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**E-FILED on March 7, 2007**

6 **UNITED STATES BANKRUPTCY COURT**

7 **DISTRICT OF NEVADA**

8 In re:  
USA COMMERCIAL MORTGAGE COMPANY,  
9 Debtor.

Bankruptcy Case No.

BK-S-06-10725-LBR  
BK-S-06-10726-LBR  
BK-S-06-10727-LBR  
BK-S-06-10728-LBR  
BK-S-06-10729-LBR

10 In re:  
USA CAPITAL REALTY ADVISORS, LLC,  
11 Debtor.

Chapter 11

12 In re:  
USA CAPITAL DIVERSIFIED TRUST DEED  
13 FUND, LLC,  
14 Debtor.

Jointly Administered Under  
BK-S-06-10725-LBR

15 In re:  
USA CAPITAL FIRST TRUST DEED FUND,  
16 LLC  
Debtor.

17 Affects:  
USA COMMERCIAL MORTGAGE COMPANY,  
18 Plaintiff

**Adversary Case No. 06-01251-LBR**

19 vs.

**DATE: 4/26/07**

20 SALVATORE REALE,

**TIME: 1:30 p.m.**

21 Defendant

22  
23 **MOTION FOR SUMMARY JUDGMENT**

24 Defendant SALVATORE REALE ("Reale"), by and through his attorneys of record,  
25 GERRARD, COX & LARSEN, submit this Motion for Summary Judgment pursuant to BR  
26 7056 and FRCP 56.

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This Motion is made and based upon the papers and pleadings on file herein, the Points and Authorities which follow, the exhibits attached hereto, and such argument as the Court may entertain at the hearing of this matter.

DATED this 7th day of January, 2007.

**GERRARD COX LARSEN**

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SALVATORE REALE

**POINTS AND AUTHORITIES**

**I.**

**NATURE OF MOTION**

All of the transfers complained of by Plaintiff were repayments of loans extended by Reale to the principals of the Debtor and USA Investment Partners, LLC (“Investment Partners”); however, the loan proceeds went directly from Reale to the Debtor and Investment Partners. Reale provided a “reasonably equivalent value” to the Debtor for each payment he received from the Debtor, as the amount of loan proceeds undisputably advanced directly to the Debtor by Reale is greater than the aggregate amount of the payments received by Reale from the Debtor. These payments were received over a period of four years during which time Reale continued in good faith to extend additional loans to the Debtor and its principals as a result of the payments he was receiving. As a good faith transferee for value, Reale is entitled to summary judgment pursuant to 11 U.S.C. §§ 548(a) & (c), 550(b), and N.R.S. §§ 112.180, 112.190 & 112.220(1).

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**II.**

**STATEMENT OF FACTS**

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3 For more than fifteen years, Reale has been investing in hard-money loans which are  
4 generally secured by first-position trust deeds. *See Affidavit of Salvatore J. Reale, at ¶ 2,*  
5 *attached hereto as Exhibit “F” and incorporated herein by this reference.* In 1999, Thomas  
6 A. Hantges (“Hantges”) and Joseph D. Milanowski (“Milanowski”) approached Reale and  
7 requested a line of credit loan which Hantges and Milanowski could use to advance money to  
8 various entities which they owned and/or controlled. *See Exhibit “F” at ¶ 3.* Each advance  
9 would be treated as a loan to Milanowski and Hantges and would be advanced to the entity  
10 identified by Milanowski and Hantges; however, the loan was made based upon the credit of  
11 Milanowski and Hantges, and accordingly, only Milanowski and Hantges were required to  
12 sign the promissory note used to memorialize the loan. *See Exhibit “F” at ¶¶ 4, 5, 8, & 14.*

13 By December 1, 2000, Mr. Reale had made loans totaling Five Million Five Hundred  
14 Seventy-Five Thousand Dollars (\$5,575,000.00) to Hantges and Milanowski to be used by  
15 USA Commercial Mortgage Company (“USACM”), USA Investment Partners (“Investment  
16 Partners”) and other entities owned and or controlled by Milanowski and Hantges. These  
17 loans were memorialized in a promissory note dated December 1, 2000 (the 12/01/00 Note”)  
18 from Hantges and Milanowski, as borrowers, and Reale as Lender. *See Exhibit “F” at ¶¶ 5 &*  
19 *6.* A true and correct copy of the 12/01/04 Note is attached hereto as Exhibit “A” and is  
20 incorporated herein by this reference.

21 Each of the advances under this loan were made directly from Reale to USACM or to  
22 one of the entities wholly owned and/or controlled by Hantges and Milanowski, as directed by  
23 Milanowski and Hantges. At the time of each advance, Hantges and Milanowski would make  
24 an advance request to Mr. Reale, as lender, along with instructions for an entity to which they  
25 desired the advance to be made payable. Mr. Reale would then advance the loan proceeds by  
26 making a check payable to the designated entity. An amendment to the promissory note  
27 would then be prepared and executed by Hantges and Milanowski. *See Exhibit “F” at ¶¶ 8,*  
28 *9, 14 & 20.*

1 As of December 1, 2004, the December 1, 2000 promissory note had been amended  
2 approximately forty-five (45) separate times, and the balance of the loan had grown to over  
3 Twelve Million Dollars. See Exhibit "F" at ¶ 10. On or about December 1, 2004, Hantges  
4 and Milanowski executed a new promissory note in favor of Salvatore Reale, Trustee of The  
5 Salvatore J. Reale Revocable Trust Dated November 15, 2004 (the "Trust"), in the amount of  
6 Twelve Million Three Hundred Thousand Dollars (\$12,300,000.00) (the "12/01/04 Note"),  
7 which replaced the earlier 12/01/00 Note and the amendments thereto. A true and correct  
8 copy of the 12/01/04 Note is attached hereto as Exhibit "B" and is incorporated herein by this  
9 reference. The 12/01/04 Note accrued interest at the rate of 15.25% per annum. See Exhibit  
10 "F" at ¶ 11.

11 Between January 19, 2005 and December 30, 2005, the 12/01/04 Note was amended  
12 eleven separate times to reflect additional advances made such that the principal balance of  
13 the loan increased to Thirteen Million Eight Hundred Thousand Dollars (\$13,800,000.00) by  
14 December 30, 2005. As of this date, Mr. Reale was unwilling to make further advances until  
15 some large principal reductions to this loan were made. See Exhibit "F" at ¶¶ 12 & 13.

16 The following loan advances were made directly from Reale to USACM, as evidenced  
17 by the following checks from Reale, each of which was negotiated and cashed by USACM  
18 (the "USACM Checks"):

Date	Check No.	Amount
08/13/99	1315	\$300,000.00
10/14/99	1336	\$1,000,000.00
11/10/99	1344	\$325,000.00
12/09/99	1350	\$400,000.00
02/28/00	1420	\$500,000.00
03/07/00	1423	\$2,644.80
03/29/00	1428	\$200,000.00
05/01/00	1443	\$2,200,000.00
05/01/00	1445	\$300,000.00
06/03/00	1451	\$350,000.00
07/03/00	1458	\$250,000.00
07/08/00	1459	\$150,000.00
09/01/00	1471	\$50,000.00
10/02/00	1472	\$100,000.00
11/01/00	1480	\$150,000.00
11/10/00	1483	\$100,000.00
12/01/00	1490	\$100,000.00

1      01/01/01                      1498                      \$100,000.00  
 2      **TOTAL**    **\$6,577,644.80**

3                      Copies of the USACM Checks are attached hereto as Exhibit “C” and are incorporated  
 4 herein by this reference. Each of these loan advances, totaling Six Million Five Hundred  
 5 Seventy-Seven Thousand Six Hundred Forty-Four and 80/100s Dollars (\$6,577,644.80) was  
 6 received directly into the USACM bank account. *See Exhibit “F” at ¶¶ 15 & 16.*

7                      In addition, the following loan advances were made directly from Reale to Investment  
 8 Partners, as evidenced by the following checks from Reale, each of which was negotiated and  
 9 cashed by Investment Partners (the “Investment Partners Checks”):

Date	Check No.	Amount
02/01/01	1508	\$125,000.00
02/01/01	1511	\$25,000.00
03/01/01	1034	\$100,000.00
03/20/01	1529	\$150,000.00
04/01/01	1533	\$150,000.00
05/01/01	1059	\$150,000.00
05/24/01	1554	\$100,000.00
06/01/01	1564	\$50,000.00
07/01/01	1073	\$100,000.00
07/05/01	1076	\$50,000.00
08/01/01	1085	\$100,000.00
11/01/01	1120	\$100,000.00
12/01/01	1138	\$100,000.00
01/01/02	1170	\$50,000.00
02/01/02	1187	\$50,000.00
04/01/02	1209	\$100,000.00
04/09/02	1227	\$100,000.00
05/01/02	1224	\$100,000.00
07/01/02	1245	\$100,000.00
08/01/02	1263	\$100,000.00
10/01/02	1298	\$100,000.00
11/01/02	1315	\$100,000.00
01/01/03	1380	\$400,000.00
05/01/03	1496	\$100,000.00
07/01/03	1548	\$100,000.00
08/01/03	1556	\$150,000.00
09/01/03	1584	\$100,000.00
10/01/03	1613	\$100,000.00
11/01/03	1653	\$150,000.00
12/01/03	1671	\$100,000.00
01/01/04	1676	\$100,000.00
01/05/04	1724	\$50,000.00
02/01/04	1738	\$100,000.00
04/01/04	1779	\$150,000.00
04/30/04	1807	\$50,000.00

1	06/01/04	1824	\$150,000.00
	07/01/04	1849	\$150,000.00
2	08/01/04	1859	\$100,000.00
	09/01/04	1892	\$250,000.00
3	09/15/04	1894	\$50,000.00
	09/15/04	1902	\$50,000.00
4	10/01/04	1905	\$50,000.00
	10/01/04	1921	\$75,000.00
5	10/08/04	1926	\$200,000.00
	11/01/04	1934	\$200,000.00
6	12/01/04	1956	\$150,000.00
	01/19/05	1991	\$100,000.00
7	02/01/05	2003	\$175,000.00
	03/01/05	2021	\$225,000.00
8	05/01/05	2066	\$200,000.00
	06/01/05	2096	\$225,000.00
9	07/01/05	2113	\$175,000.00
	08/01/05	2134	\$175,000.00
10	09/01/05	2160	\$175,000.00
	10/01/05	2176	\$100,000.00
11	01/01/06	2268	\$200,000.00
	04/01/06	2335	250,000.00
12	<b>TOTAL</b>		<b>\$7,175,000.00</b>

13  
14 Copies of the Investment Partners Checks are attached hereto as Exhibit "D" and are  
15 incorporated herein by this reference. Each of these loan advances, totaling Seven Million  
16 One Hundred Seventy-Five Thousand Dollars (\$7,175,000.00) was received directly into the  
17 Investment Partners bank account.<sup>1</sup> *See Exhibit "F" at ¶¶ 17 & 18.*

18 As can be seen above, the majority of all these loan advances were in the form of  
19 checks cashed by Investment Partners, an entity wholly owned and controlled by Hantges and  
20 Milanowski. Reale is of the understanding that these loan proceeds were in turn transferred  
21 by Investment Partners to entities owned by Investment Partners, such as HMA Sales, LLC  
22 and USA Investment Partners VI, LLC, and used to acquire and operate the assets owned by  
23 these entities, such as the Royal Hotel and the Zoso Hotel. *See Exhibit "F" at ¶¶ 19 & 23.*

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27 <sup>1</sup>Checks 1508, 1511, 1034, 1529, 1533, 1059, 1824, 1859, 1892, 1894, 1902, 1905, 1921, 1926, 1934, 1956,  
28 negotiated and cashed by Investment Partners. The remaining thirty checks in Exhibit "D" are made payable to and  
cashed by Investment Partners. This was never an issue for Reale as the loan was extended to Milanowski and Hantges  
with the understanding that they would be directing the money to the entities which they felt needed the money. *See  
Exhibit "F" at ¶ 19.*

1 Paragraph 5 of the Plaintiff's Amended Complaint alleges forty, monthly payments  
2 made on this loan from January 31, 2003 through March 30, 2006, from USACM directly to  
3 Reale. These payments total Five Million Nine Hundred Fifty-One Thousand Three Hundred  
4 Ninety-Seven Dollars (\$5,951,397.00).<sup>2</sup>

5 On or about March 13, 2006, Investment Partners made a payment on this loan in the  
6 amount of Four Million Dollars (\$4,000,000.00), which partially satisfied the loan by  
7 reducing the loan balance to Nine Million Eight Hundred Thousand Dollars (\$9,800,000.00).  
8 See Exhibit "F" at ¶¶ 24 & 25.

9 On April 1, 2006, as a result of the principal reduction payment received, Reale made  
10 another loan advance to Investment Partners in the amount of Two Hundred Fifty Thousand  
11 Dollars (\$250,000.00). See Exhibit "F" at ¶ 27. See Exhibit "E", attached hereto and  
12 incorporated herein by this reference.

13 On or about April 13, 2006, USACM filed its Chapter 11 bankruptcy petition.

14 On or about January 23, 2007, Plaintiff filed its Amended Complaint in which the  
15 Plaintiff seeks to avoid and recover each of the loan payments described herein, on the  
16 following basis:

- 17 1. As actual fraudulent transfers under 11 U.S.C. § 548(a)(1)(A);
- 18 2. As constructively fraudulent transfers under 11 U.S.C. § 548(a)(1)(B);
- 19 3. As actual fraudulent transfers under the state law uniform fraudulent transfer  
20 act found in N.R.S. § 112.180(1)(a);
- 21 4. As constructively fraudulent transfers under the state law uniform fraudulent  
22 transfer act found in N.R.S. § 112.180(1)(b); and
- 23 5. For turnover under 11 U.S.C. § 550(a) and N.R.S. § 112.220.

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27 <sup>2</sup>Plaintiff has rounded these numbers and there are several minor inaccuracies in the amounts reported by  
28 Plaintiffs and the actual payment amount. However, there is one major discrepancy in the payment amount of  
\$345,426.00 which Plaintiff alleges was paid to Reale on April 29, 2004. Plaintiff's own records indicate this payment  
was actually for \$145,425.00, which results in an overstatement by Plaintiff of \$200,000.00. Thus, the actual amount of  
these transfers is \$5,751,397.00, using Plaintiff's rounded numbers.



1 trial to resolve the differing versions of the truth. Admiralty Fund v. Hugh Johnson & Co.,  
2 677 F.2d 1301, 1305-06 (9<sup>th</sup> Cir. 1982). The substantive law defines which facts are material.  
3 Anderson at 248, 106 S. Ct. 2505.

4       Once the movant’s burden is met by presenting evidence which, if uncontroverted,  
5 would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent  
6 to set forth specific facts demonstrating that there is a genuine issue for trial. Anderson v.  
7 Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511 (1986); Lea at 1031. To preclude a  
8 grant of summary judgment, the nonmoving party must set forth “specific facts showing that  
9 there is a genuine issue for trial.” Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.,  
10 475 U.S. 574, 587, 106 S. Ct. 1348 (1986).

11       Entitlement to summary judgment must be shown “through affidavits or some other  
12 form of admissible evidence.” Garner, 2006 U.S. Dist. LEXIS at \*9 (*citing* Fontenot v.  
13 Upjohn Co., 780 F.2d 1190, 1194 (5<sup>th</sup> Cir. 1986)). However, the nonmoving party must, by  
14 affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue  
15 for trial or have summary judgment entered against him. Id. In meeting its burden, the  
16 nonmoving party must go beyond the pleadings and by its own evidence present specific facts  
17 showing that there is a genuine issue for trial. Far Out Prods. v. Oskar, 247 F.3d 986, 997 (9<sup>th</sup>  
18 Cir. 2001).

19       The non-moving party must do more than show there is some metaphysical doubt as to  
20 a material fact. Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1050 (9<sup>th</sup> Cir. 1995);  
21 Matsushita, 475 U.S. at 586, 106 S. Ct. 1348. A party cannot rely on self-serving, conclusory  
22 affidavits, but must “set forth specific facts” regarding each element of the claim. Smolen v.  
23 Deloitte, Haskins & Sells, 921 F.2d 959, 963 (9<sup>th</sup> Cir. 1990). Furthermore, the nonmoving  
24 party may not “build a case on the gossamer threads of whimsy, speculation, and conjecture.”  
25 Society of Lloyd’s v. Hudson, 276 F. Supp. 2d 1110, 1112 (D. Nev. 2003). (*quoting* Bulbman,  
26 Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)). The mere hope that  
27 discovery may yield further evidence is not a sufficient basis for a continuance of a motion for

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1 summary judgment. Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal  
2 Traders Dist. Council, 817 F.2d 1391, 1395 (9<sup>th</sup> Cir. 1987).

3 **B. ALL OF PLAINTIFF’S CLAIMS FAIL IF, IN GOOD FAITH, REALE GAVE**  
4 **REASONABLY EQUIVALENT VALUE FOR THE PAYMENTS**

5 **1. The Section 548(a) Claims**

6 Plaintiff has alleged the existence of actual and fraudulent transfers under 11  
7 U.S.C. § 548(a) and under N.R.S. § 112.180(1). In order to establish a claim under 11 U.S.C.  
8 § 548(a), the Plaintiff must establish an actual fraudulent transfer under § 548(a)(1)(A) or a  
9 constructively fraudulent transfer under § 548(a)(1)(B). Section 548(a) states as follows:

10 (a) (1) The trustee may avoid any transfer (including any transfer to or for the  
11 benefit of an insider under an employment contract) of an interest of the debtor  
12 in property, or any obligation (including any obligation to or for the benefit of  
13 an insider under an employment contract) incurred by the debtor, that was  
14 made or incurred on or within 2 years before the date of the filing of the  
15 petition, if the debtor voluntarily or involuntarily–

16 (A) made such transfer or incurred such obligation with actual  
17 intent to hinder, delay, or defraud any entity to which the debtor  
18 was or became, on or after the date that such transfer was made  
19 or such obligation was incurred, indebted; or

20 (B) (i) received less than a reasonably equivalent value in  
21 exchange for such transfer or obligation; and

22 (ii) (I) was insolvent on the date that such transfer was made or  
23 such obligation was incurred, or became insolvent as a result of  
24 such transfer or obligation;

25 (II) was engaged in business or a transaction, or was about to  
26 engage in business or a transaction, for which any property  
27 remaining with the debtor was an unreasonably small capital;

28 (III) intended to incur, or believed that the debtor would incur,  
debts that would be beyond the debtor's ability to pay as such  
debts matured; or

(IV) made such transfer to or for the benefit of an insider, or  
incurred such obligation to or for the benefit of an insider, under  
an employment contract and not in the ordinary course of  
business.

**a. The Section 548(a)(1)(A) claim**

In order to establish a fraudulent transfer under Section 548(a)(1)(A),  
the Plaintiff must establish actual fraudulent intent which requires a subjective evaluation of  
the debtor’s motive. Jeffrey Bigelow Design Group v. Harman, 956 F.2d 479, 484 (4<sup>th</sup> Cir.  
1992). In this case, the Plaintiff has presented no evidence of, and has made no specific

1 factual allegations of, any actual fraudulent intent on the part of USACM in making the  
2 payments to Reale. In fact, these payments were made monthly, over the course of four years,  
3 which is flatly inconsistent with Plaintiff’s allegation that they were made “with actual intent  
4 to hinder delay or defraud creditors”. There is no evidence to support such an assertion.  
5 However, even if such evidence existed, Reale is still protected from such a claim by 11  
6 U.S.C § 548(c), which provides an absolute defense to an actual fraudulent transfer claim if  
7 the transferee, in good faith, gave good value for the transfers. 11 U.S.C. § 548(c) states as  
8 follows:

9 (c) Except to the extent that a transfer or obligation voidable under this section  
10 is voidable under section 544, 545, or 547 of this, a transferee or obligee of  
11 such a transfer or obligation that takes for value and in good faith has a lien on  
12 or may retain any interest transferred or may enforce any obligation incurred,  
13 as the case may be, to the extent that such transferee or obligee gave value to  
14 the debtor in exchange for such transfer or obligation.

13 Undisputably, Reale provided value directly to both USACM and Investment Partners  
14 that exceeded the value of the payments he received from such entities. The checks provide  
15 irrefutable evidence that Reale provided \$6,577,644.80 of value directly to USACM and  
16 received alleged payments of only \$5,751,397.00 from USACM. Reale provided value  
17 directly to Investment Partners of \$7,175,000.00 and received a payment of only  
18 \$4,000,000.00 from Investment Partners. The good faith is demonstrated by the fact that  
19 Reale continued to make loan advances throughout this entire four year period, based upon  
20 the payments he was receiving. There is no evidence that Reale had any reason to believe that  
21 any of these payments would be avoidable.

22 **b. The Section 548(a)(1)(B) claim**

23 In order to establish a fraudulent transfer under Section 548(a)(1)(B),  
24 the Plaintiff must establish that the Debtor was insolvent at the time of each of these transfers  
25 or rendered insolvent by the transfer, **and** that the Debtor received less than a reasonably  
26 equivalent value for the transfer. For the reasons stated above, it will be impossible for the  
27 Plaintiff to establish this claim as the amounts of the payments received by Reale from  
28 USACM were less than the amounts Reale provided to USACM.

1 Reale did not receive the \$4,000,000.00 payment from USACM, but received it from  
2 Investment Partners. This payment satisfied a portion of the outstanding loan due to Reale  
3 from Hantges and Milanowski. 11 U.S.C. § 550(b) protects the \$4,000,000.00 payment from  
4 being recoverable because Reale gave value for this payment, both in the form of the  
5 \$7,175,000.00 loaned directly to Investment Partners, and as a result of the partial satisfaction  
6 of this outstanding loan. Section 550(a) & (b) state as follows:

7 (a) Except as otherwise provided in this section, to the extent that a transfer is  
8 avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title,  
9 the trustee may recover, for the benefit of the estate, the property transferred,  
10 or, if the court so orders, the value of such property, from--

- 11 (1) the initial transferee of such transfer or the entity for whose benefit such  
12 transfer was made; or  
13 (2) any immediate or mediate transferee of such initial transferee.

14 (b) The trustee may not recover under section [subsection] (a)(2) of this section  
15 from--

- 16 (1) a transferee that takes for value, including satisfaction or securing of a  
17 present or antecedent debt, in good faith, and without knowledge of the  
18 voidability of the transfer avoided; or  
19 (2) any immediate or mediate good faith transferee of such transferee.

20 Once again, Reale is protected from the Plaintiff's claims as he gave good value for  
21 the payments he received over the course of a four-year period, and had no knowledge that the  
22 payments could be avoided, given the fact that he had transferred the loan proceeds directly to  
23 the entities which were making payments to him.

24 **2. The N.R.S. Chapter 112.180(1) Claims**

25 N.R.S. § 112.180(1) states as follows:

26 NRS 112.180 Transfer made or obligation incurred with intent to defraud or  
27 without receiving reasonably equivalent value; determination of intent.

28 1. 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; or

(b) Without receiving a reasonably equivalent value in exchange for the  
transfer or obligation, and the debtor:

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1 (1) Was engaged or was about to engage in a business or a transaction for  
2 which the remaining assets of the debtor were unreasonably small in relation to  
3 the business or transaction; or

4 (2) Intended to incur, or believed or reasonably should have believed that  
5 he would incur, debts beyond his ability to pay as they became due.

6 **a. The Section 112.180(1)(a) claim**

7 Again, in order for the Plaintiff to establish a claim under N.R.S. §  
8 112.180(1)(a), the Plaintiff must establish the subjective motive or intent of the Debtor and  
9 establish the scienter necessary to establish fraudulent intent. There has been no showing of  
10 such a motive or intent. As indicated above with respect to the Section 548(a)(1)(A) claim,  
11 these payments were made monthly, over the course of four years, which is flatly inconsistent  
12 with Plaintiff's allegation that they were made "with actual intent to hinder delay or defraud  
13 creditors". However, even if such evidence existed, Reale is still protected from such a claim  
14 by N.R.S. § 112.220(1), which provides an absolute defense to an actual fraudulent transfer  
15 claim if the transferee, in good faith, gave "reasonably equivalent value" for the transfers.

16 N.R.S. § 112.220(1) states as follows:

17 1. A transfer or obligation is not voidable under paragraph (a) of  
18 subsection 1 of NRS 112.180 against a person who took in good faith and for a  
19 reasonably equivalent value or against any subsequent transferee or obligee.

20 Even if USACM can be shown to have some sort of fraudulent intent in making these  
21 payments, (a showing which is totally lacking presently), Reale certainly gave reasonably  
22 equivalent value for the transfers because he disbursed \$6,577,644.80 directly to USACM.  
23 Thus, the \$5,751,397.00 in payments allegedly made directly from USACM to Reale over the  
24 past four years are protected by N.R.S. § 112.220(1). The \$4,000,000.00 payment received  
25 by Reale from Investment Partners is protected by N.R.S. § 112.220(2), which states as  
26 follows:

27 2. Except as otherwise provided in this section, to the extent a transfer is  
28 voidable in an action by a creditor under paragraph (a) of subsection 1 of NRS  
112.210, the creditor may recover judgment for the value of the asset  
transferred, as adjusted under subsection 3 of this section, or the amount  
necessary to satisfy the creditor's claim, whichever is less. The judgment may  
be entered against:

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(a) The first transferee of the asset or the person for whose benefit the transfer was made; or

(b) Any subsequent transferee **other than a transferee who took in good faith for value** or from any subsequent transferee (emphasis added).

Again, if Reale gave value, in good faith, for the \$4,000,000.00 transfer he received from Investment Partners, he is protected by N.R.S. § 112.220(2)(b). Reale had advanced \$7,175,000.00 directly to Investment Partners, which certainly qualifies as “value” under N.R.S. § 112.170(1), and he received what he believed was a significant loan repayment, with no knowledge of any problem. Reale further gave satisfaction of a pre-existing debt by crediting this payment against the outstanding loan which had a balance in excess of \$13,700,000.00 at the time the payment was received. N.R.S. § 112.170(1) states -

1. Value is 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 (emphasis added).

**a. The Section 112.180(1)(b) claim**

For the Plaintiff to establish a claim under N.R.S. § 112.180(1)(b), the Plaintiff must establish the insolvency of USACM and that Reale did not give “reasonably equivalent value in exchange for the transfer.” The Plaintiff cannot do this for the same reasons set forth above with respect to 11 U.S.C. § 548(a)(1)(B), because Reale actually advanced more money to the transferees than he received. Again, if Reale gave “reasonably equivalent value” in good faith, he is absolutely protected by both N.R.S. § 112.220(1) and § 112.220(2)(b).

As can be seen from the statutes referenced above, if Reale, acting as a lender in good faith, gave “reasonably equivalent value” for these payments, they cannot be avoided.

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1 **C. REALE'S LOAN ADVANCES CONSTITUTE "REASONABLY EQUIVALENT**  
2 **VALUE"**

3 Plaintiff has asserted that Reale's loan was only to Milanowski and Hantges, the  
4 principals of Investment Partners and USACM, and because there is no documented loan from  
5 Reale to USACM and/or Investment Partners, the loan proceeds advanced by Reale, directly  
6 to USACM and Investment Partners, does not qualify as "value" given to USACM and  
7 Investment Partners. The Plaintiff is wrong, as a matter of law.

8 As the Ninth Circuit Court of Appeals recently stated:

9 It is well settled that "reasonably equivalent value can come from one other  
10 than the recipient of the payments, a rule which has become known as the  
11 indirect benefit rule." *Harman v. First Am. Bank (In re Jeffrey Bigelow Design  
Group, Inc.)*, 956 F.2d 479, 485 (4th Cir. 1992). For example, in *Rubin v.  
Manufacturers Hanover Trust Co.*, the court explained:

12 a debtor may sometimes receive "fair" consideration even though  
13 the consideration given for his property or obligation goes initially  
14 to a third person . . . although transfers solely for the benefit of  
15 third parties do not furnish fair consideration . . . the transaction's  
16 benefit to the debtor need not be direct; it may come indirectly  
17 through benefit to a third person . . . . If the consideration given to  
18 the third person has ultimately landed in the debtor's hands, or if  
the giving of the consideration to the third person other-wise  
confers an economic benefit upon the debtor, then the debtor's net  
worth has been preserved, and [the statute] has been satisfied --  
provided, of course, that the value of the benefit received by the  
debtor approximates the value of the property or obligation he has  
given up.

19 *661 F.2d 979, 991-92 (2d Cir. 1981)* (internal quotation marks and citations omitted).

20 *Frontier Bank v. Brown*, 371 F.3d 1056, 1058-1059 (9th Cir. 2004).

21 In *Frontier Bank*, the lender had extended a \$150,000.00 loan directly to the three  
22 shareholders of Northern Merchandise, Inc. (the "debtor"). The loan was structured so that the  
23 lender deposited the loan proceeds directly into the debtor's bank account, although the  
24 transaction was documented as a loan to the shareholders. The debtor later granted a blanket  
25 UCC security interest to the lender to secure repayment of the shareholder's loan. The debtor  
26 went out of business and all of its assets were sold with the proceeds going to the lender pursuant  
27 to the security interest granted to the lender. Other creditors placed the debtor into an involuntary  
28 bankruptcy and the resulting trustee brought claims to avoid the transfer of the security interest

1 and the subsequent payment on the security interest as preferential and fraudulent transfers  
2 because the loan was between the lender and the shareholders rather than between the lender and  
3 the debtor. The Trustee also argued that the shareholders used the loan proceeds to make a  
4 capital contribution to the debtor for which the debtor had no obligation back to the shareholders.  
5 In rejecting the Trustee's arguments, the Ninth Circuit stated:

6 We reject this formalistic view. Although Debtor was not a party to the October  
7 loan, it clearly received a benefit from that loan. In fact, Frontier deposited the \$  
8 150,000 proceeds of the October Loan directly into Debtor's checking account.  
9 Because Debtor benefitted from the October Loan in the amount of \$ 150,000, its  
10 grant of a security interest to Frontier to secure Shareholder's indebtedness on that  
11 loan, which totaled \$150,000, resulted in no net loss to Debtor's estate nor the  
12 funds available to the unsecured creditors. To hold otherwise would result in an  
13 unintended \$ 150,000 wind-fall to Debtor's estate. Accordingly, Debtor received  
14 reason-ably equivalent value in exchange for the security interest it granted to  
15 Frontier.

16 371 F.3d at 1059.

17 The Ninth Circuit further explained that "the primary focus of Section 548 is on the net  
18 effect of the transaction on the debtor's estate and the funds available to the unsecured creditors."

19 The Ninth Circuit adopted the reasoning of the Fourth Circuit Court of Appeals from In re  
20 Jeffrey Bigelow Design Group, Inc., 956 F.2d 479, 485 (4<sup>th</sup> Cir. 1992) and cited *In re Bigelow*  
21 as another example of the indirect benefit rule. The Ninth Circuit Court of Appeals stated:

22 *Jeffery Bigelow* is such an example. In *Jeffery Bigelow*, shareholders of a debtor  
23 entered into a line of credit agreement with First American Bank for \$ 1,000,000.  
24 *956 F.2d at 481.* Although the shareholders were the makers of the line of credit,  
25 "only the debtor received the draws and all payments were made directly from the  
26 debtor to First American." *Id.* Subsequently, "the debtor executed a note for \$  
27 1,000,000 to [the shareholders] with substantially the same terms as the line of  
28 credit between First American and [the shareholders]." *Id.* As the debtor directly  
repaid First American, its liability on the note to the shareholders likewise  
decreased. *Id.* Holding that the payments made by the debtor on the shareholders'  
line of credit did not constitute fraudulent conveyances, the Fourth Circuit  
reasoned:

29 The proper focus is on the net effect of the transfers on the debtor's  
estate, the funds available to the unsecured creditors. As long as  
the unsecured creditors are no worse off because the debtor, and  
consequently the estate, has received an amount reasonably  
equivalent to what it paid, no fraudulent transfer has occurred.

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1 *Id. at 484.* Because it was "apparent that the transfers [had] not resulted in the  
2 depletion of the bankruptcy estate," but rather "served simply as repayment for  
3 money received," the Fourth Circuit held that "no fraudulent transfer occurred."  
4 *Id. at 485.*

5 371 F.3d at 1059.

6 *The Frontier Bank and In re Bigelow* cases are directly on point with the facts of this case.  
7 Just as in *Frontier Bank* and *In re Bigelow*, Reale made a loan to the principals of USACM and  
8 Investment Partners with the complete understanding that the loan proceeds were going directly  
9 to USACM and Investment Partners, entities owned and controlled by the principals. As in  
10 *Frontier Bank* and *In re Bigelow*, the only loan documents are between the principals of the  
11 debtor and the lender, although the loan proceeds were transferred directly to the debtor. As in  
12 *Frontier Bank* and *In re Bigelow*, the lender received payments directly from the debtor, in this  
13 case Reale received payments totaling \$5,751,397.00 from USACM, which was an amount less  
14 than the \$6,577,644.80 directly transferred by Reale to USACM. Reale also received a principal  
15 reduction payment of \$4,000,000.00 from Investment Partners, which was less than the  
16 \$7,175,000.00 which Reale had directly transferred to Investment Partners.

17 The net effect on USACM is that it directly received more from Reale than it repaid to  
18 Reale, which means that under the indirect benefit rule, as stated by the Ninth Circuit Court of  
19 Appeals in *Frontier Bank*, these payments cannot be considered fraudulent transfers.

20 The \$4,000,000.00 principal reduction payment received by Reale from Investment  
21 Partners is likewise protected using the same analysis, but applying 11 U.S.C. §§ 548(c) and  
22 550(b). The payment cannot be avoided as a fraudulent transfer because Reale received this  
23 payment from Investment Partners, an entity to which he had directly transferred \$7,175,000.00,  
24 and because Reale used this payment to satisfy a pre-existing debt, which is good value for  
25 purposes of 11 U.S.C. §§ 548(c) and N.R.S. § 112.220(1) & (2)(b).

26 **D. REALE ACTED IN GOOD FAITH AS WOULD ANY LENDER**

27 This case is not the typical fraudulent transfer case where the debtor transferred away  
28 assets for little or no value, or with the intent to defraud creditors. As demonstrated above, the  
money paid out in this case was to repay a legitimate credit line loan of long-standing, and under

1 which the Debtor received **more** than it transferred. All evidence points to the good faith under  
2 which Reale, as a lender, was operating.

3 First, this loan was originated in August of 1999, nearly six years before USACM filed  
4 for bankruptcy. Over the course of six years, Reale made over eighty advances on this loan,  
5 which total more than eighteen million dollars. With few exceptions, these advances were made  
6 at the beginning of every month until January of 2006, at which time Reale refused to make  
7 further advances without substantial principal reductions. The loan payments which are the  
8 subject of this case were normal loan payments received every month over a four-year period  
9 with nothing out of the ordinary.

10 On March 13, 2006, Investment Partners made a significant payment of this loan, as had  
11 been requested by Reale as a condition to extending further credit. As a result of this payment,  
12 Reale made another \$250,000.00 loan advance on April 1, 2006.

13 Everything about this loan indicates Reale was operating in good faith, as a lender, and  
14 certainly without any notice that the payments he was receiving were problematic in any manner.  
15 As the *Frontier Bank* and *In re Bigelow* cases make clear, the fact that Milanowski and Hantges,  
16 as the principals, directed these loan proceeds to their various entities, is not evidence of a lack  
17 of good faith, rather it is a common occurrence in privately held companies. Likewise, under  
18 *Frontier Bank* and *In re Bigelow*, there is no lack of good faith arising from the fact that  
19 Milanowski and Hantges caused these same entities to make repayments of the loan proceeds  
20 received by such entities.

21 **IV.**

22 **CONCLUSION**

23 Under the undisputed facts of this case, Reale is entitled to summary judgement as a  
24 matter of law. There is no disputing the promissory notes and the loan advance checks, which  
25 clearly demonstrate a loan with a six-year history. There is no disputing that \$6,577,644.80 of  
26 the loan proceeds went directly from Reale into USACM's bank account. There is no disputing  
27 that \$7,175,000.00 of the loan proceeds went directly from Reale into Investment Partner's bank  
28 account. There is no disputing the fact that the \$5,751,397.00 in loan payments, received by

1 Reale directly from USACM, were monthly payments made over a four year period, and that they  
2 are less than the \$6,577,644.80 transferred directly from Reale to USACM. These payments are  
3 protected under the indirect benefit rule of *Frontier Bank* and *In re Bigelow*, and by 11 U.S.C.  
4 § 548(c) and N.R.S. §§ 112.220(1). There is no disputing the fact that Reale received a  
5 \$4,000,000.00 principal reduction payment directly from Investment Partners (not USACM), and  
6 that this payment was less than the \$7,175,000.00 transferred directly from Reale to Investment  
7 Partners over the preceding four years. There is no disputing that this \$4,000,000 payment was  
8 used by Reale in satisfaction of pre-existing debt. This payment is protected by 11 U.S.C. §§  
9 548(c) & 550(b) and N.R.S. §§ 112.220(2)(b).

10 Under the controlling law of the Ninth Circuit and the plain language of the statutes, Reale  
11 is entitled to summary judgment on all claims asserted by the Plaintiff and respectfully requests  
12 that this Court enter summary judgment in his favor.

13 DATED this 7<sup>th</sup> day of March, 2007.

14  
15 GERRARD, COX & LARSEN

16  
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