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9 **IN THE UNITED STATES BANKRUPTCY COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 In re:

12 MORTGAGES LTD.,

15 Debtor.

Chapter 11

Case No. 2:08-bk-07465-RJH

RADICAL BUNNY, L.L.C.'S:

**(1) RESPONSE AND OBJECTION TO
FTI CONSULTING, INC.'S 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; AND**

**(2) RESPONSE AND OBJECTION TO
FTI CONSULTING, INC.'S MOTION
FOR ORDER PURSUANT TO
BANKRUPTCY RULE 3020
REQUIRING SEGREGATION OF
FUNDS AND FOR COMPLIANCE
WITH CONFIRMED PLAN OF
REORGANIZATION**

Related Docket Nos. 2514, 2556 & 2557

1 Radical Bunny, L.L.C. (“RBLLC”), secured creditor and party in interest, by
2 and through undersigned counsel, hereby responds and objects to: (1) “FTI
3 Consulting, Inc.’s Motion To Alter or Amend Judgment Awarding Radical Bunny,
4 L.L.C.’s Administrative Priority Claim For Substantial Contribution and Request
5 For Indicative Ruling Pursuant to Federal Rule of Civil Procedure 62.1” (“FTI’s
6 Motion to Amend Judgment”) (Docket No. 2557); and (2) “FTI Consulting, Inc.’s
7 Motion For Order Pursuant to Bankruptcy Rule 3020 Requiring Segregation of
8 Funds and For Compliance With Confirmed Plan of Reorganization Motion to
9 Compel Immediate Payment” (“FTI’s Motion to Compel Payment”)(Docket No. 2556).

10 The relief sought in FTI’s Motion to Amend Judgment should be denied
11 because:

12 (1) such relief should not be imposed solely on RBLLC or its legal
13 counsel, DeConcini McDonald Yetwin & Lacy, P.C. (“DMYL”), based on the law
14 and policy of equal priority of payment of all administrative claims under the
15 confirmed plan of reorganization in this case, because it is inequitable to single
16 out RBLLC’s administrative claim order.

17 (2) such relief is premature and not ripe because there has not yet been
18 a determination that there are not sufficient funds to pay all administrative claims
19 in this case pursuant to the confirmed plan; while RBLLC has sought relief for
20 disclosure of financial information from the Liquidating Trustee to ensure funds
21 are available for payment, such disclosure has not yet occurred.

22 (3) such relief is not needed for this Court to exercise its ongoing
23 authority to provide for pro rata payment of all administrative claims under the
24 confirmed plan of reorganization. All administrative claims that have been paid
25 (or are paid) remain subject to appropriate remedies, including disgorgement, if it
26 is determined that, based on changed, unknown or undisclosed circumstances,
27 there are insufficient funds to pay all administrative claims.
28

1 FTI's Motion to Compel Payment should be denied for the same reasons,
2 pending further determination by this Court as to the financial status of the
3 Liquidating Trust, and the Liquidating Trustee's ability to pay all administrative
4 claims in this case. RBLLC further requests that FTI's Motions be denied for the
5 other reasons set forth herein.

6 This Response and Objection is supported by the record of this case, and
7 specifically the docket entries identified herein. FTI Consulting, Inc. ("FTI") seeks
8 relief related to this Court's "Order Granting Radical Bunny's Administrative Claim
9 for Substantial Contribution" (Docket No. 2514)("RBLLC Granting Order") entered
10 on December 17, 2009. Payment of RBLLC's Substantial Contribution Claim was
11 provided in this Court's "Order Approving Allowance & Payment Of Substantial
12 Contribution Claim Pursuant To 11 U.S.C. § 503(b)(3)(D) And (4)" (Docket No.
13 2521) ("RBLLC Payment Order"), entered on December 21, 2009. Such relief
14 was entered pursuant to the terms of the "The Official Committee of Investors'
15 First Amended Plan of Reorganization Dated March 12, 2009" (Docket No. 1532),
16 which was confirmed pursuant to an Order of this Court (Docket No. 1755)(herein,
17 "Confirmed Plan").

18
19 A. Equal Priority Does Not Authorize Unequal Treatment

20 FTI seeks an amendment of the RBLLC Granting Order to authorize FTI to
21 seek disgorgement from DMYL for funds that have not yet been paid to DMLY
22 under the RBLLC Payment Order. Such requested relief is based on the terms of
23 pro rata distribution to estate professionals provided for in 11 U.S.C. § 726(b).

24 FTI's Motion to Amend Judgment seeks to amend only the RBLLC Granting
25 Order. Pro rata distribution under 11 U.S.C. §726(b), and the fundamental
26 concept of "equitable distribution" under the Bankruptcy Code, cannot justify
27 inequitable treatment of RBLLC's administrative claim under the Confirmed Plan.
28 RBLLC's administrative claim, if paid, cannot be the only claim for which

1 disgorgement could be ordered. If FTI's pending administrative claim is granted, it
2 cannot be the only administrative claimant entitled to pro rata or "equitable
3 distribution"; that right applies equally to all administrative claimants in this case.

4 This Court has entered a large number of administrative orders for the
5 payment of administrative claims under the Confirmed Plan, including an order for
6 payment of FTI's counsel ("Schian Walker Payment Order"), for its previous
7 representation of the Official Committee of Investors in the Value-to-Loan
8 Opportunity Fund I L.L.C. (the "VTL Committee") (Docket No. 2054). Virtually all
9 of those orders, including the Schian Walker Payment Order, have not addressed
10 the effect of any unknown and undisclosed administrative insolvency. But, there
11 is no basis to single out RBLLC to ensure "equitable" payment of administrative
12 claims. There is no legal or equitable basis to amend the RBLLC Granting Order
13 so that only RBLLC could be denied its right to payment of its administrative claim
14 based on insufficient funds, and so that only FTI could be entitled to such relief. If
15 there is to be disgorgement of amounts paid to administrative claimants under the
16 terms of the Confirmed Plan due to an administrative insolvency, such
17 disgorgement must be equitable. The Liquidating Trustee, who is responsible for
18 payment of administrative claims, is the appropriate party to proceed with
19 disgorgement claims against all administrative claimants who receive more than
20 they are equitably entitled to under the Confirmed Plan.

21
22 B. The Requested Relief is Not Ripe for Adjudication

23 FTI's Motion to Amend Judgment and FTI's Motion to Compel Payment are
24 also not ripe for determination. The Liquidating Trustee has not yet disclosed the
25 current financial condition of the Liquidating Trust or the extent of funds available for
26 payment of administrative claims in this case. The RBLLC Payment Order has not
27 been complied with, and is subject to an appeal by the Liquidating Trust. If it is
28 determined that there are not sufficient funds to pay all administrative claims, as

1 provided by the Confirmed Plan, then at that time it would be appropriate to enter
2 an order to address appropriate remedies, including potential disgorgement from
3 all administrative claimants whose claims have been paid. Granting FTI's
4 requested relief prior to that determination would be premature.

5 RBLLC further specifically reserves all of its rights to address the legal
6 issues of disgorgement raised by FTI, after the current financial condition of the
7 Liquidating Trust is disclosed. RBLLC agrees that equity requires equal priority
8 for all administrative claims allowed under the Confirmed Plan. But the
9 appropriate remedies for any administrative insolvency in this case will
10 necessarily depend on the extent of funds available to pay administrative claims.
11 RBLLC will address the appropriate remedies, and the legal basis for those
12 remedies, after such disclosure is made.

13
14 C. This Court Has Jurisdiction and Authority to Enter Appropriate Orders

15 FTI's Motion to Amend Judgment is also based on the false premise that its
16 requested relief is necessary. It is not. This Court has jurisdiction and authority,
17 under 28 U.S.C. §1334, 11 U.S.C. §1142 and the Confirmed Plan, to enter
18 appropriate orders to address changed or previously unknown or undisclosed
19 circumstances that affect implementation of the Confirmed Plan. Under the terms
20 of the Confirmed Plan, all allowed administrative claims were to be paid in cash or
21 from the Exit Financing. The disclosure of the current financial condition of the
22 Liquidating Trust will determine if the terms of the Confirmed Plan can be
23 implemented in accordance with its terms.

24 If this Court finds that there are not sufficient funds to pay all administrative
25 claims as provided in the Confirmed Plan, holders of administrative claims who
26 have received payment of their claims remain subject to the jurisdiction of this
27 Court. This Court has authority to impose appropriate remedies to address the
28

1 equitable payment of administrative claims in this case, whether or not the order
2 awarding a particular administrative claim addressed such potential remedies.

3 This Court's ongoing jurisdiction to address payment of administrative
4 claims is particularly important because administrative expenses continue to be
5 incurred. The Liquidating Trustee continues to incur attorneys fees and other
6 expenses with equal priority to other administrative expenses in this case.

7 D. Additional Grounds for Denying FTI's Motions

8 FTI's Motion to Compel Payment seeks segregation of funds for the full
9 amount of their asserted administrative claim. RBLLC further objects to the FTI's
10 Motion to Compel Payment to the extent that RBLLC: (1) is not provided
11 appropriate security pending the appeal of the Liquidating Trustee, or (2) is not
12 paid amounts as ordered in the RBLLC Payment Order, prior to any segregation
13 of funds for the benefit of FTI. The amount of FTI's administrative claim has not
14 yet been determined, and RBLLC's right to assurance of payment of its
15 administrative claim should not be diminished by FTI's requested relief.

16 RBLLC further requests that this Court deny FTI's requested relief under
17 new Rule 62.1 of the Federal Rules of Civil Procedure. To the extent that Rule
18 62.1 applies, subsection (a) specifically authorizes this Court to deny any motion
19 that is made while an appeal is pending. The Liquidating Trustee has appealed
20 the RBLLC Granting Order and the RBLLC Payment Order so denial of FTI's
21 Motion to Amend Judgment is also appropriate under Rule 62.1.

22 E. Conclusion and Requested Relief

23 Based on the foregoing, RBLLC requests that this Court:

- 24 (1) deny FTI's Motion to Amend Judgment;
- 25 (2) deny FTI's Motion to Compel Payment pending a determination of the
26 availability of funds to pay all administrative claims, and the provision
27

1 of appropriate security for the payment of RBLLC's Substantial
2 Contribution Claim pending appeal; and
3 (3) grant such additional and other relief as is just and proper under the
4 circumstances of this case.

5 DATED this 6th day of January, 2010.

6 DECONCINI MCDONALD YETWIN & LACY, P.C.

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8
9 BY /s/ SHELTON L. FREEMAN

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14 **COPIES** served by e-mail
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