Myers & Jenkins, P.C.
One East Camelback Road
Suite 500
Phoenix, Arizona 85012

(602) 200-7900

William Scott Jenkins (#005896)
wsj@mjlegal.com
Jill M. Hulsizer (#023282)
jmh@mjlegal.com

Attorneys for Kevin T. O'Halloran,
Trustee of the ML Liquidating Trust

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: MORTGAGES, LTD., Debtor.	Chapter 11 **NO.: 2:08-bk-07465-RJH** **LIQUIDATING TRUSTEE'S RESPONSE TO MORTGAGES LTD 401(K) PLAN'S APPLICATION FOR ORDER TO SHOW CUASE** **Hearing Date: July 15, 2010** **Hearing Time: 1:30 p.m.**

Kevin T. O'Halloran, ("Liquidating Trustee"), Trustee of the ML Liquidating Trust, (the "Liquidating Trust"), hereby submits his Response to Mortgages Ltd. 401(K) Plan's Application for Order to Show Cause [DE 2776] (the "Application") and respectfully requests that the Application be denied on the grounds and for the reasons specified below.

I. **The Application is Procedurally Improper.**

The Application is in reality **a disguised motion to turn over funds**. In the Application, the 401(K) Plan specifically requests the Court to "enter an order requiring the Liquidating Trustee to immediately turn over the funds in the Hurst and Ecco impound accounts." Because the 401(K) Plan explicitly seeks to recover money from the Liquidating Trustee, the Application itself is procedurally improper.

Myers & Jenkins, P.C.
One East Camelback Road
Suite 500
Phoenix, Arizona 85012

Rule 7001 provides that "a proceeding to recover money or property" is properly the subject of an adversary proceeding. *Fed. R. Bank. P. 7001*. "A turnover action is an adversary proceeding which must be commenced by a properly filed and served complaint." *In re Wheeler Tech., Inc.*, 139 B.R. 235, 240 (B.A.P. 9th Cir. 1992) quoting *In re Perkins*, 902 F.2d 1254, 1258 (7th Cir.1990); (additional citations omitted). In light of the fact that Application seeks the recovery of money or property, the Application is procedurally improper and should not be heard as a contested matter under Rule 9014.

II. **The Liquidating Trustee Claims No Interest In the Impound Accounts.**

The Application requests the turn over of funds held in two separate impound accounts, (the "Impound Accounts"), which relate to two properties known as the Hurst and Ecco properties. The 401(K) Plan asserts it owns 100% of the Ecco property and 93% of the Hurst property and, therefore, is entitled to the funds held in said Impound Accounts. The Impound Accounts were originally established in two separate bank accounts under the tax identification number of Mortgages Ltd., now known as ML Servicing Co., Inc. The accounts are currently on deposit at Chase Bank under the following names: (i) ML Servicing Co., Inc. – Hurst, James T. and Linda L. Loan 8610 C1, and (ii) ML Servicing Co., Inc. for Ecco Holdings LLC Loan 8597.[1] Although the Liquidating Trust is the sole shareholder of ML Servicing Co., Inc., neither the Liquidating Trust, nor the Liquidating Trustee, has any interest in the Impound Accounts. Further, the Liquidating Trustee has never claimed any interest in the Impound Accounts. Under the foregoing circumstances, and following the confirmation of the Plan of Reorganization, the Liquidating Trustee requested and until very recently continued to await direction from the ML Manager regarding the transfer of the Impound Accounts to ML Manager. It is ML Manager's position that the Impound Accounts still need to be re-titled in the name of ML Manager and has objected to the turn-over of the Impound Accounts to the 401(K) Plan.

[1] Kevin T. O'Halloran is a signatory on the Impound Accounts as an employee of ML Servicing Co., Inc. – not as the Liquidating Trustee.

Myers & Jenkins, P.C.
One East Camelback Road
Suite 500
Phoenix, Arizona 85012

III. **The Liquidating Trustee has Complied With the Court's Stipulated Order.**

As the Court may recall, the 401(K) Plan and Liquidating Trustee submitted a Stipulated Order Regarding 401(k) Plan's Motion To Ratify Appointments And To Define Liquidating Trustee's Role With Respect To The 401(k) Plan, which the Court entered on September 23, 2009 [DE 2210] (the "Stipulated Order"). The Stipulated Order provides, in pertinent part, as follows:

> (v) the Liquidating Trustee shall turn over to the current trustees of the 401(k) Plan **all books, records and other documents and information belonging solely to the 401(k) Plan**; provided however that ML Manager LLC shall continue to maintain possession and control of the original ML Loan Documents for all the ML Loans and REO in which the 401(k) Plan and the Pass-Through Investors, the MP Funds and/or the Loan LLCs jointly have an ownership interest. To the extent the 401(k) Plan is responsible to reimburse ML Manager LLC, the Liquidating Trust and/or ML Servicing Co. for any expenses and costs, nothing in this Order shall relieve the 401(k) Plan from such responsibility. As to such jointly owned ML Loans and REO, the ML Manager LLC and/or Liquidating Trustee shall make available to the 401(k) Plan copies of all such documents and information upon written request of the 401(k) Plan which cost for copies shall be paid by the 401(k) Plan. (emphasis supplied).

It is disingenuous for the 401(K) Plan to assert that the Liquidating Trustee is violating the Stipulated Order for a variety of reasons. Upon entry of the Stipulated Order, the Liquidating Trustee did turn over to the trustees of the 401(K) Plan "**all books, records and other documents and information belonging solely to the 401(k) Plan**" within its possession or under its control. Among other things, the Liquidating Trustee turned over to the 401(K) Plan the check book for the 401(K) Plan bank accounts. The Stipulated Order did not compel the Liquidating Trustee to turn over the Impound Accounts as alleged in the Application. In fact, nothing in the signed Stipulated Order mentions or addresses the Impound Accounts. As a consequence, the Liquidating Trustee fully satisfied its obligations under the Stipulated Order.

Moreover, the Stipulated Order directed the Liquidating Trustee to turn over the "books, records and other documents and information **belonging solely to the 401(k) Plan**." Assuming, arguendo, that the Impound Accounts were covered by the Stipulated Order, the Impound Accounts in question **do not belong solely** to the 401(K) Plan. Moreover, the Hurst property was foreclosed on by the lender subsequent to the Court's entry of the Stipulated Order. As a consequence, it would not

Myers & Jenkins, P.C.
One East Camelback Road
Suite 500
Phoenix, Arizona 85012

have been appropriate to turn over the Hurst Impound Account at the time of the entry of the Stipulated Order, assuming the Stipulated Order applied to said Account, because ownership in such Account did not occur until after the foreclosure took place.

The Application interestingly fails to mention the ML Manager's declared interest in the Impound Accounts, despite the 401(K) Plan's awareness of such interest. Plainly, the Impound Accounts do not belong **solely** to the 401(K) Plan as the funds within the Impound Accounts remain subject to property cost and expense allocations, which have not yet been determined by the ML Manager. Thus, even if the Stipulated Order contemplated the turn-over of the Impound Accounts, which the Liquidated Trustee denies, the accounts would not have been subject to turn over to the 401(K) Plan, because they did not belong **solely** to the 401(K) Plan, either by virtue of the 401(K) Plan's lack of a 100% ownership interest in the underlying property or the fact that there remained a dispute with ML Manager as to the ownership of the funds. Under the foregoing circumstances, the 401(K) Plan Application lacks merit and must be denied.

IV. The Application Involves a Disagreement Between the 401(k) Plan and ML Manager - Not the Liquidating Trustee.

Quite frankly, the 401(K) Plans Application came out of left field and was a complete surprise, if not shock, to the Liquidating Trustee. It was not until the Application was filed that the Liquidating Trustee became aware of the discussions and disagreements between the 401(K) Plan and ML Manager relating to the Impound Accounts. It appears that these discussions and negotiations had been ongoing for some period of time and never involved the Liquidating Trustee. Nonetheless, the 401(K) Plan fails to mention the existence of such discussions with the ML Manager anywhere in its Application.

The Application mischaracterizes numerous facts. First, the 401(K) Plan never made demand on the Liquidating Trustee to turn over the funds in the Impound Accounts. To the contrary, the two separate emails attached to the Application as Exhibits B and D requesting the turn over of the funds were both sent to Mark Winkleman, the COO of ML Manager LLC, not to the Liquidating Trustee. Mr. Winkleman is not an employee or agent of the Liquidating Trustee or the Liquidating Trust.

Second, the Liquidating Trustee never refused to turn over the funds in the Impound Account to the 401(K) Plan prior to the filing of the Application. The accusation that the Liquidating Trustee has refused to comply with those requests is simply false.

Further, the 401(K) Plan clearly knew the identity of the Liquidating Trustee and his undersigned counsel at all times material to this Application. The 401(K) Plan dealt with the Liquidating Trustee and his counsel as recently as September 2009 in the preparation of the Stipulated Order. Yet the 401(K) Plan representatives did not contact the Liquidating Trustee or his counsel at any time prior to the filing of the Application.[2] Instead, all of their communications were directly with representatives of the ML Manager. To fail to acknowledge these rather material facts in its Application should not be countenanced by this Court and such subterfuge should result in sanctions being imposed upon the 401(K) Plan in the form of an award of the Liquidating Trustee's attorneys' fees incurred in having to respond to this Application.

V. **Conclusion**

The Liquidating Trustee has fully complied with the directives of the Stipulated Order and the 401(K) Plan's Application for Order to Show Cause is without merit. In addition, the Application is procedurally improper under Rule 7001, Fed. R. Bank. P. The Liquidating Trustee has never claimed an interest in the Impound Accounts. Moreover, the Liquidating Trustee is not and never has resisted the turn over of the Impound Accounts to the parties properly entitled to such accounts. While it is the ML Manager's position that the Plan of Reorganization and Confirmation Order require that the Impound Accounts be transferred to and managed by ML Manager, the Liquidating Trustee will turn over the Impound Accounts to whomever the Court directs. For the foregoing reasons, the Liquidating Trustee respectfully requests that the Application be denied and he be awarded his attorneys' fees incurred in responding to the 401(K) Plan Application.

[2] In fact, the 401(K) Plan counsel has not contacted undersigned counsel at any point in time up through the filing of this Response, although notice of the Hearing on the Application was served upon attorney, Mark Dorval, who has represented the ML Liquidating Trust in other matters before this Court.

Myers & Jenkins, P.C.
One East Camelback Road
Suite 500
Phoenix, Arizona 85012

RESPECTFULLY SUBMITTED this 8th day of July, 2010.

MYERS & JENKINS, P.C.

/s/ William Scott Jenkins
William Scott Jenkins
Jill M. Hulsizer
Attorneys for Kevin T. O'Halloran,
Trustee of the ML Liquidating Trust

Myers & Jenkins, P.C.
One East Camelback Road
Suite 500
Phoenix, Arizona 85012