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12 Mortgages Ltd. Opportunity Fund MP-17 L.L.C.
13 MP062011 L.L.C.
14 MP122009 L.L.C.
MP122030 L.L.C.

15 UNITED STATES BANKRUPTCY COURT
16 DISTRICT OF ARIZONA

17
18 In re
19 MORTGAGES LTD., an Arizona
corporation,
20 Debtor.

Chapter 11
Case No. 2-08-BK-07465-RJH
(The Honorable Randolph J. Haines)

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PDG LOS ARCOS, LLC, an Arizona
limited liability company,

Plaintiff,

v.
ROBERT M. ADAMS, Trustee,
Schedule B Property, under the R and C
Adams Family Trust dated December
27, 1994, et al.,

Defendants.

Adv. No. 08-781

(Removed from the Superior Court of the
State of Arizona, County of Maricopa,
Case No. CV2008-024361)

**MOTION TO (1) DISMISS FOR
FAILURE TO INCLUDE AN
INDISPENSABLE PARTY PURSUANT
TO BANKRUPTCY RULE 7012(B)(7),
AND (2) DISMISS COUNTS III AND IV
FOR FAILURE TO STATE A CLAIM
PURSUANT TO BANKRUPTCY RULE
7012(B)(6); MEMORANDUM OF
POINTS AND AUTHORITIES AND
DECLARATION OF RICHARD
FELDHEIM IN SUPPORT THEREOF**

Complaint filed: October 2, 2008

1 Defendants Mortgages Ltd. Opportunity Fund MP-12 L.L.C., Mortgages Ltd.
2 Opportunity Fund MP-13 L.L.C., Mortgages Ltd. Opportunity Fund MP-14 L.L.C.,
3 Mortgages Ltd. Opportunity Fund MP-15 L.L.C., Mortgages Ltd. Opportunity Fund MP-
4 16 L.L.C., Mortgages Ltd. Opportunity Fund MP-17 L.L.C., MP062011 L.L.C.,
5 MP122009 L.L.C., and MP122030 L.L.C. (“**MLtd. Defendants**”) hereby move the Court
6 for an order (i) dismissing the complaint filed by plaintiff PDG Los Arcos, L.L.C.
7 (“**Plaintiff**”) for failure to include an indispensable party, Mortgages Ltd., pursuant to
8 Bankruptcy Rule 7012(b)(7), and (ii) dismissing Counts III and IV for failure to state a
9 claim pursuant to Bankruptcy Rule 7012(b)(6).

10 Defendants’ motion is made on the following grounds:

- 11 • Plaintiff’s complaint should be dismissed because Plaintiff failed to include
12 Mortgages Ltd., an indispensable party, who is (i) a direct lender under the
13 \$26 million loan (“**Loan**”) at issue, (ii) a party to the Loan documents that
14 were allegedly breached, and (iii) the servicing agent for all defendants with
15 respect to enforcement of the Loan;
- 16 • Count III for Tortious Breach of Covenant of Good Faith and Fair Dealing
17 should be dismissed because this claim is not recognized under Arizona law
18 outside of the insurance context;
- 19 • Plaintiff’s argument that this Court should extend a tortious breach of
20 contract beyond the insurance context because a “special relationship”
21 exists between lenders and a borrower with respect to a multi-million dollar
22 commercial loan is without merit; and
- 23 • Count IV for Punitive Damages should be dismissed because punitive
24 damages cannot be awarded for a breach of contract or an implied covenant
25 within a contract.

26 This Motion is based upon the Memorandum of Points and Authorities and the
27 Declaration of Richard Feldheim filed concurrently herewith, the pleadings on file herein,
28

1 and on such further oral and documentary evidence as may be introduced at or before the
2 hearing of this Motion.

3
4 Dated: November 6, 2008

DLA PIPER LLP (US)

5
6 s/ Mark A. Nadeau

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16 Opportunity Fund MP-13 L.L.C.;

17 Mortgages Ltd. Opportunity Fund MP-14

18 L.L.C.; Mortgages Ltd. Opportunity Fund

19 MP-15 L.L.C.; Mortgages Ltd. Opportunity

20 Fund MP-16 L.L.C.; Mortgages Ltd.

21 Opportunity Fund MP-17 L.L.C.;

22 MP062011 L.L.C.; MP122009 L.L.C.;

23 MP122030 L.L.C.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants Mortgages Ltd. Opportunity Fund MP-12 L.L.C., Mortgages Ltd.
3 Opportunity Fund MP-13 L.L.C., Mortgages Ltd. Opportunity Fund MP-14 L.L.C.,
4 Mortgages Ltd. Opportunity Fund MP-15 L.L.C., Mortgages Ltd. Opportunity Fund MP-
5 16 L.L.C., Mortgages Ltd. Opportunity Fund MP-17 L.L.C., MP062011 L.L.C.,
6 MP122009 L.L.C., and MP122030 L.L.C. (“**MLtd. Defendants**”) hereby move for an
7 order (i) dismissing plaintiff PDG Los Arcos, L.L.C.’s (“**Plaintiff**”) complaint for failure
8 to include Mortgages Ltd., an indispensable party, pursuant to Bankruptcy Rule
9 7012(b)(7), and (ii) dismissing Counts III and IV for failure to state a claim pursuant to
10 Bankruptcy Rule 7012(b)(6).

11
12 **I. INTRODUCTION**

13 This dispute concerns a \$26 million commercial loan (“**Loan**”) that Plaintiff claims
14 defendants failed to fully fund despite contractual obligations to do so. Seeking both
15 compensatory and punitive damages, Plaintiff brought causes of action for breach of
16 contract, breach of the covenant of good faith and fair dealing, tortious breach of the
17 covenant of good faith and fair dealing, and punitive damages.

18 It is axiomatic that all responsible parties must be before the court in order to fully
19 and fairly adjudicate a matter, and to prevent piecemeal and potentially inconsistent
20 adjudications. Here, Plaintiff brought this action alleging breach of the Loan documents
21 without including all parties holding an interest in the Loan. Specifically, Plaintiff failed
22 to include Mortgages Ltd.

23 Mortgages Ltd. is an indispensable party because Mortgages Ltd. is (i) the original
24 lender with respect to the Loan, (ii) currently a direct lender under the Loan, (ii) a party to
25 the Loan documents that were allegedly breached, and (iv) the Servicing Agent for the
26 Loan and, in that capacity, has the power and duty to act on behalf of all defendants in
27 enforcing their rights and remedies with respect to the Loan. The Loan is in material
28 money default based on Plaintiff’s failure to make any loan payments since June 2008.

1 If the Court does not dismiss the complaint, Mortgage Ltd.'s rights and remedies
2 against Plaintiff as a direct lender and the servicing agent under the Loan may be
3 impacted under principles of *res judicata* and/or collateral estoppel. Thus, Mortgages Ltd.
4 is an indispensable party who must be joined if the Court is to properly adjudicate this
5 matter.

6 To the extent that principles of *res judicata* and/or collateral estoppel do not apply,
7 there would be serial, and potentially inconsistent, adjudications of the same claims and/or
8 defenses regarding purported breaches of the Loan. For example, while Plaintiff asserts
9 breaches under the Loan documents by defendants in this action, Mortgages Ltd. will file
10 a separate action to enforce rights and remedies under the defaulted Loan on its own
11 behalf and on behalf of the defendants. Such serial or multiple actions could result in
12 inconsistent adjudications of the same claims and/or defenses. Accordingly, the MLtd.
13 Defendants seek an order from the Court dismissing the complaint pursuant to Bankruptcy
14 Rule 7012(b)(7).

15 In any event, the Court should dismiss Counts III and IV as without merit as a
16 matter of law. Although the gravamen of Plaintiff's complaint is an alleged breach of the
17 loan agreement, Plaintiff asserts a claim in Count III for tortious breach of the covenant of
18 good faith and fair dealing, and seeks to recover punitive damages. At best, Plaintiff has a
19 contract claim. The proper remedy for breach of contract is contract damages. By
20 seeking punitive damages, Plaintiff is trying to recover more than the benefit of its
21 bargain.

22 Under Arizona law, tort damages for breach of the covenant of good faith and fair
23 dealing has been limited to the insurance context where it is founded largely on the
24 existence of a "special relationship" between the insurer and the insured. Outside of
25 actions filed by insureds, and certain limited exceptions dealing with employment
26 contracts, Arizona courts do not recognize a tort claim arising from any breach of
27 contract.

28 Here, Plaintiff claims that "[t]he relationship between PDG and the defendant-

1 lenders was a special-nature relationship in that the lenders were involved in a joint
2 enterprise with PDG.” This legal conclusion is unsupported by any factual allegations and
3 is patently inadequate. This \$26 million arms-length loan transaction is a classic example
4 of an agreement between parties who do not enjoy a special relationship. Here, the
5 original loan agreement was negotiated between Mortgages Ltd., a commercial lender,
6 and PDG, a commercial property developer engaged in a \$26 million commercial
7 development project. No transaction could possibly be more at arms-length, and nothing
8 about this deal suggests that a special relationship exists. Thus, Plaintiff’s claim for
9 tortious breach based on the existence of a special relationship is fatally flawed and must
10 be dismissed.

11 Because this case arises out of contract, and punitive damages are not available for
12 breach of contract, Count IV for punitive damages must also be dismissed. Indeed, even
13 if Plaintiff’s claim for tortious breach survives this motion to dismiss, and it should not,
14 Plaintiff’s claim for punitive damages should still be dismissed. Plaintiff’s only factual
15 allegation with respect to punitive damages is the conclusory claim that “lender-
16 defendants’ tortious conduct was conscious and willful” because “defendants knowingly
17 disregard[ed] the virtual certainty of significant harm to [Plaintiff].” Such a conclusory
18 statement fails to allege “conduct on the part of the defendant amounting to aggravation,
19 outrage, malice or willful and wanton misconduct.” As such, it is inherently insufficient
20 to support an award of punitive damages.

21 Thus, the MLtd. Defendants also seek an order dismissing Count III for Tortious
22 Breach of Covenant of Good Faith and Fair Dealing and Count IV for Punitive Damages
23 pursuant to Bankruptcy Rule 7012(b)(6).

24 II. STATEMENT OF FACTS

25 A. The Loan

26 On or about June 18, 2007, Mortgages Ltd. (“Mortgages Ltd.”) made a loan to
27 Plaintiff in the maximum principal amount of \$26,000,000 (the “Loan”). The Loan is
28 evidenced by a Construction Loan Agreement (“Loan Agreement”) and a Promissory

1 Note (“Note”), both dated June 18, 2007. The maturity date stated in the Note is
2 December 22, 2008.

3 When the Loan was made, Mortgages Ltd. and Plaintiff executed a Servicing
4 Agreement (“**Servicing Agreement**”) pursuant to which Mortgages Ltd. was appointed
5 Servicing Agent for the Loan. As Servicing Agent, Mortgages Ltd. is authorized to act on
6 behalf of all defendants with respect to enforcement of the Loan.

7 Mortgages Ltd. is also a direct lender with respect to the Loan. Based upon the
8 allegations of the Complaint, all of the named defendants in this action, including the
9 MLtd. Defendants, have interests in the Loan, having acquired their interests from
10 Mortgages Ltd., the original lender.

11 **B. Borrower Files Suit, But Does Not Include Mortgages Ltd. In The Action**

12 The Loan has been in material monetary default since July 2008. Three months
13 after Plaintiff stopped making monthly Loan payments, Plaintiff filed suit against some,
14 but not all, of the parties with an interest in the Loan. In particular, Plaintiff failed to
15 include in its lawsuit Mortgages Ltd., a direct lender and the servicing agent for all
16 defendants.

17 Mortgages Ltd. is a party to the operative loan documents (“**Loan Documents**”),
18 Mortgages Ltd. is in privity of contract with Plaintiff, the MLtd. Defendants and all of the
19 other defendants, and Mortgages Ltd.’s rights, remedies and obligations under the Loan
20 Documents will be impacted by the outcome of Plaintiff’s action.

21 **C. Procedural History**

22 On October 29, 2008, the MLtd. Defendants filed a Notice of Removal pursuant to
23 28 U.S.C. §§ 1441 and 1452, removing Case No. CV2008-024361 from the Maricopa
24 County Superior Court. The case is now before this Court as Adversary Proceeding No.
25 08-781. In the Notice of Removal, the MLtd. Defendants alleged that this action is a core
26 proceeding. To the extent that this Court determines that it is non-core, the MLtd.
27 Defendants consent to the entry of final orders and judgments by this Court.

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III. ARGUMENT

A. The Court Should Order The Complaint Dismissed Because Plaintiff Failed To Join Mortgages Ltd., An Indispensable Party.

Bankruptcy Rule 7012(b)(7) requires dismissal of a complaint if an indispensable party cannot be joined pursuant to Bankruptcy Rule 7019. Fed. R. Bankr. P. 7012(b) (“Rule 12(b)-(h) F.R.Civ.P. applies in adversary proceedings.”). Bankruptcy Rule 7019 provides, among other things, that “Rule 19 F.R.Civ.P. applies in adversary proceedings....” Fed. R. Bankr. P. 7019. Federal Rule of Civil Procedure 19 requires the joinder of any “Required Party”:

A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person’s absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may: (i) as a practical matter impair or impede the person’s ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.... If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

Federal courts routinely hold that a party with an interest in the agreement or property upon which the plaintiff has sued is a required party to the lawsuit, necessitating dismissal of the lawsuit or joinder of the party. See, e.g., *Scandinavian Airlines System Denmark-Norway-Sweden v. McDonald’s Corp.*, 870 F. Supp. 213, 217 (N.D. Ill. 1994) (where three persons contracted to form a joint venture, and one of the three co-venturers sued another of the co-venturers for breach of the joint venture contract by allegedly usurping an opportunity of the joint venture, court held that third co-venturer was a necessary party; absent joinder of the third co-venturer, the defendant “face[d] the real possibility of multiple suits and inconsistent obligations”); *Deere & Co. v. Diamond Wood Farms, Inc.*, 152 F.R.D. 158, 161-62 (Ark. 1993) (in action by lender holding first lien on farm equipment against the borrowers, other lender holding second lien on the equipment

1 was indispensable party who's absence mandated dismissal of the action; disposition of
2 the case without second lien holder might have impaired its ability to protect its interest in
3 the equipment); *Belcher v. Prudential Ins. Co. of America*, 158 F. Supp. 2d 777, 779-80
4 (Ohio 2001); *Poling v. K. Hovnanian Enterprises*, 99 F. Supp. 2d 502, 516-17 (N.J. 2000).

5 Here, Plaintiff failed to join Mortgages Ltd., an indispensable party to this
6 litigation. As the original lender, a direct lender, a party to the Loan Documents, and the
7 servicing agent of the defendants, Mortgages Ltd. is a required party in whose absence the
8 court will be unable to accord complete relief, and who is so situated that disposing of the
9 action without its participation in the lawsuit may, as a practical matter, impair or impede
10 Mortgages Ltd.'s ability to protect its own interests, as well as the interests of the
11 defendants.

12 1. The Court Cannot Accord Complete Relief Without Mortgages Ltd.

13 In a ruling on a motion under Federal Rules of Civil Procedure 12(b)(6) or (7),
14 "[f]actual assertions in pleadings ... are considered judicial admissions conclusively
15 binding on the party who made them." *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.
16 2d 224, 226 (9th Cir. 1988); *see also Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-378
17 (9th Cir. 1996) ("[a]ll allegations of material fact are taken as true").

18 Here, based upon Plaintiff's allegations, the named defendants, including the
19 MLtd. Defendants, own collectively less than 100% "of the loan obligations that arise
20 under PDG's construction loan agreement and the associated loan documents."
21 (Complaint, p. 4:16-18.) Plaintiff further alleges that "[e]ach of the defendants is a lender
22 by virtue of the fact that they appointed Mortgages Ltd. to act as their agent with respect
23 to the construction loan agreement and the associated loan documents and assumed a
24 proportionate share of the rights and obligations under the various loan documents
25 associated with the construction loan." (Complaint, p. 4:19-23.)

26 Thus, Plaintiff admits that in order to have all parties with beneficial interests in the
27 Loan before this Court, another lender or lenders must be joined to the proceedings.
28 Mortgages Ltd. is the missing direct lender. (Declaration of Richard Feldheim ("Feldheim

1 Decl.”), ¶ 3.) Plaintiff also admits that Mortgages Ltd. is the agent for all defendants with
2 respect to the Loan and that, as such, Mortgages Ltd. is the sole entity authorized to act on
3 defendants’ behalf with respect to the enforcement of the Loan that is the subject of
4 Plaintiff’s lawsuit, and under which Plaintiff is currently in default. (Feldheim Decl., ¶ 4.)

5 Clearly, this Court would not be able to accord complete relief without joining
6 Mortgages Ltd. as a party to the action. Mortgages Ltd. is a direct lender, the agent of the
7 defendants with respect to the Loan and in privity of contract with all of the parties in this
8 action. As such, Mortgages Ltd. is an indispensable party, and without Mortgages Ltd.,
9 Plaintiff’s complaint must be dismissed.

10 2. If Mortgages Ltd. Is Not Joined, It Will Not Be Able To Protect Its Own
11 Interest, Or The Interests Of The Other Lenders On Whose Behalf It Has
12 The Power And Duty To Act.

13 As a direct lender, Mortgages Ltd.’s interest in the Loan could be adversely
14 affected by any decision this Court might render. A decision on whether defendants
15 breached the Loan will effect, and perhaps impair, Mortgages Ltd.’s ability to enforce the
16 Loan directly or as an agent for the defendants. If it succeeds, Plaintiff will argue that any
17 claims Mortgages Ltd. might have had as a direct lender against Plaintiff have been lost
18 under principles of *res judicata* and collateral estoppel. Yet Mortgages Ltd. would have
19 been denied its day in court, and would have been unable to present a defense.

20 To the extent that principles of *res judicata* and/or collateral estoppel do not apply,
21 there would be serial, and potentially inconsistent, adjudications of the same claims and/or
22 defenses regarding purported breaches of the Loan. For example, while Plaintiff asserts
23 breaches of the Loan documents by defendants in this action, Mortgages Ltd. will file a
24 separate action (or actions) to enforce rights and remedies under the defaulted Loan on its
25 own behalf and on behalf of defendants. Such serial or multiple actions could result in
26 inconsistent adjudications of the same claims and/or defenses.

27 Because Mortgages Ltd. would not be able to protect its own interests or the
28 interests of the defendants if not joined, and because separate adjudications would result
in confusion, inconsistency and waste, Mortgages Ltd. is an indispensable party. Thus,

1 Plaintiff's complaint must be dismissed.¹

2 **B. The Complaint Fails To State Causes Of Action For Tortious Breach Of**
3 **Covenant Of Good Faith And Fair Dealing, And Punitive Damages.**

4 Under Bankruptcy Rule 7012(b)(6), a complaint, or any count contained within a
5 complaint, must be dismissed if it fails to state a claim upon which relief can be granted.
6 Fed. R. Bankr. P. 7012(b) ("Rule 12(b)-(h) F.R.Civ.P. applies in adversary proceedings.").
7 "The court may dismiss a complaint as a matter of law for '(1) lack of a cognizable legal
8 theory or (2) insufficient facts under a cognizable legal claim.'" *SmileCare Dental Group*
9 *v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996).

10 1. **Tortious Breach Of Covenant Of Good Faith And Fair Dealing Is Not A**
11 **Recognized Claim In Arizona Outside Of The Insurance Context.**

12 "Tort recovery for breach of the implied covenant of good faith and fair dealing is
13 well established in actions brought on insurance contracts. Courts have been reluctant,
14 however, to extend the tort action beyond the insurance setting. The rationale for
15 permitting tort recovery in insurance contract disputes and not in disputes involving other
16 contracts has been founded largely upon the existence of a 'special relationship' between
17 insurer and insured." *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 385
18 (1985) (citations omitted); *see also Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 197
19 (1994) (upholding decision of trial court to grant summary judgment to defendants on a
20 claim for tortious breach of the covenant of good faith and fair dealing, after trial court
21 found that Arizona courts have not recognized a claim in tort arising from breach of a
22 contract unless public policy is violated by the breach).

23 Even in the employment context, where arguably there is an unequal relationship
24 between employer and employee, Arizona courts regularly reject attempts to create a tort
25 claim for breach of the covenant of good faith and fair dealing. *See Wagenseller*, 147
26 Ariz. at 383, 386 (holding that the remedy for breach of the covenant of good faith and
27 fair dealing is generally on the contract itself; a tort claim for its breach may only be

28 ¹ There should be, however, no inference that Mortgage Ltd. hereby consents to the lifting of the automatic stay.

1 asserted to protect against firing for a reason which contravenes public policy); *see also*
2 *Nelson*, 181 Ariz. at 198 (holding that tort damages are not “recoverable through a theory
3 of tortious breach of the covenant of good faith and fair dealing in Arizona. The cause of
4 action for ‘bad faith’ employment termination ... simply does not exist under Arizona
5 law.”).

6 Plaintiff’s assertion that a “special relationship” exists between Plaintiff, the
7 borrower, and defendants, as alleged lenders, under the \$26 million commercial loan, is
8 without merit. This \$26 million arms-length commercial loan transaction is a classic
9 example of an agreement between parties who do **not** enjoy a special relationship. Here,
10 the original loan agreement was negotiated between Mortgages Ltd., a large commercial
11 lender, and PDG, a commercial property developer engaged in a \$26 million development
12 project. No transaction could possibly be more at arms-length, and nothing about this deal
13 suggests that a special relationship exists. In other courts, the nature of the relationship
14 between a lender and borrower has been often addressed, with courts consistently holding
15 that it is not a “special” or fiduciary relationship. *See Price v. Wells Fargo Bank*, 213 Cal.
16 App. 3d 465, 476 (1989) (“‘A debt is not a trust and there is not a fiduciary relation
17 between debtor and creditor as such.’ The same principal should apply with even greater
18 clarity to the relationship between a bank and its loan customers.”); *see also Nymark v.*
19 *Heart Federal Sav. & Loan Ass’n*, 231 Cal.App.3d 1089, 1093 n. 1 (1991) (“The
20 relationship between a lending institution and its borrower-client is not fiduciary in
21 nature.”).

22 Accordingly, Plaintiff’s claim for tortious breach based on the existence of a
23 “special relationship” is without merit. Although Plaintiff makes the claim in a strained
24 attempt to qualify for punitive damages, Plaintiff has failed to allege facts that establish a
25 claim for tortious breach of the implied covenant of good faith and fair dealing. This is a
26 contract dispute and Plaintiff is not entitled to damages beyond the benefit of its bargain.

27 Thus, Count III for Tortious Breach of Covenant of Good Faith and Fair Dealing
28 must be dismissed.

1 2. Punitive Damages Cannot Be Awarded For Breach Of Contract.

2 a. The gravamen of Plaintiff's complaint is breach of contract.

3
4 Under Arizona law, punitive damages cannot be awarded for a breach of contract
5 claim. *See Continental Nat'l Bank v. Evans*, 107 Ariz. 378, 382 (1971). In *Evans*, the
6 Arizona Supreme Court observed that "the authorities are generally in accord that punitive
7 damages cannot be awarded for such a breach." *Id.* (citing 22 Am.Jur.2d, Damages, §
8 245; American Law Institute, Restatement of Law of Contracts, § 342; Williston on
9 Contracts, Rev.Ed. § 1340; Sutherland on Damages, 4th Ed., Exemplary Damages § 390).

10 Here, the dispute involves the rights and duties of the respective parties "under a
11 construction loan agreement for the redevelopment of commercial real property in
12 Scottsdale, Arizona." (Complaint, p. 4:13-14.) The defendants are allegedly lenders
13 under the agreement, and Plaintiff is the developer/borrower. (Complaint, p. 4:12-13 &
14 4:15-16.) Plaintiff alleges that the "defendants are required to provide financing to
15 [Plaintiff] for the redevelopment project" and that "defendants have failed to fund their
16 share of the loan as required by the loan documents, and, as a result, [Plaintiff] has
17 suffered ... damages" (Complaint, p. 5:10-14.) Plaintiff also alleges that "[t]his case
18 arises out of contract." (Complaint, p. 5:17.) (Emphasis added.) Based upon Plaintiff's
19 own allegations, the Court should view this case as a contract dispute, which it is, and
20 nothing more. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008) ("Courts must
21 ... assume the truth of the well-pled factual allegations").

22 Although Plaintiff asserts a claim for tortious breach of the covenant of good faith
23 and fair dealing, as discussed above, such a claim does not exist in Arizona and must be
24 dismissed. Absent a claim sounding in tort, Plaintiff has only contract claims remaining,
25 which Plaintiff admits are the gravamen of its complaint. (Complaint, p. 5:17.) The law
26 is clear, punitive damages cannot be awarded for a breach of contract. *See Continental*
27 *Nat'l Bank*, 107 Ariz. at 382. Thus, Plaintiff's punitive damages claim must be dismissed.

1 **b.** Even if Count III for tortious breach survives, Plaintiff has pled
2 insufficient facts to support an award of punitive damages.

3 Even though Arizona is a notice pleading state, sufficient facts must be pled in the
4 complaint or the claim will be dismissed. *See Cullen*, 218 Ariz. at 419. In *Cullen*, the
5 Arizona Supreme Court held that in deciding a Rule 12(b)(6) motion to dismiss, Arizona
6 courts must “look only to the pleading itself and consider the well-pled factual allegations
7 contained therein. Courts must also assume the truth of the well-pled factual allegations
8 and indulge all reasonable inferences therefrom. Because Arizona courts evaluate a
9 complaint’s well-pled facts, mere conclusory statements are insufficient to state a claim
10 upon which relief can be granted.” *Id.* Thus, “a complaint that states only legal
11 conclusions, without any supporting factual allegations, does not satisfy Arizona’s notice
12 pleading standard” *Id.*

13 Indeed, even if Plaintiff’s claim for tortious breach of the covenant of good faith
14 and fair dealing survives this motion to dismiss, and it should not, Plaintiff has failed to
15 allege facts sufficient to support a claim for punitive damages. In *Continental Nat’l Bank*,
16 the Arizona Supreme Court held that the mere fact that plaintiff suffered actual damages
17 arising out of a tort “does not mean that punitive damages must be awarded. There must
18 be conduct on the part of the defendant amounting to aggravation, outrage, malice or
19 willful and wanton misconduct.” *Id.*

20 Here, Plaintiff’s only assertion in this regard is the conclusory claim that “lender-
21 defendants’ tortious conduct was conscious and willful” because “defendants knowingly
22 disregard[ed] the virtual certainty of significant harm to [Plaintiff], choosing instead to act
23 for their own advantage without justification as though insulated from claims for damages
24 and destruction of [Plaintiff].” (Complaint, p.7:2-5.) Because Plaintiff’s complaint fails
25 to allege “conduct on the part of the defendant amounting to aggravation, outrage, malice
26 or willful and wanton misconduct”, it is inherently insufficient to support an award of
27 punitive damages. *Id.*; *see also Cullen*, 218 Ariz. at 419 (“mere conclusory statements are
28 insufficient to state a claim upon which relief can be granted.”).

1 Thus, Count IV for Punitive Damages must be dismissed not only because the
2 gravamen of Plaintiff's complaint is breach of contract and tort damages cannot be
3 awarded for breach of contract, but also because Plaintiff failed to plead sufficient facts to
4 support a finding of "malice, ill will or willful and wanton misconduct." *Id.*

5 **IV. CONCLUSION**

6 Accordingly, and for the reasons set forth herein, the MLtd. Defendants
7 respectfully request that the Court issue an order dismissing Plaintiff's complaint for
8 failure to join Mortgages Ltd. in this action pursuant to Bankruptcy Rule 7012(b)(7), and
9 dismissing Counts III and IV with prejudice pursuant to Bankruptcy Rule 7012(b)(6).

10
11 Dated: November 6, 2008

DLA PIPER LLP (US)

12
13 s/ Mark A. Nadeau

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19 Counsel for Mortgages Ltd. Opportunity Fund
20 MP-12 L.L.C.; Mortgages Ltd. Opportunity
21 Fund MP-13 L.L.C.; Mortgages Ltd.
22 Opportunity Fund MP-14 L.L.C.; Mortgages
23 Ltd. Opportunity Fund MP-15 L.L.C.;
24 Mortgages Ltd. Opportunity Fund MP-16
25 L.L.C.; Mortgages Ltd. Opportunity Fund MP-
26 17 L.L.C.; MP062011 L.L.C.; MP122009
27 L.L.C.; MP122030 L.L.C.

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DECLARATION OF RICHARD FELDHEIM

I, Richard Feldheim, declare as follows:

1. I am the President and CEO of Mortgages Ltd. I make this declaration based on my own personal knowledge of the facts set forth below, and if called as a witness I could and would testify competently thereto.

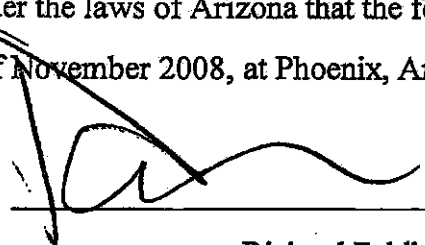
2. On or about June 18, 2007, Mortgages Ltd. ("Mortgages Ltd.") made a loan to PDG Los Arcos, L.L.C. ("Plaintiff") in the maximum principal amount of \$26,000,000 (the "Loan").

3. Mortgages Ltd. is currently a direct lender under the Loan, and a party to the documents that evidence the Loan, including the Promissory Note, Construction Loan Agreement and Deed of Trust, which are all dated June 18, 2007.

4. When the Loan was made, Mortgages Ltd. and Plaintiff executed a Servicing Agent Agreement ("Servicing Agreement") pursuant to which Mortgages Ltd. was appointed to act as the Servicing Agent with respect to the Loan. A true and correct copy of the Servicing Agreement is attached as Exhibit "A" and incorporated by reference herein.

5. Plaintiff has not made any monthly payments under the Loan since June 2008.

I declare under penalty of perjury under the laws of Arizona that the foregoing is true and correct. Executed this 5th day of November 2008, at Phoenix, Arizona.



Richard Feldheim

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Jonathan E. Hess
Office of the U.S. Trustee
230 North First Avenue, Suite 204
Phoenix, Arizona 85003-1706

Michael C. Blair, Esq.
Baird, Williams & Greer, L.L.P.
6225 N. 24th Street, Suite 125
Phoenix, Arizona 85016

By s/Patricia Kelly

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EXHIBIT A

SERVICING AGENT AGREEMENT

Loan No. 859305

June 18, 2007

"Trustor" (individually and collectively):

EDG LOS ARCOS, L.L.C., an Arizona limited liability company

"Beneficiary": Mortgages Ltd., an Arizona corporation

"Servicing Agent": Mortgages Ltd., an Arizona corporation

In consideration of the reciprocal promises contained herein, Borrower, Lender and Servicing Agent (collectively, the "Parties") hereby agree to the following.

1. APPOINTMENT AND AUTHORITY OF SERVICING AGENT

Trustor and Beneficiary hereby appoint Mortgages Ltd. to act as the Servicing Agent with regard to the Loan. Servicing Agent is authorized to perform any and all of the following tasks:

- a. Hold the originals of the Promissory Note, Deed of Trust, Fee Schedule and all other documents executed by the Borrower or any other party in connection with the Loan (collectively, the "Loan Documents").
- b. Service and administer the Loan in any manner provided by the Loan Documents.
- c. Process any and all Loan payments from Borrower or other payor.
- d. Assess and process all fees and charges set forth in the Loan Documents including, but not limited to, administrative fees, notice fees and late charges.
- e. Apply any funds received by Servicing Agent to the fees and costs incurred or assessed by Beneficiary before applying the funds to the amounts owing under the Loan Documents (including notice fees, service fees, administrative fees, inspection fees, appraisal fees, expert fees, attorneys' fees, litigation costs, forced placed insurance premiums, late charges and guarantor collection expenses (as described herein)). Any insurance placed by Servicing Agent may be placed with an affiliate of servicing Agent or a captive insurance company.

f. Retain deposits received under the Loan Documents as impounds for the payment of the following:

- (1) Future payments due;
- (2) Taxes and assessments;
- (3) Construction;
- (4) Insurance premiums;
- (5) Extension fees;
- (6) Administration fees; and
- (7) Any other expenditure required under the Loan Documents.

(Any impound account may be held in the name of Servicing Agent for the benefit of Lender and others, and Servicing Agent may apply and/or disburse any such deposits in accordance with the Loan Documents).

g. Evaluate, effectuate and process an assumption of the Loan, and assess and receive an assumption fee and/or an interest rate increase.

h. Sign, file and record all documents which are reasonable or desirable to facilitate servicing of the loan, including: (1) deeds of release and reconveyance (full and partial); (2) endorsements and assignments of Loan Documents (including assignments of all or a portion of the beneficial interest of any deed of trust included in the Loan Documents); (3) corrections, amendments, modifications and extensions of Loan Documents; (4) disclaimers; (5) financing statements; and (6) assumptions and various certifications.



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SERVICING AGENT AGREEMENT

Loan No. 859305

June 18, 2007

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i. Incur all fees, costs and expenses deemed necessary by Servicing Agent to protect Beneficiary's interests under the Loan Documents;

j. Incur all fees, costs and expenses deemed necessary by Servicing Agent to protect the property securing the Loan (the "Trust Property"), including insurance premiums, receiver fees, property manager fees, maintenance expenses and security expenses.

k. Obtain forced placed insurance on any portion of the Trust Property in the event the Borrower fails to maintain insurance as required by the Loan Documents.

l. Sign, file and record any and all documents reasonable or desirable to protect Lender's interests and/or pursue Lender's remedies upon default, including: (1) a statement of breach or non-performance; (2) a substitution of trustee; (3) a notice of election to foreclose; (4) a notice of trustee's sale; (5) an affidavit of non-military service; (6) a notice of proposed disposition of collateral and various verifications.

m. In the event of default and at Servicing Agent's discretion, commence foreclosure of the Trust Property, initiate a trustee's sale and/or institute any proceeding necessary to collect the sums due under the Loan Documents or to enforce any provision therein (including (1) pursuing an action against any borrower or guarantor of the Loan; (2) pursuing injunctive relief, the appointment of a receiver, provisional remedies or a deficiency judgment; (3) pursuing claims in bankruptcy court; (4) pursuing an appeal; (5) collecting rents; and (6) taking possession or operating the Trust Property).

n. In the event of default and at Servicing Agent's discretion effect a sale of Lender's interest, in whole or in part, in the Loan Documents at the expense of Trustor which expense shall be secured by the Deed of Trust.

o. Retain attorneys, trustees and other agents necessary to collect the sums due under the Loan Documents, to protect the Trust Property and/or to proceed with foreclosure of the Trust Property, initiate a trustee's sale and/or institute, defend, appear or otherwise participate in any proceeding (legal, administrative or otherwise) that Servicing Agent deems reasonable and desirable.

p. Incur and pay such costs, expenses and fees as Servicing Agent deems appropriate in undertaking and pursuing enforcement of the Loan Documents and/or collection of amounts owed thereunder, including attorney fees, receiver fees, trustee fees, expert fees and any fees, costs and expenses incurred in an effort to collect against any borrower or any guarantor of the Loan.

2. ACCOMMODATION.

Servicing Agent provides its services as an accommodation only, and shall incur no responsibility or liability to any person, including Borrower and Lender for any act or omission by Servicing Agent or any person or entity active for Servicing Agent.

3. ASSIGNMENT, RESIGNATION AND TERMINATION.

a. Servicing Agent shall have the right to assign the collection account or resign as Servicing Agent at any time, provided that Servicing Agent notifies Lender and Borrower of such assignment or resignation in writing.

(1) If Servicing Agent assigns the collection account, Servicing Agent will deliver all Loan Documents, directions and account records to assignee, at which time Servicing Agent will have no further duties or liabilities hereunder.

(2) If Servicing Agent resigns, Lender shall have the right to designate a new collection agent and Servicing Agent shall deliver to Lender all Loan Documents, directions and account records to Lender or the newly designated collection agent, at which time Servicing Agent will have no further duties or liabilities hereunder.

b. If that the ownership of the Trust Property becomes vested in the Lender by trustee's sale, judicial foreclosure or otherwise, then this Agreement shall automatically terminate and Servicing Agent will have no further duties or liabilities hereunder.



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[Handwritten signature]

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SERVICING AGENT AGREEMENT

Loan No. 859305

June 18, 2007

Page 3

c. Upon Servicing Agent's assignment or resignation, or termination of this Agreement, Borrower shall immediately reimburse Lender for all fees, costs and expenses incurred hereunder. After such reimbursement and payment, Borrower shall remain obligated to indemnify, in accordance with Section 4 hereof, for liabilities which accrued prior to such resignation or termination.

4. INDEMNITY

a. Lender and Borrower shall immediately indemnify and hold Servicing Agent harmless for, from and against any and all liabilities incurred by Servicing Agent in performing under the terms of this Agreement or otherwise arising, directly or indirectly, from the Loan or Loan Documents, including all attorneys' fees, insurance premiums, expenses, costs, damages and expenses.

b. In the event that Servicing Agent requests that Lender and/or Borrower pay any amount owed hereunder, Lender and/or Borrower shall remit that amount to Servicing Agent within 5 business days of Servicing Agent's request.

5. BORROWER'S OBLIGATIONS

a. **Standard Fees and Costs.** Borrower shall pay to Servicing Agent, for the account of Beneficiary, its current fees and costs, including those items set forth in the Fee Schedule received by Borrower. The Fee Schedule is subject to change without notice as to the amounts and items included therein. Borrower shall pay a servicing set-up fee of \$1,500.00, and a monthly servicing fee of \$30.00. When the Loan is paid in full, Borrower shall pay a Close Out Fee of \$1,500.00, which is in addition to the monthly servicing fee. There will be a \$30.00 charge to Borrower for each payoff request.

b. **Late Fees and Notices.** In the event that a regular payment is not received by Servicing Agent on or before the fifth calendar day after the due date, a late charge of 35% of the monthly Principal and Interest payment will be charged and Borrower shall pay that amount to Servicing Agent, for the account of Lender. The parties agree that this late payment charge is intended to compensate Lender for losses incurred as a result of the late payment and that such late payment charge does not constitute and shall not be construed as a penalty. Servicing Agent will charge \$125.00, plus postage, for each notice sent regarding late payments, nonpayment of taxes, assessments, insurance premiums or any other matter that affects the Trust Property. Servicing Agent will charge \$25.00 for each notice sent regarding returned checks, plus any actual charges assessed by the financial institution of the Servicing Agent as a result of each returned check. These notice fees are subject to change at the Servicing Agent's discretion. In the event that the Loan is not paid in full by the maturity date, Borrower acknowledges that a late charge will be assessed, for the account of Lender, in the amount of 3% of the remaining principal balance of the Loan on the first day after Borrower's failure to pay and on the same day each month thereafter, until the final payment is received by Servicing Agent. All fees and charges are independent of one another and any default interest assessed; thus, a matured loan shall accrue default interest, maturity late fees and any other applicable fees and charges.

c. **Payment Statements.** Servicing Agent, as a convenience only, will provide to Borrower a monthly payment statement. Borrower acknowledges and agrees that it is obligated to make all payments when due under the Loan Documents, whether or not such payment statement is received by Borrower.

6. PARTIAL AND FINAL PAYMENTS

a. **Partial Payments.** In the event that Servicing Agent receives and processes a partial payment of any amount due under the Loan Documents, such act shall not constitute full payment, estoppel or a waiver of any right of Lender or Servicing Agent to recover the deficiency or to require future payments to be made in full.

b. **Final Payment.** In the event that the final sum to pay the principal balance in total is received by Servicing Agent after 1:00 p.m., interest shall be charged through the next normal business day.

7. GENERAL PROVISIONS

a. This Agreement is binding on the Parties and their heirs, personal representatives, successors, permitted assigns, beneficiaries and trustees.



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[Handwritten Signature]
initials

b. This Agreement and the benefits hereunder are not assignable or transferable by Borrower. Lender may assign Lender's rights and obligations under this Agreement without prior notice to Borrower. Lender, however, must give Servicing Agent prior written notice. After assignment, Lender shall have no further duties or liabilities to Borrower.

c. This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Arizona, without regard to the choice of law rules of the State of Arizona. The Parties hereby submit to the exclusive jurisdiction of any Arizona State or Federal Court sitting in the City of Phoenix in any action or proceeding arising out of or relating to this Agreement. The Parties waive the defense of an inconvenient forum.

d. The Parties voluntarily, knowingly, irrevocably and unconditionally waive the right to a jury trial on any contested matters arising from this Agreement or the Loan Documents.

e. This Agreement sets forth the entire agreement and understanding of the Parties with respect to the subject matter hereof and is to be read in consistency and accordance with the other Loan Documents.

f. This Agreement may be amended, modified, superseded, canceled, renewed or extended and the terms and covenants hereof may be waived only by a written instrument signed by all of the parties hereto. The failure of Servicing Agent or Beneficiary at any time or times to require performance of any provision of this Agreement shall in no manner affect the right of Servicing Agent at a later time to enforce the same. No waiver by Beneficiary or Servicing Agent of the breach of any term or covenant contained in this Agreement, whether by conduct or otherwise, in any one or more instances, shall be deemed to be, or construed as, a further or continuing waiver by Servicing Agent or Lender of any such breach, or a waiver of the breach of any other term or covenant contained in this Agreement.

g. If any term or other provision of this Agreement is declared invalid, illegal or incapable of being enforced by any rule of law or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect.

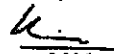
h. As used in this Agreement, the word "include(s)" means "include(s), without limitation," and the word "including" means "including, but without limitation."

i. No remedy herein conferred upon or reserved to Servicing Agent is intended to be exclusive of any other remedy herein or by law provided or permitted, but each shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

This Agreement is effective on the date set forth on the first page.

SEE ATTACHED SIGNATURE PAGE




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SERVICING AGENT AGREEMENT

Loan No. 859305

June 18, 2007

Page 3

BORROWER:

PDG LOS ARCOS, L.L.C., an Arizona limited liability company


By: **Richard J. Sojka**
As: **Authorized Manager**

LENDER:
MORTGAGES LTD., an Arizona corporation


Laura Martini, Vice President

SERVICING AGENT:
MORTGAGES LTD., an Arizona corporation


Laura Martini, Vice President

