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Pro Per

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U.S. BANKRUPTCY COURT ARIZONA

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: MORTGAGES LTD., an Arizona corporation, Debtor.	In Proceedings Under Chapter 11 Case No. 2:08-bk-07465-RJH **REPLY TO ML MANAGER LLC'S RESPONSE TO ROBERT FURST'S MOTION FOR ENTRY OF ORDER CONFIRMING THAT ALL INVESTORS IN THE GP PROPERTIES LOAN ORIGINATED BY THE MORTGAGES LTD. 401(K) PLAN HAVE TERMINATED THEIR AGENCY AGREEMENTS WITH ML MANAGER**

Robert G. Furst files this Reply to ML Manager's Response to Motion for Entry of Order Confirming that All Investors in the GP Properties Loan Originated by the Mortgages Ltd. 401(k) Plan Have Terminated Their Agency Agreements with ML Manager.

The Motion should be granted by the Court because (1) the GP Properties Loan was a 401(k) Plan Loan, not an "ML Loan," (2) the trustees of the 401(k) Plan are currently managing the pension plan's undivided interest in GP Properties (which was acquired when the loan was foreclosed upon), (3) 100% of the individual investors in GP Properties want to manage their undivided interests by themselves (in cooperation with the 401(k) Plan), (4) ML Manager agreed a long time ago that the 401(k) Plan and the individual investors could co-manage their joint investment (until ML Manager

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abruptly changed its mind in late 2009), (5) ML Manager has absolutely no legal or equitable interest in the property, and (6) the property is not pledged to secure the Exit Financing.

There is simply no justifiable reason for ML Manager to oppose this action. What the GP Properties investors are attempting to accomplish is exactly what the Plan Proponents originally envisioned. Notably, in an e-mail, dated June 8, 2009 (a copy of which is attached hereto as Exhibit A), Cathy Reece, Esq., counsel for ML Manager, referenced seventeen loans (including the GP Properties Loan) which were "smaller in amount, had no MP Funds and also had just a few investors," and stated that **"[i]t is our intention to let our investors in those loans make their own decisions about how they want to proceed."** That is what ML Manager envisioned on June 8, 2009 (two weeks after the Plan of Reorganization was confirmed), and that is all that the GP Properties investors want today.

A. Background: The Relationship Between Mortgages Ltd. and the 401(k) Plan.

Mortgages Ltd. was engaged in the mortgage banking business making direct loans to third-party borrowers with its own funds (hereinafter referred to as "ML Loans") and then selling fractional interests in those loans to individual investors.[1] In addition, Mortgages Ltd. sponsored a 401(k) Plan for its employees that wanted to invest in these ML Loans but was prohibited from doing so under ERISA. As a result, the 401(k) Plan embarked upon an investment plan to make its own direct loans to third-party borrowers (hereinafter referred to as "401(k) Plan Loans").

1. The 401(k) Plan owns interests in eight loans made directly to third-party borrowers.

The 401(k) Plan presently owns all or a portion of eight loans which were made directly by the 401(k) Plan to third-party borrowers (or, in some cases, the loans have already been foreclosed, and the 401(k) Plan now owns all or a portion of the underlying real property). Three of the

[1] For the purposes of this pleading, "ML Loans" has the same meaning as set forth in the Debtor's Plan of Reorganization. See Sections 2.52 and 2.54 of the Plan of Reorganization.

1 loans/properties are owned entirely by the 401(k) Plan; one loan/property also has one individual
2 investor; one loan/property also has three individual investors; one loan/property also has nine
3 individual investors; one loan/property also has twenty individual investors (i.e., GP Properties); and
4 one loan/property also has an unknown number of individual investors. These eight investments by
5 the 401(k) Plan shall be referred to herein as "401(k) Plan Investments" to indicate that they are
6 either (1) 401(k) Plan Loans, or (2) real property acquired upon the foreclosure of a 401(k) Plan
7 Loan.
8
9
10 **2. Mortgages Ltd. and its investors sometimes acquired fractional interests in 401(k) Plan Loans by assignment.**

11 With regard to the five 401(k) Plan Loans which are owned by the 401(k) Plan in conjunction
12 with individual investors, in each case (1) the 401(k) Plan first made a direct loan to a third-party
13 borrower, and (2) the 401(k) Plan then sold a portion of the promissory note and deed of trust to
14 Mortgages Ltd. and/or individual investors through separate assignments. (In contrast, in non-401(k)
15 Loans, Mortgages Ltd. loaned its own funds to third-party borrowers and then sold fractional interests
16 in these loans to individual investors).
17
18 **3. Mortgages Ltd. never made a single penny from any of these 401(k) Plan Loans.**

19 Importantly, to comply with ERISA, Mortgages Ltd., as the plan sponsor, never profited at all
20 from any of the 401(k) Plans, even though Mortgages Ltd. has, at times, serviced the loans. Rather,
21 the 401(k) Plan kept all of the interest payments and fees paid by the third-party borrowers, except
22 for the interest payments paid to individual investors owning fractional interests. Mortgages Ltd.
23 retained no interest rate spread, no discount points, no default interest, and no late fees. Nothing!
24
25
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B. The GP Properties Loan: 401(k) Plan Loan or ML Loan?

In its Response, ML Manager contends, for the first time, that the GP Properties investors cannot terminate their Agency Agreements and self-manage their investment in conjunction with the trustees of the 401(k) Plan. ML Manager also contends that, because the GP Properties Loan was an ML Loan (which it was not), ML Manager can charge the individual investors with a share of the Exit Financing costs.

Although not stated in their Response, ML Manager has now also adopted a new position *vis a vis* the 401(k) Plan. ML Manager now claims that (1) ML Manager can charge the 401(k) Plan for a share of the Exit Financing costs, and (2) ML Manager can, in its sole discretion, sell the entire GP Properties at any time without the consent of the trustees of the 401(k) Plan or the individual investors. Needless to say, these new positions are outrageous and totally unsupportable and unjustified.

1. The GP Properties Loan was clearly a 401(k) Plan Loan.

Without question, the GP Properties Loan was a 401(k) Plan Loan from the outset, that is, a direct loan made by the 401(k) Plan to a third-party borrower. The Promissory Note explicitly states that GP Properties Carefree Cave Creek, LLC is the Maker, and Scott M. Coles or Christopher J. Olson, Trustees of the Mortgages Ltd. 401(k) Plan is the Holder. A copy of the Promissory Note is attached hereto as Exhibit B.

2. The GP Properties Loan was not an "ML Loan" because Mortgages Ltd. was not the lender.

Contrary to the position of ML Manager, the GP Properties Loan was not an ML Loan, within the meaning of the Plan of Reorganization, because it was not a direct loan made by Mortgages Ltd. to a third-party borrower.

The Plan of Reorganization clearly defines ML Loans, ML Notes and ML Deeds of Trust. Section 2.52 defines ML Loans to mean "loans evidenced by the ML Notes and ML Deeds of Trust." In turn, Section 2.54 defines ML Notes to mean "**promissory notes from the Debtor to third-party borrowers** (emphasis added)." Finally, Section 2.50 defines ML Deeds of Trust as "**deeds of trust . . . securing ML Notes granted by third party borrowers to the Debtor** (emphasis added)." Copies of Sections 2.50, 2.52 and 2.54 of the Plan of Reorganization are attached hereto as Exhibit C.

3. The 401(k) Plan is not an "Investor" in "ML Loans" within the meaning of the Debtor's Plan of Reorganization.

Because the 401(k) Plan invested in its own loans, not ML Loans, it is not an "Investor" within the meaning of the Plan of Reorganization. Section 2.40 defines Investor to mean "all **Persons holding fractional or participating interests in the ML Loans** or in the ML Funds . . . whether **as a pass-through investor** or an investor under the ML Funds, excluding the Debtor (emphasis added)." A copy of Section 2.40 of the Plan of Reorganization is attached hereto as Exhibit D.

Purposely, the 401(k) Plan does not fit into that definition. Under ERISA, the 401(k) Plan was prohibited from investing in ML Loans; that is the primary reason that the 401(k) Plan made direct loans to borrowers, including the GP Properties Loan.

4. With regard to the 401(k) Plan, its ownership interests in the 401(k) Plan Loans are not assets of the Debtor's bankruptcy estate.

ERISA is premised on the fundamental legal principle that the assets of an ERISA-qualified pension plan are not subject to the claims of its corporate sponsor's creditors. The Plan of Reorganization is totally consistent with this principle because it simply sets forth rules for "ML Loans" owned by "Investors" and never mentions the 401(k) Plan at all.

Consequently, the 401(k) Plan, to the extent it owns all or a portion of eight 401(k) Plan Investments (including originally the GP Properties Loan and now the GP Properties), is clearly not governed by the Debtor's Plan of Reorganization, particularly those provisions relating to ML Loans. Its ownership interests in the eight 401(k) Plan Investments are plan assets, not assets of the Debtor's bankruptcy estate.

5. **Because the 401(k) Plan does not own ML Loans, it is not responsible Exit Financing costs attributable to its corporate sponsor's bankruptcy.**

The 401(k) Plan is not responsible for any of the Exit Financing costs because (1) it is not an Investor in any of the ML Loans or ML Funds, as defined in the Plan of Reorganization, and (2) under ERISA, it is prohibited from paying the expenses of Mortgages Ltd., its plan sponsor (particularly expenses resulting from the fraudulent conduct of its plan sponsor). However, this issue is not presently before the Court.

6. **Like the 401(k) Plan, investors in the Value-to-Loan Fund are also not responsible for Exit Financing costs because they also do not own ML Loans.**

Recently, ML Manager and certain members of the Official Investors Committee have led the Court into believing that all Mortgages Ltd. investors are required, under the Plan of Reorganization, to bear "their fair share" of the Exit Financing costs. However, they have concealed that, in truth, most Mortgages Ltd. investors are required to pay these costs, but some are not.

For example, investors in the Value-to-Loan Fund (the "VTL Fund") are not responsible for any Exit Financing costs because they are not "Investors" within the meaning of the Plan of Reorganization. As defined in Section 2.40, an "Investor" must own ML Loans or a membership interest in an ML Fund which owns ML Loans. Investors in the VTL Fund own neither. The VTL Fund is not an ML Fund, as specifically defined in Section 2.55 of the Plan of Reorganization (see Exhibit C), and the VTL Fund does not own ML Loans. Instead, the VTL Fund simply lends money

to the ML Funds which own ML Loans. Therefore, according to the Plan of Reorganization, the VTL Fund is not responsible for any Exit Financing costs (which ML Manager admits outside the courtroom but never discusses in the courtroom).

This is an extremely critical point. ML Manager will soon ask the Court to rule that the 401(k) Plan must pay "its fair share" of the Exit Financing Costs because, according to them, all "investors" are required to pay the Exit Financing costs. However, this is simply not true. The stark reality is that neither the 401(k) Plan nor the VTL Fund is responsible for any Exit Financing costs because neither owns ML Loans.

Notably, until late Fall in 2009, there was no issue at all: ML Manager Board consistently proclaimed that neither the VTL fund nor the 401(k) Plan was responsible for Exit Financing. Unfortunately, however, two Board members resigned, and the new Board adopted a new, but unsupportable, position: the 401(k) Plan would now be responsible for "its fair share," but the VTL Fund would not. This is the not-so-hidden agenda of ML Manager today, that is, to improperly pull the pension plan assets and affairs of the 401(k) Plan into the bankruptcy proceedings of its corporate sponsor (which the Court has already stated that it would not do).

7. The individual investors in the GP Properties Loan may or may not be responsible for Exit Financing costs.

As a separate issue, the individual investors in GP Properties (including the Furst Pension Plan) may or may not be responsible for a share of the Exit Financing costs, depending upon the Court's final determination on the issue in the upcoming months. However, this issue is not presently before the Court.

C. <u>The Issue: The Right of the Investors in GP Properties to Control Their Investment</u>.

The sole issue before the Court is who controls the fractional interests owned by the GP Properties investors, the investors or ML Manager. There was never any dispute on this issue until

late Fall of 2009, when ML Manager began to realize that it was running out of money and needed new revenue sources, including the 401(k) Plan Loans. To address, at least in part, its liquidity problems, ML Manager thereupon commenced its efforts to wrest control of the 401(k) Plan Investments from, not only the individual investors, but from the 401(k) Plan, too. Prior to that time, there was no question that the 401(k) Plan controlled its own destiny, in conjunction with the individual investors in GP Properties (and the other 401(k) Plan Investments).[2]

1. ML Manager has always acknowledged that the 401(k) Plan Loans are different than ML Loans (because the 401(k) Plan is not subject to the Plan of Reorganization).

From the time that the Official Investors Committee ("OIC") was drafting the Plan of Reorganization until the date of confirmation, Cathy Reece, Esq., counsel for the OIC, repeated assured the trustees of the 401(k) Plan that the pension plan would not be governed by the Plan of Reorganization or subject to exit financing costs.

Moreover, shortly after the Plan of Reorganization was confirmed, Cathy Reece, on behalf of ML Manager, confirmed this structure. First, with regard to the three 401(k) Plan Loans owned entirely by the 401(k) Plan, she stated that "these three loans can go their own way with no management or service involving the OIC Plan." Second, with regard to the two 401(k) Plan Loans with one and three individual investors, respectively, she assumed that the 401(k) Plan and the investors would also "go their own way with no management or service involving the OIC Plan." Third, with regard to the remaining three 401(k) Plan Loans (i.e., the GP Properties Loan and two other 401(k) Plan Loans with multiple investors), she anticipated that the investors may want to form a Loan LLC managed by ML Manager, and "[t]hen the 401(k) Plan and the Loan LLC could decide where to have the loan serviced and what to do to collect or workout the loan." In each case, she

[2] Notably, in one 401(k) Plan Investment (i.e., Hurst), the individual investors and the 401(k) Plan had already refurbished the real property and leased it to a tenant, without any involvement by ML Manager.

explicitly recognized the independence of the 401(k) Plan (and also the independence of the individual investors going forward).

Importantly, none of the GP Properties investors transferred their fractional interests into a Loan LLC because none of them wanted to relinquish control to ML Manager, and, therefore, a Loan LLC was never formed. Significantly, if they had, in fact, chosen to form a Loan LLC, they could have removed ML Manager, as manager of the Loan LLC, right now, without cause, by a majority vote. By retaining their fractional interests, the GP Properties investors thought that they, too, could "go their own way with no management or service involving the OIC Plan." Instead, more than one year later, ML Manager is totally ignoring its prior statements, and it is now taking the new, unreasonable position that (1) ML Manager is still their agent, and (2) not even a unanimous vote to remove ML Manager will be recognized without a court fight.

2. The investors in the GP Properties Loan simply want to manage the GP Property themselves in conjunction with the 401(k) Plan.

Based upon Cathy Reece's statements above, the GP Properties investors reasonably believed that ML Manager had already committed to allow them to control their own destiny. The GP Properties investors simply want to do the same thing as the individual investors in the two 401(k) Plan Loans with only one and three investors, respectively, that is, "go their own way with no management or service involving the OIC Plan." The GP Properties investors believe that Cathy Reece's 2009 statements are binding on ML Manager, and they should not be required to resort to technical legal arguments to terminate their relationship with ML Manager.

3. In any event, the investors in GP Properties can terminate their Agency Agreements at any time because the agency powers are not coupled with an interest.

Even if the Court deems Cathy Reece's 2009 statements to be non-binding, the individual investors in GP Properties (including the Furst Pension Plan) can still terminate their Agency

Agreements with ML Manager at any time because the agency powers are not coupled with an interest (unlike the Rev Op Group).

ML Manager has no legal or equitable interest in GP Properties because (1) it has no actual ownership interest in the real property, and (2) its predecessor, Mortgages Ltd., as the plan sponsor, never possessed any right to fees, interest spread, etc. in the GP Properties Loan. Therefore, the Agency Agreements for all of the individual investors in GP Properties (including the Furst Pension Plan) are not coupled with an interest and are terminable at will.

4. Even if the Agency Agreements are coupled with an interest, they are terminable under Paragraph 3(b).

Even if the Agency Agreements were deemed to be coupled with an interest, the individual investors still have the unilateral right to terminate them. Paragraph 3(b) of the Agency Agreements expressly states that a "[p]articipant may terminate this Agreement after it becomes the sole owner of the Trust property." In the case at hand, 100% of the investors desire to terminate the Agency Agreements and work cooperatively to hold, manage and market GP Properties. This is the functional equivalent of one investor becoming the "sole owner" of the property, and, in fact, the investors do intend to form a limited liability company in the near future to consolidate their interests in one entity. As a result, the investors do have the right, under Paragraph 3(b), to terminate their Agency Agreements.

5. The individual investors in GP Properties unequivocally terminated the Agency Agreements no later than February 2010.

The individual investors in GP Properties clearly and unequivocally terminated their Agency Agreements, effective February 2010. Evincing desperation, ML Manager argues that Robert Furst's e-mail to Elliott Pollack was not a "definitive termination" simply because Mr. Furst stated in the e-mail that he "trusts that you and the Board will concur." Mr. Furst was simply being polite and

respectful to someone he has known for more than twenty years. He was not indicating that ML Manager needed to agree to the termination.

Notably, one of the investors in GP Properties who terminated his Agency Agreement was Scott Summers, a member of the ML Manager Board. He can confirm that, without a doubt, the ML Manager Board understood that the investors had, in fact, terminated their Agency Agreements because he, too, told the entire ML Manager Board about the unanimous investor vote.

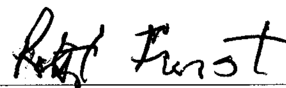
6. The Court can resolve this controversy without further delay and expense.

ML Manager claims that the termination of the Agency Agreements cannot be determined on a motion, yet ML Manager has repeatedly argued the validity of the Agency Agreements on motions. This is an extremely simple, straightforward issue, and there is no reason for further delay.

7. Conclusion.

In conclusion, the undersigned requests that the Court issue an order confirming that the Agency Agreements have been terminated by all of the investors in GP Properties, effective February 1, 2010, and that ML Manager shall have no further authority over GP Properties in any respect. The Court can later decide, upon motion, whether the investors owe ML Manager any amounts, and if so, the proper amount.

DATED: July 8, 2010



Robert G. Furst
4201 North 57th Way
Phoenix, Arizona 85018
(602) 377-3702

Subj: **Fw:**
Date: 6/8/2009 3:06:57 P.M. Pacific Daylight Time
From: tdcrim@msn.com
To: a.z.heartdocone@aol.com
CC: drmorley@aol.com

----- Original Message -----
From: REECE, CATHY
To: TOM CRIMMINS ; bbuckley@cox.net
Sent: Friday, June 05, 2009 3:19 PM
Subject: RE:

Tom, thanks for your email. I will take a look at your email and each of the loans you have mentioned . I think we had already decided not to put these 3 loans into an new Loan LLC. There were 17 loans that we identified for that purpose because they are smaller in amount, had no MP Funds and also have just a few investors. It is our intention to let the investors in those loan make their own decision about how they want to proceed. I will be back in touch with you to discuss how to proceed with your loans and what paper work will be needed. Once we identify who will be the servicer for the Loan LLCs you might want to consider using the same servicing company to collect and disburse the funds to you. Cathy

FENNEMORE CRAIG
ATTORNEYS
DENVER | LAS VEGAS | NOGALES | PHOENIX | TUCSON

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From: TOM CRIMMINS [mailto:tdcrim@msn.com]
Sent: Thursday, June 04, 2009 10:25 PM
To: bbuckley@cox.net

EXHIBIT A

PROMISSORY NOTE
Interest Only/Commercial

Loan No. **860206** **July 18, 2007**

Loan Amount: **$4,550,000.00**

"**Maker**" (individually and collectively):

GP Properties Carefree Cave Creek, L.L.C., an Arizona limited liability company
P. O. Box 15195
Phoenix, AZ 85060

"**Holder**": **Scott M. Coles or Christopher J. Olson, CPA, Trustees of the Mortgages Ltd. 401(k) Plan**

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1. PROMISE TO PAY

a. As consideration for the receipt of a loan and other value, Maker hereby promises to pay the outstanding balance of the Designated Loan Amount **$4,550,000.00** in United States currency (the "Principal"), plus interest, to the order of the Holder, **Scott M. Coles or Christopher J. Olson, CPA, Trustees of the Mortgages Ltd. 401(k) Plan,** or any subsequent holder of this Promissory Note (this "Note"). Maker understands and agrees that **Scott M. Coles or Christopher J. Olson, CPA, Trustees of the Mortgages Ltd. 401(k) Plan,** may subsequently transfer this Note, subject to the terms and conditions contained herein. **Scott M. Coles or Christopher J. Olson, CPA, Trustees of the Mortgages Ltd. 401(k) Plan,** or anyone who takes this Note by transfer and who is entitled to receive payments under this Note, is referred to hereinafter as the "Holder."

b. In connection with this Note and on the same date, Maker or a third party trustor executed a Deed of Trust, Assignment of Rents and Leases, Security Agreement and Fixture Filing (the "Deed of Trust") securing this Note (the "Deed of Trust") and a Servicing Agent Agreement. This Note, the Deed of Trust, the Servicing Agent Agreement and any other agreement, document or instrument evidencing, governing or securing the payment of the indebtedness evidenced by the Note are collectively referred to herein as the "Loan Documents". Maker understands and agrees that the Servicing Agent Agreement, which is incorporated herein by reference, authorizes the Servicing Agent appointed thereunder to, among other things, act on the Holder's behalf in accordance with this Note.

3. INTEREST

Interest will be charged on that portion of the Principal which has been committed by Holder, beginning, at Holder's discretion, on the Loan Funding Date or the Commitment Termination Date (in the event that the Loan closing was delayed for any reason other than one caused by Holder) continuing until the Principal has been paid in full. The Loan Funding Date' is the date upon which Lender allocates and designates sums sufficient to fund this Loan. The 'Commitment Termination Date' is the date upon which Lender's Loan commitment expires. Beginning on the Loan Funding Date or the Commitment Termination Date, as the case may be, and so long as no event of default exists, interest will accrue and be paid at the rate of **12.25%** per annum. In the event of default, Maker agrees to pay the Default Interest Rate as set forth herein.

4. PAYMENTS

a. **Time of Payments.** Maker will pay **interest only** by making monthly payments on the 1st day of each month beginning **September 1, 2007.** Maker will continue to make monthly payments until Maker has paid all of the Principal, interest and any other charges that Maker may owe under this Note or the other Loan Documents. Monthly payments received by Holder in advance will not be posted to Maker's account greater than 14 calendar days prior to the payment due date.

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EXHIBIT B

07/12/2010

b. Maker's monthly payments will be applied to the following in such order as Holder, in its sole discretion, may determine

(i) To the payment of any costs, fees or other charges incurred under this Note and the other Loan Documents;

(ii) To the payment of accrued interest; **and**

(iii) To the reduction of the Principal balance.

c. All remaining Principal, together with accrued unpaid interest and any other amounts due hereunder or under the Loan Documents (collectively, the "Maker's Liabilities") shall be due and payable in full on **July 19, 2008** (the "Maturity Date"), unless Maker's Liabilities become due and payable sooner because of acceleration, in which case Maker's Liabilities shall be due and payable in full on the date of such acceleration. Maker understands that the Maturity Date requires Maker to pay all Principal, interest and all other charges then due.

d. Place of Payments. Maker will make all monthly payments to Servicing Agent at 55 E. Thomas Road, Phoenix, Arizona 85012, or at a different address if Servicing Agent has given Maker written notice of a different address.

5. RIGHT TO PREPAY AND PREPAYMENT PREMIUM

a. Maker has the right to make payments of Principal at any time before they are due ("Prepayment") provided that:

(1) All sums due under the Note are current;

(2) Prepayment is made on a monthly payment due date;

(3) Payment of a prepayment premium equal to **5%** of the Principal balance of the Note before reduction, if Prepayment is made before **July 19, 2007; and**

(4) At the time of making a Prepayment, Maker advises Servicing Agent, in writing that Maker is making a Prepayment.

b. Any payment of Principal only is considered a Prepayment. Holder will use all of Maker's Prepayments to reduce the amount of Principal that Maker owes under this Note. If Maker makes a partial Prepayment, there may be a change in the amount of Maker's monthly payment.

6. LOAN CHARGES

a. Note Interest Rate. If Holder charges or if Maker pays any fees, charges or other sums pursuant to this Note or any other Loan Documents which, under the law, may be deemed to be interest, then the interest rate set forth in Section 2 above shall be deemed to be increased to include such additional interest. Therefore, if it is determined that the rate of interest applicable to this Note is greater than the rate of interest stated in Section 2 above, then the actual rate thus determined shall become the agreed upon and contracted rate of interest for this Note.

b. Interpretation and Remedy. Notwithstanding any provision herein or in any of the Loan Documents, the total liability for payments in the nature of interest shall not exceed the limits now imposed by the usury laws of Arizona, if any. If a law, which applies to this Note and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this Note exceed the permitted limits, then: **(i)** loan charges shall be reduced by Holder in an amount sufficient to reduce the loan charges to the permitted limit; **and (ii)** any sums already collected from Maker which exceeded permitted limits will be refunded to Maker. Holder may choose to make this refund by reducing the Principal Maker owes under this Note or by making a direct payment to Maker. If a refund reduces Principal, then the reduction will be treated as a partial Prepayment and the provisions of 4will not apply.

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7. MAKER'S FAILURE TO PAY AS REQUIRED

a. Late Charge for Overdue Payments. If Holder has not received the full amount of any of Maker's monthly payments by the close of business on a date which is five (5) calendar days after the date it is due, Maker will pay a late charge to **Holder.** The amount of the late charge will be **35%** of the monthly Principal and Interest payment. In the event that this Note is not paid in full by the Maturity Date, Maker acknowledges that a late charge will be assessed in the amount of **3%** of the remaining Principal balance on the next day following the Maturity Date and on the same day each month thereafter until the Note is paid in full.

b. Default. A default under this Note if exists if any of the following occurs:

(i) Maker Fails to pay the full amount of each monthly payment on or before the date it is due;
(ii) Maker Fails to pay all sums due as of the Maturity Date;
(iii) Maker Fails to pay all sums required by any other Loan Documents;
(iv) Maker Fails to perform or observe any covenants or obligations set forth herein or in any other Loan Documents; **or**
(v) Any default exists under and of the other Loan Documents.

c. Acceleration. If a default exists, then Holder may accelerate the Maturity Date and declare that all sums owing under this Note and the other Loan Documents are immediately due and payable, without notice.

d. No Waiver By Holder. Failure of Holder, for any period of time or on more that one occasion, to exercise its option to accelerate the Maturity Date shall not constitute a waiver of the right to exercise the same at any time during the continued existence of an event of default or any subsequent event of default.

e. Payment of Holder's Costs and Expenses. If an event of default occurs, Maker shall pay all costs of enforcement, collection and preparation therefor, whether or not any action or proceeding is commenced in any court and, if commenced, during all appeals, including attorneys' fees, guarantor collection expenses (as described in the Servicing Agent Agreement), appraisal fees, inspection fees, expert witness fees, foreclosure processing fees, litigation costs and all other related expenses (collectively, "Default Costs"). Maker, at the option of Holder, shall appear and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Holder and shall pay all costs and expenses of Holder, including the cost of evidence of title and attorneys' fees, in any such action or proceeding in which Holder may appear or be named, with interest thereon at the Default Interest Rate from the date incurred or expended until paid in full.

f. Default Interest. If a default exists, then (in addition to the late charge as stated in Section 6(a)above) the interest rate on the unpaid Principal shall be **increased to 27% per annum** (the "Default Interest Rate") commencing on the date through which interest was last paid, and shall continue, at the option of the Holder, until all payments have been made current, all sums due under this Note and the other Loan Documents have been paid in full and/or all non-monetary defaults under the Loan Documents have been cured to the Holder's satisfaction. Any advances made by Holder, pursuant to the terms of the Loan Documents, and all Default Costs shall accrue interest at the Default Interest Rate. In the event Maker files or is involuntarily placed in bankruptcy, Maker hereby agrees that Holder shall be entitled to interest on all Loan arrearages of whatever nature at the Default Interest Rate.

8. NOTICES

Unless applicable law requires a different method, any notice that must be given to Maker under this Note will be given by mailing it by first class mail or by delivering it to Maker at the address stated above or at a different address if Maker gives Servicing Agent written notice of a different address. Any notice that must be given to Holder shall be given by mailing it by first class mail to Servicing Agent, at 55 E. Thomas Road, Phoenix, Arizona 85012, or at a different address if Servicing Agent has given Maker written notice of a different address.

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9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

Any person who is a guarantor, surety or indorser of this Note is also obligated to perform under the terms of this Note. Any subsequent person who takes over Maker's rights under this Note by whatever means, including the obligations of a guarantor, surety or indorser of this Note, is also bound by all of the promises and liabilities created by this Note and the other Loan Documents. Holder may enforce its rights under this Note against each Maker or successor, jointly and severally. This means that each signer may be required to pay all sums owed under this Note irrespective of the type, value or ownership of the property securing the Note.

10. WAIVERS

Maker, for itself and all endorsers, guarantors and sureties of this Note, and their heirs, personal representatives, successors, assigns, beneficiaries and trustees, hereby waives presentment for payment, demand, notice of nonpayment, notice of dishonor, protest of any dishonor, notice of protest and protest of this Note, and all other notices in connection with the delivery, acceptance, performance, default or enforcement of the payment of this Note, and agrees that their respective liability shall be unconditional and without regard to the liability of any other party and shall not be in any manner affected by any indulgence, extension of time, renewal, waiver or modification granted or consented to by Holder. Maker, for itself and all endorsers, guarantors and sureties of the Note, and their heirs, personal representatives, successors, assigns, beneficiaries and trustees, hereby consents to every extension of time, renewal, waiver or modification that may be granted by Holder with respect to the payment or other provisions of this Note, and to the release of any makers, endorsers, guarantors or sureties, and of any collateral given to secure the payment hereof, or any part hereof, with or without substitution, and agrees that additional makers, endorsers, guarantors or sureties may become parties hereto without notice to Maker or to any endorser, guarantor or surety and without affecting the liability of any of them.

11. SECURITY

This Note and the other Loan Documents, including, among others, the Deed of Trust, were executed by Maker and, if necessary, various other parties to protect Holder from possible losses which might result if Maker does not perform the obligations set forth in this Note. The Loan Documents describe how, and under what conditions, Maker may be required to make immediate payment in full of all sums Maker owes under this Note. Some of those conditions, but not all, are described as follows:

a. If Maker or another party, such as a third party trustor of the Deed of Trust securing this Note, sells, conveys, transfers, assigns, contracts for sale, leases with option to purchase or further encumbers the property securing the Note (the "Secured Property") or any part thereof, including, but not limited to, any further assignment of the Secured Property's income, wraparound mortgage or purchase contract;

b. If Maker is a limited liability company and any ownership interest in Maker is sold, conveyed or transferred;

c. If Maker is a partnership and any general partnership interest in Maker is sold, conveyed or transferred, either voluntarily or involuntarily without the prior written consent of Holder; **or**

d. If Maker is a corporation and the controlling interest in Maker is sold, conveyed or transferred.

Upon the occurrence of any of the above or any other triggering events set forth in the Loan Documents, Holder, at its option, shall have the right to accelerate the sums owing under the Note and those sums shall become immediately due and payable to Holder. This provision shall apply to each and every such sale, conveyance, transfer, lease, encumbrance or assignment, regardless as to whether Holder has consented or waived its rights in connection with any such previous sale, conveyance, transfer, lease, encumbrance or assignment by Maker.

12. TIME

Time is of the essence in all aspects of this Note and the Loan Documents.

13. GENERAL

a. This Note is binding on Maker and Maker's heirs, personal representatives, successors, permitted assigns, beneficiaries and trustees.

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b. This Note and the benefits hereunder are not assignable or transferable by Maker. However, Holder may assign its rights under this Note and the other Loan Documents without prior notice to Maker.

c. Maker acknowledges that Mortgages Ltd. is Holder's Servicing Agent.

d. This Note shall be governed by, construed and enforced in accordance with the laws of the State of Arizona, without regard to the choice of law rules of the State of Arizona. Maker hereby submits to the jurisdiction of any Arizona State or Federal Court sitting in the City of Phoenix in any action or proceeding arising out of or relating to this Note. Maker hereby waives the defense of an inconvenient forum.

e. Maker, and Holder by its acceptance of this Note, hereby waive their respective rights to a trial by jury in any action or proceeding based upon, or related to, the subject matter of this Note and the business relationship that it being established. This waiver is knowingly, intentionally, voluntarily and irrevocably made by Maker and by Holder and Maker acknowledges that neither Holder nor any person acting on behalf of Holder has made any representations of fact to include this waiver of trial by jury or has taken any actions which in any way modify or nullify its effect. Maker and Holder acknowledge that this waiver is a material inducement to enter into a business relationship, that Maker and holder have already relied on this waiver in entering into this Note and that each of them will continue to rely on this wavier in their related future dealings.

f. This Note, together with the other Loan Documents, sets forth the entire agreement and understanding between Maker and Holder, and supersedes all prior agreements, arrangements and understandings, written or oral, between Maker and Holder.

g. This Note may be amended, modified, superseded, canceled, renewed or extended and the terms or covenants hereof may be waived only by a written instrument executed by Maker, Holder. The failure of Servicing Agent, at any time or times, to require performance of any provision of this Note shall in no manner affect the right of the Holder or Servicing Agent at a later time to enforce the same. No waiver by Holder or Servicing Agent of the breach of any term or covenant contained in this Note, whether by conduct or otherwise, in any one or more instances, shall be deemed to be, or construed as, a further or continuing waiver by Holder or Servicing Agent of any such breach, or a waiver of the breach of any other term or covenant contained in this Note.

h. If any term or other provision of this Note or any other Loan Document is declared invalid, illegal or incapable of being enforced by any rule of law or public policy, all other conditions and provisions of this Note shall nevertheless remain in full force and effect.

i. Notwithstanding any provision contained in this Note or any of the other Loan Documents to the contrary, including, without limitation, Maker's right to obtain advances or disbursements under the Loan, Holder may, in Holder's sole and absolute discretion, exercise Holder's rights and enforce Holder's remedies under and pursuant to Title 33, Chapter 7, Article 9 of Arizona Revised Statutes (including, without limitation, A.R.S. Section 33-1058), without any liability to Maker and without releasing Maker from any of Maker's obligations, duties and liabilities under the Loan Documents.

j. As used in this Note, the word "include(s)" means "include(s), without limitation," and the word "including" means "including, without limitation."

SEE ATTACHED SIGNITURE PAGE

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PROMISSORY NOTE SIGNITURE PAGE

IN WITNESS WHEREOF, this Note has been executed as of the date set forth on the first page.

MAKER:

GP Properties Carefree Cave Creek, L.L.C., an Arizona limited liability company

By: Michael J. Peloquin
Its: Manager

STATE OF **AZ**)
)ss
COUNTY OF **MARICOPA**)

The foregoing instrument was acknowledged before me 19 day of July, 2007 by **Michael J. Peloquin of GP Properties Carefree Cave Creek, L.L.C., an Arizona limited liability company on behalf of the LLC**

Notary Public

My Commission Expires:

OFFICIAL SEAL
NECHELLE WIMMER
NOTARY PUBLIC-ARIZONA
MARICOPA COUNTY
My Comm. Expires Jan. 30, 2008

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07/12/2010

1 **2.49 Loan LLCs** means between 47 and 60 separate limited liability companies
2 to be organized pursuant to the Plan to hold each of the ML Loans pursuant to Article IV
3 of the Plan. Each limited liability company will be governed in accordance with a
4 separate operating agreement. The Manager for each Loan LLC shall be the ML Manager
5 LLC.

6 **2.50 ML Deeds of Trust** means the deeds of trust and other security documents
7 securing the ML Notes granted by third party Borrowers to the Debtor, which ML Deeds
8 of Trust will be transferred to the respective separate Loan LLCs pursuant to the Plan.

9 **2.51 ML Loan Documents** means all loan documents that evidence or secure the
10 ML Loans, including the ML Notes and ML Deeds of Trust, and all related
11 correspondence and other books and records regarding the ML Loans.

12 **2.52 ML Loans** means the loans evidenced by the ML Notes and ML Deeds of
13 Trust and ML Loan Documents which will be transferred to separate Loan LLCs pursuant
14 to the Plan or if the ML Deed of Trust has been foreclosed upon the real property and the
15 ML Loan Documents will be transferred to the Loan LLC.

16 **2.53 ML Manager LLC** means the new limited liability company to be
17 organized pursuant to the Plan which will be the non-economic Manager of each of the
18 Loan LLCs and the MP Funds. The ML Manager LLC will be governed in accordance
19 with an operating agreement. The Managers of the ML Manager LLC shall be the Board
20 of Managers pursuant to the Plan and the operating agreement

21 **2.54 ML Notes** means the promissory notes evidencing loans from the Debtor to
22 third-party Borrowers, which are secured by the ML Deeds of Trust and ML Loan
23 Documents and which will be transferred to separate Loan LLCs pursuant to the Plan.

24 **2.55 MP Funds** means MP122009 L.L.C., an Arizona limited liability company,
25 MP062011 L.L.C., an Arizona limited liability company, MP122030 L.L.C., an Arizona
26 limited liability company, Mortgages Ltd. Opportunity Fund MP12, L.L.C., an Arizona

limited liability company, Mortgages Ltd. Opportunity Fund MP13, L.L.C., an Arizona limited liability company, Mortgages Ltd. Opportunity Fund MP14, L.L.C., an Arizona limited liability company, Mortgages Ltd. Opportunity Fund MP15, L.L.C., an Arizona limited liability company, Mortgages Ltd. Opportunity Fund MP16, L.L.C., an Arizona limited liability company, and Mortgages Ltd. Opportunity Fund MP17, L.L.C., an Arizona limited liability company.

2.56 MP Funds Investors means the members of the MP Funds who have purchased and own membership interests in the respective MP Fund.

2.57 MP Funds Operating Agreements means all operating agreements and related contracts between Debtor and MP Funds.

2.58 Non-Loan Assets means and includes all assets that are not used to make those payments that are due on the Effective Date of the Plan, and that are not transferred to one of the ML Manager LLC or the Loan LLCs on the Effective Date of the Plan. Non-Loan Assets shall specifically include all of the Debtor's interest in real property; avoidance and third-party claims; Avoidance Actions and Causes of Action; tangible assets, including, without limitation, computers, intellectual property, furniture, fixtures and equipment; and employee and related business contracts and customer lists, excluding existing servicing rights or agency agreements, related to the ML Loans, and excluding the Debtor's rights, if any, to interest spread, fees, extension fees, default interest and other interest, fees and charges arising out of or related to the ML Loans or the servicing rights or agency agreements.

2.59 Objection Date means the date established by the Bankruptcy Court to file objections to confirmation of the Plan.

2.60 Order for Relief Date means June 24, 2008, the date on which the Chapter 11 Case was converted to a Chapter 11 case and the Order for Relief was entered.

1 satisfactory to the Debtor; or (d) if an appeal, writ of *certiorari*, or reargument or
2 rehearing has been sought, as to which the highest court to which such order was
3 appealed, or *certiorari*, reargument or rehearing has determined such appeal, writ of
4 *certiorari*, reargument, or rehearing, or has denied such appeal, writ of *certiorari*,
5 reargument, or rehearing, and the time to take any further appeal, petition for *certiorari*, or
6 move for reargument or rehearing has expired; *provided, however,* that the possibility that
7 a motion under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure, or any
8 analogous rule under the Bankruptcy Rules, may be filed with respect to such order does
9 not prevent such order from being a Final Order.

10 **2.37 General Unsecured Claim** means any Allowed Claim against the Debtor as
11 of the Petition Date not secured by a charge against or interest in property of the Estate,
12 and that is not: (a) an Administrative Expense Claim; (b) a Priority Tax Claim; (c) a
13 Priority Claim; or (d) a Claim for Professional Fees.

14 **2.38 Insider** shall have the meaning set forth in Section 101(31) of the
15 Bankruptcy Code.

16 **2.39 Investors Committee** means the Official Committee of Investors.

17 **2.40 Investors** means all Persons holding fractional or participating interests in
18 the ML Loans or in the MP Funds which hold fractional or participating interests in the
19 ML Loans, whether as a pass-through investor or an investor under the MP Funds,
20 excluding the Debtor.

21 **2.41 Investors Damages** means the amount of principal plus accrued unpaid
22 interest through the Order For Relief Date that the Investors do not receive from the Loan
23 LLC after the ML Notes are paid in full or after reasonable collection efforts are
24 exhausted by the Loan LLC.

25

26

EXHIBIT D