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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

ML SERVICING CO., INC., an Arizona
corporation; and ML LIQUIDATING
TRUST,

Plaintiffs,

vs.

GREENBERG TRAURIG, LLP, *et al.*

Defendants.

Case No.: _____

NOTICE OF REMOVAL

Presently pending before the Superior Court
of Arizona, County of Maricopa, under
Case No. CV2011-005803

1 **PLEASE TAKE NOTICE** that, pursuant to 28 U.S.C. §§ 1332, 1334, 1441(a) and
2 1452, Greenberg Traurig, LLP (“GT”) hereby removes to this Court the state court action
3 described in Paragraph 1 below and filed by Plaintiffs ML Servicing Co., Inc. and ML
4 Liquidating Trust (collectively, “Plaintiffs”). Defendants Robert S. Kant and Ellen P.
5 Kant (collectively, the “Kants”) consent to and join in this removal.

6 **THE REMOVED CASE**

7 1. The removed case is an action for legal malpractice and breach of fiduciary
8 duty filed on March 25, 2011 in the Superior Court of Arizona, County of Maricopa,
9 styled *ML Servicing Co., Inc., et al. v. Greenberg Traurig, LLP, et al.*, Case No. CV2011–
10 005803 (the “Removed Case”).

11 **PAPERS FROM REMOVED CASE**

12 2. As required by 28 U.S.C. § 1446(a) and District of Arizona Local Rule
13 3.7(a), attached hereto as Exhibit A are true and correct copies of all process, pleadings,
14 and orders in the Removed Case. In addition, pursuant to District of Arizona Local Rule
15 3.7(a) and 28 U.S.C. § 1446(d), GT will promptly file a copy of this Notice of Removal
16 with the clerk of the Superior Court of Arizona, County of Maricopa.

17 **REMOVAL IS TIMELY**

18 3. The Summons and Complaint were served upon GT’s registered agent for
19 service in Arizona on April 7, 2011. *See* Ex. A. The Kants were served with the
20 Summons and Complaint on April 12, 2011. This Notice of Removal is filed within thirty
21 (30) days of service of all defendants, and therefore is timely under 28 U.S.C. § 1446(b)
22 and Rule 6(a) of the Federal Rules of Civil Procedure.

23 **THE DIVERSITY JURISDICTION OF THIS COURT**

24 4. Pursuant to 28 U.S.C. § 1441(a), “any civil action brought in a State court of
25 which the district courts of the United States have original jurisdiction, may be removed
26 by the defendant or defendants, to the district court of the United States for the district and

1 division embracing the place where such action is pending.” 28 U.S.C. § 1332 provides
2 that “[t]he district courts shall have original jurisdiction over all civil actions where the
3 matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs,
4 and is between . . . citizens of different States.” 28 U.S.C. § 1332(a)(1). Generally,
5 “Section 1332 requires complete diversity of citizenship; each of the plaintiffs must be a
6 citizen of a different state than each of the defendants.” *Morris v. Princess Cruises, Inc.*,
7 236 F.3d 1061, 1067 (9th Cir. 2001). Diversity jurisdiction is present here.

8 5. Plaintiff ML Servicing Co., Inc. is a citizen of Arizona. It is an Arizona
9 corporation, *see* Compl. ¶ 1, and, upon information and belief, Arizona is its principal
10 place of business. *See* 28 U.S.C. § 1332(c)(1) (“[A] corporation shall be deemed to be a
11 citizen of any State by which it has been incorporated and of the State where it has its
12 principal place of business.”).

13 6. Plaintiff ML Liquidating Trust is a citizen of Arizona. It alleges that it “is a
14 liquidating trust that is organized under the laws of Arizona.” *See* Compl. ¶ 2. “A trust
15 has the citizenship of its trustee or trustees.” *Johnson v. Columbia Props. Anchorage, LP*,
16 437 F.3d 894, 899 (9th Cir. 2006). Upon information and belief, Matthew Hartley is the
17 sole trustee of ML Liquidating Trust, *see* Declaration of Matthew Hartley, *In re*
18 *Mortgages Ltd.*, No. 2:08-bk-07465 (Bankr. D. Ariz. Jan. 28, 2011), Dkt. No. 3062, at Ex.
19 A, ¶ 1, and is a citizen of Arizona. *See* Ex. B (CV of Matthew Hartley from Sierra
20 Consulting Group, LLC website, listing a Phoenix, Arizona work address,
21 <http://www.sierracglc.com/>).

22 7. Defendant GT is a citizen of New York and Florida, not Arizona. GT is a
23 New York limited liability partnership. *See* Compl. ¶ 6. As a limited liability partnership,
24 GT’s citizenship for diversity purposes is determined by the citizenship of each of its
25 partners. *See Johnson*, 437 F.3d at 899 (“[A] partnership is a citizen of all the states of
26 which its partners are citizens.”). GT has only two partners: (1) Greenberg Traurig of

1 New York, P.C., a New York professional corporation with its principal place of business
2 in New York; and (2) Greenberg Traurig, P.A., a Florida professional corporation with its
3 principal place of business in Florida. Professional corporations are treated the same as
4 ordinary corporations for purposes of determining diversity jurisdiction. *See Kuntz v.*
5 *Lamar Corp.*, 385 F.3d 1177, 1183 (9th Cir. 2004).

6 8. Plaintiffs' complaint in the Removed Case also lists as defendants several
7 fictitiously named individual and entities, such as "JOHN AND JANE DOES 1-30" and
8 "BLACK CORPORATIONS 1-30." "For purposes of removal under [28 U.S.C. §
9 1441(a)], the citizenship of defendants sued under fictitious names shall be disregarded."
10 28 U.S.C. § 1441(a).

11 9. Although the Kants are citizens of Arizona, *see* Compl. ¶ 10, they have been
12 fraudulently joined and their citizenship is to be disregarded for purposes of diversity
13 analysis. *See Morris*, 236 F.3d at 1067 ("Nevertheless, one exception to the requirement
14 of complete diversity is where a non-diverse defendant has been 'fraudulently joined.'").

15 10. Plaintiffs' claims against the Kants are barred by Arizona's two-year statute
16 of limitations for claims of legal malpractice and breach of fiduciary duty. *See* Ariz. Rev.
17 Stat. Ann. § 12-542 (2011). The citizenship of defendants against whom a plaintiff's
18 claims are time-barred is to be disregarded under the doctrine of fraudulent joinder. *See*
19 *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998) (affirming the existence of
20 federal diversity jurisdiction despite plaintiff's inclusion of non-diverse defendants where
21 plaintiff's claims against the non-diverse defendants were barred by the statute of
22 limitations). Such defendants are deemed to be "sham defendants," and their "presence in
23 the lawsuit is ignored for purposes of determining diversity." *Morris*, 236 F.3d at 1067.
24 Accordingly, the Court has original jurisdiction over the Removed Action pursuant to 28
25 U.S.C. § 1332(a)(1).

26

1 11. Finally, the \$75,000 amount-in-controversy requirement of 28 U.S.C. §
2 1332(a) is satisfied. The complaint in the Removed Case states that Plaintiffs are seeking
3 damages for Mortgages Ltd.’s deepening insolvency from 2006 through 2008, *see* Compl.
4 ¶¶ 220, 221, which Plaintiffs claim amounts to “aggregate losses that totaled hundreds of
5 millions of dollars,” *id.* ¶¶ 43–44.

6 **THE “RELATED TO” BANKRUPTCY JURISDICTION OF THIS COURT**

7 12. As a separate and independent basis for federal jurisdiction, this Court also
8 has “related to” bankruptcy jurisdiction over the Removed Case under 28 U.S.C. §
9 1334(b). Section 1334(b) gives federal district courts original jurisdiction over “all civil
10 proceedings arising under title 11, or arising in or related to cases under title 11.” 28
11 U.S.C. § 1334(b).

12 13. The Removed Case is “related to” the ongoing *In re Mortgages Ltd.*
13 bankruptcy proceeding, No. 2:08-bk-07465 (Bankr. D. Ariz). Plaintiff ML Liquidating
14 Trust was created pursuant to Mortgages Ltd.’s bankruptcy plan. *See* First Amended Plan
15 § 6.2, *In re Mortgages Ltd.*, No. 2:08-bk-07465 (Bankr. D. Ariz.), Dkt. No. 1532
16 (hereinafter the “Plan”). The ML Liquidating Trust’s purpose is to liquidate the non-loan
17 assets of Mortgages Ltd., the Debtor. *Id.* § 6.6.

18 14. The general test for “related to” jurisdiction under § 1334(b) is whether “the
19 outcome of the proceeding could conceivably have any effect on the estate being
20 administered in bankruptcy.” *State of Montana v. Goldin (In re Pegasus Gold Corp.)*, 394
21 F.3d 1189, 1193 (9th Cir. 2005) (emphasis omitted). Where, as here, the plan provides for
22 a liquidating reorganization—meaning the debtor will not re-emerge from the
23 bankruptcy—courts apply the broad “any conceivable effect” test even after confirmation
24 of the plan. *See Boston Reg’l Med. Ctr., Inc. v. Reynolds (In re Boston Reg’l Med. Ctr.,*
25 *Inc.)*, 410 F.3d 100, 107 (1st Cir. 2005) (“[W]hen a debtor (or a trustee acting to the
26 debtor’s behoof) commences ligation designed to marshal the debtor’s assets for the

1 benefit of its creditors pursuant to a liquidating plan of reorganization, the compass of
2 related to jurisdiction persists undiminished after plan confirmation.”); *Kirschner v. Grant*
3 *Thornton LLP (In re Refco, Inc. Sec. Litig.)*, 628 F. Supp. 2d 432, 442 (S.D.N.Y. 2008);
4 *Lindsey v. Travelers Indem. Co.*, 2007 WL 841411, at *3-5 (D. Ariz. Mar. 16, 2007)
5 (applying “any effect” test to post-confirmation action).

6 15. Courts sometimes follow a more limited “close nexus” test following
7 confirmation of the plan. *See Binder v. Price Waterhouse & Co. LLP (In re Resorts Int’l,*
8 *Inc.)*, 372 F.3d 154, 168-69 (3d Cir. 2004). Here, because the Plan is a liquidating plan,
9 there is no concern of endless bankruptcy jurisdiction, and therefore the close nexus test
10 does not apply. *See Boston Reg’l Med. Ctr., Inc.*, 410 F.3d at 106–07. But even under the
11 narrower close nexus test, related to jurisdiction is satisfied because the Removed Case has
12 a close nexus to the Plan and the continuing proceedings in the bankruptcy case. *See In re*
13 *Resorts Int’l, Inc.*, 372 F.3d at 168–69 (“[W]here there is a close nexus to the bankruptcy
14 plan or proceeding, as when a matter affects the interpretation, implementation,
15 consummation, execution, or administration of a confirmed plan or incorporated litigation
16 trust agreement, retention of post-confirmation bankruptcy court jurisdiction is normally
17 appropriate.”).

18 16. The purpose of Plaintiff ML Liquidating Trust is “solely to implement the
19 Plan.” First Amended Plan § 6.2. Under the Plan, the ML Liquidating Trust may bring
20 causes of actions that belonged to the Debtor. *Id.* § 6.6. Any recovery for actions pursued
21 by the ML Liquidating Trust is placed in a Liquidation Fund and used to pay creditors
22 under the Plan. *See id.* §§ 4.2, 6.4; *see also* Compl. ¶ 44 (“Plaintiff is endeavoring to
23 recover money that is owed to it for the purpose of paying such received funds to ML’s
24 investors and creditors.”). Because “the very claims being prosecuted by the Trust[] arise
25 under the Plan,” “the ‘implementation’ and ‘execution’ of the confirmed Plan are directly
26 at issue.” *In re Refco, Inc. Sec. Litig.*, 628 F. Supp. 2d at 443. Accordingly, the Removed

1 Action satisfies even the close-nexus test, and *a fortiori* satisfies the broader “any
2 conceivable effect” test.

3 17. This is a non-core proceeding under 28 U.S.C. § 157(b). Defendants do not
4 consent to entry of final orders or judgments by the Bankruptcy Court on non-core issues.

5 **VENUE IS PROPER IN THIS DISTRICT AND DIVISION**

6 18. Venue in the District of Arizona is proper under 28 U.S.C. § 1441(a)
7 because this Court is the United States District Court for the district and division
8 corresponding to the place where the Removed Case was filed.

9 WHEREFORE, Defendant GT hereby removes this above-captioned action from
10 the Superior Court of Arizona, Maricopa County on the bases set forth above, and requests
11 that further proceedings be conducted in this Court as provided by law.

12 RESPECTFULLY SUBMITTED this 25th day of April, 2011.

13 GALBUT & GALBUT, P.C.

14
15 By: /s/ Martin R. Galbut
16 Martin R. Galbut, Esq.
17 Michaile J. Berg, Esq.

18
19 Attorneys for Defendants Greenberg Traurig
20 and Robert and Ellen Kant

21 **NOTICE OF ELECTRONIC FILING**

22 I hereby certify that on April 25, 2011, I electronically filed the foregoing with the
23 Clerk of Court for filing and uploading to the CM/ECF system which will send
24 notification of such filing to all parties of record.

25 /s/ N. Sunshine Nye
26