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

KYLE J. LIGUORI and TAMMY L. HOFFMAN, individually and on behalf of all others similarly situated, Plaintiffs, v. WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., NORTH STAR MORTGAGE GUARANTY REINSURANCE COMPANY, Defendants.	CIVIL ACTION NO. 08-cv-00479-PD

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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I. INTRODUCTION

Plaintiffs Kyle J. Liguori and Tammy L. Hoffman (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 (the "Settlement") in this nationwide class action asserting claims against Defendants Wells Fargo & Company, Wells Fargo Bank, N.A. (together, "Wells Fargo") and North Star Mortgage Guaranty Reinsurance Company ("North Star") (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 March 27, 2012, setting forth the terms of the agreed-upon Settlement (the "Agreement"). *See* Exhibit A hereto.

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 of Twelve Million Five Hundred Thousand Dollars ($12,500,000.00) (the "Settlement Fund") which will be deposited into an interest-bearing, qualified settlement account. The proposed Settlement represents over four years of rigorously contested litigation challenging Defendants' captive reinsurance arrangements and involving novel claims and highly complex arguments. The proposed Settlement[1] is fair, reasonable and adequate under the governing standards for evaluating class action settlements in the Third Circuit. Certification of the Class for settlement purposes only is clearly appropriate pursuant to Rule 23 of the Federal Rules of Civil Procedure.

As set forth below, in exchange for the release of Plaintiffs' RESPA claims described

[1] All capitalized terms used throughout this brief shall have the meanings ascribed to them in

herein and other terms and conditions of the Agreement, Defendants have agreed to pay $12,500,000.00. 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 Named Plaintiffs Kyle J. Liguori and Tammy L. Hoffman 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 Agreement, will be distributed to Participating Class Members2 based on an analysis of the number of private mortgage insurance payments made by each Participating Class Member on their applicable Reinsured Loans as of the Preliminary Approval Date. The amount that each Participating Class Member receives on account of a Reinsured Loan will be determined pursuant to a formula developed by Lead Class Counsel. If approved by the Court, the Settlement will fully and finally resolve the instant litigation.

In addition, the proposed plan for the dissemination of Class Notice to Class Members satisfies the requirements of due process and the form of notice is comprehensive and consistent with forms of notice approved in similar consumer class actions. Consequently, as explained herein, all prerequisites for preliminary approval of the Settlement and certification of the Class for settlement purposes only have been met. Preliminary approval of the Settlement and dissemination of Class Notice is thereby warranted.

Accordingly, Plaintiffs request that the Court (1) grant preliminary approval of the Settlement memorialized in the Agreement; (2) conditionally certify the Class for settlement purposes only; (3) approve and authorize the mailing of Class Notice; (4) approve the Plan of Allocation of the Settlement Fund presented herein, incorporated in the proposed Class Notice,

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the Agreement unless otherwise defined.

[2] The Parties have agreed to conduct confirmatory discovery to confirm the class size and composition.

and attached to the Agreement; (5) appoint Kyle J. Liguori and Tammy L. Hoffman as class representatives; (6) 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 & Conlon ("TCC") as Class Counsel (together "Plaintiffs' Counsel"); (7) order that the present litigation continue to be stayed pending the Court's decision on final approval of the Settlement or the Parties' termination of the Settlement pursuant to the terms of the Agreement; and (8) 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 entered into "captive reinsurance arrangements" for the purpose of receiving kickbacks, referral payments and unearned fee splits (disguised as "reinsurance" premiums) from private mortgage insurers to whom Wells Fargo referred borrowers, in violation of Sections 8(a) and (b) of RESPA, 12 U.S.C. §§ 2607(a) and (b). Plaintiffs allege that these captive reinsurance arrangements were created for the primary purpose of facilitating kickbacks and "naked" referral payments prohibited by RESPA and, secondarily, to guarantee a steady stream of business for the seven private mortgage insurance companies (collectively, the "MI Providers")[3] that provided practically all of the nation's private mortgage insurance ("PMI") during the relevant time period. Defendants contend that these payments were for *bona fide* reinsurance services—as evidenced by purported payments or projections of "losses" under the contracts. However, Plaintiffs argue that North Star, the Wells Fargo-affiliated "lender

[3] The MI providers with whom North Star 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.

captive reinsurer," assumed no, or very little, real risk under the contracts and, therefore, did not provide real or commensurately priced reinsurance.[4]

Section 8(a) of RESPA, 12 U.S.C. § 2607(a), prohibits lenders such as Wells Fargo from accepting kickbacks or referral fees from any person providing a real estate settlement service, including providers of PMI. 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 PMI—other than for services actually performed. Essentially, Plaintiffs allege that the captive reinsurance arrangements between Wells Fargo, North Star and the participating 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 Wells Fargo for referring business to the MI Providers.[5]

Specifically, Plaintiffs allege that they and every Class Member obtained residential home loans from Defendant Wells Fargo Bank, N.A. Because each made a down payment of less than twenty percent (20%) of the purchase of their home, Wells Fargo required them to purchase PMI. Plaintiffs allege that Wells Fargo referred them to MI Providers that "reinsured" their PMI policies with Defendant North Star, a Wells Fargo affiliate. However, Plaintiffs alleged that Defendants

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[4] 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.

[5] Plaintiffs' Counsel here recently settled a similar action involving virtually identical claims against Countrywide Financial Corp., Countrywide Home Loans, Inc. and Balboa Reinsurance Co. for Thirty-Four Million Dollars ($34,000,000.00). *See* Final Approval Order in *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508 (E.D. Pa. July 29, 2011) at ECF No. 149.

assumed no, or very little, actual risk of loss and, even if some risk was transferred, it was not commensurate with the PMI premiums ceded by the MI Providers to Defendants. 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 the MI Providers to whom Defendants referred their borrowers. Plaintiffs allege that this practice enabled Defendants to receive unearned portions and/or splits of the PMI premiums paid by Plaintiffs and members of the Class to the MI Providers and by eliminating competition among the MI providers to whom Defendants referred business.

Defendants deny all allegations of wrongdoing and have asserted numerous defenses to both liability and class certification. Defendants contend that North Star Mortgage Guaranty Reinsurance Company 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 the Procedural History of the Litigation

This litigation has been protracted and vigorously litigated since its initial filing by Plaintiff Liguori on January 31, 2008 in the United States District Court for the Eastern District of Pennsylvania.[6] Following the June 6, 2008 denial without prejudice of Defendants' motion to

[6] Prior to the institution of this action, another action, filed on March 7, 2007, was pending in the Northern District of California. That action, *Kay v. Wells Fargo & Co.*, No. 07-cv-01351 (N.D. Cal.) ("*Kay*"), involved virtually identical claims on behalf of persons who had obtained residential mortgage loans through Wells Fargo or any of its subsidiaries and paid for PMI issued from insurers with whom Wells Fargo had captive reinsurance arrangements. In *Kay*, the district court certified a class that included:

> All homebuyers who obtained residential mortgage loans through Wells Fargo Bank, N.A. that closed after March 7, 2006, but not including those borrowers whose loans Wells Fargo Bank, N.A. acquired from third-party lenders.

See Kay v. Wells Fargo & Co., 247 F.R.D. 572, 579 (N.D. Cal. 2007). That action was voluntarily

dismiss the claims of putative class members which arose more than one year prior to the filing of the complaint, or to strike the limitations tolling allegations,[7] Defendant answered the complaint on June 12, 2008. *See* ECF No. 38. On July 29, 2008, Plaintiff Liguori filed his motion for class certification and Defendants renewed their motion to dismiss. The parties responded to the applicable motions on September 5, 2008 and were given until September 29, 2008 to file reply briefs.

The parties requested, and on September 25, 2008, the Court entered, a stay of this action pending the Third Circuit Court of Appeals' resolution of a 12 U.S.C. § 1292(b) petition in the analogous *Alexander v. Washington Mutual, Inc.* action, No. 07-cv-04426 (E.D. Pa.) ("*Alexander*")[8] and return of that case to the district court. On August 4, 2008, the district court in *Alexander* has entered an order certifying the issue of whether the plaintiffs have standing to sue under RESPA for interlocutory appeal. The standing issue involved whether the filed rate doctrine

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dismissed after it was determined that the class representative did not have standing because her residential mortgage loan had not been reinsured through North Star, by way of an order dated January 28, 2008, that expressly provided "if a new suit is filed within 72 hours of this dismissal, then the Court will presume no prejudice to the putative class and no notice need be given. That suit can be filed wherever counsel wishes." *See* January 28, 2008 Order in *Kay* (ECF No. 125). Plaintiff Liguori filed his initial complaint in this matter within the 72-hour time frame. By agreement of the Parties, the statute of limitations for the instant action was tolled to March 6, 2006, one year prior to the filing of *Kay*.

[7] Defendants were given the option of renewing their motion at the class certification or summary judgment stage of the litigation. *See* ECF No. 37.

[8] The instant case is one of several existing analogous cases alleging RESPA violations in connection with captive reinsurance arrangements between lenders such as Wells Fargo and all of, or a subset of, the MI Providers. These cases include *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508 (E.D. Pa.); *Alexander v. Washington Mut., Inc.*, No. 07-cv-04426 (E.D. Pa.); *Moore v. GMAC Mortg., LLC*, No. 07-cv-04296 (E.D. Pa.); *Munoz v. PHH Corp.*, No. 08-cv-00759 (E.D. Cal.); *Thurmond v. SunTrust Banks, Inc.*, No. 11-cv-01352 (E.D. Pa.); *Samp v. JPMorgan Chase Bank, N.A.*, No. 11-cv-01950 (C.D. Cal.); *Menichino v. Citibank, N.A.*, No. 12-cv-00058 (W.D. Pa.); *Riddle v. Bank of America Corp.* (E.D. Pa.); *White v. PNC Fin. Servs. Grp., Inc.*, No. 11-cv-07928 (E.D. Pa.); *Manners v. Fifth Third Bank*, No. 12-cv-00442 (W.D. Pa.); *McCarn v. HSBC USA, Inc.*, No. 12-cv-00375 (E.D. Cal.).

bars the claims of borrowers who allege that their lender received kickbacks from mortgage insurance reinsured by a lender affiliate in violation of RESPA. Because those claims and the standing issue were also before the Court in this action, the parties filed a stipulation requesting that this action be stayed pending a decision by the Third Circuit on the interlocutory appeal. In the interim, the Third Circuit issued a decision in the analogous *Alston v. Countrywide Fin. Corp.,* 585 F.3d 753 (3d Cir. 2009) ("*Alston*") action, which resolved the standing issue presented in *Alexander*, with the result that *Alexander* was returned to the district court for resolution.[9] Accordingly, on January 22, 2010, the parties' joint request to remove the stay in this action was granted (ECF No. 74) and, in accordance with the Court's later order, the parties submitted a joint proposal regarding resumption of the litigation on February 8, 2010.

Thereafter, pursuant to the Court's February 23, 2010 Order, Plaintiff Liguori's motion for class certification and Defendants' opposition, as well as Defendants' renewed motion to dismiss and Plaintiffs' opposition, were deemed re-filed with a hearing set for April 20, 2010. The plaintiffs' motion for class certification in the analogous *Moore* matter was also before this Court at the same time. On March 2, 2010, the Court held a class certification hearing in *Moore*. As a result of the Court's direction that the parties develop a plan for targeted merits discovery to better inform its consideration of the class certification motion, the parties here thought it prudent to develop a similar plan given the similar procedural posture, claims and posed defenses in the two actions. The parties submitted a new proposal regarding the litigation, and, on March 22, 2010, the

[9] In *Alston*, the Third Circuit held that "the plain, unambiguous language is Section 8(d)(2) [of RESPA] indicates that damages are based on the settlement service amount with no requirement that there have been an overcharge." *Alston,* 585 F.3d at 760-61. Further, the Third Circuit found that "plaintiffs have suffered an injury-in-fact sufficient to support Article III standing," because their "particularized injury" is that they "receive[d] a loan accompanied by a kickback or unlawful referral . . . ." *Id*. at 762-63. Finally, the Third Circuit held that "[i]t is absolutely clear that the filed rate doctrine simply does not apply here." *Id*.

Court denied their pending motions without prejudice so that they could conduct focused discovery regarding, *inter alia*, Defendants' actual and projected losses and all necessary background/assumption/historical information, as well as whether Defendants' reinsurance agreements transferred actual risk. The parties were given leave to re-submit their motions upon the completion of such discovery.

Thereafter, the parties engaged in substantial discovery intended to address whether Defendants' actual and projected payments of "losses" were determinative of the merits of the RESPA claims that Plaintiffs sought to pursue on a class basis. Specifically, the Court wanted the parties to address whether the reinsurance contracts at issue constitute "real" or "commensurately priced" reinsurance as discussed in the HUD Letter.

As part of this "focused" discovery, Plaintiffs sought and reviewed, through often contentious and contested subpoenas, tens of thousands of pages of documents and numerous, complex Excel spreadsheets produced by Defendants, the third-party MI Providers and Defendants' third-party consulting actuarial firm, Milliman, Inc. ("Milliman"). Plaintiffs took the depositions of two of Defendants' corporate representatives (one of Defendants' corporate representatives was deposed twice), as well as the depositions of the corporate representatives for one of the third-party MI Providers (Radian Guaranty, Inc.) and Milliman. The parties each consulted and engaged with experts in the field of captive reinsurance and related fields and exchanged multiple, extensive expert reports.

On January 10, 2011, the Court granted the Parties' stipulation for Plaintiff Liguori to file a first amended class action complaint to add an additional named plaintiff and proposed class representative, Tammy L. Hoffman, and the complaint was filed as of that date (ECF No. 109). Defendants answered the amended complaint on January 28, 2011 (ECF No. 111) and re-filed

their renewed motion to dismiss on February 9, 2011 (ECF No. 112).[10] Plaintiffs also re-filed their motion for class certification on February 9, 2011 (ECF No. 113), and filed a motion to strike certain of Defendants' affirmative defenses set forth in their answer on February 22, 2011 (ECF No. 116).[11] On March 16, 2011, Defendants filed a motion for summary judgment as to the claims of Plaintiffs Liguori and Hoffman (ECF No. 140).

At the time when the Parties agreed to the Settlement, Defendants' renewed motion to dismiss and motion for summary judgment, as well as Plaintiffs' renewed motion for class certification, were fully briefed (with the exception of Plaintiffs' reply in further support of their motion for class certification which was due to be filed soon after) and awaiting decision.

Significant to this factual background and the Third Circuit's *Alston* decision is the fact that on November 23, 2010, the defendants in *First Am. Fin. Corp. v. Edwards*, No. 10-708, 2010 WL 4876485 (U.S. Nov. 23, 2010), another class case involving allegations of illegal kickbacks in exchange for referrals of settlement service business under RESPA, filed a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit which held that RESPA § 8(d)(2) gives standing to any plaintiff who purchased settlement services based on a referral that allegedly violated RESPA, whether or not the plaintiff suffered any actual harm. *Id*. at **1-2. The Ninth Circuit further held that the existence of a remedy under RESPA, again irrespective of whether the plaintiff suffered any actual injury, suffices to establish standing to sue under Article III. *Id*. at *2. The petition presented two questions for review, and on June 20, 2011, the United States Supreme Court granted certiorari to one of the questions in order to determine whether a private purchaser of real estate settlement services has standing to sue under Article III,

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[10] Defendants filed a corrected renewed motion to dismiss on March 9, 2011.

[11] After the filing of Plaintiffs' motion to strike, the parties met and conferred and stipulated to Defendants' filing an amended answer in exchange for the withdrawal of Plaintiffs' motion.

§ 2 of the United States Constitution. *See First Am. Fin. v. Edwards*, 131 S. Ct. 3022 (U.S. 2011). Oral argument on the petition in *Edwards* was held on November 28, 2011, and a decision is expected soon. As is discussed in Section IV.B., *infra* regarding the complexity, expense and likely duration of the litigation, when the Parties negotiated the terms of the Settlement, they were aware of the pending petition in *Edwards* and the impact that it could have on the case and Plaintiffs' claims.

C. Settlement Negotiations

While Plaintiffs' motion for class certification and Defendants' motion to dismiss and motion for summary judgment were pending, the Parties agreed to participate in arm's length settlement negotiations before John G. Bickerman of Bickerman Dispute Resolution, PLLC. Prior to the mediation, the Parties each submitted comprehensive briefs to Mr. Bickerman outlining their positions. Given the extensive discovery and the often contentious litigation described above, the Parties were acutely aware of the strengths and weaknesses of, and the facts relevant to, their respective legal positions and arguments.

On June 20, 2011, the Parties engaged in a full day of formal mediation before Mr. Bickerman, an experienced and highly respected mediator and arbitrator with extensive experience in high level litigation disputes. During the course of the mediation, there was an extensive exchange of information and analyses between the Parties 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, but with assistance from Mr. Bickerman they continued to negotiate in good faith while Plaintiffs were simultaneously preparing to file their reply in further support of their motion for class certification and preparing for anticipated oral argument on all three of the motions described above.

On July 21, 2011, 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' Agreement. *See* ECF No. 166. The agreement was achieved through spirited, and at times arduous, arm's length negotiations and renegotiations.

Plaintiffs believe that this hard-fought Settlement represents a fair and reasonable compromise in light of the risks, costs and uncertainties of continued litigation.

III. TERMS OF THE PROPOSED SETTLEMENT

As indicated above, the terms of the proposed Settlement are set forth in the Agreement attached hereto as Exhibit A.[12] The essential terms of the Settlement are as follows:

1. The Parties stipulate to class certification, for settlement purposes only, of Plaintiffs' claims for violations of RESPA §§ 2607(a) and (b). The Class is comprised of all borrowers with residential mortgage loans closed on or after March 7, 2006 through January 1, 2008 that were originated by Wells Fargo Bank and reinsured by North Star or its subsidiaries, excluding borrowers with residential mortgage loans originated by Wells Fargo Banks Correspondent Lending Division or otherwise purchased on the secondary market. *See* Exhibit A § 1.5.

[12] The full terms of the settlement are set forth in the executed Settlement Agreement dated March 27, 2012 and incorporated herein as Exhibit A, and represents the entirety of the agreement between the parties regarding the resolution of Plaintiffs' claims against Defendants. Plaintiffs do note that the proposed Settlement Class Period is shorter than that set forth in the operative complaint. Given that, as part of the mediation process presided over by Mr. Bickerman, Plaintiffs agreed that they would not continue to prosecute this suit or bring a separate action challenging the captive reinsurance activities of the Named Defendants with regard to Reinsured Loans (as the term is defined in the Settlement Agreement) for any time period preceding the settlement class period. This, of course, does not implicate or involve any other member of the proposed class. Further, Plaintiffs' counsel confirmed that, at the time the Parties had reached an agreement in principle in July 2011 (*see* letter to Judge Diamond, attached hereto as Exhibit B), that they did not, as of that date, represent any person who intended to file suit/bring any claim against any of the Named Defendants with regard to the above described activities.

2. Defendants agree to create a Settlement Fund in the amount of $12,500,000.00, plus interest earned thereon, for the benefit of the Class. Not later than five (5) business days after the entry of the Preliminary Approval Order, Lead Class Counsel shall direct 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 will be structured so it will qualify as a Qualified Settlement Fund (the "Escrow Account"). Defendants shall deposit the sum of $12,500,000.00 into the Escrow Account within ten (10) business days after they receive notice from the Settlement Administrator of the information needed to deposit the Settlement Fund. *See* Exhibit A §§ 3.1, 3.3, 3.6.

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 Agreement;

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

c) Case Contribution Awards to Kyle J. Liguori and Tammy L. Hoffman, not to exceed Seventy-Five Hundred Dollars ($7,500.00) each, as approved by the Court;

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* Exhibit A § 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 1 to the 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 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, Lead Class Counsel will retain the professional claims administration firm of 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 Agreement. *See* Exhibit A §§ 2.3, 2.11.

The form and method of notice agreed to by the Parties satisfies all due process considerations and meets the requirements of FED. R. CIV. P. 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 counsel fees and Named Plaintiffs' Case Contribution Awards that may be sought; (iv) the procedure and timing for objecting to the Settlement; and (v) the date and place for the Fairness 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. 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).

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[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 hereto as Exhibit C) to ensure the Class Notice is in compliance the their

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 their modified *pro-rata* distribution of the Settlement Fund on account of Reinsured Loans by check, mailed by the Settlement Administrator within seventy-five (75) days of the Effective Date (the "First Distribution"). *See* Exhibit A §§ 2.14, 4.3, 4.4. Payments to Participating Class Members shall be calculated and distributed according to a proposed Plan of Allocation, attached hereto as Exhibit 2 to the Agreement. The proposed Plan of Allocation in the instant matter is analogous to the Plan of Allocation approved in this district by Judge Juan R. Sanchez in *Alston* and attached hereto as Exhibit D.

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 4 to the 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 by the date that is sixty (60) days after issuance. *See* Exhibit A § 4.7.

7. In the event that a Settlement Payment check from the First Distribution is not cashed by a Participating Class Member, and that Participating Class Member's loan is actively

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recommendations.

serviced by Wells Fargo Bank, then Lead Class Counsel shall return to counsel for Defendants the total dollar amount of the uncashed Settlement Payment check to be applied to the principal balance of the Participating Class Member's loan. In the event that a Settlement Payment check from the First Distribution is not cashed by a Participating Class Member, and that Participating Class Member's loan is not actively serviced by Wells Fargo Bank, 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* Exhibit A § 4.8.

8. Upon the date when the Final Approval Order is entered, 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 Defendant Parties (as that term is defined in the

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) concern the reinsurance of PMI on any Reinsured Loan; or (b) arise from any transaction or occurrences related to the reinsurance of PMI that was the subject of the Action. *See* Exhibit A § 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 percent (33%) 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* Exhibit A § 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. *See In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998) ("The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow 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 $7,500 each, payable to the Named Plaintiffs from the Settlement Fund for their efforts in this case, including the burden and risks associated with bringing this action publicly. *See* Exhibit A § 5.4.

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 $7,500 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.,* Order Granting Final Approval, *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508 (E.D. Pa. July 29, 2011), ECF No. 149 (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. 3:07-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 and responding to discovery requests. In addition, Plaintiff Liguori sat for a deposition at which he was closely questioned for several hours. Awards of up to $7,500 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 and enhancement requests 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

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.

In class action cases, prior to the dissemination of notice to putative class members, the Court must first approve any settlement. *See* FED. R. CIV. P. 23(e). As described in *The Manual for Complex Litigation*, court approval of a class action settlement is a two-step process:

> Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties . . . . The judge must make a

> preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the . . . proposed settlement, and date of the fairness hearing.

Moore's Federal Practice, *Manual for Complex Litigation* (Fourth) § 21.632 (2004).

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 compromise of complex litigation is encouraged by the courts and favored by public policy (citations omitted); *Parks v. Portnoff Law Assocs.,* 243 F. Supp. 2d 244, 249 (E.D. Pa. 2003).

The district courts are granted 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 ensure 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 Gen. Motors Corp.*, 55 F.3d at 806).

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

The Court should preliminarily approve the Settlement. "[A] class action cannot be settled without the approval of the court and a determination that the proposed settlement is fair, reasonable and adequate." *In re Pet Food Prods. Liab. Litig.*, 629 F. 3d at 349 (citations omitted). *See also Moore,* 2011 WL 238821, at *2 (quoting FED. R. CIV. P. 23(e)(1)(C)). On a substantive level, it is the court's role "to protect the unnamed members of the class from unjust or unfair settlements . . . ." *Ehrheart*, 609 F.3d at 593 (citing *In re AT & T Corp.*, 455 F.3d 160, 175 (3d Cir. 2006) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001)). *See also In re Pet Food Prods. Liab. Litig.*, 629 F. 3d at 349 (noting, "[u]nder Rule 23(e), trial judges bear the important responsibility of protecting absent class members, 'which is executed by the court's assuring that the settlement represents adequate compensation for the release of claims.'"); *In re Ikon Office Solutions, Inc. Litig.*, 209 F.R.D. 94, 100 (E.D. Pa. 2002) (the "court must decide whether the proposed settlement itself is fair to settling parties and relevant third parties.") (citing FED. R. CIV. P. 23(e)).

Under Rule 23(e) of the Federal Rules of Civil Procedure, at the preliminary approval stage, this Court must determine whether the settlement is within a range that responsible and experienced attorneys could accept, considering all relevant risks and factors of litigation. *See Walsh v. Great Atl. & Pac. Tea Co.*, 96 F.R.D. 632, 642 (D.N.J. 1983). The range "recognizes the

uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Because a settlement represents an exercise of judgment by the negotiating parties, courts have consistently held 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):

> If 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.

To determine whether the settlement is fair, reasonable and adequate under Rule 23(e), courts in the Third Circuit apply the nine-factor test enunciated in *Girsh v. Jepson*, 521 F.2d at 157, recently reaffirmed in *In re Pet Food Prods. Liab. Litig.,* 629 F.3d at 349-351 and *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 258 (3d Cir. 2009). The *Girsh* factors are:

(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. The Third Circuit accords broad discretion to the district courts in determining whether to approve a proposed class action settlement. *Id*. at 535.[14] In addition, the Third Circuit has seen fit to expand 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

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[14] At the preliminary approval stage, this Court need only be satisfied that there is "probable cause" to believe that the settlement is fair and reasonable. *The Manual For Complex Litigation* sets forth the procedures for preliminary approval of settlements:

> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Manual for Complex Litigation, § 21.632.

Thus, the question for this Court should be whether the Settlement falls well within the "range of possible approval," *id.,* and is sufficiently fair, reasonable and adequate to warrant dissemination of notice apprising class members of the proposed settlement and to establish procedures for a final settlement hearing under Rule 23(e). The initial presumption of fairness of a class settlement may be established by showing that (1) the settlement has been arrived at by arm's-length bargaining; (2) sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently; and (3) the proponents of the settlement are counsel experienced in similar litigation. Alba Conte & Herbert Newberg, *Newberg on Class Actions* §11.41 (4th ed. 2002). The instant Settlement clearly meets each of these requirements.

> 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 reached by the Parties because it achieves a notably fair result for the Class. Plaintiffs believe that the Settlement is fundamentally fair, reasonable and in the best interest of the Class considering 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. Indeed Plaintiffs' Counsel are currently involved in prosecuting several other analogous cases. *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.[15] 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

[15] 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.

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.

1. Complexity, Expense and Likely Duration of the Litigation

Prior to the Parties reaching the Settlement with the assistance of an able mediator, this litigation had gone on for over four years and was diligently litigated by both sides. Defendants vigorously countered each move made by Plaintiffs. The Parties fully briefed Defendants' multiple motions to dismiss, Defendants' motion for summary judgment, and Plaintiffs' motion for class certification. Additionally, the Parties engaged in comprehensive discovery of numerous third-parties, including often heated and contentious discovery negotiations, took six 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.

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 *Alston* and *Moore* 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.

Moreover, the *Alston* plaintiffs' success at the Third Circuit on Defendants' standing defenses is now being questioned as a result of the Supreme Court's June 20, 2011 decision to grant certiorari in *First Am. Fin. v. Edwards*, 131 S. Ct. 3022 (2011) to determine whether a private litigant has Article III standing to allege a Section 8 RESPA claim without an allegation of an overcharge.

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); *Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995) (where litigation is potentially lengthy and will result in great expense, settlement is in the best interest of the class members). 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 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 Hearing.

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

The stage of the proceedings and the amount of discovery completed and Plaintiffs' Counsel's experience in the *Alexander*, *Alston* and *Moore* matters, gave counsel for both sides a thorough appreciation of the merits of the case and the strengths and weaknesses of their respective positions. The factual background comprising this factor has been addressed above. Hence, Plaintiffs' Counsel respectfully refers the Court to Section II *supra*. Further, the Parties have engaged in significant discovery to date—including propounding and responding to multiple sets of Interrogatories and Requests for Production, depositions of Plaintiff Liguori, Defendants' corporate witnesses and subpoenas for documents and depositions to multiple third-parties, and the review and many thousands of pages of discovery materials, including those produced by third-parties. In short, Plaintiffs have engaged in sufficient discovery to be fully informed about the fairness and appropriateness of the proposed Settlement. This factor weighs in favor of approval of the Settlement.

4. Risks of Establishing Liability and Damages

"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 at 319. 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 North Star has indeed paid 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, as noted above, Plaintiffs' standing issues, won at the Third Circuit in *Alston*, are now being questioned as a result of the Supreme Court's June 20, 2011 decision to grant certiorari in *First Am. Fin. v. Edwards*, 131 S. Ct. 3022 (2011) to determine whether a private litigant has Article III standing to allege a Section 8 RESPA claim without an allegation of an overcharge.

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 Parties agreed to mediate. Moreover, the future issues of the proper measure of damages alone would have invariably triggered a battle of the experts. This would have added additional risk that the class might ultimately receive no compensation (or a significantly reduced amount), if the Court were to side with Defendants.

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 PMI is not a settlement service, and that Plaintiffs' reliance on the Third Circuit's opinion in *Alston* is misplaced, claiming that Plaintiffs rely on *dicta* when they assert that the Third Circuit has determined that PMI is a settlement service. Plaintiffs, on the other hand, contend that the Third Circuit, in this case, determined that there could be no doubt that PMI is a settlement service. Even if PMI is deemed a settlement service, as Plaintiffs strenuously have argued, there is some disagreement regarding the assessment of the amount of damages that can be properly awarded. Defendants' Thirteenth, Fifteenth, Sixteenth, and Twenty-Third Affirmative Defenses challenge either the measure of damages, or the Constitutionality of the damages that Plaintiffs seek, contending that they violate due process and equal protection because they are excessive; they violate the excessive fines clause of the U.S. Constitution, arguing that an award such as that contemplated by the Plaintiffs (that is three times all the PMI 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 kinds 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. Defendants, in their Opposition to Plaintiff's Motion for Class Certification argued that Plaintiffs' Motion should be denied, stating:

- Plaintiffs cannot demonstrate predominance because they cannot establish the elements of a RESPA Section 8 claim using common proofs. Furthermore, they argue that the split among the Circuit Courts regarding whether Section 8 of RESPA requires an overcharge militates against a finding of superiority as the class action could affect the substantive outcome of a Class Member's claim, especially given the RESPA's requirement that plaintiffs file their claims in the district where the subject property is located.
- Plaintiffs' claims are not appropriate for private litigation.
- Plaintiffs fail to demonstrate that the Named Plaintiffs' claims are typical or adequate because they cannot represent all Class Members who were required to purchase MI as Class Members were subject to seven different MI companies, at very least they can only represent those borrowers whose loans were insured by

their own MI providers. Furthermore, Defendants argue that the named Plaintiffs are subject to unique defenses.

- Plaintiffs' class definition is temporally overbroad.

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 Fund is being paid directly by Defendants as they have not asserted any insurance coverage for the RESPA claims asserted here. It is questionable whether Defendants could afford to pay a greater judgment, especially given the economic climate with respect to national banks and real estate holdings. 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

"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." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 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 333 (3d Cir. 2010).

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 Consideration in the amount of $12,500,000.00 and is, in Plaintiffs' counsels' estimation, an excellent result.

While Plaintiffs' counsel recognizes that there is potential for recovery in the hundreds of millions, given the gross amount paid for the alleged "settlement service" by the Class for MI insurance, the Proposed Settlement there remains substantial uncertainty regarding the outcome. Indeed, RESPA establishes statutory damages amounting to three times the amount charged for the settlement service, in this case payment of PMI. 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.[16] Defendants also assert a 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,

[16] While the Third Circuit, in *Alston*, as discussed above, held that the plaintiffs had standing to assert these claims absent an overcharge, this very issue is before the Supreme Court in *Edwards*.

> 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' novel and creative argument, that the proper measure of damages is not based on the total amount of PMI paid by the Class during the Class Period, but rather is based on the amount of the first PMI 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.[17] As such, given the uncertainty of the amount of the settlement service itself, $12,500,000.00 represents a reasonable and fair compromise, especially in light of the Defendants' Constitutional challenges and the split now existing among the Circuits in this rapidly evolving and complex area of law.

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, 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. 94 (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.,*

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[17] *See, e.g.*, http://cgi.money.cnn.com/tools/mortgagecalc/ (stating that the average PMI payment ranges from $50 to $80 per month on a medium-priced home of $159,000). Assuming $80 per month, for approximately 72,000 Class Members, this amounts to $5,760,000. If the assumed $80 per month is trebled for the approximately 72,000 Class Members, *see* 12 U.S.C. 2607(d)(2), the resulting amount is $17,280,000, representing 72% of the $12,500,000 Settlement.

Contos, 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 borrowers with residential mortgage loans closed on or after March 7, 2006 through January 31, 2008 that originated by Wells Fargo Bank and reinsured by North Star, excluding borrowers with residential mortgage loans originated by Wells Fargo's Correspondent Lending Division or otherwise purchased on the secondary market.

The *Alston* Court recently granted a substantially similar class certification for settlement purposes only. *See, e.g.,* Final Approval Order, *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508 (E.D. Pa. July 29, 2011), ECF No. 149. 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:

> 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, as Defendants themselves concede, Plaintiffs readily meet the numerosity requirement and estimate that the Class will include approximately 72,000 Reinsured Loans.

2. Rule 23(a)(2) – "Commonality"

The Class satisfies the commonality requirement. "Commonality requires the plaintiff to demonstrate that that the class members 'have suffered the same injury.'" *Wal-Mart*, 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); *see also 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' PMI premiums purportedly for reinsurance services that Plaintiffs alleged exceeded and was not commensurate with the value of services actually rendered. As noted in Plaintiffs' First Amended Class Action Complaint ¶ 74, common questions

of law and fact include:

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

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

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

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

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

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

These multiple "shared legal issues" are sufficient to support certification under Rule 23(a)(2) in the context of settlement. Moreover, as the Third Circuit recently affirmed, the commonality requirement is "incorporated into the more stringent 23(b)(3) requirement." *Sullivan*, 667 F. 3d at 311. Since, as discussed in greater detail below, Plaintiffs satisfy the "more stringent" 23(b)(3) 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 Wells Fargo and was required to purchase PMI from a provider who then allegedly reinsured that loan through North Star 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"

Rule 23(a)(4) requires a finding that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23 (a)(4). The Third Circuit has noted that Rule 23(a)(4), insures "[t]hat the representatives and their attorneys will competently, responsibly and vigorously prosecute the suit." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977), *cert. den.* 434 U.S. 1086 (1978). Under the test articulated by the Third Circuit in *Bogosian*, two prongs must be satisfied: (1) the absence of any actual conflict of interest between the representative plaintiffs and other class members; and (2) the presence of competent counsel to represent the class. *Id.* Plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation on behalf of the Settlement Class members. *See* Section V.C. below. Furthermore, Plaintiffs contend that they have no interests that are adverse to those of the other Class Members.

B. The 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., In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions,* 148 F.3d at 314 (affirming lower court's finding of predominance where plaintiff alleged defendant engaged in "common scheme" or uniform practice). Accordingly, in the instant matter, common issues predominate, because Class Members seek to remedy "common legal grievances"—namely, the allegedly improper reinsurance scheme perpetuated by Defendants. Plaintiffs contend that each of these common questions may be resolved on a class-wide basis through common proof.

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 Rules 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 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 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 it violated RESPA. 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 & Conlon, 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 & Conlon 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 Declaration of Edward W. Ciolko in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement ("Ciolko Decl.") ¶ 9, Plaintiffs' Counsel have done considerable work to investigate and prosecute these claims. Specifically, regarding the instant action, KTMC attorneys have reviewed thousands of pages of documents from both Defendants and third-parties, have defended the deposition of Plaintiff Liguori, and have deposed Defendants' corporate witness and the corporate witnesses of multiple third-parties.

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. ¶ 4 and Exhibit A thereto. The firm has been appointed class counsel and lead counsel in the analogous *Alston* case, as well as in a wide range of ERISA, securities and consumer class actions and is currently prosecuting numerous additional RESPA-based or lending class actions concerning, *inter alia*, mortgage lending (discriminatory and predatory) and title insurance. *Id*. KTMC has prevailed in appeals before the First, Third and Ninth Circuits resulting in seminal decisions that have helped shape ERISA jurisprudence. For instance, in *Evans v. Akers*, 534 F.3d 65 (1st Cir. 2008), KTMC

successfully argued that former employees who have received lump sum distributions of the entire balance of their retirement plan have standing to sue under ERISA. *See also In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005) (finding that a subset of participants in a defined contribution plan had standing to sue on behalf of the plan pursuant to ERISA § 502(a)(2)); *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008) (overturning 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, such as *Alston, supra*, *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig*., 08-md-01988 (S.D. Cal.) (multi-district class case alleging RICO claims based upon predatory lending practices), *Rodriguez v. Nat'l City Bank,* 08-CV-02059-ER (E.D. Pa.) (class case alleging lending discrimination against minority borrowers) as well as others.[18]

In addition to KTMC's impressive results in the consumer protection arena, courts have not hesitated to appoint KTMC in a wide variety of complex class actions, such as *Nowak v. Ford Motor Co.*, 240 F.R.D. 355, 362 (E.D. Mich. 2006), where the Court specifically noted "[KTMC] has extensive experience litigating ERISA breach of fiduciary class actions," and that "[i]n addition to its extensive litigation experience, the firm has also successfully engaged in extensive, intricate and successful settlement negotiations and mediation involving ERISA claims," 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

[18] *See Allen v. Decision One Mortg. Co., LLC*, 07-11669-GAO (D. Mass.) (settlement of a class of borrowers alleging discrimination in mortgage lending under federal law); *Payares v. J.P. Morgan Chase & Co.,* 07-cv-05540 (C.D. Cal.) (same).

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. 02-1335-B (D.N.H. 2002) (as Co-Lead Counsel secured a record $3.2 billion settlement); *In re AOL ERISA Litig.*, 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 TCC also have substantial experience in prosecuting class and consumer actions. *See* Ciolko Decl. ¶ 8 and Exhibits B, C and D 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* action. *See* Final Approval Order in *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508 (E.D. Pa. July 29, 2011). Additionally, among the similar consumer actions that Plaintiffs' Counsel are currently litigating are three related class actions involving claims substantially similar to those at issue here

where KTMC has repeatedly prevailed in opposition to motions to dismiss. *See Moore v. GMAC Mortg.,* No. 07-04296 (E.D. Pa.); *Alexander v. Washington Mut., Inc.,* No. 07-4426 (E.D. Pa.); and *Munoz v. PHH Corp.,* No. 08-00759 (E.D. Ca.).

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). *See* Ciolko Decl. ¶ 9. 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

The Court should approve the proposed Plan of Allocation. *See* Plan of Allocation, attached to the Agreement as Exhibit 2. "Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to the approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *Melhing v. N.Y. Life Ins. Co*., 248 F.R.D. 455, 463 (E.D. Pa. 2008). Here, 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 pursuant to a formula developed by Lead Class Counsel in conjunction with counsel for Defendants based on an analysis of the number of PMI payments made by each Participating Class Member on account of the applicable Reinsured Loans. Thus, all Participating Class Members will receive a proportionate award based on the number of PMI payments that they made. This allocation is efficient and takes into account that Plaintiffs challenged Defendants' business practices and not the amount of Class Members' PMI payments, thus Class Members who

paid PMI for a longer period of time will receive more than those who paid for a shorter period of time.

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 PMI, 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 1 to the 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: (1) a description of the Class; (2) a description of the claims asserted in the class actions; (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 fairness hearing date; (7) an explanation of eligibility for appearing at the

fairness hearing; and (8) the deadline for filing objections to the settlement.

The contents of the proposed Class Notice are more than adequate. It provides Class Members of the Settlement Class 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 Commc'ns Corp.*, 17 F.3d 1553, 1560 (3d Cir. 1994). As previously stated, a similar notice plan utilized in the settlement of *Alston v. Countrywide* was approved by Judge Sanchez and is attached hereto as Exhibit D.

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 United States Postal Service software. The Class Notice will outline the allegations of the case and

[19] The Parties are currently making arrangements to put in place an e-mail address 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.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that the Court: (1) grant preliminary approval of the Settlement memorialized in the Agreement; (2) conditionally certify the Class for settlement purposes only; (3) approve and authorize the mailing of Class Notice; (4) approve the Plan of Allocation of the Settlement Fund presented herein, incorporated in the proposed Class Notice, and attached to the Agreement; (5) appoint Kyle J. Liguori and Tammy L. Hoffman as class representatives; (6) appoint Kessler Topaz Meltzer & Check, LLP as Lead Class Counsel and Bramson, Plutzik, Mahler & Birkhaeuser, LLP, Berke, Berke & Berke and Travis, Calhoun & Conlon as Class Counsel; (7) order that the present litigation continue to be stayed pending the Court's decision on final approval of the Settlement or the Parties' termination of the Settlement pursuant to the terms of the Agreement; and (8) set a date for the Final Approval Hearing.

Dated: May 16, 2012

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