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6 Attorneys for ML Liquidating Trust  
as Plaintiff in certain Superior Court Litigation

7  
8 **IN THE UNITED STATES BANKRUPTCY COURT**  
9 **FOR THE DISTRICT OF ARIZONA**

10 In re  
11 MORTGAGES, LTD.,

Chapter 11

Case No. 2:08-bk-07465-RJH

12 **ML LIQUIDATING TRUSTEE'S REPLY IN**  
13 **SUPPORT OF MOTION FOR ORDER**  
14 **DIRECTING DISCOVERY PROCEDURES**

15 **Date: June 5, 2012**  
16 **Time: 10:30 a.m.**  
17 **Location: Courtroom No. 603**  
**230 N First Ave.**  
**Phoenix, AZ**

18 Debtor.

19 Matt Hartley, as successor Liquidating Trustee of the ML Liquidating Trust  
20 ("**Liquidating Trustee**"), through undersigned counsel, replies in support of his motion to  
21 establish certain discovery procedures with respect to Robert Furst's Motion for Rule 2004  
22 Examination and Production of Documents to Kevin O'Halloran, the former Liquidating  
Trustee of the ML Liquidating Trust ("**Furst 2004 Request**," DE #3504).

23 Mr. Furst contends that the attorney-client privilege simply does not apply because he is  
24 a beneficiary of the Liquidating Trust,<sup>1</sup> asserting the "fiduciary exception" to attorney-client  
25 privilege as described in *United States v. Mett*, 178 F.3d 1058 (9<sup>th</sup> Cir. 1998). *Mett*, however,

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27 <sup>1</sup> The Liquidating Trustee acknowledges that Mr. Furst is a beneficiary of the Liquidating Trust.

1 not only involves the special circumstance of an ERISA plan, and determined that the  
2 fiduciary exception did *not* apply in that case, but expressly points out the limits of the  
3 fiduciary exception. *Mett*, 178 F.3d at 1064 (advice purely limited to plan administration is on  
4 one end of the spectrum, while advice with respect to defending the trustee against claims by  
5 beneficiaries is at the other). The *Mett* court reasoned that a communication could cover both  
6 ends of the spectrum, and that "where attorney-client privilege is concerned, hard cases should  
7 be resolved in favor of the privilege, not in favor of disclosure." *Id.* at 1065.<sup>2</sup>

8 The Liquidating Trustee has three primary concerns with disclosure of the requested  
9 documents. First, not only is the scope of the fiduciary exception generally limited, but there  
10 is an actual concern over simply allowing production of privileged documents to Mr. Furst in  
11 particular. Mr. Furst's interests are not entirely aligned with the interests of the Liquidating  
12 Trust. He is both a beneficiary of the Liquidating Trust and, as an investor, a litigant in  
13 ongoing litigation in which investors and the Liquidating Trust have competing claims against  
14 third parties. He was also a defendant in now-settled preference litigation brought by the  
15 Liquidating Trustee.

16 Second, even apart from questions of attorney-client privilege, the documents requested  
17 may be subject to one or more confidentiality or joint defense agreements – indeed, the  
18 settlement of Mr. Furst's own preference case is subject to a confidentiality agreement.

19 Third, once documents leave the control of the Liquidating Trust, they could be  
20 disclosed to third parties and prejudice the Liquidating Trustee's ongoing litigation and  
21 collection efforts.

22 The Liquidating Trustee has already objected to the Furst 2004 Request in its entirety,  
23 but if the Court is inclined to allow some discovery, the Liquidating Trustee believes that the  
24 dispute over document disclosure is not entirely ripe for decision. The importance of the

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26 <sup>2</sup> *Mett* quotes *Upjohn Co. v. United States*, 449 U.S. 383 at 393 (1981): "an uncertain privilege, or one which  
27 purports to be certain but results in widely varying applications by the courts, is little better than no privilege at  
28 all."

1 Liquidating Trustee's concerns depends in large part on the nature of the documents and  
2 information in Mr. O'Halloran's possession. The Liquidating Trustee has proposed that this  
3 Court require that all documents responsive to the Furst 2004 Request be first delivered for  
4 review to the Liquidating Trustee.<sup>3</sup> The Liquidating Trustee will then be in a position to  
5 determine whether, and to what extent, to assert privileges or confidentiality agreements, and  
6 to provide non-objectionable documents and a privilege log to Mr. Furst. If Mr. Furst believes  
7 that he should have access to additional documents described on the privilege log, and the  
8 parties are unable to reach agreement, he can apply to the Court for relief. The Court can then  
9 determine the merits of his contentions, and order whatever further disclosure may be  
10 appropriate, based on actual rather than hypothetical facts.

11 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of June, 2012.

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13 **STINSON MORRISON HECKER LLP**

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16 By: /s/ Christopher Graver # 013235

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24 \_\_\_\_\_  
25 <sup>3</sup> The Liquidating Trustee met with Mr. Furst on June 4, 2012, for purposes of attempting to resolve these issues  
26 and/or narrow the scope of Mr. Furst's discovery requests. The parties were unable to reach agreement. The  
27 Liquidating Trustee thereafter contacted Mr. O'Halloran, and Mr. O'Halloran agreed to provide the Liquidating  
28 Trustee with all documents responsive to the Furst 2004 Request. It is anticipated that they will be received  
within a week or so.

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COPY of the foregoing sent this 4th day  
of June, 2012, to:

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[rgfurst@aol.com](mailto:rgfurst@aol.com)

/s/ Anne Finch

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