IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Jonathon Rowles and George Holloway, individually and as class representatives of others similarly situated, Plaintiffs, Chase Home Finance, LLC, Defendant.	Civil Action No.: 9:10-1756-MBS **MEMORANDUM IN SUPPORT OF PETITION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND APPOINTMENT OF CLASS COUNSEL**

Plaintiffs Jonathon Rowles and George Holloway petition the court for preliminary approval of a settlement of the class action pursuant to Fed. R. Civ. P. 23(e). For the reasons stated herein, these motions should be granted.

INTRODUCTION

This case was filed on July 6, 2010 and alleges that a systematic failure of policies and procedures employed by Defendant Chase Home Finance, LLC deprived thousands of military men and women of statutory rights pertaining to their home mortgages under the Servicemembers Civil Relief Act. After two days of mediation conducted by Hon. Edward Cahn (ret.), former Chief Judge of the Eastern District of Pennsylvania, and several additional weeks of very intense negotiations, the parties have reached terms on a settlement proposal that may be briefly summarized as follows:

- The certification of a class of approximately 6,000 servicemembers entitled to settlement proceeds stemming from alleged SCRA violations.
- Payment of $12,000,000 to servicemembers affected by the alleged violations, constituting an average of approximately six times the servicemembers' ascertainable compensatory damages.
- Payment of an additional $15,000,000 to be disbursed to servicemembers who may have suffered consequential damages as a result of the alleged breaches of the SCRA.

- Full remediation by Chase of any wrongful foreclosures including, where applicable, the rescission of foreclosure sales and mortgage forgiveness, for which Chase has provided an estimated $6,400,000.

- Dedication of any monies left undisbursed from the settlement proceeds to charities focused upon benefiting United States military veterans and their families.

As will be explained in more detail below, the parties estimate the total monetary value of this potential settlement to the class members to be approximately $48,000,000.00. To facilitate this resolution, Plaintiffs bring the present motions before the Court.

FACTS AND PROCEDURAL HISTORY[1]

Captain Jonathon Rowles and Sergeant First Class George Holloway serve our country on active duty in the United States Marine Corps and United States Army Reserve, respectively. As such, they enjoy numerous rights and protections under the Servicemembers Civil Relief Act or "SCRA" (50 App. U.S.C. § 501, *et seq.*). Among these many rights are several directly pertaining to loans secured by real estate, such as: 1) the right to have the interest rate on a home mortgage existing prior to receiving active duty orders reduced to a maximum of 6% (50 App. U.S.C. § 527); 2) the right to be free of mortgage foreclosure while on active duty absent a court order to the contrary (50 App. U.S.C. § 533); and 3) the right to be free of adverse credit reporting due to their status as members of the military on active duty. (50 App. U.S.C. § 518) The purpose of the SCRA protections, according to the Act itself, is

> to provide for, strengthen, and expedite the national defense through protection extended by this Act … to servicemembers of

[1] The Plaintiffs' first amended complaint included claims filed on behalf of LTC Sarah Letts-Smith and Lance Corporal Martin Hupfl. As a part of the negotiations between the parties, these claims have been dismissed without prejudice and with tolling agreements to stay the application of any statutes of limitation for one year in order to avoid prejudice to either former party or, in the case of Martin Hupfl, any class interest arising from a potential violation of 50 App. U.S.C. § 532 (termination of installment contracts).

> the United States to enable such persons to devote their entire energy to the defense needs of the Nation.

50 App. U.S.C. § 502(1).

In 2004, prior to joining the Marine Corps, Captain Rowles purchased a home with loan proceeds provided by BNC Mortgage, Inc. One year later, Rowles executed a Marine Corps Reserve contract and then received orders calling him to active duty as of January 22, 2006. Shortly after receipt of his active duty orders, Rowles requested in writing that Defendant Chase Home Finance, LLC reduce the interest rate on his home mortgage to 6% in compliance with 50 App. U.S.C. § 527. In July of 2006, Chase informed Rowles that he qualified for SCRA protection and would receive the appropriate interest rate reduction. Beginning in December of 2007, Chase required Rowles to submit "quarterly verifications" that he remained on active duty. In order to maintain his entitled 6% interest rate, Rowles was forced to complete these verifications and oftentimes devote substantial time conversing with Chase customer service personnel.

In April of 2009, Chase raised the interest rate on Rowles' home loan above the legally-mandated 6% despite the fact that Rowles was still on active duty in the Marine Corps. Each month thereafter, Rowles continued to pay his mortgage at the legal 6% rate, but Chase declined to calculate Rowles' payments correctly. As such, according to Chase, Rowles quickly fell behind his scheduled payments and Chase began to employ collections methods to satisfy debts it wrongly contended were owed. Such methods included repeated phone calls to Rowles' residence as late as 4:00 am and warnings of reports to credit bureaus and potential foreclosure. These events caused Rowles to spend considerable time communicating with Chase via telephone, email and written correspondence. This time included leave from his unit to travel cross-country to meet with Chase representatives in an effort to preserve his 6% interest rate

under the SCRA and to prevent Chase from taking other threatened actions. Chase's actions are more specifically detailed in the affidavit of Jonathon Rowles. (Dkt. 18-1)

In March of 2000, Sergeant Holloway purchased a house located in Fountain Inn, South Carolina that was financed by NVR Mortgage Finance. At that time, George Holloway was not on active duty with the United States Army Reserve. Thereafter Holloway's loan was transferred to Chase for servicing. In 2008—while Sergeant Holloway was on active duty with the Army—Chase initiated foreclosure proceedings against Holloway's home which resulted in a foreclosure sale on May 4, 2009. As of today, Sergeant Holloway continues to serve our country on active duty, currently stationed in Afghanistan with the Army Reserve.

In June of 2010, Captain Rowles initiated this lawsuit on behalf of all Servicemembers who were denied the appropriate 6% interest rate. After several procedural twists, the complaint was amended to add Sergeant Holloway and extend relief sought to all Servicemembers possessing home loans with Chase who were denied SCRA protections, including protection against wrongful foreclosure. The parties have engaged in extensive negotiations and have reached a settlement agreement (**Exhibit A**). The Plaintiffs now pray the Court will certify a class action for the purposes of this settlement and grant preliminary approval to the settlement's terms.

ANALYSIS

I. Provisional Certification of Class for Settlement Purposes

The Fourth Circuit has spoken of the importance of certifying class actions that satisfy the requirements of Fed. R. Civ. P. 23.

> If a lawsuit meets these requirements, certification as a class action serves important public purposes. In addition to promoting judicial economy and efficiency, class actions also "afford aggrieved persons a remedy if it is not economically feasible to obtain relief

> through the traditional framework of multiple individual damage actions." Thus, federal courts should "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case 'best serve the ends of justice for the affected parties and ... promote judicial efficiency.'

Gunnells v. Healthplan Services, Inc., 348 F.3d 417, 424 (4th Cir. 2003)(internal citations omitted). "District courts have wide discretion in deciding whether or not to certify a class and their decisions may be reversed only for abuse of discretion…". *Id.* at 424.

It is recognized that a potential settlement is a relevant consideration when considering class certification. "If not a ground for certification *per se*, certainly settlement should be a factor, and an important factor, to be considered when determining certification." *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir. 1989) *abrogated by Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). Indeed, the Supreme Court itself has affirmed that "[s]ettlement is relevant to a class certification." *Amchem Products* at 619. Nevertheless, the Supreme Court has reiterated that certification of a class for the purposes of settlement must satisfy the pertinent Rule 23 requirements. *Id.*

Even for settlement purposes, in order to certify a class, the Plaintiffs must demonstrate that the proposed certification satisfies the prerequisites set forth within Rule 23(a) and Rule 23(b). Rule 23(a) empowers the Court to certify a class action when (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class as a whole; and (4) the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a). In addition, Rule 23(b) requires that questions of law or fact common to members of the class predominate over those affecting individual members of the class and a class action is a superior means of resolving the controversy. *Id.* at 23(b). The Plaintiffs shall address each requirement in turn.

a. Rule 23(a) Requirements

i. Numerosity

Rule 23(a)(1) demands evidence that "the class is so numerous that joinder of all members is impracticable." *Id.* Although there is no specific rule on how many members a class must have, the Fourth Circuit Court of Appeals has indicated that a class with over thirty members justifies a class. *Williams v.Henderson*, 129 Fed. Appx. 806, 811 (4th Cir. 2005) (citing 7A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 1762 (2d ed. 1986)). The proposed class, which will include at least 6,000 borrowers, easily satisfies Rule 23(a)(1)'s numerosity requirement.

ii. Commonality

Likewise, this case presents a number of common issues of fact and law common to the class as a whole. "Commonality requires that there are questions of law or fact common to the class . . . [and] a common question is one that can be resolved for each class member in a single hearing . . . ." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (internal citations omitted). The common question of fact and law that touches upon each and every class member's claim is as follows: did Chase employ practices and procedures that failed to ensure that home loan borrowers received eligible SCRA protections?

The legal underpinning of this action is the Servicemembers Civil Relief Act, a federal statute applying equally throughout the nation. All class members are "servicemembers," defined as "a member of the uniformed services, as that term is defined in section 101(a)(5) of title 10, United States Code." 50 App. U.S.C. § 511(1). Furthermore, as the class is defined, all class members possessed real property the purchase of which was financed or serviced by Chase. As servicemembers entitled to SCRA, these class members enjoyed rights of a maximum mortgage

interest rate (50 App. U.S.C. § 527), protection against foreclosure while on active duty (50 App. U.S.C. § 533), and protection against unlawful credit treatment as a result of their SCRA status (50 App. U.S.C. § 518).

Federal courts have observed that class actions turning upon universally-applied statutes generally satisfy concerns of commonality. Specifically, the Middle District of North Carolina has found commonality where "[a]ll of the federal claims alleged by [the plaintiffs] contain elements that would be common to the class." *Simpson v. Specialty Retail Concepts*, 149 F.R.D. 94, 99 (M.D.N.C. 1993). Similarly, the Southern District of Indiana observed commonality where "this action is based upon the uniform application of a single federal statute." *Schmitt v. United States*, 203 F.R.D. 387, 401 (S.D. Ind. 2001).

Finally, Chase's certification of over 6000 borrowers due refunds pertaining to SCRA benefits further buttresses the commonality of the issue at play in this case.

iii. Typicality

"Although the commonality and typicality requirements for class actions tend to merge, each factor serves a discrete purpose. Commonality examines the relationship of facts and legal issues common to class members, while typicality focuses on the relationship of facts and issues between the class and its representatives." *Gonzalez v. Proctor & Gamble Co.*, 247 F.R.D. 616, 621 (S.D. Cal. 2007), *quoting Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1232 n. 10 (9th Cir. 2007). For typicality to be satisfied, the "representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). In this case, "[b]ecause the claims of the representative parties are the same as the claims of the class, the typicality requirement is satisfied." *Thorn*, 445 F.3d at 339.

Both Rowles and Holloway possessed real property secured by Chase financing. Both Rowles and Holloway were subjected to the same flawed Chase policies and procedures which failed to ensure compliance with SCRA protections for over 6000 fellow servicemembers. As a result, Rowles and Holloway suffered damages typical of other class members. Rowles incurred substantial interest charges above the 6% limit mandated by Section 527. Holloway lost his home to foreclosure while on active duty in violation of Section 533. The essential facts of the class representatives' claims will be typical of the class members in the proposed settlement class. Therefore, the prosecution of Rowles' and Holloway's claims "simultaneously tend[s] to advance the interests of the absent class members." *Deiter* at 466.

iv. Adequacy

Rule 23(a)(4) requires the putative class representatives demonstrate "the representative parties will fairly and adequately protect the interests of the class." *Id.* "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc.* at 625, 117 S. Ct. at 2250. "For a conflict of interest to prevent plaintiffs from meeting the requirement of Rule 23(a), that conflict 'must be fundamental. S5acdbf9989f011d It must go to the heart of the litigation.'" *Gunnells* at 430-31, *quoting* 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 18:14 (4th ed. 2002).

No conflicts exist between the putative class representatives and members of the putative class. Rowles and Holloway each suffered from a wrongful denial of SCRA benefits pertaining to real estate loans and each suffered the type of damages—overcharged interest, wrongful foreclosure, and consequential damages related thereto—for which the class will be compensated as a result of this settlement. Rowles, as lead plaintiff from the inception of this litigation, has particularly demonstrated his loyalty to the class by appearing before Congress to provide live

testimony to the House Veterans' Affairs Committee regarding the consequences of the denial of SCRA benefits to military families. Similarly, Holloway has exhibited his loyalty to the class by serving as a class representative while on active duty in Afghanistan.

Rule 23(a)(4) "also raises concerns about the competency of class counsel and conflicts of interest." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 163, 102 S. Ct. 2364, 2373, 72 L. Ed. 2d 740 (1982). Rowles and Holloway have retained experienced and competent counsel with significant expertise in complex litigation and resolution of class action cases. Richard A. Harpootlian, P.A. has spearheaded several class actions in both State and federal court. Most recently, the firm won summary judgment for a class of cancer insurance policyholders before the Fourth Circuit, *see Ward v. Dixie Nat. Life Ins. Co.*, 257 F. App'x. 620 (4th Cir. 2007), and, after an award of damages on remand, successfully defended that judgment a second time at the appellate level. *See Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164 (4th Cir. 2010). At the State level, the firm has secured judgment on behalf of a class of thousands of state employees. *See Layman v. State*, 630 S.E.2d 265 (S.C. 2006).

Likewise, Harvey & Battey, P.A. possesses extensive complex litigation experience in State and federal court. The firm currently serves as South Carolina counsel for 112 Independent Pharmacy Plaintiffs, and regional counsel for over 200 similar Plaintiffs in North Carolina and Tennesee, in the multi-district litigation case of *Drug Mart Pharmacy Corp, et al. v American Home Products, et al*, CA No. 93 CIV 5148 (ILG)(SMG) currently pending in the United States District Court for the Eastern District of New York. The firm has successfully litigated several cases in the Fourth Circuit Court of Appeals, *see, e.g., Asquith v. City of Beaufort*, 139 F.3d 408 (4th Cir. 1998) and the South Carolina Supreme Court, *see, e.g., Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 594 S.E.2d 455 (S.C. 2004).

The three named attorneys representing the putative class possess a combined total of 75 years of experience in the legal profession and all are admitted to practice in the Fourth Circuit Court of Appeals and the United States Supreme Court. None of the named attorneys or their law firms possess any interest antagonistic to the interests of the putative class. Therefore, based upon the foregoing, both aspects of the adequacy requirement are satisfied in this case.

b. Rule 23(b)(3) Requirements

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Products, Inc.* at 614, 117 S. Ct. at 2245. Here, Plaintiffs seek class certification under Rule 23(b)(3). The rule itself provides ample guidance as to what must be shown for Rule 23(b)(3) certification.

> A class action may be maintained if Rule 23(a) is satisfied and if … the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
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> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The Supreme Court has recognized that the evolution of a Rule 23(b)(3) class action "sought to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem*

Products, Inc. at 615, 117 S. Ct. at 2246. As shown below, the proposed class and class settlement satisfy these concerns.

i. The class members' interests in individually controlling the prosecution or defense of separate actions

Quoting from the Advisory Committee notes, the *Amchem* court described the purpose behind this consideration.

> The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.

Amchem Products, Inc. at 616, 117 S. Ct. at 2246. As shown above, the "cohesion" of the proposed class is buttressed by the high degree of commonality between the various claims. The Plaintiffs allege that a systematic failure on the part of Chase to install and observe SCRA requirements resulted in financial damage to over six thousand class members. As certified by Chase, the actual compensatory damages suffered by the individual class members rises to the level of only several hundred dollars for perhaps as many as one-third of the class.

ii. The extent and nature of any litigation concerning the controversy already begun by or against class members

Plaintiffs are unaware of any other litigation concerning the specific controversy addressed by this lawsuit.

iii. The desirability or undesirability of concentrating the litigation of the claims in the particular forum

Concentrating this litigation in the District of South Carolina is desirable as both Captain Rowles and Sergeant Holloway reside in the State of South Carolina. Furthermore, Class

Counsel practice in the State of South Carolina. Finally, there are no handicaps pertaining to this forum that would otherwise be remedied in other forums.

iv. The likely difficulties in managing a class action

In instances of class certification for the purposes of settlement, the Supreme Court has recognized that the difficulties of managing a class action are not applicable. "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, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem Products, Inc.* at 591, 117 S. Ct. at 2248; *see also Gunnells v. Healthplan Services, Inc.* at 440.

II. Appointment of Class Counsel

In conjunction with the motion to certify a class action for the purposes of settlement, Plaintiffs also move for the appointment of Richard A. Harpootlian, P.A. and Harvey & Battey, P.A. as class counsel. Rule 23 provides specific considerations to be employed when appointing class counsel.

> Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:
>
> (A) must consider:
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> (i) the work counsel has done in identifying or investigating potential claims in the action;
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> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (iii) counsel's knowledge of the applicable law; and
>
> (iv) the resources that counsel will commit to representing the class;

Fed. R. Civ. P. 23(g)(1). Each criterion will be considered in turn. As shown below, class counsel are well prepared to satisfy their duty to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

a. Work done in identifying and investigating claims

Class counsel have conducted approximately one year of work developing the litigation to this point. No other law firms have participated in the representation of the plaintiffs or of the putative class. As evidenced by the extensive briefing regarding potential refunds to be provided to the putative class, class counsel have doggedly attempted to preserve the rights of the class and guarantee no rights could be compromised.

b. Experience with class actions and other complex litigation

As shown by the consideration of "adequacy of representation" under Rule 23(a)(4), class counsel have extensive experience with class actions and other complex litigation.

c. Knowledge of the applicable law

Also as noted above, class counsel possess a combined total of seventy-five (75) years of experience in the legal profession and practice extensively in federal court. Specific to the Servicemembers Civil Relief Act, the litigation and negotiations surrounding this case over the past year has left class counsel well versed in the substantive statutory law that gives rise to this case.

d. Resources committed to representing the class

Both Richard A. Harpootlian, P.A. and Harvey & Battey, P.A. are successful law firms with established traditions of courtroom success. As shown by the experience of these firms in complex litigation, these attorneys also possess the resources to prosecute a large class action for an extended period of time. However, because the motion for class certification is for the

purposes of settlement, the consideration of this criterion is less applicable than it otherwise would be.

III. Preliminary Approval of the Class Settlement

Beyond the certification of the class for settlement purposes and the appointment of class counsel, the Court should issue an order of preliminary approval of the settlement terms set forth within **Exhibit A**.

Preliminary approval of a proposed settlement is the first of two step in the class action settlement process. *See, e.g., In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997); Fed. R. Civ. P. 23(e). The preliminary approval is made prior to notice to the class on the basis of information already known to the Court and supplemented where necessary by motions and presentations by the parties. *Id.* As the authors of the Manual for Complex Litigation have noted, the Court should grant preliminary approval and order notice to the class under Rule 23(e) when the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or of segments of the class or excessive compensation for attorneys and appears to fall within the range of possible approval. MANUAL FOR COMPLEX LITIG. § 30.41 (West 2008).

a. Specific Terms of the Proposed Settlement

The Agreement provides for certification of a Settlement Class defined as:

> All borrowers with mortgage loans, or secured home equity loans or home equity lines of credit, which were active and serviced by EMC, Washington Mutual, and/or Chase as of January 1, 2005, and to whom Chase has sent or will send an Actual Refund by the Class List Close Date.

(Agreement § 3.1.) To date, Chase has provided Actual Refunds[2] for approximately 6,000

[2] "Actual Refunds" are defined in the Settlement Agreement to be the amount that Chase actually sent or will send to Class Members by the Class List Close Date in connection with its

SCRA-protected loans; however, its investigation of compliance breaches among its SCRA-eligible borrowers, and validation of the refund amounts, is ongoing. The initial Class List will be provided to the Settlement Administrator within fourteen days after entry of a preliminary approval order. (*Id.* § 3.3.) Depending on the timing of that order, Chase's investigation may not be complete. As a result, the Settlement Agreement calls for an update to that Class List by the Class List Close Date, which shall be sixty-five (65) days prior to the date of the final approval hearing. (*Id.* §§ 1.4, 3.3.) This provision is intended to ensure that: 1) any additional SCRA-protected borrowers found to have an SCRA compliance issue as Chase completes its investigation are rightly included in the Class, and 2) any additional Class Members have sufficient time to receive notice and either file a Special Claim Form or opt out of the settlement.[3]

1. Benefits to Class Members

In exchange for a release of claims (Agreement § 4), Class Members are entitled to the following benefits:

- Chase will pay a total of $12,000,000 into Fund I. Class Members who do not opt out of the Settlement will be paid from Fund I either $100 or an estimated 6.2 times the Original Estimated Refund,[4] whichever is greater.[5] The entirety of the $12,000,000 shall be

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investigation of potential SCRA compliance breaches. These amounts are separate and distinct from the payments made to Class Members if the Court finally approves this Settlement. Chase has agreed to certify under oath to the Court the amounts of those Actual Refunds to Class Members fifteen (15) days prior to the final approval hearing. (Agreement § 1.1.)

[3] Mrs. Julia Rowles, the wife of Captain Rowles, has entered into a separate individual settlement with Chase. Mrs. Rowles is not a member of the class, she has never served as a plaintiff or putative class representative in the action, and she is not co-borrower on the underlying loan serviced by Chase. The parties nevertheless thought it prudent to disclose the fact of that settlement with the Court.

[4] "Original Estimated Refund" is defined as the amount that Chase calculated as the refund due to individual Class Members in connection with its investigation of potential SCRA compliance breaches. Chase shall certify under oath to the Court the amounts of the Original Estimated Refunds to all Class Members fifteen (15) days prior to the final approval hearing. (Agreement § 1.13.)

distributed through actual payments to Class Members, with the estimated payments being subject to *pro rata* adjustment by the Settlement Administrator to achieve that goal. Any adjustment must reflect the greater of (1) a flat payment of $100; or (2) a multiplier payment that will exhaust but not exceed the remaining amount in Fund I. One payment will be made per loan transaction falling within the Settlement Class definition. Payments shall be made by check payable jointly to all co-borrowers on the loan and the check shall be negotiable for sixty (60) days. (*Id.* § 5.1.)

- Chase will pay a total of $15,000,000 into Fund II, which will be distributed to Class Members who do not opt out of the Settlement and who timely submit a Special Claim Form for additional consequential damages, including, but not limited to, compensation for emotional distress, pain and suffering, economic loss, and/or credit defamation.[6] The Special Master shall have the sole discretion to decide the amount of additional compensation, if any, due any eligible Class Member, and his decision will be final. As an example of such a claim, the parties have agreed that Plaintiff Jonathon Rowles shall be entitled to submit a Special Claim Form to the Special Master for consequential damages seeking debt forgiveness on his Chase home mortgage of $247,000, and any award may be remitted to him via forgiveness of the outstanding debt on his mortgage loan. The claim remains subject to the Fund II Special Master discretionary analysis set forth within Section 5.2 of the Agreement. All other awards paid from Fund II shall be in the form of a single cash payment. (*Id*. § 5.2.)

- The entirety of the $15,000,000 in Fund II will be distributed in accordance with the provisions in Section 5.2. If the total amount of awards granted in connection with Special Claims exceeds $15,000,000, the Special Master shall prorate the reduction of the awards so the aggregate does not exceed that amount. If the total amount is less than $15,000,000, the Special Master shall prorate the increase of the award of each Class Member submitting a Special Claim so that the aggregate shall equal $15,000,000; in no case, however, shall any award granted by the Special Master be increased greater than two times the Special Master's original award amount. If money remains in Fund II even after prorating the original awards at a rate of twice the original award, the remainder shall be distributed to designated programs approved by the Court. (*Id*. § 5.2.)

- If full payment of any Fund II awards arising out of any wrongful foreclosure under the SCRA would not be made by operation of the $15,000,000 cap and the prorated reduction described above, Chase shall make available in Fund II the additional amount needed to pay the full amount of those awards, up to a total additional contribution to Fund II of $500,000. In no event shall the amount Chase is obligated to pay out of Fund II exceed $15,500,000. (*Id*. § 5.2.2.)

- In addition to a monetary payment to each Class Member, Chase will remove prior

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[5] If, however, the total number of loans participating in the settlement exceeds 8,000, then Chase shall increase Fund I by $1,500 for each loan in excess of 8,000 that participates in this settlement. A loan will participate in the settlement if the Class Members who are borrowers on the loan do not opt out of the settlement. (Agreement § 1.11.)

[6] Prior to the Special Master's issuance of the Fund II Report pursuant to Section 5.2, the Special Master may also consider Special Claim Forms submitted late, provided the Class Member demonstrates good cause why he or she was unable to submit a Special Claim by the submission deadline. (Agreement § 5.2.)

derogatory credit reporting it made during Class Members' SCRA protection periods in connection with loans included in the Settlement Class. (*Id.* § 6.)

- Beyond the monetary compensation set forth in the Agreement, the following additional programs have been created for Class Members and may be counted toward the value of the settlement, including for purposes of Plaintiff's request for a class representative incentive award and/or attorneys' fees to Class Counsel:

  - Actual Refunds: Chase has already paid approximately $6,000,000 to identified Class Members in connection with its SCRA review;

  - Foreclosure Remediation: Consistent with its publicly announced policy, Chase will provide, including through debt forgiveness, an estimated $6,400,000 and other remedies to Class Members who were the subject of wrongful foreclosures under the SCRA as follows:

    (a) Chase will rescind the foreclosure sale where possible, and forgive the remaining mortgage debt;

    (b) If the foreclosure sale was previously rescinded, Chase will refund any mortgage payments made since the sale was rescinded with interest, and forgive the remaining mortgage debt;

    (c) If the home cannot be returned, Chase will pay the borrower the full value of the home at the time of sale (at the higher of the sale price to the third party or appraised value at the time of that sale), waive any deficiency, and forgive any remaining mortgage debt; and

    (d) In all cases above, Chase will remove all credit reporting relating to the foreclosure and refund any fees or other costs associated with the foreclosure.

    All such Class Members will also be entitled to a full refund of any fees or interest paid in excess of 6% during their period of SCRA protection. This remediation is not subject to a monetary cap, and Chase shall certify under oath the number of loans and amounts provided to Class Members under this remediation fifteen (15) days prior to the final approval hearing. In addition to the remediation above, Class Members who were the subject of a wrongful foreclosure and who do not opt out of the Settlement shall be entitled to: (1) receive an additional payment from Fund I in accordance with Section 5.1; (2) submit a Special Claim for additional consequential damages from Fund II in accordance with Section 5.2; and (3) have any claim that they did not receive the remediation due as outlined above submitted to the Special Master for resolution. (*Id.* § 7.2.)

  - Rate Reduction: Chase has agreed to reduce the interest rate on loans for borrowers eligible for the benefits under Section 527 of the SCRA from 6% percent to 4%, with an estimated value to current SCRA-eligible Class Members of approximately $9,000,000 in the first year of that rate reduction.

2. Class Representatives' Incentive Awards

Class Representatives Jonathon Rowles and George Holloway intend to request Court approval of incentive awards of $25,000 and $10,000, respectively. Chase will not oppose any

such requests. Chase has also agreed to appoint Captain Rowles as an informal advisor to its Veterans Advisory Council. These incentive awards are in line with other incentive awards approved by courts where the class representatives have taken significant actions to protect the interests of the class, and when the class has benefitted considerably from these actions, as is the case here. *See Helmick v. Columbia Gas Transmission*, No. 2:07-cv-00743**,** 2010 U.S. Dist. LEXIS 65808, at *9 (S.D. W.Va. July 1, 2010) (approving a $50,000 award to the class representative); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (approving a $25,000 incentive award); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (approving awards of $25,000 to each class representative); *Otherton v. Franklin*, 141 F. Supp. 2d 907, 914 (S.D.N.Y. 2001) (awarding $50,000 because named plaintiff was "instrumental in bringing this lawsuit forward").

3. Attorneys' Fees and Costs

Class Counsel intends to request approval of attorneys' fees and costs in an amount not to exceed $8,000,000. Chase will not oppose any such request, and will pay any fees and costs approved by the Court in an amount that does not exceed $8,000,000, and will do so within twenty-one days after the Effective Date. (Agreement § 9.1.) Any such monies awarded by the Court for attorneys' fees and expenses will be in excess of compensation paid to Class Members and shall not be deducted from Class Members' settlement benefits, nor shall be construed in any way to reduce Class Members' settlement benefits.

4. Settlement Administration

The parties have agreed, subject to Court approval, to use the Garden City Group, Inc. ("Garden City") as the Settlement Administrator. Garden City is regarded by most counsel experienced in class action litigation as setting the platinum standard for settlement administration. It was named the best Claims Administrator by the *New York Law Journal* in 2010 and has routinely been approved by courts around the country to act in this capacity.

Subject to Court approval, the Parties have agreed that Judge Cahn will be the Special

Master, who will preside over Special Claims by Class Members for additional compensation paid out of Fund II. (*Id.* § 1.19.)

All settlement administration costs, including costs of the Settlement Administrator and Special Master, and of sending class notice, are to be borne by Chase, separate and apart from the monies made available to make payments from Fund I and Fund II. (*Id.* § 8.)

b. Notice to the Settlement Class

Under Federal Rule of Civil Procedure 23(e), class members are entitled to notice of the proposed settlement and an opportunity to object or opt-out before it is finally approved by the court. Notice to the class should establish the time and place of a public hearing on the proposed settlement and specify the procedure for opting out, filing objections, and appearing at the settlement hearing. Manual for Complex Litigation, Fourth, § 21.312 (2004).

The Notice Plan in this case fully complies with Rule 23(e) and with the requirements of due process. The Notice is written in plain English and includes: (1) a description of the Settlement class; (2) a description of the proposed Settlement; (3) the names of counsel for the class; (4) a fairness hearing date; (5) a statement of the deadlines for filing objections to the Settlement, for submitting a claim, and for filing requests of exclusion; (6) the consequences of such exclusion; (7) the consequences of remaining in the Settlement class; (8) a statement of the Defendant's responsibility for Settlement class counsel's fees and expenses; and (9) information on how to obtain further information. A copy of the Notice is attached to the Settlement Agreement as Exhibit B, and a copy of the Claim Form mailed with each Notice is attached to the Settlement Agreement as Exhibit C.

Notices will be mailed to the last known mailing address of all Class Members, all of which information is in possession of Defendant. Addresses will be updated by Defendant

through use of the National Change of Address database from the U.S. Post Office. By these methods, direct and individual mailed notices will be made to all Class Members. The form and content of the Notice, together with the manner of dissemination set forth above is reasonably calculated to reached all Class Members. It is the "best notice practicable" under the circumstances and more than satisfies the requirements of due process and Rule 23.

c. Proposed Settlement is Fair, Reasonable, and Adequate

With regard to proposed class action settlements, the Fourth Circuit Court of Appeals has established that "[t]he primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991). In conducting the fairness hearing, the court considers both fairness and adequacy. *Id.*

> In assessing the fairness and adequacy of a proposed settlement, "there is a strong initial presumption that the compromise is fair and reasonable." Courts have recognized that "[s]ettlements, by definition, are compromises which 'need not satisfy every single concern of the plaintiff class, but may fall anywhere within a broad range of upper and lower limits.'"

S. Carolina Nat. Bank v. Stone, 139 F.R.D. 335, 339 (D.S.C. 1991) (internal citations omitted). "Ultimately, approval of a class action settlement is committed to 'the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances.'" *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001), *quoting Evans v. Jeff D.*, 475 U.S. 717, 742, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986).

The driving concern of the Court's fairness inquiry is whether the proposed settlement "was reached as a result of good-faith bargaining at arm's length, without collusion…." In re

Jiffy Lube Sec. Litig., 927 F.2d 155, 159 (4th Cir. 1991). To that end, the Fourth Circuit has recognized the following relevant considerations.

> (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of … class action litigation.

In re Jiffy Lube Sec. Litig., 927 F.2d 155, 159 (4th Cir. 1991). The Plaintiff will analyze each consideration of fairness in turn.

1. Posture of the Case and Extent of Discovery

District courts within the Fourth Circuit have found that even when cases settle early in the litigation after only informal discovery has been conducted, the settlement may nonetheless be deemed fair. *See, e.g., Grice v. PNC Mortg. Corp. of America*, No. CIV. A. PJM-97-3084, 1998 WL 350581 (D. Md. May 21, 1998) (preliminarily approving a settlement that was reached "very early" in the litigation, only months after the filing of the class action complaint, since it contained favorable results for both parties and reflected mutual concessions); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 501-02 (E.D. Va. 1995) (holding a class action settlement was fair where parties reached settlement agreement six months after complaint was filed and plaintiffs conducted "sufficient informal discovery and investigation to fairly evaluate the merits of [the d]efendants' positions during settlement negotiations").

Although this settlement was proposed before formal discovery, by the time of mediation, Chase had conducted a thorough review of plaintiffs' claims and provided plaintiffs' counsel with significant information. Plaintiffs were furnished with the fruits of Chase's nine-month internal review, including historical and current foreclosure policies for all heritage clients[7], historical and current collections policies, template communications with borrowers regarding the set-up of SCRA protections, a 2008 internal audit report regarding SCRA processes, a list of

[7] Over time, Chase has acquired loans serviced by EMC and Washington Mutual, each of which had its own population of SCRA-eligible loans, and protocols and procedures for conferring protections upon those loans.

wrongful foreclosures, and a list of potential class members (including their names, addresses, loan numbers, estimated refund amounts, actual refund amounts, and updates of same). In all, nearly 1,500 pages of information were supplied to plaintiffs, with each production to plaintiffs noting Chase's willingness to provide even further documentation. At Plaintiffs' demand, this body of information was certified by Chase, under oath.

The parties have also engaged in fervent in-person mediation sessions before Judge Cahn, and thereafter in often daily, and twice-daily, further negotiations between the parties. As a result of the extensive exchanges of information and vigorous negotiations to date, the parties are well apprised of the strengths and weaknesses of their respective positions and the advantages to be gained by the settlement, which reflects mutual concessions.

2. Circumstances of the Negotiations

The fact that negotiations were "adversarial" and were conducted at "arm's length" helps dispel any concern that counsel colluded in reaching agreement. *In re Microstrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 665 (E.D. Va. 2001). The parties began informal negotiations immediately after Captain Rowles filed the Amended Complaint in February 2011, and the settlement presented to the Court is the product of extensive negotiations. *See id.* ("[C]ounsel for both sides of this lawsuit participated in numerous meetings and extensive and intensive discussions extending over a period of months, with plaintiffs' lead counsel pressing their belief in the strength of their case on the merits.")

Moreover, supervision by a mediator lends an air of fairness to agreements that are ultimately reached. *S.C. Nat'l Bank*, 139 F.R.D. at 346 ("Although a magistrate judge's supervision is not mandatory in order to determine a settlement is fair, such participation can insure that the parties will negotiate in good faith without collusion."); *Vaughns v. Bd. of Educ.*, 18 F. Supp. 2d 569, 579 (D. Md. 1998) ("Settlement negotiations were protracted and much of the time were, as earlier noted by the Court, supervised by a Court-appointed mediator[.] . . . Discussions were detailed and adversarial."). Here, highly detailed adversarial negotiations took place in formal, in-person mediation sessions held before Judge Cahn, a former chief U.S.

district judge for the Eastern District of Pennsylvania who has extensive experience in the area of complex litigation. For three weeks following these sessions, the parties continued to negotiate on a daily basis by telephone, e-mail, and letters, with ongoing communications involving Judge Cahn. It was through this intensive process that the parties crafted the fair and advantageous settlement currently before the Court.

3. Experience of Counsel

Both the Plaintiffs and the Defendant are represented by competent and experienced counsel, which weighs in favor of settlement approval. *See Lomascolo v. Parsons Brinckerhoff, Inc.*, No. l:08cv1310, 2009 U.S. Dist. LEXIS 89129, at *34 (E.D. Va. Sept. 28, 2009) (finding settlement was fair where counsel were "competent and well-experienced in handling federal court litigation in general and in particular in handling class action and multiple party claims"). As noted above, Class Counsel have ample experience in class actions and settlement of the same. Chase is represented by Morrison & Foerster, which possesses one of the largest financial services class action defense practices in the country.

B. The Settlement Is Adequate

In assessing the adequacy of a proposed settlement, the Fourth Circuit considers the following five factors: (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs would likely encounter if the case were to go to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement. *Jiffy Lube*, 927 F.2d at 159.

1. Relative Strength of Plaintiffs' Case

The Plaintiffs believe that their case is fairly sound. The SCRA is clear in its prohibition of excessive interest rates and wrongful foreclosures upon our men and women in uniform. Furthermore, Chase has admitted to systematic breakdowns that led to what it has publicly described as "mistakes." Thus it appears that a good case for liability can be made.

The strength of the Plaintiffs' case, however, is amply reflected in the benefits bestowed

upon the Class in this potential settlement. As stated above, it is envisioned that the Class will receive approximately six times its actual, compensatory damages should this settlement be approved. Furthermore, a safety mechanism has been built into the settlement to ensure that—if the number of participating class members surprisingly increases—benefits shall not fall to a level less than approximately four times the actual, compensatory damages of the class members. In the context of a settlement, this is a very good result.

2. Existence of Any Difficulties of Proof

Nevertheless, as any experienced attorney is well aware, litigation is fraught with both foreseen and unforeseen difficulties. Defendant Chase does possess several potential defenses that could defeat claims by some class members. Furthermore, hotly contested class certification is never a guarantee by any stretch of the imagination and the nature of the individual damages in this case—and their varying amounts—makes it likely that the Class would face significant challenges going forward.

3. Anticipated Duration and Expense of Additional Litigation

The Court needs no reminder as to the potential duration and expense associated with complex litigation. In a case of this magnitude, a fully contested class action lawsuit would be expected to take several years to resolve at the District Court level. Any appeal would add at least another year. In the meantime, the expenses for such a complex case could easily range into the hundreds of thousands of dollars.

4. Solvency of Defendants

There is no evidence that Chase is in danger of becoming insolvent.

5. Degree of Opposition to Settlement

Due to the preliminary nature of this motion, Plaintiffs are unaware of any opposition to this settlement.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request the Court issue an order:

1) Certifying this case as a class action for settlement purposes;

2) Naming Richard A. Harpootlian, P.A. and Harvey & Battey, P.A. as Class Counsel;

3) Granting Preliminary Approval to the proposed class action settlement.

s/ Richard A. Harpootlian
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