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8 Attorneys for ML Liquidating Trust
as Plaintiff in certain Superior Court Litigation

9 **IN THE UNITED STATES BANKRUPTCY COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 In re
12 MORTGAGES, LTD.,
13 Debtor.

Chapter 11
Case No. 2:08-bk-07465-EPB

**MOTION FOR CONFIRMATION OF
SETTLEMENT WITH THE COLES GROUP**

Hearing Date:
Hearing Time:
16 Location: Courtroom 703
230 N First Ave
17 Phoenix, AZ 85003

18
19 Matthew Hartley, as Trustee ("*Trustee*") of the ML Liquidating Trust ("**ML Trust**"), and ML
20 Servicing Co., Inc., an Arizona corporation ("**ML Servicing**," and together with the ML Trust, the
21 "**ML Group**"), hereby requests an order from the Court confirming the Settlement Agreement attached
22 hereto as Exhibit A¹ (hereafter the "**Motion**"). The Settlement Agreement is between the ML Group,
23 on the one hand, and Francine Coles, individually ("*Francine*"), and as Trustee for the Coles
24 Children's Trust ("*Children's Trust*"), as Conservator for Z.A. Coles ("*Zack*") and S.B. Coles

25 ¹ The parties have reached a binding settlement agreement under Ariz. R. Civ. P. 80(d). The attached
26 Exhibit A accurately reflects the terms of the parties' settlement and counsel for both parties believe
27 that Exhibit A is the final form of the settlement agreement. Due to travel schedules, they have not
28 been able to obtain signatures for the settlement agreement. The parties will supplement this Motion
with the signatures when they are obtained.

1 ("Sam"), as Trustee for her individual trust ("*Francine Trust*"), Haley Brooke Coles ("*Hayley*"), Zack
2 Coles and Same Coles, on the other hand (collectively, the "*Coles Group*").

3 The settlement is not with and does not settle any Causes of Action against Ashley Coles
4 (hereafter referred to as the "*Non-Settling Defendant*").

5 The Settlement Agreement resolves claims by the ML Group against the Coles Group brought
6 in Maricopa County Superior Court as case no. CV2011-005890 (the "*State Court Case*") that are
7 currently on appeal in the Arizona Court of Appeals, case no. 1CA-CV-13-0282 (the "*Appeal*"). The
8 Liquidating Trust shall continue to pursue all Causes of Action in such case brought against the Non-
9 Settling Defendant.

10 The parties request the Court to consider this Motion on an expedited basis on shortened notice
11 as they have suspended proceedings pending consideration of this Motion. A separate Motion to
12 Expedite is filed herewith requesting consideration within 20 days.

13 This Motion is supported by the following Memorandum of Points and Authorities and exhibits
14 hereto.

15 MEMORANDUM OF POINTS AND AUTHORITIES

16 I. Jurisdiction.

17 This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, the Official
18 Committee of Investors' First Amended Plan of Reorganization Dated March 12, 2009 (the "*Plan*",
19 DE #1532) at §9.1(i), and the Order Confirming Investors' Committee's First Amended Plan of
20 Reorganization Dated March 12, 2009 (the "*Confirmation Order*," entered May 20, 2009, DE #1755).
21 The interests of the Debtor in ongoing and potential litigation were transferred to the ML Liquidating
22 Trust (Plan at §§ 4.3 and 6.2). To the extent, if any, that any claims were retained by ML Servicing, the
23 ML Trust has authority to bring them on behalf of ML Servicing. Plan at §6.2. This is a core
24 proceeding within the meaning of 28 U.S.C. § 157(b). In several prior proceedings post-confirmation,
25 the Court has noted that because the relief requested is an important part of the implementation of the
26 Plan, the Court has the authority to confirm and approve settlements. *See, State of Montana v. Golding*
27 (*In re Pegasus Gold Corp.*), 394 F. 3d 1189, 1194 (9th Cir. 2005). *See also*, prior motions for approval
28

1 of settlements post-confirmation (Dockets # 3652, 3812, and orders approving such motions at #3652,
2 and 3855, respectively).

4 **II. Introduction.**

5 The ML Group seeks Bankruptcy Court confirmation of a settlement that puts to rest hotly
6 disputed litigation over whether four beneficiaries of approximately \$38 million dollars in Scott Coles'
7 life insurance proceeds must return the proceeds to the bankruptcy estate. There is great uncertainty in
8 the case at the moment: this mediated settlement was reached just as the parties were about to argue to
9 the Court of Appeals whether the trial court erred when it dismissed the ML Group's claims. The
10 Settlement Agreement will put to rest this uncertainty as to the Coles Group,² eliminate the time,
11 expense and risk of further litigation with the Coles Group, and bring \$10 million to the Liquidated
12 Trust, less attorney fees and costs.

14 **III. Factual Background.**

15 **A. Proceedings in the Bankruptcy**

16 1. On June 20, 2008, an involuntary petition was filed against Debtor Mortgages Ltd., and
17 the order for relief under Chapter 11 of the United States Bankruptcy Code was entered on June 24,
18 2008.

19 2. On July 31, 2008, the Court appointed an Official Investors' Committee (the "*Investors*
20 *Committee*") to represent the interests of investors who held claims against the Debtor on account in
21 various of Debtor's investment opportunities. The Investors Committee ultimately proposed the Plan
22 that was confirmed by the Confirmation Order. The Plan had an Effective Date of June 16, 2009 (the
23 "*Effective Date*," DE #1807). The Plan is still in the process of being performed and this case has not
24 been closed.

25
26 ² A separate state court case was filed against Ashley Coles, Mr. Coles' spouse at the time of his death,
27 who was also a named beneficiary and also received a share of the life insurance proceeds. Ashley
28 Coles' case was consolidated with the State Court Case for procedural purposes only, and dismissal of
her case is also on appeal. This settlement does not affect the ML Group's claim against Ashley Coles.

1 3. Pursuant to §4.4 of the Plan, the Debtor was reorganized with a limited purpose on the
2 Effective Date, all equity interests in the Debtor were canceled, its name was changed to ML Servicing
3 Co., Inc., and new equity interests in ML Servicing were issued, 100% of which are held by the ML
4 Trust.

5 4. Pursuant to §§ 4.1 and 6.2 of the Plan, the ML Liquidating Trust was created on the
6 Effective Date solely for the purpose of implementing the Plan.

7 5. The Plan appoints the Trustee as a representative of the bankruptcy estate pursuant to 11
8 U.S.C. §1123, and gives the Trustee the rights of a trustee under §1106 of the Bankruptcy Code. The
9 ML Trust has full power and authority, either in its name or in the name of the Debtor (now ML
10 Servicing), to commence, prosecute, settle and abandon actions. Plan at §6.2.

11 B. **The State Court Case**

12 1. Before these bankruptcy proceedings were commenced, Debtor's principal, Scott Coles,
13 purchased tens of millions of dollars in life insurance, using funds that the ML Group contends were
14 the property of Mortgages Ltd., and naming as beneficiaries family members, including the Coles
15 Group. Mr. Coles committed suicide before these bankruptcy proceedings commenced, and the
16 proceeds of the life insurance were paid to the beneficiaries, including the Coles Group and the one
17 non-settling defendant, Ashley Coles. Francine, Zack, Sam and Hayley received, directly or through a
18 trust for their benefit, a share of the benefits equal to approximately \$9,670,000 each (the "**Beneficiary**
19 **Payments**").³

20 2. The ML Group is the plaintiff in the State Court Case, which seeks to avoid and recover
21 the Beneficiary Payments from the Coles Group⁴ on theories of unjust enrichment, constructive trust,
22 wrongful distribution, conversion, and breach of fiduciary duty.

23 3. On October 26, 2012, the state court judge held that because the Beneficiary Payments
24 were life insurance proceeds they were exempt under A.R.S. § 20-1131(A), and dismissed the ML
25 Group's claims against the Coles Group in the State Court Case. The ML Group believes the state court
26 improperly applied Arizona law, and it timely appealed the decision. In conjunction with this

27 ³ The amount received by Ashley Coles is not known to the ML Group.

28 ⁴ The ML Group also asserts claims against Ashley Coles. See *fn. 1, supra*.

1 settlement, the ML Group was required to dismiss the appeal against the Coles Group while it
2 proceeded against Ashley Coles.

3 4 **IV. Summary of the Settlement Terms.**

5 After extensive mediation conducted with the assistance of mediator Kevin T. Ahearn, Esq.
6 (the "*Mediator*") throughout March and April, 2014, the ML Group and the Coles Group have entered
7 into the Settlement Agreement attached hereto as Exhibit A, which provides for a full satisfaction and
8 release of all claims as between them. In summary,⁵ the Settlement Agreement provides:

9 1. Subject to Bankruptcy Court confirmation, the ML Group has agreed to accept, and the
10 Coles Group has agreed to pay to the ML Group, the sum of \$10 million (the "*Settlement Sum*") in full
11 settlement of all claims as between the ML Group and the Coles Group, known or unknown, including
12 but not limited to those stated or which could have been stated by the ML Group against the Coles
13 Group in the State Court Case, and if the Bankruptcy Court does not confirm the Settlement
14 Agreement, the ML Group would refile the State Court Case, with recovery not to exceed \$13 million.
15 The Settlement Sum is payable only if this Court confirms that (1) the settlement is fair and reasonable,
16 (2) the settlement is in the best interests of the ML Group, and (3) the consideration for the settlement
17 is sufficient for the releases provided to the Coles Group.

18 2. The parties have also agreed to execute complete mutual releases.

19 3. The Coles Group will not object to or otherwise interfere with any attempts by the ML
20 Group to pursue claims against or discover confidential information from Ashley Coles concerning her
21 settlement with the Coles Group and her receipt of any portion of the Beneficiary Payments.

22 4. The parties agree that the Mediator will be the final arbiter of any future disputes over
23 compliance with or satisfaction of the conditions of Settlement or ongoing Settlement obligations.

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⁵ While the ML Group believes its summary is accurate, to the extent it conflicts with the Settlement
27 Agreement, the Settlement Agreement controls. All interested parties are urged to read the Settlement
28 Agreement for a complete understanding of the settlement terms.

1 *General Store of Beverly Hills*, 11 B.R. 539, 541 (Bankr. 9th Cir. 1981); see also *A & C Properties*,
2 784 F.2d at 1384.

3 In this case, the \$10 million settlement represents a reasonable resolution of a dispute over \$38
4 million in life insurance proceeds – particularly since, as things currently stand, the ML Group will
5 have to prevail in the Appeal in order to proceed with a case that is still in its early stages. While the
6 ML Group is confident of its position, there is inevitably a risk that the lower court's dismissal could be
7 affirmed, leaving it with no recovery unless it successfully prosecutes a discretionary appeal to the
8 Arizona Supreme Court. Even if the trial court's decision is reversed, the ML Group anticipates
9 expensive litigation with the Coles Group as the parties conduct discovery, prepare for and conduct a
10 trial, and – whatever the result - in all probability engage in further post-trial proceedings and appeals.
11 The first and third *Woodson* factors (likelihood of success and expense of litigation) thus militate in
12 favor of approval of the Settlement, since it removes the risk of a zero recovery and resolves this
13 matter expeditiously, without further expense.

14 The third *Woodson* factor – difficulty in collection – also presents a risk that may be difficult to
15 quantify, but that weighs heavily in favor of approving the Settlement Agreement. The Coles Group
16 consists of individuals (or trusts for the benefit of individuals), and it is impossible at this point to
17 know whether, after a judgment is obtained, collection will be difficult. Certainly the litigation is an
18 incentive for the Coles Group to engage in asset protection practices that could make collection
19 problematic. By contrast, the Settlement Agreement provides a mechanism for the Coles Group to
20 voluntarily and promptly make an agreed substantial payment without further effort or risk on the part
21 of the ML Group.

22 Finally, the Settlement Agreement is well within the "zone of reasonableness," requiring the
23 Coles Group to make a prompt payment of ten million dollars when, if they are successful in defending
24 the trial court's dismissal on appeal, they would otherwise have no liability at all, and in fact would
25 have a judgment against the ML Group for attorneys' fees and expenses. Under the uncertain
26 circumstances currently present, and particularly given the risk that proceeding to a point of certainty
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1 could eliminate any recovery whatsoever, the Settlement Agreement is in the best interests of the ML
2 Group and its ultimate beneficiaries are the creditors of the Mortgages Ltd bankruptcy estate.

3
4 **VI. Conclusion.**

5 The Settlement Agreement represents a hard-fought compromise that is in the best interests of
6 creditors, and was only available during this limited window of time because of the uncertainty of the
7 outcome of the pending Appeal. The ML Group requests that the Court enter its Order

8 (i) granting this Motion by finding that (a) the settlement is fair and reasonable, (b) the
9 settlement is in the best interests of the ML Group, and (c) the consideration for the settlement is
10 sufficient for the releases provided to the Coles Group;

11 (ii) confirming and approving the ML Group's decision to enter into and perform the Settlement
12 Agreement; and

13 (iii) granting the ML Group such other and further relief as is just in the circumstances.

14 Dated this May 2, 2014.

15 **STINSON LEONARD STREET LLP**

16 By: /s/ Alisa C. Lacey (#010571)

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MEDIATION SETTLEMENT MEMORANDUM

Starting on March 19, 2014, and continuing thereafter through April 18, 2014, Kevin T. Ahern, Esq. (the "Mediator") conducted a mediation process which culminated in a binding Ariz. R. Civ. P. 80(d) settlement terms sheet (the "Terms Sheet") containing the essential terms of a settlement reached by the parties subscribing to this Mediation Settlement Memorandum (called the "Memorandum". The defined terms used in the Terms Sheet are also utilized in this Memorandum, including Exhibit 1 hereto.

Recitals

A. Reference is made to Case No. CV2011-011666 (Consolidated with CV2011-005890), M L Servicing Co., Inc., et al. vs. Ashley M. Coles et al., in the Maricopa County Superior Court, State of Arizona (the "Action").

B. Reference is made to proceedings in the United States Bankruptcy Court in the District of Arizona styled *In Re Mortgages Ltd*, Case No. 2:08-bk-07465-RJH (the "Bankruptcy Court").

C. ML Servicing Co., Inc. ("ML Servicing"), is a Plaintiff in the Action.

D. ML Liquidating Trust ("ML Liquidating"), is a Plaintiff in the Action.

E. ML Servicing and ML Liquidating are sometimes collectively called the "ML Group".

F. Francine Coles, individually, as Trustee for the Coles Children's Trust, and as conservator for Z.A. Coles and S.B. Coles (collectively, "Francine Coles"), is a Defendant in the Action.

G. Z.A. Coles ("Zack") is no longer a minor, and is a subscriber to this Memorandum.

H. S.B. Coles ("Sam") is no longer a minor, and is a subscriber to this Memorandum.

I. Haley Brooke Coles ("Haley") is a Defendant in the Action.

J. Ashley M. Coles ("Ashley Coles") is a Defendant in the Action, but this Memorandum does not affect any claims or defenses related to Ashley Coles, who is not a subscriber to this Memorandum.

K. Francine Coles, Zack, Sam and Haley are sometimes collectively called the "Coles Group".

L. The ML Group, and the Coles Group are sometimes individually called a "Party" and sometimes collectively called the "Parties".

M. In the Action, ML Group has stated various "Claims" (as further defined below) against the Coles Group for death benefit proceeds (the "Proceeds") of life insurance policies on the life of Scott Coles (the "Life Insurance Policies") whose premiums were funded by distributions from Mortgages Ltd., at the direction of Scott Coles (the "Distributions").

N. On the Specific and General Terms of Settlement set out below, the Parties have resolved all "Claims" (as further defined below) stated or which could have been stated in the Action against each other.

Specific Terms of Settlement

The Specific Terms of Settlement are set forth on **Exhibit 1** attached hereto.

General Terms of Settlement

The general terms of settlement include the following:

1. Dismissal of the Action. Subject to satisfaction of the terms and provisions set forth on Exhibit 1, and excluding only the causes of action, defenses and remedies provisionally reserved in Subsection 1.e of Exhibit 1, the Action and all "Claims" (as further defined below), and the defenses thereto asserted or which could have been asserted in the Action by the Parties against each other are to be dismissed with prejudice, each Party to bear its own costs and attorneys' fees, as a matter of settlement and not as an adjudication on the merits. Additionally, a monetary Judgment for attorney's fees in favor of the Coles Group and against the ML Group obtained in the Action is to be vacated, with prejudice.

2. Releases.

A. Subject to the conditions prescribed on Exhibit 1, the Parties hereby reciprocally release and discharge each other of and from any and all claims, causes of action, damages, personal or economic injuries, rights or liabilities whatsoever, including attorneys' fees, costs and litigation expenses, whether grounded in contract, tort, equity or regulatory violation, which are based upon or arise out of the allegations and causes of action asserted or which could have been asserted against each other in the Action or based upon the filing and/or dismissal of the Action (collectively called "Claims").

B. The term "Claims" is intended to be broadly and comprehensively defined as including any and all manner of civil or regulatory fault or liability whatsoever, whether or not presently asserted, and whether predating this instrument or arising or discovered in the future, based upon or arising out of (i) the Life Insurance Policies, (ii) the Proceeds, (iii) the Distributions, and (iv) all other factual allegations, legal contentions, and causes of action (including without limitation constructive trust) asserted or which could have been asserted by the Parties against each other in the Action, including, but not limited to all conceivable civil, regulatory or statutory causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, express or implied warranties, negligence, controversies, agreements, promises, variances, trespasses, personal and economic injuries, damages, costs, expenses, attorneys' fees, judgments, executions, and other obligations whatsoever, in law or in equity, whether or not presently asserted, including Claims that are not accrued or suspected to exist which, if known, would have materially affected the decision to settle the Action. The Parties acknowledge that (i) settlement has been negotiated and this Memorandum is being executed with conscious appreciation that unknown, unanticipated and unsuspected Claims are being released,

and (ii) the decision to settle may be based upon incomplete or inaccurate information, the risk of which is being expressly assumed. For clarity, the term "Claims" does not include any causes of action available to any Party against any other Party based upon or arising out of any future breach of an obligation prescribed on Exhibit 1. For additional clarity, if as provided on Exhibit 1, the ML Group is unable to obtain Bankruptcy Court "Confirmation" of the Settlement evidenced hereby, the releases exchanged herein shall be ineffective to the extent, but only to the extent, necessary to permit the ML Group and the Coles Group to exercise the remedies and defenses set forth in Exhibit 1, Subsection 1.e, but no others.

C. The release given and received by a Party individual is deemed to be given and received by and on behalf of the individual's spouse and marital community, successors, heirs, assigns, attorneys and insurance carriers. The release given and received by a Party entity is deemed to be given and received by and on behalf of the entity's parent companies, subsidiary companies, sibling companies, affiliates, predecessors in interest, directors, officers, shareholders, managers, members and partners (as applicable, dependent on the type of entity), as well as the entity's employees, agents, attorneys, insurance carriers, successors and assigns.

D. To effectuate the releases given and received, the Parties covenant not to hereafter make or initiate any federal, state or local civil, administrative or regulatory report, complaint, action or proceeding concerning or based upon the subject matters of the Claims released hereby.

E. To further effectuate the releases given and received, each Party covenants for the benefit of the other(s) that it will not assert any federal, state or local civil, administrative or regulatory reports, complaints, actions or proceedings against third parties based upon or arising out of the subject matters of the Claims released hereby or any of the factual allegations and theories of recovery asserted or which could have been asserted in the Action, that could result in the assertion of causes of action against another Party by a third party, except upon the condition that the Party asserting the civil action or administrative proceeding against a third party will defend, indemnify and hold the other Party(s) harmless from all claims, demands, damages, losses, judgments, attorney's fees and litigation expenses incurred as a result, regardless of whether it is alleged or proven that the foregoing was caused in part by the negligence of the indemnified Party(s).

F. Any Party that is a California resident expressly waives all rights under Section 1542 of the California Civil Code, and any rights under any similar statute, common law or regulation of the United States, of any state, or of any federal or state agency. Section 1542 of the California Civil Code reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Any Party that is a California resident acknowledges, warrants and represents that it has read and is familiar with Section 1542, quoted above, and that the actual or

potential effect of that Section 1542 and its waiver of Section 1542 has been explained, and that after consultation with its attorneys, the Party is electing to release its rights as set forth above.

3. No Admission of Liability. The settlement is not to be construed as an admission of any wrongdoing, but rather is an economic decision to settle and compromise disputed claims.

4. Agreement to Mediate and Arbitrate Certain Disputes. The Parties to this Memorandum hereby agree to submit to private mediation and arbitration in accordance herewith, any controversy and/or dispute between them (i) over the form and content of settlement documentation required by this Memorandum, (ii) over the Parties' intentions in settling, (iii) over the interpretation of and obligations imposed by this Memorandum, or (iv) over the enforcement or breach of the terms and provisions of this Memorandum (collectively called "Settlement Disputes"). This agreement to mediate and arbitrate is intended to be valid, enforceable and irrevocable, and subject to enforcement in the manner contemplated by the Arizona Revised Uniform Arbitration Act. Except as permitted below, all other remedies for resolving Settlement Disputes are waived, including specifically the right to bring a civil action in the Maricopa County Superior Court.

A. As long as he is willing and able to so act, any Settlement Dispute shall be referred to the Mediator for resolution in accordance with the procedures set forth below. If Mediator, Kevin T. Ahern, is unwilling or unable to so act, the parties to the Settlement Dispute shall attempt to agree upon a substitute private mediator, who shall mediate and if necessary arbitrate the Settlement Dispute in accordance with the procedures set forth below. If the parties to the Settlement Dispute cannot agree upon a substitute private mediator, then, in lieu of the procedures set forth below, the Settlement Dispute shall be submitted to mediation before the American Arbitration Association ("AAA"). The AAA shall thereafter appoint a substitute mediator, and the mediation shall proceed in accordance with the AAA's then commercial mediation rules. If such a mediation is unsuccessful, then in lieu of the procedures set forth below, the Settlement Dispute shall be submitted to binding arbitration before the AAA. The AAA shall thereafter appoint a substitute arbitrator, and the arbitration shall proceed in accordance with the AAA's then expedited procedures under its commercial arbitration rules.

B. Settlement Disputes referred to Mediator Ahern (or a substitute private mediator) must be initiated by written notice (a "Dispute Notice") delivered and/or mailed to the Mediator, and concurrently to the other Party. The Dispute Notice shall fully describe (in detail and with particularity) the nature of the Settlement Dispute and the relief requested by the issuer of the Dispute Notice. The Dispute Notice shall also be supported by any documents the issuing Party desires the Mediator to consider. The Party delivering a Dispute Notice shall first confer with the Mediator about the Settlement Dispute. If, in the Mediator's judgment, a Party has raised a Settlement Dispute without reasonable justification, the Mediator may summarily dismiss the

Settlement Dispute and charge the Party raising the Settlement Dispute with the entire expense of the Mediator's time. If the Mediator determines that the Settlement Dispute is genuine and supported by reasonable justification, then within five (5) business days thereafter (or such lesser or greater time as is ordered by the Mediator under the particular circumstances), any Party opposing the relief requested in the Dispute Notice shall deliver and/or mail to the Mediator (and concurrently to the other Party) a written response to the Dispute Notice (a "Response") setting forth in detail and with particularity its position on the Settlement Dispute. A Response may be supported with any documents the responding Party desires the Mediator to consider. The Mediator shall set a mediation date as soon as practicable after receipt of a Dispute Notice.

C. The Mediator will first attempt to mediate a resolution of a Settlement Dispute, but if the mediation is unsuccessful, the Mediator shall be the final arbiter of the Settlement Dispute, and he may proceed by way of arbitration in accordance with such abbreviated and summary hearing procedures as he shall consider fair and expeditious for a quick and economic resolution of the Settlement Dispute. During the arbitration, the Mediator acting as arbitrator shall have the power to (i) hold conferences, (ii) compel production of evidence, (iii) determine the admissibility, relevance, materiality and weight of evidence, (iv) decide the Settlement Dispute by way of summary disposition, (v) establish each Party's right to be heard, present material evidence and cross-examine witnesses on an abbreviated basis, (vi) allow or disallow discovery, (vii) order the exchange of evidence in lieu of discovery, (viii) enter awards for damages, (ix) enter awards for attorneys' fees, taxable costs and non-taxable litigation expenses, and (x) enter such other relief, including equitable and injunctive relief as he deems appropriate, to the full extent permitted by law. The Mediator, acting as arbitrator, shall have the exclusive authority to decide his jurisdiction, whether a valid mediation and arbitration agreement exists, whether conditions precedent to arbitration have been satisfied, any other gateway issues, and all other claims and questions of contract, tort, equity or regulatory fault material to the resolution of a Settlement Dispute, and his determination thereof shall be final, binding and non-appealable.

D. Any arbitration award shall be final, binding, non-appealable, and enforceable as a judgment of the Maricopa County Superior Court, and shall be entitled to expedited judicial confirmation and entry in the judgment docket. Any award may be confirmed by the court having jurisdiction over the Parties, as contemplated by A.R.S. §12-3022. Any award may be attacked or corrected only on the grounds contemplated by A.R.S. §§12-3023, 3024 and 3025.

E. In any arbitration, the Mediator, acting as arbitrator, shall be immune from civil liability for acting in the capacity equivalent to that of a civil court judge, and the Mediator shall not be compelled to testify or submit records pertaining to statements, conduct, decisions or rulings during the arbitration proceedings, to the same extent as a civil court judge who acts in an official judicial capacity. In any civil action brought against the Mediator for his actions as arbitrator, the Mediator shall be entitled to a mandatory award of reasonable attorneys' fees, taxable costs and non-

taxable litigation expenses upon a finding by the Court that a person brought a civil action in violation of this Subsection.

F. The expense of any successful mediation shall be advanced and shared equally by the Parties involved in a Settlement Dispute. If a mediation is unsuccessful, and a Settlement Dispute is required to be arbitrated, the unsuccessful party or parties shall bear the entire expense of the Mediator's fees. In any arbitration, the successful party shall be entitled to a mandatory award of reasonable attorneys' fees, taxable costs and non-taxable consulting, expert and other litigation expenses.

G. This agreement to mediate and arbitrate is intended to be the exclusive remedy and means by which the Parties resolve Settlement Disputes. If (i) an individual refuses to submit a Settlement Dispute to the Mediator for resolution, or (ii) in violation of this Section, files a civil action asserting a claim constituting a Settlement Dispute hereunder instead of complying with this Section, anyone aggrieved thereby may (by complaint and/or counterclaim, as applicable) petition the Maricopa County Superior Court for an order to show cause why the Court should not, as contemplated by A.R.S. § 12-3007, order the parties involved in the Settlement Dispute to proceed with mediation and arbitration as prescribed herein. The aggrieved party shall be also entitled to the entry of an order dismissing any civil action filed in breach of this Section, and a mandatory award of attorney's fees and taxable costs incurred in compelling compliance with the provisions of this Section.

H. In any civil action brought by an aggrieved party pursuant to Subsection G above, there shall be no counterclaims or third party claims asserted or consolidation of the then-pending Settlement Dispute with other claims, the single substantive issue before the Court being the enforcement of this Agreement to Mediate and Arbitrate Certain Disputes.

I. The terms and conditions of the Mediator's Mediation Engagement and Fee Agreement continue to apply to all fees associated with the services described in this Section.

5. Applicable Law/Forum and Venue. The substantive laws of the state of Arizona (without reference to conflict of laws provisions that would require application of any other law) shall govern the interpretation and enforcement of this Memorandum and any final settlement documentation. The Maricopa County Superior Court is be the exclusive forum and venue for any action filed to enforce the alternative dispute resolution provisions set forth in Section 4 above.

6. Cooperation. The Parties are expected to promptly execute such additional documents and perform such acts as may be reasonably necessary to effectuate this Memorandum, and to cooperate reasonably in the drafting and execution of final settlement documentation.

7. No Oral Modification/Waiver. The terms and provisions of this Memorandum, and any settlement agreement based thereon, shall not to be waived, modified or altered except by written instrument signed by all the Parties.

8. Integration. This Memorandum is a complete integration of the essential terms of settlement. It supersedes all prior understandings and agreements, written or oral, concerning settlement.

9. Attorney's Fees. If any civil action or proceeding becomes necessary to enforce performance or remedy a breach of the terms of settlement, the prevailing Party shall be entitled to an award of reasonable attorney's fees and expenses incurred.

10. Authority. By signing, each Party represents and warrants that it is authorized to execute this Memorandum and perform the prescribed terms of settlement.

11. Binding Agreement. This Memorandum evidences a binding and irrevocable Rule 80(d) agreement to settle the Action on the stated terms and any Dispute arising hereafter over the terms of settlement, the interpretation of this Memorandum, or the form and content of the other settlement documentation will not affect the validity or binding nature of the settlement reached and memorialized herein.

12. Signatures. For expediency, facsimile or e-mailed signatures may be used in place of original signatures, and this Memorandum may be executed in counterparts, all of which shall be deemed an original and together all counterparts shall constitute one and the same instrument. The Parties intend to be bound by the signatures on any faxed or e-mailed signature page.

This Memorandum has been prepared in part by the Mediator based upon his direct and personal involvement in the mediation process. In so doing, the Mediator is acting strictly as a scrivener of the essential terms of settlement. The Mediator has not provided legal advice to any Party, and any Party executing this instrument will be doing so with full awareness of its legal and practical effects, after opportunity to consult with separate counsel, and not based upon any legal advice given by the Mediator.

Effective Date _____

Kevin T. Ahern, Mediator

**SIGNATURE PAGE
TO
MEDIATION SETTLEMENT MEMORANDUM**

ML Group:

By: _____

Its: _____

Approved as to form:

Michael C. Manning, Esq.
James E. Holland, Jr., Esq.
Counsel for the ML Group

Coles Group:

Francine Coles, individually and as Trustee for the
Coles Children's Trust and as Conservator for
Z.A. Coles and S.B. Coles

Z.A. Coles

S.B. Coles

Haley Brooke Coles

Jerome K. Elwell, Esq.

Mediation Settlement Memorandum

Exhibit 1

The Coles Group agrees to pay to ML Servicing the sum of \$10 million (the "Settlement Sum") to ML Servicing conditioned upon the following:

- a. ML Servicing shall, immediately after this Memorandum is executed, initiate and prosecute in good faith in the Bankruptcy Court a proceeding consistent with the First Amended Plan of Reorganization dated March 12, 2009 (the "Plan") seeking from the Bankruptcy Court an order of "Confirmation" of the settlement evidenced by this Memorandum and the Terms Sheet (the "Settlement"). The term "Confirmation" means entry of an order by the Judge in the Bankruptcy Court confirming ML Servicing's and ML Liquidating Trust's decision that the Settlement is fair and reasonable, in the best interests of ML Liquidating Trust and the \$10 Million consideration for the Settlement is sufficient for the releases provided to the Coles Group. ML's petition or motion to confirm the Settlement will be provided to the Coles Group's counsel and the language of the same agreed upon (or resolved by Kevin Ahern) prior to its filing. The Coles Group will cooperate in ML Servicing's efforts to obtain Bankruptcy Court Confirmation of the Settlement. ML Servicing will not be required to obtain any declaration or finding indicating that it has exclusive rights to assert claims against the Coles Group.
- b. ML Servicing represents and warrants to the Coles Group that ML Liquidating Trust owns all of the Debtor's Causes of Action (as defined in the plan) against the Coles Group for the Proceeds of the Life Insurance Policies on Scott Coles' life purchased with the funds of Mortgages Ltd. through pre-petition Distributions to Scott Coles to pay premiums. ML Servicing does not make any other warranties or representations about the claims of the Marsh investors (Maricopa County Superior Court Case No. CV2010-097769) or otherwise, except that ML Servicing warrants that it has complete authority under the Plan to enter into this Settlement. The Coles Group is entering into this Settlement in reliance upon this warranty.
- c. The Settlement sum is to be paid within 14 days following Bankruptcy Court Confirmation under Subsection 1.a of this Exhibit 1. The payment of the Settlement Sum is expressly conditioned upon Bankruptcy Court Confirmation.
- d. the ML Group covenants to not hereafter (except as permitted under Subsection 1.e below) sue the Coles Group for any claims of any kind or nature whatsoever, legal or equitable, in contract or tort, known, unknown, or later acquired (in its own right, or from others), and further ML Group will not assign or otherwise grant any other entity or person the right to proceed on its behalf for any such claims.

- e. In the event the Bankruptcy Court declines to confirm the settlement, the ML Group shall be entitled to re-file, in state court, the same cause of action as it previously filed in the Action against the Coles Group. The ML Group shall not be entitled to assert any other or different causes of actions or theories of recovery against the Coles Group in the re-filed litigation and the Coles Group shall retain all rights of defense against such claims, except that the Coles Group will not be entitled to assert defenses of laches or statute of limitations or other time bar defenses, or the defenses of res judicata, collateral estoppel, judicial estoppel, law of the case or other claim preclusive doctrines. Additionally, in any such re-filed litigation, the right of recovery by the ML Group against the Coles Group shall be capped at \$13M.

- f. The members of the Coles Group represent and warrant that each received no more than \$9.7 million of Proceeds of the Life Insurance Policies after the death of Scott Coles, and agree to provide ML Servicing with independent evidence of the accuracy of this representation. The ML Group is entering this Settlement in reliance upon this warranty. The Coles Group agree to not object or otherwise interfere with any attempts by the ML Group to pursue claims against or discover confidential information from Ashley Coles concerning her settlement with the Coles Group and her receipt of Proceeds from the Life Insurance Policies.