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

9 In re:

10 MORTGAGES LTD.,

13 Debtor.

Chapter 11

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

12 **RADICAL BUNNY'S OBJECTION AND**
13 **RESPONSE TO LIQUIDATING**
14 **TRUST'S MOTION FOR STAY**
15 **PENDING APPEAL AND FOR STAY**
16 **OF SUPPLEMENTAL APPLICATION**
17 **PURSUANT TO 11 U.S.C.**
18 **§ 503(b)(3)(D) AND (4) FOR**
19 **ALLOWANCE AND PAYMENT OF**
20 **ADMINISTRATIVE CLAIMS OF**
21 **CREDITOR RADICAL BUNNY**

19 **Hearing Date: January 20, 2011**

20 **Hearing Time: 3:00 p.m.**

21 **Location: 230 N. 1st Ave., 6th Fl**
22 **Courtroom 603**
23 **Phoenix, AZ**

24 **Related Docket Nos. 2514, 2521, 2595, 3018,**
25 **3021, 3023, 3024 & 3025**

25 Creditor RADICAL BUNNY, L.L.C. ("RBLLC"), by and through its duly
26 authorized attorneys, hereby objects to, and responds to, the "Liquidating Trust's
27 Motion for Stay Pending Appeal and for Stay of Supplemental Application
28 Pursuant to 11 U.S.C. § 503(B)(3)(D) and (4) for Allowance and Payment of

1 Administrative Claim” (“Combined LT Stay Motion”), DE 3025, filed by “Lead
2 Counsel for the ML Liquidating Trust” (“LT Counsel”). Capitalized terms not
3 defined herein have the meaning set forth in this Court’s “Findings of Fact and
4 Conclusions of Law and Amended Order Granting Radical Bunny’s Administrative
5 Claim for Substantial Contribution” (“Amended Substantial Contribution Award”),
6 DE 3018.

7 A. There May Be No Post-Appeal Funds to Pay RBLLC’s Awarded
8 Claims

9 Ironically, LT Counsel filed its Notice of Appeal of the Amended Substantial
10 Claim Award, and the Combined LT Stay Motion, on the very same day that
11 counsel for Kevin T. O’Halloran, Trustee of the Liquidating Trust of Mortgages,
12 Ltd. (“Liquidating Trustee”) filed a “Motion for Order of Discharge of Original
13 Trustee and for Release of Trustee’s Bond” (“Trustee’s Motion”), DE 3023. The
14 Trustee’s Motion indicates, among other things, that:

- 15 (1) The Liquidating Trust is unable to pay its debts as they come due.
16 (2) The Liquidating Trust holds approximately \$400,000 but has no anticipated
17 revenue in the next six months, and has historical operating costs of
18 \$100,000 per month, an obligation to pay DLA Piper \$300,000 and other
19 outstanding payment obligations.
20 (3) There are potential claims against the Liquidating Trustee, who seeks to
21 have \$160,000 of the \$400,000 put in an escrow account for the purpose of
22 paying renewal premiums due in June, 2011, on the directors’ and officers’
23 insurance policies (“Insurance Policies”) that would cover those claims.

24 The Trustee’s Motion raises serious questions about the Liquidating Trust’s
25 ability to pay amounts related to the Amended Substantial Claim Award. LT
26 Counsel failed to note any of these financial concerns in the Combined LT Stay
27 Motion.
28

1 In light of the financial condition of the Liquidating Trust, it is essential that
2 any amount of damages that RBLLC will incur as a result of Liquidating Trust's
3 requested stay and appeal be included in the calculation of a bond or additional
4 sums to be deposited into escrow.

5 As described below, these amounts include RBLLC's Supplemental
6 Application, at least 12 months of interest on amounts already awarded and under
7 the Supplemental Application, along with the anticipated fees and costs to be
8 incurred by RBLLC during the appeal.

9 Absent these protections, the Liquidating Trust, or at least the LT Counsel,
10 will cause ongoing damages to RBLLC that will not be recoverable or would lead
11 to the need for disgorgement amongst administrative claimants.

12 The Trustee's Motion also raises serious questions about LT Counsel's
13 authority to act for the Liquidating Trust in filing its Notice of Appeal and the
14 Combined LT Stay Motion, when such action has not been authorized by its
15 trustee. As set forth in paragraph 4 of the Trustee's Motion, the Liquidating
16 Trustee continues to serve as the trustee of the Liquidating Trust until a successor
17 trustee is appointed.

18
19 B. Additional Security Must Be Provided For Stay on Appeal

20 This Court entered an initial award of RBLLC's Substantial Contribution
21 Claim ("Initial Substantial Contribution Award"), DE 2514, and an order for the
22 Liquidating Trust to pay the Initial Substantial Contribution Award ("Substantial
23 Contribution Payment Order"), DE 2521. Under the Initial Substantial Contribution
24 Award and the Substantial Contribution Payment Order, the Liquidating Trust was
25 ordered to pay RBLLC's Substantial Contribution Claim in the total amount of
26 \$572,945.50.

27 More than a year ago, LT Counsel (then as Counsel for the Liquidating
28 Trustee) sought a stay of the Initial Substantial Contribution Award and the

1 Substantial Contribution Payment Order. LT Counsel argued that the Liquidating
2 Trust should not have to pay the Substantial Contribution Claim or escrow any
3 funds in order to stay enforcement of this Court's orders. At that time, LT Counsel
4 claimed there was little risk of non-payment to RBLLC because Exit Financing
5 and other assets would ensure such payment. See DE 2535, p. 8, lines 17-20.
6 Since then, the Liquidating Trust apparently breached the terms of the Exit
7 Financing by exceeding the maximum \$20,000,000 loan amount, among other
8 things, resulting in a forbearance agreement with the Exit Financing lender
9 unfavorable to the trust beneficiaries.
10

11 The amount that the Liquidating Trust owes to RBLLC already exceeds the
12 amount held in escrow. Pursuant to the Substantial Contribution Payment Order,
13 the Liquidating Trustee deposited in escrow \$655,378.07, the \$572,945.50 plus
14 interest at 10% for one year, based on an estimate of the time period required for
15 the initial appeal. The Amended Substantial Claim Award provides that RBLLC is
16 entitled to interest accrued since December 2009. As of January 5, 2011, that
17 balance is \$657,705.29. The balance in the escrow account as of January 5, 2011
18 was \$657,396.41.

19 The requested stay for the additional appeal initiated by LT Counsel will
20 further delay payment of the Amended Substantial Contribution Award.
21 Accordingly, the Liquidating Trust must contribute an additional \$65,700 in funds
22 to the escrow just to pay interest accruing at the statutory rate for another year
23 during LT Counsel's latest appeal.

24 C. Determination of the Supplemental Application Cannot Be Stayed

25 The Amended Substantial Contribution Award: (1) determined that RBLLC
26 had the legal right, under binding Ninth Circuit precedent, to payment of attorneys
27 fees that RBLLC incurred in establishing its Substantial Contribution Claim; and (2)
28 ordered RBLLC to file its supplemental application for payment of those attorneys

1 fees. RBLLC timely filed its Supplemental Application Pursuant to 11 U.S.C. §
2 503(B)(3)(D) and (4) for Allowance and Payment of Administrative Claim
3 (“Supplemental Application”), DE 3021. It is currently set for hearing with this
4 Combined LT Stay Motion.

5 LT Counsel seeks to stay the determination of the Supplemental Application.
6 There is no legal basis for this requested relief.

7 As already determined by this Court, the Ninth Circuit Court of Appeals has
8 determined that a substantial contribution claimant is entitled to an award of
9 attorneys fees and costs incurred in establishing its claim. See *North Sports, Inc. v.*
10 *Knupfer (In re Wind N' Wave)*, 509 F.3d 938, 943-944 (9th Cir. 2007) (“*In re Wind*
11 *N' Wave*”), and the Ninth Circuit precedent cited therein.

12 The Ninth Circuit Court of Appeals has repeatedly upheld bankruptcy courts’
13 awards of attorneys fees for time spent applying for and litigating attorneys fees.
14 The award of such fees is required to ensure that a fee award is not diluted by time
15 spent on fee applications and litigation. See *In re Wind N' Wave*, 509 F.3d at 943-
16 945 [citing *In re Smith*, 317 F.3d 918, 928 (9th Cir. 2002), and *In re Nucorp*
17 *Energy*, 764 F.2d 655, 657-661 (9th Cir.1985)]. See also *In re Southern California*
18 *Sunbelt Developers, Inc.*, 608 F.3d 456, 463 (9th Cir. 2010) (confirming the
19 bankruptcy court’s award of attorneys fees for litigating an entitlement to
20 attorneys’ fees).

21 The only stated basis for LT Counsel’s claim is an unsupported argument that
22 the Liquidating Trust could succeed on its latest appeal. This Court has made
23 detailed factual findings in the Amended Substantial Contribution Award on
24 remand from the initial appeal. Those finding will be reviewed under a “clearly
25 erroneous” standard, pursuant to *Cellular 101, Inc. v. Channel Communications,*
26 *Inc. (In re Cellular 101, Inc.)*, 377 F.3d 1092, 1095 (9th Cir. 2004). See also *Lebron*
27 *v. Mechem Financial, Inc.*, 27 F.3d 937, 946 (3rd Cir. 1994) (“The inquiry
28

1 concerning the existence of a substantial contribution is one of fact, and it is the
2 bankruptcy court that is in the best position to perform the necessary fact finding
3 task.”).

4 RBLLC has repeatedly established its Substantial Contribution Claim under
5 the binding legal precedent of *In re Cellular 101, Inc.* LT Counsel may
6 unnecessarily delay payment of the Substantial Contribution Claim to RBLLC
7 through the second appeal, but there is no likelihood of success on its appeal.
8 There is no legal basis for the requested stay of the determination of the
9 Supplemental Application.
10

11 Most of the attorneys fees incurred by RBLLC in connection with its
12 Substantial Contribution Claim have been fees incurred to respond to the
13 objections of the Liquidating Trustee, the initial appeal by the Liquidating Trustee,
14 and responses to filings by LT Counsel. As described in the Supplemental
15 Application, RBLLC’s attorneys fees were “necessary” due to the actions of the
16 Liquidating Trustee and LT Counsel. If there is any issue about compensating
17 unsuccessful litigation over fee applications, it is whether LT Counsel should be
18 entitled to receive ongoing payment from the limited resources of the Liquidating
19 Trust for pursuing unnecessary appeals.

20 In order to preserve RBLLC’s rights with regard to payment of its
21 Supplemental Application, RBLLC is entitled to immediate payment of awarded
22 amounts of attorneys fees plus statutory interest, or protection of RBLLC’s rights
23 to payment through a supersedeas bond or the deposit of additional funds into the
24 escrow to pay such amounts. Based on the Supplemental Application, the sum of
25 \$125,000 plus \$12,500 for interest accruing on appeal is appropriate.

26 Finally, in light of the amounts incurred by RBLLC as set forth in the
27 Supplemental Application for addressing the first appeal, the Liquidating Trust
28 should be required to deposit the additional sum of \$25,000 into the escrow to

1 address the damages to be incurred by RBLLC as a result of the Liquidating
2 Trust's second appeal. RBLLC should not be required to pursue disgorgement
3 from other administrative claimants, who are equal priority recipients of funds under
4 the Plan, in order to preserve its rights to payment of its attorneys fees pending
5 appeal.

6 D. RBLLC Will Suffer Irreparable Harm Unless Payment is Assured

7 RBLLC will be irreparably harmed unless funds are paid or reserved to pay, in
8 full, all amounts related to RBLLC's Amended Substantial Contribution Award and
9 Supplemental Application as described above. RBLLC will suffer irreparable harm
10 if the Liquidating Trust does not comply with the terms of the Plan. RBLLC has
11 pledged all of its assets to secure the Exit Financing which was to be used to pay
12 Administrative Claims. The Plan specifically anticipated an administrative claim by
13 RBLLC. Based on the Trustee's Motion, the Liquidating Trust should be compelled
14 to demonstrate to the Court that it is in compliance with its legal obligation to
15 maintain reserves for administrative claims. LT Counsel should not be authorized to
16 continue to receive payment of its attorneys fees from the limited funds remaining in
17 the Liquidating Trust, while failing to ensure RBLLC's payment of its priority
18 administrative claim.

19 E. Conclusion and Requested Relief

20 Based on the foregoing, RBLLC requests that this Court:

- 21 (1) Deny LT Counsel's Motion for Stay Pending Appeal, or alternatively,
22 provide that any such stay is subject to appropriate protection of RBLLC's
23 and DMYL's rights during the pendency of the appeal through the
24 segregation of an additional \$65,700 into an interest-bearing escrow
25 account to be disbursed upon the final determination of such appeal.
26 (2) Deny LT Counsel's Motion for Stay of the Supplemental Application and
27 grant the Supplemental Application.
28

- 1 (3) Require immediate payment of the amounts awarded for the Supplemental
2 Application or alternatively, provide that payment of all amounts awarded
3 for the Supplemental Application is subject to appropriate protection of
4 RBLLC's and DMYL's rights during the pendency of any appeal of such
5 award through the filing of a supersedeas bond or deposits of additional
6 amounts awarded plus interest at the statutory rate for at least one year,
7 into an interest-bearing escrow account to be disbursed upon the final
8 determination of such appeal.
9
10 (4) Require that the Liquidating Trust further deposit an additional \$25,000 into
11 escrow to protect RBLLC's and DMYL's rights to recover payment of
12 attorneys fees incurred on appeal.
13
14 (5) In addition to requiring the Liquidating Trust to provide these additional
15 sums as security for any stay, RBLLC further requests such additional and
16 other relief as is just and proper under the circumstances of this Chapter 11
17 case.

DATED this 17th day of January, 2011.

DECONCINI McDONALD YETWIN & LACY, P.C.

BY /s/ SHELTON L. FREEMAN

Shelton L. Freeman

Counsel to Radical Bunny, L.L.C.

22 COPIES sent via the U.S. Bankruptcy
23 Court's ECF noticing system this
17th day of January, 2011.

24 **COPIES** served by e-mail or U.S. Mail
25 this 17th day of January, 2011, to:

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