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10 **IN THE UNITED STATES BANKRUPTCY COURT**

11 **FOR THE DISTRICT OF ARIZONA**

12 In re:

(Chapter 7 Case)

13 MORTGAGES, Ltd.

No. 2:08-bk-07465-RJH

14 Debtor.

**TRUSTEE OF THE ESTATE OF TEMPE  
LAND COMPANY, LLC's RESPONSE TO  
OBJECTION TO CLAIM**

15 Dale D. Ulrich, Trustee of the Estate of Tempe Land Company, LLC ("Trustee"), for his Response  
16 to Objection to Claim, respectfully represents as follows:

17 1. The Tempe Land Company, LLC ("TLC") case was commenced by voluntary petition filed  
18 by the Debtor under Chapter 11 on December 5, 2008, which converted to Chapter 7 on September 22,  
19 2009.

20 2. Trustee is the duly qualified and acting trustee of the Chapter 7 Estate of TLC.

21 3. Prior to Trustee's appointment, TLC filed a Proof of Claim in this case (Exhibit "A").

22 4. TLC also commenced an adversary proceeding against Debtor in the TLC case (2:08-ap-  
23 812) seeking to liquidate its claim.

24 5. Although not served upon Trustee, ML Liquidating Trust, has objected to TLC's claim.  
25 The objection seeks to disallow TLC's claim without stating any basis. The objection states that a  
26 supplement will be filed once "more information is available". No supplement has been received by  
27 Trustee.  
28

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2  
3  
4  
6. Trustee submits that no basis has been established to disallow the TLC claim. The objection seeks to side step the adversary proceeding. Trustee should be allowed to make his own determination on whether to advance the adversary proceeding, or the objecting party should proceed in the adversary and not by claim objection.

5 WHEREFORE, Trustee submits that the objection to the TLC claim should be overruled.

6 RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of November, 2009.

7 LANE & NACH, P.C.

8  
9 By /s/ MPL - 007435  
10 Michael P. Lane  
11 Attorney for Dale D. Ulrich, Trustee of  
12 The Estate of Tempe Land Company, LLC

11 COPY of the foregoing mailed/delivered  
12 via electronic notification to:

13 William Scott Jenkins  
14 Jill M. Hulsizer  
15 MYERS & JENKINS, P.C.  
16 One East Camelback Road, Suite 500  
17 Phoenix, AZ 85012  
18 Attorneys for Kevin T. O'Halloran, Trustee of the ML Liquidating Trust

19 Office of the U.S. Trustee  
20 230 North First Avenue, Suite 204  
21 Phoenix, AZ 85003-1706

22 By /s/ Rogene Clark

**UNITED STATES BANKRUPTCY COURT DISTRICT OF ARIZONA** **PROOF OF CLAIM**

Name of Debtor: **MORTGAGES LTD.** Case Number: **2:08-bk-07465-RJH**

**NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.**

Name of Creditor (the person or other entity to whom the debtor owes money or property):  
**TEMPE LAND COMPANY, LLC**

Name and address where notices should be sent:  
 C/O David Wm. Engelman, Esq.  
 ENGELMAN BERGER, P.C.  
 3636 N. CENTRAL AVENUE, SUITE 700  
 PHOENIX, AZ 85012

Telephone number: **602.271.9090**

Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number: \_\_\_\_\_  
 (if known)

Filed on: \_\_\_\_\_

Name and address where payment should be sent (if different from above):

Telephone number: \_\_\_\_\_

Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: **\$ Unliquidated -- see attached schedule**

If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

If all or part of your claim is entitled to priority, complete item 5.

Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges. **See attached schedule.**

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim.

2. Basis for Claim: **Damages regarding lender liability action - Centertown Condominium Project, Tempe, AZ - see attached schedule.**  
 (See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: \_\_\_\_\_

3a. Debtor may have scheduled account as: \_\_\_\_\_  
 (See instruction #3a on reverse side.)

4. Secured Claim (See instruction #4 on reverse side.)  
 Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

Nature of property or right of setoff:  Real Estate  Motor Vehicle  Other  
 Describe: \_\_\_\_\_

Value of Property is \$ \_\_\_\_\_ Annual Interest Rate % \_\_\_\_\_

Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ \_\_\_\_\_ Basis for perfection: \_\_\_\_\_

Amount of Secured Claim: \$ \_\_\_\_\_ Amount Unsecured: \$ \_\_\_\_\_

Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

Wages, salaries, or commissions (up to \$10,950\*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507 (a)(4).

Contributions to an employee benefit plan - 11 U.S.C. §507 (a)(5).

Up to \$2,425\* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507 (a)(7).

Taxes or penalties owed to governmental units - 11 U.S.C. §507 (a)(8).

Other - Specify applicable paragraph of 11 U.S.C. §507 (a)( ).

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See definition of "redacted" on reverse side.)

**DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.**

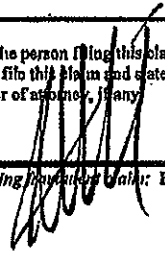
If the documents are not available, please explain: \_\_\_\_\_

Amount entitled to priority: \$ \_\_\_\_\_

\*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

Date: **10/07/08**

Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.

BY:  **Tempe Land Company, LLC**

FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

## SCHEDULE OF CLAIM

This matter arises from Tempe Land Company, LLC's ("TLC") claims against the Debtor for damages, declaratory and injunctive relief because Debtor defaulted on its obligations to provide tens of millions of dollars of development and construction financing for the ongoing Centerpoint Condominium Project in Tempe, Arizona. *See* Draft Complaint attached hereto.

The amount of TLC's claim is unliquidated at this time, however, in no event any less than \$60,000,000.00. Additional damages continue to accrue daily.

**DRAFT**

MORRILL & ARONSON, P.L.C.  
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Martin A. Aronson (009005)  
John T. Moshier (007460)  
Attorneys for Plaintiffs Tempe Land Company, L.L.C.; Kingston Capital Co., LLC;  
Graystar Investments, LLC; Kenneth Losch and David Dewar

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE STATED OF ARIZONA**

In re:  
Mortgages Ltd.,  
Debtor.

Chapter 11  
Case No. 2-08-bk-07465-RJH  
Adv. No. \_\_\_\_\_

TEMPE LAND COMPANY, L.L.C., an  
Arizona limited liability company;  
KINGSTON CAPITAL CO, LLC, an  
Arizona limited liability company;  
GRAYSTAR INVESTMENTS, LLC, an  
Arizona limited liability company;  
KENNETH K. LOSCH, an unmarried  
man; and DAVID C. DEWAR, a  
married man acting as a sole and  
separate individual,

**ADVERSARY COMPLAINT**

Plaintiffs,

v.

MORTGAGES, LTD., an Arizona  
corporation; ESTATE OF SCOTT M.  
COLES; SCOTT COLES TRUST OR  
TRUSTS; ASHLEY COLES, widow of  
Scott M. Coles; ABC  
CORPORATIONS, TRUSTS AND  
BUSINESS ENTITIES NO. 1-100; AND  
JOHN DOE DEFENDANTS NOS 1-  
100.

Defendants.

Plaintiffs, for their adversary complaint, hereby allege as follows:

## INTRODUCTION

1           1.     This action for damages, declaratory and injunctive relief has been brought  
2 because Defendant Mortgages Ltd. defaulted on its obligations to provide tens of  
3 millions of dollars of development and construction financing for the ongoing  
4 Centerpoint Project in Tempe, Arizona. After initially defaulting on its lending  
5 obligations, Mortgages Ltd., through its now-deceased former Chief Executive Officer,  
6 induced Plaintiffs to enter into a financial restructuring transaction through material  
7 misrepresentations and omissions concerning Mortgages Ltd.'s financial status and  
8 ability to perform, and his own ability, and the ability of his Trust or trusts in which he  
9 held substantial assets, to support Mortgages Ltd.'s performance. Mortgages Ltd.  
10 shortly thereafter defaulted on its obligations under the financial restructuring  
11 transaction. Mortgages Ltd.'s breach of its loan funding obligations has jeopardized  
12 the timing and completion of the Centerpoint Project and has caused the developer a  
13 minimum of several tens of millions of dollars in compensable damages.

## PARTIES

14  
15           2.     Plaintiff Tempe Land Company, LLC ("Tempe Land Company") is an  
16 Arizona limited liability company with its principal place of business in Maricopa County,  
17 Arizona.

18           3.     Plaintiff Kingston Capital Co, LLC ("Kingston Capital") is an Arizona limited  
19 liability company with its principal place of business in Maricopa County, Arizona.

20           4.     Plaintiff Graystar Investments, LLC ("Graystar Investments") is an Arizona  
21 limited liability company with its principal place of business in Maricopa County,  
22 Arizona.

23           5.     Plaintiff Kenneth K. Losch ("Losch") is an unmarried man and is a citizen  
24 and resident of Maricopa County, Arizona.

25           6.     Plaintiff David C. Dewar ("Dewar") is a married man acting for all purposes  
26 relevant to this case as a sole and separate individual, and is a citizen and resident of  
27 Maricopa County, Arizona.

1 7. Defendant Mortgages Ltd., ("Mortgages Ltd" or "Debtor") is an Arizona  
corporation with its principal place of business in Maricopa County, Arizona.

2 8. Defendant Estate of Scott M. Coles ("Coles Estate") is the estate of Scott  
3 M. Coles ("Coles"), the recently-deceased former Chief Executive Officer and, on  
4 information and belief, the sole shareholder of Mortgages Ltd. Coles was a citizen and  
5 resident of Maricopa County.

6 9. Defendant Scott Coles Trust ("Coles Trust") is the trust or trusts in which  
7 Coles held a substantial portion of his personal assets. On information and belief, if  
8 Coles was not the sole shareholder of Mortgages, Ltd., Coles Trust is the sole  
9 shareholder of Mortgages, Ltd. Plaintiff does not currently know the exact name or  
10 names of Coles Trust and will identify and disclose the correct identity and seek leave  
11 to amend the Complaint, if necessary, when that identity is determined. Scott Coles  
12 controlled Coles Trust and used it as his instrumentality and for his personal benefit in  
13 connection with the actions, events and circumstances at issue in this case. Coles'  
14 actions as alleged herein were performed for and on behalf of Coles Trust. Coles Trust  
15 has its principal place of business in Maricopa County.

16 10. Defendant Ashley Coles, was at all times material hereto, the wife of  
17 Coles. Defendant Ashley Coles is joined for purposes of establishing marital  
18 community liability. Defendant Ashley Coles is a citizen and resident of Maricopa  
19 County.

20 11. Defendants ABC Corporations, Trusts and Business Entities Nos. 1-100  
21 ("ABC Entities") are corporations, trusts, limited liability companies, partnerships or  
22 other business entities whose true identities are presently unknown. On information  
23 and belief, Defendant ABC Entities participated in the events giving rise to Plaintiffs'  
24 claims and are liable therefore. Plaintiffs will seek leave to amend to identify Defendant  
25 ABC Entities specifically when their identities are ascertained.

26 12. Defendants John Does Nos. 1-100 are persons whose true identities are  
27 presently unknown. On information and belief, Defendants John Does 1-100  
28

1 participated in the events giving rise to Plaintiffs' claims and are liable therefore.  
2 Plaintiffs will seek leave to amend to identify Defendants John Does 1-100 specifically  
3 when their identities are ascertained.

### 4 **JURISDICTION AND BACKGROUND OF BANKRUPTCY CASE**

5 13. On June 20, 2008 ("Petition Date"), Central & Monroe, LLC, Osborn III  
6 Partners, LLC, and KGM Builders, Inc. (collectively, "Petitioning Parties") filed an  
7 involuntary petition against the Debtor under Chapter 7 of the United States Bankruptcy  
8 Code. (Dkt. 1).

9 14. On June 23, 2008, the Debtor filed a "Motion To Convert Involuntary  
10 Chapter 7 Case To Case Under Chapter 11 Pursuant To 11 U.S.C. §§ 348(a) and  
11 706(a), And To Dismiss As Moot Emergency Motion For Appointment Of Interim  
12 Trustee" ("Motion to Convert") asking the Court, pursuant to 11 U.S.C. § 706(a), to  
13 convert the involuntary Chapter 7 case to a voluntary case under Chapter 11 of the  
14 Bankruptcy Code. (Dkt. 18)

15 15. On June 24, 2008, the Court entered its "Order Converting Case To A  
16 Case Under Chapter 11 And Setting Continued Hearing On First Day Motions And  
17 Emergency Motion To Appoint A Chapter 11 Trustee" converting the involuntary  
18 Chapter 7 case to a case under Chapter 11. (Dkt. 36).

19 16. The Debtor continues to operate its business as debtor-in-possession  
20 pursuant to 11 U.S.C. §§1107 and 1108. As of the date of this Adversary Complaint,  
21 no trustees or examiners have been appointed, and no official committee of unsecured  
22 creditors has been formed.

23 17. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§1334(a)  
24 and 157(a). This is a "core" proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (B), (K)  
25 and (O).

26 18. Venue in this District is appropriate pursuant to 28 U.S.C. §1409(a).

### 27 **GENERAL ALLEGATIONS**

28 19. Plaintiff Tempe Land Company is the owner and developer of a high rise



1 residential condominium and mixed use retail development located in Downtown  
2 Tempe, Arizona, known as Centerpoint (the ACenterpoint Project@).

3 20. The Centerpoint Project, when all projected phases are completed, will  
4 consist of four residential condominium towers up to 30 stories in height containing  
5 approximately 800 condominium units, a public plaza, a gourmet grocery, deli and café,  
6 a multi-level public parking facility, and a luxurious and sophisticated seventh floor  
7 amenity level with a professional demonstration kitchen, a wine lounge, a fitness center,  
8 an Aelectronic lounge,@ an in-house spa, concierge services, and a spacious outdoor  
9 area that will include a sun deck, swimming pool, spa, an urban beach with sand, and a  
10 shaded patio. The Centerpoint Project will be a world class residential and mixed use  
11 development unlike anything previously developed in the State of Arizona.

12 21. Defendant Mortgages Ltd., is a private capital commercial real estate  
13 financing company which holds itself out as the largest private lender in Arizona.  
14 Mortgages Ltd. is engaged in the business of financing commercial real estate  
15 development projects.

16 22. On or about March 21, 2007, Mortgages Ltd. issued its loan commitment to  
17 Tempe Land Co. in the designated loan amount of \$150,200,000.00 for use in Tempe  
18 Land Co.=s ongoing development of the Centerpoint Project. In connection with the  
19 loan commitment, Mortgages Ltd., and Tempe Land Co. entered into a Construction  
20 Loan Agreement dated March 20, 2007 and Tempe Land Co. executed and delivered  
21 to Mortgages Ltd. a Promissory Note dated March 20, 2007 in the designated loan  
22 amount of \$150,200,000.00, together with a Deed of Trust, Assignment of Rents and  
23 Leases, Security Agreement and Fixture Filing pertaining to the Centerpoint Project and  
24 other related loan documentation. The obligations of the parties reflected in the March,  
25 2007 loan commitment, Construction Loan Agreement, Promissory Note, Deed of Trust,  
26 Assignment of Rents and Leases, Security Agreement Fixture Filing and associated  
27 loan documents are collectively referred to as the AFirst Loan Agreement.@

28 23. The First Loan Agreement documentation was prepared on Mortgages

1 Ltd.=s standard forms and included provisions purporting to establish certain potential  
2 conditions on the advance of funds beyond the amount of what was called the AInitial  
3 Funding@ amount of \$130,200,000.00. Notwithstanding these purported conditions, the  
4 parties always understood and Defendants always promised that the loan would be fully  
5 and timely funded to the full "Designated Loan Amount" of \$150,200,000.00, provided  
6 that Tempe Land Co. was not in default. The parties knew and understood that the  
7 completion and success of the project was dependent on the full \$150,200,000 being  
8 funded, and certain loan fees exceeding \$10 million were computed based on the  
9 advance of the full \$150,200,000 and paid for by Tempe Land Co. at loan origination.

10 24. In connection with the First Loan Agreement, and the promises Defendants  
11 made to make all advances thereunder, totaling \$150,200,000, Plaintiffs Kingston  
12 Capital, Graystar Investments, Losch and Dewar executed and delivered to Defendant  
13 Mortgages Ltd. certain loan guaranties dated March 19, 2007 (the "Guaranties").

14 25. The sole consideration given by Mortgages Ltd., for the First Loan  
15 Agreement and Guaranties was Mortgages Ltd.'s promise to provide \$150,200,000.00  
16 in development and construction funding for the Centerpoint Project.

17 26. The First Loan Agreement represented the principal source of funding for  
18 Tempe Land Co.'s development and construction of the first two phases of the  
19 Centerpoint Project. Such construction and development was a stated use of the  
20 proceeds of the First Loan Agreement and the documents executed in connection with  
21 the First Loan Agreement included numerous provisions requiring and restricting the  
22 use of the First Loan Agreement Proceeds to the Centerpoint Project.

23 27. At the time the parties entered into the First Loan Agreement and  
24 Guaranties, all parties, including Defendant Mortgages Ltd., knew that the completion  
25 and success of the Centerpoint Project was dependent on Mortgages, Ltd.=s full and  
26 timely provision of \$150,200,000.00 in loan funds under the provisions of the First Loan  
27 Agreement.

28 28. After execution of the loan documents and Guaranties related to the First

1 Loan Agreement, Tempe Land Co. proceeded with development and construction at  
2 the Centerpoint Project, and Mortgages Ltd. began disbursing loan funds under the  
3 First Loan Agreement.

4 29. Construction, development and marketing of the Centerpoint Project  
5 initially was very successful. To date, Tempe Land Company has procured some \$24  
6 million in pre-sale commitments for condominium units, even though the first phases of  
7 the project are not yet complete.

8 30. Defendant Mortgages Ltd. began defaulting on its obligations to provide  
9 loan funds under the First Loan Agreement in and after December, 2007. Mortgages  
10 Ltd. funded loan draws materially late, and failed to fund loan draws in full. Ultimately, it  
11 ceased providing loan funds entirely. Scott Coles openly and repeatedly acknowledged  
12 Mortgages Ltd.'s default on the First Loan Agreement, and on information and belief,  
13 did so in the presence of third parties.

14 31. Upon Mortgages Ltd.'s default in and after December, 2007, Tempe Land  
15 Co. began incurring significant actual, incidental and consequential damages, including,  
16 but not limited to, delays in construction progress on the Centerpoint Project, impaired  
17 relations with subcontractors with whom Tempe Land Co. had established strong  
18 relationships, adverse project publicity, increased costs and lost profits.

19 32. Tempe Land Company made a diligent search for alternative financing and  
20 had several potential lenders who were interested in providing replacement financing  
21 provided that Mortgages Ltd. agreed to subordinate its loan position to the new  
22 financing. Mortgages Ltd. expressed a willingness to subordinate its position in favor of  
23 the replacement financing necessary to keep the project alive and funded, and  
24 Mortgages Ltd.'s CEO Scott Coles even went to Toronto to meet with a private capital  
25 firm called Tricon to help negotiate the details of first position replacement financing.

26 33. On information and belief, Defendant Coles Trust and/or Coles personally  
27 and Coles' marital community were substantial investors in the First Loan Agreement.  
28 During the negotiations and discussions between Coles and Plaintiffs that followed

1 Mortgages Ltd.'s default, Coles was acting for and on behalf of the interests of both  
2 Mortgages Ltd. and Coles Trust, as well as himself and his marital community in an  
3 effort to protect and advance the pecuniary interests of both Mortgages Ltd., Coles  
4 Trust and his personal and marital community interests.

5 34. After several weeks of defaults by Mortgages Ltd. and numerous meetings  
6 between Tempe Land Co. and Mortgages Ltd. personnel, including meetings with third  
7 parties such as Tricon who were willing to provide replacement financing to Tempe  
8 Land Co., Coles, and Mortgages Ltd. reversed course on their stated willingness to  
9 subordinate Mortgages Ltd.'s position to new third party financing and instead insisted  
10 on Mortgages Ltd. financing the needed capital itself by bringing Coles' and  
11 Mortgages, Ltd.'s own investor capital into a preferred lending position to which  
12 Mortgages Ltd.'s original First Loan Agreement position would be, in effect,  
13 subordinated. This mechanism involved breaking the First Loan Agreement into what  
14 Coles and Mortgages Ltd. called two separate tranches including a new first  
15 tranche in the amount of \$45,000,000 to be funded by additional Mortgages Ltd.  
16 investors. This new first tranche would provide funding in addition to the funding  
17 required by the First Loan Agreement. In addition, Coles confirmed that the amount of  
18 the \$150,000,000 that was unfunded under the First Loan Agreement would continue to  
19 accrue to pay interest on the First Loan Obligation up to the \$150,000,000 funding  
20 commitment on the First Loan Agreement.

21 35. On information and belief, Coles and Mortgages Ltd. decided not to  
22 subordinate Mortgages Ltd.'s First Loan Agreement position to third party financing  
23 because Coles, Coles Trust and Mortgages Ltd. wanted the benefit of a secured  
24 position ahead of the Mortgages Ltd. Loan which, given the amount of equity in the  
25 project, was a highly desirable and advantageous position that Coles, Coles Trust and  
26 Mortgages Ltd. preferred to keep for themselves instead of having it go to a new third  
27 party lender.

28 36. On information and belief, Coles and/or Coles Trust also had participating

1 interests in the First Loan Agreement which was to become the second Atranche@ of  
2 financing under the two tranche arrangement. Coles, Coles Trust and Mortgages Ltd.  
3 all preferred having the second subordinated Atranche@ behind a first Atranche@  
4 creditor they controlled instead of being subject to the independent motivation,  
5 judgment and control of a senior position third party creditor.

6 37. Under the new two Atranche@ arrangement Mortgages Ltd. would fund \$45  
7 million of new loan capital on the new first Atranche@ note and would continue to fund  
8 \$1 million per week under the First Loan Agreement which was now the second  
9 Atranche@.

10 38. In connection with Mortgages Ltd.'s promise to provide \$45,000,000 in  
11 project funding under the new first funding Atranche@, Mortgages Ltd. and Tempe Land  
12 Co. entered into a Construction Loan Agreement dated March 26, 2008, and a First  
13 Modification to Deed of Trust dated March 26, 2008. In addition, Tempe Land Co.  
14 executed and delivered to Mortgages Ltd. a Promissory Note dated March 26, 2008 in  
15 the designated loan amount of \$45,000,000.00. The obligations of the parties reflected  
16 in the March 26, 2008 Construction Loan Agreement, March 26, 2008 First Modification  
17 to Deed of Trust and March 26, 2008 Promissory Note are collectively referred to as the  
18 ASecond Loan Agreement.@

19 39. The Second Loan Agreement documentation was prepared on Mortgages  
20 Ltd.'s standard forms and included provisions purporting to establish certain potential  
21 conditions on the advance of funds beyond the amount of what was called the AInitial  
22 Funding@ amount of \$35,000,000 and what was called the ADesignated Loan Amount@  
23 of \$45,000,000. Notwithstanding these purported conditions, the parties always  
24 understood and Defendants always promised that the loan would be fully and timely  
25 funded to the full ADesignated Loan Amount@ of \$45,000,000, provided that Tempe  
26 Land Co. was not in default. The parties knew and understood that the completion and  
27 success of the project, particularly following Mortgages Ltd.'s default on the First Loan  
28 Agreement, was dependent on the full \$45,000,000 being fully funded, and that Tempe

1 Land Co. was exercising forbearance on pursuing its rights on the First Loan  
2 Agreement default and had ceased pursuing other funding opportunities in reliance on  
3 Mortgages Ltd.'s and Coles' promise that the full \$45,000,000 would be fully and  
4 timely funded. Indeed, the parties negotiated for a conditional waiver and release of  
5 Tempe Land Co.'s claims that was to be effective only if among other conditions,  
6 Mortgages Ltd. fully and timely advanced the \$45 million called for in the Second Loan  
7 Agreement. The conditional release was also conditioned on Mortgages Ltd.'s  
8 continuing to fund \$15 million per week under the First Loan Agreement.

9 40. In connection with the Second Loan Agreement, and the promises  
10 Defendants made under it, Plaintiffs Kingston Capital, Graystar Investments, Losch and  
11 Dewar executed and delivered to Defendant Mortgages Ltd. certain loan guaranties  
12 dated March 26, 2008 (the "Additional Guaranties").

13 41. Tempe Land Co. paid or incurred approximately \$10 million in loan fees to  
14 Mortgages Ltd. in connection with the First and Second Loan Agreements.

15 42. Mortgages Ltd.'s full and timely provision of funding under the new two  
16 "Atranche" mechanism established under the Second Loan Agreement, which  
17 Mortgages Ltd. had devised in its attempt to remedy its material breaches under the  
18 First Loan Agreement, was essential to the completion and success of the Centerpoint  
19 Project following Mortgages Ltd.'s earlier defaults.

20 43. At the time the parties executed the documentation related to the Second  
21 Loan Agreement and Additional Guaranties, all parties, including Defendant Mortgages  
22 Ltd. knew that the completion and success of the Centerpoint Project was dependent  
23 on Mortgages Ltd.'s full and timely provision of loan funds in accordance with the  
24 provisions of the First and Second Loan Agreements.

25 44. The sole and only consideration Mortgages Ltd. gave for the Second Loan  
26 Agreement and the Additional Guaranties was Mortgages Ltd.'s promise to provide the  
27 required development and construction funding for the project.  
28

1 45. Mortgages Ltd. made some initial advances under the Second Loan  
2 Agreement, but again defaulted under the First and Second Loan Agreements by failing  
3 to fund construction draws and further advances Mortgages Ltd. was required to make  
4 under the First and Second Loan Agreements.

5 46. On information and belief, Mortgages Ltd. has become insolvent or lacks  
6 the liquidity and access to cash resources necessary to meet its financing obligations to  
7 Centerpoint as well as to other borrowers to whom Mortgages Ltd. has failed to provide  
8 contractually required loan funds.

9 47. The Centerpoint Project cannot be completed without replacement  
10 financing for the lost funds Mortgages Ltd. committed to fund, but failed to fund.

11 48. This action arises under contract, and all Plaintiffs are entitled to an award  
12 of their attorneys= fees, taxable costs and litigation expenses, including expert witness  
13 fees under the terms of the parties= written agreements and pursuant to A.R.S. ' 12-  
14 341 and A.R.S. ' 12-341.01.

15 49. All conditions precedent to Defendants= liability and Plaintiffs= right to  
16 relief as prayed for herein have been performed or have occurred.

17 **COUNT ONE**

18 **(Declaratory Judgment - Invalidation of First and Second Loan Agreements v**  
19 **Tempe Land Company)**

20 50. The allegations of the preceding paragraphs are incorporated herein by  
21 reference.

22 51. Tempe Land Company executed the Promissory Notes, Deeds of Trust  
23 and other loan documents in consideration of Mortgages Ltd.=s promises to advance  
24 loan funds under the First and Second Loan Agreements.

25 52. There has been a failure of consideration for the Promissory Notes, Deeds  
26 of Trust and other documents Tempe Land Company executed in connection with the  
27 First and Second Loan Agreements because Mortgages Ltd. breached its funding  
28 obligations under the First and Second Loan Agreements.

53. In addition, Mortgages Ltd. committed a prior material breach of contract by failing to provide loan funds as required by the First and Second Loan Agreements.

54. On information and belief, Mortgages Ltd. contends that the First and Second Loan Agreements are in full force and effect, notwithstanding Mortgages Ltd.'s prior material breach and the failure of consideration for the First and Second Loan Agreements.

55. Plaintiff Tempe Land Company is entitled to a declaratory judgment establishing that its obligations, including the obligations to pay principal and interest, under the Promissory Notes, Deeds of Trust and other loan documents associated with the First and Second Loan Agreements are excused and discharged in whole or in part due to failure of consideration, Mortgages Ltd.'s prior material breach of its contractual obligations, and the material misrepresentations and omissions detailed in Count Four below.

## COUNT TWO

### **(Breach of Loan Agreements - Tempe Land Company)**

56. The allegations of the preceding paragraphs are incorporated herein by reference.

57. By failing to timely and fully provide loan funds that it was contractually obligated to advance under the First and Second Loan Agreements, Mortgages Ltd. has materially breached its contractual obligations to Plaintiff Tempe Land Company.

58. Mortgages Ltd.'s breach of its contractual obligations to Tempe Land Company has caused Tempe Land Company to suffer direct, indirect, actual, incidental and consequential damages, including lost profits and increased project costs and expenses. These damages are continuing to accrue and increase and include, but are not limited to:

- § damages for delay in completion of the project;
- § damages for expenses incurred in seeking replacement financing and for the increased cost of replacement financing;







1           §     That Mortgages Ltd. had the present financial ability to perform  
2                     under the First and Second Loan Agreements; and

3           §     That Coles and Coles Trust had the present financial ability using  
4                     their own assets to provide to Mortgages Ltd. the financing  
5                     necessary for Mortgages Ltd. to perform its funding obligations  
6                     under the First and Second Loan Agreements.

7           70.    The misrepresentations as to the present financial ability of Mortgages  
8                     Ltd., Coles and Coles Trust to perform the funding obligations under the First and  
9                     Second Loan Agreements were knowingly or negligently made or made without actual  
10                    knowledge of their truth or falsity and in reckless disregard of the truth.

11           71.    In addition, Defendants omitted to advise Plaintiffs of the following known  
12                    material facts which should have been disclosed in order to avoid making defendants=  
13                    representations that were actually made not misleading:

14           §     That Mortgages Ltd., Coles and Coles Trust were experiencing a  
15                    major liquidity crisis, and were unable to fund commitments to  
16                    numerous other borrowers;

17           §     That Mortgages Ltd.=s usual and typical funding sources for its loan  
18                    obligations were tapped out, dried up or unwilling to risk additional  
19                    capital with Mortgages Ltd.;

20           §     That Mortgages Ltd. had sought and was seeking capital from  
21                    multiple sources who had all recently declined to provide capital to  
22                    Defendants due to Defendants= precarious financial position.

23           Defendants had a duty to disclose all of these known material facts to Plaintiffs and  
24                    they knowingly, recklessly or negligently failed to do so.

25           72.    Defendants knowingly made the misrepresentations and omissions to  
26                    obtain the benefit of Plaintiffs= consenting and entering into the Second Loan  
27                    Agreement and Additional Guaranties, instead of Plaintiffs immediately pursuing their  
28                    remedies for Defendants= default and seeking available third party financing to which

Defendants= position would be subordinated.

1 73. Defendants= conduct constitutes a scheme or artifice to defraud under  
2 A.R.S. '13-2310 as well as actionable negligent misrepresentation and negligent  
3 omission of material facts.

4 74. Plaintiff Tempe Land Company is entitled to recover its damages according  
5 to proof caused by Defendants= misrepresentations and omissions.

6 75. Plaintiffs Kingston Capital, Graystar Investments, Losch and Dewar are  
7 entitled to the invalidation of the Guaranties and Additional Guaranties on the basis of  
8 Defendants= misrepresentations and omissions.

### 9 **COUNT FIVE**

#### 10 **(Usury (A.R.S. '44-1202) v Tempe Land Company)**

11 76. The allegations of the preceding paragraphs are incorporated herein by  
12 reference.

13 77. Under the First Loan Agreement, Mortgages Ltd. charged Tempe Land  
14 Co., and Tempe Land Co. paid Mortgages Ltd., the following up-front loan fees (the  
15 ALoan Fees@) on closing of the First Loan Agreement.

- 16 A. A loan fee called a Adiscount amount@ which is also commonly  
17 called Apoints@ in the amount of \$7,161,000.00;
- 18 B. A loan fee called a ARev op@ fee in the amount of \$1,302,000.00;
- 19 C. A loan fee called a Aprocessing fee@ in the amount of \$651,000;
- 20 D. A loan fee called a Aconstruction administration fee@ in the amount  
21 of \$840,000.00; and
- 22 E. Certain other smaller fees and charges bringing the total amount of  
23 loan fees paid up front to approximately \$10,000,000.

24 78. The \$10,000,000 in up front loan fees constitutes interest under A.R.S.  
25 '44-1201 which limits interest charged on a loan to the rate of interest the parties  
26 agreed would be paid.

27 79. The effective rate of interest, or APR (annual percentage rate) the parties  
28

1 agreed to was 17.82% computed on the basis of the entire \$10,000,000 in loan fees  
2 being included in the entire amount Mortgages Ltd. agreed to advance.

3 80. Because Mortgages Ltd. Failed to advance all funds it agreed to advance,  
4 the actual rate of interest Mortgages Ltd. charged Tempe Land Co. exceeded the  
5 agreed upon 17.82% effective rate of interest.

6 81. A.R.S. '44-1202 provides that if a lender charges a borrower a rate of  
7 interest exceeding the rate of interest agreed to, that all interest paid by the borrower to  
8 the lender is forfeited.

9 82. Under A.R.S. '44-1202, Mortgages Ltd. must forfeit, and Tempe Land Co.  
10 is entitled to recover (1) the entire approximately \$10,000,000 of loan fees paid up front;  
11 and (2) all interest paid by Tempe Land Co. or accrued against the loan by Mortgages  
12 Ltd.

### 13 **COUNT SIX**

#### 14 **(Unjust Enrichment & Restitution of Loan Fees & Tempe Land Co.)**

15 83. The allegations of the preceding paragraphs are incorporated herein by  
16 reference.

17 84. The acquisition of up-front loan fees as well as interest paid or accrued  
18 was wrongful due to Mortgages Ltd.'s defaults, misrepresentations and omissions, and  
19 violation of A.R.S. '44-1202.

20 85. Mortgages Ltd. wrongfully obtained excess consideration, and consequent  
21 unjust enrichment for its loan for all of the reasons stated above.

22 86. Tempe Land Co. is entitled to restitution in an amount equal to Mortgages  
23 Ltd.'s unjust enrichment, in an amount to be determined at trial.

### 24 **COUNT SEVEN**

#### 25 **(Promissory Estoppel)**

26 87. The allegations of the preceding paragraphs are incorporated herein by  
27 reference.

28 88. Mortgages Ltd. promised all Plaintiffs that it would fully and timely fund the

1 full Designated Loan Amounts of \$150,200,000 under the First Loan Agreement and  
2 \$45,000,000 under the Second Loan Agreement.

3 89. Defendant knowingly and purposefully induced Plaintiffs= reliance on their  
4 promises to fully and timely fund Mortgages Ltd.=s obligations under the First and  
5 Second Loan Agreements.

6 90. In rightful reliance on Defendants= promises Plaintiffs (1) entered into the  
7 First and Second Loan Agreements, the Guaranties and the Additional Guaranties; did  
8 not pursue other available avenues of funding; made numerous commitments related to  
9 their commencement of construction of the Centerpoint Project and paid approximately  
10 \$10 million of up-front loan fees to Mortgages Ltd.

11 91. Defendants breached their promises to fully and timely advance funds  
12 under the First and Second Loan Agreements, and Plaintiffs suffered detrimental  
13 reliance which entitles them to appropriate remedies for promissory estoppel including  
14 damages according to proof and judicial relief invalidating the Guaranties, the  
15 Additional Guaranties and all remaining performance obligations under the First and  
16 Second Loan Agreements.

## 17 **COUNT EIGHT**

### 18 **(Declaratory Judgment - Invalidation of Guaranties and** 19 **Additional Guaranties - Kingston Capital, Graystar Investments, Losch and** 20 **Dewar)**

21 92. The allegations of the preceding paragraphs are incorporated herein by  
22 reference.

23 93. Plaintiffs Kingston Capital, Graystar Investments, Losch and Dewar gave  
24 their guaranties in consideration of Mortgages Ltd=s promises to advance loan funds  
25 under the First Loan Agreement and the Second Loan Agreement.

26 94. There has been a failure of consideration for the Guaranties because  
27 Mortgages Ltd. breached its funding obligations under the First and Second Loan  
28 Agreements.

1 95. In addition, Mortgages Ltd. committed a prior material breach of contract  
by failing to provide loan funds as required by the First and Second Loan Agreements.

2 96. In addition, the Guaranties and Additional Guaranties are voidable due to  
3 Defendants= material misrepresentations and omissions as alleged in Count Three  
4 above.

5 97. On information and belief, Mortgages Ltd. contends that the Guaranties  
6 and Additional Guaranties are in full force and effect, notwithstanding Mortgages Ltd.=s  
7 prior material breach, the failure of consideration for those guaranties, and Defendants=  
8 material misrepresentations and omissions.

9 98. Plaintiffs Kingston Capital, Graystar Investments, Losch and Dewar are  
10 entitled to a declaratory judgment establishing that all the Guaranties and Additional  
11 Guaranties are void, discharged, and of no further force and effect due to failure of  
12 consideration, Mortgages Ltd.=s prior material breach of its contractual obligations, and  
13 Defendants= material misrepresentations and omissions.

#### 14 **COUNT NINE**

#### 15 **(Pattern of Unlawful Conduct B Civil Remedy Under Arizona Racketeering Act,** 16 **A.R.S. ' 13-2401 et. seq.)**

17 99. The allegations of the preceding paragraphs are incorporated herein by  
18 reference.

19 100. On information and belief, the allegations in the following pleadings filed in  
20 other actions (AOther Lawsuit Claims@) are substantially true in substance and in fact.

21 A. Complaint in Rightpath Limited Development Group, LLC, et al. v.  
22 Mortgages Ltd., et al., No. CV2008-011878, Maricopa County,  
23 Arizona, Superior Court;

24 B. Complaint in Central Phx Partners, LLC, et al. v. Mortgages Ltd.,  
25 No. CV2008-006907, Maricopa County, Arizona, Superior Court;

26 C. Answer in Mortgages Ltd. v. Windes, et al., No. CV2004-008371,  
27 Maricopa County, Arizona, Superior Court;

1 D. Answer and Counterclaim in Mortgages Ltd. v. Hospitality Plus,  
2 LLC, et al., No. CV99-06188, Maricopa County, Arizona, Superior  
3 Court;

4 E. Third Amended Complaint in Covenant Christian Center,  
5 International, Inc. v. Mortgages Ltd., et al., pending as adversary  
6 proceeding No. 2: 07-AP-00055-CGC in In Re Covenant Christian  
7 Center, International, Inc., No. 2:06-bk-02386-CGC, United States  
8 Bankruptcy Court for the District of Arizona.

9 101. On information and belief, based on the Other Lawsuit Claims, Mortgages  
10 Ltd., Coles and Coles Trust constitute an enterprise as defined by A.R.S. '13-  
11 2301.D.2. Said enterprise is and was controlled by Mortgages Ltd., Coles and Coles  
12 Trust.

13 102. For purposes of financial gain, Defendants procured benefits through a  
14 pattern of unlawful activity chargeable or indictable under the laws of the State of  
15 Arizona and punishable under those laws by imprisonment for more than one year  
16 involving (a) a scheme or artifice to defraud and (b) usury.

17 103. On information and belief, based on the Other Lawsuit Claims, that pattern  
18 of unlawful activity included (1) knowingly making misrepresentations or omissions of  
19 material fact regarding Mortgages Ltd.'s ability to fully and timely fund loans at time  
20 when it knew it could not do so in order to induce borrowers to enter into lending  
21 transactions and relationships with Mortgages Ltd. under which they paid Mortgages  
22 Ltd. large loan fees and provided Defendants other gains and benefits; and (2)  
23 unlawfully entering into usurious loan transactions.

24 104. On information and belief and based on the Other Lawsuit Claims, the  
25 pattern of unlawful activity included two or more continuous and related wrongful acts,  
26 the last of which occurred within five years of a prior unlawful act that constitutes part of  
27 the pattern of unlawful conduct.

28 105. Plaintiffs have suffered reasonably foreseeable injury to their business and





1 Deed of Trust or attempting to assert rights in any security given in  
2 connection with the First and Second Loans;

- 3 B. Attempting to collect upon or enforce the Guaranties and Additional  
4 Guaranties issued by Kingston Capital, Graystar Investments,  
5 Losch and Dewar.

6 WHEREFORE, Plaintiffs pray for judgment against Mortgages Ltd. as follows:

- 7 A. For an award of damages according to proof in favor of Plaintiff Tempe  
8 Land Company;  
9 B. For declaratory relief as prayed for herein in favor of Plaintiffs Tempe Land  
10 Company, Kingston Capital, Graystar Investments, Losch and Dewar;  
11 C. For a restitutionary award to Tempe Land company of all loan fees paid to  
12 Mortgages Ltd., together with prejudgment and post judgment interest  
13 thereon from the time said fees were paid;  
14 D. For statutory relief including an award of up to treble damages pursuant to  
15 A.R.S. ' 13-2314.04.A;  
16 E. For preliminary and permanent injunctive relief as prayed for herein favor  
17 of all Plaintiffs;  
18 F. For an award of Plaintiffs= attorneys fees, costs and litigation expenses,  
19 including expert witness fees; and  
20 G. For such other and further relief as the Court deems proper.

21 RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of October, 2008.

22 MORRILL & ARONSON, P.L.C.

23  
24 By

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26 John T. Moshier  
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28 Suite 340  
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Attorneys for Plaintiffs Tempe Land  
Company, et al.

1 COPY hereof served on  
2 Arizona Attorney General per  
A.R.S. '13-2314.04.H

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