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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

**MOTION TO APPROVE SETTLEMENT
CONCERNING METROPOLITAN LOFTS
LLC BANKRUPTCY**

**Hearing Date: May 31, 2011
Hearing Time: 11:00 a.m.**

14 ML Manager LLC ("ML Manager") requests that the Court enter an order
15 authorizing ML Manager as the manager for Metro Loan LLC and the agent for certain
16 Pass-Through Investors to settle litigation which has been brought against the investors
17 through ML Manager by the Bankruptcy Trustee in the Metropolitan Lofts, LLC
18 bankruptcy case. The primary issue in the Adversary Proceeding is the validity of the deed
19 of trust because of an alleged defect by the notary. The Bankruptcy Trustee in the
20 Adversary Proceeding seeks to avoid the deed of trust of ML Manager for the benefit of
21 the Bankruptcy Estate. This settlement would settle those issues, provide a small amount
22 in settlement for the Bankruptcy Trustee and Estate and allow the disbursement of a
23 significant amount of money to ML Manager for the investors.

24 One of Mortgages Ltd.'s borrowers, Metropolitan Lofts, LLC filed a chapter 11
25 proceeding, Case No. 2:09-bk-31907-EWH, which was converted to a chapter 7
26

1 (“Estate”). Roger Brown is the chapter 7 trustee for the Estate (“Bankruptcy Trustee”).
2 ML Manager filed a secured proof of claim for over \$38 million and a Motion for Stay
3 Relief to allow it, among other things, to foreclose on the real property and improvements.
4 The Bankruptcy Trustee filed an adversary proceeding, Case No. 2:10-ap-01876-EWH
5 (“Adversary Proceeding”), against ML Manager seeking to avoid the deed of trust on the
6 real property because of an alleged defect by the notary. The Bankruptcy Trustee listed
7 the Property for sale and in the Metropolitan Lofts Bankruptcy Case obtained approval of
8 the sale of the Property at a Section 363 sale hearing with all liens to attach to the sale
9 proceeds. The sale is due to close before June 24, 2011 and the Bankruptcy Trustee will
10 be holding net sale proceeds of approximately \$2.9 million after payment of real property
11 taxes, commissions, and closing costs. There are also mechanics lien claimants who assert
12 a lien in the net sale proceeds.

13 ML Manager and the Bankruptcy Trustee have reached a settlement of the issues
14 concerning the Adversary Proceeding, the claim of ML Manager in the Estate and the use
15 of the sale proceeds. The Bankruptcy Trustee will be seeking Court approval in the
16 Metropolitan Lofts case conditioned upon the approval of the Metro Loan LLC investors
17 and the Bankruptcy Court in the Mortgages Ltd. case. Besides filing this Motion ML
18 Manager is also seeking the vote of the investors in the Metro Loan LLC simultaneously.
19 Metro Loan LLC owns 94.3679% of the loan. The rest is held by non-transferring pass-
20 through investors.

21 Pursuant to the proposed settlement with the Bankruptcy Trustee, ML Manager
22 would allow the net sale proceeds of approximately \$2.9 million to be used to pay the
23 Bankruptcy Trustee and his counsel and the Estate’s administrative expenses and to create
24 a pot of proceeds of \$28,000 to be used to pay the unsecured creditors, excluding ML
25 Manager, on a pro-rata basis and with a satisfaction of the alleged mechanics’ liens and
26 interests in the sale proceeds. ML Manager will receive the remaining sale proceeds at the

1 close of escrow which are estimated to be approximately \$2,600,000 of the net sale
2 proceeds but are subject to change depending on the administrative expenses of the Estate
3 and the closing costs of sale.

4 ML Manager asserts a first lien position in the net sale proceeds however even if it
5 loses ML Manager asserts that it holds unsecured claims for the investors which are 99%
6 of the total unsecured claims. The mechanics lien claimants and other unsecured creditors
7 in the Estate hold the other 1% of unsecured claims in the Estate. The pot to be created
8 under the Settlement for the unsecured claims, excluding ML Manager, will be disbursed
9 on a pro-rata basis and will be in satisfaction of the alleged mechanics' liens and interests
10 in the sale proceeds. Chapter 7 administrative claims of the chapter 7 Bankruptcy Trustee
11 plus his attorney among others are estimated to be over \$200,000 and would be paid
12 before unsecured creditors. Even if ML Manager prevailed on the validity of the lien the
13 Bankruptcy Trustee would try and surcharge the proceeds for his expenses in selling the
14 property. If ML Manager were to lose on the validity of the lien, it would hold about 99%
15 of the unsecured claims and receive 99% of the remaining funds for unsecured claims
16 after payment of the administrative expenses. It will cost additional fees for the Estate and
17 for ML Manager to litigate the Adversary Proceeding, a surcharge motion, and possibly
18 the State Court mechanics lien claims. Settlement will save those fees and costs. There is
19 also a risk that ML Manager could lose any of the three matters although ML Manager
20 makes no admissions in this Settlement and denies that the lien would be invalidated.

21 After taking the different positions into account, the risk of losing the Adversary
22 Proceeding, the surcharge motion and the State Court mechanics lien litigation, the cost of
23 litigation, and the time value of money, among other things, the Bankruptcy Trustee and
24 ML Manager have agreed to the use of the net sale proceeds for the Bankruptcy Trustee
25 and Estate and administrative expenses with a pot of \$28,000 for the unsecured creditors
26 and mechanics lien claimants. The remaining proceeds would be paid to ML Manager at

1 the closing in June 2011, which is estimated to be about \$2,600,000.

2 The normal factors used by Bankruptcy Courts in approving settlements requires
3 consideration of the probability of success in the litigation, the difficulties in collecting a
4 judgment, the complexity of the matter, the expense, inconvenience or delay that will
5 result from the litigation, the interests of the parties and the reasonableness of the
6 compromise. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988); In re A&C Properties, 784
7 F.2d 1377, 1380-81 (9th Cir. 1986). In reviewing the appropriateness of the settlement,
8 ML Manager believes that the settlement is in the best interest of the investors and is the
9 best exercise of the business judgment of ML Manager consistent with its fiduciary duties.
10 The settlement removes any risk of the litigation and eliminates the continued cost of such
11 litigation. A factual issue exists in the Adversary Proceeding that would require a day long
12 trial before the Court. The surcharge motion would also require a hearing and pleadings.
13 By settling the parties avoid the time and expense of such proceedings. Further the
14 settlement will preserve the ability of ML Manager to continue its claim against the title
15 insurance company under the existing title policy which insured for such problems.
16 Further since the sale is set to close in June 2011 the settlement allows the sale proceeds
17 to be paid the ML Manager sooner than if the litigation were to continue. This will permit
18 ML Manager to use the sale proceeds attributable to the Metro Loan LLC to repay some
19 of the Exit Financing.

20 ML Manager asserts that this Court has retained and reserved jurisdiction in the
21 Plan for such a matter as this, including sections 9.1(e), (g) and (h) of the Plan among
22 others, and has the authority to approve a settlement with a borrower or its bankruptcy
23 estate under Section 105 of the Bankruptcy Code, among other sections, as an order in aid
24 of implementation of the Plan. As the Court has noted at several prior hearings, there is a
25 close nexus between the requests of ML Manager in a settlement motion and the
26 bankruptcy because the relief requested is an important part of the Plan. *See, State of*

1 *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005). The
2 Plan specifically called for the creation of the ML Manager to manage the Loan LLCs and
3 to step into the role as manager of the MP Funds and agent of non-transferring pass
4 through investors. The relief requested by ML Manager affects the amount of money that
5 the investors will receive and the pay down of the Exit Financing. Accordingly, the
6 Bankruptcy Court retains post-confirmation jurisdiction.

7 ML Manager asserts that it has the authority as Manager under the Metro Loan
8 LLC Operating Agreement, among other things, and as agent under the agency documents
9 for the non-transferring pass-through investors to settle this dispute about the loan.
10 Nevertheless, ML Manager seeks Court approval of the Settlement in aid of
11 implementation of the Plan, among other things.

12 ML Manager also proposes and seeks approval to use the Metro Loan LLC's
13 portion of the settlement proceeds pursuant to the Loan Agreement and the Interborrower
14 Agreement to pay the Exit Financing. The settlement proceeds represent sale proceeds of
15 the property which had been pledged to the Exit Lender as collateral for the Exit
16 Financing.

17 WHEREFORE, ML Manager LLC requests that the Court enter an order
18 authorizing and approving the settlement with the Bankruptcy Trustee in the Metropolitan
19 Loft LLC bankruptcy case, and approving ML Manager's use of the Metro Loan LLC's
20 portion of the proceeds under the Loan Agreement to pay the Exit Financing, and for such
21 other and further relief as is just and proper under the circumstances.

22 DATED: May 13, 2011

23 FENNEMORE CRAIG, P.C.

24 By /s/ Cathy L. Reece
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