Docket #4451 Date Filed: 7/31/2013

Hearing Date and Time: August 21, 2013 at 10:00 a.m. (EST)
Objection Deadline: August 14, 2013 at 4:00 p.m. (EST)

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| **In re:** | **Chapter 11** |
| **RESIDENTIAL CAPITAL, LLC, *et al.*,** | **Case No. 12-12020 (MG)** |
| **Debtors.** | **(Jointly Administered)** |

**NOTICE OF PRELIMINARY HEARING REGARDING JOINT MOTION PURSUANT TO 11 U.S.C. § 105 AND FED. R. BANKR. P. 7023 AND 9019 FOR AN ORDER (1) GRANTING CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT ONLY, (2) APPOINTING CLASS REPRESENTATIVE AND CLASS COUNSEL FOR PURPOSES OF SETTLEMENT ONLY, (3) PRELIMINARILY APPROVING THE SETTLEMENT AGREEMENT BETWEEN PLAINTIFFS, ON THEIR OWN BEHALF AND ON BEHALF OF THE CLASS OF SIMILARLY SITUATED PERSONS, AND THE DEBTORS, (4) APPROVING THE FORM AND MANNER OF NOTICE TO THE CLASS, (5) SCHEDULING A FAIRNESS HEARING TO CONSIDER APPROVAL OF THE SETTLEMENT AGREEMENT ON A FINAL BASIS AND RELATED RELIEF AND (6) APPROVING THE SETTLEMENT AGREEMENT ON A FINAL BASIS AND GRANTING RELATED RELIEF**

**PLEASE TAKE NOTICE** that, on July 31, 2013, the prospective class representatives Rowena Drennen, Flora Gaskin, Roger Turner, Christie Turner, John Picard and Rebecca Picard (collectively, the "**Named Plaintiffs**"), on behalf of themselves and similarly situated class members, and the above captioned debtors and debtors in possession (collectively, the "**Debtors**") filed the Joint Motion Pursuant to 11 U.S.C. § 105 and Fed. R. Bankr. P. 7023 and 9019 For An Order (1) Granting Class Certification for Purposes of Settlement Only, (2) Appointing Class Representative and Class Counsel for Purposes of Settlement Only, (3) Preliminarily Approving the Settlement Agreement Between Plaintiffs, On Their Own Behalf and On Behalf of the Class of Similarly Situated Persons, and the Debtors, (4) Approving the Form and Manner of Notice to the Class, (5) Scheduling a Fairness Hearing to Consider



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Approval of the Settlement Agreement on a Final Basis and Related Relief and (6) Approving the Settlement Agreement on a Final Basis and Granting Related Relief (the "**Motion**").

**PLEASE TAKE FURTHER NOTICE** that a hearing to consider the preliminary relief requested in the Motion (the "Preliminary Hearing") shall be held before the Honorable Martin Glenn, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of New York, Courtroom 501, One Bowling Green, New York, New York 10004 (the "**Bankruptcy Court**") on **August 21, 2013 at 10:00 a.m. (prevailing Eastern time)**, or as soon thereafter as counsel may be heard.

**PLEASE TAKE FURTHER NOTICE** that any objection to the preliminary relief requested in the Motion to be considered at the Preliminary Hearing must be in writing, conform to the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules for the Southern District of New York and shall be filed with the Bankruptcy Court electronically in accordance with General Order M-399 (General Order M-399 and the User's manual for the Electronic Case Filing System can be found at www.nysb.uscourts.gov, the official website for the Bankruptcy Court) by registered users of the Bankruptcy Court's case filing system, and by all other parties-in-interest, on a 3.5 inch disk or CD-ROM, preferably in Portable Document Format, WordPerfect or any other Windows-based word processing format (with a hard copy delivered directly to Chambers) and served in accordance with General Order M-399 and in accordance with this Court's order, dated May 23, 2012, implementing certain notice and case management procedures [Docket No. 141], so as to be received no later than **August 14, 2013 at 4:00 p.m. (prevailing Eastern Time)** (the "**Objection Deadline**")**.**

**PLEASE TAKE FURTHER NOTICE** that if no objection to the preliminary relief requested in the Motion is timely filed and served, the Bankruptcy Court may enter an order granting the preliminary relief requested in a Motion without further notice or opportunity to be heard afforded to any party.

Dated: July 31, 2013
New York, New York

/s/ Norman S. Rosenbaum
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Norman S. Rosenbaum
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**OTHER AUTHORITIES**

Prospective class representatives Rowena Drennen,[1] Flora Gaskin, Roger Turner, Christie Turner, John Picard and Rebecca Picard ("**Named Plaintiffs**" or "**Class Representatives**"), on behalf of themselves and similarly situated class members (the "**Class Members**" or the "**Kessler Settlement Class**"), by and through their respective counsel, and the above captioned debtors and debtors in possession (collectively, the "**Debtors**"),[2] including Residential Capital, LLC ("**ResCap**"), Residential Funding Company, LLC ("**RFC**") and GMAC Residential Holding Company, LLC ("**GMAC Holding**" and together with ResCap and RFC, the "**Settling Defendants**" and together with the Named Plaintiffs, the "**Parties**"), by and through their respective counsel of record, submit this joint motion (the "**Motion**")[3] seeking entry of orders, substantially in the form annexed to the Settlement Agreement (defined below) as Exhibits B and C (the "**Orders**"), pursuant to section 105 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the "**Bankruptcy Code**") and Rules 7023 and 9019 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") (1) granting class certification for purposes of settlement only, (2) appointing the Named Plaintiffs as representatives of the Kessler Settlement Class and appointing class counsel for purposes of settlement only, (3) preliminarily approving the settlement agreement between (i) Named Plaintiffs, on their own behalf and on behalf of the Class Members and (ii) the Settling Defendants, (4) approving the form and manner of notice to the Kessler Settlement Class, (5) scheduling a fairness hearing to consider approval of the Settlement Agreement on a final basis and related relief and (6) approving the Settlement Agreement on a final basis and granting related relief. In support of the Motion, the Parties rely

[1] Rowena Drennen is a member of the Creditors' Committee (defined below).
[2] The names of the Debtors in these cases and their respective tax identification numbers are identified on Exhibit 1 to the Affidavit of James Whitlinger, Chief Financial Officer of Residential Capital, LLC, in Support of Chapter 11 Petitions and First Day Pleadings [Docket No. 6].
[3] Creditors and parties-in-interest with questions or concerns regarding the Debtors' Chapter 11 cases or the relief requested in this Motion may refer to http://www.kccllc.net/rescap for additional information.

on: (i) the Declaration of William R. Thompson, General Counsel of Residential Capital, LLC (the "**Thompson Declaration**"), dated July 31, 2013, annexed hereto as **Exhibit 1**; (ii) the Supplemental Declaration of R. Frederick Walters (the "**Walters Declaration**"), dated July 31, 2013, annexed hereto as **Exhibit 2**; (iii) the Declaration of R. Frederick Walters, David M. Skeens and R. Bruce Carlson (the "**Class Counsel Declaration**"),[4] dated November 2, 2012, annexed hereto as **Exhibit 3**; (iv) the Declaration of Ronald J. Friedman Regarding Reasonableness of Allocation in Settlement of the Kessler Class Action (the "**Special Counsel Declaration**"), dated July 22, 2013, annexed hereto as **Exhibit 4**; and (v) the Kessler Settlement Agreement,[5] dated June 27, 2013, (the "**Settlement Agreement**"), annexed hereto as **Exhibit 5**. In further support of this Motion, the Parties respectfully state as follows:

## PRELIMINARY STATEMENT

1. This Court's review of the proposed Settlement Agreement, by which the Parties seek approval of the settlement of the pending putative class actions and an underlying proof of claim filed on behalf of the putative class, is subject to a two-step procedure. Initially, on August 21, 2013, during the first of two hearings on the Settlement Agreement, the Parties only request the Court to make a "preliminary" ruling regarding (i) whether the settlement class should be certified for settlement purposes; (ii) whether the proposed settlement is presumptively "fair, adequate and reasonable" such that notice of the settlement should be provided to the Class Members in the manner proposed herein; (iii) approving the appointment of the Named Plaintiffs as representatives of the Kessler Settlement Class and the appointment of class counsel;

[4] The Class Counsel Declaration was originally filed in connection with the Motion to Apply Bankruptcy Rule 7023 and Certify Claims [Docket. No. 2047]. It provides a detailed review of the causes of action at issue in the MDL Litigation (defined below), which were re-asserted in the chapter 11 proceedings against RFC, GMAC and ResCap and which are the subject of this class action settlement.

[5] Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Settlement Agreement and are incorporated by reference into this Motion.

(iv) approving the form of notice to the Kessler Settlement Class of the Settlement Agreement; and (v) the balance of the relief requested as set forth in the form of proposed order annexed as Exhibit B to the Settlement Agreement (the "**Preliminary Approval Order**"). Approval of the Settlement Agreement on a final basis in accordance with, *inter alia*, section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, will be considered, along with certain other relief as set forth in the form of proposed order annexed as Exhibit C to the Settlement Agreement (the "**Final Approval Order**"), at the final hearing to be scheduled by the Court contemporaneous with confirmation of the Plan. Parties-in-interest will have the opportunity to be heard and oppose approval of the Settlement Agreement on a final basis at the final hearing.

2. For approximately the past twelve (12) years, the Debtors have been engaged in several putative class actions relating to some 44,535 second mortgage loans held by the Class Members that were acquired by RFC following the origination thereof. In multi-district litigation pending in the U.S. District Court for the Western District of Pennsylvania, and in the class claims now asserted against the Debtors in this Court, the Kessler Settlement Class claimants assert that they are entitled to recover damages against the Settling Defendants in excess of $1.87 billion on account of purported violations of RESPA, TILA/HOEPA and RICO (each defined herein).

3. Under the terms of the Settlement Agreement, the Parties seek to fully resolve all issues among the Settling Defendants, Named Plaintiffs and the other putative Class Members by reducing the claims asserted by the Kessler Settlement Class and addressing such claim under the Plan (defined below). The Settlement Agreement brings finality to a long-standing litigation by fixing an allowed, general unsecured Borrower Claim (as defined in the Plan) against only RFC in an amount that is reasonable and that will allow for meaningful distributions to the Class

Members and other potential benefits. The Settlement Agreement also confers additional potential benefits upon the Class Members through potential insurance recoveries.

4. The Parties assert that the proposed settlement is fair, equitable and in the best interest of the Class Members, the Debtors' estates and their creditors. The terms and conditions of the settlement were reached in the context of the Plan mediation through good faith, extensive arm's-length negotiations between well-represented parties. The proposed settlement will resolve all of the remaining claims of the Kessler Settlement Class against the Settling Defendants without the need for complex, time consuming and expensive litigation, the outcome of which would be uncertain. Moreover, the Settlement Amount is fair and reasonable in light of: (a) the allegations made; (b) the potential for increased damages based on the mathematical computations that may ultimately be accepted in the MDL Litigation or by this Court; and (c) the necessary incurrence of significant costs and expenses on the part of the Named Plaintiffs as well as the Debtors' estates attendant to the continued litigation of this matter.

5. Accordingly, as discussed in greater detail herein, granting the relief requested in the Motion is in the best interest of the Kessler Settlement Class, the Debtors, their creditors and the estates.

## JURISDICTION AND VENUE

6. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

7. Venue before this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

8. The statutory predicate for the relief sought herein is section 105 of the Bankruptcy Code, Bankruptcy Rules 7023 and 9019 and Rule 23 of the Federal Rules of Civil Procedures (the "**Federal Rules**").

## BACKGROUND

### A. The Chapter 11 Cases

9. On May 14, 2012 (the "**Petition Date**"), each of the Debtors filed a voluntary petition in the United States Bankruptcy Court for the Southern District of New York (this "**Court**") for relief under Chapter 11 of the Bankruptcy Code (the "**Chapter 11 Cases**"). The Debtors are managing and operating their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. These cases are being jointly administered pursuant to Bankruptcy Rule 1015(b). No trustee has been appointed in the Chapter 11 Cases.

10. On May 16, 2012, the United States Trustee for the Southern District of New York appointed a nine (9) member official committee of unsecured creditors (the "**Creditors' Committee**") [Docket No. 102].

11. On June 20, 2012, this Court directed that an examiner be appointed [Docket No. 454], and on July 3, 2012, the Court approved Arthur J. Gonzalez as the examiner [Docket No. 674]. On May 13, 2013, the Examiner filed his report under seal and, on June 26, 2013, the Court entered an order unsealing the report [Docket Nos. 3698, 4099].

12. On July 3, 2013, the Debtors filed the Joint Chapter 11 Plan Proposed by Residential Capital, LLC, et al. and the Official Committee of Unsecured Creditors (the "**Plan**") [Docket No. 4153] and the Disclosure Statement for the Joint Chapter 11 Plan Proposed by Residential Capital, LLC, et al. and the Official Committee of Unsecured Creditors (the

"**Disclosure Statement**") [Docket No. 4157]. The hearing to approve the Disclosure Statement and related relief is currently scheduled for August 21, 2013.

**B. The Class Action**

***(i) Procedural History***

13. As of the Petition Date, several putative class actions against RFC and certain other named defendants, including Community Bank of Northern Virginia ("**CBNV**"), now owned by PNC Bank, N.A. ("**PNC**"), and the Federal Deposit Insurance Corporation ("**FDIC**") as receiver for Guaranty National Bank of Tallahassee ("**GNBT**"), were pending in the United States District Court for the Western District of Pennsylvania (the "**District Court**") as part of a multidistrict proceeding styled *In re Community Bank of Northern Virginia Second Mortgage Lending Practice Litigation,* MDL No. 1674, Case Nos. 03-0425, 02-01201, 05-0688, 05-1386 (the "**MDL Litigation**"). *See* Thompson Declaration at ¶ 6; Class Counsel Declaration at ¶ 6. The MDL Litigation relates primarily to some 44,535 second mortgage loans originated to some 70,000-plus borrowers nationwide by either CBNV or GNBT that had been acquired by RFC. *See* Class Counsel Declaration at ¶ 6. All members of the proposed Kessler Settlement Class are known and have been identified. *See* Settlement Agreement at Exhibit D (containing a list of all members of Kessler Settlement Class).[6]

14. The loans involved are "high-cost" loans under the Home Ownership and Equity Protection Act, 15 U.S.C. § 1641 ("**HOEPA**"). *See* Class Counsel Declaration at ¶ 9; Thompson Declaration at ¶ 8. Each loan transaction was governed by and subject to the Real Estate Settlement Practices Act 12 U.S.C. § 2601 *et seq.* ("**RESPA**"), the Truth in Lending Act

[6] In accordance with the Settlement Agreement, the Parties have requested and obtained authority from this Court to file Exhibit D under seal in order to protect the privacy of the members of the Kessler Settlement Class.

("**TILA**") and HOEPA (15 U.S.C. § 1602 and Regulation Z at 12 C.F.R. § 226.2). *See id*. Because the loans at issue are HOEPA loans, Named Plaintiffs contend that RFC is liable just as if it had originated the loans based on 15 U.S.C. § 1641(d). The Settling Defendants dispute this contention.

15. In the MDL Litigation, two prior class action settlements were approved by the District Court, but on appeal each was vacated by the Third Circuit Court of Appeals and remanded for further proceedings. *In re Cmty. Bank of N. Va.,* 418 F.3d 277 (3d Cir. 2005) ("***Community Bank I***"); *In re Cmty. Bank of N. Va.*, 622 F.3d 275 (3d Cir. 2010) ("***Community Bank II***"). The prior settlements were based, primarily, on RESPA claims. Objections to both of those settlements focused on the contention that claims under TILA and HOEPA had not been asserted or properly valued in the settlements.

16. Following the second appeal and remand in the MDL Litigation, primary counsel for the plaintiffs that had entered into the prior settlements and primary counsel for the objectors joined forces (collectively, the "**Plaintiffs**"). *See* Class Counsel Declaration at ¶ 62. In connection therewith, on September 20, 2011, the District Court appointed Bruce Carlson and Frederick Walters as co-lead Interim Class Counsel pursuant to Federal Rule 23(d) and 23(g)(3) ("**Class Counsel**"). *See id*. The Plaintiffs then filed Plaintiffs' Joint Consolidated Amended Class Action Complaint asserting claims under RESPA, TILA, HOEPA and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("**RICO**"), a copy of which is annexed hereto as **Exhibit 6.** *See* Thompson Declaration at ¶ 10; Class Counsel Declaration at ¶ 6.

17. The MDL Litigation proceeded on a litigation track. The parties exchanged written discovery and Rule 26 disclosures. The Settling Defendants and the non-Debtor defendants in the MDL Litigation moved to dismiss nearly all of the claims of the putative class and following limited oral argument, those motions became ripe for a ruling on September 18, 2012. *See* Class Counsel Declaration at ¶ 63.

18. Upon the Petition Date, the continuation of the MDL Litigation against RFC was stayed by operation of the automatic stay under section 362(a) of the Bankruptcy Code. Between November 2 and November 16, 2012, the Named Plaintiffs filed class proofs of claim against RFC, ResCap, GMAC-RFC Holdings Company, LLC and GMAC Mortgage, LLC (collectively, the "**Class Proofs of Claim**"). *See* Thompson Declaration at ¶ 11; Class Counsel Declaration at ¶ 8. In addition, on November 2, 2012, the Named Plaintiffs filed in the Chapter 11 Cases their Motion to Apply Bankruptcy Rule 7023 and to Certify Class Claims (the "**Motion to Certify**") [Docket No. 2044]. On December 3, 2012, the Debtors filed their opposition to the Motion to Certify [Docket No. 2337].[7] As discussed below, upon the consent of the Parties, the hearing on the Motion to Certify has been adjourned from time to time.

19. On April 24, 2013, the Honorable Gary L. Lancaster, the judge presiding over the MDL Litigation, unexpectedly passed away. At that time, no ruling on the motions to dismiss had been issued, nor had the stay been lifted to permit the adjudication of the Settling Defendants' motion to dismiss.

20. On May 16, 2013, the MDL Litigation was transferred to District Court Judge Arthur Schwab. On June 12, 2013, the District Court ruled on the non-Debtor defendants'

[7] On February 8, 2013, Named Plaintiffs filed a reply to the Debtors' opposition to the Motion to Certify [Docket No. 2874] along with supporting declarations.

pending motions to dismiss. The District Court granted the motion of FDIC (as receiver for GNBT) to dismiss on jurisdictional grounds. As to defendant PNC, all claims against it remain other than the RESPA § 2607(b) claim as it relates to title fees; that is, the District Court denied the motion to dismiss as to the RESPA § 2607(a) claim, the RESPA § 2607(B) claim as it relates to fees other than title fees, the TILA and HOEPA claims and the RICO claims. *See* Order of Court dated June 12, 2013 (a copy of which is annexed hereto as **Exhibit 7**); Memorandum Opinion dated June 27, 2013 (a copy of which is annexed hereto as **Exhibit 8**). Pursuant to the District Court's separate order establishing a briefing schedule, the Plaintiffs filed their Motion for Class Certification with respect to the non-Debtor defendants in the MDL Litigation on June 21, 2013, a copy of which is annexed hereto as **Exhibit 9**.[8] On July 31, 2013, the Western District of Pennsylvania certified a class in the MDL Litigation pending against PNC. A copy of the Western District of Pennsylvania's Orders are annexed hereto as **Exhibit 10**.

***(ii) Plaintiffs' Estimate of Damages***

21. Following vacatur and remand of the first settlement, a "viability analysis" was undertaken in the MDL Litigation in relation to the TILA and HOEPA claims advocated by the objectors. Experts for the Plaintiffs (objectors at the time), reviewed a sampling of 436 loans to, among other things, estimate damages. That effort indicated that the Plaintiffs' claims for violations of RESPA, which are the alleged wrongful settlement charges, average $4,765 per loan before trebling, and over $14,000 after trebling, which Plaintiffs contend is mandatory. *See* Class Counsel Declaration at ¶ 42.

[8] Due to its length, the declaration in support of the Motion for Class Certification has not been included in Exhibit 9. A copy of the declaration can be obtained (i) for a fee via PACER at http://www.pawd.uscourts.gov or (ii) upon written request to Morrison & Foerster.

22. TILA's statutory damages are capped in class actions at $1,000,000 per originator, which for RFC would be $2 million or roughly $40 per borrower. *See id*. at ¶ 43; 15 U.S.C. § 1640(a)(2)(B).

23. HOEPA damages are more extensive. They include not only the illegal fees on the loan but also all paid "finance charges" (*i.e*., the interest collected on the loan). *See* 15 U.S.C. § 1640(a)(4). The loan sampling by the Plaintiffs' experts indicated that an average per loan, single measure of HOEPA damages was $26,477.[9] *See* Class Counsel Declaration at ¶ 44.

24. RICO damages in this case, if proven, would consist of out-of-pocket damages that are fairly traceable to any conduct by the defendants that violated RICO. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988); *see also Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479, 497 (1985) ("Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts."); *Potomac Elec. Power Co. v. Elec. Motor and Supply, Inc*., 262 F.3d 260, 265 (4th Cir. 2001) ("If a party specifically bargains for a service, is told that the service has been performed, is charged for the service, and does not in fact receive the service, it is not appropriate for courts to inquire into whether the service 'really' had value as a precondition to finding that injury to business or property has occurred."). Thus, Plaintiffs assert the appropriate measure of damages include all settlement charges on the loans paid to the enterprises and all paid interest damages flowing from the class members' payment of excessive interest rates on their loans. However, for the purpose of the settlement discussions, the Plaintiffs looked only to the allegedly fraudulent title exam fees (line 1103) and

[9] Because this measure of damages includes interest paid on the loan and such calculations were done in 2006, this figure is now higher given that some percentage of these loans were "live" in 2006 and beyond and so interest has continued to be paid on those loans. Also, Plaintiffs contend that on some of the class loans there are multiple HOEPA violations that support additional measures of HOEPA damages as to any such loans. Debtors have disputed that contention and the inclusion of multiple recoveries for fees, and have argued that a court has discretion to and should reduce the HOEPA damages from the amount calculated by Plaintiffs.

the alleged mark up on the abstract fees (line 1102), which their experts' sampling calculated to be on average $428 per loan (or $1284 per loan under RICO's mandatory trebling).[10]

25. Aggregating these estimates produces an average per borrower damage claim of approximately $42,076.00. The Plaintiffs contend that extrapolated across the 44,535 loans in the class, the estimated damages total in excess of $1.87 billion. Excluding any trebling under RESPA or RICO establishes the estimated total claims at $1.4 billion.

26. If this case were to be litigated, in addition to disputing liability, the Debtors would challenge each of these damage components.

## C. Summary of the Settlement Agreement

### *(i) Mediation and Settlement Discussions Resulting in Settlement Agreement*

27. Beginning in April 2013, the Debtors, the Named Plaintiffs' counsel, and representatives of the vast majority of the Debtors' significant creditors participated in mandatory Plan mediation sessions ordered by this Court [Docket Nos. 2519, 3101 and 3877] under the supervision of the Court-appointed mediator, the Honorable James M. Peck, United States Bankruptcy Judge. *See* Thompson Declaration at ¶ 12. The mediation sessions ultimately resulted in a global resolution dated May 14, 2013 in the form of a Plan Support Agreement ("**PSA**") by and among the Debtors, the Creditors' Committee, the Consenting Claimants[11] and

[10] Should this settlement fail and the Plaintiffs litigate their claims, then a much greater measure of RICO damages would be sought; namely, a recovery of all the illegal fees and interest paid on the offending loan.

[11] The "**Consenting Claimants**" include American International Group, as investment advisor for certain affiliated entities that have filed proofs of claim in the Chapter 11 Cases; Allstate Insurance Company and its subsidiaries and affiliates; Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas, each solely in its capacity as trustee, indenture trustee, securities administrator, co-administrator, paying agent, grantor trustee, custodian and/or similar agency capacities in respect of certain of the RMBS Trusts (as defined below) (collectively, "**Deutsche**"); Financial Guaranty Insurance Corporation ("**FGIC**"); HSBC Bank USA, N.A., solely in its capacity as trustee in respect of certain of the RMBS Trusts ("**HSBC**"); the Kessler Settlement Class; Law Debenture Trust Company of New York, solely in its capacity as separate trustee in respect of certain of the RMBS Trusts ("**Law Debenture**"); Massachusetts Mutual Life Insurance Company and its subsidiaries and affiliates; MBIA Insurance

Ally Financial Inc. ("**Ally**"). *See id*. The Kessler Settlement Class is among the Consenting Claimants. *See id*. On June 26, 2013, this Court granted the Debtors' motion for approval of and for authority to enter into the PSA [Docket No. 4098].

28. The PSA was not conditioned upon the Parties achieving a settlement or the successful execution of the Settlement Agreement. *See* Thompson Declaration. at ¶ 13. Indeed, had the settlement not been reached, the Kessler Settlement Class had the right to withdraw from the PSA. *See id*. However, as contemplated by the PSA, subsequent to the execution of the PSA, the Parties continued their settlement discussions and engaged in extensive formal negotiations. *See id.*; PSA § 5.3. These efforts included an all-day session held on June 18, 2013, at which representatives of the Parties and the Creditors' Committee participated. These efforts resulted in an agreement in principle as to the primary components of the settlement.[12] *See* Thompson Declaration at ¶ 13.

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Corporation and its subsidiaries and affiliates (collectively, "**MBIA**," and together with FGIC, the "**Supporting Monolines**"); certain funds and accounts managed by Paulson & Co. Inc., holders of Senior Unsecured Notes issued by ResCap ("**Paulson**"); Prudential Insurance Company of America and its subsidiaries and affiliates; the Steering Committee Consenting Claimants (as defined in the Plan Support Agreement); certain holders of the Senior Unsecured Notes issued by ResCap (the "**Supporting Senior Unsecured Noteholders**"), The Bank of New York Mellon and The Bank of New York Mellon Trust Company, N.A., each solely in its capacity as trustee, indenture trustee, securities administrator, co-administrator, paying agent, grantor trustee, master servicer, custodian and/or similar agency capacities in respect of certain of the RMBS Trusts (collectively, "**BNY Mellon**"); the Talcott Franklin Consenting Claimants (as defined in the Plan Support Agreement and, together with the Steering Committee Consenting Claimants, the "**Institutional Investors**"); U.S. Bank National Association, solely in its capacity as trustee, indenture trustee, securities administrator, co-administrator, paying agent, grantor trustee, custodian and/or similar agency capacities in respect of certain of the RMBS Trusts ("**U.S. Bank**"); and Wells Fargo Bank, N.A., solely in its capacity as trustee, indenture trustee, securities administrator, co-administrator, paying agent, grantor trustee, custodian and/or similar agency capacities in respect of certain of the RMBS Trusts ("**Wells Fargo**" and together with BNY Mellon, Deutsche, HSBC, Law Debenture, and U.S. Bank, the "**RMBS Trustees**"); and Wilmington Trust, National Association, not individually, but solely in its capacity as Indenture Trustee for the Senior Unsecured Notes issued by ResCap ("**Wilmington Trust**").

[12] Counsel for the Settling Defendants also informed the insurers that issued the Policies of the court-ordered mediation, the subsequent settlement negotiations, the demands and offers exchanged by the Parties, and provided the insurers with an opportunity to participate in some of the settlement meetings with Class Counsel, which invitation the insurers declined. *See* Thompson Declaration at ¶ 13 n.3.

29. Over the next few weeks, counsel to the Parties' and the Creditors' Committee participated in extensive negotiations and drafting sessions that culminated in the Settlement Agreement. *See id.* at ¶ 14. Upon approval by this Court, the Settlement Agreement will resolve all issues among Settling Defendants, Named Plaintiffs and the other putative Class Members relating to the 44,535 second mortgage loans at issue. *See id.*; Walters Declaration at ¶ 2, 7.

***(ii) The Kessler Settlement Class***

30. Under the Settlement Agreement, the Kessler Settlement Class is defined as follows (the "**Class Definition**"):

> All persons who obtained a second or subordinate, residential, federally related, non-purchase money, HOEPA qualifying mortgage loan from Community Bank of Northern Virginia or Guaranty National Bank of Tallahassee that was secured by residential real property used as their principal dwelling and that was assigned to GMAC-Residential Funding Corporation n/k/a Residential Funding Company, LLC, who was not a member of the class certified in the action captioned Baxter v. Guaranty National Bank et al., Case No. 01-CVS-009168 in the General Court of Justice, Superior Court Division of Wake County, North Carolina.
>
> Equitable Tolling Sub-Class shall mean: All persons who meet the above class- definition, whose loan closed prior to May 1, 2000.
>
> Non-Equitable Tolling Sub-Class shall mean: All persons who meet the above class- definition, whose loan closed on or after May 1, 2000.

31. The Settlement will include all persons in the Kessler Settlement Class who do not, in accordance with the terms of the Settlement Agreement, file a timely request to opt out of the Kessler Settlement Class. *See* Thompson Declaration at ¶ 15.

***(iii) Settlement Amounts and Allocation***

**a. Settlement Amounts**

32. Under the Settlement Agreement, the claims asserted by the Kessler Settlement Class are being reduced and allowed as an unsecured borrower claim, not subject to subordination under the Plan, in the amount of $300,000,000 against Debtor RFC only (the "**Allowed Claim**"). *See id.* at ¶ 18. The other Class Proofs of Claim will be disallowed and expunged. *See id*.

33. Under the Plan, a Borrower Claims Trust[13] is to be established and funded with no less than $57.6 million. The Kessler Settlement Class will receive a distribution from the Borrower Claims Trust on account of the Allowed Claim in accordance with the terms of the Plan and the Settlement Agreement. *See id.* at ¶ 19. Out of the gross amount distributed on account of the Allowed Claim, costs, attorneys' fees and incentive awards will be deducted. *See id*. The net amount, defined in the Settlement Agreement as the Kessler Net Recovery, will then be divided among Class Members based on a formula to be developed by Class Counsel, which will be based on the actual injury calculations (estimated fees and actual interest paid) for each Class Member's loan. *See* Settlement Agreement at § 6.

34. Specifically, the proportion of the Kessler Net Recovery Distribution payable to each Class Member will be determined as follows:

a. The total damages for each Class Member, comprised of the settlement fees and interest paid with respect to the loans, will be computed. The settlement fees will be determined by a sample of approximately four hundred loans from among the Kessler Settlement Class for which Class Counsel has settlement fee data. Class Counsel does not currently have

[13] "**Borrower Claims Trust**" means that trust established and funded as part of the Plan for the benefit of the holders of Borrower Claims (as defined in the Plan).

settlement fee data for the entire Kessler Settlement Class. The fee data from the approximate four hundred loans will be analyzed to estimate the fees paid by each Class Member, taking into consideration the original loan amount for each Class Member's loan.

b. For the interest component of damages, the Settling Defendants have the actual amount of interest paid on the individual Class Member loans as of the current date.

c. The estimated fees for each Class Member's loan will be added to the actual amount of interest paid on such loan to determine the total amount of individual damages for each Class Member.

d. Finally, for loans closed before May 1, 2000, the total individual damages will be reduced by 18.5% to reflect the fact that the RESPA and TILA/HOEPA claims on loans preceding that date are subject to a statute of limitations defense and are timely only after application of the legal doctrine of equitable tolling.

*See* Settlement Agreement at § 6.

**b. Allocation**

35. While Class Counsel do not believe that this obligation would constitute a substantial litigation risk for Class Members with pre-May 1, 2000 loans, given the evidence, an allocation is appropriate in recognition of the fact that a portion of the Class Members have an additional litigation burden. This issue is addressed by the Sub-Classes set forth in the Class Definition.

36. Allocation counsel, separate from Class Counsel, was retained to represent each Sub-Class solely for the issue of allocation. Specifically, the Class Members needing equitable tolling to timely assert RESPA, TILA and HOEPA claims, represented by Named Plaintiffs John and Rebecca Picard, retained Arthur H. Stroyd, Jr., an accomplished complex litigation attorney from Pittsburgh, Pennsylvania, to represent the interests of such Sub-Class on the issue of allocation. *See* Walters Declaration at ¶ 14. Likewise, the non-equitable tolling Sub-Class,

represented by Rowena Drennen, retained Richard H. Ralston (together with Arthur H. Stroyd, Jr., "**Allocation Counsel**"), an accomplished Kansas City area attorney and former Federal Magistrate Judge, to represent that Sub-Class. *Id.* at ¶ 17. Each Allocation Counsel was provided with a wealth of information to inform them of the factual circumstances and case law relating to the equitable tolling issue. *Id.* at ¶ 20. Armed with that information and their own considerable experience, on July 11, 2013, Allocation Counsel mediated the allocation issue before Charles Atwell, a former circuit court judge. Class Counsel did not participate in the mediation session. As a result of this effort, Allocation Counsel for the Equitable Tolling Sub-Class and the Non-Equitable Tolling Sub-Class, respectively, agreed to an 18.5% reduction of those Class Member claims relying on equitable tolling as to their RESPA, TILA and HOEPA claims. *Id.* at ¶ 21.

37. Class Counsel believe that the 18.5% reduction described above is fair, adequate and reasonable to all Class Members. *Id.* at ¶ 24. Such conclusion is based not only on the fact that the reduction is based on the allocation negotiated by independent Allocation Counsel through a mediation structure that was independent of Class Counsel but also on Class Counsels' own assessment of the propriety of equitable tolling derived from their experiences in the MDL Litigation of over ten years. Those experiences include: (a) the review of thousands of pages of documents in both formal and informal discovery; (b) two appeals to the United States Court of Appeals for the Third Circuit (both generating lengthy opinions); and (c) thousands of pages of briefing related to the issues in dispute, generally, including comprehensive briefing and argument on the equitable tolling issue. *Id.* at ¶ 24-27.

38. The allocation proposal was also reviewed by SilvermanAcampora, LLP, Counsel to the Creditors' Committee for Borrower Issues. Their independent review and support is detailed in the Special Counsel Declaration, which is annexed hereto as **Exhibit 4**.

39. For all of these reasons Class Counsel believe that the 18.5% discount is fair, adequate and reasonable to all Class Members. Walters Declaration at ¶¶ 24, 27.

40. The total individual damages of each Class Member will then be divided by the total amount of individual damages of the entire Kessler Settlement Class to determine a proportion or ratio of the total settlement proceeds attributable to each Class Member. For each Class Member, the ratio will be applied to determine each Class Member's proportionate share of each Kessler Net Recovery Distribution. *See* Settlement Agreement at § 6.

41. Additionally, under the Settlement Agreement and the Plan, the Settling Defendants have agreed to assign certain Insurance Rights to the Kessler Settlement Class that are believed to provide coverage for the conduct that is the subject of the Kessler Class Claims. *See* Settlement Agreement at § 5; Thompson Declaration at ¶ 20. Thus, a recovery of insurance proceeds may also be available to the Kessler Settlement Class claimants. *See* Settlement Agreement at § 5; Thompson Declaration at ¶ 20. If payment is received or obtained under the applicable policies (the "**Policies**") on account of the Insurance Rights, then such amounts shall also be a recovery for the Kessler Settlement Class claimants. *See* Thompson Declaration at ¶ 20. In the event the Kessler Settlement Class claimants realize on any of the Insurance Rights, under the Settlement Agreement, they are obligated to reimburse the Borrower Claims Trust a proportion of the previous Borrower Claims Trust distributions received by the Kessler Settlement Class claimants (the "**Give Back**"). *See* Settlement Agreement at § 5. The Give

Back is determined by multiplying the previous Borrower Claims Trust distributions, if any, by a fraction which has as its numerator the insurance recovery and has as its denominator the Kessler Settlement Class claimants' Allowed Claim. *See id*. Any such Give Back will be added to the Borrower Claims Trust and made available, after the payment of any remaining attorneys' fees and incentive awards, for distribution to the Class Members and other allowed Borrower claims in the Borrower Claims Trust without regard to the insurance recovery. *See* Plan at § IV.F.6.

***(iv) Attorneys' Fees, Litigation Costs and Incentive Awards***

42. Named Plaintiffs will apply for an incentive award not to exceed $72,500.00 in the aggregate amount for the remaining proposed class representatives in the MDL Litigation (including the Named Plaintiffs), which sums individually are set forth in Schedule 1 to the Settlement Agreement. *See* Settlement Agreement at § 7.a. Any such incentive award shall be in addition to the distribution made on such Plaintiffs' claims.

43. Class Counsel will also seek reimbursement of their reasonable litigation costs and expenses from the Kessler Gross Recovery, in an amount not to exceed $1,500,000.00. *See id.* at § 7.b.

44. Prior to the final hearing, proposed Class Counsel will file with the Court a supplemental pleading in further support of final approval of the Settlement Agreement, including approval of the incentive award, attorneys' fees and litigation costs. Within such supplemental pleading, Class Counsel will request an award of attorneys' fees not to exceed thirty-five (35%) of each Kessler Net Recovery. *See id.* at § 7.c. In accordance with the Settlement Agreement, the Settling Defendants and the Creditors' Committee shall not object to this fee application. Allocation Counsel will be compensated on a lodestar for their time

expended and that amount (the "**Allocation Fee**") will be paid from Class Counsel's fee award. *See* Walters Declaration at ¶ 23. The mediator who presided over the allocation issue, Charles Atwell, will be compensated at his reasonable hourly mediation rate and such amount will also be paid from Class Counsel's fee award. *See id*.

***(v) Settlement Claims Administrator***

45. Named Plaintiffs will select a Settlement Fund Administrator (the "**Administrator**"). The Administrator's fees will be paid from the Kessler Gross Recovery.[14] *See id.* at § 2.13.

***(vi) Conditions Precedent to the Settlement Agreement***

46. Under the terms of the Settlement Agreement, the Settlement will not become effective until certain conditions have been satisfied, including, without limitation, (a) the Settlement Agreement is granted preliminary approval by this Court pursuant to the Preliminary Approval Order, (b) the form of Class Notice (defined below) is approved pursuant to the Preliminary Approval Order and has been mailed to the Kessler Settlement Class, (c) the Settlement Agreement is granted final approval by this Court pursuant to the Final Approval Order and such order is not stayed, modified or vacated on appeal and (d) the Plan has been confirmed and the effective date of the Plan has occurred. *See* Settlement Agreement § 14.

**RELIEF REQUESTED**

47. By this Motion, the Parties seek entry of the Preliminary Approval Order and the Final Approval Order, substantially in the forms of the orders annexed to the Settlement Agreement as Exhibits B and C, pursuant to section 105 of the Bankruptcy Code and Bankruptcy

[14] "**Kessler Gross Recovery**" refers to the gross amount of any distribution to or for the benefit of the Kessler Settlement Class received from any source pursuant to the Plan, including the Borrower Trust or the Policies.

Rules 7023 and 9019, (1) granting class certification for purposes of settlement only, (2) appointing the Named Plaintiffs as representatives of the Kessler Settlement Class and appointing Class Counsel for purposes of settlement only, (3) preliminarily approving the Settlement Agreement, (4) approving the form and manner of notice to Kessler Settlement Class, (5) scheduling a fairness hearing to consider approval of the Settlement Agreement on a final basis and for the purposes of granting related relief, and (6) approving the Settlement Agreement on a final basis and granting such related relief.

48. As noted above, at the Preliminary Hearing, the Parties only seek entry of the Preliminary Approval Order with the final approval of the Settlement Agreement reserved for consideration by the Court at the final hearing.

## BASIS FOR RELIEF REQUESTED

### A. Certification of Kessler Settlement Class

49. The preliminary approval process melds into what is sometimes deemed provisional certification of a settlement class. *See, e.g., In re Penthouse Exec. Club Comp. Litig.*, Master File No. 10 Civ. 1145 (KMW), 2013 WL 1828598, at *3 (S.D.N.Y. Apr. 30, 3013) ("Provisional settlement class certification and appointment of class counsel have several practical purposes, including avoiding the costs of litigating class status while facilitating a global settlement, ensuring notification of all class members of the terms of the proposed Settlement Agreement, and setting the date and time of the final approval hearing"). To grant such provisional certification (subject to confirmation (or not) after the final approval hearing), the court looks conditionally under Bankruptcy Rule 7023 and Federal Rule 23(e), at the requisites for class certification set forth in Federal Rule 23(a) (l), (2), (3) and (4) and at whether certification for settlement may be appropriate under at least one of the conditions set forth in the

subparts of Federal Rule 23(b). Here, each element needed to support certification of the Kessler Settlement Class for settlement is established.[15]

***(i) The Federal Rule 23(a) Prerequisites Are Satisfied***

50. Under Federal Rule 23(a), one or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:

a. the class is so *numerous* that joinder of all members is impracticable;

b. there are questions of law or fact *common* to the class;

c. the claims or defenses of the representative parties are *typical* of the claims or defenses of the class; and

d. The representative parties will fairly and *adequately* protect the interests of the class.

Fed. R. Civ. P. 23(a).

51. Notably, the analysis of these factors has been twice accomplished by the Third Circuit in the settlement context:

> With respect to the District Court's certification decision, we concluded that three of the four Rule 23(a) requirements-numerosity, typicality, and commonality-were met, as well as the Rule 23(b)(3) predominance and superiority requirements. We expressed serious concerns, however, as to whether the adequacy requirement of Rule 23(a) could be met, specifically in the context of whether the named plaintiffs and class counsel were adequate representatives in light of their failure to assert colorable TILA/HOEPA claims . . .
>
> * * * *
>
> The sole disputed Rule 23 requirement in this case, as it was in *Community Bank I*, is adequacy of representation.

[15] Both Named Plaintiffs and the Debtors have briefed the reasons why they believe the standards for certification of a litigated class are and are not, respectively, met. All parties reserve and maintain all of those points in the event that the proposed settlement were to fail for any reason.

*Community Bank II*, 622 F.3d at 284, 291 (internal citations omitted).

52. While the Third Circuit previously determined the numerosity, commonality and typicality factors to be established for settlement purposes, a quick review of the same serves to demonstrate the propriety of the Third Circuit's findings. As to any prior concerns about adequacy of either the class representatives or counsel, the inclusion of the TILA/HOEPA claims, use of sub-classes and the allocation provisions of the Settlement Agreement are designed to address these concerns.

**1. Numerosity**

53. Federal Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Numerosity is presumed at forty (40) class members. *Consol. Rail Corp v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir. 1995). With 44,535 loans at issue, numerosity is plainly established. *See Community Bank I*, 418 F.3d at 303.

**2. Commonality of Issues**

54. To satisfy the commonality requirement under Rule 23(a)(2), a party must establish that there are common issues of fact or law that affect all class members. *See Assif v. Titleserv, Inc.*, 288 F.R.D. 18, 23 (E.D.N.Y. 2012). Here, RFC acquired 44,535 loans made by the Banks in alleged violation of RESPA, TILA, HOEPA and RICO. Named Plaintiffs allege that because these loans were made using common (federally mandated) loan documents it is fundamental that there are common questions of law and fact. Moreover, Named Plaintiffs assert that the claims of each Class Member are subject to the same affirmative defenses and to a uniform calculation of damages. *See In re BGI, Inc.*, 465 B.R. 365, 375 (Bankr. S.D.N.Y. Feb. 17, 2010); *Wenzel v. Partsearch Technologies, Inc. (In re Partsearch Technologies, Inc.)*, 453

B.R. 84, 94 (Bankr. S.D.N.Y. 2011) (acknowledging that "[t]he claims of each Class Member would be subject to the same affirmative defenses raised by the Debtors . . .").

55. Some of the common issues of fact and law identified by Named Plaintiffs include but are not limited to the following:

a. RFC's loan acquisition practices and procedures;

b. whether the written contracts between the Shumway Bapst entities and the banks established obligations that were per se violations of RESPA;

c. whether the Banks made inaccurate TILA disclosures to the Class Members;

d. whether the Banks utilized a practice or device whereby the mandatory disclosures under TILA were not timely made;

e. whether certain of the Class Members' promissory notes failed to disclose required HOEPA disclosures restricting prepayment penalties or other prohibited terms;

f. whether the Class Members' HOEPA Notices (i) were displayed in the required conspicuous type size manner; (ii) contained knowingly false acknowledgments of receipt before closing; or (ii) were nevertheless deficient in asserting receipt within no specified period or within "3 days" or "72 hours" before closing, but not asserting the number of "business" days before closing;

g. whether the Class Members' HUD-1 or HUD1-A Settlement Statements concealed and/or misrepresented the identity of the recipients, nature or the amounts of the settlement fees and charges imposed on their loans; and

h. whether RFC was involved or a participant in a RICO enterprise.

56. Indeed, the existence of commonality for settlement purposes has already been noted by the Third Circuit. *See Community Bank I*, 418 F.3d at 303; *Community Bank II*, 622 F.3d at 284, 291.

**3. Typicality of Claims**

57. Typicality requires that the claims or defenses of the class representatives are typical of the claims or defenses of the class members. *See* Fed.R.Civ.P. 23(a)(3). "Typicality 'is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Tiro v. Pub. House Invs., LLC*, 288 F.R.D. 272, 277 (S.D.N.Y. 2012) (citing *Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir. 1997). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

58. In this case, Named Plaintiffs are alleged to have suffered the same type of injury as the rest of the putative Class Members from claims premised on identical legal theories and common facts. Most certainly, Named Plaintiffs' claims are "typical" of the claims alleged on behalf of the Kessler Settlement Class. *In re BGI, Inc.*, 465 B.R. at 376. As noted by the Third Circuit in relation to one of the previous settlements: "[b]ecause the claims of all class members here depend upon the existence of the Shumway scheme, 'their interests are sufficiently aligned [such] that the class representatives can be expected to adequately pursue the interests of the absentee class members.'" *Community Bank I*, 418 F.3d at 303.

**4. Adequacy of Representation**

59. Federal Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class." Federal Rule 23(g)(4) also states: "[c]lass counsel must fairly and adequately represent the interests of the class." What constitutes adequate representation depends on the circumstances of each particular case and is a discretionary

finding. *In re BGI, Inc.*, 465 B.R. at 376. The fact that Named Plaintiffs' claims are typical of the Kessler Settlement Class is strong evidence that Named Plaintiffs' "'interests are not antagonistic to those of the class; the same strategies that will vindicate plaintiffs' claims will vindicate those of the class.'" *See Tiro,* 288 F.R.D. at 280 (citation omitted).

60. As to the adequacy of the Plaintiffs, the Third Circuit stated:

> [T]he adequacy requirement is designed to "uncover conflicts of interest between the named parties and the class they seek to represent." (internal citation omitted) Here, there is an obvious and fundamental intra-class conflict of interest (the same we identified in *Community Bank I*): the named plaintiffs' claims-whether under RESPA, TILA, or HOEPA-are untimely, and they must rely on equitable tolling to save them . . . . As we noted in *Community Bank I*, however, this intra-class conflict is by no means fatal to whether these cases can be maintained as a class action. The most obvious remedy would be to create subclasses, as we suggested in our prior opinion . . . .

*Community Bank II*, 622 F.3d at 303-04 (emphasis added).

61. The adequacy issue identified by the Third Circuit has been addressed by the subsequent developments. Regarding the Class Representatives, the proposed Kessler Settlement Class includes sub-classes on either side of the equitable tolling issue, and Named Plaintiffs serving as class representatives include individuals that belong to each of the sub-classes. Moreover, as described above, each sub-class is represented by Allocation Counsel and that counsel, in mediation before Charles Atwell, a former circuit court judge, agreed upon an 18.5% reduction for the Equitable Tolling Class members.

62. As to Class Counsel, the adequacy concerns identified by the Third Circuit related to the decision of counsel for the settling plaintiffs in the MDL Litigation not to assert TILA/HOEPA claims. *Community Bank II*, 622 F.3d at 307-08. After the second vacatur and

remand, counsel for the settling plaintiffs (Mr. Carlson as lead) allied with counsel for the objecting class members (Mr. Walters as lead), and the now co-joined plaintiff groups filed in the MDL Litigation the Joint Consolidated Amended Class Action Complaint asserting TILA/HOEPA claims on behalf of the entire putative class (as well as RESPA and RICO claims). Thus, the adequacy concern identified by the Third Circuit regarding Class Counsel has been remedied.

***(ii) The Federal Rule 23(b) Prerequisites Are Satisfied***

63. In addition to the four requirements of Federal Rule 23(a), Named Plaintiffs must satisfy one of three criteria in Federal Rule 23(b). In this case, Named Plaintiffs seek certification under Federal Rule 23(b)(3), which requires that questions of fact or law *predominate* over questions affecting only individual class members and that the class device be *superior* to any other method to adjudicate the controversy.

64. In this case, Named Plaintiffs and the putative Kessler Class Claimants allege statutory injury by a common course of conduct. The Third Circuit addressed the existence of predominance here in the context of the first previous settlement as follows: "Just as the record below supports a finding of typicality, it also supports a finding of predominance. All plaintiffs' claims arise from the same alleged fraudulent scheme." *Community Bank I*, 418 F.3d at 309.

65. Federal Rule 23(b)(3) provides a non-exhaustive list of factors to consider in determining superiority, which include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in a particular

forum; and (d) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3).

66. Here, a number of reasons indicate that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. First, the difficulty and expense in proceeding against the Debtors when balanced against the amounts to be recovered by each of the Class Members mandates that no Class Member has an interest in individually controlling the prosecution of a separate action for the asserted statutory violations. Second, to the Parties' knowledge, with the exception of the pending MDL Litigation, there is no other individual litigation concerning the rights of any Class Member that is currently pending. Third, concentrating all potential litigation concerning the claims against the Debtors and the rights of the Kessler Settlement Class in this Court will avoid a multiplicity of suits or claims and will conserve the judicial resources of the Parties. Fourth, while substantial in terms of the number of loans, in actuality the administration of the settlement of this action as a class action will not be complicated or difficult. Pursuant to the Settlement Agreement, all of the Class Members have been identified and their settlement allocations will be established and calculated based on the Debtors' records. Understandably then, in connection with one of the previous settlements, the Third Circuit concluded that it found "no reason… why a Rule 23(b)(3) class action is not the superior means to adjudicate this matter." *Community Bank I*, 418 F.3d at 309.

67. For the above reasons, all elements of Federal Rule 23(a) as well as the 23(b)(3) requirements are satisfied for the purpose of the Settlement.

**B. Appointment of Proposed Class Counsel**

68. Appointment of class counsel is governed by Federal Rule 23(g) under the following criteria: (a) "the work counsel has done in identifying or investigating potential claims in the action;" (b) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (c) "counsel's knowledge of the applicable law; and" (d) "the resources that counsel will commit to representing the class". Fed. R. Civ. P. 23(g)(1)(A). The court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the class. Fed. R. Civ. P. 23(g)(1)(B).

69. Named Plaintiffs' counsel undisputedly meets all of these criteria. Though the initial investigation of these claims occurred many years ago, the prior settlements, the Third Circuit opinions, the MDL Litigation court's recent denial of motions to dismiss and the proposed Settlement Agreement all speak to the validity of Named Plaintiffs' counsel's efforts in identifying, investigating and prosecuting the asserted claims as well as their overall knowledge of the applicable law. Both R. Frederick Walters and Walters Bender Strohbehn & Vaughan, P.C. as well as Bruce Carlson and Carlson Lynch are class action specialists and have been appointed class counsel in many consumer class action matters. Firm resumes for Walters Bender Strohbehn & Vaughan, P.C. and Carlson Lynch are attached here to as **Exhibit 11** and **Exhibit 12**, respectively. In addition, the twelve (12) year commitment to the MDL Litigation and the willingness to represent Ms. Drennen on the Creditors' Committee and invest substantial advances in retaining bankruptcy counsel aptly demonstrate the commitment of Named Plaintiffs' counsel to the representation of the Kessler Settlement Class.

**C. The Court Should Preliminarily Approve the Settlement Agreement and Enter the Preliminary Approval Order**

70. "Court review of a proposed class action settlement is subject to a two-step procedure: The settlement must be preliminarily approved and then approved on a final basis following a fairness hearing." *In re BGI, Inc.*, 465 B.R. at 378. A court first makes a "preliminary" ruling regarding whether the settlement class should be certified and whether the proposed settlement is presumptively "fair, adequate and reasonable" and, thereafter, notice should be sent to the class and a final fairness hearing scheduled. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005) (citing Manual for Complex Litigation, Fourth § 21.632 (2004)); *Silver v. 31 Great Jones Rest.*, No. 11 CV 7442 (KMW) (DCF), 2013 WL 208918, at *1 (S.D.N.Y. Jan. 4, 2013).

***(i) The Settlement Agreement is Presumptively Fair, Adequate and Reasonable***

71. A court's responsibility is to review a settlement and the release to be given to determine whether the class action settlement appears preliminarily to be presumptively fair, adequate and reasonable. *See, e.g., Clark v. Ecolab, Inc.*, No. 07 Civ. 8623 (PAC), 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (citing Herbert B, Newberg & Alba Conte, Newberg on Class Actions ("*Newberg*") § 11.25 (4th ed. 2002)). All the court need find to grant this preliminary approval is that "probable cause" exists to submit the proposed class action settlement to the class members and to establish a full-scale hearing for the purpose of determining final approval. *Tiro v. Pub. House Investments, LLC*, Nos. 11 Civ. 7679 (CM), 11 Civ. 8249 (CM), 2013 WL 2254551, at *1 (S.D.N.Y. May 22, 2013) (citing *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980).

72. This "probable cause" analysis looks to whether a settlement is "within the range of possible settlement approval," such that notice to the class is appropriate. *Tiro*, 2013 WL 2254551, at *1-2; *Danieli v. IBM*, No. 08 CV 3688 (SHS), 2009 WL 6583144, at *4–5 (S.D.N.Y. Nov. 16, 2009) (preliminary approval granted where no "obvious defects" in the settlement and the allocation proposed is rationally related to the weaknesses and strengths of the asserted claims); *Yuzary v. HSBC Bank USA, N.A.*, No. 12 CV 3693 (PGG), 2013 WL 1832181, at *1 (S.D.N.Y. April 30, 2013) ("If the proposed settlement 'appears to fall within the range of possible approval,' the court should order that the class members receive notice of the settlement") (citation omitted).

73. In this case, there is most certainly probable cause to find that the Settlement Agreement should be preliminarily approved. The Settlement Agreement is the result of good faith, extensive, arm's length negotiations following over a decade of litigation and was reached in connection with the mediation ordered by this Court and overseen by Judge Peck, and as a result of the substantive negotiations that followed the execution of the PSA. *See* Thompson Declaration at ¶ 21; Walters Declaration at ¶ 28. These facts demonstrate that the Settlement Agreement is in good faith and eminently reasonable. *Tiro*, 2013 WL 2254551, at *2 (citing *In re Penthouse Executive Club Comp. Litig.*, 2013 WL 1828598, at *2); *Yuzary*, 2013 WL 1832181, at *2.

74. It is also noteworthy that the Settlement Agreement comes after twelve (12) years of litigation, which efforts spawned two Third Circuit opinions, each of which recognized the possibility of certification of these claims for settlement. Class Counsel, all of which are experienced class action lawyers, are more than capable and sufficiently informed to evaluate, accept and endorse the Settlement Agreement. In addition, Class Counsel was assisted by highly

experienced bankruptcy counsel retained to assist in understanding the bankruptcy issues relating to the ability to litigate and collect on these claims from the Debtors' estates. Moreover, counsel for the Creditors' Committee also assisted in the negotiations. Such experience and guidance has allowed Class Counsel and counsel for the Settling Defendants the ability to evaluate and to endorse the Settlement Agreement. "'Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.'" *Tiro*, 2013 WL 2254551, at *2 (citing *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, Nos. 05 Civ. 10240 (CM) *et al.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007)).

75. Lastly, the Allowed Claim substantially exceeds the amount of the prior settlements. In addition, under the terms of the Settlement Agreement and Plan, certain rights in and to the Policies will be assigned to the Kessler Settlement Class, thus affording the Class the potential for a very significant recovery for the Class Members.

76. For these reasons, the Court should preliminarily approve the Settlement Agreement.

**D. Approval of Notice of the Settlement Agreement**

***(i) Contents of the Class Notice***

77. Federal Rule 23(c)(2)(B), in pertinent part, provides as follows:

> The notice must clearly and concisely state in plain, easily understood language:

> the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

78. The notice should generally describe the terms of the settlement, inform the class about the potential award of expenses and attorneys' fees and provide specific information regarding the date, time, and place of the final approval hearing. *Yuzary*, 2013 WL 1832181, at *5; *see also In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (class notice "need only describe the terms of the settlement generally").

79. A copy of the proposed class notice (the "**Class Notice**") is annexed to the Settlement Agreement as Exhibit A. Among other things, it sets forth in plain English the nature of the action, defines the class and speaks to the claims, the defenses and other issues. The Class Notice tells the prospective Class Members how to opt out or object and that they may retain their own counsel. Moreover, the Class Notice makes clear that the Settlement Agreement, if approved, will be binding on all Class Members. The Class Notice also apprises the Kessler Settlement Class, among other things, that complete information regarding the Settlement Agreement is available upon request from proposed Class Counsel and that any Class Member may appear and be heard at the hearing on final approval of the Settlement Agreement.

80. The proposed Class Notice more than meets the requirements of Federal Rule 23(c)(2)(B).

***(ii) Notice Plan***

81. Federal Rule 23(c)(2)(B) provides, in pertinent part, as follows: "[f]or any class certified under Rule 23(b)(3), the Court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Mailing to each Class Member's last known address satisfies the "best notice practicable" test. *Eisen v. Carlisle & Jacquelin, et al*., 417 U.S. 156, 174-75 (1974) (individual mailings satisfy Rule 23(c)(2)).

82. The Settlement Agreement provides that, at the Debtors' expense, the listing of addresses for the class members shall be updated. Then, Class Counsel and Debtors' counsel will cause to be mailed by first class mail the Class Notice, at the Debtors' expense, to each of the Class Members. The mailing and the fairness hearing (i.e., the final hearing) will be timed so that the Class Members will have not less than thirty (30) days from the date of the mailing to opt out of the Kessler Settlement Class, to object to the Settlement Agreement and to appear at the fairness hearing.

83. For the above reasons, the notice plan is reasonably calculated to apprise the Kessler Settlement Class about the Settlement Agreement and the right to opt out and exclude themselves. In sum, providing notice in the described manner, as more fully provided for in the Settlement Agreement, satisfies the "best notice practicable" test.

**E. The Settlement Should Be Approved on a Final Basis Pursuant to Federal Rule 23(e) and Bankruptcy Rule 9019 after the Fairness Hearing**

84. The Parties respectfully request that the Court schedule a fairness hearing, subject to the Court's calendar, to be held no sooner than one hundred (100) days after the filing of this

Motion and contemporaneous with confirmation of the Plan. At the fairness hearing, the Court should approve the Settlement Agreement on a final basis. As explained by this Court:

> For the Settlement to be approved in bankruptcy court, the Settlement must be *both* procedurally and substantively fair under Rule 23 and Federal Rule of Bankruptcy Procedure 9019. *See WorldCom,* 347 B.R. at 143–49. This process requires the Court to assess the fairness of a settlement by examining its terms and the negotiation process leading to settlement. *See D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir. 2001).

*In re BGI, Inc.*, 465 B.R. at 378. For the many reasons already expressed and further addressed below, the proposed Settlement is both procedurally and substantively fair.

***(i) The Settlement is Procedurally Fair Pursuant to Federal Rule 23 and Bankruptcy Rule 9019***

85. To meet approval under Federal Rule 23 and Bankruptcy Rule 9019, the Court must find that the "proposed settlement is free from collusion and inadequate representation," which results from arm's length negotiations between the parties. *Id*. This Court has explained that a "'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached between experienced, capable counsel after meaningful discovery.'" *Id*. (quoting *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116 (2d Cir. 2005)).

86. Here, the Settlement Agreement is the product of arm's length negotiations between the Parties. *See* Thompson Declaration at ¶ 16; Walters Declaration at ¶ 28. At the time of settlement, each of the Parties had made an extensive investigation of the facts through formal and informal discovery and undertaken their own analyses of the merits of the case based on those facts and existing law. *See* Thompson Declaration at ¶ 16; Walters Declaration at ¶¶ 25, 28-29. These efforts allowed for an informed negotiation between Named Plaintiffs and the

Settling Defendants.[16] *See* Thompson Declaration at ¶ 16; Walters Declaration at ¶¶ 28-29. The Settling Defendants were represented by their bankruptcy counsel, Morrison & Foerster LLP, and their defense counsel in the MDL Litigation, Bryan Cave LLP. *See* Thompson Declaration at ¶ 13, n.2. The Parties were all aware of the major issues related to the Class Members' claims for damages that remained following, and as a result of, the proceedings in the MDL Litigation, and the two Third Circuit appeals. *See* Thompson Declaration at ¶ 16; Walters Declaration at ¶ 25. All sides have had ample opportunity to assess the likelihood that the putative class will be certified as a class proof of claim pursuant to the Motion to Certify. *See* Thompson Declaration at ¶ 16; Walters Declaration at ¶ 25. Indeed, the Parties have extensively briefed this issue. *See* Thompson Declaration at ¶ 16; Walters Declaration at ¶ 25. Likewise, the Parties had ample opportunity to evaluate the merits of the Class Members' claims for damages, as well as the likelihood and extent that Named Plaintiffs may have prevailed on their claims for damages.[17] *See* Thompson Declaration at ¶ 16; Walters Declaration at ¶ 25.

87. From the Debtors' perspective, the Settlement Agreement is the product of a well informed assessment of all the risks of litigation either before this Court or in the MDL Litigation. *See* Thompson Declaration at ¶ 17.

[16] *See In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 813 (3d Cir. 1995) (evaluating whether the parties have an "adequate appreciation of the merits of the case before negotiating" a class action settlement); *In re Austrian & German Bank Holocaust Litig.,* 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) ("[I]t is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make . . . an appraisal' of the Settlement") (citation omitted); *see also In re WorldCom, Inc.*, 347 B.R. 123, 145 (Bankr. S.D.N.Y. 2006) ("This factor is attuned to the parties' knowledge and awareness of the relative strength or weakness of each party's respective arguments and positions. The progression of discovery is a useful proxy through which to measure that knowledge and awareness.").

[17] *See e.g., E.E.O.C. v. McDonnell Douglas Corp.*, 894 F.Supp. 1329, 1334 (E.D. Mo. 1995) ("The voluminous documents that have been reviewed, the interviews of potential witnesses, and the analyses of all the information that was gathered have brought the case to a point at which an informed assessment of its merits and the probable future course of the litigation can be made.").

***(ii) The Settlement Agreement is Substantively Fair Pursuant to Federal Rule 23(e)***

88. Federal Rule 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed or compromised only with the court's approval." Fed. R. Civ. P. 23(e). This requires the Court to find that the settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2); *see also In re BGI, Inc.*, 465 B.R. at 379*; In re Initial Pub. Offering Sec. Litig*., 243 F.R.D. 79, 83, 87 (S.D.N.Y. 2007); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005).

89. To evaluate the substantive fairness of a settlement, a court analyzes the following factors: "'(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.'" *See Mba v. World Airways, Inc.,* 369 Fed. Appx. 194, 197 (2d Cir. 2010) (quoting *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974)*, abrogated on other grounds by Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 47 (2d Cir. 2000)). The Parties address these factors below.

**1. The Complexity, Expense and Likely Duration of the Litigation**

90. The complexity, expense, and likely duration of further litigation factor looks to and weighs the risks "that go hand in hand with protracted litigation" and asks whether a presumed final result would in any way be superior to the settlement. *See Gottlieb v. Wile*s, 11 F.3d 1004, 1015 (10th Cir. 1993); *Vigil v. Finesod*, 779 F. Supp. 522, 526 (D.N.M. 1990) ("If the

proposed settlement is not approved, the result will be a much more complicated and expensive course of litigation and there is no assurance that the final result will in any way be superior. The time and expense for additional litigation is not warranted under the circumstances."). An analysis under this factor also recognizes that judgments, recovered after lengthy litigation and trial, can be lost on appeal. *See, e.g., In re BGI, Inc.*, 465 B.R. at 379 ("On the other hand, the Class Members would have received nothing if they were not successful. Therefore, it is reasonable for the Class Members 'to take the bird in the hand instead of the prospective flock in the bush.'") (quoting *Oppenlander v. Standard Oil Co.,* 64 F.R.D. 597, 624 (D. Colo. 1974)).

91. In this case, there is no doubt that the issues are complex and have been hard fought for over a decade. Continued litigation of the Class Members' claims would require the expenditure of a substantial amount of time and resources to both have the Kessler Settlement Class certified by the Court and establish RFC's liability to all, or a part of, such class. Moreover, there exists the risk of an adverse result at trial and/or on appeal. The Settlement Agreement, on the other hand, will provide tangible recoveries to each Class Member in the near term versus an uncertain future recovery. *See Aramburu v. Healthcare Fin. Servs., Inc*., No. 02-CV-6535 (MDG), 2009 WL 1086938, at *3 (E.D.N.Y. Apr. 22, 2009) ("the settlement provides certain compensation to the class members now rather than awaiting an eventual resolution that would result in further expense without any definite benefit"). Altogether, this factor also supports the Settlement Agreement.

**2. The Reaction of the Class to the Settlement Agreement**

92. As noted by this Court, "[t]he fairness of a proposed settlement can be measured by class reaction." *In re BGI, Inc.*, 465 B.R. at 379. This factor will be established by the time

of the fairness hearing. At this time, the Parties have no reason to expect any opposition to the Settlement Agreement.

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

93. "The purpose of this factor is to assess 'the parties' knowledge and awareness of the relative strength or weakness of each party's respective arguments and positions. The progression of discovery is a useful proxy through which to measure that knowledge and awareness." *In re BGI, Inc.*, 465 B.R. at 380 (citation omitted).

94. As previously noted, the Settlement Agreement was reached after extensive negotiations between the well represented Parties following years of litigation. The proceedings in the MDL Litigation included the exchange of thousands of pages of documents, the taking of deposition and other sworn testimony in related litigation or regulatory proceedings, expert review of the viability of the TILA and HOEPA claims, two "roadmap" opinions from the Third Circuit and, most recently, the denial of motions to dismiss in the MDL Litigation (save for the finding of no jurisdiction as to the FDIC as receiver for GNBT and the dismissal of one RESPA claim). Certainly, this litigation is at a stage where a settlement is based on a fully informed decision because the Parties have had an ample opportunity to adequately assess their chances of succeeding on the merits. *In re BGI, Inc.*, 465 B.R. at 380.

**4. Risk of Prevailing (Establishing Liability, Establishing Damages and Maintaining the Class Through Trial)**

95. Under *Grinnell*, these are three separate factors, but, as noted by this Court, the Second Circuit considers these factors together to collectively assess a plaintiff's risks of prevailing. *In re BGI, Inc*., 465 B.R. at 380 (citing *Wal–Mart Stores, Inc.*, 396 F.3d at 118).

96. Named Plaintiffs believe that they can establish liability and the Settling Defendants contend otherwise. Named Plaintiffs were largely successful in avoiding PNC's motion to dismiss the MDL Litigation, but Named Plaintiffs would still face hurdles to recover against the Settling Defendants if the claims were to proceed to trial. The Class Members face a number of affirmative defenses to their claims that may affect their ability to establish the Settling Defendants' liability as to each of their claims. Further, while Named Plaintiffs believe the evidence of the alleged statutory violations is strong, at the viability briefing stage in the MDL Litigation, RFC, in the context of the Motion to Certify, proffered experts who contended that certain title charges were legitimate such that there was no APR understatement. The Settling Defendants contend that they have other viable defenses to liability. Thus, presuming Kessler Settlement Class certification at least at some level, the case could come down to a battle of the experts, and in such a case, settlement is favored over continued litigation. *See In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267-68 (S.D.N.Y. 2012).

97. Moreover, Named Plaintiffs must first prevail on the Motion to Certify, which has been met by vigorous opposition of the part of the Debtors, and the Settling Defendants have indeed asserted a variety of arguments against certification of a litigation class and against ultimate liability in both the MDL Litigation and this Court, many of which have not yet been addressed definitively as to the Debtors in the MDL Litigation (by operation of the stay) or by this Court. Moreover, the granting of certification is always subject to challenge by a motion to decertify, *In re Wachovia Equity Sec. Litig.,* No. 08 Civ. 6171 (RJS), 2012 WL 2774969, *5 (S.D.N.Y. June 12, 2012), or permissive appeal, Fed. R. Civ. P. 23(f).

98. If litigated, the Settling Defendants contend that there are many individualized issues that advise against certification. Named Plaintiffs disagree and assert that the alleged common and widespread scheme that they assert underlies the MDL Litigation make this a near perfect class action lawsuit, and that the Third Circuit twice indicated in the settlement context that elements for certification, save the adequacy issue that has now been addressed, were present.

99. Named Plaintiffs assert that the risk of establishing damages is slight because the statutes upon which the Kessler Settlement Class bases its claims expressly speak to the monetary remedy available under the statute. Thus, Named Plaintiffs believe that, should they prevail on liability, damages are simply mathematical calculations based, primarily, on fees appearing on the HUD-1 settlement statement for each loan and the loan payment history for each loan. The Settling Defendants contend that, assuming liability, mathematical formulas under HOEPA can and should be adjusted downward by the Court.

**5. The Ability of the Settling Defendants to Withstand a Greater Judgment**

100. The *Grinnell* factors also look to a settlement's fairness by examining a defendant's ability to pay a judgment greater than the amount offered in a settlement. *In re BGI, Inc.*, 465 B.R. at 380. "Specifically, 'evidence that the defendant will not be able to pay a larger award at trial tends to weigh in favor of approval of a settlement'" because the possibility of a future bankrupt judgment debtor does not benefit any of the parties involved in a class action. *Id.* (quoting *In re Warner Commc'n Sec. Litig.*, 618 F. Supp. 735, 746 (S.D.N.Y. 1985)). Nonetheless, "the fact 'that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate.'" *Id.* (quoting *In re*

*PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) *aff'd sub nom. In re PaineWebber Inc. Ltd. P'ships Litig.*, 117 F.3d 721 (2d Cir. 1997)).

101. As noted by this Court, "[i]n the context of an ongoing bankruptcy case, 'this factor is of uncertain utility . . . as the defendant's ability to pay more is clearly constrained.'" *Id.* at 380 (quoting *WorldCom,* 347 B.R. at 147). Here, the assets of the Settling Defendants are finite and subject to several billions of dollars of other unsecured claims. *See* Thompson Declaration at ¶ 18. The Kessler Settlement Class could have chosen not to become parties to the PSA and not settle with the Debtors. They would have had the right to contest all of the provisions of the Plan, including the funding of the Borrower Claims Trust, to potentially enhance the recovery to the Kessler Settlement Class. However, the Class Representatives devoted substantial resources to enable them to participate in the Chapter 11 Cases in a meaningful manner.

102. The Class Representatives are cognizant of the many billions of dollars of claims asserted against these Chapter 11 estates by a diverse creditor constituency; the intercompany issues between Ally and the Debtors; and the extent of the Debtors' assets absent the contemplated Ally contribution. It was in the context of the PSA that the Class Representatives engaged in settlement negotiations with the Debtors, and, not unlike all other creditor constituencies who have become Consenting Claimants, the Class Representatives understand that the process of arriving at a consensual Plan required compromise on the part of all parties to the Plan mediation. While the Class Representatives did not settle the Class Proofs of Claim in the context of the PSA, they chose to be Consenting Claimants in the process designed to achieve near universal consensus among the vast majority of the Debtors' creditor constituents in the context of the Plan under which creditors will receive meaningful recoveries.

103. Accordingly, this factor also supports the reasonableness of the Settlement Agreement.

**6. The Range of Reasonableness of the Settlement Fund In Light of the Best Possible Recovery and All the Attendant Risks of Litigation**

104. A court analyzes the final two *Grinnell* factors together "'since both speak to the fairness of the settlement's terms relative to the possible outcomes of litigation.'" *In re BGI, Inc.*, 465 B.R. at 381. As explained by this Court:

> The range of reasonableness "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). Moreover, "[d]ollar amounts [in class action settlement agreements] are judged not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Agent Orange Prod. Liab. Litig.,* 597 F. Supp. 740, 762 (E.D.N.Y. 1984) (citations omitted); *see also Air Line Pilots Ass'n v. American Nat'l Bank and Trust Co. of Chicago (In re Ionosphere Clubs, Inc.),* 156 B.R. 414, 431 (S.D.N.Y. 1993) ("The weighing of a claim against compensation cannot be . . . exact. Nor should it be, since an exact judicial determination of the values in issue would defeat the purpose of compromising the claim . . . ."). On this point, the *Grinnell* court observed that "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."

*In re BGI, Inc.*, 465 B.R. at 381; *see also In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514, at *6 (E.D.N.Y. Oct. 23, 2012) ("'the dollar amount of the settlement by itself is not decisive in the fairness determination, and the fact that the settlement fund may equal only a fraction of the potential recovery at trial does not render the settlement inadequate'") (quoting *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 131 (S.D.N.Y. 1997)).

105. The Allowed Claim of $300 million is a reasonable amount when compared to the total damages that the Kessler Settlement Class claimants assert that they could recover against the Settling Defendants before this Court. *See* Thompson Declaration at ¶ 22. At this time, the ultimate recovery to the Kessler Settlement Class claimants from the Borrower Claims Trust is unknown given that the total number of borrower claims is not yet finally determined. Current estimates, however, place the Kessler Gross Recovery at approximately $27 million. Additionally, beyond that Borrower Claims Trust recovery, under the assignment of the Insurance Rights contemplated by the Settlement Agreement (if successful against the Insurers), the Class Members have an opportunity to realize a substantial additional recovery on the Allowed Claim.

106. To achieve a "best possible" recovery, among other things, Named Plaintiffs would have to establish equitable tolling for many Class Members as to the RESPA and TILA/HOEPA claims and would have to overcome a number of proof hurdles relative to those claims and the RICO claim, as well as overcome Debtors' contention that the court can and should reduce the HOEPA damages. Named Plaintiffs believe that they could prevail while the Settling Defendants deny liability and believe they could successfully defend these claims.

107. In light of the complexity of this case and the risk of a lesser recovery if not settled, the Settlement Agreement is entirely in the range of reasonableness. *See Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 849-50 (E.D. La. 2007) ("'inherent in compromise is a yielding of absolutes and an abandoning of highest hopes'") (quoting *Nelson v. Waring,* 602 F. Supp. 410, 413 (N.D. Miss. 1983)); *see also Great Neck Capital Appreciation Inv. P'ship, L.P. v. PriceWaterhouseCoopers, L.L.P. (In re Harnischfeger Indus., Inc.)*, 212 F.R.D. 400, 409-

10 (E.D. Wis. 2002) ("The mere possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement.").

108. It is also appropriate for a court to defer to the judgment of experienced counsel who have competently evaluated the parties' claims and defenses. *In re BGI, Inc.*, 465 B.R. at 381 ("When attorneys for both parties to a settlement believe that the agreement is fair, reasonable and adequate, this factor weighs in favor of approval."); *see also In re IKON Office Solutions, Inc. Sec. Litig.,* 194 F.R.D. 166, 181 (E.D. Pa. 2000) ("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.'"); *E.E.O.C. v. Hiram Walker & Sons, Inc*., 768 F.2d 884, 889 (7th Cir. 1985) ("court should refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights").

109. The amount of the Allowed Claim, the amount of the Borrower Claims Trust distribution and the assignment of Insurance Rights to which the Settling Defendants have agreed in order to resolve Named Plaintiffs' claims for damages and the other claims encompassed by the release, when balanced against the delay, cost, expense and risk of trial, particularly in light of all the complications and limitations on recovery imposed by the Chapter 11 Cases, demonstrates unequivocally that the Settlement Agreement is fair, reasonable and adequate for the Class Members. As such, the final *Grinnell* factors are satisfied.

***(iii) The Settlement Agreement is Substantively Fair Pursuant to Bankruptcy Rule 9019***

110. Bankruptcy Rule 9019 authorizes a bankruptcy court to approve a compromise or settlement after notice and a hearing. Section 105 of the Bankruptcy Code empowers a court to issue any order that is "necessary or appropriate." 11 U.S.C. § 105(a). "As a general matter,

'[s]ettlements and compromises are favored in bankruptcy as they minimize costly litigation and further parties' interests in expediting the administration of the bankruptcy estate.'" *In re Trinsum Grp., Inc.*, No. 08-12547 (MG), 2013 WL 1821592, at *3 (Bankr. S.D.N.Y. Apr. 30, 2013) (quoting *In re Dewey & LeBoeuf LLP,* 478 B.R. 627, 641-42 (Bankr. S.D.N.Y. 2012).

111. "Approval of a compromise and settlement is committed to the sound discretion of the Court." *In re Drexel Burnham Lambert Grp.*, 134 B.R. 493, 494 (Bankr. S.D.N.Y. 1991). As noted by this Court:

> Courts have developed standards to evaluate if a settlement is fair and equitable and identified factors for approval of settlements based on the original framework announced in *TMT Trailer Ferry,* 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). *See Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC),* 478 F.3d 452, 462 (2d Cir. 2007). Those factors are interrelated and require the Court to evaluate: (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation, "with its attendant expense, inconvenience, and delay," including the difficulty in collecting on the judgment; (3) "the paramount interests of the creditors," including each affected class's relative benefits "and the degree to which creditors either do not object to or affirmatively support the proposed settlement"; (4) whether other parties in interest support the settlement; (5) the "competency and experience of counsel" supporting, and "[t]he experience and knowledge of the bankruptcy court judge" reviewing, the settlement; (6) "the nature and breadth of releases to be obtained by officers and directors"; and (7) "the extent to which the settlement is the product of arm's length bargaining." *In re Iridium Operating LLC,* 478 F.3d at 462. The burden is on the settlement proponent to persuade the Court that the settlement is in the best interests of the estate. *See* 8 Norton Bankruptcy Law and Practice 3d § 167:2.

*In re BGI, Inc.*, 465 B.R. at 381-82.

112. "In evaluating the necessary facts, a court may rely on the opinion of the debtor, parties to the settlement, and the professionals." *In re Dewey & LeBoeuf LLP*, 478 B.R. 627, 641

(Bankr. S.D.N.Y. 2012). Further, "the Court need not decide the numerous issues of law and fact raised by a compromise or settlement, 'but must only 'canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness.'" *In re Trinsum Grp., Inc.*, 2013 WL 1821592, at *4 (quoting *In re Adelphia Commc'ns Corp.,* 327 B.R. 143, 159 (Bankr. S.D.N.Y. 2005). The bankruptcy court "'does not have to be convinced that the settlement is the best possible compromise or that the parties have maximized their recovery.'" *Six W. Retail Acquisition, Inc. v. Loews Cineplex Entm't Corp.*, 286 B.R. 239, 248 n.12 (S.D.N.Y. 2002) (quoting *Nellis v. Shugrue*, 165 B.R. 115, 123 (S.D.N.Y. 1994)). Rather, the settlement should be approved as long as it does not fall below the lowest point in the range of reasonableness. *Cosoffv. Rodman (In re W.T. Grant Co.),* 699 F.2d 599, 608, 613 (2d Cir. 1983).

113. "When determining whether a compromise is in the best interests of the estate, the Court must 'assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal.'" *Key3Media Grp., Inc. v. Pulver.com, Inc. (In re Key3Media Grp., Inc.)*, 336 B.R. 87, 93 (Bankr. D. Del. 2005) (citation omitted). To properly balance these values, the Court should consider all factors "relevant to a full and fair assessment of the wisdom of the proposed compromise." *TMT Trailer Ferry, Inc.*, 390 U.S. 414, 424 (1968); *see also Key3Media Group*, 336 B.R. at 92 ("the bankruptcy court 'must be apprised of all relevant information that will enable it to determine what course of action will be in the best interest of the estate.'") (quoting *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996)).

114. As this Court observed in *In re BGI, Inc.*, "[a]lthough the factors articulated in *Grinnell* do not precisely mirror those enumerated in *Iridium Operating*, the reasons behind approving the Settlement are also applicable in the *Bankruptcy Rule 9019* context." 465 B.R. at

382. Accordingly, as support for Bankruptcy Rule 9019 approval, the Parties adopt the Federal Rule 23 analysis set forth above in section E(ii) of this Motion. Just as that analysis overwhelmingly supports a finding that the Settlement Agreement meets all the Federal Rule 23 requirements, so too does it establish that the Settlement Agreement is in the best interests of the Debtors' estates under the *Iridium* factors and Bankruptcy Rule 9019.

115. More specifically, and as described in greater detail above, the issues at hand in the MDL Litigation are complex and have been ongoing for more than a decade. The continued litigation of these issues would be time consuming and costly, and, while the Debtors believe they have meritorious class and liability defenses, would expose the Debtors to significant litigation risks as well as, if liability were established, a risk that a court would fail to use the discretionary authority the Debtors contend it has to limit the large damages that might result from the use of mathematical formulas. *See* Thompson Declaration at ¶ 21. By contrast, the execution of the Settlement Agreement would eliminate future litigation as well as the continued accrual of fee and expenses associated therewith.

116. Approval of the Settlement Agreement is in the best interest of the Debtors and their creditors because it resolves the MDL Litigation in the most cost effective manner reasonable and caps the Debtors' liability at an amount that is fair and reasonable to all of the parties. *See id.* at ¶ 21. Moreover, if the Settlement Agreement is not approved, the Parties do not believe that they would agree to a resolution on better terms than what is presently before the Court. *See id*. Furthermore, while the Parties do not anticipate any opposition to the Settlement Agreement, the degree to which creditors or other parties in interest support or object to the Settlement Agreement will be established by the time of the fairness hearing, after the Motion has been filed and served in accordance with the Case Management Procedures Order, approved

by this Court on May 23, 2012 [Docket No. 141], and the Class Notice has been distributed to the Kessler Settlement Class.

117. As addressed in greater detail above, the Settlement Agreement was negotiated by the Parties without collusion, in good faith, from arm's-length bargaining positions and with the benefit of having conducted extensive investigations and analyses of the facts. In addition, all Parties were represented by experienced and sophisticated counsel through the MDL Litigation and in subsequent negotiations – the Settling Defendants were represented by both their bankruptcy counsel and defense counsel, the Named Plaintiffs were represented by Class Counsel, the sub-classes for the Kessler Settlement Class were each represented by separate Allocation Counsel, and both counsel for the Creditors' Committee and Special Borrowers' counsel were involved in the negotiation of and/or approved the Settlement Agreement.

118. Accordingly, the Debtors submit that the *Iridium* factors all strongly militate in favor of approving the Settlement Agreement under Bankruptcy Rule 9019.

***(iv) The Allocation Plan is Fair***

119. The proposed individual distributions to the Class Members from the Kessler Net Recovery that are described above are also fair and equitable. This is yet another factor favoring the Settlement Agreement. *See Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 855 (1999) (noting that fairness of distribution is "the second element of equity within a class").[18]

120. "'To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized—namely, it must be fair and adequate . . . . An allocation

[18] The "inclusiveness of the class" is the first element of equity within a class identified by the Supreme Court. *See Ortiz*, 527 U.S. at 854.

formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *In re Wachovia Equity Sec. Litig.*, No. 08 CIV. 6171 (RJS), 2012 WL 2774969, at *5 (S.D.N.Y. June 12, 2012) (quoting *In re WorldCom, Inc. Sec. Litig.,* 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005)). In that regard, "[n]either the Federal Rules of Civil Procedure nor the Supreme Court requires that settlements offer a pro rata distribution to class members; instead the settlement need only be 'fair, reasonable, and adequate.'" *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 629 (6th Cir. 2007) (citation omitted); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 193 (5th Cir. 2010); *see also In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 135 (S.D.N.Y. 2008) ("A plan of allocation that calls for the pro rata distribution of settlement proceeds on the basis of investment loss is presumptively reasonable.").

121. As explained above, the Class Members will receive *pro rata* distributions from the settlement fund based on the amounts of their loans and the estimated settlement fees, and the actual interest paid on the loans. Each Class Member is treated the same based upon his or her own damages experience – a methodology that is by definition fair and equitable. Moreover, in regard to the loans that closed before May 1, 2000, the 18.5% discount reflects the relative merit of the statute of limitations defense as determined by separate Allocation Counsel in a mediation specific to this issue. Each aspect of the allocation has a reasonable basis and is fair to the Class Members. *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *7 ("'An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel'") (citation omitted).

## CONCLUSION

122. The detailed analysis above overwhelmingly establishes that the Settlement Agreement is appropriate under Bankruptcy Rules 7023 and 9019 and provides a meaningful recovery to the Kessler Settlement Class. The Settlement Agreement was achieved in conjunction with the mediation process overseen by Judge Peck involving knowledgeable and informed counsel for the Settling Defendants and the Kessler Settlement Class and which effort also involved counsel for the Creditors' Committee. In addition, the allocation relative to the equitable tolling sub-classes was derived from a separate mediation before Charles Atwell, a former circuit court judge, in which each subclass was represented by separate Allocation Counsel. Moreover, SilvermanAcampora, as special borrowers' counsel, reviewed the Settlement Agreement and found it to be reasonable.

123. Accordingly, the Parties respectfully request that the Court enter: (a) the proposed Preliminary Approval Order, attached to the Settlement Agreement as Exhibit B, (1) granting certification of the Kessler Settlement Class for purposes of settlement only, (2) appointing proposed Class Counsel for settlement purposes, (3) preliminarily approving the Settlement Agreement, (4) approving the form and manner of Class Notice and (5) scheduling a fairness hearing to consider approval of the Settlement Agreement on a final basis; and (b) the proposed Final Approval Order, substantially in the form attached to the Settlement Agreement as Exhibit C, approving the Settlement Agreement on a final basis following the fairness hearing.

## NOTICE

124. Notice of this Motion will be given to the following parties, or in lieu thereof, to their counsel: (a) the Office of the United States Trustee for the Southern District of New York; (b) the Office of the United States Attorney General and the attorneys general of each state; (c)

the Office of the New York Attorney General; (d) the Office of the United States Attorney for the Southern District of New York; (e) the Internal Revenue Service; (f) the Securities and Exchange Commission; (g) each of the Debtors' prepetition lenders, or their agents, if applicable, (h) each of the indenture trustees for the Debtors' outstanding note issuances; (i) Ally Financial Inc.; (j) Barclays Bank PLC, as administrative agent for the lenders under the debtor in possession financing facility; (k) Ocwen Loan Servicing, LLC and its counsel; (l) the Creditors' Committee; (m) the Kessler Settlement Class and their counsel; (n) the Insurers and their counsel; (o) PNC Bank, N.A.; (p) the Federal Deposit Insurance Corporation, as receiver for Guaranty National Bank of Tallahassee; and (q) all parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in view of the facts and circumstances, such notice is sufficient and no other or further notice need by provided.

**NO PRIOR REQUEST**

125. Except as otherwise noted herein, no prior motion for the relief requested herein has been made to this Court or any other court.

**WHEREFORE**, the Parties respectfully request the Court enter the Preliminary Approval Order and then enter the Final Approval Order following the fairness hearing and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
July 31, 2013

*/s/ Daniel J. Flanigan*
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*Counsel to the Debtors and*
*Debtors in Possession*

# Exhibit 1

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| In re: | ) | Case No. 12-12020 (MG) |
| RESIDENTIAL CAPITAL, LLC, et al., | ) | Chapter 11 |
| Debtors. | ) | Jointly Administered |

**DECLARATION OF WILLIAM R. THOMPSON, GENERAL COUNSEL OF RESIDENTIAL CAPITAL, LLC, IN SUPPORT OF JOINT MOTION PURSUANT TO 11 U.S.C. § 105 AND FED. R. BANKR. P. 7023 AND 9019 FOR AN ORDER (1) GRANTING CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT ONLY, (2) APPOINTING CLASS REPRESENTATIVE AND CLASS COUNSEL FOR PURPOSES OF SETTLEMENT ONLY, (3) PRELIMINARILY APPROVING THE SETTLEMENT AGREEMENT BETWEEN PLAINTIFFS, ON THEIR OWN BEHALF AND ON BEHALF OF THE CLASS OF SIMILARLY SITUATED PERSONS AND THE DEBTORS, (4) APPROVING THE FORM AND MANNER OF NOTICE TO THE CLASS, (5) SCHEDULING A FAIRNESS HEARING TO CONSIDER APPROVAL OF THE SETTLEMENT AGREEMENT ON A FINAL BASIS AND RELATED RELIEF, AND (6) APPROVING THE SETTLEMENT AGREEMENT ON A FINAL BASIS AND GRANTING RELATED RELIEF**

I, William R. Thompson, under penalty of perjury, declare as follows:

1. I am the General Counsel ("**GC**") of the above-captioned debtors and debtors in possession (collectively, the "**Debtors**"). I submit this declaration (the "**Declaration**") in support of the *Joint Motion Pursuant to 11 U.S.C. § 105 and Fed. R. Bankr. P. 7023 and 9019 For An Order (1) Granting Class Certification for Purposes of Settlement Only, (2) Appointing Class Representative and Class Counsel for Purposes of Settlement Only, (3) Preliminarily Approving the Settlement Agreement Between Plaintiffs, On Their Own Behalf and On Behalf of the Class of Similarly Situated Persons and the Debtors, (4) Approving the Form and Manner of Notice to the Class, (5) Scheduling a Fairness Hearing to Consider Approval of the Settlement*

*Agreement on a Final Basis and Related Relief and (6) Approving the Settlement Agreement on a Final Basis and Granting Related Relief* (the "**Motion**").[1]

2. I first joined the company in April 2005, serving as Chief Litigation Counsel for GMAC Mortgage, LLC ("**GMACM**") and later for its parent, Residential Capital, LLC ("**ResCap**"). I assumed the role of GC for ResCap and its subsidiaries in the first quarter 2013 upon the accession of former ResCap General Counsel Tammy Hamzehpour to the position of Chief Business Officer for ResCap.

3. Prior to my time with GMACM and ResCap, I was a SVP and Associate General Counsel in charge of litigation for American Business Financial Services and before that Chair of the Litigation Group for the City of Philadelphia Law Department. I also spent some time as Acting City Solicitor for the City of Philadelphia. Before joining the Philadelphia Law Department, I was a partner at Klehr, Harrison, Harvey, Branzburg LLP in Philadelphia and maintained a sophisticated commercial litigation practice there for over twelve (12) years. I began my career as an Assistant District Attorney in the Philadelphia District Attorney's Office. All told, I have over thirty (30) years of litigation experience.

4. I offer this Declaration to show that the settlement agreement (the "**Settlement Agreement**"), dated June 27, 2013, entered into by and between (i) the Debtors, including ResCap, Residential Funding Company, LLC ("**RFC**") and GMAC Residential Holding Company, LLC ("**GMAC Holding**" and together with ResCap and RFC, the "**Settling Defendants**"), and (ii) Rowena Drennen, Flora Gaskin, Roger Turner, Christie Turner, John Picard and Rebecca Picard ("**Named Plaintiffs**" and together with the Settling Defendants, the "**Parties**"), on behalf of themselves and similarly situated class members (the "**Class**

[1] Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Motion.

**Members**" or the "**Kessler Settlement Class**") represents a fair and reasonable compromise in connection with the MDL Litigation (defined below) and is in the best interests of the Debtors' estates.

5. Except as otherwise indicated, all statements in this Declaration are based upon: my personal knowledge; information supplied or verified by personnel in departments within the Debtors' various business units; my review of the Debtors' books and records as well as other relevant documents; my discussions with other members of the Debtors' management team; and information supplied by the Debtors' consultants. In making my statements based on my review of the Debtors' books and records, relevant documents, and other information prepared or collected by the Debtors' employees or consultants, I have relied upon these employees and consultants to accurately record, prepare, collect, and/or verify any such documentation and other information.

**A. <u>The Class Action</u>**

6. As of May 14, 2012 (the "**Petition Date**"), several putative class actions against RFC and certain other named defendants, including Community Bank of Northern Virginia ("**CBNV**"), now owned by PNC Bank, N.A. ("**PNC**"), and the Federal Deposit Insurance Corporation ("**FDIC**") as receiver for Guaranty National Bank of Tallahassee ("**GNBT**"), were pending in the United States District Court for the Western District of Pennsylvania (the "**District Court**") as part of a multidistrict proceeding styled *In Re: Community Bank of Northern Virginia Second Mortgage Lending Practice Litigation*, MDL No. 1674, Case Nos. 03-0425, 02-01201, 05-0688, 05-1386 (the "**MDL Litigation**").

7. The MDL Litigation related primarily to some 44,535 second mortgage loans originated to borrowers nationwide by either CBNV or GNBT that had been acquired by RFC.

8. The loans involved are so called "high-cost" loans under the Home Ownership and Equity Protection Act, 15 U.S.C. § 1641 ("**HOEPA**"). Each loan transaction was governed by and subject to the Real Estate Settlement Practices Act, 12 U.S.C. § 2601 et seq. ("**RESPA**"), the Truth in Lending Act ("**TILA**") and HOEPA (15 U.S.C. § 1602 and Regulation Z at 12 C.F.R. § 226.2).

9. In the MDL Litigation, two prior class action settlements were approved by the District Court but on appeal each was vacated by the Third Circuit Court of Appeals and remanded for further proceedings. The prior settlements were based, primarily, on RESPA claims, and both of the objections to those settlements focused on the contention that claims under TILA and HOEPA had not been asserted or properly valued in the settlements.

10. Following the second appeal and remand in the MDL Litigation, primary counsel for the plaintiffs that had entered into the prior settlements joined forces with primary counsel for the objectors (collectively, the "**Plaintiffs**"). The Plaintiffs then filed Plaintiffs' Joint Consolidated Amended Class Action Complaint asserting claims under RESPA, TILA, HOEPA and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("**RICO**"), a copy of which is annexed to the Motion as **Exhibit 6**.

11. Upon the Petition Date, the continuation of the MDL Litigation against RFC was stayed by virtue of the imposition of the automatic stay under section 362(a) of the Bankruptcy Code. In addition, between November 2 and November 16, 2012, Named Plaintiffs filed class proofs of claim against RFC, ResCap, GMAC-RFC Holdings Company, LLC and GMACM (collectively, the "**Class Proofs of Claim**").

**B. The Negotiation of the Settlement Agreement**

12. Beginning in April 2013, the Debtors, counsel to Named Plaintiffs, along with representatives of the vast majority of the Debtors' significant creditors, participated in mandatory plan mediation sessions under the supervision of the Court-appointed mediator, the Honorable James M. Peck, United States Bankruptcy Judge. The mediation sessions ultimately resulted in a global resolution dated May 14, 2013 culminating in the Plan Support Agreement ("**PSA**") by and among the Debtors, the Creditors' Committee, the Consenting Claimants (as defined in the Motion) and Ally Financial Inc. ("**Ally"**). The Kessler Settlement Class are among the Consenting Claimants. Counsel to the Debtors and Named Plaintiffs explored the concept of settlement during this phase of the mediation, but no resolution was achieved.

13. The PSA was not conditioned upon the Parties achieving a settlement and while they are parties to the PSA, the Kessler Settlement Class had the right to withdraw from the PSA under certain conditions. Subsequent to the execution of the PSA, the Parties resumed their settlement discussions and engaged in extensive formal negotiations.[2] These efforts included an all-day negotiation session held on June 18, 2013 that lasted well into the evening. Counsel to the Debtors, Named Plaintiffs and the Creditors' Committee participated in the June 18 session. These efforts resulted in an agreement in principle as to the primary components of the settlement.[3]

14. Over the next few weeks counsel to the Parties and the Creditors' Committee devoted substantial efforts to the preparation of the Settlement Agreement. This involved

[2] Throughout the settlement discussions, the Settling Defendants were represented by their bankruptcy counsel, Morrison & Foerster LLP, and their defense counsel in the MDL Litigation, Bryan Cave LLP.

[3] Counsel for the Settling Defendants also informed the insurers that issued the Policies of the court-ordered mediation, the subsequent settlement negotiations, the demands and offers exchanged by the Parties, and provided the insurers with an opportunity to participate in some of the settlement meetings with counsel for the Kessler Settlement Class.

lengthy negotiations and extensive joint drafting sessions that culminated in the Settlement Agreement. Upon approval by this Court, the Settlement Agreement will resolve all issues among the Settling Defendants, Named Plaintiffs and the other putative Class Members relating to the 44,535 second mortgage loans at issue.

15. The settlement will include all persons in the Kessler Settlement Class who do not, in accordance with the terms of the Settlement Agreement, file a timely request to opt out of the Kessler Settlement Class.

16. I believe that the Settlement Agreement is the product of arm's length negotiations between the Parties. At the time of settlement, each of the Parties had made an extensive investigation of the facts through formal and informal discovery and undertaken their own analyses of the merits of the case based on those facts and existing law. These efforts allowed for an informed negotiation between Named Plaintiffs and the Settling Defendants. I understand that during the settlement discussions, the Parties were all aware of the major issues related to the Class Members' claims for damages. Moreover, it is my understanding that all sides had ample opportunity to assess the likelihood that the putative class claim would be certified as a class proof of claim pursuant to the Motion to Certify (as defined in the Motion), and indeed, the Parties have extensively briefed this issue. Likewise, the Parties had ample opportunity to evaluate the merits of the Class Members' claims for damages, as well as the likelihood and extent that Named Plaintiffs may have prevailed on their claims for damages.

17. Accordingly, I, along with the Debtors, believe that the Settlement Agreement is the product of a well informed assessment of all the risks of litigation either before this Court or in the MDL Litigation.

**C. Settlement Amounts and Allocation**

18. The assets of the Settling Defendants are finite and subject to several billons of dollars in unsecured claims. Nonetheless, the Joint Chapter 11 Plan Proposed by Residential Capital, LLC, et al. and the Official Committee of Unsecured Creditors (the "**Plan**") provides that a Borrower Claims Trust is to be established and funded with no less than $57.6 million. Under the Settlement Agreement, the claims asserted by the Kessler Settlement Class are being reduced and allowed as an unsecured borrower claim, not subject to subordination under the Plan, in the amount of $300,000,000 against Debtor RFC only (the "**Allowed Claim**"). The other Class Proofs of Claim will be disallowed and expunged.

19. It is my understanding that the Kessler Settlement Class will receive a distribution from the Borrower Claims Trust on account of the Allowed Claim in accordance with the terms of the Settlement Agreement and the Plan. Out of the gross amount distributed on account of the Allowed Claim, costs, attorneys' fees and incentive awards will be deducted. The net amount, defined in the Settlement Agreement as the Kessler Net Recovery, will then be divided among Class Members according to the formulas contained in the Settlement Agreement.

20. Additionally, as part of the settlement, the Settling Defendants have agreed to assign certain insurance rights (the "**Insurance Rights**") that are believed to provide coverage for the alleged conduct that is the subject of the claims of the Kessler Settlement Class. Thus, a recovery of insurance proceeds may also be available to the Kessler Settlement Class claimants. If payment is received or obtained under the applicable policies then such amounts shall also be a recovery for the Kessler Settlement Class claimants.

21. The Settlement Agreement is the product of extensive, arm's length negotiations following twelve (12) years of complex litigation and was reached in connection with the

mediation ordered by this Court and overseen by Judge Peck, and as a result of the substantive negotiations that followed the execution of the PSA. I understand that the continued litigation of these issues would be time consuming and costly, and while the Debtors have meritorious class and liability defenses, continued litigation could potentially expose the Debtors to significant damages. Accordingly, and after consideration of the substantial risks attendant on litigating these claims on the merits, the Debtors believe that approval of the Settlement Agreement is in the best interest of the Debtors and their creditors because it resolves the MDL Litigation in the most cost effective manner reasonable and caps the Debtors' liability at an amount that is fair and reasonable to all of the parties. Moreover, if the Settlement Agreement is not approved, the Debtors do not believe that the Parties would agree to a resolution on terms more favorable to the Debtors than what is presently before the Court.

22. The Debtors believe that the Allowed Claim is a reasonable amount when compared to the total damages that the Kessler Settlement Class claimants could potentially recover against the Settling Defendants before this Court, which I understand are in excess of $1.87 billion. In agreeing to the Allowed Claim, the Debtors, with the assistance of their professional advisors, carefully considered the risks inherent in continuing the litigation of this matter both in connection with class certification implicated by the pending Motion to Certify and, were the class to be certified as an allowed class claim, on the underlying merits.

23. As to class certification, the Western District of Pennsylvania twice certified a settlement class in this case, and although the Third Circuit reversed both certifications, the Third Circuit did make several general comments suggesting that the Plaintiffs' RESPA, TILA and HOEPA claims may be certified and that are problematic for our equitable tolling arguments – or at least for the prospect of resolving the equitable tolling issues before a trial.

While the Debtors do not believe that these prior determinations are binding (as the Plaintiffs urge), there is a risk that the Bankruptcy Court will grant the Motion to Certify.

24. In addition, without a settlement, litigation will necessitate extensive document discovery that would be extremely expensive and burdensome. Many voluminous loan files are available only in hard copy in off-site storage, but there is also a large set of electronic materials. As noted, much of the evidence is in the hands of third parties who would require subpoenas and perhaps compensation for compliance, and whose record-keeping situations are unknown. Both the Plaintiffs and the Debtors would be likely to seek to take more than the ten (10) fact depositions per side routinely allowed under Federal Rule of Civil Procedure 30, and both sides would have several expert witnesses. Trial could be expected to take weeks and involve a large trial team of lawyers and experts.

25. Under any scenario, the Debtors' estates and in likelihood, subsequent to the Plan Effective Date, the Borrower Claims Trust, would need to devote substantial financial and human resources to the defense of the action, which could take several months and likely much longer to resolve through contested litigation.

26. I understand that the Creditors' Committee has endorsed the settlement. I believe that because the Settlement Agreement resolves a significant potential liability of the estates on reasonable terms, it is in the best interests of the estates and facilitates the Debtors' exit from bankruptcy protection under the Plan. I further understand that if consummated, the Settlement Agreement will provide meaningful recoveries to tens of thousands of the Debtors' current and former borrowers with the potential for enhanced recoveries from available insurance.

27. Based on all of the factors described above, I, along with the Debtors, have concluded that the Settlement Agreement is in good faith and eminently reasonable.

I declare under penalty of perjury that the foregoing is true and correct.

New York, New York
Dated: July 31, 2013

/s/ William R. Thompson
William R. Thompson
General Counsel of Residential Capital, LLC

# Exhibit 2

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| In re:<br><br>RESIDENTIAL CAPITAL, LLC, *et al.*,<br><br>Debtors. | Chapter 11<br><br>Case No.: 12-12020 (MG)<br><br>Jointly Administered |

**DECLARATION OF R. FREDERICK WALTERS IN SUPPORT OF JOINT MOTION PURSUANT TO 11 U.S.C. § 105 AND FED. R. BANKR. P. 7023 AND 9019 FOR AN ORDER (1) GRANTING CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT ONLY, (2) APPOINTING CLASS REPRESENTATIVE AND CLASS COUNSEL FOR PURPOSES OF SETTLEMENT ONLY, (3) PRELIMINARILY APPROVING THE SETTLEMENT AGREEMENT BETWEEN PLAINTIFFS, ON THEIR OWN BEHALF AND ON BEHALF OF THE CLASS OF SIMILARLY SITUATED PERSONS AND THE DEBTORS, (4) APPROVING THE FORM AND MANNER OF NOTICE TO THE CLASS, (5) SCHEDULING A FAIRNESS HEARING TO CONSIDER APPROVAL OF THE SETTLEMENT AGREEMENT ON A FINAL BASIS AND RELATED RELIEF, AND (6) APPROVING THE SETTLEMENT AGREEMENT ON A FINAL BASIS AND GRANTING RELATED RELIEF**

R. Frederick Walters, pursuant to 28 U.S.C. §1746, hereby declares as follows in support of the "**Joint Motion**" referenced in the above caption:

1. I am a shareholder in the firm of Walters, Bender, Strohbehn & Vaughan, P.C. ("**Walters Bender**"). This declaration ( the "**Declaration**') is a Supplement to the Declaration of R. Frederick Walters, David M. Skeens and R. Bruce Carlson in Support of Motion to Apply Bankruptcy Rule 7023 and to Certify Class Claims (Doc. 2047), which describes the long history of a multidistrict proceeding styled *In Re: Community Bank of Northern Virginia Second Mortgage Lending Practice Litigation*, MDL No. 1674, Case Nos. 03-0425, 02-01201, 05-0688, 05-1386 (the "**MDL Litigation**")[1] which litigation involved as a defendant one of the debtor entities, Residential Funding Company, LLC ("**RFC**"), and the effort to assert and

[1] Capitalized terms not defined herein shall have the definition set forth in the Settlement Agreement that is attached to the Joint Motion as Exhibit 5.

seek certification of those class action claims in the Bankruptcy Cases against certain Debtors including Residential Capital, LLC, RFC and GMAC Residential Holding Company, LLC.

2. These class claims relate to 44,535 second mortgage loans (some 70,000 plus individual borrowers) originated by Community Bank of Northern Virginia (now PNC Bank) or Guaranty National Bank of Tallahassee and then almost immediately purchased by RFC.

3. This past spring I was involved on behalf of the **Kessler Class Claimants**, along with representatives of almost all the Debtors' significant creditors, in Court ordered **Plan** mediation sessions overseen by the Honorable James M. Peck, United States Bankruptcy Judge. From this considerable effort, the participating parties reached a global resolution on May 14, 2013 as set forth in a Plan Support Agreement (the "**PSA**") by and among the Debtors, the Creditors' Committee, the Consenting Claimants and Ally Financial Inc. ("**Ally**"). The Kessler Settlement Class that I represent was among the Consenting Claimants.

4. The PSA was not conditioned upon any settlement of the class action claims of the Kessler Class Claimants against certain Debtor entities but it did contemplate continued settlement discussions between the Kessler Class Claimants and the Debtors. Such discussions did continue, culminating in a lengthy mediation session on June 18, 2013 (all day and late into the evening) involving the Kessler Class Claimants, the Debtors and the Creditors' Committee.

5. As a result of those informed and lengthy negotiations, the Parties came to a resolution (the "**Settlement**") that is memorialized in the Kessler Settlement Agreement ("**Agreement**"), which proposed class action settlement is the subject of the Joint Motion.

6. The purpose of this Declaration is: (a) to describe generally the manner in which the damages for the individual **Kessler Settlement Class Members** will be calculated and allocated, including the process pursuant to which **Allocation Counsel** were retained for the purpose of

negotiating and resolving the allocation proposal described in the Agreement at ¶6(c)(ii) relating to the issue of equitable tolling in relation to certain Kessler

Settlement Class Members' RESPA, TILA and HOEPA claims; and (b) to speak to the fairness, adequacy and reasonableness of the Settlement.

**Overall Calculation of the Individual Damages of Kessler Settlement Class Members**

7. Under the Plan, a Borrower Claims Trust will be established and funded in cash with no less than $57.6 million subject to the Borrower Claims Trust True-up. As set forth in the Settlement, the claims asserted by the Kessler Settlement Class are being reduced and allowed as a non-subordinated general unsecured claim against RFC (the "**Allowed Claim**") in the amount of $300 million.

8. Because of the Allowed Claim, the Kessler Settlement Class will receive distributions (the "**Kessler Gross Recovery**") from the Borrower Claims Trust in accordance with the terms of the Plan and the Settlement. Costs and expenses, attorneys' fees and incentive awards will be deducted from the Kessler Gross Recovery to determine the net amount to be distributed to the Kessler Settlement Class ( the "**Kessler Net Recovery**"). Those monies will be distributed to the Class Members based on a formula to determine the actual damages suffered by each Class Member as compared to the total of individual damages for all Class Members. The individual damages are comprised of two (2) components - estimated fees and actual interest paid on that Class Member's mortgage loan.

9. To arrive at each Class Member's damages, **Class Counsel** will employ economist Kurt Kruger, Ph.D. to estimate the fees and then use that estimate to calculate the sum of the estimated fees and actual interest paid for each Kessler Settlement Class Member. Dr. Krueger will then calculate each Kessler Settlement Class Member's proportionate recovery based on

each Kessler Settlement Class Member's individual damages as compared to the total of all Kessler Settlement Class Members' damages. Dr. Kruger has substantial experience conducting the described analysis and computation of interest damages in other mortgage related litigation that involved a like measure of damages. Dr. Krueger has estimated fees in several other cases for class members for which actual fee data was not available using data similar to that which is available in MDL Litigation. Those estimations served as the basis to allocate and pay settlements to class members in several other cases in which the undersigned was appointed class counsel. A copy of Dr. Krueger's CV is attached as **Exhibit A**.

10. Because the Debtors cannot supply actual fee data for the entire Kessler Settlement Class on a timely or economically feasible basis, the fee component of the individual damages will be estimated by Dr. Krueger using actual fee data from a sample of over four hundred loans, including that of the Class Representatives from among the Kessler Settlement Class for which Class Counsel has settlement fee data. Dr. Krueger will also be provided the loan files for the 400-plus sample of loans and can therefore estimate the fees based on correlations to other available data such as loan amount, interest rate and term, as he determines appropriate and reliable. Considering his past experience estimating fees and his knowledge, training and experience, Dr. Krueger will then, in consultation with Class Counsel, analyze the available data using principles and methodologies that he as the holder of a Doctorate in Economics believes are reliable to estimate the fees for each loan based on the data that is available for each loan.

11. For the interest paid component of damages, the Debtors have provided Class Counsel with the actual amount of interest paid on the individual Kessler Settlement Class Member loans as of the current date in the form of the data maintained by the Debtors. That data will be presumed accurate based on the representations of the Debtors. Dr. Krueger

will assemble the interest data and then the estimated fees for each Kessler Settlement Class Member's loan will be added to the actual amount of interest paid on such loan to determine the total amount of individual damages for each Kessler Settlement Class Member.

12. Dr. Krueger will then apply the 18.5% discount to the Equitable Tolling Sub-Class and determine each Kessler Settlement Class Member's proportionate share of the Kessler Net Recovery.

**Allocation Adjustments Based on Certain Class Members' Reliance on Equitable Tolling**

13. It was recognized as part of the overall allocation process that as to the RESPA, TILA and HOEPA claims, certain members of the Kessler Settlement Class would rely on equitable tolling to timely assert their claims while others were timely without the need for equitable tolling. In recognition of this fact, in the Agreement, the Kessler Settlement Class was segregated into sub-classes - the Equitable Tolling Sub-Class and the Non-Equitable Tolling Sub-Class - based on those within the Kessler Settlement Class that relied upon equitable tolling and those that did not, respectively. It was also determined, and the Agreement provides, that such sub-classes should be independently represented solely for the purpose of determining an appropriate allocation of the Kessler Net Recovery based on the equitable tolling issue. This process was deemed "the allocation issue" and the separate and independent counsel to be engaged to represent the interests of these sub-classes solely for the purpose of determining an appropriate allocation were defined as Allocation Counsel.

*Equitable Tolling Subclass*

14. In effectuation of the allocation process referenced in the Agreement and as described herein, on July 2, 2013 **Named Plaintiffs,** John and Rebecca Picard, interviewed and retained

Pittsburgh lawyer Arthur H. Stroyd, Jr. for the purpose of representing them and the Equitable Tolling Sub-class in negotiations to resolve the appropriate allocation of the Kessler Net Recovery as described in the Settlement.

15. Mr. Stroyd is a partner with the Pittsburgh, Pennsylvania law firm of Del Sole Cavanaugh Stroyd, LLC. His professional resume is attached hereto as **Exhibit B.** Mr. Stroyd is a former officer in the U.S. Navy serving in the legal office. Mr. Stroyd also served as a law clerk to the Honorable Joseph F. Weis, Jr., U.S. Court of Appeals for the Third Circuit. In private practice, Mr. Stroyd has focused on complex commercial litigation including class action litigation. He spent most of his private practice career with the international law firm, Reed Smith LLP, where he was one of its Managing Partners and Head of its Litigation Group. Currently, Mr. Stroyd's practice focuses on representing defendants in class action litigation and serving as a mediator, arbitrator and Early Neutral Evaluator. As his professional resume and history illustrates, Mr. Stroyd is imminently qualified to serve as independent Allocation Counsel for the Picards and the Equitable Tolling Sub-Class.

16. Mr. Stroyd was assisted in his work as Allocation Counsel by Edward Kilpela, a partner in the Del Sole firm. Mr. Kilpela heads Del Sole's class action litigation group. Before joining the Del Sole firm in 2012, Mr. Kilpela litigated and tried class actions and mass tort matters for Williams & Connolly LLP and then Wheeler Trigg O'Donnell LLP. He is a *cum laude* graduate of the University of Michigan law school. As his professional resume and history on the Del Sole web site illustrates, Mr. Kilpela is likewise well qualified to assist with Allocation Counsel's representation of the Picards and the Equitable Tolling Sub-Class.

*Non-Equitable Tolling Subclass*

17. In further effectuation of the allocation process referenced in the Agreement and as described herein, on July 2, 2013 Named Plaintiff Rowena Drennen interviewed and retained well known Kansas City lawyer, Richard H. Ralston for the purpose of representing her and the Non-Equitable Tolling Sub-Class in negotiations to resolve the appropriate allocation of the Kessler Net Recovery described in the Settlement.

18. Mr. Ralston is a former United States Magistrate Judge for the Western District of Missouri (1976-1988), and in that capacity he presided over numerous complex commercial litigation matters. Currently Mr. Ralston is the head of The Ralston Law Group, LLC where he focuses his practice on serving as a mediator and arbitrator. Previously, Mr. Ralston was Of Counsel to the Armstrong Teasdale law firm and a Director with the law firm of Polsinelli Shalton & Welte (now Polsinelli Shughart). Mr. Ralston also has been a law professor at Creighton University School of Law and the University of Missouri at Kansas City. His professional resume is attached as **Exhibit C**. During his legal career Mr. Ralston has represented clients in class litigation as well as mediated class cases. Those class mediation efforts include second mortgage consumer cases very similar to the instant matter. As his professional resume and history illustrates, Mr. Ralston is imminently qualified to serve as independent Allocation Counsel for Ms. Drennen and the Non-Equitable Tolling Sub-Class.

*Mediation*

19. In conformity with the Agreement and the process and structure for resolution of the allocation issue, on July 11, 2013, Counsel for the Equitable Tolling Sub-Class (Messrs Stroyd and Kilpela) and the Non-Equitable Tolling Sub-Class (Mr. Ralston) personally attended a mediation at the offices of Foland, Wickens, Eisfelder, Roper & Hofer, PC, 911 Main Street,

Kansas City, Missouri before Charles E. Atwell, a former judge of the Circuit Court of Jackson County, Missouri as part of the effort to resolve the allocation of the Kessler Net Recovery described in the Settlement. Regarding Mr. Atwell's qualifications, he was appointed Circuit Judge in Jackson County, Missouri on July 23, 1996 and served as a judge through November of 2012. He was a very accomplished and respected jurist. Missouri Lawyer's Weekly, the preeminent state-wide legal publication in Missouri, named Mr. Atwell as the Best Circuit Judge in the State in 2007. His judicial experience included presiding over complex commercial litigation matters and determining a number of limitations issues. Before becoming a judge, Mr. Atwell was a partner in the Kansas City, Missouri law firm of Wyrsch Atwell Mirakian Lee & Hobbs where he established a reputation locally and throughout the United States as a very skilled trial lawyer. Mr. Atwell also served as an Assistant Prosecuting Attorney with the Jackson County, Missouri prosecutor's office and an Assistant United States Attorney for the Western District of Missouri. His professional resume attached is hereto as **Exhibit D.**

20. In advance of that mediation, Allocation Counsel and Mr. Atwell were provided a host of materials to inform them relative to the claims of the Kessler Settlement Class and more specifically, the equitable tolling issue. Generally speaking, those items included the Kessler Settlement Agreement, the two substantial opinions from the Third Circuit generated in the MDL Litigation, the Joint Consolidated Amended Class Action Complaint from the MDL Litigation, the motions to dismiss that Complaint and the District Court's order generally denying the motions to dismiss and the class certification pleadings filed in both the MDL Litigation and in this bankruptcy proceeding. A copy of the index of the precise items supplied to Allocation Counsel and Mr. Atwell is attached hereto as **Exhibit E**.

21. It is my understanding from the "Settlement Points Relative to Mediation Conducted on July 11, 2013," which is attached hereto as **Exhibit F**, that following a day long mediation (9:00 a.m. until 3:00 p.m.), the respective Allocation Counsel negotiated and agreed to an individual damage reduction for the Equitable Tolling Sub-Class as referenced in paragraph 6(b)(ii) of the Agreement in the amount of eighteen and one half percent (18.5%).

22. Notably, Class Counsel was not present at and did not otherwise participate in the mediation conducted by Mr. Atwell with the independent Allocation Counsel on July 11, 2013.

23. Neither of the Allocation Counsel nor Mr. Atwell has been involved in this matter prior to their respective engagements. None of them has any monetary interest in the Settlement in regard to any share of any attorneys' fees awarded pursuant to the Settlement or otherwise other than payment of their lodestar from the proposed attorneys' fee award. Rather, Allocation Counsel will be paid a lodestar rate based upon their hourly rate and Mr. Atwell will be paid his hourly mediation fee from any award of attorneys' fees to Class Counsel.

24. I, along with all other Class Counsel, believe that the 18.5% reduction described above is fair, adequate and reasonable to all Class Members. This conclusion is based on numerous factors. First, the structure and process in the Agreement, including but not limited to the use of Sub-Classes for each side of the equitable tolling issue, is a process that was advocated by the United States Court of Appeals for the Third Circuit in its two opinions arising from the MDL Litigation. Second, the implementation of this process involved the engagement of highly experienced, knowledgeable and independent counsel - the Allocation Counsel - to represent the Sub-Classes with respect to the equitable tolling issue and resolution of the issue and both sides were thoroughly informed of the relevant facts and law on this issue. Third, the use of a formal mediation session to determine an appropriate allocation overseen by a respected and

knowledgeable retired judge as mediator provided structural assurance as to the objective nature of the process and the outcome. Fourth, the lack of participation of Class Counsel in the actual mediation before Judge Atwell provides additional assurance as to the objective and fair nature of the process and outcome. As such, I am confident that the allocation as negotiated and agreed upon by the Allocation Counsel who were well informed independent professionals under the supervision of an experienced retired trial judge and mediator is fair and reasonable.

25. Further, Class Counsel is very familiar with this precise equitable tolling issue from our ten-plus years of experience in the MDL Litigation. That experience includes access to and the review of thousands of pages of documents derived from both formal and informal discovery that delineate the facts underlying the equitable tolling issue. We have also engaged in thousands of pages of briefing in this matter including many devoted to the equitable tolling issue and a review of the relevant case law. Among other things, those efforts resulted in two appeals to the United States Court of Appeals for the Third Circuit, which generated lengthy precedential opinions that discussed equitable tolling as well as many other issues. Further, Class Counsel has considered the damages recoverable on the RESPA, TILA/HOEPA and RICO claims in bankruptcy as well as the fact that the RICO claim is timely as to all Class Members when evaluating the fairness, adequacy and reasonableness of the 18.5% discount for the Equitable Tolling Sub-Class. Considering these factors and based on our own knowledge, experience and professional judgment, Class Counsel believes the 18.5% discount for the Equitable Tolling Sub-Class is fair, adequate and reasonable for all Kessler Settlement Class Members.

26. I have also reviewed the declaration of Ronald J. Friedman, Special Counsel to the Official Committee of Unsecured Creditors of Residential Capital, LLC, *et al,* dated July

22, 2013, which was prepared pursuant to Article 6(d) of the Agreement. That declaration by independent counsel with no stake in the outcome provides yet additional evidentiary proof that the 18.5% discount for the Equitable Tolling Sub-Class is fair, adequate and reasonable.

27. After carefully considering the Allocation Counsel structure and process, the independent Allocation Counsel mediation, the Allocation Counsel mediation outcome, the Special Counsel to the Official Committee of Unsecured Creditor's independent declaration and Class Counsel's own knowledge, experience and professional judgment, I believe the 18.5% discount for the Equitable Tolling Sub-Class is fair, adequate and reasonable.

**The Settlement is Fair Adequate and Reasonable**

28. Regarding the overall settlement, it was the result of good faith, extensive, arm's length negotiations following over a decade of litigation and was reached through the mediation ordered by Judge Glenn and overseen by Judge Peck. As previously noted, the many years of the MDL Litigation spawned two Third Circuit opinions, each of which recognized the possibility of certification of these claims for settlement. To bolster our own experiences in the MDL Litigation when now thrust into the bankruptcy environment, we employed Daniel Flanigan, a highly experienced bankruptcy counsel to assist the Kessler Settlement Class Members in understanding the bankruptcy issues including those issues relating to the advancement of class action claims in a bankruptcy court and the ability to litigate and collect on these claims from the Debtors' estates. Certainly, the Kessler Settlement Class could potentially or theoretically achieve a higher claim through continued litigation, but that effort would not be without significant risk, particularly in terms of seeking monies from a finite pool of assets as to which a host of other substantial and sophisticated creditors seek their own recovery. Notably, the Allowed Claim substantially exceeds the amount of the prior settlements reached in the MDL

Litigation and the recovery from the Borrower Claims Trust should approach or perhaps exceed those amounts. In addition, under the terms of the Agreement and Plan, certain Insurance Rights in and to the **Policies** will be assigned to the Kessler Settlement Class thereby providing the Class the potential for a very significant recovery. As such, the overall Settlement is most certainly fair, adequate and reasonable.

29. I have participated in the drafting of the Joint Motion which this Declaration supports. I have also studied in detail the nine (9) *Grinnell* factors as referenced in the Motion that are used in the Second Circuit to analyze whether or not a settlement is fair, adequate and reasonable. I agree with and support the analysis in the Joint Motion with respect to the *Grinnell* factors. As that analysis demonstrates, the Settlement is indisputably fair, adequate and reasonable.

30. I have been appointed as class counsel in more than twenty (20) class settlements just since January 2007. All of those have been finally approved by a court as fair, adequate and reasonable. At least nineteen (19) of those involve consumer claims related to mortgage loans just as these are consumer claims related to mortgage loans. Based on my experience in other cases, my knowledge of the facts and law in this case, and my professional judgment of the risks involved, I believe the Settlement is fair, adequate and reasonable.

31. In the current Settlement, the Agreement provides for payment of individual incentive fees from the Kessler Gross Recovery to the remaining Class Representatives in the MDL Litigation in the individual amounts listed on Schedule 1 to the Agreement that, in the aggregate, total $72,500.00. Those incentive fees are in addition to any damage recovery the Class Representatives may receive and are designed to compensate the class representatives for their time and effort for serving as representatives of the Kessler Settlement Class which has produced a very substantial benefit for the entire Kessler Settlement Class. Those proposed incentive

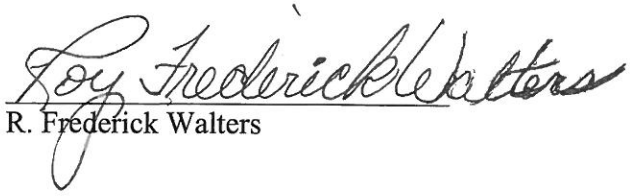
fees are fair, adequate and reasonable in the circumstances of this case and will be explained in greater detail in supplemental pleadings that will be filed prior to the final Settlement Hearing.

32. Likewise, the Agreement provides that Class Counsel will seek reimbursement of their reasonable litigation costs and expenses from the Kessler Gross Recovery in an amount not to exceed $1,500,000.00. A major component of those expenses relates to the monies expended by my law firm to retain and pay experienced bankruptcy counsel, Daniel Flanigan, to assist the Kessler Class Members in navigating through the Bankruptcy Cases. The remaining expenses are of the type customarily incurred in the prosecution of this type of litigation. Those expenses continue to accrue and are fair and reasonable in the circumstances of this case and will be explained in greater detail in supplemental pleadings that will be filed prior to the final Settlement Hearing.

33. Last, the Agreement provides that Class Counsel will seek an award of attorneys' fees in an amount not to exceed 35% of any Kessler Net Recovery. That proposed not to exceed award is fair and reasonable in the circumstances of this case when considering the duration of the representation, the extensive amount of work already performed and that yet remains to be performed including expected litigation as to the assigned Insurance Rights, the risk involved, the contingent nature of the representation, the complexity of the issues, the result obtained, the skill needed to prosecute the action and other factors for awarding attorneys' fees. The "not to exceed" percentage is also reasonable based upon my experience in other class cases. The proposed award will also be explained in greater detail in supplemental pleadings to be filed prior to the final Settlement Hearing.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: July 31, 2013



R. Frederick Walters

**Exhibit A**

VITA

# Kurt V. Krueger, Ph.D.

April 24, 2013

## Employed Position

Senior Economist at John Ward Economics (1990 →)

## Professional Positions

Managing Editor — *Journal of Forensic Economics* (2009 →)
President — National Association of Forensic Economics (2013-14)

## Mailing Addresses


| | |
|---|---|
| Business Address | 8340 Mission RD, STE 235, Prairie Village, KS 66206 |
| Business Telephone | (913) 381-9420 |
| Business Fax | (913) 648-5740 |
| Email | Krueger@JohnWardEconomics.com |
| Home Address | 6215 W 156 TERR, Overland Park, KS 66223 |
| Home Telephone | (913) 710-5197 |


## Education

| | |
|---|---|
| Ph.D. Economics | University of Missouri-Kansas City, 2003 |
| M.A. Economics | University of Kansas, 1986 |
| B.S. Economics | University of Kansas, 1984<br>Graduated with Honors<br>Boynton Outstanding Senior in Economics Award<br>Boynton Junior and Senior Scholarship in Economics |

## Teaching and Research Experience

| | |
|---|---|
| Adjunct Professor | Rockhurst University, Heltzberg School of Management, 2004 (Law and Economics). |
| Lecturer | Graduate School of Business, University of Missouri-Kansas City, 1990 (International Finance). |
| Research Assistant | Institute of Public Policy and Business Research, University of Kansas, 1984-1988. |
| Teaching Assistant | Department of Economics, University of Kansas, 1985-1987. |

## Past Employed Positions

Research Associate Spectrum Economics, Overland Park, KS, 1988-1990

## Organization Membership

American Academy of Economic and Financial Experts
American Economic Association
American Risk and Insurance Association
Midwest Economics Association
Missouri Valley Economic Association
National Association of Forensic Economics
Society of Labor Economists

## Past Professional Service

Vice President, Southern Region — National Association of Forensic Economics (elected term 2004 through 2006)
Associate Editor — *Litigation Economics Review* (2000 to 2004)
Board of Editors — *Journal of Forensic Economics* (2000)
Associate Editor — *Journal of Forensic Economics* (1993-2000; 2002-2008)
Referee: *Journal of Forensic Economics* (since 1992)

## Peer Reviewed Journal Publications

"A Comment on "Self-Consumption in Wrongful Death Cases: Decedent or Family Income?"" *Journal of Forensic Economics*, April 2013, Vol. 24, No. 1, pp. 109-112.

"Personal Consumption and Single Persons: A Reply to Thomas Ireland" *Journal of Forensic Economics*, April 2013, Vol. 24, No. 1, pp. 105-107.

"Personal Consumption and Single Persons: A Reply to Thomas Ireland" *Journal of Forensic Economics*, September 2012, Vol. 23, No. 2, pp. 195-198.

"Personal Consumption and Single Persons" *Journal of Forensic Economics*, August 2011, Vol. 22, No. 2, pp. 143-163.

"The Markov Process Model of Labor Force Activity: Extended Tables of Central Tendency, Shape, Percentile Points, and Bootstrap Standard Errors," with Gary R. Skoog and James E. Ciecka. *Journal of Forensic Economics*, August 2011, Vol. 22, No. 2, pp. 165-229.

"The Income-Based Human Capital Valuation Methods in Public Health Economics Used by Forensic Economics," with Scott D. Grosse. *Journal of Forensic Economics*, Volume 22, Number 1 (June 2011).

"Two Definitional Issues with the Patton-Nelson Personal Consumption Tables: A Reply," *Journal of Forensic Economics*, Volume 21, Number 1 (December 2009).

"Economic Productivity by Age and Sex: 2007 Estimates for the United States," with Scott D Grosse and Mercy Mvundura. *Medical Care* - Health Care Costs Supplement, Volume 47, Number 7 Supplement 1 (July 2009).

"Two Definitional Issues with the Patton-Nelson Personal Consumption Tables: A Comment," *Journal of Forensic Economics*, Volume 20, Number 3 (April 2009).

"The Present Value of Lost Financial Support due to Wrongful Death," with Gary Albrecht. *Journal of Legal Economics*, Volume 15, Number 1 (2008).

"Personal Consumption by Husbands and Wives" *Journal of Forensic Economics*, Volume 20, Number 1 (2008).

"A Review of the Economic Foundations of Earnings and Discounting Theories Used in Forensic Economics," with Gary R. Albrecht. *The Earnings Analyst*, Volume IX (2007).

"Worklife in a Markov Model with Full-Time and Part-Time Activity," with Gary Skoog and Jim Ciecka. *Journal of Forensic Economics*, Volume 19, Number 1 (2006).

"Tort Remedy in the Law Versus Economic Restitution for Personal Injury and Wrongful Death" with Patrick Fitzgerald. *The Earnings Analyst*, Volume VIII (2006).

"Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: the State of Kansas," with John O. Ward. *Journal of Forensic Economics*, Volume 18, Number 2-3 (2005).

"Tables of Inter-year Labor Force Status of the U.S. Population (1998-2004) Usable in Operating the Markov Model of Worklife Expectancy" *Journal of Forensic Economics*, Volume 17, Number 3 (2004).

"Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: the State of Missouri," with John O. Ward. *Journal of Forensic Economics*, Volume 16, Number 1 (2003).

"The Cost of Carry and Pre-Judgment Interest" with Susan Escher. *Litigation Economics Review*, Volume 6, No. 1 (2003).

"Introduction to the Whole-time Concept" with John O. Ward and Gary R. Albrecht. *Journal of Forensic Economics*, Volume 14, Number 1 (2001).

"Average Change in Wages: the ECI Advantage" *Litigation Economics Digest*, Volume 4, Number 2, Winter 1999.

"Healthy Life Expectancy" *Litigation Economics Digest*, Volume 4, Number 1, Spring 1999.

"It's About Time: the Forensic Economic Evaluation" with Gary R. Albrecht and John O. Ward, *Journal of Forensic Economics*, Volume11, Number 3, Fall 1998.

"Role of Productivity and Prices in Forecasting Wage Rates" with Gary R. Albrecht, *Journal of Forensic Economics*, Volume 5, Number 3, Fall 1992.

## Books and Book Chapters

"The United States Approach to Computing Economic Damages Due to Personal Injury and Wrongful Death," with Gary R. Albrecht, in *Personal Injury and Wrongful Death Damages Calculations A Trans-Atlantic Dialogue*, Robert J. Thornton and John O. Ward, Editors, Bingley, UK: Emerald Group Publishing Limited, October 2009.

"Household Service Losses" with John D. Hancock, in *The Plaintiff and Defense Attorneys' Guide to Understanding Economic Damages*, Michael Brookshire, Frank Slesnick, and John Ward, Editors, Tucson: Lawyers and Judges Publishing Company, 2007.

"Healthy Life Expectancy" reprinted in *Economic Foundations of Injury and Death Damages*, Roger T. Kaufman, James D. Rodgers, and Gerald D. Martin Editors. Northampton, Massachusetts: Edward Elgar Publishing Company, 2006.

"Average Change in Wages: the ECI Advantage" reprinted in *Economic Foundations of Injury and Death Damages*, Roger T. Kaufman, James D. Rodgers, and Gerald D. Martin Editors. Northampton, Massachusetts: Edward Elgar Publishing Company, 2006.

"Building an Expert Damages Team," reprinted in *Measuring Loss in Catastrophic Injury Cases*, Kevin Marshall and Thomas R. Ireland and John O. Ward Editors, Tucson: Lawyers and Judges Publishing Company, 2006.

"Economic Valuation of Life: A Cumulative Approach" with John O. Ward and Gary R. Albrecht, in *A Hedonics Primer for Economists and Attorneys*, 2nd. Ed., Thomas R. Ireland and John O. Ward Editors, Tucson: Lawyers and Judges Publishing Company, 1996.

*Establishing Damages in Catastrophic Injury Litigation*, with John O. Ward. Lawyers and Judges Publishing Company, Tucson, Arizona, 1994.

## Editor-reviewed Publications

"Calculating Labor Force Participation Tables using CPS Microdata", *Litigation Economics Review*, Volume 5, No. 2, Winter 2001.

"Calculating the Present Value of Expected Future Medical Damages" *Litigation Economics Review*, Volume 5, No. 1, Spring 2001.

## Other Publications

*Full-time Earnings in the United States*, Expectancy Data, Shawnee Mission, KS (2000, 2002, 2004, 2005-2011).

*Labor in Missouri*, with John O. Ward and Michael S. Billinger, Center for Economic Information, University of Missouri-Kansas City (2000).

*Healthy Life Expectancy*, Expectancy Data, Shawnee Mission, KS (1999, 2000, 2000, 2001, 2003-2008).

*The Dollar Value of a Day*, with John O. Ward. Expectancy Data, Shawnee Mission, KS (1998, 1999, 2000, 2001, 2003-2011).

"Kansas Exports and Economic Development" with Gary R. Albrecht and Shirley K. Sicilian, *Kansas Business Review*, Fall 1985.

**Conference Organizer Selected Papers Presented at Professional Meetings**

"Transitions Into and Out of Disability" with Gary R. Skoog – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Chicago, IL January 2012.

"Years of Labor Force and Non-market Work under the Traditional Markov Model" with Frank Slesnick– Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Chicago, IL January 2012.

"The Markov Process Model of Labor Force Activity: Extended Tables of Central Tendency, Shape, Percentile Points, and Bootstrap Errors" with Gary R. Skoog and James E. Ciecka – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Denver, CO January 2011.

"Personal Consumption and Single Persons" – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Denver, CO January 2011.

"Worklife Tables Updated to Reflect the Last Decade's Data" with Gary R. Skoog and James E. Ciecka – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Atlanta, GA January 2010.

"Macro and Micro Valuation of the Economic Impacts of Disease, Injury, or Death" with Scott E. Grosse – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Atlanta, GA January 2010.

"The Valuation of Earning Capacity: An Update Concerning Measurement" with Frank Slesnick and Stephen Horner – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. San Francisco, CA January 2009.

"New Tabulations of the Markov Worklife Expectancy Model" – American Academy of Economic and Financial Experts 19th Annual Meetings. Las Vegas, NV, March 2007.

"Personal Consumption of Household Services" – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Chicago, IL January 2007.

"Scheduled Economic Damages and Tort Reform in the United States" with John O. Ward and Gary R. Albrecht – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Chicago, IL January 2007.

"Coming to Grips with Varying Jurisdictional Legal Remedies for Tort Victims: What About Economic Justice?" with Patrick Fitzgerald – National Association of Forensic Economics session at 81st Annual Western Economic Association International Conference, San Diego, June 30, 2006.

"Full and Part-Time Worklife Expectancy" with Gary Skoog and Jim Ciecka – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Boston, MA, January 2006.

"Personal Expenses in Husband and Wife Families" – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Boston, MA, January 2006.

"Markov Increment Decrement Worklife Tables in Forensic Economics: a Change of View" – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. San Diego, CA, January 2004.

"Transition Probabilities from the Current Population Survey" – American Academy of Economic and Financial Experts 14th Annual Meetings. Las Vegas, NV, April 2002.

"Eunomic Damage Analysis" – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Atlanta, GA, January 2002.

"The Cost of Carry and Pre-Judgment Interest" with Susan Escher – Allied Social Science Meetings: National Association of Forensic Economics National Meetings. New Orleans, LA, January 2001.

"Worklife Estimates in Personal Injury and Wrongful Death" – Allied Social Science Meetings: National Association of Forensic Economics National Meetings. Boston, MA, January 2000.

"Using the Ibbotson Pay-per-View Database in Commercial Damages Litigation" with Susan Escher and Michael Kelsay – Business Damages Forum session at 74th Annual Western Economic Association International Conference, Seattle, July 1999.

"Employment Cost Index: Methods and Data" – National Association of Forensic Economics session at 74th Annual Western Economic Association International Conference, San Diego, July 1999.

"Estimating Economic Damages as a Result of Diminished Productivity in Work and Non-Work Time" with John O. Ward and Gary R. Albrecht. – Session at 72nd Annual Western Economic Association International Conference, San Diego, July 1997.

"The Fallacy of Fairness & the Plight of Prediction in Discounting Future Dollars" with John O. Ward – Allied Social Science Meetings: National Association of Forensic Economics National Meetings. San Francisco, CA, January 1996.

"What is Measured when Calculating Earnings Capacity and Expected Earnings?" with John O. Ward – Allied Social Science Meetings: National Association of Forensic Economics National Meetings. Anaheim, CA, January 1993.

"Income Taxes and Economic Loss Calculations" with Gary R. Albrecht – 66th Annual Western Economic Association International Conference, Seattle, WA: June 1991.

"Forecasting Productivity and Wages" with Gary R. Albrecht – 65th Annual Western Economic Association International Conference, San Diego, CA: July 1990.

## Other Papers Presented at Professional Meetings

"Personal Consumption by Husbands and Wives." 43rd Annual Missouri Valley Economic Association Meeting, Kansas City, October 25, 2007.

"Scripting the Defense Forensic Economist's Testimony," 76th Annual Meeting of the Southern Economic Association, Charleston, SC: November 18, 2006.

"Tort Remedy in the Law Versus Economic Restitution for Personal Injury and Wrongful Death," with Patrick Fitzgerald – 75th Annual Meeting of the Southern Economic Association, San Diego, Ca: November 19, 2005.

"PV-Life: A Method of Calculating the Present Value of Life Care Costs" – 75th Annual Meeting of the Southern Economic Association, Washington, DC: November 19, 2005.

"Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: the State of Kansas," with John O. Ward. Missouri Valley Economic Association, Kansas City, October, 2005.

"Worklife at Home and in the Labor Force" – 2005 Meeting of the Eastern Economic Association, New York, NY: March 5, 2005.

"Healthy Life Expectancy" – 2005 Meeting of the Eastern Economic Association, New York, NY: March 5, 2005.

"Personal Expenses in Husband and Wife Families" – 74th Annual Meeting of the Southern Economic Association, New Orleans, LA: November 21, 2004.

"A Primer on Earnings Growth and Discounting" with Gary R. Albrecht – 74th Annual Meeting of the Southern Economic Association, New Orleans, LA: November 21, 2004.

"Personal Injury and Wrongful Death in the State of Missouri" with John O. Ward – Missouri Valley Economic Association, Kansas City, February, 2004.

"Disclosure and Forensic Economic Testimony" Paper Chairman – 68th Annual Western Economic Association International Conference, Lake Tahoe, NV: June 1993.

## Professional Panels

Discussant – "Personal Consumption and Human Capital Wealth" – Allied Social Science Association Annual Meetings: National Association of Forensic Economics National Meetings. Atlanta, GA January 2010.

Discussant – "Forensic Economics in the Missouri Valley" – Missouri Valley Economic Association, Kansas City, October, 2009.

Discussant – "Different Methods Used to Derive Hedonic Damages in Litigation" – National Association of Forensic Economics sponsored session at the Allied Social Science Meetings. San Francisco, CA, January 2009.

Discussant – "Forensic Economics Under Missouri's New Tort Reform Law" – Missouri Valley Economic Association, Kansas City, October, 2005.

Chair – "The American Time Use Survey and Forensic Economics" – National Association of Forensic Economics sponsored session at the Allied Social Science Meetings. Philadelphia, PA, January 2005.

Discussant – "Statistical Examination of the 9/11 Victim Compensations Fund Awards: Calculated vs. Actual Economic Awards" – National Association of Forensic Economics sponsored session at the Allied Social Science Meetings. Philadelphia, PA, January 2005.

Instructor – "Workshop on Calculating Work Probabilities Using the Markov Increment-Decrement Worklife Expectancy Model" – 74th Annual Meeting of the Southern Economic Association, New Orleans, LA: November 21, 2004.

Chair – "Analysis of Presumed Economic Loss under the September 11th Victim Compensation Fund" – National Association of Forensic Economics sponsored session at the Allied Social Science Meetings: National Association of Forensic Economics National Meetings. Atlanta, GA, January 2002.

Chair and Instructor – "Calculating Future Expected Medical Damages" – NAFE Continuing Education. Western Economic Association Annual Meetings, San Francisco, July 2001.

Chair and Instructor – "Calculating Future Expected Medical Damages" – NAFE Continuing Education. Missouri Valley Economic Association Annual Meetings. Kansas City, MO, February 2001.

Discussant – "Policy Issues in Public Economics" – National Tax Association sponsored session at the Allied Social Science Meetings: National Association of Forensic Economics National Meetings. Boston, MA, January 2000.

Co-chair and Presenter – NAFE Continuing Education – Mock Trial, Effective Testimony – Allied Social Science Meetings: National Association of Forensic Economics National Meetings. Boston, MA, January 2000.

Presenter – "The Utility of the National Compensation Survey in Forensic Economics" – Session at Allied Social Science Meetings: National Association of Forensic Economics National Meetings. New York, NY: January 1999.

Discussant – "Railroad Worklife Expectancy Tables" – Session at Western Economic Association Annual Meetings. Lake Tahoe, NV, June 1998.

Presenter – "Forensic Economic Data Acquisition" – Session at Southwestern Economic Association Annual Meetings. New Orleans, LA, March 1997.

Presenter – "Forensic Economic Data Acquisition" – Session at Midwest Economic Association Annual Meetings. Kansas City, MO, March 1997.

Moderator – "Issues in Forensic Economics" – Session at Allied Social Science Meetings: National Association of Forensic Economics National Meetings. New Orleans, LA, January 1997.

Discussant – "Issues in Forensic Economics" – Session at 69th Annual Western Economic Association International Conference, Vancouver, British Columbia, June 1994.

Discussant – "Problems in Forensic Economics" – Session at 1994 Midwest Economics Association Meetings, Chicago, March 1994.

Moderator – "Issues in Forensic Economics" – Session at 68th Annual Western Economic Association International Conference, Lake Tahoe, June 1993.

Discussant – "Some Forensic Dimensions of Rehabilitation Economics" – Session at 67th Annual Western Economic Association International Conference, San Francisco, July 1992.

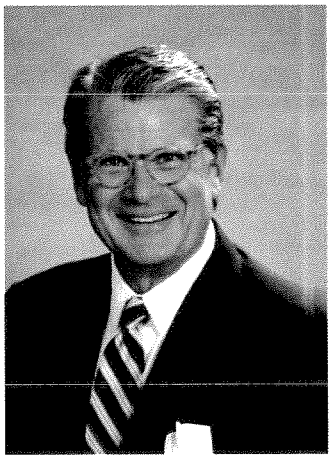
Discussant – "Law and Economics" – Session at 66th Annual Western Economic Association International Conference, Seattle, June 1991.

## Other

2001 Past Presidents' Award for Outstanding Service to the Association, National Association of Forensic Economics

Ross T. Roberts Inn of Court Program Participant

**Exhibit B**



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**Arthur H. Stroyd Jr.**
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**412-977-9243 (Cell)**
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astroyd@dscslaw.com
www.dscslaw.com

Mr. Stroyd has devoted his career to representing major corporations, financial institutions, and individual entrepreneurs in a wide range of complex lawsuits in state and federal courts. Following a clerkship with the Honorable Joseph F. Weis, Jr., U.S. Court of Appeals for the Third Circuit, he spent most of career with the international law firm, Reed Smith LLP, where he was one of its Managing Partners also serving as Head of its Litigation Group, as the Practice Leader for its Products Liability and Insurance Coverage Group and as its Recruiting Partner. He is a Fellow in the American College of Trial Lawyers and has been recognized in *The Best Lawyers in America* in five (5) categories for the past ten (10) years where he was named Lawyer of the Year 2014, in *Pennsylvania Super Lawyers,* in *The Best Lawyers in Pittsburgh* and with an "AV Preeminent Rating," the highest mark of professional excellence from *Martindale-Hubbell's* Peer Review Ratings, for more than 30 years.

Throughout Mr. Stroyd's career, he has handled a wide array of sophisticated matters involving commercial disputes, intellectual property/patent litigation, the formation and dissolution of businesses, breaches of contract, corporate waste, the sale and disposition of properties, restrictive covenants, the valuation of assets and business opportunities, product liability litigation, construction disputes, and more. He currently represents defendants in class action litigation including *Wright et al. v. Owens Corning et al.* Civil Action No. 09-01567 (W.D.Pa.), *National Association of Chain Drug Stores et al. v. Express Scripts, Inc. et al.* Civil Action No. 12-395 (W.D.Pa.), *Black et al. v. JPMorgan Chase, et al.* Civil Action No. 10-848 (W.D.Pa.), *Linda Menichino et al. v. Genworth Mortgage Insurance Corp. et al.* Civil Action No. 12-cv-00058 (W.D.Pa.), *Christopher Manners et al. v. Genworth Mortgage Insurance Corporation et al.* Civil Action No. 12-00442 (W.D.Pa.) and more. Mr. Stroyd is certified as a Mediator, Arbitrator and Early Neutral Evaluator and has been appointed as a Special Master for discovery in complex cases. Stroyd has planned and lectured at various seminars relating to commercial litigation, civil procedure, construction law, products liability as well as trial and appellate practice and was in charge of training litigation attorneys and paralegals at Reed Smith.

He serves on the Advisory Committee for Pennsylvania Bar Association's Commission for Justice Initiatives, is a member of the Jury Service Committee of the Pennsylvania Interbranch Commission for Gender, Racial & Ethnic Fairness and is General Counsel of the Material Handling Industry, a trade association of 700

manufacturers in North Carolina. He is the past President of the Academy of Trial Lawyers of Allegheny County and of the Allegheny Country Bar Association, where he also served as Chair of its Judiciary Committee and its Civil Litigation Section as well as Co-chair of a Task Force for its Gender Initiative. He was also a member of the Pennsylvania Supreme Court's Civil Procedural Rules Committee and of the House of Delegates of the Pennsylvania Bar Association, where he also chaired a Task Force reviewing its subsidies, and was the solicitor for Pennsylvania's Interbranch Commission on Juvenile Justice.

Active in the community, Mr. Stroyd has been a director of various civic and nonprofit organizations including service as President of the Mt. Lebanon School Board and of the Center for Theater Arts Board as well as Chair of the Mt. Lebanon Hospital Authority and its Zoning Hearing Board. He was elected to the Alumni Council of his alma mater. He has been on the Board of Neighborhood Legal Services Association and the Solicitor for the Republican Party of Allegheny County, where he was on its Executive Committee for ten (10) years. He recently served as Chair of the Board of Leadership Pittsburgh, Inc. and is on the Board of the Material Handling Industry Education Foundation. He recently completed service on the boards of the Senator John Heinz History Center and the University of Pittsburgh Cancer Institute.

After graduating from Kenyon College in Gambier, Ohio, with an A.B. in economics, Stroyd entered the School of Law of the University of Pittsburgh. He received his J.D. after serving as a U.S. Naval Legal Officer during the Vietnam War.

**Practice Areas**
Commercial Litigation
Alternative Dispute Resolution
Construction Law
Products Liability
**Bar Admissions**
Commonwealth of Pennsylvania
U.S. District Court for the Western District of Pennsylvania
U.S. Court of Appeals for the Third Circuit
**Education**
A.B. Kenyon College - Economics
J.D. University of Pittsburgh School of Law
**Affiliations**
American College of Trial Lawyers – Fellow
Academy of Trial Lawyers of Allegheny County – Past-President & Board of Governors
Allegheny County Bar Association – Past-President; Judiciary Committee (former Chair) & Civil Litigation Council (former Chair)
Federal Mediation Program – Certified Mediator, Arbitrator & Early Neutral Evaluation
Pennsylvania Bar Association – Advisory Member - Commission for Justice Initiatives
Pennsylvania Supreme Court's Civil Procedural Rules Committee – Past Member
Material Handling Industry (trade association Charlotte, NC) - General Counsel
Recognized in *The Best Lawyers in America (*5 categories for 10 years*)* and in *PA Super Lawyers.*
**Recognition**
"Lawyer of the Year 2014" - *The Best Lawyers in America*
The Gregg Cup – *(Kenyon College's highest alumni accolade)*
AV (preeminent peer rating in legal ability) in *Martindale Hubbell* for more than 30 years

**Exhibit C**

# RICHARD H. RALSTON

**Profession.** Attorney, Arbitrator, and Mediator with The Ralston Law Group, LLC, The Plaza West Building – Suite 810, 4600 Madison Avenue, Kansas City, Missouri, 64112. Telephone No. (816) 285-1230; Fax No. (816) 283-8739; Internet Address – rralston@ralstonlawgroup.com.

**Professional History.** Arbitrator, Mediator, and Attorney 1993 – present; Attorney, Mediator and Arbitrator, The Ralston Law Group, LLC, 2008 - Present; Of Counsel/Attorney, Armstrong Teasdale, 2003 - 2008; Director/Trial Attorney, Polsinelli Shalton & Welte (and predecessor firm), 1988 – 2003; United States Magistrate Judge, Western District of Missouri, 1976 – 1988; Professor of Law, Creighton University School of Law, 1972 – 1976 (subjects: Evidence, Civil Procedure; Litigation with the Federal Government, Federal Courts, and Environmental Law); Adjunct Professor of Law, University of Missouri-Kansas City, 1978 - 1980 (subjects: Civil Procedure and Evidence); Law Clerk to United States District Judge Elmo B. Hunter, 1969 – 1972.

**Educational Background.** B.A. in Journalism, University of Kansas, 1965; J.D., University of Missouri – Kansas City, 1969 (With Distinction) ; Editor-in-Chief, University of Missouri – Kansas City Law Review, 1968-69.

**Professional Organizations and Committees.** Former Chairman, Federal Courts Committee of the Missouri Bar; Former Member of the Board of Directors of the Kansas City Metropolitan Bar Association; Panelist of the CPR Institute for Dispute Resolution; Panelist of the American Arbitration Association; Member of the American College of Civil Trial Mediators; Member of the American College of Commercial Arbitrators; Member of the National Academy of Distinguished Neutrals; Member of the Kansas City Metropolitan Bar Association; Member of the American Bar Association; Former Master of the Ross Roberts Inn of Court; Former faculty member of the National Institute for Trial Advocacy (Boulder, Colorado; Lawrence, Kansas; Omaha, Nebraska); Member, The Association for Women Lawyers; Former Member of the Committee on Federal Model Jury Instructions; Member of the Ad Hoc Committee of the Missouri Supreme Court on Mediation Practice; Member of the Kansas City Metropolitan Bar Association Committee on Professionalism and Civility; Member of the Missouri Bar Association; Former Speedy Trial Reporter to the United States District Court for the District of Nebraska; *Super Lawyers - Alternative Dispute Resolution; Best Lawyers in America – Alternative Dispute Resolution* ; Ingram's *Best of the Bar – Alternative Dispute Resolution; LawDragon Select 500 Best Judges in America* (2006); *Kansas City Business Journal – "Best of the Best" – Alternative Dispute Resolution;* "AV" Rating, Martindale Hubbell. Frequent lecturer to bar associations, professional organizations, law schools, and insurance organizations.

**Experience.** Has been involved in dispute resolution – settlement conferences, mediations, arbitrations, or trials (jury and non-jury) – since graduation from law school in 1969. First legal position was as a law clerk for a United States District Judge who was also an extremely capable mediator (settlement judge). As a member of the federal bench, continued

mediation tradition in the Western District of Missouri by initiating a settlement conference program in federal court. In 1993, decided to devote practice exclusively to alternative dispute resolution. As a law professor, courses were primarily directed to litigation and federal practice. Taught evidence, civil procedure, federal jurisdiction, environmental law, and government litigation. Voted the Outstanding Law Professor of Creighton University in 1974.

As a federal judicial officer, docket consisted mainly of civil cases for trial and pretrial processing. Presided over the whole spectrum of jury and non-jury trials throughout the Western District of Missouri, including civil rights cases, employment discrimination cases (jury and non-jury, minimum wage and overtime cases, antitrust and securities cases, products liability cases, commercial cases, and various personal injury cases. Presided over the first employment discrimination case (an action under 42 U.S.C. § 1981) tried to a jury in the Western District of Missouri in 1980.

As a trial lawyer, represented both major corporations and individuals in all types of cases, usually of a complex and substantial nature. Has frequently been engaged as an expert witness in cases involving legal or ethical standards. Has been involved as a consultant involving insurance coverage issues in major litigation, including the Courtney pharmacy litigation. Currently represents attorneys in litigation and disciplinary actions.

**Representative Cases Handled as Mediator.** Has mediated all types of cases, large and small, ranging from complex commercial, environmental, and construction cases to medical malpractice, employment discrimination, products liability and personal injury cases. Has mediated several major class actions, as recently as 2011, actions involving mortgage loan fees, financing systems, telecommunications disputes, products liability, and Fair Labor Standards Act cases, among others. The environmental cases have included issues of water and ground pollution at oil refineries or manufacturing sites owned and operated by major national corporations. Most of those cases have been brought on behalf of multiple plaintiffs or as individual actions against multiple defendants. Many of the construction cases arose from major construction projects, including entertainment theaters in Branson, Missouri, and from major construction projects in the Kansas City metropolitan area. The commercial cases have involved multi-tiered marketing systems or individual and class actions. Has mediated numerous employment discrimination cases involving all issues ranging from the Family Medical Leave Act to all aspects of Title VII and the Civil Rights Act. The employment discrimination cases have involved race, ethnic origin, religion, gender, age, family medical leave and disability claims brought under Title VII, the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, or corresponding state laws. Has also mediated cases with the Department of Justice and other federal and state agencies involving Federal Tort Claims Act, the EEOC, the EPA, the Tucker Act, the Missouri Omnibus Nursing Home Act, and regulations of the Nuclear Regulatory Commission. Has mediated disputes between law firms, physicians' groups, and other professional organizations. Has mediated numerous insurance bad faith cases involving primary insurance carriers, excess carriers, reinsurers and insureds. Mediated a dispute arising from the destruction of the Kansas City electrical power plant, a $400,000,000 dispute involving multiple plaintiffs and defendants, primary claims and subrogation claims. Also successfully mediated a complicated warehouse fire case among insureds, primary carriers and excess carriers. One products-liability case involved carbon monoxide poisoning resulting in eight deaths and three brain-damaged victims. Has mediated

cases in most of the major cities of the United States, from Boston, Massachusetts to Baton Rouge, Louisiana; from and San Francisco, California to Providence, Rhode Island. Has been involved as a settlement judge or mediator in more than 4,000 civil cases.

**Representative Cases Handled as Arbitrator.** Has handled many personal injury, construction, employment discrimination and commercial cases as an arbitrator, both in Kansas City and elsewhere. Representative cases include disputes involving a fiber optic communications system, a telecommunications industry dispute, bulk utilities sales systems, employment discrimination, national dispute concerning local telephone service and logistical software for mass merchandisers. Has arbitrated numerous personal-injury and wrongful-death cases involving either products or vehicular accidents. In the calendar of 2004, arbitrated twelve separate cases involving a complex telecommunications dispute arising under the Telecommunications Act of 1996, several complicated business cases, and several employment discrimination matters. Sat as the chairman on all of the three-arbitrator panels. Arbitrated 21 major cases between 2007 and mid-2009, ranging in subjects from construction and transportation disputes to employment discrimination complaints. Recently sat as a single arbitrator in highly publicized disputes involving a NCAA Division I basketball coach, and a politically-charged construction case in Kansas City.

**Multi-party Dispute Resolution Experience.** A sizable percentage of mediations handled have been multi-party cases. Examples would include a warehouse-fire case, which involved $26,000,000 in claims and fifteen parties – all with claims, counterclaims, and cross-claims; several major environmental cases with numerous parties in a class-action context; a commercial case involving a $150,000,000 claim brought by approximately 50 grocery retailers who brought suit against their wholesaler; a case involving the death of a well-known professional wrestler; and a highly publicized death of a young boy who was dragged down the street by a school bus. Acted as both a mediator and a special master by requested of the parties in a recent $36,000,000 class action settlement, and mediated cases involving several highly-publicized truck accidents. Once mediated a case against eight defendants brought by six plaintiffs over a helicopter accident that resulted in multiple deaths.

**Expert Witness Engagements.** Has served as witness, expert and otherwise, on more than 26 occasions. Expert witness engagements have involved the professional standard of care for lawyers, reasonableness of settlements and consent judgments, reasonableness or attorney fees and settlements in class actions, evaluation of various types of tort and products liability actions, and other litigation related matters.

**Professional Licenses.** Admitted to the Bar, Missouri, 1969; United States District Court for the Western District of Missouri; United States District Court for the Eastern District of Missouri; United States Court of Appeals for the Eighth Circuit.

**Exhibit D**

**CHARLES E. ATWELL**
Circuit Judge

Circuit Court of Jackson County
Division 10
415 East 12th Street
Kansas City, Missouri 64106
Telephone: (816)881-3610 – FAX (816)881-3893
e-mail: Charles.Atwell@courts.mo.gov

## Personal Data

Born: April 1, 1950 in Kansas City, Missouri

Married: August 17, 1974 to Janel Ann Robinson Atwell

Children: Martin, born March 7, 1978; Ashley, born September 5, 1979

## Practice Experience

### Judicial

1996 - Appointed Circuit Judge on July 23, 1996 by Governor Mel Carnahan

### Prosecution

1977-1978 - Law intern, Jackson County, Missouri Prosecutors Office

1978-1979 - Assistant Prosecuting Attorney, Trial Division, Jackson County, Missouri Prosecutors Office

1979-1981 - Assistant Prosecuting Attorney, Career Criminal Unit, Jackson County, Missouri Prosecutors Office

1983-1984 - Assistant United States Attorney, Western District of Missouri

### Private Practice

1981-1983 – Associate, Koeningsdorf, Kusnetzky, & Wyrsch (subsequently Koeningsdorf & Wyrsch)

1984-1996 – Partner, Wyrsch, Atwell, Mirakian, Lee, & Hobbs, P.C. (previously Koeningsdorf & Wyrsch)

**Bar Admissions**

1978 - Supreme Court of Missouri

1979 - United States District Court for the Western District of Missouri

1981 - United States Court of Appeals for the Eighth Circuit

1984 - United States Court of Appeals for the Sixth Circuit

1989 - United States Court of Appeals for the Tenth Circuit

1989 - United States Supreme Court

**Federal Court appearances pro hac vice or otherwise**

District of Colorado; Northern District of Ohio; Eastern District of Arkansas; Southern District of New York; Eastern District of New York; Central District of California; District of New Mexico; Central District of Oklahoma; Northern District of Virginia

**State Court appearances pro hac vice or otherwise**

Wyandotte County, Kansas; Johnson County, Kansas; Maricopa County, Arizona; Baltimore County, Maryland; Bourbon County, Kansas; Shawnee County, Kansas; Saline County, Kansas; Lake County, Ohio

**Teaching and Instruction**

1973-1975
Teacher, American History and Government, Kansas City, Missouri Public Schools

1974-1976
Teacher, National Youth Sports Camp, Kansas City, Missouri, a program sponsored by the University of Missouri-Kansas City and the NCAA to provide summer sports training to inner-city youth

1981
Instructor, National Institute of Trial Advocacy, Midwest Regional, Northwestern University, Evanston, IL

1981-2000
Adjunct Professor of Law, University of Missouri at Kansas City. One of a team teaching "Criminal Trial Techniques," a practical approach to trial advocacy in a criminal context

1982-1988
Instructor, National Institute of Trial Advocacy, Mid-America Regional, University of Kansas, Lawrence, KS

1984-1986
Instructor, Trial Skills Program, Missouri State Public Defender, Kansas City, MO

1998
Coach, UMKC Trial Competition team with the Honorable J. D. Williamson, relative to the National Association of Criminal Defense Lawyers Trial Competition in Atlanta, GA

1993-2000
Instructor, National Institute of Trial Advocacy, Midwest Regional, Northwestern University, Evanston, IL

2001-present
Instructor, National Institute of Trial Advocacy, Midwest Regional, Loyola University, Chicago, IL

2003, 2006, 2007 and 2008
Instructor, National Session, National Institute of Trial Advocacy, Lewisville, CO

May 2010 appeared as a panelist at the Appellate Forum sponsored by OSCA. This was a CLE for State appellate judges.

June 2010 appeared as a panelist on ethics sponsored by the Hispanic Bar Association

June 2010 teacher at the NITA deposition program held at Loyola Law School

**Lectures and Seminars Presented as an Attorney**

1980
Criminal Jury Instructions, Missouri Prosecutors Association

1980-1981
Review of the Law Annual Bench/Bar Conference, Kansas City Metropolitan Bar Association

1981
Criminal Jury Instructions, Kansas City Metropolitan Bar Association

1982
Review of the Law Practical Skills Course, Missouri Bar Association

1984
Representing Defendants at Sentencing, Missouri Association of Criminal Defense Lawyers

1984-1985
Sentencing Issues under the Comprehensive Crime Control Act of 1984, Kansas City Metropolitan Bar Association

1986
Federal Sentencing Guidelines, Kansas City Metropolitan Bar Association

1989
Changing Criminal Law, Kansas City Metropolitan Bar Association

1990
Cross Examination of Informants, Missouri Bar Association

1991
Ethics in Criminal Cases, Missouri Bar Association

6/92, 1/93, 6/93, 1/94, 6/94, 1/95
Federal Rules of Evidence, Kansas City Metropolitan Bar Association

1992
Trial Tactics, Jackson County Court Seminar, KCMBA

1992
Inns of Court, Cross and Direct in the William Kennedy Smith Case, Kansas City Metropolitan Bar Association

1992
Merits of CLE Participation, American Society of Trial Consultants

Sept 1993
Missouri Evidence Restated (Missouri Bar Association)

1993
Short Course for Criminal Defense Lawyers, Nebraska Association of Criminal Defense Lawyers

Feb 1993
Federal Rules of Evidence for the law firm of Wallace, Saunders, et al.

Nov 1993 to Nov 1994
Served as co-chair for continuing legal education for the National Association of Criminal Defense Lawyers. In that capacity served as moderator on 10/93 "The Ultimate Cross Examination Seminar," Chicago, IL; 2/94 "Forensic Evidence, White Collar Crime and Mental Defenses," Maui, HI; 5/94 "Constitutional Issues," Washington, D.C.; 8/94 "The Ultimate Search & Seizure Seminar," Traverse City, MI; 11/94 "Defenses that Work," Houston, TX

Feb 1995
Panelist, Federal Practice Seminar, Missouri Association of Trial Attorneys
(On several occasions have served as a faculty member for the Public Defender training programs, both as a judge and as a lawyer.) (As a lawyer, tried approximately 65 jury trials to completion and was involved in both civil and criminal litigation.)

**Lectures and Seminars Presented as a Judge**

Oct 1996
Lecture for the Kansas Association of Criminal Lawyers in conjunction with the Nebraska Bar Association Meeting on the use and disuse of informants

April 1997
NACDL Meeting St. Louis, Missouri, "Evidence in Criminal Cases"

Oct 1997
Member of judicial panel as part of the NACDL meeting in New York City. The panel was moderated by Arthur Miller of the Harvard Law School and included the Honorable Michael Bender, Associate Justice of the Colorado Supreme Court; the Honorable Jed Rakof, United States District Judge for the Southern District of New York; and the Honorable Nancy Gertner, United States District Judge for the District of Massachusetts

April 1998
KCMBA Issues in Family Law Cases, appeared on judicial panel

June 1998
Panelist for "Family Law Issues" Kansas Metropolitan Bar Association
May 1999
Panelist for the Missouri Organization of Defense Lawyers annual meeting at Lodge of Four Seasons, "Trial Issues"

1999 and 2003
Participated in Judicial Panel, Missouri Association of Criminal Defense Lawyers

1999
Ethics panel regarding attorney-client privilege issues, UMKC Law School, moderator, Prof. Arthur Miller, Harvard Law School

1999-present
Faculty member for Inns of Court sponsored by the Kansas City Metropolitan Bar Association, lecture on voir dire practice

1999
Lecture on trial advocacy in domestic cases

April 2000
Missouri Association of Criminal Defense Lawyers Annual Meeting "Practical Tips From All Three Sides"

April 2000
Kansas City Metropolitan Bar Association, Evidence and Trial Tips in Family Law Cases

Aug 2000 and Oct 2000
Lecture on Post-Conviction Remedies, Missouri Judicial College

April 2001
Kansas City Metropolitan Bar Associatinon, Nuts and Bolts of Family Law Cases

2001-present
Member of the instructional team for the Core Criminal Law Topics, Missouri Judicial College

2001
Lecture, Missouri Association of Criminal Defense Lawyers, "Practical Points, A View from the Bench"

2001
Facilitator and discussion group leader, general jurisdiction class, National Judicial College

2002, 2003, 2004, 2005, 2006, 2007, 2008 and 2009
Participated in Judicial Panel, Missouri Association of Trial Attorneys Annual Meeting, Lodge of Four Seasons

2007
Presented a Seminar on Child Sexual Abuse for the Missouri Bar, Jan 19, 2007, St. Louis, Missouri

May 2009
Appeared on judicial panel at the Missouri Association of Criminal Defense Lawyers meeting. Other panelists included the Honorable Zel Fisher of the Missouri Supreme Court; the Honorable John Moody of the 44th Judicial Circuit, State of Missouri; and the Honorable John Clayton, Associate Circuit Judge for Maries County, Missouri.

Dec 2009
Made a presentation on Jury Selection in Capital cases in seminar sponsored by the Office of State Court Administrators for the State of Missouri and the United States Department of Justice

Sept 2010
Guest lecturer with Prof. Thomas Stewart of St. Louis University Law School at the Missouri Attorney General's fall training. The lecture topic was jury selection. (As a judge, tried an estimated 50 or more jury trials to conclusion. Such trials have included capital murder cases, products liability, medical negligence, commercial litigation and securities fraud. Also presided over numerous hearings in the area of criminal law, family law, juvenile law, and general civil litigation.)

**Publications**

1976
Case Note 45, Use of the Hybrid Defense, University of Missouri-Kansas City Law Review

1977
Comment 46, Student Rights Under the Fourth Amendment, University of Missouri-Kansas City Law Review

1980
Missouri Criminal Instructions Packet, Kansas City Metropolitan Bar Association and Missouri Prosecutors Association, for use at seminars

1981
Criminal Practice in Missouri State Courts (portion), Kansas City Metropolitan Bar Association

1985
Pocket Part, District Court Criminal Practice, West's Federal Forms, Vol. V, co-author with Dean Robert Popper, UMKC School of Law

1989
Indictments, Information, and Grand Jury Process, supplement to Missouri Bar Criminal Practice, two-volume set

1990
Supplement to Chapter 5, Missouri Criminal Practice CLE, Missouri Bar Association, an update to Indictments, Information, and Grand Jury Process.

1990
Cross Examination of Informants, notes from the lecture, Missouri Bar Association

1992
Article on Sentencing Guidelines co-authored with Mark Dover for annual MACDL seminar

1995
Rewrote in its entirety Chapter 5 of Missouri Criminal Practice CLE on indictment information and grand jury process

1997- 1998
Most recent supplement to Chapter 5, Missouri Criminal Practice CLE on indictment information and grand jury process

2001
Author of Supplement Chapter 4 Informations, Indictments, and Grand Jury Procedures, MO Criminal Practice, 3rd Edition, published by the Missouri Bar

## Education

### Continuing Legal Education

1980
National Institute of Trial Advocacy, Northwestern Law School

1983
United States Department of Justice Introductory Course for New Assistant United States Attorneys, Scottsdale, AZ

1985-present
National Association of Criminal Defense Lawyers meetings and seminars

1988
American Law School, General Bankruptcy Law Seminar

1989
Kansas City Metropolitan Bar Association, Business Torts Seminar

1992
National Criminal Defense College, Mercer Law School, Macon, GA

1996-Present
Attended Missouri Judicial College
1997
General Jurisdiction Course, National Judicial College, Reno, NV

Nov 1998 and Jan 1999
Participant in Missouri Sentencing Policy Seminar and Workshop sponsored by St. Louis University Law School and taught by The Honorable Michael Wolff

1998
Handling Capital Cases, Nation Judicial College, Reno, NV

2004
Search and Seizure Seminar, National Judicial College, Reno, NV

2006
Mediation Seminar, National Judicial College, Reno, NV

2007
Advanced Mediation Seminar, National Judicial College, Reno, NV

Note: Throughout attorney career, active participant in most NACDL and MACDL conferences in which CLE seminars are held

Oct 2010
Seminar involving issues and skills for presiding judges

**Law School**

Juris Doctorate (J.D.) University of Missouri at Kansas City School of Law 1978

**Graduate Studies**

24 hours toward Master's Degree in History, University of Missouri at Kansas City 1972-73

**Undergraduate Studies**

Bachelor's of Science, Education (B.S.) University of Kansas, Lawrence, KS 1968-72

**Professional Organizations and Service Memberships**

**Service as an Attorney**

1982-present
Missouri Association of Criminal Defense Lawyers
Offices Held: President, 1989; President-Elect, 1988

1984-present
National Association of Criminal Defense Lawyers Co-Chair, CLE Committee, 1993-present; Vice-Chairman, State and Local Bar Liaison Committee, 1990-present; Nominating Committee, 1992; Board of Directors, 1991-93, 1994-97.

1988
First Vice President, 1987; Second Vice President, 1986; Board of Directors, 1982-87.

1989-present
Missouri Capital Punishment Resource Center Board of Directors 1990; Secretary, Treasurer 1990-93

1990
Finalist United States Magistrate for the Western District of Missouri

1990
Jackson County Criminal Justice Coordinating Committee (Established by the Presiding Judge in Jackson County, Missouri. Members include prosecutors, public defenders, members of law enforcement. Served as private criminal defense bar representative)

1992
Nominating Committee Kansas City Metropolitan Bar Association

1992-1994
Committee to Review Post-Conviction Relief Appointed by the Chief Justice of the Missouri Supreme Court

1993
Public Safety and Corrections Advisory Committee to the Governor's Transition Team appointed by Missouri Governor Mel Carnahan

1994
Kansas City Metropolitan Bar Association Executive Committee, serving as co-chair of the continuing legal education committee

1994
Strategic Planning Committee, University of Missouri-Kansas City School of Law

1993-1995
Appointed to Supreme Court Committee to establish court rules consistent with the effective Death Penalty Act of 1996

**Service as a Judge**

1996
Made Honorary member of NACDL by board of directors

1996
Member of Missouri Supreme Court committee regarding the use of "Opt-in" rules consistent with the Anti-terrorism and Federal Death Penalty Act of 1996

1997
Appointed to Missouri Supreme Court Committee to review Missouri court rules on charging procedures

Nov 1998
Coach of UMKC trial team that participated in Cathy Bennett National Trial Competition at the NACDL Meeting in Atlanta, GA

1999
Appointed to the Missouri Approved Instruction Committee (criminal)

1999-present
Member of Missouri Supreme Court Committee on Procedures in Criminal Cases since 1999 forward. (Originally this committee handled MAI matters and, in year 2000, the Court expanded its jurisdiction to include not only instructional issues, but other criminal law issues, including revision of Supreme Court rules.)

2000
Served on Missouri Supreme Court committee to review practices in postconviction cases

2001
Appointed to be regular presenter in the criminal law section of the Missouri Judicial College. Other presenters include the Honorable Gene Hamilton of Columbia, MO; the Honorable Carolyn Whittington, St. Louis County; and Morley Swingle, Prosecutor for Cape Girardeau County

2003
Appointed Chairman of the Missouri Supreme Court Committee on Procedures in Criminal Cases by the Missouri Supreme Court

2004 to present
Asked to participate in the New Judge Orientation seminar sponsored by the Supreme Court and Office of State Courts Administrator

Oct 2004
Featured speaker at the fall meeting at the Missouri Association of Criminal Defense Lawyers

2008-2009
Served as Administrative Judge for the Family Court of Jackson County, Missouri. Was the Chief Judicial Officer in juvenile matters in Jackson County and was the supervising Judicial Officer for approximately 400 employees. The staff and services of the Family Court in Jackson County constitute a budget of approximately $20 million.

2009
Appointed by the Missouri Supreme Court to be a member of the Gender and Justice committee

Dec 2009
Elected Presiding Judge for Jackson County Circuit Court of Jackson County to commence a two-year term beginning in January 2011

**Honors and Recognitions**

1998
Received 97 percent approval rating from lawyers in the Missouri Bar surveys for judges subject to retention election

2004
Received 94.5 percent approval rating from lawyers in the Missouri Bar surveys for judges subject to retention election

2007
In yearly survey conducted by Missouri Lawyers Weekly, selected as best Circuit Judge in the State of Missouri

2010
Re-elected Circuit Judge on a retention ballot. Prior to election, participated in Missouri Bar evaluation. Received 4.5 or above rating on a scale of 1 to 5, with 5 being the highest, in all areas.

**Some Reported Cases of Significance While Practicing Law:**

United States v. Sindel, 94-2683 and 94-2684 (8th Cir. 1995)
United States v. Willis, 970 F.2d 494 (8th Cir. 1992),
cert. denied, 113 S.Ct. 1650 (1993)
United States v. Angela Jones, 990 F.2d 405 (8th Cir. 1993),
cert. denied, 114 S.Ct. 350 (1993)
United States v. George, 986 F.2d 1176 (8th Cir. 1993),
cert. denied, 114 S.Ct. 269 (1993)
United States v. Auricchio, 983 F.2d 1468 (8th Cir. 1993)
State v. Beatty, 849 S.W.2d 56 (Mo. Ct. App. 1993)
In the Interest of A.S.B. v. Juvenile Officer, 842 S.W.2d 234 (Mo. Ct. App. 1992)
United States v. Lux, 905 F.2d 1379 (10th Cir. 1990)
United States v. Bowman, 907 F.2d 63 (8th Cir. 1990)
United States v. Kroh, 915 F.2d 326 (8th Cir. 1990),
initial opinion, 896 F.2d 1254 (8th Cir. 1990)
State v. Smith, 633 S.W.2d 412 (Mo. Ct. App. 1989)
Ellis v. State, 773 S.W.2d 194 (Mo. Ct. App. 1989)
State v. Clay, 779 S.W.2d 673 (Mo. Ct. App. 1989)
State v. Clark, 756 S.W.2d 565 (Mo. Ct. App. 1989)
United States v. Norton, 846 F.2d 521 (8th Cir. 1988)

United States v. Nichols, 808 F.2d 660 (6th Cir. 1987)
United States v. Gantos, 817 F.2d 41 (8th Cir. 1987)
United States v. Gregg, 829 F.2d 1430 (8th Cir. 1987)
State v. Christensen, 729 S.W.2d 738 (Mo. Ct. App. 1986)
United States v. Tager, 788 F.2d 349 (6th Cir. 1986)
United States v. Begnaud, 783 F.2d 144 (8th Cir. 1986)
State v. Ervin, 723 S.W.2d 412 (Mo. Ct. App. 1986)
Marvin v. United States, 732 F.2d 669 (1984)
United States v. Robertson, 706 F.2d 253 (8th Cir. 1983)
United States v. Marvin, 687 F.2d 1221 (8th Cir. 1982)
United States v. Frantse, 655 F.2d 128 (8th Cir. 1981)
Rogers v. State, 650 S.W.2d 30 (Mo. Ct. App. 1983)
Lewis v. State, 650 S.W.2d 335 (Mo. Ct. App. 1983)
State v. Lindsey, 630 S.W.2d 191 (Mo. Ct. App. 1982)
State v. Gibeson, 614 S.W.2d 14 (Mo. Ct. App. 1981)
State v. Settle, 679 S.W.2d 310 (Mo. Ct. App. 1984)

**Some Reported Cases of Significance as a Judge:**

**JUDGE ATWELL: Opinions reviewed at appellate and supreme court level**

- Planned Parenthood of Kansas & Mid-Mo., v. Nixon, 220 S.W.3d 732 (Mo. 2007)
- State v. Peete, 131 S.W.3d 893, (Mo.App.W.D. 2007)
- Dhyne v. State Farm Fire & Cas. Co., 2006 Mo. LEXIS 52 (Mo. 2006)
- Picerno v. Nichols-Fox, 205 S.W.3d 883 (Mo.App.W.D. 2006)
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- State v. Jackson, 144 S.W.3d 885 (Mo.App.W.D. 2004)
- Randol v. State, 144 S.W.3d 874 (Mo.App.W.D. 2004)
- State ex rel. White v. Gray, 141 S.W.3d 460 (Mo.App.W.D. 2004)
- Collins v. State, 141 S.W.3d 96 (Mo.App.W.D. 2004)
- State v. Case, 140 S.W.3d 80 (Mo.App.W.D. 2004)
- State v. Payne, 135 S.W.3d 504 (Mo.App.W.D. 2004)
- D'Arcy & Assocs. V. K.P.M.G. Peat Marwick, 129 S.W.3d 25 (Mo.App.W.D. 2004)
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- Alcorn v. Union Pac. R.R. Co., 50 S.W.3d 226 (Mo. 2001)
- Taylor v. State, 126 S.W.3d 755 (Mo. 2004)
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- Mesa v. Cesena, 121 S.W.3d 334 (Mo.App.W.D. 2003)
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- Cent. Fire Sprinklers v. CNA/Transp. Ins. Co., 87 S.W.3d 408 (Mo.App.W.D. 2002)
- State v. Wiley, 80 S.W.3d 509 (Mo.App.W.D. 2002)
- Aaron v. State, 81 S.W.3d 682 (Mo.App.W.D. 2002)
- State v. Hatch, 54 S.W.3d 623 (Mo.App.W.D. 2001)
- State v. Collins, 42 S.W.3d 736 (Mo.App.W.D. 2001)
- State v. Taylor, 18 S.W. 3d 366 (Mo. banc 2000)
- Tower Props. Co. v. Allen, 33 S.W.3d 684 (Mo.App.W.D. 2000)
- Victory Hills Ltd. Pshp. V. Nationsbank N.A., 28 S.W.3d 322 (Mo.App.W.D. 2000)
- Reed v. Reed, 10 S.W.3d 173 (Mo.App.W.D. 2000)
- Aaron v. State, 985 S.W.2d 434 (Mo.App.W.D. 1999)
- Draper v. Draper, 982 S.W.2d 289 (Mo.App.W.D. 1998)
- Holt v. Holt, 976 S.W.2d 25 (Mo.App.W.D. 1998)
- Coleman v. Gilyard, 969 S.W.2d 271 (Mo.App.W.D. 1998)

**Exhibit E**

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| **IN RE:** | ) | |
| **RESIDENTIAL CAPITAL, LLC, et al** | ) | **Case No. 12-12020(MG)** |
| | ) | |
| | ) | **Chapter 11** |
| | ) | |
| **Debtors.** | ) | **Jointly Administered** |

## INDEX OF DOCUMENTS PRODUCED TO ALLOCATION COUNSEL

1. Kessler Settlement Agreement.
2. In re: Community Bank of Northern Virginia, 418 F.3d 277 (CBNV 1).
3. In re: Community Bank of Northern Virginia, 622 F.3d 275 (CBNV 2).
4. Plaintiffs' Joint Consolidated Amended Class Action Complaint in MDL no. 1674 (Doc #507).
5. Defendants Motion to Dismiss the Consolidated Amended Complaint in MDL no. 1674 (Doc #522).
6. Memorandum of Law in Support of Defendants' Motion to Dismiss in MDL no. 1674 .(Doc # 521).
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8. Defendants' Reply re Motion to Dismiss in MDL no. 1674 (Doc #548) .
9. Memorandum Opinion re: Motions to Dismiss in MDL no. 1674 (Doc #610).
10. Plaintiffs' Notice of Supplemental Authority re: Equitable Tolling in MDL no. 1674 (Doc #594).
11. Plaintiffs' Motion to Certify a Class under Bankruptcy Rule 7023 in BNK case no. 12-12020 (Doc #2044).
12. Plaintiffs' Memorandum of Law in Support of Motion to Certify in BNK case no.12-12020 (Doc # 2045).
13. Defendant Debtor's Opposition to Motion to Certify a Class in BNK case no. 12-12020 (Doc #2337).
14. Plaintiffs' Reply to Motion to Certify a Class in BNK case No. 12-12020 (Doc #2874).
15. Drennen HUD 1.
16. Picard HUD 1.
17. Damages Summary in Bankruptcy.
18. Plaintiffs' Motion for Class Certification in MDS no. 1674 (Doc #607)
19. Memorandum in Support of Plaintiffs' Motion for Class Certification in MDL case no. 1674 (Doc #609)
20. Brief of Defendant PNC Bank NA In Opposition to Plaintiffs' Motion for Class Certification in MDL case no. 1674 (Doc #612)
21. Plaintiffs' Reply Brief in Support of Class Certification in MDL case no. 1674 (Doc #614)

**Exhibit F**

Settlement Points Relative to Mediation Conducted on July 11, 2013

In Re: Residential Capital, LLC, et al.
Case No. 12020(MG)

A mediation was conducted on July 11, 2013. Present at the mediation was the mediator, Charles E. Atwell of the law firm of Foland, Wickens, etc., as well as allocation counsel Richard H. Ralston for the non-equitable tolling subclass and Edwin J. Kilpela, Jr. and Arthur H. Stroyd, Jr. for the equitable tolling subclass. Such mediation lasted from 9:00 a.m. until 3:00 p.m. and it was agreed between the parties that the fill in percentage for individual damage reduction referenced in paragraph 6(b)(ii) of the Kessler Settlement Agreement shall be eighteen and one-half percent (18.5%).

Charles E. Atwell

Edwin J. Kilpela, Jr.

Arthur H. Stroyd, Jr.

Richard H. Ralston

# Exhibit 3

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| **In re:**<br><br>**RESIDENTIAL CAPITAL, LLC, *et al.*,**<br><br>**Debtors.** | **Chapter 11**<br><br>**Case No.: 12-12020 (MG)**<br><br>**Jointly Administered** |

**DECLARATION OF R. FREDRICK WALTERS, DAVID M. SKEENS AND R. BRUCE CARLSON IN SUPPORT OF MOTION TO APPLY BANKRUPTCY RULE 7023 AND TO CERTIFY CLASS CLAIMS**

R. Fredrick Walters, David M. Skeens and R. Bruce Carlson ("Declarants"), pursuant to 28 U.S.C. §1746, hereby declares as follows:

1. Declarants Walters and Skeens are attorneys employed by the law firm of Walters, Bender, Strohbehn & Vaughan, P.C. ("Walters Bender") and each have worked at this firm since 2000 or earlier. Walters and Skeens have each had substantial responsibility since around 2000 with respect to a number of mortgage lending class action matters handled by their firm, including a number of class action cases brought by persons represented by Walters Bender against GMAC-Residential Funding Corporation n/k/a Residential Funding Company, LLC ("RFC").

2. Declarant Carlson is an attorney employed by the law firm of Carlson Lynch, Ltd. Declarant Carlson has had substantial responsibility since around 2000 with respect to a number of mortgage lending class action matters, including a number of class action cases brought by persons represented by Carlson against RFC.





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3. This Declaration is submitted on behalf of Rowena Drennen,[1] Flora Gaskin, Roger Turner, Christie Turner, John Picard, and Rebecca Picard (the "Class Claimants") in support of the Class Claimants' accompanying Motion to Apply Bankruptcy Rule. 7023 and to Certify Class Claims.

4. The facts set forth in this Declaration are based upon (a) personal knowledge; (b) the review of testimony and records obtained in discovery or subpoenas to third parties in the representations mentioned in paragraph 1 and 2 (reviewed by Declarants or others at their respective law firms); and (c) information and belief acquired during the noted representations. Each Declarant attests that if called and sworn as a witness, he would testify competently to the matters set forth herein.

5. This Declaration is organized as follows:



## I. OVERVIEW OF THE LITIGATION AGAINST RFC: *IN RE COMMUNITY BANK OF NORTHERN VIRGINIA SECOND MORTGAGE LENDING PRACTICES LITIGATION*

6. At the time of RFC's bankruptcy, four putative class actions against RFC and others were pending in the United States District Court for the Western District of Pennsylvania

[1] Rowena Drennen is a member of the Official Committee of Unsecured Creditors. *See* Appointment of Official Committee of Unsecured Creditors, filed May 16, 2012 (Doc. No. 102).

as part of a multidistrict proceeding styled *In Re: Community Bank of Northern Virginia Second Mortgage Lending Practice Litigation,* MDL No. 1674, Case Nos. 03-0425, 02-01201, 05-0688, 05-1386 (the "MDL Class Action"). The Class Claimants are among the 41 lead plaintiffs in the MDL Class Action and representative of that group of lead plaintiffs and of the overall putative class. They have pursued class action claims against RFC for over 10 years based upon its participation in a predatory lending scheme and racketeering enterprise perpetrated against 44,535 borrowers nationwide, as described in detail below. All 44,535 members of the proposed class are known and have been identified. Indeed, as part of the litigation against RFC, two class action settlements were approved (but later vacated on appeal) and pursuant to each settlement RFC undertook to mail notice of the settlement to the class members.

7. The MDL Class Action is itself a consolidation of six separate class action lawsuits, filed between May 1, 2001 and February 26, 2003, brought by Declarant Carlson that were pending in the United States District Court for the Western District of Pennsylvania as of July 2003, at which time they were consolidated for purposes of a class action settlement.

8. The claims pending against RFC in the MDL Class Action that were pending at the time of its bankruptcy are set forth in the Joint Consolidated Amended Class Action Complaint ("Complaint"), a copy of which is attached as **Exhibit A.** The Class Claimants' Class Proofs of Claim filed in this bankruptcy case (the "Class Claim" or "Claims") are based upon the same allegations set out in full in the Complaint and are attached to this Declaration as **Exhibits B, C, and D.**[2]

9. The allegations in the MDL Class Action lay out a massive predatory and illegal lending scheme that involved many of the sharp practices underlying the recent collapse of the

[2] To avoid unnecessary duplication and bulk, Exhibits B, C, and D do not include Attachment 2, which in each instance is the Complaint attached to this Declaration as Exhibit A.

American mortgage market. The loans involved are all "high-cost" loans under the Home Ownership and Equity Protection Act, 15 U.S.C. § 1641 ("HOEPA"). Each loan transaction was governed by and subject to the Real Estate Settlement Practices Act 12 U.S.C. § 2601 *et seq.* ("RESPA"), the Truth in Lending Act ("TILA") and HOEPA (15 U.S.C. § 1602 and Regulation Z at 12 C.F.R. § 226.2). In addition, each loan was a federally-related mortgage loan obtained primarily for personal, family, or household purposes and, as such, constituted a consumer credit transaction within the meaning of the TILA and HOEPA. Complaint, at ¶¶ 2, 6, 9. RFC bought the loans at issue from the originating banks and because these are HOEPA loans, RFC is liable just as if it had originated the loans. 15 U.S.C. § 1641(d).

10. Each of the 44,535 individual loans at issue was purchased by RFC and our analysis shows that each had an average principal balance of approximately $35,000. The borrowers enticed to close one of these loans paid "origination" and "title" fees in excess of 12% of the original principal balance of the loan and exorbitant interest rates that were largely unrelated to the credit worthiness of the borrowers. The fees charged in connection with these loans were grossly excessive and far beyond those a borrower would pay in a true free market for settlement services rather than an illegitimate transaction centered on an underlying fraudulent kick-back scheme. Complaint, at ¶ 2.

11. As Plaintiffs allege, the kickback scheme at issue was initially conceived by three brothers, David, DeVan and Chris Shumway and Randy Bapst. The Shumway/Bapst "business plan" was to drive loan volume via a massive nationwide direct mail marketing campaign. Borrowers identified by the marketing campaign were referred to either Community Bank of Northern Virginia ("CBNV") or Guaranty National Bank of Tallahassee ("GNBT") (collectively the "Banks"), who would process and originate the loans in their own names, and then kick-back

the overwhelming majority of the settlement fees to companies controlled by Messrs. Shumway and Bapst, notwithstanding the fact that these Shumway/Bapst companies were not providing any compensable settlement services in connection with the loans. Complaint, at ¶ 3.

12. The original conspirators who conceived the massive mortgage lending fraud developed familiarity with the residential mortgage industry beginning in the late 1980s. By the late 1990s, some mortgage originators had begun to pursue an "originate and sell" business model whereby they would originate as many loans as possible, and derive most of their profit from the settlement fees that they would charge prior to selling the loans to investors like RFC. Their incentive, therefore, was to drive that fee income up as high as possible. Two of the aforementioned conspirators, brothers David and Devan Shumway, along with their colleague Randy Bapst collaborated to go into business for themselves to pursue this originate and sell approach to mortgage lending out of their headquarters in Northern Virginia, (hereafter the "Shumway/Bapst Organization" or the "Organization"). The Shumway/Bapst Organization developed a particular expertise in originating "high loan to value" or "125" second mortgage loans, wherein the cumulative amount of mortgage indebtedness on the home at issue often exceeded the amount of equity in the home. Complaint at ¶ 61-84.

13. The Complaint alleges that the Organization's goal—fueled by seed capital provided by brother Chris Shumway's hedge fund successes —was to maximize the amount of settlement fees that it could extract from borrowers, irrespective of creditworthiness and irrespective of what settlement services were actually provided to a borrower in connection with a given loan. To facilitate the maximization of cumulative settlement fees, the Organization invested substantial sums into a national direct mail marketing campaign that was calculated to generate as much loan volume as possible. Complaint at ¶¶3, 63.

14. Regulatory problems, however, dogged the Shumway/Bapst Organization from its inception. In the first instance, Virginia banking regulators challenged the Organization's ability to originate loans throughout the country without proper licensure. Plaintiffs allege that to deflect this issue, and to simultaneously permit it to circumvent state settlement fee caps and interest ceilings that applied to non-depository lenders, the Organization conceived a plan whereby it would develop an association with a regulated depository institution, which would arguably not be subject to the same licensure obligations and fee and interest caps that constrained non-depository lenders. The business plan specifically contemplated that the Organization would target financially distressed banks, which would be offered the opportunity to derive significant income by making the loans referred to them by the Shumway/Bapst Organization, so long as the banks would agree to kick-back to the Organization the lion's share of the origination fees generated through the loans. Complaint at ¶¶ 64-66. The plan contemplated that the banks would not be required to hold the second mortgage loans in their own portfolio, but that the loans would instead be sold *en masse* to an investor, primarily RFC. Complaint at ¶¶ 78-81; 85-97. The plan also required that the banks would use title companies controlled by the Organization to extract additional excessive and unearned fees from the borrowers. Complaint at ¶ 67.

15. Plaintiffs allege that the initial structure used by the Organization and its co-conspirator CBNV was an entity denominated EquityPlus Financial, LLC (the "LLC"). A company owned by the Shumway/Bapst Organization with a confusingly similar name, EquityPlus Financial, Inc., owned 75% of the LLC, and CBNV owned the remaining 25%. This structure was in place for the five month period between May 29, 1998 and October 29, 1998. All loans originated during this period violated the Affiliated Business Association ("ABA")

disclosure requirements of the RESPA in that CBNV did not disclose that substantially all of the settlement fees charged to Plaintiffs and the Class in connection with the loans were being paid to the LLC, contrary to what was represented to borrowers in the settlement papers (which showed the settlement fees as being paid to CBNV). Complaint at ¶¶ 68-70.

16. However, the Virginia banking regulators continued to challenge the business structure being used by the Organization (now in combination with CBNV) to originate second mortgage loans. In response, the Organization (in combination with CBNV and, the Plaintiffs allege, with the complicity of RFC) concocted the business structure that would remain in place during the period when the vast majority of loans at issue were originated. David Summers, the president of CBNV, described this structure in a March 11, 1999 letter to the Virginia banking regulators:

> [T]he mortgage affiliations have been restructured as loan production offices of Community Bank. The loan originators and processors of the limited liability mortgage affiliates are now employees of the Bank and the principals of the limited liability companies (such as EquityPlus Financial, LLC) are now consultants to the Bank.

Complaint at ¶ 71.

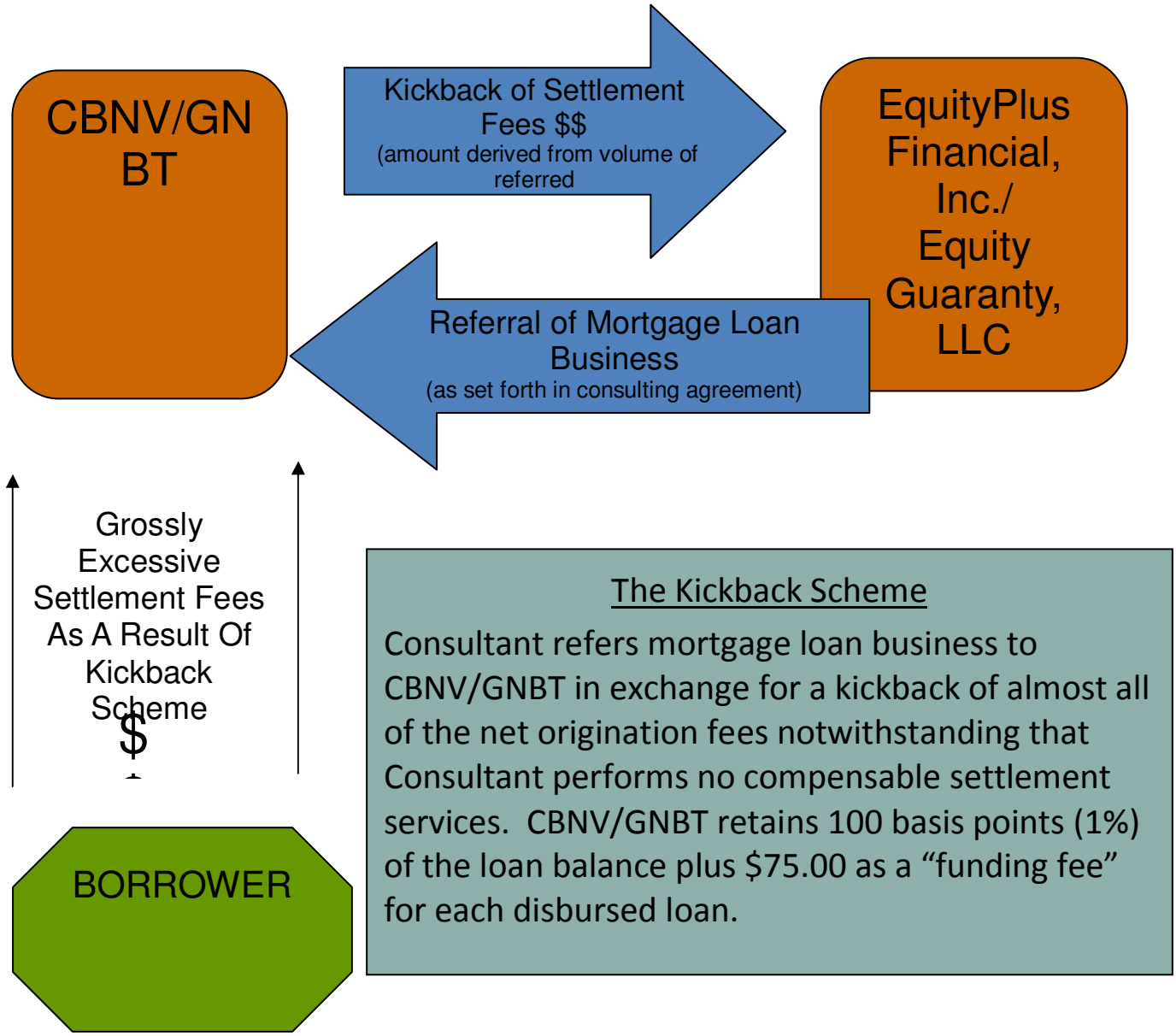
17. As alleged in the COMPLAINT, the Organization and CBNV created this consulting structure to deflect accusations by the Virginia banking regulators that it was unlawful for EquityPlus Financial, LLC to originate and process mortgage loans without proper state licensure. But the Shumway/Bapst crew was only clever by half. This new consulting structure ultimately created a much larger federal law compliance issue. The consulting agreements expressly prohibited the consultants (i.e., Messrs. Shumway and Bapst and their employees) from performing any settlement services in connection with the loans at issue (instead requiring that said services be provided by the banks and their employees). Notwithstanding this fact, the

very same agreements that precluded the consultants from performing work on the loans, required that the overwhelming majority of all settlement fees at issue be kicked-back to the consultants. Therefore, by the express terms of these consulting agreements the payment of these huge kickbacks to the consultants was ***not*** in exchange for the performance of settlement services, but was instead compensation for the referral of mortgage leads to CBNV and later other banks. Complaint at ¶¶ 72-74.

18. Graphically, the Section 8(a) RESPA violation described in the Complaint can be demonstrated by the chart on the following page:

**SECTION 8(a) of RESPA:**

**No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.**




19. The Complaint alleges that it is difficult to envision a more blatant violation of Section 8 of RESPA than an ***actual contract*** that precludes a party from performing any settlement services in connection with certain loans while also requiring payment of nearly all

settlement service fees resulting from those loans to that same party. The Shumway/Bapst organization established contractually mandated illegal RESPA kickbacks.

20. While different iterations were utilized as the scheme evolved and the Organization looked to stay one step ahead of the regulators, the basic plan always involved having nearly all of the settlement costs and charges funneled to the Shumway/Bapst group. The kickbacks, of course, were never disclosed to borrowers in the federally-mandated loan documents issued to them. Instead, the loan documents fraudulently misrepresented the actual recipients of the settlement fees to conceal the kickback scheme.

21. The scheme participants were not limited to the Shumway/Bapst organization and the Banks. Plaintiffs allege that RFC was a knowing and necessary part of the predatory lending scheme. RFC provided CBNV and GNBT with the operating capital necessary to fund the predatory loans. Without RFC's commitment to purchase the loan origination output generated by the predatory lending scheme, the scheme could not survive. Indeed, when RFC finally did pull out the scheme quickly collapsed.

22. Specifically, RFC would purchase the loans from the Banks on a correspondent basis, shortly after the settlement of the loans. RFC profited from interest incurred while holding the loans in its own portfolio, and then again after it securitized pools of loans for sale on Wall Street. The capital provided by RFC was integral to the successful operation of the scheme, in that the Banks did not have sufficient capital to permit them to hold the loans in their own portfolios for any appreciable period of time. The profits realized by RFC from this scheme were directly tied to loan volume, and every participant in the scheme, including RFC, blatantly ignored the unlawful aspects of the settlement practices at issue in order to maximize the high loan volume. Complaint, at ¶¶ 4, 5.

23. The factual basis for the Class Claims, summarized above, is set forth in great detail in the Complaint. The legal relief available to the 44,535 Class Claimants arising from this long running scheme is as follows:

a. Violations of the Real Estate Settlement Procedures Act for kickbacks, unearned fees and impermissible business relationships;

b. Violations of the Truth in Lending Act and the Home Ownership and Equity Protection Act for inaccurate and understated material disclosures;

c. Violations of other disclosure and substantive requirements of TILA and HOEPA; and

d. Violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") for racketeering activities used to perpetuate and further a predatory lending scheme.

## II. RESPA, TILA, HOEPA and RICO– An Overview

*Real Estate Settlement Procedures Act*

24. The Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq*. ("RESPA") was intended by Congress to protect residential mortgage borrowers from certain abusive practices in the mortgage settlement process that impede the operation of a free market for settlement services and inflate the costs of mortgages without providing any corresponding benefit to consumers. Congress passed RESPA in order to "insure that consumers throughout the Nation are provided with greater and timelier information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country." 12 U.S.C. § 2601. One of the abusive practices that Congress sought to eliminate through the enactment of RESPA was the payment of referral fees, kickbacks, and other unearned fees, including fees for which no

services were performed. S.Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551.

25. To combat these perceived abuses, Congress enacted Section 8 of RESPA, which prohibits business referral payments and unearned fees related to real estate settlement services, to wit:

> §2607 Prohibition against Kickbacks and Unearned Fees
>
> (a) Business referrals. No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) Splitting Charges. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. §2607.

26. In practice, the application of RESPA is straightforward. An individual or entity must provide settlement services in exchange for any settlement fees to be paid to that individual or entity in connection with a given mortgage loan. If no settlement services are provided by that individual or entity, then, by definition, RESPA precludes that person or entity from being paid from the settlement proceeds generated by the loan.

27. As to damages, RESPA states that "any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation *in an amount equal to three times the amount of any charge paid for such settlement service."* 12 U.S.C.A. § 2607(d)(2)(emphasis added). Thus, there is no discretion as to the award of damages. As

courts have observed, the "[s]tatutory damages relieve litigants of the burden of having to prove an exact measure of pecuniary harm arising from a violation of their rights under the statute. They also provide litigants with a bounty for acting in the public interest." *Kahrer v. AmeriquestMortg. Co.,* 418 F.Supp.2d at 748, 755 (W.D. Pa. 2006).

*Truth in Lending Act and Home Ownership and Equity Protection Act*

28. The Truth in Lending Act and the Home Ownership and Equity Protection Act are remedial consumer protection statutes. TILA applies to all consumer credit transactions, subject to limited exceptions which do not apply in the *In Re Community Bank* litigation. 15 U.S.C. §§ 1601-03. HOEPA, which is a part of TILA, applies only to certain high cost home mortgage loans, like those at issue. The basic premise of TILA is to require lenders to provide uniformly calculated, accurate and timely disclosures to prospective borrowers of the true cost of a loan.

29. The Truth in Lending Act was enacted in 1968 in order to promote the informed use of consumer credit, including mortgage loans, by mandating standardized methods by which the costs associated with borrowing are calculated and disclosed to consumers – so the consumer knows the full cost of the credit and so the consumer can make an "apples to apples" comparison between two lenders. The regulations that implement the statute are known as "Regulation Z", codified at 12 CFR Part 226. Regulation Z contains most of the specific requirements imposed by TILA are found in Regulation Z.

30. Recognizing the symbiotic relationship between the originators of predatory home loans and the secondary purchasers of those loans, Congress passed HOEPA in 1994. This enactment amended certain provisions of TILA to give special protections to borrowers obtaining high-interest and high-cost second mortgage loans. Notable among these protections is

the imposition of liability on the purchasers of HOEPA loans such that they are liable to the borrower just as if they had made the loans themselves:

> Any person who purchases or is otherwise assigned a mortgage referred to in section 1602(aa) of this title ***shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the creditor of the mortgage***…"

15 U.S.C. § 1641(d)(emphasis added).

31. The true cost of a loan is described under the commonly recognized statutory terms "Amount Financed," "Finance Charge" and the "Annual Percentage Rate ("APR")". The APR is calculated through a mathematical formula that is derived from the Amount Financed (funds actually available to the borrower) and Finance Charge (interest, fees and costs – what the money will cost the borrower over the life of the loan). These two numbers are mutually exclusive; that is, a settlement charge is allocated to either one or the other but not to both. The higher the finance charges, the higher the APR.

32. Under TILA, all settlement charges are presumed to be part of the Finance Charge. 15 U.S.C. § 1605(a); 12 C.F.R. § 226.4. There are exceptions to this rule. Items that can be excluded from the finance charge include charges for "[f]ees for title examination, abstract of title, title insurance, property survey, and similar purposes." 12 C.F.R. § 226.4(c)(7). Such fees can only be excluded from the finance charge, however, if they are "bona fide and reasonable in amount." *Id;* Official Staff Commentary to § 226.4 at ¶ 4(c)(7).

33. In addition to the disclosures mandated by TILA, HOEPA requires the Lender-Banks to warn prospective borrowers about the high cost of their loans through an advance notice – the "HOEPA Notice" – of the loan's monthly payment amount and certain cost information, including a specific and separate disclosure of the APR at least three (3) business days prior to closing. 15 U.S.C. §§ 1639(a), (b)(1); 12 C.F.R. § 226.32 ("Section 32"). The idea

of the HOEPA Notice is to give the consumer the opportunity to reject the loan offer before being rushed to sign numerous papers at a closing.

34. HOEPA also has certain prohibitions relating to the imposition of prepayment penalties. *See* 15 U.S.C. § 1639(c); 12 C.F.R. § 226.32(d)(6)-(7). For example, HOEPA does not allow the collection of a prepayment penalty when the prepayment is made via a refinancing with the current creditor under the mortgage. The inclusion of a prohibited prepayment penalty in the terms of the loan is "deemed a failure to deliver the material disclosures" under HOEPA. 15 U.S.C. § 1639(j).

35. A creditor's failure to make the "material disclosures" required by TILA and HOEPA, or to make those disclosures at the time required by HOEPA, gives rise to substantial damages as set forth in 15 U.S.C. § 1640 which include actual ***and*** statutory damages. 15 U.S.C. § 1640(a). These same violations also provide the aggrieved borrower – each class member, for example -- with a statutory right to rescind their loan as well as providing for injunctive and declaratory relief. 15 U.S.C. § 1635; 12 C.F.R. § 226.23.

36. The specific damages a borrower is entitled to recover under15 U.S.C. § 1640 are as follows:

a. "Actual" Damages. Section 1640(a)(1) allows the class members their "actual" damages. The case law has interpreted this to mean all bogus, unreasonable and marked up fees should be refunded as restitution to the borrowers. *In re Russell*, 72 B.R. 855, 863-64 (E.D. Pa. 1987); *Goldman v. First National Bank of Chicago*, 532 F.2d 10, 15 (5th Cir. 1976).

b. Statutory Damages. Sections 1640(a)(2), (3) and (4) provide for "statutory" awards of damages for non-HOEPA TILA violations and HOEPA violations.

Section 1640(a)(2) is applicable to all violations and limits the statutory award to the range of $200 to $2,000 where the borrowers' principal residence secures the loan. In a class action, the class is limited to a statutory award of $500,000 *per creditor* "for the same failure to comply" with the requirements of TILA and HOEPA. 15 U.S.C. § 1640(a)(2)(B).

c. Also, prevailing class members are entitled to their costs and attorneys' fees. 15 U.S.C. § 1640(a)(3).

d. Additional HOEPA Statutory Damages. For violations of HOEPA, in addition to the actual damages under § 1640(a)(1) and the statutory damages under § 1640(a)(2) and (3),each class member is entitled to additional statutory damages in "an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material." 15 U.S.C. § 1640(a)(4). "Material disclosures" are defined at 15 U.S.C. § 1602(u) to include "the annual percentage rate ,… the amount of the finance charge, the amount to be financed, … and the [HOEPA] disclosures required by section 1639(a) of this title." Thus, the failure to provide the borrower an accurate APR is a violation of § 1639 giving rise to these additional HOEPA damages under § 1640(a)(4). Statutory damages in HOEPA class actions are not limited since the limitation on class actions applies only to the penalty awarded under § 1640(a)(2)(B). There is no cap on the damages under § 1640(a)(4).

37. Consequently, if a creditor violates HOEPA's disclosure requirements and/or if that creditor includes prohibited terms in a HOEPA loan, or engages in abusive practices, then that creditor *and its assignees* will not only be subject to civil liability and damages under 15

U.S.C. § 1640(a)(1), (2) and (3), but they will also be liable for damages under § 1640(a)(4) for those additional HOEPA violations.

*Racketeer Influenced and Corrupt Organizations Act*

38. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*., was enacted in 1970. The Act is intended to address ongoing and expansive criminal activities but it also provides for a civil cause of action, including trebled damages.

39. In order to establish a RICO violation under § 1962(c), a plaintiff must establish the (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Under § 1962(d), it is "unlawful for any person to conspire" to violate § 1962(c).

40. RICO provides for civil remedies, including a cause of action for treble damages which is available to "[a]ny person injured in his business or property by reason of a violation of section 1962...." 18 U.S.C. § 1964(c). The recoverable damages are simply those fairly traceable to the defendants' conduct.

41. The additional legal and factual bases for the Class Claimants' RICO claims are fully set out, in great detail, in the First Amended RICO Case Statement ("RICO Statement") filed in the MDL Class Action in October 2011. The size of that document precludes attaching it as an exhibit to this declaration but it can be located on PACER (U.S. District Court for the Western District of Pennsylvania, *In Re: Community Bank of Northern Virginia Second Mortgage Lending Practices Litigation*, Case No. 2:03-cv-00425, ECF No. 511).

## III. INITIAL DAMAGE ESTIMATES FOR PUTATIVE CLASS MEMBERS

42. The estimated per loan damages on Plaintiffs' claims for violations of the Real Estate Settlement Procedures Act ("RESPA"), which are the wrongful settlement charges, average over $4765 per loan before trebling, and over $14,000 after mandatory trebling.

43. As explained above, the TILA statutory damages are capped in a class action at the lesser of $500,000 or 1% of the wrongdoer's net worth, making the Class Claims statutory TILA damages around $20 per borrower or, as to RFC, an even $1 million dollars. It is a much different story, however, with respect to HOEPA statutory damages. Those damages include not only the illegal fees but also all finance charges (i.e. the interest collected on the loan). These amounts are, on average, over $26,000 per borrower. And this calculation is for a single TILA/HOEPA violation; there are multiple violations on many of the loans although for purposes of this Declaration the total of the damage calculations conservatively reference only a single HOEPA damage calculation.

44. There is also a rescission remedy available under TILA. This is a remedy that is available to many of the class members. The available damages in connection with a rescission remedy under the TILA are as follows:

a. A refund of all of the finance or other charges that you have paid in connection with the transaction. 15 U.S.C. Sec. 1635 (b).

b. The borrower may also be entitled to actual and/or statutory damages under 15 U.S.C. Sec. 1640 (a).

c. Costs and attorney's fees. *Id.*

Thus, the rescission damages would mirror the HOEPA statutory damages which, as noted, average $26,477 per loan. These damages would not be available to every class member but to a large number of them and those class members would appropriately be a separate sub-class.

45. Given the Supreme Court's broad reading of RICO damages (whatever out-of-pocket damages are fairly traceable to the defendants' conduct), Plaintiffs contend that the appropriate damages could include all settlement charges on the loans paid to the enterprises and

all paid interest damages flowing from the class members' payment of excessive interest rates on their loans, such as the differences in the actual and disclosed interest rates and/or the increased interest payments resulting from the bogus fees. However, for the purpose of the class claims asserted in this bankruptcy, Plaintiffs seek only the fraudulent title exam fees (line 1103) and the mark up on the abstract fees (line 1102), which on average are $428 and total $1284 under RICO's mandatory trebling.

46. Based on the extensive record gathered during the pre-petition litigation, the Class Claimants' current estimate (which is preliminary and without prejudice to the right of the Putative Class members to claim additional amounts as the facts and law may ultimately warrant) that the total amount recoverable on each individual Class Claim is, on average, $42,076.00. Because there are 44,535 known putative Class members, the damages for which RFC is liable on these claims is at least $1.87 billion dollars.

47. All of these claims can be certified for Class treatment. As noted, the District Court has entered two orders approving previously proposed national settlements of the class claims at issue. While each settlement was vacated on appeal, in both such rulings the Third Circuit confirmed that these claims are appropriate for class treatment. *In re Community Bank of Northern Virginia*, 418 F.3d 277, 303-10 (3rd Cir. 2005) (CBNV I); *In re Community Bank of Northern Virginia*, 622 F.3d 275, 284 (3rd Cir. 2010) (CBNV II).

## IV. THE PROCEDURAL HISTORY OF THE CLASS LITIGATION

48. Beginning in 2001 as to loans originated by CBNV and 2002 as to GNBT loans, borrowers across the nation began to file class action lawsuits as the result of this predatory lending scheme. Six of these actions were filed in Pennsylvania and these actions were led by Declarant Carlson. In July 2003, CBNV, GNBT, and RFC reached a nationwide settlement with the plaintiffs in six putative class actions filed by Carlson (the "Original Settlement"). The

Original Settlement Class was defined to include all persons: (i) who entered into a loan agreement with CBNV and/or GNBT;(ii) whose loan was secured by a second mortgage deed or trust on property located in the United States; (iii) whose loan was purchased by RFC; and (iv) who were not members of the class certified in the action captioned *Baxter v. Guaranty National Bank, et al.*, Case No. 01-CVS-009168, in the General Court of Justice, Superior Court Division of Wake County, North Carolina.

49. In December 2003, the district court approved the $33 million class-wide settlement involving RFC.

50. A number of class members, represented by Walters Bender and other counsel, objected to the settlement and appealed to the Third Circuit. The Objectors argued, inter alia, that the settlement was inadequate.

51. While the appeals of the district court's first settlement approval and attendant rulings were pending in 2004, objecting class members filed an action captioned as *Hobson, et al. v. Irwin Union Bank and Trust, Co., et al.* in the Northern District of Alabama.

52. *Hobson* was filed to assert TILA/HOEPA claims on behalf of all borrowers victimized by the predatory lending scheme, not just those whose loans were assigned to RFC. The *Hobson* plaintiffs pursued formal discovery and obtained thousands of pages of business records that graphically evidence the predatory lending scheme and overall merit of the federal consumer protection law claims, including the class-wide TILA/HOEPA claims.

53. On May 5, 2005, the Joint Panel for Multi District Litigation transferred the *Hobson* action to the Western District of Pennsylvania as part of a multidistrict proceeding, No. 1674, captioned as "*In re Community Bank of Northern Virginia Second Mortgage Lending Practices Litigation*."

54. In August of 2005the Third Circuit vacated the class settlement and remanded the case to the district court for further analysis of the TILA/HOEPA claims and the adequacy requirement for class certification. *In re Community Bank of Northern Virginia,* 418 F.3d 277 (3rd Cir. 2005).[3]

55. On remand, the Settling Plaintiffs notified the district court that they had reached an agreement with the defendants to modify the earlier settlement, increasing it to in excess of $50 million dollars. At oral argument, the district court noted that he believed the TILA/HOEPA claims were factually viable but he was not sure if they were timely.

56. On October 6, 2006, the district court issued a *Memorandum* finding that the TILA/HOEPA claims were not "viable," because they were time-barred under a standard of review stated as: "whether the Class Plaintiffs were inadequate representatives under Rule 23 because they failed to assert TILA/HOEPA claims which would have survived a Rule 12(b)(6) motion to dismiss."

57. The district court then appointed a retired district court judge Donald Ziegler as a "friend of the court" to review the fairness of the new settlement but he was expressly not to reconsider the district court's statute of limitations decision.

58. Following Judge Ziegler's review, in January of 2008 the district court again certified a settlement class and approved a second, revised class-wide settlement totaling $57 million involving RFC. The Class included: All persons: (i) who entered into a loan agreement with CBNV and/or GNB; (ii) whose loan was secured by a second mortgage deed or trust on property located in the United States; (iii) whose loan was purchased by RFC; and (iv) who were

[3] In its opinion, the Third Circuit noted that all of the elements of Rule 23 had been satisfied with the possible exception of Fed. R. Civ. P. 23(a)(4), stating: "We emphasize, as we stated above, that we do not preclude the possibility that the adequacy of class representation can be established on a more developed record. . . .Because we believe certification may indeed be appropriate, we examine some of the relevant factors to be considered on remand." *Community Bank I* at 308-309.

not members of the class certified in the action captioned *Baxter v. Guaranty National Bank, et al.*, Case No. 01-CVS-009168, in the General Court of Justice, Superior Court Division of Wake County, North Carolina.

59. Objectors, with Walters Bender again serving as lead counsel for that group, timely filed their objections to the second proposed settlement. The district court held a fairness hearing on June 30, 2008. On August 14, 2008, the district court entered a final judgment approving this second class action settlement.

60. Another appeal to the Third Circuit followed. The Objectors again challenged the district court's order approving the settlement on grounds that the value of the claims being settled and released exceeded the $57 million offered in connection with the revised settlement. The Objectors also took issue with the district court's limitations ruling. As to those borrowers outside the one-year limitations period, both the settling plaintiffs and Objectors have consistently contended that equitable tolling applies and thus the claims of all class members are timely.

61. The Third Circuit again vacated the approval of the settlement based on concerns that the settlement Class did not satisfy Rule 23(a)(4).*See In re Community Bank of Northern Virginia*, 622 F.3d 275 (2005). The Third Circuit found that because no class representatives for the Settling Plaintiffs had loans within one year of the operative filings, it was concerned about their ability to represent those class members who were within one-year. In this regard, the Third Circuit also took issue with the district court's limitation ruling and its application of the principals of relation back under Fed. R. Civ. P. 15.[4]

[4] In its opinion, the Third Circuit Noted: "As we noted in *Community Bank I*, however, this intra-class conflict is by no means fatal to whether these cases can be maintained as a class action. The most obvious remedy would be to create sub-classes, as we suggested in our prior opinion." *Community Bank II* at 304.

62. Following remand from *CBNV II*, counsel for Plaintiffs who had entered into the prior settlements and counsel for Objectors joined forces. In connection with this allegiance, on September 20, 2011, the District Court appointed Declarant Carlson and Declarant Walters as co-lead Interim Class Counsel pursuant to Fed.R.Civ.P. 23(d) and 23(g)(3).

63. The case has subsequently proceeded on a litigation track. The parties have exchanged written discovery and Rule 26 disclosures. All Defendants moved to dismiss nearly all portions of the claims of the putative class. The district court scheduled oral argument on the Motions to Dismiss on September 18, 2012. At that time, the district court announced that it would decide the Motion to Dismiss of PNC Bank (successor to CBNV) on the briefing and the Court also conferred with lead counsel for the parties and instructed them to submit a scheduling order to move forward with discovery relating to class certification. The district court did hear oral argument as to the separate motion to dismiss of the FDIC relating to its claim that no class claim can proceed against the FDIC as Receiver. As of the date of this Declaration, the district court has not issued a ruling on either PNC's or the FDIC's motions to dismiss.

64. As part of this bankruptcy filing, the district court has implemented a stay of the MDL Class Action as to Defendant Residential Funding Company, LLC and ordered the case closed as to RFC by its order of September 18, 2012.

## V. CLASS CERTIFICATION

65. As detailed above, Plaintiffs contend that the loans in question contained fraudulent, overcharged, marked up, unearned and bogus fees, in violation of and/or actionable under RESPA, TILA, HOEPA and RICO. This relief is available on a class wide basis because of the uniformity of proof from borrower to borrower.

66. The uniformity of proof flows primarily from each class member's loan file including the following sources of information:

a. The federally-mandated Uniform Residential Loan Application in the loan files (Fannie Mae Form 1003) which identifies the date of initial loan intake by phone or Internet, the loan processors and agents of the defendants (and enterprises) that handled the borrowers' loan application (and thus who participated in acts of misrepresentation).

b. The HOEPA Notice under 15 U.S.C. § 1639(a) and (b) that identifies the borrower's loan as a loan subject to HOEPA. Notably, the purchaser of the loans, RFC, received a HOEPA Notice of Assignment which informed them that they were acquiring HOEPA loans.

c. The federally-mandated HUD-1 or HUD-1A Settlement Statement for each borrower is perhaps the most important document. Essentially a receipt for the loan transaction, it will identify the Section 800 settlement charges for loan origination fees, loan discount fees and credit reports (Lines 801, 802, 804), the Line 1102 charge for abstracts of title fees, and Line 1103 charge for title examinations. The HUD-1 or HUD-1A's for each borrower will also identify the disclosed recipients of those fees and charges (but not the true recipient).

d. The federally mandated Itemization of Amount Financed, TILA and HOEPA disclosures, which set forth the amount financed, finance charges, and APR (which Plaintiffs allege were materially misstated).

67. More specifically, as Plaintiffs allege, the class member borrowers were charged "loan origination" and/or "loan discount" fees" in connection with their second mortgage loans. Those charges were set forth on the HUD-1 Settlement Statement on Lines 801 and 802 as being wholly paid to CBNV and/or GNBT. In fact, Plaintiffs allege that only a small portion of the fees

were paid to the Banks and the remainder was paid to the loan origination office which generated the loan. Indeed, as explained in the COMPLAINT, and described in paragraphs 28-30 above, the contracts between the consultants (Shumway/Bapst) and the Banks required this kickback arrangement, a violation of section 8(a) of RESPA.

68. Second, the Class members were also charged fees for credit reports at line 804 of the HUD-1 Settlement Statements, which charges were marked up and exceeded the true cost to the Banks, or provider of credit reports that were identified as the recipients of the fees on the borrowers' HUD-1 Settlement Statements. The Banks and loan production offices obtained "Negotiated Savings" on the true cost of the credit reports which were separately itemized as a single operating expense on the Bank's balance sheets and which are reflected as an "Operating Expense Ratio" or profit on expenses. These "Negotiated Savings" were not passed on to the Class members and thus the "Operating Expense Ratio" proves that there were mark ups on the credit report fees charged on Line 804 of the Class members' Settlement Statements. Thus, the was an unearned fee (the mark-up) charged in connection with this Line 804 charge in violation of section 8(b) of RESPA.

69. Third, the Class members were charged fees for "abstract or title searches" on Line 1102 of HUD-1 Settlement Statements. Those fees were neither bona fide nor reasonable because no true title or abstract search was performed on the loans. Instead, the title companies who were listed as the recipients of the fees ordered "Property Reports" from third party vendors and Affiliated Service Providers such as General American Corp. and Service Link. This is another illegal, undisclosed fee split in violation of § 8(b) of RESPA and a false representation of the recipient of the fees on the HUD-1 Settlement Statements. Because the defendants possessed the Class Members' loan origination files, the Class members could not determine whether any

abstract of title appeared in their loan files such that they could discover that the charges for the abstracts of title were marked up.

70. Fourth, the Class members were charged fees for "title examinations" on Line 1103 of HUD-1 Settlement Statements. These title examination charges are neither bona fide nor reasonable because ***no*** title examinations were performed on the loans. Because the defendants possessed the Class Members' loan origination files, the Class members could not determine whether any title examination appeared in their loan files such that they could discover that the charges for the title examinations were entirely bogus This is yet another violation of RESPA § 8(b).

71. Fifth, legitimate title charges are not included in the calculation of a loan's Finance Charge. Correspondingly, legitimate title charges are included in the Amount Financed (the total amount of the loan principal). These two calculations – Finance Charge and Amount Financed—determine a loan's Annual Percentage Rate. Plaintiffs contend that title charges to the borrowers under this scheme were not bona fide or reasonable. Nonetheless, such charges were excluded from the Finance Charge and included in the Amount Financed. As a result, for each member of the class the Finance Charge was understated and the Amount Financed was overstated. And having improperly overstated the Finance Charge and understated the Amount Financed, the APR calculation was wrong, resulting in a materially understated APR, and all such figures – the Finance Charge, Amount Financed and APR were therefore inaccurately disclosed to each class member in violation of TILA and HOEPA.

72. Sixth, the RICO claims relate to the same bogus and illegal fees and the same loan documents and uniform class-wide proof, including proof in the loan file of the predicate wire and mail fraud acts.

73. Plaintiffs seek to proceed under Federal Rule of Civil Procedure 23, or its Bankruptcy equivalent, Rule 7023, with class action certification of what is known as a "(b)(3)" class. To do so, Plaintiffs must establish the elements of Rule 23(a): numerosity, commonality, typicality and adequacy of representation. Plaintiffs must also establish, under Rule 23(b)(3) that common questions of fact and law predominate and that proceeding on a class action basis is the superior method of adjudicating the case. The uniformity of this class wide proof and the amenability of these claims to class action treatment was examined by the Third Circuit in both of its prior opinions and the Third Circuit advised that this matter is certifiable as a class action.

74. Specifically, here is what the Third Circuit said about the conditionally certified settlement class, which analysis applies equally to the current litigation class:

- "There is no dispute that the conditionally certified class meets the numerosity and commonality prongs of Rule 23(a)." *CBNV I*, 418 F.3d at 303.
- "We likewise find that the requirements of typicality are met." *Id.*
- "Just as the record below supports a finding of typicality, it also supports a finding of predominance. All Plaintiffs' claims arise from the same alleged fraudulent scheme." *Id.* at 309.
- "We find no reason, and Appellants fail to offer any, why a Rule 23(b)(3) class action is not the superior means to adjudicate this matter." *Id.*

75. In its second decision, the Third Circuit described its early pronouncements about the propriety of class action certification: "we concluded [in *CBNV I*] that three of the four Rule 23(a) requirements – numerosity, typicality, and commonality – were met, as well as the Rule 23(b)(3) predominance and superiority requirements. *CBNV II*, 622 F.3d at 284.

76. The sole class certification requirement that the Third Circuit had concern about was the adequacy of representation: "We therefore conclude preliminarily based on the record before us that all the requirements of Fed.R.Civ.P. 23(a) can be met with the exception of

adequacy of representation, which requires additional analysis." *CBNV I*, 418 F.3d at 309. The concern voiced in *CBNV I* was whether the named representatives were adequate because none of them had loans within one year of the operative filings and whether counsel for the settling plaintiffs was adequate based on their failure to advance the TILA and HOEPA claims. *Id.* at 307-308. In the second decision, the Third Circuit found again that these concerns had not been remedied. *CBNV II*, 622 F.3d at 303-308.

77. Neither of those adequacy of representation concerns remains. In both the Pennsylvania Class Action and in this class proceeding proposed in the RFC bankruptcy, counsel for the putative classes consists of a combined force of counsel for the prior settling plaintiffs (primarily Mr. Carlson and Carlson Lynch, Ltd.) and the objectors (primarily Fred Walters and Walters Bender), the TILA and HOEPA claims are being pursued (along with RESPA and RICO claims), and the class representatives include, as to both Banks, borrowers with loans within one year of the operative filings (that do not rely on equitable tolling or class action tolling) as to the timeliness of their RESPA, TILA and HOEPA claims (RICO has a four year limitations period)) and borrowers with loans outside the one-year dates.

78. The Class Claimants on whose behalf this Declaration is submitted are an appropriate subset of the class representatives in the Pennsylvania Class Action in that they likewise include, as to both Banks, borrowers with loans within one year of the operative filings and borrowers with loans outside the one-year dates.

79. Thus, class certification is an issue already considered at length by the Third Circuit and as to which the Third Circuit concluded that certification of a class action in connection with the claims arising from this predatory lending scheme would be appropriate.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: November 2, 2012

*/s/ R. Fredrick Walters*
R. Fredrick Walters

*/s/ David M. Skeens*
David M. Skeens

*/s/ R. Bruce Carlson*
R. Bruce Carlson

# Exhibit 4

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*Official Committee of Unsecured Creditors of*
*Residential Capital, LLC, et al.*

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| In re: | Chapter 11<br>Case No. 12-12020 (MG) |
| RESIDENTIAL CAPITAL, LLC a/k/a<br>RESIDENTIAL CAPITAL CORPORATION, et al. | (Jointly Administered) |
| Debtors. | |

**DECLARATION OF RONALD J. FRIEDMAN REGARDING REASONABLENESS OF ALLOCATION IN SETTLEMENT OF THE KESSLER CLASS ACTION**

Ronald J. Friedman, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury:

1. I am a member of SilvermanAcampora LLP ("SilvermanAcampora" or "Special Counsel"), with offices located at 100 Jericho Quadrangle, Suite 300, Jericho, New York 11753. I am duly admitted to practice law before this Court and the courts of the State of New York.

2. I submit this declaration (the "Declaration") pursuant to Article 6(d) of the stipulation (the "Stipulation") settling the class action claims brought by Rowena Drennen, Flora Gaskin, Roger Turner, Christie Turner, John Picard, and Rebecca Picard, individually and as the proposed representatives of the class of persons defined in article 3(a) of the Stipulation (collectively, the "Kessler Settlement Class"), against Residential Funding Company, LLC, Residential Capital, LLC, and GMAC Residential Holding Company, LLC (the "Settling

Defendants"), arising from the proceeding styled *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation,* MDL No. 1674, Case Nos. 03-0425, 02-01201, 05-0688, and 05-1386, pending in the United States District Court for the Western District of Pennsylvania, under which Stipulation Special Counsel is required to review the Allocation[1] for reasonableness.

3. Unless otherwise stated in this Declaration, I have personal knowledge of the facts hereinafter set forth and, if called as a witness, I could and would testify competently thereto.

**Preliminary Statement and Finding of Reasonableness**

4. As discussed below, Special Counsel finds that the Allocation on the whole is reasonable. Particularly, the methodology utilized in the Allocation to determine the amount of each Kessler Class Member's Claim is reasonable because, among other things, (i) determination of the HUD-1 settlement fee component of that claim is subject to independent review and calculation by an expert in that field; (ii) the Sample Size (defined below) to the overall corresponding loan data points appears to be substantially representative as to principal loan amount and locality in which loans were closed; and (iii) regardless, increasing the Sample Size would be cost prohibitive when measured against the anticipated marginal benefit that may or may not be achieved through an increase in the Sample Size on a per claim basis.

5. Furthermore, the Discount Rate (defined herein) of 18.5% reasonably takes into account probability of success on equitable tolling issues in light of a shift occurring in the Third Circuit toward a less stringent standard found in other courts outside that Circuit, and equitable tolling issues not being applicable to damages attributed under the Settlement to RICO. Additionally, the two groups of Kessler Class Claimants (Non-Equitable Tolling and Equitable

[1] Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Stipulation.

Tolling) were each represented by sophisticated counsel in an all-day mediation on that particular issue and Special Counsel's review did not find anything which could call into question the reasonableness of their independently negotiated 18.5% agreement.

**General Background**

6. On October 25, 2012, the Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (collectively, the "Debtors") voted to retain SilvermanAcampora as its special counsel ("Special Counsel"). On November 30, 2012, this Court entered the Order Authorizing and Approving the Retention of SilvermanAcampora LLP as Special Counsel to the Official Committee of Unsecured Creditors *Nunc Pro Tunc* to October 25, 2012 (the "Retention Order"). Pursuant to the Retention Order, Special Counsel represents the Committee in connection with issues and matters relating to the Debtors' current and former borrowers (collectively, the "Borrowers").

7. As the Court is aware, during the course of its representation of the Committee, Special Counsel has become well versed in all matters related to Borrowers in the Debtors' case and has, among other things:

a. analyzed all claims filed by Borrowers in the Debtors' cases, including class action claims, in connection with the preparation of an analysis of the Borrower Claims for the Committee;

b. analyzed the allegations contained in, and facilitated the resolutions of, adversary proceedings filed by Borrowers against the Debtors;

c. communicated with Borrowers regarding specific Borrower concerns in relation to the Debtors' cases through the creation and operation of a dedicated Borrower inquiry hotline; and

d. appeared on behalf of the Committee at multiple hearings on Borrower related adversary proceedings and other Borrower-related matters.

8. Pursuant to article 6(d) of the Stipulation, Special Counsel was tasked with

investigating the reasonableness of the Allocation of the Kessler Settlement Class Member Payments established under the Stipulation and rendering an opinion as to such reasonableness.

9. Special Counsel reviewed the Stipulation, performed independent research regarding the appropriateness of the Allocation contemplated in the Stipulation in light of the facts of the case, and performed independent legal research to determine the reasonableness of the Allocation.

**Allocation Process under the Stipulation**

10. Article 6(c) of the Stipulation provides that the allocation of payments to the members of the Kessler Class shall be established through a four (4) step process. The first step entails the computation of each Kessler Settlement Class Member's damages under RESPA, TILA/HOEPA, and RICO. The second step entails applying a discount rate to claims on loans closed before May 1, 2000. The third step entails computing the *pro rata* share for each Kessler Settlement Class Member Payment by dividing the individual damages for each Kessler Settlement Class Member by the total of all individual damages for the entire Kessler Settlement Class. The fourth step entails determining each Kessler Settlement Class Member's Payment by multiplying the Kessler Net Recovery Distribution by the *pro rata* share of the Kessler Settlement Class Member.[2]

*Step One: Computing Kessler Class Member Damages Claims*

11. Step one is comprised of two components for establishing damage claim amounts. The first component ("Component A") requires estimating the settlement fees paid with respect to the closing of each loan. The second component ("Component B" and together with Component A, "Step One") requires calculating the actual amount of interest paid by a Kessler

[2] For additional information regarding the allocation of payments to Kessler Class Members, see article 6(c) of the Stipulation.

Settlement Class Member with respect to their respective loan.

12. Special Counsel views Component A as a subjective component of the damage calculation because not every loan will be evaluated to determine the actual amount of settlement fees paid by each Kessler Settlement Class Member on their respective loan. Special Counsel believes, however, that the method employed in the calculation of Component A is reasonable, as further discussed below. Special Counsel finds Component B to be an objective component based on actual interest paid on a per loan basis and, therefore, is *per se* reasonable.

13. Component A requires an expert (the "Expert") to perform the damages calculations specific to the types of claims, including the settlement fee claims, being settled through the Stipulation. The Expert will be selected by Class Counsel and will, among other things, estimate the settlement fees based on a sample of approximately four hundred forty (440) loans (the "Sample Size") from among the Kessler Settlement Class for which Class Counsel has fee data. The Expert will analyze the loan and fee data variations that the Expert determines to be material in order to determine the settlement fees for each loan, with principal loan amount to be an important data point. That methodology appears, to Special Counsel, to be reasonable, particularly because such review and calculations will be performed by the Expert and the use of the Expert is in and of itself a hallmark of reasonableness. Moreover, due to the retention of the Expert, Special Counsel believes that it is not its role to opine on these issues other than in the most general sense embodied herein. Rather, the Expert will make his/her own independent determinations based on his/her knowledge and direct experience and review of the Sample Size and other data available.

14. Special Counsel did review certain data from the Sample Size as part of its evaluation. Overall, that data, after sorting by principal loan amount, appears to reflect a

reasonable amount of consistency when compared to the Kessler Settlement Class, specifically when comparing individual loan fees and other settlement fees. Further, Special Counsel also reviewed the Sample Size on a state level and determined that the closing costs, per each loan, do not appear to reflect unreasonable variations and differences that could arise from the locality of where a particular loan closed.

15. In reaching its conclusion, Special Counsel also explored the costs that would need to be incurred to create a larger Sample Size than what currently exists. Special Counsel believes that it would be prohibitively expensive to increase the Sample Size by any substantial measure. This is particularly so when measured on a per loan basis because the relative amounts of each Kessler Class Member Claim are not projected to be large enough that any increase would not result in a material increase in a corresponding Kessler Class Member Payment.

16. Taking into consideration the presence of the Expert, the size and make-up of the Sample Size, as well as the prohibitive costs to be incurred in supplementing the Sample Size, Special Counsel believes Component A to be reasonable.

17. Component B is based on the actual amount of interest paid on each loan based upon the loan payment records of each Kessler Settlement Class Member, as provided by the Settling Defendants.

18. Taking into consideration the objective nature of Component B, Special Counsel believes Component B to be reasonable.

19. Accordingly, Special Counsel believes Step One to be reasonable.

*Step 2: Discount for Loans that Closed Before May 1, 2000*

20. Step two ("Step Two") requires that the claims held by Kessler Settlement Class Members whose loans closed before May 1, 2000 (the "Equitable Tolling Members") be reduced

by a discount rate of eighteen and a half percent (18.5%) (the "Discount Rate"). The Discount Rate is being applied because the Equitable Tolling Members' claims under RESPA and TILA/HOEPA would have been subject to a statute of limitations defense asserted by the Settling Defendants outside of the Settlement. Thus, the Discount Rate takes into account a risk factor that equitable tolling could not be established by the Equitable Tolling Members, or, at a minimum, a cost adjustment based on legal fees necessary to establish that equitable tolling would apply to the Equitable Tolling Members (the "Risk Factor").

21. In determining whether the Discount Rate is reasonable, Special Counsel reviewed and analyzed, among other things, the pleadings for the underlying class action lawsuit and the case law cited in those pleadings. Special Counsel also performed its own independent legal research and analysis concerning the legal issues relating to equitable tolling and how certain courts have ruled on this issue.

22. After performing its analysis, Special Counsel has determined that the Discount Rate accounts for a Risk Factor of approximately 35% on the claims to which equitable tolling applies.[3]

23. To illustrate how a Risk Factor of approximately 35% equates to a Discount Rate of 18.5%, assume that an Equitable Tolling Member's total damages are $100. This class member is assumed to have a valid RICO claim, and is therefore entitled to an undisputed $46 recovery.[4] Further, assuming a Risk Factor of approximately 35% as to the remaining $54 of

[3] The exact percentage is equal to 34.26%.

[4] By using the damages summary provided to Special Counsel by Class Counsel, Special Counsel has determined that the Kessler Settlement Class Members' RESPA claims represent approximately 8% of their total claim, while the TILA/HOEPA and RICO claims each represent approximately 46% of their total claim. Because equitable tolling is not necessary to establish the RICO claims and, as a result, each Kessler Settlement Class Member is assumed to have a valid RICO claim, Special Counsel has determined that 46% (the "RICO Percentage") of their total claim will be awarded to each Kessler Settlement Class Member. Therefore, when adjusting for the RICO Percentage, the balance of the Equitable Tolling Members' claims for RESPA and TILA/HOEPA, which claims

damages, the Equitable Tolling Member would be entitled to an additional $35.10 on account of their RESPA and TILA/HOEPA claims, for a total damages claim of $81.10.

24. Moreover, as a result of Special Counsel's independent investigation of the allegations contained in the complaint, reviewing the applicable case law, the split of authorities amongst the circuits on the issue of equitable tolling, and the Third Circuit's move towards a less stringent standard with regard to RESPA/TILA cases,[5] Special Counsel believes that a Risk Factor of approximately 35% and a Discount Rate of 18.5% are reasonable.

*Step 3: Determining Each Kessler Class Member Payment*

25. Step three ("Step Three") calculates the ratio for the total settlement proceeds attributable to each Kessler Settlement Class Member by dividing the individual damages for each Kessler Class Member, calculated through Step One and Step Two, by the total amount of damages for the entire Kessler Settlement Class.

26. Step Three will be applied to determine each Kessler Settlement Class Member's proportionate share of each Kessler Net Recovery Distribution and the amount of each Kessler Settlement Class Member Payment.

27. Step Three is an objective step, requiring a simple mathematical calculation.

28. Taking into consideration the objective nature of Step Three, Special Counsel believes Step Three to be reasonable.

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may be disputed because those claims are rely upon equitable tolling, equals 54% (the "Equitable Tolling Percentage").

[5] There is an indication in the Third Circuit's latest decision in this class action suit that the Third Circuit may be moving towards a less stringent standard that is applied in other circuits, which would not require the Equitable Tolling Members to plead and prove any additional acts of concealment, other than the violation of the statute itself, because such additional requirement would effectively render equitable tolling in the RESPA and TILA/HOEPA context a "dead letter." *See Drennan v. PNC Bank, NA (In re Comty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig.)*, 622 F.3d 275, 307 n. 24 (3d Cir. 2010).

*Step Four: Computing Each Kessler Settlement Class Member Payment*

29. Step four ("Step Four") involves the calculation of each Kessler Class Member Payment by multiplying the ratio derived in Step Three for each individual Kessler Class Member by the Kessler Net Recovery Distribution.

30. Step Four is an objective step, requiring a simple mathematical calculation.

31. Taking into consideration the objective nature of Step Four, Special Counsel believes Step Four to be reasonable.

32. After reviewing: (i) the Stipulation; (ii) the pleadings in the Kessler litigation as they related to the issue of equitable tolling, including, but not limited to, the complaint, motions to dismiss, and oppositions to the motions to dismiss; (iii) performing an independent investigation of the facts surrounding the stipulation; and (iv) performing independent legal research regarding the reasonableness of the allocation of Kessler Class Member Payments, Special Counsel believes the allocation contained in Article 6 of the Stipulation to be reasonable.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Jericho, New York on July 22, 2013

*s/ Ronald J. Friedman*
Ronald J. Friedman

# Exhibit 5

**KESSLER SETTLEMENT AGREEMENT**

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EXECUTION VERSION

**KESSLER SETTLEMENT AGREEMENT**

SETTLEMENT AND RELEASE AGREEMENT ("**Agreement**") made subject to approval by the Court (as defined herein) by Rowena Drennen, Flora Gaskin, Roger Turner, Christie Turner, John Picard and Rebecca Picard ("**Named Plaintiffs**"), individually and as the proposed representatives of the Kessler Class Claimants (as defined herein) in the Bankruptcy Cases (as defined herein), and Defendants Residential Funding Company, LLC ("**RFC**"), Residential Capital, LLC, and GMAC Residential Holding Company, LLC (the "**Settling Defendant**s") (the Named Plaintiffs (on behalf of the Kessler Class Claimants) and the Debtors (as defined herein), including the Settling Defendants, collectively, the "**Parties**").

**RECITALS**

WHEREAS, the Settling Defendants and certain affiliates of the Settling Defendants ("**Debtors**") commenced Chapter 11 cases on May 14, 2012, styled *In re Residential Capital, LLC, et al.*, Case No. 12-12020(MG), United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Cases**"); and

WHEREAS, the Named Plaintiffs are a subset of the named plaintiffs asserting class action claims against RFC and certain other parties arising from mortgage loans made by Community Bank of Northern Virginia ("**CBNV**") and Guaranty National Bank of Tallahassee ("**GNBT**") and purchased by RFC in an MDL proceeding styled *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation,* MDL No. 1674, Case Nos. 03-0425, 02-01201, 05-0688 and 05-1386, pending in the United States District Court for the Western District of Pennsylvania (the "**MDL Litigation**"); and

WHEREAS, the Named Plaintiffs filed the Proofs of Claim (as defined herein) on behalf of the Kessler Class Claimants against each of the Settling Defendants and a Motion To Apply

Bankruptcy Rule 7023 And To Certify Class Claims [Dkt. No. 2044) (the "**Motion to Certify**") by which they seek to assert in the Bankruptcy Cases as claims on behalf of the Kessler Class Plaintiffs the same claims asserted in the MDL Litigation against RFC (the "**Bankruptcy Class Claims**") (the MDL Litigation and the Bankruptcy Class Claims, collectively, the "**Litigation**"); and

WHEREAS, the Named Plaintiffs have asserted claims against the Settling Defendants alleging violations of the Real Estate Settlement Practices Act ("**RESPA"**), the Truth In Lending Act ("**TILA**"), the Home Ownership and Equity Protection Act ("**HOEPA**") and Racketeer Influenced and Corrupt Organizations Act ("**RICO**") seeking all available damages on their own behalf and on behalf of a class of persons similarly situated as a result of certain actions taken in connection with certain second mortgage loans made to such persons and for which the Named Plaintiffs contend the Settling Defendants are liable as, among other things, the purchasers, assignees, servicers and/or master servicers of said loans; and

WHEREAS, the Settling Defendants deny the claims and causes of action being asserted against them in the Litigation, deny all liability to the Kessler Class Claimants, have opposed the MDL Litigation, and the Debtors filed an objection to the Motion to Certify [Dkt. No. 2337]; and

WHEREAS, upon mutual consent, the Parties have adjourned the hearing to consider the Motion to Certify from time to time; and

WHEREAS, counsel for the Named Plaintiffs (the "**Plaintiffs' Counsel**") and counsel for the Settling Defendants and Debtors have thoroughly investigated the facts relating to the claims alleged in the Litigation and the events and transactions underlying the Litigation, through formal and informal discovery, and have made a thorough analysis of the legal principles applicable to the claims, including the Proofs of Claim, being asserted against the Settling

Defendants; and

WHEREAS, beginning in April 2013, the Debtors, the Plaintiffs' Counsel and other parties participated in plan mediation sessions pursuant to orders of the Court [Dkt. Nos. 2519, 3101 and 3877] that were supervised by the Court-appointed mediator, the Honorable James M. Peck, United States Bankruptcy Judge; and

WHEREAS, throughout the mediation there were ongoing negotiations between and among various parties, including the Debtors, the Official Committee of Unsecured Creditors appointed in the Bankruptcy Cases (the "**Creditors' Committee**"), certain of the major constituencies in the case, including Plaintiffs' Counsel on behalf of the Kessler Class Claimants (collectively, the "**Consenting Claimants**"), which ultimately resulted in a global resolution memorialized in a Plan Support Agreement, dated May 14, 2013 by and among the Debtors, the Creditors' Committee, the Consenting Claimants, Ally Financial Inc. and its non-debtor subsidiaries and affiliates, including Ally Securities (the "**Plan Support Agreement**" or "**PSA"**), who with the Consenting Parties have agreed to, among other things, support the Plan (as defined herein); and

WHEREAS, on May 23, 2013, the Debtors filed a motion to approve the Plan Support Agreement [Dkt. No. 3814], which was approved by the Court on June 26, 2013 [Dkt. No. 4098]; and

WHEREAS, Section 5.3 of the PSA provided as follows:

> 5.3 **Kessler Class Claims**. The obligations of counsel for the putative Kessler Class under this Agreement are subject to satisfactory resolution of ongoing settlement negotiations with the Debtors on or before the date specified in the Supplemental Term Sheet, and ultimate approval of the settlement by a court of

> competent jurisdiction on or before the date specified in the Supplemental Term Sheet,[1] including with respect to the amount of the allowed claim of the Kessler Class and other terms and conditions of a settlement.

Accordingly, beginning on June 18, 2013 and concluding on June 27, 2013, Plaintiffs' Counsel and counsel for the Settling Defendants and Debtors engaged in arm's length negotiations concerning the settlement of the Proofs of Claim and the causes of action being asserted against the Settling Defendants in the Litigation and reached the agreements set forth herein; and

WHEREAS, the Named Plaintiffs and Plaintiffs' Counsel have concluded that a settlement with the Settling Defendants as stated herein will be fair, just, equitable, reasonable, adequate, and in the best interests of the Kessler Class Claimants based upon their investigation, study, negotiations and discovery taken in the Litigation, and taking into account the contested issues involved, the expense and time necessary to prosecute the Litigation against the Settling Defendants through trial and/or an appeal, the uncertainties of complex litigation, the benefits to be received pursuant to this Settlement, the collectability from Settling Defendants to satisfy a judgment, and the complexities and issues raised by and in the Bankruptcy Cases; and

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1 The Supplemental Term Sheet provided as follows: " . . . the obligations of the Kessler Class Claimants under the Plan Support Agreement and the Term Sheets are conditioned on (i) reaching agreement with the Debtors and the Creditors' Committee on or before June 10, 2013 with respect to the allowed amount of the Kessler Class Claim, (ii) reaching written agreement with the Debtors and the Creditors' Committee on or before June 24, 2013 with respect to other terms of settlement to be embodied in a settlement agreement, (iii) obtaining preliminary Bankruptcy Court approval under Rules 9019 and 7023 of the proposed settlement agreement on or before the date of the hearing on the Disclosure Statement, and (iv) obtaining final approval under Rule 9019 and Rule 7023 of such settlement agreement as part of the Plan confirmation process."

By agreement, the Parties extended the dates to reach agreement with respect to the allowed amount of the Kessler Class Claim to June 20, 2013 and reaching a written agreement to June 27, 2013.

WHEREAS, the Settling Defendants and other Debtors have concluded that (i) the Allowed Claim Amount is a reasonable settlement amount given Settling Defendants' potential liability, and (ii) it is in the best interests of the Debtors, their bankruptcy estates and their creditors to settle the claims asserted against them in the Litigation, including the Proofs of Claim, on the terms and conditions set forth herein for the purpose of (A) avoiding the burden, significant expense, inconvenience, delay and uncertainty of continuing litigation, (B) obtaining the releases provided for herein, (C) putting to rest all controversies that have been or could be raised against the Settling Defendants in the Litigation and/or on appeal, and (D) facilitating the confirmation and consummation of the Plan that will benefit all of the Debtors' estates and all of their creditors; and

WHEREAS, the Parties acknowledge and agree that this Agreement constitutes a compromise in settlement of the claims (including the Proofs of Claim) and causes of action that have been or could be raised by any Kessler Class Claimant against the Settling Defendants and the other Released Persons (as defined herein) as to the CBNV/GNBT Loans (as defined herein) but shall in no way release or affect (except as set forth herein) the existing or future claims, causes of action, remedies, and/or rights to relief of any Kessler Class Claimant against any person, association, or entity other than a Released Person with respect to the CBNV/GNBT Loans.

NOW THEREFORE, the undersigned parties, each intending to be legally bound and acknowledging the sufficiency of the consideration and undertakings set forth herein, do hereby agree, subject to approval of the Court of this Agreement, that the Litigation and the Released Claims (as defined herein) against the Released Persons as defined herein, are finally and fully compromised and settled and that the claims of the Kessler Class Members against the Released

Persons shall be dismissed with prejudice as against the Released Persons as follows:

**1. Denial of Liability; No Admissions**

The Parties are entering into this Agreement for the purpose of resolving vigorously disputed claims that have arisen between them and in the interest of avoiding the burdens, expense, and risk of further litigation. By entering into any preliminary settlement discussions, agreeing to the terms of this Agreement, or seeking the approval of this Settlement, the Parties are not making any admissions or concessions whatsoever with respect to any claims or defenses alleged or asserted, or any factual or legal assertions in the Litigation. Neither this Agreement nor any of its terms or provisions nor any of the negotiations between the Parties or their counsel nor any papers filed in support of the Settlement shall be construed as an admission or concession by any of the Parties or their counsel of anything whatsoever, including but not limited to: any alleged violation or breach of contract or duty, any alleged fraud, misrepresentation or deception; any alleged violation of any federal, state, or local law, rule, regulation, guideline or legal requirement (or any other applicable law, rule, regulation, guideline or legal requirement); any alleged conduct that could be or has been asserted as the basis for damages or sanctions; the merits of any defenses that the Settling Defendants asserted; or the propriety of class certification of the Kessler Settlement Class if the Litigation were to be litigated rather than settled. The Parties expressly agree that, in the event the Settlement does not become final and effective in accordance with Section 14 hereof, no Party shall use or attempt to use any conduct or statement of any other Party in connection with this Agreement, or any effort to seek approval of the Agreement, to affect or prejudice any other Party's procedural or substantive rights in any ensuing litigation, including any appeal. Neither this Agreement and its terms and provisions nor any papers filed in support of the Settlement shall be offered or

received as evidence in any action or proceeding to establish: (a) any liability or admission on the part of the Settling Defendants or their parent or subsidiary or affiliated companies or their attorneys, or to establish the existence of any condition constituting a violation of or non-compliance with any federal, state, local or other applicable law, rule, regulation, guideline or other legal requirement or any condition that has been or could be asserted as the basis for damages or sanctions; (b) the truth or relevance of any fact alleged in the Litigation; (c) the existence of any class alleged in the Litigation; (d) the propriety of class certification; (e) the validity of any claim or defense that has been or could have been asserted in the Litigation or in any other litigation; (f) that the consideration to be given to the Kessler Settlement Class Members hereunder represents the amount that could be or would have been recovered by any such persons if the claims against Settling Defendants were litigated; or (g) the propriety of class certification in any other proceeding or action. Except as is provided herein, the Parties expressly reserve all procedural and substantive rights and defenses to all claims and causes of action and do not waive any such rights or defenses in the event that the Agreement is not approved for any reason.

## 2. Definitions

As used in this Agreement, the following terms shall be defined as set forth below:

2.1 **Allocation Counsel.** "**Allocation Counsel**" means the separate counsel that shall be retained to represent each of the two (2) proposed Sub-Classes described at Paragraph 3(a) of this Agreement. Allocation Counsel shall represent the proposed sub-classes, respectively, solely for the purpose of negotiating and resolving the allocation proposal that is described at Paragraph 6(c)(ii) of this Agreement.

2.2 **Allowed Claim.** "**Allowed Claim**" means an allowed unsecured claim not

subject to subordination in the amount of $300,000,000.00, against RFC only, which amount shall sometimes also be referred to herein as the "**Kessler Settlement Amount**" and the "**Kessler Allowed Claim**."

2.3 **Borrower Claims Trust.** "**Borrower Claims Trust**" means that trust established and funded as part of the Plan for the benefit of the holders of Borrower Claims (as such term is defined in the Plan).

2.4 **CBNV/GNBT Loan.** "**CBNV/GNBT Loan**" means any loan from Community Bank of Northern Virginia or Guaranty National Bank of Tallahassee described in the definition of the Kessler Settlement Class in Section 3a below.

2.5 **Class Counsel**. "**Class Counsel"** means Plaintiffs' Counsel, Walters Bender Strohbehn & Vaughan, P.C., 2500 City Center Square, 1100 Main Street, Kansas City, Missouri 64105 and Carlson Lynch LTD, PNC Park, 115 Federal Street, Suite 210, Pittsburgh, Pennsylvania, 15212.

2.6 **Class Mail Notice**. "**Class Mail Notice**" means a document in a form substantially the same as that attached hereto as **Exhibit A**.

2.7 **Court.** "**Court**" means the United States Bankruptcy Court for the Southern District of New York presiding over the Bankruptcy Cases.

2.8 **Effective Date**. The "**Effective Date**" of this Agreement means the date when all of the conditions set forth in Section 14 have occurred and the Settlement thereby becomes effective in all respects.

2.9 **Final Approval Order**. "**Final Approval Order**" means an order of the Court in a form substantially the same as that attached hereto as **Exhibit C**, finally approving this Agreement and the Settlement pursuant to Bankruptcy Rules 9019 and 7023, which must be

entered no later than the date of entry of the order confirming the Plan ("**Confirmation Order**") but in any event not earlier than 100 days after the date the Settling Defendants and the Named Plaintiffs jointly file the Motion to Approve.

2.10 **Final Hearing Date**. **"Final Hearing Date**" means the date set by the Court for the hearing on final approval of the Settlement, which shall be on or before the date of the hearing on confirmation of the Plan ("**Confirmation Hearing**").

2.11 **Insurance Rights. "Insurance Rights**" means any and all of the Debtors' rights, titles, privileges, interests, claims, demands, or entitlements to any proceeds, payments, causes of action, and choses in action under, for, or related to the Policies with respect to a particular item of loss under the Policies, including the rights (1) to recover insurance proceeds for an item of loss covered under the Policies and (2) to recover from the insurers that issued the Policies for breach of contract or breach of other duty or obligation owed by such insurer under the Policies, as applicable, including the duty to settle, together with any extra contractual or tort claim arising therefrom, including bad faith, breach of implied covenant of good faith and fair dealing, fraud, or violation of any statutory or common law duty owed by the insurer under the Policies, as applicable, and all with respect to a particular item of loss under the Policies.

2.12 **Kessler Class Claimants/Kessler Settlement Class.** "**Kessler Class Claimants** and "**Kessler Settlement Class**" shall have the meaning set forth in Section 3(a) below.

2.13 **Kessler Gross Recovery**. "Kessler Gross Recovery" means the gross amount of any distribution to or for the benefit of the Kessler Settlement Class received from any source pursuant to the Plan, including the Borrower Trust or the Policies.

2.14 **Kessler Net Recovery**. "**Kessler Net Recovery**" means the Kessler Gross Recovery less: (a) the amount of any litigation expenses and/or costs approved by the Court and

awarded to Plaintiffs' Counsel; (b) the amount of any incentive award approved by the Court and paid to the Named Plaintiffs; (c) any interest earned and attributable to these awards, respectively, while on deposit awaiting distribution ("**in escrow**"); and (d) any expenses of administration incurred since the inception of the Qualified Settlement Fund (defined in Section 6(c) herein) as well as those costs associated with administering the Kessler Net Recovery Distribution.

2.15 **Kessler Net Recovery Distribution**. "**Kessler Net Recovery Distribution**" means the Kessler Net Recovery less: (a) the proportionate share of any amount of any awards for attorneys' fees or attorney compensation approved by the Court and awarded to Plaintiffs' Counsel and (b) any interest earned and attributable to the amount of such awards while in escrow; and (c) a Giveback, if any.

2.16 **Kessler Settlement Class Member**. "**Kessler Settlement Class Member**" means a member of the Kessler Settlement Class, who does not timely opt out of the Settlement pursuant to Section 11 below.

2.17 **Kessler Settlement Class Member Payment**. "**Kessler Settlement Class Member Payment**" means a Kessler Net Recovery Distribution payment to the respective Kessler Settlement Class Member(s) pursuant to the Settlement plus any interest earned and attributable to such sum while in escrow.

2.18 **Named Plaintiffs**. "**Named Plaintiffs**" means the individuals asserting the class claims in the Bankruptcy Cases as follows: Rowena Drennen, Flora Gaskin, Roger Turner, Christie Turner, John Picard and Rebecca Picard, and any person(s) claiming by, through and/or under them.

2.19 **Plan.** "**Plan**" means the chapter 11 plan to be jointly proposed in the Bankruptcy

Cases by the Creditors' Committee and the Debtors in accordance with the Plan Support Agreement.

2.20 **Plaintiffs' Counsel**. "**Plaintiffs' Counsel**" means, collectively, Walters Bender Strohbehn & Vaughan, P.C., 2500 City Center Square, 1100 Main Street, Kansas City, Missouri 64105 and Carlson Lynch LTD, PNC Park, 115 Federal Street, Suite 210, Pittsburgh, Pennsylvania, 15212.

2.21 **Policies. "Policies**" means insurance policies issued under the General Motors Combined Specialty Insurance Program 12/15/00-12/15/03 (policy numbers listed at **Exhibit E**).

2.22 **Preliminary Approval Order**. "**Preliminary Approval Order**" means an order of the Court preliminarily approving the Settlement, conditionally and preliminarily certifying a class for settlement purposes, directing the issuance of a class notice and scheduling a settlement hearing in accordance with Bankruptcy Rule 7023, in a form substantially similar to that attached hereto as **Exhibit B**.

2.23 **Proofs of Claim**. "**Proofs of Claim**" mean the proofs of claims filed by the Named Plaintiffs in the Bankruptcy Cases against RFC, GMAC Mortgage, LLC, Residential Capital, LLC and GMAC-RFC Holding Company, LLC and designated as claims nos. 2110, 2117, 2254 and 5596, respectively, in the Debtors' Official Claims Register.

2.24 **Releasors**. "**Releasors**" means the Named Plaintiffs and all other Kessler Settlement Class Members, and each of their respective heirs, executors, administrators, assigns, predecessors, and successors, and any other person claiming by or through any or all of them. The Releasors shall not include any of the following: (a) any member(s) of the Kessler Settlement Class who opts out of the Settlement in accordance with Section 11 below; and (b) any person(s) whom RFC fails to identify as a member of the RFC Settlement Class on **Exhibit**

**D**.

2.25 **Released Claims**. "Released Claims" means any and all claims (including the Proofs of Claim), demands, actions, causes of action, rights, offsets, setoffs, suits, damages, lawsuits, liens, costs, surcharges, losses, attorneys' fees, expenses or liabilities of any kind whatsoever, in law or in equity, for any relief whatsoever, including monetary, injunctive or declaratory relief, rescission, general, compensatory, special, liquidated, indirect, incidental, consequential or punitive damages, as well as any and all claims for treble damages, penalties, attorneys' fees, costs or expenses, whether known or unknown, alleged or not alleged in the Litigation, the Proofs of Claim or in any proofs of claim filed by a Kessler Class Member in the Bankruptcy Cases, suspected or unsuspected, contingent or vested, accrued or not accrued, liquidated or unliquidated, matured or unmatured, that arise out of the CBNV/GNBT Loans, including any claims against the Released Persons arising out of the handling, preservation, impairment, or otherwise related to any insurance coverage or other Insurance Rights under the Policies or contractual indemnification related to the CBNV/GNBT Loans, and that any of the Releasors have had, or now have, from the beginning of time up through and including the Effective Date against the Released Persons ("**Claims**"), including: (1) allegations that were or could have been asserted against the Released Persons in the Litigation in any way relating to a CBNV/GNBT Loan; and (2) any activities of the Released Persons with respect to a CBNV/GNBT Loan, including any alleged representations, misrepresentations, disclosures, incorrect disclosures, failures to disclose, acts (legal or illegal), omissions, failures to act, deceptions, acts of unconscionability, unfair business practices, breaches of contract, usury, unfulfilled promises, breaches of warranty or fiduciary duty, conspiracy, excessive fees collected, or violations of any consumer protection statute, any state unfair trade practice statute,

or any other body of case, statutory or common law or regulation, federal or state, including TILA, HOEPA, RESPA, RICO (and, respectively, in each case, their implementing regulations). It is the intention of the Releasors to provide a general release of the Released Claims against the Released Persons; provided, however, that anything in this Agreement to the contrary notwithstanding, the term Released Claims does not include: (A) the claims of the Kessler Class Claimants, whether or not currently asserted in the Litigation, against (1) PNC Bank as successor to Community Bank of Northern Virginia or the FDIC as receiver of Guaranty National Bank of Tallahassee, (2) the insurers that issued the Policies listed in **Exhibit E**, or (3) any other person, association or entity other than the Released Persons in connection with the CBNV/GNBT Loans; or (B) any and all claims for indemnification or contribution that RFC might otherwise have against PNC Bank as successor to Community Bank of Northern Virginia or the FDIC as receiver of Guaranty National Bank of Tallahassee.

2.26 **Released Persons**. "**Released Persons**" means the Settling Defendants and the Debtors, and each of their past and present officers, directors, shareholders, employees, attorneys (including any consultants hired by counsel), accountants, heirs, executors, and administrators, and each of their respective predecessors, successors, and assigns. Notwithstanding anything in this Agreement to the contrary, the term Released Persons **expressly does not include any of the following**: (a) PNC Bank, as successor in interest to Community Bank of Northern Virginia; (b) the FDIC, as receiver of Guaranty National Bank of Tallahassee; (c) insurers or successors to insurers that issued the Policies as listed in **Exhibit E**; or (d) any other person, association or entity other than a Released Person.

2.27 **Settlement.** "**Settlement"** means the compromise and settlement memorialized by this Agreement.

2.28 **Settling Defendants' Counsel**. "**Settling Defendants' Counsel**" means Morrison & Foerster LLP, 1290 Avenue of the Americas, New York, New York, 10104 and Bryan Cave LLP, 560 Mission Street, 25th Floor San Francisco, CA 94105.

2.29 **Settlement Hearing**. "**Settlement Hearing**" means the hearing on final approval of the Settlement under Bankruptcy Rules 7023 and 9019, which must occur on or before the date of the Confirmation Hearing.

**3. Certification of the Kessler Settlement Class**

a. The Parties shall jointly file a motion with the Court pursuant rules 7023 and 9019 of the Federal Rules of Bankruptcy Procedure (the "**Motion to Approve**"), which shall request, among other things, that the Court approve the Settlement for a class of persons for purposes of settlement only (referred to and defined herein as the "**Kessler Settlement Class**" and also the "**Kessler Class Claimants"**), defined as follows:

> All persons who obtained a second or subordinate, residential, federally related, non-purchase money, HOEPA qualifying mortgage loan from Community Bank of Northern Virginia or Guaranty National Bank of Tallahassee that was secured by residential real property used as their principal dwelling and that was assigned to GMAC-Residential Funding Corporation n/k/a Residential Funding Company, LLC, who was not a member of the class certified in the action captioned Baxter v. Guaranty National Bank, et al., Case No. 01-CVS-009168 in the General Court of Justice, Superior Court Division of Wake County, North Carolina.
>
> Equitable Tolling Sub-Class shall mean: All persons who meet the above class-definition, whose loan closed prior to May 1, 2000.
>
> Non-Equitable Tolling Sub-Class shall mean: All persons who meet the above class-definition, whose loan closed after May 1, 2000.

b. Subject to the provision of section 9(a), a list of all members of the Kessler Settlement Class that is apparent from Debtors' reasonable review of available information contained within Debtors' electronic data warehouse records is attached hereto as **Exhibit D;**

however, the Parties shall seek authority from the Court to have the contents of **Exhibit D** filed under seal with the Court to protect the privacy of the names and addresses of the members of the Kessler Settlement Class.

c. The Settling Defendants' motion also shall request the Court rule on the reasonableness of the Kessler Settlement Amount. All motions filed pursuant to this provision will be served upon the insurers that issued the Policies in a manner consistent with the relevant federal rules, orders of the Court and the terms of the Preliminary Approval Order.

d. If this Agreement is not approved by the Court pursuant to the proposed Final Approval Order, or if for any reason this Settlement fails to become effective pursuant to Section 14 of this Agreement, the conditional settlement class certification provided herein, the Settlement and any action(s) taken or to be taken in connection therewith, including but not limited to any papers filed in support of the Settlement, shall be terminated and shall become null and void and have no further force or effect, the Preliminary Approval Order shall be vacated, the Parties shall be restored to their respective positions existing prior to the execution of this Agreement, and the Parties' rights and obligations with respect to the use of this Agreement, the Settlement contemplated hereby, and any papers filed in support of the Settlement shall be subject to Sections 1 and 15 hereof. In such case, or if this Agreement shall terminate or the settlement embodied herein does not become effective for any reason, the Agreement and all negotiations, court orders, and proceedings relating thereto and papers filed in support thereof shall be without prejudice to the rights of the Parties, and each of them, who shall be restored to their respective positions existing prior to the execution of this Agreement. In addition, and in such event, evidence relating to the Agreement, all negotiations, and papers filed in support of the Settlement shall not be discoverable or admissible in the Litigation or otherwise.

4. **Allowed Claims.** The Plan shall provide that the Kessler Settlement Class shall have the Allowed Claim as provided in Section 2.1 herein and in accordance with the PSA. In addition to the Allowed Claim for distribution purposes under the Plan, members of the Kessler Settlement Class shall be entitled, upon preliminary approval of the Agreement by the Bankruptcy Court, to the Allowed Claim for the purpose of voting on the Plan. In addition, Proofs of Claim Nos. 2117, 2254 and 5596 filed against Residential Capital, LLC, GMAC-RFC Holding Company, LLC and GMAC Mortgage, LLC, respectively, shall be deemed expunged in their entirety on the Effective Date along with any proof of claim filed by a Kessler Settlement Class Member to the extent that it relates to a Released Claim without further act of the Debtors or an order of the Court.

**5. Policies**

a. The sole source of recovery of the Kessler Settlement Class shall be distributions from the Borrower Claims Trust and Insurance Rights under the Policies and not from any other assets or property of the Settling Defendants, Released Persons or any other Debtor, or, as established under the Plan, the Liquidating Trust (as defined in the PSA) or the Private Securities Claims Trust (as defined in the PSA).

b. On the Effective Date, the Debtors shall convey, transfer, and assign their rights to the Insurance Rights to (i) the Kessler Settlement Class with respect to indemnity for the Kessler Settlement Amount and (ii) the Liquidating Trust with respect to: (a) costs, charges and expenses incurred with respect to the Litigation, including such costs, charges, expenses (including legal fees and expenses) incurred in defending the Litigation in the Bankruptcy and defending the Litigation of all Claims against RFC related to the CBNV/GNBT loans, including those cases consolidated in *In Re Community Bank of Northern Virginia Second Mortgage*

*Lending Practice Litigation*, MDL No. 1674, U.S. District Court for the Western District of Pennsylvania Case Nos. 03-0425, 02-01201, 05-0688, 05-1386; (b) costs, charges, and expenses incurred with respect to that certain class action styled *Steven and Ruth Mitchell v. Residential Funding Company, LLC, et al*., Circuit Court of Jackson County, Missouri Case No. 03-CV220489-01 ("**Mitchell Class Action**"); (c) any damages, judgments, settlements, costs, charges and expenses previously paid or agreed to be paid by Debtors with respect to the Mitchell Class Action, including compensatory damages, punitive damages, interest and attorneys' fees; and (d) any damages, judgments, settlements, costs, charges and expenses previously paid by Debtors with respect to: *Shokere, et al. v. Residential Funding Company, LLC, et al.*, Circuit Court of Jackson County, Missouri Case No. 1116-CV30478, *Baker, et al. v. Century Financial Group, Inc., et al.*, Circuit Court of Clay County, Missouri Case No. CV100-4294CC, *Couch, et al. v. SMC Lending, Inc., et al.*, Circuit Court of Clay County, Missouri Case No. CV100-4332CC, *Gilmor, et al. v. Preferred Credit Corporation, et al*., U.S. District Court for the Western District of Missouri Case No. 4:10-CV-00189-ODS, and *Beaver, et al. v. Residential Funding Company, LLC, et al*., Circuit Court of Jackson County, Missouri Case No. 00CV215097-01. The Debtors reserve the right to enter into an agreement with the class members in the Mitchell Class Action in connection with the unpaid prior Mitchell settlement agreement that may include an assignment of Insurance Rights under the Policies with respect to the Mitchell settlement amount. In the event of such agreement with the Mitchell class, such agreement will include provisions similar to Sections 5(c) and 5(d), addressing cooperation with the Parties and treatment of insufficient insurance funds to pay for valid claims, and the Parties agree that the provisions and their obligations in Sections 5(c) and 5(d) of this Agreement shall also extend to the assignee of such Insurance Rights.

c. The Parties acknowledge that the proceeds under the Policies may be insufficient to pay the full value of all of the insurance claims listed in Section 5 of this Agreement. The Liquidating Trust shall be entitled to recover sixty million dollars ($60,000,000) of Policy proceeds without any proration between the Parties. If the Liquidating Trust obtains judgments or settlements of Policy proceeds that total in excess of sixty million dollars ($60,000,000) (the amount in excess of $60,000,000 hereafter referred to as the "**Liquidating Trust Excess Recovery**"), which when added to the amounts of insurance proceeds recovered by the Kessler Settlement Class obtained by judgments or settlements (hereafter referred to as the "**Kessler Recovery**") (the sum of the Liquidating Trust Excess Recovery and the Kessler Recovery together hereafter referred to as the "**Recovery Sum**"), exceeds the remaining three hundred forty million dollars ($340,000,000) in Policy limits, then those recoveries of proceeds will be prorated as follows: The Liquidating Trust's share of the remaining three hundred forty million ($340,000,000) in Policy limits shall be the fraction that the Liquidating Trust Excess Recovery bears to the Recovery Sum, and the Kessler Settlement Class's share of the remaining three hundred forty million ($340,000,000) in Policy limits shall be the fraction the Kessler Recovery bears to the Recovery Sum.

d. The Plan shall provide that the Kessler Settlement Class and the Debtors and their successors and assigns including the Liquidating Trust shall cooperate with each other in good faith to coordinate the prosecution of their respective Insurance Rights and shall use reasonable efforts not to prejudice the others' Insurance Rights provided that nothing in this provision shall require either the Liquidating Trust or the Kessler Settlement Class to undertake any efforts that would materially adversely affect the position of the cooperating party. Such cooperation shall include cooperating by bringing any insurance coverage action in a combined action or

proceeding to the extent necessary to avoid insurance company defenses based on splitting of a cause of action through partial assignment. Each assignee of Insurance Rights shall bear its own costs and expenses in pursuing recovery on the rights assigned to it. Each party shall have sole settlement authority with respect to its claims.

e. To the extent the Kessler Settlement Class recovers under Insurance Rights on account of all or some of their claims, the Kessler Settlement Class shall return a proportionate amount (such proportionate amount determined by dividing the recovery amount under the Insurance Rights by the Allowed Claim) of any prior distributions from the Borrower Claims Trust Assets made on account of any recoveries of the Kessler Settlement Class from the Borrower Claims Trust (the "**Giveback**"). The Kessler Settlement Class shall be entitled to its proportionate share of any distributions from the Borrower Trust resulting from the Giveback. No Kessler Net Recovery Distribution shall be made from proceeds recovered from the Insurance Rights unless and until a Giveback, if any, owed to the Borrower Claims Trust has actually been made.

f. The Kessler Settlement Class and the Liquidating Trust take on all risk of recovery or lack thereof (including non-collectability), on the Insurance Rights. The assignment of the Insurance Rights under the Policies is without recourse or warranty with respect to actual recovery on such assigned rights. The lack of recovery on the Insurance Rights by the Kessler Settlement Class or the Liquidating Trust, as applicable, shall not create any rights of recovery against any Debtor, Released Person or Settling Defendant. To avoid any doubt, there shall be no claims upon the Debtors, Released Persons, or Settling Defendants based upon the failure to recover insurance proceeds or other Insurance Rights or the recovery of only a limited amount of insurance proceeds or other Insurance Rights, even in such instances where the Debtor, Released

Person, or Settling Defendants' own past conduct is what precludes or limits the recovery or such instance where the assignments embodied in this Agreement are found to be invalid for any reason.

g. A separate written agreement, in form and substance reasonably satisfactory to the Debtors, the Creditors' Committee and Plaintiffs' Counsel, shall be executed by the trustee of the Liquidating Trust and the Kessler Settlement Class on the Effective Date, memorializing the cooperation and other obligations of the Liquidating Trust and the Kessler Settlement Class with respect to the Policies (the "**Cooperation Agreement**"). The Cooperation Agreement will be filed as part of the Plan Supplement (as defined in the PSA).

**6. Administration of Distributions to Kessler Class Claimants**

a. Plaintiffs' Counsel, subject to such supervision and direction of the Court as may be appropriate or necessary, shall be responsible for and shall administer and oversee the distribution to the Kessler Class Claimants of any funds distributed to or for the benefit of the Kessler Class Claimants, whether received from the Borrower Trust, from Insurance Rights with respect to the Policies, or any other source, and any and all costs associated with allocating and administering the distribution to the Kessler Class Claimants shall be borne by the Kessler Class Claimants and deducted from the Kessler Gross Recovery.

b. The Debtors shall provide to Plaintiffs' Counsel copies (in an electronic format) of mutually agreed upon electronic data from the data warehouse with respect to all CBNV/GNBT Loans of the Kessler Settlement Class Members identified in **Exhibit D**. Such electronic data from the data warehouse shall be provided at the expense of the Debtors. To the extent that loan files and electronic loan histories with respect to CBNV/GNBT Loans of the Kessler Settlement Class Members identified in Exhibit D exist within Debtors' possession and

control, Debtors shall not destroy such loan files and electronic loan payment histories without reasonable prior notice to Plaintiffs' Counsel, and will provide Plaintiffs' Counsel with reasonable access to such loan files and electronic loan payment histories, which shall be obtained at the expense of Plaintiffs' Counsel.

c. The Kessler Net Recovery Distribution (as defined in Section 2.14) will be apportioned and allocated to the Kessler Settlement Class Members by way of an individual Kessler Settlement Class Member Payment (as defined in Section 2.15). This allocation will be done by (i) First, computing the individual damages for each Kessler Settlement Class Member in the manner set forth below; (ii) Second, by applying the ___ discount described below for loans that closed before May 1, 2000; (iii) Third, computing the pro rata share or percentage for each Kessler Settlement Class Member Payment by dividing the individual damages for each Kessler Settlement Class Member by the total of all individual damages for the entire Kessler Settlement Class; and (iv) Fourth, determining each Kessler Settlement Class Member Payment by multiplying the Kessler Net Recovery Distribution by the pro rata share or percentage of such Kessler Settlement Class Member, all in the manner set forth below:

(i) **Computing the individual damages for each Kessler Settlement Class Member:** The two (2) material components of damages for the RESPA, TILA/HOEPA and RICO claims are the settlement fees and the interest paid on the loan. The individual Kessler Settlement Class Member damages will be comprised of the sum of: (a) the estimated settlement fees paid with respect to such loan and (b) the actual amount of interest paid with respect to such loan.

(a) The estimated settlement fees paid with respect to each loan will be based on a sample of approximately four hundred loans from among the Kessler

Settlement Class for which Class Counsel has settlement fee data. That sample will be analyzed by an expert to estimate settlement fees for each individual loan based on loan and fee data variations that the expert determines are material in order to reasonably estimate the fees for each loan. That estimate will consider the original loan amount for each Kessler Settlement Class Member's loan as well as other data. .

(b) The actual amount of interest paid on the individual Kessler Settlement Class Member loans will be based upon the loan payment records and data of each Kessler Settlement Class Member through the current date as provided by the Settling Defendants.

(ii) **Discount for loans that closed before May 1, 2000.** For loans closed before May 1, 2000, the individual damages will be reduced by _____ to reflect the fact that the RESPA and TILA/HOEPA claims on loans preceding that date are subject to a statute of limitations defense and are timely only after application of the legal doctrine of equitable tolling. The specific allocation proposal shall be negotiated by Allocation Counsel in a mediation to occur in advance of the filing of the Motion for Preliminary Approval of this Agreement.

(iii) **Determining each Kessler Settlement Class Member Payment:** The individual damages of each Kessler Settlement Class Member will then be divided by the total amount of damages of the entire Kessler Settlement Class to determine a proportion or ratio of the total settlement proceeds attributable to each Kessler Settlement Class Member. For each Kessler Settlement Class Member, the ratio will be applied to determine each Kessler Settlement Class Member's proportionate share of each Kessler Net Recovery Distribution and the amount of each Kessler Settlement Class Member Payment.

d. The above allocation proposal, as it may be modified, will be reviewed by Special

Borrowers' Counsel to the Creditors' Committee, SilvermanAcampora, LLP, 100 Jericho Quadrangle, Suite 300, Jericho, New York 11753 ("**Special Borrowers' Counsel**") for reasonableness, and said allocation may be subsequently modified. Plaintiffs' Counsel shall cooperate with any reasonable requests for information from Special Borrowers' Counsel. Special Borrowers' Counsel shall perform such investigation, review and analysis as Special Borrowers' Counsel believes necessary in order to render an opinion. Such opinion shall be provided in the form of a declaration and filed as part of or contemporaneously with the filing of the Motion to Approve.

e. Any funds received by or for the benefit of the Kessler Settlement Class shall be deposited in an account at a bank selected by Plaintiffs' Counsel (such funds, collectively, the "**Qualified Settlement Fund**"). Class Counsel shall establish the Settlement Fund on or before the receipt of any funds. The Parties intend that this account will qualify as a Qualified Settlement Fund under Section 468B of the Internal Revenue Code of 1986, as amended (the "**Code**"), that the Qualified Settlement Fund shall be established, operated and managed in accordance with Treasury Regulations Sections 1.468B-1 to 1.468B-5, and that all transfers of cash or property to or from the Qualified Settlement Fund shall be made in compliance with such Treasury Regulations. The Parties agree that the Borrower Claims Trust, Debtors, Liquidating Trust, or insurers under the Policies, as the case may be, are the respective transferors (each, respectively, to the extent of any transfer by it, a "**Transferor**") of any of the respective payments made by them respectively to or for the benefit of the Kessler Settlement Class within the meaning of 26 CFR §1.468B-1(d)(1). The Settlement Fund Administrator designated pursuant to the Plan of Allocation ("**Administrator**") shall make all payments required to be made to Class Counsel, the Named Plaintiffs, and Kessler Settlement Class Members pursuant to

the terms of this Agreement, pay all taxes imposed on the income of the Qualified Settlement Fund, and arrange for the preparation and filing of all tax reports, tax forms and tax returns required to be filed by the Qualified Settlement Fund, including all Forms 1099. All taxes on the income of the Qualified Settlement Fund, and all costs and expenses related to the opening, operation, management and closing of the Qualified Settlement Fund, shall be paid solely out of the Qualified Settlement Fund and shall be considered a cost of administration. All distributions from the Qualified Settlement Fund shall be made by the Administrator in accordance with the terms of this Agreement. Settling Defendants have no responsibility for or liability with respect to the investment, allocation, or distribution of funds of the Qualified Settlement Fund; the determination, administration, calculation, or payment of claims or distributions from the Qualified Settlement Fund; the payment or withholding of any taxes or the filing of any tax returns, forms, or notices with respect to the income of or distributions from the Qualified Settlement Fund. Any Transferor shall supply to the Administrator the statement described in Treasury Regulation Section 1.468B-3(e)(2), 26 C.F.R. § 1.468B-3(e)(2), no later than February 15th of the year following each calendar year in which a Transferor makes a transfer to the Qualified Settlement Fund. The Administrator, subject to such supervision and direction of the Plaintiffs' Counsel and the Court as may be necessary, shall be solely responsible for and shall administer and oversee the distributions to the Kessler Settlement Class.

f. If any member of the Kessler Settlement Class timely opts out and excludes themselves from the Settlement, such member shall no longer be a Kessler Settlement Class Member and distributions that would otherwise be made to such member shall be reallocated to the Kessler Settlement Class Members pro rata. Plaintiffs' Counsel, together with the Administrator, shall calculate the Kessler Class Net Recovery and the Kessler Class Net

Distribution and distribute the Kessler Class Net Distribution, plus any interest earned, to the Kessler Settlement Class Members (i.e., those members of the Kessler Settlement Class, if any, who did not timely opt out) in amounts calculated in accordance with the Plan of Allocation or as the Court may otherwise determine and approve. Plaintiffs' Counsel and the Administrator shall distribute the Kessler Settlement Class Member Payments to the Kessler Settlement Class Members within a reasonable time after receipt of any amount that Plaintiff's Counsel and the Administrator determine to be a sufficient amount to justify the time and expense of calculating and making a distribution. Any returned checks will be re-mailed to any new address disclosed. To the extent any check is returned without any new address disclosed or a second time, Plaintiffs' Counsel shall undertake reasonable efforts to locate a current address for such Kessler Settlement Class Member. If any Kessler Settlement Class Member refuses to accept receipt of a Kessler Settlement Class Member Payment check, or does not cash a Kessler Settlement Class Member Payment check within sixty (60) days of receipt, Plaintiffs' Counsel shall undertake reasonable efforts to locate and/or contact the Kessler Settlement Class Member and inquire about receiving and/or cashing the check. A Kessler Settlement Class Member's right to a settlement payment pursuant to this Agreement is a conditional right that terminates if a Kessler Settlement Class Member to whom a Kessler Settlement Class Member Payment check is mailed fails to cash his or her check within six months of the date of the check. In such case, the check shall be null and void (the checks shall be stamped or printed with a notice to this effect), and the Parties shall have no further obligation under the terms of this Agreement to make payment to such Kessler Settlement Class Member. Within 210 days of the date of mailing of the final Kessler Net Distribution, Counsel shall file a report with the Court confirming that the entirety of the Kessler Net Distributions and related Kessler Settlement Class Member Payments were

distributed to the Kessler Settlement Class Members and checks cashed or, if such a confirmation cannot be provided, outlining the steps that remain to distribute any unclaimed portion of the Kessler Net Distribution. Plaintiffs' Counsel shall reallocate the amounts of any unclaimed or uncashed checks to the paid Kessler Settlement Class Members pro rata based on their allocable share of their total paid distributions of claimed checks at such time as Plaintiffs' Counsel determines to be appropriate in their sole discretion, but which in any event shall be prior to the expiration of any period of escheatment. If any such reallocation results in an amount that is in Plaintiffs' Counsel's opinion too small to justify the time and expense necessary to distribute to the Kessler Settlement Class Members, then Plaintiffs' Counsel shall file a motion with the Court to distribute such amount to a charity designated by Plaintiffs' Counsel.

g. Kessler Settlement Class Members shall be responsible for any taxes due or any tax liability arising out of any distribution.

h. The Released Persons shall have no responsibility for, interest in, or liability whatsoever with respect to or arising out of the investment, allocation, or distribution of the Settlement Funds, the determination, administration, calculation, or payment of claims, the payment or withholding of taxes, or any losses incurred in connection therewith.

i. Any Kessler Settlement Class Member who receives a payment pursuant to the Settlement shall be solely responsible for distributing or allocating such payment between or among all co-borrowers on his, her, or their CBNV/GNBT Loan, or to any assignees of his or her claim, regardless of whether a payment check has been made out to all or only some of the Kessler Settlement Class Members' co-borrowers and represents and warrants that he, she or they are entitled to receipt of the Kessler Settlement Class Member Payment and has not

assigned by operation of law or otherwise the right to receipt of the Kessler Settlement Class Member Payment. The Kessler Settlement Class Members shall, upon receipt of any Kessler Settlement Class Member Payment, remit the Kessler Settlement Class Member Payment to any person who has received by assignment or operation of law any right, title or interest to or in the Kessler Settlement Class Member Payment.

j. No person shall have any claim against the Released Persons, Plaintiffs' Counsel, the Administrator, or any agent designated pursuant to this Agreement or the Plan of Allocation based upon any distributions made substantially in accordance with this Agreement or any orders of the Court.

**7. Incentive Award and Attorneys' Fees and Costs**

a. The Named Plaintiffs may petition the Court for the payment of an incentive award in a total amount not to exceed $72,500.00 (the "**Incentive Cap**"), which is the sum of the individual amounts set forth on **Schedule 1**, in recognition of services rendered by the remaining named plaintiffs in the MDL Litigation (including the Named Plaintiffs) for the benefit of the Kessler Settlement Class during the Litigation. Any such incentive award shall be in addition to the amount to be paid on such Plaintiffs' individual claims. The amount of any incentive award approved by the Court, and any interest attributable to said amount while in escrow, shall be deducted from the Kessler Gross Recovery to determine the Kessler Net Recovery from which any award of attorneys' fees to Plaintiffs' Counsel shall be deducted before the balance is distributed to the Kessler Settlement Class Members as the Kessler Net Distribution in accordance with the Plan of Allocation. The Settling Defendants and the Committee shall not object to the Named Plaintiffs applying to the Court for and/or receiving an incentive award in the amounts on **Schedule 1**. To the extent the Court approves incentive awards in an amount

less than the Incentive Cap, the difference, and any interest attributable to the amount of the difference, shall be included in and treated as a part of the Kessler Net Recovery.

b. Plaintiffs' Counsel and/or the Named Plaintiffs may petition the Court for an award of reasonable and documented litigation expenses and/or court costs not to exceed one million five hundred thousand dollars ($1,500,000.00). The Settling Defendants and the Committee shall not object to Plaintiffs' Counsel and/or the Named Plaintiffs applying to the Court for, and receiving, an award of expenses and/or costs in the above amount. The amount of any award for litigation expenses and/or costs approved by the Court, and any interest attributable to said amount while in escrow, shall be deducted from the Kessler Gross Recovery to determine the Kessler Net Recovery from which any award of attorneys' fees to Plaintiffs' Counsel shall be deducted before the balance is distributed to the Kessler Settlement Class Members as the Kessler Net Distribution in accordance with the Plan of Allocation. To the extent the Court awards expenses and/or costs in an amount that is less than the not to exceed amount stated above, the difference and any interest attributable thereto, shall be included in and treated as a part of the Kessler Net Recovery. Allocation Counsel shall be paid their respective litigation expenses and costs (the "**Allocation Costs**") as approved by the Court for their representation of the Sub-Classes with respect to the allocation issue. The Allocation Costs shall be included in, paid from and subject to the above referenced not to exceed award of attorney's litigation costs and fees.

c. Plaintiffs' Counsel and/or the Named Plaintiffs may also petition the Court for an award of attorneys' fees not to exceed thirty-five percent (35%) of each Kessler Net Recovery. The amount of any such fee award approved by the Court, and any interest attributable thereto, shall be deducted from the Kessler Net Recovery to determine each Kessler Net Distribution and

the individual Kessler Settlement Class Member Payments. The Settling Defendants and the Committee shall not object to Plaintiffs' Counsel and/or the Named Plaintiffs applying to the Court for, and receiving, an award of attorneys' fees in the above amount. To the extent the Court awards attorneys' fees in an amount that is less than the not-to-exceed amount stated above, the difference and any interest attributable thereto, shall be included in and treated as a part of the Kessler Net Recovery Distribution. Allocation Counsel shall be paid separately for their representation of the Sub-Classes with respect to the allocation issue with said separate payment consisting of a lodestar for their time expended on the negotiation of the allocation proposal (the "**Allocation Fee**"). The Allocation Fee shall be included in, paid from and subject to the above referenced not to exceed award of attorneys' fees.

d. Except as otherwise provided in this Agreement, each Party shall bear its own attorneys' fees, costs, and expenses incurred in the prosecution, defense, or settlement of the Litigation.

**8. Releases**

a. On the Effective Date, in exchange for the agreement by the Settling Defendants to make available and fund the Borrower Claims Trust, to assign the Insurance Rights as set forth herein and for other good and valuable consideration, Releasors, by operation of this Release and the judgment set forth in the Final Order, shall be deemed without further action by any person or the Court (i) to have fully, finally and forever released, settled, compromised, relinquished, and discharged any and all of the Released Persons of and from any and all Released Claims; (ii) to have consented to dismiss with prejudice the Released Claims of the Releasors against the Released Persons in the Litigation; and (iii) to be forever barred and enjoined from instituting or further prosecuting the Released Persons in any forum whatsoever including any state, federal, or

foreign court, or regulatory agency. The Parties agree that the Released Persons will suffer irreparable harm if any Kessler Settlement Class Member takes action inconsistent with this Section 8(a), and that, in such event, the Released Persons may seek an injunction as to such action without further showing of irreparable harm; provided, however, that nothing in the Release under this Agreement shall be deemed to waive or impair the right of the Kessler Settlement Class or any members thereof or the Liquidating Trust to seek and recover for their respective claims under the Policies.

b. The Releasors acknowledge and agree that they are aware that they may hereafter discover material or immaterial facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Releases, but that it is their intention to, and they do hereby, upon the Effective Date of this Agreement, fully, finally and forever settle and release each of the Released Persons from all Released Claims, known or unknown, suspected or unsuspected, accrued or not accrued contingent or matured, which now exist, may hereafter exist, or may heretofore have existed, without regard to the subsequent discovery or existence of such different or additional facts.

c. The Releasors further acknowledge that they may have sustained losses that are presently unknown or unsuspected, that such damages and other losses as were sustained might, but for the releases set forth in this Agreement (the "**Releases**"), have given rise to additional causes of action, claims, demands and/or debts in the future. The Releasors acknowledge that the Releases have been negotiated and agreed upon in light of this realization and, being fully aware of this situation, Releasors intend to release the Released Persons from any and all such unknown claims. The Releases may be pleaded as a defense or as a bar to any action or proceeding which may be brought, instituted or taken with respect to any matters which are in

any way related to the Litigation and/or any claims covered by the Releases. The Releasors waive any benefits that California Civil Code Section 1542 and any other laws, legal decisions, and legal principles of similar effect might provide to them in the future, and agree that the Releases extend to all Released Claims whether known or suspected by the Parties or not, to and including the Effective Date of this Agreement. California Civil Code Section 1542 reads as follows:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

The Releasors acknowledge that the effect of California Civil Code Section 1542 has been explained to them by their own counsel. The Releasors further acknowledge and agree that this waiver of rights under Section 1542 of the Civil Code has been separately bargained for and is an essential term of this Agreement.

d. Subject to Court approval, each Kessler Settlement Class Member shall be bound by this Agreement and all of their claims shall be dismissed with prejudice and released even if they never received actual, prior notice of the Litigation or the Settlement in the form of the Class Mail Notice or otherwise. The Releases and agreements contained in this Section [6] shall apply to and bind all Kessler Settlement Class Members, including those Kessler Settlement Class Members whose Class Mail Notices are returned as undeliverable, and those for whom no current address can be found, if any.

e. The Parties shall use their reasonable best efforts to include in the Final Approval Order a bar order that permanently bars, enjoins and restrains: any and all persons and entities (including but not limited to non-settling defendants in the Litigation, their successors or assigns, and any other person or entity later named as a defendant or third party in the Litigation) from

instituting, commencing, prosecuting, asserting or pursuing any claim against any of the Released Parties for contribution or indemnity (whether contractual or otherwise), however denominated, arising out of, based upon or related in any way to the Released Claims or claims and allegations asserted in the Litigation (or any other claims where the alleged injury to the entity/individual is the entity/individual's actual or threatened liability to one or more members of the Kessler Settlement Class), whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, whether asserted in this Court, in any federal or state court, or in any court, arbitration proceeding, administrative agency, or other forum in the United States or elsewhere, and whether such claims are legal or equitable, known or unknown, foreseen or unforeseen, matured or unmatured, accrued or unaccrued. All such claims will be extinguished, discharged, satisfied and unenforceable, subject to a hearing to be held by the Court, if necessary. Any person or entity so barred and enjoined shall be entitled to appropriate judgment reduction, if applicable, in accordance with applicable statutory or common law rule to the extent permitted for the claims alleged herein.

**9. Representations, Stipulations & Covenants**

a. Each of the Settling Defendants represent, warrant and declare that they have acted in good faith and with best efforts in assembling **Exhibit D** and that **Exhibit D** contains a list of borrowers whose Loans were purchased by RFC from CBNV or GNBT, which loans the Debtors believe were HOEPA-qualifying loans when made, and which loans were not part of the class certified in Baxter v. Guaranty National Bank, et al., Case No. 01-CVS-009168 in the General Court of Justice, Superior Court Division of Wake County, North Carolina. The Settling Defendants make no representations, warranties, or declarations regarding the existence or enforceability of contractual indemnification or insurance coverage under the Policies or other

Insurance Rights, or the existence or enforceability of indemnification rights under any agreement between RFC and CBNV and/or GNBT or its successors.

b. Upon the Effective Date, the following stipulations shall be made:

(i) No Privilege Waiver. Each Party stipulates and acknowledges that neither this Agreement nor a Party's decision to negotiate and/or execute the Agreement can be used to show or establish that a Party's conduct during this Litigation, including that of counsel, gives rise to or constitutes a waiver of the attorney-client, common interest or joint defense privilege or work product doctrines.

(ii) Use of Discovery Information. The Parties agree to comply with the terms of the Stipulated Protective Order entered in the MDL Litigation except as the Parties have previously agreed in writing or may hereafter agree in writing.

c. Plaintiffs' Counsel represent and warrant to the Settling Defendants that they have not been retained by any existing client or contacted by any potential client to commence a new lawsuit or pursue any claims or right of relief against the Settling Defendants with respect to any of the Released Claims and that they have not been informed of an intention on the part of any member of the Kessler Settlement Class to opt out of the Settlement. In addition, Plaintiffs' Counsel agree that they will not solicit the right to legally represent any person, including any member or members of the Kessler Settlement Class who opt(s) out of the Kessler Settlement Class and Settlement, with respect to the Released Claims, but this agreement does not (and shall not) in any way prohibit or restrict Plaintiffs' Counsel from undertaking such representation if requested by any such person or persons.

d. The Debtors represent, warrant and declare that, based upon their best efforts review of available information in the Debtors' possession, they believe that the Policies

identified in **Exhibit E** are the only Debtors' insurance policies that could provide coverage for the Debtors' liability to the Kessler Settlement Class.

e. The Debtors covenant and agree that if, before the Effective Date, the Debtors discover any additional insurance policies under which any of the Debtors is an insured and that provide coverage for the Debtors' liability to the Kessler Settlement Class, then they will assign to the Kessler Settlement Class the Insurance Rights under such policies with respect to the liability of the Debtors to the Kessler Settlement Class. The Plan will provide that if, after the Effective Date, the Liquidating Trust discovers any additional insurance policies under which any of the Debtors are an insured and that provide coverage for the Debtors' liability to the Kessler Settlement Class, then the Liquidating Trust will assign to the Kessler Settlement Class the Insurance Rights under such policies with respect to the liability of the Debtors to the Kessler Settlement Class.

**10. Preliminary Approval Order.** On or before July 19, 2013, the Parties shall move before the Court for entry of a Preliminary Approval Order substantially similar to **Exhibit B**, which provides the following:

a. Certifies the proposed Kessler Settlement Class, the Equitable Tolling Sub-Class and the Non-Equitable Tolling Sub-Class pursuant to Bankruptcy Rule 7023 for settlement purposes;

b. Preliminarily approves the Agreement as fair, reasonable and adequate under Bankruptcy Rule 7023 and consistent with bankruptcy needs and concerns, subject to a final determination by the Court;

c. Approves the appointment of the Named Plaintiffs as representatives of the Kessler Settlement Class and any required subclass, approves the appointment of John Picard

and Rebecca Picard as the representatives of the Equitable Tolling Sub-Class, and approves the appointment of Rowena Drennen as the representative of the Non- Equitable Tolling Sub-Class for settlement purposes;

d. Approves the appointment of Plaintiffs' Counsel as counsel for the Kessler Settlement Class and any required subclass approves the appointment of Allocation Counsel for the Equitable Tolling Sub-Class and the Non-Equitable Tolling Sub-Class, respectively, with respect to the allocation for settlement purposes;

e. Directs the Settling Defendants to provide to Plaintiffs' Counsel by no later than three (3) business days after entry of the Preliminary Approval Order the best available listing of the names and addresses of all class members;

f. Approves a form of mailed notice, substantially similar to the Class Mail Notice attached as **Exhibit A**, to be sent to the members of the Kessler Settlement Class;

g. Directs Plaintiffs' Counsel and the Debtors to mail, at Debtors' expense, the Class Mail Notice promptly after entry by the Court of the Preliminary Approval Order to the Kessler Settlement Class by first-class mail to the last known address of such persons;

h. Schedules a hearing on final approval of this Agreement on a date not later than the date of the Confirmation Hearing;

i. Establishes a procedure for members of the Kessler Settlement Class to opt out and setting a date, approximately thirty (30) days after the mailing of the Class Mail Notice, after which no member of the Kessler Settlement Class shall be allowed to opt out of the Kessler Settlement Class;

j. Establishes a procedure for the members of the Kessler Settlement Class to appear and/or object to the Settlement and setting a date, approximately thirty (30) days after the

mailing of the Class Mail Notice, after which no member of the Kessler Settlement Class shall be allowed to object;

k. Provides insurers that issued the Policies with notice of and the opportunity to participate in any hearing regarding preliminary or final approval of the Agreement; and

l. Contains such other and further provisions consistent with the terms and provisions of this Agreement as the Court may deem advisable.

**11. Opt Outs and Objections By Members of the Kessler Settlement Class**

a. Procedure for Opt Outs. The deadline for opt out requests shall be set forth in the Preliminary Approval Order. Any request to opt out must be in writing and must include the name, address, telephone number, and last four digits of the Social Security Number of the class member seeking to opt out and a statement that the class member and all other borrowers named on the class member's promissory note are seeking exclusion. Any opt out request must be personally signed by each person who was a party to the promissory note in connection with the class member's CBNV/GNBT Loan, unless such person is deceased or incompetent. If a party to the promissory note is deceased, an opt out request may be personally signed by the personal representative of the deceased and a copy of the death certificate for such person shall be submitted with the opt out request. If a party to the promissory note is incompetent, the guardian must sign the opt out request. Any opt out request must include a reference to "In re Residential Capital, LLC, Case No. 12-12020(MG)" and be mailed to:

R. Frederick Walters, Esquire
Walters Bender Strohbehn & Vaughan, P.C.
2500 City Center Square
1100 Main Street
Kansas City, MO 64105

R. Bruce Carlson, Esquire
Carlson Lynch, Ltd.

PNC Park
115 Federal Street, Suite 210
Pittsburgh, PA 15212
(on behalf of the Kessler Settlement Class)

-and-

Norman S. Rosenbaum
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104

and

K. Lee Marshall
Bryan Cave LLP
560 Mission Street, 25th Floor
San Francisco, CA 94105
(on behalf of the Settling Defendants)

To be considered timely and effective, any opt out request must be received on or prior to the date established by the Court in the Preliminary Approval Order. No member of the Kessler Settlement Class may opt out by having a request to opt-out submitted by an actual or purported agent or attorney acting on behalf of the class member. No opt out request may be made on behalf of a group of class members. Each member of the Kessler Settlement Class who does not submit an opt out request substantially in compliance with this Section shall be included in the Kessler Settlement Class and deemed a Kessler Settlement Class Member. For purposes of determining timeliness, an opt-out request shall be deemed to have been submitted when received by either Class Counsel or Settling Defendants' Counsel. Class Counsel shall provide to the Court, on or before the date of the Final Approval Hearing, a list of all persons who have timely and adequately filed a request to be excluded from the Settlement.

b. Effect of Opt Outs by Members of the Kessler Settlement Class. If class member opt outs result in the exclusion from the Settlement of 3.0% of the CBNV/GNBT Loans issued to the Kessler Settlement Class Members that would otherwise be included in the Settlement, the

Settling Defendants, in their sole discretion, may rescind this Agreement, in which event each and every obligation under the Agreement shall cease to be of any force and effect, and this Agreement and any orders entered in connection therewith shall be vacated, rescinded, canceled, and annulled. If the Settling Defendants exercise this option, the Parties shall return to the status quo in the Litigation as if the Parties had not entered into this Agreement. In addition, and in such event, this Agreement and all negotiations, court orders, court papers, and proceedings relating thereto, shall be without prejudice to the rights of the Parties, and each of them, and evidence of or relating to the Agreement and all negotiations shall not be admissible or discoverable in the Litigation or otherwise. The Settling Defendants must exercise their option to rescind the Agreement pursuant to this Section 11(b) at least ten (10) business days prior to the Final Hearing Date, by giving written notice of such exercise to Plaintiffs' Counsel.

c. Bankruptcy Trustees. In instances where a member of the Kessler Settlement Class has filed for bankruptcy under Chapter 7 after obtaining his, her, or their CBNV/GNBT Loan, if the member of the Kessler Settlement Class opts out of the Settlement, the Chapter 7 bankruptcy trustee shall be deemed to have opted out of the Settlement. Conversely, if the Chapter 7 bankruptcy trustee opts out of the Settlement, the member of the Kessler Settlement Class shall be deemed to have opted out of the Settlement. If neither the member of the Kessler Settlement Class nor the Chapter 7 bankruptcy trustee opts out of the Settlement, both shall be bound by the Release provisions of Section 8.

d. Procedure for Objections to Settlement. Any member of the Kessler Settlement Class who wishes to object to the Settlement or to the incentive awards or the awards of expenses, costs and/or attorneys' fees must file a written notice of objection, including supporting papers as described further below (hereinafter collectively referred to as the "**Notice**

**of Objection**"), with the Court on or prior to the date established by the Court in the Preliminary Approval Order. For purposes of determining timeliness, a Notice of Objection shall be deemed to have been submitted when received and filed by the Clerk of Court. Copies of the Notice of Objection must also be mailed to the following on or prior to the date established by the Court in the Preliminary Approval Order, which shall be no later than ten (10) days prior to the Final Hearing Date:

R. Frederick Walters, Esquire
Walters Bender Strohbehn & Vaughan, P.C.
2500 City Center Square
1100 Main Street
Kansas City, MO 64105

and

R. Bruce Carlson, Esquire
Carlson Lynch, Ltd.
PNC Park
115 Federal Street, Suite 210
Pittsburgh, PA 15212

(on behalf of the RFC Settlement Class)

-and-

Norman S. Rosenbaum
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104

and

K. Lee Marshall
Bryan Cave LLP
560 Mission Street, 25th Floor
San Francisco, CA 94105

(on behalf of the Settling Defendants)

-and-

Elise S. Frejka

Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036

(on behalf of the Creditors' Committee)

The Notice of Objection must be in writing, and shall specifically include:

(i) The name, address, and telephone number of the class member filing the objection;

(ii) A statement of each objection asserted;

(iii) A detailed description of the facts underlying each objection;

(iv) Any loan documents in the possession or control of the objector and relied upon by the objector as a basis for the objection;

(v) If the objector is represented by counsel, a detailed description of the legal authorities supporting each objection;

(vi) If the objector plans to utilize expert opinion and/or testimony as part of the objection(s), a written expert report from all proposed experts;

(vii) If the objector plans to call a witness or present other evidence at the hearing, the objector must state the identity of the witness and identify any documents by attaching them to the objection and provide any other evidence that the objector intends to present;

(viii) A statement of whether the objector intends to appear at the hearing; and

(ix) A copy of any exhibits which the objector may offer during the hearing;

(x) A reference to "In re Residential Capital LLC, Case No. 12-12020(MG)."

Attendance at the final hearing is not necessary. Any member of the Kessler Settlement Class who does not make his or her objection in the manner provided shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness, adequacy, or reasonableness of the Settlement or any other provision of this Agreement.

**12. Final Approval Order**

a. The Named Plaintiffs and Plaintiffs' Counsel agree that they will request the Court to enter, after the hearing on final approval of this Agreement, but in any event not earlier

than 100 days after the date of the filing of Motion to Approve a Final Approval Order substantially in the form attached as **Exhibit C**. In accordance with **Exhibit C**, the Final Approval Order shall certify the Kessler Settlement Class and find that the Settlement and this Agreement are fair, reasonable, and adequate, are consistent with bankruptcy needs and concerns and in the best interests of the Kessler Settlement Class, the Debtors' estates and their creditors, is reasonable from the perspective of the Kessler Settlement Class and the Debtors given the potential liability of the Settling Defendants, the likelihood of success in the Litigation, and the costs associated with the inconvenience, delay, uncertainty and continuation of the Litigation and otherwise satisfies the standards established by the Second Circuit for approval of a compromise and settlement in Bankruptcy. The Final Approval Order shall require the Parties to carry out the provisions of this Agreement.

b. The Named Plaintiffs shall also seek an order from the District Court dismissing all remaining individual and class claims and motions of the Named Plaintiffs and the Kessler Settlement Class Members against the Settling Defendants in the Litigation on the merits and with prejudice as to the Releasors, declaring that the Named Plaintiffs and Kessler Settlement Class Members are bound by the Releases set forth in Section 8 of this Agreement as of the Effective Date, containing an express determination by the Court that "there is no just reason for delay," and reserving continuing jurisdiction over the enforcement of this Agreement, the administration and distribution of the Settlement funds and, if necessary, vacating and/or setting aside the Final Order in the event the Settlement does not (or cannot) become effective pursuant to Section 14 below.

**13. <u>Certifications to the Court</u>**

a. On or before the Final Hearing Date, Plaintiffs' Counsel shall file with the Court

an affidavit verifying that the court-approved Class Mail Notices have been sent by first-class mail.

b. On or before the Final Hearing Date, Plaintiffs' Counsel shall file with the Court an affidavit verifying that they have complied with the procedures described in Section 16(a) with respect to all Class Mail Notices returned as undeliverable.

c. On or before July 12, 2013, Plaintiffs' Counsel shall provide SilvermanAcampora with a proposed allocation of the Kessler Net Recovery to the Kessler Class Claimants, and on or before July 19, 2013, SilvermanAcampora as Special Borrowers Counsel to the Creditors' Committee, shall file with the Court a declaration regarding the fairness of the proposed Allocation.

**14. Effectiveness of Settlement Agreement**

a. The "Effective Date" of this Agreement shall be the date when all of the following conditions have occurred, at which point the Settlement shall be deemed effective in all respects:

(i) This Agreement has been signed by the Debtors, the Named Plaintiffs, Plaintiffs' Counsel, and Settling Defendants' Counsel;

(ii) The insurers who issued the Policies have been given at least 48 hours to review and provide their consent to this Agreement, with such notice to be furnished to the insurers on the day following the execution of this Agreement, and either have provided their unanimous consent, or the Debtors, in their sole discretion, have elected to proceed with this Agreement despite not receiving such consent;

(iii) A Preliminary Approval Order has been entered by the Court, in a form substantially similar to that attached as **Exhibit B**, granting preliminary approval of this

Agreement, and approving a form of Class Mail Notice, as provided in Section [8];

(iv) The Court-approved Class Mail Notice has been duly mailed to the Kessler Settlement Class as ordered by the Court;

(v) A Final Approval Order has been entered by the Court in a form substantially similar to that attached as **Exhibit C**, as provided in Section 12;

(vi) The Final Approval Order shall not have been stayed, modified or vacated on appeal, and the time to appeal shall have passed; and

(vii) The Plan, as described in the Plan Support Agreement, has been confirmed and the Effective Date of the Plan (as defined in the Plan) has occurred.

b. If any material portion of the Agreement or the Final Approval Order is vacated, voided, modified, or otherwise altered by the Court or on appeal, any Party may, in its sole discretion, within seven (7) calendar days of such ruling, declare that the Agreement has failed to become effective and in such circumstances, the Agreement shall cease to be of any force and effect as provided in Section 15.

**15. Failure of Condition**

If for any reason, this Agreement fails to become effective as provided in Section 14, all obligations under the Agreement shall cease to be of any force and effect, and this Agreement, the dismissal entered pursuant to this Agreement, the Final Order and any orders entered in connection with the Settlement, dismissal order or Final Order, shall be vacated, rescinded, canceled, annulled, and deemed "void," "no longer equitable" and/or "justifying relief" for purposes of Fed.R.Civ.P. 60(b) and Bankruptcy Rule 9024, and the Parties shall be returned to the status quo prior to entering into this Agreement with respect to the Litigation as if this Agreement had never been entered into, except that the provisions of Section 1 hereof shall

survive and remain binding on the Parties and effective in all respects regardless of the reasons for such failure of condition. In addition, the Agreement and all negotiations, court orders, court papers and proceedings relating thereto shall be without prejudice to the rights of any and all parties hereto, and evidence relating to the Agreement and all negotiations,court papers and proceedings shall not be admissible or discoverable in the Litigation or otherwise.

**16. Class Notice Forms**

a. **Exhibit D** constitutes a list of the members of the Kessler Settlement Class to whom notice pursuant to this Agreement shall be provided. Prior to mailing, addresses will be updated at Debtors' expense by use of the United States Postal Service's National Change of Address database or another address database service (e.g., Accurint, Intelius). Any returned notices shall be re-mailed to any new address disclosed. To the extent any notice is returned a second time, Plaintiffs' Counsel shall undertake reasonable efforts to locate current addresses for said class member(s). The notices shall be mailed within five (5) days of the Preliminary Approval Order.

b. Subject to Court approval, all Kessler Settlement Class Members shall be bound by this Agreement and the Released Claims shall be dismissed with prejudice and deemed released as of the Effective Date, even if a Kessler Settlement Class Member did not receive actual notice of the Litigation or the Settlement. Further, the Parties expressly acknowledge and agree that a Final Approval Order shall be entered by the Court dismissing the Released Claims and barring the relitigation of the Released Claims as provided herein, regardless of whether such Released Claims were actually asserted, to the fullest extent of the law and that any dismissal order or judgment shall be entitled to Full Faith and Credit in any other court, tribunal, forum, including arbitration fora, or agency.

**17. Public Comments**

a. Except as may be necessary or appropriate, in the Debtors' sole discretion, in connection with the filing of the Plan and accompanying disclosure statement on the docket in the Bankruptcy Cases, before the filing of the Motion to Approve, neither the Parties nor any of their counsel shall issue any press release or have other communications with the media regarding the Settlement, except as required by law.

b. The Named Plaintiffs and Plaintiffs' Counsel agree that they will not issue any press release related to the Settlement without giving the Settling Defendants and the Settling Defendants' Counsel an opportunity to review and comment on any such release prior to it being made public. It is expressly understood and agreed that a Party's website is not the "press" and that the publication and/or a description of information and documents on a Party's website is not a "press release."

c. No Party and no counsel shall make any public comments including any posting on a website that would undermine the Settlement, adversely affect the ability of the Parties to obtain final approval of the Settlement, or disparage any other Party or counsel for any Party.

d. Nothing in this Section shall prohibit Plaintiffs' Counsel from providing legal advice to any of the individual Kessler Class Claimants and/or any other client, or prohibit the Settling Defendants' Counsel from providing information as necessary to insurers that issued the policies and/or counsel for PNC Bank as successor to Community Bank of Northern Virginia or the FDIC as receiver of Guaranty National Bank of Tallahassee.

**18. Miscellaneous Provisions**

a. The Parties hereby confirm that the Disclosure Statement and Plan shall provide for funding of the Borrower Claims Trust in an amount of not less than $57,600,000.00, which

amount may be increased, but not decreased, on one and only one occasion, i.e., by the Borrower Trust True-Up (as defined in the PSA).

b. The Plan Support Agreement provides as follows:

> The Plan and the Borrower Claims Trust Agreement will provide that allowed Borrower Claims against the Borrower Claims Trust that would otherwise be asserted against one of the Consolidated Debtors shall receive a recovery comparable to recoveries of unsecured creditors at such Consolidated Debtor (excluding, in computing such recovery percentages, recoveries, if any, from the Policies (defined below)). The Cash to be paid to the Borrower Trust will be specified in the Borrower Trust Agreement and such Cash shall equal the Distribution Amount plus any additional amounts necessary to fund the Borrower Claim Trust to comply with the preceding sentence (the "**Borrower Trust True-Up**").

For the avoidance of doubt, the comparable recovery percentages of unsecured creditors at the respective Consolidated Debtors shall be established finally and for all purposes, including for all future distributions by the Borrower Trust, at the time of and in connection with the Borrower Trust True-Up, and neither the amount to be transferred to the Borrower Trust nor the percentage distributions from the Borrower Trust shall be adjusted following the effective date of the Plan based on actual experience with respect to recoveries from the Liquidating Trust following the effective date of the Plan. For example, if at the time of the Borrower Trust True-Up the comparable recovery percentages were established at 29% for the GMAC Consolidated Debtors and 10% for the RFC Consolidated Debtors, each future distribution from the Borrower Trust shall be based on 29% and 10% recovery percentages even if actual future experience were to result in actual recovery percentages for GMAC and RFC unsecured creditors respectively, of 32% and 7%, or conversely, for another example, of 25% and 14%.

c. Notwithstanding anything to the contrary in the PSA, notice of any increase in funding of the Borrower Trust pursuant to the Borrower Trust True-Up shall be filed as part of the Plan Supplement. The Borrower Trust True-Up, if any, shall be presumptively valid. If the Kessler Class Claimants determine that the Borrower Trust True-Up is insufficient to comply

with the PSA, then they may object to the Borrower True True-Up without adversely affecting the Settlement. If the Kessler Class Claimants object, they shall have the burden to show that the Borrower Trust True-Up is insufficient and provide evidence in support of such objection.

d. The Debtors shall bear the cost and burden of distributing all notices to parties-in-interest of the Motion to Approve the Settlement in accordance with the Court's Case Management Order.

**19. General Provisions**

a. Entire Agreement. This Agreement constitutes the full, complete and entire understanding, agreement, and arrangement of and between the Named Plaintiffs and the Kessler Settlement Class Members on the one hand and the Settling Defendants on the other hand with respect to the Settlement and the Released Claims against the Released Persons. This Agreement supersedes all prior oral or written understandings, agreements, and arrangements between the Parties with respect to the Settlement and the Released Claims against the Released Persons. Except for those set forth expressly in this Agreement, there are no agreements, covenants, promises, representations or arrangements between the Parties with respect to the Settlement and/or the Released Claims against the Released Persons.

b. Modification in Writing. This Agreement may be altered, amended, modified or waived, in whole or in part, only in a writing signed by all Parties and approved by the Court. This Agreement may not be amended, altered, modified or waived, in whole or in part, orally.

c. Ongoing Cooperation. The Parties hereto shall execute all documents and perform all acts necessary and proper to effectuate the terms of this Agreement.

d. Duplicate Originals/Execution in Counterparts. All Parties, Plaintiffs' Counsel, and Settling Defendants' Counsel shall sign five (5) copies of this Agreement and each such

copy shall be considered an original. This Agreement may be signed in one or more counterparts. All executed copies of this Agreement, and photocopies thereof (including facsimile or pdf copies of the signature pages), shall have the same force and effect and shall be as legally binding and enforceable as the original. Plaintiffs' Counsel shall have five (5) business days from the date on which the Agreement is signed by the last of counsel and the Debtors to sign to obtain the signatures of the Named Plaintiffs.

e. No Reliance. Each Party to this Agreement warrants that he, she or it is acting upon his, her, or its independent judgment and upon the advice of his, her, or its own counsel and not in reliance upon any warranty or representation, express or implied, of any nature or kind by any other party, other than the warranties and representations expressly made in this Agreement. In particular, but without limiting the foregoing, the Named Plaintiffs and Plaintiffs' Counsel acknowledge that the Settling Defendants have made no representations, warranties, or declarations and that the Named Plaintiffs and Plaintiffs' Counsel have not relied upon any representations, warranties, or declarations regarding the existence or enforceability of contractual indemnification or insurance coverage under the Policies or other Insurance Rights, or the existence or enforceability of indemnification rights under any agreement between RFC and CBNV and/or GNBT or otherwise.

f. Governing Law. This Agreement shall be interpreted, construed, enforced, and administered in accordance with the laws of the state of New York, without regard to conflict of laws rules. This Agreement shall be enforced in the Court. The Settling Defendants, the Named Plaintiffs and the Kessler Settlement Class Members waive any objection that each such party may now have or hereafter have to the venue of such suit, action, or proceeding and irrevocably consent to the jurisdiction of the Court in any such suit, action or proceeding, and agree to accept

and acknowledge service of any and all process which may be served in any such suit, action or proceeding.

g. Reservation of Jurisdiction. Notwithstanding the dismissal of and entry of a Final Approval Order, the Court shall retain jurisdiction for purposes of enforcing the terms of this Agreement and implementing the Settlement, including the issuance of injunctions against actions brought by Kessler Settlement Class Members in violation of the Final Approval Order.

h. Binding on Successors. This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors, assigns, executors, administrators, heirs and legal representatives.

i. Mutual Preparation. This Agreement shall not be construed more strictly against one party than another merely by virtue of the fact that it may have been prepared by counsel for one of the Parties, it being recognized that because of the arm's length negotiations between the Parties, all Parties have contributed to the preparation of this Agreement.

j. Gender Neutrality. All personal pronouns used in this Agreement, whether used in the masculine, feminine or neuter gender, shall include all other genders, and the singular shall include the plural and vice versa.

k. Taxes. All Kessler Settlement Class Members shall be responsible for paying and/or reporting any and all federal, state and local income taxes due on the payments made to them pursuant to the Settlement.

l. No Other Financial Obligations on the Settling Defendants. The Settling Defendants shall not be liable or obligated to pay any fees, expenses, costs or disbursements to the Named Plaintiffs, Plaintiffs' Counsel or the Kessler Settlement Class Members, or any attorney representing any of them, either directly or indirectly, in connection with the Litigation

or the administration of this Agreement, other than the amounts expressly provided for herein.

m. Authority. With respect to themselves, each of the Parties to this Agreement represents, covenants and warrants that subject to the entry of the Final Order (a) they have the full power and authority to enter into and consummate all transactions contemplated by this Agreement and have duly authorized the execution, delivery and performance of this Agreement and (b) the person executing this Agreement has the full right, power and authority to enter into this Agreement on behalf of the party for whom he/she has executed this Agreement, and the full right, power and authority to execute any and all necessary instruments in connection herewith, and to fully bind such party to the terms and obligations of this Agreement. Notwithstanding the foregoing, nothing in this subparagraph shall be read to supersede subparagraph 5(f), above.

n. Exhibits. The exhibits attached to this Agreement are incorporated herein as though fully set forth.

o. Construction/Interpretation. Except when the context otherwise requires, words importing the masculine gender include the feminine and the neuter, words importing the singular number shall include the plural number and vice versa and words importing persons shall include firms, associations, corporations and other entities. All references hereinto Articles, Sections and other subdivisions, unless referring specifically to the Plan or provisions of the Bankruptcy Code, the Bankruptcy Rules, or other law, statute or regulation, refer to the corresponding Articles, Sections and other subdivisions of this Agreement, and the words "herein" and words of similar import refer to this Agreement as a whole and not to any particular Article, Section or subdivision of this Agreement. The term "including" shall mean "including, without limitation."

IN WITNESS WHEREOF, the undersigned, being duly authorized, have caused this Agreement to be executed as of this ___ day of June 2013.

PLAINTIFFS' COUNSEL

Dated: June ___, 2013

By:_____
R. Frederick Walters

By:_____
R. Bruce Carlson

SETTLING DEFENDANTS' AND DEBTORS' COUNSEL

Dated: June ___, 2013

MORRISON & FOERSTER LLP

By:_____
Norman S. Rosenbaum
Jordan A. Wishnew
1290 Avenue of the Americas
New York, New York 10104
Tel: (212) 468-8000
Fax: (212) 468- 7900

*Counsel for Residential Capital, LLC, et al., Debtors and Debtors in Possession*

RESIDENTIAL FUNDING COMPANY, LLC
RESIDENTIAL CAPITAL, LLC
GMAC RESIDENTIAL HOLDING COMPANY, LLC

Dated: June __, 2013

_____
By: William R. Thompson
Title: General Counsel

**NAMED PLAINTIFFS**

Dated: June __, 2013

_____
ROWENA DRENNEN

Dated: June __, 2013

_____
FLORA GASKIN

Dated: June __, 2013

_____
ROGER TURNER

Dated: June __, 2013

_____
CHRISTINE TURNER

Dated: June __, 2013

_____
JOHN PICARD

Dated: June __, 2013

_____
REBECCA PICARD

**EXHIBITS AND SCHEDULES**

Exhibit A – Class Mail Notice

Exhibit B – Preliminary Approval Order

Exhibit C – Final Approval Order

Exhibit D – RFC Settlement Class List

Exhibit E – List of Policies

Schedule 1 – Alphabetical List of Named Plaintiffs' Incentive Awards

EXECUTION VERSION

IN WITNESS WHEREOF, the undersigned, being duly authorized, have caused this Agreement to be executed as of this ___ day of June 2013.

PLAINTIFFS' COUNSEL

Dated: June 27, 2013

By: R. Frederick Walters

By:_____
R. Bruce Carlson

SETTLING DEFENDANTS' AND DEBTORS' COUNSEL

Dated: June ___, 2013

MORRISON & FOERSTER LLP

By:_____
Norman S. Rosenbaum
Jordan A. Wishnew
1290 Avenue of the Americas
New York, New York 10104
Tel: (212) 468-8000
Fax: (212) 468- 7900

*Counsel for Residential Capital, LLC, et al., Debtors and Debtors in Possession*

EXECUTION VERSION

IN WITNESS WHEREOF, the undersigned, being duly authorized, have caused this Agreement to be executed as of this ___ day of June 2013.

PLAINTIFFS' COUNSEL

Dated: June 28, 2013

By:_____
R. Frederick Walters

By:_____
R. Bruce Carlson

SETTLING DEFENDANTS' AND DEBTORS' COUNSEL

Dated: June ___, 2013

MORRISON & FOERSTER LLP

By:_____
Norman S. Rosenbaum
Jordan A. Wishnew
1290 Avenue of the Americas
New York, New York 10104
Tel: (212) 468-8000
Fax: (212) 468- 7900

*Counsel for Residential Capital, LLC, et al., Debtors and Debtors in Possession*

IN WITNESS WHEREOF, the undersigned, being duly authorized, have caused this Agreement to be executed as of this ___ day of June 2013.

PLAINTIFFS' COUNSEL

Dated: June ___, 2013

By:_____
R. Frederick Walters

By:_____
R. Bruce Carlson

SETTLING DEFENDANTS' AND DEBTORS' COUNSEL

Dated: June 27, 2013

MORRISON & FOERSTER LLP

By:_____
Norman S. Rosenbaum
Jordan A. Wishnew
1290 Avenue of the Americas
New York, New York 10104
Tel: (212) 468-8000
Fax: (212) 468- 7900

*Counsel for Residential Capital, LLC, et al., Debtors and Debtors in Possession*

EXECUTION VERSION

RESIDENTIAL FUNDING COMPANY, LLC
RESIDENTIAL CAPITAL, LLC
GMAC RESIDENTIAL HOLDING COMPANY, LLC

Dated: June 27, 2013

By: William R. Thompson
Title: General Counsel

EXECUTION VERSION

**NAMED PLAINTIFFS**

Dated: June 20, 2013

ROWENA DRENNEN

Dated: June __, 2013

FLORA GASKIN

Dated: June __, 2013

ROGER TURNER

Dated: June __, 2013

CHRISTINE TURNER

Dated: June __, 2013

JOHN PICARD

Dated: June __, 2013

REBECCA PICARD

EXECUTION VERSION

**NAMED PLAINTIFFS**

Dated: June __, 2013

ROWENA DRENNEN

Dated: June 28, 2013

FLORA GASKIN

Dated: June __, 2013

ROGER TURNER

Dated: June __, 2013

CHRISTINE TURNER

Dated: June __, 2013

JOHN PICARD

Dated: June __, 2013

REBECCA PICARD

EXECUTION VERSION

**NAMED PLAINTIFFS**

Dated: June __, 2013

ROWENA DRENNEN

Dated: June __, 2013

FLORA GASKIN

Dated: June 28, 2013

ROGER TURNER

Dated: June 28 2013

CHRISTINE TURNER

Dated: June __, 2013

JOHN PICARD

Dated: June __, 2013

REBECCA PICARD

EXECUTION VERSION

**NAMED PLAINTIFFS**

Dated: June __, 2013

ROWENA DRENNEN

Dated: June __, 2013

FLORA GASKIN

Dated: June __, 2013

ROGER TURNER

Dated: June __, 2013

CHRISTINE TURNER

Dated: ~~June~~ JULY 1, 2013

JOHN PICARD

Dated: ~~June~~ JULY 1, 2013

REBECCA PICARD

**EXHIBIT A**

**UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

**IN RE: RESIDENTIAL CAPITAL, LLC, et. al., Debtors**
**Case No. 12-12020**

# NOTICE OF PROPOSED CLASS ACTION SETTLEMENT AND OF SETTLEMENT HEARING

*A federal court has authorized this Notice. This is not a solicitation from a lawyer. Please read this Notice carefully and completely.*

TO: ALL PERSONS: (I) WHO ENTERED INTO A LOAN AGREEMENT WITH COMMUNITY BANK OF NORTHERN VIRGINIA AND/OR GUARANTY NATIONAL BANK OF TALLAHASSEE; (II) WHOSE LOAN WAS SECURED BY A SECOND MORTGAGE OR DEED OF TRUST ON RESIDENTIAL PROPERTY LOCATED IN THE UNITED STATES; (III) WHOSE LOAN QUALIFIED AS A HOEPA MORTGAGE LOAN; AND (IV) WHOSE LOAN WAS PURCHASED BY GMAC- RESIDENTIAL FUNDING CORPORATION ("RFC"), WHO WAS NOT A MEMBER OF THE CLASS CERTIFIED IN THE ACTION CAPTIONED BAXTER V. GUARANTY NATIONAL BANK, ET AL., CASE NO. 01-CVS-009168 IN THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION OF WAKE COUNTY, NORTH CAROLINA. YOU MAY BE ELIGIBLE TO RECEIVE PAYMENTS UNDER THIS CLASS ACTION SETTLEMENT.

**THIS NOTICE MAY AFFECT YOUR RIGHTS. PLEASE READ IT CAREFULLY.**

- A class settlement has been proposed in the above-identified bankruptcy ("ResCap Chapter 11 Bankruptcy"), related to fees and interest charged on certain second mortgage loans. The U.S. Bankruptcy Court presiding over the ResCap Chapter 11 Bankruptcy (the "Court") has entered an order preliminarily approving the settlement. This settlement makes available cash relief for eligible class members (the "Kessler Settlement Class"), as part of the distribution of assets in the ResCap Chapter 11 Bankruptcy on account of a proof of claim filed in the ResCap Chapter 11 Bankruptcy on behalf of the Kessler Settlement Class. Certain mortgage borrowers who entered into second mortgage loan agreements with Community Bank of Northern Virginia ("CBNV") and/or Guaranty National Bank of Tallahassee ("GNBT") **ARE ELIGIBLE TO RECEIVE MONEY** once the settlement and distribution of assets is approved, as described below. If you qualify, you will receive an automatic cash payment. You can also elect to exclude yourself from the settlement, or object to it.

- The settlement resulted from negotiations between the debtors in the ResCap Chapter 11 Bankruptcy and certain named plaintiffs, including Brian and Carla Kessler, who are asserting class action claims arising from certain CBNV/GNBT second mortgage loans, in a court proceeding captioned *In re Community Bank of Northern Virginia Second Mortgage Lending Practices Litigation*, MDL No. 1674, Case Nos. 03-0425, 02-01201,

05-0688 and 05-1386, pending in the United States District Court for the Western District of Pennsylvania (the "MDL Litigation"). Prior to the filing of the ResCap Chapter 11 Bankruptcy, RFC was also a defendant in the MDL Litigation. Only the claims against the debtors in the ResCap Chapter 11 Bankruptcy are being resolved by this settlement. Litigation against non-settling defendants in the MDL Litigation will continue and proceed separately.

- Your legal rights are affected whether you act, or don't act. Read this notice carefully.

**YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:**

| | |
|---|---|
| **DO NOTHING AT THIS TIME.** | If you do nothing, you are agreeing to participate in the settlement and you will be a member of the Kessler Settlement Class. A check will be mailed to you once the settlement is approved and the distribution of assets occurs in the ResCap Chapter 11 Bankruptcy. By selecting this option, you are giving up your rights to sue (to the extent permitted by the Bankruptcy Code) Residential Funding Company, LLC, Residential Capital, LLC, GMAC Residential Holding Company, LLC, and other direct and indirect subsidiaries of Residential Capital, LLC, the debtors in the ResCap Chapter 11 Bankruptcy (the "Settling Defendants"). |
| **EXCLUDE YOURSELF** | If you ask to be excluded from the Kessler Settlement Class, **you will not receive any cash payments from the settlement.** This is the only option that may allow you to be part of any other proceeding against any of the Settling Defendants or the other Released Parties concerning claims that were, or could have been, asserted in the MDL Litigation.<br><br>**If you choose to exclude yourself from the Kessler Settlement Class and have not filed a proof of claim in the ResCap Chapter 11 Bankruptcy before the bar date (November 16, 2012), upon the confirmation and effectiveness of the ResCap Chapter 11 Plan, your claims may be released.** |
| **OBJECT** | Participate in the settlement, but write to the Court about why you do not like it. You cannot object to the settlement unless you are a class member and do not exclude yourself. |

| | |
|---|---|
| **GO TO A HEARING** | Ask to speak in Court about the fairness of the settlement. |

- These rights and options – and the deadlines to exercise them – are explained in this notice.

- The Court still has to decide whether to grant final approval of the settlement and to approve the ResCap Chapter 11 Plan. Payments will be made once the Court grants final approval, confirms the ResCap Chapter 11 Plan and the ResCap Chapter 11 Plan goes into effect. No payments will be made if the Court does not grant final approval of the settlement, if the Court does not approve the ResCap Chapter 11 Plan or if the Rescap Chapter 11 Plan does not go into effect.

**1. Why did I get this notice?**

Mortgage records show that CBNV and/or GNBT originated or made a second mortgage loan to you between June 6, 1998 and November 13, 2002, and that such loan was assigned to and purchased by RFC.

**2. What is the proof of claim about?**

The named plaintiffs, on behalf of all members of the proposed settlement class, have filed a proof of claim in the ResCap Chapter 11 Bankruptcy ("Kessler Class Claim"). The Kessler Class Claim is based upon the same allegations set out in full in the Joint Consolidated Amended Class Action Complaint filed in the MDL Litigation on October 4, 2011 (the "Complaint"). The Complaint asserts, among other things, that RFC, along with certain others, have violated federal laws in connection with the fees and interest charged on second mortgage loans issued by CBNV and/or GNBT, and assigned to and purchased by RFC. RFC and the other Settling Defendants deny all liability in the MDL Litigation.

**3. What is a class action and who is involved?**

In a class action, one or more people called "Class Representatives," sue on behalf of people who have similar claims. All these people are a "Class" or "Class Members." The named plaintiffs who sued – and all the class members like them – are called the plaintiffs. The companies the named plaintiffs sued are called the defendants. One court resolves the issues for all class members, except for those who exclude themselves from the class. In this case, the Kessler Class Claim asserted in the ResCap Chapter 11 Bankruptcy has been resolved through negotiations with the Settling Defendants and such class settlement, which will result in an allowed claim amount in the ResCap Chapter 11 Bankruptcy, has been preliminarily approved by the Court. The Court has decided that, subject to final approval, the Kessler Class Claim can be resolved and settled on a class-wide basis.

**4. What does the lawsuit complain about? What are the Defendants' responses?**

In the MDL Litigation, which is the basis for the Kessler Class Claim in the ResCap Chapter 11 Bankruptcy, the named plaintiffs allege that RFC, CBNV and GNBT violated federal laws in connection with the fees and interest charged on second mortgage loans. Specifically, the named plaintiffs allege that the defendants in the MDL Litigation violated the Real Estate Settlement Procedures Act ("RESPA"), the Truth In Lending Act ("TILA"), the Home Ownership and Equity Protection Act ("HOEPA"), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in connection with the fees and interest rates disclosed and charged on certain second mortgage loans.

RFC, and the other Settling Defendants, deny that they violated any federal law in connection with the second mortgage loans that are the subject of the MDL Litigation.

**5. Why is there a settlement?**

The Court did not decide in favor of the plaintiffs or the defendants. The plaintiffs think they could have prevailed at a trial. The defendants think the plaintiffs would not have prevailed at trial. But there was no trial. Instead, both sides agreed to a settlement. That way, they avoid the risk and expense of a trial, and the people affected will receive cash payments. The class representatives and the attorneys for the class think the settlement is best for all class members.

**6. How do I know if I am part of the settlement?**

The Court has preliminarily decided that everyone who fits the following description is a Kessler Settlement Class Member for purposes of resolving the Kessler Class Claim in the ResCap Chapter 11 Bankruptcy:

> All persons:
>
> (i) who entered into a loan agreement with Community Bank of Northern Virginia and/or Guaranty National Bank of Tallahassee;
>
> (ii) whose loan was secured by a second mortgage deed or trust on residential property located in the United States;
>
> (iii) whose loan qualified as a HOEPA mortgage loan;
>
> (iv) whose loan was purchased by GMAC- Residential Funding Corporation;
>
> (v) who was not a member of the class certified in the action captioned Baxter v. Guaranty National Bank, et al., Case No. 01-CVS-009168 in the General Court of Justice, Superior Court Division of Wake County, North Carolina.

**7. I'm still not sure if I am included.**

If you are still not sure whether you are included, you can ask for free help to determine your status. You can call 1-800-xxx-xxxx.

**8. What does the settlement provide?**

The settlement provides for payments to Kessler Settlement Class Members as part of the distribution of assets in the ResCap Chapter 11 Bankruptcy, as follows:

The Settling Defendants have agreed to an allowed claim amount of $300 Million on the effective date of the ResCap Chapter 11 Plan against RFC. Settlement payments will be made to Kessler Settlement Class Members from a borrower claim trust to be established under the ResCap Chapter 11 Plan, after the payment of costs, attorneys' fees, and named plaintiff incentive awards. If you participate in the settlement, you will receive your settlement payment based upon a formula to be developed by Class Counsel, approved by the Court, and designed to distribute the settlement proceeds in a fair and equitable manner.

From the total amount of settlement funds made available to the Kessler Settlement Class (the "Kessler Gross Recovery"), Court approved costs and incentive fees to named plaintiffs will first be deducted to determine the Kessler Net Recovery. From the Kessler Net Recovery, Court-approved attorneys' fees up to 35% will deducted to arrive at the Kessler Net Recovery Distribution.

The proportion of the Kessler Net Recovery Distribution payable to each Kessler Settlement Class Member will be determined by:

First, computing the total damages for each Kessler Settlement Class Member, comprised of the settlement fees and interest paid with respect to the loans. The settlement fees will be determined by a sample of approximately four hundred loans from among the Kessler Settlement Class for which Class Counsel has settlement fee data. Class Counsel does not currently have settlement fee data for the entire Kessler Settlement Class. The fee data from the approximate four hundred loans will be analyzed to estimate the fees paid by each Kessler Settlement Class Member, taking into consideration the original loan amount for each Kessler Settlement Class Member's loan. Second, for the interest component of damages, the Settling Defendants have the actual amount of interest paid on the individual Kessler Settlement Class Member loans as of the current date. Third, the estimated fees for each Kessler Settlement Class Member's loan will be added to the actual amount of interest paid on such loan to determine the total individual damages for each Kessler Settlement Class Member. Finally, for loans closed before May 1, 2000, [ ]% of the individual damages will be discounted. The discount reflects the fact that the RESPA and TILA/HOEPA claims on loans preceding that date are subject to a statute of limitations defense and must rely on the legal doctrine of equitable tolling to be valid.

The individual damages of each Kessler Settlement Class Member will then be divided by the total individual damages of the entire Kessler Settlement Class to determine a proportion or ratio of the total settlement proceeds attributable to each Kessler Settlement Class Member. For each

Kessler Settlement Class Member, the ratio will be applied to determine each Kessler Settlement Class Member's proportionate share of each Kessler Net Recovery Distribution.

For purposes of providing generally the order of magnitude of the possible distributions, Class Counsel estimates that a Kessler Net Recovery Distribution could be approximately $20 million. (Please note that this is a very rough estimate and that the final Kessler Net Recovery Distribution may be significantly different). Based on an estimated Kessler Settlement Class size of 44,535 loans, a Kessler Net Recovery Distribution of $20 million would yield, on average, a distribution to each Kessler Settlement Class Member of $449. This is only an estimate. The actual distributions will vary depending on the factors described above. Some Kessler Settlement Class Members may receive a larger or smaller distribution based on their specific loans and the other factors involved.

Additionally, as part of the settlement, the Settling Defendants have agreed to assign their rights to recover certain proceeds under certain insurance policies that provide coverage for the conduct at issue in the MDL Litigation and which is the subject of the Kessler Class Claims. These potential insurance proceeds may be available to make up the difference between the allowed claim amount of $300 Million and the amount initially contributed to the borrower claim trust for the benefit of the Kessler Settlement Class Members under the ResCap Chapter 11 Plan. If any payment is received or obtained under these insurance policies, then such amounts, less a proportional reimbursement for the amount already contributed to the borrower claim trust for the benefit of the class members, will be added to the Borrower Claim Trust and made available, after the payment of any remaining attorneys' fees and named plaintiff incentive awards, for distribution to the Kessler Settlement Class Members, using the same formula described above but not other claimants in the Borrower Claims Trust.

**9. How do I participate in the settlement?**

If you want to participate in the settlement, you do not need to do anything now. If the settlement is approved and the ResCap Chapter 11 Plan is approved and goes effective, one or more checks will be mailed to you. If additional insurance proceeds are obtained and contributed to the borrower claim trust, a second check may also be mailed to you. You are required, upon receipt of any such payment, to remit such payment to any person who has received by assignment or operation of law, any right title or interest to or in such payment from you.

A Kessler Settlement Class Member's right to a settlement payment is a conditional right that terminates if a Kessler Settlement Class Member to whom a check is mailed fails to cash his or her check within six months of the date of the check. In such case, the check shall be null and void and the Parties shall have no further obligation to make payment to such class member.

Joint borrowers, such as a husband and wife, will receive a single payment per loan, even if they are separated or divorced. Any Kessler Settlement Class Member who receives a payment under the settlement is personally and solely responsible for distributing or allocating the payment between or among any co-borrower(s), regarding of whether the check is made payable to all or only some of the co-borrowers. Kessler Settlement Class members will also be responsible for paying any taxes due on any payment received and are strongly encourage to consult with their

own tax advisor concerning the tax effects of any money received pursuant to this Settlement.

**10. When would I get my payment(s)?**

The Court will hold a hearing on **[xx days after the deadline for filing any objections]**, to decide whether to finally approve the settlement. If the Court approves the settlement and approves the ResCap Chapter 11 Plan, there may be appeals. It is always uncertain whether these appeals can be resolved, and resolving them can take time, perhaps more than a year. In addition, it will take time for the Borrower Claims Trust to properly determine the distributions it is required to make under the ResCap Chapter 11 Plan. Please be patient.

**11. What am I giving up to get a payment or stay in the Kessler Settlement Class?**

Unless you exclude yourself from the Kessler Settlement Class, you are staying in the Kessler Settlement Class. That means that you cannot sue, continue to sue, or be part of any other proceeding in the Court or lawsuit against the Settling Defendants or other Released Parties arising out of or relating to the claims asserted, or which could have been asserted, in the ResCap Bankruptcy Case or the MDL Litigation pertaining to the Kessler Settlement Class Members' loans, including, but not limited to, the fees and interests charged on second mortgage loans. Specifically, you will be releasing all "Released Persons" from all "Released Claims." Released Claims are defined as:

> any and all claims (including the Proofs of Claim), demands, actions, causes of action, rights, offsets, setoffs, suits, damages, lawsuits, liens, costs, surcharges, losses, attorneys' fees, expenses or liabilities of any kind whatsoever, in law or in equity, for any relief whatsoever, including monetary, injunctive or declaratory relief, rescission, general, compensatory, special, liquidated, indirect, incidental, consequential or punitive damages, as well as any and all claims for treble damages, penalties, attorneys' fees, costs or expenses, whether known or unknown, alleged or not alleged in the Litigation, the Proofs of Claim or in any proofs of claim filed by a Kessler Class Member in the Bankruptcy Cases, suspected or unsuspected, contingent or vested, accrued or not accrued, liquidated or unliquidated, matured or unmatured, that arise out of the CBNV/GNBT Loans, including any claims against the Released Persons arising out of the handling, preservation, impairment, or otherwise related to any insurance coverage or other Insurance Rights under the Policies or contractual indemnification related to the CBNV/GNBT Loans, and that any of the Releasors have had, or now have, from the beginning of time up through and including the Effective Date against the Released Persons ("**Claims**"), including: (1) allegations that were or could have been asserted against the Released Persons in the Litigation in any way relating to a CBNV/GNBT Loan; and (2) any activities of the Released Persons with respect to a CBNV/GNBT Loan, including any alleged representations, misrepresentations, disclosures, incorrect disclosures, failures to disclose, acts (legal or illegal), omissions, failures to act,

> deceptions, acts of unconscionability, unfair business practices, breaches of contract, usury, unfulfilled promises, breaches of warranty or fiduciary duty, conspiracy, excessive fees collected, or violations of any consumer protection statute, any state unfair trade practice statute, or any other body of case, statutory or common law or regulation, federal or state, including TILA, HOEPA, RESPA, RICO (and, respectively, in each case, their implementing regulations). It is the intention of the Releasors to provide a general release of the Released Claims against the Released Persons; provided, however, that anything in this Agreement to the contrary notwithstanding, the term Released Claims does not include: (A) the claims of the Kessler Class Claimants, whether or not currently asserted in the Litigation, against (1) PNC Bank as successor to Community Bank of Northern Virginia or the FDIC as receiver of Guaranty National Bank of Tallahassee, (2) the insurers that issued the Policies listed in **Exhibit E**, or (3) any other person, association or entity other than the Released Persons in connection with the CBNV/GNBT Loans; or (B) any and all claims for indemnification or contribution that RFC might otherwise have against PNC Bank as successor to Community Bank of Northern Virginia or the FDIC as receiver of Guaranty National Bank of Tallahassee.

Any claims arising out of future conduct, such as failure to credit a future payment are **not** released. "Released Persons" are defined to include:

> the Settling Defendants and the Debtors, and each of their past and present officers, directors, shareholders, employees, attorneys (including any consultants hired by counsel), accountants, heirs, executors, and administrators, and each of their respective predecessors, successors, and assigns. Notwithstanding anything in this Agreement to the contrary, the term Released Persons **expressly does not include any of the following**: (a) PNC Bank, as successor in interest to Community Bank of Northern Virginia; (b) the FDIC, as receiver of Guaranty National Bank of Tallahassee; (c) insurers or successors to insurers that issued the Policies as listed in **Exhibit E**; or (d) any other person, association or entity other than a Released Person.

In addition, if you stay in the Kessler Settlement Class, all of the Court's orders will apply to you and legally bind you.

**12. Can I exclude myself from the Kessler Settlement Class?**

If you do not wish to participate in this settlement, you must notify Class Counsel and Counsel for the Defendants in writing that you wish to be excluded from the Kessler Settlement Class. Your request to be excluded from the Kessler Settlement Class must contain the following information: (1) the name of class member; (2) the current address of the class member; and (3) the date signed. Any opt out request must be personally signed by each person who was a party to the promissory note in connection with the class member's CBNV/GNBT Loan, unless such

person is deceased or incompetent. If a party to the promissory note is deceased, an opt out request may be personally signed by the personal representative of the deceased and a copy of the death certificate for such person shall be submitted with the opt out request. If a party to the promissory note is incompetent, the guardian must sign the opt out request. No request for exclusion can be made on behalf of a group of class members or through an agent or attorney.

You must mail your exclusion request postmarked no later than **[ ]** to Class Counsel at:

Walters Bender Strohbehn & Vaughan, P.C.
2500 City Center Square
1100 Main Street
Kansas City, Missouri 64105

Carlson Lynch Ltd.
PNC Park
115 Federal Street
Pittsburgh, PA 15212

If you ask to be excluded from the Kessler Settlement Class, you will not receive a payment, and you cannot object to the settlement. **However, in the event you choose to opt out of the settlement and you have not filed a proof of claim on or before the bar date (November 16, 2012) for the filing of proofs of claim in the ResCap Chapter 11 Bankruptcy, you will be precluded from obtaining any recovery against the debtors in the ResCap Chapter 11 Bankruptcy**.

**13. If I don't exclude myself, can I sue the Defendants for the same thing later?**

No. Unless you exclude yourself, you give up any right to sue the Settling Defendants for all Released Claims (defined above). If you have a pending lawsuit involving any claim that might fall within the definition of Released Claims, speak to your lawyer in that case immediately, because you must exclude yourself from *this* class to continue your own lawsuit. If you have a pending lawsuit on matters that are not within the definition of Released Claims, you may continue to have a claim in the ResCap Chapter 11 Bankruptcy even if you do not exclude yourself from this Kessler Settlement Class. **However, even if your claim does not fall within the definition of Released Claims, if you have not filed a proof of claim on or before the bar date (November 16, 2012) for the filing of proofs of claim in the ResCap Chapter 11 Bankruptcy, you will be precluded from obtaining any recovery against the debtors in the ResCap Chapter 11 Bankruptcy.**

**14. If I exclude myself, can I get a payment from this Settlement?**

No. If you exclude yourself, you will not receive any payment from this Settlement.

**15. Do I have a lawyer in this case?**

The Court preliminarily designated law firms of Walters Bender Strohbehn & Vaughan, P.C. and Carlson Lynch Ltd. to represent you and other class members. These lawyers are called Class Counsel. You will not be charged for these lawyers. If you want to be represented by your own lawyer, you may hire one at your own expense.

**16. How will these lawyers be paid?**

Class Counsel will ask the Court to approve payment of litigation expenses and/or court costs incurred by Class Counsel from the Kessler Gross Recovery, in an amount not to exceed [$_____]. Separately, Class Counsel will ask the Court to approve payment of attorneys' fees not to exceed thirty-five percent (35%) of the amount of each Kessler Net Recovery. The fees would pay Class Counsel for investigating the facts, litigating the case, and negotiating the settlement. This case has been litigated since 2001, including two appeals. Furthermore, Class Counsel anticipates that a significant amount of time and expense will be necessary after final approval of this settlement in order to pursue for the benefit of the Kessler Settlement Class collection of the coverages under the various insurance policies either by settlement or trial. Throughout the previous 12 plus years this case has been litigated, Class Counsel has not been paid either for the expenses advanced or fees for the time and effort expended on behalf of the Kessler Settlement Class. In addition, class counsel will ask for an incentive award of _____to each of the named plaintiffs for their services as class representatives. The Settling Defendants have agreed not to oppose these fees and expenses.

**17. How can I object to the Settlement?**

If you are a Kessler Settlement Class Member, you can object to any part of the settlement that you don't like. You can give reasons why you think the Court should not approve it. The Court will consider your views. To object, you must send a letter that you object to the Kessler Class Settlement, referencing the case "In re Residential Capital LLC, Case No. 12-12020." Be sure to include your name, address, telephone number, **your signature**, and the reasons you object to the settlement. Further details as to the requirements for an objection are stated in Section 11 of the Settlement Agreement, available at www._____. **You must mail your objection, postmarked not later than [_____] to each of these addresses:**

| COURT | CLASS COUNSEL | DEFENSE COUNSEL |
|---|---|---|
| Clerk of Court<br>U.S. Bankruptcy Court for the<br>Southern District of New York<br>One Bowling Green<br>New York, NY 10004<br><br>**You must ask the Clerk to file your Objection in the Court's official records of the case.** | Walters Bender Strohbehn & Vaughan, P.C.<br>2500 City Center Square<br>1100 Main Street<br>Kansas City, Missouri 64105<br><br>Carlson Lynch Ltd.<br>PNC Park<br>115 Federal Street<br>Pittsburgh, PA 15212 | Morrison & Foerster LLP<br>1290 Avenue of the Americas<br>New York, New York 10104 |

| | | |
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| | | |

If you do not follow these instructions, the Court will not consider your objections and you will waive all objections and have no right to appeal if the settlement is approved.

**18. What's the difference between objecting and excluding?**

Objecting is simply telling the Court that you don't like something about the settlement. You can object only if you stay in the Kessler Settlement Class. If you object and the settlement is approved, you will still receive the payments made to class members, you will be bound by the final judgment, and your claims will be released.

Excluding yourself is telling the Court that you don't want to be part of the Kessler Settlement Class. If you exclude yourself, you have no basis to object because the settlement no longer affects you.

**19. When and where will the Court decide whether to approve the Settlement?**

The Court will hold a hearing to decide whether to approve the settlement. This "Fairness Hearing" will be held on **[ ]** at the U.S. Bankruptcy Court for the Southern District of New York, One Bowling Green, Courtroom 501, New York, NY 10004. At this hearing, the Court will consider whether the settlement is fair, reasonable and adequate. If there are objections or requests to be heard, the Court may consider them at the hearing. The Court may also decide the amount of attorneys' fees and costs to be paid to Class Counsel. The hearing may be postponed without further notice to you.

**20. Do I have to come to the Hearing?**

No. Class Counsel will answer any questions the Court may have. But, you are welcome to come at your own expense. If you file an objection with the Court, you don't have to come to Court to talk about it. As long as you mailed your written objection complying with the requirements of the Settlement Agreement on time to all of the addresses listed above, the Court will consider it. You may also pay your own lawyer to attend at your own expense, but it's not necessary.

**21. May I speak at the hearing?**

You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must send a letter saying that it is your "Notice of Intention to Appear in _____. Be sure to include your name, address, telephone number, and your signature. Your Notice of Intention to Appear must be postmarked no later than **[ ]**, and be sent to the Clerk of the Court, Class Counsel, and Defense Counsel at the addresses listed above. You cannot speak at the hearing if you excluded yourself from the settlement.

**22. How do I get more information?**

The foregoing is only a summary of the circumstances surrounding the litigation, the claims asserted, the class, the settlement, and related matters. You may seek the advice and guidance of your own private attorney, at your own expense, if you desire. For more detailed information, you may review the pleadings, records, and other papers on file in the ResCap Chapter 11 Bankruptcy, which may be inspected during regular business hours at the U.S. Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, NY 10004, or online at www.kccllc.net/rescap. You may also review the docket entries in the MDL Litigation, which are available at the U.S. District Court for the Western District of Pennsylvania, 700 Grant Street, Pittsburgh, PA, 15219. If you wish to communicate with Class Counsel, you may write to the addresses provided above.

Please do not direct any inquiries to the Court or to the Settling Defendants.

So Ordered.

/s/The Honorable Martin Glenn
United States Bankruptcy Judge

**EXHIBIT B**

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| In re: | ) | |
| | ) | Chapter 11 |
| RESIDENTIAL CAPITAL, LLC, *et al.*, | ) | |
| | ) | Case No. 12-12020 (MG) |
| | ) | |
| Debtors, | ) | Jointly Administered |
| | ) | |

**ORDER PURSUANT TO RULES 7023 AND 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE (1) PRELIMINARILY APPROVING SETTLEMENT AGREEMENT BETWEEN NAMED PLAINTIFFS, INDIVIDUALLY AND AS REPESENTATIVES OF THE KESSLER SETTLEMENT CLASS, AND THE SETTLING DEFENDANTS; (2) GRANTING CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT ONLY; (3) APPROVING THE FORM AND MANNER OF NOTICE TO KESSLER SETTLEMENT CLASS MEMBERS OF THE SETTLEMENT AGREEMENT; (4) SCHEDULING A FAIRNESS HEARING TO CONSIDER FINAL APPROVAL OF THE SETTLEMENT AGREEMENT; AND (5) GRANTING RELATED RELIEF**

Pending before the Court is the joint motion ("Joint Motion") of Plaintiffs, Rowena Drennen, Flora Gaskin, Roger Turner, Christie Turner, John Picard and Rebecca Picard (the Bankruptcy Litigation "Named Plaintiffs"), individually and as the proposed representatives of the "Kessler Settlement Class," as defined herein, and Debtor-Defendants Residential Funding Company, LLC ("RFC"), Residential Capital, LLC, and GMAC Residential Holding Company, LLC (collectively, the "Settling Defendants"), by and through their respective counsel of record, for an Order, among other things: (1) Preliminarily Approving the Kessler Settlement Agreement dated June __, 2013 between Named Plaintiffs, individually and as the proposed representatives of the Kessler Settlement Class, and the Settling Defendants (the "Agreement"); (2) Granting **C**lass Certification for Purposes of Settlement Only; (3) Approving the Form and Manner of Notice to

the Kessler Settlement Class; (4) Scheduling a Final Fairness Hearing for the Final Consideration and Approval of the Settlement Agreement; and (5) Granting Related Relief. The Court has considered the Joint Motion and has reviewed the Settlement Agreement. The Court now therefore grants the Joint Motion and Orders, Adjudges and Decrees as follows:

1. The Named Plaintiffs and Settling Defendants have executed the Agreement in order to settle and resolve the Litigation as between the Settling Defendants, subject to approval of the Court.

2. The definitions set forth in the Agreement are hereby incorporated by reference into this Order (with capitalized terms as set forth in the Agreement).

3. The Agreement is the result of serious, informed, arm's length and non-collusive negotiations. Based on the range of possible outcomes, the cost, delay and uncertainty associated with further litigation, the interest of the Debtors' estates and creditors and the support of the Committee, the Agreement is reasonable and cost-effective.

4. The terms of the Agreement and the Settlement as provided therein, are approved preliminarily as fair, reasonable and adequate to the Kessler Settlement Class, subject to further consideration at the Fairness Hearing described below.

5. The terms of the Agreement and the Settlement as provided therein, are also approved preliminarily as fair and equitable to the Debtors' bankruptcy estates and their creditors, subject to further consideration at the Fairness Hearing described below.

6. Accordingly, for the purpose of a settlement in accordance with the Agreement, this Court, pursuant to Bankruptcy Rule 7023, hereby preliminarily certifies the following classes of persons as settlement classes:

> All persons who obtained a second or subordinate, residential, federally related, non-purchase money, HOEPA qualifying mortgage loan from

Community Bank of Northern Virginia or Guaranty National Bank of Tallahassee, that was secured by residential real property used as their principal dwelling and that was assigned to GMAC-Residential Funding Corporation n/k/a Residential Funding Company, LLC, who was not a member of the class certified in the action captioned Baxter v. Guaranty National Bank, et al., Case No. 01-CVS-009168 in the General Court of Justice, Superior Court Division of Wake County, North Carolina (the "Kessler Settlement Class") .

All persons who meet the above class-definition, whose loan closed prior to May 1, 2000 (the "Equitable Tolling Sub-Class").

All persons who meet the above class-definition, whose loan closed after May 1, 2000 ("Non-Equitable Tolling Sub-Class") .

7. Pursuant to the Agreement, and for purposes of the Settlement only, the Court finds preliminarily that:

a. The Kessler Settlement Class, the Non-Equitable Tolling Sub-Class and the Equitable Tolling Sub-Class are each so numerous that joinder of all members is impracticable;

b. There are questions of law or fact common to: (i) the Kessler Settlement Class that predominate over questions affecting only individual members of the Kessler Settlement Class; (ii) the Non-Equitable Tolling Sub-Class that predominate over questions affecting only individual members of the Non-Equitable Tolling Sub-Class; and (iii) the Equitable Tolling Sub-Class that predominate over questions affecting only individual members of the Equitable Tolling Sub-Class;

c. The claims of the Named Plaintiffs are typical of those of the members of the Kessler Settlement Class, the claims of Rowena Drennen are typical of those of the members of the Non-Equitable Tolling Sub-Class and the claims of John Picard and Rebecca Picard are typical of those of the members of the Equitable Tolling Sub-Class;

d. The Named Plaintiffs and Plaintiffs' Counsel will fairly and adequately represent and protect the interests of the members of the Kessler Settlement Class;

e. Rowena Drennen and Allocation Counsel for the Non-Equitable Tolling Sub-Class will fairly and adequately represent and protect the interests of the members of the Non-Equitable Tolling Sub-Class;

f. John Picard and Rebecca Picard and Allocation Counsel for the Equitable Tolling Sub-Class will fairly and adequately represent and protect the interests of the members of the Equitable Tolling Sub-Class; and

g. Certification of the Kessler Settlement Class, the Non-Equitable Tolling Sub-Class and the Equitable Tolling Sub-Class as proposed, is an appropriate method for the fair and efficient adjudication of the controversies between the Kessler Settlement Class and Settling Defendants.

8. For the purpose of this preliminary approval, and for all matters relating to the Settlement and the Litigation, until further order of the Court, the Court: (a) appoints the Named Plaintiffs as Representatives of the Kessler Settlement Class and R. Frederick Walters, Kip D. Richards, David M. Skeens, J. Michael Vaughan, and Garrett M. Hodes of the law firm Walters Bender Strohbehn & Vaughan, P.C. and Bruce Carlson and Gary Lynch of the law firm Carlson Lynch Ltd. PNC Park, 115 Federal Street, Suite 210, Pittsburgh, PA 15212 as Counsel for the Kessler Settlement Class ("Plaintiffs' Counsel" or "Class Counsel"); and (b) appoints _____ as Allocation Counsel for the Non-Equitable Tolling Sub-Class for the purpose of allocation only; and (c)_____ as Allocation Counsel for the Equitable Tolling Sub-Class for the purpose of allocation only.

9. By this Order, the Court hereby exercises subject matter and personal

jurisdiction over the Kessler Settlement Class for purposes of evaluating the final certification of the Kessler Settlement Class and the fairness and adequacy of the Settlement.

10. The Class Mail Notice, as set forth in Exhibit A to the Parties' Agreement, is hereby approved.

11. The Class Mail Notice in a form substantially the same as that set forth in Exhibit A to the Agreement shall be mailed by Class Counsel by first-class mail, postage prepaid, to all members of the Kessler Settlement Class identified on Exhibit D of the Agreement. Such mailing shall be made within five (5) days of the entry of this Preliminary Approval Order.

12. These notice methodologies (a) protect the interests of the Named Plaintiffs, the Kessler Settlement Class, and Settling Defendants, (b) are the best notice practicable under the circumstances, and (c) are reasonably calculated to apprise the Kessler Settlement Class of the proposed Settlement; the Agreement; the nature of the action; the definition of the Kessler Settlement Class; the class claims, issues or defenses; that a Kessler Class Member may enter an appearance through an attorney if the Kessler Class Member so desires; their right to opt out and exclude themselves from or object to the proposed Settlement and the time and manner for doing so; and the binding effect of a Kessler Settlement Class judgment on Kessler Settlement Class Members. In addition, the Court finds that the notice methodologies are reasonable and constitute due, adequate and sufficient notice to all persons entitled to receive notice of the proposed Settlement and meet all applicable requirements of law, including, but not limited to, Fed.R.Bankr.P. 7023 and the Due Process Clause of the Fifth Amendment of the United States Constitution.

13. Prior to the Fairness Hearing, Class Counsel shall serve and file a sworn

statement of a person with knowledge, evidencing compliance with the provisions of this Order concerning the mailing of the Class Mail Notice.

14. The Qualified Settlement Fund referenced in Section 6(c) of the Agreement is hereby approved and Class Counsel is authorized and directed to establish the Qualified Settlement Fund pursuant to this Order and the terms of this Agreement. All taxes, costs and expenses associated with the Qualified Settlement Fund and its administration shall be paid as provided in the Agreement.

15. Any member of the Kessler Settlement Class desiring exclusion from the Kessler Settlement Class shall mail a request for exclusion ("Request for Exclusion") to the Parties' respective counsel. To be valid, the Request for Exclusion must be **received** on or before **_____, 2013**. Such Request for Exclusion must be in writing and include: (a) the name, address, telephone number and the last four digits of the social security number of the class member seeking to opt out; (b) a statement that the class member and all other borrowers named on the class member's promissory note are seeking exclusion; (c) the signature of each person who was a party to the promissory note made in connection with the class member's loan, unless such person is deceased or legally incompetent, in which event the opt out submission shall be signed by said deceased or legally incompetent person's personal representative or guardian; and (d) a reference to "In re Residential Capital, LLC, Case No. "12-12020 (MG)." Any member of the Kessler Settlement Class who does not properly and timely request exclusion from the Kessler Settlement Class in full compliance with these requirements shall be included in the Kessler Settlement Class and be bound by any judgment entered in this Action with respect to the Class.

16. Within seven (7) days after the deadline for submitting Requests for Exclusion, Class Counsel shall file with the Court a sworn statement to identify those persons, if any, who timely submitted a Request for Exclusion. The originals of all Requests for Exclusion shall be retained by the Parties. Class Counsel shall also identify those persons, if any, whose efforts to be excluded were rejected because they failed to comply with paragraph 13 above and shall provide the Court with all communications received from such individuals. A hearing (the "Fairness Hearing") shall be held at ____a.m. on _____**, 2013**, in United States Bankruptcy Court, Southern District of New York, One Bowling Green, Courtroom 501, New York, New York 10004-1408. At the Fairness Hearing, the Court will consider: (a) the fairness, reasonableness, and adequacy of the Settlement; (b) the entry of any final order or judgment in the Litigation with respect to the Kessler Settlement Class; (c) the application for incentive awards for the services rendered by the Named Plaintiffs; (d) the application for attorney's fees and for reimbursement of expenses by Class Counsel; and (e) other related matters. The Fairness Hearing may be postponed, adjourned or continued by Order of the Court without further notice to the Kessler Settlement Class.

17. To be considered at the Fairness Hearing, any Kessler Class Member desiring to file an objection or other comment on the Settlement shall be required to file all such objections and comments and all supporting pleadings on or before _____**, 2013**, with service upon Class Counsel and Counsel for Settling Defendants. The objections of any Kessler Class Member must be in writing, and must specifically include the following: (a) the name, address, and telephone number of the class member filing the objection; (b) a statement of each objection asserted; (c) a detailed description of the facts underlying each objection; (d) any loan documents in the possession or control of the objector and relied upon by the objector

as a basis for the objection; (e) if the objector is represented by counsel, a detailed description of the legal authorities supporting each objection; (f) if the objector plans to utilize expert opinion and/or testimony as part of the objection(s), a written expert report from all proposed experts; (g) if the objector plans to call a witness or present other evidence at the hearing, the objector must state the identity of the witness and identify any documents by attaching them to the objection and provide any other evidence that the objector intends to present; (h) a statement of whether the objector intends to appear at the hearing; (i) a copy of any exhibits which the objector may offer during the hearing; and (j) a reference to "In re Residential Capital, LLC 12-12020 (MG)."

18. Debtors shall provide notice of the Fairness Hearing to the insurers who issued insurance policies under the General Motors Combined Specialty Insurance Program 12/15/00 - 12/15/03 ("Insurers") on or before _____, 2013. Any Insurer desiring to file an objection or other comment on the Settlement shall be required to file all such objections and comments and all supporting pleadings on or before _____, 2013, with service upon Class Counsel and Counsel for Settling Defendants. The objections of any Insurer must be in writing, and must specifically include the following: (a) the identity of the Insurer or Insurers filing the objection; (b) a statement of each objection asserted; (c) a detailed description of the facts underlying each objection; (d) a detailed description of the legal authorities supporting each objection; (e) if the objector plans to utilize expert opinion and/or testimony as part of the objection(s), a written expert report from all proposed experts; (f) if the objector plans to call a witness or present other evidence at the hearing, the objector must state the identity of the witness and identify any documents by attaching them to the objection and provide any other evidence that the objector intends to present; (g) a statement of whether the objector intends to appear at the

hearing; (h) a copy of any exhibits which the objector may offer during the hearing; and (i) a reference to "In re Residential Capital, LLC "12-12020."

19. Unless otherwise ordered by the Court, no objection to or other comment concerning the Settlement shall be heard unless timely filed in accordance with the respective guidelines specified above. Class Counsel and Counsel for Settling Defendants shall promptly furnish each other with copies of any and all objections or written requests for exclusion that come into their possession.

20. Any objector who does not make his or her objection in the manner provided in this Order shall be deemed to have waived any such objection and shall forever be barred from making any objection to the Settlement, including without limitation, the propriety of class certification, the adequacy of any notice, or the fairness, adequacy or reasonableness of the Settlement.

21. Submissions of the Parties relative to the Settlement, including memoranda in support of the Settlement, applications for attorney's fees and reimbursement of expenses by Class Counsel, and any applications for the payment of services rendered by the Named Plaintiffs shall be filed with the Clerk of the Court on or before _____**, 2013**.

22. Any attorney hired by any objector for the purpose of appearing and/or making an objection shall file his or her entry of Appearance at the Class Member's expense on or before _____**, 2013**, with service on Class Counsel and Counsel for Settling Defendants per the Federal Rules of Civil Procedure.

23. Any Kessler Settlement Class Member may appear at the Fairness Hearing in person, or by counsel if an appearance is filed and served as provided in the Class Mail Notice, and such person will be heard to the extent allowed by the Court. No person shall be permitted

to be heard unless, on or before **_____, 2013**, such person has (a) filed with the Clerk of the Court a notice of such person's intention to appear; and (b) served copies of such notice upon Class Counsel and Counsel for Settling Defendants.

24. All other events contemplated under the Agreement to occur after entry of this Order and before the Fairness Hearing shall be governed by the Agreement and the Class Mail Notice, to the extent not inconsistent herewith. Class Counsel and Counsel for Settling Defendants shall take such further actions as are required by the Agreement.

25. The Parties shall be authorized to make non-material changes to the Class Mail Notice so long as Class Counsel and Counsel for Settling Defendants agree and one of the Parties files a notice thereof with the Court prior to the Fairness Hearing. Neither the insertion of dates nor the correction of typographical or grammatical errors shall be deemed a change to the Class Mail Notice.

26. All claims against and motions involving Settling Defendants with respect to the "CBNV/GNBT Loans" are hereby stayed and suspended until further order of this Court, other than as may be necessary to carry out the terms and conditions of the Agreement or the responsibilities related or incidental thereto.

27. The claims of the Named Plaintiffs, the members of the Kessler Settlement Class and/or the remaining members of the Litigation Class against any Defendant and/or person or entity other than Settling Defendants and other "Released Persons," are **not** stayed or suspended by the Agreement, this Order, or otherwise. Only the "Released Claims" of the "Releasors" as against the "Released Persons," as defined in the Agreement, are suspended and stayed.

28. If Final Approval of the Settlement does not occur, or if the Settlement does not

become effective on or before the Effective Date as provided in the Agreement, or if the Settlement is rescinded or terminated for any reason, the Settlement and all proceedings had in connection therewith shall be null and void and without prejudice to the rights of the Parties before the Settlement was executed and made, and this Order and all Orders issued pursuant to the Settlement shall be vacated, rescinded, canceled, annulled and deemed "void" and/or "no longer equitable" for purposes of Fed. R. Bankr. P. 9024, as provided in and subject to Paragraph [14] of the Agreement.

29. Neither this Order, the Agreement, nor any of their terms or provisions, nor any of the negotiations between the Parties or their counsel (nor any action taken to carry out this Order), is, may be construed as, or may be used as an admission or concession by or against any of the Parties or the Released Persons of (i) the validity of any claim or liability, any alleged violation or failure to comply with any law, any alleged breach of contract, any legal or factual argument, contention or assertion, (ii) the truth or relevance of any fact alleged by Plaintiffs, (iii) the existence of any class alleged by Plaintiffs, (iv) the propriety of class certification if the Litigation were to be litigated rather than settled, (v) the validity of any claim or any defense that has been or could have been asserted in the Litigation or in any other litigation; (vi) that the consideration to be given to Kessler Settlement Class Members hereunder represents the amount which could be or would have been recovered by any such persons after trial; or (vii) the propriety of class certification in any other proceeding or action. Entering into or carrying out the Agreement, and any negotiations or proceedings related to it, shall not in any way be construed as, or deemed evidence of, an admission or concession as to the denials, defenses, or factual or legal positions of Settling Defendants, and shall not be offered or received in evidence in the Litigation or any action or proceeding against any party

in any court, administrative agency or other tribunal for any purpose whatsoever, except as is necessary to enforce the terms of this Order and the Agreement; provided, however, that this Order and the Agreement may be filed by Settling Defendants in any action filed against or by Settling Defendants, or any other Released Person, to support a defense of *res judicata*, collateral estoppel, release, waiver, good faith settlement, judgment bar or reduction, full faith and credit, or any other theory of claim preclusion, issue preclusion or similar defense or counterclaim. Settling Defendants expressly reserve all rights and defenses to any claims and do not waive any such rights or defenses in the event that the Agreement is not approved for any reason.

SO ORDERED.

_____

Martin Glenn, United States Bankruptcy Judge

**EXHIBIT C**

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| In re: | ) | |
| | ) | Chapter 11 |
| RESIDENTIAL CAPITAL, LLC, *et al.*, | ) | |
| | ) | Case No. 12-12020 (MG) |
| | ) | |
| Debtors, | ) | Jointly Administered |
| | ) | |

**FINAL ORDER PURSUANT TO FED. R. CIV. P. 23 AND FED. R. BANKR. P. 9019 APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE KESSLER SETTLEMENT CLASS MEMBERS AND THE SETTLING DEFENDANTS AND GRANTING RELATED RELIEF**

The Court having carefully reviewed and considered the Settlement and Release Agreement dated June __, 2013 (the "**Agreement**"), between Rowena Drennen, Flora Gaskin, Roger Turner, Christie Turner, John Picard and Rebecca Picard ("**Named Plaintiffs**"), individually and as the representatives of the Kessler Settlement Class (as defined herein) in the Bankruptcy Cases, and Debtor Defendants Residential Funding Company, LLC ("**RFC**"), Residential Capital, LLC, and GMAC Residential Holding Company, LLC (the "**Settling Defendant**s"), the evidence and arguments of counsel as presented at the Fairness Hearing[1] held on _____, 2013, the Joint Motion to Approve filed by the Parties seeking approval of the Agreement and other supporting memoranda and declarations in support filed with this Court, [and the timely objections to the proposed Settlement], and all other filings in connection with the Parties' settlement as memorialized in the Agreement (the "**Settlement**"); and for good cause shown,

[1] Unless otherwise provided herein, all capitalized terms in this Order shall have the same meaning as those terms in the Agreement.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. **Incorporation of Other Documents**. This Order incorporates and makes the Agreement, together with all exhibits and schedules attached thereto, which were filed with the Court on or about ___ _, 2013 [Dkt. No. [ ], a part hereof.

2. **Jurisdiction**. Because adequate notice was disseminated and all potential members of the Kessler Settlement Class were given notice of and an opportunity to opt out of the Settlement, the Court has personal jurisdiction over all members of the Kessler Settlement Class. The Court has subject matter jurisdiction over the Kessler Allowed Claim and the Motion to Certify, including, without limitation, jurisdiction to approve the proposed Settlement and to grant final certification of the Kessler Settlement Class pursuant to 28 USC §§ 157 and 1334 and venue is proper before this Court pursuant to 28 USC §§ 1408 and 1409.

3. **Final Class Certification**. The Kessler Settlement Class, the Equitable Tolling Sub-Class and the Non-Equitable Tolling Sub-Class, each of which this Court previously certified preliminarily, is hereby finally certified for settlement purposes pursuant to Rule 7023 of the Federal Rules of Bankruptcy Procedure (which incorporates Fed. R. Civ. P. 23), the Court finding that for purposes of settlement, the Kessler Settlement Class, the Equitable Tolling Sub-Class and the Non-Equitable Tolling Sub-Class fully satisfy all of the applicable requirements of Rule 23 and due process.

The Kessler Settlement Class, the Equitable Tolling Sub-Class and the Non-Equitable Tolling Sub-Class, are defined, respectively, as follows:

> Kessler Settlement Class is defined as: All persons who obtained a second or subordinate, residential, federally related, non-purchase money, HOEPA qualifying mortgage loan from Community Bank of Northern Virginia or Guaranty National Bank of Tallahassee, that was secured by residential real property used as their principal dwelling and that was assigned to GMAC-Residential Funding Corporation n/k/a Residential Funding Company, LLC who

was not a member of the class certified in the action captioned Baxter v. Guaranty National Bank, et al., Case No. 01-CVS-009168 in the General Court of Justice, Superior Court Division of Wake County, North Carolina

Equitable Tolling Sub-Class is defined as: All persons who meet the above class-definition, whose loan closed prior to May 1, 2000.

Non-Equitable Tolling Sub-Class is defined as: All persons who meet the above class-definition, whose loan closed after May 1, 2000.

[No members of the Kessler Settlement Class timely requested to be excluded from or "opted out" of the Kessler Settlement Class.] **OR** [A list of those persons who have timely excluded themselves from the Kessler Settlement Class, and who therefore are not bound by the Settlement and the Final Judgment, is attached hereto as **Exhibit 1** and incorporated herein and made a part hereof.]

4. **Adequacy of Representation**. With the employment of Allocation Counsel and the certification of subclasses, there are no apparent conflicts of interest between: (1) the Named Plaintiffs and the Kessler Settlement Class, or among the members of the Kessler Settlement Class; or (2) Rowena Drennen and the Non-Equitable Tolling Sub-Class or among the members of the Non-Equitable Tolling Sub-Class; or (3) John Picard and Rebecca Picard and the Equitable Tolling Sub-Class or among the members of the Equitable Tolling Subclass. Plaintiffs' Counsel will fairly and adequately represent and protect the interests of the Kessler Settlement Class. Allocation Counsel will each fairly and adequately represent and protect the interests, respectively, of the Non-Equitable Tolling Sub-Class and the Equitable Tolling Sub-Class. Accordingly, (a): the Named Plaintiffs and R. Frederick Walters, Kip D. Richards, David M. Skeens, J. Michael Vaughan, and Garrett M. Hodes of the firm Walters Bender Strohbehn & Vaughan, P.C., and Bruce Carlson and Gary Lynch of the law firm Carlson Lynch Ltd., PNC Park, 115 Federal Street, Pittsburgh, PA 15212 as Counsel for the Kessler Settlement Class

("Plaintiffs' Counsel" or "Class Counsel"), have satisfied the requirements of Rule 23 and are hereby appointed and approved as representatives of the Kessler Settlement Class and Counsel for the Kessler Settlement Class, respectively; (b) Rowena Drennen and _____ , Allocation Counsel for the Non-Equitable Tolling Sub-Class with respect to allocation, have satisfied the requirements of Rule 23 and are hereby appointed and approved as the representative of the Non-Equitable Tolling Sub-Class and Allocation Counsel for the Non-Equitable Tolling Sub-Class with respect to allocation, respectively; (c) John and Rebecca Picard and _____ , Allocation Counsel for the Equitable Tolling Sub-Class with respect to allocation, have satisfied the requirements of Rule 23 and are hereby appointed and approved as the representatives of the Equitable Tolling Sub-Class and Allocation Counsel for the Equitable Tolling Sub-Class with respect to allocation, respectively.

5. **Class Notice**. The Court finds that the Class Mail Notice and its distribution to the Kessler Settlement Class as implemented pursuant to the Agreement and the Preliminary Approval Order:

a. Constituted the best practicable notice to the members of the Kessler Settlement Class under the circumstances of this Litigation;

b. Constituted notice that was reasonably calculated, under the circumstances, to apprise the members of the Kessler Settlement Class of (i) the pendency of the Bankruptcy Cases and the proposed Settlement, (ii) the nature of the action, (iii) the definition of the Kessler Settlement Class, (iv) the class claims, issues or defenses, (v) that a Kessler Class Member may enter an appearance through an attorney if the Kessler Class Member so desires, (vi) their right to opt out and exclude themselves from the proposed Settlement and the time and manner for doing so, (vii) their right to

object to any aspect of the proposed Settlement and the time and manner for doing so (including, but not limited to, the following: final certification of the Kessler Settlement Class; the fairness, reasonableness or adequacy of the Settlement as proposed; the adequacy of the Named Plaintiffs and/or Class Counsels' representation of the Kessler Settlement Class; the proposed awards of attorney's fees and expenses; and the proposed incentive awards), (viii) their right to appear at the Fairness Hearing if they did not exclude themselves from the Kessler Settlement Class, and (ix) the binding effect of the Order in the Bankruptcy Cases on all members of the Kessler Settlement Class who did not request exclusion;

c. Constituted notice that was reasonable and constituted due, adequate and sufficient notice to all persons and entities entitled to be provided with notice; and

d. Constituted notice that fully satisfied the requirements of Bankruptcy Rule 7023 and Rule 23, due process, and any other applicable law.

6. **Final Settlement Approval**. The terms and provisions of the Agreement, including all exhibits, have been entered into in good faith and as a result of serious, informed, arm's length and non-collusive negotiations. Based on the range of possible outcomes and the cost, delay and uncertainty associated with further litigation, the Agreement is reasonable and cost-effective. Therefore, the terms of the Agreement and the Settlement as provided therein are fully and finally approved, subject to satisfaction of the conditions precedent set forth in Section 14 of the Agreement, pursuant to Bankruptcy Rule 7023 and Rule 23, as fair, reasonable and adequate as to, and in the best interests of, the Parties and the Kessler Settlement Class Members, and in full compliance with all applicable requirements of the United States Constitution (including the Due Process Clause), and any other applicable law. Likewise, the terms of the

Agreement and the Settlement as provided therein, are fully and finally approved, subject to satisfaction of the conditions precedent set forth in Section 14 of the Agreement, under Fed. R. Bankr. P. 9019 as fair and equitable to the Debtors' Bankruptcy Estate and their creditors. The Agreement and the transactions contemplated thereby, including the releases given herein, are in the best interest of the Debtors, their estates, their creditors and all other parties in interest. The Agreement and the transactions contemplated thereby, including the releases given therein, meet the standards established by the Second Circuit for the compromise and settlement in bankruptcy, and are reasonable, fair and equitable and supported by adequate consideration. The Parties are hereby directed to implement and consummate the Agreement according to its terms and provisions and subject to satisfaction of the conditions precedent set forth in Section 14 of the Agreement.

7. **Binding Effect**. The terms of the Agreement and this Order shall be forever binding on all of the Kessler Settlement Class Members and the Named Plaintiffs, individually and as representatives of said Class, as well as on their respective heirs, executors, administrators, assigns, predecessors, and successors, and any other person claiming by or through any or all of them. The terms of the Agreement and Order shall have *res judicata* and other preclusive effect as to the "Releasors" for the "Released Claims" as against the "Released Persons," all as defined in the Agreement.

8. **Releases**. The Releasors, as defined in Section 2.24 of the Agreement, shall be bound by the Releases provided in Section 8 of the Agreement, which is incorporated herein in all respects, regardless of whether such persons received any compensation under the Agreement or Settlement. The Releases are effective as of the Effective Date specified in Section 14 of the Agreement. The Court expressly adopts all defined terms in Section 2 of the Agreement,

including but not limited to, the definitions of the persons and claims covered by the Releases as set forth at Sections 2.25 (Released Claims), 2.26 (Released Persons) and 2.24 (Releasors).

9. **Enforcement of Settlement.** Nothing in this Order shall preclude any action by any Party to enforce the terms of the Agreement.

10. **Additional Payment to the Named Plaintiffs.** The Court hereby awards the amounts listed on Schedule A ($_____total) to be paid from the Kessler Gross Recovery to the Named Plaintiffs as incentive awards for their services as representatives of the Kessler Settlement Class in the Bankruptcy Cases.

11. **Attorney's Fees and Expenses.** Plaintiffs' Counsel is awarded $_____ representing the litigation expenses and court costs that Plaintiffs' Counsel have incurred and advanced in connection with the Litigation and the Settlement, which shall be deducted from the Kessler Gross Recovery. Allocation Counsel for the Non-Equitable Tolling Sub-Class and Equitable Tolling Sub-Class are awarded _____ and _____ for their litigation expenses and court costs, respectively, and such sums shall be deducted from the Kessler Gross Recovery. In addition, the Court awards Plaintiffs' Counsel Attorney's fees of 35% of each Kessler Net Recovery. Allocation Counsel for the Non-Equitable Tolling Sub-Class and Equitable Tolling Sub-Class are awarded _____ and _____ for their attorney fees, respectively, and such sums shall be paid from Plaintiffs' Counsel Attorney's fee award. The Court finds and concludes that each of the above awards to Plaintiffs' Counsel for work and services in this case and in connection with the Settlement is reasonable for the reasons stated in *Plaintiffs' Application for Award of Attorney's Fees, Litigation Expenses and Court Costs* (Doc. #___) and finds as follows:

**[As customary, Plaintiffs will include additional language for the Court to consider using in any final order that it signs in support of Plaintiffs' fee award.]**

12. **No Other Payments**. The preceding paragraphs of this Final Order cover, without limitation, any and all claims against Released Persons for attorney's fees and expenses, costs or disbursements incurred by Plaintiffs' Counsel or any other counsel representing the Named Plaintiffs as representatives of the Kessler Settlement Class or the Kessler Settlement Class Members, or incurred by the Kessler Settlement Class Members, in connection with Released Claims against Released Persons, except to the extent otherwise specified in this Order or the Agreement.

13. **Retention of Jurisdiction.** Without in any way affecting the finality of this Order, this Court expressly retains jurisdiction as to all matters relating to the administration and enforcement of the Agreement and Settlement and of this Order, and for any other necessary purpose as permitted by law, including, without limitation:

a. enforcing the terms and conditions of the Agreement and Settlement and resolving any disputes, claims or causes of action that, in whole or in part, are related to the administration and/or enforcement of the Agreement, Settlement, this Order (including, without limitation, whether a person is or is not a member of the Kessler Settlement Class or a Kessler Settlement Class Member; and whether any claim or cause of action is or is not barred by this Order);

b. entering such additional Orders as may be necessary or appropriate to protect or effectuate the Court's Order and/or to ensure the fair and orderly administration of the Settlement and distribution of the Kessler Gross Recoveries; and

c. entering any other necessary or appropriate Orders to protect and effectuate this Court's retention of continuing jurisdiction.

14. **Claims Reserved.** The entry of this Order shall in no way stay, bar, preclude, abate or otherwise operate as a dismissal, release, discharge or adjudication of any claims other than the Released Claims as to the Released Persons by the Releasors.

15. **Contribution, Indemnity and Other Claims.** Any and all persons and entities (including but not limited to non-settling defendants in the Litigation, their successors or assigns, and any other person or entity later named as a defendant or third party in the Litigation) are permanently enjoined, barred and restrained from instituting, commencing, prosecuting, asserting or pursuing any claim against any of the Released Parties for contribution or indemnity (whether contractual or otherwise), however denominated, arising out of, based upon or related in any way to the Released Claims or claims and allegations asserted in the Litigation (or any other claims where the alleged injury to the entity/individual is the entity/individual's actual or threatened liability to one or more members of the Kessler Settlement Class), whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, whether asserted in this Court, in any federal or state court, or in any court, arbitration proceeding, administrative agency, or other forum in the United States or elsewhere, and whether such claims are legal or equitable, known or unknown, foreseen or unforeseen, matured or unmatured, accrued or unaccrued. All such claims will be extinguished, discharged, satisfied and unenforceable, subject to a hearing to be held by the Court, if necessary. Any person or entity so barred and enjoined shall be entitled to appropriate judgment reduction, if applicable, in accordance with applicable statutory or common law rule to the extent permitted for the claims alleged herein.

Dated: ____ __, 2013
New York, New York

_____
The Honorable Martin Glenn
UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT D**

**Filed Under Seal**

# EXHIBIT E

**General Motors**
**Combined Specialty Insurance Program**
**12/15/00 - 12/15/03**

| Insurer | % of | Limit | Policy |
|---|---|---|---|
| **Primary - $50 million** | | | |
| Lloyd's & British Cos. | 100 | **$50,000,000** | 823/FD0001142 |
| **First Excess - $50mil xs $50 mil** | | | |
| Hartford | 40 | $20,000,000 | NDA 0200454-00 |
| CNA/Continental Casualty | 20 | $10,000,000 | 169737324 |
| Lloyd's & British Cos. | 20 | $10,000,000 | 823/FD0001144 |
| MAG/Clarendon | 20 | $10,000,000 | MAG 14 400436 50000 |
| **Total** | 100 | **$50,000,000** | |
| **Second Excess - $100mil xs $100mil** | | | |
| Swiss Re | 100 | **$100,000,000** | MP 27049.1 |
| **Third Excess - $100mil xs $200mil** | | | |
| ACE | 25 | $25,000,000 | GM-9384D |
| XL | 25 | $25,000,000 | XLE+O-03920-00 |
| Starr Excess | 25 | $25,000,000 | 6457606 |
| Chubb Atlantic | 25 | $25,000,000 | (03) 3310-10-90 |
| **Total** | 100 | **$100,000,000** | |
| **Fourth Excess - $100mil xs $300mil** | | | |
| Zurich/Steadfast Ins. Co. | 50 | $50,000,000 | IPR 2185703-00 |
| St. Paul Mercury | 25 | $25,000,000 | 512CM0406 |
| Axcelera/North Am. Specialty | 25 | $25,000,000 | BNX0000337-00 |
| **Total** | 100 | **$100,000,000** | |
| **Grand Total** | | **$400,000,000** | |

# SCHEDULE 1
## KESSLER SETTLEMENT CLASS

| NAMED PLAINTIFFS | PROPOSED INCENTIVE AWARD |
|---|---|
| **Drennen, John Rowena & John** | **12,500.00** |
| **Gaskin, Flora** | **7,500.00** |
| **Kessler, Brian & Carla** | **7,500.00** |
| **Kossler, Phil & Jeannie** | **7,500.00** |
| **Nixon, John & Kathy** | **7,500.00** |
| **Picard, John & Rebecca** | **7,500.00** |
| **Sabo, William & Ellen** | **7,500.00** |
| **Turner, Roger and Christine** | **7,500.00** |
| **Wasem, Tammy & David** | **7,500.00** |

# Exhibit 6

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| IN RE: COMMUNITY BANK OF NORTHERN VIRGINIA SECOND MORTGAGE LENDING PRACTICES LITIGATION | MDL No. 1674<br><br>Case No. 03-0425<br>Case No. 02-01201<br>Case No. 05-0688<br>Case No. 05-1386<br><br>Hon. Gary L. Lancaster |

THIS DOCUMENT RELATES TO ALL MDL ACTIONS

**PLAINTIFFS' JOINT CONSOLIDATED AMENDED CLASS ACTION COMPLAINT**

Plaintiffs jointly amend all previously filed complaints in this multidistrict proceeding by substituting the following allegations of this *Joint Consolidated Amended Class Action Complaint* (sometimes the "*MDL Complaint*").

## I. THE NATURE OF THIS ACTION

1. This action is brought by a Plaintiffs' Class of residential mortgage borrowers against Community Bank of Northern Virginia ("CBNV")(a Virginia state-chartered, federally insured bank), now owned by PNC Bank, N.A., the Federal Deposit Insurance Corporation as receiver for Guaranty National Bank of Tallahassee ("GNBT") (a national bank)(collectively "the Banks"), and GMAC-Residential Funding Corporation n/k/a Residential Funding Company, LLC ("RFC").[1]

2. The conduct being challenged in this action demonstrates the types of sharp practices that fueled the collapse of the American mortgage market. The objective of the conspiracy at issue was to generate the highest possible volume of residential second mortgage

loans as a vehicle to extract exponentially excessive settlement fees from borrowers (Plaintiffs are challenging the practices that occurred in approximately 50,000 loan transactions). These loans had an average principal balance of approximately $35,000. Every borrower who was enticed to close one of these loans paid "origination" and "title" fees in excess of 12% of the original principal balance of the loan – as well as exorbitant interest rates that were largely unrelated to the credit worthiness of the borrowers.[2] The fees that were charged in connection with these loans were at least four times as high as the fees that would have been available to these borrowers in a true free market for settlement services that was not impeded by the presence of a fraudulent kick-back scheme.

3. The kickback scheme at issue was conceived by brothers David, DeVan and Chris Shumway and Randy Bapst. The Shumway/Bapst "business plan" was to drive loan volume via a massive nationwide direct mail marketing campaign. Borrowers who were identified by the marketing campaign were referred to the Bank Defendants, who would process and originate the loans in their own names, and then kick-back the overwhelming majority of the settlement fees to companies controlled by Messrs. Shumway and Bapst (the entities controlled by Shumways and Bapst will hereafter be referred to generally as the "Shumway/Bapst Organization"), notwithstanding that the Shumway/Bapst Organization was not providing any compensable settlement services in connection with the loans.

4. Defendant RFC (and in terms of loan volume to a lesser extent the other Investor Defendants) played a crucial role in the scheme. Specifically, RFC would purchase the loans

[1] RFC purchased the vast majority of the second mortgage loans at issue. A number of other entities, however, also purchased second mortgage loans originated by the Banks, including, Irwin Union Bank and Trust Company, Household Finance, Inc., Wilshire Funding Corporation, Fairbanks Capital Corporation and Morequity, Inc..

[2] During the period of time when GNBT was making the mortgage loans at issue -- from approximately April 2000 through August 2002 -- it originated more than 28,000 loans for a cumulative loan amount in excess of $1 billion. The vast majority of these loans, like the loans originated by CBNV, were sold to RFC on a correspondent basis.

from the Banks on a correspondent basis, shortly after the settlement of the loans. RFC profited from interest incurred while holding the loans in its own portfolio, and then again after it securitized pools of loans for sale on Wall Street. The capital provided by RFC was integral to the successful operation of the scheme, in that the Banks did not have sufficient capital to permit them to hold the loans in their own portfolios for any appreciable period of time.

5. The profits realized by the participants in the scheme were directly tied to loan volume, and every participant in the scheme ignored the unlawful aspects of the settlement practices at issue to maximize loan volume.

6. This action includes both a plaintiffs' and a defendants' class in connection with the second mortgage home loans made by the Banks. The class of Plaintiffs includes all persons obtaining high-cost, high-interest loans from CBNV and/or from GNBT . The loans at issue are all "high-cost" loans under the Home Ownership and Equity Protection Act, 15 U.S.C. § 1641 ("HOEPA").

7. In two prior opinions, the Third Circuit has confirmed that this matter can likely proceed as a class action. Specifically, two District Court orders approving previous proposed national settlements of the class claims at issue have been considered, vacated and remanded with instructions by the Third Circuit. In these opinions, the Third Circuit held that the claims at issue satisfy the numerosity, typicality and commonality elements of Rule 23(a), as well as the predominance and superiority elements of Rule 23(b)(3). *In re Community Bank of Northern Virginia,* 418 F.3d 277, 309-310 (3rd Cir. 2005). The Third Circuit offered detailed guidance regarding how to address potential adequacy issues under Rule 23(a)(4). *Id.* Any potential adequacy issue is resolved through the filing of this Joint Consolidated Amended Complaint.

8. This *MDL Complaint* relates back to the initial filings in *Davis v. Community Bank of Northern Virginia, et al*. (Case No. 02-1201)(May 1, 2000) for CBNV and the Investor Defendants and *Ulrich v. Guaranty National Bank of Tallahassee, et al*. (Case No. 02-1616)(September 18, 2001) for GNBT pursuant to Federal Rule 15 and principles of class action tolling. The claims alleged herein arise out of the conduct, transactions or occurrences set forth in the *Davis* and *Ulrich* complaints and the Defendants have long had notice of these claims such that they will not be prejudiced in maintaining a defense on the merits to these claims.

9. Each of the Plaintiffs and the Plaintiff Class Members loan transaction is a federally related mortgage loan and is governed by and subject to the Real Estate Settlement Practices Act 12 U.S.C. § 2601 *et seq.* ("RESPA"), the Truth in Lending Act ("TILA") and HOEPA (15 U.S.C. § 1602 and Regulation Z at 12 C.F.R. § 226.2). Each loan transactions is a consumer credit transactions within the meaning of the TILA and HOEPA. The loans were federally related mortgage loans obtained primarily for personal, family, or household purposes, and the mortgages were all secured by the Class Members' respective principal dwellings. None of the Class Members' loans were for business, commercial or agricultural purposes..

10. The Banks and RFC and others, were jointly engaged in a conspiracy and racketeering enterprise, described more fully below, from which they each profited by the origination and sale of HOEPA loans through extensive mail and wire fraud.

11. The Investor Defendants, including specifically RFC, are liable as conspirators with the Banks under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and common law, as conspirators and joint venturers, and as assignees under HOEPA.

12. HOEPA, at 15 U.S.C. § 1641(d) states that:

> Any person who purchases or is otherwise assigned a mortgage referred to in section 1602 (aa) of this title shall be subject to all claims and defenses with

> respect to that mortgage that the consumer could assert against the creditor of the mortgage, unless the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising ordinary due diligence, could not determine, based on the documentation required by this subchapter, the itemization of the amount financed, and other disclosure of disbursements that the mortgage was a mortgage referred to in section 1602 (aa) of this title.

13. Each of the Investor Defendants knew they were acquiring HOEPA loans. The Investor Defendants were, upon information and belief, often involved in the making of many of the Class members' loans, such as by giving written or electronic pre-approval to the underwriting of loans and by its commitments to purchase loans from the Banks prior to the time the loans were closed.

14. The Class members' claims arise under RESPA, TILA, HOEPA and RICO, 18 U.S.C. §§ 1961, *et seq*. The Plaintiff Class does not state any claims for "usury" under state or federal law and expressly disclaims any such claims as part of this lawsuit.

15. Pending completion of discovery, the Class members all state claims for (1) violations of RESPA for kickbacks, unearned fees, and impermissible affiliated business relationships; (2) violations of TILA and HOEPA for inaccurate and understated material disclosures; (3) violations of TILA and HOEPA for other disclosure and substantive violations;; and (4) violations of RICO for Defendants' racketeering activities used to perpetuate and further the predatory lending scheme. Plaintiffs also seek a declaratory judgment related to their rescission rights under 15 U.S.C. § 1635.

## II. THE PARTIES, JURISDICTION AND VENUE

### The Plaintiffs

16. Plaintiff Ruth J. Davis resides at 302 Trotwood Drive, Coraopolis, Allegheny County, Pennsylvania.

17. Plaintiffs Philip F. Kossler and Jeannie C. Kossler, husband and wife, reside at 127 Huron Drive, Carnegie, A11egheny County, Pennsylvania.

18. Plaintiffs Brian W. and Carla M. Kessler, husband and wife, residing at 6466 State Route 908, Apt. 908, Tarentum, Allegheny County, Pennsylvania.

19. Plaintiff Patrice Porco resides at 805 Center Avenue, Avalon, Pennsylvania.

20. Plaintiff Thomas T. Mathis resides at 1435 LaSalle Avenue, Pittsburgh, Pennsylvania.

21. Plaintiffs Stephen R. Haney and Amy L. Haney, husband and wife, reside at 868 Flemington Street, Pittsburgh, Pennsylvania.

22. Plaintiffs John and Rebecca Picard, husband and wife, reside at 5214 Becky Drive, Pittsburgh, Pennsylvania.

23. Plaintiffs William and Ellen Sabo, husband and wife, reside at 3812 Cambria Street, Homestead, Pennsylvania.

24. Plaintiffs Russell and Kathleen Ulrich, husband and wife, reside at 515 Fieldcrest Drive, Pittsburgh, Pennsylvania.

25. Plaintiff Nora H. Miller resides at 304 Brookston Drive, Cranberry TWP, Pennsylvania.

26. Plaintiffs Robert A, and Rebecca A, Clark, husband and wife, reside at 3020 Hebron Drive, Pittsburgh, Pennsylvania.

27. Plaintiff Edward R. Kruszka Jr., resides at 1320 Coronado Drive, McKeesport, Pennsylvania.

28. Plaintiff Tina Merl Boor reside at 231 Marshall St, Perkasie, Pennsylvania 19844-1440.

29. Plaintiff Martin J. Baratz resides at resides at 1727 Graces Ter, Edmond, Oklahoma 73025.

30. Plaintiff Clell L. Hobson resides at 5100 Old Birmingham Hwy, Apt. 1001, Tuscaloosa, Alabama.

31. Plaintiff Rosa Kelly Parkinson, a Captain in the United States Army, resides at 3736 Patti Parkway, Decatur, Georgia.

32. Plaintiffs John and Kathy Nixon, husband and wife, reside at 6701 Hibiscus Lane, Northport, Alabama.

33. Plaintiff Brian Cartee resides at 125 Palmetto Bay Road, Savannah, Georgia.

34. Plaintiffs Mack and Robin Dorman, husband and wife, reside at 318 Foxwood Circle, St. Mary's Georgia.

35. Plaintiffs Jerome and Charretta Roberts, husband and wife, reside at 415 Suwanee East Drive, Lawrenceville, Georgia.

36. Plaintiff Melba Brown resides at 2553 Riverside Drive, Mobile, Alabama.

37. Plaintiff Flora A. Gaskin, resides at 3408 22nd Street, Northport, Alabama.

38. Plaintiffs Roy Lee and Ruthie Mae Logan, husband and wife, reside at 5565 Jug Factory Road, Tuscaloosa, Alabama.

39. Plaintiffs Shawn and Lorene Starkey, husband and wife, reside at 1461 Spruce Ave., Liberty, Missouri.

40. Plaintiffs John and Rowena Drennen, husband and wife, reside at 2703 Bellefontaine Ave., Kansas City, Missouri.

41. Plaintiff Richard Montgomery resides at 4904 Whitney Drive, Independence, Missouri.

42. Plaintiffs Tammy and David Wasem reside at 710 Ballantrae Drive, Wentzville, Missouri.

43. Each of the above identified plaintiffs is a member of the Plaintiff Class and representative of all of the Class members.

44. Plaintiffs reserve the right to add additional proposed representative plaintiffs, if necessary and in accordance with the Order of the Court.

## Defendants

### The Bank Defendants

45. COMMUNITY BANK OF NORTHERN VIRGINIA ("CBNV") is a Virginia corporation with its principal place of business in Virginia and which does business in Pennsylvania and which as a lender and as part of the aforementioned predatory lending scheme made at least 22,810 and more likely close to 30,000 HOEPA loans to certain of the Plaintiffs and to members of the Plaintiff Class. CBNV is now known as PNC National Bank.

46. .GUARANTY NATIONAL BANK OF TALLAHASSEE ("GNBT") is (or was) a national bank with its principal place of business in Tallahassee, FL. As indicated above, GNBT is named as a Defendant because it was previously named as a defendant in one or more prior complaints although it was closed by the OCC in March 2004 and the FDIC appears in this matter as the receiver of GNBT. As a lender and as part of the aforementioned predatory lending

scheme, GNBT made at least 21,725 HOEPA loans to certain of the Plaintiffs and to members of the Plaintiff Class.

**The Investor or Non-Bank Defendants**

47. DEFENDANT GMAC-RESIDENTIAL FUNDING CORPORATION n/k/a RESIDENTIAL FUNDING COMPANY, LLC (sometimes referred to above and below as "RFC") is a Delaware corporation (it is now a limited liability company) with its principal place of business in Minnesota and is a 100% subsidiary of GMAC-RFC Holding Corporation. GMAC-RFC is licensed to and does business nationwide and purchased at least 44,535 loans of the Plaintiff Class directly or indirectly from the Banks

48. Defendant JP MO**R**GAN CHASE BANK, F/K/A THE CHASE MANHATTAN BANK (sometimes "JP Morgan-Chase") is a New York corporation with its principal place of business in New York and which does business nationwide. JP Morgan-Chase acts as trustee for trusts and loan pools created by RFC for the purpose of "securitizing" mortgage loans. The specific identity of each of the trusts that have been assigned the loans of the Plaintiff Class, either directly or indirectly or through an intervening depositor of other special purpose entity or "shelf" from the Banks is unknown at this time but is known by RFC and JP Morgan-Chase.

49. Defendant IRWIN UNION BANK AND TRUST COMPANY ("Irwin") is (or was) an Indiana corporation with its principal place of business in California. Irwin did business nationwide and purchased loans of the Plaintiff Class directly or indirectly from the Banks. As indicated above, Irwin is named as a Defendant because it was previously named as a defendant in one or more prior complaints although it was closed by the FDIC on September [1]8, 2009.

50. Pursuant to HOEPA, 15 U.S.C. § 1641(d), each Investor Defendant is liable for the violations of TILA, HOEPA, RESPA and RICO committed by CBNV and GNBT against Plaintiffs and the members of the Class under rules of conspiracy and assignee liability.

51. The Investor Defendants are entities or the trustees of entities that purchased HOEPA loans from CBNV or GNBT. The Investor Defendants held or still hold the loans of Plaintiffs or members of the Plaintiff Class.

**The Defendant Class**

52. The Defendants also include members of a Defendant Class as more specifically alleged below. The Defendant Class purchased ***all*** of the HOEPA loans of the Plaintiff Class directly or indirectly from the Banks and/or the Investor Defendants and as such stand in the shoes of the Banks and/or the Non-Bank Defendants under 15 U.S.C. § 1641(d) and under the rules of conspiracy and assignee liability. As such, Pursuant to HOEPA, 15 U.S.C. § 1641(d), the Defendant Class is liable to Plaintiffs and the Plaintiff Class for the violations of TILA, HOEPA, RESPA and RICO committed by CBNV and GNBT and/or the Investor Defendants.

**Jurisdiction And Venue**

53. Federal question jurisdiction is proper under 28 U.S.C. § 1331, 12 U.S.C. § 2614, 18 U.S.C. § 1964, and 15 U.S.C. § 1640(e) as the federal claims asserted herein arise under federal law.

54. Venue and personal jurisdiction are proper in this Court pursuant to recognized principles of due process and in accordance with 28 U.S.C. § 1407, and also 28 U.S.C. § 1391 and 18 U.S.C. § 1965. Specifically, each of the actions in which this *Joint Consolidated Amended Class Action Complaint* has been filed are part of a multi-district preceding No. 1674,

which was consolidated in this Court as part of the "*In re: Community Bank of Northern Virginia Second Mortgage Loan Litigation*."

55. Defendants have either directly, or indirectly, purposefully directed their activities toward Pennsylvania and nationwide residents and because the Plaintiffs' causes of action arise out of and relate to the Defendants' activities, in part, within this judicial district and nationwide.

56. Because Defendants do business nationwide, they are subject to the general jurisdiction of all district courts in the United States. Defendants have substantial, continuous, and systematic contacts with the State of Pennsylvania and/or other states nationwide. By virtue of the scheme and conspiracy described in this Complaint, CBNV and GNBT made and the Non-Bank Defendants and the Defendant Class members acquired over 50,000 loans nationwide, including hundreds of loans in Pennsylvania, from CBNV and GNBT. The Non-Bank Defendants and the Defendant Class members have thus, in essence, funded and/or purchased HOEPA mortgage loans made to Pennsylvania and nationwide borrowers, and they have liens on real property in Pennsylvania and other states nationwide (which was used as collateral for HOEPA mortgage loans) and the power of the Pennsylvania and other courts nationwide to enforce those liens, which they have undoubtedly done in the past.

57. The Plaintiffs and the Class members made monthly payments on their HOEPA mortgage loans and Defendants and the Defendant Class members continued to profit directly or indirectly from the revenue stream generated by the HOEPA mortgage loans.

58. The Investor Defendants and the Defendant Class members are or were in the business of funding and purchasing HOEPA mortgage loans, and such activities were central to the conduct of their business, and their funding and servicing of Pennsylvania and/or nationwide mortgage loans has been substantial and continuous.

59. The contacts of the Defendants with Pennsylvania and/or other states nationwide are sufficient, substantial and continuous, and the Plaintiffs and the Class members' causes of action arise from and relate to those contacts so that the maintenance of the suit in this Court and the transferee Court does not offend traditional notions of fair play and substantial justice. Defendants should reasonably anticipate being haled into this Court in this judicial district in Pennsylvania and other districts nationwide to answer for their own unlawful acts, especially since Pennsylvania and all other states have a strong interest in providing a forum for their residents aggrieved by schemes to violate consumer protection acts and fair lending laws.

60. Indeed, Plaintiffs' and Class Members' mortgage instruments expressly provide that "[t]he state and local laws applicable to this [mortgage] shall be the laws of the jurisdiction in which the property is located. The foregoing sentence shall not limit the applicability of Federal law to this [mortgage]." Moreover, these loans which were purchased by the Investor Defendants and the Defendant Class members were purchased with notice pursuant to 15 U.S.C. § 1641(d)(4) that these loans were HOEPA loans and that the Investor Defendants and the Defendant Class members stood in the shoes of the Banks with respect to liability for such loans.

## III. FACTUAL BACKGROUND

### Overview of the Shumway/Bapst Scheme

61. Beginning in early 1998, three brothers, David, DeVan and Chris Shumway, in concert with Randy Bapst, conceived what was to become a massive mortgage fraud scheme.

62. David and DeVan Shumway, and Randy Bapst, all had extensive previous experience in the mortgage industry.

63. Chris Shumway is the younger brother of David and DeVan. He provided seed money from his substantial personal wealth that permitted the Shumway/Bapst Organization to mount a very large direct mail marketing campaign and thereby maximize the volume of second mortgage loans available to refer to the Bank Defendants.

64. The Shumway brothers and Mr. Bapst created multiple business forms through which they ultimately referred the loans. The form and/or names of these entities was changed as part of the Shumway/Bapst Organization's effort to stay one step ahead of the Virginia state banking regulators (i.e. the Bureau of Financial Institutions of the Virginia State Corporation Commission), including their ultimate effort to avoid the reach of Virginia regulators altogether through a relationship with Florida-domiciled national bank GNBT.

65. As noted, the plan conceived by the Shumway/Bapst Organization sought to maximize loan volume, and thereby maximize loan settlement fees and interest. However, a non-depository lender must comply with fee caps and interest ceilings imposed by the laws of the various states, thereby limiting potential profits. To evade this problem, the Shumway/Bapst plan envisioned an association with a regulated depository institution, which arguably would not be subject to these same fee caps and interest ceilings.[3]

[3] The Shumway/Bapst Organization obtained formal opinion letters from prominent law firms regarding their ability to export interest rates and avoid state fee caps. For example, it obtained a letter from the Washington, D.C. office

66. The business plan specifically contemplated that the Shumway/Bapst Organization would target a financially distressed bank, which would be offered an opportunity to derive significant income through the loans referred to the Banks by the Shumway/Bapst Organization, so long as the Banks would agree to kick-back the lion's share of the origination fees generated through the loans to the Shumway/Bapst Organization.

67. The plan also required that the Banks would use title companies controlled by the Shumway/Bapst Organization to extract additional excessive and unearned fees from the borrowers.

68. The initial structure used by the Shumway/Bapst Organization and Bank Defendant CBNV (now PNC) was an LLC designated EquityPlus Financial, LLC. EquityPlus, Inc. owned 75% of the LLC and CBNV owned 25%.[4]

69. This initial structure utilized by EquityPlus Financial, Inc. and CBNV was in place for approximately five months (May 29, 1998, through October 29, 1998). During that five month period, the LLC originated loans that violated the Affiliate Business Arrangement requirements of RESPA, thereby invalidating RESPA's ABA exemption, by: a) failing to disclose the relationship among CBNV, EquityPlus Financial, Inc. and EquityPlus Financial,

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of Pittsburgh-based law firm Kirkpatrick & Lockhart dated May 18, 2000, which addressed the applicability of the National Bank Act to loans made by GNBT. David Shumway, and GNBT's president, asked that Kirkpatrick and Lockhart address the following issues: 1) whether GNBT could rely upon the most favored lender provisions of the National Bank Act to export Florida interest rates; 2) the fees that are included in the "interest rate" under the most favored lender provisions; 3) how high of an "interest rate" could be contracted for under Florida's usury provisions and mortgage laws; and, 4) the maximum prepayment fee and number of discount points that could be charged under Florida law.

[4] This particular business form was conceived in response to past regulatory problems experienced by the Shumway/Bapst Organization. Specifically, the Virginia banking regulators had previously challenged a "net branch" arrangement pursuant to which Shumway/Bapst controlled company EquityPlus Financial, Inc. was brokering loans for Virginia state bank Resource Bank without the required licensure. The regulators terminated the arrangement by issuing a cease and desist order. Thus, when EquityPlus, Inc. commenced business with CBNV, it created an entity which was partially owned by a state-chartered bank, so that it could that assert that the LLC was a subsidiary of the bank, and thus would not need state

LLC; b) requiring the use of the settlement services being provided by EquityPlus, LLC and title companies which had common ownership with EquityPlus Financial, Inc.; and, c) providing a thing of value pursuant to the arrangement that was other than a return on ownership interest.

70. During the pendency of the LLC structure described above, the mortgage loans at issue were funded by the Bank with all origination services other than loan funding being provided by the LLC. Nonetheless, the HUD-1s issued to borrowers at closing indicated that all settlement services delineated in Section 800 of the HUD-1s were being performed by the Bank and that all fees for those services were being paid to the Bank. This was untrue. Most of the services were being performed by the LLC and the majority of the fees for the services were being paid to the LLC. The concealment of the actual allocation of fees collected impeded the operation of a free market for settlement services and contributed to the Bank's ability to significantly overcharge borrowers for these services.[5]

71. After the Virginia banking regulators expressed concern regarding the legality of the LLC structure being utilized by EquityPlus Financial, Inc. and CBNV, the parties to that arrangement changed the form of the operation. David Summers, the president of CBNV, described this change in a March 11, 1999, letter to the Virginia banking regulators wherein he stated: "[T]he mortgage affiliations have been restructured as loan production offices of Community Bank. The loan originators and processors of the limited liability mortgage affiliates are now employees of the Bank and the principals of the limited liability companies (such as EquityPlus Financial, LLC) are now consultants to the Bank."

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licensure to broker mortgage loans in Virginia. Therefore, EquityPlus, Inc. and CBNV combined to form EquityPlus, LLC.

72. In other words, beginning in approximately October 1998, EquityPlus Financial, Inc. became a "consultant" to CBNV. After that date, all settlement services related to the loans at issue were performed by CBNV. EquityPlus Financial, Inc. did not provide any settlement services in connection with these loans after that date.

73. Commencing in approximately October 1998, borrowers identified by the EquityPlus Financial, Inc. would be referred to CBNV for second mortgage loans. Toward that end, EquityPlus Financial, Inc. would identify potential borrowers from address lists which it purchased from credit reporting agency Equifax. It would then contract with direct mail marketing company Hart Hanks of San Antonio, Texas to do mass mailings to the selected potential borrowers.

74. Notwithstanding that EquityPlus Financial, Inc. was not providing any settlement services, CBNV paid kick-backs to EquityPlus Financial, Inc. in exchange for the referral of the loan business at issue. Those kick-backs consisted of all origination fees, net of expenses, less 1% of the loan balance plus $75 (these latter amounts were retained by CBNV as "loan funding fees"). The kick-backs paid to EquityPlus Financial, Inc. were directly derivative of loan volume, and did not bear any relationship to settlement services provided by EquityPlus Financial, Inc. in connection with the loans, in that, as noted, EquityPlus Financial, Inc. did not perform any compensable settlement services in connection with the loans.

75. CBNV actively concealed the payment of kick-backs to EquityPlus Financial, Inc. in the loan documents issued to each borrower. For example, the HUD-1s issued to each borrower indicated that all origination fees were being paid to CBNV, when in reality most of the fees were being kicked-back to EquityPlus Financial, Inc., an entity not identified anywhere

[5] During this time frame, borrowers were also required to use title companies owned and controlled by the Shumway/Bapst Organization. These companies were used to extract additional excessive and unearned fees from

on the borrowers' HUD-1s.

76. In the spring of 2000, EquityPlus, Inc. began to wind down its relationship with CBNV. David Shumway, the president of EquityPlus Financial, Inc., asserts that around that time he was introduced to the principals of GNBT by Don Schmoltz, a former consultant to CBNV.

77. In April 2000, using a new entity with the name Equity Guaranty, LLC, the Shumway/Bapst Organization entered into a Consulting Agreement with GNBT which was in all material respects identical to the agreement that was in place between EquityPlus Financial, Inc. and CBNV for the period between October 1998 and November 1999. This Consulting Agreement remained in place through approximately February 2002.

78. Despite having the Shumway/Bapst Organization move on to an arrangement with GNBT, CBNV continued to originate second mortgage loans via other consultants, which loans, upon information and belief, perpetrated many of the same wrongs associated with the CBNV-Shumway/Bapst relationship and which loans were purchased by RFC and perhaps other Investor Defendants.

79. As to the Shumway/Bapst Organization, regardless of whether through CBNV or GNBT, the fundamentals of the scheme did not change.

80. RFC purchased substantially all of the loans made to borrowers who were referred to both CBNV and GNBT by the Shumway/Bapst Organization.

81. Representatives of RFC knew that nothing material had changed in the operation from the Shumway/Bapst/CBNV days other than the names of the business forms generating the loans. RFC suspected that unlawful fees were being paid to the Shumway/Bapst Organization.

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borrowers. These fees were delineated in Section 1100 of the HUD-1s issued to the borrowers.

Indeed, a memorandum of a conversation with Don Russell of RFC and Paul Schieber, one of its attorneys, on January 29, 2001 notes:

> "GMAC/RFC's continuing concerns with title fee charges. GMAC/RFC believes that the fees are excessive."

82. On information and belief, between March and September of 2001, approximately 8948 loans were originated by GNBT, with a total original principal balance of $335,070,300, or an average per loan balance of $37, 446.00.

83. With respect to those loans, GNBT collected in excess of $ 32,000,000 in origination fees, nearly all of which was illegally kicked-back to the Shumway/Bapst organization. Shumway/Bapst-controlled title companies were also paid in excess of $8,000,000 in fees for ostensible title-services in connection with these loans, much of which was collected in violation of applicable federal law.

84. The kick-back scheme conceived by the Shumway/Bapst Organization and carried out by the Bank Defendants – with the facilitation of RFC—eliminated the possibility of a free market for settlement services in connection with the loans at issue to the demonstrable financial detriment of Plaintiffs and the putative Class.

**The Role of Defendant GMAC-Residential Funding Corporation**

85. In the above text, this *MDL Complaint* suggests that Defendant RFC "purchased" nearly all of the loans referred to CBNV/GNBT by the Shumway/Bapst Organization. While that is a true statement, it is an oversimplification and it is useful to review GMAC-RFC's specific role in these transactions within the historical context of RFC's business model.

86. Residential Funding Company LLC traces its roots to 1982, when it was formed as a subsidiary of Banco Mortgage Company, an affiliate of Northwestern National Bank, the predecessor of Northwest Bank.

87. Initially, RFC focused on buying and securitizing "jumbo" mortgages (mortgages with loan balances above the purchasing authority of Freddie Mac and Fannie Mae). Over time, it moved toward buying and securitizing other mortgage products including, in a very material way, second mortgage loans.

88. In the most simple terms, ''securitization" refers to the process of packaging loans (not only mortgage loans) for sale as securities. Based on its business model, RFC's income was generated in two fundamental ways: 1) income derived from holding performing loans in inventory; and, 2) the more substantial income derived when loans are packaged and sold as securities. GMAC-RFC also derived income from loan servicing through other affiliated companies generally known as Homecomings.

89. Since RFC does not really originate mortgage loans directly, it is necessary for it to cultivate relationships with third-party loan "originators" to insure that RFC has access to a steady flow of loan "product" which will then generate income for RFC while it is held in inventory and subsequently packaged, and then generate even more income when the packages are sold as securities.

90. In 1990, RFC was acquired by General Motors Acceptance Corporation. Throughout the early and mid-1990's the company that had become GMAC-RFC expanded the variety of loan "products" that it would purchase and securitize.

91. By the late 1990's, profit margins derived from the securitizations of lower-risk loan products began to dissipate and many companies, including GMAC-RFC, began to securitize higher-risk loan products.

92. Eventually, GMAC-RFC achieved market dominance with respect to the purchase and securitization of higher-risk mortgage loans known as "125" loans, so-called

because the amount financed represented up to 125% of the value of the collateral securing the loan. These loans were also known as High-LTV (loan-to-value) loans. This "125" loan product was the marketing focus of the Shumway/Bapst Organization and, by 1999, the Shumway/Bapst operation had become the largest referral source for banks originating the "125" loan product that was ultimately purchased by RFC.

93. Because the Shumway/Bapst Organization was the largest source of referrals for loans in the 125% securitization market that GMAC-RFC had begun to dominate, and because the relationship was so profitable, GMAC -RFC turned a blind eye to the illegal settlement practices that pervaded the loans at issue.

94. The settlement fees collected in connection with the loans at issue were significant sources of revenue not only for the Banks and the Shumway/Bapst companies, but also for GMAC-RFC. More specifically, these fees were typically rolled into the principal of the loans and GMAC-RFC derived substantial interest income from these illegal fees while the loans were held in portfolio and then again as a function of the fact that the illegal fees padded the income received from GMAC-RFC when the loans were ultimately securitized.

95. Because GMAC-RFC derived substantial income from the unlawful settlement fees, GMAC-RFC actively worked with the Bank Defendants to expand the loan volume being generated by the operation.

96. GMAC-RFC directly participated in the fraudulent lending activities in that it provided the Bank Defendants with a continuing commitment to purchase all of the high-cost loan production, notwithstanding that it knew that the loans included unlawful terms.

97. As a function of its regular presence at the offices where the loans at issue were being solicited, referred and originated, as a function of the fact that it audited the financial

statements of CBNV and GNBT, and as a function or the fact that it received all of the original loan files, including the final Settlement Statements, when it purchased the loans at issue, and as a function of the fact that it audited the loans that it was purchasing, GMAC-RFC knew the precise extent to which every borrower was being defrauded in connection with the loans at issue.

**Other Investor Defendants**

98. After CBNV began to wind down its relationship with the Shumway/Bapst Organization and RFC, it continued to originate loans through other "consultants" and sell such loans to other investor-purchasers like Irwin Union, Household Finance and Morequity. These loans had settlement terms that were very similar to the terms in the loans that were sold to RFC.

99. These other Investor-Defendants were also integral to CBNV's continued scheme. For example, in 2001, Irwin purchased 1610 loans from CBNV and throughout the scheme it purchased as many as 3,200 loans from CBNV.

**The Downfall of the GNBT – Shumway/Bapst Operation**

100. In mid-2001, the Office of the Comptroller of the Currency ("OCC") performed an examination of GNBT. Its findings were set forth in a Report of Examination dated July 23, 2001. The OCC noted myriad deficiencies in GNBT's mortgage lending practices.

101. In January 2002, GNBT entered into a Letter Agreement with the OCC which placed tight controls on the Bank.

102. By this time, however, relations had also deteriorated with GMAC-RFC. By January of 2002, GMAC-RFC had become increasingly concerned about GNBT's loan origination practices.

103. Ultimately, GMAC-RFC determined that notwithstanding the substantial income

derived from the GNBT loans, it was unwilling to continue to shoulder the risk that came with the unlawful lending practices of GNBT.

104. Thus, in January of 2002, GMAC-RFC stated that it was unwilling to purchase any additional GNBT loans and that it would be returning approximately $40,000,000.00 in loans that had already been delivered to GMAC-RFC for purchase.[6]

105. GMAC-RFC's actions had adverse implications for both the Shumway/Bapst Organization and GNBT. Without any purchaser for the loan production, GNBT did not have adequate reserves to maintain the loans in its own portfolio. Therefore, the Shumway/Bapst Organization had no bank to which to refer additional loans, and the Bank had no secondary market purchaser to buy additional loans. Thus the mortgage fraud scheme conceived by the Shumway/Bapst Organization ultimately withered away.

106. Subsequently, the Shumway/Bapst Organization attempted to obtain a license for a new mortgage company named Calusa Investments. Rejecting that entities license application for the second time, the Virginia banking regulators stated: "The applicant's principals have an attitude of utter disdain for compliance with laws and regulations applicable to the mortgage lending/brokering business."

107. As to GNBT, it was closed by regulators and in the OCC news release regarding that closure it was reported that as to the high loan-to-value home equity lending program, i.e., the scheme with Shumway/Bapst, the OCC found numerous violations of consumer laws.

[6] On July 17, 2002, David Shumway sent a letter to Bruce Paradis, then President and C.E.O. of RFC, demanding that RFC purchase the loans that it had returned. RFC reconsidered its decision, and ultimately did repurchase those loans but did not purchase any new loans.

**Assignee, Joint Venturer and Conspirator Liability**

108. Pursuant to HOEPA, at 15 U.S.C. § 1641(d), the Investor Defendants and the Defendant Class members are liable to the Plaintiffs and the Plaintiff Class for the Banks' violations of federal and state law just as the Banks are to the Plaintiffs.

109. The Investor Defendants and the Defendant Class members are also liable to the Plaintiffs and the Plaintiff Class for the Banks' violations of federal or state law just as the Banks are liable, because they were engaged in a joint venture, partnership and conspiracy to make, originate and sell as many high-cost mortgage loans as possible, as described fully above. The participants in the consulting/loan production office scheme were jointly engaged in and responsible for the violations of federal law.

110. Additionally, while HOEPA denies the Investor and the Defendant Class members of any "holder in due course" defenses, such defense is not and would not otherwise be available to the Investor Defendants and the Defendant Class members because they did not take the notes and purchase the Plaintiffs' loans in "good faith" and without notice that Plaintiffs' had defenses to the loans. The Investor Defendants and the Defendant Class members were, to some extent, involved in the making of the loans, and they pre-approved loans for purchase prior to the time they were closed.

111. Also, each of the loans that the Investor Defendants and the Defendant Class members received contained the required Section 32 or HOEPA Assignment Notice required by 15 U.S.C. § 1641(d) (4) and the standard forms in the Class members' loan files such as the TILA and HOEPA Disclosures and the HUD-1s, provided actual knowledge of the TILA and HOEPA violations and would have provided notice to the Investor Defendants and the Defendant Class members that the Class members had defenses to enforcement of the loans.

112. In addition, the Non-Bank Defendants and the Defendant Class members individually reviewed each loan file and performed their own HOEPA calculations to determine if the loans were high-cost loans covered by HOEPA and otherwise met their criteria for purchase.

113. Further, the existence of the HOEPA § 1641(d)(4) notice eliminates any "holder in due course" defenses to the Class members' claims.

114. The Non-Bank Defendants and the Defendant Class members took the promissory notes and trust deeds subject to the same restrictions, limitations, and defects as they had in the hands of the Banks and acquired no greater rights than its assignors had at the time of the assignment or sale of the loans.

## The Plaintiffs' Loans

### The Davis Loan

115. In the winter of 1999 Ruth Davis received a solicitation in the mail indicating that she had been pre-approved for a debt-consolidation second mortgage loan with CBNV.

116. Ms. Davis called the toll free phone number to apply for a second mortgage loan.

117. On or about February 22, 1999 CBNV closed the Davis loan. On this date, Ms. Davis first received her TILA and HOEPA disclosures.

118. In connection with the above-alleged predatory lending scheme, CBNV loaned Ms. Davis a total sum of $24,100.00 to be repaid with interest at a rate of 13.75% (APR of 15.456%) in consecutive monthly installments over a period of 24 years. The loan was a consumer loan obtained for personal, family or household purposes.

119. To secure repayment of their note, Ms. Davis executed a deed of trust for the benefit of CBNV. The deed of trust granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

120. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Davis loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 1,928.00 |
| 802 | Loan Discount | CBNV | 482.00 |
| 804 | Credit Report | EPF | 45.00 |
| 807 | Flood Certification Fee | EPF | 20.00 |
| 1101 | Settlement or Closing Fee | Title America LLC | 283.00 |
| 1102 | Abstract or Title Search | Title America LLC | 300.00 |
| 1103 | Title Examination | Title America LLC | 300.00 |
| 1111 | Overnight Fee | Title America LLC | 25.00 |
| 1112 | Processing Fee | Title America LLC | 250.00 |
| 1201 | Recording Fee | Allegheny County | 41.50 |

121. The HUD-1 is fraudulent in that the line items shown as being payable to CBNV in Section 800 were, other than perhaps a very small percentage, kicked-back to Equity Plus Financial, Inc.

122. Moreover, the title charges set forth in Section 1100 of the Davis HUD-1 were neither bona fide nor reasonable. The $300.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of actual cost of the property report is a RESPA violation.

123. Also, in violation of RESPA's prohibition against unearned fees, Ms. Davis was charged a loan discount fee for which no discount in her loan rate was given.

124. In connection with this loan, Ms. Davis was provided with a Federal Truth-In-Lending Disclosure Statement that stated that her Finance Charge was $63,971.58 and that her annual percentage rate was 15.46%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Kossler Loan**

125. In the summer of 1998 the Kosslers received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with CBNV.

126. Mr. and Mrs. Kossler called the toll free phone number to apply for a second mortgage loan.

127. On or about July 28, 1998, CBNV closed the Kossler loan. On this date, Mr. and Mrs. Kossler first received their TILA and HOEPA disclosures.

128. In connection with the above-alleged predatory lending scheme, CBNV loaned Mr. and Mrs. Kossler a total sum of $30,000.00 to be repaid with interest at a rate of 12.99% (APR of 14.817%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

129. To secure repayment of their note, Mr. and Mrs. Kossler executed a deed of trust for the benefit of CBNV. The deed of trust granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

130. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Kossler loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 2,250.00 |
| 804 | Credit Report | CREDCO | 13.00 |

| | | | |
|---|---|---|---|
| 808 | Document Review | CBNV | 250.00 |
| 809 | Processing Fee | CBNV | 150.00 |
| 1101 | Settlement or Closing Fee | First National Title & Escrow | 450.00 |
| 1102 | Abstract or Title Search | First National Title & Escrow | 25.00 |
| 1103 | Title Examination | First National Title & Escrow | 325.00 |
| 1111 | Signing Agent | NSC | 200.00 |
| 1201 | Recording Fee | Not identified | 43.50 |

131. The HUD-1 is fraudulent in that the line items shown as being payable to CBNV in Section 800 were, other than perhaps a very small percentage, kicked-back to EquityPlus Financial, Inc. and/or Equity Plus Financial, LLC. Plaintiffs did not receive an Affiliate Business Disclosure in connection with this loan apprising them of the relationship among CBNV, EquityPlus Financial, Inc. and Equity Plus Financial, LLC.

132. Moreover, the title charges were neither bona fide nor reasonable. The $325.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the actual cost of the property report is a violation of RESPA.

133. In connection with this loan, Mr. and Mrs. Kossler were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $40,938.40 and that their annual percentage rate was 14.817%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Kessler Loan**

134. In the Spring of 1999 Mr. and Mrs. Kessler received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with CBNV.

135. Mr. and Mrs. Kessler called the toll free phone number to apply for a second mortgage loan.

136. On or about April 30, 1999 CBNV closed the Kessler loan. On this date, Mr. and Mrs. Kessler first received their TILA and HOEPA disclosures.

137. In connection with the above-alleged predatory lending scheme, CBNV loaned Mr. and Mrs. Kessler a total loan of $33,000.00 to be repaid with interest at a rate of 14.75% (APR of 17.841%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

138. To secure repayment of their note, Mr. and Mrs. Kessler executed a deed of trust for the benefit of CBNV. The deed of trust granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

139. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Kessler loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 2,640.00 |
| 802 | Loan Discount | CBNV | 990.00 |
| 807 | Application Fee | CBNV | 95.00 |
| 811 | Underwriting Fee | CBNV | 185.00 |
| 1101 | Settlement or Closing Fee | Title America LLC | 283.50 |
| 1102 | Abstract or Title Search | Title America LLC | 300.00 |
| 1103 | Title Examination | Title America LLC | 300.00 |
| 1111 | Overnight Fee | Title America LLC | 25.00 |
| 1112 | Document Review | Title America LLC | 250.00 |
| 1201 | Recording Fee | Allegheny County | 41.50 |

140. The HUD-1 is fraudulent in that the line items shown as being payable to CBNV in Section 800 were, other than perhaps a very small percentage, kicked-back to EquityPlus Financial, Inc.

141. Moreover, the title charges were neither bona fide nor reasonable. The $300.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the actual cost of the property report is a violation of RESPA. The charge for post-settlement document review was unlawful under RESPA.

142. Also, in violation of RESPA's prohibition against unearned fees, Mr. and Mrs. Kessler were charged a loan discount fee for which no discount in her loan rate was given.

143. In connection with this loan, Mr. and Mrs. Kessler were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $53,587.45 and that their annual percentage rate was 17.841%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Porco Loan**

144. In the summer of 2000 Patrice Porco received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

145. Ms. Porco called the toll free phone number to apply for a second mortgage loan.

146. On or about September 9, 2000 GNBT closed the Porco loan. On this date, Ms. Porco first received her TILA and HOEPA disclosures.

147. In connection with the above-alleged predatory lending scheme, GNBT loaned Ms. Porco a total loan of $29,800.00 to be repaid with interest at a rate of 12.99% (APR of 16.71%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

148. To secure repayment of her note, Ms. Porco executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

149. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Porco loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 2,980.00 |
| 802 | Loan Discount | GNBT | 894.00 |
| 811 | Underwriting Fee | GNBT | 185.00 |
| 813 | Application Fee | GNBT | 150.00 |
| 1101 | Settlement or Closing Fee | Title America LLC | 250.00 |
| 1102 | Abstract or Title Search | Title America LLC | 63.00 |
| 1103 | Title Examination | Title America LLC | 300.00 |
| 1111 | Overnight Fee | Title America LLC | 25.00 |
| 1112 | Document Review | Title America LLC | 250.00 |
| 1113 | Processing Fee | Title America LLC | 260.00 |
| 1201 | Recording Fee | Title America LLC | 41.50 |

150. The HUD-1 is fraudulent in that the line items shown as being payable to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to Equity Guaranty.

151. Moreover, the title charges were neither bona fide nor reasonable. The $300.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the actual cost of the property report is a violation of RESPA. Additionally, the charge for post-settlement document review violated RESPA.

152. Also, in violation of RESPA's prohibition against unearned fees, Ms. Porco was charged a loan discount fee for which no discount in her loan rate was given.

153. In connection with this loan, Ms. Porco was provided with a Federal Truth-In-Lending Disclosure Statement that stated that her Finance Charge was $43,024.86 and that her annual percentage rate was 16.7196%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Mathis Loan**

154. In the spring of 2001 Mathis received a solicitation in the mail indicating that he had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

155. Mr. Mathis called the toll free phone number to apply for a second mortgage loan.

156. On or about June 7, 2001 GNBT closed the Mathis loan. On this date, Mr. Mathis first received her TILA and HOEPA disclosures.

157. In connection with the above-alleged predatory lending scheme, GNBT loaned Mr. Mathis a total loan of $25,000.00 to be repaid with interest at a rate of 14.99% (APR of 17.24%) in consecutive monthly installments over a period of 25 years. The loan was a consumer loan obtained for personal, family or household purposes.

158. To secure repayment of their note, Mr. Mathis executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

159. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Mathis loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 2,375.00 |
| 804 | Credit Report | GNBT | 60.00 |
| 811 | Underwriting Fee | GNBT | 200.00 |
| 812 | Flood Certification Fee | GNBT | 20.00 |

| | | | |
|---|---|---|---|
| 1101 | Settlement or Closing Fee | USA Title LLC | 175.00 |
| 1102 | Abstract or Title Search | USA Title LLC | 63.00 |
| 1103 | Title Examination | USA Title LLC | 450.00 |
| 1111 | Overnight Fee | USA Title LLC | 25.00 |
| 1112 | Document Review | USA Title LLC | 250.00 |
| 1113 | Processing Fee | USA Title LLC | 260.00 |
| 1201 | Recording Fee | Allegheny County | 43.50 |

160. The HUD-1 is fraudulent in that the line items shown as being payable to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to Equity Guaranty.

161. Moreover, the title charges were neither bona fide nor reasonable. The $450.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of cost of the property report is a violation of RESPA. Additionally, the charge for a post-settlement document review violated RESPA.

162. In connection with this loan, Mr. Mathis was provided with a Federal Truth-In-Lending Disclosure Statement that stated that his Finance Charge was $74,020.58 and that his annual percentage rate was 17.2411%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Haney Loan**

163. In the spring of 2001 Mr. and Mrs. Haney received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

164. Mr. and Mrs. Haney called the toll free phone number to apply for a second mortgage loan.

165. On or about May 23, 2001 GNBT closed the Haney loan. On this date, Mr. and Mrs. Haney first received her TILA and HOEPA disclosures.

166. In connection with the above-alleged predatory lending scheme, GNBT loaned Mr. and Mrs. Haney a total loan of $24,500.00 to be repaid in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

167. To secure repayment of their note, Mr. and Mrs. Haney executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

168. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Haney loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 2,450.00 |
| 802 | Loan Discount | GNBT | 490.00 |
| 804 | Credit Report | GNBT | 50.00 |
| 811 | Underwriting Fee | GNBT | 200.00 |
| 812 | Flood Certification Fee | GNBT | 20.00 |
| 1101 | Settlement or Closing Fee | USA Title LLC | 175.00 |
| 1102 | Abstract or Title Search | USA Title LLC | 50.00 |
| 1103 | Title Examination | USA Title LLC | 450.00 |
| 1111 | Overnight Fee | USA Title LLC | 25.00 |
| 1112 | Document Review | USA Title LLC | 250.00 |
| 1113 | Processing Fee | USA Title LLC | 260.00 |
| 1201 | Recording Fee | Allegheny County | 43.60 |

169. The HUD-1 is fraudulent in that the line items shown as being payable to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to Equity Guaranty, LLC.

170. Moreover, the title charges were neither bona fide nor reasonable. The $450.00 charge for title examination of a third-party's property report is illegal per se under HUD

regulations and the mark up of the actual cost of the property report is a violation of RESPA. Additionally, the charge for a post-settlement document review violated RESPA.

171. Also, in violation of RESPA's prohibition against unearned fees, Mr. and Mrs. Haney were charged a loan discount fee for which no discount in her loan rate was given.

172. In connection with this loan, Mr. and Mrs. Haney were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $31,996.99 and that their annual percentage rate was 15.0957%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Picard Loan**

173. In the late Fall of 1999 Mr. and Mrs. Picard received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with CBNV.

174. Mr. and Mrs. Picard called the toll free phone number to apply for a second mortgage loan.

175. On or about November 30, 1999 CBNV closed the Picard loan. On this date, Mr. and Mrs. Picard first received her TILA and HOEPA disclosures.

176. In connection with the above-alleged predatory lending scheme, CBNV loaned Mr. and Mrs. Picard a total loan of $47,900.00 to be repaid with interest at a rate of 14.99% (APR of 18.416%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

177. To secure repayment of their note, Mr. and Mrs. Picard executed a deed of trust for the benefit of CBNV. The deed of trust granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

178. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Picard loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 3,832.00 |
| 802 | Loan Discount | CBNV | 2,155.00 |
| 803 | Appraisal Fee | Not identified | 175.00 |
| 807 | Application Fee | CBNV | 95.00 |
| 811 | Underwriting Fee | CBNV | 185.00 |
| 1101 | Settlement or Closing Fee | Title America LLC | 250.00 |
| 1102 | Abstract or Title Search | Title America LLC | 50.00 |
| 1103 | Title Examination | Title America LLC | 300.00 |
| 1111 | Overnight Fee | Title America LLC | 25.00 |
| 1112 | Document Review | Title America LLC | 260.00 |
| 1113 | Processing Fee | Title America LLC | 250.00 |
| 1201 | Recording Fee | Allegheny County | 41.50 |

179. The HUD-1 is fraudulent in that the line items shown as being payable to CBNV in Section 800 were, other than perhaps a very small percentage, kicked-back to EquityPlus Financial, Inc.

180. Moreover, the title charges were neither bona fide nor reasonable. The $300.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the actual cost of the property report is a violation of RICO. The charge for a post-settlement document review violated RESPA.

181. Also, in violation of RESPA's prohibition against unearned fees, Ms. Porco was charged a loan discount fee for which no discount in her loan rate was given.

182. In connection with this loan, Mr. and Mrs. Picard were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $79,767.89 and

that their annual percentage rate was 18.416%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Sabo Loan**

183. In the Fall of 1999 Mr. and Mrs. Sabo received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with CBNV.

184. Mr. and Mrs. Sabo called the toll free phone number to apply for a second mortgage loan.

185. On or about October 15, 1999 CBNV closed the Sabo loan. On this date, Mr. and Mrs. Sabo first received her TILA and HOEPA disclosures.

186. In connection with the above-alleged predatory lending scheme, CBNV loaned Mr. and Mrs. Sabo a total loan of $35,000.00 to be repaid with interest at a rate of 14.75% (APR of 17.390%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

187. To secure repayment of their note, Mr. and Mrs. Sabo executed a deed of trust for the benefit of CBNV. The deed of trust granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

188. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Sabo loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 3,500.000 |
| 808 | Application Fee | CBNV | 95.00 |
| 809 | Underwriting Fee | CBNV | 185.00 |
| 1101 | Settlement or Closing Fee | Resource Title LLC | 250.00 |

| | | | |
|---|---|---|---|
| 1102 | Abstract or Title Search | Resource Title LLC | 275.00 |
| 1103 | Title Examination | Resource Title LLC | 370.00 |
| 1111 | Overnight Fee | Resource Title LLC | 85.00 |
| 1112 | Disbursement Fee | Resource Title LLC | 26.50 |
| 1201 | Recording Fee | Not identified | 45.50 |

189. The HUD-1 is fraudulent in that the line items shown as being payable to CBNV in Section 800 were, other than perhaps a very small percentage, kicked-back to EquityPlus Financial, Inc.

190. Moreover, the title charges were neither bona fide nor reasonable. The $370.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the actual cost of the property report is also a violation of RESPA.

191. In connection with this loan, Mr. and Mrs. Sabo were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $56,211.00 and that their annual percentage rate was 17.39%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Ulrich Loan**

192. In the Summer of 2000 Mr. and Mrs. Ulrich received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

193. Mr. and Mrs. Ulrich called the toll free phone number to apply for a second mortgage loan.

194. On or about August 8, 2000 GNBT closed the Ulrich loan. On this date, Mr. and Mrs. Ulrich first received her TILA and HOEPA disclosures.

195. In connection with the above-alleged predatory lending scheme, GNBT loaned Mr. and Mrs. Ulrich a total loan of $46,850.00 to be repaid with interest at a rate of 12.99% (APR of15.469%) in consecutive monthly installments over a period of 25 years. The loan was a consumer loan obtained for personal, family or household purposes.

196. To secure repayment of their note, Mr. and Mrs. Ulrich executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

197. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Ulrich loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 4,685.00 |
| 802 | Loan Discount | GNBT | 937.00 |
| 807 | Application Fee | GNBT | 150.00 |
| 811 | Underwriting Fee | GNBT | 185.00 |
| 1101 | Settlement or Closing Fee | Title America LLC | 275.00 |
| 1102 | Abstract or Title Search | Title America LLC | 83.00 |
| 1103 | Title Examination | Title America LLC | 300.00 |
| 1111 | Overnight Fee | Title America LLC | 25.00 |
| 1112 | Document Review | Title America LLC | 260.00 |
| 1113 | Processing Fee | Title America LLC | 250.00 |
| 1201 | Recording Fee | Allegheny County | 41.50 |

198. The HUD-1 is fraudulent in that the line items shown as being payable to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to Equity Guaranty.

199. Moreover, the title charges were neither bona fide nor reasonable. The $300.00 charge for title examination of a third-party's property report is illegal per se under HUD

regulations and the mark up of the actual cost of the property report is a violation of RESPA. The post-settlement document review fee violated RESPA.

200. Also, in violation of RESPA's prohibition against unearned fees, Mr. and Mrs. Ulrich were charged a loan discount fee for which no discount in her loan rate was given.

201. In connection with this loan, Mr. and Mrs. Ulrich were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $118,324.73 and that their annual percentage rate was 15.469%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Miller Loan**

202. In the spring of 1999 Nora Miller received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with CBNV.

203. Ms. Miller called the toll free phone number to apply for a second mortgage loan.

204. On or about April 30, 1999 CBNV closed the Miller loan. On this date, Ms. Miller first received her TILA and HOEPA disclosures.

205. In connection with the above-alleged predatory lending scheme, CBNV loaned Ms. Miller a total loan of $34,000.00 to be repaid with interest at a rate of 12.50% (APR of 15.590%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

206. To secure repayment of their note, Ms. Miller executed a deed of trust for the benefit of CBNV. The deed of trust granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

207. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Miller loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 2,380.00 |
| 802 | Loan Discount | CBNV | 1,870.00 |
| 1101 | Settlement or Closing Fee | Title America LLC | 283.50 |
| 1102 | Abstract or Title Search | Title America LLC | 300.00 |
| 1103 | Title Examination | Title America LLC | 300.00 |
| 1111 | Overnight Fee | Title America LLC | 25.00 |
| 1112 | Document Review | Title America LLC | 250.00 |
| 1201 | Recording Fee | Allegheny County | 41.50 |

208. The HUD-1 is fraudulent in that the line items shown as being payable to CBNV in Section 800 were, other than perhaps a very small percentage, kicked-back to EquityPlus Financial, Inc.

209. Moreover, the title charges were neither bona fide nor reasonable. The $300.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the actual cost of the property report is a violation of RESPA. The charge for post-settlement document review also violates RESPA.

210. Also, in violation of RESPA's prohibition against unearned fees, Ms. Miller was charged a loan discount fee for which no discount in her loan rate was given.

211. In connection with this loan, Ms. Miller was provided with a Federal Truth-In-Lending Disclosure Statement that stated her Finance Charge was $46,332.99 and that her annual percentage rate was 15.59%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Clark Loan**

212. In the Spring of 2001 Mr. and Mrs. Clark received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

213. Mr. and Mrs. Clark called the toll free phone number to apply for a second mortgage loan.

214. On or about March 20, 2001 GNBT closed the Clark loan. On this date, Mr. and Mrs. Clark first received her TILA and HOEPA disclosures.

215. In connection with the above-alleged predatory lending scheme, GNBT loaned Mr. and Mrs. Clark a total loan of $27,500.00 to be repaid with interest at a rate of 11.99% (APR of 16.0042%) in consecutive monthly installments over a period of 10 years. The loan was a consumer loan obtained for personal, family or household purposes.

216. To secure repayment of their note, Mr. and Mrs. Clark executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

217. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Clark loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 2,750.00 |
| 802 | Loan Discount | GNBT | 550.00 |
| 804 | Credit Report | GNBT | 50.00 |
| 811 | Underwriting Fee | GNBT | 200.00 |
| 812 | Flood Certification Fee | GNBT | 20.00 |
| 1101 | Settlement or Closing Fee | USA Title LLC | 175.00 |
| 1102 | Abstract or Title Search | USA Title LLC | 63.00 |
| 1103 | Title Examination | USA Title LLC | 450.00 |

| | | | |
|---|---|---|---|
| 1111 | Overnight Fee | USA Title LLC | 25.00 |
| 1112 | Document Review | USA Title LLC | 250.00 |
| 1113 | Processing Fee | USA Title LLC | 260.00 |
| 1201 | Recording Fee | Allegheny County | 39.50 |

218. The HUD-1 is fraudulent in that the line items shown as being payable to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to Equity Guaranty.

219. Moreover, the title charges were neither bona fide nor reasonable. The $450.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the actual cost of the property report is a violation of RESPA. The charge for post-settlement document review also violated RESPA.

220. Also, in violation of RESPA's prohibition against unearned fees, the Clarks were charged a loan discount fee for which no discount in her loan rate was given.

221. In connection with this loan, Mr. and Mrs. Clark were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $23,785.92 and that their annual percentage rate was 16.0042%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Kruszka Loan**

222. In the Spring of 2001 Mr. and Mrs. Kruszka received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

223. Mr. and Mrs. Kruska called the toll free phone number to apply for a second mortgage loan.

224. On or about May 5, 2001 GNBT closed the Kruszka loan. On this date, Mr. and Mrs. Kruszka first received their TILA and HOEPA disclosures.

225. In connection with the above-alleged predatory lending scheme, GNBT loaned Mr. and Mrs. Kruszka a total loan of $20,100.00 to be repaid with interest at a rate of 16.99% (APR of 19.772%) in consecutive monthly installments over a period of 20 years. The loan was a consumer loan obtained for personal, family or household purposes.

226. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Kruszka loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 1,507.00 |
| 802 | Loan Discount | GNBT | 402.00 |
| 804 | Credit Report | GNBT | 50.00 |
| 807 | Flood Certification Fee | GNBT | 20.00 |
| 810 | E Appraisal | GNBT | 32.00 |
| 811 | Underwriting Fee | GNBT | 200.00 |
| 1101 | Settlement or Closing Fee | USA Title LLC | 175.00 |
| 1102 | Abstract or Title Search | USA Title LLC | 63.00 |
| 1103 | Title Examination | USA Title LLC | 450.00 |
| 1111 | Overnight Fee | USA Title LLC | 25.00 |
| 1112 | Document Review | USA Title LLC | 250.00 |
| 1113 | Processing Fee | USA Title LLC | 260.00 |
| 1201 | Recording Fees | Allegheny County | 43.50 |

227. The HUD-1 is fraudulent in that the line items shown as being payable to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to Equity Guaranty.

228. Moreover, the title charges were neither bona fide nor reasonable. The $450.00 charge for title examination of a third-party's property report is illegal per se under HUD

regulations and the mark up of the actual cost of the property report is likewise illegal under RESPA.

229. Also, in violation of RESPA's prohibition against unearned fees, Ms. Porco was charged a loan discount fee for which no discount in her loan rate was given. The charge for post-settlement document review also violates RESPA.

230. In connection with this loan, Mr. and Mrs. Kruszka were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $53,198.40 and that their annual percentage rate was 19.772%. Both the Finance Charge and Disclosed APR are materially inaccurate.

**The Merl Boor Loan**

231. In the fall of 2000, Tina Merl Boor received a solicitation in the mail indicating that she had been "pre-approved" for a debt-consolidation second mortgage loan with CBNV.

232. Tina Merl Boor called the toll-free number to apply for a second mortgage loan.

233. On or about December 9, 2000, CBNV closed the Merl Boor loan. On this date, Ms. Merl Boor first received her TILA and HOEPA disclosures.

234. Upon information and belief, this loan included all of the unlawful fees and charges described in connection with the loans made to other borrowers by CBNV as set forth herein.

235. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of Mr. Merl Boor's loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 4,396.32 |
| 802 | Loan Discount Fee | | |

| | | | |
|---|---|---|---|
| 808 | Lender Document Review Fee | | |
| 810 | Lender Underwriting Fee | CBNV | 295.00 |
| 811 | Document Review | CBNV | 150.00 |
| 1101 | Settlement or Closing Fee | First Title and Escrow | 50.00 |
| 1102 | Abstract or Title Search | | |
| 1103 | Title Examination | | |
| 1105 | Document Preparation | | |
| 1201 | Recording Fee | First Title and Escrow | 48.00 |
| 1202 | City/County/stamps | | |

**The Baratz Loan**

236. In late 2001, Mr. Baratz received a solicitation in the mail indicating that he had been "pre-approved" for a debt-consolidation second mortgage loan with GNBT.

237. Mr. Baratz called the toll-free number to apply for a second mortgage loan.

238. On or about January 16, 2002, GNBT closed the Baratz loan. On this date, Mr. Baratz first received their TILA and HOEPA disclosures.

239. Upon information and belief, this loan included all of the unlawful fees and charges described in connection with the loans made to other borrowers by GNBT as set forth herein.

**The Hobson Loan**

240. In early 2001 Mr. Hobson received a solicitation in the mail indicating that he had been "pre-approved" for a debt-consolidation second mortgage loan with CBNV.

241. Mr. Hobson called the toll-free number to apply for a second mortgage loan.

242. On or about May 2, 2001, CBNV closed Mr. Hobson's loan by Fed Ex delivery in Alabama and return the very next day via the return, pre-paid Fed Ex envelope provided. For the first time, when the papers were delivered to him for closing did Mr. Hobson receive his TILA and HOEPA disclosures, which was less than 3 days prior to the closing of his loan.

243. In connection with the above-alleged predatory lending scheme, CBNV loaned Mr. Hobson a total loan of $55,500.00 to be repaid with a note interest rate of 17.75% (APR of 19.904%) in consecutive monthly installments over a period of 20 years. The loan was a consumer loan obtained for personal, family or household purposes.

244. To secure repayment of his note, Mr. Hobson executed a deed of trust for the benefit of CBNV. The deed of trust granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

245. In connection with this HOEPA Mortgage Loan, as shown on his HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of Mr. Hobson's loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 2,497,50 |
| 802 | Loan Discount Fee | CBNV | 2,220.00 |
| 808 | Lender Document Review Fee | CBNV | 150.00 |
| 809 | Lender Underwriting Fee | CBNV | 295.00 |
| 810 | Lender Application Fee | CBNV | 275.00 |
| 1101 | Settlement or Closing Fee | Resource Title | 50.00 |
| 1102 | Abstract or Title Search | Resource Title/"GAC" | 175.00 |
| 1103 | Title Examination | Resource Title | 695.00 |
| 1105 | Document Preparation | Resource Title | 175.00 |
| 1201 | Recording Fee | Not identified | 45.00 |
| 1202 | City/County/stamps | Not identified | 83.25 |

246. The HUD-1 is fraudulent in that the line items shown as being paid to CBNV in Section 800 were, other than perhaps a very small percentage, kicked-back to a mortgage consultant for CBNV.

247. Moreover, the fees were neither bona fide nor reasonable. Indeed, Mr. Hobson was charged a total of $870.00 for an abstract of title ($175.00) and a title examination ($695.00). Charging $695.00 for a review of another settlement provider's property report is per

se illegal under HUD regulations. The only evidence of title work that was done on his loan is a Real Estate Property Report in which the third party service provider charged $120.00. The Property Report was marked up $55.00 over its actual cost of $120.00.

248. The charge for document preparation was bogus since the title company did not prepare any of the documents. Moreover, charging for preparation of TILA, HOEPA and RESPA disclosures is illegal under 12 U.S.C. § 2610.

249. In connection with this loan, Mr. Hobson was provided with a Federal Truth-In-Lending Disclosure Statement that stated that his Finance Charge was $152,996.30 and that his annual percentage rate was 19.904%, the same APR incorrectly disclosed in the 3-day advance HOEPA Notice that was not delivered to Mr. Hobson until closing.

250. The HOEPA Notice contained extraneous matter designed to detract from the elements required under 15 U.S.C. 1639, violated the "conspicuous type size" requirement of 15 U.S.C. § 1639(a) and contained a false acknowledgement of receipt "3 days before closing." Furthermore, even the false acknowledgement is deficient on its face for failing to state that the HOEPA Notice had been received "3 ***business*** days prior" to closing, 15 U.S.C. 1639(b)(1)(emphasis added). Mr. Hobson's HOEPA Notice merely states "3 days before closing."

251. Finally, the HOEPA Notice states the "***Note***" interest rate of 17.750 % in the upper right-hand corner in a deliberate ploy designed to detract and confuse the borrower's understanding of the true APR disclosed below. 15 U.S.C. § 1639(a) defines the "Specific disclosures" required and makes no provision, expressly or implicitly, for the HOEPA Notice to contain any interest figure other than the required APR. This represents yet another separate violation of HOEPA Notice requirements for which Defendants are jointly and severally liable.

252. Both the stated Finance Charge, the Amount Financed and the disclosed APR were materially inaccurate.

253. The terms of Mr. Hobson's Note lacked a required HOEPA disclosure restricting prepayment penalties under 15 U.S.C. § 1639(c).

254. In violation of RESPA's prohibition against unearned fees, Mr. Hobson was charged a loan discount fee for which no discount was given.

**The Kelly Loan**

255. In the late summer of 2000, Captain Kelly received a solicitation in the mail indicating that she had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

256. Captain Kelly called the toll-free number to apply for a second mortgage loan.

257. On or about September 27, 2000, GNBT closed Captain Kelly's loan by delivery of her closing documents via a courier who obtained Captain Kelly's execution of her closing documents in a public library near Decatur, Georgia, thereby violating Georgia's requirement that all "face-to-face" closings be conducted by a licensed attorney. Captain Kelly first received her TILA and HOEPA disclosures upon the courier's arrival, and upon the same date as the settlement date of her loan.

258. In connection with the above-alleged predatory lending scheme, GNBT loaned Captain Kelly a total loan of $51,000 to be repaid with interest at a rate of 13.990% (APR of 16.532 %) in consecutive monthly installments over a period of 25 years. The loan was a consumer loan obtained for personal, family or household purposes.

259. To secure repayment of her note, Captain Kelly executed a security deed for the benefit of GNBT. The security deed granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

260. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of Captain Kelly's loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 5,160.00 |
| 802 | Loan Discount | GNBT | 516.00 |
| 807 | Application | GNBT | 150.00 |
| 811 | Underwriting Fee | GNBT | 185.00 |
| 1101 | Settlement or Closing Fee | Title America LLC | 250.00 |
| 1102 | Abstract or Title Search | Title America LLC | 106.00 |
| 1103 | Title Examination | Title America LLC | 300.00 |
| 1112 | Document Review | Title America LLC | 260.00 |
| 1113 | Processing Fee | Title America LLC | 250.00 |

261. The HUD-1 is fraudulent in that the line items shown as being paid to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to a consultant for GNBT, Equity Guaranty.

262. Moreover, the title charges were marked up and neither bona fide nor reasonable.

263. Captain Kelly was charged and "Title America" purportedly received $406.00 for an abstract of title and a title examination, as shown in Lines 1102 and 1003 of her HUD-1. The title examination fee of $300 for review of General American's property report is per se illegal under HUD regulations. The only title work appearing in her loan file is a Real Property Report prepared by General American Corporation South, which charged "Title America" $81.00 for the report. The actual cost of the property was illegally marked up from $81.00 to $106.00.

264. The charge for post-settlement document review violated RESPA.

265. In connection with this loan, Captain Kelly was provided with a Federal Truth-In-Lending Disclosure Statement that stated that her Finance Charge was $109,105.81 and that her APR was 16.532 %.

266. The Finance Charge, the Amount Financed and the disclosed APR were materially inaccurate.

267. The same APR was incorrectly disclosed in Captain Kelly's HOEPA Notice that she never received until the papers were delivered by courier for her closing, which was the same date as her date of settlement. Her HOEPA Notice violated the "conspicuous type size" requirement of 15 U.S.C. § 1639(a) and contained a false acknowledgement of receipt.

268. The terms of Captain Kelly's Note lacked a required HOEPA disclosure restricting prepayment penalties under 15 U.S.C. § 1639(c).

269. In violation of RESPA's prohibition against unearned fees, Captain Kelly was charged a loan discount fee for which no discount was given.

**The Nixon Loan**

270. In early 2001, the Nixons received a solicitation in the mail indicating that they had been approved for a debt consolidation second mortgage loan with CBNV.

271. The Nixons called the toll-free number to apply for a second mortgage loan.

272. On or about February 2, 2001, CBNV closed the Nixons' loan. The closing documents were Fed Ex'd to their home in Florida and were subsequently forwarded to Mr. Nixon at a meeting he was attending in Florida. Upon receipt, Rev. Nixon complied with the closing instructions and returned the executed closing documents the day after their receipt in Florida.

273. In connection with the above-alleged predatory lending scheme, CBNV loaned the Nixons a total loan of $49,999.00 to be repaid with interest at a rate of 18.25% (APR of 20.261%) in consecutive monthly installments over a period of 25 years. The loan was a consumer loan obtained for personal, family or household purposes.

274. To secure repayment of their note, the Nixons executed a deed of trust for the benefit of CBNV. The deed of trust granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

275. In connection with this HOEPA Mortgage Loan, as shown on his HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Nixons' loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 3,999.92 |
| 807 | Application | CBNV | 275.00 |
| 1101 | Settlement or Closing Fee | Paramount Title | 50.00 |
| 1102 | Abstract or Title Search | "GAC" | 260.00 |
| 1103 | Title Examination | Paramount Title | 595.00 |
| 1105 | Document Preparation | Paramount Title | 175.00 |
| 1201 | Recording Fee | Clerk of Court | 109.00 |
| 1203 | Mortgage Tax | Clerk of Court | 74.99 |

276. The HUD-1 is fraudulent in that the line items shown as being paid to CBNV in Section 800 were, other than perhaps a very small percentage, kicked-back to a consultant for CBNV.

277. Moreover, such fees were neither bona fide nor reasonable. Indeed, while the Nixons were charged for an Abstract of Title and a Title Examination (which perform the same function) no evidence whatsoever exists in the Nixons' loan file to suggest that an abstract of title or a title examination was even done. The $595 charge for title examination of a third-

party's property report is illegal per se under HUD regulations and the mark up of the $81.00 actual cost of the property report to $260.00 is likewise illegal. The charge for document preparation was bogus since the title company did not prepare any of the documents. Moreover, charging for the preparation of TILA, HOEPA and RESPA disclosures is illegal under 12 U.S.C. § 2610.

278. In connection with this loan, the Nixons were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $185,347.31 and that their APR was 20.261%.

279. The Finance Charge, the Amount Financed and the disclosed APR were materially inaccurate.

280. The same APR was incorrectly disclosed in the Nixons' HOEPA Notice that they did not receive until the day before they signed and returned their loan documents. The HOEPA Notice the Nixons received the day before signing and returning their closing papers violates the "conspicuous type size" requirement of 15 U.S.C. 1639(a) and contains the false acknowledgement that the Nixons received their HOEPA Notice "at least three (3) business days before closing."

**The Cartee Loan**

281. In late 2001 or early 2002 Mr. Cartee received a solicitation in the mail indicating that he had been "pre-approved" for a debt-consolidation second mortgage loan with GNBT.

282. Mr. Cartee called the toll-free number to apply for a second mortgage loan.

283. On or about February 25, 2002, "GNBT" closed Mr. Cartee's loan by Fed Ex delivery. For the first time, when the papers were delivered to him for closing did Mr. Cartee

receive his TILA and HOEPA disclosures, which was less than 3 days prior to the closing of his loan.

284. In connection with the above-alleged predatory lending scheme, GNBT loaned Mr. Cartee a total loan of $29,500.00 to be repaid with a note interest rate of 12.750% (APR of 15.5596%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

285. To secure repayment of his note, Mr. Cartee executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

286. In connection with this HOEPA Mortgage Loan, as shown on his HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of Mr. Cartee's loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 2,802.50 |
| 802 | Loan Discount Fee | GNBT | 590.00 |
| 808 | GA State Tax Fee | Not identified | 6.50 |
| 810 | Lender Application Fee | GNBT | 125.00 |
| 1101 | Settlement or Closing Fee | USA Title, LLC | 100.00 |
| 1102 | Abstract or Title Search | USA Title, LLC | 81.00 |
| 1103 | Title Examination | USA Title, LLC | 450.00 |
| 1113 | Processing Fee | USA Title, LLC | 265.00 |
| 1201 | Recording Fee | Chatham County Clerk | 22.00 |
| 1202 | City/County/stamps | Clerk of the Superior Court | 88.50 |

287. The HUD-1 is fraudulent in that the line items shown as being paid to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to the Shumway/Bapst entity.

288. Moreover, the fees were neither bona fide nor reasonable. Indeed, Mr. Cartee was charged a total of $531.00 for an abstract of title ($81.00) and a title examination ($450.00). The $450.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations. The only title work that was done on his loan is a Real Estate Property Report, which charges were marked up and for which no title examination was performed.

289. In connection with this loan, Mr. Cartee was provided with a Federal Truth-In-Lending Disclosure Statement that stated that his Finance Charge was $40,694.64 and that his annual percentage rate was 15.5596%, the same APR incorrectly disclosed in the 3-day advance HOEPA Notice that was not delivered to Mr. Cartee until closing.

290. Both the stated Finance Charge, the Amount Financed and the disclosed APR were materially inaccurate.

291. Mr. Cartee's Note contains an illegal prepayment penalty. The terms of Mr. Cartee's Note lacked a required HOEPA disclosure restricting prepayment penalties under 15 U.S.C. § 1639(c).

292. In violation of RESPA's prohibition against unearned fees, Mr. Cartee was charged a loan discount fee for which no discount was given.

**The Dorman Loan**

293. In late 2001 or early 2002 Mr. and Mrs. Mack Dorman received a solicitation in the mail indicating that they had been "pre-approved" for a debt-consolidation second mortgage loan with GNBT.

294. The Dormans called the toll-free number to apply for a second mortgage loan.

295. On or about February 11, 2002, GNBT closed the Dorman loan (by Fed Ex delivery.) For the first time, when the papers were delivered to them for closing did the Dormans

receive their TILA and HOEPA disclosures, which was less than 3 days prior to the closing of his loan.

296. In connection with the above-alleged predatory lending scheme, GNBT loaned the Dormans a total loan of $29,600.00 to be repaid with at an APR of 16.4352% in consecutive monthly installments over a period of 10 years. The loan was a consumer loan obtained for personal, family or household purposes.

297. To secure repayment of his note, the Dormans executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

298. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Dorman's loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 2,812.50 |
| 802 | Loan Discount Fee | GNBT | 592.00 |
| 808 | GA State Tax Fee | Not identified | 6.50 |
| 810 | Lender Application Fee | GNBT | 125.00 |
| 1101 | Settlement or Closing Fee | USA Title, LLC | 100.00 |
| 1102 | Abstract or Title Search | USA Title, LLC | 81.00 |
| 1103 | Title Examination | USA Title, LLC | 450.00 |
| 1113 | Processing Fee | USA Title, LLC | 265.00 |
| 1201 | Recording Fee | County Clerk | 22.00 |
| 1202 | City/County/stamps | Clerk of the Superior Court | 88.50 |

299. The HUD-1 is fraudulent in that the line items shown as being paid to GNBT in Section 800 were, other than perhaps a very small percentage, actually kicked-back to a Shumway/Bapst entity.

300. Moreover, the fees were neither bona fide nor reasonable. Indeed, the Dormans were charged a total of $531.00 for an abstract of title ($81.00) and a title examination ($450.00). The $450.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations. The only title work that was done on his loan is a Real Estate Property Report, which charges were marked up and for which no title examination was performed.

301. In connection with this loan, the Dormans were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $40,694.64 and that their annual percentage rate was 16.4352%, the same APR incorrectly disclosed in the 3-day advance HOEPA Notice that was not delivered to the Dormans until closing.

302. Both the stated Finance Charge, the Amount Financed and the disclosed APR were materially inaccurate.

303. In violation of RESPA's prohibition against unearned fees, the Dormans were charged a loan discount fee for which no discount was given.

**The Roberts Loan**

304. In the fall of 2000, Mr. and Mrs. Jerome Roberts received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

305. Mr. and Mrs. Roberts called the toll-free number to apply for a second mortgage loan.

306. On or about October 9, 2000, GNBT closed the Roberts loan with a courier who conducted the closing at Mr. Robert's work location in Sandy Springs, in violation of Georgia's requirement that face-to-face closings must be conducted by a licensed attorney. Upon meeting with the courier the Roberts immediately executed their closing documents. The Roberts first

received their TILA and HOEPA disclosures at the time the documents were delivered by courier. Since they signed immediately, their advance HOEPA Notice was not delivered three business days before their closing.

307. In connection with the above-alleged predatory lending scheme, GNBT loaned the Roberts a total loan of $39,000 to be repaid with interest (14.99%)(APR of 17.828%) in consecutive monthly installments over a period of 25 years. The loan was a consumer loan obtained for personal, family or household purposes.

308. To secure repayment of their note, the Roberts executed a security deed for the benefit of GNBT. The security deed granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

309. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Roberts' loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 3,900.00 |
| 802 | Loan Discount | GNBT | 780.00 |
| 811 | Underwriting Fee | GNBT | 185.00 |
| 813 | Application Fee | GNBT | 150.00 |
| 1101 | Settlement or Closing Fee | Title America LLC | 250.00 |
| 1102 | Abstract or Title Search | Title America LLC | 106.00 |
| 1103 | Title Examination | Title America LLC | 300.00 |
| 1112 | Document Review Fee | Title America LLC | 260.00 |
| 1113 | Processing Fee | Title America LLC | 250.00 |

310. The HUD-1 is fraudulent in that the line items shown as being paid to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to a consultant for GNBT, Equity Guaranty.

311. Moreover, the title charges were neither bona fide nor reasonable. The $300.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the $81.00 actual cost of the property report to $106.00 is likewise illegal. The charge for post-settlement document review violates RESPA.

312. In connection with this loan, the Roberts were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $116,570.41 and that their APR was 17.828 %.

313. The Finance Charge, the Amount Financed and the disclosed APR were materially inaccurate. The same APR was incorrectly disclosed in the Roberts' HOEPA Notice, which they never received until the papers were delivered by courier and signed immediately.

314. The HOEPA Notice contained the false acknowledgement that the Roberts had "read and received, three business days prior to settlement, a copy of this disclosure statement." The acknowledgement, besides being false, is deficient on its face in that it does not state the required elements in a "conspicuous type size" as required by 15 U.S.C. § 1639(a).

315. The terms of the Roberts' Note lacked a required HOEPA disclosure restricting prepayment penalties under 15 U.S.C. § 1639(c).

316. In violation of RESPA's prohibition against unearned fees, the Roberts were charged a loan discount fee for which no discount was given.

**The Brown Loan**

317. In the summer of 2000, Ms. Melba Brown received a solicitation in the mail indicating that she had been pre-approved for a debt-consolidation second mortgage loan with CBNV.

318. Ms. Brown called the toll-free number to apply for a second mortgage loan.

319. On or about August 12, 2000, CBNV closed the Brown loan with a courier who conducted the closing. Upon meeting with the courier Ms. Brown immediately executed her closing documents. Ms. Brown first received her TILA and HOEPA disclosures at the time the documents were delivered by courier. Since she signed immediately, her advance HOEPA Notice was not delivered three business days before her closing.

320. In connection with the above-alleged predatory lending scheme, CBNV loaned Ms. Brown a total loan of $30,000 to be repaid with interest (17.450%)(APR of 20.704%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

321. To secure repayment of her note, Ms. Brown executed a security deed for the benefit of CBNV. The security deed granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

322. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Brown loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 2,400.00 |
| 802 | Loan Discount | CBNV | 600.00 |
| 804 | Credit Report | CBNV | 15.75 |
| 808 | Lender Underwriting Fee | CBNV | 295.00 |
| 809 | Lender Application Fee | CBNV | 95.00 |
| 810 | Lender Document Review Fee | CBNV | 150.00 |
| 1101 | Settlement or Closing Fee | Resource Title LLC | 250.00 |
| 1102 | Abstract or Title Search | Resource Title LLC/GAC | 275.00 |
| 1103 | Title Examination | Resource Title LLC | 95.00 |
| 1111 | Disbursement Fee | Resource Title LLC | 150.00 |

323. The HUD-1 is fraudulent in that the line items shown as being paid to CBNV in Section 800 were, other than perhaps a very small percentage, actually kicked-back to a mortgage consultant for CBNV.

324. Moreover, the title charges were neither bona fide nor reasonable. T The $95.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the $81.00 actual cost of the property report to $275.00 is likewise illegal.

325. In connection with this loan, Ms. Brown was provided with a Federal Truth-In-Lending Disclosure Statement that stated that her Finance Charge was $58,774.00 and that her APR was 20.704 %. The Finance Charge, the Amount Financed and the disclosed APR were materially inaccurate.

326. The HOEPA Notice contained the false acknowledgement that Ms. Brown had "read and received, three business days prior to settlement, a copy of this disclosure statement." The acknowledgement, besides being false, is deficient on its face in that it does not state the required elements in a "conspicuous type size" as required by 15 U.S.C. § 1639(a).

327. In violation of RESPA's prohibition against unearned fees, Ms. Brown was charged a loan discount fee for which no discount was given.

**The Gaskin Loan**

328. In the summer of 2001, Ms. Flora Gaskin received a solicitation in the mail indicating that she had been pre-approved for a debt-consolidation second mortgage loan with CBNV.

329. Ms. Gaskin called the toll-free number to apply for a second mortgage loan. On or about August 8, 2001, CBNV closed the Gaskin loan with a courier who conducted the closing.

Upon meeting with the courier, Ms. Gaskin immediately executed her closing documents. She first received her TILA and HOEPA disclosures at the time the documents were delivered by courier. Since she signed immediately, her advance HOEPA Notice was not delivered three business days before her closing.

330. In connection with the above-alleged predatory lending scheme, CBNV loaned Ms. Gaskin a total loan of $30,000 to be repaid with interest at a rate of 15.99% (APR of 17.965%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

331. To secure repayment of her note, Ms. Gaskin executed a security deed for the benefit of CBNV. The security deed granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

332. In connection with this HOEPA Mortgage Loan, as shown on her HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Gaskin loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 3,129.00 |
| 805 | Application Fee | CBNV | 275.00 |
| 810 | Underwriting Fee | CBNV | 295.00 |
| 811 | Lender Document Review Fee | CBNV | 150.00 |
| 1101 | Settlement or Closing Fee | Paramount Title | 50.00 |
| 1102 | Abstract or Title Search | Paramount Title | 260.00 |
| 1103 | Title Examination | Paramount Title | 675.00 |
| 1105 | Document Preparation Fee | Paramount Title | 175.00 |

333. The HUD-1 is fraudulent in that the line items shown as being paid to CBNV in Section 800 were, other than perhaps a very small percentage, kicked-back to a consultant for CBNV operating a loan production office in Columbia, Maryland.

334. Moreover, the title charges were neither bona fide nor reasonable. The $675.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the $81.00 actual cost of the property report to $260.00 is likewise illegal. The charge for document preparation was bogus since the title company did not prepare any of the documents, and it is illegal to charge for preparation of TILA, HOEPA and RESPA disclosures under 12 U.S.C. § 1610.

335. In connection with this loan, Ms. Gaskin was provided with a Federal Truth-In-Lending Disclosure Statement that stated that her Finance Charge was $49,435.17 and that her APR was 17.965 %.

336. The Finance Charge, the Amount Financed and the disclosed APR were materially inaccurate.

337. The HOEPA Notice contained the false acknowledgement that Ms. Gaskin had "read and received, three business days prior to settlement, a copy of this disclosure statement." The acknowledgement, besides being false, is deficient on its face in that it does not state the required elements in a "conspicuous type size" as required by 15 U.S.C. § 1639(a).

338. The terms of Ms. Gaskin's Note lacked a required HOEPA disclosure restricting prepayment penalties under 15 U.S.C. § 1639(c).

**The Turner Loan**

339. In the fall of 2000, Mr. and Mrs. Roger Turner received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

340. Mr. and Mrs. Turner called the toll-free number to apply for a second mortgage loan.

341. On or about October 10, 2000, "GNBT" closed the Turner loan with a courier who conducted the closing. Upon meeting with the courier, the Turners immediately executed their closing documents. The Turners first received their TILA and HOEPA disclosures at the time the documents were delivered by courier. Since they signed immediately, their advance HOEPA Notice was not delivered three business days before their closing.

342. In connection with the above-alleged predatory lending scheme, GNBT loaned the Turners a total loan of $16,200 to be repaid with interest at a rate of 14.375% (APR of 18.033%) in consecutive monthly installments over a period of 25 years. The loan was a consumer loan obtained for personal, family or household purposes.

343. To secure repayment of their note, the Turners executed a security deed for the benefit of GNBT. The security deed granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

344. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Turners' loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 1,620.00 |
| 802 | Loan Discount | GNBT | 324.00 |
| 807 | Application Fee | GNBT | 150.00 |
| 811 | Underwriting Fee | GNBT | 185.00 |
| 1101 | Settlement or Closing Fee | Title America LLC | 250.00 |
| 1102 | Abstract or Title Search | Title America LLC | 130.00 |
| 1103 | Title Examination | Title America LLC | 300.00 |
| 1111 | Overnight Fee | Title America LLC | 25.00 |
| 1112 | Document Review Fee | Title America LLC | 260.00 |
| 1113 | Processing Fee | Title America LLC | 250.00 |

345. The HUD-1 is fraudulent in that the line items shown as being paid to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to a consultant for GNBT, Equity Guaranty.

346. Moreover, the title charges were neither bona fide nor reasonable. The $300.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the $81.00 actual cost of the property report to $130 is likewise illegal. The charge for post-settlement document review violates RESPA.

347. In connection with this loan, the Turners were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $46,761.38 and that their APR was 18.033 %.

348. The Finance Charge, the Amount Financed and the disclosed APR were materially inaccurate.

349. The HOEPA Notice contained the false acknowledgement that the Turners had "read and received, three business days prior to settlement, a copy of this disclosure statement." The acknowledgement, besides being false, is deficient on its face in that it does not state the required elements in a "conspicuous type size" as required by 15 U.S.C. § 1639(a).

350. The terms of the Turners' Note lacked a required HOEPA disclosure restricting prepayment penalties under 15 U.S.C. § 1639(c).

351. In violation of RESPA's prohibition against unearned fees, the Turners were charged a loan discount fee for which no discount was given.

**The Logan Loan**

352. In the summer of 2001, Mr. and Mrs. Roy Lee Logan received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

353. The Logans called the toll-free number to apply for a second mortgage loan.

354. On or about July 11, 2001, GNBT closed the Logan loan with a courier who conducted the closing. Upon meeting with the courier, the Logans immediately executed their closing documents. They first received their TILA and HOEPA disclosures at the time the documents were delivered by courier. Since they signed immediately, their advance HOEPA Notice was not delivered three business days before their closing.

355. In connection with the above-alleged predatory lending scheme, GNBT loaned the Logans a total loan of $18,600 to be repaid with interest at a rate of 11.99% (APR of 15.692%) in consecutive monthly installments over a period of 10 years. The loan was a consumer loan obtained for personal, family or household purposes.

356. To secure repayment of their note, the Logans executed a security deed for the benefit of GNBT. The security deed granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

357. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Logans' loan:

| *HUD-1 Line No.* | *Description:* | *Paid To:* | *Amount in $:* |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 1,860.00 |
| 804 | Credit Report | GNBT | 50.00 |
| 811 | Underwriting Fee | GNBT | 200.00 |
| 812 | Flood Certification Fee | GNBT | 20.00 |

| | | | |
|---|---|---|---|
| 1101 | Settlement or Closing Fee | USA Title LLC | 150.00 |
| 1102 | Abstract or Title Search | USA Title LLC | 130.00 |
| 1103 | Title Examination | USA Title LLC | 450.00 |
| 1111 | Overnight Fee | USA Title LLC | 25.00 |
| 1112 | Document Review Fee | USA Title LLC | 250.00 |
| 1113 | Processing Fee | USA Title LLC | 260.00 |

358. The HUD-1 is fraudulent in that the line items shown as being paid to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to a consultant for GNBT, Equity Guaranty.

359. Moreover, the title charges were neither bona fide nor reasonable. The $450.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the $81.00 actual cost of the property report to $130.00 is likewise illegal. The post-settlement document review fee violates RESPA.

360. In connection with this loan, the Logans were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $15,904.64 and that their APR was 15.6972 %.

361. The Finance Charge, the Amount Financed and the disclosed APR were materially inaccurate.

362. The HOEPA Notice contained the false acknowledgement that the Logans had "read and received, three business days prior to settlement, a copy of this disclosure statement." The acknowledgement, besides being false, is deficient on its face in that it does not state the required elements in a "conspicuous type size" as required by 15 U.S.C. § 1639(a).

363. The terms of the Logans' Note lacked a required HOEPA disclosure restricting prepayment penalties under 15 U.S.C. § 1639(c).

**The Starkey Loan**

364. In the fall of 2001, the Starkeys received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

365. The Starkeys called the toll-free number to apply for a second mortgage loan.

366. On or about October 31, 2001, GNBT closed the Starkeys' loan in Missouri. On this date, the Starkeys first received their TILA and HOEPA disclosures.

367. In connection with the above-alleged predatory lending scheme, GNBT loaned the Starkeys a total loan of $30,300 to be repaid with interest at a rate of 11.99% in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

368. To secure repayment of their note, the Starkeys executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

369. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Starkey loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 3,030.00 |
| 802 | Loan Discount | GNBT | 606.00 |
| 804 | Credit Report | GNBT | 50.00 |
| 811 | Underwriting Fee | GNBT | 200.00 |
| 812 | Flood Certification Fee | GNBT | 20.00 |
| 1101 | Settlement or Closing Fee | USA Title LLC | 150.00 |
| 1102 | Abstract or Title Search | USA Title LLC | 134.00 |
| 1103 | Title Examination | USA Title LLC | 450.00 |
| 1111 | Overnight Fee | USA Title LLC | 25.00 |
| 1112 | Document Review | USA Title LLC | 250.00 |
| 1113 | Processing Fee | USA Title LLC | 260.00 |

370. The HUD-1 is fraudulent in that the line items shown as being payable to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to a consultant for GNBT, Equity Guaranty.

371. Moreover, the title charges were neither bona fide nor reasonable. T The $450.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the $81.00 actual cost of the property report to $134.00 is likewise illegal. The charge for post-settlement document review violates RESPA.

372. In connection with this loan, the Starkeys were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $39,391.81 and that their annual percentage rate was 14.9528%.

373. Both the Finance Charge and Disclosed APR are materially inaccurate.

374. In violation of RESPA's prohibition against unearned fees, the Starkeys were charged a loan discount fee for which no discount was given.

**The Drennen Loan**

375. In the summer of 2001, the Drennens received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

376. The Drennens called the toll-free number to apply for a second mortgage loan.

377. On or about July 28, 2001, GNBT closed the Drennens' loan in Missouri. On this date, the Drennens first received their TILA and HOEPA disclosures.

378. In connection with the above-alleged predatory lending scheme, GNBT loaned the Drennens a total loan of $47,100.00 to be repaid with interest at a rate of 15.99% (APR of 18.6284%) in consecutive monthly installments over a period of 25 years. The loan was a consumer loan obtained for personal, family or household purposes.

379. To secure repayment of their note, the Drennens executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

380. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Drennen loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 4,239.00 |
| 802 | Loan Discount | GNBT | 942.00 |
| 804 | Credit Report | GNBT | 50.00 |
| 811 | Underwriting Fee | GNBT | 200.00 |
| 812 | Flood Certification Fee | GNBT | 20.00 |
| 813 | E Appraisal Fee | GNBT | 32.00 |
| 1101 | Settlement or Closing Fee | USA Title LLC | 150.00 |
| 1102 | Abstract or Title Search | USA Title LLC | 134.00 |
| 1103 | Title Examination | USA Title LLC | 450.00 |
| 1111 | Overnight Fee | USA Title LLC | 25.00 |
| 1112 | Document Review | USA Title LLC | 250.00 |
| 1113 | Processing Fee | USA Title LLC | 260.00 |

381. The HUD-1 is fraudulent in that the line items shown as being payable to GNBT in Section 800 were, other than perhaps a very small percentage, kicked-back to a consultant for GNBT, Equity Guaranty.

382. Moreover, the title charges were neither bona fide nor reasonable. The $450.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the $109 actual cost of the property report to $134.00 is likewise illegal. The charge for post-settlement document review violates RESPA.

383. In connection with this loan, the Drennens were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $150,605.00 and that their annual percentage rate was 18.3996%.

384. Both the Finance Charge and Disclosed APR are materially inaccurate.

385. In violation of RESPA's prohibition against unearned fees, the Drennens were charged a loan discount fee for which no discount was given.

**The Montgomery Loan**

386. In the Fall of 2001, Mr. Montgomery received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with GNBT.

387. Mr. Montgomery contacted GNBT to apply for a second mortgage loan. While he believed he was dealing with a bank, he was, in fact, dealing with a consultant for GNBT, Equity Guaranty.

388. On or about November 16, 2001, GNBT closed the Montgomery loan in Missouri.

389. In connection with the above-alleged predatory lending scheme, GNBT loaned Mr. Montgomery a total loan of $81,000.00 to be repaid with interest at a rate of 13.2483% (APR of 18.6284%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

390. To secure repayment of their note, Mr. Montgomery executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans.

391. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Montgomery loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | GNBT | 8,100.00 |
| 802 | Loan Discount | GNBT | 1,620.00 |
| 804 | Credit Report | Chase | 50.00 |
| 812 | Flood Certification Fee | GNB | 20.00 |
| 813 | E Appraisal | GNB | 32.00 |
| 1101 | Settlement or Closing Fee | USA Title, LLC | 150.00 |
| 1102 | Abstract or Title Search | USA Title, LLC | 184.00 |
| 1103 | Title Examination | USA Title, LLC | 450.00 |
| 1111 | Overnight Fee | USA Title, LLC | 25.00 |
| 1112 | Document Review | USA Title, LLC | 250.00 |
| 1113 | Processing Fee | USA Title, LLC | 260.00 |
| 1201 | Recording Fees | Not identified | 41.00 |

392. The HUD-1 is fraudulent in that the line items shown as being payable to GNBT in Section 800 were, other than perhaps a very small percentage, actually paid to a consultant for GNBT, Equity Guaranty.

393. The title charges accessed against Mr. Montgomery were neither bona fide nor reasonable. The $450.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and the mark up of the actual cost of the property report is a violation of RESPA.

394. In connection with this loan, Mr. Montgomery was provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $92,588.65 and that their annual percentage rate was13.2483%.

395. Both the Finance Charge and Disclosed APR are materially inaccurate.

396. The required HOEPA disclosures were not timely provided to Mr. Montgomery.

397. In violation of RESPA's prohibition against unearned fees, Mr. Montgomery was charged a loan discount fee for which no discount was given.

**The Wasem Loan**

398. In the summer of 2001 Mr. and Mrs. Wasem received a solicitation in the mail indicating that they had been pre-approved for a debt-consolidation second mortgage loan with CBNV.

399. The Wasems called CBNV via their toll free phone number to apply for a second mortgage loan. Upon information and belief, the Wasems were instead dealing with a consultant of CBNV.

400. On or about August 9, 2001 CBNV closed the Wasem loan. On this date, Mrs. And Mrs. Wasem first received her TILA and HOEPA disclosures.

401. In connection with the above-alleged predatory lending scheme, CBNV loaned Mr. and Mrs. Wasem a total loan of $47,000.00 to be repaid with interest at a rate of 14.5% (APR of 15.456%) in consecutive monthly installments over a period of 15 years. The loan was a consumer loan obtained for personal, family or household purposes.

402. To secure repayment of their note, Mr. and Mrs. Wasem executed a deed of trust for the benefit of CBNV. The deed of trust granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans.

403. In connection with this HOEPA Mortgage Loan, as shown on their HUD-1 Settlement Statement, the following fees and costs were charged, contracted for and paid at or before closing of the Wasem loan:

| ***HUD-1 Line No.*** | ***Description:*** | ***Paid To:*** | ***Amount in $:*** |
|---|---|---|---|
| 801 | Loan Origination Fee | CBNV | 4,700.00 |
| 805 | Application Fee | CBNV | 275.00 |

| | | | |
|---|---|---|---|
| 810 | Underwriting Fee | CBNV | 295.00 |
| 1101 | Settlement or Closing Fee | Paramount Title | 50.00 |
| 1102 | Abstract or Title Search | GAC | 260.00 |
| 1103 | Title Examination | Paramount Title | 675.00 |
| 1105 | Document Preparation | Paramount Title | 175.00 |
| 1112 | Document Review | CBNV | 150.00 |
| 1201 | Recording Fees | Clerk of the Court | 53.00 |

404. The HUD-1 is fraudulent in that the line items shown as being payable to CBNV in Section 800 were, other than perhaps a very small percentage, actually paid to a consultant of CBNV.

405. Moreover, the title charges were neither bona fide nor reasonable. The $675.00 charge for title examination of a third-party's property report is illegal per se under HUD regulations and upon information and belief, the actual cost of the property report was illegally marked up. The charge for document preparation was bogus since the title company did not prepare any of the documents and it is illegal to charge for preparation of TILA, HOEPA and RESPA disclosures under 12 U.S.C. § 1610.

406. In connection with this loan, Mr. and Mrs. Wasem were provided with a Federal Truth-In-Lending Disclosure Statement that stated that their Finance Charge was $60,683.67 and that their annual percentage rate was 14.527%. Both the Finance Charge and Disclosed APR are materially inaccurate.

407. The required HOEPA disclosures were not timely provided to the Wasems.

**Equitable Tolling and Equitable Estoppel**

408. The Defendants, and each of them, knowingly and actively misled the Class Members concerning material facts related to their individual mortgage loans and knowingly and actively prevented the Class Members from pursuing their claims by, among other things:

(a) Engaging in a scheme that was by its nature and design "self-concealing" and not reasonably discoverable by Plaintiffs and the Class notwithstanding the exercise of due diligence;
(b) Issuing fraudulent mortgage loan settlement documents to Plaintiffs and the Class which concealed the fact that the Bank Defendants were paying the Shumway/Bapst organization a referral fee for the residential mortgage loans at issue by way of a kick-back to companies controlled by the Shumway/Bapst organization, notwithstanding that the Shumway/Bapst organization was not performing any compensable settlement services in connection with the loans at issue;
(c) Falsely representing that title examinations were performed on each borrowers' loans by way of the imposition and disclosure of a settlement charge in Line 1103 of each borrowers' HUD-1 Settlement Statement for such service;
(d) Falsely representing that a true abstract or title search was performed on each of the borrowers' loans by way of the imposition of a settlement charge in Line 1102 of each borrowers' HUD-1 Settlement Statement for such service;
(e) Falsely representing that compensable "document review" services were performed in connection with the settlement of Plaintiffs' loans by disclosing such charge at Line 1112 of the Title Fee section of Plaintiffs' HUD-1s when in fact any document review services ostensibly performed in exchange for this fee were in fact non-compensable post-settlement services;
(f) Knowingly and actively concealing the understatement of Finance Charges, the overstatement of the Amount Financed and the resulting understatement of the APRs on the TILA Disclosure Statements and HOEPA Notices provided to Plaintiffs and all Class Members by, among other things, failing to include in their calculations certain title charges that were not bona fide, reasonable, lawful and/or not paid to true third parties;
(g) Falsely representing on each HUD-1 Settlement Statement that a true, honest, and independent settlement agent was performing services on the loan, when in fact the settlement agents were part of the racketeering and overall conspiracy;
(h) Knowingly and actively concealing that the origination fees, discount fees or other types of fees and charges listed in Section 800 of the HUD-1s were not being paid to GNBT or CBNV;
(i) Knowingly and actively concealing that the origination fees, discount fees or other types of fees and charges listed in Section 1100 of the HUD-1s were being paid to third-party title companies when such fees and charges were instead being kick-backed to and shared with, directly or indirectly, the Consultants and their affiliated entities;

(j) Concealing the import of the false acknowledgement of receipt in all HOEPA Notices:

(k) Knowing of their various HOEPA violations as detailed above and falsely representing to the Class Members that they had a right to rescind within three (3) days when the Banks knew or should have known that their violations of HOEPA in fact afforded every Class Member a full *three-year* period to rescind under the provisions of 15 U.S.C. § 1635(f), thereby estopping as a matter of law Defendants' assertion of the three-year repose period under 15 U.S.C. § 1635; and

(l) Knowingly and actively preventing the Banks' federal regulators (FDIC and OCC) from disseminating reports of their wrongdoing to the public, thereby suppressing and preventing the Class Members from discovering their causes of action against the Banks and Defendants until the one-year limitations periods for TILA and RESPA had since elapsed for many Class Members.

409. The Class members exercised reasonable diligence during their loan transactions and dealings with the Banks and in reviewing their loan documentation, but could not have, nor been reasonably expected to, uncover the complex set of facts and the highly sophisticated scheme giving rise to their claims against Defendants due to the fraudulent concealment, unlawful and conspiratorial conduct of Defendants.

410. For example, by withholding the Property Reports from the borrowers and by their failure to disclose that no title examinations were in fact performed on the loans, the Banks actively misled the borrowers and prevented them from discovering that the settlement charges imposed in Lines 1102 and 1103 of the HUD-1 Settlement Statements were neither bona fide nor reasonable and had been improperly marked up.

411. Defendants are estopped to challenge the Class Members' reliance upon equitable tolling and estoppel to toll TILA's and RESPA's one-year statute of limitations Because the Defendants knowingly and intentionally concocted and concealed their fraudulent scheme, the Banks and the Investor Defendants and the Defendant Class members are estopped by their unclean hands to rely upon statutes of limitations that, if sustained, would reward these Defendants' efforts to conceal their wrongdoing. Any equitable tolling or equitable estoppel that

lies against the Banks to support the claims against such Banks applies with equal force to the Investor Defendants and the Defendant Class members who stand in the Banks' shoes under the assignee liability provisions of HOEPA. 15 U.S.C. § 1641(d).

**Class Action Tolling**

412. In addition, the statutes of limitations for each of the Plaintiffs' and the Class members' individual claims has been tolled by virtue of class action tolling since May 1, 2001 and continues to be tolled.

413. Specifically, on May 1, 2001, a class action captioned as *Davis v. CBNV, et al.* was brought against Community Bank of Northern Virginia, RFC and a number of other assignee/purchasers of its high-cost or HOEPA loans seeking to impose liability upon those entities based upon the same facts giving rise to claims described in this Consolidated Class Action Complaint; namely the wrongs perpetrated by the Shumway/Bapst scheme through CBNV. The *Davis* lawsuit adequately notified CBNV, its conspirators, and the purchasers of its loans, not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment such that the defendants had the essential information necessary to determine both the subject matter and size of the prospective class action litigation. Since May 1, 2001, no court has *denied* certification of a class action for which the loans of the class members are within the defined class. Consequently, at the time of the filing of this lawsuit, the Class members' statutes of limitation for their individual claims remained tolled, and there should be no question as to the timeliness of their claims.

414. The statutes of limitations for those Class members whose loans were made by GNBT have been tolled by virtue of class action tolling since September 19, 2002 and continue

to be tolled. On September 19, 2002, a class action lawsuit captioned as *Ulrich v. GNBT* was brought against GNBT and the assignee/purchasers of GNBT's loans including RFC. This action sought relief for the class members based upon the same facts giving rise to claims described in this Consolidated Class Action Complaint. This lawsuit adequately notified Defendants, its conspirators, and the purchasers of the GNBT loans, not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment such that the defendants had the essential information necessary to determine both the subject matter and size of the prospective class action litigation. Further, those Class members whose loans were purchased by RFC have been tolled as to RFC since the *Davis* filing regardless of which bank originated their loan as the *Davis* filing put RFC on notice of the claims arising from the Shumway/Bapst scheme which they knew at the time of that *Davis* filing was ongoing and continuing in connection with the Shumway/Bapst Organization's affiliation and conspiracy with GNBT.

## IV. CLASS ACTION ALLEGATIONS

### The Plaintiff Class

415. The Plaintiffs properly bring their claims set forth herein as a Plaintiff class action under Fed.R.Civ.P. 23(b)(3). The Plaintiffs propose, as the definition of the Plaintiff Class, that the Plaintiff Class consists of:

> all persons nationwide who obtained a second or subordinate, residential, federally related, non-purchase money, HOEPA qualifying mortgage loan from CBNV or GNBT that was secured by residential real property used by the Class Members as their principal dwelling.

416. Plaintiffs reserve the right to revise and amend this class definition, perhaps to include sub-classes, as proper and necessitated by the progression of discovery and other issues in this class action case.

417. Specifically excluded from the proposed Class are officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint venturers, of any of the Defendants or entities controlled by the Defendants and their heirs, successors, assigns, or other persons or entities related to or affiliated with Defendants, or any of them and all governmental entities.

418. For the purposes of the Class definition, the term "person" shall also include the person(s) to whom the loan was made and who signed the Note or, if such person(s) have filed for bankruptcy or otherwise voluntarily or involuntarily transferred his or her rights to pursue claims in this lawsuit, then that person(s)' bankruptcy trustee or legal assign.

419. Having previously stipulated or acquiesced to certification of a class defined similarly to that above but limited to borrowers whose loans were purchased by RFC, the Banks and RFC are estopped to contest certification of the Class defined above.

420. The particular members of the Plaintiff Class are capable of being identified without difficult managerial or administrative problems. For example, the members of the Plaintiff Class are readily identifiable from the information and records in the possession or control of CBNV, GNBT and the Non-Bank Defendants and the Defendant Class members and/or the representatives or servicing agents of each.

421. The Class Members are so numerous that individual joinder of all members is impractical. Upon information and belief, this Plaintiff Class includes as many as 50,000 borrowers.

422. There are questions of law and fact common to the Plaintiff Class, which questions predominate over any questions affecting only individual Plaintiff Class members and, in fact, the wrongs suffered and remedies sought by the Plaintiff Class members involve

numerous common violations of TILA, HOEPA, RESPA and RICO, which involve common documentary proof, the only difference being the exact monetary amount to which each Plaintiff Class member is entitled, a matter of mere mathematical calculation. The principal common issues include, but are not limited to, the following:

(a) Whether the Plaintiff Class Members' HUD-1 or HUD1-A Settlement Statements concealed and/or misrepresented the identity of the recipients, nature or the amounts of the settlement fees and charges imposed on their loans;

(b) Whether the Plaintiff Class Members' HUD-1 or HUD1-A Settlement Statements contained false statements;

(c) Whether the applicable statutes of limitation are tolled against the Defendants under the doctrines of equitable tolling, equitable estoppel, legal tolling and other maxims of equity;

(d) The effect of class action tolling on the claims of the Plaintiff Class Members;

(e) The nature of the Defendants' violations of RESPA, TILA, HOEPA and RICO;

(f) Whether, CBNV and GNBT utilized a practice or device whereby the mandatory disclosures under TILA were not timely made;

(g) Whether CBNV and GNBT made inaccurate TILA disclosures to the Plaintiff Class Members;

(h) Whether certain of the Plaintiff Class Members' Notes failed to disclose required HOEPA disclosures restricting prepayment penalties or other prohibited terms;

(i) Whether the Plaintiff Class Members' HOEPA Notices were displayed in the required conspicuous type size manner; contained knowingly false acknowledgments of receipt before closing; or were nevertheless deficient in asserting receipt within no

specified period or within "3 days" or "72 hours" before closing, but *not asserting* the number of "*business*" days before closing;

(j) The nature and extent of the remedies available to the Plaintiff Class Members under TILA and HOEPA;

(k) Whether Plaintiffs and the Class members are entitled to additional damages and remedies for Defendants separate violations of the substantive provisions of TILA and HOEPA;

(l) Whether the Plaintiff Class Members who closed their loans within three years before the *Davis* and *Ulrich* cases were filed, are entitled to rescind their loans;

(m) Whether the assignee liability of HOEPA (15 U.S.C. § 1641(d)) applies to the claims of Plaintiffs and the Plaintiff Class and to the Defendants;

(n) Whether Defendants are liable in treble damages to the Plaintiff Class Members for violations of RESPA;

(o) The nature and extent of the remedies available to the Plaintiff Class members under RESPA;

(p) Whether the Defendants were involved in or participants in RICO enterprises;

(q) Whether the aforesaid use of the U.S. Postal Service and interstate couriers in furtherance and consummation of the Banks' lending scheme constituted mail fraud;

(r) Whether the aforesaid use of interstate wires in furtherance and consummation of the Banks' lending scheme constituted wire fraud:

(s) The nature and extent of the remedies available to the Plaintiff Class Members under RICO;

(t) The nature and extent of the declaratory and injunctive relief available to the Plaintiff Class members; and

(u) Whether Defendants are liable for punitive damages

423. The Plaintiffs' claims are typical of those of the members of the Plaintiff Class. The claims are based on the same legal and factual theories because those claims depend upon the existence of uniform scheme which uniformly impacted all Class members, including the named Plaintiffs. The named Plaintiffs claims are sufficiently aligned with the claims of the class to permit them to pursue their own litigation goals and simultaneously pursue the interests of the absentee class members in adequate fashion. Because this action challenges the same course of unlawful conduct which affects the putative class, the typicality requirement is satisfied irrespective of any slight factual variation that might underlie an individual Class member's claims.

424. The Plaintiffs will fairly and adequately represent and protect the interests of the Plaintiff Class. The Plaintiffs have suffered substantial economic injury in their own capacity from the practices complained of and understand the nature of their duty as representatives of the Class, the nature and extent of their claims against Defendants Class and the relief available to them and the Class Members.

425. Neither the Plaintiffs nor their counsel have any conflicting interests which might cause them not to vigorously pursue this action. Further, the class representatives include representative of the different subclasses, if any, that may arise in connection with Plaintiffs' claims.

426. The Plaintiffs have retained counsel who are experienced in complex and class action litigation generally, and in the types of claims at issue in this lawsuit specifically, are

knowledgeable in the applicable law, and have done a significant amount of work in identifying and investigating potential claims in this action.

427. Certification of a Plaintiff Class under Fed. R. Civ. P. 23(b)(3) is appropriate, in that while injunctive and declaratory relief is sought, this action seeks predominantly monetary damages. The questions of law and fact that are common to the Plaintiff Class predominate over any questions of fact pertaining to individual Plaintiff Class Members and a Plaintiff class action is superior to other available methods for the fair and efficient adjudication of this controversy. A Plaintiff class action will cause an orderly and expeditious administration of Plaintiff Class Members' claims and economies of time, effort and expense will be fostered and uniformity of decisions will be insured. Moreover, the individual Plaintiff Class Members are likely unaware of their rights and/or not in a position (either through experience or financially) to commence individual litigation against Defendants. Expecting the Plaintiff Class Members to bring claims individually is unrealistic and unfeasible, which is evidenced by the fact that Congress specifically provided for class actions in TILA and HOEPA. The only practical means of rectifying these problems and providing wide spread relief is through class action procedure.

428. To the extent that the Court deems the Plaintiffs' request for declaratory or injunctive relief, including the claim set forth in Count III, as an integral part of relief for the Class, then certification of a Plaintiff Class under Fed. R. Civ. P. 23(b)(2) is also appropriate as Defendants acted or refused to act on grounds generally applicable to the class without regard to the individual facts and circumstances of each individual class member.

**The Defendant Class**

429. This action is also properly brought as a Defendant Class under Fed.R.Civ.P. 23. Plaintiffs propose, as the definition of the Defendant Class, that the Defendant Class be defined as follows:

> Those persons or entities, or their trustees, that purchased or were assigned the HOEPA loans of the Plaintiffs or the Plaintiff Class.

430. The particular members of the Defendant Class are capable of being described without difficult managerial or administrative problems. The members of the Defendant Class are readily identifiable from the information and records in the possession or control of CBNV, GNBT or the Shumway Organization or its affiliated entities and from the other Defendants who have since assigned these loans to other members of the Defendant Class and/or their representatives or servicing agents of such HOEPA loans.

431. The Defendant Class members are sufficiently numerous that individual joinder of all members is impractical. This allegation is based on the fact that CBNV and GNBT "generated" extensive HOEPA loans on a nationwide basis.

432. There are questions of law and fact common to the Defendant Class which questions predominate over any questions affecting only individual members of the Defendant Class and, in fact, the wrongs alleged against non-Bank Defendants and the Defendant Class members and the remedies sought by Plaintiffs and the Plaintiff Class members against such Defendants are identical, the only difference being the exact monetary amount to which each Defendant and Defendant Class Member is liable to the respective members of the Plaintiff Class. The principal common issues include, but are certainly not limited to:

a) The Defendant Class members' conduct related to the predatory lending scheme;

b) Whether the Defendant Class members are liable for the Banks' wrongful acts under HOEPA;

c) Whether the Defendant Class members are liable for the Banks' wrongful acts under principles of assignee, conspiracy and/or partnership liability;

d) The Defendant Class members' involvement in the racketeering enterprises;

e) Whether the Defendant Class is entitled to assert any defenses to the Banks' violations of TILA, HOEPA, RESPA and RICO; and

f) Whether the Defendant Class members are liable to the Plaintiff and the Plaintiff Class members as a result of their involvement in the aforementioned predatory lending scheme.

433. The Non-Bank Defendants' defenses and those of the Defendant Class Members (which defenses are denied) are typical of those of the individual Non-Defendants and will be based on the same legal and factual theories.

434. The Non-Bank Defendants, in representing their own interests, will also fairly and adequately represent and protect the interests of the Defendant Class. Those Non-Bank Defendants will, as they have in the past, retain counsel experienced in defending class actions and actions involving unlawful commercial practices. Said defendants do not, based upon information and belief, have any interests which might cause them not to vigorously defend this action.

435. Certification of a defendant class under Fed.R.Civ.P. 23 (b)(3) is appropriate as to the Defendant Class Members in that common questions predominate over any individual questions and a defendant class action is superior for the fair and efficient adjudication of this controversy. A defendant class action will cause an orderly and expeditious administration of

Defendant Class members' defenses, if any, and economies of time, effort and expenses will be fostered and uniformity of decisions will be insured.

## V. CAUSES OF ACTION AGAINST DEFENDANTS

### COUNT I

### Violations of the Real Estate Settlement Procedures Act

436. Each preceding paragraph of this *MDL Complaint* is hereby incorporated as if fully set forth herein.

437. The scheme described above violated the anti-kick back and unearned fee provisions of RESPA (including the Affiliate Business Arrangement requirements, when applicable).

438. The note and mortgage that each Class Member entered into with CBNV and GNBT created a "federally related mortgage loan" as defined at 12 U.S.C. § 2602(1).

439. The Bank Defendants used the Plaintiffs' HUD-1 Settlement Statements (and other loan disclosure documents required by federal law including the Good Faith Estimate) to conceal illegal kickbacks and unearned fees being paid to the Shumway/Bapst Organization on the HOEPA mortgage loans made by the Banks and purchased by RFC (and other Investor Defendants).

440. The section 800 charges listed on the HUD-1s uniformly misrepresented that origination and loan discount fees were being paid to the Banks when, in fact, said fees were being kicked-back almost entirely to the Shumway/Bapst Organization in exchange for the referral of the loans to the banks, notwithstanding that the Shumway/Bapst Organization was not performing any compensable settlement services in connection with the loans.[7] The amount of

[7] The term "origination fees" as used in this context includes all fee delineated in Section 800 of the HUD-1s issued to borrowers in connection with the loans at issue.

the kickbacks was directly derivative of loan volume, and the Banks retained only a small "funding fee" in connection with each disbursed loan.[8]

441. As described in the text above, the title companies used in the loans referred to the Banks by the Shumway/Bapst Organization were entities owned and controlled by Messrs. Shumway and Bapst. The fees charged to borrowers for ostensible title services by those companies were delineated in Section 1100 of the HUD-1s issued in connection with the loans.

442. As noted, most of the fees reflected in Section 1100 were unearned in violation of Section 8(b) of RESPA in that the fees charged were not in exchange for compensable settlement services.

443. To the extent that any affiliated business arrangement disclosures were required, they were not provided until closing, and those disclosures falsely stated or misrepresented the nature and extent of the affiliation. Further, the disclosures were meaningless since the borrowers were required by the Banks to use title companies owned and controlled by the Shumway/Bapst Organization, thereby impeding the operation of a free marked for title-related settlement services.

444. The Investor Defendants and the Defendant Class members were aware that fees charged for title services were excessive and often unearned.

445. Additionally, Plaintiffs and each class member, as evidenced at line 802 of their HUD-1 Settlement Statement, was charged a "loan discount fee."

446. HUD describes a loan discount fee as follows: "Also called 'points' or 'discount

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[8] As previously noted, the first business structure used by CBNV and EquityPlus Financial, Inc. to generate loans was EquityPlus Financial, LLC, which they owned jointly. With respect to loans made during the pendency of that LLC, CBNV violated RESPA's affiliate business arrangement disclosure requirements as follows: a) it did not disclose the relationship among CBNV, EquityPlus Financial, Inc. and EquityPlus Financial, LLC; b) it required the use of EquityPlus Financial, LLC, for the provision of settlement services; and, c) The parties to the arrangement were being provided with a thing of value that was other than a return on ownership interest.

points', a loan discount is a one-time charge imposed by the lender or broker to lower the rate at which the lender or broker would otherwise offer the loan to you. Each 'point' is equal to one percent of the mortgage account…." Here, however, the interest rate on the loans to Plaintiffs and other class members' was not discounted or lowered in exchange for the payment of the loan discount fee. Rather, the fee was wholly unearned in that there was no compensable settlement service provided in exchange for the fee. As such, it was a fee collected "other than for services actually performed" in violation of Section 8(b) of RESPA. The collection of the purported "loan discount fee" therefore constitutes a separate and actionable violation of RESPA.

447. As a result of the RESPA violations above alleged, the Class has been damaged in an amount to be determined at a trial of this action, where they will seek all permissible treble damages, costs and reasonable attorneys' fees.

## COUNT II

### Violations of TILA, as Amended by HOEPA, for Inaccurate and Understated Material Disclosures

448. Each preceding paragraph of this *MDL Complaint* is hereby incorporated as if fully set forth herein.

449. The loans of the Plaintiffs are "HOEPA" loans governed by the provisions of the HOEPA amendments to TILA and satisfy the definition for HOEPA loans provided at 15 U.S.C. § 1602(aa) and at Regulation Z at 12 C.F.R. § 226.32.

450. As an incident to, or a condition of, the Banks' extension of credit to the Plaintiff Class members, the Banks withheld and charged to the Class members at closing certain fees and charges to be paid directly or indirectly by the Plaintiff Class members in order to obtain the HOEPA mortgage loans.

451. CBNV and GNBT issued to each borrower a HOEPA Notice (15 U.S.C. §

1639(a) & (b)) and issued to the Non-Bank Defendants and the Defendant Class a HOEPA *Notice of Assignment* (15 U.S.C. § 1641(d)(4)). The Non-Bank Defendants and the Defendant Class members reviewed the loan files at their purchase and were aware that the mortgages were HOEPA loans.

452. Each of the Plaintiff Class members' loans that was consummated within the three-year period preceding the filing of the *Davis* case on May 1, 2001 and the *Ulrich* case on September 19, 2002, retains the right of cancellation or rescission provided by 15 U.S.C. § 1635 and 12 C.F.R. § 226.23. As to RFC only, each of the class members whose loans closed within three years before the *Davis* filing on May 1, 2001, approximately 33,335 loans by extrapolation, remains entitled to rescission.

453. TILA, as amended by HOEPA, at 15 U.S.C. §§ 1602(u), 1638, 1639, and its implementing regulation, Regulation Z, requires creditors to make specific, timely and accurate disclosures of "material" information to borrowers to promote the "informed use of credit." The "material" information includes the "annual percentage rate, the method of determining the finance charge and the balance upon which a finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number and amount of payments, the due dates or periods of payments scheduled to repay the indebtedness," and the disclosures required by HOEPA at § 1639(a).

454. Certain tolerances for accuracy (or inaccuracies) are permitted as set forth at 15 U.S.C. §§ 1605(f), 1610(c) and Regulation Z, at 12 C.F.R. §§ 226.22 and 226.23 for the disclosure of the Finance Charge and Annual Percentage Rate. No tolerances are available, however, in connection with certain of the title fees being challenged in this action, including the impermissible title examination fees, impermissible marked up "property report" fees and

impermissible "abstract fees."

455. CBNV and GNBT violated HOEPA and TILA on every loan by failing to provide accurate disclosures of the Finance Charge and APR as required by 15 U.S.C. §§ 1638 and 1639 and as calculated by Regulation Z with tolerance for inaccuracies at 12 C.F.R. §§ 226.22, 226.23 and 226.32.

456. The Banks falsely and incorrectly represented that the amounts charged to the Plaintiffs and Plaintiff Class members as title charges in section 1100 of the Plaintiffs' HUD-1s for such things as "abstract or title searches" (line 1102) and "title examinations" (line 1103) and in certain instances "document review" (line 1112) and/or "settlement or closing fees" (line 1101) and document preparation fees were charges incurred by the Banks. Instead, the charges listed on the HUD-1 Settlement Statements were standardized fees that were charged on all of the second mortgage loans. These charges were not "bona fide" and "reasonable" nor paid to "true" third parties. In fact, they were being used directly or indirectly to further the scheme and to provide unearned fees to the Shumway/Bapst Organization.

457. By virtue of the fact that the title companies were required by the Banks and/or affiliated with and/or controlled by the Shumway/Bapst Organization, the title work done by them was required to be included within the Banks' calculations of the Finance Charges and Annual Percentage Rates that TILA and HOEPA required to be disclosed to the Class members.

458. Moreover, and regardless of the required use of the title companies and their affiliations, because title work charges were not bona fide and reasonable, these charges should have been included within the Banks' calculations of the Finance Charges and Annual Percentage Rates.

459. The Banks, as a routine and typical practice, as evidenced from the HUD-1s and

the Truth-in-Lending Disclosure Statements that they provided to the Plaintiffs and the Plaintiff Class members, *excluded* the section 1100 title charges from their calculations of the Finance Charge and the Amount Financed.

460. For example, in each instance, the marked up, bogus, excessive and unnecessary "abstract of title" (line 1101), "title search" (line 1102) and "title examination" (line 1103) fees charged to the Plaintiffs and Plaintiff Class members were excluded from the calculation of the Finance Charge when they should have been *included* in the Finance Charge. Conversely, the same amounts were used in the calculation of the Amount Financed when they should have been *deducted* from the Amount Financed. Although the section 1100 title charges for title abstracts, title searches and title examinations were required and/or paid to affiliates and controlled entities they were always improperly excluded from the calculations of the Finance Charge and Amount Financed and should have been included in the calculation of the Finance Charge and Amount Financed.

461. Even if the section 1100 title charges for title abstracts, title searches and title examinations were not required or not paid to affiliates and controlled entities, the charges were always marked up (Lines 1102) and were neither bona fide nor reasonable (Lines 1102 and 1103) and, as such, were always improperly excluded from the calculations of the Finance Charge and Amount Financed and should have been included in the calculation of the Finance Charge and Amount Financed.

462. Thus, in each and every instance, by virtue of their mechanism or formula of making these calculations, the *disclosed* Finance Charge on the Plaintiffs' and the Plaintiff Class Members' loans was understated, and the Amount Financed on which the APR is calculated was overstated. As a result, the *disclosed* Finance Charges and Amount Financed were inaccurate and

violated TILA and HOEPA at 15 U.S.C. §§ 1605(f), 1635, 1638 and 1639 and Regulation Z, at 12 C.F.R. §§ 226.23 and 226.32.

463. Further, having improperly overstated the Amount Financed, the Banks inaccurately disclosed the Annual Percentage Rate (APR) on the loans of the Plaintiffs and the Plaintiff Class Members. In each and every instance, as evidenced from the HUD-1s and the Truth in Lending Disclosure Statements that they provided to the Plaintiffs and the Plaintiff Class Members, the Banks disclosed APRs that were understated from the properly calculated and actual APR.

464. In each and every instance, the disclosed APR was understated by more than the 1/8$^{th}$ of a basis point or the 0.125% tolerance for error provided by Congress. In the case of loan padding of the "title examinations" and the "property reports" fees, the tolerance for error is zero. As a result, the disclosed APRs were inaccurate and violated TILA and HOEPA at 15 U.S.C. §§ 1606(c), 1635, 1638 and 1639 and Regulation Z, at 12 C.F.R. §§ 226.22, 226.32.

465. Because certain of the section 1100 title charges were improperly excluded from the calculation of the Finance Charge and should have been included in the calculation of the Finance Charge, in each and every instance the *disclosed* Finance Charge on the Plaintiffs' and the Plaintiff Class members' loans was understated, and varied from the Actual Finance Charge by more than $100 or by more than ½ of one percent of the gross loan amount for purposes of rescission (not damages). As stated, loan padding reduces these normal tolerances to zero. Because the APR is a required element of the advance HOEPA Notice required 3 business days before closing, 15 U.S.C. § 1639(a)(2)(A), it matters not when the HOEPA pre-closing notice was delivered because the disclosed APR in the notice, being identical to the underdisclosed APR in the TILA Statement, rendered the notice defective as a matter of law and represented a

*per se* violation of HOEPA Notice requirements without regard to the timeliness of delivery. Because it is an *advance* disclosure, a HOEPA Notice's deficiencies cannot be cured after the fact without closing a new loan with proper advance disclosures.

466. The Defendants were well aware of the fraudulent conduct described above and the violations of HOEPA and TILA and knew at all material times that the majority of the fees would be dispersed to companies owned and controlled by the Shumway/Bapst Organization by the sham title companies used to close HOEPA mortgage loans. However, because of the Investor Defendants' and the Defendant Class members' insatiable appetite for the high-cost, high-interest loans, the Defendants allowed the loan production offices and the Banks to violate HOEPA and TILA. As described above, by agreeing to purchase the HOEPA mortgage loans from the Banks, in essence funding the loans, the cycle of HOEPA/TILA violations was perpetuated and continued by RFC and, to a lesser degree, other purchasers of these predatory and illegal loans.

467. Under 15 U.S.C. § 1641(d) the Non-Bank Defendants and the Defendant Class members are subject to all claims and defenses that the Plaintiff Class members have against CBNV and GNBT. Under 15 U.S.C. § 1635(g), the Plaintiff Class members are also entitled to additional relief under 15 U.S.C. § 1640 not related to their rescission rights.

468. Accordingly, even disregarding the zero error tolerances applicable to loan padding, as a result of (1) the *disclosed* Finance Charges being inaccurate and understated by more than $100 or ½ of one percent of the gross loan amount in every instance and (2) the *disclosed* APRs being inaccurate and understated by more than 0.125 % in every HOEPA Notice; the loans violate HOEPA and TILA and the Plaintiff Class is entitled to damages under 15 U.S.C. §§ 1635, 1639, 1640 and 1641(d), including, all (1) actual and statutory damages; (2)

rescission rights and damages; and (3) an amount equal to the sum of all finance charges and fees paid by the Class Members for each and every *separate* HOEPA violation as to each and every *separate* borrower.

**COUNT III**

**Multiple Violations of the Substantive Provisions of TILA and HOEPA**

469. Each preceding paragraph of this *MDL Complaint* is hereby incorporated as if fully set forth herein.

470. CBNV and GBNT committed multiple violations of the substantive provisions of TILA and HOEPA, giving rise to multiple damage awards under 15 U.S.C. § 1640(a). These violations are in addition to, and cumulative of the violations of TILA and HOEPA for inaccurate and understated material disclosures set forth above in Count I.

471. 15 U.S.C. § 1640(a) specifies that "any creditor who fails to comply with any requirement imposed under this part ... or part D or E of this subchapter ... is liable." This broad language encompasses all violations of the relevant parts of TILA and each violation committed by the Banks results in a separate statutory recovery for Plaintiffs.

472. The loans of the Plaintiff Class members are HOEPA loans governed by the provisions of the HOEPA amendments to TILA and satisfy the definitions for HOEPA loans provided in 15 U.S.C. § 1602(aa).

473. CBNV and GNBT issued to each borrower a HOEPA Notice (15 U.S.C. § 1639(a) & (b)) and to the Non-Bank Defendants and the Defendant Class a HOEPA Notice of Assignment (15 U.S.C. §1641(d)(4)); 12 C.F.R. §§ 226.34(a)(2).

474. The predatory lending scheme also violated TILA and HOEPA because the Banks made untimely material disclosures on the Plaintiffs and the Class members' loans.

475. TILA, as amended by HOEPA, at 15 U.S.C. §1639(b)(1) expressly required the Banks to provide certain HOEPA disclosures "not less than three *business* days *prior* to consummation of the transaction."

476. Section 103(y) of TILA (15 U.S.C. § 1602(y)) incorporates by reference any requirement imposed by Regulation Z promulgated by the Federal Reserve Board. Section 103(y) specifically provides: "Any reference to any requirement imposed under this [TILA] title or any provision thereof includes reference to the regulation of the [Federal Reserve] Board under this title or the provision thereof in question."

477. Regulation Z, Section 226.2 (a)(13) defines "consummation" as follows: "(13) *Consummation* means that time the consumer becomes contractually obligated on a credit transaction." 12 C.F.R. §226.2(a)(13). The Class Members became "contractually obligated" when they executed their notes and security deeds on the dates of their closings.

478. Defendants had actual knowledge that the Class members' HOEPA mortgage loans were subject to the requirements of HOEPA.

479. GNBT and CBNV, in contravention of HOEPA at 15 U.S.C. §1639(b)(1), did not provide timely notice as required by TILA and HOEPA, but, in fact, first provided the required HOEPA Notice with the closing papers for such loans and less than 3 business days before the consummation of such loans, which can be readily ascertained by a review of the applicable Fed Ex closings or the records of the attorney or courier closings.

480. The Banks' violations of HOEPA were intentional. Integral to the predatory lending scheme was the Banks regular practice of withholding timely disclosures.

481. The Banks' HOEPA Notices contained an additional violation in that the warnings, APR and monthly payment disclosures were printed in a non-bold, non-capital, type

size *smaller than* the other type in the notice, thereby violating HOEPA's requirement that the required warnings, APR and monthly payment disclosures in the HOEPA Notice be printed "in conspicuous type size." (15 U.S.C. § 1639(a); 12 C.F.R. § 226.32 (c)).

482. The Banks' notices also routinely included both the APR and the note interest rate such that the disclosures were misleading and confusing.

483. The Banks also routinely included in their HOEPA Notices a line immediately above the borrowers' signature lines that typically and falsely required the borrower to acknowledge having received the HOEPA Notice either 3 days before closing or 72 hours before closing, when the Banks knew to a certainty that such was not the case. To the extent that such acknowledgment was known to be false to the loan's originator, the originator's wrongful conduct estops any reliance upon such acknowledgement under the equitable doctrine that no man may profit or gain an advantage over another by his own wrongdoing.

484. In addition, such a falsification of the HOEPA Notices' receipt acknowledgement constitutes a separate HOEPA violation in that it falsely represents compliance with the 3-business-day advance delivery requirement of 15 U.S.C. § 1639(b)(1). Addition of any false information beyond the required disclosures of 15 U.S.C. § 1639(a)(1) & (2) constitutes a separate HOEPA violation for which the Banks and their Investor assignees are jointly and severally liable.

485. Wholly apart from their false acknowledgement of receipt, many such acknowledgements are deficient on their face in that they acknowledge receipt: (1) without stating any period at all of purported pre-closing notice, or (2) merely attest delivery "3 days" or "72 hours" before closing without acknowledging receipt "3 *business* days prior" to closing. 15 U.S.C. § 1639(b)(1). Such deficient acknowledgements raise a presumption of non-compliance

and constitute yet another separate violation of HOEPA for which the Banks and RFC are jointly and severally liable.

486. The promissory notes of the Class Members also contained an additional and separate HOEPA violation respecting HOEPA's restriction on the collection of prepayment in refinancings by original lenders. Specifically, most of the note forms utilized by CBNV and GNBT contain provisions providing for prepayment penalties but *do not* disclose the HOEPA restriction that a prepayment penalty may be collected "if … (B) the penalty applies only to a prepayment made with amounts obtained by the consumer by means *other than* a refinancing by the creditor under the mortgage, or an affiliate of that creditor." (15 U.S.C. § 1639(c)(2)(B)). The lack of such disclosure constitutes an additional and separate violation of HOEPA for which the Banks and the Non-Bank Defendants and the Defendant Class members are jointly and severally liable.

487. Because the HOEPA Notices were defective as a matter of law for understatement of the true APR, failure to set forth the required disclosures in conspicuous type size, insertion of false receipt acknowledgements as to the HOEPA Notices, and deficient receipt acknowledgements failing to specify the receipt period in "business" days, the HOEPA Notices were worth nothing for compliance purposes regardless of when they were purportedly delivered.

488. Under 15 U.S.C. § 1641(d) the Non-Bank Defendants and the Defendant Class members are subject to all claims and defenses that the Plaintiff Class members have against CBNV and GNBT.

489. Accordingly, as a result of the additional violations of the substantive provisions of TILA and HOEPA, Plaintiffs are entitled to multiple damage awards under 15 U.S.C. §§

1635, 1639, 1640 and 1641(d), including, all (1) actual and statutory damages; (2) rescission rights and damages; and (3) an amount equal to the sum of all finance charges and fees paid by the Class Members for each and every *separate* HOEPA violation as to each and every *separate* borrower.

490. Under 15 U.S.C. § 1635(g), the Plaintiff Class members are also entitled to additional relief under 15 U.S.C. § 1640 not related to their rescission rights.

491. Under 15 U.S.C. § 1635(a), those certain Plaintiff Class members whose loans were consummated within three years of the filing of the *Davis* case on May 1, 2001 and the *Ulrich* case on September 19, 2002 are entitled to assert claims for rescission against any assignee or holder of their notes and mortgages. As to RFC the legal tolling date for rescission for all class members, based on *Davis*, is May 1, 1998.

**COUNT IV**

**Declaratory Judgment that the Class Members have a Right to Rescind Their Loans**

492. Each preceding paragraph of this *MDL Complaint* is hereby incorporated as if fully set forth herein.

493. Rescission is available for three business days following the finalization of the transaction, and, if the creditor fails to make all material disclosures consumer's ability to rescind may be extended for up to three years. 15 U.S.C. § 1635(a).

494. Defendants' actions affected the entire Class such that declaratory relief would be appropriate for the entire class. This request for declaratory relief is appropriate with respect to the entire class.

495. The Plaintiffs and the members of the Plaintiff Class seek a declaration that the Banks violated TILA and HOEPA as set forth above in Counts II and III, and thus under 15

U.S.C. § 1635(a), those class members whose loans were consummated within three years of the date of the filing the *Davis* case on May 1, 2001 and the *Ulrich* case on September 19, 2002 are entitled to assert claims for rescission against any assignee or holder of their notes and mortgages.

496. As to the CBNV loans and GNBT loans that have been paid off, those Class members are not obligated to make a tender of the principal back to Defendants.

497. In addition, because the HOEPA enhanced damages and rescission damages to the Class members will exceed any tender obligation, those Class members are not required to tender any principal back to Defendants. Instead, the Class members are entitled to a return of finance charges and interest paid on their loans.

## COUNT V

### Violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) and 1962(d)

498. Each preceding paragraph of this *MDL Complaint* are hereby incorporated as if fully set forth herein.

499. Each Plaintiff and member of the Class is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

500. The Banks, the Shumway/Bapst Organization and related entities as well as other "consultants" to the Banks (collectively the "Consultants"), the Investor Defendants and the Defendant Class members are persons within the meaning of 18 U.S.C. §§ 1961(3).

501. The Banks, the Shumway/Bapst Organization and related entities as well as other "consultants" to the Banks (collectively the "Consultants"), the Investor Defendants and the Defendant Class members are each "persons" as defined under 18 U.S.C. § 1961(3) and have violated the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1962(c)

and 1962(d) because they were associated with enterprises, as defined in more detail below, which enterprises engaged in and wholesale activities of which affect interstate commerce and which said Defendants conducted and participated, both directly and indirectly in the conducting of the affairs of such enterprises through a pattern of racketeering activity, and which Defendants conspired to violate the provisions of 18 U.S.C, § 1962(d).

502. Further, even if the Investor Defendants and the Defendant Class members did not conduct or participate directly in the enterprises, they agreed with the Consultants and the Banks and became co-conspirators with them as to the goal of the enterprises and facilitated and supported the endeavor by providing the flow of capital to the Banks, making them subject to conspiracy liability under 18 U.S.C. § 1962(d). The scheme described in detail above ended when the loan purchasers, including the Investor Defendants and the Defendant Class members stopped the flow of capital to the Banks and the Consultants.

503. The Investor Defendants and the Defendant Class members are also liable for the RICO violations of the Banks and the Consultants by virtue of 15 U.S.C. § 1641, in that the Investor Defendants and the Defendant Class members stand in the shoes of the creditors, the Banks.

504. The Banks, the Consultants, and the Investor Defendants and the Defendant Class members used the mails and the wires and as described in more detail below, as such are defined and prohibited in 18 U.S.C. §§ 1341 and 1343, and engaged in the laundering of monetary instruments as defined and prohibited at 18 U.S.C. § 1956, as part of a fraudulent scheme and pattern of racketeering activity that was perpetrated on a nationwide basis against the home equity mortgage borrowers of the Banks and in particular on the Plaintiffs and the Plaintiffs Class.

505. The first enterprise, "the CBNV Consultant Enterprise," consisted of a formal or informal association in fact of individuals and legal entities which included CBNV, its Consultants (including EquityPlus Financial and any successor or affiliated entity which was controlled by the owners of EquityPlus and not otherwise delineated here, Community Home Mortgage, LLC, Community Plus Financial, Community First Financial, America's Mortgage, LLC, First Security Savings, Inc., and Interbank/Market Makers, LLC), its loan purchasers-investors (primarily, RFC, Irwin, Household Finance and Countrywide), and the title companies (including Title America LLC, Resource Title, Paramount Title, Home Title and Escrow and Papermaster Title and Escrow) which were used by CBNV and its Consultants . This enterprise functioned as a continuing unit, and the liable persons were joined in purpose and in their goals to solicit and make the illegal and false second mortgage loans to borrowers of CBNV nationwide (including Plaintiffs whose loans were made by CBNV) and to sell those loans to the Investor Defendants, including primarily RFC, and the Defendant Class members.

506. This enterprise was an association in fact that promoted and consummated and assigned and received an assignment of such home equity mortgage loans made by CBNV. The enterprise was participated in by CBNV, who made the loans to its borrowers, who funneled the illegal and excessive charges from the loans to the Consultants, who also sold the loans to the Investor Defendants and the Defendant Class members. The Investor Defendants and the Defendant Class members participated in the enterprise through their provision of the flow of operating capital to the enterprise through the purchase of the loans that met their criteria for their securitization purposes. The title companies were affiliated with the Consultants and CBNV and were participating in a RESPA markup and kickback scheme.

507. The second enterprise, "the GNBT Consultant Enterprise," consisted of a formal

or informal association in fact of individuals and legal entities which included GNBT, their primary consultant Equity Guaranty LLC and any successor or affiliated entity which was controlled by the owners of Equity Guaranty LLC and not otherwise delineated here, its investor-purchasers, primarily RFC, and the title companies (primarily Title America LLC and USA Title, LLC) which were used by GNBT and its consultant. This enterprise functioned as a continuing unit, and the liable persons were joined in purpose and in their goals to solicit and make the false and illegal second mortgage loans to borrowers of GNBT nationwide (including Plaintiffs whose loans were made by GNBT) and to sell those loans to RFC.

508. This enterprise was an association in fact that promoted and consummated and assigned the home equity mortgage loans made by GNBT. The enterprise was participated in by GNBT, who made the loans to its borrowers, who funneled the illegal and excessive charges from the loans to the consultant, who also sold the loans to the investor-purchasers, primarily RFC. RFC participated in the enterprise through its provision of the flow of operating capital to the enterprise through the purchase of the loans that met their criteria for their securitization purposes. The title companies were affiliated with and controlled by the consultant and GNBT and were participating in a RESPA markup and kickback scheme.

509. These first two enterprises had a structure that shared a commons and shared purpose, and had a continuity of structure and personnel and which structure, as an association in fact, was ascertainable and distinct from the pattern of racketeering itself, and which pattern of racketeering activity which was continuous, spanning a period of more than four years from the period in late 1997 until late in 2002, which included some 50,000 borrower/victims and which activity was related by the making of some 50,000 home equity loans through the concealed scheme as outlined above.

510. Alternatively, and in addition to the first two enterprises referenced above, CBNV as an enterprise and with whom the "persons" within the following association in fact enterprise conspired in violation of 18 U.S.C. § 1962(d), and an association in fact enterprise, consisting of the Shumway/Bapst Organization along with the EquityPlus Financial, LLC and EquityPlus Financial, Inc., and CBNV and RFC; and each of which enterprises formed an "enterprise" as defined by RICO, 18 U.S.C. § 1961(4), which enterprises and each of them, were continuous with respect to their structure and shared a common and shared purpose with a continuity of structure and personnel and which enterprises were ascertainable and distinct from the pattern of racketeering activity under which enterprises were conducted, and which continued in existence from a period in late 1997 until in or about 2000.

511. When their relationship with CBNV soured, GNBT as an enterprise and with whom the "persons" within the following association in fact enterprise conspired in violation of 18 U.S.C. § 1962(d), and an association in fact enterprise consisting of the Shumway/Bapst Organization and Equity Guaranty and related entities, including Title America and Title USA, and GNBT and RFC; and each of which enterprises formed an "enterprise" as defined by RICO, 18 U.S.C. § 1961(4), which enterprises and each of them were continuous with respect to their structure and shared a common and shared purpose with a continuity of structure and personnel and which enterprises were ascertainable and distinct from the pattern of racketeering activity under which enterprises were conducted, and which continued in existence from the period in late 1999 or early 2000 until late in 2002.

512. The pattern of racketeering activity through each above enterprises included the illegal use of the mails and the wires, as such are defined and prohibited in 18 U.S.C. §§ 1341 and 1343 related directly to the scheme, as evidenced by the HUD-1 Settlement Statements

which uniformly misrepresented the disposition or payment of proceeds to CBNV, GNBT or to the title companies, when in fact the majority of the proceeds were being paid to the Consultants. In particular, the Plaintiffs' and the Plaintiffs Class' HUD-1 Settlement Statements were standard form, RESPA required documents used by the Banks and the Consultants and the Investor Defendants and the Defendant Class in the Class Members' HOEPA mortgage loan transactions, which HUD-1 Settlement Statements uniformly concealed or misrepresented the nature, amount and disposition of the charges and proceeds paid to the Banks and the title companies, or other affiliate entities, which payments, in fact, were illegally kicked back, marked-up, concealed and, without limitation, certain of such charges were illegal disbursed and concealed as being disbursed to the Consultants including in most instances persons or entities within the Shumway/Bapst Organization.

513. Additionally, the Truth In Lending Disclosure for Real Estate Mortgage Loans and the Truth In Lending Disclosure (For Section 32 Mortgages) as provided to the Plaintiffs were false and misleading in that the Annual Percentage Rate (the "APR") was understated and in violation of TILA and HOEPA and disclosures were provided to the Class Members (albeit not necessarily timely).

514. The enterprises used the interstate mails and wires to market their second mortgage loan programs and to solicit loans from potential borrowers. The use of the wires and mails was essential to each mortgage loan transaction.

515. The enterprises also engaged in money laundering as a part of, and in furtherance of, its scheme and artifice to defraud the Class members in violation of 18 U.S.C. § 1956.

516. The enterprises knew that the property involved in the second mortgage loan

transactions that they conducted with the Class members represented the proceeds of activities which constituted felonies under federal law (*i.e.*, mail and wire fraud).

517. The second mortgage loan transactions were "financial transactions" as defined by 18 U.S.C. § 1956(c)(4).

518. The enterprises conducted the second mortgage loan transactions with the intent of carrying on, promoting and facilitating further acts of mail and wire fraud and/or knowing that the second mortgage loan transactions were designed in whole or in part to conceal or disguise the nature, source and control of the mail and wire fraud The Defendants and the enterprises knew that the property involved in their financial transactions represented the proceeds of unlawful activities and they conducted and/or attempted to conduct their financial transactions, which involved the proceeds of the unlawful activities, with the intent to promote the carrying on of the unlawful activities and to with intent to avoid taxation on these proceeds and regulation by state licensing entities.

519. Further, Defendants and the enterprises knew that the transactions were designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the unlawful activities and to avoid a transaction reporting requirement under State or Federal law (as found by the OCC in its Reports of Examination).

520. Indeed, among other things, the predicate acts of mail and wire fraud and money laundering, which are described with particularity above, and can be referenced by reviewing the loan papers found in the Plaintiffs' loan files and which are evidenced by the closing of the borrowers' loans, consisted of and used the mails and wired as follows:

(a) the purchase of credit/customer lists from the major credit reporting agencies;

(b) the false representations used by the Consultants and the loan production offices to the credit reporting agencies to obtain the customer lists;

(c) the directed mailings to the Class members used to falsely lure borrowers to the loan production offices including as set forth with more particularity immediately below;

(d) the directed mailings to the Class members which falsely contained non-existent and misrepresented loan offers, such as the borrowers were "pre-approved" for offers of credit that were not being offered;

(e) the use of the wires and telephones to intake applications for loans;

(f) the ordering of credit reports for every borrower on every loan (as evidenced by the charges for credit reports on Line 804 of the Plaintiffs' HUD-1s);

(g) the receipt of the credit reports on the borrowers (as evidenced by the charges for credit reports on Line 804 of the Plaintiffs' HUD-1s);

(h) the use of the mails and carriers such as Federal Express to "overnight" the closing papers and HUD-1's to and from the Banks and/or the Consultants ;

(i) the wiring of settlement funds, including the funds for the bogus and unlawful fees, between the Banks, the Investor Defendants and the Defendant Class members, and the Consultants and the title companies;

(j) the wiring of funds between the Investor Defendants and the Defendant Class members and the Banks after the loans were purchased by the Investors;

(k) the Banks' and the Consultants' use of the Internet to obtain funding and purchase approvals from the Investor Defendants and the Defendant Class members;

(l) the disbursement of payments to the Class members' creditors through disguised sources;

(m) the collection and receipt the Class members' monthly loan payments;

(n) the maintenance of separate books and records for the Consultants in the Banks' records;

(o) the use of shared bank accounts to deposit and withdraw proceeds of the unlawful activities; and

(p) the dozens of letters and emails which are set forth above, that were designed to perpetuate and further the consulting/franchising scheme.

521. In addition, the racketeering activity consisted of the representations and concealment included in the HUD-1s as referenced in specific detail above as to each Class member, which HUD-1s were false and misleading and contained fraudulent misrepresentations and concealments as set forth in particular detail above, relating to each of the Plaintiffs' loans.

522. Additionally, the racketeering activity consisted of the representations and concealments included in the Truth In Lending Disclosure for Real Estate Mortgage Loans and the Truth In Lending Disclosure (For Section 32 Mortgages) as referenced in specific detail above as to each Class member, which Disclosures were false and misleading and contained fraudulent misrepresentations and concealments as set forth in particular detail above, relating to each of the Plaintiffs' loans.

523. Although not a necessary element of this RICO claim, the Class members relied to their detriment by consummating the lending transactions with what was represented to be and was believed to be legitimate lenders, but were, in fact, part of a predatory scheme in which the promoter used a consulting/franchising scheme to lend an air of legitimacy to the transaction. It was, in fact a false air of legitimacy, upon which misrepresentations plaintiffs

justifiably and reasonably relied, all to the Class members' detriment in that instead of dealing with legitimate lenders, Class members unknowingly, dealt with a fraudulent and illegitimate scheme. The Class members were damaged by reason of such fraudulent racketeering activity.

524. The racketeering activity was "self-concealing" and the very essence of these enterprises was to conceal the racketeering activity from the Class members.

525. The Defendants, including the Banks and the Investor Defendants and the Defendant Class members are therefore liable persons to the Plaintiffs and the Plaintiff Class for the violation of 18 U.S.C. § 1962(c) and 1862(d) for having participated and conducted the operation and management of enterprises as described with specificity above and in accordance with the definition of an enterprise as set forth in 18 U.S.C. § 1961(4), through a pattern of racketeering activity of mail and wire fraud and money laundering activity, and as a conspiracy to violate the provisions of 18 U.S.C. § 1962(c), and the Class members were injured in their property by reason of such racketeering activity, which injury by virtue of the fraudulent and concealing racketeering activity was not discovered and could not have been discovered exercising reasonable diligence until and in fact, after this lawsuit was first filed. As such, the Class members' RICO claims are timely for the four-year period preceding the filing of the filing of the *Davis* case on May 1, 2001 and the *Ulrich* case on September 19, 2002.

526. Additionally, the Defendants, including the Banks and the Investor Defendants and the Defendant Class members and the Consultants and the related and affiliate title companies conspired with and agreed, knowingly, to participate in the racketeering acts and goals of the enterprises as set forth with particularity above and agreed with one another to

conduct the enterprises through the fraudulent consulting scheme, which agreement included in specific part, the actual lending of the money to the borrowers, including the Class members, and the falsification of the HUD-1s and the Truth In Lending Disclosures, and by funneling the fraudulent and illegitimate charges to the unregulated and illegitimate promoters of these loans with the excessive charges, all in violation of 18 U.S.C. § 1962(d). The Defendants, including the Banks and Investor Defendants and the Defendant Class members are therefore liable by virtue of 15 U.S.C. § 1641.

527. Additionally, the Investor Defendants and the Defendant Class members conspired with and agreed, knowingly, to participate in the racketeering acts and goals of the enterprise as set forth with particularity above. They agreed with the Consultants and the Banks to the conducting of the enterprise through the fraudulent scheme, which agreement included the their actual participation in the enterprises by pre-approving loans and financing their operations, which allowed the enterprises to not only continue, but to proliferate, making more victims on the one hand, but on the other, more profits for the Consultants, the Banks and the Investor Defendants and the Defendant Class members, The scheme was dependent upon the continuous source of money and flow of capital necessary to continue the scheme and the enterprise, all in violation of 18 U.S.C. § 1962(d).

528. Further, the Investor Defendants and the Defendant Class members are liable to the Plaintiffs and the Plaintiff Class just as the Banks are liable for the above RICO violations by virtue of 15 U.S.C. § 1641(d) because the underlying racketeering activities involved high cost loans.

529. The Class members were in fact injured by the actions of Defendants by the conduct constituting violations of RICO, and suffered monetary damages as a result. That the

Class members relied upon the predicate acts of mail and wire fraud and money laundering is evidenced by their agreement to enter into the second mortgage loan transactions with the Banks, their payment of fees and charges on their loans and the continued monthly payments on their second mortgage loans. As a direct, foreseeable and proximate result of the acts as alleged herein, and the violations of 18 U.S.C. §§ 1962(c) and 1962(d) by the Defendants, the Class members suffered substantial economic injury and injury to their property and they shall recover threefold the damages sustained by them, the cost of this lawsuit, and reasonable attorneys' fees.

**PRAYER FOR RELIEF**

WHEREFORE, on all asserted causes of action against Defendants, Plaintiffs and the Plaintiff Class members pray for judgment against said Defendants and the Defendant Class members as follows:

(a) For an Order certifying that this action may be maintained as a Plaintiff class action, as defined above, under Fed. R. Civ. P. 23(a) and 23(b)(3);

(b) For an Order appointing the Plaintiffs to act as representatives of the Plaintiff Class Members and the Plaintiff Class;

(c) For an Order appointing the undersigned counsel, Carlson Lynch, LTD and Walters, Bender, Strohbehn & Vaughan, P.C. to act as Co-Lead counsel for the Plaintiffs' Class pursuant to Fed. R. Civ. P. 23(g);

(d) For an Order directing that reasonable notice of the Plaintiff Class action be given to all members of the Plaintiff Class at the appropriate time and in the manner directed by the Court;

(e) For violating the HOEPA requirements of 15 U.S.C. §§ 1635, 1638, and 1639, a declaration that those certain Plaintiff Class members whose loans were closed within the three-year period preceding the filing of the filing of the *Davis* case on May 1, 2001 and the *Ulrich* case on September 19, 2002, remain entitled to rescind their loans and that to any pending or current loans that Defendants are prohibited from foreclosing on the Plaintiffs' and Plaintiff Class members' mortgages;

(f) For damages related to Defendants' failure to rescind the Plaintiffs' and the Class members' HOEPA loans;

(g) For violating the HOEPA requirements of 15 U.S.C. §§ 1635, 1638, and 1639, an Order and Judgment finding that Defendants and the Defendant Class members are liable as a matter of law to each Plaintiff Class member for damages and declaratory and injunctive relief allowable under 15 U.S.C. §§ 1635, 1639, 1640 and 1641(d), including, all (1) actual and statutory damages; (2) rescission rights and damages; and (3) an amount equal to the sum of all finance charges and fees paid by the Plaintiff Class members for each and every *separate* HOEPA violation as to each and every *separate* borrower;

(h) For violations of the above laws a finding of assignee liability under the provisions of HOEPA;

(i) For violating RESPA, an Order and Judgment finding that the Defendants and the Defendant Class members are liable as a matter of law to each member of the Plaintiff Class for treble damages;

(j) For violating RESPA, an Order and Judgment awarding RESPA treble damages to the Plaintiff Class members and against the Defendants and the Defendant Class

members in accordance with the loans which were "made" or assigned to the said Defendants and the Defendant Class members;

(k) For violating RICO 18 U.S.C. § 1962(c) and 1962(d), a finding that the Defendants and the Defendant Class members are jointly and severally liable as a matter of law to each member of the Class for actual damages;

(l) For a trebling of the actual damages as provided in 18 U.S.C. § 1964(c);

(m) For a permanent injunction enjoining Defendants and the Defendant Class members, together with their officers, directors, employees, agents, partners or representatives, successors and any and all persons acting in concert with them or by agreement with them from directly or indirectly engaging in the wrongful acts and practices described above, all for the benefit of the Plaintiff Class Members and other future borrowers;

(n) For reasonable attorneys' fees as provided by law and statute;

(o) For pre-and-post judgment interest as provided by law in amount according to proof at trial;

(p) For an award of costs and expenses incurred in this action; and

(q) For such other and further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiffs demand a jury trial on all issues so triable.

Respectfully submitted:

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**ATTORNEYS FOR PLAINTIFFS**

# Exhibit 7

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE:

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| COMMUNITY BANK OF NORTHERN VIRGINIA MORTGAGE LENDING PRACTICES LITIGATION | MDL No. 1674<br>02-1201, 03-0425, 05-0688, 05-1386<br>**ELECTRONICALLY FILED** |

**ORDER OF COURT**

This case was reassigned to this Court on May 16, 2013. Doc. no. 593. Since then, the Court has reviewed:

(1) the FDIC's Motion to Dismiss for Lack of Jurisdiction and Motion to Dismiss/Strike Plaintiffs' Class Action Claims and Certain Prayers for Relief Against the FDIC and its Brief in Support (doc. nos. 516, 517);

(2) PNC's Motion to Dismiss for Failure to State a Claim and its Brief in Support (doc. nos. 520, 521);

(3) Plaintiffs' Briefs in Opposition to each of the Motions (doc. nos. 539, 540, respectively);

(4) the Reply Brief filed by the FDIC and PNC as to PNC's Motion to Dismiss (doc. no. 548);

(5) the Reply Brief filed by the FDIC as to the FDIC's Motion to Dismiss and Motion to Dismiss/Strike (doc. no. 549);

(6) Plaintiffs' Sur-Reply Brief as to PNC's Motion to Dismiss (doc. no. 554);

(7) Plaintiffs' Sur-Reply Brief as to the FDIC's Motion to Dismiss and Motion to Dismiss/Strike (doc. no. 561); and

(8) a transcript of the September 18, 2012, oral argument related to the above-referenced Motions (doc. no. 591); as well as

(9) all supplemental authority filed by the parties related to these Motions (doc. nos. 562, 565, 573, 577-579, 594, 598, 599, 600, 602, and 603).

The Court ordered the parties to attend a status conference on June 12, 2013. On June 5, 2013, the Court notified the parties that any new argument pertaining to the Motions should be made orally during the status conference. The parties have not advanced any new arguments.

**AND NOW,** this **12th day of June, 2013**, upon consideration of all of the written and oral submissions proffered by the parties:

The Court **GRANTS** Defendant FDIC's Motion to Dismiss for Lack of Subject Matter Jurisdiction (doc. no. 516).

The Court **GRANTS IN PART and DENIES IN PART** Defendant PNC's Motion to Dismiss for Failure to State a Claim (doc. no. 520) as follows:

(1) PNC's Motion to Dismiss the named representatives who did not schedule their claims in this case as an asset of their bankruptcy estate and/or who are not the real party in interest, is **GRANTED**;

(2) PNC's Motion to Dismiss any claims brought against it by any Plaintiff whose loan did not originate with PNC nor was assigned to PNC, is **GRANTED**;

(3) PNC's Motion to Dismiss claims made pursuant to §2607(b) of Real Estate Settlement Procedures Act ("Section 1100 fees"), 12 U.S.C. § 2607 ("RESPA"), is **GRANTED**;

(4) PNC's Motion to Dismiss Plaintiffs Edward Kruszka and Richard Montgomery for failure to join an indispensable party pursuant to Fed.R.Civ.P. 12(b)(7), is **GRANTED**;

(5) PNC's Motion to Dismiss actual damages under the Truth in Lending Act, as amended by the Home Ownership Equity Protection Act, 15 U.S.C. § 1601 ("TILA/HOEPA"), *et seq.*, is **DENIED;**

(6) PNC's Motion to Dismiss TILA/HOEPA claims and the Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1962(c) and (d), is **DENIED;** and

(7) PNC's Motion to Dismiss claims made pursuant to any Section of RESPA other than Section §2607(b) of RESPA ("Section 1100 fees"), is **DENIED.**

The Court's Opinion related to this Order shall be filed in due course.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All Registered ECF Counsel

# Exhibit 8

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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| IN RE: | COMMUNITY BANK OF NORTHERN VIRGINIA MORTGAGE LENDING PRACTICES LITIGATION | ) ) ) ) ) | MDL No. 1674 Civ. Action Nos. 02-1201, 03-425, 05-688, 05-1386 ELECTRONICALLY FILED |

**MEMORANDUM OPINION**

This matter is before the Court on Defendants' Motions to Dismiss. Doc. nos. 516 and 520. Plaintiffs have filed a putative class action alleging that Defendants' issuance of second mortgages violated, *inter alia*, the Real Estate Settlement Practices Act, 12 U.S.C. § 2601, *et seq.* ("RESPA"), the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, as amended by the Home Ownerships Equity Protection Act ("HOEPA"), 15 U.S.C. § 1639 *et seq.* and the Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* ("RICO").

Defendant Federal Deposit Insurance Corporation ("FDIC"), as receiver for the Guarantee National Bank of Tallahassee ("GNBT"), has filed a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(1), 12(b)(6), 12(b)(7), 12(f), 15, 19(a) and 23(d)(1)(D) and 12 U.S.C. §§ 1821 and 1825 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. 101-73, 103 Stat. 183 (1989) ("FIRREA").[1] Doc. no. 516.

[1] As noted, Defendant FDIC filed its Motion, in part, pursuant to F.R.Civ.P. 12(f), which is a Motion to Strike. Because this Court granted Defendant FDIC's Motion to Dismiss, the Court will not address the Motion to Strike in this Opinion.

Defendant PNC has filed a Fed.R.Civ.P. 12(b)(6) Motion arguing that Plaintiffs have failed to state a claim upon which relief can be granted. Doc. no. 520. Defendant PNC further seeks dismissal of certain named Plaintiffs' claims against it for lack of standing. Both Defendants also argue that other named representatives' claims should be dismissed for failure to join their spouses, who, Defendants claim, are indispensable parties. Defendants jointly further contend that Plaintiffs' claims under RESPA and RICO should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim.

The Court has reviewed the following: (1) the FDIC's Motion to Dismiss for Lack of Jurisdiction and Motion to Dismiss/Strike Plaintiffs' Class Action Claims and Certain Prayers for Relief Against the FDIC and its Brief in Support (doc. nos. 516, 517); (2) PNC's Motion to Dismiss for Failure to State a Claim and its Brief in Support (doc. nos. 520, 521); (3) Plaintiffs' Briefs in Opposition to each of the Motions (doc. nos. 539, 540, respectively); (4) the Reply Brief filed by the FDIC and PNC as to PNC's Motion to Dismiss (doc. no. 548); (5) the Reply Brief filed by the FDIC as to the FDIC's Motion to Dismiss and Motion to Dismiss/Strike (doc. no. 549); (6) Plaintiffs' Sur-Reply Brief as to PNC's Motion to Dismiss (doc. no. 554); (7) Plaintiffs' Sur-Reply Brief as to the FDIC's Motion to Dismiss and Motion to Dismiss/Strike (doc. no. 561); and (8) a transcript of the September 18, 2012, oral argument related to the above-referenced Motions (doc. no. 591); as well as (9) all supplemental authority filed by the parties related to these Motions (doc. nos. 562, 565, 573, 577-579, 594, 598, 599, 600, 602, and 603).

The Court ordered the parties to attend a status conference on June 12, 2013. On June 5, 2013, the Court notified the parties that any new argument pertaining to the Motions to Dismiss should be made orally during the status conference. Upon hearing no new arguments, the Court ruled on these Motions and entered an Order disposing of them. Doc. no. 605. Set forth below is the Court's reasoning for each ruling in that Order (doc. no. 605), which is incorporated post, as if fully set forth herein.

## I. BACKGROUND

The parties and the Court are conversant in the procedural and factual background of this case. The United States Court of Appeals for the Third Circuit has previously set forth, in detail, the convoluted procedural history of these cases. *See In re Cmty. Bank of N. Va.*, 622 F.3d 275, 279–90 (3d Cir. 2010); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 283–98 (3d Cir. 2005). After the latest remand, Chief Judge Lancaster, who had been assigned these cases, *In re Cmty. Bank of N. Va. Mortgage Lending Practices Litig.*, 368 F.Supp. 2d 1354, 1355 (J.P.M.L. 2005), issued a Case Management Order (doc. no. 506). Thereafter, Plaintiffs filed a Joint Consolidated Amended Complaint (doc. no. 507), Defendants filed Motions to Dismiss (doc. nos. 516 & 520), and Chief Judge Lancaster heard argument thereon. See doc. no. 591. After Chief Judge Lancaster's untimely death, the Judicial Panel on Multidistrict Litigation re-assigned these cases to this Court. *In re Cmty. Bank of N. Va. Mortgage Lending Practices Litig.*, MDL 1674 (J.P.M.L. May 17, 2013). All references to actions taken by "this Court" prior to May 17, 2013, refer to actions taken by Chief Judge Lancaster.

The following facts are taken from the Joint Consolidated Amended Complaint (doc. no. 507), and are accepted as true solely for the purposes of this Memorandum Opinion. Other facts relevant to this Court's decision are set forth in context as necessary.

In the late 1990s, an organization run by David Shumway, Devan Shumway, and Randy Bapst founded an organization to originate and sell second mortgages to investors. This organization partnered with Defendant PNC (then known as the Community Bank of Northern Virginia ("CBNV"), a regulated depository institution), to originate second mortgages, charge origination fees, and then sell them almost immediately to investors such as the Residential Funding Corporation ("RFC"). The Joint Consolidated Amended Complaint alleges that the issuance of these second mortgages violated RESPA, TILA/HOEPA, and RICO.

A. CBNV and GNBT

CBNV is a Virginia Corporation with its principal place of business in Virginia and, as a lender, made approximately 22,810 of the loans at issue here. CBNV is now known as PNC National Bank. GNBT was a national bank with its principal place of business in Tallahassee, Florida. GNBT made at least 21,725 of the loans at issue here. GNBT was closed by the Office of Comptroller of Currency in 2004. The FDIC was substituted for GNBT in this litigation in 2004. Facts regarding the FDIC receivership relevant to these Motions are set forth, *infra,* at section C.

B. Representative Plaintiffs

Named as representative Plaintiffs are: Ruth J. Davis, Phillp F. and Jeannie C. Kossler, Brian W. and Carl M. Kessler, Patrice Porco, Thomas T. Mathis, Stephen R. and Amy L. Haney,

John and Rebecca Picard, William and Ellen Sabo, Russell and Kathleen Ulrich, Nora H. Miller, Robert A. and Rebecca A. Clark, Edward R. Kruszka, Jr., Tina Merl Boor, Martin J. Baratz, Clell L. Hobson, Rosa Kelly Parkinson, John and Kathy Nixon, Brian Cartee, Mack and Robin Dorman, Jerome and Charetta Roberts, Melba Brown, Flora A. Gaskin, Roy Lee and Ruthie Mae Logan, Shawn and Lorene Starkey, John and Rowena Drennen, Richard Montgomery, and Tammy and David Waseem.

1. Ruth Davis

Ms. Davis had a CBNV loan, which closed on February 22, 1999. According to the Joint Consolidated Amended Complaint, this was the date she was first given her TILA and HOEPA disclosures. The principal balance of her loan was $24,100.00 to be repaid, with an interest rate of 13.75% (APR of 15.456%), monthly for 24 years. Ms. Davis executed a deed of trust that granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to Ms. Davis. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 (a "Loan Discount"), 804 ("Credit Report"), and 807 (a "Flood Certification Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), and 1112 ("Processing Fee"). Ms. Davis was given a Federal Truth in Lending Disclosure Statement that identified her Finance Charge as $63,971.58 and her APR as 15.46%. Ms. Davis filed for personal bankruptcy on April 15, 2005. She did not schedule this action in her petition.

2. Phillp F. and Jeannie C. Kossler

The Kosslers had a CBNV loan, which closed on or about July 28, 1998. According to the Joint Consolidated Amended Complaint, this was the date the Kosslers were first given their TILA and HOEPA disclosures. The principal balance of their loan was $30,000.00 to be repaid with an interest rate of 12.99% (APR of 14.817%) monthly for 15 years. The Kosslers executed a deed of trust that granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Kosslers. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 804 ("Credit Report"), and 808 ("Document Review"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), and 1111 ("Signing Agent"). The Kosslers were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $40,938.40 and their APR as 14.817%.

3. Brian W. and Carl M. Kessler

The Kesslers had a CBNV loan, which closed on or about April 30, 1999. According to the Joint Consolidated Amended Complaint, this was the date the Kesslers were first given their TILA and HOEPA disclosures. The principal balance of their loan was $33,000.00 to be repaid, with an interest rate of 14.75% (APR of 17.841%), monthly for 15 years. The Kesslers executed a deed of trust that granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Kesslers. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a

"Loan Origination Fee"), 802 ("Loan Discount"), 807 ("Application Fee"), and 811 ("Underwriting Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), and 1112 ("Document Review"). The Kosslers were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $53,587.45 and their APR as 17.841%.

4. Patrice Porco

Patrice Porco had a GNBT loan which closed on or about September 9, 2000. According to the Joint Consolidated Amended Complaint, this was the date she was first given her TILA and HOEPA disclosures. The principal balance of her loan was $29,800.00 to be repaid, with an interest rate of 12.99% (APR of 16.71%), monthly for 15 years. Ms. Porco executed a deed of trust that granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to Ms. Porco. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 811 ("Underwriting Fee"), and 813 ("Application Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). Ms. Porco was given a Federal Truth in Lending Disclosure Statement that identified her Finance Charge as $43,024.86 and her APR as 16.7196%.

5. Thomas T. Mathis

Thomas T. Mathis had a GNBT loan which closed on or about June 7, 2001. According to the Joint Consolidated Amended Complaint, this was the date he was first given his TILA and HOEPA disclosures. The principal balance of his loan was $25,000.00 to be repaid, with an interest rate of 14.99% (APR of 17.24%), monthly for 25 years. Mr. Mathis executed a deed of trust that granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to Mr. Mathis. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 804 ("Credit Report"), 811 ("Underwriting Fee"), and 812 ("Flood Certification Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). Mr. Mathis was given a Federal Truth in Lending Disclosure Statement that identified his Finance Charge as $74,020.58 and their APR as 17.2411%. Mr. Mathis filed for personal bankruptcy on April 29, 2004. He did not schedule this action in his petition.

6. Stephen R. and Amy L. Haney

Stephen R. and Amy L. Haney had a GNBT loan which closed on May 23, 2001. According to the Joint Consolidated Amended Complaint, this was the date the Haneys were first given their TILA and HOEPA disclosures. The principal balance of their loan was $24,500.00 to be paid monthly for 15 years. The Joint Consolidated Amended Complaint does not indicate the interest rate or APR. The Haneys executed a deed of trust that granted GNBT a security lien in

residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Haneys. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 804 ("Credit Report"), 811 ("Underwriting Fee"), and 812 ("Flood Certification Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). The Haneys were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $31,996.99 and their APR as 15.0957%. The Haneys filed for personal bankruptcy on June 2, 2009. They did not schedule this action in their petition.

7. John and Rebecca Picard

John and Rebecca Picard had a CBNV loan which closed on November 30, 1999. According to the Joint Consolidated Amended Complaint, this was the date the Picards were first given their TILA and HOEPA disclosures. The principal balance of the loan was $47,900.00 to be repaid monthly for 15 years. The interest rate was 14.99% (APR of 18.416%). The Picards executed a deed of trust that granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Picards. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 803 ("Appraisal Fee"), 807 ("Application Fee"), and 811 ("Underwriting Fee). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"),

1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). The Picards were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $79,767.89 and their APR as 18.416%.

8. William and Ellen Sabo

William and Ellen Sabo had a CBNV loan which closed on or about October 15, 1999. According to the Joint Consolidated Amended Complaint, this was the date the Sabos were first given their TILA and HOEPA disclosures. The principal balance of their loan was $35,000.00 to be paid over 15 years. The interest rate was 14.75% (APR of 17.390%). The Sabos executed a deed of trust that granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Sabos. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 808 ("Application Fee"), and 809 ("Underwriting Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), and 1112 ("Document Review"). The Sabos were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $56,211.00 and their APR as 17.39%. Ms. Sabo filed for personal bankruptcy on December 13, 2007. She did not schedule this action in her petition.

9. Russell and Kathleen Ulrich

Russell and Kathleen Ulrich had a GNBT loan which closed on or about August 8, 2000. According to the Joint Consolidated Amended Complaint, this was the date the Ulriches were

first given their TILA and HOEPA disclosures. The principal balance of their loan was $46,850.00 to be paid over 25 years. The interest rate was 12.99% (APR of 15.469%). The Ulriches executed a deed of trust that granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Ulriches. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 807 ("Application Fee"), and 811 ("Underwriting Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). The Ulriches were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $118,324.73 and their APR as 15.49%. Mrs. Ulrich filed for personal bankruptcy on February 26, 2007. She did not schedule this action in her petition.

10. Nora H. Miller

Nora H. Miller had a CBNV loan which closed on or about April 30, 1999. According to the JOINT CONSOLIDATED AMENDED COMPLAINT, this was the date she was first given her TILA and HOEPA disclosures. The principal balance of her loan was $34,000.00 to be paid over 15 years. The interest rate was 12.50% (APR of 15.590%). Ms. Miller executed a deed of trust that granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Ms. Miller. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan

Origination Fee"), and 802 ("Loan Discount"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), and 1112 ("Document Review"). Ms. Miller was given a Federal Truth in Lending Disclosure Statement that identified her Finance Charge as $46,332.99 and her APR as 15.59%. Ms. Miller filed for personal bankruptcy on August 15, 2003 and August 20, 2009. She did not schedule this action in either petition.

11. Robert A. and Rebecca A. Clark

Robert A. and Rebecca A. Clark had a GNBT loan which closed on or about March 20, 2001. According to the Joint Consolidated Amended Complaint, this was the date the Clarks were first given their TILA and HOEPA disclosures. The principal balance of their loan was $27,500.00 to be paid over 10 years. The interest rate was 11.99% (APR of 16.0042%). The Clarks executed a deed of trust that granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Clarks. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 804 ("Credit Report"), 811 ("Underwriting Fee"), and 812 ("Flood Certification Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). The Clarks were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $23,785.92 and their APR

as 16.0042%. The Clarks filed for personal bankruptcy on April 28, 1997 and July 16, 2009. They did not schedule this action in either petition.

12. Edward R. Kruszka, Jr.

Edward R. Kruszka, Jr. had a GNBT loan which closed on or about May 5, 2001. According to the Joint Consolidated Amended Complaint, this was the date he was first given his TILA and HOEPA disclosures. The principal balance of his loan was $20,100.00 to be paid over 20 years. The interest rate was 16.99% (APR of 19.772%). Mr. Kruska executed a deed of trust that granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to Mr. Kruszka. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 804 ("Credit Report"), 807 ("Application Fee"), 810 ("E Appraisal"), and 811 ("Underwriting Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). Mr. Kruszka was given a Federal Truth in Lending Disclosure Statement that identified his Finance Charge as $53,198.40 and his APR as 19.722%. Mr. Kruszka filed for bankruptcy on May 24, 2002. He did not schedule this action in his petition.

13. Tina Merl Boor

Tina Merl Boor, formerly known as Tina Merl, had a CBNV loan which closed on or about December 9, 2000. According to the Joint Consolidated Amended Complaint, this was the date she was first given her TILA and HOEPA disclosures. The principal balance of her loan

was not included in the Joint Consolidated Amended Complaint. Several fees were itemized on the HUD-1 settlement statement given to Ms. Boor. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 808 ("Lender Document Review Fee"), 810 ("Lender Underwriting Fee"), and 811 ("Document Review"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), and 1105 ("Document Preparation"). The Joint Consolidated Amended Complaint contains no information regarding the Finance Charge, nor does it contain any information regarding the APR. Ms. Boor field for bankruptcy on August 20, 2007. She did not schedule this action in her petition.

14. Martin J. Baratz

Martin J. Baratz had a GNBT loan which closed on or about January 16, 2002. According to the Joint Consolidated Amended Complaint, this was the date he was first given his TILA and HOEPA disclosures. The Joint Consolidated Amended Complaint contains no further allegations regarding Mr. Baratz's loan.

15. Clell L. Hobson

Clell L. Hobson had a CBNV loan which closed on or about May 2, 2001, via FedEx delivery with return, pre-paid, next-day return envelope. According to the Joint Consolidated Amended Complaint, this was the date he was first given his TILA and HOEPA disclosures. The principal balance of his loan was $55,500.00 to be paid over 20 years. The interest rate was 17.75% (APR of 19.904%). Mr. Hobson executed a deed of trust that granted CBNV a security

lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to Mr. Hobson. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 808 ("Lender Document Review"), 809 ("Lender Underwriting Fee"), and 810 ("Lender Application Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), and 1105 ("Document Preparation"). Mr. Hobson was given a Federal Truth in Lending Disclosure Statement that identified his Finance Charge as $152,996.30 and his APR as 19.904%. The Joint Consolidated Amended Complaint further alleges that other aspects of the notices given to Mr. Hobson violated HOEPA. Mr. Hobson filed for personal bankruptcy on December 2, 2002. He did not schedule this claim in his petition.

16. Rosa Kelly Parkinson

Rosa Kelly Parkinson, then known as Rosa Kelly, had a GNBT loan which closed on or about Septmber 27, 2000 via a courier who obtained the execution of the loans in a public library near Decatur, George. According to the Joint Consolidated Amended Complaint, this was the date she was first given her TILA and HOEPA disclosures. The principal balance of her loan was $51,000.00 to be paid over 25 years. The interest rate was 13.99% (APR of 16.532%). Captain Kelly executed a deed of trust that granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to Captain Parkinson. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 807

("Application Fee"), and 811 ("Underwriting Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1112 ("Document Review"), and 1113 ("Processing Fee"). Captain Kelly was given a Federal Truth in Lending Disclosure Statement that identified her Finance Charge as $109,105.81 and her APR as 16.532%. The Joint Consolidated Amended Complaint further alleges that other aspects of the notices given to Captain Kelly violated HOEPA and Georgia law.

17. John and Kathy Nixon

John and Kathy Nixon had a CBNV loan which closed on or about February 2, 2001, via FedEx to their home in Florida. According to the Joint Consolidated Amended Complaint, this was the date the Nixons were first given their TILA and HOEPA disclosures. The principal balance of their loan was $49,999.00 to be paid over 25 years. The interest rate was 18.25% (APR of 20.261%). The Nixons executed a deed of trust that granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Nixons. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee") and 807 ("Application"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), and 1105 ("Document Preparation"). The Nixons were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $185,347.31 and their APR as 20.261%. The

Joint Consolidated Amended Complaint further alleges that other aspects of the notices given to the Nixons violated HOEPA.

18. Brian Cartee

Brian Cartee had a GNBT loan which closed on or about February 25, 2002. According to the Joint Consolidated Amended Complaint, this was the date he was first given his TILA and HOEPA disclosures, via FedEx. The principal balance of his loan was $29,500.00 to be paid over 15 years. The interest rate was 12.750% (APR of 15.556%). Mr. Cartee executed a deed of trust which granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to Mr. Cartee. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 808 ("GA State Tax Fee"), and 810 ("Lender Application Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), and 1113 ("Processing Fee"). Mr. Cartee was given a Federal Truth in Lending Disclosure Statement that identified his Finance Charge as $40,694.64 and his APR as 15.5596%. The Joint Consolidated Amended Complaint further alleges that other aspects of the notices given to Mr. Cartee violated HOEPA.

19. Mack and Robin Dorman

Mack and Robin Dorman had a GNBT loan which closed on or about February 11, 2002. According to the Joint Consolidated Amended Complaint, this was the date the Dormans were first given their TILA and HOEPA disclosures, which arrived via FedEx delivery. The principal

balance of their loan was $29,600.00 to be paid over 10 years. The Joint Consolidated Amended Complaint does not identify the interest rate but alleges that the APR was 16.4352%. The Dormans executed a deed of trust that granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Dormans. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 808 ("GA State Tax Fee"), and 810 ("Lender Application Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), and 1113 ("Processing Fee"). The Dormans were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $40,694.64 and their APR as 16.4532%. The Joint Consolidated Amended Complaint further alleges that other aspects of the notices given to the Dormans violated HOEPA.

20. Jerome and Charetta Roberts

Jerome and Charetta Roberts had a GNBT loan which closed on or about October 9, 2000. According to the Joint Consolidated Amended Complaint, this was the date the Roberts were first given their TILA and HOEPA disclosures via courier to Mr. Roberts' place of work. The principal balance of their loan was $39,00.00 to be paid over 25 years. The interest rate was 14.99% (APR of 17.828%). The Roberts executed a deed of trust which granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Roberts. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan

Discount"), 811 ("Underwriting Fee"), and 813 ("Application Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1112 ("Document Review"), and 1113 ("Processing Fee"). The Roberts were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $116,570.41 and their APR as 17.828%. The Joint Consolidated Amended Complaint further alleges that other aspects of the notices given to the Roberts violated HOEPA and Georgia law.

21. Flora A. Gaskin

Flora A. Gaskin had a GNBT loan which closed on or about August 8, 2001. According to the Joint Consolidated Amended Complaint, this was the date she was first given her TILA and HOEPA disclosures via a courier who conducted the closing. The principal balance of their loan was $30,000.00 to be paid over 15 years. The interest rate was 15.99% (APR of 17.965%). Ms. Gaskin executed a deed of trust that granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to Ms. Gaskin. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 805 ("Application Fee"), 810 ("Underwriting Fee"), and 811 ("Lender Document Review Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), and 1105 ("Document Preparation Fee"). Ms. Gaskin was given a Federal Truth in Lending Disclosure Statement that identified

her Finance Charge as $49,435.17 and her APR as 17.965%. The Joint Consolidated Amended Complaint further alleges that other aspects of the notices given to Ms. Gaskin violated HOEPA.

22. Melba Brown

Melba Brown had a CBNV loan which closed on or about August 12, 2000. According to the Joint Consolidated Amended Complaint, this was the date she was first given her TILA and HOEPA disclosures via courier. The principal balance of her loan was $30,000.00 to be paid over 15 years. The interest rate was 17.450% (APR of 20.704%). Ms. Brown executed a deed of trust that granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to Ms. Brown. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 804 ("Credit Report"), 808 ("Lender Underwriting Fee"), and 810 ("Lender Document Review Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), and 1111 ("Disbursement Fee"). Ms. Brown was given a Federal Truth in Lending Disclosure Statement that identified her Finance Charge as $58,774.00 and her APR as 20.704%. The Joint Consolidated Amended Complaint further alleges that other aspects of the notices given to Ms. Brown violated HOEPA. Ms. Brown filed for personal bankruptcy on August 24, 2005. She did not schedule this action in her petition.

23. Mr. and Mrs. Roger Turner

Mr. and Mrs. Roger Turner first mentioned in the Joint Consolidated Amended Complaint at paragraph 339, had a GNBT loan that closed on or about October 10, 2000.

According to the Joint Consolidated Amended Complaint, this was the date the Turners were first given their TILA and HOEPA disclosures via courier. The principal balance of their loan was $16,200.00 to be paid over 25 years. The interest rate was 14.375% (APR of 18.033%). The Turners executed a security deed for the benefit of GNBT. This security deed granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Turners. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 807 ("Application Fee"), and 811 ("Underwriting Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review Fee"), and 1113 ("Processing Fee"). The Turners were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $46,731.38 and their APR as 18.033%. The Joint Consolidated Amended Complaint further alleges that other aspects of the notices given to the Tuners violated HOEPA.

24. Roy Lee and Ruthie Mae Logan

Roy Lee and Ruthie Mae Logan had a GNBT loan which closed on or about July 11, 2001. According to the Joint Consolidated Amended Complaint, this was the date the Logans were first given their TILA and HOEPA disclosures via courier who conducted the closing. The principal balance of their loan was $18,600.00 to be paid over 10 years. The interest rate was 11.99% (APR of 15.692%). The Logans executed a security deed in favor of GNBT. The security deed granted GNBT a security lien in residential real estate subject to one or more prior

mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Logans. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 804 ("Credit Report"), 811 ("Underwriting Fee"), and 812 ("Flood Certification Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). The Logans were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $15,904.64 and their APR as 15.6972%.[2] The Joint Consolidated Amended Complaint further alleges that other aspects of the notices given to the Logans violated HOEPA.

25. Shawn and Lorene Starkey

Shawn and Lorene Starkey had a GNBT loan which closed on or about October 31, 2001. According to the Joint Consolidated Amended Complaint, this was the date the Starkeys were first given their TILA and HOEPA disclosures. The principal balance of their loan was $30,300.00 to be paid over 15 years. The interest rate was 11.99%. The Starkeys executed a deed of trust for the benefit of GNBT. The deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Starkeys. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 804

[2] The Court notes that the Joint Consolidated Amended Complaint indicates in one place that the APR is 15.692%, and in another place the APR is 15.6972%.

("Credit Report"), 811 ("Underwriting Fee"), and 812 ("Flood Certification Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). The Starkeys were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $39,391.81 and their APR as 14.9528%. The Starkeys filed for personal bankruptcy on May 13, 2005. They did not schedule this action in their petition.

26. John and Rowena Drennen

John and Rowena Drennen had a GNBT loan which closed on or about July 28, 2001. According to the Joint Consolidated Amended Complaint, this was the date they were first given their TILA and HOEPA disclosures. The principal balance of their loan was $47,100.00 to be paid over 25 years. The interest rate was 15.99% (APR of 18.6284%). The Drennens executed a deed of trust for the benefit of GNBT. This deed of trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Drennens. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 804 ("Credit Report"), 811 ("Underwriting Fee"), 812 ("Flood Certification Fee"), and 813 ("E Appraisal Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). The Drennens were given a Federal Truth in Lending Disclosure Statement that identified

their Finance Charge as $150,605.00 and their APR as 15.49%. The Drennens filed for personal bankruptcy on October 19, 2004, and Ms. Drennen filed for bankruptcy on August 4, 2005. This action was not scheduled in either petition. According to Plaintiffs, Ms. Drennen has reopened her bankruptcy, and the trustee has abandoned this claim to her.

27. Richard Montgomery

Richard Montgomery, had a GNBT loan which closed on or about November 16, 2001. According to the Joint Consolidated Amended Complaint, this was the date he was first given his TILA and HOEPA disclosures. The principal balance of his loan was $81,000.00 to be paid over 15 years. The interest rate was 13.2483% (APR of 18.6284%). Mr. Montgomery executed a deed of trust for the benefit of GNBT. This trust granted GNBT a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to Mr. Montgomery. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 802 ("Loan Discount"), 804 ("Credit Report"), 812 ("Flood Certification Fee"), and 813 ("E Appraisal"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1111 ("Overnight Fee"), 1112 ("Document Review"), and 1113 ("Processing Fee"). Mr. Montgomery was given a Federal Truth in Lending Disclosure Statement that identified his Finance Charge as $92,588.65 and his APR was 13.248%.

28. Tammy and David Wasem

Tammy and David Wasem had a CBNV loan which closed on or about August 9, 2001. According to the Joint Consolidated Amended Complaint, this was the date the Wasems were first given their TILA and HOEPA disclosures. The principal balance of their loan was $47,000.00 to be paid over 15 years. The interest rate was 14.5% (APR of 15.456%). The Wasems executed a deed of trust for the benefit of CBNV. This deed of trust granted CBNV a security lien in residential real estate subject to one or more prior mortgage loans. Several fees were itemized on the HUD-1 settlement statement given to the Wasems. Among those fees were the "Section 800" fees contained in Line Nos. 801 (a "Loan Origination Fee"), 805 ("Application Fee"), and 810 ("Underwriting Fee"). In addition, there were several "Section 1100" fees contained in Line Nos. 1101 (a "Settlement or Closing Fee"), 1102 ("Abstract or Title Search"), 1103 ("Title Examination"), 1105 ("Document Preparation"), and 1112 ("Document Review"). The Wasems were given a Federal Truth in Lending Disclosure Statement that identified their Finance Charge as $60,683.67 and their APR as 14.527%.

C. Facts related to FDIC Appointment as Receiver for GNBT

The FDIC was appointed as receiver for GNBT in 2004. The FDIC published notice of its appointment in the newspapers local to the GNBT headquarters in Florida. The FDIC further sent notice to Plaintiffs' counsel. Plaintiffs' counsel filed three claims post receivership. On June 14, 2004, Plaintiffs' counsel filed three (3) proofs of claim. The first proof of claim was filed as a class claim on behalf of a class of unnamed borrowers of GNBT, as defined by the first settlement agreement approved by this Court on December 4, 2003. This claim was disallowed

by the non-action of the FDIC 180 days after it was filed on December 11, 2004. The second proof of claim was filed on behalf of a class of borrowers as defined by Civil Action No. 02-1201. This claim was denied on November 22, 2004. The third proof of claim was filed on behalf of the putative class in *Phipps v. GNBT*, Case No. 03-420 (W.D. Mo., April 3, 2003). This case was dismissed by the United States District Court for the Western District of Missouri on September 17, 2003, several months prior to the claim being filed. *Phipps v. GNBT*, 2003 WL 2214964. This claim was denied by the FDIC on November 2, 2004. The dismissal of the case was upheld by the Court of Appeals for the Eighth Circuit on July 28, 2005. *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005).

II. STANDARD OF REVIEW

A. Rule 12(b)(1)

A party may move for dismissal pursuant to Fed.R.Civ.P. 12(b)(1) based on lack of subject matter jurisdiction. When analyzing a Rule 12(b)(1) challenge, the Court must first determine whether the moving party is making a facial or factual jurisdictional attack. *CNA v. U.S.*, 535 F.3d 132, 139 (3d Cir. 2008). "If [it] is a facial attack, the court looks only at the allegations in the pleadings and does so in the light most favorable to the [non-moving party]." *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 513 (3d Cir. 2007). However, if it is a factual jurisdictional attack, where the moving party argues that the Court lacks jurisdiction based on evidence outside of the pleadings, the Court may "consider and weigh evidence outside the pleadings . . . ." *Id.* at 514. A jurisdictional challenge is a factual challenge if "it concerns not an alleged pleading deficiency, but rather the actual failure of [the non-moving party's]

claims to comport with the jurisdictional prerequisites." *Id.* Under these circumstances, the Court is not "confined to the allegations in [the . . .] complaint," and the Court is "entitled to independently evaluate the evidence to resolve disputes over jurisdictional facts." *S.R.P. ex rel Abunabba v. U.S.*, 676 F.3d 329, 332 (3d Cir. 2012).

Here, Defendant FDIC makes a factual challenge to this Court's subject matter jurisdiction as to Plaintiffs' claims against it. Thus, the Court is free to consider and weigh evidence outside the pleadings.

B. Rule 12(b)(6)

Federal Courts require notice pleading, rather than the heightened standard of fact pleading when evaluating a motion brought pursuant to Fed.R.Civ.P. 12(b)(6). Fed.R.Civ.P. 8(a)(2) requires only "'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to 'give defendant fair notice of what the . . . claim is and the grounds on which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

After the United States Supreme Court decided *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the United States Court of Appeals for the Third Circuit explained that a District Court must engage in analysis of the following three steps to test the sufficiency of a Complaint:

> First, the court must take note of the elements a plaintiff must plea to state a claim. Second the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and the determine whether they plausibly give rise to an entitled for relief.

*Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 212 (3d Cir. 2013) (citation omitted).

The third step of this analysis requires this Court to consider the specific nature of the claims presented and to determine whether the facts pled to substantiate the claims are sufficient to show a "plausible claim for relief." *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 118 (3d Cir. 2013). "While legal conclusions can provide the framework of a Complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 664.

This Court may not dismiss a Complaint merely because it appears unlikely or improbable that Plaintiff can prove the facts alleged or will ultimately prevail on the merits. *Twombly*, 550 U.S. at 563, n. 8. Instead, this Court must ask whether facts alleged raise a reasonable expectation that discovery will reveal evidence of the necessary elements. *Id.* at 556. Generally speaking, a Complaint that provides adequate facts to establish "how, when, and where" will survive a Motion to Dismiss. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 212 (3d Cir. 2009). In short, a Fed.R.Civ.P. 12(b)(6) Motion to Dismiss should not be granted if a party alleges facts which could, if established at trial, entitle that party to relief. *Twombly*, 550 U.S. at 563, n. 8.

In addition, Defendants challenge the standing of some of the named representatives. The doctrine of standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *In re Majestic Star Casino*, --- F.3d ---, 2013 WL 2162781 (3d Cir. May 21, 2013) (quoting *Valley Forge Christian Coll. v. Ams. United For Separation of Church & State, Inc.*, 454 U.S. 464, 484(1982)) (internal quotation marks omitted). It "involves both constitutional limitations on federal-court jurisdiction and prudential

limitations on its exercise." *Id.* at *6, (citation and internal quotations omitted). "One of those prudential limits demands that the plaintiff generally . . . assert his own legal rights and interests, and [ ]not rest his claim to relief on the legal rights or interests of third parties." *Id.*

C. Failure to Join Indispensable Parties - 12(b)(7) and 19(a)

A movant must show that the plaintiff has failed to join a party under Fed.R.Civ.P. 19 in order to prevail on a Fed.R.Civ.P. 12(b)(7) Motion to Dismiss. Fed.R.Civ.P. 19(a) states, in material part, that the following are:

> (a) Persons Required to Be Joined if Feasible.
>
> > Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> >
> > > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> > >
> > > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: as a practical matter impair or impede the person's ability to protect the interest; leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

F.R.Civ.P. 19(a).

When reviewing a motion brought pursuant to Fed.R.Civ.P. 12(b)(7), the Court must accept the allegations in the Complaint as true and draw all reasonable inferences in favor of the non-moving party. *Pittsburgh Logistics Sys., Inc. v. C.R. England, Inc.*, 699 F.Supp.2d 613, 618 (W.D. Pa. 2009). In addition, a Court may consider "relevant, extra-pleading evidence" during

its evaluation of a Fed.R.Civ.P. 12(b)(7) motion. *Citizen Band Potawatomi Indian Tribe of OK v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994). Defendants argue that some of the named representatives have failed to join their spouses who, they argue, must be joined if feasible.

III. FDIC MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The FDIC took over as receiver for GNBT in 2004. The FDIC argues that several Plaintiffs, who have loans that originated with GNBT, failed to file a claim with the FDIC as required by the Financial Industry Reform and Recovery Act, ("FIRREA"), 12 U.S.C. § 1821. The FDIC argues that Plaintiffs' claims are barred by their failure to exhaust administrative remedies. Although the FDIC does acknowledge that seven Plaintiffs filed claims, the FDIC notes that it disallowed those claims. Even if any one of those claims should be allowed, the FDIC argues that FIRREA does not allow those seven Plaintiffs to pursue their administrative claims on a class-wide basis.

Plaintiffs contend that FIRREA does allow claims to be administratively pursued on a class-wide basis. In the alternative, Plaintiffs argue that the FDIC should be estopped from asserting this defense at this juncture, because of its continued participation in this litigation, and because of its failure to provide Plaintiffs with sufficient notice of the receivership.

A. Failure to Exhaust Administrative Remedies Generally

"FIRREA, which was passed in response to the savings and loan crisis of the 1980s, gives the FDIC the authority to act as a receiver or conservator for failed institutions." *Tellado v. IndyMac Mtg. Svcs.*, 707 F.3d 275, 279, (3d Cir. 2013). "The statute also creates an administrative claims process for institutions in receivership and limits judicial review of certain

claims." *Id.*, citing 12 U.S.C. § 1821(d)(3)-(13). The United States Court of Appeals for the Third Circuit interpreted Section 1821(d)(13) to be "a statutory exhaustion requirement: in order to obtain jurisdiction to bring a claim in federal court, one must exhaust administrative remedies by submitting the claim to the receiver in accordance with the administrative scheme for adjudicating claims detailed in Section 1821(d)." *Id.*, (citing *Nat'l Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 383 (3d Cir. 1991)). The District Court has jurisdiction to review the claim *de novo* only after a claim has been filed with the FDIC and processed. *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 392, n. 11.

Turning to the instant matter, of the forty three (43) named Plaintiffs, only twenty-five (25) had loans that were originated by GNBT. Of these 25, as set forth above, only a handful filed claims with the FDIC post-receivership. Therefore, the question becomes, whether these claims satisfy the administrative exhaustion requirement and, if so, can they constitute class claims under FIRREA.

As to the first question, the FDIC disallowed the claims of the seven named representatives who filed claims. The FDIC argues that after the disallowance, FIRREA requires Plaintiffs to take some affirmative action to continue their pre-receivership lawsuits. Plaintiffs contend that they are not required to take any affirmative action. Rather, Plaintiffs argue that the expiration of the claims period, which accompanies the stay is, in itself, a continuation of the action as defined by the statute.

No authority from the Court of Appeals for the Third Circuit defines the term "continue" under FIRREA. However, persuasive authority suggests that Plaintiffs have failed to comply

with 12 U.S.C. § 1821(d)(6)(B), which requires Plaintiffs to "continue an action commenced before the appointment of a receiver" after the notice of disallowance. *See Holmes v. FDIC*, 861 F.Supp.2d 955 (E.D. Wis. 2012); and *Dougherty v. Deutsche Bank Nat.*, 2011 WL 3565079 (E.D. Pa. Aug. 12, 2011).

B. Exhaustion - Class Claims

Moreover, pursuant to FIRREA, claims cannot be filed on a class-wide basis. The FDIC argues that FIRREA, by its silence on class claims, is analogous to the Bankruptcy Code, and therefore, impliedly prohibits class-wide claims. The GNBT Plaintiffs contend that, pursuant to Rule 23, class-wide claims can be properly maintained on a class-wide basis. In the alternative, the GNBT Plaintiffs contend that if class-wide claims are held to be improper, the FDIC should not be allowed to pursue this defense because the FDIC failed to provide the individual notice required by FIRREA. The GNBT Plaintiffs argue that the FDIC must mail individual notice to each GNBT class member and then accept otherwise untimely claims.

The Court finds that neither FIRREA nor Rule 23 authorize claims against the FDIC to be filed on a class-wide basis. With regard to FIRREA itself, the Court of Appeals for the Third Circuit has suggested in other contexts that "in the absence of more specific legislative authority, in interpreting FIRREA we will apply the definition of 'claim' . . . contained in the Bankruptcy Code . . . ." *Nat'l Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 386-87 (3d Cir. 1994). The Court of Appeals suggested, in an unpublished decision, that claims may not be filed on a class-wide basis under the Bankruptcy Code. *In re W.R. Grace & Co.*, 316 Fed. Appx. 134 (3d Cir. 2009). In *W.R. Grace*, the Court reasoned that "the authority to act for a class pursuant to

Rule 23 does not imply any authorization to file a proof of claim for an individual in bankruptcy proceedings." *Id.* at 136.

Further, the Rules Enabling Act prohibits the Federal Rules from expanding any substantive rights. The Rules Enabling Act, which gives the judicial branch the power to promulgate the Federal Rules of Civil Procedure, requires that these rules "not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072. If read as the Plaintiffs suggest, Rule 23 would effectively trump FIRREA's administrative scheme and thereby effectively abridge FIRREA and enlarge the class members rights against the FDIC. As a matter of first impression, the Court finds that, like the Bankruptcy Code, FIRREA does not authorize the pursuit of claims on a class-wide basis.

C. Waiver Based on Estoppel and Lack of Notice

Plaintiffs argue that the FDIC should be estopped from raising its attack on subject matter jurisdiction because of the FDIC's continued participation in this litigation. This argument is specious. It is well established that this Court's "subject matter jurisdiction cannot be expanded to account for the parties' litigation conduct." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (internal quotations and citations omitted); see also *Insurance Corp. of Ireland, Ltd. v. Campagnie des Bauxites de Guinee,* 456 U.S. 694 (1982); and *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951).

It is equally well established that if, at any time prior to final judgment, it appears that there is no longer subject matter jurisdiction, a Court must immediately dismiss the action and, in

fact, is powerless to do otherwise. As the Supreme Court has stated, in two cases nearly 100 years apart:

> [T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.

*Insurance Corp. of Ireland, Ltd.*, 456 U.S. at 702, quoting *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 382 (1884).

Plaintiffs argue in the further alternative that the FDIC failed to give the individual notice required by FIRREA. Plaintiffs argue, therefore, that they should be excused from exhausting their administrative remedies.

The FDIC argues that it provided notice by: (1) publishing notice of the receivership in a Tallahassee, Florida area newspaper; (2) mailing notice of the receivership to the class members' attorneys and to the opt out Plaintiffs' attorneys; and (3) substituting itself for GNBT in this action.

The Court of Appeals for the Third Circuit has not addressed this issue. Under FIRREA, there are two separate and distinct procedures for notice – one governing notice of the receivership, and the other governing notice of the claims' bar date and the need to file claims with the receiver.

When the FDIC takes over a failed bank as a receiver, FIRREA mandates that the FDIC must first give notice that it has been so appointed. 12 U.S.C. § 1821(d)(5)(C)(ii). Then, the receiver must notify creditors that they must "present their claims, together with proof" by a specified date. 12 U.S.C. §§ 1821(d)(3)(B)(1), 1821(d)(3)C). Courts that have addressed the issue have consistently interpreted the two provisions as separate requirements having separate remedies. See *infra.*

Section 1821(d)(5)(C)(ii)(I) provides that the receiver may not disallow a claim as untimely if "the claimant did not receive notice of the appointment of the receiver in time to file such claim before" the bar date. Section 1821(d)(5)(C)(ii)(I). Importantly, this section does not proscribe the form of notice necessary to satisfy this provision. There is no dispute that the FDIC did mail notice to class counsel upon being appointed receiver for GNBT.

Section 1821(d)(3)(C), requiring notice to creditors, applies only to the creditors' need to file claims with the FDIC before the bar date. FIRREA requires that the FDIC "promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice," followed by republication approximately one or two months later. 12 U.S.C. § 1821(d)(3)(B). It must also mail a similar notice "to any creditor shown on the institution's books . . . ." Section 1821(d)(3)(C). The statute does not provide any penalties if the FDIC fails to comply with the notice requirements.

Plaintiffs argue that the individual GNBT claimants both appeared on the banks' books and, because Plaintiffs were members of a then certified class, were easily discoverable by the FDIC. Under § 1821(d)(5), they argue, the claims of absent members cannot be disallowed

because Plaintiffs received no notice of the bar date. Plaintiffs further argue that due process requires that they should be given individual notice consistent with Rule 23.

Most Courts that have considered the notice provisions of FIRREA have compared § 1821(d)(3)(C) to § 1821(d)(5) and concluded that, because the latter contains a statutory penalty for failure to comply and the former does not, Congress did not intend to provide a remedy for violations of § 1821(d)(3)(C). *See Freeman v. FDIC*, 56 F.3d 1394, 1402 (D.C. Cir. 1995); *Intercontinental Travel Mktg. v. FDIC*, 45 F.3d 1278 (9th Cir. 1994); *Meliezer v. Resolution Trust Corp.* 952 F.2d 879, 882-82 (1st Cir. 1992).

Further, the remedy provided by § 1821(d)(5) for claimants has been construed as requiring only actual notice of the receivership, rather than mailed individual notice. Substitution of the receiver into a pending lawsuit has been held to be sufficient actual notice to parties in that action. *See Tri-State Hotels v. FDIC*, 79 F.3d 707, 716 (8th Cir. 1996) (exhaustion of administrative remedies not required when claimant had actual notice); *Freeman*, 56 F.3d at 1404 (actual notice of receivership put plaintiffs on inquiry notice of claims bar date); and *Intercontinental Travel Mktg.*, 45 F.3d at 1281 (stipulation of substitution provided notice of receivership). Publication in local newspapers is sufficient notice of the receivership. *Tillman v. Resolution Trust Corp.*, 37 F.3d 1032, 1036 (4th Cir. 1994) (holding that evidence of publication in local newspapers precludes defense of lack of notice of receivership). Further, notice was given to class counsel for a then certified class. Although Plaintiffs attempt to argue that individual notice to each class member was required, this argument makes no sense under FIRREA or the Rules of Professional Conduct. Counsel for the FDIC was almost certainly

barred by the Rules of Professional Conduct from directly communicating with absent class members. At that time, they were adverse parties the FDIC knew to be represented after Rule 23 certification. Instead, the FDIC sent notice to Plaintiffs' counsel. Accordingly, Plaintiffs' argument that they should be excused from FIRREA's administrative exhaustion requirement due to lack of notice is without merit.

IV. ALL DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

A. Personal Bankruptcies - Lack of Standing

Defendants argue that seventeen (17) out of forty-three (43) named representatives have filed for personal bankruptcy and failed to list this action as an asset of the bankruptcy estate. Plaintiffs concede that these representatives have filed for bankruptcy. Plaintiffs further concede that their failure to list this action as an asset means they are not the "real party in interest." *Killmeyer v. Ogelbay Norton Company*, 817 F.Supp.2d 681 (W.D. Pa. 2011).

However, Plaintiffs contend, that they should be given time to reopen their bankruptcies, and substitute the bankruptcy trustee as the real party in interest. Plaintiffs request that this Court wait until final judgment to require Plaintiffs to reopen their bankruptcy proceedings. This would be unprecedented.

Plaintiffs submit that one representative plaintiff, Rowena Drennen, has reopened her bankruptcy and that the Trustee has abandoned this claim to her. On this record, it appears that Ms. Drennen may have successfully reopened the relevant bankruptcy proceeding, and therefore, may be the real party in interest for her claim. Accordingly, her individual claim survives at this

juncture. The remainder of the claims of those Plaintiffs who are not the real parties in interest are dismissed.

B. Loans Not Originated or Assigned to Defendants

Plaintiffs concede that they lack standing against some Defendants, and therefore, they concede that they can only pursue claims against those Defendants who either originated or were assigned their loans. Accordingly, all Plaintiffs' claims against a Defendant that did not issue or otherwise acquire their loans are dismissed for lack of standing.

C. RESPA

Defendants contend that Plaintiffs have failed to state a claim for RESPA violations. Defendants argue that Plaintiffs' claims regarding discount fees are not settlement services under RESPA. Defendants further argue that Plaintiffs' RESPA claim fails because there is no allegation that the fees were split among entities. Defendants also contend that Plaintiffs' arguments in support of their kickback claims fail.

Plaintiffs allege RESPA violations related to two different sections of the statute, which govern two different types of fees. Broadly speaking, the fees are: (1) loan origination and other loan fees and (2) title fees. The first are often referred to as "Section 800" fees, based upon the section of the HUD - 1 form where they are located. The other type of fee is a "Section 1100" fee.

In *Freeman v. Quicken Loans*, 132 S.Ct. 2034 (2012), the United States Supreme Court held that "Section 2607 (b) [which governs Section 1100 fees] unambiguously covers only a settlement service provider's splitting of a fee with one or more other person; it cannot be

understood to reach a single provider's retention of an unearned fee." *Id.* at 2040 (footnote omitted). Defendants contend that this holding is fatal to Plaintiffs' Section 1100 claims. Plaintiffs only real response appears to be that the majority of their RESPA claims are Section 800 claims. Accordingly, pursuant to *Freeman*, Plaintiffs' Section 1100 claims, which allege only a single provider's retention of an unearned fee, are properly dismissed.

D. Failure to Join Spouses

Defendants argue that Plaintiffs Edward Kruszka and Richard Montgomery should be dismissed pursuant to Fed.R.Civ.P. 12(b)(7) because their spouses have not been joined. Plaintiffs contend that Defendants have failed to meet their burden of proving that spouses are "necessary and indispensable parties" whose joinder is not feasible under Rule 19. "The moving party bears the burden of showing that a non-party is both necessary and indispensable." *Pittsburgh Logistics Systems, Inc. v. C.R. England, Inc.,* 669 F.Supp.2d 613, 618 (W.D. Pa 2009).

The plain language of Rule 19(a) supports Defendants' position. Plaintiffs have not joined the spouses of Mr. Kruszka and Mr. Montgomery, nor have they identified why joinder is not feasible. Accordingly, their claims are dismissed.

E. Timeliness - RESPA and TILA

1. One Year Statute of Limitations

Much ink has been spilled on this issue. Defendants argue that Plaintiffs did not file any case within the one-year statute of limitations applicable to RESPA actions and to TILA actual damages actions under § 1640(e) of that statute. Plaintiffs contend that the Court of Appeals

comments, albeit in *dicta*, regarding the applicability and interplay of the relation-back theory and class action tolling make this issue inappropriate for resolution on a Fed.R.Civ.P. 12(b)(6) Motion. Plaintiffs further point to recent decisions which hold that, under the proper circumstances, Plaintiffs would be entitled to equitable tolling: *Riddle v. Bank of America*, No. 12-cv-1740, 2013 WL 1482668 (E.D. Pa. April 11, 2013); *Barlee v. First Horizon National Corp.*, No. 12-cv-3045, 2013 WL 1389747 (E.D. Pa. Apr. 5, 2013); and *Barlee v. First Horizon National Corp.*, No. 12-cv-3045, 2013 WL 706091 (E.D. Pa. Feb. 27, 2013). The Court of Appeals for the Third Circuit observed in this case that "because the question of equitable tolling generally requires consideration of evidence beyond the pleadings, such tolling is not generally amenable to resolution on a Rule 12(b)(6) Motion." *In re Community Bank*, 622 F.3d 275, 301-02 (3d Cir. 2010). Accordingly, this part of Defendants' Motion to Dismiss is denied, without prejudice to Defendants' right to assert this defense on a fully developed record.

2. Rescission

Defendants argue that Plaintiffs have failed to state a claim for rescission under § 1635(f) of TILA because: (1) rescission is subject to a statute of repose which cannot be tolled for any reason; (2) the right to rescind is barred by Plaintiffs' refinancing of the loans at issue; and (3) Plaintiffs have failed to tender back.

As to the latter two arguments, evaluation of these claims would require an inquiry into factual issues outside the allegations of the Joint Consolidated Amended Complaint. Plaintiffs contend that Defendants Rule 12(b)(6) Motions on this issue should be denied.

With regard to the issue of equitable tolling, Plaintiffs contend they are seeking to apply class action, or *American Pipe* tolling (see *American Pipe and Constr. Co. v. Utah,* 414 U.S. 538 (1974)), which they argue can trump a statute of repose. On this issue, the Court of Appeals for the Third Circuit recently held that a TILA claim for rescission need not be filed in Court within three (3) years, but rather, the plaintiffs need only provide written notice to their lender within three years. *Sherzer v. Homestar Mtg Services*, 707 F.3d 255 (3d Cir. 2013).

In order to evaluate this Motion, the Court would be required to engage in a detailed analysis of whether, and when, each putative class member who seeks rescission provided written notice to their lender. This inquiry is not appropriate for resolution on a Motion to Dismiss. Accordingly, this part of Defendants' Motion to Dismiss is denied, without prejudice to Defendants' right to assert this defense on a fully developed record.

F. TILA and RICO

Defendants argue that Plaintiffs have failed to state a claim upon which relief can be granted under either TILA or RICO. Plaintiffs contend that there are numerous factual issues in dispute on this issue which preclude granting a Rule 12(b)(6) Motion to Dismiss. In this case, the Court of Appeals has repeatedly emphasized that a statute of limitations defense should not be evaluated at this stage of the pleadings. See, *In re Community Bank of Northern Virginia*, 622 F.3d 275, 292-93 (3d Cir. 2010). Accordingly, this part of Defendants' Motion to Dismiss is denied, without prejudice to Defendants' right to assert this defense on a fully developed record.

V. CONCLUSION

For the reasons set forth above, the Court entered its Order (doc. no. 605), on the then-pending Motions to Dismiss (doc. nos. 516 and 520), on June 12, 2013. That Order is incorporated by reference as if fully set forth herein.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All Counsel of Record

# Exhibit 9

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| IN RE: COMMUNITY BANK OF NORTHERN VIRGINIA SECOND MORTGAGE LENDING PRACTICES LITIGATION | MDL No. 1674<br><br>Case No. 03-0425<br>Case No. 02-01201<br>Case No. 05-0688<br>Case No. 05-1386<br><br>Hon. Arthur J. Schwab |

THIS DOCUMENT RELATES TO ALL MDL ACTIONS

**PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

1. Plaintiffs Brian W. and Carla M. Kessler, Flora A. Gaskin, Philip F. and Jeannie C. Kossler, John and Kathy Nixon, John and Rebecca Picard, William and Ellen Sabo and Tammy and David Wasem (collectively "Plaintiffs") hereby respectfully request that the Court enter the proposed Order submitted herewith and certify the following Class and Sub-Classes:

**GENERAL CLASS**

All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling, for the period May 1998-December 2002.

**SUB-CLASSES**

Sub-Class 1: (RESPA ABA Disclosure Sub-Class) (Plaintiffs: Philip and Jeannie Kossler)--All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-October 1998;

Sub-Class 2: (RESPA Kickback Sub-Class) (Plaintiffs: Brian and Carla Kessler; John and Rebecca Picard)--All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by

the Class Members as their principal dwelling for the period October 1998-November 1999;

Sub-Class 3: (TILA/HOEPA Non-Equitable Tolling Sub-Class) (Plaintiffs: Kathy and John Nixon; Flora Gaskin; and, Tammy and David Wasem)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1, 2001-May 1, 2002;

Sub-Class 4: (TILA/HOEPA Equitable Tolling Sub-Class) (Plaintiffs: All Plaintiffs other than the Nixons, Gaskins and Wasems)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-December 2002;

Sub-Class 5: (RICO Sub-Class) (Plaintiffs: John and Rebecca Picard; Brian and Carla Kessler)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-November 1999.

2. Plaintiffs request that all named Plaintiffs be appointed as representatives of the General Class and that the designated Plaintiffs be appointed as representatives of the requested Sub-Classes.

3. Plaintiffs request that R. Bruce Carlson (and the law firm Carlson Lynch Ltd.) and R. Frederick Walters (and the law firm Walters Bender Strohbehn & Vaughan) be appointed as co-lead counsel and that the following law firms be appointed as class counsel: Richardson, Patrick, Westbrook & Brickman, The Law Offices of Daniel O. Myers, The Legg Law Firm, The Law Offices of Franklin Nix.

4. Plaintiffs request that the Court certify the following common claims and issues:

(A) Plaintiffs' claims for violations of the RESPA ABA disclosure requirements (for the period May 1998-October 1998);

(B) Plaintiffs' claims for violations of the RESPA anti-kickback and unearned fee requirements (Section 800 Origination Fees)(for the period October 1998-November 1999);

(C) Plaintiffs claims for violations of TILA/HOEPA;

(D) Plaintiffs claims for violations of RICO;

(E) The defenses set forth to each of the above claims; and,

(F) The proper measure of damages for Plaintiffs and each member of the certified class, in the event that Plaintiffs establish liability on one or more of their claims.

Dated: June 21, 2013

Respectfully submitted,

*/s/ R. Bruce Carlson*
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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| IN RE: COMMUNITY BANK OF NORTHERN VIRGINIA SECOND MORTGAGE LENDING PRACTICES LITIGATION | MDL No. 1674<br><br>Case No. 03-0425<br>Case No. 02-01201<br>Case No. 05-0688<br>Case No. 05-1386<br><br>Hon. Arthur J. Schwab |

THIS DOCUMENT RELATES TO ALL MDL ACTIONS

**ORDER CERTIFYING CLASS**

AND NOW, this _____ day of _____, 2013, upon consideration of Plaintiffs' Motion for Class Certification (Doc. No. _____) ("Motion") and all related submissions, IT IS HEREBY ORDERED that Plaintiffs' Motion is GRANTED and the following class and sub-classes are certified:

**GENERAL CLASS**

All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling, for the period May 1998-December 2002.

All of the named Plaintiffs are appointed as representatives of the General Class.

**SUB-CLASSES**

Sub-Class 1: (RESPA ABA Disclosure Sub-Class) (Plaintiffs: Philip and Jeannie Kossler)--All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-October 1998;

Sub-Class 2: (RESPA Kickback Sub-Class) (Plaintiffs: Brian and Carla Kessler; John and Rebecca Picard)--All persons nationwide who obtained a

second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period October 1998-November 1999;

Sub-Class 3: (TILA/HOEPA Non-Equitable Tolling Sub-Class) (Plaintiffs: Kathy and John Nixon; Flora Gaskin; and, Tammy and David Wasem)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1, 2001-May 1, 2002;

Sub-Class 4: (TILA/HOEPA Equitable Tolling Sub-Class) (Plaintiffs: All Plaintiffs other than the Nixons, Gaskins and Wasems)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-December 2002;

Sub-Class 5: (RICO Sub-Class) (Plaintiffs: John and Rebecca Picard; Brian and Carla Kessler)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-November 1999.

The proposed Plaintiffs for each of the Sub-Classes noted above are hereby appointed as representatives for those Sub-Classes.

IT IS FURTHER ORDERED that the class claims and issues shall be the claims set forth in Plaintiffs' Joint Consolidated Amended Complaint (Doc. No. 507) and the corresponding defenses to said claims:

(1) Plaintiffs' claims for violations of the RESPA ABA disclosure requirements (for the period May 1998-October 1998);

(2) Plaintiffs' claims for violations of the RESPA anti-kickback and unearned fee requirements (Section 800 Origination Fees) (for the period October 1998-November 1999);

(3) Plaintiffs' claims for violations of TILA/HOEPA;

(4) Plaintiffs' claims for violations of RICO;

(5) The defenses set forth to each of the above claims; and,

(6) The proper measure of damages for Plaintiffs and each member of the certified class, in the event that Plaintiffs establish liability on one or more of their claims.

IT IS FURTHER ORDERED that R. Bruce Carlson (and the law firm Carlson Lynch Ltd.) and R. Frederick Walters (and the law firm Walters Bender Strohbehn & Vaughan) are appointed as co-lead counsel for the Class, and that the following law firms shall serve as counsel for the class: Richardson, Patrick, Westbrook & Brickman; The Law Offices of Daniel O. Myers; Legg Law Firm; Law Offices of Franklin Nix.

This Court shall hereafter enter such further and additional orders relating to class notice and other proceedings as may be required to expeditiously advance the administration and disposition of this case.

BY THE COURT,

_____

Arthur J. Schwab
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| IN RE: COMMUNITY BANK OF NORTHERN VIRGINIA SECOND MORTGAGE LENDING PRACTICES LITIGATION | MDL No. 1674<br><br>Case No. 03-0425<br>Case No. 02-01201<br>Case No. 05-0688<br>Case No. 05-1386<br><br>Hon. Arthur J. Schwab |

THIS DOCUMENT RELATES TO ALL MDL ACTIONS

**MEMORANDUM IN SUPPORT OF**
**PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

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**Additional Counsel for Plaintiffs**

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**"The applicant's principals have an attitude of utter disdain for compliance with laws and regulations applicable to the mortgage lending/brokering business."**[1]

## I. INTRODUCTION

The Joint Consolidated Amended Class Action Complaint ("JCAC") (Doc. No. 507) alleges that Plaintiffs and in excess of 22,000 putative Class Members were charged unlawful fees and provided with fraudulent settlement disclosures as part of a national predatory lending scheme involving second mortgage loans that were originated by Community Bank of Northern Virginia ("CBNV").[2] Individually and on behalf of a putative national class, Plaintiffs seek monetary damages for violations of the Real Estate Settlement Procedures Act ("RESPA"), the Truth in Lending Act ("TILA"), the Home Ownership and Equity Protection Act ("HOEPA"), and the Racketeer Influenced and Corrupt Organizations Act ("RICO").

These are paradigmatic class claims raising common questions that are readily susceptible to common answers. *See, e.g., Wal-Mart Stores v. Dukes*, 131 S.Ct. 2541, 2551 (2011). As such, the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy of representation are easily satisfied, as are the additional Rule 23(b) requirements of predominance and superiority. In recognition of this fact, the Third Circuit has twice held that these claims satisfy the elements of Rule 23 (with one no longer applicable exception). *See In re Community Bank of N. Va. and Guar. Nat'l Bank of Tallahassee Second Mortgage Loan Litig.*, 418 F.3d 277, 303, 308, 309 (3d Cir. 2005) ("*CBNV I*") (finding that: "the numerosity, typicality,

[1] *See* Revised License Denial for Calusa Investments, Virginia State Corporation Commission Bureau of Financial Institutions, attached to Declaration of R. Bruce Carlson and R. Fred Walters in Support of Class Certification as Ex. 4 ("Carlson/Walters Declaration"). The Shumway/Bapst principals created Calusa Investments after terminating the business relationships at issue in this litigation. This quote relates to the Virginia mortgage banking regulators' review of the mortgage lending activity challenged in this litigation.

[2] Defendant PNC, Bank N.A., is the successor in interest to CBNV.

and commonality prongs are met," *id.* at 303, that adequacy of representation needs further consideration, *id.* at 308, and that the record supports "a finding of predominance" and that there is "no reason . . . why a Rule 23(b)(3) class action is not the superior means to adjudicate this matter," *id.* at 309); *Community Bank of N. Va. and Guaranty Nat'l Bank of Tallahassee Second Mortgage Loan Litig.*, 622 F.3d 275, 284 (3d Cir. 2010) ("*CBNV II*") (confirming that all the Rule 23 elements save the adequacy issue have been established).[3]

In the face of this law of the case, and despite twice successfully moving Judge Lancaster to certify these claims and twice arguing to the Third Circuit that such claims easily satisfy the elements of Rule 23—a proposition with which the Third Circuit unambiguously agreed save the adequacy issue—PNC is presumably preparing to argue precisely the opposite position to this Court. However, PNC should be judicially estopped from changing its position regarding the propriety of class certification with respect to any Rule 23 element ***other than manageability***. *Carnegie v. Household Int'l., Inc.*, 376 F.3d 656, 659-60 (7th Cir 2004) (Posner, J.) (holding that the doctrine of judicial estoppel precludes a defendant who previously championed class certification in the context of a settlement class from later opposing certification of a litigation class (except as to manageability) after the proposed settlement was not approved).

PNC's duplicity notwithstanding, and as the Third Circuit has already found and as is highlighted below, the claims at issue could not be more straightforward and susceptible to class proof.

[3] The Third Circuit's primary concern regarding the propriety of class certification derived from the fact that the prior iteration of the claims asserted by the named plaintiffs did not include TILA/HOEPA claims. This concern has been eliminated as previously antagonistic counsel for the original named plaintiffs and objecting plaintiffs combined their efforts in the best interests of the class and—as co-counsel—filed the JCAC asserting the TILA/HOEPA claims.

## II. THE CLASS OF PERSONS AND THE CLAIMS AND ISSUES TO BE CERTIFIED

### A. Class of Persons[4]

Pursuant to Rule 23, Brian W. and Carla M. Kessler, Flora A. Gaskin, Philip F. and Jeannie C. Kossler, John and Kathy Nixon, John and Rebecca Picard, William and Ellen Sabo, and Tammy and David Wasem (collectively, "Plaintiffs")[5] respectfully request that the Court certify each of the below listed claims asserted in the JCAC, which is incorporated herein by reference, for class treatment.

1. Violations of RESPA (Count I);

2. Violations of TILA and HOEPA for Inaccurate and Understated Material Disclosures (Count II);

3. Other, Multiple Violations of the Substantive Provisions of TILA and HOEPA (Count III); and

4. Violations of RICO (Count V).

As set forth in the accompanying Motion for Class Certification, the "Class" that Plaintiffs seek to certify is defined as follows:

> All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling, for the period May 1998- December 2002.

Plaintiffs also seek to certify the following sub-classes:

---

[4] The class of persons and claims are set forth in light of the Court's Order granting the dismissal of the claims against the FDIC as receiver for the Guaranty National Bank of Tallahassee ("GNBT") and the Court's Order granting in part and denying in part the Motion to Dismiss filed by PNC. (Doc. No. 605).

[5] Attached to Carlson/Walters Declaration as Exhibits 5-11 are true and correct copies of standardized loan documents provided to Plaintiffs Brian W. and Carla M. Kessler (Ex. 5), Flora A. Gaskin (Ex. 6), Philip F. and Jeannie C. Kossler (Ex. 7), John and Kathy Nixon (Ex. 8), John and Rebecca Picard (Ex. 9), William and Ellen Sabo (Ex. 10), and Tammy and David Wasem (Ex. 11) in connection with the closing of their CBNV loans.

Sub-Class 1: (RESPA ABA Disclosure Sub-Class) (Plaintiffs Philip and Jeannie Kossler) All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-October 1998;

Sub-Class 2: (RESPA Kickback Sub-Class) (Plaintiffs Brian and Carla Kessler; John and Rebecca Picard) All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period October 1998-November 1999;

Sub-Class 3: (TILA/HOEPA Non-Equitable Tolling Sub-Class) (Plaintiffs Kathy and John Nixon; Flora Gaskin; and, Tammy and David Wasem) All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1, 2001-May 1, 2002;

Sub-Class 4: (TILA/HOEPA Equitable Tolling Sub-Class) (Plaintiffs All Plaintiffs other than the Nixons, the Wasems, and Flora Gaskin) All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-December 2002;

Sub-Class 5: (RICO Sub-Class) (Plaintiffs John and Rebecca Picard; Brian and Carla Kessler) All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-November 1999.

**B. The Kickback Scheme (RESPA Claims).**

RESPA, among other things, expressly prohibits payments or referrals for kickback of mortgage settlement business. 12 U.S.C. § 2607(a). In a textbook violation of RESPA's anti-kickback provisions, the entity that received the overwhelming majority of the hundreds of millions of dollars in mortgage settlement fees generated from the unlawful business model at issue in this case did not perform any settlement services in connection with those loans and was in fact contractually precluded from providing any settlement services. Therefore, it was

unlawful for this entity to be paid from loan settlement proceeds. The kickback scheme was uniformly concealed from the borrowers in standardized loan documents. Specifically, the named Plaintiffs and every putative Class Member received loan documents that falsely represented that the settlement fees were being paid to CBNV, PNC's predecessor in interest, when in fact almost all of the fees were being kicked back to an entity that was never disclosed to the borrowers. This scheme is easily demonstrated by comparing the aforementioned standardized loan documents that were used to close the loans of the named Plaintiffs and every putative Class Member, the documents that created the business structure at issue, and financial reporting documents filed by CBNV with the Securities and Exchange Commission ("SEC").[6]

Each borrower received a HUD-1 Settlement Statement indicating that CBNV was retaining an origination fee of approximately 10% of the original balance of the loan. *See* HUD-1s for Brian and Carla Kessler and Rebecca and John Picard, attached to Carlson/Walters Declaration as Exs. 5 and 9. Every putative Class Member received a HUD-1 form at closing that showed a similar allocation of settlement fees, as demonstrated by the relevant excerpts of the Kessler HUD-1 set forth below.

[6] The RESPA allegations in the JCAC challenging the kickback of Section 800 origination fees apply to loans closed between October 1998 and November 1999. JCAC at ¶ 77. Given that the date of filing for the first complaint addressing this conduct was May 1, 2001 (*Davis v. CBNV,* 02-cv-1201 (W.D. Pa.))—more than one year after the kickback structure involving CBNV loans had been terminated—every putative Class Member relies on equitable tolling to assert a timely RESPA claim. Thus, by definition, there is no potential intra-class conflict with respect to this claim. For those loans that were closed during the five month period prior to the inception of the kickback scheme (between May 1998 and October 1998), CBNV violated the Affiliated Business Arrangement ("ABA") disclosure requirements of RESPA. JCAC at ¶¶ 69-70. This violation is easily proven by common evidence in that CBNV did not provide the required ABA disclosure form to any borrower who closed a loan during this period.

**Settlement Statement**
Transactions without Sellers

| Name & Address of Borrower: | Name & Address of Lender: |
|---|---|
| BRIAN W. KESSLER and CARLA M. KESSLER<br>6466 RT 908, Tarentum, PA 15084 | COMMUNITY BANK OF NORTHERN<br>11417 SUNSET HILLS RD. STE<br>RESTON, VA 20190 |
| Property Location: (If different from address)<br>6466 RT 908<br>Tarentum, PA 15084 | Settlement Agent:<br>TITLE AMERICA<br>Place of Settlement:<br>11417 SUNSET HILLS RD STE |
| Loan Number:<br>SLK-68509 | Settlement Date:<br>April 30, 1999 |

| L. SETTLEMENT CHARGES | | |
|---|---|---|
| 800 | Items Payable in Connection with Loan | |
| 801. | Loan origination fee to COMMUNITY BANK OF NORTHERN VIRGINIA | 2,640.00 |
| 802. | Loan discount to COMMUNITY BANK OF NORTHERN VIRGINIA | 990.00 |
| 803. | Appraisal fee to | |
| 804. | Credit report to | |
| 805. | Inspection fee to | |
| 806. | Mortgage insurance application fee to | |
| 807. | Application Fee to COMMUNITY BANK OF NORTHERN VIRGINIA | 95.00 |
| 808. | | |
| 809. | | |
| 810. | | |
| 811. | Underwriting Fee to COMMUNITY BANK OF NORTHERN VIRGINIA | 185.00 |

While Plaintiffs and putative Class Members were each provided a HUD-1 at closing indicating that origination fees of 10% or more were being collected from each borrower and paid to CBNV, CBNV confirmed to the SEC that it was retaining only 1-2% from each loan in origination fees and that the remainder was being paid to an undisclosed third-party entity (i.e., the Shumway/Bapst Organization).

NOTE D—LOANS HELD FOR SALE

The Bank has established agreements with several mortgage brokers whereby the Bank will fund first and second trust loans approved by the broker which meet the Bank's specified lending criteria. The Bank then sells the loans to outside investors at agreed-upon prices. The Bank retains a mortgage origination fee of 1 to 2 percent on each transaction. Any remaining fees generated from the origination of the loan and subsequent sale in excess of costs incurred are paid to the mortgage broker. Losses incurred as a result of selling loans at a discount are charged back to the mortgage broker. The Bank does not retain servicing rights on any loans sold to outside investors.

*See* Excerpt from CBNV 1998 Annual Report attached to Carlson/Walters Declaration as Ex. 12.

The actual allocation of origination fees that was disclosed to the SEC but concealed from borrowers by the fraudulent HUD-1s was the allocation mandated by the Consulting Agreement between the Shumway/Bapst Organization and CBNV. *See* Consulting Agreement attached to Carlson/Walters Declaration as Ex. 13, at ¶ 8 and Addenda A-D. As noted, not only was the Shumway/Bapst Organization not performing any settlement services in connection with

the loans at issue (notwithstanding that it was receiving the bulk of the settlement fees pursuant to the terms of the Consulting Agreement), it was ***contractually precluded from providing any settlement services***. *See* Ex. 13 to Carlson/Walters Declaration at ¶ 3; *see also* Supplemental Pre-Filed Testimony of David B. Shumway submitted to the Commonwealth of Virginia State Corporation Commission attached to Carlson/Walters Declaration as Ex. 14, at 8, Q56-A58. This arrangement is an unambiguous and fundamental violation of RESPA.

Just as PNC's RESPA liability is easily proven, so too are the resulting damages. Each putative Class Member's RESPA damages are established by a simple calculation derived from the fee allocation information set forth in the HUD-1s every loan at issue. Specifically, PNC is liable for three times the amount of the Section 800 fees denoted as being paid to CBNV in the HUD-1s. *See Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 761 (3d Cir 2009) (borrower is entitled to RESPA damages consisting of three times any charge paid for the service connected to the kickback or fee split).[7] In short, it is difficult to conceive of claims that would be more easily tried on a class basis than the RESPA kickback claims at issue in this case.[8]

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[7] The propriety of class certification in RESPA cases where borrowers paid settlement fees to a party that has provided no settlement services is discussed at length in *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314 (11th Cir. 2008); *see also Weil v. The Long Island Sav. Bank*, 200 F.R.D. 164 (E.D.N.Y. 2001); *Markocki v. Old Republic Nat'l Title Ins. Co.*, 254 F.R.D. 242 (E.D. Pa. 2008); *Alexander v. Washington Mut., Inc.*, 2012 WL 6021098 (E.D. Pa. Dec. 4, 2012).

[8] PNC's counsel told the Court at the June 12 status conference that PNC's "best" argument in opposition to class certification is that some of the putative class members' claims must rely on equitable tolling to be timely. Any such argument as a basis to deny certification would be baseless as it is the wrongful conduct of the Banks that gives rise to tolling, which conduct was common to all of the thousands of borrowers.
Through a systematic and uniform scheme involving standardized loan closing documentation, the borrowers paid excessive and illegal closing costs and were not provided accurate disclosures of the true costs of the loan. The key to the scheme was that it was hidden behind the morass of standardized loan closing papers and/or the true information about those fees and costs and who was receiving them did not appear in the loan documents. Equitable tolling is available to aggrieved consumers in precisely the circumstance where the HUD-1 is fraudulent, *see, e.g.,*

### C. The TILA/HOEPA Claims

TILA requires standardized disclosure of information about the costs of credit. HOEPA is a subset of TILA which addresses certain high cost (high annual percentage rate ("APR") and/or excessive fees and costs) mortgage loans. *See* 15 U.S.C. § 1602(aa) and TILA's "Regulation Z," 12 C.F.R. § 226.32; *see also* Affidavit of Margot Saunders attached to Carlson/Walters Declaration as Ex. 15, ¶¶ 15-18. HOEPA requires additional *Miranda*-type warnings about the high cost of the loan to be conspicuously provided at least three days before the transaction is consummated. *See* 15 U.S.C. § 1639. Key among those material disclosures is to accurately tell the prospective borrower the true cost of the loan in terms of the APR.[9] *See* 15 U.S.C. § 1602(v) (finance charges and APR are material disclosures). CBNV uniformly provided a materially inaccurate (understated) APR to the putative Class Members in violation of 15 U.S.C. § 1639 and 12 C.F.R. § 226.32, which gives rise to strict liability. *See CBNV I*, 418 F.3d at 277.

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*Bradford v. WR Starkey Mortg.*, 2008 WL 4501957, at *3-4 (N.D. Ga. 2008), or contains inaccurate disclosures, *Veal v. Crown Auto Dealerships, Inc.*, 2006 WL 435693, at *3 (M.D. Fla. 2006). Moreover, in this exact circumstance, other courts have certified a class action and rejected an "individualized inquiry" argument. *See In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 488 (W.D. Pa. 1999) (Ziegler, J.) ("We agree with plaintiffs and find that the issue of the fact concealment is the predominating question, even though other individual questions are present, because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did, rather than what plaintiffs did."); *see also Sykes v. Mel Harris and Assocs., LLC.*, 285 F.R.D. 279, 292 (S.D.N.Y. 2012) (in certifying RICO and FDCPA claims relating to a common scheme to fraudulently obtain default judgments to collect debts, the court rejected defendants' argument that typicality was not met because some members of the class may need to rely on equitable tolling to assert a timely claim). Perhaps most significantly, in regard to the fact that in this case some class members rely on an equitable theory to establish a timely claim and others do not, the Third Circuit noted that such circumstance "is by no means fatal to whether these cases can be maintained as a class action. The most obvious remedy would be to create subclasses…" *CBNV II*, 622 F.3d at 304.

[9] The APR is the measurement, on an annual basis, of the rate of return to the creditor based on all the finance charges imposed, and not just the rate of interest. As such, it is among the most important of the disclosures mandated by TILA and HOEPA.

The APR is calculated through a mathematical formula derived from the Amount Financed (funds actually available to the borrower) and Finance Charge (the costs incidental to the extension of credit). These two numbers are mutually exclusive; that is, a settlement charge is allocated to either one or the other but not to both. The higher the finance charges, the higher the APR. Under TILA, all settlement charges are presumed to be part of the Finance Charge. *See* 15 U.S.C. § 1605(a); 12 C.F.R. § 226.4. There are exceptions to this rule. Items that can be excluded from the Finance Charge include "[f]ees for title examination, abstract of title, title insurance, property survey, and similar purposes" but only if they are "bona fide and reasonable in amount." 12 C.F.R. §226.4(c)(7); *Inge v. Rock Fin. Corp.*, 388 F.3d 930, 932 (6th Cir. 2004); Official Staff Commentary to § 226.4 at ¶4(c)(7).

CBNV, as a routine and typical practice, improperly *excluded* the section 1100 title charges from its calculations of the Finance Charge.[10] As a result, the *disclosed* Finance Charge

[10] Evidence that such charges are not bona fide or reasonable includes reports of the OCC, the testimony of CBNV insiders, and expert opinion testimony. *See, e.g.*, Affidavit of William Dodson, attached to Carlson/Walters Declaration as Ex. 16 and Affidavit of John Coghlan, attached to Carlson/Walters Declaration as Ex. 17. More specifically, the purported title examination consisted exclusively of merely reviewing the work of another settlement services provider, most often the "abstracts" provided by General American Title Corp. Such a review of the services of another settlement service provider does not constitute "an actual, distinct, additional service permissible under HUD's regulations." HUD Policy Statement of 2001, at 26, n.7, attached to Carlson/Walters Declaration as Ex. 18. Moreover, such an abstract is not a title exam. *See* Dodson Affidavit, ¶ 9A. CBNV also charged a "marked up" charge (HUD-1 Line 1102) to obtain a rudimentary property report (which is not a true title abstract) and illegally passed this marked up charge onto the putative Class Members. *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 389 (3d Cir. 2005); 12 U.S.C. § 2607(b).

Beyond such proof that the charges were not bona fide or reasonable, the fact that the title services were mandatory precludes them from being excluded from the calculation of the finance charge. *See* 15 U.S.C. § 1605(a)); 12 C.F.R. § 226.4(a)(1)-(2); *see also Inge*, 281 F.3d at 619 ("If the creditor required a third party to perform a service, is aware that the third party will perform the service, and imposes a separate charge on the consumer for the performance of the service, the fee is a disclosable finance charge."); 12 C.F.R. § 226, Supp. I, Official Staff Interpretations, § 226.4(a)(2)-2.

on the putative Class Members' loans was inaccurate and understated and violated TILA and HOEPA at 15 U.S.C. §§ 1605(f), 1635, 1638 and 1639, and Regulation Z, at 12 C.F.R. § 226.23. And having improperly calculated the Finance Charge and the Amount Financed, CBNV inaccurately disclosed the APR in the three-day advance notice required by HOEPA and in the TILA Disclosure Statement in violation of TILA and HOEPA at 15 U.S.C. §§ 1606(c), 1635, 1638 and 1639, and 12 C.F.R. § 226.22.

As a result, this APR disclosure violation entitles Class Members to statutory damages under 15 U.S.C. § 1640.[11] For violations of HOEPA, at 15 U.S.C. § 1639, each putative Class Member is entitled to "an amount equal to the sum of all finance charges and fees paid by the consumer…." 15 U.S.C. § 1640(a)(4). This is a mathematical calculation determinable from the figures set forth in each putative Class Members' loan payment history and in Defendant's computerized loan databases.[12]

Because these TILA and HOEPA violations flow from standardized loan documents and a uniform scheme of improperly excluding certain section 1100 charges from the APR calculation, these claims particularly lend themselves to class treatment. And indeed, the Third Circuit concluded that the HOEPA claims are appropriate for class certification. *CBNV I*, 418 F.3d at 306 ("Whether an individual borrower has a viable TILA or HOEPA claim may be determinable by conducting simple arithmetic computations on certain figures obtained from the

[11] It is estimated that over 87% of the CBNV loans are HOEPA loans with a materially misstated APR calculation. *See* Decl. of Hasbrouck Haynes, attached to Carlson/Walters Decl.as Ex. 19.

[12] If no loan payment histories are available, the same calculation can be performed using borrowers' 1098 forms, or by experts who can very accurately estimate loan amortization using the loan amount, interest rate and duration to pay off (or to the date of the calculation if an active loan). RFC, the entity that acquired all of the loans at issue, has indicated that it possesses the loan payment histories for putative class members so the need for an expert on this issue is unlikely.

face of each loan's TILA Disclosure Statement."); *see also Hickey v. Great W. Mortgage Corp.*, 158 F.R.D. 603, 612 (N.D. Ill. 1994) ("The determination of whether the challenged fees were improperly included in the 'amount financed' or excluded from the 'finance charge' in individual transactions is a simple ministerial task."). For this reason, the Third Circuit concluded that the HOEPA claims are appropriate for class certification. *CBNV I*, 418 F.3d at 305-06.

Beyond the materially understated APR, CBNV violated HOEPA in other ways. HOEPA requires that the disclosures be set forth in conspicuous type, *see* 15 U.S.C. § 1639(a); 12 C.F.R. § 226.32(c), and that such notices be received three business days in advance of the loan closing. 15 U.S.C. § 1639(b)(1). CBNV violated these requirements. HOEPA also prohibits the use of prepayment penalties in certain circumstances including when there is a re-financing by the original lender. 15 U.S.C. § 1639(c). Despite this prohibition, CBNV included prepayment penalty and other prohibited provisions. As a result of these additional violations, Plaintiffs are entitled to additional damage awards under 15 U.S.C. §§ 1639, 1640 and 1641(d); *see Belmont v. Assocs. Nat. Bank (Delaware)*, 219 F.Supp.2d 340, 345-46 (E.D.N.Y. 2002). These additional HOEPA claims likewise lend themselves to class treatment because they can be determined by a review of documents in the loan file and by reference to Defendant's own business records.

**D. The RICO Claims**

Plaintiffs allege that CBNV conducted an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(c), and that it conspired with the Shumway-Bapst organization and others to so act. 18 U.S.C. § 1962(d). This scheme and racketeering activity was dependent upon the systematic and fraudulent use of the mail and wires, as prohibited by 18 U.S.C. §§ 1341 and 1343. That mail and wire fraud consisted, primarily, of the dissemination of HUD-1 Settlement Statements which falsely identified CBNV as receiving origination fees, falsely identified

payments to title companies allegedly for services when the services were never performed, failed to identify the persons receiving payments from the Plaintiffs' loan proceeds and misstated the APR. These fraudulent misrepresentations evidenced on the face of the loan document also give rise to Plaintiffs' claims for violations of the provisions of RESPA, 12 U.S.C. § 2603, 24 CFR § 3500.8, Appendix A, and TILA and HOEPA at 15 U.S.C. §§ 1605(f), 1635, 1638 and 1639 and Regulation Z, at 12 C.F.R. § 226.23. Additionally, CBNV engaged in acts of money laundering in violation of 18 U.S.C. § 1956(a) and (h) in its efforts to conceal its involvement in the scheme and to disseminate money to participants in the enterprise.

As emphasized throughout this brief, the named Plaintiffs and every putative class member received the same types of federally-mandated disclosures that contained false representations concerning the legitimacy, amount and recipients of the settlement charges imposed on the loans as well as inaccurate disclosures about the cost of the loan. Such repeated and uniform activity establishes a pattern. Evidence of the enterprise is likewise commonly proven across the class by the same documentary and other evidence that demonstrates the creation and operation of the predatory lending enterprise. In such a circumstance, where a common practice of the defendant applies to the plaintiffs, the Third Circuit recognizes that a class under RICO is properly certified. *See Hoxworth v. Blinder Robinson & Co., Inc.*, 980 F.2d 912 (3d Cir. 1992) (failure to disclose excessive markups on the price of penny stocks); *Eisenberg v. Gagnon*, 766 F.2d 770, 786-87 (3d Cir. 1985) (reversing denial of class certification finding that typicality existed in securities action because suit was based on same omissions and misrepresentations in documents prepared by Defendants). Notably, lawsuits challenging other RICO consumer fraud schemes have been approved for class action treatment by many courts. *See, e.g., Household Int'l, Inc.*, 376 F.3d 656 (7th Cir. 2004) (certifying RICO class claims

relating to undisclosed referrals in connection with tax refund anticipation loans); *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004) (certifying RICO claims under 23(b)(3) brought by virtually every doctor in the United States against virtually every health maintenance organization in the U.S. relating to an alleged conspiracy to underpay billed reimbursements); *Negrete v. Allianz Life Ins. Co. of North America*, 238 F.R.D. 482 (C.D. Cal. 2006) (certifying consumer class under RICO relating to the fraudulent sale of annuities); *Weil v. Long Island Savings Bank, FSB*, 200 F.R.D. 164 (E.D.N.Y. 2001) (certifying consumer class under RICO, RESPA and TILA in connection with mortgage loan kickback scheme); *Cullen v. Whitman Med. Corp.*, 188 F.R.D. 226 (E.D. Pa. 1999) (granting certification for class of consumers when school purported to sell services to students and services turned out to be bogus and a sham).

RICO damages can likewise be determined on a classwide basis. For violations of RICO, the Class members can recover damages that are traceable to the defendants' conduct. *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254, 258, n.2 (3d Cir. 2007). These damages would include all bogus and marked up fees, as well as the interest paid on those fees. *See, e.g., Potomac Elec. Power Co. v. Electric Motor and Supply, Inc.*, 262 F.3d 260, 265 (4th Cir. 2001) ("if a party specifically bargains for a service, is told that the service has been performed, is charged for the service, and does not in fact receive the service, it is not appropriate for courts to inquire into whether the service "really" had value as a precondition to finding that injury to business or property has occurred."). And any such damages are trebled. 18 U.S.C. § 1964.

Thus, the same uniform documentary evidence—the class members' HUD-1s and loan payment histories that are used to establish the RESPA and TILA/HOEPA violations, and to calculate the damages for such violations—may also be used to evidence the RICO violations and to calculate damages.

Lastly, RICO has a four year statute of limitations. *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 245 (3d Cir. 2001). The RICO claims are therefore are timely without the necessity of equitable tolling. Thus, the RICO action does not fail even if other claims supported by the same wrongful behavior, such as the RESPA and TILA/HOEPA claims, could be deemed time barred. *See Hoxworth*, 980 F.2d at 925 (approving expanded class size under RICO claim despite some of underlying securities claims being arguably time barred).

## III. THE RULE 23 REQUIREMENTS ARE MET

### A. The Rule 23(a) Prerequisites Are Satisfied

Under Rule 23(a), one or more members of a class may sue or be sued as representative parties on behalf of all members in a class action 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;

4. The representative parties will fairly and *adequately* assert and protect the interests of the class.

Fed. R. Civ. P. 23(a). As noted, the Third Circuit has already ruled on the Rule 23 issues:

> With respect to the District Court's certification decision, we concluded that three of the four Rule 23(a) requirements-numerosity, typicality, and commonality-were met, as well as the Rule 23(b)(3) predominance and superiority requirements. We expressed serious concerns, however, as to whether the adequacy requirement of Rule 23(a) could be met, specifically in the context of whether the named plaintiffs and class counsel were adequate representatives in light of their failure to assert colorable TILA/HOEPA claims . . .
>
> * * * *
>
> The sole disputed Rule 23 requirement in this case, as it was in *Community Bank I*, is adequacy of representation.

*CBNV II*, 622 F.3d at 284, 291 (internal citations omitted).

Any issue regarding adequacy has been cured and the other Rule 23 findings are the law of the case. But even without the prior findings of the Third Circuit, as detailed below, the proposed Class easily meets all of the Rule 23 criteria.

**1. Numerosity**

It is undisputed that there are in excess of twenty thousand loans originated by CBNV at issue. Thus, the numerosity requirement is indisputably satisfied. *See CBNV I*, 418 F.3d at 303.

**2. Commonality of Issues**

Rule 23(a)(2) requires that there are questions of law or fact common to the class. The Third Circuit has already held that commonality exists regarding the claims at issue. *See CBNV I*, 418 F.3d at 303. That determination is very much in lockstep with recent Supreme Court class certification jurisprudence. *See Dukes*, 131 S.Ct. at 2551 (commonality and predominance are defeated when it cannot be said that there was a common course of conduct in which the defendant engaged with respect to each individual. But commonality is satisfied where common questions generate common answers "apt to drive the resolution of the litigation."); *see also Sullivan v. DB Inv., Inc.*, 667 F.3d 273, 299 (3d Cir. 2011) (discussing *Dukes* and holding that commonality existed as to the antitrust claim against DeBeer's for inflating diamond prices because "DeBeer's alleged misconduct and the harm it caused would be common as to all the class members, and would thus inform the resolution of the litigation if it were not settled"). Here, CBNV operated an assembly line generating unlawful loans which included illegal kickbacks, materially inaccurate APR disclosures, and repeated mail and wire fraud and money laundering to facilitate a RICO enterprise.

This uniform course of conduct demonstrates that there are common questions to which there are common answers. Some of the most obvious common issues of fact and law include but are not limited to the following:

- Whether the structure created by CBNV and the Shumway Bapst entities resulted in an unlawful kickback scheme that was a *per se* violation of RESPA;
- Whether the putative Class Members are entitled to damages in the amount of three times all origination fees denoted in their HUD-1s as being payable to CBNV;
- Whether CBNV made inaccurate TILA/HOEPA disclosures to the putative Class Members;
- Whether CBNV utilized a practice or device whereby the mandatory disclosures under TILA were not timely made, were not conspicuously made, or did not disclose that illegal prepayment penalties were imposed;
- Whether the acts of the Defendants equitably toll the claims of the putative Class Members;
- Whether the evidence discussed above proves (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

The existence of commonality cannot be credibly disputed.

**3. Typicality of Claims**

Plaintiffs' claims in this case are "typical" of the claims alleged on behalf of the Class. Plaintiffs' claims present the same fact patterns and legal theories that each putative Class Member would have to present if he or she filed an individual suit. "Because the claims of all class members here depend upon the existence of the Shumway scheme, 'their interests are sufficiently aligned [such] that the class representatives can be expected to adequately pursue the interests of the absentee class members.'" *CBNV I*, 418 F. 3d at 303 (citing *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 312 (3d Cir. 1998)). Indeed, the existence of typicality is reinforced by the Third Circuit's holding regarding the more exacting requirement of

predominance under Rule 23(b)(3): "Just as the record below supports a finding of typicality, it also supports a finding of predominance. All plaintiffs' claims arise from the same alleged fraudulent scheme." *CBNV I*, 418 F.3d at 309.

**4. Adequacy of Representation**

Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class." Regarding this issue, the Third Circuit stated:

> [T]he adequacy requirement is designed to 'uncover conflicts of interest between the named parties and the class they seek to represent.' (internal citation omitted) Here, there is an obvious and fundamental intra-class conflict of interest (the same we identified in *Community Bank I*): the named plaintiffs' claims-whether under RESPA, TILA, or HOEPA-are untimely, and they must rely on equitable tolling to save them . . . . **As we noted in *Community Bank I*, however, this intra-class conflict is by no means fatal to whether these cases can be maintained as a class action. The most obvious remedy would be to create subclasses, as we suggested in our prior opinion** . . . .

*CBNV II*, 622 F.3d at 304 (emphasis added). Any doubts about adequate representation or potential conflicts should be resolved in favor of upholding the class. *Zeno v. Ford Motor Co., Inc.*, 238 F.R.D. 173, 188 (W.D. Pa. 2006).

Plaintiffs have eliminated any issue in this context by suggesting sub-classes.

Rule 23(g)(4) also states: "Class counsel must fairly and adequately represent the interests of the class." The Third Circuit's questions regarding the adequacy of counsel for the settling plaintiffs derived from the pre-*CBNV II* decision not to assert TILA/HOEPA claims *CBNV II*, 622 F.3d at 308. After remand in *CBNV II*, counsel for the settling Plaintiffs allied with counsel for the objecting class members to eliminate the concerns expressed by the Third Circuit. Most fundamentally, Plaintiffs filed the JCAC asserting TILA/HOEPA claims on behalf of the entire putative class. Therefore, by definition, any issues with respect to adequacy of counsel have been eliminated.

**B. The Rule 23(b) Prerequisites Are Satisified**

In addition to the four requirements of Rule 23(a), Plaintiffs must also satisfy one of three criteria in Rule 23(b). In this case, Plaintiffs seek certification under Rule 23(b)(3), which requires that questions of fact or law *predominate* over questions affecting only individual class members and that the class device be *superior* to any other method to adjudicate the controversy.

**1. Predominance**

The Supreme Court has noted that the predominance requirement is easily met in consumer protection cases such as this one. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Here, Plaintiffs and the putative Class Members allege statutory injury by a common course of conduct. These allegations "provide[] the 'single central issue' required to ensure predomination of common questions over individual issues." *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 962 F.Supp. 450, 511-12 n.45 (D.N.J. 1997) (citing cases). The Third Circuit confirmed the existence of predominance in this case as follows: "Just as the record below supports a finding of typicality, it also supports a finding of predominance. All plaintiffs' claims arise from the same alleged fraudulent scheme." *CBNV I*, 418 F.3d at 309.

**2. Superiority**

Rule 23(b)(3) requires that class resolution be "superior to other available methods for the fair and efficient adjudication of the controversy," and it provides a non-exhaustive list of factors to consider in determining superiority, which include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in a particular forum; and (D) the difficulties likely to be encountered in the management of a class

action. Fed. R. Civ. P. 23(b)(3). The Third Circuit reached the following conclusion regarding the existence of superiority: "We find no reason . . . why a Rule 23(b)(3) class action is not the superior means to adjudicate this matter." *CBNV I*, 418 F.3d at 309.

**3. Manageability**

As noted, the sole issue that PNC should be permitted to challenge regarding class certification is manageability. However, it is well-settled that the issue of manageability is rarely an adequate basis to deny class certification. *See, e.g.*, *In re Plastics Additives Antitrust Litig.*, 2006 WL 6172035, *13 (E.D. Pa. Aug 31, 2006) (Davis, J.) ("[D]enying certification on the sole ground of the unmanageability of the action, at least at the class certification stage, is 'disfavored.'"); *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) ("[F]ailure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and 'should be the exception rather than the rule.'").

And, as Judge Posner explained in *Household International*, courts have many options in addressing manageability issues:

> The number of class members need have no bearing on the burdensomeness of litigating a violation [of RICO]. Whether particular members of the class were defrauded and if so what their damages were are another matter, and it may be that if and when the defendants are determined to have violated the law separate proceedings of some character will be required to determine the entitlements of the individual class members to relief. That prospect need not defeat class treatment of the question whether the defendants violated RICO. Once that question is answered, if it is answered in favor of the class, a global settlement along the lines originally negotiated (though presumably with different dollar figures) will be a natural and appropriate sequel. And if there is no settlement, that won't be the end of the world. Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damage issues. Those solutions include "(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class."

*Household Int'l*, 376 F.3d at 661 (internal citations omitted); *see also Slapikas v. First Am. Title Ins. Co.*, 250 F.R.D. 232, 250 (W.D. Pa. 2008) ("[Defendant] argues that the large size of the class and number of legal issues would make trial as a class action unmanageable . . . . The court is satisfied that certification at this stage is appropriate. If the liability issue is determined unfavorably to the class then the case will be resolved. If the liability issue is resolved in favor of the class, then the court may consider on a fully developed record whether to decertify the class or take other appropriate action."); *Zeno v. Ford Motor Co.*, 238 F.R.D. 173, 196 (W.D. Pa. 2006) (same) (citing *CBNV I* with approval); *Meyer v. CUNA Mut. Group*, 2006 WL 197122, *22 (W.D. Pa. Jan. 25, 2006) (same).

Accordingly, a class action is both manageable and manifestly superior to the litigation of these claims in individual civil actions. To further illustrate the manageability of this action, and consistent with Third Circuit guidance, Plaintiffs' proposed Trial Plan is attached to the Carlson/Walters Declaration as Exhibit 20. *See Wachtel v. Guardian Life Ins. Co.*, 453 F.3d 179, 186 n.7 (3d Cir. 2006).

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court certify the proposed class and subclasses.

Dated: June 21, 2013

Respectfully submitted,

*/s/ R. Bruce Carlson*
**CARLSON LYNCH LTD**
R. Bruce Carlson

*/s/ R. Frederick Walters*
**WALTERS, BENDER, STROHBEHN VAUGHAN**
R. Frederick Walters

*Interim Co-Lead Counsel for Plaintiffs*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| IN RE: COMMUNITY BANK OF NORTHERN VIRGINIA SECOND MORTGAGE LENDING PRACTICES LITIGATION | MDL No. 1674<br><br>Case No. 03-0425<br>Case No. 02-01201<br>Case No. 05-0688<br>Case No. 05-1386<br><br>Hon. Arthur J. Schwab |

THIS DOCUMENT RELATES TO ALL MDL ACTIONS

**NOTICE OF ERRATA REGARDING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND BRIEF IN SUPPORT**

Plaintiffs hereby give notice of errata to the Court and all parties regarding page two of Plaintiffs' Motion for Class Certification (Dkt. 607); page two of the Proposed Order attached to the Motion (Dkt. 607-1); and page four of Plaintiffs' Memorandum of Law in Support of the Motion (Dkt. 609), all filed on June 21, 2013. The same error is being corrected in all three documents.

In the proposed Sub-Class definitions, the date ranges for Sub-Class 3 and Sub-Class 4 were incorrect.

The *correct* date ranges are as follows:

> Sub-Class 3: (TILA/HOEPA Non-Equitable Tolling Sub-Class) (Plaintiffs: Kathy and John Nixon; Flora Gaskin; and, Tammy and David Wasem)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period **May 1, 2000-December 2002;**
>
> Sub-Class 4: (TILA/HOEPA Equitable Tolling Sub-Class) (Plaintiffs: All Plaintiffs other than the Nixons, Gaskins and Wasems)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase

money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period **May 1998-April 30, 2000**;

A corrected version of page two of Plaintiffs' Motion for Class Certification is attached hereto as Exhibit A; a corrected version of page two of the Proposed Order attached to the Motion is attached hereto as Exhibit B; and a corrected version of page four of Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Class Certification is attached hereto as Exhibit C. Plaintiffs respectfully request this Court to substitute Exhibit A for page two of the Motion, to substitute Exhibit B for page two of the Proposed Order, and to substitute Exhibit C for page four of the Memorandum.

Dated: June 28, 2013

Respectfully Submitted,

/s/ R. Bruce Carlson
R. Bruce Carlson
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CARLSON LYNCH LTD
PNC Park
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(p) 412.322.9243
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*Interim Co-Lead Counsel for Plaintiffs*

# Exhibit A

the Class Members as their principal dwelling for the period October 1998-November 1999;

Sub-Class 3: (TILA/HOEPA Non-Equitable Tolling Sub-Class) (Plaintiffs: Kathy and John Nixon; Flora Gaskin; and, Tammy and David Wasem)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1, 2000-December 2002;

Sub-Class 4: (TILA/HOEPA Equitable Tolling Sub-Class) (Plaintiffs: All Plaintiffs other than the Nixons, Gaskins and Wasems)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-April 30, 2000;

Sub-Class 5: (RICO Sub-Class) (Plaintiffs: John and Rebecca Picard; Brian and Carla Kessler)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-November 1999.

2. Plaintiffs request that all named Plaintiffs be appointed as representatives of the General Class and that the designated Plaintiffs be appointed as representatives of the requested Sub-Classes.

3. Plaintiffs request that R. Bruce Carlson (and the law firm Carlson Lynch Ltd.) and R. Frederick Walters (and the law firm Walters Bender Strohbehn & Vaughan) be appointed as co-lead counsel and that the following law firms be appointed as class counsel: Richardson, Patrick, Westbrook & Brickman, The Law Offices of Daniel O. Myers, The Legg Law Firm, The Law Offices of Franklin Nix.

4. Plaintiffs request that the Court certify the following common claims and issues:

(A) Plaintiffs' claims for violations of the RESPA ABA disclosure requirements (for the period May 1998-October 1998);

# Exhibit B

second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period October 1998-November 1999;

Sub-Class 3: (TILA/HOEPA Non-Equitable Tolling Sub-Class) (Plaintiffs: Kathy and John Nixon; Flora Gaskin; and, Tammy and David Wasem)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1, 2000-December 2002;

Sub-Class 4: (TILA/HOEPA Equitable Tolling Sub-Class) (Plaintiffs: All Plaintiffs other than the Nixons, Gaskins and Wasems)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-April 30, 2000;

Sub-Class 5: (RICO Sub-Class) (Plaintiffs: John and Rebecca Picard; Brian and Carla Kessler)-- All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-November 1999.

The proposed Plaintiffs for each of the Sub-Classes noted above are hereby appointed as representatives for those Sub-Classes.

IT IS FURTHER ORDERED that the class claims and issues shall be the claims set forth in Plaintiffs' Joint Consolidated Amended Complaint (Doc. No. 507) and the corresponding defenses to said claims:

(1) Plaintiffs' claims for violations of the RESPA ABA disclosure requirements (for the period May 1998-October 1998);

(2) Plaintiffs' claims for violations of the RESPA anti-kickback and unearned fee requirements (Section 800 Origination Fees) (for the period October 1998-November 1999);

(3) Plaintiffs' claims for violations of TILA/HOEPA;

# Exhibit C

Sub-Class 1: (RESPA ABA Disclosure Sub-Class) (Plaintiffs Philip and Jeannie Kossler) All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-October 1998;

Sub-Class 2: (RESPA Kickback Sub-Class) (Plaintiffs Brian and Carla Kessler; John and Rebecca Picard) All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period October 1998-November 1999;

Sub-Class 3: (TILA/HOEPA Non-Equitable Tolling Sub-Class) (Plaintiffs Kathy and John Nixon; Flora Gaskin; and, Tammy and David Wasem) All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1, 2000-December 2002;

Sub-Class 4: (TILA/HOEPA Equitable Tolling Sub-Class) (Plaintiffs All Plaintiffs other than the Nixons, the Wasems, and Flora Gaskin) All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-April 30, 2000;

Sub-Class 5: (RICO Sub-Class) (Plaintiffs John and Rebecca Picard; Brian and Carla Kessler) All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-November 1999.

**B. The Kickback Scheme (RESPA Claims).**

RESPA, among other things, expressly prohibits payments or referrals for kickback of mortgage settlement business. 12 U.S.C. § 2607(a). In a textbook violation of RESPA's anti-kickback provisions, the entity that received the overwhelming majority of the hundreds of millions of dollars in mortgage settlement fees generated from the unlawful business model at issue in this case did not perform any settlement services in connection with those loans and was in fact contractually precluded from providing any settlement services. Therefore, it was

# Exhibit 10

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

IN RE:

COMMUNITY BANK OF NORTHERN VIRGINIA MORTGAGE LENDING PRACTICES LITIGATION

MDL No. 1674
03cv0425 and 05cv0688
(Order relates to all cases)
**ELECTRONICALLY FILED**

**ORDER OF COURT**

AND NOW, this 31st day of July, 2013, upon consideration of Plaintiffs' Motion for Class Certification (doc. no. 607 as amended by doc. no. 611) ("Motion"), Declaration and Brief in support thereof (doc. nos. 608 & 609), Defendant PNC's Brief in Opposition (doc. no. 612), and oral argument held on July 19, 2013 (doc. no. 615), IT IS HEREBY ORDERED THAT Plaintiffs' Motion is GRANTED, and the following class and sub-classes are certified:

GENERAL CLASS

> All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling, for the period May 1998-December 2002.

All of the named Plaintiffs are appointed as representatives of the General Class.

SUB-CLASSES

> Sub-Class 1: (RESPA ABA Disclosure Sub-Class) (Plaintiffs: Philip and Jeannie Kossler) – All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-October 1998.
>
> Sub-Class 2: (RESPA Kickback Sub-Class) (Plaintiffs: Brian and Carla Kessler; John and Rebecca Picard) – All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period October 1998-November 1999.

Sub-Class 3: (TILA/HOEPA Non-Equitable Tolling Sub-Class) (Plaintiffs: Kathy and John Nixon; Flora Gaskin; and, Tammy and David Wasem) – All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1, 2000-December 2002.

Sub-Class 4: (TILA/HOEPA Equitable Tolling Sub-Class) (Plaintiffs: All Plaintiffs other than: Kathy and John Nixon, Flora Gaskin, and Tammy and David Wasem) – All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-April 30, 2000.

Sub-Class 5: (RICO Sub-Class) (Plaintiffs: John and Rebecca Picard; Brian and Carla Kessler) – All persons nationwide who obtained a second or subordinate, residential, federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998-November 1999.

The Plaintiffs noted for each of the Sub-Classes above are hereby appointed as representatives for those Sub-Classes.

IT IS FURTHER ORDERED THAT the class claims and issues shall be the claims set forth in Plaintiffs' Joint Consolidated Amended Complaint (doc. no. 507) as follows:

(1) Plaintiffs' claims for violations of the RESPA ABA disclosure requirements (for the period May 1998-October 1998);

(2) Plaintiffs' claims for violations of the RESPA anti-kickback and unearned fee requirements (Section 800 Origination Fees) (for the period October 1998-November 1999);

(3) Plaintiffs' claims for violations of TILA/HOEPA;

(4) Plaintiffs' claims for violations of RICO;

(5) The defenses set forth to each of the above claims; and,

(6) The proper measure of damages for Plaintiffs and each member of the certified class, in the event that Plaintiffs establish liability on one or more of their claims.

IT IS FURTHER ORDERED THAT R. Bruce Carlson (and the law firm Carlson Lynch Ltd.) and R. Frederick Walters (and the law firm Walters Bender Strohbehn & Vaughan) are appointed as Co-Lead Counsel for the Class, and that the following law firms shall serve as additional counsel for the Class: Richardson, Patrick, Westbrook & Brickman; The Law Offices of Daniel O. Myers; Legg Law Firm; Law Offices of Franklin Nix.

/s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All ECF Counsel of Record

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

IN RE:

| | |
|---|---|
| COMMUNITY BANK OF NORTHERN VIRGINIA MORTGAGE LENDING PRACTICES LITIGATION | MDL No. 1674<br>03cv0425 and 05cv0688<br>**ELECTRONICALLY FILED** |

**MEMORANDUM OPINION**

This matter is before the Court on Plaintiffs' Motion for Class Certification (doc no. 607 as amended by doc. no. 611). The Court has thoroughly reviewed all the documents filed in this case relevant to the issue of whether this putative class, as defined by the Joint Consolidated Amended Complaint ("JCAC") (doc. no. 507) and Plaintiffs' Motion for Class Certification, meets the requirements of Federal Rule of Civil Procedure 23. For the reasons set forth below, the Motion will be granted, the class will be certified, and Plaintiffs will be directed to present a plan to the Court for providing notice of the certification to the class.

## I. FACTUAL AND PROCEDURAL BACKGROUND

As the United States Court of Appeals for the Third Circuit has stated, "[t]he complex factual and procedural history of these matters is set forth at length" in its prior Opinions in this case, therefore, a brief summary is all that is necessary at this juncture. *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 279 (3d Cir. 2010) ("*Community Bank II*") (citing *In re Cmty. Bank of N. Va.*, 418 F.3d 277 (3d Cir. 2005) ("*Community Bank I*")).

Although the parties do not dispute that the two prior Opinions issued by the United States Court of Appeals in this matter do not constitute "law of the case,"[1] this Court finds that

[1] At the Class Certification hearing held before this Court on July 19, 2013, Plaintiffs' Counsel abandoned their law of the case argument and readily conceded that law of the case does not apply under these circumstances.

the Court of Appeals has provided extensive guidance in both *Community Bank I* and *Community Bank II*. The Court will, therefore, rely heavily on the Court of Appeals' observations.

As the Court of Appeals for the Third Circuit stated, this putative class action "involve[s] the alleged predatory lending scheme of the Shumway/Bapst Organization ("Shumway"), a residential mortgage loan business involved in facilitating the making of high-interest mortgage – backed loans to debt-laden homeowners." *Community Bank II,* 622 F.3d at 279. The Court of Appeals further summarized that "[b]ecause Shumway [was] not a depository lender – and thus not subject to fee caps and interest ceilings under various state laws – it allegedly formed relationships with defendant Community Bank of Northern Virginia ("CBNV") . . . . [a] financially distressed bank . . . to circumvent these restrictions." *Id.*

CBNV's association with Shumway "allegedly permitted Shumway to conceal the origin of the loans, thus creating the appearance that fees were paid solely to a depository institution when, in reality . . . the overwhelming majority of the fees and other charges associated with the loans were funneled to Shumway." *Id.* at 279-80 (citation, internal punctuation, and internal quotations omitted). CBNV was acquired by Mercantile Bankshares Corp. in 2005. Mercantile is now owned by PNC Bank, N.A. ("PNC"). There is no dispute that PNC is the successor to CBNV, through its acquisition of Mercantile. However, for clarity and consistency, and to reflect that it is solely the conduct of CBNV that is at issue here, the Court will continue to refer to Defendant PNC as CBNV throughout this Opinion.

The action at issue began as a number of actions filed in this Court and throughout the country. The Judicial Panel on Multidistrict Litigation ("MDL Panel") created MDL No. 1674 and transferred the actions that originated elsewhere to this Court. *In re Cmty. Bank of N. Va. Mortgage Lending Practices Litig.*, 368 F. Supp. 2d 1 354 (J.P.M.L. 2005). There is no reason to

set forth the long and convoluted procedural history of this case. Suffice it to say that some Plaintiffs and Defendants agreed to settle this case on a class-wide basis first, in 2003, and then again, in 2008. This Court (through Opinions and Orders entered by the late Chief Judge Lancaster) certified the class and preliminarily approved those settlements after extensive analysis. After each preliminary approval, this Court directed the parties to provide notice to the class. The class was informed of the certification and the proposed settlement, twice. After allowing time for class members to either opt out of the class or object to the terms of the settlements both times, this Court finally approved the settlements and entered final judgments. The Court of Appeals for the Third Circuit reversed twice, based upon the objections of some class members. These class members objected to the certifications and settlements solely on the basis of the named Representatives' purported inadequacy under Fed.R.Civ.P. 23(a)(4).

On remand after the second appeal, Plaintiffs and the former Objectors joined forces to file all of their potential claims against all Defendants by filing the JCAC. In doing so, Plaintiffs followed the guidance provided by the Court of Appeals in *Community I* and *Community II*, and jointly asserted claims pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* as amended by the Home Ownership Equity Protection Act ("HOEPA"), 108 Stat. 2190, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. Plaintiffs also reasserted their Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq*., claims.[2]

The JCAC originally named as Defendants CBNV, Federal Deposit Insurance Corporation ("FDIC") as the Receiver for Guaranty National Bank Of Tallahassee ("GNBT"),

[2] The Court would note that the Motion for Certification is silent at to any state law claims, and thus, this Court will not address those potential state law claims and thereby excluding them from the certification process.

PNC Bank as successor to CBNV, and GMAC-Residential Funding Company n/k/a Residential Funding Company ("RFC"). Doc. No. 507, ¶1. On May 15, 2012, RFC filed a Notice of Bankruptcy and Effect of Automatic Stay. Doc. No. 564. On September 18, 2012, all claims against RFC were stayed in relation to this case.[3] Doc. No. 584. The FDIC was named as Defendant solely in its capacity as receiver for GNBT. See doc. no. 507, ¶ 1. This Court granted FDIC's Motion to Dismiss for lack of subject matter jurisdiction. Doc. Nos. 605 & 610. Therefore, the only remaining claims that are currently before the Court are those asserted by Plaintiffs against CBNV.

Pursuant to Rule 23, Brian W. and Carla M. Kessler, Flora A. Gaskin, Philip F. and Jeannie C. Kossler, John and Kathy Nixon, John and Rebecca Picard, William and Ellen Sabo, and Tammy and David Wasem ask this Court to certify each of the claims alleged in the JCAC for class treatment. Those claims are: (1) at Count I for CBNV's violations of RESPA; (2) at Count II for CBNV's violations of TILA as amended by HOEPA for Inaccurate and Understated Material Disclosures; (3) at Count III for Other, Multiple Violations of the Substantive Provisions of TILA and HOEPA; and (4) at Count V for Violations of RICO.

Plaintiffs ask the Court to certify a class defined as "All persons nationwide who obtained a second or subordinate, residential federally related, non purchase money, mortgage loan from CBNV that was secured by residential real property used by the Class Members as their principal dwelling, for the period May 1998 - December 2002." Doc. No. 607. Plaintiffs also ask this Court to certify the following subclasses:

Sub-Class 1: (RESPA ABA Disclosure Sub-Class) (Plaintiffs Philip and Jeannie Kossler) – All persons nationwide who obtained a second or subordinate,

[3] As a matter of "housekeeping" JP Morgan Chase had been previously named as a Defendant as trustee for the trusts and loan pools created by RFC (doc. no. 507, ¶ 48), but the case against JP Morgan Chase was also effectively stayed by doc. no. 584.

residential, federally related, non purchase money, mortgage from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998 - October 1998.

Sub-Class 2: (RESPA Kickback Sub-Class)(Plaintiffs Brian and Carla Kessler; and John and Rebecca Picard) – All persons nationwide who obtained second or subordinate, residential, federally related, non purchase money, mortgage from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period October 1998 - November 1999.

Sub-Class 3: (TILA/HOEPA Non Equitable Tolling Sub-Class)(Plaintiffs Kathy and John Nixon; Flora Gaskin; and Tammy and David Wasem) – All persons nationwide whoobtained second or subordinate, residential, federally related, non purchase money, mortgage from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1, 2000 - May 1, 2002.

Sub-Class 4: (TILA/HOEPA Equitable Tolling Sub-Class)(Plaintiffs All Plaintiffs other than the Nixons, the Wasems and Flora Gaskin) – All persons nationwide who obtained second or subordinate, residential, federally related, non purchase money, mortgage from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998 - April 30, 2000.

Sub-Class 5: (RICO Sub-Class)(Plaintiffs John and Rebecca Picard; Brian and Carla Kessler) – All persons nationwide who obtained second

or subordinate, residential, federally related, non purchase money, mortgage from CBNV that was secured by residential real property used by the Class Members as their principal dwelling for the period May 1998 - November 1999.

Doc Nos. 607 & 611. Defendant CBNV opposes the Motion for Class Certification.

**II. STANDARD OF REVIEW**

This Court has federal question jurisdiction over the claims remaining in this case pursuant to 28 U.S.C. §1331. Venue is proper in this District pursuant to 28 U.S.C. § 1407. "When a transferee court receives a case from the MDL Panel, the transferee court applies the law of the circuit in which it is located to issues of federal law." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 911 (8th Cir. 2004); *Murphy v. F.D.I.C.*, 208 F.3d 959, 965 (11th Cir. 2000); *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994); *Menowitz v. Brown*, 991 F.2d 36, 40-41 (2d Cir. 1993). Rule 23 is a federal law. Accordingly, this Court will apply the law of the United States Court of Appeals for the Third Circuit to this Motion for Class Certification.

As the Court of Appeals for the Third Circuit has instructed, in order to certify a class under Fed.R.Civ.P. 23, this Court must determine whether, in its sound discretion, the four requirements of Rule 23(a) are met and, if so, the Court must then determine whether the "class fits within one of the three categories of class actions in Rule 23(b)." *Community Bank II*, 622 F.3d at 291.

Rule 23 is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct 2541, 2550 (2011) (citation omitted). As the United States Supreme Court explained, "Rule 23 does not set forth a mere pleading standard . . ." but rather "[a] party seeking class certification must affirmatively

demonstrate his compliance with the Rule . . . ." *Id* at 2551. Further, as the Supreme Court recently explained, Plaintiffs "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Beherend*, 133 S.Ct. 1426, 1428 (2013). The Supreme Court has directed the Court to undertake a "rigorous analysis" to determine whether Plaintiffs have established each element of Rule 23 at the time of certification. *Wal-Mart*, 131 S.Ct. at 2551.

Rule 23(a), which "[e]very putative class must satisfy," requires that:

> (1) the class must be so numerous that joinder of all members is impracticable (numerosity); (2) there must be questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties must be typical of the claims or defense of the class (typicality); and (4) the named plaintiffs must fairly and adequately protect the interests of the class (adequacy of representation . . . .)

*Community Bank II*, 622 F.3d at 291 (citations and internal quotations omitted). If these requirements are met, the Court must then analyze whether the putative class satisfies at least one section of Rule 23(b).

Plaintiffs seek certification pursuant to Rule 23(b)(3), "which requires that (i) common questions of law or fact predominate (predominance), and (ii) the class action is the superior method of adjudication (superiority)." *Id.* The factors the Court must consider include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3)(A-D).

In addition, since Plaintiffs propose to certify this class for trial, the Court must determine "whether the case, if tried, would present intractable management problems . . . ." *Community Bank II*, 622 F.3d at 291; *In re LifeUSA Holding Inc.*, 242 F.3d 136, 148 (3d Cir. 2001) (Court must determine "if tried as a class action, [this case] could be efficiently and fairly managed, which is the polestar of Rule 23(b)(3)"). In addition, since this is not a settlement class, but rather a class for trial, the Court must analyze "the likely difficulties of managing a class action." Fed.R.Civ.P. 23(b)(3)(D).

It is important to note that the Court of Appeals for the Third Circuit "and other circuit courts have . . . rejected the proposition that [Rule 23] categorically prohibits the evaluation of the merits of class claims at the certification stage." *Community Bank II,* 622 F.3d at 293. "[A] merits inquiry is precluded at the class certification stage where it is not necessary to determine a Rule 23 requirement." *Id.* (citation and internal quotation omitted). The Court of Appeals noted that "in reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can properly be resolved as a class action." *Id.* (citation omitted). Moreover, "[b]ecause each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements." *Id.* (citation and internal quotation omitted).

However, the Court must be mindful that "the extent to which a district court may consider the merits of claims in ruling on a class certification motion has limits." *Community Bank II,* 622 F.3d at 294. The Court of Appeals for the Third Circuit has instructed that "[w]hen a district court properly considers an issue overlapping the merits in the course of determining whether a Rule 23 requirement is met, it does not do so in order to predict which party will prevail on the merits." *Id.* (citation and internal quotation omitted). Therefore, "merits inquiry is

not permissible when the merits issue is unrelated to a Rule 23 requirement." *Id.* (citation and internal quotation omitted). Thus, "it remains true that in determining the propriety of a class action, the question is *not whether the plaintiff or plaintiffs have stated a cause of action* . . . but rather whether the requirements of Rule 23 are met." *Id.* (citation and internal quotation omitted) (emphasis and ellipsis in original).

**III. DISCUSSION**

In accordance with the guidance the Court of Appeals for the Third Circuit has provided with respect to this case, the Court turns its attention to whether Plaintiffs, in the JCAC, have met the requirements of Rule 23.

**A. Rule 23(a)**

As the Court of Appeals for the Third Circuit instructed, "Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiffs' and counsel's ability to fairly and adequately protect class interests." *Community Bank I*, 418 F.3d at 302.

As noted above, Plaintiffs must establish the four (4) requirements of Rule 23(a): numerosity, commonality, typicality and adequacy. "Because . . . commonality and typicality, are similar to (but less rigorous than) Rule 23(b)(3)'s predominance inquiry, Courts often discuss them together." *Opperman v. Allstate N.J. Ins. Co.*, 2009 WL 3818063, *7 (D.N.J. Nov. 13, 2009) (citing *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996)). As the Court of Appeals for the Third Circuit has instructed, "commonality, like numerosity, evaluates the sufficiency of the class itself, and typicality like adequacy of representation, evaluates the named plaintiff(s) . . . ." *Community Bank I,* 418 F.3d at 302 (citation and internal quotation omitted).

Plaintiffs must also establish that the class fits within one of the three categories set forth in Rule 23(b). Here, Plaintiffs seek certification under Rule 23(b), which requires the Court to "determine that common questions of law or fact predominate and that the class action mechanism is the superior method for adjudicating the case." *Id.*

**1. Numerosity**

There is no dispute that there are approximately 22,000 members of the putative class. This number meets and, in fact far exceeds, the requirements of Rule 23(a)(1). *See Community Bank II*, 622 F.3d at 284 (citing *Community Bank I*, 418 F.3d at 303-10); *see also In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 273 (3d Cir. 2009) ("numbers in excess of forty, particularly those exceeding one hundred or one thousand have sustained the [numerosity] requirement"). On the record before the Court at this time, the sub-classes are also sufficiently numerous.

**2. Commonality and Typicality**

Rule 23(a)(2) requires Plaintiffs to show that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). The United States Supreme Court has noted that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart,* 131 S.Ct. at 2551 (citation and internal quotation omitted). Moreover, "[w]hat matters to class certification . . . is not the raising of common questions . . . but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (citation and internal quotation omitted).

The Court of Appeals opined in *Community Bank I*, that "the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Community Bank I*, 418 F.3d at 303; *see also Community Bank II*, 622 F.3d at 284. Granted, the Court of Appeals

was providing instruction to this Court on remand regarding the Plaintiffs' RESPA claims, and was analyzing a Complaint that has been superseded by the JCAC. That being said, Plaintiffs merely followed the Court of Appeals for the Third Circuit's direction by adding the TILA/HOEPA and RICO claims. The viability of these claims is ascertainable by examining identical loan documents.

The Court of Appeals further opined, with regard to typicality, that "the concepts of commonality and typicality are broadly defined and tend to merge." *Community Bank I*, 418 F.3d at 303 (citation and internal quotation omitted). The Court of Appeals, in providing guidance to this Court on remand, observed that "[c]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Id.* (citation and internal quotation omitted). Thus, "[b]ecause the claims of all class members here depend on the existence of the Shumway scheme, their interests are sufficiently aligned such that the class representatives can be expected to adequately pursue the interests of the absentee class members." *Id.* (citation, internal quotation, and internal punctuation omitted). Accordingly, although the Court expresses no opinion on the merits of these claims at this juncture, the Court finds that Plaintiffs have satisfied their burden under Rule 23. The Court also finds that any further inquiry into the merits at this stage of the litigation would be impermissible, as that inquiry is "unrelated to a Rule 23 requirement." *Community Bank II*, 622 F.3d at 294 (citation and internal quotation omitted).

**3. Adequacy**

To observe that much ink has been spilled on this issue, both in this Court and the Court of Appeals for the Third Circuit, on this issue would be an understatement. As the Court of

Appeals stated, the Rule 23(a)(4) adequacy requirement "encompasses two distinct inquiries designed to protect the interests of the absent class members: it considers whether the named plaintiffs' interests are sufficiently aligned with the absentees', and it tests the qualifications of the counsel to represent the class." *Community Bank I*, 418 F.3d at 303. In *Community II,* the Court of Appeals noted that "[it] continue[d] to have concerns – essentially the same as those [] identified in *Community Bank I* – regarding whether the named plaintiffs and their counsel are adequate representatives." *Community Bank II*, 622 F.3d at 303.

Fortunately, the Court of Appeals for the Third Circuit, in order "to aid the Court on remand," provided an explanation of:

> [its] concerns . . . focusing specifically on (a) the apparent intra-class conflict with respect to the statute-of-limitations problem, which may raise questions regarding the named plaintiffs' adequacy under Rule 23(a)(4); and (b) class counsel's justifications for the decision not to assert TILA/HOEPA claims on behalf of the class, which may raise questions regarding counsel's adequacy under Rule 23(g).

*Id.*

As to the intra-class conflict, the Court of Appeals for the Third Circuit stated its view that the potential "intra-class conflict is by no means fatal to whether these cases can be maintained as a class action . . . [t]he most obvious remedy is to create subclasses as [it] suggested in [*Community Bank I*]." *Id.* at 304. Plaintiffs are seeking certification of sub-classes. According the Court of Appeals for the Third Circuit in *Community Bank I* and *Community Bank II*, although admittedly *dicta*, sub-classes could satisfy Rule 23(a)(4), if they are deemed to be "necessary and appropriate." *Id.*, citing *Community Bank I*, 418 F.3d at 310. Given the Court of Appeals' statements in *Community Bank I* and *Community Bank II*, this Court finds that the subclasses, as identified and described by Plaintiffs (see Section I., *infra.*), are in fact, necessary and appropriate.

As to the second concern relating to counsel's adequacy under Rule 23(g), the Court of Appeals acknowledged that:

> [it] did not elaborate in *Community Bank I* on the type of inquiry a district court should engage in when addressing class counsel's adequacy in light of the decision to bring some, but not other, potentially colorable claims on behalf of the class and [] need not do so definitively here.

*Community Bank II*, 622 F.3d at 305. However, the Court of Appeals emphasized that "the determination of whether class counsel is adequate is committed to a district court's sound discretion, as it is in a better position than [the Court of Appeals] to evaluate class counsel's performance." *Id.* at 308.

CBNV challenges the adequacy of interim class counsel on the basis that they have changed their position, joined forces, and filed a JCAC which asserts all potentially colorable claims, including those pursuant to TILA/HOEPA. This does not appear to the Court to be a sign of inadequacy of counsel. Rather, interim class counsel simply agrees with the Court of Appeals for the Third Circuit. Further, the Court, although not as familiar with the conduct of interim class counsel in other cases, was favorably impressed by their advocacy during the Rule 12(b)(6) briefing and oral argument, as well as with the quality of the all other relevant documents filed by interim class counsel in this case.

The only issue regarding adequacy of counsel that has given this Court pause is whether or not each sub-class should be given its own counsel. Fortunately, the Court of Appeals for the Third Circuit has recently provided substantial direction on this issue as well. In *Dewey v. Volkswagen Akteingesellshaft*, 681 F.3d 170 (3d Cir. 2012), the Court of Appeals discussed the circumstances under which a class and sub-classes may be represented by the same counsel. In summary, the Court of Appeals has instructed the Court to analyze whether there is a "fundamental" conflict under the circumstances presented. *Id.* at 183-84. "A fundamental

conflict exists where some class members claim to have been harmed by the same conduct that benefitted other members of the class." *Id.* at 184. Here, Plaintiffs' proposed five sub-classes in order to ameliorate the statute of limitations problems identified by the Court of Appeals in *Community Bank I* and *Community Bank II*. The conduct of CBNV was the same as to all class members. The only real distinction is a temporal one, that is, when this conduct occurred. Accordingly, there is no fundamental conflict here, and Class Counsel can represent both the class and the sub-classes.

In the exercise of its sound discretion, the Court concludes that there is no fundamental conflict here that would preclude Interim Co-Lead Counsel from representing both the class and all of the sub-classes.

On the record before the Court at this time, Plaintiffs have satisfied the requirements of Rule 23(a)(4).

**B. Rule 23(b)(3)**

**1. Predominance and Superiority**

The Court of Appeals for the Third Circuit has instructed that "[t]o meet the requirements of Rule 23(b)(3)," this Court "must find that questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Community Bank I*, 418 F.3d at 308. Further, "[t]he predominance inquiry tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation." *Id.* at 308-09. In addition, although this is not now a settlement class, "a predominance analysis is similar to the requirement of Rule 23(a)(3) that claims or defense of the named representatives must be typical of the claims [or] defenses of the class." *Id.* at 309. The

Court of Appeals concluded in *Community Bank I* that "just as the record below supports a finding of typicality it also supports a finding of predominance." *Id*; *see also Community Bank II*, 622 F.3d at 284. In summary, the Court of Appeals noted that "[a]ll plaintiffs' claims arise from the same alleged fraudulent scheme." *Community Bank I,* 418 F.3d at 309.

As to superiority, this "requirement asks a district court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *Community Bank I*, 418 F.3d at 309 (citation and internal quotation omitted). On the record developed before the first remand, the Court of Appeals for the Third Circuit "[found] no reason, and [CBNV] fail[s] to offer any, why a Rule 23(b)(3) class action is not the superior means to adjudicate this matter." *Id.* This Court also observes, as an aside, that at this point, individual class members would face some difficult, if not insurmountable, tolling issues if they were required to file suit on their own behalf at this time which, in many cases, is almost a decade after they first received notice that this case had been prosecuted and settled for them.

Accordingly, again, while the Court expresses no opinion on the merits of these claims on a more fully developed record, Plaintiffs have satisfied their burden under Rule 23. Any further inquiry into the merits at this stage would be impermissible, as that inquiry is "unrelated to a Rule 23 requirement." *Community Bank II*, 622 F.3d at 291 (citation and internal quotation omitted).

**2. Manageability**

This is the first instance in which a Rule 23(b)(3)(D) inquiry, *i.e.*, whether there are "likely to be difficulties in managing the class action," is at issue in this case. The Court notes that Rule 23(d) vests in the Court substantial discretion to enter orders, subsequent to the Order Certifying the Class that will follow, to manage the class. The United States Court of Appeals

for the Seventh Circuit has identified a number of "imaginative solutions to problems created by the presence in a class action litigation of individual damages." *Carnegie v. Household Int'l*, 376 F.3d 656, 661 (7th Cir. 2004) (citations omitted). This Court expresses no opinion at this juncture which of those solutions, save the creation of sub-classes, which has been crucial here, may be necessary. This Court finds that speculative, and premature, analysis is not necessary to resolve the question of manageability. This class action is manageable to try as to liability, even if damages issues may require some inquiry into facts specific to individual class members.

**IV. CONCLUSION**

For the reasons set forth above, Plaintiffs' Motion for Class Certification (doc. no. 607) will be GRANTED. An appropriate Order follows.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Court Judge

cc: All Registered ECF Counsel

# Exhibit 11

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Walters Bender Strohbehn & Vaughan is a Kansas City based firm with a nationwide practice and reputation. We specialize only in trial work, including, particularly, class action cases and complex litigation involving predatory lending and other consumer protection issues. We also work in the areas of commercial litigation, insurance law, securities litigation and we handle catastrophic injury cases. Since our inception in 1991, we have been involved in representing both plaintiffs and defendants throughout the United States. Our efforts on behalf of plaintiffs have resulted in settlements and verdicts valued well in excess of $500 million dollars. The profiles of the talented attorneys and staff that make up our Firm can be viewed at www.wbsvlaw.com.

**COMPLEX AND CLASS ACTION LITIGATION**

The 19 attorneys in our Firm have been involved in a number of complex, multi-district and class action lawsuits during their respective careers, representing both plaintiffs and defendants. Our class action work includes cases concerning predatory lending, unlawful mortgage loan fees, securities fraud, life insurance premiums, shareholder derivative suits, products liability, deceptive trade and merchandising practices, anti-trust practices, commercial code violations, motor vehicle repossessions and employment benefits. Beyond these class cases, our Firm has most recently been involved in nationwide litigation concerning hundreds of millions of dollars invested in allegedly abusive tax shelters, and we recently obtained multiple million dollar settlements in cases involving sexual abuse by an athletic coach, the breach of a shareholder agreement and severe electrical shock injuries. We are always investigating new cases, exploring new and developing areas of the law, and incorporating the latest technology into our practice.

In the class action arena, on behalf of thousands of individuals, our Firm has achieved some truly extraordinary results as class counsel. For example, in 2007, as class counsel we successfully prosecuted and settled a consumer class action involving over 4,100 second mortgage loans that resulted in a $36.3 million dollar settlement. In 2008, we took to trial and achieved a jury awarded of $104 million dollars in favor of the plaintiffs' class of victimized second mortgage borrowers. In August 2012, we settled a number of class action cases involving over 3,200 second mortgage loans for over $160 million dollars. Recently, we obtained a series of approximately 20 consumer class action settlements, providing monetary benefits of over $47 million dollars to some 1,300 class members.

A listing of our representative complex and class action cases is set forth below.


**JUNE 2013**

**PREDATORY LENDING**

*Baker v. Century Financial Group, Inc.*,
Circuit Court of Clay County, Missouri, Case No. CV 100-4294,
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.

*Beaver, et al. v, U.S. Bank, National Association, et al.*,
Circuit Court of Jackson County, Missouri, Case No. 1216-CV21345,
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.

*Couch v. SMC Lending, Inc.,*
Circuit Court of Clay County, Missouri, Case No. CV100-4332,
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.

*Gilmor v. Preferred Credit Corp.,*
Circuit Court of Clay County, Missouri, Case No. CV 100-4263,
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.

*Hall v. America West Financial, et al.,*
Circuit Court of Jackson County, Missouri, Case No.00CV218553-01,
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.

*Hopkins v. Kansas Teachers Community Credit Union,*
United States District Court for the Western District of Missouri, Case No. 08-5052-CV-SW-GAF,
Uniform Commercial Code and Missouri Merchandising Practices Act – counsel for class of plaintiffs.

*In re Community Bank of Northern Virginia Mortgage Practices Lending Litigation,*
United States District Court for the Western District of Pennsylvania, MDL No.-1674,
Predatory lending, racketeering - representing plaintiffs and objectors in multidistrict litigation.

*Landrum v. Meadows Credit Union,*
United States District Court for the Western District of Missouri, Case No. 08-441-CV-W-DW,
Uniform Commercial Code and Missouri Merchandising Practices Act – counsel for class of plaintiffs.

*McLean v. First Horizon Home Loan Corporation f/k/a McGuire Mortgage Company,*
Case No.00 CV 228530 Circuit Court of Jackson County, Missouri,
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.

*Mitchell v. Residential Funding Corp., et al.,*
Circuit Court of Jackson County, Missouri, Case No.03CV220489,
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.

*Shokere, et al v. Residential Funding Company, et al.,*
Circuit Court of Jackson County, Missouri, Case No. 1116-CV30478
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.


*Smith v. Premier Associates Mortgage Company, et al.,*
Circuit Court of Jackson County, Missouri, Case No.01CV201263,
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.

*Thomas, et al. v. U.S. Bank, N.A., et al.*,
*Circuit Court of Jackson County, Missouri,* Case No. 1216-CV20561,
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.

*Daniel and Amy Thompson vs. Sovereign Bank, N.A.*,
*Circuit Court of Jackson County, Missouri,* Case No. 1216-CV09804,
Missouri Second Mortgage Loans Act – lead counsel for class of plaintiffs.

**OTHER SIGNIFICANT LITIGATION**

*Doe, et al. V. Johnson County Park & recreation District, et al.*
Consolidated Case Nos. 0516-CV-23636, 07-EXEC-3929, 0716-CV-24114-01,
Vexation Refual to Pay, Insurance Coverage Dispute – representing the plaintiffs.

*In Re: American Investors Life Ins. Co. Annuity Marketing and Sales Practices Litigation*
United States District Court of the Eastern District of Pennsylvania, MDL-1712
Nationwide Putative Class Action Involving Deferred Annuities – representing the American Investor defendants.

*In re: Indianapolis Life Insurance Company I.R.S. § 412(i) Plans Life Insurance Marketing Litigation*
United States District Court for the Northern District of Texas, MDL 1983
Nationwide Putative Class Action Involving the Sale of Life Insurance to Fund § 412(i) Plans – representing defendant, Indianapolis Life.

*In re Motor Fuel Litigation,*
United States District Court for the District of Kansas, MDL Case No.:1840,
Multi-state proceeding to remedy unfair motor fuel sales practices – liaison counsel for plaintiffs.

*Strube v. American Equity Investment Life Insurance Co. and Creative Marketing International Corp.*,
United States District Court, Middle District of Florida, Case No. 6:01-CV-1236-Orl-19DAB,
Fraud and Unfair Business Practices - representing defendant Creative Marketing Int.'l Corp.

**PRODUCTS LIABILITY**

*Foster, et al. v. ABTCo., Inc., et al.*,
Circuit Court of Choctaw County, Alabama, Case No. CV95-151-M,
Products liability - representing the class of plaintiffs.

*Heilman, et al. v. Perfection Corp., et al.*,
United States District Court for the Western District of Missouri, Case No. 99-0679-CW-W-6,
Products liability/Magnuson-Moss - representing the class of plaintiffs.


*In Re: Bausch & Lomb Inc. Contact Lens Solution Products Liability Litigation,*
United States District Court for South Carolina, Case No. 2:06-mn-77777,
Products liability - representing plaintiffs.

*In Re: Bisphenol-A (BPA) Polycarbonate Plastics Product Liability Litigation,*
United States District Court for Western District of Missouri, Case No. 08-MD-01967-ODS,
Products liability – co-lead class counsel representing plaintiffs.

**SECURITIES LITIGATION**

*The Amalgamated Bank v. LeMay, Sprint Corporation, et al.*
Circuit Court for Jackson County, Missouri, Case No. 00CV 230077
Shareholders' Derivative Suit – liaison counsel for plaintiffs

*Antonson v. Robertson, et al.,*
United States District Court for the District Court of Kansas, Case 2:88-cv-02567-GTV
Securities Exchange Act – representing the defendants

*Boyd, et al. v. Novastar,*
United States District Court of the Western District of Missouri, Case No. 07-0139-CV-W-ODS
Securities Violations – representing putative plaintiff class

*Epstein, et al v. Wittig, Inc.,*
United States District Court for the District of Kansas, Case No. 03CV-4081,
Shareholders' Derivative Suit – liaison for the plaintiffs.

*In re NovaStar Financial Securities Litigation,*
United States District Court for the Western District of Missouri,
Consolidated Case No. 04CV0330-CV-W-ODS,
Private Securities Litigation Reform Act – liaison representing the class of plaintiffs.

*In re Royal Dutch/Shell Transport Securities Litigation,*
United States District Court for the District of New Jersey, Civil Action No. 04-374(JWB),
Securities violations – representing the Kansas Public Employee Retirement System.

*In re Sprint Corp. Securities Litigation*,
United States District Court for the District of Kansas, Case No. 5:01-cv-04080,
Securities violations – liaison counsel for class of plaintiffs.

*New England Health Care Employees Pension Fund v. Sprint Corporation, et al./In re Sprint Corporation Securities Litigation,*
United States District Court for the District of Kansas, Master File No. 01CV04080, Case No. 01-4080-DES,
Securities Suit – liaison counsel for class of plaintiffs.


*Seiffer v. Topsy's International, Inc.,*
United States District Court, for the District of Kansas, Civ. A. No. KC-3455,
Securities Fraud Class Action - representing the plaintiffs.

**ANTITRUST LITIGATION**
*In re Vitamins Antitrust Litigation,*
United States District Court for the District of Columbia, Misc. No. 99-197 (TFH), MDL No. 1285,
District Court for Wyandotte County, Kansas, Case No. 00 C 1890,
Antitrust – representing plaintiffs and opt-out plaintiffs.

*Kansas City Urology, P.A., et al. v. Blue Cross & Blue Shield of Kansas City, Inc. et al.,*
Circuit Court of Jackson County, Missouri, Case No. 0516-CV-04219,
Antitrust, contract and other claims – co-lead counsel for plaintiffs.

*Prime Care of Northeast Kansas, LLC, et al. v. Blue Shield of Kansas City, Inc. et al.,*
District Court of Wyandotte County, Kansas, Case No. 05-CV-02227,
Antitrust, contract and other claims – co-lead counsel for plaintiffs.

**LIFE INSURANCE LITIGATION**
*Bhat v. AmerUs Life Insurance Co., et al.,*
United States District Court for the Northern District of California, Case No. C 96-02026,
SI Universal Life Insurance Class Action-DAC Tax Litigation - representing the defendant.

*Cozad v. American Mutual Life Insurance Co.*,
District Court of Travis County, Texas,
Life Insurance Vanishing Premium Litigation - representing the defendant.

*In re Millennium Multiple Employer Welfare Benefit Plan*,
Adversary No. 10-01152, Action, United States Bankruptcy Court for the Western District of Oklahoma,
Nationwide interpleader action under Federal Interpleader Act, representing Aviva Life and Annuity Company.

*Ireton, et al. v. American Family Life Insurance Co.*,
United States District Court for Eastern District of Wisconsin, Case No. 97-C-1184,
Life Insurance Class Action-Vanishing Premium Litigation - representing the defendant.

*Kortebein v. AmerUs Life Insurance Co.,*
Circuit Court of Cook County, Illinois, Case No. 00CH00932,
Life Insurance -Post Settlement Objections - representing the defendant.

**UNITED STATES SAVINGS BOND LITIGATION**
*In re Matured, Unredeemed, and Unclaimed United States Savings Bonds with Purchasers or Owners with Last Known Addresses in the State of Kansas,* District Court for Shawnee County, Kansas, Case No. 13-C-05.
Kansas Disposition of Unclaimed Property Act - representing the plaintiff, State of Kansas.

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## Practice Areas

- Litigation
- Plaintiff Class Actions
- Professional Malpractice
- Toxic Torts
- Bad Faith
- Design and Construction Law
- Personal Injury Law
- Products Liability Law

**University** Culver-Stockton College; University of Missouri, B.S.M.E., 1970

**Law School** University of Missouri, J.D., 1973

**Admitted** 1973, Missouri

**Memberships** Kansas City Metropolitan and American Bar Associations; The Missouri Bar; Missouri Association of Trials Attorneys; American Association for Justice.

**Born** Greenfield, Missouri, August 31, 1947

**Biography** Phi Delta Phi.

**ISLN** 902970494

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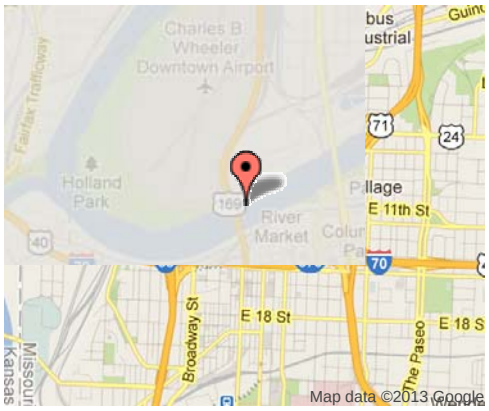


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**Practice Areas**

- Litigation
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- Professional Negligence Law
- Business Litigation

**University** University of Missouri at Columbia, B.S., cum laude, 1975

**Law School** University of Missouri at Columbia, J.D., 1979

**Admitted** 1979, Missouri and U.S. District Court, Western District of Missouri; 2006, Kansas and U.S. District Court, District of Kansas

**Memberships** Kansas City Metropolitan Bar Association (Co-Chair, Civil Procedure Committee; Chair, CLE Committee; President Elect, Board of Directors); The Missouri Bar; Missouri Association of Trial Attorneys; American Association for Justice.

**Born** El Dorado Springs, Missouri, July 16, 1953

**Biography**
Recipient: Kansas City Business Journal's Best of the Bar, 2003-2008; Missouri and Kansas Super Lawyers, 2005-2008; KCMBA (1999) and KCMBF (2005) Presidential Recognition Awards. Member, Federal Practice Committee, U.S. District Court, Western District of Missouri.

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## Practice Areas

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- Personal Injury Law
- Arbitration
- Products Liability Law
- Commercial Law
- Civil Trials

**University** University of Northern Iowa, B.A., cum laude, 1972; Kansas University

**Law School** Washburn University, J.D., with honors, 1978

**Admitted** 1978, Missouri; 1984, Kansas

**Memberships** Kansas City Metropolitan, Johnson County and Kansas Bar Associations; The Missouri Bar; American Association for Justice; Kansas Association for Justice; Missouri Association of Trial Attorneys.

**Born** Marengo, Iowa, December 11, 1949

**Biography** Recipient, Purple and Old Gold Award, University of Northern Iowa, 1972. Included, Missouri and Kansas Super Lawyers, 2006-2009. Member, Board of Editors, Washburn University Law Journal, 1976-1978.

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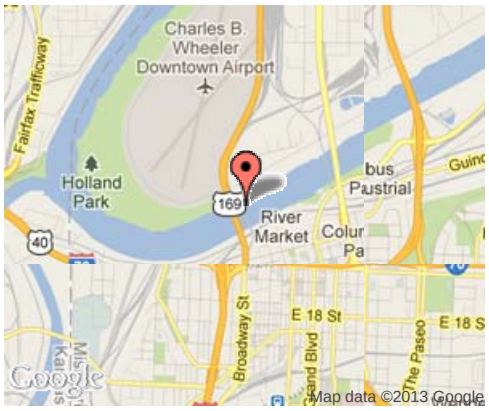


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| | |
|---|---|
| **University** | University of Missouri, B.S.B.A., cum laude, 1972 |
| **Law School** | University of Missouri, J.D., 1975 |
| **Admitted** | 1975, Missouri; 1980, U.S. Supreme Court; 2003, U.S. District Court, District of Kansas |
| **Memberships** | Kansas City Metropolitan and American Bar Associations; The Missouri Bar; American Association for Justice; Missouri Association of Trial Attorneys. |
| **Born** | St. Louis, Missouri, July 28, 1950 |
| **Biography** | Member, Editorial Board, Missouri Law Review, 1974-1975. Included, Missouri and Kansas Super Lawyers (Business Litigation), 2006. |
| **ISLN** | 901838337 |

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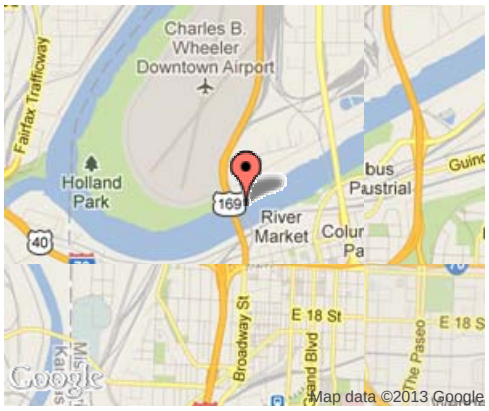


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# Karen Wedel Renwick

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## Practice Areas

- General Litigation
- Commercial Litigation
- Design and Construction Law
- Personal Injury Law
- Plaintiff Class Actions
- Products Liability Law

**University** Kansas State University, B.A., 1980

**Law School** Washburn University, J.D., cum laude, 1984

**Admitted** 1984, Kansas; 1991, Missouri

**Memberships** The Missouri Bar; Kansas Bar Association; Kansas Association for Justice (Member, Board of Governors; Chairman, Women's Caucus, 2004-2004); American Association for Justice.

**Born** Kansas City, Missouri, December 24, 1957

**Biography** Member, National Moot Court Competition, 1982; Top Oralist. Associate Editor and Research Editor, Washburn Law Journal, 1983-1984.

**ISLN** 902902020

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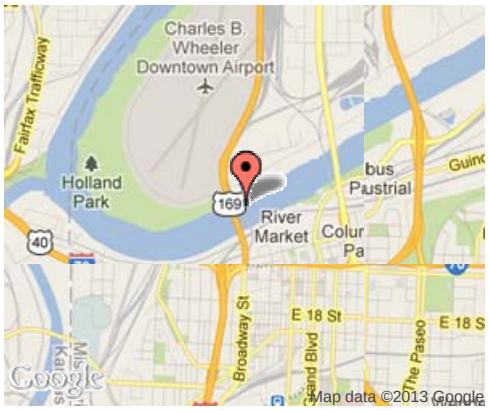


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## Practice Areas

- General Litigation
- Business and Commercial Law
- Plaintiff Class Actions
- Products Liability Law
- Personal Injury Law

**University** University of Kansas, B.S., 1983

**Law School** University of Tulsa, J.D., 1986

**Admitted** 1986, Kansas; 1992, Missouri

**Memberships** Kansas City Metropolitan, Johnson County (President, 1997-1998; Member, Board of Directors, 1992-1998; Bench Bar Committee, 1995-1996) and Kansas (Recipient, Outstanding Service Award. 1996; Member: Board of Governors, 1995-1996; Executive Committee, 1995-1996; Bench Bar Committee, 1993-1995; President, 1995-1996, Young Lawyers Section) Bar Associations; The Missouri Bar; Kansas Association of Justice; Johnson County Bar Foundation (President, 2003; Member, Board of Directors, 1998-2008).

**Born** Tulsa, Oklahoma, October 3, 1960

**Biography** Member, Energy Law Journal, 1985-1986. Listed, "Best of the Kansas City Bar," Kansas City Business Journal, 2006.

**ISLN** 904807712

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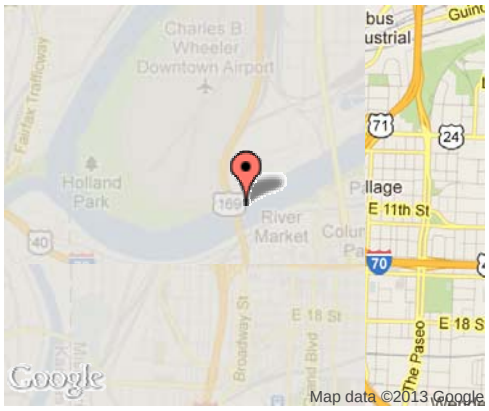


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**Practice Areas**

- Business and Commercial Litigation
- Consumer Class Actions
- Construction Litigation
- Transportation Litigation
- Personal Injury Litigation
- Products Liability
- Patent Infringement
- Copyright Infringement

**University** Baker University, B.A., summa cum laude, 1986

**Law School** Kansas University, J.D., 1989

**Admitted** 1989, Missouri; 2005, Kansas

**Memberships** Kansas City Metropolitan Bar Association; The Missouri Bar; Missouri Association of Trial Attorneys; Kansas Association of Justice.

**Born** Lawrence, Kansas, October 23, 1963

**Biography** Member, Kansas Law Review.

**Reported Cases** Schwartz v. Bann-Cor Mortgage, 197 S.W.3d 168 (Mo. App. 2006); Phipps v. FDIC, 417 F.3d 1006 (8th Cir. 2005); Johnston v. Sweany, 69 S.W.3d 398 (Mo. 2002); McGinley v. Franklin Sports, Inc., 262 F.3d 1339, 60 U.S.P.Q.2d 1001 (Fed.Cir.2001); Mizner v. North River Homes, Inc., 913 S.W.2d 23 (Mo.App.E.D.1995).

**ISLN** 902163964

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## Practice Areas

- General Litigation
- Commercial Law
- Business Law
- Personal Injury Law
- Construction Law
- Class Actions
- Civil Law

| | |
|---|---|
| **University** | University of Missouri-Columbia, B.S., 1983 |
| **Law School** | University of Missouri-Kansas City, J.D., with distinction, 1988 |
| **Admitted** | 1988, Missouri; 1989, Kansas |
| **Memberships** | Kansas City Metropolitan, Kansas and American Bar Associations; The Missouri Bar; Missouri Association of Trial Lawyers. |
| **Born** | Olathe, Kansas, December 3, 1960 |
| **Biography** | Member, Order of the Bench and Robe. Member, UMKC Law Review, 1986-1988. |
| **ISLN** | 903670270 |

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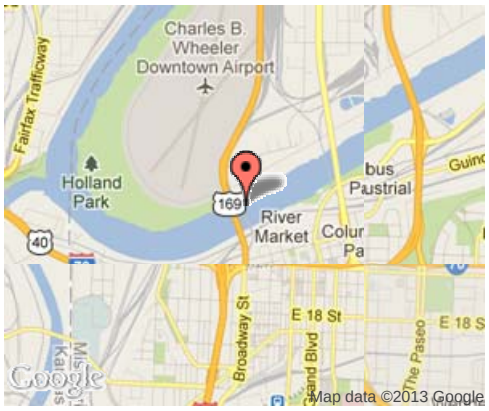


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## Experience & Credentials

### Practice Areas

- Civil Litigation
- Commercial Litigation
- Business Litigation
- Bankruptcy
- Personal Injury

| | |
|---|---|
| **University** | University of Missouri-Kansas City, B.A., with distinction, 1986 |
| **Law School** | University of Missouri-Kansas City, J.D., with distinction, 1990 |
| **Admitted** | 1990, Missouri and U.S. District Court, Western District of Missouri; 1991, Kansas and U.S. District Court, District of Kansas; 1995, U.S. Court of Appeals, Eight Circuit |
| **Memberships** | Kansas City Metropolitan and American Bar Associations; The Missouri Bar. |
| **Born** | Kansas City, Missouri, July 27, 1956 |
| **Biography** | Member, Order of the Bench and Robe. Associate Editor, University of Missouri-Kansas City Law Review, 1988-1990. |
| **ISLN** | 906118717 |

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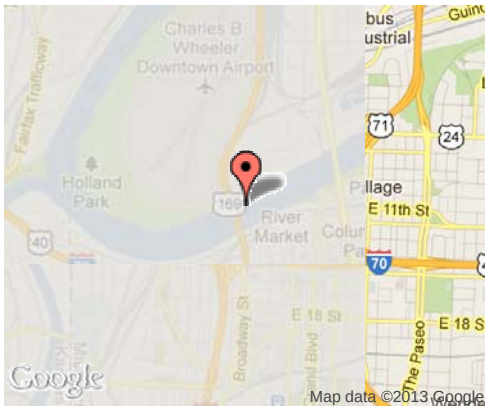


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# Exhibit 12

# FIRM RESUME OF CARLSON LYNCH LTD.

Effective June 1, 2004, Bruce Carlson and Gary Lynch combined their prior practices to form the firm of Carlson Lynch Ltd., with the intention of building a boutique firm that expanded upon their substantial individual experience and success representing plaintiffs in consumer, labor and employment and wage and hour, class action litigation in federal and state courts throughout the country. Litigation prosecuted by Carlson Lynch has resulted not only in the substantial monetary recoveries on behalf of class members described below, but Carlson Lynch cases continue to generate seminal legal authority, and the firm recently obtained its third federal appellate reversal within a twelve month period. In June 2012, the United States Supreme Court granted *certiorari* in a collective action under the FLSA in which Carlson Lynch is lead counsel for Plaintiff. Oral argument occurred in December 2012, wherein the Solicitor General of the United States participated as *amicus* supporting the position advocated by Carlson Lynch (this case originated in the EDPA).[1]

From June 2004 through June 15, 2013, Carlson Lynch was either lead or co-lead counsel representing plaintiffs in the following representative list of settled class actions:

■ *In re Wireless Phone Equipment Replacement Insurance Litigation,* (C.P. Allegheny County, Pennsylvania): Bruce Carlson and Gary Lynch were lead counsel in this national litigation alleging consumer fraud in connection with wireless phone equipment replacement insurance. Following the fairness hearing in November, 2004, the Court entered Findings of Fact and Conclusions of Law which commented on the adequacy of Carlson Lynch as lead counsel as follows:

> "Class counsel have abundant experience as lead counsel in consumer class

[1] In a highly anticipated 5-4 decision, the Supreme Court reversed the Third Circuit and ruled against Plaintiff.

> action litigation. Indeed, class counsel have frequently appeared before this Court. Other courts have routinely recognized class counsels' adequacy . . . . This Court readily agrees with these other courts, and finds that Bruce Carlson and Gary Lynch are more than adequate counsel, and indeed are capable and diligent class action attorneys."

The settlement was approved and the settlement proceeds were distributed to the class.

- *Gualano v. Abercrombie & Fitch Stores, Inc.*, (U.S.D.C., W.D. Pa). Bruce Carlson and Gary Lynch were co-lead counsel in this wage and hour litigation alleging that defendant retail clothier was violating federal and state minimum wage laws. Following the fairness hearing in early 2005, where a multi-state settlement was presented to the Court for approval, the Court entered Findings of Fact and Conclusions of Law addressing lead counsels' adequacy as follows:

> "The Court finds the plaintiffs' counsel, Bruce Carlson and Gary Lynch, are experienced class counsel and that they have met all of the requirements of Rule 23(g)(1)(B) and (C). Consistent with the underlying purpose of Fed. R. Civ. P. 23, plaintiffs' counsel have achieved, with utmost efficiency, a quality result for the entire class and are commended for the diligence and effective advocacy they have displayed on behalf of their clients."

- *Pasci v. Express, LLC*, (U.S.D.C., W.D. Pa.). This case was similar to the *Abercrombie* case discussed above, and proceeded to a fairness hearing in November 2004, where a multi-state settlement was presented to the Court for approval. Regarding the adequacy of Carlson Lynch, the Court issued Findings and Conclusions stating:

> "With respect to the adequacy of counsel, the Court finds that class counsel have capably and vigorously represented the class. Bruce Carlson and Gary Lynch have substantial experience in class-based litigation involving consumer fraud and employment claims . . . . Class counsel achieved an efficient and excellent result on behalf of the class."

- *White v. United Steel Workers of America,* (U.S.D.C., W.D. Pa.). Carlson Lynch was co-lead counsel in this age-discrimination class action against the U.S.W.A. After overcoming a motion to dismiss on a legal issue regarding which there was a substantial split of authority, the

defendant requested mediation to explore the possibility of settlement. After extensive mediation over a one month period in June 2004, the case ultimately settled for an amount that defense counsel characterized as the highest ever paid by the U.S.W.A. in connection with civil litigation.

■ *Bannon v. First One Lending, Inc.*, (C.P., Allegheny County, Pennsylvania). Carlson Lynch was co-lead counsel in this class action filed on behalf of Pennsylvania second mortgage loan borrowers alleging that they were charged excessive settlement fees in violation of the Pennsylvania Secondary Mortgage Loan Act. After the court denied defendant's motion to dismiss, the case ultimately settled and plaintiffs and the class were refunded 100% of the alleged overcharge.

■ *Dwight v. American Eagle Outfitters, Inc.,* (C.P., Allegheny County, Pennsylvania). Carlson Lynch was lead counsel in this class action alleging that American Eagle violated the minimum wage laws. The parties negotiated a multi-state settlement, which was approved by the trial court. The settlement proceeds have been distributed to the class.

■ *Tarlecki v. Bebe Stores, Inc.* (U.S.D.C., N.D. CA) Carlson Lynch was co-lead counsel in this wage and hour litigation alleging that defendant retail clothier was violating federal and state minimum wage laws. With the mediation assistance of a former federal judge from the Northern District of California, the parties reached a proposed national settlement, and final approval was granted following a fairness hearing in late 2009, at which Gary Lynch appeared on behalf of the Class.

■ *Dykeman v. Charming Shoppes, Inc.*, (Sup. Ct., King County, Washington) Carlson Lynch was co-lead counsel in this case alleging violations of the Washington state minimum wage laws. After the Court denied defendants' motion to dismiss and granted plaintiffs' class

certification motion, the parties reached a mediated settlement which was approved by the trial judge. The settlement proceeds were distributed to the class in early spring of 2007.

Carlson Lynch was also co-lead counsel in a related case in state court in California on behalf of a class of California Charming Shoppes Employees. The parties in that case negotiated a proposed settlement, and final approval was granted following a fairness hearing in May 2008.

■ *Pitts v. NovaStar Home Loans, Inc. et al.*, (U.S.D.C., S.D., Ga.) Carlson Lynch was co- lead counsel for plaintiffs in this national RESPA class action. The Southern District of Georgia was the MDL court for this litigation. After the Court denied defendant's motion to dismiss, after the court denied defendants' motion for summary judgment and granted plaintiffs' motion for class certification in a related Maryland state court action – where Carlson Lynch was also co-lead counsel, and after extensive discovery including the video depositions of several of defendants' top executives, the parties participated in multiple mediation sessions and ultimately arrived at a national cash settlement on behalf of class members for $17,300,000.00. The Court granted preliminary approval of the proposed settlement on July 11, 2007. A fairness hearing was held on September 14, 2007, at which Bruce Carlson appeared on behalf of the class. On September 18, 2007, the court entered an Order granting final approval of the settlement and entering Judgment.

■ *Battaline v. Advest,* (U.S.D.C., W.D. Pa.). Carlson Lynch was lead counsel for plaintiffs in this wage and hour class action alleging that defendant stock brokerage company violated state overtime laws. After Defendant filed its answer and substantial informal and formal discovery ensued, the parties participated in mediation and reached an agreement regarding a proposed national settlement. The Court entered an order granting final approval of the settlement on September 16, 2008.

■ *Ellis v. Edward Jones* (U.S.D.C.N.D.OH.). Gary Lynch and Carlson Lynch chaired the Plaintiffs' Leadership Committee in this wage and hour class action alleging that defendant stock brokerage company violated federal and state overtime laws. After Defendant filed an answer and after significant discovery wherein Defendant produced in excess of 500,000 pages of documents and hundreds of videotapes, the parties commenced mediation to pursue a potential global settlement. The first mediation, which occurred in Atlanta in March 2007, was unsuccessful. Ultimately, the parties participated in a second mediation in San Francisco, at which the parties arrived at the basic terms of a proposed settlement pursuant to which class members from multiple states received in excess of $19,000,000.00. After a fairness hearing on January 5, 2009, the Court granted final approval of the settlement.

■ *Byers v. PNC Financial Services Group, Inc.* (U.S.D.C. W.D. Pa.) Carlson Lynch was lead plaintiff's counsel in this wage and hour class action alleging that defendant stock brokerage company violated federal and state overtime laws. A multi-state settlement was approved following a fairness hearing in June 2008.

■ *Steen v. A.G. Edwards, Inc.* (U.S.D.C., S.D. Ca.) Carlson Lynch was co-class counsel for plaintiff in this wage and hour litigation alleging that defendant stock brokerage company violated federal and state overtime laws. A mediated national class-based settlement has been reached and preliminary approval has been granted. A fairness hearing was held on August 31, 2009 in Los Angeles, after which the Court has entered an Order granting final approval of the settlement.

■ *Meola v. AXA Financial, Inc.* (U.S.D.C., N.D. Ca.) Carlson Lynch was co-class counsel for plaintiff in this wage and hour litigation alleging that defendant financial services company violated federal and state overtime laws. A mediated national class-based settlement

was negotiated in this matter and final approval was granted following a fairness hearing in the fall of 2009.

■ *In re St. Francis Health System* (C.P., Allegheny County Pennsylvania) Carlson Lynch was counsel for the class in connection with this wage and hour litigation on behalf of certain former employees of the St. Francis Health System in Pittsburgh. Plaintiff asserted that the class was deprived of severance benefits when St. Francis Health System was acquired by another hospital group in Western Pennsylvania. Prior to the disposition of Plaintiff's class certification motion, the parties engaged in extensive mediation before reaching a class-based settlement.

■ *Haag v. Janney Montgomery Scott* (U.S.D.C., E.D. Pa.) Carlson Lynch was a member of the three firm Executive Committee in this wage and hour class action alleging that defendant stock brokerage company violated federal and state overtime laws. After protracted litigation and two separate mediations, the parties reached a multi-state settlement. A fairness hearing was conducted in Philadelphia on June 30, 2009, where Gary Lynch appeared on behalf of the class. Following the hearing, the Court granted final approval of the settlement.

■ *Steinberg v. Morgan Stanley & Co.* (U.S.D.C., S.D. Ca.) Carlson Lynch was co-class counsel for plaintiff in this wage and hour litigation alleging that defendant stock brokerage company violated federal and state overtime laws. A mediated national class-based settlement was reached and final approval of the settlement has been granted.

■ *Ramsey v. Ryan Beck, Inc.* (U.S.D.C., S.D. N.Y.) Carlson Lynch was co-class counsel in this wage and hour class action alleging that defendant stock brokerage company violated federal and state overtime laws. After protracted litigation, the parties reached a multi-state settlement and final approval was granted in June 2010.

■ *Kniess v. Heritage Valley Health Systems, Inc.* (C.C.P., Allegheny Cty, PA) Carlson Lynch was lead counsel in this wage and hour class action alleging the defendant hospital system failed to pay overtime compensation to its nurse practitioners and physician's assistants. The parties reached a mediated class settlement whereby class members received the majority of the back pay alleged by Carlson Lynch.

■ *Leadbitter v. The Washington Hospital, Inc.* (U.S.D.C., W.D. PA.) Carlson Lynch was lead counsel in this wage and hour class action alleging the defendant hospital system failed to pay overtime compensation to its nurse practitioners and physician's assistants. The parties reached a mediated class settlement whereby class members will be eligible to receive the majority of the back pay alleged by Carlson Lynch, and the settlement has received final approval from the Court.

■ *Kaher v. Ameriquest Mortgage Co.* (U.S.D.C., W.D. Pa./MDL N.D. Ill.). Carlson Lynch was counsel for plaintiff in connection with this consolidated group of class actions alleging the existence a kick-back scheme in violation of RESPA, along with numerous other unfair lending practices. The specific case being handled by Carlson Lynch created new law under RESPA. Specifically, Carlson Lynch filed this action as a test case to challenge what they viewed as a negative trend in the law regarding how federal trial courts were determining whether a consumer has standing to sue under RESPA, as well as the manner in which damages are calculated under RESPA. Every prior federal trial court to consider these issues had sided with defendants. In opposing the Ameriquest motion to dismiss that was filed in this case, Carlson Lynch argued that these other federal trial courts had fundamentally misinterpreted the legislative history of RESPA, to support their decisions to dismiss the prior cases. In a seminal decision, the United States District Court for the Western District of Pennsylvania departed from

the holdings issued by these other federal courts, and agreed with the arguments of Carlson Lynch, denying the motion to dismiss. *See*, *Kahrer v. Ameriquest Mortgage Co.*, 418 F.Supp.2d 748 (W.D. Pa. 2006)(Hay, J.). Multiple federal courts of appeal have adopted the *Kahrer* reasoning, including at least the Sixth and Third Circuits.

This case was ultimately settled as part of MDL proceedings against Ameriquest in the Northern District of Illinois, and final approval of the settlement has been granted.

■ *Career Education Corporation Misclassification Litigation* (U.S.D.C., W.D. Pa.) In early 2011, Carlson Lynch filed a putative collective action on behalf of admissions representatives employed by culinary schools operated by Career Education Corporation. Carlson Lynch alleges that these individuals were misclassified and improperly denied overtime benefits. A class settlement was negotiated in this case and final approval of the settlement was granted in December 2011.

■ *Atrium Centers, LLC Automatic Meal Break Deduction Litigation* (U.S.D.C., N.D. Ohio) Carlson Lynch is lead counsel in this collective action on behalf of hourly health care workers (primarily nurses) alleging improper pay practices in connection with automatic meal break deductions. After the court granted Plaintiffs' motion for conditional certification of a collective action under the FLSA, extensive discovery ensued. Following the close of discovery, in the fall of 2012 the Parties engaged in mediation with a former United States Magistrate Judge and reached an agreement to settle the case on a collective basis. The settlement was approved by the court in December 2012 and the settlement proceeds have been distributed.

■ *Northwestern Memorial Healthcare Automatic Meal Break Deduction Litigation* (U.S.D.C., N.D. Ill.) Carlson Lynch is lead counsel in this collective/class action on behalf of hourly health care workers (primarily nurses) alleging improper pay practices in connection with

automatic meal break deductions. After extensive discovery and the denial of Defendant's motion for summary judgment, the Parties reached a mediated class settlement in the fall of 2012. The Court has preliminarily approved the settlement and a fairness hearing is set for the fall of 2013.

■ C*rozer-Keystone Health System Overtime Litigation (Nurse Practitioners/Physician's Assistants)*. Carlson Lynch filed a putative collective action against Crozer-Keystone Health System in the Eastern District of Pennsylvania. The Complaint challenges pay practices related to nurse practitioners and/or physicians' assistants. The plaintiffs in these cases allege that they are illegally being denied overtime compensation by their employers. After discovery, the Parties filed cross motions for summary judgment. In a widely reported opinion issued on January 4, 2011, the Court granted Plaintiff's motion for summary judgment, holding that Defendant has misclassified individuals in Plaintiff's job position. Defendant's motion for reconsideration of the federal court's summary judgment decision was denied in a twenty one page opinion and order issued on August 15, 2011.

Following mediation, the settlement of this case was approved in August 2012.

■ *CitiMortgage SCRA Litigation* (S.D.NY). In July 2011, Carlson Lynch is tri-lead counsel in a class action against CitiMortgage on behalf of Sergeant Jorge Rodriguez in the Southern District of New York. This case alleges that CitiMortgage improperly foreclosed upon Mr. Rodriguez's home (and the homes of similarly situated individuals) while he was serving his country in Iraq, in violation of the Servicemembers Civil Relief Act. The case recently settled on a class basis and a motion for preliminary approval of the settlement is pending.

**Other Active Class Actions**

In addition to the above-listed cases, Carlson Lynch is lead, or co-lead counsel in

numerous pending class actions including the following (this list is ***not*** complete—it is intended to be representative only):

- *In re Community Bank of Northern Virginia and Guaranty National Bank of Tallahassee Secondary Mortgage Loan Litigation*, (U.S.D.C., W.D. Pa.). Carlson Lynch is class counsel in this national litigation under the Real Estate Settlement Procedures Act. The case originally settled for a cash amount in excess of $33,000,000.00. Bruce Carlson was lead counsel for the settling plaintiffs and presented the original proposed settlement at a fairness hearing in November 2003. The Court approved the settlement notwithstanding a coordinated opt-out and objection campaign mounted by a consortium of competing plaintiffs' counsel. The objectors appealed the Court's order approving the settlement, and Carlson presented the settling plaintiffs' position at oral argument before the U.S. Court of Appeals for the Third Circuit on February 17, 2005. In August 2005, the Third Circuit vacated the order approving the settlement, and remanded the case for further proceedings relating to the settlement.

After extensive additional briefing on remand, and with the mediation assistance of a former judge from the United States Court of Appeals for the Third Circuit, the settling parties negotiated a modified and enhanced settlement, whereby Defendants agreed to make available to the class an additional amount in excess of $14,000,000, so that the value of the proposed modified settlement was close to $50,000,000.00. At the same time, United States District Court Judge Gary L. Lancaster issued a lengthy opinion rejecting the objectors' argument that the settling plaintiffs should have asserted additional claims under the Truth in Lending Act. The proposed modified and enhanced settlement was referred to the former Chief Judge of the Western District of Pennsylvania – acting as a friend of the Court –to make an initial determination regarding the fairness and adequacy of the revised settlement. On July 5, 2007,

former Chief Judge Ziegler issued an advisory opinion holding that the modified, enhanced settlement was fair, adequate and reasonable for the class.

Thereafter, Judge Lancaster conducted a lengthy hearing regarding whether the proposed settlement class should be certified and the modified settlement preliminarily approved. On January 25, 2008, Judge Lancaster issued an opinion and order certifying the settlement class and preliminarily approving the proposed settlement. A fairness hearing related to the enhanced settlement was conducted on June 30, 2008. On August 15, 2008, the Court issued a comprehensive Opinion and Order granting final approval of the modified settlement.

Objectors again appealed the final judgment and approval of the modified settlement to the Third Circuit. Following extensive briefing, Bruce Carlson argued the position of the settling plaintiffs before the Third Circuit on April 20, 2010.

In the fall of 2010, the Third Circuit issued a published a lengthy precedential decision vacating the Order approving the settlement and remanding for further proceedings. The initial post-remand status conference was held on February 23, 2011.

At the post-remand status conference, counsel for Plaintiffs – including counsel for the objectors—proposed two alternative suggestions for the direction of the litigation going forward: 1) global mediation to ascertain whether a new settlement was possible; or, 2) entry of an MDL case management order appointing Bruce Carlson and Fred Walters as co-lead counsel for all of the consolidated actions, and directing that the case be litigated consistent with the structure set forth in the proposed order. The Court granted Defendants' request for thirty days to consider which way it would like to proceed, and Defendants ultimately requested additional mediation, which occurred in Manhattan on June 9-10, 2011. The case did not settle and is back in litigation. Defendants have filed motions to dismiss and Plaintiffs filed their brief in opposition

to the motions in early February 2012. Oral argument on the motion was held in September 2012. In late June 2013, the Court issued an Order granting the motions in part, and denying the motions in part. All of Plaintiffs' key claims survived the motions to dismiss.

Bruce Carlson and Fred Walters have been formally appointed as interim lead counsel for the class. Following the death of former Chief Judge Lancaster, the case was transferred to Judge Schwab. After the case was transferred, Plaintiffs filed a motion for class certification. The motion has been fully briefed and the Court has held oral argument in connection with the motion.

Bruce Carlson and Fred Walters are also counsel for the putative class, and represent a class plaintiff on the unsecured creditors committee, in a related bankruptcy proceeding pending in the SDNY wherein the debtor is *Rescap*, the parent company of one of the original defendant's in this action. Carlson Lynch and Walters Bender (along with bankruptcy counsel) reached a settlement in principle for the class in the bankruptcy case during the week of June 17, 2013, and a formal motion for approval of the settlement will be filed in the bankruptcy court in early July 2013.

■ *FACTA Litigation.* Carlson Lynch has been counsel for Plaintiffs in numerous putative class actions alleging a violation of the Fair and Accurate Credit Transaction Act. These cases have been filed in various federal courts nationally. Class certification motions have been granted in multiple cases. Motions to Dismiss have been denied in at least five of the cases. A motion for summary judgment was denied in a sixth case. Proposed class-based settlements have been negotiated in more than (20) twenty of the cases, with final approval having been granted, and judgment entered, in those cases.

On June 4, 2008, Congress passed an amnesty bill that eliminated potential liability for

every defendant that had a FACTA case pending against it as of that date, but did not change the law prospectively. As a result, several defendants with which Carlson Lynch had negotiated class settlements—wherein final judgment had not been entered—attempted to retreat from settlements based upon the change in law. Two judges in the Western District of Pennsylvania, and one judge in the Eastern District of Pennsylvania, issued orders and wrote opinions supporting Carlson Lynch's efforts to enforce the settlements, and those cases proceeded to judgment. One judge in the Western District of Pennsylvania refused to enforce a similarly postured class settlement, and vacated the preliminary approval order that she had previously issued. Carlson Lynch appealed that decision and the Third Circuit reversed in a published decision issued on June 15, 2010. The Third Circuit directed the trial judge to enforce the settlement, and a fairness hearing in that case was held on February 10, 2011, at which time final approval of the settlement was granted.

Carlson Lynch has recently filed multiple new FACTA cases, and discovery in those cases is ongoing, with proposed class settlements negotiated in numerous cases.

.■ *Hospital Meal-Break Overtime Litigation.* Beginning in late 2010, Carlson Lynch filed numerous putative class and/or collective actions on behalf of hourly health care workers (primarily nurses) alleging improper pay practices in connection with automatic meal break deductions. These cases remain in active litigation. Some of the defendants in these cases include: UPMC (Pittsburgh), West Penn Allegheny Health Systems (Pittsburgh), Genesis Health Care (Philadelphia), Northwestern University Health Care System (Chicago), Kindred Health Care (Chicago), HCR Manorcare (Toledo), Vanderbilt University Health Care System (Nashville), HCA, Inc. (Nashville), Resurrection Health Care (Chicago), St. John Health (Detroit). Document and deposition discovery is ongoing in some of the cases. Conditional

certification was granted in at least seven of the cases.

There has been active motions practice in a number of the cases as well, with numerous issues currently pending before multiple federal courts of appeal. On August 31, 2011, the United States Court of Appeals for the Third Circuit issued a seminal opinion in *Symczyk v. Genesis Healthcare Corporation*, reversing the trial court's order granting defendant's motion to dismiss. Gary Lynch successfully argued the appellant/plaintiff's position before the Third Circuit in this case. In this opinion, the Third Circuit defined the standards for preliminary certification in cases under Section 216(b) of the Fair Labor Standards Act. The decision in this case represented the third federal appellate reversal obtained by Carlson Lynch in the twelve month period preceding the issuance of the decision.

Some of these cases have settled on a collective basis during the summer and fall of 2012, and those settlements will be described in more detail once the documents become public.

■ *EFTA Litigation.* Beginning in late 2010, Carlson Lynch filed putative class actions on behalf of consumers in multiple federal venues under the Electronic Fund Transfer Act. Those venues include: Western District of Pennsylvania, Eastern District of Pennsylvania, Middle District of Pennsylvania, Western District of New York, Southern District of New York, Northern District of Ohio, District of Maryland, Middle District of Florida, Southern District of Florida, Western District of Missouri, Eastern District of Missouri, Southern District of Texas, Northern District of Texas, Western District of Texas, Middle District of Tennessee, Western District of Tennesse and Northern District of Georgia. These cases allege that various automated-teller machine ("ATM") operators (primarily financial institutions) violated mandatory ATM fee disclosure requirements, and therefore were not permitted to impose transaction fees on ATM users at their machines. Motions to dismiss were granted in two cases

based upon EFTA's statutory safe harbor provision, and Carlson Lynch appealed the dismissals to the Third Circuit. The Third Circuit agreed with Carlson Lynch and reversed the Orders granting the motions to dismiss, and both of those cases were remanded for further proceedings, and then settled on a class basis. Class settlements have been negotiated in at least twenty five additional cases to date. Some cases have been settled on an individual basis. Numerous cases remain pending throughout the country and are in active litigation. Litigation classes have recently been certified in some of the cases.

■ *ADA ATM Accessibility Litigation.* Carlson Lynch is currently counsel for Plaintiffs in a substantial number of actions filed under the Americans with Disabilities Act on behalf of blind individuals to enforce ATM accessibility laws. These cases are pending in numerous federal venues nationally. A substantial number of the cases have been settled, and in all of those cases the Defendants have agreed to equitable relief calculated to guarantee that they come into compliance with the relevant regulations, and that once they are in compliance, they will remain in compliance. There has been a limited amount of motions practice in these cases. Several Defendants have filed motions to dismiss challenging Plaintiffs' standing to sue under Article III of the Constitution. None of these motions have been successful to date, and in fact one United States Magistrate Judge in the Eastern District of Texas initially issued a Report and Recommendation suggesting that Defendant's motion to dismiss should be granted, but after Carlson Lynch filed a motion for reconsideration demonstrating that the Magistrate Judge was urging a position that would be a clear error of law, the Magistrate Judge issued an amended opinion and recommended that the motion to dismiss be denied in its entirety. Motions to dismiss have been denied in six of these cases to date.

■ *Other Class Actions.* As of June 2013 Carlson Lynch has filed numerous additional

class actions on behalf of consumers and wage earners throughout the country. These cases include wage and hour cases against adult entertainment establishments (i.e. on behalf of "strippers" who have been paid improperly) and false advertising cases related to deceptive product labeling. Those cases will be described in greater detail as the cases mature.

**FIRM LAWYERS**

**Bruce Carlson**

Bruce Carlson is from Wilkinsburg, Pennsylvania, where he attended the public schools. He graduated from the University of Pittsburgh School of law in 1989. He was the Executive Editor of the Journal of Law and Commerce in law school. He also obtained his undergraduate degree from the University of Pittsburgh, graduating *summa cum laude* in political philosophy. After law school, he was employed for approximately four years at Eckert Seamans Cherin & Mellott, in Pittsburgh. Subsequently, he was a member at the Pittsburgh plaintiffs-FELA and mass tort firm previously known as Peirce Raimond, Osterhout, Wade, Carlson & Coulter. During his five year tenure at the Peirce firm, Carlson developed and managed one of the largest, if not the largest, pediatric lead poisoning practices in the country. After his practice evolved and began to focus more on consumer class action litigation, he affiliated the practice with a prominent Pittsburgh-based plaintiffs' class action firm. During the three and one-half years that he was affiliated with that firm, Carlson originated and was lead counsel in more consumer class cases than any lawyer in Western Pennsylvania. These cases were filed not only in Western Pennsylvania, but in state and federal courts throughout the country. Effective June 1, 2004, Carlson ended his relationship with his former firm and aligned his practice with his law school friend and frequent co-counsel, Gary Lynch.

Carlson is admitted to practice in the state courts of Pennsylvania and West Virginia, the

United States District Courts for the Western, Middle and Eastern Districts of Pennsylvania, the Northern and Southern Districts of West Virginia, the Northern District of Ohio, the Northern, Southern, Eastern and Western Districts of Texas, the District of Maryland, the Western District of Tennessee and the United States Courts of Appeal for the Third and Eleventh Circuits. He is a member of the Million Dollar Advocates Forum. He is a member of the American Association of Justice, and the Pennsylvania, Western Pennsylvania and West Virginia Trial Lawyers Associations.

**Gary Lynch**

Gary Lynch is from New Castle, Pennsylvania, where he attended the public schools. He has been engaged in the practice of complex litigation on behalf of plaintiffs for the last fifteen years. He graduated from the University of Pittsburgh School of Law in 1989, after obtaining a Bachelor of Science degree in Accounting at Penn State University in 1986. While in law school, he was the Topics Editor of the *Law Review*.

After graduating from law school, Lynch was initially employed by Reed Smith, then the largest law firm in Pittsburgh. After working at that firm for several years and focusing primarily on litigation defense, he decided that he wanted to start his own practice, representing plaintiffs rather than defendants. Initially, he specialized in employment litigation on behalf of plaintiffs, and in that context, successfully handled both individual cases and class actions.

From 1994 through 1999, he served as the managing partner of a four-attorney "boutique" firm, focusing on plaintiff employment litigation, complex personal injury, Workers' Compensation and Social Security disability. During this time, Lynch began to focus his practice on class litigation, at first solely in the context of employment discrimination litigation. Since founding Carlson Lynch with Bruce Carlson in 2004, he has continued his practice in

plaintiffs' employment litigation and, at the same time, has increasingly worked on consumer class actions. In collaboration with Bruce, Gary has been successful in expanding his class action practice nationally. Gary is currently spearheading nationwide class litigation involving a number of different industries and practices. He oversees all of the firm's labor and employment class litigation.

Gary is admitted to practice in the state courts of Pennsylvania, the United States District Courts for the Western, Middle and Eastern Districts of Pennsylvania, the Northern and Southern Districts of Ohio, the Northern District of Illinois and the United States Courts of Appeal for the First, Third, Seventh, Ninth and Eleventh Circuits. He is also admitted to the United States Supreme Court.

**Pam Miller**

Pam graduated from Westminster College in 1989 with a degree in history and political science. She graduated from the University of Pittsburgh School of Law in 1993. Pam oversees the firm's disability practice.

**Stephanie Goldin**

Stephanie attended the College of William of Mary, where she graduated in 2000 with a Bachelors of Business Administration, with a minor in economics. She graduated *cum laude* from the University of Pittsburgh School of Law in 2006. While at Pitt Law, Stephanie served on the Journal of Law and Commerce. Stephanie worked as a clerk at Carlson Lynch between her second and third years of law school, and during her third year of law school, before joining the firm as a full time lawyer in the fall of 2006. Stephanie works primarily in the firm's consumer class litigation practice.

**Sunshine Fellows**

Sunshine attended the University of Pennsylvania, where she graduated in 1998 with a Bachelor of Arts in Sociology. She graduated *cum laude* from the University of Pittsburgh School of Law in 2001. While at Pitt Law, Sunshine served as a Research Editor for the Law Review. After law school, Sunshine was an associate at Kirkpatrick Lockhart & Gates between 2001 and 2004, Bechtol & Lee between 2004 and 2007 and Jackson Lewis between 2007 and 2011. Sunshine works primarily in the firm's wage and hour and employment practices.

**Carlos Diaz**

Carlos attended Duquesne University where he graduated in 2001 with a Bachelor of Science in Business Administration. He obtained his law degree from Duquesne in 2004. After law school, Carlos was an associate at Melkus, Fleming & Gutierrez in Tampa, Florida, between 2004 and 2006, and Burns White in Pittsburgh between 2006 and 2011. Carlos is admitted to practice in both Pennsylvania and Florida. Carlos speaks fluent Spanish. Carlos works primarily in the firm's consumer class litigation practice.

**Jamisen Etzel**

Jamisen attended Duquesne University where he graduated *magna cum laude* in 2008 with a Bachelor of Arts in Political Science. He obtained his law degree from New York University School of Law in 2011. While at NYU Law, Jamisen was the Managing Editor of the Journal of Legislation and Public Policy. During the summer of 2010, Jamisen served an internship with United States District Judge William H. Walls of the United States District Court for the District of New Jersey. Jamisen works primarily in the firms' consumer class litigation practice.

**OF COUNSEL:**

**Tom Withers**

Tom became of counsel to Carlson Lynch in June 2008, and often provides advice and counsel to

the firm regarding trial strategy.

Tom graduated from the University of Georgia law school in 1984. He also received his undergraduate degree from the University of Georgia.

After graduating from law school, Tom joined Oliver, Maner and Gray, in Savannah, Georgia, where he was a partner from 1988 until 1990. While at Oliver, Maner and Gray, Tom was primarily engaged in the defense of medical malpractice cases for physicians. During his six years with the firm, Tom tried approximately ten medical negligence cases to verdict, all of which resulted in verdicts for the defendants.

Thereafter, Tom joined the United States Attorney's Office in the Southern District of Georgia, where he remained for eight years. Tom initially served as an Assistant U.S. Attorney in the Criminal Section before becoming Chief of the Criminal Section in 1993. Tom also served as a Professional Responsibility Officer during his time with the United States Attorney's Office and was given the Department of Justice's Director's Award in 1997.

In 1998, Tom left the United States Attorney's Office and became a founding partner of Gillen Parker & Withers (now, Gillen Withers & Lake, LLC). Tom's practice focuses on federal and state criminal defense, Medicare/Medicaid fraud, and complex civil litigation.

Tom is admitted to practice in the state courts of Georgia, the United States District Courts for the Southern and Northern Districts of Georgia, and the United States Court of Appeals for the Eleventh Circuit.