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

10 In re:

11 MORTGAGES LTD., an Arizona
12 corporation,

13 Debtor.

14 Proceedings Under Chapter 11

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

16 **LIQUIDATING TRUST'S OBJECTION**
17 **TO THE SUPPLEMENTAL**
18 **APPLICATION OF RADICAL BUNNY,**
19 **LLC PURSUANT TO 11 U.S.C.**
20 **§ 503(b)(3)(d) AND (4) FOR**
21 **ALLOWANCE AND PAYMENT OF**
22 **ADMINISTRATIVE CLAIM OF**
23 **CREDITOR RADICAL BUNNY**

24 **(Re: Docket No. 3021)**

25 The ML Liquidating Trust ("Liquidating Trust"), by and through its counsel, hereby submits
26 this objection to the Supplemental Application Pursuant to 11 U.S.C. § 503(b)(3)(D) and (4) for
27 Allowance and Payment of Administrative Claim of Creditor Radical Bunny, [DE 3021]
28 ("Supplemental Application") and in support thereof avers as follows:

29 **I. BACKGROUND**

30 On January 3, 2011, counsel for Radical Bunny, LLC ("RBLLC") filed the Supplemental
31 Application seeking reimbursement for \$126,712.00 in attorneys fees and \$2,051.50 in costs
32 incurred by counsel in connection with, among other things, the preparation and litigation of its
33 Application Pursuant to 11 U.S.C. § 503(b)(3)(D) and (4) for Allowance and Payment of
34 Administrative Claim [DE 1888] (the "Fee Application"), its *unsuccessful* attempt to defend its

1 award of fees to the Bankruptcy Appellate Panel for the Ninth Circuit (“BAP”) and its second
2 attempt to obtain payment of its fees¹. The Supplemental Application follows an order of this Court
3 (the “Order”), entered December 22, 2010, in which the Court, on remand from the BAP, granted
4 RBLLC’s Fee Application. On January 5, 2011, the Liquidating Trust filed a Notice of Appeal
5 relating to the Order. Given that the Order is not final, any supplemental fee application is
6 premature and should not be considered until the issues pending appeal have been finally resolved.
7 Moreover, the Court lacks jurisdiction to modify the Order by supplementing the fees awarded
8 therein while an appeal is pending.
9

10 **II. OBJECTION**

11 The Supplemental Application is not ripe for decision. Consideration of the merits of the
12 Supplemental Application – i.e., whether the fees requested for litigation over the fee award are
13 compensable under the Bankruptcy Code – is premature as counsel for RBLLC has not obtained a
14 *final* order awarding its requested fees in the underlying Fee Application. Consideration of the
15 Supplemental Application at this time will cause the Liquidating Trust and the Debtor’s Estate to
16 incur additional costs and fees in connection with discovery and litigation that may prove
17 unnecessary in the event that the BAP again reverses the award of fees. For this reason, the
18 Supplemental Application is not ripe for adjudication.
19

20 Counsel for RBLLC is not entitled to fees incurred in connection with litigation of the Fee
21 Application if it is ultimately unsuccessful in defending the Fee Application. *See In re Catalina Spa*
22 *& R.V. Resort, Ltd.*, 97 B.R. 13, 21 (Bankr. S.D. Cal. 1989) (holding that compensation for fee
23 application preparation and litigation is only compensable upon a finding of the court of “substantial
24 contribution” for the underlying services); *see also In re Wind N’ Wave*, 509 F.3d 938, 944 (9th Cir.
25
26

27 ¹ In its response to the Liquidating Trust’s Motion for Stay Pending Appeal, counsel for
28 RBLLC also seeks payment of fees it *might* incur going forward.

1 2007) (holding that Section 503(b)(3)(D) allows for a *successful* applicant to seek fees incurred in
2 preparing and defending fee application); *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659-60 (9th Cir.
3 1985) (noting that rationale behind compensating litigation over fee application is to avoid dilution
4 of fee *awarded*). In *Wind N' Wave*, the Ninth Circuit set forth the test for compensability of
5 attorneys fees as follows:

6 where a creditor receives attorney's fees under Section
7 503(b)(4), the time and expenses devoted to *securing the*
8 *attorney's fee award* are also compensable if [(a) the services
9 for which compensation is sought satisfy the requirements of
10 Section 330 of the Bankruptcy Code and (b) the case
 exemplifies a 'set of circumstances' where the time and
 expense incurred by the litigation is 'necessary'].

11 *Id.* at 943-44 (emphasis added). Before the Court can even assess whether the services rendered in
12 preparing and litigating a fee application were reasonable and necessary, the applicant must be
13 successful in obtaining a final award of its fees under Section 503(b)(4). *See In the Matter of*
14 *Southern California Sun-Belt Developers, Inc.*, 608 F.3d 456, 462 (9th Cir. 2010) (finding that, like
15 other fee shifting provisions, eligibility for fees turns on the merits of the litigation as a whole and
16 noting that “**fee eligibility is . . . inextricably linked to the proceedings’ dispositive**
17 **adjudication**”) (emphasis added).

18 Where a creditor is unsuccessful in its fee application litigation, no fees may be awarded in
19 connection with the litigation of that fee application. *In re Riverside-Linden*, 945 F.2d 320 (9th Cir.
20 1991). In *Wind N' Wave*, the Ninth Circuit upheld its decision in *Riverside-Linden*, noting that
21 “compensating unsuccessful litigation over fee applications might lead to frivolous fee requests.”
22

23 *Id.* at 943. The litigation in the *Wind N' Wave* case concluded with the BAP granting the application
24 of fees under Section 504(b)(3)(D). That has not happened in the present case.
25

26 Here, the Order is not a final order because it was appealed before it became final. The BAP
27 reversed RBLLC's original fee award, citing numerous evidentiary and legal issues to be considered
28

1 on remand. After the remand, the Court entered another Order approving all of the fees requested,
2 but the Order was appealed to the BAP within the 14 day appeal period. The Liquidating Trust
3 believes that counsel for RBLLC has once again failed to meet its burden of proof to support its Fee
4 Application with evidence sufficient to meet the legal standard set forth in *Cellular 101, Inc. v.*
5 *Channel Communications, Inc.*, 377 F.3d 1092, 1096 (9th Cir. 2004). The Liquidating Trust also
6 believes that the Order does not follow the parameters set forth in the opinion of the BAP and that
7 the Liquidating Trust will be successful on appeal. The parties should not be required to litigate the
8 new request in the Supplemental Application for additional fees until the appeal of the Order has
9 been determined.
10

11 Additionally, this Court lacks jurisdiction to grant the relief sought in the Supplemental
12 Application, as the practical result of such relief is alteration of the Court's Order. In the 9th Circuit,
13 the general rule is that once an appeal has been filed, the lower court loses jurisdiction over the
14 subject matter of the appeal. *In re Sherman*, 491 F.3d 948, 967 (9th Cir. 2007). In *Sherman*, the 9th
15 Circuit held that the bankruptcy court "may not alter or expand upon the judgment." *Id.*; *In re*
16 *Ratliff*, 2010 WL 653700 *1 (Bankr. D. Ariz. 2010) ("a timely appeal . . . deprives the bankruptcy
17 court of the power to alter, expand or vacate the order at issue"); *In re Ahmed*, 420 B.R. 518, 523
18 (Bankr. C.D. Cal. 2010). The Liquidating Trust has filed a Notice of Appeal to the Order.
19

20 Accordingly, this Court is deprived of the power to alter or expand the Order by supplementing the
21 fees awarded therein. Entry of an order granting the relief sought in the Supplemental Application,
22 will have the effect of expanding the relief awarded under the Order, which action is outside of this
23 Court's jurisdiction.²
24

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26 ² Any such alteration of the fees awarded by granting the Supplement Application
27 would leave the Liquidating Trust with the possibility of having to appeal a second
28 fee award while the first fee award, upon which the second is clearly dependent, is
still pending appeal. As a result, if the BAP reversed the Order and denied the fees
awarded in the Fee Application, the Liquidating Trust would still be faced with a

1 Finally, to the extent that this Court believes that it is somehow appropriate to make an
2 additional award of fees *before* there is a final order on the underlying Fee Application, then the
3 Liquidating Trust must be provided an opportunity to conduct discovery. The Liquidating Trust has
4 not been provided sufficient time to review the Supplemental Application. Moreover, the
5 Liquidating Trust is entitled to additional discovery, including depositions, in order to determine
6 whether the fees requested are reasonable or necessary and meet the standards set by the Ninth
7 Circuit for such supplemental awards. Because the Supplemental Application is premature, the
8 Liquidating Trust believes that the Court should postpone discovery on the Supplemental
9 Application until there is a final order on the Fee Application.
10

11 If the Court is going to move forward on the Supplemental Application before there is a final
12 order, then the Liquidating Trust is entitled to take discovery and, if necessary, have this Court hear
13 its objection. The Liquidating Trust therefore reserves any and all rights to object to the merits of
14 the Supplemental Application. The Liquidating Trust, after discovery, may object to the necessity of
15 the fees incurred, particularly in light of the BAP findings that counsel for RBLLC failed to properly
16 support its Fee Application and RBLLC's admission that only upon remand did it "conduct an
17 extraordinary analysis of the entire Chapter 11 record" to address the deficiencies highlighted by the
18 BAP. *See* Supplemental Application at p. 6. This finding by the BAP and admission by counsel for
19 RBLLC would make an award of fees for the first attempt at the Fee Application and its
20 unsuccessful defense on appeal seem extremely unlikely. Counsel for RBLLC, the proponent of the
21 Fee Application, should have established a sufficient record supporting its Fee Application prior to
22 submitting the Fee Application to this Court in the first instance, and the Debtor's Estate should not
23 be forced to bear the costs of RBLLC's need to do it multiple times. Counsel for RBLLC should
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25
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27 supplemental fee award that related to the success of RBLLC on the first appeal.
28 Such a result is untenable.

1 therefore not be entitled to fees incurred in connection with its loss in the first appeal or fees for
2 failing to properly support the case on its first presentation. Moreover, the Liquidating trust may
3 object to the reasonableness of fees incurred, including the reasonableness of particular time entries
4 listed in the exhibits to the Supplemental Application.

5 Forcing the parties to litigate the merits of the Supplemental Application prior to the entry of
6 a final order on the Fee Application and establishment of entitlement to such fees will result in the
7 expenditure of additional, and potentially, unnecessary, fees and costs for both parties. Such a
8 decision will further increase the costs to the Debtor's Estate.

10 **III. CONCLUSION**

11 Consideration of the Supplemental Application prior to a final order on the merits of the
12 underlying Fee Application is premature and unduly burdensome to the Liquidating Trust, which
13 continues to incur costs as a result of the failure of RBLLC to adequately support the Fee
14 Application. Moreover, because the Order is pending appeal, this Court lacks jurisdiction to modify
15 the Order by supplementing the fees awarded therein. Accordingly, the Liquidating Trust requests
16 that this Court stay consideration of the Supplemental Application until an order is entered by the
17 BAP on appeal and such order becomes a final order. In the alternative, to the extent that the Court
18 refuses to wait for a final order, the Liquidating Trust requests that the Court set a discovery
19 schedule that will allow the Liquidating Trust sufficient time to conduct discovery, fully review the
20 Supplemental Application and raise any substantive objections to the Supplemental Application once
21 discovery is complete.
22
23

24 Respectfully submitted,

25 Dated: January 19, 2011

STRADLEY RONON STEVENS & YOUNG, LLP

26 By: /s/ Mark J. Dorval
27 Mark J. Dorval, Esquire
28 Counsel for the ML Liquidating Trust

CERTIFICATE OF SERVICE

I, Julie M. Murphy, certify, that on January 19, 2011, I electronically transmitted the attached documents to the Clerk's Office, using the CM/ECF System for filing, which transmitted a Notice of Electronic Filing to the parties in interest via the Court's ECF System, and also served a copy of the documents on the following parties via a separate e-mail:

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/s/Julie M. Murphy _____

Julie M. Murphy

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