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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 TO OBJECTION TO MOTION TO SELL REAL PROPERTY**
	Real Property located at the northwest corner of University Dr. and Ash Ave. in Tempe, Arizona
	Hearing Date: April 11, 2011 **Hearing Time: 2:30 p.m.**

ML Manager LLC ("ML Manager"), as manager for the U&A Loan LLC and as agent for the pass-through investors who hold fractional interests but who did not transfer into either U&A 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. 3113) ("Motion")[1] 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[2] ("Objectors") filed an objection to the sale

[1] ML Manager filed the executed Sale Agreement with the Notice of Filing Executed Purchase Agreement (Docket No. 3144), which is incorporated herein and in the Motion.

[2] One of the Objectors, L.L.J. Investments, LLC, is an alleged successor-in-interest to 3 prior Rev Op Group investors listed in the opening paragraph of the Objection. The assignments to this entity has not been recognized by ML Manager and is improper under the operative documents. As a result the L.L.J. Investments, LLC lacks standing to pursue the Objection.

(the "Objection"). This Reply addresses the Objection and is supported by the Declaration of Melinda Korth, the broker used by ML Manager, which is attached as Exhibit A.

I. THE RESULTS OF THE LOAN LLC VOTE

The investors in U&A 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 ML Manager of the members of U&A Loan LLC and the MP Funds investors in the Loan LLC. Based on the voting results, 83.23% of the dollars which were voted in U&A Loan LLC approved the sale. In other words, U&A Loan LLC, which owns 77.119% of the Property, voted to sell the Property to the Purchaser for the price and at the time proposed by ML Manager.

II. WAIVER BY THE EXIT FINANCIER

One of the contingencies of the Sale Agreement concerns the Exit Financier. This provision was intended to ensure that the property will not be sold for too low a price. The Exit Financier has expressed that it does not intend to exercise its right to compete. So this contingency has been satisfied.

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 Property at this time for $3,240,000 to the Purchaser BREOF Investors LLC, a Delaware limited liability company, on the terms set forth in the Sale Agreement. The Purchaser has posted a Deposit of $300,000 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.

ML Manager believes the price obtained is the current market price for the Property. The Purchase Price of $3,240,000 obtained in this sale is the best offer received by ML Manager. 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 course of 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, 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, 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, the Objectors decided not to transfer and as a result their percentage is managed by ML Manager as the Agent. Only members of U&A 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 contingencies for the accepting vote of the Loan LLC and the waiver by the Exit Financier have been met. ML Manager requests that this Court enter the order requested so that the sale can be consummated.

V. ML MANAGER AS THE AGENT HAS AUTHORITY TO SELL

The Objectors, all of whom are alleged members of the Rev-Op Group, 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 that has already occurred in this Court. All of the Objectors, or their predecessors were parties to the Adversary Proceeding, *ML Manager v. Hawkins et al.*, 2:10-ap-00430-RJH (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]

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 MOTION

This Court has jurisdiction to hear this Motion. 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

[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).

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 implementation 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 as 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. 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 loan on the Property. Although it is true that the loan is substantially underwater, and in addition to the fact that the Court can take judicial notice of the tremendous down turn in the market since the Property was acquired, a huge fallacy in the Objectors' argument is that they are ignoring the fact that the loan was not just an acquisition loan. As the Court will recall from the evidence presented at the University and Ash hearing, Mortgages Ltd. loaned much more than the amount needed to acquire the Property. The loan amount was approximately $30 million under a $130 million construction loan. At the closing, fees and other loan charges in the approximate amount of $10 million were paid to Mortgages Ltd. Additionally, it appears that millions of dollars of the loan proceeds were used by the borrower on other properties that did not benefit the University & Ash Property at all. The reality is that the University & Ash Property was never worth anything close to $30 million, and it will not be possible to recover all of that money. According to the testimony in the prior proceedings before this Court, the Property was originally purchased for approximately $3 million, at the height of the real estate market. Because the Property was never improved, it is simply not worth

more than it was at the height of the market. The marketing efforts of ML Manager's real estate brokers produced several good offers and, ML Manager accepted a price of $3,240,000. 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 the Property is 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. Here the Rev-Op Group offers an article which speculates that the real estate market in the Phoenix Metropolitan area will increase in 2011. 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 due every six months. Plus the real property taxes are unpaid and accrue interest at the rate of 16% per annum. 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. CB Richard Ellis is a nationally recognized brokerage firm with substantial experience marketing commercial real estate in the Phoenix Metropolitan Area. This property was widely marketed and exposed to the market. This was the best offer received.

Furthermore, the Rev-Op Group suggests that ML Manager should enter into some joint venture to maintain the property until that day when it can be sold at a profit. Notably, a joint venture would not guaranty any specific returns to the investors and would subject the investors to further risk. A joint venture would require that ML Manager enter into the development business. Additionally, such a joint venture would likely require that the investors subordinate their interest or provide a lien to a third-party that ultimately could deprive the investors of any recovery. There would be no guaranty under that kind of scenario that the investors would in fact receive any kind of return, let alone $3,240,000 which they will receive from the sale. Any allegation that a joint venture

would generate a greater return for the investors is speculation. While the Property was being marketed for sale, ML Manager was not approached by any party seeking a joint venture. ML Manager exercised its business judgment and determined that the Purchase Price was the highest and best offer made after the extensive marketing process.

WHEREFORE, 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: April 8, 2010

FENNEMORE CRAIG, P.C.

By /s/ *Cathy L. Reece*
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Copy of the foregoing emailed
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