FENNEMORE CRAIG, P.C.
Cathy L. Reece (005932)
Keith L. Hendricks (012750)
3003 N. Central Ave., Suite 2600
Phoenix, Arizona 85012
Telephone: (602) 916-5343
Facsimile: (602) 916-5543
Email: creece@fclaw.com

Attorneys for ML Manager LLC

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 southeast corner of Central Ave. and Monroe St. in Phoenix, Arizona
	Hearing Date: May 2, 2011 **Hearing Time: 2:30 p.m.**

ML Manager LLC ("ML Manager"), as manager for the C&M Loan LLC and as agent for the pass-through investors who hold fractional interests but who did not transfer into either C&M Loan LLC ("Non-transferring pass-through investors"), hereby files this Reply in Support of its Motion to Sell Real Property (Docket No. 3156) ("Motion") and asks that the Court enter an order authorizing and approving the sale as set forth in the Motion and Sale Agreement.

Certain Rev-Op Group investors[1] ("Objectors") filed an objection to the sale (the "Objection"). This Reply addresses the issues raised in the Objection and ML Manager

[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 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.

requests that the Court overrule the Objection.

ML Manager also received a Limited Objection (Docket No. 3171) filed by KGM Builders, Inc. (the "Limited Objection"). Pursuant to the appropriate State law provisions, ML Manager proposes to bond over the alleged mechanics lien asserted by KGM. That should resolve that Limited Objection so that the Sale can go forward.

I. THE RESULTS OF THE LOAN LLC VOTE

The investors in C&M 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 C&M Loan LLC and the MP Funds investors in the Loan LLC. Based on the voting results, 89.39% of the dollars which were voted in C&M Loan LLC approved the sale. In other words, C&M Loan LLC, which owns 82.497% 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 $7,750,000 to the Purchaser Stonebridge Realty Advisors, Inc., a Colorado corporation, 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 $7,750,000 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.

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 C&M 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.[2]

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

[2] 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).

required for post-confirmation jurisdiction is satisfied if the remedies sought by the ML 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. Again, this goes beyond preserving an issue for appeal, and cross the line into an improper attempt to re-litigate issues that have been conclusively decided.

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. 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 exits in the Objectors' argument because they are ignoring the fact that the loan was not an acquisition loan. As the Court will recall from the evidence presented during the Bankruptcy case, the Grace Entities alleged that this loan was only partially funded. The amount loaned was approximately $27 million under a partially funded multi-million construction loan. This is a partially completed project and it is not surprising that it in its current condition is not worth the amount loaned. At the closing, prepaid loan fees, developer fees and other costs or expenses were advanced that did not add value to the project. Moreover, the construction will need to be re-started, and probably redone in many instances. This means that not every dollar that went into the project increased the

value of the project on an ongoing basis on a dollar-for-dollar basis. Indeed, that was the basis of the Grace Entities' entire claim and extensive litigation in this matter.

The Grace Entities, represented by Snell & Wilmer (Don Gaffney and Don Ennis) were parties to the involuntary petition and alleged significant lender liability claims over $100 million against Mortgages Ltd. Primarily as a result of the partially funded C&M loan. The Grace Entities were some of the most adversarial parties to the bankruptcy and eventually their claims were only resolved after months of contentious negotiations that culminated in an approval by this Court of the settlement agreement over the objection o the Rev-Op Group (which settlement was ultimately appealed, but the appeal was dismissed as moot.) The reality is that the C&M Property is not worth anything close to $27 million, and it will not be possible to recover all of that money. The marketing efforts of ML Manager's real estate brokers produced several good offers and, ML Manager accepted a price of $7,750,000. 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. 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.

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 29, 2011

FENNEMORE CRAIG, P.C.

By /s/ *Cathy L. Reece*
Cathy L. Reece
Keith L. Hendricks
Attorneys for ML Manager LLC

Copy of the foregoing emailed
this 29th day of April, 2011 to:

Bryce Suzuki
BRYAN CAVE
One Renaissance Square
Two North Central Ave., Suite 2200
Phoenix, AZ 85004-4406
United States of America
602 364 7285
602-716-8285
bryce.suzuki@bryancave.com

/s/ Gidget Kelsey-Bacon

2415841