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7 Counsel for the Rev Op Investors

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

10 In re:

11 MORTGAGES LTD.,

12 Debtor.

In Proceedings Under Chapter 11

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

**RESPONSE AND RESERVATION OF
RIGHTS WITH RESPECT TO ML
MANAGER'S MOTION TO APPROVE
SALE OF REAL PROPERTY (OSBORN
III/TEN LOFTS)**

Hearing Date: 9/28/10

Hearing Time: 2:30 p.m.

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17 Bear Tooth Mountain Holdings, LLP; Brett McFadden; Evertson Oil Company, Inc.; LLJ
18 Investments, LLC (as successor in interest to Louis B. Murphey, the James C. Schneck
19 Revocable Trust, and The Lonnie Joel Krueger Family Trust); Michael Johnson Investments II,
20 L.L.C.; Morley Rosenfield, M.D. P.C. Restated Profit Sharing Plan; Pueblo Sereno Mobile
21 Home Park L.L.C.; Ronald Kohner; Trine Holdings, L.L.C.; William L. Hawkins Family LLP;
22 Yuval & Mirit Caine; and/or their successors and assigns (collectively, the "Rev Op Investors")
23 hereby file this Response to the ML Manager's *Motion To Sell Real Property Free And Clear Of*
24 *Liens, Claims, Encumbrances, And Interests* dated September 3, 2010 (the "Sale Motion"). In
25 support of this Response, the Rev Op Investors hereby submit as follows:

26 1. Pursuant to the Sale Motion, ML Manager states that Osborn III Loan, LLC and
27 various pass-through investors co-own the property at issue in the Sale Motion (the "Property").
28 The Rev Op Investors are among the pass-through investors referenced in the Sale Motion.

1 2. According to the Sale Motion, ML Manager does not yet have an actual offer on
2 the Property but is marketing the Property for at least \$14 million.

3 3. The Rev Op Investors may be agreeable to a sale of the Property to the extent a
4 sufficient sale price is obtained and equitable sale terms are reached. To date, however, no
5 actual sale offer has been presented to the Court or parties in interest. The Rev Op Investors
6 reserve all rights with respect to these issues and submit that absent an actual sale offer, the
7 Court should not enter an advisory order on the Sale Motion.

8 4. The Rev Op Investors currently object to the Sale Motion on the basis that: (i) a
9 “sale free and clear” mechanism is not provided for in the plan confirmed by the Court (the
10 “Plan”); (ii) section 363 of the Bankruptcy Code and its “free and clear” mechanism have no
11 application here; and (iii) no applicable non-bankruptcy law allows for such mechanism.
12 Assuming, *arguendo*, section 363 were applicable here, the ML Manager has not made any effort
13 to make a showing under subsections 363(f) or (h) of the Bankruptcy Code.

14 5. ML Manager claims the Plan provides for retained jurisdiction under section 105
15 of the Bankruptcy Code and/or under sections 9.1(e), (g), and (h) of the Plan. These sections of
16 the Plan do not provide a basis for retained jurisdiction with respect to the ML Manager’s
17 requests for relief under the Sale Motion.

18 6. It is black-letter law that post-confirmation jurisdiction is necessarily more limited
19 than pre-confirmation jurisdiction. *See In re Johns-Manville Corp.*, 7 F.3d 32, 34 (2d Cir. 1993);
20 *CCM Pathfinder Pompano Bay, LLC v. Compass Fin. Partners LLC*, 396 B.R. 602, 605 (Bankr.
21 S.D.N.Y. 2008); *see also In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005). It is
22 beyond dispute the Plan does not provide for retained jurisdiction with respect to the matters
23 addressed in the Sale Motion.

24 7. ML Manager has no interest in the Property and therefore its asserted agency
25 power to bind the Rev Op Investors is revocable and has been revoked. ML Manager lacks
26 authority to sell the Rev Op Investors’ valuable ownership rights as tenants in common of the
27 Property. The Rev Op Investors reserve all of their rights on authority issues.
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1 8. The Sale Motion also makes a reference to a distribution of proceeds to the pass-
2 through investors. ML Manager has only recently provided its proposed allocation model and
3 provided an accounting of the expected costs and potential distributions to creditors. No
4 distributions that may be considered binding under the Sale Motion should be made without a
5 full and fair resolution of the allocation model issues.

6 9. ML Manager suggests the proposed sale order will direct the non-transferring
7 investors to execute documents effectuating the Court’s order and sale. The ML Manager cites
8 no authority for this request for relief, which is obviously objectionable to the Rev Op Investors.

9 10. ML Manager also proposes to pay at closing from the Loan LLC’s portion of the
10 sale proceeds the amount owed under the note and deed of trust in the amount of \$875,000 as a
11 part of the Grace settlement. The Grace settlement and the question of whether ML Manager
12 may assess exit financing to the Rev Op Investors are currently on appeal. No portion of the
13 settlement payment should be assessed to the Rev Op Investors prior to resolution of the pending
14 appeal. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); (“The filing of
15 a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of
16 its control over those aspects of the case involved in the appeal.”); *In re Padilla* , 222 F.3d 1184,
17 1190 (9th Cir. 2000); *In re Mirzai*, 236 B.R. 8, 10 (B.A.P. 9th Cir. 1999); *McClatchy*
18 *Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734-35 (9th Cir.
19 1982) (a court “may not finally adjudicate substantial rights directly involved in the appeal”).

20 11. ML Manager requests the waiver of the stay provided in Bankruptcy Rule
21 6004(h). The Rev Op Investors object to this request because it might have an adverse impact on
22 their ability to seek appellate review of any relief that may be granted by the Court pursuant to
23 the Sale Motion.

24 WHEREFORE, the Rev Op Investors request that the Court enter an order sustaining the
25 objections set forth above.

1 DATED this 24th day of September, 2010.

2 BRYAN CAVE LLP

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4 By /s/ BAS, #022721
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8 COPY of the foregoing served this
9 24th day of September, 2010:

10 Via Email:

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/s/ Sally Erwin

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