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7
8 **IN THE UNITED STATES BANKRUPTCY COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 In re:

11 MORTGAGES LTD.,

14 Debtor.

Chapter 11

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

**REPLY TO LIQUIDATING TRUST'S
OBJECTION TO THE
SUPPLEMENTAL APPLICATION
PURSUANT TO 11 U.S.C.
§ 503(b)(3)(D) AND (4) FOR
ALLOWANCE AND PAYMENT OF
ADMINISTRATIVE CLAIM OF
CREDITOR RADICAL BUNNY**

Hearing Date: January 20, 2011
Hearing Time: 3:00 p.m.
Location: 230 N. First Ave., 6th Floor,
Courtroom 603, Phoenix, AZ Hearing

Related Docket Nos. 1888, 2014, 2027, 2088,
2395, 2398, 2407, 2514, 2521, 2529, 2595, 2982,
3009, 3018, 3021 & 3048

24
25 Creditor RADICAL BUNNY, L.L.C. ("RBLLC"), by and through its duly
26 authorized attorneys, hereby replies to the "Liquidating Trust's Objection to the
27 Supplemental Application Pursuant to 11 U.S.C. § 503(B)(3)(D) and (4) for
28 Allowance and Payment of Administrative Claim of Creditor Radical Bunny", DE

1 3048 ("Objection"), filed by Counsel for the ML Liquidating Trust ("LT Counsel").
2 Capitalized terms used, but not defined herein, are defined in the Supplemental
3 Application, DE 3021.

4 A. This Court Has Jurisdiction to Award Attorneys' Fees

5 Even after a notice of appeal has been filed, the Bankruptcy Court has
6 authority to award attorneys' fees. The Bankruptcy Court retains jurisdiction to rule
7 upon ancillary matters such as awarding attorneys' fees. The United States
8 Supreme Court has determined that it is "indisputable that a claim for attorney's
9 fees is not part of the merits of the action to which the fees pertain." *Budinich v.*
10 *Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988).

11 This continued jurisdiction has been repeatedly recognized. See, e.g.,
12 *United States ex rel Familian Northwest v. RG & B Contractors, Inc.*, 21 F.3d 952,
13 954-56 (9th Cir.1994); *In re Price*, 410 B.R. 51, 56 (Bankr. E.D. Cal. 2009); *In re*
14 *Ratliff*, 2010 WL 653700 (Bankr. D. Ariz. 2/18/2010). See also *Hill & Sanford, LLP*
15 *v. Mirzai (In re Mirzai)*, 236 B.R. 8, 10 (9th Cir. BAP 1999). Compare *In re*
16 *Sherman*, 491 F.3d 948 (9th Cir. 2006), which did not address an award of
17 attorneys' fees.

18 A notice of appeal "filed after ... judgment but before the determination of
19 the fee amount, pertain[s] only to the merits of the litigation." *Intel Corp. v.*
20 *Terabyte International, Inc.*, 6 F.3d 614, 617 (9th Cir.1993). Therefore, LT
21 Counsel's pending notice of appeal relates only to the merits of the Amended
22 Order, and this Court retains jurisdiction to determine the amount of attorneys fees
23 to be awarded.

24 B. Amended Order is Final Judgment Justifying Fee Award

25 This Court has authority to enforce the terms of the Amended Order. This
26 Court can determine the amount of attorneys fees and costs to be awarded as
27 requested by the Supplemental Application, which is ripe for decision. This Court
28

1 has already determined that the fees and costs incurred in preparing and in
2 litigating RBLLC's Administrative Claim Application are recoverable under *North*
3 *Sports, Inc. v. Knupfer (In re Wind N' Wave)*, 509 F.3d 938, 943-944 (9th Cir.
4 2007), and related Ninth Circuit precedent.

5 This Court's Amended Order is a final order for purposes of determining the
6 amount of attorneys fees to be awarded. "It is fundamental that the mere
7 pendency of an appeal does not, in itself, disturb the finality of a judgment."
8 *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983). The only
9 stated basis for LT Counsel's objection to a determination of the amount of RBLLC's
10 attorneys fees is an unsupported argument that the Liquidating Trust could succeed
11 on its latest appeal. That possibility does not affect the current finality of the
12 Amended Order for the purpose of awarding attorneys' fees.

13 A fee award is only final and appealable after the amount of attorneys fees
14 to be awarded has been determined. *See, e.g., Intel Corp. v. Terabyte*
15 *International, Inc.*, 6 F.3d 614, 617 (9th Cir.1993). A prompt determination of the
16 amount of attorneys fees to be awarded will create a second final, appealable
17 judgment. Immediate entry of such award will address the LT Counsel's objection
18 to governing federal law (which requires LT Counsel to separately appeal the
19 requested fee award). If LT Counsel desires to appeal the fee award, LT Counsel
20 can request that such appeal be consolidated with the appeal of the Amended
21 Order.

22
23 C. There is No Legal or Equitable Basis for Delay

24 There is no legal or equitable basis to delay entry of an award for the
25 Supplemental Application. An immediate award of attorneys fees is appropriate
26 under Ninth Circuit law. Based on information from the Trustee of the Liquidating
27 Trust, the Liquidating Trust may have failed to comply with its legal obligation to
28 maintain reserves for payment of administrative claims in this case. An immediate

1 determination of the amount of the one professional administrative claim that
2 remains pending in this Chapter 11 case will be beneficial for all parties.

3 The Supplemental Application establishes RBLLC's entitlement to attorneys
4 fees pursuant to the legal standards of 11 U.S.C. § 330. The filings in this case,
5 and this Court's own knowledge of the litigation of the Administrative Claim
6 Application, establish that RBLLC's attorneys fees were "necessary" due to the
7 actions of the Liquidating Trustee and LT Counsel. These are the only legally
8 applicable legal standards that RBLLC is required to meet to recover its attorneys
9 fees and costs. *See North Sports, Inc. v. Knupfer (In re Wind N' Wave)*, 509 F.3d
10 at 943-944.

11 LT Counsel failed to timely object to the reasonableness of any particular
12 time entries evidencing DMYL's legal services. There is no legal or equitable
13 basis to allow LT Counsel to pursue "discovery" regarding the reasonableness of
14 those attorneys fees when no discovery was timely pursued. It would be
15 particularly inequitable to allow LT Counsel to delay a determination of RBLLC's
16 attorneys fees when the Liquidating Trust may not even have the resources to
17 pay its outstanding obligations. Any delay in entering the requested fee award
18 would only unduly prejudice the rights of RBLLC who has provided extensive
19 benefit to the estate in this case and who funded the Liquidating Trust.
20

21 D. Conclusion and Requested Relief

22 Based on the foregoing, RBLLC requests that this Court grant the requested
23 relief in the Supplemental Application and direct the immediate payment in the
24 amount of \$128,763.59 to DeConcini McDonald Yetwin & Lacy, P.C., as Counsel
25 for RBLLC as provided in the Confirmation Order. RBLLC further requests such
26 additional and other relief as is just and proper under the circumstances of this
27 Chapter 11 Case.
28

1 DATED this 20th day of January, 2011.

2 DECONCINI McDONALD YETWIN & LACY, P.C.

3
4 BY /s/ Shelton L. Freeman
5 Shelton L. Freeman
6 Counsel to Radical Bunny, L.L.C.

7 COPIES sent via the U.S. Bankruptcy
8 Court's ECF noticing system this
9 20th day of January, 2011.

10 **COPIES** served by e-mail or U.S. Mail
11 this 20th day of January, 2011, to:

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By /s/ Melissa Smith