

**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 *Grinnell* 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 3/5/14 at 2:30pm (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: November 18, 2013

  
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Honorable Chief Judge Patti B. Saris  
United States District Judge



**CERTIFICATE OF SERVICE**

I certify that the NOTICE OF AMENDED SETTLEMENT AGREEMENT AND REQUEST FOR PRELIMINARY APPROVAL, AMENDED SETTLEMENT AGREEMENT AND RELEASE and [PROPOSED] ORDER OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and copies will be sent to those indicated as non-registered participants on November 8, 2013.

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*/s/ Whitney Street*

Whitney E. Street