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as Plaintiff in certain Superior Court Litigation

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

9 In re  
10 MORTGAGES, LTD.,

Chapter 11

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

11 **REPLY IN SUPPORT OF LIQUIDATING**  
12 **TRUSTEE'S MOTION FOR ENTRY OF**  
13 **PROTECTIVE ORDER PURSUANT TO**  
14 **COURT'S RULING OF JUNE 5, 2012, AND**  
15 **RESPONSE TO "ROBERT FURST'S MOTION**  
16 **FOR DETERMINATION OF PRIVILEGE**  
17 **AND CONFIDENTIALITY ISSUES; MOTION**  
18 **FOR SANCTIONS"**

19 **Hearing Date: October 2, 2012**  
20 **Time: 11:00 a.m.**  
21 **Place: Courtroom No. 603**  
22 **230 North Central Ave.**  
23 **Phoenix, AZ**

24 Debtor.

21 Matt Hartley, as successor Liquidating Trustee of the ML Liquidating Trust  
22 ("**Liquidating Trustee**"), replies in support of his Motion for Entry of Protective Order  
23 Pursuant to Court's Ruling of June 5, 2012 (the "**Protective Order Motion**"), and responds to  
24 the additional matters raised in Robert Furst's ("**Furst**") "Response to ML Liquidating Trust's

1 Furst's Motion for Determination of Privilege and Confidentiality Issues; Motion for  
2 Sanctions" ("**Furst Response**"). This Reply is supported by the following Memorandum, the  
3 attachments hereto, and the record in this case.

4 **MEMORANDUM**

5 The Liquidating Trustee, as described in his Protective Order Motion, is ready to share  
6 with Mr. Furst non-privileged documents produced by Kevin O'Halloran, subject to the  
7 confidentiality arrangements the parties discussed, and that Mr. Furst agreed to, at the June 5,  
8 2012 hearing on this matter. Mr. Furst has refused to approve a form of protective order that  
9 would allow him access to non-privileged documents, without prejudice to his right to seek,  
10 through Liquidating Trust consent or Court order, to use them more widely after he had seen  
11 them. He chose to depose Mr. O'Halloran without awaiting the production of documents.  
12 Now he seeks to have the Court order virtually unlimited use of documents, alleging that they  
13 may be embarrassing or even actionable, and to impose sanctions in the form of the cost of a  
14 deposition he unilaterally chose to take before he had seen the documents.

15 While Mr. Furst accuses the Liquidating Trustee of "stonewalling,"<sup>1</sup> it has never been in  
16 doubt that Mr. Furst would ultimately see the non-privileged documents. The Court, pursuant  
17 to the Liquidating Trustee's Protective Order Motion, will undoubtedly enter an order that will  
18 allow Mr. Furst to view the documents under some conditions. Mr. Furst has never articulated  
19 a reason why he needs to hurry, and at this point he is, himself, the only roadblock to  
20 reviewing the document production. It is premature, and potentially prejudicial to the  
21 Liquidating Trust's mission of collecting assets through litigation, for the Court to simply  
22 designate certain categories of documents as not confidential at this stage. The Liquidating  
23 Trustee proposes that the parties do exactly what the Court ordered on June 5, 2012 – give Mr.  
24 Furst a chance to review the documents, subject to a protective order, and then come back to  
25 this Court, if necessary, for further proceedings.

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26 <sup>1</sup> For a description of the efforts the Liquidating Trustee has made to provide discovery, see Protective Order  
Motion at pp. 2-5.

1                   **1. The Liquidating Trust's Concern Over Unfettered Disclosure to Mr. Furst**

2                   The Liquidating Trust has a special purpose: it exists to litigate. It is charged with  
3 "pursuing the Avoidance Actions and Causes of Action on behalf of the Debtor's Estate", and  
4 has the "full power to commence, prosecute, settle and abandon" those actions. (Official  
5 Committee of Investors' First Amended Plan of Reorganization Dated March 12, 2009 (the  
6 "**Plan**," DE #1532) at §6.2.) A review of Arizona court dockets discloses that the Liquidating  
7 Trust is involved in nineteen lawsuits in Bankruptcy Court, five in Maricopa County Superior  
8 Court, and eleven in U.S. District Court (see online dockets attached as Exhibit A, hereto).<sup>2</sup>  
9 The Liquidating Trust is in direct competition with Mr. Furst for recovery from the defendants  
10 in at least one pending case, a class action entitled *Facciola, et al., v. Greenberg Traurig, LLP*,  
11 U.S. District Court for the District of Arizona, no. 10-cv-01025-FJM (final approval of an \$89  
12 million settlement with two class action groups, but not including the Liquidating Trust, is  
13 pending).

14                   While Mr. Furst contends that he is seeking largely administrative information from the  
15 Liquidating Trust (*see, e.g.*, transcript of 6/5/2012 hearing attached hereto as Exhibit B, at  
16 p.6), the administrative "business" of the Liquidating Trust is in fact litigation. The  
17 Liquidating Trustee, and the Board of the Liquidating Trust, are constantly reviewing,  
18 analyzing, discussing, and making decisions about the conduct of litigation. The information  
19 provided to Mr. Furst in these proceedings, if generally disclosed, could well reveal  
20 information or legal strategy to other parties to the detriment of the Liquidating Trust and its  
21 beneficiaries. Since the business of the Litigation Trust is litigation, how it conducts that  
22 business is exactly the kind of "trade secret or other confidential research, development, or  
23 commercial information" that 11 U.S.C. §107(b) and Fed. R. Civ. P. 9018 protects. *Cf. In re*  
24 *Orion Pictures Corporation*, 21 F.3d 24, 28-29 (2<sup>nd</sup> Cir. 1994 ("Commercial information has  
25 been defined as information which would cause 'an unfair advantage to competitors by

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26                   <sup>2</sup> Because of removals, remands, and consolidations, some of these dockets refer to the same case in more than  
one court.

1 providing the information as to the commercial operations of the debtor"; affirming  
2 bankruptcy court's protective order as to licensing agreement, disclosure of which would give  
3 competitors unfair advantage.)

4 **2. Mr. Furst's Objections to the Proposed Protective Order Should be**  
5 **Overruled and His Proposed Modifications Should Be Rejected**

6 Mr. Furst, at the June 5, 2012 hearing, expressly agreed to the procedure proposed by  
7 the Liquidating Trust: "I would be willing to sign a reasonable confidentiality agreement on  
8 my own behalf that I wouldn't share this information with anyone else, you know, other than  
9 in the court proceeding" (Exhibit B at p. 9). The thrust of the Liquidating Trust's proposed  
10 procedure was to provide Mr. Furst access to documents, narrow the scope of any issues in  
11 light of the actual documents produced, and return to the Court for a determination only if  
12 there was an actual dispute. In the end, however, Mr. Furst insists that, rather than review  
13 documents first and discuss the extent to which they could be more widely used later, several  
14 broad categories of documents should simply be produced without confidentiality protection.  
15 The categories are listed in the Furst Response at pp. 9-10, paragraph (a)-(j), and the  
16 Liquidating Trustee responds to them as follows:

17 (a) Mr. O'Halloran's personal notes.

18 As to category (a), the Liquidating Trustee objects to a blanket, unprotected disclosure of Mr.  
19 O'Halloran's notes, because those notes memorialize statements made by legal counsel and  
20 recite legal issues being considered by the Board.

21 (b) The ML Liquidating Trust Board's 'conflict of interest' policies, as  
22 amended from time to time, any voting by the Board to suspend the  
23 'conflict of interest' policies, and any self-dealing actions taken by Board  
24 members;

25 (c) All communications relating to efforts by Board members to obtain  
26 personal benefits for themselves that were unavailable to non-Board  
members.

1 As to categories (b) and (c), the Liquidating Trustee does not believe that documents that fit  
2 solely within these categories have an independent basis for confidentiality and, if Mr. Furst  
3 will identify these documents from among those produced to him, it is highly likely that the  
4 Liquidating Trustee will simply agree.

- 5 (d) All communications by Board members (or others) to impede the ML  
6 Liquidating Trust's prosecution of its legal claims against Greenberg  
7 Traurig, Quarles & Brady, Mayer Hoffman and others.

8 With respect to Mr. Furst's category (d), these communications, if any exist, by their nature  
9 relate to pending or anticipated litigation, including the Greenberg Traurig class action, and  
10 accordingly should be protected.

- 11 (e) All communications with Cathy Reece, Esq., in which she stated that ML  
12 Manager was not the agent for the Mortgages Ltd. 401(k) Plan (including  
13 without limitation Mr. O'Halloran's testimony on this subject in his 2004  
14 examination."

15 Regarding category (e), such communications with Ms. Reece, if they exist, may be subject to  
16 the common interest agreements described in the Protective Order Motion, and may well  
17 contain additional information that should be protected on other grounds.

- 18 (f) All documents prepared before the common defense agreements were  
19 signed.

20 As to category (f), Mr. Furst apparently misapprehends the scope of the privilege pursuant to a  
21 common interest agreement; there is no requirement for a writing, so the date of the actual  
22 written agreement does not control the time-frame it covers. Restatement (3d) of The Law  
23 Governing Lawyers § 76, *cmt. c* (under common interest doctrine, “[e]xchanging  
24 communications may be predicated on an express agreement, but formality is not required”);  
25 *Pac. Pictures Corp. v. United States Dist. Court*, 679 F.3d 1121, 1129 (9th Cir. 2012) (for  
26 common interest principle to apply, “the parties must make the communication in pursuit of a  
joint strategy in accordance with some form of agreement – *whether written or unwritten*”

1 (emphasis added)). In this case the common interest agreements <sup>3</sup>are not just prospective, they  
2 are expressly retrospective and include communications made prior to the date of the  
3 agreement.

4 (g) Kevin O'Halloran's testimony about Jim Merriman's statements.

5 Category (g) refers to testimony about statements of a Liquidating Trust Board member, which  
6 should be protected to the extent they reveal legal issues, analysis, and decisions of the Board.

7 (h) All voting by the ML Liquidating Trust Board.

8 As stated, category (h) is overbroad. Whether voting by the Board should be protected from  
9 further disclosure depends on what the Board was voting on, *e.g.*, litigation decisions.

10 (i) The transcript of Mr. O'Halloran's 2004 examination.

11 With respect to category (i), as far as the Liquidating Trustee is aware, Mr. O'Halloran's  
12 deposition transcript has not yet been transcribed. However, to the extent his deposition  
13 testimony deals with confidential information such as that identified above, it should be  
14 subject to the Protective Order, as well.

15 (j) All communication relating to the allocation of expenses between ML  
Liquidating Trust, ML Manager and the Loan LLCs.

16 As Mr. Furst is aware, the Court has already entered a protective order as to the documents  
17 which are referenced in Mr. Furst's category (j). (Order dated September 3, 2012, DE#2920.)

### 18 **3. The Fiduciary Exception to the Attorney-Client Privilege**

19 Mr. Furst complains that, at his deposition of Mr. O'Halloran, Mr. O'Halloran was not  
20 allowed to answer the question of "whether communications with counsel were in relation to  
21 defense of the Trust, as opposed to administration of the Trust."<sup>4</sup> Mr. Furst contends that the  
22 attorney-client privilege does not apply to the Liquidating Trust's administrative matters

23 \_\_\_\_\_  
24 <sup>3</sup> The common interest agreements are themselves confidential. They will be made available to Mr. Furst upon  
entry of an appropriate Protective Order, and copies will be available at the October 2, 2012 hearing on the  
Protective Order Motion.

25 <sup>4</sup> No transcript of the deposition is currently available so the exact exchange complained of cannot be quoted  
26 here.

1 because he is a beneficiary of the Liquidating Trust, asserting the "fiduciary exception" to  
2 attorney-client privilege as described in *United States v. Mett*, 178 F.3d 1058 (9<sup>th</sup> Cir. 1998).  
3 *Mett*, however, not only involves the special circumstance of an ERISA plan, and determined  
4 that the fiduciary exception did *not* apply in that case, but expressly points out the limits of the  
5 fiduciary exception. *Mett*, 178 F.3d at 1064 (advice purely limited to plan administration is on  
6 one end of the spectrum, while advice with respect to defending the trustee against claims by  
7 beneficiaries is at the other). The *Mett* court reasoned that a communication could cover both  
8 ends of the spectrum, and that "where attorney-client privilege is concerned, hard cases should  
9 be resolved in favor of the privilege, not in favor of disclosure." *Id.* at 1065.<sup>5</sup>

10 The whole purpose of the Liquidating Trust is to litigate Mortgages Ltd. claims in order  
11 to collect and ultimately distribute assets. Unlike trusts whose primary purpose is investment,  
12 administration of the Liquidating Trust is virtually inseparable from its litigation function. In  
13 this case, not only is the scope of the fiduciary exception highly limited, but there is an actual  
14 concern over simply allowing production of privileged documents and information to Mr.  
15 Furst in particular. Mr. Furst's interests are not entirely aligned with the interests of the  
16 Liquidating Trust. He is both a beneficiary of the Liquidating Trust and, as an investor, a  
17 litigant in ongoing litigation in which investors and the Liquidating Trust have competing  
18 claims against third parties. He was a defendant in now-settled preference litigation brought  
19 by the Liquidating Trustee. And, as he has made abundantly clear, the purpose of his Rule  
20 2004 fishing expedition is to pursue the Trust itself – the exact condition that negates the  
21 "fiduciary exception."

22 There is a very real danger here that once privileged documents and information leave  
23 the control of the Liquidating Trustee, they could be disclosed to third parties to further

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24 <sup>5</sup> *Mett* quotes *Upjohn Co. v. United States*, 449 U.S. 383 at 393 (1981): "an uncertain privilege, or one which  
25 purports to be certain but results in widely varying applications by the courts, is little better than no privilege at  
26 all."

1 interests adverse to the Liquidating Trust, and prejudice the Liquidating Trustee's ongoing  
2 litigation efforts.

3 **4. No Sanction Should Be Assessed Here.**

4 Mr. Furst requests that sanctions be imposed. There is no legal or factual basis for his  
5 request. The Liquidating Trustee is not in violation of any order. Mr. Furst complains that he  
6 will have to depose Mr. O'Halloran a second time and seeks to impose that expense on the  
7 Liquidating Trust, but it is Mr. Furst himself who chose to depose Mr. O'Halloran prematurely,  
8 without first looking at the documents. The sanctions request is groundless and should be  
9 denied.

10 **CONCLUSION**

11 For the foregoing reasons, the Liquidating Trustee requests that the Court deny the  
12 relief requested in the Furst Reply, enter the Proposed Protective Order, and grant him such  
13 other and further relief to which he may be entitled.

14 RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of September, 2012.

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19 COPY of the foregoing sent this 21st day  
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27 /s/ Anne Finch

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# **EXHIBIT A**

**2:08-bk-07465-RJH** Mortgages Ltd.**Case type:** bk **Chapter:** 11 **Asset:** Yes **Vol:** i **Judge:** Randolph J. Haines**Date filed:** 06/20/2008 **Date of last filing:** 09/20/2012 **Plan confirmed:** 05/20/2009**Associated Cases**

Case	Associated Case	Type
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:08-ap-00436-RJH</u> RIGHTPATH LIMITED DEVELOPMENT GROUP, LLC, et al et v. MORTGAGES, LTD. (closed)	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:08-ap-00440-RJH</u> SOJAC I, LLC, an Arizona limited liability company v. Mortgages LTD, an Arizona corporation et al (closed)	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:08-ap-00780-RJH</u> National Retail Development Partners I, LLC v. Maness et al (closed)	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:08-ap-00781-RJH</u> PDG Los Arcos, LLC v. Adams et al (closed)	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:08-ap-00831-RJH</u> MORTGAGES LTD v. PDG Los Arcos, LLC et al	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:08-ap-00832-RJH</u> MORTGAGES LTD v. National Retail Development Partners I, LLC et al	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:08-ap-00881-RJH</u> MORTGAGES LTD et al v. Dragoo et al (closed)	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:08-ap-00906-RTBP</u> CP Loan, LLC et al v. Riverfront Commons, LLC et al (closed)	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:08-ap-00920-RJH</u> Gould Evans Associates L.C. et al v. MORTGAGES LTD. et al (closed)	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:08-ap-00957-RJH</u> MORTGAGES LTD. et al v. Vento et al (closed)	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:09-ap-00037-RJH</u> MORTGAGES LTD et al v. Vento et al (closed)	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages Ltd.	<u>2:09-ap-00042-RJH</u> MORTGAGES LTD et al v. Vento et al (closed)	Adversary
<u>2:08-bk-07465-RJH</u> Mortgages	<u>2:09-ap-00056-RJH</u> Mechanical Solutions Incorporated v. MORTGAGES, LTD. et al	Adversary

Ltd.		
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:09-ap-00423-RJH SUMMERS GROUP, INC. v. J.C. York Electrical Contracting, Inc. et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:09-ap-00424-RJH Jeffrey C. Stone, Inc. d/b/a Summit Builders v. Arizona Control Specialists et al</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:09-ap-00713-RJH Goldblatt et al v. MORTGAGES LTD et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-00430-RJH ML Manager LLC et al v. William L. Hawkins as Trustee of the CornerstoneRe</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-00717-RJH L.L.J. INVESTMENTS, LLC v. ML Manager LLC</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01094-RJH ML Liquidating Trust v. Paletz et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01095-RJH ML Liquidating Trust v. Crag A. Forte and Lauri T. Forte, Trustees of the</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01098-RJH ML Liquidating Trust v. Michael Denning and Donna Denning, Husband and Wif (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01099-RJH ML Liquidating Trust v. Burnside et al</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01100-RJH ML Liquidating Trust v. Celebrity Fight Night Foundation, Inc. (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01101-RJH ML Liquidating Trust v. Shepherd of the Desert Education Foundation (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01102-RJH ML Liquidating Trust v. Barrington et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01103-RJH ML Liquidating Trust v. Paul D. Levie, Inc. (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01104-RJH ML Liquidating Trust v. Bonnie Gladden, Trustee of the BLG Trust I, Dated (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages</u>	<u>2:10-ap-01126-RJH ML Liquidating Trust v. Furst et al (closed)</u>	Adversary

Ltd.		
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01127-RJH ML Liquidating Trust v. Yang et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01128-RJH ML Liquidating Trust v. Katz et al</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01130-RJH ML Liquidating Trust v. Perry L. Coles, Trustee of the Scott M. Coles Trus (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01131-RJH ML Liquidating Trust v. Denning et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01132-RJH ML Liquidating Trust v. Zeigler et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01133-RJH ML Liquidating Trust v. Everette et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01134-RJH ML Liquidating Trust v. Walter et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01135-RJH ML Liquidating Trust v. Coles et al</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01165-RJH SOTERIA, LLC, an Arizona limited liability company v. VCB Loan, LLC et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01214-RJH Victims Recovery v. Greenberg Traurig LLP et al</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01402-RJH Ashkenazi v. CBIZ INC et al</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01420-RJH BASELINE &amp; VAL VISTA ASSOCIATES, LIMITED PARTNERSH v. FIDELITY NATIONAL TITLE INSURANCE COMPANY et al (closed)</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:10-ap-01824-RJH MARSH v. Mayer Hoffman McCann PC et al</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages Ltd.</u>	<u>2:11-ap-00593-RJH Losch et al v. ML Manager LLC</u>	Adversary
<u>2:08-bk-07465-RJH Mortgages</u>	<u>2:11-ap-00725-RJH ML LIQUIDATING TRUST v. MAYER HOFFMAN MCCANN PC et al</u>	Adversary

Ltd.		
2:08-bk-07465-RJH Mortgages Ltd.	2:11-ap-02053-RJH CORDELLO et al v. ML Manager LLC	Adversary

### Other Filings by Same Debtor(s)

There Are No Case Filing Associations For This Case

<b>PACER Service Center</b>			
<b>Transaction Receipt</b>			
09/21/2012 14:51:05			
<b>PACER Login:</b>	mh0034	<b>Client Code:</b>	
<b>Description:</b>	Associated Cases	<b>Search Criteria:</b>	2:08-bk-07465-RJH
<b>Billable Pages:</b>	2	<b>Cost:</b>	0.20

## Select A Case

**ML Liquidating Trust is a party in 11 cases.**

<u>2:09-cv-02336-JWS</u>	Furst v. Smith et al	filed 11/06/09
<u>2:09-cv-02698-RCJ</u>	Rev Op Group and Sternberg Enterprises Profit Sharing Plan v. ML Liquidating Trust, et al	filed 12/23/09 closed 01/31/12
<u>2:10-cv-01025-FJM</u>	Facciola, et al v. Greenberg Traurig, LLP, et al	filed 05/11/10
<u>2:10-cv-01820</u>	Rev Op Group and Sternberg Enterprises Profit Sharing Plan v. ML Manager LLC et al	filed 08/23/10 closed 08/25/10
<u>2:10-cv-02019-RRB</u>	ML Liquidating Trust v. Mayer Hoffman McCann PC et al	filed 09/21/10 closed 04/13/11
<u>2:11-cv-00130-GMS</u>	ML Liquidating Trust v. Westchester Fire Insurance Company	filed 01/19/11 closed 03/23/11
<u>2:11-cv-00235-RCJ</u>	ML Liquidating Trust v. Radical Bunny LLC	filed 02/03/11 closed 08/04/11
<u>2:11-cv-00456-SMM</u>	Westchester Fire Insurance Company v. ML Liquidating Trust et al	filed 03/08/11 closed 04/09/12
<u>2:11-cv-00649-RCJ</u>	ML Liquidating Trust v. Radical Bunny LLC	filed 04/01/11 closed 08/04/11
<u>2:11-cv-00832-DGC</u>	ML Servicing Company Incorporated et al v. Greenberg Traurig LLP et al	filed 04/25/11 closed 08/02/11
<u>2:11-cv-01428-RCJ</u>	ML Liquidating Trust v. Mayer Hoffman McCann PC, et al	filed 07/19/11 closed 02/24/12

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Civil Court Case History << return for new search

Case Number	Party / Business Name
CV2011-005890	M L Liquidating
CV2011-011666	M L Liquidating
CV2010-032749	M L Liquidating Trust
CV2010-053947	M L Liquidating Trust
CV2011-005803	M L Liquidating Trust
CV2011-011666	M L Liquidating Trust



# **EXHIBIT B**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

\_\_\_\_\_  
In re: )  
 )  
MORTGAGES LTD. CH: 11 ) 2:08-BK-07465-RJH  
 )  
HEARING ON ROBERT FURST'S MOTION FOR )  
RULE 2004 EXAMINATION OF KEVIN )  
O'HALLORAN AND OBJECTION FILED BY ML )  
LIQUIDATING TRUST )  
\_\_\_\_\_ )

U.S. Bankruptcy Court  
230 N. First Avenue, Suite 101  
Phoenix, AZ 85003-1706

June 5, 2012  
10:33 a.m.

BEFORE THE HONORABLE RANDOLPH J. HAINES, Judge

APPEARANCES:

For ML Liquidating Trust: Christopher Graver  
Alisa C. Lacey  
STINSON MORRISON HECKER, L.L.P.  
1850 N. Central Avenue #2100  
Phoenix, AZ 85004-4584

Also Present: Matt Hartley, Trustee

Also Appearing: Robert Furst  
4701 North 57th Way  
Phoenix, AZ 85018

Proceedings recorded by electronic sound technician, Sheri  
Fletcher; transcript produced by AVTranz.

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1 THE COURT: Good morning. Please be seated.

2 THE CLERK: In the case of 08-7465, Mortgages Ltd.

3 THE COURT: Appearances?

4 MR. GRAVER: Good morning, Your Honor. Chris Graver  
5 and Alisa Lacey on behalf of the ML Liquidating Trust, and Matt  
6 Hartley, the Liquidating Trustee, is also present in the  
7 courtroom.

8 MR. FURST: Robert Furst on behalf of himself.

9 THE COURT: And I think we'll treat this as Mr. Furst  
10 being the movant. This is a motion for 2004 examination and an  
11 objection filed by the liquidating trust.

12 Mr. Furst, why don't you first tell me what this is  
13 all about? What discovery do you want in connection with what  
14 dispute?

15 MR. FURST: Okay. There actually is not a dispute at  
16 this point in time. And what I filed is, you know, what I felt  
17 was a routine motion to conduct an examination of the initial  
18 liquidating trustee under Bankruptcy Code § 2004. I've spoke  
19 to Kevin O'Halloran. He has no objection to the appearance.  
20 Matt Hartley in the context of the earlier preference action  
21 against me and that was settled, and we discussed the  
22 possibility of me deposing Mr. Hartley in the future and there  
23 was no objection as evidenced by the emails that I cited in my  
24 reply.

25 And it's hard for me to limit what the scope of the

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1 examination is going to be under § 2004, and I specified in my  
2 motion that certain concerns were raised by the -- by  
3 Mr. O'Halloran's resignation approximately two years ago and  
4 the resignation at approximately the same time of two of the  
5 other board members. And a communication was sent to the  
6 investors stating that there were policy differences and that  
7 created, you know, a sense of alarm among a large group of  
8 investors of Mortgages Ltd. So that, you know, I would like to  
9 inquire about the circumstances surrounding his resignation but  
10 I don't want to limit it. I want to ask him questions about  
11 the administration of the Trust while he was Trustee.

12 THE COURT: Well, I'm still wondering what -- what  
13 you want the discovery for. I'm not understanding. What issue  
14 is there pending that this discovery might be at all relevant  
15 to? You say there's alarm but -- because he resigned. That  
16 was two years ago. That doesn't sound like alarm to me.

17 MR. FURST: Well, there is alarm and the fact of the  
18 matter is, you know, I've had conversations with Matt Hartley.  
19 The investors are aware and Matt Hartley, the current Trustee,  
20 is aware that there are certain concerns in the investor  
21 community that, you know, the policy differences between Kevin  
22 O'Halloran and the board members related to his perception of  
23 what was right and wrong and their perception of right and  
24 wrong and conflicts of interest. And there are certain  
25 situations out there of, you know, conflict of interest among

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1 board members. And I think it deserves an inquiry.

2 THE COURT: You believe some board members may have  
3 conflicts of interest?

4 MR. FURST: Yes.

5 THE COURT: Not Mr. Hartley --

6 MR. FURST: No.

7 THE COURT: -- but board members?

8 MR. FURST: Correct.

9 THE COURT: But again, there's no motion pending to  
10 displace a board member or any -- anything like that? This is  
11 just --

12 MR. FURST: Well --

13 THE COURT: -- a fishing expedition, in other words?

14 MR. FURST: -- well, I know it's allowed to be a  
15 fishing expedition but I don't believe it is. I think I have,  
16 you know, in a sense, you know -- you know, to use the term,  
17 you know, a reasonable belief or probable cause. I haven't  
18 started out on a fishing expedition. I have reason to believe  
19 -- I'm not acting alone. There are other people that have the  
20 same concerns and --

21 THE COURT: And these concerns relate to who is  
22 serving on the board of the ML Liquidating Trust, is that  
23 right?

24 MR. FURST: Either past members or present members.

25 THE COURT: Well, the reason I'm asking is, yes, it's

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1 generally understood that unlike most discovery rules in --  
2 under the Federal Rules of Civil Procedure, for example, Rule  
3 2004 does permit what you might call fishing expedition. But  
4 It still is limited to -- the examination may relate only to  
5 the acts, conduct or property or the liabilities and financial  
6 conditions of the Debtor, which now doesn't exist, or any  
7 matter which may affect the administration of the Debtor's  
8 estate, which now doesn't exist, or to the Debtor's right to a  
9 discharge, which never had any application. So how does  
10 anything you want to do have anything to do with the Debtor  
11 that ceased to exist in, what, 2008?

12 MR. FURST: Well, I don't believe the Debtor really  
13 ceased to exist. I mean my understanding -- and I'm not a  
14 bankruptcy lawyer -- but this was a --

15 THE COURT: Well, maybe it didn't.

16 MR. FURST: Yeah.

17 THE COURT: But in any event, what you're seeking to  
18 investigate relates only to the Liquidating Trust.

19 MR. FURST: And the Liquidating Trust represents all  
20 of the -- is the current shareholder of the reorganized Debtor.  
21 That's how this was restructured. Mortgages Ltd., as part of  
22 the plan of reorganization, changed its name to ML Servicing,  
23 and the Scott Coles Trust or the Scott Coles, LLC relinquished  
24 all of its stock in Mortgages Ltd. and the Liquidating Trust  
25 obtained that stock. So --

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1 THE COURT: So how does any of the discovery that you  
2 want have anything to do with the acts or conduct of the  
3 Debtor?

4 MR. FURST: Well, again, the Debtor is ML Servicing  
5 and the Debtor is controlled by the Liquidating Trust board.

6 THE COURT: Right.

7 MR. FURST: And that's -- that's the only way to  
8 question what's occurring at ML Servicing or at ML Liquidating  
9 Trust. And, you know, we're all beneficiaries of that Trust.  
10 This seemed like the proper procedure to make an inquiry as to  
11 the administration of the Debtor or in the administration of  
12 the Liquidating Trust since the plan was confirmed --

13 THE COURT: But those -- those are distinct, though,  
14 right? You say the Liquidating Trust is now a shareholder of  
15 the Debtor but you're not seeking to inquire about anything  
16 regarding the Debtor. You're only seeking to inquire about the  
17 administration of the shareholder of the Debtor --

18 MR. FURST: Well, and --

19 THE COURT: -- who are its board members --

20 MR. FURST: Well, in some sense --

21 THE COURT: -- and whether they have conflicts.

22 MR. FURST: I mean in some senses, it's  
23 indistinguishable. You know, the Liquidating Trust, you know,  
24 for example, claims of ML Servicing which would inure to the  
25 benefit of the Liquidating Trust and all the beneficiaries of

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1 the Trust. You know, that's something that's going on right  
2 now, you know.

3 THE COURT: Right. But that all relates to the  
4 Trust. As I recall, the only reason that the Debtor continued  
5 to exist at all was so that there's no concern with some  
6 Arizona regulatory authority regarding the ability of ML  
7 Liquidating Trust to collect on its loans and so forth.

8 MR. FURST: Again, I'm not sure about the only reason  
9 for ML Servicing continuing to exist. I do know that the  
10 Liquidating Trust is asserting claims against other law firms,  
11 other accounting firms on behalf of ML Servicing, the Debtor.  
12 And you know, I do know of circumstances where members of the  
13 board are seeking or have obtained, you know -- you know,  
14 disproportionate benefits. And you know, without disclosing in  
15 a more confident -- you know, any information that is  
16 confidential, you know, it's hard to say any more than that.  
17 This is not a fishing expedition. There is a reason for it.  
18 There was a --

19 THE COURT: Well, it sounds now like it pertains to  
20 some claims that ML Liquidating Trust is pursuing against some  
21 third parties.

22 MR. FURST: No. It had -- no. It pertains more to  
23 the actions taken by certain board members on their own behalf  
24 in relation to some of those matters.

25 THE COURT: Right. But relating to those matters.

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1 So my question is wouldn't you then be entitled to discovery in  
2 that litigation assuming you have -- you're a party to it and  
3 have standing?

4 MR. FURST: I'm not a party to it and I don't have  
5 standing.

6 THE COURT: Well, I gather that -- I mean as you say,  
7 it doesn't appear that there's any objection from Mr. Hartley  
8 or Mr. O'Halloran to the discovery going forward, but it's  
9 simply a procedural objection that the current Liquidating  
10 Trustee wants to review any documents before they are produced  
11 to you to determine whether there is a privilege applicable or  
12 not. And what is your objection to that procedure?

13 MR. FURST: I don't have an objection to that  
14 procedure. You know, I've called --

15 THE COURT: Then what issue do I have to decide  
16 today?

17 MR. FURST: Well --

18 THE COURT: Do we have an agreement on that  
19 procedure?

20 MR. FURST: -- well, I think having just spoken to  
21 opposing counsel, I think that their -- what they call their  
22 fall-back position is, you know, to limit the discovery. I  
23 think they're going to make an initial argument that I should  
24 not be entitled to take a deposition or an examination in any  
25 case. But with regard to what they call the fall-back

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1 position, you know, I called Kevin O'Halloran last night. He  
2 returned my call this morning and he wanted me to report to the  
3 Court that he had no objection to my deposition. But has he  
4 reported to the Liquidating Trustee, he doesn't want to make  
5 any agreements with the Liquidating Trustee or me. He wants to  
6 do what the Court says or what the parties agree. And he has  
7 stated that he's worked on gathering the documents and what  
8 he'd like to do is deliver the documents to the Liquidating  
9 Trustee with his own log and provide me a log and let them, you  
10 know, spend some -- a reasonable period of time to make their  
11 objections based upon attorney/client privilege or  
12 confidentiality. I have no problem with that. With regard to  
13 the confidentiality, I would be willing to sign a reasonable  
14 confidentiality agreement on my own behalf that I wouldn't  
15 share this information with anyone else, you know, other than  
16 in the court proceeding. So you know, if that's acceptable to  
17 the other party -- the other side, there should be no problem  
18 there.

19           One other point I'd like to touch on is if I'm  
20 allowed to seek the production of documents and conduct the  
21 examination, I requested the documents for a period of time  
22 that really didn't include, you know, the period of Mr.  
23 O'Halloran's resignation as Trustee so I'd like to extend the  
24 period just through his resignation.

25           THE COURT: Which was, what, some time early in 2008?

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1 MR. FURST: No. His resig -- no. No. He began  
2 serving when the plan was confirmed like in June of 2009.

3 THE COURT: You're right. 2010?

4 MR. FURST: Yeah. I think towards the end of 2010.

5 THE COURT: September 2010. So you're asking for  
6 documents from the time of confirmation until his resignation?

7 MR. FURST: Correct.

8 THE COURT: All right. Thank you.

9 MR. FURST: Okay.

10 THE COURT: Mr. Graver?

11 MR. GRAVER: Thank you, Your Honor. Actually, I do  
12 want to make it clear. We actually do oppose this discovery at  
13 all. Our request was that the Court deny it without prejudice.  
14 If Mr. Furst wants to come back with another -- with another  
15 request that is more limited, that seems like a more  
16 appropriate way to us. And frankly, what we're talking about  
17 here, we met with Mr. Furst yesterday as he mentioned,  
18 attempted to get him to narrow the scope. He told us he didn't  
19 even know what questions he was going to ask at the deposition.  
20 So I think the Court is absolutely correct that it's really  
21 unclear what's going on here. Mr. Furst is not only a  
22 beneficiary of the Trust, he is also an investor and as an  
23 investor he's a member, as far as I'm aware, of classes in both  
24 of what's called the class action and the mass action  
25 situations as well as of course the -- the preference

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1 litigation that's now been settled. So we have significant  
2 concerns about the use he would put any information to or  
3 whether he's entitled to it anyway. Those -- those actions are  
4 going forward in competition with the action brought by the  
5 Liquidating Trust against at least two sets of defendants. I  
6 think the Court has already identified the overbroad scope  
7 here.

8 In addition, we are very concerned. There's about  
9 2,000 beneficiaries of the Trust.

10 THE COURT: Well, I don't think I identified an  
11 overbroad scope that you referred to. You didn't object on the  
12 basis that you're not entitled to a 2004 exam post-  
13 confirmation.

14 MR. GRAVER: We did not. You're right. That's  
15 right, Your Honor. I hereby amend my objection to adopt the  
16 Court's analysis.

17 THE COURT: Your only concern was that you didn't  
18 know whether Mr. Furst was a party in interest with respect to  
19 the Liquidating Trust. And I gather now, you don't -- you've  
20 resolved that concern?

21 MR. GRAVER: That concern has been resolved, Your  
22 Honor. And in addition as I've just said, we've identified the  
23 -- a series of conflicts that give us great concern. We  
24 certainly do think the scope is overbroad. There's no way  
25 actually to know what Mr. O'Halloran's documents are until they

1 get reviewed which is going to take a lot of effort.

2 THE COURT: But this is really in effect a third  
3 party subpoena. So why -- why does the Trust have any  
4 objection on over-breadth if the deponent has no such  
5 objection? How is that any --

6 MR. GRAVER: Well --

7 THE COURT: -- undue burden on you?

8 MR. GRAVER: -- Your Honor, these are all documents  
9 that relate to when Mr. O'Halloran was in fact the Trustee of  
10 the Trust.

11 THE COURT: Right.

12 MR. GRAVER: And our position is those are really our  
13 documents. He doesn't really have the right to just turn those  
14 over without our consent. Mr. O'Halloran -- what he said -- he  
15 didn't actually say he had no objection to the deposition to us  
16 -- what he told us was that he didn't want to take a position  
17 one way or the other. He'll do whatever he's ordered to do.  
18 So the burden, frankly, falls on the Liquidating Trust to look  
19 over the documents. But Mr. O'Halloran was Trustee when there  
20 was ongoing litigation that is still ongoing right now. There  
21 are in addition numerous privilege issues and there are  
22 numerous confidentiality agreements of various sorts. There  
23 may be -- I'm not liberty to disclose whether there are or not  
24 -- agreements that make the existence of the agreement  
25 undisclosable absent a court order. So we have -- we would

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1 have an enormous amount of work to do in order to go through  
2 these documents, figure out which ones are privilege or subject  
3 to confidentiality agreements.

4 THE COURT: Do you have any idea -- apparently, Mr.  
5 O'Halloran has already started gathering the documents so he  
6 must have an idea of the magnitude of what's requested that he  
7 has that he could respond to. Do you have any such idea?

8 MR. GRAVER: We spoke with Mr. O'Halloran yesterday,  
9 Mr. Harley and I did. He doesn't have any paper documents.  
10 What he has are his emails and the attachments to the emails.  
11 So the actual magnitude of it is unknown. He did say that he  
12 would print them out and Bates stamp them and provide us with  
13 the copy and the log that Mr. Furst has -- has identified for  
14 us. Frankly, the Trustee, you know -- while we're certainly  
15 willing to or we have to if we need to -- we'd prefer not to  
16 spend time going through those or attending a deposition which  
17 might or might not need to be taken under seal, and opening the  
18 door basically for another set perhaps of Rule 2004 exams by  
19 some other claimant. I mean we've got 2,000 beneficiaries  
20 here. This could have a major impact on the ability of the  
21 Trust to do what it's --

22 THE COURT: Well, can you tell me -- I mean I didn't  
23 really get a very clear answer from Mr. Furst -- can you tell  
24 me what your concern is? What disputes are pending that have  
25 any relationship to this discovery that's been required to the

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1 extent you know?

2 MR. GRAVER: I don't know exactly which ones, Your  
3 Honor. I simply raise again the concern that some of this  
4 information might have -- might actually be giving Mr. Furst a  
5 leg up over the Trust since he is also a member of the class  
6 that is -- that has some competing litigation with us. I  
7 frankly don't know what other things there may be. He's  
8 identified problems with unnamed board members that left but I  
9 don't know what those are or what he intends to do with it.  
10 But certainly, as far as I'm aware, there is no pending  
11 litigation --

12 THE COURT: I don't see how it could give Mr. Furst a  
13 leg up with respect to that litigation.

14 MR. GRAVER: Your Honor, there -- we have several  
15 groups of plaintiffs in different litigation that are going  
16 after the same assets and there's a limited number of assets to  
17 go after. We're -- you know, my firm is involved in some of  
18 that litigation but I am not personally so I can't really tell  
19 you what that is. But there is certainly a concern that there  
20 might be information, Liquidation Trust strategies, etcetera,  
21 that could wind up being disclosed. That might have an affect.  
22 We simply don't know. We'll have to look at the documents in  
23 order to figure that out but I -- that is a real potential out  
24 there.

25 THE COURT: I guess I'm having a hard time

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1 conceptualizing what the concern is. He wants to discover  
2 whether there were conflicts or self-dealing by members of the  
3 board of the Liquidating Trust. Your concern regards the fact  
4 that the Liquidating Trust is suing third parties like -- let's  
5 say Greenburg Traurig, right? That was, what, a failure to  
6 advise that Mortgages was violating securities laws or  
7 something like that? And I gather there's a class action also  
8 pending against Greenburg Traurig, and I understand you may be  
9 competing in a sense for a recovery or a share of recovery that  
10 might come on that. How does Mr. Furst's concern about whether  
11 the Liquidating Trust board is acting under conflicts of  
12 interest or improperly treating with its -- some of its members  
13 have any relationship to what might've gone in Greenburg  
14 Traurig --

15 MR. GRAVER: Well --

16 THE COURT: -- years pre-petition?

17 MR. GRAVER: -- I understand, Your Honor, and I -- I  
18 mean he's looking for what the board did about that post-  
19 petition, post-confirmation with the Trust was in place. But I  
20 mean that is -- that is not our only concern. The Court asked  
21 about the pending disputes. You know, what we have are just  
22 some vague allegations that there might be something going on  
23 there, and what would ultimately be a disruptive event to the  
24 extent a beneficiary who doesn't have a conflict of interest is  
25 entitled to those documents because he does have a dispute I

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1 think under appropriate circumstances that seems like  
2 information that might be provided. But to open the door to a  
3 lot of other things while the Liquidating Trust is trying to  
4 actually liquidate and distribute assets is a significant  
5 concern to us.

6 I'm -- if I may, Your Honor, and I also note that the  
7 Trust is making at least annual reports to all of the  
8 shareholders about what the Trust is doing without disclosing  
9 confidential information of course. So there is, you know --  
10 the actual results of what the board does is something that all  
11 of the shareholders are aware of -- all of the beneficiaries  
12 are aware of.

13 THE COURT: Well, it looks to me like your objection  
14 as far as over-breadth was because that it requested  
15 information protected by the privilege or attorney/client work  
16 product. And it sounds like that issue has been resolved  
17 because Mr. Furst is agreeable to your requested procedure that  
18 you first review the documents for privilege issues. You also  
19 objected that it might involve hundreds of thousands of pages  
20 but it now sounds like it doesn't. We're only talking about  
21 emails.

22 MR. GRAVER: Well, emails and attachments, Your  
23 Honor. I honestly can't say and Mr. O'Halloran could not say.

24 THE COURT: All right. Anything else?

25 MR. GRAVER: No. Thank you, Your Honor.

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1 THE COURT: And Mr. Furst, any words in rebuttal?

2 MR. FURST: Well, I would just like to reiterate that  
3 I don't intend to engage in a fishing expedition. I think  
4 after -- and if the Court so orders after the documents are  
5 produced and the log is prepared, you know, I think we can  
6 readdress some of these issues as far as the scope and limiting  
7 the scope of inquiry. And -- well, that's about it.

8 THE COURT: All right. It's ordered granting the  
9 motion 2004 exam subject to the process suggested by the  
10 Liquidating Trust that the documents first be produced to the  
11 Liquidating Trust for it to make any assertions of privilege  
12 and then produce a privilege log. I will expect that the  
13 investigation is limited to the extent identified in the  
14 motion, and that appears to be limited to the administration of  
15 the Trust, the conflict of interest policies, communications  
16 with the attorneys for the class action and mass action  
17 investor groups, which I don't see how that could be attorney/  
18 client privilege since they're adverse parties, and the reasons  
19 for Mr. O'Halloran's resignation. And I'll sign the minute  
20 entry. That'll be the order and I'll expect the parties to  
21 work cooperatively on the production of documents, the  
22 deposition and the privilege log.

23 MR. GRAVER: Thank you, Your Honor.

24 THE COURT: And if it wasn't obvious, I must say I am  
25 very skeptical of the ability to use Rule 2004 for this kind of

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1 post-confirmation examination that doesn't appear to be related  
2 to the actions or conduct of the Debtor, but since the  
3 Liquidating Trust didn't object on that basis, I'm allowing  
4 this deposition and production to go forward. I'll also expect  
5 the parties to work on any confidentiality order that they find  
6 appropriate.

7 MR. GRAVER: Thank you, Your Honor.

8 THE COURT: Thank you. That concludes this hearing.  
9 Brief recess before calling 11:00.

10 (Proceedings Concluded)

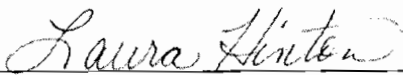
11

12

13 I certify that the foregoing is a correct transcript from  
14 the record of proceedings in the above-entitled matter.

15

16 Dated: September 11, 2012

  
AVTranz, Inc.  
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Phoenix, AZ 85013

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