

1 FENNEMORE CRAIG, P.C.  
Cathy L. Reece (005932)  
2 Christian M. Olson (025666)  
3003 N. Central Ave., Suite 2600  
3 Phoenix, Arizona 85012  
Telephone: (602) 916-5343  
4 Facsimile: (602) 916-5543  
Email: creece@fclaw.com  
5 colson@fclaw.com

6 Attorneys for ML Manager LLC

7

8 IN THE UNITED STATES BANKRUPTCY COURT  
9 FOR THE DISTRICT OF ARIZONA

10 In re

11 MORTGAGES LTD.,

12 Debtor.

13

14

15

16

Chapter 11

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

**MOTION FOR ORDER ENFORCING  
SECTION 10.5 OF THE PLAN AND  
PARAGRAPH D OF THE CONFIRMATION  
ORDER**

**Hearing Date: NA**

**Hearing Time: NA**

17 ML Manager LLC (“ML Manager”), as Manager of Centerpoint I Loan LLC and  
18 Centerpoint II Loan LLC (the “CP Loan LLCs”) and as agent for numerous individual  
19 investors (the “Investors”, and, together with the CP Loan LLCs, “Taxpayer”),  
20 respectfully requests this Court issue an order enforcing the provision of the Plan and  
21 Confirmation Order stating that Taxpayer is exempt from payment of transaction privilege  
22 taxes, including speculative builder taxes, to the City of Tempe (the “City”) arising out of  
23 the sale (the “Sale”) of that certain real property located in the City described herein as the  
24 “Centerpoint Property.” Pursuant to Section 10.5 of the Official Committee of Investors  
25 First Amended Plan of Reorganization dated March 12, 2009 (the “Plan”)(Docket No.  
26 1532), as confirmed by this Court and as stated in Paragraph D in its Order Confirming

1 Investors Committee’s First Amended Plan of Reorganization dated March 12, 2009 (the  
2 “Confirmation Order”)(Docket No. 1755), transfers contemplated by and under the Plan  
3 are exempt from such taxes. The purpose of this request, which is being made at the  
4 suggestion of the City, is to enforce the express terms of the Plan and the Confirmation  
5 Order as they relate to the Sale of the Centerpoint Property and the City.

6 **I. JURISDICTION**

7 Pursuant to Sections 9.1(g) and (h) of the Plan and for the purposes of Section  
8 105(a) of the Bankruptcy Code, this Court has retained jurisdiction to effectuate  
9 performance of the provisions of the Plan and to determine such other matters as provided  
10 in the Confirmation Order. Issuance of the requested order is within this Court’s retained  
11 jurisdiction in that it will effectuate the performance of Section 10.5 of the Plan and  
12 Paragraph D of the Confirmation Order.

13 The City was listed on the Master Mailing List in the case and was one of the  
14 persons or entities that were mailed copies of the Disclosure Statement, Plan, Ballots and  
15 Order setting hearing and objection deadline on April 6, 2009 (Docket No. 1601). The  
16 City did not object to the Plan or appeal the confirmation.

17 **II. FACTUAL BACKGROUND**

18 Pursuant to the Plan and the Confirmation Order, this Court approved the creation  
19 of several Loan LLCs to facilitate the recovery of funds by investors who had invested in  
20 loans issued by the debtor. These loans were secured by deeds of trust on real property  
21 and now managed by ML Manager. Under the terms of the Plan, the MP Funds, the  
22 debtor and several investors transferred their fractional interests in such loans and related  
23 security to the Loan LLCs in exchange for membership interests. Other investors retained  
24 direct ownership interests in the loans for which ML Manager is the Agent based on the  
25 debtor’s transfer of the Agency Agreements to ML Manager. Under the Plan, ML  
26 Manager was created as the successor to the debtor as agent for investors and manager of

1 the MP Funds and Loan LLCs.

2 At the time the Plan was confirmed, the debtor owned about \$97 million of the  
3 \$124 million of interests on the first note and the 9 MP Funds held about \$24 million of  
4 the interests in the first note and the debtor held about \$4.3 million of the \$9.5 million on  
5 the second note and 1 MP Fund held a small amount of the interests in the second note  
6 relating to the Centerpoint Property. Pursuant to the Plan, these interests, among others,  
7 were transferred to the CP Loan LLCs. The borrower under the loans subsequently  
8 defaulted on the loan obligations. As a result, the CP Loan LLCs and the other investors  
9 owning a share of the Centerpoint Property exercised their rights against the collateral and  
10 acquired the property through trustee's sale. ML Manager, acting on their behalf,  
11 subsequently sold the Centerpoint Property.

### 12 **III. PROCEDURAL BACKGROUND**

13 Subsequent to the Sale of the Centerpoint Property, Taxpayer (i) filed a Privilege,  
14 Use and Transient Lodging Tax Report (the "Report") with the City, claiming that the  
15 proceeds from the Sale were exempt from privilege taxes pursuant to Section 10.5 of the  
16 Plan and Paragraph D of the Confirmation Order, and (ii) submitted a request for a Letter  
17 of Good Standing from the City, which, if issued, would have indicated that Taxpayer did  
18 not owe any taxes in connection with the Sale. The relevant language of Section 10.5,  
19 upon which Taxpayer's claim of exemption relied, is as follows:

20 **10.5 Exemption from Transfer Taxes.** Pursuant to 11 U.S.C. §1146(a), . . .  
21 the making or delivery of any deed or other instrument of transfer under, in  
22 furtherance of, or in connection with the Plan, including any deeds, bills of  
23 sale or assignment executed in connection with any of the transactions  
contemplated under the Plan shall not be subject to any . . . speculative  
builder, transaction privilege, . . . or other similar tax.

24 The same language is contained in Paragraph D of the Confirmation Order.

25 On June 6, 2011, Taxpayer received a letter from the City stating that the Report  
26 was not in compliance with the Tempe City Code (the "Code") and that the City could not

1 issue a Letter of Good Standing because the City could not identify any exceptions under  
2 the Code or bankruptcy proceedings that would relieve Taxpayer of the obligation to pay  
3 taxes on the Sale. In subsequent conversations with the City, the City suggested it may be  
4 willing to approve the claimed exemption if Taxpayer could establish that the tax  
5 exemptions provided in Section 10.5 of the Plan and Paragraph D of the Confirmation  
6 Order apply to the Sale. The City recommended that Taxpayer request an order from this  
7 Court to address this issue. A copy of the proposed order requested in this Motion is  
8 attached hereto as Exhibit A.

#### 9 **IV. LEGAL ANALYSIS**

##### 10 **A. The Sale is Necessary to the Investors' Recovery of Their Investment**

11 The Sale of the Centerpoint Property is a transfer contemplated under the Plan  
12 subject to Section 10.5 of the Plan and Paragraph D of the Confirmation Order. The Plan  
13 requires the Loan LLCs to distribute "funds" to their members in accordance with the  
14 Loan LLCs' operating agreements. Plan § 4.13. The operating agreements require ML  
15 Manager to, among other things, take all actions to enforce the loans, realize on the  
16 collateral, and resell any realized collateral. Operating Agreement § 1.4. Pursuant to the  
17 Approved Amended Disclosure Statement in Support of the Official Committee of  
18 Investors' First Amended Plan of Reorganization Dated March 12, 2009 (the "Disclosure  
19 Statement")(Docket No. 1298), ML Manager, as the manager of the Loan LLCs, is  
20 required to collect the maximum amount from the borrowers under the loans held by the  
21 Loan LLCs and to look for ways to get as much money as possible to the investors, who  
22 have interests in the Loan LLCs. Disclosure Statement Part D.

23 The Plan contemplates that the investors may not be able to collect the full amount  
24 of their investments through the Loan LLC's efforts to collect principal and interest under  
25 the loans or, in the alternative, to seize and liquidate collateral. Plan § 2.41. The Plan  
26 therefore preserves and allows the investors to hold unsecured claims under the Plan to

1 collect Investor Damages, defined as the difference between what the investors collect  
2 from the Loan LLCs and what they are owed. Plan §§ 2.41; 4.6.

3 Here, upon the borrower's default the CP Loan LLCs could not make distributions  
4 of funds to their members in accordance with Section 4.13 of the Plan unless the CP Loan  
5 LLCs sold the Centerpoint Property. The CP Loan LLCs' obligations to collect the  
6 maximum amount from the borrowers, as explained in Part D of the Disclosure Statement,  
7 required the CP Loan LLCs to realize on the loan collateral. Through completion of the  
8 Sale, the CP Loan LLCs facilitated the purposes of the Plan by aiding the Investors in the  
9 recovery of their investment from the debtor and thereby reduced potential Investor  
10 Damages.

11 **B. The Sale Was Necessary to Repay the Exit Financing Essential to**  
12 **Consummation of the Plan**

13 The sale of property held by the Loan LLCs upon default was necessary to repay  
14 the Exit Financing, which financing is required "to consummate the Plan." Plan §§ 2.35,  
15 4.15. The Plan anticipated that each of the parties benefiting by the Exit Financing,  
16 including the Loan LLCs, would enter into inter-borrower agreements to allocate the use  
17 and repayment of the Exit Financing. Plan § 4.15; Confirmation Order, Section H. This  
18 is, in fact, exactly what occurred. The Loan LLCs, along with other parties, executed an  
19 Inter-Borrower Agreement and a Loan Agreement. As borrowers under the agreements,  
20 the Loan LLCs agreed to be held jointly and severally liable for repayment of the Exit  
21 Financing. Inter-Borrower Agreement Recital D. The collateral under the Loan  
22 Agreement includes the loans held by the Loan LLCs, which are secured by deeds of trust,  
23 and the real property that the Loan LLCs then owned or later acquired through foreclosure  
24 or trustee's sale. Loan Agreement §§ 1.4, 1.36. The Loan LLCs are required under the  
25 Loan Agreement to pay 70% of the proceeds of the sale of the loan notes or real property  
26 to the lender until the Exit Financing is repaid. Loan Agreement § 2.4.

1 Consistent with Sections 2.35 and 4.15 of the Plan, the Inter-Borrow Agreement  
2 and Loan Agreement allocated liability for repayment of the Exit Financing to the CP  
3 Loan LLCs. Upon the borrower's default under the loans secured by the Centerpoint  
4 Property, the CP Loan LLCs ceased to receive any income from the loans from which to  
5 repay the Exit Financing. In order to meet its allocated obligations to repay the Exit  
6 Financing and to facilitate consummation of the Plan, the CP Loan LLCs had to sell the  
7 Centerpoint Property.

8 **C. This Court has Recognized Similar Sales as Being in Conformance with**  
9 **and in Furtherance of the Plan**

10 In other instances where the Loan LLCs have faced resistance from interested  
11 parties in selling the real property they acquired through foreclosure or trustee's sale, ML  
12 Manager has turned to this Court to confirm the validity of the sale decision and its  
13 conformance with the intent of the Plan. In several of the orders approving motions to sell  
14 real property, this Court confirmed its approval of a property sale by a Loan LLC and  
15 ordered that ML Manager distribute the proceeds "pursuant to its agreements, the  
16 Interborrower Agreement and the Confirmation Order." Thus, this Court has previously  
17 declared that real property sales by the Loan LLCs are in accordance with the  
18 Confirmation Order approving the Plan.

19 **V. CONCLUSION**

20 The Sale of the Centerpoint Property is a sale under the Plan because (1) it was  
21 contemplated by the Plan, (2) it results in the distribution of funds to the investors, in  
22 partial satisfaction of their claims against the bankrupt debtor and in furtherance of the  
23 purposes of the Plan, and (3) it provides necessary capital, as contemplated by the Plan  
24 and supporting documents, to repay the Exit Financing essential to carrying out the Plan  
25 provisions and purposes. As a transfer under the Plan, the Sale and other similar transfers  
26 that may arise are entitled to the benefits of tax exemption under Section 10.5 of the Plan

1 and Paragraph D of the Confirmation Order. As such, ML Manager, on behalf of  
2 Taxpayer, requests that this Court provide the City with the assurance that it needs to  
3 approve the claimed tax exemption, namely, a court order substantially in the form  
4 attached as Exhibit A ruling that the provisions of Section 10.5 of the Plan and Paragraph  
5 D of the Confirmation Order apply to the Sale of the Centerpoint Property.

6 Respectfully submitted this 6th day of January, 2012.

7 FENNEMORE CRAIG, P.C.

8

9 By /s/ Cathy L. Reece (005932)  
10 Cathy L. Reece  
11 Christian M. Olson  
Attorneys for ML Manager LLC

12 COPY of the foregoing sent by  
13 first class mail this 6th day of  
January, 2012 to:

14 City of Tempe  
15 P.O. Box 5002  
16 Tempe, Arizona 85280  
Attn: David Park

17 City of Tempe  
18 21 East Sixth Street, Suite 201  
Tempe, Arizona 85280  
Attn: David Park

19

20 By /s/ Nikki Nolund

21

22

23

24

25

26

# EXHIBIT

# A



1 FENNEMORE CRAIG, P.C.  
Cathy L. Reece (005932)  
2 Christian M. Olson (025666)  
3003 N. Central Ave., Suite 2600  
3 Phoenix, Arizona 85012  
Telephone: (602) 916-5343  
4 Facsimile: (602) 916-5543  
Email: creece@fclaw.com  
5 colson@fclaw.com

6 Attorneys for ML Manager LLC

7

8 IN THE UNITED STATES BANKRUPTCY COURT  
9 FOR THE DISTRICT OF ARIZONA

10 In re

11 MORTGAGES LTD.,

12 Debtor.

Chapter 11

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

13

14

**ORDER GRANTING ML MANAGER'S  
MOTION FOR ORDER ENFORCING  
SECTION 10.5 OF THE PLAN AND  
PARAGRAPH D OF THE CONFIRMATION  
ORDER**

15

16 The Court having considered ML Manager LLC's Motion to Enforce Section 10.5  
17 of the Plan and Paragraph D of the Confirmation Order ("Motion"), and no objection  
18 having been filed, and good cause appearing,

19 IT IS HEREBY ORDERED granting the Motion.

20 IT IS FURTHER ORDERED that the tax exemptions provided in Section 10.5 of  
21 the Official Committee of Investors First Amended Plan of Reorganization dated March  
22 12, 2009 (the "Plan") and Paragraph D of the Order Confirming Investors Committee's  
23 First Amended Plan of Reorganization dated March 12, 2009 (the "Confirmation Order")  
24 apply to the sale (the "Sale") by ML Manager LLC, as manager of Centerpoint I Loan  
25 LLC and Centerpoint II Loan LLC and as agent for numerous individual investors, of that  
26 certain real property located in Tempe, Arizona, conveyed pursuant to that Special

1 Warranty Deed recorded in the Official Records of Maricopa County at Recording  
2 Number 20110152133, and that, therefore, the Sale, and the parties thereto, are exempt  
3 from any speculative builder or transaction privilege taxes that would otherwise arise out  
4 of the Sale.

5 SIGNED AND DATED ABOVE

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26