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IN THE UNITED STATES DISTRICT COURT

THE DISTRICT OF ARIZONA

ML LIQUIDATING TRUST, as successor-in-interest to Mortgages Ltd.,

Plaintiff,

v.

MAYER HOFFMAN MCCANN P.C., a Missouri professional corporation; CBIZ, Inc., a Delaware corporation; CBIZ MHM, LLC, an Ohio limited liability company,

Defendants.

Case No. 2:10-cv-02019-RRB

DEFENDANTS MAYER HOFFMAN MCCANN P.C., CBIZ, INC., AND CBIZ MHM, LLC'S REPLY IN SUPPORT OF JOINT MOTION TO DISMISS COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The response of Plaintiff ML Liquidating Trust ("Trust") confirms that the Court should dismiss most claims against Mayer Hoffman McCann P.C. and all claims against CBIZ, Inc., and CBIZ MHM, LLC (collectively "CBIZ"). (*See* Doc. 34, Resp. (hereinafter "Resp.").) As a general matter, the Trust argues that "'[a] dismissal for failure to state a claim is appropriate only where it appears, beyond doubt, that the plaintiff can prove no set of facts that would entitle it to relief.'" (Resp. 4-5 (quoting *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999).) But *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), overruled this "no set of facts" test, concluding that it had "earned its retirement." *Id.* at 563. Instead, a complaint's well-pleaded facts must establish "plausible grounds" for each and every element. *Id.* at 556. The Trust has good reason to ignore *Twombly* because its arguments rely primarily on the outdated pleading standards.

Turning to its claims against Mayer Hoffman, the Trust's response fails to salvage its negligence count. *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317 (Ariz. Ct. App. 1996), held that an allegation of auditor malpractice may be brought only as a negligent-misrepresentation, not a negligence, claim. The Trust argues that this rule applies only in lawsuits brought by *third parties*, not *clients*. But nothing in *Standard Chartered* calls for the Trust's limitation, and other cases have rejected it. *See Shacknai v. Mathieson*, No. CV-08-01025-PHX-FJM, 2009 WL 4673767, at *3 (D. Ariz. Dec. 3, 2009). The Trust's breach-of-contract claim against Mayer Hoffman fares no better. All the contractual terms identified in its response merely express preexisting professional duties that Mayer Hoffman already owed its clients independent of any contract. Thus, the Trust's claims sound in tort. *Energex Enters., Inc. v. Shughart, Thomson & Kilroy, P.C.*, No. CIV-04-1367 PHX-ROS, 2006 WL 2401245, at *5 (D. Ariz. Aug. 17, 2006). Finally, the Trust cannot avoid the terms in the 2004 and 2005 engagement letters between Mayer Hoffman and Mortgages Ltd. (**"**ML**"**) that limit the period in which ML could bring suit. While the Trust

argues that those terms are void, courts routinely enforce them. *See, e.g., Harbor Court Assocs. v. Leo A. Daly Co.*, 179 F.3d 147, 150-51 (4th Cir. 1999) (citing cases).

As for the claims against CBIZ, the Trust offers token resistance. It, for example, contends that "Defendant CBIZ MHM, LLC does not seek dismissal of any of the claims asserted against it." (Resp. 1.) But it ignores that our opening brief defined "CBIZ and CBIZ MHM" collectively as "CBIZ." (Doc. 32, Mem. in Supp., at 1 (hereinafter "Mem. in Supp.").) Thus, the reasons why "[t]he Trust's claims against CBIZ must be dismissed" (*id.* at 2, 10-17) apply to *both* CBIZ, Inc., *and* CBIZ MHM, LLC. Nor does the Trust cite any non-conclusory allegations that establish the primarily liability of CBIZ (that is, CBIZ, Inc., and CBIZ MHM, LLC). While it points out that CBIZ provided support to Mayer Hoffman, it makes no argument that CBIZ contracted with ML. (Resp. 2.) It has failed to explain how an entity, by merely assisting a contracting party, becomes primarily liable on the contract. The Trust's arguments for vicarious liability are similarly deficient. (Resp. 14-16.) It argues that dismissal on the pleadings is not permitted (Resp. 14-15), but ignores numerous cases dismissing vicarious-liability claims for failing to allege an essential element of a joint venture. *See, e.g., Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 416-17 (7th Cir. 1988). Similarly, the Trust attempts to rebut our statute-of-limitations argument by asserting that the question whether a cause of action has accrued is a "question[] of fact for the jury." (Resp. 17.) But several courts have found that an action based on an audit accrues, *as a matter of law*, when the audited entity's financial health comes to light. *See, e.g., Auto Servs. Co., Inc. v. KPMG, LLP*, 537 F.3d 853, 857 (8th Cir. 2008). Furthermore, the Trust fails to adequately allege how CBIZ could be bound by its tolling agreement with Mayer Hoffman even though CBIZ did not sign that agreement and nothing suggests Mayer Hoffman signed it on CBIZ's behalf.

In short, the Court should dismiss the negligence and breach-of-contract claims against Mayer Hoffman and any claims arising out of Mayer Hoffman's 2004 and 2005 engagements with ML. It should also dismiss all claims against CBIZ.

ARGUMENT

I. THE COURT MUST DISMISS THE TRUST'S NEGLIGENCE AND BREACH-OF-CONTRACT CLAIMS AGAINST MAYER HOFFMAN.

A. Under Arizona Law, An Auditor-Malpractice Claim May Rely Only On The Tort Of Negligent Misrepresentation, Not Negligence.

The Trust's negligence claim must be dismissed because Arizona law does not allow an auditor-negligence claim in addition to a negligent-misrepresentation claim against the same auditor. As indicated, Arizona courts have rejected "'a claim for auditor negligence separate and distinct from [a] negligent misrepresentation claim.'" (Mem. in Supp. 6 (quoting *Standard Chartered*, 945 P.2d at 342).) But the Trust asserts both.

In response, the Trust accuses us of "brazen[ly] mischaracteriz[ing] . . . *Standard Chartered*" and "not be[ing] candid with the Court." (Resp. 5.) The Trust bases these accusations on a meritless factual distinction. It contends that *Standard Chartered* eliminated auditor-negligence actions *only* if brought by third parties, not by the auditor's clients, because that case involved a third-party claim. (Resp. 5-6.) But neither *Standard Chartered* nor *Kuehn v. Stanley*, 91 P.3d 346 (Ariz. Ct. App. 2004), mentions this limitation on the scope of their holdings. To the contrary, *Standard Chartered* referred to "auditor negligence" *generally* as a "tort of misrepresentation" within the ambit of Restatement (Second) of Torts § 552. 945 P.2d at 342. And courts have interpreted those cases as adopting a bright-line rule that applies *even when* the plaintiff has a professional relationship with the defendant. *Shacknai v. Mathieson*, No. CV-08-01025-PHX-FJM, 2009 WL 4673767, at *3 (D. Ariz. Dec. 3, 2009) (applying rule to dismiss client's claim against financial advisor); *Baptist Found. of Ariz. v. Arthur Andersen LLP*, No. CV 2000-015849, 2002 WL 34178626 (Ariz. Super. Ct. Jan. 14, 2002) (applying rule to dismiss client's claim against accounting firm). In short, "[a] claim for negligence against a provider of professional information concerning representations or omissions must satisfy requirements beyond a general claim for negligence." *Shacknai*, 2009 WL 4673767, at *3. As in *Shacknai*, the Court should dismiss the Trust's negligence claim.

Nor does the Trust have any case support for its proposed limitation on *Standard Chartered*. It relies solely on *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 7 P.3d 979 (Ariz. Ct. App. 2000), but the defendants there did not move to dismiss the auditor-negligence claim on the grounds we assert here. Rather, they sought to have the claim dismissed as time-barred. *Id.* at 981. It thus lacks relevance to the present issue.

The Trust, lastly, criticizes us for arguing that an auditor does not owe "its audit client a professional duty of care" in conflict with *Barmat v. John and Jane Doe Partners A-D*, 747 P.2d 1218 (Ariz. 1987). (Resp. 5, 7.) But we argue no such thing. It is axiomatic that one element of a negligent-misrepresentation claim is *breach of a duty*. *See Van Buren v. Pima Cmty. College Dist. Bd.*, 546 P.2d 821, 823 (Ariz. 1976) (noting that negligent misrepresentation requires a "duty owed and a breach of that duty") (internal citation and quotations omitted). The Trust's negligence claim must be dismissed, not because auditors owe no duties to their clients, but because that claim is wholly duplicative of its negligent-misrepresentation claim.

B. The Trust's Breach-Of-Contract Allegations Fail Because They Merely Reiterate Preexisting Duties Owed By Mayer Hoffman.

The Trust's breach-of-contract claim likewise must be dismissed because, as the basis for its claim, it has alleged only the breach of professional duties that exist independent of any contract. (Mem. in Supp. 7-8.) Under Arizona law, if terms in a contract between an auditor and a client merely reiterate the auditor's preexisting legal duties, they do not give rise to a valid contract claim. *DeSilva v. Baker*, 96 P.3d 1084, 1092 (Ariz. Ct. App. 2004); *Energex Enter., Inc. v. Shughart, Thomson & Kilroy, P.C.*, No. CIV-04-1367 PHX-ROS, 2006 WL 2401245, at *5 (D. Ariz. Aug. 17, 2006).

In response, the Trust overstates the extent to which "a claim for breach of an express contract against a professional may peacefully co-exist with a" tort claim. (Resp. 7.) Contrary to its argument, simply because a promise has *specificity* does not save a contract claim if the specific duty alleged exists independent of the contract. Only if a

contract creates duties that "would not exist 'but for' the contract" may an action be predicated on the contract. *DeSilva*, 96 P.3d at 1092 (Ariz. App. 2004) (citation omitted).

And here none of the alleged promises identified by the Trust create duties that "would not exist 'but for' the contract." All of the obligations on which the Trust relies are preexisting duties imposed on auditors by the Auditing Standards Board ("ASB") of the American Institute of CPAs. *See* AICPA, Code of Prof'l Conduct § 202.01. For example, the promise that Mayer Hoffman "would perform tests of the documentary evidence supporting the transactions recorded in ML's accounts" (Resp. 7), is a duty existing independent of any contract between Mayer Hoffman and ML. *See, e.g.*, AU § 318.50 ("Substantive [audit] procedures . . . include tests of details of classes of transactions, account balances, and disclosures and substantive analytical procedures.").

Similarly, that Mayer Hoffman promised to "'advise [ML] about appropriate accounting principles and their application'" (Resp. 8 (quoting Compl. ¶¶ 46, 143)) is another professional requirement of Mayer Hoffman's engagement with ML. *See* AU § 380.34 ("The auditor should communicate with those charged with governance the following matters: (a) The auditor's views about qualitative aspects of the entity's significant accounting practices . . ."); AU § 380.37 (Communication about qualitative aspects of the entity's accounting practices includes "comments on the acceptability of significant accounting practices."). In sum, all of the promises that the Trust highlights are duties Mayer Hoffman owed to ML by virtue of its role as a professional auditor. They cannot also serve as a basis for a contract claim.[1]

[1] The Trust notes that "the cases relied upon by Defendants were resolved on motions for summary judgment." (Resp. 8 n.3.) The Trust mischaracterizes at least two cases. *See Energex Enters.*, 2006 WL 2401245, at *1 (granting motion for *judgment on the pleadings* on breach-of-contract claim); *Baptist Found.*, 2002 WL 34178626, at *2 (same). Regardless, since issues of contract interpretation raise *legal questions* reviewed de novo, *Elm Ret. Ctr., LP v. Callaway*, No. 1 CA-CV 09-0631, 2010 WL 4312757, at *3 (Ariz. Ct. App. Nov. 2, 2010), the different procedural posture does not matter.

C. The Trust Filed This Suit Outside The One-Year Limitation Set Forth In The 2004 and 2005 Engagement Letters.

As we also showed (Mem. in Supp. 9-10), Arizona, like virtually all U.S. jurisdictions, permits parties to contractually shorten a statute of limitations. *See Zuckerman v. Transamerica Ins. Co.*, 650 P.2d 441, 446 (Ariz. 1982); *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 608 (1947). The parties' 2004 and 2005 engagement letters did just that, shortening ML's ability to bring suit to one year from the date that Mayer Hoffman performed it services. As such, the Trust may not bring any claim based on the services performed under those engagement letters.

The Trust makes two arguments in response. *First*, it argues that the shortened time limitation is "unenforceable as a matter of law." (Resp. 9.) Relying on *Zuckerman*, it claims that ML may not have "bargained" for the term. (*Id.* at 10.) But *Zuckerman* makes clear that such a term may be "held invalid," as a general matter, *only* "on the ground that the term[] [is] unconscionable and that unfair advantage has been taken of a claimant whose bargaining position was inferior." 650 P.2d at 446 (internal quotation marks omitted). The Trust's complaint does not even attempt to meet this unconscionability standard. Nor could it. The 2004 and 2005 engagement letters are not voluminous and do not contain terms buried among dozens of boilerplate provisions. In addition, ML was a sophisticated business entity, one that entered into hundreds of more complicated contracts with borrowers and investors, not a consumer subject to a contract of adhesion. Thus, it did not have an inferior bargaining position.

The Trust also claims that we fail to cite any Arizona cases enforcing such contractual limitations "in the context of a professional services agreement." (Resp. 10.) But it cites none that have *refused* to enforce such limitations. And the single California decision on which it relies, *Charnay v. Cobert*, 51 Cal. Rptr. 3d 471 (Cal. App. 2 Dist. 2006), is an outlier. Numerous courts have upheld such provisions in professional-services contracts. *See, e.g., Visual Edge Tech., Inc. v. Bruner-Cox LLP*, No. 2010CA00041, 2010 WL 4345916, at *2-4 (Ohio Ct. App. Nov. 1, 2010) (accounting

services); *Fed. Ins. Co. v. Konstant Architecture Planning, Inc.*, 902 N.E.2d 1213, 1217 (Ill. App. Ct. 2009) (architectural services); *Keiting v. Skauge*, 543 N.W.2d 565, 567-68 (Wis. Ct. App. 1995) (home-inspection services).

Equally true, the limitations term is not "contrary to public policy" simply because it departs from the "well-established discovery rule." (Resp. 10-11.) Numerous courts have likewise upheld a contractual provision abrogating the discovery rule, even where the provision falls within a form agreement. *See e.g., Harbor Court*, 179 F.3d at 150-51 (collecting cases); *see also Fed. Ins.*, 902 N.E.2d at 1217; *Gustine Uniontown Assocs., Ltd. v. Anthony Crane Rental, Inc.*, 892 A.2d 830, 837-38 (Pa. Super. Ct. 2006); *Entous v. Viacom Int'l, Inc.*, 151 F. Supp. 2d 1150, 1155-56 (C.D. Cal. 2001).[2]

Second, the Trust argues that the limitations period in the engagement letters, even if enforceable, does not bar any claims. (Resp. 11-12.) That is so allegedly because the engagement letters contain an "implied" term requiring ML to "actually become aware of [any] claim" before the one-year limit began to run. (Resp. 11-12.) Yet it is black-letter law that courts "will give effect to a contract as written where the terms of the contract are clear and unambiguous." *Mining Inv. Group, LLC v. Roberts*, 177 P.3d 1207, 1211 (Ariz. Ct. App. 2008). Here, the engagement letters set forth an unambiguous triggering event that begins the running of the contractual limitations period. A claim "must be filed within twelve (12) months *after performance of [Mayer Hoffman's] service*." (Ex. C to Mem. in Supp. (emphasis added).) The agreements are not "silent" on whether they

[2] In any event, *Charnay* is distinguishable on its facts. The difference in bargaining power in *Charnay* is absent here. In *Charnay*, legal services were provided to an individual, not a sophisticated business entity. 51 Cal. Rptr. 3d at 475. Courts are more likely to enforce a term varying a limitations period where "the parties to the agreement are sophisticated business actors." *Harbor Court*, 179 F.3d at 151. *Charnay* is also inapposite because of the inherent severity of the limitations period that the defendants sought to enforce. There, the limitations period extinguished all claims a mere ten days after the plaintiff received a billing statement. 51 Cal. Rptr. 3d at 480. By contrast, the limitations period here permitted claims for a full year after services were performed. (*See* Ex. C to Mem. in Supp.; Ex. D to Mem. in Supp.)

incorporate the "discovery rule." (Resp. 11.) They reject that rule by initiating the limitations period once Mayer Hoffman completes its audit, *whether or not* ML knew of any claims. The Trust's contrary argument asks this Court to do what it cannot; "[i]t is not within the province . . . of the court to alter, revise, modify, extend, rewrite or remake an agreement." *Mining*, 177 P.3d at 1211 (internal quotation marks omitted).

II. THE TRUST HAS NOT STATED PLAUSIBLE CLAIMS AGAINST CBIZ.

As indicated in our opening brief, the Trust's claims against CBIZ fail for the same reasons that its claims against Mayer Hoffman fail plus two additional ones. Nothing in the Trust's response alters that conclusion.

A. The Trust's Complaint Does Not Adequately Plead CBIZ's Liability.

The Trust has failed to plead sufficient factual allegations that establish "plausible grounds" for holding CBIZ liable for Mayer Hoffman's audits. *Twombly*, 550 U.S. at 556. It has not shown that CBIZ can be liable, either primarily or vicariously.

Primary Liability. As indicated in our opening brief, CBIZ neither contracted with ML nor conducted ML's audits. (Mem. in Supp. 10-11.) To overcome this problem with its primary-liability claim, the Trust argues that CBIZ asks the Court to "ignor[e] [its] pervasive involvement in the ML audits." (Resp. 13.) But the Trust cannot point to any non-conclusory allegations that state that CBIZ actually conducted the audits. Instead, it points out that CBIZ provided numerous items to Mayer Hoffman to assist its audits, including accounting personnel, administrative services, equipment, marketing materials, and billing and collection support. (Resp. 13-14.) But mere assistance to Mayer Hoffman does not demonstrate that CBIZ conducted the ML audits.

Furthermore, even *assuming* sufficient allegations to show that CBIZ conducted the audits, the Trust fails to explain how that can lead to *primary*—as opposed to *vicarious*—liability. It makes no argument that ML contracted with CBIZ for the audits. To the contrary, each of the engagement letters and audit reports demonstrate that only Mayer Hoffman did so. (*See* Ex. A to Mem. in Supp., at 1; Ex. B to Mem. in Supp., at 1;

Ex. C to Mem. in Supp., at 5; Ex. D. to Mem. in Supp., at 4.) Instead, the Trust appears to argue that a contract can *directly* bind not only the party who enters the contract but also all other entities who provide assistance to the party in carrying out its duties. It cites no cases for that astounding proposition. *Cf. Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399, 1406 (D. Colo. 1989) ("It is hornbook law that a contract can be enforced only against a party to a contract."). It is obviously incorrect.

Vicarious Liability. The Trust thus falls back on vicarious liability. But its joint-venture claim fails because the Trust has not alleged adequate facts to plead the elements of a joint venture. (Mem. in Supp. 12-15.) The main thrust of the Trust's counterargument is that dismissal on the pleadings is not permitted because "'each case [of an alleged joint venture] must be decided upon its own facts.'" (Resp. 15 (quoting *West v. Soto*, 336 P.2d 153, 157 (Ariz. 1959).) This assertion—which fails to mention modern pleading standards post-*Twombly*—ignores the Trust's obligation to plead "plausible grounds" for a joint venture. 550 U.S. at 556; *see Murry v. W. Am. Mortgage Co.*, 604 P.2d 651, 654 (Ariz. Ct. App. 1979). And numerous courts have dismissed similar joint-venture claims for failing to allege an essential element. *See Secon*, 855 F.2d at 416-17 (dismissing complaint for failure to plead control); *Star Energy Corp. v. RSM Top-Audit*, No. 08 Civ. 00329, 2008 WL 5110919, at *3 (S.D.N.Y. Nov. 26, 2008) (same); *In re Parmalat Secs. Litig.*, 377 F. Supp. 2d 390, 407 (S.D.N.Y. 2005) (same).

Here, as a matter of law, the Trust fails to allege that CBIZ had an equal right to control Mayer Hoffman's audits. *See Tanner Cos. v. Superior Court*, 696 P.2d 693, 695 (Ariz. 1985). It concedes that accounting rules require Mayer Hoffman's "independence" from CBIZ (Resp. 14 n.5), and it also does not dispute that those rules condone the "alternative practice structure" adopted by CBIZ and Mayer Hoffman's agreement.[3] *See*

[3] The Trust argues that the agreement between Mayer Hoffman and CBIZ "should not be considered in connection with Defendants' 'Motion to Dismiss.'" (Resp. 15 n.6.) However, Ninth Circuit precedent "extend[s] the doctrine of incorporation by reference to consider documents in situations where the complaint necessarily relies upon a

AICPA, Code of Prof'l Conduct § 101-14. If the Court finds that the Trust has stated a joint-venture claim, however, it would place CBIZ in an untenable position, eliminating the "alternative practice structure" that accounting rules permit. If CBIZ maintains its present relationship with Mayer Hoffman—under which Mayer Hoffman has exclusive controls of its audits—it subjects itself to joint-venture liability for audit work despite its utter inability to control that work. If, by contrast, CBIZ contracts with Mayer Hoffman to take control of its audits and protect itself from the Trust's view of joint-venture law, it would violate the accounting rules that require Mayer Hoffman's independence. The Court should reject the Trust's attempts to impose this Catch-22 on CBIZ.

B. The Trust Fails To Identify A Valid Reason Why The Statute Of Limitations Has Not Run On Its Negligence Claims Against CBIZ.

As we illustrated (Mem. in Supp. 15-17), the two-year statute of limitations has run on the Trust's negligence-based claims against CBIZ. In response, the Trust attempts to salvage those claims by asserting that, under the discovery rule, the question whether its cause of action accrued in June 2008 (when ML fell into bankruptcy) is a "question[] of fact for the jury." (Resp. 17.) Numerous courts, however, have recognized that a cause of action arising out of an allegedly negligent audit accrues, as a matter of law, no later than the collapse of the audited entity. *See, e.g., Auto Servs. Co.*, 537 F.3d at 857. Here, ML knew of any claim not only when it collapsed into bankruptcy, but also when reports surfaced suggesting it had conducted a "Ponzi scheme."[4]

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document," even if not expressly mentioned. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). Here, the Trust's Complaint repeatedly relies on the content of their agreement. (*Compare* Compl. ¶¶ 26, 30 *with* ASA § 7; *compare* Compl. ¶¶ 27, 29 *with* ASA § 2.)

[4] *See* Jan Buchholz, Rightpath pushes to convert Mortgages Ltd. Chapter 11 reorganization to Chapter 7 liquidation, Business Journal (Phoenix) (Aug. 4, 2008) (noting allegations "that [ML] was involved in a Ponzi scheme") (attached as Ex. A); *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 (9th Cir. 1999) (taking "judicial notice" of "news articles").

Furthermore, the Trust mischaracterizes the bankruptcy code as providing a two-year stoppage of this state statute of limitations. (Resp. 16.) It does no such thing. Instead, it permits claims to be brought within the later of (1) the state statute of limitations or (2) two years after the order for relief. 11 U.S.C. § 108(a). As explained above, the regular two-year statute of limitations has run on the Trust's negligence-based claims. And the bankruptcy court issued its order for relief in June 2010, which was *over* two years before this suit. Thus, the Trust cannot take advantage of the special bankruptcy limitations period either. That the Trust did not bring its claims within the period that the bankruptcy code itself establishes as sufficient for an "orderly investigation" (Resp. 17 n.8) provides even more evidence that those claims are untimely.

Finally, the Trust has failed to explain how the tolling agreement it entered with Mayer Hoffman could apply to CBIZ. (Resp. 17-18.) While it asserts that CBIZ's arguments on the agreement's meaning "raise[] questions of fact pertaining to the making of the agreement" (Resp. 18), that is not so. The tolling agreement is *unambiguously signed* only by Mayer Hoffman (and not on behalf of anyone else). (Mem. in Supp. 17.) As a matter of law, it could bind only Mayer Hoffman, not CBIZ. *Cf. Abramson v. Brownstein*, 897 F.2d 389, 393 (9th Cir. 1990) (noting that, under California law, tolling agreement "must be . . . signed by the person obligated").

CONCLUSION

For the foregoing reasons, this Court should dismiss the negligence and breach-of-contract counts against Mayer Hoffman as well as any counts arising from its 2004 and 2005 audits. It should also dismiss all counts against CBIZ, Inc., and CBIZ MHM, LLC.

DATED January 14, 2011.

Respectfully submitted,

By: /s/ *Katherine V. Brown*

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2011 I electronically filed the foregoing Reply in Support of the Joint Motion to Dismiss Complaint with the Clerk of the Court using the CM-ECF system and served the following parties by U.S. mail:

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EXHIBIT A

Phoenix Business Journal - August 4, 2008
/phoenix/stories/2008/08/04/daily8.html

PHOENIX Business Journal

Monday, August 4, 2008

Rightpath pushes to convert Mortgages Ltd. Chapter 11 reorganization to Chapter 7 liquidation

Phoenix Business Journal - by Jan Buchholz

Rightpath Limited Development Group filed a motion Monday morning asking the U.S. Bankruptcy Court to convert the current **Mortgages Ltd.** Chapter 11 reorganization into a Chapter 7 liquidation case.

Rightpath has been embroiled in litigation with Mortgages Ltd. since mid-May, before the private commercial lender was forced into Chapter 11 bankruptcy by another developer, Grace Communities. After the bankruptcy filing in late June, the Rightpath case alleging fraud and racketeering and originally filed in Superior Court of Arizona, has been stayed but could be resurrected through the bankruptcy proceedings.

In the meantime, Rightpath's attorneys from Sheppard Mullin Richter & Hampton LLP, say they are dissatisfied with the bankruptcy court proceedings.

In today's motion, attorney Chris Reeder asserts that Mortgages Ltd. "is comprised of self-interested insiders that have proven themselves to be completely incapable of managing the bankrupt estate. The management both past and present have allowed the depletion of assets of the estate and have given preferential treatment to a select group of creditors (the so-called director investors) and insiders to the detriment of all other creditors."

Both Rightpath and Grace Communities were borrowers of large construction and/or land acquisition loans from Mortgages Ltd. in the range of $100 million and above. Both also have claimed that they never received all the money promised them by Mortgages Ltd.

Carolyn Johnsen, an attorney with Jennings, Strouss & Salmon PLC who represents Mortgages Ltd. in its Chapter 11 case, said the arguments made in the latest Rightpath filing are untrue.

The bankruptcy has been mired in attacks and counterattacks by Mortgages Ltd. management and its legal counsel, various borrowers, thousands of investors and creditors, particularly since the suicide of the lender's chairman and sole shareholder, Scott Coles.

His body was discovered in his home at the base of Camelback Mountain June 2. The Maricopa County Medical Examiner's office determined he had deliberately overdosed on a combination of alcohol and drugs.

Now Rightpath says in court documents that Mortgages Ltd. "has mismanaged the bankrupt estate" and since it is no longer offering new loans or accepting new investments "there is no valid reason for keeping this case as a Chapter 11 proceeding."

Today's filing includes a declaration from C.Paul Wazzan, a Los Angeles consultant with a Ph.D. in finance from the University of California, Los Angeles, claiming that after examining deeds of trusts and other documents related to Rightpath's loan with Mortgages Ltd. he believes "irregularities" will require "a dollar by dollar forensic accounting of Mortgages Ltd."

Rightpath continues to assert that Mortgages Ltd. was involved in a Ponzi scheme, in essence taking in new money from investors to pay off older investors.

Johnsen denies the assertion and says it's the borrowers who are at fault.

"None of the arguments are compelling whatsoever and many if not most of the allegations are false," Johnsen said. "Please remember that these borrowers are in default to the company for over $109 million and have demonstrated they will stop at nothing to pre-empt their obligations."

In addition to Rightpath, which is developing the Mainstreet in Glendale mixed-use development near the new Los Angeles Dodgers-Chicago White Sox training facility, other Mortgages Ltd. borrowers who claim they were underfunded include Grace Communities, KML Development and Avenue Communities, which is developing the Centerpoint high-rise residential and retail project in downtown Tempe.

The next court hearing concerning the Mortgages Ltd. bankruptcy is scheduled for Wednesday.