FENNEMORE CRAIG, P.C.
Cathy L. Reece (005932)
Keith L. Hendricks (012750)
3003 N. Central Ave., Suite 2600
Phoenix, Arizona 85012
Telephone: (602) 916-5343
Facsimile: (602) 916-5543
Email: creece@fclaw.com

Attorneys for ML Manager LLC

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re MORTGAGES LTD., Debtor.	Chapter 11 Case No. 2:08-bk-07465-RJH **REPLY IN SUPPORT OF MOTION TO SELL REAL PROPERTY** **Real Property located in Phoenix, Arizona consisting of approximately 2.89 acres located at southwest corner of 3rd Street and Roosevelt** **Hearing Date: December 6, 2010** **Hearing Time: 10:00 a.m.**

ML Manager LLC ("ML Manager"), as manager for the RG I Loan LLC and the RG II Loan LLC and as agent for the pass-through investors who hold fractional interests but who did not transfer into either the RG I loan LLC or the RG II 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. 2994) ("Motion") and asks that the Court enter an order authorizing and approving the sale as set forth in the Motion and Sale Agreement.

Four alleged Rev-Op Group investors[1] ("Objectors") filed an objection to the sale

[1] The 4 entities that filed the Objection are alleged successors in interest to the 4 Rev Op Group investors listed in the opening paragraph of the Objection. The assignments to these 4 entities have not been recognized by ML Manager and are improper under the operative documents. As a result the 4 Objectors lack standing to pursue the Objection.

(the "Objection"). This Reply addresses the Objection and is supported by the Declaration of Michael Lieb, the broker used by ML Manager, which is attached as Exhibit A, and a portion of a deposition transcript from one of the Borrowers' principals, which is attached as Exhibit B.

I. THE RESULTS OF THE LOAN LLC VOTE.

The investors in RG I Loan LLC and RG II Loan LLC and all the MP Funds, were asked to vote on this Major Decision. As the Court will recall, the operating agreements for the Loan LLCs require that Major Decisions (such as selling the property) must be voted on by the members of the applicable 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 RG I Loan LLC and RG II Loan LLC and all the MP Funds investors. Based on the voting results, 93.48% of the dollars which were voted in the RG I Loan LLC approved the sale and 92.84% of the dollars which were voted in the RG II Loan LLC approved the sale. In other words, RG I Loan LLC, which owns 57.966% of the RG I property, and RG II Loan LLC, which owns 82.133% of the RG II property, voted to sell the properties 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. 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 loans to sell the two properties at this time for $3,085,138 to

the Purchaser Concord Eastridge, Inc., an Arizona corporation, on the terms set forth in the Sale Agreement. The Purchaser has posted a Deposit of $100,000 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.

As reflected in Exhibit A, ML Manager believes the price obtained is the current market price for the properties. The Purchase Price of $3,085,138 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.

As reflected in Exhibit A, 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 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.

IV. 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.

1 On these loans, the predecessors in interest of the 4 Objectors decided not to
2 transfer and as a result their percentage is managed by ML Manager as the Agent. Only
3 members of RG I Loan LLC and RG II Loan LLC and the investors in the MP Funds in
4 the Loan LLCs are allowed to vote and to control the Major Decisions of ML Manager on
5 the management of the property. Pursuant to the Agency Agreement, the Agent has sole
6 discretion on the decisions to be made about the management of the property after
7 foreclosure.

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

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

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

21 ML Manager in the exercise of its business judgment and in its sole discretion has
22 decided to proceed with the sale as presented. The contingencies for the accepting vote of
23 the Loan LLCs and the waiver by the Exit Financier have been met. ML Manager requests
24 that this Court enter the order requested so that the sale can be consummated.
25
26

V. ML MANAGER AS THE AGENT HAS AUTHORITY TO SELL.

The Objectors, all of whom are alleged members of the Rev-Op Group and whose predecessors are parties to the Hawkins 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.[2]

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.

VI. 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

[2] 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).

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.

Further, 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.

Finally, this Motion is not a motion under Section 363 of the Bankruptcy Code and so is not "free and clear" sale in the Section 363 sense. The Exit Financier's lien will attach to the proceeds so in that sense it is free of their liens. The Exit Financier will provide the necessary release if any at the closing to the title company. There are no mechanics liens on these properties. The real property taxes will be paid at closing as well. As discussed at the prior sale hearings, ML Manager is selling the properties with all of the Objectors' interests as a holder of a fractional interest in the property to attach to the proceeds as permitted under the Agency Agreement and as contemplated under the Plan. That is the extent of the request for a sale free and clear. Section 363 is not being employed and the Court is not approving the sale under Section 363. The Objectors are not prejudiced by any of the analysis or issues in this regard and have no basis in law or fact to object.

VII. THE FACT THAT THE LOAN IS UNDERWATER IS NOT A JUSTIFICATION TO DENY THE MOTION.

The Objectors argue that the sale price is substantially less than the aggregate amount of the two loans on the two parcels. Although it is true that the loans are substantially underwater, in addition to the fact that the Court can take judicial notice of the tremendous down turn in the market since these two properties were acquired, a huge fallacy in the Objectors' argument is that they are ignoring the fact that the two loans were not just acquisition loans. As the Court will recall from the evidence presented at the University and Ash hearing, which also involved the two RG I and RG II properties, Mortgages Ltd. loaned much more than the amount needed to acquire the property. Included in the loans were (1) all of the finance, pre-paid interest, up-front points and

other loan related costs that went back to Mortgages Ltd. ("Pre-paid Loan Expenses"), (2) developer fees and reimbursement for the developer contributions to the property ("Developer Fees"), (3) substantial soft costs, engineering costs, legal costs ("Soft Costs"), (4) costs for a show-room and advertising for the Mosiac project ("Advertising Costs"), and (5) refinance costs ("Refinance Costs"). In short, the "non-property" related costs for the loans, even back in 2006 and 2007 when these loans were originated, were a substantial amount of the loans, even as much as half the amounts of the loans. (Attached as Exhibit B is the deposition transcripts for Justin LaMar explaining the origin of the two Roosevelt and Gateway loans).

The RG I property was acquired in April 2006 with a loan that also included Pre-paid Loan Expenses, Developer Fees, and Soft Costs. The initial loan was for $5.7 million. (*See* Exhibit B) This loan was refinance in February 2007 for $7 million, which included, in addition to the above described non-property costs, Advertising Costs and all of the Refinance Costs. As such, an additional $1.3 million was lent with no additional security or property being acquired. The RG II property was acquired in May 2007 with a loan of $6.1 million. Like the previous loans, this loan also financed, in addition to the property acquisition, Pre-paid Loan Expenses, Developer Fees, Soft Costs and Advertising Costs. In other words, these loans were extremely upside down even at the acquisition values that were established at the very top of the market. Of course, the market values now are only a fraction of what they were when the property was acquired. As such, there is no mystery as to why these loans are so upside down and the fact that the property value is substantially less than the loan amount, although unfortunate, is simply not germane to the inquiry as to whether these properties are now being sold for a fair and reasonable price.

VIII. THE OBJECTORS ARE AGAIN IGNORING THE CARRYING COSTS OF HOLDING PROPERTY.

As it has in opposition to every other sale motion, the Objectors argue that ML Manager should hold the property speculating that the market will increase in the future. Although they address this argument more in response to this Motion with references to the location and utility of the property location, the argument is no different here than it has been in response to any other sale motion. Whether and how much the market will increase in the foreseeable future is still simply speculation. What is not speculation is that there are substantial carrying costs associated with holding this or any other property. As the Court knows, the Exit Financing continues to accrue interest at the rate of 17.5 % per annum, with additional fees such as the repayment incentive fees. As such, the market would essentially need to substantially improve every year just to keep pace with the current return to the investors. The Court has clearly held that all investors must pay their fair share of the Exit Financing. As such, delaying the repayment of the Exit Financing simply increases the amount that will be attributed to these properties, and it is simply speculation to assume that future increases in the market will outpace the carrying costs.

IX. THE ANECDOTAL COMPS PROVIDED BY THE OBJECTORS ARE INADMISSIBLE AND NOT CREDIBLE OR A BASIS TO DENY THE MOTION.

Without offering any admissible evidence of value to this property, the Objectors make reference to anecdotal comps to argue that the value is too low. This evidence is inadmissible. To be admissible, there must be foundation for opinion testimony, particularly testimony or comparisons as to value with regard to real property. *See, e.g., Parker v. State*, 89 Ariz. 124, 128, 359 P.2d 63, 65 (1961) (affirming trial court's decision to exclude evidence of real estate value because the witness's knowledge concerning the

land was slight); *State v. McDonald*, 88 Ariz. 1, 9, 352 P.2d 343, 348 (1960) (noting that the evidence of property value without foundation is inadmissible). The Objectors have not laid foundation for their allegations of comparable values, nor do they offer any opinions or admissible evidence. They merely refer to isolated sales that do not provide evidence of the value of these properties. Attached as Exhibit A is a declaration from the professional broker retained to market this property. Mr. Lieb is recognized as an expert in the commercial market where this property is located. This property was widely marketed and exposed to the market. This was the best offer received.

X. **CONCLUSION.**

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

DATED: December 3, 2010

FENNEMORE CRAIG, P.C.

By *_/s/ Cathy L. Reece_*
Cathy L. Reece
Keith L. Hendricks
Attorneys for ML Manager LLC

Copy of the foregoing sent this
3rd day of December, 2010 to the party
listed below via email:

Robert J. Miller
Bryce A. Suzuki
Bryan Cave, LLP
One Renaissance Square
Two North Central Ave., Suite 2200
Phoenix, Arizona 85004-4406
rjmiller@bryancave.com
bryce.suzuki@bryancave.com

*_/s/ Gidget Kelsey-Bacon_*

2374817.2