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8 Counsel for the Rev Op Group

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

11 In re:
 12 MORTGAGES LTD.,
 13
 14 Debtor.

Case No. 2:11-cv-00200-RCJ
 BK Case No. 2:08-bk-07465-RJH

17 REV OP GROUP,
 18
 19 Appellants,
 20 vs.
 21 ML MANAGER, LLC,
 22
 23 Appellee.

**APPELLANTS' NOTICE OF APPEAL
 TO UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT**
REPRESENTATION STATEMENT

24 Appellants AJ Chandler 25 Acres, L.L.C., Bear Tooth Mountain Holdings, L.L.P.,
 25 Brett M. McFadden, Cornerstone Realty and Development, Inc., Cornerstone Realty and
 26 Development, Inc. Defined Benefit Plan and Trust, Evertson Oil Company, Inc., James
 27 C. Schneck Rev. Trust, LLJ Investments, LLC, Louis B. Murphey, Michael Johnson
 28 Investments II, L.L.C., Morley Rosenfield, M.D. P.C. Restated Profit Sharing Plan,

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1 Pueblo Sereno Mobile Home Park, L.L.C., Queen Creek XVIII, L.L.C., The Lonnie Joel
2 Krueger Family Trust, William L. Hawkins Family L.L.P., and/or their successors and
3 assigns (collectively, the “Rev Op Investors”), appeal to the United States Court of
4 Appeals for the Ninth Circuit from the *Order* of the district court for the district of
5 Arizona entered in this case on November 4, 2011 affirming the judgment of the
6 bankruptcy court for the district of Arizona. A copy of the Order is attached hereto as
7 Exhibit A.

8 **REPRESENTATION STATEMENT**

9 Pursuant to Fed. R. App. P. 12(b) and Circuit R. 3-2(b), the parties to the Order
10 appealed from and the names, addresses, and telephone numbers of their respective
11 counsel are as follows:

12 **ML Manager LLC**

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1 RESPECTFULLY SUBMITTED this 1st day of March, 2012.

2 **BRYAN CAVE LLP**

3
4 By: /s/ Justin A. Sabin

5 Robert J. Miller

6 Bryce A. Suzuki

7 Justin A. Sabin

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10 Counsel for the Rev Op Group

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CERTIFICATE OF SERVICE

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ORIGINAL of the foregoing electronically filed with the Court this 1st day of March, 2012.

COPY of the foregoing served via email this 1st day of March, 2012, upon:

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/s/ Robyn L. Kerns _____

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EXHIBIT A

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

REV OP GROUP,)	
)	
Plaintiff,)	
)	2:11-cv-00200-RJC
vs.)	2:11-cv-00853-RJC
)	
ML MANAGER LLC,)	ORDER
)	
Defendant.)	
_____)	

14 These related bankruptcy appeals arise out of the bankruptcy judge’s approval of the sale
15 of Debtor’s real property. Defendant has separately moved to dismiss both appeals for
16 mootness. For the reasons given herein, the Court denies the motions to dismiss in both cases
17 and affirms the bankruptcy court in the ‘200 Case.

18 **I. FACTS AND PROCEDURAL HISTORY**

19 Debtor Mortgages, Ltd. originated, serviced, and sold fractional interests in mortgages. In
20 response to mass defaults or because of general mismanagement of assets, it allegedly
21 transformed itself into a Ponzi scheme, paying old investors with the funds it received from new
22 investors. Eventually, it filed for bankruptcy.

23 The Confirmation Order created single-purpose entities to hold Debtor’s interests in
24 various loans (both servicing rights and fractional ownership in the loans themselves) and
25 created ML Manager LLC to implement the Confirmation Plan. The loan at issue in the ‘853

1 Case (the “U&A Loan”) relates to an undeveloped lot at the corner of W. University Dr. and S.
2 Ash Ave. in Tempe, Arizona near Arizona State University (the “Property”). After confirmation,
3 the holders of 77.11% of the interests in the U&A Loan transferred their interests to U&A Loan
4 LLC. Rev Op Group (“ROG”), a group of thirteen individual investors, did not transfer its
5 interest in the U&A Loan to U&A Loan LLC, and it objected to ML Manager’s motion to
6 approve the sale of the Property. The bankruptcy judge granted the motion to sell the Property.
7 ROG appealed the sale order but did not move to stay it (and it had failed to appeal the
8 Confirmation Order directly), and the sale has been completed. The buyer, Broef Tempe Land
9 REO LP (“Broef”), a Delaware limited partnership, paid \$3,240,000 for the Property. (*See*
10 Master Settlement Statement, May 23, 2011, ECF No. 5-1). ML Manager has moved to dismiss
11 the present appeal for mootness, arguing that it is impossible for Appellant to obtain the relief it
12 seeks, because Broef was a bona fide purchaser for value, and hence the sale cannot be reversed.

13 The same litigation pattern (objection in the bankruptcy court but failure to appeal the
14 Confirmation Plan or Order) occurred in the ‘200 Case, in which ROG objects to that part of the
15 Confirmation Order requiring ML Manager to obtain a \$20 million “Exit Loan.” The Exit Loan
16 was conceived to pay the expenses of bankruptcy administration, and each investor was required
17 to help repay the loan pro rata through liquidation of the Debtor’s loan portfolio (in which the
18 investors also had interests), with any surplus to be returned to the investors pro rata. Over 1500
19 investors have received distributions under this portion of the Confirmation Order.

20 **II. LEGAL STANDARDS**

21 “In general, the party asserting mootness ‘has the heavy burden of establishing that there
22 is no effective relief remaining for a court to provide.’” *Suter v. Goedert*, 504 F.3d 982, 986 (9th
23 Cir. 2007) (quoting *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1116–17 (9th Cir. 2003) (quoting
24 *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep’t of Energy*, 232
25 F.3d 1300, 1303 (9th Cir. 2000))). The mootness of a challenge to the sale of assets in

1 bankruptcy is governed by § 363(m) of the Bankruptcy Code. *Id.* at 986–87. The code provides:

2 The reversal or modification on appeal of an authorization under subsection
3 (b) or (c) of this section of a sale or lease of property does not affect the validity of
4 a sale or lease under such authorization to an entity that purchased or leased such
 property in good faith . . . unless such authorization and such sale or lease were
 stayed pending appeal.

5 *Id.* at 987 (quoting 11 U.S.C. § 363(m)) (alteration in original). “When a sale of assets is made
6 to a good faith purchaser, it may not be modified or set aside unless the sale was stayed pending
7 appeal.” *In re Filtercorp, Inc.*, 163 F.3d 570, 576 (9th Cir. 1998) (citing § 363(m)). The
8 dispositive issue in determining the mootness of the present appeal is therefore the good faith of
9 the purchaser.

10 The proponent of a finding of good faith bears the burden of proof on the issue. *In re M*
11 *Capital Corp.*, 290 B.R. 743, 750 (B.A.P. 9th Cir. 2003). “Typically, lack of good faith is shown
12 by ‘fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take
13 grossly unfair advantage of other bidders.’” *Id.* at 746 (quoting *Ewell v. Diebert (In re Ewell)*,
14 958 F.2d 276, 281 (9th Cir. 1992) (quoting *Cnty. Thrift & Loan v. Suchy (In re Suchy)*, 786 F.2d
15 900, 902 (9th Cir. 1985))). Good faith is an issue for the trial court. *Id.* at 747. A finding of
16 good faith by the trial court will not be reversed unless clearly erroneous. *See In re Filtercorp*,
17 163 F.3d at 577.

18 **III. ANALYSIS**

19 **A. The ‘200 Case**

20 The Court denies the motions to dismiss the appeal as moot. Although there may have
21 been many distributions under the Confirmation Order, the complexity of crafting relief does not
22 affect its availability. If Appellants were to prevail in the appeal, the Court could potentially
23 require the other investors to return portions of their distributions into the bankruptcy estate or
24 craft an equitable remedy from other assets in the bankruptcy estate. Although such a remedy
25 would not be legally impossible, however, it would be extremely difficult to achieve and would

1 be inappropriate in any case.

2 The Court therefore affirms the bankruptcy court's distributions under the Exit Loan,
3 and, insofar as Appellant can still appeal it, the Court affirms the Confirmation Order directly.
4 Requiring prorated funding of the Exit Loan through prorated, reduced returns on the sale of
5 investment properties managed (and partially owned) by Debtor was not error. The bankruptcy
6 court demanded—and there is no indication that ML Manager has flouted this requirement—that
7 ROG's share of the exit financing be "fair, equitable and proportional." The Court also finds
8 that the Plan was substantially consummated soon after confirmation when ML Manager took
9 control of the majority interests in most of the properties and began selling them and distributing
10 the proceeds. Therefore, the Plan cannot now be modified and the expenses thereunder
11 reallocated. There is also no evidence of bad faith by ML Manager at the expense of ROG,
12 which has been treated fairly and had expenses allocated to it proportionally, as required by the
13 bankruptcy court.

14 Finally, the Court affirms the bankruptcy judge's ruling that ML Manager had a contract
15 right coupled with an interest because it had the servicing rights (via the Agency Agreements)
16 and certain investors had assigned to it fractional interests in underlying loans themselves, which
17 ML Manager held in the Loan LLCs.

18 **B. The '853 Case**

19 Broef paid \$3,240,000 for the Property. (*See* Master Settlement Statement). Appellant
20 argues that the sale order includes no finding of good faith and in fact "explicitly refuse[s]" to
21 make any finding on the issue of good faith.¹ The written sale order identifies the parties to the

22
23 ¹Appellant also argues that Broef had notice of the fact that ML Manager did not
24 represent the interests of Rev Op Group, but this is only relevant to the appeal of the sale order
25 itself, not to the present motion to dismiss for mootness, because bad faith under § 363(m)
requires fraud, collusion, or unfair advantage. Even as to the propriety of the sale order itself, it
is likely that under Arizona law the majority ownership of the interest in a property may choose
to sell it over the objections of the minority interests. But even assuming for the sake of

1 sale, the price, and the objection, and finds that the sale constituted fair consideration, but
 2 Appellant is correct that there is no explicit finding of good faith. (*See* Sale Order, Apr. 14, 2011,
 3 ECF No. 3180 in Case No. 2:08-bk-07465-RJH). The minutes of the hearing on the motion to
 4 sell the Property indicate that the bankruptcy judge specifically solicited an order that
 5 “SHOULD NOT INCLUDE ANY FINDING AS TO THE GOOD FAITH OF THE
 6 PURCHASER” (*See* Mins., Apr. 11, 2011, ECF No. 3163 in Case No. 2:08-bk-07465-
 7 RJH). Still, the Court finds that there is effective relief to be had even if the sale cannot be
 8 directly set aside. If ROG can show that the Property was sold at an unfair price over its
 9 objection, its measure of relief will be its prorated share of the difference between a fair price as
 10 determined at trial and the actual sale price. The Court will therefore deny the motions to
 11 dismiss for mootness in the ‘853 Case but will not determine that appeal in the present order.

12 CONCLUSION

13 IT IS HEREBY ORDERED in Case No. 2:11-cv-00200-RCJ that the Motions to Dismiss
 14 (ECF Nos. 9, 29) are DENIED, the Motion for Status Conference (ECF No. 7) is DENIED as
 15 moot, the Motions for Leave to File Excess Pages (ECF Nos. 10, 21) are GRANTED, the Motion
 16 for Extension of Time (ECF No. 16) is GRANTED, the Motion for Expedited Consideration
 17 (ECF No. 17) is DENIED as moot, and the Motion to Strike (ECF No. 34) is DENIED.

18 IT IS HEREBY ORDERED in Case No. 2:11-cv-00200-RCJ that the bankruptcy court is
 19 AFFIRMED. The Court denies attorney’s fees under Arizona Revised Statutes section 12-
 20 341.01. Although ML Manager and the ROG investors are subject to the Agency Agreements,
 21 and those agreements contain fee-shifting provisions, the present suit does not arise out of any
 22 breach of those agreements but is better characterized as arising directly out of the

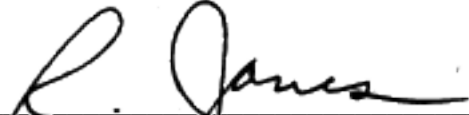
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 24 argument some sort of oppression of the minority sellers by the majority sellers that would
 25 support reversal of the sale order on the merits, the appeal may be moot under § 363(m) if the
 buyers acted in good faith, because Appellant did not move to stay the sale order.

1 implementation of the Confirmation Order. That order, though it involved the Agency
2 Agreements and affirmed them, did not depend on the agreements and could have achieved the
3 same results in all relevant substantive respects in their absence. The Court will, however,
4 permit taxation of costs by the Clerk, not pursuant to Arizona Revised Statutes section 12-341,
5 but pursuant to Rule 54(d)(1). *See Hanna v. Plumer*, 380 U.S. 460 (1965); *Abrams v. Lightolier*
6 *Inc.*, 50 F.3d 1204 (3d Cir. 1995).

7 IT IS FURTHER ORDERED in Case No. 2:11-cv-00853-RCJ that the Motions to
8 Dismiss (ECF Nos. 5, 9) are DENIED.

9 IT IS SO ORDERED.

10 Dated this 4th day of November, 2011.

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14 ROBERT C. JONES
15 United States District Judge
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