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6 **UNITED STATES BANKRUPTCY COURT**

7 **FOR THE DISTRICT OF ARIZONA**

8 In re

9 MORTGAGES LTD.,

10 Debtor.

Chapter 11

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

11 **RESPONSE AND OBJECTION TO**
12 **DEBTOR'S MOTION TO TRANSFER CASE**
13 **ASSIGNMENT OF 44 CP I LOAN LLC (2:12-**
14 **BK-15286-EWH) AND 44 CP II LOAN LLC**
15 **(2:12-BK-15287-CGC) TO THE HONORABLE**
16 **RANDLOPH J. HAINES PURSUANT TO**
17 **LOCAL RULE 1015-1(a)**

18 Parkway Bank and Trust, Co. ("Parkway"), through its undersigned counsel, hereby
19 responds and objects to 44 CP I Loan LLC's ("44 CP I") and 44 CP II Loan LLC's ("44
20 CP II") (collectively "44 CP Entities") Motion to Transfer Case Assignment ("Motion").
21 The Motion should be denied because the cases of the 44 CP Entities are not related to this
22 case.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. RELEVANT FACTS.**

25 1. Parkway is not a creditor of either of the 44 CP Entities. Instead, Parkway
26 loaned funds to 44th & Camelback Property, LLC ("Borrower") secured by a deed of trust
in certain real estate owned by Borrower (the "Property").

1 2. Mortgages, Ltd., made certain loans to Borrower prior to the bankruptcy of
2 Mortgages, Ltd. As agent, Mortgages, Ltd., entered into a Subordination Agreement with
3 Parkway on or about March 12, 2008, giving Parkway a senior lien on the Property.

4 3. There is no dispute that Parkway holds a properly perfected first deed of trust
5 on the Property. There also is no dispute as to the validity and effectiveness of the
6 Subordination Agreement. [See 44 CP Entities' Bankruptcy Schedules at Schedules D
7 acknowledging that "Parkway Bank holds a first position deed of trust on the same real
8 property which secures Debtor's Deed of Trust").]

9 4. Parkway had a scheduled trustee's sale of the Property on or about July 11,
10 2012.

11 5. According to the Motion, on July 9, 2012 the ML Manager LLC caused the
12 44 CP Entities to each file separate petitions for relief under Chapter 11 of Title 11[See
13 Motion at p. 1.]

14 6. On information and belief, the bankruptcy petitions were filed by or on
15 behalf of the 44 CP Entities in order to prevent Parkway from concluding its trustee's sale
16 of the Property.

17 7. On July 23, 2012 the 44 CP Entities each filed their Schedules & Statements
18 of Financial Affairs with the Bankruptcy Court.

19 8. 44 CP I reports that it owns no real property [44 CP I Schedule A], no
20 personal property except a 77.005% interest in the Note and Deed of Trust secured by real
21 property located at 44th Street and Camelback Road in Phoenix, Arizona [44 CP I Schedule
22 B], and no executory contracts or unexpired leases [44 CP I Schedule G].

23 9. In its Schedules, 44 CP I reports only two alleged creditors: the Maricopa
24 County Treasurer and Parkway. [44 CP I Schedule D.] 44 CP I claims "[t]he real property
25 on which Debtor has a Deed of Trust may have unpaid taxes" [*id.*] and Parkway "holds a
26 first position deed of trust on same real property which secures Debtor's Deed of Trust"

1 [id.]. Both alleged debts are marked contingent, unliquidated, and disputed, as well as
2 marked for unknown value and unknown status as secured or unsecured. [Id.]

3 10. However, 44 CP I does not and cannot assert that it owes anything to
4 Maricopa County or to Parkway.

5 11. In its Statement of Financial Affairs (“44 CP I SFA”), 44 CP I reports that it
6 has had no real business operations: it admits it has had no income [44 CP I SFA §§ 1, 2],
7 never made any payments to creditors [44 CP I SFA § 3], there have been no suits,
8 administrative proceedings, executions, garnishments or attachments against to it [44 CP I
9 SFA § 4], no repossessions, foreclosures, or returns of its property [44 CP I SFA § 5], no
10 assignments or receiverships relating to it [44 CP I SFA § 6], it has made no no gifts [44
11 CP I SFA § 7], it has suffered no losses [44 CP I SFA § 8], it has made no payments
12 related to debt counseling or bankruptcy [44 CP I SFA § 9] and no transfers of any kind
13 [44 CP I SFA § 10], no closed financial accounts [44 CP I SFA § 11], no safe deposit
14 boxes [44 CP I SFA § 12], no setoffs of any property have occurred [44 CP I SFA § 13], it
15 holds no property for another person [44 CP I SFA § 14], it has never owned more than
16 five percent of and has never been a partner in another business [44 CP I SFA § 18], no
17 inventory has ever been taken of its property [44 CP I SFA § 20], it has no current partners,
18 officers, directors, or shareholders [44 CP I SFA § 21], it has no former partners, officers,
19 directors, or shareholders [44 CP I SFA § 22], and no withdrawals or distributions have
20 ever been made by it to an insider [44 CP I SFA § 23].

21 12. In its Summary of Schedules, 44 CP II reports that it has no real property [44
22 CP II Schedule A], no personal property but a 92.324% interest in the Note and Deed of
23 Trust secured by real property located at 44th Street and Camelback Road in Phoenix,
24 Arizona [44 CP II Schedule B], and no executory contracts or unexpired leases [44 CP II
25 Schedule G].

26

1 13. In its Summary of Schedules, 44 CP II reports only two potential creditors:
2 the Maricopa County Treasurer and Parkway. [44 CP II Schedule D.] The Debtor claims
3 “[t]he real property on which Debtor has a Deed of Trust may have unpaid taxes” [*id.*] and
4 Parkway “holds a first position deed of trust on same real property which secures Debtor’s
5 Deed of Trust” [*id.*]. Both alleged debts are marked contingent, unliquidated, and disputed,
6 as well as marked for unknown value and unknown status as secured or unsecured. [*Id.*]

7 14. However, 44 CP II does not and cannot assert that it owes anything to
8 Maricopa County or to Parkway.

9 15. In its Statement of Financial Affairs (“44 CP II SFA”), 44 CP II reports that
10 it has had no real business operations: it admits it has had no income [44 CP II SFA §§ 1,
11 2], never made any payments to creditors [44 CP II SFA § 3], there have been no suits,
12 administrative proceedings, executions, garnishments or attachments against to it [44 CP II
13 SFA § 4], no repossessions, foreclosures, or returns of its property [44 CP II SFA § 5], no
14 assignments or receiverships relating to it [44 CP II SFA § 6], it has made no gifts [44 CP
15 II SFA § 7], it has suffered no losses [44 CP II SFA § 8], it has made no payments related
16 to debt counseling or bankruptcy [44 CP II SFA § 9] and no transfers of any kind [44 CP II
17 SFA § 10], no closed financial accounts [44 CP II SFA § 11], no safe deposit boxes [44 CP
18 II SFA § 12], no setoffs of any property have occurred [44 CP II SFA § 13], it holds no
19 property for another person [44 CP II SFA § 14], it has never owned more than five percent
20 of and has never been a partner in another business [44 CP II SFA § 18], no inventory has
21 ever been taken of its property [44 CP II SFA § 20], it has no current partners, officers,
22 directors, or shareholders [44 CP II SFA § 21], it has no former partners, officers, directors,
23 or shareholders [44 CP II SFA § 22], and no withdrawals or distributions have ever been
24 made by it to an insider [44 CP II SFA § 23].

25 16. Neither 44 CP Entity has any claim against it or any payment obligations
26 current, pending, or forthcoming.

1 17. Based on a cursory review of their Schedules, neither 44 CP Entity has any
2 means to maintain or satisfy a Chapter 11 Plan.

3 **II. LEGAL ANALYSIS.**

4 Both Chapter 11 bankruptcies at issue here were filed in bad faith in order to
5 frustrate Parkway’s rights and ability to foreclose on the Property. As explained more fully
6 below, the assertion that the business and operations of the 44 CP Entities are related to the
7 Mortgages, Ltd., bankruptcy case is not correct. As a result, the Motion should be denied.

8 **A. The 44 CP Entities’ Respective Bankruptcies Were Filed For Improper
9 Purposes And In “Bad Faith”.**

10 “The purpose of a Chapter 11 reorganization is to assist financially distressed
11 business entities by providing them temporary relief from creditors while they attempt to
12 successfully restructure themselves to a viable status.” *In re Lange*, 75 B.R. 154, 156
13 (Bankr. N.D. Ohio 1987) (citing *In re Winshall Settlor’s Trust*, 758 F.2d 1136, 1137 (6th
14 Cir. 1985). The courts have established that if there is no need for rehabilitation or
15 reorganization, then a petition cannot fulfill the purposes for which Chapter 11 was
16 designed. *See In re SGL Carbon Corp.*, 200 F.3d 154, 166 (3rd Cir. 1999).

17 Further, under § 1112(b) of the Bankruptcy Code a Chapter 11 bankruptcy petition
18 can be dismissed for lack of good faith. *See In re Lange*, 75 B.R. at 157 (citing *In re*
19 *Winshall*, 758 F.2d at 1137; *In re Dolton Lodge*, 22 B.R. 918, 922 (Bankr. N.D. Ill. 1982).
20 Factors to consider when determining whether a given petition was filed in good faith may
21 consist of (1) whether the debtor has any assets, (2) whether the debtor has an ongoing
22 business to reorganize, and (3) whether there was a reasonable probability of a plan being
23 proposed and confirmed. *See In re Lange*, 75 B.R. at 157 (citing *In re Eden Associates*, 13
24 B.R. 578, 585 (Bankr. S.D.N.Y. 1981). In addition courts have and can also consider
25 factors that show ““an intent to abuse the judicial process and the purposes of the
26 reorganization provisions’ or, in particular, factors which evidence that the petition was
filed ‘to delay or frustrate the legitimate efforts of secured creditors to enforce their

1 rights.” *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1394 (11th Cir. 1988) (quoting *In*
2 *re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984).

3 Here, the 44 CP Entities have no current need to rehabilitate or reorganize. They
4 owe no debts to any person (including Parkway) and have no business operations, income,
5 or ability to reorganize.

6 In reality, the 44 CP Entities’ petitions were filed in bad faith on the eve of
7 Parkway’s trustee sale of the Property. Their schedules and statements of financial affairs
8 clearly show that they have no assets but for a partial interest in a subordinate Deed of
9 Trust, no ongoing business to reorganize, and no evident means to fund a plan. The 44 CP
10 Entities’ bankruptcies will not serve to assist the companies, but only to frustrate
11 Parkway’s efforts to exercise its state law rights and remedies.

12 Transferring the cases will only further delay and inhibit the bankruptcy system’s
13 ability to address the above stated issues. Furthermore, the cases will continue to stand as
14 an inappropriate and unnecessary obstacle to Parkway enforcing its legal rights in its
15 security interest. Thus, the Motion should be denied.

16 **B. Neither Rule 1015-1(A) Of The Local Rules Of Bankruptcy Procedure**
17 **Nor Rule 42(A)(3) Of The Federal Rules Of Civil Procedure Justify**
18 **Transferring Either Bankruptcy Case.**

19 The 44 CP Entities move to transfer assignment of their respective bankruptcy cases
20 pursuant to Local Bankruptcy Rule 1015-1(a) and Rule 42(a)(3) of the Federal Rules of
21 Civil Procedure (“FRCP”). The 44 CP Entities claim the bankruptcy cases are so related
22 and interwoven that it is in the best interest of the parties and the judiciary to allow the
23 same judge to hear all three cases. They are incorrect.

24 *1. Issues in 44 CP Entities’ Bankruptcy Cases are Not Related to the*
25 *Mortgages Ltd. Case.*

26 The 44 CP Entities’ bankruptcy cases turn on issues wholly independent from and

1 unrelated to the Mortgages Ltd. bankruptcy proceedings. For example, the 44 CP Entities
2 Schedules clearly show evidence of bad faith in filing the Chapter 11 bankruptcies.
3 Parkway intends to file appropriate motions seeking dismissal or stay relief after joint
4 administration if ordered in the 44 CP Entities case.

5 Such issues must be addressed before these bankruptcies proceed any further. Local
6 Rule 1015-1(a) requires that the moving party provide the reason to transfer the case, but
7 here, the 44 CP Entities provide no reason that addresses or pertains to the fundamental
8 issues of eligibility or good faith filing under Chapter 11. Any transfer at this point will
9 only confuse these pertinent initial issues, and thus should not be permitted.

10 2. *Rule 42(a)(3) Does Not Support the Transfer of the Assignment of*
11 *these Bankruptcy Cases.*

12 The 44 CP Entities argue that transferring the bankruptcies at this point is in the best
13 interest of justice, cost, and efficiency. This is simply wrong. It is far more efficient to
14 address preliminary issues, unrelated to the substantive facts of the Mortgages Ltd.
15 bankruptcy, before making other substantive-based considerations.

16 Further, under FRCP 42(a)(3), the court can enter an order to prevent unnecessary
17 cost or delay, but only where the actions involve a common question of law or fact. Here,
18 the requested order would not prevent unnecessary cost or delay, but would create them for
19 Parkway. Transferring this case would delay the adjudication of the issues identified above,
20 as well delay Parkway's ultimate ability to exercise its rights under the Deed of Trust.
21 Additionally, the initial issues in the bankruptcies do not relate to the Mortgages Ltd.
22 bankruptcy. They relate solely to the 44 CP Entities' good faith in filing and eligibility to
23 proceed in Chapter 11 generally. There are no common questions of law and fact in the
24 cases of the 44 CP Entities and the Mortgages, Ltd., bankruptcy cases.

1 **III. CONCLUSION.**

2 Transferring the 44 CP Entities' bankruptcies at this time is unwarranted.
3 Preliminary issues regarding the bad faith of the bankruptcy filings of the 44 CP Entities
4 and whether the automatic stays should be lifted in the 44 CP Entities' cases should be
5 addressed before any such consideration is made. At best, the Motion is premature, and at
6 worst, and most likely, it is entirely unnecessary.

7 Parkway Bank & Trust Company respectfully requests this Court to deny the 44 CP
8 Entities' Motion to Transfer Case Assignment.

9 RESPECTFULLY SUBMITTED this 27th day of July, 2012.

10 **TIFFANY & BOSCO, P.A.**

11 By: /s/Christopher R. Kaup

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15 **FOREGOING** electronically filed with
16 Bankruptcy Court on this 27th day of July,
17 2012.

18 **COPIES** served by the Court's electronic
19 notification system if marked with an "*" or
20 otherwise mailed, on this or the next business
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