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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

10 In re  
11 MORTGAGES LTD.,  
12 Debtor.

Chapter 11

Case No. 2-08-BK-07465-RJH

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

16 ML Manager LLC ("ML Manager") hereby files its Response to Partitioning  
17 Owners' Motion to Amend Findings Under Rule 7052 and To Alter or Amend Judgment  
18 Under Rule 9023 ("Motion To Amend")(Docket No. 2778) and requests that the Court  
19 deny the Motion To Amend without hearing. The Order Approving Motion to Sell Real  
20 Property free and Clear of Liens, Claims, Encumbrances, and Interests ("Sale  
21 Order")(Docket No. 2770) was entered on May 28, 2010. The sale is supposed to close  
22 mid-July 2010. The Partitioning Owners (also called Movants in this Response) filed the  
23 Motion To Amend 13 days after the entry of the order and requested a hearing. The filing  
24 of the Motion To Amend has already delayed closing and the setting of a hearing would  
25 further delay the closing and jeopardize the sale to the Buyer, all without the filing of an  
26 appeal and posting of a bond by Partitioning Owners. If the Court denies the Motion To

1 Amend, the time for appeal starts to run and to delay the closing further the Partitioning  
2 Owners will have to decide if they are going to appeal and will have to post a bond if the  
3 Court grants a stay pending appeal. This process at least would protect ML Manager and  
4 the investors in the VCB Loan LLC from the damages of the loss of the sale in the event  
5 the Buyer terminates the sale. ML Manager therefore requests that the Court deny the  
6 Motion To Amend promptly and without hearing.

7 In sum, the Motion To Amend is without merit. This Court stated its complete  
8 findings of fact and conclusions of law on the record at the May 27, 2010 oral argument.  
9 The Sale Order signed by this Court specifically incorporates those findings and  
10 conclusions. Moreover, the signed Sale Order is consistent with the findings and  
11 conclusions as stated by the Court. Accordingly, there is no reason for this Court to alter  
12 or amend either its findings or its order. Movants are attempting to turn back the clock on  
13 over a year and a half of this Court's rulings in order to attempt to gain greater rights than  
14 those set forth by the confirmed plan of reorganization (the "Plan"). The Court's findings  
15 and order are consistent with the evidence in the record, the law of case, and the tenor of  
16 this Court's prior rulings. Accordingly, the Court should deny the Motion To Amend  
17 promptly and without hearing.

18 **I. THE FINDINGS OF THE COURT ARE SUFFICIENTLY STATED ON**  
19 **THE RECORD**

20 In bankruptcy proceedings it is common for the Court to make oral findings of fact  
21 and conclusions of law. *See, e.g., Rains v. Flinn (In re Rains)*, 428 F.3d 893, 898 (9th Cir.  
22 2005) (noting that the bankruptcy court made oral findings of fact and conclusions of law  
23 and then memorialized these findings in a minute order); *Neilson v. United States (In re*  
24 *Olshan)*, 356 F.3d 1078, 1081 (9th Cir. 2004) (noting that the bankruptcy Court issued  
25 oral findings of fact and conclusions of law). These findings and conclusions are part of  
26 the record, binding on litigants and applicable parties and constitute the law of the case.

1 *See Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990)  
2 (holding that the law of the case doctrine precludes a court from reconsidering a decision  
3 it had already made). Moreover the oral findings of fact and conclusions of law stated by  
4 the Court on May 27, 2010 sufficiently support the Court’s judgment.

5 **A. The Courts’ findings and conclusions regarding the affect of Mortgages**  
6 **Ltd.’s breach of fiduciary duty are specifically stated on the record.**

7 As expressly stated in the Motion To Amend, the Court specifically stated its  
8 findings and conclusions relating to the affect of Mortgages Ltd.’s alleged breach of  
9 fiduciary duty on the record. *See*, May 27, 2010 Transcript 65:7-66:19. This conclusion  
10 renders irrelevant Mortgages Ltd.’s alleged breach of fiduciary duty because the alleged  
11 breach can have no further affect on these proceedings. According to the Court, the  
12 alleged breach provided the investors with a damages claim against Mortgages Ltd.  
13 May 27, 2010 Transcript at 66:17-19. As all of the potential claims against Mortgages  
14 Ltd. were resolved through the Plan, the alleged breaches are irrelevant to the issues  
15 currently before the Court. As the Movants and the Court are aware, the Plan specifically  
16 allowed each Investor (including the Movants) an “Investor Damage” Claim and treated  
17 their Unsecured Claim in Class 11E or Class 11F by giving them a beneficial interest in  
18 the ML Liquidating Trust for their Investor Damage Claim. *See* Plan at p.29-30 and 32-  
19 33. These issues were expressly resolved under the Plan because 1800 or more claims  
20 were filed by Investors asserting, among other things, breach of fiduciary duty, breach of  
21 contract, fraud, etc., against the Debtor Mortgages Ltd. *See* Article VIII.C.6 on page 63 of  
22 the Disclosure Statement. Thus, there is no reason to include additional findings relating  
23 to the fiduciary duty. Finally, even if relevant, the Movants have waived these issues  
24 (particularly issues of termination of the agency because of pre-petition breaches) as they  
25 were not raised in the bankruptcy proceedings or at any other time since the Plan took  
26 affect over a year ago.

1           **B. The Court retained jurisdiction pursuant to the Plan.**

2           The only objection to jurisdiction was related to the choice of law between this  
3 action and the Movants' Partition action in the State Court. As both of these matters  
4 undoubtedly relate to the bankruptcy, there is no question of jurisdiction and no need for  
5 the Court to alter its order to include a jurisdictional basis. Article IX and Article X of the  
6 Plan provide a reservation of jurisdiction to address the issues raised in the Motion To  
7 Sell.

8           **II. THERE EXIST NO GROUNDS TO ALTER OR AMEND THE ORDER**

9           This Court has held that a motion for reconsideration under Rule 9023 or  
10 Rule 59(e) "should not be granted, absent highly unusual circumstances, unless the trial  
11 court is presented with newly discovered evidence, committed clear error, or if there is an  
12 intervening change in the controlling law." *In re Arden Props., Inc.*, 248 B.R. 164, 167  
13 (Bankr. D. Ariz. 2000) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir.  
14 1999)). A court's reconsideration of its judgment is an "extraordinary remedy" and  
15 should only be used sparingly. *Id.* at 168. This Court has recognized four circumstances  
16 in which a Rule 9023 motion would be appropriate: 1) where the movant can demonstrate  
17 that the motion is necessary to correct manifest errors of law or fact upon which the  
18 judgment is based; 2) where the movant has newly discovered evidence; 3) to prevent  
19 manifest injustice; and 4) where there has been an intervening change in controlling law."  
20 *Id.* Here, none of these circumstances are present and the Motion To Amend fails.

21           **A. ML Manager possesses an agency coupled with an interest.**

22           The Motion To Amend first claims that the Court committed manifest error by  
23 finding that ML Manager possessed an agency coupled with an interest. Despite this  
24 claim, the movants concede that they expressly incorporated the Rev Op Group's  
25 arguments and that the Court expressly rejected these arguments at the May 26, 2010  
26 hearing. At that hearing the Court held that based on the "undisputed facts Mortgages,

1 Ltd. did have an agency that was coupled with interest in the thing itself, the subject of the  
2 agency, mainly the loans.” Excerpt from May 26, 2010 Transcript at 2:7-10. The Court  
3 further held that Mortgages Ltd. specifically retained an interest in the default interest rate  
4 and the interest spread and transferred this interest to ML Manager. *Id.* at 2:11-19.

5 Here, the Motion To Amend does not set forth a valid reason for the Court to  
6 exercise an extraordinary remedy to amend this ruling. *See, In re Arden Props* 248 B.R.  
7 at 167-68. There is no law or evidence that suggests that the Court’s ruling constituted a  
8 manifest error in fact or law. *Id.* The Motion To Amend does not cite a single case that  
9 questions this Court’s ruling. *See* Motion at 8-9. Neither does the Motion To Amend  
10 provide any support for the baseless allegation that Mortgages Ltd. did not retain and then  
11 transfer an interest in the VCB Loan. Specifically, the Motion To Amend does not cite or  
12 explain the “glaring facts” that this Court allegedly ignored. *Id.* at 9. Accordingly, there  
13 are no grounds to amend this Court’s ruling. *See, e.g. In re Arden Props* 248 B.R. at 167-  
14 68.

15 Nor did the Court commit manifest error by declining to hold an evidentiary  
16 hearing on this issue. In its ruling, the Court expressly held that it was ruling on the  
17 undisputed facts. Accordingly, there was no need to hold an evidentiary hearing.  
18 Furthermore, the Motion to Amend does not set forth any factual dispute relating to this  
19 decision that was unavailable to the Movants. Thus, the Court need not reconsider its  
20 ruling.

21 **B. The Court’s exercise of jurisdiction was not manifest error.**

22 This Court did not err by accepting jurisdiction over ML Manager’s Motion to Sell  
23 the Subject Property. In the Plan, the Court reserved broad jurisdiction over matters  
24 relating to the implementation of the Plan. Plan at Art. IX. This retention of jurisdiction  
25 enables the Court to assist, when necessary, with the implementation of the Plan. In  
26 addition, in Section 9.1(e) the Court retained jurisdiction to determine “all controversies

1 and disputes arising under, or in connection with, the Plan and all agreements or releases  
2 referred to in the Plan...” Further in Section 9.1(g) the Court retained jurisdiction to  
3 effectuate payments under, and the performance of, the provisions of the Plan.” In  
4 addition the Channeling Injunction of Section 10.3 of the Plan confers jurisdiction on the  
5 Bankruptcy Court, especially in light of the Partition action and the allegations of  
6 termination due to breach of duty pre-petition. The Motion to Amend’s claim that this  
7 jurisdiction constitutes error fails.

8 **C. This Court did not err in ignoring Movants’ discretion arguments.**

9 The Motion To Amend further claims that this Court committed manifest error by  
10 ignoring their argument that certain investor’s withholding of discretion prohibited ML  
11 Manager from selling the property. However, this argument fails as this Court has already  
12 addressed and denied this argument.

13 This Court had already ruled that the withholding discretion provision did not  
14 affect Mortgages Ltd.’s ability to manage the loans. “Under the ‘law of the case’ doctrine,  
15 a court is ordinarily precluded from reexamining an issue previously decided by the same  
16 court, or a higher court, in the same case.” *Minidoka Irrigation Dist. v. DOI*, 406 F.3d  
17 567, 573 (9th Cir. 2005); *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002). The  
18 withholding of discretion argument is the same argument that presented to the Court and  
19 litigated in connection with the University & Ash litigation. At that time, the Court  
20 rejected the argument and found:

21 Indeed, it’s [the argument about withholding discretion] kind  
22 of contrary to the very premise of some of the objectors that  
23 this was in fact a security under the Howey standards,  
because I believe most investors were investing in  
Mortgages’ ability to manage these loans.

24 See Transcript of November 25, 2008 at p. 5 (which is Exhibit 46 to Complaint in the  
25 Adversary Proceeding). The Court’s decision that an investor’s decision to withhold  
26 discretion did not affect the Agent’s ability to manage the loan for the benefit of all the

1 investors is the law of the case. Indeed, this ruling provided the foundation for numerous  
2 other rulings as well as the basis for the Plan.

3 Moreover, the Court's prior decision was correct based on the interpretation of the  
4 Agency Agreements. As noted below, the Agency Agreements grant agent with broad  
5 powers to manage the loans in the Agent's sole discretion. Applying the alleged  
6 withholding of discretion to the Agency Agreements would render portions of the  
7 Subscription Agreements, the Private Offering Memorandum, and the entire Agency  
8 Agreements inconsistent with each other, superfluous, and would eviscerate the entire  
9 structure of the investment where common management was central to the investment and  
10 therefore declared irrevocable. The law regarding construction of contracts is clear. The  
11 Court must adopt an interpretation that, wherever possible, harmonizes the various  
12 provisions of the documents, gives full effect to all separate provisions, does not render  
13 any provision superfluous, and does not allow the evisceration of parts of the contract.  
14 *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 476, ¶ 45, 224 P.3d 960, 973 (App. 2010)  
15 ("We interpret a contract 'so that every part is given effect, and each section of an  
16 agreement must be read in relation to each other to bring harmony, if possible, between all  
17 parts of the writing.' Our reading of one provision of a contract must not render a related  
18 provision meaningless."). In this case, the only interpretation that meets all of these  
19 requirements of the law is the interpretation that the Grant of Discretion provision applies  
20 to the instance where agency could be granted to select the investment, but not to the  
21 agency granted by the Agency Agreements. This interpretation is consistent with this  
22 Court's previous ruling. Accordingly, the Court did not commit manifest error by  
23 reaffirming this decision.

24 **D. ML Manager retains authority coupled with an interest.**

25 The Motion To Amend also claims that the Court erred in denying their argument  
26 that Mortgages Ltd.'s agency terminated prior to the bankruptcy as a result of Mortgages

1 Ltd.'s breaches of fiduciary duty. However, the Court's denial of this argument was not  
2 error, because an agency coupled with an interest does not create a typical agency  
3 relationship. The Court's decisions regarding the inability to terminate Mortgages Ltd.'s  
4 agency are well supported by legal authority. Rather than repeat the arguments here, ML  
5 Manager incorporates by reference the pleadings and the Court's ruling on this issue in the  
6 prior proceedings.

7 The cases cited by the Motion To Amend do not demonstrate that the Court's  
8 ruling constituted manifest error. The Motion To Amend cites to two separate cases,  
9 neither of which is binding upon this Court. First, the Motion Top Amend cites to a  
10 dissenting opinion in *Giordano v. Stubbs*, 184 S.E.2d 165, 169-70 (Ga. 1971) to support  
11 the proposition that Mortgages Ltd. breach terminated the agency agreement. This  
12 unsupported opinion was not adopted by the opinion and has not been followed by any  
13 other jurisdiction. Thus, this authority carries little weight in this Court. Similarly, the  
14 Motion's citation to *Marnon v. Vaughan Motor Co.*, 219 P.2d 163 (Ore. 1950) is also  
15 highly distinguishable. The proffered citation in *Marnon* is clearly dicta as there the court  
16 determined that the agent did not possess an agency coupled with an interest.

17 These insignificant cases do not set forth the "inalterable conclusion" that the  
18 Motion To Amend claims that they establish. Indeed, this limited authority supports ML  
19 Manager's conclusion that this Court's decision did not constitute manifest error.

20 **E. Movants gave up the authority to direct the agent.**

21 Finally, the Motion argues that the Court erred by holding that ML Manager could  
22 ignore the Movants' express instructions. However, this holding was not manifest error  
23 because the Agency Agreement provided Mortgage Ltd., and subsequently ML Manager,  
24 with the sole discretion to manage the Movants' interests in the Loans, including the VCB  
25 Loan.

26 The Motion To Amend attempts to frame this issue as a matter of fiduciary duty,



1 claiming that ML Manager violated its fiduciary duty by failing to follow the express  
2 instructions of its principals. Motion at 15-16. Contrary to this statement, the clear  
3 language of the Agency Agreement resolves this issue. The Agency Agreements,  
4 accepted by each of the investors, grants ML Manager the sole discretion to make  
5 decisions relating to the loans. Thus, the law cited in the Motion To Amend is irrelevant  
6 as it is clear that ML Manager did not violate any fiduciary duty by exercising its business  
7 judgment in seeking the sale.

8 The type of agency relationship between ML Manager and its principals cannot  
9 require the principals' pre-approval before taking any action. This principle is eloquently  
10 stated in *Heine v. Newman, Tannenbaum, Helpern, Syracuse & Hirschtritt*, 856 F. Supp.  
11 190 (S.D. N.Y. 1994), *aff'd*, 50 F.3d 2 (2d Cir. 1995), where a principal sued its agent for  
12 acting pursuant to an agency agreement without first communicating with the principal.  
13 The court rejected that argument stating:

14 If parties were required to verify with the principal each  
15 instruction given to them by an attorney-in-fact, the authority  
16 given to attorneys-in-fact would be eviscerated. No party to a  
17 transaction would rely on the statements of attorneys-in-fact  
18 without independent verification from the principal, and,  
19 accordingly, an attorney-in-fact would not be authorized to  
take any and all acts as fully as the principal. If a principal  
were permitted, at a future point in time, to decide that a  
particular instruction should have been verified, parties to a  
contract could not and would not be able to rely on the  
statements or instructions of attorneys-in-fact.

20 *Id.* at 195 (citations omitted).

21 Here, the Court can take judicial notice of the numerous documents previously  
22 filed that set forth the nature of the agency relationship. It is clear that the Movants,  
23 granted Mortgages Ltd. broad agency powers to manager the Loans on their behalf by  
24 executing the Agency Agreements. These agreements do not require the principals' pre-  
25 approval prior to exercise of the powers. Instead, the agreements make it clear that the  
26 actions are within the "sole discretion" of the agent. *See Agency Agreement*, at § 1

1 (“Participant authorizes Agent to perform all of the tasks described in this Agreement on  
2 Participant’s behalf, **at Agent’s sole discretion.**”) (emphasis added). This concept is  
3 repeated numerous times. See Agency Agreement Section 1(b), Section 1(d), and Section  
4 3(b), all of which restate the long list of items which can be performed by the Agent as  
5 Agent deems appropriate in its sole discretion. Any contrary ruling would provide each  
6 investor with an absolute veto right over any action taken by ML Manager.

7 **III. CONCLUSION**

8 To prevail on the Motion To Amend, the Movants must establish that this Court’s  
9 Sale Order constitutes manifest error. There is no error. Accordingly, the Motion To  
10 Amend fails and should be promptly denied without hearing.

11 DATED this 20th day of June, 2010.

12 FENNEMORE CRAIG, P.C.

13 By           /s/ Cathy L. Reece (#005932)

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16 Copy of the foregoing was served  
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