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9
10 IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

11 In re
12 MORTGAGES LTD.,
13 Debtor.

Chapter 11
Case No. 2:08-bk-07465-RJH

14 **REPLY TO OBJECTION TO MOTION TO
SELL REAL PROPERTY**

15 **Real Property consisting of approximately 14.29
16 Acres located at the southwest corner of Miller
Road and McDowell Road, Scottsdale, Arizona,
17 known as PDG Los Arcos**

18 **Hearing Date: July 19, 2011
Hearing Time: 10:00 a.m.**

19 ML Manager LLC (“ML Manager”), as manager for the PDG LA Loan LLC and
20 as agent for the pass-through investors who hold fractional interests but who did not
21 transfer into PDG LA Loan LLC (“Non-transferring pass-through investors”), hereby files
22 this Reply in Support of its Motion to Sell Real Property (Docket No. 3255) (“Motion”)
23 and asks that the Court enter an order authorizing and approving the sale as set forth in the
24 Motion and Sale Agreement.

25 Certain Rev-Op Group investors (“Objectors”) filed an objection to the sale
26 (Docket No. 3262) which is 2 pages long but incorporates by reference all the other

1 objections to sales pleadings filed by the various Rev Op Group Investors. This Reply
2 addresses the issues raised by the Objectors and ML Manager requests that the Court
3 overrule the Objections.

4 ML Manager also received an Objection filed by the borrower PDG Los Arcos,
5 LLC. (“Borrower”) (Docket No. 3266). This Reply addresses the issues raised by the
6 Borrower collectively with the other Objectors in their Objections (collectively,
7 “Objections”). To the extent that Borrower attempts to raise arguments on behalf of the
8 investors asserting the price is low and that the sale harms the investors, the Borrower has
9 no such standing and in fact should be ashamed of itself. As the Court will remember, the
10 Borrower filed suit against the investors over 2 years ago which was dismissed by this
11 Court with an award of attorneys fees in favor of the investors, appealed to the District
12 Court which affirmed the Bankruptcy Court dismissal and awarded attorneys fees to the
13 investors, and appealed to the 9th Circuit Court of Appeals which also affirmed the
14 Bankruptcy Court with the attorneys fee request pending. ML Manager has unpaid
15 Judgments for Attorneys Fees against the Borrower. Further, ML Manager has foreclosed
16 because the Borrower did not pay the loan, and ML Manager has filed suit against the
17 Borrower and the Guarantors for the deficiency. ML Manager asserts that it is the
18 Borrower’s conduct that has caused the losses to the investors. ML Manager requests that
19 the Court over rule the Objections.

20 ML Manager also received a Limited Objection from the Maricopa County
21 Treasurer (Docket No. 3265). As in all prior sales, ML Manager proposes to pay all
22 outstanding real property taxes at closing for the property being sold and will work with
23 the Maricopa County Treasurer to confirm the tax parcel numbers. ML Manager
24 anticipates that it will satisfy the Maricopa County Treasurer’s Limited Objection and
25 does not address it further in this Reply.

26

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

2 The investors in PDG LA Loan LLC and all the MP Funds were asked to vote on
3 this Major Decision. As the Court will recall, the operating agreements for the Loan
4 LLCs require that Major Decisions (such as selling the property) must be voted on by the
5 members of the applicable limited liability company and the investors in the MP Funds
6 and must be approved by a majority in dollars of those who vote. A vote has been
7 conducted by ML Manager of the members of PDG LA Loan LLC and the MP Funds
8 investors in the Loan LLC. Based on the voting results, 89.12% of the dollars which were
9 voted in PDG LA Loan LLC approved the sale. In other words, PDG LA Loan LLC,
10 which owns 86.489% of the Property, voted to sell the Property to the Purchaser for the
11 price and at the time proposed by ML Manager.

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

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

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

18 ML Manager, in the exercise of its business judgment, has decided it is in the best
19 interest of the investors in the loans to sell the Property at this time for \$6.4 million to the
20 Purchaser Mark-Taylor Capital LLC, an Arizona limited liability company, on the terms
21 set forth in the Sale Agreement. The Purchaser has posted a Deposit of \$400,000 and the
22 escrow has been set up at Lawyers Title Insurance Company, a local title company. The
23 Purchaser has demonstrated that it has ample funds to purchase the Property. The balance
24 of the Purchase Price will be payable in cash at closing. The closing is dependant upon the
25 approval process and contingent upon rezoning. The sale is anticipated to close is mid-
26 December.

1 ML Manager believes the price obtained is the current market price for the
2 Property. The Purchase Price of \$6.4 million obtained in this sale is the best offer
3 received by ML Manager. ML Manager does not believe it was necessary or a good use
4 of funds to obtain a formal appraisal of the Property. ML Manager employed Cassidy
5 Turley at BRE Commercial, a leading real estate brokerage firm, to list and market the
6 Property. The broker marketed the Property widely to a buyer of this type of Property and
7 over the course of the marketing period received and reviewed several offers for the
8 Property. The Sale Agreement used is the standard form agreement which is being used
9 by ML Manager, and which in fact has been used on multiple occasions already. The
10 broker will receive a customary commission upon closing.

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

14 In its decision to sell and enter into the Sale Agreement, ML Manager has
15 exercised its best business judgment which is consistent with its fiduciary duties and
16 responsibilities.

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

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

24 On this loan, the Objectors decided not to transfer and as a result their percentage is
25 managed by ML Manager as the Agent. Only members of PDG LA Loan LLC and the
26 investors in the MP Funds in the Loan LLC are allowed to vote and to control the Major

1 Decisions of ML Manager on the management of the property. Pursuant to the Agency
2 Agreement, the Agent has sole discretion on the decisions to be made about the
3 management of the property after foreclosure.

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

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

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

23 ML Manager, in the exercise of its business judgment and in its sole discretion, has
24 decided to proceed with the sale as presented. The contingencies for the accepting vote of
25 the Loan LLC and the waiver by the Exit Financier have been met. ML Manager requests
26 that this Court enter the order requested so that the sale can be consummated.

27 **V. ALL PRIOR ATTEMPTS TO TERMINATE THE AGENCY ARE NULL**
28 **AND VOID AND OF NO EFFECT**

29 The Objectors, all of whom are alleged members of the Rev-Op Group, assert that
30 they have a right to terminate their agency agreements and assert that they have recorded a
31 notice of termination of agency. In making these arguments, the Objectors are simply

1 ignoring all of the litigation and rulings that has already occurred in this Court. All of the
2 Objectors were parties to the Adversary Proceeding, *ML Manager v. Hawkins et al.*, 2:10-
3 ap-00430-RJH (the “Hawkins Adversary”). Those rulings are law of the case. *Minidoka*
4 *Irrigation Dist. v. DOI*, 406 F.3d 567, 573 (9th Cir. 2005)(“Under the ‘law of the case’
5 doctrine, a court is ordinarily precluded from reexamining an issue previously decided by
6 the same court, or a higher court, in the same case.”); *see also Old Person v. Brown*, 312
7 F.3d 1036, 1039 (9th Cir. 2002). More important, those rulings are contained in a final
8 judgment (Docket 105 in Hawkins Adversary) (the “Declaratory Judgment”) the effect of
9 which has not been stayed.¹

10 The Objectors argue that they have recorded a notice of termination of the Agency
11 Agreement and that the recorded notice means the Purchaser will take subject to the
12 notice. This is inaccurate and incorrect. The Declaratory Judgment resolved these issues.
13 The Court has already ruled in the Declaratory Judgment and in many other rulings on
14 similarly situated sale motions that the Objectors are irrevocably subject to and bound by
15 the Agency Agreement. Paragraph 75 of the Declaratory Judgment expressly states that
16 “all attempts made by the Rev-Op Group to terminate or void the [Agency Agreement] are
17 without effect, or are null and void.” As stated above, the Declaratory Judgment has not
18 been stayed and is a final and enforceable judgment.

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

23
24
25 ¹ 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 **VI. ML MANAGER INCORPORATES THE PRIOR RELATED PLEADINGS**

2 In its Objection, the Rev Op Objections incorporate by reference their prior
3 objections to sale motions. Two objections were resolved by a stipulated order and
4 another five objections were overruled but not appealed. The remaining three objections
5 raised issues that were overruled and subsequently appealed. All three such appealed sales
6 have closed and the properties transferred to third parties. Not only are the appellate issues
7 pending but motions to dismiss the appeals for mootness are also pending. ML Manager
8 incorporates by reference all of its prior replies and responses, among other things, and the
9 decisions of the Bankruptcy Court. None of the issues supposedly raised are new but have
10 been raised by the Objectors and have been consistently overruled by the Bankruptcy
11 Court. The Court here should similarly reject them.

12 **VII. THE FACT THAT THE LOAN IS UNDERWATER IS NOT A**
13 **JUSTIFICATION TO DENY THE MOTION**

14 The Objectors argue that the sale price is substantially less than the aggregate
15 amount of the loan on the Property. Although it is true that the loan is substantially
16 underwater, and in addition to the fact that the Court can take judicial notice of the
17 tremendous down turn in the market since the Property was acquired, the fact that the loan
18 is underwater is not determinative. It is not surprising that the raw dirt is not now worth
19 the amount loaned. The reality is that the PDG LA Property is not worth anything close to
20 \$23.9 million when the loan was made, and it will not be possible to recover all of that
21 money. The only relevant question now is the current value of the property; not the
22 amount loaned. ML Manager through its experienced broker marketed the real estate to
23 find and obtain the highest price available. The broker solicited and reviewed the offer
24 made from a third party after the exposure to the market. After careful and due
25 consideration ML Manager accepted a price of \$6.4 million. The fact that the property
26

1 value is substantially less than the loan amount, although unfortunate, is simply not
2 germane to the inquiry as to whether the Property is now being sold for a fair and
3 reasonable price.

4 **VIII. THE OBJECTORS ARE AGAIN IGNORING THE CARRYING COSTS OF**
5 **HOLDING PROPERTY**

6 As it has in opposition to every other sale motion, the Objectors argue that ML
7 Manager should hold the property speculating that the market will increase in the future.
8 Whether and how much the market will increase in the foreseeable future is still simply
9 speculation. What is not speculation is that there are substantial carrying costs associated
10 with holding this or any other property. As the Court knows, the Exit Financing continues
11 to accrue interest at the rate of 17.5 % per annum, with additional fees such as the
12 repayment incentive fees due every six months. Plus the real property taxes are unpaid
13 and accrue interest at the rate of 16% per annum. As such, the market would need to
14 substantially improve every year just to keep pace with the current return to the investors.
15 The Court has clearly held that all investors must pay their fair share of the Exit
16 Financing. As such, delaying the repayment of the Exit Financing simply increases the
17 amount that will be attributed to these properties, and it is simply speculation to assume
18 that future increases in the market will outpace the carrying costs.

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

22
23 DATED: July 18, 2011

24 FENNEMORE CRAIG, P.C.

25 By /s/ Cathy L. Reece
26 Cathy L. Reece

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MOYES SELLERS & HENDRICKS

By /s/ Keith L. Hendricks
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Copy of the foregoing emailed
This 18th day of July, 2011 to:

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