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

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

11 Plaintiff,

12 vs.

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

16 Defendants.

Case No. 2:10-cv-02019-RRB

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION FOR
LEAVE TO FILE SUR-REPLY**

17 Plaintiff ML Liquidating Trust, as successor-in-interest to Mortgages, Ltd. ("ML
18 Trust") has filed a motion requesting that this matter be remanded back to state court (the
19 "Remand Motion"). Although the issues have been fully briefed by the parties in accordance
20 with the Court's briefing schedule, Defendants now move for permission to file a Motion for
21 Leave to File Sur-Reply (the "Sur-Reply Motion"). Defendants' Sur-Reply Motion is
22 nothing more than an effort to improperly supplement arguments which already have been
23 made by Defendants in their repose to the Remand Motion. Thus, the Sur-Reply Motion
24 should be denied.

1 **II. DEFENDANTS’ SUR-REPLY IS IMPROPERLY INTENDED TO**
2 **SUPPLEMENT ARGUMENTS ALREADY MADE BY DEFENDANTS AND**
3 **SHOULD BE DENIED.**

4 Sur-replies “are highly disfavored, as they usually are a strategic effort by the
5 nonmoving party to have the last word on a matter.” *Sims v. Paramount Gold and Silver*
6 *Corp.*, 2010 WL 5364783, *8 (Slip Copy) (D. Ariz. Dec. 21, 2010). “Accordingly, courts
7 will not allow surreplies except in the most extraordinary circumstances.” *Id.*

8 Defendants seek leave to file a sur-reply based upon the pretext that “for the first
9 time” Plaintiff’s reply brief raised “an argument regarding the citizenship of trusts.” (Sur-
10 Reply Motion, p. 2.)¹ The Sur-Reply Motion, however, rests on a flawed presumption --
11 specifically that Plaintiff had an obligation to establish citizenship for diversity purposes or
12 otherwise disprove diversity jurisdiction in its opening brief in support of its Remand
13 Motion.

14 In the Remand Motion, Plaintiff challenged the allegations in Defendants’ Notice of
15 Removal, pointing out that Defendants had failed to meet their heavy burden of establishing
16 the existence of diversity or bankruptcy-related jurisdiction and further arguing that the
17 matter should, in any event, be equitably remanded. (*See* Remand Motion, Doc. No. 33.)
18 Having raised a challenge to Defendants’ alleged jurisdictional bases for removal, the burden
19 was squarely on Defendants to establish jurisdiction. *See Schwartz v. FHP Intern. Corp.*,
20 947 F.Supp. 1354, 1358 (D. Ariz. 1996) (“Plaintiffs’ motion for remand places the burden of
21 establishing federal jurisdiction on Defendants FHP.”) “The strong presumption against

22 ¹ Even though Defendant’s Sur-Reply Motion is based solely upon a purportedly new
23 argument relating to Plaintiff’s citizenship, Defendants also intend to use their proposed
24 “Sur-Reply” to inappropriately re-argue its position concerning this Court’s ability to
25 equitably remand this matter. (*See* Exh. 1 to Defendants’ Sur-Reply Motion, pp. 4-5.) At a
minimum, this portion of Defendants’ Sur-Reply Motion, which bears absolutely no
relationship whatsoever to Defendants’ underlying rationale for seeking leave to file a sur-
reply in the first place, should be stricken.

1 removal jurisdiction” meant that Defendants had “the burden of establishing that removal
2 [was] proper” and, therefore, that diversity jurisdiction exists. *Gaus v. Miles Inc.*, 980 F.2d
3 564, 566 (9th Cir. 1992).

4 Plaintiff’s Remand Motion did not specifically dispute whether a “trust has the
5 citizenship of its trustee or trustees” because, at the time it was filed, any discussion
6 regarding the Trust’s citizenship, for purposes of defeating diversity, was premature. The
7 burden was on Defendants to establish diversity jurisdiction -- not on Plaintiff.

8 When Defendants responded to Plaintiff’s Remand Motion, they provided affidavits,
9 claiming to be citizens of Kansas and Ohio. (*See* Defendants’ Response to Plaintiff’s Motion
10 to Remand, Doc. No. 35.) Relying on *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d
11 894 (9th Cir. 2006), Defendants argued that a trust takes the citizenship of its trustee(s) *only*.
12 Defendants claimed that diversity existed because the Trustee at the time (Kevin O’Halloran)
13 was a citizen of Georgia.

14 In its reply brief, Plaintiff did not raise a “new” argument. Plaintiff responded to the
15 Defendants’ assertion that a trust’s domicile for jurisdictional purposes is determined *solely*
16 by the residence of the trustee. Plaintiff pointed out that controlling authority -- the United
17 States Supreme Court’s decision in *Carden v. Arkoma Assoc.*, 494 U.S. 185, 110 S.Ct. 1015,
18 108 L.Ed.2d 157 (1990) -- holds that in suits by an artificial entity such as a trust or
19 partnership, it is appropriate for the Court to look to the citizenship of the trust’s
20 beneficiaries for purposes of determining the citizenship of the Trust under 28 U.S.C. § 1332
21 (diversity jurisdiction).² Under this rule, because certain ML Trust beneficiaries reside in

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23 ² In its proposed “Sur-Reply,” Defendants argue that Plaintiff “relies exclusively on out-of-
24 circuit, non-binding precedent” to overcome the Ninth Circuit’s statement in *Johnson* that “a
25 trust has the citizenship of its trustee or trustees.” This is fallacious. Plaintiff’s position is
premiered on *Carden* and Ninth Circuit courts are “bound to follow a controlling Supreme
Court precedent until it is explicitly overruled by that Court.” *See also U.S. v. Weiland*, 420

1 Ohio, diversity is defeated. There is certainly nothing “unfair” about pointing the Court to
2 the correct rule of law as Plaintiff has done in connection with its effort to rebut the existence
3 of diversity jurisdiction as purportedly established by the affidavits provided in connection
4 with Defendant’s response to the Remand Motion.

5 It was Defendant’s burden to establish diversity using the appropriate jurisdictional
6 standard and, thus, arguably incumbent *upon Defendant* to bring *Carden* to the attention of
7 the Court -- either in its removal notice or in its response brief. It is certainly hard to fathom
8 that Defendants, collectively represented by one of the largest law firms in the world, were
9 unaware of *Carden* or were otherwise “caught off guard” by Plaintiff’s reliance on *Carden* in
10 its reply brief. Whatever the case may be, if Defendants truly needed or wanted an
11 “opportunity to respond” to the purportedly “new” arguments raised in Plaintiff’s reply,
12 Defendants’ proposed “Sur-Reply” would at least include some discussion of the *Carden*
13 decision. Yet, like Defendant’s notice of removal and its response to the Remand Motion,
14 Defendants’ proposed Sur-Reply is devoid of any mention whatsoever of *Carden* and simply
15 parrots its previously stated position -- i.e., that the citizenship of a trust is determined
16 exclusively by the domicile of the trustee. In other words, Defendants seek leave to file their
17 proposed Sur-Reply to improperly regurgitate and supplement the same stance that
18 Defendants have already taken -- not to address a new argument.

19 Defendants should not be permitted to ignore Supreme Court precedent and then feign
20 surprise in an effort to improperly have the last word. *Sims* 2010 WL 5364783 at *8.

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23 F.3d 1062 (9th Cir. 2005); *U.S. v. Chase*, 281 F.2d 225 (7th Cir. 1960) (“[D]istrict Courts as
24 well as the Courts of Appeals must follow the decisions and interpretations of our highest
25 court in spite of any individual predilections that may exist.”) Quite remarkably, Defendants
totally disregard *Carden*, never mentioning the decision in their removal notice, their
Response *or even in their proposed Sur-Reply*.

1 Defendants have not shown the “exceptional circumstances” required to warrant a surreply
2 and, therefore, Defendants’ motion should be denied. *Id.*

3 **III. CONCLUSION**

4 For the reasons set forth herein, Plaintiff respectfully requests that the Court deny
5 Defendant’s Sur-Reply Motion. Alternatively, if the Court grants the Sur-Reply Motion,
6 Plaintiff requests leave to file a response.

7 **RESPECTFULLY SUBMITTED:** this 28th day of January, 2011.

8 **DICARLO CASERTA MCKEIGHAN & PHELPS PLC**

9 */s/ Nicholas J. DiCarlo*

10 Nicholas J. DiCarlo

11 Christopher A. Caserta

12 **ORIGINAL** electronically filed with the Clerk’s Office;
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