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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:** **(1) RESPONSE TO RADICAL BUNNY, L.L.C.'S MOTION TO COMPEL IMMEDIATE PAYMENT; AND** **(2) MOTION TO APPROVE MODIFIED SUPERSEDEAS** **(Re: Docket No. 2548)**

Kevin T. O'Halloran, Trustee of the Liquidating Trust of Mortgages, Ltd. ("Liquidating Trust"), by and through his counsel, hereby responds to Radical Bunny, L.L.C.'s Motion to Compel Immediate Payment [Docket # 2548] (the "Motion") as follows:

1. Radical Bunny, L.L.C.'s Motion to Compel Immediate Payment is Improper.

On December 21, 2009, this Court entered the Order Approving Allowance & Payment of Substantial Contribution Claim Pursuant to 11 U.S.C. § 503(b)(3)(D) and (4) (the "Order") [Docket # 2521]. The Order approved the substantial contribution claim of Radical Bunny, L.L.C. ("RBLLC") in its entirety and directed "the immediate payment in the amount of $595,798.25 to

DeConcini McDonald Yetwin & Lacy, P.C. as Counsel for Radical Bunny, LLC." (See Order at p. 2).

RBLLC already possesses an order awarding payment of $595,798.25 (the "Fee Award") against the Liquidating Trust, as well as an order instructing payment of the Fee Award to DeConcini McDonald Yetwin & Lacy, P.C ("DMYL"). The instant Motion is, therefore, not necessary, and, further, the request is not supported by law. To the extent that RBLLC is not able to immediately collect its Fee Award from the Liquidating Trust, RBLLC's option should be the same as any other party who obtains an award from a court – to pursue execution.[1] RBLLC should not be seeking additional relief from this Court.

2. This Court Should Permit Modified Supersedeas.

On January 4, 2010, this Court entered the Order Granting in Part and Denying in Part Motion for Stay Pending Appeal ("Stay Order"). In the Stay Order, this Court recognized the "modified supersedeas" option available to appellants in the Ninth Circuit, as set forth in *Wymer*. *In re Wymer*, 5 B.R. 802, 806-07 (BAP 9th Cir. 1980). In *Wymer*, the Ninth Circuit Bankruptcy Appellate Panel stated that a court may depart from the normal supersedeas bond and discretionary stay requirements for "good cause" shown by the appellant seeking the stay pending appeal. *Id.* An appellant has satisfied the "good cause" requirement where it shows that one of the following conditions is present:

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1 The Liquidating Trust is not suggesting that it will not follow the Court's orders with respect to the Fee Award, and has been working with counsel for RBLLC in that regard. However, no special order from this Court is appropriate under the circumstances. Additionally, to the extent that the Liquidating Trust posts adequate security at any time, whether before or after the time of filing the notice of appeal, it would be entitled to a stay of execution by right, making a motion to compel payment unnecessary. *See In re Wymer*, 5 B.R. 802, 805, 806 (BAP 9th Cir. 1980).

(1) the appellant has the present financial ability to respond to the money judgment and also a financially secure plan for maintaining the same degree of solvency during the period of appeal; or

(2) the appellant's present financial condition is such that the posting of a full bond would impose an undue financial burden.

See Id. at 806-07; *Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979).

If either of the above conditions are satisfied, the court is "free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment debtor's financial dealings, which would furnish equal protection to the judgment creditor." *Wymer*, 5 B.R. at 806; *see also Asarco LLC v. Americas Mining Corp.*, 2009 WL 3785710, at *3-4 (S.D. Tex. June 2, 2009) (granting appellant's motion for modified supersedeas because "it would be extremely difficult, if not impossible, for [appellant] to … both post a full supersedeas bond and finance its reorganization plan…."); *In re Bruce Church, Inc.*, 774 P.2d 818, 821 (Az. Ct. App. 1989) (recognizing that facts and circumstances may warrant the court to depart from the usual cash bond requirement for a stay pending appeal).

Here, good cause to depart from the normal supersedeas bond requirement exists because the Liquidating Trust's present level of funding and cost of operating are such that the posting of a full bond would impose an undue financial burden. The Liquidating Trust recognizes that an order has been entered and is cognizant of the fact that the Court wants the Fee Award to be paid or security to be posted. The Liquidating Trust would like to accomplish this by providing security for the Fee Award that would not impair the Liquidating Trust's operations by removing a significant amount of (unbudgeted) cash from the Estate.

While RBLLC argues that the Exit Financing was put into place to pay administrative claims, RBLLC does not address the fact that (i) its substantial contribution Fee Award was not in the budget created with the Plan and Exit Financing, and (ii) the other professional fees that were requested in the bankruptcy far exceed the amounts projected in the Plan and Exit Financing. Therefore, funding the entire amount of the Fee Award this early in the Plan process, before any properties held by the Liquidating Trust have been sold to bring in additional funds to the Estate, would be an undue financial burden on the ongoing operations of the Liquidating Trust.

The Liquidating Trust owns two real properties with a combined appraised value of over $9 million (the "Properties").[2] (See Appraisals prepared by Paul Johnson, attached hereto as Exhibit "A"). Additionally, through the ML Manager, there are additional properties with values aggregating in the hundreds of millions of dollars. The Liquidating Trust intends to sell the Properties, but it requires funds to operate until the sales of the Properties can be accomplished. Pursuant to the Exit Financing, a portion of the proceeds from the sales of the Properties will flow to the Liquidating Trust (and additional funds from the sales would go to pay down the Exit Financing and create new availability under the line for borrowing). Requiring the Liquidating Trust to put aside $600,000 in cash would jeopardize the Liquidating Trust's ability to operate long enough to realize the proceeds from selling the Properties.

In lieu of posting a supersedeas bond or depositing the amount of the Fee Award in an escrow account, to secure RBLLC's interest in the Fee Award during the pendency of the appeal, the Liquidating Trust proposes to secure the Fee Award to RBLLC by granting RBLLC a second lien on one or both of the Properties in the full amount of the Fee Award. These

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[2] The Liquidating Trust owns real property located at Highway 260 and Old Cristmill Road, Eager, Arizona (the "River Run Property") and real property located at Palm Lane and Central Avenue, Phoenix, Arizona (the "Chateau on Central Property").

second liens are more than sufficient to secure RBLLC's Fee Award because the fair market value of the Properties and the terms of the Exit Financing allow for sufficient equity to fully secure the Fee Award.[3] To the extent that one or both of the Properties are sold prior to the determination of the appeal, the Liquidating Trust will place proceeds from the sale(s) equal to the Fee Award in escrow, until a determination on the appeal is made.

As this Court noted, security may be granted in a form other than a bond. As the *Wymer* court noted, this Court "is free to exercise its discretion to fashion some other arrangement for substitute security ... which would furnish equal protection to the judgment creditor." *Wymer*, at 806-07 (quoting *Poplar*, 600 F.2d at 1191). The Liquidating Trust is requesting that the Court exercise its discretion in order to facilitate the successful operation of the Plan. The Fee Award was an expense that was not anticipated in creating the budget for Exit Financing. Moreover, the other fee applications also exceeded the budgeted amounts. Requiring that the full amount of the Fee Award be set aside in cash would impair the Liquidating Trust's ability to operate while providing no more security than the liens on the Properties.

Counsel for RBLLC noted in his <u>Response and Objection to FTI Consulting, Inc.'s Motion to Alter or Amend Judgment Awarding RBLLC Claim and Response and Objection to FTI Consulting, Inc.'s Motion for Order Pursuant to Bankruptcy Rule 3020 Requiring Segregation of Funds</u> (the "FTI Objection"), that all administrative claimants will ultimately receive the same percentage distribution on their fee awards pursuant to §726(b) of the Bankruptcy Code. This will be accomplished either by payment in full, as anticipated under the Plan, or, as RBLLC notes in its FTI Objection, if it is determined that the Estate is administratively insolvent, by way of

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[3] To the extent that the Court requires additional information relating to the lien positions and/or equity with respect to the Properties, the Liquidating Trust could supplement the record at the Court's request.

disgorgement, particularly as those rights have been preserved through the actions of FTI Consulting, Inc. with respect to a number of the professional fee awards in this bankruptcy.

Therefore, the alternate security requested by the Liquidating Trust satisfies the requirement that the Fee Award be secured pending appeal, does not ultimately put RBLLC at any more risk than the other administrative claimants in this bankruptcy, and does not interfere with the operations of the Liquidating Trust as contemplated in the Plan. Due to the protections granted to RBLLC and the added benefit to the operations of the Liquidating Trust, the Court should exercise its discretion and allow the Liquidating Trust to secure the Fee Award by granting RBLLC second priority liens on the Properties.

WHEREFORE, on the basis of the foregoing, the Liquidating Trust respectfully requests that this Court (i) deny Radical Bunny, L.L.C.'s Motion to Compel Immediate Payment; and (ii) grant the Liquidating Trust's Motion for Approval of Modified Supersedeas. A proposed form of Order is attached hereto.

RESPECTFULLY SUBMITTED this 8th day of January, 2010.

STRADLEY RONON STEVENS & YOUNG, LLP

By: /s/ Mark J. Dorval
Mark J. Dorval, Esquire
Nicholas M. Orloff, Esquire
Lead Counsel for Kevin T. O'Halloran,
Trustee for the Liquidating Trust

EXHIBIT "A"

PARCEL ANALYSIS

LOAN NUMBER: 858701

BORROWER: REO

PROPERTY TYPE: Rural residential subdivision with 141 finished lots, 2 commercial lots, and an 18 hole seasonal golf course.

PROPERTY ADDRESS/LOCATION: Highway 260 and Old Cristmill Road, Eager, Arizona

DESCRIPTION: Originally 213 single family lots including an 18 hole golf course which is currently in poor condition, plus two (2) 6.2 acre commercial parcels. REO comprises the golf course;141 finished lots; and the two (2) 6.2 acre commercial parcels. As of the Date of Value, a mobile mini facility serves as the "Clubhouse" (on 6.2 acres). The other 6.2 acres serves as the driving range. I understand that both facilities could eventually be combined and one 6.2 acre parcel could be developed with commercial uses including a conference hotel.

TAX PARCEL NUMBERS: Not available.

DATE INSPECTED: 2005 - Not associated with this assignment.

CURRENT CONDITION: Per Chris Welch with Mortgages Ltd. and Larry Chavez, a knowledgeable local resource who has worked at the course, the course has been neglected, staff has not been paid, and the rental golf carts have been removed. The greens are "gone". In 2006, when lot sales were strong, the course was in good condition. Since then, maintenance has deteriorated. The course was not properly nor timely winterized and one-quarter of the plastic sprinkler heads cracked. Per Mr. Chavez, according to Todd Schiffner, a former River Run course superintendent, it would cost about $250,000 to return the course to good condition. Immediate issues include top dressing the greens for this winter.

SALES HISTORY: $6,000,000 on April 30, 2007 (Assume Deed in Lieu)

HIGHEST & BEST USE: Upgrade golf course, sell remaining lots, then sell or gift the golf course to homeowners, County, or Eager.

BUYER PROFILE: An investor or group of local investors who would front-end the golf course renovation and sell lots as quickly as possible in order to make the golf course break even.

ANALYSIS: According to Larry Chavez, the Town of Eager or the County will not accept the golf course unless it has a history of operating at a break-even level. In the meantime, the future owner must subsidize the maintenance and improvements in order to sell the lots. Thus, the program would be to spend $250,000 to upgrade the golf course and then sell the remaining 141 lots at $40,000 per on average. Seventy lots have golf course influence, seventy-one are interior. Once the golf course breaks even, gift it to the County, Town, or Homeowners.

There are no comparable sales. I have assumed:

- A 6 year sell out.
- In Year 1, it will cost $250,000 to renovate the golf course. It will not break even until Year 4.
- Golf course influenced lots would sell for $50,000.
- Interior lots would sell for $30,000.
- The buyer would sell 16 interior lots and 16 exterior lots per year starting in Year 2.
- All the lots will not be sold until Year 6, at which time the golf course would have a year or two of stabilized operation making it transferrable.

Based on a simple discounted flow analysis, the following present values are indicated at the following internal rates of return:

15%	$3,180,811
20%	$2,723.782
25%	$2,351,972

My DCF and research do not include selling or marketing expenses, golf course operation subsidies in Years 2 and 3, potential for higher prices in subsequent years, or faster absorption.

REASONABLE VALUE IF F&C:

Based on the above analysis, the probable Market Value is between $2,500,000 and $3,000,000. I have concluded at:

$2,750,000

As a sanity check, the buyer would invest a total of $3,000,00 in year one to purchase the unsold lots in bulk including $250,000 in golf course renovation costs in return for gross proceeds of $5,630,000 (70 x $50,000 and 71 x $30,000) over six years. This is reasonable since once the golf course has been upgraded and a marketing program is in place, the opportunity for higher lot prices in Years 3, 4, 5, and 6 is speculative but real.

PARCEL ANALYSIS

LOAN NUMBERS: 856905; 857005

BORROWER: REO

PROPERTY TYPE: 21 partially completed, zero lot line, high density, luxury, single family residences.

PROPERTY ADDRESS/LOCATION: Northwest corner of Palm Lane and Central Avenue, Chateaux on Central.

DESCRIPTION: 21 single family units, zero lot line zoned urban residential, City of Phoenix. Approximately 3 units are complete, 13 units are not complete, 5 units are almost complete. Reportedly, the completion costs to finish the 13 units is approximately $6,000,000; completion costs to complete the 5 units is approximately $2,200,000; for a total of $8,200,000.

TAX PARCEL NUMBERS: 118-51-120 through 140

DATE INSPECTED: October 8, 2008

CURRENT CONDITION: No activity, secured.

SALES HISTORY: None relevant. The units were marketed but with no firm contracts. The original asking prices ranged from roughly $2,000,000 to $4,500,000.

HIGHEST & BEST USE: Finish uncompleted units and sell out.

BUYER PROFILE: Investor/developer

ANALYSIS: I have been asked to provide two values; one retail and one bulk.

Retail Value

The retail analysis is simply the total value of the 21 units, if completed, with no discount for holding, marketing, profit, etc. Based upon my preliminary research, the approximate value of each unit is $1,000,000; or $21,000,000 from which the $8,200,000 needs to be subtracted, indicating a current retail value of $12,800,000.

Bulk Value

Bulk Value represents the value assuming one transaction at one point in time to one buyer. I have assumed the 21 units will sell for $1,000,000 each once all are completed, that they will sell out in 21 months and will take 3 months to complete and start marketing. I have assumed 10 percent selling and marketing costs and a 20 percent internal rate of return. Based upon the above assumptions, the present Bulk Value is approximately $6,500,000.

REASONABLE VALUE IF F&C:

Sum of Retail Assuming Completed: $12,800,000

Bulk Value: $6,500,000

Chateaux on Central

Sales Price	$1,000,000												
Absorption/per month	1												
Completion Costs	$8,200,000												
		Mo.1	Mo.2	Mo.3	Mo.4	Mo.5	Mo.6	Mo.7	Mo.8	Mo.9	Mo.10	Mo.11	Mo.12
Gross Proceeds					$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000
Expenses		$ (4,000,000.00)	$ (3,000,000.00)	$ (1,200,000.00)									
Sales/Marketing/Holding	0.1				-100000	-100000	-100000	-100000	-100000	-100000	-100000	-100000	-100000
Monthly Net Income		-$4,000,000	-$3,000,000	-$1,200,000	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000

		Mo.13	Mo.14	Mo.15	Mo.16	Mo.17	Mo.18	Mo.19	Mo.20	Mo.21	Mo.22	Mo.23	Mo.24
Gross Proceeds		$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000
Expenses													
Sales/Marketing/Holding	0.1	-100000	-100000	-100000	-100000	-100000	-100000	-100000	-100000	-100000	-100000	-100000	-100000
Monthly Net Income		$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	

	Year	Month
PW @	0.20	0.017
	0.25	0.021
	0.30	0.025

$6,486,650.33
$5,797,761.73
$5,156,276.72

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 **ORDER RE:** **(1) RADICAL BUNNY L.L.C.'S MOTION TO COMPEL IMMEDIATE PAYMENT; AND** **(2) LIQUIDATING TRUST'S MOTION FOR APPROVAL OF MODIFIED SUPERSEDEAS**

AND NOW, upon consideration of the Motion of Radical Bunny, L.L.C. to Compel Immediate Payment and the Motion of the Liquidating Trust for Approval of Modified Supersedeas, and for good cause shown,

It is hereby ORDERED that:

(1) The Motion of Radical Bunny, L.L.C. ("RBLLC") to Compel Immediate Payment is DENIED; and

(2) The Motion of the Liquidating Trust for Approval of Modified Supersedeas is GRANTED, and the Liquidating Trust shall grant RBLLC a second priority lien on either (a) the real property located at Highway 260 and Old Cristmill Road, Eager, Arizona (the "River Run Property"), or (b) the real property located at Palm Lane and Central Avenue, Phoenix, Arizona (together with the River Run Property, the "Properties") in the amount of $595,798.25 (the "Fee Award").

(3) If there is a sale of one or both of the Properties prior to final adjudication of the appeal in this matter, the Liquidating Trust shall set aside the amount of the Fee Award to be held in escrow pending final resolution of the appeal.

Dated and signed above.

COPY of the foregoing ORDER to be served upon:

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CERTIFICATE OF SERVICE

I, Nicholas M. Orloff, certify, that on January 8, 2010, 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:

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