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9 Lead Counsel for Kevin T. O'Halloran,  
10 Trustee of ML Liquidating Trust

6 **IN THE UNITED STATES BANKRUPTCY COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8 In re:

9 MORTGAGES LTD., an Arizona  
10 corporation,

11 Debtor.

Proceedings Under Chapter 11

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

**MOTION FOR ENTRY OF AN ORDER  
ON MOTION TO ALTER/AMEND  
JUDGMENT [D.E. NO 2557]**

14 Kevin T. O'Halloran, Trustee of the Liquidating Trust of Mortgages, Ltd. ("Liquidating  
15 Trust"), hereby moves this honorable Court for an order resolving the Motion to Alter/Amend Judgment  
16 Awarding Radical Bunny, LLC's Administrative Priority Claim for Substantial Contribution and  
17 Request for Indicative Ruling Pursuant to Federal Rule of Civil Procedure 62.1 (the "Motion to Alter"),  
18 which was filed by FTI Consulting, Inc. ("FTI") on January 4, 2010 and is docketed at docket entry  
19 number 2557, and in support thereof avers as follows:

21 1. On July 6, 2009 Radical Bunny, LLC ("Radical Bunny") filed a motion seeking  
22 an award for substantial contribution [D.E. 1888].

23 2. On July 27, 2009, the Liquidating Trust filed an objection to the substantial  
24 contribution motion [D.E. 2014].  
25  
26

1           3.       On November 18, 2009, the matter was submitted to the Court for consideration.

2           4.       On December 17, 2009 the Court entered the Order Granting Radical Bunny's  
3 Administrative Claim for Substantial Contribution ("Order Granting Application") [D.E. 2514].

4           5.       On December 21, 2009, this Court entered the Order Approving Allowance &  
5 Payment of Substantial Contribution Claim Pursuant to 11 U.S.C. § 503(b)(3)(D) and (4) ("Order  
6 Approving Payment" together with the Order Granting Application, the "Orders") ordering payment to  
7 DeConcini McDonald Yetwin & Lacy, P.C. in the amount of \$595,798.25 [D.E. 2521].

8           6.       Thereafter, on December 28, 2009, the Liquidating Trust filed a notice of appeal  
9 [D.E. 2529].

10          7.       On January 4, 2010, FTI filed its Motion to Alter relating to the Orders [D.E.  
11 2557].

12          8.       As security for the appeal, and by agreement with Radical Bunny, on January 22,  
13 2010, the Liquidating Trust deposited \$655,378.07 into an escrow account. Thereafter on March 8,  
14 2010, the Liquidating Trust filed its Opening Brief with the Bankruptcy Appellate Panel for the Ninth  
15 Circuit.  
16

17          9.       On March 22, 2010, the clerk for the Bankruptcy Appellate Panel of the Ninth  
18 Circuit issued an order in the Liquidating Trust's Appeal suggesting that the Liquidating Trust's appeal  
19 of the substantial contribution award might not be ripe insofar as FTI filed a motion seeking to amend  
20 the Order awarding the substantial contribution. The clerk's order is attached hereto as Exhibit "A".

21          10.      The clerk's order requires the Liquidating Trust to take steps to have an order  
22 entered by this Court resolving the Motion to Alter.  
23

24          11.      Upon information and belief, the Motion to Alter is moot.

25          12.      More specifically, at a hearing before the Court on January 27, 2010, counsel for  
26

1 FTI and counsel for Radical Bunny advised the Court that their respective clients had reached an  
2 agreement on that subject. The complete transcript of the proceedings on January 27, 2010 is attached  
3 hereto as Exhibit "B". However, in pertinent part, the record reflects as follows:

4 THE COURT: All right. So you believe you reached an agreement on a  
5 form of modified final order? [referring to FTI's motion to alter or amend  
6 the judgment].

7 MR. SCHIAN: Correct.

8 \* \* \*

9 MR. FREEMAN: Yes. Your Honor. Shelton Freeman on behalf of  
10 Radical Bunny. Your Honor, Mr. Schian and I have reached agreement in  
11 terms of the fact that any award to Radical Bunny would be subject to the  
12 similar treatment to any other admin claimants if they're subjected to  
13 disgorgement. We didn't actually get into detail about amending the order,  
14 and I would – I guess I'm a little concerned about impacting the speediness  
15 of our appeal by amending that order, but certainly the relief that we  
16 discussed is as Mr. Schian presented, that any award to us is subject to the  
17 same claims for disgorgement that any of the other admin claims are.

18 See Exhibit "B" at 26-28.

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13. In light of the foregoing, it appears that FTI and Radical Bunny reached an  
agreement on the Motion to Alter, thus rendering the Motion to Alter moot.



Exhibit "A"

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**FILED**

MAR 22 2010

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

|                                |   |                      |              |
|--------------------------------|---|----------------------|--------------|
| In re:                         | ) | BAP No.              | AZ-09-1412   |
|                                | ) |                      |              |
| MORTGAGES, LTD.,               | ) | Bk. No.              | 08-07465-RJH |
|                                | ) |                      |              |
| Debtor.                        | ) |                      |              |
| <hr/>                          |   |                      |              |
| KEVIN T. O'HALLORAN, Trustee   | ) |                      |              |
| of the ML Liquidating Trust,   | ) |                      |              |
|                                | ) |                      |              |
| Appellant,                     | ) |                      |              |
| v.                             | ) | <b>CLERK'S ORDER</b> |              |
|                                | ) | (Response Required)  |              |
| GRANT LYON, Chapter 11 Trustee | ) |                      |              |
| for Radical Bunny, LLC,        | ) |                      |              |
|                                | ) |                      |              |
| Appellee.                      | ) |                      |              |
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This appellate case file has been administratively reviewed and a jurisdictional problem has been identified. This is an appeal from the "Order Approving Allowance & Payment of Substantial Contribution Claim Pursuant to 11 U.S.C. § 503(b)(3)(D) and (4)" (administrative claim of creditor Radical Bunny) entered on December 22, 2009 (docket no. 2521) and the order on which it was based, "Order Granting Radical Bunny's Administrative Claim for Substantial Contribution" entered on December 18, 2009 (docket no. 2514). The order at docket no. 2514 serves the function of findings of fact and conclusions of law for the order at docket no. 2521.

Appellant's notice of appeal was filed December 28, 2009 (docket no. 2529). However, FTI Consulting timely filed a motion to alter or amend the docket no. 2514 order (docket no. 2557, filed January 4, 2010). It is immaterial that the notice of appeal was filed before the timely tolling motion. The tolling motion was filed within the relevant period; fourteen days from December 18, 2009, was Friday, January 1, 2010, a legal holiday. Pursuant to Fed. R. Bankr. P. 9006(a)(1)(C), the deadline to file a timely tolling motion was the next business day, Monday, January 4, 2010.

Under Fed. R. Bankr. P. 8002(b), a timely motion to alter or amend the judgment under Rule 9023 tolls the time to appeal for all parties until entry of an order disposing of the motion. A notice of appeal is not effective until entry of an order disposing of any outstanding timely tolling motions. Fed. R. Bankr. P. 8002(b). No separate order appears on the docket resolving FTI Consulting's January 4th motion. However, the minutes from the January 27, 2010, hearing on FTI Consulting's motion indicated that the parties had reached an agreement on the motion. There are no further references to the motion to alter or amend on the docket. However, in a subsequent order approving sale of real property, entered February 26, 2010 (docket no. 2676), paragraph (8) provides that the Liquidating Trustee shall

pay FTI Consulting at least \$600,000. While that provision may have satisfied FTI Consulting's concerns raised in its motion to alter or amend the order at docket no. 2514, it does not explicitly say so.

In order for this appeal to proceed, appellant must provide to the Panel an entered order resolving the tolling motion. It is appellant's responsibility to perfect this appeal.

Therefore, by **MONDAY, APRIL 12, 2010**, appellant must file a written response either 1) providing a conformed copy of an entered order disposing of the motion<sup>1</sup> or 2) explaining what steps appellant has taken to get an order entered by the bankruptcy court. Although it is not technically necessary, a limited remand is hereby granted to allow the court to enter an appropriate order.

**FOR THE PANEL,**

*Susan M. Spraul*

**Susan M. Spraul, Clerk of Court**

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<sup>1</sup> The parties should note that any party wishing to challenge the order resolving the tolling motion or any amendment to the order on appeal caused by the tolling motion may need to file an amended notice of appeal or an original notice of appeal. See Fed. R. Bankr. P. 8002(b).



Exhibit "B"

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

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|--|--------|---------------------|
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| In re:                                 | )      |                     |
|  | )      |                     |
| MORTGAGES LTD.                         | CH: 11 | ) 2:08-bk-07465-RJH |
|  | )      |                     |
| 1) EVIDENTIARY HEARING ON APPLICATION  | )      |                     |
| FOR COMPENSATION OF FTI CONSULTING     | )      |                     |
| AS FINANCIAL ADVISORS TO THE DEBTOR    | )      |                     |
|  | )      |                     |
| 2) HEARING ON FTI CONSULTING'S PENDING | )      |                     |
| MOTIONS CONCERNING PAYMENT &           | )      |                     |
| SEQUESTRATION OF ADMINISTRATIVE        | )      |                     |
| EXPENSES                               | )      |                     |
| <hr/>                                  |        |                     |

U.S. Bankruptcy Court  
230 North 1<sup>st</sup> Avenue  
Phoenix, AZ 85003

January 27, 2010  
1:35 p.m.

BEFORE THE HONORABLE RANDOLPH J. HAINES, Judge

APPEARANCES:

|                          |                                 |
|--------------------------|---------------------------------|
| For FTI Consulting Inc.: | Dale C. Schian                  |
|                          | Michael Walker                  |
|                          | SCHIAN WALKER, P.L.C.           |
|                          | 3550 N. Central Ave., #1700     |
|                          | Phoenix, AZ 85012-2115          |
| For ML Manager, LLC:     | Keith L. Hendricks              |
|                          | FENNEMORE CRAIG PC              |
|                          | 3003 N. Central Ave., Ste. 2600 |
|                          | Phoenix, AZ 85012-2913          |

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APPEARANCES: (Continued)

For Grant Lyon, Trustee for Radical Bunny, LLC: Shelton L. Freeman (telephonic)  
DECONCINI MCDONALD YETWIN  
& LACY PC  
6909 E. Main St.  
Scottsdale, AZ 85251

For Kevin O'Halloran, Trustee of the Liquidating Trust: Michael O'Mara (Telephonic)  
STRADLEY RONON STEVENS  
& YOUNG, LLP  
2600 One Commerce Square  
Philadelphia, PA 19103

Proceedings recorded by electronic sound technician, Sheri Fletcher; transcript produced by AVTranz.

1 THE CLERK: In the case of 08-7465, Mortgages Ltd.

2 THE COURT: Appearances.

3 MR. SCHIAN: Dale Schian and Mike Walker of Schian  
4 Walker, appearing on behalf of FTI Consulting, Inc.

5 MR. HENDRICKS: Your Honor, Keith Hendricks on behalf  
6 of ML Manager.

7 THE COURT: And do we have telephonic appearances?

8 MR. FREEMAN: Yes, Your Honor. Shelton Freeman on  
9 behalf of Grant Lyon, trustee for Radical Bunny.

10 MR. HENDRICKS: Is Michael O'Mara on? I didn't hear  
11 him click on. I was wondering if I need to step out and call  
12 him on my cell and see if -- why he hasn't clicked on, because  
13 he needs to --

14 THE COURT: I haven't heard.

15 MR. HENDRICKS: -- part of this.

16 THE COURT: Let's find out. Do we have an appearance  
17 telephonically by Michael O'Mara? Apparently not. You want to  
18 take a brief recess while you call him and see --

19 MR. HENDRICKS: Yeah.

20 THE COURT: -- if he can call in?

21 MR. HENDRICKS: If I could, Your Honor. He needs to  
22 be part of this because not going to be binding without him.

23 (Mr. Hendricks exits courtroom)

24 MR. HENDRICKS: He -- if I may report. We've been  
25 negotiating all morning, including till just before we came in

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1 here. There was one point that he had not yet discussed with  
2 his client. We don't think it's going to be an issue. He's  
3 just trying to track down the client and make sure the client  
4 had approved the last issue. I just got a hold of him. He  
5 will be calling in in a minute, right now.

6 THE COURT: All right. Should we wait then?

7 MR. O'MARA: Your Honor, it's Michael O'Mara calling  
8 in.

9 THE COURT: All right, thank you. I note your  
10 appearance.

11 Who wants to proceed with this? Mr. Schian.

12 MR. SCHIAN: Thank you, Your Honor. Dale Schian for  
13 FTI. There has been an Exhibit Number 1 marked, which is a  
14 term sheet that the parties started on late this evening and I  
15 think Mr. O'Mara was just confirming with his client, if --  
16 have you seen a -- have you been provided with a copy of that  
17 yet?

18 THE COURT: Yes. I have --

19 MR. SCHIAN: Okay.

20 THE COURT: -- Exhibit 1.

21 MR. SCHIAN: Your Honor, the parties have reached an  
22 agreement to settle the ML Manager, ML Servicing Liquidating  
23 Trust and Radical Bunny objections to the FTI final fee  
24 application. We have endeavored to document that in a term  
25 sheet that the parties have been negotiating. The -- I believe

1 -- I do not intend to go through the full term sheet. I'll let  
2 it speak for itself, but let me tell you about a couple  
3 provisions that need to be -- that we've still been discussing  
4 that need to be modified slightly or perhaps clarified. And  
5 also what we contemplate to be the approval process for this  
6 and how that relates to third party rights.

7           The basic term is that FTI will have an approval  
8 final award, but the award goes up if it is not paid by a  
9 certain date. And so there is a payment structure in there,  
10 but in general terms it starts at an award of a million five.  
11 But if the award is not paid by December 3, 2010 it goes up to  
12 a million 950, with certain other provisions in there.

13           We have taken into account the possibility that there  
14 could be an inadequacy of funds to pay all administrative  
15 claims in full, although we -- the parties, I believe, have  
16 endeavored to avoid that possibility through the structure of  
17 this settlement. In the event there is a need to look at any  
18 type of disgorgement or pro rata allocation among  
19 administrative claimants, in that event we have done a couple  
20 things.

21           One is the -- what are defined as the ML parties have  
22 identified certain assets that are being committed  
23 specifically, some of those with the express consent of the  
24 lender to satisfy administrative claims in the case. So what  
25 we have done is we've taken what's out there and, if you will,

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1 created a pool of assets that have been identified to make  
2 those payments, including some subordination concessions from  
3 the exit financier to permit that to occur.

4 If there is -- and so in the unlikely event, or what  
5 we hope to be the unlikely event of a ratable distribution, in  
6 that event FTI's allowed award would be the million 950, less  
7 -- and it would be credited for any amounts that it has  
8 previously received.

9 Down in paragraph 9 of the term sheet the parties  
10 specifically identify what they contemplate will be the source  
11 of the assets to make the payments. The exit financier, we are  
12 -- we believe has agreed that that has -- he -- they have not  
13 yet approved this term sheet, nor have they seen this in  
14 writing. But it is our understanding that the ML parties have  
15 reached an agreement with the exit financier that will permit up  
16 to 600,000 -- no, will permit \$600,000 in monies that would  
17 otherwise be used to make a principal payment or payment to the  
18 exit financier to be used to pay administrative fees owing to  
19 FTI.

20 It is contemplated that will come from the sale of  
21 Chateau on Central, but in -- and this is one of the areas  
22 where the term sheet probably isn't as clear as it needs to be.  
23 In the event that, for whatever reason, Chateau on Central does  
24 not close, then they would contemplate that it would come from  
25 one of the other properties identified, I believe, in subpart

1 9(d)(2), most likely the River Run or Mummy Mountain  
2 properties, such time they're sold. The \$600,000 of monies  
3 that would otherwise be payable to the exit financier will be  
4 made available to satisfy the FTI administrative claim.

5 There is a -- 9(b) talks about a provision where in  
6 the event there is not a closing on Chateau, there's a  
7 nonrefundable earnest money deposit. It's my understanding  
8 that the only requirement to close that would be -- is the --  
9 an order of this Court authorizing the sale. And that is, I'm  
10 told, is in process. And then not -- it is contemplated that  
11 at the time that Chateau on Central sells, there will be  
12 approximately \$3.1 million escrowed for disputed mechanics and  
13 material lien claims. To the extent that the actual money  
14 required to satisfy those is less than what is escrowed, the  
15 liquidating trust interest in those monies will also be paid to  
16 FTI, to the extent that FTI has not already been satisfied.

17 That is the, in broad brush, the terms of the  
18 agreement. There is a express provision with respect to other  
19 parties. With respect to possible rights of disgorgement in  
20 the event of nonpayment, it is contemplated that those will be  
21 maintained in the status quo until -- at least until this  
22 agreement has been performed.

23 There's also a provision down there indicating that  
24 the parties intend to reduce this to an order, and ask that the  
25 order be entered but with notice and an opportunity to object

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1 to the order to all administrative claimant -- excuse me. I  
2 used the term administrative claimants. The correct term is  
3 professional fee claimants in the Mortgages Ltd. bankruptcy.  
4 And so to the extent that there is an objection to how we are  
5 treating the -- either the security or the potential claims for  
6 disgorgement in here, we want to make sure that this order has  
7 been noticed to the potentially affected parties.

8 The -- that is the agreement in broad brush. I will  
9 -- except with respect to the clarification on the -- perhaps  
10 the source of the \$600,000 on paragraph 9, it is not my  
11 intention of my comments to alter what is in the written  
12 agreement that the parties have been working on. After we put  
13 this on the record, I -- there's also a matter with respect to  
14 the Radical Bunny order that we can talk about, but I would  
15 suggest that I with -- I defer my comments on that until we  
16 finish with the proposed FTI settlement.

17 THE COURT: All right, fair enough. I guess I'm not  
18 sure about your comment. I don't see where anything you said  
19 is -- varies from this term sheet or was necessary to clarify  
20 it.

21 MR. SCHIAN: The amplification -- the clarification  
22 is in paragraph 9(a). It suggests that the \$600,000 is coming  
23 from the Chateau closing.

24 THE COURT: Right.

25 MR. SCHIAN: If Chateau doesn't close, that same

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1 \$600,000 that the exit lender has agreed not to take and permit  
2 to go to FTI may come from another property, most likely the  
3 River Run or Mummy Mountain properties, which are referred to  
4 actually in paragraph 9(d)(ii). But the \$600,000 is only  
5 referred to relative to Chateau and in (f), and so the concern  
6 was that that provision in the term sheet perhaps isn't as  
7 clear as perhaps it should be.

8 THE COURT: All right.

9 MR. SCHIAN: Okay.

10 THE COURT: I guess, Mr. Schian, one question I did  
11 have is paragraph 6. It says if there is a default with  
12 respect to the payment of the security obligations to FTI.  
13 What are security obligations?

14 MR. SCHIAN: That is a lawyer whose fingers don't  
15 always hit the R when they mean to and they sometimes hit the  
16 F. That should be payment or security, or the security  
17 obligations to FTI. In other words, the exit -- the ML parties  
18 are providing certain collateral to secure the administrative  
19 fees. Should they do something else with that collateral and  
20 not apply that collateral to the FTI obligations as  
21 contemplated by the -- by this agreement, that would be a  
22 default. That should be an or.

23 THE COURT: So -- all right, understand that the  
24 paragraph 6 reference then should be or, but I guess one thing  
25 I didn't understand previously, but I think you've now implied,

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1 paragraph 9(d) talks about the pledge to secure payment.  
2 You're -- the parties are contemplating here that you're  
3 actually going to be given security in the sense of a deed of  
4 trust or something, or is it just going to be this order  
5 effectively dedicates that fund?

6 MR. SCHIAN: I don't believe we have fully worked out  
7 the documentation on exactly what we're securing. That may  
8 depend somewhat on the way the assets are currently pledged, if  
9 they are pledged to the exit financier. So it is contemplated  
10 that the funds will be -- will -- that the assets will be  
11 secured for the payment of administrative fees in --  
12 professional fees in connection with the Mortgages Ltd.  
13 bankruptcy proceedings.

14 Did -- I'm sorry, did I answer your question?

15 THE COURT: In other words, there will be  
16 documentation beyond the order that actually grants you a  
17 security interest?

18 MR. SCHIAN: To -- well, whether we're going to  
19 effectuate it in the order and have the order be  
20 self-effectuating, or whether there will be separate  
21 documentation, which I contemplate will be necessary at least  
22 with the exit financier, it is contemplated there will be  
23 additional documentation to grant such a security interest,  
24 yes.

25 THE COURT: All right. But it hasn't really been

1 decided the nature of that documentation?

2 MR. SCHIAN: If it -- no, it has not been discussed  
3 in any level of detail at this point, other -- beyond the fact  
4 that we know we need it. We need additional documentation.

5 THE COURT: All right, thank you.

6 Anyone else wish to be heard on this?

7 MR. HENDRICKS: Your Honor --

8 THE COURT: Mr. Hendricks?

9 MR. HENDRICKS: Because of that last point, I would  
10 like to. It is the intent of the parties, as it was  
11 negotiated, that the parties to this agreement intend to be  
12 bound. We've heard from -- Mr. O'Mara has an issue. There was  
13 a last minute change on a couple of things and he's trying to  
14 track down Mr. O'Halloran, and there is a term or two that --  
15 and I'll let him speak as to whether or not his, you know, he's  
16 got his approval under those things. But assuming that  
17 everything else gets signed off, the intent was that the  
18 parties would be bound to that. And that therefore, I think  
19 it's important to put on the record the intent of a couple of  
20 things.

21 I would like to walk a little bit more how the money  
22 out of Chateau will flow under the agreement, since that's the  
23 parties' intent that we would ask the Court then to effectuate.  
24 The -- currently the -- there's a contract that has been signed  
25 for \$7 million for a purchaser to buy the Chateau properties.

1 A \$500,000 nonrefundable deposit has been put down, nonrefund  
2 -- there's only one condition to that contract, and that will  
3 be that we get a court order approving the sale, the court  
4 order for that sale process, and it will be a 363. You asked  
5 me that this morning. I didn't know, but I do now.

6 It will be a 363 process. And assuming that the sale  
7 and the sale procedures are approved and the sale goes through,  
8 the way the money would flow is 31 percent of that property is  
9 owned by the liquidating trust. The other money is owned by a  
10 couple of pass-through investors and the MP funds. It was not  
11 put into a loan LLC. So there are no loan LLCs involved, it's  
12 just the MP funds and a couple of pass-through investors.

13 There -- the ML Manager side of it, that would be all  
14 the investor side of it, will need to be escrowed because  
15 there's going to be further proceedings that will determine how  
16 that 69 percent gets resolved. We've kind of been in front of  
17 you on a couple of things, and as you can matter (sic), we're  
18 kind of negotiating. This will be the first time we'll be in  
19 front of you on how money will actually start to flow, and so  
20 we'll need to get those procedures all ironed out.

21 But as to -- so those kind of monies are not  
22 available for anything because we don't know when and how that  
23 will be resolved. The 31 percent that goes to the trust, the  
24 exit financier -- the trust is entitled to take 10 percent off  
25 the top for operating expenses and then 70 percent of the

### **AVTranz**

1 remaining amount under the documents would flow to the exit  
2 financier. The exit financier has agreed -- and our analysis was  
3 that would be about \$800,000.

4 THE COURT: Is the property owned free and clear?

5 MR. HENDRICKS: The prop- -- there are mechanic's  
6 liens on the property. Other than mechanic's liens --

7 THE COURT: Okay.

8 MR. HENDRICKS: -- the prop --

9 THE COURT: No other -- no senior mortgage or --

10 MR. HENDRICKS: No senior mortgage.

11 THE COURT: All right. The exit financier would be  
12 entitled to about \$800,000. Through different negotiations I  
13 don't need to bore you with, the exit financier is essentially  
14 going to front 200,000 of that. The exit financier has  
15 essentially said you can take that \$800,000. They're fronting  
16 to us through a return of an interest payment, a mechanism I  
17 don't know that you need to get the details to, but they're  
18 going to give us 200,000 that we'll make that initial payment  
19 to FTI from. The other 600,000 is what we're talking about.  
20 So that 800,000 is essentially money that would otherwise have  
21 been paid to the exit financier that we have freed up to use to  
22 pay this.

23 The remaining 300,000 that needs to be paid under  
24 this, as you -- we just said, there are mechanic liens on that  
25 property. We will be escrowing the entire amount necessary to

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1 satisfy those mechanic liens. And in the confirmation order, I  
2 don't know if you remember this, but Mr. Shull for Gold Creek  
3 represented those mechanic lien claimants. And the settlement  
4 we reached in the plan confirmation was that we will arbitrate  
5 those claims on a fairly rapid basis. Any money that is  
6 reduced from the 3.1 million, that is either through settlement  
7 or arbitration. And we believe that at least a million dollars  
8 of that, which would leave 300,000, which is the final 300,000,  
9 can be obtained through that, and then that money will be used  
10 to pay -- to fund the 1.1 million. So essentially the --  
11 that's where the money comes from.

12 The \$500,000, the trust portion of the \$500,000, if  
13 it does -- if this order's confirmed and it doesn't close and  
14 the \$500,000 is then released to the trust, or its portion of  
15 it, then that money would go to FTI.

16 As to Riverfront (sic), the -- there was -- River Run  
17 and Mummy Mountain, there has been discussions that if the exit  
18 financier was willing to release its -- or allow 600,000 that  
19 would otherwise be obligated to go to it, that it probably  
20 would do the same on River Run. Frankly, we just -- I -- we  
21 have no reason to not believe that, but we've never asked the  
22 exit financier. They have never told us that they would do  
23 that.

24 Also, with River Run, which is owned 100 percent by  
25 the liquidating trust, we believe that there would be probably

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1 sufficient monies to pay the whole 1.1 million or whatever  
2 number it is even if there wasn't a release of the exit  
3 financier's portion because none of that money's being split  
4 with the investors. It's all the trust's money. So that that,  
5 over and above what would be owed to the exit financier even if  
6 they didn't release the 600, which frankly we think they  
7 probably will.

8           On the remedies provisions, the basic premise of the  
9 remedies provision was if there's a default that prejudices  
10 FTI, if somebody gets an order of a pro rata, you know, the  
11 payment to the professional fees is now pro rata at some lesser  
12 amount than the awarded amount, then they are starting at a  
13 point of 1.95.

14           THE COURT: Right.

15           MR. HENDRICKS: But it's not that if there's some  
16 technical default where it doesn't otherwise prejudice them.  
17 It doesn't, you know, they don't get the windfall of moving it  
18 up to 1.95 just because some, you know, employee lawyer comes  
19 in and says I didn't get my \$12,000 and we've already paid  
20 them. This is only if it prejudices them so that they would  
21 get less than they would otherwise get under the agreement.

22           Those are the concerns, or I just wanted to put on  
23 the record kind of the thought process that we were under. And  
24 I'll leave it to then Mr. O'Mara to let us know where he  
25 stands. I know he's frantically trying to chase down his

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1 client for the final point.

2 MR. O'MARA: Thank you, Mr. Hendricks.

3 Your Honor, again, it's Michael O'Mara on behalf of  
4 the liquidating trust. I apologize to the Court for calling in  
5 a few minutes late. I was in fact trying to touch base with  
6 the liquidating trustee with regard to one open issue here that  
7 has not yet been discussed with Your Honor.

8 There was -- just to give you just a little bit of  
9 background, there have been ongoing negotiations to try and  
10 reach a settlement that were being conducted primarily through  
11 the liquidating trustee and a principal of FTI. Very late last  
12 evening they reached an agreement in principle, and since then  
13 the attorneys have been doing their best to document the  
14 language of that agreement in an appropriate way. I think that  
15 has been accomplished.

16 There is, however, one open issue that, at the  
17 moment, would prevent me from agreeing to the terms of this  
18 settlement. I do not have client authority at the moment for  
19 this settlement unless the parties were to agree that there  
20 would be language in the settlement, the same exact language  
21 that we had in the settlement that we achieved with the  
22 Jennings Strouss firm and the DLA firm, which relates to that  
23 there would be no preclusive effect under res judica- -- I'm  
24 sorry, res judicata, collateral estoppel, or similar doctrines  
25 by entry of this order. That's an issue that has not yet been

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1 resolved.

2 I have had an opportunity to speak to my client  
3 actually on my cell phone while Mr. Hendricks was making his  
4 presentation. The trustee does not have authority to make that  
5 decision and needs to take it to the board. And that's  
6 something that he's not sure he would be able to do until  
7 tomorrow.

8 There was discussion. I can represent to the Court  
9 that in the discussion last night between the principals, the  
10 agreement that was reached as I understand it was that this  
11 order would have in the same standard bells and whistles that  
12 the other orders did in the significant professional fee  
13 disputes. And the most significant ones obviously being  
14 Jennings Strouss and DLA. And that was a provision that we  
15 were able to reach without any trouble in those instances, and  
16 that's the provision that, at the moment, is still open.

17 THE COURT: I'm not quite understanding what the  
18 provision is. I think it's what you referred to as no res  
19 judicata effect?

20 MR. O'MARA: Yes. What we've done before, because  
21 there are at least -- maybe more hypothetical, but there are  
22 potential claims that the liquidating trust has against certain  
23 entities. And there are -- there's a split and a line of  
24 authority out there as to whether or not an approval of a fee  
25 application can have a res judicata or collateral estoppel

1 effect such that it would preclude any claims going forward  
2 after entry of the fee award. Both Jennings Strouss and DLA  
3 agreed that we could put express language into the order with  
4 regard to there not being any type of res judicata or  
5 collateral estoppel effect in that regard.

6 THE COURT: Are you talking in a sense of the  
7 merry-go-round context?

8 MR. O'MARA: I don't follow that, Your Honor.

9 THE COURT: You're talking about that approval of  
10 fees not preclude say malpractice claims against the same  
11 professionals whose fees were awarded? Is that what you're  
12 talking?

13 MR. O'MARA: Yes, Your Honor.

14 THE COURT: All right.

15 MR. O'MARA: Yes, Your Honor.

16 THE COURT: Merry-go-round was the famous case out of  
17 the Third Circuit, where such claims went to, I think state  
18 court, and were litigated subsequent to approval of the fees.  
19 That's -- that was my reference. But --

20 MR. O'MARA: Yes, yes. I follow you now. I follow  
21 you.

22 THE COURT: Well, I guess you're saying you asked for  
23 that and FTI agreed to it, but you don't have your client's  
24 approval that it would be satisfactory, or it's not --

25 MR. O'MARA: No.

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1 THE COURT: -- been agreed to by FTI?

2 MR. O'MARA: No, no. I -- my representation is that  
3 what was discussed last night between the principals was that  
4 this order would have the same standard language that was in  
5 the other significant fee disputes that resulted in  
6 settlements. I cannot represent to the Court that there was a  
7 specific discussion about res judicata or collateral estoppel,  
8 but that was certainly an understanding that we on our side of  
9 the table had.

10 And Mr. Schian and I talked about this just before he  
11 left for the courthouse, and at the moment, you know, there's  
12 no provision in this agreement before the Court along those  
13 lines. And without that, at the moment, I don't have client  
14 approval to approve of the settlement absent that provision. I  
15 don't know if that will change or not.

16 THE COURT: Oh, I -- okay. I understand. Well,  
17 we've got FTI here. Is FTI willing to agree to that provision?  
18 Maybe it will -- could be resolved that way. Your Honor

19 MR. SCHIAN: No, Your Honor. That is an important  
20 term to FTI. They are taking a significant discount for  
21 payment here and the last thing they want is to do another  
22 round on this one. They want a complete and total resolution.  
23 It is FTI's position that a -- an award on a final fee  
24 application is res judicata as to all matters that could have  
25 been raised in connection with the fee application, including

1 any claims of professional liability.

2 THE COURT: But you haven't gotten any provision to  
3 that effect in this agreement. You're --

4 MR. SCHIAN: No.

5 THE COURT: You're just going to rely on --

6 MR. SCHIAN: Correct.

7 THE COURT: -- that's your belief of what the law is.

8 MR. SCHIAN: That is correct. And that's what, you  
9 know, the term sheet reflects that there will be a final order  
10 approving their fees. The effect of that is whatever the fact  
11 -- effect of that is under applicable law, but we were asked  
12 for a -- for an express reservation of those rights, as  
13 Mr. O'Mara indicated, about an hour ago as we were leaving for  
14 court. And I indicated that that is not acceptable to FTI.

15 And I believe that to my recollection -- I've been  
16 following the orders rather closely in this case. I believe  
17 only the DLA, and I know the Jennings Strouss order, have  
18 similar provisions in them. Otherwise the orders have been --  
19 have generally been silent on that issue.

20 THE COURT: All right. So I guess we do have an open  
21 issue there.

22 MR. HENDRICKS: Your Honor, Mr. Schian asked me to  
23 clarify one issue with regard to the sale, if that is -- if now  
24 is a good time, or if you're still talking with Mr. O'Mara.

25 THE COURT: You -- well, let me ask Mr. O'Mara. Are

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1 you concluded, Mr. O'Mara?

2 MR. O'MARA: I am at the moment. I don't have any  
3 final certainty on this issue. And as soon as I do, I can  
4 report back to the Court. Otherwise the terms as have been set  
5 forth are agreeable to us but for this one open issue.

6 THE COURT: All right, thank you.

7 MR. HENDRICKS: The was -- this regards the -- where  
8 I said that it was going to be a 363 sale of the Chateau. It  
9 would be also the parties' intention that if the liquidating  
10 trust obtains more money, if there's an auction and people  
11 actually start bidding and the price starts going up, and that  
12 -- up to the amount necessary to pay them off, the agreement  
13 was that there is contemplated that \$360,000 at least would go  
14 to the trust for its operating expenses out of the deal. There  
15 will be enough money to pay FTI and 360 to -- or there'll be  
16 enough money to give FTI the 600, 360 to the trust, and then  
17 there's the issue of the resolution of the mechanic's liens.  
18 If the price goes up and the trust has more unencumbered  
19 assets, that -- above the 360, that money would go to FTI up  
20 until the point it is paid in full. And so at Mr. Schian's --

21 THE COURT: All right.

22 MR. HENDRICKS: -- request, I wanted to clarify that.

23 THE COURT: All right, thank you.

24 Anyone wish -- else wish to be heard on this  
25 settlement term sheet, which I gather is in effect not being

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1 approved today; right? Anyone else wish to be heard?

2 MR. FREEMAN: Yes, Your Honor. Shelton Freeman on  
3 behalf of Radical Bunny. It -- Radical Bunny does approve. We  
4 had an objection to FTI's application as well. One concern,  
5 Your Honor, that we do have is I guess being able to monitor  
6 the progress on this and see some financial reporting. There  
7 isn't -- there haven't been any, I guess material financial  
8 reports filed. We don't have copies of the loan documents or  
9 anything. So we're unable to really track the progress of  
10 this. And if we are going to be at risk of a disgorgement  
11 order, it would be really beneficial or helpful to us to be  
12 able to see how ML Manager and the liquidating trust are  
13 progressing once this settlement is approved.

14 THE COURT: I guess that's just a generalized  
15 comment? You're not suggesting that this should be denied or  
16 anything, but you're noting that you would like some future  
17 financial reporting?

18 MR. FREEMAN: Yes, Your Honor. If you'll look in  
19 paragraph 9(h), it has a provision in there that talks about  
20 the ML parties will respond to FTI for updates. And I guess we  
21 would -- we're not objecting to the settlement, but we would, I  
22 guess, amplify that we would like to be included in that. And  
23 probably we -- I guess I would propose that more specific  
24 reporting requirements be imposed so that we have definitive  
25 information about where the case is and what our risk of

1 disgorgement could be.

2 THE COURT: All right, noted.

3 MR. FREEMAN: Thank you, Your Honor.

4 THE COURT: Anyone else wish to be heard?

5 Mr. Schian, shall I simply what, continue this  
6 hearing then until we see if you are able to draft and upload a  
7 form of order? I gather your procedural idea is that you will  
8 reduce this to an order, that I would approve that subject to  
9 15 days negative notice?

10 MR. SCHIAN: Yes, Your Honor. That is our procedural  
11 suggestion. And I believe -- I assume that Mr. O'Mara's  
12 estimate is accurate, that probably by, you know, tomorrow or  
13 perhaps -- I thought he said by perhaps as early as tomorrow,  
14 but I may have to let him repeat that -- we'll have -- we'll  
15 know whether we have an -- the liquidating trust's agreement on  
16 this. At that point, we can either -- I would propose we  
17 either notify the Court that we will be uploading a form of  
18 order or ask that this matter be reset for hearing if we -- if  
19 it turns out we do not have a resolution.

20 Mr. O'Mara, did I get the dates on that approximately  
21 correct?

22 MR. O'MARA: You did. It's my understanding that we  
23 should be able to have some resolution of this by tomorrow.  
24 And if that were to change, obviously I would let you know  
25 immediately, as well as the Court. But I believe that to be



1 the case.

2 THE COURT: All right. Well, then my suggestion is I  
3 simply conclude this hearing, not say anything further now, and  
4 I'll simply await either the uploading of a form of order or a  
5 request for a continued hearing.

6 MR. SCHIAN: Thank you, Your Honor. We -- may I  
7 proceed briefly to the Radical Bunny matter, which --

8 THE COURT: You may do so.

9 MR. SCHIAN: Thank you. Mr. Freeman and I have had  
10 lengthy discussions regarding the proposed Radical Bunny -- the  
11 pending Radical Bunny or -- excuse me, the order approving the  
12 Radical Bunny fees as to which FTI filed a motion to alter or  
13 amend. It is my belief that we are in agreement as to the  
14 principal terms for an amended order to simply reflect that  
15 Radical Bunny and the payments, the escrow that has been set  
16 aside for Radical Bunny, the parties rights are preserved; and  
17 that that order is in no better or worse position than any of  
18 the other administrative claimants who are in a similar  
19 position with an order that either has not yet become final or  
20 as to which there's been an agreement -- that has not become  
21 final for whatever reason.

22 So it is my belief that we will be successful in  
23 uploading a form of order on that. It actually relates  
24 somewhat to the structure that we have set up for the FTI  
25 settlement in terms of there is an escrow deposit with respect

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1 to the Radical Bunny order, there's collateral being pledged to  
2 FTI. But in reality, given that all parties face the  
3 possibility of disgorgement should the fund be insufficient,  
4 whatever collateral is pledged really is to the benefit of all  
5 administrative claimants because it reduces everyone's  
6 possibility of there being a shortfall to make full payment.

7 So Mr. Freeman and I have discussed that.

8 THE COURT: Maybe I need to have you back up a bit  
9 and give me some background on where we stand on Radical Bunny.  
10 I thought where we -- where matters stand right now is I've  
11 allowed some fees of Radical Bunny and denied a stay pending  
12 appeal. It's on appeal. And that's where we are; right? Are  
13 you telling me that there's been some kind of a settlement or  
14 something and -- I mean you referred to --

15 MR. SCHIAN: We --

16 THE COURT: -- creation of some escrow for Radical  
17 Bunny. I didn't know it had any such thing.

18 MR. SCHIAN: Okay. I'm sorry, Your Honor. I will  
19 back up on that.

20 There was an order entered allowing Radical Bunny  
21 approximately \$600,000 in fees and an appeal was taken of that.  
22 There was a motion for a stay pending appeal which was denied  
23 absent posting of either a bond or an escrow. It is my  
24 understanding that by the date specified in your order, that an  
25 escrow has been established to fund that award while the appeal

1 is pending to -- as a reserve or a bond for that award.

2 We had filed a timely motion to alter or amend the  
3 judgment to reflect that the entry of a final judgment with  
4 respect to Radical Bunny did not prejudice any -- FTI's right  
5 to seek -- to share pro rata in any fees paid in the event that  
6 it turned out to be insufficient. Because of the pending  
7 appeal, the -- there was a -- actually a procedure that was  
8 just amended, was just added to, I think it's Rule 63, but I,  
9 candidly, I've been focused on other things in the last 24  
10 hours, that says the parties may ask the Court who issued the  
11 original order if they would be inclined or willing to enter an  
12 order amending their order to clarify certain things despite  
13 the fact that the order is on appeal. And so we filed -- we  
14 followed that procedure to request such an order.

15 It is my belief that Mr. Freeman and I will be able  
16 to reach an agreement on an agreed form of order that we would  
17 ask the Court to enter simply to preserve the parties' rights  
18 in the event that disgorgement becomes not a theoretical issue,  
19 but a real live issue. And that relates somewhat to the  
20 escrowed funds, was the purpose I talked about the escrow.

21 THE COURT: All right. So you believe you reached an  
22 agreement on a form of modified final order?

23 MR. SCHIAN: Correct.

24 THE COURT: And you're also telling me that, in  
25 effect, the parties have reached an agreement on a stay pending

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1 appeal?

2 MR. SCHIAN: Your -- or had -- I wasn't involved  
3 directly in those.

4 THE COURT: Right.

5 MR. SCHIAN: Your order had provisions for posting a  
6 -- essentially a cash bond or an escrow, and it is my  
7 understanding that that did in fact occur.

8 THE COURT: And the result of that in effect is to  
9 stay any further enforcement by Radical Bunny pending the  
10 appeal?

11 MR. SCHIAN: Correct.

12 THE COURT: But it doesn't resolve the appeal. The  
13 appeal's going to go forward?

14 MR. SCHIAN: Correct.

15 THE COURT: All right.

16 MR. SCHIAN: Thank you.

17 THE COURT: Appreciate your update.

18 Anyone else want to address anything on that?

19 MR. FREEMAN: Yes, Your Honor. Shelton Freeman on  
20 behalf of Radical Bunny.

21 Your Honor, Mr. Schian and I have reached agreement  
22 in terms of the fact that any award to Radical Bunny would be  
23 subject to the similar treatment to any other admin claimants  
24 if they're subjected to disgorgement. We didn't actually get  
25 into detail about amending the order, and I would -- I guess

1 I'm a little concerned about impacting the speediness of our  
2 appeal by amending that order, but certainly the relief that we  
3 discussed is as Mr. Schian presented, that any award to us is  
4 subject to the same claims for disgorgement that any of the  
5 other admin claims are.

6 THE COURT: All right, thank you.

7 And anything else we need to address today?

8 MR. SCHIAN: Your Honor, there is another pending  
9 motion. I would suggest that that also just be pulled off  
10 calendar at the moment pending -- if we have an agreed  
11 resolution, it resolves -- there was a motion to set aside a --  
12 the amount of the FTI fee --

13 THE COURT: Right.

14 MR. SCHIAN: -- in a 3020(d) motion.

15 THE COURT: I think that should simply be taken off  
16 calendar and await either approval of a final order or your  
17 request for a continued hearing on that.

18 MR. SCHIAN: Thank you, Your Honor. That would be my  
19 suggestion.

20 THE COURT: All right. While we're all here, let me  
21 ask -- maybe Mr. Hendricks would be the best one to tell me.  
22 Have all of the fee disputes now been resolved? I mean  
23 obviously one's on appeal, but have they all been addressed  
24 now --

25 MR. HENDRICKS: Greenberg Traurig.

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1 THE COURT: -- or do we still have others coming?

2 MR. HENDRICKS: Greenberg Traurig. And --

3 THE COURT: And what's the status of that one?

4 MR. HENDRICKS: That one, Larry Watson of the U.S.  
5 Trustee's office is really the point person on that one. The  
6 -- he has been negotiating --

7 THE COURT: First procedurally, they've filed a fee  
8 application --

9 MR. HENDRICKS: Yes.

10 THE COURT: -- and it's been objected to?

11 MR. HENDRICKS: Yes, they have.

12 THE COURT: And no hearing is yet set on it?

13 MR. HENDRICKS: No. There is an evidentiary hearing  
14 currently set, I believe March 7th. But the deadline for  
15 disclosure of expert witnesses I believe was yesterday, and we  
16 disclosed Professor Rappaport from ULNV Law School as our  
17 expert. I don't believe that there's been any other experts  
18 disclosed.

19 Larry Watson has been negotiating with the Greenberg  
20 Traurig firm, the home office, and where they may stand, and  
21 we're hopeful that, as with everyone other than MCA it turns  
22 out, we've been able to reach -- we'll be able to reach a  
23 resolution by consensus and settlement.

24 THE COURT: All right. Thank you for that report.

25 MR. HENDRICKS: You're welcome.

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1 THE COURT: Based on that then, that concludes this  
2 hearing. Thank you.

3 MR. SCHIAN: Thank you.

4 MR. FREEMAN: Thank you, Your Honor.

5 (Proceedings Concluded)  
6  
7

8 I certify that the foregoing is a correct transcript from  
9 the record of proceedings in the above-entitled matter.  
10  
11

12  
13 Dated: April 6, 2010



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**CERTIFICATE OF SERVICE**

I, Mark J. Dorval, certify, that on April 8, 2010, I electronically transmitted the attached documents to the Clerk's Office, using the CM/ECF System for filing, which transmitted a Notice of Electronic Filing to the parties in interest via the Court's ECF System, and also served a copy of the documents on the following parties via e-mail:

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