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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

ML LIQUIDATING TRUSTEE'S:

**PRELIMINARY OBJECTION TO ROBERT G.
FURST'S MOTION FOR 2004 EXAMINATION
AND PRODUCTION OF DOCUMENTS BY
KEVIN O 'HALLORAN**

AND

**MOTION FOR ORDER DIRECTING
DISCOVERY PROCEDURES**

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20 Debtor.

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22 Matt Hartley, as successor Liquidating Trustee of the ML Liquidating Trust
23 ("**Liquidating Trustee**"), through undersigned counsel, files his preliminary objection to
24 Robert Furst's Motion for Rule 2004 Examination and Production of Documents to Kevin
25 O'Halloran, the former Liquidating Trustee of the ML Liquidating Trust ("**Furst 2004**
26 **Request,**" DE #3504). The Liquidating Trustee further moves for an Order Directing
27 Discovery Procedures which directs Mr. O'Halloran to produce any documents to the
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1 Liquidating Trustee first, prior to any production to Mr. Furst, in order to allow the
2 Liquidating Trustee to determine the privileges and agreements that the Liquidating Trustee
3 may be entitled to assert or protect.

4 MEMORANDUM

5 **I. Background.**

6 1. The order for relief was entered in this case on June 24, 2008 (DE #36).

7 2. The Official Committee of Investors' First Amended Plan of Reorganization
8 Dated March 12, 2009 ("**Plan**," DE #1532) was confirmed by this Court's Order entered May
9 20, 2009 (DE #1755).

10 3. The Liquidating Trust was created, and the Liquidating Trustee was appointed,
11 pursuant to the Plan, and is authorized thereunder, among other things, to pursue collection of
12 assets of the bankruptcy estate. In that capacity the Liquidating Trust (along with the
13 reorganized debtor, ML Servicing Co., Inc.), retained the law firm of Stinson Morrison Hecker
14 LLP as counsel in certain litigation in Arizona Superior Court.

15 4. Mr. Kevin O'Halloran served as the original Trustee of the Liquidating Trust.
16 Mr. O'Halloran resigned as Trustee in September, 2010. Matt Hartley is the current Trustee of
17 the Liquidating Trust.

18 5. Robert G. Furst purports to be a party-in-interest in these proceedings. He does
19 not allege whether he is a beneficiary of the Liquidating Trust, and the Liquidating Trustee has
20 not yet determined whether he is a beneficiary. The Liquidating Trust assumes for purposes of
21 this objection that Mr. Furst has an interest in the Liquidating Trust, but will further object if
22 he is not in fact a beneficiary of the Liquidating Trust.

23 **II. Argument.**

24 The Liquidating Trustee does not know to what extent, if any, Kevin O'Halloran has
25 possession of any documents he obtained during his tenure as trustee. However, to the extent
26 he has any such documents, he has them as a result of his status as trustee, and they remain
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1 subject to his fiduciary obligations as trustee. The Liquidating Trust has a continuing interest
2 in protecting its privileges and obligations with respect to such documents, and this objection
3 is filed in furtherance thereof.

4 The Furst 2004 Request is facially overbroad and requests information clearly protected
5 by privilege, including but not limited to the attorney-client and work product privileges.¹ For
6 example, Item 2 on Exhibit A requests "*All documents relating to existing or prospective*
7 *litigation involving the ML Liquidating Trust.*" Such request could literally involve hundreds
8 of thousands of pages, be extraordinarily expensive, and would encroach upon privileges and
9 agreements with third parties that limit the Trustee's ability to disclose information.² Other
10 objections are fully reserved until the Liquidating Trustee has the opportunity to know what
11 documents are in Mr. O'Halloran's possession.

12 The requests on Exhibit A are very broad and burdensome. Beyond a bald statement
13 that the request relates to the "administration of the ML Liquidating Trust," the Furst 2004
14 Request provides no explanation why the information is requested, and it does not make any
15 attempt to limit the scope of the requests. In order to balance the burdens of the requests
16 against the reasons that underlie them, it would seem reasonable for the Court to ask Mr. Furst
17 to refine his requests. The Trust has obligations to many creditors. It does not seem
18 reasonable for one investor to impose such burdens without some refinement and explanation.
19 For that reason, the Liquidating Trustee requests that the Furst 2004 Request be denied without
20 prejudice at this time.

21 Further, if the Court is inclined to permit production, the Liquidating Trustee, pursuant
22 to Fed. R. Bank. P. 9014 and 7026(c), moves this Court for an Order Directing Discovery
23 Procedures with respect to the Furst 2004 Request in order to permit compliance with any
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25 ¹ Mr. Furst, unlike many *pro per* litigants, presumably is familiar with issues of privilege and the scope of
26 discovery, as he is an inactive member of the Arizona bar.

27 ² See, e.g., January 6, 2010, Stipulated Motion for Protective Order re: Production of Documents by Hebets &
28 Maguire, LLC and Shelley Hartsuiker Pursuant to Court Order (DE #2569).

1 agreements imposing confidentiality obligations, and to preserve applicable privileges,
2 including, without limitation, the attorney-client and work product privileges, with respect to
3 the Liquidating Trustee. The Liquidating Trustee does not know what documents are in Mr.
4 O'Halloran's possession as a result of his prior service as trustee. Mr O'Halloran may not be
5 aware of agreements which might require further proceedings prior to determining the scope of
6 production, and Mr. O'Halloran may be in possession of documents and information that is
7 otherwise privileged, and which should not be produced, but listed on a privilege log.

8 For example, Items 4 and 5 on Exhibit A request *all documents relating to*
9 *communications between the Liquidating Trust and Mr. O'Halloran and counsel for the class*
10 *action and mass action investor groups*, as well as documents relating to "*work sharing, fee*
11 *sharing, and recovery sharing in relation to the litigation against Greenburg Traurig or any*
12 *other potential defendant*". First, such requests appear designed to invade attorney client and
13 work product privileges. Second, such request attempts to obtain documents that may well be
14 confidential. Once the requests are made more specific, the Liquidating Trustee will be in a
15 position to determine if a requested document is privileged or falls under a confidentiality
16 agreement. At that point, the Liquidating Trustee will be able to ask this Court to review the
17 extent to which such documents should continue to be protected, or possibly establish terms
18 for production which protect the information. Of course, much of this may depend upon the
19 as-yet-undisclosed underlying reasons for Furst's requests.

20 Finally, the Furst 2004 Request also seeks the deposition of Mr. O'Halloran. For the
21 same reasons described above, the Liquidating Trustee objects to the deposition, as it appears
22 Mr. Furst intends to delve into privileged and confidential matters. This concern might be
23 diminished if Mr. Furst narrowed and refined the scope of the request so that the Liquidating
24 Trustee could evaluate it. At a minimum, the Liquidating Trustee should have a right to be
25 present to protect privileged and confidential information from disclosure.

1 **III. Relief Requested.**

2 A. Given the very broad and invasive nature of the requests listed on Exhibit
3 A to the Furst 2004 Request, the Liquidating Trustee requests that the Court deny the Furst
4 2004 Request, including the request to depose Mr. O'Halloran without prejudice at this time.
5 If Mr. Furst re-urges his motion, and can explain his reasons for the requests and make them
6 more specific, then much expense and burden will be avoided.

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8 B. If the Court is inclined to grant the Furst 2004 Request as filed, the
9 Liquidating Trustee requests that the Court order discovery procedures which permit the
10 Liquidating Trustee to preserve appropriate rights for the benefit of the Liquidating Trust.
11 Specifically, the Liquidating Trustee requests the Court order Mr. O'Halloran to produce all
12 information which is responsive to the 2004 Request to the Liquidating Trustee, and permit the
13 Liquidating Trustee to review such information, assert any declarations of privilege or assert
14 issues regarding any applicable confidentiality agreement, **prior to** any production to Mr.
15 Furst. The Liquidating Trustee also requests the right to be present at any deposition of Mr.
16 O'Halloran in order to protect against disclosure of privileged or confidential information.

17 Wherefore, the Liquidating Trustee respectfully requests relief as set forth above.

18 RESPECTFULLY SUBMITTED this 11th day of May, 2012.

19
20 **STINSON MORRISON HECKER LLP**

21
22 By: /s/ Christopher Graver # 013235

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COPY of the foregoing sent this 11th day
of May, 2012, to:

Robert G. Furst
4701 North 57th Way
Phoenix, AZ 85018

/s/ Anne Finch
