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Thomas S. Moring, # 021247
PAK & MORING PLC
8930 E. Raintree Drive, Suite 100
Scottsdale, Arizona 85260
(480) 444-9999 – Telephone
(480) 308-0015 – Facsimile Transmission
tom@pakmoring.com

Attorneys for Mortgages Ltd. 401(k) Plan

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

In re:)	In Proceedings Under Chapter 11
)	
MORTGAGES LTD.,)	APPLICATION FOR ORDER TO SHOW CAUSE
)	Case No. 2:08-bk-07465-RJH
an Arizona corporation,)	
)	
Debtor.)	
)	
)	

Mortgages Limited 401(K) Plan (“401(K) Plan”), by and through undersigned counsel, hereby moves this Court for an Order requiring Defendant Kevin T. O’Halloran, Trustee of the ML Liquidating Trust (“Liquidating Trustee”) to appear and show cause, if any should exist, why declaratory judgment should not be entered against him on the issue of its failure to turn over to the 401 (K) Plan those funds in the Liquidating Trustee’s possession belonging to the 401(K) Plan. Specifically, the 401(K) Plan seeks an Order directing the Liquidating Trustee to turn over monies held in escrow by the Liquidating Trustee. These funds are held in escrow accounts which were established prior to the bankruptcy, related to two properties in which the 401(K) Plan holds an interest, commonly known as the Hurst and Ecco properties. These properties were foreclosed on by the lenders. The 401(K) Plan is a 100% owner of Ecco, and is now the

1 sole owner by virtue of the foreclosure. Through the foreclosure process, the 401(K)
2 Plan now holds approximately 93% of the Hurst loan.

3 As a preliminary matter, Movant notes that the Court has previously determined
4 that it has no jurisdiction over the 401 (K) Plan. *See* Docket # 2210. However, in that
5 same Order the Court made clear it has jurisdiction over Liquidating Trustee. In fact, the
6 Court previously ordered the turnover of all funds belonging to the 401(K) Plan. Movant
7 requests this Court enter an order directing the turnover of the escrowed funds from the
8 Hurst and Ecco loans, and award the 401(K) Plan its attorneys fees involved in bringing
9 this Motion to enforce the Court's September 23, 2009, Order.
10

11 **I Factual Background**

12 **A) The 401(K) Plan's assets are not property of the estate**

13 This Court has previously been requested to intervene when ML Liquidating Trust
14 was improperly retaining assets belonging to the 401(K) Plan, including books, records,
15 and funds belonging to the 401(K) Plan. At the hearing on that Motion, the Court made
16 clear that the 401(K) Plan is not property of the estate, and directed ML Liquidating Trust
17 to return the 401(K) Plan's assets. Therefore, any assets of the 401(K) Plan, including
18 those funds being sought in the instant Motion, are outside the bankruptcy estate and
19 should be turned over immediately. To date, the Liquidating Trustee has continued to
20 refuse to turn over these funds.
21

22 As of November, 2009, it was clear that there were funds remaining in those
23 escrow impound accounts. Despite demand for the money, the Liquidating Trustee has
24 again failed to turn over these funds belonging to the 401(K) Plan.

25 **B) The loans in issue**

26 The first loan is the Hurst loan. The impound account balance for that loan is
27 attached hereto as Exhibit A. As of the date of this Motion, there remains \$12,139.07 in
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1 the Hurst account, after deducting all costs and offsets. Based on its proportional
2 ownership, approximately 93% of the balance of the Hurst impound account is property
3 of the 401(K) Plan and must be turned over to the 401(K) Plan pursuant to the Court's
4 September 2009 Order. On February 9, 2010, Jim Cordello, one of the Trustees of the
5 401(K) Plan, requested the funds from the Liquidating Trustee. A copy of that request is
6 attached as Exhibit B. To date, the Liquidating Trustee has refused to comply with that
7 request.

8
9 The second loan is the Ecco loan. The impound account balance for that loan is
10 attached hereto as Exhibit C. As of the date of this Motion, there remains \$76,713.05 in
11 the Ecco account, after deducting all costs and offsets. The entire balance of the Ecco
12 impound account is property of the 401(K) Plan and must be turned over to the 401(K)
13 Plan pursuant to the Court's September 2009 Order. On February 8, 2010, Jim Cordello,
14 one of the Trustees of the 401(K) Plan, requested the funds from the Liquidating Trustee.
15 A copy of that request is attached as Exhibit D. To date, the Liquidating Trustee has
16 refused to comply with that request.

17 18 CONCLUSION

19 For all the foregoing reasons, the 401(K) Plan requests this Court enter an order
20 requiring the Liquidating Trustee to immediately turn over the funds in the Hurst and Ecco
21 impound accounts described above. The 401(K) Plan further requests that the Court order the
22 Liquidating Trustee to pay the attorneys' fees incurred by the 401(K) Plan as a result of the
23 Liquidating Trustee's continuing refusal to abide by the terms of the September, 2009 Order.
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26 DATED: June 8, 2010
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/s/ Thomas S. Moring
Thomas S. Moring,
PAK & MORING PLC
Attorneys for Mortgages Ltd. 401(k) Plan