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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

**ML MANAGER LLC'S MOTION FOR
ATTORNEYS' FEES AND COSTS RE
REV OP GROUPS' MOTION FOR
CLARIFICATION AND RELATED
JOINDERS**

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16 ML Manager LLC ("ML Manager") hereby moves for an award of its attorneys'
17 fees and costs the Rev Op Group as identified in the original motion and Sternberg
18 Enterprises Profit Sharing Plan ("Sternberg"), and their counsel, (collectively the "Rev Op
19 Group") in an amount reflecting the fees and costs incurred by ML Manager in
20 unnecessarily responding to the Rev Op Group's Emergency Motion to Clarify (Doc. No.
21 2168) (the "Motion") and related joinders filed by Sternberg (the "Joinders").

22 ML Manager in turn filed a Response to the Motion (Doc. No. 2265) and to the
23 Joinders (Doc. No. 2269) and requested attorneys' fees and costs. A hearing was held on
24 October 8, 2009 (Doc. No. 2279) and this Court issued its Memorandum Decision (Doc.
25 No. 2323) on October 21, 2009, which was amended on October 21, 2009 (Doc. No.
26 2338), and its Order (Doc. No. 2345) on October 28, 2009. On October 30, 2009, Rev Op

1 Group (Doc. No. 2353) and Sternberg (Doc. No. 2323) moved the Court to reconsider the
2 Memorandum Decision and Order. On November 4, 2009, this Court denied both
3 motions (Doc. No. 2369) and on November 18, 2009, the Rev Op Group filed its notice of
4 appeal (Doc. No. 2401).

5 By its conduct, the Rev Op Group has abused the bankruptcy process by
6 multiplying litigation for an improper purpose, introducing frivolous arguments and
7 impermissibly and disingenuously attempting to alter or modify the Investor Committee's
8 confirmed Plan well after its confirmation date of May 20, 2009 and outside any statutory
9 framework allowing for such change. The Rev Op Group sought and seeks to stymie the
10 effective implementation of the Plan and filed the denied Motion, Joinders and subsequent
11 pleadings to intimidate ML Manager and to undermine the authority it possesses
12 necessary to successfully carry out the terms and conditions of the Plan.

13 LEGAL ANALYSIS

14 Section 105 of the Bankruptcy Code grants broad powers to implement the
15 provisions of Title 11 and to prevent abuse of process. *See In re Rainbow Magazine, Inc.*,
16 77 F.3d at 2854-85 (finding that the Debtor's principal had engaged in egregious conduct
17 which abused the bankruptcy process in bad faith and stating that "there can be little doubt
18 that bankruptcy courts have the inherent power to sanction vexatious conduct presented
19 before the court." In *Rainbow Magazine*, the Ninth Circuit Court of Appeals interpreted
20 § 105 to allow a bankruptcy court "to prevent an abuse of process" and to sanction bad
21 faith or vexatious conduct that does not fall within the purview of Rule 9011 or 11 U.S.C.
22 § 1927.¹ *Id.* at 283-85; *see also Pacific Harbor Capital*, 210 F.3d 1112, 1124 (9th Cir.

24 ¹ 28 USC § 1927. Counsel's liability for excessive costs:

25 Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who
26 so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy
personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

1 2000) (stating that a court “needs” the inherent power in order to “punish and deter
2 frivolous arguments.”); *In re Volpert*, 110 F.3d 494, 500 (7th Cir. 1997), *In re Rimsat*,
3 *LTD.*, 212 F.3d 1039 (7th Cir. 2000); and *Dressler v. Seeley. (In re Silberkraus)*, 253 B.R.
4 890 (Bankr. C.D. Cal. 2000). In *In re Silberkraus*, the debtor was sanctioned for, among
5 other things, having filed for the frivolous and improper purpose of avoiding pending state
6 court litigation while being solvent on the petition date. 253 B.R. at 905-06.

7 The purpose for sanctions is to deter abusive conduct. The *Silberkraus* court
8 succinctly stated that “[t]he only effective way to deter filing and prosecuting bankruptcy
9 cases in bad faith is to impose monetary sanctions against both the [parties and] counsel
10 who do this.” 233 B.R. at 912. The court reasoned further as follows: “[a]warding
11 sanctions to pay some or even all the attorney fees a creditor expends defending its
12 position in a bankruptcy filed in bad faith does not get the creditor ahead. In fact such an
13 attorneys fee award does not even get the creditor even, because the creditor is not
14 compensated for the time value of the delay caused by the bankruptcy case.” *Id.* at 913.
15 The court continued: “attorneys have every incentive to continue filing and prosecuting
16 petitions in bad faith because [clients] pay these attorneys legal fees for doing so” and that
17 severe monetary sanctions are the only way to deter this bad faith conduct. *Id.*
18 Furthermore, the express language of Rule 9011 clearly contemplates sanctions against
19 persons other than the signing attorney. The Ninth Circuit Court of Appeals has stated
20 that “Rule 9011 allows a bankruptcy court to sanction attorneys, parties, and individuals

21 The courts are split as to whether Section 1927 is available to bankruptcy courts. *In re Courtesy Inns*, 40 F3d 1084,
22 12 Colo Bankr Ct Rep 76, 26 BCD 355, 32 CBC2d 498, 1994 (10th Cir. Colo. 1994) (holding that case law is clear
23 that Section 1927 is not applicable in bankruptcy cases because a bankruptcy court is not a "court of the United
24 States.") contra *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90 (3d Cir. N.J. 2008) (holding that bankruptcy court
25 was not "court of the United States" under Section 1927 and 28 U.S.C.S. § 451, a matter on which courts were split,
26 the court of appeals held "but was a unit of the district court. The district court's delegation of authority under 28
U.S.C. § 157 authorized the bankruptcy court to impose § 1927 sanctions." The 9th Circuit, however, has held that
the bankruptcy court does not have the power to impose a Section 1927 sanction. *Miller v. Cardinale (In re DeVille)*,
361 F.3d 539, 546 (9th Cir. Cal. 2004). Counsel recognizes that the Court may be bound by the 9th Circuit law,
however, because there is a split in the Circuits on this issue, counsel raises the issue to preserve it on appeal.

1 that file bad-faith documents before the court.” *Rainbow Magazine*, 77 F.3d at 282.

2 In the alternative, ML Manager requests attorneys fees and costs as a matter of
3 contract law and pursuant to ARS 12-341.01. Further, the Confirmed Plan may be
4 considered a contract from which attorneys fees may be awarded. See e.g. *Official*
5 *Creditors Comm. Of Stratford, Inc. v. Strafford Inc. (In re Stratford)*, 635 F.2d 365, 368
6 (5th Cir. 1981); and *Hillis Motors, Inc. v. Hawaii Auto. Dealers’ Assn*, 997 F.2d 581 (9th
7 Cir. 1993) both finding that a reorganization plan resembles a consent decree, and
8 therefore should be construed primarily as a contract. See also, *In re Mansfield Tire &*
9 *Rubber Co.*, 152 B.R. 477 (Bankr. N.D. Ohio 1993) holding that a plan creates legally
10 enforceable rights upon confirmation.

11 **APPLICATION**

12 Following *Rainbow Magazine* and *Silberkraus* and other legal bases, this Court
13 should order that ML Manager is entitled to its fees and costs in the respective amounts of
14 \$24,745.05 and \$2,013.20, totaling \$26,758.25. Filed simultaneously is the declaration of
15 Cathy Reece setting forth the fees and costs incurred. The Motion and Joinders filed by
16 the Rev Op Group were frivolous, groundless, unreasonable and filed for an improper
17 purpose. The Motion and subsequent pleadings, although cleverly disguised and
18 prosecuted as a motion to clarify, clearly sought to do that which was prohibited by 11
19 U.S.C. § 1127 – modify an order of plan confirmation. The Motion and related pleadings
20 were not only filed in bad faith but in an attempt to harass ML Manager and waste
21 valuable time and resources.

22 Prior to confirmation of the Plan, all objections were resolved, no appeals were
23 filed and no motions to alter or amend the Confirmation Order were filed. Even the
24 Rev Op Group withdrew its objection to confirmation. Thereafter, the Confirmation
25 Order and Plan, pursuant Section 1141 of the Bankruptcy Code, became binding on all the
26 parties, including the Rev Op Group. See *In re Heritage Hotel Partnership I*, 160 B.R.

1 374, 375-77 (B.A.P. 9th Cir. 1993) (holding that “[i]t is now well-settled that a
2 bankruptcy court’s confirmation order is a binding, final order, accorded full *res judicata*
3 effect and precludes the raising of issues which could or should have been raised during
4 the pendency of the case...”); *In re Wolfberg*, 255 B.R. 879 (B.A.P. 9th Cir. 2000)
5 (holding that the principle of strictly applying *res judicata* to preclude litigation of issues
6 that could of or should been litigated prior to plan confirmation is broadly applied).

7 Since the Plan became effective on June 15, 2009, the Plan has been implemented
8 and substantially consummated. Among other things, the articles and bylaws of
9 Mortgages Ltd were amended, ML Manager LLC and 48 Loan LLCs were formed, the old
10 stock cancelled and the new stock issued to the ML Liquidating Trust, the Exit Financing
11 Loan was closed and funded and the interests of the 9 MP Funds, Mortgages Ltd and
12 various pass-through investors have been transferred into the Loan LLCs.

13 Despite all of the above, the Rev Op Group made belated and untimely Plan
14 objections, which this Court held were procedurally improper. The other issues raised for
15 “clarification” were either not ripe or were moot, which this Court also held. The Motion
16 and Joinders did not present a single debatable issue.

17 The Rev Op Group is represented by a seasoned bankruptcy lawyer that knew or
18 should have known the pleadings were procedurally improper, barred by the law of the
19 case, principles of *res judicata* and equitable estoppel, and/or were substantively without
20 merit. The Motion and Joinders had the effect of needlessly multiplying litigation,
21 harassing ML Manager, increasing costs and simply wasting valuable time and resources.
22 As argued in other pleadings, the Motion and Joinders have also had a chilling effect on
23 negotiations with borrowers.

24 The conduct of the Rev Op Group must not be rewarded by the Court. To prevent
25 similar and continued conduct by these claimants and to prevent an unreasonable
26 diminution of the estate to the detriment of worthy investors and claimants, the Court

1 must require payment for impermissible conduct. Ignoring the vexatious conduct will
2 only pave the way for future antics and take limited funds out of the pockets of claimants.

3 **PRAYER**

4 For the forgoing reasons, ML Manager respectfully requests an award of its
5 attorneys' fees and costs in the amount of \$26,758.25 against the Rev Op Group and its
6 counsel and for other relief as the Court sees just.

7 RESPECTFULLY SUBMITTED this 18th day of November, 2009.

8 FENNEMORE CRAIG, P.C.

9
10 By /s/ Cathy L. Reece
11 Cathy L. Reece
Keith L. Hendricks
Attorneys for ML Manager LLC

12 COPY of the foregoing
13 transmitted electronically this
14 18th day of November, 2009,
to the parties on the Service List.

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16 By /s/ Nikki Nolund
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