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

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT, PLAN OF ALLOCATION AND CERTIFICATION OF CLASS FOR SETTLEMENT PURPOSES

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, 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 (collectively, "Plaintiffs") bring this motion for the entry of an order (i) granting final approval to the proposed settlement of the above captioned action (the "Litigation") set forth in the Stipulation and Agreement of Settlement dated March 28, 2012 (the "Stipulation"); (ii) approving the proposed plan for allocating the settlement proceeds to the Class (the "Plan of Allocation"); and (iii) certifying the proposed Class for purposes of settlement.

This Motion is based upon (i) the 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 and the exhibits attached thereto; (ii) the Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Proposed Settlement and Plan of

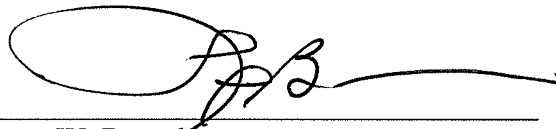
Allocation; and (iii) all other pleadings and matters of record; and such additional evidence or argument as may be presented at the hearing on August 27, 2012.

Plaintiffs will submit a proposed Order and Final Judgment to the Court, along with their reply submission, on or before August 20, 2012.

Opposing parties do not concur with this Motion.

Dated: July 23, 2012

Respectfully submitted,



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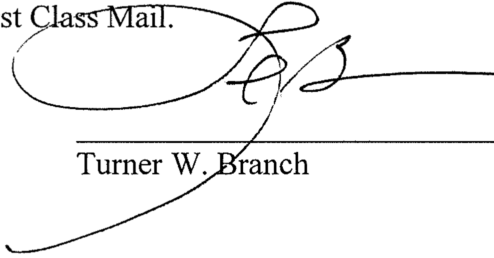
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 23, 2012, the foregoing PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT, PLAN OF ALLOCATION AND CERTIFICATION OF CLASS FOR SETTLEMENT PURPOSES was electronically filed with the Clerk of the court using the CM/ECF System, which will send notification of such filing to all counsel of record and declarant served the parties who are not registered participants of the CM/ECF System, via United States First Class Mail.



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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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT AND PLAN OF ALLOCATION

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND AND LITIGATION HISTORY 4

III. THE SETTLEMENT MEETS THE JUDICIAL STANDARDS FOR FINAL APPROVAL UNDER RULE 23 6

A. Legal Standards for Final Approval of Class Action Settlement 6

B. The Settlement Is Fair, Reasonable and Adequate 8

1. The Proposed Settlement Is the Result of Fair and Honest Negotiations 8

2. Serious Questions of Law and Fact Exist, Placing the Ultimate Outcome of the Litigation in Doubt 9

a. The Risks of Establishing Liability 11

b. The Risks of Establishing Causation and Damages 12

3. The Value of an Immediate Recovery Outweighs the Mere Possibility of Future Relief After Protracted and Expensive Litigation 14

4. The Judgment of the Parties that the Settlement Is Fair and Reasonable 17

a. Plaintiffs and Co-Lead Counsel Support the Settlement 17

b. The Class's Reaction, to Date, Supports the Settlement 18

c. The Underwriter Defendants' Objection To The Proposed Order And Final Judgment 18

IV. THE PLAN OF ALLOCATION IS FAIR, REASONABLE AND ADEQUATE 20

V. THE COURT SHOULD AFFIRM ITS CERTIFICATION OF THE CLASS 22

VI. CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Alvarado Partners, L.P. v. Mehta,
723 F. Supp. 540 (D. Colo. 1989) 10

In re Am. Bank Note Holographics, Inc., Sec. Litig.,
127 F. Supp. 2d 418 (S.D.N.Y. 2001) 20

Amoco Prod. Co. v. Fed. Power Comm'n,
465 F.2d 1350 (10th Cir. 1972) 6

In re AOL Time Warner, Inc. Sec. & ERISA Litig.,
MDL Docket No. 1500, 02 Civ. 5575 (SWK), 2006 U.S. Dist. LEXIS 17588
(S.D.N.Y. Apr. 6, 2006) 11

In re Apollo Grp., Inc. Sec. Litig.,
Master File No. CV 04-2147-PHX-JAT (LEAD), 2008 U.S. Dist. LEXIS 61995
(D. Ariz. Aug. 4, 2008) 10

In re AremisSoft Corp. Sec. Litig.,
210 F.R.D. 109 (D.N.J. 2002) 10

Armstrong v. Bd. of Sch. Dirs.,
616 F.2d 305 (7th Cir. 1980) 6

In re BankAtlantic Bancorp, Inc.,
No. 07-61542-CIV, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) 10

Big O Tires, Inc. v. Bigfoot 4x4, Inc.,
167 F. Supp. 2d 1216 (D. Colo. 2001) 6

In re Broadcom Corp. Sec. Litig.,
CASE NO. SACV 01-275 DT (MLGx),
2005 U.S. Dist. LEXIS 41976 (C.D. Cal. Sept. 12, 2005) 22

Carson v. Am. Brands, Inc.,
450 U.S. 79 (1981) 7

In re Cendant Corp. Litig.,
264 F.3d 201 (3d Cir. 2001) 13

In re Clorox Co. Sec. Litig.,
238 F. Supp. 2d 1139 (N.D. Cal. 2002), *aff'd sub nom. Emp'rs Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125 (9th Cir. 2004) 10

Diaz v. Romer,
801 F. Supp. 405 (D. Colo. 1992) 6

Dura Pharm., Inc. v. Broudo,
544 U.S. 336 (2005) 12

Eisenstadt v. Centel Corp.,
113 F.3d 738 (7th Cir. 1997) 10

In re EVCI Career Colls. Holding Corp. Sec. Litig.,
Master File No. 05 Civ. 10240 (CM),
2007 U.S. Dist. LEXIS 57918 (S.D.N.Y. July 27, 2007) 13

Freedman v. Value Health, Inc.,
34 Fed. Appx. 408 (2d Cir. 2002)...10

Gottlieb v. Wiles,
11 F.3d 1004 (10th Cir. 1993) 7, 12, 14

Jones v. Nuclear Pharm., Inc.,
741 F.2d 322 (10th Cir. 1984) 7, 8

In re King Res. Co. Sec. Litig.,
420 F. Supp. 610 (D. Colo. 1976) 7, 10, 15

Lane v. Page,
No. CIV 06-1071 JB/ACT, 2012 U.S. Dist. LEXIS 74273 (D. N.M. May 22,
2012)..*passim*

Law v. NCAA,
108 F. Supp. 2d 1193 (D. Kan. 2000), *aff'd*, 246 F.3d 681 (10th Cir. 2001)..........................20

Lopez v. City of Santa Fe,
206 F.R.D. 285 (D.N.M. 2002) 17

Lucas v. Kmart Corp.,
Civil Action No. 99-cv-01923-JLK, 2006 U.S. Dist. LEXIS 51439 (D. Colo. July
27, 2006)...8, 20, 21

Marcus v. State of Kan., Dep't of Revenue,
209 F. Supp. 2d 1179 (D. Kan. 2002)...17

Maywalt v. Parker & Parsley Petroleum Co.,
92 Civ. 1152 (RWS), 1997 U.S. Dist. LEXIS 97 (S.D.N.Y. Jan. 6, 1997) 21

In re Mfrs. Life Ins. Co. Premium Litig.,
MDL No. 1109, Master File No. 96-CV-230 BTM (AJB), 1998 U.S. Dist. LEXIS
23217 (S.D. Cal. Dec. 21, 1998) 12

Miller v. Woodmoor Corp.,
Nos. 74-F-988, 76-F-567, 1978 U.S. Dist. LEXIS 15234 (D. Colo. 1978)............................11

Millsap v. McDonnell Douglas Corp.,
Case No. 94-CV-633-H(M), 2003 U.S. Dist. LEXIS 26223 (N.D. Okla. May 28, 2003)..........14

In re N.M. Natural Gas Antitrust Litig.,
607 F. Supp. 1491 (D. Colo. 1984)..........7, 8

Newton v. Fortis Ins. Co.,
Civil Action No. 04-cv-1650-PSF-OES,
2006 U.S. Dist. LEXIS 33965 (D. Colo. May 26, 2006)..........22

In re Oracle Corp. Sec. Litig.,
627 F.3d 376 (9th Cir. 2010)..........10

In re PaineWebber Ltd. P'ship Litig.,
171 F.R.D. 104 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997)..........13

In re Qwest Commc'ns. Int'l, Inc. Sec. Litig.,
Civil Case No. 01-cv-01451-REB-CBS, 2006 U.S. Dist. LEXIS 71039 (D. Colo. Sept. 28, 2006)..........8, 10

Robbins v. Koger Props., Inc.,
116 F.3d 1441 (11th Cir. 1997)..........10

Rutter & Wilbanks Corp. v. Shell Oil Co.,
314 F.3d 1180 (10th Cir. 2002), *cert. denied*, 539 U.S. 915 (2003)..........7, 8

Sears v. Atchison, Topeka & Santa Fe Railway., Co.,
749 F.2d 1451 (10th Cir. 1984)..........6

In re Sprint Corp. ERISA Litig.,
443 F. Supp. 2d 1249 (D. Kan. 2006)..........18

Trujillo v. Colo.,
649 F.2d 823 (10th Cir. 1981)..........6

Vaszlavik v. Storage Tech. Corp.,
Civil Action No. 95-B-2525, 2000 U.S. Dist. LEXIS 21129 (D. Colo. Mar. 9, 2000)..........7, 8

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,
396 F.3d 96 (2d Cir. 2005)..........8

In re Warner Commc'ns Sec. Litig.,
618 F. Supp. 735 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986)..........13

Wilkerson v. Martin Marietta Corp.,
171 F.R.D. 273 (D. Colo. 1997) 7, 8

In re Williams Sec. Litig.,
496 F. Supp. 2d 1195 (N.D. Okla. 2007) 13

In re Williams Sec. Litig.,
558 F.3d 1130 (10th Cir. 2009) 10

Williams v. First Nat'l Bank of Pauls Valley,
216 U.S. 582 (1910) 6

In re WorldCom, Inc. Sec. Litig.,
Master File 02 Civ. 3288 (DLC), 2005 U.S. Dist. LEXIS 3791 (S.D.N.Y. Mar. 14, 2005) 19

Zupnik v. Fogel,
989 F.2d 93 (2d Cir.1993) 19, 20

STATUTES

15 U.S.C. § 78u-4(f)(7) 19

15 U.S.C. § 78u-4(f)(7)(B)(i) 19

Federal Rules of Civil Procedure 23 .... *passim*

OTHER AUTHORITIES

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, 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 (collectively, the "Plaintiffs"), by and through their counsel Kessler Topaz Meltzer & Check, LLP and Wolf Haldenstein Adler Freeman & Herz LLP (together, "Co-Lead Counsel"), respectfully submit this memorandum of law in support of their motion for an order: (i) finally approving the proposed settlement of the above-captioned action (the "Litigation"), which this Court preliminarily approved by its Order Preliminarily Approving Settlement and Providing for Notice dated April 23, 2012 (the "Preliminary Approval Order"); (ii) approving the proposed plan for allocating the settlement proceeds to the Class (the "Plan of Allocation"); and (iii) finally certifying the Class for settlement purposes.[1]

Pursuant to the terms of the Stipulation and Agreement of Settlement dated March 28, 2012 (the "Stipulation"), Plaintiffs, through their counsel, have obtained $2,000,000 (the "Settlement Amount") for the benefit of the Class, in exchange for the dismissal of all claims brought in the Litigation against the Settling Defendants and a full release of claims against these defendants and

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[1] The Class, as preliminarily certified by the Court for purposes of effectuating the Settlement, is comprised of all persons and entities who purchased or otherwise acquired Thornburg Mortgage, Inc. ("TMI" or the "Company") 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. 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 of Pendency of Class Action, Proposed Settlement, Settlement Fairness Hearing and Motion for Attorneys' Fees and Expenses (the "Notice").

the Released Parties.[2] The Settlement Fund (the Settlement Amount plus all interest earned thereon) will be used for the payment of any taxes, notice and administrative costs, and for Court-awarded attorneys' fees and expenses. The cash remainder after these expenditures, (the "Net Settlement Fund"), will be distributed to Class Members who are not otherwise excluded from the Class and who submit a valid Proof of Claim and Release to the Claims Administrator and whose claim for recovery has been allowed pursuant to the terms of the Stipulation or by order of the Court ("Authorized Claimants"). Each Authorized Claimant shall be allocated a percentage of the Net Settlement Fund based upon the relationship that each Authorized Claimant's claim bears to the total of all Authorized Claimants' claims, as explained in the Notice. *See also* §IV below.

As more fully discussed below and in the 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 submitted herewith (the "Joint Declaration" or "Joint

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[2] Unless otherwise noted, capitalized terms used herein shall have those meanings contained in the Stipulation. 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 term "Released Parties" means TMI, the Individual Defendants, the Dismissed Defendants, and any of their current or former, subsidiaries, affiliates, partners, joint ventures, officers, directors, principals, shareholders, members, agents (acting in their capacity as agents), employees, attorneys, insurers, including the Insurer, reinsurers, advisors, accountants, associates and/or any other individual or entity in which any of TMI, the Individual Defendants, or the Dismissed Defendants has a controlling interest or which is related to or affiliated with any of TMI, the Individual Defendants, or the Dismissed Defendants and the current or former legal representatives, heirs, successors in interest or assigns of any of TMI, the Individual Defendants, or the Dismissed Defendants; provided, however, that "Released Parties" does not include any of the Non-Settling Defendants, nor any of their respective parents, successors, subsidiaries, and affiliates and any entity in which any of them have or had a controlling interest and the officers and directors thereof. This Settlement does not release any of the Class's claims against the Non-Settling Defendants (a/k/a the "Underwriter Defendants"), and Plaintiffs continue to pursue an appeal of the Court's dismissal of their claims against the Underwriter Defendants.

Decl."), Plaintiffs and their counsel believe the present Settlement – reached after nearly five years of litigation and months of settlement negotiations among experienced and knowledgeable counsel – is a fair, reasonable and adequate result for the Class. Notably, the Settlement provides a certain recovery for the Class where, in light of the following circumstances, there existed a real risk of no recovery: (i) the absence of the corporate defendant, TMI, due to its Chapter 11 bankruptcy filing during the course of the Litigation; (ii) the limited amount of insurance proceeds (which were simultaneously being used to pay defense costs) 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; and (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. Thus, the risks involved in continued litigation and the possibility of obtaining nothing from the Settling Defendants supports approval of this Settlement.

Additionally, the reaction of the Class thus far has been positive. Pursuant to the Court's Preliminary Approval Order, a total of 213,994 copies of the Notice have been mailed to potential members of the Class or their nominees.[3] The Notice contains a detailed description of the nature and procedural history of the Litigation, as well as the material terms of the Settlement, including: (i) Plaintiffs' estimate of the average per share recovery; (ii) the manner in which the Net Settlement

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[3] *See* ¶9 of the Declaration of Josephine Bravata Concerning (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Report on Requests for Exclusion Received to Date (the "Bravata Decl.") submitted on behalf of Strategic Claims Services ("SCS"), the Court-appointed claims administrator for the Settlement, and attached as Exhibit 1 to the Joint Declaration. In addition, the Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on May 30, 2012. *See* Bravata Decl. at ¶7.

Fund (as defined above) will be allocated among participating Class Members; (iii) a description of the claims that will be released in the Settlement; (iv) the right and mechanism for Class Members to exclude themselves from the Class; and (v) the right and mechanism for Class Members to object to the Settlement, the Plan of Allocation, and/or Co-Lead Counsel's request for attorneys' fees and expenses. As of the date of this memorandum, two putative Class Members have filed objections (only one of which pertains to the Settlement itself) and fourteen requests for exclusion from the Class have been received.[4] *See* Bravata Decl. at ¶11.

Accordingly, for the reasons set forth herein and in the accompanying Joint Declaration, Plaintiffs respectfully request that the Court grant final approval of this Settlement. In addition, the Plan of Allocation is a fair and reasonable method for distributing the Net Settlement Fund to the Class and also warrants the Court's final approval. Finally, the proposed Class meets all of the elements of Federal Rules of Civil Procedure 23(a) and (b)(3); therefore, the Court should grant final certification of the Class for settlement purposes.

II. FACTUAL BACKGROUND AND LITIGATION HISTORY

This Litigation involves alleged misrepresentations and omissions of material information concerning TMI's business and financial condition during the Class Period. Joint Decl. at ¶11. Specifically, the operative complaint in the Litigation – the Consolidated Amended Class Action

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[4] As set forth in the Notice, the deadline for submitting a request for exclusion from the Class or an objection to the Settlement, or any aspect thereof, is August 6, 2012. Co-Lead Counsel will collectively address the objections and requests for exclusion received to date, along with any additional objections and requests for exclusion received after the date of this submission, in a separate submission to be filed with the Court on or before August 20, 2012. 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) and is discussed below at §III(4)(c).

Complaint dated June 14, 2011 (the "Complaint") – alleges that, throughout the Class Period, Defendants[5] misrepresented and concealed the Company's exposure to the deteriorating mortgage market, and its potentially disastrous effect on the Company's highly-leveraged business.[6] Joint Decl. at ¶13. Specifically, the Complaint alleges 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 (*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, a multi-billion dollar funding source for the Company. *Id.* The Complaint further alleges that these material misrepresentations and omissions caused the price of TMI common and preferred stock to be artificially inflated throughout the Class Period, resulting in damages to persons and entities who purchased or otherwise acquired the Company's stock during this time.

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

[6] The Complaint alleges 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. 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. Joint Decl. at ¶12.

For the sake of brevity and to avoid repetition, Plaintiffs respectfully refer the Court to the accompanying Joint Declaration for a detailed discussion of the factual background and procedural history of the Litigation. Joint Decl. at ¶¶15-30.[7]

III. THE SETTLEMENT MEETS THE JUDICIAL STANDARDS FOR FINAL APPROVAL UNDER RULE 23

A. Legal Standards for Final Approval of Class Action Settlement

Rule 23(e) requires that the settlement of a class action be approved by the Court. Indeed, the settlement of disputed claims is clearly favored by the courts. *See generally Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 595 (1910); *see also Amoco Prod. Co. v. Fed. Power Comm'n*, 465 F.2d 1350, 1354 (10th Cir. 1972); *Sears v. Atchison, Topeka & Santa Fe Railway., Co.*, 749 F.2d 1451, 1455 (10th Cir. 1984); *Trujillo v. Colo.*, 649 F.2d 823, 826 (10th Cir. 1981) (citing "important public policy concerns that support voluntary settlements").[8] This is especially true in complex class actions such as this. *See Big O Tires, Inc. v. Bigfoot 4x4, Inc.*, 167 F. Supp. 2d 1216, 1229 (D. Colo. 2001); *Diaz v. Romer*, 801 F. Supp. 405, 407 (D. Colo. 1992) (in approving class action settlement, the court explained that a "consensual resolution of a dispute is always preferred"); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 313 (7th Cir. 1980) ("Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.").

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[7] In addition to the Joint Declaration, Plaintiff are also simultaneously submitting to the Court, on behalf of their counsel, 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"). The Joint Declaration and Fee Memorandum are incorporated by reference herein.

[8] Unless otherwise noted, all internal citations are omitted.

The authority to grant or deny approval of a proposed settlement lies within the sound discretion of the Court. *See Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187 (10th Cir. 2002), *cert. denied*, 539 U.S. 915 (2003); *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir. 1993). In exercising its discretion, the Court should not adjudicate the merits of the action or substitute its judgment for that of the parties who negotiated the settlement. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D. Colo. 1997); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 625 (D. Colo. 1976) (the court "need not, and should not, decide the merits of the controversy").[9]

Moreover, 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*, 11 F.3d at 1014; *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. Mar. 9, 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

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[9] "[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole is fair, reasonable and adequate to all concerned. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for a trial on the merits." *In re N.M. Natural Gas Antitrust Litig.*, 607 F. Supp. 1491, 1497 (D. Colo. 1984).

reasonable." *Jones*, 741 F.2d at 324; *see also Rutter*, 314 F.3d at 1188 (affirming test); *In re Qwest Commc'ns. Int'l, Inc. Sec. Litig.*, Civil Case No. 01-cv-01451-REB-CBS, 2006 U.S. Dist. LEXIS 71039, at *15 (D. Colo. Sept. 28, 2006) (same).[10] As demonstrated herein and in the Joint Declaration, the Settlement satisfies each of the foregoing factors and warrants final approval by the Court.

B. The Settlement Is Fair, Reasonable and Adequate

1. The Proposed Settlement Is the Result of Fair and Honest Negotiations

Where a settlement results from arm's-length negotiations between experienced counsel, "the Court may presume the settlement to be fair, adequate and reasonable." *Lucas v. Kmart Corp.*, Civil Action No. 99-cv-01923-JLK, 2006 U.S. Dist. LEXIS 51439, at *22 (D. Colo. July 27, 2006) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). Additionally, in assessing whether a proposed settlement was fairly and honestly negotiated, courts in the Tenth Circuit review the negotiation process, as well as consider the lengths to which the parties have litigated the case. *See Vaszlavik*, 2000 U.S. Dist. LEXIS 21129, at *5; *Wilkerson*, 171 F.R.D. at 285 (finding settlement negotiations to be fair, honest and at arm's-length where the parties "vigorously advocated their respective positions throughout the pendency of the case"). Here, the proposed Settlement is the product of extensive arms'-length, informed, non-collusive negotiations conducted by capable counsel who are well experienced in securities litigation. Joint Decl. at ¶¶25-26, 33; *see also* firm biographies for Co-Lead Counsel attached to Exhibits 3 and 4 to the Joint Declaration.

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[10] 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. *N.M. Natural Gas*, 607 F. Supp. at 1504.

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 Class's remaining claims against the Individual Defendants as well as the limited resources available for any potential recovery from these defendants. Joint Decl. at ¶33. Co-Lead Counsel's knowledge came from, among other things, a thorough 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); consultation with experts, interviews of former employees of TMI; intensive research of the law applicable to the Class's claims and defenses thereto and substantial motion practice. *Id.*; *see also generally* Joint Decl. at ¶¶15-30. With this knowledge, Co-Lead Counsel were able to carefully engage in a rigorous negotiation process with counsel for the Settling Defendants which included numerous telephonic conferences and meetings. Joint Decl. at ¶33.

Counsel for both sides zealously advocated their respective positions throughout the settlement process, including during the several months, following the Settling Parties' agreement to settle, spent negotiating the specific terms of the Stipulation. But for the Settlement – an agreement that Plaintiffs and their counsel believe to be in the best interests of the Class in light of the risks involved in continued litigation against the Individual Defendants – Plaintiffs were prepared to continue prosecuting the Litigation against these defendants. *Id.* at ¶34. Thus, the Settling Parties' settlement process clearly demonstrates that the Settlement was the result of fair and honest negotiations, and this factor weighs in favor of the Court's final approval of the Settlement.

2. Serious Questions of Law and Fact Exist, Placing the Ultimate Outcome of the Litigation in Doubt

At the time the Settlement was reached, Plaintiffs and their counsel believed their remaining Exchange Act claims against the Individual Defendants were meritorious. Nevertheless, they

recognized the numerous risks and uncertainties to further litigation of the Class's claims. Joint Decl. at ¶35. *See also Qwest*, 2006 U.S. Dist. LEXIS 71039, at *17-*18 ("The [accounting, scienter, causation and damages issues involved] are complex and problematic [and] [t]he risk that a jury would deny recovery to the plaintiffs is substantial. The settlement creates a certainty of some recovery, and eliminates the risk of no recovery if the litigation were pursued to trial."); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 125 (D.N.J. 2002) ("Regardless of the strength of case counsel might present at trial, victory in litigation is never guaranteed."). Furthermore, Plaintiffs and their counsel recognized that there have been many securities class actions prosecuted in the belief that they were meritorious, only to lose on summary judgment, at trial or on appeal.[11]

The risks and uncertainties of continuing this Litigation against the Individual Defendants, which were extensively considered by Co-Lead Counsel and informed their recommendation of the Settlement to Plaintiffs, are discussed below and in the accompanying Joint Declaration. *See Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 548 (D. Colo. 1989) (the "views and experience of counsel are legitimate factors to consider"); *King Res.*, 420 F. Supp. at 625 ("[c]ourts have

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[11] *See, e.g.*, *In re Williams Sec. Litig.*, 558 F.3d 1130, 1143 (10th Cir. 2009) (affirming grant of summary judgment for energy company in PSLRA case). *See also In re Oracle Corp. Sec. Litig.*, 627 F.3d 376 (9th Cir. 2010) (affirming district court's decision granting defendants' motion for summary judgment); *Freedman v. Value Health, Inc.*, 34 Fed. Appx. 408 (2d Cir. 2002) (same); *Eisenstadt v. Centel Corp.*, 113 F.3d 738 (7th Cir. 1997) (same); *In re Clorox Co. Sec. Litig.*, 238 F. Supp. 2d 1139 (N.D. Cal. 2002), *aff'd sub nom. Emp'rs Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125 (9th Cir. 2004) (granting summary judgment in favor of defendants). Even a successful jury verdict for plaintiffs is no guarantee of a recovery. *See In re BankAtlantic Bancorp, Inc.*, No. 07-61542-CIV, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (court granted defendants' motion for a judgment as a matter of law following jury verdict mostly in plaintiffs' favor); *In re Apollo Grp., Inc. Sec. Litig.*, Master File No. CV 04-2147-PHX-JAT (LEAD), 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008) (granting judgment to defendants and nullifying a unanimous jury verdict for plaintiffs following a two month trial); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant).

consistently refused to substitute their business judgment for that of counsel, absent evidence of fraud or overreaching").

a. The Risks of Establishing Liability

Plaintiffs faced numerous hurdles to establishing liability. The claims remaining against the Individual Defendants involve complex claims for relief under §§10(b) and 20(a) of the Exchange Act. By their very nature, securities class actions involve complex legal and factual issues. *See, e.g.*, *Miller v. Woodmoor Corp.*, Nos. 74-F-988, 76-F-567, 1978 U.S. Dist. LEXIS 15234, at *12 (D. Colo. 1978) ("There are few 'routine' or 'simple' securities actions."); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, MDL Docket No. 1500, 02 Civ. 5575 (SWK), 2006 U.S. Dist. LEXIS 17588, at *39 (S.D.N.Y. Apr. 6, 2006) (noting that the "difficulty of establishing liability is a common risk of securities litigation").

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." (ECF No. 252). Joint Decl. at ¶36. The Settling Parties disagree on nearly all factual and legal issues involved in the Litigation and, to this day, the Settling Defendants adamantly deny any liability. *Id.* at 37.

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,

including, *inter alia*, that the Individual Defendants did not act with the requisite scienter, that the alleged misstatements were not materially misleading, and that there was no control person liability. *Id.* Had the Settlement not been reached, Plaintiffs would expect the Individual Defendants to build foundations for each of these defenses, and others, and to assert each of them at summary judgment, trial and on appeal. *See Gottlieb*, 11 F.3d at 1015 (the value of the settlement is weighed "against the possibility of some greater relief at a later time, taking into consideration the additional risks and costs that go hand in hand with protracted litigation"); *In re Mfrs. Life Ins. Co. Premium Litig.*, MDL No. 1109, Master File No. 96-CV-230 BTM (AJB), 1998 U.S. Dist. LEXIS 23217, at *17 (S.D. Cal. Dec. 21, 1998) ("even if it is assumed that a successful outcome for plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement – which is not at all apparent – there is easily enough uncertainty in the mix to support settling the dispute rather than risking no recovery in future proceedings").

b. The Risks of Establishing Causation and Damages

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. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005). 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. Joint Decl. at ¶38.

Further, the presentation of evidence and the Settling Parties' differing arguments on damages would hinge upon extensive expert discovery and testimony. *See In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1295 (N.D. Okla. 2007) ("Plaintiffs asserting claims under §10(b) and Rule 10b-5 case generally rely on expert testimony to establish the fact of damages and the recoverable amount of damages."); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad non-actionable factors such as general market conditions"). 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." Joint Decl. at ¶39. *See, e.g.*, *Lane*, 2012 U.S. Dist. LEXIS 74273, at *196 ("It is evident from this case's long and complex history that any jury trial could have resulted in many different outcomes, and that a class victory was uncertain."); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007 U.S. Dist. LEXIS 57918, at *24 (S.D.N.Y. July 27, 2007) (citing *In re PaineWebber Ltd. P'ship Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997) (noting unpredictability of outcome of battle of damage experts)); *see also In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) ("establishing damages at trial would lead to a 'battle of experts' . . . with no guarantee whom the jury would believe"). 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 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). Joint Decl. at ¶38.

Had the Litigation proceeded, there existed real uncertainties concerning liability and damages (in addition to the risk that, even if Plaintiffs were successful in proving liability and damages at trial, they would not be able to collect on a judgment). Indeed, Plaintiffs and their counsel have negotiated a recovery for the Class without undertaking the foregoing litigation risks (and in light of the adverse circumstances discussed below), and this factor supports the Settlement.

3. The Value of an Immediate Recovery Outweighs the Mere Possibility of Future Relief After Protracted and Expensive Litigation

As set forth above, the Class will receive $2 million in exchange for its agreement to settle the Litigation with the Settling Defendants. This Settlement provides the members of the Class with an immediate benefit and eliminates the significant risks of continued litigation under circumstances where there existed a real risk of no recovery. Joint Decl. at ¶41. Moreover, the recovery obtained for the Class is a certain result, and its value must be weighed "against the possibility of some greater relief at a later time, taking into consideration the additional risks and costs that go hand in hand with protracted litigation." *Gottlieb*, 11 F. 3d at 1015. In considering the reasonableness of the Settlement, the Court should consider that the Settlement provides for payment to the Class now, rather than a speculative payment many years down the road. *See Millsap v. McDonnell Douglas Corp.*, Case No. 94-CV-633-H(M), 2003 U.S. Dist. LEXIS 26223, at *43 (N.D. Okla. May 28, 2003) ("considering the time value of money, [the settlement amount] distributed to class members today has considerably greater value than it would following a trial and subsequent appeal"); *see*

also King Res., 420 F. Supp. at 625 (in evaluating the "significance of immediate recovery by way of the compromise to the mere possibility of relief in the future" it is appropriate to "take the bird in the hand instead of a prospective flock in the bush").

A critical consideration in Plaintiffs' decision to enter into the Settlement was the absence of the alleged corporate defendant, TMI, and the limited resources available to satisfy a future judgment against the Individual Defendants. Specifically, in May 2009, while defendants' motions to dismiss were pending, TMI filed for Chapter 11 bankruptcy, 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.[12] 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. Joint Decl. at ¶42.[13] *See Lane*, 2012 U.S. Dist. LEXIS 74273, at *197 ("[W]ithout the Settlement, there is no guarantee that there will be funds available to satisfy any jury verdict that might be returned in the class's favor.").

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

[13] Indeed, the Settlement Amount essentially exhausts TMI's available D&O insurance for the relevant claims. *Id.* *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).

In addition to the particular risks faced in this Litigation, Plaintiffs also considered the risks and expense inherent in litigating a securities class action through trial generally. 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.[14] 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. Joint Decl. at ¶43. *See Lane*, 2012 U.S. Dist. LEXIS 74273, at *197 ("Pursuing the litigation further would require significant judicial and party resources to complete motions for summary judgment, motions under Daubert v. Merrell Dow Pharmaceuticals, and motions in limine. Any of those decisions could then be appealed to the Tenth Circuit along with any jury verdict that might be returned."). These costs would have further depleted the limited insurance available to satisfy any future judgment against the Individual Defendants.

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[14] The complexity of this Litigation is further evidenced by the other cases that have cited to key opinions issued by the Court in this Litigation. *See* Fee Memorandum at §III(D)(1). 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. Joint Decl. at ¶60.

Accordingly, Plaintiffs and 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.[15] Joint Decl. at ¶44. This factor strongly supports the Settlement.

4. The Judgment of the Parties that the Settlement Is Fair and Reasonable

a. Plaintiffs and Co-Lead Counsel Support the Settlement

"When a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable." *Marcus v. State of Kan., Dep't of Revenue*, 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002) (noting that counsel's judgment as to the fairness of the agreement is entitled to considerable weight). Further, a court is "entitled to rely upon the judgment of experienced counsel for the parties [and] absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Lopez v. City of Santa Fe*, 206 F.R.D. 285, 292 (D.N.M. 2002). Here, 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 very real possibility that no recovery would be obtained. Joint Decl. at ¶45.

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[15] As this Court noted in *Lane*, although $3.7 million "may not be as large a Settlement fund as members of the class hoped to receive, and is probably less than class counsel wanted upon filing this action, it is significant given the real likelihood that the class could receive nothing." *Lane*, 2012 U.S. Dist. LEXIS 74273, at *218. 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.

b. The Class's Reaction, to Date, Supports the Settlement

To date, the reaction of the Class to the Settlement has been positive and supports the Settlement. *See generally In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1262 (D. Kan. 2006) (reviewing reaction of class members to settlement and overruling any objections before finding the settlement to be fair, adequate and reasonable). SCS, in accordance with the procedures for mailing and publication established by the Court's Preliminary Approval Order, undertook an extensive program to ensure that notice of the Litigation and the proposed Settlement was widely disseminated to those who purchased or otherwise acquired TMI common and/or preferred stock during the Class Period. Following the dissemination of 213,994 copies of the Notice to potential Class Members and nominees, there have been two objections filed, and fourteen requests for exclusion from the Class received.[16] Bravata Decl. at ¶¶9, 11. Thus, the Class's reaction so far militates in favor of the Court's final approval of the Settlement. Joint Decl. at ¶46.

c. The Underwriter Defendants' Objection to the Proposed Order and Final Judgment

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.[17] 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

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[16] Of the two Class Member objections filed, only one objects to the Settlement itself; the other objects solely to Co-Lead Counsel's request for attorneys' fees and expenses. *Id.* at n.30. As stated above, the deadline for objecting to the Settlement or requesting exclusion from the Class is August 6, 2012. All objections and requests for exclusion received (including any received after the date of this memorandum), will be collectively addressed by Co-Lead Counsel in a reply submission to be filed with the Court on or before August 20, 2012.

[17] A copy of the objection filed by the Underwriter Defendants (the "Underwriter Objection") (ECF No. 388) is attached to the Joint Declaration as Exhibit 2. The Underwriter Objection was posted on SCS's website, www.strategicclaims.net, along with a copy of the Final Order.

Defendants'] contractual rights and their 'ability to seek contribution or indemnification.'" *See* Underwriter Objection at p. 1.

It is the Settling Parties' 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 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.[18] *See* Jonathan C. Dickey & Joel A. Feuer, *Securities Litigation: A Practitioner's Guide* 13-21 (2009) (recognizing that there is a judgment reduction based on proportionate fault that takes place "notwithstanding the partial settlement and the resulting bar order");[19] *see also In re WorldCom, Inc.*

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[18] As set forth in 15 U.S.C. § 78u-4(f)(7) regarding "Settlement discharge":

> **(A) In general**
> A covered person who settles any private action at any time before final verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling covered person arising out of the action. The order shall bar all future claims for contribution arising out of the action —
> (i) by any person against the settling covered person; and
> (ii) by the settling covered person against any person, other than a person whose liability has been extinguished by the settlement of the settling covered person.
> **(B) Reduction**
> If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment, the verdict or judgment shall be reduced by the greater of—
> (i) an amount that corresponds to the percentage of responsibility of that covered person; or
> (ii) the amount paid to the plaintiff by that covered person.

[19] In reviewing a judgment reduction provision which deviated from the PSLRA's standard statutory language, the Court stated "In its Reply Memorandum, the Lead Plaintiff also argues that the Underwriter Defendants do not have standing to object to the terms of the settlement, citing *Zupnik v. Fogel*, 989 F.2d 93 (2d Cir.1993), for the proposition that the Underwriter Defendants lack standing because they would suffer no "legal prejudice" from the settlement. *Id.* at 98. If the Court gave effect to the Judgment Reduction Formula of the Stipulation under consideration here, however, the Judgment Reduction Formula's divergence from the terms of 15 U.S.C. § 78u-4(f)(7)(B)(i) would have a direct and binding effect on the Underwriter Defendants' rights to a judgment credit ***to which they would otherwise be entitled***. They therefore face "formal legal

Sec. Litig., Master File 02 Civ. 3288 (DLC) 2005 U.S. Dist. LEXIS 3791, at *21 (S.D.N.Y. Mar. 14, 2005) ("There may be instances in which a settlement may be approved without the identification of a specific judgment reduction provision. Where the settling defendants wish or require approval of a formula for judgment reduction, where there are only a few non-settling defendants, or where there is "a single set of facts," it may be practical and desirable to designate a formula at the time the settlement is reviewed for fairness."). Plaintiffs believe the arguments raised by the Underwriter Defendants are without merit.

IV. THE PLAN OF ALLOCATION IS FAIR, REASONABLE AND ADEQUATE

Upon approval of the Settlement and the Court's entry of an order approving distribution, the Net Settlement Fund shall be distributed to Authorized Claimants. The proposed Plan of Allocation (the "Plan") set forth in full on SCS's website, www.strategicclaims.net, details the manner in which the Net Settlement Fund shall be allocated.[20] *See* Exhibit C to the Bravata Declaration.

Assessment of the adequacy of a plan of allocation in a class action is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair, reasonable and adequate. *See Lucas*, 2006 U.S. Dist. LEXIS 51439, at *28; *Law v. NCAA*, 108 F. Supp. 2d 1193, 1196 (D. Kan. 2000), *aff'd*, 246 F.3d 681 (10th Cir. 2001). "An allocation formula need only have a reasonable basis, particularly if recommended by experienced and competent class counsel." *Lucas*, 2006 U.S. Dist. LEXIS 51439, at *29 (quoting *In re Am. Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001)); *Law*, 108 F. Supp. 2d at 1196 (noting that the court

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prejudice," *Zupnik*, 989 F.2d at 98 (citation omitted), and have standing to object." (emphasis added).

[20] Given its length, an abbreviated version of the Plan was attached to the Notice that was mailed to potential Class Members. Joint Decl. at ¶54.

gives substantial weight to the opinions of experienced counsel regarding the fairness of allocation). Further, a plan that allocates settlement funds to class members based on the extent of their injuries or the strength of their claims is reasonable. *See Lucas*, 2006 U.S. Dist. LEXIS 51439, at *29.

Here, Co-Lead Counsel prepared the Plan after careful consideration and detailed analysis, and with the assistance of a damages consultant. Joint Decl. at ¶51. As of the filing of this memorandum, not a single Class Member has objected to the Plan. *Id.* at ¶54. *See Maywalt v. Parker & Parsley Petroleum Co.*, 1997 U.S. Dist. LEXIS 97, at *11-*12 (S.D.N.Y. Jan. 6, 1997) (stating that lack of objections to plan of allocation is an important factor in evaluating the plan).

The Plan reflects that the price of TMI common stock and preferred stock[21] 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 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.[22] In addition, in order to recover under the Plan, a Class Member must have held their

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[21] 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.

[22] 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

eligible TMI stock through at least one corrective disclosure, otherwise their resulting Recognized Loss will calculate to zero.[23] Joint Decl. at ¶52.

Moreover, 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 upon the percentage that his, her or its claim bears to the total of the claims for all Authorized Claimants. *Id.* at ¶53. *See Newton v. Fortis Ins. Co.*, 2006 U.S. Dist. LEXIS 33965, at *4 (D. Colo. May 26, 2006) (approving plan of allocation where the allocation was pro rata across the class); *In re Broadcom Corp. Sec. Litig.*, 2005 U.S. Dist. LEXIS 41976, at *17 (C.D. Cal. Sept. 12, 2005) (same). Accordingly, Plaintiffs and their 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.

V. THE COURT SHOULD AFFIRM ITS CERTIFICATION OF THE CLASS

In presenting the proposed Settlement to the Court for preliminary approval, Plaintiffs requested that the Court certify the Class for settlement purposes so that notice of the proposed Settlement, the final approval hearing and the rights of Class Members to request exclusion, object

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on which the information correcting the misstatement or omission that is the basis for the action is disseminated."

[23] 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).

or submit Proof of Claim forms could be issued. In its Preliminary Approval Order, the Court, for purposes of the Settlement only, preliminarily certified the Litigation as a class action and preliminarily certified Plaintiffs as class representatives. Joint Decl. at ¶48. Nothing has changed to alter the propriety of the Court's certification and, for all the reasons stated in Lead Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement dated April 16, 2012 (*see* ECF No. 385), incorporated herein by reference, and the accompanying Joint Declaration at ¶¶49-50, Plaintiffs respectfully request that the Court reiterate its prior certification of: (i) the Class for purposes of carrying out the Settlement pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3); and (ii) Plaintiff as the class representative, as well as its prior appointment of counsel.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Settlement and Plan of Allocation are fair, reasonable, and adequate, and respectfully request this Court to grant final approval of the Settlement and Plan of Allocation. Additionally, all of the requirements for certification have been met, and Plaintiffs respectfully submit that the Court should certify the Class for settlement purposes.

Dated: July 23, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 23, 2012, the foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT AND PLAN OF ALLOCATION was electronically filed with the Clerk of the court using the CM/ECF System, which will send notification of such filing to all counsel of record and declarant served the parties who are not registered participants of the CM/ECF System, via United States First Class Mail.

Turner W. Branch