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

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CLERK *ML*
U.S. BANKRUPTCY
DISTRICT OF ARIZONA

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

In re:)	In Proceedings Under Chapter 11
)	
MORTGAGES LTD.,)	Case No. 2:08-bk-07465-RJH
)	
an Arizona corporation,)	ROBERT FURST'S RESPONSE TO
)	MOTION TO APPROVE
)	SETTLEMENT WITH
)	MORTGAGES LTD 401K PLAN
)	
Debtor.)	Hearing Date: December 11, 2012
)	Hearing Time: 11:00 a.m.
)	
)	
)	
)	

Robert G. Furst hereby files his Response to Motion to Approve Settlement with Mortgages Ltd. 401(k) Plan. From the perspective of the ML investors, the Motion should be approved because the settlement provides a "windfall" to the ML investors, not a compromise of its claims.

Cathy Reece of Fennemore Craig drafted the Confirmed Plan in her role as legal counsel for the Official Investors Committee (the "OIC"). In her role as legal counsel for the OIC (and as the drafter of the Confirmed Plan), Cathy Reece expressly stated to the Plan Trustee immediately prior to the confirmation hearing that the 401(k) Plan would not be subject to the Confirmed Plan. Cathy Reece also told Robert Furst, a plan participant, that the 40(k) Plan would not be responsible for exit

1 financing costs because it did not own "ML Loans," as defined in the Confirmed Plan, and she told
2 the ML investors who attended live presentations explaining the Confirmed Plan that the 401(k) Plan
3 would not be subject to the Confirmed Plan. Nor would ERISA allow the 401(k) Plan to be assessed
4 to pay the debts and expenses of its corporate sponsor, Mortgages Ltd.
5

6 Moreover, when Cathy Reece became ML Manager's legal counsel after the plan
7 confirmation, she initially maintained the same position she articulated to the Plan Trustee
8 immediately before confirmation --- the 401(k) Plan "could go their own way" outside the
9 Confirmed Plan. Nearly one year after plan confirmation, everything dramatically changed. In early
10 2010, when ML Manager was rapidly running out of money, Cathy Reece decided to target the
11 401(k) Plan as a new source of necessary funds. She abruptly changed her mind about the
12 inapplicability of the Confirmed Plan to the 401(k) Plan and asserted for the first time that, under the
13 Confirmed Plan, (1) ML Manager was the agent for the 401(k) Plan with full control over the Plan's
14 assets, and (2) the 401(k) Plan Loans were subject to assessment for exit financing costs. This 180°
15 shift in position was truly breathtaking, particularly as it was advanced by the very lawyer who
16 secured confirmation of a plan of reorganization through assurances to the contrary. When asked to
17 reconcile her statements during the confirmation process with her current position, Cathy Reece
18 asserted that her prior written statements to the Plan Trustee, while soliciting his support
19 immediately prior to the confirmation hearing, were, in *her* words, "irrelevant."
20
21
22
23

24 Assuming that Cathy Reece was acting in good faith as OIC's legal counsel during the
25 confirmation proceedings, it is impossible to view her current position as anything other than an
26 attempt to shift ML Manager's financial predicament in large part to the 401(k) Plan. The Plan
27 Trustees vigorously disputed her about-face and ultimately commenced litigation seeking
28

1 declaratory relief on these matters. In the opinion of the undersigned, Cathy Reece's actions
2 constitute a fraud on the 401(k) Plan and a fraud on the undersigned, who repeatedly received
3 assurances from Cathy Reece, both pre-confirmation and post-confirmation, that the 401(k) Plan
4 was, of course, not subject to the Confirmed Plan. The ML investors should embrace this settlement
5 recovery from the 401(k) Plan as "found," but undeserved, money.
6

7 To shine the spotlight on Cathy Reece's actions in this matter, the undersigned submits the
8 following bullet points:
9

10 **A. Cathy Reece's E-Mail to the Plan Trustee Immediately Prior to Plan Confirmation:
11 The 401(k) Plan Can "Go Their Own Way" Outside the Confirmed Plan.**

12 During the bankruptcy proceedings, Cathy Reece repeatedly stated that the 401(k) Plan
13 would not subject to the OIC's proposed plan of reorganization (which became the Confirmed Plan),
14 just like the 401(k) Plan was not subject to the competing plan submitted by the Debtor. In May,
15 2009, immediately prior to the confirmation hearing, Chris Olson, the Plan Trustee, contacted Cathy
16 Reece once again for assurances that the 401(k) Plan was outside the Confirmed Plan. Cathy Reece
17 responded affirmatively, as follows (*see* Exhibit A):
18

19 Chris—
20

21 I have not been able to reach you yet so **let me walk through**
22 **the loans**. You sent me the names of 6 and then I saw 2 others. You
23 are correct that the OIC Plan is not asking the 401k plan to transfer its
24 ownership interests into any Loan LLC. We understand your
25 constraints.

26 As I understand it, **there are 3 loans where the 401k plan is**
27 **the only owner of the note--Downtown Community, CDIG and**
28 **ECCO. Clearly these three loans can go their own way with no**
management or service involving the OIC Plan. One loan has only
1 investor with the 401k plan-- 43rd Ave and Olney. One loan has
3 other investors with the 401k plan and the land has been

1 **foreclosed on--Hurst. I assume the investors in these two loans will**
2 **agree with you that these loans will go their own way with no**
3 **management or service involving the OIC Plan.**

4 **The other three loans have some MP funds and investors--**
5 Bisontown has 9 other investors including 1 MP Fund, Vanderbilt has
6 31 other investors including 5 MP Funds and GP Carefree has 20 other
7 investors and no MP Funds. What I wanted to discuss was what to do
8 with the non-401k plan ownership of those 3 loans. **I would think that**
9 **the non-401k fractional interests could go into the Loan LLC for**
10 **that loan. Then the 401k Plan would be joint owner with the Loan**
11 **LLC of the loan in their respective percentage.** The Loan LLC will
12 be managed by the Board which includes Bruce Buckley, Elliott
13 Pollack, Scott Summers, Radical Bunny trustee and a soon to be
14 named Rev Op person. It should make it much easier to administer the
15 loan. You then have only one party to deal with, not a large number of
16 individual investors who might disagree with each other. **Then the**
17 **401k Plan and the Loan LLC could decide where to have the loan**
18 **serviced and what to do to collect or workout the loan.** Is that what
19 you had in mind for these 3 loans? This is what I thought we discussed.
20 But let me know what you think. (Emphasis added).

21 When later confronted with this e-mail, Cathy Reece, in her subsequent capacity as
22 ML Manager's counsel, stated that her statements to the Plan Trustee were "legally irrelevant" and
23 not binding on ML Manager. She stated:

24 [The investor] attaches an email from Cathy Reece that was
25 written before ML Manager was even formed. The fact that
26 Fennemore Craig represented the Official Investors Committee
27 and later represented ML Manager does not make the two
28 separate entities fungible. They are not . . . [I]t is legally
 irrelevant . . .

 Thus, according to Cathy Reece, the prior statements made by the drafter of the Confirmed
Plan --- Cathy Reece --- about the intended meaning of the Confirmed Plan were "legally irrelevant,"
rather than dispositive of the drafter's intent.

1 **B. Mark Winkleman's Letter to Investors: ML Manager is Not the Agent for the**
2 **401(k) Plan**

3 After the confirmation hearing, a group of investors filed a motion seeking clarification of the
4 Confirmed Plan on the issues of (1) whether the pass-through investors, who did not transfer their
5 fractional interests into a Loan LLC, could be charged with a portion of the exit financing costs, and
6 (2) whether these pass-through investors were bound by their agency agreements. On October 21,
7 2009, the Court issued a Memorandum Decision, as follows:
8

9 **Paragraph U of the confirmation order permits the ML Manager**
10 **to charge back to the non-opt in participating investors their**
11 **proportionate share of all of its expenses, including but not limited**
12 **to the exit financing.** This Plan does impose a limitation that such
13 charge back be fair, equitable and proportional, but within those
14 limitations the ML Manager can exercise his business judgment
15 whether to obtain financing to cover exit costs and operational
16 expenses, and when to make the charge backs . . . **The ML Manager**
17 **does have authority to deal with the loans and the collateral**
18 **securing the loans to the extent provided by the governing**
19 **documents including but not limited to the applicable subscription**
20 **agreements and agency agreements.** (Emphasis added).

21 This ruling made it clear that (1) all "pass-through investors" were responsible for their share
22 of the pre-emergence and post-emergence expenses of the Debtor, and (2) ML Manager was their
23 agent pursuant to the applicable agency agreements.

24 However, Mark Winkleman, COO of ML Manager, soon made it crystal clear that this ruling
25 did not extend to the 401(k) Plan. On November 2, 2009, less than two weeks after the
26 Memorandum Decision, Mr. Winkleman sent a letter (*see* Exhibit B) to all co-owners of the GP
27 Properties loan, which was a 401(k) Plan Loan, in which he stated:

28 **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

1 Mortgages Ltd. 401(k) plan also owns a significant percentage of the
2 property, but **ML Manager is not the agent for the 401(k) plan.**
(Emphasis added).

3 **C. Kevin O'Halloran, ML Liquidating Trustee: Cathy Reece Told Him ML Manager**
4 **Would Not Control 401(k) Plan Loans**

5 Shortly after the confirmation hearings, the ML Liquidating Trust, which controlled the
6 reorganized Debtor, delivered to the Plan Trustee the loan documents for the 401(k) Plan Loans
7 which were 100% owned by the Plan. Kevin O'Halloran, the initial ML Liquidating Trustee, spoke
8 to Cathy Reece about the management of these Plan Loans under the OIC Plan, and she told him that
9 the 401(k) Plan would control these loans, not ML Manager.
10

11
12 The undersigned conducted a 2004 examination of Kevin O'Halloran, and the relevant
13 portion of Mr. O'Halloran's 2004 examination is attached hereto as Exhibit C. In his examination,
14 Mr. O'Halloran stated that, in his conversations with Cathy Reece and Mark Winkleman
15 immediately after confirmation, it was made clear to him that ML Manager would not be involved
16 with the 401(k) Plan Loans:
17

18 In the late summer, probably of 2009, **the issue of the 401(k)** was
19 a discussion item because of the fact that ML Servicing, its
20 predecessor entity, and Mortgages Ltd., had been -- I don't
21 remember all of its positions, but had, I believe, been the plan
22 sponsor and possibly had other roles under the ERISA laws for
23 the 401(k) plan. **So I was interested in knowing who was**
24 **responsible for those properties and whether the ML**
25 **managers had any interest in them and were going to be**
26 **taking them under their area of responsibility. And I was**
27 **specifically told by Mr. Winkleman and Ms. Reece that they**
28 **were not part of anything that they were doing.** (Emphasis
added).

(2004 Examination Transcript, page 36, lines 6 through 19)

1 Moreover, when Kevin O'Halloran was shown Mark Winkleman's letter referenced
2 above (*see* Section B above), he was able to corroborate Mark Winkleman's statement that
3 ML Manager was not the agent for the 401(k) Plan:
4

5 Q. Have you ever seen this letter before?

6 A. I probably have. I don't recall seeing it, but I probably have
7 because I got a copy of all of these communications that went out.

8 Q. I would like to read the first two sentences of the second
9 paragraph. It says, "As confirmed by the bankruptcy judge's
10 orders during the past two weeks, and ML Manager, LLC, the
11 agent for each of the individual investors and continues to act in
12 this capacity, the Mortgages Ltd., 401(k) plan also owns a
13 significant percentage of the property. **The ML Manager is not
14 the agent for the 401(k) plan.**" My question for you, Mr.
15 O'Halloran, is: Is that consistent with Cathy Reece's and
16 Mark Winkleman's statement to you, the ML Manager was
17 not the agent for the 401(k) plan?

18 A. That is definitely the case, yes.

19 (2004 Examination Transcript, page 43, lines 7 through 23

20 **D. Two OIC Members --- Honeylou Reznik and Robert Facciola --- Testified that It
21 Was Their Understanding That the 401(k) Plan Was Not Responsible for Exit
22 Financing Costs.**

23 Importantly, two of the five members of the OIC (the plan proponent for the Confirmed Plan)
24 --- Robert Facciola and Honeylou Reznik¹ --- have signed affidavits under oath that it was their
25 understanding that (1) ML Manager would not be the agent for the 401(k) Plan, and (2) the 401(k)
26 Plan would not be responsible for any portion of the exit financing costs. The affidavits are attached
27 hereto as Exhibits D and E.

28 ¹ Honeylou Reznik and Robert Facciola were the lead plaintiffs in the Mortgages Ltd.
investors class action lawsuit against Greenberg Traurig and Quarles & Brady.

1 Specifically, Honeylou Reznik stated in her affidavit under oath the following:

2 9. Cathy Reece's e-mail [to Chris Olson] is consistent with my
3 understanding of the meaning and intent of the Confirmed Plan, which
4 is that (a) the Trustees of the 401(k) Plan (not ML Manager) would
5 continue to control all of their plan assets, outside of the Plan, and (b)
6 the 401(k) Plan would not be impacted by the Confirmed Plan in any
7 way, including any liability for pre-emergence and post-emergence
8 expenses (which were also known as exit financing costs) . . .

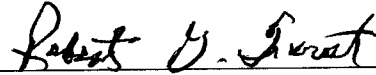
9 11. Mr. Winkleman's letter . . . is consistent with my understanding
10 of the meaning and intent of the Confirmed Plan, which is that ML
11 Manager would not be the agent for the 401(k) Plan.

12 Mr. Facciola's affidavit expressed the same understanding, with somewhat different
13 wording.

14 **Conclusion**

15 In conclusion, the undersigned requests that the Court approve the settlement with the
16 Mortgages Ltd. 401(k) Plan because, as stated above, it is a "windfall" to the ML investors. In future
17 proceedings, however, the Court should be mindful of the actions of Cathy Reece in relation to the
18 401(k) Plan and should hold her appropriately accountable.²

19 DATED: December 7, 2012

20
21 
22 _____
23 Robert G. Furst

24
25
26
27
28 ² Robert Furst expressly does not waive any rights that he may have against Cathy Reece.

EXHIBIT A

>> Chris--
>> I have not been able to reach you yet so let me walk through
the
>> loans. You sent me the names of 6 and then I saw 2 others. You are
>> correct that the OIC Plan is not asking the 401k plan to transfer its
>> ownership interests into any Loan LLC. We understand your
constraints.
>> As I understand it, there are 3 loans where the 401k plan is
the
>> only owner of the note-- Downtown Community, CDIG and ECCO. Clearly
>> these three loans can go their own way with no management or service
>> involving the OIC Plan. One loan has only 1 investor with the 401k
>> plan-- 43rd Ave and Olney. One loan has 3 other investors with the
401k
>> plan and the land has been foreclosed on--Hurst. I assume the
investors
>> in these two loans will agree with you that these loans will go their
>> own way with no management or service involving the OIC Plan.
>> The other three loans have some MP funds and investors--
>> Bisontown has 9 other investors including 1 MP Fund, Vanderbilt has
31
>> other investors including 5 MP Funds and GP Carefree has 20 other
>> investors and no MP Funds. What I wanted to discuss was what to do
with
>> the non-401k plan ownership of those 3 loans. I would think that the
>> non-401k fractional interests could go into the Loan LLC for that
loan.
>> Then the 401k Plan would be joint owner with the Loan LLC of the
loan in
>> their respective percentage. The Loan LLC will be managed by the
Board
>> which includes Bruce Buckley, Elliott Pollack, Scott Summers, Radical
>> Bunny trustee and a soon to be named Rev Op person. It should make it
>> much easier to administer the loan. You then have only one party to
deal
>> with, not a large number of individual investors who might disagree
with
>> each other. Then the 401k Plan and the Loan LLC could decide where to
>> have the loan serviced and what to do to collect or workout the
loan. Is
>> that what you had in mind for these 3 loans? This is what I thought
we
>> discussed. But let me know what you think.
>> Give me a call to discuss. Thanks.
>> Cathy
>>

EXHIBIT B

ML MANAGER LLC
14050 N.83rd Ave., Suite 180
Peoria, AZ 85381

November 3, 2009

RE: 860206 - GP Properties Carefree Cave Creek, L.L.C.

As many of you are aware, the Trustee's Sale for the above loan was held on October 21, 2009 and the beneficiaries were the successful bidder and now own the property in Carefree.

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. The overall ownership group is responsible for the cost of maintaining the property, including, but not limited to, property insurance and payment of real property taxes. The Guarantee of the loan is unaffected by the foreclosure and Mr. Peloquin continues to have personal liability for the deficiency.

ML Manager, L.L.C. has obtained property insurance coverage on your behalf. Additionally, minor environmental remediation regarding three areas on the property is being completed. A copy of the Trustee's Deed evidencing your ownership of the property has been attached to this email. Please be sure to contact us if you require a hard copy sent to your address on file with us.

There appears to be interest in scheduling a meeting of the investors and you will be receiving information about this meeting in the near future by separate email.

Thank you.

Sincerely,

Mark Winkleman
Chief Operating Officer
ML Manager, L.L.C.

ML Manager LLC
14050 N 83rd Ave. Suite 180
Peoria, Arizona 85381

CONFIDENTIAL

This email and any attachments are confidential and may not be forwarded, copied or distributed beyond the named recipient(s) without prior permission of the sender. We do not waive confidentiality by mis-transmission. If you have received this email in error, please contact the sender. Thank you.

EXHIBIT C

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1 flow for interest spread from the ML loan portfolio
 2 for the years 2009, 2010, 2011, 2012 and 2013; is
 3 that correct?
 4 **A. That's what the page suggests, yes, sir.**
 5 Q. Then if you go on to the following page,
 6 which is the continuation of the same schedule on the
 7 far right-hand side, the total projected interest
 8 spread of \$7,400,000 plus; is that correct?
 9 **A. In the total column, there is a number**
 10 **there that says that, yes, sir.**
 11 Q. Below that, it says that they excluded
 12 401(k) plan loans, and then they list a few loans
 13 underneath that. Do you know why they excluded
 14 401(k) plan loans?
 15 MR. HARTLEY: Object to the form.
 16 A. My understanding is that the 401(k) loans,
 17 as you call them, were not part of anything that the
 18 ML managers was involved with, working on, interested
 19 in, other than whatever minor portions they may have
 20 had an interest in for some of the properties.
 21 BY MR. FURST:
 22 Q. Did you have any discussions with Ed
 23 McDonough or Cathy Reece about that subject?
 24 **A. I don't know that I had a discussion,**
 25 **per se, with Mr. McDonough. And it may have come up**

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1 **with him, but it would have been just as a property**
 2 **issue. I did have a discussion with Mr. Winkleman**
 3 **and Ms. Reece about the 401(k) properties.**
 4 Q. Could you tell me about those discussions
 5 and when they occurred?
 6 **A. In the late summer, probably of 2009, the**
 7 **issue of the 401(k) was a discussion item because of**
 8 **the fact that ML Servicing, its predecessor entity,**
 9 **and Mortgages Ltd., had been -- I don't remember all**
 10 **of its positions, but had, I believe, been the plan**
 11 **sponsor and possibly had other roles under the ERISA**
 12 **laws for the 401(k) plan.**
 13 **So I was interested in knowing who was**
 14 **responsible for those properties and whether the**
 15 **ML managers had any interest in them and were going**
 16 **to be taking them under their area of responsibility.**
 17 **And I was specifically told by Mr. Winkleman and**
 18 **Ms. Reece that they were not part of anything that**
 19 **they were doing.**
 20 **So I filed a motion with the court to**
 21 **determine who was responsible for the 401(k). And**
 22 **there's some filings out there to determine that**
 23 **gives you -- I don't remember all of them, but that**
 24 **will give you some information on that. That's**
 25 **probably about September of 2009.**

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1 **But in the context of filing those motions,**
 2 **I had some conversations with the ML Manager**
 3 **representatives, and they told me they had no**
 4 **interest whatsoever in those --**
 5 Q. These discussions were both with Cathy
 6 Reece and Mark Winkleman?
 7 **A. That's correct. I had a number of**
 8 **conversations with Mr. Winkleman, quite a number with**
 9 **him, and a few with Ms. Reece. I don't recall the**
 10 **exact numbers. And Ms. Reece, I may have talked with**
 11 **her, with Mr. Winkleman, with Mr. Jenkins, Scott**
 12 **Jenkins, who was the attorney to the liquidating**
 13 **trust, ML Servicing, because I believe his law firm**
 14 **filed whatever was filed on behalf of the estate, and**
 15 **his law firm discussed it before the court.**
 16 MR. HARTLEY: Excuse me, gentlemen. On
 17 this page that we're dealing with, starting with
 18 ML01593 at the bottom is marked as attorney work
 19 product, privileged and confidential.
 20 Mr. Furst, can you tell me where you got
 21 this document from and what it was attached to that
 22 would make it so it would not be attorney client
 23 privileged and work product?
 24 MR. FURST: Yes. This document is the
 25 accounting back-up for Exhibit C to this examination.

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1 This document I obtained when I read the
 2 preconfirmation court hearing transcript. Ed
 3 McDonough referred to this document and actually
 4 introduced it into evidence.
 5 And a few months ago, I went to the
 6 bankruptcy court and was able to obtain this exhibit
 7 there maintained in bound form at the bankruptcy
 8 court. So even though this document specifies that
 9 it is attorney work product, it was submitted to the
 10 bankruptcy court preconfirmation.
 11 MR. HARTLEY: Okay. I'm going to reserve
 12 the right to confirm that. But subject to that,
 13 we'll allow this to go forward, otherwise, this will
 14 be all deemed attorney-client privilege and work
 15 product. We're unable to confirm it. I will point
 16 out that also at the bottom of this, it's also marked
 17 as "Subject to change, tentative and preliminary."
 18 With that being noted, continue on. I apologize for
 19 the interjection.
 20 BY MR. FURST:
 21 Q. Back to the page that this gentleman was
 22 just referring to where it says that the 401(k) plan
 23 loans were excluded, do you know whether interest --
 24 ML Manager was entitled, interest spread from the
 25 401(k) plan loans?

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1 **A. My understanding from my discussion with**
 2 **Mr. Winkleman and Ms. Reece was that they had no**
 3 **expectation of any involvement with those loans or**
 4 **any recoveries from those loans or anything from**
 5 **those loans.**
 6 Q. So from your conversations with
 7 Mr. Winkleman and Cathy Reece, was it their
 8 understanding that the confirmed plan would be
 9 financed only by the non-401(k) plan loans?
 10 **A. I don't know what their understanding was.**
 11 **But I had the distinct impression that they had no**
 12 **expectation of being involved or recovering anything**
 13 **from or giving anything to any of the 401(k) loan**
 14 **properties other than recovering, if a property was**
 15 **sold, and they had a 1-percent, 10-percent interest,**
 16 **that they would get their share of those proceeds to**
 17 **whatever pots they were expecting those proceeds to**
 18 **correctly go to.**
 19 Q. I would like to put in front of you the
 20 e-mail from Cathy Reece to Christopher Olson dated
 21 May 3rd, 2009. And could you mark this as Exhibit E,
 22 please?
 23 (Exhibit E was marked for identification.)
 24 A. I have the document, Mr. Furst.
 25

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1 BY MR. FURST:
 2 Q. Have you ever seen this document or this
 3 e-mail exchange before?
 4 **A. I don't believe I have, no. If I have, I**
 5 **don't recall seeing this.**
 6 Q. This e-mail exchange begins at the bottom
 7 with an e-mail from Chris Olson, who was the trustee
 8 of the 401(k) plan, to Cathy Reece who, at the time,
 9 was the attorney for the official investor committee
 10 dated May 3rd, 2009. And towards the end of Chris
 11 Olson's e-mail to Cathy Reece, she states that, "The
 12 trustee of the Mortgages Ltd., 401(k) plan will be
 13 responsible for administering these loans outside of
 14 the OIC's plan of reorganization. Please confirm our
 15 understanding." Do you see that language?
 16 **A. Yes, sir.**
 17 Q. And then the e-mail --
 18 MR. HARTLEY: Hang on just a second. I
 19 need to confirm something. Who is Rachel Schwartz
 20 and --
 21 MR. FURST: My understanding is she's the
 22 wife of Chris Olson.
 23 MR. HARTLEY: Chris Olson's wife?
 24 MR. FURST: Yes, that's my understanding.
 25 These were e-mails to and from his home.

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1 MR. HARTLEY: Thank you.
 2 BY MR. FURST:
 3 Q. Now I'd like to go through the e-mail, the
 4 response e-mail, from Cathy Reece to Chris Olson.
 5 And she walks him through the eight loans owned by
 6 the 401(k) plan. I'll start with the second
 7 paragraph. She said that, "As I understand it, there
 8 are three loans where the 401(k) plan is the only
 9 owner of the note, Downtown Community, CDIG and ECCO.
 10 Clearly, these three loans can go their own way with
 11 no management or service involving the 401(k) plan."
 12 My question for you, Mr. McDonough, is that
 13 consistent with your understanding or your
 14 recollection of your conversations with Cathy Reece?
 15 **A. I'm not sure who you're referring to.**
 16 **There's no Mr. McDonough.**
 17 Q. Oh, I'm sorry. Mr. O'Halloran.
 18 **A. I didn't get into specifics in terms of,**
 19 **you know, there are three loans, et cetera, et**
 20 **cetera. My understanding from my conversation with**
 21 **Ms. Reece and Mr. Winkleman is that they had no**
 22 **interest in, no involvement in, no desire to become**
 23 **involved in any of the loans that had the 401(k)**
 24 **invested in it.**
 25 **Their only interest that was expressed to**

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1 **me was if there was a sale of a property that they**
 2 **had an investor interest in, that they would get**
 3 **that, say, 10 percent. If it was a 10-percent**
 4 **interest, that they get 10 percent of the net**
 5 **proceeds and turned over to whoever that investor was**
 6 **that they represented. Or if it happened to be a**
 7 **pool, that the funds would be turned over to the pool**
 8 **that they represented.**
 9 **So I didn't go -- my conversation with**
 10 **Ms. Reece did not, that I recall in any way, shape or**
 11 **form, walked through this e-mail or anything like**
 12 **this. It was about the loans that the 401(k) had,**
 13 **and it was about whether, they, the ML managers, were**
 14 **involved with them or going to be involved with them**
 15 **or not.**
 16 **We did distinguish between those which were**
 17 **a hundred percent owned and those that were not a**
 18 **hundred percent owned by the 401(k). But the only**
 19 **distinction was in respect of the ML managers being**
 20 **paid at the time of the sale, whatever their net**
 21 **interest was.**
 22 **To go to the example that I was using, if**
 23 **it was a 10 percent interest and the property was**
 24 **sold, that that pool would get the 10 percent.**
 25 Q. Let me put in front of you a letter dated

<p style="text-align: right;">Page 43</p> <p>1 November 3rd, 2009, from Mark Winkleman to the 2 investors of CG Properties Carefree. Mark that 3 Exhibit F. 4 (Exhibit F was marked for identification.) 5 A. This is Exhibit F. 6 BY MR. FURST: 7 Q. Have you ever seen this letter before? 8 A. I probably have. I don't recall seeing it, 9 but I probably have because I got a copy of all of 10 these communications that went out. 11 Q. I would like to read the first two 12 sentences of the second paragraph. It says, "As 13 confirmed by the bankruptcy judge's orders during the 14 past two weeks, and ML Manager, LLC, the agent for 15 each of the individual investors and continues to act 16 in this capacity, the Mortgages Ltd., 401(k) plan 17 also owns a significant percentage of the property. 18 The ML Manager is not the agent for the 401(k) plan." 19 My question for you, Mr. O'Halloran, is: 20 Is that consistent with Cathy Reece's and Mark 21 Winkleman's statement to you, the ML Manager was not 22 the agent for the 401(k) plan? 23 A. That is definitely the case, yes. 24 (Off-the-record discussion.) 25 BY MR. FURST:</p>	<p style="text-align: right;">Page 45</p> <p>1 And then the Court determined that they belonged to 2 the 401(k), so the funds were all turned over to them 3 at that time. 4 Q. So when the initial assignments were made 5 to -- from the Liquidating Trust and the ML Manager 6 who intentionally held back the impound accounts for 7 the loans that were owned 100 percent by the 401(k) 8 plan until there was a judicial determination; is 9 that correct? 10 A. That's correct, yes. 11 Q. Are you aware of any change in Cathy 12 Reece's position or in the position of the ML Manager 13 board in 2010, where they began to assert that ML 14 Manager was, in fact, the agent for the 401(k) plan? 15 A. None to my knowledge. 16 Q. After you were in your position as 17 liquidating trustee, did you move to Phoenix? 18 A. No. I commuted back and forth. 19 Q. Did you have an office in Phoenix? 20 A. I relocated the Mortgages Ltd., office from 21 Camelback out to its current location, assuming 22 they're still out in Peoria. We rented a smaller 23 property, and I established a desk area within that 24 space from which I operated when I was working on 25 Mortgages Ltd.'s activities in the Phoenix area.</p>
<p style="text-align: right;">Page 44</p> <p>1 Q. Let me ask you about the impound accounts 2 relating to the ML loans. When you began as the 3 liquidating trustee, were you entrusted with the 4 impound accounts? 5 A. I'm not sure what you mean by entrusted, 6 but did I have an awareness of those accounts, yes. 7 Did we tell the bank that the ML Liquidating Trust 8 and ML Servicing would be the contact point going 9 forward, yes. 10 Q. I'm just trying to obtain a general 11 understanding about those things in the account and 12 who had custody of them, whether it was ML Manager or 13 ML Liquidating Trust. 14 And my question is: After confirmation, 15 was custody initially transferred or retained, I 16 guess, by ML Servicing Company? 17 A. It was initially retained by ML Servicing. 18 And then when Mr. Winkleman came on board, he was 19 advised that the accounts were there and they related 20 specifically to the loan properties that he was 21 responsible for. So the majority of them were turned 22 over to him. 23 And then the 401(k), there was some 401(k) 24 monies and until the Court determined who had 25 responsibility for those, they were up in the air.</p>	<p style="text-align: right;">Page 46</p> <p>1 Q. Could you explain to me the chain of 2 command? Who did you report to, and who reported to 3 you? 4 A. I had two positions. I was ostensibly the 5 CEO of the renamed Mortgages Ltd., which became ML 6 Servicing, Inc. That entity employed directly some 7 of the former employees of ML or Mortgages Ltd. And 8 their employment continued under the name of ML 9 Servicing, Inc., and they reported to me. They 10 included people in the accounting area, people in the 11 investor relations area, people in the computer 12 department, et cetera. All of the employees that 13 were there reported to me. 14 And then in that capacity as ML Servicing, 15 Inc., CEO, I reported to a board of directors which 16 was chaired by Mr. Baldino until about August of 17 2010, after which Mr. Shaw became -- Richard Shaw, 18 became the chair and Mr. David Goldman was the 19 treasurer. And Mr. Jim Merryman was the corporate 20 secretary. 21 I was also the trustee of ML Liquidating 22 Trust. It had no employees. I reported to the same 23 five people who made up the board of directors of ML 24 Servicing. They were the liquidating trust board, 25 and it was also chaired by Mr. Baldino until about</p>

EXHIBIT D

Declaration of Robert Facciola

1. I, Robert Facciola, declare as follows:
2. I was a member of the Official Investors' Committee ("OIC") in Mortgages Ltd.'s bankruptcy. Because of my personal financial interest as an investor and my responsibilities as a member of the Committee, I am familiar with and understand Mortgages Ltd.'s bankruptcy plan and have general knowledge of the matters that follow.
3. Cathy Reece, Esq., of the law firm of Fennemore Craig, was counsel for the OIC.
4. The OIC filed a plan of reorganization for Mortgages Ltd. ("ML"), which was ultimately confirmed by the Court (the "Confirmed Plan").
5. The Confirmed Plan provided, among other things, that (a) the ML Loans owned by investors of Mortgages Ltd. would be controlled by a new entity called ML Manager, and (b) the investors of Mortgages Ltd. would be responsible to pay the pre-emergence and post-emergence costs of Mortgages Ltd., ML Manager and the ML Liquidating Trust.
6. In connection with the Confirmed Plan, the OIC filed an Amended Disclosure Statement, which specified the status of the Mortgages Ltd. 401(k) Plan. The Amended Disclosure Statement stated that, unlike all of the ML

investors who were bound by their existing Agency Agreements, the Trustees of the 401(k) Plan would continue to “make their own decisions.” The Amended Disclosure Statement provided:

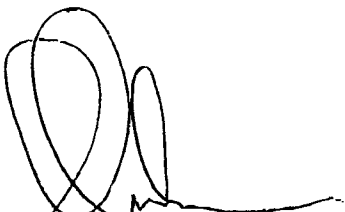
The Loans in which the Mortgages Ltd. 401(k) Plan holds the ownership interest will not be transferred to Loan LLCs. Instead the trustee(s) of the Mortgages Ltd. 401(k) Plan shall make their own decisions and decide who will service their Loans. (Emphasis added)

7. My understanding of the meaning and intent of the Confirmed Plan is that (a) the Trustees of the 401(k) Plan (not ML Manager) would continue to control all of their plan assets, outside of the Confirmed Plan, and (b) the 401(k) Plan would not be impacted by the Confirmed Plan in any way, including any liability for pre-emergence and post-emergence expenses (which were also known as the exit financing costs).

8. My understanding of the meaning and intent of the Confirmed Plan is that ML Manager would not be the agent for the 401(k) Plan.

9. I declare under penalty of perjury that the statements in this Declaration are correct to the best of my knowledge.

Dated: July 13, 2012.



Robert Facciola

EXHIBIT E

Declaration of Honeylou C. Reznik

1. I, Honeylou C. Reznik, declare as follows:
2. I was a member of the Official Investors' Committee ("OIC") in Mortgages Ltd.'s bankruptcy. Because of my personal financial interest as an investor and my responsibilities as a member of the Committee, I am familiar with and understand Mortgages Ltd.'s bankruptcy plan and have general knowledge of the matters that follow.
3. Cathy Reece, Esq., of the law firm of Fennemore Craig, was counsel for the OIC.
4. The OIC filed a plan of reorganization for Mortgages Ltd. ("ML"), which was ultimately confirmed by the Court (the "Confirmed Plan").
5. The Confirmed Plan provided, among other things, that (a) the ML Loans owned by investors of Mortgages Ltd. would be controlled by a new entity called ML Manager, and (b) the investors of Mortgages Ltd. would be responsible to pay the pre-emergence and post-emergence costs of Mortgages Ltd., ML Manager and the ML Liquidating Trust.
6. In connection with the Confirmed Plan, the OIC filed an Amended Disclosure Statement, which specified the status of the Mortgages Ltd. 401(k) Plan. The Amended Disclosure Statement stated that, unlike all of the ML investors who were bound by their existing Agency Agreements, the Trustees of the 401(k) Plan would continue to "make their own decisions." The Amended Disclosure Statement provided:

The Loans in which the Mortgages Ltd. 401(k) Plan holds the ownership interest will not be transferred to Loan LLCs. Instead the trustee(s) of the Mortgages Ltd. 401(k) Plan shall make their own

decisions and decide who will service their Loans. (Emphasis added)

7. It is my understanding that Chris Olson, the Plan Trustee, sent the following e-mail to Cathy Reece, Esq. on May 5, 2009, shortly before the Confirmed Plan was approved by the Court:

Cathy,

I am reviewing the OIC's plan and getting ready to cast the vote for the 401k Plan. I want you to confirm our conversation that we had on April 22 at your meeting. In regards to the 401k Plan, you will not be pursuing placing the loans owned by the 401k Plan (either 100% owned, partially owned by the Plan or deed titled currently in the name of the Plan due to foreclosure Trustee's sale) into the loan LLC's to be formed by the OIC if the OIC's plan of reorganization is ultimately determined to be the plan that moves forward. The Trustee of the Mortgages Ltd. 401k Plan will be responsible for administering these loans outside of the OIC's plan of reorganization.

Please confirm our understanding.

Thank you.
Chris J. Olson
Plan Trustee

8. It is my understanding that, on May 5, 2009, Ms. Reece sent a response e-mail to Chris Olson, confirming that the 401(k) Plan Loans "can go their own way with no management or service involving the OIC Plan:"

Chris—

I have not been able to reach you yet so let me walk through the loans. You sent me the names of 6 and then I saw 2 others. You are correct that the OIC Plan is not asking the 401k plan to transfer its ownership interests into any Loan LLC. We understand your constraints.

As I understand it, there are 3 loans where the 401k plan is the only owner of the note--Downtown Community, CDIG and ECCO. Clearly these three loans can go their own way with no management or service involving the OIC Plan. One loan has only 1 investor with the 401k plan-- 43rd Ave and Olney. One loan has 3 other investors with the 401k plan and the land has been foreclosed on--Hurst. I assume the investors in these two loans will agree with you that these loans will go their own way with no management or service involving the OIC Plan.

The other three loans have some MP funds and investors--Bisontown has 9 other investors including 1 MP Fund, Vanderbilt has 31 other investors including 5 MP Funds and GP Carefree has 20 other investors and no MP Funds. What I wanted to discuss was what to do with the non-401k plan ownership of those 3 loans. I would think that the non-401k fractional interests could go into the Loan LLC for that loan. Then the 401k Plan would be joint owner with the Loan LLC of the loan in their respective percentage. The Loan LLC will be managed by the Board which includes Bruce Buckley, Elliott Pollack, Scott Summers, Radical Bunny trustee and a soon to be named Rev Op person. It should make it much easier to administer the loan. You then have only one party to deal with, not a large number of individual investors who might disagree with each other. Then the 401k Plan and the Loan LLC could decide where to have the loan serviced and what to do to collect or workout the loan. Is that what you had in mind for these 3 loans? This is what I thought we discussed. But let me know what you think.

Give me a call to discuss.

Thanks. Cathy

9. Cathy Reece's e-mail described in Paragraph 6 above is consistent with my understanding of the meaning and intent of the Confirmed Plan, which is that (a) the Trustees of the 401(k) Plan (not ML Manager) would continue to control all of their plan assets, outside of the Confirmed Plan, and (b) the 401(k) Plan would not be impacted by the Confirmed Plan in any way, including any liability for pre-emergence and post-emergence expenses (which were also known as the exit financing costs).

10. I understand that one of the 401(k) Plan Loans – GP Properties – was jointly owned by the 401(k) Plan and individual investors, and that, on November 3, 2009, ML Manager sent a letter to all investors in the GP Properties loan notifying them that the GP property had been acquired in a foreclosure sale. In the letter, Mark Winkleman, the Chief Operating Officer of ML Manager, stated:

As many of you are aware, the Trustee's Sale for the above loan was held on October 21, 2009 and the beneficiaries were the successful bidder and now own the property in Carefree.

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.** The overall ownership group is responsible for the cost of maintaining the property, including, but not limited to, property insurance and payment of real property taxes. The Guarantee of the loan is unaffected by the foreclosure and Mr. Peloquin continues to have personal liability for the deficiency.

ML Manager, L.L.C. has obtained property insurance coverage on your behalf. Additionally, minor environmental remediation regarding three areas on the property is being completed. A copy of the Trustee's Deed evidencing your ownership of the property has been attached to this email. Please be sure to contact us if you require a hard copy sent to your address on file with us.

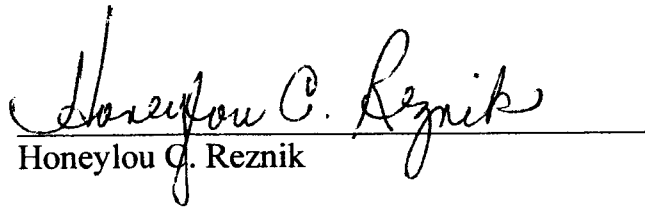
There appears to be interest in scheduling a meeting of the investors and you will be receiving information about this meeting in the near future by separate email.

Thank you.
Sincerely,
Mark Winkleman
Chief Operating Officer
ML Manager, L.L.C.

11. Mr. Winkleman's letter described in Paragraph 10 above is consistent with my understanding of the meaning and intent of the Confirmed Plan, which is that (ML Manager would not be the agent for the 401(k) Plan.

12. I declare under penalty of perjury that the statements in this Declaration are correct to the best of my knowledge.

Dated: July ____, 2012.


Honeylou G. Reznik