FENNEMORE CRAIG, P.C.
Cathy L. Reece (005932)
Keith L. Hendricks (012750)
3003 N. Central Ave., Suite 2600
Phoenix, Arizona 85012
Telephone: (602) 916-5343
Facsimile: (602) 916-5543
Email: creece@fclaw.com

Attorneys for ML Manager LLC

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re	Chapter 11
MORTGAGES LTD.,	Case No. 2:08-bk-07465-RJH
Debtor.	**ML MANAGER LLC'S OBJECTION TO MCA FINANCIAL GROUP, LTD.'S MOTION (1) FOR NEW TRIAL PURSUANT TO FRCP 59(a)(2); (2) TO ALTER OR AMEND A JUDGMENT PURSUANT TO FRCP 59(e); (3) FOR RELIEF FROM JUDGMENT OR ORDER PURSUANT TO FRCP 60(b)(1); AND/OR (4) FOR RELIEF FROM JUDGMENT OR ORDER PURSUANT TO FRCP 60(b)(6)**

ML Manager LLC ("ML Manager") hereby files its Objection to MCA Financial Group, Ltd.'s Motion (1) for New Trial Pursuant to FRCP 59(a)(2); (2) to Alter or Amend a Judgment Pursuant to FRCP 59(e); (3) for Relief from Judgment or Order Pursuant to FRCP 60(b)(1); and/or (4) for Relief from Judgment or Order Pursuant to FRCP 60(b)(6) (Docket No. 2677) (the "Motion").[1] Simply stated, enough is enough and it is time to put this matter to bed. For more than 15 months MCA has kept these issues alive. When MCA filed its First Fee Application during the course of the bankruptcy, the Official Investor's Committee (the "OIC") objected, but was willing to withdraw the objection and allow the fees to be final if MCA would recognize that there were some adjustments that

[1] Although MCA fails to state the applicable Federal Rules of Bankruptcy Procedure serving as the predicate for the Motion, ML Manager assumes that the Motion is based on Bankruptcy Rules 9023 and 9024.

needed to be made. MCA refused demanding 100 cents on the dollar for every single minute they worked on the case. As such, all that was possible was an interim agreement where MCA and the OIC agreed that MCA could keep the fees it had been paid subject to a final determination. Then prior to the trial in January, based on the issues that the Court ruled on in the January 20 Order, ML Manager again raised the same issues seeking a resolution that addressed those issues. MCA rejected every reasonable proposal even though almost every other professional with a substantial fee request recognized that adjustments were appropriate. As such, the matter went to trial and the Court properly found that there were areas where adjustments in MCA's fee were required as had been argued for over 15 months. The Court was not mislead, confused or unaware. Instead, the Court simply ruled on the facts as it found them to be. To continue to waste the Court's time, and the precious resources of the parties is unreasonable and should be rejected out of hand. Indeed, MCA's conduct and the arguments even prove a fundamental basis of the Court's opinion and justify rejecting this petition out of hand, and awarding ML Manager the fees and costs it has incurred in responding to the post-judgment issues.

In the January 20 Order, the Court stated:

> [I]t appears that such work [by MCA on the DIP Financing] was undertaken in a vain hope that the inability to obtain any other financing would effectively require the continued employment of MCA, notwithstanding the Court's July 1 Order.

MCA's bitterness that it was not retained and that the DIP financing proposal it negotiated was not acceptable to all of the parties is evident. Indeed, MCA attempts to argue that its DIP financing proposal would have been better than the exit financing obtained in the confirmation of the plan. Whether or not MCA's bitterness is justified is no longer the issue. Enough is enough. The Court specifically found that MCA's time on DIP financing was not reasonable. The Court was presented with a form of order presented by

MCA and a form of order presented by ML Manager. The issues that were associated with the competing forms of order were fully and adequately briefed, and the Court made an informed decision. That decision should be upheld.

FACTS

On July 1, 2008, the Court ordered the phased withdrawal of MCA as financial advisor to the Debtors, as memorialized by entry of that certain order dated July 3, 2008 (Docket No. 106) (the "Phased Withdrawal Order"). Despite the Court's order, MCA continued to incur substantial fees related to a DIP financing proposal (the "SVP Proposed Financing") with Southwest Value Partners Fund XIV, LP, and Southwest Value Partners Finance I, LLC (collectively referred to herein as "SVP"). The fees in question were more than just the time spent negotiating with SVP. It also included all the time MCA spent discussing these issues with others.

On September 17, 2008, MCA filed its *First and Final Application for Allowance and Payment of Fees for Services Rendered by MCA Financial Group, Ltd., as Financial Advisor to Debtor* (Docket No. 517) (the "First Fee Application"), in which MCA attached spreadsheets (the "Spreadsheets") reflecting fees incurred in relation to "Debtor in Possession Financing" in the aggregate amount of $31,085, which included $24,960 in fees incurred after July 1, 2008. On October 2, 2008, the OIC filed its objection to the First Fee Application, wherein it joined in the objections previously filed by Radical Bunny, LLC and the Unsecured Creditors' Committee (Docket No. 591). On November 6, 2008, MCA filed a reply in support of its First Fee Application (Docket No. 930) (the "Fee Reply"), wherein MCA noted that "it provided services to the Debtor regarding the [SVP] DIP Financing Motion[2] in the approximate amount of $31,000." Fee Reply, p. 5.

[2] "DIP Financing Motion" was the defined term used in the MCA Reply to refer to the *Emergency Motion for an Interim Order (A) Authorizing Debtor to Obtain PostPetition Financing Pursuant to 11 U.S.C. Sections 105, 361, 362 and 364; (B) Deeming Prepetition Secured Parties Adequately Protected Pursuant to 11 U.S.C. Sections 361, 362, 363 and 364; and (C) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and (c) and Local Rule*

The Court held hearings on the First Fee Application on November 6 and 10 of 2008. During this time, the OIC reached out to MCA to inform them that it was willing to withdraw its objection and allow the fees to be final if MCA would recognize that there were some adjustments that needed to be made. Unlike other professionals who agreed to make such necessary adjustments, MCA refused and instead demanded the full amounts requested in their First Fee Application. As such, all that was possible was an interim agreement where MCA and the OIC agreed that MCA could keep the fees it had been already been paid by retainer subject to a final determination. Furthermore, $26,262.64 in outstanding fees remained subject to a final determination by the Court. The terms of this interim agreement are memorialized in the *Stipulated Order Resolving Contested Matter Re First and Final Fee Application of MCA Financial Group, Ltd.* (Docket No. 1263) (the "Stipulation").

On July 14, 2009, MCA filed its *Final Fee Application of MCA Financial Group, Ltd.* (Docket No. 1953) (the "Final Fee Application") in which MCA requested Court approval of its fees, including the amounts left outstanding under the Stipulation. On August 14, 2009, the Liquidating Trustee filed its objection to the Final Fee Application and joined in the prior objections filed by ML Manager and Radical Bunny (Docket No. 2083).

On January 12, 2010, the Court held an evidentiary hearing on the Final Fee Application (Docket No. 2594) (the "January 12 Hearing"), in which MCA again introduced its Spreadsheets which reflected $31,085 in fees incurred in relation to "Debtor in Possession Financing", of which $24,960 were incurred after July 1, 2008. MCA further procured the testimony of Morris Aaron, MCA's president, in support of its position that all $24,960 in post-July 1 fees related to "Debtor in Possession Financing"

4001-4 (Docket No. 53), in which the Debtors sought Court approval to enter into the SVP Proposed Financing.

were reasonable and beneficial to the estate. The Court considered the Final Fee Application, the Spreadsheets, the Aaron testimony, and all other evidence submitted at the hearing and, based on the clear weight of the evidence, disagreed with MCA's position. On January 20, 2010, the Court entered its *Order Granting in Part and Denying in Part Final First Fee Application of MCA Financial Group, Ltd.* (Docket No. 2604) (the "January 20 Order"), in which the Court held MCA's Final Fee Application should be granted "with the exception of the amount sought for work on DIP financing from and after July 1, 2008." As reflected in the Fee Reply and the Spreadsheets, MCA's post-July 1 fees related to DIP Financing totaled $24,960.

Despite the Court's clear directive in the January 20 Order and the unambiguous representations made by MCA in the Fee Reply and Spreadsheets, MCA subsequently took the position that only $2,730 in post-July 1 fees were incurred in relation to the SVP Financing and that this was the only amount disallowed by the January 20 Order. Because of MCA's attempts to ignore the terms of the January 20 Order, on February 10, 2010, ML Manager filed a notice of lodging of proposed order (the "ML Manager Proposed Order") which sought to clarify the January 20 Order to reflect that $24,960 in MCA's fees were denied. On February 11, 2010, MCA filed its own proposed order (the "MCA Proposed Order") in which MCA again attached "revised" Spreadsheets for the Court's review and "revised" the facts to reflect that only $2,590[3] in post-July 1 fees were incurred in relation to the SVP Proposed Financing. MCA filed an objection to the ML Manager Proposed Order setting forth its arguments, and ML Manager filed an objection to the MCA Proposed Order. As such, the issues related to the competing forms of Order were fully briefed before the Court decided which form of order to adopt. The Court

[3] As set forth above, MCA has reduced the amount of post-July 1 fees it contends were related to the SVP Proposed Financing from an initial starting point of $24,960, as reflected in the Fee Reply, to a $2,790 figure conveyed to ML Manager after entry of the January 20 Order, and finally to a $2,590 figure as reflected in the MCA Proposed Order.

again declined to accept MCA's position, instead entering the ML Manager Proposed Order on February 17, 2010 (the "February 17 Order"), which clarified the January 20 Order to reflect that the entire $24,960 in post-July 1 fees were denied.

On March 1, 2010, a date more than 38 days after entry of the January 20 Order, MCA filed the present Motion, in which MCA again submits a further "revised" Spreadsheet as well as the unsworn declaration of Aaron (which contains the same testimony provided by Aaron at the January 12 Hearing). Despite having multiple opportunities before the Court to argue its case, MCA, pursuant to its Motion, is attempting to seek another opportunity to re-litigate the same issues the Court has considered, and rejected, on more than one prior occasion.[4]

ARGUMENT

I. MCA FAILS TO MEET ITS BURDEN UNDER RULE 59(a)(2)

Rule 59(a) of the Federal Rules of Civil Procedure provides that "[t]he court may, on motion, grant a new trial on all or some of the issues … after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." FED. R. CIV. P. 59(a)(1)(B). "There are three grounds for granting new trials in court-tried actions under Rule 59(a)(2): (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence." *SEC v. Holt*, 2007 U.S. Dist. LEXIS 59323, at *5 (D. Ariz. Aug. 13, 2007) (citing *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978)). "[H]owever, a … motion to amend should [not] be employed … to relitigate old issues, to advance new theories, or to secure a rehearing on the merits." *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 2007 U.S. Dist. LEXIS 39843, at *3 (D. Ariz. May 30, 2007)

[4] As will be shown below, MCA fails to even attempt to satisfy any of the elements required to receive relief under Rules 59 and 60 of the Federal Rules of Civil Procedure. Instead, the present Motion appears to be a veiled attempt to toll the deadline for filing a notice of appeal, assuming the appeals deadline has not already passed considering the Court's January 20 Order was entered more than 14 days ago.

(internal quotations and citations omitted). Yet this is exactly what MCA appears to be doing by its Motion.

a. There is No Newly Discovered Evidence

As this Court has previously noted, "evidence is not 'newly discovered' for purposes of Rule 59 if it 'could have been discovered with reasonable diligence' at the time of trial." *In re Arden Props., Inc.*, 248 B.R. 164, 170 (Bankr. D. Ariz. 2000) (Haines, B.J.) (quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987)). *See also* 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2808 (2d ed. 1995) ("Newly discovered evidence must be of facts existing at the time of trial. The moving party must have been excusably ignorant of the facts despite using due diligence to learn about them."). Furthermore, "the newly discovered evidence must be 'of such magnitude that production of it earlier would likely have changed the outcome of the case.'" *Arden Props., Inc.*, 248 B.R. at 170 (quoting *Coastal Transfer*, 833 F.2d at 211).

The Motion wholly fails to present the Court with any "newly discovered evidence", and MCA does not contend otherwise in its Motion. Instead, the Motion merely provides another "revised" Spreadsheet and the unsworn declaration of Aaron. The "revised" Spreadsheet and the Aaron declaration do not constitute "newly discovered evidence", as they simply reconvey the same information presented to the Court on multiple prior occasions. To the extent that MCA attempts to argue that this evidence is new, MCA does not attempt, nor can they in good faith, provide the Court with any justification why such alleged evidence was not available prior to the Court's entry of the January 20 Order and the February 17 Order. *See Arden Props.*, 248 B.R. at 170 (citing *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 n.6 (9th Cir. 1994)) ("Where the moving party does not make any showing that such an affidavit was unavailable at the time of trial, rejection of such a tardy affidavit is 'well within' a court's discretion."). "The time

has come to conclude this case." *Lumbermens*, 2007 U.S. Dist. LEXIS 39843, at *3. "All of [MCA's] arguments have been considered carefully." *Id*. at *3-4. "The Court has made its decision." *Id*. at *4. "The Court [should] not revisit and reconsider [its] decision on the basis of nothing more than [MCA's] assertion of arguments already made and rejected." *Id*. The Motion must be denied.

b. There was no Manifest Error of Law or Fact

MCA alleges that the "[February 17] Order was based upon errors of fact and law…." Motion, p. 2. However, MCA fails to explain, much less cite, any legal authority on which the Court improperly relied. Furthermore, and as set forth above, MCA fails to provide the Court with any evidence to support its assertion that an error of fact occurred. To prove an error of fact, MCA is required to make a "showing … that it was a clear and manifest error [for the Court] to rely on the evidence on which the trial judge relied." *Arden Props.*, 248 B.R. at 171. As set forth above, the January 20 Order denied all fees "for work on DIP financing from and after July 1, 2008." The Court's holding in the January 20 Order and the clarification provided in the February 17 Order were reached after the Court reviewed such evidence as the Fee Reply and the Spreadsheets, both of which clearly provide that $24,960 in post-July 1 fees incurred by MCA were related to DIP Financing, and more specifically, to the SVP Proposed Financing. At one point, MCA implies that the Court was misled or didn't understand the issues. Given that MCA fully briefed and argued the issues before the Court ruled, this argument is curious. Is MCA arguing that its prior briefing had incompetently addressed or explained the issues? Surely not. The bottom line is that MCA fully presented its position to the Court. This position was simply rejected. No error of law or fact occurred, and MCA does not prove otherwise. The Motion must be denied.

II. MCA FAILS TO MEET ITS BURDEN UNDER RULE 59(e)

"A motion for reconsideration under Rule 59(e) 'should not be granted, absent

highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law.'" *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999). A well-respected treatise notes that a motion for reconsideration may also be granted "'if necessary to prevent manifest injustice….'" *Id*. at 1255 n.1 (quoting 11 Charles Alan Wright *et. al*, Federal Practice and Procedure § 2810.1 (2d ed. 1995)). The standards enunciated under Rule 59(e) are similar to those under Rule 59(a)(2). As set forth above, there has not been a change in the controlling law, MCA has not introduced any "newly discovered evidence", and the Court did not commit an error of law or fact. Furthermore, and as set forth below, MCA was not the victim of "manifest injustice."

"The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2810.1 (2d ed. 1995). Yet, by resubmitting its Spreadsheets and the Aaron declaration, this is exactly what MCA attempts to do. The Court previously considered all of this evidence and testimony and reached its holding after considering such evidence. MCA cannot, in good faith, contend that any "manifest injustice" occurred by the Court's reliance on the same information that MCA seeks to reintroduce by its Motion. Apparently recognizing the flaw in its logic, MCA again fails to cite any authority to support its bold assertion that any manifest injustice occurred. Instead, MCA attempts to hurl its unsubstantiated belief "that the Investor's Committee led the Court to erroneously confuse" the issues. Considering MCA's concession in the MCA Reply that all $24,960 in post-July 1 fees were related to DIP Financing, it is MCA who is arguably now attempting to "erroneously confuse" the Court. The Motion must be denied.

III. MCA'S RELIEF UNDER RULE 59 IS UNTIMELY

Rule 59 of the Federal Rules of Civil Procedure is made applicable in bankruptcy

proceedings pursuant to Bankruptcy Rule 9023. *See* FED. R. BANKR. P. 9023. Bankruptcy Rule 9023 provides that "[a] motion for a new trial or to alter or amend a judgment shall be filed … no later than **14 days** after entry of judgment." *Id*. (emphasis added). The January 20 Order was entered on January 20, 2010, a date more than 14 days prior to MCA's filing of the present Motion. Arguably, the February 17 Order did not constitute a new order and did not alter the final, non-appealable nature of the January 20 Order. Instead, the February 17 Order merely served to clarify the Court's unambiguous judgment provided in the January 20 Order. Since the present Motion was filed more than 14 days after the January 20 Order, it is untimely and must be denied.

IV. RULES 60(b)(1) AND 60(b)(6) ARE INAPPLICABLE

As the Ninth Circuit has noted, "[t]he denial of a motion for reconsideration under Rule 59(e) is construed as a denial of relief under Rule 60(b)." *McDowell*, 197 F.3d at 1255 n.3. Since MCA fails to meet its burden under Rule 59(e), its request for relief under Rule 60(b) must also be denied. Nonetheless, ML Manager provides a further discussion regarding Rule 60(b)'s inapplicability, below.

a. MCA Fails to Meet its Burden under Rule 60(b)(1)

Rule 60(b)(1) of the Federal Rules of Civil Procedure provides that "the court may relieve a party … from a final judgment, order, or proceeding for … (1) mistake, inadvertence, surprise, or excusable neglect." FED. R. CIV. P. 60(b)(1). In its Motion, MCA merely cites to Rule 60(b)(1) without alleging that any of the four grounds provided under that rule exist to provide them with relief. In fact, MCA cannot credibly argue that any surprise, mistake or inadvertence occurred since the evidence before the Court included, among other things, the Fee Reply and the Spreadsheets, in which MCA conceded that $24,960 in post-July 1 fees were incurred in relation to the SVP Proposed Financing. MCA also fails to present, much less argue, the factors necessary to satisfy "excusable neglect" under Rule 60(b)(1), which are "the danger of prejudice to the debtor,

the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

MCA's failure to provide a scintilla of authority to support its Motion reveals that MCA is merely unhappy with the Court's order. However, as one leading treatise explains, "relief will not be granted under Rule 60(b)(1) merely because a party is unhappy with the judgment." 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2858 (2d ed. 1995). Therefore, the Motion must be denied.

b. MCA Fails to Meet its Burden under Rule 60(b)(6)

Rule 60(b)(6) provides that "the court may relieve a party … from a final judgment, order, or proceeding for … (6) any other reason that justifies relief." FED. R. CIV. P. 60(b)(6). "Judgments are not often set aside under Rule 60(b)(6)." *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1103 (9th Cir. 2006). "Rather, the Rule is used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Id*. (internal quotations and citations omitted). "Accordingly, a party who moves for such relief must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with … the action in a proper fashion." *Id*. (internal quotations and citations omitted). MCA fails to allege in its Motion that "extraordinary circumstances" existed beyond its control which prevented it from proceeding in a proper fashion. As set forth above, no such argument can be credibly made since the Court provided MCA with multiple opportunities to argue its case. The Motion must be denied.

CONCLUSION

Based on the facts and law set forth above, ML Manager respectfully requests a

Court order denying MCA's Motion, awarding ML Manager its attorneys' fees and costs incurred in responding to this meritless Motion, and granting such other and further relief to which it may be entitled.

DATED: March 15, 2010

FENNEMORE CRAIG, P.C.

By */s/ Cathy L. Reece* (005932)
Cathy L. Reece
Attorneys for ML Manager LLC

COPY of the foregoing emailed this 15th day of March, 2010 to the following:

Howard Meyers
Andrew Abraham
Burch & Cracchiolo, P.A.
702 East Osborn Road
Phoenix, AZ 85014
hmeyers@bcattorneys.com
aabraham@bcattorneys.com
Attorneys for MCA Financial Group, Ltd.

Larry L. Watson
Office of the United States Trustee
230 N. 1st Avenue, Ste. 204
Phoenix, AZ 85003
larry.watson@usdoj.gov
U.S. Trustee

Michael O'Mara
Stradley Ronon Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103
mo'mara@stradley.com

/s/ *Stephanie Fulk-Higgs*