

1 Mark J. Dorval
2 Nicholas M. Orloff
3 Stradley Ronon Stevens & Young, LLP
4 2600 One Commerce Square
5 Philadelphia, PA 19103
6 Telephone: 215.564.8000
7 mdorval@stradley.com
8 norloff@stradley.com
9 Lead Counsel for Kevin T. O'Halloran,
10 Trustee of ML Liquidating Trust

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

In re:

MORTGAGES LTD., an Arizona
corporation,

Debtor.

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

**LIQUIDATING TRUST'S MOTION FOR
STAY PENDING APPEAL**

(Re: Docket No. 2529)

Kevin T. O'Halloran, Trustee of the Liquidating Trust of Mortgages, Ltd.
("Liquidating Trust"), by and through its counsel, hereby moves this Honorable Court, pursuant to
Bankruptcy Rule 8005, for a stay pending the outcome of its appeal ("Appeal") of this Court's
Order Granting Radical Bunny's Administrative Claim for Substantial Contribution [Docket #
2514] (the "Order Granting"), which incorporated the Bankruptcy Court's Order Approving
Allowance & Payment of Substantial Contribution Claim Pursuant to 11 U.S.C. § 503(b)(3)(D) and
(4), [Docket # 2521] (the "Order Approving", together with the Order Granting, the "Orders") for
the reasons set forth in the accompanying Memorandum of Law.

1 WHEREFORE, the Liquidating Trust respectfully requests the Court to issue an
2 order, substantially in the form filed herewith, staying the enforcement of the Orders pending the
3 determination of the Appeal.

4
5 Dated: December 30, 2009

STRADLEY RONON STEVENS & YOUNG, LLP

6 By: /s/ Mark J. Dorval
Mark J. Dorval, Esquire

7 Nicholas M. Orloff, Esquire
8 Lead Counsel for Kevin T. O'Halloran,
Trustee for the Liquidating Trust

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Mark J. Dorval
2 Nicholas M. Orloff
3 Stradley Ronon Stevens & Young, LLP
4 2600 One Commerce Square
5 Philadelphia, PA 19103
6 Telephone: 215.564.8000
7 mdorval@stradley.com
8 norloff@stradley.com
9 Lead Counsel for Kevin T. O'Halloran,
10 Trustee of ML Liquidating Trust

11
12 **IN THE UNITED STATES BANKRUPTCY COURT**
13 **FOR THE DISTRICT OF ARIZONA**

14 In re:

15 MORTGAGES LTD., an Arizona
16 corporation,

17 Debtor.

18 Proceedings Under Chapter 11

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

20 **MEMORANDUM OF LAW IN SUPPORT**
21 **OF LIQUIDATING TRUST'S MOTION**
22 **FOR STAY PENDING APPEAL**

23 **(Re: Docket No. 2529)**

24 Kevin T. O'Halloran, Trustee of the Liquidating Trust of Mortgages, Ltd. ("Liquidating
25 Trust"), by and through his counsel, hereby moves this honorable Court to impose a stay of this
26 Court's Order Granting Radical Bunny's Administrative Claim for Substantial Contribution
27 [Docket # 2514] (the "Order Granting"), which incorporated the Bankruptcy Court's Order
28 Approving Allowance & Payment of Substantial Contribution Claim Pursuant to 11 U.S.C.
§ 503(b)(3)(D) and (4), [Docket # 2521] (the "Order Approving", together with the Order
Granting, the "Orders") pending the Liquidating Trust's appeal of these Orders and in support
thereof avers as follows:

I. BACKGROUND

On July 6, 2009, Radical Bunny, LLC ("Radical Bunny") filed its Application
Pursuant to 11 U.S.C. § 503(b)(3)(D) and (4) for Allowance and Payment of Administrative Claim

1 [Docket # 1888]. On July 27, 2009, the Liquidating Trust filed an Omnibus Objection to Motion
2 for Allowance and Payment of Administrative Claim [Docket # 2014].

3 On November 12, 2009, the parties entered into and filed a Joint Statement of
4 Material Facts of Radical Bunny and the Liquidating Trust For Application Pursuant to 11 U.S.C.
5 § 503(b)(3)(D) and (4) for Allowance and Payment of Administrative Claim [Docket # 2395] (the
6 “Joint Stipulation”). On November 16, 2009, the parties entered into a Supplemental Statement of
7 Facts of Radical Bunny and the Liquidating Trust For Application Pursuant to 11 U.S.C.
8 § 503(b)(3)(D) and (4) for Allowance and Payment of Administrative Claim [Docket # 2407] (the
9 “Supplemental Stipulation” together with the Joint Stipulation, the “Stipulations”).

10 On December 17, 2009, this Court entered the Order Granting, which incorporated
11 by reference this Court’s December 21, 2009 Order Approving. The Orders award Radical Bunny
12 \$572,945.50 in attorneys’ fees and \$22,852.75 in costs, and directed the immediate payment of the
13 full amount, \$595,798.25 (the “Fee Award”).

14 On December 28, 2009, the Liquidating Trust filed a Notice of Appeal of the Orders
15 (the “Appeal”) [Docket # 2529].

16 **II. RELIEF SOUGHT**

17 The Liquidating Trust seeks a stay of enforcement of the Orders pending resolution
18 of the Appeal.

19 **III. BASIS FOR RELIEF**

20 **A. Legal Standard for a Discretionary Stay**

21 Bankruptcy Rule 8005 provides, in pertinent part, as follows: “the bankruptcy
22 judge may suspend or order the continuation of other proceedings in the case under the Code or
23 make any other appropriate order during the pendency of an appeal on such terms as will protect
24 the rights of all parties in interest.” See Fed. Rules Bankr. Proc. Rule 8005.

1 In the Ninth Circuit, a discretionary stay will be granted where appellant can prove
2 that the following four conditions are satisfied:

- 3 (1) Appellant is likely to succeed on the merits of the appeal;
- 4 (2) Appellant will suffer irreparable injury;
- 5 (3) No substantial harm will come to appellee; and
- 6 (4) The stay will do no harm to the public interest.

7
8 In re Wymer, 5 B.R. 802, 806 (BAP 9th Cir. 1980).¹ The issuance of a discretionary stay pending
9 an appeal rests with the sound discretion of the bankruptcy court. In re Yellowstone Mountain
10 Club, LLC, No. 08-61570-11, 2009 WL 2163528 at *3 (Bankr. D. Mont. July 16, 2009).

11 **B. All Conditions Required for a Discretionary Stay are Present**

12 **1. The Liquidating Trust is Likely to Succeed on the Merits of the Appeal**

13 The Liquidating Trust is likely to prevail on the merits of its Appeal. As the
14 Bankruptcy Court recognized in the Order Granting, the decision of the Bankruptcy Court rested
15 on legal rather than factual grounds. Indeed, the parties entered into Stipulations covering the
16 majority of the facts on which the Court relied to render its decision. The first element required for
17 the imposition of a discretionary stay – likelihood of success on the merits – is more easily
18 satisfied when the decision of the lower court rested on legal, rather than factual grounds. See In re
19 Texas Equip. Co., Inc., 283 B.R. 222, 227 (Bankr. N.D. Tex. 2002) (“When the issue appealed is
20 mostly a factual question over which the bankruptcy court has broad discretion, such discretion is
21 unlikely to be overturned on appeal ... With respect to a questions of law, however, especially
22
23
24

25
26 ¹ Some courts within the Ninth Circuit have held that the in order to obtain a discretionary stay under Rule 8005,
27 appellant must only show (1) a likelihood of probable success on the merits and the possibility of irreparable injury; or
28 (2) that serious questions going to the merits are raised and the balance of hardships tips sharply in its favor. See In re
Dudley, No. 06-1371, 2006 WL 862932 at *2 (N.D. Cal. Apr. 4, 2006). However, as the Liquidating Trust strongly
believes that all four conditions required under Wymer are present, it will review the Wymer legal standard.

1 questions involving the application of law, or when the law has not been definitively addressed by
2 a higher court, the movant more easily satisfies the first element”).

3 In the Orders, the Bankruptcy Court recognized the existence of a split of authority
4 among the Circuit Courts regarding the relevance of the self-interest of a creditor and that the
5 Ninth Circuit has not yet taken a position on this issue. The Bankruptcy Court relied upon (i) its
6 interpretation of the Ninth Circuit’s holding, as opposed to the holding itself, and (ii) language in a
7 concurring opinion to arrive at the conclusion that the Ninth Circuit would allow a substantial
8 contribution in its entirety under the present circumstances. In its memoranda and oral argument,
9 the Liquidating Trust strenuously disputed this speculation regarding the Ninth Circuit’s position
10 and provided a significant legal basis for its argument, relying upon the authority from the Ninth
11 Circuit and numerous additional cases representing the overwhelming weight of authority on the
12 issue. Radical Bunny had the burden to prove that it was entitled to an award for substantial
13 contribution and was not able to provide any support in the relevant case law other than the general
14 reference to the Ninth Circuit’s standard. The Liquidating Trust, therefore, believes it is likely to
15 persuade the Bankruptcy Appellate Panel of its position.
16
17

18 Because the Bankruptcy Court’s application of law will be reviewed *de novo* by the
19 reviewing court², and given that the weight of authority from the Ninth Circuit, as well as from
20 other Circuit Courts, supports the position taken by the Liquidating Trust, the likelihood of success
21 on appeal is significant. As stated above, an appellant is likely to satisfy this element where the
22 disputed issue is a question of law, and the relevant law has not been clearly addressed by a higher
23 court. See Texas Equip., 283 B.R. at 227; see also In re Westwood Plaza Apartments, Ltd., 150
24

25
26 ² See In re Macke Intern. Trade, Inc., 370 B.R. 236, 245 (BAP 9th Cir. 2007) (“The bankruptcy court’s findings of fact
27 are reviewed for clear error, and conclusions of law are reviewed de novo ... We review mixed questions of law and
28 fact de novo ... We review the bankruptcy court’s interpretation of the Bankruptcy Code regarding attorney’s fees de
nov”) (citations omitted).

1 B.R. 163, 168 (Bankr. E.D. Tex. 1993) (granting discretionary stay where Circuit Court had yet to
2 address the issue raised on appeal).

3 **2. The Liquidating Trust Will Suffer Irreparable Harm**

4 The Liquidating Trust will suffer irreparable harm if the Court does not grant a stay
5 pending the Appeal. Until funds come in from the sale of assets, the Liquidating Trust's source of
6 funds has been through its exit financing line of credit, which carries a 17.5% rate of interest. If
7 the Liquidating Trust is required to pay Radical Bunny immediately, and the Orders are
8 subsequently overturned, to the extent that the payment to Radical Bunny comes from draws on the
9 line of credit, the Liquidating Trust (to the extreme detriment of Debtor's creditors and investors)
10 will be irreparably harmed in the amount of the interest needlessly (and wastefully) paid to the exit
11 financing lender. Moreover, the Liquidating Trust would unnecessarily be prevented from utilizing
12 those funds for other purposes. This Court confirmed the plan of reorganization on June 11, 2009.
13 It would be a hardship to the Liquidating Trust to pay this significant amount during the early
14 stages of the plan, and it risks an unnecessary expenditure of Estate funds on an award that has
15 been appealed and for which the Liquidating Trust has a likelihood of success on appeal.

16 Moreover, Radical Bunny is involved in its own bankruptcy proceeding (Bankr. D.
17 Az., Case No. 08-13884) and, unlike the Liquidating Trust, does not have a confirmed plan of
18 reorganization with exit financing in place, making it extremely difficult for the Liquidating Trust
19 to cause Radical Bunny to return the fee award if the Liquidating Trust is successful with the
20 Appeal. Therefore, in the event that Radical Bunny receives nearly \$600,000 from the Liquidating
21 Trust before the Appeal is decided, the risk shifts to the Liquidating Trust to recover such funds in
22 the event that it is successful on the Appeal – and the Radical Bunny estate does not have the cash
23 available to return those funds. Moreover, to the extent that the Liquidating Trust is able to pursue
24 Radical Bunny's law firm, DeConcini McDonald Yetwin & Lacy, P.C. ("RB Counsel") for a return
25
26
27
28

1 of the funds, there is no information available to the Court that ensures that RB Counsel would be
2 able to return those funds. This is a significant risk to the Estate in a situation where there is little
3 risk to Radical Bunny of the alternative result – granting the stay.

4 Not only will this risk-shifting be burdensome and risky for the Liquidating Trust,
5 but the costs of such recovery may be significant and likely without recourse for reimbursement.

6 See In re Adelpia Communications Corp., 361 B.R. 337, 351 (S.D.N.Y. 2007) (finding irreparable
7 harm to appellant where disgorgement of funds was not a practical remedy if appeal was
8 successful). On the other hand, if the stay is granted, the Liquidating Trust, which is overseen by
9 this Court, will continue in the same position with respect to its ability to satisfy the Fee Award in
10 the event that the Orders are sustained after appellate review, and Radical Bunny will be in no
11 worse position.
12

13 3. No Substantial Harm Will Come to Radical Bunny

14 As stated above, allowing Radical Bunny to enforce the Fee Award shifts
15 significant risk to the Liquidating Trust of recovering the money in the event of successful Appeal.
16 However, there is little risk to Radical Bunny that it will be in a worse position to satisfy the Fee
17 Award in the event of an unsuccessful Appeal. In addition to the exit financing, the Liquidating
18 Trust has additional assets including causes of action and real property from which it expects to
19 bring additional funds into the Estate. Moreover, RB Counsel has a primary source of recovery of
20 its fees – its client, Radical Bunny. Counsel is entitled to an administrative claim in the Radical
21 Bunny bankruptcy for all of its fees, including the fees awarded by the Orders. Given this primary
22 source of payment, a mere stay pending resolution of the Appeal will not cause additional risk to
23 RB Counsel getting paid whatever amount it may be due.
24
25
26
27
28

1 **4. The Stay Will Do No Harm to the Public Interest**

2 Finally, a stay pending the Appeal will do no harm to the public interest. First, the
3 stay only applies to actions by Radical Bunny to collect the Fee Award granted in the Orders and
4 not to any other aspect of this bankruptcy case. The remainder of the bankruptcy case will proceed
5 as scheduled. Thus, the administration of the Debtor's Estate will not be hindered by granting the
6 stay.
7

8 Additionally, granting a stay pending the Appeal will diminish the costs that would
9 be incurred on behalf of the Liquidating Trust in the event that the Appeal is successful and the
10 Liquidating Trust is required to recover the money from Radical Bunny or RB Counsel. Such a
11 reduction in expenses is extremely important to the investors and creditors of the Estate who are
12 still hoping for a recovery. The cost of borrowing under the exit financing is 17.5%. If the Appeal
13 process takes a year and the Liquidating Trust is successful, then the Liquidating Trust could pay
14 over \$100,000 in interest on a professional fee that it ultimately did not have to pay and it will lose
15 the use of those funds in the interim. This cost is borne by the Debtor's numerous investors and
16 creditors. This charge to the investors and creditors in a situation where a stay would allow for a
17 significant savings without increasing the risk to Radical Bunny is unnecessary.
18
19
20
21
22
23
24
25
26
27
28

1 **IV. CONCLUSION**

2 WHEREFORE, on the basis of the foregoing, the Liquidating Trust respectfully requests
3 that this Court grant the relief sought herein and enter an order substantially in the form of the
4 attached proposed order.
5

6 RESPECTFULLY SUBMITTED this 30th day of December, 2009
7

8
9 STRADLEY RONON STEVENS & YOUNG, LLP

10 By: /s/ Mark J. Dorval
11 Mark J. Dorval, Esquire
12 Nicholas M. Orloff, Esquire
13 Lead Counsel for Kevin T. O'Halloran,
14 Trustee for the Liquidating Trust
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 COPY of the foregoing ORDER to be served upon:

2 Shelton L. Freeman, Esq.
DeConcini McDonald Yetwin & Lacy, P.C.
3 tfreeman@lawdmyl.com
Fax: 480-398-3101
4 Attorneys for Radical Bunny

5 Cathy L. Reece, Esq.
Fennemore Craig, P.C.
6 creece@fclaw.com
Attorneys for ML Manager LLC

7 Richard M. Lorenzen, Esq.
8 Perkins Coie Brown & Bain P.A.
rlorenzen@perkinscoie.com
9 Fax: 602-648-7077
Attorneys for Official Unsecured Creditors
10 Committee of Radical Bunny, LLC

11 William Scott Jenkins, Esq.
Myers & Jenkins, P.C.
12 wsj@mjlegal.com
Fax: 602-200-7910
13 Attorneys for ML Liquidating Trust

14 S. Cary Forrester, Esq.
Forrester & Worth, PLLC
15 scf@fwlawaz.com
Fax: 602-271-4300
16 Attorneys for Lewis & Underwood Trust

17 Robert J. Miller, Esq.
Bryan Cave LLP
18 Rjmiller@bryancave.com
Fax: 602-364-7070
19 Attorneys for Rev Op Group

20 Larry L. Watson, Esq.
U.S. Trustee's Office
21 230 North Central Avenue, #204
Phoenix, Arizona 85003-1706
22 Fax: 602-514-7270
larry.watson@usdoj.gov

CERTIFICATE OF SERVICE

I, Nicholas M. Orloff, certify, that on December 30, 2009, I electronically transmitted the attached documents to the Clerk's Office, using the CM/ECF System for filing, which transmitted a Notice of Electronic Filing to the parties in interest via the Court's ECF System, and also served a copy of the documents on the following parties via a separate e-mail:

Shelton L. Freeman, Esq.
DeConcini McDonald Yetwin & Lacy, P.C.
tfreeman@lawdmyl.com
Fax: 480-398-3101
Attorneys for Radical Bunny

Cathy L. Reece, Esq.
Fennemore Craig, P.C.
creece@fclaw.com
Attorneys for ML Manager LLC

Richard M. Lorenzen, Esq.
Perkins Coie Brown & Bain P.A.
rlorenzen@perkinscoie.com
Fax: 602-648-7077
Attorneys for Official Unsecured Creditors
Committee of Radical Bunny, LLC

William Scott Jenkins, Esq.
Myers & Jenkins, P.C.
wsl@mjlegal.com
Fax: 602-200-7910
Attorneys for ML Liquidating Trust

S. Cary Forrester, Esq.
Forrester & Worth, PLLC
scf@fwlawaz.com
Fax: 602-271-4300
Attorneys for Lewis & Underwood Trust

Robert J. Miller, Esq.
Bryan Cave LLP
Rjmiller@bryancave.com
Fax: 602-364-7070
Attorneys for Rev Op Group

Larry L. Watson, Esq.
U.S. Trustee's Office
230 North Central Avenue, #204
Phoenix, Arizona 85003-1706
Fax: 602-514-7270
larry.watson@usdoj.gov

/s/Nicholas Orloff
Nicholas Orloff