

1 FENNEMORE CRAIG, P.C.
Cathy L. Reece (005932)
2 Keith L. Hendricks (012750)
3003 N. Central Ave., Suite 2600
3 Phoenix, Arizona 85012
Telephone: (602) 916-5343
4 Facsimile: (602) 916-5543
Email: creece@fclaw.com

5 Attorneys for Official Committee
6 of Investors

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 OF INVESTORS
COMMITTEE TO MORTGAGES LTD.'S
DISCLOSURE STATEMENT IN SUPPORT
OF ITS CHAPTER 11 PLAN OF
REORGANIZATION**

Hearing Date: April 6, 2009
Hearing Time: 3:00 p.m.

16 The Official Committee of Investors (the "Investors Committee") here by objects
17 to the adequacy of Mortgages Ltd.'s Disclosure Statement in Support of Its Chapter 11
18 Plan of Reorganization ("Debtor's Disclosure Statement"). The Investors Committee
19 requests that Court approval of the Debtor's Disclosure Statement be denied because it
20 does not contain "adequate information" within the meaning of Section 1125(a) of the
21 Bankruptcy Code, and because the Plan is not confirmable.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. THE OVERVIEW**

24 As the Court knows, the Investors Committee represents the \$730 million of
25 Investors who have invested their life savings, retirement and hard-earned moneys in the
26 in the purchase of Notes and Deeds of Trust on Arizona Real Estate, which was originated

1 and serviced by the Debtor. Pursuant to an agency relationship, they have entrusted their
2 money and the servicing of their Notes and Deeds of Trust to a Debtor that is now
3 insolvent, dysfunctional and administratively insolvent. The investors are getting almost
4 no money at all on their \$730 million loan portfolio, as collections have almost
5 completely stopped. The Debtor, rather than acknowledging it has miserably failed in
6 obtaining workouts and collecting money on defaulted loans, blames it on the economy
7 and the real estate market. Instead of acknowledging its own misconduct and
8 mismanagement, and rather than truly trying to correct its way of doing business or
9 servicing the loans, it just charges more fees from Borrowers on money it can't collect and
10 from the Investors who are not receiving any money. Debtor has mismanaged the
11 collection of the loans and continues to incur expenses it cannot afford. Frankly, enough is
12 enough.

13 Among other things, this Debtor's Plan proposes to unilaterally modify the Agency
14 Agreements, to unilaterally modify the Operating Agreements of the MP Funds, to
15 unilaterally renegotiate the servicing fee, to give unfettered discretion to the Reorganized
16 Debtor in servicing the Loans, to artificially cap the unsecured claims of the investors
17 without explanation or justification, to accrue and charge huge unwarranted fees (as a
18 straw man) and then to relinquish then as if being magnanimous, and to turn over control
19 to undisclosed directors, officers, employees, possible equity partners and liquidating
20 trustee. As indicated below, despite the fact the Debtor's Disclosure Statement is 84 pages
21 long, it is very light on substance and does not adequately deal with such important
22 questions as: (1) Who is running the Debtor and who approved the filing of this Plan, (2)
23 Who will be running the Reorganized Debtor after confirmation and making the decisions
24 on the loan workouts, (3) What allegations have been made against the Debtor by the
25 Arizona Department of Financial Institutions and what is the Debtor's response and
26 explanation to the Investors, (4) What impact will revocation of the Debtor's license have

1 on its ability to service the Loans, (5) Given the serious allegations and possible
2 revocation of its license, what makes the Debtor believe that it can get its current license,
3 which expires March 31, 2009, renewed or obtain a new license issued for the
4 Reorganized Debtor, (6) What is the Debtor's track record during the Bankruptcy on
5 collecting any of the \$900 million loan portfolio, (7) What fees or other moneys has the
6 Debtor actually paid itself post-petition and where did that money come from, (8) Given
7 the dismal collections post-petition, why should the Investors put their trust in the
8 Reorganized Debtor to collect any money on their behalf, (9) What does the Debtor
9 propose to do to resolve the conflict as to which Loans will be assessed Pre-Emergence
10 Fees, (10) On the votes to be made by the "Investors and Creditors" in PLS and the ML
11 Trust, who really will be controlling the vote? Radical Bunny has been given a \$125
12 million unsecured claim and the Investors have been capped at a \$60 million claim. Won't
13 Radical Bunny control and make the decisions, and (11) What would Investors and
14 Creditors get in a liquidation and what is the Debtor's analysis on this issue?

15 **II. LEGAL STANDARD FOR APPROVAL OF THE DISCLOSURE** 16 **STATEMENT**

17 As the Court is well aware, to be approved a disclosure statement must offer
18 "adequate information" that would enable a "hypothetical investor of the relevant class to
19 make an informed judgment about the plan." See Section 1125. Generally courts evaluate
20 whether the disclosure statement provides adequate information about the following
21 items, among others:

- 22 — circumstances that gave rise to the filing of the Chapter 11 petition
- 23 — a complete description of the available assets and their value
- 24 — the anticipated future of the debtor
- 25 — the source of the information provided in the disclosure statement
- 26 — a disclaimer, which typically indicates that no statements or information

1 concerning the debtor or its assets or securities are authorized, other than those set forth in
2 the disclosure statement

- 3 — the condition and performance of the debtor while in Chapter 11
- 4 — information regarding claims against the estate
- 5 — a liquidation analysis setting forth the estimated return that creditors would
6 receive in a Chapter 7
- 7 — the accounting and valuation methods used to produce the financial information
8 in the disclosure statement
- 9 — information regarding the future management of the debtor, including the
10 amount of compensation to be paid to any insiders, directors and/or officers of the debtor
- 11 — the collectability of any accounts
- 12 — an estimate and itemization of the administrative expenses and fees
- 13 — any financial information, valuations, pro forma projections that would be
14 relevant to a creditor
- 15 — the actual or projected value that can be obtained from avoidable transfers
- 16 — the existence, likelihood and possible success of nonbankruptcy litigation
- 17 — the relationship of debtor with affiliates.

18 *See In re Scioto Valley Mortgage Co.*, 88 B.R. 168 (Bankr. S.D. Ohio 1988); *see also In*
19 *re A.C. Williams Co.*, 25 B.R. 173 (Bankr. N.D. Ohio 1982); *In re U.S. Brass Corp.* 194
20 B.R. 420 (Bankr. E.D. Tex. 1996).

21 **III. DEBTOR'S DISCLOSURE STATEMENT LACKS ADEQUATE** 22 **INFORMATION**

23 The Debtor's Disclosure Statement offers no meaningful information in several
24 important categories. The Court should deny approval of the Debtor's Disclosure
25 Statement as it is "inaccurate and replete with deficiencies." *See In re Hirt*, 97 B.R. 981
26 (Bankr. E.D. Wis. 1989).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

A. There is no Discussion of the Dysfunction of the Debtor and Who Authorized the Filing of the Debtor Plan

The Court will note that the Debtor’s Counsel, not the Debtor’s President or Chairman of the Board, signed the Plan. There is a real question as to who is the real Plan Sponsor. Chris Olson, who, until the evening of March 3, 2009, was a Director and until March 20, 2009 was the CFO of the Debtor, recently testified at a Rule 2004 exam noticed by Robert Furst. From this deposition, it is clear that both George Everett and Chris Olson, the only two directors of the Debtor, did not authorize the filing of the Plan and in fact disagreed with many of the important issues in Plan. They resigned rather than vote for the Plan. Chris Olson resigned at 6:30 p.m. on March 3, 2009 without approving the Plan and the Debtor’s Counsel filed the Plan around 7:30 a.m. on March 4, 2009. The new director or directors could hardly have had enough time to review and analyze this complex Plan and they were not told that the prior directors opposed the Plan and resigned because of their opposition to the Plan. Mr. Olson testified to this effect on March 25, 2009. As this testimony is contrary to representations from the Debtor, his deposition transcript should be disclosed by the Debtor. There was no president or CEO, as Richard Feldheim had resigned a few weeks earlier. So who made the decision and is it properly authorized? One of the new directors, Steve Chanen, resigned on Friday March 27, 2009. A new director, Mary Leonard, was brought in on Monday, March 23, 2009. Richard Feldheim, who supposedly resigned, has been hired as a “consultant” without Court approval or disclosure for \$1 a year. In addition, the Debtor has laid off significantly all the employees and may have only 8 or 10 employees left. Who are they and what are they doing? Who are the officers calling the shots? With the management and servicing of a \$730 million loan portfolio for the Investors at risk, the important disclosure of who is in charge and making decisions about the Loans is important and must be disclosed.

1 **B. The Debtor’s Disclosure Statement Does Not Disclose Any of the People**
2 **Who Will Be Making the Decisions at the Reorganized Debtor Post-**
3 **Confirmation**

4 The Debtor indicates that it will disclose the names and qualifications of the new
5 Directors “prior to the confirmation hearing.” That is just too late. The Investors are
6 entitled to know prior to their vote who will be in control of their \$730 million loan
7 portfolio. This is important for a number of reasons. First, it goes to whether or not the
8 license can or will be renewed by the Arizona Department of Financial Institutions. The
9 taint of the Debtor’s prior conduct can be attributable to individuals and in fact the State
10 can revoke the ability of individuals to continue to work in the industry and with the
11 Debtor. Carolyn Goldman is the current person who is designated as the responsible
12 person for the license. It is not clear that she in fact is currently an employee or actively
13 involved in management which is required under the State statute. Is she going to continue
14 and how is she tainted? Will a new person be designated and can that person be approved?
15 Second, it goes to what Debtor’s officers and directors will be continuing in the
16 Reorganized Debtor’s employment and what will be their compensation. It also goes to
17 the affiliations of any individuals. This is all required to be disclosed in Section
18 1129(a)(5). Third, not only does Section 1129(a)(5) require a full disclosure of this kind,
19 but it is only fair and appropriate for the Investors to know the name and qualifications of
20 the people who will be put in charge of their \$730 million portfolio. Are they trustworthy?
21 Do they have the right experience and background? Who are they entrusting their life
22 savings, retirement and hard-earned money to? This is crucial and must be disclosed
23 before they are asked to vote.

23 **C. The Debtor Must Disclose the ADFI Grounds For Revocation of Their**
24 **License and Explain Their Defense**

25 At a minimum, the Debtor should attach as an Exhibit to the Disclosure Statement
26 the Notice of the Filing of the ADFI Administrative Proceeding and the Complaint filed.

1 There are serious grounds stated in that pleading, such as false financial reporting. There
2 are both pre-petition and post-petition allegations of misconduct. The allegations go to the
3 very heart and nature of the relationship between the Investors and their agent — the
4 Debtor. Besides merely attaching a copy, the Debtor also needs to offer an explanation to
5 the Investors. Are these acts ongoing? What efforts have been made to correct these
6 deficiencies? How have the Investors been impacted? A full explanation and disclosure
7 needs to be made in the Disclosure Statement before it is approved.

8 Further, the Debtor must disclose and discuss how the revocation will impact its
9 Plan and post-confirmation servicing of the Investors' Loans. They should explain what
10 will happen to their business if the license is revoked. It is not enough to say that they will
11 apply for a new license under the Reorganized Debtor's name. They must disclose how
12 long it will take for a new license to be approved, what they will do in the interim period,
13 whether they can collect any fees for servicing during the period a license is not in effect,
14 and what they will do for cash flow in the meantime.

15 **D. Debtor Must Discuss and Disclose What it is Doing to Renew its**
16 **Existing License so it can Continue in Business Through the Effective**
17 **Date of a Plan**

18 The Debtor's current license expires March 31, 2009. The Debtor was to have filed
19 an application and paid a renewal by March 31, 2009. A.R.S. § 6-944. If it does not
20 comply, its license is automatically suspended. Although the statute does allow the Debtor
21 to pay a late charge of \$25 per day and file the application late, Debtor only has 30 days
22 before the suspension is permanent. A.R.S. § 6-944. If the license is denied, the applicant
23 cannot reapply for at least one year. In its application, it must provide an audited financial
24 statement for 2008. The Debtor does not have such a financial statement. It must show
25 that it is "solvent". It cannot show this. In fact, its Monthly Operating Reports filed with
26 the Court for February shows just the opposite. It must obtain prior approval for any
change in control. It has replaced its Directors several times, all without the

1 Superintendent's approval, let alone prior approval. A.R.S. § 6-944. The list goes on and
2 on. It is likely that the Debtor's Plan will not be confirmed (if at all) until sometime in
3 June 2009 which will be too late. Of course, the Debtor may think it will merely hire
4 another entity to service the loans, but even if it tries to do this, the Debtor cannot collect
5 or be paid any fees without a license. How will it stay in business without its fees? There
6 is a significant question of whether the Debtor, while acting in the role of an agent and not
7 as a principal, can get around the licensing issue by delegating to a subagent, which the
8 Debtor does not disclose or discuss at all.

9 **E. Debtor Must Discuss and Disclose How the Reorganized Debtor Will**
10 **Obtain a New License**

11 As indicated above, if the Debtor intends for the new Reorganized Debtor to get its
12 own license, the Debtor needs to discuss how this can be done. At a minimum, the process
13 takes at least 120 days for a new license, requires a certain level of solvency and liquidity,
14 and the personnel and directors must be fingerprinted and approved by the
15 Superintendent. *See* A.R.S. § 6-604. In addition, any person controlling more than 20% of
16 the ownership interest must also go through a background check and be approved by the
17 Superintendent. It would appear that Radical Bunny LLC will be the holder of over 20%
18 of the membership interest in the Reorganized Debtor. How will the bankruptcy estate of
19 Radical Bunny qualify? These are all very important questions that need answers. It is
20 obvious by the silence that the Debtor does not know how to answer these questions or
21 does not know what questions are even relevant to the process of obtaining a new license.

22 **F. There are no Disclosures about the Emergence Financing, Capital or**
23 **whatever it is called**

24 To prove feasibility of the Plan, the Debtor must have financing through loans or
25 new capital. While the Debtor indicates it will obtain such financing or capital, it does not
26 disclose that it has such money, what the terms are or who is providing the money. The
Debtor indicates it will disclose this information prior to confirmation. However, it is too

1 important to the structure of the Reorganized Debtor for it to be disclosed after the vote is
2 taken. If the money comes in as a loan, what are the terms and what is the collateral? If it
3 comes in as new capital, what is the preferred return, who are the directors the new equity
4 partner will require be put on the Board, among other things. Another important question
5 will be what portion of the Investors Pre-Emergence Fees of \$47 million and the Post-
6 Emergence Fee of 1% of the unpaid principal balance of the Notes (which is at least \$7.3
7 million a year for 3 to 5 years) will go to pay the new Emergence Capital or equity and
8 not go into the ML Trust or the Reorganized Debtor's operations? This will be very
9 revealing. There is a lot missing from this picture either because the Debtor does not have
10 any Emergence Financing or Capital or because the Debtor does not want to explain it.
11 Regardless, the Debtor needs to disclose it prior to expecting the Investors and Creditors
12 to vote on the Plan.

13 **G. There is no Disclosure About the Condition and Performance of the**
14 **Debtor Post-Petition**

15 The Debtor is silent on its track record post-petition. This is an important
16 disclosure to be made. If the Debtor wants the right to continue servicing the Investors
17 \$730 million of loans, they should disclose how much they collected post-petition, what
18 fees were charged for the services and what their profit and losses were post-petition. It is
19 clear that the Debtor has not been breaking even post-petition despite the fact that it is not
20 paying its post-petition administrative professionals or rent. How can the Reorganized
21 Debtor break even and stay in business post-confirmation? The assumption in the pro
22 forma projections has to be compared to the Debtor's performance and credibility. What
23 changes are they making in their services and in their strategy in collecting the loans for
24 the Investors. Why should they be given a chance at all? The disclosure of the post-
25 petition information will be important to feasibility but also to help the Investors know if
26 they want to trust the Reorganized Debtor to service their Loans. This must all be

1 disclosed prior to voting.

2 **H. There is No Disclosure About the Dispute Over the Agency Agreement**
3 **and the Modifications to Be Made**

4 The Debtor states that it will be modifying the Agency Agreement and the
5 Operating Agreements for the MP Funds. No modified versions have been made
6 available. These will be important documents for the Investors to review prior to voting.
7 The Disclosure Statement must also disclose that the issue of the scope of the existing
8 Agency Agreement and the Operating Agreements was a seriously disputed issue in this
9 case. The Debtor has one interpretation of how much it can do in servicing the loans —
10 basically that it has unfettered authority and makes all decisions in its sole and absolute
11 discretion. The Investors Committee had a narrower view. The Debtor proposes to
12 broaden and “reaffirm” and even make it more clear in the modifications and in the
13 Confirmation Order. How far they think they can go must be disclosed. The Debtor
14 should be required to give example of what it thinks the Reorganized Debtor can do in
15 collecting the Loans? Can they convert debt to equity, release guaranties, accept “hope
16 certificates as full compensation for the loans, release collateral, sell the Note at a
17 significant discount, enter into long-term development agreements, walk away from some
18 loans altogether without collecting anything, etc? How far do these new and modified
19 Agency Agreements and Operating Agreements go? The Investors need to know before
20 they are required to vote.

21 Right now, the Operating Agreement allows the Investors in the MP Funds to vote
22 to remove the Manager. This right is an important one. Is it being changed and removed?
23 If not, will it be effective post-confirmation so that it can be invoked? Similarly, the
24 Agency Agreement, under state law, can be revoked regardless of any language to the
25 contrary. Can the Investors revoke their Agency Agreement post-confirmation? This
26 information needs to be disclosed prior to voting.

1 Further, the Agency Agreements and Operating Agreements are executory
2 contracts which the Debtor cannot cure and which are not assumable. Of course, if they
3 are executory they also cannot be modified unilaterally. Further, the Agency Agreements
4 may have terminated as a matter of law upon the insolvency and bankruptcy of the agent.
5 This issue was briefed as a part of the Statements of Position but was not ruled on by the
6 Court. The issue remains and may make the Debtor's Plan non-confirmable.

7 **I. Debtor Needs to Explain Why it is Discriminating Against the Investors**
8 **and Capping the Investors Unsecured Claims at 10% of the Principal**
9 **Balance**

10 While acknowledging that the Investors have filed about 1700 proofs of claims
11 amounting to \$730 million, the Debtor arbitrarily caps the unsecured claims at 10%. On
12 the other hand, the Debtor appears to value the secured claim of Radical Bunny at about
13 40% recovery on the Notes and values the unsecured claim at a deficiency of 60% of the
14 Notes. Debtor should disclose this analysis and how it came up with the disparate
15 differences between the claims.

16 **J. Debtor needs a Liquidation Analysis**

17 The Debtor's liquidation analysis is lacking. This is an important requirement that
18 the Debtor needs to disclose.

19 **K. Debtor Needs to Disclose that the Pre-Emergence Fees and Post-**
20 **Emergence Fees are Disputed and that it presents a Conflict of Interest**

21 The Investors are entitled to know what they can expect to receive under the
22 Debtor's Plan in plain, simple language. They need to know that the Pre-Emergence Fees
23 will be taken from the first available money received from a Borrower, thus reducing the
24 amount of principal or interest that they can expect to receive on their Note. Then they
25 need to know that Reorganized Debtor will take the 1% servicing fee per year on the
26 unpaid principal balance from the first available money from Borrowers even though the
Borrowers will never pay the loans in full. Plus, there may be other fees that can be

1 recovered. How will they be applied and recovered?

2 Since one of the fundamental features of the Debtor's Plan is the Pre-Emergence
3 Fees and the Post-Emergence Fees, and since the Debtor intends that those fees are
4 collected and paid to the Reorganized Debtor before the Investors receive any money, the
5 Debtor should disclose that it does not expect the Borrowers to pay in full. The Investors
6 need to understand that in this situation they will not recover their investments even
7 though the Reorganized Debtor will be receiving substantial money for managing (or
8 mismanaging) their loans. This fundamental dispute is what caused Chris Olson and
9 George Everett to resign from the Debtor's Board of Directors and to refuse to support the
10 Debtor's Plan. Mr. Olson testified that prior to the bankruptcy Investors were never
11 charged such fees, and nobody at the Debtor contemplated that such fees ever would be
12 charged to the Investors.

13 The Investors Committee disputes the ability of the Debtor to charge and collect
14 these fees. This should be disclosed.

15 Further the Debtor believes that the fees are uncollectible and in its Monthly
16 Operating Statements has fully reserved the fees. This change in accounting was made
17 post-petition. The Debtor should be required to explain why the change was made and
18 why the Debtor suddenly started accounting and reserving for the fees.

19 But this is not enough. The Debtor must also disclose which loans will bear the
20 brunt of these fees. The Debtor has stated in the Exhibit the source of the various fees per
21 Loan. However, in offering a reduction of \$213 million of fees down to \$47 million, the
22 Debtor does not reveal where the money will come from and which Borrowers or Loans
23 will be assessed those fees as they are collected. A full analysis needs to be made. This
24 raises a significant undisclosed conflict of interest of the Agent and Manager. Further, as
25 the Reorganized Debtor renegotiates the Loans with the Borrowers, there will be an
26 inherent conflict between what is characterized as a fee that will go to the Reorganized

1 Debtor and what will be paid to the Investors. This conflict needs to be addressed and the
2 Debtor needs to explain how it will be dealt with.

3 In addition, the Debtor needs to disclose whether Radical Bunny will also be
4 required to pay these fees or any fees on the fractional interests in Notes which it will be
5 receiving for its \$75 million Secured Claim. Will the Investors bear the brunt of all the
6 expenses of servicing loans post-confirmation or will Radical Bunny be expected to also
7 contribute to the collection of its Notes?

8 **L. The Dispute over the Validity of the VTL Loans and Security Interest**
9 **Needs to be Disclosed and the Impact of that Possible Litigation Must**
10 **be taken Into Account**

11 The Investors Committee has indicated that the Debtor, as the Manager for the MP
12 Funds, was not authorized to enter into the loans with the VTL Fund. Stated simply,
13 Debtor (as Manager for both the MP Funds and the VTL Fund) was required to take a
14 vote of the membership before entering into a “contract with an affiliate” and before
15 giving a security interest in all the MP Funds assets to the VTL Fund. This was not done
16 and therefore the Manager had no authority to act and the security documents are
17 unenforceable. *See* A.R.S. Section 29-654. The VTL Fund asserts that it is a secured
18 creditor of the MP Funds and that it has the right to control all the decisions of the MP
19 Funds until the loans are repaid. The Debtor’s Plan keeps the VTL Loans and documents
20 in place. Debtor intends to continue to manage both the MP Funds and the VTL Fund.
21 This conflict of interest and the challenge to the authority and validity of the liens needs to
22 be disclosed and discussed in the Debtor’s Disclosure Statement.

23 **M. Debtor Needs to Disclose More Information About its Assets**

24 Debtor has not disclosed sufficient information about certain assets. For example,
25 the Debtor needs to disclose the best available information about the SM Coles Note
26 Receivable, the claims in the Coles Probate Estate, the information about the life
insurance beneficiary claims, and other insider dealings which the Debtor has a

1 responsibility to pursue for the creditors and Investors.

2 Debtor should disclose more about assets such as the Chateaux on Central and the
3 cost to complete and the Debtor's plans to sell or refinance the property. What can be
4 recovered? Also the property at Central and Highland needs to be discussed. What are the
5 plans for that property? Did the entitlements lapse post-petition? Also, what will happen
6 with the property in Fountain Hills? Will the lots be sold? Did the entitlements lapse post-
7 petition? The Debtor knows the properties and should explain what it plans to do to sell or
8 refinance the properties and how those decisions will be made. The Debtor needs to also
9 disclose what insurance policies are in place and whether there is title insurance available
10 to fight claims by Mechanics Lien holders that assert there was a break in priority.

11 **N. The Debtor Needs to Disclose Its Plans as To the University & Ash**
12 **Settlement**

13 The Debtor discusses the historical information about the settlement and the
14 hearing. But what the Investors in University & Ash need to be told is what the Debtor
15 intends to do once the Plan is confirmed. Will it try and close on the settlement with
16 University & Ash or will the settlement be terminated. The appeal is still pending, but it
17 could be mooted out after confirmation if the settlement is terminated or if it is
18 unconsummated.

19 **O. There is a Lack of Disclosure and Candor about the Centerpoint OSC**
20 **Settlement**

21 The Debtor needs to disclose more about the Centerpoint OSC settlement and facts.
22 The Investors Committee and Radical Bunny have disagreed with the Debtor on its
23 business judgment in the handling of the Tempe Land Company DIP loan. The Debtor
24 should disclose that under the Stratera DIP Financing, loan Tempe Land Company waived
25 any defense to foreclosure of the DIP Financing Loan. Instead of demanding immediate
26 repayment of the \$2.3 million, the Debtor negotiated a settlement that only recovers
\$563,000 from affiliates. This will result in either the Debtor through its Plan repaying the

1 Stratera DIP Financing Loan at a substantial interest rate or Tempe Land Company
2 obtaining a senior priority DIP financing loan in its own bankruptcy case that will
3 subordinate the Investors interest to the new Tempe Land Company DIP Loan. Both of
4 the results could have been avoided if the Debtor would have used its leverage to require
5 the immediate repayment of the Loan or recovered the property without substantial future
6 litigation. One of the terms of the settlement is a release by Tempe Land Company of
7 claims against Richard Feldheim and Christine Zahedi. Their involvement and role in the
8 misuse of the Tempe Land Company financing should be disclosed.

9 **P. There is an Inadequate Disclosure of the Circumstances that Led to The**
10 **Debtor's Financial Difficulties and the Bankruptcy**

11 Many of the salient facts that give rise to the problems that led to Debtor's
12 financial difficulties and the bankruptcy are omitted in the Debtor's Disclosure Statement.
13 These are important to the Investors because they directly bear on the amount of the
14 unsecured claims being capped for the Investors. The Debtor caps the unsecured claim
15 mostly because it views the Investor damages as arising from the declining real estate
16 market rather than from its own mismanagement and misconduct. For example, the
17 Debtor fails to adequately describe when and how it began defaulting on the loan
18 commitments to various Borrowers. It does not disclose how it began new programs, such
19 as the VTL Fund, to pursue new money but in so doing breached the Operating
20 Agreements of MP Funds. It does not disclose that by borrowing money from Radical
21 Bunny at the interest rate of 13% at the same time it was lending tens of millions of
22 dollars to Scott Coles at 8%. Debtor does not disclose how its was booking impairment to
23 the servicing fees it expected to collect from Borrowers even though it did not book any
24 impairment to the underlying Loan. Debtor has failed to disclose that it had phased out or
25 eliminated the Revolving Opportunity commitments to itself that had previously covered
26 its unfunded loan commitments. Debtor fails to describe how it made construction loan

1 commitments without sufficient underwriting criteria or how it changed its underwriting
2 criteria and appraisal process from prior years. These important facts, among others,
3 reveal the extent to which it was the Debtor's own conduct or omissions that may have
4 caused the Investors damages, not just the real estate market.

5 **Q. The Disclosure of Causes of Action and Avoidance Actions is**
6 **Insufficient**

7 There are substantial causes of action and avoidance actions that need to be
8 preserved against third parties. Both the potential targets and the potential claims need to
9 be expanded in the Disclosure Statement. The Debtor's claims against its own
10 professionals and insiders need to be expanded to include negligence, breach of contract,
11 breach of fiduciary duty, aiding and abetting breach of fiduciary duty, indemnity, breach
12 of good faith and fair dealing and misrepresentation. Debtor should also preserve all
13 causes of action and avoidance actions against all Borrowers, guarantors and related
14 parties.

15 **R. There is No Disclosure about Radical Bunny's Role or Conduct Pre-**
16 **Petition and the Contested Issues Concerning its Secured Claim**

17 The Debtor proposes to give Radical Bunny a secured claim for \$75 million, an
18 unsecured claim for \$125 million, a priority payment for \$35 million from certain assets,
19 and a release of all causes of action and avoidance actions. Debtor should fully disclose
20 the nature of the relationship pre-petition and the disbursements paid to Radical Bunny in
21 the two years prior to bankruptcy. There needs to be a meaningful discussion about the
22 challenge to Radical Bunny security interest and why the Debtor has flip-flopped on this
23 issue.

24 **S. The Debtor Does Not Disclose how Votes of the Investors and MP**
25 **Funds Will Be Calculated and Counted**

26 The Disclosure Statement needs to state and disclose who will vote the MP Funds
and how the MP Fund votes will be calculated and counted. It also does not indicate how

1 they Investors' claims are calculated and voted.

2 **IV. THE DEBTOR'S DISCLOSURE STATEMENT SHOULD NOT BE**
3 **APPROVED BECAUSE THE DEBTOR'S PLAN IS NOT CONFIRMABLE**

4 A Court cannot approve a disclosure statement if the plan with which it relates
5 cannot be confirmed. *See In re Beyond.com Corp.*, 289 B. R. 138 (Bankr. N.D. Cal. 2003).
6 As indicated above, there are a few items in the Debtor's Plan which make it non-
7 confirmable. First, the Debtor has to comply with State law relating to its license and
8 servicing of Investors Loans. The Reorganized Debtor must demonstrate that it can keep
9 or get a license. Without a license the Reorganized Debtor cannot collect or be paid any
10 fees on the Investors Loans. Second, the Agency Agreements terminated on the filing of
11 the Bankruptcy. Also, the Agency Agreement and Operating Agreements are executory
12 contracts that are personal in nature and cannot be assumed. Since the Agency
13 Agreements and the Operating Agreements are both the backbone of the Debtor's Plan
14 this determination makes the Plan non-confirmable. Third, the Debtor has not obtained
15 any financing for its Plan. Without financing, the Plan is not confirmable. Fourth, the Plan
16 cannot be proposed by any means forbidden by law. To the extent Debtor violated
17 securities laws pre-petition and post-petition, post-confirmation the Reorganized Debtor
18 continues the same practices and schemes in relation to the Investors. Fifth, the Plan
19 unfairly discriminates against certain unsecured claims of Investors.

20 The Investors Committee requests that the Court deny approval of the Debtor's
21 Disclosure Statement.

22 DATED: March 30, 2009

FENNEMORE CRAIG, P.C.

23 By /s/ Cathy L. Reece

Cathy L. Reece

Attorneys for Official Committee of Investors

24 COPY of the foregoing emailed
25 this 30th day of March 2009 to the parties
26 on the attached Service List.

/s/ Susan Stanczak-Ingram