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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 TO ALTER OR AMEND
JUDGMENT AWARDING RADICAL
BUNNY, L.L.C.'S ADMINISTRATIVE
PRIORITY CLAIM FOR SUBSTANTIAL
CONTRIBUTION AND REQUEST FOR
INDICATIVE RULING PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE
62.1**

16 Pursuant to Bankruptcy Rule 9023, FTI Consulting, Inc. ("**FTI**") requests that the Court
17 amend the *Order Granting Radical Bunny's Administrative Claim for Substantial Contribution*
18 [DE 2514] (the "**Substantial Contribution Order**"), which approved the substantial contribution claim
19 of Radical Bunny, L.L.C. ("**RBLLC**") as an administrative claim on par with all other administrative
20 claims incurred in the above-captioned bankruptcy case of Mortgages Ltd. (the "**Debtor**"). FTI requests
21 that the Substantial Contribution Order be amended to reflect that the rights of FTI to seek disgorgement
22 are not prejudiced by the Substantial Contribution Order if it is later determined that insufficient funds
23 are available to pay FTI's allowed administrative claim in full. FTI further seeks to amend the
24 Substantial Contribution Order to provide that disgorgement may be sought from the law firm of
25 DeConcini, McDonald, Yetwin & Lacy, P.C. (the "**DeConcini Firm**") because the Substantial
26 Contribution Order directed payment of the RBLLC substantial contribution claim to the DeConcini

1 Firm, which represented RBLLC in these proceedings, and whose services provided the basis for
2 RBLLC's substantial contribution claim.

3 Because the Liquidating Trustee (defined herein) has appealed the Substantial
4 Contribution Order [DE 2534], FTI also brings this motion (the "**Motion**") pursuant to Fed. R. Civ. P.
5 62.1.¹ FTI requests that the Court state either (i) that it would grant the Motion if the appellate court
6 remands for that purpose or (ii) that the Motion raises a substantial issue. Fed. R. Civ. P. 62.1(a)(3).

7 This Motion is more fully supported by (i) the attached Memorandum of Points and
8 Authorities; (ii) FTI's *Motion for Order Pursuant to Bankruptcy Rule 3020 Requiring Segregation of*
9 *Funds and For Compliance With Confirmed Plan of Reorganization* (the "**Rule 3020 Motion**") filed
10 concurrently herewith; and (iii) the entire relevant record in this case.

11 DATED this 4th day of January, 2010.

12 SCHIAN WALKER, P.L.C.

13
14 By /s/ MICHAEL R. WALKER, #003484
15 Dale C. Schian
16 Michael R. Walker
Attorneys for FTI Consulting, Inc.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **A. STATEMENT OF FACTS**

19 1. On May 20, 2009, the Court issued its *Order Confirming Investors Committee's*
20 *First Amended Plan of Reorganization Dated March 12, 2009* ("**Confirmation Order**") [DE 1755],
21 _____

22 ¹ Presumably Fed. R. Civ. P. 62.1 is made applicable in these proceedings by Bankruptcy Rule 7062.
23 Although Bankruptcy Rule 7062 does not presently incorporate Fed. R. Civ. P. 62.1, the Ninth Circuit
24 Court of Appeals has repeatedly recognized the remedy requested herein. Federal Rule of Civil
25 Procedure 62.1 appears to codify Ninth Circuit law that holds that where relief under Fed. R. Civ. P.
26 60(b) may be appropriate where a trial court's order is on appeal, the appellant has the right to ask the
trial court for an indication that it would either entertain or grant a Rule 60(b) motion. *See, e.g., In re*
Crateo, Inc., 536 F.2d 862, 869 (9th Cir. 1976); *G.C. and K.B. Investments, Inc.*, 326 F.3d 1096, 1101-
02, n.2 (9th Cir. 2003).

1 thereby confirming the Official Committee of Investors' *First Amended Plan of Reorganization* (the
2 "**Plan**"). Through the Confirmation Order, the Court determined that administrative claims consisting
3 largely of professional fees would be paid in full when they became allowed claims as the Code requires
4 as a condition to confirmation. § 1129(a)(9)(A). The factual finding and/or legal conclusion that the
5 Plan satisfies § 1129(a)(9)(A) is set forth specifically in the Confirmation Order at ¶14.

6 2. On July 6, 2009, RBLLC, through its counsel, the DeConcini Firm, filed its
7 *Application Pursuant to 11 U.S.C. §503(b)(3)(D) and (4) for Allowance and Payment of Administrative*
8 *Claim of Creditor Radical Bunny* [DE 1888] (the "**Application**"). In the Application, RBLLC sought an
9 award of the attorneys' fees and costs it incurred in making a substantial contribution to the Debtor's
10 case. Although RBLLC was the applicant, the fees and expenses requested in the Application were
11 those that RBLLC owed to the DeConcini Firm and were to be paid to that firm.

12 3. On December 17, 2009, the Court entered the Substantial Contribution Order.
13 The Substantial Contribution Order approved the Application in its entirety and further directed the
14 immediate payment from ML Manager, L.L.C. ("**ML Manager**") or Kevin T. O'Halloran, trustee of the
15 ML Liquidating Trust (the "**Liquidating Trustee**"), to the DeConcini Firm in the total amount of
16 \$595,798.25, consisting of fees of \$572,945.50 and costs of \$22,852.75. The Substantial Contribution
17 Order is silent, however, as to whether the fees and costs it awarded to the DeConcini Firm are subject
18 to disgorgement if funds are not available to pay other allowed administrative claims in full, such as the
19 fees and costs that FTI has requested in its *First and Final Application of FTI as Financial Advisors to*
20 *Debtor and Debtor In Possession For Allowance of Fees and Reimbursable Expenses* (the "**FTI Fee**
21 **Application**"), which remains pending before the Court.

22 4. On December 30, 2009, the Liquidating Trustee appealed the Substantial
23 Contribution Order [DE 2534].

24 5. As this Court is aware, whether sufficient funds exist to pay allowed
25 administrative claims has been an issue almost since the Confirmation Order was entered. Accordingly,
26 when the Substantial Contribution Order was entered, FTI contacted ML Manager, the Liquidating

1 Trustee, and the DeConcini Firm to determine whether or not funds existed to the make the payment
2 required under the Substantial Contribution Order to the DeConcini Firm and also to make payment of
3 the fees and costs requested in the FTI Fee Application.

4 6. Despite its repeated requests, FTI has not received any information that indicates
5 that funds are available to pay, in full, the sums due the DeConcini Firm under the Substantial
6 Confirmation Order and the sums that FTI may be entitled to receive under the FTI Fee Application.
7 *See, e.g.*, Exhibit A (December 21, 2009 e-mail to the Committee's counsel inquiring whether funds
8 exist to pay the fees requested in the FTI Fee Application, which went unanswered).

9 7. Accordingly, FTI is forced to request that the Court amend the Substantial
10 Contribution Order to permit FTI to seek disgorgement from the DeConcini Firm if funds are not
11 available to pay FTI's allowed administrative claims in full. Because the Substantial Confirmation
12 Order provides for payment to the DeConcini Firm, it is appropriate that disgorgement be sought from
13 the DeConcini Firm and not from the RBLLC bankruptcy estate.

14 **B. LEGAL AUTHORITY**

15 As noted above, the Liquidating Trustee has appealed the Substantial Contribution Order.
16 Pursuant to Fed. R. Civ. P. 62.1(a), if a timely motion is made for relief that the Court lacks authority to
17 grant because of an appeal that has been docketed and is pending, the Court may, among other things,
18 either state that it would grant the motion if the district court remands for that purpose or that the motion
19 raises a substantial issue.

20 Courts take opposing views as to whether fees awarded pursuant to a final order under
21 Bankruptcy Code § 330 can be disgorged if administrative insolvency occurs when the order is silent on
22 the issue. *Compare In re Appalachian Star Ventures, Inc.*, 341 B.R. 222, 226 (Bankr. E.D. Tenn. 2006)
23 (fees paid pursuant to final order subject to disgorgement and *pro rata* distribution) *with In re St. Joseph*
24 *Cleaners, Inc.*, 346 B.R. 430, 438 (Bankr. W.D. Mich. 2006) (fees paid pursuant to final order not
25 subject to disgorgement). To avoid unnecessary litigation in the event that funds are not sufficient to
26 pay all administrative claimants in full, FTI respectfully requests that the Court alter and amend the

1 Substantial Contribution Order to expressly indicate that the payment is without prejudice to FTI's right
2 to seek disgorgement from the DeConcini Firm if such disgorgement becomes necessary.

3 *Pro rata* distribution to estate professionals is provided for in 11 U.S.C. § 726(b), which
4 FTI respectfully submits should be the prevailing statutory authority regarding disgorgement. The
5 inability to pay allowed professional fee claims is a default under the Plan. As a result, reliance upon
6 the distribution provisions of Chapter 7 is appropriate in this case. Bankruptcy Code § 726(b) provides
7 that Chapter 11 administrative claims shall be paid *pro rata*. Furthermore, 11 U.S.C. § 503(a)(2)
8 suggests that Chapter 11 administrative claims share equal priority, and it is a longstanding bankruptcy
9 principle that claims of equal priority should share in estate assets on a *pro rata* basis. Finally,
10 distributions to estate professionals should not be made on a "race to the courthouse" basis.

11 Along with this Motion, FTI has filed a motion under Bankruptcy Rule 3020(d) asking
12 that ML Manager and the Liquidating Trustee be required to segregate the fees and costs that FTI has
13 requested in its FTI Fee Application. If those funds are indeed segregated and are made available solely
14 to make payment to FTI, then the relief sought in this Motion would no longer be required, except to the
15 extent that the fees and expenses awarded to FTI would be subject to disgorgement at a later date. FTI's
16 position is that all non-final fee orders should contain disgorgement provisions absent a strong showing
17 by the Liquidating Trustee and ML Manager that funds exist to pay all allowed professional fee claims
18 in full. FTI has made numerous attempts to obtain this information informally and without the Court's
19 assistance, but the Liquidating Trustee and ML Manager have disregarded FTI's inquiries. Accordingly,
20 the Substantial Contribution Order should be amended to provide for disgorgement if funds are not
21 available to pay allowed professional fee claims in full.

22 WHEREFORE, FTI respectfully requests that the Court rule that it would grant the relief
23 requested in the Motion (that the Substantial Contribution Order be altered or amended to provide that
24 the payment to the DeConcini Firm is subject to the rights of FTI to seek disgorgement under the
25 circumstances described above) so that the Court may decide the Motion if the district court remands for
26 that purpose.

1 DATED this 4th day of January, 2010.

2 SCHIAN WALKER, P.L.C.

3
4 By /s/ MICHAEL R. WALKER, #003484

5 Dale C. Schian
6 Michael R. Walker
7 Attorneys for FTI Consulting, Inc.

8 COPY of the foregoing
9 e-mailed this 4th day
10 of January, 2010, to:

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11 /s/ JULIE LARSEN _____

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EXHIBIT "A"

From: Dale Schian
Sent: Monday, December 21, 2009 9:37 PM
To: REECE, CATHY
Cc: HENDRICKS, KEITH; Mark J. Dorval (mdorval@stradley.com); 'O'Mara, Michael'; Shelton L. Freeman; Michael Walker
Subject: FW: 2:08-bk-07465-RJH Certificate of Service

Cathy: You have repeatedly represented to the court that sufficient funds are available to pay all administrative costs as they are approved. In light of the allowance of the fees reflected below, please advise whether you are still able to make that representation and whether you believe that these fees can be paid without prejudice to FTI's right to payment of its fees when its application is finally adjudicated. Please respond before it is necessary for us to file anything with the court concerning this matter.

Thank you,
Dale

From: ecf_support@azb.uscourts.gov [mailto:ecf_support@azb.uscourts.gov]
Sent: Monday, December 21, 2009 3:43 PM
To: Courtmail@azb.uscourts.gov
Subject: 2:08-bk-07465-RJH Certificate of Service

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U.S. Bankruptcy Court

District of Arizona

Notice of Electronic Filing

The following transaction was received from SHELTON L. FREEMAN entered on 12/21/2009 at 3:42 PM AZ and filed on 12/21/2009

Case Name: Mortgages Ltd.
Case Number: [2:08-bk-07465-RJH](#)
Document Number: [2519](#)

Docket Text:

Certificate of Service *OF ORDER APPROVING ALLOWANCE & PAYMENT OF SUBSTANTIAL CONTRIBUTION CLAIM PURSUANT TO 11 U.S.C. Â§ 503(b)(3)(D) AND (4)* filed by SHELTON L. FREEMAN of DECONCINI MCDONALD YETWIN & LACY PC on behalf of G. GRANT LYON, CHAPTER 11 TRUSTEE (related document(s)[2514] Order on Application for Administrative Expenses).(FREEMAN, SHELTON)