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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:
MORTGAGES LTD., an Arizona
corporation,

Debtor.

Chapter 11
Case No. 2-08-BK-07465-RJH
**(PROPOSED) JOINT PRETRIAL
STATEMENT FOR EVIDENTIARY
HEARING ON DLA PIPER LLP (US)'S
FIRST AND FINAL FEE APPLICATION
FOR ALLOWANCE AND PAYMENT OF
FEES**

Date: November 25, 2009
Time: 10:00, a.m..
Place: Courtroom 603
230 N. First Avenue
Phoenix, AZ 85003

(The Honorable Randolph J. Haines)

Pursuant to this Court’s July 30, 2009 Minute Entry Order [Docket No. 2031] and Local Rule 7016-1, DLA Piper LLP (US) (“DLA”), ML Manager LLC (“ML Manager”), ML Liquidating Trust (“Liquidating Trust”), and G. Grant Lyon, in his capacity as duly appointed Chapter 11 Trustee (“RBLLC Trustee”) for Radical Bunny, L.L.C. (“RBLLC”)(collectively, the “Parties”), through their respective counsel, hereby file this Joint Pretrial Statement for the evidentiary hearing (the “Hearing”) on the First and Final Fee Application for Allowance and Payment of Fees for Services Rendered and Expenses Incurred by DLA Piper LLP (US), as Special Real Estate and Litigation Counsel for Debtor (the “Fee Application”).¹

¹ Reference to the Fee Application shall include time from June 20, 2009 through July 20, 2009 referenced by the Supplement to the Fee Application filed on July 27, 2009.

1 **A. Nature of Case**

2 This Hearing concerns the allowance and approval of the Fee Application and the
3 objections to the Fee Application filed by ML Manager, the Liquidating Trust and the
4 RBLLC Trustee (collectively, the “Objectors”). From October 8, 2008 through July 20,
5 2009 (“Application Period”), DLA rendered time and legal services to the Debtor as
6 special real estate and litigation counsel. Through the Fee Application, DLA is seeking
7 fees in the amount of \$1,406,056.80 and expenses in the amount of \$83,459.26 for a total
8 of \$1,489,516.06 pursuant to sections 328, 330 and 503(b) of the Bankruptcy Code.
9 After the initial hearing on this matter on July 28, 2009, this Court set the Hearing.

10 **B. Uncontested Material Facts**

11 The parties have agreed to the following uncontested material facts:

12 1. After the filing of the Bankruptcy, the Debtor sought to employ a law firm
13 to pursue recovery of loan proceeds and other assets of the Debtor. This included the
14 prosecution of claims against difficult borrowers and guarantors as well as the defense to
15 counterclaims raised by Borrowers. DLA was selected for these purposes.

16 2. On October 23, 2008, the Debtor filed its Application for an Order
17 Authorizing Employment and Retention of DLA Piper LLP (US) as Special Real Estate
18 and Litigation Counsel (“DLA Retention Application”)(Docket No. 864) together with
19 the Affidavit of Mark Nadeau in support thereof (“Nadeau Declaration”)(Docket No.
20 865).

21 3. The Engagement Letter between the Debtor and DLA was attached to the
22 Retention Application and stated that Mr. Nadeau’s hourly rate was \$690.00 per hour for
23 2008 and that other lawyers who may render services on the Debtor’s behalf may have
24 higher or lower hourly rates.

25 4. The Nadeau Declaration identified 3 partners and 2 associates as the
26 principal attorneys at DLA who were anticipated at the time to render services on behalf
27 of the Debtor with hourly rates between \$385 to \$725 per hour. The principal attorneys
28 identified in the Nadeau Declaration had biographical information published on DLA’s

1 website at www.dlapiper.com and DLA was otherwise readily described in both internet
2 and publicly available documents.

3 5. The Nadeau Declaration specifically stated that the Debtor was retaining
4 DLA to, among other things, (a) negotiate with, collect from and litigate with problem
5 borrowers and guarantors of loans (but that routine foreclosure matters would continue to
6 be handled by foreclosure counsel), (b) investigate the sources and causes of Debtor's
7 losses and pursue avenues of recovery, including litigation, against appropriate parties,
8 and (c) represent the Debtor in the NRDP and PDG litigation matters, and in such other
9 litigation as the Debtor may request.

10 6. This Court entered the Order approving the Debtor's retention of DLA on
11 October 24, 2008. (Docket No. 873).

12 7. On January 21, 2009 the Court held a hearing on the October Cover Sheet
13 Application and the objections. The Court on January 27, 2009 entered its memorandum
14 decision allowing \$100,000 to be paid on an interim basis. (Docket No. 1320). DLA was
15 never paid the \$100,000 as provided in the memorandum decision.

16 8. DLA filed its Cover Sheet Applications for October 2008 through April
17 2009 on November 20, 2008, April 27, 2009, May 21, 2009 and June 4, 2009. (Docket
18 Nos. 1039, 1603, 1604, 1605, 1606, 1756, and 1772).

19 9. In the OIC's objection to the October Cover Sheet Application, the OIC
20 had reserved its objections for the final fee application process. The OIC never made any
21 other objections and did not file objections to any other fee statements.

22 10. The OIC's First Amended Plan of Reorganization was confirmed by the
23 Court on May 20, 2009 ("Plan") (Docket No. 1755) and became effective June 15, 2009
24 ("Effective Date") (Docket No.). Pursuant to the Plan, all professionals were to file their
25 final fee applications on or before July 6, 2009 (20 days after the Effective Date).
26 Section VII (b)(2) of the Disclosure Statement describing the Plan stated that Allowed
27 Administrative Claims would be paid from the Exit Financing.

28 11. DLA filed its Fee Application on July 2, 2009 (Docket No. 1873) and filed

1 its Supplement on July 27, 2009 (Docket No. 2023). DLA is seeking payment of fees in
2 the amount of \$1,406,056 and expenses in the amount of \$83,459.26

3 **C. Contested Material Facts and Issues of Law**

4 **1. Contested Material Facts**

5 The following are contested material facts by DLA and the Objectors.

6 **a. DLA Contested Material Facts**

7 1. In or about August, 2008, the Debtor had a number of significant and
8 complex litigation claims against borrowers and guarantors, was served with several
9 lawsuits filed by borrowers against loan investors (including funds managed by Debtor)
10 and was seeking counsel to represent the Debtor in such matters.

11 2. In August 2008, Mark Nadeau (“Mr. Nadeau”) was invited to a meeting at
12 the Debtor’s offices among certain members of the Official Committee of Investors
13 (“OIC”), other members of an unofficial investor group and the Debtor’s CEO and Board
14 of Directors.

15 3. The Debtor was seeking counsel to prosecute claims concerning substantial
16 loan and guaranty defaults and also to defend it against a number of actual and potential
17 litigation matters related to the Debtor’s lending activities.

18 4. During the August meeting, Mr. Nadeau informed the Debtor and the
19 investors about the range of DLA’s fees and the legal team he would construct to work on
20 the Debtor’s litigation matters, which potentially included attorneys from outside of
21 Phoenix.

22 5. DLA is the largest law firm in the world with a sophisticated finance and
23 real estate practice.

24 6. DLA was ranked in the top 5 of national real estate firms and has a
25 sophisticated government affairs practice.

26 7. During many telephonic conferences in late August and during September
27 2008, the Debtor and others representing the OIC urged Mr. Nadeau to become counsel
28 to the Debtor. At a second meeting in early October 2008, the Debtor informed DLA that

1 it wanted DLA to be the lead advisor on all key litigation matters and that it would be
2 assigned the majority of the Debtor's troubled \$800 million loan portfolio.

3 8. DLA provided regular status reports to the Debtor on the matters assigned
4 to it.

5 9. Counsel to the OIC was offered opportunities in December and January to
6 meet with DLA to discuss litigation strategies and declined to meet.

7 10. Following receipt of objections to the first fee statement of DLA, the law
8 firm and Debtor commenced discussions about a reduction in fees and/or scope of the
9 engagement to ease concerns raised by the objecting parties.

10 11. After lengthy internal meetings with the Debtor and its counsel, DLA
11 agreed to give a significant discount on total fees. The initial discount for November and
12 December 2008 and January and February 2009 represented the complete write off of
13 time for certain timekeepers no longer employed by DLA, a write off of all time for any
14 lawyer working on a file that is "brought up to speed", a 15% discount off the entire fees,
15 an additional 10% discount off the Case Administration category beyond earlier
16 agreements, and an additional 20% discount off the Professional Retention and Fee
17 Application category beyond earlier agreements ("Discount"). In addition to the
18 Discount, DLA agreed to bill the Debtor at 2008 rates and provide a continuing 15%
19 discount off all future fees through calendar year 2009. After the Debtor and DLA
20 agreed on the Discount, DLA filed its monthly fee statements for November 2008
21 through April 2009 and neither the OIC or Radical Bunny objected.

22 12. The litigation between the Debtor and the borrowers/guarantors was
23 complex with loan files that were sometimes incomplete and loans that had not been fully
24 funded. The loan defaults included both developed and undeveloped land as security for
25 borrowing in the tens of millions of dollars in value.

26 13. DLA also provided consultation on existing claims against the Debtor and
27 advised on settlement tactics intended to achieve loan modifications for a loan portfolio
28 that was non-performing.

1 14. The Debtor and DLA suffered constant interference from the OIC who
2 independently met with borrowers and advised certain borrowers that the Debtor had no
3 authority to modify loans, and any settlement would only work if it was originated and
4 approved by the OIC.

5 15. The Debtor's bankruptcy case ("Bankruptcy Case") was one of the largest
6 bankruptcy cases in Arizona history, including 2,800 investors, 61 borrowers, 3 Court-
7 Appointed Committees, one unofficial committee and 91 mechanics liens holders.

8 16. The Debtor's case consistently received national media attention, and
9 interested investors were nationally and internationally based.

10 17. The Debtor and its counsel approved the involvement of DLA lawyers and
11 partners outside of Arizona.

12 18. Time related to general administrative categories was necessary and
13 reasonable at the time they were rendered.

14 19. Substantial administrative time for work associated with the Plan of
15 Reorganization, substitution of counsel, and the fee statements and Fee Application has
16 been incurred by Mr. Nadeau and his staff in Phoenix without charge to the Debtor. Mr.
17 Nadeau has incurred substantial administrative time related to this reorganization from
18 March to the date of the first hearing on the Fee Application and has billed none to the
19 estate.

20 20. Time billed to the TARP matter was considered necessary and critical to
21 prospects for a Debtor sponsored Plan of Reorganization and work performed by DLA
22 was at the specific request of Debtor, its chief officers, the Board of Directors, and its
23 counsel (JSS).

24 21. The Debtor was informed that DLA was a busy law firm and Mr. Nadeau
25 and others assigned to the case would have to forego other work in order to focus on the
26 difficult issues presented.

27 22. DLA's blended hourly rate in this case, including paraprofessionals is
28 \$387.00 per hour.

1 23. Although the OIC plan was confirmed on May 20, 2009, DLA was required
2 to perform additional services for the Debtor until July 20, 2009 because counsel for ML
3 Manager delayed in advising DLA which of its litigation matters it would be substituting
4 in for and deadlines for responsive pleadings were approaching.

5 **b. Objectors Contested Material Facts**

6 1. DLA was employed to handle only a few collection and litigation matters.
7 At the time of the discussions about and employment of DLA, Debtor already had Rule
8 9019 settlement motions on file for approximately \$400 million of the loans, including
9 Tempe Land Company, Grace Entities, Rightpath, and University and Ash entities. The
10 OIC had objected to each of the pending “settlements,” which objections were pending
11 at the time of the retention of DLA. Debtor subsequently filed settlement motions for
12 another approximately \$70 million of settlements. The OIC also objected to these,
13 including the Sorenson entities, SOJAC and Bisontown settlements. The Rightpath,
14 Sorenson, SOJAC and Bisontown settlements were ultimately approved and implemented
15 by January 2009. The other settlement motions were not withdrawn by Debtor but were
16 taken off calendar after hostile reactions to the same by the OIC although the parties
17 continued to discuss settlement thereafter. All of the loans involved were secured by
18 Arizona real estate, invoked Arizona law, and involved Arizona Borrowers and
19 guarantors. Each of the loans involved multiple structures, some were single asset while
20 some were not, some involved various LLC entities or corporate structures and were
21 often guaranteed by sophisticated developers and others with multiple assets and tiered
22 financial statements.

23 2. Contrary to its Fee Application, DLA was not hired to handle the following
24 loans: (1) Arizona Commercial Land Acquisitions; (2) Tempe Land Company; (3)
25 Central & Monroe; (4) All State Associates XVI; (5) All State Associates IX; (6)
26 Roosevelt Gateway; (7) Roosevelt Gateway II; and (8) University & Ash. Any fees
27 charged for these matters should be disallowed. Objectors estimate those fees to be about
28 \$23,000. Further, the fees charged were unreasonable, unnecessary and duplicative of

1 services rendered by Debtor's other professionals.

2 3. The rates charged by DLA are not reasonable and are not the customary
3 compensation charged by comparably skilled practitioners in cases other than bankruptcy
4 cases in this market.

5 4. DLA asserts it incurred \$156,000 of fees in Case Administration such as
6 monitoring and reviewing pleadings and docket entries in the Bankruptcy Case. DLA was
7 not employed as general bankruptcy counsel and these services were duplicative of
8 Debtor's bankruptcy counsel, were not reasonably likely to benefit the estate and were
9 not necessary to the administration of the case. Moreover, these fees were not necessary
10 to allow DLA to complete the discrete tasks it was given. The fees in this category are
11 not reasonable and should be disallowed.

12 5. DLA asserts it incurred about \$70,000 (between the Fee Application and
13 Supplement) in its Retention and Fee Applications. This is not a reasonable amount of
14 fees for this task.

15 6. DLA charged the Debtor with \$11,303 of "nonworking travel" time. It
16 brought attorneys from its Chicago and Los Angeles offices for meetings and Court
17 appearances and charged the nonworking travel time to the Debtor. The fees in this
18 category do not reasonably benefit the estate and were unnecessary. These amounts
19 should be disallowed.

20 7. DLA charged \$63,026 in the category it calls "litigation strategy", \$50,483
21 in the category it calls "loan analysis" and \$39,361 in the category it calls "legal
22 research". None of the fees are identified to any of the files it set up for specific loans or
23 borrowers or guarantor litigation. That totals \$152,870 for general services not tied to
24 specific matters or files.

25 8. DLA charged \$39,489 for "meetings". The fees were not related to specific
26 matters because those were charged to those matters. These are in addition to the
27 meetings needed to perform the work on specific files. These fees for "meetings" are
28 duplicative, unnecessary, unreasonable and do not benefit the estate. These fees of

1 \$39,489 should be disallowed.

2 9. DLA incurred fees of \$67,026.03 in rendering services concerning the
3 “TARP Program”. The descriptions in this category are vague, e.g. “monitoring”
4 proceedings. While some review and analysis of the TARP program may have been
5 appropriate to determine whether Debtor was eligible for this program, at some point
6 early in the review it was or should have been clear that further work in this area was not
7 going to benefit the estate and was not warranted or necessary. The fees should be
8 reduced to a much more reasonable number.

9 10. DLA was asked to handle the Cottonwood/Riverfront loan and bankruptcy
10 matter which involved a \$7.5 million loan. DLA asserts it incurred fees of about
11 \$294,000 in handling the matter. The matter has not been concluded. The fees incurred
12 are excessive and not reasonable.

13 11. OIC’s counsel did not interfere in the Riverfront bankruptcy proceeding so
14 as to prevent successful results by DLA.

15 12. Debtor’s counsel in the Riverfront bankruptcy seeks fees of \$75,000
16 according to its first interim fee application. DLA’s fees for the same matter are
17 excessive and not reasonable.

18 13. DLA was asked to handle the Foothills bankruptcy and guarantor litigation.
19 The loan is approximately \$25.7 million. DLA seeks fees of about \$143,000 in that case.
20 The matter has not been concluded. DLA’s fees for this matter are excessive and
21 unreasonable.

22 14. By contrast, fees sought by the Debtor’s counsel in the Foothills bankruptcy
23 (according to its interim fee application) are \$45,000. DLA’s fees for the same matter are
24 excessive and unreasonable.

25 15. DLA was asked to defend the litigation brought by National Retail against
26 the MP Funds. DLA incurred fees of about \$170,000 on this \$5.2 million loan. While the
27 motion to dismiss the adversary was successful, Dax Watson incurred only \$80,000 for
28 the same services in this matter and the PDG Los Arcos matter combined.

1 16. DLA was asked to defend the litigation brought by PDG Los Arcos against
2 the MP Funds. DLA incurred fees of about \$190,000 on a \$23.9 million loan. The issues
3 were identical to the National Retail matter mentioned above. While the motion to
4 dismiss was successful, Dax Watson incurred only \$80,000 for the same services in this
5 matter and the National Retail matters combined. DLA incurred combined fees of
6 \$360,000 on these two matters. The DLA fees are excessive and not reasonable. The
7 DLA fees for these two loans should be significantly reduced.

8 17. The fees incurred on other individual files are not reasonable in light of the
9 services rendered and results achieved.

10 18. The OIC did not agree to the employment of DLA or make a request of the
11 Debtor that the Debtor hire DLA. Joseph Baldino (speaking only for himself) gave three
12 names to Richard Feldheim and suggested that the Debtor might need additional counsel
13 to pursue a few of the difficult borrowers or guarantors. Mr. Baldino provided the names
14 of Pat McGroeder of Gallagher & Kennedy, Leo Beus of Beus Gilbert, PLLC and Mark
15 Nadeau of DLA. Mr. Baldino did not attend a meeting with Mr. Feldheim and Mr.
16 Nadeau.

17 19. The OIC and its counsel did not interfere with the Debtor's negotiations
18 with borrowers and did not tell borrowers not to deal with the Debtor. On the contrary,
19 the OIC met with Rightpath, University & Ash, Tempe Land Company, and Grace
20 Entities with the express approval of and at the request of the Debtor. These Borrowers
21 were told that only the Debtor had the authority to enter into a settlement and file a
22 settlement motion. Clearly the OIC had the right and ability to object to settlements that it
23 did not believe were reasonable – as a creditors committee routinely does in any Chapter
24 11 case of consequence.

25 20. As reflected by emails to and from Cathy Reece and Forrest Lammiman of
26 DLA in December and in emails from Brad Stevens, Cathy Reece and Keith Hendricks
27 did engage in discussions in December 2008 and January 2009 with DLA attorneys.
28 . . .

1 **2. Contested Issues of Law**

2 The following are the contested issues of law material to the Hearing:

3 Whether DLA is entitled to fees for services rendered and expenses incurred in the
4 total amount of \$1,489,516.06 pursuant to Sections 328, 330 and 503(b) of the
5 Bankruptcy Code.

6 **a. DLA Position**

7 This Bankruptcy Case was undeniably one of the largest bankruptcy cases in
8 Arizona’s history. This case involved over \$950 million in loan assets and consistently
9 received national media attention from publications such as the Wall Street Journal, New
10 York Times, USA Today, Bankruptcy Law 360 and the Daily Deal. The litigation and
11 related issues arising out of this case were very complex with multiple deal structures and
12 very sophisticated borrowers and guarantors. DLA is one of the most highly ranked
13 firms (by the American Lawyer & Chambers) in terms of its Real Estate practice.
14 Likewise, each of the partners engaged on the Debtor’s cases has significant experience
15 in the overlapping legal arenas impacting the cases handled by the firm. In real estate
16 lending, bankruptcy and financial litigation matters our litigation team was required to
17 defend and prosecute claims in state, federal, and bankruptcy court, while assuring
18 substantive and procedural issues were handled consistently amongst a variety of cases
19 and in front of a number of judges. In addition, DLA has a prominent government affairs
20 practice group, lead at the time of its retention by the former Senator George Mitchell
21 (also Global Chair of the firm), who is now the Middle East Envoy for our State
22 Department. DLA was specifically considered and chosen by the Debtor based upon
23 these qualifications and its ability to react immediately with a minimum of conflicts in
24 this region. Other major firms in Arizona, where DLA maintains an office doing work
25 for local, regional, national and international clientele, were already conflicted from
26 representing Debtor owing to existing clients adverse to the Debtor, or relationships
27 amongst various investor groups that prohibited oversight of multiple cases. Regardless,
28 the rates charged by DLA are consistent with other work performed by the firm for

1 private clients in Arizona. In fact, despite the accusations raised by ML Manager, the
2 investors themselves, many of whom comprise the ML Trust Board and were members of
3 the OIC interviewed DLA to handle the litigation issues facing the Debtor and
4 encouraged the Debtor, with the assistance of Fennemore Craig and its financial
5 consultants, to retain DLA. At all times prior to and after DLA's retention, the Debtor,
6 its counsel, ML Manager and RBLLC were well aware of DLA's hourly rates and how
7 they compared to those of other professionals employed in this case. Indeed, DLA was
8 retained even after it declined to give an initial discount requested by those who
9 interviewed DLA.

10 From the outset, DLA was required to vigorously defend the Debtor in two
11 prominent cases receiving substantial press coverage and to immediately commence work
12 in several additional loan matters wherein hundreds of millions of dollars were at stake.
13 DLA was told it was to be the lead advisor on all litigation matters involving its loan
14 portfolio. In addition, the work in PDG and NRDP alone consisted of more than
15 collection work, but required responding to motions to remand, non-core determination
16 and other similar pleadings that move beyond that of "simple collection matters." At the
17 behest of Debtor, DLA located counsel for the investors in cases where claims were made
18 against the investors and worked closely with those attorneys to minimize the expense of
19 said investors in defending claims made against them as individuals. DLA defeated all of
20 PDG and NRDP's motions in addition to prevailing on its initial motion to dismiss with
21 respect to the asserted tort claims. With respect to Foothills and Riverfront Commons,
22 the attorneys at DLA had to have in-depth knowledge and skill in bankruptcy to respond
23 to the Chapter 11 filings of those borrowers, again, more than just simple "collection
24 work."

25 The Debtor specifically requested that DLA perform work (whether in the form of
26 litigation or consultation) in all of the matters set forth in the Fee Application and
27 contrary to the objectors, DLA provided status reports to the Debtor on a regular basis.
28 DLA was well on its way to achieving significant results in a majority of the pending

1 litigation when the OIC intervened and progress was stifled. Over objections of the
2 Debtor, the OIC commenced its own independent meetings with borrowers. Such
3 meetings allowed borrowers to constantly argue about “who was on first” and several
4 attorneys for borrowers suggested that there was no point in meeting with Debtor or its
5 counsel because the OIC said they “would control any settlement.” As the OIC gained
6 momentum toward confirming their plan of reorganization, borrowers became unwilling
7 to settle with the Debtor. The borrowers all delighted in the extension of time on their
8 credits and hoped for an economic rebound leading to increased value of real estate
9 assets. Delay in payment or resolution benefited most borrowers while it was clearly to
10 the disadvantage of the Debtor. The OIC consistently approached borrowers about
11 settlement, stating that the Debtor had no authority to settle. Borrowers became
12 “confused”² and efforts at settlement or other recoveries were stymied.

13 Despite the interference by the OIC, DLA managed to have two \$100,000,000
14 cases against the investors dismissed, would have achieved summary judgment against
15 the guarantors in the Cottonwood matter (if it weren’t for the last minute tactics of
16 Fennemore Craig to derail the Debtor’s progress), and would have successfully dismissed
17 the Foothills bankruptcy (if only the Debtor would have had the funds to pay for a formal
18 appraisal).

19 DLA submits that the appropriate market for considering the reasonableness of
20 DLA’s fees is the national legal community. The complex facts of this “mega”
21 bankruptcy and large collateral lawsuits required the special counsel as approved in the
22 original DLA Retention Application. DLA should not have its fees dictated by a less
23 than full view of the local market but rather on the national market articulated by the
24 Arizona Bankruptcy Court in the *In re First Magnus Financial Corporation* (2008 WL
25 2233503) (Bankr. D. Ariz. May 22, 2008) case. When faced with the need for counsel
26 with skill in bankruptcy, real estate, litigation, loan work outs and government affairs, the
27 Debtor chose DLA. The Debtor’s case was complex, and one with national significance.

28 _____
² This “confusion” was largely tactical and convenient to borrowers.

1 Indeed, the investor population was international and many prominent people outside of
2 Arizona were stakeholders in the bankruptcy process. DLA brought in a team approved
3 by Debtor and its counsel (and certain investors) together in an effort to best serve the
4 Debtor and to serve in more than just a “collection” capacity. In doing so, DLA
5 ultimately charged the Debtor a significantly discounted rate, a rate even lower than that
6 earlier approved by this Court without objection. Moreover, the rates charged by DLA
7 were commensurate with the rates charged by the other high profile Phoenix litigators
8 that were considered by the Debtor for utilization as special counsel.

9 DLA is entitled to be paid its reasonable attorneys’ fees and expenses for its work
10 as special real estate and litigation counsel to the Debtor in the amount of \$1,489,516.06.
11 DLA preserves all rights to seek additional fees and costs incurred since July 20, 2009 in
12 connection with DLA's fee application and objections thereto.

13 **b. Objectors’ Positions**

14 The Objectors assert that DLA hourly rates are not reasonable or customary for
15 services they rendered in the matters upon which they were engaged. Even the reduced
16 rates asserted by DLA significantly exceed the hourly rates for other attorneys providing
17 legal services in this market and case. DLA relies on In re First Magnus Financial
18 Corporation, 2008 WL 2233503 (Bankr. D. Ariz. May 22, 2008) in claiming that
19 excessive hourly rates are justified in this case. In First Magnus, Judge Marlar was
20 addressing a truly national debtor with over 5,500 employees in virtually every state. In
21 this case, the Debtor’s assets were about \$200 million and it had only 25 employees all
22 located in Phoenix. It managed a loan portfolio of assets located only in Arizona. As
23 reflected in one of the exhibits, the top 10 borrower groups made up 85% of the loans.
24 The loan documents were uniform, and invoked Arizona law. The loans were secured by
25 Arizona real estate and were made to Arizona borrowers and guarantors. Judge Marlar
26 recognized that the general rule for appropriate hourly rates is the prevailing market rates
27 in the community where the court sits. The general rule must be applied in this case
28 which is limited to Arizona. DLA cannot establish that local counsel was unavailable,

1 unwilling or unable to handle the authorized services provided by DLA that could justify
2 an exception to this general rule. The excessive requested rates cannot be awarded just
3 because DLA is the world's largest law firm when there are no relevant national or
4 international issues.

5 DLA exaggerates both the significance of this bankruptcy case and the
6 significance of DLA's involvement in this case. True, this is a large case, but no amount
7 of press clippings from around the country will convert it to a national case. It is Arizona
8 based, both in its assets and law. DLA was not the Debtor's general bankruptcy counsel,
9 but was authorized to be employed to provide discrete services to the Debtor in this case.
10 DLA spent excessive amounts of time reviewing the Debtor's standard loan
11 documentation for many loans, researching general issues and analyzing loans upon
12 which it were not employed. Debtor has other special litigation counsel Greenberg
13 Taurig employed to handle most of the largest loans, and had ordinary course counsel
14 Gust Rosenfeld to handle collections, foreclosures and guarantor law suits.

15 There is no question that this case generated media attention. The circumstances of
16 Scott Coles' death, particularly in light of the ongoing financial challenges to the entire
17 financial system of the United States, generated significant media interest. However
18 media attention does not justify the award of unreasonable and excessive attorney's fees
19 in a bankruptcy case.

20 The unreasonableness of the fees, whether they were necessary, the lack of benefit
21 to the estate, the duplication of services when compared to the other professionals used
22 by Debtor, and the extravagant rates, all dictate that DLA should not be allowed the fees
23 in the amounts requested. The Objectors request that the Court look at the entire record of
24 this case when evaluating the reasonableness of the requested fees.

25 The reasonableness of the expenses is also in question. DLA has not itemized its
26 expenses and has not sustained its burden to show that the expenses were necessary and
27 reasonable.

28 As for unauthorized work, DLA took on and charged for work it was never

1 authorized to handle. All such fees should be denied.

2 Duplicative services cannot be approved. DLA has the burden to show either that
3 its services were not duplicative or that they were reasonable. DLA has not met and
4 cannot meet its burden.

5 DLA charged additional fees of \$43,242.47 or 140.1 hours after the Effective Date
6 of June 15, 2009. After that date, DLA was supposed to stand down and all matters were
7 to be continued. This is what happened by and large. The fees charged for this time were
8 mostly on the pursuit of fees in the PDG Los Arcos (\$14,778.95 or 44.3 hours) and
9 National Retail (\$12,917.88 or 37.8 hours) matters. DLA also charged \$9,723.15 (34.1
10 hours) on preparing its fee application. Under applicable 9th Circuit law, some time for
11 preparation of fee applications is allowable, but not a figure near \$10,000. The fees are
12 excessive for the benefit obtained, generally unreasonable and subject to reduction.

13 In its Supplement (Docket No. 2023) DLA requests additional fees of \$43,242.47
14 and expenses of \$2,999.40 for time spent from June 20 through July 20, 2009. It
15 complains that Fennemore Craig "waited almost two months after its plan was confirmed
16 to advise DLA Piper it would indeed be substituting in as counsel of record." Of course
17 the Plan did not become effective until June 15, 2009 and until that Effective Date ML
18 Manager had no authority to replace DLA and Fennemore Craig was not in a position to
19 substitute in of record. DLA was directed to seek continuances and standstills in all
20 matters until the new ML Manager was up and running. By July 20 almost all the
21 substitution of counsel pleadings were prepared and signed by the new client. There was
22 no unreasonable delay during this 30 day period. DLA however continued to charge fees.
23 Most of the fees appear to be in pursuit of their own fee application or in pursuit of the
24 fees in the PDG Los Arcos and National Retail matters. While some time for a transition
25 was appropriate, \$43,242.47 is not reasonable and should be reduced.

26 **D. List of Witnesses**

27 **1. DLA's Witnesses**

28 DLA's expected witnesses that it will call are::

1 (a) Mark Nadeau, partner of DLA.
2 (b) Rob Odson, partner of DLA.
3 (c) Richard Feldheim, prior President and Chief Executive Officer of the
4 Debtor.

5 (d) C. Taylor Ashworth, expert witness

6 DLA's witnesses that it may call are:

7 (e) Christine Zahedi, prior Chief Operating Officer of the Debtor.

8 (f) Joseph Baldino, member of the OIC and a current member of the
9 Liquidating Trust Board.

10 (g) William Hawkins, member of the unofficial large investor committee and is
11 a current member of the Board of Managers of ML Manager LLC.

12 (h) Ed McDonough, member of Alvarez & Marsal which acted as financial
13 advisor to the OIC.

14 (i) Michael Tucker, member of FTI which was retained by the Debtor as
15 financial advisor.

16 (j) Chris Olson, former member of the Board of Directors of Debtor and was
17 the CFO for the Debtor.

18 (k) George Everett is a former member of the Board of Directors of Debtor.

19 (l) Carolyn J. Johnsen, counsel to Debtor.

20 (m) Dax Watson, Mack Drucker & Watson, counsel to the non MLTD investors
21 in the PDG and NRDP litigation matters.

22 **2. Objectors' Witnesses**

23 (1) Joseph Baldino

24 (2) Nechelle Wimmer

25 (3) Chris Olson

26 (4) Sean O'Brien

27 (5) Sarah Lisa Petrauschkle

28 (6) Laura Martini

1 (7) George Everette

2 (8) All witnesses listed by DLA.

3 **E. Witness Declarations**

4 **1. DLA Declarations**

5 DLA offers the following witness declarations as evidence at the Hearing:

6 (a) Declaration of Christine Zahedi filed August 19, 2009 in this case no. 08-
7 07465 (Docket No. 2108).

8 (b) Declaration of Richard Feldheim filed August 19, 2009 in this case no. 08-
9 07465 (Docket No. 2109).

10 (c) Declaration of Michael Tucker to be filed in this case no. 08-07465 (Docket
11 No. 2138).

12 (d) Declaration of Mark A. Nadeau filed July 27, 2009 in case no. 08-07465
13 (Docket No. 2016).

14 (e) Declaration of Mark A. Nadeau filed October 23, 2008 in case no. 08-
15 07465 (Docket No. 865).

16 (f) Declaration of Andrew D. Eskin filed July 27, 2009 in case no. 08-07465
17 (Docket No. 2017).

18 (g) Declaration of Allison Kierman filed July 27, 2009 in case no. 08-07465
19 (Docket No. 2018).

20 (h) Declaration of Robert J. Odson filed July 17, 2009 in case no. 08-07465
21 (Docket No. 1967).

22 (i) Declaration of Jennifer L. Nassiri filed July 17, 2009 in case no. 08-07465
23 (Docket No. 1968).

24 (j) Declaration of Brendan P. Collins filed July 17, 2009 in case no. 08-07465
25 (Docket No. 1969).

26 DLA incorporates the entire record before the Court, including any additional
27 declarations filed on DLA's behalf.

28 DLA is prepared to stipulate to the admissibility of declarations provided that such

1 a stipulation applies equally to both DLA and the Objectors. If the Objectors will not
2 stipulate to the admissibility of declarations, DLA objects to the Objectors' use of the
3 Declaration of Ed McDonough, or any other declarations used by the Objectors, if the
4 declarant is not available in the Courtroom at the Hearing for cross-examination by DLA.

5 **2. Objectors' Declarations**

6 The Objectors do not anticipate using any Declarations at the Hearing other than
7 the Declarations of Ed McDonough, Nechelle Wimmer and Kevin O'Hallaran, but
8 reserve the right to use any of the DLA Declarations listed above. However, the
9 Objectors also object to DLA using any of the Declarations listed above if the Declarant
10 is not available in the Courtroom at the Hearing for cross-examination by the Objectors.
11 The Objectors also may use Declarations previously used in the Bankruptcy case for
12 impeachment purposes without listing them in this Joint Pretrial Statement.

13 **F. List of Exhibits**

14 DLA has delivered copies of its exhibits 1-54 to The Objectors. All Parties
15 reserve all objections to the various exhibits listed:

16 **1. DLA's List of Exhibits**

17 DLA intends to introduce the following exhibits at the Hearing.

- 18 1. DLA's Fee Application.
- 19 2. DLA's fee statements from October 2008 through April 30,
20 2009.
- 21 3. Fee Application Summary in Support of Fee Application.
- 22 4. Supplement to Fee Application.
- 23 5. Order dated July 2, 2009 filed in *Liss, et al. v. Excel*
24 *Transportation Services, Inc., et al.*, Case No. CV-04-2001-PHX-SMM, United States
25 District Court for the District of Arizona.
- 26 6. Transcript of Record taken April 30, 2009, *In re Riverfront*
27 *Commons, LLC*, 2:09-BK-00122-RTBP.
- 28 7. Documents and other papers on file in every case in which

1 DLA represented the Debtor in its Bankruptcy Case, including the multiple adversary
2 proceedings in NRDP, PDG, Foothills, Dragoo, Cottonwood, and Riverfront Commons
3 summarized by way of court dockets in those cases.

4 8. Article dated June 26, 2008, from Bloomberg.com entitled
5 *Mortgages Ltd. Files Chapter 11 After CEO Commits Suicide.*

6 9. Article dated June 26, 2008, from Daily Deal/The Deal
7 entitled *Credit Crunch Hits Another Lender.*

8 10. Article dated July 16, 2008, from The Wall Street Journal
9 entitled *Hard Money: Real-Estate Financier's Death Hints At Trouble for Lenders.*

10 11. Article dated July 17, 2008, from The Times (London)
11 entitled *Suicide Suspected in Death of Property Loans Chief.*

12 12. Article dated July 17, 2008, from The Wall Street Journal
13 (Europe) entitled *Real-Estate Financier's Death Hints at Trouble for Lenders --- Mr.*
14 *Coles' Firm Draws Attention to Condition of Commercial Market.*

15 13. Article dated July 24, 2008, from The Wall Street Journal
16 entitled *Coles' Death Ruled a Suicide.*

17 14. Article dated August 6, 2008, from Law 360 entitled
18 *Conversion Fight Over Mortgages Ltd. Rages On.*

19 15. Article dated August 7, 2008, from Daily Deal/The Deal
20 entitled *Mortgages Ltd. Gets New DIP.*

21 16. Article dated August 11, 2008, from Daily Deal/The Deal
22 entitled *Mortgages Ltd. Wins DIP.*

23 17. Article dated August 26, 2008, from Source Media, Inc.
24 entitled *Feldheim Joins Mtgs. Ltd.*

25 18. Article dated September 23, 2008, from Law 360 entitled
26 *Mortgages Ltd. Investors Ask to Form Committee.*

27 19. Article dated December 6, 2008, from Wall Street Journal
28 entitled *Tempe Land Files for Chapter 11.*

1 20. Article dated December 6, 2008, from Associated Press
2 entitled *Condo Developer Files for Chapter 11*.

3 21. Article dated December 11, 2008, from Daily Deal/The Deal
4 entitled *Tempe Land Creditor Files for Relief*.

5 22. Article dated December 12, 2008, from USA Today entitled
6 *Timing Proves Bad For Phoenix; Big Investments Made Just Before Economic Decline*.

7 23. Article dated January 7, 2009, from Dow Jones Corporate
8 Filings Alert entitled *Mortgages Ltd Investors Want Permission to File Rival Plan*.

9 24. Article dated January 26, 2009, from Business Wire, Inc.
10 entitled *Reeder, Lu & Green, LLP Launch New Law Firm; New Firm, Same Winning*
11 *Team Offers Broad Based, Complex Commercial Litigation Expertise*.

12 25. Article dated January 29, 2009, from Daily Deal/The Deal
13 entitled *Mortgages Ltd. To Liquidate*.

14 26. Article dated March 3, 2009, from Law 360 entitled
15 *Investors' Plan Draws Ire In Mortgages Ltd. Ch. 11*.

16 27. Article dated March 30, 2009, from Bloomberg.com entitled
17 *Mortgages Ltd. Plan Faces Motion for Conversion to Chapter 7*.

18 28. Article dated April 7, 2009, from Daily Deal/The Deal
19 entitled *Mortgages Moves to Confirmation*.

20 29. Article dated April 20, 2009, from Daily Deal/The Deal
21 entitled *Tempe Land Files Plan*.

22 30. Article dated May 4, 2009, from Law 360 entitled *Creditors*
23 *Balk At Mortgages Ltd. Ch. 11 Plan*.

24 31. Article dated May 6, 2009, from Law 360 entitled *Mortgages*
25 *Ltd. Asks to Sell Land to Pay Off Creditor*.

26 32. Article dated May 12, 2009, from Law 360 entitled *Creditors*
27 *Object to Mortgages Ltd.'s Land Sale*.

28 33. Article dated May 13, 2009, from Law 360 entitled

1 *Mortgages Ltd., Investors Offer Up 3rd Ch. 11 Plan.*

2 34. Article dated May 21, 2009, from Daily Deal/The Deal
3 entitled *Mortgages Ltd. Wins Plan Confirmation.*

4 35. Article dated July 5, 2009, from The New York Times
5 entitled *Ruins of the Second Gilded Age.*

6 36. Article dated July 28, 2009, from Market Watch from Dow
7 Jones entitled *SEC Sues Over Alleged \$197 Million Mortgage Fraud.*

8 37. Article dated July 29, 2009, from The Wall Street Journal
9 entitled *SEC Sues Four Over Real-Estate Deal --- The Agency Accuses Phoenix Firm's*
10 *Officers of Fraud in Fund Raising.*

11 38. Article dated July 29, 2009, from M2 Presswire entitled *US*
12 *SEC: SEC Charges Four Arizona-Based Promoters in \$197 Million Mortgage Lending*
13 *Scheme.*

14 39. Debtors Schedules and Statement of Financial Affairs.

15 40. Various e-mails exchanged between DLA and OIC or others
16 concerning requests for meetings and efforts to resolve fee disputes.

17 41. Various phone records illustrating calls between DLA and
18 Joseph Baldino regarding the hiring of DLA.

19 42. All motions, oppositions and replies filed by DLA in the PDG
20 (2:08-ap-00781-RJH and 2:08-ap-00831-RJH) and NRDP (2:08-ap-00780-RJH and 08-
21 ap-00832-RJH) matters (including the draft motion to dismiss sent to Mack Drucker &
22 Watson). (See, Exhibit 7)

23 43. Joinders to DLA's multiple pleadings filed by Mack Drucker
24 & Watson in the PDG and NRDP matters (See Exhibit 7)

25 44. Employment Application filed by Fennemore Craig PC.

26 45. Employment Application filed by Jennings Strouss & Salmon
27 PLC.

28 46. Employment Application filed by Greenberg Traurig LLP.

1 47. Chart illustrating breakdown of fees between the Drago
2 adversary proceeding, 2:08-ap-00881 RJH and Foothills Chapter 11 case, 2-09-bk-
3 02482-RJH.

4 48. Chart illustrating breakdown of fees between Cottonwood
5 adversary proceeding, 2:08-ap-00906-RTB and Riverfront Chapter 11 case, 2-09-bk-
6 00122-RTB.

7 49. Chart illustrating various deadlines in the PDG, NRDP, and
8 Foothills matters requiring DLA to continue to perform work during the Supplemental
9 Fee Period of June 20, 2009 through July 20, 2009.

10 50. Summary chart of DLA write-offs.

11 51. Debtors' Application for an Order Authorizing Employment
12 and Retention of DLA Piper LLP (US) as Special Real Estate and Litigation Counsel for
13 Debtor *Nunc Pro Tunc* to October 8, 2008

14 52. Affidavit of Mark A. Nadeau in Support of Debtor's
15 Application for an Order Authorizing Retention of DLA Piper LLP (US) as Special Real
16 Estate and Litigation Counsel for Debtor *Nunc Pro Tunc* to October 8, 2008

17 53. Order Authorizing Employment and Retention of DLA Piper
18 LLP (US) as Special Real Estate and Litigation Counsel for Debtor *Nunc Pro Tunc* to
19 October 8, 2008

20 54. November 4, 2009 correspondence from Barry R. Sadners to
21 Michael O'Mara et al.

22 55. All exhibits identified by the Objectors.

23 56. All impeachment exhibits.

24 **2. Objectors' List of Exhibits**

25 1. All exhibits listed and used or identified by DLA.

26 2. Debtor's Schedule of Assets and Liabilities and Statement of
27 Affairs and Monthly Operating Reports.

28 3. List of Borrower Loans listing amounts and grouped by

1 related Borrower entities.

2 4. Copies of various Borrower Promissory Notes or Loan
3 Documents.

4 5. Fee Application and Billing Statements of Debtor's Ordinary
5 Course Counsel Gust Rosenfeld PLC ("Gust Rosenfeld"), including fee statements,
6 summaries and supplemental fee applications.

7 6. Summary comparisons of DLA and Gust Rosenfeld rates,
8 attorney years in practice, legal services, fees and matters handled, and results achieved.

9 7. Fee Application of the Debtor's bankruptcy counsel Jennings
10 Strouss & Salmon PLC ("JSS"), including fee statements, summaries and supplemental
11 fee applications.

12 8. Fee Application of the Debtor's special counsel Greenberg
13 Traurig LLP, including fee statements, summaries and supplemental fee applications.

14 9. Fee Application of the Debtor's financial advisor FTI
15 Consulting, including fee statements, summaries and supplemental fee applications.

16 10. Fee Application of the OIC counsel, Fennemore Craig PC,
17 including fee statements, summaries and supplemental fee applications.

18 11. Fee Application of the Unsecured Creditors Committee's
19 counsel, Nussbaum & Gillis PC, including fee statements, summaries and supplemental
20 fee applications.

21 12. Summary comparison of the various fee applications of the
22 Debtor's professionals and the overlap and duplication of services.

23 13. Fee Application of the Mack Drucker & Watson in the
24 Bankruptcy case and Requests for fees in the National Retail adversary proceeding 2:08-
25 ap-00780-RJH and the PDG Los Arcos adversary proceeding 2:08-ap-00781-RJH and the
26 Court's order awarding fees, including fee statements, summaries and supplemental fee
27 applications.

28 14. Fee applications filed by debtor's counsel Polsinelli Shugart

1 PC in the Riverfront bankruptcy case 2:09-bk-00122 RTBP and the Foothills bankruptcy
2 proceeding 2:09-bk-002482-RJH.

3 15. Various Minute Entries and transcripts from the Riverfront
4 bankruptcy proceeding, including minute entries, memorandum decisions and pleadings,
5 including and without limitation, affidavits submitted by DLA.

6 16. Application to Employ DLA (Docket No. 864) and Nadeau
7 Declaration and the Engagement Letter (Docket No. 865).

8 17. Various emails to and from DLA and counsel for OIC about
9 discussions and proposals.

10 18. Various emails to and from DLA and counsel for ML
11 Manager or Liquidating Trust for turnover or delivery of files and substitution of counsel
12 and copies of various substitutions of counsel.

13 19. Various emails to and from DLA, the Debtor, its counsel and
14 counsel for the OIC concerning communications relevant to the issues raised in this
15 matter. (The applicable privilege is waived as to the emails described in paragraphs 17 –
16 19 on a limited basis and only as to the DLA fee request).

17 20. All impeachment exhibits.

18 RESPECTFULLY SUBMITTED this 18th day of November, 2009.

19
20
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Special Counsel for G. Grant Lyon, Chapter 11 Trustee
for Radical Bunny, L.L.C.

Filed electronically using the
Court's ECF System this
18th day of November, 2009.

By s/ Nikki Nolund