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12 Counsel for the Rev Op Investors

13 **IN THE UNITED STATES BANKRUPTCY COURT**
14 **FOR THE DISTRICT OF ARIZONA**

15 In re:
16 MORTGAGES LTD.,
17 Debtor.

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

**MOTION TO RECONSIDER ORDER
APPROVING ML MANAGER LLC'S
MOTION TO SELL THE MARYLAND
WAY AND RIGHTPATH PROPERTIES**

Hearing Date: Not Yet Set
Hearing Time: Not Yet Set

18 Pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure, as made applicable
19 to this contested matter pursuant to Rules 9023 and 9024 of the Federal Rules of Bankruptcy
20 Procedure, Bear Tooth Mountain Holdings, L.L.P.; Queen Creek XVIII, L.L.C.; Pueblo Sereno
21 Mobile Home Park, L.L.C.; Michael Johnson Investments II, L.L.C.; The Lonnie Joel Krueger
22 Family Trust; LLJ Investments, LLC; Louis B. Murphey; James C. Schneck Rev. Trust;
23 Evertson Oil Company, Inc.; Cornerstone Realty and Development, Inc. Defined Benefit Plan
24 and Trust; and/or their successors and assigns (collectively, the "Rev Op Investors") hereby seek
25 reconsideration and/or amendment of the *Order Approving Motion to Sell Real Property* [DE
26 #3621] entered on October 19, 2012 (the "Order"), which contains language that the Court
27 previously instructed ML Manager not to include in its form sale orders. In support of this
28 Motion, the Rev Op Investors submit as follows:

1 1. On September 28, 2012, ML Manager filed its *Motion To Sell Real Property* [DE
2 #3593] (the “Sale Motion”) pursuant to which it sought a comfort order allowing it to sell certain
3 real property known as the Maryland Way property, the Rightpath I property, and the Rightpath
4 II property.

5 2. On October 15, 2012, the Rev Op Investors filed their *Objection to ML*
6 *Manager’s Motion to Sell Real Property* [DE #3613] pursuant to which they opposed the Sale
7 Motion for the reasons stated therein and as further stated in their various other sale motion
8 objections incorporated therein by reference.

9 3. On October 17, 2012, the Rev Op Investors filed their *Request for Judicial Notice*
10 *re: ML Manager’s Sale Motion* [DE #3618] pursuant to which the Rev Op Investors requested
11 that the Court take judicial notice of the complaint the Rev Op Investors filed against ML
12 Manager, its board, and Mr. Mark Winkleman in Maricopa County Superior Court regarding,
13 among other things, the defendants’ breach of fiduciary duty.

14 4. Thereafter, on October 17, 2012, the Court held a hearing on the Sale Motion.
15 Counsel for the Rev Op Investors argued their objections to the Sale Motion and also provided
16 the Court with additional information regarding the state-court lawsuit against ML Manager, its
17 board, and Mr. Winkleman. In particular, counsel for the Rev Op Investors argued that any
18 finding of compliance with fiduciary duty would be improper in light of the state court litigation.

19 5. The Court ultimately approved the Sale Motion at the October 17 hearing, and
20 instructed ML Manager to upload the form of order the Court had previously approved in
21 connection with prior sale motions. The form of order ML Manager lodged and the Court
22 signed, however, contains inappropriate language that the Court previously instructed ML
23 Manager not to include in its sale orders.

24 6. As the Court may recall, it held a hearing on July 19, 2012 to consider ML
25 Manager’s motion to sell certain real property located in Eloy, Arizona [DE #3516]. At the
26 conclusion of that hearing, the Court directed ML Manager not to include any finding regarding
27 its compliance with fiduciary duty in the form of order it was to lodge with the Court.
28

1 7. Thereafter, ML Manager lodged and the Court signed the *Order Approving*
2 *Motion to Sell Real Property* [DE #3551], which approved the motion to sell the Eloy property
3 and which did *not* include any language regarding ML Manager’s compliance with its fiduciary
4 duty per the Court’s instruction.¹

5 8. On October 18, 2012, despite the Court’s prior instruction that ML Manager not
6 include language in its form sale orders regarding compliance with fiduciary duty, and further
7 despite the fact that ML Manager, its board, and Mr. Winkleman are defendants in a lawsuit
8 regarding their failure to comply with their fiduciary duty, ML Manager filed its *Notice of*
9 *Lodging Order Approving Motion to Sell Real Property* [DE #3620] attached to which was a
10 form of order approving the Sale Motion that inexplicably and improperly included the following
11 provision: “The decision to sell and enter into the Sale Agreement is supported by the best
12 exercise of business judgment of ML Manager which is consistent with ML Manager’s fiduciary
13 duties and responsibilities.” The underlined portion of the quoted provision is clearly
14 inappropriate and contrary to the Court’s prior rulings.

15 9. On October 19, 2012,² the Court entered the Order in the same form as lodged by
16 ML Manager and containing the same improper language regarding ML Manager’s compliance
17 with fiduciary duty quoted in paragraph 8 above. *See* Order, p.2, ¶ (e).

18 10. Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, a court may alter
19 or amend an order “to correct a clear error or prevent manifest injustice.” *In re Syncor ERISA*
20 *Litigation*, 516 F.3d 1095 (9th Cir. 2008) (quoting *Dixon v. Wallowa County*, 336 F.3d 1013,
21 1022 (9th Cir. 2003)). Similarly, Rule 60(a) of the Federal Rules of Civil Procedure permits a
22

23 ¹ There can be no dispute about the Court’s direction with respect to the fiduciary duty
24 language, as ML Manager further confirmed the Court’s instruction in its *Response to Rev Op*
25 *Group Investors’ Objection to Sale Order Lodged by ML Manager and Objection to Rev Op*
Group Investors’ Form of Order [DE #3539] filed on August 2, 2012.

26 ² The Court signed the Order on October 18 (the same day ML Manager lodged the form
27 of the Order), and entered the Order the morning of October 19. Counsel for the Rev Op
28 Investors was in the process of preparing an objection to ML Manager’s form or order when the
Court entered the Order, thereby necessitating the filing of this Motion.

1 court to amend an order to correct an oversight, mistake, or omission, and Rule 60(b)(6) provides
2 that a court may grant relief from a prior order for any reason that justifies relief. *See* Fed. R.
3 Civ. P. 60; *United States v. Washington*, 98 F.3d 1159, 1163 (9th Cir. 1996).

4 11. In this case, the Order contains a finding that ML Manager complied with its
5 fiduciary duties and obligations, which the Court unequivocally found to be improper for
6 inclusion in the orders approving ML Manager's sale motions. Presumably the Court took ML
7 Manager at its word that it would lodge a form of order approving the Sale Motion that was
8 consistent with the Court's prior rulings, and signed the Order based on that assumption.
9 However, ML Manager failed to comply with the Court's directive, and the Order contains an
10 inappropriate finding that ML Manager was previously instructed not to include in sale orders.
11 Accordingly, reconsideration and/or amendment of the Order to delete the inappropriate finding
12 is necessary under the circumstances.

13 WHEREFORE, for all the foregoing reasons, the Rev Op Investors respectfully request
14 that the Court enter an Order:

15 A. Reconsidering or amending the Order to remove the following language from
16 page 2, paragraph (e) of the Order: "which is consistent with ML Manager's fiduciary duties and
17 responsibilities"; and

18 B. Granting the Rev Op Investors such other relief as may be just and appropriate
19 under the circumstances.

20 DATED this 19th day of October, 2012.

21 BRYAN CAVE LLP

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COPY of the foregoing served via email
this 19th day of October, 2012 upon:

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