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6 **UNITED STATES BANKRUPTCY COURT**

7 **DISTRICT OF ARIZONA**

8 In re:

9 MORTGAGES LTD.,

10 Debtor.

No. 2-08-bk-07465-RJH

CHAPTER 11

**RESPONSE TO ML MANAGER'S  
EMERGENCY MOTION FOR ORDER  
CONTINUING DEADLINES AND  
HEARING IN FTI FEE APPLICATION,  
THE JOINDERS OF THE LIQUIDATING  
TRUST AND RADICAL BUNNY, AND ML  
MANAGER'S SUPPLEMENT TO THE  
MOTION**

**AND**

**CROSS-MOTION IN LIMINE TO  
PRECLUDE WITNESSES AND EXHIBITS  
NOT PROPERLY IDENTIFIED**

DATE: December 8, 2009

TIME: 10:00 a.m.

LOCATION: 230 North First Avenue

Phoenix, Arizona

Courtroom 603, 6th Floor

21 FTI Consulting, Inc. ("**FTI**"), by and through its duly authorized undersigned counsel,  
22 submits its *Response to ML Manager's Emergency Motion for Order Continuing Deadlines and Hearing*  
23 *in FTI Fee Application* (the "**Motion to Continue**") [DE 2467], *Joinder of Liquidating Trust to ML*  
24 *Manager's Emergency Motion for Order Continuing Deadlines and Hearing in the FTI Fee Application*  
25 *Matter* ("**Liquidating Trust Joinder**") [DE 2472], *Joinder of RBLLC Trustee to ML Manager's*  
26 *Emergency Motion for Order Continuing Deadlines and Hearing in the FTI Fee Application Matter*

1 ("Radical Bunny Joinder") [DE 2475], *Supplement to ML Manager's Emergency Motion for Order*  
2 *Continuing Deadlines and Hearing in FTI Fee Application*(the "**Supplement**") [DE 2476], and files its  
3 Cross-Motion in Limine to Preclude Witnesses and Exhibits Not Properly Identified as a result of ML  
4 Manager, LLC's ("**ML Manager**"), ML Liquidating Trust's ("**Liquidating Trust**"), and Radical Bunny,  
5 LLC's ("**Radical Bunny**") (collectively, the "**Objectors**") complete failure and refusal to participate in  
6 the preparation of a joint pretrial statement and, more generally, in the pretrial process.

7 A. REQUESTS TO DELAY THE TRIAL.

8 The Motion to Continue, Liquidating Trust Joinder, Radical Bunny Joinder, and the  
9 Supplement raise five issues. The Motion to Continue requests a continuation of the date to file the joint  
10 pretrial statement and asserts that the ML Manager is not prepared to go to trial because it needs  
11 additional time to retain an expert witness. The Liquidating Trust Joinder asserts that a continuance is  
12 justified because FTI has not yet produced all of its work product to the Liquidating Trust. The Radical  
13 Bunny Joinder asserts that a continuance is required because, although it has no pending discovery  
14 request or other entitlement to obtain documentation from FTI, it wants additional time to review  
15 documents that the other objecting parties are requesting. Finally, the Supplement asserts that a  
16 continuance is required because it has yet to review all of FTI's work product, which is summarized in  
17 two trial exhibits that FTI voluntarily provided to the Objectors. As more fully set forth in the attached  
18 Memorandum of Points and Authorities, none of these issues justify continuing the trial where the  
19 Objectors either lack or have failed to look for evidence to support their positions.

20 1. Joint Pretrial Statement. FTI asserts that the continuance to December 9 for the  
21 parties to complete their joint pretrial statement, that the Court has already granted, is adequate and no  
22 additional continuance is justified.

23 2. Lack of Expert Testimony. The Motion to Continue asks that the Court continue  
24 the hearing principally because the Objectors admit that they lack the necessary evidence to support  
25 their objections. Whether such failure is a result of their lack of diligence in preparing for trial or, as

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1 FTI contends, as a result of the lack of substance to object is of no consequence: neither justifies further  
2 delay in continuing the trial in this matter that has been scheduled since last September.

3 3. Liquidating Trust Joinder. Although not a justification for the Liquidating Trust's  
4 failure to participate in pretrial discovery, FTI takes these unfounded accusations seriously and  
5 responded to it in Court at the September 17 hearing and subsequently. It resolved this issue with  
6 counsel and reduced that agreement to writing weeks ago, yet the issue reappears in the Liquidating  
7 Trust Joinder. A detailed explanation of this issue is set forth in the attached Memorandum of Points  
8 and Authorities; however, FTI has promptly and fully complied with all proper requests for its work  
9 product and counsel has agreed in writing that they "will not assert in the joint pretrial, or at trial that  
10 there has been any stonewalling or refusal to produce the file." *See Certification of Counsel Pursuant to*  
11 *Local Rule 9013-1(e)* (the "**Certification of Counsel**") at Exhibit I, filed contemporaneously herewith  
12 [DE2484].

13 4. Radical Bunny Joinder. The Radical Bunny Joinder indicates that it requests a  
14 continuance because it has not had an opportunity to review documents requested by the other parties. It  
15 has not independently identified witnesses, served discovery, nor participated in the pretrial proceedings.  
16 It, like all the other Objectors, has received a complete set of the FTI trial exhibits; however, it  
17 apparently believes that it is entitled to a continuance because the time to respond to document requests  
18 made by other Objectors has not yet expired.

19 5. Supplement Filed by ML Manager. Finally, in its Supplement, ML Manager  
20 asserts that a continuance is necessary because two exhibits voluntarily produced by FTI are business  
21 records that identify the full extent of the work product created by FTI during the course of its  
22 employment in this matter. Initially, ML Manager is not the successor to FTI's client, and has no right  
23 to receive those records independent of a proper discovery request; therefore, this appears to be an  
24 attempt to "boot strap" ML Manager into the position of the Liquidating Trust. It must fail for the same  
25 reason that the Liquidating Trust's position fails. Lack of diligence did not justify its request for

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1 expedited discovery, and it has been agreed that FTI will make these documents available on December  
2 7, 2009.

3 B. CROSS-MOTION IN LIMINE TO PRECLUDE WITNESSES AND EXHIBITS NOT  
4 TIMELY DISCLOSED.

5 Although the Objectors apparently believe that it is appropriate to ignore discovery  
6 requests as long as they list the witnesses and exhibits in the joint pretrial statement, that is not  
7 permissible, and such witnesses and exhibits not properly nor timely identified must be excluded. The  
8 exclusion of witnesses and exhibits not properly identified effectively moots the request to continue the  
9 trial to seek additional witnesses. The time to identify experts was long ago. The principal reason  
10 sought to delay the trial in this matter is the purported need to retain an expert to testify. As more fully  
11 set forth in the Certification of Counsel, filed contemporaneously herewith, the issue of the disclosure or  
12 nondisclosure of witnesses and exhibits by the Objectors goes to the very heart of this matter; therefore,  
13 FTI requests that the Court consider that issue in the context of FTI's Cross-Motion in Limine to  
14 Preclude Witnesses and Exhibits Not Properly Identified.

15 C. CONCLUSION.

16 As more fully set forth in the Memorandum of Points and Authorities, none of the  
17 foregoing bases justify the relief sought in the Motion to Continue. Since last September this matter has  
18 been set for a one-day trial. FTI has properly indentified one live witness, two declarations and thirteen  
19 exhibits. The Objectors have properly identified three fact witnesses and six exhibits. This matter  
20 should proceed to trial on December 16 based upon the witnesses and exhibits properly and timely  
21 identified.

22 DATED this 3rd day of December, 2009.

23 SCHIAN WALKER, P.L.C.

24 By /s/ DALE C. SCHIAN, #010445  
25 Dale C. Schian  
26 Michael R. Walker  
Attorneys for FTI Consulting, Inc.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 A. **INTRODUCTION.**

3 A misguided sense of duty has persuaded the Objectors that it is acceptable to delay  
4 payments to the professionals who worked in this matter for as long as possible for the admitted purpose  
5 of avoiding the accrual of interest on the very expensive exit financing that was obtained. When this  
6 matter came up for hearing on September 16, 2009, FTI urged the Court to examine the objections,  
7 contending that most of the objections were inadequate as a matter of law, and requested that, to the  
8 extent an evidentiary hearing is required, the evidentiary hearing be set in approximately sixty days.

9 The Objectors, principally ML Manager, protested and asserted that as a result of  
10 objections to other professional fee applications, notably MCA Financial Group, Ltd. and DLA Piper,  
11 LLP, it would be impossible for them to be prepared to go to trial in less than ninety days. The Court  
12 took the issue of the sufficiency of the objections under advisement, indicating that it may or may not  
13 consider it prior to the final hearing,<sup>1</sup> and acceded to the Objectors requests and granted them ninety  
14 days to prepare for an evidentiary hearing on the FTI fee application.

15 Having obtained the ninety day delay that they sought, the Objectors left the courtroom  
16 and spent the next fifty days doing nothing to prepare for trial in this matter. They did not serve  
17 discovery, they ignored discovery propounded upon them, and eventually served woefully inadequate  
18 responses to FTI's discovery that consisted of three simple questions: (1) what exhibits you intend to  
19 offer; (2) tell us who your witnesses are; and (3) disclose your experts and their opinions. The Motion to  
20 Continue now makes abundantly evident the reason that the Objectors were unable to respond to those  
21 three simple interrogatories is that they lack any evidence to support their objections. Now, two days  
22 before the date established by the Court for filing a joint pretrial statement, the Objectors come to this  
23 Court asking that the trial be continued so that they may go look for the evidence they admittedly lack.

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26 <sup>1</sup> These matters remain under advisement.

1 FTI timely served simple discovery to ascertain the identity of witnesses and documents.  
2 No witnesses or exhibits were identified by the deadlines established under the Federal Rules of Civil  
3 Procedure to respond to those interrogatories; therefore, as more fully set forth in the attached  
4 Certification of Counsel, submitted pursuant to Local Bankruptcy Rule 9013-1(e), and filed concurrently  
5 herewith, efforts were repeatedly undertaken to obtain meaningful disclosures with respect to the  
6 evidence that the objecting parties expected to offer at trial on this matter. Nevertheless, it is the  
7 position of the Objectors that they did not need to make timely responses to the discovery requests,  
8 identify their witnesses and exhibits, or even retain their experts prior to, at earliest, the deadline for the  
9 filing of a joint pretrial statement. FTI respectfully requests that this Court limit the witnesses and  
10 exhibits that may be called and offered at trial in this matter to the three fact witnesses and six exhibits  
11 specifically identified in response to the discovery requests.

12 B. CHRONOLOGY.

13 1. On November 5, 2009, FTI served notices of deposition for the three fact  
14 witnesses identified by ML Manager.

15 2. With those notices, it included a letter, which is attached as Exhibit G to the  
16 Certification, indicating that the dates were flexible as long as the depositions could be concluded within  
17 the next three weeks.

18 3. In the response, on November 6 counsel for ML Manager indicated that as a result  
19 of the DLA trial it would be impossible to conduct depositions prior to Thanksgiving. *See Exhibit 1*  
20 hereto.

21 4. Also on November 6, ML Manager served its *ML Manager's First Request for*  
22 *Production of Documents to FTI Consulting, Inc.*, which required FTI to respond within thirty days of  
23 the request. *See Exhibit 2* hereto.

24 5. Nevertheless, with the request for production of documents, counsel for ML  
25 Manager also sent the letter that is attached hereto as **Exhibit 3** accusing FTI of improprieties and  
26 demanding that all responsive documents be produced not later than November 19.

1           6.     In response to the refusal to provide witnesses for deposition before  
2 Thanksgiving, counsel wrote the letter that is attached hereto as **Exhibit 4** indicating that the DLA trial  
3 did not provide a justification for refusing to participate in pretrial discovery, especially as the DLA trial  
4 was known at the time the schedule was established and was considered in delaying the trial of this  
5 matter until December.

6           7.     Also on November 11, 2009, counsel responded to the allegations of improper  
7 conduct by FTI and demands for expedited discovery via the letter that is attached hereto as **Exhibit 5**.  
8 With Exhibit 5, FTI served a *Notice of Deposition to ML Manager, LLC* sent pursuant to Rule 30(b)(6)  
9 requiring identification of the person who would testify as to the allegations and improprieties set forth  
10 in Exhibit 3.

11           8.     Exhibit 5 further indicated that ML Manager's delay of nearly two months in  
12 requesting discovery did not justify expedited discovery.

13           9.     Additionally, Exhibit 5 addressed a nearly simultaneous telephone call and e-mail  
14 from Nechelle Wimmer to FTI, a copy of which was attached as Exhibit A to the Liquidating Trust  
15 Joinder.

16           10.    Exhibit 5 objected to the request made by Ms. Wimmer as improper and indicated  
17 that FTI would not respond to the improper request.

18           11.    Nevertheless, Exhibit 5 went on to state:

19           We do not ascribe any improper motive or conduct to Ms. Wimmer, and  
20 understand that the ML Manager and the ML Liquidating Trust may have  
21 a legitimate need for additional documentation or work product from FTI.  
22 Ms. Wimmer and others working for those entities should continue to feel  
23 at liberty to request from FTI documentation necessary or helpful to them  
24 in the performance of their duties. FTI will endeavor to accommodate the  
25 needs of those professionals and respond to any reasonable request in a  
26 timely manner. We trust that future requests will be motivated by  
legitimate business purposes and not be utilized as an attempt to evade  
either the rules governing discovery or the prohibition on direct contact  
with an opposing party.

12.    ML Manager responded with the letter that is attached hereto as **Exhibit 6**.

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1           13.     Sent five days after its first discovery request, in Exhibit 6 ML Manager first  
2 proposed to postpone the joint pretrial statement to December 9, and suggested that if FTI was unwilling  
3 to respond to the requested expedited document production, "we can stipulate to extend the hearing on  
4 the fee application until early next year."

5           14.     Finally, Exhibit 6 requests a copy of the draft pretrial no later than December 7,  
6 2009 so that it can be filed with the Court on December 9, 2009.

7           15.     On November 13, a response was sent to ML Manager indicating that FTI insisted  
8 on abiding by the dates and deadlines established by the Court and the rules, but also requesting the  
9 input of ML Manager in drafting the joint pretrial statement, and indicating that FTI would endeavor to  
10 provide ML Manager with a draft joint document before Thanksgiving. It requested that any revisions  
11 or comments be provided by Monday, November 30, so that it could be revised and filed with the Court  
12 on December 2. *See Exhibit 7* hereto.

13           16.     As reflected in the Certification of Counsel at paragraph 14 and Exhibits I, J and  
14 K, extensive discussions were undertaken between counsel in an attempt to resolve the discovery  
15 disputes.

16           17.     The upshot of those discussions as reflected in Exhibits I, J and K was that the  
17 requested 30(b)(6) deposition would be cancelled, FTI would respond to the request for production of  
18 documents on December 7, and "that there will be no statements made about the file." *See Exhibit K* to  
19 the Certification of Counsel. The agreement extended to both the Liquidating Trust and ML Manager.  
20 *See Exhibit J* to the Certification of Counsel.

21           18.     Believing the matter to be resolved, on November 19, 2009 an e-mail was sent  
22 offering to make certain FTI work product available immediately as FTI had reason to believe that it  
23 might be helpful to the Liquidating Trust in its current efforts. A true and correct copy of that e-mail  
24 was attached as Exhibit A to the Liquidating Trust Joinder. Also included as Exhibit A to the  
25 Liquidating Trust Joinder is an e-mail from Ms. Wimmer directly to FTI, once again asking "when can  
26 we expect to receive the full work product I requested via e-mail 11-09-2009."

1           19. As a result of the e-mail that was attached as Exhibit A to the Liquidating Trust  
2 Joinder, on November 20, 2009 an e-mail, *see* **Exhibit 8** hereto, was sent to counsel asking that Ms.  
3 Wimmer be informed of FTI's response to her request for "everything. . .and of FTI's willingness to get  
4 her whatever she needs to conduct the day to day business."

5           20. As reflected in **Exhibit 9** hereto, counsel indicated that Ms. Wimmer would be  
6 contacted the following Monday.

7           21. FTI was surprised by the Liquidating Trust Joinder, which, notwithstanding the  
8 foregoing and agreements of counsel, accuses FTI of failing to produce its work papers.

9           22. At her deposition taken December 3, Ms. Wimmer testified that she was unaware  
10 of the response to her e-mails, which is attached hereto as Exhibit 5.

11           23. On November 25, 2009, FTI provided its draft of the joint pretrial to all counsel  
12 of record, in the form that was attached to the Motion to Continue. Counsel for ML Manager  
13 immediately responded describing the pretrial as "very disappointing" and complaining about the  
14 statements of the issues, that exhibits were not identified, and FTI's position statements were not  
15 included. A response was immediately sent indicating that the exhibits were being compiled and would  
16 be provided as soon as possible, attaching a copy of the FTI response setting forth its positions with  
17 respect to the various issues, asking that the Objectors provide their characterization of the issues if they  
18 were dissatisfied with the way that FTI had characterized them, and reminding the parties of the due date  
19 for the joint pretrial. A true and correct copy of this correspondence is attached hereto as **Exhibit 10**.

20           24. On Monday November 30, 2009, FTI provided all parties with its list of exhibits.

21           25. On Tuesday, December 1, 2009, copies of all FTI exhibits and a revised joint  
22 pretrial statement that included a summary statement of FTI's position with respect to each issue was  
23 provided to all counsel of record.

24           26. No input was received from any of the objecting parties until midday on  
25 Wednesday, at which time the draft document that is attached as Exhibit L to the Certification of  
26 Counsel was provided identifying numerous previously-undisclosed witnesses and exhibits.

1 C. JOINT PRETRIAL STATEMENT.

2 Consistent with Local Rule 7016-1(b), FTI provided a draft of the joint pretrial statement  
3 one week ahead of time. Although ML Manager complains that the draft did not include exhibits or  
4 FTI's position with respect to the issues outlined, FTI's list of exhibits, together with actual copies of the  
5 exhibits, were promptly provided and FTI's position with respect to the issues was fully set forth in its  
6 *Response to Objections to the First and Final Fee Application of FTI Consulting, Inc. as Financial*  
7 *Advisors to the Debtor and Debtor in Possession for Allowance and Payment of Fees and Expenses* [DE  
8 2181], another copy of which was promptly provided to all counsel.

9 Long before the pretrial was due, FTI repeatedly reminded counsel of the deadline to file  
10 the pretrial and asked for their input. It received no input until midday on the day that the joint pretrial  
11 statement was due.

12 As a result of the Motion to Continue and FTI's lack of opposition to a one-week  
13 continuance, the Court has now set December 9 as the deadline to file the joint pretrial statement.  
14 Subject to the Court's ruling on the Motion in Limine as to which witnesses and exhibits may properly  
15 be included in the joint pretrial statement, there is no reason to believe that the parties cannot complete  
16 and file the joint pretrial statement on or before December 9. Therefore, FTI requests that the Court not  
17 grant any relief beyond what it has already granted on this issue.

18 D. LACK OF EXPERT TESTIMONY.

19 This matter has been set for trial since September, and the Objectors were well aware of  
20 the need to present evidence to support their positions. The time to have retained experts, much less  
21 disclose their opinions, has long since passed. Lack of evidence or inability to procure evidence does  
22 not justify continuing the trial absent a showing of diligence by the party who is not prepared for trial.  
23 *See United States v. 2.61 Acres of Land*, 791 F.2d 666, 671 (9th Cir. 1986). No such showing has been  
24 even suggested in this case and the request to delay the trial or identify additional witnesses must be  
25 properly denied.

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1 E. LIQUIDATING TRUST JOINDER.

2 As set forth in detail in the chronology above and multiple exhibits that have been  
3 submitted herewith and with the Certification of Counsel, FTI has provided documents when requested  
4 and volunteered documents when it became aware of activities of the Liquidating Trustee that would  
5 benefit from documentation that FTI had in its possession, but which had not been requested. FTI  
6 properly objected to the Objectors' attempts to obtain a litigation advantage and circumvent the  
7 discovery rules. After lengthy discussions, the parties reached an agreement concerning the immediate  
8 provision of any documents reasonably necessary to assist the Liquidating Trust in performing its duties,  
9 and that all documents would be made available on December 8. Further, as reflected in Exhibits I, J  
10 and K to the Certification of Counsel, it was agreed that "there will be no statements made about the file.  
11 On the production of the file, you will produce what you were going to by December 7, and allow us to  
12 review the documents on December 8." See Exhibit K to the Certification of Counsel. Therefore, the  
13 statements made in the Liquidating Trust Joinder should be disregarded as contrary to the facts as agreed  
14 by counsel and do not establish a basis to continue the trial in this matter.<sup>2</sup>

15 F. RADICAL BUNNY JOINDER.

16 Radical Bunny's participation in these proceedings is contrary to the prior rulings of the  
17 Court in connection with untimely joinders, and FTI's objection to Radical Bunny's participation  
18 remains under advisement. Its participation, or lack thereof, since the September 17 hearing aptly  
19 demonstrates FTI's concerns. Initially, it failed to respond to discovery requests. See Certification of  
20 Counsel at paragraph 4 and Exhibit E. It eventually responded indicating essentially that it did not know  
21 which witnesses, exhibits, or experts it may call; however, it indicated that it might call the same  
22 witnesses of the other objecting parties. See generally Certification of Counsel at paragraph 8 and

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23  
24 <sup>2</sup> The draft joint pretrial statement was prepared in reliance upon the agreement that production of the  
25 FTI work product was not an issue in these proceedings. FTI also cancelled the deposition of a 30(b)(6)  
26 representative who was requested to testify as to any purported failure. If that issue is to be re-injected  
into these proceedings, FTI will need to identify additional documentation and conduct additional  
discovery to refute those allegations. However, FTI can accomplish that without delay.

1 Exhibit C. As set forth in the Certification of Counsel at paragraphs 10-12 and Exhibit H, Radical  
2 Bunny has never identified the substance of the testimony for any witness that it may call nor verified its  
3 discovery responses. Nor has Radical Bunny participated whatsoever in the preparation of a joint  
4 pretrial statement. Finally, Radical Bunny has not served any discovery, yet it has filed a joinder  
5 indicating that a continuance is required so that it might review documents produced in response to  
6 requests by other parties. FTI would submit that the Radical Bunny Joinder does not constitute cause to  
7 continue the trial in this matter and aptly demonstrates why Radical Bunny's untimely joinder should be  
8 overruled and this matter should proceed to trial without its participation.

9 G. SUPPLEMENT FILED BY ML MANAGER.

10 Finally, ML Manager requested the trial be continued because two of the exhibits  
11 identified and provided to ML Manager by FTI are business documents that identify all of FTI's work  
12 product generated in connection with its employment in this matter. FTI is not seeking to introduce all  
13 of its work product, only the summaries of its work product, which as ML Manager notes and one would  
14 expect are voluminous. Production of the actual work product is being made pursuant to the agreement  
15 of counsel; therefore, the Supplement filed by ML Manager adds nothing to the analysis and does not  
16 justify continuing the trial in this matter.

17 H. CROSS-MOTION IN LIMINE TO PRECLUDE WITNESS AND EXHIBITS NOT  
18 PROPERLY IDENTIFIED.

19 Shortly after the September hearing, FTI sought through normal discovery the  
20 identification of witnesses and exhibits. As a result of the Objectors' request to delay the trial in this  
21 matter until December, FTI did not need to seek expedited discovery but sought discovery through three  
22 simple interrogatories requesting the identification of exhibits, witnesses and experts and their opinions.  
23 When it obtained no disclosure of any witness or exhibit in response to its interrogatories, it followed up  
24 repeatedly and in writing. Although responses to the interrogatories were due on October 22, 2009,  
25 neither the Liquidating Trust nor Radical Bunny bothered to respond. Therefore, on October 26, 2009, a  
26 letter was sent to counsel for both parties reminding them of their failure to comply with their discovery

1 obligations and requesting answers to the interrogatories by October 30, 2009. Also on October 26,  
2 2009, a letter was sent to counsel for the Liquidating Trust, indicating that, among other things, FTI  
3 would request that the Court prevent it from calling any witnesses and introducing any exhibits at the  
4 trial that were not identified in response to discovery.

5 No response was received from the Liquidating Trust either by October 30, 2009 or  
6 subsequent. ML Manager responded to the interrogatories by identifying "[a]ll pleadings and  
7 documents filed in the Administrative Bankruptcy case as well as all Adversaries" and the "Fee  
8 applications of Jennings Strouss, DLA Piper and FTI." It also identified three witnesses: (1) Nechelle  
9 Wimmer, (2) Kevin O'Halloran, and (3) Edward McDonough. ML Manager further indicated that it had  
10 not yet determined whether expert witness testimony was relevant to the issues involving FTI's Fee  
11 Application, but that it was considering calling Edward McDonough as an expert witness. ML Manager  
12 further stated that *it would supplement its response as further determinations were made in accordance*  
13 *with Federal Rule 26(e).*

14 Radical Bunny also responded on October 30, 2009. Radical Bunny's response  
15 essentially stated that it did not know which witnesses, exhibits, or experts it would call; however, it  
16 indicated that it was considering utilizing the objections to the FTI fee application as an exhibit and  
17 would consider calling the same witnesses identified by the other objecting parties.

18 On November 5, 2009, notices of deposition were sent with respect to the three witnesses  
19 identified by ML Manager, together with a letter indicating that the dates and times were flexible as long  
20 as the depositions could be concluded prior to the Thanksgiving holiday. The November 5  
21 correspondence also requested that any expert and opinions to be rendered by Mr. McDonough be  
22 disclosed not later than November 13, 2009, and informed ML Manager that identifying as an "exhibit"  
23 of any pleadings filed in these proceedings or any of the related adversaries was inadequate to permit  
24 FTI to identify what ML Manager intended to offer as an exhibit. Also on November 5, 2009, a similar  
25 letter was sent to counsel for Radical Bunny indicating that their identification of exhibits was  
26 inadequate and that Radical Bunny also needed to identify the substance of the testimony for any

1 witness it intended to call and provide expert disclosures if it intended to solicit opinion testimony from  
2 Mr. McDonough. Once again, a response was requested by Friday, November 13, 2009.

3 On Monday, November 16, 2009, counsel for ML Manager sent undersigned counsel  
4 correspondence stating that neither he nor his witnesses were available for depositions before the  
5 Thanksgiving holiday. On November 17, the undersigned responded to ML Manager's November 16  
6 correspondence, noting that the time for the objecting parties to identify witnesses and exhibits had  
7 passed and that FTI was willing to accommodate the objecting parties' scheduling difficulties, provided  
8 that "we are not going to be presented with additional late identified witnesses or expert testimony."  
9 Counsel for ML Manager responded and summarized the dispute that the parties had been unable to  
10 resolve as "I understand that you are going to object to additional witnesses being listed in the joint  
11 pretrial. We will have to agree to disagree on that."

12 At 11:11 a.m. on Wednesday, December 2, 2009, the day the joint pretrial was due, the  
13 undersigned first received the comments of ML Manager with respect to their input on the proposed  
14 joint pretrial statement. In their proposed additions to the joint pretrial statement, ML Manager  
15 purported to identify *six additional witnesses*, indicates that *one of their previously identified fact*  
16 *witnesses (Kevin O'Halloran) may seek to offer opinion testimony*, and includes *four generic*  
17 *designations* (e.g., a representative of Rev Op Investors, any witness identified during discovery or  
18 depositions). ML Manager further purported to identify *thirty-two exhibits, only three of which had*  
19 *previously been identified*, but even as to those exhibits, ML Manager sought to include "fee statements,  
20 summaries, and supplemental fee applications." No copies of the documents first identified on  
21 December 2 were provided with the draft of the joint pretrial statement, and many of the designations  
22 are generic and not susceptible of identification in a way that permits their identification. These include,  
23 for example, "any and all documents produced during discovery," "spreadsheets prepared by the  
24 Debtor," and "e-mails between FTI, counsel for the Debtor, the Debtor and other parties to the  
25 bankruptcy." To date, no supplementation or verification of the discovery responses has been received  
26 from any of the Objectors.

1           Although the Objectors apparently believe that it is appropriate to ignore discovery  
2 requests as long as they list the witnesses and exhibits in the joint pretrial statement, such conduct is not  
3 permissible, and all witnesses and exhibits not properly nor timely identified must be excluded. As  
4 Courts in the Ninth Circuit recognize, parties who fail or refuse to comply with discovery requests  
5 without a substantial basis may be sanctioned. *Guruwaya v. Montgomery Ward, Inc*, 119 F.R.D. 36, 40  
6 (N.D. Cal. 1988) (noting that prior to the 1993 amendments to Fed. R. Civ. P. 26 requiring mandatory  
7 disclosure, Rules 26(a) and 37(a)(4) governed interrogatories and sanctions for the refusal of discovery  
8 without a substantial basis). "Sandbagging", or failing to disclose witnesses or their disclosures, is  
9 impermissible. *See, e.g., U.S. v. 143 Acres of Land, more or less, situated in San Diego County*, 2009  
10 WL 249986 at \*2 (S.D. Cal. Jan. 30, 2009) (noting that " 'Although Fed. R. Civ. P. 26(e) requires a party  
11 to 'supplement or correct' a disclosure upon information later acquired, that provision does not give  
12 license to sandbag one's opponent with claims and issues which should have been included in the expert  
13 witness' report." ' (citing *Lindner v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 635 (D. Haw. 2008)  
14 (quoting *Beller ex rel. Beller v. United States*, 221 F.R.D. 689, 695 (D. N.M. 2003)). Pursuant to Fed.  
15 R. Civ. P. 37, witnesses who are not properly or timely disclosed must be excluded. *See, e.g., Forbes v.*  
16 *21st Century Ins. Co.*, 258 F.R.D. 338, 339 (D. Ariz. 2009) (holding that "Plaintiffs offer no explanation  
17 for why they could not or did not disclose 'Lisa' in a timely fashion, and do not show that the late  
18 disclosure was harmless. Plaintiffs' disclosure of 'Lisa' is therefore in violation of Rule 26(a)(1)(A)(I),  
19 and Plaintiffs' use of 'Lisa' as a witness must be prohibited") (citing Fed. R. Civ. P. 37(c)(1)).

20           The Objectors have not proffered a substantial basis for failing to timely or properly  
21 identify all witnesses and exhibits. The Objectors' continuing refusal to comply with discovery is  
22 highly prejudicial to FTI, given that trial is less than two weeks away, and the exhibits still have not  
23 been produced, the substance of the witnesses' testimony (over even the identity of some witnesses)  
24 disclosed, nor any expert reports provided. Accordingly, any and all witnesses and exhibits not yet  
25 identified must be excluded.

26 ///

1 I. CONCLUSION.

2 FTI requests that the Motion to Continue be denied and that this matter proceed to trial as  
3 scheduled on December 16 with the witnesses and exhibits identified by FTI and the three fact witnesses  
4 and six exhibits properly identified by the Objectors in response to the discovery propounded upon  
5 them.

6 DATED this 3rd day of December, 2009.

7 SCHIAN WALKER, P.L.C.

8  
9 By /s/ DALE C. SCHIAN, #010445  
10 Dale C. Schian  
Michael R. Walker  
Attorneys for FTI Consulting, Inc.

11 COPY of the foregoing e-mailed  
12 this 3rd day of December, 2009, to:

13 Cathy L. Reece, Esq.  
14 Keith Hendricks, Esq.  
15 Gerald L. Shelley, Esq.  
16 Fennemore Craig, P.C.  
17 3003 North Central Avenue, #2600  
Phoenix, Arizona 85012  
Attorneys for ML Manager, LLC  
[creece@fclaw.com](mailto:creece@fclaw.com)  
[khendric@fclaw.com](mailto:khendric@fclaw.com)  
[gshelley@fclaw.com](mailto:gshelley@fclaw.com)

18 Shelton L. Freeman, Esq.  
19 Nancy J. March, Esq.  
20 DeConcini McDonald Yetwin & Lacy, P.C.  
21 6909 East Main Street  
Scottsdale, Arizona 85251  
22 Attorneys for G. Grant Lyon, Chapter 11  
Trustee of Radical Bunny, LLC  
[tfreeman@lawdmyl.com](mailto:tfreeman@lawdmyl.com)  
[nmarch@dmyl.com](mailto:nmarch@dmyl.com)

23 Michael D. O'Mara, Esq.  
24 Mark J. Dorval, Esq.  
25 Stradley, Ronon, Stevens & Young, L.L.P.  
26 2600 One Commerce Square  
Philadelphia, Pennsylvania 19103  
Attorneys for Kevin O'Halloran, Trustee of ML Liquidating Trust  
[mo'mara@stradley.com](mailto:mo'mara@stradley.com)  
[mdorval@stradley.com](mailto:mdorval@stradley.com)

1 Sharon B. Shively, Esq.  
2 Sacks Tierney, P.A.  
3 4250 North Drinkwater Boulevard  
4 Scottsdale, Arizona 85251-3693  
5 Attorneys for Kevin O'Halloran, Trustee  
6 of ML Liquidating Trust  
7 [sharon.shively@sackstierney.com](mailto:sharon.shively@sackstierney.com)

8 William S. Jenkins, Esq.  
9 Myers & Jenkins, P.C.  
10 One East Camelback Road, #500  
11 Phoenix, Arizona 85012  
12 Attorneys for Kevin O'Halloran, Trustee  
13 of ML Liquidating Trust  
14 [wsj@mjlegal.com](mailto:wsj@mjlegal.com)

15 \_\_\_\_\_  
16 /s/ DEBBI STEPHENS

17 132273.2

18  
19  
20  
21  
22  
23  
24  
25  
26

**EXHIBIT "1"**

# FENNEMORE CRAIG, P.C.

3003 North Central Avenue, Suite 2600  
Phoenix, Arizona 85012-2913  
(602) 916-5000

**Joshua T. Greer**

Direct Phone: (602) 916-5498  
Direct Fax: (602) 916-5698  
jgreer@fclaw.com

**Law Offices**

Phoenix (602) 916-5000  
Tucson (520) 879-6800  
Nogales (520) 281-3480  
Las Vegas (702) 692-8000  
Denver (303) 291-3200

November 6, 2009

**VIA EMAIL AND US MAIL**

Dale Schian  
SCHIAN WALKER  
3550 N. Central Ave., Suite 1700  
Phoenix, AZ 85012

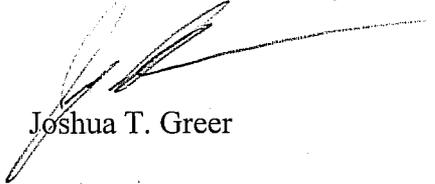
Re: Depositions regarding FTI Fee Applications

Dear Mr. Schian:

As you are aware, the hearing set for DLA's fee application is currently set for November 25, 2009. We were unable to reach a settlement with DLA during mediation today. Accordingly we will be preparing for the DLA hearing during the next two weeks and will be unable to appear at the depositions you have noticed relating to the FTI fee application. We would greatly appreciate your courtesy in rescheduling the depositions of Mr. O'Halloran, Mr. McDonough and Ms. Wimmer until after Thanksgiving. Thank you.

Sincerely,

FENNEMORE CRAIG, P.C.



Joshua T. Greer

JOSG/bal

2255090

**EXHIBIT "2"**

1 FENNEMORE CRAIG, P.C.  
Cathy L. Reece (005932)  
2 Keith L. Hendricks (012750)  
3003 N. Central Ave., Suite 2600  
3 Phoenix, Arizona 85012  
Telephone: (602) 916-5343  
4 Facsimile: (602) 916-5543  
Email: creece@fclaw.com

5 Attorneys for ML Manager LLC

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

9 In re  
10 MORTGAGES LTD.,  
11 Debtor.

Chapter 11

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

**ML MANAGER'S FIRST REQUEST  
FOR PRODUCTION OF DOCUMENTS  
TO FTI CONSULTING, INC.**

12  
13  
14 Pursuant to Fed. R. Civ. P. 34, as made applicable by Fed. R. Bankr. P. 9014 and  
15 Fed. R. Bankr. P. 7034, ML Manager LLC requests that FTI Consulting, Inc. produce and  
16 permit ML Manager to inspect and copy each of the following documents within thirty  
17 (30) days of the date of this request, or within such shorter time as may be agreed upon or  
18 ordered by the Court, at the offices of Fennemore Craig, Suite 2600, 3003 N. Central  
19 Avenue, Phoenix, Arizona 85012-2913.

20  
21 **DEFINITIONS**

22 For purposes of these discovery requests, the following words shall have the  
23 meaning indicated below, unless otherwise stated within the discovery request:

24 1. "Document" or "Record" means any document or record in your  
25 custody, possession or control, including, but not limited to, any printed, written,  
26 recorded, taped, electronic, graphic, or other tangible matter from whatever source,

1 however produced or reproduced, whether in draft or otherwise, whether sent or received  
2 or neither, including the original, all amendments and addenda and any non-identical copy  
3 (whether different from the original because of notes made on or attached to such copy or  
4 otherwise) of any and all writings, correspondence, letters, telegrams, telex  
5 communications, cables, notes, notations, papers, newsletters, memoranda, inter-office  
6 communications, releases, agreements, contracts, books, pamphlets, studies, minutes of  
7 meetings, recordings or other memorials or any type of personal or telephone  
8 conversations, meetings or conferences (including, but not limited to, telephone bills and  
9 long distance charge slips), reports, analyses, evaluations, estimates, projections,  
10 forecasts, receipts, statements, accounts, books of account, diaries, calendars, desk pads,  
11 appointment books, stenographer's notebooks, transcripts, ledgers, registers, worksheets,  
12 journals, statistical records, cost sheets, summaries, lists, tabulations, digests, canceled or  
13 uncanceled checks or drafts, vouchers, charge slips, invoices, purchase orders, hotel  
14 charges, accountant's reports, financial statements, checks, ledgers, deposit records, bank  
15 statements, newspapers, periodical or magazine materials, and any material underlying,  
16 supporting or used in the preparation of any documents. The term "Document" also  
17 means without limitation, any electronically stored information ("ESI"), including  
18 metadata, by which, on which, or through which information of any type is  
19 communicated, transmitted, recorded or preserved.

20 2. "Concerning" means: with respect to, relating to, referring to,  
21 regarding, supporting, substantiating, purporting, embodying, establishing, identifying,  
22 listing, evidencing, comprising, connected with, memorializing, recording, commenting  
23 upon, responding to, showing, describing, analyzing, reflecting, representing, constituting,  
24 supporting, contradicting, or explaining, whether in who or in part.

25  
26



1 copying or any other expense, the terms for reimbursement for such charges and expenses  
2 must be agreed to in advance and evidenced by a written agreement, signed by all parties.

3           2.     You are required to furnish all documents or things known to you or  
4 in your control, regardless of whether such documents or things are possessed directly by  
5 you or your agents, employees, representatives, investigators, or by your attorneys or their  
6 agents, employees, representatives, or investigators.

7           3.     As to each document or series of documents, indicate the paragraphs  
8 and subparagraphs to which a produced document or thing is responsive.

9           4.     Documents attached to each other should not be separated.

10          5.     ESI shall be produced as follows:

11           a.     All ESI shall be produced in its native format, with all  
12 metadata intact, on compact discs, DVDs, zip drives, or hard drives and in the following  
13 format: (a) databases are to be produced in a computer searchable and reasonably usable  
14 form; (b) emails are to be produced in Personal Storage Table ("PST") or Extensible  
15 Markup Language ("XML") format; (c) word processing documents are to be produced in  
16 Microsoft Word or Word Perfect format, unless such documents do not exist in the native  
17 format, in which case such documents should be produced in searchable Portable  
18 Document Format ("PDF"), if they are maintained in this format in the ordinary course of  
19 business, or in Tagged Image File Format ("TIFF"), if they are maintained in any other  
20 format, consistent with the instructions below; (d) spreadsheets are to be produced in  
21 Microsoft Excel format; and (e) audio files are to be produced in MPEG-1 Audio Layer 3  
22 ("MP3") format.

23           b.     To the extent no native data exists for a particular document,  
24 ESI shall be produced in TIFF, single page, black and white, dithered (if appropriate),  
25 Group 4 TIFF at 300 x300 dpi resolution and 8 1/2 x 11 inch page size, except for  
26 documents requiring different resolution or page size. Each TIFF formatted file shall be

1 produced with a unitization/load file in standard format (i.e., Opticon (.opt), Summation  
2 (.dii), IPRO (.lfp), Concordance (.opt, .dat) or the like) showing the Bates number of each  
3 page and the appropriate unitization of the documents. The TIFF images shall also be  
4 accompanied by extracted data or Optical Character Recognition data (OCR) in single  
5 page format. To the extent TIFF images are produced, you shall provide a declaration by  
6 the custodian of records, or other party responsible for the collection and production of the  
7 subject documents, setting forth the reason/s why it is producing data in this format and, if  
8 appropriate, the nature of the due diligence in attempting to confirm whether data exists in  
9 native format.

10 c. For ESI produced in TIFF or native format, you shall also  
11 produce the following metadata, to the extent such metadata exists: (a) for all electronic  
12 documents: starting Bates Number, ending Bates Number, number of pages in a  
13 document, starting attachment Bates Number and ending Bates Number; (b) for non-email  
14 electronic documents: file name (including extension), creation date, modified date, title,  
15 subject, author, company, last saved, file path (for files located on a shared space or server  
16 only), custodian of the record (for files located on the hard drive of a personal computer  
17 only) and MD-5 Hash values; (c) for emails: sent date, received date, to name, to address,  
18 from name, from address, cc name(s), cc address(es), bcc name(s), bcc address(es),  
19 subject, "re" or "fwd", replies sent to, attachment count and MD5 Hash values. Both  
20 paths and file names of images must exactly match their text files (except for the file  
21 extensions), including case sensitivity. A chart setting forth the appropriate load files for  
22 this metadata is attached as Exhibit A.

23 d. Paper production of ESI is is permissible only in the following  
24 circumstances:

25 (i) The document was originally created and maintained as  
26 a paper document, i.e., handwritten notes.

1 (ii) The document was originally created electronically, but  
2 upon reasonable due diligence, the producing party has determined that it no longer exists  
3 in that format and only exists as a paper file.

4 (iii) The responsive data includes pleadings and orders filed  
5 with any court and letters between counsel.

6 (iv) In circumstances where such a production would be  
7 unreasonably burdensome or otherwise not permissible under the Federal Rules of Civil  
8 Procedure, and where the producing party has raised the issue with the other party.

9 (v) By separate stipulation.

10 To the extent paper files are produced, you shall provide a declaration by the custodian of  
11 records, or other party responsible for the collection and production of the subject  
12 documents, setting forth the reason/s why it is producing data in paper form and, if  
13 appropriate, the nature of the due diligence in attempting to confirm whether data exists  
14 electronically.

15 6. If any requested document or thing cannot be produced in full,  
16 produce to the extent possible, specifying the reason for your inability to produce the  
17 remainder and stating whatever information, knowledge, or belief you do have concerning  
18 the unproduced portion.

19 7. If any documents or things requested were at one time in existence,  
20 but are no longer in existence, then so state, specifying for each document or thing: (a) the  
21 type of document or thing; (b) the information contained thereon; (c) the date upon which  
22 the document ceased to exist; (d) the circumstances under which it ceased to exist; (e) the  
23 identity of all persons having knowledge of the circumstances under which it ceased to  
24 exist; and (f) the identity of all persons having knowledge or who had knowledge of the  
25 contents thereof.

26

1           8.     In the event that you seek to withhold any document or information  
2 on the basis that it is properly entitled to some limitation of discovery: (a) you shall, at or  
3 before the time the documents are to be produced, provide a numerical list of the  
4 documents or information for which limitation of discovery is claimed; (b) you shall  
5 indicate for each document or information the following information; (c) the name of each  
6 author, writing, sender, or initiator of such document or information, if any; (d) the name  
7 of each recipient, addressee or party for whom such document or information was  
8 intended, if any; (e) the date of such document, if any, or an estimate thereof and so  
9 indicate as an estimate if no date appears on said documents; (f) the general subject matter  
10 of such document or information, so as to sufficiently identify the document or  
11 information; and (g) the basis for your belief that the document or information is properly  
12 entitled to a limitation or discovery.

13           9.     This request for production of documents is deemed to be continuing.  
14 If, after producing documents and things, you obtain or become aware of any further  
15 documents, things or information responsive to this request for production of documents,  
16 you are required to immediately produce such additional documents and things, and/or  
17 provide such additional information relating thereto.

18           10.    These instructions supplement any duties and obligations imposed  
19 under the applicable rules of discovery, and all such requirements imposed under such  
20 rules are incorporated by reference as if fully set forth herein. The Request for Production  
21 is in addition to and not in substitution of obligations to provide ongoing disclosures under  
22 Fed. R. Civ. P. 26, and, in addition to requests herein you remain fully obligated to  
23 provide such disclosures otherwise required under Fed. R. Civ. P. 26. To the extent any  
24 information requested in an Interrogatory also is relevant to a disclosure required under  
25 Fed. R. Civ. P. 26, such request also shall be deemed to be a notice of deficiency and  
26 request for additional information required under Fed. R. Civ. P. 26, and an independent

1 and prompt response governed by Fed. R. Civ. P. 26 shall be required, without regard to  
2 the time allowed for responding to these requests under Fed. R. Civ. P. 34.

3  
4 **REQUEST FOR DOCUMENTS**

5 1. Any and all Documents or correspondence relating to FTI's  
6 representation of Mortgages Ltd., including all emails and other correspondence and other  
7 documents.

8 2. Any and all Documents you might use at a hearing regarding FTI's  
9 fee application.

10 DATED: November 6, 2009

11 FENNEMORE CRAIG, P.C.

12 By /s/ Keith L. Hendricks  
13 Keith L. Hendricks  
Attorneys for ML Manager LLC

14 COPY of the foregoing mailed this  
15 6<sup>th</sup> day of November, 2009 to:

16 Dale Schian  
17 SCHIAN WALKER  
18 3550 N. Central Ave., Suite 1700  
Phoenix, AZ 85012

19 /s/ L. Carol Smith

**EXHIBIT "3"**

# FENNEMORE CRAIG, P.C.

3003 North Central Avenue, Suite 2600  
Phoenix, Arizona 85012-2913  
(602) 916-5000

**Joshua T. Greer**

Direct Phone: (602) 916-5498

Direct Fax: (602) 916-5698

jgreer@fclaw.com

**Law Offices**

Phoenix (602) 916-5000

Tucson (520) 879-6800

Nogales (520) 281-3480

Las Vegas (702) 692-8000

Denver (303) 291-3200

November 6, 2009

**EMAIL AND US MAIL**

Dale Schian

SCHIAN WALKER

3550 N. Central Ave., Suite 1700

Phoenix, AZ 85012

Re: ML Manager LLC's Request to Production to FTI Consulting, Inc.

Dear Mr. Schian:

As you are undoubtedly aware, pursuant to the Official Investors Committee's Confirmed Plan, ML Manager LLC assumed the obligation to pursue all claims held by Mortgages Ltd. for borrowers' non-payment or default of loan obligations. Accordingly, ML Manager has stepped into the shoes of Mortgages Ltd. with respect to privilege and has a direct right to access the files created by FTI during the course of FTI's work for Mortgages Ltd.

On more than one occasion, several parties have requested that FTI provide both ML Manager and the ML Liquidating Trust with copies of all working files and correspondence created during FTI's work for Mortgages Ltd. Despite these repeated requests, FTI has stonewalled and stubbornly refused to provide either ML Manager or ML Liquidating Trust with these files. This failure to promptly transfer Mortgages Ltd.' files has impaired ML Manager's ability to evaluate assets of the estate and effectuate the Confirmed Plan. This conduct is indefensible and could warrant sanctions against FTI under Arizona law. *C.f., Matter of Van Baalen*, 123 Ariz. 82, 597 P.2d 985 (1979) (sanctioning an attorney for failing to return client files). Accordingly, ML Manager again requests that you immediately transfer all files and correspondence pertaining to Mortgages Ltd. to Fennemore Craig.

Additionally, should FTI ignore ML Manager's latest request, I have enclosed ML Manager's attached Request for Production of Documents directed to FTI Consulting, Inc. These documents correspondence are relevant to the contested matter involving FTI's attorneys' fees. Due to the fast approaching hearing on FTI's fee application, please produce these

# FENNEMORE CRAIG, P.C.

Dale Schian  
November 6, 2009  
Page 2

documents no later than November 19, 2009. If production by this date is not possible, please let us know so we can seek appropriate relief from the Court.

Sincerely,

FENNEMORE CRAIG, P.C.

A handwritten signature in black ink, appearing to read "J. Greer", with a long horizontal flourish extending to the right.

Joshua T. Greer

JOSG/bal

2254995

**EXHIBIT "4"**



COMPLEX LITIGATION & BANKRUPTCY

3550 N. Central Ave. Suite 1700  
Phoenix, AZ 85012-2115

**Dale C. Schian**  
[dschian@swazlaw.com](mailto:dschian@swazlaw.com)

November 11, 2009

**Via E-Mail Only [jgreer@fclaw.com]**

Joshua T. Greer, Esq.  
Fennemore Craig, P.C.  
3003 North Central Avenue, #2600  
Phoenix, Arizona 85012-2913

Re: Mortgages, Ltd. - FTI Consulting, Inc.

Dear Mr. Greer:

This is to respond to your letter dated November 6, 2009 concerning the scheduled depositions of Kevin O'Halloran, Edward McDonough, and Nechelle Wimmer. The trial on the DLA Piper fee application was scheduled and anticipated at the time that the court set the hearing and pretrial schedule for the FTI fee application. As such, it does not provide a justification for delaying this matter, and our impending trial date does not permit us to accommodate your request to delay the depositions until after Thanksgiving. I have previously corresponded concerning this matter with both Cathy Reece and Keith Hendricks. Copies of that correspondence are transmitted herewith. The dates, deadlines and offers to accommodate reasonable scheduling of the requests as set forth in that correspondence are renewed. Nevertheless, we expect your client to fully comply with its discovery obligations, and we intend to proceed based upon the schedules previously established.

Because I received no response to my inquiry as to whether you would voluntarily produce witnesses without the necessity of a subpoena, I contacted Mr. McDonough, who requested that he appear pursuant to a subpoena, which we will accomplish. He also indicated that he is out of town next week and requested that his deposition be rescheduled to November 24. An Amended Notice of Deposition is transmitted herewith.

In his November 7, 2009 e-mail, Mr. Hendricks asked me to provide him with dates for depositions of Michael Tucker and Chas Harvick. Mr. Tucker could be available for deposition on either December 7 or December 8. We do not anticipate calling Mr. Harvick at trial. I can request dates from Mr. Harvick; however, given your limited availability before Thanksgiving, and

Joshua T. Greer, Esq.  
November 11, 2009  
Page 2

the impending December deadlines and trial, please advise whether you still wish to take Mr. Harvick's deposition.

Sincerely,



Dale C. Schian

DCS:dls  
Enclosures

cc: Michael R. Walker, Esq.

131477v1





COMPLEX LITIGATION & BANKRUPTCY

3550 N. Central Ave. Suite 1700  
Phoenix, AZ 85012-2115

**Michael R. Walker**  
[mwalker@swazlaw.com](mailto:mwalker@swazlaw.com)

November 5, 2009

**Sent via e-mail only [reece@fclaw.com]**

Cathy L. Reece, Esq.  
Fennemore Craig, P.C.  
3003 North Central Avenue, #2600  
Phoenix, Arizona 85012

Re: Mortgages Ltd. 2-08-07465  
Response to First Set of Non-Uniform Interrogatories

Dear Cathy:

Enclosed are Notices of Deposition for Nechelle Wimmer and Ed McDonough and a copy of a Notice of Deposition for Kevin O'Halloran. We are flexible with the days and times; however, we must complete the depositions prior to November 26, 2009. Therefore, if any of the days and times are unacceptable and need to be changed, please provide me with alternate days and times that are prior to November 26, 2009.

Please advise us immediately if it is necessary to subpoena Ms. Wimmer and Mr. McDonough or whether you will voluntarily produce them for deposition. If it is necessary to subpoena them, we will serve that subpoena upon your firm as that is the address identified in your interrogatory responses. If it is necessary to serve them at a different address, please supplement your responses accordingly.

With regard to Mr. McDonough, if you intend to ask him to offer opinions at trial, please complete the answers to interrogatories, provide the information required by Rule 26(e), Fed. R. Civ. P., and produce a complete copy of Mr. McDonough's file not later than Friday, November 13. Nevertheless, until you identify him as an expert and disclose his opinions, we will treat Mr. McDonough as a fact witness who we are at liberty to contact.

In response to Interrogatory No. 1, you list as one of your exhibits "all pleadings and documents filed in the administrative case as well as all adversaries." This answer is inadequate as a matter of law. As I am sure you are aware, we are not required to speculate which of the thousands of pleadings and documents filed in this case you might introduce at the trial of this matter. Therefore, properly designate each specific document and pleading you intend to use and do so on or before Wednesday, November 11, 2009. In the event you do not do that, I will presume that no

Cathy L. Reece, Esq.  
November 5, 2009  
Page 2

pleadings or documents will be offered in evidence at the trial.

In addition, it appears that no one has verified the answers to interrogatories. Please have the appropriate representative verify the answers. In the event you have any questions, please do not hesitate to call.

Very truly yours,



Michael R. Walker

MRW:jsl

Enclosures

131207.3



## Dale Schian

---

**From:** Dale Schian  
**Sent:** Thursday, November 05, 2009 3:14 PM  
**To:** HENDRICKS, KEITH; Julie Larsen; tfreeman@lawdmyl.com; nmarch@dmyl.com; mdorval@stradley.com; sharon.shively@sackstierney.com; wsj@mjlegal.com  
**Cc:** Michael Walker; chas.harvick@fticonsulting.com; michael.tucker@fticonsulting.com; REECE, CATHY  
**Subject:** RE: Mortgages Ltd.; 2-08-07465  
**Attachments:** SWAZLAW-#131247-v1-11-5-09\_Letter\_to\_Reece.PDF; image001.gif

Keith: In case you didn't read the accompanying letter sent to Cathy, a copy of which is attached, Mike offered to accommodate your schedules provided we can conclude the depositions prior to Thanksgiving. That is necessary because the pretrial is due the next week. I will inquire of Mr. Tucker and Mr. Harvick as to their availability. If the 19<sup>th</sup> and 20<sup>th</sup> don't work for you, either get someone else to cover the depositions or suggest other dates during the next three weeks that work. In the future, please correspond through counsel and not directly to our clients.  
Dale

---

**From:** HENDRICKS, KEITH [mailto:KHENDRIC@FCLAW.com]  
**Sent:** Thursday, November 05, 2009 2:48 PM  
**To:** Julie Larsen; tfreeman@lawdmyl.com; nmarch@dmyl.com; mdorval@stradley.com; sharon.shively@sackstierney.com; wsj@mjlegal.com  
**Cc:** Dale Schian; Michael Walker; chas.harvick@fticonsulting.com; michael.tucker@fticonsulting.com; REECE, CATHY  
**Subject:** RE: Mortgages Ltd.; 2-08-07465

Dale,

I am surprised that you would notice depositions without giving us the professional courtesy of clearing dates. I am not available on Nov. 19 or Nov. 20. Mr. O'Halloran is out of the state and I don't know his schedule. I haven't talked with any of the witnesses about their schedule. Are you going to make us go to the Court to seek protective orders or are you going to propose and clear dates that work for everyone?

With regard to your clients, please give me dates when Michael Tucker and Chas Harvick will be available for depositions.

Keith



**IRS CIRCULAR 230 DISCLOSURE:** To ensure compliance with requirements imposed by the IRS, we inform you that, to the extent this communication (or any attachment) addresses any tax matter, it was not written to be (and may not be) relied upon to (i) avoid tax-related penalties under the Internal Revenue Code, or (ii) promote, market or recommend to another party any transaction or matter addressed herein (or in any such attachment). For [additional information](#) regarding this disclosure please visit our web site.

**CONFIDENTIALITY NOTICE:** The information contained in this message may be protected by the attorney-client privilege. If you believe that it has been sent to you in error, do not read it. Please immediately reply to the sender that you have received the message in error. Then delete it. Thank you.

---

**From:** Julie Larsen [mailto:JLarsen@swazlaw.com]  
**Sent:** Thursday, November 05, 2009 2:36 PM  
**To:** HENDRICKS, KEITH; tfreeman@lawdmyl.com; nmarch@dmyl.com; mdorval@stradley.com; sharon.shively@sackstierney.com; wsj@mjlegal.com

**Cc:** Dale Schian; Michael Walker; chas.harvick@fticonsulting.com; michael.tucker@fticonsulting.com

**Subject:** Mortgages Ltd.; 2-08-07465

Ladies and Gentlemen:

Attached please find Notices of Deposition for Kevin O'Halloran [DE 2372], Nechelle Wimmer [DE 2373], and Edward McDonough [DE 2374].

**Julie Larsen**

**Paralegal**

Schian Walker, P.L.C.

3550 N. Central Ave., Ste. 1700

Phoenix, AZ 85012-2115

Ph: (602) 277-1501

Fax: (602) 297-9633

E-mail: [jlarsen@swazlaw.com](mailto:jlarsen@swazlaw.com)

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**EXHIBIT "5"**



COMPLEX LITIGATION & BANKRUPTCY

3550 N. Central Ave. Suite 1700  
Phoenix, AZ 85012-2115

**Dale C. Schian**  
[dschian@swazlaw.com](mailto:dschian@swazlaw.com)

November 11, 2009

**Via E-Mail Only [jgreer@fclaw.com]**

Joshua T. Greer, Esq.  
Fennemore Craig, P.C.  
3003 North Central Avenue, #2600  
Phoenix, Arizona 85012-2913

Re: ML Manager, LLC's Request for Production to FTI Consulting, Inc.

Dear Mr. Greer:

Although I was initially astounded by the baseless statements and accusations directed to FTI and contained in your November 6, 2009 correspondence to me, I have concluded that the statements are merely the result of you being new to this matter and insufficiently acquainted with what has actually transpired. Please be assured that FTI has been cooperative, even accommodating, in responding to requests for information and work product necessary to assist the ML Liquidating Trustee in the performance of his duties. I believe that when you further investigate this matter you will find that to be the case. Nevertheless, because your letter has interjected this issue, enclosed herewith is a Notice of Deposition directed to your client requiring that they identify and produce a representative to testify with respect to the matters contained in your correspondence. It is my hope and expectation that once you have had the opportunity to further investigate this matter, you will retract the disparaging remarks and apologize. Provided that that happens not later than one week from today, we will consider this matter resolved and cancel the deposition.

With respect to the request for production of documents transmitted with your letter, we will respond to that request consistent with the requirements and time frames imposed by the Rules of Civil Procedure. Your firm's delay of approximately two months in preparing and serving its discovery request does not justify shortening our client's time to respond to the discovery.

Prior to your involvement in this matter, FTI established and maintained a good rapport with the professionals and employees of ML Liquidating Trust, and had faithfully and timely provided them with whatever documentation they requested. Unfortunately, your correspondence demanding "copies of all working files and correspondence created during FTI's work for Mortgages Ltd.," together with the threats and accusations that accompanied the request, coupled with Nechelle

Joshua T. Greer, Esq.  
November 11, 2009  
Page 2

Wimmer's phone call and e-mail to FTI Monday morning requesting "a complete copy of the FTI work product for the Mortgages Ltd. case" evidences an attempt to obtain discovery in connection with the litigation outside what is authorized under the rules. In similar circumstances, courts have found such attempts to be improper. In *Erickson v. Newmar Corp.*, 87 F.3d 298, 301-02 (9th Cir. 1996) (violation that an attorney's ethical duty found where the attorney engaged in *ex parte* contact with an expert witness outside the procedures carefully provided for and limited by the rules for controlled discovery).

Finally, as reflected in my e-mail to Keith Hendricks sent the day before your letter, it is improper for your firm to contact FTI directly. Such communications must necessarily go through counsel. ER 4.2. It is also improper for lawyers to ask others to do what the lawyer cannot do directly. ER 8.4(a). Nevertheless, these rules appear to have been violated as a result of Ms. Wimmer's making the same request contained in your November 6 letter directly to FTI early in the morning the next business day after your letter. As such, we have instructed FTI not to respond to Ms. Wimmer's improper inquiry.

We do not ascribe any improper motive or conduct to Ms. Wimmer, and understand that the ML Manager and the ML Liquidating Trust may have a legitimate need for additional documentation or work product from FTI. Ms. Wimmer and others working for those entities should continue to feel at liberty to request from FTI documentation necessary or helpful to them in the performance of their duties. FTI will endeavor to accommodate the needs of those professionals and respond to any reasonable request in a timely manner. We trust that future requests will be motivated by legitimate business purposes and not be utilized as an attempt to evade either the rules governing discovery or the prohibition on direct contact with an opposing party.

Sincerely,



Dale C. Schian

DCS:dls  
Enclosure

cc: Michael R. Walker, Esq.

131480v3



**EXHIBIT "6"**

# FENNEMORE CRAIG, P.C.

3003 North Central Avenue, Suite 2600  
Phoenix, Arizona 85012-2913  
(602) 916-5000

**Joshua T. Greer**  
Direct Phone: (602) 916-5498  
Direct Fax: (602) 916-5698  
jgreer@fclaw.com

**Law Offices**  
Phoenix (602) 916-5000  
Tucson (520) 879-6800  
Nogales (520) 281-3480  
Las Vegas (702) 692-8000  
Denver (303) 291-3200

November 11, 2009

## VIA EMAIL

Dale Schian  
SCHIAN WALKER  
3550 N. Central Ave., Suite 1700  
Phoenix, AZ 85012  
dschian@swazlaw.com

Re: Objections to FTI's Fee Application

Dear Mr. Schian:

I have received your both of your letters of November 11, 2009 with regards to the hearing on FTI's fee application. While I will not be responding to any of the personal allegations or attacks, I hope to be able to resolve the pending issues which I see as follows: 1) depositions of ML Manager's witnesses; 2) depositions of FTI's witnesses; 3) production of FTI's files and 4) drafting of joint pretrial memorandum.

First, I was surprised at your refusal to reschedule the depositions of ML Manager's witnesses. I do not understand the need to conduct these depositions in the middle of the hearings regarding DLA's fee application. The hearing on FTI's application is at this time scheduled to begin on December 16. Generally, pretrial statements are due five business days prior to trial. *See* Rule 7016-1. Accordingly, we agree to stipulate to production of a joint pretrial statement until December 9, 2009. Additionally, we renew our request that you reschedule the current depositions until after Thanksgiving. We are available for depositions on December 1, 2, 3, 7, 8, 9, 10, 11 and we will produce our witnesses on those days pending their individual availability. If you insist on conducting the depositions on the scheduled dates, we will be forced to petition the court for appropriate relief.

Second, we will plan on scheduling the deposition of Mr. Tucker on December 7, 2009. As for Mr. Harvick, at this time we are still planning on taking Mr. Harvick's deposition and request that you provide us with available dates as soon as possible. We also request that you

# FENNEMORE CRAIG, P.C.

Dale Schian  
November 11, 2009  
Page 2

identify any additional witnesses that you plan on calling in support of FTI's fee applications and provide us with dates in which they are available to be deposed.

Third, I apologize if you perceived my statements regarding the production of files as harsh; however, I believe it is consistent with FTI's responses to ML Manager's repeated requests. ML Manager initially requested the files of FTI back in July 2009 as it began assuming control of the Loans on behalf of the investors. ML Manager made this request through Jennings Strouss due to Jennings role as an intermediately between FTI and ML Manager during the transition. Five months later neither ML Manager nor ML Servicing has received any substantial production of files from FTI. I understand that this may cause some embarrassment with your client, but that does not change the fact that ML Manager is entitled to these files a client. As you know, Mortgages Ltd. was renamed to ML Servicing. As such, ML Servicing is FTI's former client. I assume that is why Nechelle Wimmer called. My request for production was merely an attempt to obtain for ML Manager what FTI refused to provide to its client. As for the conduct of Nechelle, I am sure you will agree that there is nothing improper about a client's request for information from its professional.

Your letter indicated that FTI will not be responding Nechelle's request and that you will not be producing files on Friday. Please let me know if FTI plans on producing any files pursuant to my prior request. If your client desires additional time to respond, we can stipulate to extend the hearing on the fee application until early next year. However, failure to produce any documents will force us to seek that relief from the Court.

Finally, with regards to the aforementioned pretrial memorandum, please provide us with a draft no later than December 7, 2009 so that we can submit a copy to the Court on December 9, 2009.

Please let me know if you believe I have missed any of the issues requiring immediate attention. Thank you.

Sincerely,

FENNEMORE CRAIG, P.C.



Joshua T. Greer

**EXHIBIT "7"**



COMPLEX LITIGATION & BANKRUPTCY

3550 N. Central Ave. Suite 1700  
Phoenix, AZ 85012-2115

**Dale C. Schian**  
[dschian@swazlaw.com](mailto:dschian@swazlaw.com)

November 13, 2009

**Via E-Mail Only [jgreer@fclaw.com]**

Joshua T. Greer, Esq.  
Fennemore Craig, P.C.  
3003 North Central Avenue, #2600  
Phoenix, Arizona 85012-2913

Re: Mortgages, Ltd. - FTI Consulting, Inc. Fee Application

Dear Mr. Greer:

To respond to your November 11, 2009 correspondence: you should not be surprised by my position with respect to the witness depositions. It has been consistent since they were noticed a week ago. As you have declined to accept our request to provide other acceptable dates within the three-week period during which we request the witnesses be produced, the depositions will proceed as scheduled.

You are correct as to the provisions of Local Rule 7016-1. However, apparently the counsel who attended the hearing failed to inform you that the court intentionally set the December 2 date, and indicated that it wanted the joint pretrial statement two weeks before the hearing on December 16.

We will plan to provide Michael Tucker on December 7 as requested in your letter and I will check with Chas Harvick for dates and times.

With respect to the production of files by FTI, it does not do any good for you and me to debate the point; we will ask the appropriate questions to a representative of ML Manager pursuant to the 30(b)(6) notice that I sent you on Wednesday.

With respect to your recent discovery request, FTI will respond consistent with my prior correspondence and the applicable rules of civil procedure. Your firm's failure to seek discovery sufficiently in advance of when you would like to see the responses does not justify seeking to impose additional burdens on my client nor to delay the trial in this matter.

Joshua T. Greer, Esq.  
November 13, 2009  
Page 2

Please provide me with your portions of the joint pretrial statement, which we will incorporate and endeavor to provide you with a draft joint document before Thanksgiving. We would ask that you provide us with any comments or revisions not later than Monday, November 30, so that it may be revised and filed with the court by December 2.

Sincerely,



Dale C. Schian

DCS:dls  
Enclosures

cc: Michael R. Walker, Esq.

131531v3



**EXHIBIT "8"**

## Dale Schian

---

**From:** Dale Schian  
**Sent:** Friday, November 20, 2009 10:32 AM  
**To:** HENDRICKS, KEITH; REECE, CATHY; GREER, JOSH; Shelley, Gerald L.  
**Cc:** Michael Walker  
**Subject:** FW: FTI Work Product  
**Attachments:** Work product; SWAZLAW-#131514-v1-Letter\_to\_Greer\_re\_\_RFP.PDF

Please see Nechelle's e-mail to Chas below that appears to have been sent in response to my offer yesterday to have copies of the guarantee work product made available to whoever needs it. It appears that she believes that copies of "everything" are coming as a result of her 11/9 e-mail. I would appreciate it if someone would make certain that she is aware of my response to that e-mail, a copy of which is attached, and of FTI's willingness to get her whatever she needs to conduct the day to day business.

Thanks,  
Dale

---

**From:** Nechelle Wimmer <NWimmer@mtgltd.com>  
**To:** Harvick, Chas  
**Sent:** Fri Nov 20 11:37:26 2009  
**Subject:** FW: FTI Work Product

Chas –

Please see the e-mail below from your counsel and advise as to when we can expect to receive the full work product I requested via e-mail 11-09-2009.

Thanks!

## Nechelle Wimmer

[NWimmer@mtgltd.com](mailto:NWimmer@mtgltd.com)

**P:** 623.234.9564  
**C:** 602.540.1502  
**F:** 623.234.9575

### ML Servicing Co

14050 N 83rd Ave. Suite 180  
Peoria, Arizona 85381

[www.mtgltd.com](http://www.mtgltd.com)

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**From:** HENDRICKS, KEITH [mailto:KHENDRIC@FCLAW.com]  
**Sent:** Thursday, November 19, 2009 6:57 PM  
**To:** Nechelle Wimmer; Mark Winkleman; GREER, JOSH  
**Subject:** Fw: FTI Work Product

# FENNEMORE CRAIG

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---

**From:** Dale Schian <dschian@swazlaw.com>  
**To:** HENDRICKS, KEITH  
**Cc:** SHELLEY, GERALD; REECE, CATHY; GREER, JOSH; Michael Walker <mwalker@swazlaw.com>  
**Sent:** Thu Nov 19 17:00:32 2009  
**Subject:** FTI Work Product

Hi Keith: I hope that notwithstanding our exchanges over document issues, Nechelle and the other employees feel at liberty to request documents and information directly from FTI. It has come to my attention that the Nov 3 Newsletter (#5) indicated that Simon Consulting and Jim Sell are being retained to analyze the financial status of borrowers and guarantors. FTI has already done much of that analysis. It has approximately a dozen notebooks containing its research and analysis that it has already photocopied anticipating that someone will need them. They can be made available immediately. Just let us know who wants them.

Dale

Dale Schian  
Schian Walker, P.L.C.  
3550 N. Central Ave.  
Suite 1700  
Phoenix AZ 85012  
(602) 277-1501  
[SchianWalker.com](http://SchianWalker.com)

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**EXHIBIT "9"**

## Dale Schian

---

**From:** HENDRICKS, KEITH [KHENDRIC@FCLAW.com]  
**Sent:** Friday, November 20, 2009 11:37 AM  
**To:** Dale Schian; GREER, JOSH  
**Subject:** Re: FTI Work Product

I will call her when I get back on Monday.

---

**From:** Dale Schian <dschian@swazlaw.com>  
**To:** HENDRICKS, KEITH; REECE, CATHY; GREER, JOSH; Shelley, Gerald L. <GLS@quarles.com>  
**Cc:** Michael Walker <mwalker@swazlaw.com>  
**Sent:** Fri Nov 20 10:31:56 2009  
**Subject:** FW: FTI Work Product

Please see Nechelle's e-mail to Chas below that appears to have been sent in response to my offer yesterday to have copies of the guarantee work product made available to whoever needs it. It appears that she believes that copies of "everything" are coming as a result of her 11/9 e-mail. I would appreciate it if someone would make certain that she is aware of my response to that e-mail, a copy of which is attached, and of FTI's willingness to get her whatever she needs to conduct the day to day business.

Thanks,  
Dale

---

**From:** Nechelle Wimmer <NWimmer@mtg ltd.com>  
**To:** Harvick, Chas  
**Sent:** Fri Nov 20 11:37:26 2009  
**Subject:** FW: FTI Work Product

Chas –

Please see the e-mail below from your counsel and advise as to when we can expect to receive the full work product I requested via e-mail 11-09-2009.

Thanks!

## Nechelle Wimmer

[NWimmer@mtg ltd.com](mailto:NWimmer@mtg ltd.com)

**P:** 623.234.9564

**C:** 602.540.1502

**F:** 623.234.9575

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**From:** HENDRICKS, KEITH [mailto:KHENDRIC@FCLAW.com]  
**Sent:** Thursday, November 19, 2009 6:57 PM  
**To:** Nechelle Wimmer; Mark Winkleman; GREER, JOSH  
**Subject:** Fw: FTI Work Product

## **FENNEMORE CRAIG**

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---

**From:** Dale Schian <dschian@swazlaw.com>  
**To:** HENDRICKS, KEITH  
**Cc:** SHELLEY, GERALD; REECE, CATHY; GREER, JOSH; Michael Walker <mwalker@swazlaw.com>  
**Sent:** Thu Nov 19 17:00:32 2009  
**Subject:** FTI Work Product

Hi Keith: I hope that notwithstanding our exchanges over document issues, Nechelle and the other employees feel at liberty to request documents and information directly from FTI. It has come to my attention that the Nov 3 Newsletter (#5) indicated that Simon Consulting and Jim Sell are being retained to analyze the financial status of borrowers and guarantors. FTI has already done much of that analysis. It has approximately a dozen notebooks containing its research and analysis that it has already photocopied anticipating that someone will need them. They can be made available immediately. Just let us know who wants them.

Dale

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**EXHIBIT "10"**

## Dale Schian

---

**From:** Dale Schian  
**Sent:** Wednesday, November 25, 2009 2:06 PM  
**To:** HENDRICKS, KEITH; mdorval@stradley.com; sharon.shively@sackstierney.com; wsj@mjlegal.com; Shelton Freeman  
**Cc:** REECE, CATHY; SHELLEY, GERALD; Michael Walker  
**Subject:** RE: FTI Joint Pretrial  
**Attachments:** SWAZLAW-#129014-v1-FTI\_Response\_to\_Fee\_App\_Objections.PDF; image001.gif

Keith: To respond to your comments:

- We are working on and refining our list of exhibits, which we will provide to you as soon as possible together with copies of the documents.
- The FTI position is not a mystery. It was set forth months ago in our response, a copy of which is attached. We are simply working to summarize the positions to include in the pretrial.
- We attempted to set forth issues. If you disagree with our characterization, I look forward to receiving your comments.
- The pretrial is due a week from today. This is not the first, second or even third time I have written your firm reminding them of the deadline and asking for your input. Your position has been consistent: to delay. That is not acceptable. We will file a pretrial on 12/2. I hope that it will not have to be another unilateral pretrial.

Dale

---

**From:** HENDRICKS, KEITH [mailto:KHENDRIC@FCLAW.com]  
**Sent:** Wednesday, November 25, 2009 12:44 PM  
**To:** Dale Schian; mdorval@stradley.com; sharon.shively@sackstierney.com; wsj@mjlegal.com; Shelton Freeman  
**Cc:** REECE, CATHY; SHELLEY, GERALD; Michael Walker  
**Subject:** RE: FTI Joint Pretrial

Dale,

This draft of a JPT is very disappointing. You do not list exhibits. You don't even provide what your position is with regard to the issues you identified. Many of what you describe as "uncontested facts" are characterizations and obviously objectionable to the objectors. You then purport to circumscribe the contested issues that the objectors raise in a prejudicial way. It is clear that you are fishing and seeking to bind the objectors while keeping your powder dry as long as possible. This is not good faith, or even a fair beginning point for a JPT.

I don't see how you could expect all of the objectors to reach agreements on their positions on Monday when you haven't even provided a fair starting place. Since you have not given us a fair starting place for a JPT, given that it is a holiday weekend, and given that you have refused to stipulate to continue the date for the JPT, it is likely that we will ask the Court to continue the deadlines.

Keith

## **FENNEMORE CRAIG**

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**From:** Dale Schian [mailto:dschian@swazlaw.com]  
**Sent:** Wednesday, November 25, 2009 11:35 AM  
**To:** mdorval@stradley.com; sharon.shively@sackstierney.com; wsj@mjlegal.com; Shelton Freeman  
**Cc:** HENDRICKS, KEITH; REECE, CATHY; SHELLEY, GERALD; Michael Walker  
**Subject:** FTI Joint Pretrial

Attached is a draft joint pretrial. We've taken a stab at the basic facts, framing the issues and have included witnesses and exhibits based upon the discovery responses. If we can get your statements of position by Monday, we can incorporate them into draft to circulate on Tuesday and file on Wednesday.

Dale

Dale Schian  
Schian Walker, P.L.C.  
3550 N. Central Ave.  
Suite 1700  
Phoenix AZ 85012  
(602) 277-1501  
[SchianWalker.com](http://SchianWalker.com)

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