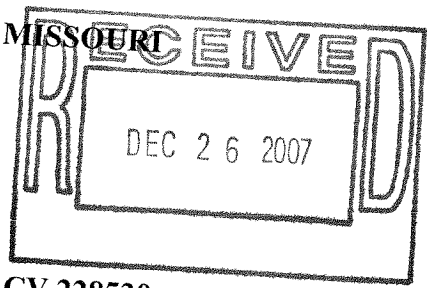


IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE



DAVID C. McLEAN, et al.,  
  
Plaintiffs,  
  
v.  
  
FIRST HORIZON HOME LOAN  
CORPORATION (f/k/a McGuire Mortgage  
Company),  
  
Defendant.

Case No. 00 CV 228530  
Division 28

**DEFENDANT'S REPLY SUGGESTIONS IN SUPPORT OF ITS  
MOTION FOR COURT INTERPRETATION OF SETTLEMENT AGREEMENT  
AND ENFORCEMENT OF JUDGMENT**

First Horizon's motion should be granted. The Settlement Agreement does not provide for a "second claim period" after the agreed-to Claim submission deadline, as the Special Master seeks to require. Moreover, the Settlement Agreement, in paragraph 3.04, specifically limits to \$250 the settlement amount available to borrowers with Bankruptcy Loans and provides that a bankruptcy trustee may only recover additional amounts if he or she submits a Valid Claim Form—contrary to the payment proposal devised by the Special Master. Plaintiffs' arguments to the contrary are not only inconsistent with the language of the Settlement Agreement but they are also contradictory of the record made in this Court.

**I. THE COURT HAS JURISDICTION AND THE POWER TO INTERPRET THE  
SETTLEMENT AGREEMENT AND ENFORCE THE JUDGMENT.**

Plaintiffs do not dispute that ¶ 7.14 of the Settlement Agreement provides that, "[a]lthough the Court shall enter a judgment, the Court shall retain jurisdiction over the interpretation, effectuation, enforcement, administration, and implementation of this Agreement." Moreover, the trial court has inherent power to enforce its judgments.

*SD Investments, Inc. v. Michael-Paul, LLC*, 157 S.W.3d 782, 786 (Mo. App. W.D. 2005). The Court's Final Order and Judgment not only incorporates the Settlement Agreement but also specifically states it is within the province of the Court to interpret and enforce the Settlement Agreement consistent with its terms and the parties' Agreement. Thus, there is no doubt that this Court has the authority to interpret the clear, unambiguous provisions in the contract and enforce the Judgment as entered.

Plaintiffs' reliance on *State ex rel. Abdullah v. Roldan*, 207 S.W.3d 642 (Mo. App. W.D. 2006), is misplaced. There, unlike here, the moving party sought to have the court alter its judgment as to the allocation of attorney fees. The court correctly refused to do so citing Mo. R. Civ. P. 75.01, which limits a trial court's ability to *modify* judgments within a 30-day time period. But because First Horizon only asks the Court to enforce the Settlement Agreement and Judgment as it is written and entered, and *does not* seek to amend the documents, *Abdullah* does not apply.

Instead, the trial court always retains, within its inherent powers, the authority to enforce the terms of its judgments. *SD Investments*, 157 S.W.3d at 786.<sup>1</sup> Because the Judgment and Settlement Agreement specifically provide that the Court is to interpret and enforce the written documents, and the actions proposed by plaintiffs and taken by Special Master Mauer and Mr. Ralston (over First Horizon's repeated objections) are contrary to the terms of the Agreement, it is necessary for the Court to become involved and interpret and enforce the Agreement.<sup>2</sup>

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<sup>1</sup> See also *Gaunt v. State Farm*, 24 S.W.3d 130, 135 (Mo. App. W.D. 2000) (same); *Multidata Sys. Int'l Corp. v. Zhu*, 107 S.W.3d 334, 339 (Mo. App. E.D. 2003) (same); *Lake Thunderbird Property Owners Assoc., Inc. v. Lake Thunderbird, Inc.*, 680 S.W.2d 761, 763 (Mo. App. E.D. 1984) (same).

<sup>2</sup> As the Missouri Supreme Court has recognized, settlement terms not agreed upon by the parties cannot be imposed thereafter. See *Lavelock v. Cooper Tire Rubber Co.*, 169 S.W.3d

As discussed more fully below, the particular issues presented to this Court concern proposals by the Special Master that would redraft the Agreement far exceeding the Special Master's limited role. Issues concerning interpretation and enforcement of the Agreement are reserved solely for the Court. Neither the Judgment nor the Settlement Agreement provided authority to force new requirements on the parties (or, in this instance, subject First Horizon to substantially different obligations beyond those to which it agreed in the Settlement Agreement). And, contrary to plaintiffs' characterizations, First Horizon is not in any respect "appealing" to this Court any decisions that the Settlement Agreement reserved to Special Master Mauer: (1) First Horizon filed the instant motion *before* the Special Master entered any "order" on the allocation of payments for Bankruptcy Loans, and *before* the unauthorized "second claim period" is completed, (2) First Horizon objected to the Special Master even reaching these issues and, particularly, First Horizon exercised its right under ¶ 3.18 of the Settlement Agreement to have the Bankruptcy Court decide any disputes concerning Bankruptcy Loans, and (3) the Special Master exceeded his limited decisional authority in revising and changing the Agreement, rather than simply resolving "challenges."

## **II. THE "SUPPLEMENTAL" CLAIM PROCESS IS CONTRARY TO THE SETTLEMENT AGREEMENT.**

The Settlement Agreement details the requirements before a Claim Form submitted by a Class Member can be considered a Valid Claim Form that is subject to payment. Those requirements include, among other things, that the Claim Form include a "response to each question that the Class Member is required to answer"; that the Claim Form be signed "by each

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865, 866-67 (Mo. banc. 2005); *see also State ex rel. Ford Motor Co. v. Manners*, 2007 WL 4238958 \*5 (Mo. banc 2007) (same).

person who is a Class Member” on the Loan; and that the Claim Form be postmarked by May 31, 2007.

The Special Master, whose only role is to apply the Agreement to resolve challenges to the Claims submitted by Class Members, nonetheless determined that Class Members who did not submit a Valid Claim Form by May 31, 2007 would, over six months later, be given another opportunity to submit a Claim Form in order to correct deficiencies in their prior submissions. First Horizon’s opening suggestions explained that this process was not agreed to by the parties in their Settlement Agreement (which the Court approved as fair and reasonable), and in fact it is contrary to the Agreement. Instead of applying the language in the Agreement, the Special Master purported to amend, add to, and rewrite it, which he was not authorized to do either by the Settlement Agreement or this Court. The Court should interpret and enforce the Agreement by (a) finding that the Settlement Agreement does not provide for the proposed “supplemental” Claim submission process, (b) find that any re-submitted Claim Forms are void, and (c) ordering that any Claim Form that was not a Valid Claim Form as of the agreed Claim submission deadline (May 31, 2007) must be denied.

Class Counsel makes several arguments in an attempt to defend the Special Master’s decision, none of which justifies the proposed fundamental changes to the Agreement. Class Counsel first argues (at 4) that the new procedures were an effort to prevent “undue hardship” to Class Members because of alleged failures of the Settlement Administrator.<sup>3</sup> But the critical point is that the “process” that the Special Master devised was not provided for in the Agreement. Under the Settlement Agreement, the Special Master was appointed *only* to resolve

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<sup>3</sup> First Horizon’s statement concerning the appropriateness of the Settlement Administrator’s conduct, and the numerous updates he provided to Class Counsel, is detailed in the opening Suggestions, and requires no reiteration now. *See also* Exhibits M, N attached hereto.

challenges to Claims submitted by Class Members; he was given no authority to fashion new Claim-submission procedures or to revise the Agreement in any way. If Class Counsel had wanted the remedy for alleged failures of Settlement Administration to have been a new Claim-submission process after the agreed-to deadline, they could have tried to negotiate such a provision. Instead, that antidote is not part of the Agreement, and the Special Master had no authority to invent one.<sup>4</sup> The Agreement, like any other contract, must be interpreted and enforced to provide the benefits and obligations existing in the written, negotiated document, and cannot be revised to provide a benefit or remedy that was not agreed.

Class Counsel also argues (at 5) that the Settlement Agreement permits the parties to challenge the Settlement Administrator's decisions as part of the disputed Claim process. See Settlement Agreement ¶¶ 2.34, 3.10. While parties can certainly contest those decisions in the challenge process, the new Claims process is a contrived *remedy* for a meritorious challenge that simply is not provided for in the Agreement.

Finally, Class Counsel argues (at 6) that the May 31, 2007 deadline for Class Members to submit Claim Forms does not bar new Claim Forms now because Claim Forms may be “amended or supplemented pursuant to the procedures set forth herein with respect to Disputed Claims.” Settlement Agreement ¶ 2.14. In fact, the Settlement Agreement provides *no such procedures* within the Claims dispute period or process. Moreover, this argument ignores that, in order for a Claim to be subject to payment, there must be a Valid Claim Form, meaning that it

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<sup>4</sup> The proposed new Claim-submission process would obligate First Horizon to pay Claims that are not valid Claims under the terms of the Settlement Agreement. Any requirement that it do so because of alleged failures of the Settlement Administrator would violate ¶ 7.06, which states that neither party “shall have any liability or obligation for errors or omissions of Settlement administration, including . . . the process of Claim forms . . . and all other aspects of administration.”

must be submitted by the agreed Claim-submission deadline. Nothing in the Agreement permits any amended or supplemented Claim Form after the May 31, 2007 deadline.

**III. THE SPECIAL MASTER'S BANKRUPTCY LOAN PAYMENT PROPOSAL IS CONTRARY TO PARAGRAPH 3.04 OF THE SETTLEMENT AGREEMENT.**

The Special Master has purported to order that, in the case of Bankruptcy Loans, First Horizon is to tender the entire Settlement Benefit for the Loan in a check payable jointly to the borrower and the bankruptcy trustee. That payment process is, however, directly contrary to the manner in which the Settlement Agreement provides that payments would be made for Bankruptcy Loans. Paragraph 3.04 specifically and clearly states that, if a borrower with a Bankruptcy Loan submits a Valid Claim Form, then he or she is to receive \$250, *and* if the bankruptcy trustee of the borrower's bankruptcy estate *also* timely submits a Valid Claim Form for the subject Loan, then the trustee would be eligible to receive the remainder of the Settlement Benefit for that Loan. Contrary to Class Counsel's assertion, *nothing* in the Agreement says that a borrower with a Bankruptcy Loan is to receive more than a \$250 settlement payment.

Attached to First Horizon's opening brief are three important documents that confirm that all parties fully understood that this was how ¶ 3.04 was to work. First, Exhibit J includes the various drafts of ¶ 3.04. Those documents make clear that the provision was placed into the Agreement only after considerable discussion and consideration. Second, Exhibit I is an excerpt from "Plaintiffs' Motion for Final Approval of Class Action Settlement" filed in this Court wherein plaintiffs confirmed their understanding that, in the case of Bankruptcy Loans, the borrower would receive \$250 and the remainder would be available to a bankruptcy trustee "*who files a Valid Claim Form*" (emphasis added). Finally, Exhibit K is a letter from the mediator who negotiated the Agreement (Richard Ralston) summarizing important settlement terms, which letter also states this same allocation of payments on Bankruptcy Loans in the case of a

trustee “who files a timely and valid Claim Form.” Class Counsel’s brief does not dispute that these documents confirm that the Special Master’s proposal as to how payments on Bankruptcy Loans are to be made is contrary to the parties’ Agreement.

Class Counsel’s arguments cannot avoid the plain language of ¶ 3.04. Class Counsel argues (at 8) that ¶ 3.04 is “ambiguous.” But that paragraph clearly says that, in the case of Bankruptcy Loans, the borrower-debtor is to receive \$250, and the trustee may recover additional amounts only if he or she submits a Valid Claim Form. This is exactly the way in which the plaintiffs and the mediator understood that provision as well. *See Exhibits I and K.*<sup>5</sup>

Class Counsel next argues (at 8) that ¶ 3.04 is modified by ¶¶ 1.11 and 1.44. That is simply untrue. Paragraph 1.11 states that a bankruptcy trustee and a debtor are treated “collectively” as a single Class Member even if they file different Claim Forms. Paragraph 1.44 defines Valid Claim Form, and says that if more than one person is considered a single Class Member, they need only submit one Claim Form, “*except as provided with respect to Bankruptcy Loans in paragraph 3.04 and 3.05*” (emphasis added). Accordingly, far from modifying ¶ 3.04, ¶ 1.44 recognizes that ¶ 3.04 stands alone in detailing how payment is to be made for Bankruptcy Loans and neither ¶ 1.11 nor ¶ 1.44 *expands* the agreed treatment of Bankruptcy Loans.

Next, Class Counsel says (at 9) that the fact that Claim Forms need only be signed by a borrower or a bankruptcy trustee means that trustees can recover even if they do not file a separate Claim Form. But this unfounded inference is contrary to the plain language of ¶ 3.04, which states that a trustee can recover any balance over \$250 *only* if he or she “files a Valid Claim Form.” *See also* Exhibit I (plaintiffs’ submission to the Court recognizes that trustee can

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<sup>5</sup> Any suggestion that plaintiffs might have negotiated differently if this was the understanding is both utter speculation and belied by the *fact* that this *was* the understanding of Class Counsel and the mediator as well as First Horizon.

recover only if he or she “files a Valid Claim Form”); Exhibit K (mediator’s letter states that monies will be made available only to a trustee “who files a timely and valid Claim Form”). The Claim Form was used by both borrowers and trustees to submit Claims for the respective portion of a Settlement Benefit to which they are entitled. The fact that a single form served both purposes does not mean that, if either a borrower or a trustee filed a Claim, both were entitled to recover.<sup>6</sup>

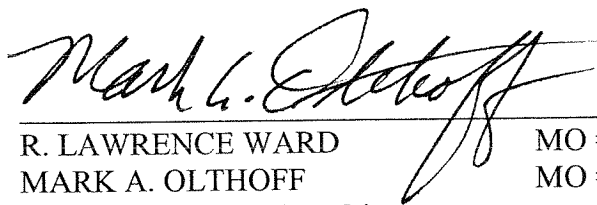
Finally, we note that the Special Master’s decision with respect to Bankruptcy Loans is also invalid because it was not a decision resolving any “challenge” to a Claim. The Special Master’s role was limited to resolving contested challenges to Claims. *See* Settlement Agreement ¶ 3.13. The Special Master’s proposal creating a payment method for Bankruptcy Loans is not a decision on a “challenge,” but is just a *sua sponte* way to see that, contrary to the parties’ agreement in ¶ 3.04, the entire Settlement Benefit is paid on each Bankruptcy Loan. The proposal should be rejected for this reason as well.

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<sup>6</sup> Class Counsel also argues (at 9) that the fact that Claim Forms were not mailed directly to bankruptcy trustees means that they did not have to file Claims in order to recover. This is again contrary to the stated requirement in ¶ 3.04 that a trustee must “file[] a Valid Claim Form” in order to recover. Neither can Class Counsel nor the Special Master attack the adequacy of the Class Notice directing the class members to notify the trustees to submit claim forms. This Court approved that notice nearly a year ago.

Respectfully submitted,

SHUGHART THOMSON & KILROY, P.C.



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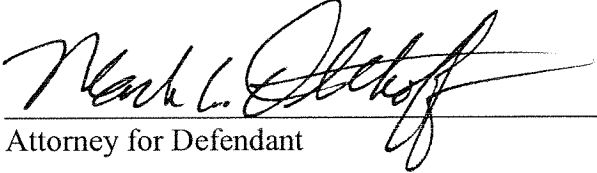
ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing was delivered via regular mail, postage pre-paid, this 21st day of December, 2007, to:

R. Frederick Walters, Esq.  
R. Keith Johnston, Esq.  
Walters, Bender, Strohbahn & Vaughan, PC  
2500 City Center Square  
1100 Main Street  
P.O. Box 26188  
Kansas City, MO 64196

Class Counsel

  
\_\_\_\_\_  
Attorney for Defendant

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**From:** stilghman@aol.com  
**Sent:** Monday, April 23, 2007 11:14 AM  
**To:** fwalters@wbsvlaw.com; krichards@wbsvlaw.com; Chud, Adam M; Hefferon, Thomas M  
**Subject:** McLean

Paragraph 2.34 in section D (Post-Approval Administration) is a bit confusing as to timing of activities. It says to analyze claim submissions within 7 days of receipt. So I assume I need to be analyzing claims now even though though 2.34 is in the Post-Approval section.

In looking at Paragraph 2.34 of the settlement agreement it says we are to match Valid Claims against the Damage Claim listing within 7 days of receiving a claim. Best I can tell the Damage Claim Listing is described in paragraph 2.03. I don't have all the information described there. I received a list that included name, address and date (which I have taken to be origination date). There was a column for SSN, but nothing was in that column for each record.

So I think I need to get an updated listing that includes the information outlined in paragraph 2.03. Also need to know which loans are Special Category Loans.

st

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AOL now offers free email to everyone. Find out more about what's free from AOL at [AOL.com](http://AOL.com).

**EXHIBIT** M

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**From:** STilghman@aol.com  
**Sent:** Tuesday, May 08, 2007 3:50 PM  
**To:** fwalters@wbsvlaw.com  
**Cc:** Hefferon, Thomas M; dskeens@wbsvlaw.com; krichards@wbsvlaw.com; molthoff@stklaw.com; Chud, Adam M; jbanz@wbsvlaw.com  
**Subject:** Re: McLean

Fred,  
I am a little confused about your comment to me and then one to Adam.  
I have no information about amounts.  
I think I was suppose to get sometime information earlier on but have not. Section 2.03 list several bits of information that is to be provided but I have yet to receive. Some of the information I am missing is loan financial data. So if that is something I need to make a determination about who gets a letter other than a YES answer to question 7 then I need the info.

Steve

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See what's free at [AOL.com](http://AOL.com).

**EXHIBIT** N

9/25/2007