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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.
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Case No. 11-08607-R-DTB

REPLY BRIEF IN SUPPORT OF
MOTION FOR ORDER APPROVING
AGREEMENT BETWEEN
RECEIVER AND CREDITOR
REGARDING DISPOSITION OF
CERTAIN COMMERCIAL
PROPERTY WITHIN JURISDICTION
OF RECEIVER

Date: November 19, 2012
Time: 10:00 a.m.
Ctmm: 8, 2nd Floor
Judge: Hon. Manuel L. Real

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I. INTRODUCTION.

By its Motion, Movant U.S. Bank, National Association, etc. ("Movant") seeks a Court order approving and implementing the terms of an agreement with the appointed Receiver, Thomas Hebrank (the "Receiver" and collectively with Movant, the "Consenting Parties"), to remove certain real property located at 455 Park Place, Lexington, Kentucky ("Property") from the Receivership (the "Agreement"). Movant has the senior secured lien on the Property. The amount owed on the Loan far exceeds the value of the Property. As such, there is no value in the Property for the receivership or any victims of Defendants. The Receiver has been in place and managing the property for approximately one year and has entered into the Agreement because the Property is a drain on the Receivership as its expenses exceed its income. Therefore, the Receiver has stated that if this Motion is not granted, he will likely abandon the Property.

Movant served hundreds of creditors with the Motion and Proposed Order and received only one objection, in the form of an Opposition filed by John J. Kohut and Joanne Kohut (the "Kohuts"). The Kohuts are guarantors of Movant's loan. The Kohuts do not dispute that the relief sought by the Motion is in the best interests of the Receivership. However, the Kohuts object to the Motion, based on the false premise that granting the Motion would somehow violate the Permanent Injunction by allowing Movant to pursue them under their Guaranties. The Kohuts' interpretation of the Permanent Injunction is incorrect, as it does not protect the Kohuts from individual actions on the Guaranties. However, even if the Kohut's interpretation were correct, the Motion should be granted because that issue is not before the Court on this Motion. The granting of the Motion will not affect any of the Kohuts' rights or possible defenses. If the Kohuts believe they have defenses to their obligations under the Guaranties, they will be free to assert them should Movant chose to seek enforcement of such Guaranties.

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2 The Motion is simple and straightforward. It seeks equitable relief by
3 removing a net-loss Property from the estate. Accordingly, as discussed below, it is
4 in the best interests of the victims of Mr. Copeland that the Agreement of the
5 Consenting Parties be effectuated and the Property be transferred outside of the
6 Receivership. Movant therefore requests that the Court grant the Motion.

7 II. DISCUSSION.

8 A. *The Kohuts' Guaranties Are Not Before This Court, and Granting the* 9 *Motion Will Not Deprive The Kohuts of Any Defenses.*

10 In Opposition, the Kohuts argue that they are protected parties under the
11 Permanent Injunction and that the granting of the Motion will violate the Permanent
12 Injunction by depriving them of their purported defenses. As explained below, the
13 Kohuts are not protected parties under the Permanent Injunction. However, even if
14 they were, the Motion should be granted because doing so will not impact the
15 ability of the Kohuts to raise any such defenses at the appropriate time.

16 The issue of the Guaranties is not before the Court on this Motion. The only
17 issue before the Court is Movant's request that the Court issue an order effectuating
18 the Agreement between the Consenting Parties to remove the Property from the
19 Permanent Injunction. This will allow Movant to exercise its rights as the senior
20 secured lien on the Property under Kentucky law. Granting the Motion will not
21 impact the Guaranties themselves, as Movants are not seeking any relief or remedy
22 as to the Guaranties.

23 Even if the Kohuts' were, in fact, victims of Defendants (which has not been
24 established by the Opposition) and were protected from any action on the
25 Guaranties by the Permanent Injunction (which is not the case, as explained below),
26 the Motion should be granted because it would not impact or prejudice the Kohuts'
27 rights. If Movant were to initiate an action on the Guaranties, the Kohuts would
28 have an opportunity to defend against it and raise any defenses they feel

1 appropriate, including the Permanent Injunction and the currently unsupported
 2 claim that the Guaranties are not enforceable because they were obtained by the
 3 fraud of Mr. Copeland. Granting the Motion will not deprive the Kohuts of any of
 4 their defenses to an action on the Guaranties whatsoever.

5 The Kohuts do not, because they cannot, dispute that their defenses will
 6 survive this Motion and therefore their Opposition should be disregarded.

7 **B. *The Kohuts' Reliance on Permanent Injunction Is Without Merit.***

8 The Kohuts' Opposition is premised on the faulty conclusion that they are
 9 "protected from an action by U.S. Bank under the scope of the October 19, 2011
 10 Order [the Permanent Injunction]" from an action on the Guaranties. [Opposition at
 11 p. 8.] They are not. The Kohuts' argument to the contrary is based upon a
 12 misinterpretation of the Permanent Injunction and, in particular, a misquoted
 13 provision from it.

14 The Permanent Injunction was issued to enjoin the fraudulent activities of
 15 Defendants Charles Copeland, Copeland Wealth Management, A Financial
 16 Advisory Corporation ("CWM") and Copeland Wealth Management, a Real Estate
 17 Corporation ("Copeland Realty") and to marshal and preserve the assets for the
 18 benefit of the victims of their fraudulent practices. To that end, the Permanent
 19 Injunction, among other things, prohibits Defendants from engaging in any
 20 investment practices, obligates Defendants to disgorge ill-gotten gains, appoints the
 21 Receiver to take possession of Defendants' property, and prohibits third parties
 22 from commencing actions against "Defendants CWM and Copeland Realty or their
 23 subsidiaries or affiliates." [Permanent Injunction: p. 7.]

24 Even assuming the Kohuts are victims of Defendants (which is unproven at
 25 this point), the Permanent Injunction does not in any way restrict third parties, such
 26 as Movants, from pursuing claims against them. The Kohuts are not "subsidiaries
 27 or affiliates" of CWM or Copeland Realty (or Mr. Copeland for that matter). By
 28 their Opposition, the Kohuts are attempting to stretch the Permanent Injunction

1 from an order seeking to preserve the assets of Defendants for the benefit of the
 2 victims into an order which broadly shields the Kohuts from any liability to third
 3 parties.

4 The Kohuts' misinterpretation of the Permanent Injunction appears to stem
 5 from their incomplete and inaccurate restatement of Article VIII of the Permanent
 6 Injunction. The Kohuts' purported quotation of the relevant portion of that Article
 7 is missing several key words and punctuation.

8 The relevant portion of Article VIII actually states:

9 IT IS FURTHER ORDERED, ADJUDGED AND
 10 DECREED that, except by leave of this Court, during the
 11 pendency of this receivership, all clients, investors, trust
 12 beneficiaries, note holders, creditors, claimants, lessors and
 13 all other persons or entities seeking relief of any kind, in law
 14 or in equity, from Defendants CWM and Copeland Realty or
 15 their subsidiaries or affiliates, and all persons acting on
 16 behalf of any such investor, *trust beneficiary, note holder,*
 17 creditor, claimant, lessor, consultant group, or other person,
 18 including sheriffs, marshals, servants, agents, employees,
 19 and attorneys, are hereby restrained and enjoined from,
 20 directly or indirectly, with respect to these person and
 21 entities:

22 (a) commencing, prosecuting, continuing or
 23 enforcing any suit or proceeding (other than actions by the
 24 Commission) against any of them:¹

25 [Permanent Injunction, Article VIII, p. 7 (emphasis added).]

26 Article VIII simply prohibits actions against CWM and Copeland Realty

27 ¹ Language in italicized bold was omitted from the Kohut's version of Article VIII in the Opposition, including a
 28 comma after the word attorneys. Their improper copying of the Order might have led to their incorrect interpretation
 of it.

1 during the pendency of the Receivership, without leave of Court. To that end, the
 2 first portion of the first paragraph identifies a group of persons who are prohibited
 3 from bringing any such claims – “clients, investors, trust beneficiaries, note
 4 holders, creditors, claimants, lessors and all other persons seeking relief of any
 5 kind.” This group would include the Kohuts themselves, as investors of
 6 Defendants. Article VIII then logically extends the prohibition on creditor
 7 enforcement to those persons acting on behalf of the same group against CWM and
 8 Copeland Realty, including “sheriffs, marshals, servants, agents, employees and
 9 attorneys.”

10 Thus, Article VIII prohibits the Kohuts, and their agents, from suing
 11 Defendants and recovering assets from them which would deplete the estate. It
 12 says nothing about actions brought against the Kohuts themselves. The Kohuts’
 13 arguments to the contrary are without any support in the Permanent Injunction or in
 14 law and therefore should be rejected.

15 **C. *The Kohuts Are Liable under the Guaranties Regardless of the Condition***
 16 ***of the Borrower and Possession of the Property.***

17 The Kohuts do not dispute that they signed the Guaranties.² Rather, they
 18 argue that the Guaranties are not enforceable because the Kohuts did not understand
 19 or remember that they signed them. This argument and the overall enforceability of
 20 the Guaranties are not before the Court. And, granting the Motion will not
 21 eliminate or diminish any legitimate defense the Kohuts may have in this regard.³
 22 The instant consensual Motion seeks nothing from the Kohuts, as it only transfers
 23 the Property out of the Receivership. If liability were at issue, the Guaranties,
 24 which the Kohuts admit to signing, clearly waive any right to argue that Movant’s
 25 remedies shall be limited to proceeding against the Property and Borrower and not
 26 the Kohuts.

27 ² There are two guaranties attached to Exhibit A to the Kohut Declaration: (a) the Guaranty of Recourse Obligations
 28 of Borrower (“Recourse Guaranty”) and the Personal Guaranty (“Personal Guaranty,” collectively with Recourse
 Guaranty, the “Guaranties”).

³ Movant is amenable to adding this clarifying sentence to the proposed order if that will abate the Kohuts’ concerns.

Moreover, the Kohuts' liability is expressed in the Guaranties themselves. Section 2 of the Recourse Guaranty provides that it "is expressly understood and agreed that this is a continuing guaranty and that the obligations of Guarantor hereunder are and shall be absolute under any and all circumstances."⁴ Section 9 provides that it is understood if Movant is prevented or delayed from taking any remedial action against the borrower, Movant may declare all debt due and payable and enforce all rights and remedies against the Kohuts immediately.⁵ Section 12 states that Movant may seek its rights and remedies against the Kohuts without first proceeding against Borrower and/or the Property.⁶ Further, Section 10 of the Personal Guaranty provides that payment "shall not be impaired, modified, changed, released or limited in any manner whatsoever by any impairment, modification, change, release or limitation of the liability of the Borrower . . . resulting from the decision of any court."⁷

Further, the Kohuts' argument that Movant should not be permitted to seek its collateral and then a deficiency claim against the Kohuts is belied by the Guaranties themselves. Specifically, as noted above, Section 12 of the Recourse Guaranty and Section 3 of the Personal Guaranty provide that Movant has the right to proceed against the Kohuts before proceeding against the Borrower. *See, e.g.*, Kohut Decl., Ex. A, page 10 of 18 ("[Movant] shall have the right to proceed against Guarantor immediately upon the occurrence of any declared default by Borrower . . . under the Note [and other security instruments] without taking any prior action or proceeding of any kind to enforce the loan documents.") Further, Section 5 of the Recourse Guaranty provides any indebtedness of Borrower to the Kohuts shall be deferred, postponed, and subordinated until the Movant's debt is paid in full. *Id.*, Ex. A, page 3 of 18.

⁴ See Declaration of Joanne Kohut filed concurrently with the Opposition ("Kohut Decl."), Ex. A, page 2 of 18.

⁵ See Kohut Decl., Ex. A, page 4 of 18.

⁶ See Kohut Decl., Ex. A, page 5 of 18.

⁷ See Kohut Decl., Ex. A., page 13 of 18.

1 These provisions show the Kohuts remain presently liable under the
 2 Guaranties regardless of whether the Property stays under the Receiver's control or
 3 is transferred outside the estate. Meanwhile, if the Motion is denied, all the other
 4 creditors suffer because the Property – which the Kohuts concede is forcing the
 5 Receiver to incur expenses – remains within the Receivership.

6 ***D. Other Arguments Made by the Kohuts are Red Herrings.***

7 The Receiver and hundreds of creditors agree, or at least do not oppose, that
 8 the Property should be transferred from the Receivership. The Kohuts made many
 9 arguments to prevent this, many of which are flawed, disingenuous or simply red
 10 herrings.

11 ***RED HERRING NO. 1: Movant failed to attach an Agreement.***

12 There is no Agreement attached to the Motion because the parties settled the
 13 matter subject to the Court's approval through back and forth communications. All
 14 the terms for the settlement are included in the Motion (multiple times). The parties
 15 contemplated that the formalized written agreement would come through an order
 16 of the Court. All the terms of the settlement therefore are in the proposed order
 17 submitted and served with the moving papers. Let it be clear – the Agreement does
 18 not include a release for the Kohuts. The Receiver has reviewed these papers and
 19 has no objection.

20 ***RED HERRING NO. 2: Movant omits mention of the Guaranties.***

21 There is no reference to the Guaranties because, as noted above, the
 22 Guaranties are not part of the Motion. In fact, nothing in this Motion alters the
 23 rights and defenses for the Kohuts. If the Motion is denied, the Receiver will likely
 24 move to abandon the Property. The Motion, on the other hand, seeks approval of
 25 transferring the Property out of the Receivership and resulted in no objections from
 26 hundreds of creditors aside from the Kohuts. While the Kohuts have filed an
 27 Opposition, they are unable to articulate any sound argument against it. Indeed,
 28 they do not, because they cannot deny that granting the Motion would be in the best

1 interests of Defendants' victims.

2 ***RED HERRING NO. 3: Movant did not attach the Appraisal.***

3 The Kohuts argue that they have the right to view the Appraisal for the
4 Property. Movant has shared the Appraisal with the Receiver under a
5 confidentiality agreement. The Receiver agreed the underlying debt surpasses the
6 value of the Property and it is in the best interest of creditors is to transfer the
7 Property from the estate. The Kohuts have no right to view the Appraisal and have
8 even less right to demand it be filed in the public record. That said, as noted in the
9 moving papers, a true and complete copy of the Appraisal will be brought to the
10 hearing on the Motion and upon request provided to the Court for review.

11 ***RED HERRING NO. 4: There are no grounds to lift the stay.***

12 Movant provided case law on the Court's authority to grant the equitable
13 relief sought by the Motion. The Kohuts concede in the Opposition that the Court
14 holds such equitable powers. But then the Kohuts in the last section of the
15 Opposition argue that the Court must consider the *Wencke* factors before it can
16 release the Property from its own injunction. Such argument is misguided as the
17 Court has authority to modify its own orders. *System Federation No. 91 v. Wright*,
18 364 U.S. 642, 647-48 (1961) (holding that a district court has "wide discretion" to
19 modify an injunction based on changed circumstances or new facts); *A & M*
20 *Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002) (same). Putting
21 that aside, the undisputed facts show that the *Wencke* factors favor Movant. First,
22 denying the Motion would not preserve the status quo because, as the Receiver
23 believes, the Property is depleting assets from the estate and prefers the Property
24 transferred from the estate. In fact, if the Agreement is not approved by the Court,
25 the Receiver has stated that he intends to file a motion to abandon the Property.
26 Second, the time is ripe in the course of the Receivership to transfer the Property
27 since the Receiver has reviewed the Appraisal and does not believe liquidation is in
28 the creditors' best interests. And third, nobody disputes the merits of Movant's

1 claim that the Borrower owes millions of dollars to Movant and such indebtedness
2 is secured by the Property. These factors weigh in favor of Movant, but putting that
3 aside, they are largely a red herring since the Court has the equitable powers to
4 release the Property from the Receivership.

5 ***RED HERRING NO. 5: Too much speculation about the Property.***

6 There is no speculation as to what shall happen to the Property if the Motion
7 is granted. The terms of the Agreement and the Proposed Order are very clear. The
8 Property shall temporarily remain in the possession of the Receiver while the
9 Movant seeks appointment of a state court receiver in Kentucky. In the meantime,
10 Movant will move to foreclose on the Property. If a state court receiver cannot be
11 appointed within ninety days, the Property will be deemed abandoned.

12 As for the Kohuts, no decision has been made as to whether or not to enforce
13 the Guaranties. However, there is nothing in the Permanent Injunction or the Loan
14 Documents themselves that prohibits Movant from doing so. Should Movant file
15 an action on the Guaranties, the Kohuts will have an opportunity to defend
16 themselves. Granting this Motion will not deprive the Kohuts of any of their
17 defenses. Thus, the issue of the Guaranties is not before this Court. The Kohuts'
18 attempt to seek a summary release of their Guaranties based upon a single
19 declaration which merely states that they do not remember signing them is clearly
20 inappropriate and should be denied.

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III. CONCLUSION.

For the reasons set forth above and in the moving papers, Movant requests entry of an order approving the agreement reached with the Receiver with regard to the disposition of the Property and effectuating the terms of that agreement.

DATED: November 5, 2012.

PERKINS COIE LLP

By: 
Michael B. Garfinkel

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
Securities Inc., Commercial
Mortgage Pass-Through Certificates,
Series 2006-TOP22

PROOF OF SERVICE

I, Caroline Mallahi, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1888 Century Park East, Suite 1700, Los Angeles, CA 90067-1721.

On November 5, 2012, I served a copy of the within document(s):

**REPLY BRIEF IN SUPPORT OF MOTION FOR ORDER APPROVING
AGREEMENT BETWEEN RECEIVER AND CREDITOR REGARDING
DISPOSITION OF CERTAIN COMMERCIAL PROPERTY WITHIN
JURISDICTION OF RECEIVER**

xx **BY ELECTRONIC NOTICE VIA THE ECF SYSTEM TO:**

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XX **BY MAIL:** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

****SEE ATTACHED SERVICE LIST****

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

1 I declare under penalty of perjury under the laws of the State of California
2 that the above is true and correct.

3 Executed on November 5, 2012 at Los Angeles, California.
4

5 
6 Caroline Mallahi