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Attorneys for Mortgages Ltd. 401(k) Plan

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**  
**MORTGAGES LTD. 401(K)**  
**PLAN'S OBJECTION TO**  
**ML MANAGER'S MOTION**  
**TO CONTINUE**  
**DEADLINES**

Pursuant to the briefing schedule contained in the Court's Order dated July 15, 2010 (Dkt. 2834), the Mortgages Ltd. 401(k) Plan (the "401(k) Plan") filed a Motion for Order Directing Release of Funds (the "Motion to Release") on Monday, August 9, 2010. (Dkt. 2871). The Motion to Release sought an Order requiring the Liquidating Trust to turn over to the 401(k) Plan money held in certain impound accounts. In this Motion to Release, the 401(k) Plan set forth two independent bases for the relief: 1) that under the Plan of Reorganization ("POR") and the Confirmation Order, there is no basis for ML Manager's claimed right to assess the funds for exit financing or other expenses, and 2) that in any event, ML Manager's position was foreclosed by the fiduciary duty,

prohibited transaction and preemption provisions of ERISA. ML Manager's Response, if any, was due by September 7, 2010, pursuant to the July 15 scheduling order.

On August 16, 2010, ML Manager filed a brief (Dkt. 2877) in response to a motion by Mr. Robert Furst (Dkt. 2716), in which ML Manager asserted far-reaching rights not just to charge the 401(k) Plan for the expenses of the bankruptcy of its sponsor, but also to use the assets of the 401(k) Plan for its own benefit. As explained in a brief filed by the 401(k) Plan on August 30, 2010 (Dkt 2902), ML Manager's positions were in flagrant disregard of the obligations that would arise under ERISA if ML Manager's fundamental position – that it is an agent of the 401(k) Plan with extensive management right – is correct.

In light of ML Manager's positions, the 401(k) Plan filed a Complaint in District Court against ML Manager, regarding the ERISA issues implicated by ML Manager's claims over Plan assets, and seeking declaratory and injunctive relief pursuant to ERISA § 502(a)(3), *codified at* 29 U.S.C. § 1132(a)(3). The 401(k) Plan also filed a Motion to Partially Withdraw the Reference (Dkt. 2901).

As further explained in the 401(k) Plan's brief at Dkt. 2902, withdrawal of the reference is mandatory in light of the ERISA issues presented in the controversy between the 401(k) Plan and ML Manager. Nonetheless, pending a ruling on the Motion to Partially Withdraw the Reference, the Court may rule on the non-ERISA issues, namely whether the Plan of Reorganization and Confirmation Order permit ML Manager to assess exit financing and other costs against the assets of the 401(k) Plan. A ruling in the 401(k) Plan's favor on this point could well render moot the remaining issues in controversy between the 401(k) Plan and ML Manager.

Rather than file a brief in accordance with the schedule established by the Court, ML Manager has requested that all deadlines be continued "until it is clear as to what

venue it is most appropriate to decide these issues.” See ML Manager’s Motion to Continue All Deadlines Relating to the Issues Raised by Mortgages Ltd. 401(k) Plan (Dkt. 2926). The 401(k) Plan objects to such a continuation. Until the reference is withdrawn, the Court may go forward and hear the 401(k) Plan’s Motion to Release, although, for the reasons set forth in the 401(k) Plan’s Brief, Dkt. 2902, pages 2-3, the 401(k) Plan respectfully urges the Court to abstain from ruling on ERISA issues.

DATED this 17<sup>th</sup> day of September, 2010.

KELLER ROHRBACK, P.L.C.

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## **CERTIFICATION**

I hereby certify that this NOTICE OF APPEARANCE AND REQUEST FOR NOTICE 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 September 17, 2010. Paper copies, if any, will be sent by first class mail to those indicated as non-registered participants on September 17, 2010.

By /s/ Karen L. Trumpower\_\_\_\_\_