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6  
7 IN THE UNITED STATES BANKRUPTCY COURT  
8 FOR THE DISTRICT OF ARIZONA

9 In re  
10 MORTGAGES LTD.,  
11 Debtor.

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

**ML MANAGER'S RESPONSE TO MOTION  
TO RECONSIDER ORDER RE: MOTION TO  
SELL THE MARYLAND WAY AND  
RIGHTPATH PROPERTIES**

**Hearing Date: October 17, 2012  
Hearing Time: 11:00 a.m.**

15 ML Manager LLC ("ML Manager"), as the manager for MWP Loan LLC, RLD I  
16 Loan LLC and RLD II Loan and the agent for certain Pass-Through Investors, hereby  
17 files this Response to the Rev Op Groups' Motion to Reconsider Order Approving ML  
18 Manager LLC's Motion to Sell The Maryland Way and Rightpath Properties  
19 ("Reconsideration Motion")(Docket No. 3622) and requests that the Court deny the  
20 Reconsideration Motion. ML Manager lodged and served the form of Order on October  
21 18, 2012 (Docket No. 3620). The Court entered the Order Approving Motion Sell Real  
22 Property (Docket No. 3621) on October 19, 2012.

23 In the Reconsideration Motion, the Rev Op Group states that the phrase "which is  
24 consistent with ML Manager's fiduciary duties and responsibilities" in paragraph (e)  
25 should be deleted as it is improper. This fiduciary duty phrase was requested by ML  
26 Manager in the Motion to Sell (Docket No. 3593) and in the Reply (Docket No. 3617)

1 filed by ML Manager and was brought up at the hearing by ML Manager. The Court  
2 overruled the Objection to the Motion to Sell of the Rev Op Group. The Court did not  
3 take Judicial Notice as requested by the Rev Op Group of the State Court pleading.  
4 Counsel was told to upload the standard order. Based on the law of the case and given  
5 that 26 sale orders include the fiduciary duty language, and given that the last 2 sale  
6 orders have included this fiduciary duty language (*see*, Docket Nos. 3600 and 3601,  
7 which both approved sales of properties in which the Rev Ops hold interests), counsel for  
8 ML Manager included the fiduciary duty phrase in the lodged order and served the order  
9 on the opposing counsel expecting that the Court would look at it and sign it. The fact  
10 that it was not included in the August 10, 2012 sale order (Docket No. 3551) cited by  
11 Rev Op's counsel does not mean it is to be excluded in all sale orders.

12 ML Manager asserts that the inclusion of the fiduciary duty phrase is appropriate  
13 in this sale order. **Contrary to the statement in the Reconsideration Motion, this**  
14 **Court has never found this phrase to be improper.** In fact, the Court has found the  
15 fiduciary duty language appropriate and it has become law of the case. This phrase has  
16 been included in 26 sale orders, including the 4 sale orders which are on appeal to the  
17 Ninth Circuit. The prior objections of the Rev Op Group to this phrase have been  
18 overruled. The Paragraph in the 26 sale orders reads the same—"The decision to sell and  
19 enter into the Sale Agreement is supported by the best exercise of business judgment of  
20 ML Manager which is consistent with ML Manager's fiduciary duties and  
21 responsibilities." Despite the objections of the Rev Op Group this complete phrase has  
22 been included in 26 sale orders and is law of the case.

23 The 4 sale orders (Docket No. 2887, 2892, 3180 and 3396) that have been  
24 appealed include that same fiduciary duty phrase and the inclusion of that phrase has been  
25 raised and upheld as an issue on appeal. The District Court in its decisions affirmed the  
26 sale orders including the fiduciary duty language and the appropriateness of the language

1 without an evidentiary hearing. Judge Jones, in affirming the U&A sale on January 10,  
2 2012 in Case 2:11-cv-00853-RCJ (Docket No. 34) stated:

### 3 **C. Fiduciary Duties and Business Judgment Rule**

4  
5 Finally, Appellant argues that ML Manager violated its fiduciary  
6 duties to Appellant by selling the Property at approximately ten percent of  
7 the amount then due and \$27 per square foot less than comparable sales.  
8 ML Manager responds that it accepted the highest of eight offers after  
9 aggressively marketing the Property, and that 82.3% of the ownership  
10 interests in U&A Loan LLC voted to accept the offer. ML Manager notes  
11 that Appellant proffered no evidence in the bankruptcy court that the sale  
12 price was inadequate apart from counsel's own unsworn arguments and  
13 inadmissible newspaper clippings about the recovery of the economy,  
14 which report is doubtful.

15 *Id.* at p. 4. The District Court affirmed the Bankruptcy Court's decision on the Fiduciary  
16 Duties and Business Judgment.

17 Similarly, Judge Jones, in affirming the CITLO and ZDC sale orders on May 3,  
18 2012 in Case 2:10-cv-01917-RCJ (Docket No. 62) stated:

### 19 **IV. Fiduciary Duties**

20 Appellants argue that the bankruptcy court erred by approving the  
21 sale orders without considering whether ML Manager had considered its  
22 fiduciary duties to Appellants. (Opening Brief (#43) at 21). Specifically,  
23 Appellants argue that ML Manager refused to consider Blackeye Capital's  
24 offers or to consider any higher or better offer. (*Id.*)

25 Here, the bankruptcy court did not err in approving the sale of the  
26 properties. As noted in the proceedings below, ML Manager hired a broker  
to list and market the property over a period of time, reviewed offers to the  
property, and accepted the highest offer from a buyer that it thought would  
close. (Reply to CITLO Sale (#36-8) at 3; Reply to ZDC Sale (#37-3) at 3).  
Appellants did not object to this process, but instead argued that Blackeye  
Capital's untimely, last minute offers should have been considered. As  
Blackeye Capital notes in its responses, it was a "prospective bidder" and  
only submitted a bid to purchase the properties after ML Manager had

1 listed the property, reviewed the offers, and accepted an offer from a buyer  
2 that it thought would close. Because ML Manager did exercise its fiduciary  
3 duties with respect to actual offers during the listing period, the bankruptcy  
4 court did not err in approving the sale. As such, the Court affirms the  
CITLO and ZDC sale orders.

5 *Id.* at 9-10.

6 Further, Judge Jones, in affirming the Dysart (aka NRDP) sale order on July 6,  
7 2012, in Case 2:12-cv-00036-RCJ (Docket No. 18) stated:

8 Moreover, with respect to the business judgment/fiduciary duties  
9 argument, the bankruptcy court did not err by approving the sale order of  
10 the Dysart Property. As noted in the proceedings below, ML Manager  
11 hired a broker to list and market the property for over a year and accepted  
12 the highest offer from a buyer during that period. Additionally, ML  
13 Manager explained how past sales fell through when it did not accept last  
minute bids and then explained that, in this market, it felt private sales  
were better. As such, the Court did consider ML Manager's business  
judgment with respect to this sales order.

14 *Id.* at p. 9. The District Court accordingly affirmed the bankruptcy court's sale order and  
15 the business judgment/fiduciary duty language.

16 Since the sale orders were affirmed, the Rev Op Group has appealed to the 9<sup>th</sup>  
17 Circuit. This issue of exercise of business judgment/fiduciary duty has been raised on  
18 appeal to the 9<sup>th</sup> Circuit by the Rev Op Group. There is no stay pending appeal and the  
19 sale orders and the District Court orders are all final enforceable orders.

20 Further, this Court expressly ruled in the Order Regarding Distribution of  
21 Proceeds (aka Allocation Order) (Docket No. 3051) in January 20, 2011, in paragraphs  
22 D, F and G that the "business judgment consistent with its fiduciary duty" is the  
23 appropriate standard for the issues related to the distributions and allocations. The issue  
24 was briefed in that contested matter (*see* Docket No. 2913, page 6, lines 1-16). This  
25 ruling too has been appealed to the District Court and has been affirmed by Judge Jones  
26 in 2:11-cv-00200-RCJ on November 4, 2011, and the Motion to Alter Judgment was

1 denied February 23, 2012. Once affirmed by Judge Jones, the Rev Op Group appealed it  
2 to the 9<sup>th</sup> Circuit and this issue is on appeal. The Bankruptcy Court order and District  
3 Court order are not stayed and are final enforceable orders.

4 Further in the Order Approving the Motion to Approve Settlements with Grace  
5 Entities (Docket No. 2825) entered July 12, 2010, the same fiduciary duty phrase is used  
6 for the settlements of the 6 Grace Entities loans. The District Court dismissed the appeal  
7 as equitably moot so the bankruptcy court order remains final and enforceable. *See* 2:10-  
8 cv-01665-RCJ, Docket No. 24, entered January 31, 2011.

9 At the hearing on July 16, 2012 referenced by the Rev Op Group on the sale  
10 which resulted in the Eloy sale order (Docket No. 3551), the discussion was that this  
11 standard and the fiduciary duty phrase are “law of the case” and that the Court has ruled  
12 that the fiduciary duty is satisfied by the exercise of the business judgment. As such the  
13 Court thought it was redundant to recite in an order. The Court said that it was not  
14 intending to change the standard or the law of the case and that the Rev Op counsel  
15 should understand that. To the contrary, it now appears that the Rev Op counsel are  
16 purposefully taking advantage of this change of language and, in fact, interpret it as a  
17 ruling by the Court that it was “improper” to make this finding.

18 If the Court intends to change the law of this case on the “exercise of the business  
19 judgment which is consistent with ML Manager’s fiduciary duties and responsibilities”  
20 then ML Manager requests a hearing on this precise issue so that it can be fully briefed  
21 and ruled on. Given that the Court’s prior findings and conclusions on this precise issue  
22 are on appeal to the 9<sup>th</sup> Circuit, ML Manager asserts that the Court no longer has the  
23 jurisdiction to change the law of the case and its rulings on this issue.

24 WHEREFORE, ML Manager requests that the Court deny the Reconsideration  
25 Motion.

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DATED: October 22, 2012

FENNEMORE CRAIG, P.C.

By /s/ Cathy L. Reece  
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Copy of the foregoing emailed  
22<sup>nd</sup> day of October, 2012 to:

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