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 PRELIMINARY APPROVAL OF SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF PROPOSED CLASS NOTICE, AND SCHEDULING OF A FINAL APPROVAL HEARING

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I. INTRODUCTION

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 Preliminary Approval of Settlement, Preliminary Certification of Settlement Class, Approval of Proposed Class Notice and Scheduling a Final Approval Hearing in this nationwide class action asserting claims against Defendants GMAC Mortgage, LLC ("GMAC Mortgage"), GMAC Bank (now known, and herein referred to, as "Ally Bank") and Cap Re of Vermont, LLC ("Cap Re") (collectively "Defendants") (together with Plaintiffs, the "Parties") for violations of Sections 8(a) and (b) of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2607(a) and (b). The Parties entered into a Settlement Agreement dated December 10, 2013, setting forth the terms of the agreed-upon Settlement (the "Settlement Agreement"). *See* Settlement Agreement, attached as Exhibit 1 to the Declaration of Edward W. Ciolko in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement ("Ciolko Decl."), filed contemporaneously herewith.

The proposed Settlement represents an excellent result, resolving all claims asserted by Plaintiffs against Defendants and providing substantial benefits to members of the proposed Settlement Class (the "Class") 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"). Each Class Member who does not opt out of the Settlement will receive a payment based on one of two methods – both of which have been approved by courts reviewing similar captive reinsurance settlements.[1] *See, e.g.,* Final Approval Order in *Alexander v. Washington Mutual Inc.*, No.

[1] The Settlement Agreement permits Plaintiffs to conduct reasonable confirmatory discovery regarding the contours of the Settlement Class. *See* Settlement Agreement § 2.7.

07-cv-4426 (E.D. Pa. December 4, 2012) ("*Alexander*") at ECF No. 105 and Final Approval Order in *Liguori, et al. v. Wells Fargo Bank, N.A., et al.*, No 08-cv-00479 (E.D. Pa. February 7, 2013) ("*Liguori*") at ECF No. 186. The Settlement Fund will be deposited into an interest-bearing, qualified settlement account. The proposed Settlement represents six years of hotly contested litigation challenging Defendants' captive reinsurance arrangements involving novel claims and highly complex legal arguments and was achieved in the context of the Chapter 11 Bankruptcy cases of Residential Capital, LLC, Defendant GMAC Mortgage and certain of their affiliates 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 (the "ResCap Bankruptcy Proceedings"). Cap Re, as an individual subsidiary of Residential Capital, LLC, did not file for Chapter 11 relief.

As set forth below, in exchange for the release of Plaintiffs' claims described herein and other terms and conditions of the Settlement Agreement, Cap Re has agreed to pay $6,250,000.00. If the Settlement is approved and becomes final, the Settlement Fund, after payment of attorneys' fees and litigation costs as approved by the Court, Case Contribution Awards for Plaintiffs Donna Moore, Frenchola Holden, and Keith McMillon as approved by the Court, the fees and costs of the Settlement Administrator, and any other Administrative Costs incurred in connection with the implementation of the Settlement Agreement, will be distributed to Participating Class Members as set forth in Section III below. If approved by the Court, the Settlement will fully and finally resolve the instant litigation.

As explained herein, this Settlement satisfies all the prerequisites for preliminary approval of the Settlement and certification of the Class for settlement purposes only. The proposed

Settlement[2] is fair, reasonable, and adequate under the governing standards for preliminary approval of class action settlements in the Third Circuit. Certification of the Class for settlement purposes only is appropriate pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rule 23").

Accordingly, Plaintiffs request that the Court: (1) grant preliminary approval of the Settlement memorialized in the Settlement Agreement as within the range of settlements that it might ultimately and finally approve as fair, reasonable, and adequate; (2) conditionally certify the Class for Settlement purposes only; (3) approve and authorize mailing of the Class Notice; (4) preliminarily appoint Donna Moore, Frenchola Holden and Keith McMillon as class representatives; (5) preliminarily appoint Kessler Topaz Meltzer & Check, LLP ("KTMC") as Lead Class Counsel and Bramson, Plutzik, Mahler & Birkhaeuser, LLP ("BPMB"), Berke, Berke & Berke ("BB&B") and Travis & Calhoun, P.C. ("TC") as Class Counsel (together "Plaintiffs' Counsel"); (6) order all proceedings in the Action other than such as may be necessary to carry out the terms and conditions of the Settlement Agreement or the responsibilities related to or incidental thereto are stayed and suspended until further order of this Court; and (7) set a date for the Final Approval Hearing.

II. FACTUAL AND PROCEDURAL 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" which Plaintiffs assert were a "sham." Pursuant to these agreements, GMAC Mortgage and Ally Bank (together,

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[2] All capitalized terms used throughout this memorandum shall have the meanings ascribed to them in the Settlement Agreement unless otherwise defined.

"GMAC") agreed to refer its mortgage insurance ("MI") business to MI providers in exchange for their agreement to purchase purported reinsurance from GMAC's captive reinsurer, Cap Re. In exchange for the referral of this 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 a kickback paid by the MI Providers[3] to GMAC in exchange for the referral of a guaranteed stream of MI business because Cap Re did not take on any risk for the "reinsurance." Plaintiffs argue that Cap Re assumed no, or very little, real risk under the contracts and, therefore, did not provide real or commensurately priced reinsurance in violation of RESPA Sections 8(a) and (b). The ceded premiums were, therefore, a kickback prohibited by 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. Specifically, 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. Essentially, 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.[4]

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[3] 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.

[4] Plaintiffs' Counsel here recently settled three similar actions involving virtually identical claims. *See* Final Approval Order in *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508 (E.D. Pa. July 29, 2011)

The United States Department of Housing and Urban Development ("HUD") addressed 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 serviced 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 allege that they and every Class Member obtained residential home loans originated or acquired by GMAC. Because each made a down payment of less than twenty percent (20%) of the purchase price of their home, GMAC required them to purchase MI. Plaintiffs allege that GMAC referred them to MI Providers that "reinsured" their MI policies with Defendant Cap Re, a GMAC affiliate. However, Plaintiffs alleged that Cap Re assumed no, or very little, actual risk of loss and, even if some risk was transferred, it was not commensurate with the MI premiums ceded by MI Providers to Cap Re. Plaintiffs further allege that Defendants set up a "captive reinsurance" scheme 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. 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 Cap Re and by eliminating competition among the MI Providers for GMAC's referred business.

("*Alston*") at ECF No. 149, Final Approval Order in *Alexander v. Washington Mutual Inc.*, No 07-4426 (E.D. Pa. December 4, 2012) ("*Alexander*") at ECF No. 105, and Final Approval Order in *Liguori, et al. v. Wells Fargo Bank, N.A., et al*, No. 08-00479 (E.D. Pa. February 7, 2013) ("*Ligouri*") at ECF No. 186.

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. Summary of this Litigation

The Parties vigorously litigated this matter starting with the transfer of the case to the Eastern District of Pennsylvania from the Northern District of California, two stays, and the May 14, 2012 bankruptcy filings of Residential Capital, LLC and GMAC Mortgage.

1. October 12, 2007 Through May 14, 2012

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.[5] Over the following six years the Parties fully briefed motions to dismiss filed by Defendants in response to Plaintiffs' Amended Complaint ("FAC") (*Badesha,* ECF No. 38), two bouts of class certification briefing, extensive and hotly contested discovery involving the Parties and numerous third-parties, and a fully briefed motion for summary judgment (ECF No. 181), as follows:

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[5] 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* (ECF No. 62).

i. On October 12, 2007, the E.D. Pa. received the original records from the Northern District of California. Each Defendant promptly filed motions to dismiss the FAC.[6] Plaintiffs opposed those motions which were fully briefed by December 21, 2007. Plaintiffs and Defendants aggressively litigated every phase of the Action and pressed hard on behalf of their clients. On March 4, 2008 this Court denied Defendants' motions to dismiss and shortly thereafter established a schedule which would govern this Action. Defendants filed answers to the FAC on March 19, 2008.

ii. On May 13, 2008, Plaintiff sought leave to file a Second Amended Complaint ("SAC")[7] 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.

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[6] Up until this juncture, there was only one Plaintiff. As of the filing of the SAC, there were two Plaintiffs. As such, the term "Plaintiffs" refers to Donna Moore and Frenchola Holden.

[7] 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.

iii. The Parties began active discovery at this time. 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. 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.[8] Plaintiffs also served Interrogatories on all Defendants who, in turn, served Requests for Production of Documents on Plaintiffs. Plaintiffs noticed 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.*, Judge Diamonds' Order regarding one such discovery dispute. (ECF No. 79).

iv. Plaintiffs filed their first motion for class certification on July 1, 2008. Defendants opposed Plaintiffs' motion on July 22, 2008. Plaintiffs filed their reply on August 14, 2008. Shortly thereafter, the Court entered a scheduling order establishing discovery and all other pre-trial events. Defendants also sought leave, and were granted leave to file a Sur-Reply. The Court scheduled the motion for class certification hearing for September 23, 2008.

v. While this Action was proceeding before this Court, several analogous actions, making similar claims against other lenders and their captive reinsurers were working their way through other district courts in the Eastern District of Pennsylvania. In two of these cases, *Alston* and *Alexander*, those courts determined that the plaintiffs in

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[8] Ultimately, the Plaintiffs and Triad resolved their dispute and Triad withdrew its motion to quash.

those actions did not have standing to proceed with their RESPA claims. The standing issue involved whether the filed rate doctrine bars the claims of borrowers who allege that their lender received kickbacks from mortgage insurance reinsured by a lender affiliate in violation of RESPA. On August 4, 2008, the district court in *Alexander* entered an order certifying the issue of whether the plaintiffs have standing to sue under RESPA for interlocutory appeal. 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 25, 2008, this Court entered a stay of this action pending the Third Circuit's resolution of a 12 U.S.C. § 1292(b) petition and marked this matter administratively closed during appeal and denied Plaintiffs' motion for class certification pending the *Alexander* appeal.

vi. The Third Circuit ultimately took up the appeal in the *Alexander* matter. In the interim, the Third Circuit issued a decision in the analogous *Alston* case, which resolved the standing issue presented in *Alexander* in Plaintiffs' favor. Specifically, the Third Circuit held in *Alston* that plaintiffs had standing to pursue a RESPA claim. The result was that *Alexander* was returned to the district court for resolution. Accordingly, this Court granted the Parties' joint request to remove the stay in this action on January 14, 2010 and entered a scheduling order on February 2, 2010. (ECF Nos. 107,110).

vii. 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 hearing on class certification, the Court ordered that the Parties "engage in focused discovery...concerning the actual and projected loss information" submitted by Defendants. (ECF 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?

viii. The Parties began an intense period of focused discovery aimed at determining whether the reinsurance arrangements actually transferred risk. To that end, Plaintiffs noticed and took several depositions, including depositions of Defendants' 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. 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. Each Plaintiff also sat for a deposition lasting the better part of a day.

ix. Plaintiffs also sought leave, and were granted leave, over Defendants' opposition to file a 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 its concern with 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.

x. 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.

xi. 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.

xii. 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 Corporation, 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. The Supreme Court did not consider this issue, 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*.

xiii. 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.

(ECF Nos. 226, 227, 268).

2. History and Impact of the Bankruptcy Proceedings

The commencement of the ResCap Bankruptcy Proceedings interrupted the continued progress of these proceedings and required the Parties 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 in the United States Bankruptcy Court for the Southern District of New York.

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 (ECF 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 the 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, 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 (the "Plan") embodying the terms of the PSA which had been approved by the Bankruptcy Court. The essential features of the global settlement embodied in the PSA and the Plan provided for: (i) AFI's 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[9] 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 limited 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 AFI's $2.1 billion contribution to the

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[9] 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.

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 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 Trust 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.[10]

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[10] In many Chapter 11 cases, the debtors segregate a fund for disputed claims and make distributions on allowed claims. Debtors rarely segregate sufficient funds to satisfy the disputed claims in full, and thus, the later a claim is allowed, the smaller the likely recovery percentage.

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 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 is 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.

3. Proceedings in the Eastern District of Pennsylvania Post Bankruptcy

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 suspense order in this matter.

ii. Plaintiffs filed a motion to vacate the stay of these proceedings with respect to the non-bankrupt defendants (ECF 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. (ECF 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.

iii. The Court denied both Plaintiffs' Motion to Vacate the Stay and the Motion for a Preliminary Injunction, without prejudice. (ECF Nos. 251, 255).

iv. 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.

C. Settlement Negotiations

As with the prosecution of this matter, following the ResCap Bankruptcy Proceedings, the settlement negotiations also 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.

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 and some expertise with the issues reaised in the Action, who agreed to serve as mediator. 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 the number of putative class members and damages as well as information about Defendants' current financial position. The Parties were not immediately successful in reaching a settlement.

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 try to resolve their dispute by way of mediation. The Parties held this renewed mediation session on June 17, 2011, again with the assistance 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 and positions regarding the size of the class and settlement positions.

The Parties again agreed to mediate with Judge Cahn and held mediation sessions 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.

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 which among approximately 3,000 Borrower Claims. 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 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. 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 commensurate with other settlements of this type, even outside of the Chapter 11 context. In broad strokes, Plaintiffs, Debtor GMAC Mortgage and non-Debtor 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. (Chapter 11 ECF No. 5457).

On October 29, 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, which is set forth in the Parties' Settlement Agreement. (ECF 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[11]. 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.

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.

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

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.[12] The essential terms of the Settlement are as follows:

1. The Parties stipulate to class certification, for settlement purposes only. The Class is comprised of 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 that was reinsured by Cap Re. *See* Settlement Agreement § 1.4.

2. Defendants agree to create a Settlement Fund in the amount of $6,250,000.00, plus interest earned thereon, for the benefit of the Class. Lead Class Counsel has directed the Settlement Administrator to establish at a federally-insured financial institution an account for the purpose of holding the Settlement Fund, which shall be considered a common fund created as a result of this action and has it structured so it will qualify as a Qualified Settlement Fund ("Escrow Account"). Cap Re shall deposit the sum of $6,250,000.00 into the Escrow Account within seven (7) days of entry of the Preliminary Approval Order. *See* Settlement Agreement §§ 3.1. 3.3, 3.5.

3. The Settlement Fund will be used to pay:

   a) Settlement Payments to Participating Class Members, as awarded by the Court and in accordance with the terms of the Settlement Agreement;

   b) Attorneys' fees and litigation costs of Plaintiffs' Counsel, as awarded by the Court and in accordance with the terms of the Settlement Agreement;

   c) Case Contribution Awards to Donna Moore, Frenchola Holden and Keith McMillon, not to exceed Five Thousand Dollars ($5,000.00) each, as approved by the Court;

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[12] The full terms of the settlement are set forth in the executed Settlement Agreement dated December 10, 2013 and as attached as Exhibit 1 to the Ciolko Decl. filed contemporaneously herewith, and represents the entirety of the agreement between the Parties regarding the resolution of Plaintiffs' claims against Defendants.

d) The fees and costs of the Settlement Administrator, including the costs of Class Notice; and

e) Any other Administrative Costs in connection with the implementation of the Agreement. *See* Settlement Agreement § 4.1

4. No later than forty-five (45) days after entry of the Preliminary Approval Order, the Settlement Administrator will provide each Class Member with a Class Notice in the form attached as Exhibit B to the Settlement Agreement. By that same date, the Class Notice will be posted on a dedicated Settlement website established by Lead Class Counsel, along with other documents related to the litigation such as a list of frequently asked questions and the Settlement Agreement with all of its Exhibits. The number and variation in the dissemination of the Class Notice is consistent with standards employed in notification programs designed to reach unidentified members of settlement groups or classes.[13] The Class Notice will provide potential Class Members with contact information for Lead Class Counsel. Additionally, in the Settlement Agreement the Parties propose to use The Garden City Group, Inc. (the "Settlement Administrator") to mail the Class Notice and to perform other required claims administration services as set forth in the Settlement Agreement. *See* Settlement Agreement §§ 2.4, 2.12. The Garden City Group, Inc. is a highly-revered professional claims administration firm with extensive experience, including the administration of captive reinsurance settlements.

The form and method of notice agreed to by the Parties satisfies all due process considerations and meets the requirements of Rule 23(e)(1)(B). The proposed Class Notice describes in plain English: (i) the terms and operations of the Settlement; (ii) the nature and extent of the release of claims; (iii) the maximum attorneys' fees and Named Plaintiffs' Case

[13] During the process of drafting the proposed from of Class Notice, Lead Class Counsel consulted the Federal Judicial Center "Notice Checklist and Plain Language Guide 2010" (attached to the Ciolko Decl. as Exhibit 6) to ensure the Class Notice is in compliance the their recommendations.

Contribution Awards that may be sought; (iv) the procedure and timing for objecting to the Settlement; and (v) the date and place for the Final Approval Hearing. A similar notice plan utilized in the settlement of analogous actions have been judicially approved as appropriate, fair, and adequate. *See, e.g.*, Order Preliminarily Approving Settlement, Conditionally Certifying Class for Settlement Purposes, Approving Form and Manner of Class Notice, and Setting Date for Final Approval of Settlement, *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508 (E.D. Pa. Mar. 22, 2011), ECF No. 124, Order (A) Granting Preliminary Approval to Proposed Class Action Settlement, (B) Conditionally Certifying Class for Settlement Purposes, and (C) Providing for, Among Other Things, Class Notice, Final Approval Hearing and Administration; *Alexander v. Washington Mutual, Inc.*, No. 07-cv-04426 (E.D. Pa. June 25, 2012), ECF No. 90, and Order Preliminarily Approving Settlement, Conditionally Certifying Class for Settlement Purposes, Approving Form and Manner of Class Notice, and Setting Date For Final Approval Hearing; *Liguori v. Wells Fargo Bank, N.A.*, No. 08-cv-00479 (E.D. Pa. Aug. 31, 2012), ECF No. 173. As such, the proposed Class Notice and method of dissemination satisfies the requirements of due process. *See* Newberg on Class Actions, § 8.34 (4th ed. 2002).

5. Class Notice recipients may elect to opt-out of the Class and not be bound by the Agreement and the Settlement that it evidences. Those Class Members who do not elect to opt-out of the Settlement shall become Participating Class Members and shall receive a payment from the Settlement Fund by check, mailed by the Settlement Administrator within seventy-five (75) days of the Effective Date (the "First Distribution"). *See* Settlement Agreement §§ 2.15, 4.3, 4.4. Payments to Participating Class Members shall be calculated and distributed according to a proposed Plan of Allocation. *See* § 4.3 to the Settlement Agreement.

6. Sixty (60) days after the issuance of Settlement Payments, a reminder postcard will

be mailed to all Participating Class Members who have not yet negotiated their Settlement Payment checks, in substantially the form attached as Exhibit E to the Settlement Agreement. The Reminder Postcard shall note that a check was previously issued to the Participating Class Member pursuant to the Settlement, and that the check must be negotiated by the date that is one hundred and twenty (120) days after issuance. The Reminder Postcard will also provide the contact information for the Settlement Administrator should the Participating Class Member need to request a new check, and note that the check reissue request must be made within sixty (60) days of the date that the reminder postcard is mailed. Any checks reissued must be negotiated no later than the date that is sixty (60) days after issuance. *See* Settlement Agreement § 4.7.

7. In the event that a Settlement Payment check from the First Distribution is 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"). Settlement Payment checks issued pursuant to the Second Distribution must be negotiated within sixty (60) days of their date of issue. If any Settlement Payment checks from the Second Distribution remain uncashed, 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 no Administrative Costs remain unpaid, then all funds remaining in the Escrow Account shall be distributed, on a *pro rata* bases, to those Participating Class Members who cashed their original Settlement Payment checks pursuant to the First Distribution ("Third Distribution"). The Third Distribution shall exclude those Participating Class Members who did not cash their Settlement Payment checks pursuant to the Second Distribution. *See* Settlement Agreement § 4.8.

8. Except as provided for in §§ 6.4, 6.6 of the Settlement Agreement, and provided that any order approving the Chapter 11 Plan contains the Cap Re Carve out defined in § 6.3 of the Settlement Agreement (which condition has been satisfied), upon the Settlement Effective Date, Named Plaintiffs and each Participating Class Member, and each of their respective representatives, heirs, executors, spouses, guardians, successors, estates, bankruptcy estates, attorneys, agents and assigns, and all those who claim through them or who assert claims (or could assert claims) on their behalf will be deemed to have completely released and forever discharged Defendants (as that term is defined in the Settlement Agreement), from any claim, right, demand, complaint, action, cause of action, obligation, 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) raised in the Action or the ResCap Bankruptcy Proceedings (including without limitation the Proof of Claim filed by Plaintiffs and nay proof of claim filed by, or on behalf of, any Participating Class Member in the ResCap Bankruptcy Proceedings that is otherwise covered by the release set forth herein), or (b) could have been raised in this Action or the ResCap Bankruptcy Proceedings (including without limitation the proof of Claim filed by the Plaintiffs and any proof of claim filed by or on behalf of any Participating Class Member in the ResCap Bankruptcy Proceedings that is otherwise covered by the release set forth herein) arising out of the same transactional nucleus of operative facts regarding Cap Re's reimsurance of primary mortgage insurance for Participating Class Members. *See* Settlement Agreement § 6.2.

9. Lead Class Counsel may apply to the Court for an award of attorneys' fees for Plaintiffs' Counsel not to exceed thirty-three and one-third percent (33 1/3%) of the Settlement

Fund and reimbursement of litigation costs of Plaintiffs' Counsel reasonably incurred in prosecuting this case, to be paid from the Settlement Fund. *See* Settlement Agreement § 5.1.

The Third Circuit has made clear that the "percentage of recovery" method is the "favored" method for awarding attorneys' fees in class actions resulting in a common fund. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) ("The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'"); *see also Moore v. Comcast Corp.*, No. 08-cv-773, 2011 WL 238821, at *4 (E.D. Pa. Jan. 24, 2011) (stating that "both the Supreme Court and our Court of Appeals have favored calculating attorney's fees as a percentage of recovery."); *Pozzi v. Smith*, 952 F. Supp. 218, 225 (E.D. Pa. 1997) ("The Third Circuit has counseled district courts that in common fund cases the percentage of recovery method to calculate attorneys' fees *is ordinarily the one most appropriate*, and that the lodestar method should be reserved for statutory fee cases or instances where the nature of the settlement evades a precise evaluation needed for the percentage of recovery method." (emphasis added).

10. Lead Class Counsel may apply to the Court for Case Contribution Awards not to exceed $5,000, payable from the Settlement Fund, to each of the Named Plaintiffs in recognition for their efforts in helping to litigate this case, including the burden and risks associated with bringing this action publicly. *See* Settlement Agreement § 5.3.

Courts in this Circuit regularly "approve incentive payments to plaintiffs in class action suits." *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D 468, 486 (E.D. Pa. 2010). Courts approve incentive awards to: (1) compensate "named plaintiffs for the services they provide and the risks they take on during the course of the class action litigation," *id.*; (2) to "provide reasonable incentives to individual plaintiffs whose willingness to participate as lead

plaintiffs allows class actions to proceed and so confer benefits to broader classes of plaintiffs," *id.* (citing *Briggs v. Hartford Fin. Servs. Grp., Inc.*, No 07-cv-05190, 2009 WL 2370061, at *16 (E.D. Pa. July 31, 2009)); and (3) when such awards are authorized by the settlement and were disclosed in the notice to the class. *See In Re Diet Drugs Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 490 (E.D. Pa. 2008); *Serrano v. Sterling Testing Sys.*, 711 F. Supp. 2d. 402, 424 (E.D. Pa. May 7, 2010).

The proposed award of up to $5,000 for each Named Plaintiff is eminently reasonable, given that they took an active role in prosecuting this litigation and put themselves at risk by bringing suit against the holder of their mortgage loans. The proposed awards are in line with awards that have been approved in this Circuit. *See, e.g.*, *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508 (E.D. Pa. July 29, 2011), ECF No. 149, Order Granting Final Approval, (approving incentive awards to class representatives of $7,500 each). In fact, case contribution awards in far greater amounts have been awarded in other consumer class-action settlements. *See, e.g.*, *Moore*, 2011 WL 238821, at *6 (approving an incentive award in the amount of $10,000 when the "named plaintiff actively assisted class counsel in the litigation on behalf of the class."); *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 609 (D.N.J. 2010) (approving incentive awards to class representative plaintiffs in the amount of $10,000 each); *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231 (E.D.N.Y. 2010) ($25,000 awarded as enhancement to class representative); *In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D. 226 (E.D. Pa. 2009) (up to $10,500 awarded as enhancement to class representatives); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009) (awards of up to $45,000 for class representatives in consumer antitrust class action); *Sauby v. City of Fargo*, No. 07-cv-10, 2009 WL 2168942 (D.N.D. July 16, 2009) (award of $10,000 to class representative).

While the amounts of such awards vary, the purpose of the award is constant. Such awards

recognize plaintiffs' contributions to the Settlement and credit them for the amount of effort that they expended and the risks that they undertook, and serve as an incentive to others who are willing to put themselves forward to enforce the law on behalf of others. Thus, courts have awarded more to plaintiffs where they took an active role, expended many hours and attended depositions. Here, each of the Named Plaintiffs participated fully in the prosecution of the litigation by meeting and conferring with counsel, in person, telephonically and via e-mail, and responding to discovery requests. In addition, all three Plaintiffs sat for a deposition at which they were closely questioned for several hours. Awards of up to $5,000 to each of the Named Plaintiffs is particularly appropriate in this case as Plaintiffs were "not in any sense figurehead plaintiffs as is sometimes the case in class action suits. They were active clients. As a result of their having come forward, thousands of passive class members will receive significant benefit[s] from the settlement fund." *Dewey*, 728 F. Supp. 2d at 610 (citations omitted).

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

IV. ARGUMENT

A. The Court Should Grant Preliminary Approval to the Settlement Because it is Fair, Reasonable, and Adequate

Plaintiffs present this Settlement to the Court for its review under FED. R. CIV. P. 23, which provides in pertinent part:

> (e) Settlement, Voluntary Dismissal, or Compromise

> (1) (A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.
>
> (B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
>
> (C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

Settlements of disputed claims, especially those of complex class action litigation, are favored. The Third Circuit recently "reaffirm[ed] the 'overriding public interest in settling class action litigation." *In re: Pet Food Prods. Liab. Litig.*, 629 F. 3d 333, 351 (3d Cir. 2010) (citations omitted). *See also Sullivan v. DB Invs., Inc.*, F.3d 273, 311 (3d Cir. 2011) (noting the "strong presumption in favor of voluntary settlement agreements, which we have explicitly recognized with approval.") (citing *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010)). It is clear that, "[t]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995). *See also Moore*, 2011 WL 238821, at *3 (noting the public interest in settling class action litigation); *In re Sch. Asbestos Litig.*, 921 F.2d. 1330, 1333 (3d Cir. 1990) (noting that settlement resolves disputes that would otherwise "linger" and therefore conserves judicial resources and expense).

The district courts have broad discretion "in determining whether to approve a proposed class action settlement . . . . This discretion is conferred in recognition that '[t]he evaluation of [a] proposed settlement in this kind of litigation . . . requires an amalgam of delicate balancing, gross approximations and rough justice.'" *Serrano*, 711 F. Supp. 2d at 414 (citations omitted); *see also*

Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975).

> [I]n addressing a settlement, the court must reconcile two principles that are, at least superficially, in tension. On the one hand, the court must scrupulously ensures that the proposed settlement is in the best interests of class members by reference to the best possible outcome. On the other hand, the court must not hold counsel to an impossible standard, as a settlement is virtually always a compromise, 'a yielding of the highest hopes in exchange for certainty and resolution.'

In re Ikon Office Solutions, Inc., Secs. Litig., 194 F.R.D. 166, 179 (E.D. Pa. 2000) (citing *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 806).

Because a settlement represents an exercise of judgment by the negotiating parties, courts consistently hold that the function of a court reviewing a settlement is neither to rewrite the settlement agreement reached by the parties nor to try the case by resolving issues left unresolved by the settlement. *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974); *Bullock v. Kircher's Estate*, 84 F.R.D. 1, 4 (D.N.J. 1979). As stated in *LaChance v. Harrington*, 965 F. Supp. 630, 638 (E.D. Pa. 1997) "[i]f a settlement is to have any utility toward reducing the burden litigation places on the courts and litigants, the court must guard against conducting a mini-trial on the merits in order to determine the plaintiffs' likelihood of establishing liability."

B. The Settlement is More than Fair, Reasonable and Adequate

The Parties achieved this Settlement after extensive litigation and discovery which gave them a very accurate picture of the strengths and weaknesses of their respective cases, despite, as discussed above, the ResCap bankruptcy which could possibly have resulted in Participating Class Members receiving no payment at all. This Settlement represents a fair result and was, cleary, achieved through arms length negotiations and meets the criteria used in this Circuit to evaluate the settlement of any proposed class action. "Review of a proposed class action settlement involves a two-step process: preliminary approval and a subsequent fairness hearing." *Harry M. v. PA Dept.*

of Public Welfare, No. 10-cv-922, 2013 WL 1386286, at *1 (M.D. Pa. Apr. 4, 2013). At the preliminary approval stage, courts look at whether: "(1) the 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 GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 785. Preliminary approval of a settlement, "may be granted as long as the proposal does not 'disclose [] grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys, and whether it appears to fall within the range of possible approval.'" *Dugan v. Towers, Perrin, Oorster & Crosby, Inc.,* 2013 U.S. Dist. LEXIS 136305, at *4-5 (E.D. Pa. Sept. 24, 2013) (quoting *Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007)). "This preliminary determination established an initial presumption of fairness when the court finds that: (1) the 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 GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 785. If such factors are satisfied, the settlement is presumed to be fair. *Id.* At the final approval stage, courts within the Third Circuit apply a more rigorous nine factor analysis to assess the fairness, adequacy, and reasonableness of a proposed class action settlement which considers:

(1) the complexity, expense, and likely duration of the litigation;

(2) the reaction of the class to the settlement;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

> (7) the ability of the defendants to withstand a greater judgment;
>
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
>
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh, 521 F.2d at 156-57. In addition, the Third Circuit expanded the *Girsh* factors to include, when appropriate, the following non-exclusive factors:

> [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 Pet Food Prods. Liab. Litig., 629 F.3d at 350 (citations omitted).

Here, the Court should exercise its discretion to preliminarily approve the Settlement. *Girsh*, 521 F.2d at 535. Plaintiffs believe that the Settlement is fundamentally fair, reasonable and in the best interest of the Class considering the ResCap Bankruptcy, the strength of Defendants' defenses and the risk, expense, complexity and delay associated with further litigation. In making its determination of these risks, the Court should give deference to the opinions of the Parties, who have researched the issues and are familiar with the facts of the litigation. *See Austin v. Pa. Dep't of Corrs.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995) ("In determining the fairness of a proposed settlement, the Court should attribute significant weight to the belief of experienced counsel that settlement is in the best interests of the class."); *Lake v. First Nationwide Bank*, 900 F. Supp. 726,

732 (E.D. Pa. 1995) ("Significant weight should be attributed 'to the belief of experienced counsel that settlement is in the best interest of the class.'"). Counsel for the Parties brought a depth of experience to the negotiating table. *See* below at Section V.C.

Both Plaintiffs' Counsel and counsel for Defendants are experienced in class action litigation, with decades of experience on both sides and are well versed in RESPA class action litigation.[14] As long as a settlement is reached by experienced counsel in arm's length negotiations, significant weight must be given to the opinion of class counsel with regard to settlement. *See Lake*, 900 F. Supp. at 732; *Austin*, 876 F. Supp. at 1472. This Settlement was negotiated at arm's length by knowledgeable and experienced counsel after fulsome and vigorous discussions conducted at arm's length. In addition, following the ResCap bankruptcy, attorneys experienced in large bankruptcies participated in the negotiations which led to the creative and felicitous result achieved. Moreover, as discussed herein, Plaintiffs engaged in sufficient discovery and other investigation to allow them to fully understand the risks in this litigation and accordingly the fairness and reasonableness of the Settlement.[15] Additionally, although premature at this stage, the Settlement also meets the requirements of *Girsh*.

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.

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[14] Submitted herewith is the Declaration of Edward Ciolko setting forth, *inter alia*, the experience of Plaintiffs' Counsel and providing the resumes of the firms proposed as Lead Class Counsel and Class Counsel. *See also* Section V.C. below.

[15] Because notice has yet to be sent to the Class, the Class' reaction to the settlement cannot be considered at this juncture. The Named Plaintiffs, however, who represent the Settlement Class, fully approve of the Settlement.

2001)). Prior to the Parties reaching the Settlement with the assistance of an able mediator, this litigation had gone on for over six 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, including 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 copious document productions 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.

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 as is evident from Plaintiffs' experience in the analogous *Alexander*, *Alston* and *Liguori* cases where the Parties each engaged experts, who arrived at different and competing conclusions. Based on this experience, 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, the trial result would not necessarily end the litigation, giving the losing party the 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 strongly militates in favor of approval. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241 (3d Cir. 2009). 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.

2. Reaction of the Class to the Settlement

Notice has not yet been sent to the Class. Consequently, they have not yet had the opportunity to opine on the Settlement. As such, Lead Class Counsel will address this factor at the final approval papers at the Final Approval Hearing.

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. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 813. "Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Id.*; *see also In re Schering-Plough/Merck Merger Litig.*, No. 09-cv-1099, 2010 WL 1257722, at *10 (D.N.J. Mar. 26, 2010) (same). As set forth above, the Parties engaged in extensive discovery with respect to class certification issues and the issue of

risk transfer and had briefed not only multiple motions to dismiss, 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, Plaintiffs' Counsel's experience in the *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, Plaintiffs' Counsel respectfully refers the Court to Section II.3.C *supra*.

4. Risks of Establishing Liability and Damages

As this Court recently recognized, the fourth and fifth *Girsh* factors are "closely related" and are therefore properly addressed together. *In re Flonase Antitrust Litig.*, NO. 08-cv-3149, 2013 WL 2915606, at *4 (E.D. Pa. June 14, 2013). "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., Litig.*, 209 F.R.D. at 105 (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998)). 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.

Id. at 105-06 (citing *LaChance*, 965 F. Supp. at 638.)

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 to 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. Moreover, the future issues of the proper measure of damages alone would have been subject to extensive discovery and briefing and triggerd 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.

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' Affirmative Defenses challenge either the measure of damages and the Constitutionality of the damages that Plaintiffs seek, contending that they violate due process and equal protection because they are excessive because they violate the excessive fines clause of the U.S. Constitution, that is,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.

It is Plaintiffs' 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.

See In re Ikon Office Solutions, Inc., Litig., 209 F.R.D. at 105 (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 817).

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. C08-838Z, 2010 WL 2679886 (W.D. Wash. July 1, 2010). Based on Plaintiffs' 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, with numerous, cogent arguments against the propriety of class certification.

The risks associated with class certification increase the risk of maintaining the proposed class, and therefore supports settlement. *See 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, makes clear, there are strong arguments in favor of class certification. Nevertheless, Plaintiffs also recognize, as the Third Circuit decisions confirm, that class certification is fraught with risk; district courts are required to conduct a "rigorous analysis" in order to decide all the 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).

Thus, the risks attendant to class certification augur in favor of preliminary approval of the Settlement.

6. Ability of Defendants to Withstand a Greater Judgment

The Settlement is being paid by Cap Re who has not asserted any insurance coverage for the RESPA claims asserted here. It is highly questionable whether Cap Re could afford to pay a greater judgment, especially given the ResCap Chapter 11 bankruptcy. Nonetheless, 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 made the likelihood of Plaintiffs obtaining any settlement a real concern. As such, this factor also militates in favor of preliminary approval of the Settlement.

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)." *In re GMC Pick-Up Truck Fuel Tank Prods.*

Liab. Litig., 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.*, 55 F.3d at 806. 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 In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 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 *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 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.

In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d at 806 (citation omitted). As previously discussed, the proposed Settlement confers a substantial benefit on the Settlement Class, namely a Settlement in the amount of $6,250,000.00 and is, in Plaintiffs' Counsels' estimation, an excellent result.

While Plaintiffs' Counsel recognizes that in the best of all possible worlds there is potential

for recovery in the hundreds of millions given the gross amount paid for the alleged "settlement service" by the Class for mortgage insurance, there remains substantial uncertainty regarding the outcome or a source of funds to pay any such recovery. Indeed, RESPA establishes statutory damages amounting to three times the amount charged for the settlement service, in this case payment of MI. Defendants have raised challenges to Plaintiffs' ability to represent a nationwide class, noting a split among the circuits with regard to Plaintiffs' standing to assert a RESPA Section 8 claim absent an overcharge. Defendants also assert 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' argue 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. As such, given the uncertainty 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.

Prior to entering into the Settlement, Plaintiffs' Counsel considered the uncertain outcome and the risk of any litigation, especially in a complex action such as this one, the ResCap Bankruptcy as well as the difficulties and delays inherent in any such litigation. Plaintiffs' 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. 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 Plaintiffs' 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.

V. THE COURT SHOULD CERTIFY THE PROPOSED CLASS FOR SETTLEMENT PURPOSES

Plaintiffs request that the Court certify the following proposed 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.

Courts recently granted substantially similar class certifications for settlement purposes only[16].

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[16] The *Alexander* settlement also took place in the context of a muajor bankruptcy, the Washington

See, e.g., Final Approval Order, *Alston,* No. 07-cv-03508 (E.D. Pa. July 29, 2011), ECF No. 149, Order Granting Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, Approval of Plan of Allocation, Appointment of Class Representative, and Appointment of Lead Class Counsel and Class Counsel; *Alexander*, No. 07-cv-4426 (E.D. Pa. December 4, 2012), ECF No. 105 and Final Approval Order; *Liguor*, No. 08-cv-00479 (E.D. Pa. February 8, 2013), ECF No. 186. One of this Court's functions in reviewing a proposed settlement of a class action is to determine whether the action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Plaintiffs must satisfy the four elements of Rule 23(a) and one or more of the requirements of Rule 23(b). In determining whether a settlement class should be certified, district courts "must apply an even more rigorous, 'heightened standard' in cases 'where settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously.' We have explained that this 'heightened standard is designed to ensure that class counsel has demonstrated sustained advocacy throughout the course of the proceedings and has protected the interests of all class members.'" *In re Pet Food Prods. Liab. Litig.*, 629 F.3d at 349-350. The Court should certify a settlement class in this instance because the requirements of Rule 23(a) are met, and this settlement class is appropriately considered a Rule 23(b)(3) class due to the opt-out nature of the class and the predominance of monetary relief.

A. Rule 23(a)'s Requirements are Satisfied

Rule 23(a) states that:

Mutual bankruptcy, which was an important factor in that case, affecting the amount of recovery made on behalf of the class.

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"These four elements are referred to in the short-hand as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." *In re Corel Corp. Secs. Litig.*, 206 F.R.D. 533, 539 (E.D. Pa. 2002). "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate" and "effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (citing *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)). The Settlement Class should be certified as it withstands the "heightened" and "rigorous" scrutiny required.

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." Rule 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." *Cohen v. Chi. Title Ins. Co.*, 242 F.R.D. 295, 300 (E.D. Pa. 2007); *Gates v. Rohm and Haas Co.*, 265 F.R.D. 208, 215 (E.D. Pa. 2010) (the threshold is approximately 40 class members). Here, Plaintiffs readily meet the numerosity requirement because the Class will include an estimated amount of around 66,000 Reinsured Loans – the exact number is subject to verification. The Parties have agreed to conduct confirmatory discovery regarding the contours of and size of the Settlement Class.

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*, 131 S. Ct. 2551. 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); *In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 148 F.3d at 310. "Commonality exists when proposed class members challenge the same conduct of the defendants." *Rosen* v. *Fidelity Fixed Income Trust*, 169 F.R.D. 295, 298 (E.D. Pa. 1995).

A common question is "one which arises from a 'common nucleus of operative facts' regardless of whether 'the underlying facts fluctuate over the class period and vary as to individual claimants.'" *In re Centocor, Inc. Secs. Litig. III*, No. 98-cv-260, 1999 WL 54530, at *2 (E.D. Pa. Jan. 27, 1999) (quoting *Kromnick v. State Farm Ins. Co.*, 112 F.R.D. 124, 128 (E.D. Pa. 1986)).

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' Third Amended Class Action Complaint ¶ 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 v. DB Investments, Inc.*, 667 F. 3d 273, 311 (3d Cir. 2011). Since, as discussed in greater detail below, Plaintiffs satisfy the "more stringent" 23(b)(3) requirements, they also satisfy the commonality requirement.

3. Rule 23(a)(3) – "Typicality"

"Typicality requires the 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. "[F]actual 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." *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992); *In re Honeywell Int'l Secs. Litig.*, 211 F.R.D. 255, 260 (D.N.J. 2002); *In re Cephalon Secs. Litig.*, No. 96-cv-0633, 1998 WL 470160, at *2 (E.D. Pa. Aug. 12, 1998); *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). Courts "look to the defendant's conduct and the plaintiff's legal theory to satisfy Rule 23(a)(3)." *Rosario* v. *Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

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.*, *Ikon Office Solutions, Inc. Litig.*, 191 F.R.D. at 463; *In re Centocor Secs. Litig. III*, 1999 WL 54530, at *2 (noting that typicality requirement of Rule 23(a)(3) is satisfied where "litigation of the named plaintiffs' claims can reasonably be expected to advance the interests of absent class members") (quoting *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 478 (E.D. Pa. 1997)); *In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 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). Plaintiffs' Counsel are qualified, experienced, and able to conduct the litigation on behalf of the Settlement Class Members. *See* Section V.4.C below.

B. The Settlement Class May Be Properly Certified Under Rule 23(b)

In addition to satisfying all of the criteria of Rule 23(a), a party seeking class certification must also satisfy one of the requirements of Rule 23(b). While only one of the conditions of Rule 23(b) must be satisfied in order to merit class certification, if the requirements of more than one of the alternatives are met, then the court may certify the action under each that is satisfied. *See, e.g.*, *Babcock v. Computer Assocs. Int'l*, 212 F.R.D. 126, 133 (E.D.N.Y. 2003). 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." *In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 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.*, *id*. 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.

Here, the relief sought is the same for every Class Member. Likewise, the legal theories of each Class Member are identical. "Rule 23(b)(3) focuses on the relationship between the common and individual issues. When common issues present a significant aspect of the case and they can be resolved for all members of the Class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis." *Local Joint Exec. Bd. v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001), *cert. denied*, 534 U.S. 973 (2001). "[T]he fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance." *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 580 (D. Minn. 1995).

Further, the additional superiority inquiry under Rule 23(b)(3) involves "a comparative evaluation of alternative mechanisms for dispute resolution." *Hanlon v. Chrysler*, 150 F.3d 1011, 1023 (9th Cir. 1988). 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.

C. Kessler Topaz Meltzer & Check, LLP Should be Appointed Lead Counsel for the Class and the Law Firms of Bramson, Plutzik, Mahler & Birkhaeuser, LLP, Berke, Berke & Berke and Travis & Calhoun, P.C. Should be Appointed Class Counsel

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 the law firms of Bramson, Plutzik, Mahler & Birkhaeuser, LLP, Berke, Berke & Berke and Travis & Calhoun, P.C. as "Class Counsel." 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. While a court may consider any factor concerning the proposed class counsel's ability to "fairly and adequately represent the interests of the class," Rule 23(g)(1)(A) specifically instructs a court to consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in 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."

Here, each of Rule 23(g)(1)(A)'s considerations weighs strongly in favor of finding Plaintiffs' Counsel adequate. To date, as set forth in the Ciolko Decl. ¶ 14, Plaintiffs' 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, Holden and

McMillon, and have deposed Defendants' corporate witness and the corporate witnesses of multiple third-parties and pursued their claims in Bankruptcy Court.

As reflected in the firm resume attached to the Ciolko Decl., 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. ¶¶ 8-9 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*, 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 lititgation on behalf of the class and negotiated the settlement on behalf of plaintiffs. Their work on the calims 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 tha these firms are qualified to fairly and adequately represent the interests of the settlement class.

Alexander at *11.

KTMC has prevailed in appeals before the First, Third, Sixth and Ninth Circuits, resulting in seminal decisions in that area of law. For instance, 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)); *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410 (6th

Cir. 2012) (finding that defendants' express incorporation of SEC filings into the plan's summary plan description was sufficient to support an allegation that defendants conveyed misleading information to plan participants); *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008) (overturning the district court's grant of summary judgment).

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.[17] 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 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," and *In re Sadia, S.A. Secs. Litig.*, 269 F.R.D. 298 (S.D.N.Y. 2010) where 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 results, including *In re Tyco Int'l. Ltd. Secs. Litig.*, No. 02-cv-1335-B (D.N.H. 2002) (as Co-Lead Counsel secured a record $3.2 billion settlement); *In re Flonase Antitrust Litig.*, No 08-cv-3149 (E.D. Pa.) (as Class

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[17] *See Allen v. Decision One Mortg. Co., LLC*, No. 07-cv-11669 (D. Mass.) (settlement of a class of borrowers alleging discrimination in mortgage lending under federal law); *Payares v. J.P. Morgan Chase & Co.*, No. 07-cv-05540 (C.D. Cal.) (same).

Counsel, obtained a $150 million cash settlement); *In re AOL ERISA Litig.*, No. 02-cv-8853 (S.D.N.Y.) as Co-Lead Counsel, KTMC helped obtain a $100 million settlement); *In re Nat'l City Corp. Secs., Derv. & ERISA Litig.*, No. 08-nc-70000 (N.D. Ohio 2010) (on November 30, 2010, the Court granted final approval to a $43 million settlement which KTMC, as Co-Lead Counsel, obtained on behalf of participants of a defined contribution plan); *In re Remeron Antitrust Litig.*, No. 02-cv-2007 (D.N.J. 2002) (achieving a $36 million recovery for class members as part of a settlement that also included significant injunctive relief); *In re Schering-Plough Corp. ERISA Litig.*, No. 03-cv-1204 (D.N.J.) (September 30, 2010 preliminary approval of $8.5 million settlement). Moreover, KTMC recently prevailed in a major trial in the Delaware Chancery Court awarding $1.26 billion to aggrieved shareholders in this derivative action. *See In re Southern Peru Copper Corp. Shareholder Derivative Litig.*, C.A. No. 961-CS (Del. Ch.).

The law firms of BPMB, BB&B, and TC also have substantial experience in prosecuting class and consumer actions. *See* Ciolko Decl. ¶ 9, and Exhibits 3, 4 and 5 thereto (attaching firm resumes). Thus, collectively, Plaintiffs' 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 Plaintiffs' Counsel's successful prosecution and settlement of the analogous *Alston*, *Alexander* and *Liguori* actions. *See* Final Approval Order in *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508 (E.D. Pa. July 29, 2011); Order Granting Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, Approval of Plan of Allocation, Appointment of Class Representative, and Appointment of Lead Class Counsel and Class Counsel, *Alexander v. Washington Mutual, Inc.*, No. 07-cv-4426 (E.D. Pa. December 4, 2012), ECF No. 105; and Final Approval Order, *Liguori v. Wells Fargo Bank, N.A.*, No.

08-cv-00479 (E.D. Pa. Februrary 8, 2013), ECF No. 186. Additionally, among the similar consumer actions that Plaintiffs' 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 to dismiss and a motion for class certification. *See Munoz v. PHH Corp.,* No. 08-cv-00759 (E.D. Cal.).

Plaintiffs' 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. *Id.* As further provided by Rule 23(g)(1)(C)(i) and as noted above, KTMC has committed significant resources to prosecuting the class case. *Id.*

VI. PLAN OF ALLOCATION

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. In short, the allocation will either be (a) *pro rata* as approved in *Alexander* or (b) by reference to the number of MI payments the Participating Class Member made as was approved in *Liguori*.[18]

[18] The Settlement Agreement provides that in the event after investigation, the number of private mortgage insurance payments is not reasonably obtainable from the readily-searchable computer media of Cap Re and GMAC Mortgage,the Settlement Fund will be paid to Participating Class Members on a *pro rata* basis. Judge O'Neill approved a *pro rata* distribution in *Alexander.*

Such allocation 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.

VII. THE PROPOSED NOTICE PLAN

The threshold requirement concerning class notice is whether the means employed to distribute the notice was reasonably calculated to apprise the class of the pendency of the action, of the proposed settlement, and of the class members' right to opt out or object. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). The mechanics of the notice process are left to the discretion of the court, subject only to the broad "reasonableness" standards imposed by due process. In this Circuit, it has long been the case that a notice of settlement will be adjudged adequate where the notice announces the date of the settlement hearing, outlines the allegations prompting the litigation, and summarizes the settlement terms. *See Serrano v. Sterling Testing Sys.*, 711 F. Supp. 2d 402 (E.D. Pa. 2010); *Boone v. City of Phila.*, 668 F. Supp. 2d 693 (E.D. Pa. 2009); *In re Am. Investors Life Ins. Annuity Mktg. & Sales Practice Litig.*, 263 F.R.D. 226 (E.D. Pa. 2009).

The proposed Class Notice (Exhibit B to the Settlement Agreement) more than satisfies all requirements. The language of the Class Notice was negotiated and has been agreed to by the parties. The proposed Notice is written in simple terminology and includes: n(1) a description of the Class; (2) a description of the claims asserted in this class action; (3) a description of the Settlement; (4) the deadlines for filing for exercising the right to opt-out; (5) the names of counsel for the Class; (6) the Final Approval Hearing date; (7) an explanation of eligibility for appearing at the Final Approval Hearing; and (8) the deadline for filing objections to the settlement.

The contents of the proposed Class Notice are more than adequate. It provides Settlement

Class Members with sufficient information to make an informed and intelligent decision whether to object to the Settlement.[19] As such, it satisfies the content requirements of Rule 23. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (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 all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" [internal citations omitted]. 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."). *See also Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1560 (3d Cir. 1994).

The dissemination of the Class Notice satisfies all due process requirements. The Settlement Agreement provides for notice to the class through first class mailing of the Class Notice. The Defendants will provide a Class Member List of all known Class Members obtainable from Defendants' readily searchable computer media. Defendants will provide the last known address reflected on their computer system for Class Members. The Settlement Administrator will update the records so that Class Members' most recent address will be utilized using current NCOA software and/or United States Postal Service software. The Class Notice will outline the allegations of the case and announce the date of the Final Approval Hearing. In sum, the contents and dissemination of the proposed Notice constitutes the best notice practicable under the circumstances, and complies fully with the requirements of Rule 23.

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[19] The Parties are currently making arrangements to put in place an e-mail address and website for communications to and from Class Members.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) grant preliminary approval of the Settlement memorialized in the Settlement Agreement; (2) conditionally certify the Class for settlement purposes only; (3) approve and authorize the mailing of Class Notice; (4) preliminarily appoint Donna Moore, Frenchola Holden and Keith McMillon as class representatives; (5) preliminarily appoint Kessler Topaz Meltzer & Check, LLP as Lead Class Counsel and Bramson, Plutzik, Mahler & Birkhaeuser, LLP, Berke, Berke & Berke and Travis & Calhoun, P.C. as Class Counsel; (6) order all proceedings in the Action other than such as may be necessary to carry out the terms and conditions of the Settlement Agreement or the responsibilities related to or incidental thereto are stayed and suspended until further order of this Court; and (7) set a date for the Final Approval Hearing.

Dated: January 24, 2014

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Counsel for Plaintiffs and the Proposed Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 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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