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6
7 IN THE UNITED STATES BANKRUPTCY COURT
8 FOR THE DISTRICT OF ARIZONA

9 In re

10 MORTGAGES LTD.,

11 Debtor.

Chapter 11

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

12 **REPLY TO OBJECTION TO MOTION TO**
13 **SELL REAL PROPERTY**

14 **Real Property consisting of approximately 9.7**
15 **acres located west of the northwest corner of**
16 **Goldwater Drive and Scottsdale Road in**
17 **Scottsdale, Arizona, known as the northwest**
18 **quadrant of Portales Place**

19 **Hearing Date: May 2, 2011**
20 **Hearing Time: 2:30 p.m.**

21 ML Manager LLC (“ML Manager”), as manager for the PPP Loan LLC and as
22 agent for the pass-through investors who hold fractional interests but who did not transfer
23 into either PPP Loan LLC (“Non-transferring pass-through investors”), hereby files this
24 Reply in Support of its Motion to Sell Real Property (Docket No. 3145) (“Motion”) and
25 asks that the Court enter an order authorizing and approving the sale as set forth in the
26 Motion and Sale Agreement.

Certain Rev-Op Group investors¹ (“Objectors”) filed an objection to the sale (the

¹ 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 yet been recognized by ML Manager because of
improprieties in the attempted assignment. Until those improprieties have been cured and
the assignment recognized, L.L.J. Investments, LLC lacks standing to pursue the
Objection.

1 “Objection”). This Reply addresses the issues raised in the Objection and ML Manager
2 requests that the Court overrule the Objection.

3 ML Manager also received an Objection (Docket No. 3188) filed by Super 8
4 Motel of Clear Lake, Inc. and Kevin Daney (the “Lis Pendens Objection”). This Reply
5 addresses the issues in the Super 8 Objection and, to the extent that they are not overruled,
6 proposes to bond over or escrow around the alleged vendees lien asserted by the Lis
7 Pendens Objection should the Court require such action. That should resolve that Lis
8 Pendens Objection so that the Sale can go forward.

9 **I. THE RESULTS OF THE LOAN LLC VOTE**

10 The investors in PPP Loan LLC and all the MP Funds were asked to vote on this
11 Major Decision. As the Court will recall, the operating agreements for the Loan LLCs
12 require that Major Decisions (such as selling the property) must be voted on by the
13 members of the applicable limited liability company and the investors in the MP Funds
14 and must be approved by a majority in dollars of those who vote. A vote has been
15 conducted by ML Manager of the members of PPP Loan LLC and the MP Funds investors
16 in the Loan LLC. Based on the voting results, 88.03% of the dollars which were voted in
17 PPP Loan LLC approved the sale. In other words, PPP Loan LLC, which owns 68.7109%
18 of the Property, voted to sell the Property to the Purchaser for the price and at the time
19 proposed by ML Manager.

20 **II. WAIVER BY THE EXIT FINANCIER**

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

25 **III. EXERCISE OF VALID BUSINESS JUDGMENT**

26 ML Manager, in the exercise of its business judgment, has decided it is in the best

1 interest of the investors in the loans to sell the Property at this time for \$14,500,000 to the
2 Purchaser JLB Realty LLC, a Texas limited liability company, on the terms set forth in
3 the Sale Agreement. The Purchaser has posted a Deposit of \$2 million and the escrow has
4 been set up at a local title company. The Purchaser has demonstrated that it has ample
5 funds to purchase the Property.

6 ML Manager believes the price obtained is the current market price for the
7 Property. The Purchase Price of \$14,500,000 obtained in this sale is the best offer
8 received by ML Manager. ML Manager does not believe it was necessary or a good use
9 of funds to obtain a formal appraisal of the Property. The price is all cash at the close of
10 escrow.

11 ML Manager employed a broker to list and market the Property. The broker
12 marketed the Property widely to a buyer of this type of Property and over the course of the
13 marketing period received and reviewed several offers for the Property. ML Manager
14 reviewed all the offers and accepted the highest offer from a buyer that it thought would
15 close. The Sale Agreement used is the standard form agreement which is being used by
16 ML Manager, and which in fact has been used on multiple occasions already. The broker
17 will receive a customary commission upon closing.

18 The Purchaser is a good-faith purchaser who has negotiated at arms-length. The
19 Purchaser is not related to or affiliated with ML Manager, the investors, or the Exit
20 Lender.

21 **IV. AGENT HAS SOLE DISCRETION ON SALE AS TO THE NON-**
22 **TRANSFERRING PASS-THROUGH INVESTORS**

23 As the Court will recall, ML Manager received an assignment of the irrevocable
24 Agency Agreements which contains a power of attorney coupled with an interest and
25 became the Agent for all the Pass-Through Investors. The Pass-Through Investors were
26 given until October 31, 2009, to decide whether to transfer into the applicable Loan LLCs

1 and receive a membership interest.

2 On this loan, the Objectors decided not to transfer and as a result their percentage is
3 managed by ML Manager as the Agent. Only members of PPP Loan LLC and the
4 investors in the MP Funds in the Loan LLC are allowed to vote and to control the Major
5 Decisions of ML Manager on the management of the property. Pursuant to the Agency
6 Agreement, the Agent has sole discretion on the decisions to be made about the
7 management of the property after foreclosure.

8 Paragraph 3(b) of the Agency Agreement states:

9 If ownership of any Trust Property becomes vested in
10 Participant, either in whole or in part, by trustee's sale,
11 judicial foreclosure or otherwise, Agent may enter into one or
12 more real estate broker's agreement on Participant's behalf
13 for the sale of the applicable Trust Property, enter into a
14 management and/or maintenance agreements for management
15 or maintenance of the applicable Trust Property, if applicable,
16 may acquire insurance for the applicable Trust Property, and
17 may take such other actions and enter into such other
18 agreements for the protection and sale of the applicable Trust
19 Property, **all as Agent deems appropriate in its sole**
20 **discretion.**

21 This sole discretion in the Agent remains necessary so that the property can be
22 managed in a way to maximize the value for all the investors in the property and to ensure
23 that no one investor could hold the others hostage. The vote of the Loan LLC investors
24 was intended to be a check and balance of the discretion of the Agent/Manager on Major
25 Decisions. The Non-transferring pass-through investors chose to retain their interests
26 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.

1 **V. ML MANAGER AS THE AGENT HAS AUTHORITY TO SELL**

2 The Objectors, all of whom are alleged members of the Rev-Op Group, assert that
3 they have a right to terminate their agency agreements. In making these arguments, the
4 Objectors are simply ignoring all of the litigation and rulings that has already occurred in
5 this Court. All of the Objectors, or their predecessors were parties to the Adversary
6 Proceeding, *ML Manager v. Hawkins et al.*, 2:10-ap-00430-RJH (the “Hawkins
7 Adversary”). Those rulings are law of the case. *Minidoka Irrigation Dist. v. DOI*, 406
8 F.3d 567, 573 (9th Cir. 2005)(“Under the ‘law of the case’ doctrine, a court is ordinarily
9 precluded from reexamining an issue previously decided by the same court, or a higher
10 court, in the same case.”); *see also Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir.
11 2002). More important, those rulings are contained in a final judgment (Docket 105 in
12 Hawkins Adversary) (the “Declaratory Judgment”) the effect of which has not been
13 stayed.²

14 The Declaratory Judgment resolved these issues. The Court has already ruled in
15 the Declaratory Judgment and in many other rulings on similarly situated sale motions
16 that the Objectors are subject to and bound by the Agency Agreement.

17 Although the Objectors may be entitled to preserve the record for an issue on
18 appeal, to simply assert the same arguments that have already been resolved following
19 expensive and significant litigation is beyond the pale. These arguments should be
20 rejected out-of-hand.

21 **VI. THIS COURT HAS JURISDICTION TO HEAR THIS MOTION**

22 This Court has jurisdiction to hear this Motion. First of all, the Court can take
23 judicial notice that the Rev-Op Group has admitted the jurisdiction of this Court on
24

25 ² The Rev-Op Group has appealed the final judgment from the Hawkins Adversary. No
26 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).

1 numerous occasions by filing pleadings seeking affirmative relief regarding the same
2 issues present in this case. *See, e.g.*, Counterclaims filed by Rev-Op Group in 10-ap-430
3 at ¶ 5 (relating to ML Manager's agency authority over the Rev-Op Group). Additionally,
4 this Court retained post-confirmation jurisdiction because there is a close nexus between
5 the current lawsuit and the execution and implementation of the Plan. The close nexus
6 required for post-confirmation jurisdiction is satisfied if the remedies sought by the ML
7 Manager could affect the implementation of the Plan. *See, State of Montana v. Goldin (In*
8 *re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005). *Goldin* is analogous to the
9 jurisdictional question in this matter. In *Goldin*, the Bankruptcy Court confirmed the
10 debtor's plan which called for the creation of RSC, an entity to perform services for the
11 state on a temporary basis. *Id.* at 1193. The debtor sued the state alleging that the state
12 breached its agreement with the RSC. *Id.* The state argued that the Bankruptcy Court
13 lacked jurisdiction to hear this matter. In finding jurisdiction, the Ninth Circuit held that
14 the claims asserted by the debtor, "could affect the implementation and execution of the
15 Plan itself, which specifically called for the creation of RSC and the transfer of debtor
16 money to fund it." *Id.* at 1194. Accordingly, the Ninth Circuit concluded that a "close
17 nexus" existed between the claims and the bankruptcy to satisfy the Bankruptcy Court's
18 jurisdiction. *Id.*

19 Here the close nexus exists between the relief requested by ML Manager and the
20 Mortgages Ltd. bankruptcy, because, the relief requested by ML Manager is an essential
21 part of the implementation of the Plan. The Plan specifically called for the creation of ML
22 Manager to manage the Loan LLCs and to step into the role as manager for the MP Funds
23 and as agent of non-transferring pass-through investors. The relief requested by ML
24 Manager affects the amount of money that the investors will receive. Accordingly, the
25 Bankruptcy Court retains post-confirmation jurisdiction.

26

1 Further, as this Court has already found in connection with many similarly situated
2 sale motions, this Court has jurisdiction under the retained and reserved jurisdiction in the
3 Plan for such a matter as this, including in Section 9.1(e), (g) and (h) of the Plan, among
4 others, and has authority to approve the sale under Section 105 of the Bankruptcy Code,
5 among others. Again, preserving an issue for appeal is one thing, but continually
6 attempting to re-litigate clearly decided issues is simply improper.

7 Finally, this Motion is not a motion under Section 363 of the Bankruptcy Code and
8 so is not “free and clear” sale in the Section 363 sense. The Exit Financier’s lien will
9 attach to the proceeds so in that sense it is free of their liens. The Exit Financier will
10 provide the necessary release if any at the closing to the title company. The real property
11 taxes will be paid at closing as well. As discussed at the prior sale hearings, ML Manager
12 is selling the properties with all of the Objectors’ interests as a holder of a fractional
13 interest in the property to attach to the proceeds as permitted under the Agency Agreement
14 and as contemplated under the Plan. That is the extent of the request for a sale. Section
15 363 is not being employed and the Court is not approving the sale under Section 363. The
16 Objectors are not prejudiced by any of the analysis or issues in this regard and have no
17 basis in law or fact to object.

18 **VII. THE FACT THAT THE LOAN IS UNDERWATER IS NOT A**
19 **JUSTIFICATION TO DENY THE MOTION**

20 The Objectors argue that the sale price is substantially less than the aggregate
21 amount of the loan on the Property. Although it is true that the loan is substantially
22 underwater, and in addition to the fact that the Court can take judicial notice of the
23 tremendous down turn in the market since the Property was acquired, the fact that the loan
24 is underwater is not determinative. A huge fallacy in the Objectors’ argument is that they
25 are ignoring the fact that the loan was not an acquisition loan. As the Court will recall
26 from the evidence presented during the Bankruptcy case, the Grace Entities alleged that

1 Mortgages Ltd. has failed to fund a number of projects and as a result they asserted a
2 lender liability claim of over \$100 million and filed the involuntary bankruptcy
3 proceeding. The amount loaned here was approximately \$32 million. This loan was
4 allegedly made in connection with a planned condo project, and included substantial pre-
5 paid lending costs, development fees, and financing related to the initial stages of the
6 development. At the closing, the prepaid loan fees, developer fees and other costs or
7 expenses were advanced that did not add value to the raw dirt that was being acquired. As
8 such, it is not surprising that the raw dirt is not now worth the amount loaned. The reality
9 is that the PPP Property is not worth anything close to \$32 million when the loan was
10 made, and it will not be possible to recover all of that money. The only relevant question
11 now is the value of the property; not the amount loaned. The marketing efforts of ML
12 Manager's real estate brokers produced several good offers and, ML Manager accepted a
13 price of \$14,500,000. The fact that the property value is substantially less than the loan
14 amount, although unfortunate, is simply not germane to the inquiry as to whether the
15 Property is now being sold for a fair and reasonable price.

16 **VIII. THE OBJECTORS ARE AGAIN IGNORING THE CARRYING COSTS OF**
17 **HOLDING PROPERTY**

18 As it has in opposition to every other sale motion, the Objectors argue that ML
19 Manager should hold the property speculating that the market will increase in the future.
20 Whether and how much the market will increase in the foreseeable future is still simply
21 speculation. What is not speculation is that there are substantial carrying costs associated
22 with holding this or any other property. As the Court knows, the Exit Financing continues
23 to accrue interest at the rate of 17.5 % per annum, with additional fees such as the
24 repayment incentive fees due every six months. Plus the real property taxes are unpaid
25 and accrue interest at the rate of 16% per annum. As such, the market would need to
26 substantially improve every year just to keep pace with the current return to the investors.

1 The Court has clearly held that all investors must pay their fair share of the Exit
2 Financing. As such, delaying the repayment of the Exit Financing simply increases the
3 amount that will be attributed to these properties, and it is simply speculation to assume
4 that future increases in the market will outpace the carrying costs.

5 **IX. THE SUPER 8 OBJECTION SHOULD NOT HALT THE SALE.**

6 Additionally, the Super 8 Objection should not halt the sale of this property. The
7 Super 8 Objection involves certain vendee's liens that allegedly exist on the Property.
8 Here, this objection is does not prevent ML Manager from selling this Property for two
9 separate yet equally compelling reasons.

10 First, the Super 8 Objection is invalid because there are no valid vendee's liens
11 against this property and the lis pendens is improper, and nothing more than an attempt to
12 essentially extort a settlement where no valid claim exists. Arizona law a vendee's lien is
13 only available to a purchaser of real property who has deposited money *towards the*
14 *purchase* of the property. See, e.g., *Pima Farms v. Elliot*, 32 Ariz. 342, 344, 258 P. 304,
15 305 (1927). In *Pima Farms*, the Arizona Supreme Court affirmed a buyers' right to assert
16 a vendee's lien. There, a seller entered into a real estate purchase contract that allowed
17 the buyer to rescind if the seller failed to provide a certain amount of water to the
18 property. When the seller failed to do so, the buyer terminated the contract and sued for a
19 return of his \$475.80 deposit. *Id.* at 343, 258 P. at 304. The court found against the seller
20 in holding that the buyer had a lien against the property for repayment of the amount that
21 he advanced under the purchase contract. *Id.* at 346-47, 258 P. at 305-06.

22 However, *Pima Farms* and its progeny do not apply to an investor making an
23 equity investment in a real estate development project. The vendee's lien only applies to
24 someone who put up money to purchase property. The Super 8 Objectors did not deposit
25 money towards the purchase of real property. ML Manager has been informed that the
26 money provided to Portales Place Properties, LLC was not for the purchase of a condo

1 unit. Instead, this money was an equity investment in the viability of the project.
2 Specifically, in its answer, Portales Place Properties, LLC (in other words, Grace Entities)
3 stated:

4 Plaintiff's purported characterization of the transaction is
5 misleading because Plaintiff was an investor in the Project
6 including having executed a Subscription Agreement for
7 Membership Interest. Plaintiff's characterization is also
8 misleading because Plaintiff's characterization omits that fact
(known to Plaintiff at all material times) that Defendant
9 obtained a Special Order of Exemption from the Arizona
10 Department of Real Estate.

11 Portales Place Property, LLC' Answer at ¶ 5. In other words, Grace Entities has made it
12 clear that Super 8 was not putting down \$800,000 to buy a condo, which would be more
13 than the asking price of the units in the proposed development. Instead, Super 8 made an
14 equity investment in Grace Entities' project. Equity investments in a real estate
15 development do not create vendee's liens. *See, e.g., Pima Farms*, 32 Ariz. at 344, 258 P.
16 at 305. Accordingly the alleged vendee's liens are improper.

17 Additionally, should the Court find that some question as to the validity of the
18 vendee's liens exists, the Court should still approve the sale as ML Manager will agree to
19 resolve the vendee's liens through a bond, escrow or settlement.

20 WHEREFORE, for the foregoing reasons, ML Manager requests that the Court
21 overrule the Objections and enter an order as requested by the ML Manager in the Motion
22 authorizing and approving the sale.

23 DATED: April 29, 2011

FENNEMORE CRAIG, P.C.

24 By /s/ Cathy L. Reece
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2 This 29th day of April, 2011 to:

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