

1 **SCHIAN WALKER, P.L.C.**

3550 NORTH CENTRAL AVENUE, #1700

2 PHOENIX, ARIZONA 85012-2115

TELEPHONE: (602) 277-1501

3 FACSIMILE: (602) 297-9633

E-MAIL: ecfdocket@swazlaw.com

4 DALE C. SCHIAN, #010445

MICHAEL R. WALKER, #003484

Attorneys for FTI Consulting, Inc.

6 **UNITED STATES BANKRUPTCY COURT**

7 **DISTRICT OF ARIZONA**

8 In re:

9 MORTGAGES LTD.,

10 Debtor.

No. 2-08-bk-07465-RJH

CHAPTER 11

**MOTION TO ALTER OR AMEND
JUDGMENT**

11 Pursuant to Rule 59(a)(2), applicable in these proceedings pursuant to Bankruptcy Rule
12 9023, FTI Consulting, Inc. ("FTI"), an unpaid administrative claimant in these proceedings, moves the
13 Court for an order amending the *Order Granting and Approving First and Final Application for*
14 *Approval, Allowance and Authorization of Payment of Fees and Expenses Incurred by Alvarez &*
15 *Marsal Dispute Analysis and Forensic Services, LLC as Financial Advisors and Consultants for the*
16 *Official Committee of Investors* entered at docket entry 2183 (the "Order"). FTI requests that the Order
17 be amended to reflect that the payment authorized thereby is without prejudice to the rights of claimants
18 with an equal or higher priority, and is subject to disgorgement in the event that it is later determined
19 that insufficient funds are available to pay all claimants having an equal or higher priority. This motion
20 is supported by the Memorandum of Points and Authorities that is attached hereto and incorporated
21 herein by this reference.

22 DATED this 28th day of September, 2009.

23 SCHIAN WALKER, P.L.C.

24 By /s/ DALE C. SCHIAN, #010445

Dale C. Schian

Michael R. Walker

Attorneys for FTI Consulting, Inc.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On September 16, 2009, the Court entered its Order granting compensation to Alvarez &
3 Marsal Dispute Analysis and Forensic Services, LLC as financial advisors and consultants for the
4 Official Committee of Investors (the "Applicant") in the amount of \$707,019.04. The Order directs the
5 payment of the remaining balance "on a final basis from the funds held by the Liquidating Trust within
6 five (5) business days of the entry of this Order." Order at 2:2-3.

7 As set forth more fully in FTI's *Motion to Alter or Amend Judgment* [DE 2159] filed on
8 September 8, 2009 in these proceedings, the record in these proceedings causes it to be unclear as
9 whether the payments authorized by the Order can be made without prejudice to the rights of FTI.

10 Courts take opposing views as to whether fees awarded pursuant to a final order under
11 Bankruptcy Code § 330 can be disgorged if administrative insolvency occurs. *Compare In re*
12 *Appalachian Star Ventures, Inc.*, 341 B.R. 222, 226 (Bankr. E.D. Tenn. 2006) (fees paid pursuant to
13 final order subject to disgorgement and pro rata distribution) *with In re St. Joseph Cleaners, Inc.*, 346
14 B.R. 430, 438 (Bankr. W.D. Mich. 2006) (fees paid pursuant to final order not subject to disgorgement).
15 To avoid unnecessary litigation in the event that insufficient funds exist to pay all administrative
16 claimants in full, FTI respectfully requests that the Court alter and amend the Order to expressly indicate
17 that the payment is without prejudice to its rights, including the right to share pro rata with the Applicant
18 should that be necessary.

19 WHEREFORE, FTI respectfully requests that the Court alter or amend the Order to
20 indicate that the payment authorized is without prejudice to the rights of any claimant having an equal or
21 higher priority.

22 DATED this 28th day of September, 2009.

23 SCHIAN WALKER, P.L.C.

24 By /s/ DALE C. SCHIAN, #010445
25 Dale C. Schian
26 Michael R. Walker
Attorneys for FTI Consulting, Inc.

1 COPY of the foregoing e-mailed
2 this 28th day of September, 2009, to:

3 Edward M. McDonough
4 Alvarez & Marsal Dispute Analysis & Forensic Services, LLC
5 2355 East Camelback Road, #805
6 Phoenix, Arizona 85016
7 emcdonough@alvarezandmarsal.com

8 Carolyn J. Johnsen, Esq.
9 Bradley J. Stevens, Esq.
10 Todd B. Tuggle, Esq.
11 Jennings Strauss & Salmon, P.L.C.
12 201 East Washington Street, 11th Floor
13 Phoenix, Arizona 85004-2385
14 Attorneys for Debtor
15 cjjohnsen@jsslaw.com
16 bstevens@jsslaw.com
17 ttuggle@jsslaw.com

18 Cathy L. Reece, Esq.
19 Keith L. Hendricks, Esq.
20 Fennemore Craig, P.C.
21 3003 North Central Avenue, #2600
22 Phoenix, Arizona 85012
23 Attorneys for ML Manager, LLC
24 creece@fclaw.com
25 khendricks@fclaw.com

26 Sharon B. Shively, Esq.
Sacks Tierney, P.A.
4250 North Drinkwater Boulevard, 4th Floor
Scottsdale, Arizona 85251-3693
Attorneys for Kevin T. O'Halloran, Trustee of the Liquidating Trust of Mortgages Ltd.
sharon.shively@sackstierney.com

Mark J. Dorval, Esq.
Stradley, Ronon, Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, Pennsylvania 19103
Attorneys for Kevin T. O'Halloran, Trustee of the Liquidating Trust of Mortgages Ltd.
mdorval@stradley.com

Shelton L. Freeman, Esq.
DeConcini McDonald Yetwin & Lacy, P.C.
7310 North 16th Street, #330
Phoenix, Arizona 85020
Attorneys for G. Grant Lyon, Chapter 11
Trustee for Radical Bunny, L.L.C.
tfreeman@dmylphx.com

_____/s/ DEBBI STEPHENS