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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  
12 Pursuant to Rule 59(a)(2), applicable in these proceedings pursuant to Bankruptcy Rule  
13 9023, FTI Consulting, Inc. ("FTI"), an unpaid administrative claimant in these proceedings, moves the  
14 Court for an order amending the *Order Granting and Approving First and Final Application for*  
15 *Approval, Allowance and Authorization of Payment of Fees and Expenses Incurred by Fennemore*  
16 *Craig, P.C. as Counsel for the Official Committee of Investors* entered at docket entry 2133 (the  
17 "Order"). FTI requests that the Order be amended to reflect that the payment authorized thereby is  
18 without prejudice to the rights of claimants with an equal or higher priority, and is subject to  
19 disgorgement in the event that it is later determined that insufficient funds are available to pay all  
20 claimants having an equal or higher priority. This motion is supported by the Memorandum of Points  
21 and Authorities that is attached hereto and incorporated herein by this reference.

22 DATED this 8th 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 The Order granting compensation to Fennemore Craig, P.C. as counsel for the Official  
3 Committee of Investors (the "Applicant") in the amount of nearly \$1.9 million is far and away the  
4 largest award made to any administrative creditor thus far in these proceedings. The Order directs  
5 payment of the remaining balance "on a final basis from funds held by the Liquidating Trust within five  
6 (5) days of the entry of the Order." Order at 2:1-3. Of all the professionals involved in this matter, the  
7 Applicant is in the best position to know whether the amounts to be paid pursuant to the Order can or  
8 cannot be paid without prejudice to the rights of FTI.

9 When this application was first presented to the Court on July 28, 2009, the question of  
10 payment without prejudice to the rights of other administrative creditors was directly raised. *See*  
11 *generally* partial Transcript at 69:23-71:8 attached hereto as Exhibit "A." The Applicant responded at  
12 90:20-91:21 and indicated that "in the event that administrative expenses were larger than the amount  
13 that was currently available on the draw, that [the lender] would agree to increase the line so that we  
14 would be able to have sufficient money to pay all administrative expenses. And we've already had those  
15 discussions with them twice." *Id.* at 91:8-13. Although positive, discussions are far from a commitment  
16 to advance additional funds.

17 When the Order was initially uploaded, counsel for FTI wrote counsel for the Applicant  
18 asking to "confirm that sufficient funds are available to pay the requested amount sought in all fee  
19 applications should those applications be approved in the amounts requested." No response has been  
20 received to that request.

21 Last week, the trustee of the Liquidating Trust of Mortgages, Ltd. filed his Chapter 11  
22 Post-Confirmation Interim Report [DE 2156] and indicated that the Liquidating Trust "is not presently  
23 in compliance with the terms of the confirmed Plan of Reorganization as a result of the Liquidating  
24 Trust's Board of Director's decision not to pay the monthly mortgage payments due to Arizona Bank &  
25 Trust in August and September, 2009." Additionally, last week, another administrative claimant,  
26 Jennings Strouss & Salmon, P.L.C., filed a "Notice of Lodging Order Granting the Final Application for

1 Allowance and Payment of Compensation and Reimbursement of Expenses of Jennings, Strouss &  
2 Salmon, P.L.C. for Services Rendered and Expenses Incurred on Behalf of the Debtor" [DE 2153]. The  
3 proposed order that was attached as Exhibit "A" included the following language at 2:17-19 of the  
4 proposed order: "IT IS FURTHER ORDERED that the Total Award will not be subject to pro rata  
5 treatment or disgorgement in the event that the Liquidating Trust of Mortgages, Ltd. is unable to pay in  
6 full all allowed administrative costs arising from this bankruptcy case" (emphasis in original).

7 Courts take opposing views as to whether fees awarded pursuant to a final order under  
8 Bankruptcy Code § 330 can be disgorged if administrative insolvency occurs. *Compare In re Specker*  
9 *Motors Sales Co. v. Eisen*, 300 B.R. 687 (W.D. Mich. 2003); *In re Appalachian Star Ventures, Inc.*, 341  
10 B.R. 222, (Bankr. E.D. Tenn. 2006) (fees paid pursuant to final order subject to disgorgement and pro  
11 rata distribution) *with In re St. Joseph Cleaners, Inc.*, 346 B.R. (Bankr. W.D. Mich. 2006); *In re Penn*  
12 *State Clothing Corp.*, 204 B.R. 161 (Bankr. E.D Pa. 1997) (fees paid pursuant to final order not subject  
13 to disgorgement). To avoid unnecessary litigation in the event that insufficient funds exist to pay all  
14 administrative claimants in full, FTI respectfully requests that the Court alter and amend the Order to  
15 expressly indicate that the payment is without prejudice to its rights, including the right to share pro rata  
16 with the Applicant should that be necessary.

17 THEREFORE, as a result of FTI's inability to obtain confirmation from the Applicant,  
18 the Liquidating Trustee's notice that it is not in compliance with the terms of the confirmed plan, and the  
19 express provision contained in the proposed order with respect to another applicant, FTI respects that the  
20 Court alter or amend the Order to indicate that the payment to the Applicant is without prejudice to the  
21 rights of any claimant having an equal or higher priority.

22 RESPECTFULLY SUBMITTED this 8th 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  
2 e-mailed this 8th day  
of September, 2009, to:

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\_\_\_\_\_/s/ DEBBI STEPHENS

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# **EXHIBIT "A"**

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

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In re: )  
MORTGAGES LTD. CH: 11 ) 2:08-bk-07465-RJH  
1) NATIONAL RETAIL DEVELOPMENT ) ADV: 2-08-00780  
PARTNERS, I, vs ALAN J. MANESS )  
DEFENDANT MARGOLIN'S APPLICATION FOR )  
ATTORNEYS FEES - DAXTON WATSON )  
2) PDG LOS ARCOS, LLC vs ROBERT M ADAMS ) ADV: 2-08-00781  
DEFENDANTS LEE & HALLIDAY'S )  
APPLICATION FOR ATTORNEYS FEES )  
3) FINAL APPLICATION FOR ATTORNEYS FEES )  
& EXPENSES BY DLA PIPER AS SPECIAL )  
REAL ESTATE & LITIGATION COUNSEL FOR )  
DEBTOR )  
4) FIRST & FINAL APPLICATION FOR )  
ALLOWANCE & PAYMENT OF FEES & )  
EXPENSES INCURRED BY FENNEMORE CRAIG )  
AS COUNSEL FOR THE INVESTORS )  
COMMITTEE )  
5) FIRST & FINAL APPLICATION FOR )  
ALLOWANCE & PAYMENT OF FEES & )  
EXPENSES INCURRED BY ALVAREZ & )  
MARSAL DISPUTE ANALYSIS & FORENSIC )  
SERVICES )  
6) APPLICATION FOR ALLOWANCE & PAYMENT )  
OF ADMINISTRATIVE EXPENSE OF )  
FENNEMORE CRAIG FOR REPRESENTATION )  
OF THE UNOFFICIAL INVESTORS )  
COMMITTEE )  
7) APPLICATION FOR ALLOWANCE & PAYMENT )  
OF ADMINISTRATIVE EXPENSE OF ALVAREZ )  
& MARSAL FOR PROFESSIONAL SERVICES )  
RENDERED TO THE UNOFFICIAL INVESTORS )  
COMMITTEE )

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- 8) APPLICATION FOR FINAL ALLOWANCE OF )  
ATTORNEYS FEES & COSTS OF SCHIAN )  
WALKER AS WALKER AS COUNSEL FOR THE )  
VALUE-TO-LOAN COMMITTEE )
  - 9) APPLICATION FOR ALLOWANCE & PAYMENT )  
OF ADMINISTRATIVE CLAIM & EXPENSES )  
OF CREDITOR RADICAL BUNNY )
  - 10) FINAL APPLICATION FOR APPROVAL, )  
ALLOWANCE & PAYMENT OF FEES & )  
EXPENSES INCURRED BY THE PAUL G. )  
JOHNSON COMPANY FOR SERVICES ON )  
BEHALF OF THE DEBTOR )
  - 11) FIRST & FINAL FEE APPLICATION OF )  
FTI CONSULTING INC. AS FINANCIAL )  
ADVISORS TO THE DEBTOR FOR )  
ALLOWANCE OR COMPENSATION & )  
REIMBURSEMENT OF EXPENSES )
- 

U.S. Bankruptcy Court  
230 North 1<sup>st</sup> Avenue  
Phoenix, AZ 85003

July 28, 2009  
1:39 p.m.

BEFORE THE HONORABLE RANDOLPH J. HAINES, Judge

APPEARANCES:

For Pass-Through Investors of PDG Los Arcos, and National Retail Development Partners:	Daxton R. Watson MACK DRUCKER & WATSON PLLC 2398 E. Camelback Rd., #690 Phoenix, AZ 85016
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For PDG Los Arcos and National Retail Development Partners I, LLC:	Michael C. Blair BAIRD WILLIAMS & GREER LLP 6225 N. 24th St., Ste. 125 Phoenix, AZ 85016
--	---

1 already been paid, and then came up with the net outstanding,  
2 took out the disputed amount by Jennings, Strouss, and came up  
3 with a million, 449.

4 MS. JOHNSEN: Well, I guess my question is, and I  
5 just didn't have time to add these numbers up, the 535 is the  
6 pre-appointment amount included in that or --

7 MS. REECE: Yes, it is.

8 MS. JOHNSEN: It is included.

9 MS. REECE: Yeah. The 535 in my -- when I read it  
10 and added up your numbers, included the 95,000 for the  
11 unofficial committee.

12 MS. JOHNSEN: And is the same -- is that the same for  
13 Alvarez & Marsal?

14 MS. REECE: That's correct, it is the same for  
15 Alvarez & Marsal.

16 MS. JOHNSEN: Okay. Subject to disgorgement for both  
17 of those professionals, we would agree to what has been  
18 proposed.

19 THE COURT: All right. While you're at the podium --

20 MS. JOHNSEN: Yes, sir.

21 THE COURT: -- what response to you have to the  
22 argument that that you don't have standing to object?

23 MS. JOHNSEN: Well, we are an administrative claimant  
24 and there is a question, according to what was proposed by the  
25 OIC as their budget. They've only budgeted for \$7 million in



1 professional fees. That's what was approved by the Court,  
2 entered into evidence. And the total fee applications are  
3 approximately 12 million. So there is a question, of course,  
4 whether there will be enough to -- or, whether there has been  
5 budgeted enough to pay all of the administrative claims.

6 I think the second point is that the challenge or one  
7 of the principal challenges to our fee application, for  
8 example, is duplication of efforts.

9 THE COURT: I need a little more on that budgeting  
10 point because obviously the Code requires that an allowed  
11 administrative claim be paid in full in cash when allowed. So  
12 what happens if we get to the point where the allowances exceed  
13 what was budgeted? What do you think is going to happen at  
14 that point?

15 MS. JOHNSEN: Well, I think there's a problem with  
16 the continuation of the plan, and I think it can be challenged  
17 at that point. Perhaps there needs to -- confirmation, you  
18 know, it may be overturned at that point if there's not  
19 sufficient administrative monies to be paid. I haven't really  
20 delved into --

21 THE COURT: You don't think there's a possibility,  
22 for example, that money could be re-allocated, re-budgeted? In  
23 other words, found somewhere else? Advanced?

24 MS. JOHNSEN: I think there --

25 THE COURT: Whatever?

1 MS. JOHNSEN: I think there is that possibility. I'm  
2 only basing our standing on, you know, what's in the record at  
3 this time. And what has been presented to you.

4 THE COURT: And suppose they make the case that,  
5 "Look, no matter what, we're going to have enough money to pay  
6 all allowed administrative claims when allowed." Do you have  
7 an argument that you nonetheless have standing and your  
8 objection should be heard?

9 MS. JOHNSEN: Well, I think you have standing when  
10 you're an administrative claimant and there is a duty to  
11 scrutinize -- that even the Court has the duty to scrutinize  
12 the fee applications, number one. Number two --

13 THE COURT: I understand you may think that. Do you  
14 know of any Court that has so held?

15 MS. JOHNSEN: I don't have a case to cite to you  
16 today. I just received their brief yesterday, and I -- so I  
17 didn't have the opportunity to review that. I'm certainly  
18 happy to provide the Court with case law as necessary.

19 I think it also dovetails into our own fee  
20 application, because what has been challenged is duplication of  
21 effort. And in other -- and that we performed unnecessary  
22 duties or unnecessary work when what was going on in the case  
23 is that there was a duplication of effort on the committee's  
24 part. And so you're almost -- because the committee was  
25 generating needless fees and duplicating our efforts, those

1 THE COURT: Very well. If it is resolved, you may  
2 upload a order allowing the fees in the amount agreed to and  
3 vacating the hearing.

4 MR. DINNER: Thank you.

5 THE COURT: And while we're all together, maybe  
6 Ms. Reece, you can tell me -- two questions. Number one, how  
7 are things going with the reorganized entities, and another  
8 question that I had which really arose in connection with the  
9 Jennings, Strouss objection, and that is in this case do we  
10 have a reorganized Debtor?

11 MS. REECE: As we all might remember from the plan,  
12 the reorganized Debtor is actually Mortgages Ltd. that has been  
13 renamed as ML Servicing Company. So we went through the  
14 process of amending articles and bylaws after the effective  
15 date so that the reorganized Debtor is called the ML Servicing  
16 Company. The stock is wholly owned by the Liquidating Trust.  
17 And Kevin O'Halloran is the president of that corporation, and  
18 the board of directors is the same board as the Liquidating  
19 Trust. So that is the concise answer that I can give on that.

20 I think the reorganization is going just fine. We --  
21 as you know, the effective date was the 15th of June, when we  
22 had the opportunity to close on the exit financing. We made  
23 the first draw request in the pull on the amount of money that  
24 was made available for paying off all of the Stratera loans,  
25 which we paid in full, and the administrative rent claim.

1           We also set aside money for the operating budgets  
2 pursuant to Mr. McDonough's testimony and the exhibits that we  
3 had as a part of the disclosure statement, so both entities  
4 have a certain amount of operating money that they will  
5 continue to use. We have at least \$8 million left to draw upon  
6 the exit financing, and if you remember from the trial, we had  
7 two of the witnesses from the lender who were available for the  
8 testimony and who testified that in the event that  
9 administrative expenses were larger than the amount that was  
10 currently available on the draw, that they would agree to  
11 increase the line so that we would be able to have sufficient  
12 money to pay all administrative expenses. And we've already  
13 had those discussions with them twice.

14           After July 6th, when all of the fee applications were  
15 actually filed, it became evident that if you granted every  
16 penny that was requested and take off the amount that's already  
17 been paid to date, we would need about \$12 million. We are  
18 hopeful that we will get below the \$12 million amount, but in  
19 the event we need to go back to the exit financier in order to  
20 draw and to increase the line, they have expressed that they  
21 are willing to do that.

22           And so we do believe that that will not present a  
23 problem. It's more than we'll want to draw, it's more than  
24 we'll want to pay, but it is feasible, and that was the  
25 testimony at the actual trial, is that it was feasible and

1 Mr. McDonough testified to that as well. So we don't believe  
2 that'll be a problem.

3 THE COURT: How are you doing on the assignment of  
4 investors' interests to the LLCs?

5 MS. REECE: We have transferred, after the effective  
6 date, all of the MP fund interests in the various loans into  
7 the LLCs. We created 47 LLCs for the loan and we created an  
8 LLC for the ML Manager. So we've transferred all of the MP  
9 funds interests into those LLCs. We've also transferred all of  
10 Mortgages Ltd.'s interests into that, so we have approximately  
11 \$580 million worth of interest in the notes and deeds of trusts  
12 already in those 47 LLCs.

13 We've set up a series of about ten meetings that are  
14 taking place over the next three weeks with the investors, the  
15 Pass-Through Investors. There are about 400, 500 of them that  
16 have been invited to the meetings. We have drafted all of the  
17 assignment documents for every single one of them for their  
18 loans, and provided the opportunity for them to come and meet  
19 with us and talk with us and then to execute.

20 We are looking for August 14th as being the outside  
21 date for accomplishing that so that we deliver all the  
22 documents to the title company to record them and file them at  
23 the same time. In my discussions with the SEC this week --

24 THE COURT: So the -- when a person submitted a  
25 ballot and checked a box saying, "I agree to contribute my