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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

In re:  
MORTGAGES, LTD.,  
Debtor.

Chapter 11

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

**SUPPLEMENT TO MOTION FOR  
APPROVAL OF SETTLEMENT  
BETWEEN ML MANAGER AND  
JEFFREY C. STONE, INC., DBA  
SUMMIT BUILDERS (PROCEEDS  
FROM SALE OF OSBORN III/TEN  
LOFTS)**

Hearing Date: May 31, 2011

Hearing Time: 11:00 a.m.

Location: Ctrm 603  
230 N. First Avenue  
Phoenix, AZ

ML Manager, LLC, as the manager for Osborn III Loan, LLC (“Osborn III”), and the agent for 31 Pass-Through Investors (“ML Manager”), by and through undersigned counsel, hereby files this supplement to its *Motion for Approval of Settlement Between ML Manager and Jeffrey C. Stone, Inc., dba Summit Builders (Proceeds from Sale of Osborn III/Ten Lofts)* (the “Settlement Motion”) [DE 3218].

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

In the Settlement Motion, ML Manager asserted that Fidelity National Title Insurance Company, successor-by-merger to Lawyers Title Insurance Corporation (“Fidelity”) had terminated its defense of ML Manager in the underlying state court litigation regarding competing claims to the Escrowed Sale Proceeds.<sup>1</sup> This assertion was based upon the contents of a letter from Fidelity dated March 21, 2001, which was attached as Exhibit “C” to the Settlement Motion (the “March 21 Letter”). In the March 21 Letter, Fidelity states, among other things:

Consequently, regardless of whether or not the ML Parties were ever insureds under the policies, they certainly are no longer insured under the above-referenced policies, and are therefore not entitled to further protection under the terms of the policies . . . .

. . .

Consequently, the Company does not believe it has an obligation to provide for the continued defense of the ML Parties under the above-referenced Policy.<sup>2</sup>

Understandably, ML Manager interpreted this letter as a notice that Fidelity was terminating the defense of the underlying lawsuit.

ML Manager provided Fidelity with a copy of the Settlement Motion and related Notice of Hearing [DE 3219]. On May 26, 2011, Fidelity sent another letter to ML Manager regarding this matter (the “May 26 Letter”). In the May 26 Letter, Fidelity asserts that any statements in the Settlement Motion to the effect that Fidelity has terminated the defense of the underlying action “are not true.”<sup>3</sup> Fidelity asserts further that, to the contrary, it is continuing to defend the lien action.<sup>4</sup> ML Manager is informed and believes that the underlying litigation in the lien action has essentially been on hold since the parties notified

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<sup>1</sup> See, e.g., Settlement Motion, fn1, and p. 6.

<sup>2</sup> March 21 Letter, at p. 3.

<sup>3</sup> May 26 Letter, at p. 2.

<sup>4</sup> *Id.*

the Court on the eve of the hearings on their respective cross-motions for summary judgment that a settlement had been reached. Nonetheless, accepting the statements in the May 26 Letter as true for purposes of this matter, Fidelity's change or clarification of its position has no impact on the relief requested in the Settlement Motion. Fidelity has merely supplanted the termination of its defense with the imminent threat of termination, hanging like the Sword of Damocles over ML Manager's head.<sup>5</sup> The underlying bases for, and both the underlying legitimacy and reasonableness of the settlement, have not changed. ML Manager faces a significant risk that Summit will prevail in the litigation, while Fidelity has refused to acknowledge its liability under the Title Policy for these claims, and now contends that it no longer has any obligation to defend ML Manager in that litigation. Nonetheless, so that the record is clear, ML Manager has filed this supplement in order to bring to the attention of all parties and the Court the contents of the May 26 Letter.

WHEREFORE, ML Manager respectfully requests the Court to grant the Settlement Motion, together with such other and further relief as the Court may deem just and proper.

DATED: May 27, 2011

**PERKINS COIE LLC**

By: /s/ Richard M. Lorenzen (# 006787)

Richard M. Lorenzen  
2901 N. Central Avenue, Suite 2000  
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*Attorneys for ML Manager, LLC*

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<sup>5</sup> "Does not Dionysius seem to have made it sufficiently clear that there can be nothing happy for the person over whom some fear always looms?" Cicero, *Tusculan Disputations* 5.1.

ORIGINAL e-filed with the Court and  
COPY sent via e-mail or First Class Mail  
on May 27, 2011, to:

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*Counsel for Fidelity National Title Insurance Company*

The 30 Non-Transferring Pass-Through Investors on the attached OSBORN III SERVICE LIST via e-mail.

The Non-Transferring Pass-Through Investor without an e-mail address on the attached OSBORN III SERVICE LIST via First Class Mail.

The MECHANICS' LIEN HOLDERS with email addresses as follows:

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All parties on the ECF SERVICE LIST in this case.

/s/ Kathryn Hardy \_\_\_\_\_

LEGAL20985101.1

# Exhibit “A”

JONATHAN S. BATCHELOR  
TODD A. BAXTER  
NICOLE FELKER BERGSTROM  
GARY L. BIRNBAUM  
FREDDA J. BISMAN  
JAMES T. BRASELTON  
DAVID G. BRAY  
ROBERT C. BROWN  
DAVID V. BURKETT  
J. GREGORY CAHILL  
SPENCER W. CASHDAN  
JASON B. CASTLE  
SCOT L. CLAUS  
D. SAMUEL COFFMAN  
ROBIN L. DE RESPINO  
DONALD E. DYKMAN  
FRED C. FATHE  
GLENN M. FELDMAN  
DAVID N. FERRUCCI  
ERIN R. FORD  
RICHARD A. FRIEDLANDER  
JERRY GAFFANEY  
KOLBY W. GRANVILLE  
KENNETH A. HODSON  
SCOTT A. HOLCOMB  
DAVID L. LANSKY  
DANA M. LEVY  
CLIFFORD L. MATTICE

WILLIAM NOVOTNY  
CHARLES H. OLDHAM  
DAVID J. OUMETTE  
JEFF C. PADDEN  
JAMES H. PATTERSON  
MICHAEL J. PLATI  
MARLENE A. PONTRELLI  
CHARLES S. PRICE  
ANDREW L. PRINGLE  
LES RAATZ  
LEONCE A. RICHARD III  
STEPHEN E. RICHMAN  
JAMES S. RIGBERG  
MICHAEL S. RUBIN  
PAUL RUDERMAN  
BARRY R. SANDERS  
TRICIA SCHAFER  
MICHAEL R. SCHEURICH  
ROBERT L. SCHWARTZ  
ROBERT A. SHULL  
GARY J. SOSINSKY  
TIMOTHY J. THOMASON  
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RUSSELL PICCOLI

(OF COUNSEL)

PHILLIP WEEKS (1936-1998)  
DONALD N. MCINTYRE (1932-1998)

May 26, 2011

Mr. Richard M. Lorenzen  
Perkins Cole  
2901 N. Central Avenue, Suite 2000  
Phoenix, Arizona 85012

**Re: Policy: H23-Z025296 (the "Policy")**  
**Insured: Mortgages, Ltd.**  
**Claim No.: 330613**  
**Property: Ten Lofts Project, Scottsdale, AZ (the "Project")**

Dear Rich:

I acknowledge receipt of your letter of May 20, 2011. As I stated in my letter of March 8, Fidelity had not previously been provided any details of the settlement, which appears to have been in process since at least January. Notably, you waited until May 20 to provide the details of the settlement to Fidelity and then did so via the belated transmission of a Motion that you filed in the bankruptcy court on May 16 on shortened time (about which you also provided no notice to Fidelity).

Fidelity has complied with all of its obligations under its pertinent policy. It has defended the lien action. It appropriately reserved rights.

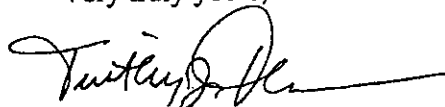
Mr. Richard M. Lorenzen  
May 26, 2011  
Page 2

Contrary to the allegations set forth in the Motion, Fidelity continues to defend the lien action. Fidelity continues to receive billings from, and to pay, Gust Rosenfeld, Mortgages Ltd.'s counsel. Although, as set forth in Mr. Duvall's letter, Fidelity does not believe it has the obligation to continue providing that defense, it is in fact continuing to defend the lien action. The statements to the contrary in the Motion are not true. Mr. Duvall's letter did specifically request information from its purported insureds indicating why, despite the language in the policy, said purported insureds believe that any coverage afforded by the policy continued after the insured land was transferred. Fidelity has not received a response to that request.

Fidelity has not approved this settlement. Therefore, pursuant to Paragraph 8(c) of the policy, Fidelity is not liable for any sums paid pursuant to this settlement.

The preceding is not intended as a comprehensive response. As such, Fidelity expressly reserves all its rights at law and equity.

Very truly yours,



Timothy J. Thomason  
For the Firm

TJT/cl

cc: Homer Duvall



**OSBORNE III SERVICE LIST**

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