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7 Counsel for the Rev Op Investors

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

10 In re:

11 MORTGAGES LTD.,

12 Debtor.

In Proceedings Under Chapter 11

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

**OBJECTION TO ML MANAGER'S
MOTION TO SELL REAL PROPERTY
(REAL PROPERTY CONSISTING OF
APPROXIMATELY 9.7 ACRES
LOCATED WEST OF THE NORTHWEST
CORNER OF GOLDWATER DRIVE AND
SCOTTSDALE ROAD IN SCOTTSDALE,
ARIZONA, KNOWN AS THE
NORTHWEST QUADRANT OF
PORTALES PLACE)**

Hearing Date: May 2, 2011

Hearing Time: 2:30 p.m.

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21 AJ Chandler 25 Acres, L.L.C.; Morley Rosenfield, M.D. P.C. Restated Profit Sharing
22 Plan; Queen Creek XVIII, L.L.C. William L. Hawkins Family L.L.P.; and/or their successors
23 and assigns (collectively, the "Rev Op Investors"), hereby file this Objection to ML Manager's
24 *Motion To Sell Real Property* [DE #3145] dated April 5, 2011 (the "Sale Motion"). In support of
25 this Objection, the Rev Op Investors hereby submit as follows:

26 1. According to the Sale Motion, PPP Loan LLC and various pass-through investors
27 co-own the real property consisting of approximately 9.7 acres located west of the northwest
28 corner of Goldwater Drive and Scottsdale Road in Scottsdale, Arizona, known as the northwest

1 quadrant of Portales Place (the “Property”). The Rev Op Investors are among the pass-through
2 investors referenced in the Sale Motion.

3 2. The Rev Op Investors collectively held a 5.753% interest in Loan No. 852606
4 (the “Loan”), and collectively own a corresponding interest as tenants in common of the
5 Property.

6 3. ML Manager states that it has foreclosed on the Property at a trustee’s sale.
7 According to the Motion, the outstanding principal amount on the Loan totals approximately \$32
8 million.

9 4. The proposed sale price for the Property is \$14,500,000. Such sale price likely
10 will result in a net recovery for investors of less than 45.4% of their original investment dollars.
11 The Rev Op Investors, which have a total investment in the Loan of \$1,840,922.43, will lose at
12 least \$1,005,143.65 as a result of ML Manager’s decision to sell the Property at this inopportune
13 time. This loss may be even greater if there are valid mechanics’ liens on the Property.

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

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

25 7. The Rev Op Investors object to the Sale Motion on the basis that: (i) a “sale free
26 and clear” mechanism is not provided for in the plan confirmed by the Court (the “Plan”) and no
27 applicable non-bankruptcy law allows for such mechanism; (ii) good faith purchaser status for
28 any potential purchaser cannot be granted under section 363 of the Bankruptcy Code, or

1 otherwise, particularly in light of the pending objections, litigation, and appeals regarding ML
2 Manager’s sale of this Property and other properties, and ML Manager has articulated no
3 justification for such request; (iii) the Court lacks jurisdiction to approve such sale; (iv) ML
4 Manager has no authority to act on behalf of the Rev Op Investors with respect to the Property;
5 and (v) the proposed liquidation sale in the worst of market conditions is neither consistent with
6 ML Manager’s fiduciary duties¹ nor a proper exercise of ML Manager’s business judgment.

7 8. First, ML Manager has failed to cite any provision of the Plan or any applicable
8 non-bankruptcy law that provides for a “free and clear” sale or the finding of a “good faith
9 purchaser” as proposed in the Sale Motion. Assuming, *arguendo*, that section 363 were
10 applicable here, ML Manager has not made any effort to make a showing under subsections
11 363(f), (h), or (m) of the Bankruptcy Code.

12 9. Second, ML Manager has failed to provide any justification for its request that the
13 purchaser of the Property be given good faith purchaser status. *See In re M Capital Corp.*, 290
14 B.R. 743, 747 (B.A.P. 9th Cir. 2003) (“[T]he proponent of section 363(m) good faith has the
15 burden of proof.”). Indeed, ML Manager cannot properly request such a determination in light
16 of the myriad objections to ML Manager’s attempts to sell the properties in which the Rev Op
17 Investors hold interests, and the pending appeals regarding such sales. Additionally, this
18 Objection serves as further notice to any potential purchaser of the Property of the disputes
19 between the Rev Op Investors and ML Manager regarding the propriety of ML Manager’s sale
20 of this Property and other properties, of the objections filed thereto, and of the appeals currently
21 pending related thereto.

22 10. Third, ML Manager claims the Plan provides for retained jurisdiction under
23 section 105 of the Bankruptcy Code and/or the Plan. The Plan does not provide a basis for
24 retained jurisdiction with respect to ML Manager’s request for relief under the Sale Motion. *See*

25 _____
26 ¹ It is singularly inappropriate for ML Manager to request a finding that it has fulfilled its fiduciary
27 duties to the Rev Op Investors and other investors in the context of a sale motion. The Rev Op Investors
28 reserve all rights with respect to the fiduciary duties owed to them by ML Manager, and nothing herein
shall be construed as a waiver of such rights.

1 *In re Johns-Manville Corp.*, 7 F.3d 32, 34 (2d Cir. 1993); *CCM Pathfinder Pompano Bay, LLC*
2 *v. Compass Fin. Partners LLC*, 396 B.R. 602, 605 (Bankr. S.D.N.Y. 2008); *see also In re*
3 *Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005).

4 11. In contrast, the Rev Op Investors’ valuable rights survived any discharge of the
5 Debtor, and the Rev Op Investors are entitled to realize upon the value of their ownership
6 interests as it deems appropriate. *Dewsnup v. Timm*, 502 U.S. 410, 424 (1992) (discharge
7 relieves the debtor only of personal liability and does not affect in rem actions against property);
8 *In re Gibson*, 172 B.R. 47, 49 (Bankr. W.D. Ark. 1994) (discharge of the debtor does not
9 eradicate in rem liability which may exist against assets, including monies).

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

20 13. Moreover, ML Manager has no interest in the Property; its asserted agency power
21 has been decoupled from any interest ML Manager purported to hold in the Loan. It is beyond
22 dispute that, as a factual matter, the Property has been foreclosed upon and ML Manager does
23 not have any ownership interests in the Property.² Thus, even assuming ML Manager’s
24 purported use rights in the Loan could qualify as an “interest” (which is disputed and the subject
25 of a pending appeal), ML Manager does not have any such rights with respect to the Property.

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27
28 ² Such rights did not exist with respect to the Loan prior to foreclosure either.

1 Accordingly, its asserted agency power to bind the Rev Op Investors is revocable and has been
2 revoked.

3 14. The Rev Op Investors also reserve all of their rights on authority issues that are
4 currently pending on appeal before the district court. ML Manager lacks authority to sell the
5 Rev Op Investors' valuable ownership rights as tenants in common of the Property. ML
6 Manager's alleged authority to make decisions on behalf of the Rev Op Investors fails for a host
7 of reasons, including, without limitation, the following:

8 • ML Manager does not have any agency power. The Debtor terminated the
9 Rev Op program in writing to the Rev Op Investors prior to the bankruptcy petition date.
10 In addition, the Rev Op Investors terminated any agency of the Debtor in writing prior to
11 the bankruptcy petition date.

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

22 • Even if ML Manager had an agency coupled with an interest (which it
23 does not), ML Manager is wrong as a matter of law that its asserted agency power is
24 irrevocable. An agency coupled with an interest is premised "upon the good faith of the
25 agent's action." *McHaney v. McHaney*, 209 Ark. 337, 347, 190 S.W.2d 450, 454 (Ark.
26 1945). "It is immaterial, in the application of this rule, that the agency is one coupled
27 with an interest." *Id.*; *see also Perkins v. Hershey*, 77 Mich. 504, 507, 43 N.W. 1021,
28 1022 (Mich. 1889); Am. Jur. 2d, Agency § 205 ("The agent or employee is bound to

1 exercise the utmost good faith, loyalty, and honesty toward the principal or employer,
2 regardless of whether the agency is one coupled with an interest”). Thus, “whether
3 the agency is coupled with an interest or not would make no difference in so far as the
4 right of the principal to terminate the contract is concerned” whenever the agent has
5 “been unfaithful to his principal.” *Marnon v. Vaughan Motor Co.*, 189 Or. 339, 219 P.2d
6 163 (Or. 1950).

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

13 • Even if the Agency Agreement were applicable (which it is not), it does
14 not give ML Manager authority to sell the Rev Op Investors’ tenant-in-common interests.
15 The Agency Agreement expressly states that the agency power thereunder serves only to
16 carry out the intent of Agency Agreement, which cannot be severed from the investment
17 transaction as a whole. *See* Complaint, Exh. 1, Agency Agreement, ¶ 1. Accordingly,
18 while the servicing agent may “commence foreclosure” or “initiate a trustee’s sale,” there
19 is no authority for the agent to *complete* a foreclosure or trustee’s sale without the
20 principal’s consent. Similarly, although the servicing agent may *list* REO property,
21 nowhere does the Agency Agreement authorize the servicing agent to *complete* any sale
22 without consent.

23 15. Finally, the Rev Op Investors submit that the proposed sale is not consistent with
24 ML Manager’s fiduciary duties and is not even a proper exercise of business judgment.
25 Investors face a significant and needless loss of their investments. The gross sales price of \$14.5
26 million fails to adequately compensate investors owed more than \$32 million in the aggregate
27 and is not fair market value for the Property.
28

1 16. By nearly all accounts, commercial real property prices are anticipated to rise
2 from their current historic lows. The most recent commercial real estate study conducted by Karl
3 Guntermann, the Fred E. Taylor Professor of Real Estate at ASU’s W.P. Carey School of
4 Business, supports an anticipated upward trend in commercial real estate prices: “If the
5 historical pattern is followed, which appears to be the case, 2011 should see a significant
6 improvement in commercial prices, basically a recovery from the distressed levels of 2009 and
7 2010.”³

8 17. ML Manager ignores anticipated improvement in market conditions and seeks an
9 order from this Court “blessing” a sale at the bottom of the market. Such decision-making is not
10 reasonable business judgment and fails to comply with ML Manager’s fiduciary obligations.

11 18. As the manager of the Loan LLCs and the asserted agent of pass-through
12 investors, ML Manager has the fiduciary responsibility to maximize the return to all investors.
13 In its role as a fiduciary, ML Manager should be required to demonstrate to investors that all
14 avenues of recovery have been explored and thoroughly vetted prior to a straight liquidation at a
15 significant loss. At a minimum, ML Manager should provide assessments of different
16 approaches considered rather than simply stating that the Property has been “subjected to the
17 market,” which ML Manager has admitted is the worst since the Great Depression. ML Manager
18 has failed to provide any such assessment. In light of these failures, the Sale Motion should be
19 denied.

20 WHEREFORE, the Rev Op Investors request that the Court enter an order denying the
21 Sale Motion and granting to the Rev Op Investors such other relief as it deems appropriate.

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25 ³ See news story and link to formal report at http://asunews.asu.edu/20101215_business_asursi. Other
26 news sources report the beginning of recovery for the Phoenix market. On February 2, 2011, the Phoenix
27 Business Journal reported that Phoenix “was among the biggest gainers” in restoring private sector jobs.
28 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.

1 DATED this 25th day of April, 2011.

2 BRYAN CAVE LLP

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4 By /s/ BAS, #022721

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10 COPY of the foregoing served via email
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