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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re MORTGAGES LTD., Debtor.	Chapter 11 Case No. 2:08-bk-07465-RJH **ML MANAGER'S** **(1) REPLY IN SUPPORT OF ITS EMERGENCY MOTION FOR ORDER CONTINUING DEADLINES AND HEARING IN FTI FEE APPLICATION,** **(2) RESPONSE TO FTI'S CROSS MOTION IN LIMINE TO PRECLUDE WITNESSES AND EXHIBITS NOT PROPERLY IDENTIFIED, and** **(3) MOTION PURSUANT TO LOCAL RULE 9072-2 FOR ASSIGNMENT TO ADR** **Hearing Date[1]:** December 8, 2009 **Hearing Time:** 10:00 a.m.

ML Manager, LLC ("ML Manager") hereby files its (1) Reply in Support of the Emergency Motion to Continue (the "Motion to Continue"), (2) Response to FTI's Cross-Motion in Limine, and (3) a Motion for Assignment to ADR. The Response by FTI Consulting, Inc. ("FTI") the Motion to Continue essentially asserts an argument based on erroneous notion that its prior discovery requests unilaterally created a disclosure deadline

[1] The Court has set the hearing on the Motion to Continue for December 8, 2009 at 10:00 a.m. The hearings for the Cross Motion in Limine and the Motion for Assignment to ADR have not yet been set, but ML Manager believes that these issues should all be heard together.

for all of the Objectors. As shown below, FTI is wrong. FTI then files what it call of "Cross-Motion in Limine" premised on the same argument that there was one deadline for disclosure of all the Objectors witnesses and exhibits, but a separate and much later deadline for FTI. Finally, ML Manager hereby moves pursuant to Local Rule 9072-2 for assignment of this matter to ADR. As the Court is aware, there have been two prior hotly contested fee applications in this matter that were resolved by mediation. As such ML Manager believes that a mediation of this matter would be beneficial, and ML Manager believes that given Judge Case's familiarity with the case from the mediation of the Jennings Strouss fee application, that the mediation should be held in his court as soon as his schedule permits.

Although there are three separate motions now before the Court, all boil down to the pre-hearing procedure related to the FTI Fee Application and a common factor in all of the motions is the time needed by the Objectors to prepare their case and FTI's prior refusal to produce its file before now. The bottom line it that as of the filing of this pleading, FTI has not yet produced or even allowed an inspection of its files and work product. Even though that vast majority, if not all of the documents at issue are the Debtor's original documents or documents that were created at the Debtor's offices using the Debtor's equipment and paper, and even though ML Manager and ML Servicing were assigned all of the Debtor's rights in this regard, FTI is now claiming that it will not return the Debtor's property, or produce documents unless it receives payment. Nevertheless, FTI is insisting that the litigation over the reasonableness of its fees proceed to trial next week and that none of the Objectors can introduce any of the material from FTI's files or call witnesses to discuss the implication of the information from these files. FTI bases this argument on a fallacious interpretation of the law on discovery. FTI is simply wrong as a matter of procedural law, and wrong a matter of fundamental fairness and equity. There have been no deadlines missed that preclude the disclosure of witnesses and

exhibits. Moreover, the Objectors need time to obtain expert representation given the unexpected decision of Mr. McDonough's firm that he should not act as an expert in this matter, and, more importantly, they need time to review and rely on FTI's files that have yet to be copied or delivered. Furthermore, the Objectors believe that mediation would be of benefit in this matter.

I. **THERE HAS BEEN NO MISSED DEADLINES FOR THE DISCLOSURE OF WITNESSES AND EXHIBITS**

FTI's response to ML Manager's Motion to Continue, and its Cross-motion in Limine are premised on the argument that the Objectors' deadlines for disclosing all witnesses and exhibits was on October 30, 2009, and that this deadline was unilaterally created by the issuance of FTI's discovery requests, but that FTI's deadline for disclosure of witnesses and exhibits did not occur until the filing of the pre-trial. As demonstrated more fully in the response to FTI's Cross-motion in limine below, FTI is wrong as a matter of pretrial procedure and as a matter of fairness and equity. Simply stated, Rule 33 does not create any discovery deadline. *See,* Fed. R. Bank. P. 7026(e). Indeed FTI can produce no relevant authority indicating that Rule 33 creates a cut-off for discovery. The Objectors' responded to FTI's discovery requests with the information available to them at the time. Moreover, the Objectors' have supplemented those discovery responses, as allowed by the relevant procedural rules. The relevant deadline for the disclosure of witnesses and exhibits is the date of the filing of the Joint Pre-trial Statement, which deadline has not yet past. More to the point, it is totally inequitable for FTI to attempt to preclude the Objectors from reviewing and using FTI's files and work product as exhibits in this matter through procedural gamesmanship. Yet, that is exactly what FTI is attempting to do.

II. **REPLY IN SUPPORT OF MOTION TO CONTINUE**

The Motion to Continue was brought based on two facts. First, that ML Manager

needs time to retain an expert because the expert it assumed would be available to testify is now unavailable. Second, that FTI has not provided to the Objectors' its files for review or production. FTI's sole response is that the deadline for listing witnesses and exhibits was created by their discovery requests, and it does not matter that the Objectors have not had access to FTI's files and no expert could be called because those documents were not identified and the opinions were not disclosed by the deadline for responding to the discovery requests. In other words, FTI's entire argument in response to the Motion to Continue is premised on the validity of its argument that the discovery requests created a deadline for the disclosure of witnesses and exhibits. As shown below, FTI is wrong.

Because FTI's procedural argument fails, the two facts upon which the Motion to Continue was brought remain. The Objectors need additional time to find a replacement expert and the Objectors need time to review and analyze FTI's files. ML Manager respectfully asserts that these reasons are sufficient justification and good cause for a continuance.

III. RESPONSE TO CROSS MOTION IN LIMINE

FTI entire Cross-motion in Limine is premised on the fiction that the deadline for the response to their Interrogatory established an enforceable deadline for the disclosure of witnesses and exhibits for the Objectors, but not for FTI. Indeed, FTI is taking the untenable position that the Objectors cannot even identify and use documents from FTI's files (even though those files are supposedly the work product that ML Manager and ML Servicing are being asked to pay over $2.4 million for) because FTI had no deadline to, and refused to produce its complete files until December 7.

FTI's motion is contradictory. On one hand it is opposing the motion to continue the trial and on the other hand they are claiming surprise and sandbagging. Such contradiction is transparent and should not be honored. It is undisputed that the joint pretrial memorandum for the contested matter involving FTI's Fee Application is not due

until December 9, 2009.[2] It is also undisputed that this Court has not set any other deadlines as to discovery in this matter. Furthermore, FTI even agrees that the Rules of Civil Procedure permit ML Manager to supplement its responses to FTI's discovery requests. Accordingly, inasmuch as ML Manager has complied with all of the rules relevant to this contested matter, ML Manager respectfully requests that this Court deny FTI's motion in limine seeking to excluded ML Manager's witnesses and exhibits.

A. Relevant facts support introduction of all of ML Manager's evidence.

On October 30, 2009, ML Manager responded to FTI's discovery requests. Notably, at that time, ML Manager had not been provided a copy of FTI's files, and ML Manager was also preparing for the DLA Piper evidentiary hearing scheduled for November 25, 2009 as well as (as the Court knows from all of the other pleadings filed by the Rev-Op Group and others) dealing with numerous other issues relative to the administration of the confirmed plan of reorganization.[3] Thus, when ML Manager responded to FTI's discovery requests, its responses were fully accurate based on the information currently available to ML Manager at the time of response. In other words, due to other pressing matters and the fact that FTI had not yet produced a copy of its files and alleged work product, ML Manager had not determined what evidence or witnesses it intended to use at a hearing nearly six weeks away. This information was included in ML Manager's responses and ML Manager also indicated that it would supplement its responses as it made decisions regarding exhibits and witnesses. After that, there were numerous emails, correspondence and telephone calls between counsel where additional witnesses were disclosed. In fact, counsel for ML Manager has indicated many times over

[2] FTI now argues that the continuance of the deadline for the Joint Pretrial Statement until December 9 is sufficient. Ironically, before ML Manager's Motion to Continue was filed attaching the draft of the Joint Pretrial that FTI had previously prepared, FTI took the position that it would not agree to a continuation of the deadline for the filing of the Joint Pretrial. See FTI's Cross-Motion in Limine.

[3] Additionally, counsel for ML Manager was involved in another large confirmation hearing before Judge Baum relating to another bankruptcy.

the last 30-45 days that additional witnesses would be called. Drafts of the Joint Pretrial Statement were exchanged. Moreover, depositions were scheduled, and FTI concluded a two-day, seven hour deposition of one of the Objectors' key witnesses, Nechelle Wimmer. Significantly, FTI cancelled the previously scheduled depositions of two other witnesses, Ed McDonough and Kevin O'Halloran. As such, FTI cannot seriously assert surprise as an issue.

B. **FTI's motion in limine fails for two independent reasons.**

FTI's argument in this case is two fold: first, FTI argues that ML Manager is precluded from offering evidence not stated in its preliminary discovery responses; and second, that ML Manager's evidence is excluded because of sandbagging. FTI's first argument is misplaced because Rule 33 does not create any discovery deadline. *See,* Fed. R. Bank. P. 7026(e). Indeed FTI can produce no relevant authority indicating that Rule 33 creates a cut-off for discovery. FTI's second argument fails because the relevant facts demonstrate that ML Manager is not sandbagging as it is not insisting that FTI proceed with the trial next week, but has offered FTI as much time as necessary to conduct any discovery that FTI deems necessary. This argument is extremely ironic because it is FTI that has thus far refused to produce its complete files.

1. Rule 33 does not create a discovery deadline.

FTI's principal argument fails because the Rule 33 cannot be interpreted to create discovery deadlines. FTI's argument is contrary to logic and imposition of this unwritten rule, would introduce gamesmanship into the rules of civil procedure. The rules of civil procedure expressly permit a party to supplement its responses to discovery. Specifically, Rule 7026(e) states:

> A party . . . who has responded to an interrogatory, request for production, or request for admission – must supplement or correct its disclosure or response:
>
> (A) in a timely manner if the party learns that in some

> material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
>
> (B) as ordered by the court.

FTI has cited no authority, nor can it, suggesting that discovery responses impose a unilateral deadline for the disclosure of witnesses and exhibits. If this were the case, parties would rush to be the first to serve discovery demanding the identification of witnesses and exhibits knowing that if they succeeded in being first they would preclude the use of their own files as exhibits because they won the race to issue discovery. The concept that a race to issue interrogatories creates unilateral witness and exhibit disclosure deadline is ludicrous.

Here, FTI's discovery requests could not have operated as a discovery deadline. The Court had not set any discovery deadlines save the submission of a joint pretrial memorandum on December 9, 2009. More importantly, at the time FTI had issued its written discovery, FTI had not provided ML Manager with any information regarding FTI's own case even though FTI has the burden of proof. Furthermore, FTI did not request that the Court establish any pretrial deadlines. During early November, counsel for FTI and ML Manager had telephonic communication and exchanged correspondence. During this exchange, which further fleshed out legal and factual theories, ML Manager disclosed additional witnesses such as Veronica Sas and Sarah Lisa Petrauschke. Even though these additional witnesses were disclosed within a matter of days of the discovery response and weeks before the Joint Pretrial was due (and, as shown below, constituted a supplement to discovery responses) and despite the fact that FTI had not yet disclosed any of its witnesses and exhibits or produced its files, FTI was taking the position that no additional witnesses or exhibits could be disclosed after October 30.

The first disclosure that ML Manager received from FTI occurred on Wednesday

November 25, 2009, the day before Thanksgiving when FTI submitted a (deficient) draft of the Joint Pre Trial. This draft identified for the first time, issues FTI claimed were relevant, but did not even state FTI's factual or legal position with regard to these issues. In other words, it seems clear that FTI was once again attempting to lock down the Objectors' factual and legal positions before it even disclosed its own theories. Even though the submission was obviously deficient, the Objectors cooperatively between themselves determined some of the additional exhibits and witnesses they needed to address the issues contained in FTI's deficient draft. Prior to that time, no determinations had been made, so all of the discovery responses were accurate and compliant with the Rules of Civil Procedure. Although some of the witnesses had been formally disclosed prior, and others had been communicated in emails and other correspondence, ML Manager formally listed the additional witnesses and exhibits it intended to offer before the deadline for submission of the Joint Pretrial.

Thus, even if FTI had some authority suggesting that Rule 33 operated as a discovery cutoff, which it can not, the factual posture of this case would not justify FTI's requested relief. FTI cannot unilaterally establish a discovery deadline by serving written discovery first. FTI has taken no steps to apprise the Objectors of the issues it attempted to argue. Accordingly, ML Manager respectfully requests that the Court deny FTI's motion in limine.

2. ML Manager was not sandbagging,

FTI further accuses ML Manager of sandbagging and cites cases stating that the Court is required exclude evidence as a result of sandbagging. These cases simply do not apply to the facts or the procedure of this case.

First, ML Manager's informal disclosure of possible additional witnesses means that FTI cannot claim surprise. Moreover, ML Manager's repeated offers to provide FTI with as much time as needed to prepare its case outshine's FTI's accusations of

sandbagging. In its November 6, 2009 correspondence, ML Manager expressly informed counsel for FTI of its commitments and requested professional courtesy in extending the time for depositions. ML Manager later, in response to FTI's concerns about surprise, offered to extend deadlines to provide FTI with additional time to prepare for the hearing. Additionally, ML Manager filed a motion to continue the evidentiary hearing. FTI cannot accuse ML Manager of sandbagging as ML Manager has repeatedly offered FTI additional time and discretion to prepare its case in the manner it deems appropriate. "Courts have looked with disfavor upon parties who claim surprise and prejudice but who do not ask for a recess so they may attempt to counter the opponent's testimony." *Johnson v H. K. Webster, Inc.* 775 F2d 1, 8 (1st Circ. 1985)(superseded by statute on other grounds as stated in *Klonoski v Mahlab,* 156 F3d 255, (1st Circ. 1998).

Second, the cases cited by FTI are not bankruptcy cases. FTI did not cite a single case in bankruptcy in which the Court excluded evidence based on sandbagging. One possible reason for FTI's inability to cite applicable case law is the distinction between bankruptcy contested matters and non-bankruptcy civil litigation. As a general rule, bankruptcy litigation does not contemplate civil litigation time frames. For example, during the confirmation hearing, objections to the plan were due on May 5, 2009. The confirmation hearing on the proposed plan was set to begin on May 13, 2009, providing the parties with eight days to prepare all witnesses and exhibits relating to the objections to the plan. No one, not even FTI's current counsel (who back then was then representing the VTL Committee in opposition to many of the positions that FTI was then taking) objected to this time frame or accused any other party of sandbagging.

IV. MOTION TO REFER THIS MATTER TO MEDIATION

Mediation was successful in the other two contested fee applications. As such, pursuant to Local Rule 9072-2, ML Manager request that this matter be assigned to ADR. Specifically, ML Manager believes that mediation before Judge Case, as soon as his

schedule permits, would be advantageous for this matter. He has substantial knowledge of the case given the mediation of the fee application by Jennings Strouss.

V. CONCLUSION

Two facts remain undisputed. ML Manager needs additional time to retain and bring up to speed an expert to opine on the reasonableness of FTI's Fees. FTI is asking the Court to order the payment of almost $2.5 million. This would be a substantial burden on the investors who will bear the burden of this expense and the financing costs to pay the amount. Fairness dictates that the Objectors be allowed to offer evidence and testimony regarding the reasonableness of these fees. Second, the Objectors need time to review and analyze FTI's alleged work product. It seems outrageous for FTI to argue that their files should be excluded from consideration of this matter given that FTI did not once provide a contemporaneous bill to the Court, the other parties in the bankruptcy, or even the Debtor to review until FTI filed its one and only fee application. Moreover, FTI's work product was allegedly produced for the benefit of the Debtor, but FTI refused to provide its complete file to ML Servicing, which is the reorganized Debtor. ML Manager and the other Objectors are not attempting to gain any unfair advantage in this proceeding. Instead, ML Manager is attempting to ensure that this hearing be evaluated and resolved on its merits, and not on legal technicalities.

DATED: December 7, 2009

FENNEMORE CRAIG, P.C.

By /s/ *Keith L. Hendricks*
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Keith L. Hendricks
Attorneys for ML Manager LLC

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2009, I electronically

transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants.

/s/ *L. Carol Smith*