IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

GORDON CASEY and DUANE SKINNER, individually and on behalf of all others similarly situated, Plaintiff, v. CITIGROUP, INC., CITIBANK, N.A., CITIMORTGAGE, INC., MIDFIRST BANK, N.A. d/b/a MIDLAND MORTGAGE, and FIRSTINSURE, INC., Defendants.	Civil Case No. 5:12-cv-820 (DNH/DEP)
CELESTE COONAN, individually and on behalf of all others similarly situated, Plaintiff, v. CITIBANK, N.A., CITIMORTGAGE, INC., ASSURANT, INC., AMERICAN SECURITY INSURANCE COMPANY, and STANDARD GUARANTY INSURANCE COMPANY, Defendants.	Civil Case No. 1:13-cv-353 (DNH/DEP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

Plaintiffs Gordon Casey ("Casey"), Duane Skinner ("Skinner"), and Celeste Coonan ("Coonan") (collectively, "Plaintiffs") submit this memorandum of law in support of their motion for preliminary approval of the Settlement Agreement and Release attached as Exhibit 1 to the Declaration of Kai Richter ("Richter Decl.") ("Settlement" or "Settlement Agreement").[1]

Under the terms of this Settlement, members of the proposed Settlement Classes will be entitled to receive ***more than $110 million*** in refunds of force-placed insurance ("FPI") premiums that were charged to their accounts by Citi. Specifically, Settlement Class members who were charged for force-placed hazard insurance will receive back 12.5% of their force-placed hazard insurance premiums upon submitting a claim, which represents over **83.3%** of the allegedly unlawful commissions that Citi's affiliate received on force-placed hazard insurance (15% of the premium), from its force-placed insurance vendor.[2] Moreover, Citi has agreed to refund 8% of the force-placed flood insurance premiums and 8% of the force-placed wind insurance premiums to Settlement Class members who submit claims, even though no commissions were paid to Citi or its affiliates on flood or wind insurance.

Just as importantly, the Settlement Agreement provides for substantial injunctive relief. For example, the Settlement forbids Citi and its affiliates from accepting commissions or any

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[1] The Settlement Agreement resolves all lender-placed insurance claims asserted against Defendants Citibank, N.A. ("Citibank") and CitiMortgage, Inc. ("CitiMortgage") (collectively, "Citi") in *Casey v. Citibank, N.A. et al.*, No. 5:12-cv-820 (N.D.N.Y.) (the "*Casey* Action") and *Coonan v. Citibank*, *N.A. at al.*, No. 1:13-cv-353 (N.D.N.Y.) (the "*Coonan* Action"), which have been consolidated in this Court. In addition, the Settlement resolves the lender-placed insurance claims asserted against Assurant, Inc. ("Assurant"), American Security Insurance Company ("ASIC"), and Standard Guaranty Insurance Company ("SGIC") (collectively, the "Assurant Entities") in the *Coonan* action. The Settlement does not, however, resolve the claims in the *Casey* Action against MidFirst Bank, N.A. d/b/a Midland Mortgage and FirstInsure, Inc. (collectively, the "MidFirst Defendants").

[2] Citi's affiliate received 15% commissions on net written hazard insurance premiums during the proposed hazard settlement class period, except that from April 1, 2010 through April 30, 2013, Citi's affiliate received a 12% commission on net written hazard insurance premiums for policies insuring property in the state of California.

other form of compensation in connection with FPI for a period of six years, and also forbids the Assurant Entities from offering commissions or other compensation to Citi for the same period of time.[3] In addition, the Settlement places limits on the amount of insurance coverage that Citi may require borrowers to maintain, and requires Citi to offer Settlement Class members the opportunity to reduce their flood insurance coverage if Citi increased their coverage requirement (post-origination) to an amount in excess of the amount required under federal law. Further, the Settlement requires Citi to attempt to renew a Settlement Class member's existing insurance coverage, upon request, in the event of a lapse in coverage, prior to purchasing any force-placed coverage (which is typically more expensive).

In light of the substantial monetary and injunctive relief afforded to Settlement Class members under the Settlement – and the delay, costs and substantial risks that would be associated with continuing the litigation – Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notices of Settlement and authorizing distribution of the Notices via first class mail (and by publication); (3) certifying the proposed Settlement Classes; (4) designating Plaintiffs' Counsel as Class Counsel; (5) designating Plaintiffs as class representatives; and (6) scheduling a final approval hearing. This motion is supported by Citi and the Assurant Entities as co-parties to the Settlement.

BACKGROUND

I. PROCEDURAL HISTORY

A. The *Casey* Action

Plaintiff Casey filed the *Casey* Action on May 17, 2012. *Casey*, Dkt. No. 1. Among other things, Casey alleged that Citi unlawfully forced him and other borrowers to carry

[3] The Assurant Entities provide FPI to Citi and/or perform related services for Citi.

excessive flood insurance coverage for their property and improperly profited from the force-placement of flood insurance. In his Complaint, Casey asserted claims against Citi for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty/breach of trust, and violation of the New York Deceptive Practices Act ("NYDPA"), N.Y. Gen. Bus. Law § 349, *et seq*.

On July 26, 2012, Plaintiffs Casey and Skinner filed an Amended Complaint. *Casey*, Dkt. No. 21. The Amended Complaint asserted substantially similar claims against Citi as Casey's initial Complaint, as well as claims for conversion and for violation of the federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq*.

On August 28, 2012, Citi filed a motion to dismiss. *Casey*, Dkt. No. 60. On January 2, 2013, the Court denied the motion to dismiss and also denied a separate motion to dismiss filed by the MidFirst Defendants. *Id.*, Dkt. No. 92. Following the Court's ruling, both sets of Defendants sought permission to file an interlocutory appeal with the Second Circuit. *Id.*, Dkt. Nos. 97, 102. Following briefing, the Court declined to certify the matter for interlocutory review in a separate order dated April 10, 2010. *Id.*, Dkt. No. 110.

B. The *Coonan* Action

On March 27, 2013, Plaintiff Coonan filed the *Coonan* Action. *Coonan*, Dkt. No. 27. In her Complaint, Coonan alleged that Citi improperly profited from force-placed hazard insurance, and asserted class claims against Citi for breach of contract/breach of the covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, and conversion. Given the similarity of the claims in the *Coonan* and *Casey* Actions (the "Subject Actions"), the Court issued an order on August 7, 2013 consolidating the Subject Actions for pretrial purposes. Shortly beforehand, on July 24, 2013, the Court also issued a pair of Orders appointing

Plaintiffs' counsel as interim class counsel in both cases.[4] On January 31, 2014, Plaintiff Coonan filed an Amended Complaint (with Citi's consent) adding the Assurant Entities as parties to the *Coonan* Action, and adding a federal RICO claim. *Coonan*, Dkt. No. 38.

C. Discovery and Mediation

A mediation deadline was set by the Court in both cases for December 31, 2013. *Casey Text Order dated Feb. 22, 2013*; *Coonan Text Order dated Aug. 7, 2013* (consolidating cases and adopting pretrial schedule in *Casey*). In compliance with this deadline, Plaintiffs and Citi arranged to participate in mediation with Professor Eric Green of Resolutions, LLC on November 26, 2013 and December 16, 2013, and advised the Court accordingly. *See Casey Minute Entry dated October 15, 2013*. Professor Green is a retired law professor at Boston University, and was chosen because of his extensive experience mediating complex cases, including class action cases. *Richter Decl., ¶ 12.*

Prior to mediation, Plaintiffs sought and obtained from Citi substantial discovery that was relevant to Plaintiffs' ability to participate in settlement discussions and mediation on an informed basis. Specifically, Citi made multiple productions that included, without limitation, the relevant contracts between Citi (and its affiliates) and the Assurant Entities, as well as reports showing the amount of premiums charged and commissions earned in connection with FPI. *Id.* In addition, Citi produced an extensive set of class data to Plaintiffs, which included both aggregate data, and later individual class data on a loan-level basis so that Plaintiffs could conduct their own independent damages analysis with respect to every Settlement Class member. *Id.* Among other things, this class data included information regarding (1) the type of insurance

[4] Nichols Kaster, PLLP and Berger & Montague, P.C. were appointed interim co-lead class counsel in *Casey*. The same two firms and Gilman Law, LLP were appointed interim co-lead class counsel in *Coonan*.

coverage (flood, hazard, wind); (2) amount of insurance coverage; (3) periods of coverage; and (4) cost of coverage purchased by Citi for members of the Settlement Classes on a loan-by-loan basis. *Id.*

Plaintiffs' counsel personally reviewed and analyzed this class data, and also retained an outside expert, Arthur Olsen, to analyze the class data in advance of mediation. *Id. at ¶* 19. Mr. Olsen is a well-regarded data expert who has performed extensive data analyses in other class action cases involving banks, including both FPI class actions and cases dealing with bank overdrafts. *Id.* In addition, Plaintiffs' counsel were able to draw on their extensive experience litigating other FPI cases against other industry participants, including numerous large mortgage servicers and insurance companies. *Id. at ¶¶* 22-23 & Exs. 4-7.

Following Plaintiffs' analysis of the information and data produced by Citi, the parties exchanged mediation statements and participated in a mediation session with Professor Green on November 26, 2013 in New York City. *Id. at ¶* 12. That mediation lasted a full day, and was conducted in two separate rooms with Professor Green serving as an intermediary between the parties in each room. *Id. at ¶* 13. At all times, the settlement discussions were conducted at arm's length, and although the parties negotiated vigorously, they ultimately were unable to reach an agreement during the first session. *Id.*

Accordingly, the parties continued their negotiations during a second day of mediation with Professor Green that took place on December 16, 2013 in New York City (which was also conducted in separate rooms with Mr. Green serving as an intermediary). *Id. at ¶* 14. At the conclusion of that mediation, the parties reached an agreement on many of the material terms of this Settlement, subject to further negotiations regarding injunctive relief in the *Casey* Action, and also further subject to the negotiation of attorneys' fees, costs, and class representative

awards, which the Parties and the mediator agreed at the outset of the mediation would not be discussed or negotiated until the parties had agreed on all other terms, including the terms relating to injunctive relief. *Id.*

Following the second day of mediation, the parties continued their discussions, culminating in an agreement reached on January 10, 2014 concerning all material terms of the Settlement. *Id. at ¶* 15. The parties then reached the comprehensive Settlement Agreement that is the subject of this motion. *Id.*

II. OVERVIEW OF SETTLEMENT TERMS

A. Proposed Nationwide Settlement Classes

The Settlement Agreement calls for certification of two proposed nationwide Settlement Classes. The "Flood Settlement Class" is defined as follows:

> All persons who were charged by Citi for lender placed flood insurance (unless such charge was flat cancelled and refunded in full) in connection with a mortgage loan, home equity loan, or home equity line of credit secured by property in the United States during the time period from May 17, 2006 through the date of the preliminary approval of the Settlement Agreement [the "Flood Class Period"].

Richter Decl., Ex. 1 at ¶ 2(u). The "Hazard Settlement Class" is defined as follows:

> All persons who were charged by Citi for lender placed hazard insurance (unless such charge was flat cancelled and refunded in full) in connection with a mortgage loan, home equity loan, or home equity line of credit secured by property in the United States during the time period from January 1, 2007 through the date of the preliminary approval of the Settlement Agreement [the "Hazard Class Period"].

Richter Decl., Ex. 1 at ¶ 2(y).[5] According to the class data produced by Citi, these Settlement Classes collectively consist of hundreds of thousands of borrowers.

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[5] For purposes of the Settlement and this Motion for Preliminary Approval, the term "hazard insurance" refers to insurance against the risks of any type of hazard (*e.g.*, fire, windstorm, *etc.*), except for floods, unless otherwise noted. *Richter Decl., Ex. 1 at ¶* 2(y).

B. Monetary Relief

Under the Settlement, members of both Settlement Classes will have the opportunity to receive a refund of a portion of the amounts that they were charged for FPI during the relevant Class Periods, upon submitting a claim form.[6] The amount of the refund varies depending on the type of insurance that was force-placed. Hazard Settlement Class Members who submit claims will receive a refund equal to 12.5% of the amount that they were charged for force-placed Hazard Insurance during the Hazard Class Period (excluding stand-alone wind insurance, which will be refunded at a rate of 8%). *Richter Decl., Ex. 1 at ¶* 23. Flood Settlement Class Members who submit claims will receive a refund equal to 8% of the amount that they were charged for force-placed flood insurance during the Flood Class Period. *Id. at ¶* 22. The reason for the difference in these payments is that commissions were paid by the Assurant Entities to a Citi affiliate on hazard insurance (excluding stand-alone wind insurance), but not flood insurance. *Richter Decl., ¶ 5.* As noted above, Plaintiffs contend that these commissions were unlawful, and should have been deducted from the amounts that were charged to borrowers.

Notably, these refund percentages will be applied to the ***entire*** amount that was charged for force-placed hazard or flood insurance during the relevant Class Period, and not just the allegedly inflated or excessive amount that was charged. As a result, the actual recovery percentage is higher than the refund percentage. For example, the 12.5% refund on hazard insurance actually represents **<u>83.3%</u>** of the allegedly unlawful commissions that Coonan alleges were improperly included in the amounts charged to borrowers.[7] Similarly, Flood Class

[6] The proposed claim forms can be found at Exhibits D and E to the Settlement Agreement. (*Richter Decl., Ex. 1*).

[7] The documents produced by Citi in discovery reflect that a 15% commission was paid by the Assurant Entities to an affiliate of Citi on force-placed hazard insurance (excluding stand-alone wind insurance) during the Hazard Class Period. *See supra* at 1, n.2; *Richter Decl., ¶ 5*.

Members will receive an 8% refund on the entire amount that they were charged for force-placed flood insurance during the Flood Class Period, even though no commissions were paid to Citi or its affiliates on flood insurance, and not all of the flood coverage that was purchased by Citi for Flood Settlement Class members was excessive.[8] Further, Settlement Class members who submit claims under the Settlement will not be precluded from submitting claims for property damage under their force-placed insurance policies, and therefore will retain the full benefit of the force-placed coverage that was purchased for them by Citi.

Settlement Class members who submit timely claims will receive these refunds regardless of whether they actually paid the amounts that were charged to their accounts for FPI (although the form of the refund will vary). Settlement Class members who paid any portion of the charges, or who no longer have an active account with Citi, will receive their refund in the form of a check. *Richter Decl., Ex. 1 at ¶* 29.[9] To the extent that Settlement Class members have active accounts but did not pay any portion of the charges, Citi may elect to provide them their refund in the form of an escrow credit to their mortgage escrow account. *Id.*

Finally, these refunds will be provided exclusive of attorneys' fees and costs, any named Plaintiff service awards, or settlement administration costs.[10] *Richter Decl., Ex. 1 at ¶¶* 24-25,

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[8] To the extent that Flood Settlement Class members with secured property in a Special Flood Hazard Area ("SFHA") allowed their flood insurance coverage to lapse, or maintained less coverage than required under the National Flood Insurance Act, Citi was statutorily required to purchase flood insurance coverage for their property. *See* 42 U.S.C. § 4012a(b)(1); 4012a(e).

[9] Settlement class members who are issued their payments by check will have 180 days to cash their settlement checks. *Id. at ¶* 32. Any checks that remain uncashed after that period has run will be paid to the Low Income Investment Fund as *cy pres* or as otherwise ordered by this Court. *Id.*

[10] After soliciting bids from several entities, the parties have jointly selected Kurtzman Carson Consultants, LLC ("KCC") to be the Claims Administrator. *See Richter Decl., Ex. 1 at ¶ 2(g).* KCC is a well-regarded settlement administration firm that has a long track record of administering class action settlements. *See Richter Decl., Ex. 8.*

43. Thus, Settlement Class members who submit claims will receive the full benefit of these refunds, without further deduction.

C. Injunctive Relief

The Settlement also provides for substantial injunctive relief, as outlined in Paragraphs 35 through 40 of the Settlement Agreement.[11]

First, the Settlement prohibits Citi and its affiliates from accepting commissions or other compensation on force-placed hazard or flood insurance for six years; from accepting payments from any forced-placed insurer or vendor for administrative or other services related to FPI; and from accepting below-cost or free outsourced services from force-placed insurers or vendors. *Richter Decl., Ex. 1 at ¶* 35. Similarly, the Assurant Entities will be prohibited for a period of six years from providing commissions or other compensation to Citi or its affiliates on force-placed hazard or flood insurance; from paying Citi or its affiliates any administrative fees or other amounts for services associated with FPI; and from offering below-cost or free outsourced services to Citi or its affiliates in connection with FPI or insurance tracking. *Id.*

Second, to address the claims in the *Casey* action relating to excessive flood insurance coverage requirements, Citi has agreed to undertake a review of all active Flood Settlement Class member accounts to determine which accounts previously had their flood insurance coverage requirements increased by Citi. *Richter Decl., Ex. 1 at ¶* 37. To the extent that this review uncovers Flood Settlement Class members who had their flood insurance coverage requirements increased, these class members will be provided the option to reduce their flood insurance

[11] Because Citi is a highly-regulated enterprise, the Settlement Agreement provides that these injunctive terms are subject to conflicts with regulatory requirements. *See Richter Decl., Ex. 1 at ¶ 41.* Citi has affirmatively represented in the Settlement Agreement that it is not presently aware of any such conflicts. *Id.*

coverage to the ***lesser*** of the following amounts (provided that such amounts are sufficient to satisfy federal requirements and any applicable investor requirements):

- The replacement cost value ("RCV") of the structures on their property (using the Flood Settlement Class Member's Hazard Insurance coverage as a proxy for RCV);

- The maximum amount of Flood Insurance coverage available under the National Flood Insurance Program (currently $250,000); or

- The unpaid principal balance ("UPB") of all liens secured by the property (whether owed to Citi or another lender).

Id. This is the minimum amount of flood insurance coverage currently allowed under federal law. *See* 42 U.S.C. § 4012a(b)(1).[12]

Third, to avoid unanticipated increases in coverage requirements in the future, Citi has agreed that it will not require insurance coverage (of any type) in excess of an amount greater than a class member's last known coverage amount ("LKCA"), or if the LKCA is unavailable, their unpaid principal balance (not to exceed RCV), provided that the LKCA is at least equal to the amount required by federal law and any investor requirements. *Richter Decl., Ex. 1 at ¶¶* 36, 38.

Finally, in order to reduce the number of instances in which force-placed coverage is purchased, Citi has agreed to advance funds to renew a borrower's previously-existing insurance coverage upon request by the borrower (in the event of a lapse in coverage due to non-payment by the borrower) before force-placing coverage. *Richter Decl., Ex. 1 at ¶* 39. This is another

[12] With respect to the third bullet option, all liens on the property must be considered because the lender in the second position is responsible for ensuring that there is sufficient flood insurance to cover both the first lien and the second lien. *See* Loans in Areas Having Special Flood Hazards; Interagency Questions & Answers Regarding Flood Insurance, 74 Fed. Reg. 35914, 35940 (July 21, 2009) ("2009 Interagency Q&A") ("[A] lender cannot comply with the Act and Regulation by requiring the purchase of an NFIP flood insurance policy only in the amount of the outstanding principal balance of the second mortgage without regard to the amount of flood insurance coverage on a first mortgage.").

valuable benefit because force-placed coverage is typically more expensive than coverage that borrowers can obtain on their own.

D. Release of Claims

In exchange for the foregoing relief, Settlement Class Members who do not opt out of the Settlement will release Citi and the Assurant Entities (and their affiliates and agents) from all claims asserted in the Actions and any related claims which could be asserted against Citi or the Assurant Entities in connection with FPI on mortgage loans, home equity loans, or home equity lines of credit serviced by Citi during the Flood Class Period or Hazard Class Period, based upon the allegations set forth in the operative Complaints. *Richter Decl., Ex. 1 at ¶¶* 2(gg)-(hh) & 62. This release will only apply to force-placed flood insurance claims as to the Flood Settlement Class, and to force-placed hazard insurance claims as to the Hazard Settlement Class. *Richter Decl., Ex. 1 at ¶* 2(gg). Further, this release will be limited to those FPI policies reflected in the class data produced by Citi in connection with this litigation. *Id. at ¶* 63.

E. Class Notice, Claims Process, and Settlement Administration

Settlement Class members will be sent notice of the Settlement (together with a Claim Form) via first-class mail. *Richter Decl., Ex. 1 at ¶* 50.[13] Copies of the proposed class notices are attached as Exhibits A and B to the Settlement Agreement. In addition, notice of the Settlement will be published nationally in USA Today. *Id.* at ¶¶ 2(ff), 52. The proposed Published Notice is attached as Exhibit C to the Settlement Agreement. These Notices provide information to Settlement Class Members regarding, among other things, (1) the terms of the Settlement; (2) the scope of the release; (3) how to submit a claim under the Settlement; (4) their

[13] The class notices will be sent to Settlement Class members' last known mailing address (as reflected in Citi's records). *Id.* at ¶¶ 49-50. In the event that a class notice is returned as undeliverable, the Claims Administrator will conduct an automated skip trace in an effort to locate a valid address, and re-mail the class notice if a valid address is found. *Id.* at ¶ 51.

objection and opt-out rights and the deadline for asserting them; and (5) the date, time, and location of the final approval hearing.

Settlement Class members will have 60 days from the date that Notices are mailed to object or opt out of the settlement. *Richter Decl., Ex. 1 at ¶¶* 2(z), 56-57. To the extent that Class members wish to submit a claim, they may do so up to 120 days after the Effective Date of the settlement. *Id.* at ¶¶ 2(f), 20.[14] Settlement Class members will have several options for submitting their claims (*i.e.*, via mail, fax, email, or online by uploading their completed Claim Form through the settlement website), *id.* at ¶ 19, and only will need to submit one Claim Form regardless of how many FPI placements they were subject to during the relevant Class Period (unless they are members of both Settlement Classes, in which case they will need to submit one Claim Form for each case). *Id.* at ¶¶ 18, 28. If the Claims Administrator receives a Claim Form that it deems invalid for any reason, the Claims Administrator will inform Class Counsel, and Class Counsel may then follow up with the relevant Settlement Class member to cure the deficiency. *Id.* at ¶ 21. Any defective Claim Form may be cured and will be accepted as timely if the defect is resolved within 30 days after the end of the claims period. *Id.*

To the extent that Settlement Class members would like further information about the Settlement, the Claims Administrator will establish a settlement website (www.CMImortgageinsurancesettlement.com), from which Settlement Class members may download copies of the Settlement Agreement, class notices, claim forms, operative Complaints, approval motions, and Plaintiffs' motion for attorneys' fees, costs, and class representative compensation. *Id.* at ¶ 54. In addition, the Claims Administrator will establish a toll-free

[14] The "Effective Date" of the Settlement will be the date of the Court's final approval order, unless objections to the Settlement are filed, in which case the Effective Date will be the date that the appeal period from the final approval order expires or the date that any appeals are resolved (whichever is later). *Id.* at ¶ 2(o).

number with an interactive voice response ("IVR") feature that will allow Settlement Class Members to obtain recorded information about the Settlement. *Id*. at ¶ 53. In the event that Settlement Class members have questions, they will be directed to leave a message on the settlement website, and the Claims Administrator or Class counsel will follow-up with them as appropriate. *Id.* In addition, the class notices will include contact information for Class Counsel, so that Settlement Class members may contact Class Counsel directly.

F. Attorneys' Fees, Costs, and Class Representative Awards

Under the Settlement, Citi has agreed to pay the costs of settlement administration to the Claims Administrator in full. *Richter Decl., Ex. 1 at ¶* 46. In addition, Citi has agreed to pay any amounts approved by the Court for Class Counsel's costs (up to $125,000) and attorneys' fees (up to $7 million). *Id*. at ¶ 44. This cap on fees is less than **6.4%** of the amount of funds available to Settlement Class members under the Settlement, and well below the benchmark established by other class action settlements in this Circuit. Finally, Citi has agreed to pay class representative service awards to each named Plaintiff in the amount of $2,500 as compensation for the time and efforts they have invested in the Subject Actions and on behalf of the Settlement Class members. *Id*. at ¶ 45. The Settlement Agreement (and Plaintiffs' support of the Settlement) is not conditioned upon Court's approval of any of the above amounts. The Court will consider whether to grant or deny these awards separate and apart from its consideration of the fairness, reasonableness, and adequacy of the Settlement at the final approval hearing.

ARGUMENT

I. STANDARD OF REVIEW

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any settlement agreement that will bind absent class members. This involves a "two-step process."

In re NASDAQ Market-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997); MANUAL FOR COMPLEX LITIGATION § 30.41, at 236 (3d ed. 1995). During the first step, the court considers whether the settlement warrants preliminary approval, such that notice of the settlement may be sent to the class members. In the second step, after notice of the proposed settlement has been sent to the class and a hearing has been held to consider the fairness and adequacy of the proposed settlement, the court considers whether the settlement warrants final court approval. *Id.*

The decision whether to approve a proposed class action settlement is a matter of judicial discretion. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). However, there is a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal quotation marks and citation omitted); *see also In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998); *In re Interpublic Sec. Litig.*, 2004 WL 2397190, at *7 (S.D.N.Y. Oct. 26, 2004); 4 NEWBERG ON CLASS ACTIONS ("NEWBERG") § 11:41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). As a result, "courts should give proper deference to the private consensual decision of the parties … [and] should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation[.]" *Clark v. Ecolab Inc.*, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (citations omitted). "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

This is particularly true on a motion for preliminary approval, which involves only an "initial evaluation" of the fairness of the proposed settlement. *Clark*, 2009 WL 6615729, at *3

(citing NEWBERG § 11:25). To grant preliminary approval, the court need only find that there is "probable cause" to submit the settlement to class members and hold a full-scale hearing as to its fairness. *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980). The court is not required to answer the ultimate question of whether the settlement is fair, reasonable, and adequate. *See* 5 MOORE'S FEDERAL PRACTICE § 23.83[a], at 23-336.2 to 23-339. Instead, the court simply evaluates whether the settlement "appears to fall within the range of possible approval[.]" *Clark*, 2009 WL 6615729, at *3; NEWBERG § 11:25. Thus, "preliminary approval should be granted and notice of the proposed settlement given to the class if there are no obvious deficiencies in the proposed settlement." *In re Medical X-ray Film Antitrust Litig.*, 1997 WL 33320580, at *6 (E.D.N.Y. Dec. 26, 1997); *see also In re Initial Public Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) ("Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.").

II. THE PROPOSED SETTLEMENT SATISFIES THE STANDARD FOR PRELIMINARY APPROVAL

"Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). Here, both the terms of the settlement and the manner in which they were negotiated strongly support preliminary approval.

A. The Settlement Is the Product of Arm's Length Negotiations Between Experienced Counsel Before a Well-Respected and Neutral Mediator

At the preliminary approval stage, a proposed class action settlement "will enjoy a presumption of fairness" where the settlement "is the product of arm's-length negotiations conducted by experienced counsel knowledgeable in complex class litigation." *In re Excess*

Value Ins. Coverage Litig., 2004 WL 1724980, at *10 (S.D.N.Y. July 30, 2004); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d at 116; MANUAL FOR COMPLEX LITIGATION § 30.42 ("[A] presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel"). That is precisely the situation presented here.

The settlement terms in these cases are the product of extensive arm's length negotiations between counsel for Plaintiffs and counsel for Citi and the Assurant Entities. Prior to mediation, Plaintiffs served discovery and requested and obtained numerous documents from Citi and the Assurant Entities. In addition, Plaintiffs requested and were provided a massive set of class data.

After this data was produced and thoroughly analyzed by Plaintiffs' Counsel and their expert, the parties participated in two full-day mediation sessions before Professor Eric Green, a well-respected and impartial mediator with extensive experience facilitating large class action settlements. *See supra* at 4-5. His involvement underscores the arm's length nature of the negotiations, and weighs strongly in favor of preliminary approval. *See, e.g., In re AMF Bowling*, 334 F. Supp. 2d 462, 465 (S.D.N.Y. 2004) (the participation of such a neutral and respected mediator … in the settlement negotiation process "gives [the court] confidence that [the negotiations] were conducted in an arm's-length, non- collusive manner"); *In re WorldCom, Inc. ERISA Litig.*, 2004 WL 2338151, at *6 (S.D.N.Y. 2004) (fact that "[a] respected and dedicated judicial officer presided over the lengthy discussions from which this settlement emerged" belied any suggestion of collusion in the negotiating process).[15]

[15] *Accord*, *Carnegie v. Mut. Sav. Life Ins. Co.*, 2004 WL 3715446, at *18 (N.D. Ala. Nov. 23, 2004); *Schwartz v. TSU Corp.*, 2005 WL 3148350, at *21 (N.D. Tex. Nov. 8, 2005) (noting that the parties' use of a mediator evidenced the non-collusive nature of their negotiations); *In re Cardizean CD Antitrust Litig.*, 218 F.R.D. 508, 530 (E.D. Mich. 2003) (same); *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers*, LLP, 212 F.R.D. 400, 410 (E.D. Wis. 2002) (same).

Moreover, the undersigned counsel involved in the negotiations are experienced in handling class action litigation – specifically including class actions relating to FPI – and were clearly capable of assessing the strengths and weaknesses of their respective positions. One of the lead firms, Nichols Kaster, PLLP, is the same law firm that was appointed class counsel in *Hofstetter v. Chase Home Fin., LLC*, 2011 WL 1225900, at *9 (N.D. Cal. Mar. 31, 2011), has been appointed class counsel or interim class counsel in several other cases involving FPI (including the present cases), has negotiated other class action settlements with various defendants relating to their FPI practices, and has won praise from other courts for its work in this area. *See Richter Decl., ¶ 23*. One of the other lead firms, Berger & Montague, P.C., also has been appointed class counsel or interim class counsel in several cases involving FPI (including the present cases), and recently won preliminary approval of a nationwide class action settlement relating to Chase's force-placed flood insurance practices with respect to mortgage loan borrowers. *Id. & Ex. 5*. The other lead firm, Gilman Law, LLP, is also involved in numerous FPI cases, was previously appointed interim class counsel by this Court in the *Coonan* action, and previously helped negotiate a nationwide class action settlement with Chase relating to force-placed wind insurance, which received final approval from the court in that case. *Id. & Ex. 6*. Finally, Taus, Cebulash & Landau, LLP has extensive class action experience, and is also involved in numerous FPI cases in addition to the present cases. *Id. & Ex. 7*. The combined experience of Class Counsel demonstrates that the class members were well-represented at the bargaining table.

B. The Settlement Provides Significant Relief to Class Members

The terms that were negotiated provide considerable benefits to the classes, both in terms of monetary and injunctive relief. As a result, the Settlement falls well within the range of reasonableness for preliminary approval.

1. Monetary Relief

By any measure, the monetary relief provided to Settlement Class members is substantial. On a total dollars basis, the gross value of the Settlement is over $110 million – even before accounting for the value of the injunctive relief. *See Richter Decl., Ex. 1 at ¶¶ 24-25*.

On a percentage basis, the monetary relief is also impressive. The percentage of the premium refunded to Settlement Class members on hazard insurance (12.5%) represents over ***83.3% of the allegedly unlawful commissions that were paid on hazard insurance*** (15% of the premium). Moreover, Citi has agreed to refund 8% of the premiums on flood and wind insurance, even though no commissions were paid to Citi or their affiliates on flood or wind insurance. Given the absence of such commissions on flood and wind insurance, the modestly lower percentage refunded to class members who were force-placed with flood or wind insurance is reasonable.[16]

As an added benefit to Settlement Class members, Citi has agreed to pay Class Counsel's attorneys' fees and costs, and Class Counsel have agreed not to seek fees and costs in excess of

[16] Even when measured against the total premiums paid by borrowers instead of the commissions received, the percentage recovery is substantial and well within the range of reasonableness for settlement purposes. *See In re Checking Account Overdraft Litig.*, 830 F.R.D. 1330, 1346 (S.D. Fla. 2011) (recovery of 9 percent was reasonable); *Newbridge Networks Sec. Litig.,* 1998 WL 765724, *2 (D.D.C. Oct. 23, 1998) ("an agreement that secures roughly 6 to 12 percent of a potential recovery ... seems to be within the targeted range of reasonableness"); *In re Rite Aid Corp. Sec. Litig.,* 146 F.Supp.2d 706, 715 (E.D.Pa.2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses"); *accord*, *Johnson v. Brennan*, 2011 WL 4357376, at *11 (S.D.N.Y. Sept. 16, 2011) ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.") (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974)).

the specified amounts. Thus, Class members who submit claims will receive ***all of the amounts they are entitled to under the Settlement***, without any deduction for attorneys' fees or costs (or costs of settlement administration, which Citi also has agreed to pay).

Further, the claims process is designed to elicit a strong response from Settlement Class members, ensuring that the maximum number of them receive compensation. The Claim Form is short, and designed to be easily understood, filled out, and returned. *Richter Decl., Ex. 1 at Exs. D-E.* Class members may return claim forms by a variety of methods, including mail, email, fax, and online. *Richter Decl., Ex. 1 at ¶* 19. Class members will only need to return one Claim Form regardless of how many FPI placements they received during the relevant Class Period. *Id. at ¶* 18. Should the Claims Administrator receive a Claim Form that it deems invalid for any reason, the Claims Administrator will inform Class Counsel and Class Counsel may then follow up with the Class member in order to cure the deficiency. *Id. at ¶* 21. Any defective Claim Form may be cured, and will be accepted as timely if the defect is resolved within 30 days after the end of the claims period. *Id.* Nothing in the agreement gives Citi a right to challenge claims forms. These features, which are often not present in claims-made settlements, will ensure that Settlement Class Members have every opportunity to recover monetary relief under the settlement.

2. Injunctive Relief

The injunctive relief provided to class members under the Settlement is also significant. Among other things:

- No Commissions. Citi and its affiliates will not accept – and the Assurant Entities will not pay to them – any commissions or other compensation in connection with FPI for a period of at least six years. This addresses the allegedly unlawful practices relating to commissions and other compensation on FPI going forward.

- Restrictions on Coverage Requirements. Citi will not force-place coverage in excess of a Settlement Class member's previous coverage amount (if known), or their unpaid principal balance (if the previous coverage level is unknown), subject to the restrictions set forth in the Settlement Agreement. In addition, Citi will provide Flood Settlement Class members the opportunity to reduce their flood insurance coverage to the minimum amount required by federal law, if their coverage requirement previously was increased by Citi. This is a reasonable and sensible compromise that addresses the claims in the *Casey* Action relating to unfair increases in flood insurance coverage requirements, while providing Citi discretion to set its own flood insurance coverage requirement so long as that coverage requirement is communicated upon origination of a borrower's loan or line of credit.
- Renewal of Borrower's Own Coverage in Lieu of Force-Placed Coverage. Citi will attempt to renew a Settlement Class member's existing insurance coverage, upon request, in the event of a lapse in coverage, prior to purchasing any force-placed coverage. This will help to mitigate the need for force-placed coverage altogether.

This injunctive relief will provide long-lasting benefits to Settlement Class members that will continue years after they receive their settlement payments. Indeed, because many of the Settlement Class members have 30-year mortgages with Citi, the value of the injunctive relief likely will exceed the value of the monetary relief for many Settlement Class members.

C. Plaintiffs and the Settlement Class Members Would Face Significant Risks in the Absence of a Settlement

The relief outlined above is even more impressive when viewed in light of the risks of continuing the litigation. *See In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks."). Although Plaintiffs believe their

claims are strong, they would have faced substantial risks in the absence of a settlement, both with respect to class certification and on the merits.

1. Class Certification Risks

While Plaintiffs strongly believe they would have been able to certify a litigation class in these consolidated cases, in a number of recent FPI cases, class certification was denied. *See Gooden v. Suntrust Mortg.,* 2013 WL 6499250, at *9 (E.D. Cal. Dec. 11, 2013); *Gustafson v. BAC Home Loans Servicing, LP*, No. 11-915, --- F.R.D. ---, 2013 WL 5911252 (C.D. Cal. Nov. 4, 2013); *Gordon v. Chase Home Fin., LLC*, 2013 WL 436445 (M.D. Fla. Feb. 5, 2013); and *Kunzelmann v. Wells Fargo Bank, N.A.*, 2013 WL 139913 (S.D. Fla. Jan. 10, 2013). In other FPI cases, the classes that have been certified have been limited to single-state classes. *See Lane v. Wells Fargo Bank, N.A.*, 2013 WL 3187410 (N.D. Cal. June 21, 2013) (certifying class of California borrowers to pursue claims against Wells Fargo related to improper commissions in connection with force-placed flood insurance); *Williams v. Wells Fargo Bank, N.A.*, 280 F.R.D. 665 (S.D. Fla 2012) (certifying class of Florida borrowers to pursue claims against Wells Fargo relating to inflated premiums and unlawful kickbacks in connection with force-placed hazard insurance). Thus, even though Class Counsel had success certifying a national class in *Hofstetter v. Chase Home Fin., LLC*, 2011 WL 1225900 (N.D. Cal. Mar. 31, 2011), and other courts have certified national classes in other FPI cases,[17] it was not guaranteed that the Court would have

[17] *See Brand v. Nat'l Bank of Commerce*, 213 F.3d 636, 2000 WL 554193, at *1 (5th Cir. 2000) (certifying nationwide class to pursue allegations that defendant "charged borrowers more than the cost of the insurance under a system of kickbacks from the insurer"); *Hall v. Midland Group*, 2000 WL 1725238, at *1, *3 (E.D. Pa. Nov. 20, 2000) (certifying nationwide class where "[t]he essence of plaintiff's allegations [was] that defendant [] engaged in the forced placement of hazard insurance through agencies owned by affiliates . . . which received commissions for these placements."); *Robinson v. Countrywide Credit Indus.*, 1997 WL 634502, at *4, *5 (E.D. Pa. Oct. 8, 1997) (certifying nationwide class where "the central issues revolve[d] around whether the form contracts authorized placement of the type of insurance purchased and whether Countrywide knowingly purchased inflated or expensive policies to generate commissions.").

certified a nationwide class (or any class) on a contested class certification motion in this case. By settling the case at this juncture, and obtaining Citi's consent to nationwide class certification, Plaintiffs wisely have sought to assure class-wide relief to the broadest possible set of class members.[18]

2. Risks on the Merits

In addition to these class certification risks, Plaintiffs also would have faced risks on the merits of their claims. These risks further demonstrate the reasonableness of this Settlement.

Specifically, with respect to Plaintiffs' claims regarding allegedly unlawful commissions, certain courts have dismissed these types of claims in other FPI cases under the so-called "filed-rate doctrine." *See Cohen v. Am. Sec. Ins. Co.,* 735 F.3d 601, 608 (7th Cir. 2013); *Decambaliza v. QBE Holdings, Inc.*, 2013 WL 5777294, at *5-9 (W.D. Wis. Oct. 25, 2013); *Singleton v. Wells Fargo Bank, N.A.*, 2013 WL 5423917, at *2 (N.D. Miss. Sept. 26, 2013). Although numerous other courts (including this Court) have allowed such claims to proceed past a motion to dismiss,[19] it is uncertain how the Second Circuit would rule on the merits of these claims, and this Court did not address the filed-rate doctrine in its order denying Citi's motions to dismiss (because they did not raise it as a defense at that time).

As to the claims in the *Casey* action relating to allegedly excessive flood insurance requirements, several other courts have dismissed similar claims. *See McKenzie v. Wells Fargo Bank, N.A.*, 2012 WL 5372120 (N.D. Cal. Oct. 30, 2012); *Lacroix v. U.S. Bank, N.A.*, 2012 WL

[18] By the same token, Citi assures that it will not be subjected to multiple suits across the country on a piecemeal basis.

[19] *See, e.g.*, *Casey v. Citibank, N.A.*, 915 F. Supp. 2d 255, 267 (N.D.N.Y. 2013); *Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093, 1115 (N.D. Cal. 2013); *Simpkins v Wells Fargo Bank, N.A.*, 2013 WL 4510166, at *7 (S.D. Ill. Aug 26, 2013); *Ellsworth v. U.S. Bank, N.A.*, 908 F. Supp. 2d 1063, 1088 (N.D. Cal. 2012); *McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, 863 F. Supp. 2d 928, 955-61 (N.D. Cal. 2012); *Montanez v. HSBC Mortg. Corp. (USA)*, 876 F. Supp. 2d 504, 513 (E.D. Pa. 2012); *Williams v. Wells Fargo Bank, N.A.*, 2011 WL 4901346, at *2, *4 (S.D. Fla. Oct. 14, 2011).

2357602 (D. Minn. June 19, 2013); *Feaz v. Wells Fargo Bank, N.A.*, 2012 WL 6680301 (S.D. Ala. Nov. 19, 2012). Moreover, the United States Government has taken the position in an *amicus* brief that lenders may require FHA borrowers (such as Casey) to maintain more flood insurance than is required by the U.S. Department of Housing and Urban Development ("HUD") or federal law. *See Casey*, Dkt. No. 90 (attaching *amicus* brief in *Kolbe v. BAC Home Loans Serv., LP*, 738 F.3d 432, (1st Cir. 2013) ("*Kolbe III*") (en banc)). Thus, although this Court and other courts have allowed such excess coverage claims to proceed past motions to dismiss,[20] it is once again uncertain whether Casey and Skinner ultimately would have prevailed on such claims in the *Casey* Action. Indeed, this uncertainty is starkly illustrated by the proceedings in the *Kolbe* case, where (1) the district court dismissed the plaintiff's excess coverage claims, *see Kolbe v. BAC Home Loans Servicing, L.P.*, 2011 WL 3665394 (D. Mass. Aug. 18, 2011) ("*Kolbe I*"); (2) the First Circuit later reversed the district court in a 2-1 panel opinion, *see Kolbe v. BAC Home Loans Servicing, L.P.*, 695 F.3d 111 (1st Cir. 2012) ("*Kolbe II*"); and (3) the First Circuit then vacated the panel decision, took up the matter *en banc*, and split three-to-three, resulting in an affirmance of the district court decision by default. *See Kolbe III*, 738 F.3d at 436.

By entering into a settlement now, Plaintiffs have hedged against these risks and locked in substantial gains for the Settlement Classes. This further illustrates the reasonableness of the Settlement. Indeed, "[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969); *see also Velez v. Majik Cleaning Serv., Inc.*, 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007).

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[20] *See e.g.*, *Lass v. Bank of America, N.A.*, 695 F.3d 129 (1st Cir. Sept. 21, 2012); *Richards v. RBS Citizens, N.A.*, No. 1:12-cv-00239, Dkt. No. 21 (D.R.I. Oct. 10, 2012); *Morris v. Wells Fargo Bank N.A.*, 2012 WL 3929805 (W.D. Pa. Sept. 7, 2012); *Skansgaard v. Bank of Am., N.A.*, 896 F. Supp. 2d 944 (W.D. Wash. 2011); *Wulf v. Bank of Am., N.A.*, 798 F. Supp. 2d 586 (E.D. Pa. 2011).

D. Continuing the Litigation Would Have Resulted in Significant Additional Cost and Delay

Aside from the these risks, continuing the litigation would have resulted in complex, costly, and lengthy proceedings before this Court and likely the Second Circuit, which would have significantly delayed any relief to Class members (at best), and might have resulted in no relief to Class members at all. In order to prosecute their claims to a final judgment, Plaintiffs would have had to take several depositions, appear for their own depositions, retain additional experts, engage in two rounds of class certification motion practice (in *Casey* and *Coonan*), engage in two rounds of summary judgment motion practice, prepare for trial in both cases, and present evidence during two separate jury trials each lasting one to two weeks. Aside from the time and delay that would have been involved, the costs associated with these litigation activities would have been significant. Moreover, even if Plaintiffs had won certification of nationwide classes and litigated their claims on behalf of the Class members to a successful conclusion, it is likely that Citi would have appealed any judgment entered against them, resulting in further expense and delay.

"Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). The present cases are no exception. Thus, one of the main benefits of entering into a settlement now is that it avoids further delay and expense, and assures immediate relief to Settlement Class Members – including the immediate implementation of injunctive relief upon final approval of the Settlement.

III. THE PROPOSED CLASS NOTICES AND NOTICE PLAN ARE REASONABLE

In addition to approving the substance of the parties' Settlement Agreement, the Court should approve the proposed class notices and notice plan. Pursuant to Rule 23(e), the Court is required to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Although the question of what constitutes reasonable notice is left to the discretion of the Court, Rule 23 provides that the best notice practicable "include[s] individual notice to all class members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice contemplated here. Under the Settlement Agreement, each Settlement Class member will be sent a notice of the proposed Settlement via first-class mail, informing them of the terms of the settlement and their rights to opt-out or object. *See Richter Decl., Ex. 1 at ¶ 2(r), (v) & Exs. A, B.* This type of notice is presumptively reasonable, and satisfies the requirements of due process. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985) (the procedure "where a fully descriptive notice is sent by first-class mail to each class member, with an explanation of the right to 'opt-out,' satisfies due process").[21] Moreover, the Claims Administrator will be publishing notice of the Settlement in a national newspaper and establishing a website that will contain detailed information about the Settlement as well.

The content of the Notices also satisfies the "reasonable" standard of Rule 23(e). The proposed Notices provide, among other things: (1) a summary of the lawsuit and the claims asserted; (2) a clear definition of the Settlement Classes; (3) a description of the material terms of

[21] The Claims Administrator will mail the Notices to Settlement Class members' last known mailing address (as reflected in Citi's records). *See supra* at 11 n.13. If a Notice is returned as undeliverable, the Claims Administrator will re-mail the Notice to any forwarding addresses provided, and in the absence of a forwarding address, will perform a skip-trace to attempt to find the class member. *Id*. This constitutes "reasonable effort" to identify class members. *See* Fed. R. Civ. P. 23(c)(2)(B).

the Settlement; (4) instructions as to how Class members may make a claim; (5) a disclosure of the release of claims should they choose to remain in the class; (6) an explanation of Class members' opt-out rights, a date by which Class members must opt out, and information regarding how to do so; (7) instructions as to how to object to the Settlement and a date by which Class members must object; (8) the date, time, and location of the final approval hearing; (9) the internet address for the settlement website and the toll-free number from which Class members may obtain additional information about the Settlement; and (10) the names of the law firms representing the Settlement Classes, contact information for the lead firms, and information regarding how Class Counsel and the named class representatives will be compensated. Although there are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements, the notice in this case is clearly reasonable as it "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *See Lomeli v. Sec. & Inv. Co. Bahrain*, 2013 WL 6170572, at *2 (2d Cir. Nov. 26, 2013) (quoting *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 438 (2d Cir. 2007)) (internal citations omitted); *accord*, *Silverstein v. AllianceBernstein, L.P.*, 2013 WL 4713553, at *4 (S.D.N.Y. Aug. 27, 2013) (holding notice satisfied "each of [the Rule 23(c)] requirements and adequately [put] Class Members on notice of the proposed settlement" where it "describes the terms of the settlement, informs the classes about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing."); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (settlement notice "need only describe the terms of the settlement generally").

IV. Certification of the Settlement Classes under Rule 23 is Appropriate

In addition to approving the proposed Settlement and notices of settlement, this Court should certify the proposed Settlement Classes. In the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in evaluating class certification. *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997)). As a result, doubts as to whether or not to certify a class action should be resolved "in favor of allowing the class to go forward." *In re Indep. Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002).

This is especially true in the context of a settlement class because the court need not inquire whether a trial of the action would be manageable on a class-wide basis. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial."). Likewise, variations in state laws are "irrelevant to certification of a [nationwide] settlement class" because the settlement eliminates the burden of establishing the elements of liability under disparate laws. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 303 (3d Cir. 2011) (en banc) (citing cases). Thus, "[t]he requirements for class certification are more readily satisfied in the settlement context than when a class has been proposed for the actual conduct of the litigation." *White v. Nat'l Football League*, 822 F. Supp. 1389, 1402 (D. Minn. 1993) (citations omitted); *see also Horton v. Metropolitan Life Ins. Co.*, No. 93-1849-CIV-T-23A, 1994 U.S. Dist. LEXIS 21395, at *15 (M.D. Fla. Oct. 25, 1994).[22]

[22] Because Plaintiffs seek class certification in the context of preliminary approval, the Court need only preliminarily certify the Settlement Class now, with a more thorough inquiry into the

This is borne out by an examination of other FPI cases in which class settlements have been reached. Although the case law on contested class certification motions for litigation purposes has been mixed, *see supra* at 21, courts have uniformly certified classes for settlement purposes in other FPI cases. *See, e.g., Clements v. JPMorgan Chase Bank, N.A.*, No. 3:12-cv-02179, Dkt. No. 61 (N.D. Cal. Jan. 17, 2014) (preliminary approval order); *Saccoccio v. JPMorgan Chase Bank*, *NA*, No. 1:13-cv-21107, Dkt. No. 77 (S.D. Fla. Oct. 4, 2013) (preliminary approval order); *Pulley v. JPMorgan Chase Bank, N.A.*, No. 12-CV-60936, Dkt. No. 84 (S.D. Fla. Nov. 25, 2013) (final approval order); *Ulbrich v. GMAC Mortgage*, No. 0:11-cv-62424, Dkt. No. 105 (S.D. Fla. May 10, 2013) (final approval order).

A. The Requirements of Rule 23(a) are Met

Rule 23(a) sets forth four prerequisites for class certification: numerosity, commonality, typicality, and adequacy of representation. *In re NTL, Inc. Sec. Litig.*, 2006 WL 330113, at *5 (S.D.N.Y. Feb. 14, 2006). Plaintiffs satisfy all four requirements as set forth below.

1. Numerosity

Rule 23(a)(1) requires Plaintiffs to show that the number of persons in the proposed classes is so numerous that joinder of all class members would be impracticable. This standard is clearly met in a case such as this involving hundreds of thousands of class members nationwide. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("[N]umerosity is presumed at a level of 40 members.").

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issues to be heard at the hearing for final approval, if needed. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006) (concluding that "conditional certification survives the 2003 amendments to Rule 23(c)(1)"); *In re Qiao Xing Sec. Litig.*, 2008 WL 872298, at *1 (S.D.N.Y. Apr. 2, 2008) (certifying class on a preliminary basis until final determination at fairness hearing); *In re Stock Exchanges Options Trading Antitrust Litig.*, 2005 WL 1635158, at *5 (S.D.N.Y. July 8, 2005) ("In the context of settlement, courts often provisionally certify the class along with preliminary approval of the settlement."); MANUAL FOR COMPLEX LITIGATION (4th) § 21.632 ("The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b).").

2. Commonality

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." This does not mean that all class members must make identical claims and arguments, but only that "plaintiff's grievances share a common question of law or fact." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001). Thus, "[t]he commonality element is generally satisfied when a plaintiff alleges that defendants have engaged in a standardized course of conduct that affects all class members." *In re Checking Account Overdraft Litig.*, 275 F.R.D. 666, 673 (S.D. Fla. 2011) (internal brackets and quotations marks omitted); *see also Gutierrez v. Wells Fargo Bank, N.A.*, 2008 WL 4279550, at *17 (N.D. Cal. Sept. 11, 2008) (commonality satisfied where "[t]he challenged practice is a standardized one applied on a routine basis to all customers" by the bank).

Here, there are common issues of law and fact with respect to both the challenged "commission" practice and Citi's flood insurance coverage requirements. *See Robinson*, 1997 WL 634502, at *3 ("There exist common issues of law or fact, such as whether [the defendants] purchased unauthorized coverage, inflated the amount of forced placed insurance, and whether [they] did so to gain improperly inflated commissions."). Accordingly, the commonality requirement is also satisfied. *Id.*[23]

[23] *See also, e.g., Hofstetter*, 2011 WL 1225900, at *8 ("Plaintiffs allege a variety of legal and factual questions common to the class, such as … the amount of flood-insurance coverage [defendants] required borrowers to carry."); *id.* at *15 (certifying subclass of borrowers to pursue claim that defendant acted unlawfully "by charging inflated premiums and by generating commission income through self-dealing"); *Hall*, 2000 WL 1725238, at *1 & *3 (holding that there were "common questions of fact and law" where "[t]he essence of plaintiff's allegations is that defendant [] engaged in the forced placement of hazard insurance through agencies owned by affiliates . . . and debited the affected mortgagors' escrow accounts in the amount of excessive and unauthorized premiums charged by the affiliates which received commissions for these placements."); *Brand*, 2000 WL 554193, at *1 (finding commonality requirement was satisfied where plaintiff identified several common issues, including whether the defendant bank "charged borrowers more than the cost of the insurance under a system of kickbacks from the insurer"); *Lane*, 2013 WL 3187410, at *8 (commonality and predominance requirements satisfied where

3. Typicality

The typicality requirement "tend[s] to merge" with the commonality requirement. *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982); *see also In re Checking Account Overdraft Litig.*, 275 F.R.D. at *3 n.8 (citation omitted). Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A.*, 126 F.3d at 376 (internal quotations omitted). This does not require that the situations of the named representatives and the class members be identical. *In re Veeco Instruments, Inc. Sec. Litig.*, 235 F.R.D. 220, 238 (S.D.N.Y. 2006). Rather, it is sufficient that "the disputed issue of law or fact occup[ies] essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 280 (S.D.N.Y. 2003). Thus, "minor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendants direct "the same unlawful conduct" at the named plaintiffs and the class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

Here, the named Plaintiffs are typical of the Settlement Classes that they seek to represent, as they had mortgages that were serviced by CitiMortgage, were force-placed with flood or hazard insurance by CitiMortgage, and claim that they were subject to the same alleged

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plaintiffs alleged that Wells Fargo "engaged in a common scheme to force-place insurance on borrowers whose individual insurance had lapsed, and that [Wells Fargo] did so in a manner designed to maximize the kickbacks it received from captive insurance providers QBE and ASIC."); *Williams*, 280 F.R.D. at 672 (certifying class of borrowers where "[t]he essence of th[e] case, as alleged, [was] a common scheme to systematically, and without any individual consideration, force-place insurance at an excessive rate to every person whose self-placed property insurance had lapsed" and earn a commission for Wells Fargo).

abuses of the force-placed insurance process as other class members. Accordingly, Rule 23(a)(3) is also satisfied.[24]

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." In order to satisfy requirement, two elements must be met: (1) class counsel must be qualified, experienced and generally able to conduct the litigation; and (2) the representative plaintiff's interests must not be antagonistic to those of the class. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000).

As noted above, Plaintiffs' counsel have extensive experience litigating class action cases relating to FPI, and previously were determined to be adequate by this Court and appointed class counsel on an interim basis. *See supra* at 17. Moreover, "[t]here is nothing to indicate that [Plaintiffs'] interests are in conflict with any members of the class." *Brand*, 2000 WL 554193, at *2; *see also Robinson*, 1997 WL 634502, at *3. For the reasons discussed above, the interests of the named Plaintiffs are common with, and not antagonistic to, the interests of the other Settlement Class members. Thus, the adequacy requirement is also met.

B. The Requirements of Rule 23(b)(3) are Met

In addition to satisfying Rule 23(a), parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). *Amchem Prods. Inc. v. Windsor*, 521 U.S.

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[24] *See, e.g., Hofstetter*, 2011 WL 1225900 at *9 (finding that typicality was satisfied because the named plaintiffs' "claims likely differ from those of other class members only as to damages and other immaterial factual details"); *Brand*, 2000 WL 554193, at *1 ("[Plaintiff] was subjected to force-placed collateral protection insurance by [the bank]. If [the bank] systematically overcharged for premiums to all class members, then [plaintiff's] claims will be the same as those of the other class members with regard to such practices."); *Robinson*, 1997 WL 634502, at *3 ("[T]he claim of [plaintiff], an escrowed borrower with forced placed insurance, is typical because his claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and is based on the same legal theory.") (internal brackets and quotation marks omitted); *Williams*, 280 F.R.D. at 673 (holding that the named plaintiffs were "typical of the class in that they were both charged and either paid or still owe Wells Fargo for the alleged excessive and inflated premiums for the force-placed property insurance").

591, 623 (1997); *In re NTL, Inc. Sec. Litig.*, 2006 WL 330113, at *12. Here, Plaintiffs seek certification under Rule 23(b)(3), which allows a class action to be maintained if: (1) questions of law or fact common to the class members predominate over any questions affecting only individual members; and (2) a class action is superior to other methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). Both of these criteria are met here.

1. Predominance

The predominance requirement is "readily met" in consumer cases such as this. *Amchem*, 521 U.S. at 624. "In order to meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *In re NTL, Inc. Sec. Litig.*, 2006 WL 330113, at *12 (quoting *In re Visa Check/ MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001)). According to the Second Circuit, "[c]lass-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002). That is precisely the situation presented here.

The questions relating to the alleged commissions scheme predominate over any individualized issues. The same commission rate (15%) was applied to the same type of force-placed insurance coverage (hazard insurance) irrespective of individual borrower circumstances, and the question of whether those commissions were lawful is a classic class-wide issue that is appropriate for resolution in one stroke -- and which has been resolved in one stroke via the moratorium on such commissions in the Settlement Agreement. *See, e.g., Williams*, 2012 WL

566067, at *5 ("The determination of the truth or falsity of the Plaintiffs' allegations that Wells Fargo and QBE engaged in a scheme to force-place insurance with inflated and excessive premiums will resolve an issue that is central to the validity of each one of the claims in one stroke."). Moreover, the common issues relating to flood insurance coverage requirements also predominate any individualized issues, as evidenced by the significance attached to these common issues by the United States Government (in its *amicus* brief) and the Third Circuit (in granting *en banc* review in *Kolbe*).[25] Accordingly, several other courts have determined that common issues predominated in other FPI cases. *See e.g., Brand*, 213 F.3d 636, 2000 WL 554193, at *1-2 (5th Cir. 2000); *Williams*, 280 F.R.D. at 674-75; *Hofstetter*, 2011 WL 1225900 at **14-15; *Robinson*, 1997 WL 634502, at *4 ("We conclude that common class issues of law and fact predominate over any individual issues in this case. While individual issues are present, especially in the context of damages, they do not predominate. Rather, the central issues revolve around whether the form contracts authorized placement of the type of insurance purchased and whether Countrywide knowingly purchased inflated or expensive policies to generate commissions.").

2. Superiority

The superiority requirement is also satisfied here. Resolving borrowers' claims together in a class action is vastly superior to leaving each of them to fend for themselves in litigation against one of the nation's largest mortgage servicers. Indeed, it is unlikely that class members even could bring their claims on an individual basis. *See Hofstetter*, 2011 WL 1225900, at *16 ("[T]he class action mechanism is a superior method for resolving these claims[] because the

[25] In its *amicus* brief, the Government emphasized the importance of interpreting FHA mortgages consistently nationwide. *See Casey*, Dkt. No. 90 at 14 n.3 (stating that "it would make little sense for the meaning of a uniform provision prescribed by a federal agency as a nationwide condition of participation in a federal program to depend on the content of state law").

cost of litigation likely would not be justified without aggregating them together."); *Williams*, 280 F.R.D. at 675 ("Since the damage amounts allegedly owed to each individual [borrower] are relatively low—especially as compared to the costs of prosecuting the types of claims in this case involving complex, multi-level business transactions between sophisticated Defendants—the economic reality is that many of the class members would never be able to prosecute their claims through individual lawsuits."). As the Supreme Court has recognized, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter a Preliminary Approval Order: (1) preliminarily approving the Settlement; (2) approving the proposed Notices of Settlement and authorizing distribution of the Notices via first class mail (and by publication); (3) certifying the proposed Settlement Classes; (4) designating Plaintiffs' Counsel as Class Counsel; (5) designating Plaintiffs as class representatives; and (6) scheduling a final approval hearing.

Dated: February 5, 2014

/s/ Kai Richter

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