

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

DONNA MOORE, FRENCHOLA HOLDEN,
and KEITH MCMILLON, individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

GMAC MORTGAGE, LLC, GMAC BANK
and CAP RE OF VERMONT, INC.,

Defendants.

Civil Action No. 2:07-cv-04296-PD

**DECLARATION OF EDWARD W. CIOLKO
IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT, PRELIMINARY
CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF
PROPOSED CLASS NOTICE AND SCHEDULING OF A
FINAL APPROVAL HEARING**

I, EDWARD W. CIOLKO, declare as follows:

1. I am a partner with the law firm of Kessler Topaz Meltzer & Check, LLP ("KTMC"). I am personally involved in the prosecution of this matter and have been since its inception and submit this Declaration in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement, Preliminary Certification of Settlement Class, Approval of Proposed Class Notice, Approval of Plan of Allocation and Scheduling of a Final Approval Hearing ("Preliminary Approval Motion"). The information set forth in this Declaration is based upon my personal knowledge, as well as, information shared with me by my co-counsel in this litigation.

2. I am a graduate of Georgetown University Law Center, admitted to practice before the United States Courts of Appeal for the First, Second, Third, Fourth, Fifth, Sixth, Ninth

and Eleventh Circuits, District of Columbia Court of Appeals, the United States Supreme Court, the United States District Court for the Northern District of Illinois, the Eastern District of Wisconsin, District of Colorado and the Eastern District of Michigan. I am admitted *pro hac vice* to the District Court for the Eastern District of Pennsylvania in connection with the above-captioned matter.

3. This Declaration is submitted in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement, Preliminary Certification of Settlement Class, Approval of Proposed Class Notice and Scheduling of a Final Approval Hearing as set forth in the Settlement Agreement ("Settlement Agreement") dated December 10, 2013, attached hereto as Exhibit 1.

4. This Declaration is submitted in support of a settlement, for that purpose only, and is inadmissible in any subsequent proceeding, other than in connection with the Settlement of this Action. This Declaration and the statements contained herein are without prejudice to Plaintiffs' position on the merits in the event that the Settlement is not approved by the Court.

5. Before this case was transferred to the Eastern District of Pennsylvania on October 12, 2007, Case No. 07-cv-04296-PD (E.D. Pa.) ("Action"), KTMC filed an identical case against the same Defendants on March 7, 2006 in the United States District Court for the Northern District of California, styled *Badesha v. GMAC Mortgage, LLC*, No. C06-27817-JCS (N.D. Cal.).

6. The Settlement provides that Defendants will pay a total of \$6,500,000 (Six Million Five Hundred Thousand U.S. Dollars) (the "Settlement Fund") to the Settlement Class which consists of "All borrowers with residential mortgage loans originated and/or acquired by GMAC Mortgage, Ally Bank and/or their affiliates on or after January 1, 2004 with private mortgage insurance that was reinsured by Cap Re ("the Class") in exchange for Plaintiffs and all

Participating Class Members releasing claims against Defendants that (a) concern the reinsurance of private mortgage insurance on any Reinsured Loan; or (b) arise from any transaction or occurrences related to the reinsurance of primary mortgage insurance that was the subject of this Action.

7. KTMC has taken the lead in prosecuting this Action since its inception, working in conjunction with the law firms of Brahmson, Plutzik, Mahler & Birkhaeuser, LLP (“BPMB”), Berke, Berke & Berke (“BBB”) and Travis & Calhoun, P.C.¹ (“TC”) (collectively with KTMC, “Plaintiffs’ Counsel”).² Plaintiffs’ Counsel are all experienced attorneys who have litigated a wide variety of complex consumer class action claims.

8. KTMC specializes in complex class action litigation, representing investors, employees and consumers in class actions pending in state and federal courts throughout the United States, including those involving mortgage loan transactions. The firm is composed of over 100 attorneys and a support staff of 100 located in two offices (Radnor, PA and San Francisco, CA) specializing in the prosecution of large, complex class actions nationwide. KTMC is well-regarded nationally for their successful representation of clients. Because of its track record of impressive results, courts have not hesitated to appoint KTMC as class counsel or interim class counsel in numerous complex mortgage related consumer protection actions, such as *Alston v. Countrywide Fin. Corp.*, No. 07-cv-03508 (E.D. Pa.) (“*Alston*”), *Alexander v. Washington Mutual, Inc.*, No. 07-vc-04426-TON (E.D. Pa.) (“*Alexander*”); and *Liguori v. Wells Fargo & Company*, No. 08-cv-00479-PD (E.D. Pa.) (“*Liguori*”) (three analogous cases alleging violations of § 8 of RESPA) as well as others.

¹ Travis & Calhoun, P.C. (“TC”) was formerly named Travis, Calhoun & Conlon, P.C.

² Kessler Topaz Meltzer & Check, LLP (“KTMC”) was preliminarily appointed as Lead Class Counsel and Brahmson, Plutzik, Mahler & Birkhaeuser, LLP (“BPMB”), Berke, Berke & Berke (“BBB”), and Travis Calhoun & Conlon, P.C. were appointed as Class Counsel. ECF No. 173.

9. In addition, courts have appointed KTMC in a wide variety of complex class actions, such as *In re Chesapeake Energy Corp. 2012 ERISA Class Litig.*, 286 F.R.D. 621, 624 (W.D. Okla. 2012), where the Court specifically noted “KTMC is one of the most experienced ERISA litigation firms in the country, with particular expertise in the area of ERISA breach of fiduciary class actions,” and that “in addition to its extensive litigation experience, KTMC has also successfully engaged in extensive, intricate and successful settlement negotiations and mediations involving complex legal and factual issues involving ERISA claims, resulting in large recoveries for affected classes,” and *In re Sadia, S.A. Secs. Litig.*, 269 F.R.D. 298 (S.D.N.Y. 2010) where the Court noted that “[KTMC] [has] extensive experience in securities litigation and [has] successfully prosecuted numerous securities fraud class actions on behalf of injured investors [and are] qualified, experienced and able to conduct the litigation.” Recently, KTMC served as lead class counsel in *Alston* where it achieved a \$34 million settlement on behalf of Countrywide mortgage borrowers, in *Alexander* where it achieved a \$4 million settlement on behalf of Washington Mutual mortgage borrowers and in *Liguori* where it achieved a \$12.5 million settlement on behalf of Wells Fargo mortgage borrowers, and also recently served as co-lead class counsel in *In re: National City Corporation Securities, Derivative & ERISA Litigation*, No. 08-nc-7000 (N.D. Ill.) where it achieved a \$43 million settlement on behalf of retirement plan participants. During its successful history, the firm has recovered over a billion dollars for class members. The firm has developed a nationwide reputation for excellence and is able to manage all aspects of complex class action litigation. See Firm Resume of KTMC, attached hereto as Exhibit 2.

10. Lead Class Counsel engaged the firm of Lowenstein Sandler LLP (“Lowenstein Sandler”) as bankruptcy counsel to provide expert advice and assist with protecting Class

Members' claims in this Action to the extent that the Res Cap Bankruptcy Proceedings³ could affect their ability to proceed with their claims. Lowenstein Sandler's participation and active involvement in all aspects of the bankruptcy related events were crucial to the successful resolution of this Action and played a significant part in preserving assets to be used to pay the Settlement Fund.

11. The skill and expertise of Lead Class Counsel in this Action is best demonstrated by the fact that they obtained a multi-million dollar settlement in this case despite the complexity of the claims involved, the precarious financial position of the Defendants and the quality and resources of Defendants' counsel—lawyers from highly skilled and highly respected law firms.

12. Defendants are represented in this case by, *inter alia*, Marc Durant of Durant and Durant LLP; Michael J. Agoglia of Morrison and Foerster LLP; and Richard G. Haddad of Otterbourg P.C., all of whom are highly experienced and competent attorneys who vigorously and aggressively contested the claims asserted in this litigation.

13. Class Counsel, BPMB, BBB and TC, are also experienced and well-recognized attorneys with substantial experience in prosecuting both individual and class claims in consumer, RESPA, mortgage lending and lending discrimination cases. The firm resumes of BPMB, BBB, and TC, attached hereto as Exhibits 3, 4, and 5 respectively, reflect the depth and substance of that experience.

14. KTMC has effectively and efficiently collaborated with Class Counsel to vigorously pursue the litigation. Among other things, the work performed over the six years of active litigation that resulted in the proposed Settlement presented for Preliminary Approval (the

³ The Res Cap Bankruptcy Proceedings refers to the voluntary petitions for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") that GMAC and several affiliates and subsidiaries (the "Debtors"), not including Ally Bank or Cap Re, filed on May 14, 2012 commencing Chapter 11 proceedings that were jointly administered under the case caption *In Re Residential Capital, LLC*, Case No. 12-12020.

time and cost related to same will be set out in detail should this Settlement ultimately be considered for Final Approval and an application for fees and costs be made) included the investigation and filing of original and amended pleadings; defeating and resolving dispositive motions; performing analyses of loan data and application of actuarial and accounting precepts; pursuing discovery through the gathering, reviewing, and analyzing of a substantial volume of documents and data produced by Defendants and numerous third-parties (including the mortgage insurance providers, actuarial firms, management companies and banks); consulting with experts; taking and defending depositions; participating in multiple mediation sessions and ongoing detailed, thorough and spirited settlement negotiations which included the sharing and analysis of data relating to the claims asserted; and following the bankruptcy of the ultimate parent of defendants GMAC Mortgage, LLC and Cap Re of Vermont Inc. (*see n. 1*) engaged in extensive litigation and negotiations to make sure assets would be available for the benefit of the Settlement Class.

15. The Settlement presented for Preliminary Approval was negotiated at arm's length over a period of close to three years and numerous mediation sessions with the assistance of the Hon. Edward N. Cahn of Blank Rome LLP an agreed-to, experienced class action mediator.

16. More particularly, the mediation which resulted in the Settlement submitted for Preliminary Approval involved pre and post mediation telephone conversations with Judge Cahn, the exchange of lengthy mediation briefs addressing both legal and factual issues, extensive expert reports and several robust, day long mediation sessions in Philadelphia, PA, followed by continuing negotiations to finalize and document the agreement reached. In addition, following the ResCap Bankruptcy, the negotiations took place in the context of the bankruptcy and

involved intense and complicated discussions with key participants in the bankruptcy. The nature of these mediation and negotiation sessions, the experience of all counsel, and the involvement of a skilled mediator are illustrative of the arm's-length nature of the negotiations that lead to the Settlement Agreement submitted for Preliminary Approval. Judge Cahn approved the mediation process and the ongoing negotiations.

17. The procedures established in the Settlement Agreement for identifying the members of the Settlement Class, providing direct mail notice of the proposed Settlement terms, and affording opportunities to object to or opt out of the Agreement are, in my view, and based upon my experience in similar class action litigation, fulsome, fair and sufficient.

18. During the process of drafting the approved form of Class Notice, Lead Class Counsel consulted the Federal Judicial Center "Notice Checklist and Plain Language Guide 2010" (attached hereto as Exhibit 6) to ensure the Class Notice is in compliance with their recommendations.

19. Through actively pursuing the litigation and engaging in the exchange of information in the discovery process, Lead Class Counsel gained a thorough understanding of the strengths and weaknesses of their case, the risks and the value of the case, and had more than sufficient information to determine, and to negotiate for, a fair resolution for the Class.

20. Subject to Court approval, the Settlement will be administered in accordance with the proposed Plan of Allocation described in the Settlement Agreement and accompanying Memorandum of Law in Support of the Preliminary Approval Motion.

21. Plaintiffs' Counsel, in consultation with Defendants' Counsel, specially developed the unique and creative proposed Plan of Allocation which is discussed in the Class Notice. All Participating Class Members will receive a proportionate monetary payment *via*

check based on the number of PMI payments that they made after January 1, 2004. This allocation is fair, efficient and takes into account that Named Plaintiffs challenged Defendants' business practices, not the amount of Class Members' payments.

22. In my opinion, based upon my experience as outlined above, the prosecution of other similar cases, and my collaboration with Class Counsel and bankruptcy counsel, all of whom are experienced counsel, the Settlement presented warrants the Court's preliminary approval. Its terms are not only fair, reasonable and adequate, but also clearly an excellent result for the Class. The proposed Settlement will provide meaningful, timely and concrete monetary benefits to members of the Settlement Class. Based upon all of these factors, I therefore, respectfully recommend that the Court grant preliminary approval of the Settlement.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 24, 2014

/s/ Edward W. Ciolko
Edward W. Ciolko

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF.

/s/ Edward W. Ciolko
Edward W. Ciolko