

1 Marc A. Levinson (California Bar No. 57613)
2 Jeffery D. Hermann (California Bar No. 90445)
3 ORRICK, HERRINGTON & SUTCLIFFE LLP
4 400 Capitol Mall, Suite 3000
5 Sacramento, California 95814-4497
6 Telephone: (916) 447-9200
7 Facsimile: (916) 329-4900
8 Email: malevinson@orrick.com
9 jhermann@orrick.com

Bob L. Olson (Nevada Bar No. 3783)
Anne M. Loraditch (Nevada Bar No. 8164)
BECKLEY SINGLETON, CHTD.
530 Las Vegas Boulevard South
Las Vegas, Nevada 89101
Telephone: (702) 385-3373
Facsimile: (702) 385-5024
Email: bolson@beckleylaw.com
aloraditch@beckleylaw.com

6 Rob Charles (Nevada Bar No. 6593)
7 LEWIS & ROCA, LLP
8 3993 Howard Hughes Parkway, Suite 600
9 Las Vegas, Nevada 89169
10 Telephone: (702) 949-8321
11 Facsimile: (702) 949-8320
12 Email: rcharles@lrlaw.com

10 *Attorneys for Petitioning Creditors USA Capital Diversified Trust Deed Fund, LLC*
11 *and USACM Liquidating Trust*

12 **UNITED STATES BANKRUPTCY COURT**
13 **DISTRICT OF NEVADA**

14 In re

15 JOSEPH D. MILANOWSKI,

16 Debtor.

Case No. BK-S-07-13162 LBR

Chapter 11

DECLARATION OF MICHAEL A. TUCKER IN SUPPORT OF PETITIONING CREDITORS' EMERGENCY (1) MOTION UNDER 11 U.S.C. §§ 303 (f) AND (g), 105 AND 1104(a) FOR AN ORDER APPOINTING AN INTERIM TRUSTEE, AND (2) EX PARTE MOTION FOR AN ORDER IMMEDIATELY RESTRICTING THE ALLEGED DEBTOR'S BUSINESS-RELATED ACTIVITIES PENDING APPOINTMENT OF AN INTERIM TRUSTEE

Hearing Date: OST PENDING
Hearing Time: OST PENDING

26 I, Michael A. Tucker, hereby declare, verify and state as follows:

27 1. I am over the age of 18, am mentally competent, have personal knowledge of the
28 facts that follow, except where noted as upon information and belief, and if called upon to testify

1 thereto, I could and would do so under oath. I make this declaration in support of the Emergency
2 (1) Motion Under 11 U.S.C. §§ 303 (f) and (g), 105 and 1104(a) for an Order Appointing an
3 Interim Trustee, and (2) Ex Parte Motion for an Order Immediately Restricting the Alleged
4 Debtor's Business-Related Activities Pending Appointment of an Interim Trustee (the "Motion").

5 2. I am a Senior Managing Director with FTI Consulting, Inc. ("FTI"), a financial
6 advisory services firm specializing in reorganization, litigation and related consulting services. I
7 joined FTI in 2002 upon FTI acquiring PricewaterhouseCoopers LLP's Business Recovery
8 Services group where I was a Partner and had been employed for 17 years.

9 3. On April 13, 2006 (the "Petition Date"), USA Capital Diversified Trust Deed
10 Fund, LLC ("Diversified") and four related companies, namely USA Commercial Mortgage
11 Company ("USACM"), USA Capital Realty Advisors, LLC ("USACRA"), USA Capital First
12 Trust Deed Fund, LLC and USA Securities, LLC (collectively the "USA Debtors") filed petitions
13 for relief under chapter 11 of the Bankruptcy code. FTI was retained by the Official Committee of
14 Equity Security Holders of USA Capital Diversified Trust Deed Fund, LLC ("Diversified
15 Committee") on June 9, 2006 to perform financial advisory services for the Diversified
16 Committee in the chapter 11 cases. On March 12, 2007, the Debtors' Third Amended Plan of
17 Reorganization (the "Plan") became effective and in accordance with the Plan, I became the
18 Administrator of Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC
19 ("Diversified").

20 4. **Jointly-Administered Bankruptcy Filings.** By order entered June 9, 2006, the
21 Court approved the joint administration of the five bankruptcy cases (the "USA Cases").

22 5. Commencing no later than January 2003 and continuing through at least December
23 2004, Milanowski and Hantges caused USACM to begin raiding Diversified as a source of funds
24 for the Collection Account and for their own potential personal gain. Milanowski and Hantges
25 ultimately perpetrated a massive fraud upon Diversified by failing in every conceivable way to
26 adhere to the promises and representations contained in the Prospectus or to protect the interests
27 of Diversified's members.
28

1 6. **Corporate Looting – USAIP.** During the course of the USA Cases, evidence of
2 the misdeeds perpetrated upon Movants¹ and others by Milanowski and Hantges came to light.
3 The use of the business entity - USAIP - by Milanowski and Hantges for their own potential
4 personal gain to the detriment of Movants is a telling illustration of the acute need for the
5 appointment of an interim trustee in this case.

6 7. USAIP is a Nevada limited liability company owned by Milanowski (as trustee for
7 the Joseph D. Milanowski 1998 Trust), Hantges (as trustee of the Thomas A. Hantges 1997 Trust)
8 and Paul Hamilton. Milanowski and Hantges were the managers of USAIP through February
9 2005. Thereafter, Milanowski was the sole manager until April 5, 2007.

10 8. On April 4, 2007, Movants and Alabruj Investments, LLC (“Alabruj,” and together
11 with Movants, the “USAIP Petitioning Creditors”), filed an involuntary chapter 11 petition
12 against USAIP, Case No. BK-S-07-11821 LBR (the “USAIP Case”), and sought the appointment
13 of an interim trustee for USAIP’s assets on an emergency basis. At the emergency hearing held
14 April 5, 2007, the Court ordered the appointment of an interim trustee (*see* Order For
15 Appointment Of An Interim Trustee And Setting Omnibus Hearing entered April 6, 2007,
16 [USAIP Docket No. 13]), and on or around April 6, 2007, after being duly appointed by the
17 Office of the United States Trustee, Lisa Poulin assumed control of USAIP’s assets.

18 9. Milanowski and Hantges have conducted much of their personal real estate
19 development activities through the USAIP business entity. Its primary assets are equity member
20 interests in limited liability companies engaged in real estate development activities. USAIP is
21 the manager of many of the limited liability companies in which it owns a member interest.

22 10. For example, USAIP is the borrower on the 10-90, Inc. loan from Diversified,
23 which, as of the date hereof, includes unpaid principal in excess of \$55 million plus accrued and
24 unpaid interest which Diversified contends exceeds \$60 million (“10-90 Loan”). Milanowski and
25 Hantges each personally guarantied the repayment of the 10-90 Loan.

26 ///

27 ///

28 ¹ Unless otherwise defined herein, all capitalized terms shall have the same meaning ascribed in the Motion.

1 11. USAIP manages entities that are borrowers on numerous loans arranged by
2 USACM and entities that are obligors of Diversified. Milanowski and Hantges have guaranteed
3 the repayment of loans arranged by USACM and owed to Movants and other creditors. *Id.*

4 **Milanowski Burdened USA Investors VI, LLC, With Personal Obligations**
5 **Owing to Salvatore Reale For No Consideration.**

6 12. One entity managed by USAIP is USA Investors VI, LLC (“Investors VI”), which
7 is the owner of the Hotel Zoso (formerly known as the Marquis Hotel) in Palm Springs,
8 California. Investors VI owes in excess of \$20 million to direct lenders in a loan arranged by
9 USACM (“Marquis Hotel Loan”). Investors VI also is obligated to Diversified, a substantial
10 creditor of Investors VI, in connection with the Sheraton Hotel loan. The Hotel Zoso has been
11 under a contract of sale since May 2006. Investors VI was the subject of an involuntary
12 bankruptcy petition filed by Diversified in this Court, case no. BK-S-06-13925-LBR. Recently,
13 the trustee of USAIP filed a voluntary petition for Investors VI, initiating case no. BK-S-07-
14 12377 LBR.

15 13. Commencing in the Summer of 2006, the USA Debtors engaged in discussions
16 with Milanowski for payment of the Marquis Hotel Loan and obligations owing to Diversified
17 upon the sale of the Hotel Zoso. Milanowski offered that he would make such payments, but
18 when asked for enforceable commitments by the USA Debtors, Milanowski stated that it was not
19 possible to provide Diversified with a deed of trust or other direct claims against the property to
20 assure such payment, since, according to Milanowski, approval of the Bureau of Indian Affairs
21 (“BIA”) for such a lien or claim was necessary, would take a great deal of time, and most likely
22 would not be obtained.

23 14. Diversified and USACM Trust subsequently learned – as a result of the filing of a
24 proof of claim in the Investors VI case – that in early September 2006, five months after the filing
25 of the USA Cases, Milanowski on behalf of USAIP, as manager of Investors VI, signed a
26 guaranty, deed of trust, promissory note and security agreement in favor of Salvatore J. Reale, as
27 trustee of the Salvatore J. Reale Living Trust dated November 15, 2004 (“Reale”), filed UCC-1
28 financing statements in connection with the same in late September 2006, and, after obtaining

1 BIA approval, recorded the deed of trust against the Hotel Zoso property. Not only did these
2 documents secure the personal obligations of Milanowski and Hantges owing to Reale with
3 property belonging to Investors VI, but Milanowski thereby acknowledged two other multi-
4 million dollar obligations improbably alleged to be owing to Reale by Investors VI and secured
5 those obligations with the Hotel Zoso property of Investors VI. All such actions taken by
6 Milanowski were undertaken in the name of USAIP.

7 **Milanowski's Agreement with Ashby USA Pursuant to which USAIP**
8 **Unnecessarily Agreed to Absorb All Manner of Expenses.**

9 15. USAIP holds a 50% member interest in Ashby USA, LLC ("Ashby USA"), an
10 entity that is in the process of developing major portions of the Roripaugh Ranch project in
11 Temecula, California. The USAIP ownership interest is pledged to Diversified as collateral for
12 the 10-90 Loan. The manager of Ashby USA is Ashby Development Company.

13 16. In the Spring of 2006, Ashby USA was the borrower under \$51 million of bonds
14 issued by the City of Temecula. After the bonds were purchased, the City of Temecula and bond
15 counsel allegedly learned that USACM had filed its chapter 11 case on April 13, 2006. The City
16 of Temecula contended that the bonds would have to be repurchased and resold after making the
17 additional disclosures about the bankruptcy case. The costs of repurchase and re-issuance of the
18 bonds are likely substantial. Although Ashby Development Company, as the manager of Ashby
19 USA, was responsible for the statements in the bond offering statement, Ashby Development
20 Company demanded that USAIP absorb *all* bond re-issuance expenses. Milanowski assured the
21 USA Debtors that he would not agree to the Ashby demands for reimbursement of bond re-
22 issuance costs.

23 17. However, the USA Debtors subsequently learned that even while Milanowski was
24 assuring the USA Debtors that he would not agree to the Ashby reimbursement demands, in
25 October of 2006, Milanowski executed an amendment to the operating agreement of Ashby USA,
26 which did just that, agreeing to extremely broad categories of reimbursable expenses that go far
27 beyond those directly related to any conceivable bond re-issuance costs. As a result of
28 Milanowski's actions on behalf of USAIP, not only were the USA Debtors misled as to

1 Milanowski's intentions until it was too late to take any pre-emptive action, but the collateral for
2 the 10-90 Loan was improperly reduced in value by an amount that could be millions of dollars --
3 without any consideration whatsoever to USAIP.

4 **Milanowski, Through USAIP, Burdened HMA Sales, LLC, With Liability**
5 **for Personal Obligations Owing to Salvatore Reale.**

6 18. USAIP also manages HMA Sales, LLC ("HMA"), the former owner of the Royal
7 Hotel in Las Vegas. As the Court is aware as a result of the HMA Adversary, Milanowski
8 granted Reale a deed of trust against the Royal Hotel in May 2006 in order to secure repayment of
9 the loans Reale made to Hantges and Milanowski personally. HMA received no consideration
10 whatsoever for taking on and collateralizing the approximately \$10 million debt that Hantges and
11 Milanowski owed to Reale.

12 19. Milanowski granted the Reale lien on the Royal Hotel while Milanowski was
13 negotiating with the USA Debtors on the USAIP \$58 million Note. In doing so, Milanowski
14 effectively stripped substantial value from the collateral pledged to secure that Note (including
15 the equity interests in HMA Sales, LLC and numerous other LLC entities), to the detriment of the
16 Movants and other creditors.

17 **Milanowski Conspired to Place USAIP Into Receivership**
18 **to Avoid This Court's Jurisdiction.**

19 20. On March 26, 2007, Robert A. Russell, an individual, Placer County Land
20 Investors, LLC ("Placer Investors"), a California limited liability company, and SVRB
21 Investments, LLC, an Arizona limited liability company – entities that Movants are informed and
22 believe to be owned and/or controlled by Robert A. Russell (together with Placer Investors and
23 SVRB, "Russell") – filed papers in case no. EDCV07-0343 SGL (JCRx) (the "Receivership
24 Action") in United States District Court, Central District of California (Eastern Division) (the
25 "California Court") seeking the ex parte and immediate appointment of a receiver for all of
26 USAIP's assets.

27 21. On March 27, 2007, while under Milanowski's control, USAIP filed a Declaration
28 of Non-Opposition (the "Consent Declaration") in response to the ex parte receivership motion in

1 the Receivership Action. A true and correct copy of the Consent Declaration is attached hereto as
2 **Exhibit 1** and is incorporated herein by this reference.

3 22. After entering an ex parte order in the Receivership Action that, among other
4 things, prohibited all persons from initiating bankruptcy proceedings against USAIP and perhaps
5 stayed the litigation ongoing in this Court against entities in which USAIP has an ownership
6 interest and for which USAIP is the manager, the California Court – after hearing oral arguments
7 on Movants’ emergency motion for modification – entered an order modifying its previous order,
8 which clarified, among other things, that the filing of a bankruptcy case against USAIP and the
9 litigation ongoing in this Court were not stayed. Modification Order, at ¶ 2, lines 8-16. A true
10 and correct copy of the Modification Order is attached hereto as **Exhibit 2** and is incorporated
11 herein by this reference. Thus, despite Milanowski’s attempts to thwart efforts to recover from
12 USAIP assets, the USAIP Petitioning Creditors filed the USAIP Case.

13 **Movants Lack Information about Other Self-Dealing and Harmful Transactions**
14 **in which Milanowski and Hantges Have Engaged Because, Among Other Things,**
15 **Milanowski and Hantges Have Repeatedly Invoked Their Fifth Amendment Rights.**

16 23. Given the above and certain other transactions of which Movants are aware,
17 Movants suspect that Milanowski and Hantges utilized their control over USACM and USAIP,
18 USACM’s control over Loan repayments, and USAIP’s control over the numerous entities
19 affiliated with USAIP, to their personal advantage and to the detriment of the Movants and others.
20 Moreover, while under the control of Milanowski and Hantges, USAIP was not forthcoming in
21 providing financial or operational information to the USA Debtors or their successors, Diversified
22 and USACM Trust, consistently insisting that a global deal and settlement first be reached
23 between USAIP and Movants before USAIP would provide financial information.

24 **Milanowski and Hantges Owe Substantial Sums that Are Mature, Liquidated**
25 **and Cannot Be Disputed.**

26 24. The 10-90 Loan is in default, and Diversified’s guaranty claims against
27 Milanowski and Hantges have matured, are liquidated and cannot be disputed. Milanowski and
28 Hantges are aware of their guaranty obligations, but no payment has been forthcoming. A true
and correct copy of the correspondence to USAIP, Milanowski and Hantges demanding

1 repayment on the 10-90 Loan is attached hereto as **Exhibit 3** and is incorporated herein by this
2 reference.

3 I declare under penalty of perjury under the laws of the United States of America that the
4 foregoing is true and correct to the best of my knowledge and belief.

5 Executed this 29th day of May 2007, at Phoenix, Arizona.

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

/s/ Michael A. Tucker
MICHAEL A. TUCKER