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6
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

**REPLY IN SUPPORT OF MOTION TO SELL
REAL PROPERTY FREE AND CLEAR OF
LIENS, CLAIMS, ENCUMBRANCES, AND
INTERESTS – (CITLO)**

**Real Property located in Maricopa County, AZ
located at Hohokam Freeway and Belleview
Street, Phoenix, AZ**

**Hearing Date: August 25, 2010
Hearing Time: 10:30 a.m.**

17 ML Manager LLC (“ML Manager”), as manager for the CITLO Loan LLC and the
18 9 MP Funds that are members of the CITLO Loan LLC and as agent for the 4 pass-
19 through investors who hold fractional interests but who did not transfer into the CITLO
20 Loan LLC (“Non-transferring pass-through investors”), hereby files this Reply in Support
21 of its Motion to Sell Real Property Free and Clear of Liens, Claims, Encumbrances, and
22 Interests (Docket No. 2859), and asks that the Court enter an order authorizing and
23 approving the sale as set forth in the Motion.

24 Mr. Suzuki and Mr. Miller filed an objection to the sale on behalf of 3 Non-
25 transferring pass-through investors who are part of the Rev-Op Group (the “Objectors”).
26 This Reply addresses the objection.

1 **I. THE RESULTS OF THE LOAN LLC VOTE.**

2 The CITLO Loan LLC (“CITLO Loan LLC”), which was formed in June 2009
3 pursuant to the confirmed Plan, owns 86.798% of the interest in the property. The
4 members of the CITLO include the 9 MP Funds and the pass-through investors who
5 transferred into the CITLO Loan LLC. 13.202% of the interest is owned by 4 non-
6 transferring pass-through investors. As the Court will recall, the operating agreement for
7 the CITLO Loan LLC required that Major Decisions (such as selling the property) must
8 be voted on by the members of the limited liability company and the investors in the MP
9 Funds and must be approved by a majority in dollars of those who vote. A vote has been
10 conducted by the ML Manager of the members of the CITLO Loan LLC and the MP Fund
11 investors. Based on the voting results, about 94.33% of the dollars which were voted
12 approved the sale. In other words, about 94.33% of the dollars held by investors who
13 voted in the CITLO Loan LLC which owns about 86.98% of the property voted to sell the
14 property for the price, to the buyer and at the time proposed by ML Manager.

15 **II. WAIVER BY THE EXIT FINANCIER.**

16 One of the contingencies of the Sale Agreement and the Exit Financing Loan
17 Agreement is that (as long as the loan is outstanding) the Exit Financier has the right to
18 compete for the purchase of any property sold. This provision was intended to ensure that
19 the property will not be sold for too low a price. The Exit Financier has provided ML
20 Manager with a written waiver of its right to compete.

21 **III. COMPLETION OF DUE DILIGENCE BY THE BUYER.**

22 Another contingency was the completion of due diligence by the buyer. That due
23 diligence has now been completed and the buyer upon entry of the Court Order is ready,
24 willing and able to close the sale.

25 **IV. EXERCISE OF VALID BUSINESS JUDGMENT.**

26 ML Manager in the exercise of its business judgment has decided it is in the best

1 interest of the investors in the loan to sell the property at this time for \$1.925 million to
2 Endres, LLC or its assigns on the terms set forth in the Sale Agreement. The buyer has
3 posted \$50,000 earnest money and the escrow has been set up at a local title company.
4 The buyer has demonstrated that it has ample funds to purchase the Property. The buyer
5 has completed its due diligence and is ready to close. It is anticipated that if the Court
6 enters the sale order that the sale will close at the first available time.

7 ML Manager believes the price obtained is the current market price for the
8 property, which consists of the 42 unit apartment complex and about 2.6 acres of adjacent
9 land. The sale price of \$1.925 million obtained in this sale is the best offer received by
10 ML Manager from a viable purchaser. ML Manager does not believe it was necessary or
11 good use of funds to obtain a formal appraisal of the Property. The price is all cash at the
12 close of escrow.

13 ML Manager employed a broker, Hendricks & Associates, to list and market the
14 property. The broker marketed the property widely to buyers of this type of property and
15 over the marketing period received and reviewed several offers for the property. ML
16 Manager reviewed all the offers and accepted the highest offer from a buyer that it
17 thought would close. The Sale Agreement used is the standard form agreement which is
18 being used by ML Manager, and which in fact has been used on multiple occasions
19 already. The broker will receive a customary commission upon closing.

20 **V. AGENT HAS SOLE DISCRETION ON SALE AS TO THE NON-**
21 **TRANSFERRING PASS-THROUGH INVESTORS.**

22 As the Court will recall, the ML Manager received an assignment of the
23 irrevocable Agency Agreements which contains a power of attorney coupled with an
24 interest and became the Agent for all the Pass-Through Investors. The Pass-Through
25 Investors were given until October 31, 2009 to decide whether to transfer into the
26 applicable Loan LLCs and receive a membership interest.

1 On this loan, 4 Pass-Through Investors decided not to transfer and as a result
2 13.202% is managed by ML Manager as the Agent while 86.798% is managed by ML
3 Manager as the manager for the CITLO Loan LLC. Only members of the CITLO Loan
4 LLC and the investors in the MP Funds in the Loan LLC are allowed to vote and to
5 control the Major Decisions of ML Manager on the management of the property. Pursuant
6 to the Agency Agreement, the Agent has sole discretion on the decisions to be made about
7 the management of the property after foreclosure.

8 Paragraph 3(b) of the Agency Agreement states:

9 If ownership of any Trust Property becomes vested in
10 Participant, either in whole or in part, by trustee's sale,
11 judicial foreclosure or otherwise, Agent may enter into one or
12 more real estate broker's agreement on Participant's behalf
13 for the sale of the applicable Trust Property, enter into a
14 management and/or maintenance agreements for management
15 or maintenance of the applicable Trust Property, if applicable,
16 may acquire insurance for the applicable Trust Property, and
17 may take such other actions and enter into such other
18 agreements for the protection and sale of the applicable Trust
19 Property, **all as Agent deems appropriate in its sole**
20 **discretion.**

21 This sole discretion in the Agent remains necessary so that the property can be
22 managed in a way to maximize the value for all the investors in the property and to ensure
23 that no one investor could hold the others hostage. The vote of the Loan LLC investors
24 was intended to be a check and balance of the discretion of the Agent/ Manager on Major
25 Decisions. The Non-transferring Pass-Through investors chose to retain their interests
26 under the existing Agency Agreements.

ML Manager in the exercise of its business judgment and in its sole discretion has
decided to proceed with the sale as presented. The other contingencies having been met –
the accepting vote of the Loan LLC and the waiver by the Exit Financier—ML Manager
requests that this Court enter the order requested so that the last contingency can be
satisfied for the buyer and the title company.

1 **VI. ML MANAGER AS THE AGENT HAS AUTHORITY TO SELL**

2 The Objectors, all of whom are members of the Rev-Op Group and parties to the
3 Adversary, 2:10-ap-00430-RJH (the “Hawkins Adversary”), assert that they have a right
4 to terminate their agency agreements pursuant to paragraph 3(b) of the Master Agency
5 Agreements, or and that they are not subject to the agency agreements because no signed
6 copies have been produced. In making these arguments, the Objectors are simply
7 ignoring all of the litigation and rulings from the Hawkins Adversary. Those rulings are
8 law of the case. *Minidoka Irrigation Dist. v. DOI*, 406 F.3d 567, 573 (9th Cir.
9 2005)(“Under the ‘law of the case’ doctrine, a court is ordinarily precluded from
10 reexamining an issue previously decided by the same court, or a higher court, in the same
11 case.”); *see also Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002).. More
12 important, those rulings are contained in a final judgment (Docket 105 in Hawkins
13 Adversary) (the “Declaratory Judgment”) the effect of which has not been stayed.¹

14 The Declaratory Judgment resolved these issues. To place it in context, as
15 the Court will recall. The “Master Agency Agreements” were created first. They were
16 created when Gary Zwilling was representing Mortgages Ltd. prior to 2006. In 2006,
17 Greenberg Traurig began to represent Mortgages Ltd., and created new forms and
18 documentation for all of the investors. Specifically, a new Private Offering Memorandum
19 dated July 6, 2006 (the “POM”) was created, as well as a form of a Subscription
20 Agreement, Rev-Op Agreement, and Agency Agreement.

21 The Court has already ruled in the Declaratory Judgment that the Objectors
22 are subject to and bound by the Agency Agreement. Significantly, the Agency Agreement
23 expressly superseded and replaced all prior agency agreements, which necessarily

24 _____
25 ¹ The Rev-Op Group has appealed the final judgment from the Hawkins Adversary,
26 however, they have not sought a stay. The law is clear. The judgment is to be given full
force and effect unless a stay is issued. *See, e.g., In re Roberts Farms, Inc.*, 652 F.2d 793,
798 (9th Cir. 1981)

1 includes the Master Agency Agreement. Agency Agreement at § 7(e) (“[The Agency
2 Agreement] replaces and supersedes all prior agency agreements between Participant and
3 Agent relating to any of the Loans. All such prior agency agreements are null and void.”).
4 One of the significant changes between the Master Agency Agreement and the Agency
5 Agreements is the conditions upon which an investor can terminate the agency agreement
6 after a foreclosure sale. Under the Master Agency Agreement, an investor may terminate
7 his, her or its agency relationship following a foreclosure sale, however, under the Agency
8 Agreement found to be in force by the Court under the Declaratory Judgment is that
9 termination is only allowed if the investor owns 100% of the property.

10 The Objectors understand this distinction, which is why they are attempting
11 to go back to the outdated Master Agency Agreement and ignore the Court’s ruling in the
12 Declaratory Judgment. Although the Objectors may be entitled to preserve the record for
13 an issue on appeal, to simply assert the same arguments that have already been resolved
14 following expensive and significant litigation is beyond the pale. These arguments should
15 be rejected out of hand.

16 **VII. THIS COURT HAS JURISDICTION TO HEAR THIS CONTESTED**
17 **MATTER**

18 This Court has jurisdiction to hear this dispute. First of all, the Court can
19 take judicial notice that the Rev-Op Group has admitted the jurisdiction of this Court on
20 numerous occasions by filing pleadings seeking affirmative relief regarding the same
21 issues present in this case. *See, e.g.*, Counterclaims filed by Rev-Op Group in 10-ap-430
22 at ¶ 5 (relating to ML Manager's agency authority over the Rev-Op Group). Additionally,
23 this Court retained post-confirmation jurisdiction because there is a close nexus between
24 the current lawsuit and the execution and implementation of the Plan. The close nexus
25 required for post-confirmation jurisdiction is satisfied if the remedies sought by the ML
26 Manager could affect the implementation of the Plan. *See State of Montana v. Goldin (In*

1 *re Pegasus Gold Corp.*), 394 F.3d 1189, 1194 (9th Cir. 2005). *Goldin* is analogous to the
2 jurisdictional question in this matter. In *Goldin*, the Bankruptcy Court confirmed the
3 debtor's plan which called for the creation of RSC, an entity to perform services for the
4 state on a temporary basis. *Id.* at 1193. The debtor sued the state alleging that the state
5 breached its agreement with the RSC. *Id.* The state argued that the Bankruptcy Court
6 lacked jurisdiction to hear this matter. In finding jurisdiction, the Ninth Circuit held that
7 the claims asserted by the debtor, "could affect the implementation and execution of the
8 Plan itself, which specifically called for the creation of RSC and the transfer of debtor
9 money to fund it." *Id.* at 1194. Accordingly, the Ninth Circuit concluded that a "close
10 nexus" existed between the claims and the bankruptcy to satisfy the Bankruptcy Court's
11 jurisdiction. *Id.*

12 Here the close nexus exists between the relief requested by ML Manager and the
13 Mortgages Ltd. bankruptcy because the relief requested by ML Manager is an essential
14 part of the Plan. The Plan specifically called for the creation of ML Manager to manage
15 the Loan LLCs and to step into the role as manager for the MP Funds and agent of non-
16 transferring pass through investors. The relief requested by ML Manager affects the
17 amount of money that the investors will receive. Accordingly, the Bankruptcy Court
18 retains post-confirmation jurisdiction.

19 Finally, this Court has jurisdiction under the retained and reserved jurisdiction in
20 the Plan for such a matter as this, including in Section 9.1(e), (g) and (h) of the Plan,
21 among others, and has authority to approve the sale under Section 105 of the Bankruptcy
22 Code, among others.

23 **VIII. THE ORDER SHOULD BE ENTERED AS PROPOSED BY ML**
24 **MANAGER**

25 Attached as Exhibit A is the proposed form of Order approving the sale. It is in the
26 form that has previously been approved by this Court in other sale motions. The

1 provisions are appropriate. The Rule 6004 waiver was granted in one other sale. As
2 expressed above, the buyer has completed its due diligence and is ready to close. The
3 waiver would allow the parties to close within 14 days after entry of the Order.

4 **IX. CONCLUSION.**

5 For the foregoing reasons, ML Manager requests that the Court enter an order as
6 requested by the ML Manager in the Motion authorizing and approving the sale.

7 DATED: August 25, 2010

8 FENNEMORE CRAIG, P.C.

9 By /s/ Cathy L. Reece
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