

FILED

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY [Signature]
DEPUTY

WELLS FARGO BANK, N.A., AS TRUSTEE FOR
THE REGISTERED HOLDERS OF CREDIT
SUISSE FIRST BOSTON MORTGAGE
SECURITIES CORP., COMMERCIAL
MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2007-C1,

PLAINTIFF,

V.

OAK HOLLOW AT SACRAMENTO
CALIFORNIA, LLC; SIERRA VILLAGE AT
SACRAMENTO CALIFORNIA, LLC; BLUFFS
AT CASTLE ROCK COLORADO, LLC;
CENTER POINTE EAST COLORADO, LLC;
APARTMENTS AT PALM HARBOR FLORIDA,
LLC; WOODCHASE GEORGIA, LLC;
PALMETTO SOUTH CAROLINA, LLC;
PEPPERHILL SOUTH CAROLINA, LLC; DOVE
LANDING VA PORTFOLIO I, LLC; DOVE
LANDING VA PORTFOLIO II, LLC; DOVE
LANDING VA PORTFOLIO III, LLC; DOVE
LANDING VA PORTFOLIO IV, LLC; DOVE
LANDING VA PORTFOLIO V, LLC; DOVE
LANDING VA PORTFOLIO VI, LLC; DOVE
LANDING VA PORTFOLIO VII, LLC; DOVE
LANDING VA PORTFOLIO VIII, LLC; DOVE
LANDING VA PORTFOLIO IX, LLC; AUSTIN
TEXAS WILDWOOD APARTMENTS, LP;
AUSTIN TEXAS WILDWOOD APARTMENTS,
LLC; AUSTIN TEXAS CLUBCREEK
APARTMENTS, LP; AUSTIN TEXAS
CLUBCREEK APARTMENTS, LLC; VILLAGE
AT RIVERSIDE APARTMENTS TEXAS, LP;
and VILLAGE AT RIVERSIDE APARTMENTS
TEXAS, LLC,

DEFENDANTS.

CIVIL ACTION NO. **A09CA591 SS**

A true copy of the original, I certify.
Clerk, U.S. District Court

By [Signature]
Deputy

**PLAINTIFF'S ORIGINAL COMPLAINT AND
AGREED APPLICATION FOR APPOINTMENT OF RECEIVER**

Plaintiff, Wells Fargo Bank, N.A., as Trustee for the Registered Holders of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2007-C1 ("**Plaintiff**" or "**Noteholder**"), acting by and through Midland Loan Services, Inc., a Delaware corporation, as special servicer pursuant to a Pooling and Servicing Agreement, dated March 1, 2007, files this Plaintiff's Original Complaint and Agreed Application for Appointment of Receiver against the following entities (hereinafter one or more, but not necessarily all "**Defendants**," all collectively "**Borrower**"):

- (1) Oak Hollow at Sacramento, LLC, a Delaware limited liability company ("**Oak Hollow**");
- (2) Sierra Village at Sacramento California LLC, a Delaware limited liability company ("**Sierra Village**");
- (3) Bluffs at Castle Rock Colorado, LLC, a Delaware limited liability company ("**Bluffs**");
- (4) Center Pointe East Colorado, LLC, a Delaware limited liability company ("**Center Pointe**");
- (5) Apartments at Palm Harbor Florida, LLC, a Delaware limited liability company ("**Palm Harbor**");
- (6) Woodchase Georgia, LLC, a Delaware limited liability company ("**Woodchase**");
- (7) Palmetto South Carolina, LLC, a Delaware limited liability company ("**Palmetto**");
- (8) Pepperhill South Carolina, LLC, a Delaware limited liability company ("**Pepperhill**");
- (9) Dove Landing VA Portfolio I, LLC, a Delaware limited liability company ("**Dove Landing I**");
- (10) Dove Landing VA Portfolio II, LLC, a Delaware limited liability company ("**Dove Landing II**");

- (11) Dove Landing VA Portfolio III, LLC, a Delaware limited liability company ("**Dove Landing III**");
- (12) Dove Landing VA Portfolio IV, LLC, a Delaware limited liability company ("**Dove Landing IV**");
- (13) Dove Landing VA Portfolio V, LLC, a Delaware limited liability company ("**Dove Landing V**");
- (14) Dove Landing VA Portfolio VI, LLC, a Delaware limited liability company ("**Dove Landing VI**");
- (15) Dove Landing VA Portfolio VII, LLC, a Delaware limited liability company ("**Dove Landing VII**");
- (16) Dove Landing VA Portfolio VIII, LLC, a Delaware limited liability company ("**Dove Landing VIII**");
- (17) Dove Landing VA Portfolio IX, LLC, a Delaware limited liability company ("**Dove Landing IX**");
- (18) Austin Texas Wildwood Apartments, LP, a Texas limited partnership ("**Wildwood**");
- (19) Austin Texas Wildwood Apartments, LLC, a Delaware limited liability company (d/b/a Hillside Forest Apartments, LLC) ("**Wildwood GP**");
- (20) Austin Texas Clubcreek Apartments, LP, a Texas limited partnership ("**Clubcreek**");
- (21) Austin Texas Clubcreek Apartments, LLC, a Delaware limited liability company (d/b/a Creekside View Apartments, LLC) ("**Clubcreek GP**");
- (22) Village at Riverside Apartments Texas, LP, a Texas limited partnership ("**Riverside**"); and
- (23) Village at Riverside Apartments Texas, LLC, a Delaware limited liability company (d/b/a Old Time Village Apartments, LLC) ("**Riverside GP**").

Defendants Oak Hollow, Sierra Village, Bluffs, Center Pointe, Palm Harbor, Woodchase, Palmetto, Pepperhill, Dove Landing I, Dove Landing II, Dove Landing III, Dove Landing IV,

Dove Landing V, Dove Landing VI, Dove Landing VII, Dove Landing VIII, and Dove Landing IX are hereinafter collectively referred to as "Delaware Entities."

Defendants Wildwood, Wildwood GP, Clubcreek, Clubcreek GP, Riverside, and Riverside GP are hereinafter collectively referred to as "Texas Entities."

NATURE OF ACTION

1. This is an action arising out of Defendants' alleged breach of the terms and provisions contained within applicable loan documents securing repayment of a securitized commercial real estate loan in the original principal amount of \$179,784,800.00, secured by twenty (20) income-producing apartment complexes located in California, Colorado, Florida, Georgia, South Carolina, Texas, and Virginia.

JURISDICTION & VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332 because, as noted below, complete diversity of citizenship exists between Plaintiff, on the one hand, and Defendants, on the other hand, and because the amount in controversy exceeds \$75,000, exclusive of interest and costs.

3. As noted below, Defendants are subject to personal jurisdiction in the State of Texas, and venue of this action is proper in this District, because a substantial part of the property at issue is situated in this District. 28 U.S.C. § 1391(a)(2).

PARTIES & SERVICE

4. Plaintiff is a REMIC trust for which Wells Fargo Bank, N.A., is the Trustee and real party-in-interest. For diversity purposes, a national bank is a citizen of the state in which the bank's main office, as set forth in its articles of association, is located. 28 U.S.C. §1348; *Wachovia Bank, National Association v. Schmidt, et al.*, 546 U.S. 303 (2006). As provided in its articles of association, Wells Fargo Bank, N.A.'s main office is located in Sioux Falls, South

Dakota. Therefore, for purposes of 28 U.S.C. §1332, Plaintiff is a citizen of the State of South Dakota. Plaintiff may be served through its undersigned attorneys.

5. Defendants are Delaware limited liability companies, and Texas limited partnerships, and as explained below, their members and partners, respectively, are citizens of the States of Delaware and California. For diversity purposes, the citizenship of a limited liability company or a partnership is determined by the citizenship of each member, or partner (as applicable), of the entity. Therefore, for purposes of 28 U.S.C. §1332, Defendants are citizens of the States of Delaware and California, as more particularly described below:

Delaware Entities

- a. Delaware Entities each have three (3) members: NCV Portfolio Member I, LLC ("NCV I"), a Delaware limited liability company, as the sole equity member; and Cheryl A. Tussie ("Tussie") and Michelle A. Dreyer ("Dreyer"), as special members.
- b. NCV Portfolio I, LLC has three (3) members: NCV Portfolio Member III, LLC ("NCV III"), a Delaware limited liability company, as the sole equity member; and Tussie and Dreyer, as special members.
- c. NCV Portfolio Member III, LLC has three (3) members: NCV Portfolio Member IV, LLC ("NCV IV"), a Delaware limited liability company, as the sole equity member; and Tussie and Dreyer, as special members.
- d. NCV IV has three (3) members: National Commercial Ventures, LLC ("NCV"), a Delaware limited liability company, as the sole equity member, and Tussie and Dreyer, as special members.
- e. NCV has one (1) member, Richard Nathan. Based on information and belief, Mr. Nathan is domiciled in and therefore a citizen of the State of California.
- f. Based on information and belief, Tussie and Dreyer are domiciled in and therefore citizens of the State of Delaware.

Wildwood and Wildwood GP

- g. Wildwood has two (2) partners: Wildwood GP, as its general partner; and NCV I, as its limited partner.

- h. Wildwood GP has three (3) members: NCV Delaware Portfolio II, LLC ("NCV II"), a Delaware limited liability company, as the sole equity member; and Tussie and Dreyer, as special members.
- i. Both NCV I and NCV II have three (3) members: NCV III, as the sole equity member; and Tussie and Dreyer, as special members.
- j. NCV III has three (3) members: NCV IV, as the sole equity member; and Tussie and Dreyer, as special members
- k. NCV IV has three (3) members: NCV, as the sole equity member, and Tussie and Dreyer, as special members.
- l. NCV has one (1) member, Richard Nathan. Based on information and belief, Mr. Nathan is domiciled in and therefore a citizen of the State of California.
- m. Based on information and belief, Tussie and Dreyer are domiciled in and therefore citizens of the State of Delaware.

Clubcreek and Clubcreek GP

- n. Clubcreek has two (2) partners: Clubcreek GP, as its general partner; and NCV I, as its limited partner.
- o. Clubcreek GP has three (3) members: NCV II, as the sole equity member; and Tussie and Dreyer, as special members.
- p. Both NCV I and NCV II have three (3) members: NCV III, as the sole equity member; and Tussie and Dreyer, as special members.
- q. NCV III has three (3) members: NCV IV, as the sole equity member; and Tussie and Dreyer, as special members
- r. NCV IV has three (3) members: NCV, as the sole equity member, and Tussie and Dreyer, as special members.
- s. NCV has one (1) member, Richard Nathan. Based on information and belief, Mr. Nathan is domiciled in and therefore a citizen of the State of California.
- t. Based on information and belief, Tussie and Dreyer are domiciled in and therefore citizens of the State of Delaware.

Riverside and Riverside GP

- u. Riverside has two (2) partners: Riverside GP, as its general partner; and NCV I, as its limited partner.

- v. Riverside GP has three (3) members: NCV II, as the sole equity member; and Tussie and Dreyer, as special members.
- w. Both NCV I and NCV II have three (3) members: NCV III, as the sole equity member; and Tussie and Dreyer, as special members.
- x. NCV III has three (3) members: NCV IV, as the sole equity member; and Tussie and Dreyer, as special members
- y. NCV IV has three (3) members: NCV, as the sole equity member, and Tussie and Dreyer, as special members.
- z. NCV has one (1) member, Richard Nathan. Based on information and belief, Mr. Nathan is domiciled in and therefore a citizen of the State of California.
- aa. Based on information and belief, Tussie and Dreyer are domiciled in and therefore citizens of the State of Delaware.

6. Delaware LLC Borrowers may be served with process through their registered agent: National Registered Agents, Inc., 160 Greentree Drive, Suite 101, Dover, Delaware 19904.

7. Texas Entity Borrowers may be served with process through their registered agent: National Registered Agents, Inc., 1614 Sidney Baker Street, Kerrville, Texas 78028.

FACTUAL BACKGROUND

A. The Secured Indebtedness

8. On October 31, 2006, Borrower, as borrowers, and Column Financial, Inc., a Delaware corporation ("**Original Noteholder**"), as lender, entered into a Loan Agreement (as amended by that certain First Amendment to Loan Agreement, dated February 8, 2007, the "**Loan Agreement**"),¹ which relates to a commercial real estate loan (the "**Loan**") made from Original Noteholder to Borrower. The Loan is evidenced by a Promissory Note (the "**Note**")²

¹ See Exhibit 1, which is a true and correct copy of the Loan Agreement.

² See Exhibit 2, which is a true and correct copy of the Note.

dated October 31, 2006, executed by Borrower, as maker, payable to the order of Original Noteholder, as original payee, in the principal amount of \$179,784,800.00.

9. Defendants used the proceeds of the Loan in connection with twenty (20) improved (multi-family) commercial real estate properties which are located and more particularly described as follows (collectively, the "**Properties**"):

California Properties

- a. An apartment complex located at 5416 & 5350 Jackson Street, Sacramento, California, more commonly known as "**Sierra Village Apartments**"; and
- b. An apartment complex located at 4407 Oak Hollow Drive, Sacramento, California, more commonly known as "**Oak Hollow Apartments**";

Colorado Properties

- c. An apartment complex located at 483 Scott Boulevard, Castle Rock, Colorado, more commonly known as "**Bluffs at Castle Rock**"; and
- d. An apartment complex located at 15490 East Center Avenue, Aurora, Colorado, more commonly known as "**Center Pointe East Apartments**";

Florida Property

- e. An apartment complex located at 2100 S. Conway Road, Orlando, Florida, more commonly known as "**Palm Harbor Apartments**";

Georgia Property

- f. An apartment complex located at 100 Chase Common Drive, Norcross, Georgia, more commonly known as "**Woodchase Apartments**";

South Carolina Properties

- g. An apartment complex located at 3211 Mountainbrook Avenue, Charleston, South Carolina, more commonly known as "**Pepperhill Apartments**"; and
- h. An apartment complex located at 7501 Peppercorn Lane, Charleston, South Carolina, more commonly known as "**Palmetto Apartments**";

Texas Properties

- i. An apartment complex located at 7610 Cameron Road, Austin, Texas, more commonly known as "Wildwood Apartments";
- j. An apartment complex located at 502 W. Longspur Boulevard, Austin, Texas, more commonly known as "Club Creek Apartments"; and
- k. An apartment complex located at 1500 Crossing Place, Austin, Texas, more commonly known as "Village at Riverside Apartments";

Virginia Properties

- l. An apartment complex located at 3038 Sewells Point, Norfolk, Virginia, more commonly known as "Dove Landing Point";
- m. An apartment complex located at 800-817 Broadmeadows Court, Virginia Beach, Virginia, more commonly known as "Dove Landing East";
- n. An apartment complex located at 4800-4808 Apple Orchard Court, Virginia Beach, Virginia, more commonly known as "Dove Landing Beach (Apple Orchard)";
- o. An apartment complex located at 4700-4708 Maple Terrace Court, Virginia Beach, Virginia, more commonly known as "Dove Landing Beach (Maple Terrace)";
- p. An apartment complex located at 2201 Baltic Avenue, Virginia Beach, Virginia, more commonly known as "Dove Landing Baltic";
- q. An apartment complex located at 5609-5620 Baker Court, Virginia Beach, Virginia, more commonly known as "Dove Landing West";
- r. An apartment complex located at 3340-3346 Shasta Court, Virginia Beach, Virginia, more commonly known as "Dove Landing Plaza Apartments";
- s. An apartment complex located at 5301-5328 Justin Court, Virginia Beach, Virginia, more commonly known as "Dove Landing North (Justin Court)"; and
- t. An apartment complex located at 860 Broadmeadows Court, Virginia Beach, Virginia, more commonly known as "Dove Landing Pharah".

10. Repayment of the Note is secured by, among other things, the liens, security interests, terms and provisions contained, with respect to each of the Properties, within the

Mortgage (or Deed of Trust or Deed to Secure Debt) and Security Agreement, dated October 31, 2006 (collectively, the "Mortgages"), executed and delivered by each of the Defendants as security for the Loan and encumbering each of the individual Properties.³ The Note, the Loan Agreement, the Mortgages, and all other documents executed in connection therewith or relating in any way thereto are referred to hereinafter either individually or collectively as the "Loan Documents."

B. Cross-Default; Cross-Collateralization

11. Each of the Loan Documents is cross-defaulted and cross-collateralized with all others. Section 10.18(a) of the Loan Agreement provides, in relevant part:

Borrower agrees that the Mortgages are and will be cross-collateralized and cross-defaulted with each other so that (i) an Event of Default under any of the Mortgages shall constitute an Event of Default under each of the other Mortgages which secure the Note; (ii) an Event of Default under the Note or this Loan Agreement shall constitute an Event of Default under each Mortgage; (iii) each Mortgage shall constitute security for the Note as if a single blanket lien were placed on all of the Properties as security for the Note; and (iv) such cross-collateralization shall in no event be deemed to constitute a fraudulent conveyance.

C. Assignments

12. Pursuant to certain assignments, endorsements, and/or transfers of the Loan Documents, Plaintiff is the (i) owner and holder of the (x) right to receive payments due under the Note, and (y) right to receive the outstanding indebtedness evidenced by the Note; and (ii)

³ See Exhibit 3, which is a true and correct copy of the Mortgage recorded against the Properties located in Austin, Texas (the "Travis County Mortgage"). The relevant portions of each of the Mortgages are substantially similar. Accordingly, to limit the size of this Complaint, only the Travis County Mortgage has been attached to this Complaint.

owner of the liens, security interests and right to enforce the terms and provisions contained within the Loan Documents.⁴

D. Defendants' Defaults

First Default: Failure to Pay for Utilities Services

13. Pursuant to Section 3.4 of each Mortgage, Borrower covenanted to "cause the Property to be maintained in a good and safe condition and repair."⁵

14. Borrower has breached this covenant by failing to pay one or more utility companies providing services to the Properties. Consequently, *vital services to the Properties are in imminent danger of being cut off, and the utility company[ies] have in fact threatened to terminate service to the affected Properties. If this happens, the damage to Plaintiff's collateral – which includes rents generated by the Properties – could be substantial, as currently-paying tenants would either lose access to critical utility services, or terminate their leases and move away from the Properties, thereby further reducing cash flow generated by the Properties which, if available, could be used to maintain the Properties.*

15. Accordingly, Plaintiff believes there is an urgent need to protect the value of the Properties from imminent danger of loss and diminished value through this Court's appointment of a receiver for the Properties so that Plaintiff can provide the money necessary, in Plaintiff's reasonable and good faith discretion, to pay the past due utility bills so that the utility companies will continue to service the Properties, without becoming exposed to mortgagee-in-possession liability.

⁴ See Exhibit 4, which contains a true and correct copy of Section 2.01(a) of the Pooling and Servicing Agreement evidencing the assignment of the Loan to Plaintiff.

⁵ See Exhibit 3 at § 3.4.

Second Default: Failure to Comply with the Management Agreement

16. Pursuant to Sections 5.1.22(a) and 5.1.22(b) of the Loan Agreement, Borrower agreed as follows:

Borrower shall cause the Properties to be operated, in all material respects, in accordance with the Management Agreement. . . .

Borrower shall . . . promptly perform and/or observe, in all material respects, all of the covenants and agreements required to be performed and observed by it under the Management Agreement.⁶

17. Further, Section 8.1(a)(xii) of the Loan Agreement provides that it shall be an Event of Default under the Loan Documents “if a material default has occurred and continues beyond any applicable cure period under the Management Agreement . . . and if such default permits the Manager . . . thereunder to terminate or cancel the Management Agreement. . . .”

18. Borrower has failed to pay the property management companies overseeing one or more of the Properties. Because of Borrower’s non-payment, there is an imminent risk that the affected property management companies will (i) terminate the applicable Management Agreements, and (ii) abandon those Properties.

19. Accordingly, Plaintiff believes there is an urgent need to ensure the Properties are properly managed through this Court’s appointment of a receiver for the Properties so that Plaintiff can provide the money necessary, in Plaintiff’s reasonable and good faith discretion, to pay for the Properties to be managed by a qualified property manager, without Plaintiff becoming exposed to mortgagee-in-possession liability.

⁶ See Exhibit 1 at §§ 5.1.22(a) and 5.1.22(b).

E. Plaintiff's Right to Collect Rents

20. Pursuant to Section 1.2 of the Mortgages and the Assignment of Leases and Rents (as amended, modified and/or restated from time to time),⁷ dated as of October 31, 2006, and executed by each of the individual Defendants, as assignor, to Original Noteholder, as assignee, recorded in the Real Property and/or Official Records in each county in which the Properties are located (collectively, the "Assignment of Rents"), Defendants each absolutely and unconditionally (not collaterally) assigned to Plaintiff all of Defendants' right, title and interest in and to all current and future Leases and Rents (defined in the Mortgages and Assignment of Rents) of the Properties, subject to a revocable license in favor of Defendants. However, upon the occurrence of an Event of Default (as defined in the applicable Loan Documents), Defendants' license to collect the rents granted under Section 1.2 of the Deed of Trust and the Assignment of Rents is automatically revoked, and Plaintiff (or Plaintiff's agents) may then collect the Rents and revenues from the Properties, and direct each tenant of the Properties to pay such Rents to Plaintiff or Plaintiff's agents.⁸

F. Plaintiff's Right of Possession

21. Upon the occurrence or continuance of an Event of Default under any of the Loan Documents, Plaintiff has the right to, among other things, enter upon and take control of the Properties, including the right to collect all rents and revenues of the Properties. Specifically, the Mortgages provide:

⁷ See Exhibit 5, which is a true and correct copy of the Assignment of Rents recorded against the Properties located in Austin, Texas (the "Travis County Assignment of Rents"). The relevant portions of each of the Assignment of Rents are substantially identical; accordingly, to limit the size of this complaint, only the Travis County Assignment of Rents has been attached to this Complaint.

⁸ See Exhibit 3 at Section 7.1(h); *see also*, Exhibit 5 at Section 3.1.

[Plaintiff] may enter into or upon the Property, either personally or by its agents, nominees or attorneys and dispossess [Borrower] and its agents and servants therefrom, without liability for trespass, damages or otherwise and exclude [Borrower] and its agents or servants wholly therefrom, and take possession of all books, records and accounts relating thereto and [Borrower] agrees to surrender possession of the Property and of such books records and accounts to [Plaintiff] upon demand”⁹

G. Basis for Appointment of Receiver Independent of Loan Documents

22. Pursuant to the Federal Rules of Civil Procedure, this Court has the power to appoint a receiver over the Properties, and the appointment of a receiver to manage and operate the Properties is just and necessary in this case for the following reasons:

- a. Borrower has agreed to the appointment of a receiver in this matter;
- b. The Properties are in imminent danger of being materially injured and/or diminishing in value because of Defendants’ inability to pay for vital utility services to the Properties and because of the imminent risk that the property managers for several of the Properties will abandon their positions, which would leave Plaintiff’s collateral without adequate supervision;
- c. Plaintiff’s primary collateral faces imminent danger of being lost, materially injured or diminished in value. Plaintiff has a vested interest in protecting the value of its primary collateral, and in preventing the risk of personal property that also serves as its collateral from being lost, removed or materially injured;
- d. Denying Plaintiff’s request for appointment of a receiver would harm Plaintiff more than the appointment would injure Borrower because without a receiver, the Properties will continue to diminish in value, whereas the appointment of a receiver only deprives Borrower of possession of the Properties;
- e. Plaintiff has a vested interest in ensuring that the Properties are properly maintained and repaired;
- f. Plaintiff has a vested interest in ensuring that rents, income and other profits at the Properties are being properly used for the benefit of the Properties and for payment of debt service;

⁹ See Exhibit 3 at Section 7.1(h).

- g. Plaintiff has a vested interest in reviewing the books and records maintained in connection with the Properties;
- h. Plaintiff has a vested interest in making sure that the Properties are adequately insured;
- i. Plaintiff has a vested interest in ensuring that ad valorem taxes on the Properties are being timely paid, so as to prevent the possibility of ad valorem tax liens recorded after the recording of Plaintiff's Mortgages priming Plaintiff's liens on the Properties; and
- j. Plaintiff has the current right to possession of the Properties and to the rents, profits and income generated therefrom, and it is preferable that a receiver, who is accountable to the Court and to the parties-in-interest, take possession rather than Plaintiff taking possession.

CAUSES OF ACTION AND REMEDIES

COUNT ONE: BREACH OF CONTRACT

23. To the extent not inconsistent herewith, Plaintiff incorporates by reference the allegations made in paragraphs 1 through 22 as if set forth fully herein.

24. Borrower covenanted and agreed in the Loan Documents to maintain the Properties in good and safe condition and repair. By failing to comply with this contractual obligation (because of their inability to pay utility companies), Defendants have breached their covenant with, and have injured (which injury is continuing), Plaintiff. Accordingly, Plaintiff is entitled to pursue all remedies available to Plaintiff (i) under the Loan Documents, and (ii) at law or in equity to protect the value of Plaintiff's collateral.

COUNT TWO: APPLICATION FOR APPOINTMENT OF RECEIVER

25. To the extent not inconsistent herewith, Plaintiff incorporates by reference the allegations made in paragraphs 1 through 24 as if set forth fully herein.

26. Pursuant to Federal Rule of Civil Procedure 66, this Court has the power to appoint a receiver. Specifically, "the appointment of a receiver can be sought by anyone showing an interest in certain property or a relation to the party in control or ownership thereof

such as to justify conservation of the property by a court officer.” *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 241 (5th Cir. 1997).

27. Based upon Plaintiff’s desire for a receiver and Borrower’s agreement to the appointment of a receiver, Plaintiff requests that the Court appoint a receiver to (i) take possession and control of the Properties; (ii) preserve and maintain the Properties; and (iii) preserve the ability of a future buyer of the Properties to assume the Loan (with Plaintiff’s consent).¹⁰

28. Additionally, the appointment of a receiver is appropriate since the equitable factors for appointment weigh heavily in Plaintiff’s favor. Imminent danger exists that the Properties will continue to diminish in value because of Borrower’s inability to pay utility companies; and, in fact, one or more utility companies have threatened to terminate service to the Properties. Moreover, because of Borrower’s inability to pay one or more property management companies as required by the Management Agreements, an imminent risk exists that property management companies will abandon several of the Properties, which would almost ensure that the value of the Properties would further deteriorate, given that there would be no one in place to monitor and care for Plaintiff’s collateral. Appointment of a receiver will permit Plaintiff to provide the money necessary, in Plaintiff’s reasonable and good faith discretion, to address the foregoing critical issues without becoming exposed to mortgagee-in-possession liability.

29. Further, Plaintiff seeks a receiver because other legal remedies will not suffice and no less drastic equitable remedies exist. The urgent issues described above cannot be solved with money damages alone or any other equitable remedy. Further, the condition of these

¹⁰ Because of the current downturn in the commercial real estate credit markets, originations (new loans) are virtually non-existent, and the appointment of a receiver will facilitate the loan assumption process by insuring compliance with all applicable REMIC guidelines, federal tax requirements to which Plaintiff is obligated to adhere at all times.

Properties and mortgagee-in-possession concerns mandate a suitable manager to oversee the necessary repairs, finances, and day-to-day operations of the Properties. The appointment of a receiver with specific knowledge of the structure of "securitized" commercial real estate loans such as the Loan will best accommodate these concerns.

30. Finally, Borrower will not suffer significant harm if this Court appoints a receiver. The appointment will merely remove some of Borrower's responsibility and authority and allow Plaintiff a way to make desperately needed payments to utility companies without incurring potential mortgagee-in-possession liabilities and, further, to ensure that the property management companies are paid and remain on-site at the Properties. On the other hand, the failure to obtain a receiver will cause Plaintiff great harm because, without a receiver, the Properties will surely continue to deteriorate, and Plaintiff's primary collateral will be severely diminished in value.

Additional Grounds Warranting Appointment of Receiver

31. Plaintiff is a secured creditor of Borrower, and the appointment of a receiver facilitates subjecting the Properties to Plaintiff's secured claim, pending an orderly sale of the Properties (by foreclosure or otherwise) or an assumption of the Loan which will not violate REMIC guidelines, federal tax requirements to which Plaintiff must adhere at all times.

32. Furthermore, because an Event of Default exists, Borrower's license to collect income from the Properties has been revoked and, therefore, Borrower is no longer entitled to possession of the rents, profits, income or leases related to the Properties. Accordingly, the appointment of a receiver is necessary to ensure preservation of the Properties and the income generated by the Properties.

33. Appointment of a receiver to manage and operate the Properties is just and necessary in this case because (i) statutory grounds exist for the appointment of a receiver; (ii) Borrower has agreed to the appointment of a receiver in this matter; and (iii) equitable grounds

exist for the appointment of a receiver. Plaintiff prefers (and Borrower has agreed) that such right of possession be vested in a receiver who is qualified and experienced to possess and operate the Properties. Doing so will permit Plaintiff to provide the money necessary, in Plaintiff's reasonable and good faith discretion, to address the critical issues affecting the Properties without becoming exposed to mortgagee-in-possession liability.

34. Plaintiff specifically prays for the following relief:

- a. Robert V. Schrader, Esq., with The Hayman Group, 5700 Crooks Road, Suite 400, Troy, Michigan 48098,¹¹ who is not a party, attorney for a party or other person interested in this action, be appointed to act and serve as receiver ("Receiver") with respect to the Properties, with respect to income (of any kind) therefrom, whether now existing or hereafter collected, and with respect to any and all other property and property interests pledged or assigned to Plaintiff under the Loan Documents on which Plaintiff holds a lien under the Loan Documents or in which Plaintiff otherwise has an interest under the Loan Documents;
- b. Receiver be allowed to take and have complete and exclusive control and possession of the Properties, together with any and all bank accounts, credit card receipts, demand deposits, reimbursement rights, bank deposits, security deposits and all other forms of accounts, accounts receivable, payment rights, cash and cash equivalents, along with any and all information necessary to operate the Properties, including but not limited to all security codes, combinations, passwords and other access codes and all other collateral securing the indebtedness owed to Plaintiff;
- c. Borrower and all persons acting under its direction (including any remaining property managers) be ordered to deliver possession of the Properties to the Receiver, including all property-related information and YARDI files, without any right of offset or recoupment, along with all other collateral securing the indebtedness owed to Plaintiff, including but not limited to, (i) cash collateral (whether consisting of cash on hand, cash in any and all bank accounts or other accounts, all rights to security deposits, including but not limited to amounts that Borrower may have deposited with utility companies and all other cash and cash equivalents); (ii) all keys; (iii) all loans and communications and correspondence files relating thereto; (iv) security deposits, rent, prepaid rent, other sums relating to the use, enjoyment, possession, improvement or occupancy of

¹¹ See Exhibit 6, which is a brief description of The Hayman Group's experience and expertise with respect to acting as a receiver for comparable commercial real estate properties throughout the country.

all or any part of the Properties and any accounts of any of the foregoing; (v) a current list of the occupants of the Properties, including data with respect to each occupant; (vi) any and all accounts receivable and accounts payable reports; (vii) any and all contracts in effect with respect to the Properties and all communications and correspondence pertinent thereto; (viii) any and all contracts, bids or other materials relating to any contractor work at the Properties; (ix) any and all payroll records, employee files, applications and other materials relevant to those persons employed at the Properties; (x) any and all insurance policies and certificates covering the Properties, and all communications and correspondence pertinent thereto; (xi) any and all bank statements relating to any accounts associated with the Properties; and (xii) any and all other records pertaining to the management of the Properties;

- d. Borrower and any persons acting under Borrower's direction (including any property manager) be (i) directed to deliver the Properties to Receiver; (ii) enjoined from in any way disturbing the possession of the Properties or other property that is the subject of the Court's order; (iii) prohibited and restrained from disposing of, dissipating, mishandling or misappropriating any of the Properties or other such property; (iv) prohibited from taking any actions that would, directly or indirectly, have an adverse impact on the value of the Properties; (v) prohibited and restrained from canceling, reducing or modifying any and all insurance coverage in existence with respect to the Properties; and (vi) prohibited and restrained from collecting any rents or other sums due to Borrower, all until further order of the Court;
- e. Effective immediately, Receiver be ordered to take any and all actions Receiver deems reasonable and appropriate to prevent waste to the Properties and to preserve, secure, manage, maintain and safeguard the Properties and all other forms of property to which Receiver is entitled to take possession and control under the Court's order;
- f. Receiver be vested with the books and records of Borrower with respect to operation of the Properties and other property subject to the Court's order, including any and all information related to: (i) rent rolls and leases affecting the Properties; (ii) amounts paid by lessees and other obligors of Borrower; (iii) liens, encumbrances and other interests against or affecting the Properties; (iv) property taxes owed by Borrower; (v) all types of insurance affecting the Properties; (vi) plans, specifications, surveys and drawings of the Properties; (vii) access codes to any of the Properties; (viii) all operating and bank statements of Borrower; and (ix) all other aspects of the Properties;
- g. Receiver be authorized to continue to manage, operate, lease and market for lease the Properties and to employ such managers, agents, employees, servants, accountants and attorneys as may in his judgment be advisable or

necessary in the management, conduct, control or custody of the affairs of Borrower and its assets; be authorized to make payments and disbursements in the ordinary course of business and to make such payments and disbursements as may be necessary and proper for the preservation of the Properties and other property of Borrower; and be authorized to pay net income from the Properties to Plaintiff, in reduction of the indebtedness owed to Plaintiff by Borrower;

- h. Receiver be authorized, with approval of the Court and Plaintiff, to market for sale and to sell the Properties and other collateral or facilitate an assumption of the Loan and execute on Borrower's behalf any necessary documents in connection with such sale or assumption;
- i. Receiver be authorized to receive and collect any and all sums due or owing to Borrower in any manner related to the Properties, whether the same are now due or shall hereafter become due and owing, to deposit such sums into an account established and maintained by Receiver, and to expend such sums on the operation and management of the Properties in the ordinary course of its business;
- j. Receiver be authorized to institute, prosecute, defend, compromise and/or intervene in or become a party to such actions or proceedings in state or federal courts necessary for the protection, maintenance and preservation of the assets of Borrower and to carry out the terms of the Court's order appointing Receiver, including but not limited to, the collection of rents and other amounts now or hereafter becoming due, the removal of tenants or other persons from the Properties and/or the defense of any action brought against Receiver acting in such capacity;
- k. Receiver be authorized to maintain appropriate property insurance for the Properties, public liability insurance, worker's compensation insurance, fire and extended coverage insurance, burglary and theft insurance and other types of insurance normally obtained in connection with the operation and management of properties similar to the Properties; and be authorized to continue any current policies in place and to purchase further insurance as Receiver deems appropriate;
- l. Receiver be authorized to pay all current and past due real estate taxes, personal property taxes and any other taxes and assessments against the Properties;
- m. Receiver be authorized to prepare and file tax returns with respect to the Properties, and other property subject hereto, as may be required by law, provided, however, Receiver is not responsible for the preparation of tax returns for Borrower or any of its affiliates;

- n. Receiver and Plaintiff be authorized to enter into further lending transactions by which Plaintiff may lend monies to Receiver (on a nonrecourse basis as to Receiver) to enable Receiver to perform his duties hereunder, which shall be secured by a first and prior lien and security interest on the Properties and on all other collateral of Plaintiff, in favor of Plaintiff as security for such on the same terms and conditions set forth in the Deed of Trust;
- o. Receiver be authorized to (i) negotiate and enter into new leases, occupancy agreements and contracts in the ordinary course of the business of the Properties; (ii) modify existing leases, occupancy agreements and contracts in the ordinary course of the business of the Properties; (iii) pay all utilities, expenses and other obligations secured by the Properties or which may give rise to liens on the Properties, and all other outstanding obligations to suppliers and service providers in the ordinary course of business, including obligations incurred prior to the commencement of the receivership, so long as Receiver has determined that it is prudent to do so in order to maintain business relationships that are beneficial to the conduct of the receivership; (iv) make repairs necessary to the maintenance of the Properties in order to preserve the Properties in the ordinary course of business; and (v) comply with all requirements and regulations applicable to the Properties;
- p. Receiver be permitted to apply income from the Properties, subject to the lien rights of Plaintiff, as follows: (i) Receiver's approved fees and expenses; (ii) the current operating expenses of the receivership in the ordinary course of business; (iii) the obligations owed to Plaintiff under the Loan Documents; and (iv) such other obligations incurred;
- q. Receiver be permitted to maintain sufficient cash on hand to enable Receiver to meet those expenses, the payment of which is authorized herein, in an amount to be agreed to between Receiver and Plaintiff;
- r. Except in the event of gross negligence, willful misconduct or actions in violation of orders of the Court, Receiver have no personal liability for any obligations incurred in the course of the receivership, any and all such liabilities being limited to the assets (including the cash and cash equivalents) received and generated by Receiver in the course of the receivership, subject to the existing lien of Plaintiff, and Borrower hold Receiver harmless except in connection with any willful misconduct or gross negligence by Receiver; and
- s. The authority granted to Receiver be self-executing.

CONDITIONS PRECEDENT

35. Plaintiff has satisfied all conditions precedent for bringing this action.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that:

- a. Robert V. Schrader, Esq. with The Hayman Group be appointed Receiver pursuant to Federal Rule of Civil Procedure 66 and be vested with all necessary authority to act on behalf of Borrower and access and administer all funds and accounts at all banks and other financial institutions owned or controlled by Borrower with regard to the Properties, and that upon entry of an order appointing a receiver, all business activities of Borrower related to the Properties be conducted under the direction and with the approval of the receiver as specifically requested in paragraph 43 above; and,
- b. On final trial hereof, Plaintiff have judgment against Defendants and interest to the extent allowed by applicable law, together with its reasonable and necessary attorneys' fees and all costs of court, and such other and further relief, both general and special, at law or in equity, to which Plaintiff may be justly entitled.

Dated: August 6, 2009

Respectfully submitted,

FULBRIGHT & JAWORSKI, L.L.P.

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