IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

DEANTHONY THOMAS AND SUSAN JELINEK-THOMAS, et al., individually and as representatives of the U.S. BANK DIRECT LOANS SETTLEMENT CLASS, Plaintiffs, vs. U.S. BANK NATIONAL ASSOCIATION ND AND U.S. BANK NATIONAL ASSOCIATION, Defendants.	Case No. 1216-CV20561 Division 13

PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND JUDGMENT, WITH SUGGESTIONS IN SUPPORT

Named Plaintiffs DeAnthony Thomas and Susan Jelinek-Thomas, James C. Baker and Jill S. Baker, David R. Beebe and Nancy J. Beebe, Danita S. Couch and Jack T. Chastain, Sr., Jeffrey A. Cox and Michelle A. Cox, Dana S. Hall and Melanie D. Hall, Steven M. Rich, Phillip M. Schrier and Sharon K. Schrier, William S. Springer and Linda A. Springer, and Ted Varns and Raye Ann Varns, as representatives of certain "U.S. Bank Direct Loans Settlement Class Members," respectfully move the Court to enter an Order enforcing the Settlement Agreement and Judgment entered in this action on November 16, 2012 to hold that none of the 140 U.S. Bank Direct Loans identified on Exhibit E attached hereto is an "Active Loan" for purposes of the Settlement and Judgment.

In the alternative, the Named Plaintiffs request on behalf of the Class Members who obtained the loans on Exhibit E that if the Court, for whatever reason, declares that any of the U.S. Bank Direct Loans identified on Exhibit E are "Active Loans," which Plaintiffs deny, then the Court should vacate the Judgment solely as to the Class Members who have such "Active

Loans" pursuant to Mo. Rule 74.06(b)(2), (1) or (5) on the grounds that the Settlement Agreement, when reduced to writing, does not accord with the real understanding and Settlement of the Parties as reached on June 1-2, 2011 due to fraud, misrepresentation and other misconduct by Defendants, or because of mutual mistake, inadvertence or surprise, and/or because the Judgment would be "no longer equitable" as to any of the Class Members entitled to recover on the 140 contested loans.

SUGGESTIONS IN SUPPORT

The Named Plaintiffs move the Court for an Order enforcing the Settlement and Release Agreement attached as Exhibit B, which the Court approved as fair, reasonable and adequate in connection with its Final Approval Order and Judgment entered in this case on November 16, 2012. Section 21.j of the Settlement Agreement provides that "[n]otwithstanding the entry of a judgment on the Released Claims, the Court shall retain jurisdiction over the interpretation, effectuation, enforcement, administration, and implementation of this Agreement…." (Ex. B, §21.j; Ex. C: Final Approval Order, ¶15(c); Ex. D: Final Judgment, ¶9) Questions regarding enforcement and any of these other issues may thus be properly brought before this Court for determination.

THE NEED FOR ENFORCEMENT

Since the date of the Settlement and the entry of the Judgment, an issue has arisen over whether 140 U.S. Bank Direct Loans are "Active Loans" for purposes of the Settlement Agreement. The term "Active Loan" is defined in Section 2.1 of the Agreement. The definition provides:

> "Active Loan" means any U.S. Bank Direct Loan that is owned by a Settling Defendant and has not been fully repaid as of the Effective Date.

(Ex. B, § 2.1)

Plaintiffs contend, based on the "Essential Terms" of the Settlement as stated in the Parties' Terms Sheet and Addendum for the Settlement (attached as Exhibit A), the language of the executed Settlement Agreement, Defendants' records and conduct and the numerous communications that occurred throughout the lengthy process of reducing the Terms Sheet to writing, that the Parties originally agreed, and at all times throughout the settlement process understood and confirmed, that an "Active Loan" meant and could only mean a U.S. Bank Direct Loan that was "still active" at the time of the Settlement on June 1-2, 2011. "Still active" meant just that – that the loan was "active" (that the loan was "marked by vigorous activity" and/or a "present operation, transaction, movement, or use"). The U.S. Bank Direct Loans that were "still active" on June 1-2, 2011 were those limited, few loans on which the borrowers were then still making payments, and which Defendants and their servicers were actively collecting. These were the only U.S. Bank Direct Loans that the Parties ever agreed would be deemed and treated as "active," such that the amount of the settlement payment to be "paid" to the borrower Class Members entitled to recover on these "current" or "active loans" would be reduced by what Defendants' records ultimately showed the unpaid principal balance of the loan to be as of the Effective Date, when the settlement "payments" could and would be made to the participating Class Members "by check.".

It was not until December 27, 2012 – after the Effective Date – that Defendants sought to change the settlement that the Parties reached on June 1-2, 2011. On that late date, Defendants for the first time challenged the Parties' original determination that there were only 74 U.S. Bank Direct Loans on which the borrowers were still making payments, and which Defendants were actively collecting, at the time of the Settlement, and which the Parties mutually agreed and

deemed to be the only "current" or "active" loans for purposes of the Settlement.[1] In an email dated December 27, 2012, Defendants for the first time asserted that the term "Active Loan" could mean a U.S. Bank Direct Loan that was not "still active." To Plaintiffs' surprise, Defendants began to assert that an "Active Loan" was any U.S. Bank Direct Loan, whether "active" or not, that had never been fully repaid, such that Defendants could reach back, reclaim as "unpaid," and take a credit for the loan amounts that Defendants had voluntarily charged and/or written off and/or ceased collecting long before the Settlement was reached in June 2011.

Under Defendants' newly-found and opportunistic spin on Section 2.1, about which neither the Named Plaintiffs nor the Court nor the Class was ever alerted or apprised, Defendants now seek to manufacture a way to significantly reduce, and in many instances eliminate entirely, the settlement payments promised to more than 430 Class Members entitled to recover on 140 U.S. Bank Direct Loans even though Defendants (1) had previously and voluntarily charged and/or written off the balance of these 140 loans, (2) had not been collecting or attempting to collect on the 140 loans at the time of the Settlement in June 2011, and/or (3) had represented to Plaintiffs in writing and through their own written payment records that each of the 140 loans had a principal balance of $0.00.[2]

Defendants are now asserting that, under their new way of reading of Section 2.1, ***and despite the plain wording of the Court-approved Class Notices***, the numerous Class Members who elected to participate in the Settlement and who submitted Valid Claims will not receive the promised settlement payment "by check," but instead receive a forgiveness of debt that had been

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[1] The number of uncontested "Active Loans" has since been reduced to 52 based on the supplemental payment histories that Defendants provided pursuant to the Settlement.

[2] The $0.00 principal balance shown on the payment histories for five (5) of the 140 contested U.S. Bank Direct Loans were changed by Defendants to accommodate a presumably non-billed payment received from a borrower after the balance had been charged off and "zeroed out." (See Ex. E)

previously written off, and which will likely result in the creation of "phantom income" on which the Class Members will likely have to pay income tax – even though the Class Members will not be receiving sufficient cash from the Settlement to do so. Worse still, Defendants are actually willing to accept that no fewer than 230 of these 430 Class Members who were told by the Court and the Parties that they would "receive ***a payment*** ranging from an estimated $250.00 to $142,564.88 ($33,499.25 on average)" "by check" will not, in fact, be receiving ***any*** "payment" at all, but will instead receive a forgiveness of debt that had been previously written off, and which will likely result in the creation of "phantom income" on which the Class Members will likely have to pay income tax without receiving ***any*** cash from the Settlement to pay it. Defendants are taking this remarkable and extraordinarily unjust position even though they at no time alerted the Court, the Named Plaintiffs or the Class, either before or at the final approval hearing, that such an inequitable and unanticipated result would occur. Defendants are further taking this position even though (1) Defendants undeniably knew that the members of the U.S. Bank Direct Loans Settlement Class were not apprised by the Class Mail Notice or Class Publication Notice, or otherwise, that the creation of "phantom income" arising from amounts that had long ago been written off and the payment of taxes would likely result from a Class Members' decision to participate in the Settlement; and (2) Defendants had represented to the Named Plaintiffs and the members of the U.S. Bank Direct Loans Settlement Class, through Plaintiffs' Counsel, in June and July 2011, that there were only 74 "current" or "active" U.S. Bank Direct Loans.[3]

The position that Defendants are taking now that the Settlement has become effective is as intolerable as it is unjust. The Court's assistance is needed in order to enforce the Settlement

[3] The number of "current" or "active" loans has been reduced from 74 to 52 based on the supplemental payment histories that Defendants provided.

Agreement as originally intended and agreed. The Court should hold Defendants to their word and enforce the Settlement Agreement such that only those 52 U.S. Bank Direct Loans that the Parties have identified and agreed to have been the remaining "current" or "active" U.S. Bank Direct Loans at the time of the Settlement on June 1-2, 2011 are the only loans for which an offset of "unpaid" principal can be made. Those 52 loans are the only unpaid loans on which the borrowers were making payments and which Defendants were actively collecting on June 1-2, 2011 and which remained unpaid as of the Effective Date. Under no circumstances should the Court construe the Settlement Agreement so as to allow Defendants to consider and treat as an "Active Loan" any of the additional 140 patently "***inactive*** loans" for which Defendants now claim they are also entitled to a credit for the principal amounts that Defendants voluntarily chose to write off before the Settlement and/or that were allegedly due on a loan that was no longer active. Under no circumstances should the Court enforce the Settlement Agreement so as to eliminate the valuable benefits of which the members of the Settlement Class were repeatedly apprised and thereby entrap the Class Members entitled to recover on 140 patently inactive loans into having to declare and pay taxes on "phantom income." Each of the contested 140 loans is listed on the schedule attached hereto as Exhibit E. The settlement payments to be made on those 140 loans are "on hold" pending the Court's resolution of this issue.

BACKGROUND

1. Defendants, and each of them, were for many years defendants in the following civil MSMLA class action cases: *Baker v. Century Financial Group, Inc.*, Case No. CV100-4294, filed June 28, 2000 (Cir. Ct. Clay County, Missouri); *Beaver v. First Consumers Mortgage, Inc.*, Case No. 00-CV-215097-01, filed June 23, 2000 (Cir. Ct. Jackson County, Missouri) (consolidated with *Beaver v. First Consumers Mortgage, Inc.*, Case No. 03-CV-

213643, filed May 28, 2003 (Cir. Ct. Jackson County, Missouri)); *Couch v. SMC Lending, Inc.*, Case No. 7CV-100-4332, filed June 29, 2000 (Cir. Ct. Clay County, Missouri); *Gilmor v. Preferred Credit Corporation*, Case No. CV100-4263, filed June 27, 2000 (Cir. Ct. Clay County, Missouri), *removed*, Case No. 10-0189-CV-W-ODS (W.D. Mo.); *Hall v. American West Financial*, Case No. 00CV218553-01, filed July 28, 2000 (Cir. Ct. Jackson County, Missouri); and *Thomas v. U.S. Bank Nat. Ass'n, ND*, Case No. 04-CV-83549-01, filed June 02, 2004 (Cir. Ct. Platte County, Missouri), *removed and pending before* the United States District Court for the Western District of Missouri as Case No. 11-6013-CV-SJ-SOW (W.D. Mo.) (collectively, the "Missouri Cases").

2. The plaintiffs in each of the Missouri Cases asserted claims against Defendants and others based on the origination, collection and exchange of junior or "second" mortgage loans secured by residential real estate situated in Missouri and the alleged violation by Defendants and others of the Missouri Second Mortgage Loans Act ("MSMLA"), §§ 408.231-408.241 RSMo.

3. The plaintiffs in the Missouri Cases sought compensatory and punitive damages and other relief for themselves and various putative and certified classes of similarly-situated Missouri borrowers as a result of certain loan fees, closing costs and interest amounts being directly or indirectly charged, contracted for, received and/or collected by the originating lenders and/or Defendants in connection with 1,505 Missouri "Second Mortgage Loans" secured by a junior lien on "residential real estate" in Missouri, as those terms are defined in § 408.231 RSMo, that were purchased by, assigned to, or otherwise acquired or serviced by Defendants, or either of them.

The U.S. Bank Direct Loans Settlement

4. On June 1 and 2, 2011, the Named Plaintiffs and Defendants mediated and engaged in extensive arm's length negotiations with regard to the settlement on a global basis of the claims being asserted against Defendants in the Missouri Cases. At the end of the mediation, the Named Plaintiffs and Defendants executed a written Terms Sheet and Addendum for what became known as the "U.S. Bank Direct Loans Settlement" (or at times, the "Settlement"), which covered the "U.S. Bank Direct Loans" as made to the members of the "U.S. Bank Direct Loans Settlement Class." A genuine copy of the parties' Terms Sheet, with Addendum, is attached as Exhibit A.

5. The Terms Sheet, with Addendum, for the Settlement contains the following provisions:

> II. Purpose of the Terms Sheet
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> The Parties have reached agreement on the following essential terms of a settlement between Plaintiffs and Defendants, subject to the terms and conditions set forth herein. The Parties agree to use their best efforts to negotiate in good faith a definitive final settlement agreement incorporating these essential terms as well as customary terms that are standard in class action settlement agreements.
>
> III. Essential Terms
>
> A. Cooperation: The Parties will cooperate with each other in good faith to effectuate the settlement in a manner that is efficient, reasonable, and fair to all Parties. The Parties will negotiate whether to initiate one or more new settlement class actions or to seek the approval of the settlement in one or more existing proceedings. The Parties will stipulate to certification of a class action for settlement purposes only in the Thomas action referenced above. The Parties agree to recommend approval of the settlement agreement to all courts from whom approval is required and to undertake their best efforts, including all reasonable steps and efforts contemplated by the settlement agreement, to give full force and effect to the settlement agreement's terms and

conditions.

B. Definition of settling class: All persons who obtained second mortgage loans on Missouri residential real estate, and the bankruptcy estates of any such persons who filed for bankruptcy, whose loans were purchased, assigned, serviced or otherwise acquired by USBND or USBNA (the "Settling Class Members").

C. Settled Claims: All claims of any kind (including defenses of rescission, voidness or offset) which the Settling Class Members have had, now have, or may have which were or could have been raised in the Actions or which are related to the subject loans. Upon final approval of the settlement, Plaintiffs will dismiss with prejudice all claims asserted against Defendants in all pending actions and will stipulate to the entry of final judgment.

* * *

I. ***Active Loans: The loans of the Settling Class Members which are still active shall be deemed paid off upon receipt of a valid claim form from that Settling Class Member, and the principal that is deemed paid shall be deducted from the amount otherwise due to that Settling Class Member under the settlement agreement.***

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US Bank Missouri Second Mortgage Loan Litigation – June 1-2, 2011 Mediation
Addendum to Term[s] Sheets

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1. ***Purpose of Terms Sheet – "The Parties have reached agreement on the following essential terms of a settlement between Plaintiffs and Defendants, subject to the terms and conditions set forth herein. The Parties agree to use their best efforts to negotiate in good faith a definitive final settlement agreement."***

* * *

3. Loan Data and Payment information Promptly Supplied by US Bank/servicers before claims period begins or we use plaintiffs' estimates.

(Ex. A) (emphasis added)

6. Essential Term I was proposed by Defendants, through counsel, to address how

the loans on which those borrower Class Member(s) who were "still" making payments at the time of the mediation (i.e., the loans that were "current" or "still active") would be handled under the Settlement.

7. Defendants proposed that such "active" loans "shall be deemed paid off upon receipt of a valid claim form from that Settling Class Member, and the principal that is deemed paid shall be deducted from ***the amount otherwise due to that Settling Class Member under the settlement agreement***." (Exhibit A, Essential Term I) Of course, such "active" loans could not be, and were never intended by the Parties to include, any loan having a principal balance greater than "***the amount [that the Parties anticipated would be] otherwise due to [the] Settling Class Member.***"

8. The Parties agreed to and accepted Essential Term I ***as proposed by Defendants*** because they understood and believed that the amounts to be recovered by the settling Class Members who had such "active" loans would be substantial, given the origination dates of the loans and the lengthy duration of the payments, which were still being made when the Settlement was reached on June 1-2, 2011. The principal balance of such loans, by definition, could never be greater than "***the amount [that the Parties anticipated would be] otherwise due to [the] Settling Class Member.***" Given the duration of payments, the Parties understood that any Class Member with an "active loan" would receive a net cash benefit even after reduction by the amount of the unpaid principal.

9. The Parties at no time agreed to consider or treat as a "current" or "active" loan any U.S. Bank Direct Loan on which the borrower was not current and "still" making payments as of June 1-2, 2011.

10. The Parties at no time agreed to consider or treat as a "current" or "active" loan

any U.S. Bank Direct Loan on which the borrower(s) had ceased making payments before June 1-2, 2011.

11. The Parties at no time agreed to deem as paid and deduct any principal that had been charged or written off and/or which was not being actively collected as of June 1-2, 2011 from the amounts that a Class Member would become entitled to receive under the Settlement for illegal fees and interest paid.

12. Defendants at no time disclosed or explained that a "current" or "active" loan could or would include a U.S. Bank Direct Loan on which Defendants and their servicers had as of June 1-2, 2011 (a) charged or written off the principal balance, (b) "discontinued" collection, and/or (c) released the mortgage lien securing the debt.

Defendants' Payment Histories

13. Pursuant to the Essential Terms of the Settlement (Ex. A), Defendants provided the Named Plaintiffs with payment histories for the U.S. Bank Direct Loans at issue in the Missouri Cases in June 2011. Defendants supplemented their production for these loans in November 2011 and May 2012. Some of the payment histories that Defendants produced in May 2012 supplemented those that Defendants had originally produced in the *Gilmor* case in August and December 2008.

14. Pursuant to the Essential Terms of the Settlement (Ex. A), the Named Plaintiffs provided Defendants with a listing of the U.S. Bank Direct Loans that the Named Plaintiffs understood to be "current" or "still active" for purposes of the Settlement. Defendants responded each time and identified the U.S. Bank Direct Loans that were "active" (i.e., "current") for purposes of the Settlement.

15. On June 28, 2011, Defendants confirmed by e-mail that six (6) of the 132 U.S.

Bank Direct Loans at issue in the *Gilmor* case were "active loans" (viz., Barbier, Bell, Coffey, Dee, Ellis and Griffin). A genuine copy of the referenced e-mail exchange is attached as Exhibit F.

16. On July 21, 2011, Defendants confirmed by e-mail that sixty-eight (68) of the 1,371 U.S. Bank Direct Loans from the *Thomas* case were "current" or "active" loans. A genuine copy of the referenced e-mail exchange between the plaintiffs and Defendants is attached as Exhibit G.

17. There were no "current" or "active" U.S. Bank Direct Loans in any of the other Missouri Cases.

18. The identification of the "active" or "current" loans as made by the Named Plaintiffs and Defendants pursuant to the Settlement was based solely on the payment histories that Defendants provided to Plaintiffs and expressly represented and agreed to be "accurate and admissible."

19. Defendants at all times understood that they were required to provide Plaintiffs with the "most updated data possible" so that Plaintiffs could calculate individual class member damages.

20. Genuine copies of the payment histories that Defendants provided for the U.S. Bank Direct Loans identified on Exhibit E are attached hereto and marked collectively as Exhibit H-1.

21. Defendants did not provide the Named Plaintiffs with any information other than the payment histories from which the "active" status of the U.S. Bank Direct Loans could be determined.

The Initial Draft of the Settlement Agreement

22. On or about July 21, 2012, the Named Plaintiffs provided Defendants with an initial draft of a written agreement to memorialize the terms of the U.S. Bank Direct Loans Settlement. Consistent with the Essential Terms as stated on the Terms Sheet and Addendum, the Named Plaintiffs' draft of the settlement agreement described "… any active U.S. Bank Direct Loan" as "a U.S. Bank Direct Loan on which payments are being made" in paragraph 19(b) and provided that "the outstanding amount of the loan principal" on any U.S. Bank Direct Loans "that are active at the time of [Class Member] payment" "shall be deemed paid and deducted from the U.S. Bank Direct Loans Settlement Class Member Payment [as] calculated with respect to such Loan." A genuine copy of the Named Plaintiffs' initial draft is attached as Exhibit I.

23. On or about October 28, 2011, Defendants provided the Named Plaintiffs with their "mark-up" of Plaintiffs' initial draft. Among other things, Defendants' mark-up: (a) deleted the description of an "active U.S. Bank Direct Loan" from paragraph 19(b) of the Named Plaintiffs' initial draft, (b) replaced Plaintiffs' description with a formal definition of "**Active Loan**" in the Definitions section, which provided: "'Active Loan' meas [sic] any U.S. Bank Direct Loan that is owned by a Settling Defendant and has not been fully paid as of the Effective Date" and (c) reworded paragraphs 4 and 19 to provide, among other things, that "all principal indebtedness outstanding" with respect to each Active Loan relating to a Valid Claim "… shall be deemed paid and satisfied by … Defendants" ***such that "[s]aid principal amounts so deemed paid and satisfied shall reduce the amounts that remain owing with respect to the Valid Claim Amounts***." A genuine copy of the Defendants' "mark-up" of Plaintiffs' initial draft is attached as Exhibit J.

24. Defendants' "mark-up" of the Named Plaintiffs' initial draft agreement confirmed that the definition of "Active Loans" in Section 2.1 meant only those loans that were "still active" as originally stated in the Terms Sheet, such that the principal indebtedness to be "deemed paid and satisfied" pursuant to the Settlement would "reduce" the "Valid Claim Amounts" that would "***remain owing***" ***after*** any reduction for principal had been made. Defendants' "mark-up" of the Named Plaintiffs' initial draft made clear that in all instances, the participating members of the U.S. Bank Direct Loans Settlement Class would receive a money "payment" under the Settlement.

25. Defendants' "mark-up" provided in paragraph 4.d that Defendants, "[a]s of the Effective Date, … shall take appropriate steps in accordance with their normal practices to: (i) reflect satisfaction in full of all mortgage indebtedness and to release the lien of any mortgage associated with Active Loans relating to Valid Claims …; and (ii) ***discontinue*** the collection of any interest on Active Loans relating to Valid Claims … and ***return any interest*** collected or received on any such loans after the Effective Date to the members of the U.S. Bank Direct Loans Settlement Class Members who paid such interest." Of course, no "collection" efforts could be "discontinued" and no "interest received after the Effective Date" could be "returned" on any loan on which the obligors were not actively paying, and which the Defendants had by then already ceased collecting. The ***only loans*** on which Defendants could "discontinue" the collection of interest and "return any interest collected or received" were and could only be the U.S. Bank Direct Loans that were "still active" as the Parties described and agreed to in Essential Term I. (Ex. A)

Defendants' Now-Conspicuous Silence Throughout the Drafting Process

26. From October 2011 through August 2012, Defendants and the Named Plaintiffs

had numerous discussions and exchanged seemingly unending drafts of what became the written Settlement Agreement. At no time during the course of those discussions and/or multiple revisions to the drafts did Defendants ever mention, disclose or indicate that they understood or intended to assert that there were any "Active Loans" other than the "active loans" that Defendants had earlier identified for Plaintiffs and/or that an "Active Loan" was anything other than a "current" loan (i.e., a U.S. Bank Direct Loan on which the borrower was "still" making his or her payments in June 2011).

27. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever seek to amend, retract, clarify, alter or modify any of their earlier e-mails confirming the Parties' determination and agreement that there were only 74 "current" or "active" U.S. Bank Direct Loans for purposes of the Settlement.

28. Defendants at no time explained, disclosed, or in any way indicated that their decision to replace the description of an "active U.S. Bank Direct Loan" in paragraph 19.b with a formal definition of "Active Loan" in the Definitions section of the Settlement Agreement was intended to change the meaning of the term "active U.S. Bank Direct Loan" as the Parties had used it.

29. Defendants at no time explained, disclosed, or in any way indicated that their definition of "Active Loan" was contrary to or different from the meaning of Essential Term I. (Ex. A)

30. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever mention, disclose or indicate that any of the loan data and/or documents and loan payment and payoff information they provided failed to identify the "Active Loans."

31. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever mention, disclose or indicate in any way that the "total principal balance" and/or "current principal balance" for any of the U.S. Bank Direct Loans was anything other than what was stated on the payment histories that Defendants had provided for the loans.

32. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever mention, disclose or indicate in any way that they understood and intended to assert that an "Active Loan" was or could be a U.S. Bank Direct Loan for which Defendants' records showed a "current principal balance" or "total principal balance" of $0.00.

33. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever mention, disclose or indicate that they understood and intended to assert that an "Active Loan" was or could be a U.S. Bank Direct Loan that was in default, was not being repaid, was not being collected, and/or was a loan for which the principal balance had been previously charged or written off or otherwise reduced to $0.00 by means of a rebate or other credit.

34. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever mention, disclose or indicate in any way that they understood or intended to assert that an "Active Loan" was or could be a U.S. Bank Direct Loan for which Defendants had released its lien interest against the real property securing the mortgage debt.

35. Defendants at no time explained, disclosed, or indicated in any way that their definition of "Active Loan" could or would include a U.S. Bank Direct Loan that was not "still

active" and/or was a U.S. Bank Direct Loan on which Defendants and their servicers had already "released" the mortgage lien and/or had previously "discontinued" collection, and/or was a loan on which no additional interest was being paid, such that no interest would likely ever be "returned."

36. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever disclose, mention or provide any explanation as to what part of the mortgage debt (e.g., principal, interest, loan fees, late fees, etc.) had to be "unpaid" for a loan to be an "Active Loan" as defined in Section 2.1 of the Settlement Agreement.

37. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever mention, disclose or indicate that there would be loans for which no Settlement Class Member Payment would be made, despite the submission of a Valid Claim.

38. The Named Plaintiffs at all times were led to believe and understood based on the Terms Sheet, the Settlement Agreement, and Defendants' representations and conduct that an "Active Loan" was and could only be a U.S. Bank Direct Loan on which the borrower was "current" or "active" in that the borrower was being billed and "still" making payments at the time of the Settlement, such that the amount of the "principal indebtedness outstanding" remaining at the time of the settlement payment would "reduce" (but never eliminate) the money "payment" that the Class Member would receive "by check."

39. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever mention, disclose or indicate in any way that certain members of the U.S. Bank Direct Loans Settlement Class would not receive any settlement

payment, “by check” or otherwise, because the amount of their U.S. Bank Direct Loan that Defendants claim had not been paid would be greater than the “Claim Amount” for the loan would ever be.

40. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever mention, suggest or insist in any way that the members of the U.S. Bank Direct Loans Settlement Class should be notified that some Class Members would not receive a payment, “by check” or otherwise, because the amount of their U.S. Bank Direct Loan that Defendants claim had not been paid would be greater than their “Claim Amount” could ever be.

41. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever mention, suggest or insist that the members of the U.S. Bank Direct Loans Settlement Class should be notified that by participating in the Settlement, certain Class Members would likely become obligated to pay income tax on the amount of any principal indebtedness that Defendants had previously written off but now seek to resurrect and claim a credit for.

42. At no time during the course of any of their discussions and/or negotiations with the Named Plaintiffs did Defendants ever acknowledge or disclose that certain members of the U.S. Bank Direct Loans Settlement Class having a U.S. Bank Direct Loan that was an “Active Loan” as Defendants now seek to construe that term could not make an informed decision about whether to opt out or participate in the Settlement and file a Claim based on the language of the Settlement Agreement, Class Mail Notice, Claim Form, and Publication Notice to which Defendants agreed.

The U.S. Bank Direct Loans Settlement Agreement

43. On August 9, 2012, Defendants and the Named Plaintiffs (all of whom were named plaintiffs in the Missouri Cases) executed the Settlement and Release Agreement attached as Exhibit B.

44. Defendants confirmed as a part of the Settlement that "the loan data [they] provided … [to the Named Plaintiffs was] accurate and admissible for purposes of the Settlement" and expressly represented, warrantied and declared that they had "acted in good faith and … employed their best efforts and due diligence in identifying the members of the U.S. Bank Direct Loans Settlement Class … ***and in producing the loan data and documents and loan payment and payoff information from which the Estimated Claim Amounts and Claim Amounts are and will be derived***."

45. Like Defendants' "mark-up" to the Named Plaintiffs' initial draft, the final version of the Settlement Agreement confirmed that the definition of "Active Loans" meant only those loans that were "still active," such that the principal indebtedness to be "deemed paid and satisfied" pursuant to the Settlement would "reduce" (but not eliminate) the "Valid Claim Amounts" that would "remain owing" after the reduction for the principal indebtedness had been made. The Settlement Agreement was clear: In all instances, the participating members of the U.S. Bank Direct Loans Settlement Class would receive a "payment" "by check" under the Settlement.

46. For example, the Settlement Agreement required Defendants, "[o]n the Effective Date or the date on which all challenges to the Claims are resolved, whichever is later, to deem as..,

> … paid and satisfied all principal indebtedness outstanding with respect to each Active Loan relating to a Valid Claim and held by the Settling Defendants ….

> ***[such that] Said principal amounts … deemed paid and satisfied shall reduce the amounts that remain owing with respect to the Valid Claim Amounts of the U.S. Bank Direct Loans Settlement Class Members*** and shall be subject to the payment of attorney's fees as provided in Section 19(b).

(Ex. B, §4.d) (emphasis added) This provision would be meaningless if an "Active Loan" could be a U.S. Bank Direct Loan having an outstanding principal balance that was greater than the settlement payment to be made, since there would be no "remaining amount" that would still be "owed" and paid "by check" after the reduction for the principal had been made. Such U.S. Bank Direct Loans were never contemplated or agreed to be "Active Loans" for purpose of the Settlement.

47. The Settlement Agreement also required Defendants, "[a]s of the Effective Date or five (5) business days of the date on which all challenges to the Claims are resolved, whichever is later, to

> … inform the servicers of any Active Loans of the substance of this Agreement and request that they take appropriate steps in accordance with the loan servicer's normal practices to: (i) reflect satisfaction in full of all mortgage indebtedness and to release the lien of any mortgage associated with Active Loans relating to Valid Claims as of the Effective Date; and (ii) ***discontinue*** the collection of any interest on Active Loans relating to Valid Claims after the Effective Date ***and return any interest collected or received on any such loans after May 31, 2011 to the U.S. Bank Direct Loans Settlement Class Members who paid such interest by payment to the Settlement Fund pursuant to Section 4(b)***.

(Ex. B, §4.d) (emphasis added) Again, no "collection" efforts could be "discontinued" and no interest "received" after May 31, 2011 could be "returned" by Defendants on any of the loans on which the obligors were not actively paying, and which Defendants had by then already ceased collecting and/or written off.

48. The Settlement Agreement required Defendants "[w]ithin two (2) business days of the Effective Date or the date on which all challenges to the Claims are resolved, whichever is later,"

> [to] provide Class Counsel with a schedule stating (i) the principal loan indebtedness still owing with respect to the Active Loans that relate to Valid Claims; and (ii) the amount of any interest received on any such loans after May 31, 2011, which shall be refunded to the Class Members with respect to such Active Loans.

(Ex. B, §19.d)

49. The May 31, 2011 date to which the parties agreed corresponded to the mediation and was the day before the mediation began and was selected in reference to Essential Term I of the Terms Sheet. (Ex. A)

50. The Named Plaintiffs agreed to the minimal two-day deadline by which Defendants were required to provide Plaintiffs with "the principal loan indebtedness still owing with respect to the Active Loans that relate to the Valid Claims" because the Named Plaintiffs understood and believed based on Defendants' records, representations and conduct that the "principal loan indebtedness still owing with respect to the Active Loans" could not be calculated until the Settlement had become Effective since the loans were "still active" (and being paid) at the time of the Settlement on June 1-2, 2011, such that the principal balance of such loans was still being reduced. Just two days' time was also sufficient for Defendants to calculate the "principal loan indebtedness still owing with respect to the Active Loans" since Defendants' records, representations and conduct showed that the number of Active Loans" was minimal.

51. Defendants also agreed as a part of the Settlement that any interest collected on the "Active Loans" on or after May 31, 2011, would be refunded to the U.S. Bank Direct Loans Settlement Class Members who paid the interest, and that the amount of any such interest refund would be paid in addition to the amount of the interest-paying Class Member's Valid Claim Amount. (Ex. B, § 19.d) The existence of this provision also shows the Parties' understanding

and agreement that an "Active Loan" had to be "active" in the plain and simple sense that the loan was "active" and being billed and paid and collected by Defendants at the time of the Settlement on June 1-2, 2011 (thereby necessitating a provision that required Defendants to refund the interest that was still being paid on the loans after the date of the Settlement on June 1-2, 2011).

52. If Defendants had at any time asserted (or apprised the Named Plaintiffs that they would ultimately assert) that an Active Loan could be anything other than a U.S. Bank Direct Loan that was "still active" at the time of the Settlement (i.e., a loan that was "still" being "actively" paid to and collected by Defendants as of June 1-2, 2011), and Defendants were fully able and were required to make that assertion if that is what they intended, the Named Plaintiffs would have rejected the assertion as being contrary to the Essential Terms of the Settlement and, in any event, would have (a) demanded that Defendants provide them with the amounts of the principal loan indebtedness that Defendants claimed to be "outstanding" with respect to any such inactive Active Loans (i.e., the Active Loans that were not "still active" as of May 31, 2011) long before the Settlement Agreement was executed (which Defendants could have done) and (b) if a new agreement on this term had been reached, insisted that the Settlement Class be notified and apprised of the possibility that certain Class Members submitting Valid Claims would **not** receive a U.S. Bank Direct Loans Settlement Class Member Payment, "by check" or otherwise, but would instead receive a forgiveness of debt that had been previously written off and realize "phantom" income on which they would likely have to pay income tax without receiving any cash with which to do so.

The Settlement Litigation and
U.S. Bank Direct Loans Settlement Class

53. The Named Plaintiffs filed this lawsuit against Defendants on August 10, 2012

pursuant to the Settlement. This lawsuit was filed to resolve in a single proceeding all of the claims being asserted against Defendants in the Missouri Cases with respect to the U.S. Bank Direct Loans.

54. Throughout the course of the settlement and court proceedings that ensued, Defendants continued to confirm that the definition of "Active Loans" meant only those loans that were "still active" and being paid as of June 1-2, 2011, as agreed and stated on the Terms Sheet for the Settlement.

The Motion for Preliminary Approval

55. On August 10 2012, the Named Plaintiffs filed their Motion for Preliminary Approval of Class Action Settlement, which apprised the Court of the "benefits provided by the Settlement" as follows:

THE U.S. BANK DIRECT LOANS

1) ***Payment of $50,416,378.77*** to be apportioned net of the proposed incentive, expense and attorney's fees awards among the U.S. Bank Direct Loans Settlement Class Members [footnote omitted] which sum represents a recovery of the following amounts that the Named Plaintiffs sought from U.S. Bank ND and U.S. Bank in connection with the U.S. Bank Direct Loans being challenged in the Missouri cases:

   a. $27,385,860.99, representing a recovery of 100% of the allegedly illegal fee and interest paid amounts sought from U.S. Bank ND and U.S. Bank as being assessed and collected in connection with the U.S. Bank Direct Loans in violation of the MSMLA;

   b. An additional $23,030,517.78, representing a recovery in excess of the allegedly illegal fee and interest paid amounts, and which is properly classified as prejudgment interest; and

   The sum of the above or $50,416,378.77 "Net Distributable Settlement Amount" is 55% of the "Net Settlement Amount" **and that amount *shall be paid* to the U.S. Bank Direct Loans Settlement Class Members** pro rata as shown on Schedule 4 to the Agreement (filed under seal).

   The net settlement *payments* to be made to the Class Members will

range from an estimated $250 to $142,564.88 ($33,499.25 on average).

* * *

(emphasis added)

56. Defendants did not disclose to or apprise the Court either before or at the preliminary approval hearing that, contrary to what was plainly stated in the Motion for Preliminary Approval, the $50,416,378.77 "payment" amount would not be "paid to the U.S. Bank Direct Loans Settlement Class."

57. The *only* reduction of debt about which the Parties ever apprised the Court and Class was that which would "reduce" (but not eliminate) the Valid Claim Amounts that were owed to the U.S. Bank Direct Loans Settlement Class Members who had filed a Valid Claim. Such reduction was at all times characterized as a reduction of the settlement payment and never as a "payment" of money.

58. Defendants did not disclose to or apprise the Court either before or at the preliminary approval hearing that the description of the "Net Settlement Amount" and/or the "net settlement payments" to be made pursuant to the Settlement would not apply to certain loans that Defendants would, unknown to Plaintiffs, ultimately assert to be "Active Loans" under the Settlement Agreement.

59. Defendants did not disclose to or apprise the Court either before or at the preliminary approval hearing that a Class Member submitting a Valid Claim might not receive **any** settlement payment, but would instead receive a forgiveness of debt that had been previously written off, and which would likely result in the creation of "phantom income" on which the Class Member would have to pay tax without receiving any cash from the Settlement to do so.

60. Defendants did not disclose to or apprise the Court either before or at the preliminary approval hearing that the Valid Claims of certain Class Members would give rise to a forgiveness of debt that had been previously written off, and which would likely result in the creation of "phantom" income on which the Class Members would have to pay tax without receiving any cash from the Settlement to do so.

61. Defendants did not disclose to or apprise the Court either before or at the preliminary approval hearing that several of the Estimated Claim Amounts shown on Schedule 2 to the Motion for Preliminary Approval were understated in that they did not include the amounts that Defendants intended to assert had not been paid on certain U.S. Bank Direct Loans that Defendants deemed to be "Active Loans," and for which Defendants would later seek a credit and offset.

62. Defendants did not disclose to or apprise the Court either before or at the preliminary approval hearing that Defendants would seek a credit and offset of nearly $5 million for what Defendants claimed had not been paid on the U.S. Bank Direct Loans even though they knew they had previously charged and written off and were not actively seeking to collect the amount of that debt as of June 1-2, 2011.

63. Plaintiffs did not apprise the Court of any of the matters identified in paragraphs 56 through 62 above because they understood at all times, based on the Terms Sheet, the Settlement Agreement, and Defendants' records, representations and conduct that the number of "Active Loans" within the meaning of the Settlement was minimal and that any deductions to be made with regard to those "Active Loans" would not materially alter a Class Member's decision to file a claim or opt out of the Settlement since (a) the Class Members having an "Active Loan" were aware that they still owed principal on their loan that Defendants were seeking to collect

(i.e., the principal balance had not been written off), (b) the amount of the Claim in each instance would greatly exceed the "principal indebtedness outstanding," (c) a net "payment" of money would be made "by check" to every Class Member who submitted a Valid Claim, and (d) the proceeds from the net "payment" would be more than enough to pay for any income tax that the participating Class Member might be assessed in connection with the net payment and/or the reduction of principal debt.

The Class Mail Notice

64. Defendants reviewed and altered the wording of the Class Mail Notice that was mailed to the members of the U.S. Bank Direct Loans Settlement Class before it was approved by the Court.

65. The Class Mail Notice provided:

> CLASS MEMBERS WHO OBTAINED A U.S. BANK DIRECT LOAN AND WHO DO NOT EXCLUDE THEMSELVES FROM THE SETTLEMENT WILL BE ENTITLED TO ***RECEIVE A PAYMENT RANGING FROM AN ESTIMATED $250.00 TO $142,564.88 ($33,499.25 ON AVERAGE).***
>
> * * *
>
> B. U.S. Bank Settlement Class Member Payments: If approved by the Court, the Settlement will provide the members of the U.S. Bank Direct Loans Settlement Class who do not exclude themselves, and whose loan is not a "Non-Qualifying Loan" described in Sub-paragraph E below, with an anticipated ***settlement payment*** **ranging from an estimated $2,516.92 to $142,564.88 ($34,015.27 on average)**. The amount of each such "U.S. Bank Direct Loans Settlement Class Member Payment" represents a pro rata share of the "Net Distributable Settlement Amount" (defined below) ***that is determined per loan based on: (a) the amount of the allegedly challenged loan fees charged, contracted for or received in connection with the loan; (b) the interest paid on the loan; and (c) prejudgment interest on those amounts***.
>
> * * *
>
> F. Distribution of Payments: If the Court approves the Settlement and it

> becomes effective according to the terms and conditions of the Agreement, the members of the U.S. Bank Direct Loans Settlement Class who do not exclude themselves from the Settlement ***will receive their U.S. Bank Direct Loans Settlement Class Member Payment for the loan by check***. The check will be mailed by first-class mail, postage prepaid, to the U.S. Bank Direct Loans Settlement Class Members, or to the bankruptcy trustee for those U.S. Bank Direct Loans Settlement Class Members who filed a Chapter 7 or Chapter 13 bankruptcy after obtaining their loan. The check will be mailed by the Settlement Administrator and will not come from the Settling Defendants directly. Joint borrowers, such as a husband and wife, will receive a single payment per loan, even if they are separated or divorced. Any U.S. Bank Direct Loans Settlement Class Member who receives a payment under the Settlement is personally and solely responsible for distributing or allocating the payment between or among any co-borrower(s), regardless of whether the check is made payable to all or only some of the U.S. Bank Direct Loans Settlement Class Member's co-borrowers. U.S. Bank Direct Loans Settlement Class Members will also be responsible for paying any taxes due on any U.S. Bank Direct Loans Settlement Class Member Payment received. U.S. Bank Direct Loans Settlement Class Members are strongly encouraged to consult with their own tax advisor concerning the tax effects of any money received pursuant to this Settlement. Class Counsel cannot provide you with any tax advice.

(Ex. K) (emphasis added)

66. A true and genuine copy of the Class Mail Notice as mailed to the U.S. Bank Direct Loans Settlement Class is attached hereto as Exhibit K.

67. The Notice plainly advised the Class that a monetary "payment" would be made "by check."

68. Defendants did not disclose to or apprise the Court either before or at the time it approved the Class Mail Notice that certain Class Members would not receive a settlement "payment" "by check" even if they filed a Valid Claim.

69. Defendants did not disclose to or apprise the Court either before or at the time it approved the Class Mail Notice that certain Class Members would not receive any "settlement payment" even if they filed a Valid Claim.

70. Defendants did not disclose to or apprise the Court either before or at the time it approved the Class Mail Notice that the "Net Distributable Settlement Amount" would be affected by the amount Defendants claimed had not been paid on the "Active Loans," as Defendants now seek to construe that term.

71. Defendants did not disclose to or apprise the Court either before or at the preliminary approval hearing that Defendants would claim a credit and offset of more than $5 million for what Defendants claimed had not been paid on the U.S. Bank Direct Loans even though they had previously charged and written off and were not seeking to collect that debt as of June 1-2, 2011.

72. Plaintiffs did not seek to include any of the matters identified in paragraphs 68 through 71 above in the Class Mail Notice because they understood at all times, based on the Terms Sheet, the Settlement Agreement and Defendants' records, representations and conduct that the number of "Active Loans" was minimal and that any deductions to be made with regard to those few loans would not materially alter a Class Member's decision to file a claim or opt out of the Settlement since (a) the Class Members having an "Active Loan" were aware that they still owed principal on their loan that Defendants were seeking to collect (i.e., the principal balance had not been written off), (b) the amount of the Claim in each instance would greatly exceed the "principal indebtedness outstanding," (c) a net "payment" of money would be made "by check" to every Class Member who submitted a Valid Claim, and (d) the proceeds from the net "payment" would be more than enough to pay for any income tax that the participating Class Member might be assessed in connection with the net payment and/or the reduction of principal debt.

Defendants' Class Publication Notice

73. Defendants prepared and submitted a Class Publication Notice to the Court for approval pursuant to the Settlement.

74. The Class Publication Notice as prepared and published by Defendants provided in part:

> The lawsuit claims that the subject loans violated the Missouri Second Mortgage Loan Act. If you meet the criteria for settlement benefits, ***you will receive*** ***an amount equal to all of the challenged loan fees paid when you received your loan, all of the interest that you paid on your loan, and a portion of the prejudgment interest on the loan fee and interest paid amounts calculated at the legal rate of 9% per year***.

(Ex. L) (emphasis added)

75. The Class Publication Notice that Defendants prepared and published pursuant to the Settlement did not disclose that certain Class Members submitting Valid Claims would not "receive" any settlement payment, even if they met the "criteria for settlement benefit," but would instead receive a forgiveness of debt that had been previously written off, and which would likely result in the creation of "phantom" income on which the participating Class Members would likely have to pay income tax without receiving any cash from the Settlement to do so.

76. The Named Plaintiffs did not suggest that Defendants include any language concerning the matters identified in paragraph 75 in the Publication Notice because the Named Plaintiffs understood at all times, based on the Terms Sheet, the Settlement Agreement, and Defendants' records, representations and conduct that the number of Active Loans" was minimal and that any deductions to be made with regard to those truly "active Loans" would not materially alter a Class Member's decision to file a claim or opt out of the Settlement since (a) the Class Members having an "Active Loan" were aware that they still owed principal on their

loan that Defendants were seeking to collect (i.e., the principal balance had not been written off), (b) the amount of the Claim in each instance would greatly exceed the "principal indebtedness outstanding," (c) a net "payment" of money would be made "by check" to every Class Member who submitted a Valid Claim, and (d) the proceeds from the net "payment" would be more than enough to pay for any income tax that the participating Class Member might be assessed in connection with the net payment received and/or the reduction of principal debt pursuant to the Settlement.

The Claim Form

77. Defendants also reviewed and approved the wording of the Claim Form to be delivered to the U.S. Bank Direct Loans Settlement Class.

78. The Claim Form as approved by the Court required that the amount of the "settlement payment to be made" in connection with a U.S. Bank Direct Loan, as "currently estimated" by the Parties, be calculated and expressly stated in the Claim Form before it was mailed out.

79. As required by the Court, each of the Claim Forms stated the "currently estimated" amount of the "settlement payment to be made" in connection with the subject U.S. Bank Direct Loan.

80. None of the Claim Forms that were completed and mailed out to the members of the U.S. Bank Direct Loans Settlement Class stated that the amount of the "settlement payment to be made" on the corresponding loan would or could be $0.00 or a negative amount.

81. None of the Claim Forms that were completed and mailed to the U.S. Bank Direct Loans Settlement Class disclosed that a Class Member submitting a Valid Claim might not receive any "settlement payment," but would instead receive a forgiveness of debt that had been

previously written off, and which would likely result in the creation of "phantom" income on which the Class Member would have to pay income tax, without receiving any cash from the Settlement to do so.

82. At no time did Defendants ever propose or suggest that the Claim Form apprise the U.S. Bank Direct Loans Settlement Class that the submission of a Valid Claim could give rise to a forgiveness of debt that had been previously written off, and which would likely result in the creation of "phantom" income on which the Class Members would have to pay income tax, without receiving any cash with which to do so.

83. The 140 Claim Forms submitted to the U.S. Bank Direct Loans Settlement Class Members that Defendants opportunistically claim to have an "Active Loan" are attached as Exhibit M.

The Final Approval Order and Judgment

84. At the Fairness Hearing on November 16, 2012, Class Counsel advised the Court before counsel for Defendants that of the $92 million gross settlement, "$50,416,378.77 will be distributed to the [Class Members who made Valid Claims], net of … incentive fees, … expenses, … and attorney fees."

85. Defendants did not clarify or correct the statements made by Class Counsel or apprise the Court that, as Defendants saw it, less than $50,416,378.77 would be "distributed" in settlement.

86. Defendants did not disclose to or apprise the Court, the Named Plaintiffs or the Settlement Class, through Counsel, before or at the Final Approval Hearing that certain members of the U.S. Bank Direct Loans Settlement Class would not receive any settlement payment, "by check" or otherwise, because the amount of the alleged principal indebtedness that Defendants

claim had not been paid and had been written off would be greater than the "Claim Amount" for the loan would ever be.

87. Defendants did not disclose to or apprise the Court, the Named Plaintiffs or the Settlement Class, through Counsel, before or at the Final Approval Hearing that certain members of the U.S. Bank Direct Loans Settlement Class would receive a settlement payment that was reduced significantly by the amount of the alleged principal indebtedness that Defendants claim had not been paid and had been written off.

88. Defendants did not disclose to or apprise the Court, the Named Plaintiffs or the Settlement Class, through Counsel, about any of the other matters concerning the settlement "payment" as set forth above.

89. The Court, without knowledge of any of the above matters concerning the settlement payments to be made to the participating Class Members identified on Exhibit E, entered its Order Finally Approving Class Action Settlement and Certifying a Class for Settlement Purposes (Ex. C) and Final Judgment (Ex. D) at the conclusion of the Fairness Hearing on November 16, 2012.

The Effective Date Arrives

90. The U.S. Bank Direct Loans Settlement became effective pursuant to its terms on December 26, 2012.

91. On December 27, 2012, Defendants advised Plaintiffs by e-mail that the Aggregate Valid Claim Cash Amount was "$45,623,655.83," a sum $4,792,722.94 less than the $50,416,378.77 "amount" that the Court was told at the Fairness Hearing would be "paid" and "distributed" to the Class. (Ex. N)

92. Defendants identified a total of 192 U.S. Bank Direct Loans as "Active Loans

(because they have not been fully paid)" and provided what Defendants alleged to be the amount of "principal currently outstanding" for each loan. (Ex. N)

93. Defendants made their representations as to the payment status of the 192 U.S. Bank Direct Loans knowing that the balances for which they sought a credit and offset were not shown on and conflicted with the payment histories Defendants had earlier provided to the Named Plaintiffs per the Settlement.

94. Defendants made their representations as to the payment status of the 192 U.S. Bank Direct Loans knowing that the outstanding balance of the loans had been charged and/or written off long before the Settlement and were not active or being collected as of June 1-2, 2011.

95. Defendants made their representations as to the payment status of the 192 U.S. Bank Direct Loans knowing that the notes and deeds of trust for some or all the loans had been fully paid and satisfied and/or without knowledge of whether the representations were true or not.

96. Defendants made their representations as to the payment status of 140 of the 192 U.S. Bank Direct Loans without previously disclosing to the Court, the Named Plaintiffs and/or the Settlement Class, through Counsel, that Defendants would ultimately seek a credit and offset for the amounts that Defendants had previously released, charged or written off and/or on which Defendants and their servicers had ceased active collection long before the Settlement was reached on June 1-2, 2011.

97. Upon receipt of Defendants' list of the 192 allegedly "Active" U.S. Bank Direct Loans, Plaintiffs reviewed the payment histories that Defendants had earlier provided and advised Defendants by e-mail that only 52 of the 192 loans that Defendants had identified were

"Active Loans."

98. The payment histories that Defendants had earlier provided for the 52 loans showed that the loans were "still active" at the time of the settlement (See Exhibit H-2). The payment histories that Defendants had provided for the remaining 140 U.S. Bank Direct Loans stated that the "Total Principal Balance" and "Current Principal Balance" was "$0.00." (See Exhibit H-1)[4]

99. Defendants had at no time disclosed or advised the Named Plaintiffs that they were reversing the charge-offs/write-offs that Defendants had previously made to the U.S. Bank Direct Loans.

100. Defendants at no time disclosed or advised the Named Plaintiffs that the "Current Principal Balance" or "Total Principal Balance" for any of the U.S. Bank Direct Loans was anything other than the $0.00 or other amount shown on the payment histories that Defendants provided pursuant to the Settlement.

101. Defendants at no time explained or disclosed to the Named Plaintiffs that Defendants were "still" collecting any of the 140 U.S. Bank Loans listed on Exhibit E. The fact of the matter is that Defendants weren't. Nor had Defendants ever before disclosed or advised the Named Plaintiffs that Defendants considered any of the 140 loans to be "current" or "active" loans or an "Active Loan."

102. The Parties have not been able to resolve their dispute over whether the 140 U.S. Bank Direct Loans listed on Exhibit E are "Active Loans" for purposes of the Settlement Agreement.

103. With the exception of the U.S. Bank Direct Loans made to Class Members Date

[4] See supra n.2.

and Watson (Ex. P), for which partial payments under reservation have been made, none of the U.S. Bank Direct Loans Settlement Class Members identified on Exhibit E have received the U.S. Bank Direct Loans Settlement Class Member Payment to which they are entitled pursuant to the terms of the Settlement."

104. The above factual statements have been verified as true by an affiant having personal knowledge of the same.

ARGUMENTS AND LEGAL AUTHORITIES

Missouri law promotes and encourages the peaceful settlement of claims. *B-Mall Co. v. Williamson*, 977 S.W.2d 74, 77 (Mo. App. 1998). When interpreting a settlement agreement, the task is to determine what the parties agreed to – not to determine what they might have agreed to – and no new obligations may be imposed that were not contemplated or negotiated by the Parties. *See, e.g., Lavelock v. Cooper Tire & Rubber Co.*, 169 S.W.3d 865 (Mo. banc 2005). In *Lavelock*, for example, the parties entered into a settlement agreement and, in accordance therewith, the plaintiffs returned confidential materials to the defendant following the settlement. *Id*. at 866. The plaintiffs then filed a motion for the entry of a protective order, requesting preservation of the confidential documents. *Id*. The trial court ordered the defendant to create an index of the documents returned to it and to file the index with the court. *Id*. The defendant moved to enforce the terms of the settlement agreement and prohibit the court from requiring the defendants to create such an index, as there was no provision in the parties' settlement agreement requiring the defendants to do so. *Id*. The Missouri Supreme Court acknowledged that the terms of the settlement agreement did not require defendant to maintain an index and held that the trial court "erred in imposing provisions that were not included in the settlement agreement." *Id*. at 867.

Similarly, here, Defendants' attempts to resurrect and reclaim a credit for amounts that Defendants had voluntarily charged and/or written off are not permitted by the Settlement Agreement and Judgment. As the unambiguous terms of the Settlement Agreement make clear, such offsets and credits for these patently inactive U.S. Bank Direct Loans were neither contemplated nor agreed to by the Parties. To the extent it can be read otherwise, then the Settlement Agreement is ambiguous and should be construed consistent with the overwhelming extrinsic evidence showing that only those loans that were "still active" at the time of the mediation on June 1-2, 2011 were the only loans for which an offset and payment reduction would be allowed.

A. The Court Should Hold Defendants to their Word and Enforce the Settlement Agreement Such that No Deduction for Unpaid Principal Shall be Made as to any of the U.S. Bank Direct Loans Identified on Exhibit E.

The Court should enforce the Settlement Agreement and Judgment given the Parties' dispute over whether the 140 U.S. Bank Direct Loans identified on Exhibit E are "Active Loans" for purposes of the Settlement Agreement. Defendants contend that the 140 U.S. Bank Direct Loans listed on the schedule attached as Exhibit E are "Active Loans" for purposes of the Settlement Agreement. Plaintiffs dispute Defendants' assertion. The final payments of the amounts to which these Class Members are entitled have been put on hold pending the Court's resolution of this issue.

The payment histories that Defendants provided for the 140 U.S. Bank Direct Loans pursuant to the Settlement stated that the "total" or "current principal balance" for each of the 140 loans was "0.00" and/or that the loans were not "still active" at the time of the Settlement on June 1-2, 2011. (Ex. H-1) These payment histories stand in stark contrast to those produced for the 52 unpaid U.S. Bank Direct Loans that admittedly were "still active" at that time. (Ex. H-2)

Defendants have at no time offered Plaintiffs any proof to show that any of the 140 patently inactive loans were "still active" on June 1-2, 2011. All that Defendants offer is the December 27, 2012 e-mail reflecting Defendants' unilateral and opportunistic attempt to reverse and reclaim the amounts that they had previously charged and/or written off in an unjust ploy to reduce and in many instances eliminate entirely the settlement payments to be made to the Class Members who obtained those 140 U.S. Bank Direct Loans. (Ex. O-1 to O-4) The Court should not condone such tactics. Defendants' position is contrary to the Settlement and Judgment and should be rejected as such.

Defendants and the Named Plaintiffs have agreed that the issue over whether the 140 loans listed on Exhibit E are "Active Loans" for purposes of the Settlement Agreement is in dispute and in need of judicial determination. The Court should now make that determination and hold Defendants to their word and enforce the Agreement such that only those U.S. Bank Direct Loans that the Parties identified and agreed to be the "current" or "active" U.S. Bank Direct Loans at the time of the Settlement on June 1-2, 2011 are the only loans for which an offset of unpaid principal can be made. The Settlement Agreement does not permit the deductions for indebtedness that was previously written off by Defendants in connection with the loans identified on Exhibit E.[5]

B. In the Alternative, the Named Plaintiffs Request Relief from the Judgment Pursuant to Mo. Rule 74.06(b)(3) on Behalf of the U.S. Bank Direct Loans Settlement Class Members Identified on Exhibit E.

If the Court for whatever reason declares that the U.S. Bank Direct Loans Settlement Class Members identified on Exhibit E do have an "Active Loan" for purposes of the Settlement,

[5] The credit and offset that Defendants seek to take from the resurrected debt will no doubt come as a complete surprise to the participating Class Members, most of whom have filed for bankruptcy and/or whose homes were the subject of foreclosure proceedings.

which Plaintiffs deny, then the Court should vacate the Judgment solely as to those Class Members on the grounds that the inclusion of the definition of "Active Loan" occurred through the fraud, misrepresentation or other misconduct of Defendants, their agents and employees. Defendants, fraudulently and with the intent to deceive, suggested the inclusion of language in order to cause the written settlement agreement to vary from the real understanding of the Parties knowing that the Named Plaintiffs were unaware of Defendants' fraud, failures to disclose and other deceptions. The definition of "Active Loan," as Defendants are attempting to construe it, would enable Defendants to treat as an "Active Loan" a loan that had been "inactive" for any number of years. (Ex. E) The subject loans were not being paid or actively collected as of June 1-2, 2011 and/or were loans that had been previously charged and/or written off and had a stated "total" or "current principal balance" of $0.00,. Defendants' misconduct is substantiated by Defendants' repeated failures to disclose to Plaintiffs and the Court that the Settlement as represented to the Court and the Settlement Class would not hold true for the Class Members identified on Exhibit E.

Vacating the Judgment as to the U.S. Bank Direct Loans Settlement Class Members identified on Exhibit E would be proper pursuant to Mo. Rule 74.06(b)(3) since, as detailed above, the failure of the Settlement Agreement to accord real understanding that the Parties reached on June 1-2, 2011 was due to the fraud, misrepresentations or other misconduct of Defendants, their agents and employees. Defendants failed to disclose and/or misrepresented material facts knowing that the Named Plaintiffs and the Settlement Class, through Counsel, were acting in reliance on Defendants' disclosures and conduct in accepting the Settlement and opting to participate in the Settlement instead of opting out. Defendants also knew that their fraud would cause a delay in payment and additional unexpected injury to those Class Members

who found their Claim Amounts reduced by principal amounts that had long ago been written off and/or which Defendants had not been actively collecting. Plaintiffs were not aware of the defective interpretation that Defendants were attempting to give to the definition of "Active Loan" until December 27, 2012, when Defendants advised Plaintiffs by e-mail that the Aggregate Valid Claim Cash Amount was "$45,623,655.83," a sum $4,792,722.94 less than the $50,416,378.77 "amount" that the Court was told at the Fairness Hearing would be "paid" and "distributed" to the Class. Only then did Plaintiffs become aware of the subtle distinction that Defendants were apparently plotting to give to the written agreement though their proffered definition of "Active Loan." Plaintiffs would not have executed the written Settlement Agreement had they known that Defendants intended to construe the definition so as to reverse and reclaim the amounts that they had previously charged or written off in an unjust attempt to reduce and in many instances eliminate entirely the settlement payments to be made to the Class Members who obtained these 140 U.S. Bank Direct Loans. Under such circumstances, an Order vacating the Judgment as to the U.S. Bank Direct Loans Settlement Class Members identified on Exhibit E would be proper pursuant to Mo. Rule 74.06(b)(3). *See* Mo. Rule 74.06(b) (court may relieve "a party or his legal representative from a final judgment or order for … fraud … misrepresentation, or other misconduct of an adverse party"); *cf. Hewlett v. Hewlett*, 845 S.W.2d 717 (Mo. App. 1993) (affirming trial court's decision to vacate judgment because one party misrepresented his true net worth).[6]

[6] Once the Judgment is vacated as to any Class Members deemed to have an "Active Loan," those Class Members will seek to reform the underlying Settlement Agreement and/or sue Defendants for fraudulent misrepresentation and the recovery of actual and punitive damages, given the fraudulent conduct here. Such relief will likely be sought by means of a class action.

C. In the Alternative, the Named Plaintiffs Request Relief from the Judgment Pursuant to Mo. Rule 74.06(b)(2) on Behalf of the U.S. Bank Direct Loans Settlement Class Members Identified on Exhibit E.

Plaintiffs additionally submit in the alternative that if the Court declares that the U.S. Bank Direct Loans Settlement Class Members identified on Exhibit E have an "Active Loan" for purposes of the Settlement, which Plaintiffs deny, then the Court should vacate the Judgment solely as to those Class Members on the grounds that the Settlement Agreement, when reduced to writing, failed to accord with the real understanding of the Parties as reached on June 1-2, 2011. Vacating the Judgment as to the U.S. Bank Direct Loans Settlement Class Members identified on Exhibit E would be proper pursuant to Mo. Rule 74.06(b)(2) since, as detailed above, the real understanding that the Parties reached on June 1-2, 2011 is reflected on the Terms Sheet attached as Exhibit A, which, among other things, memorialize the "essential term" to treat as an "Active Loan" only those U.S. Bank Direct Loans that were then "still active" (i.e., the loans on which a borrower was still being billed and making payments such that there would be enough of a recovery to generate a settlement payment well in excess of what was left of the principal).

The failure of the Settlement Agreement to accord with the real understanding of the parties was thus due to mutual mistake, inadvertence or surprise, specifically an unconscious ignorance or oversight by the Parties at and before execution of the Settlement Agreement of a matter that was essential to the Settlement. The Named Plaintiffs discovered the Parties' misunderstanding and defect in the Settlement Agreement in early 2013. By e-mails dated January 7, January 28, and February 14, 2013, the Named Plaintiffs notified Defendants, through counsel, that the Named Plaintiffs did not agree with Defendants' characterization of the 140 loans listed on Exhibit E as Active Loans. (Ex. O-1, O-2, O-3) Plaintiffs further requested

Defendants to provide Plaintiffs with the support for their decision to treat as "active" loans that were patently inactive, as shown on Defendants' payment histories. (Id.) Defendants' response was lacking. (Ex. O-4) Under circumstances such as these, an Order vacating the Judgment as to the U.S. Bank Direct Loans Settlement Class Members identified on Exhibit E would be both appropriate and warranted pursuant to Mo. Rule 74.06(b)(1). *See* Mo. Rule 74.06(b)(1) (court may relieve "a party or his legal representative from a final judgment or order for … mistake, inadvertence, surprise or excusable neglect"); *Cf. Snead by Snead v. Cordes by Golding*, 811 S.W.2d 391, 395 (Mo. App. 1991) (vacating judgment approving settlement due to mistake or inadvertence of the parties); *In re Marriage of Breyley*, 247 Ill.App.3d 486, 491-92 (Ill. App. 1993) (judgment approving agreement vacated due to mistake of fact).

D. In the Alternative, the Named Plaintiffs Request Relief from the Judgment Pursuant to Mo. Rule 74.06(b)(5) on Behalf of the U.S. Bank Direct Loans Settlement Class Members Identified on Exhibit E.

An Order vacating the Judgment as to the Settlement Class Members identified on Exhibit E would also be proper pursuant to Mo. Rule 74.06(b)(5) based on the above facts. Given the inequitable results of Defendants' conduct, the enforcement of the Judgment against the U.S. Bank Direct Loans Settlement Class Members identified on Exhibit E as Defendants suggest would be unjust and inequitable and unjustifiably penalize those Direct Loans Settlement Class Members in ways that neither the Named Plaintiffs nor Defendants nor the Court intended.

The Court should enforce the Agreement as originally intended and memorialized in the Essential Terms. (Ex. A) The Court should not allow Defendants to take a position that is inconsistent with those terms for a number of reasons as explained above including the following:

a. On numerous occasions, Defendants led the Named Plaintiffs to believe that an "Active Loan" within the meaning of the U.S. Bank Direct Loans

Settlement Agreement was consistent with the Terms Sheet and meant only those U.S. Bank Direct Loans on which the obligors were actively paying and that the Defendants were actively collecting as of June 1-2, 2011 (the "current" or "active" loans).

b. Until December 27, 2012, Defendants' communications with the Named Plaintiffs and the loan listings that Defendants provided pursuant to the Terms Sheet had singularly and unconditionally confirmed that the number of U.S. Bank Direct Loans that were "still active" at the time of the Settlement on June 1-2, 2011 was minimal (i.e., 74, which was later pared down to 52).

d. From and after June 1-2, 2011, when the Settlement was reached, until December 27, 2012, when Defendants delivered to Plaintiffs the list of loans they deemed to be "Active Loans," neither Defendants nor Defendants' authorized agents or employees notified Plaintiffs that Defendants intended to construe Section 2.1 such that the principal indebtedness "deemed paid and satisfied" pursuant to the Settlement would be the amounts that Defendants had long ago charged or written off or ceased to actively collect.

e. At no point after June 1-2, 2011, when the Settlement was reached, until December 27, 2012, when Defendants delivered to Plaintiffs the list of loans they deemed to be "Active Loans," did Defendants or their authorized agents or employees attempt to notify the Court or the Class that that Defendants intended to construe Section 2.1 such that the principal indebtedness "deemed paid and satisfied" pursuant to the Settlement would be the amounts that Defendants had long ago charged or written off and/or ceased to actively collect.

f. From and after June 1-2, 2011, when the Settlement was reached, until December 27, 2012, when Defendants delivered to the Named Plaintiffs the list of loans they deemed to be "Active Loans," Defendants' acts and conduct and dealings and transactions with the Named Plaintiffs in connection with the Settlement Agreement were calculated so as to, and did in fact, lead the Named Plaintiffs to believe that the definition of "Active Loans" covered only those U.S. Bank Direct Loans that were "still active" as of the Settlement on June 1-2, 2011, as intended and agreed to in the written Terms Sheet.

Given these circumstances, Plaintiffs alternatively assert that an Order vacating the Judgment as to the U.S. Bank Direct Loans Settlement Class Members identified on Exhibit E pursuant to Mo. Rule 74.06(b)(5) would be proper. *See* Mo. Rule 74.06(b)(5) (court may relieve

"a party or his legal representative from a final judgment or order … [if] it is no longer equitable that the judgment remain in force"); *cf. Everhart v. Crabb*, 775 S.W.2d 335 (Mo. App. 1989) (judgment approving a general release vacated because it was no longer equitable for it to remain in force).

CONCLUSION

For the foregoing reasons, the Court should enter an Order enforcing the Settlement Agreement and Judgment entered in this action on November 16, 2012 to hold that none of the 140 U.S. Bank Direct Loans identified on Exhibit E attached hereto is an "Active Loan" for purposes of the Settlement and Judgment. In the alternative, the Court should hold that if for whatever reason the Court declares that any of the U.S. Bank Direct Loans identified on Exhibit E are "Active Loans," which Plaintiffs deny, then the Court should vacate the Judgment solely as to the Class Members who have such "Active Loans" pursuant to Mo. Rule 74.06(b)(2), (1) or (5) on the grounds that the Settlement Agreement, when reduced to writing, does not accord with the real understanding and Settlement of the Parties as reached on June 1-2, 2011 due to fraud, misrepresentation and other misconduct by Defendants, or because of mutual mistake, inadvertence or surprise, and/or because the Judgment would be "no longer equitable" as to any of the Class Members entitled to recover on the 140 contested loans. The Named Plaintiffs additionally request that the Court awarding Plaintiffs reasonable attorney's fees and expenses, plus any additional court costs incurred, together with such other relief as the Court deems just and proper under the circumstances.

Dated: November 13, 2013

Respectfully submitted,

WALTERS BENDER STROHBEHN
& VAUGHAN, P.C.

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ATTORNEYS FOR PLAINTIFFS/
COUNSEL FOR THE CLASS

VERIFICATION

R. Frederick Walters, Counsel for Plaintiffs and the Settlement Class, being first duly sworn upon his oath, deposes and says:

1. My name is R. Frederick Walters. I am over 18 years of age and competent to make this verification.

2. I am Class Counsel and the lead attorney of record for the Named Plaintiffs in this action and in each of the Missouri Cases. I was personally involved with the class settlement at issue.

3. I, and persons under my direction, have personally reviewed all of the information and documents described in *Plaintiffs' Motion to Enforce Settlement Agreement and Judgment with Suggestions in Support* and have analyzed the same for purposes of this case.

4. Each of the documents submitted with *Plaintiffs' Motion to Enforce Settlement Agreement and Judgment with Suggestions in Support* is a true and accurate copy of what it is described to be.

5. Each of the facts set forth above is true and correct and is based on my personal knowledge, my personal review and analysis of the documents submitted with *Plaintiffs' Motion to Enforce Settlement Agreement and Judgment with Suggestions in Support*, and/or on the knowledge of the legal assistants who reviewed and compiled information under my direction.

Dated: 11/13/2013

Roy Frederick Walters

Roy Frederick Walters

COUNTY OF JACKSON)
) ss.
STATE OF MISSOURI)

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this 13th day of November 2013.

Joanne M Haake
Notary Public

My Commission Expires: 4/29/2016

CERTIFICATE OF SERVICE

The undersigned certifies that on this 13th day of November, 2013 this document was filed electronically with the Circuit Court of Jackson County, Missouri using the Missouri Courts e-Filing System, with notice of case activity to be generated and sent electronically by the Clerk to all designated persons and a copy sent via electronic mail to the following individuals who are not designated to receive electronic notice from the Court:

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