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U.S. BANKRUPTCY
DISTRICT OF ARIZONA

6 **IN THE UNITED STATES BANKRUPTCY COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 In re:) In Proceedings Under Chapter 11
9 MORTGAGES LTD.,) Case No. 2:08-bk-07465-RJH
10 an Arizona corporation,) **ROBERT FURST'S MOTION FOR**
11 Debtor.) **ENTRY OF ORDER REQUIRING (A)**
12) **IMMEDIATE DISTRIBUTION OF FIVE**
13) **MONTHLY INTEREST PAYMENTS**
14) **RECEIVED FROM THE BORROWER OF**
15) **THE 300 EAST CAMELBACK ROAD**
16) **LOAN, (B) 17.5% INTEREST ON ALL**
17) **WITHHELD AMOUNTS, (C)**
18) **DETERMINATION OF THE AMOUNT**
19) **OF "INTEREST RATE SPREAD" OWED**
20) **TO ML MANAGER AND (D)**
21) **DETERMINATION THAT ML**
22) **MANAGER IS A FIDUCIARY**

23 Robert G. Furst & Associates Ltd. Defined Benefit Pension Plan files this Motion for Entry of
24 Order Requiring (A) Immediate Distribution of Five Monthly Interest Payments Received from the
25 Borrower of the 300 East Camelback Road Loan, (B) 17.5% Interest on all Withheld Amounts and
26 (c) Determination of the Amount of "Interest Rate Spread" Owed to ML Manager and (d)
27 Determination that ML Manager is a Fiduciary (the "Motion").

28 **1. Background Facts**

Robert G. Furst & Associates Ltd. Defined Benefit Pension Plan ("Investor") owns a minority
interest in the 300 East Camelback Road loan, Loan Number 794502 (the "Loan"), which has a

1 current outstanding balance of approximately \$275,000. Because of small loan size of the Loan, ML
2 Manager decided that no Loan LLC would be formed for this Loan. As a result, all of the investors
3 in the Loan are Pass-Through Investors who will governed by their respective Agency Agreements.

4 Since the Confirmation Order, dated May 20, 2009, ML Manager has received five monthly
5 interest payments from the Borrower of the Loan, for the months of June, July, August, September
6 and October, respectively. However, ML Servicing Co. has withheld 100% of the five monthly
7 interest payments from the Pass-Through Investors in the Loan, including Investor.

9 **2. Pass-Through Investors' Right to ~~File~~ (A) Immediate Distribution, and (B) 17.5%**
10 **Interest on the Withheld Payments**

11 **a. Pass-Through Investors' Right to Immediate Distribution**

12 At yesterday's court hearing, Cathy Reece, Esq., counsel for ML Manager, asserted that, in
13 order to avoid any default on the Exit Financing, ML Manager can properly withhold an unspecified
14 amount of all cash distributions belonging to the Pass-Through Investors, even though the Pass-
15 Through Investors are not the Borrowers in the Exit Financing. As a result, ML Manager has elected
16 to withhold 100% of the five interest payments received from the Borrower of the Loan. Investor
17 believes that ML Manager had no right to withhold 100% of the monthly interest payments from the
18 Pass-Through Investors in this Loan and, therefore, seeks a Court order requiring immediate
19 distribution of all sums properly owing.

20 **b. Pass-Through Investors' Right to 17.5 Interest on the Withheld Payments**

21 At the same time that Cathy Reece claims that ML Manager has the unlimited power to bind
22 the Pass-Through Investors to all of the contractual obligations owed by the Loan LLCs under the
23 Exit Financing and Inter-Borrower Agreement (even though the Agency Agreements do not permit
24 the Agent to borrow such funds), she also asserts (albeit inconsistently and punitively) that ML
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1 Manager has the right and power to deny the Pass-Through Investors of the rights, privileges and
2 protections afforded to the Loan LLCs under the same documents. Specifically, she claims that ML
3 Manager can withhold 70%-100% of the cash distributions payable to the Pass-Through Investors in
4 order to satisfy the contractual obligations of the Loan LLCs under the Exit Financing, but the Pass-
5 Through Investors “may” or “may not” be entitled to interest at the rate of 17-1/2% per annum (as
6 provided in the Inter-Borrower Agreement) when the cash proceeds are subsequently reimbursed by
7 the 51 Loan LLCs over the next ten to fifteen years.
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9 When Cathy Reece’s position was addressed at yesterday’s court hearing, the Court properly
10 noted that Paragraph U (1) of the Confirmation Order resolves this issue. Paragraph U (1) reads as
11 follows:
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13 Before each distribution is made, Pass-Through Investors who retain their
14 fractional interests in the ML Loans shall be assessed their proportionate share
15 of costs and expenses of [servicing] and collecting the ML Loans in a fair,
16 equitable and nondiscriminatory manner and shall be reimbursed in the same
17 manner as the other Investors. (Emphasis added)

18 Accordingly, Investor requests a Court order confirming that the Pass-Through Investors in
19 the Loan, including Investor, are entitled to receive interest on all withheld amounts at the rate of
20 17.5% per annum, from the date of receipt until the date of repayment by the Borrowers (i.e., the
21 Loan LLCs) under the Exit Financing.

22 **3. Servicing Costs Owed by Pass-Through Investors**

23 Under the governing 1,000 Agency Agreements, the Pass-Through Participants may or may not
24 have agreed to pay to ML Manager, out of each monthly interest payment received from a loan
25 borrower, a servicing fee in the form of an “interest rate spread.” The “interest rate spread” is the
26 amount by which (1) the interest rate paid by the loan borrower, exceeds (2) the agreed-upon interest
27 rate paid to each Pass-Through Investor.
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1 To illustrate the mechanics of the “interest rate spread,” assume that (a) a loan borrower is
2 obligated to pay interest at the rate of 13% interest per annum on a ML Loan, (b) Mortgages Ltd.
3 agreed to pay one Pass-Through Investor interest at the rate of 7% and another Pass-Through Investor
4 interest at the rate of 12%. In such a case, the first Investor would pay a 6% “interest rate spread”
5 (i.e., 13% minus 7%) as his servicing cost, and the second Investor would pay a 1% “interest rate
6 spread” (i.e., 13% minus 12%) as his servicing cost.
7

8 Investor requests a Court order confirming that the servicing costs charged to the Pass-Through
9 Investors will be so calculated. Specifically, because Investor’s Agency Agreement provides that
10 Investor will not pay any “interest rate spread” (i.e., Investor is entitled to, and at all times has
11 received, the entire 13% monthly interest payment received from the loan borrower), Investor
12 requests that the Court order reflect that no servicing fee shall be deducted from the amounts owed to
13 Investor.
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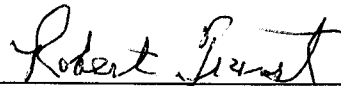
15 **4. ML Manager is a Fiduciary**

16 Robert G. Furst & Associates Ltd. Defined Benefit Pension Plan previously executed an
17 Agency Agreement with Mortgages Ltd., as Agent. This Agency Agreement has now been assigned
18 by Mortgages Ltd. to ML Manager, as Agent.
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20 The Court has, on several occasions, stated that the discretionary actions of Mortgages Ltd.,
21 as Agent, under its prior management must be judged in light of its fiduciary responsibilities as
22 Agent. Moreover, the Private Offering Memorandum makes it abundantly clear that the Agent
23 (whoever it is at any time) is necessarily a fiduciary under ERISA. Accordingly, Investor requests a
24 Court order confirming that ML Manager is, in fact, a fiduciary for Investor under the Agency
25 Agreement, in the same manner that Mortgages Ltd. was a fiduciary in its prior capacity as Agent.
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1 In addition, Investor requests a Court order that, because ML Manager is a fiduciary under the
2 Agency Agreement (and Mortgages Ltd. was a fiduciary when it served as Agent), Investor has no
3 obligation to indemnify Agent for any costs resulting from, or related to, the fraudulent, intentional or
4 negligent misconduct of the Agent (whether it is Mortgages Ltd. or ML Manager).

5 DATED: October 9, 2009
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