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8 Trustee of Radical Bunny, L.L.C.

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

11 In re:

12 MORTGAGES LTD.,

13
14 Debtor.

Chapter 11

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

RADICAL BUNNY, L.L.C.'S:

**(1) RESPONSE AND OBJECTION TO
LIQUIDATING TRUST'S MOTION FOR
STAY PENDING APPEAL; AND**

**(2) MOTION TO COMPEL IMMEDIATE
PAYMENT**

Hearing Date: TBD

Hearing Time: TBD

Location: 230 N. First Ave., 6th Floor,
Courtroom 603, Phoenix, AZ

Related Docket Nos. 2514, 2521, 2529 & 2535

24 Radical Bunny, L.L.C. ("RBLLC"), secured creditor and party in interest, by
25 and through undersigned counsel, hereby (1) responds and objects to "Liquidating
26 Trust's Motion For Stay Pending Appeal" ("Stay Motion") filed at Docket No.
27 2535; and (2) moves the Court to enter an order compelling immediate payment of
28 RBLLC's Substantial Contribution Claim for the reasons set forth herein.

1 The Liquidating Trust claims that paying the Radical Bunny claim will cause
2 irreparable harm “to the extreme detriment of Debtor’s creditors and investors”
3 and that interest paid on the draws to pay this claim would be “needlessly (and
4 wastefully)” paid. These assertions by the Liquidating Trust are both incredulous
5 and lacking in good faith. These absurd statements ignore:

- 6 1) The fact that RBLLC is the largest creditor of ML;
- 7 2) The RBLLC is a significant beneficiary of the Liquidating Trust;
- 8 3) That the Liquidating Trust has already paid over \$7,300,000 Million in
9 administrative professional fees and is apparently paying “needlessly (and
10 wastefully)” interest on the draws to pay those claims;
- 11 4) That RBLLC pledged all of its assets to secure the Exit Financing;
- 12 5) That the very purpose of the Exit Financing was to pay administrative
13 claims; and
- 14 6) That the Liquidating Trust already stipulated that RBLLC has no other
15 source of payment of the fees incurred by DMYL until the Exit Financing has been
16 fully satisfied.

17 RBLLC also seeks assurance that there are actually funds available to pay
18 its Administrative Claim, and an order to compel immediate payment of that claim.
19 The Liquidating Trust has provided no evidence that it has sufficient funds to
20 ensure such claim can be paid at the end of the Liquidating Trust’s appeal, nor
21 has it offered security. The Liquidating Trust has not met its burden for granting a
22 stay without such security. RBLLC requests that this Court deny the Stay Motion
23 and compel immediate payment unless a supersedeas bond in the amount of the
24 awarded Substantial Contribution Claim, plus interest at the statutory rate for at
25 least one year, is posted.
26

27 This Response, Objection and Motion is supported by the docket entries in
28 the record of this case, as identified herein.

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. OVERVIEW OF FACTS MATERIAL TO RBLLC'S REQUESTED RELIEF**

4 **A. Plan Terms for Payment of Administrative Claims**

5 1. On April 6, 2009, "The Official Committee of Investors' First Amended
6 Plan of Reorganization Dated March 12, 2009" (the "Plan") was filed in this case
7 (Docket No. 1532). The Plan was confirmed pursuant to an Order of this Court
8 dated May 20, 2009 ("Confirmation Order")(Docket No. 1755).

9 2. Pursuant to Sections 3.2 and 4.15 of the Plan, administrative claims
10 that are allowed were to be paid in cash on the Effective Date of the Plan (or in
11 the ordinary course, or as agreed by the holder of the Claim), and if not paid by
12 the Effective Date, such administrative claims were to be paid from Exit Financing
13 (as defined in the Plan).

14 3. The Confirmation Order approved the form of Liquidating Trust
15 Agreement attached as Exhibit H to the Disclosure Statement for the Plan (Docket
16 No. 1531). Section 4(a) of the Liquidating Trust Agreement requires the
17 Liquidating Trustee to reserve amounts to pay allowed administrative expenses of
18 the bankruptcy.

19 4. RBLLC was formed to make loans to Mortgages Ltd. and made such
20 loans using funds from more than more than 900 loan participants. RBLLC made
21 various loans totaling almost \$200 million dollars to Mortgages Ltd. RBLLC is a
22 creditor of the bankruptcy estate of Mortgages Ltd. (Docket No. 2395, ¶¶ 4-5 &
23 14).

24 5. RBLLC's sole source of income was from loan payments made by
25 Mortgages Ltd. (Docket No. 2395, ¶ 6).

26 6. Under the Plan, RBLLC agreed to pledge its claimed interests in
27 Mortgages Ltd.'s various loans and its other claimed security for the Exit
28 Financing that is the source of payment of all post-confirmation expenses under

1 the Plan, including final applications of administrative claimants. (Docket No.
2 2395, ¶ 41).

3 7. Pursuant to an Inter-Borrower Agreement dated June 11, 2009,
4 advances of the Exit Financing are to be made to the Liquidating Trustee for the
5 purpose of paying "Claims Required to be Paid", which is a defined term that
6 includes payment of Administrative Claims. Requests for advances of the Exit
7 Financing require the joint signature of both the Liquidating Trustee and ML
8 Manager LLC. See Docket Entry 2265, Ex. 2, §§ 2.1 & 2.2.

9 8. On June 15, 2009 the Exit Financing was closed and some funds
10 were advanced. See Docket No. 2265, p. 4.

11 9. According to the Notice of Effective Date of First Amended Plan filed
12 on June 16, 2009 at Docket No. 1807, the Effective Date of the Plan occurred on
13 June 15, 2009.

14 B. Filing and Granting of RBLLC's Substantial Contribution Claim

15 10. On July 6, 2009, RBLLC timely filed its "Application Pursuant to 11
16 U.S.C. § 503(B)(3)(D) and (4) for Allowance and Payment of Administrative
17 Claim" ("Application for Administrative Claim"), Docket No. 1888. The Plan
18 provided that administrative claims must be filed within twenty (20) days of the
19 Effective Date of the Plan.
20

21 11. RBLLC's Application for Administrative Claim sought payment for
22 services provided from the beginning of this case in June, 2008 through
23 December 31, 2008. (Docket No. 2395, ¶ 23).

24 12. If DMYL does not receive compensation from the bankruptcy estate
25 of Mortgages Ltd., the only source of payment will be plan distributions to RBLLC,
26 which will only occur after repayment of the Exit Financing. (Docket No. 2395, ¶
27 25).

28

1 13. The Liquidating Trustee filed an "Omnibus Objection of Liquidating
2 Trust to Applications Pursuant to 11 U.S.C. § 503(B)(3)(D) and (4) for Allowance
3 and Payment of Administrative Claim of Radical Bunny, the Lewis Trust and the
4 Rev Op Group". (Docket No. 2014).

5 14. In support of its Substantial Contribution Claim, RBLLC also filed (1)
6 "Radical Bunny, L.L.C.'s Reply to Omnibus Objection of Liquidating Trust to
7 Applications Pursuant to 11 U.S.C. § 503(B)(3)(D) and (4) For Allowance And
8 Payment Of Administrative Claim", Docket No. 2027; and (2) "Radical Bunny,
9 L.L.C.'S Supplemental Memorandum Regarding Effect of Change of Management
10 and Counsel on Application Pursuant to 11 U.S.C. § 503(B)(3)(D) And (4) For
11 Allowance And Payment Of Administrative Claim", Docket No. 2088.

12 15. On November 12, 2009, RBLLC and the Liquidating Trust filed a
13 "Joint Statement of Material Facts of Radical Bunny and Liquidating Trust for
14 Application Pursuant to 11 U.S.C. § 503(b)(3)(D) and (4) for Allowance and
15 Payment of Administrative Claim of Creditor Radical Bunny", Docket No. 2395.

16 16. On November 16, 2009, RBLLC and the Liquidating Trust filed a
17 "Supplemental Statement Facts of Radical Bunny and Liquidating Trust for
18 Application Pursuant to 11 U.S.C. § 503(b)(3)(D) and (4) for Allowance and
19 Payment of Administrative Claim of Creditor Radical Bunny", Docket No. 2407.

20 17. A hearing was held on RBLLC's Application for Administrative Claim
21 on November 18, 2009.

22 18. On December 17, 2009, this Court entered its "Order Granting
23 Radical Bunny's Administrative Claim for Substantial Contribution" (Docket No.
24 2514)("Granting Order").

25 19. On December 21, 2009, this Court entered its "Order Approving
26 Allowance & Payment Of Substantial Contribution Claim Pursuant To 11 U.S.C. §
27 503(b)(3)(D) And (4)" (Docket No. 2521) ("Payment Order").
28

1 20. Pursuant to the Granting Order and Payment Order, RBLLC currently
2 holds an "Administrative Claim" for \$595,798.25.

3 21. On December 28, 2009, the Liquidating Trustee filed a "Notice of
4 Appeal of the Granting Order and the Payment Order" (Docket No. 2529)

5 22. The Liquidating Trustee has not posted a supersedeas bond.

6 **II. THERE IS NO LEGAL BASIS FOR REQUESTED STAY RELIEF**

7 **A. The Liquidating Trustee Has Not Satisfied Rule 8005**

8 Rule 8005 of the Federal Rules of Bankruptcy Procedure ("FRBP") governs
9 the grant of a stay pending appeal of an order entered in a bankruptcy case¹.
10 Rule 8005, FRBP, provides in part (emphasis added):

11 A motion for a stay of the judgment, order, or decree of a bankruptcy
12 judge, for approval of a supersedeas bond, or for other relief pending
13 appeal must ordinarily be presented to the bankruptcy judge in the first
14 instance. Notwithstanding Rule 7062 but subject to the power of the
15 district court and the bankruptcy appellate panel reserved hereinafter,
16 the bankruptcy judge may suspend or order the continuation of other
17 proceedings in the case under the Code or make any other appropriate
18 order during the pendency of an appeal on such terms as will protect
19 the rights of all parties in interest.
20

21 The Liquidating Trustee did not file a supersedeas bond or seek approval of such a
22 bond under Rule 8005. The Liquidating Trustee's Stay Motion provides no evidence
23 of how the rights of RBLLC or DMYL to payment under the Granting Order, the
24 Payment Order and the Plan, will be protected while the Liquidating Trustee pursues

25
26
27 ¹ Rule 7062, FRBP, provides that Rule 62 of the Federal Rules of Civil Procedure
28 "applies in adversary proceedings". The Granting Order and Payment Order were
not entered in an adversary proceeding in this case.

1 an appeal of those orders. The Liquidating Trustee has not established compliance
2 with Rule 8005.

3 RBLLC and DMYL are entitled to protection of their right to payment under
4 the Payment Order and the Plan. RBLLC has pledged all of its assets to secure the
5 Exit Financing in order to pay Administrative Claims. RBLLC had proven its
6 Administrative Claim. It is a stipulated fact that RBLLC has no other source of
7 payment for DMYL's outstanding fees and costs, except for amounts to be
8 distributed to RBLLC only after repayment of the Exit Financing. The Liquidating
9 Trustee is legally obligated to reserve amounts for payment of Administrative
10 Claims. There is no evidence in the record whether the Liquidating Trustee has
11 satisfied this obligation. There is also no evidence in the record to demonstrate the
12 ability of the Liquidating Trust or the ML Manager to meet the anticipated
13 Administrative Claims. The Liquidating Trust should be compelled to demonstrate
14 to the Court that it is in compliance with its legal obligation to maintain reserves for
15 administrative claims. In the event that it has failed to meet this requirement, there
16 is a risk of disgorgement by all professionals. The Court and the parties are entitled
17 to know this information, particularly in the context of a request by the Liquidating
18 Trust to delay payment. In order to protect the rights of RBLLC and DMYL during
19 the pendency of the Liquidating Trust's appeal, DMYL either needs to be promptly
20 paid, or the Liquidating Trustee must provide clear and unequivocal security for
21 such payment.
22

23 B. The Liquidating Trustee Has Not Satisfied Other Legal Standards

24 This Court recently denied a request for stay pending appeal of an order
25 confirming a plan of reorganization in *In re Regatta Bay, LLC*, 406 B.R. 875 (Bankr.
26 Ariz. 2009). In that case, this Court applied the following legal test to such request:

27 The Ninth Circuit employs a sliding scale for a stay pending appeal,
28 which should be granted when the appellant demonstrates either (1) "a

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strong likelihood of success on the merits” and “the possibility of irreparable injury,” or (2) “serious legal questions are raised and that the balance of hardships tips sharply in its favor.”

406 B.R. at 877 (quoting *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir.1983), *rev'd on other grounds*, 469 U.S. 1082, 105 S.Ct. 583, 83 L.Ed.2d 694 (1984)).

The Liquidating Trustee refers to a four part test, citing *In re Wymer*, 5 B.R. 802, 806 (BAP 9th Cir. 1980). The four prongs of that test are: (1) Appellant is likely to succeed on the merits of the cross-appeal; (2) There will be irreparable injury suffered if no stay is granted; (3) the cross-appellee will not suffer substantial harm because of the stay; and (4) The public interest will not be harmed by reason of the stay. The Liquidating Trust has the burden to establish each of the four prongs, and the failure to satisfy any one prong of the standard “dooms” the Stay Motion. See *In re Irwin*, 338 B.R. 839, 843 (E.D. Cal. 2006).

The Liquidating Trust has not satisfied the conditions required for a stay under either of the foregoing tests. The Liquidating Trustee has virtually no chance of prevailing on appeal on the merits. The Liquidating Trustee has provided no evidence of irreparable harm to the Liquidating Trust. Instead, RBLLC and DMYL will suffer substantial and irreparable harm from any stay that does not ensure that funds are available to pay its Administrative Claim. Thus, the balance of hardship strongly favors a denial of the requested stay relief. The Trustee has raised no serious legal questions. Granting the stay, without protecting the rights of RBLLC and DMYL, would violate Rule 8005, FRBP, and harm the public interest.

1. This Court Properly Ruled Based on Binding Precedent

The Liquidating Trustee misstates this Court’s Granting Order to allege it is “likely” to prevail on appeal. This Court properly relied on the governing legal standard in the Ninth Circuit Court of Appeals to determine RBLLC’s Application for Administrative Claim. The only binding precedent cited in the objection of the

1 Liquidating Trustee is the same precedent properly relied upon by this Court to grant
2 RBLLC's Application, *Cellular 101, Inc. v. Channel Communications, Inc. (In re*
3 *Cellular 101, Inc.)*, 377 F.3d 1092 (9th Cir. 2004), and *Christian Life Center*
4 *Litigation Defense Committee v. Silva (In re Christian Life Center)*, 821 F.2d 1370
5 (9th Cir. 1987).

6 The Liquidating Trustee has not shown any likelihood of success by arguing
7 that distinguishable bankruptcy court cases from other jurisdictions (or un-
8 published cases) can prevail over binding legal precedent by the Ninth Circuit
9 Court of Appeals, which was correctly applied in the Granting Order. RBLLC was
10 required to meet the legal standard that prevails in the Ninth Circuit Court of
11 Appeals, and RBLLC did so. That same standard will apply on appeal. The
12 Court's own Granting Order establishes that RBLLC has a greater chance of
13 prevailing on appeal than the Liquidating Trust has. Additionally, the required
14 legal standard of the Ninth Circuit Court of Appeals relied upon by this Court,
15 "substantial benefit" is well established. It is equally certain that the binding legal
16 standard is that self-interest of a creditor does not preclude an administrative
17 claim if "substantial benefit" has been proven.

18 There are no undetermined issues as faced the Texas courts in the cases
19 cited in the Stay Motion. See *Texas Equip. Co., Inc.*, 283 B.R. 222, 227 (Bank.
20 N.D. Tex. 2002)(noting that no Texas case directly on point decided the contract
21 issues in the adversary proceeding); and *In re Westwood Plaza Apartments, Ltd.*,
22 150 B.R. 163, 168 (Bankr. E.D. Tex. 1993)(noting that the Fifth Circuit had not yet
23 addressed the legal standard for determining the market rate of interest in a "cramdown"
24 plan).

25 The Liquidating Trustee also misstates the applicable standard of review,
26 which further supports the high probability that RBLLC will prevail on appeal. The
27 Granting Order and Payment Order granted relief based on the factual
28

1 determination that RBLLC had provided a substantial contribution in this case.
2 That factual determination will be reviewed under a “clearly erroneous” standard,
3 as the granting of such a claim was reviewed in *Cellular 101, Inc. v. Channel*
4 *Communications, Inc. (In re Cellular 101, Inc.)*, 377 F.3d 1092, 1095 (9th Cir. 2004).
5 See also *Lebron v. Mechem Financial, Inc.*, 27 F.3d 937, 946 (3rd Cir. 1994)
6 (“The inquiry concerning the existence of a substantial contribution is one of fact,
7 and it is the bankruptcy court that is in the best position to perform the necessary
8 fact finding task.”).

9
10 2. The Trust Cannot Be Harmed By Complying with the Plan

11 The Liquidating Trustee claims that the Liquidating Trust will suffer irreparable
12 harm because it will need to pay RBLLC’s Administrative Claim through Exit
13 Financing. That is the very method that the Plan provided for payment of
14 Administrative Claims, and the same mechanism used to pay other administrative
15 claims in this case. The Liquidating Trust has no assets securing the Exit
16 Financing; RBLLC does. The Liquidating Trust cannot show any harm by having to
17 comply with the terms of the very Plan which created the Liquidating Trust.

18 The Liquidating Trust is correct that RBLLC has no cash to pay DMYL’s
19 attorneys fees and costs, but RBLLC does have the right to payment of its allowed
20 Administrative Claim and an additional right to future distribution from the Liquidating
21 Trust. If the Liquidating Trust did prevail on appeal, then the Liquidating Trust could
22 offset any distributions due to RBLLC from funds that the Liquidating Trust alleges
23 will come in from the sale of assets. The Liquidating Trust is protected by that offset
24 right. In fact, RBLLC is the only administrative claimant whose assets secure the
25 Exit Financing and who has a right to distribution from the Liquidating Trust. There
26 can be no risk to the Liquidating Trust unless it is based on the undisclosed financial
27 condition of the Liquidating Trust or an undisclosed inability to obtain the necessary
28 advance under the Exit Financing.

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3. RBLLC Will Suffer Substantial and Irreparable Harm

It is RBLLC who will suffer irreparable harm if the Liquidating Trust does not comply with the terms of the Plan. RBLLC has pledged all of its assets to secure the Exit Financing which is to be used to pay Administrative Claims. The Plan specifically anticipated an administrative claim by RBLLC. All of RBLLC's rights to distributions from the Liquidating Trust are subject to payment of those priority administrative claims and re-payment of the Exit Financing. If RBLLC's Administrative Claim is not timely paid, then RBLLC will unquestionably be irreparably harmed unless funds are reserved to pay RBLLC's Administrative Claim.

The Stay Motion makes various unsubstantiated claims to (1) future sales of assets generating funds; and (2) additional assets that are "expected" to be brought into the "Estate". But the Liquidating Trustee provides no answer at all as to how RBLLC's right to payment of the Administrative Claim would be protected while these funds flow in and out of the Liquidating Trust during the pendency of the appeal. The Liquidating Trustee did not reveal to this Court his legal obligation to reserve funds for payment of administrative claims or any evidence to establish whether he has complied with that obligation. Moreover, if there is any possibility that the Liquidating Trustee cannot pay all priority administrative claims, then RBLLC will further be irreparably harmed if the parties are not given a timely opportunity to seek disgorgement from other administrative claimants that have already been paid in this case (whether the Liquidating Trustee or others), to ensure equitable payment of all administrative claims in this case.

4. The Balance of Hardships Compels Denial of Stay

As described above, the Liquidating Trust will not be harmed by denial of a stay, but RBLLC will suffer irreparable and substantial harm. The balancing of hardships requires denial of the requested stay, particularly, in this case, where there is no serious legal question at issue.

1 5. The Public Interest Compels Denial of Stay

2 The Liquidating Trustee also misstates the effect of failing to preserve the
3 rights of RBLLC to payment of its Administrative Claim. This bankruptcy case will
4 be significantly affected if the Administrative Claim is not paid or funds are not
5 segregated and reserved for payment when RBLLC succeeds in the appeal. The
6 Liquidating Trustee is legally obligated to pay the priority Administrative Claim of
7 RBLLC before making any distributions to other creditors in this case. If any funds
8 are distributed without preserving that right to priority payment, RBLLC would be
9 required to seek remedies against the Liquidating Trustee and/or disgorgement from
10 all creditors that received such funds. There is no legal basis for ignoring the terms
11 of the Plan and the legal obligations of the Liquidating Trustee in these
12 circumstances. There is no reason to impose a burden on RBLLC to later seek
13 disgorgement when RBLLC's rights, as a matter of law and of public interest, can be
14 properly protected by immediate payment from the Exit Financing as provided in the
15 confirmed Plan.

16
17 **III. IMMEDIATE PAYMENT OF ADMINISTRATIVE CLAIM IS JUSTIFIED**

18 As described above, the Plan provides for payment of Administrative Claims
19 through the Exit Financing, and RBLLC and DMYL will suffer irreparable and
20 substantial harm if such amounts are not promptly paid. RBLLC requests that this
21 Court order the Liquidating Trustee and ML Manager LLC to immediately execute
22 and submit advance requests to provide payment of RBLLC's Administrative
23 Claim from the Exit Financing, and direct payment from such advances directly to
24 DMYL within five (5) days of the Court's Order.

25 Alternatively, if RBLLC and DMYL are not granted the right to immediate
26 payment, then their right to payment of the Administrative Claim must be
27 appropriately protected. Such protection can be ensured by conditioning any stay
28 pending appeal upon the filing of a supersedeas bond or the segregation of funds

1 to pay the Administrative Claim into an interest-bearing escrow account to be
2 disbursed upon the final determination of such appeal.

3 **IV. CONCLUSION AND REQUESTED RELIEF**

4 Based on the foregoing, RBLLC requests that this Court:

- 5 (1) deny the Liquidating Trustee's Stay Motion, or alternatively, provide
6 that any such stay is subject to appropriate protection of RBLLC's
7 and DMYL's rights during the pendency of the appeal through the
8 filing of a supersedeas bond or segregation of funds in the amount of
9 the Substantial Contribution Claim, plus interest at the statutory rate
10 for at least one year, into an interest-bearing escrow account to be
11 disbursed upon the final determination of such appeal;
- 12 (2) grant RBLLC's Motion to Compel Immediate Payment and enter an
13 order requiring the Liquidating Trustee and ML Manager LLC to
14 immediately execute and submit advance requests for, and direct
15 payment to DMYL of the Payment Order from the Exit Financing
16 within five (5) days of the Order; and
- 17 (3) grant such additional and other relief as is just and proper under the
18 circumstances of this case, including, without limitation, requiring the
19 Liquidating Trust to provide detailed financial information on the status
20 of the Exit Financing, reserves for administrative claims and the assets
21 of the Liquidating Trust.

22
23 DATED this 4th day of January, 2010.

24 DECONCINI MCDONALD YETWIN & LACY, P.C.

25 BY /s/ SHELTON L. FREEMAN

26 Shelton L. Freeman
27 Counsel to Radical Bunny, L.L.C. and
28 Special Counsel to G. Grant Lyon, Chapter
11 Trustee of Radical Bunny, L.L.C.

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