

1 Mark J. Dorval
2 Stradley Ronon Stevens & Young, LLP
3 2600 One Commerce Square
4 Philadelphia, PA 19103
5 Telephone: 215-564-8000
6 Mdorval@Stradley.com

7 Attorneys for Kevin T. O'Halloran, Trustee of the ML
8 Liquidating Trust

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

11 In re:

12 MORTGAGES LTD., an Arizona
13 corporation,
14 Debtor.

Proceedings Under Chapter 11

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

**BRIEF IN FURTHER SUPPORT OF THE
ML LIQUIDATING TRUST OBJECTION
TO THE APPLICATION PURSUANT TO 11
U.S.C. § 503(b)(3)(D) AND (b)(4) FOR
ALLOWANCE AND PAYMENT OF
ADMINISTRATIVE CLAIMS OF
CREDITOR RADICAL BUNNY, LLC**

**RE DOCKET NOS. 1888, 2014, 2027,
2088 _____**

16 Kevin T. O'Halloran, Trustee of the ML Liquidating Trust ("Liquidating Trust"), by and
17 through his counsel Stradley Ronon Stevens & Young, LLP, hereby files this Brief in Further
18 Support of his Objection to the Application Pursuant to 11 U.S.C. § 503(b)(3)(D) and (b)(4) for
19 Allowance and Payment of Administrative Claim ("Substantial Contribution Claim") of Creditor
20 Radical Bunny, LLC [Docket No. 1888] ("Claimant" or "RBLLC").

21 **I. FACTS**

22 **A. Summary**

23 RBLLC claims to have made a substantial contribution to the Mortgages, Ltd.
24 ("Debtor" or "ML") estate (the "Estate") and seeks payment of \$595,798.25 from this Estate for its
25 efforts. In reality, all of the work performed by RBLLC was performed to protect RBLLC's \$200
26 million claim in the Debtor's case. Moreover, the work for which RBLLC seeks
27 compensation was performed in conjunction with numerous other parties, including the Debtor, the
28 Official Committee of Investors (the "OIC"), and other creditors. As such, these services were

1 duplicative of the work being performed by Estate professional (and being paid from the Estate).
2 The Bankruptcy Code does not permit every creditor that participates in a bankruptcy case to be
3 compensated from the Debtor's Estate. To the contrary, only the creditor that makes a substantial
4 contribution is entitled to compensation from the Estate, and RBLLC falls far short of
5 demonstrating that it made any substantial contribution.

6 Moreover, any benefit that RBLLC might have provided was erased when RBLLC chose to
7 aggressively fight the efforts to confirm the plan of reorganization proposed by the OIC (the “OIC
8 Plan”). The OIC Plan was ultimately confirmed by the Court after the OIC incurred the expense of
9 resolving the RBLLC objection (an expense that was ultimately paid by the Estate). Despite
10 RBLLC’s efforts to derail confirmation of the OIC Plan, RBLLC actually seeks an award for
11 substantial contribution relating to its work on the very same OIC Plan that it vigorously opposed
12 until its own treatment under the OIC Plan was improved. Once again, this is hardly the kind of
13 unique situation that rises to the level of a substantial contribution to the entire Estate, as compared
14 to a substantial benefit to RBLLC alone. Therefore, only RBLLC should be responsible for the
15 payment of its own attorneys' fees.

16 Unfortunately for RBLLC, all of its work was done to protect its own interests and was
17 duplicative of work being performed by Estate professionals. Moreover, RBLLC’s efforts to
18 improve its own treatment in the bankruptcy by alternately supporting two different plans and
19 objecting to the OIC Plan removes any possible contribution that RBLLC might have made to the
20 Estate and makes clear that these efforts by RBLLC did not provide any substantial benefit to the
21 Estate.

22 **B. Background**

23 The Joint Statement of Material Facts of Radical Bunny and Liquidating Trust filed with
24 the Court on or about November 11, 2009 (the “Uncontested Facts”), is incorporated herein by
25 reference.

26 RBLLC was a creditor of the Debtor in the approximate amount of \$200 million, as a result
27 of certain pre-petition loans advanced from RBLLC to Debtor. *Uncontested Facts* at ¶ 5. While
28 RBLLC claims that the obligations of Debtor to RBLLC were allegedly secured by ML’s interest

1 in loans made to various borrowers, this claim was challenged by several parties, and this Court
2 was never required to determine whether RBLLC was, in fact, a secured creditor prior to
3 confirmation of the plan of reorganization. On October 8, 2008, RBLLC was placed into
4 involuntary bankruptcy by certain of its creditors. *In re Radical Bunny, LLC*, U.S. Bankr. D.
5 Arizona, Case No. 2:08-bk-13884-CGC.

6 From the inception of the case, RBLLC was active in protecting its \$200 million claim in
7 the ML bankruptcy. Through December 2008, RBLLC worked with the OIC, the Value-to Loan
8 Committee (the “VTL Committee”) and other interested parties to help formulate a creditor-
9 sponsored plan of reorganization for ML. *Uncontested Facts* at ¶ 32. However, beginning in
10 January 2009, RBLLC changed its position, abandoned the OIC and other creditors working
11 towards a creditor plan and worked with the Debtor on an opposing plan. *Id.* at ¶¶ 45-47.
12 Ultimately, the OIC proposed the OIC Plan without the support of RBLLC [Docket No. 1468]. *Id.*
13 Although claiming to be entitled to a payment for its substantial contribution to the plan process,
14 RBLLC, actually voted to reject the OIC Plan and filed a 28 page objection to the OIC Plan. *Id.* In
15 spite of RBLLC’s efforts to derail the OIC Plan, this Court ultimately confirmed by the OIC Plan.

16 On July 6, 2009, RBLLC filed its administrative claim, requesting the Debtor’s estate to
17 pay **\$595,798.25 of the legal fees and costs incurred by RBLLC**, alleging that RBLLC made a
18 “substantial contribution” to the Debtor’s bankruptcy case through its (i) work relating to the OIC
19 Plan; (ii) alleged preservation of estate assets; and (iii) objections and negotiations regarding
20 certain settlement agreements with Debtor’s borrowers. Regardless of RBLLC’s opinion of the
21 value of its contribution to the early plan formation process with the OIC and several other
22 constituents, RBLLC ultimately refused to support the OIC Plan, refused to sponsor the OIC Plan,
23 voted to reject the OIC Plan, filed an objection to the OIC Plan and aggressively fought to thwart
24 confirmation of the OIC Plan. *Id.* It is absurd for RBLLC to now claim that it made a substantial
25 contribution to the Estate through its work in the plan process and seek payment from the ML
26 estate for its conflicting efforts.¹

27
28 ¹ If the Court were to accept the view of substantial contribution proposed by RBLLC, RBLLC would be
entitled to a substantial contribution award regardless of which plan succeeded because RBLLC “helped in
formulating” and ultimately supported both proposed plans, depending on which was giving it better treatment for its

1 The remaining work for which RBLLC seeks an award was performed primarily to protect
2 its \$200 million interest and was duplicative of work performed by other Estate professionals. As
3 is true with RBLLC's work on the plan, none of RBLLC's other actions in this case rise to the
4 legal standard necessary to justify an award of a substantial contribution claim, and RBLLC
5 cannot, therefore, substantiate that this is one of the very rare situations that calls for a creditor's
6 legal fees to be shifted to the Debtor's Estate.

7 **II. ANALYSIS**

8 **A. Legal Standard**

9 The party asserting a claim under 11 U.S.C. § 503(b)(3)(D) and (b)(4), bears the burden of
10 proof to establish, by a preponderance of evidence, that it "provide[d] tangible benefits to the
11 bankruptcy estate and the other secured creditors." *In re Sedona Institute*, 2001 WL 1345985 at *1
12 (9th Cir. Nov. 1, 2001) (citing *In re Catalina Spa & R.V. Resort, Ltd.*, 97 B.R. 13, 17 (Bankr. S.D.
13 Cal. 1989)). RBLLC's counsel has not and cannot meet this burden and is not entitled to payment
14 from this Estate, as opposed to receiving payment from its own client.

15 Although section 503(b) of the Code is meant to foster participation of creditors in a
16 bankruptcy case, "courts must be sensitive to the danger of mushrooming administrative
17 expenses." *In re American Plumbing & Mechanical, Inc.*, 327 B.R. 273, 279 (Bankr. W.D. Tex.
18 2005) (citing *In re Alert Holdings, Inc.*, 157 B.R. 753, 757 (Bankr. S.D.N.Y. 1993)). As a result,
19 bankruptcy courts narrowly construe the availability of substantial contribution awards under §
20 503(b)(3)(D) and (b)(4) and "***strictly limit compensation to extraordinary creditor actions*** which
21 lead directly to significant and tangible benefits to the creditors, debtor or the estate in order to
22 maintain the integrity of § 503(b)." *In re D.W.G.K. Restaurants, Inc.*, 84 B.R. 684, 690 (Bankr.
23 S.D. Cal. 1988) (emphasis added); *see also, In re Sentinel Mgmt. Grp., Inc.*, 404 B.R. 488, 493
24 (Bankr. N.D. Ill. 2009) (citing *In re Glickman, Berkowitz, Levinson & Weiner, P.C.*, 196 B.R. 291,
25 294 (Bankr. E.D. Pa. 1996); *In re Stoecker*, 128 B.R. 205, 208 (Bankr. N.D. Ill. 1991)).

26 Applications brought pursuant to section 503(b) of the Code shall only be granted on "rare"
27

28 claim at that time. This cannot be the standard under § 503(b).

1 occasions and in “unusual” circumstances. *In re 9085 E. Mineral Office Bldg., Ltd.*, 119 B.R. 246,
2 250 (Bankr. D. Col. 1990) (recognizing the “potential ramifications for opening the door to §
3 503(b)(3) claims too far”); *In re Randall’s Island Family Golf Centers, Inc.*, 300 B.R. 590, 598
4 (Bankr. S.D.N.Y. 2003) (compensation under section 503(b)(3) is only awarded on “rare
5 occasions” and for “extraordinary actions”). Courts recognize that “[c]ompensation cannot be
6 freely given to all creditors who take an active role in bankruptcy proceedings ... [i]t must be
7 preserved for those rare occasions when the creditor’s involvement truly fosters and enhances the
8 administration of the estate.” *D.W.G.K. Restaurants*, 84 B.R. at 690; *see also, In re Sentinel*, 404
9 B.R. at 499 (claimant providing several terms that were incorporated into the plan did not provide
10 substantial contribution); *In re American Plumbing*, 327 B.R. at 284 (indenture trustee did not
11 make a substantial contribution through its cost-savings work for the estate or by its objection to
12 the plan); *In re Columbia Gas Sys. Inc.*, 224 B.R. 540 (Bankr. D. Del. 1998) (creditors denied
13 requests for substantial contribution despite their contributions to resolving key issues in
14 confirming a plan of reorganization); *In re Geriatrics Nursing Home, Inc.*, 195 B.R. 34, 38-39
15 (Bankr. D.N.J. 1996) (creditor whose actions led to better treatment of all unsecured creditors in
16 the plan was denied award of substantial contribution).

17 The substantial contribution claim being made by RBLLC does not fit within the rare
18 occasion or unusual circumstance required. As discussed more fully below, RBLLC was involved
19 in the case primarily to protect its own interests and its efforts were duplicative of other Estate
20 professionals. As a result of the promotion of its own interests and its flip-flopping support and
21 opposition of the competing plans, RBLLC ultimately received preferential treatment in the
22 confirmed OIC Plan as its reward for its efforts. RBLLC chose to engage counsel to protect its
23 \$200 million interest in the ML bankruptcy, and the *RBLLC estate* is responsible for the fees
24 incurred as a result of its decision. RBLLC’s counsel expected to be compensated by its client and
25 not by the Debtor – and at no time did the Debtor or any other party suggest that RBLLC’s counsel
26 would be compensated from the Debtor’s estate. *Uncontested Facts* at ¶¶ 26, 54.

27 In this Circuit, the principal test for substantial contribution is “the extent of benefit to the
28 estate.” *In re Cellular 101, Inc.*, 377 F.3d 1092, 1096 (9th Cir. 2004) (citing *In re Christian Life*

1 *Ctr.*, 821 F.2d 1370, 1373 (9th Cir. 1987)). As stated by RBLLC, this Court must also consider: (i)
2 the extent that the creditor acted solely for its own benefit; and (ii) whether the creditor’s actions
3 were duplicative of those taken by other parties in the bankruptcy case. *See In re US Lines, Inc.*,
4 103 B.R. 427, 431 (S.D.N.Y. 1989) (“[t]hose services which are provided solely for the client-as-
5 creditor, such as services rendered in prosecuting a creditor's claim are not compensable”); *In re*
6 *Buttes Gas Oil Co.*, 112 B.R. 191, 194 (Bankr. S.D. Tex. 1989) (court must consider whether
7 services were duplicative). Inherent in the term “substantial” is the concept that the benefit
8 received by the estate must be more than an incidental one arising from activities the applicant
9 pursued in protecting its own interests. *Sentinel*, 404 B.R. at 494 (citing *Lebron v. Mechem Fin.*
10 *Inc.*, 27 F.3d 937, 944 (3d Cir. 1994)); *see also, In re American Plumbing*, 327 B.R. at 284
11 (indenture trustee efforts in plan process were undertaken primarily to protect its own interests);
12 *Geriatrics Nursing Home*, 195 B.R. at 38-39 (creditor not entitled to substantial contribution award
13 where it acted primarily in its own interest rendering any benefit to the estate incidental).

14 RBLLC has not demonstrated any alleged contribution that RBLLC made to the Estate was
15 substantial, and no award should be granted. RBLLC seeks compensation for formulating a plan
16 and allegedly assisting in its confirmation, its efforts regarding financing and its work on
17 settlements. RBLLC’s true intent (i.e., that it was engaged in activities solely to protect its own
18 interests) is apparent from its willingness to flip-flop on which plan it was willing to support until
19 it received improved treatment under the OIC Plan. Moreover, RBLLC’s actions with respect to
20 financing were nothing more than efforts to protect its alleged security interest. Finally, RBLLC’s
21 efforts with respect to settlements were duplicative of the work of estate professionals and
22 performed to protect what RBLLC believed to be its collateral. The work on behalf of RBLLC
23 was performed to protect RBLLC’s \$200 million claim and not intended to benefit the estate or
24 other creditors. As such, no award for substantial contribution can be made. *See Lebron*, 27 F.3d
25 at 944. Moreover, RBLLC does not meet or even approach the standard established by this Circuit
26 in *Cellular 101*, and for the reasons which follow, its application must, therefore, be denied.

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28

1 **B. RBLLC Is Not Entitled to an Administrative Claim for Substantial**
2 **Contribution**

3 **1. RBLLC Cannot Justify a Substantial Contribution Award Relating to**
4 **Work on the OIC Plan When It Also Vigorously Opposed Confirmation**
5 **of the OIC Plan.**

6 One of the three primary justifications for RBLLC’s substantial contribution claim is its
7 work on the OIC Plan. Interestingly, despite its attempt to take credit for the plan that was
8 ultimately confirmed, RBLLC did not actually file or even support such a plan when it was filed by
9 the OIC. *Uncontested Facts* at ¶ 46. RBLLC, at various times, changed its support between the
10 OIC Plan and the plan being proposed by the Debtor in order to obtain the best treatment it could
11 for its claim. While these are customary and legitimate actions for a creditor to take to protect its
12 claim, they certainly do not provide a substantial contribution to the Estate. RBLLC’s actions
13 regarding the OIC Plan did more to hinder the progress of the Debtor’s reorganization than to
14 foster it, and therefore, the Debtor’s Estate should not be forced to pay **\$118,810.00** of RBLLC’s
15 legal fees incurred in such routine creditor actions as part of the plan process, especially where
16 RBLLC played all sides to improve its position. *See In re Sentinel*, 404 B.R. at 499 (even if court
17 found that the claimants actions amounted to a substantial contribution, the fees would have been
18 denied in the face of the expense the claimant caused the plan proponents to incur as claimants
19 voted against and fought confirmation of the plan); *In re White Mountain Communities Hosp., Inc.*,
20 2007 WL 2004099, at *1 (9th Cir. July 9, 2007) (denying application pursuant to section
21 503(b)(3)(D) where creditors actions “slowed the progress of reorganization”); *In re Richton*
22 *Intern. Corp.*, 15 B.R. 854, 856 (Bankr. S.D.N.Y. 1981) (“[s]ervices which substantially contribute
23 to a case are those which foster and enhance, rather than retard or interrupt the progress of
24 reorganization”).

25 RBLLC engaged in conduct and took several positions that were counter-productive to the
26 Debtor’s reorganization and confirmation of the OIC Plan. For example, RBLLC flip-flopped
27 between supporting the OIC Plan² and the plan proposed by the Debtor (depending on which plan

28 ² The fact that a chapter 11 trustee replaced RBLLC as a debtor-in-possession in RBLLC’S bankruptcy may be part of the reason for the conflicting strategies and positions. However, the net effect to the ML estate from RBLLC’s actions throughout the bankruptcy did not provide a substantial contribution.

1 gave it better treatment), as well as lodged a twenty-eight (28) page objection to the OIC Plan
2 (“RBLLC Plan Objection”) [Docket No. 1643]. *Uncontested Facts* at ¶¶ 46-48. RBLLC also filed
3 three substantive motions that, if successful, would have derailed the efforts of the OIC to confirm
4 a plan.³ *Id.* at ¶ 49. RBLLC’s ultimate treatment under the OIC Plan awarded RBLLC a premium
5 over other creditors. The improved treatment under the OIC Plan is the reward RBLLC sought and
6 obtained through its work relating to the various plans, but such efforts did not provide a
7 corresponding benefit to the Debtor’s Estate or other creditors sufficient to justify a substantial
8 contribution award.

9 Moreover, even if RBLLC had made some contribution to the OIC Plan in the beginning of
10 the bankruptcy case, which evidence is not clear given the involvement of multiple parties in the
11 plan drafting process, RBLLC’s sudden opposition to the Plan, beginning in January of 2009,
12 completely overshadowed any early contribution. In *Sentinel*, the claimant seeking substantial
13 contribution claimed to have provided many terms of the confirmed plan that provided benefits to
14 creditors. *Sentinel*, 404 B.R. at 495-96. The *Sentinel* court found that there was no substantial
15 contribution in the claimant providing beneficial terms for the plan but that, even if it had
16 determined that the claimant’s actions amounted to a substantial contribution, the award would be
17 denied due to the expense caused by the claimant in fighting the plan confirmation process.
18 RBLLC’s switching sides and lodging the RBLLC Plan Objection created an increase in costs to
19 the Estate with no corresponding benefit to anyone other than RBLLC.⁴ RBLLC’s only reward for
20

21 ³ Although it bears the burden of proof, RBLLC offers nothing more than self-serving allegations of the costs it
22 believes the OIC and the Debtor incurred in fighting the three substantive motions and two objections filed by RBLLC
23 to thwart the OIC’s efforts at reorganization. Completely lacking is any evidence from the OIC or its financial advisor
24 to describe the costs to the estate of the time spent by the OIC fighting RBLLC’s aggressive actions to derail the OIC
25 Plan. Also lacking is evidence from the Debtor regarding the costs it incurred in pushing forward with its own plan of
reorganization with the belief that it had the support of RBLLC only to have RBLLC abandon it for a better deal in the
OIC Plan. This failure to produce evidence on the part of RBLLC is fatal to its application for an award of substantial
contribution because it bears the burden of proof by a preponderance of the evidence. *See Sedona Institute*, 2001 WL
1345985 at *1.

26 ⁴ The Court requested that RBLLC file a supplemental brief with case law supporting its position that the Court
27 should look only to the benefit RBLLC provided to the early part of the OIC Plan process and should ignore the later
28 efforts of RBLLC to fight confirmation of the OIC Plan. In RBLLC’s Supplemental Memorandum Regarding Effect
of Change of Management and Counsel on Application pursuant to 11 U.S.C. § 503(b)(3)(D) and (4) for Allowance
and Payment of Administrative Claim (“RBLLC Supplement”), RBLLC devotes 11 pages to restating its arguments
but devotes only one sentence to the Court’s request. In that one sentence, RBLLC concedes that it could find no case
law to support its position regarding substantial contribution. *See RBLLC Supplement* at page 7.

1 participating in plan matters when it ultimately objected to and fought confirmation of the OIC
2 Plan should be its favorable treatment in the OIC Plan and nothing more.

3 RBLLC's actions are clearly distinguishable from the actions that led to a partial award to
4 the claimant in the *Cellular 101* case. In *Cellular 101*, the creditor seeking a substantial
5 contribution award actually proposed the only plan of reorganization on its own while the debtor
6 made no attempt to reorganize. *Cellular 101*, 377 F.3d at 1097. Moreover, in the proposed plan,
7 the creditor waived its own prepetition claim and paid all other claimants in full. *Id.* RBLLC, on
8 the other hand, did not act alone in any of its alleged contributions, negotiated for the best
9 treatment it could obtain from two different plan proponents, did not propose its own plan, did not
10 waive its claim but instead fought the OIC Plan until it received improved treatment for its own
11 claim. Even the OIC – the entity that drafted the OIC Plan, proposed it with no other sponsor and
12 fought successfully for confirmation over the objections of RBLLC and others – withdrew its
13 request for substantial contribution from the Debtor's estate. *Uncontested Facts* at ¶ 29. If the
14 OIC, who undisputedly did most of the work relating to confirming a plan in this case, recognized
15 that it was not entitled to a substantial contribution award, clearly RBLLC is not entitled to such an
16 award when it was, at best, one of many contributors to the first draft of the OIC Plan and then
17 later fought its confirmation. The Bankruptcy Code encourages creditor involvement but cannot
18 reward every creditor for its participation in the case without creating an insurmountable
19 administrative burden on the Estate. Such a weakened substantial contribution standard suggested
20 by RBLLC would foster such claims in every case in which creditors actively protect their own
21 interests, drain debtors' estates and consume court resources in adjudicating the many claims that
22 would be filed in every case. The Court must resist RBLLC's efforts to forge new ground in
23 reducing the substantial contribution standard where, as here, the claimant was one of many
24 creditors involved in the activities for which the creditor seeks to have its legal fees reimbursed by
25 the estate. *See In re D.W.G.K. Restaurants*, 84 B.R. at 689-90 (numerous participants in the
26 proceedings made similar contributions and extensive involvement is not sufficient to compel a
27 substantial contribution award).

28 Throughout the Debtor's case, RBLLC's actions have been motivated only by its own self-

1 interest.⁵ RBLLC admits that, “as a large unsecured creditor, [it] took actions to protect its own
2 potential distributions ...” See RBLLC Administrative Claim at p. 10. While a certain level of
3 self-interest is presumed and tolerated, RBLLC’s self-interest was a hindrance to the Debtor’s
4 reorganization and must not be rewarded. Moreover, as RBLLC’s self-interest was its primary
5 motivation in the plan process, a substantial contribution award would not be proper. See *Lebron*,
6 27 F.3d at 944 (while some level of self-interest is expected from a creditor, the terms “substantial”
7 requires that the benefit received by the estate must be more than an incidental one arising from
8 activities that the applicant has pursued in protecting its own interests); *Geriatrics Nursing Home*,
9 195 B.R. at 38-39 (to succeed on a substantial contribution claim a creditor must demonstrate that
10 its efforts transcended self protection, and a claim will be denied where claimant provided an
11 actual and demonstrable benefit to creditors but acted primarily in its own interest in doing so);
12 *United States Lines*, 103 B.R. at 430 (creditors face an especially difficult burden in passing the
13 substantial contribution test because they are presumed to act primarily in their own interests). The
14 legal fees incurred by a creditor monitoring a plan to ensure that it gets fair treatment are clearly
15 not compensable from the Debtor’s Estate. See *In re Buttes*, 112 B.R. at 195 (“[i]t is axiomatic that
16 legal services provided solely for the benefit of a creditor or client are not compensable from the
17 bankruptcy estate”); *In re Jack Winter Apparel, Inc.*, 119 B.R. 629, 637 (E.D. Wisc. 1990) (section
18 503(b) “should not become a vehicle for reimbursing every creditor who elects to hire an
19 attorney”).

20 Instead, RBLLC’s efforts to foster competition between the OIC and the Debtor in the
21 development of competing plans and objections to the OIC Plan that were withdrawn when
22 RBLLC’s treatment was improved under the OIC Plan, reveal RBLLC’s true agenda – it was
23 acting to improve its own position and not concerned with the effect on the ML Estate of fostering
24

25 ⁵ RBLLC’s concern regarding the Debtor’s plan of reorganization was highlighted in its RBLLC Plan
26 Objection in which it stated, “the Plan unfairly discriminates against Classes 7 and 11B, in which Radical Bunny is the
27 sole claimant [t]he Plan violates Bankruptcy Code § 1129(a)(7) because Radical Bunny receives less under the
28 Plan on account of its Class 7 and Class 11B claims than it would receive if the Debtor were to liquidate under Chapter
7.” See RBLLC Plan Objection at p. 3.

1 competition concerning the treatment of RBLLC’s claim. While these efforts clearly benefitted
2 RBLLC, the ML Estate received little or no corresponding benefit from the actions of RBLLC.
3 Therefore, this Court cannot accept RBLLC’s invitation to lower the substantial contribution
4 standard to a point where creditors are rewarded for any action taken to protect their own claims
5 where there may arguably be some incidental or inconsequential benefit to the bankruptcy estate.⁶
6 Despite filing several briefs on the issue over the past four months, RBLLC is unable to point to
7 any clear and substantial benefit received by the ML estate from RBLLC’s efforts to protect itself
8 as part of the plan process for one reason – none exist.

9 **2. RBLLC Cannot Justify a Substantial Contribution Award Relating to**
10 **Alleged Preservation of Assets Where It Acted Primarily in Its Own**
11 **Self-Interest and Duplicated the Efforts of Others.**

12 RBLLC also seeks an extraordinary amount of compensation, **\$356,253.00**, for services
13 which allegedly “preserved” the assets and value of the Debtor’s Estate. However, despite
14 numerous opportunities and the burden of proof, RBLLC fails to quantify how its actions
15 preserved or increased the Debtor’s Estate. As stated above, RBLLC must meet an extremely high
16 burden in demonstrating that its actions were not performed primarily to protect its own interests.
17 RBLLC’s efforts to prevent the approval of financing that would jeopardize what it believed to be
18 its collateral does not rise to the level of making a substantial contribution to the Estate –
19 particularly when several other constituents were taking similar actions to object to the financing.⁷
20 Similarly, RBLLC’s agreement to subordinate its claim at a time when its alleged security interest
21 was being challenged, where the subordination would allow for funding to protect the collateral in
22 which RBLLC claimed an interest, is nothing more than a means to protect RBLLC’s interests.
23 *See Lebron*, 27 F.3d at 944 (while some level of self-interest is expected from a creditor, the term
24 “substantial” requires that the benefit received by the estate must be more than an incidental one
25 arising from activities that the applicant has pursued in protecting its own interests); *Geriatrics*

26 ⁶ Moreover, such additional and significant fees from RBLLC were not contemplated in the OIC Plan, the
related budget or the exit financing.

27 ⁷ The fact that RBLLC identified a possible lender to the ML estate that ultimately did not provide financing
28 (*Uncontested Facts at ¶ 65*) is irrelevant to an analysis of whether RBLLC made a substantial contribution to the
Estate and has never been found to be sufficient to justify a substantial contribution award.

1 *Nursing Home*, 195 B.R. at 38-39 (to succeed on a substantial contribution claim a creditor must
2 demonstrate that its efforts transcended self protection, therefore claim will be denied where
3 claimant provided an actual and demonstrable benefit to creditors but acted primarily in its own
4 interest in doing so); *United States Lines*, 103 B.R. at 430 (creditors face an especially difficult
5 burden in passing the substantial contribution test because they are presumed to act primarily in
6 their own interests).

7 In support of its Administrative Claim, RBLLC asserts that it preserved the Debtor's assets
8 by objecting to the initial post-petition financing terms, identifying alternative providers of post-
9 petition financing and ensuring that estate assets were being used for the benefit of all creditors.
10 *Uncontested Facts* at ¶ 63. Such assertions do not create the rare occasion where a claim for
11 substantial contribution should be awarded, particularly as this work was duplicative of identical
12 efforts made by several other Estate professionals. *See In re D.W.G.K. Restaurants*, 84 B.R. at
13 689-90; *In re American Plumbing*, 327 B.R. at 279 (conclusory statements from creditor regarding
14 its alleged contributions are not sufficient). The burden is on RBLLC to prove that it provided
15 services that benefited the Estate and were not duplicative. *See American Plumbing*, 327 B.R. at
16 281 (court must weigh benefits conferred upon the estate with the fees sought); *In re Lease-A-*
17 *Fleet, Inc.*, 148 B.R. 419, 429 (Bankr. E.D. Pa. 1993) (substantial contribution not found where the
18 fees sought exceed the benefits conferred); *US Lines*, 103 B.R. at 429 (administrative claim under
19 503(b) must be denied where creditor's services "would merely deplete the assets of an estate
20 without providing a corresponding *greater* benefit") (emphasis added). Moreover, RBLLC must
21 also demonstrate that such efforts were not simply motivated by its desire to protect its own alleged
22 interests in the collateral being offered to secure the proposed financing. *See Lebron*, 27 F.3d at
23 944; *Geriatrics Nursing Home*, 195 B.R. at 38-39; *United States Lines*, 103 B.R. at 430.

24 RBLLC attempts to turn routine work performed on its own behalf and duplicated by many
25 other creditors and the Debtor into a claim for providing a substantial contribution to the entire
26 estate. Merely participating in the process to allegedly move the case forward and assisting in the
27 resolution of certain issues along the way does not rise to the level of a substantial contribution.
28 *Columbia Gas*, 224 B.R. at 548. By the same token, expected or routine activities in the guise of

1 extensive or active participation cannot establish substantial contribution. *American Plumbing*,
2 327 B.R. at 283. Allowing a substantial contribution award for RBLLC’s actions in protecting
3 what it believed to be its collateral would eliminate the “substantial” element from the analysis.
4 *See id.* (allowing a substantial contribution award for playing a key role in the progress of
5 resolving major issues in a large bankruptcy would essentially emasculate the “substantial”
6 element from the standards of § 503(b)).

7 By duplicating the work of other professionals, RBLLC acted to protect its interests and
8 caused an increase in costs to the Estate. Duplicating the tasks assigned to and being performed by
9 ML and its professionals is *not* a substantial contribution to the Estate. *In re D.W.G.K.*
10 *Restaurants*, 84 B.R. at 689-90. Additionally, RBLLC’S alleged good deeds should not be
11 reviewed in a vacuum. If RBLLC’s subsequent changes on plan support and objections to the OIC
12 Plan ultimately cost the Estate additional fees and expenses, RBLLC did not provide a substantial
13 contribution to the Estate. *See Sentinel*, 404 B.R. at 499 (even if court found that the claimants
14 actions amounted to a substantial contribution, the fees would have been denied in the face of the
15 expense the claimant caused the plan proponents to incur as claimants fought confirmation of the
16 plan); *US Lines*, 103 B.R. at 429 (administrative claim under 503(b) must be denied where
17 creditor’s services “would merely deplete the assets of an estate without providing a corresponding
18 greater benefit”).

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1 **3. RBLLC Cannot Justify a Substantial Contribution Award Relating to**
2 **the Debtor’s Settlements with Borrowers Where It Acted Primarily in**
3 **Its Own Self-Interest and Duplicated the Efforts of Others.**

4 RBLLC seeks payment of **\$97,882.50** in fees from the Debtor’s Estate for its services
5 relating to Debtor’s settlement of claims with certain of the Debtor’s borrowers. *Uncontested*
6 *Facts* at ¶ 82. Once again, these services described by RBLLC were duplicative of the work of the
7 OIC and others and, therefore, did not provide a substantial contribution. *See Uncontested Facts* at
8 ¶¶ 83-85. Moreover, participating in a settlement process primarily to protect the RBLLC’s own
9 interests is not a substantial contribution and does not justify the payment of fees from the Estate.⁸
10 *Columbia Gas*, 224 B.R. at 552.

11 RBLLC’s actions were clearly duplicative of those taken by numerous other professionals,
12 and RBLLC may not be compensated from the Debtor’s estate for such duplicative services.
13 Greenberg Traurig, LLP, DLA Piper LLP (US), Gust Rosenfeld, PLC, Mack Drucker & Watson,
14 FTI Consulting, MCA Financial Group, Ltd., Fennemore Craig, PC, Alvarez & Marsal and
15 Jennings, Strouss & Salmon, P.L.C., among others, were involved in the litigation and settlement
16 of multiple lawsuits with borrowers. The OIC, on behalf of all investors, monitored the litigation
17 and settlements and objected and negotiated where necessary. *Uncontested Facts* at ¶ 85. RBLLC
18 duplicated the services already being performed by the OIC and others. *Id.* RBLLC should not be
19 paid from the ML estate for work that was being performed by other Estate professionals, and no
20 estate should be forced to compensate every creditor that participates in the bankruptcy process.
21 *See In re D.W.G.K. Restaurants*, 84 B.R. at 689-90 (numerous participants in the proceedings
22 made similar contributions and extensive involvement is not sufficient to compel a substantial
23 contribution award).

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25 ⁸ RBLLC states that it will supplement the amount sought in the Application with the additional fees and costs
26 incurred preparing the Administrative Claim, addressing any objections to the Application and appearing at the hearing
27 on the Application. RBLLC’s preparation of its Administrative Claim clearly does not provide a “substantial
28 contribution” to the Debtors estate. *See In re US Lines*, 103 B.R. at 431 (the substantial contribution test does not
permit an award for work done in connection with a fee application).

1 In *Columbia Gas*, the court noted that the substantial contribution claimant was involved in
2 the settlement process because of its sizeable interest in the matter and the fact that the claimant
3 was permitted to play a role in a matter in which it had significant interest did not provide a basis
4 for finding a direct and material benefit to the estate. *Columbia Gas*, 224 B.R. at 552. The court
5 also noted the role played by many others in the process further demonstrated that the substantial
6 contribution claimant's efforts did not provide anything more than an incidental benefit to the
7 estate. *Id.*

8 RBLLC did nothing more in the settlement process than protect its interests. Like the
9 claimant in *Columbia Gas*, RBLLC invested time into the settlement process because it had its own
10 interests to protect. Also, like the claimant in *Columbia Gas*, the work performed by RBLLC was
11 performed by others, as well. RBLLC's actions do not rise to the rare and unusual level where an
12 award for substantial contribution can be justified, and RBLLC's administrative claim for
13 substantial contribution must be denied.

14 **III. CONCLUSION**

15 RBLLC received a premium in the OIC Plan as reward for its work on its own behalf
16 throughout the bankruptcy. No additional reward is warranted. Moreover, RBLLC's actions were
17 duplicative of the actions taken by others and, therefore, cannot be considered to have made a
18 substantial contribution to the Debtor's case, and the actions that RBLLC took to oppose
19 confirmation of the OIC Plan undercut and eliminated any benefit that it may have incidentally
20 conferred upon ML. For all of the reasons stated above, the Liquidating Trust respectfully requests
21 this Court to deny the substantial contribution Administrative Claims requested by RBLLC.

22 DATED this 12th day of November, 2009.

23 STRADLEY RONON STEVENS & YOUNG, LLP

24
25 By: /s/ Mark J. Dorval
26 Michael J. Cordone
27 Mark J. Dorval
28 Lead Counsel for Kevin T. O'Halloran, Trustee
for the Liquidating Trust of Mortgages, Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 12, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

John R. Clemency, Esq. Todd A. Burgess, Esq. Greenberg Traurig, LLP 2375 E. Camelback Road, #700 Phoenix, AZ 85015 clemencyj@gtlaw.com burgessst@gtlaw.com Attorney for Mortgage Ltd.	Jonathan E. Hess Larry Watson Office of the U.S. Trustee 230 N. 1st Avenue, Suite 204 Phoenix, AZ 85003-1706 Jon.e.hess@usdoj.gov Larry.watson@usdoj.gov Attorney for: US Trustee	Donald L Gaffney Donald Fredrick Ennis Christopher H. Bayley Snell & Wilmer LLP One AZ Center Phoenix, AZ 85004-2202 dgaffney@swlaw.com dfennis@swlaw.com CBayley@swlaw.com Attorney for: Central & Monroe; KGM Builders; Osborn III Partners
David Wm. Engelman Steven N. Berger Bradley D. Pack Engelman Berger, P.C. 3636 N. Central Avenue, #700 Phoenix, AZ 85012 dwe@engelmanberger.com snb@engehnanberger.com bdp@engelmanberger.com Attorney for: Tempe Land Company	Robert A. Shull Mariscal, Weeks, McIntyre & Friedlander 2901 N. Central, #200 Phoenix, AZ 85012-2705 rob.shull@mwmf.com Attorney for: Artemus Realty Capital and Gold Creek, Inc.	Shelton L Freeman Nancy J. March DeConcini McDonald Yetwin & Lacy 7310 North 16 th Street Phoenix, AZ 85020 tfreeman@dmylphx.com nmarch@dmylphx.com Attorney for: Radical Bunny, LLC
Sean O'Brien Gust Rosenfeld, PLC 201 E. Washington St., #800 Phoenix, AZ 85004-2327 spobrien@gustlaw.com mcnichol@gustlaw.com Attorney for: Larry Lattig, Litigation Trustee	Richard R. Thomas T. Whitney Thomas Sclern Richardson 1640 South Stapley Dr., #205 Mesa, AZ 85204 rthomas@thomas-schern.com twhitney@thomas-schern.com Attorney for: Eva Sperber-Porter, Litchfield Road Associates Limited Partnership, and Baseline & Val Vista Associates Limited Partnership	Daniel P. Collins Collins, May Potenza, Baran & Gillespie 201 North Central Ave., #2210 Phoenix, AZ 85004-0022 dcollins@cmpbglaw.com Attorney for: William Hall
Dennis J. Wickman Seltzer Caplan McMahon Vitek 750 B Street, Suite 2100 San Diego, California 92101 wickham@scmv.com Attorney for: Southwest Value Partners Fund XIV, LP	Jerry L. Cochran Cochran Law Firm, P.C. 2929 E. Camelback, #118 Phoenix, AZ 85016 jcochran@cochranlawfirmpc.com Attorney for: Metropolitan Lofts	Lawrence E. Wilk Jonathan P. Ibsen Jaburg & Wilk, P.C. 3200 North Central Ave, #2000 Phoenix, AZ 85012-2440 lew@jaburgwilk.com jpi@jaburgwilk.com Attorney for: Laura Martini

1 2 3 4 5	Kevin J. Blakley Gammage & Burnham, P.L.C. Two North Central Avenue, 18 th F1 Phoenix, AZ 85004 Kblakley@gblaw.com Attorney for: Ronald L. Kohner	Gerald K. Smith Lewis and Roca LLP 40 N. Central Ave., #1900 Phoenix, AZ 85004-4429 gsmith@lrlaw.com Attorney for: the Estate Scott M. Cole and Trustee of the SMC Revocable Trust U/T/A	Terry A. Dake Terry A. Dake, Ltd. 11811 North Tatum Blvd, #3031 Phoenix, AZ 85028-1621 Tdake@cox.net Attorney for: Penny Hardaway Investments
6 7 8 9 10	Rebecca J. Winthrop Ballard Spahr Andrews & Ingersoll, LLP 2029 Century Park East, #800 Los Angeles, CA 90067-2909 winthropr@ballardspahr.com Attorney for: University & Ash, Roosevelt Gateway; Roosevelt Gateway II and KML Development	Dean C. Waldt Ballard Spahr Andrews & Ingersoll, LLP Plaza 1000 — Suite 500 Main Street Voorhees, NJ 08043-4636 waldtd@ballardspahr.com Attorney for: University & Ash, LLC, Roosevelt Gateway, Roosevelt Gateway II and KML Development	Charles A. Lamar Justin C. Lamar 818 North First Street Phoenix, AZ 85004 clamar@kmldevelopment.com jlamar@kmldevelopment.com Attorney for: University & Ash; Roosevelt Gateway, Roosevelt Gateway II and KML Development
11 12 13 14 15	Ryan W. Anderson Guttilla Murphy Anderson, PC 4150 West Northern Avenue Phoenix, AZ 85051 randerson@gamlaw.com Attorney for: Department of Financial Institutions	Jerome K. Elwell Warner Angle 3550 N. Central, #1500 Phoenix, AZ 85012 jelwell@warnerangle.com Attorney for: Francine Haraway	C. Taylor Ashworth Alissa C. Lacey Stinson Morrison Hecker LLP 1850 N. Central Ave., #2100 Phoenix, AZ 85004 tashworth@stinson.com alacey@stinson.com Attorney for: Oxford & Investor Group
16 17 18 19 20 21 22	Felecia A. Rotellini Robert Charlton AZ Dept. of Financial Institutions 2910 N. 44 th St., Suite 310 Phoenix, AZ 85018 Rotellini@azdfi.gov rcharlton@azdfi.gov	William J. Maledon John L. Blanchard James E. Cross Warren J. Stapleton Osborn Maledon 2929 N. Central Ave., #2100 Phoenix, AZ 85012 wmaledon@omlaw.com jblanchard@omlaw.com jcross@omlaw.com wstapleton@omlaw.com Attorney for: Rightpath Limited Development Group, LLC	Christopher S. Reeder Yaw-Jiun Wu Sheppard, Mullin, Richter & Hampton 333 South Hope St., 48 th Floor Los Angeles, CA 90071 creeder@sheppardmullin.com gwu@sheppardmullin.com Attorney for: Right Path
23 24 25 26 27 28	C. Bradley Vynalek Quarles & Brady LLP One Renaissance Square 2 North Central Avenue Phoenix, AZ 85004 bvynalek@quarles.com Attorney for: Ashley Coles	Craig A. Raby Office of the Attorney General 1275 W. Washington Phoenix, AZ 85007 craig.raby@azag.gov	Scott A. Rose Kerry M. Griggs The Cavanaugh Law Firm 1850 N. Central Ave., #2400 Phoenix, AZ 85004 srose@cavanaghlaw.com kgriggs@cavanaghlaw.com Attorney for: Central PHX Partners

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<p>Christopher A. LaVoy LaVoy & Chernoff, PC 201 N. Central Avenue, #3300 Phoenix, AZ 85004 cal@lavoychernoff.com Attorney for: Sue Ross and Ted Dodenhoff</p>	<p>Robert J. Spurlock Bonnett, Fairbourn, Friedman & Balint 2901 N. Central Avenue, #1000 Phoenix, AZ 85012-3311 bspurlock@bffb.com Attorney for: Foothills Plaza IV, LLC</p>	<p>S. Cary Forrester Forrester & Worth, PLLC 3636 N. Central Avenue, #700 Phoenix, AZ 85012 scf@fwlawaz.com Attorney for: the Lewis Trust</p>
<p>Sheldon Sternberg 3212 Rainbow Ridge Drive Prescott, AZ 86303 sheldonsternberg@q.com Pro Per</p>	<p>Gerald T. Hickman Jardine, Baker, Hickman & Houston 3300 North Central Ave. #2600 Phoenix, AZ 85012 ghickman@jbhhlaw.com Attorney for: Mayer Hoffman McCann</p>	<p>Philip R. Rudd Ethan B. Minkin Kutak Rock LLP 8601 N. Scottsdale Rd., #300 Scottsdale, AZ 85253 philip.rudd@kutakrock.com ethan.minkin@kutakrock.com Attorney for: AZ Bank & Trust</p>
<p>Christopher S. Reeder Margaret M. Mann Sheppard, Mullin, Richter & Hampton 333 South Hope St., 48th Floor Los Angeles, CA 90071-1448 CReeder@sheppardmullin.com MMann@sheppardmullin.com Attorney for: Rightpath Limited Development Group, Mayland Way Partners; Daniel L. Hendon; Rick L. Burton; Raymond Rodrigues; Robert C. Banovac; Rightpath Limited; and Glendale Jet Center</p>	<p>John J. Dawson John A. Harris Quarles & Brady LLP One Renaissance Square 2 North Central Avenue Phoenix, AZ 85004 jdawson@quarles.com jharris@quarles.com Attorney for: Southwest Value Partners Fund XIV and Southwest Value Partners Finance I</p>	<p>Stanford E. Lerch Anthony E. DePrima Lerch and DePrima PLC 4000 N. Scottsdale Road, #107 Scottsdale, AZ 85251 slerch@ldlawaz.com tdeprima@ldlawaz.com Attorney for: Howard Farkash (Successor TTEE OFT)</p>
<p>Richard H. Herold Hinshaw & Culbertson LLP 3200 N. Central Ave., #800 Phoenix, AZ 85012-2428 rherold@hinshawlaw.com Attorney for: Irwin Union Bank</p>	<p>Patrick R. Barrowclough Atkinson, Hamill & Barrowclough PC 3550 N. Central Ave., #1150 Phoenix, AZ 85012 Patrick.Barrowclough@azbar.org Attorney for: Chuck Niday, Trustee for Ross Verne Family Trust</p>	<p>Catherine A. Sims Rose Law Group PC 6613 N. Scottsdale Road, #200 Scottsdale, AZ 85250 csims@roselawgroup.com Attorney for: Kelly Haddad and Navval Haddad, Creditors</p>

By: _____