The Property shall temporarily remain in the possession and under the
6 management of the Receiver until the earlier of (i) receipt of written notice from the
7 Movant of appointment of a new receiver under the loan documents, or (ii) ninety
8 (90) days from the effective date of the Order (as set forth in (a), above), at which
9 time the Property shall be transferred to the newly appointed receiver or, if no
10 receiver is appointed within that time, abandoned by the Receiver.

11 and

12 (c) The Receiver shall use all rents, issues and/or profits from the Property
13 received from September 12, 2012 until the Property is released from the Receiver's
14 jurisdiction, the Interim Period, toward the reasonable and customary costs and
15 expenses of the Property (including the expense of \$3,750 per month in
16 receivership fees from the effective date of the Order until the Property is released
17 under (b), above,) and Movant shall be responsible, according to proof, to fund to
18 the Receiver any deficit for the payment of such costs and expenses during the
19 Interim Period (including the payment of receivership fees set forth above).

20 Notwithstanding the foregoing, the Receiver is holding approximately \$8,000 as of
21 the date of the agreement, and does not have to use such amount towards the costs
22 and expenses of the Property.

23 Movant brings this Motion to seek the Court's approval of, and an order
24 directing disposition of the Property pursuant to, the terms of the September 12,
25 2012 agreement between the Consenting Parties.

26 **IV. Conclusion.**

27 WHEREFORE, Movant requests entry of an order approving the agreement
28 reached with the Receiver, subject to the Court's approval, with regard to the

1 disposition of the Property and effectuating the terms of that agreement.

2

3 DATED: October 5, 2012.

PERKINS COIE LLP

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By: _____
Michael B. Garfinkel

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6

Attorneys for Creditor
U.S. Bank National Association, as
Trustee, successor in interest to Bank
of America, National Association, as
successor by merger to LaSalle Bank
National Association, as Trustee for
Bear Stearns Commercial Mortgage
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