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

MARK BUTTERLINE, in his own right and as personal representative of the estate of Lisa Butterline, individually and on behalf of all others similarly situated, Plaintiff, v. CITY OF PHILADELPHIA, Defendant.	Case No.: 2:15-cv-01429-JS

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S AND DEFENDANT'S MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND PROVISIONAL CLASS CERTIFICATION

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Plaintiff Mark Butterline, in his own right and as personal representative of the Estate of Lisa Butterline ("Plaintiff"), on behalf of himself and all others similarly situated, through counsel of record ("Class Counsel"), and Defendant City of Philadelphia ("Defendant") respectfully submit this Memorandum of Law in Support of Plaintiff's and Defendant's Motion for Preliminary Approval of Settlement and Provisional Settlement Class Certification. For the reasons stated below, the Court should grant preliminary approval of the proposed settlement of this class action, order the dissemination of notice, and schedule a final fairness hearing.

I. INTRODUCTION

In a Settlement Agreement[1] executed on April 20, 2022, Class Counsel (Daniel C. Levin, of Levin Sedran & Berman, Philadelphia, PA; William Wilson of The Law Offices of William Wilson; and Michael Louis of MacElree Harvey, Ltd.) and Defense Counsel have negotiated a proposed Settlement that provides substantial benefits to individuals whose properties were foreclosed at Sheriff's Sales but who did not receive excess funds to which they may have been entitled under Pennsylvania law.

The Settlement creates a Settlement Fund of $950,000 for the benefit of approximately 100 class members. The specifics of this relief are set forth in the Settlement Agreement. *See* Exhibit 1. This highly beneficial Settlement represents the culmination of almost seven years of highly contested litigation between the Parties. Class Counsel have reviewed hundreds of documents and have interviewed many fact witnesses. Beginning June, 2021, after engaging in discovery, the Parties entered into settlement negotiations, with the help of Magistrate Judge Carol Sandra Moore Wells. As a result of the mediation, the parties were able to agree to resolve this matter for $950,000. Although these lengthy and complex negotiations have been difficult, the Parties' good-

[1] Settlement Agreement is a defined term in the Settlement. All capitalized terms in this brief are also defined terms in the Settlement.

faith efforts to resolve this litigation ultimately resulted in an arms-length Settlement representing a thoughtful compromise which takes into consideration the Parties' respective concerns—a meaningful solution to the concerns of the members of the Class and the Defendant's institutional concerns. In short, Plaintiff and Defendant respectfully submit that this Settlement is fair, adequate, and reasonable for the Settlement Class and that the requirements for final approval will be satisfied. In considering preliminary approval, this more than suffices to permit Class Notice to be provided to the Settlement Class and a Final Fairness Hearing to be scheduled.

Moreover, the Plaintiff and Defendant request that, along with granting preliminary approval of the Settlement, the Court adopt the schedule set forth below, which will assist the Parties in effectuating the various steps in the Settlement approval process under the Settlement Agreement:

	Event	*Timing*
1	Notice Date	No more than sixty (60) days after Preliminary Settlement Approval Date
2	Deadline for filing Requests for Exclusion	Forty-five (45) days after Notice Date
3	Deadline for filing Objections	Forty-five (45) days after Notice Date
4	Claim Date: deadline by which claims must be submitted	Ninety (90) days after Notice Date
5	Fairness Hearing	One Hundred and Twenty (120) days after Notice Date

Accordingly, at this preliminary stage of the Settlement process, Plaintiff and Defendant respectfully requests that the Court: (i) grant preliminary approval of the proposed Settlement Agreement; (ii) certify a Settlement Class pursuant to the provisions of Fed. R. Civ. P. 23(b)(3); (iii) schedule a Final Approval Hearing to consider final approval, pursuant to the schedule set forth above; (iv) direct that notice of the proposed Settlement and hearing be provided to absent class members in a manner consistent with the Settlement Agreement and the Notice Program, as

set forth in the above-mentioned schedule; and (v) enter the proposed order regarding Preliminary Approval Order.

II. FACTUAL BACKGROUND

The Butterlines owned a house at 2713 Huntingdon Street in Philadelphia, subject to a mortgage. Plaintiff's Second Amended Class Action Complaint, Dkt. 81 ("Complaint") ¶ 7. They experienced financial difficulty due to loss of employment and illness and fell behind on the mortgage payments. Complaint ¶ 18. In November 2007, the mortgagee filed a foreclosure action in the Philadelphia Court of Common Pleas. Complaint ¶ 9. That action eventually resulted in a default judgment in April 2009 in the amount of $62,764.79. Complaint ¶ 10.

Defendant the City of Philadelphia ("Defendant" or "City") scheduled a sheriff sale. Complaint ¶ 12. The published notice of the sale said that, in the event of active bidding, the highest bidder would be required to post certain costs at the time of sale, with the balance of the purchase price to be deposited to the sheriff within 30 days. Complaint ¶ 13. The same notice further stated that the sheriff would "file in his office a Schedule of Distribution Thirty (30) Days from the date of real estate sold on October 1, 2011" and that "distribution w[ould] be made in accordance with the Schedule unless exceptions [we]re filed within then (10) days thereafter."[2]

The sale was held on November 1, 2011, and the property was sold to the mortgagee for its bid of $93,000, which was approximately $30,000 more than the amount of the judgment. Complaint ¶ 14. On July 23, 2012, the property was deeded to the mortgagee and the deed was recorded on October 31, 2012. Complaint ¶ 15. The deed said that the transfer of title was "for and

[2] The notice, to be distinguished from the City's alleged conduct, was consistent with Pennsylvania substantive law. *In re Sheriff's Excess Proceeds Litig.*, 98 A.3d 706, 713 n.2 (Pa. Commw. Ct. 2014) ("When a foreclosure sale generates proceeds in excess of existing tax liens and costs, [Pennsylvania Rule of Civil Procedure 3136] requires the Sheriff to distribute the excess proceeds to the former property owner.").

in consideration of the sum of ($93,000)," but the mortgagee did not actually pay this amount. *Id.*; *see also* Complaint, Exhibit C. In fact, the City did not require the mortgagee even to pay the difference between the bid and the judgment ($93,000 - 62,764.79 = $30,235.21), but required payment only of the sheriff's costs of $16,291.11. Complaint ¶ 16.

When the executing creditor is the successful bidder at a sheriff's sale, the City does not always require it to pay the full amount of its bid. Complaint ¶ 17. It requires payment of the amount of the judgment, in the form of a credit under Pa. R.C.P. 3133, and the sheriff's costs, but did not always require tender of any remainder of the bid. *Id.* This contrasts with situations in which the successful bidder is a third party to the contract between the mortgagor and mortgagee, where full payment of the bid amount plus the costs is required. *See* Complaint, Exhibit E.

Plaintiff contends the City's practice—of collecting only the costs owed to the City where the winning bidder of a sheriff sale was also the executing creditor, leaving any excess in the amount by which the bid price exceeds the total of the foreclosure judgment and the sheriff's costs uncollected—was contrary to established Pennsylvania law. Complaint ¶ 17. Pennsylvania law requires a Sheriff to distribute excess funds. Pa.R.Civ.P. 3136(d). When the winning bidder is a third party, the City collects the entire bid amount. In both types of cases, the City does not distribute the excess proceeds to the former owner until they submit an administrative application to the Sheriff's Defendant Asset Recovery Team (DART).[3] Complaint ¶ 19. As part of this settlement, the City acknowledges that it has now changed this collection practice in part as a result of this Litigation.

The Butterlines made an effort to have the sale set aside and, after that was unsuccessful, submitted a DART application in December 2014. Complaint ¶ 19. On December 18, 2014, their

[3] Now known as the Home Asset Recovery Team (HART).

claim was denied by the City, which stated that, although the mortgagee had "won the bid," it had been required to actually pay only "pending cost (*i.e.*, Sheriff's cost, transfer taxes, water)" and the Butterlines were therefore "not due any monies from the Sheriff Sale." *See* Complaint, Exhibit E.

III. PROCEDURAL BACKGROUND

The Butterlines filed a class action complaint against the City of Philadelphia, the Philadelphia Sheriff's Office, and their mortgagee the Bank of New York Mellon Trust Company, N.A. ("BNY") on March 19, 2015, Dkt. 1, which was amended on May 14, 2015, Dkt. 15. The City and BNY filed separate Motions to Dismiss on June 15, 2015. Dkt. 18, 19. On March 31, 2016, the Court granted the Defendants' motions without prejudice. Dkt. 31, 32. Plaintiff filed a motion to amend the complaint on April 21, 2016. Dkt. 33. The City filed a Motion to Dismiss with Prejudice on May 9, 2016. Dkt. 34, 35. The Court granted Plaintiff's motion to amend and the City's motion to dismiss with prejudice on March 20, 2017, leaving BNY as the sole remaining Defendant. Dkt. 41, 42. BNY filed a Motion to Dismiss the Second Amended Complaint on April 24, 2017. Dkt. 44. The Court denied BNY's motion on April 6, 2018. Dkt. 53, 54. On July 13, 2018, the Court entered judgment against BNY after Plaintiff accepted a Rule 68 offer of judgment in the amount of $25,000. Dkt. 65, 66.

On August 27, 2018, Plaintiff filed a Notice of Appeal with regard to the Court's March 20, 2017, Order granting the City's Motion to Dismiss with Prejudice. Dkt. 71. Lisa Butterline died during the pendency of the appeal, and Plaintiff Mark Butterline was substituted as her personal representative. On January 19, 2021, the United States Court of Appeals for the Third Circuit vacated the Court's Order and remanded the case. Dkt. 74. Thereafter, the Parties engaged in discovery, mediation, and settlement negotiations before reaching the present settlement.

IV. THE PROPOSED SETTLEMENT

Plaintiff and Defendant are pleased to present to the Court Plaintiff and Defendant's Motion for Preliminary Approval of the Settlement of this Litigation. This Settlement is made on behalf of all persons whose property was foreclosed upon by an executing creditor who was the winner bidder, who did not receive surplus funds as they may have been entitled to under Pennsylvania law. The proposed Settlement Class is defined as:

> All individuals or entities whose real property was foreclosed and sold to an executing creditor at a sheriff sale by the City of Philadelphia since January 1, 2011 for a price greater than the sum of the (1) judgment (including reassessments) (2) sheriff's costs, (3) second mortgages and in rem liens, (4) and post-judgment interest, and who did not recover such excess funds from the Sheriff's Office.

Class Representative Mark Butterline represents the Class. His home was foreclosed upon by an executing creditor whose winning bid exceeded the judgment but who did not pay the entire winning bid at the time of the sale.

As described below, the Settlement Agreement provides for the creation of a Settlement Fund to compensate the Settlement Class for the alleged constitutional violations.

A. The Settlement Fund

The Settlement creates a Settlement Fund of $950,000. The Defendant has agreed that it may advance up to $100,000 as the initial contribution, to be used to cover the initial costs of Class Notice and administration of the Settlement. Defendants remaining obligation of $850,000 will be placed in escrow with a Settlement Administrator for the Settlement Fund. Class members will receive their *pro rata* share of the Settlement Fund after the payment of attorneys' fees, expenses, incentive awards, and administrative and notice expenses, not to exceed their Actual Damages from the Fund, or if the Fund cannot accommodate the Actual Damages, they will receive a

proportionate sum. If remaining funds exist after administration, the City of Philadelphia will receive a reverter.

Based on claims rates from other settlements, Class Counsel estimates that after deductions for the costs of notice and administration, an incentive award for the named Plaintiff, attorneys' fees, and expenses, all funds will be used. Plaintiff estimates the total value of the class is $950,000 based on information provided by Defendant.

All administrative expenses, including the costs of settlement administration and the provision of notice to class members, as well as the amount awarded by the Court for attorneys' fees and costs and incentive awards to the Class Representative, will be deducted from the above Settlement Fund prior to determining the amount of distribution for the Settlement Class. The exact amount of recovery to each class member, and the timing of such distribution, will be determined by the Settlement Agreement. The Settlement also provides that in the event a Class Member files a claim and owes any obligations to the City (fines, fees, etc.) that existed at the time of Sheriff's Sale, they will not be reflected in the Actual Damages if marked satisfied by the City. Class Counsel believes the amount of the Settlement represents a fair and reasonable settlement.

Continental DataLogix ("Continental") shall be paid from the Fund not in excess of $30,000. Continental will administrate the class settlement. Accident Investigative Resources, Inc. ("AIR") will identify last known addresses. AIR will not be paid in excess of $20,000.

B. Class Notice and Settlement Administration

Both the Class Notice and settlement administration provided for in the Settlement Agreement comport with the requirements of applicable law and Rule 23 of the Federal Rules of Civil Procedure and due process. First, all costs associated with providing notice to the class members and the administration of the Settlement shall be deducted directly from the Settlement Fund before determining the distribution to the Settlement Class. Second, notice will be provided

to the Class by direct mailing of the Class Notice and a Claim Form to all individuals at their last known or readily ascertainable address (in English) and by mailing and emailing a Summary Notice.

C. Attorneys' Fees

Class Counsel will petition the Court for reasonable attorneys' fees and expenses payable from the Settlement Fund. The Settlement Agreement provides that Class Counsel will seek attorneys' fees of $285,000 and litigation expenses not to exceed $36,000.

V. LEGAL ARGUMENT

A. Legal Standard

Federal Rule of Civil Procedure 23(e) dictates a two-step process for review of a proposed class action settlement: (1) a preliminary approval finding and notice to the class; and (2) a subsequent final approval or fairness hearing. *See* Fed. R. Civ. P. 23(e)(1)-(2); *Atis v. Freedom Mortgage Corp.*, No. 15-03424 (RBK/JS), 2018 WL 5801544, at *2 (D.N.J. Nov. 6, 2018). The preliminary approval stage of this process requires that the Court make a determination whether "giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). The preliminary approval inquiry therefore requires a two-pronged analysis: First, the Court must make a preliminary fairness evaluation of the proposed settlement, to determine whether it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Atis,* 2018 WL 5801544, at *2. Second, the Court must determine whether the proposed settlement is likely to meet the certification requirements of Rule 23(a) and (b). *See* Fed. R. Civ. P. 23(e)(1) Advisory Committee's Notes to 2018 Amendment.

Whether a proposed settlement is appropriate for preliminary approval does not require the court to reach any "ultimate conclusion on the issues of fact and law that underlie the merits of the

dispute." *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL NO. 1426, 2004 WL 1068807, at *2 (E.D. Pa. May 11, 2004) (quoting *Thomas v. NCO Fin. Sys., Inc.*, No. CIV.A. 00-5118, 2002 WL 1773035, at *5 (E.D. Pa. July 31, 2002)). Rather, the court must evaluate whether the settlement is the product of serious, informed, non-collusive negotiations such that it has no obvious deficiencies and does not grant improper preferential treatment to class representatives or segments of the class, therefore falling within the range of possible approval. *See In re Auto. Refinishing Paint Antitrust Litig.*, 2004 WL 1068807, at *5; *Carlough v. Amchem Prods.*, 158 F.R.D. 314, 335 (E.D. Pa. 1993). Ultimately, at the preliminary approval stage, the inquiry turns on whether "the settlement agreement is the product of lengthy arms-length negotiations." *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 WL 1068807, at *5.

The threshold for preliminary approval of a proposed class action settlement is not high, supported by both policy and procedure considerations. The Third Circuit has repeatedly "articulated a policy preference favoring voluntary settlement in class actions." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 378 (3d Cir. 2013); *see also Erheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010) (judicial policy strongly favors settlement in class actions). Furthermore, "[p]reliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient." *Shapiro v. Alliance MMA, Inc.*, No. 17-2583 (RBK/AMD), 2018 WL 3158812, at *2 (D.N.J. June 28, 2018); *see also Rudel Corp. v. Heartland Payment Sys., Inc.*, No. 16-cv-2229, 2017 WL 4422416, at *2 (D.N.J. Oct. 4, 2017) (applying "obviously deficient" standard). As a result, the process for approving a preliminary settlement offer may be considerably less formal than that for final approval, since its primary purpose is to ensure that there are no obvious deficiencies in the settlement that would preclude final approval. *See Jones v. Commerce Bancorp, Inc.*, No. 05–5600 (RBK), 2007 WL 2085357, at *2 (D.N.J. July 16, 2007). Preliminary approval

is thus typically granted as long as "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." *Shapiro*, 2018 WL 3158812, at *2 (internal quotation marks omitted).

With this motion, Plaintiff and Defendant request that the Court take the first step in the settlement review process by granting preliminary approval to the Settlement and authorizing implementation of the Notice Plan. As discussed in detail below, both prongs of the preliminary approval inquiry are satisfied in this case.

B. The Proposed Settlement Is Fair, Reasonable, and Adequate

The fairness prong of the preliminary approval inquiry requires that the Court consider whether a class action settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In the Third Circuit, the relevant inquiry involves consideration of two sets of factors. First, Rule 23(e)(2) requires consideration of the following fairness factors at the preliminary approval stage:

> (1) the class representatives and class counsel have adequately represented the class;
>
> (2) the proposal was negotiated at arm's length;
>
> (3) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
> >
> > (v) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Second, because the factors enumerated in Rule 23 augment, but do not displace traditional judicial inquiries, courts in the Third Circuit must also consider the applicable factors set forth in *Girsh v. Jepson*:

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

521 F.2d 153, 157 (3d Cir. 1975) (ellipses omitted).

Due to the significant overlap in these two lists of factors, the analysis below follows the frequently employed framework according to which the "Court first considers the Rules 23(e)(2) factors, and then considers additional [*Girsh*] factors not otherwise addressed by the Rule 23(e)(2) factors." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019); *Myers v. Jani-King of Philadelphia, Inc.*, No. CV 09-1738, 2019 WL 4034736, at *7 n.4 (E.D. Pa. Aug. 26, 2019) (recognizing that Third Circuit courts apply both the *Girsh* factors and "any factor under Rule 23 that is not addressed by *Girsh*").[4] As detailed below, both the Rule 23(e)(2) factors and the applicable *Girsh* factors weigh in favor of a finding that the settlement is fair, reasonable, and adequate, and should be granted preliminary approval.[5]

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[4] The Court should consider the factors set forth in both amended Rule 23(e)(2) and *Girsh*. *See* Advisory Committee Note to 2018 amendments to Rule 23(e)(2) (stating that the 2018 amendments are not intended to "displace any factor" set forth in any prior court of appeals ruling governing final approval of class action settlements, "but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision").

[5] As an initial matter, the second and seventh *Girsh* factors are inapplicable to this case. It would be premature to analyze the second factor, the reaction of the class to the settlement, prior to

1. Plaintiff and Class Counsel Have Adequately Represented the Class for Settlement Purposes

Under Rule 23(e)(2)(A), the Court should consider whether the class representative and class counsel adequately represented the class, based on "the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23 Advisory Committee's Notes to 2018 Amendment.

In this case, both Plaintiff and Class Counsel are adequate representatives of the Settlement Class. Plaintiff's interests are in alignment with those of the Settlement Class. Plaintiff and Settlement Class Members share an overriding interest in obtaining the best claims process and benefits for members of the Class. The Settlement does not grant preferential treatment to Plaintiff, who will receive the same *pro rata* relief afforded to any other Settlement Class Member. Although the Settlement also contemplates that Plaintiff may receive a class representative service award, approval of that award will be decided by the Court.

With respect to the adequate representation of the settlement class by Class Counsel, Rule 23(e)(2)(B) focuses on "the actual performance of counsel acting on behalf of the class." Fed. R. Civ. P. 23 Advisory Committee's Notes to 2018 Amendment. Class Counsel have developed this case and diligently prosecuted this action on behalf of the Settlement Class, engaging in substantial discovery and protracted settlement negotiations with defense counsel to craft a deal that fairly compensates Plaintiff and Settlement Class Members for their injuries.

Finally, prior to negotiating the Settlement, Class Counsel thoroughly investigated Plaintiff's claims and the legal theories at issue. In other words, Class Counsel had a firm "grasp

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notice to the class members. *See Shapiro*, 2018 WL 3158812, at *8. Likewise, the seventh *Girsh* factor, the ability of the defendant to withstand a greater judgment, is not implicated here, since this factor is "most relevant when the defendant's professed inability to pay is used to justify the amount of the settlement." *In re NFL Players' Concussion Injury Litig.*, 821 F.3d 410, 440 (3d. Cir. 2016).

of the legal hurdles that [Plaintiff] would need to clear in order to succeed" with their claims. *Id.* at 436.

This factor therefore supports granting preliminary approval of the settlement.

2. The Proposed Settlement Is the Product of Arms-Length Negotiations Among Experienced Counsel

Rule 23(e)(2)(B) directs the Court to consider whether the settlement proposal was negotiated at arm's length. This factor focuses on whether the settlement negotiations "were conducted in a manner that would protect and further the class interests." Fed. R. Civ. P. 23 Advisory Committee's Notes to 2018 Amendment. The settlement process in this case was negotiated at arm's length by counsel experienced in the prosecution, defense, and settlement of complex class actions.

Class Counsel have been diligently prosecuting this case since 2015, before the filing of Plaintiff's complaint. Class Counsel entered into good faith settlement negotiations with Defendant only after thoroughly investigating Plaintiff's and Class Members' claims, including reviewing hundreds of documents, interviewing many fact witnesses, and calculating Plaintiff's and Class Members' damages using records obtained from Defendant. The negotiations were wide-ranging and adversarial, involving a formal mediation session with Magistrate Judge Carol Sandra Wells and continued negotiations between counsel. These negotiations were conducted by experienced and knowledgeable counsel, who had the benefit of the wealth of fact discovery and an understanding of the legal issues. Accordingly, at this stage of preliminary approval, there is clear evidence that the Settlement is within the range of possible approval and thus should be preliminarily approved.

Together, the Rule 23(e)(2)(A) and (B) factors discussed above also encompass the third *Girsh* factor, which takes into account the stage of the proceedings and the amount of discovery

completed. *See* Fed. R. Civ. P. 23 Advisory Committee's Notes to 2018 Amendment ("Paragraphs (A) and (B) constitute the 'procedural' analysis factors, and examine 'the conduct of the litigation and of the negotiations leading up to the proposed settlement.'"). As the Third Circuit has explained, "[t]he third *Girsh* factor captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004) (citation omitted). As demonstrated above, this *Girsh* factor also weighs in support of preliminary approval.

3. The Relief Under the Proposed Settlement Is Adequate

In this case, the Settlement provides the class with a $950,000 fund. Plaintiff estimates that approximately 60% of total losses will be received by each class member who participates after deduction for Class Counsel fees, litigation and administration costs. This clearly meets the fair, reasonableness and adequacy as set forth by courts above for similar settlements.

Rule 23(e)(2)(C) requires consideration of whether the relief provided for the class is adequate, taking into account several enumerated factors. As explained below, the relief provided to the Settlement Class is more than adequate to satisfy the four (4) relevant areas of concern specified by Rule 23(e)(2)(C): (1) "the costs, risks, and delay of trial and appeal"; (2) "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims"; (3) "the terms of any proposed award of attorney's fees, including timing of payment"; and (4) "any agreement required to be identified under Rule 23(e)(3)."[6] This inquiry also subsumes several *Girsh* factors, "including (i) the complexity, expense and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of

[6] The parties have not entered into any side agreements, and thus have nothing to disclose under Rule 23(e)(3).

establishing damages; and (iv) the risks of maintaining the class through the trial." *In re Payment Card Interchange Fee*, 330 F.R.D. at 36. The complexity and expense of this case, in conjunction with the risks Plaintiff faced in maintaining this litigation, if it were to progress to trial, weigh in favor of preliminary approval.

First, the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 535; *In re Vicuron Pharms., Inc. Secs. Litig.*, 512 F. Supp. 2d 279, 284 (E.D. Pa. 2007). The parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial. *See Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 326 (C.D. Cal. 2016) ("The settlement the parties have reached is even more compelling given the substantial litigation risks in this case."). In contrast to the uncertainty and delays inherent in continued litigation, the Settlement "provides a significant, easy-to-obtain benefit to class members." *In re Haier Freezer Consumer Litig.*, No. 5:11-CV-02911-EJD, 2013 WL 2237890, at *4 (N.D. Cal. May 21, 2013). These economic gains multiply when settlement also avoids the costs of litigating class status—often a complex litigation within itself. Furthermore, a settlement may represent the best method of distributing damage awards to injured Class Members, especially where litigation would delay and consume the available resources.

With respect to the first factor, Plaintiff would likely have considerable risks proceeding with this litigation. Continued litigation would be long, complex, and expensive, and a burden to court dockets. *Lake v. First National Bank*, 900 F. Supp. 726 (E.D. Pa. 1995) (expense and duration of litigation are factors to be considered in evaluating the reasonableness of a settlement); *Weiss v. Mercedes-Benz of N. Am. Inc.*, 899 F. Supp. 1297 (D.N.J. 1995) (burden on crowded court

dockets to be considered). Continuing this litigation against Defendant would entail a lengthy and expensive battle that both parties would like to avoid.

The avoidance of all of these risks contributes significantly to the value and adequacy of the Settlement. *See, e.g.*, *Spann*, 314 F.R.D. at 326 ("The settlement the parties have reached is even more compelling given the substantial litigation risks in this case."). In contrast to the uncertainty and delays inherent in continued litigation, the Settlement "provides a significant, easy-to-obtain benefit to class members." *In re Haier Freezer Consumer Litig.*, 2013 WL 2237890, at *4. Balancing the complexities of this litigation, the substantial risk, expense, and duration of continued litigation and potential for appeals, Class Counsel firmly believe the Settlement represents a very good resolution of this litigation.

Second, as discussed above, the Settlement's proposed method of distributing relief to the Settlement Class is not unduly burdensome. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). Settlement Class Members will be required to submit an easy to complete and reasonable Claim Form in order to show membership in the Settlement Class, and Actual Damages are then calculated using a simple *pro rata* formula. Membership in the Settlement Class and each Class Members' Actual Damages are readily ascertainable from Defendant's foreclosure records.

Third, the amount of Plaintiff's attorneys' fees and litigation expenses is reasonable. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). The proposed order submitted herewith provides for Plaintiff to file their motion for attorneys' fees and expenses before the expiration of the objection period, thereby providing an opportunity for Settlement Class Member objections prior to the final approval hearing.

Finally, there is no reason to doubt the fairness of the proposed Settlement. The Settlement was the result of good faith, arm's length negotiations between experienced and informed counsel

on both sides with the assistance of a mediator. It is well established that significant weight should be attributed to the belief of experienced counsel that settlement is in the best interests of the class as here. *In re General Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001). There was no collusion between the negotiating parties. The proposed Settlement does not grant unduly preferential treatment to the class representative or to segments of the Settlement Class, and it does not provide excessive compensation to Plaintiff's counsel. *See Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 379 (N.D. Ohio 2001); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1999).

Considering the Rule 23(e)(2)(C) factors and the *Girsh* factors subsumed therein, the proposed settlement is fair, adequate, and reasonable.

4. The Settlement Treats All Class Members Fairly

The Third Circuit has observed that "[a] district court's 'principal obligation' in approving a plan of allocation 'is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund.'" *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 326 (3d Cir. 2011) (quoting *Walsh v. Great Atl. & Pac. Tea Co., Inc.*, 726 F.2d 956, 964 (3d Cir. 1983)). The Settlement is fair and reasonable to all Settlement Class Members and treats them equally in relation to the relative strengths of their claims. Each Settlement Class Member may submit a Claim Form, and the Settlement establishes a uniform, objective method for determining the outcome of individual claims. In essence, all Settlement Class Members are treated identically, while also accounting for the reality that Settlement Class Members will have different size claims. The claim protocol fairly protects the interests of all Settlement Class Members by providing fair, reasonable and adequate relief through application of identical qualifying criteria to all Settlement Class Members. Nor does the Settlement improperly grant preferential treatment to segments of the Settlement Class. *See, e.g.*, *In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333 (3d Cir. 2010)

("[V]aried relief among class members with differing claims in class settlements is not unusual."). In sum, the Settlement ensures the Settlement Class Members will be treated equitably relative to each other. This factor therefore weighs strongly in favor of preliminary approval as fair, reasonable, and adequate.

5. The Remaining *Girsh* Factors Are Also Satisfied

The remaining applicable *Girsh* factors—the eighth and ninth factors—concern whether the settlement is in the range of reasonableness in light of the best possible recovery and all the attendant risks of continued litigation. As the Third Circuit has explained, "[i]n evaluating the eighth and ninth *Girsh* factors, we ask 'whether the settlement represents a good value for a weak case or a poor value for a strong case.'" *In re NFL Players' Concussion Injury Litig.*, 821 F.3d at 440 (quoting *In re Warfarin*, 391 F.3d at 538).

Here, the Settlement provides precisely the type of relief that Settlement Class Members alleged they are owed based on the Defendant's Sheriff Sales. Furthermore, Defendant will pay all costs of administering the Settlement. The Settlement thus provides exceptional benefits to the Settlement Class, especially when considered in light of the litigation risks. Assessed against the delays and uncertainties associated with trial and appeals, the Settlement provides immediate, substantial financial benefits and clearly falls within the range of reasonableness. And whatever relief may be obtained at trial, it would still be many more months away from realization compared to the Settlement. Because the Settlement is therefore well within the range of reasonableness in light of the recovery and all the attendant risks of continued litigation, the eighth and ninth *Girsh* factors weigh heavily in favor of preliminary approval.

C. It Is Appropriate to Certify the Settlement Class for Purposes of the Settlement

The benefits of the proposed Settlement can be realized only through the certification of a settlement class. The Supreme Court of the United States has now emphatically confirmed the

viability of such settlement classes. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997). So, too, have the federal appeals courts. *See, e.g.*, *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 890 (1999) ("*Prudential II*"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998). In the case of settlements, "tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under scrutiny of the trial judge." *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R. D. 202, 205 (S.D.N.Y 1995) (quoting *In re Beef Indus Antitrust Litig.*, 607 F.2d 167, 174 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981)). Here, there is no likelihood of abuse of the class action device, and the Settlement is fair, reasonable, and adequate and is subject to approval by the Court. The Third Circuit has repeatedly "articulated a policy preference favoring voluntary settlement in class actions." *Rodriguez*, 726 F.3d at 378; *see also Erheart*, 609 F.3d at 593 (judicial policy strongly favors settlement in class actions).

Rule 23 governs the issue of class certification, whether the proposed class is a litigation class or, as here, a settlement class. All the criteria for certification of a class for litigation purposes, except manageability, apply to certification for settlement purposes. Thus, a settlement class should be certified where the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—are satisfied and when one of the three subsections of Rule 23(b) is met. For the reasons set forth below, certification of the proposed settlement class is appropriate.

1. The Elements of Rule 23(a) Are Satisfied

In order for a lawsuit to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, the named Plaintiff must establish each of the four threshold requirements of Subsection (a) of the Rule, which provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (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 or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). *See, e.g.*, *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Prudential II*, 148 F.3d at 308-09; *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir. 1975). Here, all four elements are satisfied.

a. Numerosity

In order to meet the first requirement of Rule 23(a), "numerosity," Plaintiff must demonstrate that "the [proposed] class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "To meet the impracticability standard, a party need not prove that joinder of every class member is impossible; instead, proof of 'difficulty or inconvenience of joining all members of the class' suffices." *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 140 (D.N.J. 2002) (quoting *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001).

Based on records produced by Defendant, it is known that there are approximately one hundred class members who will be entitled to recovery for excess proceeds from sheriff sales as a result of the Settlement. Specifically, records show that there are 100 properties that were foreclosed whose owners suffered Actual Damages, totaling $758,573.07, an average of $7,586 in Actual Damages per class member. Not only would it be impractical to join all members of the class, but many members of the class are likely unaware of their claims due to lack of

understanding of the issues and would not otherwise be able to pursue their claims. Accordingly, numerosity is satisfied.

b. Commonality

The second of the four criteria for class certification mandated by Rule 23(a), "commonality," requires Plaintiff to demonstrate that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality does not require an identity of claims or facts among class members; instead '[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.'" *Johnston v. HBO Film Mgmt. Inc.*, 265 F.3d 178, 184 (3d Cir. 2001) (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 310 (3d Cir. 1998)); *Marcus v. BMW of North America*, 687 F.3d 583, 597 (3d Cir. 2012). The "claims must depend on a common contention" that is "capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. "What matters to class certification . . . is . . . the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. *Id.*

Commonality is satisfied where, as here, the focus of the litigation is centered on Defendant's uniform conduct with respect to all class members. *See In re Cmty. Bank of N. Virginia Mortgage Lending Practices Litig.*, 795 F.3d 380, 399 (3d Cir. 2015); *Sullivan v. DB Investments*, 667 F.3d 273, 299 (3d Cir. 2011). The requirement may be satisfied by a single common issue. *Baby Neal by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

Defendant did not collect the full purchase price when class members' properties were sold in a sheriff sale to the class member's bank, only collecting the sheriff's taxes and fees, and then did not distribute excess proceeds from the sale. The Sheriff's Office acknowledges that this

occurred on occasion in practice. All class members therefore suffered this same type of harm, which are governed by the same legal principles. Accordingly, commonality is satisfied.

c. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This requirement is intended to ensure that the interests of named plaintiffs are aligned with the interests of the absent members. *Stewart*, 275 F.3d at 227 ("Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the [absent] class members, and is based upon the same legal theory."); *Nafar v. Hollywood Tanning Sys., Inc.*, No. CIV.A.06-CV-3826 DMC, 2008 WL 3821776, at *3–4 (D.N.J. Aug. 12, 2008). The typicality requirement is satisfied where Plaintiff and the class "point to the same broad course of alleged fraudulent conduct to support a claim for relief." *In re Lucent Techs. Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 640 (D.N.J. 2004); *Nafar*, 2008 WL 3821776, at *3–4; *Stewart*, 275 F.3d at 227; *see also Baby Neal*, 43 F.3d at 58; *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 185 (D.N.J. 2003) (quoting *Baby Neal*). Typicality does not demand that Plaintiff and class members' factual scenarios be identical with one another. *See Suchanek v. Sturm Foods, Inc.*, 311 F.R.D. 239, 255-56 (N.D. Ill. 2015) ("Variations among the named representatives in their perception of the [defendant's] packaging or their motivation for ultimately purchasing . . . simply means their claims are not completely *identical*. It does not mean their claims are *atypical* of the class.").

Plaintiff, as with all class members, owned a property in Philadelphia that was foreclosed by their bank and then sold to the bank in a sheriff sale, and then the Sheriff's Office failed to collect the excess proceeds of the sale and disperse them. This case turns on the conduct of the Sheriff's Office, which was uniform with respect to Plaintiff and class members. Accordingly, typicality is satisfied.

d. Adequacy of Representation

"'[A]dequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.'" *New Directions Treatment Servs. v. City of Reading,* 490 F.3d 293, 313 (3d Cir. 2007) (quoting *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975)).

The existence of the elements of adequate representation are presumed and "the burden is on the defendant to demonstrate that the representation will be inadequate." *Asbestos School Litig.*, 104 F.R.D. at 430 (citing *Lewis v. Curtis*, 671 F.2d 779 (3d Cir. 1982)). In the present case, the presumption of adequate representation cannot be rebutted. With respect to the issue of adequacy of counsel, the Court may take judicial notice of the fact that Class Counsel have substantial experience in litigating complex class actions. Class Counsel have been lead counsel in numerous complex class action cases. Class Counsel have and will continue to aggressively litigate this case. As discussed *supra*, Counsel have diligently prosecuted this action and taken significant discovery that has enabled them to negotiate an advantageous settlement on behalf of the class. Class Counsel negotiated the proposed Settlement from a position of knowledge and strength, and as advocates for the entirety of the Settlement Class. The adequacy requirement is satisfied for certification.

As the Supreme Court has noted, the second prong of adequacy of representation—that the plaintiff not have interests antagonistic to those of the proposed class— "tend[s] to merge with the commonality and typicality criteria" because all three examine "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem*, 521 U.S. at 626 n.2 (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157 n.13 (1982)). There is no apparent conflict between the interests of the named Plaintiff and the rest of the class. To the contrary, as discussed above with

respect to Rule 23(a)'s typicality requirement, the named Plaintiff suffered the same harm as the other members of the class and has the same interest in quickly and efficiently redressing that harm by seeking a full and fair recoupment of excess proceeds from their sheriff sale. Plaintiff's claims align with those of members of the class. All assert the same legal claims, and all seek identical relief. Accordingly, adequacy of representation is satisfied.

2. The Requirements of Rule 23(b)(3) Are Met in the Settlement Context

In addition to satisfying Rule 23(b), Plaintiff must show that each putative class falls under at least one of the three subsections of Rule 23(b). Here, the settlement class qualifies under Rule 23(b)(3). Under 23(b)(3) a class action may be maintained if:

> [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623; *Newton*, 259 F.3d at 187. Common questions must predominate over individual questions. The Court must find that "the group for which certification is sought seeks to remedy a common legal grievance." *Hochschuler v. G.D. Searle & Co.*, 82 F.R.D. 339 (N.D. Ill. 1978). Rule 23(b)(3) does not require that all questions of law or fact be common. *See Telectronics*, 172 F.R.D. at 287-88. In this regard,

courts generally focus on the liability issues and if these issues are common to the class, common questions are held to predominate over individual questions. *See id.*

The predominance requirement of Rule 23(b) entails "ask[ing] whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). In the settlement context, predominance is ordinarily satisfied by claims arising out of the defendant's common conduct. *See, e.g.*, *Sullivan*, 667 F.3d at 299-300 ("[T]he focus is on whether the defendant's conduct was common as to all of the class members."); *Mendez v. Avis Budget Grp., Inc.*, No. 11-6537 (JLL), 2017 WL 5513691 (D.N.J. Nov. 16, 2017) ("[I]n cases where it is alleged that the defendant made similar misrepresentations, non-disclosures, or engaged in a common course of conduct, courts have found that said conduct satisfies the commonality and predominance requirements.").

Here, Plaintiff raises common issues of fact and law that predominate over any individual issues that might arise. The Settlement Class Members' claims for compensatory relief are founded upon common legal theory related to the singular issue of Defendant's practice of not collecting the winning bid for an executing creditor at a Sheriff's Sale and not distributing surplus funds. Thus, Settlement Class Members have an interest in the adjudication of what is far and away the single issue of law and fact dominating this litigation—whether or not Class Members are owed the excess proceeds of their Sheriff Sales. Once that issue is determined on a class-wide basis, the Settlement Agreement renders the remaining issues relatively minor and simple, such as membership in the class and calculation of damages. To the extent that questions of damages are potentially individual, this would not detract from the predominance of the numerous common issues for settlement purposes, because the "focus of the predominance inquiry is on liability, not

damages." *Pollak v. Portfolio Recovery Assocs., LLC*, 285 F. Supp. 3d 812, 845 (D.N.J. 2018) (citation omitted).

The other requirement of Rule 23(b)(3) that must be satisfied is the superiority requirement (*i.e.*, that a class action suit provides the best way of managing and adjudicating the claims at issue). "The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *Prudential II*, 148 F.3d 316. Considerations of judicial economy underscore the superiority of the class action mechanism in this case. *See Prudential II*, 148 F.3d at 316 & n.57. Settlement on a class basis is also superior to individual litigation and adjudication because settlement provides Settlement Class Members with prompt compensation for their damages. By contrast, compensation resulting from litigation is highly uncertain and may not be received before lengthy trial and appellate proceedings are complete. In addition, the Settlement obviously removes the overwhelming and redundant costs of individual trials.

Accordingly, the Settlement Agreement renders a class action superior to other potential avenues of recovery for Plaintiff and the Settlement Class. Therefore, this case presents the paradigmatic example of a dispute that can be resolved to effectuate the fundamental goals of Rule 23: (1) to promote judicial economy through the efficient resolution of multiple claims in a single action; and (2) to provide persons with smaller claims, who would otherwise be economically precluded from doing so, the opportunity to assert their rights. 7A Fed. Prac. & Proc. Civ. § 1754 (4th ed.). At the same time, the Settlement fully preserves the due process rights of each individual plaintiff seeking compensatory damages.

In sum, the requirements of Rule 23(b)(3) are satisfied and certification of the proposed class is appropriate.

3. The Class Is Definite and Ascertainable

Class certification also requires a sufficiently defined class. *See* Fed. R. Civ. P. 23(c)(1)(B) ("An order that certifies a class action must define the class."); Manual for Complex Litigation § 21.222, at 270 (4th ed. 2005) ("The definition must be precise, objective, and presently ascertainable."). In the Third Circuit, definiteness and ascertainability are distinct requirements. *Marcus*, 687 F.3d at 591-94; *see Byrd v. Aaron's Inc.*, 784 F. 3d 154, 168 (3rd Cir. 2015). As the Third Circuit explained in *Byrd*, class definitions must be ascertainable in the sense that the class must be defined with "objective criteria" and if it is, it must be "administratively feasible" to determine whether a particular individual is a member of the class. 784 F. 3d at 163. The latter meaning that the class action proponent must show that "class members can be identified." *Id.* at 163, 166-67. "There will always be some level of inquiry required to verify that a person is a member of a class. . . . Such a process does not require a 'mini-trial,' nor does it amount to 'individualized fact-finding.' . . . We are not alone in concluding that 'the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification.'" *Boyd*, 784 F.3d at 170-71; *see also Hargrove v. Sleepy's LLC*, 974 F.3d 467, 470 (3d Cir. 2020) (emphasizing that "a plaintiff need only show that 'class members can be identified'"); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 441 (3d Cir. 2017) ("Plaintiff need not, at the class certification stage, demonstrate that a single record, or set of records, conclusively establishes class membership.").

Defendant's records already produced in discovery provide details necessary to identify each class member and calculate exactly how much they are owed in damages, so the Court need not rely on mini-trials, individualized inquiries, or fact-finding. Specifically, records show that there are roughly 100 properties that were foreclosed whose owners were not paid amounts equal to their Actual Damages, totaling $758,573.07, an average of $7,586 in excess proceeds per class

member. Defendant's records produced in discovery provide enough information—including the foreclosed address, law firm handling the sale, and sale date—to locate and provide notice to the former owners. Accordingly, the class is definite and ascertainable.

B. The Court Should Direct Notice to the Class

Under Fed. R. Civ. P. 23(e), class members are entitled to notice of any proposed settlement before it is finally approved by the Court. Rule 23(e)(1)(B) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P.23(e)(1)(B). In an action certified under Rule 23(b)(3), the Court must "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P.23(c)(2)(B). "Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class." *In re NFL Players' Concussion Injury Litig.*, 821 F.3d at 435 (quoting *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013)). "Although the Rule provides broad discretion to district courts with respect to the notice's form and content, it must satisfy the requirements of due process." *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 180. "The adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Arbuthnot v. Pierson*, 607 F. App'x 73, 73 (2d Cir. 2015).

Under Rule 23(e) and due process, adequate notice must be given to all absent class members and potential class members to enable them to make an intelligent choice as to whether to opt-out of the class. *Prudential II*, 148 F.3d at 326-27; *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996). However, the Supreme Court has not held that Rule 23 or due process requires the accomplishments of delivery of actual notice to every class member in every case, but

the provision of "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Nevertheless, Plaintiff's notice plan has been developed with the thought of providing the most comprehensive notice possible, and a notice that will in fact "reach" all class members.

In this case, counsel for the Settlement Class will obtain a last known address for each Settlement Class member. The Class Notice will be provided to the Class by direct mailing of the notice and a Claim Form to all individuals at their last known or readily ascertainable address. Moreover, the Parties will also provide a copy of the Class Notice and Claim Form to anyone who requests notice through written communication, through a dedicated internet website, and through a toll-free number to be established. Through these extensive efforts, absent class members will receive adequate notice of the Settlement. *See Zimmer Paper Prod., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985) ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirements of both Fed.R.Civ.P. 23 and the due process clause."). Finally, the Class Notice will include all necessary legal requirements and provide a comprehensive explanation of the Settlement in simple, non-legalistic terms.

This plan provides the best notice practicable under the circumstances, safeguards class members' due process rights, and enables the Court to fulfill its role as the guardian of class interests. *See* Newberg on Class Actions § 13:10 (5th ed.).

C. A Final Fairness Hearing Should Be Scheduled

The Court should schedule a final fairness hearing to obtain all required information to determine that class certification is proper and the Settlement should be approved. *See* Manual for Complex Litigation, Fourth, § 21.633. The fairness hearing will provide a forum for proponents and opponents to explain, describe, or challenge the terms and conditions of the class certification and Settlement, including the fairness, adequacy, and reasonableness of the Settlement.

Accordingly, Plaintiff requests that the Court schedule the time, date, and place of the final fairness hearing.

VI. CONCLUSION

For the foregoing reasons, Plaintiff and Defendant respectfully request that this Court enter an Order: (1) conditionally certifying a class action with respect to the claims against Defendant pursuant to Fed. R. Civ. P. 23(b)(3) for the purpose of effectuating a class action settlement of the claims against the Defendant; (2) preliminarily approving a Class Settlement with the Defendant; (3) directing notice to class members regarding Settlement of certain claims against the Defendant on a final and complete basis; and (4) scheduling a Final Fairness Hearing.

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