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July 21, 2008

VIA E-MAIL AND FAX

Mortgages Ltd.
Carolyn J. Johnsen, Esq.
Jennings Strouss & Salmon
201 E. Washington
11th Floor
Phoenix, Arizona 85004

Re: Centerpoint Project – Mortgages Ltd.

Dear Ms. Johnsen:

Our firm has been engaged as special litigation counsel by Tempe Land Company, David C. Dewar, Kenneth K. Losch, Kingston Capital Co., LLC, and Graystar Investments LLC to pursue our clients' claims against Mortgages Ltd. and others for damages and other relief to which they are entitled due to Mortgages Ltd.'s default on its obligations to provide funding for the ongoing Centerpoint Project in Tempe. The Centerpoint Project has been under construction for well over one year, and until several months ago when Mortgages Ltd. began defaulting on its funding obligations, was proceeding very successfully, having procured some \$24 million in pre-sale commitments for condominium units, even though the first phases of the Project are not yet complete. Our Firm's letter to Mortgages Ltd. dated June 6, 2008 formally notified Mortgages, Ltd. of its defaults, although Mortgages Ltd. had been aware of those default for many months prior to the June 6 letter.

Mortgages Ltd. began defaulting on its funding obligations in December 2007 by failing to fund loan draws in full, providing the funds it did advance materially late, and ultimately ceasing funding all together. After several weeks of negotiations between the parties and third party replacement financing lenders, Mortgages Ltd. and our clients entered into a second set of loan agreements that were intended to be curative of Mortgages Ltd.'s breach of its initial funding obligations. Unfortunately, Mortgages Ltd. defaulted on the curative agreements almost

immediately after they were made. There has been no funding whatsoever on this Project for at least two months.

We have been prepared to file suit for our clients against Mortgages, Ltd. for several weeks. However, our clients have had ongoing discussions with the recently terminated management of Mortgages Ltd. and proposed third party lenders in an effort to provide replacement financing to ensure completion of the Project. These discussions have also included modifications to the terms of Mortgages Ltd.'s existing loans to account for and reflect our clients' damages and the additional financial challenges to the Project caused by Mortgages Ltd.'s defaults.

These ongoing negotiations between our clients and Mortgages Ltd. while making some progress, have not achieved successful resolution. With the recent change of management and the withdrawal of Mortgages Ltd.'s DIP financing proposal, our clients have legitimate concerns that a prompt resolution will not be achieved without a significant change in position by Mortgages Ltd. in its approach to the Centerpoint Project.

Mortgages Ltd.'s default on its funding obligations has already cost our clients tens of millions of dollars of compensable damages and the interruption in financing for the Project is, and has been, threatening the Project's viability.

Continued delay in receipt of replacement funding is compounding our clients' damages and problems on a daily basis and further delays will rapidly accelerate the rate at which these damages and problems accrue.

For all practical purposes, work on the Centerpoint Project has stopped. Numerous mechanics liens have been filed against the Project in the last 30 days, and more are expected to be filed. The majority of the subcontractors have stopped work. The Project's design professional firm has issued a stop work notice and states that it has withdrawn from the job effective Monday, July 7th.

There has already been significant publicity, in the newspapers and in the market place, concerning Mortgages Ltd.'s default on its funding obligations on the Centerpoint Project, which is one of the largest of all of Mortgages Ltd.'s lending defaults. This publicity, and the problems with unpaid subcontractors, professionals, and the threat of an outright work stoppage on the Project will severely impair the Project's image in the market place. In addition to the threat to Centerpoint's existing \$24 million in sales contracts, the stoppage of construction activities on the site due to lack of funding will inevitably lead to Centerpoint being stigmatized as a troubled project, thereby depressing retail sale prices toward liquidation values. Our clients cannot tolerate the rapidly accelerating deterioration of the Project's financial condition while it remains unfunded.

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So that you are more fully informed of the nature of our clients' claims against Mortgages Ltd. and others, I am enclosing a copy of our current draft adversary complaint for filing in the Mortgages Ltd.'s bankruptcy proceedings. We are prepared to file this on our clients' behalf at any time, but are willing to refrain from doing so provided that meaningful and immediate progress is made among all interested parties toward an agreement that will allow third party replacement funds to immediately begin flowing to the Centerpoint Project for completion of its construction activities.

Our clients recognize that new management needs time to understand all the issues it inherited, including an understanding of the Centerpoint Project and our previous settlement negotiations. Our clients will afford new management a short period of time to become acquainted with these issues, and then they expect that management deal with the issues facing the Centerpoint Project. Our clients and their attorneys remain willing to meet with Mortgages Ltd. and other appropriate parties at any time to discuss implementation of a vehicle to allow replacement financing for completion of the Centerpoint Project. Absent a prompt agreement, litigation of our clients' claims for damages and other relief is inevitable.

Sincerely,


MORRILL & ARONSON, P.L.C.

Martin A. Aronson
John T. Moshier

JTM/dlh
Enclosure

cc: Cathy L. Reese (via e-mail and fax w/encl.)
Gerald K. Smith (via e-mail and fax w/encl.)
Shelton L. Freeman (via e-mail and fax w/encl.)
David Engelman (via email w/o encl.)
Gary R. Zwillinger (via email w/o encl.)
Ken Losch (via email w/o encl.)
Brian Snider (via email w/o encl.)
Martin A. Aronson (via email w/o encl.)

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Attorneys for Plaintiffs Tempe Land Company, L.L.C.; Kingston Capital Co., LLC;
Graystar Investments, LLC; Kenneth Losch and David Dewar

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

In re:
Mortgages Ltd.,
Debtor.

Chapter 11
Case No. 2-08-bk-07465-RJH
Adv. No. _____

TEMPE LAND COMPANY, L.L.C., an
Arizona limited liability company;
KINGSTON CAPITAL CO, LLC, an
Arizona limited liability company;
GRAYSTAR INVESTMENTS, LLC, an
Arizona limited liability company;
KENNETH K. LOSCH, an unmarried
man; and DAVID C. DEWAR, a
married man acting as a sole and
separate individual,
Plaintiffs,
v.
MORTGAGES, LTD., an Arizona
corporation; ESTATE OF SCOTT M.
COLES; SCOTT COLES TRUST OR
TRUSTS; ASHLEY COLES, widow of
Scott M. Coles; ABC
CORPORATIONS, TRUSTS AND
BUSINESS ENTITIES NO. 1-100; AND
JOHN DOE DEFENDANTS NOS 1-
100.
Defendants.

ADVERSARY COMPLAINT

Plaintiffs, for their adversary complaint, hereby allege as follows:

INTRODUCTION

1 1. This action for damages, declaratory and injunctive relief has been brought
2 because Defendant Mortgages Ltd. defaulted on its obligations to provide tens of
3 millions of dollars of development and construction financing for the ongoing
4 Centerpoint Project in Tempe, Arizona. After initially defaulting on its lending
5 obligations, Mortgages Ltd., through its now-deceased former Chief Executive Officer,
6 induced Plaintiffs to enter into a financial restructuring transaction through material
7 misrepresentations and omissions concerning Mortgages Ltd.'s financial status and
8 ability to perform, and his own ability, and the ability of his Trust or trusts in which he
9 held substantial assets, to support Mortgages Ltd.'s performance. Mortgages Ltd.
10 shortly thereafter defaulted on its obligations under the financial restructuring
11 transaction. Mortgages Ltd.'s breach of its loan funding obligations has jeopardized the
12 timing and completion of the Centerpoint Project and has caused the developer a
13 minimum of several tens of millions of dollars in compensable damages.

PARTIES

14
15 2. Plaintiff Tempe Land Company, LLC ("Tempe Land Company") is an
16 Arizona limited liability company with its principal place of business in Maricopa County,
17 Arizona.

18 3. Plaintiff Kingston Capital Co, LLC ("Kingston Capital") is an Arizona limited
19 liability company with its principal place of business in Maricopa County, Arizona.

20 4. Plaintiff Graystar Investments, LLC ("Graystar Investments") is an Arizona
21 limited liability company with its principal place of business in Maricopa County,
22 Arizona.

23 5. Plaintiff Kenneth K. Losch ("Losch") is an unmarried man and is a citizen
24 and resident of Maricopa County, Arizona.

25 6. Plaintiff David C. Dewar ("Dewar") is a married man acting for all purposes
26 relevant to this case as a sole and separate individual, and is a citizen and resident of
27 Maricopa County, Arizona.

1 7. Defendant Mortgages Ltd., (“Mortgages Ltd” or “Debtor”) is an Arizona
corporation with its principal place of business in Maricopa County, Arizona.

2 8. Defendant Estate of Scott M. Coles (“Coles Estate”) is the estate of Scott
3 M. Coles (“Coles”), the recently-deceased former Chief Executive Officer and, on
4 information and belief, the sole shareholder of Mortgages Ltd. Coles was a citizen and
5 resident of Maricopa County.

6 9. Defendant Scott Coles Trust (“Coles Trust”) is the trust or trusts in which
7 Coles held a substantial portion of his personal assets. On information and belief, if
8 Coles was not the sole shareholder of Mortgages, Ltd., Coles Trust is the sole
9 shareholder of Mortgages, Ltd. Plaintiff does not currently know the exact name or
10 names of Coles Trust and will identify and disclose the correct identity and seek leave
11 to amend the Complaint, if necessary, when that identity is determined. Scott Coles
12 controlled Coles Trust and used it as his instrumentality and for his personal benefit in
13 connection with the actions, events and circumstances at issue in this case. Coles’
14 actions as alleged herein were performed for and on behalf of Coles Trust. Coles Trust
15 has its principal place of business in Maricopa County.

16 10. Defendant Ashley Coles, was at all times material hereto, the wife of
17 Coles. Defendant Ashley Coles is joined for purposes of establishing marital
18 community liability. Defendant Ashley Coles is a citizen and resident of Maricopa
19 County.

20 11. Defendants ABC Corporations, Trusts and Business Entities Nos. 1-100
21 (“ABC Entities”) are corporations, trusts, limited liability companies, partnerships or
22 other business entities whose true identities are presently unknown. On information
23 and belief, Defendant ABC Entities participated in the events giving rise to Plaintiffs’
24 claims and are liable therefore. Plaintiffs will seek leave to amend to identify Defendant
25 ABC Entities specifically when their identities are ascertained.

26 12. Defendants John Does Nos. 1-100 are persons whose true identities are
27 presently unknown. On information and belief, Defendants John Does 1-100

1 participated in the events giving rise to Plaintiffs' claims and are liable therefore.
2 Plaintiffs will seek leave to amend to identify Defendants John Does 1-100 specifically
3 when their identities are ascertained.

4 **JURISDICTION AND BACKGROUND OF BANKRUPTCY CASE**

5 13. On June 20, 2008 ("Petition Date"), Central & Monroe, LLC, Osborn III
6 Partners, LLC, and KGM Builders, Inc. (collectively, "Petitioning Parties") filed an
7 involuntary petition against the Debtor under Chapter 7 of the United States Bankruptcy
8 Code. (Dkt. 1).

9 14. On June 23, 2008, the Debtor filed a "Motion To Convert Involuntary
10 Chapter 7 Case To Case Under Chapter 11 Pursuant To 11 U.S.C. §§ 348(a) and
11 706(a), And To Dismiss As Moot Emergency Motion For Appointment Of Interim
12 Trustee" ("Motion to Convert") asking the Court, pursuant to 11 U.S.C. § 706(a), to
13 convert the involuntary Chapter 7 case to a voluntary case under Chapter 11 of the
14 Bankruptcy Code. (Dkt. 18)

15 15. On June 24, 2008, the Court entered its "Order Converting Case To A
16 Case Under Chapter 11 And Setting Continued Hearing On First Day Motions And
17 Emergency Motion To Appoint A Chapter 11 Trustee" converting the involuntary
18 Chapter 7 case to a case under Chapter 11. (Dkt. 36).

19 16. The Debtor continues to operate its business as debtor-in-possession
20 pursuant to 11 U.S.C. §§1107 and 1108. As of the date of this Adversary Complaint,
21 no trustees or examiners have been appointed, and no official committee of unsecured
22 creditors has been formed.

23 17. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§1334(a)
24 and 157(a). This is a "core" proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (B), (K)
25 and (O).

26 18. Venue in this District is appropriate pursuant to 28 U.S.C. §1409(a).

27 **GENERAL ALLEGATIONS**

28 19. Plaintiff Tempe Land Company is the owner and developer of a high rise

1 residential condominium and mixed use retail development located in Downtown
2 Tempe, Arizona, known as Centerpoint (the "Centerpoint Project").

3 20. The Centerpoint Project, when all projected phases are completed, will
4 consist of four residential condominium towers up to 30 stories in height containing
5 approximately 800 condominium units, a public plaza, a gourmet grocery, deli and café,
6 a multi-level public parking facility, and a luxurious and sophisticated seventh floor
7 amenity level with a professional demonstration kitchen, a wine lounge, a fitness center,
8 an "electronic lounge," an in-house spa, concierge services, and a spacious outdoor
9 area that will include a sun deck, swimming pool, spa, an urban beach with sand, and a
10 shaded patio. The Centerpoint Project will be a world class residential and mixed use
11 development unlike anything previously developed in the State of Arizona.

12 21. Defendant Mortgages Ltd., is a private capital commercial real estate
13 financing company which holds itself out as the largest private lender in Arizona.
14 Mortgages Ltd. is engaged in the business of financing commercial real estate
15 development projects.

16 22. On or about March 21, 2007, Mortgages Ltd. issued its loan commitment to
17 Tempe Land Co. in the designated loan amount of \$150,200,000.00 for use in Tempe
18 Land Co.'s ongoing development of the Centerpoint Project. In connection with the
19 loan commitment, Mortgages Ltd., and Tempe Land Co. entered into a Construction
20 Loan Agreement dated March 20, 2007 and Tempe Land Co. executed and delivered
21 to Mortgages Ltd. a Promissory Note dated March 20, 2007 in the designated loan
22 amount of \$150,200,000.00, together with a Deed of Trust, Assignment of Rents and
23 Leases, Security Agreement and Fixture Filing pertaining to the Centerpoint Project and
24 other related loan documentation. The obligations of the parties reflected in the March,
25 2007 loan commitment, Construction Loan Agreement, Promissory Note, Deed of Trust,
26 Assignment of Rents and Leases, Security Agreement Fixture Filing and associated
27 loan documents are collectively referred to as the "First Loan Agreement."

28 23. The First Loan Agreement documentation was prepared on Mortgages

1 Ltd.'s standard forms and included provisions purporting to establish certain potential
2 conditions on the advance of funds beyond the amount of what was called the "Initial
3 Funding" amount of \$130,200,000.00. Notwithstanding these purported conditions, the
4 parties always understood and Defendants always promised that the loan would be fully
5 and timely funded to the full "Designated Loan Amount" of \$150,200,000.00, provided
6 that Tempe Land Co. was not in default. The parties knew and understood that the
7 completion and success of the project was dependent on the full \$150,200,000 being
8 funded, and certain loan fees exceeding \$10 million were computed based on the
9 advance of the full \$150,200,000 and paid for by Tempe Land Co. at loan origination.

10 24. In connection with the First Loan Agreement, and the promises Defendants
11 made to make all advances thereunder, totaling \$150,200,000, Plaintiffs Kingston
12 Capital, Graystar Investments, Losch and Dewar executed and delivered to Defendant
13 Mortgages Ltd. certain loan guaranties dated March 19, 2007 (the "Guaranties").

14 25. The sole consideration given by Mortgages Ltd., for the First Loan
15 Agreement and Guaranties was Mortgages Ltd.'s promise to provide \$150,200,000.00
16 in development and construction funding for the Centerpoint Project.

17 26. The First Loan Agreement represented the principal source of funding for
18 Tempe Land Co.'s development and construction of the first two phases of the
19 Centerpoint Project. Such construction and development was a stated use of the
20 proceeds of the First Loan Agreement and the documents executed in connection with
21 the First Loan Agreement included numerous provisions requiring and restricting the
22 use of the First Loan Agreement Proceeds to the Centerpoint Project.

23 27. At the time the parties entered into the First Loan Agreement and
24 Guaranties, all parties, including Defendant Mortgages Ltd., knew that the completion
25 and success of the Centerpoint Project was dependent on Mortgages, Ltd.'s full and
26 timely provision of \$150,200,000.00 in loan funds under the provisions of the First Loan
27 Agreement.

28 28. After execution of the loan documents and Guaranties related to the First

1 Loan Agreement, Tempe Land Co. proceeded with development and construction at
2 the Centerpoint Project, and Mortgages Ltd. began disbursing loan funds under the
3 First Loan Agreement.

4 29. Construction, development and marketing of the Centerpoint Project
5 initially was very successful. To date, Tempe Land Company has procured some \$24
6 million in pre-sale commitments for condominium units, even though the first phases of
7 the project are not yet complete.

8 30. Defendant Mortgages Ltd. began defaulting on its obligations to provide
9 loan funds under the First Loan Agreement in and after December, 2007. Mortgages
10 Ltd. funded loan draws materially late, and failed to fund loan draws in full. Ultimately, it
11 ceased providing loan funds entirely. Scott Coles openly and repeatedly acknowledged
12 Mortgages Ltd.'s default on the First Loan Agreement, and on information and belief,
13 did so in the presence of third parties.

14 31. Upon Mortgages Ltd.'s default in and after December, 2007, Tempe Land
15 Co. began incurring significant actual, incidental and consequential damages, including,
16 but not limited to, delays in construction progress on the Centerpoint Project, impaired
17 relations with subcontractors with whom Tempe Land Co. had established strong
18 relationships, adverse project publicity, increased costs and lost profits.

19 32. Tempe Land Company made a diligent search for alternative financing and
20 had several potential lenders who were interested in providing replacement financing
21 provided that Mortgages Ltd. agreed to subordinate its loan position to the new
22 financing. Mortgages Ltd. expressed a willingness to subordinate its position in favor of
23 the replacement financing necessary to keep the project alive and funded, and
24 Mortgages Ltd.'s CEO Scott Coles even went to Toronto to meet with a private capital
25 firm called Tricon to help negotiate the details of first position replacement financing.

26 33. On information and belief, Defendant Coles Trust and/or Coles personally
27 and Coles' marital community were substantial investors in the First Loan Agreement.
28 During the negotiations and discussions between Coles and Plaintiffs that followed

1 Mortgages Ltd.'s default, Coles was acting for and on behalf of the interests of both
2 Mortgages Ltd. and Coles Trust, as well as himself and his marital community in an
3 effort to protect and advance the pecuniary interests of both Mortgages Ltd., Coles
Trust and his personal and marital community interests.

4 34. After several weeks of defaults by Mortgages Ltd. and numerous meetings
5 between Tempe Land Co. and Mortgages Ltd. personnel, including meetings with third
6 parties such as Tricon who were willing to provide replacement financing to Tempe
7 Land Co., Coles, and Mortgages Ltd. reversed course on their stated willingness to
8 subordinate Mortgages Ltd.'s position to new third party financing and instead insisted
9 on Mortgages Ltd. financing the needed capital itself by bringing Coles' and Mortgages,
10 Ltd.'s own investor capital into a preferred lending position to which Mortgages Ltd.'s
11 original First Loan Agreement position would be, in effect, subordinated. This
12 mechanism involved breaking the First Loan Agreement into what Coles and Mortgages
13 Ltd. called two separate "tranches" including a new first "tranche" in the amount of
14 \$45,000,000 to be funded by additional Mortgages Ltd. investors. This new first
15 "tranche" would provide funding in addition to the funding required by the First Loan
16 Agreement. In addition, Coles confirmed that the amount of the \$150,000,000 that was
17 unfunded under the First Loan Agreement would continue to accrue to pay interest on
18 the First Loan Obligation up to the \$150,000,000 funding commitment on the First Loan
19 Agreement.

20 35. On information and belief, Coles and Mortgages Ltd. decided not to
21 subordinate Mortgages Ltd.'s First Loan Agreement position to third party financing
22 because Coles, Coles Trust and Mortgages Ltd. wanted the benefit of a secured
23 position ahead of the Mortgages Ltd. Loan which, given the amount of equity in the
24 project, was a highly desirable and advantageous position that Coles, Coles Trust and
25 Mortgages Ltd. preferred to keep for themselves instead of having it go to a new third
26 party lender.

27 36. On information and belief, Coles and/or Coles Trust also had participating

1 interests in the First Loan Agreement which was to become the second "tranche" of
2 financing under the two tranche arrangement. Coles, Coles Trust and Mortgages Ltd.
3 all preferred having the second subordinated "tranche" behind a first "tranche" creditor
4 they controlled instead of being subject to the independent motivation, judgment and
5 control of a senior position third party creditor.

6 37. Under the new two "tranche" arrangement Mortgages Ltd. would fund \$45
7 million of new loan capital on the new first "tranche" note and would continue to fund \$1
8 million per week under the First Loan Agreement which was now the second "tranche".

9 38. In connection with Mortgages Ltd.'s promise to provide \$45,000,000 in
10 project funding under the new first funding "tranche", Mortgages Ltd. and Tempe Land
11 Co. entered into a Construction Loan Agreement dated March 26, 2008, and a First
12 Modification to Deed of Trust dated March 26, 2008. In addition, Tempe Land Co.
13 executed and delivered to Mortgages Ltd. a Promissory Note dated March 26, 2008 in
14 the designated loan amount of \$45,000,000.00. The obligations of the parties reflected
15 in the March 26, 2008 Construction Loan Agreement, March 26, 2008 First Modification
16 to Deed of Trust and March 26, 2008 Promissory Note are collectively referred to as the
17 "Second Loan Agreement."

18 39. The Second Loan Agreement documentation was prepared on Mortgages
19 Ltd.'s standard forms and included provisions purporting to establish certain potential
20 conditions on the advance of funds beyond the amount of what was called the "Initial
21 Funding" amount of \$35,000,000 and what was called the "Designated Loan Amount"
22 of \$45,000,000. Notwithstanding these purported conditions, the parties always
23 understood and Defendants always promised that the loan would be fully and timely
24 funded to the full "Designated Loan Amount" of \$45,000,000, provided that Tempe
25 Land Co. was not in default. The parties knew and understood that the completion and
26 success of the project, particularly following Mortgages Ltd.'s default on the First Loan
27 Agreement, was dependent on the full \$45,000,000 being fully funded, and that Tempe
28 Land Co. was exercising forbearance on pursuing its rights on the First Loan

1 Agreement default and had ceased pursuing other funding opportunities in reliance on
2 Mortgages Ltd.'s and Coles' promise that the full \$45,000,000 would be fully and timely
3 funded. Indeed, the parties negotiated for a conditional waiver and release of Tempe
4 Land Co.'s claims that was to be effective only if among other conditions, Mortgages
5 Ltd. fully and timely advanced the \$45 million called for in the Second Loan Agreement.
6 The conditional release was also conditioned on Mortgages Ltd.'s continuing to fund
7 \$15 million per week under the First Loan Agreement.

8 40. In connection with the Second Loan Agreement, and the promises
9 Defendants made under it, Plaintiffs Kingston Capital, Graystar Investments, Losch and
10 Dewar executed and delivered to Defendant Mortgages Ltd. certain loan guaranties
11 dated March 26, 2008 (the "Additional Guaranties").

12 41. Tempe Land Co. paid or incurred approximately \$10 million in loan fees to
13 Mortgages Ltd. in connection with the First and Second Loan Agreements.

14 42. Mortgages Ltd.'s full and timely provision of funding under the new two
15 "tranche" mechanism established under the Second Loan Agreement, which Mortgages
16 Ltd. had devised in its attempt to remedy its material breaches under the First Loan
17 Agreement, was essential to the completion and success of the Centerpoint Project
18 following Mortgages Ltd.'s earlier defaults.

19 43. At the time the parties executed the documentation related to the Second
20 Loan Agreement and Additional Guaranties, all parties, including Defendant Mortgages
21 Ltd. knew that the completion and success of the Centerpoint Project was dependent
22 on Mortgages Ltd.'s full and timely provision of loan funds in accordance with the
23 provisions of the First and Second Loan Agreements.

24 44. The sole and only consideration Mortgages Ltd. gave for the Second Loan
25 Agreement and the Additional Guaranties was Mortgages Ltd.'s promise to provide the
26 required development and construction funding for the project.

27 45. Mortgages Ltd. made some initial advances under the Second Loan
28

1 Agreement, but again defaulted under the First and Second Loan Agreements by failing
2 to fund construction draws and further advances Mortgages Ltd. was required to make
under the First and Second Loan Agreements.

3 46. On information and belief, Mortgages Ltd. has become insolvent or lacks
4 the liquidity and access to cash resources necessary to meet its financing obligations to
5 Centerpoint as well as to other borrowers to whom Mortgages Ltd. has failed to provide
6 contractually required loan funds.

7 47. The Centerpoint Project cannot be completed without replacement
8 financing for the lost funds Mortgages Ltd. committed to fund, but failed to fund.

9 48. This action arises under contract, and all Plaintiffs are entitled to an award
10 of their attorneys' fees, taxable costs and litigation expenses, including expert witness
11 fees under the terms of the parties' written agreements and pursuant to A.R.S. §12-341
12 and A.R.S. §12-341.01.

13 49. All conditions precedent to Defendants' liability and Plaintiffs' right to relief
14 as prayed for herein have been performed or have occurred.

15 **COUNT ONE**

16 **(Declaratory Judgment - Invalidation of First and Second Loan Agreements -**
17 **Tempe Land Company)**

18 50. The allegations of the preceding paragraphs are incorporated herein by
19 reference.

20 51. Tempe Land Company executed the Promissory Notes, Deeds of Trust
21 and other loan documents in consideration of Mortgages Ltd.'s promises to advance
22 loan funds under the First and Second Loan Agreements.

23 52. There has been a failure of consideration for the Promissory Notes, Deeds
24 of Trust and other documents Tempe Land Company executed in connection with the
25 First and Second Loan Agreements because Mortgages Ltd. breached its funding
26 obligations under the First and Second Loan Agreements.

27 53. In addition, Mortgages Ltd. committed a prior material breach of contract

potentially lost or renegotiated condominium unit sales;

- damages caused by changing market conditions;
- damages caused by impaired market place perception and decreased pricing leverage due to being viewed as a financially troubled project.

59. Tempe Land Company is entitled to recover its damages according to proof against Mortgages Ltd.

COUNT THREE

(Implied Covenant of Good Faith and Fair Dealing)

60. The allegations of the preceding paragraphs are incorporated herein by reference.

61. There is an implied contractual covenant of good faith and fair dealing in every contract, including the contractual obligations documented in the First Loan Agreement, the Second Loan Agreement, the Guaranties and the additional Guaranties. The implied covenant of good faith and fair dealing not only prohibits each contracting party from doing anything to prevent the other parties to the contract from receiving the benefits and entitlements of the contract but also imposes the duty of good faith performance of the contract. Good faith performance of a contract emphasizes faithfulness to an agreement's common purpose and consistency with the justified expectations of the other parties.

62. In this case, the implied covenant of good faith and fair dealing required Mortgages Ltd. to fully and timely advance the \$150,200,000 Designated Loan Amount set forth in the First Loan Agreement and to fully and timely advance the \$45,000,000 Designated Loan Amount set forth in the Second Loan Agreement.

63. Mortgages Ltd. breached the implied covenant of good faith and fair dealing by failing to fully and timely advance the \$150,200,000 Designated Loan Amount set forth in the First Loan Agreement and by failing to fully and timely advance the \$45,000,000 Designated Loan Amount set forth in the Second Loan Agreement.

1 64. Tempe Land Co. has been damaged as alleged herein by Mortgages Ltd.'s
2 failure to fully and timely advance funds under the First and Second Loan Agreements,
3 and Tempe Land Co. is entitled to recover its damages according to proof caused by
4 Mortgages Ltd.'s breach of the implied covenant of good faith and fair dealing.

5 65. Mortgages Ltd.'s breach of the implied covenant of good faith and fair
6 dealing is a prior material breach which excuses and discharges Tempe Land Co.'s
7 remaining performance obligations under the First Loan Agreement and the Second
8 Loan Agreement.

9 66. Mortgage Ltd.'s breach of the implied covenant of good faith and fair
10 dealing is a prior material breach which excuses, discharges and voids all obligations of
11 Kingston Capital, Graystar Investments, Losch and Dewar under the Guaranties and
12 the Additional Guaranties.

13 **COUNT FOUR**

14 **(Misrepresentations/Omissions/Scheme or Artifice to Defraud)**

15 67. The allegations of the preceding paragraphs are incorporated herein by
16 reference.

17 68. Instead of fulfilling Mortgages Ltd.'s commitment to subordinate its position
18 to new third party financing, Coles, Coles Trust and Mortgages Ltd. (all of which were
19 solely owned and controlled by Coles) determined that it was in their joint interest, and
20 furthered their desire for financial gain, to induce Tempe Land Company to enter into
21 the two "tranche" arrangement established by the Second Loan Agreement.

22 69. To induce Plaintiffs to enter into the Second Loan Agreement rather than:
23 (a) pursuing remedies then available to them for default under the First Loan
24 Agreement, or (b) insisting on subordination to third party financing, Coles, Coles Trust
25 and Mortgages Ltd. knowingly, or alternatively recklessly or negligently misrepresented
26 to Plaintiffs the following material facts which were in fact untrue at the time:

- 27 • That Mortgages Ltd. had the present financial ability to perform
28 under the First and Second Loan Agreements; and

- That Coles and Coles Trust had the present financial ability using their own assets to provide to Mortgages Ltd. the financing necessary for Mortgages Ltd. to perform its funding obligations under the First and Second Loan Agreements.

70. The misrepresentations as to the present financial ability of Mortgages Ltd., Coles and Coles Trust to perform the funding obligations under the First and Second Loan Agreements were knowingly or negligently made or made without actual knowledge of their truth or falsity and in reckless disregard of the truth.

71. In addition, Defendants omitted to advise Plaintiffs of the following known material facts which should have been disclosed in order to avoid making defendants' representations that were actually made not misleading:

- That Mortgages Ltd., Coles and Coles Trust were experiencing a major liquidity crisis, and were unable to fund commitments to numerous other borrowers;
- That Mortgages Ltd.'s usual and typical funding sources for its loan obligations were tapped out, dried up or unwilling to risk additional capital with Mortgages Ltd.;
- That Mortgages Ltd. had sought and was seeking capital from multiple sources who had all recently declined to provide capital to Defendants due to Defendants' precarious financial position.

Defendants had a duty to disclose all of these known material facts to Plaintiffs and they knowingly, recklessly or negligently failed to do so.

72. Defendants knowingly made the misrepresentations and omissions to obtain the benefit of Plaintiffs' consenting and entering into the Second Loan Agreement and Additional Guaranties, instead of Plaintiffs immediately pursuing their remedies for Defendants' default and seeking available third party financing to which Defendants' position would be subordinated.

73. Defendants' conduct constitutes a scheme or artifice to defraud under

1 A.R.S. §13-2310 as well as actionable negligent misrepresentation and negligent
2 omission of material facts.

3 74. Plaintiff Tempe Land Company is entitled to recover its damages according
4 to proof caused by Defendants' misrepresentations and omissions.

5 75. Plaintiffs Kingston Capital, Graystar Investments, Losch and Dewar are
6 entitled to the invalidation of the Guaranties and Additional Guaranties on the basis of
7 Defendants' misrepresentations and omissions.

8 **COUNT FIVE**

9 **(Usury (A.R.S. §44-1202) – Tempe Land Company)**

10 76. The allegations of the preceding paragraphs are incorporated herein by
11 reference.

12 77. Under the First Loan Agreement, Mortgages Ltd. charged Tempe Land
13 Co., and Tempe Land Co. paid Mortgages Ltd., the following up-front loan fees (the
14 "Loan Fees") on closing of the First Loan Agreement.

- 15 A. A loan fee called a "discount amount" which is also commonly
16 called "points" in the amount of \$7,161,000.00;
- 17 B. A loan fee called a "Rev op" fee in the amount of \$1,302,000.00;
- 18 C. A loan fee called a "processing fee" in the amount of \$651,000;
- 19 D. A loan fee called a "construction administration fee" in the amount
20 of \$840,000.00; and
- 21 E. Certain other smaller fees and charges bringing the total amount of
22 loan fees paid up front to approximately \$10,000,000.

23 78. The \$10,000,000 in up front loan fees constitutes interest under A.R.S.
24 §44-1201 which limits interest charged on a loan to the rate of interest the parties
25 agreed would be paid.

26 79. The effective rate of interest, or APR (annual percentage rate) the parties
27 agreed to was 17.82% computed on the basis of the entire \$10,000,000 in loan fees
28 being included in the entire amount Mortgages Ltd. agreed to advance.

1 80. Because Mortgages Ltd. Failed to advance all funds it agreed to advance,
2 the actual rate of interest Mortgages Ltd. charged Tempe Land Co. exceeded the
3 agreed upon 17.82% effective rate of interest.

4 81. A.R.S. §44-1202 provides that if a lender charges a borrower a rate of
5 interest exceeding the rate of interest agreed to, that all interest paid by the borrower to
6 the lender is forfeited.

7 82. Under A.R.S. §44-1202, Mortgages Ltd. must forfeit, and Tempe Land Co.
8 is entitled to recover (1) the entire approximately \$10,000,000 of loan fees paid up front;
9 and (2) all interest paid by Tempe Land Co. or accrued against the loan by Mortgages
10 Ltd.

11 **COUNT SIX**

12 **(Unjust Enrichment – Restitution of Loan Fees – Tempe Land Co.)**

13 83. The allegations of the preceding paragraphs are incorporated herein by
14 reference.

15 84. The acquisition of up-front loan fees as well as interest paid or accrued
16 was wrongful due to Mortgages Ltd.'s defaults, misrepresentations and omissions, and
17 violation of A.R.S. §44-1202.

18 85. Mortgages Ltd. wrongfully obtained excess consideration, and consequent
19 unjust enrichment for its loan for all of the reasons stated above.

20 86. Tempe Land Co. is entitled to restitution in an amount equal to Mortgages
21 Ltd.'s unjust enrichment, in an amount to be determined at trial.

22 **COUNT SEVEN**

23 **(Promissory Estoppel)**

24 87. The allegations of the preceding paragraphs are incorporated herein by
25 reference.

26 88. Mortgages Ltd. promised all Plaintiffs that it would fully and timely fund the
27 full Designated Loan Amounts of \$150,200,000 under the First Loan Agreement and
28 \$45,000,000 under the Second Loan Agreement.

1 89. Defendant knowingly and purposefully induced Plaintiffs' reliance on their
2 promises to fully and timely fund Mortgages Ltd.'s obligations under the First and
3 Second Loan Agreements.

4 90. In rightful reliance on Defendants' promises Plaintiffs (1) entered into the
5 First and Second Loan Agreements, the Guaranties and the Additional Guaranties; did
6 not pursue other available avenues of funding; made numerous commitments related to
7 their commencement of construction of the Centerpoint Project and paid approximately
8 \$10 million of up-front loan fees to Mortgages Ltd.

9 91. Defendants breached their promises to fully and timely advance funds
10 under the First and Second Loan Agreements, and Plaintiffs suffered detrimental
11 reliance which entitles them to appropriate remedies for promissory estoppel including
12 damages according to proof and judicial relief invalidating the Guaranties, the
13 Additional Guaranties and all remaining performance obligations under the First and
14 Second Loan Agreements.

15 **COUNT EIGHT**

16 **(Declaratory Judgment - Invalidation of Guaranties and** 17 **Additional Guaranties - Kingston Capital, Graystar Investments, Losch and** 18 **Dewar)**

19 92. The allegations of the preceding paragraphs are incorporated herein by
20 reference.

21 93. Plaintiffs Kingston Capital, Graystar Investments, Losch and Dewar gave
22 their guaranties in consideration of Mortgages Ltd's promises to advance loan funds
23 under the First Loan Agreement and the Second Loan Agreement.

24 94. There has been a failure of consideration for the Guaranties because
25 Mortgages Ltd. breached its funding obligations under the First and Second Loan
26 Agreements.

27 95. In addition, Mortgages Ltd. committed a prior material breach of contract
28 by failing to provide loan funds as required by the First and Second Loan Agreements.

1 96. In addition, the Guaranties and Additional Guaranties are voidable due to
2 Defendants' material misrepresentations and omissions as alleged in Count Three
above.

3 97. On information and belief, Mortgages Ltd. contends that the Guaranties
4 and Additional Guaranties are in full force and effect, notwithstanding Mortgages Ltd.'s
5 prior material breach, the failure of consideration for those guaranties, and Defendants'
6 material misrepresentations and omissions.

7 98. Plaintiffs Kingston Capital, Graystar Investments, Losch and Dewar are
8 entitled to a declaratory judgment establishing that all the Guaranties and Additional
9 Guaranties are void, discharged, and of no further force and effect due to failure of
10 consideration, Mortgages Ltd.'s prior material breach of its contractual obligations, and
11 Defendants' material misrepresentations and omissions.

12 **COUNT NINE**

13 **(Pattern of Unlawful Conduct – Civil Remedy Under Arizona Racketeering Act,**
14 **A.R.S. §13-2401 et. seq.)**

15 99. The allegations of the preceding paragraphs are incorporated herein by
16 reference.

17 100. On information and belief, the allegations in the following pleadings filed in
18 other actions ("Other Lawsuit Claims") are substantially true in substance and in fact.

- 19 A. Complaint in Rightpath Limited Development Group, LLC, et al. v.
20 Mortgages Ltd., et al., No. CV2008-011878, Maricopa County,
21 Arizona, Superior Court;
- 22 B. Complaint in Central Phx Partners, LLC, et al. v. Mortgages Ltd.,
23 No. CV2008-006907, Maricopa County, Arizona, Superior Court;
- 24 C. Answer in Mortgages Ltd. v. Windes, et al., No. CV2004-008371,
25 Maricopa County, Arizona, Superior Court;
- 26 D. Answer and Counterclaim in Mortgages Ltd. v. Hospitality Plus,
27 LLC, et al., No. CV99-06188, Maricopa County, Arizona, Superior

Court;

1 E. Third Amended Complaint in Covenant Christian Center,
2 International, Inc. v. Mortgages Ltd., et al., pending as adversary
3 proceeding No. 2: 07-AP-00055-CGC in In Re Covenant Christian
4 Center, International, Inc., No. 2:06-bk-02386-CGC, United States
5 Bankruptcy Court for the District of Arizona.

6 101. On information and belief, based on the Other Lawsuit Claims, Mortgages
7 Ltd., Coles and Coles Trust constitute an enterprise as defined by A.R.S. §13-2301.D.2.
8 Said enterprise is and was controlled by Mortgages Ltd., Coles and Coles Trust.

9 102. For purposes of financial gain, Defendants procured benefits through a
10 pattern of unlawful activity chargeable or indictable under the laws of the State of
11 Arizona and punishable under those laws by imprisonment for more than one year
12 involving (a) a scheme or artifice to defraud and (b) usury.

13 103. On information and belief, based on the Other Lawsuit Claims, that pattern
14 of unlawful activity included (1) knowingly making misrepresentations or omissions of
15 material fact regarding Mortgages Ltd.'s ability to fully and timely fund loans at time
16 when it knew it could not do so in order to induce borrowers to enter into lending
17 transactions and relationships with Mortgages Ltd. under which they paid Mortgages
18 Ltd. large loan fees and provided Defendants other gains and benefits; and (2)
19 unlawfully entering into usurious loan transactions.

20 104. On information and belief and based on the Other Lawsuit Claims, the
21 pattern of unlawful activity included two or more continuous and related wrongful acts,
22 the last of which occurred within five years of a prior unlawful act that constitutes part of
23 the pattern of unlawful conduct.

24 105. Plaintiffs have suffered reasonably foreseeable injury to their business and
25 property caused by the pattern of unlawful activity.

26 106. Plaintiffs are entitled to pursue their statutory remedies under A.R.S. §13-
27 2314.04.A including recovery of up to treble damages costs, attorneys' fees and

Guaranties issued by Kingston Capital, Graystar Investments,
Losch and Dewar.

WHEREFORE, Plaintiffs pray for judgment against Mortgages Ltd. as follows:

- A. For an award of damages according to proof in favor of Plaintiff Tempe Land Company;
- B. For declaratory relief as prayed for herein in favor of Plaintiffs Tempe Land Company, Kingston Capital, Graystar Investments, Losch and Dewar;
- C. For a restitutionary award to Tempe Land company of all loan fees paid to Mortgages Ltd., together with prejudgment and post judgment interest thereon from the time said fees were paid;
- D. For statutory relief including an award of up to treble damages pursuant to A.R.S. § 13-2314.04.A;
- E. For preliminary and permanent injunctive relief as prayed for herein favor of all Plaintiffs;
- F. For an award of Plaintiffs' attorneys fees, costs and litigation expenses, including expert witness fees; and
- G. For such other and further relief as the Court deems proper.

RESPECTFULLY SUBMITTED this _____ day of July, 2008.

MORRILL & ARONSON, P.L.C.

By

Martin A. Aronson
John T. Moshier
One East Camelback Road
Suite 340
Phoenix, AZ 85012-1648
Attorneys for Plaintiffs Tempe Land
Company, et al.

COPY hereof served on
Arizona Attorney General per

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VERIFICATION

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STATE OF ARIZONA }
County of Maricopa }

I, KENNETH K. LOSCH, under penalty of perjury, solemnly declare as follows:

That I am one of the Plaintiff herein;

That I have read the foregoing Verified Complaint and that the allegations therein are true in substance and in fact to the best of my knowledge, information and belief.

Pursuant to Rule 80(i), Ariz.Civ.P., I solemnly declare under penalty of perjury that the foregoing is true and correct.

Executed on this _____ day of July, 2008.

KENNETH K. LOSCH