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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ALFREDO B. PAYARES, ZINNIA GONZALEZ and GREGORY WALKER, Plaintiffs, vs. J.P. MORGAN CHASE & CO. et al., Defendants.	No. CV-07-05540-AG(ANx) CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT DATE: September 13, 2010 TIME: 10:00 a.m. CTRM: 10D JUDGE: Honorable Andrew J. Guilford

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Plaintiffs Alfredo B. Payares, Zinnia Gonzalez, and Gregory Walker ("plaintiffs" or "Class Representatives") submit this memorandum in support of their motion for final approval of the parties' Settlement Agreement, dated March 9, 2010 ("Settlement Agreement" or "Agreement"). Plaintiffs will separately submit a Memorandum in Support of Their Request for Attorneys' Fees and Costs and Named Plaintiffs' Incentive Awards. The Chase Defendants[1] do not oppose plaintiffs' motion.

I. INTRODUCTION

The Settlement Agreement is the culmination of extremely hard-fought and contentious litigation. The Settlement provides substantial economic relief for Class members whose loans are paid off or current, and special "Red Carpet" access to loan modification services for Class members whose loans are delinquent. This relief will substantially enhance Class members' opportunities to avert foreclosure, regain their economic footing, and keep their homes. The Agreement was reached only 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.

The response of Settlement Class Members to the Agreement was overwhelmingly positive with only .02% objecting. As addressed more fully below, the objections received are without legal or factual merit. Many are based on

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[1] "Chase Defendants" refers to Chase Bank USA, N.A. and JPMorgan Chase Bank, N.A.

1 misunderstandings of the Settlement Agreement as it relates to Class members'
2 disparate impact claims. Additionally, only 157 individuals – less than .14% of the
3 class – requested exclusion.
4 The valuable relief attained as a result of this Agreement, as well as the
5 complete satisfaction of the Rule 23 requirements, mandates a finding that the
6 Agreement is fair, reasonable and adequate. Further, the proposed Settlement Class
7 meets all of the requirements for certification of a settlement class; and the Notice
8 Program has satisfied all of the requirements of Rule 23(c)(2)(B) and (e)(B) and has
9 provided the best notice practicable under the circumstances.
10 To assist the Court, attached hereto as Appendix 1 is a proposed form of Final
11 Judgment and Order of Dismissal with Prejudice. Plaintiffs can also provide the Court
12 with an electronic version of this proposed order, if the Court so desires.
13 Further, pursuant to the Court's Preliminary Approval Order (¶6) and the
14 parties' Settlement Agreement, Tilghman & Co., P.C. ("Tilghman"), the Settlement
15 Administrator, timely mailed notice to the Class. Pursuant to that notice, all
16 exclusions and objections were required to be mailed no later than July 30, 2010.
17 Preliminary Approval Order, ¶¶8-9. The briefs and evidence in support of final
18 approval and attorneys' fees and expenses are to be filed by September 3, 2010. *Id.*
19 ¶10. However, on August 18, 2010, the Ninth Circuit issued its opinion in *In re*
20 *Mercury Interactive Corp.*, No. 08-17372, 2010 WL 3239460 (9th Cir. 2010), in
21 which it ruled that pursuant to Rule 23(h), the court must set the objection deadline
22 ***after*** the deadline for class counsel to file their fee motion. *Id.* at *5. Based on
23 *Mercury*, the parties filed a stipulation seeking the Court's approval to provide
24 supplemental notice to the Class, extending the prior objection deadline and setting an
25 additional date for completion of the Fairness Hearing.

26 **II. STATEMENT OF THE CASE**

27 Plaintiffs allege that the Chase Defendants discriminated against minority
28 borrowers in making mortgage loans through a pricing system in which loan officers

1 and/or mortgage brokers had discretion to increase interest rates and/or charge
2 additional fees to particular borrowers. Plaintiffs allege that these policies exerted a
3 discriminatory disparate impact against the Defendants' minority borrowers because
4 they received higher priced loans than similarly situated non-minority borrowers.
5 Plaintiffs alleged causes of action for violations of the Civil Rights Act, the Fair
6 Housing Act ("FHA") and the Equal Credit Opportunity Act ("ECOA"). Plaintiffs
7 seek, among other things, compensatory damages and injunctive relief on behalf of
8 themselves and similarly situated African-American and Hispanic borrowers.
9 The Chase Defendants deny all claims asserted by plaintiffs, deny all
10 allegations of wrongdoing and liability, and have asserted numerous defenses,
11 including that there is no relevant discretionary pricing policy. The Chase Defendants
12 nevertheless desire to settle all claims that are asserted, or which could have been
13 asserted, in this action, solely for the purpose of avoiding the burden, expense and
14 uncertainty of continuing litigation and for the purpose of putting to rest the
15 controversies engendered by these actions.
16 On May 17, 2010, the Court preliminarily approved the Settlement and certified
17 the classes for settlement purposes. Order of Preliminary Approval of Settlement
18 ("Preliminary Approval Order"), at 1. The form of Notice approved by the Court was
19 sent to Class members in accordance with the Preliminary Approval Order and
20 Settlement on June 16, 2010. Declaration of L. Stephens Tilghman Regarding Class
21 Notice ("Administrator Decl."), ¶6.

22 **III. TERMS OF THE SETTLEMENT**

23 **A. The Settlement Class**

24 The Court preliminarily certified the following Settlement Class, as defined in
25 the Settlement Agreement, which is a nationwide class consisting of:

26 All African-American and Hispanic borrowers who, since August 23,
27 2005, obtained a mortgage loan originated through Chase's wholesale channel.

28 Settlement Agreement, ¶3.1

1 The Court preliminarily certified this Class under Rule 23(b)(3). Preliminary
2 Approval Order at 2. The Settlement Agreement allows for Class members to be
3 excluded from the Settlement. Tilghman received 157 timely requests to opt-out of
4 the Class. Administrator Decl., ¶10. If the Settlement Agreement is approved, these
5 putative Class members will not be eligible to receive any relief pursuant to the
6 Settlement Agreement, will not be bound by any further judgments in this action, and
7 will preserve their ability to independently pursue any individual claims they may have
8 against the Chase Defendants.

9 **B. Classwide Settlement Benefits**

10 Relief for Class members varies depending on the status of their respective
11 loans. Chase no longer owns or directly services many Class members' loans, in part
12 because many of these loans have already been paid off. Additionally, many Class
13 members are delinquent on their outstanding loans and are in a group of homeowners
14 struggling to keep their homes and avoid foreclosure. Accordingly, the Settlement
15 provides the following benefits for Class members whose loans are either: (1) paid-
16 off, (2) existing and non-delinquent, or (3) existing and delinquent:

17 **Paid-Off Borrowers**: Those Settlement Class members whose loans are paid-
18 off (whether by proceeds of sale, refinance or foreclosure) and who submit a claim
19 meeting the requirements set forth in the Agreement, shall be eligible to claim one of
20 the following benefits: (1) a check for $70, or (2) a $300 credit toward the closing
21 costs of his or her next Chase mortgage loan. Settlement Agreement, ¶5.1.1. Eligible
22 Paid-Off Borrowers will only be entitled to one benefit per Chase loan. *Id.* Eligible
23 Paid-Off Borrowers who have or are co-borrowers will be entitled to submit only one
24 claim form per loan, the benefits of which shall be issued jointly, with either the credit
25 or check being issued jointly in the Eligible Paid-Off Settlement Class members'
26 names. *Id.*

27 **Existing Non-Delinquent Borrowers**: Those Settlement Class members
28 whose loans are outstanding, but not delinquent, and who submit a claim meeting the

requirements set forth in the Settlement Agreement, shall be eligible to claim one of the following benefits: (1) a check for $90, or (2) a $300 credit toward the closing costs of his or her next Chase mortgage loan. *Id.* ¶5.1.2. Eligible Existing Non-Delinquent Borrowers will only be entitled to one benefit per loan. *Id.* Eligible Existing Non-Delinquent Borrowers who have or are co-borrowers will be entitled to submit only one claim form per loan, the benefits of which shall be issued jointly, with either the credit or check being issued jointly in the Eligible Existing Non-Delinquent Borrowers' names. *Id.* An Existing Non-Delinquent Borrower who submits such a claim shall not be entitled to any further benefits under the Settlement. *Id.* An Existing Non-Delinquent Borrower who does not submit a claim is eligible for Chase's Red Carpet Access, in the event that such services later become necessary. *Id.*

Existing Delinquent Borrowers: Those Settlement Class members whose loans are outstanding, but delinquent, are entitled to Red Carpet Access to Chase's loan modification services. *Id.* ¶5.1.3. Red Carpet Access will include: (1) dedicated 800 numbers (one for English speakers and one for Spanish speakers) that will be posted on the settlement website and reserved for Class members seeking loan modifications, (2) with dedicated personnel, (3) who have both fair lending training and training regarding the Settlement, and (4) some of whom have Spanish language skills. *Id.* ¶5.5. Additionally, Red Carpet Access will entitle each person whose request for a loan modification is denied to an automatic secondary review of the denial. Red Carpet Access will be available to eligible Class Members for two years after the effective date of the Agreement. *Id.*

Nothing in the Settlement Agreement shall be construed to constitute waiver of any rights that Settlement Class members may otherwise have to participate in any of Chase's otherwise-existing loan modification or foreclosure prevention programs. *Id.*

1 **C. Release**

2 The scope of the Settlement Agreement release was discussed on the record at
3 the May 17, 2010 preliminary approval hearing and is appropriately tailored to the
4 mortgage lending discrimination claims alleged in this action. Plaintiffs and Class
5 members who did not request exclusion will only release discrimination-based or
6 discrimination-related claims, as alleged or as could have been alleged based upon the
7 facts asserted in this action. *Id.* ¶4.1.

8 **D. Attorneys' Fees, Litigation Expenses, and Reimbursements**

9 By their final approval motion and consistent with the Settlement Agreement,
10 plaintiffs are applying for a total of $1.95 million in attorneys' fees and litigation
11 expenses. *Id.* ¶6.1. Additionally, plaintiffs request approval of service payments in an
12 amount not to exceed $5,000 per Class Representative. *Id.* ¶6.2. The Chase
13 Defendants do not oppose payment of these amounts. *Id.* ¶¶6.1, 6.2. These amounts
14 were negotiated at arm's-length only after agreement on relief for the Class.
15 Declaration of Hon. Edward A. Infante (Ret.) in Support of Plaintiffs' Motion for
16 Approval of Class Action Settlement ("Infante Decl."), filed March 25, 2010, ¶6.

17 **E. Notice and Administration**

18 Consistent with the Court's Preliminary Approval Order and the terms of the
19 Settlement Agreement, on June 16, 2010, the Settlement Administrator sent the
20 approved forms of Notices[2] by first class mail, postage prepaid, to Class members' last
21 known addresses. Administrator Decl., ¶6. Prior to mailing, the addresses were run
22 through the National Change of Address ("NCOA") database to ensure the addresses
23 were updated. *Id.* ¶5. The notices were sent in English; however, Spanish-speaking
24 Class members who wished to obtain the notice in Spanish were directed to the
25

26 [2] Attached as Exhibits B, C and D to the Settlement Agreement, which was
27 attached as Exhibit A to the Declaration of Theodore J. Pintar in Support of
Unopposed Motion for Preliminary Approval of Class Action Settlement, filed
28 March 10, 2010 ("Pintar Decl. ISO Prelim. Approval").

1 settlement website and provided with a toll-free number for additional information.
2 *Id.* ¶8. The settlement website provided notices in both Spanish and English. *Id.* ¶9.
3 The Administrator promptly re-mailed any notices that were returned as undeliverable
4 with a forwarding address. *Id.* ¶7.
5 The Administrator also established a website at the domain
6 http://www.noticeclass.com/payaressettlement/ and a toll-free telephone number
7 where Class members could obtain additional information on the Settlement
8 Agreement, claims process, and opt-out and objection procedures. *Id.* ¶9.
9 **F. Settlement Opt-Out Provision**
10 Chase Defendants retained the right to withdraw from the Settlement
11 Agreement by providing written notice to Class Counsel in the event of excessive opt-
12 outs. Settlement Agreement, ¶3.4. As the number of opt-outs did not meet this
13 threshold, this provision of the Settlement will not be invoked.
14 **IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE**
15
16 Rule 23(e) provides that the "claims, issues, or defenses of a certified class may
17 be settled, voluntarily dismissed, or compromised only with the court's approval."
18 Fed. R. Civ. P. 23(e). The Court may approve a settlement to the extent that it binds
19 class members, "after a hearing and finding that it is fair, reasonable, and adequate."
20 Fed. R. Civ. P. 23(e)(2); *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d
21 615, 625 (9th Cir. 1982) (a class action settlement should be reviewed under "the
22 universally applied standard [of] whether the settlement is fundamentally fair,
23 adequate, and reasonable").
24 Approval of the Settlement is committed to the sound discretion of the Court.
25 *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). However, settlements
26 of complex class actions like this prior to trial are strongly favored. *See Churchill*
27 *Village, LLC v. Gen. Elec. Co.*, 361 F.3d 566, 576 (9th Cir. 2004).
28 Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk,

> expense, complexity, and likely duration of further litigation; the risk of maintain[ed] class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998).

The Ninth Circuit consistently has applied this non-exclusive list of factors to assess whether, taken as a whole, a settlement is fair. *See Officers for Justice*, 688 F.2d at 625. "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon*, 150 F.3d at 1026; *see also Churchill Village,* 361 F.3d at 575-76.

Additionally, where as here, a proposed settlement has been reached after discovery and arm's-length negotiations conducted by capable counsel, and with the assistance of a well-respected mediator, it is "presumed fair." *National Rural Telecomm. Coop. v. DIRECTTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

Each of the factors relevant to this Settlement weighs in favor of its approval.

A. The Strength of Plaintiffs' Case/Risks of Further Litigation/Risks of Maintaining Class Action Status

The parties vigorously have disputed the merits of the claims and defenses at issue throughout the case. Plaintiffs and Class Counsel believe that their claims would ultimately be meritorious if litigated. However, they are aware that the outcome 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. Jackson*, 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (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 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

1 would require a costly battle of experts with respect to the statistical modeling, issues on
2 which the outcome is uncertain.

3 Regardless of the ultimate outcome of the case, it is indisputable that further
4 proceedings in this matter would be contentious, protracted, costly to the parties, and a
5 drain on the Court's time and resources. The Settlement allows all parties to obtain
6 adequate consideration and put to rest the claims at issue.

7 **B. The Amount Offered in Settlement**

8 The terms of the Settlement Agreement taken as a whole meet the standard for
9 "overall fairness." *See Hanlon*, 150 F.3d at 1026. As set forth above, Class members
10 will receive substantial economic and non-economic relief, which is possibly more than
11 they would receive if they proceeded with litigation.

12 The Settlement Agreement provides relief that is directly responsive to the
13 primary needs of Class members. Borrowers whose loans are existing and non-
14 delinquent or paid-off are eligible for monetary restitution of $70 or $90 per loan,
15 respectively, or $300 towards closing costs of a future Chase mortgage. Settlement
16 Agreement, ¶¶5.1.1, 5.1.2. These are significant benefits because individual
17 homeowners are unlikely to spend the time and money necessary to recover the
18 relatively small allegedly discriminatory amounts. The alleged overcharges at issue in
19 this case are the type of damages that class actions are most suited to remedy. 4 A.
20 Conte & H. Newberg, *Newberg on Class Actions* §11.6 (4th ed. 2002) ("*Newberg*").

21 Additionally, Class members whose loans are delinquent and are facing possible
22 foreclosure will benefit from the "Red Carpet Access" to Chase's loan modification
23 services. Settlement Agreement, ¶¶5.1.3, 5.5. This will provide Class members who are
24 in danger of losing their homes with greater access to Chase's loan modification
25 services, including access to dedicated personnel trained in the terms of the settlement
26 and fair housing. *Id.* ¶5.5.

27 The value of these benefits is certain but difficult to quantify. Disparate impact
28 litigation serves to ensure all people, regardless of race or ethnicity, are treated equally

1 and not subject to pernicious discrimination invisible to the ordinary consumer.
2 However, the undertaking of disparate impact litigation against a major financial
3 institution is a daunting task, requiring sophisticated economic and legal analysis and
4 legal proceedings over an extended time period. Had Class Counsel not undertaken this
5 litigation, it is doubtful that any of the Class members would have received any portion
6 of the relief obtained through this Settlement. Joint Decl., ¶18.

7 **C. The Settlement Was Achieved After Contentious,**
8 **Arm's-Length Negotiations**

9 Typically, "[t]here is usually an initial presumption of fairness when a proposed
10 class settlement, which was negotiated at arm's length by counsel for the class, is
11 presented for court approval." *Newberg* §11.41; *see also In re Employee Benefit Plans*
12 *Sec. Litig.*, No. 3-92-708, 1993 WL 330595, at *5 (D. Minn. June 2, 1993) ("The Court
13 is entitled to rely on the judgment of experienced counsel in its evaluation of the merits
14 of a class action settlement."). The Settlement was negotiated at arm's-length by
15 knowledgeable and experienced counsel during more than nine months of contentious
16 discussions. Joint Decl., ¶¶14-17. Negotiations commenced with a day-long mediation
17 session before Judge Infante in April 2010 and continued throughout the rest of the year,
18 culminating in the present Settlement Agreement. *Id.* ¶16. The nature of the mediation
19 session and involvement of a skilled mediator, the subsequent negotiations between the
20 parties, the experience of counsel as longstanding class action attorneys, and the fair
21 results reached are illustrative of the arm's-length negotiations that lead to the Settlement
22 Agreement. *Id.*

23 **D. Progress in Litigation**

24 The parties agreed upon the terms of the Settlement Agreement following
25 substantial fact investigation, informal and formal discovery, expert consultation, and
26 arm's-length negotiations by experienced counsel with the assistance of a skilled
27 mediator. *See* Infante Decl., ¶5; Joint Decl., ¶¶14-17. For these reasons, the parties and
28 the Court are in a position to assess realistically the strength of this case and the

1 comparative benefits of the proposed settlement. *See Hanlon*, 150 F.3d at 1026
2 (providing that a court should consider "the extent of discovery completed and the stage
3 of the proceedings" in making a final-approval decision).
4 The parties engaged in extensive formal and informal discovery for a year prior to
5 mediation. *Id.* ¶¶12-14. The parties exchanged written discovery, and Chase produced a
6 number of documents responsive to plaintiffs' discovery requests. *Id.* During the
7 negotiation process, Chase also produced its wholesale policies and procedures manual,
8 communications to brokers regarding broker compensation, forms of broker contracts,
9 and form disclosures to borrowers regarding options for broker compensation, and
10 information reflecting that Chase no longer sells wholesale mortgage loans. *Id.* ¶15.
11 The extensive discovery enabled plaintiffs to better assess the merits of their
12 claims and develop "a clear view of the strengths and weaknesses" of their case. *In re*
13 *Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985). The relief
14 provided under the Settlement Agreement reflects this assessment. For example,
15 plaintiffs learned through discovery that the claims of certain Class members were
16 stronger than others based on the status of their loans. Accordingly, the relief provided
17 under the terms of the Settlement Agreement varies depending on the status of the Class
18 member's loan.
19 **E. The Reaction of the Class Members**
20 The vast majority of the more than 118,000 borrowers who comprise the
21 Settlement Class have chosen to remain in the Settlement Class. As of the July 30, 2010
22 objection and opt-out deadline, the parties had received 157 opt-outs and only 29
23 objections to the Settlement Agreement. *See* Administrator Decl., ¶10; Declaration of
24 Theodore J. Pintar Regarding Class Members Correspondence ("Pintar Decl."), ¶3.
25 Reaction to a settlement is considered positive when the number of objectors is
26 minimal compared with the number of claimants. *See Hanlon*, 150 F.3d at 1027 ("[T]he
27 fact that the overwhelming majority of the class willingly approved the offer and stayed
28 in the class present[ed] at least some objective positive commentary as to its fairness.").

The very low numbers of opt-outs and objections by Class members here compare favorably to the numbers of opt-outs and objections other courts have considered when approving class settlements. *Rodriguez v. W. Publ'g Co.*, 563 F.3d 948, 967 (9th Cir. 2009) (finding a favorable reaction by class members where of the 376,301 putative class members who received notice, 54 submitted objections); *Churchill Village*, 361 F.3d at 577 (finding a favorable reaction by class members where of the 90,000 putative class members who received notice, 45 submitted objections and 500 submitted opt-outs).

Of the 118,193 Class members who were mailed notice, only 29 *pro se* Class members sent plaintiffs' counsel correspondence that may be characterized as an objection to the settlement. These have been submitted to the Court by a separate declaration.[3] *See* Pintar Decl., ¶¶6, 7, Exs. 1-29. 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 settlement is fair and reasonable. *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 (3d Cir. 1974) (settlement approved with 20% of class objecting); *Laskey v. Int'l Union*, 638 F.2d 954, 956 (6th Cir. 1981) (settlement fair and reasonable when only seven objections were filed out of 109 noticed class members); *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999).

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[3] Many of these Class member responses appear to not meet all of the requirements set forth in the Notices to be valid objections; however, they are still attached hereto and discussed above. Under the Settlement, as explained in the Notices, all objections must include: (1) the name of the lawsuit; (2) the borrower's full name, current address and telephone number; (3) the reasons for the borrower's objection; and (4) the borrower's signature. *See* Joint Decl., Exs. 1-3 [Notices]. In addition, to be considered, objections must be mailed to the lawyers handling the case for each side and to the clerk of court no later than July 30, 2010. *See id.*

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 Agreement, Class members will only release discrimination-based or discrimination-related claims. *See* discussion, *supra*, §III.C. 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.

There are three categories of objections: (1) objections to the relief in general because of prior experiences with loan modifications, refinancing or short sale agreements with Chase; (2) objections to the dollar amount of relief; and (3) Class members who fail to state a clear objection to the Settlement.

The objections by Class members Riley,[4] Covert, Rizo, Knighton, Gomez, Poole, Williams, Rodriguez, and Kyle are all based on experiences they had attempting to obtain permanent loan modifications, refinancing or short sale agreements from the Chase Defendants. *See* Pintar Decl., Exs. 10, 12, 16-20, 26, 27. As such, some express skepticism that the assistance of "Red Carpet Access" available under the Settlement will help them if the Settlement is finally approved. These objections are not valid for a number of reasons. First, because they are based on alleged conduct that is not at issue in this case, they are inapposite. These borrowers' ability to obtain loan modifications, refinancing or short sale agreements is unrelated to the claim that minority borrowers were subject to a discretionary pricing policy that had a disparate

[4] Ms. Riley is the only Class member that objects based on her inability to obtain a short sale agreement with Chase.

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impact on them. Indeed, as explained above, Class members are releasing discrimination-related claims only.

To the extent these Class members are objecting to the availability of the loan modification programs as a Settlement benefit, Chase is willing to reconsider their eligibility for the programs available under the Settlement that might entitle them to loan modification. *See* Settlement Agreement, ¶5.5. However, under Chase's loan modification programs, which are reserved to borrowers who qualify, some Class members may simply be ineligible because they do not meet program criteria. The same is true for Class members' ability to short sale their homes. Because the release does not address denied loan modifications or short sale agreements, these objectors remain free to seek additional relief at their own cost and expense.

Class members Bey, Brookins, Johnson, Koon, Hall, Benitez, Hood, Harvey, Jackson, White, Davis, Gil,[5] and Swinger all generally object to the monetary amount of relief provided under the Settlement. *See* Pintar Decl., ¶7, Exs. 1-9, 15, 24, 25. Class members Swinger, Koon, Jackson, Johnson, Hall, and Benitez all generally contend that the dollar amount offered is too low because the claims involve racial discrimination. Class members Brookins, White, Davis, Harvey, and Bey[6] all assert that the relief is insufficient because the interest rates on their mortgages should be

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[5] Gil also objects to the payment of Plaintiffs' counsel's fees and expenses. He asserts that the requested amount is too high in comparison to the monetary amount provided to each Class member. This misses the point of class action litigation. As stated above, the amount of relief each Class member could receive on an individual basis is too low to create any incentive to challenge a large banking institution like Chase. *See Newberg* ¶11.6. Accordingly, plaintiffs' counsel took on this litigation to pursue the claims as a whole without the promise of obtaining any payment, and thus, should be reasonably compensated for achieving the results of this Settlement after two years of litigation.

[6] Mr. Bey did not expressly object to the Settlement; however, on July 24, 2010, he filed a Notice of Intention, supplemental claims, and an application for temporary restraining order. On July 28, 2010, the Court rejected the documents filed Mr. Bey and ordered them returned because they were not properly filed and he is not a party to this action.

1 adjusted. Hall provides no basis for his contention that the monetary amount is too
2 low.
3 With all due respect to these Class members' concerns, Plaintiffs believe that
4 the relief provided under the terms of the Settlement is appropriate and adequate given
5 the nature of the claims. Plaintiffs' counsel were able to ascertain an estimate of the
6 damages associated with Chase's alleged discretionary pricing of loans with the
7 assistance of experts and after review of the formal, informal and confirmatory
8 discovery. The $70 and $90 settlement payments available to Class members whose
9 loans are either paid-off or existing and non-delinquent are directly related to this
10 assessment. The payment amounts are rationally related to the actual disparities
11 between minority Chase borrowers and white Chase borrowers with similar credit
12 profiles. *Id.*
13 Moreover, Class members were entitled to opt out of the Settlement. The
14 purpose of this exclusion right is to protect individuals who have interests that are
15 inconsistent with those of the class from the binding effect of a class action settlement.
16 *See Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 568 (2d Cir. 1968). "Class members
17 who find the settlement unattractive can protect their own interests by opting out of the
18 class." *Manual for Complex Litigation (Fourth)* §21.643 (2004) ("*MCL 4th*"). The
19 opt-out opportunity provided for in this Settlement ensures fairness to Class members
20 who are dissatisfied with the compensation they would receive.
21 Finally, the Beasley, Jones, and Clarke objections (Pintar Decl., Exs. 21-23) fall
22 into the third category of Class members who fail to state a clear objection to the
23 Settlement. Ms. Jones complains that Chase is overcharging her $40 a year for
24 insurance and recently raised her insurance rate by 1% when she thought she had a
25 fixed-rate mortgage. *Id.* Ex. 22. These claims are entirely unrelated to the claims
26 asserted by plaintiffs here and are thus not extinguished by the Settlement and can be
27 pursued separately. Ms. Beasley objects because she wants to know what happened to
28 her "dividends"; she also states that she wants to be included in the Settlement. *Id.*

Ex. 21. Ms. Clarke states that she believes the Settlement is unfair. She wants "big business" to pay, but she also wants to join the class action suit. *Id.* Ex. 23. To the extent the Court considers these objections to be valid, they should be overruled because they fail to provide appropriate factual or legal support.

V. THE NOTICE PROGRAM PROVIDED ADEQUATE NOTICE TO THE SETTLEMENT CLASS

Pursuant to the Court's Preliminary Approval Order and the Settlement Agreement, Tilghman, the third party Administrator, implemented the approved Class Notice Program ("Notice Program"). Preliminary Approval Order, at 3. On June 16, 2010, the Administrator sent a Notice to 118,192 Class members by first-class, pre-paid mail to the last known address based on Chase's records. Administrator Decl., ¶6. Before mailing, Class members' addresses were updated through the National Change of Address database to ensure the Notice was sent to Class members' current addresses. *Id.* ¶5. Tilghman re-mailed notices based on either (a) a forwarding address indicated on the returned notices or (b) addresses provided by class members who contacted Tilghman. Additionally, a settlement website (http://www.noticeclass.com/payaressettlement/) was established to provide information on the claims process, downloadable copies of the Notices and Settlement Agreements and updates regarding final approval and the availability of "Red Carpet Access." *Id.* ¶9.

As discussed above, in light of the Ninth Circuit's recent *Mercury* decision, the parties have filed a stipulation seeking Court approval to provide supplemental notice to the Class, to reopen the objection period to follow the filing of Class Counsel's fee motion and to continue the Fairness Hearing for 60 days.

A. The Notice Program Provided the Best Practicable Notice, Including Direct Notice, to All Identifiable Settlement Class Members

The Notice Program satisfies all requirements that the notice be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v.*

1 *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865
2 (1950). In its Preliminary Approval Order, the Court authorized Chase to retain
3 Tilghman as the Settlement Administrator to administer the notice procedures and
4 other aspects of the proposed Settlement, as set forth in the Settlement Agreement.
5 Preliminary Approval Order, at 3. Thereafter, the parties and Tilghman implemented
6 the Notice Program. Administrator Decl., ¶¶3-6. This is more than sufficient. *See,*
7 *e.g.*, *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1110-10 (10th Cir. 2001) (Rule 23
8 and due process satisfied where 77% of class members received notice of settlement).

9 **B. The Notice Program Adequately Informed Settlement Class**
10 **Members of the Settlement and the Process to Opt-Out or Object**

11 Further, the Court-approved Notice satisfied Rule 23(c)(2)(B). To provide
12 adequate notice of a class-action settlement, the notice should "'generally describe[]
13 the terms of the settlement in sufficient detail to alert those with adverse viewpoints to
14 investigate and to come forward and be heard.'" *Churchill Village*, 361 F.3d at 575.
15 In addition, Rule 23(h)(1) requires that notice of Class Counsel's request for
16 attorneys' fees must be "directed to class members in a reasonable manner." Fed. R.
17 Civ. P. 23(h)(1). The parties did that here.

18 The Class Notice was clear, straightforward and sufficiently detailed to inform
19 Class members of the nature of the action, the definition of the class certified, the
20 class claims, issues and defenses, that a Class member may enter appearance through
21 an attorney if he or she so desires, that the Court will exclude anyone from the Class
22 who requests exclusion, the time and manner for requesting exclusion, and the binding
23 effect of a class judgment on members under Rule 23(b)(3). *See* Pintar Decl. ISO
24 Prelim. Approval, Ex. 1 [Notices]. Further, the Notices appropriately informed
25 Settlement Class Members of the terms of the Settlement Agreement, the maximum
26 counsel fees and expenses that may be sought, and it explained that objectors would
27 have an opportunity to be heard at the Fairness Hearing. *Id.* All three Notices were
28 also made available in Spanish. Administrator Decl., ¶8. Accordingly, the Notices

more than fairly apprised Class members of the Settlement and their options with respect thereto.

C. The Notice Program Adequately Explained the Procedures to Request Exclusion or to Object

Notice of a class action settlement should alert class members of the procedures to request exclusion or to object. *See MCL 4th* §§21.312, 21.633 (2004). The Notices here specifically explained what it means to opt out and how one excludes oneself from the proposed Settlement. *See* Pintar Decl. ISO Prelim. Approval, Ex. 1 [Notices]. The Notices also advised that the opt-out must be written and included the necessary information to include in the written request. *Id.* It further informed Class members that they will be given an opportunity to be heard at the Fairness Hearing if they object to the settlement in writing. *Id.* Hence, the Notices provided to the Settlement Class fully apprised the Settlement members of the procedures to request exclusion or to object.

D. The Notice Program Adequately Informed the Settlement Class Members of the Final Fairness Hearing

Notice of a Final Fairness Hearing should inform the class that they can present their views on the settlement, as well as present arguments for and against settlement, when the Court addresses the fairness, reasonableness, and adequacy of a proposed settlement. *See MCL 4th* §§21.633, 21, 21.634. Here, the Notices informed Class members of the details of the Final Fairness Hearing – that it will be held on September 13, 2010 (unless continued) with the precise address. *See* Joint Decl., Exs. __ [Notices]. As noted above, the Notices informed the Members that if they wanted to be heard, whether in person or by counsel, they needed to file a timely written objection in compliance with the Notice. *Id.* As such, the Court can conclude that the Notices adequately notified the Settlement Class Members of the Final Fairness Hearing to be held before the Court.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

VI. THE PROPOSED SETTLEMENT CLASS SATISFIES THE REQUIREMENTS FOR CERTIFYING A SETTLEMENT CLASS

The 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. Additionally, 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 incorporate by reference the discussion in their Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement for the reasons making certification of the settlement class appropriate here. *See* Dkt. No. 99, at 9-15.

VII. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court find the Settlement Agreement to be fair, reasonable and adequate, and to give it final approval. A proposed form of Final Judgment and Order of Dismissal with Prejudice is attached hereto as Appendix 1.

DATED: September 3, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2010, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 3, 2010.

s/ Theodore J. Pintar

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APPENDIX 1

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ALFREDO B. PAYARES, ZINNIA GONZALEZ and GREGORY WALKER,

Plaintiffs,

vs.

J.P. MORGAN CHASE & CO. et al.,

Defendants.

No. CV-07-05540-AG(ANx)

CLASS ACTION

[PROPOSED] FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

1 The Settlement Agreement between plaintiffs, on behalf of themselves and
2 members of the Class defined below, and defendants Chase Bank USA, N.A. and
3 JPMorgan Chase Bank, N.A. ("Chase") provides for the Settlement of this lawsuit on
4 behalf of plaintiffs and Class Members, subject to final approval by this Court of its
5 terms and to the entry of this Final Judgment.
6 Pursuant to an Order, dated May 17, 2010 ("Preliminary Approval Order"), the
7 Court scheduled a hearing (the "Fairness Hearing") to consider final approval of the
8 Settlement Agreement and the Settlement reflected in it.
9 Chase denies any wrongdoing, fault, violation of law, or liability for damages of
10 any sort. Chase objected, and continues to object, to the certification of any class and
11 has agreed to the certification of this class for settlement purposes only.
12 A Fairness Hearing was held before this Court on September 13, 2010, to
13 consider, among other things, (i) whether the Settlement should be approved by this
14 Court as fair, reasonable, and adequate, (ii) whether Class Counsel's request for
15 approval of attorneys' fees and expenses is reasonable and should be approved by this
16 Court, and (iii) whether plaintiffs' request for approval of service payments is
17 reasonable and should be approved by this Court.
18 NOW THEREFORE, GOOD CAUSE APPEARING, IT IS HEREBY
19 ORDERED, ADJUDGED, AND DECREED THAT:
20 1. This Order incorporates by reference the definitions in the Settlement
21 Agreement, and all capitalized terms used in this Order will have the same meanings
22 as set forth in the Settlement Agreement, unless otherwise defined in this Order.
23 2. The Court finds that the Settlement Agreement is the product of good-
24 faith, arm's length negotiations by the Parties, with the assistance of an experienced
25 mediator. All Parties were represented by experienced counsel.
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1 3. The Court finds that the Class proposed for purposes of the Settlement
2 meets the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3), and hereby certifies a
3 Settlement Class in the Action as follows:
4 All African-American and Hispanic borrowers who, since August 23,
5 2005, obtained a mortgage loan originated through Chase's wholesale channel.
6 4. Notice was provided to members of the Settlement Class as provided for
7 under the Settlement Agreement and the Preliminary Approval Order. For the reasons
8 set forth in the Preliminary Approval Order, the Court finds that Notice was the best
9 notice practicable in the circumstances and that it met applicable standards pursuant to
10 Fed. R. Civ. P. 23(c)(2).
11 5. This Court approves the Settlement and all terms set forth in the
12 Settlement Agreement and finds that the Settlement is, in all respects, fair, reasonable,
13 adequate, and in the best interests of the Settlement Class, and the Parties to the
14 Agreement are directed to consummate and perform its terms.
15 6. The Parties dispute the validity of the claims in this Action, and their
16 dispute underscores not only the uncertainty of the outcome but also why the Court
17 finds the Settlement Agreement to be fair, reasonable, adequate, and in the best
18 interests of the Settlement Class. Beyond facing uncertainty regarding the resolution
19 of those issues, by continuing to litigate, Class Members would also face the challenge
20 of surviving an appeal of any class certification order entered in this Action, and any
21 other rulings rendered during trial. The relief negotiated by the Parties includes the
22 ability of Class Members whose mortgage loans are paid off to claim either a cash
23 payment of $70 or a $300 credit toward the closing costs of a new Chase mortgage
24 loan. The relief negotiated by the Parties includes the ability of Class Members whose
25 mortgage loans are outstanding, but not Delinquent, to claim either a cash payment of
26 $90 or a $300 credit toward the closing costs of a new Chase mortgage loan. For
27 Class Members whose mortgage loans are outstanding, but are Delinquent, the relief
28 negotiated by the Parties includes special access ("Red Carpet Access") to Chase's

1 existing loan modification program, with dedicated Chase personnel to assist with
2 loan modifications, with personnel with Spanish language skills. For these reasons,
3 the Court finds that the uncertainties of continued litigation in the trial court and
4 potentially on appeal, as well as the expense associated with it, weigh in favor of
5 approval of the Settlement Agreement.

6 7. Any and all objections to Final Approval of the Settlement Agreement
7 and to Class Counsel's request for approval of attorneys' fees and expenses have been
8 considered and are hereby found to be without merit and are overruled.

9 8. This entire Action is dismissed with prejudice, and without costs to any
10 Party, except as otherwise provided by the award of Attorney's Fees and Costs to
11 Class Counsel provided below.

12 9. Upon the Effective Date, the Class Representatives forever release,
13 waive, discharge, and agree to the dismissal of, with prejudice, all claims that have
14 been made, or could have been made, in the Action against Chase (defined here to
15 include all of its parents, subsidiaries, affiliates, agents, successors, assignors,
16 assignees, and/or assigns and their respective subsidiaries, affiliates, agents,
17 successors, assignors, assignees, and/or assigns, and each of their respective present,
18 former, or future officers, directors, shareholders, agents, employees, representatives,
19 consultants, accountants, and attorneys), under ECOA or the FHA, or any other
20 federal or state statute or any common law theory, including all claims for monetary,
21 equitable, declaratory, injunctive, or any other form of relief.

22 10. Each Class Member who has not opted out of the Settlement in
23 accordance with the terms of the Agreement, and each of their respective spouses,
24 executors, representatives, heirs, successors, bankruptcy trustees, guardians, wards,
25 joint tenants, tenants in common, tenants by the entirety, co-borrowers, agents, and
26 assigns, and all those who claim through them or who assert claims on their behalf
27 (including the government in its capacity as *parens patriae*), will be deemed to have
28 completely released and forever discharged the Released Parties, and each of them,

1 from any claim, right, demand, charge, complaint, action, cause of action, obligation,
2 or liability of any and every kind, including, without limitation, those based on
3 contract, ECOA, and/or the FHA, or any other federal, state, or local law, statute,
4 regulation, or common law, including all claims for monetary, equitable, declaratory,
5 injunctive, or any other form of relief, whether known or unknown, suspected or
6 unsuspected, under the law of any jurisdiction, which Class Representatives or any
7 Class Member ever had, now has, or may have in the future, resulting from, arising
8 out of, or in any way, directly or indirectly, connected with (a) the claims raised in this
9 Action or its related action, *Gonzalez v. JPMorgan Chase*, No. CV08-2140 (C.D.
10 Cal.), and (b) claims which could have been raised in this Action or the *Gonzalez*
11 Action based on the same transactional nucleus of facts.
12 11. Class Counsel's request for approval of attorneys' fees and costs in the
13 amount of $1.95 million, which Chase does not oppose, is approved. This Court,
14 having presided over the above-captioned action and having considered the materials
15 submitted by Class Counsel in support of final approval of the settlement as well as
16 their request for attorneys' fees and costs, finds the award appropriate based on the
17 following factors:
18 a. The settlement provides substantial benefits for the class.
19 b. The requested award of attorneys' fees and expenses is within the
20 range of reasonable fees for similar class action settlements.
21 c. The requested fee is consistent with the total lodestar fees of Class
22 Counsel, based on declarations submitted to the Court.
23 d. This litigation raised numerous questions of law and fact,
24 plaintiffs' counsel was opposed by highly skilled defense counsel, the litigation was
25 intensely contested through the completion of the Settlement Agreement, and there
26 was substantial risk that plaintiffs would not prevail on some or all of their claims.
27 e. The Settlement was negotiated at arms' length and without
28 collusion, with the assistance of a highly qualified mediator.

f. Under the Settlement Agreement, the attorney's fees and costs will be paid by Chase in addition to the substantial benefits to the Settlement Class and therefore do not reduce the amount available to Class Members from a common fund.

12. Class Representatives' request for approval of service payments in the amount of $5,000 per Class Representative, which Chase does not oppose, is approved. These payments represent appropriate compensation to the Class Representatives, consistent with the value of their service to the members of the Settlement Class. Under the Settlement Agreement, these amounts will be paid by Chase in addition to the substantial benefits to the Settlement Class and therefore do not reduce the amount available to Class Members.

13. Any person or entity wishing to appeal this Final Judgment shall post a bond with this Court in the amount of $_______________ as a condition to prosecuting the appeal.

14. If the Effective Date, as defined in the Settlement Agreement, does not occur for any reason whatsoever, this Final Judgment and the Preliminary Approval Order shall be deemed vacated and shall have no force and effect whatsoever.

15. Without affecting the finality of this Final Judgment in any way, this Court retains continuing jurisdiction for the purpose of enforcing the Settlement Agreement and this Final Judgment, and other matters related or ancillary to the foregoing.

1 16. The Parties having so agreed, good cause appearing, and there being no
2 just reason for delay, it is expressly directed that this Final Judgment and Order of
3 Dismissal with Prejudice be, and hereby is, entered as a final and appealable order.
4 * * *
5 **ORDER**
6 IT IS SO ORDERED.
7 DATED: ______________________ ______________________________________
8 HONORABLE ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE
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