IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONNA MOORE, FRENCHOLA HOLDEN and KEITH MCMILLON, individually and on behalf of all others similarly situated, Plaintiffs, v. GMAC MORTGAGE, LLC, GMAC BANK and CAP RE OF VERMONT, INC., Defendants.	Civil Action No. 2:07-cv-04296-PD

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF PLAN OF ALLOCATION, APPOINTMENT OF CLASS REPRESENTATIVES, AND APPOINTMENT OF LEAD CLASS COUNSEL AND CLASS COUNSEL

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Plaintiffs Donna Moore, Frenchola Holden and Keith McMillon (collectively, "Plaintiffs" or "Named Plaintiffs"), on behalf of themselves and all others similarly situated, respectfully submit this memorandum of law in support of their unopposed motion for an order: (i) granting final approval of a class action Settlement Agreement (the "Settlement Agreement" or "Settlement");[1] (ii) certification of Settlement Class; (iii) approval of the proposed Plan of Allocation; (iv) appointing Class representatives; and (v) appointment of Lead Class Counsel and Class Counsel.[2] The Court preliminarily approved the Settlement, and preliminarily certified the Settlement Class, on April 29, 2014, Dkt. No. 283 (the "Preliminary Approval Order").[3]

I. INTRODUCTION

The Parties have reached a proposed Settlement of this case brought pursuant to sections 8(a) and (b) of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2607(a) and (b) ("RESPA"), in the form of a cash payment by Cap Re in the amount of Six Million Two Hundred Fifty Thousand Dollars ($6,250,000.00) (the "Settlement Fund") to the Class. The proposed Settlement follows nearly seven years of hotly contested litigation challenging Defendants' captive reinsurance arrangements.

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[1] The terms of the Settlement are set forth in the Settlement Agreement which was previously filed with the Court on January 24, 2014. *See* Dkt. No. 272-3. The Settlement Agreement is also attached as Exhibit 1 to the Declaration of Edward W. Ciolko in Support of Plaintiffs' Unopposed Motions for Final Approval of Class Action Settlement, Certification of Settlement Class, Approval of Plan of Allocation, Appointment of Class Representatives and Appointment of Lead Class Counsel and Class Counsel, and for an Award of Attorneys' Fees, Reimbursement of Litigation Costs and Case Contribution Awards for the Named Plaintiffs (the "Ciolko Declaration" or "Ciolko Decl."), which further discusses the extensive efforts of Class Counsel in obtaining this Settlement. All capitalized terms not defined herein are defined in the Settlement Agreement.

[2] "Class Counsel" means Lead Class Counsel Kessler Topaz Meltzer & Check, LLP ("KTMC"), together with Bramson, Plutzik, Mahler & Birkhaeuser, LLP ("BPMB"), Berke, Berke & Berke ("BBB"), and Travis & Calhoun, P.C. ("TC").

[3] Plaintiffs file this memorandum along with their Memorandum in Support of their Unopposed Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards for the Named Plaintiffs (the "Fee Memorandum"), filed contemporaneously herewith and incorporated in full herein.

The road here was difficult – right up to the bitter end (*i.e.* – this week). Throughout the litigation, Defendants raised a host of legal and factual defenses, some of which, if successful, could have either ended Plaintiffs' case entirely or significantly reduced the potential recovery. The Parties agreed to the proposed Settlement only after arm's-length negotiations by experienced counsel on both sides through mediation that spanned many sessions over several years.[4] Obtaining a settlement amount mutually satisfactory to the Parties was made all the more difficult because ultimately there were very limited funds available for a settlement. In particular, the settlement was achieved against the backdrop of and subject to the substantial risks and hurdles created by the Chapter 11 bankruptcy cases of Residential Capital, LLC, Defendant GMAC Mortgage and certain of their affiliates which were pending in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), jointly administered and styled *In re Residential Capital, LLC*, No. 12-12020-MG (S.D.N.Y. Bank.) (the "ResCap Bankruptcy Proceedings").

The ResCap Bankruptcy Proceedings were filed during the pendency of the litigation. As a result of the bankruptcy and the plan of liquidation ultimately presented to the Bankruptcy Court for approval, the only non-debtor Defendant remaining at the time of settlement was Cap Re.[5] While Ally Bank (formerly known as GMAC Bank) was also a non-debtor Defendant, it was clear that the $2.1 billion contribution being made by Ally Financial, Inc. ("AFI") on behalf of all AFI entities to obtain a release from all claims by the debtors and third parties was ultimately going to be approved by the Bankruptcy Court. Indeed, Cap Re was also a beneficiary of that release but was carved out solely by virtue of the Settlement that is before the Court for

[4] The Hon. Edward N. Cahn (Ret.), the neutral mediator under whose auspices mediation sessions in this Action took place, will be submitting a letter in support of this Settlement.

[5] Cap Re, as an individual indirect subsidiary of Residential Capital, LLC, did not file for Chapter 11

final approval. Only the Plaintiffs in this litigation received the benefit of that carve-out. Moreover, because no insurance policies were available to cover litigation costs and/or settlement, this Settlement is being funded exclusively by Cap Re, pursuant to terms expressly negotiated by Plaintiffs, Lead Class Counsel and bankruptcy counsel for inclusion in the *Chapter 11 Plan Proposed by Residential Capital, LLC et. al. and the Official Committee of Unsecured Creditors* (the "Chapter 11 Plan") and approved by the Bankruptcy Court.[6]

The Settlement provides a recovery to borrowers on each of 122,963 Reinsured Loans[7] included in the challenged reinsurance arrangements on a *pro rata* basis. In filing for preliminary approval of the Settlement, Plaintiffs estimated the number of Reinsured Loans (and hence number of Class Members) to be around 66,000 based on information/discovery obtained during the litigation, including during settlement negotiations.[8] Once the discrepancy between the class size estimate at the time of preliminary approval and the actual class size ascertained in preparing the Class Member List came to light, the Parties met and conferred regarding the discrepancy, ultimately resolving all issues related to the number of Reinsured Loans. In particular, the additional number of Class Members are a result of the inclusion of individuals who Defendants would assert did not meet RESPA's one year statute of limitations and are not entitled to "equitable tolling," *i.e.*, Defendants would assert their claims are untimely if litigation were to continue. Class Counsel was aware that the addition of "equitable tolling" Class

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relief.

[6] As described in greater detail below in the discussion of the ResCap Bankruptcy Proceedings, because Cap Re was a non-debtor affiliate of the bankrupt entities, including GMAC Mortgage and of AFI, its assets and the disposition thereof ultimately were addressed in the Chapter 11 Plan and subject to the approval of the bankruptcy court.

[7] For purposes of distributing the Settlement Fund, a Class Member is a person or persons "obligated on a Reinsured Loan," *see* Settlement Agreement, ¶ 1.6, but, the Class ***size*** – *i.e.* the "number" of individual payments to ultimately be made to the Class – is determined by the number of Reinsured Loans.

[8] In preparing the Class Member List Defendants ascertained the exact number of Reinsured Loans. *See*

Members would likely increase the ultimate size of the class – but the ultimate number was a bit larger than envisioned. Indeed, Plaintiffs' request for additional time to file the final approval briefs was predicated on a potential material disagreement with Defendants regarding the contours of the ultimate Class size and related aspects of the terms of the Settlement. Plaintiffs' concerns have been addressed and they can confirm that, even given the enlarged Class – indeed in part because these folks were included – this remains an excellent result. Plaintiffs wish to thank Defendants and their counsel – local, bankruptcy and primary – for their provision of additional information and openness to meet and confer on these important matters.

To reiterate, it is Class Counsel's judgment here that despite having Reinsured Loan numbers a bit higher than estimated at first, the proposed Settlement is fair, reasonable, adequate, and in the best interest of the Class, as it provides for an immediate and meaningful recovery. Indeed, Class Counsel has attempted to negotiate for inclusion of the "equitable tolling" members of the class in every PMI reinsurance kickback case settlement, sometimes successfully, sometimes unsuccessfully. *See Liguori, et al. v. Wells Fargo Bank, N.A.*, et al, No. 08-cv-00479, Dkt. No. 186, Final Approval Order (E.D. Pa. February 7, 2013) ("*Ligouri* Final Approval Order") (only "timely" – under RESPA's statute of limations – portions of the proposed litigation class received a benefit). The fact that Class Counsel was able to do so successfully here is a matter of pride, and allows the greatest amount of Class Members to benefit from the Settlement. This achievement is underscored by the fact that an appeal of a denial of equitable tolling in a directly analogous case is currently on appeal to the Third Circuit in *Riddle v. Bank of America Corp.*, No. 12-cv-01740 (E.D. Pa.). Further, given the costs and uncertainties involved in gathering class data from various and sundry sources, some bankrupt,

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Declaration of Todd Underhill, attached to Ciolko Declaration as Exhibit 10.

as set forth in the declration of Todd Underhill and given the amount to be received by each claimaint, Class Counsel believed the fairest approach to allocation of proceeds would be *pro rata*. A similar *pro rata* distribution plan was approved in *Alexander v. Washington Mutual Inc.*, No 07-cv-4426, 2012 WL 6021098 (E.D. Pa. Dec. 4, 2012) ("*Alexander* Final Approval Order").

As detailed below, Plaintiffs have fully complied with the terms of the Preliminary Approval Order, including with respect to providing notice of the Settlement to Class Members. After mailing 126,227 of the approved form of Class Notices to Class Members,[9] Class Counsel has to date received *no* objections to the proposed Settlement and only four opt-outs.[10] Accordingly, Plaintiff respectfully requests that this Court enter the proposed Final Approval Order granting final approval of the Settlement and Plan of Allocation and certifying the Settlement Class, appointment of Class Representatives and Lead Class Counsel and Class Counsel.

II. BACKGROUND

A. Description of Plaintiffs' Claims

In this Action, Plaintiffs allege that Defendants violated Sections 8(a) and (b) of RESPA, 12 U.S.C. §§ 2607(a) and (b), by entering into "captive reinsurance arrangements" that Plaintiffs assert were a "sham." Pursuant to these agreements, GMAC Mortgage and Ally Bank (together,

[9] Of the 126,227 Class Notices mailed, 122,963 went to addresses on the "master" Reinsured Loan record and an additional 3,264 were mailed as the result of a different co-borrower address. *See* Affidavit of GCG (defined below) at ¶ 7.

[10] The deadline for objecting to and opting out of the Settlement has not yet elapsed. The Preliminary Approval Order gave Class Members until August 12, 2014 to file objections or opt out of the Settlement. Per the request of Class Counsel, the Court entered an order providing Class Members up until the date of the Final Approval Hearing (September 17, 2014) to object to the Settlement. *See* Dkt. No. 289. To the extent objections are filed prior to the Final Approval Hearing, Class Counsel will address them in a supplemental brief in advance of the Final Approval Hearing.

"GMAC") agreed to refer its mortgage insurance ("MI") business to MI providers[11] in exchange for the MI providers' agreements to purchase purported reinsurance from GMAC's captive reinsurer, Cap Re. Thus, in exchange for the referral of a guaranteed stream of business, the MI Providers funneled a portion of Class Members' MI premiums (up to 40% of each Class Member's MI premium) to Cap Re in the form of ceded "reinsurance" premiums. Plaintiffs allege that these ceded premiums were, in reality, kickbacks paid by the MI Providers to GMAC, in violation of RESPA sections 8(a) and (b), in exchange for the referral of a guaranteed stream of MI business because Cap Re did not provide real reinsurance to the MI Providers.

More specifically, RESPA section 8(a) of RESPA, 12 U.S.C. § 2607(a), prohibits lenders such as GMAC from accepting kickbacks or referral fees from any person providing a real estate settlement service, including providers of MI. Similarly, section 8(b) of RESPA, 12 U.S.C. § 2607(b), prohibits lenders from accepting any portion of a settlement service fee — including amounts paid by borrowers for MI — other than for services actually performed. Plaintiffs allege that the captive reinsurance arrangements between GMAC, Cap Re and the MI Providers violate Section 8 of RESPA because, rather than involving the provision of real "reinsurance" services, the arrangements are simply vehicles for unlawfully compensating GMAC for referring business to the MI Providers.[12]

The United States Department of Housing and Urban Development ("HUD") addressed

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[11] The MI providers with whom Cap Re entered into contracts to provide reinsurance under the captive reinsurance arrangements at issue in this lawsuit are: (1) Genworth Mortgage Insurance Corp.; (2) Mortgage Guaranty Insurance Corp.; (3) PMI Mortgage Insurance Co.; (4) Radian Guaranty Inc.; (5) Republic Mortgage Insurance Co.; (6) Triad Guaranty Insurance Corp.; and (7) United Guaranty Residential Insurance Co.

[12] Lead Class Counsel KTMC recently settled three similar actions involving virtually identical claims. *See Alexander* Final Approval Order, *Liguori* Final Approval Order, and *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508, Dkt. No. 149, Final Approval Order (E.D. Pa. July 29, 2011) ("*Alston* Final Approval Order").

the potential for captive reinsurance arrangements to violate RESPA in an August 6, 1997 letter to the General Counsel of Countrywide Funding Corporation in response to a request to clarify "the applicability of Section 8 of [RESPA] to captive reinsurance programs" (the "HUD Letter"). HUD set forth the analyses that it would apply in scrutinizing such arrangements, and concluded that they are permissible under RESPA ***only if*** the payments to the reinsurer: (1) are for reinsurance services "actually furnished or for services performed;" and (2) are *bona fide* compensation that does not exceed the value of such services. Plaintiffs allege that Defendants' captive reinsurance arrangements fail both prongs of this test.

Plaintiffs and every member of the class they sought to represent, obtained residential home loans originated or acquired by GMAC and were required by GMAC to purchase MI because they had made a down payment of less than twenty percent (20%) of the purchase price of their home. Plaintiffs allege that GMAC referred them and the other borrowers required to purchase MI to MI Providers that had agreed to "reinsure" the MI policies purchased with Defendant Cap Re, GMAC's captive reinsurance affiliate. Plaintiffs further allege that Defendants set up this "captive reinsurance" arrangement to facilitate the collection of tens of millions of dollars in kickbacks/unearned settlement service fees from MI providers to whom GMAC referred their business. That is, Plaintiffs alleged, Cap Re assumed no, or very little, actual risk of loss under its reinsurance contracts with the participating MI Providers and, even if some risk was transferred, it was not commensurate with the MI premiums ceded by MI Providers to Cap Re. Plaintiffs allege that this practice enabled Defendants to receive unearned portions and/or splits of the MI premiums paid by Plaintiffs and Class Members to the MI Providers and eliminated competition among the participating MI Providers to whom GMAC referred business on a rotating basis to the detriment of consumers.

Defendants deny all allegations of wrongdoing and have asserted numerous defenses to both liability and class certification. Defendants contend that Cap Re provided *bona fide* reinsurance services—as evidenced, according to Defendants, by the payment of actual losses and the projections of future "losses" under the reinsurance contracts. GMAC contends that Cap Re has incurred several hundreds of millions of dollars of actual and projected losses. Nevertheless, Defendants desire to settle all claims that are asserted in this case against them for the purpose of avoiding the burden, expense, and uncertainty of continued litigation.

B. Procedural History

The Parties vigorously litigated this matter starting before the transfer of the case to the Eastern District of Pennsylvania from the Northern District of California, and continuing through contested class certification proceedings, a contentious discovery process, two stays, and the ResCap Bankruptcy Proceedings.

1. Pre-ResCap Bankruptcy Proceedings

The District Court for the Northern District of California transferred this case to the Eastern District of Pennsylvania on October 12, 2007, on the Parties' stipulation.[13] Each Defendant promptly filed motions to dismiss the First Amended Complaint ("FAC"). Plaintiff Moore opposed those motions, which were fully briefed by December 21, 2007.[14] On March 4, 2008, this Court denied Defendants' motions to dismiss. Defendants filed answers to the FAC

[13] The original action, *Badesha, et al. v. GMAC, LLC, et al.*, No. 06-cv-07817 (N.D. Cal.) ("*Badesha*"), was transferred to the Eastern District of Pennsylvania when Plaintiffs Badesha, Folmar, and Garret were dismissed. The District Court for the Northern District of California (Magistrate Judge Joseph Spero) determined that Plaintiff Moore, the sole remaining plaintiff, did not have standing to litigate the case in California since the reinsured property at the heart of the litigation was located in Pennsylvania. *See* September 25, 2007 Stipulation re Transfer to the Eastern District of Pennsylvania in *Badesha* (Dkt. No. 62).

[14] At this juncture, there was only one Plaintiff, Donna Moore. Subsequently, following the filing of the Third Amended Complaint ("TAC"), there were three plaintiffs. As such, the term "Plaintiffs" as used herein refers to Donna Moore, Frenchola Holden and Keith McMillon.

on March 19, 2008.

On May 13, 2008, Plaintiff sought leave to file a Second Amended Complaint ("SAC")[15] seeking to add Frenchola Holden as a Plaintiff so as to eliminate legal issues (raised by Defendants at the motion to dismiss phase), which Plaintiffs anticipated would arise at class certification, and to eliminate allegations relating to former plaintiffs who had been dismissed from the action, either in California before the case was transferred, or pursuant to stipulation in this Court. Plaintiffs chose to amend the complaint prior to the class certification briefing scheduled by this Court to streamline the proceedings. Defendants opposed Plaintiffs' proposed amendment arguing that it would delay the proceedings. On May 22, 2008, this Court granted Plaintiffs' motion to amend the complaint and entered a scheduling order establishing deadlines for class certification briefing. Plaintiffs filed the SAC on May 27, 2008. Defendants filed their answers on June 3, 2008.

Plaintiffs filed their first motion for class certification on July 1, 2008. Defendants opposed Plaintiffs' motion on July 22, 2008, and Plaintiffs filed their reply on August 14, 2008. Shortly thereafter, Defendants sought leave, and were granted leave to file a Sur-Reply. The Court scheduled the motion for class certification hearing for September 23, 2008.

While this Action was proceeding before this Court, several analogous actions, arguing similar claims against other lenders and their captive reinsurers were working their way through the Eastern District of Pennsylvania. In two of these cases, *Alston* and *Alexander*, the presiding courts determined that the plaintiffs in those actions did not have standing to proceed with their RESPA claims. The standing issue involved whether a RESPA plaintiff must prove that he or

[15] While this was the first amendment on this docket (Plaintiffs had filed a First Amended Complaint in the Northern District of California) Plaintiffs opted to title this as a Second Amended Complaint in order to avoid confusion.

she was overcharged in order to establish Article III standing. A related issue was whether a plaintiff could make such an allegation in light of the filed rate doctrine, which provides that a rate filed with and approved by a governing regulatory agency is unassailable in judicial proceedings brought by ratepayers.

On August 4, 2008, the district court in *Alexander* entered an order certifying for interlocutory appeal the issue of whether plaintiffs have standing to sue under RESPA. Because those claims and the standing issue were also before this Court, the Parties filed a stipulation requesting that this Action be stayed pending a decision by the Third Circuit on the interlocutory appeal. On September 22, 2008, this Court entered a stay of this action pending the Third Circuit's resolution of the 12 U.S.C. § 1292(b) petition and marked this matter administratively closed during appeal. The following day the Court denied, without prejudice, Plaintiffs' motion for class certification pending the *Alexander* appeal. Although the Third Circuit ultimately took up the appeal in the *Alexander* matter, the standing issue was resolved in the *Alston* matter.

The Third Circuit issued a decision in the analogous *Alston* case on October 28, 2009, which resolved the standing issue presented in *Alexander* in Plaintiffs' favor. *See Alston v. Countrywide Financial Corp.*, 585 F.3d 753 (3d Cir. 2009). Specifically, the Third Circuit held in *Alston* that plaintiffs had standing to pursue a RESPA claim as such claim was not barred by the filed rate doctrine. Accordingly, on January 14, 2010, this Court granted the Parties' joint request to remove the stay in this action and entered a scheduling order on February 2, 2010 providing for the re-submission of the earlier briefing on Plaintiffs' motion for class certification, setting deadlines for supplemental briefing and scheduling a hearing on Plaintiffs' motion for class certification. Dkt. Nos. 107, 110.

The Parties submitted supplemental class certification briefing on February 8, 2010 and the Court held a hearing on Plaintiffs' motion for class certification on March 2, 2010. At the class certification hearing the Court ordered that the Parties "engage in focused discovery...concerning the actual and projected loss information" submitted by Defendants. Dkt. No. 123. The Court then directed Plaintiffs to answer a basic question: whether Defendants provided real reinsurance to the MI providers given that they had begun to pay "claims" and forecast hundreds of millions of dollars in future "losses" from Cap Re -- that is, did the reinsurance arrangements actually transfer risk? These discovery efforts are described below in Section II.C.

Plaintiffs also sought leave, and were granted leave over Defendants' opposition, to file the Third Amended Complaint ("TAC") on October 27, 2010. The TAC did not make any substantive changes; Plaintiffs merely sought leave to add an additional named plaintiff to the existing case at this Court's suggestion given certain concerns it had about Plaintiff Holden's ability to represent the Class. The Court granted Plaintiffs' motion on November 24, 2010 and ordered the Parties to complete all discovery relating to the newly added named Plaintiff, Keith McMillon. Defendants each answered the TAC on March 21, 2011.

Plaintiffs filed a renewed motion for class certification on December 14, 2010, which also included extensive briefing regarding risk transfer pursuant to the Court's orders. While the briefing on Plaintiffs' motion for class certification was still underway, Defendants filed a motion for summary judgment. The Parties completed briefing on these two motions on April 11, 2011. Plaintiffs also continued to update the Court, filing supplemental authority to inform it of pertinent holdings that were published after the completion of the Court ordered briefing.

Once again, other events affected the course of this litigation. On August 17, 2011, this Court denied the pending motions without prejudice and stayed this action following the Supreme Court's grant of certiorari in the matter of *First American Financial Corp., et al. v. Denise P. Edwards*, No. 10-708, to review whether a RESPA claimant had Article III standing to bring a claim as the outcome of that case could impact Plaintiffs' RESPA claim. Ultimately, the Supreme Court did not consider the issue presented, but instead issued a one sentence opinion stating that the grant of certiorari was "improvidently granted." *See First American Financial Corp., et al. v. Denise P. Edwards*, No. 10-708 (U.S. June 28, 2012). As a result of the Supreme Court's decision, the parties were back to the *status quo*. *Alston* was still the controlling law on the issue of Article III standing in the Third Circuit. Plaintiffs' claims were not affected by the result in *Edwards*.

While *Edwards* was pending before the Supreme Court, Defendant GMAC Mortgage filed a notice of bankruptcy which resulted in a further stay of this matter. Thus, after the *Edwards* issue was resolved, this case remained stayed due to the bankruptcy. At the time when the Parties agreed to the Settlement, the case was stayed and in suspense. *See* Dkt Nos. 226, 227, 268.

2. ResCap Bankruptcy Proceedings

The commencement of the ResCap Bankruptcy Proceedings stayed the continued progress of proceedings in this Action as to certain defendants and materially impacted the progress of this Action against the non-debtor Defendants. As a result, the Parties were required to divert considerable energy to the bankruptcy related issues before Plaintiffs could move forward with their claims. This prong of the litigation took on a life of its own:

i. On May 14, 2012 (the "Petition Date"), Residential Capital, LLC, GMAC Mortgage and several of their affiliates (collectively, the "Debtors"), not including Ally Bank or Cap Re, filed voluntary petitions for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") commencing Chapter 11 proceedings jointly administered under the case caption *In re Residential Capital, LLC*, Case No. 12-12020 (S.D.N.Y. Bank.).

ii. As of the Petition Date, the Debtors and their affiliates were the fifth largest servicer of residential mortgage loans in the United States. The Debtors faced billions of dollars of alleged liabilities asserted by diverse creditor constituents.

iii. On July 10, 2012, GMAC Mortgage filed its *Notice of Bankruptcy and Effect of the Automatic Stay* in this Action. Dkt. No. 229. This Action was automatically stayed as against GMAC Mortgage upon the commencement of the ResCap Bankruptcy Proceedings and was thereafter also effectively held in abeyance as against the non-debtor Defendants pending further developments in the ResCap Bankruptcy Proceedings. From that point forward, the intersection of the ResCap Bankruptcy Proceedings and this Action created numerous obstacles, issues and challenges that dramatically complicated Plaintiffs' pursuit of an appropriate remedy on behalf of the class.

iv. On November 16, 2012, the Plaintiffs filed a class proof of claim against Debtor GMAC Mortgage (Claim No. 5284) (the "Class Claim") on behalf of the putative class in the Action for damages resulting from the violations of RESPA alleged before this Court.

v. In an effort to avoid a likely litigation morass and recognizing the divergent interests of the numerous key stakeholders in the ResCap Bankruptcy

Proceedings, including the Official Committee of Unsecured Creditors (the "Committee"), the Debtors requested the appointment of a mediator to assist with plan negotiations on December 6, 2012. The Bankruptcy Court appointed the Hon. James M. Peck, then a sitting bankruptcy judge, as mediator.

vi. After months of bankruptcy-related mediation, in which Plaintiffs were not invited to participate, in May 2013, the mediation participants agreed on the terms of a global settlement ultimately embodied in a plan support agreement (the "PSA"). In July 2013, the Debtors and the Committee jointly filed a proposed Chapter 11 Plan, subsequently amended from time to time, (the "Plan") embodying the terms of the PSA which had been approved by the Bankruptcy Court. The essential features of the global settlement contained in the PSA and the Plan provided for: (i) among other consideration, AFI's payment of $2.1 billion, in exchange for, among other things, releases of any and all claims related to the Debtors against AFI and its non-Debtor affiliates (including Ally Bank and Cap Re, the two non-Debtor defendants in this Action); and (ii) the fixed allocation of proceeds available for distribution to specific creditor classes.

vii. Thus, the terms of the global settlement as reflected in the proposed Plan directly impacted the potential recoveries on the claims asserted in the Class Claim against GMAC Mortgage and before this Court against the non-debtor Defendants. Under the proposed Plan, claims against AFI and others, including Ally Bank and Cap Re, arising from or related to the Debtors would be released and prosecution of such claims would be enjoined. At the same time, Borrower claims arising from or relating to any alleged act or omission or any other basis of liability of any Debtor (or any

predecessor), including GMAC Mortgage, in connection with the origination, sale, and/or servicing of a mortgage loan originated, sold, consolidated, purchased, and/or serviced by any Debtor would be channeled into a Borrower Claims Trust[16] to be funded with approximately $57 million to be distributed *pro rata* among all holders of Allowed Borrower Claims. Approximately 3,000 Borrower Claims were filed against the Debtors asserting billions of dollars of alleged damages.

viii. Shortly after the PSA was approved and the Plan was filed, the Debtors proposed a four-month timeline for confirmation of the Plan. While the deadlines, although extremely challenging, complied with the requirements of the Bankruptcy Code, the timeframe for reaching a resolution or completing a trial on the numerous divergent confirmation issues was compressed.

ix. In light of the global settlement, including its contemplated releases and the fixed funds available to satisfy Borrower-related claims, it became apparent that absent a settlement of the Action, Plaintiffs would face innumerable obstacles to preserve, prove and ultimately collect on any judgment obtained on behalf of the Class. Most prominent among these hurdles was the fact that, under the proposed Plan, claims against Ally Bank and Cap Re would be released in exchange for, among other consideration, AFI's $2.1 billion contribution to the Debtors' estates to satisfy the tens of billions of dollars in alleged claims. Without a negotiated resolution, to preserve their claims against Ally Bank and Cap Re, Plaintiffs would be compelled to oppose confirmation of the Plan essentially negotiated between and supported by a nearly unanimous group of the largest creditors in the ResCap Bankruptcy Proceedings

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[16] Capitalized terms used in this Section II.B.2 referring to the ResCap Bankruptcy Proceedings but not defined in this section shall have the meaning ascribed to such terms in the Plan.

embodying a global settlement achieved under the auspices of a sitting United States Bankruptcy Judge as mediator. Given that the releases to Ally Bank and Cap Re were alleged to be granted in exchange for significant consideration, it would have been challenging at best to persuade the Bankruptcy Court that the releases were not justified, particularly where the releases to AFI, which included Ally Bank and Cap Re, were essential to and a condition for the global settlement and the $2.1 billion payment by AFI. In the absence of the releases, the global settlement would likely have unraveled, creating extreme uncertainty regarding the resolution of the ResCap Bankruptcy Proceedings.

x. Even if Plaintiffs were able to defeat just the releases to Cap Re by asserting that the consideration being provided by AFI should not be attributable to Cap Re, the litigation paths remaining against Cap Re and GMAC Mortgage were no less daunting. Under the Plan, the Plaintiffs' claims against GMAC Mortgage would be litigated by the Borrower Claims Trustee likely in the Bankruptcy Court. The timeline for litigation of such claims would be uncertain, but would likely be several years. Moreover, even if Plaintiffs ultimately succeeded on the merits and became entitled to a distribution from the Borrower Claims Trust, the recovery on that claim would be no more than a small percentage of the actual claim allowed.[17]

xi. As to the claims against Cap Re, if preserved under the scenario where Plaintiffs' challenge to the releases in favor of Cap Re succeeded, it would still have required years of litigation in this Court until a final judgment was obtained against Cap Re, if at all. Moreover, while the claims against Cap Re would likely proceed in this Court, the claims against GMAC Mortgage would likely proceed in the Bankruptcy

[17] In many Chapter 11 cases, the debtors segregate a fund for disputed claims and make distributions on allowed claims.

Court, causing tremendous judicial inefficiencies and exposing the litigants to the potential of inconsistent results. Given that Cap Re ceased "reinsuring" mortgage insurance in 2008 and was in the process of winding down, there were few assurances that at the end of the road, Cap Re would be a solvent entity from which recovery was possible.

xii. The multi-party negotiations that ultimately led to the execution of the Settlement Agreement on the eve of the confirmation hearing were arduous and complicated. However, upon the execution of the Settlement Agreement with the various protections for the Class contained therein, the Plan was confirmed by the Bankruptcy Court on December 11, 2013.

In sum, were it not for the Settlement now before this Court for final approval, the risks to the Class were daunting. First, the merits of the Action would have potentially been litigated in two separate courts, this Court and the Bankruptcy Court. And even if successfully litigated in the Bankruptcy Court, a fund capped at $57 million was created for the resolution of ***all borrower claims pursuant to the Plan of Liquidation***, which claims were alleged to be in the billions of dollars. Therefore, any judgment would have been subject to significant dilution by other allowed borrower claims absent a successful challenge to the size of that fund. Finally, the carve-out of Cap Re from the third party releases contained in the Plan of Liquidation was only negotiated for the benefit of this Class through the Settlement. Absent the Settlement, Plaintiffs would have been compelled to object to confirmation of the Plan of Liquidation despite the fact that the Plan was mediated through a then-sitting bankruptcy judge with the eventual overwhelming support of creditors representing all major creditor constituencies and billions of dollars in claims. Moreover, even if a challenge to the Cap Re release was successful, Cap Re

was in run-off and the Class would have been competing with other creditors of Cap Re for a dwindling asset pool even if Plaintiffs litigated successfully to judgment. If any one of these myriad of risks were not resolved favorably, the Class would have been faced with little or no recovery.

3. Post ResCap Bankruptcy Filing

Despite the pendency of the bankruptcy proceedings, Plaintiffs continued to advocate on behalf of the Class and to seek to protect assets that could be used to satisfy Plaintiffs' claims and provide them with some relief. Accordingly:

i. Plaintiffs filed a motion to vacate the stay of these proceedings with respect to the non-bankrupt Defendants. Dkt. No. 237. Subsequently, Plaintiffs filed a motion for Preliminary Injunction which asked this Court to prevent Cap Re, as a non-bankrupt defendant, from requesting or taking any funds from the reinsurance trusts. Dkt. No. 240. Plaintiffs believed that there would be over $66 million available to satisfy their claim and did not want those assets dissipated to the detriment of the Class.

ii. The Court denied both Plaintiffs' Motion to Vacate the Stay and the Motion for a Preliminary Injunction, without prejudice. Dkt. Nos. 251, 255.

iii. On October 25, 2013, Plaintiffs notified the Court that they had reached an agreement in principle to settle this case. On December 17, 2013, the Parties notified the Court that a settlement had been reached and that they had executed the Settlement Agreement.

v. On April 29, 2014 the Preliminary Approval Order was entered. Dkt. No. 283. Then on April 30, 2014 the Order was amended to change the opt-out deadline. Dkt. No. 284. Subsequently, per the request of Class Counsel, the Court changed the

objection deadline to September 17, 2014. *See* Dkt. No. 289.

C. Discovery Conducted

The Parties began active discovery after Defendants filed their answers to the SAC. *See supra* Section II.B.1. On January 17, 2008, Plaintiffs served Requests for Production of Documents on each of the Defendants and served third party subpoenas on the seven MI Providers that had entered into captive reinsurance agreements with Defendant Cap Re. Between the document requests served on the parties and third parties, Plaintiffs obtained and reviewed tens of thousands of pages of documents.

Setting the stage for future discovery, Defendants and the third-parties interposed many objections to Plaintiffs' requests which lead to one of many discovery disputes in this Action. Additionally, Triad, one of the MI providers, filed a motion to quash, which Plaintiffs opposed. Plaintiffs also served Interrogatories on all Defendants who, in turn, served Requests for Production of Documents on Plaintiffs. Plaintiffs noticed Rule 30(b)(6) depositions and Defendants' noticed the Plaintiffs' depositions. This pre-class certification discovery spawned several discovery disputes which required the Court's intervention. *See, e.g.*, July 15, 2008 Order regarding one such discovery dispute. Dkt. No. 79.

The Parties also engaged in class certification discovery focused on the Court's question as to whether Defendants' reinsurance arrangements actually transferred risk. To that end, Plaintiffs noticed and took several depositions, including depositions of Defendants' Rule 30(b)(6) witnesses, several third-parties, including the Defendants' actuary, and third-party MI providers. The Parties also engaged in extensive additional discovery including additional Requests for Production of Documents and Interrogatories and subpoenas to several third parties. This discovery was at times contentious and the Parties sought the Court's intervention on

several occasions to clarify and define the appropriate scope of discovery. The Parties also engaged experts in the field of reinsurance, accounting and risk transfer, and exchanged expert reports. Additionally, Plaintiffs deposed one of Defendants' experts. Further, the Parties fully briefed several motions to compel both in this Court and across the country with respect to the third-party subpoenas that were issued in this case. Plaintiffs Moore and Holden each also sat for a deposition lasting the better part of a day.

D. Settlement Negotiations

Settlement negotiations proceeded on two fronts, as part of the ResCap Bankruptcy Proceedings described above, and separately with respect to the portion of the case remaining in this Court.

1. Mediations Before Judge Cahn (Ret.)

The Parties first entered into formal negotiations to settle this matter in April 2010 with the assistance of the Honorable Judge Edward Cahn (Ret.), an experienced and highly respected mediator and arbitrator with extensive experience in high level litigation disputes, including some expertise with the issues raised in the Action. The mediation took place on April 8, 2010. During the course of the mediation, the Parties exchanged information and analyses regarding their respective settlement positions, including information regarding damages, as well as information about Defendants' current financial position. The Parties were not successful in reaching a settlement during the course of this mediation session.

Although the Parties did not resolve their dispute during the first mediation session, they continued to attempt to resolve this case through numerous telephone calls, emails and correspondence which resulted in the Parties' agreement to attend a second mediation. The Parties held this renewed mediation session on June 17, 2011, again under the auspices of Judge

Cahn. Both Plaintiffs and Defendants provided short supplemental letters to Judge Cahn to apprise him of what they believed were relevant facts and information that had come to light since they last met. While the mediation did not prove successful at this time, the Parties continued to discuss the possibility of settlement as they engaged in extensive discovery which allowed them to hone their arguments regarding settlement positions.

Further mediation sessions were held with Judge Cahn on November 29, 2012, January 14, 2013, and June 21, 2013. One issue, in particular, proved especially difficult to resolve. Defendants believed that borrowers whose loans were acquired by GMAC as correspondent loans should not be included in the class. Plaintiffs asserted that the correspondent loans were properly included as they were part of the reinsurance arrangements at issue and subject to the same improper kickbacks as non-correspondent loans. In the Settlement Agreement, Defendants agreed to include correspondent loans in the class for purposes of settlement.

2. Multi-Party Mediation

Against the backdrop of the bankruptcy and with the benefit of the previous attempts at mediation, it became clear that the complex and difficult issues attendant to the ResCap Bankruptcy Proceedings required a creative resolution of the Action. In the summer of 2013, Lead Class Counsel and bankruptcy counsel for the Plaintiffs and counsel for Defendants, as well as counsel to the Committee, became involved in the negotiation of the resolution of this Action outside of the mediations originally conducted before Judge Cahn.

The multi-party negotiations were extraordinarily difficult and made even more challenging because any settlement ultimately had to take into account the parameters of the global settlement embodied in the PSA and the Plan. In particular, the global settlement (i) fixed the amount of AFI's (which would include Ally Bank's) contribution, but did not allocate a

percentage of the contribution to any particular Borrower or non-Borrower-related claim, including the Class Claim, (ii) provided a full release to Ally Bank and Cap Re, (iii) channeled the Class Claim to a class under the Plan comprised of all Borrower claims and (iv) attempted to cap the distribution on account of all Borrower-related claims at approximately $57 million to be allocated among a very large pool of Borrower Claims.[18] At the same time, GMAC Mortgage was a liquidating debtor in Chapter 11 proposing only a partial payment on the dollar to its creditors, and Cap Re's prospects in the context of its wind down were uncertain.

On October 22, 2013, Plaintiffs, GMAC Mortgage and Cap Re executed an agreement in principle (the "AIP") providing for the settlement of the Action on the terms described herein, but subject to definitive documentation and, of course, Court approval. On October 25, 2013, counsel for Plaintiffs submitted a letter to the Court noting that the Parties had reached an agreement in principle to settle the instant Action. Dkt. No. 269. Over the course of the subsequent weeks, the Parties worked feverishly to document the agreement embodied in the AIP with the formal Settlement Agreement that is now before this Court. During the course of these negotiations, Ally Bank agreed to the terms of the proposed Settlement and became a signatory to the Settlement Agreement. Finally, on December 10, 2013, on the eve of final arguments on confirmation of the Plan, the Parties executed the Settlement Agreement. On December 11, 2013, the Plan, as amended, was confirmed, and on December 17, 2013, the Plan Effective Date occurred.[19] It should be noted that at the time final arguments on Plan confirmation took place, there were no remaining substantive objections to confirmation of the Plan.

[18] Approximately 3,000 of purported Borrower Claims were settled against the Debtor.

[19] *See* Order Confirming Second Amended Joint Chapter 11 Plan Proposal, ResCap Bankruptcy Proceedings, Chapter 11 Dkt. No. 6065.

The AIP addresses many of the logistical issues raised by the global settlement described above while still providing for a significant payment to the class similar in nature to other settlements of this type, even outside of the Chapter 11 context. In broad strokes, Plaintiffs, Debtor GMAC Mortgage and non-debtor Defendant Cap Re agreed that (i) Cap Re would fund the Settlement, (ii) the release of Cap Re under the Plan would not apply to the Action in the event this settlement is not approved by this Court, and (iii) protections would be built in to preclude Cap Re from transferring or diluting its assets outside of the ordinary course of business while the Parties sought approval of the Settlement.

Because the Settlement would be funded by a non-debtor, Plaintiffs would withdraw the Proof of Claim against Debtor GMAC Mortgage upon the execution of the Settlement Agreement. Finally, Ally Bank would retain the full benefit of the global releases established in the Plan. The Settlement was also conditioned on confirmation of the Plan by the Bankruptcy Court and the occurrence of the Effective Date of the Plan, both of which have now occurred. In light of the AIP, Plaintiffs refrained from filing a robust objection to the Plan, instead filing a short statement preserving their rights. *See* Chapter 11 Dkt. No. 5457.

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In sum, the Settlement was achieved through spirited, and at times arduous, arm's length negotiations and renegotiations. Given the extensive discovery, contentious litigation and multiple mediation sessions, the Parties had amassed sufficient information to allow them to assess the risks involved with continued litigation and the evidence which supported their respective positions. Plaintiffs believe that this Settlement represents a fair and reasonable compromise in light of the risks, costs and uncertainties of continued litigation, especially given

that this result was achieved in the context of the ResCap Bankruptcy Proceedings and the distinct possibility that Class Members would not receive any monetary payment.

III. TERMS OF THE PROPOSED SETTLEMENT

As indicated above, the terms of the proposed Settlement are set forth in the Settlement Agreement attached to the Ciolko Decl. as Exhibit 1. Below are the essential terms of the Settlement Agreement.

A. Prior to Final Approval

The Settlement Agreement set forth certain requirements to be satisfied prior to Final Approval. Each of these requirements have been satisfied as follows.

1. The Court preliminarily certified the following Class for settlement purposes only:

> All persons who obtained residential mortgage loans originated and/or acquired by GMAC Mortgage, Ally Bank, and/or their affiliates on or after January 1, 2004, with private mortgage insurance which was reinsured by Cap Re.

See Ciolko Decl. Ex. 1 § 1.4.

2. On May 2, 2014, Cap Re funded a Settlement Fund in the Settlement Amount of $6,250,000 (Six Million Two Hundred Fifty Thousand U.S. Dollars) for the benefit of the Class. *Id.* at § 3.1

3. Cap Re deposited the Settlement Amount in a Qualified Settlement Fund (the "Escrow Account") as set forth in §§ 3.1 and 3.3 of the Settlement Agreement. The Settlement Fund will be used to pay:

   (a) Settlement Payments to each Participating Class Member pursuant to Section IV of the Settlement Agreement;

   (b) Case Contribution Awards to Plaintiffs, not to exceed $5,000 each

as approved by the Court;

(c) Attorneys' fees and litigation costs of Class Counsel, as awarded by the Court;

(d) The fees and costs of the Settlement Administrator; and

(e) Any other Administrative Costs in connection with the implementation of the Agreement.

See Ciolko Decl. Ex. 1 § 4.1(e).

4. Each Class Member was mailed a Notice of Class Action Settlement (the "Class Notice")[20] in the form attached as Ex. A to the Affidavit of Jose Fraga, Senior Director of Operations for The Garden City Group, Inc. ("GCG Affidavit"). The Class Notice was mailed to Class Members on June 13, 2014, within forty-five (45) days after entry of the Preliminary Approval Order. Ciolko Decl. at § 1.20.

5. On June 13, 2014, the Class Notice was posted on a dedicated Settlement website, www.gmacpmisettlement.com, along with other documents related to the litigation, including the TAC, the Settlement Agreement with Exhibits, the Motion for Preliminary Approval and supporting papers, the Preliminary Approval Order, the [Proposed] Plan of Allocation and a list of frequently asked questions related to the Settlement. *Id.* at § 2.10

6. Lead Class Counsel retained the professional settlement administration firm of The Garden City Group, Inc. ("GCG") (the "Settlement Administrator") to mail the Class Notice and to perform other required Settlement administration services as set forth

[20] During the process of drafting the approved form of Class Notice, Lead Class Counsel consulted the Federal Judicial Center "Notice Checklist and Plain Language Guide 2010" (*see* Ciolko Decl. Ex. 8) to ensure the Class Notice is in compliance with their recommendations.

in the Settlement Agreement. *Id.* at § 1.29. The Class Notice informed Class Members that they could elect to opt-out of the Class and not be bound by the Agreement and the Settlement that it evidences. Those Class Members who did not elect to opt-out of the Settlement are Participating Class Members and shall receive their *pro rata* share of the Net Settlement Amount based on the number of Reinsured Loans of Participating Class Members from the Settlement Fund. *See* Ciolko Decl. Ex. 1 § 2.15.

B. Following Final Approval

Upon a Final Approval Order being entered, the Settlement Agreement contemplates the following:

1. Within seventy-five (75) days of the Effective Date, the Settlement Administrator shall mail to each Participating Class Member (those Class Members who did not choose to opt-out of the Settlement) a check in the amount of his or her Settlement Payment (as more fully described in Ciolko Decl. Ex. 1 § 4.4) (the "First Distribution").

2. Sixty days after the issuance of the Settlement Payments, a reminder postcard in the form attached as Ex. 4 to the Settlement Agreement, will be mailed to each Class Member who received a check but did not negotiate it, stating that they received a check, that the check would remain valid for one hundred twenty (120) days following its issuance and instructions on how to obtain a new check, if necessary. Ciolko Decl. Ex. 1 § 4.7.

3. In the event that any Settlement Payment checks from the First Distribution are not cashed by a Participating Class Member, then the total funds constituting the uncashed checks of those Participating Class Members shall be distributed, on a *pro rata* basis, to the Participating Class Members who cashed their Settlement Payment checks pursuant to the First Distribution ("Second Distribution"). *Id.* at § 4.8

4. If any Settlement Payment checks from the Second Distribution remain uncashed sixty (60) days after the date of their issue, the total funds constituting the uncashed checks shall be applied towards Administrative Costs that have not already been paid from the Settlement Fund. *Id.*

5. If the amount of uncashed Settlement Payment checks exceeds the unpaid Administrative Costs or no Administrative Costs remain unpaid, then all funds remaining in the Escrow Account shall be distributed, on a *pro rata* basis, to those Participating Class Members who cashed their original Settlement Payment checks pursuant to the First Distribution ("Third Distribution"). *Id.* The Third Distribution shall exclude those Participating Class Members who did not cash their Settlement Payment checks pursuant to the Second Distribution. *Id.* Settlement Payments will be distributed on a per loan basis.

6. Participating Class Members who do not opt out of the Settlement are deemed to have released claims against Defendants under RESPA that: (a) concern the reinsurance of PMI on any Reinsured Loan; or (b) arise from any transaction or occurrences related to the reinsurance of PMI that was the subject of the Action. *See* Ciolko Decl. Ex. 1 § 6.2.[21]

[21] Section 6.2 of the Agreement includes the following release: Except as provided for in Sections 6.4 and 6.6, and provided that any order approving the Chapter 11 Plan contains the Cap Re Carve Out (provision in the confirmation order approving the Chapter 11 Plan that preserves for Participating Class Members claims asserted in this Action against Cap Re), upon the Settlement Effective Date, and in consideration of the promises and covenants set forth herein, Named Plaintiffs and each Participating Class Member, and any other person or entity who claims through a Participating Class Member or who assert claims (or could assert claims) on a Participating Class Member's behalf, including each of their respective representatives, heirs, executors, spouses, guardians, successors, estates, bankruptcy estates, attorneys, agents, and assigns, will be deemed to have completely released and forever discharged Defendants, from any claim, right, demand, charge, complaint, action, cause of action, or liability of any and every kind, including without limitation those known or unknown, from the beginning of the world until today, that arise out of common law, state law, or federal law, including claims against Defendants under RESPA that: (a) was raised in the Action or the Chapter 11 Cases (including without limitation the Moore Proof of Claim and any proof of claim filed by, or on behalf of, any Participating Class Member in the Chapter 11 Cases that is otherwise covered by the release set forth herein), or (b) could have been raised in the Action or the Chapter 11 Cases (including without limitation the Moore Proof of Claim and any proof of claim filed by or on behalf of any Participating Class Member in the Chapter 11 Cases that is

7. Plaintiffs' Counsel may request an award of attorneys' fees of no more than 33 1/3% of the Settlement Amount. *Id*. at § 5.2.

8. Plaintiffs' Counsel will request a Case Contribution Award not to exceed $5,000 for each of the Plaintiffs for their efforts in this case, including the burden and risks associated with bringing this action publicly. *Id*. at 1 § 5.3.

9. Plaintiffs' request for (1) attorneys' fees, (2) litigation costs (expenses related to prosecuting and resolving these claims), and (3) Case Contribution Awards are subject to the Court's approval at the Final Approval Hearing and Participating Class Members who submit proper objections will have an opportunity to comment on the propriety of these requests. Accordingly, Plaintiffs have submitted briefing concurrently with respect to the fee and Case Contribution Award request, and will respond to any comments that Participating Class Members may have.

IV. THE NOTICE PLAN HAS BEEN EFFECTIVELY IMPLEMENTED

In granting preliminary approval of the Settlement, the Court found that the Class Notice is "the best notice practible under the circumstances, and constitutes due and sufficient notice" of the Settlement to all persons affected and/or entitled to participate in the Settlement, and is fully compliant with the notice requirements of FED. R. CIV. P. 23(e)(1)(B). *See* Preliminary Approval Order at ¶ 11; s*ee also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under

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otherwise covered by the release set forth herein) arising out of the same transactional nucleus of operative facts regarding Cap Re's reinsurance of primary mortgage insurance for Participating Class Members. For the avoidance of doubt, nothing in this Section 6.2 in any way limits Section 6.5. This release shall specifically apply to bar any further dispute between Parties about the matters that are within the scope of this release, whether such dispute or issue may arise or be raised in a case filed after the Preliminary Approval date.

all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court.") (internal citations omitted); *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1560 (3d Cir. 1994).

The Class Notice is written in simple terminology and includes: (1) a description of the Class; (2) a description of the claims asserted in the Action; (3) a description of the relevant Settlement terms; (4) the deadline for exercising the right to opt-out of the Settlement; (5) the names of Class Counsel; (6) the Final Approval Hearing date; (7) an explanation of a Participating Class Member's eligibility to appear at the Final Approval Hearing; and (8) the deadline for filing an objection to the Settlement.[22] An identical notice plan was approved in *Alston*, *Alexander*, and *Liguori*. *See Alexander v. Washington Mutual, Inc.*, No. 07-cv-4426, 2012 WL 6021098, at *6 (E.D. Pa. Dec. 4, 2012) (holding "The four page long notice was written in plain English and was no more complicated than necessary for the class members to understand the settlement of this complex litigation. It informed class members of their right to opt-out of the class and not be bound by the settlement.").

The Garden City Group, Inc. ("GCG") was retained as the Settlement Administrator in this Action and in connection therewith was responsible for disseminating the Class Notice to

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[22] The Class Notice also referred Class Members to a website that was set up and maintained, at the direction of Lead Class Counsel, by the Settlement Administrator at www.gmacpmisettlement.com. The website includes further information relating to the Settlement and provides links to relevant documents, including the TAC, the Settlement Agreement with Exhibits, the Motion for Preliminary Approval and supporting papers, the Preliminary Approval Order, the [Proposed] Plan of Allocation and a list of frequently asked questions. Further, the Class Notice informed Class Members that should they seek additional information, they could call, write or email Lead Class Counsel at the telephone number, mailing address, and e-mail address provided in the Class Notice.

Class Members. *See* GCG Affidavit ¶ 1, attached as Ex. 7 to the Ciolko Decl. Pursuant to Paragraph 8 of the Preliminary Approval Order and Section 2.7 of the Settlement Agreement, Defense Counsel provided Class Counsel and GCG an Excel spreadsheet listing the loan number, borrower name(s) and mailing addresses for each Reinsured Loan via file transfer protocol on May 20, 2014. Specifically, the Excel spreadsheet contained data for 122,979 Reinsured Loans. *Id.* ¶ 4. GCG reviewed the 122,979 properties and identified 16 duplicative records which were eliminated from the initial mailing. *Id.* ¶ 6. GCG then reviewed the data to determine whether an individual mortgage included a co-obligor, in which case GCG would isolate the co-borrower, determine the co-borrower's address and send the co-borrower a Class Notice if they resided at a different address. GCG identified 3,264 addresses for co-borrowers entitled to separate Notice. *Id.*

Pursuant to Section 2.8 of the Agreement, GCG was required to perform address searches using the National Change of Address (NCOA) database in order to confirm mailing addresses for the mailing population. On or about June 3, 2014, GCG conducted the requisite NCOA searches. *Id.* ¶ 5. The NCOA searches resulted in 23,063 addresses being updated for the original population. *Id.* ¶ 6. In the aggregate, the NCOA search resulted in a total of 26,327 addresses being updated.

With the inclusion of co-borrowers living at separate addresses, the total number of Notices to be sent was increased to 126,227. *Id.* ¶ 6. GCG mailed Class Notices to Class Members at those addresses via first class mail on June 13, 2014. *Id.* ¶ 7.

GCG, at the direction of Lead Class Counsel, also established a website, www.gmacpmisettlement.com.com, which became fully operational on June 13, 2014. *Id.* ¶ 8. The website provides Class Members with information concerning the litigation, including a full

description of the Class and Settlement as well as the date of the Court's Final Approval Hearing. *Id.* The website also includes the Preliminary Approval Order along with the papers filed in connection with Plaintiffs' Unopposed Motion for Preliminary Approval. *Id*. In addition to the website, GCG also established a toll-free Interactive Voice Response ("IVR") system that became operational on June 13, 2014. *Id*. ¶ 10. The IVR system received a total of 1,377 calls between June 13, 2014 and July 31, 2014. *Id.* Ninety-six (96) of those calls were from individuals requesting a Notice package. *Id*. at ¶ 11. GCG mailed each of the requesting individuals a Notice package. *Id.* Lead Class Counsel personally responded to 273 phone calls and messages from Class Members, as well as 111 emails from Class Members.

As of August 1, 2014, GCG has received only six (6) "exclusion requests," representing four (4) Reinsured Loans, *i.e.*, opt-outs, from the 122,963 Reinsured Loans. Notably, *no* objections to any portion of the Settlement has been received to date.[23]

V. THE COURT SHOULD APPROVE THE SETTLEMENT

The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975). "While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the court has an obligation to ensure that any settlement reached protects the interests of the class members." *In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 2001 WL 20928, at *4 (E.D. Pa. Jan 4, 2001) (citing *In re G.M. Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 3d Cir. 1995) ("*GM Trucks*")).

[23] As noted *supra*, the objection deadline has not yet elapsed. Pursuant to the Court's August 1, 2014 Order (Dkt. No. 289), attached to the Ciolko Decl. as Exhibit 9, all objections are due by September 17, 2014. To the extent any objections are filed, Class Counsel will file a supplemental submission with this Court addressing the objection(s) prior to the Final Approval Hearing.

As this Court recently recognized in another class action, Federal Rule 23(e) requires the district court to (1) direct notice in a reasonable manner to all class members who would be bound by the proposal, and (2) approve the proposal only after a hearing and on finding that it is fair, reasonable, and adequate." *In re Hemispherx Biopharma, Inc., Sec. Litig.*, No. 09-cv-5262, Dkt. No. 81, Order (E.D. Pa. Feb. 14, 2011) (Diamond, J.) at 7-8 (citations omitted). *See also Fleisher v. Fiber Composites, LLC*, No. 12-cv-1326, 2014 WL 866441, at *8 (E.D. Pa. Mar. 5, 2014) (Noting "prior to approving a settlement, the Court must determine whether the Notice provided to class members was adequate" and then "scrutinize the terms of the settlement to ensure that it is fair, adequate and reasonable"); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 742 (E.D. Pa. 2013) (noting that pursuant to FED. R. CIV. P. 23(e), the settlement of a class action requires a determination by the court that the proposed settlement is "fair, reasonable and adequate."). As discussed *supra*, the notice in this Action meets the requisite standard, and as discussed *infra*, the Settlement is fair, reasonable, and adequate, and merits final approval by this Court.

"In determining whether to approve a class action settlement pursuant to Rule 23(e), 'the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.'" *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-cv-1432, 2012 WL 1964451, at *2 (D.N.J. May 31, 2012) ("*Schering-Plough Enhance*") (citing *GM Trucks*, 55 F.3d at 785); *see also In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998) ("*Prudential*") (noting the trial judge has the duty of protecting absent class members "which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims") (citation omitted).

Strong judicial policy favors resolution of litigation short of trial. *See, e.g.*, *GM Trucks*, 55 F.3d at 784 ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings."); 5 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 23.161[1] (3d ed. 2006) (noting "there is a strong judicial policy in favor of settlements of class actions. Settlement of class actions conserves judicial resources by avoiding further litigation. The parties to a settlement also avoid the costs and risks of a lengthy and complex trial.") (footnotes omitted). Ultimately, a settlement is "a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *GM Trucks*, 55 F.3d at 806.

A. The Proposed Settlement Meets the Standards for Judicial Approval

In *Girsh*, the Third Circuit identified the following nine factors for courts to consider in deciding whether the settlement of a class action is fair, reasonable and adequate: (1) the complexity, expense and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. 521 F.2d at 157; s*ee also GM Trucks*, 55 F.3d at 785; *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d at 742.

As another court within this Distrct recently recognized, "[i]n more recent decisions, the Third Circuit has suggested an expansion of the nine-print [*Girsh*] test when appropriate to include what are now referred to as *Prudential* considerations," including:

> [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

In re Flonase Antitrust Litig., 291 F.R.D. 93, 98 (E.D. Pa. 2013) (citing *Prudential*, 148 F.3d at 303). *See also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010) (same); *In re Certainteed Fiber Cement Siding Litig.*, MDL No. 2270, 2014 WL 1096030, at *16 (E.D. Pa. Mar. 20, 2014) (citing *Prudential*, 148 F.3d at 323).

Moreover, the Third Circuit has held that a settlement is entitled to a presumption of fairness if the following are satisfied: "(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *18 (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 n.18 (3d Cir. 2001)); *accord Warfarin*, 391 F.3d at 535 (same). "The presumption of fairness may attach even where a class is certified for settlement purposes only, as long as the requirement of adequate representation has been satisfied." *In re CertainTeed Corp. Roofing Shingle Products Liability Litig.*, 269 F.R.D. 468, 484 (E.D. Pa. 2010) (citing *Warfarin*, 391 F.3d at 535). As discussed herein, each of these factors has been satisfied.

As set forth below, an application of the factors set forth in *Girsh*, as well as the additional factors courts within this Circuit consider, demonstrates that the proposed Settlement is fair, reasonable, and adequate.

1. Complexity, Expense and Likely Duration of the Litigation

This factor is concerned with assessing the "'probable costs, in both time and money, of continued litigation.'" *Pro v. Hertz Equipment Rental Corp.*, No. 06-cv-3830, 2013 WL 3167736, at *3 (D.N.J. June 20, 2013) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 234 (3d Cir. 2001)). Prior to the Parties reaching the Settlement with the assistance of an able mediator, this litigation had gone on for almost seven years. As set forth in greater detail above, the Parties fully briefed Defendants' multiple motions to dismiss, Defendants' motion for summary judgment, and Plaintiffs' multiple motions for class certification. Additionally, the Parties engaged in comprehensive discovery of numerous third-parties, involving often heated and contentious discovery negotiations; took numerous complex and substantive depositions of both parties and third-parties; and engaged noted experts. In addition, Plaintiffs have expended considerable time, energy and resources in reviewing voluminous document productions (tens of thousands of pages) from Defendants and multiple third-parties, damage analyses, legal research, and comparison of analogous cases. If the Settlement is not approved, continued litigation would be long, complex, expensive, and fraught with risk. And, at the end, there might be no funds with which to pay a judgment given the ResCap Bankruptcy and the winding down of Cap Re's business. *See* discussion *supra*, section II.B.2.

A trial on the merits, and preparing for the same, would entail considerable expenses to be incurred by both sides. It was evident to the Parties from their participation in the mediation and analysis of their respective positions, that a trial of this Action would involve experts from

both sides, who, working with the same information and data would draw drastically disparate conclusions as to what the data shows. Plaintiffs' experience in the analogous *Alexander*, *Alston*, and *Liguori* cases where the parties each engaged experts who arrived at different and competing conclusions, confirms the conclusion that any trial will involve a proverbial "battle of the experts." At a minimum, absent settlement, litigation would likely continue for years before Plaintiffs and the Class would see any recovery.

Finally, a trial verdict would not necessarily end the litigation given the losing party's right to appeal. All of these facts weigh in favor of the Settlement. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 642 (E.D. Pa. 2003) (noting that the "protracted nature of class action antitrust litigation means that any recovery would be delayed for several years," and "substantial and immediate benefits" to class members favors settlement approval). "That a settlement would eliminate delay and expenses and provide immediate benefit to the class militates in favor of approval." *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *17; *see also In re Janney Montgomery Scott LLC Fin. Consulting Litig.*, No. 06-cv-3202, 2009 WL 2137224, at *8 (E.D. Pa. July 16, 2009) (finding the first factor weighed in favor of settlement where "settlement allows both the class and Defendant to avoid the obstacles presented by protracted litigation" and "[c]onsiderable time, money and resources will be saved by approving the settlement.) By reaching this Settlement, the Parties will avoid additional, protracted litigation and will establish a means for prompt resolution of Class Members' claims against Defendants. These avenues of relief provide meaningful and timely benefits to Class Members. Given the alternative of long and complex litigation before this Court, the risks involved in such litigation, and the possibility of further appellate litigation, the availability of prompt relief under the Settlement is highly beneficial to the Class. *See* discussion *supra*,

section II.B.2.

2. Reaction of the Class to the Settlement

The second *Girsh* factor "attempts to gauge whether members of the class support the settlement." *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *17 (quoting *Prudential*, 148 F.3d at 318). Full consideration of this factor remains premature, as objections to the proposed Settlement are not due until September 17, 2014. Class Counsel will address this factor, and any objections that may be filed, in a supplemental submission before the Final Approval Hearing. However, the reaction of the Class to the Settlement to date has been overwhelmingly positive given that only six individuals -- representing only four (4) mortgage loans or .000003% of the total number of Reinsured Loans of the Class - have chosen to exclude themselves from the Settlement. And ***not a single objection*** to the Settlement has been received to date. A list of the Successful Opt-Outs is provided in Exhibit B to the GCG Affidavit. As this Court recognized, this lack of objections underscores the appropriateness of the Settlement. *See In re Hemispherx Biopharma, Inc., Sec. Litig.*, Order at 10 (noting only two objections were received, which "constitutes a very small percentage of the Class given that 46,000 copies of the Notice were mailed to potential Class Members," and concluding the "lack of or small number of objections" is "one indication of the fairness of a settlement"). *See also In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *17 (finding fact that "out of a settlement class of approximately 300,000, only seven objections remain and there are only twenty-one opt outs from the settlement" "weigh[ed] in favor of approval"). Indeed, "[c]ourts have generally assumed that 'silence constitutes tacit consent to the agreement.'" *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (finding that the class reacted favorably to the settlement where out of approximately forty thousand class members, only seven opted out and

two objected) (quoting *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993)).

As is evident from the low number of Opt-Outs relative to the size of the Class, and, more importantly, the lack of any objections, the reaction of the Class weighs strongly in favor of Settlement approval. *See, e.g.*, *Hall v. Best Buy Co., Inc.*, 274 F.R.D. 154, 165 (E.D. Pa. 2011) (noting "that the absence of objections to this settlement supports that finding" of reasonableness); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 460 (E.D. Pa. 2008) (reasoning the large number of settlement class members and lack of objections "weighs in favor of approval," noting "[t]he attitude of class members toward the partial settlement of this action, as evidenced by the absence of objections, strongly militates a finding that the settlement is fair and reasonable"); *Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining and Manufacturing Co.)*, 513 F. Supp. 2d 322, 331 (E.D. Pa. 2007) ("This total absence of objections argues in favor of the proposed Settlement").

3. Stage of the Proceedings and the Amount of Discovery Completed

Pursuant to the third *Girsh* factor, the Court must consider the "degree of case development that class counsel have accomplished prior to Settlement," including the type and amount of discovery already undertaken. *GM Trucks*, 55 F.3d at 813. "The parties must have an 'adequate appreciation of the merits of the case before negotiating.' To ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken." *Prudential*, 148 F.3d at 319 (quoting *GM Trucks*, 55 F.3d at 813); *see also In re Hemispherx Biopharma, Inc., Sec. Litig.*, Order at 11 ("I apply this factor to determine whether counsel had an adequate appreciation of the merits of the case before negotiating") (citation omitted); *In re Schering-Plough/Merck Merger Litig.*, No. 09-cv-1099, 2010 WL 1257722, at *10 (D.N.J. Mar. 26, 2010) (same). This is because "approval of

a settlement is favored where the parties arrived at an arms-length settlement… [with] a clear view of the strengths and weaknesses of their case." *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *17.

As set forth above, the Parties engaged in extensive discovery with respect to class certification issues and the issue of risk transfer, a factor supporting the approval. *See id.* ("[P]ost-discovery settlements are more likely to reflect the true value of the claim and be fair." (citing *Bell Atl. Corp.*, 2 F.3d at 1314). Moreover, the Parties briefed not only multiple motions to dismiss and multiple motions for class certification, but also had fully briefed Defendants' motion for summary judgment. There is no question that the Parties had thoroughly fleshed out the factual and legal issues relevant to this Settlement. Here, too, Class Counsel's experience in the analogous *Alexander*, *Alston*, and *Liguori* matters, gave counsel for both sides a thorough appreciation of the merits of the case and the strengths and weaknesses of their respective positions. Hence, Class Counsel respectfully refers the Court to Sections II.B and C, *supra*.

4. Risks of Establishing Liability and Damages

The fourth (risk of establishing liability) and fifth (risk of establishing damages) *Girsh* factors are "closely related" and are therefore properly addressed together. *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d at 744. *See also In re Flonase Antitrust Litig.*, 291 F.R.D. at 100 (noting "these two *Girsh* factors are closely related, so I will address them together."). "These inquiries survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *In re Ikon Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94, 105 (E.D. Pa. 2002) (quoting *Prudential*, 148 F.3d at 319); *see also In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *18 (quoting *Wafarin*, 391 F.3d at 537 (same)). The *Ikon* court went on to

explain:

> For example, if it appears that further litigation would realistically risk dismissal of the case on summary judgment or an unsuccessful trial verdict, it is in the plaintiffs' interests to settle at a relatively early stage. In contrast, if it appears that liability is extraordinarily strong, and it is highly likely that plaintiffs would prevail at trial, settlement might be less prudent. On this issue, the court should avoid conducting a mini-trial and must to a certain extent, give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.

209 F.R.D. at 105-06 (citing *LaChance v. Harrington*, 965 F. Supp. 630, 638 (E.D. Pa. 1997)).

In the instant action, liability, damages and class certification were already hotly contested issues. In their briefing, and in their Answer, Defendants asserted strong claims that Cap Re had sustained allegedly substantial "losses" since the inception of this action, potentially blunting Plaintiffs' claims that no real risk was transferred to Defendants in the reinsurance schemes at issue. Moreover, Defendants asserted that Plaintiffs' claims were wholly unsuited for class-wide treatment citing the fact that Plaintiffs' claims potentially covered over a decade and involved no less than seven separate MI Providers, thereby necessitating, according to Defendants, multiple individual fact inquiries. Indeed, Defendants had already advanced many of these arguments in their opposition to Plaintiffs' motion for class certification when the case was put in suspense. Additionally, the future issues of the proper measure of damages alone would have been subject to extensive discovery and briefing and triggered a "battle of the experts." This would have added additional risk that the Class might ultimately receive no compensation (or a significantly reduced amount), if the Court were to side with Defendants. As this Court recognized in a similar context, the continued disagreement regarding important issues such as liability and damages evidence the inherent risks of continued litigation and militate in favor of a settlement. *See In re Hemispherx Biopharma, Inc., Sec. Litig.*, Order at 11-12.

While Plaintiffs disagreed with Defendants' conclusions and believed that they would be able to establish liability, they recognize that some theories they set forth have yet to be fully tested in the Circuit Courts, let alone the United States Supreme Court. For instance, Plaintiffs are not aware of any case which resolves whether the reinsurance arrangements at issue here result in a transfer of risk. Defendants assail the very basis of Plaintiffs' allegations claiming that the provision of MI is not a settlement service, and that Plaintiffs' reliance on the Third Circuit's opinion in *Alston* is misplaced. Defendants challenge the measure of damages and the Constitutionality of the damages that Plaintiffs seek, contending that they violate due process and equal protection because they violate the excessive fines clause of the U.S. Constitution. Defendants further contend that an award such as that contemplated by the Plaintiffs (three times all the MI paid by Class Members during the Class period) exceeds Congress's intent with regard to this kind of business practice. The very recent *In re Certainteed Fiber Cement Siding Litig.* case counsels that with respect to establishing liability, a court should "examine what the potential rewards (or downside) of the litigation might have been had class counsel elected to litigate the claims rather than settle them." *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *18 (quoting *GM Trucks*, 55 F.3d at 814). As discussed above, given the ResCap Bankruptcy Proceedings, there were certain and definite risks of proceeding with litigation, including the very real possibility of obtaining a lesser recovery for the Class, or even no recovery at all. Accordingly, as in *In re Certainteed Fiber Cement Siding Litigation* case (*see id.*), this factor supports the approval of the Settlement here.

It is Class Counsel's considered and experienced opinion that given the potential downside risks, the upside rewards and concomitant costs of going forward, that settlement on the proposed terms is the most prudent course for Plaintiffs and the members of the Class to take.

5. Risks of Maintaining the Class Action Through Trial

A district court in this Circuit evaluating a settlement noted that:

> The value of a class action depends largely in the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action.

In re Ikon Office Solutions, Inc. Sec. Litig., 209 F.R.D. at 105 (quoting *GM Trucks*, 55 F.3d at 817). As another court recently explained, the risk of maintaining the class action through trial is measured by considering "the likelihood of obtaining and keeping a class certified if the action were to proceed to trial." *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *18 (citing *Wafarin*, 391 F.3d at 537).

Although it is Plaintiffs' belief that certification of the proposed class would have been granted by the Court, this was certainly not a guarantee. Indeed, courts across the country have denied certification of similar RESPA claims. *See, e.g.*, *Contos v. Wells Fargo Escrow Co., LLC*, No. 08-cv-838Z, 2010 WL 2679886 (W.D. Wash. July 1, 2010). Based on Class Counsel's extensive experience in these types of cases, and Defendants' prior submissions to the Court, it is clear that Defendants were vigorously opposed to class certification and would continue to aggressively oppose class certification. Clearly, Defendants' opposition posed a significant challenge to Plaintiffs, offering as it did, numerous, cogent arguments against the propriety of class certification. This factor thus supports the final approval of the Settlement. *See, e.g.*, *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *18 (reasoning "[a]bsent settlement [defendant] would contest certification of a class," and concluding "this factor supports approval of the settlement."). *See also In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) (concluding settlement was appropriate because defendants

may contest class certification "thereby creating appreciable risk to the class members' potential for recovery").

As this memorandum and Plaintiffs' motion for class certification make clear, there are strong arguments in favor of class certification. Nevertheless, Plaintiffs also recognize, as the Third Circuit decisions confirm, that class certification is far from a certainty. Moreover, district courts conducting the required "rigorous analysis" of all factual and legal disputes relevant to the requirements of Rule 23 before certifying a class, *see In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309, 320 (3d Cir. 2009); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 596 (3d Cir. 2009), have placed an increasingly heavy burden on the proponent. *See, e.g.*, *Contos v. Wells Fargo Escrow Co., LLC*, 2010 WL 2679886 (denying class certification of RESPA claims). As a Judge in this District recently noted, even a prior certification order does not end the inquiry. *See In re Flonase Antitrust Litig.*, 291 F.R.D. at 101 ("Since I certified this class a year ago, the Supreme Court released *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), which held that damages must be able to be measured classwide in order to sustain class certification. This opinion arguably renders class certification in cases like this one more difficult to prove."). Thus, the risks attendant to class certification augur in favor of settlement.

6. Ability of the Defendant to Withstand a Greater Judgment

As the *In re Flonase Antitrust Litig.* court recently recognized, "[t]he ability of defendants to withstand a greater judgment generally only comes into play when a settlement in a given case is less than would ordinarily be awarded but the defendant's financial circumstances do not permit a greater settlement." 951 F. Supp. 2d at 744. This factor is relevant here given that the Settlement is being paid by Cap Re, a business entity that is winding down and which is

without any insurance coverage for the RESPA claims at issue. Indeed, it is highly questionable whether Cap Re could afford to pay a greater judgment, especially given the ResCap Chapter 11 Bankruptcy. *See* discussion *supra*, section II.B.2. Additionally, it is often the case that "any ability of [a defendant] to withstand a greater judgment is outweighed by the risk that Plaintiffs would not be able to achieve a greater recovery at trial." *In re Philips/Magnavox Television Litig*., No. 09-cv-3072, 2012 WL 1677244, at *13 (D.N.J. May 14, 2012). Here, the ResCap Bankruptcy Proceedings made the likelihood of Plaintiffs obtaining any judgment a real concern. As such, this factor also militates in favor of approval of the Settlement. It is unclear that, if the litigation were to recommence, that Plaintiffs could successfully "freeze" Cap Re's assets, funds held in separate trust accounts for the benefit of the various Mortgage Insurers, or even if there would be anything left in those trusts years down the road after a successful trial on the merits. This factor thus weighs heavily in support of final approval.

7. Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

"According to *Girsh*, courts approving settlements should determine a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and a range in light of all the attendant risks of litigation (the ninth factor)." *GM Trucks*, 55 F.3d at 806. "This inquiry measures the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case." *Id.*; *see also In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *19 (noting these elements "evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case"). The Third Circuit has stressed that the most relevant consideration is whether the proposed settlement is within the "range of reasonableness" in light of all costs and risks of continued litigation. *See Prudential*, 148 F.3d at 322 ("[T]he very

essence of a settlement is compromise."). The Third Circuit recently reiterated how this factor should be assessed:

> We have explained that "in cases primarily seeking monetary relief," district courts should compare "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing . . . with the amount of the proposed settlement." *Gen. Motors Corp.,* 55 F.3d at 806 (quoting Manual for Complex Litigation (Second) § 30.44, at 252 (1985)); *Prudential*, 148 F.3d at 322. "This figure should generate a range of reasonableness (based on size of the proposed award and the uncertainty inherent in these estimates) within which a district court approving (or rejecting) a settlement will not be set aside." *Gen. Motors Corp.,* 55 F.3d at 806. Precise value determinations are not required.

In re Pet Food Prods. Liab. Litig., 629 F.3d at 354.

It is also important to recall that a settlement represents a compromise. In *GM Trucks*, the Third Circuit further explained that:

> The evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.

GM Trucks, 55 F.3d at 806 (citation omitted). As previously discussed, the proposed Settlement confers a real benefit on the Settlement Class, namely a Settlement in the amount of $6,250,000.00 and is, in Class Counsels' estimation, fair and reasonable given the circumstances.

Class Counsel recognizes that in the best of all possible worlds there is potential for recovery in the hundreds of millions of dollars given the gross amount paid for the alleged "settlement service" by the Class for mortgage insurance. Additionally, RESPA establishes statutory damages amounting to three times the amount charged for the settlement service, in this case, payment of MI. However, it is highly unlikely, if not impossible to obtain such recovery if actually awarded because of the ResCap Bankruptcy Proceedings and Defendants' lack of insurance. Moreover, Defendants have asserted due process concerns on the grounds that some

or all of Plaintiffs' claims violate due process limits on damage awards, given the potential for an award amounting to at least hundreds of millions of dollars. Indeed, in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996), the Supreme Court concluded that damages that are "grossly excessive" and which do not bear a reasonable relationship to the economic harm suffered violate the Due Process clause, stating, "the proper inquiry is 'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" The Court further noted:

> [W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. . . . Once again, 'we return to what we said . . . in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.'

Id. at 582-583.

Defendants' argument that the proper measure of damages is not based on the total amount of MI paid by the Class during the Class Period, but rather is based on the amount of the first MI payment made, is also particularly trenchant. Plaintiffs estimate that the amount of statutory damages based on this understanding would amount to many millions of dollars, but substantially less than the amount of damages based upon the total settlement fee paid. Defendants have also raised challenges to the amount of damages that may actually be awarded in this case, disputing Plaintiffs' ability to represent a nationwide class and noting a split among the circuits with regard to Plaintiffs' standing to assert a RESPA Section 8 claim absent an overcharge. As such, given the various legal and factual uncertainties, including the uncertainty about of the amount of the settlement service itself, and the ResCap bankruptcy, $6,250,000.00 represents a reasonable and fair compromise under the circumstances.

In sum, prior to entering into the Settlement, Class Counsel considered the uncertain outcome and the risk of any litigation, especially in a complex action such as this one, the ResCap Bankruptcy Proceedings as well as the difficulties and delays inherent in any such litigation. Class Counsel is also mindful of the inherent problems of proof (including the difficulty of establishing damages) and possible defenses available to Defendants. *See, e.g.*, *In re Ikon Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. at 103 (complexity and duration of litigation of claims, combined with the expense of litigation and risk of establishing liability and damages, weighed heavily in favor of settlement). Indeed, several recent RESPA cases have recently lost at either certification or summary judgment. *See, e.g.*, *Contos*, 2010 WL 2679886, *supra*. While Class Counsel believes strongly in the merits of Plaintiffs' claims, they nonetheless are cognizant of the developing body of adverse case law. *See id.* Consequently, this factor also favors preliminary approval of the Settlement.

8. Additional Factors Further Confirm the Propriety of the Settlement

As noted above, when evaluating a proposed settlement courts consider additional factors beyond those enumerated by the Third Circuit in *Girsh*. This is because, as the Third Circuit noted in *Prudential*, "since *Girsh* was decided in 1975, there has been a sea-change in the nature of class actions." *Prudential*, 148 F.3d at 323. "In this regard", the Third Circuit continued, "it may be useful to expand the traditional *Girsh* factors to add additional topics for the district courts to take into consideration when reviewing a proposed settlement agreement." *Id.*

Two such "additional" factors are the arms'-length nature of the negotiations and the experience of counsel. *See, e.g.*, *In re Hemispherx Biopharma, Inc., Sec. Litig.*, Order at 13 (noting "[a]lthough not a *Girsh* factor," the negotiations and experience of counsel "weigh[ed] strongly in favor of approving the Proposed Settlement."). Given the numerous mediation

sessions undertaken before an agreement in principle was reached, including mediation before a retired Judge,[24] the arm's length nature of the negotiations further support the adequacy of the Settlement here.[25] The Parties reached agreement through arm's length mediation before a retired Federal Judge. Counsel have a wealth of experience litigating class actions. As one court noted in similar circumstances: "[T]he fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable." *In re Independent Energy Holdings PLC Securities Litig.*, No. 00-cv-6689, 2003 WL 22244676 (S.D.N.Y. Sept. 29, 2003) (citation omitted). The experience of Class Counsel also supports the adequacy of the Settlement. *See id.* ("Additionally, a court 'should attribute significant weight to the belief of experienced counsel that settlement is in the best interests of the class.") (quoting *Austin v. Penn. Dep't of Corr.*, 876 F. Supp. 2d 1437, 1472 (E.D. Pa. 1995)). As demonstrated herein, these factors strongly support a determination by this Court that the Settlement is fair, reasonable, and adequate, and meriting final judicial approval.

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

"Approval of a plan of allocation of a settlement fund in a class action is governed by the same standard of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Hemispherx Biopharma, Inc., Sec. Litig.*, Order at 13-14 (quoting *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000)). Class Counsel submit that the proposed Plan of Allocation in this Action meets this standard.

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[24] As noted in footnote 4 *supra*, the Hon. Edward N. Cahn (Ret.), the neutral mediator under whose auspices mediations in this Action took place, will be submitting a letter in support of this Settlement shortly.

[25] Both of these factors are further discussed in the Fee Memorandum and Ciolko Declaration, filed concurrently herewith.

After payment of Administrative Costs, Plaintiffs' attorneys' fees and expenses, and Named Plaintiffs' Case Contribution Awards, following the Court's approval, the Net Settlement Amount will be allocated to Participating Class Members as determined by Section 4.3 of the Settlement Agreement. *See supra* Section III (terms of the proposed settlement) describing the Plan of Allocation. In short, the allocation will be *pro rata* as approved in *Alexander*.

The Settlement Agreement establishes a "phased" distribution of the Net Settlement Amount, establishing three distributions, which increases the likelihood that the members will be paid. *See supra*, Section III. First, the settlement payment with respect to any Participating Class Member shall be provided by check -- the First Distribution. *See* Exhibit 1 § 4.4. Sixty (60) days after the issuance of the Settlement Payments, the Settlement Administrator shall mail a reminder postcard to Participating Class Members notifying them that they have been mailed a check which will only remain valid for 120 days. *See* Exhibit 1 § 4.7. If a Participating Class Member's Settlement Payment is not cashed within 120 days of its issuance, then the total funds constituting those uncashed Settlement Payments will be distributed *pro rata* to those Participating Class members who cashed their Settlement Payments -- the Second Distribution. *See* Exhibit 1 § 4.8. Finally, if any Settlement Payment checks from the Second Distribution remain uncashed sixty (60) days after the date of their issue, the total funds constituting the uncashed checks shall be applied towards Administrative Costs that have not already been paid from the Settlement Fund. If the amount of uncashed Settlement Payment checks exceeds the unpaid Administrative Costs, or if no Administrative Costs remain unpaid, then all funds remaining in the Escrow Account shall be distributed, on a *pro rata* basis, to those Participating Class Members who cashed their original Settlement Payment checks pursuant to the First Distribution -- the Third Distribution. The Third Distribution shall exclude those Participating

Class Members who did not cash their Settlement Payment checks pursuant to the Second Distribution. *Id.*

This innovative, notable, and efficient method of providing prompt payment to each participating Class Member will insure that an extremely high percentage of Class Members will receive compensation under the Agreement. It also ensures that the entire Settlement Fund inures to the benefit of the Class with no "reverter" to the Defendants. A similar "phased" distribution system was approved in *Ligouri v. Wells Fargo & Co.*, No. 08-cv-00479. *See* Order Approving Petition for an Award of Attorneys' Fees, Reimbursement of Litigation Costs, and Case Contribution Awards for the Named Plaintiffs (E.D. Pa. Feb. 7, 2013) at 4 (finding "the Settlement provides for an innovative distribution system, which will proceed in three phases," which further confirmed propriety of requested attorneys' fees.)

This allocation process is fair and reasonable and consistent with the provisions of RESPA, which allows for statutory damages equaling three times the amount of the settlement charge, here the payment of MI, assessed. "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." *In re Hemispherx Biopharma, Inc., Sec. Litig.*, Order at 14; *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d at 752 (same); *see also Mehling*, 248 F.R.D. at 463 (same). The test is simply whether the "plan of allocation," like the settlement itself, is "'fair and reasonable as to all participants.'" *Sullivan v. DB Investments, Inc.*, 667 F. 3d 273, 326 (3d Cir. 2011) (quoting *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983)). In reviewing plans of allocation, "courts give great weight to the opinion of qualified counsel." *Schering-Plough Enhance*, 2012 WL 1964451, at *6 (citing *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993)). Here, Class Counsel drafted a Plan of Allocation that reflects their damage theory of the case in a simple and straightforward

manner and that prorates damages among Settlement Class Members according to loss incurred.

VII. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

Before entering the Preliminary Approval Order, this Court examined the record and preliminarily/conditionally certified the Settlement Class pursuant to FED. R. CIV. P. 23(b)(3). *See* Preliminary Approval Order at ¶ 3. Nothing has changed in the record that would compel the Court to now reach a different conclusion with respect to the final approval of the Settlement Class.

Accordingly, Plaintiffs respectfully request that the Court make appropriate findings and certify the following Class for purposes of this Settlement only:

> All persons who obtained residential mortgage loans originated and/or acquired by GMAC Mortgage, Ally Bank, and/or their affiliates on or after January 1, 2004, with private mortgage insurance which was reinsured by Cap Re.

Courts have recently certified substantially similar classes for settlement purposes only. *See, e.g.*, *Alston* Final Approval Order at ¶ 2; *Alexander* Final Approval Order, 2012 WL 6021098, at *3;[26] *Liguori* Final Approval Order at ¶ 2.

A. The Proposed Class Satisfies the Requirements of Federal Rule 23(a)

1. Rule 23(a)(1) – "Numerosity"

The Settlement Class is sufficiently numerous. The numerosity requirement is met when "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). This Court has held that a "class does not need a magic number of claimants" nor must the "[plaintiffs] allege the exact number or identity of the class members." *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *9; *Gates v. Rohm and Haas Co.*, 265 F.R.D. 208,

[26] The *Alexander* settlement also took place in the context of a major bankruptcy, the Washington Mutual bankruptcy, which was an important factor in that case, affecting the amount of recovery made on behalf of the class.

215 (E.D. Pa. 2010) (the threshold is approximately 40 class members). Here, Plaintiffs readily meet the numerosity requirement because the Class List, prepared by Defendants in accordance with Sections 1.7 and 2.7 of the Settlement Agreement, consists of 122,963 Reinsured Loans.

2. Rule 23(a)(2) – "Commonality"

The Class satisfies the commonality requirement. "Commonality requires the plaintiff to demonstrate that that the class members have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). That is, "[t]heir claims must depend upon a common contention . . . . That common contention, moreover must be capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. Rule 23(a)(2) "provides that a proposed class must share a common question of law or fact." *Sullivan*, 667 F. 3d at 311. The commonality inquiry focuses on the defendant's conduct. *See id*. ("commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members.") *See also Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class. Because the requirement may be satisfied by a single common issue, it is easily met"); *Prudential*, 148 F.3d at 310. "Commonality exists when proposed class members challenge the same conduct of the defendants." *In re Hemispherx Biopharma, Inc., Sec. Litig.*, No. 09-cv-5262, Dkt. No. 81, Order at 4 (E.D. Pa. Feb. 14, 2011) (Diamond, J.) (citing *Prudential*, 148 F.3d at 310).

"A common question is one arising from a common nucleus of operative facts." *Hawk Valley, Inc. v. Taylor*, No. 10-cv-804, 2014 WL 1302097, at *11 (E.D. Pa. Mar. 31, 2014). "Generally, where defendants have engaged in standardized conduct towards members of the

proposed class, common questions of law and fact exist." *Id.* "In fact, a single common question is sufficient to satisfy this requirement." *Id.* (citing *Prudential*, 148 F.3d at 310).

Here, Plaintiffs raised *numerous* common questions of law and fact, as all members of the Class challenge the exact same alleged conduct by Defendants - *i.e.*, Defendants' practice of collecting a portion of borrowers' MI premiums purportedly for reinsurance services that transferred no risk and/or were not commensurate with the value of services actually rendered. As noted in Plaintiffs' TAC ¶ 77, common questions of law and fact include:

a. Whether Defendants' captive reinsurance arrangements involved sufficient transfer of risk;

b. Whether payments to GMAC's captive reinsurer were *bona fide* compensation and for services actually performed;

c. Whether payments to GMAC's captive reinsurer exceeded the value of any services actually performed;

d. Whether GMAC's captive reinsurance arrangements constituted unlawful kickbacks from private mortgage insurers;

e. Whether Defendants accepted a portion, split or percentage of borrowers' private mortgage insurance premiums other than for services actually performed; and

f. Whether Defendants are liable to Plaintiffs and the Class for statutory damages pursuant to RESPA § 2607(d)(2).

These multiple "shared legal issues" are sufficient to support certification under Rule 23(a)(2) in the context of settlement. Moreover, as the Third Circuit recently affirmed, the commonality requirement is "incorporated into the more stringent 23(b)(3) requirement." *Sullivan*, 667 F. 3d at 311. Since, as discussed in greater detail below, Plaintiffs satisfy the "more stringent" 23(b)(3) requirement, they also satisfy the commonality requirement.

3. Rule 23(a)(3) – "Typicality"

"Typicality requires the evaluating court to determine whether the action can be

efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members." *Chemi v. Champion Mortg.*, No. 05-cv-1238, 2009 WL 1470429, at *7 (D.N.J. May 26, 2009). Whereas commonality evaluates the sufficiency of the class, typicality judges the sufficiency of the named plaintiff(s) as a representative of the class. *Baby Neal*, 43 F.3d at 57. The named plaintiffs' claims need only be "sufficiently similar to those of the class such that the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." *Fleisher*, 2014 WL 866441, at *6 (citation omitted). Indeed, "factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *10; *see also Baby Neal*, 43 F.3d at 58 (typicality requirement is satisfied despite the existence of pronounced factual distinctions between the claims of the named plaintiffs and the claims of the proposed class); *In re Imprelis Herbicide Marketing, Sales Practices and Products Liability Litig.*, 296 F.R.D. 351, 361 (E.D. Pa. 2013) ("If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences"). "The heart of this requirement is that the plaintiff and each member of the represented group have an interest in prevailing on similar legal claims." *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *10.

A plaintiff's claim is typical of class claims if it challenges the same conduct that would be challenged by the class. *See, e.g.*, *In re Cigna Corp. Sec. Litig.*, No. 02-cv-8088, 2006 WL 2433779, at *3 (E.D. Pa. Aug. 18, 2006) ("Rule 23(a)(3) is satisfied where the litigation of the named plaitniffs' claims can reasonably be expected to advance the interests of absent class

members."); *Prudential*, 148 F.3d at 311-12 (holding that typicality was satisfied by allegedly fraudulent scheme applying to all class members, even if different illegal sales practices were used on different beneficiaries).

Here, Plaintiffs' claims are clearly typical of those of the proposed Class. Each Named Plaintiff obtained a loan through GMAC and was required to purchase MI from a provider who then allegedly reinsured that loan through Cap Re pursuant to the captive reinsurance arrangements at issue in this lawsuit. Thus, each of the Named Plaintiffs' claims is typical of the claims of members of the proposed Class. They arise out of the same alleged business practices of Defendants and those practices were not individualized in any way material to the claims asserted. Under these circumstances, the typicality requirement is satisfied.

4. Rule 23(a)(4) – "Adequacy of Representation"

"The adequacy requirement encompasses two distinct inquiries designed to protect the interests of absentee class members: it considers whether the named plaintiffs' interests are sufficiently aligned with the absentees', and it tests the qualifications of the counsel to represent the class." *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 309 (E.D. Pa. June 26, 2012); *see also Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012). Plaintiffs satisfy both prongs of the adequacy test.

The core of the analysis for the first prong is whether the Named Plaintiffs have interests antagonistic to those of the Settlement Class. FED. R. CIV. P. 23(a)(4); *see also New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007). "Class representatives must be part of the class and possess the same interest and suffer the same injury as the class members." *In re Budeprion XL Marketing & Sales Litig.*, No. 09-md-2107, 2012 WL 2527021, at *7 (E.D. Pa. July 2, 2012) (citing *In re Pet Food Prods. Liab. Litig.*, 629 F.3d at 343).

Here, Plaintiffs have no interests adverse to those of the absent Class Members as demonstrated by the fact that, ultimately, Named Plaintiffs seek to hold Defendants accountable for, among other things, receiving unearned portions and/or splits of the PMI premiums paid by Plaintiffs and members of the Class to the MI Providers. As such, Named Plaintiffs' interests are perfectly aligned with the interests of the absent Class Members, thereby meeting the first adequacy prong.

The second prong analyzes the capabilities and performance of Class Counsel under Rule 23(a)(4) based upon the factors set forth in Rule 23(g). *See Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir. 2010). Class Counsel are qualified, experienced, and able to conduct the litigation on behalf of the Settlement Class Members. *See* Section VIII below.

B. The Proposed Class Meets the Requirements of Federal Rule 23(b)(3)

Once a court determines that the requirements of Rule 23(a) are met, it must consider whether the action is maintainable under one of the three parts of Rule 23(b). In this Action, in addition to meeting all of the requirements of Rule 23(a), Plaintiffs also meet the requirements of subsection of Rule 23(b)(3).

Under Rule 23(b)(3), a class should be certified when common questions of law or fact predominate over individual issues and a class action would be superior to other methods of resolving the controversy. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 594. Like commonality, "common issues [] predominate here because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did." *Sullivan*, 667 F.3d at 299 (citations omitted). Superiority requires the court to "balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of

adjudication." *Prudential*, 148 F.3d at 316 (internal quotations omitted).

In the case at bar, the relevant factual circumstances of each Settlement Class Member are the same in that Defendants' conduct did not vary with regard to individual Class Members. Where, as here, the necessary proof consists almost exclusively of an evaluation of Defendants' actions and inactions, the "predominance requirement" is easily satisfied. *See, e.g.*, *Prudential*, 148 F.3d at 314 (affirming lower court's finding of predominance where plaintiff alleged defendant engaged in "common scheme" or uniform practice). Accordingly, in the instant matter, common issues predominate, because Class Members seek to remedy "common legal grievances" -- namely, the allegedly improper reinsurance scheme perpetuated by Defendants. Plaintiffs contend that each of these common questions may be resolved on a class-wide basis through common proof satisfying the requisite standard. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 311 ("If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable."). Likewise, the legal theories of each Class Member are identical. In the case of small, individual, RESPA-related claims, the United States District Court for the Eastern District of New York has recently held that, in appropriate circumstances, a single class action is preferable to a multitude of individual lawsuits, since "[g]iven these small individual sums, there can be little benefit derived from individual prosecution or control." *Cohen*, 262 F.R.D. at 159.

In this case, requiring many tens of thousands of covered homeowners throughout the country to file individual lawsuits would needlessly waste judicial resources in the event of litigation, since Plaintiffs contend that each lawsuit would likely involve the same evidence regarding Defendants' reinsurance programs and whether or not they violated RESPA. Not to mention that ResCap Bankruptcy and the winding down of Cap Re virtually forecloses

borrowers from pursuing any claims. Thus, Plaintiffs believe that the most efficient way of resolving these claims is through a single class action, such as the present action, before a single fact finder.

VIII. THIS COURT SHOULD APPOINT CLASS COUNSEL AS COUNSEL FOR THE SETTLEMENT CLASS

Pursuant to Rule 23(g), Plaintiffs move for an appointment of the law firm of Kessler Topaz Meltzer & Check, LLP as "Lead Class Counsel," and appoint KTMC and the law firms of Bramson, Plutzik, Mahler & Birkhaeuser, LLP, Berke, Berke & Berke and Travis & Calhoun, P.C. as "Class Counsel," collectively. Rule 23(g) focuses on the qualifications of class counsel, complementing the requirement of Rule 23(a)(4) that the representative parties adequately represent the interests of class members. As another court within this District recently recognized:

> In appointing class counsel, [a court] must consider: (i) the work counsel has done in identifying potential claims in the action; (ii) counsel's experience handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

In re Certainteed Fiber Cement Siding Litig., 2014 WL 1096030, at *20-21 (citing FED. R. CIV. P. 23(g)(1)(A)).

Here, each of Rule 23(g)(1)(A)'s considerations weighs strongly in favor of finding Class Counsel adequate. To date, as set forth in the Ciolko Decl. ¶ 14, Class Counsel have done considerable work to investigate and prosecute these claims. Specifically, regarding the instant action, KTMC attorneys have reviewed tens of thousands of pages of documents from Defendants and third-parties, have defended the deposition of Plaintiffs Moore and Holden, and have taken the depositions of Defendants' corporate witness (twice), Defendants' expert witness

and third parties, including corporate representatives of MI Providers and Defendants' actuarial consultants, and pursued their claims in Bankruptcy Court.

As reflected in the firm resume attached to the Ciolko Declaration, KTMC, a law firm composed of over 100 attorneys, and a support staff of over 100, located in two offices (Radnor, PA and San Francisco, CA), specializes in the prosecution of large, complex class actions nationwide, and is highly experienced in the litigation and resolution of such claims. *See* Ciolko Decl. ¶¶ 7-8 and Exhibit 2 thereto. The firm has been appointed class counsel and lead counsel in the analogous *Alston*, *Alexander*, and *Liguori* cases, as well as in a wide range of ERISA, securities and consumer class actions and is currently prosecuting numerous additional RESPA-based or lending class actions concerning, *inter alia*, mortgage insurance and lender-placed insurance. *Id*. Judge O'Neill in his final approval order in *Alexander* when he appointed KTMC as Lead Class Counsel noted:

> counsel have capably pursued this litigation on behalf of the class and negotiated the settlement on behalf of plaintiffs. Their work on the claims in this case has involved the expenditure of a substantial amount of time resources. I conclude that counsel's work on this case and their prior experienced suffice to show that these firms are qualified to fairly and adequately represent the interests of the settlement class.

Alexander Final Approval Order, 2012 WL 3021098, at *11.

KTMC's advocacy in appeals before the Supreme Court of the United States, the First, Third, and Ninth Circuits, have resulted in seminal decisions. For instance, in *Fifth Third Bancorp, et al. v. Dudenhoeffer, et al.*, 134 S. Ct. 2459 (2014) ("*Fifth Third*"), the Supreme Court was called upon to consider whether, when a company retirement plan's fiduciary's decision to buy or hold the employer's stock in the plan is challenged in court, the fiduciary is entitled to a defense-friendly standard that the lower courts have called a "presumption of prudence." This presumption had existed for close to 20 years in every Federal Circuit that

considered the issue. KTMC was successful in convincing the Supreme Court to reject the presumption thereby creating new significant law in this area of practice. *Fifth Third*, 134 S. Ct. at 2463.[27]

In *Evans v. Akers*, 534 F.3d 65 (1st Cir. 2008), KTMC successfully argued that former employees who received lump sum distributions of the entire balance of their retirement plan have standing to sue under ERISA for fiduciary mismanagement of plan assets during the time period before they received their lump sum distributions. *See also In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005) (finding that a subset of participants in a defined contribution plan had standing to sue on behalf of the plan pursuant to ERISA § 502(a)(2)); *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008) (overturning the district court's grant of summary judgment). Moreover, in the above-discussed *Alston* matter, KTMC successfully argued before the Third Circuit that the plain language of section 8 of RESPA does not require a plaintiff to allege he/she suffered an overcharge in order to pursue an action. *Alston*, 585 F.3d at 759.

Because of its track record of impressive results, courts have not hesitated to appoint KTMC as class counsel or interim class counsel in numerous complex mortgage related consumer protection actions such as *Alston*, *Alexander* and *Liguori*. In addition to KTMC's impressive results in the consumer protection arena, courts have also appointed KTMC in a wide variety of complex class actions, such as *In re Chesapeake Energy Corp. 2012 ERISA Class Litig.*, 286 F.R.D. 621, 624 (W.D. Okla. 2012), where the Court specifically noted "KTMC is

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[27] KTMC was also successful in the appeal before the Sixth Circuit that resulted in the petition for *certiorari* that was granted by the Supreme Court. In *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410 (6th Cir. 2012) KTMC successfully argued that defendants' express incorporation of SEC filings into a retirement plan's summary plan description was sufficient to support an allegation that defendants conveyed misleading information to plan participants (the Supreme Court decision did not address this ruling by the Sixth Circuit).

one of the most experienced ERISA litigation firms in the country, with particular expertise in the area of ERISA breach of fiduciary class actions," and that "in addition to its extensive litigation experience, KTMC has also successfully engaged in extensive, intricate and successful settlement negotiations and mediations involving complex legal and factual issues involving ERISA claims, resulting in large recoveries for affected classes." Likewise, in *In re Sadia, S.A. Secs. Litig.*, 269 F.R.D. 298 (S.D.N.Y. 2010), the Court noted that "[KTMC has] extensive experience in securities litigation and [has] successfully prosecuted numerous securities fraud class actions on behalf of injured investors [and are] qualified, experiences and able to conduct the litigation."

The firm has also been counsel in cases achieving significant settlement and trial results, including:

- ***In re Tyco International, Ltd. Securities Litigation***, No. 02-1335-B (D.N.H.): recovering $3.2 billion for investors in a federal securities class action that required more than 220 depositions, over 700 discovery requests and responses, and the review of more than 82.5 million pages of documents.

- ***In re Bank of America Corp. Securities, Derivative, and ERISA Ligation***, No. 09-md-2058 (PKC) (S.D.N.Y.): recovering $2.425 billion for investors and securing significant corporate governance improvements in connection with federal securities claims relating to Bank of America Corp.'s merger with Merrill Lynch & Co.

- ***In re Southern Peru Copper Corp. Derivative Litigation***, No. 961-CS (Del. Ch.): obtaining a $1.3 billion judgment—the largest damage award in Delaware Chancery Court history. The Southern Peru Copper litigation required depositions that were taken in Mexico and Peru and involved a trial that lasted two weeks before Chancellor Leo E. Strine, Jr. Upon an appeal to the Delaware Supreme Court, Kessler Topaz successfully argued that Chancellor Strine's judgment should be affirmed in its entirety. *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1262-63 (Del. 2012) (affirming final judgment, with interest, of $2.1 billion).

- ***In re Wachovia Preferred Securities and Bond/Notes Litigation***, No. 09-cv-6351 (RJS) (S.D.N.Y.): recovering $627 million for investors—one of the largest recoveries under Section 11 of the Securities Act of 1933.

- ***CompSource Oklahoma v. BNY Mellon Bank, N.A.***, No. 08-cv-469 (E.D. Okla.): recovering $280 million after prosecuting claims for breaching statutory, common law, and contractual duties in connection with the administration of a securities lending program.

- ***Board of Trustees of Buffalo Laborers v. J.P. Jeanneret Associates, Inc., et al.***, No. 09-cv-8362 (LBS) (AJP) (S.D.N.Y.): recovering $216.5 million on behalf of investors in Madoff-affiliated investment funds.

- ***In re Flonase Antitrust Litigation***, No. 08-cv-3149 (E.D. Pa.): recovering $150 million on behalf of a class of direct purchasers alleging violations of federal antitrust laws after prevailing on motions to dismiss and motions for summary judgment.

- ***In re AOL ERISA Litig.***, No. 02-cv-8853 (S.D.N.Y.): obtaining a $100 million settlement in a breach of fiduciary duty action brought pursuant to the Employee Retirement Income Security Act of 1974.

- ***Transatlantic Holdings, Inc., et al. v. American International Group, Inc., et al.***, American Arbitration Association Case No. 50 148 T 00376 10: obtaining a $75 million binding arbitration award in connection with claims that American International Group, Inc. and its subsidiaries breached their fiduciary and contractual duties and committed fraud in connection with the administration of their securities lending program.

The law firms of BPMB, BBB, and TC also have substantial experience in prosecuting class and consumer actions. *See* Ciolko Decl. ¶ 12, and Exhibits 4, 5 and 6 thereto (attaching firm resumes). It should also be noted that Class Counsel enlisted Lowenstein Sandler LLP ("Bankruptcy Counsel") to assist with protecting the claims of the Class Members with regard to the GMAC bankruptcy proceedings. Collectively, Class Counsel have a wide range of experience in class action cases and other complex litigation, and have knowledge and expertise in the applicable law, which are relevant considerations under Rule 23(g)(1)(A)(ii) and (iii). More obvious evidence of this being Lead Class Counsel's successful prosecution and settlement of the analogous *Alston*, *Alexander*, and *Liguori* actions. *See Alston* Final Approval Order; *Alexander* Final Approval Order, 2012 WL 6021098; and *Liguori* Final Approval Order. The

Alexander court favorably referenced Lead Class Counsel's skills, noting "Class counsel include skilled attorneys with experience in class actions and RESPA litigation, as illustrated by the declaration and exhibits accompanying the fee application." *Alexander* Final Approval Order, 2012 WL 6021098, at *2. Additionally, among the similar consumer actions that Class Counsel are currently litigating is one related class action involving claims substantially similar to those at issue here where KTMC has also prevailed in opposition to motions. *See Munoz v. PHH Corp.*, No. 08-cv-00759 (E.D. Cal.).

Class Counsel identified and investigated the potential claims in the action and have knowledge and expertise in the applicable law, which are also relevant considerations under Rule 23(g)(1)(C)(i). KTMC has conducted significant discovery, directed both at the parties and third parties and has actively undertaken steps necessary to secure complete responses. As noted above, Class Counsel has committed significant resources to prosecuting the class case. Class Counsel therefore respectfully submit that their appointment as Lead Class Counsel and Class Counsel for the Settlement Class is warranted. *See, e.g.*, *In re Certainteed Fiber Cement Siding Litig.*, 2014 WL 1096030, at *21 (appointing counsel, reasoning "counsel have capably pursued this litigation on behalf of the class and negotiated the settlement on behalf of plaintiffs. Their work on the claims in this case has involved the expenditure of a substantial amount of time and resources. I conclude that counsel's work on this case and their prior experience suffice to show that these firms are qualified to fairly and adequately represent the interests of the settlement class.")

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the proposed Settlement and the proposed Plan of Allocation are fair, reasonable, and adequate, and request that the Court

certify the Settlement Class and grant final judicial approval to the Settlement and the Plan of Allocation.

Dated: August 6, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF.

/s/ Edward W. Ciolko
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