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26 **IN THE UNITED STATES DISTRICT COURT**
27 **THE DISTRICT OF ARIZONA**

28 ML LIQUIDATING TRUST, as
successor-in-interest to Mortgages Ltd.,

Plaintiff,

v.

MAYER HOFFMAN MCCANN P.C., a
Missouri professional corporation; CBIZ,
Inc., a Delaware corporation; CBIZ MHM,
LLC, an Ohio limited liability company,

Defendants.

Case No. CV 10-2019-PHX-RRB

**REPLY IN SUPPORT OF MOTION
FOR LEAVE TO FILE SUR-REPLY OF
DEFENDANTS MAYER HOFFMAN
MCCANN P.C., CBIZ, INC., AND CBIZ
MHM, LLC**

1 In response to the Motion for Leave to File a Sur-Reply of Defendants Mayer
2 Hoffman McCann P.C., CBIZ, Inc., and CBIZ MHM, LLC (collectively “Defendants”),
3 Plaintiff ML Liquidating Trust (“Trust”) suggests that its Reply’s argument regarding the
4 citizenship of trusts was not new because Defendants bear the burden of proof to establish
5 jurisdiction. (Doc. 47, Resp., at 3.) But that fact does not allow the Trust to make new
6 arguments in a reply brief for which Defendants get no response. If it did, all defendants
7 could submit “new arguments and new evidence” in reply briefs in support of motions to
8 dismiss, because the plaintiffs bear the burden of proof to establish their claims. *MJG*
9 *Enters., Inc. v. Cloyd*, No. 10-0086-PHX-MHM, 2010 WL 3842222, at *6 n.1 (D. Ariz.
10 Sept. 27, 2010). But, of course, that is not permitted. *Id.*

11 Regardless, the Trust’s new argument lacks merit for the reasons our Sur-Reply
12 explained. As its sole response, the Trust criticizes Defendants for not citing *Carden v.*
13 *Arkoma Associates*, 494 U.S. 185 (1990). (Doc. 47, Resp., at 3-4.) But *Carden* involved
14 the citizenship of a limited partnership, not a trust. 494 U.S. at 187. Indeed, the Ninth
15 Circuit’s binding decision in *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d
16 894 (9th Cir. 2006), cited *Carden* twice for the law governing partnerships, but did not cite
17 it at all for the law governing trusts. *See Johnson*, 437 F.3d at 899. The Court must
18 follow the test for trusts established by *Johnson*, a case that comes after *Carden* and could
19 not possibly have been overruled by it. For these reasons, Defendants respectfully request
20 that the Court allow it to file a Sur-Reply in response to the Trust’s new arguments in its
21 Reply.

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1 DATED: January 31, 2011.

2 Respectfully submitted,

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25 *CBIZ MHM, LLC*
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CERTIFICATE OF SERVICE

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I hereby certify that on January 31, 2011, I electronically filed the foregoing Reply Brief with the Clerk of the Court using the CM-ECF system and served the following parties by U.S. mail:

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