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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**

**Real Property located at 802 East Missouri
Avenue, Phoenix, AZ**

**Hearing Date: August 26, 2010
Hearing Time: 3:30 p.m.**

16 ML Manager LLC (“ML Manager”), as manager for the ZDC II Loan LLC and the
17 7 MP Funds that are members of the ZDC II Loan LLC and as agent for the 9 pass-
18 through investors who hold fractional interests but who did not transfer into the ZDC II
19 Loan LLC (“Non-transferring pass-through investors”), hereby files this Reply in Support
20 of its Motion to Sell Real Property Free and Clear of Liens, Claims, Encumbrances, and
21 Interests (Docket No. 2867), and asks that the Court enter an order authorizing and
22 approving the sale as set forth in the Motion.

23 Mr. Suzuki and Mr. Miller filed an objection to the sale on behalf of 2 Non-
24 transferring pass-through investors who are part of the Rev-Op Group (the “Objectors”).
25 This Reply addresses the objection.
26

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

2 The ZDC II Loan LLC (“ZDC II Loan LLC”), which was formed in June 2009
3 pursuant to the confirmed Plan, owns 75.293% of the interest in the property. The
4 members of the ZDC II include 7 of the 9 MP Funds and the pass-through investors who
5 transferred into the ZDC II Loan LLC. 24.707% of the interest is owned by 9 non-
6 transferring pass-through investors. As the Court will recall, the operating agreement for
7 the ZDC II 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 ZDC II Loan LLC and the MP Fund
11 investors. Based on the voting results, about 91.66% of the dollars which were voted
12 approved the sale. In other words, about 91.66% of the dollars held by investors who
13 voted in the ZDC II Loan LLC which owns about 75.293% of the property voted to sell
14 the 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. The buyer
23 has until Monday August 30, 2010 to complete its due diligence. We expect that with
24 entry of the Court Order after Monday the buyer will be ready, willing and able to close
25 the sale.

26

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

2 ML Manager in the exercise of its business judgment has decided it is in the best
3 interest of the investors in the loan to sell the property at this time for \$2,112,000 to
4 WESCAP Investments, Inc. on the terms set forth in the Sale Agreement. The buyer has
5 posted \$50,000 earnest money and the escrow has been set up at a local title company.
6 The buyer has demonstrated that it has ample funds to purchase the Property. The buyer
7 will complete its due diligence by August 30, 2010 and will be ready to close. It is
8 anticipated that if the Court enters the sale order that the sale will close on or before
9 September 14, 2010.

10 ML Manager believes the price obtained is the current market price for the
11 property, which consists of the 66 partially developed lots. The sale price of \$2,112,000
12 obtained in this sale is the best offer received by ML Manager from a viable purchaser.
13 ML Manager does not believe it was necessary or good use of funds to obtain a formal
14 appraisal of the Property. The price is all cash at the close of escrow.

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

22 The buyer is a good faith purchaser who has negotiated at arms length. The buyer
23 is not related to or affiliated with ML Manager or the investors or the Exit Lender.

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

26 As the Court will recall, the ML Manager received an assignment of the

1 irrevocable Agency Agreements which contains a power of attorney coupled with an
2 interest and became the Agent for all the Pass-Through Investors. The Pass-Through
3 Investors were given until October 31, 2009 to decide whether to transfer into the
4 applicable Loan LLCs and receive a membership interest.

5 On this loan, 9 Pass-Through Investors decided not to transfer and as a result
6 24.707% is managed by ML Manager as the Agent while 75.293% is managed by ML
7 Manager as the manager for the ZDC II Loan LLC. Only members of the ZDC II Loan
8 LLC and the investors in the MP Funds in the Loan LLC are allowed to vote and to
9 control the Major Decisions of ML Manager on the management of the property. Pursuant
10 to the Agency Agreement, the Agent has sole discretion on the decisions to be made about
11 the management of the property after foreclosure.

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

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

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

ML Manager in the exercise of its business judgment and in its sole discretion has

1 decided to proceed with the sale as presented. The other contingencies having been met –
2 the accepting vote of the Loan LLC and the waiver by the Exit Financier—ML Manager
3 requests that this Court enter the order requested so that the last contingency can be
4 satisfied for the buyer and the title company.

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

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

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

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 Agreement, Rev-Op Agreement, and Agency Agreement.

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

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

20 **VII. THIS COURT HAS JURISDICTION TO HEAR THIS CONTESTED**
21 **MATTER**

22 This Court has jurisdiction to hear this dispute. First of all, the Court can
23 take judicial notice that the Rev-Op Group has admitted the jurisdiction of this Court on
24 numerous occasions by filing pleadings seeking affirmative relief regarding the same
25 issues present in this case. *See, e.g.*, Counterclaims filed by Rev-Op Group in 10-ap-430
26 at ¶ 5 (relating to ML Manager's agency authority over the Rev-Op Group). Additionally,

1 this Court retained post-confirmation jurisdiction because there is a close nexus between
2 the current lawsuit and the execution and implementation of the Plan. The close nexus
3 required for post-confirmation jurisdiction is satisfied if the remedies sought by the ML
4 Manager could affect the implementation of the Plan. *See State of Montana v. Goldin (In*
5 *re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005). *Goldin* is analogous to the
6 jurisdictional question in this matter. In *Goldin*, the Bankruptcy Court confirmed the
7 debtor’s plan which called for the creation of RSC, an entity to perform services for the
8 state on a temporary basis. *Id.* at 1193. The debtor sued the state alleging that the state
9 breached its agreement with the RSC. *Id.* The state argued that the Bankruptcy Court
10 lacked jurisdiction to hear this matter. In finding jurisdiction, the Ninth Circuit held that
11 the claims asserted by the debtor, “could affect the implementation and execution of the
12 Plan itself, which specifically called for the creation of RSC and the transfer of debtor
13 money to fund it.” *Id.* at 1194. Accordingly, the Ninth Circuit concluded that a “close
14 nexus” existed between the claims and the bankruptcy to satisfy the Bankruptcy Court’s
15 jurisdiction. *Id.*

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

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

1 **VIII. THE ORDER SHOULD BE ENTERED AS PROPOSED BY ML**
2 **MANAGER**

3 Attached as Exhibit A is the proposed form of Order approving the sale. It is in the
4 form that has previously been approved by this Court in other sale motions. The
5 provisions are appropriate. The Rule 6004 waiver was granted in one other sale. As
6 expressed above, the buyer will have completed its due diligence Monday August 30,
7 2010 and will be ready to close. The waiver would allow the parties to close within 14
8 days after entry of the Order.

9 **IX. CONCLUSION.**

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

12 DATED: August 25, 2010

13 FENNEMORE CRAIG, P.C.

14 By /s/ Cathy L. Reece
15 Cathy L. Reece
16 Keith L. Hendricks
17 Attorneys for ML Manager LLC

18 Copy of the foregoing sent this
19 25th day of August, 2010 to the parties
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