IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

DAVID C. AND HOLLY E. McLEAN, Et al., Plaintiffs,	Case No. 00CV-228530
v.	
FIRST HORIZON HOME LOAN CORPORATION (f/k/a McGUIRE MORTGAGE COMPANY), Defendant.	Division 28

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SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

Plaintiffs are pleased to notify the Court that the parties have agreed, after five years of vigorous and heavily contested litigation, to settle this class action. The Settlement provides a benefit "Benefit Amount" of up to $36.3 million to the Class, provides substantial benefits to the entire Class without dilution of their due process rights or Defendant's due process rights, and removes the delay, risk of non-recovery and expense to the Class Members which is inherent in a class action case such as this.

In Missouri, preliminary approval of class action settlements is substantially guided by the Court of Appeals decision in *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369 (Mo. App. W.D. 1997). The Court of Appeals has stated:

> [W]e conclude that, prior to certifying a temporary settlement class, the trial court should first conduct a preliminary examination of the record before it and make a preliminary determination as to whether it appears that a settlement class should be tentatively certified. We emphasize that this determination is and will be only preliminary, and that, in the words of the Second Circuit, "[i]t is at most a determination that there is what might be termed 'probable cause' to submit the

> proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n,* 627 F 2d at 634. In light of *Amchem's* determination that a settlement class must also meet the requirements of Rule 23(a) and (b)(3), however, we hold such a preliminary "probable cause" review should also be made as to whether it appears the settlement class can meet the requirements of those sections.
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> Thus, for example, in this case, the trial court should have reviewed whether it appeared that class counsel was adequate, that the named plaintiffs were adequate representatives of the class, that there is no apparent conflict of interest between the representatives and the class or among the class, that the settlement on its face appears to be fair and to have been the result of arms length negotiations, that it appears that the named plaintiffs' claims are typical of those of the class, and that it appears that common issues will predominate. We emphasize that we are not requiring the court to hold an evidentiary hearing on these issues, although it can do so if it finds it useful. The court must, however, review the record before it, and determine whether, based on that record, it appears that the settlement is fair and that certification may ultimately be approved.

State ex rel. Byrd, 956 S.W.2d at 383.

Plaintiffs address the requirements for the preliminary approval of this class action settlement below. As the Court will see the proposed settlement class and the settlement easily satisfy the requirements set forth in *Byrd, supra.*

II. CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES

First, as noted above, to preliminarily approve a class action settlement, the Court must determine whether it should preliminary approve of the certification of the settlement class. Regarding the settlement of class actions, Rule 52.08(e) states:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 52.08(e). Here, the parties request certification of the following Class for settlement purposes:

"All persons who –

(a) obtained a second mortgage loan secured by a Deed of Trust on Missouri

real property from McGuire Mortgage Company or from First Horizon's McGuire Mortgage Division on or after November 16, 1994, through and including April 13, 2005, whose loan was at an interest rate greater than the rate under R.S.Mo. § 408.030 at the time of the loan and whose loan included one or more of the Subject Fees, or

(b) previously was mailed notice of the class certification in the Action.

For purposes of determining membership in the Class, "Subject Fees" means those fees disclosed by McGuire or First Horizon on the Class members' HUD-1 Settlement Statements to be: (i) origination fees in excess of the statutory origination fee cap set forth by § 408.233.1(5) RSMo in effect on the date that the Loan closed (which was 2% of the loan amount on and before August 28, 1998, and 5% of the loan amount thereafter), (ii) loan discount fees, (iii) tax service fees, (iv) underwriting fees, (v) processing fees, (vi) document preparation fees payable to McGuire or First Horizon, (vii) direct or indirect mortgage broker fees, (viii) express mail fees, (ix) flood certification fees, (x) payoff/delivery fees, (xi) verification of mortgage fees, and (xii) wire fees.

Settlement Agreement, at ¶¶ 1.08, 1.42.

For purposes of the Court's analysis, it is important to remember that this Court has previously certified a Class for *litigation* purposes.[1] The prior class certification makes it

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[1] The definition of the *litigation* class certified by the Court is as follows:

All individuals who, from November 16, 1994 through December 17, 2002, executed a promissory note and deed of trust for a "Second Mortgage Loan" on "Residential Real Estate" from First Horizon Home Loan Corporation (f/k/a McGuire Mortgage Company), provided such promissory note is not for a business loan as defined by § 408.015(2) and in an amount of five thousand dollars or greater as set forth in § 408.035(2); and paid:

1. An origination fee exceeding 2% of the principal loan amount for loans having a loan date before August 28, 1998; or
2. An origination fee exceeding 5% of the principal loan amount for loans having a loan date on or after August 28, 1998; or
3. Any other fees or costs paid or financed as a part of the principal loan balance <u>including, without limitation</u>, the fees and costs identified in subparagraph a below, but <u>excluding</u> the fees and costs identified in subparagraph b:

    a. <u>Fees and Costs Included</u>

    - LOAN DISCOUNT FEES
    - BROKERS FEES
    - POINTS/POINTS TO LENDER
    - DOCUMENT SIGNING FEES
    - UNDERWRITING FEES
    - PROCESSING FEES
    - ADMINISTRATION FEES

unnecessary to "preliminarily" certify the settlement class, since the record is clear and fully establishes that the settlement class may be fully certified. To be precise, while the parties have agreed to seek certification of a Class for *settlement purposes only*, the only true difference between the *litigation* Class and the proposed *settlement* Class is the extension of the class period from December 17, 2002 to April 13, 2005. This extension of the Class period is insignificant for purposes of the certification analysis which the Court must make to determine whether to certify a *settlement* class.

The primary difference between certification of a class for *litigation* purposes, as compared to certification for purposes of *settlement* only, is that the "manageability" concerns at issue in litigation classes under Rule 52.08(b)(3)(D) disappear (because the case is not to be tried) and the "adequacy of representation" requirement of Rule 52.08(4)(4) is more closely scrutinized. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 621, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *In re Prudential Insurance Company America Sales Practice Litigation Agent Actions,* 148 F.3d 283, 308 (3rd Cir. 1998). Here, the Court has already determined that the class representatives, David and Holly McLean and Roger and Eugenia Jones, and their counsel,

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- TAX SERVICE FEES
- FLOOD CERTIFICATE FEES
- EXPRESS MAIL FEES
- DIRECT MORTGAGE BROKER FEES

b. Fees and Costs Excluded

- Fees and charges paid for perfecting, releasing, or satisfying a security interest related to the second mortgage loan
- Taxes
- Fees or premiums for title examination, title insurance, or similar purposes including survey
- Fees for preparation of a deed, settlement statement, or other documents
- Fees for notarizing deeds and other documents
- Appraisal fees
- Fees for credit reports

attorneys with Walters, Bender, Strohbehn & Vaughan, P.C., will adequately represent the interests of the Class Members for a class which extends until December 2002. As a result of the Special Master's Recommendation granting Defendant's Motion for Partial Summary Judgment with respect to Preemption in April 2005 and the Court's subsequent adoption of that Recommendation, Plaintiffs submit that there is no material difference as a result of the extended class period.

Accordingly, Plaintiffs believe that the Court should find, based upon the extensive record before it, including the Court's prior orders certifying the class for litigation purposes (December 17, 2002), amending the order certifying Plaintiff Class (March 31, 2003) and denying Defendant's motion to decertify the class (June 8, 2006) that the settlement class should be certified. A rigorous analysis of each of the requirements of Rule 52.08(a) and (b)(3) makes it obvious that the settlement class should be certified.

First, the Class contains more than 4,000 members and is so numerous that joinder of all members is impracticable.

Second, there are questions of law and fact common to the Class, including, but not limited to, those related to the interpretation and operation of Missouri's Second Mortgage Loans Act ("MSMLA"), §§ 408.231, *et seq.*, the measure of damages there under, the lending practices and operations of Defendant, and the legal and factual defenses to liability and the Class Members' MSMLA claims asserted by Defendant.

Third, the claims of the Representative Plaintiffs are brought pursuant to the MSMLA, arise from the same conduct and course of conduct as the Class Members' claims, and are typical of the claims of the Class that Representative Plaintiffs seek to certify.

Fourth, there are no apparent conflicts of interest between the representatives and the

class or among the class, and the Representative Plaintiffs and their counsel will fairly and adequately protect the interests of the Class.

Further, the questions of law or fact which are common to the Members of the Class, set forth above, wholly predominate over the questions affecting only individual Members; and certification of the Class, for settlement purposes, is superior to other available methods for the fair and efficient adjudication or resolution of this controversy. Here, Plaintiffs and the Class Members' claims seek to remedy common legal grievances and certification of the Class for settlement purposes promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for the Members of the Class or Defendant.

For these reasons, the Class defined above should be formally certified, for settlement purposes. Further, Plaintiffs David and Holly McLean and Roger and Eugenia Jones should be appointed as the Representatives of the Class and R. Frederick Walters, David M. Skeens and Kip D. Richards of Walters, Bender, Strohbehn & Vaughan, P.C. should be appointed as Class Counsel.

III. THE SETTLEMENT IS PRESUMPTIVELY FAIR, ADEQUATE AND REASONABLE

The Court's next obligation is to review the Settlement Agreement and the Exhibits to that Agreement. The Court must determine that the Settlement appears, upon its preliminary review, to be presumptively fair, adequate and reasonable for the entire settlement Class. The Settlement is, of course, entirely fair, adequate and reasonable for the entirety of the Class. In *State ex rel Byrd v. Chadwick, supra* at p.378 footnote 6, the Court noted factors that are considered when determining whether a settlement is fair, reasonable and adequate. It stated:

> In determining whether the settlement is fair, reasonable, and adequate under Rule 23(e), numerous courts have noted that a trial court should consider: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense,

> and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members. *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 528 (E.D.Tex.1995) (applying factors adopted by Fifth Circuit in *Reed v. General Motors Corp.*, 703 F.2d 170 (5th Cir.1983)). *See also Lachance v. Harrington,* 965 F.Supp. 630, 637 (E.D.Pa.1997); *Lake v. First Nationwide Bank,* 156 F.R.D. 615 (E.D.Pa.1994) (applying nine similar factors adopted by Third Circuit in *Girsh v. Jepson,* 521 F.2d 153 (3d Cir.1975)).

As is apparent from the discussion hereafter, consideration of these factors unquestionably yields a determination that the settlement is fair, reasonable and adequate.

A. THE CLASS MEMBERS' CLAIMS AND RELEVANT PROCEDURAL HISTORY

1. The Class Members' claims.

This action was filed on November 16, 2000 by David and Holly McLean. The Plaintiffs allege that Defendant violated Missouri's Second Mortgage Loan Act, §§ 408.231, *et seq.* ("MSMLA") when it charged, contracted for or received certain settlement charges on theirs and the Class Members' loans which were not authorized by the MSMLA, specifically at § 408.233 RSMo. In this lawsuit, the Representative Plaintiffs seek to recover not only for themselves, but also on behalf of all others who obtained second mortgage loans secured by Missouri real property and who are similarly situated to them. Plaintiffs seek money damages and other relief from First Horizon, including repayment of the allegedly-improper fees and a return of all loan interest allegedly paid by borrowers on the loans.

2. Certification of Litigation Class

On December 17, 2002, the Court entered its Order certifying this lawsuit as a class action for litigation purposes. On March 31, 2003, the Court amended its class certification order and expanded the class to include those loans made six years prior to the filing of the action. On June 8, 2006, it denied Defendant's motion to decertify the *litigation* Class.

3. Dispositive Motions

a. Statute of Limitations

The Certification Order, as amended, used a six (6) year statute of limitations. First Horizon contended, however, the statute of limitations period should be three (3) years not six (6) and filed a motion for summary judgment on the issue. After extensive briefing, the Special Master decided to await the outcome of another case in which Class Counsel represented the Plaintiffs, *Schwartz v Bann-Cor Mortgage*, Case No. 00 CV 22663903, pending in Jackson County Circuit Court, which was then on appeal to the Court of Appeals for the Western District of Missouri. In May 2006, the Court of Appeals in Bann–Cor ultimately determined that the limitations period was six (6) years. Subsequent to that ruling the Special Master recommended that First Horizon's motion on this issue be denied. The Court adopted the Special Master's recommendation and by doing so again validated the six (6) limitation period adopted in the Certification Order as amended.

b. Partial Summary Judgment on Liability for Plaintiffs

Plaintiffs contended that the Class Members' HUD-1 Settlement Statements indisputably described the loan fees that were charged, contracted for or received by First Horizon/McGuire Mortgage in violation of the MSMLA and filed a motion for partial summary judgment on the issue of liability in 2005. Based upon undisputed facts, the Special Master recommended to the Court that summary judgment be granted for Plaintiffs and similarly situated class Members on their claims that certain fees violated the MSMLA. The Court adopted the Special Master's recommendation and entered a partial summary judgment on the issue of liability in favor of the plaintiffs in June 2006.

c. Preemption of Loans

First Horizon sought partial summary judgment on Plaintiffs' MSMLA claims related to the loan discount fees, one of the claimed illegal fees, based upon preemption. First Horizon argued that after January 1, 1999, federal law allowed it to charge such loan discount fees and, as such, that Plaintiffs' MSMLA claims were preempted. First Horizon based its preemption defense on the fact that it was a wholly-owned subsidiary of a national bank as of January 1, 1999 and was thus entitled to use federal law to preempt the MSMLA. After extensive briefing, the Special Master recommended, and this Court later adopted, a ruling that for any second mortgage loan made on or after January 1, 1999 (the date First Horizon acquired McGuire Mortgage) the loan discount fees were legal under federal law and, thus preempted as to the MSMLA.

Realizing its success with preemption as to the discount fees, First Horizon expanded its asserted preemption defense to the other alleged illegal fees by filing a second motion for partial summary judgment on preemption grounds for all other fees on loans made on or after January 1, 1999. The issue was again extensively briefed. The Special Master recommended in June 2006, a second time, that because of First Horizon's status as a wholly-owned subsidiary of a national bank as of the acquisition date of January 1, 1999, that the MSMLA was preempted by federal law for any loan made on or after January 1, 1999.

The Special Master's second recommendation has not yet been adopted by the Court. Had there been no settlement, this Court would likely have adopted the second recommendation as well and ruled that all MSMLA claims based on loans made on or after January 1, 1999 were preempted. Thus, as a consequence of these preemption rulings, all of the fees that Plaintiffs asserted were illegal under the MSMLA were now deemed to be "legal" for any loans made on

or after January 1, 1999. These preemption rulings, of course, trumped the liability ruling for all loans made on or after January 1, 1999.

d. Interest As Damages

Plaintiffs assert that the MSMLA allows recovery of all interest paid by the Class Members on their loans as a component of damage when the MSMLA is violated. See §§ 408.236 and 408.562 RSMo.[2] The interest that the Class Members paid on their loans is a substantial element of the total damages available to the Plaintiffs and the Class.

First Horizon contends that because it sold or assigned the loans almost immediately after origination, it did not actually collect any of the interest paid. Because of this and other legal arguments about the meaning of the MSMLA damages provisions, First Horizon asserted in a motion for summary judgment that interest could not be recovered from it. The motion was fully briefed and was awaiting a recommendation from the Special Master when the case was settled.

B. THE PROPOSED SETTLEMENT

The Settlement provides substantial benefits to each of the Class Members, including those Class Members whose MSMLA claims are or likely are preempted under the Court's rulings.

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[2] § 408.236 RSMo states: "Any person violating the provisions of sections 408.231 to 408.241 shall be barred from recovery of any interest on the contract, except where such violations occurred either: (1) As a result of an accidental and bona fide error of computation; or (2) As a result of any acts done or omitted in reliance on a written interpretation of the provisions of sections 408.231 to 408.241 by the division of finance."

§ 408.562 RSMo states: "In addition to any other civil remedies or penalties provided for by law, any person who suffers any loss of money or property as a result of any act, method or practice in violation of the provisions of sections 408.100 to 408.561 may bring an action in the circuit court of the county in which any of the defendants reside, in which the plaintiff resides, or in which the transaction complained of occurred to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party in such action attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary and proper."

1. The Settlement Class

As noted above, pursuant to the Settlement, the parties have agreed to extend the class period from December 2002 to April 13, 2005. Approximately 413 borrowers who were excluded from the *litigation* Class are now included in the *settlement* Class and will obtain benefits under the Settlement.

2. The Settlement Consideration

a. Compensation to Class Members

The Class Members receive substantial benefits under the Settlement. First Horizon has agreed to make available $36.3 million in settlement benefits, the "Benefit Amount," to the Class Members. The Class Members' individual recovery is determined by a formula, described below. Class Members will have to submit a Claim Form to recover benefits under the Settlement. The Claims Form and Claims Process is described in Section V below.

First, based on the preemption rulings, the majority of the settlement amount ($33.6 million or 92.562%) has been allocated to settle the "Pre-Merger" loans with the remainder ($2.7 million or 7.438%) allocated to settle the "Post-Merger" loans.[3] These numbers are called the "Gross Pre-Merger Settlement Fund" ($33.6 million) and the "Gross Post-Merger Settlement Fund" ($2.7 million), respectively. *See* Settlement Agreement, at ¶¶ 1.04, 3.06.

Second, from the amounts allocated for settlement, there will be certain amounts deducted in a proportionate share from the "Gross Pre-Merger Settlement Fund" and the "Gross Post-Merger Settlement Fund." These are the court awarded attorneys' fees, case expenses and costs, as well as settlement administration costs in excess of $200,000. The Pre and Post-Merger *pro rata* share of these expenses is 92.562% and 7.438%, respectively. Also deducted from the Pre and Post-Merger Funds are the settlement payments of $250.00 to Class Members within the

Pre or Post-Merger Classes determined to have a "Special Category Loan."[4] The Special Category payments are deducted in their entirety. *See* Settlement Agreement, at ¶ 3.06.

Third, the Class Members who have a "Bankruptcy Loan"[5] will receive a "Settlement Benefit" if they are determined to have legal capacity and/or standing to assert a Claim for benefits under the Settlement. If the Class member lacks legal capacity and/or standing to make a claim for the settlement benefits, the Class Member shall still receive at a minimum $250 of the Settlement Benefit for that Loan and the balance of the Settlement Benefit for that Loan shall be available to the person who has such legal capacity and/or standing (such as a bankruptcy trustee), and who files a Valid Claim Form. *See* Settlement Agreement, at ¶ 3.04.

Fourth, a Class Member who returns a Valid Claim Form and whose Loan is a Special Category Loan and a Bankruptcy Loan will receive a Settlement Benefit of $250 if the Class Member has the legal capacity and/or standing to assert the Claim. If such legal capacity and/or standing is lacking, the Class Member shall still receive $25 of the $250 Settlement Benefit for that Loan and the $225 balance of the Settlement Benefit for that Loan shall be available to the person who has such legal capacity and/or standing (such as a bankruptcy trustee), and who files a Valid Claim Form. *See* Settlement Agreement, at ¶¶ 3.04, 3.05.

Fifth, Class Members with Pre-Merger loans will receive benefits under the settlement which are approximately 77-78% of the total of Subject Fees and interest that they paid on their second mortgage loan or loans. Class Members with Post-Merger Loans will receive benefits under the settlement which are approximately 6.6 % of the total of Subject Fees and interest that

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[4] "Special Category Loans" are those: that included an interest rate that was less than Missouri's general usury rate in effect on the date the Loan was made , for which none of the Subject Fees was charged, or for which the parties lack sufficient information to determine a Calculated Sum. *See* Settlement Agreement, at ¶ 1.41.

[5] "Bankruptcy Loan" means any Loan made to a Class Member who filed for bankruptcy protection after the date on which the Loan was made. *See* Settlement Agreement, at ¶ 1.03.

they paid on their second mortgage loan or loans. As part of the Settlement (and previously, as part of their preparation of the Class Members' claims in litigation), Plaintiffs have prepared "Damage Claim Listings" for the Pre-Merger and Post-Merger classes which set forth for each Class Member loan, based on available data, Plaintiffs' estimate of the total of Subject Fees and interest paid on the loan as of November 7, 2006. That amount is defined as the "Calculated Sum" for each Class Member loan. *See* Settlement Agreement, at ¶ 1.05. The Calculated Sum for each Class member loan is presumptively correct unless challenged successfully by Defendant. Settlement Agreement, at ¶¶ 3.09, 3.11. The Calculated Sum is the Plaintiffs' estimate of the total paid in Subject Fees and Loan Interest with respect to each Class Members' loan as of November 7, 2006.

The formula from which the Settlement Benefits are derived is as follows:

Step 1: From the Gross Pre-Merger Settlement Fund ($33.6 million) and the Gross Post-Merger Settlement Fund ($2.7 million) the following are deducted: (a) on a *pro rata* basis Court-awarded expenses of Class Counsel; (b) on a *pro rata* basis the attorney fee award to Class Counsel; (c) on a *pro rata* basis any excess costs of administration of the settlement that exceed Two Hundred Thousand Dollars ($200,000); and (d) $250.00 payments for Special Category Loans within the Pre-Merger Class and Post-Merger Class, respectively.

After these deductions the amount that remains in the Gross Pre-Merger and Gross Post-Merger Settlement Funds, respectively, is defined as the "Net Distributable Pre-Merger Settlement Fund" and the "Net Distributable Post-Merger Settlement Fund."

Step 2: For each Pre-Merger loan, a Class Member shall receive a Settlement Benefit, which is the Calculated Sum for that Pre-Merger loan, multiplied by a fraction that has as its

numerator the Net Distributable Pre-Merger Settlement Fund and has as its denominator the total of the Calculated Sums for the Pre-Merger loans on the Damage Claim Listings. *See* Settlement Agreement, at ¶ 3.06(e). If a Class Member has multiple loans they will receive multiple payments provided they submit multiple Claim Forms.

As an example, the McLeans' November 1997 loan has Subject Fees of $1,230 and paid interest of $44,344, which total to $46,574. That amount is the Calculated Sum for that loan. In order to determine the Settlement Benefit for that loan the fraction which has as its numerator the Net Distributable Pre-Merger Fund and has as its denominator the total of all Calculated Sums for Pre-Merger loans must be calculated. The Net Distributable Pre-Merger Fund is calculated as follows:

Gross Pre-Merger Settlement Fund	33,600,000.00
Less *pro rata* attorney fees	- 11,107,440.00
(12 million x .92562) =	
Less *pro rata* costs	
(300,000 x .92562) =	- 277,686.00
Less excess administration costs	
Assume excess is 0	
Less Special Category Pre-Merger Loans	
(87 Special Category Loans x $250.00) =	- 21,750.00
Net Distributable Pre-Merger Fund	22,193.124.00

The total of all Calculated Sums for Pre-Merger loans is 28,553,966.00. Thus the fraction is:

$$\frac{22,193,124}{28,553,966} = .77723$$

The McLean's Settlement Benefit for this loan is, therefore, $46,551 x .77723 or $35,421.68.

For Pre-Merger Loans the Settlement Benefit derived from the formula ranges from a low of $338.87 to a high of $54,191.68 with an average of $10,176.

Similarly, for each Post-Merger loan, a Class Member shall receive a Settlement Benefit, which is the Calculated Sum for that Post-Merger loan, multiplied by a fraction that has as its numerator the Net Distributable Post-Merger Settlement Fund and has as its denominator the total of the Calculated Sums for the Post-Merger loans on the Damage Claim Listings. Settlement Agreement, at ¶ 3.06. If a Class Member has multiple loans they will receive multiple payments provided they submit a separate Claim Form for each loan. The estimated "Settlement Benefit" for each loan is set forth in the Damage Claim Listings for the Pre and Post-Merger subclasses, respectively.

For Post-Merger Loans the Settlement Benefit derived from the formula ranges from a low of $250.00 after gross up to a high of $3,923.71 with an average of $808.

Any Class Member who, under the formula illustrated above, has a Settlement Benefit less than $250.00 will nevertheless have their Settlement Benefit grossed up to a minimum of $250.00. Settlement Agreement, at ¶ 4.04.

Sixth, Class Members will also receive post-judgment interest at the rate of 9% simple interest on Settlement Benefits which are payable from the first day after the date on which the Court enters the Final Approval Order. Settlement Agreement, at ¶¶ 3.08, 4.02. Interest is also payable on the attorneys' fees, attorney costs and incentive awards from the same date.

b. Incentive Awards

First Horizon has agreed to not contest Plaintiffs' request for incentive awards to be paid to the Representative Plaintiffs in the amount of $12,000 to be made jointly payable to David C. McLean and Holly E. McLean and $12,000 to be made jointly payable to Roger K. Jones, and Eugenia M. Jones. *See* Settlement Agreement, at ¶ 2.28. First Horizon has also agreed not to contest Plaintiffs' request that incentive awards in the amount of $1,000 be awarded to any Class Member who has been deposed in this action. *See* Settlement Agreement, at ¶ 2.28. These incentive awards shall be made in addition to the Benefit Amount. The incentive awards do not reduce the Class Members' Settlement Benefits.

c. Attorneys' Fees, Costs and Expenses

First Horizon has also agreed not to oppose Class Counsel's request for up to $12 million in attorneys' fees and request for an award of $300,000 in litigation costs and expenses. Settlement Agreement, at ¶¶ 2.26, 2.27. The attorneys' fees and costs awarded by the Court reduce the Gross Pre and Post-Merger Settlement Funds and therefore reduce the Settlement Benefits available for distribution to Class Members on their loans.

d. Costs of Notice and Settlement Administration

First Horizon has also agreed to pay up to $200,000 for the costs of the Notice, Notice Plan (described below in Section IV) and for administration of the Settlement. *See* Settlement Agreement, at ¶ 2.32. Should costs of administration exceed $200,000.00, the excess will be prorated and deducted from the Goss Pre-Merger and Gross Post-Merger Settlement Funds. *See* Settlement Agreement, at ¶¶ 2.32, 3.06(c).

3. The Claims Process and Dispute Resolution

The Parties have also negotiated a Claims Process and Dispute Resolution procedure which provides significant due process protections to the Class Members and Defendant with

regard to the Settlement Benefits available on each loan. Class Members can challenge the amount of the Calculated Sum that is used to compute the Settlement Benefit a Class Member is entitled to receive. So can First Horizon, provided that amount is over $7,500. *See* Settlement Agreement, at ¶¶ 3.09-10.

First Horizon also has a right to obtain information from the Class Members' loan servicers and certain other third parties should it need more information to contest the Class Members' Calculated Sum. Further, First Horizon may in good faith also challenge claims, regardless of the Calculated Sum, for fraud or similar reasons, or if there is insufficient evidence the person submitting the Claim is a Class Member, or if a material omission or knowing misstatement has been made, or for being improperly determined to be a Valid Claim Form (described below). However, First Horizon may not challenge the validity of a Claim on grounds that the Loan was not a second mortgage loan, or because it was a business loan, or because it was an alleged "piggyback" loan (meaning, for purposes of Defendant's defense, that the Loan falls within the scope of R.S.Mo. § 408.237. See Settlement Agreement, at ¶¶ 3.09-10.

The Parties and Class Members may challenge the determinations of the Settlement Administrator as to the validity of any Claim Form, the identity of the person(s) to whom the Claim shall be paid, and may further challenge any act or decision of the Settlement Administrator that materially affects the right to examine and challenge Claims. *See* Settlement Agreement, at ¶ 3.10. The procedure for resolving these challenges is set forth in the Settlement Agreement. *See* Settlement Agreement, at ¶¶ 3.09-3.18. Should the parties be unable to resolve any challenges or disputes with regard to a Class Members' claim, their Calculated Sum or Settlement Benefit, then the dispute will be presented to the Special Master William Mauer for resolution or to the mediator, Richard Ralston for final resolution. *See* Settlement Agreement, at

¶¶ 3.13, 3.14. Should there be a reduction of the Settlement Benefit that results from a successful challenge of the Calculated Sum, then First Horizon shall be entitled to retain that amount. *See* Settlement Agreement, at ¶ 3.20.

4. Release of Claims

Class Members will, of course, be required to Release all of the claims they have or could have against First Horizon related to the origination of their loan. Settlement Agreement, at ¶ 5.01. However, Class Members do not release any claims they may have related to the servicing of their loan or defenses that they may have against foreclosure. Settlement Agreement, at ¶ 5.01.

IV. NOTICE OF THE CLASS ACTION SETTLEMENT AND THE NOTICE PLAN

The Notice of Proposed Class Action Settlement and Settlement Hearing, attached as **Exhibit B** to the Agreement, and the Publication Notice attached as **Exhibit E** to the Agreement approved by the Court as part of the Preliminary Approval Order. *See* Settlement Agreement, at ¶ 2.01.

Within fifteen (15) days after the date of this Order, and after submission of the Class Mailing List described in the Agreement, the Settlement Administrator shall provide by first-class mail a copy of the Notice of Proposed Class Action Settlement and Settlement Hearing and Claim Form to all Class Members. *See* Settlement Agreement, at ¶¶ 2.05, 2.06.

Within seven (7) days of the entry of the Preliminary Approval Order, the Settlement Administrator shall arrange for the publication of the Publication Notice in two Wednesday editions and one Sunday edition of the *The Kansas City Star, The St. Louis Post Dispatch, The Springfield News-Leader, The St. Joseph News-Press, The Cape Girardeau Southeast Missourian, The Columbia Tribune, The Rolla Daily News, The Hannibal Courier-Post, The Kirksville Daily Express* and *The Joplin Globe*. The publication shall be two column inches by

four column inches and placed in the paper where legal notices typically appear. Any Class Member who inquires of the Settlement Administrator concerning the Settlement in response to the Publication Notice shall be provided with a Class Notice and Claim Form. Settlement Agreement, at ¶ 2.09.

The Notice of Proposed Class Action Settlement and Settlement Hearing and Publication Notice are sufficient because they contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the Class and be bound by a final judgment. The Notice fairly apprises the Class Members of the terms of the Settlement, the formula for computing individual recoveries and an estimated amount of or range of each Class Members' individual recoveries, the options that are open to them in connection with the proceedings and refers them to the Court or Class Counsel for further detailed information. Accordingly, Notice in compliance with the provisions set forth above and as set forth in the Agreement is the best notice practicable under the circumstances, and constitutes due and sufficient notice of this Order to all persons affected by and/or entitled to participate in the Settlement, in full compliance with the notice requirements of Mo. R. Civ. P. 52.08.

Prior to the hearing described in Section VII herein, the Settlement Administrator is required to file a sworn statement evidencing compliance with the notice provisions of the Order and the Agreement concerning the provision of Notices and Claim Forms.

V. THE CLAIMS FORM

The Claim Form (**Exhibit A**) will be mailed to the Class Members with the Notice of Proposed Class Action Settlement and Settlement Hearing. The Claim Form is straightforward, unambiguous, and will be easily be understood by the Class Members who must complete the

Claim Form and return it to the Settlement Administrator in order to obtain any recovery under the Settlement. Because the Claim Form is to be executed by the Class Members under penalty of perjury, it will provide adequate due process protections to the Defendant, as well as the Class Members, and will allow the Settlement Administrator to accurately and efficiently review Claims submitted by the Class Members. Accordingly, the Claim Form should be approved for use as part of the Settlement.

In order to be entitled to receive any compensation under the Agreement, Class Members must submit a Valid Claim Form to the Settlement Administrator within ninety (90) days after mailing of the Class Notice, as provided in the Agreement. The validity of Claim Forms, claims dispute resolution procedures, and the payment process (collectively, the "Claims Process") are be governed by the terms stated in the Agreement. The Claims process as described in the Agreement provides adequate due process protections to the Parties and the Class Members and is appropriate, fair, adequate and reasonable under the circumstances.

VI. SETTLEMENT ADMINISTRATION

Per the terms of the Settlement Agreement, the Settlement Administrator shall be Tilghman and Company P.C., and is to be appointed by the Court to perform the settlement administration duties described in the Settlement Agreement and as specified in the Preliminary Approval Order.

All events and actions contemplated under the Settlement Agreement to occur after Preliminary Approval and before the hearing described in Section VII and the rights, duties and obligations of the Parties, the Class Members and the Settlement Administrator, are governed by the Agreement and the Preliminary Approval Order.

The reasonable costs and expenses of settlement administration are to be paid for as set

forth in the Settlement Agreement. First Horizon funds the costs of administration up to a maximum of $200,000.00 and that sum does not reduce the Settlement Benefit to Class Members. Should costs of administration exceed that figure, then the excess will be divided *pro rata* between the Pre and Post-Merger subclasses and the excess does reduce the amount available for distribution to the Class Members.

VII. CLASS MEMBER RIGHTS

The Class Members rights as set forth in the Settlement Agreement are summarized in the following narrative.

Out
Opt out Rights

Each Class Member can elect not to be a part of the Class and not to be bound by the Agreement, if, within sixty (60) days of the mailing of the Notice of Proposed Class Action Settlement and Settlement Hearing and Claims Forms the Class Member completes an individual, written, and signed notice of intention to opt out or request for exclusion. The Settlement Agreement does not require and Plaintiffs suggest the Court not require the notice of intent to opt out or request for exclusion to be in a particular format. However, the notice of intent to opt out or request for exclusion must contain the case number and name and the words "opt out," "exclusion," or words to that effect clearly indicating an intent not to participate in the settlement. Class Members cannot opt out as a group or as representatives of a proposed class. The request to "opt out" of the Class shall be signed by all obligors on the Loan, or their legal representatives, as set forth in the Agreement and shall be sent to the Settlement Administrator. Any Class Member who does not submit a timely notice of intention to opt out or request for exclusion, and/or who otherwise fails to comply with all requirements for opting out, shall be bound by the Agreement and the Release entered as part of the final judgment in this action.

Objection Rights and Procedure

Any Class Member who wishes to object to the proposed Settlement must mail a written objection to the Settlement ("Objection") to Class Counsel and Defense Counsel, at the addresses set forth in the Notice, and file the Objection contemporaneously with the Court. Each Objection must (a) set forth the Class Member's full name, current address, and telephone number; (b) state that the Class Member objects to the Settlement, in whole or in part; (c) set forth a statement of the legal and factual basis for the Objection; and (d) provide copies of any documents that the objecting Class Member (or "Objector") wishes to submit in support of his/her position. Any Class Member who does not submit a timely Objection in complete accordance with the Settlement, the Notice of Proposed Class Action Settlement and Settlement Hearing, and otherwise as ordered by the Court shall not be treated as having filed a valid Objection to the Settlement. Objections shall be filed in Court within sixty (60) days of the mailing of Class Notice, or be forever barred. All objections to the Settlement which are not set forth in a written objection filed in accordance with these provisions shall be deemed waived by the Court.

The procedure adequately protects the rights of Class Members to voice an objection and bring it to the attention of the Court for consideration. The procedure is in accord with due process and merits approval.

Appearance at the Fairness Hearing

Any Class Member who wishes to appear at the Fairness Hearing must file a Notice of Appearance in the Action and serve the Notice of Appearance, along with their Objection, upon Class Counsel and Defense Counsel. Class Members shall only be permitted to appear at the Fairness Hearing and to argue those matters set forth in a written objection filed in accordance with the Settlement Agreement and the Preliminary Approval Order. As proposed, no Class

Member shall be permitted to raise matters at the Fairness Hearing that the Class Member could have raised in an Objection, but failed to do so and all other objections to the Settlement are deemed waived if not set forth in a written objection. All Notice of Appearance shall be filed in Court within sixty (60) days of the mailing of the Notice of Proposed Class Action Settlement, or the Class member will be barred from appearing at the Fairness Hearing.

This procedure accords Class Members the right to appear and present argument at the Final Fairness Hearing. It affords due process to the Class Members and should be approved as set forth in the Settlement Agreement and the proposed Preliminary Approval Order.

Procedure for Intervention

Any Class Member who has not filed a timely written request for exclusion may also seek to intervene in the Lawsuit. All requests to intervene must be in compliance with the Missouri Rules of Civil Procedure and applicable law. No person shall be permitted to intervene unless such person (i) has filed with the Clerk of the Court a request or motion seeking to intervene in the Action, together with appropriate suggestions in support of the request or motion to intervene and any supporting documentation, (ii) has served copies of such notice, statement, and documentation together with copies of any other papers or briefs that such person files with the Court, upon Class Counsel, and Defense Counsel, and (iii) otherwise complies with the Settlement Agreement and Notice of Proposed Class Action Settlement for purposes of such hearing. All requests or motions to intervene shall be filed in Court within sixty (60) days of the mailing of the Notice of Proposed Class Action Settlement or will be deemed untimely and denied.

The procedure complies with Missouri's Rules of Civil Procedure and does permit, if properly and timely done, the Court to consider requests for intervention. The procedure

provides sufficient opportunity and protection to the Class Members to present a request for intervention to the Court for decision.

VIII. CONCLUSION

For the foregoing reasons, the Class defined above should be formally certified for settlement purposes. Further, Plaintiffs David and Holly McLean and Roger and Eugenia Jones should be appointed as the Representatives of the Class and R. Frederick Walters, David M. Skeens and Kip D. Richards of Walters, Bender, Strohbehn & Vaughan, P.C. should be appointed as Class Counsel. Further, Plaintiffs request, for the reasons set forth above, that the Court grant preliminary approval of the settlement of this class action as fair, adequate and reasonable and enter its Preliminary Approval Order in the form attached as **Exhibit D** to the Settlement Agreement.

Dated: February 21, 2007

Respectfully submitted,

WALTERS BENDER STROHBEHN &
VAUGHAN, P.C.

By:

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ATTORNEYS FOR PLAINTIFFS AND
CLASS COUNSEL

CERTIFICATE OF SERVICE

The undersigned certifies that the above document was hand-delivered and or transmitted via fax or email this 21 th day of February 2007 to:

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Mark A. Olthoff
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and a copy sent via email to:

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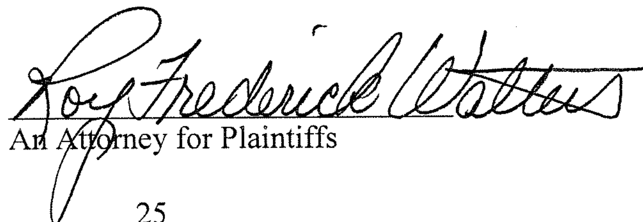

An Attorney for Plaintiffs