Mark J. Dorval
Stradley Ronon Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103
Telephone: 215-564-8000
Mdorval@Stradley.com

Attorneys for the ML Liquidating Trust

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re:	Proceedings Under Chapter 11
MORTGAGES LTD., an Arizona corporation,	Case No. 2:08-bk-07465-RJH
Debtor.	**BRIEF ON REMAND IN SUPPORT OF THE ML LIQUIDATING TRUST OBJECTION TO THE APPLICATION PURSUANT TO 11 U.S.C. § 503(B)(3)(D) AND (B)(4) FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE CLAIMS OF CREDITOR RADICAL BUNNY, LLC**

The ML Liquidating Trust ("Liquidating Trust"), by and through its counsel Stradley Ronon Stevens & Young, LLP, hereby files this Brief on Remand in Support of its Objection to the Application Pursuant to 11 U.S.C. § 503(b)(3)(D) and (b)(4) for Allowance and Payment of Administrative Claim ("Substantial Contribution Claim") of Creditor Radical Bunny, LLC [Docket No. 1888] ("Claimant" or "Radical Bunny").

I. BACKGROUND

A. Facts

Radical Bunny filed a motion before the bankruptcy court claiming that it made a substantial contribution to the Mortgages, Ltd. ("Debtor") estate (the "Estate") and sought payment of $595,798.25 for its efforts (the "Application"). The Liquidating Trust objected to the Application, asserting, among other things, that Radical Bunny failed to meet its burden of proof to establish the high standard required for an award of fees under Section 503(b)(3)(D) and (b)(4) as a substantial contribution. Radical Bunny and the Liquidating

Trust submitted the matter to this Court upon a joint statement of material facts (Appx. p. 340, Tab 9) (the "Stipulated Facts"), a Supplement to Joint Statement of Material Facts (Appx. p. 383, Tab 11) (the "Supplemental Stipulated Facts") and briefs for and against the Application. No testimony or other evidence was presented.

On December 21, 2009, this Court awarded counsel for Radical Bunny, DeConcini, McDonald, Yetwin & Lacy, P.C. ("DMYL"), a substantial contribution award against the Estate in the total amount of $595,798.25 (the "Award"). The Liquidating Trust appealed the Award to the United States Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP"). After reviewing the briefs of the Liquidating Trust and DMYL, this Court's opinion, the designated record (the "Record") and oral argument before the three-judge panel, the BAP entered an order dated August 4, 2010 (the "BAP Order"), in which the BAP reversed the Award and remanded to this Court. The BAP found that Radical Bunny failed to introduce sufficient evidence to establish the value of the services that it allegedly provided to the Estate or that such value exceeded the value to Radical Bunny from those same services, as required by *In re Cellular 101, Inc.*, 377 F.3d 1092, 1096 (9th Cir. 2004).

This Court held a status hearing on September 21, 2010 (the "Status Hearing") to determine how to proceed in light of the BAP Order. At the Status Hearing, the Court acknowledged that there had not been an evidentiary hearing when it first heard Radical Bunny's Application. *See Transcript of Hearing dated September 21, 2010* ("Transcript"), attached hereto as Exhibit "A," at p.3. At the Status Hearing, DMYL stated that it did not require any further stipulated facts or an evidentiary hearing to proceed with its Application, agreeing that it would rely upon the Record already created in order to provide the category by category analysis of the value to the Estate and the value to Radical Bunny that the BAP Order required. *See* Transcript, page 6. Although the BAP held that the Record was insufficient to support the Award, Radical Bunny chose not to seek to supplement the Record.

B. Legal Standard

The Ninth Circuit has stated, and the BAP Opinion reinforced, that the test for substantial contribution is the extent of the benefit provided to the debtor's estate. *Cellular 101*, 377 F.3d at 1096; *Christian Life Center Litigation Defense Committee v. Silva*, 821 F.2d 1370, 1373 (9th Cir. 1987). The benefit to the debtor's estate must be substantial, ***not merely incidental*** or minimal, and must outweigh the benefit to the creditor. *Cellular 101*, 377 F.3d at 1098 (emphasis added). Courts narrowly construe the availability of substantial contribution awards under § 503(b)(3)(D) and (b)(4) and "***strictly limit compensation to extraordinary creditor actions*** which lead directly to significant ***and tangible*** benefits to the creditors, debtor or the estate in order to maintain the integrity of § 503(b)." *In re D.W.G.K. Restaurants, Inc*, 84 B.R. 684, 690 (Bankr. S.D. Cal. 1988) (emphasis added); *see also, In re Sentinel Mgmt. Group, Inc.*, 404 B.R. 488, 493 (Bankr. N.D. Ill. 2009) (citing *In re Glickman, Berkowitz, Levinson & Weiner, P.C.*, 196 B.R. 291, 294 (Bankr. E.D. Pa. 1996)); *In re Stoecker*, 128 B.R. 205, 208 (Bankr. N.D. Ill. 1991).

Radical Bunny, the party asserting a claim under 11 U.S.C. § 503(b)(3)(D) and (b)(4), bears the burden of proof to establish, by a preponderance of evidence, that it "provide[d] tangible benefits to the bankruptcy estate and the other secured creditors." *In re Sedona Institute*, 2001 WL 1345985 at *1 (9th Cir. Nov. 1, 2001) (citing *In re Catalina Spa & R.V. Resort, Ltd.*, 97 B.R. 13, 17 (Bankr. S.D. Cal. 1989)). The BAP held that Radical Bunny did not meet this burden and was not entitled to payment from this Estate as a substantial contributor based upon the Record. Radical Bunny has chosen not to seek to supplement the Record. Radical Bunny, therefore, cannot meet its burden to establish the value of the services provided that actually benefited the Estate or that any such value to the Estate outweighed the value to Radical Bunny.

II. ARGUMENT

A. No Record to Support DMYL Fees

The Application sought fees in three categories, including work: (i) on a joint plan of reorganization; (ii) preserving assets of the Estate; and (iii) on settlements. The BAP

Order held that the proper legal standard to apply to the Application, as stated in *Cellular 101*, requires a review of each of Radical Bunny's activities for which it seeks compensation to decide whether that activity benefitted the Estate sufficiently to award the claimant expenses incurred for that activity. *BAP Opinion* at 19. Therefore, Radical Bunny must prove that, in each category and for each service that it provided under the generic category descriptions, the beneficial service conferred a direct, not incidental, benefit to the Estate that was not outweighed by the benefit to Radical Bunny. *Id.*

With respect to Radical Bunny's work on a plan, the BAP held that each of Radical Bunny's activities under the "Plan" category were never evaluated to determine if each provided a benefit to the Estate and for those that provided a benefit to the Estate were never weighed against the benefits it obtained through such work on the plan. *Id.* at 20. As a result, the BAP held that the "record [did] not support the [C]ourt's decision to award $118,810" for Radical Bunny's work on a plan. *Id.* at 21. Radical Bunny, through DMYL, **opted not to supplement the Record** and, as such, the conclusion reached by the BAP is inescapable and should not change. *See* Transcript at 3-4, 7. Radical Bunny, therefore, is not entitled to any award for work on a plan.

Similarly, in reviewing Radical Bunny's work in the "asset preservation" category and the limited evidence in the Record, the BAP once again noted that Radical Bunny did not provide this Court with sufficient evidence of the value to the Estate of the benefits of its work in this area or any evidence of the value Radical Bunny received from these efforts. *BAP Opinion* at 22. Radical Bunny chose not to seek to supplement the Record, and therefore, this Court still cannot conduct the "proper benefit analysis or make the required findings with respect to the quantum of benefit" that the BAP found was necessary to award the fees sought by Radical Bunny.

Finally, with respect to "settlements" category, the BAP held that the Record did not support an award of the fees requested and was merely conclusory with regard to the benefits provided. Radical Bunny chose not to seek to supplement the Record, so it cannot prove that its services provided the necessary benefit to the Estate or analyze and compare

the respective benefits to the Estate and Radical Bunny in order to meet its burden and justify to an award of fees for work on settlements.

B. Judicial Estoppel Prevents Radical Bunny from Unilaterally Supplementing the Record.

At the Status Hearing, DMYL was adamant that it did not need to or want to supplement the Record in order to prove its case for a substantial contribution award. Specifically, DMYL determined:

> COURT: [T]he critical question to ask after the remand is you believe that what the Ninth Circuit tells us is the proper standard can be applied on the basis of the facts already stipulated to and in the record?
>
> Mr. Freeman: Yes, Your Honor.
>
> COURT: We don't need to have any further evidentiary hearing nor any further stipulated facts for that matter?
>
> Mr. Freeman: That's our position, Your Honor, yes.

Transcript at 3-4.

> COURT: But in any event, your view is you can go back and analyze [the benefit to the Estate and the benefit to Radical Bunny] then on a category by category basis based on the record already made?
>
> Mr. Freeman: That's correct, Your Honor.

Transcript at 7.

Despite having three times assured the Court that Radical Bunny did not need to supplement the Record, on October 18, 2010, Radical Bunny needed 83 pages of pleadings allegedly to support its Application (the "RB Supplemental Filing") on a Record that was claimed by DMYL to be sufficient on its own to support the fees requested. Not only did Radical Bunny file a 39-page memorandum in support of its position (the "Supplemental Brief"), but it also attached, among other things, 23 pages of findings of facts and conclusions of law (the "Findings of Fact").

Radical Bunny is judicially estopped from relying upon any new evidence referenced in the Findings of Fact. Radical Bunny agreed to rely upon the Record already made[1] and specifically agreed that it did not require additional stipulated facts. Radical Bunny is now attempting to supplement the factual record with "facts" unilaterally alleged that have never been examined or tested by the Liquidating Trust and which the Liquidating Trust has never stipulated or accepted as true. Therefore, with respect to all of the additional "facts" that Radical Bunny has now submitted to the Court in the RB Supplemental Filing, the Liquidating Trust has never had an opportunity to review, test and determine the accuracy of these alleged "facts" through the discovery process and an evidentiary hearing.

Judicial estoppel prevents Radical Bunny from changing its position in this manner. Judicial estoppel provides that a party will be precluded from asserting a certain position when: 1) the party's current position is 'clearly inconsistent' with its earlier position, 2) the party was successful in persuading a court to accept its earlier position, and 3) the party would 'derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" *Williams v. Boeing Co.*, 517 F.3d 1120, 1134 (9th Cir. 2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742 (2001)). This case presents a prime example of a party trying to benefit from changing its position on whether the parties will be permitted to supplement the Record. Radical Bunny agreed – three times – that it would rely only upon the Record to support its application. This Court then set up a briefing schedule relying upon Radical Bunny's representation that it would not supplement the Record. Radical Bunny has now attempted to supplement the Record with the RB Supplemental Filing that includes the 39-page Supplemental Brief and the 23-page Findings of Fact. Radical Bunny would derive an unfair advantage and prejudice the Liquidating Trust if it is permitted to

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[1] This Record that DMYL did not want to supplement is the same Record that went to the BAP on appeal. As such, DMYL should not refer this Court to anything that was not part of the numbered Record that went to the BAP on appeal. *See In re Kyle*, 317 B.R. 390, 394 (9th Cir. BAP 2004) (claimant had a duty to protect the record and to supplement it and assumed the risk of proceeding on an incomplete record).

now utilize facts that are not in the Record to support its position, at the same time that the Liquidating Trust has been prevented from testing the accuracy of the newly introduced "facts."

The prejudice to the Liquidating Trust is clear. The Liquidating Trust relied upon Radical Bunny's promise to look only to the Record to support its Application. At the eleventh hour, Radical Bunny files a 23-page unilateral statement of facts that does exactly what Radical Bunny promised it would not do – it attempts to include new information that is not a part of the Record. The Liquidating Trust has had no opportunity to review the documents now cited by Radical Bunny, no opportunity to cross-examine affiants and no opportunity to test the veracity of the information that has been newly inserted into what was an agreed upon stipulation of facts. Judicial estoppel is applicable to prevent the prejudice to the Liquidating Trust from Radical Bunny doing what it promised not to do. *Id.*

Additionally, the new documents that Radical Bunny cites to do not actually constitute proper evidentiary support for the propositions for which they are offered. This exemplifies the problem with Radical Bunny's course of action. By unilaterally supplementing the agreed-upon Stipulated Facts without discovery, the Liquidating Trust is unable to test the "facts" that have been added and cannot properly defend itself.

For example, in the Finding of Facts in the RB Supplemental Filing, Radical Bunny states that "[Radical Bunny] benefitted the Estate by no less than $3,000,000 due to [cash collateral] funding, which significantly preserved the value of all of the assets of the Estate. If the Debtor had not continued to operate, the value of the ML Loans, including the Investor's fractional interests in the ML Loans, would have substantially and rapidly declined in value." *Findings of Fact* at ¶14. In support of this "fact" DMYL cites the Joint Statement of Facts, the Radical Bunny Notice of Non-consent to use Cash Collateral Outside the Ordinary Course of Business, the Reply of Radical Bunny to the Response to their Notice of Non-consent, the Order regarding the payment of interest; the OIC Statement of Position Regarding Interest Payments and the Debtor's Monthly Operating

Reports from August of 2008 through March of 2009. The majority of these documents are not part of the Record. Moreover, the documents cited by DMYL do not actually support the propositions for which they are being offered. Nowhere in the cited pleadings is there *evidence of the value of DMYL's services* relating to the cash collateral motion, nor do the documents cited support the contention that the entire $3,000,000 in cash collateral should be attributable solely to the services provided by DMYL. Therefore, if the improper addition of "facts" had been properly tested through discovery, the evidence would have shown that Radical Bunny still failed to meet its burden.

Similarly, Radical Bunny asserts that its subordination of its claimed security interest in the Centerpoint ML Loans "benefitted the Estate by at least $2,800,000 based on the representations of the Debtor regarding the damage to the Centerpoint property if that interim loan was not made." *Findings of Fact* at ¶ 18. Radical Bunny cites to the Debtor's disclosure statement and motion to approve the DIP financing as "evidence" of Radical Bunny's benefit to the Estate, yet the Debtor never attributes any such benefit to the services of DMYL. Additionally, although cited by DMYL in further support of this "fact" (although many of the cited documents are not a part of the Record), neither the Joint Statement, the Grace Entities opposition to DIP financing, or the Radical Bunny objection to DIP financing acknowledge or establish (as compared to simply alleging) any quantifiable benefit of DMYL's services. Again, if Radical Bunny's improper addition of "facts," was properly tested through discovery, the evidence would have shown that Radical Bunny has failed to meet its burden.[2]

In the RB Supplemental Filing, Radical Bunny details, at great length, its version of the financing of the Debtor's bankruptcy, but this self-serving version of the case is not part of the Record or agreed to be considered evidence by the parties. These allegations are conclusory and untested through discovery. Mere conclusory statements made by a

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[2] Moreover, Radical Bunny had an 80% interest in the Centerpoint project. Therefore, 80% of any benefit would pass through to Radical Bunny, leaving the Estate with only 20% of any benefit – less than the benefit to Radical Bunny. Clearly, this does not meet the *Cellular 101* standard.

claimant that its acts resulted in a substantial contribution are insufficient for an administrative expense claim. *BAP Opinion* at 23 (citing *U.S. Lines, Inc.*, 103 B.R. at 430). For example, Radical Bunny makes the conclusory statement that it received little benefit from its subordination to exit financing. In reality, due to the favorable treatment that it negotiated for itself through its objections to the OIC Plan, Radical Bunny will be receiving distributions from the sale of assets that are currently pending in this Court and the additional sales that are anticipated. Had Radical Bunny sought discovery, these additional facts would have been reviewed. Instead, Radical Bunny chose to forego discovery and simply provide the Court with its own one-sided version of the "facts" in the RB Supplemental Filing. Because Radical Bunny chose not to seek to supplement the Record (and thus denied the Liquidating Trust the same opportunity), this Court should disregard its Supplemental Filings.

The foregoing are only three examples of the numerous times that Radical Bunny has taken liberties with its unilateral insertion of "facts" not in the Record (i) without affording the Liquidating Trust the benefit of discovery to test the veracity or reliability of those "facts" and (ii) without actual evidence to support the propositions for which they are cited. The prejudice to the Liquidating Trust that would result from allowing Radical Bunny to use unproven facts to support its Application is obvious. Moreover, allowing this to happen after Radical Bunny specifically stated that it had no need to look outside the Record to support its Application would be patently unfair to the Liquidating Trust and is exactly the type of situation for which the application of judicial estoppel is required. Moreover, the new and unilateral "facts" alleged in the RB Supplemental Filing are not sufficient evidence to support the positions for which they are cited.

C. There Is No Evidence of Benefit to the Estate and No Evidence of Whether the Value to the Estate Exceeded the Value to Radical Bunny.

Even accepting the new documents that DMYL improperly seeks to add to the Record, which the Court should not, Radical Bunny has failed to follow the BAP's explicit instructions. Notwithstanding its attempt to introduce 83 additional and essentially

unchallenged pages, Radical Bunny is still unable to provide sufficient evidence of: (i) exactly what services provided benefit to the Estate; (ii) the value of those services to the Estate; or (iii) evidence that the value of those services to the Estate was greater than the value to Radical Bunny. The BAP made it clear that additional evidence was required in these three areas for **each category** for which Radical Bunny sought compensation. Notwithstanding this second chance and the guidance from the BAP on the evidence needed for each category, Radical Bunny has failed to provide actual evidence for any category in the three areas where its case was previously found to be deficient. As such, Radical Bunny cannot be awarded the fees requested as a substantial contribution.

1. There Is No Evidence that Radical Bunny's Work on Plan Provided a Greater Benefit to the Estate than to Radical Bunny.

Radical Bunny seeks to pay its counsel, DMYL, $118,810 from a substantial contribution award from the Estate for Radical Bunny's contributions to a joint plan of reorganization. While the plan drafted by DMYL was never filed with the Court, the parties stipulated that some terms of that plan were used in the OIC Plan. There was no stipulation and there remains no evidence now, however, as to the uniqueness of those terms, the necessity of those terms *or the value of those term* – the analysis that the BAP highlighted was lacking. The parties also stipulated that Radical Bunny ultimately did not support the OIC Plan, filed objections to the OIC Plan, voted to reject the OIC Plan and filed several motions to derail confirmation of the OIC Plan. The BAP found that the cost to the Estate for these activities in opposition to the OIC Plan had to be factored into any potential award to Radical Bunny.[3] *BAP Opinion* at 21.

Despite the requirement that a substantial contribution claimant quantitatively prove that the value of the contribution to the estate exceeds the value of the benefit to the

[3] Moreover, the BAP highlighted that the Ninth Circuit substantial contribution analysis includes a review of the claimant's conduct to ensure that its actions foster, and do not retard, the reorganization process. See BAP Opinion at p.17 (citing Cellular 101, 377 F.3d at 1096). The actions of Radical Bunny were clearly intended to retard the process of reorganization in order to obtain additional benefits for Radical Bunny alone.

claimant, Radical Bunny makes no attempt to specify what services and fees were necessary and beneficial to the Estate and does not quantify the value of these services for plan-related work. Instead, Radical Bunny simply provides a total of its fees for plan-related work and conclusory statements about their value. There is no evidence to support the connection between the work performed by DMYL and a quantifiable benefit to the Debtor's Estate. Similarly, Radical Bunny provides no evidence that, notwithstanding its staunch opposition to conformation of the OIC Plan and the improved treatment it received as a result, the benefit to the Debtor's Estate of Radical Bunny's work on a joint plan outweighed the benefit that Radical Bunny received from these efforts in the form of significantly improved treatment under the OIC Plan that was confirmed.[4]

The stipulated fact that some terms from a plan that Radical Bunny worked on ultimately appeared in a separate plan that was eventually confirmed, despite significant opposition by Radical Bunny, does not establish a substantial contribution to the Debtor's Estate. Missing is the evidence that the work performed by DMYL, at a cost of $118,810, provided a benefit to the Debtor's Estate of at least $118,810, and outweighed the benefit of this work to Radical Bunny. *Id.* at 20. Radical Bunny has failed to meet its evidentiary burden in this regard.

The only evidence in the Record concerning the value of Radical Bunny's plan efforts, relates to the cost to the Estate of Radical Bunny's aggressive opposition to the OIC Plan. Specifically, Radical Bunny admitted that its efforts to oppose the OIC Plan **cost** the Debtor's Estate at least $70,300. *Id.* at 21. The outcome of Radical Bunny's opposition to the OIC Plan confirmation process was that Radical Bunny received more favorable treatment under the OIC Plan, a benefit to no one other than Radical Bunny. In exchange, the OIC and the Debtor incurred additional costs of at least $70,300 defending against Radical Bunny's objections. The BAP held that it was erroneous not to account for this

[4] By Radical Bunny's reasoning, it must show that it provided value to the Estate in excess of the $25 million accelerated recovery it received in the OIC Plan as a result of its objections to overcome the standard of *Cellular 101*.

$70,300 cost to the Estate, "particularly since the only apparent result of [Radical Bunny's] objections was better treatment for itself, not the estate or other creditors." *Id.*[5]

The BAP also held that nowhere in the Record did Radical Bunny prove that its efforts with respect to a joint motion to end the Debtor's exclusivity conferred a benefit to the Estate, "much less that [the benefit conferred] outweighed whatever benefit [Radical Bunny] received." *Id.* The BAP found that the Record did not support an award for this activity. Radical Bunny opted not to supplement the Record.[6] Therefore, the $14,711.50 that is included in the Application for work relating to the joint motion to end exclusivity (see Exhibit "A" to the Application) cannot be allowed under the *Cellular 101* standard.[7]

The BAP also found that a substantial contribution award could not be supported for the work of Radical Bunny with respect to drafting an operating agreement that was discarded and redrafted by the OIC. However, because Radical Bunny's evidentiary support for its work on the plan is so lacking in the detail necessary to establish value, it is impossible to determine how much of the $118,810 was spent and should be removed for work on the operating agreement. In the time records that DMYL filed to support the Application, most of the professionals did not track the time that they spent working on the

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[5] In a strikingly similar case, *Sentinel*, the claimant seeking a substantial contribution award claimed to have provided many terms of the confirmed plan that benefited creditors. *Sentinel*, 404 B.R. at 495-96. The *Sentinel* court found that providing some beneficial terms for the plan did not amount to a substantial contribution and further found that, even if the claimant's actions arguably amounted to a substantial contribution, *the award should be denied as a result of the added expense caused by the claimant through its efforts opposing the plan confirmation process. Id.* at 499 (emphasis added).

[6] In Radical Bunny's Supplemental Brief, it states that its allegations in the joint objection to extend exclusivity are part of the Record and support the award of its fees. Radical Bunny is wrong on both counts. First, the joint objections is not a part of the Record. Second, the **allegations** in that pleading are **not facts** in this case and cannot be used as evidence of the alleged value provided by Radical Bunny because they are nothing more than unproven allegations in a pleading.

[7] Further support for refusing an award for the work on the joint motion can be found in *D.W.G.K. Restaurants*, 84 B.R. at 689-90, cited in the BAP Opinion, in which the court found that the claimant's work performing tasks alongside other estate professionals could not be considered a substantial contribution. This same argument provides yet another basis to deny all fees for work on a joint plan given that so many other estate professionals were already involved in the process and Radical Bunny has provided no evidence to distinguish its efforts from those of the other professionals working on the plan.

operating agreement.[8] If it cannot be determined how much of the $118,810 relates to work on the operating agreement, then it is not possible to determine with any certainty how much time was spent drafting provisions of the joint plan or how much value was provided to the Estate from these activities. Even in its supplement, Radical Bunny failed to provide any additional evidence to describe the amount of fees to be removed for work on the operating agreement, so the Record, even as supplemented, is not sufficient to determine the value to the Estate of the work of Radical Bunny on a joint plan of reorganization.[9] Radical Bunny should not be rewarded for its failure to properly detail the value it allegedly provided by receiving an award of its fees in the absence of appropriate evidence.

Radical Bunny has failed to meet its burden to establish the value of the benefit it conferred upon the Estate by working on a joint plan of reorganization. Likewise, the BAP found that the Record did not support a finding that the value to the Estate or other creditors was greater than the value to Radical Bunny, and Radical Bunny has chosen not to supplement the Record. With the same Record considered insufficient by the BAP, how could the result legitimately be any different on remand? The award for fees for plan work must, therefore, be denied for the same reasons cited by the BAP.

2. The Record Does Not Support an Award of Fees Relating to Alleged "Asset Preservation."

Radical Bunny was awarded an extraordinary amount of compensation, **$356,253.00**, for its efforts in "asset preservation." However, despite bearing the burden of proof, Radical Bunny failed to introduce evidence specifically quantifying how its actions

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[8] Only two professionals tracked their time working on the operating agreement, for a total expense of $1,223. However, it is clear that other professionals worked on the operating agreement, particularly as one "operating agreement" time entry included reference to work with "T Freeman," though Mr. Freeman does not separately itemize his time working on the operating agreement in his time entries. See *Application,* at Exhibit A.

[9] Radical Bunny did attach certain time records from the OIC to its RB Supplement Filing. Not only are these time records not part of the Record, they do not actually support Radical Bunny. In fact, these time records highlight that Radical Bunny cost the Estate over $21,000 in time that the OIC dedicated to attempting to revise the operating agreement provided by Radical Bunny before finally tossing it and starting from scratch. *See Supplement Stipulated Facts* at ¶ 4; *Supplemental Brief* at Exhibit 2.

preserved or increased the Debtor's Estate, how any alleged benefit to the Estate was more than an incidental one resulting from protecting its own interests, or how its efforts in this regard were unique and not duplicative of the actions undertaken by other creditors. As a result of Radical Bunny's failure to clearly quantify the benefit of its action to the Estate or whether the benefit to the Estate exceeded the benefit to Radical Bunny, the BAP reversed the award of fees for this work.

The Court cannot award a substantial contribution claim unless Radical Bunny meets an extremely high burden in demonstrating that its actions provided a benefit to the estate that outweighed the benefit to the claimant from such actions. *Cellular 101*, 377 F.3d at 1098. Radical Bunny offers no analysis of the specific services that provided a benefit to the Estate or any comparison of benefits received by the Estate or Radical Bunny. Moreover, Radical Bunny has completely failed to explain how the **services performed by DMYL,** for which it seeks an award, relate to a benefit conferred upon the Estate and instead relies upon conclusory allegations of net benefits for all services provided in this category. Despite having the burden of proof, Radical Bunny has offered no evidence to establish the value of its actions to the Estate and no legal authority supporting its unusual substantial contribution claims for "asset preservation."

Radical Bunny seeks to have the Debtor's Estate pay Radical Bunny's attorneys over $350,000 as a reward for Radical Bunny subordinating a disputed claim in order to allow for financing of the Debtor. As with the other areas for which DMYL seeks to have its fees paid as a substantial contribution to the Debtor's Estate, there is no evidence to link DMYL's $356,253.00 of legal fees to a direct benefit to the Debtor's Estate for what Radical Bunny classifies under the label "asset preservation" or any explanation of the necessity of the legal services to confer the alleged benefit of "preserving assets." Also

missing is evidence to support the second part of the analysis, that the benefit to the Debtor's Estate was greater than the benefit to Radical Bunny.[10]

Radical Bunny alleges that, by subordinating its interests, it allowed for financing of the Debtor and the use of cash collateral. Radical Bunny also argues that it saved the Debtor's Estate funds by fighting for better financing terms than those initially offered by the Debtor in its motion seeking approval of financing. Rather than establish the benefit of each activity undertaken by it, as required by the controlling law in the Ninth Circuit, Radical Bunny attempts to aggregate all of the money that the Debtor supposedly "saved" or "earned" in connection with the various financing opportunities in order to establish a value of the alleged benefit to the Debtor's Estate. Such aggregation is improper under the Ninth Circuit Standard. *BAP Opinion* at pp. 18-19 (noting that the court must review "independently each of the claimant's activities to then decide whether the activity benefitted the estate sufficiently to award the claimant expenses incurred for that activity) (citing *In re D.W.G.K. Restaurants*, 84 B.R. at 689-90)).

Further, Radical Bunny points to no fact in the record or legal authority to support its conclusion that the benefit to the Debtor's Estate of the alleged subordinations and allowances may be based simply upon the total amount of financing coming into the Debtor's Estate. If the amount of the financing obtained by the Debtor was the sole metric by which Radical Bunny's alleged contribution to the Debtor's Estate was to be measured, it would be impossible to evaluate what professional fees were necessary to create or realize that benefit. Moreover, if the fees to DMYL could be justified by simply looking to

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[10] The benefit alleged by Radical Bunny hinges on its unsubstantiated conclusion that it was a secured creditor at the time it subordinated. As the BAP recognized, Radical Bunny's status as a secured creditor was never determined by the Bankruptcy Court and was consistently contested by the Debtor, the OIC and other parties in interest throughout the case. *BAP Opinion* at 11. Radical Bunny cannot establish that its allowance of the use of cash collateral, subordination of its disputed lien for working capital or debtor-in-possession financing provided a benefit to the Debtor's Estate without first proving that it was actually a secured creditor of the Debtor. Moreover, it is unclear, based on the evidence in the Record, what legal services were required to confer the subordination and consent to cash collateral or how such necessary legal services could cost so much when the benefit alleged would seem to be derived primarily from the acts of Radical Bunny and not its lawyers with regard to subordination and cash collateral.

the value to the Debtor's Estate of the financing itself, as Radical Bunny suggests, then DMYL could charge any amount, up to one penny less than the amount of financing, and argue that it provided a greater benefit to the Debtor's Estate. Clearly, that is not the proper analysis. However, DMYL offers nothing more than this to support its request for legal fees of over $350,000. Radical Bunny claims that it provided a $14.75 million benefit to the Estate by subordinating its allegedly secured interest. Radical Bunny goes on to state that, if its objections to the OIC Plan cost the Estate $70,300 in fees, there would still be a benefit to the Estate of $14,679,700. *Supplemental Brief* at 13. Basically, as long as Radical Bunny keeps it fees under $14.75 million, it believes those fees should be paid from the Estate. Needless to say, Radical Bunny has no legal authority for this preposterous position, and it runs contrary to the BAP's finding that this suggested net benefit approach is not consistent with *Cellular 101*.

Additionally, Radical Bunny's assertion that it provided benefits through its efforts on the financing has never been presented as evidence to this Court, and the Liquidating Trust has never had the opportunity to test these **allegations** by cross-examination.[11] Likewise, Radical Bunny's claim continues to lack the detailed benefit analysis required to establish "substantial contribution." *See BAP Opinion* at p. 22.

In its Supplemental Brief, for example, Radical Bunny devotes nine pages to its account of the financing of the Debtor. In all nine pages, Radical Bunny devotes only one statement to DMYL's fees, and that one statement is conclusory. In this one insufficient and conclusory statement, Radical Bunny states that "it is reasonable to seek a claim for substantial contribution in the amount of attorneys fees and costs that [Radical Bunny] incurred. [Radical Bunny] has met its burden to establish its right to recover the requested amount...." *Supplemental Brief* at 22. It is beyond question that this statement regarding its fees falls far short of the standard enunciated by the BAP and the teachings of *Cellular*

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[11] Notably, these allegations (like all of the others that are first contained in the RB Supplemental Filing) were not a part of the Stipulated Facts or the Record for a reason – the parties do not agree that they are uncontested facts and they may not even be facts at all.

101. Mere conclusory statements made by a claimant that its acts resulted in a substantial contribution are insufficient for an administrative expense claim. *BAP Opinion* at 23 (citing *U.S. Lines, Inc.*, 103 B.R. at 430). Moreover, Radical Bunny offers no legal authority to support its position.

The BAP highlighted that Radical Bunny failed to provide a sufficiently detailed analysis of the value of the benefits to the Debtor's Estate from its actions in maintaining cash flow to the Debtor. As the moving party, Radical Bunny bore the burden of proof on this issue. *Id.* at 16 (citing *Andrew v. Coopersmith (In re Downtown Inv. Club III)*, 89 B.R. 59, 64 (9th Cir. BAP 1988)). Despite being informed by the BAP that it did not meet its burden and that the Record did not provide the Bankruptcy Court with sufficient information to conduct a proper benefit analysis or make the required findings with respect to the quantum of benefit, DMYL opted **not** to introduce new evidence into the Record or permit the Liquidating Trust to do the same for this Court to consider on remand. See *Transcript* at 3-4, 7. Because Radical Bunny decided not to introduce new evidence into the Record, it has, once again, failed to introduce any evidence from which to prove that any value was provided to the Estate from the legal service of DMYL or that the value to the Estate exceeded the value to Radical Bunny. As such, the conclusion has to be the same as it was on appeal; Radical Bunny's request for a substantial contribution award for work on "asset preservation" must be denied because there are insufficient facts upon which to base any award in this category. If this Court were to reach a contrary conclusion on the Record, its decision would be directly at odds with the decision of the BAP which found the same Record to be insufficient to support a substantial contribution award. Without new evidence, it is impossible for this Court to follow the BAP's direction and reach a contrary conclusion.

3. There Is No Record to Support Radical Bunny's Claim that Its Work on Settlements Provided Value to the Estate or that Such Value Exceeded the Value to Radical Bunny.

The BAP Opinion could not have been more clear with respect to Radical Bunny's request for fees relating to settlements. The BAP held that "[e]ven if Radical Bunny/DMYL could take credit [for the Debtor entering into unfavorable settlements], which may be difficult considering the involvement of at least eight other professionals, we see nowhere in the record where Radical Bunny articulated how efforts here increased dollars available to the estate and/or other creditors." *BAP Opinion* at 23.

Radical Bunny failed to prove that its participation in the settlement process constituted a substantial contribution because it provided no evidence from which the Court could analyze the comparative benefits as required by *Cellular 101*. Radical Bunny chose not to supplement the Record to identify the exact services performed by DMYL, the cost of those specific services or the results of those specific services to determine whether the benefit to the Estate outweighed the benefit to Radical Bunny.[12] *Cellular 101,* 377 F.3d at 1098.

The BAP found that the Record did not have any evidence of the value that Radical Bunny's work relating to settlements provided to the Estate or other creditors. Radical Bunny then chose not to seek to supplement the Record with any new evidence. Because the BAP found that the Record did not support a substantial contribution award for work on settlements and the Record has not changed, the result with this Court on remand cannot be different than the result before the BAP – the Record still fails to contain sufficient evidence to justify a substantial contribution award for work relating to settlements. Accordingly, Radical Bunny's request for fees for a substantial contribution relating to settlements must be denied.

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[12] Radical Bunny did not provide an analysis of each of the specific services that DMYL performed for Radical Bunny or how such services provided the requisite greater benefit to the Estate than to Radical Bunny. Radical Bunny, therefore, failed to establish that any alleged contribution was actually substantial. *See Cellular 101.* Moreover, the only alleged support offered by Radical Bunny relating to settlements, Exhibit 3 to the Supplemental Brief, provides no **evidence** of the alleged benefits from DMYL's services.

D. Deductions Must Be Made from Any Award to Radical Bunny.

The BAP ruled that the Record did not support any award of fees for substantial contribution to Radical Bunny. Because Radical Bunny did not supplement the Record, it is not entitled to an award for substantial contribution, as described, above. However, to the extent that this Court believes that an award to Radical Bunny for substantial contribution is justified and properly established, there are numerous deductions that must be taken from the $595,798.25 Award.

The BAP found that the $70,300 that Radical Bunny admitted it cost the Estate for fighting confirmation of the OIC Plan must be removed from any award for substantial contribution. *BAP Order* at 21. Similarly, the $14,711.50 that DMYL billed for its time working on a joint objection to the Debtor's motion to extend exclusivity must, according to the BAP, be removed from any award. *See Id.* at 20-21. The time spent working on the operating agreement must also be deducted from any award, though DMYL has made it nearly impossible to determine the amount of that deduction (though Radical Bunny does admit in the Supplemental Brief that it cost the Estate over $21,000 for wasting the OIC's time with an operating agreement that, ultimately, had to be discarded). *See Id.*

An additional deduction must be taken to reflect the $50,000 adequate protection payment that Radical Bunny admits that it received from the Estate. With respect to settlements, the entire request of $97,822 must be denied and not included in any award because the BAP determined that there was no evidence in the Record to support such an award, and Radical Bunny chose not to supplement the Record. *See Id.* at 23. Finally, by its own admission, DMYL has already been paid $108,022 of its fees. This amount should be removed from any award for substantial contribution because the award sought is intended solely to compensate DMYL.

Any award to Radical Bunny, therefore, must reflect these deductions:

Request Fees and Expenses	$595,798.25
Less:	
Settlements	$ 97,822.00
Costs for Plan Objections	$ 70,300.00
Fees for Joint Objection	$ 14,711.50
Adequate Protection Payment	$ 50,000.00
Payments Made to DMYL	$108,022.00
TOTAL	$254,942.75

From this amount, an appropriate reduction must be made for the time spent by Radical Bunny on the operating agreement that was never used, as well as the $21,000 that Radical Bunny cost the Estate by wasting the time of the professionals representing the OIC with respect to the operating agreement that had to be discarded. Radical Bunny's failure to properly support its fee request with adequately descriptive time entries should not be rewarded, and this Court should not be forced to guess what time was spent and, instead should deny fees in any category where it cannot precisely determine the time spent on the alleged benefit. Although the Liquidating Trust firmly believes that the Record does not support any award, if an award of some amount is to be made to Radical Bunny, it must, at a minimum, incorporate the appropriate deductions.

E. Radical Bunny Is Not Entitled to a Further Substantial Contribution Award for Failing to Properly Support Its Application.

Because Radical Bunny failed to properly meet its burden of proof and support its Application with evidence sufficient to meet the legal standard of *Cellular 101*, the Liquidating Trust was forced to incur additional costs for professional fees on appeal. The BAP Opinion highlighted the numerous failures of Radical Bunny's Application. On

remand, the Liquidating Trust is, yet again, forced to incur the cost of added professional fees to continue to highlight the numerous deficiencies of the Application and the Record created by Radical Bunny, none of which have been cured as instructed by the BAP. Despite its multiple failings, Radical Bunny suggests in its Supplemental Brief that it intends to seek **additional** fees for its work in attempting to obtain payment for its alleged substantial contribution. Radical Bunny failed to properly support its Application, and threatens to seek to have the Estate pay not only its own counsel but also Radical Bunny's counsel as it repeatedly (and unsuccessfully) tries to justify an award for substantial contribution. Any additional fee request from Radical Bunny must be denied as it clearly was not a substantial contribution to the Estate, and the fees are result of its own inability to meet its burden of proof and properly support its Application.

Radical Bunny's preparation of its Application and its subsequent litigation over that request do not provide a "substantial contribution" to the Debtor's Estate. *See In re US Lines*, 103 B.R. at 431 (the substantial contribution test does not permit an award for work done in connection with a fee application). The Ninth Circuit does not recognize a *per se* award of fees incurred in connection with the litigation over a fee application for fear that such fees will encourage frivolous fee requests. *In re Wind N. Wave*, 509 F.3d 938, 943-44 (9th Cir. 2007) (citing *In re Smith*, 305 F.3d 1078, 1085-86 (9th Cir. 2002)). The BAP denied payment of the Award to Radical Bunny because Radical Bunny failed to properly support its Application. To expect the Estate to pay Radical Bunny as it tries again to do it properly is ludicrous. Radical Bunny continues to cost the Estate money as it tries to improperly force through its inadequate Application with no evidentiary support. The expense that results from Radical Bunny's failure to support its Application properly is an expense to be borne solely by Radical Bunny. Therefore, any request for fees over an above the amount originally requested in the Application must be denied.

III. CONCLUSION

The BAP made clear that the Record was insufficient to support an award of substantial contribution. Radical Bunny has not supplemented the Record with the

evidence necessary to prove that it is entitled to a substantial contribution award. It has, therefore, failed to meet its burden. With the same Record that was found lacking on appeal, the result in this Court can be no different, and the Application must be denied.

Even if the Court were to consider DMYL's mindless meanderings on its various "contributions" to the bankruptcy, it is still not sufficient to provide evidence of the value to the Estate from its efforts. For example, there is no link provided to substantiate how the benefit conferred by Radical Bunny's subordination relates to $356,253.00 in legal fees from DMYL. Additionally, there is no evidence to prove that the value to the Estate was greater than the value to Radical Bunny. This was Radical Bunny's burden. It failed to meet its burden and, therefore, is not entitled to receive a substantial contribution award.

Even if this Court were to determine that the Record, which the BAP found to be insufficient to support a substantial contribution award, is now sufficient (though it has not been supplemented properly), Radical Bunny still fails to take into consideration the numerous areas in which it has failed to prove its case. Of the $118,810 in fees requested for work on a joint plan, Radical Bunny has failed to deduct the $14,711.50 spent on a joint motion to end exclusivity despite the BAP's instruction to do so. Similarly, no deduction was made for work on the operating agreement that was discarded and redrafted by the OIC. Finally, once all appropriate deductions are made, another $70,300 must be removed from any award because Radical Bunny admitted it cost the Estate at least this much in fighting the OIC Plan. Therefore, the most that could be awarded for work on a joint plan would be $34,098.50, less an amount for work on the discarded operating agreement, and the $21,000 it cost the Estate relating to the professional fees of the OIC.

Similarly, with respect to work on settlements, Radical Bunny is unable to support any award for this work. The BAP Order clearly states that there is nothing in the Record to demonstrate how its efforts in this area increased the dollars available to the Estate and/or other creditors. Because Radical Bunny has chosen to rely upon the same Record, the result cannot change. Radical Bunny's fee request of $97,882.50 for work on settlements must be denied.

With respect to work relating to asset preservation, Radical Bunny once again failed to provide any evidence of the value it provided to the Estate and whether that value exceeded the value to Radical Bunny. Because this was its burden and it failed to meet it, no award of fees can be made. Moreover, even if an award of some amount were to be considered in this category, Radical Bunny has failed to reduce its request by the $50,000 that it received as an adequate protection payment. Moreover, the award sought is for DMYL's fees, yet no reduction has been made for the $108,022 DMYL has already been paid. Finally, Radical Bunny has completely failed to provide the evidence necessary to explain how Radical Bunny's act of subordinating its allegedly secured interest in order to obtain financing relates to the $356,253 spent by its counsel. Clearly, drafting a subordination agreement or consenting to the use of cash collateral would not require the stratospheric legal fees charged. With no evidence of how any value provided by Radical Bunny relates to these fees of DMYL, no such fees may be awarded.

The BAP made clear that Radical Bunny failed to provide evidence of value of its work for **each activity** for which it sought an award. The BAP made clear that Radical Bunny failed to provide evidence that the benefit of its work to the Estate exceeded the benefit to Radical Bunny. Radical Bunny chose to plough ahead on a Record that was already determined to be insufficient to support its requested award. Because the Record is the same, the result must be the same, as well. Radical Bunny's Application must be denied, in full.

DATED this 29th day of November, 2010.

STRADLEY RONON STEVENS & YOUNG, LLP

By: /s/ Mark J. Dorval
Michael J. Cordone
Mark J. Dorval
Counsel for the Liquidating Trust of Mortgages, Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 29, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

John R. Clemency, Esq. Todd A. Burgess, Esq. Greenberg Traurig, LLP 2375 E. Camelback Road, #700 Phoenix, AZ 85015 clemencyj@gtlaw.com burgesst@gtlaw.com Attorney for Mortgage Ltd.	Jonathan E. Hess Larry Watson Office of the U.S. Trustee 230 N. 1st Avenue, Suite 204 Phoenix, AZ 85003-1706 Jon.e.hess@usdoj.gov Larry.watson@usdoj.gov Attorney for: US Trustee	Donald L Gaffney Donald Fredrick Ennis Christopher H. Bayley Snell & Wilmer LLP One AZ Center Phoenix, AZ 85004-2202 dgaffney@swlaw.com dfennis@swlaw.com CBayley@swlaw.com Attorney for: Central & Monroe; KGM Builders; Osborn III Partners
David Wm. Engelman Steven N. Berger Bradley D. Pack Engelman Berger, P.C. 3636 N. Central Avenue, #700 Phoenix, AZ 85012 dwe@engelmanberger.com snb@engehnanberger.com bdp@engelmanberger.com Attorney for: Tempe Land Company	Robert A. Shull Mariscal, Weeks, McIntyre & Friedlander 2901 N. Central, #200 Phoenix, AZ 85012-2705 rob.shull@mwmf.com Attorney for: Artemus Realty Capital and Gold Creek, Inc.	Shelton L Freeman Nancy J. March DeConcini McDonald Yetwin & Lacy 7310 North 16th Street Phoenix, AZ 85020 tfreeman@dmylphx.com nmarch@dmylphx.com Attorney for: Radical Bunny, LLC
Sean O'Brien Gust Rosenfeld, PLC 201 E. Washington St., #800 Phoenix, AZ 85004-2327 spobrien@gustlaw.com mcnichol@gustlaw.com Attorney for: Larry Lattig, Litigation Trustee	Richard R. Thomas T. Whitney Thomas Sclern Richardson 1640 South Stapley Dr., #205 Mesa, AZ 85204 rthomas@thomas-schern.com twhitney@thomas-schern.com Attorney for: Eva Sperber-Porter, Litchfield Road Associates Limited Partnership, and Baseline & Val Vista Associates Limited Partnership	Daniel P. Collins Collins, May Potenza, Baran & Gillespie 201 North Central Ave., #2210 Phoenix, AZ 85004-0022 dcollins@cmpbglaw.com Attorney for: William Hall
Dennis J. Wickman Seltzer Caplan McMahon Vitek 750 B Street, Suite 2100 San Diego, California 92101 wickham@scmv.com Attorney for: Southwest Value Partners Fund XIV, LP	Jerry L. Cochran Cochran Law Firm, P.C. 2929 E. Camelback, #118 Phoenix, AZ 85016 jcochran@cochranlawfirmpc.com Attorney for: Metropolitan Lofts	Lawrence E. Wilk Jonathan P. Ibsen Jaburg & Wilk, P.C. 3200 North Central Ave, #2000 Phoenix, AZ 85012-2440 lew@jaburgwilk.com jpi@jaburgwilk.com Attorney for: Laura Martini

Kevin J. Blakley Gammage & Burnham, P.L.C. Two North Central Avenue, 18th Fl Phoenix, AZ 85004 Kblakley@gblaw.com Attorney for: Ronald L. Kohner	Gerald K. Smith Lewis and Roca LLP 40 N. Central Ave., #1900 Phoenix, AZ 85004-4429 gsmith@lrlaw.com Attorney for: the Estate Scott M. Cole and Trustee of the SMC Revocable Trust U/T/A	Terry A. Dake Terry A. Dake, Ltd. 11811 North Tatum Blvd, #3031 Phoenix, AZ 85028-1621 Tdake@cox.net Attorney for: Penny Hardaway Investments
Rebecca J. Winthrep Ballard Spahr Andrews & Ingersoll, LLP 2029 Century Park East, #800 Los Angeles, CA 90067-2909 winthropr@ballardspahr.com Attorney for: University & Ash, Roosevelt Gateway; Roosevelt Gateway II and KML Development	Dean C. Waldt Ballard Spahr Andrews & Ingersoll, LLP Plaza 1000 — Suite 500 Main Street Voorhees, NJ 08043-4636 waldtd@ballardspahr.com Attorney for: University & Ash, LLC, Roosevelt Gateway, Roosevelt Gateway II and KML Development	Charles A. Lamar Justin C. Lamar 818 North First Street Phoenix, AZ 85004 clamar@kmldevelopment.com jlamar@kmldevelopment.com Attorney for: University & Ash; Roosevelt Gateway, Roosevelt Gateway II and KML Development
Ryan W. Anderson Guttilla Murphy Anderson, PC 4150 West Northern Avenue Phoenix, AZ 85051 randerson@gamlaw.com Attorney for: Department of Financial Institutions	Jerome K. Elwell Warner Angle 3550 N. Central, #1500 Phoenix, AZ 85012 jelwell@warnerangle.com Attorney for: Francine Haraway	C. Taylor Ashworth Alissa C. Lacey Stinson Morrison Hecker LLP 1850 N. Central Ave., #2100 Phoenix, AZ 85004 tashworth@stinson.com alacey@stinson.com Attorney for: Oxford & Investor Group
Felecia A. Rotellini Robert Charlton AZ Dept. of Financial Institutions 2910 N. 44th St., Suite 310 Phoenix, AZ 85018 Rotellini@azdfi.gov rcharlton@azdfi.gov	William J. Maledon John L. Blanchard James E. Cross Warren J. Stapleton Osborn Maledon 2929 N. Central Ave., #2100 Phoenix, AZ 85012 wmaledon@omlaw.com Jblanchard@omlaw.com jcross@omlaw.com wstapleton@omlaw.com Attorney for: Rightpath Limited Development Group, LLC	Christopher S. Reeder Yaw-Jiun Wu Sheppard, Mullin, Richter & Hampton 333 South Hope St., 48th Floor Los Angeles, CA 90071 creeder@sheppardmullin.com gwu@sheppardmullin.com Attorney for: Right Path
C. Bradley Vynalek Quarles & Brady LLP One Renaissance Square 2 North Central Avenue Phoenix, AZ 85004 bvynalek@quarles.com Attorney for: Ashley Coles	Craig A. Raby Office of the Attorney General 1275 W. Washington Phoenix, AZ 85007 craig.raby@azag.gov	Scott A. Rose Kerry M. Griggs The Cavanaugh Law Finn 1850 N. Central Ave., #2400 Phoenix, AZ 85004 srose@cavanaghlaw.com kgriggs@cavanaghlaw.com Attorney for: Central PHX Partners

Christopher A. LaVoy LaVoy & Chernoff, PC 201 N. Central Avenue, #3300 Phoenix, AZ 85004 cal@lavoychernoff.com Attorney for: Sue Ross and Ted Dodenhoff	Robert J. Spurlock Bonnett, Fairbourn, Friedman & Balint 2901 N. Central Avenue, #1000 Phoenix, AZ 85012-3311 bspurlock@bffb.com Attorney for: Foothills Plaza IV, LLC	S. Cary Forrester Forrester & Worth, PLLC 3636 N. Central Avenue, #700 Phoenix, AZ 85012 scf@fwlawaz.com Attorney for: the Lewis Trust
Sheldon Sternberg 3212 Rainbow Ridge Drive Prescott, AZ 86303 sheldonsternberg@q.com Pro Per	Gerald T. Hickman Jardine, Baker, Hickman & Houston 3300 North Central Ave. #2600 Phoenix, AZ 85012 ghickman@jbhhlaw.com Attorney for: Mayer Hoffman McCann	Philip R. Rudd Ethan B. Minkin Kutak Rock LLP 8601 N. Scottsdale Rd., #300 Scottsdale, AZ 85253 philip.rudd@kutakrock.com ethan.minkin@kutakrock.com Attorney for: AZ Bank & Trust
Christopher S. Reeder Margaret M. Mann Sheppard, Mullin, Richter & Hampton 333 South Hope St., 48th Floor Los Angeles, CA 90071-1448 CReeder@sheppardmullin.com MMann@sheppardmullin.com Attorney for: Rightpath Limited Development Group, Mayland Way Partners; Daniel L. Hendon; Rick L. Burton; Raymond Rodrigues; Robert C. Banovac; Rightpath Limited; and Glendale Jet Center	John J. Dawson John A. Harris Quarles & Brady LLP One Renaissance Square 2 North Central Avenue Phoenix, AZ 85004 jdawson@quarles.com jharris@quarles.com Attorney for: Southwest Value Partners Fund XIV and Southwest Value Partners Finance I	Stanford E. Lerch Anthony E. DePrima Lerch and DePrima PLC 4000 N. Scottsdale Road, #107 Scottsdale, AZ 85251 slerch@ldlawaz.com tdeprima@ldlawaz.com Attorney for: Howard Farkash (Successor TTEE OFT)
Richard H. Herold Hinshaw & Culbertson LLP 3200 N. Central Ave., #800 Phoenix, AZ 85012-2428 rherold@hinshawlaw.com Attorney for: Irwin Union Bank	Patrick R. Barrowclough Atkinson, Hamill & Barrowclough PC 3550 N. Central Ave., #1150 Phoenix, AZ 85012 Patrick.Barrowclough@azbar.org Attorney for: Chuck Niday, Trustee for Ross Verne Family Trust	Catherine A. Sims Rose Law Group PC 6613 N. Scottsdale Road, #200 Scottsdale, AZ 85250 csims@roselawgroup.com Attorney for: Kelly Haddad and Navval Haddad, Creditors

By:_____