IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SUYAPA ALLEN, GLENDA MEDINA, FREDDIE RAMON CHAVEZ TORUNO, DEMETRIE DOIRON and ROSALIND CAVERO, on behalf of themselves and all others similarly situated, Plaintiffs, vs. DECISION ONE MORTGAGE COMPANY, LLC, HSBC FINANCE CORPORATION, HSBC NORTH AMERICA HOLDINGS INC., HSBC MORTGAGE CORPORATION (USA), and HSBC MORTGAGE SERVICES INC. Defendants.	C.A. NO. 1:07-cv-11669-GAO

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT

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I. INTRODUCTION

Plaintiffs respectfully submit this memorandum in support of their Motion for Final Approval of Settlement in these consolidated class actions.[1] Plaintiffs will separately submit a Memorandum in Support of their Request for Attorneys' Fees and Costs and Named Plaintiffs' Service Awards. The HSBC Defendants[2] do not oppose Plaintiffs' motion.

On November 27, 2009, the parties filed a Settlement Agreement ("Settlement" or "Agreement") that will fully and finally resolve these actions, if approved. [Docket. No. 59]. The Court preliminarily approved the Settlement and certified the classes for settlement purposes on December 9, 2009. [Docket No. 71]. The form of Notice approved by the Court was sent to in accordance with the Preliminary Approval Order on February 8, 2010.

After receiving notice, the classes' response to the Settlement was overwhelmingly positive. 255,468 notices were sent and just six class members responded with correspondence that could potentially be considered an objection. Declaration of Shennan Kavanagh Regarding Class Member Correspondence ("Kavanagh Decl."), [Docket No. 78]. As discussed in Section V, *supra*, these objections are based on misunderstandings of the Settlement as it relates to class members' disparate impact claims and are without legal or factual merit. No class member objected to the attorneys' fees and costs or to the Named Plaintiffs' service payments. Notably, of the 63,058 class members who are Decision One borrowers, only 61 individuals - less than

[1] The parties have agreed to consolidate for the purposes of settlement three national class actions pending in federal courts in different jurisdictions alleging virtually identical lending discrimination claims: *Suyapa Allen, et al., v. Decision One Mortgage Co. LLC,* C.A. No. 07-11669-GAO (D. Mass.) ("*Allen*"); *Freddy Ramon Chavez Toruno v. HSBC Finance Corp. et al.*, CV 07-5998 AG (Anx) (C.D. Cal.) ("*Toruno*"); and *Demetrie Doiron, et al. v. HSBC North America Holdings, et al.*, No. 2:08-CV-00605-FCD-JFM (E.D. Cal.) ("*Doiron*"). They have been consolidated here by an amended complaint. [Docket No. 58]. This is the site of the first-filed complaint.

[2] "HSBC Defendants" collectively refers to: Decision One Mortgage Company ("Decision One"), LLC, HSBC Finance Corporation, HSBC Mortgage Corporation (USA), HSBC Mortgage Services Inc. and HSBC North America Holdings Inc.

0.1% of the class - requested exclusion. Affidavit of Settlement Administrator Concerning Notification, ¶¶4-5, 9. ("Administrator Affidavit"), [Docket No. 77].

The Settlement provides for a Settlement Fund of more than $6 million, and includes programs that will substantially enhance opportunities for class members to avert foreclosure, regain their economic footing, and keep their homes. It was reached after careful pre-suit investigation, the exchange of substantial formal and informal discovery and prolonged mediation sessions with the Honorable Edward A. Infante (Ret.) of JAMS - a highly respected and experienced mediator of complex class action cases - over the course of two years. Settlement of this complex mortgage lending disparate impact case, which would otherwise require expensive, uncertain and prolonged litigation, is in the best interests of class members because it provides them with meaningful benefits now without the risk that they may otherwise receive nothing for their claims.

For these reasons and those set forth more fully below, the Court should find that the Settlement is fair, reasonable and adequate and worthy of final approval. Indeed, the mediator, Judge Infante, agrees "...in my opinion, based on my substantial experience...[the Settlement] clearly warrants the Court's approval. The settlement terms are not only fair, reasonable and adequate, but are a favorable result for the settlement class." Declaration of Hon. Edward A. Infante (Ret.) in Support of Plaintiffs' Motion for Approval of Class Action Settlement, ¶7 ("Infante Decl."), [Docket No. 76].

A proposed form of Final Approval Order is submitted separately. The list of borrowers excluded from the Settlement is attached as Exhibit 1 to the proposed order.

II. STATEMENT OF THE CASE

In the *Allen*, *Toruno* and *Doiron* actions, Plaintiffs allege that the HSBC Defendants discriminated against minority borrowers in making mortgage loans through a pricing system in which loan officers and/or mortgage brokers had discretion to increase interest rates and/or charge additional fees to particular borrowers. Plaintiffs allege that these policies exerted a discriminatory disparate impact against the Defendants' minority borrowers because they received higher priced loans than similarly situated non-minority borrowers. Plaintiffs alleged causes of action for violations of the Civil Rights Act, the Fair Housing Act ("FHA") and the Equal Credit Opportunity Act ("ECOA"). Plaintiffs seek, among other things, compensatory damages and injunctive relief on behalf of themselves and similarly situated African-American and Hispanic borrowers.

The HSBC Defendants deny all claims asserted in the *Allen*, *Toruno* and *Doiron* actions, deny all allegations of wrongdoing and liability, and have asserted numerous defenses, including that there is no relevant discretionary pricing policy. The HSBC Defendants nevertheless desire to settle all claims that are asserted, or which could have been asserted, in the *Allen*, *Toruno* and *Doiron* actions, solely for the purpose of avoiding the burden, expense and uncertainty of continuing litigation and for the purpose of putting to rest the controversies engendered by these actions.

III. THE TERMS OF THE SETTLEMENT

A. The Settlement Class

The Court preliminarily certified the following Settlement Class, as defined in the Settlement (Settlement Agreement, ¶ 3.2), which is a nationwide class consisting of:

> All African-American or Hispanic persons throughout the United States who, between January 1, 2004 and the date of entry of the Preliminary Approval Order, obtained residential closed-end real

> estate secured loans from any of the following businesses: Decision One, HFC/Beneficial, HSBC Mortgage Corp. (USA) or HSBC Mortgage Services Telesales.

Preliminary Approval Order, ¶2.

The Court approved this class as a hybrid class action under both Fed. R. Civ. P. 23(b)(2) and Fed. R. Civ. P. 23(b)(3). The Settlement allows for class members to opt-out of the damages portion of the hybrid case under Rule 23(b)(3). A list of class members who timely excluded themselves is attached to proposed form of Final Approval Order as Exhibit 1. If the Settlement is approved, these class members will not be eligible to receive any payment pursuant to the Settlement of the damages claims, will not be bound by any further judgments in this action with respect to damages and will preserve their ability to independently pursue any individual claims for damages they may have against the HSBC Defendants. This opt-out provision is not provided with respect to the Rule 23(b)(2) non-monetary aspect of the Settlement.

B. Monetary Relief

Monetary relief for consumers involves consists of a $6,050,000 Settlement Fund ("Fund"), to be funded by the HSBC Defendants. If approved by the Court, this fund will be disbursed as follows:

1. Notice and Administration: The Fund will pay for costs of notice to the class, and administration of the settlement. Settlement Agreement, ¶ 3.4(a)(i). The parties selected Rust Consulting, Inc. ("Rust") as the Settlement Administrator. Plaintiffs estimate that Rust will be paid approximately $350,000 from the Fund for its services.

2. Fees and Costs: If approved by the Court, the Fund will pay $1.8 million in attorney's fees and costs, and service awards of $5,000 for each of the five Named Plaintiffs, totaling $25,000. Settlement Agreement, ¶ 3.4(a)(ii).

3. National Non-Profits: The Fund will pay $125,000 each to two non-profit organizations serving the Hispanic and African American populations respectively, the National Council of La Raza and the National Urban League, for the purposes of supporting financial education, homeownership education and/or foreclosure counseling activities, for a total of $250,000. Settlement Agreement, ¶ 3.4(a)(iii).

4. Claims: The Fund will pay $200 per loan to each Decision One class member. Settlement Agreement, ¶ 3.4(b). As the total number of Decision One claims, including late filed claims,[3] is 9,430, the amount of the Fund that will pay these claims is approximately $1,886,000.[4]

5. Residual: If the Fund is not exhausted by disbursements in the above categories, the residual shall be paid to the National Council of La Raza and the National Urban League, up to a total aggregate amount of $750,000 for both organizations. Here, the Fund has not been exhausted so these organizations will receive, in total, an additional disbursement under this provision of the Settlement of $500,000. If the Fund is not depleted following those disbursements, the parties agree to meet and confer to reach agreement on a charitable organization providing housing assistance or consumer credit education.[5] Settlement Agreement,

[3] Plaintiffs will file a motion to allow payment of late filed claims as some class members may have received late notice. Allowance of that motion will not affect distributions other than to reduce the amounts that may be available by way of cy pres distribution.

[4] Some additional Decision One borrowers may receive and automatic credit against the outstanding principal balance on his/her loan(s) if HSBC Mortgage Services Inc. owns and is actively servicing the loan(s) at the time claims are to be paid pursuant to the settlement. Settlement Agreement, ¶ 3.4(b).

[5] The remaining amount in the Fund after all of the disbursements listed above is approximately $1,750,000. The parties have cooperatively begun the meet and confer process to determine how this residual will be distributed, however, as of the date of filing the motion for final approval, the parties have not yet reached an agreement. Plaintiffs have proposed to counsel for the HSBC Defendants that Decision One claimants receive $250 apiece for their claims - a $50 increase of the current $200 per claim - and have proposed additional residual *cy pres* recipients, which the HSBC Defendants are considering.

¶ 3.4(a)(v). *See In re Pharmaceutical Industry Average Wholesale Price Litigation*, --- F.3d ----, 2009 WL 3933088 (1st Cir. 2009) (permitting distribution of residual amounts to *cy pres* recipients).

C. Non-Monetary Relief

In addition to the monetary relief described above, the HSBC Defendants will provide the following programmatic relief to class members at risk of foreclosure:

1. Adjustable Rate Mortgage Loan Reset Program: The HSBC Defendants will maintain an Adjustable Rate Mortgage Loan Reset Program ("LRP") for borrowers until June 30, 2010.[6] The purpose of this program is to assist borrowers in avoiding default if HSBC determines that avoidance of default is reasonably possible. Settlement Agreement, ¶ 3.5(b).

2. Foreclosure Avoidance Program: The HSBC Defendants will have a Foreclosure Avoidance Program for borrowers until June 30, 2011. The purpose of this program is to assist borrowers experiencing serious financial hardship to avoid foreclosure when HSBC determines that foreclosure avoidance is reasonably possible. Settlement Agreement, ¶ 3.5(c).[7]

3. Representations and Warranties: The HSBC Defendants have represented and warranted, among other things, that none of the HSBC entities has originated any new wholesale (i.e., those loans originated by unaffiliated third-party brokers or unaffiliated third-party

[6] No class member's loan is set to adjust after this date. Because Defendants' records show that there are only a small number of borrowers whose interest rates may reset during this time they have reserved the right to cancel the program earlier if there are insufficient numbers of borrowers who are eligible for relief under the terms of the program.

[7] Some class members seeking loan modification assistance have contacted Plaintiffs' counsel after receiving notice. Plaintiffs counsel and counsel for the Defendants arranged for a contact person at HSBC to handle these inquiries.

correspondent lenders) residential real estate secured loans to consumers since January 19, 2009. Settlement Agreement, ¶ 3.6. This representation obviated the need for further injunctive relief.

D. Release

The release is appropriately tailored to the mortgage lending discrimination claims alleged in each of the consolidated actions. Plaintiffs and class members who did not request exclusion will only release discrimination-based or discrimination-related claims, as alleged or as could have been alleged based upon the facts asserted in the Consolidated Amended Complaint. Settlement Agreement, ¶ 5.1.

E. Named Plaintiffs' Service Payments and Attorneys' Fees and Costs

By their final approval motion and consistent with the Agreement, Plaintiffs are applying for a total of $1.8 million in attorney's fees and costs (representing just under 30% of the Settlement Fund), and service awards of $5,000 for each of the Named Plaintiffs. No class member has objected to the amount of attorneys' fees and costs or Named Plaintiffs service payments requested. Likewise, the Defendants do not oppose payment of these amounts from the Settlement Fund. Settlement Agreement, ¶ 4.1. These amounts were negotiated following agreement on relief for the class and are the subject of a separate memorandum of law in support of approval of the Settlement.

F. Notice and Administration

Consistent with the Court's Preliminary Approval Order, on February 8, 2010 the Settlement Administrator sent the approved forms of Notices attached to the Settlement as Exhibits D1 and D2 by first class mail, postage prepaid to class members' last known addresses

after running them through the National Change of Address ("NCOA") database to ensure they were updated. Administrator Affidavit, ¶¶ 5, 6. The notices were sent in English and Spanish. *Id*., at ¶6. The Administrator promptly remailed any notices that were returned as undeliverable with a forwarding address. *Id*.

On February 8, 2010, the Administrator also established a website at the domain http://www.allenmortgagelendingsettlement.com and a toll-free telephone number with an interactive voice response containing an approved scripted settlement summary in both English and Spanish, which provide detailed information about the Settlement. *Id*., at ¶¶7, 8.

G. Opt-Out Provision

Paragraph 7.5(d) of the Settlement provides that the HSBC Defendants retained the right to withdraw from the Settlement in the event of excessive opt-outs. As the number of opt-outs did not meet this threshold, this provision of the Settlement will not be invoked.

IV. THE PROPOSED SETTLEMENT IS FAIR AND REASONABLE

Under Fed. R. Civ. P. 23(e), a class action settlement agreement requires the court's approval. "A district court can approve a class action settlement only if it is fair, adequate and reasonable." *City P'shp. Co. v. Atlantic Acquisition*, 100 F.3d 1041, 1043 (1st Cir. 1996), *quoting, Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990).

This Court has considered the following list of factors, applied by the Second Circuit in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448 (2nd Cir. 1974), in deciding whether to approve a settlement; (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 a 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. *New England Carpenters Health Benefits Fund v. First Databank, Inc.,* 602 F. Supp. 2d 277, 281 (D. Mass. 2009); *In re Lupron Marketing And Sales Practices Litigation,* 228 F.R.D. 75, 93 (D. Mass. 2005), *cited with approval in*, *In re Relafen Antitrust Litigation,* 231 F.R.D. 52, 72 (D. Mass. 2005).

Taken in turn, these factors uniformly point towards approval of the settlement here.

1. The Time And Expense Of Protracted Litigation Makes The Instant Action Appropriate For Settlement

Settlement promotes the interests of the litigants by saving them the expense of trial of disputed issues and reduces the strain on already overburdened courts. *See, Rolland v. Cellucci*, 191 F.R.D. 3,10 (D. Mass. 2000) (the certainty of recovery through settlement in contrast to the expense, length and uncertainty of litigation, is a strong argument in favor of settlement). Where the litigants are able to achieve compromise, settlement avoids unnecessary public expense and overburdening the courts. *Id.* (noting that without settlement of the class action for which settlement approval was sought, the following resource expenditures would be required: a two week trial, the time required for the court to issue an opinion, and one or more years of appellate practice); *In re Relafen,* 231 F.R.D. at 72 (case with potential to impose enormous costs, including a four-week trial with expert witnesses and likelihood of appeal favors final approval of settlement); *Giusti-Bravo v. U.S. Veterans Administration*, 853 F. Supp. 34, 40 (D.P.R. 1993) (the expenses and risks of prolonged litigation were described by the court as among the strongest arguments in favor of approval of the settlement).

Had the parties not reached an agreement, they would have been faced with prolonged litigation, including motion practice, oral arguments and a potential trial, the outcome of which

was uncertain. Continued litigation would have caused class members who were harmed as long as six years ago[8] and have not had recourse to wait years longer for a resolution of their claims. As the relief here includes access to foreclosure prevention services, avoiding lengthy litigation benefits class members who are at imminent risk of foreclosure. Moreover, delay would have added to the substantial existing difficulty of finding borrowers in order to provide them with mailed notice in the event of a successful outcome.

2. The Overall Reaction Of The Classes To The Settlement Has Been Positive

Reaction to a settlement is considered positive when the number of objectors is minimal compared with the number of claimants, and if notice effectively reached absent class members. *In re Lupron,* 228 F.R.D. at 96. A small percentage of objections and exclusions is an important factor contributing to a conclusion that a settlement is fair and reasonable. *Bussie v. Allmerica Financial Corporation*, 50 F.Supp.2d 59, 77 (D. Mass. 1999).

Notice is adequate if it 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." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974), *quoting, Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950*); In re Compact Disc Litig.*, 216 F.R.D. 197, 203-04 (D. Me. 2003) (notice satisfied Rule 23 because it provided sufficient information for class members to decide whether to file claims, opt out, seek exclusion or object); *Greenspun v. Bogan*, 492 F.2d 375, 382 (D. Mass. 1974) (essential purpose of notice is to apprise class members of settlement terms and class members' options). Sending notice by first class mail to class members identifiable by reasonable means is regularly deemed

[8] Members of the Settlement Class received their loans as early as January 1, 2004. Settlement, ¶3.2 (class definition).

adequate under Rule 23(c)(2). *Reppert v. Marvin Lumber & Cedar Co., Inc.*, 359 F.3d 53, 56-57 (1st Cir. 2004).

Of the 63,058 class members who are Decision One borrowers, 9,430 have returned claim forms and only 61 (less than 0.1%) requested exclusion. *See*, Administrator Affidavit, ¶¶6, 9. These individuals will be paid $200 on their claim. Only six class members returned correspondence that arguably constitute objections. The number of exclusions and objections to the settlement is *de minimis* relative to the size of the class. Section V, *supra*. Moreover, for the reasons set forth in more detail in Section V, *supra*, none of the objectors presented valid bases for their objections.

The Notices approved by this Court and sent to the class was clear, straightforward and sufficiently detailed to allow class members to determine the potential costs and benefits involved by participating in the settlement. They alerted recipients that they are members of class action settlement with the HSBC Defendants, [Notices, p. 1], described the lawsuit, [Notices, p. 1], disclosed the compensation class members would receive, [Notices, p. 2], explained the right to opt-out and the process for doing so, [Notices, p. 3], provided a detailed description of the scope and implications of the release, [Notices, pp. 3-4], explained the process for filing objections, [Notices, p. 3] and clearly stated the deadlines for filing claims, opting out, and objecting, [Decision One Notice, pp. 2-3; General Notice, p. 3]. The Notices also provided the names and addresses of the attorneys available to answer questions from class members. [Notices, p. 3]. Both Notices were also in Spanish.

The dissemination of the Notice was widespread. It was mailed to class members' last known address. Administrator Affidavit, ¶4. Before mailing, class members' addresses were updated through the National Change of Address ("NCOA") database to ensure the Notice was

sent to class members' current addresses. *Id*. In addition, the parties established a claims information website, (http://www.allenmortgagelendingsettlement.com/), containing, among other things, Frequently Asked Questions, downloadable copies of the Notice and Settlement Agreement and updates regarding preliminary approval.

3. The Parties' Pre-Suit Investigation, Coupled With The Significant Amount Of Relevant Cooperative Discovery, Allowed The Parties To Meaningfully Evaluate The Merits Of The Case And Construct An Appropriate Settlement

A settlement is fair and adequate when the parties have gathered sufficient evidence to fully and knowledgeably evaluate the merits of the case. *Duhaime v. John Hancock Mutual Life Insurance Company*, 177 F.R.D. 54, 67 (D. Mass. 1997).

This litigation was initiated only after extensive research, investigation and analysis of publicly available mortgage data and the Defendants' practices. Joint Declaration of Counsel in Support of Plaintiffs' Motion for Final Approval of Settlement and for Approval of Payment of Attorneys' Fees, Costs and Class Representative Service Payments, ¶13 ("Joint Decl.") [Docket No. 79]. Various law firms filed three separate actions in different jurisdictions, and then agreed to consolidate them in the District of Massachusetts so they could to work cooperatively and jointly in prosecuting the litigation. Joint Decl., ¶¶11, 14. By cooperating, counsel avoiding duplication of effort. Joint Decl., ¶32.

In late October 2007, Class Counsel first met with in-house and outside counsel for Defendants to explore a possible resolution of the litigation. Joint Decl., ¶15. Plaintiffs' counsel conducted further meetings in February 2008 and in April 2008. *Id*. In connection with these meetings Plaintiffs' counsel requested and reviewed documents and information relating to the Defendants' lending practices and programs. *Id*. At these meetings, the parties engaged in wide ranging and extensive discussions relating to the issues in the litigation and potential frameworks

for settlement. *Id*. In addition, the parties engaged in follow up discussions over the phone. *Id*. Although these discussions were productive, they did not yield a settlement. *Id*. Plaintiffs simultaneously pursued the litigation. Joint Decl., ¶16; *see also*, Docket. They drafted and served discovery requests, consulted with experts and continued their investigation and case development. Joint Decl., ¶16.

In May 2008 the parties participated in a formal mediation with a well-known and highly experienced mediator. Infante Decl., ¶¶1-3; Joint Decl., ¶17. This mediation session failed to resolve the case. Joint Decl., ¶17. In a further effort to achieve a settlement, the parties engaged in subsequent formal mediation sessions on October 6, 2008 and December 4, 2008. Infante Decl., ¶3; Joint Decl., ¶17. In the intervals between the mediation sessions, the parties participated in further discussions over the phone. In addition, the mediator convened over a half dozen calls to continue the settlement process. Infante Decl., ¶3; Joint Decl., ¶17.

Throughout the settlement discussions, the parties engaged in formal and informal discovery. Joint Decl., ¶15. Among other things, Defendants produced various fair lending testing results conducted by respected third parties as well as extensive documentation of pricing policies in various lending channels. *See*, *Id*. By this discovery, Plaintiffs were able to assess the strengths and weaknesses of their case, including the value of the potential damage claims. At the same time, Plaintiffs had access to publicly available information, including account data filed pursuant to HMDA. Joint Decl., ¶29. This allowed Plaintiffs to confirm that Defendants had provided accurate data. Further, Defendants have also, as part of the Settlement, provided Plaintiffs with substantial confirmatory discovery, including declarations to substantiate representations made in discovery on which Plaintiffs relied. Settlement Agreement, ¶ 6.4.

Among other things, these declarations confirmed that there was no discretionary pricing in HSBC's retail lending channel.

By the time of Settlement, Plaintiffs and Class Counsel, who are experienced in bringing disparate impact discrimination claims, had "a clear view of the strengths and weaknesses" of their case. *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985); *see also*, Infante Decl., ¶4. For example, through the discovery produced, Plaintiffs learned that some class members had stronger claims than others. They therefore crafted a Settlement to reflect these differences. Decision One borrowers, who received their loans through the wholesale channel, will be provided with cash payment or account credits. Borrowers who received their loans through other channels, where discretionary pricing was limited or non-existent, have a right to programmatic relief providing for loan restructuring and other benefits.

In sum, through their own investigation and information provided by HSBC during the settlement negotiations, Plaintiffs and Class Counsel are in a strong position to make an informed decision on the merits of recommending the settlement, as they had a "full understanding of the legal and factual issues surrounding [the] case." *Manchaca v. Chater*, 927 F. Supp. 962, 967 (E.D. Tex. 1996). This strongly supports settlement approval.

4. The Settlement Was Negotiated In Good Faith By All Parties Involved. The Arm's Length Nature Of The Negotiations And Lack Of Collusion Is Ultimately Reflected In The Settlement's Terms

"There is usually an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval." 2 H. Newberg, A. Conte, *Newberg on Class Actions*, § 11.41 (4th ed. 2002). Courts consider the length of time the parties engaged in settlement negotiations in determining good faith. *Rolland,* 191 F.R.D. at 11 (the seven months of intense negotiation prior to settlement indicated the

parties' good faith); *Bussie*, 50 F. Supp.2d at 77 (that the settlement negotiations occurred over a several month period gave rise to a strong presumption of fairness).

The settlement discussions were long and arduous. Infante Decl., ¶5; Joint Decl., ¶18. They were conducted at all times at arm's length by experienced counsel who vigorously represented the interests of their clients. Infante Decl., ¶¶5, 8; Joint Decl., ¶18. Each side was forced to make compromises and concessions during this lengthy process. Joint Decl., ¶18. Defendants strongly disputed, and even in the settlement they do not concede, the validity of Plaintiffs' legal theories and methodology. Infante Decl., ¶5; Joint Decl., ¶19.

The HSBC Defendants deny that any disparate impact has been shown, and contend that if any discriminatory conduct occurred, it was the responsibility of the various mortgage brokers that sold Plaintiffs their loans and not due to their pricing policies. Joint Decl., ¶19. The HSBC Defendants claim that changes in the market and their business practices negate any need for future relief. *Id*. Defendants are represented by highly experienced counsel, and each of these defenses has been aggressively maintained. Infante Decl., ¶5; Joint Decl., ¶19.

Throughout the negotiation process, the parties refrained from any discussion of Plaintiffs' attorneys' fee and cost claims until after agreement was reached on all material aspects of the relief to be provided to the class. Infante Decl., ¶ 6; Joint Decl., ¶20. Ultimately the parties' good faith in negotiation is reflected in the settlement terms. *See*, Infante Decl., ¶¶7. 8; Joint Decl., ¶¶21-25; *See also* , Section III, *supra*.

5. Even With A Strong Factual And Legal Case, Class Members Faced Significant Risks In Establishing Liability And Damages And Maintaining Class Certification

In reviewing a settlement, a district court's role is not to make decisions on the merits of the case. *Duhaime,* 177 F.R.D. at 68, *citing, Greenspun*, 492 F.2d at 381. Rather, the district court must weigh the likelihood of success on the merits against the amount and form of relief offered in the settlement. *Santana v. Collazo*, 714 F. 2d 1172, 1175 (1st Cir. 1983), *citing, Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 998 n. 14, 67 L.Ed.2d 59 (1981).

Plaintiffs and Class Counsel believe that their claims would ultimately be meritorious if litigated. However, they are aware that the outcome in of their case was uncertain and that such outcome would have been achieved, if at all, only after many years of arduous litigation with the attendant risk of drawn-out appeals. Among other litigation hurdles, Defendants in similar litigation have aggressively argued in motions to dismiss that *Smith v. City of Jackson*, 544 U.S. 228 (2005) means that the Supreme Court will ultimately preclude disparate impact claims under certain discrimination laws. These arguments create risk that the Supreme Court might, during the course of this litigation, eliminate disparate impact as a basis for claims under the FHA and/or the ECOA. If the case were allowed to go forward, it would require a costly battle of experts with respect to the statistical modeling, issues on which the outcome is uncertain.

6. The Settlement Terms And Conditions Offer Meaningful Benefits To All Settlement Class Members And Are Reasonable In Light Of The Best Possible Recovery And The Attendant Risks Of Litigation

"Another way to evaluate the substantive fairness of a settlement is to consider 'whether the major causes of action in the complaint are addressed in the settlement.'" *Duhaime,* 177 F.R.D. at 69, *citing, M. Berenson Co., Inc., v. Faneuil Hall Marketplace, Inc.,* 671 F.Supp. 819, 823 (D. Mass. 1987). A settlement is fair and reasonable if it is "tailored to remediate the alleged wrongdoing as set forth in the [c]omplaint." *Bussie,* 50 F. Supp. 2d. at 75.

Here, the proposed Settlement provides relief directly responsive to the primary needs of the class. Borrowers who received loans from Decision One are eligible for monetary restitution of $200 per loan, which amount is subject to proration in the unlikely event that claims exceed the available Settlement Funds. Joint Decl., ¶22. This is a significant benefit to the class members because individual homeowners are unlikely to spend the time and money necessary to recover the relatively small allegedly discriminatory amounts. The alleged overcharges at issue in this case are the type of damages that class actions are most suited to remedy. Newberg, §11.6. Additionally, few class members are likely even to be aware that their rights have been violated. Finally, the refunded amount is also very significant to class members who have recently suffered the types of financial problems that can lead to foreclosure.

HSBC borrowers will benefit from HSBC's establishment of an Adjustable Rate Mortgage Loan Reset Program and a Foreclosure Avoidance Program, which programs are already underway. Joint Decl., ¶23. In addition, Defendants will pay $250,000 of the Settlement Funds, plus a *cy pres* award, to two national nonprofit agencies (La Raza and the National Urban League) for the purposes of supporting financial education, homeownership education and/or foreclosure counseling activities. Joint Decl., ¶24.

The non-monetary value of these benefits is certain but difficult to quantify. Disparate impact litigation serves the most fundamental of all public policies: the right of individuals, no matter their race or ethnicity, to equal treatment. The type of discrimination at issue here is especially pernicious, because (unlike, for example, the use of a racial slur) it is invisible to the consumer, who therefore has little opportunity to avoid it. At the same time, the undertaking of disparate impact litigation against a major financial institution is a daunting task, requiring sophisticated economic and legal analysis and legal proceedings over an extended time period.

Had Class Counsel not undertaken this litigation, it is highly doubtful that any of the class members would have obtained any portion of the relief won through these negotiations. Joint Decl., ¶25. According to Judge Infante, "[t]he proposed settlement provides substantial and concrete monetary benefits to class members consistent with the defendants' ability to pay. The settlement terms are especially appropriate given the uncertain risks inherent in such complex consumer litigation, and the time, money, and effort that class counsel has expended." Infante Decl., ¶7.

V. RESPONSE TO OBJECTIONS

Of the 238,951 class members who were mailed notice, only 6 *pro se* class members sent Plaintiffs' Counsel correspondence that may be characterized as an objection to the settlement: Jerome and Judy Rowe, Jacqualine and David Ross, David Garrett (filed at [Docket No. 75]), Mary and Willie Barber, Maurice Hutt and Arnold Emmitt Quarles III.[9] These have been submitted to the Court by a separate declaration. Kavanagh Decl.[10] This number of objections pales by comparison to the number of individuals who opted to participate in the Settlement. The small percentage of objections and exclusions strongly supports the conclusion that the

[9] On March 25, 2010, Mr. Quarles filed an individual *pro se* complaint with the Court. *Quarles v. Decision One Mortgage Company*, Case No. 10-cv-10533 (assigned to Judge Woodlock). However, Mr. Quarles is a class member and did not request exclusion. On April 29, 2010, Judge Woodlock dismissed the complaint for failure to either to pay the $350.00 filing fee or seek leave to proceed without prepayment of the fee. [Docket No. 4]. It is unclear what Mr. Quarles seeks by his complaint and he does not cite any objections to the Settlement.

[10] None of these correspondences appears to meet all of the requirements set forth in the Notices to be valid objections. Under the Settlement, as explained in the Notice, all objections must include: (1) the borrower's name, address and telephone number; (2) the borrower's account number(s) of their loan(s); (3) a sentence confirming, under penalty of perjury, that the borrower is a Settlement Class Member; (4) the factual basis and legal grounds for the borrower's objection; (5) the identity of any witnesses whom the borrower may call to testify at the Final Fairness Hearing; and (6) copies of any exhibits the borrower intends to offer into evidence at the Final Fairness Hearing. In addition, to be considered, objections must be mailed to the lawyers handling the case for each side be filed with the court no later than March 24, 2010. [Settlement, ¶7.6].

settlement is fair and reasonable. H. Newberg, §11.41. *See also*, *Hammon v. Barry*, 752 F. Supp. 1087, 1092 (D.D.C. 1990) (85 objections to a settlement involving about 2,000 individuals constitutes "low level of dissatisfaction."); *Bryan v. Pittsburgh Plate Glass Co.,* 494 F.2d 799, 803 (3rd Cir. 1974) (settlement approved with 20% of class objecting), *cert. denied,* 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974); *Laskey v. International Union (UAW),* 638 F.2d 954, 956 (6th Cir.1981) (settlement fair and reasonable when only 7 objections were filed out of 109 noticed class members); *Bussie v. Allmerica Financial Corporation*, 50 F. Sup. 2d 59, 77 (D. Mass. 1999).

The objections do not contain appropriate factual or legal support and should be overruled on their merits so the Settlement can go forward and class members may receive the benefits they claim. Because all of the objections appear to be based, at least in part, on issues that go beyond the scope of the case and the resulting Settlement, it is important to note that all of these objectors' interests are protected here by the limited nature of the release. In exchange for the benefits provided under the Settlement, class members will only release discrimination-based or discrimination-related claims. Section III(D), *infra*. To the extent an objector has raised an issue that is not covered by the release, he or she may pursue the legal rights available to them.

Mr. Garrett[11] (Kavanagh Decl., Exhibit 3) and the Rosses (Kavanagh Decl., Exhibit 2) are the only class members who object to the amount of monetary relief available to Decision One borrowers under the Settlement. Mr. Garrett states, without support, that the $200 settlement payment is insufficient compensation. [Docket No. 75]. The Rosses are concerned that non-Decision One class members do not have an opportunity to qualify for monetary relief.

[11] Mr. Garrett is not a member of the Decision One class. He therefore lacks standing to object to this aspect of the Settlement, because it does not apply to him.

In response, the $200 settlement payments available to Decision One class members are appropriate and adequate given the nature of the disparate impact claims at issue in this case. The payment amounts are rationally related to the actual disparities between minority Decision One borrowers and white Decision One borrowers with similar credit profiles. Plaintiffs' counsel were able to ascertain the damages associated with Decision One's alleged discretionary pricing of loans with the assistance of experts and after review of the confirmatory discovery.

Also, as evidenced by confirmatory discovery, unlike Decision One, HFC/Beneficial, HSBC Mortgage Corporation (USA) and HSBC Mortgage Services Telesales did not have discretionary pricing for their loans. Settlement, ¶3.6(c). Class members who had loans from these companies therefore have not suffered damages associated with the levels of disparity for which Decision One borrowers are being compensated. Their benefits under the Settlement are thus commensurate with the harm to them. Therefore, this portion of Jacqualine and David Ross' objection is meritless.

Moreover, Decision One class members were entitled to opt out of the monetary damages portion of the Settlement under Fed. R. Civ. P. 23(b)(3). The purpose of the exclusion right is to protect individuals who have interests that are inconsistent with those of the class from the binding effect of a class action settlement. *See, Eisen v. Carlisle & Jacquelin,* 391 F. 2d 555, 568 (2nd Cir. 1968). "Class members who find the settlement unattractive can protect their own interests by opting out of the class." The Manual For Complex Litig. (Fourth) § 21.643 (2004). The opt out opportunity provided for in this Settlement ensured fairness to class members who are dissatisfied with the compensation they would receive.

The Rowes', (Kavanagh Decl., Exhibit 1) the Rosses', the Barbers' (Kavanagh Decl., Exhibit 4) and Ms. Hutt's (Kavanagh Decl., Exhibit 5) objections are all based on experiences

they had attempting to obtain permanent loan modifications from the HSBC Defendants. As such, they express skepticism that the programmatic assistance available under the Settlement will help them if the Settlement is finally approved. These objections are not valid, first, because they are based on alleged conduct that is not at issue in this case. These borrowers' ability to obtain loan modifications is not related to the claim that minority borrowers were subject to a discretionary pricing policy that had a disparate impact on them. Indeed, as explained above, class members are releasing discrimination-related claims only. To the extent that the Rowes, the Rosses, the Barbers and Ms. Hutt are objecting to the availability of the loan modification programs as a settlement benefit, HSBC is willing to reconsider their eligibility for the programs available under the Settlement that might entitle them to loan modification. However, under the programs, which are reserved to borrowers who qualify, some class members may simply be ineligible because they do not meet program criteria. Because the release does not address denied loan modifications, these objectors remain free to seek additional relief at their own cost and expense.

Mr. Quarles' objection (Kavanagh Decl., Exhibit 6) is difficult to understand. Among other things, it seems to relate to an individual dispute that Mr. Quarles, it appears, would prefer to file in North Carolina. Putting aside whether Mr. Quarles properly opted out, as he could have, in order to file there, it does not seem clear what type of relief Mr. Quarles is requesting from this Court. As an objection to Settlement, it should be overruled as frivolous.

VI. PLAINTIFFS' COUNSEL BELIEVES THAT THE SETTLEMENT IS FAIR, REASONABLE AND IN THE BEST INTEREST OF SETTLEMENT CLASS MEMBERS

In addition to the factors enumerated above, the opinion of experienced class action counsel, with substantial experience in litigation of similar size and scope, is an important consideration. "When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight." *See Rolland*, 191 F.R.D. at 10; *In re Compact Disc Litig.*, 216 F.R.D. at 212 (in determining fairness of settlement proposed by counsel, the court considers the experience and level of competence of class counsel); *Bussie*, 50 F. Supp. 2d at 77 (court's fairness determination reflected the judgment of the parties' experienced counsel that the settlement was fair and reasonable).

Here, the combined experience of Class Counsel cannot be and has not been questioned. The proposed Settlement is the product of extensive, adversarial, arm's length negotiations conducted by counsel experienced in class action litigation, and specifically experienced in litigating consumer fraud cases. Joint Decl., ¶5 and firm resumes attached thereto. As discussed above, the proposed Settlement offers the class a substantial portion of the maximum relief sought available if these cases had been litigated successfully through trial. Thus, in counsel's view, the proposed Settlement is fair, reasonable and in the best interest of the Settlement Class.

VII. THE CLASS IS APPROPRIATELY CERTIFIED FOR SETTLEMENT

This Court's preliminary approval order granted class certification for settlement purposes. Preliminary Approval Order, ¶2. No party or Class Member has objected to certification for settlement purposes here. Nothing has changed since the Court's order that would make the class un-certifiable or that changes the bases on which it may be certified. For these reasons, Plaintiffs will not repeat the discussion of the reasons making certification of a

settlement class appropriate here. *See*, Memorandum in Support of Motion for Preliminary Approval of Settlement Agreement, pp. 12-20. [Docket No. 61].

VIII. CONCLUSION

A settlement compromising conflicting positions in complex class action litigation, like this one, serves the public interest. For the foregoing reasons, Plaintiffs respectfully request that this Court find the Settlement to be fair, reasonable and adequate, and to give it final approval. A proposed form of Final Approval Order has been submitted to the Court.

Respectfully submitted,

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