

Dated: November 28, 2011



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Eileen W. Hollowell, Bankruptcy Judge

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Trustee, successor in interest to Bank of America,  
National Association, as Trustee, successor by  
merger to LaSalle Bank National Association, as  
Trustee, for the registered holders of 10 Bear  
Stearns Commercial Mortgage Securities Inc.,  
Commercial Mortgage Pass- Through  
Certificates, 11 Series 2007-PWR15*

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re:

DESERT GARDENS IV, LLC, an Arizona  
limited liability company,

Debtor.

Chapter 11

Case No. 2:11-bk-31061-EWH

**STIPULATED INTERIM  
ORDER RE: USE OF CASH  
COLLATERAL**

Hearing Date: November 23, 2011  
Hearing Time: 11:00 a.m.  
Location: Ctrm 602  
230 N. First Avenue  
Phoenix, AZ

This matter originally came before the Court pursuant to the *Emergency Motion for Use of Cash Collateral* (the “Motion”) filed by Desert Gardens IV, LLC (the “Debtor” or “Borrower”) on November 4, 2011 [DE 5], and the *Objection to Emergency Motion for Use of Cash Collateral* (the “Objection”) filed by US Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association, as Trustee, for the registered holders of 10

Bear Stearns Commercial Mortgage Securities Inc., Commercial Mortgage Pass- Through Certificates, 11 Series 2007-PWR15 (“US Bank” or “Lender”) [DE 29]. To resolve the Motion and the Objection on an interim basis, US Bank and the Debtor have agreed to allow the Debtor the limited, interim use of Cash Collateral, subject and pursuant to the terms and conditions of this Order. Accordingly, based on the Motion, the Objection, and the entire record before the court in this case:

**THE COURT HEREBY FINDS AND CONCLUDES:**

1. On November 4, 2011 (the “Petition Date”), the Debtor filed a voluntary bankruptcy petition under chapter 11 of the United States Bankruptcy Code, thereby commencing the above-captioned bankruptcy case.

**I. THE LOAN DOCUMENTS**

2. The property at issue in this matter is that certain real property located at 13517 and 13621 West Glendale Avenue, Glendale, Arizona 85307, together with all easements, rights, privileges, structures, improvements, leases, rents, furniture, fixtures, and other personal property pertaining to or affixed thereon (the “Property”).

3. On or around May 25, 2006, Wells Fargo Bank, National Association (“Original Lender”) made a loan (the “Loan”) to Desert Gardens IV, LLC (“Debtor,” or “Borrower”) the Borrower in the amount of \$26,000,000.00.

4. The Loan is evidenced in part by that certain Promissory Note Secured by Deed of Trust dated May 25, 2006 (the “Original Note”), executed by Borrower in favor of Original Lender in the original principal amount of \$26,000,000.00, as amended by that certain Amended and Restated Promissory Note Secured by Deed of Trust dated December 18, 2006 (the “Amended Note,” and together with the Original Note, collectively, the “Note”), executed by Borrower in favor of Original Lender in the same amount.

5. The Loan is secured by, among other things, that certain Deed of Trust and Absolute Assignment of Rents and Leases and Security Agreement (and Fixture Filing)

dated May 25, 2006 (the “Deed of Trust and Assignment of Rents”), executed by Borrower, as trustor, to Lawyers Title of Arizona, Inc., as trustee, for the benefit of Mortgage Electronic Registration Systems, Inc. (“MERS”), a Delaware corporation, as beneficiary and as nominee for Original Lender, which was recorded in the Official Records of Maricopa County, Arizona (the “Official Records”) on June 1, 2006, as Instrument No. 20060743845. The Deed of Trust and Assignment of Rents was modified by that certain First Amendment to Deed of Trust and Absolute Assignment of Rents and Leases and Security Agreement (and Fixture Filing) dated December 18, 2006 (“Amendment to Deed of Trust and Assignment of Rents”), executed by Borrower.

6. US Bank contends that the Deed of Trust and Assignment of Rents was executed by Borrower as trustor, for the benefit of MERS, as beneficiary and as nominee for Original Lender, which was recorded in the Official Records on December 20, 2006, as Instrument No. 20061659738.

7. The Deed of Trust and Assignment of Rents, among other things, encumbers the Property, and, as more particularly described therein, and, according to US Bank absolutely assigns to US Bank the Leases and the Rents (as defined in the Deed of Trust and Assignment of Rents) pertaining to the Property.

8. The Note, the Deed of Trust and Assignment of Rents, and all the other documents which evidence, secure, or relate to the Loan are hereinafter referred to, collectively, as the “Loan Documents.” All collateral for the Note is hereinafter referred to as “Collateral.”

## **II. THE ASSIGNMENT OF THE LOAN DOCUMENTS TO US BANK**

9. US Bank contends: (a) MERS, in its capacity as nominee for Original Lender, assigned its interest in the Note, the Deed of Trust and Assignment of Rents and all other Loan Documents to Bank of America, National Association, successor by merger to LaSalle Bank National Association, as Trustee for the registered holders of Bear Stearns Commercial Mortgage Securities Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-

PWR15 (“Bank of America”), via that certain Assignment of Deed of Trust and Absolute Assignment of Rents and Leases and Security Agreement (and Fixture Filing); Assignment of Financing Statement (the “Bank of America Assignment”), which was recorded in the Official Records on July 26, 2011, as Instrument No. 20110619220; and (b) the Note was endorsed to LaSalle Bank National Association, as Trustee for the registered holders of Bear Stearns Commercial Mortgage Securities Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-PWR15 (“LaSalle”), pursuant to that certain Allonge from Original Lender in favor of LaSalle (the “LaSalle Allonge”).<sup>1</sup>

10. US Bank contends: (a) Bank of America assigned its interest in the Note, the Deed of Trust and Assignment of Rents and all other Loan Documents to US Bank via that certain Assignment of Deed of Trust and Absolute Assignment of Rents and Leases and Security Agreement (and Fixture Filing); Assignment of Financing Statement (the “Assignment”), which was recorded in the Official Records on August 16, 2011, as Instrument No. 20110683585; and (b) the Note was endorsed to US Bank pursuant to that certain Allonge from Bank of America in favor of US Bank (the “Allonge”), and the Loan Documents were assigned to US Bank pursuant to that certain Omnibus Assignment from Bank of America in favor of US Bank.

11. US Bank contends that it holds all of Original Lender’s interest in the Loan and the Loan Documents, is the holder and owner of the Note, the beneficiary of the Deed of Trust and Assignment of Rents, and the owner of all of the other Loan Documents.

### **III. BORROWER’S DEFAULTS**

12. Article 7, Section 7.1(a)(i) of the Deed of Trust and Assignment of Rents provides that an “Optional Default” shall occur upon, among other things, Borrower’s failure to “pay within 5 days when due any [ ] sums payable under the Note, this Deed of Trust or

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<sup>1</sup> Upon the merger of LaSalle and Bank of America, all of LaSalle’s rights in the Loan Documents transferred to Bank of America.

any of the other Loan Documents, including, without limitation, any monthly payment due under the Note.”

13. Commencing in April 2011, and continuing through the present, Borrower has failed to pay the regular monthly installments of principal, interest, and tax and insurance impounds due under the Loan Documents, plus late charges, default interest, attorneys’ fees, advances, and costs and expenses; accordingly, the Loan is in default.

14. On or about July 25, 2011, US Bank’s counsel delivered a letter to Borrower (the “Demand Letter”) that: (i) provided formal notice to the Borrower of its defaults under the Loan Documents; (ii) stated that due to Borrower’s defaults “the Loan has been accelerated and all amounts under the Loan Documents are now due and payable”; and (iii) stated that the US Bank “may commence a foreclosure sale of the Property and may seek the appointment of a receiver for the Property,” among other remedies.

15. Since its receipt of the Demand Letter, Borrower has not cured the defaults under the Loan Documents and therefore is and remains in default pursuant to and under the Loan Documents, including the Deed of Trust and Assignment of Rents.

16. Borrower has not cured the defaults as requested by and/or referenced in the Demand Letter.

17. Lender contends that (a) all cash generated by, through or as a result of the Collateral and in possession of the Debtor as of the Petition Date, and (b) all cash generated by, through or as a result of the Collateral after the Petition Date, that was, in each case, subject to the security interests created by the Loan Documents or this Order, was and is the cash collateral of Lender (the “Cash Collateral”).

#### **IV. LIMITATIONS ON CERTAIN OBJECTIONS**

18. The contentions of US Bank contained in Paragraphs 6, 7, 9, 10, 11, and/or 17 in this Order shall be deemed admitted by the Debtor, and established for all purposes in this case unless, within thirty (30) days from the date of entry of this Order, the Debtor has filed in the case and served on US Bank a written objection to any such contention(s), including a

statement of the facts upon which such objection is made, together with a request for hearing on the objection.

**WHEREFORE**, based on the foregoing findings of fact, and the entire record before the Court in this matter, the Court HEREBY ORDERS:

A. The Debtor may use the Cash Collateral consistent with and subject to the terms of this Order, except as stated below, from the date of entry of this Order through January 31, 2012, as set forth in the budget attached hereto as Exhibit A.

B. Notwithstanding that the Budget contains a line item for "Legal/Accounting," US Bank has not consented to the payment of any legal, accounting, or other professional fees or expenses from its Cash Collateral, and no approval for payment of any such fees or expenses has been approved from Cash Collateral, or otherwise, under this Order, except to the extent that the Court has approved payment of the fees and expenses of Andrew Hull, Esq. for ordinary course eviction and collection services. This is without prejudice to Debtor's right to request payment of such fees or costs from Cash Collateral in the future, and without prejudice to US Bank's right to object to and be heard on any such request.

C. There will be no capital expenditures from Cash Collateral except to make necessary repairs and refurbishment on turnover of a unit, as discussed below, without the prior written consent of Lender or subsequent court order. These expenses shall be limited to paint – either full or touch up; flooring – either replacement, repair or cleaning; plumbing, garbage disposal, water heaters, outlets, A/C-Heat, window blinds, doors, cabinets and their closures, counter tops and finishes, and appliances. If the item can be repaired, then it will be. If it requires replacement, then it will be replaced. If the item is replaced or repaired as a result of tenant damage, then the tenant will be billed and security deposit applied to damages. Remaining damages due will be pursued through collections.

D. Beginning in December, 2011, on the fifteenth (15th) day of each month, the Debtor shall pay to Lender adequate protection payments of \$80,000, plus the amount of any

residual net operating income for the prior month (on a cash accounting basis) after payment of expenses.

E. Any use of Cash Collateral outside of the scope authorized in this Order is, unless otherwise directed by the Court, at the sole discretion of Lender and must be memorialized in a separate cash collateral order or other writing approving such use; provided that Debtor may exceed any line item expense on the Budget by 5% or less without obtaining US Bank's prior consent.

F. All security deposits made by any tenants of the Debtor at the Property post-petition will comprise Cash Collateral and will be subject to a Replacement Lien (as the term is defined below), provided that this shall not alter Debtor's procedures for refunding such deposits when due, in accordance with the terms of the leases, and subject to the Budget.

G. In addition to the other limitations on the use of Cash Collateral provided by this Order, but subject to Paragraph B, above, Cash Collateral may not be used to fund, directly or indirectly, any effort to:

(i) Pursue any objection to, challenge to, or effort to avoid the amount, validity, or enforceability of any of the Indebtedness owed to Lender, or Lender's liens and security interests in the collateral securing any of the Indebtedness or to otherwise assert any claim or cause of action against Lender, including without limitation, any avoidance action under Chapter 5 of the Bankruptcy Code;

(ii) Assert any claims or causes of action against Lender of any kind.

H. All of Lender's rights and remedies, if any, are expressly reserved against the Debtor and against any other individual who may have wrongly dissipated or transferred monies paid by tenants (security deposits, rents, or otherwise), and all counterclaims and defenses (if any) to such alleged rights and remedies are likewise expressly preserved.

I. Lender shall have, to the same extent and priority as Lender's prepetition lien in the Property, a post-petition replacement lien on the same type of post-petition collateral to which Lender possessed a lien on the Petition Date as follows:

(i) Notwithstanding anything in Bankruptcy Code § 552 to the contrary, and in addition to its liens and security interest under the Loan Documents, Lender is hereby granted (effective and continuing without the necessity of the execution, filing and/or recordation of security agreements, pledge agreements, control agreements, financing statements or otherwise) a valid and perfected security interest and lien (the "Replacement Liens") pursuant to 11 U.S.C. §§ 361, 362 and 363, in all cash collateral and all other property of the Debtor to the same extent, priority, and validity as Lender's prepetition liens;

(ii) The Replacement Liens and security interests shall be in addition to all security interests, liens and rights of setoff existing in favor of Lender as of the Petition Date, shall secure all of the obligations owing from the Debtor to Lender, and shall be senior to all security interests, liens and rights of setoff, except any approved by the Court or any tax lien to the extent it is senior by operation of law.

(iii) The Replacement Liens and security interests granted in this Order shall be valid, perfected, enforceable and effective against the Debtor and its successors and assigns, including any trustee or receiver in the Debtor's Bankruptcy Case or in any superseding Chapter 7 case, without any further action by the Debtor or by Lender, and without the execution, delivery, filing or recordation of any control agreements, promissory notes, financing statements, mortgages, security agreements or any other documents. The Debtor acknowledges that Lender may, but is not required to, file a financing statement to perfect the Replacement Liens granted by this Order.

(iv) Lender shall have all of the rights and remedies of a secured creditor in connection with the Replacement Liens, except to the extent that the Bankruptcy Code affects such rights and remedies.

J. Except as otherwise provided by the terms of this Order, Lender: (i) does not waive any rights it may have under the Bankruptcy Code or otherwise, including, but not limited to, any and all rights to seek relief pursuant to 11 U.S.C. §§ 362(d) and 1112, and (ii)



is not prohibited from seeking such further and other relief from the Court as the Parties may determine to be in their best interests.

K. The Debtor will also submit to the following reporting requirements:

(i) Upon five business days written notice, the Debtor will provide Lender with access to verify cash balances, deposits, withdrawals and other bank account information, and reasonable access to the Debtor's books and records.

(ii) Within ten calendar days from the end of each month, the Debtor will provide Lender with prior months' bank statements, general ledger, and a report reconciling its actual use, on a cash basis, of the Cash Collateral as compared to the amounts set forth in the Budget. These reports will also reflect that month's beginning and ending cash balances for the Debtor.

L. Nothing in this Order shall be deemed: (i) an admission by Lender that its interests are adequately protected in the Debtor's Bankruptcy Case, or (ii) evidence of any factual issue that may arise in further proceedings in the Debtor's Bankruptcy Case.

M. The terms of this Order (the "Terms") are binding upon any superseding trustee appointed in the Debtor's Bankruptcy Case, or in the event of conversion of the Debtor's Bankruptcy Case to a case to a Chapter 7 case, upon the Chapter 7 trustee. Furthermore, the Terms are binding upon the Debtor's successors or assigns.

N. The following shall constitute "Termination Events" under this Order:

(i) the Debtor fails to timely perform its obligations owing under the Order following three (3) business days written notice, except that there shall be no requirement of written notice for sub-paragraphs (ii), (iii), or (iv) below;

(ii) a trustee or examiner, with authority to affect the operation of the Debtor's business, is appointed in Debtor's Chapter 11 proceedings without Lender's consent;

(iii) an order is entered converting the Debtor's bankruptcy case to a case under Chapter 7, or dismissing the case;

(iv) Debtor expends funds or incurs liabilities for expenses of a type or in an amount not provided for in this Order, without Lender's prior written consent; or

(v) the stay, modification, amendment, vacating, or reversal of any term hereof, or any of the rights conferred hereunder, without the express prior written consent of Lender, in its sole and absolute discretion.

Upon the occurrence of any Termination Event(s), Lender's consent to use Cash Collateral shall be immediately and automatically revoked, without further notice to the Debtor except as set forth above, and all Cash Collateral shall be segregated, sequestered, and held pending further proceedings before the Court.

O. The Debtor and Lender have consented to (and in any event are subject to) the jurisdiction of the Bankruptcy Court if a dispute arises requiring the adjudication of rights or resolution of disputes over the terms of the performance of their respective duties under the Terms. Any such dispute shall be resolved by this Bankruptcy Court and not in the State court.

P. Any and all payments to be made hereunder shall continue to be made to Lender and wired to the Lender at the address set forth below.

**Wells Fargo Bank**  
**ABA# 121-000-248**  
**Acct# 4535-078117**  
**Account Name: Wells Fargo Commercial Mortgage-Servicing**  
**Ref: Loan #310904197 / Desert Gardens IV, LLC**

**Wire Address is:**  
**Wells Fargo Commercial Mortgage-Servicing**  
**200 B Street**  
**Santa Rosa, CA**

In addition, performance due to Lender hereunder, including without limitation, notices, financial reports, and requests for approval of budget modifications, shall be made to Lender's servicer at the following address:

**C-III Asset Management LLC**  
**Attn: Stewart Carrico**  
**5221 N. O'Connor Boulevard, Suite 600**

**Irving, TX 75039  
Tel: (972) 868-5380  
Fax: (972) 868-5495**

Q. Copies of all notices or other communications hereunder shall also be sent to Lender's counsel at the following address:

**Richard M. Lorenzen  
Perkins Coie LLP  
2901 N. Central Avenue, Suite 2000  
Phoenix, AZ 85012-2788  
Tel: (602) 351-8000  
Fax: (602) 648-7000**

R. Copies of all notices or other communications to Debtor hereunder shall be sent to Debtor's counsel at the following address:

**Bradley J. Stevens  
Jennings Strouss & Salmon, P.L.C.  
One E. Washington Street, #1900  
Phoenix, AZ 85004-2554  
Tel: (602) 262-5911  
Fax: (602) 495-2654**

S. No provision of this Order shall in any way impose upon Lender any duty or obligation to provide any financing or financial accommodation to Debtor, or any other party, to collect, sell, lease or otherwise dispose of any Collateral, to proceed against any party, person, individual or entity, to proceed against or exhaust any security held by Lender or any other party, person, individual or entity, or to otherwise pursue any action, right or remedy whatsoever in Lender's power.

T. Nothing contained in this Order is intended, nor shall it be construed or deemed to, confer any rights, powers or privileges on any person, firm, partnership, corporation or other entity not an express party hereto or a successor-in-interest thereof, including, without limitation, any and all sureties and guarantors with respect to any indebtedness owed by Debtor to Lender, or otherwise. Lender reserves all of its rights under law, equity or otherwise with respect to such non-parties and/or non-successors-in-interest.

U. This Order may be signed in counterpart.

V. This Order may be further extended by the parties in writing without further order of the Bankruptcy Court, and Lender may agree, in its sole and absolute discretion, to the use of Cash Collateral for items by separate written agreement by Lender to the Debtor.

W. The consent of Lender and the Debtor to the Terms is indicated below by the signatures of respective counsel.

/s/ Richard M. Lorenzen (006787)

Richard M. Lorenzen  
Attorneys for US Bank

Perkins Coie LLP  
2901 North Central Ave., Suite 2000  
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/s/ Bradley J. Stevens (006723)

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**DATED AND SIGNED AS INDICATED ABOVE.**

LEGAL22167155.3

## **Exhibit “A”**

DESERT GARDENS IV  
DEBTOR IN POSSESSION  
90 DAY BUDGET

DESERT GARDENS IV  
DEBTOR IN POSSESSION  
90 DAY BUDGET

	NOV 2011	DEC 2011	JAN 2012
<b>RECEIPTS:</b>			
Apartment Rents	280,000	280,000	280,000
Concessions	14,000	14,000	14,000
Suite Upgrade	4,000	4,000	4,000
Furniture Rents	5,000	5,000	5,000
Water, Sewer, Trash	1,200	1,200	1,200
Pet Rent	1,000	1,000	1,000
Late Charges	2,200	2,200	2,200
Filing/Court Fees	300	300	300
Laundry Income	900	900	900
Telephone Income	600	600	600
Internet	3,000	3,000	3,000
Application/Admin Fee Income	1,100	1,100	1,100
Damages	600	600	600
Security Deposits	3,500	3,500	3,500
Collections Income	4,200	4,200	4,200
Other Receipts	350	350	350
<b>TOTAL RECEIPTS</b>	<b>321,950</b>	<b>321,950</b>	<b>321,950</b>
<b>DISBURSEMENTS:</b>			
Advertising/Promotion	7,500	7,500	7,500
Referrals	2,500	2,500	2,500
Admin Fees	10,000	10,000	10,000
Bank fees	3,200	3,200	3,200
Cable TV	10,000	10,000	10,000
Cleaning	4,000	4,000	4,000
Concessions	14,000	14,000	14,000
Insurance/Employee	3,500	3,500	3,500
Insurance/Property	7,600	7,600	7,600
Landscape Maintenance	8,000	8,000	8,000
Legal/Accounting	15,000	15,000	15,000
Maintenance, Materials & Supplies	5,000	5,000	5,000
Outside Services (Carpet, Storage)	6,000	6,000	6,000
Management Fees	16,000	16,000	16,000
Office Supplies	1,000	1,000	1,000
Credit Checks	1,300	1,300	1,300
Security Deposits	3,000	3,000	3,000
Pest Control	700	700	700
Pool Maintenance	600	600	600
Salaries, Maintenance	12,000	12,000	12,000
Salaries, Mgmt. & Leasing	17,000	17,000	17,000
Security	3,000	3,000	3,000
Taxes, Payroll	4,000	4,000	4,000
Taxes, Property (Impounded)	19,000	19,000	19,000
Telephone	4,000	4,000	4,000
Internet	2,400	2,400	2,400
Tenant Eviction Costs	1,000	1,000	1,000
Trash Disposal	1,500	1,500	1,500
Utilities (Electric)	12,500	12,500	12,500
Utilities (Gas)	3,000	3,000	3,000
Water	11,000	11,000	11,000
Sewer	10,000	10,000	10,000
Fire Protection Service	4,500	4,500	4,500
Other Disbursements	1,000	1,000	1,000
<b>TOTAL DISBURSEMENTS</b>	<b>224,800</b>	<b>224,800</b>	<b>224,800</b>
<b>NET OPERATING INCOME</b>	<b>97,150</b>	<b>97,150</b>	<b>97,150</b>
Capital Improvements/Replacements	14,500	14,500	14,500
<b>DEBT SERVICE: Wells Fargo</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>PAYMENT</b>	<b>80,000</b>	<b>80,000</b>	<b>80,000</b>
<b>CASH FLOW</b>	<b>2,650</b>	<b>2,650</b>	<b>2,650</b>