

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS,
EASTERN DIVISION

ROBERT L. NICHOLLS, and GWENDOLYN
A. HOGAN-NICHOLLS, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

EMC MORTGAGE CORPORATION, and
DOES 1 through 10 inclusive,

Defendant.

Civil Action No. 11-cv-12303-PBS

**NOTICE OF AMENDED SETTLEMENT AGREEMENT AND REQUEST FOR
PRELIMINARY APPROVAL**

TO THE COURT, DEFENDANT AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the pursuant to the Court's request the parties are submitting an amended settlement agreement and requesting preliminary approval as Exhibit 1.

Defendant's Note to the Court clarifying facts related to the amended settlement agreement:

EMC clarifies that it did not intend to suggest to this Court that there are class members who have been "foreclosed upon as a result of unpaid late fees." (Dkt. 107, 10/16/13 Order.) EMC was simply making the point if a class member is foreclosed upon (for reasons unrelated to the issues in this case, i.e., the failure to make loan payments), there may no longer be any late fee balance to waive on the account in connection with the settlement in this case. That said, to address the Court's concern with the minimum payment (which was intended to ensure a benefit to those persons who do not otherwise receive a monetary award or waiver award), the parties have agreed to take the minimum payment provision out of the settlement. The parties have

further agreed to exclude from the class those persons who EMC can conclusively identify prior to class notice as not being entitled to a monetary award or a waiver award. Also, if there are any persons who receive the class notice, but who ultimately do not receive the benefit of a monetary award or a waiver award as described in the Amended Settlement Agreement, those persons will not be subject to the release provisions in the Amended Settlement Agreement.

Dated: November 8, 2013

KABATECK BROWN KELLNER LLP

By: 

Richard L. Kellner
Evan M. Zucker
644 South Figueroa Street
Los Angeles, California 90017
Telephone: (213) 217-5000
Facsimile: (213) 217-5010
rlk@kblawyers.com
ez@kblawyers.com

THE WENTZ LAW FIRM
Richard B. Wentz
Jean M. Wentz
2955 East Hillcrest Drive, Suite 123
Thousand Oaks, CA 91362
Telephone: (805) 374-0060
Rick.wentz@gmail.com
Jean.wentz@gmail.com

BLOCK & LEVITON LLP
Jeffrey C. Block, BBO #600747
Whitney E. Street, BBO #677564
155 Federal Street
Boston, MA 02110
Telephone: (617) 398-5600
Facsimile: (617) 507-6020
jeff@blockesq.com
whitney@blockesq.com

Attorneys for Plaintiffs Robert L. Nicholls and
Gwendolyn A. Hogan-Nicholls, and others
similarly situated

Exhibit 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS,
EASTERN DIVISION**

ROBERT L. NICHOLLS, and GWENDOLYN
A. HOGAN-NICHOLLS, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

EMC MORTGAGE CORPORATION, and
DOES 1 through 10 inclusive,

Defendants.

Civil Action No. 11-cv-12303-PBS

AMENDED SETTLEMENT AGREEMENT AND RELEASE

This Amended Settlement Agreement is entered into by Plaintiffs Robert L. Nicholls and Gwendolyn A. Hogan Nicholls, individually and on behalf of all Class Members, and Defendant EMC Mortgage LLC f/k/a EMC Mortgage Corporation, subject to the approval of the Court.

DEFINITIONS

1.1. As used in this Amended Settlement Agreement, the following terms shall have the following meanings:

1.2. "Action" shall mean the above-captioned lawsuit.

1.3. "Administration Costs" means the costs of administering the Settlement by the Settlement Administrator, including, but not limited to, the costs of mailing the Class Notice to the Settlement Class Members, mailing Awards and administering the Settlement Fund.

1.4. "Agreement" means this Amended Settlement Agreement, including all exhibits hereto.

1.5. "Attorney Fee Award" means the amount awarded by the Court to be paid to Plaintiffs' Counsel from the Settlement Fund, such amount to be in full and complete satisfaction of Plaintiff's Counsel's claim or request (and any request made by any other attorneys) for payment of attorneys' fees, costs, disbursements and compensation in the Action.

1.6. "Award" means the benefit provided to the Settlement Class Member, which is either (a) a "Waiver Award": an amount of late fee assessments waived from the Settlement Class Member's Loan account; or (b) a "Monetary Award": an amount remitted by the Settlement Administrator to the Settlement Class Member out of the Settlement Fund as provided in Sections 4.2 and 4.3 of this Agreement; or (c) both a Waiver Award and a Monetary Award.

1.7. "Monetary Award Expiration Date" means the date ninety (90) calendar days after the issuance by the Settlement Administrator of checks paying Monetary Awards.

1.8. "CAFA Notice" means the notice required by 28 U.S.C. Section 1715(b).

1.9. "Chase" shall mean JPMorgan Chase Bank, N.A.

1.10. "Class" or "Settlement Class" shall mean the following:

All borrowers with loans secured by properties in Massachusetts who were assessed two or more late fees by EMC anytime on or after December 1, 2005 through March 31, 2011 and who are identified on the Class List.

The Settlement Class is being proposed for certification solely for settlement purposes under Fed. R. Civ. P. 23(b)(3) and without waiver of any contention by the Settling Defendant of any challenges or defenses to the existence or propriety of a certifiable class under Fed. R. Civ. P. 23.

1.11. "Class Counsel" shall mean:

Jeffrey C Block
Whitney E. Street
BLOCK & LEVITON LLP

155 Federal Street, Suite 1303
Boston, MA 02110

Andrew Friedman
Douglas MacNamara
COHEN MILSTEIN SELLERS
& TOLL PLLC
1100 New York Ave NW, Suite 500 West
Washington, DC 20005

Richard Wentz
Jean Wentz
THE WENTZ LAW FIRM
2955 East Hillcrest Drive
Suite 123
Thousand Oaks, CA 91362

Brian S. Kabateck
Richard L. Kellner
Evan Zucker
KABATECK BROWN KELLNER LLP
644 South Figueroa Street
Los Angeles, CA 90017

1.12. "Class Funds" shall mean the funds in the Settlement Fund that are available for distribution to Class Members.

1.13. "Class List" shall mean those persons identified on the list of Settlement Class Members as described in paragraph 8.1 below.

1.14. "Class Member" or "Settlement Class Member" shall mean a member of the Settlement Class. When one or more persons were obligated on a single Loan, those persons collectively shall be treated as only one Class Member.

1.15. "Class Notice" means the mailed notice of this Settlement that is contemplated by this Agreement, substantially in the form attached hereto as Exhibit 1, or as otherwise approved by the Court.

1.16. "Class Period" shall mean the period from December 1, 2005 through March 31, 2011.

1.17. "Court" means the United States District Court for the District of Massachusetts.

1.18. "Defendant's Counsel" or "Settling Defendant's Counsel" means Burke, Warren, MacKay & Serritella, P.C.

1.19. "Effective Date" shall mean two (2) days after all of the following events and conditions have been met or occurred:

(1) All Parties or their competent representatives have executed this Settlement Agreement;

(2) The Court, by entry of an appropriate order, has preliminarily approved this Settlement Agreement, the settlement terms set forth herein, and the method for providing notice to Settlement Class members and the claims process;

(3) The Court has entered the Final Approval Order, formally and finally approving this Settlement Agreement, without material alteration, and releasing the Released Parties from the Released Claims and dismissing with prejudice, and without leave to amend, the Claims, except as to those Settlement Class members who timely request exclusion and those who do not qualify for a Waiver Award or a Monetary Award;

(4) Either (i) thirty (30) days have passed after entry of the Final Approval Order or within such time no appeal is taken from the Final Approval Order and no motion or other pleading has been filed with the Court or any appellate court to set aside or in any way alter the judgment and/or orders of the Court finally approving the Settlement; or (ii) all appellate, reconsideration, or other forms of review and potential review of the

Court's orders and judgment finally approving the Settlement are exhausted or become unavailable by virtue of the passage of time, and the Court's orders and judgment are upheld, or not altered in a manner that is substantially inconsistent with the judgment contemplated by the Final Approval Order;

(5) There was no change or modification that increased the Settling Defendant's liability, or reduced the scope of the Release, or reduced the size of the Settlement Class that caused the Settling Defendant to prevent the occurrence of Final Approval, which it is the sole option of the Settling Defendant to do; and

(6) No Party with a right to do so has terminated the Agreement.

1.20. "EMC" shall mean EMC Mortgage LLC, formerly known as EMC Mortgage Corporation.

1.21. "Final Approval" means the last date on which the Court signed the Final Approval Order.

1.22. "Final Approval Hearing" shall mean the hearing conducted by the Court in connection with the determination of the fairness, adequacy and reasonableness of this Agreement and the proposed Settlement of the Action, including Plaintiff's Counsel's application for the Attorney Fee Award and the Representative Plaintiffs' Award.

1.23. "Final Approval Motion" shall mean the motion seeking final approval of this Settlement Agreement.

1.24. "Final Approval Order" means the Court's Final Judgment and Order of Dismissal with Prejudice, substantially in the form attached hereto as Exhibit 2, or as otherwise approved by the Court which, among other things, approves this Agreement and the Settlement as fair, adequate and reasonable and confirms the final certification of the Settlement Class.

1.25. "Loan" means a residential loan of a Class Member secured by deed of trust or mortgage on property located in the Commonwealth of Massachusetts upon which the Class Member was an obligor, qualifying him, her, or them as a member of the Settlement Class.

1.26. "Monetary Award" shall mean the benefit to Settlement Class Members described in paragraph 4.3.

1.27. "Named Plaintiffs" or "Plaintiffs" shall mean Robert L. Nicholls and Gwendolyn A. Hogan-Nicholls.

1.28. "Notice Date" shall mean the date on which the Settlement Administrator shall send the Class Notice to each person on the Class List. The Notice Date shall be no more than thirty (30) business days after entry of the Preliminary Approval Order.

1.29. "Objection Deadline" means forty-five (45) calendar days from the Notice Date.

1.30. "Opt Out" means a Settlement Class Member (i) who timely submits a properly completed and executed Request for Exclusion, and (ii) who does not rescind that Request for Exclusion before the end of the Opt Out Period and (iii) for whom there is not a successful challenge to the Request for Exclusion.

1.31. "Opt Out Period" means the period commencing on the Notice Date and ending forty-five (45) calendar days thereafter during which Settlement Class Members may submit a timely Request for Exclusion. The last day of the Opt Out Period shall be specifically set forth in the Class Notice.

1.32. "Participating Class Member" shall mean a Settlement Class Member who did not timely opt out of this Settlement Agreement before the end of the Opt Out Period.

1.33. "Parties" mean the Plaintiffs (on behalf of themselves and all Class Members who do not become Opt Outs) and EMC.

1.34. "Person" means an individual, marital community, corporation, partnership, limited partnership, limited liability company, association, joint stock company, estate, legal representative, trust, unincorporated organization, and any other type of legal entity, and their or its respective heirs, predecessors, successors, representatives and assigns.

1.35. "Preliminary Approval Date" means the date on which the Preliminary Approval Order is entered by the Court.

1.36. "Preliminary Approval Order" means the Court's order granting, among other things, conditional certification of the Settlement Class, preliminary approval of this Agreement and the Settlement, and approval of the form and method of Class Notice, substantially in the form attached hereto as Exhibit 1, or as otherwise approved by the Court.

1.37. "Release(s)" means the release(s) set forth in Paragraph 14.1 of this Agreement.

1.38. "Released Parties" shall mean EMC and Chase, and each and all of their respective past, present, and future parents, subsidiaries, affiliated companies and corporations, and each and all of their respective past, present, and future directors, officers, managers, employees, general partners, limited partners, principals, agents, insurers, reinsurers, shareholders, attorneys, advisors, representatives, predecessors, successors, divisions, joint ventures, assigns, or related entities, and each and all of their respective executors, successors, assigns, and legal representatives.

1.39. "Releasing Parties" shall mean all Settlement Class Members who did not opt out during the Opt Out Period, and includes all Participating Class Members, excluding all Settlement Class Members who do not qualify for either a Waiver Award or a Monetary Award.

1.40. "Representative Plaintiffs" means Roberts L. Nicholls and Gwendolyn A. Hogan-Nicholls.

1.41. "Representative Plaintiffs' Award" means the amount, if any, that is approved by the Court for payment to the Representative Plaintiffs for acting as Plaintiffs and class representatives in the Action.

1.42. "Request for Exclusion" means the submission by Settlement Class Members to the Administrator requesting to opt out of the Settlement.

1.43. "Settlement Administrator" shall mean The Garden City Group.

1.44. "Settlement Agreement" or "Agreement" shall mean this Settlement Agreement and Release.

1.45. "Settled Class Claims" means collectively any and all claims, demands, rights, liabilities, suits, matters, obligations, damages, losses, costs, actions and causes of action of every nature and description whatsoever, in law or equity, known or unknown, latent or patent, asserted, unasserted or that might have been asserted (including, without limitation, assigned claims and common law claims for breach of contract, unjust enrichment, violations of any Consumer Protection Act or state or federal statutes, rules or regulations) either directly, in a representative capacity or in any other capacity, by the Releasing Parties against the Released Parties, including all such claims for general, special, punitive and statutory damages, as well as any and all claims for penalties, attorneys' fees and costs of such, that arise from the alleged acts, omissions, representations, facts, events, matters, transaction or occurrences at issue in the Action, including specifically any and all claims against the Released Parties seeking the return, recovery, credit or waiver of the late fees assessed to Loan accounts during the Class Period. Settled Class Claims include, without limitation, Unknown Class Claims and all claims asserted in the Complaint on file in the Action, and all claims alleged or asserted, or which could have been alleged or asserted, against the Released Parties that arise from the alleged acts, omissions,

representations, facts, events, matters, transactions or occurrences relating to the late fees at issue in the Action.

1.46. "Settlement Class Member" means a Person in the Settlement Class. When more than one person is or was obligated on a single loan, those Persons collectively shall be treated as only one Settlement Class Member.

1.47. "Settlement Fund" shall mean the escrow account established pursuant to this Settlement Agreement with Five Hundred Seventy Thousand Dollars (\$570,000.00) and is the aggregate and absolute maximum amount that the Settling Defendant will become obligated to pay by operation of the Settlement.

1.48. "Settling Defendant" means EMC.

1.49. "Unknown Class Claims" means any and all claims by the Releasing Parties against the Released Parties arising from the facts and circumstances that were alleged in the Action relating to late fees based on facts that now exist, may hereafter exist, or have previously existed that the Releasing Parties may hereafter discover in addition to, or different from, those that Class Counsel and the Releasing Parties now know or believe to be true concerning the Settled Class Claims, without regard to the subsequent discovery of those facts by the Releasing Parties or the existence of any such different or additional facts.

1.50. "Waiver Award" shall mean the benefit to Settlement Class Members described in paragraph 4.2.

RECITALS

2.1. Plaintiffs filed this Action on November 30, 2011 on behalf of themselves and other allegedly similarly situated customers of EMC in the Superior Court for Suffolk County, Massachusetts. EMC removed this action on December 23, 2011 to the United States District

Court for the District of Massachusetts where it has been pending before the Honorable Patti B. Saris as *Nicholls, et al. v. EMC Mortgage Corporation*, Civil Action No. 11-cv-12303.

2.2. In the Action, Plaintiffs allege claims against EMC regarding its practices for assessing late fees to Loan accounts during the Class Period in purported violation of Mass. Gen. Law Ann. ch. 183 § 59 ("Section 59").

2.3. EMC denies each of the claims asserted against it in the Action, denies that Plaintiffs are properly interpreting the meaning and interpretation of Section 59, and denies all liability in the Action. By entering into this Settlement Agreement, EMC does not admit any wrongdoing, and this Settlement Agreement shall not constitute an admission of liability by EMC. EMC nevertheless desires to settle the Action and the claims asserted in the Action, on the terms and conditions set forth herein, for the purpose of avoiding the burden, expense and uncertainty of continuing litigation, both to EMC and its customers, and for the purpose of putting to rest the controversies engendered by the Action.

2.4. At all times, the Parties have negotiated at arms' length. The Plaintiffs and Class Counsel have concluded, taking into account the sharply contested issues involved in the Action, the expense and time necessary to prosecute the Action through resolution of the motion for class certification, trial and possible appeals, the risks and costs of further prosecution of the Action, the uncertainties of complex litigation and the substantial benefits to be received pursuant to this Agreement, that a settlement with EMC on the terms set forth herein is fair, just, equitable, reasonable, adequate and in the best interests of the Plaintiffs and the Settlement Class. The Plaintiffs and Class Counsel, on behalf of the Settlement Class, have agreed to settle the Action with EMC on the terms set forth herein.

2.5. Subject to Court approval as provided herein, the Parties stipulate and agree that, in consideration of the promises and covenants set forth in this Agreement and upon the entry by the Court of a Final Approval Order and the occurrence of the Effective Date, the Action shall be fully settled, compromised and dismissed with prejudice upon the terms and conditions set forth below.

CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS

3.1. EMC disputes that a class would be manageable and denies that the litigation properly could be certified on the claims asserted in the Action. However, solely for purposes of avoiding the expense and inconvenience of further litigation, EMC does not oppose the certification for *settlement purposes only* of the Settlement Class pursuant to Fed. R. Civ. P. 23(b)(3). Preliminary certification of the Settlement Class shall not be deemed a concession that certification of a litigation class is appropriate, nor would EMC be precluded from challenging class certification in further proceedings in the Action or in any other action if the Settlement is not finalized or finally approved.

3.2. If the Settlement is not finally approved by the Court for any reason whatsoever, the certification of the Settlement Class will be void, and no doctrine of waiver, estoppel or preclusion will be asserted in any litigated certification proceedings in the Action. No agreements made by or entered into by EMC in connection with the Settlement may be used by Plaintiffs, any person in the Settlement Class or any other person to establish any of the elements of class certification in any litigation certification proceedings, whether in the Action or any other judicial proceeding.

SETTLEMENT CONSIDERATION

4.1. **Awards to Class Members.** In consideration of the Settlement and the Release provided herein, the Released Parties will provide each Settlement Class Member that does not

opt out of this Settlement an Award in the form of a waiver of certain late fee assessments from the Settlement Class Member's Loan account (Waiver Award) and/or a payment to the Settlement Class Member out of the Settlement Fund (Monetary Award).

4.2. **Waiver Award.** Those Loan accounts to receive waivers will be those Class Member's accounts that, as of the date the Loan account is being analyzed, which will be a date after the Final Approval of the Settlement: (a) reflect a principal balance greater than zero on the servicing system used by Chase to service the account and (b) have an outstanding late fee balance. The amount of the late fee waiver for each Loan account will be determined as follows: (a) identification of the amount of late fees assessed by EMC during the Class Period, then (b) reduction of the EMC late fee assessment amount to the extent late fees have been paid, waived or refunded on the Loan account (assuming for purposes of this Settlement that payments, waivers and refunds were on the first assessed late fees) through the date of the Settlement Agreement. The amount remaining for the Loan account is the maximum waiver amount for the Loan. Each Class Member to receive a waiver will receive up to the maximum waiver amount for the Loan to the extent there is an outstanding late fee balance on the Loan account. The Released Parties reserve the right to apply a different waiver analysis and process so long as doing so does not reduce the benefit to the Class Member. If at the time of the analysis of the Class Member's account there is no longer any late fee balance to be waived because the Class Member already received a benefit equivalent to a waiver of the late fees after the date of this Agreement (*i.e.*, Chase otherwise waived or wrote off late fees and/or Chase refunded late fees), the Class Member is to be treated as having qualified for and received a Waiver Award.

4.3. **Settlement Fund and Monetary Awards.** The Released Parties will create a Settlement Fund in the amount of Five Hundred Seventy Thousand Dollars (\$570,000.00). Other

than the Waiver Award described in paragraph 4.2, the Settlement Fund will be the aggregate and absolute maximum amount that the Settling Defendant will become obligated to pay by operation of the Settlement Agreement and will be the only source of payment for (a) Monetary Awards to Settlement Class Members; (b) the Attorneys' Fee Award, if any, to Class Counsel; (c) the Administration Costs; and (d) the Representative Plaintiffs' Award, if any.

4.4. The Monetary Award that will be payable to Class Members after the Effective Date will be determined according to the following formula:

- (a) Step One – Determination of the Net Settlement Fund. The Net Settlement Fund shall be calculated by taking the Settlement Fund (\$570,000.00) and subtracting Administration Costs, Representative Plaintiff's Award, and the Attorneys' Fee Award.
- (b) Step Two – Determination of the pro rata shares. There shall be three tiers of participation in the Settlement based upon the amount of late fee payments made (without consideration of any prior reversals, credits or refunds):
 - (i) Less than \$ 50.00 --- 1 share
 - (ii) Between \$ 50.01 and \$ 100.00 --- 2 shares
 - (iii) Between \$ 101.01 and \$ 150.00 --- 3 shares
 - (iv) Between \$150.01 and \$ 500.00 --- 6 shares
 - (v) Greater than \$ 500.00 --- 10 shares
- (c) Step Three – Determination of the dollar payments per share shall be made by taking the Net Settlement Fund and dividing it by the total number of shares.
- (d) Step Four – Calculation of the individual award. Take the number of shares for each Class Member and multiply that number by the dollar payments per share.

After the Monetary Award is determined in accordance with the above formula, this will constitute the absolute maximum amount that any Monetary Award Recipient will be entitled to receive under this Agreement.

4.5. The Named Plaintiffs may petition the Court, without opposition from the Settling Defendant, for a Representative Plaintiff's Award, payable exclusively from the Settlement Fund, up to \$3,000.00.

4.6. The Settling Defendant will deliver the Settlement Fund, net of any Administration Costs already paid, to the Settlement Administrator within twenty-one (21)

business days after the Effective Date.

4.7. **Limitations on Recovery.** If there are two or more borrowers on a single Loan account deemed eligible for a Waiver Award, a Monetary Award or both under this Agreement, they shall recover only once for a single Loan account.

AWARD PAYMENT AND WAIVER PROCESS

5.1. The Released Parties shall identify those Settlement Class Members to receive a Waiver Award within thirty (30) business days after the Effective Date.

5.2 The Settlement Administrator shall issue and mail the Monetary Award checks within sixty (60) business days after the Effective Date. All Monetary Award checks shall be mailed on the same day.

5.3 Monetary Award checks will be valid and redeemable only if they are cashed before the Monetary Award Expiration Date. Checks shall be sent by the Settlement Administrator via first class mail, postage prepaid. The Monetary Award checks will include a legend indicating that they are invalid, cannot be cashed and will not be honored after the Monetary Award Expiration Date. The Final Approval Order will include a provision to this effect and will direct the bank holding the Settlement Fund Account that it is prohibited from paying or honoring any Monetary Award check more than six (6) business days after the Monetary Award Expiration Date.

5.4 Releasing Parties shall be bound by the Releases of the Settled Class Claims as provided in this Agreement and in the Final Approval Order whether or not (1) they cash a Monetary Award check sent to them by the Settlement Administrator, or (2) they in fact received the Class Notice.

5.5 The Settlement Administrator's and the Settling Defendant's respective

obligations with respect to the distribution of the Class Notice, the Awards, the Settlement Administration Costs, the Attorney Fee Award, the Representative Plaintiffs' Award and the amounts (if any) remaining in the Settlement Fund after payment of Awards and the Attorney Fee Award shall be performed reasonably and in good faith. So long as they do, the Settling Defendant and the Settlement Administrator shall not be liable for erroneous, improper, or inaccurate distribution, and the releases in this Agreement and the Final Approval Order and any judgment shall be effective as of the Effective Date as to Plaintiff, Plaintiff's Counsel, and every Releasing Party notwithstanding any such error and regardless of whether such error is corrected.

5.6 All funds from uncashed checks shall be paid to a *cy pres* approved by the Court. The Parties recommend that Rebuilding Together Boston be the *cy pres* charity.

ATTORNEYS' FEES AND PAYMENT TO NAMED PLAINTIFFS

6.1. **Attorneys' Fees and Costs and Expenses.** Upon filing the Final Approval Motion, Class Counsel also shall file a separate Motion for Attorneys' Fees and Costs and Expenses to be paid from the Fund. Plaintiffs' Motion for Attorneys' Fees and Costs and Expenses is to be considered separately by the Court from its consideration of the fairness and adequacy of the Settlement. EMC shall not oppose any motion for attorneys' fees and costs and expenses that does not exceed \$185,000.00 plus costs. Within forty-five (45) days of the Effective Date, the Settlement Administrator shall deduct from the Settlement Fund and pay to Class Counsel the amount of attorneys' fees, costs, and expenses awarded to Class Counsel by the Court.

6.2. **Payment to Representative Plaintiffs.** Class Counsel shall also move for approval of the Representative Plaintiff's Award described in paragraph 4.5, which is an award to be paid to the Representative Plaintiffs in addition to any payment made pursuant to the process

described in Section 5. The service award is made in recognition of the Representative Plaintiffs' substantial contributions. EMC does not oppose the service award, and it shall be paid by the Settlement Administrator from the Settlement Fund subject to the Court's approval. The enforceability of this Settlement Agreement shall not be contingent on whether the Court approves the service award.

PRELIMINARY APPROVAL

7.1. Promptly after execution of this Agreement, Class Counsel shall submit this Agreement to the Court and shall request that the Court enter the Preliminary Approval Order, which, consistent with the terms of this Agreement, shall:

- a. Suspend all current deadlines in the case schedule for the Action and stay all proceedings other than those related to approval of the Settlement;
- b. Preliminarily and conditionally certify the Settlement Class for settlement purposes only and preliminarily approve this Agreement for purposes of issuing the Class Notice;
- c. Appoint Plaintiffs as Representative Plaintiffs, for settlement purposes only, of the Settlement Class;
- d. Appoint Class Counsel as counsel, for settlement purposes only, of the Settlement Class;
- e. Approve the form, contents and method of dissemination of the Class Notice;
- f. Schedule appropriate opt-out, objection, and other settlement-related dates and deadlines to be included in the Class Notice; and
- g. Schedule the Final Approval Hearing.

7.2. The Parties, through their counsel, shall cooperate, assist and undertake reasonable actions in order to accomplish these required events on the schedule set by the Court.

NOTICE OF SETTLEMENT

8.1. EMC has conducted an investigation using due diligence to identify those persons who may be Settlement Class Members and should receive the Class Notice, and will prepare a Class List identifying said persons by name, property address, last known mailing address and a number tracked to his or her respective account. Prior to mailing the Class Notice to those persons identified on the Class List, EMC shall provide Class Counsel and the Class Administrator with an electronic version of the Class List. The Class List shall be managed and maintained in accordance with the terms of the Consent Protective Order entered on or around March 16, 2012 in this Action.

8.2. On or before the Notice Date, the Settlement Administrator shall send the Class Notice to each person associated with accounts identified on the Class List via United States mail. For purposes of this mailing, the Settlement Administrator shall use the addresses provided on the Class List, subject to appropriate updating by the Settlement Administrator prior to mailing. Appropriate updating shall include the following:

- a. The Settlement Administrator will check each address against the United States Post Office National Change of Address Database; and
- b. The Settlement Administrator shall update addresses based on forwarding information received from the United States Post Office.

8.3. Any Class Notices that are returned as non-deliverable with a forwarding address shall promptly be re-mailed by the Settlement Administrator to such forwarding address. To the extent that any Class Notices are returned as non-deliverable without a forwarding address, the

Settlement Administrator shall conduct reasonable research to locate valid address information for the intended recipients of such Class Notices, and shall promptly re-mail the Class Notice, as applicable, to any Settlement Class Members for whom new address information is identified.

8.4. No later than thirty (30) days after Monetary Award payments are issued to Settlement Class Members, the Settlement Administrator shall provide an accounting to the Parties, and shall provide an updated accounting to the Parties after the period for cashing settlement payment checks has expired.

OPT OUTS

9.1. Settlement Class Members who wish to exclude themselves from the Settlement Agreement must mail the Settlement Administrator a signed Request for Exclusion, postmarked no later than the end of the Opt Out Period. The Settlement Administrator shall timely provide the Parties with copies of all completed Request for Exclusions, and Class Counsel shall file a roster of Opt Outs with the Court within seven (7) days after the end of the Opt Out Period. If the Opt Outs equal or exceed ten percent (10%) or more of Class Members, EMC, in its sole discretion, may, at any time prior to three (3) business days before Final Approval Hearing, notify Class Counsel that it believes the Settlement cannot achieve its purpose. In that event, this Settlement Agreement shall become null and void; the Action may continue; and the Parties shall jointly move that any and all orders entered pursuant to this Settlement Agreement be vacated.

9.2. Except for Opt Outs and Persons receiving neither a Waiver Award or Monetary Award, each Person in the Settlement Class will be deemed to be a Settlement Class Member for all purposes under this Agreement. Settlement Class Members will be bound by the Final Approval Order and the Release concerning the Settled Class Claims in this Agreement, whether or not the Settlement Class Member actually received the Class Notice or Request for Exclusion.

9.3. Opt Outs shall not (i) be bound by any orders or judgments entered in this Action; (ii) be entitled to relief under or be affected by this Agreement; (iii) gain any rights by virtue of this Agreement; or (iv) be entitled to object to any aspect of this Agreement.

9.4. A Settlement Class Member who timely files a written Request for Exclusion with the Settlement Administrator may subsequently withdraw that Request by filing with the Settlement Administrator written notification of such withdrawal. Such written notification of withdrawal of the Request must be actually received by the Settlement Administrator before the end of the Opt Out Period.

OBJECTIONS

10.1. If a Settlement Class Member wishes to have the Court consider an objection to the Settlement or this Agreement, such Person (1) must be and remain a Settlement Class Member and may not be an Opt Out; and (2) must file with the Court and serve on Class Counsel and the Settling Defendant's Counsel a written objection, along with any supporting documentation that the Person wishes the Court to consider, no later than the conclusion of the Opt Out Period.

10.2. Any objecting Settlement Class Member who wishes to be heard at the Final Approval Hearing must state in the objection their intention to attend and speak at that hearing. If such an objection is submitted and overruled by the Court, the objecting Settlement Class Member shall remain fully bound by the terms of this Agreement and the Final Approval Order.

FINAL APPROVAL HEARING

11.1. At least fourteen (14) calendar days prior to Final Approval Hearing:

- a. Class Counsel shall file a motion requesting that the Court grant final approval of the Settlement Agreement, with a memorandum of points and authorities in support of the motion; and
- b. Class Counsel shall file a memorandum addressing any timely submitted Objections to the Settlement.

11.2. At the Final Approval Hearing, the Court will consider and determine, *inter alia*, whether the provisions of this Settlement Agreement should be approved, whether the Settlement should be finally approved as fair, reasonable, and adequate, whether any objections to the Settlement should be overruled, whether the Representative Plaintiffs' service award should be approved, whether the Motion for Attorneys' Fees and Costs and Expenses should be approved, and whether a judgment finally approving the Settlement should be entered.

11.3. This Agreement is subject to and conditioned upon the issuance by the Court of a Final Approval Order that grants final approval of this Settlement Agreement and:

- a. Finds that the Class Notice provided in this Action satisfies the requirements of due process;
- b. Finds that the Settlement Agreement is fair, reasonable and adequate to the Class, that each member of the Class (except those who submit a timely and valid Request for Exclusion) shall be bound by this Settlement Agreement, including the release and covenant not to sue;
- c. Dismisses on the merits and with prejudice all claims asserted in the Action against EMC;
- d. Permanently enjoins each and every Class Member (excluding those Class Members who submit a timely and valid Request for Exclusion) from

bringing, joining, or continuing to prosecute against the Released Parties any action asserting the Released Claims; and

- e. Retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation and enforcement of this Settlement.

TERMINATION OF AGREEMENT

12.1 The Representative Plaintiffs, on behalf of the Participating Class Members, by Class Counsel, and EMC, by its counsel, shall each have the right to unilaterally terminate this Agreement by providing written notice of their or its election to do so ("Termination Notice") to all other Parties hereto within forty-five (45) calendar days of: (1) the Court's refusal to grant preliminary approval of this Agreement in any material respect; (2) the Court's refusal to grant final approval of this Agreement in any material respect; (3) the Court's refusal to enter the Final Approval Order in the Lawsuit in any material respect; or (4) the date upon which the Final Approval Order is modified or reversed in any material respect by an appellate court.

NO ADMISSION OF LIABILITY

13.1 EMC denies any liability or wrongdoing of any kind associated with the alleged claims in the Complaint filed in this Action. EMC has denied and continues to deny each and every material factual allegation and alleged claim asserted in the Action. Nothing herein shall constitute an admission by EMC of wrongdoing or liability or of the truth of any factual allegations in the Action. Nothing herein shall constitute an admission by EMC that the Action is properly brought on a class or representative basis other than for settlement purposes. To this end, the settlement of the Action, the negotiation and execution of this Agreement, and all acts performed or documents executed pursuant to or in furtherance of the Settlement: (i) are not, shall not be deemed to be, and may not be used as an admission or evidence of any wrongdoing

or liability on the part of EMC or of the truth of any of the factual allegations in the Action; (ii) are not, shall not be deemed to be, and may not be used as an admission or evidence of any fault or omission on the part of EMC in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal; and (iii) are not, shall not be deemed to be, and may not be used as an admission of the appropriateness of these or similar claims for class certification. Nonetheless, EMC has concluded that further litigation would be protracted and expensive, and would also divert management and employee time. EMC has taken into account the uncertainty and risks inherent in litigation. EMC has therefore concluded that it is desirable that the Action be fully and finally settled in the manner and upon the terms and conditions set forth in this Agreement.

RELEASE OF CLAIMS

14.1 As of the Effective Date of this Agreement, the Representative Plaintiffs on their own behalf, and on behalf of each Participating Class Member who is a member of the Releasing Parties, hereby do and shall be deemed to have fully, finally and forever released, settled, compromised, relinquished, and discharged the Released Parties of and from any and all Settled Class Claims (as defined above) and, without further action by any person, they will be deemed (i) to have consented to dismiss with prejudice any and all Settled Class Claims; and (ii) to have released and forever discharged any and all Settled Class Claims. The Releasing Parties are forever barred and enjoined from instituting or further prosecuting, in any forum whatsoever (including any state or federal court, or with any state, federal or local government agency or with any administrative or advisory body), suits, debts, liens, or claims, known or unknown, fixed or contingent, which the Releasing Parties may have or claim to have in asserting the

Settled Class Claims. The Releasing Parties understand and agree that they are providing the Released Parties with a full and complete release with respect to the Settled Class Claims.

MISCELLANEOUS

15.1 Each of the Parties acknowledges and represents such Party (a) has fully and carefully read this Settlement Agreement prior to execution; (b) has been fully apprised by counsel of the legal effect and meaning of the terms of this Settlement Agreement; (c) has had the opportunity to undertake whatever investigation or inquiry is necessary or appropriate in connection with this Settlement Agreement and the Action; (d) has been afforded the opportunity to negotiate any and all terms of this Settlement Agreement; and (e) is executing this Settlement Agreement voluntarily and free from any undue influence, coercion, or duress of any kind.

15.2 **Press Release.** The Parties and their counsel do not anticipate that they will issue any press release(s) concerning this Agreement or the resolution of the Action. In the event that any Party makes published statements and/or issues any press release regarding this Agreement or resolution of the Action, that Party must (i) seek approval of the other Party regarding any published statements or press release, and such approval will not be unreasonably withheld, and (ii) accurately represent the events of this Action, including that EMC agreed to settle this Action on a class basis (but no class was certified by the Court), and EMC specifically denies liability in the Action.

15.3 **Counterparts.** This Settlement Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same Agreement. This Agreement may be executed by signature delivered by facsimile or PDF, and need not be the original "ink" signature. A complete set of executed counterparts shall be filed with the Court.

15.4 **Authority.** Each person executing this Settlement Agreement on behalf of any of the Parties hereto represents that such person has the authority to so execute this Agreement.

15.5 **Entire Agreement.** This Settlement Agreement and the exhibits hereto constitute the entire fully-integrated agreement among the Parties. No representations, warranties or inducements of any kind have been made by either Party relating to this Settlement Agreement, other than as set forth herein.

15.6 **Headings and Captions.** The headings and captions inserted in this Settlement Agreement are for convenience only and in no way define, limit, or otherwise describe the scope or intent of this Settlement Agreement, or any term of this Settlement Agreement.

15.7 **No Oral Modifications.** This Settlement Agreement may be amended or modified only by a written instrument signed by or on behalf of all of the Parties or their successors-in-interest. No oral amendment or modification shall be permitted or effective.

15.8 **Notices.** All notices to the Parties or counsel required by the Agreement shall be made in writing and communicated by facsimile and email to the following:

If to Plaintiffs or Class Counsel:

Jeffrey C Block
Whitney E. Street
BLOCK & LEVITON LLP
155 Federal Street, Suite 1303
Boston, MA 02110

Andrew Friedman
Douglas MacNamara
COHEN MILSTEIN SELLERS
& TOLL PLLC
1100 New York Ave NW, Suite 500 West
Washington, DC 20005

Richard Wentz
Jean Wentz
THE WENTZ LAW FIRM

2955 East Hillcrest Drive
Suite 123
Thousand Oaks, CA 91362

Brian S. Kabateck
Richard L. Kellner
Evan Zucker
KABATECK BROWN KELLNER LLP
644 South Figueroa Street
Los Angeles, CA 90017

If to Defendant or Defendant's Counsel:

Danielle J. Szukala
BURKE, WARREN, MACKAY & SERRITELLA, P.C.
330 North Wabash Avenue
21st Floor
Chicago, IL 60611

15.9 **Governing Law.** This Agreement shall be construed under and governed by the laws of the Commonwealth of Massachusetts, applied without regard to laws applicable to choice of law.

15.10 **Jurisdiction.** The Court shall retain jurisdiction to enforce this Settlement Agreement. The Parties consent to jurisdiction for this purpose.

15.11 **CAFA Notice.** EMC will provide the CAFA Notice as required by law.

Robert L. Nicholls

EMC MORTGAGE LLC,
fka EMC MORTGAGE CORPORATION

Date:

By: *Baran*
Title *Sr. Vice President*
Date: *7 November 2013*

Gwendolyn A. Hogan Nicholls

Date:

Robert L. Nicholls

EMC MORTGAGE LLC,
fka EMC MORTGAGE CORPORATION

Robert L Nicholls
Date: October 31, 2013

By: _____

Title _____

Date: _____

Gwendolyn A. Hogan Nicholls

Gwendolyn A Hogan Nicholls
Date: October 31, 2013

APPROVED AS TO FORM AND CONTENT:

BLOCK & LEVITON LLP

By: Whitney Street

COHEN MILSTEIN SELLERS &
TOLL PLLC

By: Andrew Friedman / WS

THE WENTZ LAW FIRM

By: Richard Wentz / WS

KABATECK BROWN KELLNER LLP

By: [Signature]

Counsel for Plaintiffs and the Class

BURKE, WARREN, MACKAY &
SERRITELLA, P.C

By: [Signature]

Counsel for Defendant

Exhibit 1

FRONT

EMC Massachusetts Late Fee Settlement c/o [INSERT SETTLEMENT ADMINISTRATOR NAME AND ADDRESS]

Robert L. Nicholls and Gwendolyn A. Hogan-Nicholls v. EMC Mortgage Corp., Case No. 11-cv-12303-PBS (D. Mass.)

OFFICIAL NOTICE OF PROPOSED CLASS ACTION SETTLEMENT AND FAIRNESS HEARING

The court authorized this notice. This is not a solicitation from a lawyer.

TO: All borrowers with loans secured by properties in Massachusetts who were assessed two or more late fees by EMC anytime on or after December 1, 2005 through March 31, 2011.

THIS CARD CONTAINS LIMITED INFORMATION ABOUT THE SETTLEMENT.

BACK

You received this postcard because records indicate you have a loan secured by property in Massachusetts that is or was serviced or subserviced by EMC Mortgage LLC f/k/a EMC Mortgage Corporation ("EMC") and your account was assessed two or more late fees by EMC anytime on or after December 1, 2005 through March 31, 2011.

The plaintiffs in *Robert L. Nicholls and Gwendolyn A. Hogan-Nicholls v. EMC Mortgage Corporation*, Case No. 11-cv-12303-PBS (D. Mass.) (the "Action") allege Chase assessed late fees in violation of Mass. Gen. Law Ann. ch. 183 § 59. The Court did not decide in favor of the plaintiffs or EMC, and EMC denies any violation. However, to settle the case, EMC will create a Settlement Fund of \$570,000.00, and Settlement Class Members that do not opt out of this settlement may receive a monetary payment from the Settlement Fund and/or a waiver of certain late fee assessments from their loan account.

The purpose of this Summary Notice is: (a) to advise you of the proposed Settlement of this Action; (b) to summarize your rights under the Settlement, including the possibility of a settlement check and/or account waiver; and (c) to advise you of a court hearing to consider the final approval of the Settlement.

The "Settlement Class" is all borrowers with loans secured by properties in Massachusetts who were assessed two or more late fees by EMC anytime on or after December 1, 2005 through March 31, 2011 and who are identified on the Class List.

Subject to final approval, each person in the Settlement Class who does not opt out may receive, subject to the provisions of the Settlement Agreement a waiver of certain outstanding late fees on their loan account, and/or a monetary award from the Settlement

Fund. The monetary award to each Settlement Class Member will be made out of the \$570,000.00 Settlement Fund after administration costs, attorneys' fees and payments to the representative plaintiffs are deducted from the Settlement Fund.

IF YOU DO NOT WANT TO BE PART OF THIS SETTLEMENT, YOU MAY EXCLUDE YOURSELF BY ADVISING THE CLAIMS ADMINISTRATOR IN WRITING, POSTMARKED NO LATER THAN [INSERT DATE]. IF YOU DO NOT EXCLUDE YOURSELF, YOU WILL BE BOUND BY ANY FINAL JUDGMENT IN THE ACTION, INCLUDING THE RELEASE OF DEFENDANT FROM ANY CLAIMS ARISING OUT OF OR RELATING TO THE ASSESSMENT OF LATE FEES ON LOAN ACCOUNTS SECURED BY PROPERTIES IN MASSACHUSETTS.

IF YOU WANT TO OBJECT TO THE SETTLEMENT, YOU MUST FILE AN OBJECTION WITH THE U.S. DISTRICT COURT, 1 Courthouse Way Boston, Massachusetts 02210 postmarked no later than [INSERT DATE], and send a copy to (1) Class Counsel, Richard L. Kellner, Kabateck Brown Kellner LLP, 644 South Figueroa Street, Los Angeles, CA 90017, and (2) Defendant's Counsel, Danielle J. Szukala, Burke, Warren, MacKay & Serritella, P.C., 330 North Wabash Ave., 21st Floor, Chicago, IL 60611.

The Court has scheduled a Fairness Hearing for [INSERT DATE], at [TIME] p.m., at 1 Courthouse Way, Boston, Massachusetts 02210, in Courtroom 19 to decide whether to approve the Settlement, and if so, to determine the amount of fees and costs to be awarded to Class Counsel from the Settlement Fund. Class Counsel is seeking fees of up to [___] of the Settlement Fund, and costs not to exceed [___].

Upon final approval, the Action will be dismissed with prejudice and Settlement Class Members who do not opt out and receive an award will be deemed to release EMC and related entities as detailed in the Settlement Agreement.

Additional information about this settlement is available at [INSERT WEBSITE] or by calling [INSERT PHONE NUMBER].

NOTICE OF SETTLEMENT

If you were a borrower with a loan secured by a property in Massachusetts and were assessed two or more late fees by EMC at any time during the period from December 1, 2005 through March 31, 2011, you may benefit from a proposed Class Action Settlement.

READ THIS NOTICE CAREFULLY. YOUR LEGAL RIGHTS ARE AFFECTED WHETHER YOU ACT OR DO NOT ACT. PLEASE CHECK THE SETTLEMENT WEBSITE AT _____ REGULARLY FOR UPDATES AND FURTHER DETAILS

The Federal Court authorized this Notice. This is not a solicitation from a lawyer.

You May be Entitled to Receive Compensation Under this Class Action Settlement.

- A settlement (the "Settlement") has been reached in a class action lawsuit entitled *Robert L. Nicholls and Gwendolyn A. Hogan-Nicholls v. EMC Mortgage Corp.*, Case No. 11-cv-12303-PBS (D. Mass.), involving claims that EMC Mortgage LLC, formerly known as EMC Mortgage Corporation ("EMC"), violated Mass. Gen. Law Ann. ch. 183 § 59 ("Section 59") by assessing late fees on payments that plaintiffs' allege would have been timely and sufficient but for EMC's practice of applying payments received to the oldest outstanding installment due.
- An example of the alleged conduct, based on plaintiffs' interpretation of Section 59, is as follows: If a borrower failed to make a payment in January and had a late fee assessed, and the borrower subsequently made one full payment, EMC would credit the payment for January and assess a second late fee for non-payment of the February bill.
- EMC denies Plaintiffs' allegations and interpretation of Section 59, and denies any liability or wrongdoing, and the Court has not decided whether EMC did anything wrong. The Court has, however, preliminarily approved the settlement which affects your legal rights and you have a choice to make now.
- The Settlement will provide for a fund of \$570,000 to pay for a portion of the late fees that were assessed and paid, plus attorneys' fees and disbursements to be approved by the Court, an enhancement payment to the Class Representatives and the costs of administrating the Settlement.
- Your legal rights are affected whether you act or do not act. Please read this notice carefully.

YOUR RIGHTS AND CHOICES:

YOU MAY:		DUE DATE
DO NOTHING	If you do nothing, and you receive an award you will be giving up rights you may have to separately sue the "Released Parties" (as defined by paragraph 1.38 the Settlement) for legal claims released by the Settlement.	N/A
OBJECT	Write to the Court about why you do not like the Settlement.	_____
EXCLUDE YOURSELF	Ask to be excluded from the Settlement. This is the only option that allows you to be part of any other lawsuit against the Released Parties for legal claims released by this Settlement.	_____
APPEAR IN THE LAWSUIT OR GO TO A HEARING	Participate in the lawsuit on your own or through your own lawyer. You can also ask to speak in Court about the proposed Settlement.	_____

- These rights and choices – **and the deadlines to exercise them** – are further explained in this Notice.
- These **deadlines may be moved, cancelled or otherwise modified**, so please check the settlement website at _____ regularly for updates and further details.
- The Court still has to decide whether to approve to grant final approval of the Settlement. Benefits will be provided only if the Court finally approves the Settlement and after any appeals are resolved.

WHAT THIS NOTICE CONTAINS

BASIC INFORMATION4

1. Why did I get this Notice?

2. What is the lawsuit about?

3. What is a class action, and why is this lawsuit a class action?

4. Why is there a proposed Settlement?

WHO IS IN THE PROPOSED SETTLEMENT CLASS5

5. How do I know if I am part of the proposed Settlement Class?

6. Are there exceptions to being included?

THE PROPOSED SETTLEMENT BENEFITS – WHAT YOU MAY GET5

7. What does the proposed Settlement provide?

8. What am I giving up in exchange for the Settlement Benefits?

HOW TO GET PROPOSED SETTLEMENT BENEFITS7

9. How do I get an award?

10. When will I get my award?

EXCLUDING YOURSELF FROM THE PROPOSED SETTLEMENT7

11. Can I get out of the proposed Settlement and the Settlement Class?

12. How do I exclude myself from the proposed Settlement?

13. If I do not exclude myself, can I still later?

14. If I exclude myself, can I get benefits from the proposed Settlement?

YOUR RIGHTS AND CHOICES – OBJECTING TO THE PROPOSED SETTLEMENT8

15. How do I tell the Court I do not like the proposed Settlement?

16. What's the difference between objecting to the proposed Settlement and excluding myself from the proposed Settlement?

YOUR RIGHTS AND CHOICES – APPEARING IN THE LAWSUIT9

17. Can I appear or speak in this lawsuit and address the proposed Settlement?

18. How can I appear in this lawsuit?

IF YOU DO NOTHING9

19. What happens if I do nothing at all?

THE LAWYERS REPRESENTING YOU10

20. Do I have a lawyer in this case?

21. How much will the lawyers for the Settlement Class be paid, and how will they be paid?

THE COURT'S FAIRNESS HEARING10

22. When and where will the Court decide whether to approve the proposed Settlement?

23. Do I have to come to the hearing?

24. Can I speak at the hearing?

GETTING MORE INFORMATION11

25. Are more details about the lawsuit and proposed Settlement available?

BASIC INFORMATION

1. Why did I receive a Notice?

The Court ordered that a Notice be given because you have the right to know about a proposed Settlement that may affect you. You have legal rights and choices to make before the Court decides whether to approve the proposed Settlement.

This Notice explains:

- What the lawsuit is about.
- Who is included in the proposed Settlement.
- How the proposed Settlement may benefit you.
- What your legal rights are.
- How to get benefits of the proposed Settlement.

2. What is the lawsuit about?

This lawsuit is brought as a class action entitled *Robert L. Nicholls and Gwendolyn A. Hogan-Nicholls v. EMC Mortgage Corp.*, Case No. 11-cv-12303-PBS (D. Mass.) and is presently before the United States District Court for the District of Massachusetts. The lawsuit alleges that EMC Mortgage LLC, formerly known as EMC Mortgage Corporation ("EMC"), violated Mass. Gen. Law Ann. ch. 183 § 59 ("Section 59") by assessing late fees on payments that plaintiffs allege would have been timely and sufficient but for EMC's practice of applying payments received to the oldest outstanding installment due.

An example of the alleged conduct is as follows: If a borrower failed to make a payment in January and had a late fee assessed, and the borrower subsequently made one full payment, EMC would credit the payment for January and assess a second late fee for non-payment of the February bill.

EMC denies Plaintiffs' allegations and interpretation of Section 59, and denies any liability or wrongdoing,

The Court overseeing this lawsuit is the United States District Court for the District of Massachusetts and specifically the Honorable Patti B. Saris.

3. What is a class action, and why is this lawsuit a class action?

In a class action, one or more people, called Class Representatives, sue on behalf of other people who have similar claims. All these people together are a "Class" or "Class Members." One court decides all the issues in the lawsuit for all Class Members, except for those who exclude themselves from the Class. In a class action, the court has a responsibility to assure that prosecution and resolution of the class claims by the Class Representatives and Class Counsel is fair. In this lawsuit, the Class Representatives are asking the Court to decide the issues for borrowers with loans secured by properties in Massachusetts and who were assessed two or more late fee charges by EMC at any time during the period from December 1, 2005 through March 31, 2011 (the "Class Period").

4. Why is there a proposed Settlement?

The Court did not decide in favor of the Plaintiffs or EMC. Instead, both sides agreed to the Settlement. That way, they avoid the cost and risk of further litigation, and the people claimed to be affected will get compensation. The Class Representatives and their attorneys, the Class Counsel, believe that a class wide settlement is in the best interests of the Settlement Class.

WHO IS IN THE PROPOSED SETTLEMENT CLASS

5. How do I know if I am part of the proposed Settlement Class?

If you have received a postcard notice, you possibly are a Settlement Class Member. Judge Saris has determined that everyone who fits the below description is a Class Member:

All borrowers with loans secured by properties in Massachusetts and were assessed two or more late fee charges by EMC at any time during the period December 1, 2005 through March 31, 2011, and who are identified on the Class List.

6. Are there exceptions to being included?

Yes. The Settlement Class does not include all persons who opt-out or exclude themselves from the Settlement in a timely and correct manner by submitting a written request for exclusion. This Settlement Class also excludes the judge presiding over this matter from participation.

THE PROPOSED SETTLEMENT BENEFITS – WHAT DO I GET?

7. What does the proposed Settlement provide?

Subject to final approval, each member of the Settlement Class ("Settlement Class Member") who does not opt out may receive: (i) a waiver of certain outstanding late fees on their loan account; and/or (ii) an automatic payment from a portion of the Settlement Fund as reflected below.

The Waiver. Settlement Class Members who have not opted out may receive a waiver of certain late fees that have been assessed but not collected. Those Loan accounts to receive waivers will be those Settlement Class Members' accounts that, as of the date after the Final Approval of the Settlement: (a) reflect a principal balance greater than zero on the servicing system used to service the account; and (b) have an outstanding late fee balance.

The amount of the late fee waiver for each loan account will be determined as follows: (a) identification of the amount of late fees assessed by EMC during the Class Period, then (b) reduction of the EMC late fee assessment amount to the extent late fees have been paid, waived or refunded on the Loan account (assuming for purposes of this Settlement that payments, waivers and refunds were on the first assessed late fees) through the date of the Settlement Agreement. The amount remaining for the loan account is the maximum waiver amount for the loan.

Each Settlement Class Member to receive a waiver will receive up to the maximum waiver amount for the Loan to the extent there is an outstanding late fee balance on the Loan account. EMC reserves the right to apply a different waiver analysis and process so long as doing so does not reduce the benefit to the Settlement Class Member.

The Monetary Award. The Monetary Award that will be payable to Settlement Class Members after the date when the Settlement becomes effective will be determined according to the following formula:

- (a) Step One – Determination of the Net Settlement Fund. The Net Settlement Fund shall be calculated by taking the Settlement Fund (\$570,000.00) and subtracting Administration Costs, Representative Plaintiffs' Award, and the Attorneys' Fee Award.
- (b) Step Two – Determination of the pro rata shares. There shall be five tiers of participation in the Settlement based upon the amount of late fee payments made (without consideration of any prior reversals, credits or refunds):
 - i. Less than \$ 50.00 --- 1 share
 - ii. Between \$ 50.01 and \$ 100.00 --- 2 shares
 - iii. Between \$ 101.01 and \$ 150.00 --- 3 shares
 - iv. Between \$150.01 and \$ 500.00 --- 6 shares

- v. Greater than \$ 500.00 --- 10 shares
- (c) Step Three – Determination of the dollar payments per share shall be made by taking the Net Settlement Fund and dividing it by the total number of shares.
- (d) Step Four – Calculation of the individual award. Take the number of shares for each Settlement Class Member and multiply that number by the dollar payments per share.

After the Monetary Award is determined in accordance with the above formula, this will constitute the absolute maximum amount that any Monetary Award Recipient will be entitled to receive under this Settlement.

8. What am I giving up in exchange for the Settlement Benefits?

By staying in the Class, you become a Settlement Class Member and, you qualify for either a Waiver and/or Monetary Award, you are agreeing to fully, finally and forever release, relinquish, and discharge any current or future claims relating to the late charge claims in this action (**as more fully described in the paragraph below**) against the Released Parties, and each and all of their respective past, present, and future parents, subsidiaries, affiliated companies and corporations, and each and all of their respective past, present, and future directors, officers, managers, employees, general partners, limited partners, principals, agents, insurers, reinsurers, shareholders, attorneys, advisors, representatives, predecessors, successors, divisions, joint ventures, assigns, or related entities, and each and all of their respective executors, successors, assigns, and legal representatives.

The entire release contained in Section 14.1 of the Settlement is:

As of the Effective Date of this Agreement, the Representative Plaintiffs on their own behalf, and on behalf of each Participating Class Member who is a member of the Releasing Parties, hereby do and shall be deemed to have fully, finally and forever released, settled, compromised, relinquished, and discharged the Released Parties of and from any and all Settled Class Claims (as defined above) and, without further action by any person, they will be deemed (i) to have consented to dismiss with prejudice any and all Settled Class Claims; and (ii) to have released and forever discharged any and all Settled Class Claims. The Releasing Parties are forever barred and enjoined from instituting or further prosecuting, in any forum whatsoever (including any state or federal court, or with any state, federal or local government agency or with any administrative or advisory body), suits, debts, liens, or claims, known or unknown, fixed or contingent, which the Releasing Parties may have or claim to have in asserting the Settled Class Claims. The Releasing Parties understand and agree that they are providing the Released Parties with a full and complete release with respect to the Settled Class Claims.

HOW TO GET PROPOSED SETTLEMENT BENEFITS

9. How do I get an award?

To obtain your award, you do not have to do anything. If you do not exclude yourself from the Settlement and you qualify for an award, you will be mailed a check as provided by the Settlement and/or unpaid late fees will be waived from your loan account once the Settlement is finally approved by the Court, and after any appeals are resolved.

10. When will I get my award?

A review of your account for the waiver award and the mailing of any monetary award will occur after the Court grants "final approval" of the Settlement, and after the time for appeals has ended and any appeals have been resolved. Even if the judge approves the Settlement after a hearing on _____ (*see* the section

"The Court's Fairness Hearing" below), there may be appeals. Resolving these appeals can take time. Please be patient.

EXCLUDING YOURSELF FROM THE PROPOSED SETTLEMENT

11. Can I get out of the proposed Settlement and the Class?

If you want to keep the right to sue or continue to sue EMC over the legal issues in this case, you must take steps to get out of the Settlement. This is called excluding yourself – or is sometimes referred to as "opting out" of the Class. If you exclude yourself, you cannot get any benefits from the proposed Settlement and you cannot object to the proposed Settlement. But you keep the right to file your own lawsuit or join another lawsuit against EMC about the claims in this lawsuit.

12. How do I exclude myself from the proposed Settlement?

To exclude yourself, you must send a letter that contains all of the following:

- Your name, current address and telephone number;
- A statement that you want to be excluded from the case *Robert L. Nicholls and Gwendolyn A. Hogan-Nicholls v. EMC Mortgage Corp.*, Case No. 11-cv-12303-PBS (D. Mass.), that you do not wish to be a Settlement Class Member, and that you want to be excluded from any judgment entered in this case;
- Your signature (or your lawyer's signature).

Your exclusion request must be signed, mailed and postmarked by _____, to:

c/o: Garden City Group Administrator
P.O. Box 35104
Seattle, WA 98124-5104

You cannot exclude yourself on the phone or by e-mail.

13. If I do not exclude myself, can I sue later?

No. Unless you exclude yourself, you give up the right to sue EMC for the claims in this lawsuit. If you want to keep the right to sue EMC in a new lawsuit, you have to exclude yourself from this Settlement Class and proposed Settlement. Remember, any exclusion request must be signed, mailed, and postmarked by _____.

14. If I exclude myself, can I get any benefits from this proposed Settlement?

No. If you exclude yourself, you cannot get any proposed Settlement benefits.

YOUR RIGHTS AND CHOICES - OBJECTING TO THE PROPOSED SETTLEMENT

15. How do I tell the Court I do not like the Settlement?

If you are a Settlement Class Member and do not exclude yourself, you can tell the Court you do not like the Settlement or some part of it. You can give reasons why you think the Court should not approve it. The Court will consider your views.

To object, you must send a written objection setting forth your full name, current address, and telephone number to the Settlement Administrator and send by U.S. mail a copy to Class Counsel and Defense Counsel postmarked no later than _____. Please use the following addresses:

Settlement Administrator

Garden City Group
P.O. Box 35104
Seattle, WA 98124-5104

Class Counsel:

Richard L. Kellner
KABATECK BROWN KELLNER,
LLP
644 S. Figueroa Street
Los Angeles, California 90017

Defense Counsel:

Danielle J. Szukala
BURKE, WARREN, MACKAY &
SERRITELLA, P.C.
330 North Wabash Avenue
21st Floor
Chicago, IL 60611.

You must also state in writing all objections and the reasons for each objection, and state whether you intend to appear at the Fairness Hearing either with or without separate counsel. You shall not be entitled to be heard at the Fairness Hearing or to object to the Settlement, and no written objections or briefs submitted by you shall be received or considered by the Court at the Fairness Hearing, unless written notice of your intention to appear at the Fairness Hearing and copies of any written objections and/or briefs are filed with the Court and served on Class Counsel and Defense Counsel on or before _____. If you fail to file and serve timely written objections in the manner specified above, you shall be deemed to have waived all objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement.

If you object through a lawyer, you will have to pay for the lawyer yourself.

16. What is the difference between objecting to the Settlement and excluding myself from the proposed Settlement?

Objecting is the way to tell the Court what you do not like about Settlement. You can object only if you stay in the Class and don't exclude yourself.

Excluding yourself is the way to tell the Court you do not want to be a part of the Class and the Settlement, and that you want to keep the right to file your own lawsuit. If you exclude yourself, you cannot object because the proposed Settlement no longer will affect you.

YOUR RIGHTS AND CHOICES - APPEARING IN THE LAWSUIT

17. Can I appear or speak in this lawsuit?

As long as you do not exclude yourself, you can (but do not have to) participate and speak for yourself in this lawsuit. This is called making an appearance. You can also have your own lawyer speak for you, but you will have to pay for the lawyer yourself.

18. How can I appear in this lawsuit?

If you want to participate (or have your own lawyer instead of Class Counsel participate or speak for you) in this lawsuit, you must give the Court a paper that is titled a "Notice of Appearance." The Notice of Appearance must contain the title of the lawsuit, a statement that you wish to appear at the Fairness Hearing and the signature of you or your lawyer.

Your Notice of Appearance can also state that you or your lawyer would like to speak at the Court's hearing on the proposed Settlement. If you submit an objection (see question 17 above) and would like to speak about the objection at the Court's hearing, both your Notice of Appearance and your objection should include that information too.

Your Notice of Appearance must be signed, mailed and postmarked by _____, to the Court at:

Clerk of Court
U.S. District Court
District of Massachusetts
1 Courthouse Way
Boston, Massachusetts 02210

Copies of your Notice of Appearance must also be signed, mailed, emailed, or faxed and postmarked, or the equivalent for email and facsimile, by _____, to the same addresses listed in response to in question 15 of this Notice.

IF YOU DO NOTHING

19. What happens if I do nothing at all?

If you do nothing:

- You will stay a member of the Settlement Class and all of the Court's orders will apply to you.
- You will automatically receive any awards you qualify for under the Settlement.
- Unless you exclude yourself, you will not be able to sue, or join a new lawsuit, against EMC about the issues and claims in this lawsuit, ever again if you qualify for an award.

THE LAWYERS REPRESENTING YOU

20. Do I have a lawyer in this case?

Yes. The Court has appointed lawyers to represent you and all Settlement Class Members. The Court has appointed the following law firms to represent the Settlement Class:

KABATECK BROWN KELLNER, LLP
Richard L. Kellner
Evan Zucker
644 S. Figueroa Street
Los Angeles, California 90017
Telephone: (213) 217-5000
Facsimile: (213) 217-5010

THE WENTZ LAW FIRM
Richard Wentz
Jean Wentz
2955 East Hillcrest Drive
Suite 123
Thousand Oaks, CA 91362

BLOCK & LEVITON LLP
Jeffrey C Block
Whitney E. Street
155 Federal Street, Suite 1303
Boston, MA 02110

COHEN MILSTEIN SELLERS
& TOLL PLLC
Andrew Friedman
Douglas McNamara
1100 New York Ave NW, Suite 500 West
Washington, DC 20005

Together, these lawyers are called Class Counsel. You will not be charged for these lawyers.

21. How much will lawyers for the Class be paid and how will they be paid?

Class Counsel will ask the Court to approve payment of attorneys' fees and expenses of no more than \$185,000, plus costs. Class Counsel also will ask the Court to award the Class Representatives a total of \$3,000.00. These amounts, plus the costs of administering the Settlement (estimated to be approximately \$30,000.00), will be paid from the Settlement Fund.

THE COURT'S FAIRNESS HEARING

22. When and where will the Court decide whether to approve the proposed Settlement?

The Court will hold a Fairness Hearing at ____ a.m. on _____. This hearing date may be moved, cancelled or otherwise modified, so please check the settlement website at ____ regularly for further details. The Court is located at 1 Courthouse Way, Boston, Massachusetts 02110. At the hearing, the judge will consider all objections, if any, and will consider whether the proposed Settlement is fair, reasonable and adequate to the Class. The judge will listen to people who have asked to speak at the hearing. The judge may also decide how much to award to Class Counsel for their fees and expenses. At or after the hearing, the judge will decide whether to approve the Settlement. We do not know how long these decisions will take.

23. Do I have to come to the hearing?

You do not have to come to the hearing. Class Counsel will answer any questions from the Court. But you and/or your lawyer are welcome to come at your own expense. If you send an objection, you do not have to come to the hearing for the judge to consider it.

24. Can I speak at the hearing?

You can ask the Court to allow you (or your lawyer) to speak at the hearing. To do so, you or your lawyer must file a Notice of Appearance that says you wish to speak. Information about how to file a Notice of Appearance, and the due date for filing, is in response to question 18 of this Notice. If you submit an objection and wish to speak about it at the Fairness Hearing, you must include that information in your objection (see question 15).

You cannot speak at the hearing if you exclude yourself from the Settlement.

GETTING MORE INFORMATION

25. Are more details about the lawsuit and the Settlement available?

This Notice only summarizes the lawsuit and proposed Settlement. More details are in the complaint filed in lawsuit and in the proposed Settlement. You can get copies of these documents by visiting the Settlement website at _____

You can also look at all of the documents filed in the lawsuit at the Office of the Clerk, United States District Court, District of Massachusetts, located at 1 Courthouse Way, Boston, Massachusetts 02210.

You may also contact Class Counsel.

PLEASE DO NOT CONTACT THE COURT WITH ANY QUESTIONS.

Exhibit 2

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS,
EASTERN DIVISION**

ROBERT L. NICHOLLS, and GWENDOLYN
A. HOGAN-NICHOLLS, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

EMC MORTGAGE CORPORATION, and
DOES 1 through 10 inclusive,

Defendant.

Civil Action No. 11-cv-12303-PBS

[PROPOSED] ORDER OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

The Court considers for final approval the settlement of this class action, which was initiated by Plaintiffs Robert L. Nicholls and Gwendolyn A. Hogan-Nicholls ("Plaintiffs") against Defendant EMC Mortgage Corporation, now known as EMC Mortgage LLC ("Defendant") (Plaintiffs and Defendant are collectively referred to as the "Parties"). The terms of the settlement are set forth in the Amended Settlement Agreement, together with the exhibits thereto (the "Settlement" or "Settlement Agreement").

This matter having come before the Court on _____ for a scheduled Final Approval Hearing as set forth in the Parties' Settlement Agreement and the Court's Order for Preliminary Approval; and the Class Administrator having provided Class Members with due

and adequate notice as required by the Preliminary Approval Order, and the Court having considered all papers filed and proceedings herein, reviewed all objections to approval of the Settlement Agreement, and the Court having determined that the Settlement Agreement is fair, adequate and reasonable, and being otherwise fully informed and finding good cause therefore, the Court hereby ORDERS, ADJUDGES AND DECREES AS FOLLOWS:

1. **Court has Jurisdiction.** The Court has jurisdiction over the subject matter of this proceeding (the "Action") and over all Parties to this proceeding, including all Settlement Class Members. In addition, the Court has personal jurisdiction over all Settlement Class Members with respect to this Action and the Settlement.

2. **Class Notice is Found Adequate.** As evidenced by the declaration submitted by the Garden City Group (the "Settlement Administrator"), all potential Settlement Class Members have received adequate notice and have been given an opportunity to exclude themselves from this Action.

The Class Notice provided due and adequate notice of the proceedings and of the matters set forth in the Preliminary Approval Order, including the proposed settlement set forth in the Settlement Agreement, and fully satisfied the requirements of Federal Rules of Civil Procedure Rule 26(e) and the United States Constitutions (including the Due Process Clause), and any other applicable law. The Class Notice also provided due and adequate notice to Settlement Class Members of their right to exclude themselves from the Settlement, as well as their right to object to any aspect of the proposed Settlement.

The Court finds that the Proposed Notice specifically:

- (a) identified the Plaintiffs and the Defendant, and described the lawsuit and the settlement classes in a straightforward manner;
- (b) succinctly described the essential terms of the proposed settlement, and identified all parties against whom claims are being released;
- (c) provided class members with information on how to opt-out of the Proposed Settlement Class and provided all applicable deadlines for such action;

- (d) informed potential settlement class members that if they did not exclude themselves from the Proposed Settlement Class, and the settlement was approved, they would be bound by the resulting judgment; and
- (e) instructed potential Settlement Class Members to contact class counsel to obtain more detailed information and provided information regarding counsel's fee and expense application.

Further, the Settlement Notice provided a link to a website that will be maintained by the Settlement Administrator that includes links to the long-form settlement notice and all pertinent pleadings in this Action.

3. **Class Certification is Granted.** For purposes of the Settlement of this Action, the Court finds that the requirements of the Federal Rules of Civil Procedure, the United States Constitution, the Rules of the Court and any other applicable law have been met as to the Class defined in paragraph 5 below. Specifically, the Court finds that:

- (a) The identities of the Settlement Class Members have been ascertained, and that the Settlement Class Members are so numerous that their joinder before the Court would be impracticable;
- (b) Plaintiffs and the Settlement Class share common questions of fact and law;
- (c) Plaintiffs' alleged claims were typical of the claims of the Settlement Class;
- (d) Plaintiffs have fairly and adequately protected the interests of the Settlement Class in that
 - i. the interests of Plaintiffs and the nature of their alleged claims were consistent with those of the members of the Settlement Class,
 - ii. There appeared to be no conflicts between or among Plaintiffs and the Settlement Class,
 - iii. Plaintiffs continued to be active participants in both the prosecution and the settlement of the Action, and
 - iv. Plaintiffs and the Settlement Class Members were represented by

qualified, reputable counsel who are experienced in preparing and prosecuting large, complex class actions involving banking issues; and

- (e) Questions of law or fact common to members of the Settlement Class predominate over any questions affecting only individual members of the Settlement Class and that a class-action resolution in the manner proposed by the Settlement would be superior to other available methods for a fair and efficient adjudication of the Action. In making these preliminary findings, the Court considered, among other factors,
 - i. the interest of the Settlement Class Members in individually controlling the prosecution or defence of separate actions,
 - ii. the impracticability or inefficiency of prosecuting or defending separate actions.
- (f) Certification of the Settlement Class consolidated numerous suits into a single suit which promotes well established public policy as held by the United States Supreme Court in *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

Based on the findings set forth in paragraph 3 above, the Court certifies a Class for settlement purposes under Fed. R. Civ. P. 23(a) and 23(b)(3), consisting of all borrowers with loans secured by properties in Massachusetts who were assessed two or more late fees by EMC anytime on or after December 1, 2005 through March 31, 2011 (the "Class Period") and who are identified on the Class List.

Excluded from the Settlement Class are those persons within the scope of the Settlement Class who timely and validly requested exclusion from the Settlement Class. This Court hereby finds that only those individual listed on _____ have validly opted out of the Settlement Class.

4. **Final Approval of Settlement is Granted.** The Court hereby finds that the Settlement is fair, reasonable and adequate, and in the best interests of each of the Parties and the Settlement Class Members. Representative Plaintiffs have satisfied the standards and applicable

requirement for final approval of this class action Settlement under the Federal Rules of Civil Procedure and the United States Constitution.

The Court finds that the Settlement Agreement has been reached as a result of intensive, serious, and non-collusive arms-length negotiations, including mediation; the Settlement Agreement was executed only after Class Counsel had conducted thorough and exhaustive discovery and more than two years of active litigation; Class Counsel and Defendant's counsel have concluded that the Settlement Agreement is fair, reasonable and adequate; and Class Counsel and Defendant's counsel are reputable experienced attorneys in class actions involving banking issues.

In granting final approval of the Settlement, the Court considered the complexity, expense and likely duration of the litigation; the stage of the proceedings and the amount of discovery completed; the response of the Settlement Class Members to the Settlement; the risks of establishing liability and damages; the risks of maintaining the class action through the trial; the ability of the defendants to withstand a greater judgment; and the range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation, to warrant sending notice of the Settlement to the Class.

The Court finds that:

- (a) *Complexity, Expense & Likely Duration of Litigation.* Were litigation to have continued, Plaintiffs and Defendant would have vigorously litigated their respective claims and defenses. Both parties recognize that continued litigation would result in continued motions practice and that both parties will incur significant costs that could be avoided with the Settlement. Indeed, given the history of the case, continued litigation may have included discovery disputes and motions for summary judgment and/or summary adjudication. Accordingly, this factor weighs in favor of the Settlement.
- (b) *Reaction of the Proposed Class to the Settlement.* The Settlement Class has been engaged in responding to the Settlement. According to the Declaration of the

Garden City Group, _____, ____ Settlement Class Members were identified in the Class List. Of the ____ identified Settlement Class Members, ____ did not have correct addresses. Of the ____ that received a notice by Mail ____ objected, and ____ asked to be excluded.

- (c) *Stage of Proceedings and the Amount of Discovery Completed.* Counsel on both sides have completed sufficient work and discovery to ensure that the presentation made to the Court in the course of proposing the Settlement at issue is complete, thorough, and accurate.
- (d) *Risks of Establishing Liability and Damages.* Defendant recognizes that continued litigation would result in possible liability and possible substantial damages. Class Counsel also recognizes the time and expense associated with motion practice regarding statute interpretation, including possible appeals. The Settlement provides immediate relief to all Parties. Counsel for both Parties agree that the Settlement is in the best interest of the Parties.
- (e) *Risks of Maintaining Class Action Throughout the Litigation.* The statutory interpretation that underlies the Settlement Class claims has not been litigated. The absence of a court's statutory interpretation of the Settlement Class claims increases the risks of maintaining class certification throughout the litigation and favors the Settlement.
- (f) *Ability to Withstand Greater Judgment.* The Settlement meets the Plaintiffs' most essential requests for relief, it provides for payment of a substantial portion of the late fees, and provides a waiver of any improperly assessed late fees that have not been paid. Defendant's ability to pay more does not make the Settlement less valuable to Settlement Class Members.
- (g) *The Range of Reasonableness of Settlement in Light of Best Possible Recovery and All Attendant Risks of Litigation.* Based upon the evidence obtained during discovery, Plaintiffs' counsel estimates that the class will net between 62% and

100% of the late fees it alleges were improperly assessed, net of attorneys fees, incentive payments and administrative costs. Continued litigation poses risks to Defendant. Both sides agree that the Settlement is in the best interest of all Parties. This factor favors final approval.

5. **Claims are Released.** As of the date of this Final Order, the Representative Plaintiffs and all Settlement Class Members shall be bound by the releases set forth in the Settlement Agreement, regardless of whether such persons received any compensation under the Settlement Agreement. Except as to such rights or claims that may be created by the Settlement Agreement, all Settlement Class Members as of the date of this Final Order who did not timely exclude themselves are hereby forever barred and enjoined from prosecuting or seeking to reopen the Settled Claims, and any other claims released by the Settlement Agreement, against the released parties.

Neither the Settlement Agreement nor any of the terms set forth in the Settlement Agreement are admissions by Defendant of liability on any of the allegations alleged in the Action, nor is this Final Order a finding of the validity of any claims in the lawsuit, or of any wrongdoing by Defendant.

6. **Plaintiffs Appointed as Class Representatives.** The Court reaffirms its appointment of Plaintiffs Robert L. Nicholls and Gwendolyn A. Hogan-Nicholls as representatives of the Class ("Class Representatives").

7. **Incentive Awards Granted to Class Representatives.** The Court also hereby approves the payment of a total sum of \$3,000 to be paid from the Settlement Fund to the Class Representatives to compensate them for their participation as Class Representatives. The payment authorized by this paragraph shall be made in accordance with the terms of the Settlement Agreement.

8. **Kabateck Brown Kellner LLP, Block & Leviton LLP, Cohen Milstein Sellers & Toll PLLC, The Wentz Law Firm and Appointed Class Counsel.** The Court finds that, as required by Fed. R. Civ. P. 23(g), Class Counsel has fairly, adequately, and competently represented the interests of the Settlement Class throughout this litigation. The Court finds that Class Counsel, in its representation of the Settlement Class, has complied with the applicable Rules of Professional Conduct. The Court, having considered all objections, and based on its review of the experience of Block & Leviton LLP, Cohen Milstein Sellers & Toll PLLC, The Wentz Law Firm, and Kabateck Brown Kellner LLP, reaffirms its finding that they:

- (a) have done appropriate work identifying or investigating potential claims in the action and litigating those claims to date, including reaching the settlement now before the Court;
- (b) are experienced in handling class actions;
- (c) have demonstrated that they are knowledgeable of the applicable law;
- (d) have committed the necessary resources to represent the Settlement Class; and
- (e) have responded appropriately, competently, and in accordance with the Rules of Professional Conduct to Settlement Class members' requests for information and documentation related to this action..

The Court therefore find that Class Counsel is qualified, reputable counsel who are experienced in preparing and prosecuting large, complex class actions involving banking issues. Based on the foregoing, the Court reaffirms its appointment of Kabateck Brown Kellner LLP, Block & Leviton LLP, Cohen Milstein Sellers & Toll PLLC, The Wentz Law Firm as Class Counsel ("Class Counsel").

9. **Attorney's Fees Granted to Class Counsel.** Pursuant to the terms of the Settlement Agreement, and the Authorities, evidence, and argument set forth in Class Counsel's application, the Court hereby finds that an award of attorneys' fees in the amount of \$_____ and costs in the amount of \$_____ as final payment for and complete satisfaction of any and all attorneys' fees and costs incurred by and/or owed to Class Counsel is

hereby granted.

The Court finds that Class Counsel's request falls within the range of reasonableness and that the result achieved justifies the award. The payment of fees and costs to Class Counsel shall be made by Defendants in accordance with the terms of the Settlement Agreement.

10. **Class Administration Costs.** The Court hereby approves the payment of the reasonable costs of administration to the Garden City Group associated with the performance of its duties of \$_____. The payment authorized by this paragraph shall be made in accordance with the terms of the Settlement Agreement.

11. **Settlement Fund Ordered Disbursed.** The Court approves and orders the disbursements of the Settlement proceeds be made and administered to all borrowers with loans secured by properties in Massachusetts who were assessed two or more late fees by EMC during the Class Period and who are identified on the Class List and did not opt-out.

Defendant is required to make all payments and/or take all actions necessary to support the disbursement of Settlement proceeds in accordance with the terms of the Settlement Agreement.

Without affecting the finality of the Settlement Agreement or accompanying Judgment, this Court shall retain exclusive and continuing jurisdiction over the Parties, including all Settlement Class Members, relating to this action and the administration, consummation, enforcement and interpretation of the Settlement Agreement, this Final Order, the Final Judgment, and for any other necessary purpose.

The terms of the Settlement Agreement, this Final Order, and the accompanying Final Judgment are binding on the Representative Plaintiffs and all other Settlement Class Members, as well as their heirs, executors and administrators, successors and assigns, and those terms shall have *res judicata* and other preclusive effect in all pending and future claims, lawsuits or other proceedings, whether known or unknown, as set forth in the Settlement Agreement.

The Parties are hereby authorized, without needing further approval from the Court, to agree to and adopt such amendments to, and modification and expansions of, the Settlement Agreement,

as are in wring and signed by the parties' counsel and are consistent with this Final Order.

There is no reason to delay the enforcement of this Order and the accompanying Judgment.

IT IS SO ORDERED.

DATED: _____

Honorable Chief Judge Patti B. Saris
United States District Judge

**UNITED STATES DISTRICT COURT
THE DISTRICT OF MASSACHUSETTS**

ROBERT L. NICHOLLS, and GWENDOLYN
A. HOGAN-NICHOLLS, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

EMC MORTGAGE CORPORATION, and
DOES 1 through 10 inclusive,

Defendant.

Civil Action No. 11-cv-12303-PBS

**[PROPOSED] ORDER OF PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT**

The Court considers for preliminary approval the settlement of this class action, which was initiated by Plaintiffs Robert L. Nicholls and Gwendolyn A. Hogan-Nicholls ("Plaintiffs") against Defendant EMC Mortgage Corporation, now known as EMC Mortgage LLC ("Defendant") (Plaintiffs and Defendant are collectively referred to as the "Parties"). The terms of the settlement are set forth in the Amended Settlement Agreement, together with the exhibits thereto the "Settlement" or "Settlement Agreement").

The Court, having reviewed and considered the Settlement Agreement and all filed papers and proceedings herein, makes the following findings and grants all Parties the following relief: (1) suspension of all current deadlines in the case schedule in this matter (the "Action") and a stay of all proceedings other than those related to approval of the Settlement; (2) preliminary certification of the proposed Settlement Class for settlement purposes only; (3) preliminary approval of this agreement for purposes of issuing the Class Notice; (4) appointment of Plaintiffs as Representative Plaintiffs, for settlement purposes only, of the Settlement Class; (5) appointment of counsel, for settlement purposes only, of the Settlement Class; (6) approval of

the form, contents and method of dissemination of the proposed Class Notice; (7) scheduling of appropriate opt-out, objection, and other settlement-related dates and deadlines to be included in the Class Notice; and (8) scheduling of the Final Approval Hearing.

Specifically, the Court orders the following:

1. **Suspension of Current Deadlines and Stay of Proceedings.** All discovery and pretrial proceedings in this Action are stayed and their corresponding deadlines suspended until further order of this Court.

2. **Settlement Class Findings.** For purposes of the Settlement of this Action, the Court preliminarily finds that the requirements of the Federal Rules of Civil Procedure, the United States Constitution, the Rules of the Court and any other applicable law have been met as to the Settlement Class defined in paragraph 3 below. Specifically, the Court preliminarily finds that:

- (a) The identities of the Settlement Class Members are ascertainable and will in fact be identified by Defendant, and the Settlement Class Members are so numerous that their joinder before the Court would be impracticable;
- (b) Plaintiffs have alleged questions of fact and law common to the Settlement Class;
- (c) Plaintiffs' alleged claims are typical of the claims of the proposed Settlement Class;
- (d) Plaintiffs will fairly and adequately protect the interests of the proposed Settlement Class in that
 - i. the interests of Plaintiffs and the nature of their alleged claims are consistent with those of the members of the Settlement Class,
 - ii. There appear to be no conflicts between or among Plaintiffs and the Settlement Class,
 - iii. Plaintiffs have been and appear to be capable of continuing to be active participants in both the prosecution and the Settlement of the Action, and
 - iv. Plaintiffs and the Settlement Class Members are represented by qualified,

reputable counsel who are experienced in preparing and prosecuting large, complex class actions involving banking issues; and

- (e) Questions of law or fact common to members of the Settlement Class predominate over any questions affecting only individual members of the Settlement Class and that a class-action resolution in the manner proposed by the Settlement would be superior to other available methods for a fair and efficient adjudication of the Action. In making these preliminary findings, the Court has considered, among other factors,
 - i. the interest of the Settlement Class Members in individually controlling the prosecution or defence of separate actions,
 - ii. the impracticability or inefficiency of prosecuting or defending separate actions.
- (f) Certification of the Settlement Class consolidates numerous suits into a single suit which promotes well established public policy as held by the United States Supreme Court in *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

3. **Class Certification for Settlement Purposes.** Based on the findings set forth in paragraph 2 above, the Court preliminarily certifies a Class for settlement purposes under Fed. R. Civ. P. 23(a) and 23(b)(3), consisting of all borrowers with loans secured by properties in Massachusetts who were assessed two or more late fees by Defendant anytime on or after December 1, 2005 through March 31, 2011 (the "Class Period") and who are identified on the Class List.

If the Settlement is not finally approved by the Court for any reason whatsoever, the certification of the Settlement Class will be void, and no doctrine of waiver, estoppel or preclusion will be asserted in any litigated certification proceedings in the Action. No agreement made by or entered into by Defendant in connection with the Settlement may be used by Plaintiffs, any person in the Settlement Class or any other person to establish any of the elements of class certification in any litigation certification proceedings, whether in the Action or any

other judicial proceeding.

4. **Preliminary Approval of Class Action Settlement Findings.** The Court preliminarily finds that:

- (a) the Settlement Agreement resulted from intensive, serious, and non-collusive arm's length negotiations;
- (b) the Settlement Agreement was executed after Class Counsel had conducted thorough and exhaustive discovery and more than two years of active litigation;
- (c) Class Counsel and Defendant's counsel have concluded that the Settlement Agreement is fair, reasonable and adequate; and
- (d) the terms of the Settlement evidenced by the Settlement Agreement is sufficiently fair, reasonable and adequate under the *Grinell* factors proposed by the United States Court of Appeals for the Second Circuit, including the complexity, expense and likely duration of the litigation; the stage of the proceedings and the amount of discovery completed; the risks of establishing liability and damages; the risks of maintaining the class action through the trial; the ability of the defendants to withstand a greater judgment; and the range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation, to warrant sending notice of the Settlement to the Class.

5. **Appointment of Plaintiffs as Class Representatives.** Based on the foregoing paragraphs, the Court appoints Plaintiffs Robert L. Nicholls and Gwendolyn A. Hogan-Nicholls as representatives of the Settlement Class ("Class Representatives").

6. **Appointment of Class Counsel.** The Court reviewed the experience of the proposed Class Counsel: Block & Leviton LLP, Cohen Milstein Sellers & Toll PLLC, The Wentz Law Firm, and Kabateck Brown Kellner LLP, and finds that they are qualified, reputable counsel who are experienced in preparing and prosecuting large, complex class actions involving banking issues. Based on the foregoing, the Court appoints Block & Leviton LLP, Cohen

Milstein Sellers & Toll PLLC, The Wentz Law Firm, and Kabateck Brown Kellner LLP as Class Counsel ("Class Counsel").

7. **Proposed Notice Findings.** The Court has been presented with a proposed Class Notice. The Court finds that the Proposed Notice provides the necessary information for potential settlement class members to make an informed decision regarding the proposed settlement and that the Proposed Notice meets all of the requirements of Rule 23(e). Specifically, the Proposed Notice

- (a) identifies the Plaintiffs and the Defendant, and describes the lawsuit and the settlement classes in a straightforward manner;
- (b) succinctly describes the essential terms of the proposed settlement, and identifies all parties against whom claims are being released;
- (c) provides Settlement Class Members with information on how to opt-out of the Proposed Settlement Class and provides all applicable deadlines for such action;
- (d) informs potential settlement class members that if they do not exclude themselves from the Proposed Settlement Class, and the settlement is approved, they will be bound by the resulting judgment; and
- (e) instructs potential settlement class members to contact class counsel to obtain more detailed information and provides information regarding counsel's fee and expense application.

Further, the Settlement Notice provides a link to a website that will be maintained by the Class Action administrator that will contain links to the long-form settlement notice and all pertinent pleadings in this Action.

8. **Retention of Claims Administrator and Manner of Notice** The Court approves the appointment of the Garden City Group as the Settlement Administrator. Within thirty business days after the Court enters its Preliminary Approval Order, the Settlement Administrator shall cause the Class Notice to be mailed, by U.S. mail, to all Settlement Class Members whom Defendant has identified in a Class List. The Class List identifies persons who

may be a Settlement Class Member by name, property address, last known mailing address and a number tracked to his or her respective account (the "Class List"). The Class List shall be managed and maintained in accordance with the terms of the Consent Protective Order entered on or around March 16, 2012 in this Action. As provided in the Settlement Agreement, the reasonable expenses associated with giving notice to the Settlement Class will be paid from the Settlement Fund.

9. **Schedule of Settlement Approval Process.** The Court adopts the following schedule, set forth in the Settlement Agreement:

Event	Date
Deadline to disseminate class notice	30 business days from the date of the Court's Preliminary Approval Order.
Deadline for settlement class members to file objections to the settlement and/or fee application	45 calendar days from the date that the Class Notice is mailed.
Deadline for settlement class members to opt-out by filing an Election Not To Participate in Settlement form ("Opt Out Period")	45 calendar days from the date that the Class Notice is mailed.
Deadline for the parties' to respond to any objections and submit list of those who properly and timely submitted request for exclusion from the settlement	14 calendar days before date of final approval hearing.
Deadline to submit motion for final approval and motion for attorneys' fees and expenses.	14 calendar days before date of final approval hearing.

10. **Exclusion from the Class ("Opt-Outs").** Settlement Class Members who wish to exclude themselves from the Settlement Agreement must mail the Settlement Administrator a signed Request for Exclusion, postmarked no later than the end of the Opt Out Period. The Settlement Administrator shall timely provide the Parties with copies of all completed Request for Exclusions, and Class Counsel shall file a roster of Opt Outs with the Court within seven (7)

days after the end of the Opt Out Period. If the Opt Outs equal or exceed ten percent (10%) or more of Class Members, Defendant, in its sole discretion, may, at any time prior to twenty-one (21) business days before the Final Approval Hearing, notify Class Counsel that it believes the Settlement cannot achieve its purpose. In that event, this Settlement Agreement shall become null and void; the Action may continue; and the Parties shall jointly move that any and all orders entered pursuant to this Settlement Agreement be vacated.

Except for Opt Outs, each person in the Settlement Class will be deemed to be a Settlement Class Member for all purposes under the Settlement. Settlement Class Members will be bound by the Final Approval Order and the Release concerning the Settled Class Claims in this Agreement, whether or not the Settlement Class Member actually received the Class Notice or Request for Exclusion.

Opt Outs shall not (i) be bound by any orders or judgments entered in this Action; (ii) be entitled to relief under or be affected by this Agreement; (iii) gain any rights by virtue of this Agreement; or (iv) be entitled to object to any aspect of this Agreement.

A Settlement Class Member who timely files a written Request for Exclusion with the Settlement Administrator may subsequently withdraw that Request by filing with the Settlement Administrator written notification of such withdrawal. Such written notification of withdrawal of the Request must be actually received by the Settlement Administrator before the end of the Opt Out Period.

11. **Appearance and Objections at Fairness Hearing.** If a Settlement Class Member wishes to have the Court consider an objection to the Settlement or the Settlement Agreement, such Person:

- (a) must be and remain a Settlement Class Member and may not be an Opt Out; and
- (b) must file with the Court and serve on Class Counsel and the settling Defendant's counsel a written objection, along with any supporting documentation that the Person wishes the Court to consider, no later than the conclusion of the Opt Out Period.

Any objecting Settlement Class Member who wishes to be heard at the Final Approval Hearing must state in the objection his or her intention to attend and speak at that hearing. If such an objection is submitted and overruled by the Court, the objecting Settlement Class Member shall remain fully bound by the terms of this Agreement and the Final Approval Order.

12. **Fairness Hearing.** A hearing is scheduled for _____ at _____. (the "Fairness Hearing") to determine, among other things:

- (a) Whether the provisions of this Settlement Agreement should be approved;
- (b) Whether the Settlement should be finally approved as fair, reasonable, and adequate;
- (c) Whether any objections to the Settlement should be overruled;
- (d) Whether the Representative Plaintiffs' service award should be approved;
- (e) Whether the Motion for Attorneys' Fees and Costs and Expenses should be approved; and
- (f) Whether a judgment finally approving the Settlement should be entered.

13. **Jurisdiction.** The Court retains jurisdiction to enforce this Settlement Agreement. The Parties consent to jurisdiction for this purpose.

IT IS SO ORDERED.

DATED: _____

Honorable Chief Judge Patti B. Saris
United States District Judge

