

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

DAVID C. AND HOLLY E. McLEAN,
Et al.,

Plaintiffs,

v.

FIRST HORIZON HOME LOAN
CORPORATION (f/k/a McGUIRE
MORTGAGE COMPANY),

Defendant.

Case No. 00CV-228530

Division 28

**ORDER OF THE SPECIAL MASTER DENYING DEFENDANT'S
CHALLENGE AS TO VALIDITY AND AMOUNT OF CLAIMS MADE BY CLASS
MEMBERS WHO PREVIOUSLY FILED CHAPTER 7 BANKRUPTCIES**

This Order is submitted to memorialize the decisions of these Special Masters with respect to all issues raised by Defendant's challenges to the Settlement Claims involving prior bankruptcies filed under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701-766.

I. BACKGROUND

This case involves a class action lawsuit which was certified as such by the Circuit Court of Jackson County, Missouri on December 22, 2002. In the underlying lawsuit, the plaintiffs asserted claims for violation of Missouri's Second Mortgage Loans Act to recover interest and fees paid in connection with the second mortgage loans made by McGuire Mortgage Company ("McGuire") and later by defendant First Horizon Home Loan Corporation ("Defendant"). The plaintiffs' claims are based on allegations that McGuire and Defendant charged them closing costs and other fees which were illegal under Missouri law.

These claims have been resolved by the Special Masters in accordance with a settlement agreement between Defendant and the named plaintiffs, individually and as representatives of

absent class members (“Plaintiffs”).¹ In settling this action, Defendant denied its liability, but agreed to establish a settlement fund to compensate those who held second mortgages and paid the costs and other fees which Plaintiffs alleged were illegal. The Settlement Agreement has been approved by the Court, class notices and claim forms have been published and mailed to class members, claim forms have been received by the settlement administrator, and the claim-payment proceedings have commenced.

The Settlement Agreement establishes a classic “claims made” structure in which class members are required to submit claim forms in order to receive settlement proceeds. Claims which have been submitted in the claims proceedings may be challenged by Defendant or the Settlement Administrator on certain specified grounds, both as to amount and validity. The Settlement Agreement further provides that “all challenges that are contested shall be submitted to the [Special Masters] for resolution” and “[o]nce a challenge is resolved, the validity and amount of the Claims shall be adjusted or approved accordingly [by the Special Masters], without right of further challenge or appeal.” *See* Settlement Agreement, ¶ 3.13, 314 & 3.16. These Special Masters have been appointed as the final arbitrators for determining the correct amounts of the challenged claims and their validity. *See* Settlement Agreement, ¶ 3.14.

Under the Settlement Agreement Defendant agreed to establish a settlement fund of \$36,000,000. That number is theoretical in the real world. It is the most that Defendant is required to pay if every class member claimant submits a claim and every claim is valid and paid in full. That, of course, will never happen because in a “claims made” settlement procedure a settling defendant normally assumes that only about 17% to 20% of the potential universe of

¹ Some claimants have been permitted to resubmit their claim forms because the Settlement Administrator did not notify Class Counsel of deficiencies in their original claim forms so that those deficiencies could be addressed and resolved within the original claims submission period.

claims will even be submitted. In this case, however, the response by the *McLean* class members was surprisingly large, as more than 50% of the class members submitted claims. Therefore, if all are paid, Defendant will be required to pay out more than \$18,000,000 in settlement proceeds. In light of this apparently unanticipated result, Defendant challenged approximately 1750 of the class members' claims on a myriad of grounds. Some of those challenges had substance, but many did not. At this date, many claims have been resolved and paid, but many claims are still pending and subject to a determination by these Special Masters.

The Defendant challenged approximately 350-400 claims on grounds that the class member's loan was a "Bankruptcy Loan" as defined in paragraph 1.03 of the Settlement Agreement and, therefore, "[t]he claim at issue was filed by a Class Member who is entitled to only \$250 [Settlement Agreement, ¶ 3.04]."² See e.g., Notice of Settlement Challenge Pursuant to Settlement Agreement filed in response to claim of Vera Abernathy, at page 2. In addition, the Settlement Administrator made similar determinations that some claimants were only entitled to \$250 because the claimant said that he or she had filed bankruptcy in response to Question 9 on his or her Claim Form. These challenges were subsequently divided into two separate categories; namely, those claims involving prior bankruptcies filed by claimants under Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701-766) and those involving prior bankruptcies filed under Chapter 13 of the Bankruptcy Code (11 U.S.C. §§ 1301-1330). The challenges relating to Class Members who had filed Chapter 13 bankruptcies were resolved by Special Master Ralston by written Order, dated November 26, 2007.³ There are approximately 200-250 remaining

See §§ 2.34 and 2.14 of the Settlement Agreement and Order of November 26, 2007, p. 3-4, n. 4.

² "Bankruptcy Loan" is defined as "any Loan made to a member of the Class who filed for bankruptcy protection after the date on which the Loan was made." See Settlement Agreement, ¶ 1.03.

³ Special Master Ralston was designated to resolve the challenges to the claims involving prior

challenges involving prior bankruptcies filed by claimants under Chapter 7 (hereinafter, the “Chapter 7 Challenges” and “Chapter 7 Claims,” respectively). Class Counsel objected to all of the Chapter 7 Challenges on a number of grounds.

II. RESOLUTION OF THE AMOUNT TO BE PAID ON CHAPTER 7 CLAIMS

Counsel for the parties were unable to resolve any of the Chapter 7 Challenges by mutual agreement prior to commencement of the claim-payment proceedings. As a result, Defendant continues to maintain its Chapter 7 Challenges based on its contention that the total amount of payment on each such claim should be limited to \$250 under the Settlement Agreement if a bankruptcy trustee did not also file a separate Claim Form. In addition, Defendant has invoked the provisions of paragraph 3.18 of the Settlement Agreement, based on its determination that all other issues raised with respect to the Chapter 7 Challenges must be addressed or resolved by the bankruptcy courts.

With respect to the total amount that should be paid under the Settlement Agreement on the Chapter 7 Claims, Defendant selectively cites to paragraph 3.04 of the Settlement Agreement to contend that it is only required to pay a maximum of \$250 in all cases in which a Valid Claim Form was only filed by the borrower, or “Obligor” as defined in paragraph 1.28 of the Settlement Agreement. The undersigned Special Masters, however, find that the language in paragraph 3.04 upon which Defendant relies is, at best, ambiguous when viewed in the context of the entire Settlement Agreement. Therefore, the rules of contract construction must be applied to ascertain the true intent of the parties to the Settlement Agreement. As the Missouri Supreme Court recently explained:

Chapter 13 bankruptcies, both under the Settlement Agreement and in subsequent correspondence between counsel, due to Special Master Mauer’s recusal from participation in the decisions relating to such claims.

Missouri courts treat a settlement agreement as a contract between the parties. *Andes v. Albano*, 853 S.W.3d 936, 941 (Mo. banc 1993). As a result, normal canons of contract construction apply. Chief among those canons is that the court first looks to the plain language of the agreement. *Id.* If that language clearly addresses the matter at issue, the inquiry ends. However, if the language is not clear, the court turns to other tools of construction in an attempt to determine the intent of the parties. *Id.* When making that determination, courts will consider language in the context of the entire contract, as well as “the relationship of the parties, the subject matter of the contract ... the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties.” *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 362 (Mo. banc 1991).

TAP Pharmaceutical Products, Inc. v. State Bd. of Pharmacy, ___ S.W.3d ___, 2007 WL 4111477 (Mo. banc, November 20, 2007).

When viewed in its entirety, the plain and ordinary language used in the Settlement Agreement clearly contemplates that the *entire* amount of the Settlement Benefit payable on each Chapter 7 Claim, as defined in paragraph 1.40 of the Settlement Agreement, should be paid to either the Obligor and/or the bankruptcy trustee.⁴ See *Knob Noster R-VIII School Dist. v. Dankenbring*, 220 S.W.3d 809, 816 (Mo.App. 2007) (“The primary contract interpretation rule is to rely on the plain and ordinary meaning of the words in the contract and to consider the document as a whole”). Indeed, when the entire agreement is considered, it becomes clear that Defendant’s interpretation of the Settlement Agreement must be rejected. In essence, Defendant’s argument is flawed because it ignores several key provisions in the Settlement Agreement and other extrinsic evidence of the parties’ intent. In particular, Defendant’s interpretation fails to consider the provisions of paragraph 1.11, defining the term “Class Member,” and paragraph 1.44, defining the term “Valid Claim Form.” See Settlement

⁴ Under the Settlement Agreement, the term “Settlement Benefit” “means the individual amount to be paid to each Class Member under this Settlement, exclusive of any postjudgment interest to be paid pursuant to paragraph 4.02”

Agreement, ¶¶ 1.11 and 1.44. Defendant's argument also ignores the fact that the Claim Form agreed to by the parties requires Class Members with Bankruptcy Loans to provide information sufficient to identify their prior bankruptcy case, including information concerning the bankruptcy trustee, and that only the signature of the borrower *or* the trustee is necessary to make the Claim Form valid. Finally, and perhaps most importantly, Defendant's interpretation would not be consistent with its requirement to provide the best notice practicable, as required by Mo.R.Civ.P. 52.08(c)(2).

As expressly stated in paragraph 1.11, “[i]n the case a Bankruptcy Loan, as defined in paragraph 1.03, the bankruptcy trustee and the Obligor(s) shall be treated *collectively* as a Class Member notwithstanding the fact that separate Claim Forms may be filed as to Bankruptcy Loans.” (emphasis added). Settlement Agreement, ¶ 1.11. The meaning of the term “Class Member,” when used in the context of a Bankruptcy Loan, is illuminated further in the definition of the term “Valid Claim Form” as used in the Settlement Agreement. Under paragraph 1.44, “Valid Claim Form” is defined as follows:

“Valid Claim Form” means a Claim Form that:

(a) is completed and filled out as required, with a response to each question that the Class Member is required to answer. Immaterial omissions (e.g. omission of the four-digit add-on zip code number or middle initial) and obvious mistakes will not preclude an otherwise properly completed Claim Form from being a “Valid Claim Form;”

(b) is executed under penalty of perjury by each person who is a Class Member as set forth in paragraph 1.11. Where more than one person is treated collectively as a Class Member with respect to a particular Loan, *all such persons comprising a single Class Member shall execute a single Claim Form and only one Claim Form can be submitted for any particular Loan, except as provided with respect to Bankruptcy Loans in paragraph 3.04 and 3.05 below.* In the event the Class Member is not an Obligor as provided in paragraph 1.11 above, sufficient documentary evidence of that status must be provided to the Settlement Administrator at the time of Claim Form submission;

(c) is timely. A Claim Form shall be timely if it is postmarked by the deadline set forth in paragraph 2.14;

(d) is correct. Material omissions, material misstatements, and knowing misstatements will invalidate a Claim Form;

(e) is not successfully challenged under paragraphs 3.09-3.16 hereof or is not denied under paragraph 3.10.

Settlement Agreement, ¶ 1.44 (italics and bold added).

Giving paragraphs 1.11 and 1.44 their most reasonable interpretation, it is clear that in the context of claims involving Bankruptcy Loans, the Obligor and the bankruptcy trustee were intended to be considered collectively as one “Class Member.” See Settlement Agreement, ¶ 1.11. Similarly, paragraph 1.44 makes clear that Claim Forms had to be executed by all persons comprising a single Class Member and only one Claim form could be filed in all cases *except Claim Forms involving Bankruptcy Loans*. See Settlement Agreement, ¶ 1.44. Consistent with these provisions, the Claim Form itself only required the signature of the borrower *or* the trustee, as “Legal Representative.” Likewise, it specifically requested information sufficient to identify the prior bankruptcy in order to facilitate getting the payment to the correct trustee.

It is also perhaps more significant that the bankruptcy information sought on the Claim Form was not necessary, as Defendant clearly had sufficient information to notify the trustees of the Settlement Agreement directly. See Settlement Agreement, ¶ 2.03. In light of this fact, if Defendant’s interpretation of the Settlement Agreement were adopted, under Missouri law, it would have been necessary to directly provide the bankruptcy trustee with the Class Notice and the Claim Form if the best notice practicable was to be provided. See Mo.R.Civ.P. 52.08(c)(2). The fact that the Settlement Agreement did *not* require the Class Notice and Claim Form to be mailed directly to the bankruptcy trustees is particularly significant in terms of the parties’ intent with respect to paragraph 3.04. Thus, the Settlement Agreement clearly indicates that the parties

did not believe that the bankruptcy trustees would be required to submit separate Claim Forms or that their signatures would be required for a Valid Claim Form involving a Bankruptcy Loan to be paid in full.

Despite Defendant's contentions to the contrary, paragraph 3.04 can only be understood when read against other negotiated elements of the entire settlement, those being: (a) the definitions of paragraphs 1.11 and 1.44, as previously discussed; (b) the format of the Claim Forms agreed to by the parties; and (c) the manner of notice provided. In this context, the meaning of paragraph 3.04 becomes clear. As stated in paragraph 3.04:

Except as provided in paragraph 3.05, any Class Member who had or has a Bankruptcy Loan will be permitted to file a Claim and shall be directed to provide the Class Notice to his or her attorney and bankruptcy trustee. If such Class Member files a Valid Claim Form, and does not have the legal capacity and standing to receive the entire Settlement Benefit (calculated as if the Loan was not a Bankruptcy Loan) with respect to that Loan, the portion of the Settlement Benefit for that Bankruptcy Loan to be paid to that Class Member shall be \$250. In that event, the balance of the Settlement Benefit for that Bankruptcy Loan will be available to the Class Member who has such legal capacity and standing (such as that Class Member's bankruptcy trustee) and (i) who files a Valid Claim Form and (ii) is also a Class Member for that Loan, and (iii) the Claim otherwise qualifies for payment of a Settlement Benefit in accordance with each of the requirements of this Agreement.

Settlement Agreement, ¶ 3.04.

When viewed in conjunction with the definitions set out in paragraphs 1.11 and 1.44, the language of paragraph 3.04 clearly contemplates that payment of the entire Settlement Benefit will be made whenever a Valid Claim Form is filed by the Obligor or the bankruptcy trustee. Furthermore, paragraph 3.04 provides that Obligors with Bankruptcy Loans will be limited to a \$250 payment under that provision only *if* they lack legal capacity or standing to receive their entire Settlement Benefit. The bankruptcy trustee is entitled to payment of the remainder of the Settlement Benefit if: (1) a "Valid Claim Form" was filed; (2) the bankruptcy trustee "is also a

Class Member for the [Bankruptcy] Loan;” and (3) the Claim otherwise qualifies for payment of a Settlement Benefit.” Thus, in all cases in where a Class Member files a Valid Claim Form involving a Bankruptcy Loan and that “Class Member” includes a bankruptcy trustee, it must be paid in full if the Claim otherwise qualifies for payment of a Settlement Benefit.⁵

This interpretation is also strongly supported by the format of the Claim Forms themselves, which required information sufficient to identify the bankruptcy case and trustee whenever the Claim involved a Bankruptcy Loan. Of course, if Defendant had intended to *require* all bankruptcy trustees to file separate Claim Forms, the information concerning each prior bankruptcy would have been of only minimal relevance, if not completely superfluous, on Claim Forms provided by the borrowers. Moreover, the fact that the Claim Form only required the signature of the borrower or the trustee is equally telling, as it is clearly consistent with the language in paragraphs 1.11 and 1.44. Finally, the Defendant’s interpretation of the Settlement Agreement is contrary to the requirement that the parties provide the best notice practicable. *See* Mo.R.Civ.P. 52.08(c)(2).

For these reasons, in all cases where an Obligor has standing, he or she must of course receive the entire Settlement Benefit. However, in those cases where the Obligor lacks standing due to a Chapter 7 bankruptcy, the Obligor is entitled to the payment of only \$250, but the remainder must still be paid to the bankruptcy trustee (unless there is an agreement between the borrower/debtor and the trustee that provides otherwise).

⁵ Had Defendant urged a different analysis of the distribution of Settlement Benefits to Chapter 7 obligors and their trustees, Plaintiffs’ counsel could have negotiated for simple, clear and unambiguous language to achieve a different result. As the Settlement Agreement was ultimately drafted and executed, however, this is the only reasonable interpretation and construction of Plaintiffs’ provisions possible.

III. RESOLUTION OF THE BANKRUPTCY ISSUES RAISED BY THE CHAPTER 7 CHALLENGES

Relying upon the provisions of paragraph 3.18 of the Settlement Agreement, Defendant asserts the right to take any issue concerning its challenges to the claims involving Chapter 7 debtors to the United States Bankruptcy Court. In making that assertion, it is not entirely clear what the nature of those challenges would be nor what the Bankruptcy Court would address and decide if it did so. One thing is clear, however, from the Settlement Agreement itself; the construction and interpretation of its contractual provisions have been *exclusively* assigned to the Special Masters as final arbitrators. *See* paragraphs 3.13, 3.14 & 3.16 of the Settlement Agreement. That finality is emphasized in paragraph 3.16 which expressly provides that “[o]nce a challenge is resolved [by the Special Masters], the validity and amount of the Claim shall be adjusted or approved accordingly, *without right of further challenge or appeal.* (emphasis added) So, under the Settlement Agreement itself, any determination of whether the debtor-claimant has standing to submit a Valid Claim or what Settlement Benefit should be awarded is a matter left entirely to these Special Masters, as a matter of contract and state law, and not to the federal bankruptcy court.

The distribution of the Settlement Benefit, if one is awarded by the Special Masters, is quite a different matter. Paragraph 3.18 provides, in pertinent part, that “if the Parties or their Counsel reasonably determine that disputes, challenges, or other matters concerning one or more Claims as to a Bankruptcy Loan should be resolved or addressed by the bankruptcy court, it shall notify the others and the Class Members shall cooperate in seeking bankruptcy court action consistent with this Agreement but without prejudice to the deadlines set forth in this Agreement.” Defendant contends that the Class Counsel’s objections to the Chapter 7

Challenges raise a number of issues with respect to Bankruptcy Loans that should be decided by the bankruptcy court, including, but not limited to, the following:

- (a) Issues concerning standing in terms of the proportionate share to be received by the Obligor and the bankruptcy trustee.⁶
- (b) Issues concerning scheduling of the claim as an asset;
- (c) Issues concerning any reaffirmation agreement and the treatment of post-petition payments;
- (d) Issues concerning post-petition payments and whether the date of the bankruptcy filing limits the Settlement Benefit to the date of filing;
- (e) Issues with respect to whether the claim has been abandoned within the meaning of bankruptcy law;
- (f) Issues with respect to claimed exemptions; and
- (g) Issues as to whether the second mortgage lien holder is undersecured or fully secured at the time of the bankruptcy filing.

See Correspondence from Mark A. Olthoff to the Hon. William F. Mauer and the Hon. Richard H. Ralston, dated November 26, 2007. But none of these issues relate to the validity or amount of the Settlement Benefit to be awarded. Rather, each of the issues raised by Defendant concerns the distribution of that Settlement Benefit once awarded. So, when reading paragraph 3.18 in context, it is clear that the parties contemplated that precise delineation; namely, that the final determination of the validity of the claim and amount of the Settlement Benefit would be left to

⁶ It should be made clear that the bankruptcy court's consideration, if any, of the "standing" issue should be limited to the question of the proportional share of the entire Settlement Benefit to be paid to the borrower and/or the bankruptcy trustee. For the reasons already discussed in Section II, Defendant's challenge on grounds that payment of the entire Settlement Benefit is not required if a borrower filing a Valid Claim Form lacked standing has been denied as inconsistent

the Special Masters and final distribution of the settlement benefit would be left to the bankruptcy court if need be. Defendant's decision to invoke paragraph 3.18 is entirely understandable and reasonable with respect to these issues of distribution. But seeking a determination of the distribution of the Settlement Benefit between a given debtor and his trustee may be difficult and expensive. If Defendant is to seek bankruptcy court intervention in the distribution of a bankruptcy estate asset, assuming a specific Settlement Benefit award is, in fact, an asset of a bankruptcy estate, then it must first invoke the jurisdiction of the federal bankruptcy court. That, in and of itself, may be problematic in many cases. In order to trigger federal jurisdiction over any of these Chapter 7 debtor-claimant cases, there must be "a case under Title 11" (i.e. the Bankruptcy Code) which has been "commenced" or "pending"⁷ 28 U.S.C. § 1334(e). Although a number of the Chapter 7 bankruptcy cases are now pending or have already been "reopened" under Section 350 of Title 11, United States Code, (for the sole purpose of dealing with the Chapter 7 Settlement Benefit Claims), many such cases are now closed. Such cases will, therefore, have to be reopened in order to provide the bankruptcy court with appropriate jurisdiction to address and resolve the above-referenced bankruptcy issues. As a result and to comply with the terms of the Settlement Agreement, Defendant, as the party invoking paragraph 3.18, must insure that each closed bankruptcy case is reopened in an expeditious manner, either by motion of the trustee or by motion filed by Defendant as a party-in-interest under Section 350. That duty clearly falls upon Defendant, and not Class Counsel, once a Settlement Benefit has been awarded. For, once a Settlement Benefit has been awarded, Class Counsel has fulfilled his obligations to class members; any further action concerning the

with the terms of the Settlement Agreement.

⁷ Jurisdiction of the bankruptcy courts under 28 U.S.C. § 1334 does not, of course, reach to the issues properly before the Circuit Court in this case, or those within the purview of the Special

distribution of the recovery he has obtained for his clients is entirely a matter for Defendant, if it remains interested, the debtor-claimant, and the bankruptcy trustee.

To facilitate Defendant's invocation of paragraph 3.18 – and in keeping with our decision that the full amount of the Settlement Benefit must be paid on each claim made by a Chapter 7 debtor-claimant or his trustee – the Settlement Administrator will be required to issue Settlement Checks made payable to both the Obligors and their respective Chapter 7 trustee and/or United States Trustee, as appropriate. The co-endorsement of those checks will insure that Defendant is fully protected should there be any dispute concerning the distribution of the Settlement Benefit, and it will alert both the Obligor and the trustee that they must secure a determination of an allocation of the proceeds, be it by bankruptcy court order or by agreement. As further notice to the bankruptcy trustee that a proper distribution of the Settlement Benefit must be obtained, the Settlement Benefit check must be mailed by the Settlement Administrator to the appropriate United States Trustee and/or Chapter 7 trustee along with a copy of this Order and a cover letter from Class Counsel, to be approved by these Special Masters, explaining the circumstances and reasons for such submission.

IV. FINAL DECISION AND ORDER

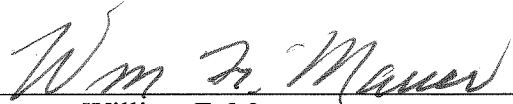
For the reasons stated above, it is therefore,

ORDERED that Defendant's challenges to the Chapter 7 Claims are denied with respect to Defendant's contention that the total amount of payment on each such claim should be limited to \$250 if a bankruptcy trustee did not also file a separate Claim Form.

Masters, as previously discussed herein.

IT IS FURTHER ORDERED that:

1. Pursuant to paragraph 3.18 of the Settlement Agreement, all other issues raised with respect to the Chapter 7 Challenges as set forth above shall be addressed or resolved by the bankruptcy court;
2. Defendant, as the party invoking paragraph 3.18, shall insure that each bankruptcy case necessary to invoke the bankruptcy court's jurisdiction is reopened in an expeditious manner, either by motion of the trustee or by motion filed by Defendant as a party in interest under 11 U.S.C. § 350;
3. The Settlement Administer will be required to issue Settlement Checks made payable to both the Obligors and the respective Chapter 7 trustees for the full amount of the Settlement Benefit payable on each Chapter 7 Claim; and
4. Such checks must be mailed to the respective Chapter 7 trustees with a copy of this Order and a cover letter from Class Counsel, to be approved by the undersigned, explaining the circumstances and reasons for such submission. A copy of this Order and the cover letter sent to the Chapter 7 trustee shall also be sent to the Obligor.
5. In instances where the respective bankruptcy has been closed and not re-opened and where there is no Chapter 7 trustee to receive the Settlement Check, such Settlement Check will be made payable to the Obligors and the U.S. Trustee for the full amount of the Settlement Benefit. Each such check will be mailed to the U.S. Trustee with a copy of this Order and a cover letter from Class Counsel, to be approved by the undersigned, explaining the circumstances and reasons for such submission. A copy of this Order and the cover letter sent to the U.S. Trustee shall also be sent to the Obligor.



William F. Mauer
Special Master



Richard H. Ralston
Special Master

Dated this 6th of DECEMBER, 2007.
at Kansas City, Missouri

CC: All Counsel of Record and Settlement Administrator