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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,) **MOTION FOR PARTIAL**
Debtor.) **WITHDRAWAL OF THE**
) **REFERENCE AND MEMORANDUM**
) **OF POINTS AND AUTHORITIES IN**
) **SUPPORT THEREOF**

Pursuant to 28 U.S.C. § 157(d), D. Ariz. Gen. Order 01-15, and Bankr. L. R.5011-2,
Robert G. Furst, the Trustee (the "Trustee") of the Robert G. Furst & Associates Ltd. Defined
Benefit Pension Plan (the "Plan"), respectfully moves this Court (*i.e.*, the United States
District Court for the District of Arizona), to partially withdraw the reference to the United
States Bankruptcy Court for the District of Arizona (the "Bankruptcy Court") with respect to
the above-captioned bankruptcy case. The requested partial withdrawal of the reference is
with respect to controversies stemming from ML Manager's claim that (1) ML Manager has

1 an “irrevocable” agency relationship with the Plan, and (2) ML Manager, as agent, has the
2 right to manage, control and sell certain of the Plan’s assets, without owing any fiduciary
3 duties to the Plan and the Plan participants. This position by ML Manager clearly implicates
4 numerous provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §
5 1001 *et seq.* (“ERISA”).
6

7 In light of the contentions made by ML Manager, the Trustee seeks withdrawal of the
8 reference hereby and has separately filed a Complaint in the District Court (*see* Exhibit A)
9 seeking declaratory and injunctive relief pursuant to ERISA § 502(a)(3), *codified at* 29
10 U.S.C. §1132(a)(3). The Trustee files this Motion because ML Manager has made the
11 assertions described above in pending proceedings before the Bankruptcy Court, and those
12 assertions are based on fundamental misunderstandings of non-bankruptcy federal law, *i.e.*,
13 ERISA; thus, the reference to the Bankruptcy Court, as to these issues, falls within the
14 mandatory withdrawal provision in 28 U.S.C. § 157(d). Accordingly, the Trustee respectfully
15 requests that this Court partially withdraw the reference of consideration of these issues from
16 the Bankruptcy Court and consolidate the withdrawn matters with the action filed by the
17 Trustee in this Court, No. CV-12-2304-PHX-LOA.
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21 The following Memorandum of Points and Authorities supports this Motion.
22

23 MEMORANDUM OF POINTS AND AUTHORITIES

24 I. Factual Background

25 A. The Bankruptcy Proceeding

26 The Mortgages Ltd. bankruptcy case was commenced on June 20, 2008. On May 15,
27 2009, the Bankruptcy Court confirmed a plan of reorganization (“POR”), which had been
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1 proposed by the Official Investors Committee (the "OIC"), and the reorganized debtor
2 emerged from bankruptcy.

3 The POR provided *inter alia* that a separate limited liability company ("Loan LLC")
4 would be formed for each loan previously funded by Mortgages Ltd. ("ML Loan"), and the
5 investors who had acquired fractional interests in the ML Loans from Mortgages Ltd., as
6 partial assignees, would have the option to transfer their fractional interests to the Loan LLCs,
7 which would be managed by a newly formed entity, ML Manager. The POR also provided
8 that, if any investors opted not to transfer their fractional interests to Loan LLCs (the "Opt-
9 Out Investors"), they would retain their fractional interests in the ML Loans, as tenants in
10 common, subject to existing agency agreements which would be transferred from Mortgages
11 Ltd. as initial agent, to ML Manager, as successor agent.
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15 The Plan is an Opt-Out Investor in several ML Loans. The critical ERISA issues for
16 determination are (1) whether ML Manager is a fiduciary of the Plan under ERISA as a result
17 of the applicable agency agreement, and (2) whether the agency agreement is terminable
18 under ERISA.
19

20 Resolution of these issues is solely based on ERISA and has nothing to do with
21 bankruptcy law or the confirmed POM. The confirmed POR simply provided that the
22 existing agency agreements would be assigned from Mortgages Ltd. to ML Manager, but the
23 rights and obligations of the principal and agent would not be changed in any respect. If
24 Mortgages Ltd. had not become bankrupt, the Trustee could have asserted an identical action
25 against Mortgages Ltd., as the original agent, in District Court for declaratory relief under
26 ERISA regarding the scope of its agency relationship. The Trustee now seeks the same
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1 adjudication with regard to the successor agent, ML Manager, and the District Court is the
2 proper forum.

3
4 To ensure that the Bankruptcy Court is fully apprised of the developments in the
5 District Court, the Plan is also filing a brief in the Bankruptcy Court informing the
6 Bankruptcy Court of this motion and the new District Court action, requesting that the
7 Bankruptcy Court refrain from ruling on any matter that implicates the Plan or its assets.

8
9 **B. The Controversy to be Withdrawn**

10 The Trustee seeks to withdraw the issues of whether there is an on-going, interminable
11 and irrevocable agency relationship between the Plan and ML Manager, as ML Manager
12 asserts (in which event, ML Manager would be an ERISA fiduciary with respect to the Plan),
13 whether ML Manager has the right under the applicable documents and ERISA to manage,
14 control and sell any assets of the Plan (which would also result in ML Manager being a
15 fiduciary for the Plan), and whether the Trustee is entitled to relief pursuant to ERISA §§
16 502(a)(2) and (3) and ERISA § 409, 29 U.S.C. §§ 1132(a)(2) and (3) and § 1109, as well as
17 any other ERISA issues that may arise between the Trustee and ML Manager.
18

19
20 The Trustee has presented these issues to the District Court for resolution through its
21 Complaint. Resolution of these issues will require detailed consideration of a number of
22 ERISA's most critical provisions, including those governing fiduciary status (ERISA § 3(21),
23 29 U.S.C. § 1002(21)), fiduciary duties (ERISA § 404, 29 U.S.C. § 1104), prohibited
24 transactions (ERISA § 406, 29 U.S.C. § 1106), remedies (ERISA §§ 409, 502(a)(2) and
25 502(a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and 1132(a)(3)), and preemption (ERISA § 514, 29
26 U.S.C. § 1144)). Further, the Court will be obliged to consider not only the statutory text but
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1 the associated regulations and other administrative guidance promulgated by the Department
2 of Labor and the substantial body of case law interpreting the statute and regulations. These
3 are all matters that arise regularly in District Court in ERISA litigation.
4

5 **II. Argument**

6 **A. The Statutory Basis for Withdrawal of the Reference**

7 Under 28 U.S.C. § 157(a), “[e]ach district court may provide that any or all cases
8 under title 11 and any or all proceedings arising under title 11 or arising in or related to a case
9 under title 11 shall be referred to the bankruptcy judge for the district.” This Court has
10 referred all such cases to the bankruptcy judges by its June 29, 2001 General Order, number
11 01-15: “[T]he court hereby refers to the bankruptcy judges for this district all cases under
12 Title 11 and all proceedings under Title 11 or arising in or related to a case under Title 11 as
13 of the effective date of the Bankruptcy Act.”
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16 Though reference to the bankruptcy judges is the rule, there is an important exception
17 in which matters pending in a bankruptcy court may be transferred back to the district court
18 by a withdrawal of the reference. 28 U.S.C. § 157(d) states:
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20 The district court may withdraw, in whole or in part, any case or proceeding
21 referred under this section, on its own motion or on timely motion of any party,
22 for cause shown. The district court shall, on timely motion of a party, so
23 withdraw a proceeding if the court determines that resolution of the proceeding
24 requires consideration of both title 11 and other laws of the United States
25 regulating organizations or activities affecting interstate commerce.

26 This statutory basis for withdrawal is implemented in this district by Bankr. L. R.
27 5011-2 pursuant to which the present Motion is made.
28

1 **B. Withdrawal of the Reference Is Mandatory**

2 Section 157 contemplates both permissive and mandatory withdrawals of the
3 reference. Here, because the matters at issue implicate ERISA, withdrawal of the reference is
4 mandatory.¹ The Ninth Circuit has explained that sec. 157(d) “mandates withdrawal in cases
5 requiring material consideration of non-bankruptcy federal law.” *Security Farms v.*
6 *International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 124 F.3d 999,
7 1008 (9th Cir. 1997).
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10 As the Supreme Court has often noted, ERISA regulates and protects employee
11 pension benefits through a “comprehensive and reticulated” statutory scheme. *E.g., Mertens*
12 *v. Hewitt Assocs.*, 508 U.S. 238, 251 (1993). Exclusive jurisdiction over most ERISA
13 actions, including the Trustee’s action, is reposed in the District Courts. ERISA § 502(e), 29
14 U.S.C. § 1132(e).
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16 Here, as explained above, the Trustee seeks to withdraw the issues of whether ML
17 Manager’s agency is terminable under ERISA, whether ML Manager is an ERISA fiduciary
18 or a party in interest with respect to the Plan (ERISA §§ 3(14) and (21), 29 U.S.C. §§
19 1002(14) and (21)), whether ML Manager’s actions have resulted in or would result in
20 breaches of ERISA fiduciary duty or prohibited transactions under ERISA (ERISA §§ 404,
21 406, 408, 29 U.S.C. §§ 1104, 1006, 1108), and whether the Trustee is entitled to relief
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26 ¹ Withdrawal of the reference would also be appropriate in this matter on a permissive basis.
27 *See Vacation Village, Inc. v. Clark County*, 497 F.3d 902, 914 (9th Cir. 2007); *Equipoint*
28 *Financial Network, Inc. v. Network Appraisal Servs., Inc.*, 2009 WL 2135873 (S.D. Cal.
2009). Resolution of these issues would not otherwise substantially delay or hinder the
administration of the bankruptcy estate.

1 pursuant to ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), and ERISA § 409,
2 29 U.S.C. § 1104. Resolution of these issues turns exclusively on considerations of ERISA.

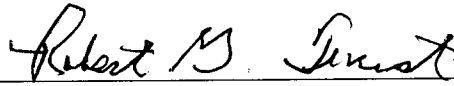
3 Resolution of these issues plainly requires both substantial and “material
4 consideration” of non-bankruptcy federal law, and therefore fall within § 157(d)’s mandatory
5 withdrawal provision. *See, e.g., In re Kiefer*, 276 B.R. 196 (E.D. Mich. 2002) (withdrawal
6 mandatory in action involving claims of ERISA fiduciary status and breach). Because
7 withdrawal is mandatory, the Trustees respectfully request that this Court grant this Motion
8 and partially withdraw the reference to the Bankruptcy Court as to the dispute between ML
9 Manager and the Trustee.

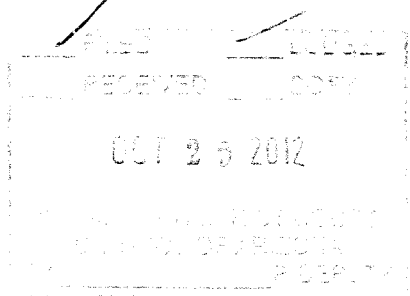
10 As explained above, the Trustee has filed an action in this Court seeking declaratory
11 and injunctive relief pursuant to ERISA with respect to these issues. The Trustee therefore
12 also requests that once withdrawn, these issues be consolidated with the ERISA action filed
13 by the Trustee.

14 **III. Conclusion**

15 For the reasons listed above, the Trustee respectfully requests that this Court grant this
16 Motion to partially withdraw the reference to the Bankruptcy Court of *In re Mortgages Ltd.*
17 with respect to the ERISA controversies between the Plan and ML Manager as described
18 above, and to consolidate the withdrawn issues with No. CV-12-2304-PHX-LOA.

19 DATED this 25th day of November, 2012

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Robert G. Furst



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 6 Pro Se

7 **UNITED STATES DISTRICT COURT**
 8 **DISTRICT OF ARIZONA**

9 ROBERT G. FURST, Trustee of the
 10 Robert G. Furst & Associates Ltd.
 11 Defined Benefit Pension Plan.

Case No. CV-12-2304-PHX-LOA

COMPLAINT

12 Plaintiff.

13 vs.

14 ML MANAGER, LLC, an Arizona limited
 15 liability company; and JOHN DOES 1-5.

16
 17 Defendants.

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 19 **I. Preliminary Statement**

20 1. This action arises out of a controversy between ML Manager, LLC (“ML
 21 Manager”) and the Robert G. Furst & Associates Ltd. Defined Benefit Pension Plan (the
 22 “Plan”). ML Manager claims it has the authority to take control of certain assets of the
 23 Plan and manage those assets, without regard to the consequences to the Plan or its
 24 participants, in violation of the Employee Retirement Income Security Act of 1974
 25 (“ERISA”). ML Manager’s brazen attempt to hijack the retirement savings of the
 26

1 participants of the Plan contravenes the most fundamental principles underlying ERISA,
2 as well as the letter of the statute.

3 2. In this lawsuit, the Plan, acting through its current trustee, seeks: (1) a
4 declaration that ML Manager has no authority to control, manage or sell Plan assets and
5 that no agency relationship currently exists between ML Manager and the Plan; (2) an
6 injunction preventing Defendants from attempting to control, manage or sell any Plan
7 asset; and (3) an award of attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g).

8 **II. Jurisdiction and Venue**

9 3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and
10 29 U.S.C. § 1132(e)(1).

11 4. This Court has personal jurisdiction over Defendants pursuant to 29 U.S.C.
12 § 1132(e)(2) and Fed. R. Civ. P. 4(k)(1)(A).

13 5. Venue is proper in this District pursuant to 29 U.S.C. § 1132(e)(2), because
14 some or all of the Defendants reside or transact business in this District.

15 **III. The Parties**

16 **A. Plaintiff**

17 6. Robert G. Furst is the current trustee and named fiduciary of the Plan. Mr.
18 Furst resides in Maricopa County, Arizona.

19 **B. Defendants**

20 7. ML Manager is an Arizona limited liability company whose principal place
21 of business is in Maricopa County, Arizona.

22 8. John Does 1-5 are the members of the Board of Managers of ML Manager.
23 Once the names of these persons are identified, to the extent necessary and appropriate,
24 Plaintiff will amend the Complaint to add their true identities.

25

26

1 **IV. Facts**

2 **A. The Plan and Its Assets**

3 9. The Plan was established in 2000 by Robert G. Furst & Associates Ltd to
4 provide a retirement savings vehicle for its employees. Robert G. Furst & Associates
5 Ltd. was the “sponsor” of the Plan within the meaning of ERISA § 3(16)(B), 29 U.S.C. §
6 1002(16)(B), and the Plan itself was an “employee pension benefit plan” within the
7 meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). Under ERISA § 502(d), 29
8 U.S.C. § 1132(d) the Plan is a legal entity separate from its sponsor.

9 10. The plan document provides that its trustee shall have full discretion and
10 authority with regard to plan assets.

11 **B. ML Manager Asserts That It Has the Right to Control, Manage and**
12 **Sell the Plan’s Assets.**

13 11. The Plan has invested in fractional interests in mortgage loans originated by
14 Mortgages Ltd., pursuant to a private offering memorandum (“POM”).

15 12. The Plan and Mortgages Ltd. executed an Agency Agreement, which is
16 attached to the POM.

17 13. Mortgages Ltd. is now the subject of bankruptcy proceedings in this
18 district, *In re Mortgages Ltd.*, No. 08-07465 (Bankr. D. Ariz. filed June 20, 2008).

19 14. ML Manager is the successor to Mortgages Ltd. under the Agency
20 Agreement

21 15. ML Manager has made several claims based upon the Agency Agreement.
22 ML Manager has alleged that, pursuant to the Agency Agreement, ML Manager has a
23 continuing agency relationship with the Plan that gives it the right to use, control, manage
24 and sell the Plan’s mortgage loans which were acquired from Mortgages Ltd.

25 16. The Agency Agreement was terminated by the Plan’s trustee in 2008.
26 Nonetheless, ML Manager asserts that the agency relationship is continuing, is “coupled

1 with an interest” and is therefore interminable and irrevocable under state law. Thus,
2 according to ML Manager, the Plan has no right to remove ML Manager as an agent, and
3 the Plan has no choice but to watch as ML Manager liquidates all of the Plan’s mortgages
4 investments, without regard to the best interests of the Plan (and for the benefit of others).

5 17. By asserting such an agency relationship, ML Manager seeks to do one of
6 the things that ERISA was specifically designed to prevent: raid plan assets to benefit
7 persons other than plan participants and beneficiaries.

8 **V. Defendants’ Fiduciary Status**

9 18. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries
10 under 29 U.S.C. § 1102(a)(1), but also any other persons who in fact perform fiduciary
11 functions. Thus, a person is a *de facto* fiduciary to the extent “(i) he exercises any
12 discretionary authority or discretionary control respecting management of such plan or
13 exercises any authority or control respecting management or disposition of its assets... or
14 (iii) he has any discretionary authority or discretionary responsibility in the
15 administration of such plan.” 29 U.S.C. § 1002(21)(A)(i)&(iii).

16 19. Fiduciary status under ERISA does not depend on whether one intended to
17 be a fiduciary. What matters is what one does. As the Supreme Court has emphasized,
18 this provision of ERISA “defines ‘fiduciary’ not in terms of formal trusteeship, but in
19 functional terms of control and authority over the [plan or its assets].” *Mertens v. Hewitt*
20 *Associates*, 508 U.S. 248, 262 (1993).

21 20. Not only is the definition broad, it contemplates that a given plan will have
22 many fiduciaries with many functions. As the leading ERISA treatise puts it, this
23 “fractionation of trusteeship” is one of the major features of ERISA, which “envisions
24 multiple fiduciary service providers, and the complexity of ERISA’s definition of
25 fiduciary . . . responds to the dispersion of fiduciary functions that ERISA permits.”
26 Langbein, *Pratt & Stable, Pension and Employee Benefit Law* at 548 (5th ed. 2010). Cf.

1 as the Supreme Court put it, "Congress commodiously imposed fiduciary standards on
2 persons whose actions affect the amount of benefits retirement plan participants will
3 receive." John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank, 510 US 86, 96
4 (1993).

5 21. During the period that ML Manager acted as agent under the Agency
6 Agreement, ML Manager was a fiduciary for the Plan as a result of the authority
7 conferred upon it by the Agency Agreement

8 22. To the extent that ML Manager holds the right to advance to itself or to
9 otherwise use, manage, control, and sell Plan assets, which it claims to hold, or exercises
10 any such rights, it would be a *de facto* fiduciary of the Plan.

11 **VI. ERISA's Fiduciary Duties, Prohibited Transaction Rules, and**
12 **Remedial Provisions**

13 23. ERISA provides a complex and interlocking scheme for the protection of
14 employee retirement savings. Among ERISA's protections include imposition of strict
15 fiduciary duties on individuals and entities that have the power to control plan assets, as
16 well as the blanket prohibition of certain transactions that raise the specter of self-dealing
17 with plan assets. ERISA also contains a comprehensive enforcement system to ensure
18 these fiduciary duties and prohibited transaction rules are not violated.

19 **A. ERISA's Fiduciary Duties**

20 24. Once it is determined that a person is an ERISA fiduciary, the
21 consequences are significant. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), imposes
22 certain obligations on fiduciaries. Of particular relevance here are the statutory directives
23 that a fiduciary — like ML Manager, if it has the right to use, manage, control, or sell
24 plan assets as it argues — "shall discharge his duties with respect to a plan solely in the
25 interest of the participants and beneficiaries" and shall do so "with the care, skill,
26 prudence, and diligence under the circumstances then prevailing that a prudent man

1 acting in a like capacity and familiar with such matters would use in the conduct of an
2 enterprise of a like character and with like aims." (Emphasis added).

3 25 These fiduciary duties under 29 U.S.C. §§ 1104(a)(1)(A) & (B) are referred
4 to as the duties of loyalty, exclusive purpose and prudence, and are the "highest known to
5 the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.2 (2d Cir. 1982).

6 **B. ERISA's Prohibited Transaction Rules**

7 26. Fiduciaries are subject not only to the general fiduciary obligations of
8 section 404, but also to the much more specific obligations of ERISA § 406, 29 U.S.C. §
9 1106. ERISA § 406 categorically bans certain transactions ("prohibited transactions" in
10 the language of the statute), without the need for any specific inquiry into the prudence of
11 the transactions. The statute particularly targets, and prohibits, transactions between a
12 plan and a "party in interest," which is very broadly defined to include, among others, the
13 employer and fiduciaries. In particular, the statute provides:

14 (1) A fiduciary with respect to a plan shall not cause the plan to
15 engage in a transaction, if he knows or should know that such transaction
16 constitutes a direct or indirect--

17 (A) sale or exchange, or leasing, of any property between the
18 plan and a party in interest;

19 (B) lending of money or other extension of credit between
20 the plan and a party in interest;

21 (C) furnishing of goods, services, or facilities between the
22 plan and a party in interest, [or]

23 (D) transfer to, or use by or for the benefit of a party in
24 interest, of any assets of the plan:...

25 ERISA § 406(a)(1), 29 U.S.C. 1106(a)(1).

26

1 27. ML Manager is a "party in interest" to the Plan if it holds the rights it
2 claims with respect to the Plan's real estate assets, for two reasons. As explained above,
3 if ML Manager holds the rights it claims with respect to the Plan's assets, ML Manager
4 would be a *de facto* fiduciary with respect to the Plan. ERISA specifically provides that
5 all Plan fiduciaries are also parties in interest. ERISA §§ 3(14)(A), 3(21). Additionally,
6 if ML Manager has the rights it claims, it would be a service provider for the Plan, and
7 ERISA also defines Plan service providers as parties in interest. ERISA § 3(14)(B).

8 28. ERISA § 406(b) also prohibits any fiduciary from "deal[ing] with the assets
9 of the plan in his own interest or for his own account, ... act[ing] in any transaction
10 involving the plan on behalf of a party ... whose interests are adverse to the interests of
11 the plan or the interests of its participants or beneficiaries, or receiv[ing] any
12 consideration for his own personal account from any party dealing with such plan in
13 connection with a transaction involving the assets of the plan."

14 **C. ERISA's Remedial Provisions**

15 29. ERISA § 502, 29 U.S.C. § 1132, contains a comprehensive enforcement
16 scheme to ensure the security of retirement benefits.

17 30. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) provides, in pertinent part, that
18 a civil action may be brought by a fiduciary for relief under 29 U.S.C. § 1109.

19 31. ERISA § 409(a), 29 U.S.C. § 1109(a) "Liability for Breach of Fiduciary
20 Duty," provides, in pertinent part, that "any person who is a fiduciary with respect to a
21 plan who breaches any of the responsibilities, obligations, or duties imposed upon
22 fiduciaries ... shall be personally liable to make good to such plan any losses to the plan
23 resulting from each such breach, and to restore to such plan any profits of such fiduciary,
24 ... and shall be subject to such other equitable or remedial relief as the court may deem
25 appropriate, including removal of such fiduciary."

1 32. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), also authorizes plan fiduciaries
2 to seek equitable relief from defendants, including, without limitation, injunctive relief
3 and, as available under applicable law, constructive trust, restitution, and other monetary
4 relief. Section 502(a)(3) states that a civil action may be brought by a fiduciary "(A) to
5 enjoin any act or practice which violates any provision of this title or the terms of the
6 plan, or (B) to obtain other equitable relief (i) to redress such violations or (ii) to enforce
7 any provisions of this title or the terms of the plan."

8 33. ML Manager is blatantly violating ERISA's exclusive purpose rule and
9 seeks to manage plan assets in a manner contrary to the best interests of the Plan
10 participants, in blatant disregard of its duty to manage these assets prudently, loyally, and
11 in the best interests of the Plan participants. As a fiduciary, ML Manager is required to
12 act "solely in the interest of the participants and beneficiaries" and exclusively for the
13 purpose of providing benefits to the participants and beneficiaries. Plainly, ML Manager
14 is not managing the Plan's assets in the interest of the Plan's participants and
15 beneficiaries, nor are its actions exclusively designed to benefit to the Plan's participants
16 and beneficiaries.

17 34. ML Manager's actions have violated and will continue to violate ERISA's
18 prohibited transaction rules.

19 **VII. The Appropriateness of Declaratory Relief**

20 35. As alleged above, there is an actual controversy between the Plan and ML
21 Manager with respect to ML Manager's rights and responsibilities with respect to the
22 assets of the Plan.

23 36. In particular, ML Manager has maintained and continues to maintain that it
24 has the power to dispose of Plan assets pursuant to the Agency Agreement, and the Plan
25 denies that it has any such power and that, further, if the Agency Agreement were
26 construed to give ML Manager such powers, then ML Manager would be an ERISA

1 fiduciary and the exercise of those powers would breach its fiduciary duties under ERISA
2 and the transactions at issue would be prohibited transactions under ERISA. Declaratory
3 relief is thus appropriate under 28 U.S.C. § 2201 and ERISA itself

4 **VIII. Claims for Relief**

5 **Count I**

6 **Claim for Declaratory Relief Regarding Agency Termination**
7 **Pursuant to 29 U.S.C. § 1132(a)(3)**
8 **As Against ML Manager and John Doe Defendants**

9 37. The foregoing allegations are expressly incorporated and realleged herein.

10 38. The agency relationship between the Plan and either Mortgages Ltd. or ML
11 Manager has terminated by its own terms or by the Plan's named fiduciary. Accordingly,
12 ML Manager has no right to use, control, manage or sell any assets of the Plan and no
13 agency relationship currently exists between ML Manager and the Plan.

14 39. To the extent state law would render any agency relationship between the
15 Plan and ML Manager irrevocable or interminable by the Plan's named fiduciaries, such
16 state law is preempted by ERISA.

17 40. In order to obtain appropriate equitable relief to redress ML Manager's
18 violations of ERISA and to enforce ERISA's provisions and the clear terms of the Plan,
19 the Plan seeks declaratory relief pursuant to ERISA § 502(a)(3) that (1) ML Manager was
20 a fiduciary of the Plan while the Agency Agreement was in effect, (2) no agency
21 relationship currently exists between ML Manager and the Plan, and (3) ML Manager
22 does not have any authority over Plan assets or any right to control, manage or sell any
23 Plan asset.

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Count II
Claim for Injunctive Relief Preventing Defendants From
Any Use, Control, or Sale of Plan Assets
Pursuant to 29 U.S.C. § 1132(a)(3)
As Against ML Manager and John Doe Defendants

41. The foregoing allegations are expressly incorporated and realleged herein.

42. As explained above, ML Manager seeks to control, manage and sell the assets of the Plan. These activities pose an immediate and severe risk of irreparable harm to the Plan.

43. As such, the Plan seeks an injunction pursuant to 502(a)(3) of ERISA preventing ML Manager from controlling or selling any assets of the Plan, because such acts would violate both the provisions of ERISA and the clear terms of the Plan documents.

Prayer for Relief

A. A Declaration that (1) ML Manager was a fiduciary of the Plan while the Agency Agreement was in effect, (2) no agency relationship currently exists between ML Manager and the Plan, and (3) Defendants do not have any authority over Plan assets or any right to control or sell any Plan asset;

B. An Injunction preventing Defendants from controlling, managing or selling any assets of the Plan.

C. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

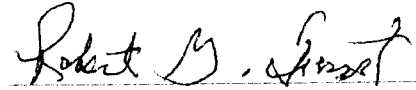
D. An Order awarding attorneys' fees pursuant 29 U.S.C. § 1132(g), and other applicable law;

E. An Order for equitable restitution and other appropriate equitable and injunctive relief against Defendants, including restitution, disgorgement of fees, and equitable tracing; and

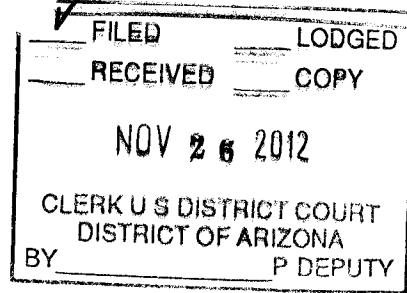
F. An Order granting such other and further relief as the Court may deem just and proper

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Dated: October 29, 2012



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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Robert G. Furst, Trustee of the
Robert G. Furst & Associates Ltd.
Defined Benefit Pension Plan,

Plaintiff,

vs.

ML Manager, LLC, an Arizona limited
liability company,

Defendant.

Case No. CV-12-2304-PHX-LOA

**MOTION FOR PARTIAL
WITHDRAWAL OF THE
REFERENCE AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Oral Argument Requested

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

In re:

MORTGAGES LTD.,

Debtor.

) In Proceedings Under Chapter 11

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

1 Pursuant to 28 U.S.C. § 157(d), D. Ariz. Gen. Order 01-15, and Bankr. L. R.5011-2,
2 Robert G. Furst, the Trustee (the "Trustee") of the Robert G. Furst & Associates Ltd. Defined
3 Benefit Pension Plan (the "Plan"), respectfully moves this Court (*i.e.*, the United States
4 District Court for the District of Arizona), to partially withdraw the reference to the United
5 States Bankruptcy Court for the District of Arizona (the "Bankruptcy Court") with respect to
6 the above-captioned bankruptcy case. The requested partial withdrawal of the reference is
7 with respect to controversies stemming from ML Manager's claim that (1) ML Manager has
8 an "irrevocable" agency relationship with the Plan, and (2) ML Manager, as agent, has the
9 right to manage, control and sell certain of the Plan's assets, without owing any fiduciary
10 duties to the Plan and the Plan participants. This position by ML Manager clearly implicates
11 numerous provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §
12 1001 *et seq.* ("ERISA").
13

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15
16 In light of the contentions made by ML Manager, the Trustee seeks withdrawal of the
17 reference hereby and has separately filed a Complaint in the District Court (*see* Exhibit A)
18 seeking declaratory and injunctive relief pursuant to ERISA § 502(a)(3), *codified at* 29
19 U.S.C. §1132(a)(3). The Trustee files this Motion because ML Manager has made the
20 assertions described above in pending proceedings before the Bankruptcy Court, and those
21 assertions are based on fundamental misunderstandings of non-bankruptcy federal law, *i.e.*,
22 ERISA; thus, the reference to the Bankruptcy Court, as to these issues, falls within the
23 mandatory withdrawal provision in 28 U.S.C. § 157(d). Accordingly, the Trustee respectfully
24 requests that this Court partially withdraw the reference of consideration of these issues from
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1 the Bankruptcy Court and consolidate the withdrawn matters with the action filed by the
2 Trustee in this Court, No. CV-12-2304-PHX-LOA.

3 The following Memorandum of Points and Authorities supports this Motion.
4

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. Factual Background**

7 **A. The Bankruptcy Proceeding**

8 The Mortgages Ltd. bankruptcy case was commenced on June 20, 2008. On May 15,
9 2009, the Bankruptcy Court confirmed a plan of reorganization (“POR”), which had been
10 proposed by the Official Investors Committee (the “OIC”), and the reorganized debtor
11 emerged from bankruptcy.
12

13 The POR provided *inter alia* that a separate limited liability company (“Loan LLC”)
14 would be formed for each loan previously funded by Mortgages Ltd. (“ML Loan”), and the
15 investors who had acquired fractional interests in the ML Loans from Mortgages Ltd., as
16 partial assignees, would have the option to transfer their fractional interests to the Loan LLCs,
17 which would be managed by a newly formed entity, ML Manager. The POR also provided
18 that, if any investors opted not to transfer their fractional interests to Loan LLCs (the “Opt-
19 Out Investors”), they would retain their fractional interests in the ML Loans, as tenants in
20 common, subject to existing agency agreements which would be transferred from Mortgages
21 Ltd. as initial agent, to ML Manager, as successor agent.
22

23 The Plan is an Opt-Out Investor in several ML Loans. The critical ERISA issues for
24 determination are (1) whether ML Manager is a fiduciary of the Plan under ERISA as a result
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1 of the applicable agency agreement, and (2) whether the agency agreement is terminable
2 under ERISA.

3
4 Resolution of these issues is solely based on ERISA and has nothing to do with
5 bankruptcy law or the confirmed POM. The confirmed POR simply provided that the
6 existing agency agreements would be assigned from Mortgages Ltd. to ML Manager, but the
7 rights and obligations of the principal and agent would not be changed in any respect. If
8 Mortgages Ltd. had not become bankrupt, the Trustee could have asserted an identical action
9 against Mortgages Ltd., as the original agent, in District Court for declaratory relief under
10 ERISA regarding the scope of its agency relationship. The Trustee now seeks the same
11 adjudication with regard to the successor agent, ML Manager, and the District Court is the
12 proper forum.
13
14

15 To ensure that the Bankruptcy Court is fully apprised of the developments in the
16 District Court, the Plan is also filing a brief in the Bankruptcy Court informing the
17 Bankruptcy Court of this motion and the new District Court action, requesting that the
18 Bankruptcy Court refrain from ruling on any matter that implicates the Plan or its assets.
19

20 **B. The Controversy to be Withdrawn**

21 The Trustee seeks to withdraw the issues of whether there is an on-going, interminable
22 and irrevocable agency relationship between the Plan and ML Manager, as ML Manager
23 asserts (in which event, ML Manager would be an ERISA fiduciary with respect to the Plan),
24 whether ML Manager has the right under the applicable documents and ERISA to manage,
25 control and sell any assets of the Plan (which would also result in ML Manager being a
26 fiduciary for the Plan), and whether the Trustee is entitled to relief pursuant to ERISA §§
27
28

1 502(a)(2) and (3) and ERISA § 409, 29 U.S.C. §§ 1132(a)(2) and (3) and § 1109, as well as
2 any other ERISA issues that may arise between the Trustee and ML Manager.

3
4 The Trustee has presented these issues to the District Court for resolution through its
5 Complaint. Resolution of these issues will require detailed consideration of a number of
6 ERISA's most critical provisions, including those governing fiduciary status (ERISA § 3(21),
7 29 U.S.C. § 1002(21)), fiduciary duties (ERISA § 404, 29 U.S.C. § 1104)), prohibited
8 transactions (ERISA § 406, 29 U.S.C. § 1106)), remedies (ERISA §§ 409, 502(a)(2) and
9 502(a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and 1132(a)(3)), and preemption (ERISA § 514, 29
10 U.S.C. § 1144)). Further, the Court will be obliged to consider not only the statutory text but
11 the associated regulations and other administrative guidance promulgated by the Department
12 of Labor and the substantial body of case law interpreting the statute and regulations. These
13 are all matters that arise regularly in District Court in ERISA litigation.

14 **II. Argument**

15 **A. The Statutory Basis for Withdrawal of the Reference**

16
17 Under 28 U.S.C. § 157(a), “[e]ach district court may provide that any or all cases
18 under title 11 and any or all proceedings arising under title 11 or arising in or related to a case
19 under title 11 shall be referred to the bankruptcy judge for the district.” This Court has
20 referred all such cases to the bankruptcy judges by its June 29, 2001 General Order, number
21 01-15: “[T]he court hereby refers to the bankruptcy judges for this district all cases under
22 Title 11 and all proceedings under Title 11 or arising in or related to a case under Title 11 as
23 of the effective date of the Bankruptcy Act.”
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1 Though reference to the bankruptcy judges is the rule, there is an important exception
2 in which matters pending in a bankruptcy court may be transferred back to the district court
3 by a withdrawal of the reference. 28 U.S.C. § 157(d) states:
4

5 The district court may withdraw, in whole or in part, any case or proceeding
6 referred under this section, on its own motion or on timely motion of any party,
7 for cause shown. The district court shall, on timely motion of a party, so
8 withdraw a proceeding if the court determines that resolution of the proceeding
9 requires consideration of both title 11 and other laws of the United States
10 regulating organizations or activities affecting interstate commerce.

11 This statutory basis for withdrawal is implemented in this district by Bankr. L. R.
12 5011-2 pursuant to which the present Motion is made.

13 **B. Withdrawal of the Reference Is Mandatory**

14 Section 157 contemplates both permissive and mandatory withdrawals of the
15 reference. Here, because the matters at issue implicate ERISA, withdrawal of the reference is
16 mandatory.¹ The Ninth Circuit has explained that sec. 157(d) “mandates withdrawal in cases
17 requiring material consideration of non-bankruptcy federal law.” *Security Farms v.*
18 *International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 124 F.3d 999,
19 1008 (9th Cir. 1997).
20

21 As the Supreme Court has often noted, ERISA regulates and protects employee
22 pension benefits through a “comprehensive and reticulated” statutory scheme. *E.g., Mertens*
23 *v. Hewitt Assocs.*, 508 U.S. 238, 251 (1993). Exclusive jurisdiction over most ERISA
24

25
26 ¹ Withdrawal of the reference would also be appropriate in this matter on a permissive basis.
27 *See Vacation Village, Inc. v. Clark County*, 497 F.3d 902, 914 (9th Cir. 2007); *Equipoint*
28 *Financial Network, Inc. v. Network Appraisal Servs., Inc.*, 2009 WL 2135873 (S.D. Cal.
2009). Resolution of these issues would not otherwise substantially delay or hinder the
administration of the bankruptcy estate.

1 actions, including the Trustee's action, is reposed in the District Courts. ERISA § 502(e), 29
2 U.S.C. § 1132(e).

3
4 Here, as explained above, the Trustee seeks to withdraw the issues of whether ML
5 Manager's agency is terminable under ERISA, whether ML Manager is an ERISA fiduciary
6 or a party in interest with respect to the Plan (ERISA §§ 3(14) and (21), 29 U.S.C. §§
7 1002(14) and (21)), whether ML Manager's actions have resulted in or would result in
8 breaches of ERISA fiduciary duty or prohibited transactions under ERISA (ERISA §§ 404,
9 406, 408, 29 U.S.C. §§ 1104, 1006, 1108), and whether the Trustee is entitled to relief
10 pursuant to ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), and ERISA § 409,
11 29 U.S.C. § 1104. Resolution of these issues turns exclusively on considerations of ERISA.
12

13
14 Resolution of these issues plainly requires both substantial and "material
15 consideration" of non-bankruptcy federal law, and therefore fall within § 157(d)'s mandatory
16 withdrawal provision. *See, e.g., In re Kiefer*, 276 B.R. 196 (E.D. Mich. 2002) (withdrawal
17 mandatory in action involving claims of ERISA fiduciary status and breach). Because
18 withdrawal is mandatory, the Trustees respectfully request that this Court grant this Motion
19 and partially withdraw the reference to the Bankruptcy Court as to the dispute between ML
20 Manager and the Trustee.
21

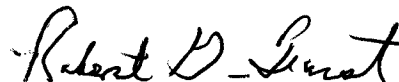
22
23 As explained above, the Trustee has filed an action in this Court seeking declaratory
24 and injunctive relief pursuant to ERISA with respect to these issues. The Trustee therefore
25 also requests that once withdrawn, these issues be consolidated with the ERISA action filed
26 by the Trustee.
27
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1 **III. Conclusion**

2 For the reasons listed above, the Trustee respectfully requests that this Court grant this
3 Motion to partially withdraw the reference to the Bankruptcy Court of *In re Mortgages Ltd.*
4 with respect to the ERISA controversies between the Plan and ML Manager as described
5 above, and to consolidate the withdrawn issues with No. CV-12-2304-PHX-LOA.
6

7 (The Trustee notes that ML Manager (which has not yet been served in this action) has
8 already filed ML Manager's Motion to Dismiss or, In the Alternative, Motion to Refer Case
9 to Bankruptcy Court (and another motion seeking the transfer of this case Judge Jones). The
10 Trustee will respond separately to those motions by the filing deadline.)
11

12 DATED this 25th day of November, 2012
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17 Robert G. Furst
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 6 Pro Se

6 UNITED STATES DISTRICT COURT
 7 DISTRICT OF ARIZONA

8 ROBERT G. FURST, Trustee of the
 9 Robert G. Furst & Associates Ltd.
 10 Defined Benefit Pension Plan.

Case No. CV-12-2304-PHX-LOA

COMPLAINT

11 Plaintiff,

12 vs.

13
 14 ML MANAGER, LLC, an Arizona limited
 15 liability company; and JOHN DOES 1-5.

16
 17 Defendants.

18
 19 I. Preliminary Statement

20 i. This action arises out of a controversy between ML Manager, LLC ("ML
 21 Manager") and the Robert G. Furst & Associates Ltd. Defined Benefit Pension Plan (the
 22 "Plan"). ML Manager claims it has the authority to take control of certain assets of the
 23 Plan and manage those assets, without regard to the consequences to the Plan or its
 24 participants, in violation of the Employee Retirement Income Security Act of 1974
 25 ("ERISA"). ML Manager's brazen attempt to hijack the retirement savings of the
 26

1 participants of the Plan contravenes the most fundamental principles underlying ERISA,
2 as well as the letter of the statute.

3 2. In this lawsuit, the Plan, acting through its current trustee, seeks: (1) a
4 declaration that ML Manager has no authority to control, manage or sell Plan assets and
5 that no agency relationship currently exists between ML Manager and the Plan; (2) an
6 injunction preventing Defendants from attempting to control, manage or sell any Plan
7 asset; and (3) an award of attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g).

8 **II. Jurisdiction and Venue**

9 3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and
10 29 U.S.C. § 1132(e)(1).

11 4. This Court has personal jurisdiction over Defendants pursuant to 29 U.S.C.
12 § 1132(e)(2) and Fed. R. Civ. P. 4(k)(1)(A).

13 5. Venue is proper in this District pursuant to 29 U.S.C. § 1132(e)(2), because
14 some or all of the Defendants reside or transact business in this District.

15 **III. The Parties**

16 **A. Plaintiff**

17 6. Robert G. Furst is the current trustee and named fiduciary of the Plan. Mr.
18 Furst resides in Maricopa County, Arizona.

19 **B. Defendants**

20 7. ML Manager is an Arizona limited liability company whose principal place
21 of business is in Maricopa County, Arizona.

22 8. John Does 1-5 are the members of the Board of Managers of ML Manager.
23 Once the names of these persons are identified, to the extent necessary and appropriate,
24 Plaintiff will amend the Complaint to add their true identities.

25
26

1 **IV. Facts**

2 **A. The Plan and Its Assets**

3 9. The Plan was established in 2000 by Robert G. Furst & Associates Ltd. to
4 provide a retirement savings vehicle for its employees. Robert G. Furst & Associates
5 Ltd. was the “sponsor” of the Plan within the meaning of ERISA § 3(16)(B), 29 U.S.C. §
6 1002(16)(B), and the Plan itself was an “employee pension benefit plan” within the
7 meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). Under ERISA § 502(d), 29
8 U.S.C. § 1132(d) the Plan is a legal entity separate from its sponsor.

9 10. The plan document provides that its trustee shall have full discretion and
10 authority with regard to plan assets.

11 **B. ML Manager Asserts That It Has the Right to Control, Manage and**
12 **Sell the Plan’s Assets.**

13 11. The Plan has invested in fractional interests in mortgage loans originated by
14 Mortgages Ltd., pursuant to a private offering memorandum (“POM”).

15 12. The Plan and Mortgages Ltd. executed an Agency Agreement, which is
16 attached to the POM.

17 13. Mortgages Ltd. is now the subject of bankruptcy proceedings in this
18 district, In re Mortgages Ltd., No. 08-07465 (Bankr. D. Ariz. filed June 20, 2008).

19 14. ML Manager is the successor to Mortgages Ltd. under the Agency
20 Agreement.

21 15. ML Manager has made several claims based upon the Agency Agreement.
22 ML Manager has alleged that, pursuant to the Agency Agreement, ML Manager has a
23 continuing agency relationship with the Plan that gives it the right to use, control, manage
24 and sell the Plan’s mortgage loans which were acquired from Mortgages Ltd.

25 16. The Agency Agreement was terminated by the Plan’s trustee in 2008.
26 Nonetheless, ML Manager asserts that the agency relationship is continuing, is “coupled

1 with an interest” and is therefore interminable and irrevocable under state law. Thus,
2 according to ML Manager, the Plan has no right to remove ML Manager as an agent, and
3 the Plan has no choice but to watch as ML Manager liquidates all of the Plan’s mortgages
4 investments, without regard to the best interests of the Plan (and for the benefit of others).

5 17. By asserting such an agency relationship, ML Manager seeks to do one of
6 the things that ERISA was specifically designed to prevent: raid plan assets to benefit
7 persons other than plan participants and beneficiaries.

8 **V. Defendants’ Fiduciary Status**

9 18. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries
10 under 29 U.S.C. § 1102(a)(1), but also any other persons who in fact perform fiduciary
11 functions. Thus, a person is a *de facto* fiduciary to the extent “(i) he exercises any
12 discretionary authority or discretionary control respecting management of such plan or
13 exercises any authority or control respecting management or disposition of its assets... or
14 (iii) he has any discretionary authority or discretionary responsibility in the
15 administration of such plan.” 29 U.S.C. § 1002(21)(A)(i)&(iii).

16 19. Fiduciary status under ERISA does not depend on whether one intended to
17 be a fiduciary. What matters is what one does. As the Supreme Court has emphasized,
18 this provision of ERISA “defines ‘fiduciary’ not in terms of formal trusteeship, but in
19 functional terms of control and authority over the [plan or its assets].” *Mertens v. Hewitt*
20 *Associates*, 508 U.S. 248, 262 (1993).

21 20. Not only is the definition broad, it contemplates that a given plan will have
22 many fiduciaries with many functions. As the leading ERISA treatise puts it, this
23 “fractionation of trusteeship” is one of the major features of ERISA, which “envisions
24 multiple fiduciary service providers, and the complexity of ERISA’s definition of
25 fiduciary . . . responds to the dispersion of fiduciary functions that ERISA permits.”
26 *Langbein, Pratt & Stabile, Pension and Employee Benefit Law* at 548 (5th ed. 2010). Or

1 as the Supreme Court put it, "Congress commodiously imposed fiduciary standards on
 2 persons whose actions affect the amount of benefits retirement plan participants will
 3 receive." *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 US 86, 96
 4 (1993).

5 21. During the period that ML Manager acted as agent under the Agency
 6 Agreement, ML Manager was a fiduciary for the Plan as a result of the authority
 7 conferred upon it by the Agency Agreement.

8 22. To the extent that ML Manager holds the right to advance to itself or to
 9 otherwise use, manage, control, and sell Plan assets, which it claims to hold, or exercises
 10 any such rights, it would be a *de facto* fiduciary of the Plan.

11 **VI. ERISA's Fiduciary Duties, Prohibited Transaction Rules, and**
 12 **Remedial Provisions**

13 23. ERISA provides a complex and interlocking scheme for the protection of
 14 employee retirement savings. Among ERISA's protections include imposition of strict
 15 fiduciary duties on individuals and entities that have the power to control plan assets, as
 16 well as the blanket prohibition of certain transactions that raise the specter of self-dealing
 17 with plan assets. ERISA also contains a comprehensive enforcement system to ensure
 18 these fiduciary duties and prohibited transaction rules are not violated.

19 **A. ERISA's Fiduciary Duties**

20 24. Once it is determined that a person is an ERISA fiduciary, the
 21 consequences are significant. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), imposes
 22 certain obligations on fiduciaries. Of particular relevance here are the statutory directives
 23 that a fiduciary — like ML Manager, if it has the right to use, manage, control, or sell
 24 plan assets as it argues — "shall discharge his duties with respect to a plan solely in the
 25 interest of the participants and beneficiaries" and shall do so "with the care, skill,
 26 prudence, and diligence under the circumstances then prevailing that a prudent man

1 acting in a like capacity and familiar with such matters would use in the conduct of an
2 enterprise of a like character and with like aims.” (Emphasis added).

3 25. These fiduciary duties under 29 U.S.C. §§ 1104(a)(1)(A) & (B) are referred
4 to as the duties of loyalty, exclusive purpose and prudence, and are the “highest known to
5 the law.” *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.2 (2d Cir. 1982).

6 **B. ERISA’s Prohibited Transaction Rules**

7 26. Fiduciaries are subject not only to the general fiduciary obligations of
8 section 404, but also to the much more specific obligations of ERISA § 406, 29 U.S.C. §
9 1106. ERISA § 406 categorically bans certain transactions (“prohibited transactions” in
10 the language of the statute), without the need for any specific inquiry into the prudence of
11 the transactions. The statute particularly targets, and prohibits, transactions between a
12 plan and a “party in interest,” which is very broadly defined to include, among others, the
13 employer and fiduciaries. In particular, the statute provides:

14 (1) A fiduciary with respect to a plan shall not cause the plan to
15 engage in a transaction, if he knows or should know that such transaction
16 constitutes a direct or indirect--

17 (A) sale or exchange, or leasing, of any property between the
18 plan and a party in interest;

19 (B) lending of money or other extension of credit between
20 the plan and a party in interest;

21 (C) furnishing of goods, services, or facilities between the
22 plan and a party in interest, [or]

23 (D) transfer to, or use by or for the benefit of a party in
24 interest, of any assets of the plan;...

25 ERISA § 406(a)(1), 29 U.S.C. 1106(a)(1).
26

1 27. ML Manager is a “party in interest” to the Plan if it holds the rights it
2 claims with respect to the Plan’s real estate assets, for two reasons. As explained above,
3 if ML Manager holds the rights it claims with respect to the Plan’s assets, ML Manager
4 would be a *de facto* fiduciary with respect to the Plan. ERISA specifically provides that
5 all Plan fiduciaries are also parties in interest. ERISA §§ 3(14)(A), 3(21). Additionally,
6 if ML Manager has the rights it claims, it would be a service provider for the Plan, and
7 ERISA also defines Plan service providers as parties in interest. ERISA § 3(14)(B).

8 28. ERISA § 406(b) also prohibits any fiduciary from “deal[ing] with the assets
9 of the plan in his own interest or for his own account, ... act[ing] in any transaction
10 involving the plan on behalf of a party ... whose interests are adverse to the interests of
11 the plan or the interests of its participants or beneficiaries, or receiv[ing] any
12 consideration for his own personal account from any party dealing with such plan in
13 connection with a transaction involving the assets of the plan.”

14 **C. ERISA’s Remedial Provisions**

15 29. ERISA § 502, 29 U.S.C. § 1132, contains a comprehensive enforcement
16 scheme to ensure the security of retirement benefits.

17 30. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) provides, in pertinent part, that
18 a civil action may be brought by a fiduciary for relief under 29 U.S.C. § 1109.

19 31. ERISA § 409(a), 29 U.S.C. § 1109(a) “Liability for Breach of Fiduciary
20 Duty,” provides, in pertinent part, that “any person who is a fiduciary with respect to a
21 plan who breaches any of the responsibilities, obligations, or duties imposed upon
22 fiduciaries . . . shall be personally liable to make good to such plan any losses to the plan
23 resulting from each such breach, and to restore to such plan any profits of such fiduciary .
24 . . . and shall be subject to such other equitable or remedial relief as the court may deem
25 appropriate, including removal of such fiduciary.”
26

1 32. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), also authorizes plan fiduciaries
2 to seek equitable relief from defendants, including, without limitation, injunctive relief
3 and, as available under applicable law, constructive trust, restitution, and other monetary
4 relief. Section 502(a)(3) states that a civil action may be brought by a fiduciary “(A) to
5 enjoin any act or practice which violates any provision of this title or the terms of the
6 plan, or (B) to obtain other equitable relief (i) to redress such violations or (ii) to enforce
7 any provisions of this title or the terms of the plan.”

8 33. ML Manager is blatantly violating ERISA’s exclusive purpose rule and
9 seeks to manage plan assets in a manner contrary to the best interests of the Plan
10 participants, in blatant disregard of its duty to manage these assets prudently, loyally, and
11 in the best interests of the Plan participants. As a fiduciary, ML Manager is required to
12 act “solely in the interest of the participants and beneficiaries” and exclusively for the
13 purpose of providing benefits to the participants and beneficiaries. Plainly, ML Manager
14 is not managing the Plan’s assets in the interest of the Plan’s participants and
15 beneficiaries, nor are its actions exclusively designed to benefit to the Plan’s participants
16 and beneficiaries.

17 34. ML Manager’s actions have violated and will continue to violate ERISA’s
18 prohibited transaction rules.

19 **VII. The Appropriateness of Declaratory Relief**

20 35. As alleged above, there is an actual controversy between the Plan and ML
21 Manager with respect to ML Manager’s rights and responsibilities with respect to the
22 assets of the Plan.

23 36. In particular, ML Manager has maintained and continues to maintain that it
24 has the power to dispose of Plan assets pursuant to the Agency Agreement, and the Plan
25 denies that it has any such power and that, further, if the Agency Agreement were
26 construed to give ML Manager such powers, then ML Manager would be an ERISA

1 fiduciary and the exercise of those powers would breach its fiduciary duties under ERISA
2 and the transactions at issue would be prohibited transactions under ERISA. Declaratory
3 relief is thus appropriate under 28 U.S.C. § 2201 and ERISA itself.

4 **VIII. Claims for Relief**

5 **Count I**

6 **Claim for Declaratory Relief Regarding Agency Termination**

7 **Pursuant to 29 U.S.C. § 1132(a)(3)**

8 **As Against ML Manager and John Doe Defendants**

9 37. The foregoing allegations are expressly incorporated and realleged herein.

10 38. The agency relationship between the Plan and either Mortgages Ltd. or ML
11 Manager has terminated by its own terms or by the Plan's named fiduciary. Accordingly,
12 ML Manager has no right to use, control, manage or sell any assets of the Plan and no
13 agency relationship currently exists between ML Manager and the Plan.

14 39. To the extent state law would render any agency relationship between the
15 Plan and ML Manager irrevocable or interminable by the Plan's named fiduciaries, such
16 state law is preempted by ERISA.

17 40. In order to obtain appropriate equitable relief to redress ML Manager's
18 violations of ERISA and to enforce ERISA's provisions and the clear terms of the Plan,
19 the Plan seeks declaratory relief pursuant to ERISA § 502(a)(3) that (1) ML Manager was
20 a fiduciary of the Plan while the Agency Agreement was in effect, (2) no agency
21 relationship currently exists between ML Manager and the Plan, and (3) ML Manager
22 does not have any authority over Plan assets or any right to control, manage or sell any
23 Plan asset.

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Count II
Claim for Injunctive Relief Preventing Defendants From
Any Use, Control, or Sale of Plan Assets
Pursuant to 29 U.S.C. § 1132(a)(3)
As Against ML Manager and John Doe Defendants

41. The foregoing allegations are expressly incorporated and realleged herein.

42. As explained above, ML Manager seeks to control, manage and sell the assets of the Plan. These activities pose an immediate and severe risk of irreparable harm to the Plan.

43. As such, the Plan seeks an injunction pursuant to 502(a)(3) of ERISA preventing ML Manager from controlling or selling any assets of the Plan, because such acts would violate both the provisions of ERISA and the clear terms of the Plan documents.

Prayer for Relief

A. A Declaration that (1) ML Manager was a fiduciary of the Plan while the Agency Agreement was in effect, (2) no agency relationship currently exists between ML Manager and the Plan, and (3) Defendants do not have any authority over Plan assets or any right to control or sell any Plan asset:

B. An Injunction preventing Defendants from controlling, managing or selling any assets of the Plan;

C. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

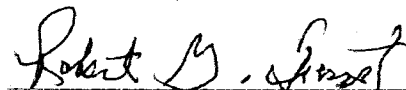
D. An Order awarding attorneys' fees pursuant 29 U.S.C. § 1132(g), and other applicable law;

E. An Order for equitable restitution and other appropriate equitable and injunctive relief against Defendants, including restitution, disgorgement of fees, and equitable tracing; and

F. An Order granting such other and further relief as the Court may deem just and proper.

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Dated: October 29, 2012



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