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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re MORTGAGES LTD., Debtor.	Chapter 11 Case No. 2:08-bk-07465-RJH **ML MANAGER'S REPLY IN SUPPORT OF ITS MOTION TO AUTHORIZE A SECOND DISTRIBUTION OF PROCEEDS IN ACCORDANCE WITH ALLOCATION MODEL, And MOTION TO APPROVE TREATMENT OF DISTRIBUTION OF DISPUTED PROCEEDS,** **And** **RESPONSE TO REV-OP GROUP'S REQUEST TO CONTINUE HEARING AND FOR EVIDENTIARY HEARING** **Hearing Date: July 19, 2011** **Hearing Time: 10:00 a.m.**

Mr. Hawkins and the few other members of the so called Rev-Op Group are once again the only investors objecting to the pending motion.[1] In this case, they are objecting

[1] Brian Mullen, the Chapter 7 Trustee of the Barnes Bankruptcy, has filed a Response (Docket No. 3263). As counsel has discussed with Mr. Mullen's attorney, ML Manager intends to add language to the order to authorize ML Manager to disburse the Barnes proceeds to the Chapter 7 Trustee subject to whatever alleged interests any of his

to and asking the Court to delay the distribution of millions of dollars to about 1800 investors. Prior to filing the Motion on June 27, 2011, counsel for ML Manager met with Mr. Hawkins and other members of the Rev-Op Group for hours to review the Allocation Model with the updated numbers reflecting sale proceeds actually received and the actual expenses incurred by ML Manager. Subsequently, the Rev-Op Group filed its objection. They did not raise new issues or concerns but raised a mixture of tired, old arguments that this Court has repeatedly rejected and weak attempts to simply delay this matter further.

I. BACKGROUND AND ARGUMENT

The Court is well aware of the procedural background of this matter. Accordingly, ML Manager will confine this Reply to the inaccuracies presented in the Rev-Op Group's Response, and issues material to the Rev-Op's objections. Like most of their recent objections, the Rev-Op Group's arguments are primarily attempts to re-litigate points this Court has already decided and many of which are now up on appeal.

A. Accounting Provided in the Allocation Model.

Without citation to the record or anything other than a conclusory statement, the Rev-Op Group asserts that the "Allocation Model does *not* fulfill the Plan's requirement that ML Manager provide an accounting to investors." Response, at p. 2. The Rev-Op Group makes several other similar statements disparaging or challenging the Allocation Model. These arguments are irrelevant to this Motion, improper because this Court has already approved the Allocation Model and that decision is on appeal, and, more importantly, simply incorrect.

On September 21, 2010, the Court issued an unsigned minute entry "approving the allocation formula proposed by ML Manager in the Allocation Brief filed on September 1, 2010." [Docket No. 2959] Then, on January 21, 2011, the Court issued its signed "Order

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Judgment Creditors may have and to allow the Trustee and those parties to resolve their issues before the Barnes Bankruptcy Court.

Regarding the Distribution of Proceeds" (the "Distribution Order"). [Docket No. 3047] The Distribution Order again approved the Allocation Model and the treatment of "obligations," "administrative expenses," "pre-confirmation costs and expenses," and "General Costs." *Id.* at ¶¶ A-I. The Rev-Op Group has appealed the Distribution Order. [Docket 3054] No stay was entered pending appeal and the first Distribution was made to about 1800 investors.

The law is clear. Issues that have already been decided by the Court are law of the case, and should not be re-litigated. *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 Order the effect of which has not been stayed. *See, e.g., In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981) (noting that a judgment will be given full effect unless stayed."). Moreover, this Court does not have jurisdiction to modify its prior ruling on issues that are now on appeal, but it does have continued jurisdiction to implement its prior Orders. A notice of appeal does not deprive the bankruptcy court of jurisdiction to implement its own orders. *See*, *In re Combined Metals Reduction Co.*, 557 F.2d 179, 190 (9th Cir. 1997). This rationale is based on the principle that "the mere pendency of the appeal does not in itself disturb the finality of a judgment." *In re Mirzai*, 236 B.R. 8, 10 (B.A.P. 9th Cir. 1999) (*quoting Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983). As a result, "[a]bsent a stay or supersedeas, the trial court . . . retains jurisdiction to implement or enforce the judgment or order. . . ." *In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000). A notice of appeal solely deprives the Court of jurisdiction to adjudicate anew the merits of an issue currently in the process of appellate review. *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982). Accordingly, from a

procedural standpoint, the arguments are without merit.

On the merits, the Rev-Op Group's complaints about an "accounting" are unfounded. For over a year, and in particular with regard to the litigation over the Allocation Model, the Rev-Op Group has asserted claims, demands, allegations and arguments with regard to "an accounting" to investors. These arguments have been uniformly rejected or overruled by the Court, and are without merit because the Allocation Model does contain and provide such an "accounting." The Model has specific detail with regard to the costs that were incurred in connection with the Exit Financing, the costs that were incurred in the implementation of the Plan and detailed budgets and projects of future costs. It then allocates those costs across the entire loan portfolio to the extent that recoveries are conservatively estimated from the various loans. Specifically, the Court stated in the Distribution Order as follows:

> D. The appropriate standard of review to consider ML Manager's allocation decisions is the business judgment standard. The treatment set forth in the Allocation Model is consistent with and fulfills ML Manager's duty under the business judgment rule as well as any fiduciary duty ***and ML Manager's role as contemplated and established by the confirmed Plan***.
>
> E. At the hearing on September 21, 2010, the Court approved the allocation formula proposed by ML Manager in the Allocation Brief filed on September 1, 2010 [Docket No. 2913] (the "Allocation Model").
>
> F. The **treatment in the Allocation Model of the obligations incurred by the Debtor, Mortgages Ltd., the administrative expenses, and other pre-confirmation costs and expenses as General Costs is approved, appropriate, and consistent with ML Manager's business judgment and consistent with and in fulfillment of its fiduciary duties**.
>
> * * *
>
> H. **All of the objections** to the distribution of proceeds under the six Loans except any objection that have been specifically reserved by this Court, **have been overruled**.
>
> I. With regard to the six Loans at issue [in the first

> distribution], **the determination, allocation and proposed distribution of costs, expenses and proceeds under the Allocation Model is approved**. This includes, without limitation, the determination that the total amount of settlement costs … **were properly treated, accounted for** and disbursed … the payment to the Exit Lender … **was properly treated accounted for** and disbursed … [the] "Permitted Reserve" … [and] "Total Estimated Costs" … **have been property treated and accounted for**….

[Docket 3047 (emphasis added)]. There is no doubt that this Court has already considered and ruled on the adequacy of the "accounting" in connection with the Allocation Model.[2]

Without any factual, evidentiary or even analytical support, the Rev-Op Group makes the conclusory allegation that ML Manager has "changed its [Allocation] model significantly in the last several months." Again, this is simply not true. The only thing that has happened is that additional loans have now been resolved and projected costs have been replaced with actual costs. As was clearly repeatedly explained to the Court in connection with the briefing associated with the Allocation Model, the Model is intended to be dynamic in that it will be updated with actual numbers when they become available. In this case, the only changes have been to update the model with the actual sale and expense information. As explained above, counsel for ML Manager sat down and explained and reviewed the actual sale proceeds and actual expense numbers to Mr. Hawkins and other Rev-Op Group members prior to filing the Motion. There has been no change in the philosophy, structure, or treatment of costs associated with the Allocation Model.

B. <u>The Pending Appeals Should Not Delay Further Distributions.</u>

There is no reason to delay the distribution to the approximate 1800 investors

[2] Moreover, as established in connection with the first Distribution Motion, ML Manager spent literally tens of hours in personal consultation with the Rev-Op Group and others to explain and provide the detail of the any "accounting" question or assumption raised. Recently, ML Manager again spent several hours with Mr. Hawkins to once again go over the Allocation Model and detail.

because of the Rev-Op Group's arguments. Many of the investors are elderly people who put their retirement funds in the loans and they need this distribution in this troubled economic environment to live on. As the Court knows, of the approximate 1800 investors involved with the ML Loans only eight or so separate investors or entity groups in the so-called Rev-Op Group are complaining. The Court is aware of all the objections the Rev-Op Group has filed since the confirmation of the Plan. Moreover, it has appealed six of the Court's decisions, and some of those appeals have been pending for almost two years.[3] There is no question that all of this litigation has delayed the resolution of the loans, and delayed distribution to the investors who are overwhelmingly supporting ML Manager's actions. In connection with each sale motion, ML Manager reports on the votes from the members of the Loan LLCs. The support for ML Manager's actions continues to be high and on average about 95% of the dollars which vote on the various ballots agree with the recommendation of the ML Manager Board. This is overwhelming and shows that investors want the resolution of these loans, the sales of the properties, and the distribution of money. Delaying the distribution until there is a resolution of the pending appeals when no stay has been issued is improper from a procedural standpoint, unnecessary and prejudicial to all the investors who are waiting for the distributions.

It is true that there is a hearing scheduled on August 26, 2011, before the District Court on various motions to dismiss those appeals and some of the substantive aspects of those appeals, but there is no guarantee that the hearing will resolve all issues. As noted above, some of the appeals are almost two years old. There are many issues that have been raised, and there is no assurance that the District Court will be able to get to all the issues at that one hearing, will rule on those issues at that time, or that further appellate practice will not be sought. The bottom line is that absent a stay, there is simply no reason

[3] One of the appeals, the Grace Entities Settlement Motion Appeal, was dismissed for mootness by the District Court. That left six other appeals, all of which are subject to motions to dismiss for mootness.

to speculate on what may or may not happen to the issues on appeal.

The lack of a stay is determinative. With regard to one of the appeals, Declaratory Judgment issued by this Court with respect to the agency issue, the Rev-Op Group did seek a stay of the enforcement of that Judgment. Significantly, however, this Court expressly denied the requested stay. [2:10-ap-00430-RJH Docket 125] Moreover, the District Court also denied the requested stay finding that the Rev-Op Group's arguments on the merits "[do] not appear to have a very strong likelihood of success on the merits." [2:10-cv-01819-MHM, Docket No. 48, at p. 6][4] Rev-Op Group did not seek to stay the implementation of the Distribution Motion or the approval of the Allocation Model even though this Court specifically granted them time to do so. (*See* Docket 3047, Distribution Order, at ¶ U ("This Order is stayed only until 8 a.m., January 24, 2011. All other stays under the Federal Rule of Bankruptcy Procedure are hereby waived."). Absent a stay, there is no reason to wait for the resolution of the appeal.

C. <u>There is No Reason for Additional Discovery.</u>

As an apparent fall-back, the Rev-Op Group claims that a delay is needed for further discovery, but fails to identify exactly what evidence is needed. The only reason for the "approximation" in the initial motion was that Bisontown sale had not yet been closed, and the state court has not yet held its reasonableness determination hearing on the Summit settlement. The seven loans at issue were (1) Centerpoint, (2) University & Ash, (3) Roosevelt & Gateway, (4) Rio Salado, (5) All State IX (6) Rodeo Ranch and (7) Bisontown.[5] In addition, there were two settlements: the distribution from the TLC bankruptcy and the settlement with Summit on the Osborn III mechanic lien escrow. As the state court has not yet approved the reasonableness of the Summit Settlement, it will

[4] A copy is attached as Exhibit A.

[5] Notably, the Rev-Op Group members are not invested in Bisontown loan, Centerpoint loan, the Rio Salado loan, the Rodeo Ranch or Bisontown loan, and are not entitled to the TLC estate distribution. As a result what they propose will hold up distributions for loans in which they have no interest or right to receive proceeds.

be excluded from the distribution figures. The updated numbers for the Model that counsel for ML Manager went over with Mr. Hawkins and the Rev Op Group members are simply the product of the settlement statements from the various transactions applied through the Allocation Model that the Court has approved. No discovery or evidence is needed.

The decision to continue a hearing is left within the sound discretion of the Court. *United States v. Real Property Located at Incline Village*, 47 F.3d 1511, 1521 n.5 (9th Cir.1995). A showing of abuse of discretion depends on the facts of each case. *Martel v. County of Los Angeles*, 56 F.3d 993, 995 n. 3 (9th Cir.1995). Rule 9014 governs contested matters such as the Rev-Op Group's opposition to the Second Distribution. However, Rule 9014 does not require an evidentiary hearing; as the rule only requires that a party be afforded notice and an opportunity for hearing. *See* Fed. R. Bankr. P. 9014(a). Whether to hold an evidentiary hearing is also left within this Court's discretion. *See, In re International Fibercom, Inc*. 503 F.3d 933, 946 (9th Cir. 2007); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1139 (9th Cir.2004); Defenders of *Wildlife v. Bernal*, 204 F.3d 920, 928-29 (9th Cir.2000); R*omley v. Sun Nat'l Bank (In re Two "S" Corp.),* 875 F.2d 240, 242-43 (9th Cir.1989) (holding that when all the facts that should have been considered were before the bankruptcy court and not in dispute, an evidentiary hearing would serve no purpose). In *International Fibercom*, the Ninth Circuit Court of Appeals upheld a Bankruptcy Court's decision to deny a requested evidentiary hearing because the bankruptcy court already had an adequate factual basis to make its decision. *International Fibercom*, 503 F.3d at 946. Additionally, the Court recognized that the movant submitted its own separate statement of facts and failed to indicate what more it would present at an evidentiary hearing. *Id*.

In this case, there is no need for an evidentiary hearing. The Court has already approved the Allocation Model. The proposed distribution is simply the effectuation of

the Orders the Court has already issued. There is nothing new in this proposed distribution from the initial distribution where no hearing was needed or held.

D. <u>The Court has Already Overruled the Legal Objections.</u>

The members of the Rev-Op Group "incorporate … by reference, their objections to the Allocation Model and first distribution." As demonstrated above, the Court has overruled these objections and these rulings are the law of the case and should not be revisited now.

The Rev-Op Group complains that the resolution of the Centerpoint loan has been "shrouded in secrecy." Nothing could be further from the truth. Moreover, none of the members of the Re-Op Group are participants or have an interest in that project. The Centerpoint project has been the subject of multiple actions, hearings and public forums. There was not a sale motion filed with this Court for the Centerpoint sale because the eight pass-through investors in that loan all signed the conveyance documents in their own capacity. As such, Court approval was not needed. However, a full hearing was held on the sale in the Radical Bunny bankruptcy, and there are multiple state court lawsuits where the issues were litigated in full. There has been no secrecy at all in connection with the sale.

The Rev-Op Group distorts the record and argues that a "surcharge" will be assessed against the members of the Rev-Op Group because of the pay-off of a lien held by an affiliate of the Exit Lender. There is no merit to this argument. In the Tempe Land Company bankruptcy, VRCP, an affiliate of the Exit Lender lent $5 million to the Centerpoint Loan LLCs to allow them to buy the parking lots and claims in that bankruptcy. This loan was secured by a deed of trust. Obviously, this lien had to be addressed to allow the sale to close. This is no different that tax liens that need to be paid on property or other obligations that must be resolved. As the members of the Rev-Op Group are not investors in that property, there is no way that this payment could result in a

"surcharge" to them.

The argument about the Osborn III settlement is both factually wrong and irrelevant. The Rev-Op Group argues that ML Manager failed to advise the title company of the foreclosure or the sale of the property. This is demonstrably false and based on erroneous information. Fidelity, the title company at issue, closed the sale transaction and provided the title insurance to the buyer. As such, Fidelity cannot argue that it did not know of the sale transaction. Moreover, the lawyer that Fidelity retained to defend the mechanic lien claim, Scott Malm of Gust Rosenfeld, negotiated the escrow agreement with Summit.

II. CONCLUSION

The Rev-Op Group has presented no new or valid reason to delay the disbursement to about 1800 investors. The reassertion of objections previously rejected by the Court is without merit and should be dismissed out of hand. Its attempts to delay this matter until after the appeals have run their course are without merit because no stay has been issued and there is insufficient reason or basis to justify a delay. Just as with the prior distributions, there is no reason for formal discovery or an evidentiary hearing. The bottom line is that the Court has already approved the Allocation Model, and the distribution is simply an effectuation of the Court's prior Orders.

DATED this 18th day of July, 2011.

FENNEMORE CRAIG, P.C.

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Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Rev Op Group,

Appellants,

vs.

ML Manager, LLC,

Appellee.

No. 10-cv-01917-MHM

No. 10-cv-01819-MHM

BK No. 08-bk-07465

ORDER

Bear Tooth Mountain Holdings LLP, et al.

Appellants,

vs.

ML Manager, LLC,

Appellee.

In re:

Mortgages Ltd.

Debtor.

The Court has before it Appellant Rev Op Group's Emergency Motion to Stay Pending Appeal of Declaratory Judgment (doc. 9) and Motion for Immediate Administrative Stay of Declaratory Judgment until Conclusion of Rescheduled Hearing (doc 18) both in case 10-cv-01819 and Appellants Bear Tooth Mountain Holdings, LLP, et al's Emergency Motion to Stay Pending Appeal of Sale Orders (doc 4) and Motion for Immediate Administrative Stay of Sale Orders Until Conclusion of Rescheduled Hearing, both in case 10-cv-01917. (Doc. 9) The Court heard oral argument on the motions on October 6, 2010 and issues the following order.

I. Background

These cases arise out of the Chapter11 bankruptcy proceedings for Mortgages Limited, case number BK NO. 08-07465. Based on the pleadings and information that have been submitted to the Court, the Court notes by way of background that Mortgages Limited ("Mortgages Ltd.") once held a $900 million portfolio of loans and had over 1800 investors. Investors in Mortgages Ltd. owned fractional interests in promissory notes and deeds of trust. Investors entered agreements with Mortgages Ltd. prior to making these investments. Because investors had fractional interests in the various mortgages, when borrowers defaulted and the properties were foreclosed upon, investors became part owners of properties as tenants in common with other investors who had interests in the same loan.

On June 28, 2008, Mortgages Ltd. filed for Chapter 11 bankruptcy. The company was thus reorganized pursuant to a plan that was confirmed by the Bankruptcy Court on March 20, 2009 ("the Plan"). As part of the Plan, an entity called ML Manager, LLC ("ML Manager") was created to manage and operate the loans in the portfolio. The original investors for the most part transferred their interests to 49 separate Loan LLC's. A number of investors, referred to as "pass through investors" did not transfer their interests. As part of the Plan, ML Manager took out $20 million in "exit financing" (the "Exit Financing") to help keep the company afloat during the reorganization.

After confirmation of the Plan, a dispute arose regarding the agency authority of ML

Manager to take action on behalf of "pass through investors." A group of 17 "pass through investors", referred to as the Rev Op Group, took the position that ML Manager cannot sell property in which its members have an interest without their approval and consent. ML Manager asserted that it had the agency power to sell property in which Rev Op investors have an interest without their consent. Because of the dispute, ML Manager initiated a declaratory action in the Bankruptcy Court, seeking a ruling on its ability to act as an agent for the Rev Op Group and filed motion for Judgment on the Pleadings. The Bankruptcy Court ultimately issued a Declaratory Judgment, finding that investors in the Rev Op Group had signed agreements with Mortgages Limited that incorporated an Agency Agreement, which created an irrevocable agency for Mortgages Ltd. to manage the loans. The Bankruptcy Court also ruled that the agency had been effectively and properly assigned to ML Manager and that ML Manager did not need the consent of Rev Op Group investors to liquidate assets in which they held an interest.

ML Manager has begun to sell properties that were part of the Mortgages Ltd. portfolio. ML Manager is selling these assets in an effort to obtain returns for investors, but also to make payments on the $20 million Exit Financing it obtained. ML Manager has already sold three properties and there are a number of pending sales set to close in the next several weeks. These sales have been approved by ML Manager, the Bankruptcy Court, and the Loan LLCs. Two of the sales that have occurred – referred to as "Zacher Missouri" and "Citi Lofts" – involve properties in which some of the Rev-Op Group investors have an interest. The Rev Op investors with an interest in these properties object to the sales because the properties are being sold at a low point in the real estate market. The Rev Op investors believe the properties can be sold at a higher price in the future, and they argue that the ML Manager is breaching a fiduciary duty owed them by selling the assets in the current market.

The Rev-Op Group appealed the Declaratory Judgment Order and other rulings of the Bankruptcy Court. Individual Rev-Op investors have also appealed the Court's rulings approving the two sales. Those appeals are currently pending before this Court. The Rev Op Group investors filed motions in the Bankruptcy Court seeking a stay of the effects of the

Declaratory Judgment and of the orders approving the two sales pending resolution of the appeal. The Bankruptcy Court denied the motions, finding that staying the orders approving the sales and the Declaratory Judgment would result in very substantial harm to ML Manager and the other investors because it would jeopardize the "Zacher Missouri" and "Citi Lofts" sales and hamper ML Manager's ability to obtain title insurance in other transactions. The Bankruptcy Court found that Interfering with these sales would in turn prevent ML Manager from meeting its obligations on the Exit Loan, triggering draconian penalties. The Bankruptcy Court also found that staying the orders would cause virtually immeasurable harm that far outweighed the harms that would befall the Rev Op investors, which it concluded was based largely on speculation about the future of the real estate market. Moreover, the Bankruptcy Court noted that the Rev Op Group's inability or unwillingness to post the necessary bond meant that ML Manager and the other investors could not be compensated for the losses they would incur in the event this Court affirmed the decisions.

The Rev Op investors now ask this Court to stay the Bankruptcy Court's orders.

II. Legal Standard

Federal Rule of Bankruptcy Procedure 8005 permits the Rev Op investors to seek a stay of the Bankruptcy Court's order from the District Court pending an appeal. The Supreme Court recently issued a decision clarifying the standard in motions to stay pending appeal. See Nken v. Holder 129 S. Ct. 1749 (2009) In Nken, the Court stressed that "[a] stay is not a matter of right, even if irreparable injury might otherwise result." 129 S. Ct. at 1761. Rather, a decision on a motion to stay is an exercise of judicial discretion requiring an assessment of the circumstances of each individual case. The party seeking the stay bears the burden of proving that the facts and circumstances of the individual case require the court to exercise its discretion. The Supreme Court stated that a party seeking a stay must show that the balance of four factors weigh in his favor: 1) a strong likelihood of success on the merits; 2) irreparable injury absent a stay; 3) whether granting stay will substantially injure other parties interested in the proceedings; and 4) where the public interest lies. Id. at 1751.

Ninth Circuit cases preceding Nken held that a sliding scale approach applies, which

allows a motion to stay where a party shows either 1) a likelihood of probable success on the merits and the possibility of irreparable injury or 2) serious questions going to the merits and the balance of hardships tips sharply in favor of the party seeking the stay. Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir. 2003)

The parties cited both standards, but did not discuss whether the Nken ruling overturned the Ninth Circuit approach to motions to stay pending appeal. In any event, whether a stay is appropriate is a matter of discretion and "dependent upon the circumstances of the particular case". Virginian R. Co. v. United States, 272 U.S. 658, 672-673 (1926). The factors need not be rigidly applied or weighed equally and no single factor is determinative of the result. See Hilton v. Braunskill, 481 U.S. 770, 777 (1987) ("traditional stay factors contemplate individualized judgments in each case.").

Under the circumstances of this particular case, the Court finds, based on the information submitted by the parties, that the severity of the harm that will come to ML Manager and non-Rev Op Group investors in the event of a stay strongly tips the balance against staying the Bankruptcy Court's Declaratory Judgment Order.

The Rev Op Group argues that entering the stay will merely preserve the status quo as properties will remain part of the portfolio controlled by ML Manager. The Rev Op group also asserts that a brief stay for the duration of the appeal, which is on an expedited track, will cause no harm. This position overlooks the fact that ML Manager must sell assets in order to make payments on the Exit Financing which was obtained as part of the Plan. According to information provided to the Court, ML Manager is currently short of the funds it needs to make an important October 31 payment. The Exit Financing is currently in a forbearance period and failure to make the payment to bring it into compliance will cause ML Manager to incur penalties including an increase in the interest charged from 17.5% to 29.5%. There are a number of sales totaling over $50,000,000 set to close in the next several weeks. Pass through investors have an interest in at least one of these sales. A stay of the Declaratory Judgment confirming ML Manager's ability to act as an agent for the Rev Op group thwarts its ability to close any sales, particularly those in which "pass through

investors" have an interest. This is because a stay of the Declaratory Judgment directly undermines the agency authority of ML Manager, so that title insurance companies will not provide insurance for sales once such a stay is entered. Those sales appear to be necessary in order to bring the loan into compliance and to continue to make payments on the loan.

More fundamentally, the ability to sell assets in the portfolio is a critical function of ML Manager, essential to fulfilling its role following the reorganization of Mortgages Ltd. to keep the company afloat and ensure some eventual return to investors. It would not be appropriate for this Court to essentially cripple the ML manager in the performance of this essential function and undermine the entire Mortgage Ltd. reorganization at such a critical time during the pendency of this appeal. The harm that would befall the reorganization effort and other former Mortgages Ltd. investors would be too severe, totaling in the tens of millions of dollars.

Moreover, the Rev Op investors have made it clear that they are unable or unwilling to post a bond as would be necessary to insure against a loss on the appeal. The purpose of a supersedeas bond is to secure the appellees from a loss resulting from a stay of execution, and a full supersedeas bond is usually required. Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1505 n. 1 (9th Cir.1987). The inability of the Rev Op Group to post a bond to ensure that other investors could be compensated for their losses in the event that the appeal is unsuccessful is further determinative in this particular case.

The Court will also, however, briefly address the other factors. Based on the Court's review of the claims at this time, the Rev Op Group does not appear to have a very strong likelihood of success on the merits on any or most of its claims. The Rev Op Group claims, for example, that it created a genuine issue of material fact precluding a judgment on the pleadings by claiming it did not know whether agreements attached to ML Manager's complaint were the actual agreements they signed. This claim does not appear to have a very strong likelihood of success on the merits. See,e.g., Fidelity Guaranty Ins. Co. v. Keystone Contractors, Inc., 2002 WL 1870476 at *3 (E.D. Pa. 2002) (defendants' "attempts to deny sufficient knowledge or information on matters clearly within the scope of their knowledge

are so blatantly evasive as to be ineffective as denials"). It does not appear that the Bankruptcy Court had to accept this denial on its face, in light of the extensive bankruptcy proceedings preceding the declaratory action, in which the agreements played an important role and in which Rev Op Group had the opportunity to object or present different agreements.

In addition, the claim that the agency was not properly assigned to ML Manager also seems unlikely to succeed, in light of the fact that the assignment was a fundamental feature of the Plan that was confirmed without objection from Rev Op Group investors. See United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1376 (2010) In addition, the claim that the Agency Agreements do not give ML Manager broad authority also seems unlikely to succeed, given that the agreements, which were provided to this Court, appear to state plainly that the agent can perform all tasks at its sole discretion including liquidating a participant's interest and entering into agreements to sell trust property.

The Rev Op Group attacks the ML Manager's authority to sell property in which they have an interest through the assertion of a number of other claims, however the possibility that these will succeed does not seem very likely, given that in a hearing prior to confirmation of the Plan, the Official Investors Committee's primary witness plainly testified that investors who did not assign their interests to a Loan LLC would be subject to the Agency Agreements and bound by the ML Manager's decisions. Also, the Rev Op Group failed to object to the Plan and did not appeal its confirmation and cannot now challenge the enforceability of a fundamental feature of the confirmed Plan. See Espinosa, 130 S. Ct. at 1376.

In addition, the harm the Rev Op Group claims it will incur without a stay is based primarily on the future prospects of the real estate market and therefore impermissibly speculative to satisfy the irreparable harm requirement. See Goldies' Bookstore, Inc. v. Superior Court of the State of California, 739 F.2d 446, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable harm"); Caribbean Marine Services Co. Inc. v. Baldrige, 844 F.2d 668, 674-675 (9th Cir. 1988).

As for the public interest, the Court does not find that this factor weighs strongly for one party or the other. There is a public interest in ensuring that investors' interests will not be liquidated by another party without the proper authority. The public has an equal interest in ensuring that confirmed bankruptcy plans are not disrupted by investors who were informed of the reorganization structure, failed to object and now have second thoughts. These two interests essentially cancel each other out so that this factor does not weigh strongly in the Court's inquiry.

In sum, having reviewed the relevant factors, and in light of the circumstances of this particular case, the Court finds that staying the Bankruptcy Court's Declaratory Judgment is not appropriate. Virginian R. Co., 272 U.S. at 672-673.

The Motion to Stay the Bankruptcy Court's Order approving the "Zacher Missouri" and "Citi Lofts" sales appears to be moot since these sales have occurred. In any event, the Court's analysis for these motions would be the same as above.

Accordingly,

IT IS HEREBY ORDERED, denying Appellant Rev Op Group's Emergency Motion to Stay Pending Appeal of Declaratory Judgment.

IT IS FURTHER ORDERED, denying Appellants Bear Tooth Mountain Holdings, LLP et al's Emergency Motion to Stay Pending Appeal of Sale Orders.

IT IS FURTHER ORDERED, denying Appellant Rev Op Group's Motion for an Administrative Stay of Declaratory Judgment until Conclusion of Rescheduled Hearing.

IT IS FURTHER ORDERED, denying Appellants Bear Tooth Mountain Holdings, LLP et al.'s Motion for an Administrative Stay of Sale Orders Until Conclusion of Rescheduled Hearing.

DATED this 12th day of October, 2010.

Mary H. Murguia
United States District Judge