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8 **SUPERIOR COURT OF ARIZONA**

9 **MARICOPA COUNTY**

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

12 Plaintiffs,)

13 v.)

14 FRANCINE COLES, individually, as)
Trustee for THE COLES CHILDREN'S)
15 TRUST and as conservator for Z.A.)
COLES and S.B. COLES, minors;)
16 HALEY BROOKE COLES, an)
individual; JOHN AND JANE DOES 1-)
17 30; BLACK CORPORATIONS 1-30;)
WHITE PARTNERSHIPS 1-30; and)
18 GRAY TRUSTS 1-30,)

19 Defendants.)
20)
21)

No. CV2011-005890

FIRST AMENDED COMPLAINT

(Unjust Enrichment, Fraudulent Transfer,
Constructive Trust, Wrongful Distribution,
Aiding and Abetting Conversion, Aiding and
Abetting Breach of Fiduciary Duty)

(Assigned to the Honorable Edward O.
Burke)

22 For their Complaint, Plaintiffs, ML Servicing Co., Inc. and ML Liquidating Trust
23 alleges as follows:
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GENERAL ALLEGATIONS

1. Plaintiff, ML Servicing Co., Inc. ("Plaintiff") is an Arizona corporation that was formerly known as Mortgages, Ltd. ("ML").

2. Plaintiff ML Liquidating Trust is a liquidating trust that is organized under the laws of Arizona and the owner of Plaintiff.

3. ML Liquidating Trust was created as part of the Chapter 11 Plan of Reorganization for ML, which was approved by the United States Bankruptcy Court for the District of Arizona on May 20, 2009.

4. Pursuant to the Chapter 11 Plan of Reorganization for ML, ML Servicing Co., Inc. and ML Liquidating Trust are authorized to prosecute the claims asserted herein.

5. Upon information and belief, each of the Defendants received proceeds from life insurance policies in which Scott Coles was the insured party.

6. Upon information and belief, Defendant Francine Coles is the Trustee for The Coles Children's Trust and he resides in Maricopa County, Arizona.

7. Upon information and belief, The Coles Children's Trust is a trust created by Scott Coles for the benefit of his children.

8. Upon information and belief, Defendant Francine Coles is a single woman residing in Maricopa County, Arizona.

9. Upon information and belief, Defendant Francine Coles is the mother of and the conservator for Z.A. Coles and S.B. Coles, who are Scott Coles' children.

10. Upon information and belief, Defendant Haley Coles is a single woman residing in Maricopa County, Arizona.

11. Defendant Haley Coles is Scott Coles' daughter.

12. The true names of all John Doe, Jane Doe, Black Corporation, White Partnership, and Gray Trust Defendants are unknown to Plaintiff at the time of the filing of this Complaint,

1 and Plaintiff, therefore, sues them through fictitious names. Plaintiff will ask leave of Court to
2 amend this Complaint to reflect the true names of these unknown Defendants if and when they
3 have been ascertained.

4 13. Jurisdiction is proper pursuant to A.R.S. § 12-123.

5 **THE LIFE INSURANCE POLICIES**

6 14. For more than 40 years, ML was a private mortgage broker and lender before an
7 involuntary petition for relief under Chapter 11 of the United States Bankruptcy Code was filed
8 by some of ML's creditors in 2008.

9 15. In the years prior to ML's bankruptcy it was owned by SMC Revocable Trust.

10 16. Before 2006, Scott Coles became ML's Chief Executive Officer and he
11 continued to serve in that capacity until his death on June 2, 2008.

12 17. By no later than 2008, ML's financial condition had deteriorated to the point that
13 it was insolvent and lacked sufficient funds to pay its investors and to fund substantial loans
14 that ML had committed to fund.

15 18. In the wake of ML's imminent collapse, on or about June 2, 2008, Scott Coles
16 committed suicide.

17 19. In the two years preceding Scott Coles' suicide, with ML's financial condition
18 rapidly deteriorating and during a time when ML was insolvent, SMC Revocable Trust caused
19 ML to transfer funds to SMC Revocable Trust, for the purpose of paying life insurance
20 premiums on life insurance policies under which Scott Coles was the insured ("the Life
21 Insurance Policies").

22 20. Upon information and belief, the SMC Revocable Trust was established by Scott
23 Coles.

24 21. SMC Revocable Trust was at all relevant times, a shareholder of ML.

1 32. ML received no benefit as a result of SMC Revocable Trust causing ML to pay
2 the premiums on the Life Insurance Policies and as an insolvent corporation, ML owed
3 fiduciary duties to its creditors and investors to refrain from making transfers to Scott Coles or
4 other insiders.

5 33. Because SMC Revocable Trust caused ML to transfer the funds that were used to
6 pay the Life Insurance Policy premiums, ML did not gratuitously or voluntarily pay those
7 premiums for the benefit of Scott Coles or any of the Defendants.

8 34. Defendants were unjustly enriched by receiving the proceeds from the Life
9 Insurance Policies.

10 35. Defendants gave no value to ML in exchange for the benefits they received from
11 the Life Insurance Policies.

12 36. ML's impoverishment and Defendants' enrichment are directly connected.

13 37. As a direct and proximate result of Defendants' unjust enrichment, Plaintiffs
14 have sustained damages in an amount to be proven at trial.

15 38. Plaintiff is entitled to have the Court impose a constructive trust on the proceeds
16 from the Life Insurance Policies that were received by Defendants.

17 **COUNT II – FRAUDULENT TRANSFER**

18 39. Plaintiffs reallege and incorporate by reference the allegations set forth in the
19 preceding paragraphs as if fully set forth herein.

20 40. SMC Revocable Trust caused ML to transfer assets to SMC Revocable Trust for
21 the purpose of purchasing life insurance policies that would benefit Defendants and which
22 would not benefit ML.

23 41. At the time of the transfers, ML had a right of payment against Scott Coles and
24 SMC Revocable Trust for the funds that were transferred for the purpose of purchasing life
25 insurance policies that would benefit Defendants.

1 42. At the time of the transfers, ML was either insolvent or became insolvent as a
2 result of the transfers.

3 43. ML did not receive reasonably equivalent value in exchange for the transfers.

4 44. Scott Coles and SMC Revocable Trust engaged in those transfers with the actual
5 intent to hinder, delay, and defraud ML and ML's creditors and investors.

6 45. Scott Coles and SMC Revocable Trust were insiders with respect to ML at the
7 time when the transfers were made.

8 46. Scott Coles, SMC Revocable Trust, and the Defendants concealed the transfers
9 from ML and its creditors and investors.

10 47. The transfer of ML's assets for the benefit of Defendants constitutes a fraudulent
11 transfer pursuant to A.R.S. §§ 44-1004 and 44-1005.

12 48. As a direct and proximate result of the fraudulent transfers for the benefit of
13 Defendants, Plaintiffs have been damaged in an amount to be proven at trial.

14 **COUNT III – CONSTRUCTIVE TRUST**

15 49. Plaintiffs reallege and incorporate by reference the allegations set forth in the
16 preceding paragraphs as if fully set forth herein.

17 50. At all relevant times, Scott Coles owed ML a fiduciary duty.

18 51. Scott Coles represented to ML that he had purchased or would purchase key man
19 or other life insurance policies for the benefit of ML.

20 52. Scott Coles expressly or impliedly led ML to believe that some or all of the funds
21 that were being transferred to SMC Revocable Trust for the purpose of paying insurance
22 premiums on key man or other life insurance policies that were for the benefit of ML.

23 53. ML reasonably relied on Scott Coles' representations.

24 54. Defendants will be unjustly enriched at Plaintiff's expense unless a constructive
25 trust is imposed on the proceeds of the Life Insurance Policies.

1 55. Plaintiff is entitled to have the Court impose a constructive trust on the proceeds
2 from the Life Insurance Policies that were received by Defendants.

3 **COUNT IV – WRONGFUL DISTRIBUTION –**
4 **VIOLATION OF A.R.S. § 10-640**

5 56. Plaintiffs reallege and incorporate by reference the allegations set forth in the
6 preceding paragraphs as if fully set forth herein.

7 57. When SMC Revocable Trust caused ML to transfer funds to SMC Revocable
8 Trust for the purpose of paying the Life Insurance Policies, he directed ML to treat those and
9 other transfers as shareholder distributions.

10 58. When SMC Revocable Trust transferred funds to the SMC Revocable Trust for
11 the benefit of Defendants, ML was unable to pay its debts as they came due in the ordinary
12 course of business.

13 59. Upon information and belief, at the time when SMC Revocable Trust transferred
14 funds to the SMC Revocable Trust for the benefit of Defendants, ML's assets were less than
15 the sum of its total liabilities.

16 60. The transfers of funds from ML to SMC Revocable Trust for the purpose of
17 paying premiums on the Life Insurance Policies violated A.R.S. § 10-640.

18 61. As a direct and proximate result of the improper distributions to SMC Revocable
19 Trust, ML has been damaged in an amount to be proven at trial.

20 62. Because the funds that were used to pay the premiums on the Life Insurance
21 Policies were obtained in violation of A.R.S. § 10-640, ML is entitled to a constructive trust on
22 the proceeds of the Life Insurance Policies.

23 **COUNT V – TRUST FUND DOCTRINE**

24 63. Plaintiffs reallege and incorporate by reference the allegations set forth in the
25 preceding paragraphs as if fully set forth herein.

1 73. Upon information and belief, Defendants knew or reasonably should have known
2 that SMC Revocable Trust was converting funds from ML at a time when ML was insolvent or
3 on the verge of becoming insolvent.

4 74. Defendants each acquiesced to the conversion of ML’s assets for their benefit
5 and accepted the benefits of the conversion of ML’s assets and thereby aided, abetted, and
6 provided substantial assistance in furtherance of the conversion of ML’s assets.

7 75. As a direct and proximate result of Defendants’ aiding, abetting, and providing
8 substantial assistance in furtherance of the conversion of ML’s assets, Plaintiffs have sustained
9 damages in an amount to be proven at trial.

10 **COUNT VII – AIDING AND ABETTING BREACH OF FIDUCIARY DUTY**

11 76. Plaintiffs reallege and incorporate by reference the allegations set forth in the
12 preceding paragraphs as if fully set forth herein.

13 77. At all relevant times, Scott Coles and SMC Revocable Trust owed ML a
14 fiduciary duty.

15 78. Scott Coles and SMC Revocable Trust breached their fiduciary duties to ML by
16 among other things, causing ML to transfer funds to SMC Revocable Trust to purchase the
17 Life Insurance Policies at times when ML was insolvent or on the verge of becoming insolvent.

18 79. Upon information and belief, Defendants knew or reasonably should have known
19 that Scott Coles and SMC Revocable Trust were breaching his fiduciary duties to ML by
20 causing ML to transfer funds for Defendants’ benefit at a time when ML was insolvent or on
21 the verge of becoming insolvent.

22 80. Defendants each acquiesced to SMC Revocable Trust and Scott Coles’ breaches
23 of their fiduciary duties and accepted the benefits of the improper transfers of ML’s assets and
24 thereby aided, abetted, and provided substantial assistance in furtherance of SMC Revocable
25 Trust and Scott Coles’ breaches of their fiduciary duties.
26

1 81. As a direct and proximate result of Defendants' aiding, abetting, and providing
2 substantial assistance in furtherance of SMC Revocable Trust and Scott Coles' breaches of
3 their fiduciary duties, Plaintiffs have sustained damages in an amount to be proven at trial.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs pray for judgment against Defendants and each of them as
6 follows:

7 A) For damages in the amount of the proceeds that each Defendant received from
8 the Life Insurance Policies;


9 B) For the imposition of a constructive trust in favor of Plaintiff on all of the
10 proceeds that each Defendant received from the Life Insurance Policies;

11 C) For its reasonable attorneys' fees and costs; and

12 D) For such other and further relief as the Court deems appropriate.
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14 RESPECTFULLY SUBMITTED this 10th day of May, 2011.
15

16 **STINSON MORRISON HECKER LLP**

17 By: 
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23 Attorneys for Plaintiff
24
25
26

1 ORIGINAL filed this 10 day of May,
2011:

2 Clerk of the Court
3 Maricopa County Superior Court
101/201 West Jefferson
4 Phoenix, Arizona 85003

5 COPY of the foregoing hand-delivered
this 10 day of May, 2011 to:

6 The Honorable Edward O. Burke
7 Maricopa County Superior Court
101/201 West Jefferson
8 Phoenix, Arizona 85003

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