IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

IN RE THORNBURG MORTGAGE, INC. SECURITIES LITIGATION	Civil Action No.: 1:07-cv-00815-JB/WDS

OBJECTION OF UNDERWRITER DEFENDANTS TO PROPOSED ORDER AND FINAL JUDGMENT

The non-settling, Underwriter Defendants[1] ("Non-Settling Defendants") respectfully submit this objection to the proposed Order and Final Judgment submitted in connection with the Plaintiffs' settlement with Thornburg's officers and directors. As proposed, the Order and Final Judgment includes a bar order at paragraph 14, but erroneously omits a corresponding judgment reduction provision. As described more fully below, such a judgment reduction provision is required as a matter of law in order to compensate the Non-Settling Defendants' loss of contribution and indemnification claims.

Although the Non-Settling Defendants have been dismissed from this case (subject to the pending appeal), they nonetheless have standing to challenge the proposed Order and Final Judgment before the district court because it would interfere with their contract rights and their "ability to seek contribution or indemnification." *New Eng. Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008) (internal quotation marks omitted). Moreover,

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[1] The Underwriter Defendants are A.G. Edwards & Sons, Inc., BB&T Capital Markets, a division of Scott & Stringfellow, Inc., Bear, Stearns & Co. Inc. (now J.P. Morgan Securities LLC), Citigroup Global Markets, Inc., Friedman, Billings, Ramsey & Co., Inc., Oppenheimer & Company, Inc., RBC Dain Rauscher Corp., Stifel, Nicolaus & Company, Incorporated, and UBS Securities LLC.

the Non-Settling Defendants raising this particular objection now (while reserving any other objections they may wish to make prior to the deadline for formal objections to be filed with the court), in order to have this one clear deficiency in the current proposed Order and Final Judgment corrected as promptly as possible and prior to Notice being sent to class members.

The Non-Settling Defendants raised this objection with counsel for the Plaintiffs on or about May 1, 2012, in an effort to correct the error through the filing of an amended proposed order. On May 16, Plaintiffs' counsel informed us that the Settling Defendants "will not agree to the filing of an amended proposed final order that includes language indicating that the non-settling defendants are entitled to a judgment reduction. Specifically, it is their position 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." Exhibit ("Ex.") 1. Given the Settling Defendants' position, Plaintiffs claimed that they were "not in a position to unilaterally file an amended proposed final order." *Id.*

No one appears to dispute that the Non-Settling Defendants are entitled by law to a judgment reduction – only whether such a set-off needs to be explicitly provided for in the Order and Final Judgment. As explained below, however, the case law on this point is clear: if the Order contains a bar extinguishing indemnification and contribution claims, it must also contain an explicit judgment reduction provision that reduces any future award against the Non-Settling Defendants by the greater of the settlement amount or the Released Defendants' proportional liability.

I. THE ORDER AND FINAL JUDGMENT EXTINGUISH SUBSTANTIAL AND VALUABLE RIGHTS OF THE NON-SETTLING DEFENDANTS.

The proposed Order and Final Judgment bars:

> all claims by any Person against the Settling Defendants and the Released Parties, or by any of them against any Persons, ***for contribution, indemnification*** or under any other theory, based upon, or related to any fact or circumstances involved in or arising out of the Litigation, with the scope and preclusive effect of this bar order as broad as that permissible under 15 U.S.C. § 78u-4(f)(7) and the common law.

Proposed Order and Final Judgment ¶ 14 (emphases added). This portion of the Order purports to extinguish any right to indemnification and/or contribution that the Non-Settling Defendants may have against either the Settling Defendants or the Released Parties.

The Non-Settling Defendants have substantial claims for both indemnification and contribution that purportedly will be eliminated by this Order, including but not limited to a statutory right of contribution against the Released Parties for those parties' proportionate share of any liability ultimately assessed against the Non-Settling Defendants. This right to contribution is expressly set forth in Section 11 of the Securities Act of 1933:

> Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

15 U.S.C. § 77k(f)(1).[2]

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[2] Paragraph (2) says that "[t]he liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u-4(f) of this title." 15 U.S.C. § 77k(f)(2)(A).

II. THE ORDER AND FINAL JUDGMENT MUST INCLUDE A JUDGMENT REDUCTION PROVISION AS REQUIRED BY LAW.

A settlement may extinguish indemnification or contribution rights such as those held by the Non-Settling Defendants only if it provides for a corresponding reduction in any future judgment against the non-settling defendant to compensate for that party's missing contribution. *Lead Plaintiffs v. HealthSouth Corp. (In re HealthSouth Corp. Sec. Litig.)*, 572 F.3d 854, 861 (11th Cir. 2009) ("both the case law and the PSLRA recognize that a bar order deprives a non-settling defendant of potentially valuable rights, and therefore, the non-settling defendant should be compensated"); *TBG, Inc. v. Bendis*, 36 F.3d 916, 923 (10th Cir. 1994) (holding that orders barring contribution claims are permissible only when there will subsequently be a determination of proportional fault and the equivalent of a contribution claim awarded).

Indeed, it is reversible error for a court to enter a bar order without a corresponding judgment reduction provision specifying how the non-settling defendants will be compensated. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 274 (2d Cir. 2006); *Kovacs v. Ernst &Young (In re Jiffy Lube Sec. Litig.)*, 927 F.2d 155, 161–62 (4th Cir. 1991). As the court explained in *Jiffy Lube*:

> We find that failure to determine a method to calculate the setoff at the time of settlement prejudices both plaintiffs, who are deprived of information affecting the desirability of the proposed settlement, and non-settling defendants, who may not receive appropriate credit for having given up the right to contribution. We therefore vacate the district court's approval of this settlement and remand for determination of an appropriate setoff method.

927 F.2d at 157. Because the proposed Order and Final Judgment purports to bar Non-Settling Defendants from seeking indemnification and contribution from the Released Parties (which is defined more broadly than the Settling Defendants), it must also include a corresponding

judgment reduction provision to account for Non-Settling Defendants' loss of these rights as to the Released Parties.

III. NON-SETTLING DEFENDANTS ARE ENTITLED TO A JUDGMENT REDUCTION PROVISION REDUCING ANY FUTURE JUDGMENT AGAINST THEM BY THE GREATER OF THE SETTLEMENT AMOUNT OR THE PROPORTIONATE FAULT OF THE RELEASED PARTIES.

The judgment reduction provision should provide that any future judgment be reduced according to the proportional fault of all of the Released Parties. *See, e.g.*, *In re PNC Fin. Servs. Grp., Inc.*, 440 F. Supp. 2d 421, 452 (W.D. Pa. 2006); *cf. In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 717–18, 731–32 (E.D. Pa. 2001). As the Tenth Circuit has explained, the contribution right entitles a non-settling defendant "to recover the amount of damages attributable to another party's fault." *TBG Inc.*, 36 F.3d at 925–26.

Moreover, if the Settlement Amount is greater than the Released Parties' proportional share of any future judgment, then the "one satisfaction rule" entitles Non-Settling Defendants to offset the judgment by the full Settlement Amount. *See Gerber v. MTC Elec. Techs. Co.*, 329 F.3d 297, 302–03 (2d Cir. 2003); *In re Refco, Inc. Sec. Litig.*, 05 Civ. 8626, 2007 WL 57872, at *4–5 (S.D.N.Y. Jan. 9, 2007). As explained below, this "capped proportionate share" approach is prescribed by the PSLRA and consistent with common law.

A. Non-Settling Defendants Are Entitled to Such a Judgment Reduction Provision under the PSLRA, Because the Settling Defendants Are "Covered Persons" Under that Statute.

The PSLRA requires that a final verdict or judgment "shall be reduced" by the capped proportionate share approach whenever "a covered person enters into a settlement with the plaintiff prior to final verdict or judgment." 15 U.S.C. § 78u-4(f)(7)(B). The term "covered person" includes "a defendant in any private action arising under this chapter" and "a defendant

in any private action arising under section 77k of this title, who is an outside director of the issuer of the securities that are the subject of the action." 15 U.SC. § 78u-4(f)(10)(C); *see also* 15 U.S.C. § 77k(f)(2). All of the Settling Defendants are covered persons under the PSLRA because they are either Exchange Act defendants or outside directors of TMI; therefore, a capped proportionate share judgment reduction provision is required.

The fact that the remaining claims against Non-Settling Defendants are brought under the Securities Act is no basis to omit this required provision. The PSLRA's judgment reduction provision "applies to all settlements by Covered Persons, regardless of whether the non settling co-defendants are Covered Persons under [the PSLRA]." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2005 WL 335201, at *11 (S.D.N.Y. Feb. 14, 2005). "[N]o distinction can be drawn between Section 11 actions and Exchange Act actions for purposes of this provision." *Id.*; *see* 15 U.S.C. § 78u-4(f)(7)(A) (bar and judgment reduction clause applies to "[a] covered person who settles *any private action*" (emphasis added)). Securities Act defendants like Non-Settling Defendants, therefore, are entitled to the PSLRA's judgment reduction provision. *In re Worldcom*, 2005 WL 335201, at *13; *see In re Refco, Inc.*, 2007 WL 57872, at *4 (applying PSLRA when Exchange Act defendant was settling but Securities Act defendants were not).

B. Non-Settling Defendants Also Are Entitled to a Judgment Reduction Provision Under Settled Common Law.

Even if some of the Released Parties (which is defined to include more than just the "Settling Parties") fall outside the definition of "covered persons" under the PSLRA, federal common law requires at least a proportionate fault judgment reduction provision whenever non-settling defendants are barred from bringing contribution claims against released parties. *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989); *In re Sunrise Sec. Litig.*, 698 F.

Supp. 1256, 1261 (E.D. Pa. 1988); *see also Eichenholtz v. Brennan*, 52 F.3d 478, 487 & n.16 (3d Cir. 1995) (applying *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 209 (1994)).

The Tenth Circuit reached the same conclusion in *TBG, Inc.*, 36 F.3d 916. Although pre-dating the PSLRA, the lower court in *TBG, Inc.* had barred the non-settling defendants' contribution claims and ordered a *pro tanto* reduction of any judgment ultimately obtained against the non-settling defendants. The Appellate Court reversed, holding that a *pro tanto* reduction did not sufficiently compensate the non-settling defendants for the loss of their rights to contribution:

> We conclude that orders barring contribution claims are permissible only because a court or jury has or will have properly determined proportional fault and awarded the equivalent of a contribution claim, not because of the compensatory award alone. Since the court did not decide the settling defendants' proportional fault and order a credit in that amount, the court had no power to bar the nonsettling defendants' contribution claims.

TBG, 36 F.3d at 923. *See also id.* at 930 (White, J., sitting by designation, concurring in part and concurring in the judgment) ("[T]he *pro tanto* credit with a bar order infringes upon non-settling defendants' relative fault contribution rights.").

<u>CONCLUSION</u>

If the proposed Order and Final Judgment in this case is to include a bar order, it must include a judgment reduction provision that is consistent with Non-Settling Defendants' indemnification and contribution rights. Pursuant to settled and controlling law, and subject to any other formal objections that may be filed, the Judgment entered by this Court must include a "capped proportionate share" judgment reduction provision applicable to all Settling Defendants and Released Parties, so as to fully compensate Non-Settling Defendants for their extinguished rights.

Dated: May 18, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2012, I filed the foregoing OBJECTION OF UNDERWRITER DEFENDANTS TO PROPOSED ORDER AND FINAL JUDGMENT electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing, as follows:

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