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6 **UNITED STATES BANKRUPTCY COURT**  
7 **DISTRICT OF ARIZONA**

9 In re:

10 MORTGAGES LTD.,

11 Debtor.

No. 2-08-bk-07465-RJH

CHAPTER 11

**MOTION FOR ORDER PURSUANT TO  
BANKRUPTCY RULE 3020 REQUIRING  
SEGREGATION OF FUNDS AND FOR  
COMPLIANCE WITH CONFIRMED PLAN  
OF REORGANIZATION**

15 Pursuant to both Bankruptcy Rule of Procedure 3020(d) and the Plan (as hereinafter  
16 defined), FTI Consulting, Inc. ("**FTI**") requests that ML Manager, L.L.C. ("**ML Manager**") and Kevin  
17 T. O'Halloran, Trustee of the ML Liquidating Trust (the "**Liquidating Trustee**", and, with ML  
18 Manager, the "**Objecting Parties**"), be immediately required to deposit the sums necessary to pay to FTI  
19 the fees and costs requested in FTI's *First and Final Fee Application of FTI Consulting as Financial*  
20 *Advisors to Debtors and Debtors In Possession and Allowance of Compensation and Reimbursement of*  
21 *Expenses* (the "**FTI Fee Application**") [DE 1896]. It is imperative that the relief requested be granted  
22 because it appears that there are insufficient funds to pay administrative claims in full, despite the many  
23 representations made to the Court and to the estate's professionals by counsel for the Official Committee  
24 of Investors (the "**Committee**") that sufficient funds are available. If the relief is not granted, then FTI  
25 may be substantially prejudiced if there are no funds to pay FTI when the Court ultimately adjudicates  
26 the FTI Fee Application that has been set for trial. This motion is more fully supported by the attached

Memorandum of Points and Authorities and the entire record in the case.<sup>1</sup>

RESPECTFULLY SUBMITTED this 4th day of January, 2010.

SCHIAN WALKER, P.L.C.

By /s/ MICHAEL R. WALKER, #003484

Dale C. Schian

Michael R. Walker

Attorneys for FTI Consulting, Inc.

**MEMORADUM OF POINTS AND AUTHORITIES**

**A. BACKGROUND**

1. On May 20, 2009, the Court issued its *Order Confirming Investors Committee's First Amended Plan of Reorganization Dated March 12, 2009* ("**Confirmation Order**") [DE 1755], thereby confirming the Committee's *First Amended Plan of Reorganization* (the "**Plan**"). The Plan was confirmed, in part, because of the Committee's representations that sufficient funds exist to pay allowed professional fee claims in full. That all such claims be paid in full is a condition to confirmation. *See* § 1129(a)(9)(A).

2. The conclusion that the Plan met § 1129(a)(9)(A) is set forth specifically in the Confirmation Order at ¶14. Both the Court and the estate's professionals were also told by Committee counsel that the source of the funds to pay the allowed claims of professionals was the exit financing ("**Exit Financing**"). Upon information and belief, the Exit Financing borrowers, which include the Objecting Parties, are required to pay interest on all borrowed funds at the rate of 17.5% per annum.

3. On July 5, 2009, Fennemore Craig, P.C. ("**Fennemore Craig**"), counsel for the Committee, filed its final application for professional fees and expenses pursuant to Bankruptcy Code § 330, which the Court approved by order dated August 28, 2009 (the "**Fee Order**") [DE 2133].

4. Because FTI was concerned that adequate funds existed to pay FTI and other

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<sup>1</sup> The Court is well aware of the background facts in this case and FTI will not burden the Court with a full recitation of those facts.

1 administrative claimants after the payment authorized in the Fee Order, FTI filed a motion to alter or  
2 amend the Fee Order ("**Motion to Amend**") to permit disgorgement or *pro rata* distribution if funds  
3 under the Exit Financing, or otherwise, were not available to pay allowed claims of professionals in full,  
4 as mandated by the Code, the Plan, and the Confirmation Order itself. Before, during, and after the  
5 Motion to Amend was filed, FTI attempted to resolve this matter out of court by repeatedly asking that  
6 the Objecting Parties provide reasonable proof that funds existed or were reasonably available to pay  
7 FTI's fees once this Court approved them in any amount. In response to this very legitimate request,  
8 Fennemore Craig and the Liquidating Trustee have been either evasive or simply non-responsive. *See,*  
9 *e.g.*, Exhibit A (e-mail to the Committee's counsel inquiring whether funds exist to pay the fees  
10 requested in the FTI Fee Application, which went unanswered).

11           5.       The Objecting Parties have objected to nearly all requests for administrative  
12 expenses filed by professionals under § 330. *See, e.g.*, DE 1025, 1086, 1899, 1926 and 1998. Their  
13 strategy appears straightforward – to coerce estate professionals to accept substantially discounted fee  
14 payments under the premise or threat that funds may not be available to pay any larger award ordered by  
15 the Court at a later date. Thus, estate professionals are forced to accept the certainty of sharply  
16 discounted payments instead of pursuing a fee award in an amount that truly represents the value of the  
17 services they rendered.

18           6.       On July 6, 2009, FTI filed the FTI Fee Application, to which the Objecting Parties  
19 objected. FTI responded to that objection (the "**Response**") [DE 2181], requesting that the Liquidating  
20 Trustee be ordered to segregate funds in a sufficient amount to pay the fees and costs that FTI requested  
21 in the FTI Fee Application.

22           7.       The Code, Plan, and the Confirmation Order all require that professionals be paid  
23 in full regardless of the sequence in which the professional claims become allowed claims. This is the  
24 only relief that FTI is seeking. Bankruptcy Rule 3020 and explicit Plan provisions authorize the Court  
25 to grant this relief.

1     **B.     LEGAL ARGUMENT**

2             Although Bankruptcy Rule of Procedure 3020(a) provides that in a Chapter 11 case, *prior*  
3 *to entry of the order confirming the plan*, the court may order the deposit with the debtor-in-possession  
4 of the consideration required by the plan to be distributed on confirmation, subsection (d) states that  
5 "notwithstanding the entry of the order of confirmation, the court may issue any other order necessary to  
6 administer the estate." *See also In re Northwestern Corp.*, 372 B.R. 684, 687 (D. Del. 2007) (holding  
7 that court could correct omission in confirmed Chapter 11 plan, where plan did not make contingency  
8 provision for eventuality of merger *vis-a-vis* disputed cash reserves, by ordering transfer agent for shares  
9 of reorganized debtor's new common stock held in disputed claims reserve to invest all cash proceeds  
10 received upon tendering shares to company in connection with merger between company and  
11 reorganized debtor).

12             Pursuant to Bankruptcy Rule 3020(d), the Court is vested with authority to issue orders in  
13 aid of execution of the plan, including orders necessary to assure that the reorganized debtor complies  
14 with the Confirmation Order, which at paragraph 14 requires *full payment of the allowed amounts of*  
15 *administrative claimants*. Given that nearly eight months have passed since the Plan was confirmed,  
16 and that substantial questions have been raised as to the ability of the Liquidating Trustee and ML  
17 Manager to perform their obligations under the Plan,<sup>2</sup> it is appropriate for this Court to enter an order in  
18 aid of confirmation requiring that the amounts sought by FTI be segregated pending adjudication of the  
19 FTI Fee Application.

20             An order under Bankruptcy Rule 3020(d) will have the additional benefit of removing the  
21

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22     <sup>2</sup> *See, e.g.*, Chapter 11 Post-Confirmation Interim Report (the "**Report**") at DE 2156 (the Liquidating  
23 Trustee indicating that it "is not presently in compliance with the terms of the confirmed plan of  
24 reorganization as a result of the Liquidating Trust's board of directors' decision not to pay the monthly  
25 mortgage payments due to Arizona Bank & Trust in August and September 2009.") Since the Report  
26 was filed in September 2009, the Liquidating Trustee has filed no additional post-confirmation reports  
or any other documents indicating the status of the activities or financial condition of either the  
Liquidating Trustee or ML Manager.

1 incentive of the Objecting Parties not to resolve fee obligations. Presently, the Objecting Parties appear  
2 to believe that it is appropriate to delay payments to professionals simply to avoid the accrual of interest  
3 under the Exit Financing. It is anticipated that the relief requested herein will permit the parties to  
4 present and litigate the FTI Fee Application without regard to any incentive to delay payment. If funds  
5 are proven to be available and segregated as FTI requests, then this dispute will be resolved more  
6 effectively and efficiently whether by settlement or trial. FTI simply wants its day in Court to have  
7 meaning, and it will have no meaning if funds are not available to pay its administrative claim.

8 **C. CONCLUSION**

9 Based upon the foregoing, FTI requests that the Court enter an order directing the  
10 Liquidating Trustee and the ML Manager to place in a segregated, interest-bearing account the sum of  
11 \$2,030,951.59 within seven (7) business days after the proposed order filed contemporaneously herewith  
12 is entered. The account shall be maintained with an approved financial institution.

13 RESPECTFULLY SUBMITTED this 4th day of January, 2010.

14 SCHIAN WALKER, P.L.C.

15 By /s/ MICHAEL R. WALKER, #003484

16 Dale C. Schian  
17 Michael R. Walker  
Attorneys for FTI Consulting, Inc.

18 COPY of the foregoing  
19 e-mailed this 4th day  
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/s/ JULIE LARSEN

133284v10

## EXHIBIT "A"

**Dale Schian**

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

**Importance:** High

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

Dale

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

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

Thanks,  
Dale

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