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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re	Chapter 11
MORTGAGES LTD.,	Case No. 2:08-bk-07465-RJH
Debtor.	**REPLY IN SUPPORT OF MOTION TO SELL REAL PROPERTY FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS** **Real Property located in Scottsdale, Arizona in the development known as Osborn III/Ten Wine Lofts Condominium project located at 7116 and 7126 E. Osborn Rd.** **Hearing Date: September 28, 2010** **Hearing Time: 2:30 p.m.**

ML Manager LLC ("ML Manager"), as manager for the Osborn III Loan LLC and the MP Funds that are members of Osborn III Loan LLC, and as agent for the 31 pass-through investors who hold fractional interests but who did not transfer into the Osborn III Loan LLC ("Non-transferring pass-through investors"), hereby files this Reply in Support of its Motion to Sell Real Property Free and Clear of Liens, Claims, Encumbrances, and Interests (Docket No. 2923), and filed a Notice of Filing Sale Agreement (Docket No. 2966) and asks that the Court enter an order authorizing and approving the sale as set forth in the Motion and Sale Agreement.

Jeffrey C. Stone, Inc., d/b/a Summit Builders, asserting a mechanics lien claim,

filed a Response (Docket No. 2961) ("Summit Objection"). 11 Rev-Op Group investors filed an objection to the sale on behalf of 11 of 31 Non-transferring pass-through investors who are part of the Rev-Op Group (the "Rev-Op Group Objection"). Mr. Bickart filed an untimely joinder to the Rev-Op Group Objection (Docket No. 2969) ("Bickart Joinder") on behalf of 1 Non-transferring pass-through investor.[1] This Reply addresses the objections.

As the Court is aware, ML Manager filed a Notice of Filing the Sale Agreement (Docket No. 2966) last week. The Sale Agreement provided a Purchase Price of $19.5 million by the Purchaser Collen Real Estate & Development Co. and also provided for a $2 million Deposit and a closing no later than November 30, 2010. ML Manager has been working on and has proposed a form of order to the Rev-Op Group and to Summit Builders which hopefully addresses their concerns and allows them to consent to the entry of the Order. As for Summit Builders, ML Manager through Gust Rosenfeld, its special counsel on this issue, has proposed 2 alternatives, both of which came from the Summit Objection. ML Manager is trying to get the title company that is defending the mechanics lien action to confirm coverage but also ML Manager has proposed to escrow a certain amount of the purchase price with the mechanics liens (if any) to attach to the sale proceeds. As for the Rev-Op Group, ML Manager has been negotiating language in the form of order similar to the concepts used in the prior Arizona Commercial sale order as the basis for addressing the concerns. The increased purchase price may have alleviated

[1] There is no justification for the week delay by Mr. Bickart in filing his Joinder in the Rev-Op Group Objection. He raises no new arguments and no arguments based on the $19.5 million sale agreement. ML Manager will address the Rev-Op Group Objection in this Reply. Contrary to Mr. Bickart's allegations, ML Manager has not tried to be "coy" or employ a "strategy" and does not have an "improper motive" in the filing of the Sale Agreement last week. As explained in the Motion, ML Manager was still negotiating with several buyers in early September when the Motion was filed and this additional time allowed ML Manager to obtain a higher price (by about $4.5 million) above the floor it set in the Motion. Given the time constraints related to the Exit Financing, this was above board and prudent of ML Manager.

most of the Rev-Op Group concerns and the parties are negotiating a form of order that would allow the sale to go forward. These details will be discussed at the hearing.

I. THE RESULTS OF THE LOAN LLC VOTE.

The Osborn III Loan LLC ("Osborn III Loan LLC"), which was formed in June 2009 pursuant to the confirmed Plan, owns 64.389% of the interest in the property. The members of the Osborn III Loan LLC include all 9 MP Funds and the pass-through investors who transferred into the Osborn III Loan LLC. 35.611% of the interest is owned by 31 Non-transferring pass-through investors. As the Court will recall, the operating agreement for the Osborn III Loan LLC required that Major Decisions (such as selling the property) must be voted on by the members of the limited liability company and the investors in the MP Funds and must be approved by a majority in dollars of those who vote. A vote has been conducted by the ML Manager of the members of the Osborn III Loan LLC and the MP Fund investors. Based on the voting results, 93% of the dollars which were voted approved the sale. In other words, investors who voted in the Osborn III Loan LLC which owns about 64.389% of the property voted to sell the property for the price, to the Purchaser and at the time proposed by ML Manager.

II. WAIVER BY THE EXIT FINANCIER.

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

III. COMPLETION OF DUE DILIGENCE BY THE PURCHASER.

The Purchaser has completed its due diligence, except for 3 items which will be completed no later than Wednesday September 29, 2010. We expect that with entry of the Court Order and as of September 29, 2010, the Purchaser will be ready, willing and able

to close the sale.

IV. EXERCISE OF VALID BUSINESS JUDGMENT.

ML Manager in the exercise of its business judgment has decided it is in the best interest of the investors in the loan to sell the property at this time for $19.5 million to the Purchaser Collen Real Estate & Development Co. on the terms set forth in the Sale Agreement. The Purchaser has posted a Deposit of $2 million and the escrow has been set up at a local title company. The Purchaser has demonstrated that it has ample funds to purchase the Property. It is anticipated that if the Court enters the sale order that the sale will close on or before November 30, 2010.[2]

ML Manager believes the price obtained is the current market price for the property, which consists of a partially completed 4-story luxury condo project. The Purchase Price of $19.5 million obtained in this sale is the best offer received by ML Manager from a viable purchaser. ML Manager does not believe it was necessary or a good use of funds to obtain a formal appraisal of the Property. The price is all cash at the close of escrow.

ML Manager employed a broker to list and market the property. The broker marketed the property widely to a buyer of this type of property and over the marketing period received and reviewed several offers for the property. ML Manager reviewed all the offers and accepted the highest offer from a buyer that it thought would close. The

[2] While the Sale Agreement gives the Purchaser until November 30, 2010 to close, ML Manager anticipates that the sale will close earlier. The Closing date may be after the deadline established by the Forbearance Agreement, but ML Manager anticipates that the Exit Financing will already be in compliance by that date. About $1.7 million will have already been paid to the Exit Lender through the closing of the Zacher-Missouri and the Citlo sales. ML Manager believes that the remaining $500,000 that needs to be paid prior to October 31 will come from the closing of one or more sales that are in the works. Although the Exit Loan will hopefully be back in compliance by the expected date of this closure, it is still important to close this loan at this time as it will go a long way to paying off the entire Exit Financing prior to the time when the next "Loan Repayment Incentive Fee" is due. Paying off the Exit Loan prior to December 15 when this Loan Repayment Incentive Fee is due will save the investors a substantial amount.

Sale Agreement used is the standard form agreement which is being used by ML Manager, and which in fact has been used on multiple occasions already. The broker will receive a customary commission upon closing.

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

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

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

On this loan, 31 Pass-Through Investors decided not to transfer and as a result 35.611% is managed by ML Manager as the Agent while 64.389% is managed by ML Manager as the manager for the Osborn III Loan LLC. Only members of the Osborn III Loan LLC and the investors in the MP Funds in the Loan LLC are allowed to vote and to control the Major Decisions of ML Manager on the management of the property. Pursuant to the Agency Agreement, the Agent has sole discretion on the decisions to be made about the management of the property after foreclosure.

Paragraph 3(b) of the Agency Agreement states:

> If ownership of any Trust Property becomes vested in Participant, either in whole or in part, by trustee's sale, judicial foreclosure or otherwise, Agent may enter into one or more real estate broker's agreement on Participant's behalf for the sale of the applicable Trust Property, enter into a management and/or maintenance agreements for management or maintenance of the applicable Trust Property, if applicable, may acquire insurance for the applicable Trust Property, and may take such other actions and enter into such other agreements for the protection and sale of the applicable Trust

Property, **all as Agent deems appropriate in its sole discretion.**

This sole discretion in the Agent remains necessary so that the property can be 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 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 Seller contingency can be satisfied for the Purchaser and the title company.

VI. ML MANAGER AS THE AGENT HAS AUTHORITY TO SELL

The Objectors, all of whom are members of the Rev-Op Group and parties to the Adversary, 2:10-ap-00430-RJH (the "Hawkins Adversary"), assert that they have a right to terminate their agency agreements. In making these arguments, the Objectors are simply ignoring all of the litigation and rulings from the Hawkins Adversary. Those rulings are law of the case. *Minidoka Irrigation Dist. v. DOI*, 406 F.3d 567, 573 (9th Cir. 2005)("Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case."); *see also Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002). More important, those rulings are contained in a final judgment (Docket 105 in Hawkins Adversary) (the "Declaratory Judgment") the effect of which has not been stayed.[3]

[3] The Rev-Op Group has appealed the final judgment from the Hawkins Adversary. No stay pending appeal has been granted. 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)

The Declaratory Judgment resolved these issues. The Court has already ruled in the Declaratory Judgment that the Objectors are subject to and bound by the Agency Agreement.

Although the Objectors may be entitled to preserve the record for an issue on appeal, to simply assert the same arguments that have already been resolved following expensive and significant litigation is beyond the pale. These arguments should be rejected out of hand.

VII. THIS COURT HAS JURISDICTION TO HEAR THIS CONTESTED MATTER

This Court has jurisdiction to hear this dispute. First of all, the Court can take judicial notice that the Rev-Op Group has admitted the jurisdiction of this Court on numerous occasions by filing pleadings seeking affirmative relief regarding the same issues present in this case. *See, e.g.*, Counterclaims filed by Rev-Op Group in 10-ap-430 at ¶ 5 (relating to ML Manager's agency authority over the Rev-Op Group). Additionally, this Court retained post-confirmation jurisdiction because there is a close nexus between the current lawsuit and the execution and implementation of the Plan. The close nexus required for post-confirmation jurisdiction is satisfied if the remedies sought by the ML Manager could affect the implementation of the Plan. *See State of Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005). *Goldin* is analogous to the jurisdictional question in this matter. In *Goldin,* the Bankruptcy Court confirmed the debtor's plan which called for the creation of RSC, an entity to perform services for the state on a temporary basis. *Id.* at 1193. The debtor sued the state alleging that the state breached its agreement with the RSC. *Id.* The state argued that the Bankruptcy Court lacked jurisdiction to hear this matter. In finding jurisdiction, the Ninth Circuit held that the claims asserted by the debtor, "could affect the implementation and execution of the Plan itself, which specifically called for the creation of RSC and the transfer of debtor

money to fund it." *Id.* at 1194. Accordingly, the Ninth Circuit concluded that a "close nexus" existed between the claims and the bankruptcy to satisfy the Bankruptcy Court's jurisdiction. *Id*.

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

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

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

The proposed form of Order approving the sale has been sent to the Summit Builders and the Rev-Op Group Objectors in an effort to resolve the concerns raised. It is in the form that has previously been approved by this Court in other sale motions, but also includes some suggested language to resolve the issues. ML Manager is hopeful that a consensual order can be negotiated.

IX. CONCLUSION.

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

DATED: September 27, 2010

FENNEMORE CRAIG, P.C.

By /s/ *Cathy L. Reece*
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