

1 **McEVOY, DANIELS & DARCY, P.C.**
2 Camp Lowell Corporate Center
3 4560 East Camp Lowell Drive
4 Tucson, Arizona 85712
5 Telephone: (520) 326-0133
6 Fax: (520) 326-5938
7 darcysm@aol.com

8 Sally M. Darcy
9 Attorney for Defendants Craig A. Forte and Lauri T. Forte,
10 Trustees of the Forte Family Revocable Living Trust Dated
11 May 30, 2001
12

13 **IN THE UNITED STATES BANKRUPTCY COURT**
14 **IN AND FOR THE DISTRICT OF ARIZONA**

15 In re:)
16 MORTGAGES LTD.,)
17 Debtor.)
18 KEVIN O'HALLORAN, LIQUIDATING)
19 TRUSTEE OF THE ML LIQUIDATING)
20 TRUST)
21 Plaintiff,)
22 CRAIG A. FORTE AND LAURI T.)
23 FORTE, TRUSTEES OF THE FORTE)
24 FAMILY REVOCABLE LIVING TRUST,)
25 DATED MAY 30, 2001,)
26 Defendants.)

No. 2:08-bk-07465-RJH

No. 2:10-ap-01095-RJH

**THE FORTES' RESPONSE TO
MOTION TO QUASH SUBPOENA
DUCES TECUM OF HENRY &
HORNE LLP AND MOTION TO
COMPEL PRODUCTION**

(Oral Argument Requested)

21 Craig and Lauri Forte ("Fortes"), Trustees of The Forte Family Revocable Living Trust
22 Dated May 30, 2001 ("Trust"), move this Court for an Order compelling the production of the documents
23 requested pursuant to the subpoena served on Henry & Horne LLP. A copy of the subpoena is attached
24 hereto as Exhibit "1."

25 In 2007, the Fortes entered into two Mortgages Ltd. Securities LLC Revolving Opportunity Loan
26 Program Purchase Agreements with Mortgages Ltd. In connection with those agreements, the Fortes

1 acquired participation interests in four notes and deeds of trust. The Fortes were redeemed prior to the
2 bankruptcy filing of Mortgages Ltd (“ML”), and the Liquidating Trustee filed this adversary against the
3 Fortes alleging the redemptions were preferential and/or fraudulent conveyances. The Fortes have denied
4 the allegations.

5 Counsel for the Liquidating Trustee recently provided “valuations” of the four properties which
6 secured the Fortes’ claims (“Liquidating Trustee’s Valuations”). Those valuations were prepared by
7 Henry & Horne, LLP.

8 MI Manager has objected to the subpoena and filed a Motion to Quash on behalf of Henry &
9 Horne, LLP.

10 According to ML Manager, in mid 2010, ML Manager engaged Henry & Horne, LLP to provide
11 valuations of the various ML investments held by the investors, including those that secured the Fortes’
12 investments. The Fortes served a subpoena on Henry & Horne LLP for the valuations it performed, but
13 only as to the properties in which the Fortes held an interest.

14 The work performed by Henry & Horne, LLP for ML Manager is set forth in the letter attached
15 to the subpoena (see attached Exhibit “1”). According to that letter, Henry & Horne, LLP determined
16 the value of a 1% interest in each of the MP Funds and Loan LLCs. Similarly, in connection with the
17 Liquidating Trustee’s Valuations, Henry & Horne, LLP valued the Fortes’ percentage interest in each of
18 the four loans. The valuations prepared for ML Manager contained limitations:

- 19 • The Henry & Horne, LLP values are strictly for tax purposes and do not represent the
- 20 value of a particular property.
- 21 • ML Manager LLC did not prepare or audit the information and databases reviewed by
- 22 Henry & Horne, LLP and can provide no assurance that such information is correct. ML
- 23 Manager LLC assumes no responsibility for opinions of value reached by Henry &
- 24 Horne, LLP who is solely responsible for the resulting valuations based upon specified
- 25 assumptions and limiting conditions set forth by Henry & Horne in their valuation reports.

26 [See Subpoena attached as Exhibit “1.”]]

1 In connection with the Liquidating Trustee's Valuations, Henry & Horne, LLP made certain
2 Statements of Certification which included the following:

3 "• We have performed no services, as an appraiser or in any other capacity, regarding the
4 property that is the subject of this report within the three-year period immediately
5 preceding acceptance of this assignment. "

6 The above statement is false. Henry & Horne LLP prepared valuations for ML Manager in 2010.
7 In connection with the Liquidating Trustee's Valuations prepared by Henry and Horne LLP,
8 Henry & Horne LLP made "Assumptions and Limiting Conditions," including the following:

9 "6. Most of the documents, factual information and financial data ("Client Data") relied upon by
10 H&H were provided by ML Manager LLC and ML Servicing Co., Inc. (formerly Mortgages,
11 Ltd.) H&H takes no responsibility for the accuracy of the information in any of the documents,
12 data or financial information. Notwithstanding any inquiry or investigation on part of H&H, it shall
13 be entitled to rely on the documents and the factual information and financial information contained
14 in the files, documents and data base of ML Manager LLC and ML Servicing Co., Inc. (formerly
15 Mortgages, Ltd.) and have no responsibility for its accuracy. H&H assumes that the information
16 furnished is true and correct in all material respect and does not omit information that could cause
17 the conclusion in this report to be misleading to he reader. H&H has not audited, reviewed, or
18 compiled any of the financial information provided to us and, accordingly, we express no audit
19 opinion or any other form of assurance on this information."

20 ML Manager provided Henry & Horne LLP with the documents, factual information and financial
21 data relied upon by Henry & Horne LLP to make valuation conclusions for the Liquidating Trustee's
22 Valuations. However, ML Manager made clear that it refused to provide any assurance that information
23 and databases that it provided to Henry & Horne, LLP were accurate.

24 ML Manager now argues that the information it provided to Henry & Horne, LLP to perform the
25 valuations cannot be disclosed to the Fortes because it is privileged, confidential, proprietary, and
26 sensitive. In claiming the privilege, ML Manager cites to an Arizona statute. There is no accountant client

1 privilege in federal court. In addition, the Liquidating Trustee has sued the Fortes, and selected Henry &
2 Horne LLP to perform valuations. The Fortes are entitled to know everything that Henry & Horne LLP
3 has done in connection with the property they are now valuing for the Liquidating Trustee. Under ML
4 Manager's theory, the Fortes have no right to review or challenge the information ML Manager provided
5 to Henry & Horne LLP for the valuations. Or, in other words, the Fortes have no right to a defense.

6 That information goes to the heart of the defense of the Fortes. Henry & Horne LLP, ML
7 Manager and the Liquidating Trustee have waived any claim of privilege or confidentiality. The Fortes
8 are entitled to review the information provided by ML Manager for the tax valuation as well as the
9 information used for the Liquidating Trustee's Valuation.

10 The arguments of ML Manager are not in good faith. ML Manager supplies the information to
11 Henry & Horne, LLP, but denies any responsibility for the accuracy of the information supplied. Henry
12 & Horne, LLP uses that information, but denies responsibility for its accuracy. And, ML Manager is
13 asking this Court to deny the Fortes the ability to review the information. That is discovery abuse.

14 The information and the values directly bear on the credibility of Henry & Horne LLP, and the
15 claims against the Fortes.

16 ML Manager complains that the information needs to be protected. The parties in this matter are
17 subject to a Protective Order. That Order remains in effect.

18 Wherefore, the Fortes respectfully request that the Motion to Quash the Subpoena be denied and
19 all materials requested in the subpoena be provided forthwith and that the Fortes be granted such other
20 relief as the Court deems appropriate.

21 DATED this 10th day of October, 2012.

22 McEVOY, DANIELS & DARCY, P.C.

23 By: /s/ Sally M. Darcy
24 Sally M. Darcy
25 Attorneys for Defendants
26

1 Copy of the foregoing mailed and emailed
2 this 10th day of October, 2012, to:

3 Cathy L. Reece
4 Fennemore Craig, PC
5 3003 N. Central Ave., Suite 2600
6 Phoenix, Arizona 85012
7 Attorney for ML Manager

creece@fclaw.com

8 Michael Nevels
9 Daniel L. Hulsizer
10 Matthew H. Mason
11 CARSON MESSINGER ELLIOTT LAUGHLIN
12 & RAGAN, PLLC
13 4808 North 22nd St., Ste. 200
14 Phoenix, Arizona 85016
15 Attorney for Plaintiff

dhulsizer@carsonlaw.com
mmason@carsonlaw.com

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EXHIBIT "1"

1 **McEVOY, DANIELS & DARCY, P.C.**
2 Camp Lowell Corporate Center
3 4560 East Camp Lowell Drive
4 Tucson, Arizona 85712
5 Telephone: (520) 326-0133
6 Fax: (520) 326-5938

7 Sally M. Darcy
8 e-mail: darcysm@aol.com
9 Attorney for Defendants

10 **IN THE UNITED STATES BANKRUPTCY COURT**
11 **FOR THE DISTRICT OF ARIZONA**

12 In re
13 **MORTGAGES LTD.,**
14 Debtor. No. 2:08-bk-07465-RJH

15 **MATTHEW HARTLEY, Successor**
16 Liquidating Trustee of the
17 **ML Liquidating Trust,**
18 Plaintiff, No. 2:10-ap-1095-RJH

19 vs.
20 **CRAIG A. FORTE and LAURI T. FORTE,**
21 Trustees of the Forte Family Revocable
22 Living Trust Dated May 30, 2001,
23 Defendants. **SUBPOENA**
24 **DUCES TECUM**

25 **TO: CUSTODIAN OF RECORDS**
26 **HENRY & HORNE, LLP, CERTIFIED PUBLIC ACCOUNTANTS**
27 **2055 EAST WARNER ROAD, SUITE 101**
28 **TEMPE, ARIZONA 85284**

XXX YOU ARE COMMANDED to produce documents at the time and place specified below:

DATE AND TIME: Friday, September 28, 2012, by 5:00 P.M.

LOCATION: LAW OFFICES OF McEVOY, DANIELS & DARCY, P.C.
C/O SALLY M. DARCY
4560 EAST CAMP LOWELL DRIVE
TUCSON, ARIZONA 85712

XXX YOU ARE COMMANDED to produce:

SEE ATTACHED EXHIBIT "A"

YOU ARE HEREBY NOTIFIED THAT ANY FAILURE TO OBEY THIS SUBPOENA
WITHOUT ADEQUATE EXCUSE MAY BE DEEMED A CONTEMPT OF THIS COURT AND
A CIVIL ARREST WARRANT MAY BE ISSUED.

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Records may be mailed in lieu of personal appearance—attendance is not necessary to satisfy the requirements of this subpoena.

DATED: September 21, 2012

ISSUING OFFICER SIGNATURE AND TITLE:

McEVOY, DANIELS & DARCY, P.C.

By: 
Sally M. Darcy, Attorney for Debtors

SALLY M. DARCY
McEVOY, DANIELS & DARCY, P.C.
CAMP LOWELL CORPORATE CENTER
4560 EAST CAMP LOWELL DRIVE
TUCSON AZ 85716
(520) 326-0133
darcysm@aol.com

Copy of the foregoing emailed/mailed this
21st day of September, 2012, to:

DANIEL L HULSIZER
CARSON MESSINGER ELLIOTT
4808 NORTH 22ND STREET, SUITE 200
PHOENIX AZ 85016

1. All tax valuation and related information prepared by Henry & Horne, LLP or in the possession of Henry & Horne, LLP, its agents, representatives, employees and/or attorneys regarding all work performed by Henry & Horne, LLP, or at its direction in connection with:

A. Rightpath Loan #858406 including but not limited to the real property securing said loan, the promissory note and deed of trust referencing said loan, and any and all participation interests in the real property, promissory note and/or deed of trust.

B. Tempe Land Loan #857605 including but not limited to the real property securing said loan, the promissory note and deed of trust referencing said loan, and any and all participation interests in the real property, promissory note and/or deed of trust.

C. ABCDW Loan #850206 including but not limited to the real property securing said loan, the promissory note and deed of trust referencing said loan, and any and all participation interests in the real property, promissory note and/or deed of trust..

D. Osborn III Loan #851106 including but not limited to the real property securing said loan, the promissory note and deed of trust referencing said loan, and any and all participation interests in the real property, promissory note and/or deed of trust..

2. All tax valuation and related information prepared by Henry & Horne, LLP or in the possession of Henry & Horne, LLP, its agents, representatives, employees and/or attorneys regarding all work performed by Henry & Horne, LLP, or at its direction in connection with the engagement by ML Manager, LLC. The information requested should include all information provided to ML Manager LLC and/or the Investors as set forth in the letter dated November 16, 2010 from ML Manager LLC to Investor, a copy of which is attached hereto, concerning or relating to:

A. Rightpath Loan #858406 including but not limited to the real property securing said loan, the promissory note and deed of trust referencing said loan, and any and all participation interests in the real property, promissory note and/or deed of trust..

B. Tempe Land Loan #857605 including but not limited to the real property securing said loan, the promissory note and deed of trust referencing said loan, and any and all participation interests in the real property, promissory note and/or deed of trust..

C. ABCDW Loan #850206 including but not limited to the real property securing said loan, the promissory note and deed of trust referencing said loan, and any and all participation interests in the real property, promissory note and/or deed of trust.

D. Osborn III Loan #851106 including but not limited to the real property securing said loan, the promissory note and deed of trust referencing said loan, and any and all participation interests in the real property, promissory note and/or deed of trust.

EXHIBIT "A"

ML MANAGER LLC
14050 N. 83rd Ave
Suite 180
Peoria, AZ, 85381

November 16, 2010

Dear Investor:

ML Manager LLC has been made aware of some potential tax benefits that some of you may be able to take advantage of relating to IRA accounts. As always, we urge you to consult with your own tax professionals to assist you with any tax decisions you make relating to your investments. Anticipating that investors may need to have a current valuation of their interests in connection with tax planning, ML Manager LLC engaged Henry & Horne, LLP, Certified Public Accountants ("Henry & Horne") to provide valuations of the various investments held by our investors. The method of obtaining the valuations is described below in this letter.

We want to caution you about the use of these valuations. We understand that each of you has a desire to know the current value of your investments. We have consistently informed you that we are not able to provide you with current valuations due to several factors. Our goal is to maximize the amount of money that can be returned to the investors; however, it is not possible to know with any certainty what the final amounts will be. As you know, we have gained control of most of the assets, sold several of the properties, made a substantial reduction of the Exit Financing and are marketing many properties for sale. We have received the court approval of our Cost Allocation Model and will be distributing checks to the investors in the loans that have either sold or paid off in the near future.

The valuations prepared by Henry & Horne, LLP are intended to facilitate various tax strategies at the current time. The valuations are not intended to inform you of how much money you will ultimately receive as the confirmed Plan of Reorganization is carried out. **The Henry & Horne, LLP values are strictly for tax purposes and do not represent the value of a particular property.** For instance, Henry & Horne, LLP has applied various discounts to the interests which are attributable to the presence or absence of voting rights, the fact that most holding are minority interests, the inability to readily liquidate interests, and other factors. **The values prepared by Henry & Horne, LLP are not intended to inform you of the amounts you are likely to ultimately receive for your interests in the loans and properties.** The values listed will not be reflected within the books of ML Manager LLC, will not be sent to any financial institutions on your behalf, and will not affect the likelihood of any future distributions from ML Manager LLC.

The Henry & Horne, LLP valuations are available on a secure website. There are security procedures in place to protect the information. If you would like to obtain a valuation of an investment in a PDF format for your use or the use of your tax advisor, you may request access to such information on the secure website by signing and returning the

attached written request form ("Written Request") by mail to the address set forth above for ML Manager LLC.

If you elect to review the valuations you will find that Henry & Horne, LLP has determined the value of a 1% interest in each of the MP Funds and the Loan LLCs. They have also determined the value of a 1% non-transferring pass-through interest in each loan or property. In order to determine the value of any of your interests you will need to determine what percentage of any MP Fund, Loan LLC or property or loan that you hold. For example, an investor may know that they invested \$444,462.00 in the MP122009, L.L.C. Fund ("MP09"), but they might not know that such investment constitutes 0.948% of the MP09 Fund. A listing is available on the secure website for each MP Fund, Loan LLC and non-transferring pass-through account to assist you.

The secure website contains a list which shows by investor code and loan number the dollar amount of each investor's investment at the date of filing of bankruptcy in each loan for pass-through interests and in each MP Fund or Loan LLC in the case of membership interests in MP Funds and Loan LLCs. The secure website also contains a table prepared by Henry & Horne, LLP which shows by loan for pass-through interests and by MP Fund or Loan LLC the current valuation in cents for each dollar which was invested on the date of the filing of bankruptcy.

Although we have tried to present the information in a clear and understandable fashion, we are aware that it is complicated and we will attempt to assist you with your questions about navigation of the secure website and understanding the information presented. You should initially contact Erica Jacob at 623-234-9569 or at ejacob@mtgllc.com for assistance.

Please be aware that ML Manager LLC has provided Henry & Horne with copies of existing operating agreements, the Exit Financing Loan Documents and expense allocations based upon the allocation model approved by the Bankruptcy Court, and also has provided computer generated data and loan documents from the files of Mortgages Ltd. **ML Manager LLC did not prepare or audit the information and databases reviewed by Henry & Horne, LLP and can provide no assurance that such information is correct. ML Manager LLC assumes no responsibility for opinions of value reached by Henry & Horne, LLP who is solely responsible for the resulting valuations based upon specified assumptions and limiting conditions set forth by Henry & Horne in their valuation reports. Use of this information for any purpose other than arriving at valuations for tax purposes or sharing the information with other persons who have not returned the Written Request is prohibited.**

We hope the information will be helpful to you. Please let us know if you have questions.

Sincerely,

Elliott Pollack, Chairman
ML Manager LLC Board

Written Request for Tax Valuation Information

The undersigned as a current holder of pass-through interest or Membership Interest hereby requests access to the secure website to review the tax valuation information prepared by Henry & Horne, LLP, Certified Public Accountants ("Henry & Horne") and the related information.

The undersigned understand and agree that (i) the valuation information is solely for the purposes of valuing such interests for tax purposes, including in connection with the valuation of an IRA account, conversion of an IRA account to a Roth IRA account, or the transfer of such interest to a charity or a irrevocable trust, and may not be used for any other purpose or shared with anyone else other than your tax advisor; (ii) Henry & Horne, LLP has applied various discounts to the interests which are attributable to the presence or absence of voting rights, the fact that most holding are minority interests, the inability to readily liquidate interests, and other factors; (iii) Henry & Horne's valuations are subject to the assumptions and limiting conditions and other extraordinary assumptions set forth in them; and (iv) the estimates of value stated in the valuations are solely the opinion of Henry & Horne, LLP and ML Manager LLC assumes no responsibility for the information used in developing the valuations or the valuations so stated or to defend or justify any valuations with the Internal Revenue Service or any state taxing authorities. The undersigned understand that they may engage Henry & Horne, LLP at their expense to defend or justify any such valuations directly if desired.

The undersigned also acknowledges that the secure website is confidential and private and agrees not to share the password of the secure website or the valuation information with anyone other than an authorized tax advisor and agrees to protect its confidentiality and privacy.

Upon receipt by mail of this written request for information at ML Manager LLC, Attn: Erica Jacob, 14050 N. 83rd Ave. Ste #180, Peoria, AZ 85381, the website address and an individual password shall be provided to you that will allow you to access the valuation information on the secure website.

Dated: _____

Signature

Printed Name

Signature

Printed Name

Your Duties In Responding To This Subpoena You have the duty to produce the documents requested as they are kept by you in the usual course of business, or you may organize the documents and label them to correspond with the categories set forth in this subpoena. *See Rule 45(d)(1) of the Arizona Rules of Civil Procedure.* If this subpoena asks you to produce and permit inspection and copying of designated books, papers, documents, tangible things, or the inspection of premises, you need not appear to produce the items unless the subpoena states that you must appear for a deposition, hearing or trial. *See Rule 45(c)(2)(A) of the Arizona Rules of Civil Procedure.*

Your Right To Object The party or attorney serving the subpoena has a duty to take reasonable steps to avoid imposing an undue burden or expense on you. The Court enforces this duty and may impose sanctions upon the party or attorney serving the subpoena if this duty is breached. *See Rule 45(c)(1) of the Arizona Rules of Civil Procedure.* You may object to this subpoena if you feel that you should not be required to respond the request(s) made. Any objection to this subpoena must be made within 14 days after it is served upon you, or before the time specified for compliance, by providing a written objection to the party or attorney serving the subpoena. *See Rule 45(c)(2)(B) of the Arizona Rules of Civil Procedure.* If you object because you claim the information requested is privileged or subject to protection as trial preparation material, you must express the objection clearly, and support each objection with a description of the nature of the document, communication or item not produced so that the demanding party can contest the claim. *See Rule 45(d)(2) of the Arizona Rules of Civil Procedure.* If you object to the subpoena in writing you do not need to comply with the subpoena until a court orders you to do so. It will be up to the party or attorney serving the subpoena to seek an order from the court to compel you to provide the documents or inspection requested, after providing notice to you. *See Rule 45(c)(2)(B) of the Arizona Rules of Civil Procedure.* If you are not a party to the litigation, or an officer of a party, the court will issue an order to protect you from any significant expense resulting from the inspection and copying commanded. *See Rule 45(c)(2)(B) of the Arizona Rules of Civil Procedure.* You may also file a motion in the court in which the case is pending to quash or modify the subpoena if the subpoena: (a) Does not provide a reasonable time for compliance; (b) Requires a non-party or officer of a party to travel to a county different from the county where the person resides or does business in person; or to travel to a county different from where the subpoena was served; or to travel to a place farther than 40 miles from the place of service; or to travel to a place different from any other convenient place fixed by an order of a court, except that a subpoena for you to appear and testify at trial can command you to travel from any place within the state; (c) Requires the disclosure of privileged or protected information and no waiver or exception applies; or (d) Subjects you to an undue burden. *See Rule 45(c)(3)(A) of the Arizona Rules of Civil Procedure.*

If this subpoena: (a) Requires disclosure of a trade secret or other confidential research, development, or commercial trade information; or (b) Requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or (c) Requires a person who is not a party or an officer of a party to incur substantial travel expense;

The court may either quash or modify the subpoena, or the court may order you to appear or produce documents only upon specified conditions, if the party who served the subpoena shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that you will be reasonably compensated. *See Rule 45(c)(3)(B) of the Arizona Rules of Civil Procedure.* A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

TO: CUSTODIAN OF RECORDS

You can avoid the necessity of appearing with the documents if you wish by mailing a copy of your original records to us with a notarized statement stating that you have included everything in your custody or control pertaining to the items requested in the attached Civil Subpoena Duces Tecum. If you prefer, you may mail your original records and we will immediately copy the records and return them to you. You need not appear, as we are interested only in obtaining the records.

PLEASE BE ADVISED THAT, PURSUANT TO A.R.S. §12-351, IF YOU ELECT TO MAIL THE RECORDS TO US RATHER THAN APPEAR, YOU MAY CHARGE US NO MORE THAN TEN CENTS PER PAGE FOR STANDARD REPRODUCTION OF DOCUMENTS, AND A REASONABLE FEE FOR CLERICAL COSTS, NOT TO EXCEED \$10.00 PER HOUR FOR EACH PERSON INVOLVED.

Thank you for your cooperation in this matter.

MAILING ADDRESS:

SALLY M DARCY
McEVOY DANIELS & DARCY, P.C.
4560 E CAMP LOWELL DR
TUCSON AZ 85712

YOU MAY NOT MAIL THESE RECORDS TO US IF THE CHARGE WILL EXCEED \$50.00. INSTEAD, YOU WILL HAVE TO PRODUCE THEM AT THE SPECIFIED DATE AND TIME FOR US TO MAKE OUR OWN COPIES.