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12 The Liquidating Trust of Mortgages Ltd.

13 **IN THE UNITED STATES BANKRUPTCY COURT**

14 **FOR THE DISTRICT OF ARIZONA**

15 In re:

16 MORTGAGES LTD.,

19 Debtor.

Chapter 11

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

18 **JOINT STATEMENT OF MATERIAL
FACTS OF RADICAL BUNNY AND
LIDUIDATING TRUST FOR
20 APPLICATION PURSUANT TO 11 U.S.C.
§ 503(b)(3)(D) AND (4) FOR
21 ALLOWANCE AND PAYMENT OF
ADMINISTRATIVE CLAIM OF CREDITOR
22 RADICAL BUNNY**

23 **Hearing Date: November 18, 2009**

Hearing Time: 1:30 p.m.

24 **Location: 230 N. First Ave., 6th Floor,
Courtroom 603, Phoenix, AZ**

25 **Related Docket Nos. 1888, 2014, 2027, & 2088**

1 Creditor RADICAL BUNNY, L.L.C. (“RBLLC”) and Kevin T. O’Halloran,
2 Trustee of the Liquidating Trust of Mortgages, Ltd. (“Liquidating Trust”), by and
3 through their duly authorized attorneys, jointly submit this Joint Statement of
4 Material Facts (“Joint Statement”). This Joint Statement is submitted in
5 connection with RBLLC’s request that this Court award the amount of
6 **\$572,945.50** in attorneys’ fees, and **\$22,852.75** in costs (collectively the
7 “Substantial Contribution Claim”), for professional services rendered by RBLLC’s
8 attorneys, DeConcini McDonald Yetwin & Lacy, P.C. (“DMYL”) in this Chapter 11
9 bankruptcy case. The payment sought from the bankruptcy estate is calculated
10 on the basis of professional services provided by DMYL on behalf of RBLLC
11 (hereinafter, “RBLLC/DMYL”) as an administrative expense, pursuant to 11
12 U.S.C. § 503(b)(3)(D) and (4), based on substantial contribution to the bankruptcy
13 estate. This Joint Statement is supported by reference to docket entries (“DE _”)
14 in the record in this case, and: (1) the Application Pursuant To 11 U.S.C.
15 § 503(B)(3)(D) and 503(B)(4) For Allowance And Payment Of Administrative
16 Claim Of Creditor Radical Bunny (“Application”), DE 1888, and the exhibits
17 thereto, including the Declaration Of Shelton L. Freeman In Support Of
18 Application Pursuant To 11 U.S.C. § 503(B)(3)(D) and 503(B)(4) For Allowance
19 And Payment Of Administrative Claim Of Creditor Radical Bunny, Ex. F to DE
20 1888 (“Freeman Declaration”); (2) RBLLC’s Proof of Claim No. 33, as amended,
21 including the Declaration and other attachments thereto (“RBLLC POC No. 33”),
22 and RBLLC’s Proof of Claim No. 1005 (“RBLLC POC No. 1005”); (3) The Official
23 Committee of Investors’ First Amended Plan of Reorganization Dated March 12,
24 2009, DE 1532 (the “Plan”); and (4) the Order confirming the Plan entered May
25 20, 2009, DE 1755 (“Confirmation Order”). The Application was opposed by the
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1 Liquidating Trust in an objection filed on July 27, 2009 as DE 2014 (the
2 “Objection”).

3 RBLLC and Liquidating Trust stipulate to the following facts:
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5 **I. Facts Regarding Pre-Bankruptcy Relationships With Mortgages Ltd.**

6 A. Initial Facts Regarding Debtor Mortgages Ltd.

7 1. Mortgages Ltd. (“Mortgages Ltd.” or “Debtor”) was a private lender
8 that made loans secured by real estate located in Arizona. Real estate loans
9 advanced by Mortgages Ltd. are referred to herein as the “ML Loans”. See DE 20,
10 ¶ 5; DE 315, ¶ 4.

11 2. Prior to taking his own life on June 2, 2008, Scott M. Coles was the
12 chairman and Chief Executive Officer of Mortgages Ltd., and served in those roles
13 since November, 1992. A trust created by Mr. Coles was the sole shareholder of
14 Mortgages Ltd., an Arizona corporation. See DE 20, ¶ 5; DE 315, ¶ 10.

15 3. On Friday June 20, 2008, an involuntary Chapter 7 bankruptcy
16 petition was filed against Mortgages Ltd. by two of its borrowers and a contractor.
17 On Tuesday June 24, 2008 (“Filing Date”), the involuntary case was converted to
18 a Chapter 11 case when an order for relief was entered. See DE 1 & 36.

19 B. Pre-Bankruptcy Relationship of RBLLC and Debtor Mortgages Ltd.

20 4. RBLLC was formed to make loans to Mortgages Ltd. using funds
21 from various individuals seeking a favorable rate of return. Upon the initial filing of
22 this case, more than 900 loan participants had provided funds to RBLLC that were
23 loaned to Mortgages Ltd. See RBLLC POC No. 33.
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1 5. RBLLC made various loans to Mortgages Ltd. evidenced by
2 promissory notes and related loan documents. Upon the Filing Date, Mortgages
3 Ltd. owed RBLLC \$197,232,758, evidenced by 99 separate promissory notes and
4 other documents. See DE 198, p. 11; RBLLC POC No. 33.

5 6. RBLLC's sole source of income was from loan payments made by
6 Mortgages Ltd. Prior to the death of Scott Coles, Mortgages Ltd. had been paying
7 RBLLC more than \$2 million dollars a month in non-default interest payments.
8 Mortgages Ltd. defaulted on its obligations to RBLLC shortly before the Filing
9 Date. See RBLLC POC No. 33.

10 7. RBLLC was not paid \$23,724,696.60 in non-default interest
11 payments due from Mortgages Ltd. from June, 2008 through entry of the
12 Confirmation Order on May 20, 2009. See RBLLC POC No. 33.

13 8. Mortgages Ltd. admitted that the almost \$200 million in outstanding
14 loans advanced by RBLLC to the Debtor, as of the Filing Date, were liquidated
15 and undisputed and were not contingent. See DE 198, p. 11.

16 9. RBLLC filed a secured proof of claim in this case claiming that the
17 Debtor's \$200 million in outstanding loans were secured by a perfected security
18 interest in all of the Debtor's assets, as reflected in UCC financing statements
19 filed with the Arizona Secretary of State, and recorded in the real property records
20 of Maricopa County, in March, 2007, by Mortgages Ltd., in favor of RBLLC as
21 secured creditor. See RBLLC POC No. 33.

22 10. During the course of this bankruptcy proceeding, various parties
23 asserted that RBLLC did not have a valid, perfected security interest. The extent
24 and validity of RBLLC's security interest in the Debtor's assets was not
25 specifically determined by this Court prior to the confirmation of the OIC Plan.
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1 11. RBLLC's asserted security interest in Mortgages Ltd.'s assets was
2 reflected in Mortgages Ltd.'s year end 2007 financial statements. See RBLLC
3 POC No. 33.

4 12. RBLLC asserts that its security interest included Mortgages Ltd.'s
5 retained interests in loans made to various borrowers. As of April 14, 2008,
6 Mortgages Ltd. represented to RBLLC that Mortgages Ltd. held \$176,649,954.82 of
7 the ML Loans. Mortgages Ltd.'s filed Schedules state that, as of the Filing Date,
8 Mortgages Ltd. owned \$167,154,585 of the ML Loans. After further verification of
9 information, it was determined that Mortgages Ltd. directly owned \$162,162,539
10 of the ML Loans as of the Filing Date. See DE 198, p. 4; DE 1298, Ex. B; RBLLC
11 POC No. 33.

12 13. The Debtor listed RBLLC as an unsecured creditor in its Schedules,
13 indicating that RBLLC held more than ninety-eight percent (98%) of all liquidated
14 and undisputed unsecured nonpriority claims as of the Filing Date. See DE 198,
15 p. 11.

16 14. RBLLC is a creditor of the bankruptcy estate ("Estate") of Mortgages
17 Ltd.

18 C. Pre-Filing Relationship of Investors and Debtor Mortgages Ltd.

19 15. In addition to using funds loaned by RBLLC to make loans secured
20 by Arizona real estate, Mortgages Ltd. used money raised from approximately
21 2,700 investors ("Investors"). See DE 20, ¶ 5.

22 16. The Investors included (1) Investors who held a direct fractional or
23 participating interest in the ML Loans whether through Revolving Opportunity
24 Loan Programs, Capital Opportunity Loan programs, Annual Opportunity Loan
25 Programs, Opportunity Plus Loan Programs, Performance Plus Loan Programs,
26 or other similar programs established by the Debtor ("Pass-Through Investors");
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1 and (2) Investors who purchased and own membership interests in the respective
2 MP Funds, which were limited liability companies controlled by Mortgages Ltd., as
3 Manager (“MP Funds Investors”). See Plan.

4 17. As of the Filing Date, the Investors and MP Funds owned
5 approximately \$732 million of the approximately \$894 million dollars of
6 outstanding ML Loans. See DE 315, ¶ 5; DE 1298, Ex. B.

7 18. In addition to RBLLC’s loans to Mortgages Ltd. evidenced by RBLLC
8 POC No. 33, RBLLC also held \$3,748,000 in direct pass-through investments in
9 two loans made by Mortgages Ltd. See RBLLC POC No. 1005; DE 1298, Ex. B.

10 19. The Pass-Through Investors were parties to various agreements with
11 Mortgages Ltd. involving management and servicing of the respective ML Loans
12 in which the Pass-Through Investors held an interest. The MP Funds Investors
13 were parties to agreements governing the management and operation of the MP
14 Funds. See DE 315, ¶¶ 5-7.

15 20. The Debtor’s filed Schedules included only one claim related to the
16 Investors: a contingent, unliquidated and disputed unsecured priority claim in the
17 amount of \$124,202,784, for all Investors that were parties to a Revolving
18 Opportunity Loan Program Purchase Agreement. See DE 198, p. 11.

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21 **II. Facts Related to RBLLC’s Claim For Substantial Contribution**

22 **A. Overview of RBLLC/DMLYL Attorneys Fees and Expenses**

23 21. RBLLC/DMYL filed a secured proof of claim in this case. See RBLLC
24 POC No. 33.

25 22. As of the filing of the Application, approximately \$1,000,000 of
26 services were provided by DMYL as attorneys to RBLLC in connection with this
27 case. The Substantial Contribution Claim seeks payment of \$572,945.50, which
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1 were related to specific aspects of this proceeding. RBLLC and DMYL have
2 continued to incur fees post-confirmation with respect to this fee application
3 process and objections to other applications.

4 23. The requested attorneys' fees were incurred for services provided
5 from the beginning of this case in June, 2008 through December 31, 2008, and do
6 not include professional services for RBLLC after December 31, 2008.

7 24. DMYL has been paid \$108,000 for the services provided to RBLLC to
8 date.

9 25. If DMYL does not receive compensation from the Mortgages Ltd.
10 Estate, the only source of payment will be plan distributions to RBLLC, which will
11 only occur after repayment of the Exit Financing.

12 26. DMYL was retained by RBLLC and had no agreement with
13 Mortgages Ltd. that its fees would be paid by the Debtor and not by its client.

14 27. The Investors were represented in this case, respectively, by: (1) the
15 Official Committee of Investors ("OIC") and (2) the Committee of Investors in the
16 Value-To-Loan Opportunity Fund I L.L.C. ("VTL Committee").

17 28. Two investor groups that were represented by the OIC, The Lewis
18 Trust and the Rev Op Group, chose to hire their own separate counsel to protect
19 their interests in the Mortgage Ltd bankruptcy. Their counsel seeks over
20 \$120,000 from the Debtor's Estate to pay the fees billed to their respective clients.

21 29. Attorneys fees and expenses and related administrative expenses for
22 the OIC and VTL Committee have been paid by the Estate in the approximate
23 amount of \$2.2 million after counsel for both accepted discounts and counsel for
24 the OIC eliminated its \$92,222 substantial contribution claim for legal
25 representation of an unofficial committee of investors prior to appointment of an
26 official committee.
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1 30. Attorneys fees and expenses for the Debtor's primary Chapter 11
2 counsel have been paid by the Estate in the aggregate amount of \$2,874,141.00
3 after counsel for the Debtor agreed to accept a discount of approximately \$1
4 million as a result of objections filed by the Liquidating Trust, ML Manager and
5 RBLLC/DMYL. The total amount of administrative claims sought on behalf of the
6 Debtor's professionals exceed \$9 million and the total administrative expenses
7 paid or requested to be paid in this case (including substantial contribution claims)
8 total in excess of \$13 million.

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10 B. Facts Related to the Reorganization Process

11 31. The Substantial Contribution Claim includes \$118,810.00 related to
12 the formulation of a plan of reorganization in this case.

13 32. For the first six months of this case, RBLLC/DMYL worked
14 cooperatively with the OIC and numerous other constituents to formulate, draft
15 and negotiate a plan of reorganization. RBLLC/DMYL worked with creditors of
16 the Estate toward the goal of a consensual, confirmable plan of reorganization.
17 RBLLC/DMYL initially worked with the Debtor and the Committees appointed in
18 this case on a plan of reorganization.

19 33. The fees requested include DMYL fees incurred in objecting to the
20 Debtor's requested extensions of exclusivity. RBLLC/DMYL worked with the OIC
21 to file a joint objection to extending that exclusivity asserting that the Debtor could
22 not provide a feasible plan of reorganization in this case. That joint objection was
23 also joined by the Official Unsecured Creditors Committee. See DE 572 & 688;
24 Freeman Declaration, ¶ 9.

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26 34. As reflected in that joint objection, RB/DMYL and the OIC stated that
27 they were prepared to file a joint plan by November 1, 2008. In connection with
28 the objection, in September, 2008, RBLLC/DMYL met with the OIC and its

1 counsel to formulate a proposed plan based upon meetings with multiple
2 constituencies of the Debtor. In October, 2008, RBLLC/DMYL began drafting a
3 joint plan. RBLLC/DMYL worked cooperatively with the OIC to formulate, draft
4 and negotiate a plan of reorganization. RBLLC/DMYL and the OIC and its
5 counsel worked with many other constituent parties, including the Debtor, other
6 Committees appointed in this case and investor groups, to develop acceptable
7 plan terms. RBLLC/DMYL and the OIC and its counsel met with potential
8 Lenders and asset managers to discuss their participation under the Plan. The
9 interests of all the creditors of the Estate were considered in formulating that plan.
10 See Freeman Declaration, ¶ 9. RBLLC/DMYL contends that these efforts were
11 successful because (1) they provided the framework for the plan that was
12 ultimately confirmed in this case; and (2) RBLLC/DMYL's draft included significant
13 portions of the plan that was ultimately confirmed in this case. The Liquidating
14 Trust contends these efforts were unsuccessful.

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16 35. The fees requested include DMYL services for preparing the initial
17 draft plan of reorganization. DMYL services also included: (1) clarification of the
18 initial plan and disclosure statement terms to protect the interests of RBLLC and
19 other creditors; (2) essential legal analysis for the drafting and terms needed for
20 the ultimate implementation of the plan; and (3) contribution of DMYL's own
21 insights regarding bankruptcy law and procedure. See Application, Ex. A &
22 Freeman Declaration, ¶ 10.

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24 36. The OIC and the official committees also billed time to the Debtors'
25 estate for work on formulating the Plan. In addition, counsel to two other investor
26 groups, the Lewis Trust and the Rev Op Group, also seek compensation from the
27 estate for work on a plan of reorganization.

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1 37. RBLLC contends that without the contribution made by DMYL to the
2 creation, negotiation and revision of the plan, the OIC and other constituents
3 would have had to perform additional work at the expense of the Debtor's Estate.
4 The Liquidating Trust contends that the OIC and the official committees also billed
5 substantial time to the Debtors' Estate for the same or substantially similar tasks.

6 38. The fees requested also include DMYL services for preparing
7 documents to be part of the proposed plan, including (1) drafting a form operating
8 agreement necessary for the submission and ultimate implementation of the plan;
9 and (2) clarification of other asset management and financing documents
10 essential to the proposed plan. See Application, Ex. A. Ultimately, the OIC
11 proposed the plan and supporting documents on its own after DMYL no longer
12 represented RBLLC in connection with the Debtors' reorganization.

13 39. On December 23, 2008, the Debtor, RBLLC and the OIC stipulated to
14 extend the Debtor's exclusivity to January 6, 2009. By December 23, 2008, many
15 of the terms of the plan of reorganization that RBLLC/DMYL and the OIC had
16 negotiated with numerous other constituencies for five months were finalized with
17 two significant issues remaining: the management of the reorganized debtor and
18 the allocation of default fees.

19 40. RBLLC/DMYL participated alongside the OIC and others in the
20 development of both the structure and the substance of the Plan that was
21 confirmed in the Confirmation Order. See Freeman Declaration, ¶ 9.

22 41. Under the Plan, RBLLC agreed to pledge its claimed interests in the
23 various loans for the exit financing that is the source of payment of all post-
24 confirmation expenses, including final applications of administrative claimants.
25 Without the pledge of the interests in the loans, exit financing would not have
26 been available without a ruling that RBLLC was unsecured.
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1 42. As of the Petition Date, Debtor stopped making interest payments to
2 RBLLC or repayment of the matured loans. RBLLC had no source of income
3 after June 2008. On October 8, 2008, certain RBLLC loan participants filed an
4 involuntary bankruptcy petition against RBLLC under Chapter 7 of the Bankruptcy
5 Code, Case No. 2-08-bk-13884-CGC (“RBLLC Case”).

6 43. The RBLLC Case was converted to a Chapter 11, and RBLLC was
7 authorized to employ DMYL to serve as special counsel to represent RBLLC on
8 specific matters, including representation in this case. Pursuant to a stipulation,
9 G. Grant Lyon (“RBLLC Trustee”) was appointed as Chapter 11 Trustee in the
10 RBLLC Case on December 30, 2008. As of that date, RBLLC Trustee became the
11 representative of RBLLC's bankruptcy estate under 11 U.S.C. § 323(a), and
12 RBLLC no longer had authority to act as debtor-in-possession of the estate.
13 Although DMYL was employed as special counsel for the RBLLC Trustee for
14 other purposes (including representation regarding one of the Debtor's borrowers,
15 Tempe Land Company), RBLLC Trustee retained separate counsel to represent
16 the RBLLC Trustee in this case.

17 44. The Substantial Contribution Claim is related to the benefits provided
18 by RBLLC/DMYL and requests reimbursement for services provided by DMYL to
19 RBLLC: (1) prior to the effective date of the RBLLC Case; and (2) for DMYL's
20 representation of RBLLC as debtor and debtor-in-possession prior to the
21 appointment of the RBLLC Trustee. The Substantial Contribution Claim excludes
22 any claims for representation of the RBLLC Trustee in this case by DMYL or any
23 other attorneys.

24 45. After December 30, 2008, DMYL was no longer involved in the plan
25 process, and the RBLLC Trustee withdrew RBLLC's support for the plan
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1 RBLLC/DMYL had been working on with the OIC and other creditors and
2 investors.

3 46. The OIC filed a plan of reorganization on its own with no joinder from
4 the many constituencies that had been involved in the process, including RBLLC.
5 See DE 1297.

6 47. RBLLC voted against the OIC plan. On May 5, 2009, RBLLC filed a
7 28 page objection/memorandum to the OIC plan. See DE 1643.

8 48. RBLLC's objection was one of 14 objections to the initial plan of
9 reorganization proposed by the OIC.

10 49. RBLLC filed three substantive motions in this case all of which
11 opposed the confirmation of the OIC plan and two substantive objections to the
12 OIC's proposed plan prior to confirmation.

13 50. As part of the resolution of the objections filed by the RBLLC Trustee,
14 the treatment of RBLLC under the Plan was modified in the Confirmation Order.

15 51. The Liquidating Trust contends that RBLLC/DMYL's services related
16 to the preparation and negotiation of the Plan were duplicative and were
17 performed to protect RBLLC's own interest. The Liquidating Trust also contends
18 that RBLLC's efforts regarding the OIC plan did not result in any savings for the
19 Debtor's Estate because of expenses incurred by the OIC and other professionals
20 in negotiating with the RBLLC Trustee and because the RBLLC Trustee fought
21 confirmation of the OIC Plan. RBLLC/DMYL asserts that RBLLC/DMYL provided
22 services that, along with the services of others, eventually led to the confirmed
23 Plan and that otherwise would have resulted in higher administrative expenses of
24 the OIC and the Estate regardless of positions later taken by the RBLLC Trustee.

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27 C. Facts Related to RBLLC's Claims Relating to Preservation of Assets
28 of the Estate

1 52. The Substantial Contribution Claim includes \$356,253 in services
2 RBLLC/DMYL claims to have incurred in preserving assets of the Estate.

3 53. RBLLC helped structure agreements on financing, cash collateral,
4 and the Plan that ensured the cash flow to allow the Debtor to continue operations
5 during and after the Chapter 11 Case. DMYL and the counsel for the OIC divided
6 work based upon strength and resources in dealing with these financing issues.
7 This division of labor was particularly effective given the repeated “emergency”
8 filings by the Debtor which required extensive analysis and short deadlines for
9 objections.

10 54. RBLLC’s primary attorney, Shelton L. Freeman, was routinely
11 requested to participate in meetings with the OIC, which sometimes requested
12 that RBLLC lead the charge on issues that would have adversely affected the
13 Estate if the Debtor’s acts went unchallenged. Neither the Debtor nor its counsel
14 requested Mr. Freeman’s involvement or ever agreed that the Mortgages Ltd.
15 Estate would compensate him for his efforts

16 a) Use of RBLLC’s Cash Collateral in which RBLLC Claimed an
17 Interest for Post-Petition Operations

18 55. The fees requested include DMYL services related to the use of cash
19 collateral, in which RBLLC claimed an interest, for the post-petition operation of
20 the Debtor.
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22 56. RBLLC allowed the Debtor to use cash collateral, in which RBLLC
23 claimed an interest, for “Ordinary Business Expenses”. The Debtor used cash
24 collateral, in which RBLLC claimed an interest, for operating expenses instead of
25 making interest payments on its obligations to RBLLC. See DE 155 & 203.

26 57. The initial use of cash collateral in the budget was for \$304,101 in
27 payroll and other operating expenses. RBLLC received no adequate protection
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1 payment for the use of the cash collateral. Other than the cash collateral, the
2 Debtor had no source of funds to even continue operations (including
3 management of the interests of the Investors). See DE 155, p. 19. RBLLC's
4 consent to use of the collateral permitted the Debtor to continue to manage all of
5 the loans, which directly benefited all Investors.

6 58. The Debtor did not agree (or disagree) to compensate DMYL for its
7 work in securing RBLLC's consent to use of cash collateral.

8 59. The Investors did not allow interest payments on their pass-through
9 investments to be used to fund operations of the Debtor. Instead the Investors
10 demanded, and were granted the right to receive interest from the ML Loans in
11 which they held an interest from the Filing Date. See DE 310, 458.

12 60. The Debtor had other secured creditors holding specific real property
13 collateral. No other secured creditor allowed its cash collateral to be used to fund
14 operations of the Debtor.

15 b) Facts Related to Post-Petition Financing for Debtor Operations

16 61. Prior to the appointment of any committees in this case, on June 27,
17 2008, the Debtor sought approval for a \$5,000,000 working capital loan tied to an
18 additional \$120,000,000 construction loan from Southwest Value Partners Fund
19 XIV, LP ("Gap Lender"). By July 14, 2008, further disclosures revealed that the
20 requested construction loan had increased to \$124,100,000, and the scope of the
21 required security for the loans had expanded to all assets of the Debtor and all
22 interests of the Investors. The initial working capital loan matured on October 31,
23 2008 if the construction loan was not approved. Interest and points on the
24 working capital loan were fifteen percent (15%). See DE 53 & 165.

25 62. RBLLC/DMYL, along with other creditors and individual investors
26 (including an "unofficial" committee of investors) , objected to the Debtor's attempt
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1 to encumber virtually all assets of its Estate (including the collateral identified in
2 RBLLC's proof of claim) and raised objections on behalf of all the creditors of the
3 Debtor's Estate as to whether the proposed financing would benefit the Estate. In
4 additional filings and court appearances, RBLLC/DMYL, the unofficial committees
5 and other creditors identified other harms caused by that proposal for DIP
6 financing that was not in the best interest of the Debtor's Estate. The "unofficial"
7 committee of investors objected to any encumbrance on the Debtor's undivided
8 interest in ML Loans, and also asserted that the Investors' interests in ML Loans
9 were not property of the Estate. See DE 75 & 79.
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11 63. RBLLC/DMYL identified alternative providers of post-petition
12 financing on more favorable terms, and urged the Debtor to consider other
13 financing alternatives. RBLLC/DMYL located a lender willing to provide funding
14 without requiring a lien on all assets of the Estate, and that lender appeared, with
15 a check, at an early financing hearing. See Freeman Declaration, ¶ 11.
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17 64. One condition of the Gap Lender's proposed loans was that the
18 Debtor retain MCA Financial Group, Ltd. ("MCA") as its financial expert. It was
19 discovered that MCA allowed the Gap Lender access to the financial records of
20 the Debtor but denied access to other potential lenders, virtually eliminating
21 competitive financing alternatives. As a result of objections, the Debtor withdrew
22 the requested Gap Lender DIP financing. By that time, the interest of other
23 lenders in competing to provide financing was evident, and all hearings on the
24 requested financing were vacated on July 21, 2008 to allow the Debtor to
25 consider financing alternatives.
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27 65. The Debtor did not obtain financing from the lenders located by
28 RBLLC/DMYL.

1 66. After the appointment of the OIC and the Unsecured Creditors
2 Committee, RBLLC/DMYL continued to work with those Committees to prevent
3 the Debtor from entering into financing that was unreasonably burdensome to
4 RBLLC and the other creditors of the Debtor's Estate and that would become a
5 lien on collateral identified in RBLLC's proof of claim. See Freeman Declaration, ¶
6 11.

7 67. On August 1, 2008, the Debtor again sought a hearing on emergency
8 financing, but the proposed terms were limited to a \$5,000,000 initial DIP loan,
9 which no longer included a lien on all Estate assets and did not pledge the
10 Investors' interests. The interest rate (and points) for that loan were reduced to
11 13%, and the new loan terms were for a one year maturity date that would not be
12 accelerated if construction financing was not approved. See DE 53, 165, 197,
13 206, 262 & 459.

14 68. RBLLC's legally presumed first priority security interest in
15 \$13,072,830 in assets was subordinated for a \$500,000 Interim Working Capital
16 DIP Loan to fund the Debtor's operations (subject to use of cash collateral, in
17 which RBLLC claimed an interest, as available). The subordinated assets were
18 (1) River Run loan (\$4,994,297); and (2) Zacher loans (\$7,597,190 and
19 \$481,383). From the Interim Working Capital DIP loan, \$50,000 was reserved for
20 adequate protection of RBLLC. See DE 323 & 293-2, Ex. B.

21 69. No other creditors' lien or security interest was subordinated for the
22 Interim Working Capital DIP Loan. See DE 323.
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24 70. RBLLC's claimed first priority security interest in Debtor's assets was
25 subordinated for a \$5,000,000 Final Working Capital DIP Loan to fund the
26 Debtor's operations. RBLLC received a \$50,000 payment from this loan
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1 representing RBLLC's only payment from the Debtor in this case from the Filing
2 Date through the entry of the Confirmation Order. See DE 459 & 293-2, Ex. B.

3 71. No other creditors' lien or security interest was subordinated for the
4 Final Working Capital DIP Loan. See DE 459.

5 72. None of the Investors' ownership in the ML Loans were subordinated
6 to the working capital loans for the operations of the Debtor. See DE 323 & 459.

7 c) Facts Related to Tempe Land Company's Centerpoint Project

8 73. The Substantial Contribution Claim includes RBLLC/DMYL's actions
9 in connection with the preservation of the Centerpoint collateral through
10 subordination of RBLLC's claimed security interest in two ML Loans advanced to
11 Tempe Land Company and secured by the Centerpoint ("Centerpoint Loans").

12 74. RBLLC/DMYL objected to initial proposals for post-petition financing
13 related to the Tempe Land Company's Centerpoint that would have been
14 unreasonably burdensome to RBLLC and other creditors of the bankruptcy
15 Estate. See DE 75.

16 75. The proposed \$124,100,000 construction loan included a proposed
17 \$75,000,000 loan to Tempe Land Company for Centerpoint. See DE 53 & 165.

18 76. As of the Filing Date, Mortgages Ltd. claimed to own \$94,736,896 of
19 the Centerpoint Loans. See DE 376, Exhibits 1 and 2.

20 77. RBLLC subordinated its claimed first priority security interest in the
21 Centerpoint Loans as collateral for a \$2,800,000 interim loan for preservation of
22 Centerpoint. See DE 483.

23 78. None of the Investors' interest in the Centerpoint Loans was
24 subordinated to the \$2,800,000 interim loan for preservation of Centerpoint. See
25 DE 483.
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1 79. The Substantial Contribution Claim also includes fees incurred in the
2 preservation of funds wrongfully disbursed to an affiliate of Tempe Land
3 Company. RBLLC was the first of several creditors to: (1) raise concerns about
4 the improper use of proceeds of the initial \$2,800,000 interim loan to Tempe Land
5 Company and the Debtor's failure to properly monitor such funding and (2)
6 request replacement of the improperly used funds. See Freeman Declaration, ¶
7 11. The Debtor then pursued the matter, but the improperly used funds were not
8 recovered.

9
10 80. It was discovered that \$568,706 in funds were wrongfully disbursed
11 to an affiliate of Tempe Land Company, Avenue Communities, and other funds
12 were not used for agreed-to purposes. After RBLLC/DMYL raised concerns about
13 the loan to Tempe Land Company, RBLLC/DMYL worked with the OIC to uncover
14 the actual, improper uses of the Debtor's advances, again ensuring preservation
15 of Estate assets and providing tangible benefit to this Estate. See Freeman
16 Declaration, ¶ 11.

17 d) RBLLC/DMYL's Claimed Preservation of Assets

18 81. The Liquidating Trust contends that RBLLC/DMYL's services related
19 to the preservation of assets were duplicative of actions being taken by others
20 and meant to protect RBLLC's large investment in the Debtor. RBLLC/DMYL
21 contends that RBLLC/DMYL provided unique and tangible benefits to the Estate
22 that were not provided by any creditor, and that benefitted all the creditors of the
23 Estate and the Investors. RBLLC/DMYL contends that some of these services
24 were provided at the request of the OIC.
25

26 D. Facts Related to Settlements With the Mortgages Ltd.'s Borrowers

27 82. The Substantial Contribution Claim includes \$97,882.50 related to
28 negotiations and settlements with Mortgages Ltd.'s borrowers. The services

1 provided in connection with borrower settlements both assisted with the
2 reorganization process and preserved assets of the Estate for the benefit of all
3 creditors.

4 83. There are no fewer than eight professionals in the Debtor's
5 bankruptcy seeking compensation for their work negotiating settlements with
6 Mortgages Ltd's approximately 50 different borrowers.

7 84. RBLLC/DMYL, along with other parties compensated by the Estate
8 challenged, both in court and out of court, unreasonable settlements proposed by
9 the Debtor. RBLLC/DMYL, along with other parties compensated by the Estate,
10 actively participated in settlement negotiations with the Debtor's borrowers to
11 ensure appropriate resolution of their claims. See Freeman Declaration, ¶ 12.

12 85. RBLLC/DMYL's actions, in conjunction with the OIC and other estate
13 professionals, ensured that Mortgages Ltd. did not pursue final court approval for
14 an unfavorable settlement with Tempe Land Company that would have given
15 away assets of the Estate, including the Debtor's proposed release of a lien on
16 2.76 acres of excess land in downtown Tempe worth more than \$10 million
17 dollars.
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26 [SIGNATURE PAGE TO FOLLOW]
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28

1 DATED this 12th day of November, 2009.

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18 COPIES sent via the U.S. Bankruptcy
19 Court's ECF noticing system this
20 12th day of November, 2009.

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