

1 **SCHIAN WALKER, P.L.C.**

3550 NORTH CENTRAL AVENUE, #1700

2 PHOENIX, ARIZONA 85012-2115

TELEPHONE: (602) 277-1501

3 FACSIMILE: (602) 297-9633

E-MAIL: ecfdocket@swazlaw.com

4 DALE C. SCHIAN, #010445

CODY J. JESS, #025066

Attorneys for FTI Consulting, Inc.

6 **UNITED STATES BANKRUPTCY COURT**

7 **DISTRICT OF ARIZONA**

8 In re:

9 MORTGAGES LTD.,

Debtor.

No. 2-08-bk-07465-RJH

CHAPTER 11

**RESPONSE TO EMERGENCY MOTION
TO PRECLUDE TESTIMONY**

DATE: January 26, 2010

TIME: 11:30 a.m.

LOCATION: 230 North First Avenue

Phoenix, Arizona

Courtroom 603, 6th Floor

15 FTI Consulting, Inc. ("**FTI**"), by and through its undersigned attorneys, responds to
16 Kevin T. O'Halloran's, Trustee of the ML Liquidating Trust (the "**Liquidating Trustee**"), *Emergency*
17 *Motion to Preclude Testimony* (the "**Emergency Motion**") [DE 2609]. The Emergency Motion seeks to
18 bar FTI from relying on the testimony of Christine Zahedi ("**Ms. Zahedi**") and Chris Olson ("**Mr.**
19 **Olson**") at the hearing on FTI's *First and Final Fee Application of FTI Consulting as Financial*
20 *Advisors to Debtors and Debtors In Possession and Allowance of Compensation and Reimbursement of*
21 *Expenses* (the "**Final Application**") scheduled for January 27, 2010, as a sanction for FTI's attorney's
22 allegedly impermissible *ex parte* communications with Ms. Zahedi and Mr. Olson (collectively, the
23 "**Communications**"). Because Ms. Zahedi and Mr. Olson are not "represented" by counsel as
24 contemplated by Arizona Rule of Professional Conduct ("**ER**") 4.2, and because neither Ms. Zahedi's
25 nor Mr. Olson's acts or omissions gave rise to the underlying litigation, the Communications are
26 permissible and, accordingly, the relief requested in the Emergency Motion must be denied.

1 Conversely, because the aforementioned concerns are not implicated when a lawyer
2 communicates with an unrepresented person, the ERs discuss,¹ but do not prevent such communications.
3 As the *Lang* court noted, "The American Bar Association Committee on Ethics has concluded that rule
4 4.2 does not prohibit *ex parte* contacts with **unrepresented former employees.**" *Lang*, 170 Ariz. at 607,
5 826 P. 2d at 1233 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359
6 (March 22, 1991) (emphasis added). According to the American Bar Association, "[I]t is the opinion of
7 the Committee that a lawyer representing a client in a matter adverse to a corporate party that is
8 represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of
9 the representation with an unrepresented former employee of the corporate party without the consent of
10 the corporation's lawyer." *Id.* The Liquidating Trustee has not alleged that it represents either Ms.
11 Zahedi or Mr. Olson, nor has it proffered any evidence that such representation can be assumed from the
12 facts. In *Lang*, which the Liquidating Trustee principally relies upon, the court noted that in *Public*
13 *Serv. Elec. & Gas v. Assoc. Elec. & Gas*, 745 F. Supp. 1037 (D. N.J. 1990), "the court concluded that
14 former employees are parties represented by the former employer's counsel within the meaning of Rule
15 4.2 and, therefore, cannot be the subject of informal *ex parte* contact." As noted by the court in *LaPoint*
16 *v. AmerisourceBergen Corp.*, 2006 WL 2105862, at *3 n. 13 (Del. Ch. Jul 18, 2006), however, *Public*
17 *Service* was superseded by *Klier v. Sordoni Skanska Const. Co.*, 337 N.J. Super. 76, 92, 766 A. 2d 761,
18 770 (N.J. App. Div. 2001) (holding that changes in New Jersey state law mean that a party may
19 interview a former member of an adverse party's control group if that former employee has disavowed
20 the corporation's representation).

21 Here, the Liquidating Trustee's interests are misaligned with Ms. Zahedi's and Mr.
22 Olson's, and its representation is not a foregone conclusion. The above-noted factors delineated in *Lang*
23 that counter against communicating with represented parties are not implicated. Ms. Zahedi and Mr.

24 ¹ See ER 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer
25 shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should
26 know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall
make reasonable efforts to correct the misunderstanding").

1 Olson are both sophisticated individuals, there is no attorney-client relationship that requires protection,
2 and the parties are actively engaged in litigation. This is not a case where an outsider has attempted to
3 breach the opposing party's privileged and confidential walls. The argument that counsel for FTI, the
4 Debtor's former professionals, should not be permitted to have contact with Ms. Zahedi and Mr. Olson,
5 the Debtor's former COO and CFO, in order to protect "attorney-client privileged communications" is
6 nonsense given FTI's role in the Debtor's case.²

7 If anything, the Liquidating Trustee's conflicted position illustrates that it does not
8 represent Ms. Zahedi and Mr. Olson. If, for example, the Liquidating Trustee does in fact represent Ms.
9 Zahedi and Mr. Olson, one wonders why it would schedule and take their depositions. Perhaps most
10 illustrative of the fact that the Liquidating Trust does not represent Ms. Zahedi and Mr. Olson is that the
11 Liquidating Trustee has identified Ms. Zahedi and Mr. Olson as "Persons against whom the Debtor, may
12 have Causes of Action." *Revised Exhibit E to the Amended Disclosure Statement* [DE 1510-4]. Surely
13 the Liquidating Trustee and its attorneys cannot maintain a cause of action against their own clients.
14 Accordingly, because Ms. Zahedi and Mr. Olson are not represented by the Liquidating Trustee, FTI's
15 attorney's *ex parte* Communications are permissible under ER 4.2.

16 Even if the Liquidating Trustee represents Ms. Zahedi and Mr. Olson, which it does not,
17 Arizona law permits *ex parte* communications with former employees of the opposing party if, among
18 other things, the acts or omissions of the former employee ***do not give rise to the underlying litigation.***
19 *Lang*, 170 Ariz. at 608-09, 826 P.2d at 1234-35; *see also Kaiser v. Amer. Telephone & Telegraph*, 2002
20 WL 13632054, at *5 (D. Ariz. Apr. 5, 2002) (same). In *Kaiser*, for example, the court stated that:

21 It is . . . undisputed that Laveaga is a former supervisor whose acts or
22 omissions are directly related to Kaiser's wage claim, and give rise to that
23 claim. Kaiser's counsel believes that Laveaga's acts or omissions do not
24 give rise to any of Kaiser's claims because Laveaga did not make the
25 decision to terminate Kaiser and did not make a decision to pay or not pay
26 Kaiser. However, that understanding is based on an unduly restrictive
reading of *Lang* and a narrow understanding of the facts of this case.

² It should be noted that the attorney-client privilege may not be used to prevent an attorney from defending himself or collecting his fee when challenged by their former client. ER 1.6(d)(4).

1 Kaiser's wage claim is directly based on alleged promises or
2 representations made by Laveaga. Indeed, Kaiser's lawyers relied on a
3 May 1999 letter authored by Laveaga to press Kaiser's claims with AT &
4 T before suit was filed, and Kaiser has subsequently confirmed that his
5 wage claim is based on promises and other representations made by
Laveaga. Thus, properly understood, the wage claim arises from acts
(representations or promises made) by Laveaga during the course of his
employment with AT & T and in the course of his duties as AT & T's
Global Sales Manager.

6 Id. at *6. Given the facts noted above, *Kaiser* is far from dispositive, and the Liquidating Trustee's
7 dearth of analysis illustrates its lopsided argument.

8 Here, the Liquidating Trustee does not even attempt to connect Ms. Zahedi's and/or Mr.
9 Olson's acts or omissions to the underlying litigation. Although the Debtor hired FTI and approved its
10 services and fees, FTI's claim does not arise from any act or omission of Ms. Zahedi or Mr. Olson in the
11 course of their employment. The fact of the matter is that the underlying litigation arises out of the
12 ***Liquidating Trustee's objection to pay FTI's fees.*** The Debtor hired FTI. Mr. Olson and Ms. Zahedi
13 were FTI's successive, primary contacts with whom FTI worked on a daily basis. As such, Mr. Olson
14 and Ms. Zahedi are the persons best able to testify as to the work that they requested FTI perform, and
15 their review and approval of the fees associated with that work. It is the Liquidating Trustee that has
16 alleged that FTI's fees are not reasonable under Bankruptcy Code § 330, and it is this accusation that
17 forms the basis for the underlying litigation. That Ms. Zahedi and/or Mr. Olson played a role in
18 approving FTI's retention, sanctioning the services it rendered, or approving its fees is irrelevant in
19 determining the propriety of opposing counsel's contact. As the State Bar of Arizona recognized in
20 Ariz. Op. 00-05, "Contacts with a former employee are not prohibited merely because that person may
21 have information which is harmful to the opposing party; nor does the fact that a former employee may
22 be a prospective witness, even a critical one, trigger the prohibition." (citing *Lang* 170 Ariz. at 606, 826
23 P.2d at 1232; Ariz. Op. 95-07 (noting fact that testimony of former employee may be detrimental to
24 former employer does not determine appropriateness of contact). The Liquidating Trustee has forced
25 FTI to defend the efficacy of the services the Debtor requested and the fees the Debtor approved.
26 Forbidding FTI's attorneys from contacting the very individuals that hired FTI and approved their fees,

1 COPY of the foregoing
2 e-mailed this 26th day
of January, 2010, to:

3 Edward M. McDonough
4 Alvarez & Marsal Dispute Analysis &
Forensic Services, LLC
5 2355 East Camelback Road, #805
Phoenix, Arizona 85016
emcdonough@alvarezandmarsal.com

6 Carolyn J. Johnsen, Esq.
7 Bradley J. Stevens, Esq.
Todd B. Tuggle, Esq.
8 Jennings Strauss & Salmon, P.L.C.
201 East Washington Street, 11th Floor
9 Phoenix, Arizona 85004-2385
Attorneys for Debtor
10 cjjohnsen@jsslaw.com
bstevens@jsslaw.com
11 ttuggle@jsslaw.com

12 Cathy L. Reece, Esq.
Keith L. Hendricks, Esq.
13 Gerald L. Shelley, Esq.
Fennemore Craig, P.C.
14 3003 North Central Avenue, #2600
Phoenix, Arizona 85012
15 Attorneys for ML Manager, LLC
creece@fclaw.com
16 khendricks@fclaw.com
gshelley@fclaw.com

17 Sharon B. Shively, Esq.
Sacks Tierney, P.A.
18 4250 North Drinkwater Boulevard, 4th Floor
Scottsdale, Arizona 85251-3693
19 Attorneys for Kevin T. O'Halloran, Trustee
of the Liquidating Trust of Mortgages Ltd.
20 sharon.shively@sackstierney.com

21 Michael D. O'Mara, Esq.
Mark J. Dorval, Esq.
22 Stradley, Ronon, Stevens & Young, LLP
2600 One Commerce Square
23 Philadelphia, Pennsylvania 19103
Attorneys for Kevin T. O'Halloran, Trustee
24 of the Liquidating Trust of Mortgages Ltd.
mo'mara@stradley.com
25 mdorval@stradley.com

26 ///

1 Shelton L. Freeman, Esq.
Nancy J. March, Esq.
2 DeConcini McDonald Yetwin & Lacy, P.C.
7310 North 16th Street, #330
3 Phoenix, Arizona 85020
Attorneys for G. Grant Lyon, Chapter 11
4 Trustee for Radical Bunny, L.L.C.
tfreeman@lawdmyl.com
5 nmarch@dmyl.com

6 _____
/s/ DEBBI STEPHENS

7 134598v2

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26