Robert J. Miller, Esq. (#013334)
Bryce A. Suzuki, Esq. (#022721)
BRYAN CAVE LLP
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406
Telephone: (602) 364-7000
Facsimile: (602) 364-7070
Internet: rjmiller@bryancave.com
bryce.suzuki@bryancave.com

Counsel for the Rev Op Group

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: MORTGAGES LTD., Debtor.	In Proceedings Under Chapter 11 Case No. 2:08-bk-07465-RJH **MOTION FOR DISTRIBUTION OF REV OP INVESTOR FUNDS IN ESCROW** Date of Hearing: Time of Hearing:

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

AJ Chandler 25 Acres, LLC; Bear Tooth Mountain Holdings, LLP; Cornerstone Realty & Development, Inc.; Cornerstone Realty & Development, Inc. Defined Benefit Plan and Trust; Evertson Oil Company, Inc.; Brett M. McFadden; LLJ Investments, L.L.C.; Michael Johnson Investments II, L.L.C.; Pueblo Sereno Mobile Home Park L.L.C.; Queen Creek XVIII, L.L.C.; Morley Rosenfield, M.D. P.C. Restated Profit Sharing Plan; William L. Hawkins Family L.L.P.; and/or their successors and assigns (collectively, the "Rev Op Investors") hereby move this Court for an order directing the immediate payment to the Rev Op Investors of funds currently being held in escrow based on the purported indemnification rights of ML Manager LLC ("ML Manager").

Following a hearing held on January 11, 2011, this Court approved the distribution of loan proceeds from six loans that ML Manager has liquidated through the sale of foreclosed collateral. The Court, however, ordered approximately $246,000 of proceeds otherwise distributable to the Rev Op Investors to be held in escrow, pending resolution of ML Manager's

asserted setoff of such amount based on its alleged indemnity rights under the form "Agency Agreement" that has been the subject of other proceedings before this Court.[1] The Court requested supplemental briefing on the issue of ML Manager's setoff theory. Accordingly, the Rev Op Investors submit this Motion seeking the distribution of the escrowed funds.

As set forth below, ML Manager is not entitled to offset the escrowed funds. ML Manager owes fiduciary duties to the Rev Op Investors and, under applicable law, may not setoff the Rev Op Investors' loan proceeds for ML Manager's unproven, inchoate "liabilities." In further support of this Motion, the Rev Op Investors respectfully submit as follows:

I. BACKGROUND.

Throughout this case, ML Manager has sought to characterize the Rev Op Investors as a small group of disgruntled investors who have wrongfully interfered with ML Manager. The reality is that the Rev Op Investor have merely sought to preserve their rights and valuable property interests by filing objections in response to bar-date notices filed by ML Manager or by defending themselves in litigation commenced by ML Manager. ML Manager, however, seeks to surcharge the Rev Op Investors' loan proceeds for all expenses, attorneys' fees, or other "damages" ML Manager might allege under its sweeping interpretation of the form Agency Agreement.

Specifically, ML Manager has cited two provisions of the Agency Agreement as the basis for recovering expenses from the Rev Op Investors. Paragraph 4.a of the Agency Agreement states:

> Participant shall indemnify, protect, defend and hold Agent harmless for, from and against all liability incurred by Agent in

[1] The applicability of the Agency Agreement is disputed by the Rev Op Investors and is the subject of an appeal currently pending before the United States District Court for the District of Arizona, Case No. 2:10-cv-01819-MHM. In a separate appeal pending in the same court, Case No. 2:09-cv-02698-MHM, the Rev Op Investors dispute ML Manager's ability to assess any portion of the "Exit Financing" against their property. The Rev Op Investors also have appealed the order approving the allocation of expenses and exit financing against their property. The Rev Op Investors reserve all applicable rights, and nothing herein shall be construed as an admission or waiver of any kind with respect to any of the pending appeals or other matters.

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

> performing under the terms of this Agreement or otherwise arising, directly or indirectly, from any Loan or the Loan Documents, including all attorneys' fees, insurance premiums, expenses, costs, damages and expenses.

Paragraph 5.d of the Agency Agreement states:

> If Participant breaches this Agreement by failing to perform or by interfering with Agent's ability to perform under this Agreement, then Participant shall pay Agent, within 30 days of written notice of breach, administrative fees, attorneys' fees, costs, and closeout fees and any other fees or charges owed to Agent as compensation hereunder, along with any additional damages incurred by Agent, whether actual, incidental or consequential.

ML Manager has invoked these provisions to assert an all-encompassing setoff right against the Rev Op Investors, while simultaneously purporting to act as their agent and fiduciary. Most of the amount sought as a "setoff" against the Rev Op Investors' loan proceeds is for ML Manager's legal fees allegedly incurred in litigation with the Rev Op Investors.[2] In every instance, however, the litigation involved important issues left open under the confirmed plan of reorganization (the "Plan") or issues raised by ML Manager through motion or complaint.

Shortly after Plan confirmation, in September 2009, the Rev Op Group filed a motion seeking clarification of certain open issues under the Plan. This Court granted that motion in part and determined, among other things, that the Rev Op Investors were subject to a surcharge to pay for a proportionate share of the exit financing under the plan. The Rev Op Investors appealed the decision, and the appeal remains pending. ML Manager never filed an application for an award of attorneys' fees or costs in connection with that contested matter and, until recently, has never alleged that the motion for clarification triggered any obligation to pay ML

[2] The Rev Op Investors submit the following based on their understanding of a summary of the asserted setoff previously provided by ML Manager. The Rev Op Investors find themselves in the awkward and unenviable position of prospectively refuting ML Manager's assertions, even though ML Manager has failed to make a record in this Court of exactly what it seeks as a setoff. Indeed, the burden of establishing an entitlement to indemnification is on the party asserting such right. *See INA Ins. Co. of N. Am. v. Valley Forge Ins. Co.*, 150 Ariz. 248, 253, 722 P.2d 975, 981 (App. 1986). The escrowed funds should be released to the Rev Op Investors based on ML Manager's failure to carry its burden alone. The Rev Op Investors contest any liability for any of the inchoate "liabilities" asserted by ML Manager and reserve all rights with respect to these issues.

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

Manager's legal fees pursuant to the Agency Agreement. ML Manager now asserts that it is entitled to a significant (and patently unreasonable) amount of legal fees allegedly incurred in connection with the motion for clarification and the related appeal.

On March 18, 2010, ML Manager commenced a declaratory judgment action in this Court, Adv. Pro. No. 2:10-ap-00430-RJH, seeking to determine that it was the irrevocable agent for the Rev Op Investors. At the outset of this adversary proceeding, ML Manager improperly sought and obtained an *Order to Show Cause Why Judgment Should Not Be Entered Against the Rev Op Group*. The order to show cause was quashed by this Court on motion by the Rev Op Group. The Rev Op Investors then filed answers and defended themselves in the adversary proceeding, but ML Manager ultimately prevailed on a motion for judgment on the pleadings. The judgment is currently on appeal.

In connection with the adversary proceeding, ML Manager filed an application for fees and costs as the successful party under A.R.S. § 12-341.01. ML Manager was awarded approximately $89,000 in fees and costs by this Court. The fee award is currently on appeal. ML Manager now asserts that it is entitled to additional "setoffs" for the fees incurred in connection with the ill-conceived order to show cause and other matters not included in its fee application. ML Manager also seeks all of its legal fees for the Rev Op Investors' appeal of the adversary proceeding.

ML Manager also seeks to surcharge the Rev Op Investors for fees and expenses incurred in connection with objections to various sales proposed by ML Manager. In each case, ML Manager filed a bar-date notice for parties to object to such proposed sales.

Similarly, ML Manager seeks to surcharge the Rev Op Investors for fees and expenses allegedly incurred in connection the objection to its "Allocation Model." Again in this context, ML Manager sent a bar-date notice to all investors and invited objections. The Rev Op Investors and several other parties objected to the proposed Allocation Model, which was ultimately approved by this Court. The Allocation Model issues are currently on appeal.

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

To the Rev Op Investors' knowledge, none of the other parties who filed objections to any of the sale motions, the Allocation Model, or other Court filings have been made the target of a "setoff" by ML Manager.

II. LEGAL ARGUMENT.

The provisions of the Agency Agreement cited by ML Manager fail to provide any legal basis for the asserted setoff. According to ML Manager's interpretation of the indemnity provision, ML Manager would be entitled to collect all fees, expenses, and other damages, as determined in ML Manager's sole discretion, even if ML Manager is unsuccessful in litigation. Under this (mis)interpretation, even if the Rev Op Investors were awarded fees as the prevailing party in litigation, ML Manager's payment of such award would be subject to reimbursement by the very party receiving it. In short, ML Manager is attempting, without any legal basis and in violation of its fiduciary duties, to create a no-win scenario for any litigant or would-be litigant who is arguably subject to the Agency Agreement. For the reasons set forth below, ML Manager's proffered interpretation of the Agency Agreement should not be countenanced by this Court, and the escrowed funds should be disbursed immediately to the Rev Op Investors.

A. ML Manager Has Not Incurred a Legally Cognizable Liability.

ML Manager is not entitled to its asserted setoff based on the indemnity clause of the Agency Agreement. Indemnity is generally defined as the "the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty." *See* Black's Law Dictionary (9th ed. 2009). Arizona law recognizes two types of contractual indemnity provisions. *See generally MT Builders, L.L.C.*, 219 Ariz. 297, 302, 197 P.3d 758, 763 (App. 2008). First, parties may contract for "indemnification against liability." *Id.* A claim for liability indemnity "does not accrue until the indemnitee has suffered actual loss ***through a judgment or payment thereon***." *Levin v. Hindhaugh*, 167 Ariz. 110, 111, 804 P.2d 839, 840 (App. 1990) (emphasis added). Second, "indemnification against loss" applies "when the indemnitee has actually paid the obligation for which he was found liable." *MT Builders*, 219 Ariz. at 302, 197 P.3d at 763.

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

The indemnity provision at issue clearly is for "indemnification against liability." The Agency Agreement states: "Participant shall indemnify, protect, defend and hold Agent harmless for, from and against all ***liability*** incurred by Agent in performing under the terms of this Agreement or otherwise arising, directly or indirectly, from any Loan or the Loan Documents . . . ." Agency Agreement ¶ 4.a (emphasis added). The indemnity provision does not include general losses and other damages, except to the extent such losses or damages are part of a liability that has been reduced to a judgment. *See Levin v. Hindhaugh*, 167 Ariz. at 111, 804 P.2d at 840 (no claim for indemnity until indemnitee has "suffered actual loss through a judgment or payment thereon"). Thus, even if ML Manager's indemnity claim existed, it would be restricted to amounts for which ML Manager has been found liable through entry of a judgment.

It is beyond dispute that no relevant judgment has been entered in this case. Accordingly, ML Manager has not incurred a liability that qualifies for indemnity under Arizona law and may not offset the escrowed funds pursuant to the Agency Agreement's indemnity provision, even if it were applicable to the Rev Op Investors.

B. <u>The Indemnity Provision Is Not a "Blank Check" as ML Manager Asserts</u>.

ML Manager's interpretation of the Agency Agreement's indemnity provision defies logic and the intent of the Agency Agreement (assuming *arguendo* it were applicable to the Rev Op Investors, which the Rev Op Investors dispute). ML Manager contends that the Agency Agreement allows it to recover any and all attorneys' fees, expenses, and damages that ML Manager might allege or assert in its sole and absolute discretion, without proof or adjudication and without regard to ML Manager's fiduciary duties to the Rev Op Investors. Under this all-encompassing interpretation of the indemnity provision, ML Manager has given itself a blank check for all of the fees and expenses it may incur as long as it ties them, however tenuously, to the Agency Agreement. This Court should not adopt this absurd interpretation of the indemnity provision.

As discussed above, ML Manager is required to have any "liability" determined and liquidated in a judgment as a precondition for indemnity. Even if the indemnity provision at

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

issue could be interpreted as a "loss indemnity" (which it cannot), ML Manager still would have to establish that the asserted loss (i) falls within the scope of the indemnity provision and (ii) was actually paid by ML Manager in its capacity as agent for the Rev Op Investors. *See INA Ins. Co. of N. Am. v. Valley Forge Ins. Co.*, 150 Ariz. 248, 253, 722 P.2d 975, 981 (App. 1986) (the obligation to indemnify "cannot be imposed solely by . . . unproven allegations against the indemnity parties, but requires factual determinations"). ML Manger can satisfy neither of these requirements.

First, the asserted expenses and damages do not fall within the limited scope of the indemnity provision of the Agency Agreement. The scope of any duty to indemnify must be determined from the relevant agreement, and such agreement must be construed "to cover only those losses or liabilities which reasonably appear to have been intended by the parties." *Herman Chanen Constr. Co. v. Guy Apple Masonry Contractors Inc.*, 9 Ariz. App. 445, 447, 453 P.2d 541, 543 (App. 1969); *Cecil Lawter Real Estate Sch., Inc. v. Town & Country Shopping Ctr.*, 143 Ariz. 527, 539-40, 694 P.2d 815, 827-28 (App. 1984); *see also MT Builders*, 219 Ariz. at 302, 197 P.3d at 763. If the meaning of an indemnity provision remains unclear after consideration of the parties' intentions, the indemnity provision must be construed against the drafter. *MT Builders*, 219 Ariz. at 302, 197 P.3d at 763 (citing cases).

In this case, the "parties" to the Agency Agreement never intended for the "Participant" to indemnify the "Agent" for the expense of litigation incurred in disputes between such parties.[3] Indeed, Mortgages Ltd.—the asserted assignor and predecessor to ML Manager—knew how to, and did, draft a provision in the Agency Agreement for shifting the costs of litigation regarding

[3] In reality, there were no "parties" to the Agency Agreement. It was a form document drafted by Mortgages Ltd., and ML Manager has admitted that no Rev Op Investor signed an Agency Agreement. Indeed, the Agency Agreement is a contract of adhesion that was, at best, incorporated by reference by other contracts of adhesion. The Official Investors Committee, which was the plan proponent, briefed these issues extensively in the bankruptcy case prior to plan confirmation. *See Statement of Position* and *Supplemental Statement of Position*, Docket Nos. 788, 940, which are incorporated herein by reference. As the entity created to implement the plan conceived by the OIC, ML Manager should be estopped from taking a contrary position on these issues. *See Hamilton v. State Farm Fire and Casualty Co.*, 270 F.3d 778 (9th Cir. 2001). In any event, the intent of the Agency Agreement is clear, even as a unilateral document, that disputes between principal and agent would not be part of the indemnity provision.

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

the Agency Agreement to the unsuccessful party. *See* Agency Agreement § 7.j (unsuccessful party to pay all costs and expenses of any litigation "to enforce or interpret any provision of this Agreement or any rights arising hereunder"). The inclusion of this fee-shifting provision precludes the interpretation of unlimited indemnity being asserted by ML Manager. *See Employer's Liability Assurance Corp. v. Lunt*, 82 Ariz. 320, 328, 313 P.2d 393, 399 (1957) (contracts should be interpreted in a manner that gives full meaning and effect to all provision rather than leaving part of a contract meaningless or illusory); *Central Arizona Water Conservation Dist. v. United States*, 32 F. Supp. 2d 1117, 1128 (D. Ariz. 1998) (similar). Moreover, any doubt on this issue must be resolved in favor of the Rev Op Investors as the non-drafting party. *MT Builders*, 219 Ariz. at 302, 197 P.3d at 763 (citing Arizona contract cases).

Aside from these insurmountable interpretive problems, the law forbids an indemnitee from recovering costs and attorneys' fees incurred in establishing the right of indemnification. *See McIntyre Refrigeration, Inc. v. Mepco Electra*, 165 Ariz. 560, 565, 799 P.2d 901, 906 (App. 1990); *INA Ins. Co. of N. Am.*, 150 Ariz. at 256, 722 P.2d at 983 (indemnification "does not include the right to fees incurred in establishing the right of indemnity"). In other words, indemnity provisions cannot be enforced as fee-shifting provisions as a matter of law. *See McIntyre Refrigeration, Inc.*, 165 Ariz. at 565, 799 P.2d at 906. In this case, most of the asserted expenses for which ML Manager seeks indemnity relate to litigation and appeals involving the determination of the validity of the very Agency Agreement that contains the indemnity provision at issue. Applicable law prohibits ML Manager from using an indemnity provision as an improper fee-shifting strategy in this fashion.

Finally, even assuming ML Manager could overcome the black-letter law on this issue, it still would not be entitled to surcharge the Rev Op Investors for a "loss indemnity" as a factual matter. ML Manager has not established or even alleged that it has paid any of the expenses for which it seeks indemnity. Indeed, it appears ML Manager intends to pay third parties, such as its legal counsel, with the specific proceeds of the Rev Op Investors. Thus, ML Manager is not entitled to its asserted setoff even under a theory of loss indemnity, because it has not yet paid

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

anything for which it can be indemnified. All of ML Manager's arguments in this regard should be rejected.

C. ML Manager's Interpretation of the Indemnity Provision Is Unconscionable and Unenforceable.

Even if ML Manager could overcome the fatal legal deficiencies discussed above (which it cannot), its interpretation of the indemnity provision would be unenforceable under Arizona law as oppressive and unconscionable. Substantive unconscionable exists when terms are "so one-sided as to oppress or unfairly surprise an innocent party," or when there is "an overall imbalance in the obligations and rights imposed by the bargain." *Maxwell v. Fidelity Fin. Servs.*, 184 Ariz. 82, 89, 907 P.2d 51, 58 (1995).[4]

It is beyond dispute that the indemnity provision as interpreted by ML Manager is ***completely*** one-sided and oppressive. The total imbalance of obligations and rights under such interpretation is perhaps best demonstrated by the fact that ML Manager is seeking to have the Rev Op Investors surcharged for the pleasure of having to defend against an improper order to show cause, which was quashed by this Court on motion by the Rev Op Investors. In the declaratory judgment adversary proceeding, ML Manager did not include the fees allegedly incurred for the improper order to show cause in its fee request under A.R.S. § 12-341.01. Such fees and expenses are *per se* unreasonable and unrecoverable under the statute. Yet the Rev Op Investors would be forced to pay for such fees and expenses under ML Manager's interpretation of the indemnity provision. That interpretation of the indemnity provision is oppressive and unenforceable.

Similarly, the indemnity provision is part of a contract of adhesion and defies the reasonable expectations of the parties. As discussed above, these concepts are not new in this case; they were argued extensively by the plan proponent prior to confirmation. *See* note 3 *supra*

[4] The indemnity provision is also procedurally unconscionable, and the Rev Op Investors reserve all rights to present evidence and testimony regarding the already well known deceptive practices of Mortgages Ltd. to induce investors to supply large sums of money to an insolvent and failing enterprise.

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

and material incorporated by reference therein. The post-confirmation entity charged with implementing the plan should not be allowed to take an inconsistent position on these issues. *See Hamilton v. State Farm Fire and Casualty Co.*, 270 F.3d 778 (9th Cir. 2001).

D. ML Manager's Improper Attempt to Enforce the Indemnity Provision Is a Violation of Its Fiduciary Duties to the Rev Op Investors.

ML Manager has a fiduciary duty to the very same parties against which it seeks to impose this unlawful remedy. *See Maricopa P'Ships, Inc. v. Petyak*, 163 Ariz. 624, 790 P.2d 279 (Ct. App. 1990) ("The inherent nature of the agency relationship imposes a fiduciary duty upon the agent . . . ."); 7/07/10 Trial Transcript, p.84 (Question [Mr. Miller]: "But didn't you have a fiduciary duty to those pass-through investors?" Answer [Mr. Winkleman]: "Yes."). As a fiduciary, an agent "is bound to exercise the utmost good faith," *Mallamo v. Hartman*, 70 Ariz. 294, 298, 219 P.2d 1039, 1041 (1950), and to act loyally in all matters connected with the agency relationship, *Musselman v. Southwinds Realty, Inc.*, 146 Ariz. 173, 175, 704 P.2d 814, 816 (Ct. App. 1984).

The ML Board now consists entirely of non-Rev Op investors, in violation of the requirements of the Plan and Confirmation Order. Investors in the Rev Op program were given the right to pick their own designee pursuant to the Plan and disclosure statement, but were stripped of that right when the ML Board forced the resignation of Mr. Bill Hawkins. *See* Disclosure Statement, pp.66-67; Confirmation Order, ¶G [DE #1755]. The ML Board did not even bother trying to find another investor in the Rev Op program to replace Mr. Hawkins. Thus, ML Manager's board of directors has a clear, irreconcilable conflict of interest in making these decisions.

It bears repeating that no other investors have been singled out for surcharge, even though several have filed objections to ML Manager's motions, particularly the allocation motion. The Rev Op Investors are ***not*** advocating for an "across the board" surcharge of investors. They are merely pointing out that the ML Board, composed entirely of non-Rev Op investors, is making decisions that clearly and directly benefit them to the direct and apparently targeted detriment of the Rev Op Investors. This Court should not approve such a violation of

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

the Plan and ML Manager's fiduciary obligations. *See, e.g.*, Confirmation Order ¶ U (ML Manager required to charge non-transferring pass-through investors for costs and expenses of servicing loans "in a fair, equitable and nondiscriminatory manner and shall be reimbursed in the same manner as other investors").

E. <u>The Rev Op Investors Have Not Breached the Agency Agreement</u>.

ML Manager's reliance on the breach provision of the Agency Agreement is equally unavailing. The Rev Op Investors dispute that they have breached the Agency Agreement, even assuming *arguendo* they are subject to it. ML Manager is not entitled to surcharge, or even to withhold, the escrowed funds based on unproven allegations of breach. No adversary proceeding or state-court lawsuit has been commenced against the Rev Op Investors pursuant to this baseless legal theory; nor has ML Manager sought any provisional remedy that would authorize it to continue to hold the Rev Op Investors' funds in escrow.[5]

In addition to ML Manager's failure to establish any breach, ML Manager's interpretation of the breach provision, as with the indemnity provision discussed above, simply goes too far. Defending against litigation is not the kind of wrongful "interference" contemplated by the Agency Agreement, and disputes over the Agency Agreement itself are covered by a specific fee-shifting provision. *See* Agency Agreement § 7.j (unsuccessful party to pay all costs and expenses of any litigation "to enforce or interpret any provision of this Agreement or any rights arising hereunder"). ML Manager cannot shoehorn its miscellaneous fees and costs into the narrow breach provision through implausible interpretation. The Rev Op Investors are entitled to the payment of their funds under any reasonable construction of the Agency Agreement.

[5] The Rev Op Investors reserve all rights with respect to such litigation, to the extent it is necessary, including all of their rights of recoupment and setoff. *See, e.g.*, *In re DeLaurentiis Entertainment Group, Inc.*, 963 F.2d 1269 (9th Cir. 1992) (§ 553 takes precedence over § 1141 in chapter 11 case); *In re Davidovich*, 901 F.2d 1533 (10th Cir. 1990) (same); *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (1992) ("secured interests survive bankruptcy," and discharge only relieves the debtor of personal liability and does not affect in rem actions against property); *In re Gibson*, 172 B.R. 47, 49 (Bankr. W.D. Ark. 1994) (discharge of the debtor does not eradicate in rem liability which may exist against assets, including monies).

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

Moreover, there is no reason to delay distribution as a practical matter. ML Manager expects to liquidate more of the Rev Op Investors' loans in the future. In fighting for these particular funds at this particular time, ML Manager appears to be motivated more by its desire to pay its counsel's significant legal bill than by its fiduciary obligations to the Rev Op Investors. The unfortunately reality is that Rev Op Investors have already lost millions of dollars on the six loans that have been liquidated for pennies on the dollar. There is no legal basis and no practical reason to force them to lose hundreds of thousands more in an unfounded and unproven surcharge.

WHEREFORE, the Rev Op Investors respectfully request that the Court enter an order:

A. Granting this Motion in its entirety;

B. Directing the payment of all Rev Op Investor funds being held in escrow; and

C. For such other relief as the Court deems appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 1st day of February, 2011.

BRYAN CAVE LLP

By: /s/ BAS, #022721
Robert J. Miller
Bryce A. Suzuki
Two North Central Avenue, Suite 2200
Phoenix, AZ 85004-4406
Counsel for the Rev Op Group

COPY of the foregoing served via email this 1st day of February, 2011, upon:

Cathy Reece, Esq.
Keith Hendricks, Esq.
FENNEMORE CRAIG, P.C.
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012-2913
creece@fclaw.com
khendric@fclaw.com
Counsel for ML Manager, LLC

/s/ Sally Erwin

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000