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12 **IN THE UNITED STATES BANKRUPTCY COURT**  
13 **FOR THE DISTRICT OF ARIZONA**

14 In re:  
15 MORTGAGES LTD.,  
16 Debtor.

In Proceedings Under Chapter 11

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

**JOINT PRETRIAL STATEMENT  
RELATING TO ML MANAGER'S  
ASSERTED SETOFF AGAINST  
PROCEEDS OF LOAN #7987S2**

Hearing Date: January 11, 2010  
Hearing Time: 1:30 p.m.

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20 This Joint Pretrial Statement is jointly submitted and filed by: (i) Morley Rosenfield as  
21 trustee of Morley Rosenfield, M.D. P.C. Restated Profit Sharing Plan ("Rosenfield"), and (ii)  
22 ML Manager LLC ("ML Manager"). This Statement pertains generally to Rosenfield's *Motion*  
23 *for Entry of an Order Compelling Turnover of Funds Being Improperly Withheld by ML*  
24 *Manager* (the "Rosenfield Motion") dated June 2, 2010 [DE #2771], the "Offset Claim" claim  
25 as asserted by ML Manager in, among other places, *ML Manager's (1) Notice of Lodging*  
26 *Allocation Model to Be Used with Regard to the Disbursement of the Proceeds to the Newman*  
27 *Loan Investors, (2) Notice that Allocation Model Has General Applicability to all Investors, and*  
28 *(3) Motion to Approve Allocation Model* dated September 1, 2010 [DE #2913] (the "Allocation

1 Motion”) and *ML Manager’s(1) Notice Of Intent To Distribute Proceeds In Accordance With*  
2 *Allocation Model, And(2) Motion To Approve Treatment Of Distribution Of Disputed Proceed*  
3 [DE #3017] (the “Distribution Motion”), and the Rev-Op Group’s Objection to the “Offset  
4 Claim” as asserted in its respective responses to the Allocation Motion and the Distribution  
5 Motion.

6 **I. NATURE OF THE ACTION.**

7 This action involves certain “charge backs” ML Manager asserts as a setoff against the  
8 proceeds of Loan #7987S2 (the “Newman Loan”) owing to Rosenfield.

9 **II. STATEMENT OF JURISDICTION.**

10 This contested matter involves interpretation of the Plan of Reorganization as confirmed  
11 in the Debtor’s case, and arises under Title 11 of the United States Code. *See* 28 U.S.C. § 1334,  
12 157.

13 **III. STATEMENT OF UNCONTESTED MATERIAL FACTS.**

14 The following facts are admitted by the parties and require no proof at the evidentiary  
15 hearing:

16 1. At various times prior to the commencement of this case, Mortgages Ltd., the  
17 debtor in the above-captioned bankruptcy case (“Debtor”), made loans to various investors (the  
18 “ML Loans”).

19 2. In or around April 2002, Debtor sold the Newman Loan at issue in this case to the  
20 following investors: (i) a 50.88% interest to Rosenfield; (ii) an approximate 14% interest to  
21 Crimmins Family Revocable Trust; and (iii) an approximate 35% interest to Frank Surdakowski  
22 or trust or entity controlled by Mr. Surdakowski.

23 3. On June 20, 2008, an involuntary Chapter 7 bankruptcy petition was filed against  
24 Debtor, which case this Court subsequently converted to a Chapter 11 bankruptcy case.

25 4. On March 12, 2009, the Official Investors Committee filed its *First Amended*  
26 *Plan of Reorganization Dated March 12, 2009* (the “Plan”) in Debtor’s bankruptcy case.

1           5.       On May 20, 2009, the Court entered its *Order Confirming Investors Committee's*  
2 *First Amended Plan of Reorganization Dated March 12, 2009*, thereby approving the plan as  
3 modified therein (the "Confirmation Order").

4           6.       No party appealed the Confirmation Order.

5           7.       Among other things, the Plan allowed for, but did not require the creation of so-  
6 called "Loan LLC's" to hold certain ownership interests related to the ML Loans. Further, the  
7 Plan provided that if a Loan LLC was created for a specific loan in the ML Loans, the so-called  
8 "pass through investors" in those loans had the option, pursuant to certain terms and conditions,  
9 to transfer their respective interests to the Loan LLCs.

10          8.       On June 11, 2009, Debtor executed an Assignment of Service and Agency  
11 Agreements which, as of its effective date of June 15, 2009, assigned and transferred to ML  
12 Manager all of Debtor's rights in, to, and under the Service and Agency Agreements, which were  
13 defined as "the existing Servicing Agent Agreements, Agency Agreements or other written  
14 agreements between (i) the Assignor, as servicer or agent for the holders of fractional interests in  
15 the ML Loans; (ii) the Assignor, the ML Borrowers and Mortgages Ltd. as lender, for the  
16 servicing of the ML Loans with the ML Borrowers."

17          9.       A Loan LLC was not created for the Newman Loan. As such, neither the  
18 Newman Loan nor any of its owners' respective interests in the Newman Loan were transferred  
19 to a Loan LLC. Rather, the Purchasers retained the Newman Loan and their respective interests  
20 in the Newman Loan.

21          10.      On September 1, 2009, Mr. Rosenfield and other investors filed an Emergency  
22 Motion for Clarification with the Court, seeking to clarify the Plan as it relates to, among other  
23 things, non-transferring investors' obligation to pay back the Exit Financing [DE #2168].

24          11.      On October 21, 2010, the Court issued a ruling on the Motion for Clarification  
25 ("the Clarification Order"). Specifically, the Court held:

26                   Issues 4 and 5 concern the right to charge a proportionate share of  
27 the exit financing and other liquidating fund expenses back against  
28 the Pass Through Investors who not opt in. The motion for  
clarification is granted, to the extent any clarification is needed.  
Paragraph U of the confirmation order permits the ML Manager to

1 charge back to the non-opt-in participating investors their  
2 proportionate share of all of its expenses, including but not limited  
3 to the exit financing. This Plan does impose a limitation that such  
4 charge back be fair, equitable and proportional, but within those  
5 limitations the ML Manager can exercise his business judgment  
6 whether to obtain financing to cover exit costs and operational  
7 expenses, and when to make the charge backs.

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12. Rosenfield and other members of the “Rev-Op Group” appealed this ruling. They also disputed and refused to acknowledge ML Manager’s authority to act as an agent for them under the Newman Loan and other of the ML Loans.

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13. ML Manager filed an adversary complaint against Rosenfield and other members of the Rev-Op Group seeking a declaratory judgment confirming its authority to act as agent for various investors, including Rosenfield; 10-ap-00430 (the “Declaratory Judgment Action”).

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14. Rosenfield and other members of the Rev-Op Group filed answers and counterclaims in the Declaratory Judgment Action asserting, among other things, that ML Manager did not have the authority to act as their agent.

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15. On July 28, 2010, in the Declaratory Judgment Action the Court entered a final Judgment in ML Manager’s favor [DE #105] confirming, among other things, ML Manager’s authority to act as agent of Rosenfield and other investors.

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16. As of March 16, 2010, the Newman Loan had matured, the borrowers thereunder had paid the Newman Loan in full, and ML Manager had received principal and other sums due under the Newman Loan in the amount of \$209,471.74.

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17. Rosenfield owned 50.88% of the Newman Loan, and asserts a claim to at least \$106,579.22 of the payment from the Newman Loan.

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18. Rosenfield filed the Turnover Motion on June 2, 2010. [DE #2771] The Turnover Motion requested an order directing ML Manager to turn over all proceeds of the Newman Loan.

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19. ML Manager’s Response to the Turnover Motion asserted, among other things, that pursuant to the Plan, the Confirmation Order and the Clarification Order, ML Manager was required to deduct from the distribution the amount of costs and expenses that should be allocated to the ML Loans including the Newman Loan.

1           20.     At hearing on June 30, 2010, this Court granted the Turnover Motion and ordered  
2 that the distribution of loan proceeds be “made by September 1, 2010 with an accounting of the  
3 charge back amounts and the methodology as to how the amounts were determined.” [DE  
4 #2802]

5           21.     The Court also set oral argument “on the charge back issue” for September 21,  
6 2010, and directed ML Manager to provide notice to similarly situated investors by September 1,  
7 2010.

8           22.     On September 1, 2010, ML Manager filed the Allocation Motion. The Allocation  
9 Motion asserted, among other things, the Offset Claim whereby ML Manager asserted the right  
10 to withhold or deduct from distributions to Rosenfield, the Rev-Op Group members, and others  
11 amounts of costs, expenses, attorneys’ fees and damages incurred as a result of litigation or  
12 actions taken by those particular investors.

13           23.     The Rev-Op Group and Rosenfield objected to the Allocation Model and asserted,  
14 among other things, that the Newman Loan was not subject to the Plan or the Confirmation  
15 Order. The Rev-Op Group and Rosenfield also objected to the Offset Claim.

16           24.     The Court overruled the Rev-Op Group’s Objection and approved the Allocation  
17 in principle at hearing on September 21, 2010. [DE #2964] The Court further set a hearing on  
18 the Offset Claim against the Newman Loan, which hearing was continued until January 11,  
19 2011.

20           25.     On September 29, 2010, the Court entered its *Amended Judgment for Fees* against  
21 various Rev Op Group investors, including Rosenfield, in the Declaratory Judgment Action.  
22 Pursuant to the fee award, ML Manager was granted \$81,545.45 in fees and \$7,818.81 in costs.  
23 The fee award is currently on appeal to the United States District Court for the District of  
24 Arizona.

25           26.     ML Manager contends that Rosenfield is jointly and severally liable with other  
26 Rev Op Group investors for various fees, expenses, and other damages, including all fees and  
27 costs awarded in the *Amended Judgment for Fees*.

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1 27. ML Manager has reached a settlement of the Offset Claim with four member of  
2 the Rev-Op Group, but continues to assert the Offset Claim against 13 members of the Rev-Op  
3 Group including Rosenfield. In the Distribution Motion, ML Manager seeks a Court Order  
4 authorizing ML Manager to deduct approximately \$310,000 from the distribution of the current  
5 Rev-Op Group members on a pro-rata basis based on first available cash.

6 28. Rosenfield contends that the Newman Loan proceeds should be disbursed without  
7 regard to the asserted setoff or alternatively that the setoff is not joint and several against  
8 Rosenfield, and that the amount of the asserted setoff is not reasonable, fair, and equitable.

9 **IV. STATEMENT OF CONTESTED FACTS**

10 A. Statement of Contested Facts Deemed Material by the Rev-Op Investors.

11 1. The Plan did not permit Debtor to transfer to ML Manager all of the necessary  
12 agreements necessary for the management of the ML Loans.

13 2. The Newman Loan was not intended to subject to any “chargebacks” or other  
14 setoffs under the Plan.

15 3. The plan proponent’s witness at the confirmation trial testified specifically  
16 regarding the Newman Loan and made clear that the intent was to allow the investors in such  
17 loan to arrange for servicing and “take back” the loan completely.

18 4. The asserted setoff is not reasonable, equitable, or consistent with ML Manager’s  
19 fiduciary duties.

20 B. Statement of Contested Facts Deemed Material by ML Manager.

21 1. As the Court is aware, there has been substantial litigation between ML Manager  
22 and the Rev-Op Group, including Rosenfield.

23 2. ML Manager has incurred substantial fees and costs as a result of this litigation.  
24 As of the end of October 2010, ML Manager had quantified the fees, costs and damages incurred  
25 as a result of the litigation with the Rev-Op Group at approximately \$336,000.

26 3. ML Manager asserts that the Offset Claim is not yet a liquidated amount because,  
27 among other reasons, the Rev-Op Group continues to engage in litigation and conduct that  
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1 damages ML Manager and the other investors. However, ML Manager has agreed that as to the  
2 distribution from the six Loans at issue in the Distribution Motion, which includes the Newman  
3 Loan, the amount of the Offset Claim shall be fixed at the pro-rata share of the approximate  
4 \$336,000 that has been incurred.

5 4. ML Manager reserves the right to assert additional amounts, once liquidated or  
6 established, against future distributions.

7 5. ML Manager has reached a settlement with four members of the Rev-Op Group  
8 where they agreed to pay their pro-rata share of the Offset Claim, or about \$26,000, from  
9 distributions they receive from the ML Loans, and to dismiss all further appeals and litigation.  
10 Accordingly, the Offset Claim has been reduced by this amount.

11 6. The Agency Agreement that this Court has ruled governs the relationship between  
12 ML Manager and the Rev-Op Group provides at paragraph 4(a):

13 Participant [Rev-Op Group member in this circumstance]  
14 shall indemnify, protect, defend and hold Agent [ML  
15 Manager] harmless for, from and against all liabilities  
16 incurred by Agent in performing under the terms of this  
17 Agreement or otherwise arising directly or indirectly, from  
18 any Loan or the Loan Documents, including all attorneys'  
19 fees, insurance premium, expenses, costs, damages and  
20 expenses.

21 7. At paragraph 5(d), the Agency Agreement further provides:

22 Breach. If Participant breaches this Agreement by failing  
23 to perform or by interfering with Agent's ability to perform  
24 under this Agreement, then Participant shall pay Agent,  
25 within 30 days of written notice of breach, administrative  
26 fees, attorneys' fees, costs, closeout fees and any other  
27 charges owed to Agent as compensation hereunder, along  
28 with any additional damages incurred by Agent, whether  
actual, incidental or consequential.

8. Without prejudice to the assertion of future amounts against future distributions,  
ML Manager requests that the Court Order authorize ML Manager to deduct approximately  
\$310,000 from the distributions of the current Rev-Op Group on a pro-rata basis based on first  
available cash. Attached as Exhibit 1 is a schedule showing the pro-rata deductions the ML  
Manager requests.

1 V. STATEMENT OF CONTESTED ISSUES THAT MUST BE TRIED AND  
2 DETERMINED AT THE EVIDENTIARY HEARING.<sup>1</sup>

3 A. Whether the Newman Loan is subject to the Plan.

4 1. Position of the Rev Op Investors. The Rev Op Investors dispute that the  
5 Newman Loan falls within any provisions of the Plan. The parties, including ML Manager,  
6 decided to leave the Newman Loan outside the plan and have the loan administered by a third-  
7 party servicer.

8 2. Position of ML Manager. ML Manager's position is that this issue has  
9 already been rejected by the Court when it overruled the Rev-Op Group's objections and  
10 approved the Allocation Model. Moreover, it is ML Manager's position that the Newman Loan  
11 is clearly part of the ML Loans. It should be undisputed that the Plan applies to the Newman  
12 Loan. The Newman Loan is clearly listed as one of the ML Loans in Exhibit B to the disclosure  
13 statement. All of the loans that Debtor managed became entangled in the Bankruptcy. The Plan  
14 resolved all of the issues relating to the ownership of the Loans and enabled the investors to  
15 move forward with these loans. Accordingly, it is ML Manager's position that, even though the  
16 Board decided against placing the Newman Loan into a separate Loan LLC, the Newman Loan  
17 still is subject to the Plan.

18 B. Whether the setoff can be asserted as a joint and several liability of Rosenfield.

19 1. Position of the Rev Op Investors. Even assuming the Newman Loan falls  
20 within the Plan (which Rosenfield disputes), the asserted setoff may not be asserted jointly and  
21 severally. Under ML Manager's interpretation of the Plan and Confirmation Order (which  
22 interpretation Rosenfield disputes), non-transferring pass-through investors may be charged only  
23 their "proportionate share of costs and expenses of serving [*sic.*] and collecting the ML Loans in  
24 a fair, equitable and nondiscriminatory manner." Joint and several liability is incompatible with  
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26 <sup>1</sup> The positions stated herein are for the purpose of facilitating the evidentiary hearing on this  
27 matter. There are several pending appeals on various orders relating to the Plan and ML  
28 Manager's authority. The parties reserve all rights with respect to all pending and any future  
appeals and other litigation.



1 ML Manager's obligations by its own interpretation of the Plan. Moreover, joint and several  
2 liability is incompatible with Arizona law.

3 2. Position of ML Manager. Although ML Manager believes that the  
4 obligation can be joint and several, ML Manager's position, as set forth in the Distribution  
5 Motion, is that the Offset Claim should be applied on a pro-rata basis from first available cash.  
6 Therefore, granting of the Distribution Motion makes this issue moot.

7 To the extent that the issue is not moot, Arizona law is clear. A party that jointly  
8 causes damage is jointly responsible to pay. The members of the Rev-Op Group acted jointly in  
9 increasing ML Manager's costs. Accordingly, the individual Rev-Op investors are jointly liable  
10 for the damages incurred by ML Manager resulting from their breach of contract. Arizona has  
11 only abrogated joint and several liability as it relates to torts. This is not a tort matter.  
12 Furthermore, nothing prevents Rosenfield from seeking contribution for his damages from the  
13 other members of the Rev-Op Group.

14 C. Whether the asserted setoff is reasonable, fair, and equitable.

15 1. Position of the Rev Op Investors. ML Manager seeks to surcharge *all* of  
16 Rosenfield's share of the Newman Loan proceeds, by asserting no less than approximately  
17 \$310,000 at the present time on a joint and several basis. Even if joint and several liability were  
18 proper (which Rosenfield disputes), ML Manager's asserted attorneys' fees are unreasonable and  
19 its asserted "damages" have not been caused by Rosenfield. ML Manager chose to sue  
20 Rosenfield and the other Rev Op Investors and even had an ill-gotten order to show cause  
21 quashed at the beginning of the litigation. Moreover, ML Manager is currently holding sufficient  
22 funds from the remaining Rev Op Investors from the proceeds of the Osborn III loan that it does  
23 not need to setoff any amounts jointly and severally against Rosenfield.

24 2. Position of ML Manager. As clearly set forth in the Distribution Motion,  
25 ML Manager is asking the Court to approve a pro-rata disposition of the Offset Claim.  
26 Therefore, the issue about joint and several allocations would be rendered moot by the approval  
27 of the Distribution Motion. As far as the reasonableness of the fees, costs and damages, they are  
28 the result of the Rev-Op Group's conduct, and essentially a matter of fairness. There is no

1 question that ML Manager has incurred these fees based solely on the arguments and litigious  
2 conduct of the Rev-Op Group. The Rev-Op Group, as demonstrated even in this Joint Statement,  
3 continue to bring up the same issues again and again. Moreover, they have opposed virtually  
4 every action taken by ML Manager. The Rev-Op Group has repeatedly hounded and harassed  
5 ML Manager in its attempts to implement the unappealed Plan. This conduct has greatly  
6 increased the costs to ML Manager to implement the Plan. ML Manager is only seeking  
7 reimbursement for those costs caused directly by the Rev-Op Group, of which Rosenfield is a  
8 member. Given the volume of work, the significance and importance of the issues, and the  
9 results, the amounts set forth by ML Manager are reasonable.

10 The issues raised by the Rev-Op Group go to the very heart of the Plan. The Rev-  
11 Op Group essentially asserted that they get a free ride. ML Manager had no option but to  
12 drastically oppose these positions as they are fundamentally counter to the core of the Plan,  
13 which was to equitably spread the costs to all investors, recover as much money as possible,  
14 minimize costs, and return as much money as possible to the investors. Given a few or small  
15 groups of investors substantial preferential treatment thwarts the entire intent of the Plan.

16 **VI. LIST OF WITNESSES.**

17 A. The Rev Op Investors will or may call the following witnesses at the evidentiary  
18 hearing:

- 19 1. Morley Rosenfield (by written declaration)
- 20 2. Tom Crimmins (by written declaration)
- 21 3. Rule 30(b)(6) witness of ML Manager
- 22 4. Any witness necessary to lay foundation for exhibits
- 23 5. Any witness listed by ML Manager

24 B. ML Manager will or may call the following witnesses at the evidentiary hearing:

- 25 1. Mark Winkelman
- 26 2. Robert Robinson
- 27 3. Brett Hopper or other Thomas Title Representative
- 28 4. Any witness necessary to lay foundation for exhibits

1 **VII. LIST OF EXHIBITS.**

2 The parties reserve any and all objections to the admissibility of exhibits and the grounds  
3 therefor. Subject to the foregoing, the following exhibits may or will be used at the evidentiary  
4 hearing:

5 A. By the Rev Op Investors:

- 6 1. All relevant filings
- 7 2. Canyon State Servicing Co. statements and documents
- 8 3. Confirmation hearing transcripts
- 9 4. Emails between C. Reece to T. Crimmins (Exh. A to Turnover Motion)
- 10 5. Correspondence between M. Rosenfield and ML Manager
- 11 6. Billing entries for ML Manager's asserted legal fees and/or other  
12 documents offered by ML Manager to support its setoff claim
- 13 7. Any documents subsequently revealed in deposition or discovery
- 14 8. Any documents designated by ML Manager
- 15 9. [Keith, we may be adding a few more specifics before finalizing]

16 B. By ML Manager:

- 17 1. The "Offset Claim" itemization.
- 18 2. Bryan Cave Fee Application for Substantial Contribution filed in the  
19 Debtor's case.
- 20 3. The appellate briefing in the pending appeals filed by the Rev-Op Group
- 21 4. The record on appeal in the above referenced appeals
- 22 5. Rev-Op Group's Opposition to ML Manager's Motion to Consolidate Oral  
23 Argument 10-cv-01819 [DE #29].
- 24 6. Any documents listed by the Rev-Op Group.

1 **VIII. TIME REQUIRED FOR TRIAL.**

2 The parties estimate that the time required for trial shall be no more than two hours.<sup>2</sup>

3 **IX. CERTIFICATIONS OF THE PARTIES.**

4 The parties hereby certify that all listed exhibits will be made available to all other parties  
5 prior to trial.

6 DATED this 5<sup>th</sup> day of January 2011.

7 BRYAN CAVE LLP

8  
9 By /s/ BAS, #022721

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15 Restated Profit Sharing Plan

16 FENNEMORE CRAIG, P.C.

17 By /s/ BAS for Keith Hendricks w/permission

18 Cathy L. Reece

19 Keith L. Hendricks

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21 Phoenix, Arizona 85012-2913

22 Counsel for ML Manager LLC

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26 <sup>2</sup> The Rev Op Investors submit that if ML Manager seeks to have its asserted setoff  
27 established at trial, it will require considerably more than two hours to conduct a proper and fair  
28 hearing.