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LLP; Queen Creek XVIII, L.L.C.; Morley
8 Rosenfield, M.D. P.C. Restated Profit Sharing
Plan; and Pueblo Sereno Mobile Home Park
9 L.L.C.

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

12 In re:

13 MORTGAGES LTD.,

14 Debtor.

In Proceedings Under Chapter 11

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

15 **MOTION FOR STAY PENDING APPEAL**
16 **OF ORDERS APPROVING SALES OF**
17 **REAL PROPERTY**

Hearing Date: Not Yet Set

Hearing Time: Not Yet Set

18 This motion is filed by the following parties (collectively, the “**Rev Op Investors**”): (i)
19 Bear Tooth Mountain Holdings, LLP (“**Bear Tooth**”), Queen Creek XVIII, L.L.C. (“**Queen**
20 **Creek**”), and Morley Rosenfield, M.D. P.C. Restated Profit Sharing Plan (“**MR Plan**”) with
21 respect to the *Order Approving Motion to Sell Real Property Free and Clear of Liens, Claims,*
22 *Encumbrances, and Interests* [DE #2887] (the “**CITLO Order**”); and (ii) Queen Creek and
23 Pueblo Sereno Mobile Home Park L.L.C. (“**Pueblo Sereno**”) with respect to the *Order*
24 *Approving Motion to Sell Real Property Free and Clear of Liens, Claims, Encumbrances, and*
25 *Interests* [DE #2892] (the “**ZDC Order**”). Having appealed from the CITLO Order and the
26 ZDC Order (collectively, the “**Sale Orders**”), the Rev Op Investors hereby move for the entry of
27 an order staying the effect of the Sale Orders, pending a ruling on their appeals. Alternatively, if
28 the Court denies a stay pending appeal, the Rev Op Investors request that the Court order a brief

1 administrative stay so that the Rev Op Investors may present a motion for stay pending appeal to,
2 and obtain a ruling from, the United States District Court for the District of Arizona. This
3 motion is more fully supported by the accompanying memorandum of points and authorities, the
4 record in the consolidated adversary proceeding involving the Rev Op Investors, Case No. 2:10-
5 ap-00430-RJH (the “**Adversary Proceeding**”), and the entire record in these Chapter 11 cases.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. BACKGROUND.**

8 This case arises from the investments of the Rev Op Investors with the above-captioned
9 debtor, Mortgages Ltd. (the “**Debtor**”). The relevant background and legal authorities are set
10 forth in the *Motion for Stay Pending Appeal* filed in the Adversary Proceeding on August 30,
11 2010 [Adv. DE #116]. Because the Sale Orders depended largely on the judgment entered in the
12 Adversary Proceeding declaring ML Manager LLC (“**ML Manager**”) to have authority to act on
13 behalf of and bind the Rev Op Investors, the arguments and authorities set forth in the *Motion for*
14 *Stay Pending Appeal* is incorporated herein by reference. The Rev Op Investors will seek to
15 consolidate the hearing on this Motion with the hearing on the stay motion filed in the Adversary
16 Proceeding. A motion for consolidated hearing is being filed concurrently herewith.

17 **II. LEGAL ANALYSIS.**

18 **A. Movant Has a Strong Likelihood of Success on the Merits.**

19 The Rev Op Investors stand more than a “fair chance of success on the merits” in their
20 appeals of the Sale Orders. On the issues set forth below, in particular, the Rev Op Investors
21 have a high likelihood of prevailing on appeal.

22 **1. The Sale Orders Rest on ML Manager’s Erroneous Theory of Agency**
23 **Authority.**

24 ML Manager’s asserted agency authority is being challenged on appeal. As set forth in
25 the *Motion for Stay Pending Appeal* filed in the Adversary Proceeding and incorporated herein
26 by reference, the judgment declaring ML Manager to have such authority was improper and
27 should be reversed on appeal. Even if the judgment were proper, however, there exists a
28

1 separate reason for ML Manager’s lack of purported agency authority in the context of the Sale
2 Orders.

3 As counsel advised the Court at the hearing on the proposed sale of the CITLO property,
4 the Court found in the Adversary Proceeding that the only “interests” of ML Manager coupled
5 with an agency were ML Manager’s asserted rights to “interest spread” and similar payment
6 rights. ML Manager’s foreclosure of the subject properties extinguished such rights, and the
7 relevant Loan LLCs and the Rev Op Investors became owners as tenants in common of the
8 properties. ML Manager has no interest whatsoever in the properties and cannot assert an
9 irrevocable agency power over the Rev Op Investors’ tenant-in-common ownership rights.
10 Stated differently, upon the “decoupling” of the purported interests of ML Manager from the
11 asserted agency, the agency became revocable and was revoked by the Rev Op Investors.

12 Under the *Hunt* doctrine, an agency power becomes revocable, even if it was initially
13 coupled with an interest, when the interest terminates or becomes “de-coupled” from the agency.
14 *See Woolley v. Embassy Suites, Inc.*, 227 Cal. App. 3d 1520, 1532–33 (Cal. App. 1991) (“the
15 lack of any present property interest . . . is fatal to [agent’s] claim of irrevocability”); *Pac.*
16 *Landmark Hotel, Ltd. v. Marriott Hotels, Inc.*, 23 Cal. Rptr. 2d 555, 561–63 (Cal. Ct. App. 1993)
17 (the interest and the agency power must be united in the same person, and the interest must be
18 specific, present, and for the benefit of the agent); *Phoenix Title & Trust Co. v. Grimes*, 101
19 Ariz. 182, 184, 416 P.2d 979, 981 (1966) (quoting *Taylor v. Burns*, 203 U.S. 120 (1906)
20 (interpreting Arizona law)). The Court ignored these facts and the applicable law when entering
21 the Sale Orders.

22 **2. The Bankruptcy Court Lacked Jurisdiction to Enter the Sale Orders.**

23 It is black-letter law that post-confirmation jurisdiction is necessarily more limited than
24 pre-confirmation jurisdiction. *See In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir.
25 2005). In determining whether a bankruptcy court has retained post-confirmation jurisdiction,
26 courts look to whether: (i) the matter has a close nexus to the bankruptcy plan or proceeding;
27 and (ii) the bankruptcy plan provides for the retention of jurisdiction over the particular matter.
28 *In re Johns-Manville Corp.*, 7 F.3d 32, 34 (2d Cir. 1993); *CCM Pathfinder Pompano Bay, LLC*

1 *v. Compass Fin. Partners LLC*, 396 B.R. 602, 605 (Bankr. S.D.N.Y. 2008); *see also Pegasus*
2 *Gold*, 394 F.3d at 1194.

3 The Plan does not provide for retained jurisdiction with respect to the matters addressed
4 in the Sale Orders. ML Manager asserted that the Plan provides for retained jurisdiction under
5 section 105 of the Bankruptcy Code and/or under sections 9.1(e), (g), and (h) of the Plan. These
6 sections of the Plan, however, do not provide a basis for retained jurisdiction under any
7 reasonable interpretation of the Plan. Moreover, the ML Manager made no attempt to explain
8 how it satisfied the “close nexus” requirement for post-confirmation retention of jurisdiction by
9 the Court.

10 **3. The Bankruptcy Court Has Been Divested of Jurisdiction over Issues**
11 **Regarding the Assessment of Exit Financing to the Rev Op Investors.**

12 The Sale Orders improperly authorize the transfer of the “net sale proceeds attributable to
13 the ownership percentage for the non-transferring pass-through investors . . . to ML Manager as
14 their agent and shall be used and distributed pursuant to the applicable agency agreements and
15 the Confirmation Order.” ML Manager should not have been authorized to pay out of the gross
16 sale proceeds attributable to the Rev Op Investors any funds to third parties or to “use” such
17 funds as ML Manager otherwise deems appropriate. This is particularly important since ML
18 Manager has previously expressed its belief that the “agency agreements” permit it to assess a
19 portion of the exit financing to the Rev Op Investors. The exit-financing issue is currently on
20 appeal, and such appeal divested the Bankruptcy Court of jurisdiction to authorize ML Manager
21 to assess exit financing to the Rev Op Investors, either directly or by authorizing ML Manager’s
22 unfettered “use” of the sale proceeds. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S.
23 56, 58 (1982); *In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000).

24 In addition, even if the Court had jurisdiction over such issues, the Sale Orders violate
25 Paragraph U of the Confirmation Order and are inequitable to the Rev Op Investors. The Sale
26 Orders essentially state that ML Manager is going to distribute money to the investors who
27 agreed to transfer their interests to the applicable Loan LLCs, but that it will withhold making
28 any distributions to non-transferring investors. The Rev Op Investors have waited more than two

1 years for any kind of recovery from these cases. Paragraph U of the Confirmation Order and
2 equity require distributions to be made within the same general timeframe to both kinds of
3 investors. It was error to enter an order in contravention of the Plan and Confirmation Order.

4 **4. The Provisions of Section 363 of the Bankruptcy Code Are**
5 **Inapplicable Post-Confirmation.**

6 ML Manager may not fall back on Section 363 of the Bankruptcy Code as a substitute for
7 its lack of authority. The Plan confirmed by this Court does not provide for the “sale free and
8 clear” mechanism, and Section 363 of the Bankruptcy Code and its “free and clear” mechanism
9 have no application here. There is no longer a debtor in possession nor is there any property of
10 the estate since a chapter 11 plan was confirmed by the Court in June 2009. In short, ML
11 Manager either has the authority to act for and bind the Rev Op Investor, or it does not. It may
12 not rely on inapplicable provisions of the Bankruptcy Code to strip away the tenancy-in-common
13 ownership interests of the Rev Op Investors.

14 Even assuming Section 363 were applicable here, ML Manager should have been
15 required to make the required showing under subsections 363(f) or (h) of the Bankruptcy Code.
16 That did not occur. The result was ML Manager receiving the benefits of Section 363’s “free
17 and clear” mechanism without any of the burdens of proving it was entitled to such relief.

18 **B. The Risk of Harm and the Balance of Hardships Tips Sharply in Favor of the**
19 **Rev Op Investors.**

20 Absent a stay, the Rev Op Investors anticipate that ML Manager will continue to “fire
21 sale” assets. Many of the Rev Op Investors have the bulk of their retirement and net worth tied
22 to the investments being rapidly liquidated by ML Manager. The Rev Op Investors submit that
23 maximizing returns to investors, particularly those who opted *not* to become borrowers of the
24 exit financing, should be of primary importance in this case. Unfortunately, it presently is not.

25 ML Manager will suffer no injury from a stay pending appeal. To the extent ML
26 Manager wishes to sell the assets or collateral of the Loan LLCs, and leave the fractional
27 interests of the Rev Op Investors intact, it is free to do so. If ML Manager wishes to sell assets
28 as “wholes,” ML Manager at worst will be forced to wait for a horrible real estate market to

1 improve. In any event, a brief appeal period is not an “irreparable harm” similar to the Rev Op
2 Investors’ forced loss of their ownership rights for fire-sale prices. *See Virginia Petroleum*
3 *Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (temporary economic loss alone, no
4 matter how substantial, does not constitute irreparable harm). In sum, ML Manager faces no
5 legally cognizable injury from a stay pending appeal, whereas the Rev Op Investors stand to lose
6 the ability to obtain meaningful appellate relief absent a stay. Under these circumstances, a stay
7 pending appeal should be granted.

8 **C. No Bond Is Required Under the Circumstances of this Case.**

9 Maintaining the status quo in this case presents no risk of loss to ML Manager, and no
10 bond is required under the circumstances. ML Manager will continue to control the real property
11 assets at issue, and the fractional ownership interest of the Rev Op Investors in such assets will
12 be not be diminished or transferred during the pendency of the appeal. Such assets can serve the
13 same function as a bond until the appeal is resolved.

14 **III. CONCLUSION.**

15 Based on the foregoing, this Court should enter an order staying the Sale Orders, pending
16 a ruling on the Rev Op Investors’ appeal thereof. Alternatively, if the Court denies a stay
17 pending appeal, the Court should order an administrative stay so that the Rev Op Investors may
18 present a motion for stay pending appeal to, and obtain a ruling from, the District Court.

19 DATED this 31st day of August, 2010.

20 BRYAN CAVE LLP

21 By /s/ BAS, #022721

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COPY of the foregoing served this
31st day of August, 2010:

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