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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 **OMNIBUS REPLY TO OBJECTIONS TO
MOTION TO SELL REAL PROPERTY**

15 **Real Property located at 902 N. Signal Butte Rd.
in Maricopa County, Arizona known as Adobe
16 Meadows**

17 **Hearing Date: November 22, 2011
18 Hearing Time: 11:00 a.m.**

19 ML Manager LLC (“ML Manager”), as the manager for VCB Loan LLC and the
20 agent for certain Pass-Through Investors, hereby files this Reply in support of its Motion
21 to Sell (“Motion”)(Docket No. 3344) the real property located at 902 N. Signal Butte Rd.
22 in Maricopa County, Arizona known as Adobe Meadows, as more specifically described
23 in the Sale Agreement (“Property”), to Pinnacle Ridge Holdings, LLC, a limited liability
24 company, (“Purchaser”) for the price of \$1.2 million (“Purchase Price”) and on the terms
25 set forth in the Agreement of Sale and Purchase (“Sale Agreement”) which is attached as
26 Exhibit A to the Motion. The Sale Agreement has a contemplated closing of early

1 December, 2011.

2 Of the 17 Pass-Through investors who are not in the VCB Loan LLC, only three
3 Pass-Through investors have filed Objections to the Motion. They are (1) Soteria, LLC's
4 Joinder in Robert Furst's Objection to Motion (Docket No. 3358), (2) Robert Furst's
5 Objection to Motion (Docket No. 3359), and (3) John C. Vinson & Taeko Vinson's
6 Joinder in Robert Furst's Objection (Docket No. 3360). (Collectively the three objections
7 are referred to herein as the "Objections". Occasionally Mr. Furst's Objection may be
8 called the "Mr. Furst Objection".)¹

9 ML Manager requests that this Court overrule the Objections and grant the Motion.
10 As more fully explained below, the Objections concerning the "grant of discretion" or
11 "withholding of discretion" (depending on your view) are some of the same objections
12 previously made by the same parties when ML Manager sought and obtained approval to
13 sell this Property in May 2010. Previously Rick Thomas filed an objection on behalf of
14 Mr. Vinson and Soteria (Docket No. 2763) and Mr. Furst filed a previous objection
15 (Docket No. 2769). As indicated below, this Court previously overruled these exact
16 Objections from the same parties concerning the "withholding of discretion" provision in
17 the Sale Order (Docket No. 2770) and on the Record at the hearing on May 27, 2010
18 (Docket No. 2774). The Court stated at the hearing "the discretion paragraph referred to
19 putting investors in loans. That's really what that was addressed to, not focusing on once a
20 loan is in default and we foreclose and recover the property, who's going to have the
21 decision making authority on how it gets liquidated. As to that, I believe discretion was
22 granted to Mortgages Ltd." *Id.* at p. 65 lines 7-20.

23 ¹ Mr. Furst attaches to the Mr. Furst Objection emails with Bob Kant at Greenberg Traurig
24 which are subject to attorney-client privilege of Mortgages Ltd. He has been warned
25 before not to use or attach such privileged emails because they are subject to privilege and
26 he has no ability or right to waive the privilege. ML Manager requests that the Court
strike the attachments with privileged material and the Mr. Furst be admonished not to do
this again. Also ML Manager states that it does not intend for the privilege to be waived
and that this action by Mr. Furst is not deemed to be such a waiver.

1 Furthermore, this Court ruled on the “withholding of discretion” provision in
2 November 2008 when it ruled on the University & Ash sale on November 25, 2008
3 (Docket No. 1090). The Court, in sustaining Mortgages Ltd’s interpretation and
4 overruling the OIC interpretation, stated the withholding discretion provision “did not
5 withhold the authority to deal with the loans”.

6 The Court also ruled on the “grant of discretion provision” or “withholding of
7 discretion” paragraph in the Declaratory Judgment at paragraph 86 entered in the
8 Declaratory Judgment Action (2:10-ap-00430-RJH, Docket No. 105) and on the Record
9 on July 15, 2010 (2:10-ap-0430-RJH, Docket No. 132-3). The Declaratory Judgment
10 itself states at paragraph 86 “The Court’s prior ruling on the provision of the Subscription
11 Agreement where an investor is entitled to withhold discretion (the “Grant of Discretion
12 Provision”) is law of the case. The Court sees no valid reason or argument to disturb its
13 prior ruling.” The Court then went on in the Declaratory Judgment to find and order that
14 the Grant of Discretion Provision only applied to the selection of investments and has no
15 application with regard to ML Manager’s current actions (paragraph 87), that applying the
16 provision to the authority to make decisions with regard to the management of the loan
17 would make portions of the Agency Agreement and Subscription Agreements inconsistent
18 and superfluous and would make impractical the structure of the investment program
19 (paragraph 88), and that applying the Grant of Discretion Provision in the way that the
20 Objectors urge here would violate the requirement that contract must be harmonized and
21 all provisions given effect, and would violate the last antecedent rule of construction
22 (paragraphs 89-90).

23 ML Manager incorporates by reference all the previous briefs on these issues,
24 rulings and transcripts. The Court has consistently ruled that ML Manager has the
25 authority as agent to sell the properties, found the agency enforceable, and ruled that the
26 “withholding of discretion” or “grant of discretion” provision is not as purported by the

1 objectors and applies to putting investors in loans and not the sale of the Property or
2 liquidation of the loan. As a result, law of the case applies and the Objections should be
3 overruled.

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

5 The investors in VCB Loan LLC and the applicable MP Funds were asked to vote
6 on this Major Decision. As the Court will recall, the operating agreements for the Loan
7 LLCs requires that Major Decisions (such as selling the Property) must be voted on by the
8 members of the applicable limited liability company and the investors in the MP Funds
9 and must be approved by a majority in dollars of those who vote. A vote has been
10 conducted by ML Manager of the members in the applicable Loan LLC and MP Funds.
11 Based on the voting results, 81.53% of the dollars which voted in VCB Loan LLC
12 approved the sale. ML Manager asserts it is authorized to go forward with the sale on
13 behalf of the Loan LLC.

14 **II. WAIVER OF THE RIGHT TO COMPETE BY THE EXIT FINANCIER**

15 One of the contingencies of the Sale Agreement concerns the Exit Financier. The
16 Exit Financier has expressed that it does not intend to exercise its right to compete. Thus
17 this contingency has been satisfied.

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

19 ML Manager, in the exercise of its business judgment, has decided it is in the best
20 interest of the investors in the VCB loan to sell the Property at this time for \$1.2 million to
21 the Purchaser. The Property was been extensively marketed for sale by Nathan &
22 Associates, Inc., a leading real estate brokerage firm that is familiar with this local area
23 and the market. After completing substantial marketing efforts, Purchaser made an offer
24 of \$1.2 million and ML Manager entered into the Sale Agreement with Purchaser for that
25 price, subject to the regular contingencies for ML Manager. Purchaser has deposited
26 \$50,000 and opened escrow at Thomas Title & Escrow. An additional \$100,000 shall be

1 deposited by Purchaser at the end of the Feasibility Period. Because the Property has
2 already been fully marketed, this is not proposed to be an auction and no higher and better
3 bids are being solicited. The Purchase Price is to be paid in cash at closing. This is an
4 arms-length, negotiated sale between unrelated parties. The anticipated closing is early
5 December, 2011.

6 Even though the debt will not be paid in full, ML Manager believes that this price
7 reflects the current market value of the Property and that it is unlikely in the foreseeable
8 future to get a higher amount for the Property. ML Manager believes that this sale is in the
9 best interest of the investors in the VCB Loan LLC and the Pass-Through Investors and is
10 a valid exercise of its business judgment consistent with any fiduciary responsibilities.

11 **IV. AGENT HAS SOLE DISCRETION ON SALE AS TO THE PASS-**
12 **THROUGH INVESTORS**

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

18 On this loan, 17 Pass-Through Investors decided not to transfer and as a result
19 26.149% is managed by ML Manager as the Agent while 73.851% is managed by ML
20 Manager as the manager for the VCB Loan LLC. Only members of the VCB Loan LLC
21 and the investors in the MP Funds in the Loan LLC are allowed to vote and to control the
22 Major Decisions of ML Manager on the management of the property². Pursuant to the
23 Agency Agreement, the Agent has sole discretion on the decisions to be made about the
24 management of the property after foreclosure.

25 ² The Pass-Through Investors have no right to instruct the Agent or to control the
26 decision. Their objection to the sale is noted, but the Agent in the exercise of its business
judgment and in exercise of its discretion has decided to proceed with the sale.

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

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

14 This sole discretion in the Agent remains necessary so that the property can be
15 managed in a way to maximize the value for all the investors in the property and to ensure
16 that no one investor could hold the others hostage. The vote of the VCB Loan LLC
17 investors was intended to be a check and balance of the discretion of the Agent/ Manager
18 on Major Decisions. The Pass-Through Investors chose to retain their interests under the
19 existing Agency Agreements. Indeed, there was an objection asserted at the hearing for
20 the confirmation of the Plan to any change or amendment to the Agency Agreements.
21 Accordingly, paragraph U(1) of the Confirmation Order expressly removed from the
22 operation of the Plan any ability to modify or change the terms of the Agency
23 Agreements.

24 **V. THE COURT HAS RULED ON THE WITHHOLDING OF DISCRETION**
25 **ISSUE AND ITS RULINGS ARE LAW OF THE CASE**

26 The Objections raise allegations that they withheld discretion from Mortgages Ltd.
when they executed their Subscription Agreements. The Objections concerning the "grant
of discretion" or "withholding of discretion" (depending on your view) are some of the
same objections previously made by the same parties when ML Manager sought and
obtained approval to sell this Property in May 2010.

Previously Rick Thomas filed an objection on behalf of Vinson and Soteria

1 (Docket No. 2763) and Robert Furst filed a previous objection (Docket No. 2769). This
2 Court previously overruled these exact Objections from the same parties concerning the
3 “withholding of discretion” provision in the Sale Order (Docket No. 2770) and on the
4 Record at the hearing on May 27, 2010 (Docket No. 2774). The Court stated at the
5 hearing “the discretion paragraph referred to putting investors in loans. That’s really what
6 that was addressed to, not focusing on once a loan is in default and we foreclose and
7 recover the property, who’s going to have the decision making authority on how it gets
8 liquidated. As to that, I believe discretion was granted to Mortgages Ltd.” Id. at p. 65 lines
9 7-20. The Court overruled the Objections and approved the sale of the Property.

10 Furthermore, this Court ruled on the “withholding of discretion” provision in
11 November 2008 when it ruled on the University & Ash sale on November 25, 2008
12 (Docket No. 1090). The Court, in sustaining Mortgages Ltd’s interpretation and
13 overruling the OIC interpretation, stated the withholding discretion provision “did not
14 withhold the authority to deal with the loans”. The withholding of discretion argument is
15 the same argument that was presented to the Court and litigated in connection with the
16 University & Ash litigation in November 2008. At that time, the Court rejected the
17 argument and found:

18 Indeed, it’s [the argument about withholding discretion] kind
19 of contrary to the very premise of some of the objectors that
20 this was in fact a security under the Howey standards,
because I believe most investors were investing in
Mortgages’ ability to manage these loans.

21 (*See* Transcript dated November 25, 2008, at p. 5.) The Court’s decision that an
22 investor’s decision to withhold discretion did not affect the Agent’s ability to manage the
23 loan for the benefit of all the investors is the law of the case.³

24 ³ Mr. Furst argues that the OIC represented by Ms. Reece made certain arguments during
25 the bankruptcy case and that somehow ML Manager is bound by those arguments. What
26 Mr. Furst misses is that the Debtor, Mortgages Ltd., made certain arguments during the
bankruptcy case that were sustained over the objection and position of the OIC. ML
Manager under the Plan is the successor to Mortgages Ltd. as the agent and the positions

1 The Court also ruled on the “grant of discretion provision” or “withholding of
2 discretion” paragraph in the Declaratory Judgment entered in the Declaratory Judgment
3 Action (2:10-ap-00430-RJH, Docket No. 105) and on the Record on July 15, 2010 (2:10-
4 ap-0430-RJH, Docket No. 132-3). The Declaratory Judgment itself states at paragraph 86
5 “The Court’s prior ruling on the provision of the Subscription Agreement where an
6 investor is entitled to withhold discretion (the “Grant of Discretion Provision”) is law of
7 the case. The Court sees no valid reason or argument to disturb its prior ruling.”

8 “Under the ‘law of the case’ doctrine, a court is ordinarily precluded from
9 reexamining an issue previously decided by the same court, or a higher court, in the same
10 case.” *Minidoka Irrigation Dist. v. DOI*, 406 F.3d 567, 573 (9th Cir. 2005)⁴; *Old Person v.*
11 *Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002). For consistency sake, the ruling should not
12 be altered, nor have the Objectors provided any reasons to do so.

13 Mr. Furst attempts to argue in the Mr. Furst Objection that the settlement reached
14 between ML Manager and Mr. Sternberg has some relevance. It does not. In contrast to
15 the agreement that Mr. Sternberg negotiated where he expressly refused to execute a
16 Subscription Agreement and/or an Agency Agreement that was irrevocable, the Objectors
17 here all executed Subscription Agreements that incorporated the same Agency
18 Agreements as all of the other investors. Indeed, in contemplating the Sternberg
19 settlement, the Court expressly found that Mr. Sternberg’s situation was unique and no

20 taken by Mortgages Ltd. and the Court’s rulings in favor of Mortgages Ltd. as agent. ML
21 Manager who happens to be represented by Ms. Reece inherits the law of the case and the
22 rights as agent as determined by the Court. ML Manager is not bound by the unsuccessful
23 positions put forth by the OIC on this issue. Indeed, the OIC’s Plan was crafted to
24 accommodate and intended to implement the Court’s prior rulings. Once the Court
25 determined that the agency agreements were irrevocable, the OIC proposed its Plan to
26 replace the agent. There is nothing inconsistent with ML Manager’s attempt to implement
the Plan adopted as a result of the Court’s prior rulings.

⁴ The law of the case doctrine is subject to three exceptions: “(1) the decision is clearly
erroneous and its enforcement would work a manifest injustice, (2) intervening controlling
authority makes reconsideration appropriate, or (3) substantially different evidence was
adduced at a subsequent trial.” *Minidoka*, 406 F.3d at 573 (rejecting each of the
exceptions). None of those exceptions apply here.

1 other investors were in the same position. Moreover, Mr. Sternberg raised his issue in a
2 separate adversary and it was settled through a Court approved settlement agreement. Mr.
3 Sternberg did not sit back to wait until a property sale was negotiated. Here, the Objectors
4 have not filed an adversary proceeding and have no basis to demand an evidentiary
5 hearing.

6 ML Manager incorporates by reference all the previous briefs on these issues,
7 rulings and transcripts. The Court has consistently ruled that ML Manager has the
8 authority as agent to sell the properties, found the agency enforceable, and ruled that the
9 “withholding of discretion” or “grant of discretion” provision is not as purported by the
10 objectors and applies to putting investors in loans and not the sale of the Property or
11 liquidation of the loan. As a result, law of the case applies and the Objections should be
12 overruled.

13 WHEREFORE, ML Manager LLC requests that the Court overrule the Objections
14 and enter an order authorizing and approving the sale.

15
16 DATED: November 21, 2011

17 FENNEMORE CRAIG, P.C.

18 By /s/ Cathy L. Reece
19 Cathy L. Reece

20 Attorneys for ML Manager LLC

21 Copy of the foregoing e-mailed
22 this 21st day of November, 2011 to:

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/s/ Gidget Kelsey-Bacon