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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re

MORTGAGES LTD.,

Debtor.

Chapter 11

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

BRIEF OF MORTGAGES LIMITED 401(K) PLAN RE:

ROBERT G. FURST'S MOTION FOR ENTRY OF ORDER CONFIRMING THAT ALL INVESTORS IN THE GP PROPERTIES CAREFREE CAVE CREEK LOAN ORIGINATED BY THE MORTGAGES LTD 401K PLAN HAVE TERMINATED THEIR AGENCY AGREEMENTS WITH ML MANAGER

Hearing Date: September 8, 2010

Hearing Time: 1:30 p.m.

The Mortgages Limited 401(k) Plan ("401(k) Plan"), by and through its Trustees and undersigned counsel, hereby submits the following brief with respect to Robert G. Furst's Motion For Entry Of Order Confirming That All Investors In The GP Properties Carefree Cave Creek Loan Originated By The Mortgages Ltd. 401k Plan Have Terminated Their Agency Agreements With ML Manager.

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I. THE COURT SHOULD ABSTAIN FROM ANY RULING ON MR. FURST'S MOTION THAT WOULD IMPLICATE MATERIAL ERISA ISSUES.

The Trustees of the 401(k) Plan generally concur with Mr. Furst's arguments in support of his Motion, and support the granting of the relief he seeks. The Trustees believe that this relief can be granted without consideration of material ERISA issues for the reasons discussed in Section II below, and they urge the Court to do so.

The Trustees note, however, that in its August 16, 2010, Supplemental Brief, Dkt. 2877, ML Manager asserted far-ranging and allegedly irrevocable rights to control and use the assets of the 401(k) Plan. ML Manager's positions betray a profound misunderstanding of the Employee Retirement Income Security Act of 1974 ("ERISA"), and threaten serious violations of ERISA's fiduciary duty and prohibited transaction provisions.

In light of the gravity of these assertions by ML Manager, the Trustees have filed an action in District Court (the "Trustees' Action") seeking appropriate declaratory, injunctive and other equitable relief, and have filed a motion to withdraw the reference to this Court with respect to the controversies that are the subject of the Trustees' Action (Dkt. 2901). *See In re Kiefer*, 276 B.R. 196, (E.D. Mich. 2002) (withdrawal mandatory in action involving claims of ERISA fiduciary status and breach). A copy of the Complaint filed by the Trustees is attached as Exhibit A.

As the Supreme Court has often noted, ERISA regulates and protects employee pension benefits through a "comprehensive and reticulated" statutory scheme. *E.g., Mertens v. Hewitt Assocs.*, 508 U.S. 238, 251 (1993). Exclusive jurisdiction over most ERISA actions, including the Trustees' Action, is reposed in the District Courts. ERISA § 502(e), 29 U.S.C. § 1132(e). The adjudication of the Trustees' Action will implicate a number of ERISA's most critical provisions, including those governing fiduciary status (ERISA § 3(21), 29 U.S.C. § 1002(21)), fiduciary duties (ERISA § 404, 29 U.S.C. §

1104)), prohibited transactions (ERSIA § 406, 29 U.S.C. § 1106)), remedies (ERISA §§ 409, 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and 1132(a)(3)), and preemption (ERISA § 514, 29 U.S.C. § 1144)), and will require consideration not only of the statutory text, but of the associated regulations and other administrative guidance promulgated by the Department of Labor and the substantial body of case law interpreting the statute and regulations.

The Court has already ruled that it has "no jurisdiction over the Mortgages Ltd. 401(k) Plan." *Order dated September 23, 2009, Dkt. 2206*. The 401(k) Plan respectfully urges the Court to abstain from entering any ruling that would implicate material ERISA issues, as those issues should be adjudicated in the District Court.[1]

II. THE COURT MAY GRANT THE RELIEF SOUGHT BY MR. FURST WITHOUT IMPLICATION OF MATERIAL ERISA ISSUES.

The Court may grant the relief sought by Mr. Furst with respect to the 401(k) Plan without consideration of material ERISA issues for the following reasons:

- Any agency between the 401(k) Plan and ML Manager with respect to the GP Loan has terminated; and
- Under the terms of the Plan of Reorganization ("POR") and the Court's Confirmation Order, neither the 401(k) Plan's interest in the GP Loan nor the proceeds of that interest may be assessed for exit financing or other costs.

Before turning to these points in Sections B and C below, we must first rectify several serious factual misstatements and omissions made by ML Manager.

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[1] The 401(k) Plan's August 9, 2010 Motion (Dkt. 2871) regarding certain impound accounts may also be granted without consideration of ERISA issues for the reasons set forth in Section III A thereof. In light of the positions taken by ML Manager in its August 16, 2010, filing, the 401(k) Plan respectfully requests that the Court also abstain from any ruling on the 401(k) Plan's Motion that would implicate material ERISA considerations.

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A. ML MANAGER'S BRIEFS CONTAIN SERIOUS FACTUAL MISSTATEMENTS AND OMISSIONS CONCERNING THE 401(K) PLAN AND ITS ASSETS.

ML Manager's briefs filed in response to Mr. Furst's Motion contain several serious factual misstatements and omissions, as follows:

1. THE 401(K) PLAN NEVER ENTERED INTO AN AGENCY AGREEMENT PURSUANT TO THE POM.

ML Manager asserts that it is "undisputed" that "even the 401(k) Plan" had signed "Subscription Agreements and Agency Agreements with the Debtor issued under the POM." Not true. The 401(k) Plan never executed a Subscription Agreement and Agency Agreement under the POM. Declaration of James Cordello dated August 30, 2010, filed herewith ("*Cordello Decl.*"), ¶ 5. The only document ever executed by the 401(k) Plan pertaining to the POM is an account agreement attached as Exhibit 1 to the Cordello Decl., and it relates only to "loans originated or acquired by Mortgages Ltd. with respect to the Programs set forth below." *Cordello Decl.*, Ex. 1, at ¶ 1. The GP Loan was not "originated or acquired by Mortgages Ltd." with respect to any of the listed Programs. *Cordello Decl.*, ¶ 7. Indeed, the 401(k) Plan never invested in any of the listed Programs. *Id., ¶* 8. Thus, the 401(k) Plan never became a party to the Agency Agreement attached to the POM, whether with respect to the GP Loan or any other loan.

2. ALL DEFAULT INTEREST AND LATE CHARGES ON THE GP LOAN ARE THE PROPERTY OF THE 401(K) PLAN.

ML Manager argues at length, based upon the terms of the Agency Agreement attached to the POM, that default interest and late charges under the GP Loan are its property. But, as noted above, the 401(k) Plan is not party to that Agency Agreement. In

fact, the actual documentation governing the GP Loan make it clear that *all* default interest and late charges are the property of the 401(k) Plan.

The 401(k) Plan, Mortgages Ltd. and the borrower entered into a Servicing Agent Agreement with respect to the GP Loan, attached to the Cordello Decl. as Exhibit 2. The Servicing Agent Agreement provides (¶ 5(b)) that late fees are paid "for the account of Lender." The Lender, of course, is the 401(k) Plan. Moreover, the promissory note indorsements by which the 401(k) Plan transferred to Mortgages Ltd. and others undivided interests in the GP Loan, transfer only undivided interests in principal payments and interest at stated accrual rates (not exceeding the regular note rate of 12.25%, and reserve to the 401(k) Plan "any and all fees and other charges." Copies of these indorsements are attached to the Cordello Decl. as Exhibit 3.

While Mortgages Ltd. may have retained default interest and late fees in loans that did not involve the 401(k) Plan, it deliberately did not do so where a loan was made by the 401(k) Plan (as was the GP Loan), and then undivided interests in the loan were assigned by the 401(k) Plan. Mortgages Ltd had considered the effect of the prohibited transaction provisions of ERISA, and correctly concluded that if it were to retain *any* economic benefit on a loan made by the 401(k) Plan, it would have engaged in a prohibited transaction. *Cordello Decl.*, ¶ 11.[2]

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[2] ERISA § 406 prohibits transactions between plans and parties in interest and prohibits fiduciaries from dealing with plan assets for their own account. While the GP Loan was outstanding, by virtue of the control over 401(k) Plan assets (the interest in the GP Loan) conferred by the Servicing Agent Agreement, ML Manager was a fiduciary for the 401(k) Plan and a party in interest, and therefore subject to the

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3. ML MANAGER HAS AFFIRMATIVELY ACKNOWLEDGED THAT IT IS NOT THE AGENT OF THE 401(K) PLAN.

ML Manager asserts in its August 16 Brief (Dkt. 2877) at 6, that "on January 15, 2010, ML Manager, as the authorized agent for the 401(k) Plan and the GP Loan Investors, filed a lawsuit in Maricopa County Superior Court . . . ." But as the face of the Complaint (attached as Exhibit E to ML Manager's *own brief*) makes clear, ML Manager *did not* act as agent for the 401(k) Plan in filing this action. Rather, ML Manager acted as agent for the *other* investors, and the Trustees of the 401(k) Plan acted on behalf of the 401(k) Plan as co-Plaintiffs.

Further, ML Manager's COO, Mr. Winkelman, has specifically acknowledged that ML Manager is *not* the agent for the 401(k) Plan. In a letter dated November 3, 2009, attached as Exhibit 4 to the Cordello Decl., Mr. Winkelman stated:

> As confirmed by the bankruptcy judge's orders during the past two weeks, ML Manager, LLC is the agent for each of the individual investors and continues to act in this capacity. The Mortgages Ltd. 401(k) plan also owns a significant percentage of the property, *but ML Manager is not the agent for the 401(k) plan.* (emphasis added).

4. ML MANAGER HAD NO BENEFICIAL INTEREST UNDER THE DEED OF TRUST, NOR DOES IT HAVE ANY RIGHT TO PURSUE A DEFICIENCY. INDEED, ML MANAGER HAS NOT PURSUED A DEFICIENCY FOR ITS ACCOUNT.

ML Manager argues that it is entitled to proceeds from the trustee's sale of the GP Loan property, or at least an "equitable lien" thereon, that it had the right to "pursue the guarantors and borrower for a deficiency . . .in its own name," and that "that happened

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proscriptions of ERISA § 406 with respect to the 401(k) Plan to the same extent as was Mortgages Ltd.

1 where ML Manager is a party to the Deficiency Lawsuit." But, ML Manager had no right
2 to any proceeds of the trustee's sale (or any right to a lien thereon), because Mortgages
3 Ltd. *retained no beneficial interest under the Deed of Trust*. Even if ML Manager's
4 claims to default interest, etc., did not fail for the reasons described above, its rights would
5 at best have been unsecured because the *entire undivided beneficial interest under the*
6
7 *Deed of Trust assigned to Mortgages Ltd. was in turn assigned by Mortgages Ltd. to the*
8 *investors. Codello Decl.*, ¶ 15.
9
10 Moreover, ML Manager is *not* a party to the Deficiency Lawsuit "in its own name."
11 It brought the suit as agent for the investors named therein, and the Complaint does not
12 seek any relief for ML Manager "in its own name." Because the trustee's sale was over
13 ninety days ago, any deficiency action by ML Manager is now time barred. *Ariz. Rev.*
14 *Stat. § 33-814.*
15
16 **B. ANY AGENCY AGREEMENT BETWEEN THE 401(K) PLAN AND ML MANAGER WITH RESPECT TO THE GP LOAN HAS TERMINATED.**
17
18 As discussed above, contrary to ML Manager's Assertions, the 401(k) Plan was
19 never party to the Agency Agreement attached to the POM. Even if it had been party
20 thereto, the then-Trustee terminated the Agreement in 2009. *Codello Decl., ¶* 18. Because
21 ML Manager has no right to default interest, late charges or "interest spread," even if the
22 concept of irrevocable "agency coupled with any interest" could otherwise apply here
23 (which it cannot under ERISA as discussed in Section IV below), there would be no
24 interest coupled to the agency.
25
26 The 401(k) Plan entered into a Master Agency Agreement ("MSA") with
Mortgages Ltd. on December 23, 2004. *Cordello, Decl.*, ¶ 16 and Ex. 5. The 401(k) Plan,

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Mortgages Ltd. and the borrower entered into a Servicing Agent Agreement ("SAA") in connection with the GP Loan on July 18, 2007. *Cordello Decl.,* Ex. 2. The SAA stated that it set "forth the entire agreement and understanding of the Parties with respect to the subject matter" thereof. *Id.*, at ¶ 7e. Thus, the SAA superceded the MSA. The SAA terminated by its own terms when title to the GP Loan property became "vested in the Lender by trustee's sale." *Id.* at ¶ 3b.

C. UNDER THE PLAN OF REORGANIZATION AND THE COURT'S CONFIRMATION ORDER, THE ASSETS OF THE 401(K) PLAN MAY NOT BE ASSESSED FOR EXIT FINANCING OR OTHER COSTS NOR OTHERWISE USED BY ML MANAGER

1. NEITHER THE POR NOR THE COURT'S CONFIRMATION ORDER PERMITS THE ASSESSMENT OF 401(K) PLAN ASSETS FOR EXIT FINANCING OR OTHER COSTS.

ML Manager's argument that it may assess 401(k) Plan assets for exit financing and other costs, and, even more astonishing, that it may use those 401(k) Plan assets in their entirety to satisfy obligations of ML Manager and others, its contrary to the plain meaning of the terms of the Plan of Reorganization ("POR") and the Court's Confirmation Order.

Unlike "ML Loans" (as defined in the POR), the GP Loan was made by the 401(k) Plan, *not* by Mortgages Ltd. Under the POR (Dkt. 1532, Section 4.13) and the Confirmation Order (Dkt. 1755, Paragraph U, as clarified on October 21, 2009, Dkt. 2323), assessments for costs (including exit financing), may only be made against "Pass-Through Investors" who do not transfer "fractional interests into [a] Loan LLC." "Pass-Through Investors" are defined (POR Section 2.63) as holders of interests in "ML Loans," which are in turn defined (Section 2.52) as loans evidenced by ML Notes and ML Deeds

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of Trust. "ML Notes" are defined (Section 2.54) as noted "evidencing loans from the Debtor to third party Borrowers. "ML Deeds of Trust" are defined (Section 2.50) as deeds of trust "granted by third party Borrowers to the Debtor."

Because the GP Loan was made by the 401(k) Plan, under a note that names the 401(k) Plan as holder secured by a deed of trust that names the 401(k) Plan as beneficiary, the GP Loan is not an ML Loan, the 401(k) Plan is not a Pass-Through Investor with respect to the loan, and the 401(k) Plan's interest in the loan may not be assessed under the unequivocal terms of the POR.

ML Manager appears to acknowledge the operation of the terms of the POR, and tries to avoid the inevitable result by dismissing the distinction between loans made by Mortgages Ltd and those made by the 401(k) Plan as "based on nothing more than semantics." *ML Manager's Supp. Brief, Dkt. 2856,* at 7. Does ML Manager seriously believe that the plain meaning of the specific terms chosen by the OIC and its counsel (now ML Manager's counsel) when they drafted a complex, 58-page POR governing a multi-million dollar reorganization and submitted it to hundreds of affected parties for balloting and to the Court for confirmation, can simply be disregarded? Words matter.

And here they matter all the more because there is a clear reason why the POR was drafted the way it was and why it would be grossly inappropriate to treat loans made by the 401(k) Plan as if they were made by Mortgages Ltd. As the Disclosure Statement for the POR noted, a key controversy in this case concerned title to the over $730 million in Notes that were "sold by the Debtor to Investors" and "endorsed to the Investors in their fractional interests." *Dkt. 1471*, at 61. The POR resolved this controversy "in favor of the

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Investors." *Id.* at 62.

But this controversy had nothing whatever to do with the 401(k) Plan because its loans *were not* sold to it by Mortgages, Ltd. Unlike the other investors in "ML Loans," the 401(k) Plan was not faced with any challenge to its title to its loans, and therefore did not receive the benefit that "Pass-Through Investors" did of a resolution of such a challenge through the POR. There is simply no basis to assess the 401(k) Plan's interest in the GP Loan for exit financing or other costs under the terms of the POR or the Court's Confirmation Order.

2. NOR DOES ML MANAGER HAVE THE RIGHT UNDER THE POR OR OTHERWISE TO USE THE 401(K) PLAN'S ASSETS FOR ITS BENEFIT.

ML Manager is not satisfied to misread the POR to permit it to assess 401(k) Plan assets for exit financing and other costs, it baldly asserts (Dkt. 2877, at 10) that:

> ML Manager has the right to treat the proceeds of the foreclosure sale, the acquisition of the property, as a payment and allocate it to interest, which ML Manager has the right to use. Under the Plan, the GP Investors still hold the ownership right to the interest, but ML Manager has the right to use the proceeds. Once the property was disposed of, if ML Manager needed the money it could use the proceeds and account for it as an advance. Alternatively, ML Manager would, at that point, assess the GP Investors their share of the costs and expenses. In either event, ML Manager has a right to use the money.

This breathtaking attempt to seize the assets of the 401(k) Plan and divert them to ML Manager's benefit is based on a remarkably contorted and altogether wrong-headed reading of the applicable documents and law.

ML Manager's argument is based on three flawed premises: that it has rights in the "interest spread;" that it has rights to proceeds of the trustee's sale; and that the real property itself is the proceeds of the trustee's sale. We have already addressed that ML

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Manager had no interest under the deed of trust and therefore no rights to proceeds of the trustee's sale.

As to the "interest spread," *i.e.,* the difference between the accrual rate assigned by the 401(k) Plan to Mortgages Ltd. and the rate assigned by Mortgages Ltd. to investors, it must first be noted that no such spread has been collected on the GP Loan since ML Manager came into existence. More important, Mortgages Ltd. did not retain any interest spread on loans made by the 401(k) Plan because it recognized that doing so would constitute a prohibited transaction under ERISA. *Cordello Decl.,* ¶ 13. ML Manager is similarly constrained under ERISA.

But it is unnecessary to dwell on ML Manager's lack of rights under the deed of trust or to the "interest spread," because even if it had those rights, its argument would go nowhere. The "proceeds of the foreclosure sale" are not "the acquisition of the property," but rather the amount bid at the trustee's sale to acquire the property. *See Ariz. Rev. Stat. § 33-812* (providing for the trustee's application of the proceeds of sale).[3] Where, as here, those proceeds are a credit bid, the amount bid serves to limit the liability of the borrower and/or guarantors in a deficiency action. *Ariz. Rev. Stat.* § 33-814. The property itself is transferred to the successful bidder and is not the proceeds of the sale, whether the bid was cash or credit. *Ariz. Rev. Stat. § 33-811.*

ML Manager's argument that the GP Loan property, now owned by the 401(k) Plan

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[3] How proceeds are allocated among principal, interest, etc., on the secured debt is not addressed by the statute, but here is governed by the very promissory note language that ML Manager quotes at p. 9 of its brief: it is determined by the Holder (*i.e.,*the 401(k) Plan, at least with respect to its undivided interest in the GP Loan).

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and the investors identified in the Deficiency Action, is the proceeds of the trustee's sale is simply wrong, as is its argument that it could sell that real property and use the proceeds as it wishes.

III. CONSIDERATION OF MATERIAL ERISA ISSUES COMPELS THE REJECTION OF ML MANAGER'S CONTENTIONS.

For the reasons set forth above, it is unnecessary for the Court to reach the material ERISA issues presented by the positions taken by ML Manager in order to grant the relief sought by Mr. Furst. Nonetheless, if the Court were to consider those material ERISA issues, it would be compelled to reject categorically ML Manager's contentions.

A. THE IRREVOCABLE AGENCY RELATION SHIP URGED BY ML MANAGER IS PROHIBITED BY ERISA.

An irrevocable contract with a party in interest is prohibited under ERISA. If ML Manager were an agent of the 401(k) Plan as it claims, it would unquestionably be a "party in interest" under ERISA § 3(14), both because it would be a fiduciary and a service provider. Irrevocable contracts with parties in interest are specifically prohibited by ERISA regulation:

> No contract or arrangement is reasonable within the meaning of section 408(b)(2) of the Act and § 2550.408b–2(a)(2) if it does not permit termination by the plan without penalty to the plan on reasonably short notice under the circumstances to prevent the plan from becoming locked into an arrangement that has become disadvantageous.

29 C.F.R. § 2550.408b-2(c).

Even apart from the prohibited transaction provisions of ERISA, if state law were to interfere with the ability of an ERISA named fiduciary to manage plan assets, it would yield a result contrary to ERISA and therefore would be preempted.

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ERISA § 514 expressly preempts state laws "insofar as they may now or hereafter relate to any employee benefit plan," ERISA § 514, 29 U.S.C. § 1144. Whether a law "relates to" employee benefit plans is a "two-part inquiry: a law 'relates to' a covered employee benefit plan for purposes of § 514(a) 'if it [1] has a connection with or [2] reference to such a plan.'" *Cal. Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 324 (1997). The Supreme Court has also ruled that ERISA impliedly preempts other state laws that conflict with ERISA, e*.g.*, *Boggs v. Boggs*, 520 US 833 (1997) (state law in conflict with ERISA plan's beneficiary designation procedures preempted), and preempts state laws that infringe on areas of core ERISA concern. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001) (state statute purporting to dictate who was an ERISA beneficiary preempted because it implicated "an area of core ERISA concern.").

Courts have routinely held state laws that bind ERISA plans or plan fiduciaries regarding areas of core ERISA concern to be preempted. *Metropolitan Life Ins. Co. v Pettit*, 164 F.3d 857, 862 (4th Cir. 1998) (ERISA preempts state laws "that bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself"); *Stevenson v. Bank of New York Co., Inc.*, 609 F.3d 56, 61 (2d Cir. 2010) ("Because [the state law in question] neither interferes with the relationships among core ERISA entities nor tends to control or supersede their functions, it poses no danger of undermining the uniformity of the administration of benefits that is ERISA's key concern.").

The issue here, namely the ability of the named fiduciaries of a plan to terminate an

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agency relationship under which a third party asserts rights to control or use plan assets, plainly relates to an employee benefit plan and involves core ERISA concerns. A fundamental feature of ERISA is that plan assets are controlled by the named fiduciaries of a plan. While that control can be delegated in whole or in part, the delegation must be subject to the named fiduciaries on-going ability to terminate the delegation. Any state law that would interfere with this core function of a plan's named fiduciaries is preempted.

B. ERISA PROHIBITS ML MANAGER FROM ASSESSING 401(K) PLAN ASSETS FOR EXIT FINANCING OR OTHER COSTS AND FROM USING THOSE ASSETS FOR ML MANAGER'S BENEFIT.

If ML Manager holds the rights that it claims to assess 401(k) Plan assets and to use those assets, then it and its Board of Directors are ERISA fiduciaries.[4] As fiduciaries, ML Manager and its Board members would be subject to ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), which provides:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

The "exclusive purpose" rule of § 404(a)(1) imposes on fiduciaries the duty to act with

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"complete and undivided loyalty to the beneficiaries of the trust," and with an "eye single to the interests of the participants and beneficiaries." *Leigh v. Engle*, 772 F.2d 113, 123 (7th Cir. 1984) (citations omitted). Clearly the assessment of 401(k) Plan assets for exit financing owed by ML Manager and others, or the use of 401(k) Plan assets to benefit ML Manager or others, would contravene this exacting standard.

In addition, the assessment of costs against 401(k) Plan assets or the use of those assets by ML Manager would constitute a prohibited transaction under ERISA § 406. ERISA § 406, 29 U.S.C. § 1106, specifically prohibits, among other things, the lending of plan assets to a party in interest, and the transfer to or use by a party in interest of plan assets. Moreover, § 406 prohibits fiduciaries from dealing with plan assets for their own account or in their own interest. The prohibitions could not be clearer with respect to the actions ML Manager claims the right to take.

IV. CONCLUSION

For these reasons, the 401(k) Plan urges the Court to grant the relief requested by Mr. Furst for the reasons set forth in Section II above, or, alternatively, to abstain from ruling on Mr. Furst's Motion.

DATED this 30th _day of August, 2010.

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[4] Under ERISA "a person is a fiduciary with respect to a plan *to the extent* . . . he exercises *any* . . . authority or control respecting management or disposition of its assets . . . ." ERISA § 3(21), 29 U.S.C. § 1002(21).

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CERTIFICATION

I hereby certify that this Brief of Mortgages Ltd. 401(k) Plan was filed through the ECF system for the United States Bankruptcy Court in Arizona, and will be sent electronically to the registered participants on the Notice of Electronic Filing on August 30, 2010. Paper copies, if any, will be sent by first class mail to those indicated as non-registered participants on August 31, 2010.

By /s/ Karen L. Trumpower

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