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Pro Per

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: MORTGAGES LTD., an Arizona corporation, Debtor.	In Proceedings Under Chapter 11 Case No. 2:08-bk-07465-RJH **SOTERIA LLC, AND THE BRUCE D. BUCKLEY IRA (EQUITY TRUST AS CUSTODIAN) OBJECTION TO MOTION TO SELL REAL PROPERTY FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS** **Real Property located at Northern Avenue and Cotton lane, in Maricopa County, Arizona** **Hearing Date: December 19, 2011** **Hearing Time: 11:30 A.M.**

Soteria, LLC an Arizona limited liability company, as lawful transferee and successor in interest to Bruce Dennis Buckley and Alivia Virginia Buckley, Trustees of the Bruce Dennis Buckley and Alivia Virginia Buckley Revocable Trust dated June 4, 1985, and amended December 7, 1994 (the Buckley Trust), as to an undivided 1.550% interest to the Nocit Property, and The Bruce D. Buckley IRA (Equity Trust as Custodian) as to an undivided 0.776 interest to the Nocit Property, hereby objects to the sale of the Nocit portion of the

above referenced Motion To Sell Real Property Free and Clear of Liens, Claims, Encumbrances and Interests. Soteria LLC is an interested party because it owns an undivided 1.550% fee title interest in and to the Nocit property. Bruce D. Buckley IRA (Equity Trust as Custodian) is an interested party because it owns an undivided 0.776% fee title interest in and to the Nocit property. The joint holdings for Soteria LLC., and the Bruce D. Buckley IRA total 2.326% of the whole, or fee title in and to approximately 2.791 acres.

MEMORANDUM OF POINTS AND AUTHORITIES

A) TERMINATION OF AGENCY – On June 18, 2008, prior to Mortgages Ltd's Bankruptcy Filing, The Buckley Trust and The Bruce D. Buckley IRA wrote and delivered letters to Laura Martini, President, and to Joseph Lee, Managing Director, advising Mortgages Ltd. that "it Had No Authority to act on our behalf other than processing payments and payoffs as received, and paying same to the Buckley Trust and the Bruce D. Buckley IRA". The purpose and intent of sending the letters was to terminate whatever agency agreement may have been in effect at the time. Subsequently, additional letters of termination were delivered to replacement management. (See Exhibit A attached)

The Master Agency Agreements provide that "Beneficiary may terminate this Agreement after it becomes owner of the Trust Property by written notice to Agent and payment of the fees, costs and expenses incurred by Agent as provided herein". Said written notice was given by our attorney, Richard R. Thomas, May 12, 2010. (See Exhibit B attached)

B) BREACH OF FIDUCIARY DUTY – Mortgages Ltd. breached its Fiduciary Duty through

its' insolvency, intentionally changing form documents to provide authority and discretion to the Debtor, ignoring the fact that some investors refused to grant the debtor authority, compromising the investors property, and expanding the Limited Powers of Attorney to dispose of Investors assets to settle claims against itself. Under well established law, such breaches and conflicts voids the agency relationship between Debtor and the Investors. This means that the Debtor, and its' successor, ML Manager, simply does not have the Authority (even if it was not terminated as set forth above, which it was), to use the investors' property as consideration to eliminate claims against it. The authority of an agent terminates, or is suspended, when the agent has notice of happening of an event, or of a change in circumstances, from which he would reasonably infer that the principal does not consent if he knew the facts. Portions of the above text were taken from "Supplement to Statement of Position on Authority and Agency" dated November 10, 2008, and drafted by Cathy L.Reece, of Fennemore Craig P.C., as attorneys for the Official Committee of Investors. The positions in the Supplement recite correctly the authorities, agencies, intentions, and the representations made to the investors. The Supplement to Statement of Position on Authority and Agency dated November 10, 2008 is (attached as Exhibit C).

C) WITHOLDING OF DISCRETION – The Buckley Revocable Trust and The Bruce D. Buckley IRA WITHHELD DISCRETION in the Existing Investor Agreement from Mortgages Ltd. (See page 6 of Exhibit D attached) "to act on our behalf in respect to interests to be acquired, or sold by the undersigned, including extending the terms of loans, modifying the payment terms of loans, accepting prepayments on the loans, releasing a portion of the

collateral securing the loan, and otherwise dealing with the loans on behalf of the undersigned". The withholding of discretion verbage is literal, and cannot not be interpreted in any other manner.

D) CONSOLIDATION DIMINISHES VALUE - The proposed sale consolidates the Nocit and the Citno properties, diminishing the value of the Nocit property. The Nocit property is 120 acres of the 392.5 acre sale. If the Nocit property is marketed individually, it would attract a wider range of Buyers, who would pay more per acre as the capital outlay for 120 acres would be significantly less. The larger the parcel, the less value per acre, and the smaller the parcel, the more value per acre.

E) STERNBERG PROFIT SHARING PLAN – The Motion to Sell Real Property proposes to transfer to the Sternberg Profit Sharing Plan approximately 4.5646 acres that is being retained by ML Manager from the Nocit and Citno lproperties, and like The Buckley Trust and The Bruce D. Buckley IRA, the Sternberg Profit Sharing Plan terminated their agency prior to Mortgages Ltd. filing bankruptcy.

CONCLUSION – The Buckley Trust and The Bruce D. Buckley IRA withheld their discretion in the Existing Agreement, terminated their Agencies June 18, 2008 (prior to Mortgages Ltd. filing bankruptcy), and again on May 12, 2011. Sternberg Profit Sharing Plan has also terminated its' agency. These entities are the only investors in the Nocit property, that have terminated their agencies. ML Manager has accommodated Sternberg, contracting for the deeding of out parcels comprising of approximately 4.5646 acres. Soteria LLC, and The Bruce D Buckley IRA is asking the court for the same accommodation, comprising of approximately 2.791 acres, which could be adjacent to the

Sternberg out parcels. This would not impair the value of either the sale parcel, or the Sternberg parcel.

In absence of the accommodation set forth above, we ask the court to disapprove the sale of the Nocit property.

Dated the 12th day of December 2011

SOTERIA LLC, an Arizona Limited Liability Company

BY: Bruce Dennis Buckley and Alivia Virginia Buckley, Trustees of the Bruce Dennis Buckley and Alivia Virginia Buckley Trust dated June 4, 1985 and Amended December 7, 1994, it's Manager.

Bruce Dennis Buckley as Trustee

Alivia Virginia Buckley as Trustee

Bruce D. Buckley IRA (Equity Trust as Custodian)

BY:

Bruce D. Buckley

Exhibit A

June 18, 2008

Joe Lee
Managing Director
Mortgages Ltd.
4455 East Camelback Road
Phoenix, Arizona 85018

Via Fax 602-287-3076 & 602-287-3093

RE: BU09 – Bruce Dennis Buckley & Alivia Virginia Buckley Revocable Living Trust
BU11 – Equity Trust Company FBO Bruce D. Buckley IRA

Dear Joe,

Since 1999 the above referenced entities have been purchasing Notes secured by First Deeds of Trust in full and fractional interests. In April of this year I was contacted by Sheila, of Mortgages Ltd., and advised that she was our new Managing Director, and would be our contact person with Mortgages Ltd. Sheila called a few weeks later and advised that Mortgages Ltd. would no longer accept new Deed of Trust purchases until they received fully executed copies of a "newly revised Investor Subscription Agreement".

I had already advised Scott Coles, and my prior Managing Director, Bob Furst, the new Agreement would not be signed as it diminished our control over our investments. We had withheld our "Grant of Discretion" in the existing "Existing Investor Account Agreement".

6/23 [illegible]

It is our understanding our association with Mortgages Ltd. is that of customer and Account Servicer only. Mortgages Ltd. does not have any authority to act on our behalf other than processing payments and payoffs as received, and paying same to the undersigned. Mortgages Ltd. shall not assign, transfer, extend, modify, reinvest, reallocate, or substitute in any manner whatsoever our Deed of Trust Investments without our knowledge and specific written consent.

Please respond via US Mail or e-mail by June 25, 2008

Sincerely,

[signature]
Bruce Dennis Buckley (Trustee)

[signature]
Alivia Virginia Buckley (Trustee)

[signature]
Bruce D. Buckley IRA

June 18, 2008

Laura Martini
President
Mortgages Ltd.
4455 East Camelback Road
Phoenix, Arizona 85018

Via Fax 602-287-3076 & 602-287-3093

RE: BU09 – Bruce Dennis Buckley & Alivia Virginia Buckley Revocable Living Trust
BU11 – Equity Trust Company FBO Bruce D. Buckley IRA

Dear Ms. Martini,

Since 1999 the above referenced entities have been purchasing Notes secured by First Deeds of Trust in full and fractional interests. In April of this year I was contacted by Sheila, of Mortgages Ltd., and advised that she was our new Managing Director, and would be our contact person with Mortgages Ltd. Sheila called a few weeks later and advised that Mortgages Ltd. would no longer accept new Deed of Trust purchases until they received fully executed copies of a "newly revised Investor Subscription Agreement".

I had already advised Scott Coles, and my prior Managing Director, Bob Furst, the new Agreement would not be signed as it diminished our control over our investments. We had withheld our "Grant of Discretion" in the existing "Existing Investor Account Agreement".

It is our understanding our association with Mortgages Ltd. is that of customer and Account Servicer only. Mortgages Ltd. does not have any authority to act on our behalf other than processing payments and payoffs as received, and paying same to the undersigned. Mortgages Ltd. shall not assign, transfer, extend, modify, reinvest, reallocate, or substitute in any manner whatsoever our Deed of Trust Investments without our knowledge and specific written consent.

Please respond via US Mail or e-mail by June 25, 2008

Sincerely,

Bruce Dennis Buckley (Trustee)

Bruce D. Buckley IRA

Alivia Virginia Buckley (Trustee)

September 22, 2008

Mortgages Ltd.
Richard Feldheim
George Everette
Christopher Olson
Joe Lee
4455 East Camelback Road
Phoenix, Arizona 85018

Via UPS

RE: BU09 – Bruce Dennis Buckley & Alivia Virginia Buckley Revocable Trust
BU11 – Equity Trust Company FBO Bruce D. Buckley IRA

In response to your two letters dated September 18, 2008 please be advised our association with Mortgages Ltd. is that of Account Servicer only. Mortgages Ltd. does NOT have the authority to act on our behalf other than processing payments and payoffs as received, and paying same to our Trust and IRA. Further, Mortgages Ltd. shall not assign, transfer, extend, modify, reinvest, reallocate or substitute in any manner whatsoever our Deed of Trust Investments without our knowledge and SPECIFIC WRITTEN CONSENT.

Please refer to our "Existing Investor Account Agreements", as well as our letter to Laura Martini and Joe Lee dated June 18, 2008 and delivered Via UPS Friday, June 20, 2008.

I am sure you have a copy of my "Existing Investor Account Agreement" on file wherein the grant of discretion was WITHELD. I have enclosed copies of the letters dated June 18, 2008 in case Laura and Joe cannot locate their copies.

If you have any questions or comments please contact me.

Regards,

Bruce D. Buckley Bruce Dennis Buckley Trustee Alivia Virginia Buckley Trustee

Bruce D. Buckley
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Carefree, Arizona 85377
480-488-2672
bbuckley@cox.net

Exhibit B

THOMAS SCHERN RICHARDSON, PLLC
ATTORNEYS AND COUNSELORS

The Stapley Center
1640 South Stapley Drive, Suite 205
Mesa, Arizona 85204

Phone 480.632.1929
Fax 480.632.1938
rthomas@thomas-schern.com

May 12, 2010

Ms. Cathy Reece
Fennemore Craig, P.C.
3003 North Central Avenue
Phoenix AZ 85012

Re: Termination of Agency Agreements re BU09 and BU11;
Bruce and Alivia Buckley in their individual capacities and as Trustees of the Bruce Dennis Buckley and Alivia Virginia Buckley Revocable Living Trust dated June 4, 1985 and amended December 7, 1994

Dear Cathy,

I represent Bruce and Alivia Buckley in their individual capacities and as Trustees of the Bruce Dennis Buckley and Alivia Virginia Buckley Revocable Living Trust dated June 4, 1985 and amended December 7, 1994. In their investor account agreements signed for the above-referenced accounts at Mortgages Ltd., my clients specifically withheld the grant of discretion to Mortgages Ltd. (See Exhibits 1 and 2 hereto) Effective March 10, 2005 and June 13, 2005, my clients also signed Master Agency Agreements. (See Exhibits 3 and 4 hereto). Subsequently, on June 18, 2008, and September 22, 2008, my clients wrote three letters to Mortgages, Ltd. (See Exhibits 5, 6 and 7 hereto). In these letters, my clients advised Mortgages Ltd. that "it had no authority to act on their behalf other than processing payments and payoffs as received, and paying same to the undersigned." My clients' purpose and intent in sending Mortgages Ltd. the three letters in 2008 was to terminate whatever agency agreement may have been in effect at the time.

Section 3(b) of the Master Agency Agreements attached as Exhibits 3 and 4 hereto specifically provide that "Beneficiary may terminate this Agreement after it becomes the owner of the Trust Property by written notice to Agent and payment of the fees, costs and

expenses incurred by Agent as provided herein." As you know, the Buckleys did not transfer their Mortgages Ltd. interests into the new loan LLCs. Rather, they have retained their interest. Thus, in addition to the Buckley's affirming the termination of their alleged agency agreements in 2008, the last sentence of Section 3(b) of the Master Agency Agreement is most certainly now in effect. Even if the alleged agency agreement at issue existed and at one time was irrevocable because it was "coupled with an interest," the subsequent relationship established pursuant to the Plan left ML Manager without such an interest, rendering the alleged agency terminable at the will of the beneficiaries as a matter of law.

Therefore, to the extent they did not already do so in their June 18, 2008 and September 22, 2008 letters, my clients hereby terminate any and all agency powers, authorities, and agreements that may have previously existed (without admitting that they did) between my clients and Mortgages Ltd. or any successor thereto. Please provide an accounting of all fees, costs and expenses incurred, and related to my clients, under paragraph 3(b) of the Master Agency Agreement.

Sincerely,

THOMAS SCHERN RICHARDSON, PLLC

Richard R. Thomas

RRT/tw
Enclosures – as stated

Exhibit C

11/10/08

Fennemore Craig, P.C.
Cathy L. Reece (No. 005932)
Keith L. Hendricks (No. 012750)
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Email: khendric@fclaw.com

Attorneys for Official Committee of Investors

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** **SUPPLEMENT TO STATEMENT OF POSITION ON AUTHORITY AND AGENCY BY INVESTORS COMMITTEE** **Date: November 10, 2008** **Time: 1:00 p.m.**

The Official Committee of Investors ("Investors Committee") hereby files its Supplement to its Statement of Position on Authority and Agency. The Investors Committee incorporates and joins in the "Objection of Parties in Interest Eva Sperber-Porter, Litchfield Road Associates Limited Partnership, and Baseline & Val Vista Associates Limited Partnership to Debtor's Motion For Final Approval of DIP Financing with Stratera Portfolio Advisors re CenterPoint Project" and "Robert Furst's Response To Debtor's Statement of Position Regarding Debtor's Authority To Renegotiate the Terms of Certain Loans and To Enter Into Settlements."

I. THE DEBTOR IMPROPERLY TREATS ALL INVESTORS THE SAME

There are three fatal flaws with the Debtor's construction of the contractual grant of authority in the operative documents. First, the Debtor has failed to identify all of the investors, or at least all of the relevant forms of the operative documents involved in the particular loans at issue. Second, the Debtor ignores the fact that some investors refused

to grant or revoked the very authority the Debtor is now attempting to exercise. Third, the Debtor ignores the fact that the Documents evolved over time and that earlier versions did not grant the same authority as the later versions. Because the Debtor is asking the Court to rule that it has authority to bind all investors, it must establish that all investors gave it the same authority. The Debtor cannot do this.

A. The Debtor Must Establish Foundation for all of the Relevant Versions of the Operative Documents

Debtor in its Statement of Position discusses some of the operative documents relevant to the Debtor's authority, but fails to address or even acknowledge that there are substantial differences in the various versions of the documents. Indeed, the Debtor essentially assumes that all of the operative documents are identical, interchangeable and currently in force. This is simply not the case. As the Court knows, there were thousands of investors. More important, the form of the documents changed over time, and the amount of authority or restrictions on authority changed. Indeed, Mr. Robert Furst has already testified by this Court that the Debtor intentionally changed the form of the documents to provide more discretion and authority to the Debtor and that there were internal discussions and concerns that the Debtor did not have the requisite authority. The Debtor's argument, however, ignores these changes and essentially assumes every investor granted the same level of authority to the Debtor. As such, the Debtor's argument is not based on a correct assumption and ignores the reality.

To prevail on an argument that it has the authority at issue, the Debtor must identify all of the different forms of the operative documents involved in the various loans at issue and establish that all of these different forms provided the authority asserted. The Debtor cannot ignore, for example, that there are multiple forms of the subscription agreements and agency agreements and that the different versions have material differences with respect to the Debtor's authority. Moreover, the Debtor cannot ignore

that the description of the authority evolved over time and that the earlier documents do not grant as much authority as the more recent documents. Instead of identifying the forms of all the investor agreements related to a particular loan or settlement, the Debtor takes a high altitude overview of the documents in general and argues from documents which have evolved and changed over time that it has authority. Without identifying all of the relevant forms of agreements, the Debtor has not met its burden and the Court cannot make a definitive decision that all of the investors impacted granted to the Debtor the authority at issue.

B. Debtor Cannot Ignore the Fact that Some Investors Refused to Grant the Debtor Authority

In addition to the general failure to meet its burden, there are many investors who refused to grant the authority the Debtor is seeking to employ. For example, Robert Furst indicated in his Response and in his testimony, that most of the Subscription Agreements had a paragraph that the allowed an investor to "withhold" discretion so that the Debtor had to obtain written consent for almost any action prior to execution, including placing the purchase of a note, or even modifications of the note. He testified that there were a number of investors who withheld discretion. This fact has been reluctantly acknowledged in open court by the Debtor.

Specifically, one common form of the Investor Subscription Agreements provides in paragraph 4(e):

> Unless authorization is withheld by so indicating below or in another written document to Mortgages Ltd. and MLS, the undersigned hereby authorizes Mortgages Ltd. to be named as the lender/payee/beneficiary as agent for the undersigned in the deed of trust or deeds of trust or mortgage or mortgages securing the Loan or Loans and other documentation relating to the Loans.

At paragraph 7, the same form of Subscription Agreement provides:

> **Grant of Discretion.** Until revoked at any time in writing, the undersigned hereby grants discretion to Mortgages Ltd.,

> in its sole discretion, to select for purchase or sale the Loan or Loans with respect to which the undersigned acquires Participations. Without limiting the foregoing, the undersigned understands that his grant of discretion will give Mortgages Ltd. the authority, in its sole discretion, to make various determinations and take various actions with Loans with respect to Participations to be acquired, acquired [sic], or sold by the undersigned.

Finally, paragraph 8 indicated whether the investor "granted a power of attorney with respect to Mortgages Ltd. investment products." It is clear that some investors took this option. Mr. Furst testified as much. Further some of the investors have sent an objection to the Court indicating that they also withheld discretion, such as the letter objection. Moreover, these agreements allowed the investors the right to revoke the authority and other investors exercised this right. The Debtor does not address this provision and does not inform the Court who those investors are and what loan they are in. Instead of addressing the fact that some investors refused to give the Debtor or revoked the very authority the Debtor now seeks to implement and what such lack of authority means with regard to the proposed settlements, the Debtor simply ignores the issue. It cannot be ignored.

C. <u>The Amount of Authority Changed Over Time</u>

Mr. Furst testified that the documents changed over time, and the Debtor's interpretation of the authority granted also changed over time. Obviously, if the Debtor felt it was necessary to change the form of its documents to grant it more authority, this means that the prior version of the documents did not grant as much authority. An example is the changes to the documents related to Opportunity Fund 15. In the Private Offering Memorandum for Opportunity Fund 15, the Debtor, included in 2007 the following at page 14:

> Among other things, the Manager will have the right to revise the terms of outstanding Loans regardless of their performance, which may include increasing the principal amount, modifying the interest rate and payment terms, changing the collateral, adding fees and costs to the principal

balance, or substituting borrowers.

The Debtor also added this exact same language at page 62 where it was describing the authority of the Debtor to manage the Funds. Because this was an addition to the form of the documents, it is disingenuous to argue that all of the documents provide the exact same level of authority.

Another example of incomplete disclosure by the Debtor relates to the Centerpoint financing, although this argument is applicable to each and every deal. The first Centerpoint note is dated March 20, 2007. The Debtor started selling fractional interests in the note immediately thereafter and continued to sell pieces of the note until June of 2008. Some of the current holders of fractional interests in the Centerpoint note might have signed the subscription agreement applicable in March 2007 and might not have signed any later version. As a result to determine the authority issue as to that investor on that loan, the Court would have to look at that specific applicable subscription agreement, not the unsigned one used in 2008. Further an Investor might have withheld discretion in March 2007 and not have changed the agreement. So again the Court would have to look at the specific subscription agreement, not the unsigned one used in 2008. It is the operative subscription agreement or agency agreement or other document which was signed by the individual investor and which is still in effect that the Court needs to see and which is important. Debtor has made no attempt to identify and provide this level of detail to the Court for making this decision.

Finally, since no new loans were made after February 2008, it is unlikely that the documents which the Debtor has given to the Court with changes effective February 2008 are even the applicable documents to be applied to an investor or the loan in question. Without more disclosure and explanation, the Debtor is not presenting a proper question to the Court in its pleading.

II. DEBTOR IS OVERSTATING ITS AUTHORITY

As fully explained and set forth in the "Robert Furst's Response to Debtor's Statement of Position ..." filed with the Court October 8, 2008 ("Furst Response"), the Debtor is authorized to administer, service and collect the loans on behalf of the investors and the MP Funds. It was not granted unlimited and unfettered discretion.

As argued in previous pleadings, the notes are owned in undivided fractional interests by the investors and/or the Debtor. In some loans the Debtor may own a percentage of the loan, but in others the Debtor owns zero percent. The Debtor has not provided the Court with a copy of any of the notes to be modified along with the endorsements made out to the investors. The point is, however, that the Debtor does not own the interest in the note, it only services that interest. In other words, the Debtor is not playing with its own money, it is attempting to use its status as an agent to make modifications to the investor's property (the notes and deeds of trust). Debtor claims that it has the right to do this because the investors gave it authority to do so. Even under the documents relied upon by the Debtor, however, the grant of authority is not so unlimited and broad.

All the activities and actions identified in the agreements for the agent to perform are related to and are constrained by the purposes of administering, servicing and collecting the loans. Nowhere in the agreements are the powers or responsibilities given to the Debtor to undertake such activities as broad as subordination to new financing, granting a security interest in the investor's interest in the loan, release of liens on collateral without payment, reduction of principal because of the settlement of causes of actions arising from the Debtor's conduct, and other such broad activities contemplated by the Debtor. As explained in detail in the Furst Response, the language must be read in context within the sections and sentences and cannot be taken out of context. The Investors Committee asserts that when read in its entirety and in context the agreements

provide the reasonable parameters set for a servicing and collection agent, such as the Debtor.

III. THE AGENCY AGREEMENTS ARE TO BE NARROWLY AND STRICTLY CONSTRUED AGAINST DEBTOR

Contrary to the Debtor's position, silence in the agreements should not and do not constitute authority to be able to make all the decisions without the consent of the investors, or constitute a grant of unlimited and unfettered discretion.

It is well established that courts must strictly construe the grant of authority in a power of attorney. *Lightning Delivery Co. v. Matteson*, 45 Ariz. 92, 97 39 P.2d 938, 941 (1935) ("It must be kept in mind that under all the authorities powers of attorney should be strictly construed and that the courts should never by construction extend the power they confer beyond that given in terms, or is absolutely necessary to carry that conferred into effect"); *Archbold v. Reifenrath*, 744 N.W.2d 701, 708 (Neb. 2008) ("Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted"). In this case, while the investor signed a subscription agreement adopting the agency agreement or operating agreement which would have been attached to a lengthy private offering memorandum and granting a power of attorney, the Debtor signed the agency agreement or operating agreement on behalf of the investor. As such, the scope of the Debtor's power of attorney or agency powers must be strictly and narrowly construed.

Further, it is black letter law that any ambiguities in a contract are to be construed against the drafter. *See, e.g., United California Bank v. Prudential Ins. Co. of America*, 140 Ariz. 238, 260, 681 P.2d 390, 412 (App. 1983) ("even if Prudential were able to demonstrate that the incorporation clause of the commitment letter which it drafted is ambiguous, such a demonstration would be self-defeating because ambiguities will be construed against the drafter"). This rule of construction carries even greater weight in

this case, because as noted above, the Debtor drafted the agreements, served in multiple capacities in the agreements and signed agreements on behalf of the principals. The Investors did not even sign the agency agreements. The Debtor exercising the power of attorney signed on their behalf pursuant to a subscription agreement.

The agreements are also contracts of adhesion that contain unreasonable and therefore unenforceable terms. "[A] contract of adhesion signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or to reject it." *Huff v. Bekins Moving & Storage Co.*, 145 Ariz. 496, 498, 702 P.2d 1341, 1343 (App. 1985). Generally speaking, "there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. The second-a principle of equity applicable to all contracts generally-is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable'." *Id.* (citations and quotations omitted). The Debtor has not shown, and cannot show, that there is any provision of the agreements that gave the Investors the reasonable expectation that the Debtor was entitled to enter into these broad of settlements or transactions on behalf of the Investors that permitted the Debtor's interests in continuing in business over the Investors' property interests or that allowed the Debtor to settle causes of actions against it for its own misconduct at the expense of the Investors. In this case, there is no mention in any of the documents that the principal amount of loans might be forgiven, that that loans might be subordinated to third parties, that the personal guarantees might be released, that separate loans might be combined, or many of the other things the Debtor is now trying to do. Rather than interpreting general phrases in the agreements broadly in favor of Debtor, all

terms need to be narrowly and strictly construed in favor of the investors.

IV. ALLOWING THE DEBTOR TO EFFECTUATE THE SETTLEMENTS WOULD IN SOME SITUATIONS AMOUNT TO A SUB ROSA OR CREEPING PLAN

The Debtor argues that the agreements have to be broadly construed or the results will be "disastrous" and "unworkable" and that there is no reasonable alternative. On the contrary, the reasonable alternative is that the Debtor needs to obtain the consent of the investors before any such onerous and drastic changes can be made in the Loans. More important, this argument simply demonstrates that the Debtor is attempting to resolve the significant outstanding issues in its favor before being obligated to fulfill the requirements of presenting a plan of reorganization and obtaining approval.

It is well established that a settlement which has the effect of dictating the terms of the debtor's plan of reorganization prior to the confirmation process cannot not be approved. *See In re Braniff*, 700 F.2d 935, 940 (5th Cir.1983) ("The debtor and the bankruptcy court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan sub rosa ..."); *In re Iridium*, 2005 WL 756900 at *7 ("the trustee *169 is not authorized to enter into a settlement if it results into a de facto or sub rosa plan of reorganization"); *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 887 (Bankr.S.D.N.Y.1990) ("A transaction which would effect a lock-up of the terms of a plan will not be permitted").

The *Braniff* Court, for instance, refused to approve two settlements by the debtor that purported to resolve disputes with certain of its secured and unsecured creditors. Those settlements involved a complex transfer of cash, aircraft, equipment, leases and landing slots in exchange for travel scrip, notes and a profit participation in the purchaser. *Braniff*, 700 F.2d at 938. The proposed agreements would have required the debtor to distribute travel scrip in any plan of reorganization, a requirement the Fifth Circuit declared impermissibly "had the practical effect of dictating some of the terms of any

future reorganization plan." *Id.* at 939-40. As that court recognized, "[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of chapter 11 for confirmation of a reorganization plan" by establishing the essential terms of a plan in connection with a separate agreement. *Id.* at 940.

Following *Braniff*, courts have refused to condone settlement agreements that do far less than Debtor's sweeping proposals to modify the protections otherwise afforded its investors. In the *Continental Air Lines* case, for instance, the bankruptcy court approved two of the debtor's post-petition aircraft leases. Creditors appealed, contending that the proposed leases "represent pieces of a creeping plan of reorganization" and that they "could have defeated a plan of reorganization containing the leases." 780 F.2d at 1227, 1228. The Fifth Circuit vacated the bankruptcy court's decision, noting that the protections afforded by the confirmation process "might become meaningless" if they could be avoided piecemeal through agreements reached prior to confirmation. *Id.* at 1227-28 ("Undertaking reorganization piecemeal pursuant to § 363(b) should not deny creditors the protection they would receive if the proposals were first raised in the reorganization plan").

Here, Debtor's attempt to summarily and significantly modify millions of dollars in loans is beyond the pale. And while the investors may eventually vote on a plan, that right will be meaningless if Debtor effectuates pre-plan settlements that irrevocably limit the options and assets available at the time of confirmation. For example, the proposed settlements ask the Court to approve the transformation of debt into equity, subordinate first and second liens to other loans, delegate agency responsibilities (such as foreclosure) to other entities, subject the investors to direct contractual liability to other lenders, consolidate the loans for several borrowers and from many investors into a single loan, and assume that future loans and subordination will be forthcoming or approved in a plan. As such, many aspects of these settlements clearly anticipate, dictate and restrict plans of

reorganization. Debtor's settlement proposals are little more than an attempted "end run" around the protections afforded to the investors under the Bankruptcy Code, and as they are *sub rosa*, they cannot be approved.

V. MANY OF THE SETTLEMENTS VIOLATE THE OPERATING AGREEMENTS OF THE FUNDS, AND EXCEED THE DEBTOR'S RIGHTS AS MANAGER

The Operating Agreement for each of the Opportunity Funds (the "Funds") states an express purpose of the Fund and then requires that a 75% vote of the members to change that purpose, or to amend the Operating Agreement. The settlements the Debtors propose violate these restrictions without the required vote.

Section 2.3 of the Operating Agreement provides that the purpose of the LLC is to:

> fund loans to borrowers or own interests in new or existing loans from third parties and to collect principal and interest payments due thereunder, or to the extent not received, pursue collection or realize on any collateral; for such loan, including the ownership and operation of any such collateral (collectively, "Loans", and individually, a "Loan").

In other words, the purpose of the Fund is to make and collect on loans. Then Section 6.4 provides that without the affirmative vote of 75% vote of the Members that the Manager shall not in subsection (a) amend the Operating Agreement, in subsection (c) change "any of the [LLCs] purposes as set forth in Section 2.3", in subsection (d) "us[e] [LLCs] funds or capital other for a business purpose of [the LLC] as set forth in Section 2.3", and in subsection (e) "commingling any Company funds or capital with the funds of any other Person". To the extent that any of the settlement changes debt to equity, combines multiple loans into one loan, or uses money for any purpose other than a loan, it violates the agreement and exceeds the Debtor's authority.

In another section of the Operating Agreement there are express "Limitations on the Manager". Section 6.5 requires the Manager to acquire and manage all Loans (which was defined in Section 2.3) of the LLC subject to certain policies and criteria, expressly that "All Loans shall be secured by a first or second lien encumbrance on real property

(and improvements if any) and such other collateral as the Manager deems appropriate to fully secure the Loan." The Manager cannot release collateral or liens if the loan is not fully secured or put the security in anything less than a second position. Several of the proposed settlements violate this restriction by either changing debt to equity or simply putting the investors into a third or fourth position.

Finally, some of the settlements delegate to other entities obligations that are exclusive the Manager. For example, Section 6.2 indicates that certain obligations are exclusive to the Manager, including the obligation to "dispose of any real property" and Section 6.3 provides that the Manager is obligated to "perform all normal business functions" of the Fund. Nevertheless, some of the settlements include a delegation of things such as foreclosure responsibilities to other entities.

Consequently, to the extent, any of the settlements remove liens, convert debt to equity, combine loans, delegate foreclosure obligations to third parties, or put the investors in a third position or worse, among other things, those actions would be in violation of the Operating Agreement would not be permitted.

VI. THE DEBTOR'S CONFLICT OF INTEREST VITIATES ITS AUTHORITY

In agreeing to settlements in order to eliminate its own liability, the Debtor, which is acting in the capacity of an agent, has a conflict of interest with the interest of the investors, its principal. The law is clear. Such a situation vitiates the agent's authority.

An agent has a fiduciary duty of loyalty to his or her principal and is bound to exercise the utmost good faith in his or her conduct of agency. *Mallamo v. Hartman*, 70 Ariz. 294, 298, 219 P.2d 1039, 1041 (1950). According to Arizona law, "[v]iolating the duty of loyalty, or failing to disclose adverse interest, ***voids the agency relationship***." *State v. DiGiulio*, 172 Ariz. 156, 160, 835 P.2d 488, 492 (App. 1992) (emphasis added). Voiding the agency relationship also voids any acts undertaken by the agent on behalf of the principal. *See id.*; *see also In re JLJ Inc.*, 988 F.2d 1112, 1116 (11th Cir. 1993)

(applying Alabama law) ("[T]he general rule is that an agent's act against the interest of the principal is void …").

The general rule that acts taken where there is a conflict of interest between the agent and the principal voids the relationship is also set forth by the *Restatement of Agency*. The *Restatement (Second) of Agency*, § 112 states that "Unless otherwise agreed, the authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal." Here, there is absolutely no evidence or document that provides that the Debtor may compromise the investor's property in order to settle the claims against itself. The Debtor is proposing settlements in order to, or at least have the effect of eliminating substantial claims against the Debtor. The primary, if not sole consideration that the Debtor is offering for these releases is the compromise of the investor's property. Under the *Restatement* and other well established law, such a conflict of interest voids the agency relationship between the Debtor and the investors. This means that the Debtor simply does not have the authority to use the investors' property as consideration to eliminate claims against it.

Moreover, the *Restatement* also provides that, "an agent's actual authority terminates … (2) upon the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf." *Restatement (Third) Agency*, § 3.09. Here, the investors, through the Court appointed Committee, and through dozens and dozens of objections have made it clear that they do not assent to the actions taken by the Debtor. As such, the actual evidence shows that the investors, or at least many of them, no longer assent to the Debtor's actions. As to these investors, the Debtor simply no longer has the authority to compromise their property. Moreover, the evidence shows that it is objectively unreasonable that the investors would continue to consent to the Debtor's

actions in compromising their property in order to obtain a release for itself.

Finally, the conflict constitutes a change of circumstances upon which the Debtor should reasonably know that the investors no longer consent to the Debtor acting on their behalf. *Restatement (Second) of Agency* § 108 provides that the authority of an agent terminates or is suspended when the agent has notice of the happening of an event or of a change in circumstances from which he should reasonably infer that the principal does not consent to the further exercise of authority or would not consent if he knew the facts. *Comment a* to this section provides if the agent has notice or he should realize that the principal would not wish him to act, the authority terminates. Section 109 covers Change in value or Business Conditions. It provides: "The authority of an agent terminates or is suspended when he has notice of a change in value of the subject matter or a change in business conditions from which he should infer that the principal, if he knew of it, would not consent to the further exercise of the authority." *Comment c* provides that "a business agent is subject to a duty to the principal to use care and skill in ascertaining business conditions, and he is not authorized to do the directed act, unless his orders are peremptory, if he reasonably should realize in light of facts which he would ascertain by the use of the skill which he has or purports to have that the principal would not desire him to act if the facts were known."

This concept is reinforced in the *Restatement (Third) of Agency*. Section 3.06 – Termination of Actual Authority – provides that "[a]n agent's actual authority may be terminated by ... (4) an agreement between the agent and the principal or the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf ...." *Comment b.* – provides insight that is directly on point. It states: "For example, the agent may become insolvent and have notice that it is important to the principal to be represented by a solvent agent. The agent may lose capacity to bind itself by a contract or

to become subject to other obligations and have notice that it is important to the principal that the agent retain such capacity." In other words, the Debtor cannot simply ignore the investors' wishes and continue with settlements that the investors reject when there are such fundamental changes. *See also Restatement (Third) of Agency* § 3.09. (termination by occurrence of changed circumstances).

The disloyalty of the Debtor also vitiates the agency authority. Section 112 of *Restatement (Second) of Agency* provides that "[u]nless otherwise agreed, the authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal." There was never any agreement that the Debtor could use the loans to settle claims against the Debtor. *Comment b* makes it clear that agents are appointed to forward the principal's interest, and when the agent ceases to do this and prefers his own or another's interests it terminates his authority.

Finally, because the Debtor's bankruptcy, by itself, terminates the Debtor's authority to act on behalf of the investors where the investors are disadvantaged because the Debtor's credit. Section 113 of the *Restatement (Second) of Agency* – Bankruptcy of Agent, provides:

> The bankruptcy or insolvency of an agent terminates his authority to conduct transactions in which the state of his credit would so affect the interests of the principal that the agent should infer that the principal, if he knew the facts, would not consent to the further exercise of the authority.

In this case, the Debtor's bankruptcy or insolvency is the primary or inextricably intertwined with the settlements. Primary to many of the claims being settled is the Debtor's inability to fund loan commitments. As such, the Debtor's insolvency has now placed the investors in a position that their property is being compromised. *See also Restatement (Third) of Agency*, § 3.09, *cmt. B.* In this situation, the Debtor's bankruptcy terminates its authority.

VII. THE AGENCY AGREEMENTS ARE EXECUTORY CONTRACTS AND MAY BE TERMINATED

Most courts, including the Ninth Circuit, have adopted Professor Vern Countryman's definition of an executory contract that a contract is executory if the "obligations of both parties are so far unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other." *Commercial Union Ins. Co. v. Texscan Corp. (In re Texscan Corp.)*, 976 F.2d 1269, 1272 (9th Cir. 1992).

A. The Agreements Are Executory

To determine whether failure to perform the remaining obligations would constitute a material breach, courts need to consider contract principles under the relevant non-bankruptcy law. *Enterprise Energy Corp. v. U.S. (In re Columbia Gas Sys. Inc.)*, 50 F.3d 233, 239-40 n.10 (3d Cir. 1995). The Court in *Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339 (9th Cir. 1983), noted that "a bankruptcy court should determine whether one of the parties' failure to perform its remaining obligations would give rise to a 'material breach' excusing performance by [the] other party under the contract law applicable to the contract...." *Id.* at 1348, n.4.

There are numerous provisions in the Agency Agreements that set forth obligations for the Debtor, but there are also several provisions with continuing investor obligations and with remedies in the event of a default, including the confidentiality provisions in Section 6, the indemnity provisions in Section 4, the obligation to execute documents in Section 5 and the obligations to reimburse for expenses, among others. In the Operating Agreements there are several provisions with continuing member obligations, including the tax indemnity obligation in Section 8 and the meeting and voting requirements in Section 6, among others, and with remedies in the event of a default, such as Section 7.6. Because a breach of these obligations by an individual investor would excuse the Debtor

from performing under the agreements vis-à-vis that investor, those agreements are executory. *See, e.g., Broyhill v. DeLuca (In re DeLuca)*, 194 B.R. 65 (Bankr. E.D. Va. 1996); *In re Daughtery Constr. Inc.*, 188 B.R. 607 (Bankr. D. Neb. 1995). Because the agency relationship is executory in nature, the filing of the bankruptcy by the Debtor has the effect of terminating the agency relationship and prevents Debtor from assuming the agreements under Section 365(c) or (e).

B. Under Section 365(c) the Agreements Cannot be Assumed

Although executory, the Agency Agreements cannot be assumed because they are personal and confidential in nature and under applicable non-bankruptcy law are nondelegable. *See Knudsen v. Torrington Co.*, 254 F.2d 283, 286 (2d Cir. 1958).

C. Under Section 365(e) the Agreements Are Not Assumable

Although executory, the Operating Agreements also cannot be assumed because they contain clauses providing for their termination upon the Debtor's bankruptcy filing (*See* Funds' Operating Agreement, at § 7.3(a), and Article XII Definition of Bankruptcy.) Although so-called *ipso facto* clauses are generally not enforceable in bankruptcy law, Section 365(e)(2)(A) provides for their enforceability where:

> (A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (ii) such party does not consent to such assumption or assignment....

As demonstrated above, applicable law here allows the investors to terminate the agency relationship. Therefore, the Operating Agreement allows the termination of the Debtor's rights as Manager, and the executory contracts cannot be assumed.

VIII. ADDITIONAL ISSUES RAISED BY THE COURT

The Court has asked the parties to brief some additional issues with regard to

authority such as the applicability of Section 363(h), and law regarding participation agreements.

A. Section 363(h) Is Not Helpful Or Applicable

The Court has inquired about the application of Section 363(h) to this case. In short, it is not applicable. The assets implicated in all of the settlements that are in question are notes and deeds of trust, not real property. The concept of "tenant in common" is applicable to real property. *See, e.g.*, A.R.S. § 12-1252. There is no authority for the proposition that tenancy in common or Section 363(h) even applies to fractionalized interests in promissory notes and deeds of trust. Moreover, the notes and deeds of trust are not even property of the bankruptcy estate. As such, the authorization in section 363(h) to for a Debtor to sale real property that is the subject of a co-tenancy is not applicable. Furthermore, section 363(h) permits the "sale" of the property. None of the settlements are seeking a sale of the promissory notes and deeds of trust. Because nothing other than the "sale" of co-owned real property is authorized by section 363 (h), it is simply not applicable.

B. Participation Cases Are Not Helpful

The Court also asked if "participation" cases are applicable and again the case law in this area is almost nonexistent. The case cited by the Debtor is not applicable to our situation. There are many cases regarding participation agreement between banks or insurance companies in the context of excess insurance, but these cases simply construe the participation agreements at issue. The Investors' Committee could find no additional propositions that were relevant or persuasive for this situation. In short it is the terms of the specific documents at issue and the general agency principles that determine the extent and scope of authority of an agent in conjunction with applicable bankruptcy law, as indicated above, that governs in this case.

IX. CONCLUSION

In addition to the previous briefing provided to the Court and the arguments and facts from the briefs incorporated herein, the Debtor's claims for authority to conclude the settlement agreements at issue fails. The Debtor improperly assumes that it has the same authority to act for all investors. The Debtor overstates the authority granted to it by the operative documents. The Debtor's authority has been vitiated by the clear conflict of interest, and its bankruptcy. The Debtor does not have authority to take the actions under the Bankruptcy Code. Finally, the additional issues raised by the Court do not provide authority for the Debtor's actions. Accordingly, the Investors Committee submits it position on the authority and agency issues but reserves the right to supplement or modify this pleading further.

DATED this 7th day of November, 2008.

FENNEMORE CRAIG, P.C.

By /s/ Cathy L. Reece (005932)
Cathy L. Reece
Keith L. Hendricks
Attorneys for the Official Committee of Investors

COPY of the foregoing emailed or mailed
this 7th day of November, 2008 to the parties
on the attached Service List.

/s/ Susan Stanczak-Ingram

2125694.1

Exhibit D

☑ MD Signature

☑ CCO Signature

☑ Officer Signature

MORTGAGES LTD.

EXISTING INVESTOR ACCOUNT AGREEMENT

1. **Programs Covered.** This Agreement relates to Pass-Through Loan Participations ("Participations") in loans originated or acquired by Mortgages Ltd. with respect to the Programs set forth below described in that certain Private Offering Memorandum dated July 10, 2006. The offering of Participations is being made through Mortgages Ltd. Securities, L.L.C. ("MLS").

The undersigned is participating in the Program or Programs set forth below:

_____ Capital Opportunity® Loan Program – minimum investment of $50,000.
_____ Annual Opportunity™ Loan Program – minimum investment of $100,000.
_____ Opportunity Plus® Loan Program – minimum investment of $100,000.
_____ Revolving Opportunity™ Loan Program – minimum investment of $500,000.
_____ Performance Plus™ Loan Program – minimum investment of $500,000.

2. **Representations and Warranties.** By executing this Agreement, the undersigned:

(a) Represents and warrants that the Account Application and any other personal and financial information previously provided, provided herewith, or subsequently provided by the undersigned to Mortgages Ltd. or MLS was, is, or will be true and correct.

(b) Acknowledges that the undersigned has received, and is familiar with and understands the Private Offering Memorandum dated July 10, 2006 or an earlier private offering memorandum provided by Mortgages Ltd. and MLS (together the "Memorandum"), including the section captioned "Risk Factors."

(c) Acknowledges that the undersigned is fully familiar with Mortgages Ltd. and its business, affairs, and operating policies and has had access to any and all material information, including all documents, records, and books pertaining to Mortgages Ltd., that the undersigned deems necessary or appropriate to enable the undersigned to make an investment decision in connection with the purchase of Participations.

(d) Acknowledges that the undersigned has been encouraged to rely upon the advice of the undersigned's legal counsel, accountants, and other financial advisors with respect to the purchase of Participations, including the tax considerations with respect thereto.

(e) Represents and warrants that the undersigned, in determining to purchase Participations, has relied and will rely solely upon the Memorandum and the advice of the undersigned's legal counsel, accountants, and other financial advisors with respect to the purchase of Participations (including the tax aspects thereof) and has been offered the opportunity to ask such questions and inspect such documents as the undersigned has requested so as to understand more fully the nature of the investment and to verify the accuracy of the information supplied.

(f) Represents and warrants that the undersigned has the full power to execute, deliver, and perform this Agreement and that this Agreement is a legal and binding obligation of, and is enforceable against, the undersigned in accordance with its terms.

(g) Represents and warrants that the undersigned is an "accredited investor" as defined in Rule 501(a) under the Securities Act of 1933, as amended (the "Securities Act") and satisfies one of the standards set forth in the Memorandum under the section captioned under "Who May Invest" and that the undersigned will inform Mortgages Ltd. and MLS of any change in such accredited investor status.

(h) Represents and warrants that the Participations owned by the undersigned have been, and any Participations acquired by the undersigned in the future will be, acquired for the undersigned's own account

without a view to public distribution or resale and that the undersigned with no contract, undertaking, agreement, or arrangement to sell or otherwise transfer or dispose of any Participations or any portion thereof to any other person.

(i) Represents and warrants that the undersigned (i) can bear the economic risk of the Participations, including the loss of the undersigned's investment and (ii) has such knowledge and experience in business and financial matters, including the analysis of or participation in private offerings and real estate investments, as to be capable of evaluating the merits and risks of an investment in Participations or that the undersigned is being advised by others (acknowledged by the undersigned as being the "Purchaser Representative(s)" of the undersigned) such that they and the undersigned together are capable of making such evaluation.

(j) Represents and warrants, if subject to the Employee Retirement Income Security Act ("ERISA"), that the undersigned is aware of and has taken into consideration the diversification requirements of Section 404(a)(3) of ERISA in determining to purchase Participations and that the undersigned has concluded that the purchase of Participations is prudent.

(k) Understands that the undersigned may be required to provide additional current financial and other information to Mortgages Ltd. and Mortgages Ltd. Securities, L.L.C. to enable them to determine whether the undersigned is qualified to purchase Participations.

(l) Understands that the Participations will not be registered under the Securities Act or the securities laws of any state or other jurisdiction and therefore will be subject to substantial restrictions on transfer.

(m) Agrees that the undersigned will not sell or otherwise transfer or dispose of any Participations or any portion thereof unless such Participations are registered under the Securities Act and any applicable state securities laws or the undersigned obtains an opinion of counsel that it is satisfactory to Mortgages Ltd. and MLS that such Participations may be sold in reliance on an exemption from such registration requirements.

(n) Understands that (i) there is no obligation or intention to register any Participations for resale or transfer under the Securities Act or any state securities laws or to take any action (including the filing of reports or the publication of information as required by Rule 144 under the Securities Act) that would make available any exemption from the registration requirements of any such laws, and (ii) the undersigned therefore may be precluded from selling or otherwise transferring or disposing of any Participations or any portion thereof for an indefinite period of time or at any particular time.

(o) 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 Memorandum nor has the undersigned relied on any representations or warranties in the belief that they were made on behalf of any of the foregoing, nor has the undersigned relied on the absence of any such representations or warranties in reaching the decision to purchase Participations.

(p) Represents and warrants that (i) if an individual, the undersigned is at least 21 years of age; (ii) the undersigned satisfies the suitability standards set forth in the Memorandum; (iii) the undersigned has adequate means of providing for the undersigned's current needs and contingencies; (iv) the undersigned has no need for liquidity in the undersigned's investments; (v) the undersigned maintains the undersigned's business or residence at the address provided to Mortgages Ltd. and MLS; (vi) all investments in and commitments to non-liquid investments including Participations currently owned are, and after any further acquisitions of Participations will be, reasonable in relation to the undersigned's net worth and current needs; and (vii) any financial information previously provided, provided herewith, or subsequently provided at the request of Mortgage Ltd. or MLS did, does, or will accurately reflect the undersigned's financial sophistication and condition with respect to which the undersigned does not anticipate any material adverse change.

(q) Understands that no federal or state agency, including the Securities and Exchange Commission or the securities commission or authorities of any state, has approved or disapproved the Participations,

passed upon or endorsed the merits of the offering of Participations, or made any finding or determination as to the fairness of the Participations for investment.

(r) Understands that the Participations are sold in reliance on specific exemptions from the registration requirements of federal and state laws and that Mortgages Ltd. and MLS are relying upon the truth and accuracy of the representations, warranties, agreements, acknowledgements, and understandings of the undersigned in order to determine the suitability of the undersigned to acquire Participations.

(s) Represents, warrants, and agrees that, if the undersigned has acquired in the past or acquires in the future Participations in a fiduciary capacity (i) the above representations, warranties, agreements, acknowledgements, and understandings shall be deemed to have been made on behalf of the person or persons for whose benefit such Participations are being acquired, (ii) the name of such person or persons is indicated below under the subscriber's name, and (iii) such further information as Mortgages Ltd. and MLS deem appropriate shall be furnished regarding such person or persons.

(t) Represents and warrants that the information set forth herein, or contained in the undersigned's Account Application, is true and complete and agrees that Mortgages Ltd. and MLS may rely on the truth and accuracy of the information for purposes of assuring that Mortgages Ltd. and MLS may rely on the exemptions from the registration requirements of the Securities Act afforded by Section 4(2) of the Securities Act and Regulation D under the Securities Act and of any applicable state statutes or regulations, and further agrees that Mortgages Ltd. and MLS may present such information to such persons as it deems appropriate if called upon to verify the information provided or to establish the availability of an exemption from registration under Section 4(2) of the Securities Act, Regulation D, or any state securities statutes or regulations or if the contents are relevant to any issue in any action, suit, or proceeding to which Mortgages Ltd. or MLS are a party or by which either of them may be bound.

(u) Understands and acknowledges that the Participations are subject to a number of important risks and uncertainties as set forth under the section captioned "Risk Factors" in the Memorandum, including significant competition; the risks generally incident to the development, ownership operation, and rental of real property; changes in national and local economic and market conditions; changes in the investment climate for real estate investments; the availability and cost of mortgage funds; the obligations to meet fixed and maturing obligations, if any; the availability and cost of necessary utilities and services; changes in real estate tax rates and other operating expenses; changes in governmental rules, fiscal policies, zoning, environmental controls, and other land use regulations; acts of God, which may result in uninsured losses; conditions in the real estate market; the availability and cost of real estate loans; and other factors beyond the control of Mortgages Ltd. The undersigned further understands and acknowledges that the Participations will also be subject to the risks associated with the development of real estate, including the cost of construction, the time it takes to complete such construction, worker strikes and other labor difficulties, energy shortages, material and labor shortages, inflation, adverse weather conditions, subcontractor defaults and delays, changes in federal, state, or local laws, ordinances, or regulations, and other unknown contingencies.

(v) Understands and acknowledges that the representations and warranties contained in this Agreement must remain true and correct at any time that the undersigned purchases any additional Participations and that the payment for any additional Participations will constitute such a reconfirmation of the truth and correctness of the representations and warranties contained in this Agreement.

(w) Understands and acknowledges that the success of any investment is impossible to predict and that no representations or warranties of any kind are made by Mortgages Ltd. or MLS or any of their affiliates with respect to the prospects of the investment or the ultimate rate of return on the Participations.

3. **General Information.** Purchaser Representative. Please check (a) or (b) below:

(a) (X) The undersigned is not relying upon the advice of a Purchaser Representative, such as an attorney, accountant, or other advisor, in making a final investment decision to purchase Participations. The undersigned believes that the undersigned has sufficient knowledge and experience in financial and

business matters to be capable of evaluating the merits and risks of an investment in the Participations.

(b) ( ) The undersigned does not have sufficient knowledge and experience in financial and business matters as required above. The undersigned intends to rely on and hereby designates as the undersigned's Purchaser Representative the individual(s) named below to assist the undersigned in evaluating the risks and merits of an investment in Participations. The undersigned authorizes Mortgages Ltd. to furnish such person with a Purchaser Representative Questionnaire requesting certain information regarding his or her expertise and background and the undersigned agrees to furnish such questionnaire to Mortgages Ltd.

Name of Purchaser Representative:_____

Address:_____

Occupation:_____

Employer:_____

If Item 3(b) is checked, each Purchaser Representative must complete a Purchaser Representative Questionnaire.

4. **Adoption of the Agency Agreement.** By executing this Subscription Agreement, the undersigned accepts and agrees to be bound by the Agency Agreement provided to the undersigned, which is an exhibit to the Memorandum. 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 in the undersigned's name, place, and stead, to make, execute, swear to, acknowledge, deliver, file, and record the following:

(a) The Agency Agreement and amendments thereto;

(b) Any Assignments of Beneficial Participation in Deeds of Trust, Promissory Note Endorsements, Assignments of Assignment of Deeds, Leases and Profits, and Assignments of Assignments of Rents that Mortgages Ltd. deems necessary and appropriate to effectuate the purposes of the Programs and the purchase of Participations.

(c) All certificates, instruments, documents, and other papers and amendments thereto that may from time to time be required under the laws of the United States of America, the state of Arizona, any other state or jurisdiction, or required by any political subdivision or agency of any of the foregoing or otherwise, or which Mortgages Ltd. deems appropriate or necessary to carry on the objects and intent of the Programs and the purchase of Participations;

(d) All conveyances and other instruments that Mortgages Ltd. deems appropriate to effect the transfer of Participations.

(e) Unless authorization is withheld by so indicating below or in another written document to Mortgages Ltd. or MLS, the undersigned hereby authorizes Mortgages Ltd. to be named as the lender/payee/beneficiary as agent for the undersigned in the deed of trust or deeds of trust or mortgage or mortgages securing the Loan or Loans and other documentation relating to the Loans.

_____ Authorization granted

Authorization withheld

This power of attorney granted hereby shall be deemed to be a power coupled with an interest, shall survive the death, legal incapacity bankruptcy, merger, sale, dissolution, termination, or other fundamental change of the undersigned, and shall survive the delivery of an assignment by the undersigned of all or any portion of the undersigned's Participations or any interest therein except that, when the assignee thereof has been approved by Mortgages Ltd. as a Participation holder, the power shall survive the delivery of such assignment with respect to the assigned interest only for the purpose of enabling Mortgages Ltd. to execute, acknowledge, and file any instruments necessary to effect such substitution.

5. **Authorization to Purchase Following Verbal Instructions.** The undersigned hereby authorizes Mortgages Ltd. Securities, L.L.C., as the undersigned's agent, to accept the undersigned's oral instructions (a) to purchase Participations in Loans secured by deeds of trusts or mortgages on the properties underlying the Loans so long as the Participations are within the parameters described in the Memorandum and (b) to apply payoff proceeds of Participations to purchase Participations in other Loans within the parameters described in the Memorandum or to forward the cash proceeds thereof to the undersigned. By executing this Agreement, the undersigned also acknowledges and confirms the following:

(a) The undersigned understands and acknowledges that Mortgages Ltd. will have the authority, based upon the undersigned's oral instructions, to make various determinations and take various actions with Loans with respect to the Participations currently owned or owned in the future by the undersigned, including extending the terms of the Loans, modifying the payment terms of the Loans, accepting prepayments on the Loans, releasing a portion of the collateral securing the Loans, and otherwise dealing with the Loans on behalf of the undersigned.

(b) To the extent that the undersigned requests with respect to a Loan, the undersigned understands that the undersigned will have the opportunity to (i) review the Property Information Sheet for the Loan, which describes material information about the Loan and the deed of trust or mortgage securing the Loan, (ii) to review Mortgage Ltd.'s entire loan file with respect to the Loan, which contains information and documentation concerning the Loan, the real property underlying the Loan, and the Borrower under the Loan; (iii) to ask any questions the undersigned has about the Loan and such documentation; and (iv) the undersigned will receive answers to any questions that the undersigned may have.

To the extent that a representative of Mortgages Ltd. Securities, L.L.C. is unable to contact the undersigned following the payoff of a Loan with respect to which the undersigned owns Participations, the undersigned authorizes Mortgages Ltd. Securities, L.L.C. to apply such proceeds to the Capital Opportunity Loan Program for its minimum investment period pending oral instructions from the undersigned for the application of such proceeds after such minimum period.

6. **Grant of Discretion.** Until revoked at any time in writing, the undersigned hereby grants discretion to Mortgages Ltd., in its sole discretion, to select for purchase and sale the Loan or Loans with respect to which the undersigned acquires Participations. Without limiting the foregoing, the undersigned understands that this grant of discretion will give Mortgages Ltd. the authority, in its sole discretion, to make various determinations and take various actions with Loans with respect to Participations to be acquired, acquired, or sold by the undersigned, including extending the terms of the Loans, modifying the payment terms of the Loans, accepting prepayments on the Loans, releasing a portion of the collateral securing the Loan, and otherwise dealing with the Loans on behalf of the undersigned.

_____ Discretion granted

Discretion withheld

7. **Disclosure of Existing Power of Attorney.** Please indicate if the undersigned has granted a power of attorney with respect to Mortgages Ltd. investment products.

☐ Yes ☒ No

If yes, please attach a copy of the document.

This power of attorney granted hereby shall be deemed to be a power coupled with an interest, shall survive the death, legal incapacity bankruptcy, merger, sale, dissolution, termination, or other fundamental change of the undersigned, and shall survive the delivery of an assignment by the undersigned of all or any portion of the undersigned's Participations or any interest therein except that, when the assignee thereof has been approved by Mortgages Ltd. as a Participation holder, the power shall survive the delivery of such assignment with respect to the assigned interest only for the purpose of enabling Mortgages Ltd. to execute, acknowledge, and file any instruments necessary to effect such substitution.

5. **Authorization to Purchase Following Verbal Instructions.** The undersigned hereby authorizes Mortgages Ltd. Securities, L.L.C., as the undersigned's agent, to accept the undersigned's oral instructions (a) to purchase Participations in Loans secured by deeds of trusts or mortgages on the properties underlying the Loans so long as the Participations are within the parameters described in the Memorandum and (b) to apply payoff proceeds of Participations to purchase Participations in other Loans within the parameters described in the Memorandum or to forward the cash proceeds thereof to the undersigned. By executing this Agreement, the undersigned also acknowledges and confirms the following:

(a) The undersigned understands and acknowledges that Mortgages Ltd. will have the authority, based upon the undersigned's oral instructions, to make various determinations and take various actions with Loans with respect to the Participations currently owned or owned in the future by the undersigned, including extending the terms of the Loans, modifying the payment terms of the Loans, accepting prepayments on the Loans, releasing a portion of the collateral securing the Loans, and otherwise dealing with the Loans on behalf of the undersigned.

(b) To the extent that the undersigned requests with respect to a Loan, the undersigned understands that the undersigned will have the opportunity to (i) review the Property Information Sheet for the Loan, which describes material information about the Loan and the deed of trust or mortgage securing the Loan, (ii) to review Mortgage Ltd.'s entire loan file with respect to the Loan, which contains information and documentation concerning the Loan, the real property underlying the Loan, and the Borrower under the Loan; (iii) to ask any questions the undersigned has about the Loan and such documentation; and (iv) the undersigned will receive answers to any questions that the undersigned may have.

To the extent that a representative of Mortgages Ltd. Securities, L.L.C. is unable to contact the undersigned following the payoff of a Loan with respect to which the undersigned owns Participations, the undersigned authorizes Mortgages Ltd. Securities, L.L.C. to apply such proceeds to the Capital Opportunity Loan Program for its minimum investment period pending oral instructions from the undersigned for the application of such proceeds after such minimum period.

6. **Grant of Discretion.** Until revoked at any time in writing, the undersigned hereby grants discretion to Mortgages Ltd., in its sole discretion, to select for purchase and sale the Loan or Loans with respect to which the undersigned acquires Participations. Without limiting the foregoing, the undersigned understands that this grant of discretion will give Mortgages Ltd. the authority, in its sole discretion, to make various determinations and take various actions with Loans with respect to Participations to be acquired, acquired, or sold by the undersigned, including extending the terms of the Loans, modifying the payment terms of the Loans, accepting prepayments on the Loans, releasing a portion of the collateral securing the Loan, and otherwise dealing with the Loans on behalf of the undersigned.

Discretion granted

Discretion withheld

7. **Disclosure of Existing Power of Attorney.** Please indicate if the undersigned has granted a power of attorney with respect to Mortgages Ltd. investment products.

☐ Yes ☒ No

If yes, please attach a copy of the document.

8. **Miscellaneous.**

(a) **Choice of Law.** This Agreement and all questions relating to its validity, interpretation, performance, and enforcement, will be governed by and construed in accordance with the laws of the state of Arizona, notwithstanding any Arizona or other conflict-of-law provision to the contrary.

(b) **Binding Agreement.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and the respective heirs, personal representatives, successors, and assigns of the parties hereto, except that the undersigned may not assign or transfer any rights or obligations under this Subscription Agreement without the prior written consent of the Mortgages Ltd.

(c) **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.

(d) **Dispute Resolution.**

(i) This section applies to any controversy or claim arising from, relating to, or in any way connected with this Agreement, the offering of Participations, the Loans, the Agency Agreement, or any other documents relating to the Loans.

(ii) In the event of any such controversy or claim, the parties shall use their best efforts to settle the controversy or claim. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 60 days, then, upon notice by either party to the other, all such controversies or claims shall submitted to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures.

(iii) In the event that mediation does not result in a resolution, any party that still wishes to pursue a controversy or claim shall first notify the other party in writing within 60 days after the mediation. Upon receipt of such notice, the receiving party shall elect, in its sole and absolute discretion, to compel the dispute either to court for litigation pursuant to this section or to arbitration pursuant to this section. The receiving party shall notify the other party of the election within 10 days after receipt of the notice.

(iv) In the event that the dispute is compelled to arbitration, the parties agree to submit the unresolved controversies or claims to arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within ten days of their appointment. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association. The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute. The arbitrators shall not award consequential damages. Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount. The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees. Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of the other parties. The place of arbitration shall be Phoenix, Arizona.

(v) In the event that the dispute is compelled to court for litigation, the parties agree that the unresolved controversies or claims shall be determined in federal or state court sitting in the city of Phoenix, and they agree to waive the defense of inconvenient forum and any right to jury trial.

IN WITNESS WHEREOF, intending to irrevocably bind the undersigned and the heirs, personal representatives, successors, and assigns of the undersigned and to be bound by this Agreement, the undersigned is executing this Agreement on the date indicated.

Dated: Jan. 30, 2007

For Mortgages Ltd. Securities, L.L.C. use only

Signature of Managing Director

Signature of Chief Compliance Officer

Name in which Individual Investment Is to Be Registered:

Print Name of Individual Investor:
Bruce Dennis Buckley

Signature of Individual Investor:
Bruce Dennis Buckley

Print Name of Individual Co-Investor:
ALIVIA VIRGINIA BUCKLEY

Signature of Individual Co-Investor:
Alivia Virginia Buckley

Name of corporate, partnership, limited liability company, trust, qualified pension, profit sharing, stock/Keogh, or 401k Plan Investor:

By: _____
(Name of first executing party)

By: _____
(Signature of first executing party)

Its: _____

By: _____
(Name of second executing party)

By: _____
(Signature of second executing party)

Its: _____

ACCEPTED:
MORTGAGES LTD.

By: Joseph P. Walter
Its: Investment Operations Manager
Registered Principal

09/06/2006

IN WITNESS WHEREOF, intending to irrevocably bind the undersigned and the heirs, personal representatives, successors, and assigns of the undersigned and to be bound by this Agreement, the undersigned is executing this Agreement on the date indicated.

Dated: August 30, 2007

Name in which Individual Investment Is to Be Registered:

Equity Trust Company, Custodian FBO Bruce D. Buckley IRA Acct.#3XXXX

Print Name of Individual Investor:

Bruce D. Buckley

Signature of Individual Investor:

Bruce D Buckley

Print Name of Individual Co-Investor:

*****Bruce can only sign doc that are not to be recorded, otherwise signature block should be:**

_____

Authorized Representative

Signature of Individual Co-Investor:

_____

For Mortgages Ltd. Securities I.L.C use only

_____

Signature of Managing Director

_____

Signature of Chief Compliance Officer

ACCEPTED:

MORTGAGES LTD.

By: _____

Its: _____

09/06/2006