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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: MORTGAGES LTD., Debtor.	In Proceedings Under Chapter 11
	Case No. 2:08-bk-07465-RJH
	OBJECTION TO ML MANAGER'S MOTION TO SELL REAL PROPERTY (NATIONAL RETAIL DEVELOPMENT)
	Hearing Date: February 28, 2011 Hearing Time: 10:00 a.m.

Queen Creek XVIII, L.L.C., or its successors and assigns (collectively, "Queen Creek"), hereby file this Objection to the ML Manager's *Motion To Sell Real Property* [DE #3071] dated February 2, 2011 (the "Sale Motion"). In support of this Objection, Queen Creek hereby submits as follows:

1. According to the Sale Motion, NRDP Loan LLC ("NRDP") and various pass-through investors co-own the property known as the National Retail Development property located at 5116 North Dysart Road, Litchfield Park, Arizona (the "Property"). Queen Creek is among the pass-through investors referenced in the Sale Motion.

2. Queen Creek held a 9.612% interest in Loan No. 860905 (the "Loan") and owns a corresponding interest as a tenant in common of the Property .

3. ML Manager states that it has foreclosed on the Property and improvements thereon at a trustee sale. According to the Motion, the outstanding principal amount on the Loan totals more than $5.2 million.

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4. The proposed sale price for the Property is $2,812,500. Such sale price likely will result in a net recovery for investors of less than 45% of their original investment dollars. Queen Creek, which has a total investment in the Loan of $500,000, will lose at least $270,000 as a result of ML Manager's decision to sell the Property at this inopportune time. This loss may be even greater if there are valid mechanics' liens on the Property

5. From the time of plan negotiations and the subsequent inception of the Plan, the Rev Op Investors have had a clear understanding of the respective deals they struck with Mortgages Ltd. The Rev Op Investors' understood (during plan negotiations and through plan confirmation) that, in the event of a foreclosure, they would be considered tenants in common and, therefore, would have the right to protect their property rights and their investments.

6. After confirmation, ML Manager began seeking approval for proposed sales of real property in which any of the Rev Op Investors held an interest. Each such sale motion was accompanied by a notice for filing objections to the proposed sales. Pursuant to these notices, the Rev Op Investors filed objections in an effort to protect their valuable property interests. As with past objections, by filing this Objection, Queen Creek is merely complying with the notice filed by ML Manager.

7. Queen Creek objects to the Sale Motion on the basis that: (i) a "sale free and clear" mechanism is not provided for in the plan confirmed by the Court (the "Plan") and no applicable non-bankruptcy law allows for such mechanism; (ii) the Court lacks jurisdiction to approve such sale; (iii) ML Manager has no authority to act on behalf of Queen Creek with respect to the Property; and (iv) the proposed liquidation sale in the worst of market conditions is neither consistent with ML Manager's fiduciary duties nor a proper exercise of ML Manager's business judgment.

8. First, ML Manager has failed to cite any provision of the Plan or any applicable non-bankruptcy law that provides for a "free and clear" sale as proposed in the Sale Motion. Assuming, *arguendo*, that section 363 were applicable here, the ML Manager has not made any effort to make a showing under subsections 363(f) or (h) of the Bankruptcy Code.

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9. Second, ML Manager claims the Plan provides for retained jurisdiction under section 105 of the Bankruptcy Code and/or the Plan. The Plan does not provide a basis for retained jurisdiction with respect to ML Manager's request for relief under the Sale Motion. *See In re Johns-Manville Corp.,* 7 F.3d 32, 34 (2d Cir. 1993); *CCM Pathfinder Pompano Bay, LLC v. Compass Fin. Partners LLC,* 396 B.R. 602, 605 (Bankr. S.D.N.Y. 2008); *see also In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005).

10. In contrast, Queen Creek's valuable rights survived any discharge of the Debtor, and Queen Creek is entitled to realize upon the value of its ownership interests as it deems appropriate. *Dewsnup v. Timm*, 502 U.S. 410, 424 (1992) (discharge relieves the debtor only of personal liability and does not affect in rem actions against property); *In re Gibson*, 172 B.R. 47, 49 (Bankr. W.D. Ark. 1994) (discharge of the debtor does not eradicate in rem liability which may exist against assets, including monies).

11. Although the Court has ruled with respect to other sale motions that a close nexus exists between such sales and the Debtor's bankruptcy case, Queen Creek continues to dispute such conclusion, is among the investors who have appealed relevant sale orders, and reserves all applicable rights with respect to such matters. *See Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000); *In re Mirzai*, 236 B.R. 8, 10 (B.A.P. 9th Cir. 1999); *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734-35 (9th Cir. 1982) (a court "may not finally adjudicate substantial rights directly involved in the appeal").

12. Moreover, ML Manager has no interest in the Property; its asserted agency power has been decoupled from any interest ML Manager purported to hold in the Loan. It is beyond dispute that, as a factual matter, the Property has been foreclosed upon and ML Manager does not have any ownership interests in the Property.[1] Thus, even assuming ML Manager's

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[1] Such rights did not exist with respect to the Loan prior to foreclosure either.

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purported use rights in the Loan could qualify as an "interest" (which is disputed and the subject of a pending appeal), ML Manager does not have any such rights with respect to the Property. Accordingly, its asserted agency power to bind Queen Creek is revocable and has been revoked.

13. Queen Creek also reserves all of its rights on authority issues that are currently pending on appeal before the district court. ML Manager lacks authority to sell Queen Creek's valuable ownership rights as a tenant in common of the Property. ML Manager's alleged authority to make decision on behalf of Queen Creek fails for a host of reasons, including, without limitation, the following:

- ML Manager does not have any agency power. The Debtor terminated the Rev Op program in writing to the Rev Op Investors prior to the bankruptcy petition date. In addition, Queen Creek and other Rev Op Investors terminated any agency of the Debtor in writing prior to the bankruptcy petition date.

- ML Manager does not have any interest coupled with its asserted agency. The only possible "interest" coupled with ML Manager's asserted agency power would consist of rights to: (i) collect fees and charges related to the Debtor's lending operations, which ceased long ago; and/or (ii) deduct a portion of monthly interest payments "in an amount determined by Agent at the time of the origination of such Loan," *see* Agency Agreement, p.4, ¶ 1(c). The Plan resolved this issue "in favor of the Investors" by transferring or assigning the Debtor's asserted right to fees, charges, and interest spread to the Loan LLCs and non-transferring pass-through investors. *See* Disclosure Statement, pp.62-63; Plan § 4.12 (as modified by Confirmation Order ¶ X). Thus, ML Manager has no conceivable "interest" in the loans whatsoever

- Even if ML Manager had an agency coupled with an interest (which it does not), ML Manager is wrong as a matter of law that its asserted agency power is irrevocable. An agency coupled with an interest is premised "upon the good faith of the agent's action." *McHaney v. McHaney*, 209 Ark. 337, 347, 190 S.W.2d 450, 454 (Ark. 1945). "It is immaterial, in the application of this rule, that the agency is one coupled with an interest." *Id.*; *see also Perkins v. Hershey*, 77 Mich. 504, 507, 43 N.W. 1021,

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1022 (Mich. 1889); Am. Jur. 2d, Agency § 205 ("The agent or employee is bound to exercise the utmost good faith, loyalty, and honesty toward the principal or employer, regardless of whether the agency is one coupled with an interest . . . ."). Thus, "whether the agency is coupled with an interest or not would make no difference in so far as the right of the principal to terminate the contract is concerned" whenever the agent has "been unfaithful to his principal." *Marnon v. Vaughan Motor Co.*, 189 Or. 339, 219 P.2d 163 (Or. 1950).

- The "Agency Agreements" were not validly assigned to ML Manager. They were not assignable as a matter of law. *See* 11 U.S.C. § 365(c); *In re Exide Technologies*, 378 B.R. 762, 767 (D. Del. 2007) (plan of reorganization cannot change the nature of a contract simply because the plan "deems" it so); *In re Fitch*, 174 B.R. 96, 101 (Bankr. S.D. Ill. 1994). Moreover, they were not properly assigned as a matter of fact.

- Even if the Agency Agreement were applicable (which it is not), it does not give ML Manager authority to sell Queen Creek's tenant-in-common interests. The Agency Agreement expressly states that the agency power thereunder serves only to carry out the intent of Agency Agreement, which cannot be severed from the investment transaction as a whole. *See* Complaint, Exh. 1, Agency Agreement, ¶ 1. Accordingly, while the servicing agent may "*commence* foreclosure" or "*initiate* a trustee's sale," there is no authority for the agent to *complete* a foreclosure or trustee sale without the principal's consent. Similarly, although the servicing agent may *list* REO property, nowhere does the Agency Agreement authorize the servicing agent to *complete* any sale without consent.

14. Finally, Queen Creek submits that the proposed sale is not consistent with ML Manager's fiduciary duties and is not even a proper exercise of business judgment. Investors face a significant and needless loss of their investments. The gross sales price of approximately $2.8 million fails to adequately compensate investors owed $5.2 million in the aggregate and is not fair market value for the Property.

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15. By nearly all accounts, commercial real property prices are anticipated to rise from their current historic lows. The most recent commercial real estate study conducted by Karl Guntermann, the Fred E. Taylor Professor of Real Estate at ASU's W.P. Carey School of Business, supports an anticipated upward trend in commercial real estate prices: "If the historical pattern is followed, which appears to be the case, 2011 should see a significant improvement in commercial prices, basically a recovery from the distressed levels of 2009 and 2010."[2]

16. ML Manager ignores this reality and seeks an order from this Court "blessing" a sale at the bottom of the market. Such decision-making is not reasonable business judgment and fails to comply with ML Manager's fiduciary obligations.

17. As the manager of the Loan LLCs and the asserted agent of pass-through investors, ML Manager has the fiduciary responsibility to maximize the return to all investors. In its role as a fiduciary, ML Manager should be required to demonstrate to investors that all avenues of recovery have been explored and thoroughly vetted prior to a straight liquidation at a significant loss. At a minimum, ML Manager should provide assessments of different approaches considered rather than simply stating that the Property has been "subjected to the market," which ML Manager has admitted is the worst since the Great Depression.

18. In this case, the Property is approximately 25,000 square feet with substantial tenant improvements suitable for day care or other educational uses, such as charter schools. ML Manager has failed to provide any analysis or any indication that it has investigated possible joint ventures or leasing opportunities that would produce income and provide an opportunity to sell after a tenant is acquired and rents are stabilized. In light of these failures, the Sale Motion should be denied.

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[2] *See* news story and link to formal report at http://asunews.asu.edu/20101215_business_asursi. Other news sources report the beginning of recovery for the Phoenix market. On February 2, 2011, the Phoenix Business Journal reported that Phoenix "was among the biggest gainers" in restoring private sector jobs. The Bureau of Labor Statistics also reported that Phoenix led the nation in restoring private-sector employment with a year-to-year increase of 2.3 percent. In short, there is no reason to sell when economic recovery and real property values are expected to improve over the next several years.

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WHEREFORE, Queen Creek requests that the Court enter an order denying the Sale Motion and granting to Queen Creek such other relief as it deems appropriate.

DATED this 22nd day of February, 2011.

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COPY of the foregoing served via email this 22nd day of February, 2011 upon:

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