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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re Mortgages Ltd., Debtor.	Chapter 11 Case No. 2-08-BK-07465-RJH **RESPONSE TO FTI'S MOTION TO ALTER OR AMEND JUDGMENT** Hearing Date: October 8, 2009 Hearing Time: 10:30 a.m.

Fennemore Craig, PC hereby responds in opposition to FTI Consulting, Inc.'s ("FTI") Motion to Alter or Amend Judgment (the "Motion"), wherein it seeks to amend the Order granting Fennemore Craig's fee application (Docket No. 2133).[1] FTI's Motion should be denied because the fees have already been paid to Fennemore Craig pursuant to its final fee application (Docket No. 1879) and in conjunction with the confirmed plan (Docket Nos. 1532 and 1755) and the issue is moot; there is no evidence that the plan has failed; FTI brought its Motion solely because the ML Manager objected to FTI's fee application; and FTI lacks standing to file this Motion since it did not object to Fennemore Craig's fee application. Fennemore Craig requests that the Court deny the Motion.

I. PROFESSIONAL FEES PAID IN CONJUNCTION WITH A CONFIRMED PLAN ARE NOT SUBJECT TO DISGORGEMENT

In support of its Motion, FTI cites to *Specker Motor Sales Co. v. Eisen*, 393 F.3d

[1] The subject Order was signed on August 26, 2009. Pursuant to Rule 59(e), the deadline for the parties to move to amend the Order was September 8, 2009. DLA Piper's joinder, which was filed on September 9, 2009, was not timely. Accordingly, this Court should strike DLA Piper's joinder (Docket No. 2160), however, if the Court is not inclined to do so, Fennemore Craig requests that its Response be considered a combined response to FTI and DLA Piper.

659, 663 (6th Cir. Mich. 2004) for the proposition that disgorgement of Fennemore Craig's fees is appropriate. FTI's reliance on *Specker*, however, is misplaced.

In *Specker*, debtor's counsel received a compensation award, but the case was converted from a Chapter 11 to a Chapter 7 proceeding prior to confirmation of a plan. The bankruptcy court found that the plain language of 11 U.S.C. § 726(b) mandates disgorgement of fees when necessary to achieve pro rata distribution among similarly situated claimants. The district court affirmed, finding that "mandatory disgorgement is the only reasonable and logical result if 11 U.S.C. § 726(b) is to be given any effect." *Specker*, 393 F.3d at 661. Accordingly, counsel was required to disgorge the amount necessary to ensure equal pro rata distribution among all allowed administrative claims because of the administratively insolvent estate. *Id.*

FTI also cited *In re Appalachian Star Ventures, Inc.*, 341 B.R. 222 (Bankr. E.D. Tenn. 2006), which relied on *Specker*. In *Appalachian*, the trustee argued that disgorgement of the debtor's chapter 11 counsel's retainer was necessary to achieve a pro rata distribution among other administrative claimants after the case was converted to a Chapter 7 proceeding. The *Appalachian* court found that the retainer was "expressly an award of 'interim compensation'" and not made in conjunction with a confirmed plan. *Appalachian*, 341 B.R. at 224-25. Accordingly, the payment was subject to disgorgement. The court ultimately held, however, that the fees were not subject to disgorgement because of a lien granted under state law.

FTI would have this Court believe that *Specker* and *Appalachian* stand for the proposition that a court may reel-in payments made pursuant to a final application in conjunction with a confirmed plan. Neither *Specker* nor *Appalachian*, however, concerned payments made in conjunction with a confirmed plan, and in fact were converted to Chapter 7 proceedings **before** a plan confirmation.

This distinction is made abundantly clear in another case cited by FTI, *In re St. Joseph Cleaners, Inc.*, 346 B.R. 430 (Bankr. W.D. Mich. 2006), which FTI also cited to. In *St. Joseph*, where the case was ultimately converted to a Chapter 7 proceeding after the

debtor defaulted on the confirmed plan of reorganization. The trustee, relying on *Specker*, moved to disgorge the debtor's counsel's retainer, and the court noted that there was an "important distinction" between the case before it and *Specker*, because "the debtor never confirmed a Chapter 11 plan." *St. Joseph*, 346 B.R. at 440. The court further explained that the distinction was important because of the binding effect courts generally give to a confirmed plan, citing as an example *In re Kaleideoscope of High Point, Inc.*, 56 B.R. 562 (Bankr. M.D. N.C. 1986), where the bankruptcy court refused to compel disgorgement of fees paid in conjunction with a confirmed plan. *St. Joseph*, 346 B.R. at 441. The court quoted the following from *Kaleideoscope*:

> Clearly, parties must be able to rely on the permanency of the plan. Negotiation and compromise of positions would be greatly hindered or impossible if creditors had to contend with the possibility of returning funds after disbursement through valid court order.
>
> This court strongly feels that the confirmed plan as implemented should stand and that the court should not require redistribution of previously disbursed funds. Funds were disbursed as they became available and as allowed and ordered by the court. A confirmed plan binds the participants, and rights are vested with the order of substantial consummation.

St. Joseph, 346 B.R. at 442 (*quoting Kaleidoscope*, 56 B.R. at 565-66 (holding that Section 726(b) did not give it the authority to "reel-in" payments previously made in conjunction with a confirmed plan)). Although the *Specker* court did not specifically note the distinction, the *St. Joseph* court noted that there was no confirmed plan in *Specker*, pointing to Sixth Circuit cases preceding *Specker* that have held, similar to *Kaleidoscope*, that courts will not "reel-in" payments previously made in conjunction with a confirmed plan. For example, *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458 (6th Cir. 1991), a debtor's confirmed Chapter 11 plan erroneously referenced a bank's claim as secured when in fact the bank had never perfected its lien. The debtor then made post-confirmation payments to the bank pursuant to its supposed secured claim. The case was later converted to a Chapter 7 proceeding and the trustee sought to recover those payments. The *Chattanooga* court stated as follows:

> Payments made during an ongoing Chapter 11 should not be "reeled in." As long as payments are made as required by the plan, and the plan remains in effect, a party can rely on the payments being final. However, once the plan is aborted, and a case is converted to Chapter 7, the parties must revert to Chapter 7 to distribute any remaining property of the estate.

St. Joseph, 346 B.R. at 442 (*quoting Chattanooga*, 930 F.2d at 463).

Here, Fennemore Craig's final fee application, which was filed in conjunction with the requirements of the confirmed plan, was approved by the Court without any objection by FTI. Moreover, the application required payment within 5 days and the amounts were in fact paid. Accordingly, Fennemore Craig should be able to rely on those payments being final. Therefore, as *Specker* and *Appalachian* are inapplicable, FTI's request should be denied.

II. FTI'S MOTION IS INAPPROPRIATE AND IT LACKS STANDING TO OBJECT

It is important to note that FTI appears to seek disgorgement from Fennemore Craig's fees in retaliation for the ML Manager's objection to FTI's fee application. FTI's revenge tactics should not be tolerated.

In its Motion, FTI alleges that the plan has failed and that there are insufficient funds available to pay all of the fee applications. Motion at 2:17-20. FTI readily admits, however, that it does not in fact have actual evidence of any default under the plan, but, nevertheless, requests some assurance that the plan is being followed and that there are adequate funds available to fully fund the confirmed plan. In other words, FTI has no idea whether or not the plan is failing, but it is willing to "cry wolf" just in case. FTI and its counsel are likely aware that their baseless scare tactics are reckless and unprofessional and that they will cause concern to the exit financer, apply pressure on the Liquidating Trust and ML Manager to provide additional assurances and/or financing, and that its baseless accusations jeopardize the successful reorganization.

In an attempt to show that a "wolf attack" is imminent, FTI points to the Post-Confirmation Interim Report (Docket No. 2156), which states that the Liquidating Trust's Board of Director's business decision to default on the monthly mortgage payments due to

Arizona Bank & Trust implies that there are insufficient funds available to fully fund the plan. It appears, however, that FTI was either being disingenuous or it simply neglected to read the remainder of the Report stating the Board's decision was based on the negative equity of the secured property and not whether there were sufficient funds available:

> [The Liquidating Trust] is not presently in compliance with the terms of the confirmed Plan of Reorganization as a result of the Liquidating Trust's Board of Director's decision not to pay the monthly mortgage payments due to Arizona Bank & Trust in August and September, 2009. Following the confirmation of the Plan, the Liquidating Trust did pay the July installment due to Arizona Bank & Trust. **However, the newly constituted Board of Directors of the Liquidating Trust thereafter made a good faith determination that the fair market value of the property securing the indebtedness owing to Arizona Bank & Trust was substantially less than such indebtedness. As a consequence, the Liquidating Trust's Board of Directors concluded that it was in the best interests of the Liquidating Trust to cease making any further payments with respect to such indebtedness and allow Arizona Bank & Trust to pursue its retained rights and remedies under the applicable loan documentation as completed by the express language of the Plan, including its right to foreclose its interest in the property securing such loan.**

(Emphasis added.)

Furthermore, it appears that FTI is attempting to circumvent the rules and the binding effect of the plan by raising arguments related to the availability of funds that should have been raised prior to plan confirmation. As the plan has been confirmed it is now too late to raise objections thereto. *See* 11 U.S.C. § 1141(a); *In re Heritage Hotel Partnership I*, 160 B.R. 374, 377 (B.A.P. 9th Cir. 1993) (holding that the principle of res judicata prevents a party from later raising issues that could have been raised during the confirmation of a plan of reorganization). It is curious that the Debtor did file an objection to the Plan based on feasibility but it withdrew its objections on the last day of the Confirmation hearing May 19, 2009. In addition, FTI lacks standing to file this Motion because it did not file an objection to Fennemore Craig's fees. Further, even if FTI had filed an objection, as reflected in the response filed by Fennemore Craig to Jennings Strouss' objection to Fennemore Craig's fees, FTI would not have had standing

to pursue the objection itself.

III. CONCLUSION

For the reasons stated above, Fennemore Craig requests this Court deny FTI's Motion in its entirety.

DATED this 1st day of October, 2009.

FENNEMORE CRAIG, P.C.

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COPY of the foregoing transmitted electronically this 1st day of October, 2009, to:

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