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

11 **In re:**

12 **MORTGAGES LTD.,**

13 **Debtor.**

**In Proceedings Under Chapter 11**  
**(converted from Chapter 7)**

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

**PARTITIONING OWNERS' MOTION**  
**TO AMEND FINDINGS UNDER**  
**RULE 7052 AND TO ALTER OR**  
**AMEND JUDGMENT UNDER RULE**  
**9023**

**(Oral Argument Requested)**

14 Pursuant to *Fed.R.Civ.P.* 52(b), Bankruptcy Rule 7052, the parties referred to herein  
15 as “the Partitioning Owners” hereby move this Court to amend its findings, and/or to make  
16 additional findings, in connection with its May 28, 2010 *Order Approving Motion to Sell*  
17 *Real Property Free and Clear of Liens, Claims, Encumbrances, and Interests* [Docket  
18 #2770] (“the VCB Order”). In addition, pursuant to *Fed.R.Civ.P.* 59(e), Bankruptcy Rule  
19 9023, the Partitioning Owners move this Court to alter or amend the VCB Order. In support  
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1 of this two-pronged motion, the Partitioning Owners submit the accompanying  
2 Memorandum of Points and Authorities.

3  
4 DATED this 10<sup>th</sup> day of June, 2010.

5  
6 **THOMAS SCHERN RICHARDSON, PLLC**

7 By /s/ Richard R. Thomas  
8 Richard R. Thomas  
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12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. BACKGROUND.**

14 On May 7, 2010, ML Manager filed a motion to approve the sale of the “VCB  
15 Property.” [Dkt. No. 2731]. The Partitioning Owners filed a formal objection on May 26,  
16 2010. [Dkt. No. 2763]. The Court convened a hearing on the proposed sale on May 27,  
17 2010.<sup>1</sup> The Court heard oral argument but did not convene an evidentiary hearing, despite  
18 Partitioning Owners’ request for one. During the hearing, the Court approved the sale. ML  
19 Manager then uploaded a form of order, which the Court signed and entered the next  
20 morning, on May 28, 2010.  
21

22  
23 Partitioning Owners now seek to have the Court amend or supplement its findings in,  
24 and to alter/amend, the VCB Order.  
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27 <sup>1</sup> The Transcript of that hearing has been filed as Dkt. No. 2774. All references to the Transcript of that hearing shall be  
in the following form: “(T. xx:xx-xx:xx)”

1 **II. THIS COURT SHOULD AMEND ITS FINDINGS UNDER RULE 7052,**  
2 **BECAUSE THE VCB ORDER IS INCOMPLETE.**

3 The Partitioning Owners respectfully contend that this Court committed manifest  
4 errors of law and fact in rendering its ruling on the VCB Property sale. (See Section III  
5 below) Without waiving that argument, the Partitioning Owners ask this Court to  
6 supplement the VCB Order to include the following additional findings by the Court at the  
7 May 27, 2010 hearing.<sup>2</sup>

9 **A. The VCB Order Should Contain the Court's Finding That, Even**  
10 **Assuming Serious Violations Of A Breach Of Fiduciary Duty By**  
11 **Scott Coles And Mortgages, Ltd. Prior To Bankruptcy,**  
12 **The Agency Agreement Was Not Terminated.**

13 In its Motion to Sell, ML Manager addressed the interests of the "17 Pass-Through  
14 Investors" who did not transfer their fractional interests in the VCB loan to VCB Loan,  
15 LLC. Those "investors" have been referred to as "NTIs." To force the NTIs (which include  
16 the Partitioning Owners) to sell their interests in the VCB Property against their will, ML  
17 Manager invoked "Section 3(b) of the Agency Agreement." It is an alleged power that ML  
18 Manager inherited from Mortgages Ltd.

19  
20 In their Objection, citing black-letter agency law, the Partitioning Owners vigorously  
21 argued that the agency agreement ML Manager now brandishes actually terminated before  
22 bankruptcy as a result of the rampant breaches of fiduciary duty by Mortgages, Ltd. The  
23 Partitioning Owners found it unthinkable that ML Manager should be allowed to wield the  
24

25 <sup>2</sup> Partitioning Owners do not agree with the findings they now seek to add to the VCB Order but believe that since such  
26 findings were either explicitly referenced by the Court or necessary to the conclusions reached by the court, they should  
27 explicitly set forth in the Order. Adding such findings also serves the purpose of providing a more complete and  
28 accurate record for appeal.

1 very agency power that Mortgages Ltd. had so blatantly abused before the bankruptcy.  
2 According to the Partitioning Owners, not even an agency coupled with an interest can or  
3 should survive such disloyalty by the agent. Addressing that specific issue, this Court stated  
4 the following:  
5

6 ...Where we are is not what anyone envisioned, certainly not  
7 when they literally bought Scott Coles' promises. I agree there  
8 were undoubtedly, I'm not making a finding, but just noting - -  
9 more or less judicial notice, I guess - - numerous breaches of  
10 fiduciary duties at probably the inception of all of these  
11 relationships.

12 The problem we're dealing with here today is really not  
13 how do we give everybody what they thought they were  
14 promised by Scott Coles, because frankly that's not possible. It  
15 never was possible. And again, I'm not making a finding it's - -  
16 it was a Ponzi scheme, but that's always the situation that exists  
17 when you do have a Ponzi scheme. You've got promises being  
18 made and people relying on them that were impossible at the  
19 time they were made. We, however, today are in the situation of  
20 how is the best way to get out of this mess.

21 . . . . .

22 ...there were pre-bankruptcy breaches of that fiduciary duty.  
23 Again, I'm not making a finding of that but simply noting that  
24 they undoubtedly were. But again, when you have a power  
25 coupled with an interest, legally I don't think that automatically  
26 terminates the power. It does give rise to claims against the  
27 estate and perhaps against others, but doesn't terminate the  
28 power.

29 . . . . .

30 Consequently I, for today's proceeding, find and  
31 conclude that Mortgages Ltd. does have the power to liquidate  
32 this property....

33 (T. 64:16-65:6; 66: 13-22)

1 Thus, although the Court claims not to have been making an express finding of  
2 breach of fiduciary duty, at a minimum, the Court *assumed* such a breach. The Court then  
3 found that such a breach *did not* terminate the agency power ML Manager inherited from  
4 Mortgages Ltd. It is that finding, and the Court's assumption of the breach of fiduciary  
5 duty, that should now be included in the Court's order explaining the basis for its approval  
6 of the sale. Partitioning Owners reemphasize that they strongly disagree with the Court's  
7 finding that the agency power survived the pre-bankruptcy breaches of fiduciary duty.  
8 However, to make the Court's order accurate, the Court should add as a finding to its Order  
9 that the agency power of Mortgages Ltd. survived all pre-bankruptcy breaches of fiduciary  
10 duty and were assignable in whole to ML Manager.  
11  
12

13  
14 **B. The Court Should Articulate in Its Order the Basis For Its Jurisdiction**  
15 **Over the Partitioning Owners.**

16 In its VCB Order, the court simply concluded that “[t]his Court has jurisdiction over  
17 the issues presented in the Motion.” (VCB Order, 2:8) In light of the post-confirmation  
18 circumstances of the VCB sale, and with all due respect to the Court, that is not a sufficient  
19 description of the basis of a finding on the Court's jurisdiction, given that in their objection,  
20 Partitioning Owners challenged the subject matter jurisdiction of this Court to approve a  
21 sale of the Partitioning Owners' interest in VCB Property. The Court said very little at the  
22 May 27, 2010, hearing about its alleged subject matter jurisdiction. However, the Court  
23 acknowledged at oral argument that the VCB sale was not a Section 363 sale. (T. 41: 11-  
24 21). In its original motion to approve the sale, ML Manager invoked Section 363, Section  
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1 105, and even the Plan as the basis for this Court's subject matter jurisdiction. The VCB  
2 Order should clarify the basis for the Court's assertion of subject matter jurisdiction over the  
3 Partitioning Owners and all other NTIs in the VCB Property.  
4

5 **C. The Court Should Include Its Finding That ML Manager Owes Non-**  
6 **Transferring Investors a Fiduciary Duty.**

7 Whether ML Manager owed NTIs a fiduciary duty was an important issue at the May  
8 27, 2010 hearing on the VCB sale. Judging from ML Manager's arguments, ML Manager  
9 owed Partitioning Owners and the other NTIs no fiduciary duty whatsoever, despite its  
10 professed status as the agent of those parties<sup>3</sup>. Partitioning Owners argued vigorously that  
11 ML Manager did owe a fiduciary duty to the NTIs and that it had breached that duty in the  
12 way it had dealt with the proposed sale.  
13

14 This Court agreed, in concept, with Partitioning Owners. The Court specifically  
15 found that:  
16

17 I do agree, it is – must be exercised with full recognition of  
18 fiduciary duty. I don't think you can say there was no fiduciary  
19 duty here. On the other hand, though, is it a fiduciary duty as  
20 came out in my colloquy with Mr. Hendricks that is effectively  
21 limited or at least must be construed in light of the fact that  
22 whenever you have an agency coupled with an interest, you  
23 have an inherent conflict of interest...And therefore, I think, the  
24 fiduciary duty which does exist, must nevertheless be judged in  
25 light of the known and existing conflicts.<sup>4</sup>  
26

25 <sup>3</sup> Which argument prompted the following inquiry from the Court: "So does that effectively mean there is no fiduciary  
26 duty for an agent when he's got an agency coupled with an interest?" (T. 34: 10-12)

27 <sup>4</sup> The Court later clarified its meaning of the use of the word "existing conflicts." (T. 68:10-69:16)  
28

1 (T. 65:21-66:10) Thus, the Court expressly found that ML Manager owes the NTIs a  
2 fiduciary duty. However, there is no hint of that finding in the VCB Order. This Court  
3 should supplement the VCB Order to add an express finding that ML Manager owed the  
4 NTIs, including the Partitioning Owners, a fiduciary duty and the nature and extent of the  
5 fiduciary duty.  
6

7  
8 Moreover, the Court could not have reached the conclusion it reached regarding the  
9 authority of ML Manager to sell the directly owned interests of the Partitioning Owners in  
10 the VCB Property without a finding that agent ML Manager had no fiduciary duty to  
11 comply with the explicit instruction of the Partitioning Owners/principals, which explicit  
12 instruction was set forth in the formal objections as follows:  
13

14 “ . . . the Partitioning Owners hereby explicitly instruct ML  
15 Manager to take no action on their behalf, or any one of them,  
16 that would cause the sale or any other transfer or disposition  
of the Partitioning Owners’ VCB Interest.”

17 (Objection page 10: 23-27) Partitioning Owners specifically request that the Order be  
18 supplemented to explicitly include a finding regarding the right of ML Manager to act in  
19 derogation of a specific instruction of Partitioning Owners.  
20

21 **III. THIS COURT SHOULD ALTER OR AMEND THE VCB ORDER UNDER**  
22 **RULE 9023.**

23 A motion to alter or amend a judgment under Rule 9023 [Federal Rule 59(e)] is  
24 appropriate to correct manifest errors of fact or law. *See, Backlund v. Barnhart*, 778 F.2d  
25 1386, 1388 (9<sup>th</sup> Cir. 1985); *In re Luce*, 2010 WL 1236295 (Bkrtcy. D. Mont., March 25,  
26  
27  
28

1 2010); *In re Oak Brook Apartments of Henrico County, Ltd.*, 126 B.R. 535 (Bkrtcy. S.D.  
2 Ohio, 1991). Without waiving any appealable issue in the Court's VCB order, the  
3 Partitioning Owners also ask this Court to alter or amend the VCB Order under Bankruptcy  
4 Rule 9023 to correct certain manifest errors of fact and law.

6 **A. This Court Erred In Concluding That The Agency Agreement Creates**  
7 **An Agency Coupled With An Interest.**

8 Neither the parties nor the Court expended much analysis on the question of whether  
9 the alleged agency power of ML Manager was "coupled with an interest." The Court  
10 merely made a bald finding to that effect. (T. 65:7-14) Undoubtedly, the Court and ML  
11 Manager were satisfied that the issue had already been decided the day before in connection  
12 with the associated case of *ML Manager v. Hawkins, et al*, Case No. 2:10-ap-00430-RJH  
13 ("the Hawkins case").<sup>5</sup> In filing their Objection to the VCB sale, Partitioning Owners  
14 expressly incorporated the arguments of the Rev-Op parties in the Hawkins case on the  
15 issue of agency. The Court there concluded that the agency power of ML Manager was  
16 coupled with an interest and, therefore, not revocable at will by the principal. For the  
17 reasons the Rev-Op parties in the Hawkins case presented to support their argument that the  
18 agency was not coupled with an interest, the Partitioning Owners here contend that this  
19 Court should alter or amend its VCB Order and find that the alleged agency power of ML  
20 Manager was *not* coupled with an interest. Moreover, this Court's failure to convene an  
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27 <sup>5</sup> The minute entry of that hearing is found at Docket # 85 in that case.



1 evidentiary hearing to consider that issue is further evidence that the Court committed  
2 manifest error in reaching its conclusion.

3  
4 In addition, the Court ignored the glaring fact that, as to this sale, ML Manager has  
5 absolutely *no* interest, coupled or otherwise, including in particular the kind of interest the  
6 Court found during the May 26, 2010 hearing on the motion for partial summary judgment  
7 in the Hawkins case. The VCB Property has been foreclosed.

8  
9 **B. This Court Erred In Finding That It Had Jurisdiction To Consider A**  
10 **Sale That Included The Sale Of The Partitioning Owners' Interest In**  
11 **The VCB Property.**

12 In its Motion to Sell, ML Manager described what it claimed to be the jurisdictional  
13 power of this Court to approve a sale of non-consenting co-owners like Partitioning  
14 Owners:

15 ML Manager asserts that the Court has retained jurisdiction in the  
16 Plan for such a matter as this, including sections 9.1(e), (g), and (h)  
17 of the Plan among others, and has the authority to approve the sale  
18 under Section 363(b) and (f) of the Bankruptcy Code and under  
19 Section 105 of the Bankruptcy Code, among other sections, as an  
20 order in aid of implementation of the Plan.

21 (ML Manager's Motion, at p. 4) However, nowhere in any provision of the Plan, nor in  
22 any portion of the Court's confirmation order, has the Court reserved jurisdiction to  
23 approve the sale of co-owners' interest in any property. Moreover, as the Court itself  
24 acknowledged,<sup>6</sup> 11 U.S.C. § 363 does not apply following confirmation. *See, In re Golf,*  
25 *LLC, 322 B. R. D. (Bankr., D. Neb., 2004); In re Western Integrated Networks, LLC, 329*

26 <sup>6</sup> The Court acknowledged that the proposed sale was not a "363 sale," adding "...most importantly, it's not a 363(h)."  
27 (T. 41:11-21)

1 B.R. 334 (Bankr. D. Colo., 2005)(finding that section 542 does not apply post-  
2 confirmation). Thus, this Court simply did not have the jurisdictional authority to approve  
3 the sale of property that would involve the sale of Partitioning Owners' interests.  
4 Consequently, this Court should not have approved the proposed sale of the entire VCB  
5 Property.  
6

7 **C. The Court Erred in Ignoring the Fact That Many Partitioning Owners**  
8 **Withheld Discretion From Mortgages Ltd.**

9 Many Partitioning Owners refused to grant Mortgages Ltd. "discretion" in their  
10 investor account agreements. The Court ignored this fact, perhaps prompted by the  
11 incomplete description ML Manager provided the Court of that particular provision.  
12 Counsel for ML Manager made a distinction between the "discretion" issue in the investor  
13 account agreements and the discretion in the agency agreements themselves. (T. 39:16-  
14 40:13) The Court echoed that distinction in its verbal order. (T. 65:7-20) However, the  
15 actual text of the "discretion" paragraph in the investor account agreement exposes that  
16 incorrect distinction. For example, in the "Existing Investor Account Agreement" of Bruce  
17 and Alivia Buckley ("Buckley"),<sup>7</sup> Buckley expressly withheld authority for Mortgages Ltd.  
18 to act as Buckley's agent *under the agency agreement*. True, in section 6 of that same  
19 investor account agreement, Buckley expressly withheld discretion to Mortgages Ltd. to  
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26 <sup>7</sup> That Agreement is attached as Exhibit 1 to a May 12, 2010 letter on behalf of Bruce and Alivia Buckley that  
27 purported to ensure termination of the agency agreement and power. That entire letter is found as Exhibit 6 to the  
28 Objection of the Partitioning Owners and is in the record.

1 *select* the loans. However, the withholding of discretion was much broader than that.

2 Buckley expressly refused to give Mortgages Ltd. the power to

3  
4 ...[i]n its sole discretion, to make various determinations and take  
5 various actions with Loans with respect to Participations to be  
6 acquired, acquired, or sold by the undersigned, including extending  
7 the terms of the Loans, modifying the payment terms of the Loans,  
8 accepting prepayments on the Loans, releasing a portion of the  
9 collateral securing the loans, and otherwise dealing with the Loans  
10 on behalf of the undersigned.

11 Thus, contrary to the incomplete description of the investor account agreement ML  
12 Manager put forth at the May 27, 2010, hearing, the plain terms of the document  
13 Mortgages Ltd. itself drafted deprived Mortgages Ltd. – and now, ML Manager – of any  
14 power to act. Buckley is not the only Partitioning Owner that withheld discretion in this  
15 manner.

16 This Court committed manifest error in ignoring the express withholding of  
17 discretion by Partitioning Owners. In light of that withholding of discretion, ML Manager  
18 has no power to act on behalf of the “investors” involved. No investor that withheld  
19 discretion ever bargained for the kind of treatment they now have received at the hand of  
20 ML Manager. This Court should legitimize ML Manager’s improper efforts to hot-wire  
21 the rights of Partitioning Owners.

22  
23 **D. This Court Erred In Concluding That The Agency Power Did Not**  
24 **Terminate Prior To The Death of Scott Coles.**

25 This Court assumed that there had been “numerous breaches of fiduciary duties at  
26 probably the inception of all of these relationships.” (*See*, T. 64:20-21; 66:12-15) However,  
27

1 without explanation and without any support in the law, this Court found that, "...when you  
2 have a power coupled with an interest, legally I don't think that [such a breach of fiduciary  
3 duty] automatically terminates the power." (See, T. 66:12-19) The Court's ruling is  
4 manifest error.  
5

6 It is black-letter agency law that, even where the agency is coupled with an interest,  
7 the disloyalty of the agent terminates the agency power. For example, under the  
8 Restatement (Second) Agency § 112,  
9

10 Unless otherwise agreed, the authority of an agent terminates if,  
11 without knowledge of the principal, he acquires adverse interests or  
12 if he is otherwise guilty of a serious breach of loyalty to the  
principal.

13 Courts have faithfully followed this principle. For example, the Ninth Circuit found that

14 ...[w]hen an agent acts contrary to the interests of the principal, the  
15 agency relationship ceases. See *United States v. Hill*, 579 F.2d 480,  
16 482 (8th Cir.1978) (person who picks up mail for another with intent  
to steal no longer acts as an agent and is guilty of mail theft)...

17 *U.S. v. Galindo*, 871 F.2d 99, 101 (9<sup>th</sup> Cir. 1989). Thus, an agent who breaches its  
18 fiduciary duty to its principal forfeits its agency power.  
19

20 The disloyal agent cannot save its agency power (as ML Manager is attempting to  
21 do here) by waving its "agency coupled with an interest" in the face of its victim/principal.  
22 Whatever measure of superhuman status ML Manager thinks it acquired with the agency  
23 agreement, the prior disloyalty of Mortgages Ltd. was pure kryptonite to that power before  
24 ML Manager ever latched onto it. As one noted jurist concluded,  
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1 An agent is a fiduciary with respect to the matters within the scope  
2 of his agency. The very relation implies that the principal has  
3 reposed some trust or confidence in the agent, and the agent or  
4 employee is bound to the exercise of the utmost good faith, loyalty,  
5 and honesty toward his principal or employer. The fiduciary  
6 relationship existing between an agent and his principal has been  
7 compared to that which arises upon the creation of a trust, and the  
8 rule requiring an agent to act with the utmost good faith and loyalty  
9 toward his principal or employer applies regardless of whether the  
10 agency is one coupled with an interest, or the compensation given  
11 the agent is small or nominal, or that it is a gratuitous agency.

12 *Giordano v. Stubbs*, 184 S.E.2d 165, 169 - 170 (Ga. 1971)(Felton dissenting). In *Marnon*  
13 *v. Vaughan Motor Co.*, 219 P. 2d 163 (Ore. 1950), the Oregon Supreme Court faced a case  
14 of a disloyal agent who (like ML Manager) thought his agency “coupled with an interest”  
15 made him immune to termination. The court shot that argument down squarely, stating as  
16 follows:

17 All the cases cited by Marnon differ from the case at bar in that they  
18 were dealing with the cancellation of contracts by the principal  
19 without cause. In the case at bar we have a situation where the agent  
20 has been unfaithful to his principal in garnering secret profits, *and*  
21 *whether the agency is coupled with an interest or not would make no*  
22 *difference in so far as the right of the principal to terminate the*  
23 *contract is concerned. A sound public policy decrees that an agent*  
24 *must be faithful to his trust; and when he is not, we know of no law*  
25 *that would compel the principal to retain the agent in his services.*  
26 *Even where an agency is coupled with an interest, the power and*  
27 *right of the principal to cancel for cause obtains; and if the agent has*  
28 *any redress, it must come from the terms of the contract itself.*

*Id.* at 166 (emphasis added). These cases frame the inalterable conclusion that ML  
Manager should not be allowed to wield an agency power that, prior to Mortgages Ltd.’s

1 bankruptcy, was the instrument of fraud and disloyalty and that, by operation of law,  
2 evaporated long before ML Manager boarded the agency bandwagon.

3  
4 **E. The Court Erred in Finding That ML Manager Could Ignore The**  
5 **Express Instructions of Partitioning Owners to Refrain From Selling**  
6 **Their Interests in the VCB Property.**

7 The Court correctly found that ML Manager owes a fiduciary duty to the Partitioning  
8 Owners. However, the Court committed manifest error when it found that ML Manager  
9 could ignore the express instruction of the Partitioning Owners to refrain from selling their  
10 interest in the VCB Property.

11 An agent that can disregard the instructions of its principal is an unfaithful agent,  
12 especially where, as here, complying with the instructions of the Partitioning Owners'  
13 instruction will not jeopardize any ethereal "coupled interest" ML Manager thinks it has.

14 The Court's ruling ignores the most basic concepts of agency law. Early in this  
15 bankruptcy case, this Court reminded the parties of the overarching fiduciary duties  
16 imposed on any entity purporting to act on behalf of the investor principals. At the  
17 November 25, 2008 hearing regarding the debtor's request for approval of certain  
18 settlements related to the so-called University & Ash loan and the Roosevelt Gateway I  
19 and II loans, this Court noted that the debtor's authority, such as it was, was that "given in  
20 the agency agreement or subscription agreement" and the Court observed the following:  
21  
22  
23

24 Those are my reasons why I believe the authority exists – existed and  
25 continues to exist in the debtor in possession. I do agree, of course, it has  
26 to be exercised with the interest of investors and creditors primarily in mind  
27 because **there is also that fiduciary duty.**"  
28

1  
2 (See Section II.C. of Partitioning Owners' Objection)

3 The "fiduciary duty" identified by the Court finds routine expression throughout the  
4 common law and the existence and nature of that fiduciary duty are summarized in the  
5 Restatement (Third) of Agency ("*Restatement*") as follows (and in relevant part):  
6

7 Agency is the fiduciary relationship that arises when one person (a  
8 "principal") manifests assent to another person (an "agent") that the agent  
9 shall act on the principal's behalf and subject to the principal's control, and  
the agent manifests assent or otherwise consents so to act...

10 An agent has a fiduciary duty to act loyally for the principal's benefit in all  
11 matters connected with the agency relationship.

12 *Restatement, §§1.01, 8.01.*

13 More particularly, the *Restatement* also dictates the following about the limits of an  
14 agent's duty:  
15

16 ...**(2) An agent has a duty to comply with all lawful instructions received**  
17 **from the principal** and persons designated by the principal concerning the  
agent's actions on behalf of the principal...

18 An agent acts with actual authority when, **at the time of taking action that**  
19 **has legal consequences for the principal**, the agent reasonably believes, in  
20 accordance with the principal's manifestations to the agent, **that the**  
**principal wishes the agent so to act...**

21  
22 **(1) An agent has actual authority to take action designated or implied in the**  
23 **principal's manifestations to the agent and acts necessary or incidental to**  
24 **achieving the principal's objectives, as the agent reasonably understands**  
**the principal's manifestations and objectives when the agent**  
**determines how to act...**

25  
26 **(2) An agent's interpretation of the principal's manifestations is reasonable**  
27 **if it reflects any meaning known by the agent to be ascribed by the principal**  
28

1 and, in the absence of any meaning known to the agent, as a reasonable  
2 person in the agent's position would interpret the manifestations in light of  
3 the context, including circumstances of which the agent has notice **and the**  
4 **agent's fiduciary duty to the principal...**

4 (Emphasis added) (See *Restatement*, §§ 2.01, 2.02, 8.09)

5 Thus, the *Restatement* makes clear that the fiduciary duties of an agent require: (i)  
6 the agent act subject to a “principal’s control” (§1.01), (ii) the agent has a “a fiduciary duty  
7 to act loyally for the principal's benefit in all matters connected with the agency  
8 relationship” (§8.01), (iii) the agent act in accordance with “all lawful instructions received  
9 from the principal (§8.09) “as the agent reasonably understands the principals  
10 manifestations” (§2.02) “at the time of taking action that has legal consequences for the  
11 principal” § 2.01. Therefore, agency law does not allow ML Manager to disregard the  
12 instructions of these principals. The Court committed manifest error by ignoring these  
13 black-letter concepts.  
14  
15  
16

#### 17 **IV. CONCLUSION.**

18 The VCB Order is incomplete. It does not contain all of the Court’s material  
19 findings, even though Partitioning Owners disagree with many of those rulings. For the  
20 sake of accuracy, completeness and ultimately efficiency on appeal, Partitioning Owners  
21 respectfully ask this Court to include additional findings in its VCB Order, Pursuant to  
22 Bankruptcy Rule 7052. As to the Court’s substantive rulings, pursuant to Bankruptcy Rule  
23 9023 and in light of the clear manifest error, Partitioning Owners respectfully ask this Court  
24 to alter or amend those findings, for the reasons stated herein.  
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DATED this 10<sup>th</sup> day of June, 2010.

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Original electronically filed  
this 10<sup>th</sup> day of June, 2010 with  
the Clerk of the US Bankruptcy Court  
and electronically delivered to all parties  
and counsel of record

/s/ Teresa A. Whitney