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10 IN THE UNITED STATES BANKRUPTCY COURT  
11 FOR THE DISTRICT OF ARIZONA

12 In re  
13 MORTGAGES LTD.,  
14 Debtor.

Chapter 11

Case No. 2-08-BK-07465-RJH

**ML MANAGER'S RESPONSE TO  
MOTION FOR ENTRY OF AN ORDER  
COMPELLING TURNOVER OF FUNDS  
BEING IMPROPERLY WITHHELD BY  
ML MANAGER LLC**

**Hearing Date: June 30, 2010**

**Hearing Time: 10:00 a.m.**

16 ML Manager LLC ("ML Manager") hereby files its Response to Morley  
17 Rosenfield's<sup>1</sup> Motion for Entry of an Order Compelling Turnover of Funds Being  
18 Improperly Withheld by ML Manager (the "Motion")(Docket No. 2771) and asks that the  
19 Court deny the Motion. The Motion is procedurally and substantially deficient. The  
20 Motion lacks substance because this Court has already held that the Plan grants ML  
21 Manager the right and authority to allocate the expenses of the Bankruptcy on all investors  
22 according to its business judgment. Additionally, ML Manager received and possesses  
23

24 <sup>1</sup> Dr. Rosenfield is a member of the Rev Op Group which has been actively opposing ML  
25 Manager for several months. Currently Dr. Rosenfield is actively appealing this Court's  
26 ruling imposing the burdens of the exit financing on all investors, as well as contesting the  
viability of the Agency Agreement. Dr. Rosenfeld is represented in this matter personally  
by the counsel for the Rev Op Group.

1 the irrevocable agency Dr. Rosenfield granted to Mortgages Ltd. Furthermore, the  
2 Motion is procedurally improper because it was not brought as a separate adversary  
3 proceeding and seeks to obtain relief from additional parties to this litigation.  
4 Accordingly, ML Manager requests that this Court deny the Motion.

5 **I. FACTUAL HISTORY**

6 The Motion seeks to compel ML Manager to turn over money it collected from  
7 Loan #7987S2 (the "Loan"). While not stated in the Motion, the Borrower owed two  
8 loans secured by one piece of real estate; the first owned entirely by three investors and  
9 the second owned by five investors including one of the MP Funds. According to the  
10 Plan, these loans were not transferred to individual Loan LLCs as the size and number of  
11 investors did not warrant the cost of filing and maintaining a LLC for the two loans.  
12 Instead the Agency Agreements were assigned to ML Manager and post effective date  
13 ML Manager continued as the Agent for the investors in the Loan. After the Effective  
14 Date of June 15, 2009, the Board of ML Manager did not cancel the Agency Agreement  
15 and retained a third party servicing company to service the Loan and the monthly  
16 payments from the Borrower.<sup>2</sup> The Borrower continued to perform after the Effective  
17 Date, and Dr. Rosenfield continued receiving monthly interest payments from the third  
18 party servicing company hired by the Agent ML Manager. The Borrower paid off both  
19 loans in late March 2010. ML Manager is in the process of determining the allocable  
20 share of the costs and expenses in the Plan and Confirmation Order to assess to all  
21 investors on all the loans in the portfolio and at the appropriate time will distribute the  
22 proceeds of this Loan to the investors in the Loan after making the appropriate assessment

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23 <sup>2</sup> Prior to implementation of the Plan on June 9, 2009, counsel for the Official Investors  
24 Committee did state in an email that the Plan Proponent was not creating a Loan LLC for  
25 this Loan and that the servicing of the Loan might be turned over to the investors but that  
26 the decision had not be made. After the Effective Date of June 15, 2009 when ML  
Manager took over and became the Agent, ML Manager decided not to cancel the Agency  
Agreement on smaller loans and to retain a third party servicing company for the Loan for  
the Agent.

1 of the costs and expenses.

2 The Plan and Confirmation Order stated that each of the investors would be  
3 assessed their fair and equitable share of expenses. This provision was explicitly stated in  
4 paragraph U(3) of the Confirmation Order which reads:

5 Before such distributions are made, Pass-Through Investors  
6 who retain their fractional interests in the ML Loans shall be  
7 assessed their proportionate share of costs and expenses of  
serving and collecting the ML Loans in a fair, equitable and  
nondiscriminatory manner and shall be reimbursed in the same  
manner as the other Investors.

8 Confirmation Order at ¶ U(3) [Docket No. 1755]. Additionally, in its October 21, 2009  
9 Memorandum Decision, this Court clarified that ML Manager can make this allocation  
10 according to its business judgment. See October 21, 2009 Memorandum Decision  
11 [Docket No. 2323]. Specifically, this Court held:

12 The motion for clarification is granted, to the extent any  
13 clarification is needed. Paragraph U of the confirmation  
14 order permits the ML Manager to charge back to the non-opt-  
in participating investors their proportionate share of all of its  
15 expenses, including but not limited to the exit financing. This  
Plan does impose a limitation that such charge back be fair,  
equitable and proportional, but within those limitations the  
16 ML Manager can exercise his business judgment whether to  
obtain financing to cover exit costs and operational expenses,  
and when to make the charge backs.

17 *Id.* at p. 1-2. Finally, this Court confirmed that ML Manager possessed an irrevocable  
18 agency at the May 26, 2010 hearing.

19 **II. LEGAL ARGUMENT**

20 **A. The Motion is procedurally improper.**

21 The Motion fails on its face because it fails to comply with the procedural  
22 requirements to obtain the relief requested by Dr. Rosenfield.

23 **1. The Motion should be brought as a separate adversary.**

24 The Motion is procedurally improper because it was not brought as a separate  
25 adversary proceeding according to the Federal Rules of Bankruptcy Procedure.  
26

1 According to Rule 7001 “a proceeding to recover money or property” must be brought as  
2 an adversary proceeding. Fed. R. Bank. P. 7001; *In re Wheeler Tech.*, 139 B.R. 235, 239  
3 (B.A.P. 9th Cir. 1992) (“Rule 7001 requires an action to recover property to be brought as  
4 an adversary proceeding.”). Thus, a motion seeking to turn over property must be  
5 commenced with an adversary complaint. *Id.* (“A turnover action is an adversary  
6 proceeding which must be commenced by a properly filed and served complaint.”  
7 (quoting *In re Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990)) (additional citations  
8 omitted).

9 Here, the Motion is an attempt to recover money from ML Manager by requiring  
10 that ML Manager turn over money it is holding. Indeed, the Motion expressly requests an  
11 order compelling ML Manager to pay money to Dr. Rosenfield. Accordingly, this action  
12 should not be heard as a contested matter under Rule 9014, but as a separate adversary  
13 proceedings ensuring that the matter is fully heard.

14 **2. Dr. Rosenfield does not have standing to move on behalf of the**  
15 **other participants.**

16 The second procedural flaw in the Motion relates to Dr. Rosenfield’s standing to  
17 seek relief on behalf of all of the participants in the Loan. As noted above, three separate  
18 investors own the Loan. Dr. Rosenfield has not submitted any evidence indicating that he  
19 has the authority to act on behalf of the other participants in the Loan. Despite this lack of  
20 evidence, the Motion seeks relief on behalf of all the participants. Dr. Rosenfield has no  
21 standing to seek recovery of funds to which he has no right. Accordingly, he lacks  
22 standing to seek recovery of anything over his percentage interest in the Loan.

23 **B. ML Manager is utilizing its business judgment in determining the**  
24 **proportionate share of the investors’ allocation.**

25 In addition to the procedural defects, the Motion fails substantively because ML  
26 Manager has the right to allocate expenses to each of the Pass-Through Investors and to

1 assess those amounts before and at the time of the distribution to the investors in the Loan.  
2 ML Manger has the responsibility to exercise its business judgment in determining the  
3 timing and amount of this allocation. Accordingly, the Motion is substantially improper  
4 as it seeks to infringe on ML Manager’s rights and duties.<sup>3</sup>

5 As noted above, paragraph U of the Confirmation Order provides ML Manager  
6 with the authority to make this allocation and the assessment before it makes a  
7 distribution. *See* Confirmation Order at Paragraph U(3) [Docket No. 1755]. Additionally,  
8 this Court has already held that the charge backs should be allocated in accordance with  
9 ML Manager’s business judgment. *See* October 21, 2009, Memorandum Decision [Docket  
10 No. 2323].

11 Currently ML Manager is in the process of determining the proper methodology  
12 and manner for the assessment and allocation of all costs and expenses, including the Exit  
13 Financing, among all of the investors on all of the loans in accordance with its business  
14 judgment. ML Manager has been working diligently on the process, has asked an  
15 accountant to prepare and apply a model for the process that will be applied to each loan  
16 as money is available to distribute, and is working with counsel on the documents and  
17 requirements to ensure that this assessment and allocation is applied across the board to all  
18 loans on a fair, equitable, proportional and non-discriminatory manner to all investors as  
19 required by Paragraph U of the Confirmation Order and the Plan. The time taken thus far  
20 to determine a proper process has been reasonable in light of the numerous factors  
21 affecting the allocation and assessment, including the large number of investors, the large  
22 number of loans and the likelihood of recovering on these loans. ML Manager must  
23 ensure that it properly allocates and assesses the expenses and costs to funds prior to

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24  
25 <sup>3</sup> Remarkably, the Motion erroneously states that ML Manager is “improperly  
26 withholding” the funds and has no interest in the Loan. This issue has already been  
decided by this Court as it relates to Dr. Rosenfield. Indeed, counsel for Dr. Rosenfield is  
the same counsel that argued this issue before the Court.

1 distribution, as it will be extremely difficult or impossible to recover funds after  
2 disbursement to investors. If for example not enough money is assessed or allocated and  
3 proceeds are distributed, it will be almost impossible and unworkable to have to collect or  
4 seek return of money. Accordingly, ML Manager is taking precautions and being careful  
5 to ensure that the allocations and assessments made to investors such as Dr. Rosenfield is  
6 appropriate. This Loan is the first Loan to receive a distribution of principal and so taking  
7 additional time to make sure the process works is warranted.

8 **III. CONCLUSION**

9 The Motion is procedurally improper because it was not brought in a separate  
10 adversary. The Motion is substantively improper as it seeks to infringe on ML Manager's  
11 duties. The Manager will be in a position within a reasonable time to make the  
12 appropriate distribution pursuant to Paragraph U(3) to Dr. Rosenfield but it does not  
13 believe it can do so at this time. Accordingly, ML Manager requests that this Court deny  
14 the Motion.

15 DATED this 23rd day of June, 2010.

16 FENNEMORE CRAIG, P.C.

17 By           /s/ Cathy L. Reece (#005932)

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21 Copy of the foregoing was served  
22 by email this 23rd day of June, 2010 on:

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