**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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| GINNINE FRIED, on behalf of herself and all others similarly situated,<br><br>Plaintiff,<br>v.<br><br>JPMORGAN CHASE & CO., and JPMORGAN CHASE BANK, N.A. d/b/a CHASE,<br><br>Defendants. | Civil Action No.: 15-2512(MCA)(MAH) |

# BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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## PRELIMINARY STATEMENT

Pursuant to Fed. R. Civ. P. 23(e), Plaintiff Ginnine Fried submits this motion in support of final approval of the proposed Settlement.[1]

Plaintiff commenced this class action lawsuit on behalf of herself and all others similarly situated, seeking economic damages and injunctive relief arising out of the business practices of Defendant JPMorgan Chase Bank, N.A. d/b/a Chase ("Defendant" or "Chase")[2] in connection with the collection of Private Mortgage Insurance ("PMI")[3] on residential mortgage transactions. Plaintiff alleged that Chase conflated certain loan modification concepts, including "original value" and the automatic "termination date" applicable to loan modifications, with those for loan refinancing and consequently required Plaintiff and similarly situated borrowers to continue paying PMI after the Homeowners Protection Act of 1998, 12 U.S.C. § 4901 *et seq*. ("HPA") required termination of PMI.

After four years of hard-fought litigation, Plaintiff and Chase reached a nationwide settlement that provides real and substantial benefits to Settlement Class Members in the form of monetary and non-monetary relief.[4] First, the proposed Settlement creates a $3 million common

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[1] On June 17, 2019, Plaintiff and Class Counsel separately filed a motion for an award of attorneys' fees, costs and expenses and an Incentive Award to Plaintiff. Service ("Fee Motion"). (Dkt. Entries 79, 79-1.) Class Counsel previously filed a true and correct copy of the Settlement Agreement, attached as Exhibit 1 to the Declaration of Antonio Vozzolo in support of preliminary approval ("Vozzolo Prelim. Approval. Decl."). (Dkt. Entry 76-3.).

[2] Defendant JPMorgan Chase & Co. was dismissed from the case pursuant to the Court's November 30, 2017 order. (Dkt. Entries 57, 58.)

[3] PMI is extra insurance that lenders require from most homebuyers who obtain loans that are more than 80 percent of their new home's value.

[4] All capitalized terms used and not otherwise defined herein have the definitions set forth in the Settlement Agreement.

fund ("Settlement Fund"), which will be utilized to pay Settlement Class Members, and all approved attorneys' fees and expenses. Settlement Class Members are not required to submit a claim form, rather settlement payments will be made automatically by check via First Class Mail to Settlement Class Members. Second, as a direct result of this Action, Defendant ceased the collection of improper PMI charges and will comply with the United States Court of Appeals for the Third Circuit ruling in *Fried v. JP Morgan Chase & Co.*, 850 F.3d 590 (3d Cir. 2017)) (the "Third Circuit Order"). These practice changes are significant in that they will save class members, based on Plaintiff's Counsel's calculation, approximately $16.5 million in PMI overpayments from the date when the changes were made. Indeed, this change in Chase's business practices has already saved Settlement Class Members millions in overpayment of PMI premiums. Combined with the monetary relief under the Settlement, proposed Class Counsel believe that total value of the proposed Settlement to Settlement Class Members exceeds $19.5 million, adequately addressing and compensating Settlement Class Members for the harm they suffered in light of the risks of continued litigation.

The proposed Settlement reflects an excellent resolution of the Parties' respective claims and defenses, is fair, reasonable, and adequate, and falls within the range of permissible approval. The Settlement resulted from protracted arm's-length negotiations by experienced attorneys familiar with the legal and factual issues of this case and all Settlement Class Members are treated fairly under the terms of the Settlement. Moreover, the Parties have litigated this action for four years, with Plaintiff prevailing both on a motion to dismiss, which was appealed to the Third Circuit, and on a partial motion for summary judgment. Through this motion practice, together with both informal investigation and discovery, as well as confirmatory discovery after the material terms of the Settlement were reached, the Parties have ample knowledge of both the facts

and the law underlying Plaintiff's claims and Defendant's defenses, the risks presented by the case, and the value achieved by the proposed Settlement.

Finally, the reaction of the Class strongly supports approval of the Settlement. Pursuant to the Court's Preliminary Approval Order, as described more fully below, notice by first class mail was provided to each of the Settlement Class Members. To date, not a single Class Member has either requested exclusion from the Settlement or filed an objection. This is hardly surprising since the Settlement has already provided significant monetary benefits to Settlement Class Members through the changes Chase has already implemented in its PMI collections.

Accordingly, Plaintiff submits that the Settlement is fair, reasonable and adequate and in the best interests of the Settlement Class.

## FACTUAL BACKGROUND

### I. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of this Action is set forth in Plaintiff's Brief in Support of Motion for Attorneys' Fees, Costs and Expenses, and Incentive Award, pp. 3-7 (Dkt. Entry 79-1) and the Declaration of Antonio Vozzolo in Support of Motion for an Award of Attorneys' Fees, Costs and Expenses, and an Incentive Award for Plaintiff ("Vozzolo Fee Decl.")(Dkt. Entry 79-2), both of which are incorporated herein by reference.

### II. THE MATERIAL TERMS OF THE SETTLEMENT

The Settlement Agreement requires Defendant to pay $3,000,000.00 into a common Settlement Fund, which will be used to pay any Fee Award to Class Counsel, Class Representative Incentive Award, and payments to Settlement Class Members. *See* (Dkt. Entry 76-3) ("Settlement Agreement" or "Settlement") § 3. Payments will be made to Settlement Class Members automatically by the Settlement Administrator. Notably, following the entry of the Third Circuit

Order, and as a direct result of Plaintiff and Class Counsel's success on that appeal, Chase has modified its practices to conform to the Third Circuit's Order, and the Settlement provides that Chase will comply with the construction of the HPA in the Third Circuit Order, unless and until the Third Circuit Order is limited, altered or overruled by further judicial, regulatory, or legislative action. *Id.* § 5. Class Counsel, using the spreadsheet provided by Defendant, has calculated that this change in business practices will prevent Chase from collecting approximately $16.5 million in unearned PMI premiums in violation of the express provisions of the HPA. Vozzolo Fee Decl. ¶ 10. In addition to the Settlement Fund, Defendant will pay all reasonable costs and expenses for providing administration of the Settlement and notice to the Class in accordance with the Settlement Agreement.[5] Settlement Agreement § 8.

In exchange for the foregoing relief, the Settlement Class Members who do not opt out of the Settlement will release Defendant and all Released Parties from all Released Claims asserted in this Action and any related claims which could be asserted arising out of or relating to (i) the charging, overcharging, billing, collection, or payment of PMI charges or premiums through and including the date of mailing of Notice, (ii) Defendant's disclosure practices relating to PMI through and including the date of mailing of Notice, and (iii) any other claims raised or that could have been raised within the scope of the facts asserted in the Complaint. *Id.* ¶7.3.

[5] Notice costs also include notification of the Attorney General of the United States, the Office of the Comptroller of the Currency, the Director of the Consumer Financial Protection Bureau, and the attorneys general of the 48 states and the District of Columbia in which a Settlement Class Member resides in accordance with the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715(b).

## LEGAL ARGUMENT

### I. THE COURT SHOULD CONFIRM ITS CERTIFICATION OF THE SETTLEMENT CLASS

The Court's Preliminary Approval Order (Dkt. Entry 78) conditionally certified a class for settlement purposes of all customers of Chase-serviced mortgage loans for which the customers (i) entered into a loan modification, (ii) had a PMI Automatic Termination Date on or after April 1, 2013, and (iii) made one or more payments for PMI after their Automatic Termination Date[6] and before the date, if any, that Defendant ceased servicing their loan, which payments were not fully refunded to the customer by the private mortgage insurer.[7] (Dkt. Entry 78) ¶ 2 (the "Settlement Class").

Under Federal Rule of Civil Procedure 23, a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the Court to find that:

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[6] The "Automatic Termination Date" is the date on which a mortgagor's obligation to pay for private mortgage insurance would have automatically terminated under 12 U.S.C. § 4902(b) if automatic termination dates had been calculated and applied using the "original value" of the mortgaged property as defined in 12 U.S.C. § 4901(12), and not the updated at-modification value of the property.

[7] Excluded from the Class are: (i) the Settlement Administrator; (ii) any officers, directors, or employees of Defendant as of the date of filing of the Action; (iii) any judge presiding over the Action and his or her immediate family members; and (iv) Persons who properly and timely opt out of the Settlement Class by submitting a Request for Exclusion.

> questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3). The propriety of certifying a class solely for purposes of settlement is well established in the Third Circuit. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 508 (D.N.J. 1997) (stating that Rule 23 allows Court to certify class for settlement purposes only); *In re General Motors Corp. Pick-Up Truck Fuel Tank*, 55 F.3d 768, 778 (3d Cir. 1995); *In re Pet Food Prods. Liab. Litig.,* 2008 WL 4937632, at *3 (D.N.J. Nov. 18, 2008) ("Class actions certified for the purposes of settlement are well recognized under Rule 23."), affirmed in part and vacated in part, *In re Pet Food Prods. Liab. Litig*., 629 F.3d 333, 335 (3d Cir. 2010). The Court should now grant final certification because the Settlement Class meets all of the requirements of Rule 23(a) and Rule 23(b)(3).

**A. Rule 23(a) Is Satisfied**

**1) Numerosity**

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is "impracticable." *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 73 (D.N.J. 1993), *vacated and remanded*, 171 F.3d 818 (3d Cir. 1999). For purposes of Rule 23(a)(1), "impracticable" does not mean impossible, only that common sense suggests that it would be difficult or inconvenient to join all class members. *See Prudential*, 962 F. Supp. at 510; *see also Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (numerosity requirement satisfied "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40") (citation omitted). Given the number (3,753) and geographic dispersion of Class Members, joinder would

be impracticable, and the proposed Settlement Class easily satisfies Rule 23's numerosity requirement. *Liberty Lincoln Mercury, Inc.*, 149 F.R.D. at 73.

**2) Commonality**

The Rule 23(a)(2) requirement is satisfied where, as here, there exists "questions of fact and law which are common to the class." All questions of fact and law need not be common to satisfy the rule. Rather, the commonality requirement is easily satisfied by the existence of one common question of law or fact. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 527-28 (3d Cir. 2004); *see also Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (commonality requirement not demanding because it may be satisfied by a single common issue). The commonality requirement is satisfied if the named plaintiff shares at least one question of fact or law with the complaints of the prospective class. *See In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 597 (3d Cir. 2009) (citation omitted); *see also Baby Neal*, 43 F.3d at 56 ("Because the requirement may be satisfied by a single common issue, it is easily met . . . .").

Here, Class Members share numerous common questions, including: (a) whether Chase miscalculated the PMI Termination Dates for modified mortgage loans; (b) whether Chase used the wrong value when calculating the Termination Dates for modified mortgage loans; and (c) whether Plaintiff and Class Members are entitled to recover damages in connection with Chase's alleged unlawful conduct. Because Plaintiff has identified numerous questions of law and fact common to all members of the class, Rule 23(a)(2)'s commonality requirement is fully satisfied.

**3) Typicality**

Rule 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class and seeks to ensure that the interests of the named plaintiffs align with those of the class. *Baby Neal*, 43 F.3d at 57.

Typicality is satisfied if the plaintiff's claims are not '"markedly different"' from those of other class members, *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985) (citation omitted), and plaintiff and the class '"point to the same broad course of alleged fraudulent conduct to support a claim for relief."' *In re Lucent Techs., Inc. Sec. Litig*., 307 F. Supp. 2d 633, 640 (D.N.J. 2004) (citation omitted). "[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." *Baby Neal*, 43 F.3d at 58 (citation omitted). '"Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory."' *Id.* (citation omitted). Indeed, the Third Circuit recognizes a "low threshold" for satisfying typicality. *Newton*, 259 F.3d at 183-84 (citation omitted); *see also McGee v. Cont'l Tire N. Am., Inc.*, 2009 U.S. Dist. LEXIS 17199, at *27 (D.N.J. Mar. 4, 2009) ("As with numerosity, the Third Circuit has 'set a low threshold for satisfying' typicality….") (citations omitted).

Here, the claims of the named Plaintiff are typical of those of the Class. Like those of the Class, her claims arise out of Chase's practice of utilizing an improper methodology for calculating the Termination Dates for modified mortgage loans. Plaintiff has precisely the same claims as the Settlement Class and must satisfy the same elements of each of those claims, as must other Settlement Class members. Supported by the same legal theories, Plaintiff and all Settlement Class Members share claims based on the same alleged course of conduct: Chase's improper assessment and collection of PMI. Because Plaintiff has been harmed by same overall course of conduct and in the same way as the Class, her claims are typical of the Class Members.

**4) Adequacy**

The final prerequisite requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy of representation inquiry has two components intended to assure that the absentees' interests are fully pursued…." *GM Trucks*, 55 F.3d at 800; *see also Chakejian,* 275 F.R.D. at 209-10. First, "it considers whether the named plaintiffs' interests are sufficiently aligned with the absentees' [interests]." *GM Trucks*, 55 F.3d at 800 (citation omitted). Second, "it tests the qualifications of the counsel to represent the class." *Id.* (citation omitted). Plaintiff satisfies both prongs of the adequacy requirement.

First, Plaintiff's interests are consistent with, and not antagonistic to, the interests of other Settlement Class Members. Plaintiff and each Class Member were injured in the same manner, and Plaintiff asserts the same legal claims as those of the Class. Thus, they share a common interest in establishing liability and securing the maximum possible recovery. Plaintiff has taken her obligations to the Settlement Class seriously. She engaged in the prosecution of this matter, has consistently conferred with her counsel, reviewed the various pleadings, and consulted with Class Counsel regarding the propriety of the Settlement.

Further, this Court has already found that Plaintiff's Counsel are qualified, experienced, and able to conduct the litigation, as evidenced by the Court's March 28, 2019 Preliminary Approval Order appointing Plaintiff's Counsel as Class Counsel. (Dkt. Entry 78.) Additionally, Class Counsel are active practitioners who are highly experienced in complex class actions, including consumer fraud and product defect litigation. *See* Vozzolo Prelim. Approval Decl. Ex. 2 (Firm Resume of Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C.); Ex. 3 (Vozzolo LLC Firm Resume). This experience has provided Class Counsel with extensive knowledge of the applicable law. In addition, Class Counsel has devoted considerable time and resources to this Action. Accordingly, since Plaintiff and Class Counsel have demonstrated their commitment to

representing the Settlement Class and neither have interests antagonistic to the Settlement Class, the adequacy requirement is satisfied.

**B. Rule 23(b)(3) Is Satisfied**

To certify a class under Rule 23(b)(3), the Court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The existence of individual questions of fact does not *per se* preclude class certification. *Eisenberg*, 766 F.2d at 787. Rather, the predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (citation omitted); *see also In re Ins. Brokerage Antitrust Litig.*, 579 F.3d at 266 (3d Cir. 2009). Particularly within the context of this Settlement, the proposed Settlement Class is well-suited for certification under Rule 23(b)(3) because questions common to the Settlement Class Members predominate over questions affecting only individual Settlement Class Members, and the class action device provides the best method for the fair and efficient resolution of the Settlement Class Members' claims against Chase.

**1) Common Legal And Factual Questions Predominate**

A class action is appropriate under Rule 23(b)(3) if "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "[C]ommon issues predominate when the focus is on the defendants' conduct and not on the conduct of the individual class members." *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 187 (D.N.J. 2003) (citation omitted); *see also In re Cmty. Bank*, 418 F.3d at 309 (predominance requirement satisfied where "[a]ll plaintiffs' claims arise from the same alleged fraudulent scheme"; "[t]he presence of potential state law or federal claims that were not asserted

by the named plaintiffs does not defeat a finding of predominance") (citation omitted). The Third Circuit has noted that the predominance requirement is "readily met" in certain cases alleging consumer fraud. *Prudential*, 148 F.3d at 314 (quoting *Amchem*, 521 U.S. at 625).

As discussed above, the same common questions relevant to the Rule 23(a)(2) analysis predominate, including whether Chase used the wrong methodology value when calculating the Termination Dates for modified mortgage loans. The predominance requirement is satisfied.

**2) A Class Action Is A Superior Method Of Adjudication**

For certification under Rule 23(b)(3), the court must determine that class treatment is superior to other available methods of adjudication. Fed. R. Civ. P. 23(b)(3). Class certification is superior where individual claims are small or modest. *Prudential*, 148 F.3d at 316; *see also Bredbenner v. Liberty Travel, Inc.,* 2011 U.S. Dist. LEXIS 38663, at *26-27 (D.N.J. Apr. 8, 2011).

Class treatment is not merely superior, but is the only manner in which to ensure fair and efficient adjudication of this Action. Given that each Settlement Class Member's claim, individually, is of a relatively low value, individual Settlement Class Members will likely have little incentive to pursue their claims on an individual basis. A class action will allow individual Settlement Class Members to bring together claims that would be economically infeasible to litigate otherwise. Class treatment in the settlement context is also superior to individual suits or piecemeal litigation because it facilitates favorable resolution of all Settlement Class Members' claims and conserves scarce judicial resources. Also, there has been no other litigation concerning this controversy, and there is no reason why this case should not be concentrated in this Court. Further, because we are in the context of a proposed Settlement, whether the case would be manageable at trial is not of consequence. *See Amchem*, 521 U.S. at 620. Therefore, a class action is a superior method of adjudicating this case.

## II. NOTICE SATISFIES DUE PROCESS

Before final approval can be granted, Due Process and Rule 23 require that the notice provided to the Settlement Class is "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice must clearly state essential information regarding the settlement, including the nature of the action, terms of the settlement, and class members' options. *See* Fed. R. Civ. P. 23(c)(2)(B). Both the content and the means of dissemination of the notice must satisfy the "best practicable notice" standard.

Plaintiff has provided the Class with adequate notice of the Settlement. In accordance with the Preliminary Approval Order, Kurtzman Carson Consultants ("KCC") mailed the Settlement Notice via first-class mail to 3,753 Class Members identified through Defendant's last known or available address of record for each Class Member or any updated address identified by the KCC. *See* Declaration of Edward Dottilo (Dkt. Entry 82-1) ("Dottilo Decl.") ¶5.[8] The direct notice sent to all reasonably identifiable Settlement Class Members provided the best notice practical under the circumstances, giving Settlement Class Members a full and fair opportunity to consider the terms of the Settlement and make a fully informed decision as to whether to participate, object, or opt-out of the Settlement. *Eisen*, 417 U.S. at 173 (noting that individual notice is preferred method

[8] 92 out of the 3,753 Notices sent by KCC were returned as undeliverable by the United States Postal Service. In response, KCC ran a search for an updated address for Settlement Class Members whose Notice was returned as undeliverable, and updated and re-mailed the Notice to 18 Settlement Class Members for whom an address were found. Dottilo Decl. ¶9.

where addresses of class members can be ascertained through reasonable effort); *Prudential I*, 962 F. Supp. at 527 (actual notice by mail and published notice was "ideal").

Notice of the proposed Settlement was also served on the Attorney General of the United States and to the Attorneys General of all 48 states and the District of Columbia where putative Settlement Class Members are believed to reside, the Office of the Comptroller of the Currency, and the Director of the Consumer Financial Protection Bureau, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715. Dottilo Decl. ¶3. KCC also established a national toll-free number, and established a dedicated Settlement Website featuring copies of the Notice, the Settlement Agreement, Preliminary Approval Order, exclusion request form, Complaint, and other information relating to the terms and benefits of the Settlement such as Frequently Asked Questions to aid in providing the necessary information to Settlement Class Members. *Id.* ¶¶ 6-7. Thus, the notice program that the Court initially and preliminarily approved was fully implemented and has informed the Class fully of their rights and benefits under the Settlement, fulfilling the requirements of due process and those of Rule 23(c)(2).

## III. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE GRANTED FINAL APPROVAL

"[S]ettlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts . . . and preventing lawsuits." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 401 (1977) (alteration in original). In complex class action lawsuits such as this, the policy of favoring voluntary resolution through settlement is particularly strong. *See In re Pet Food Prods. Lib. Litig.*, 629 F.3d 333, 351 (3d Cir. 2010) (finding "overriding public interest in settling class action litigation"). The Third Circuit applies this "strong presumption in favor of voluntary settlement agreements," which is "especially strong in class actions and other complex cases . . . because they promote the amicable resolution of disputes

and lighten the increasing load of litigation faced by federal courts." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (quotation omitted).

**A. The Settlement is Fair, Reasonable and Adequate**

Under the amended provisions of Rule 23(e), approval of a settlement requires that the Court find that the settlement is "fair reasonable and adequate after considering whether:

> (A) The class representatives and class counsel have adequately represented the class;
>
> (B) The proposal was negotiated at arm's length;
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> (C) The relief provided for the class is adequate, taking into account:
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> (i) the costs, risks, and delay of trial and appeal;
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> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
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> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3)
>
> (D) the proposal treats class members equitably relative to each other."

Fed. R. Civ. P. 23(e)(2).

These factors appear to be a combination of the factors formerly considered under *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)[9] and *In re Prudential Insurance Company America Sales Practice Litigation*, 148 F.3d 283, 323-24 (3d Cir. 1998), and are intended to focus the parties'

[9] The *Girsh* factors are: "(1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." 521 F.2d at 157.

and the Court's attention on a shorter list of factors relating to the propriety of a proposed class settlement.

> A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of these factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).
>
> This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision on whether to approve the proposal.

Fed. R. Civ. P. 23, Advisory Committee Notes, 2018 Amendments, Subdivision (e)(2)

**1) Plaintiff and Class Counsel Adequately Represented the Settlement Class**

As demonstrated in Plaintiff's Fee Brief and the accompanying declaration, Plaintiff and Class Counsel have diligently represented the interests of the Settlement Class through four years of contentious litigation. In the definition of "original value" and the application of the HPA cap on statutory damages, this Action presented two complex legal issues of first impression. Nevertheless, Class Counsel prevailed on these issues against Defendant's motion to dismiss, an appeal of this Court's MTD Order and overcame Defendant's motion for partial summary judgment. Therefore, "this court knows first-hand that the case was honestly and persistently negotiated, with both parties holding their ground when required." *Pliego v. Los Arcos Mexican Rests., Inc.*, 313 F.R.D. 117, 129-130 (D. Colo. 2016). Just as in *Pliego*, this Court has "first-hand" knowledge of the zealous manner in which Plaintiff and Class Counsel have represented the interests of the Settlement Class.

Moreover, Plaintiff and Class Counsel were fully informed of the facts and the law prior to agreeing to the Settlement. While the Parties had not conducted formal discovery, this action was unique in that there was little dispute regarding the facts. Rather, the dispute in this action revolved around the proper application of the HPA to the largely undisputed facts. Courts within this District have recognized in cases such as this, where Class Counsel conducted extensive informal investigation and discovery and have survived multiple dispositive motions, even with "no formal discovery, Plaintiff's Counsel had ample information to evaluate the prospects for the Class and to assess the fairness of the Settlement." *In re Ocean Power Techs., Inc.*, 2016 U.S. Dist. LEXIS 158222, *54-55 (D.N.J. Nov. 15, 2016); *see also In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 482 (D.N.J. 2012) (" Even settlements reached at a very early stage and prior to formal discovery are appropriate where there is no evidence of collusion and the settlement represents substantial concessions by both parties."); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012) ("The threshold necessary to render the decisions of counsel sufficiently well informed, however, is not an overly burdensome one to achieve—indeed, formal discovery need not have necessarily been undertaken yet by the parties."). In this Action, when the Settlement was reached, even without formal discovery, the factual basis of this Action was sufficiently developed that Defendant was prepared, albeit unsuccessfully, to file for partial summary judgment. Plaintiff and Class Counsel were well-informed regarding Plaintiff's claims and the likelihood of recovery from Defendant. As a result, Plaintiff and Class Counsel had an adequate basis for assessing the strengths of the Settlement Class's claims and the risks of continued litigation against Chase when they entered into the Settlement.

In sum, Plaintiff and Class Counsel more than adequately represented the interests of the Settlement Class throughout the litigation.

**2) The Settlement is the Product of Good Faith, Arm's-Length Negotiations Conducted By Well-Informed And Experienced Counsel**

This Settlement is the result of extensive arm's-length negotiations undertaken in good faith by experienced and respected counsel for the Parties. As noted above, the Parties' negotiations—spanning the course of nearly two years—involved numerous telephonic conferences between the Parties and a settlement conference before this Court. *See Sakalas v. Wilkes-Barre Hosp. Co.*, 2014 WL 1871919 (M.D. Pa. May 8, 2014) (settlement approved where *"*case has been actively litigated for over three years, requiring both parties to complete discovery and subsequently undergo settlement discussions and ultimately a settlement conference wherein the present agreement was reached."). The Court's participation in the settlement conference provides further assurance that the settlement is the result of arm's-length negotiations. *See Ramirez v. Greenside Corp.*, 2017 U.S. Dist. LEXIS 30527, *8 (S.D.N.Y. March 3, 2017)("because I presided over the settlement conference at which the settlement was reached, I know that the settlement is the product of arm's-length bargaining between experienced counsel."); *Pliego*, 313 F.R.D. at 129-130 ("Given this court's direct involvement in two settlement conferences with the parties and their counsel, this court knows first-hand that the case was honestly and persistently negotiated, with both parties holding their ground when required.").

Throughout every stage of their negotiations, the Parties weighed the strengths and weaknesses of Plaintiff's claims and Chase's defenses, including consideration of, among other issues, legislative intent with respect to the HPA's definition of "original value," any possible statutory cap on actual damages, the statute of limitations, and difficulties in certifying a class. In addition, the Settlement followed an extensive investigation as well as informal discovery and motion practice. *See In re Philips/Magnavox TV Litig.*, 2012 WL 1677244, at *11 (D.N.J. May 14,

2012) ("Where this negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent.").

Moreover, Class Counsel, two firms with extensive experience in prosecuting complex class actions in this District and around the country, believe that the Settlement is in the best interests of the Settlement Class. Vozzolo Fee Decl. ¶¶ 5, 12. Counsel's judgment is entitled to considerable weight. *See Varacallo v. Mass Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (Courts have consistently given "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.").

The fact that the Settlement is the product of protracted, arm's-length negotiations between experienced and well-informed counsel demonstrates that the process by which the Settlement was reached was fair and not the product of collusion. *See, e.g., Glaberson v. Comcast Corp.*, 2014 WL 7008539, at *4 (E.D. Pa. Dec. 12, 2014) (a settlement is presumed to be fair "when the negotiations were at arm's length, there was sufficient discovery, and the proponents of the settlement are experienced in similar litigation"). These arms' length negotiations culminating in the present Settlement strongly supports the Court's granting of final approval.

**3) The Relief Provided to the Class is Adequate**

Under amended Rule 23(e), the Court must also consider whether the relief to the class is adequate, taking into account "the costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C)(i).

The assessment of the adequacy of the Settlement, "calls upon courts to make this evaluation from two slightly different vantage points. According to *Girsh*, courts approving settlements should determine a range of reasonable settlements in light of the best possible

recovery (the eighth *Girsh* factor) and a range in light of all the attendant risks of litigation (the ninth factor). *GM Trucks,* 55 F.3d at 806 (citations omitted). "The evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.*

Chase has agreed to pay $3,000,000.00 into a common Settlement Fund, which will be used to pay any attorneys' fees, the incentive award, and payments to Settlement Class Members. Settlement Agreement § 3. Following investigation and confirmatory discovery, Class Counsel has calculated that the total actual damages suffered by the Settlement Class was approximately $3.775 Million. Therefore, the Settlement Fund represents approximately 80% of the total damages. Courts routinely approve as "fair, reasonable, and adequate" settlements that yield recoveries far below these ranges. *See, e.g., In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006) (settlement representing only 4% of total damages was deemed "excellent" result in light of litigation risks); *Noll v. Ebay, Inc.*, 309 F.R.D. 593, 607 (N.D. Cal. 2015) (approving settlement providing 9% recovery of online fees incurred); *Barel v. Bank of Am.*, 255 F.R.D. 393, 402 (E.D. Pa. 2009) (approving a settlement with a value of 52% of the low end of the damages range and 5.2% of the high end damages range); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 183-84 (E.D. Pa. 2000) (approving a settlement that ranged from 5.2% to 36.4% of the potential recovery).

Moreover, following the entry of the Third Circuit Order, and as a direct result of Plaintiff and Class Counsel's success on that appeal, Chase has modified its practices to conform to the Third Circuit Order, and the Settlement provides that Chase will comply with the construction of the HPA in the Third Circuit Order, unless and until the Third Circuit Order is limited, altered or

overruled by further judicial, regulatory, or legislative action. Settlement Agreement § 5. Class Counsel, using the spreadsheet provided by Defendant has calculated that this change in business practices will prevent Chase from collecting approximately $16.5 million in unearned PMI premiums in violation of the express provisions of the HPA, representing 100% of Settlement Class Members' damages following entry of the Third Circuit Order.[10] Accordingly, the total benefit generated by the efforts of Plaintiff and Class Counsel exceeds $19.5 million. When combined, this total recovery of $19.5 million represents a remarkable recovery of 96.5% of Settlement Class Members' damages of $20.2 million.

This case is inherently complex due to the fact that it presents two legal issues of first impression. *See Sakalas*, 2014 WL 1871919 ("This case involves several potentially complex legal questions, including an issue of first impression "); *Pantelyat v. Bank of Am., N.A.*, 2019 WL 402854 (S.D.N.Y. Jan. 31, 2019) ("novel legal issues" increase the "risk of non-recovery" against a well-financed bank). Given the current trend in reducing federal consumer regulations, Plaintiff also faces a unique risk of a change in the law or Consumer Finance Protection Bureau regulations that could possibly leave the Settlement class with no recovery whatsoever. Moreover, the risks in this action was exacerbated by Chase's contention that the HPA contained a statutory cap of $500,000 on actual damages for the Class.

This case has already been litigated for more than four years and will require additional years of time and expense, including completing discovery, briefing on class certification and a potential Rule 23(f) appeal, additional motions for summary judgment, and trial. Even then, based Defendant's aggressive litigation of this Action to date, it is virtually certain that appeals would

[10] In addition to the Settlement Fund, Defendant will pay all reasonable costs and expenses for providing administration of the Settlement and notice to the Class in accordance with the Settlement Agreement. *Id.* § 8.

be taken from any verdict. In sum, "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial. Moreover, it was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class." *Warfarin Sodium*, 391 F.3d 516, 536 (3d Cir. 2004).

Plaintiff and Class Counsel believe her case is strong but acknowledge, as with any complex consumer class action such as this Action, there are real risks to recovery. In light of the inherent costs, risks and delay in prosecuting this action through trial, the immediate benefits provided to the Settlement Class represents an excellent result.

**4) The Plan of Distribution is Fair and Equitable**

Plans of distributions, like settlement agreements, are to be approved if they treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(D).

Both the valuable benefits made available pursuant to the Settlement and the plan of distribution squarely and equitably address the issues raised in this litigation. The proposed method of distributing relief to Settlement Class Members is simple. Settlement Class Members are not required to submit a claim form, rather settlement payments will be made automatically by check via First Class Mail to Defendant's last known or available address of record for each Class Member. Moreover, the amount of the Settlement Checks to Settlement Class Members will be based upon their proportionate share of the Settlement fund based upon the dollar amount of their respective PMI Overpayments. Accordingly, this method easily satisfies Rules 23(e)(2)(C)(ii) and 23(e)(2)(D).

While not directly addressed by the amendments to Rule 23(e) the fairness of the distribution to the Settlement Class is demonstrated by the response of the Class to the Settlement. Under the *Girsh* factors applied in the Third Circuit prior to the amendment to Rule 23, "the

number and vociferousness of the objectors" was a factor examined in evaluating the fairness of a settlement. *GM Trucks,* 55 F.3d 768, 812 (3d Cir. 1995). Given breadth of the class, and the overall effectiveness of the notice program (which reached over 3,753 members of the Settlement Class through direct notice (Dottilo Decl. at ¶¶ 10-11), the fact that there were neither a single request for exclusion nor a single objection is a strong indicator that the Settlement is fair, reasonable and adequate. *See, e.g.*, *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) ("only" 29 objections in 281 member class "strongly favors settlement"). Moreover, under the *Girsh* analysis "silence constitutes tacit consent to the [settlement] agreement." *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n. 15 (3d Cir. 1993). While the analysis of exclusion and objections is not expressly required under Rule 23(e) as amended, the absence of requests for exclusion and objections is evidence the Settlement Class not only finds the Settlement fair reasonable and adequate, but the distribution of the Settlement Fund equitable as well.

**5) The Requested Attorneys' Fees And Expenses and Incentive Award Are Reasonable**

As set forth in Plaintiff's Fee Motion, the attorneys' fees, costs and expenses requested by Class Counsel, as well as the Incentive Award requested for Plaintiff are fair and reasonable. There are no other agreements made in connection with the Settlement.

## CONCLUSION

For the reasons set forth above, the Plaintiff respectfully requests that the Court grant this motion and enter an order finally certifying the Settlement Class and approving the Settlement as fair reasonable and adequate.

Dated: July 8, 2019

Respectfully submitted,

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