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*Charles A. and Eileen M. McLane,*  
15 *and Joel B. and Donna L. Kramer*

16 **IN THE UNITED STATES BANKRUPTCY COURT**

17 **THE DISTRICT OF ARIZONA**

18 In re:

19 Mortgages Ltd.,

20 Debtor.

Chapter Proceedings

Case No. 2:08-bk-07465-RJH

21  
22  
23 VICTIMS RECOVERY, LLC, an Arizona  
limited liability company,

24 Plaintiff,

25 GREENBERG TRAURIG LLP, et al.

26 Defendants.

Adversary Case No. 2:10-ap-01214-RJH

**REPLY IN SUPPORT OF MOTION  
TO STAY PROCEEDINGS  
PENDING COMPLIANCE WITH  
DISPUTE-RESOLUTION  
PROCEDURES**

1 Defendants CBIZ, Inc. and CBIZ MHM, LLC (jointly "CBIZ"), and Mayer Hoffman  
2 McCann, P.C. ("Mayer Hoffman"), Charles A. and Eileen M. McLane, and Joel B. and  
3 Donna L. Kramer hereby submit this reply in support of their Motion to Stay Proceedings  
4 Pending Compliance with Dispute-Resolution Procedures.

5 **ARGUMENT**

6 In its Response to Motion to Stay Proceedings, Plaintiff Victims Recovery, LLC  
7 ("VR") appears to make three arguments: (1) that the Account Agreements and Ninth  
8 Circuit law prohibit a non-signatory from compelling a signatory to comply with  
9 contractually-mandated dispute-resolution procedures; (2) that Defendants must show  
10 hardship before this Court may issue a stay pending compliance with dispute-resolution  
11 procedures; and (3) that Defendants have waived their right to the dispute-resolution  
12 procedures by failing to initiate those procedures themselves. Each of these arguments is  
13 incorrect.

14 **A. Defendants May Enforce the Dispute-Resolution Procedures.**

15 1. **The Dispute-Resolution Procedures Are Not Limited to Claims**  
16 **Between the Parties to the Subscription Agreement.**

17 Citing sections 8(d)(ii) through (iv) of the Account Agreements, VR first argues that  
18 only disputes between parties to the Agreements are subject to the contractual dispute-  
19 resolution procedures. Sections 8(d)(ii) through (iv), however, only identify the obligations  
20 of the parties to the Agreements once a covered dispute arises.<sup>1</sup> They do not define  
21 covered disputes. Section 8(d)(i) of the Account Agreements identifies what disputes are  
22 subject to the dispute-resolution procedures:

23 This section applies to any controversy or claim arising from, relating to, or in  
24 any way connected with this Agreement, the Offering, the Loans, the Agency  
25 Agreement, and any other documents relating to the loans.

26 (Account Agreements at 8(d)(i).) There is no requirement that the controversy or  
27 claim be between the parties to the Agreements. The claim or controversy need only relate

28 <sup>1</sup> As discussed more fully below, while the procedures outlined in sections 8(d)(ii) through (iv) do only apply to the parties to the Account Agreements, non-signatory Defendants may compel VR to comply with those procedures.

1 to the Agreements, the Offering, or the loans. (*Id.*) Because VR's claims all arise from the  
2 audited financial statements, appended to and incorporated by the Private Offering  
3 Memorandum ("POM"), the claims are subject to the dispute-resolution procedures.

4 The cases cited by VR are not to the contrary. In *Aerisa, Inc. v. Plasma-Air*  
5 *International*, the parties to a contract agreed to submit to arbitration "any dispute *between*  
6 *them* arising out of or relating to this Agreement." No. CV 08-227-PHX-NVW, 2008 WL  
7 5210842, at \*1 (D. Ariz. Dec. 11, 2008) (emphasis added). Because the clause only  
8 covered disputes "between them"—the parties to the agreement—the provision did not, "on  
9 its face, extend to any dispute between Aerisa and the other, non-signatory defendants." *Id.*  
10 Likewise, in *Charles Schwab & Co., Inc. v. Reaves*, the arbitration provision was limited in  
11 coverage to claims between Schwab and the account holder.

12 You . . . and Schwab agree to settle by arbitration any controversy *between or*  
13 *among you . . . us* and/or any of our parents, subsidiaries, affiliates, officers,  
directors, employees or agents relating to the Account Agreement . . .

14 No. CV-09-2590-PHX-MHM, 2010 WL 447370, at \*4 (D. Ariz. Feb. 4, 2010)  
15 (emphasis added). As was the case with the arbitration provision in *Aerisa*, the *Schwab*  
16 arbitration provision expressly limited covered claims to those "between or among you [the  
17 account holder] [and] us [Schwab]." *Id.* No such limiting language appears in the Account  
18 Agreements. Therefore, the Agreements require the application of the dispute-resolution  
19 procedures to VR's claims.

20 2. In Any Event, VR Is Equitably Estopped from Refusing to Abide by  
21 the Dispute-Resolution Procedures.

22 VR argues that, because Defendants are not signatories to the Account Agreements,  
23 Ninth Circuit law prohibits them from enforcing the dispute-resolution procedures against  
24 VR absent an agency relationship with one of the signatories. (Response at 9.) VR's  
25 argument on this point confuses two circumstances that are very different. Here, a non-  
26 signatory seeks to compel a signatory to comply with dispute-resolution procedures. A  
27 non-signatory may equitably estop a signatory from refusing to comply with dispute-  
28 resolution procedures in broad circumstances, including where the signatory raises

1 allegations of “substantially interdependent and concerted misconduct by both the  
2 nonsignatory and one or more signatories to the contract.” *Hawkins v. KPMG LLP*, 423 F.  
3 Supp. 2d 1038, 1050 (N.D. Cal. 2006). This makes sense because the person against whom  
4 the dispute-resolution procedures are being enforced signed the agreement containing them  
5 and agreed to abide by them.

6 By contrast, VR relies on cases, unlike this one, where signatories attempt to *compel*  
7 *non-signatories* to comply with dispute-resolution procedures. The standard is obviously  
8 different when the person against whom the dispute-resolution procedures are being  
9 enforced did not sign the agreement containing them or otherwise agree to abide by them.  
10 *See Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009)  
11 (vacating arbitration award in which arbitrator attempted to bind non-party relatives of a  
12 signatory to the agreement); *Comer*, 436 F.3d at 1101 (refusing to allow Smith Barney—a  
13 signatory to an agreement with an arbitration provision—to enforce an arbitration  
14 agreement against a non-signatory); *Able Distrib. Co., Inc. v. James Lampe, General*  
15 *Contractor*, 773 P.2d 504, 515 (Ariz. App. 1989) (recognizing that signatory to arbitration  
16 agreement could not require non-signatory to arbitrate). Cases involving enforcement by a  
17 signatory against a non-signatory therefore are inapplicable.

18 The only other cases cited by VR support Defendants’ position, not VR’s. In *Mundi*  
19 *v. Union Security Life Insurance Co.*, 555 F.3d 1042 (9th Cir. 2009), the Ninth Circuit  
20 considered whether a non-signatory to an equity-line-of-credit agreement could enforce the  
21 arbitration provision in that agreement. The non-signatory was a party to an insurance  
22 certificate that the plaintiff had taken out to cover the line of credit. While the insurance  
23 certificate was tangentially related to the line of credit, the certificate was not referred to in  
24 the line-of-credit agreement, and the plaintiff had not alleged any concerted action between  
25 the bank issuing the line of credit and the issuer of the insurance certificate. Because of the  
26 attenuated relationship between the issuer’s conduct and the equity line of credit itself, the  
27 arbitration provision did not apply.

1 The resolution of [plaintiff's] claim does not require the examination of any  
2 provisions of the EquityLine Agreement. The EquityLine Agreement does  
3 not mention the insurance certificate, let alone incorporate it by reference . . .  
4 [Plaintiff's] claim is based solely on USLIC's actions, and there are no  
allegations of collusion or of misconduct by . . . the signatory to the  
arbitration agreement."

5 *Id.* at 1047.

6 Thus, contrary to VR's assertion, *Mundi* does not stand for the proposition that a  
7 non-signatory cannot enforce a dispute-resolution provision against a signatory. (Response  
8 at 7.) *Mundi* expressly recognizes two circumstances in which a non-signatory may compel  
9 a signatory to comply with contractual dispute-resolution procedures: (1) when the  
10 agreement containing the dispute-resolution procedures references or incorporates the  
11 document forming the basis of the plaintiff's claim; and (2) when the plaintiff alleges  
12 collusion or concerted misconduct between a signatory and the non-signatory defendant.  
13 *Id.* (citing *American Bankers Ins. Group v. Long*, 453 F.3d 623, 630 (4th Cir. 2006)). The  
14 only reason that the non-signatory in *Mundi* could not enforce the dispute-resolution  
15 provision was because those circumstances were absent. *Id.* But here they are indisputably  
16 present.

17 The other cases VR cites also recognize that when a document that forms the basis of  
18 a plaintiff's claim is incorporated into the arbitration agreement or when collusion is  
19 asserted, enforcement of the dispute-resolution procedures against the signatory is  
20 appropriate. *See Hawkins*, 423 F. Supp. 2d at 1050 (recognizing that enforcement of  
21 dispute-resolution procedures by non-signatory is appropriate when the signatory raises  
22 allegations of "substantially interdependent and concerted misconduct by both the  
23 nonsignatory and one or more of the signatories to the contract"); *Sokol Holdings, Inc. v.*  
24 *BMB Munai, Inc.*, 542 F.3d 354, 361 (2d Cir. 2008) (recognizing that signatory is estopped  
25 from refusing to comply with dispute-resolution procedures when non-signatory  
26 defendant's conduct "was intertwined" with the contract providing for arbitration). In those  
27 cases, like *Mundi*, the requisite connection between the non-signatory's alleged conduct and  
28 the agreement with the dispute-resolution provision was simply absent. *Hawkins*, 423 F.

1 Supp. 2d at 1049 (allegations of plaintiff's fraud claim were "wholly independent of any  
2 wrongdoing associated" with contract containing dispute-resolution procedure or one of its  
3 signatories); *Sokol*, 542 F.3d at 362 (finding that there was not a sufficient relationship  
4 between any signatory and the non-signatory defendant to compel arbitration). Contrary to  
5 VR's contention, none of these cases stands for the proposition that Defendants may not  
6 compel VR to comply with the dispute-resolution procedures under circumstances where a  
7 plaintiff alleges collusion or concerted misconduct between a signatory and the non-  
8 signatory defendant relating to the agreement containing the dispute-resolution procedure.

9 As set out more fully in Defendants' Motion to Stay, VR's claims are both based on  
10 a document that is incorporated by reference in the Account Agreements and allege  
11 collusion between Defendants and Mortgages Ltd., one of the signatories to the Agreement.  
12 VR alleges that the Defendants made false statements in audited financial statements that  
13 were incorporated into the POM and that the Defendants "intentionally and willfully acted  
14 in concert with . . . the wrongful acts of MLtd. . . . pursuant to a common plan or scheme."  
15 (Compl. ¶¶ 27, 72.) This is precisely the kind of concerted conduct that allows a non-  
16 signatory to compel a signatory to comply with dispute-resolution procedures. See  
17 *American Bankers*, 453 F.3d at 630 (allowing non-signatory to compel signatory's  
18 compliance with dispute-resolution procedures where signatory's claims depended on a  
19 document incorporated by reference into the agreement containing the dispute-resolution  
20 provision); *Denney v. BDO Seidman, LLP*, 412 F.3d 58, 70 (4th Cir. 2005) (allowing non-  
21 signatory bank to enforce arbitration agreement against plaintiff where plaintiff alleged  
22 bank acted in concert with other signatory to fraudulently induce plaintiff to invest);  
23 *Hansen v. KPMG LLP*, No. CV 04-10525-GLT, 2005 WL 6051705, at \*2-3 (C.D. Cal.  
24 March 26, 2005) (same); *Chew v. KPMG LLP*, 407 F. Supp. 2d 790, 793-94 (S.D. Miss.  
25 2006) (allowing independent auditors—non-signatories to the agreement containing the  
26  
27  
28

1 dispute-resolution procedures—to enforce those procedures because plaintiffs alleged the  
2 auditors were involved in another signatory’s scheme to defraud plaintiffs.<sup>2</sup>

3 **B. Defendants Do Not Need to Show a Clear Case of Hardship.**

4 Citing *George Kessel International, Inc. v. Classic Wholesales, Inc.*, 544 F. Supp. 2d  
5 911 (D. Ariz. 2008), VR also claims that Defendants must show a “clear case of hardship”  
6 to justify a stay pending compliance with dispute-resolution procedures. *George Kessel*  
7 stands for the general proposition that a court has inherent power to issue a stay. *Id.* at 912.  
8 That case, however, addressed a stay pending the reexamination of a patent, and the specific  
9 requirements set forth by *George Kessel* are limited to that context. *Id.* at 913 (setting forth  
10 factors court should consider “[i]n deciding whether to stay litigation pending patent  
11 reexamination”).

12 In contrast to discretionary stays such as in the case of patent reexaminations, a  
13 signatory’s obligation to arbitrate is contractual and does not depend on a court’s inherent  
14 powers. *Mundi*, 555 F.3d at 1044. Once a court determines that the issues involved are  
15 referable to contractually-mandated dispute-resolution procedures, the court must stay the  
16 proceedings. *See, e.g., Meritage Homes Corp. v. Hancock*, 522 F. Supp. 2d 1203, 1210-11  
17 (D. Ariz. 2007) (holding that Federal Arbitration Act requires a stay or dismissal pending  
18 compliance with contractually-mandated arbitration procedures). In any event, even if  
19 harm were a consideration, the Ninth Circuit has recognized that requiring a party to  
20 arbitrate a claim does not constitute substantial harm. *Camping Construction Co. v. District*  
21 *Council of Iron Workers of the State of Cal. and Vicinity*, 915 F.2d 1333, 1349 (9th Cir.  
22 1990).

23 **C. Defendants Were Not Required to Initiate the Dispute-Resolution**  
24 **Procedures.**

25 VR’s final argument is that Defendants waived their rights to compel compliance  
26 with the dispute-resolution procedures by failing to comply with them. “A party seeking to

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27 <sup>2</sup> Contrary to VR’s claim, *Chew* was not “sharply criticized” by *Goldman v. KPMG*  
28 *LLP*, 92 Cal. Rptr. 534 (Cal. App. 2009). Rather, the court in *Goldman* simply stated that  
the analysis from *Chew* did not “add[] anything to, or detract[] from, the analysis in the  
text.” *Id.* At 546 n. 8.

1 prove waiver of a right to arbitrate must demonstrate (1) knowledge of an existing right to  
2 compel arbitration; (2) acts inconsistent with that right; and (3) prejudice to the party  
3 opposing arbitration resulting from inconsistent acts.” *Britton v. Co-op Banking Group*,  
4 916 F.2d 1405, 1412 (9th Cir. 1990). “Because waiver of the right to arbitration is  
5 disfavored, ‘any party arguing waiver of arbitration bears a heavy burden of proof.’” *AZ*  
6 *Holding, LLC v. Frederick*, No. CV-08-0276-PHX-LOA, 2010 WL 500443, at \*4 (D. Ariz.  
7 Feb. 10, 2010) (quoting *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir.  
8 1986)). Courts in the Ninth Circuit generally find waiver only when a party chooses to  
9 litigate a matter rather than assert its right to arbitrate. See *Global Sec. & Comms., Inc. v.*  
10 *AT&T*, 191 F.3d 460 (Table), 1999 WL 513873, at \*2 (9th Cir. 1999) (collecting cases).

11 There are no such circumstances present here. Defendants filed their Motion to Stay  
12 Pending Compliance with Dispute-Resolution Procedures contemporaneously with their  
13 Motion to Dismiss. Such actions do not indicate a desire to litigate that is inconsistent with  
14 Defendants’ right to use alternative dispute resolution. *Id.* All VR can point to in response  
15 is the fact that Defendants did not seek mediation within 60 days of VR filing its  
16 Complaint. (Response at 9.) The obligation to pursue mediation and ultimately arbitration,  
17 however, remains with the party “wish[ing] to pursue a claim or controversy,” not the party  
18 defending against such a claim. (Account Agreements at Section 8(d)(iii).) Because  
19 Defendants have not pursued any claims against VR, they were not obligated to initiate the  
20 dispute-resolution procedures. It was VR that was required to do so. VR’s argument falls  
21 far short of carrying the “heavy burden” of proving waiver. *AZ Holding*, 2010 WL 500443,  
22 at \*4.

### 23 CONCLUSION

24 For the reasons set forth in their Motion to Stay and those set forth above, defendants  
25 CBIZ, Inc., CBIZ MHM, LLC, Mayer Hoffmann McCann, P.C., Charles and Eileen  
26 McLane, and Joel and Donna Kramer respectfully request that the Court stay all  
27 proceedings in this matter until completion of contractually-required dispute-resolution  
28 procedures.



1 DATED September 27, 2010.

2 Respectfully submitted,

3 By: /s/ Katherine V. Brown

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 27, 2010, I electronically transmitted the attached  
3 document to the Clerk's office using the CM/ECF System for filing and transmittal of a  
4 Notice of Electronic Filing to the CM/ECF registrants. I further certify that I served the  
5 attached document by U.S. mail on the following who are not registered participants of the  
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