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9 **IN THE UNITED STATES BANKRUPTCY COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 In re:
12 MORTGAGES LTD.,

13 Debtor.

In Proceedings Under Chapter 11
Case No. 2:08-bk-07465-RJH

**RESPONSE TO THE MOTION TO
REMOVE WILLIAM HAWKINS
FROM THE BOARD OF THE ML
MANAGER LLC**

Hearing Date: 1/11/2010
Hearing Time: 3:00 p.m.

18 This Response is filed by the Rev Op investors who collectively hold
19 approximately \$58.4 million in Rev Op investments (collectively, the “**Rev Op Group**”)
20 and the Sternberg Enterprises Profit Sharing Plan, in opposition to the ML Manager’s
21 Emergency Motion For Order Concerning Removal Of William Hawkins From The
22 Board of Managers dated November 25, 2009 (the “**Removal Motion**”). This Response
23 is supported by the declaration of William Hawkins filed contemporaneously herewith
24 (the “**Hawkins Decl.**”) and the entire record before the Court in the chapter 11
25 proceeding of Mortgages Ltd. (“**ML**”).

26 **INTRODUCTION**

27 1. At some point in time, the ML Manager and its counsel will need to realize
28 they simply cannot file motions seeking relief without any basis in law or fact. The

1 Removal Motion represents the second time in a week that they have filed such a motion
2 with this Court.

3 2. The first time, the ML Manager filed a motion seeking to sanction the Rev
4 Op Group and its counsel for filing a motion to clarify the plan and confirmation order.¹
5 The Court denied that motion without a hearing. This time, the ML Manager has
6 attacked Mr. Hawkins – the designated board member of all Rev Op investors – on the
7 hope that the Court will remove him from the board of the ML Manager. In so doing, the
8 ML Manager board members who supported the filing of the Removal Motion obviously
9 hope to gain total control of the board to the exclusion of the Rev Op investors’ board
10 designee, Mr. Hawkins.

11 3. When the invective is stripped out of the Removal Motion, the ML
12 Manager is left with an argument that Mr. Hawkins should be removed from the board
13 because certain of his actions as an investor – not as a board member – are in conflict
14 with positions taken by the majority of the board. Namely, Mr. Hawkins is the business
15 representative of a number of entities that joined in the filing of a motion to clarify the
16 plan and has an appeal pending before this Court.² These are not a legitimate reasons to
17 remove Mr. Hawkins from the board.

18 4. While it was not disclosed in the Removal Motion, the ML Manager’s
19 board has already adopted a conflicts procedure *and* is following that procedure, so that
20

21 ¹ See Sanctions Motion dated November 18, 2009. [DE #2415]

22 ² While the Removal Motion makes it appear that the clarification motion was some
23 sort of overtly hostile act taken against the ML Manager, it was in fact a motion designed
24 to seek clarification of a number of issues under the plan in a legitimate fashion, many of
25 which should have been uncontroversial. Clearly, Mr. Hawkins, as a representative of
26 entities that joined in the filing of the clarification motion, is not in a conflict situation
27 with respect to all of the issues raised in that motion. The conflicts basically boil down to
28 the pending appeal regarding the exit financing and a disagreement over the extent of the
ML Manager’s authority with respect to pass-through investors who did not transfer their
interests into the Loan LLCs formed pursuant to the plan.

1 all board members, including Mr. Hawkins, do not vote on any board decision involving
2 a conflict situation. Mr. Hawkins is capably performing all of his board duties except in
3 those narrow instances where a conflict exists. Thus, the efforts of the other board
4 members, acting through the ML Manager, to try and wrest the Rev Op investors' board
5 seat away from Mr. Hawkins must fail because there is no disabling conflict of interest
6 that prohibits from Mr. Hawkins from properly performing his board duties.

7 5. The entire board of the ML Manager is comprised of investors. Mr.
8 Hawkins and the other board members are not required to abandon their personal
9 economic interests in order to be eligible to remain on the board. They merely have to
10 balance their board responsibilities with their personal interests in accordance with the
11 existing conflicts procedure. It is beyond dispute that Mr. Hawkins is performing all of
12 his duties as a board member except in those few areas where the board's conflicts
13 procedure require his recusal. Thus, the Removal Motion should be denied by the Court.

14 **FACTUAL AND PROCEDURAL BACKGROUND**

15 6. Conspicuously absent from the Removal Motion is any mention of the fact
16 that this is the *second time* counsel for the ML Manager has led the charge on a strategy
17 to prevent Mr. Hawkins from serving on this board. The last time, ML Manager's
18 counsel was representing the Official Investors Committee (the "OIC").

19 7. During the plan confirmation process, the OIC and its then counsel (Cathy
20 Reece) took the position that Mr. Hawkins could not serve as the Rev Op investors'
21 designated representative. Instead, the OIC and Ms. Reece claimed that the OIC had the
22 power to designate that seat, along with three of the other seats on the five person board.
23 This tactical move drew an immediate objection because the Rev Op investors had voted
24 for, and selected, Mr. Hawkins as their designee on the ML Manager board. *See*
25 *Supplemental Confirmation Objection* dated May 11, 2009. [DE #1691]

26 8. As was pointed out at the time, the OIC was dominated by non-Rev Op
27 investors, who selected three out of the five members of the ML Manager board. The
28 ML Manager board remains dominated by these same designees, who apparently

1 authorized the filing of the Removal Motion on recommendation of Ms. Reece in another
2 effort to prevent Mr. Hawkins from sitting on the board.

3 9. The ML Manager and its counsel not only fail to mention these facts in the
4 Removal Motion, but they actually “spin” the facts in a totally opposite direction. In the
5 very first paragraph of the fact section in the Removal Motion, they actually try to make
6 it sound like *the OIC* selected Mr. Hawkins to serve on the board. *See* Removal Motion,
7 p.2, lns. 8-11. At best, this statement is a half-truth.

8 10. Mr. Hawkins was selected as the board designee by the Rev Op investors,
9 who were given the right to pick their own designee pursuant to the plan and disclosure
10 statement. *See* Disclosure Statement, pp.66-67. The Court’s confirmation order, which
11 is a final and non-appealable order, appointed Mr. Hawkins and other members to the
12 board of the ML Manager. *See* Confirmation Order, ¶G. [DE #1755]

13 11. The OIC’s plan does not contain any provision that allows for the removal
14 of a board member. Yet, the board members other than Mr. Hawkins are purporting to
15 act on behalf of the ML Manager to remove Mr. Hawkins and also seek to *hand-pick* his
16 replacement – a blatant “power grab” by the other board members.

17 12. The OIC’s plan does not support this tactic; these board members seek to
18 override this Court’s confirmation order based upon Section 2.1(a)(2) of the ML
19 Manager’s operating agreement, which provides as follows:

20 *The individuals listed on Exhibit B shall serve as Managers for so long as*
21 *they are not* deceased, incapacitated, or *otherwise unable to reasonably*
22 *serve in that capacity. If any Manager shall* resign, become deceased,
23 *incapacitated, fail to perform his duties or fail to attend meetings of the*
24 *Board or otherwise be unable to, or fail to, reasonably serve as*
25 *determined by the other Managers . . . the remaining Managers may*
26 *declare a vacancy and appoint a new Manager to serve in place of the*
27 *Departing Manager without the consent of the Members.*

28 Operating Agreement ¶2.1(a)(2) (emphasis added).

13. As explained by Mr. Hawkins in his declaration, however, Mr. Hawkins
has attended every board meeting and capably performed all of his duties as a board

1 member. The only instances where Mr. Hawkins has not performed his board duties is
2 with respect to the specific matters where counsel for the ML Manager has advised the
3 board that Mr. Hawkins' personal stake is in conflict with decisions that must be made by
4 the ML Manager.

5 14. The ML Manager argues that Mr. Hawkins should be removed as a board
6 member because he is the business representative for a number of Rev Op investor
7 entities who have an appeal pending and who also dispute that the ML Manager has the
8 "sole discretion" to make decisions for all pass-through investors who did not transfer
9 their ML notes to the Loan LLCs formed pursuant to the plan. What the ML Manager
10 and its counsel failed to point out, however, is that the disclosure statement and plan
11 contemplated these kinds of conflicts would occur.³

12 15. The Court-approved disclosure statement specifically addresses conflicts
13 and procedures for dealing with them and states, in relevant part, as follows:

14 A question has been raised about how the Board of Managers will handle
15 conflicts of interest which arise due to the different Loans that each of the
16 Board members is invested in. *As with almost all Board of Directors or*
17 *Board of Managers, the Board will establish customary conflict rules,*
18 *however it is anticipated that each person will be required to disclose any*
19 *conflict prior to discussion and deliberation and will not vote on any*
20 *matter in which they have a conflict.* However because the MP Funds are
21 in almost every Loan and because the Investors are in a lot of Loans, it is
22 anticipated that the Board will fully reveal all such conflicts and with the
23 aid of Counsel will be able to work through any such issues. Also as a
24 check and balance, all Major Decisions on a Loan (as defined and reflected
25 in the Loan LLC operating agreement) will require the vote of the members
26 of the Loan LLC. This check and balance should help to alleviate any
27 concern about such potential conflicts. When members are informed about
28 the pros and cons of such Major Decisions, the Board should also inform

25 ³ This should be no big surprise to anyone – least of all ML Manager's counsel who
26 drafted the disclosure statement and plan. Since every single board member is an
27 investor with a direct economic interest in the outcome of this chapter 11 proceeding, it
28 had to be obvious to the OIC and its counsel that these kinds of situations would arise.

1 the members of any conflicts which existed on the Board and how the
2 conflicts were resolved and handled.

3 Disclosure Statement, p.68 (emphasis added).

4 16. The ML Manager and its counsel also failed to disclose that the ML
5 Manager board adopted a conflicts procedure. Those board members who have a conflict
6 are not allowed to vote on board decisions where the conflict exists. It is a simple
7 “recusal from voting” mechanism.

8 17. Finally, they also failed to disclose that, since the Rev Op Group filed its
9 clarification motion, Mr. Hawkins has been excluded from decisions *and* from board
10 discussions regarding those matters. Mr. Hawkins has abided by this recusal request
11 even though this practice goes beyond the conflicts procedure adopted by the board.

12 18. As to the other conflict arguments presented in the Removal Motion, Mr.
13 Hawkins addresses those arguments in his declaration. Suffice it to say that the ML
14 Manager and its counsel were, at best, overzealous and, at worst, slanderous in their
15 attack on Mr. Hawkins.

16 19. Perhaps more than any other statement, the following statement from the
17 Removal Motion demonstrates their disingenuous position:

18 The Rev Op Group’s [clarification] motion is a direct attack on ML
19 Manager’s authority to conduct necessary business and on ML Manager’s
20 ability to assess exit financing expenses to all investors in a fair, equitable
21 and non-discriminatory manner. Mr. Hawkins is on both sides of the attack
22 – as a member of the attacking Rev Op Group and as a member of the
23 Board of the attacked ML Manager LLC.

24 Removal Motion, p.4.

25 20. This statement is patently false. The Rev Op Group did not attack anyone –
26 it filed a motion seeking to clarify a hastily drafted and ambiguous plan. More
27 importantly, Mr. Hawkins *is not* on both sides of these issues. Again, the ML Manager’s
28 board members and its counsel fully well know that Mr. Hawkins has been excluded
from any board discussions and decisions on issues where his position as an investor are
in direct conflict with the position taken by the majority of the ML Manager’s board.

1 in endless and costly litigation and that the suits were undertaken for the purpose of
2 harassing the [organization] and its members.” *Id.* at 314.

3 25. Here, the ML Manager has a board member, Mr. Hawkins, who was
4 selected as the designee of a group of investors (Rev Op investors), and the Court
5 endorsed the designation and provided for his appointment in the confirmation order. As
6 such, the Removal Motion is an improper collateral attack on a final and non-appealable
7 order of this Court. *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (collateral
8 attack of a bankruptcy court order “cannot be permitted . . . without seriously
9 undercutting the orderly process of the law”); *In re Pardee*, 218 B.R. 916, 926 (B.A.P.
10 9th Cir. 1998).

11 26. Even if the Removal Motion was not an improper collateral attack of a final
12 and non-appealable order, the ML Manager has presented no credible facts in support of
13 the Removal Motion. Since the OIC and its counsel saw fit to propose a plan where all of
14 the ML Manager board members are investors with a direct economic interest in this
15 chapter 11 proceeding, the situation that the ML Manager finds itself in – a board
16 member’s personal positions in conflict with certain positions taken by the majority of
17 the board – is an expected outcome that was anticipated and addressed through a conflicts
18 procedure. Mr. Hawkins is abiding by the conflicts procedure on the very few issues
19 where there is an actual conflict. In contrast to *Grace, supra*, Mr. Hawkins is performing
20 all of this duties as a board member and not a single instance of misconduct where Mr.
21 Hawkins is acting as a board member has been alleged, let alone established, by the other
22 board members.

23 27. The ML Manager’s argument that an operating agreement provision may
24 override a confirmation order and the designation of a board member by the Rev Op
25 investors is likewise without merit. Mr. Hawkins is perfectly willing and able to perform
26 his duties and has been doing that since the board was formed in June 2009 – as the other
27 board members very well know. Again, the ML Manager and its counsel have failed to
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1 raise a *single instance* where Mr. Hawkins has either failed to properly perform his
2 duties as a board member.

3 28. The contention that Mr. Hawkins “will continue to disrupt the business of
4 the ML Manager” is fiction and just an improper excuse for certain board members and
5 counsel to try and settle a score with the Rev Op investors and Mr. Hawkins. There
6 simply is no reason for the Court to revisit its confirmation order pursuant to which Mr.
7 Hawkins was appointed to this board.

8 29. Likewise, the Court should decline to issue an advisory opinion that Section
9 2.1 of the operating agreement gives the majority of the board the prospective ability to
10 remove any board member and hand-pick a replacement. The Removal Motion and other
11 recent actions by this board are perhaps the best evidence that the Court should not
12 confirm that this board has the power to remove any other board member in the future
13 just because a board majority thinks it is appropriate to do so, even assuming it was
14 appropriate to provide an advisory opinion on this issue (which it is not).

15 **CONCLUSION**

16 For all of the foregoing reasons, the Rev Op Group respectfully requests that the
17 Court deny the Removal Motion; and enter any other and further order as is just and
18 proper in the circumstances presented herein.

19 DATED this 4th day of January, 2010.

20 BRYAN CAVE LLP

21 By /s/ RJM, #013334

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