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11 *and USACM Liquidating Trust*

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

14 In re
15 THOMAS A. HANTGES,
16 Debtor.

Case No. BK-S-07-13163 LBR
Chapter 11

**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

25 USA Capital Diversified Trust Deed Fund, LLC (“Diversified”) and USACM Liquidating
26 Trust, successor in interest to USA Commercial Mortgage Company, on its own behalf and as
27 servicer on behalf of numerous Direct Lenders (“USACM Trust,” and, collectively with
28 Diversified, “Movants”), jointly move the Court for an emergency order appointing an interim

1 trustee, and in addition, immediately restricting the alleged debtor's business-related activities
2 and control over the assets of the debtor pending the hearing on the appointment of an interim
3 trustee, and if granted, the actual appointment of an interim trustee. The gist of this motion (the
4 "Motion") is that the alleged debtor, Thomas Hantges ("Hantges"), together with Joseph D.
5 Milanowski ("Milanowski"),¹ engaged in unlawful activities for his and their own benefit, to the
6 detriment of Movants and their other creditors, through direct or indirect ownership, control
7 and/or management of numerous entities and their affiliates, and that emergency relief is
8 necessary in order to preserve Hantges' assets and records.

9 The Motion is made pursuant to 11 U.S.C. §§ 303(f) and (g), 105 and 1104(a), and is
10 based upon the following points and authorities, the declaration of Michael Tucker (the "Tucker
11 Declaration"), the declaration of Jeffery D. Hermann (the "Hermann Declaration"), the
12 declaration of Geoffrey L. Berman (the "Berman Declaration"), the declaration of Edward M.
13 Burr, Jr. (the "Burr Declaration"), and the declaration of Brigid Higgins (the "Higgins
14 Declaration"), all of which declarations are filed concurrently herewith, in support hereof, and are
15 incorporated for all purposes herein by this reference. The Motion is also based on the far
16 lengthier Michael Tucker declaration (the "HMA Declaration"), originally filed in the adversary
17 proceeding currently pending before this Court as Adv. No. BK-S-06-01256 LBR (the "HMA
18 Adversary") as Adversary Docket No. 170, and is also incorporated for all purposes herein by this
19 reference. For the convenience of the parties and due to its length, the HMA Declaration will be
20 filed in its entirety in this case tomorrow.

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27 ¹ Movants and Nevada State Bank, as Petitioning Creditors, also filed today, contemporaneously with the
28 alleged debtor's petition, an involuntary chapter 11 bankruptcy petition against Milanowski. Movants also are
seeking the appointment of an interim trustee on an emergency basis in the Milanowski bankruptcy case through a
motion substantially similar to and concurrently filed with the Motion.

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MEMORANDUM OF LAW
POINTS AND AUTHORITIES

I.

BACKGROUND FACTS

The lengthy record before this Court in the USA Cases (defined below) is replete with facts that demonstrate that prior to the filing of the USA Cases, Milanowski and Hantges unlawfully used their control over the various debtors and their affiliates for their own personal gain, and to the severe disadvantage of the investors who placed their faith, and often their life savings, in the companies run by Milanowski and Hantges. The Motion demonstrates that both before and after the filing of the USA Cases, Milanowski and Hantges continued to put their own interests ahead of those of investors, frustrating the efforts of the chapter 11 debtors to recover assets for the defrauded investors, by their failure to cooperate with the estates, by their invocation of their Fifth Amendment privileges, by their fraudulent transfers of assets that should have been available to investors and by seeking to avoid the reach of this Court. Each of the various examples detailed below justifies the relief requested in the Motion.

1. **Jointly-Administered Bankruptcy Filings.** On April 13, 2006 (the “Petition Date”), Diversified and four related companies, namely USA Commercial Mortgage Company (“USACM”), USA Capital Realty Advisors, LLC, USA Capital First Trust Deed Fund, LLC and USA Securities, LLC (collectively the “USA Debtors”), filed voluntary petitions in this Court seeking relief under chapter 11 of the Bankruptcy Code. By order entered June 9, 2006, the Court approved the joint administration of the five bankruptcy cases (the “USA Cases”). Tucker Declaration, ¶¶ 3-4.

2. **Creditor Abuse – USACM.** USACM was licensed as a mortgage broker by the State of Nevada since January 11, 1990. Burr Declaration, ¶ 6.

3. Before the Petition Date, USACM was in the business of underwriting, originating, brokering, funding and servicing commercial loans (hereafter “Loans”) primarily secured by residential and commercial developments, both on behalf of investors (hereafter “Direct Lenders”) and for its own account. Burr Declaration, ¶ 7.

1 4. Hantges, through the “Thomas A. Hantges Separate Property Trust”, is a
2 shareholder of USACM. Before the Petition Date, he was USACM’s Chairman of the Board and
3 Chief Executive Officer. Burr Declaration, ¶ 8.

4 5. Milanowski, through the “Joseph D. Milanowski 1998 Trust,” is a shareholder of
5 USACM. Before the Petition Date, he managed USACM as its President and Chief Operating
6 Officer. He also served as a Director. He was primarily responsible for much of the underwriting
7 and loan servicing for USACM. Burr Declaration, ¶ 9.

8 6. Movants allege that Hantges and Milanowski controlled and directed the actions of
9 USACM described below. In addition, any failure by Hantges or Milanowski to undertake any
10 management activity, effectively deeding control of the scheme to the other, is in and of itself
11 approval of the schemes, to the detriment of creditors and third parties. Burr Declaration, ¶ 10.

12 7. USACM maintained a bank account generally referred to as the Collection Trust
13 Account (the “Collection Account”) before the Petition Date. The Collection Account served as
14 the lone USACM bank account to facilitate the collection of principal, interest and fees on Loans
15 due from the respective borrowers. Borrower receipts and USACM funds were commingled in
16 the Collection Account. Burr Declaration, ¶ 11.

17 8. When Borrowers on Loans originated and serviced by USACM known as Beastar,
18 LLC; Beau Rivage Homes; Freeway 101; and Universal Hawaii paid down principal or paid off
19 Loans within the Loan Portfolio, the principal payments received by USACM as Loan servicer
20 were not returned to the Direct Lenders as principal payments, but were held and used by
21 USACM in breach of the Loan Servicing Agreements (“LSAs”) executed by USACM with its
22 Direct Lenders. Since the Petition Date, Mesirov Interim Financial Management (“Mesirov”)
23 has determined that approximately \$46.8 million was collected from borrowers and not repaid to
24 the Direct Lenders to such borrowers. In other words, Milanowski and Hantges stole \$46.8
25 million from Direct Lenders. The claims of Direct Lenders for the diverted funds are referred to
26 herein as “Unremitted Principal.” Burr Declaration, ¶ 12.

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1 9. **Creditor Abuse – Diversified.** Diversified was created as a \$200 million fund
2 and was offered to Nevada residents commencing in May 2000. As of the Petition Date, the
3 equity invested in Diversified was \$149,555,735. HMA Declaration, ¶ 14.

4 10. The creation of Diversified in 2000 provided distinct operating advantages to
5 USACM and was a more attractive investment vehicle to certain investors. The USACM
6 business model put the Direct Lenders in the position of making choices as to which loans to
7 participate in, how much to invest among the different loans, what term to choose, etc. The
8 Direct Lenders also obtained no diversification of their exposure to the risk of default on their
9 loans (although the Direct Lenders may have perceived only a negligible risk of default since
10 USACM failed to share the news that loans were not performing), and the liquidity of their
11 investments was dependent upon the timing of the repayment of the loans by the borrowers.
12 HMA Declaration, ¶¶ 13-14.

13 11. The Diversified Prospectus stated, among other things, that (i) Diversified would
14 invest only in loans secured by first deeds of trust upon real property, (ii) loan-to-value ratios for
15 the loans in which Diversified would become a Direct Lender would not exceed 75%, (iii) loan
16 diversification restrictions would be imposed upon the loans invested in by Diversified such that
17 no loan would exceed \$20 million, (iv) no loan would exceed 15% of all loans outstanding at any
18 time, and (v) no more than 25% of the loans outstanding at any time would be made to a single
19 borrower or an affiliate of such borrower. HMA Declaration, ¶ 16.

20 12. Commencing no later than January 2003 and continuing through at least December
21 2004, Milanowski and Hantges caused USACM to begin raiding Diversified as a source of funds
22 for the Collection Account and for their own potential personal gain. Milanowski and Hantges
23 ultimately perpetrated a massive fraud upon Diversified by failing in every conceivable way to
24 adhere to the promises and representations contained in the Prospectus or to protect the interests
25 of Diversified’s members. Tucker Declaration, ¶ 5; *see also* HMA Declaration, ¶¶ 22-25.

26 13. **USAIP Diversions.** USACM transferred funds to USA Investment Partners, LLC
27 (“USAIP”) without legitimate business justification or consideration for a period of years at the

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1 direction of Hantges and Milanowski. Mesirov identified some \$58 million in transfers dating
2 back to 2003. Burr Declaration, ¶ 13.

3 14. One purpose of such transfers was to permit USAIP to acquire equity interests in
4 development projects for the benefit of USAIP's owners – Hantges, Milanowski and Paul
5 Hamilton. Burr Declaration, ¶ 14.

6 15. Additionally, on information and belief, loans originated by USACM to certain
7 Borrowers were treated by those Borrowers as the equivalent of capital contributions by USAIP
8 for equity interests in those projects. Burr Declaration, ¶ 15.

9 16. As the filings in the USAIP involuntary chapter 11 bankruptcy case demonstrate,
10 USAIP's ability to repay the \$58 million obligation is doubtful at best. Burr Declaration, ¶ 16.

11 17. **Corporate Looting – USAIP.** During the course of the USA Cases, evidence of
12 the misdeeds perpetrated upon Movants and others by Milanowski and Hantges came to light.
13 The use of the business entity - USAIP - by Milanowski and Hantges for their own potential
14 personal gain to the detriment of Movants is a telling illustration of the acute need for the
15 appointment of an interim trustee in this case. Tucker Declaration, ¶ 6.

16 18. USAIP is a Nevada limited liability company owned by Milanowski (as trustee for
17 the Joseph D. Milanowski 1998 Trust), Hantges (as trustee of the Thomas A. Hantges 1997 Trust)
18 and Paul Hamilton. Milanowski and Hantges were the managers of USAIP through February
19 2005. Thereafter, Milanowski was the sole manager until April 5, 2007. Tucker Declaration, ¶ 7.

20 19. Milanowski and Hantges have conducted much of their personal real estate
21 development activities through the USAIP business entity. Its primary assets are equity member
22 interests in limited liability companies engaged in real estate development activities. USAIP is
23 the manager of many of the limited liability companies in which it owns a member interest.
24 Tucker Declaration, ¶ 8.

25 20. On April 4, 2007, Movants and Alabruj Investments, LLC (“Alabruj,” and together
26 with Movants, the “USAIP Petitioning Creditors”), filed an involuntary chapter 11 petition
27 against USAIP, Case No. BK-S-07-11821 LBR (the “USAIP Case”), and sought the appointment
28 of an interim trustee for USAIP's assets on an emergency basis. At the emergency hearing held

1 April 5, 2007, the Court ordered the appointment of an interim trustee (*see* Order For
2 Appointment Of An Interim Trustee And Setting Omnibus Hearing entered April 6, 2007,
3 [USAIP Docket No. 13]), and on or around April 6, 2007, after being duly appointed by the
4 Office of the United States Trustee, Lisa Poulin assumed control of USAIP's assets. Tucker
5 Declaration, ¶ 9.

6 21. USAIP manages entities that are borrowers on numerous loans arranged by
7 USACM and entities that are obligors of Diversified. Milanowski and Hantges have guaranteed
8 the repayment of loans arranged by USACM and owed to Movants and other creditors. Tucker
9 Declaration, ¶ 10.

10 22. For example, USAIP is the borrower on the 10-90, Inc. loan from Diversified,
11 which, as of the date hereof, includes unpaid principal in excess of \$55 million plus accrued and
12 unpaid interest which Diversified contends exceeds \$60 million ("10-90 Loan").² Milanowski
13 and Hantges each personally guaranteed the repayment of the 10-90 Loan. Tucker Declaration, ¶
14 11.

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

17 23. One entity managed by USAIP is USA Investors VI, LLC ("Investors VI"), which
18 is the owner of the Hotel Zoso (formerly known as the Marquis Hotel) in Palm Springs,
19 California. Investors VI owes in excess of \$20 million to Direct Lenders in a loan arranged by
20 USACM ("Marquis Hotel Loan"). Investors VI also is obligated to Diversified, a substantial
21 creditor of Investors VI, in connection with the Sheraton Hotel loan. The Hotel Zoso has been
22 under a contract of sale since May 2006. Investors VI was the subject of an involuntary
23

24 ² The HMA Declaration addresses in great detail the fraudulent nature of the 10-90 Loan, and Movants will
25 not repeat such discussion in this Motion beyond noting that Milanowski and Hantges orchestrated 10-90, Inc. to be
26 used as a straw man for USAIP in the series of advances and borrowings that comprise the 10-90 Loan. More
27 specifically, Milanowski and Hantges caused Diversified to loan funds to 10-90, Inc., which then transferred funds to
28 a second "straw man," Mountain Vista Inc., which then transferred funds to USAIP -- which then funneled funds to
its affiliates and related entities. The 10-90 Loan was formally transferred from 10-90, Inc. to USAIP on January 1,
2005, thereby eliminating the participation of the two straw men. The Diversified cash advances recorded under the
10-90 Loan were used by USAIP for its various real estate development ventures and other deals in the name of
USAIP and related entities for the potential personal gain of Hantges and Milanowski. *See* HMA Declaration, ¶¶ 26-
34.

1 bankruptcy petition filed by Diversified in this Court, case no. BK-S-06-13925-LBR. Recently,
2 the trustee of USAIP filed a voluntary petition for Investors VI, initiating case no. BK-S-07-
3 12377 LBR. Tucker Declaration, ¶ 12.

4 24. Commencing in the Summer of 2006, the USA Debtors engaged in discussions
5 with Milanowski for payment of the Marquis Hotel Loan and obligations owing to Diversified
6 upon the sale of the Hotel Zoso. Milanowski offered that he would make such payments, but
7 when asked for enforceable commitments by the USA Debtors, Milanowski stated that it was not
8 possible to provide Diversified with a deed of trust or other direct claims against the property to
9 assure such payment, since, according to Milanowski, approval of the Bureau of Indian Affairs
10 (“BIA”) for such a lien or claim was necessary, would take a great deal of time, and most likely
11 would not be obtained. Tucker Declaration, ¶ 13.

12 25. Diversified and USACM Trust subsequently learned – as a result of the filing of a
13 proof of claim in the Investors VI case – that in early September 2006, five months after the filing
14 of the USA Cases, Milanowski on behalf of USAIP, as manager of Investors VI, signed a
15 guaranty, deed of trust, promissory note and security agreement in favor of Salvatore J. Reale, as
16 trustee of the Salvatore J. Reale Living Trust dated November 15, 2004 (“Reale”), filed UCC-1
17 financing statements in connection with the same in late September 2006, and, after obtaining
18 BIA approval, recorded the deed of trust against the Hotel Zoso property. Not only did these
19 documents secure the personal obligations of Milanowski and Hantges owing to Reale with
20 property belonging to Investors VI, but Milanowski thereby acknowledged two other multi-
21 million dollar obligations improbably alleged to be owing to Reale by Investors VI and secured
22 those obligations with the Hotel Zoso property of Investors VI. All such actions taken by
23 Milanowski were undertaken in the name of USAIP. Tucker Declaration, ¶ 14.

24 **Milanowski’s Agreement with Ashby USA Pursuant to which USAIP**
25 **Unnecessarily Agreed to Absorb All Manner of Expenses.**

26 26. USAIP holds a 50% member interest in Ashby USA, LLC (“Ashby USA”), an
27 entity that is in the process of developing major portions of the Roripaugh Ranch project in
28 Temecula, California. The USAIP ownership interest is pledged to Diversified as collateral for

1 the 10-90 Loan. The manager of Ashby USA is Ashby Development Company. Tucker
2 Declaration, ¶ 15.

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

13 28. However, the USA Debtors subsequently learned that even while Milanowski was
14 assuring the USA Debtors that he would not agree to the Ashby reimbursement demands, in
15 October of 2006, Milanowski executed an amendment to the operating agreement of Ashby USA,
16 which did just that, agreeing to extremely broad categories of reimbursable expenses that go far
17 beyond those directly related to any conceivable bond re-issuance costs. As a result of
18 Milanowski's actions on behalf of USAIP, not only were the USA Debtors misled as to
19 Milanowski's intentions until it was too late to take any pre-emptive action, but the collateral for
20 the 10-90 Loan was improperly reduced in value by an amount that could be millions of dollars --
21 without any consideration whatsoever to USAIP. Tucker Declaration, ¶ 17.

22 **USAIP Burdened HMA Sales, LLC, With Liability**
23 **for Personal Obligations Owing to Salvatore Reale.**

24 29. USAIP also manages HMA Sales, LLC ("HMA"), the former owner of the Royal
25 Hotel in Las Vegas. As the Court is aware as a result of the HMA Adversary, Milanowski
26 granted Reale a deed of trust against the Royal Hotel in May 2006 in order to secure repayment of
27 the loans Reale made to Hantges and Milanowski personally. Tucker Declaration, ¶ 18.

1 30. HMA received no consideration whatsoever for taking on and collateralizing the
2 approximately \$10 million debt that Hantges and Milanowski owed to Reale. *Id.*

3 31. USAIP granted the Reale lien on the Royal Hotel while USAIP was negotiating
4 with the USA Debtors on the USAIP \$58 million Note. In doing so, USAIP effectively stripped
5 substantial value from the collateral pledged to secure that Note (including the equity interests in
6 HMA Sales, LLC and numerous other LLC entities), to the detriment of the Movants and other
7 creditors. Tucker Declaration, ¶ 19.

8 **Milanowski Conspired to Place USAIP Into Receivership**
9 **to Avoid This Court's Jurisdiction.**

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

18 33. On March 27, 2007, while under Milanowski's control, USAIP filed a Declaration
19 of Non-Opposition (the "Consent Declaration") in response to the ex parte receivership motion in
20 the Receivership Action. A true and correct copy of the Consent Declaration is attached to the
21 Tucker Declaration as Exhibit 1 and is incorporated herein by this reference. Tucker Declaration,
22 ¶ 21.

23 34. After entering an ex parte order in the Receivership Action that, among other
24 things, prohibited all persons from initiating bankruptcy proceedings against USAIP and perhaps
25 stayed the litigation ongoing in this Court against entities in which USAIP has an ownership
26 interest and for which USAIP is the manager, the California Court – after hearing oral arguments
27 on Movants' emergency motion for modification – entered an order modifying its previous order,
28 which clarified, among other things, that the filing of a bankruptcy case against USAIP and the

1 litigation ongoing in this Court were not stayed. Modification Order, p. 2, lines 8-16; Tucker
2 Declaration, ¶ 22. A true and correct copy of the Modification Order is attached to the Tucker
3 Declaration as Exhibit 2 thereto and is incorporated for all purposes herein by this reference.
4 Thus, despite Milanowski's attempts to thwart efforts to recover from USAIP assets, the USAIP
5 Petitioning Creditors filed the USAIP Case. Tucker Declaration, ¶ 22.

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

9 35. Given the above and certain other transactions of which Movants are aware,
10 Movants suspect that Milanowski and Hantges utilized their control over USACM and USAIP,
11 USACM's control over Loan repayments, and USAIP's control over the numerous entities
12 affiliated with USAIP, to their personal advantage and to the detriment of the Movants and others.
13 Moreover, while under the control of Milanowski and Hantges, USAIP was not forthcoming in
14 providing financial or operational information to the USA Debtors or their successors, Diversified
15 and USACM Trust, consistently insisting that a global deal and settlement first be reached
16 between USAIP and Movants before USAIP would provide financial information. Tucker
17 Declaration, ¶ 23.

18 36. Further, the many inquiries of USAIP made by the USA Debtors were repeatedly
19 met with refusals to answer on the grounds of Fifth Amendment privilege. While under the
20 control of Milanowski and Hantges, USAIP employed only three people, Milanowski, Hantges
21 and Victoria Loob. Hermann Declaration, ¶ 7. Milanowski invoked his Fifth Amendment
22 privilege 47 times during the deposition taken in the HMA Adversary on March 13, 2007,
23 choosing to answer only those questions that provided information he considered to be favorable
24 to Reale.³ *See, generally*, Milanowski Deposition Transcript; Hermann Declaration, ¶ 8. A true
25 and correct copy of the transcript from the deposition of Joseph Milanowski (the "Milanowski
26 Deposition Transcript") is attached to the Hermann Declaration as Exhibit 1 thereto and is

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28 ³ The 47 count does not include the instances where Milanowski referred to his earlier invocation of the
privilege in refusing to answer a new question.

1 incorporated herein by this reference. Loob also was deposed in the HMA adversary and also
2 invoked the Fifth Amendment, answering no questions. *See, generally*, Loob Deposition
3 Transcript; Hermann Declaration, ¶ 8. A true and correct copy of the transcript from the
4 deposition of Victoria S. Loob (the “Loob Deposition Transcript”) is attached to the Hermann
5 Declaration as Exhibit 2 thereto and is incorporated herein by this reference.

6 37. Hantges did not initially invoke the Fifth Amendment, choosing instead to ignore a
7 deposition subpoena in the HMA Adversary and not show up at the designated time and place –
8 despite the fact that counsel for the parties in that adversary did appear. *See, generally*, Hantges
9 March Deposition Transcript; Hermann Declaration, ¶ 9. A true and correct copy of the transcript
10 from the March 14, 2007 deposition of Thomas Hantges (the “Hantges March Deposition
11 Transcript”) is attached to the Hermann Declaration as Exhibit 3 thereto and is incorporated
12 herein by this reference. Attached to the Hermann Declaration as Exhibit 4 thereto, and
13 incorporated herein by this reference, is the Amended Notice of Deposition of Thomas Hantges
14 reflecting that the Hantges Deposition was rescheduled for March 14, 2007, at 3:00 p.m. at the
15 offices of Gerrard Cox & Larsen.

16 38. After several continuances granted by counsel for Diversified, Hantges finally did
17 appear for a duly noticed deposition taken in the Investors VI Case on April 25, 2007. Hermann
18 Declaration, ¶ 10. Hantges invoked his Fifth Amendment privilege during the short deposition
19 declining even to answer such preliminary questions as whether he had ever been deposed before,
20 the details of his educational background, and every succeeding question. *See, generally*,
21 Hantges April Deposition Transcript; Hermann Declaration, ¶ 10. A true and correct copy of the
22 transcript from the April 25, 2007 deposition of Thomas Hantges (the “Hantges April Deposition
23 Transcript”) is attached to the Hermann Declaration as Exhibit 5 thereto and is incorporated
24 herein by this reference.

25 39. In short, there may be many more instances of Milanowski and Hantges utilizing
26 the assets and business of various entities under their ownership or control, whether directly or
27 indirectly, for their own personal advantage, but Milanowski, Hantges and Loob have impeded
28 Movants in determining whether that is the case. Hermann Declaration, ¶ 11.

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

3 40. The 10-90 Loan is in default, and Diversified's guaranty claims against
4 Milanowski and Hantges have matured, are liquidated and cannot be disputed. Milanowski and
5 Hantges are aware of their guaranty obligations, but no payment has been forthcoming. Tucker
6 Declaration, ¶ 24. A true and correct copy of the correspondence to USAIP, Milanowski and
7 Hantges demanding repayment on the 10-90 Loan is attached to the Tucker Declaration as
8 Exhibit 3 and is incorporated for all purposes herein by this reference.

9 41. Milanowski and Hantges have guaranteed repayment on loans arranged by
10 USACM from numerous Direct Lenders made to Placer County Land Speculators LLC
11 ("Placer"), and Investors VI, with outstanding balances totaling more than \$73 million in the
12 aggregate. These loans are in default, and the guaranty claims against Milanowski and Hantges in
13 connection with these loans have matured, are liquidated and cannot be disputed. USACM
14 Liquidating Trust, as servicer for the direct lenders involved in these loans, has made demand on
15 Milanowski and Hantges for payment on their guaranty obligations, but no payment has been
16 forthcoming. Berman Declaration, ¶¶ 4-5. True and correct copies of the correspondence from
17 USACM Trust to Milanowski and Hantges demanding repayment on their guaranty obligations in
18 connection with the Placer and Investors VI loans are attached to the Berman Declaration as
19 Exhibits 1 and 2, respectively, and are incorporated for all purposes herein by this reference.

20 42. Mesirov investigated the books and records of USACM and caused schedules of
21 assets to be filed. USACM's schedules filed June 23, 2006 [Docket No. 784] reflect that Hantges
22 owed USACM \$133,557.00 and Milanowski owed \$7,097.50 as shareholder accounts receivable.
23 The USACM Trust owns these claims, made demand on Hantges and Milanowski for repayment,
24 and have not received any payment or response. Berman Declaration, ¶ 6. True and correct
25 copies of the correspondence from USACM Trust to Milanowski and Hantges demanding
26 repayment on their debts are attached to the Berman Declaration as Exhibits 3 and 4, respectively,
27 and are incorporated for all purposes herein by this reference.

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1 **II.**

2 **LEGAL ARGUMENT**

3 For the above reasons and others, Diversified and USACM Trust seek the appointment of
4 an interim trustee during the gap period before an order for relief is entered. USAIP's actions,
5 including its complicity in obtaining the Receiver Order on an ex parte basis as but one example,
6 demonstrate the lengths to which Milanowski and Hantges will go to evade the recovery efforts of
7 their creditors and to remain beyond the reach of this Court. Further, Movants are concerned that
8 Milanowski and Hantges will utilize their control over their own assets and the business entities
9 owned and controlled personally by them, and the affiliates of such entities, to further advantage
10 themselves and further disadvantage their creditors during the time between receiving notice of
11 the motion for an interim trustee and the qualification and appointment of such a trustee by the
12 Office of the U.S. Trustee if so ordered by this Court. Such interim period could take a week or
13 perhaps longer, depending upon many factors. For this reason, Diversified and USACM Trust
14 seek also, on an ex parte basis, to immediately limit Hantges' authority to engage in any activities
15 involving his personal assets or the assets of business entities that he may, whether directly or
16 indirectly, own, control or manage, without first obtaining an order of the Court after (expedited)
17 notice and a hearing. Such extraordinary relief is necessary in order to preserve the assets of the
18 Hantges estate for the benefit of his creditors.

19 **A. The Appointment of an Interim Trustee For the Hantges Bankruptcy Estate Is**
20 **Appropriate Under Bankruptcy Code § 303(g).**

21 Bankruptcy Code § 303(g) authorizes the bankruptcy court to order the appointment of an
22 interim trustee in order to preserve the assets of the alleged debtor's estate pending a hearing on
23 the involuntary petition. Section 303(g) states in pertinent part as follows:

24 (g) At any time after the commencement of an involuntary case under
25 chapter 7 of this title but before an order for relief in the case, the court,
26 on request of a party in interest, after notice to the debtor and a hearing,
27 and if necessary to preserve the property of the estate or to prevent loss to
28 the estate, may order the United States trustee to appoint an interim
trustee under section 701 of this title to take possession of the property of
the estate and to operate any business of the debtor.

1 When determining whether to authorize the appointment of a trustee under Section 303(g),
2 courts have sought to balance the harm to creditors against the potential damage that the alleged
3 debtor's business may incur, a test that may be employed in this case. *See In re Rush*, 10 B.R.
4 518, 525 (N.D. Ala. 1980). Accordingly, courts have appointed interim trustees where they have
5 found the appointment is necessary to prevent irreparable harm from occurring to the debtor's
6 creditors. *See e.g. In re James Plaza Joint Venture*, 62 B.R. 959, 961 (Bankr. S.D. Tex. 1986)
7 (interim trustee was appointed because of concern that the funds would be disposed of,
8 distributed, or dissipated). This view is supported by the legislative history of section 303(g)
9 which provides that an interim trustee should be appointed if it is shown that the alleged debtor
10 would "attempt to abscond with assets, dispose of them at less than their fair market value or
11 dismantle his business, all to the detriment of its creditors." *H.R. Rep. 95-595*, 95th Cong., 2d
12 Sess. 33 (1978), *U.S. Code Cong. & Admin. News* 1978 5787, 6279, 5819, *quoted in, In re*
13 *DiLorenzo*, 161 B.R. 752, 754 (Bankr. S.D.N.Y. 1993) (no trustee appointed where fear of
14 possible transfer of assets was unsupported by record).

15 The immediate appointment of an interim trustee is warranted in order to prevent Hantges'
16 further utilization and control over his personal assets and the assets of the business entities that
17 he may own or control, whether directly or indirectly, to his personal advantage and the
18 disadvantage of his creditors. Given the past actions described above, there is every reason to
19 believe that Hantges will engage in similar unlawful actions in the future. Also, as set forth
20 above, Hantges cannot possibly fulfill his obligations as a debtor in possession even if he could be
21 trusted to do so – and he cannot be so trusted – because of his inability or unwillingness to give
22 testimony about his business affairs and assets of those business entities under his direct or
23 indirect ownership or control.

24 At least three chapter 11 cases have concluded that the appointment of a trustee is
25 appropriate where the debtor or debtor's management has invoked the Fifth Amendment. *Tradex*
26 *Corp. v. Morse*, 339 B.R. 823, 833 (D. Mass. 2006) (chapter 11 trustee appointed where debtor's
27 principal invoked Fifth Amendment and was unavailable to answer questions regarding the
28 business and financial affairs of the debtor); *In re PRS Insurance Group, Inc.*, 274 B.R. 381, 387

1 (Bankr. D. Del. 2001) (appointment of trustee necessary where, among other reasons, debtor's
2 controlling shareholder invoked Fifth Amendment privilege in refusing to answer questions
3 regarding alleged fraudulent diversion of assets); *Matter of Moses*, 171 B.R. 789, 791 (Bankr.
4 E.D. Mich. 1994) (motion for appointment of trustee was granted due to court's finding that the
5 case could not be properly administered by the debtor in possession and that it was in the best
6 interest of the estate and its creditors to appoint a trustee because the debtor's assertion of the
7 Fifth Amendment prevented answering certain questions). In particular, the court in *Tradex*
8 *Corp.* articulated that the "unwillingness [of debtor's principal] to testify ongoing management of
9 the company from the person entrusted to act as a fiduciary." *Tradex Corp.*, 339 B.R. at 834.
10 While none of these cases was an involuntary, Movants submit that the voluntary or involuntary
11 nature of the petition is irrelevant.

12 Movants understand that section 303(g) refers to chapter 7 cases and does not address the
13 use of that provision in the chapter 11 involuntaries, although they note that section 303(g) does
14 not prohibit such appointments. Movants submit that the absence of such a prohibition coupled
15 with the express language of Bankruptcy Code § 1104(a) and with Bankruptcy Code
16 §105(a) empowers bankruptcy courts to appoint gap trustees in chapter 11 involuntaries such as
17 this one.

18 Section 1104(a) provides that the court may appoint a trustee "[a]t any time after
19 commencement of the case...." Section 303(b) provides that "[a]n involuntary case against a
20 person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11
21 of this title...." 11 U.S.C. § 303(b). Thus, the appointment of a chapter 11 trustee is not tied to an
22 order for relief. Rather, it is permitted after the commencement of the case, which occurs upon
23 the filing of the petition.

24 A case directly on point supports Movants' reading of the Bankruptcy Code – *In re*
25 *Professional Accountants Referral Svcs, Inc.*, 142 B.R. 424 (Bankr. D. Col. 1992). There, after
26 considering the "threshold matter" of the likelihood of the entry of an order for relief, the court
27 held that an interim trustee could be appointed for cause pursuant to section 1104 and/or section
28 105, finding that there was dishonesty and gross mismanagement, and that there would likely be

1 irreparable injury if a trustee were not appointed. *Id.* at 429. In an earlier case, however, a
2 bankruptcy judge came to a contrary conclusion. *Matter of Beaucrest Realty Assocs.*, 4 B.R. 164
3 (Bankr. E.D.N.Y. 1980). The reasoning in *Beaucrest* was criticized as unpersuasive by Judge
4 Brooks in *Professional Accountants*, who also noted that *Beaucrest* had not been followed.

5 Also, in *In re Colony Press, Inc.*, 83 B.R. 862 (Bankr. D. Mass. 1988), the court noted
6 in the procedural history that it had granted a motion to appoint an interim trustee prior to
7 granting the order for relief. Additionally, *Collier on Bankruptcy* § 303.13[5] (15th ed. Rev.
8 2006) notes that the plain language of section 1104 provides for the appointment of a trustee after
9 the commencement of the case.

10 Moreover, in *In re Alpine Lumber and Nursery*, 13 B.R. 977 (Bankr. S.D. Cal. 1981), the
11 court held that where an interim trustee is appointed under section 303(g) in an involuntary
12 chapter 7 case, voluntary conversion to chapter 11 does not result in the removal of the interim
13 trustee. While the case is not dispositive, it is an example of an instance where an interim trustee
14 was allowed in a chapter 11 context before the order of relief was entered and before a party in
15 interest requested the appointment of a trustee under section 1104. In *Alpine Lumber*, Judge Katz
16 placed the burden on the alleged debtor either to post a bond or to establish that the conditions for
17 appointing an interim trustee no longer existed after conversion, implicitly recognizing that
18 merely being in chapter 11 does not change the need for the relief, *i.e.*, the need to preserve
19 the property of the estate.

20 In looking at the “threshold matter” of whether an order for relief will enter in the instant
21 case, Movants submit that the Court’s entry of such an order is inevitable. Given the reasons
22 above and others, the Court has sufficient grounds to immediately enter an order for relief against
23 Hantges pursuant to the involuntary petition filed concurrently herewith. Specifically, section
24 303(h) of the Bankruptcy Code provides, in pertinent part:

25 (h) [A]fter trial, the court ***shall order relief*** against the debtor in an
26 involuntary case under the chapter under which the petition was filed, only
if—

27 (1) the debtor is generally not paying such debtor’s debts as such
28 debts become due unless such debts are the subject of a bona fide
dispute as to liability or amount; or

1 (2) within 120 days before the date of the filing of the petition, a
2 custodian, other than a trustee, receiver, or agent appointed or
3 authorized to take charge of less than substantially all of the
4 property of the debtor for the purpose of enforcing a lien against
5 such property, was appointed or took possession.

6 11 U.S.C. § 303(h)(1) and (2) (emphasis added).

7 As demonstrated herein, Hantges is not generally paying his debts as they become due and
8 such debts are not the subject of a bona fide dispute as to liability or amount.

9 **B. The Court Should Immediately Withdraw Debtor's Authority During the Gap
10 Period Pursuant to Bankruptcy Code § 303(f).**

11 Section 303(f) of the Bankruptcy Code provides the Court with the additional power of
12 limiting the operating authority of an alleged debtor. Section 303(f) provides as follows:

13 (f) Notwithstanding section 363 of this title, *except to the extent that the*
14 *court orders otherwise*, and until an order for relief in the case, any
15 business of the debtor may continue to operate, and the debtor may
16 continue to use, acquire or dispose of property as if an involuntary case
17 concerning the debtor had not been commenced. (emphasis added)

18 Thus, while an alleged debtor generally may operate during the gap period as if no
19 involuntary had been filed, the Court has the power to withdraw or limit that operating authority.
20 “[I]f the debtor is acting in a manner that suggests that the assets of the estate will be disposed of
21 to the detriment of creditors, the court can limit the debtor’s powers under section 303(f) as that
22 subsection contemplates that the court can ‘order otherwise.’” 2 *Collier on Bankruptcy* § 303.12
23 at 303-85 (15th ed. Rev. 2006).

24 Movants therefore request on an ex parte basis that, pending this Court’s appointment of
25 an interim trustee (or its denial of such request), the Court immediately enter an order under
26 Bankruptcy Code § 303(f) preserving the status quo – including preserving the electronic and
27 other books and records – and restricting Hantges’ authority to engage in any business-related
28 activities with respect to his assets or those of any of the business entities he may own or control,
whether directly or indirectly, without first obtaining an appropriate order of this Court after
expedited notice and a hearing.

1 Such order would encompass a prohibition applicable to Hantges personally and
2 applicable to the entities directly or indirectly owned and controlled by Milanowski or Hantges⁴
3 on (i) the destruction or secretion of documents, books and records, including electronic records;
4 (ii) changing management of any entity in which Hantges, directly or indirectly, is the manager
5 or has the power to replace the manager; and (iii) transferring any funds. Movants intend to
6 serve such an order on any number of third parties, including banks and other financial
7 institutions, to put those parties on notice that Hantges no longer has any authority to deal in any
8 manner with his own assets or financial affairs. Such extraordinary relief is necessary in order to
9 preserve the assets of this estate and will help ensure that Movants and Hantges' other creditors
10 are not further disadvantaged by Milanowski and Hantges pending the qualification and
11 appointment of an interim trustee. The ex parte order can be revisited in a matter of days at the
12 emergency hearing on the appointment of an interim trustee.

13 **III.**

14 **CONCLUSION**

15 WHEREFORE, for all of the foregoing reasons, Diversified and the USACM Trust
16 respectfully request that an interim trustee be appointed in the Hantges involuntary bankruptcy
17 case in order to preserve the property of Hantges' estate and the value of his assets, and that an
18 order be immediately entered by the Court withdrawing the authority of the alleged debtor to deal

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28 ⁴ A number of such entities, and the ownership and control of Milanowski or Hantges over those entities, are identified in **Exhibit 1** to the Higgins Declaration. Higgins Declaration, Exhibit 1.

1 with assets owned or controlled by him, whether directly or indirectly, without a further order of
2 the Court after expedited notice and a hearing.

3 Respectfully submitted this 29th day of May 2007.

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