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

KYLE J. LIGUORI and TAMMY L. HOFFMAN, individually and on behalf of all others similarly situated,	:	
Plaintiffs,	:	
v.	:	**Civ. No. 08-479**
WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., NORTH STAR MORTGAGE GUARANTY REINSURANCE COMPANY,	:	
Defendants.	:	

ORDER

Plaintiffs in this class action allege that Wells Fargo, in violation of the Real Estate Settlement Procedures Act, accepted kickbacks and fee splits from Private Mortgage Insurers to whom it referred business. 12 U.S.C. § 2607. On August 31, 2012, I preliminarily approved settlement and certified the class for settlement purposes. *(Doc. No. 173.)* Now before me is Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, Approval of Plan of Allocation, Appointment of Class Representatives, and Appointment of Lead Class Counsel and Class Counsel. *(Doc. No. 179.)*

There have been no objections to the proposed Settlement and only 23 of the 73,738 Class Members have opted out of the Class. I held a final approval hearing on January 28, 2013, at which there were no objectors. Because I conclude that the proposed Settlement Class meets the requirements of Rule 23 and that the proposed Settlement is fair, reasonable, and adequate, I will grant Plaintiff's Unopposed Motion.

"When presented with an unopposed motion for class certification and settlement approval, a court must separate its analysis of the class certification issue from its evaluation of the settlement's fairness." In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig., 263 F.R.D. 226, 234 (E.D. Pa. 2009) (citing In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 257 (3d Cir. 2009)). I will first address whether class certification is appropriate, then evaluate the fairness of the settlement.

I. CERTIFICATION OF SETTLEMENT CLASS

The Parties have proposed the following Settlement Class:

> All borrowers with residential mortgage loans closed on or after March 7, 2006 through January 1, 2008 that were originated by Wells Fargo Bank, N.A. ("Wells Fargo Bank") and reinsured by North Star Mortgage Guaranty Reinsurance Company ("North Star") or its subsidiaries, excluding borrowers with residential mortgage loans originated by Wells Fargo Bank's Correspondent Lending Division or otherwise purchased on the secondary market.

On August 31, 2012, I ordered that notice be disseminated to this proposed Class.

To certify a class under Rule 23, I must conclude that Plaintiffs have met each of the four Rule 23(a) requirements and one or more of the Rule 23(b) requirements. Fed. R. Civ. P. 23. I must construe Rule 23 liberally; "in a doubtful case . . . any error, if there be one, should be committed in favor of allowing a class action." Eisenberg v. Gagnon, 776 F.2d 770, 785 (3d Cir. 1985). In determining whether a proposed settlement class should be certified, however, courts must apply a more rigorous standard where "settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously." In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 349-50 (3d Cir. 2010). This ensures "that class counsel has demonstrated sustained advocacy throughout the course of the proceedings and has protected the interests of all class members." Id.

The proposed Settlement Class meets all four requirements of Rule 23(a): 1) at 73,738 persons, it is sufficiently numerous; 2) Class Members share legal and factual questions regarding Defendants' practice of collecting a portion of borrowers' mortgage insurance premiums for reinsurance services; 3) the Named Plaintiffs' claims typify those of the Class as they challenge the same conduct that would be challenged by the Class; and 4) Named Plaintiffs and Class Counsel will fairly and adequately represent Class interests.

In addition, the proposed Class meets the requirements of Rule 23(b)(3), which permits class action lawsuits when "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and that a class action is the superior method for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). Here, common questions of both fact and law "predominate," as Defendants' alleged conduct did not vary with regard to Class Members. Furthermore, courts have found that class actions are the most efficient and consistent method of adjudicating a collection of RESPA claims such as these. See Alexander v. Washington Mut., Inc., Civ. No. 07-4426, 2012 WL 6021098, at *5 (E.D. Pa. Dec. 4, 2012) (citing Cohen v. J.P. Morgan Chase & Co., 262 F.R.D. 153, 159 (E.D.N.Y. 2009)).

Accordingly, I certify the proposed Settlement Class.

II. NOTICE TO THE CLASS

I must "determine notice was appropriate before evaluating" the settlement on its merits. Alexander, 2012 WL 6021098, at *6. I find that the notice provided to Class Members meets the requirements of Rule 23(c)(2)(B):

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

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

Fed. R. Civ. P. 23(c)(2)(B). On October 10, 2012, after conducting an address search, the settlement administrator, Garden City Group, Inc., mailed notice to 73,738 Class Members by first-class mail. The notice was written in clear, concise language, and informed recipients of the proposed Class, its claims, and the terms of the proposed Settlement. The notice also provided instructions for opting out and gave the date for the final approval hearing. Class Members could access a website created to provide further information regarding the Settlement, and could also call a toll-free number with their questions.

III. APPROVAL OF CLASS ACTION SETTLEMENT AND ALLOCATION PLAN

I may approve a class action settlement under Rule 23 where, as here, it is "fair, reasonable and adequate." See Fed. R. Civ. P. 23(e)(1)(c); In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 316 (3d Cir. 1998); Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118 (3d Cir. 1990); Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d 956, 965 (3d Cir. 1983). I have broad discretion in making this decision. Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975).

Courts in this Circuit give considerable weight and deference to the views of experienced counsel as to the merits of an arms-length settlement. In re Auto. Refinishing Paint Antitrust

Litig., 2004 U.S. Dist. LEXIS 29161, at *6 (E.D. Pa. September 27, 2004); see also Petruzzi's, Inc. v. Darling-Del. Co., 880 F. Supp. 292, 301 (M.D. Pa. 1995) ("[T]he opinions and recommendations of . . . experienced counsel are . . . entitled to considerable weight."); Lake v. First Nationwide Bank, 156 F.R.D. 615, 628 (E.D. Pa. 1994) (giving "due regard to the recommendations of the experienced counsel in this case, who have negotiated this settlement at arms-length and in good faith"). "A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." In re Linerboard Antitrust Litig., 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003).

In Girsh v. Jepson, the Third Circuit identified nine factors to assist courts in determining whether a class action settlement should be approved as "fair, adequate and reasonable." 521 F.2d at 157. These "Girsh factors" are:

> (1) the complexity, expense and likely duration of the litigation;
> (2) the reaction of the class to the settlement;
> (3) the stage of the proceedings and the amount of discovery completed;
> (4) the risks of establishing liability;
> (5) the risks of establishing damages;
> (6) the risks of maintaining the class action through the trial;
> (7) the ability of the defendants to withstand a greater judgment;
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
> (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

In re Cendant Corp. Litig., 264 F.3d 201, 232 (3d Cir. 2001). When appropriate, courts should also consider

> (10) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; (11) the existence and probable outcome of claims by other classes and subclasses; (12) the comparison between the results achieved by the settlement for

> individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; (13) whether class or subclass members are accorded the right to opt out of the settlement; (14) whether any provisions for attorneys' fees are reasonable; and (15) whether the procedure for processing individual claims under the settlement is fair and reasonable.

Prudential, 148 F.3d at 323 (numbers added). After these factors here, I conclude that the Settlement is fair, adequate, and reasonable.

First, the complexity, expense, and likely duration of the litigation support settlement. The Parties had diligently litigated this matter for over four years before they reached a settlement. The Parties fully briefed Defendants' Motion to Dismiss, and were in the process of completing briefing relating to Defendants' Motion for Summary Judgment. The continued prosecution of the case would have incurred significant costs and caused substantial delay before a recovery, if any, could be obtained. All Parties are represented by able counsel who vigorously and effectively litigated this matter. Trial likely would be lengthy, "with its attendant pretrial order, laborious winnowing of proof before trial, and post-trial skirmishing." In re Gulf Oil/Cities Serv. Tender Offer Litig., 142 F.R.D. 588, 591 (S.D.N.Y. 1992). The Settlement guarantees substantial benefits to the Class and avoids years of delay and uncertainty.

The second Girsh factor supports approval of the Settlement: no Class member has objected, and only 23 potential Class Members have opted out. Absence of objections carries "nearly dispositive weight." In re Linerboard Antitrust Litigation, 296 F. Supp. 2d 568, 578 (E.D. Pa. 2003) (citations omitted).

The stage-of-proceedings factor also weighs in favor of the Settlement. The Parties have engaged in extensive discovery and consulted with experts. Class Counsel had considerable information from which to make an informed judgment regarding the reasonableness of the

proposed Settlement. Moreover, the case has been in active litigation for over four years and there has been ample time to review and assess the issues raised during discovery.

The fourth, fifth, and sixth Girsh factors—the risks of establishing liability and damages and of maintaining the class action through the trial—also favor settlement. Liability and damages were both hotly contested, and would have likely required expensive expert testimony on both sides, reducing any judgment to Class Members. Arguments raised by Defendants over the course of litigation have yet to be tested in the circuit courts, and litigation would likely generate lengthy appeals. Finally, Defendants continued to oppose class certification, increasing the risk of maintaining the Class. By arriving at a fair and reasonable settlement for the Class, Class Counsel have averted the myriad risks involved in litigating this case through to a verdict.

The seventh Girsh factor does not support approval of the Settlement, as Defendants could withstand a greater judgment. Standing alone, however, the determination that a defendant could withstand a greater judgment "does not carry much weight in evaluating the fairness" of a settlement. Meijer, Inc. v. 3M, 2006 WL 2382718, at *16 (E.D. Pa. Aug. 14, 2006) (citing Perry v. FleetBoston Fin. Corp., 229 F.R.D. 105, 116 (E.D. Pa. 2005)). Moreover, Plaintiffs would face attendant risks if this case proceeded to trial, and could potentially recover nothing. Accordingly, I accord this factor little weight. See, e.g., Lazy Oil Co. v. Wotco Corp., 95 F. Supp. 2d 290, 318 (W.D. Pa. 1997) (that a settling defendant had the financial resources to pay a larger judgment did not weigh against settlement "in light of the risks that Plaintiffs would not be able to achieve any greater recovery at trial").

Finally, the eighth and ninth factors weigh in favor of settlement. In light of the risks of continued litigation and the uncertainty respecting the appropriate measure of damages, the

settlement amount is reasonable. Furthermore, the gross payment per Class member here is $173, higher than gross payments in settlements recently approved by this Court in similar cases. See Alexander, 2012 WL 6021098, at *10 ($94 gross payment per class member); Memorandum in Support of Final Approval of Settlement at 36, Alston v. Countrywide Fin. Corp., Civ. No. 07-3508 (E.D. Pa. July 15, 2011) ($125 gross payment per class member).

Several of the non-exclusive factors developed by the Third Circuit also support the Settlement. The attorneys' fees proposed by Class Counsel (and awarded in a separate Order of this date) are reasonable, Class Members have been afforded the opportunity to opt out of the Settlement Class, and the procedure for processing individual claims is fair and reasonable.

Taking into consideration all the benefits obtained for the Class and the risks of litigation, I find that the Girsh factors strongly support the Settlement.

I must also determine the reasonableness of the plan of allocation the settlement affords. See In re Ikon Office Solutions, Inc., 194 F.R.D. 166, 184 (E.D. Pa. 2000). "Approval of a plan of allocation of a settlement fund in a class action is 'governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'" Id. (quoting In re Computron Software, Inc., 6 F. Supp. 2d 313, 321 (D.N.J. 1998)). "As with other aspects of settlement, the opinion of experienced and informed counsel is entitled to considerable weight." In re Am. Bank Note Holographics, Inc., 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001). Here, the plan of allocation will reimburse Class Members based on the number of PMI payments paid, and in no circumstance will any portion of the Settlement Fund revert to Defendants. Class Counsel described this proposal for Settlement distribution in its

notice to Class Members. No Class member objected to the proposed allocation plan. I conclude that the plan of distribution of the Settlement fund is fair, adequate, and reasonable.

AND NOW, this 7th day of February, 2013, upon consideration of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, Approval of Plan of Allocation, Appointment of Class Representatives, and Appointment of Lead Class Counsel and Class Counsel *(Doc. No. 179)*, Defendants' Memorandum in support of the proposed Settlement *(Doc. No. 183)*, and the Parties' Settlement Agreement executed March 27, 2012, and after a duly-noticed final approval hearing on January 28, 2013, **IT IS HEREBY ORDERED** as follows:

Except as otherwise defined herein, all capitalized terms shall have the same meaning ascribed to them in the Settlement Agreement.

1. Pursuant to Federal Rule of Civil Procedure 23(e), the terms of the Agreement dated March 27, 2012 are hereby finally approved as fair, reasonable and adequate in light of the factual, legal, practical and procedural considerations raised by this Action.

2. Solely for the purpose of Settlement in accordance with the Settlement Agreement, and pursuant to Rules 23(a) and (b)(3), the Court hereby finally certifies the following Class:

> All borrowers with residential mortgage loans closed on or after March 7, 2006 through January 1, 2008 that were originated by Wells Fargo Bank, N.A. ("Wells Fargo Bank") and reinsured by North Star Mortgage Guaranty Reinsurance Company ("North Star") or its subsidiaries, excluding borrowers with residential mortgage loans originated by Wells Fargo Bank's Correspondent Lending Division or otherwise purchased on the secondary market.

3. The Court appoints Named Plaintiffs Kyle J. Liguori and Tammy L. Hoffman as representatives of the Class.

4. The Court appoints the law firm Kessler Topaz Meltzer & Check, LLP as Lead Class Counsel, and the law firms of Bramson, Plutzik, Mahler & Birkhaeuser, LLP, Berke, Berke & Berke, and Travis Calhoun & Conlon as Class Counsel (collectively, "Plaintiffs' Counsel") pursuant to Rule 23(g).

5. The Court finds that, pursuant to Rules 23(a) and (b)(3), in light of the current posture of this case as a class action, that:

a. The Class is so numerous that joinder of all members is impracticable.

b. There are questions of law or fact common to the Class.

c. The claims of the Named Plaintiffs are typical of the claims of the Class.

d. Named Plaintiffs and Plaintiffs' Counsel have and will fairly and adequately protect the interests of the Class.

e. The questions of law or fact common to members of the Class, and which are relevant for settlement purposes, predominate over the questions affecting only individual members.

f. Certification of the Class is superior to other available methods for the fair and efficient adjudication of the controversy.

6. The Court finds that the Settlement is fair, adequate and reasonable. Accordingly, the Settlement should be and is approved and shall govern all issues regarding the

Settlement and all rights of the Parties, including the Class Members. Each Class Member who has not opted out of the Class shall be bound by the terms and provisions of the Agreement and this Order, including the releases and covenants not to sue set forth in the Agreement, which are hereby incorporated by reference and become part of the final judgment in this Action.

7. The Settlement Administrator shall cause the Settlement Fund to be disbursed in accordance with the Agreement. Specifically, within seventy-five (75) days of the entry of this Order, the Settlement Administrator shall cause each Participating Class Member to be mailed a check as payment under the Settlement, as further limited and approved by the Agreement.

8. Within five (5) business days following the Effective Date, the Settlement Administrator shall disburse to the Named Plaintiffs the Case Contribution Awards specified below, which the Court finds to be warranted by the activities and leadership undertaken by each of the Named Plaintiffs:

Kyle J. Liguori: $7,500

Tammy L. Hoffman: $7,500

9. Having awarded Plaintiffs' Counsel attorneys' fees and costs in my Order of February 7, 2013, the Settlement Administrator shall release from the Settlement Fund the fees and expenses awarded to Lead Class Counsel after the Effective Date, pursuant to Section 5.2 of the Agreement. Lead Class Counsel shall disburse such award among Plaintiffs' Counsel, as that term is defined in the Agreement, in a manner consented to by all recipients, pursuant to an agreement among Plaintiffs' Counsel.

10. The Settlement Administrator and the Parties, consistent with the terms and deadlines established in the Agreement, shall prepare reports and calculations, make any

payments, adjustments or remittances required, and otherwise comply with their respective obligations under Sections 4.1 through 4.9 of the Agreement.

11. All claims against Defendants, as defined in the Agreement, are hereby dismissed on the merits and with prejudice.

12. Each and every Class Member is permanently barred from bringing, joining, or continuing to prosecute against Defendant Parties, as defined in the Agreement, any claim that was brought in this Action or otherwise for which a release and covenant not to sue is given under the Agreement.

13. This Court retains jurisdiction of all matters relating to the interpretation, implementation, effectuation, and enforcement of the Agreement. The Court retains jurisdiction to enforce this Order.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

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Paul S. Diamond