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

9 In re
10 MORTGAGES LTD.,
11 Debtor.

Chapter 11
Case No. 2:08-bk-07465-RJH
OBJECTION TO CENTERPOINT DIP
FINANCING BY INVESTORS
COMMITTEE
Date: November 18, 2008
Time: 11:00 a.m.

12
13
14 The Official Committee of Investors (“Investors Committee”) hereby files its
15 Objection to the Centerpoint DIP Financing Motion (“Financing Motion”) which is
16 currently scheduled to be heard November 18, 2008. While the Debtor has expressed that
17 it may reduce the full \$4.8 million of financing and may modify the draft of the proposed
18 loan documents which were filed with the Court, no additional pleadings have been filed
19 by the Debtor and no new loan documents have been circulated. Therefore, the Investors
20 Committee hereby files its objection to the pleadings on file.

21 Pursuant to the Financing Motion and the documents filed with the Court for
22 approval, the Debtor proposes to, among other things, have the Court approve the full
23 \$4.8 million of financing on the Centerpoint Project, without adequate backup to support
24 the need for the money, without sufficient backup or lien releases for the money already
25 advanced under the Interim Order, without proper evidence of an equity cushion and
26 adequate protection for the existing liens, and without an exit strategy for repayment of
27 the loan in 4 months. In its Final Order Debtor and Stratera propose to pledge and
28 subordinate the interests of the Investors and in the proposed loan documents to make the

1 Investors personally liable for the financing. Although the disbursement of \$2.8 million
2 of the \$4.8 million was authorized in the Interim Order Authorizing Debtor to Obtain Post
3 Petition Secured Financing on the Centerpoint Project which was signed on September 3,
4 2008 (“Interim Order”), the collateral and security interest were limited to the Debtor’s
5 interests in the Centerpoint Loan. The Investors’ interests in the Centerpoint Notes and
6 Deed of Trust were not pledged or primed or subordinated for the Interim Order. The
7 Debtor is now seeking to pledge, prime and subordinate their interests in the Final Order.

8 As the Court reviews the Financing Motion it should keep in mind that the reason
9 this Financing Motion is before the Court is because the Debtor allegedly breached its
10 funding obligations to Centerpoint and was not and is not able to lend sufficient funds to
11 Centerpoint to complete construction. As a result, the Debtor had to find a hard money
12 lender to lend the Debtor money so that the Debtor can satisfy its alleged obligation to
13 provide funds to Centerpoint. This is not the obligation of the Investors or the MP Funds.
14 Yet to satisfy its own alleged obligation and commitment to Centerpoint and to mitigate
15 its own alleged liability, the Debtor is seeking to use its status as an Agent of the Investors
16 and the Manager of the MP Funds to pledge the Investors and the MP Fund property to
17 provide the funds to Centerpoint. The Debtor could have made this loan without pledging
18 the Investors’ interests, but Debtor refused to do so. There were lenders willing to make a
19 loan to Debtor as a part of the working capital line that would have provided funds for this
20 Centerpoint advance without the need to encumber the Centerpoint Notes or Deed of
21 Trust.

22 The Investors Committee has several objections to this final Financing Motion
23 which requires a pledge, priming and subordination of the Investors’ interests in the
24 Centerpoint Notes and Deed of Trust and the cash flow from the Centerpoint Project,
25 among other things. (1) The Investors’ interests in the Notes are not property of the
26 Debtor’s estate and the Court does not have authority under Section 364 of the
27 Bankruptcy Code to encumber non-debtor assets. (2) The Debtor does not have authority
28 as the Agent for the Pass Through Investors or as Manager for the MP Funds to bind the

1 Investors to the terms of the proposed loan, including but not limited to, to pledge, prime
2 and subordinate the Investors' interest to secure this loan to the Debtor, to subordinate the
3 Investors' interest in the cash flow, to make the Investors "Borrowers" under the Stratera
4 Loan, to make them liable for the loan, expenses, attorneys fees, insurance, etc. or to
5 commit the Investors to indemnify Stratera under the loan documents. (3) The Investors'
6 interests are not adequately protected for a priming lien for the \$4.8 million and financing
7 of the additional \$2 million is inappropriate at this time. (4) The terms of the Financing
8 Motion as they apply to the Investors and the MP Funds are not a reasonable exercise of
9 the Debtor's business judgment. Further, the Investors Committee also brings to the
10 Court's attention that the draft loan documents (which change the character of the loan)
11 were not served on the Investors in the loan. The original Interim order and Term Sheet
12 evidently were served on Investors but the draft loan documents were not. Significantly,
13 however, the loan documents change the deal to now make the Investors individually and
14 personally liable for the repayment of the entire \$4.8 million. Given the nature of the
15 additional provisions and problems caused by the draft loan documents, such as the fact
16 the Investors are "Borrowers" under the Centerpoint Loan, there has not been adequate
17 notice given to the Investors of these last changes to the loan.

18 **I. SECTION 364 DOES NOT AUTHORIZE THE DEBTOR TO PLEDGE THE**
19 **PROPERTY OF A NON-DEBTOR**

20 Section 364 cannot be used as a basis for authorizing the Debtor as the Agent of the
21 Investors and the Manager of the MP Funds to pledge the interest of the Investors or the
22 MP Funds in the Notes and Deed of Trust on the Centerpoint Project since this is non-
23 debtor's property and is not "property of the estate". The Bankruptcy Code only speaks in
24 terms of the Court authorizing the securing of debt "secured by a lien on property of the
25 estate". See 11 U.S.C. Sections 364 (c)(2) and (3), and (d). Nowhere in the Bankruptcy
26 Code does the language indicate that the Court may authorize debt secured by property of
27 a non-debtor. Nor has any case law been cited by the Debtor on this point. This Section
28 only applies to the Debtor's incurring of its own debt and the granting of liens in the

1 “property of the estate”. Thus if the Debtor intends to incur the full amount of the \$4.8
2 million debt and pledge only the Debtor’s interest in the Centerpoint Notes and Deed of
3 Trust, then Section 364 would provide such authority as to the “property of the estate”.
4 But that is all.

5 **II. THE DEBTOR DOES NOT HAVE AUTHORITY TO BIND INVESTORS**
6 **OR THE MP FUNDS TO THE TERMS OF THE LOAN DOCUMENTS**

7 As more fully explained in the Investors Committee’s “Statement of Position” and
8 “Supplement to Statement of Position” filed in this matter, the Debtor as Agent or
9 Manager has limited authority and such authority does not include the extreme actions
10 required for the Financing Motion.

11 In the draft Stratera loan documents, the Debtor proposes as the Agent and
12 Manager to commit the Investors and the MP Funds to a number of actions and
13 obligations which the Investors Committee asserts are not authorized or permitted by the
14 Agent or Manager. Because there are so many and they are pervasive throughout the draft
15 loan documents, only the most important or obvious actions are discussed. Further, there
16 are some important differences and expansions of ideas in the loan documents that were
17 not noticed to Investors. Also the Intercreditor Agreement has a signature line for the
18 counsel for Investors Committee. This will need to be removed.

19 **(1) Investors are “Borrowers” under proposed Loan** – Under the draft of the
20 Promissory Note, the Debtor will execute the Promissory Note to Stratera for the
21 \$4.8 million loan and incur the debt as the “Borrowers” on behalf of itself as the Debtor
22 and as Agent and Manager on behalf the Investors and the MP Funds, thus incurring
23 liability for the Investors and MP Funds as “Borrowers”. The Debtor should not be
24 permitted to create or incur an obligation that can be enforced against the Investors or the
25 MP Funds. There is no provision in any of the operative documents that provides that the
26 Debtor, as an agent, has the authority to incur obligations in the name of the investors.
27 Moreover, there is no provision the MP Funds Operating Agreements that provides that
28 the Debtor, as the manager of the MP Funds, can encumber fund assets in order for the

1 Debtor to acquire a loan. Because there is no statement in any of the proposed loan
2 documents that this is a non-recourse obligation or that any liability is limited to the
3 undivided fractional interest or that it creates no personal liability and can only be offset
4 or recouped against the Centerpoint Notes, the Debtor lacks authority to act as an agent to
5 exposure the Investors to personal liability or to act as a manager of the Funds to
6 encumber their assets for the benefit of the Debtor. The Investors thought they were going
7 to own Loans, not be borrowers that owe money on the Debtor's loan.

8 **(2) As "Borrowers" the Investors have increased risk** – Under the draft of the
9 loan documents, both the Debtor and the Investors would be "Borrowers." The defined
10 term "Borrowers" is used throughout the draft loan documents. Every provision which
11 addresses the Borrowers will include the Investors and the MP Funds. For example, the
12 representations and warranties in Section 7 of the Loan and Pledge Agreement are made
13 not only by the Debtor, but also the "Borrowers" which include the Investors. As a result,
14 the Investors are representing that the Debtor is authorized to do these things, that the
15 documents are enforceable, that the lien is in first position on the Investors interest in the
16 Notes but also on the Centerpoint real property, and that there is good title, among other
17 things. The Investors should not be making such representations and it is not appropriate
18 for the Debtor to put them in this position. Also the Covenants in Section 8 are made by
19 all the Borrowers. Again the Investors have no ability to agree to such covenants, such as
20 perfection, insurance, inspections, use of proceeds, etc. Further, the Miscellaneous
21 Provisions in Section 11, also are made by all the Borrowers, including the grant of a
22 power of attorney to Stratera, an indemnity of Stratera by all the Borrowers and a waiver
23 and release of Stratera by all the Borrowers. All of these items go beyond the scope or
24 language of the Agency Agreement or Operating Agreements. The Debtor has no ability
25 to bind the Investors or the MP Funds to these types of obligations or liability. Indeed, the
26 two members of the Board of Directors for the Debtor, Chris Olson and George Everette
27 both testified that they do not support the execution of the loan documents as submitted to
28 the Court.

1 **(3) The Debtor is pledging the Investors' Interests in the Centerpoint Notes**
2 **and is subordinating the cash flow payments to Investors** – In Section 5 of the Loan
3 and Pledge Agreement, the Debtor is granting a security interest in “all of the rights of
4 ML or the Centerpoint Investors in and to the Centerpoint Loan, including the Centerpoint
5 Note, Deed of Trust, the Centerpoint Guarantees and any document or instruments
6 executed or delivered in connection with the Centerpoint Loan.” It is defined as the
7 “Stratera Collateral”. So not only is the Debtor creating an obligation under the
8 Promissory Note for the Investors and MP Funds but also their own property will be
9 pledged by the Agent or Manager for that obligation and other vague obligations under
10 Section 6 of the Loan and Pledge Agreement. While the Debtor could pledge its own
11 interest in the Notes, no provision expressly allows the Debtor to grant a security interest
12 in or pledge the Investors and MP Fund interests in the Notes. The subordination of the
13 Investors and MP Fund interests in the cash flow is contained in the draft of the
14 Intercreditor Agreement. The provisions clearly provide for the cash to be controlled and
15 diverted to pay Stratera first. As stated in the Supplement and other pleadings filed by the
16 Investors Committee, the investment documents do not provide that such subordination is
17 permitted.

18 **(4) Stratera intends to take possession of the original Centerpoint Notes and**
19 **Endorsements** – Section 8 contains a covenant by all the Borrowers concerning
20 perfection of the security interest. Under that provision, the Borrowers are required to
21 deliver the Centerpoint Notes to Stratera in subsection 8(a) and then under subsection 8(c)
22 an executed endorsement in blank. The Investors Committee objects to allowing the
23 Debtor (the Agent for the Investors and the Manager of the MP Funds) to give up
24 possession of the original \$133 million of Notes and all endorsements to Stratera who
25 only has a secured position for \$4.8 million. This issue came up in conjunction with the
26 Emergency hearing on this matter, as well as in the \$5 million Working Capital Loan by
27 Stratera. After objection by the Investors Committee, Stratera agreed that perfection as to
28 the Debtor's interest in the \$20 million Zacher Note for the \$5 million Working Capital

1 Loan would be accomplished by filing a financing statement with the Arizona Secretary
2 of State and under Court Order without the need for Stratera to take possession of the
3 original Zacher Note. At that time it was discussed and agreed with Stratera and its
4 counsel on this matter that it would not take possession of the Centerpoint Notes for
5 perfection. The draft of the Loan Documents is contrary to this agreement. Further, there
6 is no indemnity obligation by Stratera for losses or claims which might arise from taking
7 and holding possession of the original Notes and endorsements. In Section 11.17 of the
8 Loan and Pledge Agreement, Borrowers are prohibited from offsetting any claims they
9 may have against the Stratera Note, so in essence the Borrowers would have no ability to
10 protect themselves from damages caused by Stratera should something happen to the
11 original Notes and endorsements.

12 **(5) The Debtor will delegate all of the enforcement rights to Stratera for its**
13 **\$4.8 million loan** – The Investors Committee asserts it is inappropriate for the Debtor to
14 delegate any of the rights and remedies against Centerpoint. It is particularly egregious to
15 allow the Debtor to delegate such important rights and remedies to a senior lender whose
16 interests are in conflict with the Debtor and the Investors. As stated in the Supplement to
17 Statement of Position, these rights are non-delegable under agency law and cannot be
18 assigned in a manner that will jeopardize the Investors for whom the Debtor is the Agent.

19 **(6) The Debtor cannot put the Investors in a position where they could be**
20 **wiped out** – The Debtor should not be able to exercise its authority in a manner that
21 would allow the Investors interests and a \$130 million loan can be wiped out to repay a
22 \$4.8 million loan. Under Section 7 at the top of page 4 of the Term Sheet which is
23 attached to the Interim Order, the Debtor and Stratera expressly agreed “Notwithstanding
24 the Foreclosure Management Authority, Stratera will not have the right to foreclosure out
25 the subordinated interests of the Debtor or the Investors in the Centerpoint Project. In the
26 event of a foreclosure of the Deed of Trust, title will vest in Stratera, the Debtor, and the
27 Investors, according to their respective interests”. The bottom line is that Stratera with a
28 \$4.8 million loan should never be able to foreclose out the Investors and leave them

1 without their Notes or the underlying real estate and guarantees. Despite the language
2 cited above, Stratera and the Debtor inserted provisions in the proposed Loan and Pledge
3 Agreement in Section 10.2 (iv) and 10.3 and 10.6, that allow Stratera to “sell such Stratera
4 Collateral [which includes the Borrowers interest in the Centerpoint Notes] at public or
5 private sale”, that allow Stratera to purchase the Stratera Collateral at any public or private
6 sale, and that allow Stratera all the rights or remedies afforded a secured creditor under the
7 UCC”. While Stratera and the Debtor may say that the beginning phrase at the start of
8 Section 10 is “Subject to the terms of the Stratera Intercreditor Agreement”, there is no
9 remedy of having a public or private sale of the Notes under any circumstances. So the
10 offensive provision is not permitted and should be stricken from the Loan and Pledge
11 Agreement entirely. Only Centerpoint can be sued, foreclosed or pursued and only the
12 Centerpoint property may be sold at public or private sale, not the Notes owned by the
13 Investors.

14 **(7) Major Decisions should not be sent to Arbitration and the Investors**
15 **cannot be left out of the process** – The Debtor should not allow the remedies to be
16 granted where the tail wags the dog, or in other words, where the \$4.8 million loan
17 controls or jeopardizes recovery for the Investors on significantly more money. Despite
18 the prior agreement during the negotiation of the emergency \$2.8 million, Section 4 of the
19 Intercreditor Agreement reneges on that agreement and allows Stratera to settle the
20 Centerpoint Loan without the consent of the Investors. The Major Decisions which
21 required Unanimous Consent were to include any settlement with the Debtor and
22 Centerpoint. The current wording added by Stratera to Section 9(c)(iii) of the
23 Intercreditor Agreement about Major Decisions is not correct and should be stricken.
24 Release of collateral or guarantees and settlement of the Centerpoint Loan cannot be done
25 without consent of the Investors. Further the provision in Section 9(d) of the Intercreditor
26 Agreement about the process for selling for fair market value by reducing the sale price
27 every three months is not reasonable and will unfairly and arbitrarily require a fire sale of
28 the property to the injury of the Investors. Further the appraisal process completely

1 excludes the Investors and thus circumvents the Major Decision provision. In addition,
2 the whole Dispute Resolution provision is too cumbersome and was not agreed to. It
3 allows a single arbitrator to make the final decision and delegates to the arbitrator the
4 price for any sale among other things. It is also possible that the investors could be left
5 out of the process. Further the jurisdiction provision in the Loan and Pledge Agreement
6 chooses State Court. If a dispute needs to be resolved then the Bankruptcy Court should
7 determine the issues. This process would be quicker and more cost effective and because
8 of the Bankruptcy Court's knowledge of the case would be judicially efficient.

9 As stated in the Supplement, these issues of authority are intended to be used so as
10 to protect the Investors and the Collateral. The Debtor as the servicing agent or collection
11 agent or as the Manager with regards to the collection of the Loans must also exercise its
12 responsibilities in a manner to protect the Loans and Collateral. The specific issues raised
13 herein demonstrate how the financing proposal and the draft of the loan documents do not
14 protect the Investors and are thus outside the scope of authority for the Debtor.

15 In analyzing the Centerpoint Financing Motion, one over-riding fact must be kept
16 in mind: The Debtor is acting as a fiduciary for other people's money. While about 70%
17 of the money funding the Centerpoint loan came from or belongs to the Debtor, there is
18 also about 30% or \$38 million of Investor money in the Centerpoint loans. It came from
19 investors or other entities, including hundreds of individuals, including many elderly
20 investors who depend on this money. This is not a business deal to many of these
21 investors; it is their life savings – life savings that some of these elderly investors cannot
22 access and are relying on for their continued support in a troubled market. In other words,
23 the Debtor is playing with other people's money. The Investors Committee's goal in this
24 matter is not to be obstructionist or unreasonable, but it is simply to protect the Investor's
25 rights and to get as much of the investor's money back to them as soon as possible.

26 **III. THE INVESTORS INTERESTS ARE NOT ADEQUATELY PROTECTED**
27 **FOR A PRIMING LIEN FOR THE \$4.8 MILLION AND FINANCING OF**
28 **THE ADDITIONAL \$2 MILLION IS INAPPROPRIATE AT THIS TIME**

The Debtor has not offered any valuation of the Centerpoint property to show that

1 increasing the Loan by \$4.8 million plus fees, interest and expenses, makes economic
2 sense. The burden is on the Debtor to show that the Investors and the MP Funds are not
3 being put in a worse position with the priming of their interests.

4 Moreover, the repayment of the \$4.8 million loan, which will mature in just a few
5 months, is currently anticipated to be made from the acquisition of additional future
6 financing even though there is no loan commitment in place and many moving parts that
7 make the possibility of future funding speculative. In other words, there is no defined exit
8 strategy. This substantially increases the risk to the Investors.

9 The Centerpoint Loan is in default. Borrower is not making any payments to the
10 Debtor or the Investors. No interest has been paid to the Debtor or Investors since June
11 2008 and no interest payments to the Debtor or the Investors are being proposed by the
12 Debtor or Stratera or the Borrower. As a result the Centerpoint Notes continue to accrue
13 interest creating a larger debt. The interest on Note A in the amount of about \$123 million
14 is 13.5% and the interest on Note B in the amount of \$9.5 million is 18%. The default
15 rate is 27%. Stratera's Loan has an interest reserve for 6 months. However, in the event
16 the Stratera Loan is not repaid, a 27% default rate plus a late charge accrues to the \$4.8
17 million loan balance thus causing the Investors to get further in the hole on their interest
18 accruals.

19 There is no feasible exit strategy for the repayment of the Stratera Loan. The Loan
20 is now due around March 2, 2009 — 180 days from the Interim Order. That leaves 4
21 months for the repayment of the \$4.8 million loan. The Debtor does not have the cash and
22 has no plans for obtaining the cash to pay off the Stratera \$4.8 million loan itself. The
23 Borrower Centerpoint does not have cash to pay off the \$4.8 million loan. There has been
24 no showing by the Debtor at all about the feasibility of some exit strategy. It is imprudent
25 for new money to be lent to the Borrower when it is not clear that it will ever be repaid.

26 Further, the Centerpoint settlement is currently set for hearing around November
27 18, 2008. The settlement contemplates that the Debtor and Investors will subordinate to
28 new construction financing in the amount of \$75 million. Some of the proceeds of the \$75

1 million financing were earmarked for the payoff of the \$4.8 million Loan. However,
2 Centerpoint and the Debtor have been looking for this \$75 million of financing since July
3 2008 and still have not obtained a commitment. And in light of recent market events,
4 there is grave doubt as whether Centerpoint can obtain such financing. The settlement
5 also contemplates that the principal amount of the \$133 million loan will be reduced to
6 \$95 million. No interest or payments will be made on this reduced loan amount for quite
7 some time.

8 There are several provisions in the draft loan documents that have a *sub rosa* effect
9 of a Plan. Section 2.3(b) indicates that the Debtor can not change ownership or it will be
10 an event of default allowing foreclosure. Section 8.4 indicates that the Investors cannot
11 transfer or sell their interests without the consent of Stratera. Section 11.1 allows Stratera
12 to compromise and settle the Centerpoint Loan without the consent of the Investors. And
13 Section 8 of the Intercreditor Agreement requires the consent of Stratera to any
14 compromise or settlement of the Centerpoint Loan by the other parties, in other words, a
15 veto power.

16 Without adequate protection of the Investors' interests, including a clear feasible
17 exit strategy for repayment and interest payment to Investors to prevent further
18 deterioration of their position, the Court should not approve the priming lien and allow the
19 Investors' interests to be pledged, subordinated or primed.

20 **IV. DEBTOR HAS NOT SATISFIED ITS REASONABLE BUSINESS**
21 **JUDGMENT WHILE STILL MEETING ITS DUTIES OF CARE,**
22 **COMPETENCE OR DILIGENCE TO THE INVESTORS**

23 This Financing Motion does not satisfy Debtor's obligation as agent or under the
24 business judgment rule to act with the care, competence and the diligence required of
25 agents in similar circumstances, for a variety of reasons. The Investors bear the risk of
26 this new Loan. Significantly, there is no analysis by the Debtor attached to its Financing
27 Motion, no showing in a reasonable and credible manner how the loan will be paid off, no
28 valuation analysis showing the impact of the loan proceeds and how the value of the
project is enhanced by the use of the proceeds and no risk/benefit analysis of the loan.

1 While the Debtor and Centerpoint have a 9019 settlement motion on file, both that
2 settlement and this financing require the presence of new financing of \$75 million in order
3 to pay off the \$4.8 million loan. There currently is no commitment for the \$75 million
4 new construction financing. Lenders have been looking at the deal since July when a due
5 diligence room was set up at Mortgages Ltd. But Debtor and Centerpoint do not have a
6 lender and no exit strategy for the loan.

7 This lack of an exit strategy and lack of adequate protection violate the Debtor's
8 obligation to act with the care, competence and diligence exercised by agents in similar
9 circumstances. See, Section 8.08 of the *Restatement (Third) of Agency*. The Debtor
10 serves as an agent, or otherwise manages, a loan portfolio of nearly \$1 billion,
11 substantially all of the portfolio being comprised of other people's money (the investors,
12 etc.). The Debtor should accordingly be held to a high standard of care. Indeed, this is a
13 higher standard of care than would apply in a normal context, because the Debtor is
14 seeking to obtain a loan to satisfy its commitment to the Borrower Centerpoint by
15 pledging the Investors' interests in the Centerpoint Notes, delegating the foreclosure
16 procedures, by subordinating the cash flow of the Investors to the new lender, and making
17 the Investors "Borrowers" under the new loan, among other things. Although the
18 Debtor's breach of its duty of loyalty is addressed below, its duties of care, competence
19 and diligence are expressly implicated here. It has not met those duties.

20 Moreover, due to the power of attorney and agency relationships, the scope of the
21 agent's authority must be strictly constructed. It is well established that courts must
22 strictly construct the grant of authority in a power of attorney. *Lightning Delivery Co. v.*
23 *Matteson*, 45 Ariz. 92, 97 39 P.2d 938, 941 (1935) ("It must be kept in mind that under all
24 the authorities powers of attorney should be strictly construed and that the courts should
25 never by construction extend the power they confer beyond that given in terms, or is
26 absolutely necessary to carry that conferred into effect"); *Archbold v. Reifenrath*, 744
27 N.W.2d 701, 708 (Neb. 2008) ("Powers of attorney are by necessity strictly construed,
28 and broad encompassing grants of power are to be discounted").

1 This Financing Motion also does not satisfy the business judgment rule. In this
2 case, the Debtor has a duty to be acting on behalf of the Investors, with whose money it is
3 making deals. The complete lack of a feasible exit strategy for repayment of the loan in
4 the next 4 months makes a finding that the Debtor acted on a reasonable basis impossible.
5 Indeed, based on the deposition testimony of the Debtor's directors, even the Debtor's
6 own two directors do not support the loan as submitted to the Court. Further, the Debtor's
7 selfish action in requiring the Investors interest be pledged and subordinated, making the
8 investors "Borrowers" under the Note, and not collecting any interest for the Investors
9 increases the risk of the Investors, exposes them to deterioration of the repayment
10 chances, and makes a finding of good faith impossible. The Debtor's actions may well be
11 in its own best interests, but there has been no showing that its actions are in the best
12 interest of the Investors.

13 By acting as set forth above, the Debtor has placed its own interests above the
14 interests of the Investors. This conflict for the Debtor prevents this decision from being a
15 reasonable exercise of the business judgment rule and constitutes a breach of the Debtor's
16 duty to its principals.

17 The Debtor owes a duty of loyalty and a duty to not self deal to the Investors and
18 should be required to live up to that standard. In particular, Section 8.02 of the
19 *Restatement (Third) of Agency* provides that "[a]n agent has a duty not to acquire a
20 material benefit from a third party in connection with transactions conducted or other
21 actions taken on behalf of the principal or otherwise through the agent's use of the agent's
22 position." Similarly, Section 8.05(1) of the *Restatement (Third) of Agency* provides that,
23 "[a]n agent has a duty (1) not to use property of the principal for the agent's own purposes
24 or those of a third party." As noted above, the Debtor failed to provide the additional
25 construction funds and now is forced to borrow money to lend to Centerpoint. In order
26 to get the money Debtor has to pledge the Investors interest in the Centerpoint Notes and
27 has to subordinate the cash flow payments to the new lender. The Debtor also has to make
28 the Investors "Borrowers" under the loan exposing them to risk and liability. The Debtor

1 does not have a feasible plan for repayment of the loan thereby impacting negatively the
2 Notes. This is the very definition of an agent using its principal's property for the agent's
3 own purposes.

4 Finally, the Investors Committee also brings to the Court's attention that the draft
5 loan documents (which change the character of the loan) were not served on the Investors
6 in the Centerpoint Loan. The original Interim Order and Term Sheet appear to have been
7 served on Investors but the draft loan documents were not. Given the nature of the
8 additional provisions and problems caused by the draft loan documents, such as the fact
9 the Investors are "Borrowers" under the Centerpoint Loan, there is a serious question
10 about the adequacy of the notice given to the Investors of these last changes to the Loan.

11 Therefore, the Investors Committee requests that the Financing Motion be denied
12 and that the Court find that the Debtor is not authorized to sign the proposed loan
13 documents with Stratera.

14 DATED this 14th day of November, 2008.

15 FENNEMORE CRAIG, P.C.

16
17 By /s/ Cathy Reece (005932)

18 Cathy L. Reece
19 Keith L. Hendricks
20 Attorneys for the Official Committee of
21 Investors

22
23 COPY of the foregoing emailed or mailed
24 this 14th day of November, 2008 to the parties
25 on the attached Service List.

26
27 /s/ Susan Stanczak-Ingram

28
2125713/25831.001

SERVICE LIST
2:08-bk-07465

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File an Answer/Response/Objection to a Motion:2:08-bk-07465-RJH Mortgages Ltd. CASE CONVERTED on 06/24/2008

Type: bk

Chapter: 11 i

Office: 2 (Phoenix)

Judge: RJH

Assets: y

Case Flag: Appeal, Exhibits

U.S. Bankruptcy Court**District of Arizona**

Notice of Electronic Filing

The following transaction was received from CATHY L. REECE entered on 11/14/2008 at 4:17 PM AZ and filed on 11/14/2008

Case Name: Mortgages Ltd.**Case Number:** 2:08-bk-07465-RJH**Document Number:** 984**Docket Text:**

Objection to Motion/Application to *Centerpoint DIP Financing by Investors Committee* (related to motions(s)[408]) filed by CATHY L. REECE of FENNEMORE CRAIG on behalf of Official Committee of Investors (related document(s)[408] motion Motion to Approve) (Attachments: # (1) Service List). (REECE, CATHY)

The following document(s) are associated with this transaction:

Document description:Main Document**Original filename:**C:\Documents and Settings\sstancza\My Documents\Mtg Ltd - Objection to Centerpoint Financing (hearing date 11 18 2008).pdf**Electronic document Stamp:**

[STAMP bkecfStamp_ID=875559564 [Date=11/14/2008] [FileNumber=12620679-0] [82a05fdd7fd84a9332a75a209645eae0991dd88cb4a89eb7110ae17df924488565269fe43bd6bb476f44518bb1b95bead2dd04ab2a8b43e8fcf1aaa5f08f062b]]

Document description: Service List**Original filename:**C:\Documents and Settings\sstancza\My Documents\Mtg Ltd - Service List as of 10 27 08.pdf**Electronic document Stamp:**

[STAMP bkecfStamp_ID=875559564 [Date=11/14/2008] [FileNumber=12620679-1] [7b5644ec5a17c27e7027c1330c5f0116cd8dc0f1a539f615d27928a732a73c9de7f72bd3e0868bf03800a14a3f65850fa6b7faf7d5aa87196b7801a15c233216]]

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