Entered on Docket
December 11, 2009

Hon. Linda B. Riegle
United States Bankruptcy Judge

O'REILLY LAW GROUP, LLC
John F. O'Reilly, Esq.
Nevada Bar No. 1761
Timothy R. O'Reilly, Esq.
Nevada Bar No. 8866
325 S. Maryland Parkway
Las Vegas, Nevada 89101
Telephone: (702) 382-2500
Facsimile: (702) 384-6266
E-Mail: tor@oreillylawgroup.com

BIENERT, MILLER, WEITZEL & KATZMAN
Steven J. Katzman, Esq.
California Bar No. 132755
Luis A. Feldstein, Esq.
California Bar No. 184824
115 Avenida Miramar
San Clemente, California 92672
Telephone: (949) 369-3700
Facsimile: (949) 369-3701
E-Mail: skatzman@bmwklaw.com

Attorneys for Defendant
STANLEY E. FULTON

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In Re: USA COMMERCIAL MORTGAGE COMPANY, Debtor.	CASE NO.: BK-S-06-10725 LBR Chapter 11 BK-S-06-10725 LBR
In Re: USA CAPITAL REALTY ADVISORS, LLC Debtor.	BK-S-06-10726 LBR BK-S-06-10727 LBR
In Re: USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC Debtor.	BK-S-06-10728 LBR BK-S-06-10729 LBR Jointly Administered
In Re: USA CAPITAL FIRST TRUST DEED FUND, LLC Debtor.	**Adversary No. 08-01132**
In Re: USA SECURITIES, LLC Debtor.	

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Affects: ☐ All Debtors ☐ USA Commercial Mortgage Company ☐ USA Capital Realty Advisors, LLC ☒ USA Capital Diversified Trust Deed Fund, LLC ☐ USA Capital First Trust Deed Fund, LLC ☐ USA Securities	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS REGARDING (1) DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; (2) PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND (3) DEFENDANT'S COUNTERMOTION FOR SUMMARY JUDGMENT**
USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, Plaintiffs, vs. STANLEY E. FULTON, Defendant.	

Law Offices
O'REILLY LAW GROUP, LLC
A NEVADA LIMITED LIABILITY COMPANY INCLUDING CORPORATIONS
325 South Maryland Parkway • Las Vegas, Nevada 89101
Telephone (702) 382-2500 • Facsimile (702) 384-6266

Defendant Stanley E. Fulton's ("Defendant" or "Fulton") Motion for Summary Judgment, Plaintiff USA Capital Diversified Trust Deed Fund, LLC's ("Plaintiff" or "DTDF") Motion for Partial Summary Judgment, and Defendant Stanley E. Fulton's Countermotion to Plaintiff's Motion for Partial Summary Judgment, (collectively the "Motions") came on for hearing on September 3, 2009 at 9:30 a.m. Steven Katzman, John O'Reilly and Timothy O'Reilly appeared on behalf of Defendant and Eric Madden and Michael Yoder appeared on behalf of Plaintiff.

This Court, having considered the Motions along with the Oppositions, Replies, Declarations, exhibits and supporting documents submitted in support thereof, and having heard the arguments of counsel made at the hearing on September 3, 2009, now therefore makes the following findings of fact, conclusions of law and recommendations under Federal Rule of Civil Procedure 52 and Federal Rule of Bankruptcy Procedure 7052.

FINDINGS OF FACT

1. In February, 2001, Fulton was solicited by Joseph D. Milanowski to loan USA Investment Partners ("USAIP") five million dollars. At this time, USACM, DTDF, and USAIP were commonly known to be operating collectively under the name USA Capital. Furthermore,

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USAIP was represented as the wholly owned subsidiary of USACM and USACM served as the exclusive loan servicer and loan originator for DTDF. USACM, DTDF and USAIP had overlapping management. Fulton testified in his Declaration on file with this Court that USAIP was a holding company owned by Tom Hantges and Joe Milanowski. Given the amount of the loan, Fulton retained, Lionel Sawyer & Collins ("LS&C"), to represent him and to assist in negotiating, reviewing and properly documenting the loan.

2. On or about February 15, 2001, the loan was executed and Mr. Fulton loaned USAIP five million dollars (the "Fulton-USAIP Loan").

3. The maturity date of the Fulton-USAIP Loan was February 13, 2002.

4. The Fulton-USAIP Loan was guaranteed by USA Commercial Mortgage ("USACM") doing business as USA Capital ("USA Capital") and the principals of USAIP and USACM, Joseph Milanowski and Thomas Hantges (the "USA Capital Principals"). At the time of the Fulton-USAIP Loan, USAIP was represented in the prospectus of Diversified Trust Deed Fund ("DTDF") as the wholly owned subsidiary of USACM. The Fulton-USAIP Loan was further secured by a collateral assignment of a 6 million dollar promissory note from USACM to Reno South Meadows, LLC ("RSM"). According to the income tax returns filed by South Meadows Associates, LLC ("SMA") and K-1 forms issued to the owners, over the relevant time frame, RSM was the largest equity holder in SMA, owning a 33.3% interest. RSM was designated on the tax returns as the tax matters partner, authorized to act on behalf of SMA.

5. As a result of the Fulton-USAIP Loan, a Uniform Commercial Code Financing Statement Form 1 was filed listing USACM and USAIP as debtors.

6. The wire transfer of funds in the amount of five million dollars, from Fulton, took place on February 16, 2001. USAIP was the entity that received the $5 million transfer of funds from Fulton.

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7. On February 20, 2001, three of the five million dollars from the Fulton-USAIP Loan were transferred by USAIP to USACM. DTDF did not receive any of the proceeds for the Fulton-USAIP Loan.

8. On or about November 28, 2001, Fulton assigned his $500,000 interest in a USACM-originated loan to DTDF in exchange for a $500,000 check from DTDF. On or about February 20, 2002 Fulton assigned his $500,000 interest in another USACM-originated loan to DTDF in exchange for another $500,000 check from DTDF.

9. The Fulton-USAIP Loan matured on February 13, 2002 and therefore the entire principal amount of the Fulton-USAIP Loan became due and owing on the same date. On or about February 20, 2002 Fulton participated in a meeting with Milanowski after contacting Milanowski about repayment of the Fulton-USAIP Loan. Fulton testified that the following occurred at this meeting:

> [I]n that meeting I said, "I want the money, this $5 million you owe me," and Joe had said…something like, "Well, you'll work with us or you'll have to chase us." I think those were Joe's words. And I believe I responded, "Well, I'm not going to do either one of those. I'm going to have my money, get my money, or I'll have your business license."

10. Soon thereafter, Fulton again retained the assistance of LS&C to negotiate and secure payment. Counsel for USA Capital negotiated with LS&C terms of repayment, which required USACM to make five payments of $1 million each on the following dates: (a) March 11, 2002; (b) March 15, 2002; (c) April 15, 2002; (d) May 15, 2002; and (e) June 15, 2002. As a result, LS&C forwarded to counsel for USACM wire transfer instructions.

11. On or about March 11, 2002, Milanowski directed a $1million wire transfer from South Meadows Apartments, LLC ("SMA") to Fulton's brokerage account as the first payment on the Fulton-USAIP Loan. This transfer was reflected on Fulton's account statements as originating

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from "SOUTH MEA." All previous wire transfers from USACM had appeared on Fulton's account statement as coming from "USA COMMERCIAL M."

12. On or about March 15, 2002, Milanowski directed another $1 million wire transfer from SMA to Fulton's brokerage account as the second payment on the Fulton-USAIP Loan. This transfer also was reflected on Fulton's account statements as originating from "SOUTH MEA." Fulton testified that he understood that these "SOUTH MEA" transfers came from one of the entities within the "vast group of companies," not from USACM itself.

13. On or about June 15, 2002, Milanowski directed a $1 million wire transfer from USACM to Fulton's brokerage account as the fifth payment on the Fulton-USAIP Loan. This transfer was reflected on Fulton's account statements as originating from "USA COMMERCIAL M."

14. Fulton demanded that USACM pay late fees and default interest in connection with the Fulton-USAIP Loan. Specifically, on July 10, 2002, LS&C sent a letter to USACM demanding payment of more than $650,000 in late fees and default interest.

15. On or about August 16, 2002, Milanowski directed a $250,000 wire transfer from DTDF to Fulton's brokerage account to pay the 5% late fee incurred by USAIP in connection with the Fulton-USAIP Loan. This transfer was reflected on Fulton's account statements as originating from "USA CAPITA."

16. Unbeknownst to Fulton, DTDF paid back $2.25 million of the USAIP-Fulton Loan on April 15, 2002, May 15, 2002 and August 13, 2002 (collectively, the "DTDF Transfers"). Each of the wire transfers constituting the DTDF Transfers reflected on Fulton's statement indicated that the DTDF Transfers came from "USA CAPITA."

17. Fulton did not make any further investments with USACM or USAIP after obtaining repayment of the Fulton-USAIP Loan.

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18. The fact that the money was designed as having come from "USA Capita" is not sufficient to make a reasonable person know that it could have been stolen property because "USA Capita" could have been "USA Capital."

19. Due to the relationship between SMA and RSM the fact that payments are designated as coming from "SOUTH MEA" on March 11, 2002 and March 15, 2002 is not sufficient to make a reasonable person know that the DTDF Transfers could have been stolen funds and not coming from appropriate parties. Further, given the relationship between RSM and SMA as referenced in ¶ 4 above, it was reasonable to conclude that the payments had come from a party authorized to make such payment under the Fulton-USAIP Loan.

20. Fulton provided value to USAIP as defined under NRS 112.220(1) for the DTDF payments.

21. The Value that Mr. Fulton provided under NRS 112.220(1) was "reasonably equivalent" as Mr. Fulton lent five million dollars and received five million dollars in return, consistent with the terms of the Fulton-USAIP Loan.

22. The Fulton-USAIP Loan was a commercial transaction and USA Commercial Mortgage, when operating, was charging large sums for late fees on, amongst other things, loans. As a result, reasonably equivalent value was tendered for the $250,000 late fee received by Mr. Fulton on August 13, 2002.

23. Sufficient facts are not present in the record to date that create a genuine issue of material fact or to permit a reasonable jury to find that Fulton did give any indirect benefit, constituting value, to DTDF under the synergy theory.

24. Although Fulton was the initial transferee of the DTDF Transfers, there is nothing in the record for summary judgment to demonstrate that Fulton knew the DTDF Transfers came from DTDF.

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25. There is no evidence establishing that Fulton had any form of actual knowledge that the DTDF Transfers could have been stolen property.

26. Under the facts of the case, there are no circumstances by which a reasonable person could have known or caused a reasonable person to know that the DTDF Transfers could have constituted stolen property pursuant to NRS 41.580 as:

a. Consistent with general business practice, USA Capital conducted business by and through a number of entities who have related affiliates and subsidiaries. As to certain USA Capital entities, Diversified Trust Deed Fund had a prospectus and USA Commercial Mortgage was regulated by the State of Nevada;

b. As evident by the people who invested in the Diversified Trust Deed Funds through USA Capital, hundreds of people trusted Joseph Milanowski and Thomas Hantges;

c. Mr. Fulton also trusted Mr. Milanowski as he was a financial advisor with whom he had conducted ten million dollars in transactions;

d. Mr. Fulton had an attorney from a reputable firm, LS&C, who reviewed the records associated with the Fulton-USAIP loan;

e. At no time, prior to the filing of the lawsuit, was Mr. Fulton told that any of the DTDF Transfers came from DTDF;

f. The funds Mr. Fulton received to pay back the principal of the Fulton-USAIP loan were not designated as having come from DTDF;

g. The fact that the DTDF Transfers were designated as "USA Capita" in Mr. Fulton's financial statements is not sufficient to make a reasonable person know that it could have been stolen property because "USA Capita" could have been USA Capital;

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h. A reasonable person who receives money from a business entity isn't required to examine the check or the transfer to see what account it was drawn on;

i. USA Capital's rebooking of the DTDF Transfers to the 1090 Loan several months after the last payment to Mr. Fulton was unbeknownst to Fulton;

j. The Waiver of Indictment, Criminal Information, or Criminal Docket for Case 2:09-cr-00291-RLH-PAL-1 of Mr. Joseph Milanowski (Doc.112) is not sufficient to prove Mr. Fulton knew anything and is not binding against Mr. Fulton; and

k. It is not sufficient to make a reasonable person know that property could be stolen by the fact one is paid after he has made a demand for payment. If it was sufficient, then anybody who received money in this economy could be sued under NRS 41.580 for receiving stolen property if it just so happened not to have come from the legal entity with whom the agreement was originated. There is no reason to make that assumption. For example, one could legitimately presume the person borrowed the money.

27. Plaintiff has not and will not be able to prove by clear and convincing evidence, the minimal applicable burden of proof, that Fulton withheld property under circumstances that make it a violation of Subsection 1 of NRS 205.275.

28. The findings herein have no impact on whether Fulton acted in good faith as required for a good faith transferee defense, including the defense provided under NRS 112.220(1). NRS 41.580 has a different standard than NRS 112.220(1).

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CONCLUSIONS OF LAW

A. Applicable to All Pending Motions for Summary Judgment

1. The findings of fact are incorporated into the conclusions of law to the fullest extent possible as if they were fully set forth herein.

2. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (made applicable in this proceeding by Fed. R. Bankr. P. 7056).

3. In assessing whether the non-moving party has raised a genuine issue, its competent evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "the mere existence of a scintilla of evidence is insufficient to create a genuine issue of material fact." *Id.* at 252.

4. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

5. Where a claim or defense is factually implausible, the opposing party must present "more persuasive evidence than would otherwise be necessary in order to show that there is a genuine issue for trial." *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1988).

6. At the summary judgment stage, facts are viewed in the light favorable to the nonmoving party "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is not genuine issue for trial." *Id.*

B. Conclusions Regarding Reasonably Equivalent Value

1. Plaintiff has alleged a fraudulent transfer claim pursuant to NRS 112.180(1)(a), which sets forth that a transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (a) With actual intent to hinder, delay or defraud any creditor of the debtor. Plaintiff has not alleged or claimed for avoidance of a constructively fraudulent transfer including those pursuant to NRS 112.180(1)(b) and NRS 112.190(1) .

2. A constructively fraudulent transfer claim under NRS 112.180(1)(b) requires that the value be provided to the debtor. Specifically, NRS 112.180(1)(b) provides as follows: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation incurred, if the debtor made the transfer or incurred the obligation . . . "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation . . . ." NRS 112.180(1)(b) (emphasis added).

3. Similarly, a constructively fraudulent transfer claim under NRS 112.190(1) requires that the value be provided to the debtor. NRS 112.190(1) provides as follows: "A transfer made or obligation incurred by the debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." NRS 112.190(1) (emphasis added).

4. A defense to a claim under NRS 112.180(1)(a) is available pursuant to NRS 112.220(1), which provides: **"**A transfer or obligation is not voidable under paragraph (a) of

Law Offices
O'REILLY LAW GROUP, LLC
A NEVADA LIMITED LIABILITY COMPANY INCLUDING CORPORATIONS
325 South Maryland Parkway •Las Vegas, Nevada 89101
Telephone (702) 382-2500 •Facsimile (702) 384-6266

Law Offices
O'REILLY LAW GROUP, LLC
A NEVADA LIMITED LIABILITY COMPANY INCLUDING CORPORATIONS
325 South Maryland Parkway • Las Vegas, Nevada 89101
Telephone (702) 382-2500 • Facsimile (702) 384-6266

subsection 1 of NRS 112.180 against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee."

5. NRS 112.170(1) defines Value being given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

6. The plain language of NRS 112.220(1) and NRS 112.170(1) shows value to the debtor is not a prerequisite to the good-faith defense of §112.220(1). In other words, the statutes do not require that the value must be provided to the debtor when an actual fraudulent transfer is alleged pursuant to NRS 112.180(1)(A) and 11 USC §544. In determining whether the value tendered was reasonably equivalent, the purpose of the payments must be examined. In the instant matter, Fulton was paid in accordance with the terms of the Fulton-USAIP Loan.

7. Cases such as *In re Lucas Dallas, Inc.*, 185 B.R. 801, 807 (B.A.P. 9th Cir. 1995) and *S.E.C. v. Resource Development Int'l, LLC*, 487 F.3d 295 (5th Cir. 2007) are factually distinguishable and apply to cases involving a constructively fraudulent transfer.

8. DTDF did not receive any direct or indirect value under NRS 112.220(1) from Fulton or otherwise in exchange for the DTDF Transfer. Nor did DTDF receive any direct or indirect benefit from Fulton in exchange for the DTDF Transfers.

C. <u>Conclusions Regarding Receipt of Stolen Property</u>

1. NRS 41.580 provides that if property has been taken from its owner by larceny, robbery, burglary, embezzlement, theft or any other offense that is a crime against property and another person buys, receives, possesses or withholds the property under circumstances that make such conduct a violation of subsection 1 of NRS 205.275, the owner of the property may bring a civil action against the person who bought, received, possessed or withheld the property and may

recover treble the amount of any damage the owner has suffered, together with his costs in the action and a reasonable attorney's fee.

2. In Nevada, civil cases must be proven by clear and convincing evidence on allegations of fraud and imposition of punitive damages. At the very least, a clear and convincing standard would apply to a civil claim under NRS 41.580.

3. NRS 205.275(1) provides that a person commits an offense involving stolen property if the person, for his own gain or to prevent the owner from again possessing his property, buys, receives, possesses or withholds property: (a) knowing that it is stolen property; or (b) under such circumstances as should have caused a reasonable person to know that it is stolen property.

4. As to the reasonable person standard as set forth in NRS 205.275(1)(b), it is not under circumstances that should have caused a reasonable person to believe it was stolen property. The standard is what should have caused a reasonable person to know that it was stolen property. *See* NRS 205.275(1)(b).

5. In examining these statutes, we must look at the Nevada Supreme Court's holding in *Wiechers v. Sheriff, Washoe County*, 543 P.2d 1347 (Nev. 1975). In *Wiechers*, the Nevada Supreme Court reversed a lower court's determination that probable cause existed to conclude the defendant violated the Receipt of Stolen Property Criminal Statute. In *Wiechers v. Sheriff, Washoe County*, 543 P.2d 1347 (Nev. 1975), the Court found that there was insufficient evidence supporting the determination of probable cause that the defendant knowingly acquired stolen engines, despite the testimony of two witnesses who stated that they stole automobiles, removed the engines and sold stolen engines to defendant. The Court held that the "record is barren of any inference or suggestion that [defendant] was implicated in any manner in, or with, the . . . theft ring; and, in fact, it affirmatively shows that he had no knowledge that the engines had been stolen. . . . *Furthermore, [defendant] paid for the stolen engines in the ordinary course of business with*

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Telephone (702) 382-2500 • Facsimile (702) 384-6266

his 'regular' business checks. Id. Similarly, Fulton performed the Fulton-USAIP commercial loan in his ordinary course of business and did nothing to hide the transaction.

6. This Court, after evaluating all facts set forth herein, concludes there are insufficient facts to establish Mr. Fulton knew or should have caused a reasonable person to know the DTDF Transfers could have been stolen property.

RECOMMENDATIONS

1. Defendant's Motion for Summary Judgment (DE #72) should be granted. Specifically, summary judgment should be granted in favor of Fulton on the NRS 41.580 claim.

2. Defendant's Countermotion for Partial Summary Judgment (DE #92) should be granted. Specifically, summary judgment should be granted in favor of Fulton on the issue of whether reasonably equivalent value was given under NRS 112.220(1).

3. Plaintiff's Motion for Partial Summary Judgment (DE #80) should be granted in part and denied in part. Specifically, summary judgment should be granted in favor of DTDF on the issues of whether: (a) the DTDF Transfers involved property belonging to DTDF; and (b) Fulton was the initial transferee of the DTDF Transfers under 11 USC 550(a)(1). Summary Judgment for DTDF should be denied on the issue of whether reasonably equivalent value was given under NRS 112.220(1).

4. Given the Court's recommendation to grant Defendant's Motion for Summary Judgment based upon the findings and conclusions above, it is not necessary for this Court to determine whether Plaintiff's claim under NRS 41.590 is barred by the applicable limitations period, the doctrine of *pari delicto* or is unconstitutional. These issues are preserved, if necessary, for the district court.

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Law Offices
O'REILLY LAW GROUP, LLC
A NEVADA LIMITED LIABILITY COMPANY INCLUDING CORPORATIONS
325 South Maryland Parkway • Las Vegas, Nevada 89101
Telephone (702) 382-2500 • Facsimile (702) 384-6266

DATED this _____ day of December 2009.

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UNITED STATES BANKRUPTCY COURT JUDGE

PREPARED AND SUBMITTED:

O'REILLY LAW GROUP, LLC

By: /s/ Timothy R. O'Reilly
John F. O'Reilly, Esq.
Nevada Bar No. 1761
Timothy R. O'Reilly, Esq.
Nevada Bar No. 8866
325 South Maryland Parkway
Las Vegas, Nevada 89101
Telephone: (702) 382-2500
Facsimile: (702) 384-6266
E-Mail: tor@oreillylawgroup.com

Attorneys for Defendant STANLEY E. FULTON

BIENERT, MILLER, WEITZEL & KATZMAN

By: /s/ Steven J. Katzman
Steven J. Katzman, Esq
California Bar No. 132755
Luis Feldstein, Esq.
California Bar No. 184824
115 Avenida Miramar
San Clemente, California 92672
Telephone: (949) 369-3700
Facsimile: (949) 369-3701
E-Mail: skatzman@bmwklaw.com

Law Offices
O'REILLY LAW GROUP, LLC
A NEVADA LIMITED LIABILITY COMPANY INCLUDING CORPORATIONS
325 South Maryland Parkway • Las Vegas, Nevada 89101
Telephone (702) 382-2500 • Facsimile (702) 384-6266

CERTIFICATION PURSUANT TO LOCAL RULE 9021

In accordance with LR 9021, counsel submitting this document certifies as follows (check one):

_____ The court has waived the requirement of approval under LR 9021

_____ No parties appeared or filed written objections, and there is no trustee appointed in the case.

___x__ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and any trustee appointed in this case, and each has approved or disapproved the order, or failed to respond, as indicated below [list each party and whether the party has approved, disapproved, or failed to respond to the document]

Approved: John F. O'Reilly, Esq. _/s/ John F. O'Reilly_____

Approved: Timothy R. O'Reilly, Esq. _/s/ Timothy R. O'Reilly_____

Approved: Steven J. Katzman, Esq. _/s/ Steven J. Katzman_____

Approved:: Michael J. Yoder, Esq. _/s/ Michael J. Yoder_____

Approved: Eric D. Madden, Esq. _/s/ Eric D. Madden_____

DATED: December 10, 2009. _/s/ Timothy R. O'Reilly_____

_/s/ Steven J. Katzman_____

Attorneys for Defendant
STANLEY E. FULTON

Law Offices
O'REILLY LAW GROUP, LLC
A NEVADA LIMITED LIABILITY COMPANY INCLUDING CORPORATIONS
325 South Maryland Parkway • Las Vegas, Nevada 89101
Telephone (702) 382-2500 • Facsimile (702) 384-6266