EXHIBIT

A

IT IS HEREBY ADJUDGED and DECREED this is SO ORDERED.

The party obtaining this order is responsible for noticing it pursuant to Local Rule 9022-1.

Dated: July 27, 2010

Randolph J. Haines

RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re MORTGAGES LTD., Debtor.	Chapter 11 Case No. 2:08-bk-07465-RJH
ML MANAGER LLC, an Arizona limited liability company, Plaintiff, v. WILLIAM L. HAWKINS as Trustee of the CORNERSTONE REALTY AND DEVELOPMENT, INC. DEFINED BENEFIT PLAN AND TRUST, et al.; Defendants.	Adv. Pro. No. 2:10-ap-00430-RJH Consolidated with Adv. No. 2:10-ap-00717 **Declaratory Judgment**
And Related Counterclaims	

Pursuant to 28 USCS § 2201, and Bankruptcy Rule 7012(c), and for good cause appearing, the Court hereby enters judgment (1) dismissing the Count II (the Declaratory Judgment Claim) as set forth in the First Amended Counterclaims (Docket Nos. 38 through 52 in Adversary Proceeding No. 2:10-ap-00430-RJH (the "Hawkins Adversary") filed by Defendants/Counterclaimants William L. Hawkins as Trustee of the Cornerstone Realty and Development, Inc. Defined Benefit Plan and Trust, et al (the eighteen counterclaimants are collectively, the "Counterclaimants"), (2) dismissing Count II of the First Amended Complaint (Docket 7 in Adversary Proceeding No. 2:10-ap-00717-RJH (the "LLJ Adversary")) filed by L.L.J. Investments, LLC ("LLJ") (the Counterclaimants and LLJ are collectively the "Rev-Op Group", and Count II of the Counterclaims and

Count II of LLJ's Amended Complaint are collectively, the "Rev-Op Group's Declaratory Judgment Claims"), (3) granting judgment for Plaintiff ("ML Manager") under its Verified Complaint for Declaratory Judgment on the Enforceability of the Agency Agreements ("ML Manager's Declaratory Judgment Claim") (Docket No. 1 filed in the Hawkins Adversary") (the "Verified Complaint"), and (4) denying the Counterclaimant's Affirmative Defenses to ML Manager's Declaratory Judgment Claim.

This Judgment is based on: (1) the Pleadings of record and exhibits attached thereto in Hawkins Adversary including the Verified Complaint (Docket No. 1), the Rev-Op Group's Answers (Docket Nos. 18 through 35), the Rev-Op Group's Counterclaims (Docket Nos. 38 through 52), ML Manager's Answer to Amended Counterclaim[s] (Docket Nos. 60 through 74); and (2) the Pleadings of record and exhibits attached thereto in LLJ Adversary including the Amended Complaint (Docket No. 7), and ML Manager's Answer (Docket No. 16). Pursuant to *United States v. 14.02 Acres*, 547 F.3d 943, 955 (9th Cir. 2008) this Judgment is also based on the Court's judicial notice of the other filings and matters of record in the Hawkins Adversary, including the briefing and argument on ML Manager's Application for an Order to Show Cause (*See* Docket Nos. 2, 13) the Rev-Op Group's Motion for Partial Summary Judgment (*See* Docket Nos. 58, 59, 80, 81, 84, 92), and ML Manager's Motion for Judgment on the Pleadings (*See* Docket Nos. 86, 95, 96). In addition, the Court takes judicial notice of the filings, matters of record and argument from the general bankruptcy case In re Mortgages, Ltd. (the "Debtor"), filed on June 20, 2008, Case No. 2:08-bk-07465-RJH (the "ML Bankruptcy"), all associated cases filed before or heard by this Court.

Upon consideration of the Pleadings and exhibits thereto, the matters of record considered under the doctrine of Judicial Notice, other filings of record, the statements and arguments of counsel, the Court finds and concludes as follows:

1. Judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law.

2. Although all allegations of fact by the party opposing the motion are

accepted as true and are construed in the light most favorable to that party, the Court need not accept as true mere conclusory allegations or legal characterizations. Materials submitted with the Pleadings may also be considered.

3. In connection with a motion for judgment on the pleadings, a party must allege facts to state a claim to relief or defenses that are plausible on their face. Facial plausibility means that a party must plead factual content that allows the court to draw the reasonable inference against the opposing party.

4. This matter arises out of the ML Bankruptcy.

5. This Court has jurisdiction over this consolidated adversary proceeding pursuant to 28 U.S.C. § § 157 and 1334.

6. This consolidated adversary proceeding is brought pursuant to FRBP 7001, 11 U.S.C. § § 1129, 1141 and the Confirmed Plan in the ML Bankruptcy.

7. ML Manager was formed pursuant to the First Amended Plan of Reorganization approved in the ML Bankruptcy (Docket No. 1532) (the "Confirmed Plan"), and the Confirmation Order entered on May 20, 2009 (Docket No. 1755) (the "Confirmation Order").

8. All objections made by any members of the Rev-Op Group to the Plan were withdrawn prior to the entry of the Confirmation Order.

9. There was no appeal taken from the Confirmation Order or Plan. The Plan and Confirmation Order constitute a final, non-appealable order. They are the "law of the case" and must be given the effect of a final judgment. Any argument or objection that could have or should have been made to a provision of the Plan or the Confirmation Order has been waived, overruled or adjudicated by final judgment.

10. Under its Declaratory Judgment Claim, ML Manager seeks a declaration confirming the validity and binding nature of the transfer and assignment to ML Manager of the "Agency Agreements" (the form of which was attached as Exhibit 20 to the Verified Complaint), and a declaration of ML Manager's rights and agency authority under the Agency Agreements as it applies to the Rev-Op Group. (*See* Verified Complaint, at ¶ 137)

11. Under their Declaratory Judgment Claim, the Rev-Op Group seeks a declaration:

a. Regarding the existence, validity, and scope of ML Manger's agency authority over the Rev-Op Group's interests. (*See* Hawkins Counterclaim,[1] at ¶ 78)

b. That any agency authority held by ML Manager was revocable because ML Manager does not have an agency coupled with an interest. (*See* Hawkins Counterclaim, at ¶ 78)

c. Alternatively, that any agency authority was revocable and was in fact validly revoked because the Debtor did not have an agency coupled with an interest and/or defaults on the part of the Debtor made the agency revocable. (*See* Hawkins Counterclaim, at ¶ 79)

d. Alternatively, that the documents associated with the agency are executory in nature, and any assignment is prohibited by the Bankruptcy Code such that the purported transfer and assignment is invalid. (*See* Hawkins Counterclaim, at ¶ 80)

e. Alternatively, that the Agency Agreement relied upon by ML Manager was not effectively transferred to ML Manager. (*See* Hawkins Counterclaim, at ¶ 81)

f. Alternatively, that the Rev-Op Group is not bound by the Agency Agreements because they were never executed. (*See* Hawkins Counterclaim, at ¶ 82)

g. Alternatively, the Agency Agreements do not give ML Manager the authority to, without prior written consent from the Rev-Op Group (i) sell their interests in loans, (ii) sell property associated with their loans, (iii) initiate lawsuits on their behalf against borrowers, (iv) initiate or complete any kind of judicial or

[1] Unless otherwise noted, the Counterclaims filed by all of the Rev-Op Group are similar in all respects material to this Order. Because the other Counterclaims are similar, many citations in this Order shall refer only to the Counterclaim filed by the first named defendant William L. Hawkins as Trustee of the Cornerstone Realty and Development Inc. Defined Benefit Plan and Trust, Docket No. 52 (the "Hawkins Counterclaim").

non-judicial foreclosure action, (v) settle, compromise or modify any loans or guarantees (vi) sell, dispose of, or transfer any real property or other assets in which the Rev-Op Group holds an interest, and (vii) bind the Rev-Op Group to any additional indebtedness.

(*See, e.g.,* Hawkins Counterclaim, at ¶ 83)

12. The Court's findings and conclusions as stated herein are separate and not necessarily dependent on each other.

13. The Court's findings and conclusions stated herein are not an exclusive list of all findings and conclusions made by the Court, which include, among other things, all findings and conclusions as stated on the record during hearings in this matter, and any other findings and conclusions that are necessary to support this Order.

14. Both Declaratory Judgment Claims raise the validity and binding nature of the Agency Agreement attached to the Verified Complaint as Exhibit 20, and both Declaratory Judgment Claims involve the issue of whether the Agency Agreement is binding on the Rev-Op Group.

15. The Plan defines "Revolving Opportunity Investors" ("Rev-Op Investors") to mean the "Investors that subscribed to and entered into the Revolving Opportunity Loan Program with Debtor." (Plan, at § 2.81)

16. The Plan provides that Rev-Op Investors have the voluntary decision to transfer their ownership interests in what is defined by the Plan as ML Loans to a "Loan LLC", or to retain these interests in their own name. (*See* Plan, at § 3.6 (k)(Class 10B: Revolving Opportunity Investor Claims). The Plan then provides: "The Agency Agreements and other contracts may be transferred by the Debtor to ML Manager LLC … at the option of the Plan Proponent." (*Id.*).

17. Because the Plan defines Rev-Op Investors as investors who have subscribed to and entered into the Revolving Opportunity Loan Program (the "Rev-Op Program"), the question before the Court is whether the Rev-Op Group, who claim to be Rev-Op Investors (*see, e.g.,* Hawkins Counterclaim, at ¶ 9), are bound by or subject to the Agency

Agreement. In other words, an initial question is whether the Agency Agreements were part of the Rev-Op Program.

18. It is undisputed that the separate form Agency Agreements, themselves, were not physically executed by the Rev-Op Group. This fact, however, does not end the inquiry as to whether the Rev-Op Group is bound by or subject to the Agency Agreement.

19. As described below, three documents have relevance to the question of whether the Agency Agreement is binding on the Rev-Op Group. These documents are (i) the "Revolving Opportunity Loan Program Purchase Agreement" or "Rev-Op Agreement," (ii) the Existing Investor Account Agreement, the Investor Subscription Agreement, or the New Investor Subscription Agreement (collectively, the "Subscription Agreement"), and the Private Offering Memorandum dated July 10, 2006 (the "POM").

20. In the Verified Complaint, it is alleged that the Subscription Agreements all contain a provision which states materially as follows:

> By executing this Subscription Agreement, the undersigned accepts and agrees to be bound by the Agency Agreement ... The undersigned further hereby irrevocably constitutes and appoints Mortgages Ltd., with full power of substitution, as the undersigned's true and lawful attorney and agent, with full power and authority ...

(Verified Complaint, at ¶ 36)

21. In responding to this allegation, the Rev-Op Group "[a]vers that the quoted document speaks for itself," but generally asserts they lack knowledge as to truth of the remaining allegations and that the Subscription Agreement is not a defined term, and therefore the allegation is vague. (*See, e.g.,* Hawkins Answer, at ¶ 16).

22. The Verified Complaint further alleges that the Revolving Opportunity Loan Program Purchase Agreements have provisions entitled Section 11.1, "Adoption of the Agreements," which states as follows:

> By executing this Agreement, Investor accepts and agrees to be bound by the Agency Agreement ... Investor further hereby irrevocably constitutes and appoints [Mortgages Ltd.] with full power of substitution, as the Investor's true and lawful attorney and agent, with full power and authority...

(Verified Complaint, at ¶ 40)

23. In responding to this allegation, the Rev-Op Group again "[a]vers that the quoted document speaks for itself, " but generally asserts the Revolving Opportunity Loan Purchase Agreement is not a defined term, and therefore the allegation is vague. (*See, e.g.,* Hawkins Answer, at ¶ 19).

24. The POM attached as Exhibit 1 to the Verified Complaint provides:

> The Company [the Debtor] and each Participation holder will be a party to an Agency Agreement, substantially in the form of Exhibit A to this Memorandum, that provides for the Company to administer the Loans on behalf of the Participation holders. The Company will act as the agent for the Participation holders under the Agency Agreement, as the beneficiary under the deeds of trust on the underlying properties, and will have certain powers and duties including administering the Loans on behalf of the Participation holders.

(Exhibit 1 to Verified Complaint, at p. 8).

25. The Court finds that there is no plausible dispute as to the form of the Agency Agreement, the Subscription Agreement, the Rev-Op Agreement, or the POM with regard to the incorporation of the Agency Agreement. The form of the Agency Agreement relied upon by ML Manager in the Verified Complaint is the same form of the Agency Agreement that is attached to the POM. (*Compare* Exhibit 20 of the Verified Complaint *to* Exhibit A to Exhibit 1 to the Verified Complaint). Moreover, the POM attaches as an Exhibit the operative form of the Agency Agreement, the Subscription Agreement and the Rev-Op Agreement.

26. There is no plausible fact alleged that another operative form of an Agency Agreement exits. Furthermore, the Court takes judicial notice of the fact that there has been significant litigation in the ML Bankruptcy and in related proceedings regarding the Debtor's and ML Manager's authorization to act as the agent for the investors. There has not been any evidence presented during any of this litigation that another version of the Agency Agreement was attached to the POM, the Rev-Op Agreement or the Subscription Agreement, with materially different terms, or used by the Debtor in connection with the

Rev-Op Program.

27. The Court finds that there is no plausible disputed issue of fact sufficient to warrant a trial on the form of the Agency Agreement at issue.

28. Because there is no plausible issue of material fact as to the form of the Agency Agreement, and because the Rev-Op Agreement, Subscription Agreement and POM all indicate that by entering into the Rev-Op Program Revolving Opportunity Investors accept and agree to be bound by the Agency Agreement, the question is whether the Rev-Op Group executed or agreed to be bound by the Rev-Op Agreement, the Subscription Agreement, or the "Rev-Op Program" as set forth in the POM.

29. Prior to the bankruptcy, the Debtor raised funds from investors through various loan programs. (Verified Complaint, at ¶ 31; Hawkins Answer,[2] at ¶ 10).

30. The Rev-Op Group were investors with the Debtor through what the Debtor called the "Revolving Opportunity Loan Program." (Hawkins Counterclaim, at ¶ 9; ML Manager Answer to Hawkins Counterclaim, at ¶ 9; Verified Complaint, at ¶ 34; Hawkins Answer, at ¶ 13). The Parties have referred to this as the "Rev-Op Program."

31. Based on the record before the Court, the Court finds that the Rev-Op Group subscribed to and entered into the Rev-Op Program with the Debtor.

32. Investment in the Rev-Op Program was not offered by the Debtor prior to July 2006. (Hawkins Counterclaim, at ¶ 13, ML Manager Answer to Hawkins Counterclaim, at ¶13)

33. Investment in the Rev-Op Program was offered to investors for the first time pursuant to the Private Offering Memorandum dated July 10, 2006 (the "POM"). (Hawkins Counterclaim, at ¶ 14, ML Manager Answer to Hawkins Counterclaim, at ¶14)

34. The POM was attached as Exhibit 1 to the Verified Complaint.

35. No party alleged, offered any plausible evidence, allegation, or offered a

[2] The Answers filed by the Rev-Op Group are similar in all respects material to this Order. Because the other Answers are similar, citations in this Order shall refer to the Answer filed by the first named defendant William L. Hawkins as Trustee of the Cornerstone Realty and Development Inc. Defined Benefit Plan and Trust, Docket No. 18 (the "Hawkins Answer").

proffer of evidence that another version of a POM existed with terms that were materially different for the Rev-Op Program, or that any other offering document existed that contained material terms for purposes of the issues raised in this matter that were different from the POM.

36. The Court further takes judicial notice that there has been significant litigation in the ML Bankruptcy and in related proceedings regarding terms of the loan programs offered to investors, the POM or other offering documentation, and the Agency Agreements at issue in this matter, and there has been no evidence presented that another version of the POM with materially different terms exists with respect to the Rev-Op Program and the Agency Agreements, or that other offering documents exist for the Rev-Op Program that has materially different terms with regard to the Agency Agreements.

37. Attached to the POM dated July 10, 2006 (Exhibit 1 to the Verified Complaint) are five exhibits including: Exhibit A: Agency Agreement (which is identical to Exhibit 20 to the Verified Complaint, or the "Agency Agreement"); Exhibit B: New Investor Subscription Agreement (the "NISA"); and Exhibit E: Revolving Opportunity Loan Program Purchase Agreement (the "Rev-Op Agreement").

38. In addition to the NISA, attached to the Verified Complaint were two other similar agreements that were alleged to be executed by some members of the Rev-Op Group including the "Existing Investor Account Agreement" (the "EIAA"), and the "Investor Subscription Agreement" (the "NSA").

39. For purposes of the facts material to this Order, the provisions of the NISA, the EIAA, and the NSA are substantially similar (the NISA, the EIAA, and the NSA are collectively, the "Subscription Agreements"). There has been no plausible allegation raised, no evidence presented, and no proffer of evidence presented that the terms various versions of the Subscription Agreements were materially different with regard to any issue raised in the two Declaratory Judgment Claims.

40. The Court finds that there is no plausible issue of material fact that warrants a trial on the issue of whether there are other forms of the Rev-Op Agreement, the

Subscription Agreement or the POM with terms materially different with regard to the issues raised by the Declaratory Judgment Claims.

41. In their respective Counterclaims, each member of the Rev-Op Group admitted that as part of their investments in the Rev-Op Program, they executed one or more documents with the Debtor. (*See, e.g.,* Hawkins Counterclaim, at ¶ 17).

42. The Verified Complaint alleges that the Rev-Op Group executed a Rev-Op Agreement. (Verified Complaint, at ¶ 39)("Revolving Opportunity Investors, including Defendants, also executed a separate Revolving Opportunity Loan Program Purchase Agreement.")

43. In responding to this allegation, the Answers for seventeen of the eighteen members of the Rev-Op Group (everyone except Weksler-Casselman) admit that they executed or signed a document titled "Revolving Opportunity Loan Program Purchase Agreement." (*See, e.g.,* Hawkins Answer, at ¶ 18)("Admits only that Defendant executed one or more documents titled 'Revolving Opportunity Loan Program Purchase Agreement.') (*See also* Kohner Answer, Docket 19, at ¶ 19 (same); Rosenfeld Answer, Docket 20, at ¶ 19 (same); Johnson Answer, Docket 22, at ¶ 19 (same); Evertson Answer, Docket 23, at ¶ 19 (same); McFadden Answer, Docket 24, at ¶ 19 (same); Caine Answer, Docket 25, at ¶ 19 (same); Trine Holdings Answer, Docket 26, at ¶ 19 (same); AJ Chandler Answer, Docket 20, at ¶ 19 (same); Murphey Answer, Docket 27, at ¶ 19 (same); Krueger Answer, Docket 28, at ¶ 19 (same); Schneck Answer, Docket 29, at ¶ 19 (same); Bear Tooth Answer, Docket 30, at ¶ 19 (same); Cornerstone Realty Answer, Docket 31, at ¶ 19 (same); Pueblo Sereno Answer, Docket 32, at ¶ 19 (same); Queen Creek Answer, Docket 33, at ¶ 19 (same); Hawkins Family Answer, Docket 34, at ¶ 19 (same)).

44. The Verified Complaint alleges that all but two members of the Rev-Op Group (Hawkins[3] and Ronald Kohner) executed one or more versions of Subscription Agreements. (Verified Complaint, at ¶ 35)

[3] William L. Hawkins as Trustee of the Cornerstone Realty and Development, Inc. Defined Benefit Plan and Trust dated January 1, 2004 and any amendments thereto.

45. In responding to this allegation, each member of the Rev-Op Group other than Hawkins and Kohner admitted that they executed one or more versions of the Subscription Agreements. (Rosenfeld Answer, Docket 20, at ¶ 15)("Admits only that Defendant signed a document titled 'Existing Investor Account Agreement'. . . ."); (Weksler-Casselman Answer, Docket 21, at ¶ 15)("Admits only that Defendant signed a document titled 'Existing Investor Account Agreement'. . . ."); (Johnson Answer, Docket 22, at ¶ 15)("Admits only that Defendant signed a document titled 'Existing Investor Account Agreement'. . . ."); (Evertson Oil Answer, Docket 23, at ¶ 15)("Admits only that Defendant signed a document titled 'New Investor Subscription Agreement'. . . ."); (McFadden Answer, Docket 24, at ¶ 15)("Admits only that Defendant signed a document titled 'Existing Investor Account Agreement'. . . ."); (Caine Answer, Docket 25, at ¶ 15)("Admits only that Defendant signed a document titled 'Existing Investor Account Agreement'. . . ."); (Trine Holdings Answer, Docket 26, at ¶ 15)("Admits only that Defendant signed a document titled 'Existing Investor Account Agreement'. . . ."); (AJ Chandler Answer, Docket 27, at ¶ 15)("Admits only that Defendant signed a document titled 'Existing Investor Account Agreement'. . . ."); (Murphey Answer, Docket 28, at ¶ 15)("Admits only that Defendant signed a document styled 'Investor Account Agreement'. . . ."); (Krueger Answer, Docket 29, at ¶ 15)("Admits only that Defendant signed a document styled 'Investor Account Agreement'. . . ."); (Schneck Answer, Docket 30, at ¶ 15)("Admits only that Defendant signed a document titled 'Existing Investor Account Agreement'. . . ."); Bear Tooth Answer, Docket 31, at ¶ 15)("Admits only that Defendant signed a document titled 'Existing Investor Account Agreement'. . . ."); (Cornerstone Realty Answer, Docket 32, at ¶ 15)("Admits only that Defendant signed documents titled 'Investor Subscription Agreement' and 'Existing Investor Account Agreement'. . . ."); (Pueblo Sereno Answer, Docket 33, at ¶ 15)("Admits only that Defendant signed a document titled 'New Investor Subscription Agreement'. . . ."); (Queen Creek Answer, Docket 34, at ¶ 15)("Admits only that Defendant signed a document titled 'New Investor Subscription Agreement'. . . ."); (Hawkins Family Answer, Docket 35, at

¶ 15)("Admits only that Defendant signed a document titled 'Existing Investor Account Agreement'. . . .").

46. The Verified Complaint attached as exhibits each of the agreements executed by the Rev-Op Group. (Verified Complaint, at ¶ ¶ 52-72)

47. In responding to these allegations, seventeen of the eighteen Rev-Op Group members (everyone except the Caine Defendants) admitted that they executed a document with the same title as alleged in the Verified Complaint, but alleged that they lacked knowledge or information sufficient to form a belief as to the truth of the remaining allegations. (*See, e.g.,* Hawkins Answer, Docket 18, at ¶ 25)("Admits only that Defendant executed one or more documents titled 'Revolving Opportunity Loan Program Purchase Agreement' and/or 'Master Agency Agreements.'"). (*See also* Kohner Answer, Docket 19, at ¶ 26; Rosenfeld Answer, Docket 20, at ¶ 26; Weksler-Casselman Answer, Docket 21, at ¶ 26; Johnson Answer, Docket 22, at ¶ 27; Evertson Answer, Docket 23, at ¶ 27; McFadden Answer, Docket 24, at ¶ 27; Trine Holdings Answer, Docket 26, at ¶ 27; AJ Chandler Answer, Docket 20, at ¶ 27; Murphey Answer, Docket 27, at ¶ 26; Krueger Answer, Docket 28, at ¶ 26; Schneck Answer, Docket 29, at ¶ 26; Bear Tooth Answer, Docket 30, at ¶ 27; Cornerstone Realty Answer, Docket 31, at ¶ 27; Pueblo Sereno Answer, Docket 32, at ¶ 27; Queen Creek Answer, Docket 33, at ¶ 27; Hawkins Family Answer, Docket 34, at ¶ 27).

48. In sum, every member of the Rev-Op Group admits to executing a Rev-Op Agreement, or at least one of the three versions of the Subscription Agreement. Indeed, all but three admit to executing both a Rev-Op Agreement and a Subscription Agreement. Although Weksler-Casselman denies executing a Rev-Op Agreement, it admits executing a Subscription Agreement. Although Hawkins and Kohner deny executing a Subscription Agreement, they both admit executing a Rev-Op Agreement.

49. Moreover, when presented with an allegation in the Verified Complaint that the members of the Rev-Op Group executed specific documents that were attached to the Verified Complaint as Exhibits, seventeen of the eighteen members of the Rev-Op Group

(every member except the Caines) admitted that they executed a document with the exact same title, but generally alleged that they lacked knowledge as to the remaining allegations.

50. Although they previously admitted that they had executed a document titled an "Existing Investor Account Agreement," and a document titled "Revolving Opportunity Loan Program Purchase Agreement" (*see* Caine Answer, at ¶ ¶ 15, 19), the Caines alleged they lacked knowledge as to whether the documents attached to the Verified Complaint were executed on their behalf. (Caine Answer, at ¶ 27)

51. The averments in the Pleadings constitute judicial admissions and are binding on the Rev-Op Group. *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 225 (9th Cir. 1988)

52. During oral argument, counsel for the Rev-Op Group was asked if there was any evidence or facts to support a conclusion that the Rev-Op Group members had signed documents with terms that were materially different with regard to the issues before the Court. The Rev-Op Group could not identify any facts or evidence that documents with different terms were executed. Instead, the Rev-Op Group argued that the documents had to be placed into context of other alleged evidence. Such evidence, however, would only be relevant if it altered the nature of the agency at issue. As shown below, such evidence, even if true, would not affect the nature of the agency created.

53. The Subscription Agreement contains a provision superseding all prior agreements and understandings, including oral agreements:

> **Entire Agreement**. This Agreement contains the entire understanding between the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings, inducements, or conditions, express or implied, oral or written, except as herein contained;

(Subscription Agreement at ¶ 8(c)) (*See also* Subscription Agreement, at ¶ 2(e))("By executing this Agreement, the undersigned ... represents and warranted that the undersigned, in determining to purchase Participations, has relied and will rely solely upon

the [POM] and the advice of the undersigned's legal counsel...."); (Subscription Agreement, at ¶ 2(0)("Represents and warrants that neither Mortgages Ltd. or MLS nor anyone purportedly acting on behalf of either of them has made any representations or warranties respecting the Participations except those contained in the POM...").

54. Similarly, the Rev-Op Agreements contains a provision integrating prior representations:

> **Entire Agreement**. This Agreement, together with the Loan Assignment Documents and the Reassignment and Release Documents, contain the entire agreement between the parties with regard to the subject matter hereof. There are no representations, promises, warranties, understandings, or agreements, expressed or implied, oral or otherwise, in relation thereto, except those expressed referred to or set forth herein. Each party acknowledges that the execution and delivery of this Agreement is its free and voluntary act and deed, and that said execution and delivery have not been induced by, nor done in reliance upon, any representations, promises, warranties, understandings, or agreements made by the other party, its agents, officers, employees, or representatives.

(Rev-Op Agreement at ¶ 10.2.)

55. Rule 7008(b)(2) requires a defendant to fairly respond to the substance of an allegation in a Complaint. The Court finds admissions that the Rev-Op Group executed documents associated with the Rev-Op Program, and specific admissions that the Rev-Op Group executed documents with the same title as averred in the Verified Complaint, but a general assertion that the defendants lack knowledge that they executed the documents attached to the Complaint without an assertion or averment that another documents exists with materially different terms,do not raise any plausible issues of fact that require a trial to resolve and do not fairly meet the substance of the allegations in the Complaint.

56. The Court takes judicial notice of the fact that during the bankruptcy proceedings for the Debtor, and in other significant collateral litigation both before and after the confirmation of the Plan, there has been significant litigation regarding the rights, duties, and scope of the authority for the Debtor to act as the investors agent under the Agency Agreement, and also ML Manager's right to act under the Agency Agreements. In

all of this litigation, there has been no other form of a Rev-Op Agreement or Subscription Agreement offered as evidence with terms that are materially different with regard to the issues involved in this matter, or a proffer of evidence made that other versions of documents exist with regard to the Rev-Op Program that materially change the terms of the documents with regard to the issues involved with this matter.

57. Given that (1) the definition of a "Revolving Opportunity Investor" is an investor who subscribed to and entered into the Rev-Op Program, (2) the Rev-Op Program was offered pursuant to a POM which stated that the investors would be parties to an Agency Agreement and attached the form of the operative documents including the Agency Agreement, a form of the Subscription Agreement, and the form of the Rev-Op Agreement, (3) each member of the Rev-Op Group has admitted executing documents associated with the Rev-Op Program, and (4) each member of the Rev-Op Group has expressly admitted to executing either a Rev-Op Agreement or Subscription Agreement, and most have admitted to executing both, the Court finds that there is not a plausible issue of material fact that requires a trial to resolve with regard to the issue of whether the Rev-Op Group executed the Rev-Op Agreement and/or Subscription Agreement, or agreed to be bound by the Agency Agreement as described by the POM.

58. Furthermore, pursuant to Arizona law with regard to the execution of documents, *see, e.g., Johnson Intern., Inc. v. City of Phoenix*, 192 Ariz. 466, 470-71 967 P.2d 607, 611-12 (App. 1998), the Court finds that an agreement is binding even if it is not formally executed if it is clear that the parties intended to bind themselves to the terms.

59. The Court finds that based on the facts as set forth in the Pleadings, it is clear that the operative documents provide that the Rev-Op Group was to be bound to the Agency Agreement.

60. The Court further finds that the Agency Agreements were incorporated by reference into the Subscription and Rev-Op Agreements, one of which, at least, was executed by each member of the Rev-Op Group.

61. The Court finds that incorporation of the Agency Agreement into the

agreement executed by the Rev-Op Group is clear and unequivocal based on the language of the Subscription and Rev-Op Agreements, and that the incorporation was called to the attention of the Rev-Op Group by virtue of language that made it clear that by executing the Rev-Op Agreement or Subscription Agreement the investor agreed to be bound by the Agency Agreement. The Rev-Op Group consented to incorporation by executing the Subscription and Rev-Op Agreements, and the terms of the Agency Agreement were easily available to the Rev-Op Group because the form of the Agreement was attached to, at a minimum, the POM. Moreover, the Subscription Agreement and Rev-Op Agreements both have provisions where the investor represents and warrants that they have received, and are familiar with the POM. (*See* Subscription Agreement, at ¶ 2(b); Rev-Op Agreement, at ¶ 8.2(c))

62. The Court finds that the Subscription and Rev-Op Agreements and the POM all make it clear that the Agency Agreement is part of the contract.

63. The Court further finds and concludes that authority may be created by words or conduct that agent reasonably believes indicate principal's desires. *Villanueva v. Brown*, 103 F.3d 1128, 1136 (3d Cir. 1997). Here, the POM, the Rev-Op Agreement and the Subscription Agreements all made it clear that the loans would be managed pursuant to the Agency Agreements, and the Rev-Op Group admits that they participated in the Rev-Op Program.

64. [Intentionally deleted.]

65. The Agency Agreements created an agency (the "Loan Management Agency") for the Debtor to manage the ML Loans, as that term is defined by the Plan. The Court finds that Loan Management Agency was coupled with an interest in favor of the Debtor, and remains coupled with an interest in favor of ML Manager.

66. The Debtor had an interest in the ML Loans. The Debtor contracted directly with borrowers, which contracts entitled it to certain rights. The Debtor had the rights, among other things, to collect from the borrowers, to take action in its own name to protect

its rights, and even to file suit in its own name to enforce its rights.

67. The Debtor assigned an interest in many of its rights to investors, but the Debtor did not assign all of its rights. For example, the Debtor did not assign to the investors the right to seek the interest spread or default interest. This, among other things, gave the Debtor an interest in the ML Loans, which was the subject matter of the Loan Management Agency.

68. The fact that some of the documents referred to the Debtor's rights as "compensation" did not change the nature of the Debtor's rights.

69. Because the Loan Management Agency is coupled with an interest, it is irrevocable for all material purposes or matters associated with or set forth in the Rev-Op Group's Declaratory Judgment Claim and ML Manager's Declaratory Judgment Claim.

70. The Loan Management Agency was capable of assignment to ML Manager, and was effectively and properly assigned to ML Manager pursuant to Exhibit 50 to the Verified Complaint.

71. The Plan and Confirmation Order provide that, among other things, the Agency Agreements were not executory contracts and were to be assigned to ML Manager.

72. Any objection or argument that the Agency Agreements were executory contracts could have and should have been made prior to the entry of the Confirmation Order. No such objection or argument was made and the Rev-Op Group has waived the right to object to this determination in the Plan. Moreover, the Plan and Confirmation Order shall be given the effect of "law of the case" and "*res judicata.*" These doctrines bar further litigation of the issue of whether the Agency Agreements were executory contracts.

73. Furthermore, because the Loan Management Agency is irrevocable, at the time of the confirmation of the Plan as well as now the agency relationship at issue did not and could not meet the requirements of an executory contract under the *Countryman* standard.

74. ML Manager continues to have an interest in the ML Loans and the subject matter of the Loan Management Agency. The Plan gives ML Manager the right to use, among other things, the interest spread and default interest for as long as needed.

75. Because the Loan Management Agency possessed by ML Manager is an agency coupled with an interest, it remains irrevocable. All attempts made by the Rev-Op Group to terminate or void the Loan Management Agency are without effect, or are null and void.

76. Allegations of breach of contract or breach of fiduciary duty, as well as any other claims that have been alleged against either the Debtor or ML Manager, do not change the nature of the Loan Management Agency. All claims that have been asserted against the Debtor or ML Manager, even if true, would not render the Loan Management Agency revocable or change the irrevocable nature of the Loan Management Agency.

77. Any claims that the Rev-Op Group has against the Debtor have been addressed or resolved through the adoption of the Plan. All Rev-Op Investors have claims against the Debtor in the Liquidating Trust created by the Plan. All Rev-Op Investors, including the Rev-Op Group (unless they renounce or seek to rescind their participation in the Rev-Op Program), were given a preferential or accelerated recovery in the Liquidating Trust in settlement or recognition of their claims under the Rev-Op Program. Neither the existence of these claims, nor their treatment under the Plan, affects the irrevocable nature of the Loan Management Agency.

78. Any further evidence regarding other alleged agreements between members of the Rev-Op Group and the Debtor, even if true, would not impact the irrevocable nature of the Loan Management Agency.

79. From the language used in the documents it is clear that the duration of the Loan Management Agency was not intended to be linked to the duration of the Rev-Op Program. The Rev-Op Program was for a fixed length of time - typically twelve months. The Agency Agreements, however, clearly provide that the agency is irrevocable.

80. The question of whether the Loan Management Agency is severable from the

obligation to repurchase the Rev-Op Group's interest in the ML Loans is to be ascertained from the language employed and the subject matter of the contract. *O'Malley Inv. & Realty Co. v. Trimble,* 5 Ariz.App. 10, 17, 422 P.2d 740, 747 (App. 1967)(*quoting Leeker v. Marcotte*, 41 Ariz. 118, 128, 15 P.2d 969 (1932).

81. In this case, the language clearly provides that the agency is irrevocable even though the term of the Rev-Op repurchase obligation was limited to fixed amount of time. Moreover, common management of the loans was clearly identified as a feature of the investment that was offered to hundreds of investors.

82. The scope of ML Manager's authority under the Loan Management Agency is set forth in the Agency Agreements.

83. Under the Loan Management Agency, ML Manager does not require prior written consent or any type of consent from the Rev-Op Group to take actions authorized by the Agency Agreements.

84. The authority granted to ML Manager under the Loan Management Agency is such that all authorized actions can be taken within the sole discretion of the agent, subject to any applicable provision of the Plan, Confirmation Order or further order of the Court.

85. With regard to the issues raised by the Rev-Op Group in their Declaratory Judgment Action, the Court finds that ML Manager has the authority, subject to provisions of the Plan and Confirmation Order and a possible review by the Court under a business judgment standard, to (i) sell or liquidate any investor's interest, which includes the Rev-Op Group's respective interest, in the ML Loans if the investor owns less than 100% interest in any Loan, (ii) initiate and complete a judicial or non-judicial foreclosure or trustee's sale of property secured by the ML Loans, (iii) settle, compromise or modify the terms of the ML Loans or guarantees associated with the ML Loans pursuant to the terms of the Agency Agreement and the Plan, (iv) initiate and complete a sale of real property in which the Rev-Op Group has an interest provided that more than one investor has an interest in such property, and (v) incur and seek to recover from the Rev-Op Group in a

proportionate, non-discriminatory, fair and equitable manner any costs and expenses associated with the management of the ML Loans including, if necessary in ML Manager's reasonable discretion, additional indebtedness.

86. The Court's prior ruling on the provision of the Subscription Agreement where an investor is entitled to withhold discretion (the "Grant of Discretion Provision") is the law of the case. The Court sees no valid reason or argument to disturb its prior ruling.

87. Moreover, the Court finds that the Loan Management Agency is not implicated by the Grant of Discretion Provision, and the Grant of Discretion Provision applies, if at all, to the agency that many investors previously gave the Debtor to select investments for them. Because ML Manager is not selecting any investments, pursuing any new investments or undertaking such similar activity, this provision has no application with regard to ML Manager's current actions.

88. Applying the Grant of Discretion Provision to the Loan Management Agency would make portions of the Agency Agreements and the Subscription Agreement inconsistent and superfluous, and would make impractical the structure of the investment program set forth under the POM where common management of the loans was a part of the investment for all investors.

89. This Court is required to adopt an interpretation that, wherever possible, harmonizes the various provisions of the documents, gives full effect to all separate provisions, does not render any provision superfluous, and does not allow the evisceration of parts of the contract. The Court must apply a standard of reasonableness in contract interpretation. These doctrines would be violated by applying the Grant of Discretion Provision to the Loan Management Agency, and such application would nullify many provisions of the Agency Agreements, such as the irrevocability of the agency, and the fact that the agency was conveyed to the agent in its "sole discretion." Application of the Grant of Discretion Provision is also inconsistent with the doctrine that an agency coupled with an interest is irrevocable.

90. Applying the Grant of Discretion Provision to the Loan Management Agency

would violate the last antecedent rule of construction.

91. Based on (i) a construction of the Rev-Op Agreement, the Subscription Agreements, the POM and the Agency Agreements, (ii) the plausible material facts set forth in the Pleadings (but not taking into account any allegations where there has been a failure to establish any plausible issue of fact that requires a trial to resolve), and (iii) the application of the law where applicable, the Court declares that the Loan Management Agency is an agency coupled with an interest, and that agency it is irrevocable. The Loan Management Agency was capable of and properly assigned to ML Manager. The Rev-Op Group became bound by the Agency Agreements when they executed the Rev-OP Agreement, or the Subscription Agreements, and when they subscribed to and entered into the Rev-Op Program as described in the POM. The scope of ML Manager's agency under the Loan Management Agency is set forth in the Agency Agreement, except as restricted or modified, if at all, in the Plan and Confirmation Order. The Grant of Discretion Provision in some versions of the Subscription Agreement does not alter these conclusions.

92. This Order constitutes a final ruling on the both Declaratory Judgment Actions. The Court expressly finds that there is no just reason for delay of the entry of a final judgment on the Declaratory Judgment claims. Pursuant to Rule 7054(b), this Order is declared to be a final order.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that ML Manager have judgment on its Declaratory Judgment Claim as set forth in the Verified Complaint, and judgment be rendered against and dismissing with prejudice the Rev-Op Group's Declaratory Judgment Claims.

ORDERED, SIGNED AND DATED AS STATED ABOVE.