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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.,

15 Debtor.

Chapter 11

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

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

**(1) REPLY TO LIQUIDATING
TRUST'S RESPONSE TO RADICAL
BUNNY, L.L.C.'S MOTION TO
COMPEL IMMEDIATE PAYMENT;
AND**

**(2) RESPONSE AND OBJECTION TO
LIQUIDATING TRUST'S MOTION TO
APPROVE MODIFIED SUPERSEDEAS**

Hearing Date: January 12, 2010

Hearing Time: 1:00 p.m.

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

Related Docket Nos. 2514, 2521, 2529, 2535,
2548, 2552 & 2578

25
26 Radical Bunny, L.L.C. ("RBLLC"), secured creditor and party in interest, by
27 and through undersigned counsel, hereby (1) replies to "Liquidating Trust's
28 Response to Radical Bunny L.L.C.'s Motion to Compel Immediate Payment"

1 (“Motion to Compel Payment”); and (2) responds and objects to “Liquidating
2 Trust's Motion to Approve Modified Supersedeas” (“Unsupported Motion”) filed at
3 Docket No. 2578.

4 In connection with its response and objection to the Unsupported Motion,
5 RBLLC incorporates herein its Motion to Compel Payment and the record
6 references therein. Capitalized terms used, but not defined herein, are as set forth
7 in the Motion to Compel Payment or in the Confirmed Plan (as defined in the Motion
8 to Compel Payment).

9 A. Overview of Why Bond or Other Cash Security is Necessary

10 The Unsupported Motion alleges the Liquidating Trustee proposes to provide
11 alternative security to RBLLC. The Liquidating Trustee really seeks to:

12 (1) subordinate payment of RBLLC’s administrative claim to the payment
13 of the Exit Financing and all other administrative claims in this case;

14 (2) reduce the financial viability of payment of RBLLC’s administrative
15 claim; and

16 (3) modify the terms of the Confirmed Plan, to the detriment of the legal
17 rights of numerous parties in interest, without due process.

18 RBLLC’s interests in this case have already been repeatedly subordinated.
19 RBLLC is legally and equitably entitled to equal priority of payment of its
20 administrative claim with payment of all other administrative claims in this case.
21 RBLLC is entitled to protection of RBLLC’s rights pending the Liquidating Trustee’s
22 appeal of the Granting Order and Payment Order. All other parties in interest are
23 entitled to preservation of their rights under the Confirmed Plan, without violation of
24 their due process rights by the Liquidating Trustee.

25 B. The Plan Funds Administrative Claims Through Exit Financing

26 The Confirmed Plan provides for payment of administrative claims from the
27 Exit Financing. The Confirmed Plan also provides for anticipated exit costs to be
28

1 funded by the Exit Financing. The Exit Financing is secured by: (1) the limited
2 assets of the Liquidating Trust; and (2) the much more extensive assets of the
3 Loan LLCs (as defined in the Confirmed Plan), which are managed by ML
4 Manager LLC. The intent of the Confirmed Plan was for the assets of both the
5 Liquidating Trust and the Loan LLCs to fund the ongoing payment of
6 administrative claims in the case and the reorganization of Mortgages Ltd.,
7 including the administrative costs of the Liquidating Trust and ML Manager LLC.

8 The actual terms of the Exit Financing have not been disclosed to RBLLC.
9 Recorded documents indicate that the Exit Financing was provided by Universal-
10 SCP I, L.P. ("Exit Financing Lender"). Exhibit O to the Amended Disclosure
11 Statement for the Confirmed Plan (Docket No. 1531)("Disclosure Statement")
12 provided a loan proposal for a \$20,000,000 loan for 36 months, which accrues
13 interest at 20.0% per annum, and provides for payment of various loan fees,
14 including: (1) a 10% origination fee; (2) a \$600,000 repayment incentive fee
15 (calculated at 3.0% times \$20,000,000) payable after 13 months, and thereafter
16 every 6 months during the loan term; and (3) an additional disposition incentive
17 payment of 10% of the net proceeds of real property sold (which will not reduce
18 the principal balance of the Exit Financing). The Liquidating Trustee has
19 indicated that the interest rate for the actual Exit Financing provided by the Exit
20 Financing Lender is 17.5% per annum.

21
22 C. The Plan Paid Unsecured Claims From Liquidating Trust Assets

23 The Confirmed Plan created the Liquidating Trust and transferred certain
24 "Non-Loan Assets" to the Liquidating Trust. Those Non-Loan Assets included the
25 "RBLLC Non-Loan Collateral" identified in the Plan, which was transferred to the
26 Liquidation Trust free and clear of any liens of RBLLC. The Liquidating Trust was
27 intended to hold and liquidate the Non-Loan Assets to pay unsecured claims after
28

1 the Liquidating Trust repays its portion of the Exit Financing, pays the Secured
2 Claims on the Non-Loan Assets, and pays its operating expenses.

3 The RBLLC Non-Loan Collateral included Mortgages Ltd.'s interest in: (1)
4 real property in Eager, Arizona that used to be operated as the River Run Golf
5 Course, and related vacant land ("River Run Property"); and (2) twenty one (21)
6 residential lots, with some partially constructed residential units, identified as
7 "Chateaux on Central" ("Chateaux Property", and collectively with the River Run
8 Property, the "Liened Properties"). The Liquidating Trust's assets consist of
9 potential recovery claims and real property (which currently may consist of only
10 the Liened Property, after the Liquidating Trustee elected to allow some real
11 property to be foreclosed).

12 The Exit Financing Lender has a lien on the Liened Properties, but it is
13 subject to the terms of the Confirmed Plan. Section 6.6 of the Confirmed Plan
14 provides that the Non-Loan Assets are subject to Mechanics Lien Claims. The
15 Disclosure Statement (page 30) states that more than Three Million Dollars of
16 mechanics liens have been asserted against the Chateaux Property alone. The
17 amount of such Mechanics Lien Claims can increase as interest accrues and
18 claims for related attorneys fees are awarded. The amount of potential
19 mechanics liens on the River Run Property are unknown. Thus, the Exit
20 Financing Lender may have no first priority lien in either of the Liened Properties.
21 Any proceeds payable to the Liquidating Trustee from the sale of the Liened
22 Properties is subject to payment of the Mechanics Lien Claims and amounts due
23 to the Exit Financing Lender. It is also subject to a contractual obligation for a
24 10% reserve to pay allocated Exit Financing expenses of the Liquidating Trust
25 under the Inter-Borrower Agreement. Finally, both Liened Properties are subject
26 to unpaid real property taxes.
27
28

1 A Deed of Trust, Assignment of Leases and Rents, Security Agreement and
2 Fixture Filing (“Deed of Trust”) covering the Chateaux Property, was made in
3 favor of the Exit Financing Lender, and recorded in the County Recorder on June
4 19, 2009, at Document No. 20090541602. Section 6.4 of the Deed of Trust
5 prohibits any further encumbrance of the Chateaux Property without the prior
6 written consent of the Exit Financing Lender. The Unsupported Motion provides
7 no evidence of such consent.

8
9 While the Confirmed Plan intended for the Non-Loan assets to be used to
10 pay unsecured claims, the Non-Loan Assets were also be used to pay a portion of
11 the Exit Financing. After payment of the Mechanics Lien Holders, the disclosed
12 information on the Exit Financing indicates that the Liquidating Trustee would only
13 have the right to a maximum of 20% of net proceeds from the sale of the Liened
14 Property. Exhibit O to the Disclosure Statement indicates that 70% of all net
15 proceeds from the sale of the Liened Properties must be paid to the Exit
16 Financing Lender to reduce the loan balance of the Exit Financing. Additionally, a
17 10% disposition incentive fee from the net proceeds of sale of the Liened
18 Properties must be paid to the Exit Financing Lender. That 10% fee does not
19 reduce the balance of the Exit Financing. Pursuant to the Inter-Borrower
20 Agreement, the Liquidating Trust also agreed to reserve 10% of dispositions for
21 payment of its reallocation obligations related to the Exit Financing.

22 D. The Liquidating Trustee Has Burden to Secure Payment of Orders

23 The Liquidating Trustee has the burden to establish it has provided
24 appropriate security to justify a stay pending appeal of the Granting Order and
25 Payment Order. It is the burden of the Liquidating Trust to justify a departure from
26 both the normal supersedeas bond and the normal discretionary stay rules (high
27 probability of success on appeal and irreparable injury) that this Court has already
28 denied. See *In re Wymer*, 5 B.R. 802, 807 (BAP 9th Cir. 1980)(“*Wymer*”).

1 If a court chooses to depart from the usual requirement of a full security
2 supersedeas bond to suspend the operation of an unconditional money
3 judgment, it should place the burden on the moving party to objectively
4 demonstrate the reasons for such a departure. It is not the burden of
5 the judgment creditor to initiate contrary proof. Such a supersedeas
6 bond is a privilege extended the judgment debtor as a price of
7 interdicting the validity of an order to pay money.

8 *Wymer*, 5 B.R. at 807 (quoting *Poplar Grove Planting and Refining Co., Inc. v.*
9 *Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)). The Liquidating
10 Trustee has not met that burden.

11 E. The Liquidating Trust Alone Cannot Provide Financial Security

12 The Liquidating Trustee seeks a stay pending appeal on the theory that it
13 can provide a financially secure plan for payment of the Payment Order. Courts
14 have recognized that if a judgment debtor can prove it can pay a money judgment
15 and presents a financially secure plan for maintaining that same degree of
16 solvency during the period of an appeal, then the court may exercise discretion to
17 substitute alternative security for the usual supersedeas bond. See *Wymer*, 5 B.R.
18 at 806-807; *Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart,*
19 *Inc.*, 600 F.2d at 1191.

20 The Liquidating Trust cannot meet this test. The Liquidating Trustee has
21 provided no proof that it can pay the Payment Order, and has provided no
22 assurance that it will be able to pay the Payment Order at the conclusion of the
23 appeal. First, the Liquidating Trust is just that – a trust designed to liquidate all
24 assets transferred to it for the purpose of paying unsecured claims. Its financial
25 status, standing alone, is inadequate to provide any assurance of the Payment
26 Order, in contrast to the assurance of payment from the Exit Financing.

27 The Liquidating Trustee’s claim that additional security is being provided is
28 misleading in the context of the unique financing of the Confirmed Plan. The
Confirmed Plan assured payment of administrative claims through Exit Financing.

1 The Confirmed Plan did not require administrative claimants to rely on the financial
2 solvency of the Liquidating Trust. Instead, Administrative claimants were assured of
3 payment from the Exit Financing which was available because it was secured by the
4 assets of all the Loan LLCs as well as the Liquidating Trust.

5 The Liquidating Trustee now seeks to greatly reduce the assurance that
6 RBLLC's administrative claim will be paid. Only 10% of any net sales proceeds of
7 the Liened Properties, after payment of all mechanics lien claims, could be
8 available to pay the Payment Order. These are the limited funds that the
9 Liquidating Trustee now proposes to "secure" payment of the amounts due under
10 the Payment Order, if either of the Liened Properties are sold during the
11 pendency of the appeal of the Payment Order. That potential payment would also
12 assume that the Liened Properties are not foreclosed in the interim. In essence,
13 the Liquidating Trustee intends to reduce the available collateral for paying
14 RBLLC's administrative claim from the certainty of advance from the Exit
15 Financing secured by assets of the Loan LLCs, to the very limited equity value, if
16 any, of remaining real estate assets in the Liquidating Trust. This violates the
17 terms and intent of the Confirmed Plan.

18 The importance of immediate payment of administrative claims is also due
19 to the use of the Exit Financing to pay ongoing administrative costs of operating:
20 (1) the ML Manager LLC and related Loan LLCs, and (2) the Liquidating Trust.
21 These ongoing administrative costs are also required to be paid from Exit
22 Financing secured by (1) the assets of the Loan LLCs, and (2) the assets of the
23 Liquidating Trust. Exhibit N to the Disclosure Statement includes a liquidation
24 analysis. It estimates that the Liquidating Trust alone will incur \$1.4 million for
25 expenses just in 2010. Thus, as the Liquidating Trustee refuses to pay RBLLC's
26 administrative claim, the Liquidating Trustee intends to reduce the net worth of the
27 Liquidating Trust by more than twice the amount of the Payment Order.
28

1 The Liquidating Trustee asserts it should be able to grant a “second priority
2 lien” on either of the Liened Properties, as security pending appeal for its payment
3 obligations under this Court’s Payment Order. But the Liened Properties cannot
4 be relied upon to ensure RBLLC will be paid the amounts owed under the
5 Payment Order because the existing priority obligations of the Mechanics Lien
6 Claims and the Exit Financing exceed even the alleged value of the Liened
7 Property not to mention unpaid property taxes on both properties. This leaves no
8 value for a subordinate lien holder. The priority lien holders could also foreclose
9 on the Liened Properties during the pendency of the appeal. Thus, there is no
10 assurance of collateral or payment of the Payment Order.

11 The current market value of the Liened Properties is also unknown. The
12 Unsupported Motion alleges that it attaches “appraisals.” In fact, the record of this
13 case reflects no appraisals, but only speculative and unsubstantiated estimates. A
14 “Parcel Analysis” was prepared by the Paul G. Johnson Company (“Johnson”) for
15 the Liened Properties in October 2008, for Mortgages Ltd.’s negotiations with its
16 borrowers. The actual market value of the Liened Properties today is unknown. It
17 would necessarily be affected by the continued uncertain real estate market, and
18 the limited availability of loans to secure financing of real estate acquisition and
19 construction.

20 Johnson did not inspect the River Run Property located in Eager, Arizona.
21 Instead it relied on hearsay to “estimate” a value of \$2,750,000, assuming an
22 additional \$250,000 was available to make the abandoned golf course functional.
23 Based on the application for payment of his fees, Docket No. 1889, Johnson
24 spent just a few hours to make phone calls and write up the unsubstantiated
25 “Parcel Analysis” of the River Run Property. The current value and condition of
26 the River Run Property, including the status of environmental hazards or potential
27 dumping on the property, is unknown.

1 Johnson estimated the “bulk value” of the Chateaux Property at \$6.5
2 million. That estimate assumes a buyer could obtain financing of more than \$8
3 million in additional funds to complete the improvements. After payment of known
4 mechanics liens claims of more than \$3 million dollars, the value of this property
5 is highly uncertain.

6 Even if this Court were to speculate that some value may be left after
7 payment of sale expenses, mechanics liens, property taxes and the Exit
8 Financing, there may not be any funds left over to be “set aside” to comply with
9 the Payment Order. This is particularly true given that the maximum amount that
10 could be set aside is 10% of the net proceeds from the sale, if any, of the Liated
11 Properties. This cannot constitute security that “will protect the rights of” RBLLC
12 as required by Rule 8005, Federal Rules of Bankruptcy Procedure, or provide
13 good cause for substitution of supersedeas bond requirements.

14
15 F. The Liquidating Trustee's Requested Relief Violates Due Process

16 The Liquidating Trust claims a right to grant a “second” priority lien in front
17 of existing liens. The Liquidating Trust did not serve the Unsupported Motion on
18 the Exit Financing Lender, the holders of mechanics liens secured by the Liated
19 Property, or other parties in interest that would be adversely affected by the
20 requested relief. The liens (and related rights) of other creditors also cannot be
21 compromised without due process. It is uncertain if this proposed lien is intended
22 to prime the lien of the Mechanics Lien Holders or the Exit Financing Lender. The
23 status of other liens on the Liated Properties, including liens for payment of
24 property taxes, is also uncertain. There is no legal authority for modifying the
25 priority of those existing liens without due process. On that basis alone, the
26 alleged “second” liens are likely unenforceable and cannot provide any assurance
27 of payment of the Payment Order. Finally, the granting of an additional lien,
28 without prior written consent, violates the terms of the Exit Financing Lender’s

1 Deed of Trust. Creating a default under the Exit Financing, without notice to the
2 Exit Financing Lender and all creditors that would be affected by such a default,
3 does not comply with due process.

4 G. The Liquidating Trustee Cannot Prove Undue Financial Burden

5 This Court already rejected the Liquidating Trustee's argument of irreparable
6 injury. Now the Liquidating Trustee claims that posting a bond would impose an
7 "undue financial burden" because it will need to ensure payment of RBLLC's
8 Administrative Claim through advances from the Exit Financing. That is the very
9 method that the Plan provided for payment of Administrative Claims, and the same
10 mechanism used to pay other administrative claims in this case. The Exit Financing
11 was required to establish the feasibility of the Confirmed Plan because it assured
12 payment of administrative claims in this case. The Liquidating Trust cannot be
13 burdened by having to comply with the terms of the very plan which created the
14 Liquidating Trust

15
16 The Unsupported Motion alleges that the undue burden arises because the
17 aggregate administrative claims awarded exceed a budget and "estimates". The
18 Confirmed Plan placed no limitation on the award or payment of administrative
19 claims based on any budget or estimate. Page 2 of the Disclosure Statement
20 states: "ANY ESTIMATES OF CLAIMS SET FORTH HEREIN MAY VARY FROM
21 THE AMOUNT OF CLAIMS ULTIMATELY APPROVED BY THE BANKRUPTCY
22 COURT." The Confirmed Plan provided no limitation on the amount of total
23 administrative claims that could be allowed so long as they were timely filed and
24 approved by this Court.

25 The Liquidating Trust also ignores the fact that it was aware of the claim by
26 RBLLC before it even paid the first administrative claim from the Exit Financing.
27 RBLLC filed its Application on July 6, 2009 at DE 1888. The bulk of the payments to
28

1 post-confirmation administrative claims commenced in August 2009, and through
2 the end of August approximately \$4 million had been paid.

3 RBLLC has already established that it timely filed its administrative claim.
4 That claim has already been awarded pursuant to the Granting Order and the
5 Payment Order. RBLLC is entitled to payment of its administrative claim under the
6 terms of the Confirmed Plan. There is no reason to require RBLLC to “pursue
7 execution” against the Liquidating Trust. The Confirmed Plan requires payment
8 from the Exit Financing. This Court has jurisdiction and authority to provide such
9 relief.

10 Additionally, the Liquidating Trustee alleges that setting aside the amount of
11 the Payment Order would jeopardize the ability of the Liquidating Trust’s ability to
12 operate. If there is no availability to pay the expenses of the Liquidating Trust from
13 the Exit Financing after an advance of funds required to pay RBLLC’s claim, the
14 Liquidating Trust is already effectively administratively insolvent.

15 The Liquidating Trustee needs to either comply with the Confirmed Plan by
16 paying the Payment Order or by posting a bond or other cash security from the Exit
17 Financing. If the Liquidating Trustee does not have sufficient funds to do that, then
18 the current financial condition of the Liquidating Trust and Exit Financing must be
19 disclosed. Given its own ongoing administrative expenses, any such insolvency
20 needs to be dealt with now to ensure equal priority payment of all administrative
21 claims. RBLLC should not be required to pursue disgorgement from other
22 administrative claimants, who are equal priority recipients of funds under the
23 Confirmed Plan, in order to preserve its rights to payment of the Payment Order
24 pending appeal.

25
26 H. Conclusion and Requested Relief

27 Based on the foregoing, RBLLC requests that this Court:
28

- 1 (1) grant RBLLC's Motion to Compel Immediate Payment and enter an
2 order in the form filed herewith;
3 (2) deny the Liquidating Trustee's Unsupported Motion; and
4 (3) grant such additional and other relief as is just and proper under the
5 circumstances of this case.

6 DATED this 11th day of January, 2010.

7 DECONCINI McDONALD YETWIN & LACY, P.C.

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9
10 BY /s/ SHELTON L. FREEMAN

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