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5 Pro Per

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U.S. BANKRUPTCY COURT  
DISTRICT OF ARIZONA

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

<p>8 In re:</p> <p>9</p> <p>10 MORTGAGES LTD.,</p> <p>11 an Arizona corporation,</p> <p>12</p> <p>13</p> <p>14 Debtor.</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p>	<p>) In Proceedings Under Chapter 11</p> <p>) Case No. 2:08-bk-07465-RJH</p> <p>) <b>ROBERT G. FURST'S REPLY TO ML</b></p> <p>) <b>LIQUIDATING TRUSTEE'S</b></p> <p>) <b>PRELIMINARY OBJECTION TO</b></p> <p>) <b>ROBERT G. FURST'S MOTION FOR</b></p> <p>) <b>2004 EXAMINATION AND</b></p> <p>) <b>PRODUCTION OF DOCUMENTS BY</b></p> <p>) <b>KEVIN O'HALLORAN, AND</b></p> <p>)</p> <p>) <b>ROBERT G. FURST'S RESPONSE TO</b></p> <p>) <b>ML LIQUIDATING TRUSTEE'S</b></p> <p>) <b>MOTION FOR ORDER DIRECTING</b></p> <p>) <b>DISCOVERY PROCEDURES</b></p> <p>)</p>
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21 Robert G. Furst, a party-in-interest in these proceedings, hereby files (1) his Reply to  
22 ML Liquidating Trustee's Preliminary Objection to Robert G. Furst's Motion for 2004  
23 Examination and Production of Documents by Kevin O'Halloran, and (2) his Response to  
24 ML Liquidating Trustee's Motion for Order Directing Discovery Procedures. Importantly,  
25 Matt Hartley, the current ML Liquidating Trustee, has already consented, without  
26 qualification, to the 2004 examination of Mr. O'Halloran, and so has Mr. O'Halloran.  
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1 Accordingly, Mr. Furst's motion should be granted, without the necessity for any newly-  
2 requested "discovery procedures."  
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4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 In the confirmed Plan of Reorganization, Kevin O'Halloran was designated as the  
6 initial Liquidating Trustee for the ML Liquidating Trust. On September 27, 2010, the ML  
7 Liquidating Trust Board notified the ML investors that Kevin O'Halloran had abruptly  
8 resigned as Liquidating Trustee, stating that "Kevin's decision to resign was based primarily  
9 upon a difference of opinion regarding policy." Within a short period of time, Joe Baldino,  
10 the Chairman of the ML Liquidating Trust Board, and Jan Sterling, a Board member, also  
11 resigned, leading many ML investors to wonder what was going on inside the ML  
12 Liquidating Trust.  
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15 On January 23, 2012, Mr. Furst met with Matt Hartley, the successor Liquidating  
16 Trustee, to request an opportunity to meet with Kevin O'Halloran to discuss the  
17 administration of the ML Liquidating Trust during his tenure and the reasons for his  
18 resignation. Mr. Hartley agreed to facilitate such a meeting. Later that day, Mr. Hartley sent  
19 an e-mail to Mr. Furst, in which he stated:  
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21 Bob, [t]hanks for coming in this morning. I spoke to Kevin  
22 O'Halloran this afternoon and think I worked out an arrangement  
23 that will be acceptable to you. I misplaced your phone number,  
24 so please call me at your convenience to discuss.

25 Thereafter, on January 25, 2012, Mr. Hartley spoke to Kevin O'Halloran and arranged  
26 for a deposition rather than a meeting. Mr. Hartley then sent a follow-up e-mail to Mr. Furst,  
27 in which he stated:  
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1 I spoke to Kevin O'Halloran this afternoon and he said his  
2 attorney spoke to your attorney and he is making himself  
3 available for a deposition which can be either telephonic or you  
can go to Atlanta.

4 Unfortunately, Mr. Hartley has had a recent change of heart, and he now seeks to  
5 silence Kevin O'Halloran, by arguing that (1) Mr. Furst may not be a beneficiary of the ML  
6 Liquidating Trust (and, therefore, may not have standing to request a 2004 examination), (2)  
7 Mr. Furst's requests are "overbroad" and "burdensome," and (3) Mr. Furst's requests seek  
8 information protected by the attorney-client privilege. All of these arguments are meritless.  
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10 First, Mr. Furst is clearly a beneficiary of the ML Liquidating Trust, just like all of the  
11 other ML investors. *See* Section 3.6 of the confirmed Plan of Reorganization.  
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13 Second, there is no reason to limit the scope of the 2004 examination. Bankruptcy  
14 Rule 2004 is a broadly construed discovery device which permits any party in interest in a  
15 bankruptcy proceeding to move for a court order to examine any entity so long as the  
16 examination relates to "acts, conduct, or property or to the liabilities and financial condition  
17 of the debtor, or to any matter which may affect the administration of the debtor's estate, or to  
18 the debtor's right to a discharge." *Fed.R.Bankr.P. 2004(b)*. The scope of inquiry permitted  
19 under a Rule 2004 examination is generally very broad and can "legitimately be in the nature  
20 of a 'fishing expedition.'" *In re Wilcher*, 56 B.R. 428, 433 (Bankr.N.D.Ill.1985). Notably,  
21 Kevin O'Halloran has not voiced any objections about the scope of the examination.  
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25 Third, the Liquidating Trustee has no right to review the requested documents before  
26 the 2004 examination in order to protect the attorney-client privilege because, in the Ninth  
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1 Circuit, there is a **fiduciary exception** to the attorney-client privilege. In *United States v.*  
2 *Mett*, 178 F3d 1058, 1064 (9<sup>th</sup> Cir. 1999), the Ninth Circuit held:

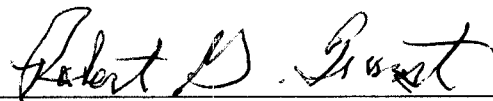
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4 The Ninth Circuit . . . has joined a number of other courts in  
5 recognizing a “fiduciary exception” to the attorney-client  
6 privilege. See *United States v. Doe*, 162 F.3d 554, 556-57 (9th  
7 Cir.1998); *United States v. Evans*, 796 F.2d 264, 265-66 (9th  
8 Cir.1986). This exception had its genesis in English trust law,  
9 but has since been applied to numerous fiduciary relationships.

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**Conclusion**

In conclusion, Mr. Furst requests that the Court grant his motion for a 2004  
examination of Kevin O’Halloran, without the necessity of any “discovery procedures. The  
Liquidating Trustee is welcome to attend the 2004 examination of Mr. O’Halloran, and he is  
free to voice his objections at that time.

DATED: May 14, 2012



Robert G. Furst