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

8 In re

9 MORTGAGES LTD.,

10 Debtor.

Chapter 11

Case No. 2:08-bk-07465-RJH

11 **ML MANAGER LLC'S MOTION TO STRIKE**
12 **WITHOUT HEARING ROBERT FURST'S**
13 **MOTION FOR ENTRY OF ORDER**
14 **CONFIRMING THAT (A) THE MORTGAGES**
15 **LTD. 401(K) PLAN IS NOT SUBJECT TO**
16 **THE CHAPTER 11 PLAN OR THE EXIT**
FINANCING, AND (B) ML MANAGER LLC
HAS NO DISCRETIONARY AUTHORITY
OVER THE 401(K) PLAN

Hearing Date: None set
Hearing Time: None set

17 ML Manager LLC ("ML Manager") hereby files its Motion to Strike ("Motion")
18 without hearing the Motion for Entry of Order Confirming that (A) the Mortgages Ltd.
19 401(k) Plan is not Subject to the Chapter 11 Plan or the Exit Financing, and (B) ML
20 Manager LLC has no Discretionary Authority over the 401(k) Plan ("Mr. Furst's
21 Motion"), filed by Robert Furst on March 24, 2010 (Docket No. 2700).

22 The Mortgages Ltd. 401(k) Plan (the "401(k) Plan") has appeared in this case and is
23 represented by counsel, Thomas S. Moring of Pak & Moring PLC. Any relief requested
24 for the 401(k) Plan should be made by the Trustee of the 401(k) Plan by and through its
25 counsel. While Mr. Furst is an attorney, he does not represent the 401(k) Plan but rather
26 represents himself. Mr. Furst also is not the Trustee of the 401(k) Plan. And has no

1 authority to act on behalf of or speak for the 401(k) Plan Trustee. Pursuant to Mr. Furst's
2 Motion, Mr. Furst requests a Court order finding that (i) the 401(k) Plan is not subject to
3 the confirmed Chapter 11 plan or the exit financing and (ii) ML Manager has no authority
4 over the 401(k) Plan. Mr. Furst's Motion should be stricken summarily without hearing
5 by the Court on procedural grounds since Mr. Furst lacks standing to bring it and because
6 his request is not ripe. ML Manager is already talking with the 401(k) Plan Trustee and
7 the Counsel for the 401(k) Plan about the issues concerning the 401(k) Plan, the loans
8 serviced by Mortgages Ltd., the agency agreement and the expenses. As the Court will
9 remember, the 401(k) Plan by and through its counsel previously filed a Motion to Ratify
10 Appointments and to Define Liquidating Trustee's Roles with Respect to the 401(k) Plan
11 (Docket No. 2115) which was resolved by a Stipulated Order dated September 23, 2009
12 (Docket No. 2210). In that Stipulated Order all of the rights and arguments of the ML
13 Manager about the expenses and costs to be charged to the 401(k) Plan were reserved. See
14 paragraph v of the Stipulated Order.

15 Mr. Furst has no standing to represent or bring actions or request the relief for the
16 401(k) Plan and in bringing Mr. Furst's Motion is interfering with the ML Manager's
17 discussions with and negotiations with the Trustee and Counsel for the 401(k) Plan. As a
18 result Mr. Furst's Motion should be stricken without prejudice. If the Trustee of the
19 401(k) Plan decides an action or motion is necessary he can bring a request for relief by
20 and through counsel.

21 Similar to a corporation, which is recognized as a separate legal entity with sole
22 standing to take action concerning the corporation, the 401(k) Plan stands as a separate
23 legal entity. As such the Trustee of the 401(k) Plan directs the actions and positions of the
24 401(k) Plan and employs counsel to act on its behalf. As a separate legal entity, the 401(k)
25 Plan must be represented by counsel to appear and request legal relief of a Court. Mr.
26 Furst does not have the legal right to sidestep the 401(k) Plan Trustee's authority and to

1 appear and make a request for the 401(k) Plan. *See Stoll v. Quintanar (In re Stoll)*, 252
2 B.R. 492, 496 (B.A.P. 9th Cir. 2000) (“Under general principles of trust law, a beneficiary
3 of a trust generally lacks standing to sue third parties on behalf of the trust.”).

4 In addition, Mr. Furst’s Motion is not ripe as no controversy yet exists. The ML
5 Manager Board and its counsel are trying to discuss and negotiate the issues related to the
6 401(k) Plan loans with the Trustee and counsel for the 401(k) Plan. No demand has been
7 made or refused. Until the issues are ripe and properly brought before the Court it is not a
8 wise use of the resources of the ML Manager or the other parties or the Court to hear or
9 require responses on Mr. Furst’s Motion.

10 Further, rather than address the substantive issues at this time, ML Manager
11 reserves the right to fully address the legal and factual issues if the 401(k) Plan Trustee by
12 and through its counsel files a pleading or if this Motion to Strike is not granted and the
13 Court sets Mr. Furst’s Motion for hearing and requires a response. Meanwhile, ML
14 Manager requests that the Court summarily without hearing deny Mr. Furst’s Motion
15 without prejudice for it to be raised by the party with standing to request relief.

16 DATED: April 2, 2010

17 FENNEMORE CRAIG, P.C.

18
19 By /s/ Keith L. Hendricks (012750)
20 Keith L. Hendricks
21 Attorneys for ML Manager LLC

22 COPY of the foregoing mailed this
23 2nd day of April, 2010 to the following:

24 Robert Furst
25 4201 N. 57th Way
26 Phoenix, Arizona 85018
ProPer

/s/ Gidget Kelsey Bacon