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7 Counsel for the Rev Op Group

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

10 In re:

Chapter 11

11 MORTGAGES LTD.,

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

12 Debtor.

**REV OP INVESTORS' (I) OBJECTION TO ML
MANAGER'S MOTION TO AUTHORIZE A
SECOND DISTRIBUTION OF PROCEEDS, AND
(II) REQUEST TO CONTINUE HEARING AND
FOR EVIDENTIARY HEARING**

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15 Date of Hearing: July 19, 2010

16 Time of Hearing: 10:00 a.m.

17 The investors identified in Exhibit "A" hereto (collectively, the "Rev Op Investors"), by
18 and through their duly authorized counsel, hereby file this Objection to, and request to continue
19 hearing on the *Motion to Authorize a Second Distribution of Proceeds in Accordance with*
20 *Allocation Model and to Approve Treatment of Distribution of Disputed Proceeds* filed by ML
21 Manager LLC ("ML Manager") on June 27, 2011 (the "Motion"). In further support of this
22 Objection, the Rev Op Group hereby submits as follows:¹

23 **I. BACKGROUND.**

24 1. The OIC's *First Amended Plan of Reorganization* was confirmed, as amended
25 (the "Plan"), on May 20, 2009.

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27 ¹ The Rev Op Investors are parties to several appeals and litigation involving ML
28 Manager. The Rev Op Investors reserve all of their rights on appeal and in all other matters, and
nothing herein shall be deemed an admission or otherwise prejudice the Rev Op Investors with
respect to such matters.

1 2. On September 1, 2010, ML Manager filed its “Allocation Model.” The
2 Allocation Model does *not* fulfill the Plan’s requirement that ML Manager provide an accounting
3 to investors.

4 3. The Allocation Model essentially allows ML Manager to state its “allocation” of
5 loan proceeds to investors and third parties in abstract terms. ML Manager is able to maintain
6 the accounting details—i.e., the actual numbers—of the total allocation concealed from any one
7 investor. At best, an investor may see the allocation details for its fractional interests in a limited
8 number of loans, but will never gain a full understanding of the allocation and how the gross loan
9 proceeds are distributed to other investors and third parties. The Rev Op Investors submit that a
10 fractional view of limited details does not constitute the accounting required under the Plan.

11 4. Moreover, the Allocation Model essentially has become a cost-spreading device
12 that ML Manager may alter in its sole discretion, without disclosure to investors. Indeed, ML
13 Manager apparently has changed its model significantly in the last several months. Although a
14 representative of certain of the Rev Op Investors has met with ML Manager to discuss the most
15 recent changes to the Allocation Model, the Rev Op Investors do not have a meaningful
16 understanding of the distributions ML Manager is proposing under the Motion.

17 5. Moreover, the Rev Op Investors have appealed the order approving the Allocation
18 Model and the initial distribution. That appeal remains pending, but has been scheduled for
19 argument before the District Court on August 26, 2011. The disposition of that appeal obviously
20 could have a direct impact on the Motion, and there is no reason that ML Manager must
21 distribute additional proceeds prior to the appeal hearing.

22 6. Undersigned counsel made a written request to ML Manager to continue the
23 hearing on the Motion until after the August appeal hearing, but ML Manager refused
24 purportedly because it did not want to “hold up distributions,” a sudden rationale that certainly
25 was not operative for the first two years of this case. The Rev Op Investors submit that a small
26 delay to gain some degree of clarity on the outstanding appellate issues is appropriate and would
27 not be prejudicial to investors.
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1 7. Even without regarding the appeal hearing, at a minimum, the currently scheduled
2 hearing on the Motion should be held as an initial hearing, and a continued evidentiary hearing
3 must be scheduled after the Rev Op Investors, and any other parties in interest, have had the
4 opportunity to conduct discovery to gain a full understanding of the proposed distribution.

5 8. ML Manager has offered very little information and absolutely no evidence
6 regarding the proposed distribution. The Rev Op Investors are entitled to understand how ML
7 Manager intends to surcharge them and distribute the relatively few dollars that might be left.
8 Indeed, at this point, it is unclear how ML Manager has arrived at its figure of “approximately \$9
9 million” for distribution to investors.

10 9. The fact that ML Manager has brought a second distribution motion based on
11 approximated amounts and without any meaningful information or evidence should be troubling
12 to all investors and this Court. Indeed, one of the arguments that ML Manager has
13 disingenuously raised in the appeal of the first distribution is that the Rev Op Investors failed to
14 raise specific objections to that distribution. Although the Rev Op Investors did, in fact, raise
15 specific objections and requested an evidentiary hearing, the Rev Op Investors were unable to
16 present the kind of financial specifics that ML Manager apparently believes were necessary,
17 because there was no evidentiary hearing set in connection with the first distribution.

18 10. Accordingly, to the extent the currently scheduled hearing is not continued until
19 after the appeal hearing, a reasonable discovery schedule and an should evidentiary hearing be
20 set.

21 **II. OBJECTIONS.**

22 11. The Rev Op Investors incorporate herein, by this reference, their objections to the
23 Allocation Model and the first distribution. [DE #2935, 3028] As set forth more fully therein,
24 the Motion is improper for at least the following reasons:

- 25 • A fully briefed appeal is currently pending with respect to ML Manager’s
26 ability to “charge back” the costs of the Exit Financing to the Rev Op Group. The
27 pending appeal has divested the Bankruptcy Court of jurisdiction to approve an allocation
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1 model that assesses exit financing to the Rev Op Investors. *See Griggs v. Provident*
2 *Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

3 • The proposed allocation and distribution is inconsistent with the
4 Interborrower Agreement and Plan and constitutes an impermissible modification of the
5 Plan. ML Manager may not modify the Plan based on the expediciencies *de jour*. For
6 example, failure by the Liquidating Trust to fund certain expenses as required under the
7 Interborrower Agreement may not be recouped through the surcharge of the Rev Op
8 Group's assets. *See* Interborrower Agreement §§ 3.2-3.4.

9 • ML Manager may not opt out of its fiduciary duties to the Rev Op
10 Investors in favor of a "business judgment" standard. ML Manager has put its own
11 interests above those of the Rev Op Investors, and an allocation and distribution scheme
12 that implements a breach of fiduciary duty should not be approved.

13 • The Rev Op Investors should not be forced to pay the astronomical
14 expenses associated with the Tempe Centerpoint project and other specific loans in which
15 they had no interests.

16 12. In addition to these objections, the Motion suffers from several fatal deficiencies
17 that preclude approval of a second distribution. First, all investors are entitled to a complete
18 accounting to date that details, without limitation: (i) all amounts disbursed pursuant to the initial
19 distribution; (ii) all amounts paid to the Exit Lender; (iii) all amounts paid to ML Manager's
20 professionals; (iv) all amounts paid for other expenses; and (v) all amounts retained or reserved.
21 This accounting is required by the Plan, is long overdue, and should be a prerequisite to any
22 consideration of further distributions.

23 13. ML Manager also should provide a precise accounting of the proposed
24 distribution that discloses the full amount of the gross proceeds and that accounts for their
25 distribution in specific terms. Approximations and "to be determined" calculations have been
26 the source of considerable dispute in this case. To avoid ambiguity and misunderstanding, ML
27 Manager must disclose specific amounts and their intended recipients, not approximations and
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1 generalizations. If ML Manager wants to surcharge the Rev Op Investors, it must tell them
2 exactly how much and for what the surcharge will be.

3 14. The details regarding the Centerpoint project, in particular, are problematic and
4 continue to be shrouded in secrecy. Because ML Manager seeks to force the Rev Op Investors to
5 pay for the costs and expenses of the Centerpoint project, a property in which they held no
6 interests, the Rev Op Investors are entitled to discovery and a full understanding of the
7 Centerpoint sale transaction.

8 15. Of particular concern, ML Manager has disclosed for the first time to the Rev Op
9 Investors that it has paid \$5.9 million to an affiliate of the Exit Lender to purchase additional
10 ownership interests associated with the Centerpoint project. Ostensibly, the proposed allocation
11 includes a surcharge to the Rev Op Investors for this payment that benefits only ML Manager
12 and possibly the investors in the Centerpoint project.

13 16. ML Manager also should disclose all amounts it will retain as a “Permitted
14 Reserve” and for “Total Estimated Costs,” both concepts invented by ML Manager and its
15 professionals in part to ensure their continued compensation. The Rev Op Investors are
16 informed and believe that the Total Estimated Costs have increased and likely have objections to
17 the ongoing, incremental “chipping away” at their already paltry recoveries.

18 17. The proposed distributions also involve the Osborn III loan, which was the
19 subject of a recent settlement executed by ML Manager. Astonishingly, however, ML Manager
20 failed to advise the title company of either the non-judicial foreclosure of the Osborn III property
21 or the settlement with various lien claimants on the property.

22 18. The title company recently filed a lawsuit in Maricopa County Superior Court
23 seeking a declaratory judgment that the title policy is void. That lawsuit names several of the
24 Rev Op Investors as defendants.² Prior to any distribution of settlement proceeds, ML Manager
25 should analyze and disclose to investors how any distribution of settlement proceeds may further
26 affect the title company litigation.

27 _____
28 ² The Rev Op Investors reserve all rights with respect to the lawsuit and all claims
against ML Manager and its professionals arising from their handling of the matter.

1 **III. REQUEST FOR CONTINUANCE AND FURTHER HEARING.**

2 19. Based on the status of this matter and the utter lack of information available to the
3 Rev Op Investors, the Rev Op Investors hereby move this Court and respectfully request that any
4 hearing on the Motion be continued until after the appeal hearing scheduled for August 26, 2011.
5 At that time, this Court should hold a short status hearing to consider the status of the appeals
6 and the need for further hearing on the Motion.

7 20. Pursuant to Local Rule 9013-1(i), the Rev Op Investor advise the Court that ML
8 Manager objects to such continuance on the purported basis that distributions to investors should
9 not be delayed. This rationale is occasionally invoked at ML Manager's convenience in this
10 case, and it bears repeating that a motion to compel turnover of loan proceeds is the only reason
11 ML Manager finally developed an allocation at all. A short delay pending the outcome of the
12 appeal hearing will not prejudice investors or any parties in this matter.

13 21. To the extent the currently scheduled hearing is not continued, a reasonable
14 discovery schedule and an evidentiary hearing should be set. Pursuant to Local Rule 9014-1(b),
15 the Rev Op Investors submit that: (a) an estimated seven-hour hearing will be required for
16 receipt of all evidence, including live testimony; (b) depending on the availability of ML
17 Manager's accountants and professionals, the parties should be ready to present such evidence in
18 45-60 days; (c) depending on the cooperation of ML Manager and its professionals, the
19 estimated time required to complete all formal and informal discovery should be 30-45 days; (d)
20 it may be helpful to hold a Bankruptcy Rule 7016 Scheduling Conference at the currently
21 scheduled hearing on the Motion; and (e) the Rev Op Investors are not aware of any pro se party
22 who may participate at the evidentiary hearing.

23 WHEREFORE, the Rev Op Group respectfully requests that the Court enter an order:

24 A. Denying the Motion; and

25 B. Granting to the Rev Op Group such other relief as may be just and appropriate.

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