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5 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

11 **REPLY IN SUPPORT OF MOTION TO  
ALTER OR AMEND JUDGMENT FILED  
BY FTI CONSULTING, INC.**

12 DATE: October 8, 2009

TIME: 10:30 a.m.

13 LOCATION: 230 North First Avenue

Phoenix, Arizona

14 Courtroom 603, 6th Floor

15 FTI Consulting, Inc. ("FTI") filed its *Motion to Alter or Amend Judgment* [DE 2159] (the  
16 "Motion"), not as an objection to the fees and costs incurred and approved to be paid to Fennemore  
17 Craig, P.C. as counsel for the Official Committee of Investors, but only to avoid prejudice to FTI and  
18 other administrative claimants in the event that insufficient funds exist to pay all allowed administrative  
19 claims in full. The *Response to FTI's Motion to Alter or Amend Judgment* [DE 2249] (the "Response")  
20 fails to address the central issue: that being, whether adequate funds exist to pay FTI and other  
21 administrative claimants after the payment authorized pursuant to the *Order Granting and Approving*  
22 *First and Final Application for Approval, Allowance and Authorization of Payment of Fees and*  
23 *Expenses Incurred by Fennemore Craig, P.C. as Counsel for the Official Committee of Investors* [DE  
24 2133] (the "Order"). FTI has previously attempted to address this issue with counsel for the ML  
25 Manager, LLC. It has also requested that the Court eliminate the need for FTI to raise the issue by  
26 requiring, pursuant to Bankruptcy Rule 3020, that the funds necessary to satisfy the FTI application be

1 set aside. See *Response to Objections to the First and Final Application of FTI Consulting, Inc. as*  
2 *Financial Advisors to the Debtor and Debtor In Possession for Allowance and Payment of Fees and*  
3 *Expenses* [DE 2181] at 22:19 to 23:13. However, until the issue of the availability of funds to fully  
4 satisfy all administrative claims is resolved, the Motion seeks a narrow ruling that the fees paid to  
5 Fennemore Craig can be ordered disgorged if funds are not available to pay all allowed administrative  
6 claims in full. FTI requests that the Court amend the Order accordingly. This reply is supported by the  
7 Memorandum of Points and Authorities that is attached hereto and incorporated herein by this reference.

8 DATED this 6th day of October, 2009.

9 SCHIAN WALKER, P.L.C.

10  
11 By /s/ DALE C. SCHIAN, #010445  
12 Dale C. Schian  
13 Michael R. Walker  
14 Attorneys for FTI Consulting, Inc.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 A. The Motion is Not Moot.

17 The Response asserts that the Motion is moot because Fennemore Craig has already been  
18 paid. That assertion is mistaken in several respects. First, the Order is not final within the meaning of  
19 Bankruptcy Rule 59, so that all compensation awarded so far has been interim in nature. Interim fees  
20 are subject to disgorgement. *In re Lockwood Corp.*, 216 B.R. 628, 636 (Bankr. D. Neb. 1997)  
21 (explaining that interim compensation is subject to disgorgement when the estate is administratively  
22 insolvent). Second, FTI has not objected and does not object to either the allowance or payment to  
23 Fennemore Craig. Instead, the Motion is simply requesting that any payment pursuant to the Order be  
24 subject to disgorgement if there are inadequate funds to satisfy all claims of an equal priority under the  
25 Plan, including that of FTI. Until adequate provision is made to assure that funds are available to satisfy  
26 FTI, the issue of the potential need to order disgorgement is not moot.

1 B. FTI Has Standing to Preserve Its Right to Equality of Payment.

2 The Response at 4:12 to 6:1 asserts that FTI lacks standing to object to the Order because  
3 it did not object to Fennemore Craig's final fee application. This assertion is not well taken as FTI does  
4 not object to the allowance or even the payment of the fees authorized by the Order. In order to have  
5 standing, one must have a "personal stake" in the dispute. *Raines v. Byrd*, 521 U.S. 811, 819 (1997).  
6 Those "who are directly and adversely affected pecuniarily by an order of the bankruptcy court" have  
7 standing to appeal that order. *In re CFLC, Inc.*, 89 F.3d 673, 675 (9th Cir. 1996) (citing and quoting *In*  
8 *re Fondiller*, 707 F.2d 441, 442 (9th Cir. 1983)). As an administrative claimant, FTI obviously has  
9 standing to ensure that funds are available to pay its administrative claim when it is allowed.

10 C. Amending the Order is Appropriate to Avoid Future Litigation.

11 The Response argues at length that payments made pursuant to an order granting final  
12 approval are not subject to disgorgement. Response at 1:24 to 4:10. FTI asserts that the law in this area  
13 is unsettled. *Compare In re Appalachian Star Ventures, Inc.*, 341 B.R. 222, 226 (Bankr. E.D. Tenn.  
14 2006) (fees paid pursuant to final order subject to disgorgement and pro rata distribution) *with In re St.*  
15 *Joseph Cleaners, Inc.*, 346 B.R. 430, 438 (Bankr. W.D. Mich. 2006) (fees paid pursuant to final order  
16 not subject to disgorgement). Nevertheless, the purpose of the Motion is not to resolve the issue of  
17 whether the Court has the authority to order disgorgement of fees paid pursuant to a final order. FTI  
18 seeks to amend the Order to avoid future litigation over that issue should inadequate funds exist to fully  
19 satisfy administrative claims. As long as such uncertainty exists, FTI asserts that it is appropriate to  
20 expressly reserve the authority to the Court should it become necessary in future.

21 D. FTI is Merely Protecting Its Right to Equality of Payment.

22 The Response states: "[i]n its Motion, FTI alleges that the Plan has failed and that there  
23 are insufficient funds available to pay all of the fee applications." Response at 4:16-17 (citing Motion at  
24 2:17-20).

25 ///

26 ///

1           What the Motion actually says at the referenced location is as follows:

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

5           Motion at 2:17-20. The Motion contains no contention that the Plan has failed nor that insufficient  
6           funds exist; rather, it merely states that FTI has asked for confirmation as to the availability of funds to  
7           satisfy administrative claims.

8           The Response goes on to state that:

9           FTI has no idea whether or not the plan is failing, but it is willing to 'cry  
10           wolf' just in case. FTI and its counsel are likely aware that their baseless  
11           scare tactics are reckless and unprofessional and that they will cause  
12           concern to the exit financier, 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.

13           Response at 4:20-25. These assertions fail for three significant reasons. First, as stated above, the  
14           Motion contains no allegation "that the plan has failed." That statement appears for the first time in the  
15           Response. Second, FTI, through its counsel, has repeatedly attempted to resolve the question of  
16           availability of funds to fully satisfy all administrative claims without the need for a public discussion as  
17           to the financial viability of the plan of reorganization, *see* Exhibit "A" hereto, but FTI has received no  
18           substantive response or proposal to address this issue. Finally, for all of the flamboyant language  
19           contained in the Response, and despite having been asked the question in open court on several  
20           occasions, no adequate response has been proffered as to the availability of funds to fully comply with  
21           the terms of the Plan, which, *inter alia*, requires the full payment of allowed administrative expenses.  
22           *See* Plan [DE 1468] at Section 3.2; *Order Confirming Investors Committee's First Amended Plan of*  
23           *Reorganization Dated March 12, 2009* [DE 1755] at ¶ 14.

24           E.           FTI Seeks to Promote Equality of Payment Among All Administrative Claimants.

25           The Response asserts that "FTI brought its Motion solely because ML Manager objected  
26           to FTI's fee application." Response at 1:20-21. That assertion is truly "baseless" and ignores the record

1 before the Court. In addition to the attempts by FTI to resolve this matter short of filing the Motion, *see*  
2 Exhibit "A" hereto, FTI has sought to preserve its right to equality of payment with respect to each of  
3 the recent orders approving final fee applications. FTI obtained a *Stipulated Motion to Extend Time to*  
4 *File Motion to Alter or Amend Judgment* filed with respect to the *Order Granting the Final Application*  
5 *for Allowance and Payment of Compensation and Reimbursement of Expenses of Jennings, Strouss &*  
6 *Salmon, P.L.C. for Services Rendered and Expenses Incurred on Behalf of the Debtor* [DE 2164], and  
7 filed a *Motion to Alter or Amend Judgment* with respect to the final application of Alvarez & Marsal  
8 [DE 2226].<sup>1</sup> Therefore, FTI has sought to preserve its right to equality of treatment with respect to all of  
9 the orders recently entered with respect to final fee applications. Fennemore Craig's is not the  
10 exception; rather, it is simply the first of the large fee applications to be resolved with the objecting  
11 parties and obtain an order authorizing payment.

12 WHEREFORE, FTI respectfully requests that the Motion be granted, and that the Order  
13 be amended to expressly reflect that the fees paid are subject to disgorgement if inadequate funds exist  
14 to fully satisfy all administrative claims.

15 DATED this 6th day of October, 2009.

16 SCHIAN WALKER, P.L.C.

17  
18 By /s/ DALE C. SCHIAN, #010445  
19 Dale C. Schian  
20 Michael R. Walker  
21 Attorneys for FTI Consulting, Inc.

22  
23 <sup>1</sup> Both Jennings, Strouss & Salmon and Alvarez & Marsal responded affirmatively to FTI's informal  
24 request to avoid litigation over the finality of their orders. Alvarez & Marsal indicated a willingness to  
25 enter into a stipulation with respect to its order similar to what was entered with respect to Jennings,  
26 Strouss & Salmon; however, because Alvarez & Marsal are not represented by counsel in these  
proceedings, it was not possible to obtain such a stipulation before the order became final. Therefore, it  
is necessary to file a motion despite the courtesy and cooperation afforded by Alvarez & Marsal with  
respect to this matter.

1 COPY of the foregoing  
2 e-mailed this 6th day  
of October, 2009, to:

3 Carolyn J. Johnsen, Esq.  
4 Bradley J. Stevens, Esq.  
5 Todd B. Tuggle, Esq.  
6 Jennings Strauss & Salmon, P.L.C.  
7 201 East Washington Street, 11th Floor  
8 Phoenix, Arizona 85004-2385  
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13 Cathy L. Reece, Esq.  
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18 Attorneys for ML Manager, LLC  
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Trustee for Radical Bunny, L.L.C.  
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\_\_\_\_\_/s/ DEBBI STEPHENS

129704v7

# **EXHIBIT "A"**



COMPLEX LITIGATION & BANKRUPTCY

3550 N. Central Ave. Suite 1700  
Phoenix, AZ 85012-2115

**Dale C. Schian**  
[dschian@swazlaw.com](mailto:dschian@swazlaw.com)

September 22, 2009

*Via E-Mail Only [creece@fclaw.com]*

Cathy L. Reece, Esq.  
Fennemore Craig, P.C.  
3003 North Central Avenue, #2600  
Phoenix, Arizona 85012-2913

*Via E-Mail Only [mdorval@stradley.com]*

Mark J. Dorval, Esq.  
Stradley, Ronon, Stevens & Young, LLP  
2600 One Commerce Square  
Philadelphia, Pennsylvania 19103

Re: Mortgages Ltd. - Payment of Administrative Expenses

Dear Cathy and Mark:

This is to follow up on the prior requests that I have made with respect to the ability of the reorganized debtor to satisfy administrative claims in the event that the pending fee applications are allowed in the amounts sought. I have requested this information in writing, and again when we spoke last week, but have yet to receive satisfactory assurance that final allowance and payment of fee applications, which have recently been ordered, will not prejudice the rights of FTI Consulting, Inc. ("FTI") and its ability to get paid at such time as its fee application is finally adjudicated. Because we were not able to obtain such assurances, we were compelled to file our Motion to Alter or Amend Judgment [DE 2159]. We would have preferred not to have filed that document; unfortunately, our inability to obtain a response to my prior e-mail left us with no alternative.

When we spoke last week, Cathy indicated that FTI's raising of the issue was somehow harmful to the efforts of the reorganized debtor and may impede their efforts to collect from borrowers. Although it is not readily apparent to us, nor do we believe that that is the case, to the extent that it has transpired, it must be fairly attributable to the failure to respond to my prior informal requests.

Irrespective of the history, any objections to the Order Granting the Final Application for Allowance and Payment of Compensation and Reimbursement of Expenses of Jennings, Strouss & Salmon, P.L.C. for Services Rendered and Expenses Incurred on Behalf of the Debtor [DE 2164] must be filed on or before September 24, 2009. Similarly, any objection to the Order Granting and Approving First and Final Application for Approval, Allowance and Authorization of Payment of Fees and Expenses Incurred by Alvarez & Marsal Dispute Analysis and Forensic Services, LLC as Financial Advisors and Consultants for the Official Committee of Investors [DE 2183] must be filed on or before September 28, 2009, and the Motion to Alter or Amend Judgment of the Fennemore Craig fees is set for hearing on October 8, 2009.



Cathy L. Reece, Esq.  
Mark J. Dorval, Esq.  
September 22, 2009  
Page 2

To the extent that the Liquidating Trustee or ML Manager perceives public discussion of the reorganized debtor's ability to satisfy outstanding administrative claims as detrimental, we would greatly prefer to have that issue satisfactorily resolved prior to any additional public filings or discussions. As I indicated in my initial e-mail, a copy of which is included with this letter, we are open to discussion as to the mechanism for documenting the reorganized debtor's ability to pay these amounts without prejudice to the rights of FTI. Nevertheless, the assurances given to date are simply inadequate.

I look forward to hearing from you at your earliest convenience.

Sincerely,



Dale C. Schian

DCS:dls  
Enclosure

cc: Carolyn J. Johnsen, Esq. [Via E-Mail]  
Mark A. Nadeau, Esq. [Via E-Mail]  
Garland A. Brown, Esq. [Via E-Mail]  
Mr. Edward M. McDonough [Via E-Mail]

129228v2



## Dale Schian

---

**From:** Dale Schian  
**Sent:** Tuesday, September 08, 2009 4:34 PM  
**To:** 'REECE, CATHY'  
**Cc:** HENDRICKS, KEITH; Michael Walker  
**Subject:** FW: ML  
**Attachments:** SWAZLAW-#128635-v1-Motion\_to\_Alter\_or\_Amend\_Judgment.pdf

**Importance:** High

Cathy: Would you PLEASE call me back before I have to file the attached today? I've copied Keith in case you're not reading e-mails today.

Dale

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**From:** Dale Schian  
**Sent:** Thursday, August 27, 2009 1:15 PM  
**To:** REECE, CATHY  
**Cc:** Michael Walker  
**Subject:** ML

Hi Cathy: I was glad to see that you got a resolution on your fee issues. I think yours is the first of the large applications to be resolved. As we start finally approving and authorizing payment of the larger fee applications, I need to confirm that sufficient funds are presently available to pay the requested amounts sought in all fee applications should those applications be approved in the amounts requested. Assuming the answer is yes, I'm open to suggestions as to how we document this. Let me know and when you have a moment, perhaps we can discuss the FTI application.

Thanks,  
Dale

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