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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 TO APPROVE SETTLEMENT  
AGREEMENT AND RELEASE WITH  
MAYER HOFFMAN MCCANN P.C., CBIZ,  
INC. AND CBIZ MHM, LLC**

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18 The ML Liquidating Trust (“ML Trust”), together with its Trustee, Matthew Hartley,  
19 (the “Trustee”), hereby request that this Court enter an order authorizing and approving the  
20 Settlement Agreement and Release dated February 2, 2015, (the “Settlement Agreement”),  
21 attached hereto as Exhibit A. The Settlement Agreement resolves all claims asserted by the  
22 ML Trust against the Settling Defendants (as defined below) in that certain action pending in  
23 the Superior Court of the State of Arizona, in and for Maricopa County, entitled *ML*  
24 *Liquidating Trust v. Mayer Hoffman McCann P.C., et al*, Case No. CV2010-053947  
25 (hereinafter, the “State Court Case”). The Settlement Agreement is between the ML Trust on  
26 the one hand, and Mayer Hoffman McCann P.C., (“Mayer Hoffman”), CBIZ, Inc., (“CBIZ”),  
27 and CBIZ MHM, LLC, (“CBIZ MHM”), on the other hand (collectively, the “Settling  
28 Defendants”). Pursuant to the terms of the Settlement Agreement, the parties thereto further

1 request the Court to consider this Motion on an expedited basis on shortened notice as  
2 proceedings have been suspended in the State Court Case pending consideration of this  
3 Motion by this Court. This Motion is supported by the following Memorandum of Points  
4 and Authorities.

## 5 6 **MEMORANDUM OF POINTS AND AUTHORITIES**

### 7 **I. Jurisdiction**

8 This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334,  
9 the Official Committee of Investors' First Amended Plan of Reorganization Dated March 12,  
10 2009 (the "Plan", DE # 1532) and the Order Confirming Investors' Committee's First  
11 Amended Plan of Reorganization Dated March 12, 2009 (the "Confirmation Order," entered  
12 May 20, 2009, DE #1755). The ML Trust submits that the Bankruptcy Court has retained  
13 and reserved jurisdiction in the Plan for matters such as this, including sections 9.1 (e), (g)  
14 and (h) of the Plan, among others, and has authority to approve the settlement under Section  
15 105 of the Bankruptcy Code as an order in aid of implementation of the Plan. The interests  
16 of the Debtor in ongoing and potential litigation were transferred to the ML Liquidating  
17 Trust by the Plan. (Plan, §§ 4.3 and 6.2) Further, pursuant to section 6.2 of the Plan, the ML  
18 Trust has the power and authority to commence, prosecute, settle and/or abandon the claims  
19 and causes of action that have been asserted in the State Court Case. As this Court has  
20 recognized in past proceedings regarding this Debtor, because the relief requested is an  
21 important part of the implementation of the Plan, the Court has the authority to confirm and  
22 approve settlements. (*See* prior motions for approval of settlements post-confirmation at  
23 Docket nos. 3652, 3812 and orders approving such motions at Docket nos. 3652, and 3855,  
24 respectively.) *See also State of Montana v. Golding (In re Pegasus Gold Corp.)*, 394 F. 3d  
25 1189, 1194 (9<sup>th</sup> Cir. 2005). Accordingly, the Bankruptcy Court retains post-confirmation  
26 authority to confirm the Settlement Agreement between the ML Trust and the Settling  
27 Defendants.

1 **II. Factual Background**

2 **A. Proceedings in the Bankruptcy Court and the Creation of the ML Trust**

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

6 2. On May 20, 2009, the Bankruptcy Court entered an Order confirming  
7 the Plan (DE #1807), which became effective on June 15, 2009 (the "Effective Date"). The  
8 Plan is still in the process of being performed and this case has not been closed.

9 3. Pursuant to Sections 4.1 and 6.2 of the Plan, the ML Liquidating Trust  
10 was created on the Effective Date solely for the purpose of implementing the Plan. Further,  
11 the Plan appoints the Trustee as a representative of the bankruptcy estate pursuant to 11  
12 U.S.C. §1123, and gives the Trustee the rights of a trustee under §1106 of the Bankruptcy  
13 Code.

14 4. Pursuant to Sections 4.4 of the Plan, all equity interests in the Debtor  
15 were canceled, its name was changed to ML Servicing Co., Inc., and new equity interests in  
16 ML Servicing were issued, 100% of which are held by the ML Trust.

17 5. Pursuant to Section 6.2 of the Plan, the ML Trust was vested with the  
18 authority to commence, prosecute, settle and abandon certain claims and causes of action  
19 formerly belonging to the Debtor, including claims against the Settling Defendants.

20 6. The ML Trust and the Settling Defendants now desire to settle the State  
21 Court Case on the terms set forth in the Settlement Agreement and for the reasons described  
22 below.

23 **B. The State Court Case**

24 1. On August 26, 2010, the ML Trust filed the State Court Case in the  
25 Superior Court of the State of Arizona, in and for Maricopa County, against the Settling  
26 Defendants. The Complaint in the State Court Case, as amended, alleges that the Settling  
27 Defendants either audited and/or were integrally involved in the yearly audits of the Debtor.  
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1 The Complaint further asserts claims against the Settling Defendants for professional  
2 malpractice, negligent misrepresentation and breach of contract in connection with certain of  
3 those audits. The Settling Defendants have denied the material allegations of the Complaint  
4 and have asserted numerous affirmative defenses.

5           2. On September 28, 2012, the Settling Defendants filed a Motion to  
6 Dismiss pursuant to Ariz. R. Civ. Pro. 12(b)(6). By Order entered May 7, 2013, the Superior  
7 Court (Hon. Arthur T. Anderson) dismissed the ML Trust's claims against all of the Settling  
8 Defendants for professional malpractice and breach of contract. The Superior Court denied  
9 dismissal of the ML Trust's negligent misrepresentation claim, but further held that the  
10 statute of limitations barred all claims against the Settling Defendants for audits completed  
11 prior to year end 2006. In addition, the Superior Court rejected the ML Trust's allegations  
12 that it was entitled to recover damages for the deepening insolvency of the Debtor prior to  
13 the involuntary petition date.

14           3. On September 23, 2013 the Superior Court denied the ML Trust's  
15 Motion for Reconsideration of the court's decision dismissing the ML Trust's claims for  
16 professional malpractice.

17           4. After months of litigation, a mediation of the ML Trust' claims was  
18 conducted with the assistance of mediator Kevin T. Ahern, Esq. (the "Mediator"). As a  
19 result of the mediation, the ML Trust and the Settling Defendants have agreed, subject to  
20 Bankruptcy Court approval, to resolve the State Court Case by entering into entering into the  
21 Settlement Agreement, which provides for a full satisfaction and release of all claims as  
22 between them. A summary of the material settlement terms is set forth below.

### 23 **III. Summary of the Settlement Terms**

24           1. Subject to Bankruptcy Court approval, in consideration for the full settlement  
25 of all claims as between the ML Trust and the Settling Defendants, the ML Trust will be  
26 paid, and has agreed to accept, the total sum of \$2,000,000 (the "Settlement Amount"),  
27 which shall be payable in 36 equal monthly installments of \$55,550 beginning on January 1,  
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1 2015 (the “Settlement Payments”).

2           2.     The Settlement Agreement is subject to and conditioned upon the Bankruptcy  
3 Court’s approval of same. If the Bankruptcy Court does not approve the Settlement  
4 Agreement, it shall be deemed void and of no further force and effect. While the motion for  
5 Bankruptcy Court approval is pending, the Settlement Payments shall accrue on a monthly  
6 basis in accordance with paragraph 1 above. If the Bankruptcy Court approves the  
7 Settlement Agreement, the accrued Settlement Payments will be released to the ML Trust  
8 within 10 business days of the approval order becoming Final (as such term is defined in the  
9 Settlement Agreement).

10           3.     The Settlement Agreement contains complete mutual releases as well as  
11 standard covenants, representations and warranties.

12           4.     The parties to the Settlement Agreement agree that any dispute[s] under the  
13 Settlement Agreement will first be presented to the Mediator for resolution before the filing  
14 and adjudication of those dispute[s] in a court of competent jurisdiction in Phoenix, Arizona.

15 **IV. The Settlement Is in the Best Interests of the ML Trust and Its Beneficiaries**

16           ML Trust seeks the approval of the settlement with the Settling Parties pursuant to the  
17 terms of the Settlement agreement as generally described herein. While perhaps not strictly  
18 applicable post-confirmation, Rule 9019 and the case law interpreting that rule provide  
19 helpful guidance in evaluating settlements. In *In re Woodson v. Fireman’s Fund Ins (In re*  
20 *Woodson)*, 839 F.2d 610 (9<sup>th</sup> Cir. 1988), the Ninth Circuit explained that in considering a  
21 proposed settlement, the Court should consider: (1) the probability of success in the  
22 litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the  
23 complexity of the litigation involved, and the expense, inconvenience and delay necessarily  
24 attending it; and (4) the paramount interest of the creditors and a proper deference to their  
25 reasonable views. *See also Martin v. Kane (In re A&C Properties,)* 784 F.2d 1377 (9<sup>th</sup> Cir.  
26 1986).

27           As explained in *Woodson*, the Bankruptcy Court has great latitude in approving  
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1 settlements. *Woodson*, 839 F.2d at 620. In considering the proposed settlement agreement,  
2 the Court need not decide questions of law or fact raised in the controversies sought to be  
3 settled or determine that the proposed agreement is the best possible outcome. Rather, the  
4 Court need only canvass the issues to determine whether the proposed settlement falls  
5 “below the lowest point in the zone of reasonableness.” *See Newman v. Stein*, 464 F.2d 689,  
6 at 693 (2<sup>nd</sup> Cir. 1972); *In re Pennsylvania Truck Lines, Inc.*, 150 B.R. 595 (Bankr. E.D. Pa.  
7 1992). Thus, the Court should confirm the subject Settlement Agreement if it finds that the  
8 settlement does not fall below the threshold of reasonableness. *See In re Planned Protective*  
9 *Services, Inc.*, 130 B.R. 94, 99 n.7 (Bankr. C.D. Cal. 1991). Further, the function of  
10 compromise is to avoid the delay and expense of litigation unless there appears to be a sound  
11 legal basis for the litigation and a likelihood of substantial ultimate benefit to the estate. *In*  
12 *re General Store of Beverly Hills*, 11 B.R. 539, 541 (Bankr. 9<sup>th</sup> Cir. 1981); see also *A & C*  
13 *Properties*, 784 F.2d at 1384. Accordingly, the Ninth Circuit authorities strongly support the  
14 Court’s approval of the Settlement Agreement.

15 The ML Trust has carefully weighed the cost of continuing this litigation, the  
16 probability of recovery and the difficulties posed by future collection, on the one hand, with  
17 the benefits and economics of a settlement for an assured amount, on the other. The ML  
18 Trust has concluded that it is in the best interest of the ML Trust and its beneficiaries to end  
19 the litigation for a compromised amount without the cost, expense, delay and continued risk  
20 of litigation.

21 First, a favorable judgment against the Settling Defendants is by no means assured.  
22 Although the ML Trust believes that the audits of the Debtor were flawed, the Settling  
23 Defendants have raised significant defenses based upon the alleged misconduct of the  
24 Debtor’s management, including the in pari delicto defense, which could serve as a complete  
25 bar to recovery, and comparative fault, which could substantially reduce the amount of any  
26 future judgment. Moreover, the Superior Court has issued a number of decisions which have  
27 negatively impacted the ML Trust’s case, including the dismissal of the professional  
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1 negligence and breach of contract counts against the Settling Defendants. Further, the  
2 Superior Court has held that the ML Trust is not entitled to recover for the deepening  
3 insolvency of the Debtor prior to bankruptcy, causing uncertainty as to the nature and  
4 amount of damages that the Superior Court will allow the ML Trust to request from a jury.  
5 Even if these Superior Court rulings are erroneous, it could be several years before the  
6 rulings can be addressed by an appellate court, and if a re-trial were necessary, it would  
7 further increase the cost, delay and continued risk associated with such litigation. A  
8 settlement removes the risk of zero recovery and resolves this matter expeditiously, without  
9 future appeals and further expense.

10 The second and third *Woodson* factors--difficulty in future collection and continued  
11 expense and delay—are of paramount importance to the ML Trust and militate heavily in  
12 favor of approving the Settlement Agreement. Two of the three Settling Defendants—CBIZ  
13 and CBIZ MHM—have no insurance covering the claims asserted in the State Court Case.  
14 Although defendant Mayer Hoffman did have insurance coverage when the State Court Case  
15 was commenced, the ML Trust has been informed that the insurance is now *completely*  
16 *exhausted* as a result of other litigation and/or settlement of other claims filed against Mayer  
17 Hoffman by former investors in the Debtor and by lawsuits in other venues that are unrelated  
18 to the Debtor. Thus, there currently are no insurance proceeds available to settle this case or  
19 to pay a significant future judgment. As a result of the lack of collectable insurance  
20 proceeds, it was necessary, in the reasoned judgment of the ML Trust and its Trustee, to  
21 enter into a structured settlement providing for the payment of the Settlement Amount in  
22 monthly installments.

23 The lack of insurance proceeds and the likely inability to pay a large future judgment  
24 also weigh heavily against the considerable expense of continuing the State Court Case.  
25 Counsel in the State Court Case has informed the ML Trust that at least four different experts  
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1 will be necessary to pursue the case through summary judgment and trial.<sup>1</sup> The combined  
2 future expense of those experts is confidently estimated to exceed \$1-1.5 million given the  
3 complexity of the claims asserted and the complexities involved in calculating the Debtor's  
4 damages. Thus, the ML Trust was faced with the Hobson's choice of spending a large  
5 portion of its limited resources pursuing claims that, even if successful, would result in a  
6 judgment that would be difficult, if not impossible, to collect due to the lack of any available  
7 insurance proceeds.

8 Finally, due to all of the foregoing factors, the Settlement Agreement is well within  
9 the "zone of reasonableness." Given the lack of any available insurance proceeds and the  
10 considerable risks and expense of continued litigation, the proposed settlement clearly is  
11 reasonable and in the best interests of the ML Trust and its beneficiaries.

12 In sum, the ML Trust believes that, under the circumstances, the Settlement  
13 Agreement is a valid exercise of its authority under section 6.2 of the Plan to compromise  
14 and settle claims belonging to the Debtor. The ML Trust also submits that the settlement is  
15 reasonable as it provides a mechanism for the Settling Defendants to voluntarily make an  
16 agreed substantial payment without any further expenditure or risk to the ML Trust.  
17 Accordingly the ML Trust respectfully requests the Court to approve the Settlement  
18 Agreement attached hereto as Exhibit A. Notice of this Motion is being provided to all  
19 beneficiaries of the ML Liquidating Trust, all persons who have requested notice in the  
20 bankruptcy and the U.S. Trustee.

21 **V. Conclusion**

22 The Settlement Agreement represents a compromise that is in the best interests of the  
23 Debtor and its creditors. The ML Trust requests that the Court enter an Order

24 (i) granting this Motion by Finding that (a) the settlement is fair and  
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26 <sup>1</sup> Counsel in the State Court Case has identified four experts per the Court's case management order:  
27 a standard of care (i.e. auditing) expert, a restructuring expert, an expert for the calculation of  
28 damages and an expert on the policies and procedures of the Arizona Department of Financial  
Institutions.



1 reasonable, (b) the settlement is in the best interests of the ML Trust and its beneficiaries and  
2 (c) the consideration for the settlement is sufficient for the releases provided to the Settling  
3 Defendants

4 (ii) authorizing and approving the ML Trust's decision to enter into and  
5 perform the Settlement Agreement; and

6 (iii) granting the ML Liquidating Trust such other and further relief as the  
7 Court deems just and appropriate under the circumstances.

8 Dated this 17<sup>th</sup> day of February, 2015.

9 **MYERS & JENKINS P.C.**

10 By: /s/William Scott Jenkins

11 William Scott Jenkins  
12 One E. Camelback Road, Suite 500  
13 Phoenix, AZ 85012-1629  
14 *Attorneys for ML Liquidating Trust*

# **EXHIBIT A**

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release, dated February 2, 2015, is entered into by and between ML Liquidating Trust (“ML Trust”) on the one hand, and Mayer Hoffman McCann P.C., (“MHM”), CBIZ, Inc., and CBIZ MHM, LLC (CBIZ, Inc. and CBIZ MHM, LLC are collectively referred to as “CBIZ”), on the other hand (the “Agreement”). ML Trust, MHM, and CBIZ are collectively referred to herein as the “Parties.”

### RECITALS

WHEREAS, on June 20, 2008, an involuntary petition was filed against Debtor Mortgages Ltd. (the “Debtor”) and on June 24, 2008, the Debtor voluntarily converted the case to one under Chapter 11 of the United States Bankruptcy Code.

WHEREAS, on May 20, 2009, the United States Bankruptcy Court for the District of Arizona (the Honorable Randolph J. Haines) entered an Order confirming the The Official Committee of Investors’ First Amended Plan of Reorganization Dated March 12, 2009 (the “Plan”), which became effective on June 24, 2009 (the “Effective Date”).

WHEREAS, pursuant to §4.4 of the Plan, as of the Effective Date, all equity interests in the Debtor were canceled, its name changed to ML Servicing Co, Inc. (“ML Servicing”), and new equity interests in ML Servicing were issued, 100% of which are held by the ML Trust.

WHEREAS, pursuant to §6.2 of the Plan, the ML Trust has the power and authority to commence, prosecute, settle and abandon certain claims and causes of action formerly belonging to the Debtor.

WHEREAS, on or about August 26, 2010, ML Trust filed an action, entitled *ML Liquidating Trust v. Mayer Hoffman McCann P.C., et al.*, Case No. CV2010-053947 (the “ML Trust Action”), in the Superior Court of Arizona, Maricopa County, naming MHM and CBIZ as defendants.

WHEREAS, the Parties desire to settle their disputes, dismiss with prejudice the ML Trust Action against MHM and CBIZ, and exchange mutual releases, to avoid further expense and inconvenience and the distractions of burdensome and prolonged litigation, without any admission of liability or wrongdoing.

NOW, THEREFORE, IT IS HEREBY AGREED by and among the Parties, that:

## DEFINITIONS

As used in this Agreement, the following terms have the following meanings:

“Bankruptcy Court” means the United States Bankruptcy Court for the District of Arizona, before which the ML Bankruptcy is pending.

“CBIZ” means CBIZ, Inc. and CBIZ MHM, LLC themselves, and, as applicable, each of their past and present successors, predecessors, parents, subsidiaries, and affiliates, and the officers, directors, shareholders, employees, members, managers, lawyers, agents, representatives, insurers, and assigns of CBIZ, Inc., CBIZ MHM, LLC, and their past and present successors, predecessor, parents, subsidiaries, and affiliates.

“Complaint” means the complaint filed on or about August 26, 2010, by ML Trust in the ML Trust Action, and any amended complaint that has been, or could have been filed in that action, including, but not limited to, the First Amended Complaint filed on or about August 31, 2012.

“Defendant Claim(s)” means any and all claims, causes of action, liabilities, suits, debts, liens, contracts, agreements, promises, damages, demands, disputes, controversies, costs, expenses, attorneys’ fees, and losses whatsoever, whether in law or equity, known or unknown, fixed or contingent, foreseen or unforeseen, suspected or unsuspected, anticipated or unanticipated, matured or unmatured, asserted or unasserted, accrued or not accrued, and whether based on any federal, state, foreign, or common law right of action, that MHM and/or CBIZ now have or may hereafter have against the ML Trust by reason of any matter, cause or thing whatsoever from the beginning of time to the date hereof, arising out of, based upon, or relating to the Dispute, as well as any matters, causes, claims or things whatsoever relating to the Dispute that were, or have been, or could in any way have been, or could be, alleged in a counterclaim or motion for costs, including any unknown claims relating to the Dispute that MHM and/or CBIZ do not know or suspect to exist in their favor at any time on or before the date that the MHM and/or CBIZ releases herein become effective and that, if known by them, might have affected their settlement with or grant of a release to the ML Trust.

“Defendant Released Claim(s)” means each and every Defendant Claim, whether arising under any federal, state, foreign, civil, or common law right of action or rule, that has been or could be asserted by MHM and/or CBIZ against the ML Trust in any court, tribunal, or other forum of competent jurisdiction, arising out of, based upon, or related to the Dispute.

“Dispute” means any claims arising out of, based upon, or relating in any way to Mortgages Ltd. and/or its affiliates, including, but not limited to, the limited liability companies Mortgages Ltd. managed, including, but not limited to: (i) the filing of the Complaint; (ii) the allegations in the Complaint; and (iii) MHM’s audits of Mortgages Ltd. and its affiliates, including, but not limited, the limited liability companies Mortgages Ltd. managed.

“Final” means, when used in connection with the Bankruptcy Court’s approval of the Settlement Agreement, that the relevant approval order will be final:

- a. if no appeal is taken, on the third (3rd) business day following the date on which the time to appeal therefrom (including any potential extension of time) has expired; or
- b. if any appeal is taken, on the third (3rd) business day following the date on which all appeals therefrom, including petitions for rehearing or reargument, petitions for rehearing en banc, and petitions for certiorari or any other form of review, have been finally disposed of, such that the time to appeal therefrom (including any potential extension of time) has expired.

“MHM” means Mayer Hoffman McCann P.C. and, as applicable, its past and present successors, predecessors, subsidiaries, affiliates, officers, directors, shareholders, employees, members, managers, lawyers, agents, insurers, representatives, and assigns. MHM also includes Miller Wagner & Company, Ltd. and its past and present successors, predecessors, subsidiaries, affiliates, officers, directors, shareholders, employees, members, managers, lawyers, agents, insurers, representatives, and assigns.

“MHM’s and CBIZ’s Counsel” means David F. Adler of the firm Jones Day, 901 Lakeside Avenue, Cleveland, Ohio, 44114.

“ML Bankruptcy” means the matter entitled *In re Mortgages Ltd.*, Case No. 2:08-bk-07465-RJH, pending in the Bankruptcy Court.

“ML Trust” means the ML Liquidating Trust itself, ML Servicing, as successor to the Debtor, the ML Trustee and, as applicable, each of its executors and administrators, past and present successors, predecessors, parents, subsidiaries, affiliates, officers, directors, shareholders, employees, board members, managers, trustees, lawyers, agents, representatives, insurers, and assignees, and assignors, and any person they represent or that acts by, through, under, or in concert with them, or any of them.

“ML Trustee” means Matthew H. Hartley, Trustee of the ML Trust.

“Plaintiff Claim(s)” means any and all claims, causes of action, liabilities, suits, debts, liens, contracts, agreements, promises, damages, demands, disputes, controversies, costs, expenses, attorneys’ fees, and losses whatsoever, whether in law or equity, known or unknown, fixed or contingent, foreseen or unforeseen, suspected or unsuspected, anticipated or unanticipated, matured or unmatured, asserted or unasserted, accrued or not accrued, and whether based on any federal, state, foreign, or common law right of action, that the ML Trust may now have or may hereafter have against MHM and/or CBIZ by reason of any matter, cause or thing whatsoever from the beginning of time to the date hereof, arising out of, based upon, or relating to the Dispute, as well as any matters, causes, claims or things whatsoever relating to the Dispute that were, or have been, or could in any way have been, or could be, alleged in the Complaint, including any unknown claims relating to the Dispute that the ML Trust does not know or suspect to exist in its favor at any time on or before the date that the ML Trust’s releases herein become effective and that, if known, might have affected its settlement with or grant of a release to MHM and/or CBIZ.

“Plaintiff’s Counsel” means Nicholas J. DiCarlo of the firm DiCarlo Caserta McKeighan PLC, 6900 E. Camelback Road, Suite 250, Scottsdale, AZ 85251.

“Plaintiff Released Claim(s)” means each and every Plaintiff Claim, whether arising under any federal, state, foreign, civil, or common law right of action or rule, that has been or could be asserted by the ML Trust against MHM and/or CBIZ in any court, tribunal, or other forum of competent jurisdiction, arising out of, based upon, or related to the Dispute.

“Settlement Sum” means the settlement amount referred to in Section 1(a) below.

“Trial Court” means the Superior Court of Arizona, Maricopa County, before which the ML Trust Action is pending.

#### AGREEMENT

NOW, THEREFORE, in consideration of the terms, promises, covenants, and conditions contained herein, and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Settlement Payment.

(a) In full and final settlement and compromise of any and all Plaintiff Claims, MHM shall pay the sum of Two Million Dollars (\$2,000,000) to ML Trust. The Settlement Payment may be paid in thirty-six (36) equal monthly installments of \$55,555.00 per month (each called a

“Payment”) commencing January 1, 2015, and continuing on the first day of each calendar month thereafter until the Settlement Sum has been paid in full.

(b) As further provided in Section 2 below, the Agreement is conditioned upon approval by the Bankruptcy Court, and until Bankruptcy Court approval of the Agreement is obtained by ML Trust, Payments shall accrue on a monthly basis in accordance with Section 1(a) above. Within ten (10) business days of Bankruptcy Court approval becoming Final, all then-accrued Payments shall be released by MHM to ML Trust.

(c) Payments shall be due on the first day of each calendar month until the Settlement Sum has been paid in full. In the event that ML Trust has not received a Payment within five (5) business days of the first day of each calendar month, it may give MHM written notice of default. Payments shall not bear interest, but any payment not made within ten (10) business days of written default notice from ML Trust will be subject to a 5% late fee on the amount of the overdue Payment, due and payable at the time the overdue Payment is made. If a Payment is not made within thirty (30) days of written default notice, without further notice or opportunity to cure, ML Trust may accelerate the entire unpaid balance of the Settlement Sum, which shall be then due and payable in full.

(d) MHM shall have the right to pre-pay the deferred balance of the Settlement Sum without penalty.

## 2. Settlement Approval by the Bankruptcy Court

The Agreement shall be subject to and conditioned upon approval by the Bankruptcy Court. Within ten (10) business days of the Parties executing this Agreement, ML Trust shall move in the Bankruptcy Court for approval of the Agreement. Upon Bankruptcy Court approval becoming Final (the “Settlement Approval Date”), the Agreement shall be in full force and effect. If the Bankruptcy Court disapproves the Agreement, it shall be void and of no further force and effect. ML Trust will exercise best efforts to seek Bankruptcy Court approval on an expedited basis.

## 3. Release by ML Trust.

(a) Effective as of the Settlement Approval Date, for valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the ML Trust hereby fully, finally, irrevocably and unconditionally releases and forever discharges MHM and CBIZ from any and all Plaintiff Claims except those to enforce this Agreement.

(b) This Settlement Agreement releases, to the fullest extent permitted by law, both all Plaintiff Claims that the ML Trust know about, and all Plaintiff Claims that the ML Trust may not presently know about. The ML Trust acknowledges that it may later discover facts in addition to, or different from, those which it knows or believes to be true with respect to the subject matter of this general release, but that it is the ML Trust's intention to fully, finally, and forever settle and release all matters set forth in subparagraph (a) above. The general release by the ML Trust shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different facts. This release shall not be interpreted to apply to any beneficiary of the ML Trust (including beneficiaries who are past or present board members of the ML Trust) pursuing claims against MHM and/or CBIZ in their capacities as lenders to the Debtor, or investors in fractional interests in mortgage loans originated by the Debtor or mortgage pool limited liability companies managed by the Debtor, whether individually or as a member of a class of investors.

(c) With respect to any and all Plaintiff Released Claims, the ML Trust shall be deemed to have waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of California Civil Code § 1542, which provides:

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.

The ML Trust shall be deemed to have expressly waived any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law or international or foreign law, which is similar, comparable or equivalent to California Civil Code § 1542. This provision shall not be interpreted to apply to any beneficiary of the ML Trust (including beneficiaries who are past or present board members of the ML Trust) pursuing claims against MHM and/or CBIZ in their capacities as lenders to the Debtor, or investors in fractional interests in mortgage loans originated by the Debtor or mortgage pool limited liability companies managed by the Debtor, whether individually or as a member of a class of investors.



(d) The ML Trust represents and warrants that there has been no assignment or other transfer of any interest in any Plaintiff Claim which they, or any of them, may have against the MHM and/or CBIZ, and agrees that if such assignment or transfer of interest has in fact occurred, that it will indemnify and hold MHM and CBIZ harmless from any liability, claims, demands, damages, costs, expenses, and attorneys' fees incurred by MHM and/or CBIZ as a result of any such assignment or transfer, or any rights or Plaintiff Claims under any such assignment or transfer. The indemnification described in this Section 3(d) does not apply to Plaintiff's Counsel or any other counsel of record for ML Trust in the ML Trust Action, the ML Trustee or past, present or future board members of the ML Trust. This indemnification provision shall not be interpreted to apply to any beneficiary of the ML Trust (including beneficiaries who are past or present board members of the ML Trust) pursuing claims against MHM and/or CBIZ in their capacities as lenders to or investors in the Debtor, whether individually or as a member of a class of investors.

(e) The ML Trust hereby covenants and agrees that it will not initiate or pursue any suit, or bring any cross-claim, third-party complaint or claim for contribution in any jurisdiction against MHM or CBIZ, or seek to enforce, any judgment of any kind against MHM or CBIZ based upon, arising out of, or related to the Dispute. This covenant not to sue described in this Section 3(e) does not apply to Plaintiff's Counsel, acting in his capacity as counsel or any other counsel of record for ML Trust in the ML Trust Action, acting in their capacity as counsel, the ML Trustee or past, present or future board members of the ML Trust. This provision shall not be interpreted to apply to any beneficiary of the ML Trust (including beneficiaries who are past or present board members of the ML Trust) pursuing claims against MHM and/or CBIZ in their capacities as lenders to or investors in the Debtor, whether individually or as a member of a class of investors.

(f) The ML Trust agrees that if it hereafter commences, facilitates, joins in, or in any manner seeks relief through any suit arising out of, based upon, or relating to any of the Plaintiff Released Claims, or in any manner asserts against MHM or CBIZ, any of the Plaintiff Claims released hereunder, then the ML Trust shall pay to MHM and/or CBIZ, in addition to any other damages caused to MHM or CBIZ, all attorneys' fees incurred by MHM and/or CBIZ in defending or otherwise responding to said suit or claim. As used in this Section 3(f), "facilitates" shall not include and shall not be interpreted to include the ML Trust producing documents or

making witnesses available in response to subpoenas or other appropriate legal process. The indemnification described in this Section 3(f) does not apply to Plaintiff's Counsel or any other counsel of record for ML Trust in the ML Trust Action, the ML Trustee or past, present or future board members of the ML Trust. This indemnification provision shall not be interpreted to apply to any beneficiary of the ML Trust (including beneficiaries who are past or present board members of the ML Trust) pursuing claims against MHM and/or CBIZ in their capacities as lenders to or investors in the Debtor, whether individually or as a member of a class of investors.

(g) Neither MHM nor CBIZ shall be liable or obligated to pay any fees, expenses, costs or disbursements to, or incur any expense on behalf of, any person or entity in connection with this Agreement, except as expressly provided for in this Agreement.

4. Release by MHM and CBIZ.

(a) Effective as of the Settlement Approval Date, for valuable consideration, the receipt and sufficiency of which are hereby acknowledged, MHM and CBIZ hereby fully, finally, irrevocably and unconditionally release and forever discharge the ML Trust from any and all Defendant Claims except those to enforce this Agreement.

(b) This Settlement Agreement releases, to the fullest extent permitted by law, both all Defendant Claims that MHM and CBIZ know about, and all Defendant Claims that any or all of them may not presently know about. MHM and CBIZ acknowledge that they are aware that they may later discover facts in addition to, or different from, those which they know or believe to be true with respect to the subject matter of this general release, but that it is their intention to fully, finally, and forever settle and release all matters set forth in subparagraph (a) above. The general release by MHM and CBIZ shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different facts. This release shall not be interpreted to apply to any beneficiary of the ML Trust (including beneficiaries who are past or present board members of the ML Trust) pursuing claims against MHM and/or CBIZ in their capacities as lenders to the Debtor, or investors in fractional interests in mortgage loans originated by the Debtor or mortgage pool limited liability companies managed by the Debtor, whether individually or as a member of a class of investors.

(c) With respect to any and all Defendant Released Claims, MHM and CBIZ shall be deemed to have waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of California Civil Code § 1542, which provides:

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.

MHM and CBIZ shall be deemed to have expressly waived any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law or international or foreign law, which is similar, comparable, or equivalent to California Civil Code § 1542. This provision shall not be interpreted to apply to any beneficiary of the ML Trust (including beneficiaries who are past or present board members of the ML Trust) pursuing claims against MHM and/or CBIZ in their capacities as lenders to the Debtor, or investors in fractional interests in mortgage loans originated by the Debtor or mortgage pool limited liability companies managed by the Debtor, whether individually or as a member of a class of investors.

(d) MHM and CBIZ represent and warrant that there has been no assignment or other transfer of any interest in any Defendant Claim which they may have against the ML Trust, and that if such assignment or transfer of interest has in fact occurred, that they will agree to indemnify and hold the ML Trust harmless from any liability, claims, demands, damages, costs, expenses, and attorneys' fees incurred by the ML Trust as a result such assignment or transfer, or any rights or Defendant Claims under any such assignment or transfer. The indemnification described in this Section 4(d) does not apply to Defendants' Counsel or any other counsel of record for MHM and/or CBIZ in the ML Trust Action.

(e) MHM and CBIZ hereby covenant and agree that they will not initiate or pursue any suit, or bring any cross-claim, third-party complaint or claim for contribution in any jurisdiction against the ML Trust, or seek to enforce, any judgment of any kind against the ML Trust based upon, arising out of, or related to the Dispute. This covenant not to sue described in this Section 4(e) does not apply to Defendants' Counsel, acting in his capacity as counsel or any other counsel of record for MHM or CBIZ in the ML Trust Action, acting in their capacity as counsel.

(f) MHM and CBIZ each agree that if they hereafter commence, facilitate, join in, or in any manner seek relief through any suit arising out of, based upon, or relating to any of the

Defendant Released Claim(s), or in any manner asserts against the ML Trust, any of the Defendant Claim(s) released hereunder, then MHM and/or CBIZ shall pay to the ML Trust, in addition to any other damages caused to the ML Trust, all attorneys' fees incurred by the ML Trust in defending or otherwise responding to said suit or claim. As used in this Section 4(f), "facilitate" shall not include and shall not be interpreted to include MHM or CBIZ producing documents or making witnesses available in response to subpoenas or other appropriate legal process. The indemnification described in this Section 4(f) does not apply to Defendants' Counsel or any other counsel of record for MHM and/or CBIZ in the ML Trust Action.

5. Dismissal of the ML Trust Action

No later than five (5) business days after the Settlement Approval Date, the Parties shall file with the Trial Court a stipulation of dismissal, with prejudice, of all ML Trust's claims in the ML Trust Action against MHM and CBIZ, substantially in form to the attached Exhibit A. Each Party shall bear its own costs and expenses (including attorneys' fees) in connection therewith.

6. Representations and Warranties.

(a) ML Trustee represents and warrants that he is fully authorized as Trustee of the ML Trust to enter into this Agreement on behalf of ML Trust and has been fully advised by Plaintiff's Counsel as to material terms of this Agreement.

(b) The Parties acknowledge that they have been advised, or had the opportunity to be advised, by their own counsel and other advisors in connection with this Agreement. The Parties enter into this Agreement solely on the basis of that advice and on the basis of their own independent investigation of all of the facts, laws and circumstances material to this Agreement. Aside from the representation and warranties set forth in this Section 6, no Party is relying on any statement or omission by the other Party or its counsel.

(c) The Parties acknowledge that the representations and warranties set forth in this Section 6 are material terms to this Agreement.

7. Non-Admission of Liability.

This Agreement is not and shall not be treated as an admission of liability or wrongdoing by any Party for any purpose. Neither this Agreement nor compliance with this Agreement, nor any related negotiations, statements, or court proceedings, shall constitute or be construed as, offered as, received as, used as, or deemed to be evidence or an admission or concession of any liability or wrongdoing whatsoever on the part of any person or entity, including, but not limited

to, MHM or CBIZ, or as a waiver by MHM or CBIZ of any applicable defense, or as a waiver by the ML Trust of any Plaintiff Claims, causes of action, or remedies.

8. Waiver of Costs and Attorneys' Fees.

The Parties, and each of them, hereby agree that, as against each other, each Party shall bear its own costs and attorneys' fees incurred in connection with this Dispute.

9. Entire Agreement.

This Agreement, including the Exhibits referred to herein, constitutes the entire agreement between the Parties with respect to the Dispute and supersedes all prior and/or contemporaneous arrangements, oral and/or written agreements and/or discussions or negotiations between or among the Parties or their agents of attorneys (including, without limitation, the Ariz. R. Civ. P. 80(d) settlement agreement entered into between the Parties on January 8, 2015) with respect thereto. No promise, representation, or warranty by any Party, or attorney or agent of any Party, regarding the Dispute that is not expressly contained or referred to in this Agreement shall be valid or binding on that Party. The Parties have included this Section 9 to preclude the introduction of parole evidence to vary, interpret, supplement, or contradict the terms of this Agreement.

10. Amendments.

Any amendment or modification to this Agreement must be in writing signed by the duly authorized representative(s) of the Parties and stating the intention of the Parties to amend this Agreement.

11. Construction of Agreement.

This Agreement shall be construed as a whole in accordance with its fair meaning and in accordance with the laws of the State of Arizona. The language of this Agreement shall not be construed for or against any Party. The headings used herein are for reference only and shall not affect the construction of this Agreement.

12. Governing Law.

The Parties agree that this Agreement shall be construed, interpreted, governed, and applied in accordance with the laws of the State of Arizona.

13. Disputes.

The Parties agree that any disputes under this Agreement shall in the first instance be presented to Kevin Ahern for mediation. In the event the mediation is unsuccessful, any action

for breach of this Agreement or to enforce the terms of this Agreement shall be filed and adjudicated exclusively in a court of competent jurisdiction in Phoenix, Arizona, with the prevailing party being entitled to recover its reasonable attorneys' fees and costs.

14. Counterparts.

This Agreement may be executed in counterparts, all of which, when taken together, shall constitute one agreement, with the same force and effect as if all signatures had been entered on one document. Execution by facsimile or emailed PDF shall be fully and legally binding on the Parties and all other signatories.

15. Notices.

Whenever this Agreement requires or contemplates that a Party shall or may give notice to the other, notice shall be provided by email, facsimile and/or next-day (excluding Saturday and Sunday) express delivery service as follows and shall be deemed effective upon such email transmission to the email address(es) below or delivery to the facsimile number or address, as the case may be, below:

a. If to MHM or CBIZ, then to:

David F. Adler  
Jones Day  
901 Lakeside Avenue  
Cleveland, Ohio 44114  
(216) 586-1344  
dfadler@jonesday.com

b. If to ML Trust, then to:

Nicholas J. DiCarlo  
DiCarlo Caserta McKeighan PLC  
6900 E. Camelback Road, Suite 250  
Scottsdale, Arizona 85251  
(480) 429-7544  
ndicarlo@dcmplaw.com

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the dates indicated below.

For ML Liquidating Trust:



Matthew R. Hartley, Esq.

Trustee of the ML Liquidating Trust

Date: 1-30-15

For Mayer Hoffman McCann P.C.:

\_\_\_\_\_

Name:

Title:

Date: \_\_\_\_\_

For CBIZ, Inc.:

\_\_\_\_\_

Name:

Title:

Date: \_\_\_\_\_

For CBIZ MHM, LLC:

\_\_\_\_\_

Name:

Title:

Date: \_\_\_\_\_

For ML Liquidating Trust:

\_\_\_\_\_  
Matthew R. Hartley, Esq.

Trustee of the ML Liquidating Trust

Date: \_\_\_\_\_

For Mayer Hoffman McCann P.C.:

*William L. Hancock*  
\_\_\_\_\_

Name: *William L. Hancock*

Title: *President*

Date: *2/2/15*  
\_\_\_\_\_

For CBIZ, Inc.:

\_\_\_\_\_  
Name:

Title:

Date: \_\_\_\_\_

For CBIZ MHM, LLC:

\_\_\_\_\_  
Name:

Title:

Date: \_\_\_\_\_



For ML Liquidating Trust:

\_\_\_\_\_  
Matthew R. Hartley, Esq.

Trustee of the ML Liquidating Trust

Date: \_\_\_\_\_

For Mayer Hoffman McCann P.C.:

\_\_\_\_\_  
Name:

Title:

Date: \_\_\_\_\_

For CBIZ, Inc.:

*mg morelli*  
\_\_\_\_\_  
Name: Matthew J. Morelli

Title: Assoc. C.

Date: 2/3/15

For CBIZ MHM, LLC:

*mg morelli*  
\_\_\_\_\_  
Name: Matthew J. Morelli

Title: Assoc. C.

Date: 2/3/15

# EXHIBIT A

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MARICOPA**

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

Plaintiff,

vs.

MAYER HOFFMAN MCCANN P.C., a Missouri professional corporation, CBIZ, INC., a Delaware corporation, CBIZ MHM, LLC, a Delaware limited liability company,

Defendants.

Case No. CV2010-053497

**STIPULATION FOR DISMISSAL  
WITH PREJUDICE OF PLAINTIFF'S  
CLAIMS AGAINST MAYER  
HOFFMAN MCCANN PC, CBIZ, INC.,  
AND CBIZ MHM, LLC,**

(Assigned to the Hon. Arthur Anderson)

Pursuant to Rule 41(a)(1)(B) of the Arizona Rules of Civil Procedure, Plaintiff ML Liquidating Trust and Defendants Mayer Hoffman McCann P.C., CBIZ, Inc., and CBIZ MHM, LLC, through undersigned counsel, hereby state that they have settled the dispute that gave rise to this action and hereby stipulate and move this Court for an Order dismissing all claims against Defendants Mayer Hoffman McCann P.C., CBIZ, Inc., and CBIZ MHM, LLC in their entirety and with prejudice. Each party shall bear its own costs and expenses (including attorneys' fees).

RESPECTFULLY SUBMITTED this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_,

**POLSINELLI PC**

By: \_\_\_\_\_

Carlyle W. Hall III

Craig M. Waugh

CityScape

One East Washington, Suite 1200

Phoenix, Arizona 85004

Telephone: (602) 650-2000

Facsimile: (602) 264-7033  
*Attorneys for Defendants*  
*Mayer Hoffman McCann P.C., CBIZ, Inc.,*  
*and CBIZ MHM, LLC*

**JONES DAY**

By: \_\_\_\_\_  
David F. Adler  
James R. Wooley  
Louis A. Chaiten  
Northpoint  
901 Lakeside Avenue  
Cleveland, Ohio 44114  
*Attorneys for Defendants*  
*Mayer Hoffman McCann P.C., CBIZ, Inc.,*  
*and CBIZ MHM, LLC*

**DICARLO CASERTA & MCKEIGHAN PLC**

By: \_\_\_\_\_  
Nicholas J. DiCarlo  
Christopher A. Caserta  
6900 E. Camelback Rd., Ste. 250  
Scottsdale, AZ 85251  
*Attorneys for Plaintiff ML Liquidating Trust*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF MARICOPA**

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

Plaintiff,

vs.

MAYER HOFFMAN MCCANN P.C., a Missouri professional corporation, CBIZ, INC., a Delaware corporation, CBIZ MHM, LLC, a Delaware limited liability company,

Defendants.

Case No. CV2010-053497

**[PROPOSED] ORDER GRANTING STIPULATION FOR DISMISSAL WITH PREJUDICE OF PLAINTIFF'S CLAIMS AGAINST MAYER HOFFMAN MCCANN PC, CBIZ, INC., AND CBIZ MHM, LLC,**

(Assigned to the Hon. Arthur Anderson)

Upon stipulation of the parties and good cause appearing,

IT IS HEREBY ORDERED THAT:

All claims of the Plaintiff ML Liquidating Trust against Defendants Mayer Hoffman McCann P.C., CBIZ, Inc., and CBIZ MHM, LLC are hereby dismissed in their entirety and with prejudice. Each party shall bear its own costs and expenses (including attorneys' fees).

DATED this \_\_\_\_ day of \_\_\_\_\_ 2015.

\_\_\_\_\_  
The Honorable Arthur Anderson  
Maricopa County Superior Court Judge