UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

IN RE THORNBURG MORTGAGE, INC. SECURITIES LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS	Case No. CIV 07-815JB/WDS

JOINT DECLARATION OF BENJAMIN J. SWEET AND BETSY C. MANIFOLD IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT, PLAN OF ALLOCATION AND APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

BENJAMIN J. SWEET and BETSY C. MANIFOLD respectfully submit this joint declaration (the "Joint Declaration"), pursuant to Federal Rule of Civil Procedure 23(e), in support of: (i) final approval of the settlement of this class action (the "Settlement"), on the terms and conditions reflected in the Stipulation and Agreement of Settlement dated March 28, 2012 (the "Stipulation") which the Court preliminarily approved by its Order Preliminarily Approving Settlement and Providing for Notice dated April 23, 2012 (the "Preliminary Approval Order"); (ii) final certification of the Class for settlement purposes; (iii) the proposed plan for allocating the settlement proceeds to the Class (the "Plan of Allocation"); and (iv) Co-Lead Counsel's application for an award of attorneys' fees and expenses.[1]

I. INTRODUCTION

1. We, Benjamin J. Sweet and Betsy C. Manifold, are partners with the law firms of Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz") and Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein"), respectively. Kessler Topaz and Wolf Haldenstein were appointed by this Court to serve as Co-Lead Counsel for plaintiffs, W. Allen Gage, individually and on behalf of J. David Wrather, Harry Rhodes, FFF Investments, LLC, Robert Ippolito, individually and as Trustee for the Family Limited Partnership Trust, and Nicholas F. Aldrich, Sr. (collectively, the "Lead Plaintiffs"); Betty L. Manning ("Manning"); John Learch ("Learch"); and Boilermakers Lodge 154 Retirement Plan ("Boilermakers" and, collectively with Lead Plaintiffs, Manning and Learch, the "Plaintiffs"), and the Class (as defined below) in the above-captioned action (the "Litigation"). We have been personally involved in all aspects of the Litigation, including the negotiations resulting in the Settlement of the Litigation with the Settling Defendants (as defined below) and the implementation of the Settlement (discussed

[1] Unless otherwise noted, capitalized terms used herein shall have those meanings contained in the Stipulation.

below) to date. We have also been kept informed of developments in the Litigation by attorneys working with us and under our direction.

2. Because this Joint Declaration is submitted in support of a settlement, it is therefore privileged and inadmissible in any proceeding, other than in connection with the Settlement. In the event that the Settlement is not approved by the Court, this Joint Declaration and the statements contained herein and in any supporting memorandum are made without prejudice to Plaintiffs' position on the merits.

II. TERMS OF THE SETTLEMENT AND NOTICE

3. The Settlement provides for the payment of Two Million Dollars ($2,000,000) in cash (the "Settlement Amount") on behalf of the Settling Defendants.[2] On April 9, 2012, the United States Bankruptcy Court for the District of Maryland acting in *In re: TMST, Inc. f/k/a Thornburg Mortgage, Inc., et al.*, Case Nos. 09-17787, 17790, 17791, 17792 (Jointly Administered under Case No. 09-17787) (the "Bankruptcy Court") granted the Settling Defendants' motion, pursuant to Section 362 of the Bankruptcy Code, for an order modifying the automatic stay to allow for payment under the directors' and officers' insurance policies to settle the Litigation. Pursuant to the Stipulation and the Bankruptcy Court's April 9, 2012 Order, the Settlement Amount has been deposited into an escrow account for the benefit of the Class.

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[2] The term "Settling Defendants" refers collectively to: (i) Garrett Thornburg, Larry A. Goldstone, and Clarence G. Simmons (the "Individual Defendants") and (ii) Anne-Drue M. Anderson, David A. Ater, Joseph H. Badal, Eliot R. Cutler, Paul G. Decoff, Michael B. Jeffers, Ike Kalangis, Owen M. Lopez, Francis I. Mullin III, and Stuart C. Sherman (the "Dismissed Defendants" and, together with the Individual Defendants, the "Settling Defendants"). The corporate defendant, Thornburg Mortgage, Inc. ("TMI" or the "Company") filed a petition for voluntary Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Maryland on May 1, 2009 and has been voluntarily dismissed from the Litigation with prejudice. *See* ¶¶8, 18 below.

4. The terms of the Settlement are set forth in the Stipulation and in the Notice of Pendency of Class Action, Proposed Settlement, Settlement Fairness Hearing and Motion for Attorneys' Fees and Expenses (the "Notice") (attached hereto as Exhibit 1(C)). A total of 213,994 copies of the Notice have been mailed to potential Class Members and nominees pursuant to the Court's Preliminary Approval Order. *See* ¶9 of the Declaration of Josephine Bravata (the "Bravata Declaration"), submitted on behalf of the Court-authorized claims administrator for the Settlement, Strategic Claims Services ("SCS").[3] In addition, the Summary Notice of Pendency and Proposed Class Action Settlement (the "Summary Notice") was published in *Investor's Business Daily* and transmitted over *PR Newswire* on May 30, 2012. Bravata Decl. at ¶7. SCS also posted information regarding the Settlement on its website, www.strategicclaims.net, which provides access to downloadable copies of the Notice, Proof of Claim, Stipulation, Preliminary Approval Order and Plan of Allocation. As of July 19, 2012, the section of SCS's website devoted to the Settlement has received a total of 430 unique visits. Bravata Decl. at ¶5, fn 2.[4]

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[3] As specifically set forth in the Bravata Declaration (attached hereto as Exhibit 1), a total of 1,791 Notices, along with a letter, were mailed to SCS's master list of nominees. Bravata Decl. at ¶4. As in most securities class actions, the large majority of shareholders are beneficial owners whose securities are held in "street name" (*i.e.*, the securities are purchased by brokerage firms, banks, institutions and other third-party nominees on behalf of the beneficial owners). *Id.* at fn 1. Additionally, as of July 19, 2012, SCS has mailed a total of 212,203 Notices, along with a copy of the Proof of Claim and Release form ("Proof of Claim" and, together with the Notice, the "Claim Packet") to potential Class Members or nominees. *Id.* at ¶9. Of the 212,203 Claim Packets mailed, 2,146 Claim Packets were mailed to the individuals and organizations contained on the shareholder list provided to SCS by TMI's transfer agent. *Id.* at ¶¶5, 9. The remaining 210,057 Claim Packets were mailed in response to requests by nominees, for forwarding, and by other individuals. *Id.* at ¶9.

[4] Information regarding the objection filed by the non-settling, Underwriter Defendants (*i.e.*, A.G. Edwards & Sons, Inc.; BB&T Capital Markets, a division of Scott & Strongfellow, Inc.; UBS Securities, LLC; Citigroup Global Markets, Inc.; Friedman, Billings, Ramsey & Co., Inc.; Oppenheimer & Company, Inc.; RBC Dain Rauscher Corp.; Stifel, Nicolaus & Company, Inc.;

5. Along with providing information about the Settlement, the Notice advises recipients that Class Members who do not wish to participate in the Settlement may exclude themselves from the Class. The Notice also advises recipients that Class Members who do not believe that all aspects of the Settlement, including the Plan of Allocation or Co-Lead Counsel's request for an award of attorneys' fees and expenses are fair, reasonable and adequate, have the right to object to any or all of the foregoing. As of the filing of this Joint Declaration, only two purported Class Members have objected to the Settlement and/or Co-Lead Counsel's request for attorneys' fees and expenses, and fourteen requests for exclusion from the Class have been received. Bravata Decl. at ¶11.[5]

6. If the Court approves the Settlement and it becomes Final as that term is defined in the Stipulation, the claims asserted in the Litigation against the Settling Defendants shall be dismissed with prejudice, subject to the terms of the Stipulation and the Final Order entered by the Court. For the reasons set forth below and in the accompanying memoranda,[6] we

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and Bear, Stearns & Co., Inc. (now J.P Morgan Securities LLC)), as well as a copy of the objection and Proposed Order and Final Judgment, are also available for review on SCS's website. *See* ¶47 below.

[5] The deadline for submitting objections or requests for exclusion is August 6, 2012. *See* Exhibit 1(C) hereto. As this deadline has not yet passed, Co-Lead Counsel will collectively address the objections and requests for exclusion received to date, along with any additional objections and/or requests for exclusion received after the date of this Joint Declaration, in a separate submission to be filed with the Court on or before August 20, 2012. As mentioned above, the non-settling, Underwriter Defendants also filed an objection to the Settlement but did not do so as Class Members. Their objection is limited to the absence of a judgment reduction provision in the Proposed Order and Final Judgment (the "Final Order") attached as Exhibit B to the Stipulation filed with the Court on April 16, 2012. *See* ECF No. 386. *See also* ¶47 below.

[6] In conjunction with the Joint Declaration, Co-Lead Counsel are also submitting (i) the Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Proposed Settlement and Plan of Allocation (the "Settlement Memorandum") and (ii) the Memorandum of Law in Support of Approval of Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses (the "Fee Memorandum").

respectfully submit, on behalf of Co-Lead Counsel, that: (i) the terms of the Settlement and Plan of Allocation are fair, reasonable and adequate in all respects, and pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, should be approved by this Court; (ii) the Class satisfies each of the requirements for class certification and warrants final certification for settlement purposes; and (iii) Co-Lead Counsel's request for an award of attorneys' fees and expenses is warranted and should be awarded.

III. BACKGROUND REGARDING THE PARTIES IN THE LITIGATION

7. Pursuant to the Court's Preliminary Approval Order, the Class was preliminarily certified pursuant to Federal Rule of Civil Procedure 23, for purposes of effectuating the Settlement, and consists of all persons and entities who purchased or otherwise acquired TMI common stock and/or preferred stock in the open market and/or in or traceable to the Offerings between April 19, 2007 and March 19, 2008, inclusive and who were damaged thereby.[7] By the same Order, the Court appointed, preliminarily and for purposes of the Settlement only, Plaintiffs, W. Allen Gage, individually and on behalf of J. David Wrather, Harry Rhodes, FFF Investments, LLC, Robert Ippolito, individually and as Trustee for the Family Limited Partnership Trust, Nicholas F. Aldrich, Sr., Betty L. Manning, John Learch, and Boilermakers Lodge 154 Retirement Plan, as class representatives.

8. During the Class Period, the corporate defendant TMI was a publicly-traded residential mortgage lender claiming to focus primarily on the "jumbo" or "super-jumbo" segment (*i.e.*, loans totaling over $417,000) of the adjustable-rate mortgage ("ARM") market

[7] Excluded from the Class are: (1) TMI, the Defendants, the directors and officers of TMI, members of the immediate families and their legal representatives, heirs, successors or assigns, and any entity in which any of the Defendants have or had a controlling interest; and (2) all Persons who file valid and timely requests for exclusion from the Class in accordance with the Preliminary Approval Order and the Notice.

with its principal place of business in Sante Fe, New Mexico.[8] At all times during the Class Period, TMI's securities traded on the New York Stock Exchange under the symbol "TMA." Complaint at ¶60. On May 1, 2009, during the course of the Litigation, TMI filed a petition for voluntary Chapter 11 bankruptcy. *Id.*; *See also In re: TMST, Inc. f/k/a Thornburg Mortgage, Inc., et al.*, Case No. 09-17787. On May 5, 2009, TMI filed a Suggestion of Bankruptcy in this Court asserting that its bankruptcy filing operated as an automatic stay of judicial proceedings against it under 11 U.S.C. §§ 362(a)(1) and 362(a)(3). *See* ECF No. 193.[9] On March 2, 2012, Plaintiffs voluntarily dismissed TMI from the Litigation with prejudice. *See* ECF No. 384.

9. Certain of TMI's executive officers and directors during the relevant time period were also named as defendants in the Litigation: (i) Garrett Thornburg ("Thornburg"), the Company's founder, Chairman of the Board of Directors and Chief Executive Officer ("CEO") until December 18, 2007; Larry A. Goldstone ("Goldstone"), the Company's President, Chief Operating Officer and CEO from December 18, 2007 until September 11, 2009; and Clarence D. Simmons ("Simmons"), the Company's Chief Financial Officer from April 2005 until September 11, 2009 (together, Thornburg, Goldstone and Simmons are referred to herein as the "Individual Defendants"); (ii) Joseph H. Badal ("Badal"), the Company's Chief Lending Officer and Executive Vice President until his retirement on December 31, 2007; Paul G. Decoff ("Decoff"), the Company's Senior Executive Vice President and Chief Lending Officer as of January 1, 2008; and the following directors of the Company during the relevant time period: Ann-Drue M.

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[8] *See* Consolidated Amended Class Action Complaint dated June 14, 2011 (the "Amended Complaint" or "Complaint") (ECF No. 361) at ¶¶6, 60.

[9] The following entities are also parties to the TMI bankruptcy: TMST Acquisition Subsidiary, Inc. f/k/a Thornburg Acquisition Subsidiary, Inc. (Case No.: 09-17790); TMST Home Loans, Inc. f/k/a Thornburg Mortgage Home Loans, Inc. (Case No.: 09-17791); and TMST Hedging Strategies, Inc. f/k/a Thornburg Mortgage Hedging Strategies, Inc. (Case No.: 09-17792).

Anderson, David A Ater, Eliot R. Cutler, Ike Kalangis, Owen M. Lopez, Francis I. Mullin, III, Michael B. Jeffers, and Stuart C. Sherman (collectively, the "Dismissed Defendants" and, together with the Individual Defendants, the "Settling Defendants").[10] Complaint at ¶¶61-65, 470-476.

10. Also named as defendants in this Litigation were the underwriters for four separate public securities offerings by the Company during the Class Period (the "Offerings")[11]: AG Edwards & Sons, Inc.; BB&T Capital Markets; UBS Securities, LLC; Citigroup Global Markets, Inc.; Friedman, Billings, Ramsey & Co., Inc.; Oppenheimer & Company, Inc.; RBC Dain Rauscher Corp.; Stifel, Nicolaus & Company, Inc.; and Bear, Stearns & Co., Inc. (collectively, the "Underwriter Defendants" or "Non-Settling Defendants"). The Settlement does not release any of the Class's claims against the Underwriter Defendants, and Plaintiffs continue to pursue an appeal of the Court's dismissal of the Class's claims against the Underwriter Defendants.

[10] Defendants Goldstone and Badal also served as directors of the Company during the relevant time period. *Id.* at ¶¶62-63.

[11] Collectively, the Offerings generated more than $900 million for TMI during the relevant period. Complaint at ¶¶480-491. The Offerings refer collectively to: (i) the May 4, 2007 public offering of 4.5 million shares of TMI common stock at $27.05 per share, for gross proceeds of $121.7 million (the "May 2007 Offering"); (ii) the June 19, 2007 public offering of 2.75 million shares of 7.5% Series E Cumulative Convertible Redeemable Preferred Stock at $25.00 per share, for gross proceeds of $68.75 million (the "June 2007 Offering"); (iii) the September 7, 2007 public offering of 20 million shares of 10% Series F Cumulative Convertible Redeemable Preferred Stock at $25.00 per share, for gross proceeds of $500 million (the "September 2007 Offering"); and (iv) the January 15, 2008 concurrent public offerings of 8 million shares of 10% Series F Cumulative Convertible Redeemable Preferred Stock at $19.50 per share, for gross proceeds of $156 million, and 7 million shares of TMI common stock at $8.00 per share, for gross proceeds of $56 million (the "January 2008 Offerings").

IV. HISTORY OF THE LITIGATION

A. Background Of The Claims Asserted

11. This Litigation arises out of alleged misrepresentations and omissions of material information concerning TMI's business and financial condition during the Class Period. TMI's business was analogous to a depository bank, such that it generates income from the small, net spread between the interest income it earns on its assets and the cost of its borrowings. Complaint at ¶¶6, 116. Therefore, to show profitability during the Class Period, TMI had to exponentially "grow" the size of its balance sheet through the purchase and origination of mortgage-backed assets – a business model that required the Company to have continuous access to capital. *Id.* at ¶7.

12. Plaintiffs allege that, during the relevant time period, TMI assured its investors that its liquidity was not at risk, stating as late as July 20, 2007 that its unencumbered assets securing TMI's highly leveraged financing were at their highest level "in the history of the organization" and portrayed itself as a unique and secure mortgage company, focusing exclusively on low risk, prime-only loans, while other lenders pursued high-risk subprime and Alt-A borrowers. *Id.* at ¶¶8, 11-12.[12] Unbeknownst to investors, however, TMI was not a low-risk lender but instead possessed billions of dollars in high-risk Alt-A mortgage-related assets. Complaint at ¶16.

[12] Alt-A loans are mortgage loans to borrowers who do not qualify for a conventional, prime mortgage loan. Complaint at ¶141. Often an Alt-A borrower is unable to provide the proof of income or the verification of assets necessary to obtain a prime mortgage, but has a satisfactory credit score, or *vice versa*. *Id.* at ¶142. In other words, Alt-A or "alternative" loans are associated with and defined by a higher level of risk than prime loans due to a borrower's inability to provide these fundamental guarantees. *Id.*

13. Plaintiffs further allege that, throughout the Class Period, Defendants[13] misrepresented and concealed the Company's exposure to the deteriorating mortgage market, and its potentially disastrous effect on the Company's highly-leveraged business. *Id.* at ¶15. Specifically, Plaintiffs assert that Defendants violated the federal securities laws by issuing materially false and misleading statements and omitting material information required to be disclosed regarding, *inter alia*, (1) TMI's financial condition during fiscal year 2006; (2) TMI's exposure to billions of dollars in purchased mortgage-backed securities ("MBS") (*i.e.*, a series of fixed-income assets that were bundled and sold as securities) backed by high-risk Alt-A mortgages; (3) TMI's inability to access several major funding sources as the credit crisis deepened; and (4) the existence of cross-default provisions in all of TMI's reverse repurchase agreements ("RPAs")[14], a multi-billion dollar funding source for the Company. Complaint at ¶¶112, 153-228.

14. The Complaint alleges that the truth regarding TMI's business and financial condition during the Class Period was revealed through a series of disclosures – culminating with the Company's announcement on March 19, 2008 that it had entered into a bailout agreement with five of its remaining lenders to obtain approximately $5.8 billion in financing. Complaint at ¶¶41, 388-391.[15] Following this announcement, the price of TMI common stock dropped from

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[13] "Defendants" refers collectively to TMI, the Settling Defendants and the Non-Settling Defendants.

[14] RPAs involve a simultaneous sale of pledged securities to a lender at an agreed upon price in return for an agreement to repurchase the same securities at a future date (the maturity of the borrowing) at a higher price. Complaint at ¶118.

[15] Less than two weeks previously, on March 11, 2008, TMI filed a restatement revealing a $676.6 million impairment charge on its balance sheet to reflect this it may not have the ability to hold certain ARM assets to maturity, as well as a $300,000 reduction in management fees and a $5.4 million reduction in fourth-quarter performance fees. Complaint at ¶¶37, 219-220.

its prior-day close of $2.98 to close at $1.50 on March 19, 2008, a one-day decline of 49%. Complaint at ¶227. In total, over the course of the Class Period, TMI's common stock experienced a 95% drop in value from a Class Period high closing price of $28.10 on June 4, 2007 to the $1.50 per share closing price on March 19, 2008.

B. The Procedural History Of The Litigation

15. On August 21, 2007, the first class action complaint alleging violations of the federal securities laws against TMI and certain of the other Settling Defendants, styled *Slater v. Thornburg, et al.*, CIV 07-815 (the "Original Action"), was filed in the United States District Court for the District of New Mexico. *See* ECF No. 1. Thereafter, several related actions were filed,[16] and by Order dated February 8, 2008, these actions were consolidated with the Original Action under the caption: *In re Thornburg Mortgage, Inc. Securities Litigation*, Case No. CIV 07-815 JB/WDS. *See* ECF No. 49. By the same Order, the Court appointed (i) W. Allen Gage, individually and on behalf of J. David Wrather, Harry Rhodes, FFF Investments, LLC, Robert Ippolito, individually and as Trustee for the Family Limited Partnership Trust, and Nicholas F. Aldrich, Sr., individually and behalf of the Aldrich Family as the lead plaintiff (referred to herein as the "Lead Plaintiffs"); and (ii) Lead Plaintiffs' selection of Schiffrin Barroway Topaz & Kessler, LLP (n/k/a Kessler Topaz Meltzer & Check, LLP) and Wolf Haldenstein as Co-Lead Counsel and the Branch Law Firm as Liaison Counsel.

16. Following an extensive investigation, Lead Plaintiffs, along with additional plaintiffs Manning and Learch, filed the Consolidated Class Action Complaint (the "Consolidated Complaint") on May 27, 2008, alleging claims under Sections 10(b) and 20(a) of

[16] Three of the related actions were filed in the United States District Court for the Southern District of New York and subsequently transferred to the District of New Mexico.

the Securities Exchange Act of 1934 (the "Exchange Act") (the fraud claims), including Rule 10b-5 promulgated there under by the Securities and Exchange Commission ("SEC"), and Sections 11, 12(a)(2) and 15 of the Securities Act (the non-fraud claims). *See* ECF No. 68. Specifically, the Consolidated Complaint asserted: (i) violations of Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, against TMI, the Individual Defendants, and defendants Badal and Decoff (First Claim); (ii) violations of Section 20(a) of the Exchange Act against the Individual Defendants and defendants Badal and Decoff (Second Claim); (iii) violations of Section 11 of the Securities Act against TMI, the Individual Defendants, the Dismissed Defendants (excepting Michael B. Jeffers), and the Underwriter Defendants (Third Claim); (iv) violations of Section 12(a)(2) of the Securities Act against TMI, the Individual Defendants, the Dismissed Defendants (excepting Mr. Jeffers), and the Underwriter Defendants (Fourth Claim); and (v) violations of Section 15 of the Securities Act against the Individual Defendants and defendants Badal and Decoff (Fifth Claim).

17. On September 22, 2008, the Individual Defendants and the Dismissed Defendants (excepting Mr. Jeffers) moved to dismiss the Consolidated Complaint. *See* ECF Nos. 126-132. On December 22, 2008, Lead Plaintiffs, Manning and Learch filed two responses in opposition to defendants' motions to dismiss – one addressing defendants' arguments concerning the Securities Act claims and one addressing defendants' arguments concerning the Exchange Act claims. *See* ECF Nos. 152-157. Additionally, in response to defendants' arguments regarding the named plaintiffs' standing to pursue claims in connection with certain Offerings, Lead Plaintiffs, Manning and Learch moved the Court for leave to file an amended consolidated class

action complaint to add additional representative plaintiff, Boilermakers. *See* ECF No. 160.[17] Following further briefing on the motions to dismiss (*see* ECF Nos. 165-168), the parties presented oral argument on April 22, 2009.

18. While defendants' motions to dismiss were pending, TMI filed a petition for voluntary Chapter 11 bankruptcy on May 1, 2009. *See In re: TMST, Inc. f/k/a Thornburg Mortgage, Inc., et al.*, Case No. 09-17787. On May 5, 2009, TMI filed a Suggestion of Bankruptcy in this Court asserting that its bankruptcy filing operated as an automatic stay of judicial proceedings against it under 11 U.S.C. §§ 362(a)(1) and 362(a)(3). *See* ECF No. 193.[18] At the Court's direction, Lead Plaintiffs submitted detailed status reports regarding TMI's bankruptcy proceedings on July 22, 2009, October 1, 2009 and November 3, 2009. *See* ECF Nos. 202, 206 and 212.[19]

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[17] By memorandum opinion and order dated February 27, 2010, the Court granted Lead Plaintiffs, Manning and Learch leave to file an amended consolidated class action complaint to add Boilermakers as an additional representative plaintiff. *See* ECF No. 266.

[18] On March 2, 2012, Plaintiffs voluntarily dismissed TMI from the Litigation with prejudice. *See* ECF No. 384. TMI was not previously dismissed from the Litigation due to, as expressed in Lead Plaintiffs' Motion for a Partial Lifting of the PSLRA Stay of Discovery (*see* ECF. No. 222), concerns regarding the debtor's preservation of documents pursuant to Section (b)(3)(C) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). 15 U.S.C. §78u-4(b)(3)(C). *See also* ¶¶28-29 below.

[19] Lead Plaintiffs' July 22, 2009 status report addressed TMI's pending bankruptcy as well as provided a response to the officer and director defendants' July 21, 2009 letter requesting that the Court hold the Litigation in abeyance until the Bankruptcy Court rules on TMI's request for a stay of the case as to all parties involved. Lead Plaintiffs' October 1, 2009 status report not only addressed the procedural history of TMI's bankruptcy proceedings, but also addressed (i) why the Bankruptcy Code's automatic stay provision is inapplicable to matters against the non-debtor defendants (*i.e.*, the Underwriter Defendants and officer and director defendants) and (ii) the alleged prejudice to Lead Plaintiffs and the Class by their inability to litigate the case as discoverable information likely is disappearing. Lead Plaintiffs' November 3, 2009 status report provided the Court with an update on TMI's bankruptcy proceedings as well as, *inter alia*, the Bankruptcy Court's ruling on the U.S. Trustee's Motion for Appointment of Chapter 11 Trustee.

19. By Amended Memorandum Opinion and Order dated January 27, 2010, the Court granted in part and denied in part defendants' motions to dismiss. Specifically, the Court (i) dismissed all claims asserted under the Securities Act; (ii) dismissed the claims asserted under Section 10(b) of the Exchange Act, with the exception of certain claims asserted against defendant Goldstone based on three statements he issued during the Class Period; (iii) dismissed all claims asserted under Section 20(a) of the Exchange Act, with the exception of those claims asserted against defendants Simmons, Goldstone and Decoff; and (iv) reserved judgment as to the Section 10(b) claims against TMI and the Section 20(a) claims against defendants Simmons, Goldstone and Decoff (the "January 27, 2010 Opinion and Order"). *See* ECF No. 252. A separate Memorandum Opinion and Order also issued on January 27, 2010 dismissed all claims asserted against the Underwriter Defendants. *See* ECF No. 251.

20. Shortly thereafter, on February 5, 2010, Plaintiffs filed a Motion for Clarification of the Court's January 27, 2010 Opinion and Order, seeking permission to file a motion for leave to amend their pleading and also requesting that the Court revisit the conclusions in its January 27, 2010 Opinion and Order. With respect to the Court's January 27, 2010 Opinion and Order, Plaintiffs specifically requested the Court to re-consider its determinations that, *inter alia*: (i) the Company's 2007 restatement was not actionable under the Securities Act and (ii) certain statements in the Offering Documents were mere puffery.

21. Pursuant to Federal Rule of Civil Procedure 26(f), the parties held a meeting on February 19, 2010 and thereafter, on March 1, 2010, filed a Joint Status Report and Provisional Discovery Plan with the Court. *See* ECF No. 268.

22. After a hearing in connection with Plaintiffs' Motion for Clarification on June 9, 2010 (*see* ECF No. 298), the Court, by Memorandum Opinion and Order issued on July 5, 2010,

granted Plaintiffs the opportunity to file an omnibus motion seeking reconsideration of the Court's January 27, 2010 Opinion and Order and leave to amend the Consolidated Complaint. On July 9, 2010, Plaintiffs filed their Omnibus Motion for (i) Leave to Amend the Consolidated Class Action Complaint and (ii) for Reconsideration of the Court's January 27, 2010 Memorandum Opinions and Orders Granting in Part and Denying in Part Defendants' Motions to Dismiss the Consolidated Amended Complaint (the "Motion for Consideration"). The Court heard oral argument in connection with Plaintiffs' motion on November 3, 2010.

23. On March 31, 2011, the Court entered an order granting in part and denying in part Plaintiffs' Motion for Reconsideration. Thereafter, on June 2, 2011, the Court entered a memorandum opinion fully detailing the basis for its March 31, 2011 order, and further ordered that it had reconsidered its January 27, 2010 Opinion and Order and would make no substantive change to its decisions, except for its decision to reserve ruling on the dismissal of Plaintiffs' Section 20(a) claims against defendants Goldstone, Simmons, and Decoff. *See* ECF 360. The Court ruled that it would sustain the Section 20(a) claims against defendants Goldstone and Simmons, but that it would dismiss the Section 20(a) claim against defendant Decoff. The Court also granted Plaintiffs leave to file an amended complaint, because the amendment might cure deficiencies in Plaintiffs' allegations establishing Section 20(a) liability against TMI. On July 25, 2011, the Court entered final judgment that disposed of all of Plaintiffs' claims against the Dismissed Defendants and the Underwriter Defendants. *See* ECF No. 372.[20]

[20] Plaintiffs timely filed a Notice of Appeal as to the Underwriter Defendants in accordance with F.R.A.P. 4(a)(1)(A) on August 24, 2011. *See* ECF. No. 373.

24. Thereafter, On June 14, 2011, Plaintiffs filed the operative complaint, the Consolidated Amended Class Action Complaint, with the Court. *See* ECF No. 361.[21]

C. Settlement Negotiations

25. The Settling Parties, by and through their counsel, began discussing a possible resolution of the Litigation in mid-2011. Pursuant to joint motions by certain of the Settling Parties, the Court stayed the proceedings while the settlement negotiations were ongoing. *See* ECF Nos. 379 and 381.[22] The Settling Parties' negotiations continued over the course of several months before an agreement in principle to settle the Litigation was ultimately reached in January, 2012.

26. Thereafter, the Settling Parties negotiated the details of a settlement agreement and drafted the relevant settlement papers, ultimately executing the Stipulation on March 28, 2012.[23] The Court granted preliminary approval of the Settlement on April 23, 2012.

D. Plaintiffs' Investigative Efforts

27. Plaintiffs, through their counsel, conducted an in-depth and ongoing investigation into the strengths and weaknesses of the Class's claims as well as the viability of the defenses

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[21] The Amended Complaint asserted the same claims as the previous Consolidated Complaint, but added new factual allegations which Plaintiffs intended to cure perceived pleading deficiencies in claims asserted under the negligence-based, strict liability provisions of Sections 11 and 15 of the Securities Act as well as claims for control person liability asserted under Section 20(a) of the Exchange Act.

[22] The Court-ordered stay did not apply to Plaintiffs' appeal from the final judgment regarding the Underwriter Defendants.

[23] In addition to drafting and negotiating the Stipulation and related settlement documents, counsel for the Settling Defendants, after discussions with Co-Lead Counsel, drafted and filed with the Bankruptcy Court a motion, pursuant to, *inter alia*, section 362 of the bankruptcy code, requesting modification of the automatic stay to allow the use of the available Director & Officer ("D&O") insurance proceeds to fund the Settlement Amount. This motion was granted pursuant to order of the Bankruptcy Court entered on April 9, 2012.

put forth by Defendants prior to reaching the agreement to settle the Litigation with the Settling Defendants. This investigation included, among other things, review and analysis of (i) public documents pertaining to TMI and the other Defendants; (ii) TMI's filings with the SEC; (iii) documents in connection with the Offerings; (iv) press releases published by TMI; (v) analyst reports concerning TMI; (vi) pleadings in other actions in which TMI or the Individual Defendants are/were a party; (vii) pleadings and other documents filed in TMI's consolidated bankruptcy proceedings; (viii) newspapers and magazine articles and other media coverage regarding TMI and the Individual Defendants; and (ix) motions in the bankruptcy proceedings and exhibits attached thereto; as well as (x) interviews of former TMI employees; (xi) consultation with experts; and (xii) research of the applicable law with respect to the claims asserted in the Litigation and the potential defenses thereto. In addition, following TMI's bankruptcy filing in May 2009, Plaintiffs engaged and consulted extensively with experienced bankruptcy counsel, Lowenstein Sandler PC, in an effort to monitor TMI's bankruptcy proceedings and navigate through certain issues in connection with TMI's bankruptcy.

28. On November 10, 2009, while defendants' motions to dismiss the Consolidated Complaint were pending, Plaintiffs filed a motion with the Court to partially modify the discovery stay imposed by the PSLRA.[24] A hearing on Plaintiffs' motion was held on June 9, 2010. At the hearing the Court directed the parties to meet and confer on an appropriate document preservation order and on an agreement for the production of certain document

[24] This motion specifically requested to (i) recover relevant documents, computers and other materials alleged to have been misappropriated by the Individual Defendants from TMI; (ii) obtain documents previously produced by TMI and the Individual Defendants to government agencies and other third parties pursuing claims similar to Lead Plaintiffs' claims against TMI and the Individual Defendants; and (iii) issue document preservation subpoenas and requests to TMI, the Individual Defendants and select third parties.

production logs. *See* ECF No. 298. By Order dated July 1, 2010, the Court denied Plaintiffs' motion to partially modify the discovery stay without prejudice.

29. Thereafter, the parties negotiated a stipulation whereby, during the stay of discovery pursuant to 15 U.S.C.§78u-4(b)(3)(B), in accordance with 15 U.S.C.§78u-4(b)(3)(C), defendants Goldstone and Simmons specifically agreed to "treat all documents, data compilations (including electronically recorded or stored data) and tangible objects that are in the custody or control" of either defendant Goldstone and/or defendant Simmons "that are relevant to the allegations" contained in the complaint "as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure" (with the exception of materials in the possession, custody or control of other parties in, or third parties to, the Litigation). *See* ECF No. 316. The parties' filed their Stipulation and Order Providing for Preservation of Documents, along with a status report, on July 9, 2010, and on July 13, 2010, the Court entered the parties' stipulation. *See* ECF Nos. 306 and 316.

30. Co-Lead Counsel have devoted thousands of hours to their investigation of and prosecution of the Class's claims. Co-Lead Counsel's investigation has been critical to the prosecution of this Litigation. As a result of these efforts, both Co-Lead Counsel and Plaintiffs have an in-depth knowledge of the strengths and weaknesses of the claims asserted in this Litigation that has permitted them to fully consider and evaluate the fairness of the Settlement to the Class.

V. THE FACTORS AFFECTING SETTLEMENT

31. The Settlement now before the Court is the culmination of litigation efforts over the course of nearly five years, including months of settlement negotiations. As discussed herein, the proposed Settlement provides a benefit for the Class where there existed a real risk of

no recovery. In entering into the Settlement, Co-Lead Counsel evaluated the potential recovery for the Class in light of all the relevant circumstances involved in the Litigation, in particular: (i) TMI's Chapter 11 bankruptcy filing during the course of the Litigation; (ii) the limited amount of insurance proceeds available to fund a settlement with the Individual Defendants or satisfy a future judgment; (iii) the Court's dismissal of the negligence-based Securities Act claims asserted against the Dismissed Defendants and Underwriter Defendants; (iv) the risks and uncertainty Plaintiffs faced to proving materiality, falsity, scienter and loss causation with respect to their remaining claims against the Individual Defendants if the Litigation continued; and (v) the time and substantial expense that would be required to prosecute this Litigation to completion. Indeed, the Settlement represents a realistic assessment by both sides of the strengths and weaknesses of their respective claims and defenses as well as the risks of further litigation and is a fair, reasonable and adequate settlement.

32. In the Tenth Circuit, as in other circuits, a class-action settlement is entitled to final approval under Rule 23(e) where it is "fair, reasonable and adequate." *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir. 1993); *see also Lane v. Page*, No. CIV 06-1071 JB/ACT, 2012 U.S. Dist. LEXIS 74273, at *185 (D. N.M. May 22, 2012); *Vaszlavik v. Storage Tech. Corp.*, Civil Action No. 95-B-2525, 2000 U.S. Dist. LEXIS 21129, at *2, *4 (D. Colo. 2000) (citing *Jones v. Nuclear Pharm., Inc.*, 741 F.2d 322, 324 (10th Cir. 1984)). To that end, the Tenth Circuit has identified four non-exclusive factors for courts to consider in determining whether a proposed settlement is fair, reasonable and adequate: "(1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4)

the judgment of the parties that the settlement is fair and reasonable." *Gottlieb*, 11 F.3d at 1014; *Jones*, 741 F.2d at 324; *see Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002) (affirming test).[25] As demonstrated herein and in the accompanying Settlement Memorandum, the Settlement satisfies each of the foregoing factors and warrants final approval by the Court.

A. The Proposed Settlement Was Fairly And Honestly Negotiated

33. An analysis of the first *Jones* factor strongly favors the Settlement. The Settlement is the product of extensive arms'-length, informed, non-collusive negotiations conducted by capable counsel who are well experienced in securities litigation. Over the course of the Litigation, Co-Lead Counsel had, among other things, conducted an extensive investigation into the alleged claims, including the review of voluminous public documents pertaining to TMI and the other Defendants and pleadings in other actions in which TMI or the Individual Defendants are/were a party (including TMI's bankruptcy proceedings); consulted with experts, interviewed former employees of TMI and conducted intensive research of the law applicable to the Class's claims and defenses thereto. By the time settlement discussions began in mid-2011, Co-Lead Counsel had a solid understanding, both factually and legally, of the strengths and weaknesses of the remaining claims against the Individual Defendants (*see* ¶¶35-40 below) as well as the limited resources available for any potential recovery against these defendants (*see* ¶42 below). Equipped with this knowledge, Co-Lead Counsel were able to engage in a rigorous and protracted negotiation process with counsel for the Settling Defendants.

[25] Additional relevant factors may include: (i) the risk of establishing damages at trial; (ii) the extent of discovery and the current posture of the case; (iii) the range of possible settlement; and (iv) the reaction of class members to the proposed settlement. *In re N.M. Natural Gas Antitrust Litig.*, 607 F. Supp. 1491, 1504 (D. Colo. 1984).

Indeed, counsel for both sides zealously advocated their respective positions throughout the course of the settlement negotiations.

34. As discussed above, the Settling Parties engaged in settlement negotiations which spanned the course of many months, including numerous telephonic conferences, before reaching a tentative agreement to settle the Litigation. Following their tentative agreement to settle, the Settling Parties spent additional months negotiating the specific terms of the Settlement and drafting the relevant settlement documents. But for the Settlement – an agreement that Co-Lead Counsel believe to be in the best interests of the Class in light of the risks involved in further litigation against the Individual Defendants – Co-Lead Counsel were prepared to continue prosecuting the Litigation against these defendants.

B. Serious Questions Of Law And Fact Exist, Placing The Ultimate Outcome Of The Litigation In Doubt

35. An analysis of the second *Jones* factor was an important factor in Plaintiffs' decision to resolve the Litigation with the Settling Defendants and strongly supports the Settlement. While Plaintiffs believe their remaining Exchange Act claims against the Individual Defendants were meritorious, Plaintiffs recognize, nonetheless, that there existed real uncertainty regarding the outcome of the case. In determining the Settlement's fairness, Co-Lead Counsel and Plaintiffs considered and analyzed the potential risks to continued litigation, and in light of such risks, believe the Settlement is in the best interests of the Class.

1. The Risks Faced In Establishing Liability

36. If the Litigation were to proceed, Plaintiffs faced hurdles with respect to establishing the Individual Defendants' liability. Following the dismissal of the Securities Act claims, Plaintiffs' claims were significantly narrowed, with Plaintiffs' remaining claims against the three Individual Defendants consisting entirely of a challenge to the following three

statements: (i) defendant Goldstone's statement on June 6, 2007 that TMI was focused "exclusively" on prime mortgage origination; (ii) defendant Goldstone's statement on July 20, 2007 that TMI is "not an Alt-A lender"; and (iii) TMI's public disclosure in its March 3, 2008 Form 8-K (signed by defendant Goldstone) that, "[t]o the extent that any other reverse repurchase agreement contains a cross-default provision, the related lender, which may be an underwriter or its affiliate, could declare an event of default at any time." *See* ECF No. 252.

37. The Settling Parties disagree on nearly all factual and legal issues and, to this day, the Settling Defendants adamantly deny any liability. In their motions to dismiss and in connection with the Settling Parties' settlement negotiations, the Settling Defendants asserted various defenses to Plaintiffs' Exchange Act claims, and if the Litigation were to continue, Plaintiffs anticipated that the Individual Defendants would assert these defenses, and others, at summary judgment, trial and on appeal. For example, the Individual Defendants would argue that they did not act with the requisite scienter, that the alleged misstatements were not materially misleading, and that there was no control person liability.

2. The Risks Faced In Establishing Loss Causation And Damages

38. Even if Plaintiffs were successful in overcoming each and every defense the Individual Defendants could raise regarding liability, Plaintiffs also anticipated a significant challenge to establishing causation and damages. First, Plaintiffs would be required to prove that the three allegedly false and misleading statements attributed to defendant Goldstone artificially inflated the price of TMI securities from June 6, 2007 to the end of the Class Period, and that once TMI corrected these allegedly false statements, the price of TMI securities dropped, damaging Plaintiffs and the Class. In addition to proving that these three statements artificially inflated the price of TMI securities, Plaintiffs would also be required to prove the amount of the

artificial inflation. If the Litigation had continued, the Individual Defendants would have likely argued, among other things, that defendant Goldstone's statements did not artificially inflate the value of TMI securities, that TMI had disclosed the truth about its Alt-A assets and RPAs, and that any loss in the value of TMI securities was due to the collapse of real estate values and the mortgage market in 2006 through 2008.

39. Further, the presentation of evidence and the Settling Parties' differing arguments on damages would hinge upon extensive expert discovery and testimony. Although Plaintiffs believe they would be able to present expert testimony to meet their burden, and to rebut any arguments that the Individual Defendants would make, the Individual Defendants would likely assert that there were no damages or substantially smaller damages. As a result, the crucial element of damages would likely be reduced at trial to a "battle of the experts." Co-Lead Counsel have sufficient experience to recognize that in such a battle there exists the substantial possibility that a trier of fact could be swayed by the Individual Defendants' experts, who would seek to minimize or eliminate the amount of Plaintiffs' losses by showing that any losses were attributable to factors other than the alleged misstatements and omissions (in this case for example, the collapse of real estate values and the mortgage market in 2006 through 2008). Had the Litigation proceeded, there existed real uncertainties concerning damages (in addition to the risk that, even if Plaintiffs were successful in proving damages at trial, they would not be able to collect on a judgment).

40. Although the Class's potential damages from Plaintiffs' 10b-5 claims are substantial, the Settlement provides Class Members with a recovery and avoids the very real risk of no recovery after further litigation.

C. The Value Of The Present Recovery Greatly Outweighs The Possibility Of Future Relief After Protracted And Expensive Litigation With The Individual Defendants

41. The third *Jones* factor was also a critical factor in Plaintiffs' ultimate decision to resolve the Litigation with the Settling Defendants and weighs strongly in favor of the Settlement. Here, the $2 million cash Settlement provides the members of the Class with an immediate benefit and eliminates the significant risks of continued litigation with the Individual Defendants under circumstances where there existed a real risk of no recovery.

42. First and foremost, in May 2009, the alleged corporate wrongdoer in this Litigation, TMI, filed for Chapter 11 bankruptcy, while defendants' motions to dismiss were pending, and was no longer a viable source of recovery for the Class. In addition, only limited insurance proceeds were available to fund a settlement or satisfy a judgment with respect to the Individual Defendants in the Litigation.[26] Moreover, these insurance proceeds were wasting, and when taking into account the defense costs which would be incurred if this Litigation were to continue against the Individual Defendants, including the costs of full blown merits and expert discovery, there is a strong possibility that all of the available insurance would be depleted, and it is unlikely that much if any of the available insurance proceeds would have remained by the time of a trial in this Litigation to fund a judgment for an amount significantly greater than the Settlement. Indeed, the Settlement Amount essentially exhausts TMI's available D&O insurance for the relevant claims.[27] When considering the specific circumstances of this Litigation, particularly the bankruptcy of the corporate defendant and the effect continued litigation would

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[26] *See* June 9, 2010 Hearing Transcript (ECF No. 298) at 43-44 (explaining that TMI carries only $10 million in D&O insurance).

[27] *See* June 9, 2010 Hearing Transcript (ECF No. 298) at 43-44 (explaining that a substantial portion of the D&O insurance had already been advanced – and will continue to be advanced – to the multiple defense counsel in this case to pay their substantial legal fees).

have on the remaining insurance proceeds, the Settlement represents an immediate and guaranteed recovery for the Class.

43. Moreover, although Plaintiffs had conducted a thorough investigation of the Class's claims prior to reaching the Settlement, if the Litigation had continued, the Settling Parties would need to engage in formal discovery. As described in detail above, Plaintiffs' claims involved numerous complex legal and financial issues, including complicated accounting provisions and intricacies of the mortgage industry that would have required Plaintiffs to conduct voluminous document discovery and take many depositions. Following the close of merits discovery, Plaintiffs and the Individual Defendants would then engage in expert discovery, often the most costly phase of complex litigation, and thereafter, brief summary judgment and prepare for trial. Thus, the costs and risks associated with prosecuting Plaintiffs' remaining claims against the Individual Defendants to a verdict, not to mention through the inevitable appeals - would have been high, and the process would require many hours of the Court's time and its resources. As discussed previously, these costs would have further depleted the limited insurance available to satisfy any future judgment against the Individual Defendants.

44. Accordingly, Co-Lead Counsel believe that the Settlement is a fair, reasonable, and adequate result for members of the Class considering the risk of recovering nothing or less than the Settlement Amount after substantial delay.[28]

[28] Plaintiffs continue to litigate their claims against the Underwriter Defendants at the appellate level and there remains the possibility of an additional recovery for the Class from these defendants.

D. The Judgment Of The Parties That The Settlement Is Fair And Reasonable

1. Plaintiffs And Co-Lead Counsel Support The Settlement

45. An analysis of the fourth factor also supports the Settlement. Both Co-Lead Counsel – law firms with extensive experience in the area of complex and class action litigation, particularly securities class actions, and which are intimately familiar with the facts of this Litigation – and Plaintiffs believe the proposed Settlement provides a fair, reasonable and adequate result for the Class, in light of the risks in continued litigation and the real possibility that no recovery would be obtained.

2. The Class's Reaction To The Settlement

46. Additionally, to date, the reaction of the Class to the Settlement has been positive. The Court-authorized claims administrator, SCS, in accordance with the procedures for mailing and publication established by the Court's Preliminary Approval Order, undertook efforts to ensure that notice of the Litigation and the proposed Settlement was widely disseminated to potential Class Members. Following the dissemination of 213,994 copies of the Notice to potential Class Members and nominees, only two putative Class Members have filed objections in connection with the Settlement, and fourteen requests for exclusion from the Class have been received.[29]

[29] The objection filed by Frank C. Melfi on July 5, 2012 objects to both the Settlement and the maximum amount of attorneys' fees and expenses set forth in the Notice (*see* ECF No. 389), while the objection filed by Joel E. Reed on July 5, 2012 objects only to the amount of attorneys' fees and expenses (*see* ECF No. 390). Both of these objections, along with any additional objections filed after the date of this Joint Declaration, will be collectively addressed by Co-Lead Counsel in a reply submission to be filed with the Court on or before August 20, 2012. The deadline for submitting objections and requests for exclusion is August 6, 2012.

3. The Underwriter Defendants' Objection To The Proposed Order And Final Judgment

47. On May 18, 2012, the non-settling, Underwriter Defendants filed an objection to the Final Order attached as Exhibit B to the Stipulation filed with the Court on April 16, 2012. *See* ECF No. 386.[30] The Underwriter Objection is limited to the absence of a judgment reduction provision in the Final Order, and asserts that the absence of such a provision will "interfere with [the Underwriter Defendants'] contractual rights and their 'ability to seek contribution or indemnification.'" *See* Underwriter Objection (Exhibit 2 hereto) at p. 1. It is the Settling Parties' position, however, that the PSLRA itself provides non-settling defendants with a statutory right to claim an offset as a result of the partial settlement against any litigated judgment the plaintiffs may obtain against the non-settling defendants at trial, and see no need to amend the Final Order to reiterate language and reaffirm rights already embodied in the PSLRA. *See* Settlement Memorandum at §III(B)(4)(c).

VI. CERTIFICATION OF THE CLASS

48. In connection with final approval of the Settlement, Plaintiffs seek final certification of the Class for settlement purposes and appointment of Plaintiffs as class representatives. As a term of the Settlement, the Settling Parties agreed to certification of a Class consisting of all persons and entities who purchased or otherwise acquired TMI common stock and/or preferred stock in the open market and/or in or traceable to the Offerings during the Class Period and who were damaged thereby.[31] In its Preliminary Approval Order, the Court, for

[30] A copy of the objection filed by the Underwriter Defendants (the "Underwriter Objection") (ECF No. 388) attached as Exhibit 2 hereto, along with a paragraph addressing the objection, appears on SCS's website.

[31] Excluded from the Class are: (a) TMI, the Defendants, the director and officers of TMI, members of the immediate families and their legal representatives, heirs, successors or assigns,

purposes of the Settlement only, preliminarily certified the Litigation as a class action and preliminarily certified Plaintiffs as class representatives. The Class warrants final certification pursuant to Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure because the proposed Class satisfies each of the requirements for class certification.

49. The requirements of Fed. R. Civ. P. 23(a) have been met. First, the Class is numerous; throughout the Class Period, TMI's securities were actively traded on the New York Stock Exchange, an open and efficient market. Complaint at ¶434.[32] As such, Plaintiffs believe that Class Members number in the thousands. Second, there are various issues common to the Class, including allegations concerning: (i) whether the federal securities laws were violated by Defendants; (ii) whether TMI and the Individual Defendants engaged in a fraudulent scheme and omitted and/or misrepresented material facts; (iii) whether TMI and the Individual Defendants knew or recklessly disregarded that their statements were materially false and/or misleading; (iv) whether the prices of TMI common stock and TMI preferred stock were artificially inflated during the Class Period; and (v) whether TMI and the Individual Defendants' fraudulent scheme, misrepresentations and omissions caused Class Members to suffer economic losses, *i.e.* damages, the extent of those damage and the appropriate measure of damages, if any. Third, Plaintiffs' claims are typical of those of the Class because Plaintiffs, like the other members of the Class, purchased or otherwise acquired TMI common stock and/or preferred stock in the open market and/or in or traceable to the Offerings during the relevant period, and as a result of Defendants' alleged conduct, suffered damages. Finally, Plaintiffs are adequate representatives in that their

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and any entity in which any of the Defendants have or had a controlling interest; and (b) all Persons who file valid and timely requests for exclusion from the Class in accordance with the requirements set forth in the Court's Preliminary Approval Order and Notice.

[32] During the Class Period, there were hundreds of millions of outstanding shares of TMI stock. *Id.*

claims and interests are co-extensive, and not antagonistic, to those of absent Class Members, and Co-Lead Counsel are qualified, experienced, and able to litigate and settle the Litigation.

50. Furthermore, the requirements of Fed. R. Civ. P. 23(b)(3) are also satisfied. Since the liability of the Individual Defendants will be the same as to all Class Members, with only the amount of damages differing, common questions predominate. Similarly, a class action is a superior method of litigating claims against defendants, given the large number of class members and the likelihood that individual claims would often be too small to warrant individual suits.

VII. THE PLAN OF ALLOCATION

51. The proposed Plan of Allocation (the "Plan") provides the manner in which the Settlement Amount, plus interest, less payment of Court-approved attorneys' fees and expenses and the costs of claims administration, including the costs of printing and mailing the Claim Packet and the cost of publishing the Summary Notice (the "Net Settlement Fund"), shall be distributed to Authorized Claimants.[33] Co-Lead Counsel prepared the Plan after careful consideration and detailed analysis, and with the assistance of a damages consultant.

52. The Plan reflects that the price of TMI common stock and preferred stock[34] was artificially inflated during the Class Period (April 19, 2007 to March 19, 2008, inclusive) due to alleged misrepresentations and/or omissions by Defendants. The Plan takes into account the impact of nine disclosures set forth in the Complaint. The Plan apportions the Net Settlement

[33] "Authorized Claimant" is defined in the Stipulation as any Claimant who submits a valid Proof of Claim and Release to the Claims Administrator and whose claim for recovery has been allowed pursuant to the terms of this Stipulation or by order of the Court.

[34] The following preferred stock is eligible under the Settlement: (i) TMI 8% Series C Cumulative Redeemable Preferred Stock; (ii) TMI Series D Adjusting Rate Cumulative Redeemable Preferred Stock; (iii) TMI 7.5% Series E Cumulative Convertible Redeemable Preferred Stock; and (iv) TMI 10% Series F Cumulative Convertible Redeemable Preferred Stock.

Fund among Class Members based on what manner they purchased/acquired their TMI stock *(i.e.*, in the open market or in or traceable to the Company's Offerings) and when they purchased/acquired and sold their TMI stock. The Plan also takes into account, among other things, the 90-day look back period of the PSLRA.[35] In addition, in order to recover under the Plan, a Class Member must have held their eligible TMI stock through at least one corrective disclosure, otherwise their resulting Recognized Loss will calculate to zero.[36]

53. Under the Plan, the Court-authorized claims administrator, SCS, will calculate each Authorized Claimant's Recognized Loss based on the information supplied with the Class Member's Proof of Claim. Distributions will be made to Authorized Claimants after all Proofs of Claim have been processed and after the Court has approved the final calculations and distributions to be made to the Class. The Plan is not a formalized damage study, but rather it is a simplified methodology designed solely to compare one Class Member to another through their respective transactions in the TMI common and preferred stock eligible to participate in the Settlement. Overall, if the total claims for all Authorized Claimants exceed the Net Settlement Fund, each Authorized Claimant's share of the Net Settlement Fund will be determined based

[35] Pursuant to Section 21(D)(e)(1) of the Private Securities Litigation Reform Act of 1995, "in any private action arising under this title in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated."

[36] Under the relevant securities laws, a claimant's recoverable damages are limited to the losses attributable to the alleged securities law violation. For TMI stock purchased in or traceable to the Offerings, it is not possible to recover to the extent a purchaser paid in excess of the offering price (*i.e.*, $27.05 per share for the May 2007 Offering; $25.00 per share for the June 2007 Offering; $25.00 per share for the September 2007 Offering; and $19.50 and $8.00 per share for the January 2008 Offerings, respectively).

upon the percentage that his, her or its claim bears to the total of the claims for all Authorized Claimants.

54. Given its length, an abbreviated version of the Plan was attached to the Notice that was mailed to potential Class Members. As indicated in the Notice, the full version of the Plan is available for review on SCS's website, www.strategicclaims.net, and can also be obtained by contacting SCS and requesting a copy. As of the filing of this Joint Declaration, not a single objection to the Plan has been received. Accordingly, Co-Lead Counsel believe that this method of allocation has a reasonable and rational basis and is fair and equitable and therefore, warrants the Court's approval.

VIII. CO-LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES

55. Co-Lead Counsel respectfully request an award of attorneys' fees in the amount of 20% of the Settlement Fund. This request is consistent with established precedent in the Tenth Circuit, as well as in federal courts throughout the country, as fees in the amount of the requested percentage (and greater) have been consistently awarded in securities class actions to plaintiffs' counsel working on a contingent fee basis and obtaining a common fund for the benefit of a class. *See* §III(B) of the Fee Memorandum submitted herewith. In addition, a cross-check of the lodestar also supports the attorneys' fees requested. Plaintiffs' Counsel[37] have

[37] The term "Plaintiffs' Counsel" refers collectively to (i) Co-Lead Counsel, Kessler Topaz and Wolf Haldenstein, (ii) Liaison Counsel, the Branch Law Firm, and (iii) bankruptcy counsel, Lowenstein Sandler PC (and Lowenstein Sandler PC's local bankruptcy counsel in Baltimore, Maryland). The lodestar and expense submissions of David Kessler and Betsy C. Manifold, on behalf of Kessler Topaz and Wolf Haldenstein, respectively, Tuner W. Branch, on behalf of the Branch Law Firm, and Michael S. Etkin, on behalf of Lowenstein Sandler, PC (and their local bankruptcy counsel in Baltimore, Maryland), are attached hereto as Exhibits 3 through 6. These exhibits reflect the names of the attorneys and professional support staff who worked on the Action, the hourly rates currently chargeable by each such attorney and professional support staff, the lodestar value of the time expended by such attorneys and professional support staff, the unreimbursed disbursements of the firms, and the background and experience of the firms.

incurred a total of $5,409,776.75 in time from the inception of the Litigation through July 23, 2012.[38] Thus, the requested fee award, rather than seeking a positive risk multiplier generally awarded by courts applying the lodestar or lodestar cross check methods, actually represents a negative multiplier of approximately 0.074 to the lodestar (*i.e.* Co-Lead Counsel are requesting significantly less than what Plaintiffs' Counsel's billable hours would have provided).

56. District courts in the Tenth Circuit have the discretion to apply either the "percentage-of-the-fund" method or the "lodestar" method when determining awards of attorneys' fees in common fund recoveries. *See Lucas v. Kmart Corp.*, 2006 U.S. Dist. LEXIS 51420, at *10 (D. Colo. 2006). Therefore, Co-Lead Counsel are presenting the information necessary for the Court to use either method for its analysis.

57. Regardless of which method for fee calculation is applied, district courts in the Tenth Circuit also consider the factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 718, 717-19 (5th Cir. 1974) when determining an award of attorneys' fees. The twelve *Johnson* factors are: (1) time and labor required; (2) novelty and difficulty of the issues; (3) skill required to perform the legal services properly; (4) preclusion of other employment; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) amount involved and results obtained; (9) experience, reputation, and ability of the attorneys; (10) undesirability of the case; (11) nature and length of professional

[38] Time spent in connection with the appeal against the Underwriter Defendants is not included in this lodestar number.

relationship with the client; and (12) awards in similar cases.[39] Co-Lead Counsel respectfully submit that an analysis of these criteria demonstrates that the requested fee is fair and reasonable.

58. In addition, although not specifically cited as a factor for consideration by the Tenth Circuit, courts also recognize the significance of the Class Members' reaction to the request for attorneys' fees and expenses. Here, the Notice advised Class Members that Co-Lead Counsel would be requesting an award of attorneys' fees not to exceed 25% of the Settlement Amount and reimbursement of out-of-pocket expenses not to exceed $260,000, plus interest earned on both amounts at the same rate earned on the Settlement Fund, all to be paid from the Settlement Fund. As of the filing of this Joint Declaration, only two objections to the maximum amount of attorneys' fees and expenses set forth in the Notice have been received.[40]

A. The Time And Labor Dedicated By Plaintiffs' Counsel

59. An analysis of the first *Johnson* factor, the time and labor required, clearly supports the fee award requested. During the pendency of the Litigation, as detailed in ¶¶15-29 above, Co-Lead Counsel marshaled considerable resources and time in the research, investigation, prosecution and ultimate resolution of the Litigation with the Settling Defendants. Co-Lead Counsel's efforts included, *inter alia*, performing an extensive investigation into the Class's claims; drafting two comprehensive complaints; consulting with experts and bankruptcy counsel; briefing arguments made in several motions, including extensive motions to dismiss filed by defendants and Plaintiffs' Motion for Clarification; and engaging in arm's-length settlement

[39] Plaintiffs will not address the following *Johnson* factors because they do not pertain to this Action: preclusion of other employment, time limitations imposed by the client or the circumstances, and the nature and length of the professional relationship with the client.

[40] As stated above, the deadline for submitting objections is August 6, 2012. Should any objections be received after the date of this submission, they will be collectively addressed by Co-Lead Counsel, along with the two objections filed to date, in a submission to be filed with the Court on or before August 20, 2012.

negotiations with the Settling Defendants over the course of several months, followed by additional months of negotiating the terms of the Stipulation and drafting the related settlement documents.[41] As set forth in the lodestar and expense submissions attached hereto, Plaintiffs' Counsel have devoted over 11,362 hours to the prosecution of the Class's claims from the inception of this Litigation through July 23, 2012, resulting in a total lodestar of $5,409,776.75. *See* Exhibits 3 through 6 hereto. Thus, the requested fee award results in the application of an approximately 0.074 multiplier to the lodestar. Co-Lead Counsel respectfully submit that such a multiplier from the attendant lodestar cross-check, fully supports the requested attorneys' fees as fair and reasonable.

B. The Novelty And Difficulty Of The Issues And Amount Involved And The Results Obtained

60. An analysis of the second and eighth *Johnson* factors, the novelty and difficulty of the issues and the amount involved and the results obtained, also militates in favor of the Court's approval of the requested fees. Courts have widely recognized that shareholder actions are difficult and uncertain, and as seen with the Court's dismissal of Plaintiffs' negligence-based Securities Act claims against the Dismissed Defendants and Underwriter Defendants, this case is no different. As discussed above, this securities class action involves complicated issues of law and fact, including issues relating to complex accounting provisions, financial arrangements and intricacies of the mortgage industry, multiple defendants with different federal securities laws claims against them, various securities (common and preferred stock) and four separate Offerings. The complexity of this Litigation is further evidenced by the other cases that have

[41] Moreover, Co-Lead Counsel will continue to perform legal work on behalf of the Class should the Court approve the Settlement. Additional resources will be expended assisting Class Members with their Proofs of Claim and related inquiries and working with the claims administrator, SCS, to ensure the smooth progression of claims processing.

cited to key opinions issued by the Court in this Litigation. *See* Fee Memorandum at §III(D)(1).[42] To date, this Court has written over 365 pages of decisional authority in at least eight separate memorandum opinions addressing the many novel issues involved in this Litigation. *See Id.*

61. In addition, the alleged corporate wrongdoer, TMI, filed for voluntary Chapter 11 bankruptcy early in the Litigation, operating as an automatic stay of judicial proceedings against it under 11 U.S.C. §§ 362(a)(1) and 362(a)(3) and adding an additional layer of complexity to the Litigation. In light of the foregoing complexities and the risks to continued litigation, the present Settlement represents a favorable result for the Class.

C. The Skill Required And The Experience, Reputation, And Ability Of The Attorneys

62. An analysis of the third and ninth *Johnson* factors, the skill required to perform the legal services properly and the experience, reputation, and ability of the attorneys, weighs strongly in support of the requested fee award. Both Kessler Topaz and Wolf Haldenstein practice extensively in the highly complex field of shareholder securities litigation and have successfully litigated these types of actions in courts throughout the country. Court-appointed Liaison Counsel, the Branch Law Firm, and Lowenstein Sandler PC are also highly experienced in complex litigation. *See* firm biographies attached to Exhibits 3 through 6 hereto.

63. Over the course of nearly five years, Co-Lead Counsel familiarized themselves with the complex claims alleged in the Litigation, vigorously prosecuted the Litigation against several groups of defendants and negotiated a recovery for the Class from limited insurance

[42] For example, the Court's memorandum opinion cited as *In re Thornburg Mortgage, Inc. Sec. Litig.*, 695 F. Supp. 2d 1165 (D. N.M. 2010) has been cited in over ten different cases, spanning various jurisdictions.

proceeds and where there was a real possibility of no recovery from the Individual Defendants if the Litigation were to continue. In doing so, Co-Lead Counsel analyzed the possible recovery for the Class in light of the Court's dismissal of Plaintiffs' negligence-based Securities Act claims against the Dismissed Defendants and Underwriter Defendants and the limited claims remaining against the Individual Defendants, TMI's Chapter 11 bankruptcy filing and the available insurance proceeds (which were rapidly dwindling as a result of continuing litigation) to satisfy a future judgment against the Individual Defendants. In addition, Co-Lead Counsel faced formidable opposition from several nationally prominent law firms representing the Settling Defendants.

D. Whether The Fee Is Fixed Or Contingent

64. An analysis of the sixth *Johnson* factor, whether the fee is fixed or contingent, also supports Co-Lead Counsel's fee request. At the outset of this case, Co-Lead Counsel undertook all of the risks of litigating the Class's claims on a contingent basis – including surviving dispositive motions, obtaining class certification, proving liability, causation and damages, prevailing in the "battle of the experts," and litigating the case through trial and possible appeals. From the outset, Co-Lead Counsel understood that they were embarking on a complex, expensive and lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, Co-Lead Counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of the Litigation, and that funds were available to compensate staff and to cover the considerable costs that a case such as this requires. With an average lag time of several years for these cases to conclude, the financial burden on contingent-fee counsel is far

greater than on a firm that is paid on an ongoing basis. Indeed, Plaintiffs' Counsel have received no compensation for their efforts during the course of this Litigation.

65. Plaintiffs' Counsel also bore the risk that no recovery against the Settling Defendants would be achieved (or that a judgment could not be collected, in whole or in part). Even with the most vigorous and competent of efforts, success in contingent-fee litigation, such as this, is never assured. In fact, there have been many hard-fought lawsuits where, because of: (i) the discovery of facts unknown when the case was commenced; (ii) changes in the law while the case was pending; or (iii) decisions on summary judgment or following a trial on the merits, that excellent professional efforts produced no fee for counsel. *See* Fee Memorandum at §III(F). Thus, there existed a real risk that Plaintiffs' Counsel would invest substantial resources and efforts and receive nothing – a risk that became even greater following TMI's Chapter 11 bankruptcy filing, as well as the Court's dismissal of Plaintiffs' negligence-based Securities Act claims.

E. The Undesirability Of The Case

66. An analysis of the tenth *Johnson* factor, the undesirability of the case, further supports the requested fee award. Securities cases have generally been recognized as "undesirable." *See* Fee Memorandum at §III(G).

F. Customary Fee And Awards In Similar Cases

67. Finally, an analysis of the fifth and twelfth *Johnson* factors, customary fee and awards in similar cases, also weigh in favor of Co-Lead Counsel's fee request. While the percentage of fees awarded in securities actions have varied substantially, courts in the Tenth Circuit and around the country consistently award percentage fees to plaintiffs' counsel that are equal to or greater than the fee requested by Co-Lead Counsel herein. Accordingly, the present

request for attorneys' fees in the amount of 20% of the Settlement Fund is reasonable and on the lower end of attorneys' fees typically awarded by courts in complex class actions, particularly given that Co-Lead Counsel seek a "negative" multiplier of approximately 0.074.[43]

IX. CO-LEAD COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES

68. Co-Lead Counsel also request reimbursement of out-of-pocket expenses in the amount of $243,145.93, incurred by Plaintiffs' Counsel to date in connection with the prosecution of the Litigation and subsequent resolution with the Settling Defendants.[44] Co-Lead Counsel respectfully submit that their expense request is appropriate, fair, and reasonable and should be approved in the amount submitted herein.

69. The expenses incurred by Plaintiffs' Counsel on behalf of the Class were necessary and appropriate for the prosecution and resolution of this Litigation with the Settling Defendants. A large portion of Plaintiffs' Counsel's expenses was used to fund Plaintiffs' investigation – expenses critical to Co-Lead Counsel's success in achieving the proposed Settlement. Plaintiffs' Counsel's expenses arise from, *inter alia*: expert expenses, photocopying of documents, on-line research, postage, express mail and next day delivery, filing fees, transportation, meals, travel and other incidental expenses directly related to the prosecution of this Litigation. *See* lodestar and expense submissions attached hereto as Exhibits 3 through 6. Courts have typically found that such expenses are reimbursable from a fund recovered by counsel for the benefit of the class.

70. Co-Lead Counsel's request for reimbursement of expenses is within the upper limit of the $260,000 figure contained in the Notice mailed to the Class. In response to the

[43] Unpublished opinions cited in the Fee Memorandum are attached hereto as Exhibit 7.

[44] Expenses incurred specifically in connection with the appeal against the Underwriter Defendants are not included in this figure.

mailing of nearly 214,000 Notices, as of the date of this Joint Declaration, there have been only two objections to the amount of attorneys' fees and expenses set forth in the Notice.[45]

We declare under penalty of perjury that the foregoing facts are true and correct and that this declaration was executed this 23rd day of July, 2012.

BENJAMIN J. SWEET

BETSY C. MANIFOLD

[45] As noted above, these two objections will be addressed in Co-Counsel's submission to the Court on or before August 20, 2012 (after the deadline for objections has passed).