IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHNATHAN AND TRUDE YARGER, a married couple, DONNA INSALACO, JEFFREY GERBITZ, and JOSHUA RICHMAN,

Plaintiffs,

v.

CAPITAL ONE, N.A., successor by merger to ING BANK, F.S.B., d/b/a ING DIRECT,

Defendant.

Case No. 11-154-LPS

OPENING BRIEF IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Settlement Class Plaintiffs respectfully submit this Opening Brief in Support of their Motion for Final Approval of the Settlement Agreement ("Settlement") between Plaintiffs and Defendant Capital One, N.A., successor by merger to ING Bank, F.S.B., d/b/a ING Direct ("ING"),[1] and for final certification of the Settlement Class. This Court preliminarily approved the Settlement by Order dated May 7, 2014. D.I. 232.

As the Court is well aware, this settlement is the result of more than three years of vigorous, highly contested litigation, and after multiple mediation sessions conducted over several years with the assistance of an independent mediator. The Settlement provides for direct monetary relief in the form of an automatic cash payment to *every* member of the Class (numbering approximately 115,000 persons), with no claims process, totaling $20.35 million in cash. ING will also pay costs of notice and claims administration.

I. PROCEDURAL HISTORY

A. Undisputed Facts.

From October 1, 2005 through May 31, 2009, ING offered an "Orange" home mortgage loan, an adjustable rate mortgage ("ARM") that provided for a three-, five-, or seven-year period of fixed-rate interest before requiring a yearly interest rate adjustment. From July 2008 through May 31, 2009, ING offered its "Easy Orange" home mortgage loan, which provided for a five- or ten-year period of fixed interest before requiring a balloon payment. In connection with these loans, ING offered a program called "Rate Renew." Rate Renew resets an ARM or balloon mortgage prior to the end of the pre-rate adjustment period (for ARMs) or the balloon payment due date (for balloon mortgages). The Rate Renew option is the subject of this litigation.

[1] ING Direct was purchased by Capital One, N.A. in June 2011.

B. Summary of Plaintiffs' Allegations.

This Court is familiar with the claims and evidence in this case, many of which are detailed in its orders of August 27, 2012 (D.I. 115) and October 9, 2012 (D.I. 128), as well as on September 9, 2013 (D.I. 25) in the *Gerbitz* action, and Plaintiffs do not repeat them here.

C. *Yarger* Case Status.

On January 25, 2011, Plaintiffs filed a class action complaint in New Castle County Superior Court, alleging that ING's conduct with regard to Rate Renew violated the Delaware Consumer Fraud Act ("DCFA"), 6 Del. C. §§ 2511 *et seq.*, as well as claims for common law fraud, promissory estoppel, and breach of the implied covenant of good faith and fair dealing. On February 18, 2011, ING removed the case to this Court. (D.I. 1). Plaintiffs filed a motion for class certification on January 10, 2012, seeking certification of a nationwide class of ING mortgage customers. (D.I. 44, 45). After full briefing (D.I. 84, 95, 108, 113) and a hearing (D.I. 88), this Court granted Plaintiffs' motion in part and certified a ten-state class as to the DCFA claim. (D.I. 116). The Court did not certify Plaintiffs' claim for injunctive relief. *Id.* ING sought reconsideration of the order and an interlocutory appeal from the Third Circuit, both of which were fully briefed (D.I. 121), and both of which were denied. (D.I. 125); *see also Yarger v. ING Bank,* 2013 U.S. App. LEXIS 3376 (3d Cir. Jan. 4, 2013).

After the class certification ruling, the parties engaged in extensive motion practice. ING filed a contested Motion to file an Amended Answer (D.I. 148), to which Plaintiffs responded (D.I. 153), and which the Court granted (D.I. 181). In late 2013, three motions were fully briefed and pending before the Court: a Motion to Permit Expert Testimony (D.I. 192), Motion for Judgment on the Pleadings (D.I. 173), and a Motion to Amend/Correct the Class Definition (D.I. 196). On January 6, 2014, this Court, at the request of the parties, deferred consideration of those motions in light of ongoing mediation and settlement efforts. (D.I. 220).

D. Other Actions.

After the Court declined to include residents of California in the *Yarger* Class, Class counsel continued to advocate for those persons by filing *Gerbitz v. ING Bank,* fsb, Case No. 12-cv-01670 (D. Del.), on December 7, 2012, which was related to *Yarger*. Like *Yarger*, *Gerbitz* was hotly contested. ING moved to dismiss the action, a motion the Court granted in part and denied in part following another hearing. (D.I. 25). Additional Plaintiffs' Counsel filed a case in California on behalf of California residents styled *Richman v. ING Bank, FSB et al.*, Case No. 13-cv-1132-JAH-BLM (S.D. Cal.).

Class counsel also continued to advocate for persons in the 39 states not included in the *Yarger* and *Gerbitz* actions. Dozens of people from throughout the country contacted Class counsel to convey their experiences with Rate Renew and seek representation. Class counsel relied in particular on Donna Insalaco during the mediation process, as well as the Yargers and Mr. Gerbitz.

E. Discovery Status.

The parties engaged in exhaustive discovery. Plaintiffs served comprehensive written discovery on ING, in the form of four sets of Interrogatories, six sets of Requests for Admission, and two sets of Requests for Production. (D.I. 26, 27, 34, 109, 117, 147, 150-52). ING produced, and Class counsel analyzed, more than 40,000 pages of documents, data, and electronically stored information. Plaintiffs also responded to two sets of Interrogatories and one set of Requests for Admission. (D.I. 168, 172). The parties also engaged in significant motion practice regarding this discovery. (*See, e.g.*, D.I. 65).

In addition to written discovery, Plaintiffs took six depositions of the following ING executives and Rule 30(b)(6) designees: (1) Chad Kendall; (2) Anthony Battaglia; (3) Scott Lugar; (4) Matthew Blackard; (5) Vas Rajan; and (6) Amy Hagen. These individuals were

responsible for overseeing the Rate Renew program, as well as ING's communication with customers. ING deposed both of the Yargers, as well as Jim Wasilewski, the mortgage broker through whom the Yargers obtained their ING mortgage. The parties also engaged in extensive expert discovery. Plaintiffs vetted and retained academic and industry experts in connection with this action, each of whom added substantial value to both the litigation and settlement efforts.

In addition to defending ING's deposition of Plaintiff's expert Scott Scherf, Plaintiffs deposed ING's experts, including (1) Ravi Dhar; (2) Richard Kulka; and (3) Sonya Kwon. These depositions covered ING's analysis of its marketing materials, as well as surveys conducted as to consumer expectations regarding Rate Renew. Taken as a whole, these depositions provided the parties with a clear sense of the relative strengths of their respective positions, and were a key component in the ultimately fruitful mediation session.

F. Settlement Negotiations.

On January 17, 2014, at the conclusion of a day-long, in-person mediation session, and following a mediator's proposal from Jonathan Harkavy of Patterson Harkavy LLP, the Parties reached an agreement in principle to settle this matter. Previous in-person mediation sessions with Mr. Harkavy on November 29, 2012 and the Hon. Marina Corodemus (ret.) on October 24, 2011 had failed to produce a resolution. In March, 2014, the Parties reached final agreement on and executed the Settlement Agreement. D.I. 225-1.

II. MATERIAL TERMS OF THE SETTLEMENT

Plaintiffs seek final approval of the Settlement on behalf of the following Class:

> All natural persons who either (a) obtained an Orange Mortgage or Easy Orange Mortgage from ING on or after October 1, 2005 and on or before May 31, 2009 or (b) obtained an Orange Mortgage from ING before October 1, 2005 and performed a Rate Renewal of such mortgage on or after October 1, 2005 and on or before May 31, 2009; provided, however, that the class shall not include any current or former legal representative, officer, director or employee

of ING, the judge to whom the Action is assigned, or any member of such judge's immediate family.

A. Class Benefits.

Under the Settlement, ING will provide financial compensation to every Class Member. The Settlement provides that ING shall pay twenty million, three hundred fifty thousand dollars ($20,350,000) into the Settlement Fund. ING will also advance all costs of notice and claims administration.[2] All of that money, less fees and expenses for Class counsel and Class Representatives' Service Awards, in amounts to be determined by the Court, will be paid out to Class Members.

All Class Members who do not opt out will receive a check in the mail. There is no claims process—if a person is in the Class and does not opt out, he or she will receive money. The Allocation Plan addresses each of the types of monetary damages alleged by Plaintiffs as follows:

a. ***Calculation of "Individual Price Differential".*** ING has generated a list of: (1) all Loan Accounts on which Settlement Class Members (a) performed one or more Rate Renewals effective on or before January 31, 2014, and (b) paid, for any such Rate Renewal, a Rate Renewal charge in excess of the Rate Renewal charge in effect at the time the Rate Renewed Loan Account was originated; and, (2) for each such Loan Account, the amount the borrower paid to Rate Renew in excess of the Rate Renewal charge in effect at the time the Rate Renewed Loan Account was originated. Settlement at ¶ 3.2.2. Said another way, this list shows how much a particular Class Member *did* pay to Rate Renew and how much she *would* have paid

[2] This is an unusual provision – and extremely beneficial to the Class. In almost all common fund settlements, notice and claims administration are paid out of the fund itself; here, ING bears those costs on top of the fund. Here, ING will recover from the Settlement Fund, as reimbursement for such notice and administration costs, only the value of any checks that remain uncashed 150 days after the initial benefit check mailing.

had the price of Rate Renew stayed at the amount in effect at the time the Class Member took out his or her mortgage. The difference between these two amounts in the "Individual Price Differential."

b. ***Identification of "Rate Spread Accounts".*** ING has also generated a list of all Class Member accounts for which, at any point during the life of the account, the interest rate on the mortgage was more than 1.50 percentage points above the prevailing rate offered by ING at the time for the same type of mortgage. Settlement at ¶ 3.3. The list includes the amount of the original principal on those accounts. *Id.* The purpose of the list is to identify those Class Members for whom a Rate Renew might have been economically rational, and yet who did not do a Rate Renew, which is necessary because Capital One's records do not reflect which borrowers requested, and were denied, a Rate Renewal.

c. ***Payment Calculations.*** Upon Final Approval, Class Members who do not opt-out shall receive compensation as follows:

- For each Loan Account, the borrower Class Member(s) shall receive a base payment of twenty-five dollars ($25), Settlement at ¶ 7.1.1, *plus*;
- For each Loan Account identified as a "Rate Spread Account," the borrower Class Member(s) shall receive a sum equal to their original loan amount, divided by 100,000, times $15, Settlement at ¶ 7.1.2; *plus*;
- For each Loan Account identified as having an "Individual Price Differential," the borrower Class Members(s) shall receive a sum equal to his or her Individual Price Differential divided by the aggregate amount of Individual Price Differential, multiplied by the amount remaining in the Settlement Fund after the subtracting the

amounts allocated previously, Class Representative Service awards, and Class counsel fees and costs, Settlement at ¶ 7.1.3.

The following chart summarizes the calculation for each Class Member:

Compensation Type	Available to?	Amount Per Class Loan
Base	All Class Members	$25
Rate Spread	Class Members who, at some point in the life of their ING mortgage, had an interest rate that was 1.50 percentage points higher than the applicable rate offered by ING for a similar mortgage product at the time.	$15 x (Original Principal Balance of Loan Account/100,000)
Individual Price Differential	Class Members who Rate Renewed at a cost greater than that which was offered by ING at the time the Class Member took out their ING mortgage.	(Price Differential / Agg. Price Differential) x Remaining Settlement Fund.

III. PRELIMINARY APPROVAL AND NOTICE TO CLASS

On May 7, 2014, the Court granted preliminary approval to the settlement and provisionally certified the Class for settlement purposes. D.I. 232. In doing so, the Court found that that "certification of the Settlement Class under Fed. R. Civ. P. 23 is appropriate because the Settlement Class is so numerous that joinder would be impracticable, this action presents common issues of law and fact that predominate over any individual questions, the named Plaintiffs and their counsel are adequate representatives of the Settlement Class, and Plaintiffs' claims are typical of the claims of the members of the Settlement Class." *Id.* at ¶ 4. In addition, the Court found that the settlement was "fair, reasonable, and adequate." *Id.* at ¶ 5. The Court Ordered that notice should go out to Class Members as described in the Settlement Agreement, and that such notice was "reasonable and appropriate, and satisf[ies] the requirements of due process and the Federal Rules of Civil Procedure." *Id.* at ¶ 11.

Pursuant to the Court's Order, notice has gone out to Class Members.[3] The proposed notice program included the dissemination of the Long Form Notice, which describes the material terms of the Settlement and the procedures for each Class Member to receive the benefits available to them under the Settlement. *See* Declaration of Orran L. Brown, Sr. filed herewith ("Brown Dec.") at ¶ 12. The Long Form Notice also describes the procedures by which Class Members may opt out of the Settlement and/or provide comments in support of or in objection to the Settlement. Brown Dec., at Attachment 3.

Under the supervision of Class counsel, BrownGreer sent notice to 115,131 people, comprising the borrowers on 77,940 Class Loan Accounts. Brown Dec., at ¶ 7. Notice was sent via U.S. mail to each Settlement Class Member's last known mailing address. *Id.* at ¶ 11. Because some co-borrowers are shown to have different mailing addresses, 83,110 notices were sent via U.S. Mail. *Id.* BrownGreer also sent email notice to 97,267 Settlement Class Members who had supplied an email address to ING. *Id.* at ¶ 16. The total number of notices sent by U.S. mail and email exceed the class size because many Class Members received both types of notice. BrownGreer received 784 notices that were ultimately returned as undeliverable, which, pursuant to the Settlement Agreement, were treated as opt-outs. *Id.* at ¶ 23. All other Class members received direct notice of the settlement. Of the remaining population that received direct notice, only 92 potential class members affirmatively opted out of the settlement—less than one-tenth of one percent of the population that received notice. *Id.* at ¶¶ 26, 29. The Court has also received only six written objections to the settlement.[4]

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[3] ING agreed to pay for costs of class notice separately from the Settlement Fund. Settlement at ¶ 3.7. ING also provided notice of the settlement to governmental officials, pursuant to the Class Action Fairness Act. D.I. 231.

[4] *See* D.I. 234 (Letter from Lawrence Palmer, received 7/21/14 regarding Objection re Proposed Settlement); D.I. 236 (Letter to Clerk dated 7/25/14 by Dennis K. Baker re: Objections to Order

Along with the provision of notice, Brown Greer has established a website in which potential class members can get information regarding the settlement.[5] On this website, class members can view, download, and/or print copies of the Settlement Notice, as well as the Settlement Agreement, the Court's Preliminary Approval Order, and Plaintiff's pending motion for Attorney's Fees, Costs, and for Class Representative Service Payments. The website also contains contact information for Brown Greer, as well as an FAQ.

After mailing notice to Class Members, Class counsel and counsel for ING discovered a typographic error in the notice submitted to the Court and provided to Class Members. Brown Dec., at ¶ 30. This error did not affect the calculation of compensation to Class Members. *Id.* In its Order with Respect to Notice, entered on July 31, 2014 (D.I. 237), this Court directed the Parties to correct the Notice and inform affected Class Members of the typo. *Id.* at ¶ 31; *see also* D.I. 237. The proper language was updated on the settlement website, and Brown Greer sent a one-page notice to affected "Rate Spread" Class Members via U.S. Mail and email. Brown Dec. at ¶¶ 32-36. There are no objections to the settlement on the basis of this error in the initial notice.

Pursuant to the Court's Preliminary Approval Order, both the opt-out and objection periods have now passed. *See* D.I. 237, at ¶ 25 (setting September 5, 2014, as the opt-out deadline, and September 16, 2014, as the objection deadline).

Regarding Settlement); D.I. 238 (Letter to Clerk from Dennis Skowronski, dated 8/18/14, regarding modification to proposed settlement); D.I. 244 (Letter to Clerk from Scott McCullough, rec'd 7/7/14, regarding Objection to Settlement); D.I. 245 (Letter to Clerk from Sheel Chand, dated 8/28/14, regarding Objection re Order Proposed Settlement); D.I. 246 (Letter to Clerk from Janice Runge, dated 9/12/14, regarding Objection to Settlement). Class Plaintiffs will specifically address each of these objections in their reply brief in support of final approval, due with the Court on September 30, 2014.

[5] www.ingraterenewalsettlement.com

IV. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE.

A. Overview Of The Class Settlement Approval Process.

The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time and cost of prolonged litigation. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2010); *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 535 (3d Cir. 2004) ("*Warfarin II*"). Where parties propose to resolve class action litigation through settlement, they must obtain court approval. *See* Fed. R. Civ. P. 23(e); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011) (en banc).

B. The Settlement Satisfies the Requirements of Rule 23.

In its preliminary approval Order, the Court certified a Settlement Class determining that it satisfied the requirements of Rule 23(a) and 23(b)(3). *See* D.I. 232, at ¶ 11. Nothing has changed since the Court's Order that should make the Court change its mind about the certification of a settlement class, so Plaintiffs will not repeat that discussion here. *See* D.I. 226, Opening Brief in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, for Certification of the Settlement Class, and for Approval of Notice Plan and Form of Notice, at 15-19.

C. The Settlement Is Entitled to a Presumptive Finding of Fairness.

Under Federal Rule of Civil Procedure 23(e), a settlement must be "fair, reasonable and adequate" to be approved. Fed. R. Civ. P. 23(e). *See also In re The Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998), *cert. denied, Krell v. Prudential Ins. Co. of Am.*, 525 U.S. 1114 (1999); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118 (3d Cir. 1990); *Walsh v. Great Atl. & Pa. Tea Co., Inc.*, 726 F.2d 956, 965 (3d Cir. 1983). In evaluating the settlement, the court is responsible for protecting the rights of the absent class members and is required to "independently and objectively analyze the evidence and

circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001) (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995))

"An initial 'presumption of fairness for the settlement is established if the court finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *In re Warfarin Sodium Antitrust Litig*., 212 F.R.D. 231, 248 n.15 (D. Del. 2002) ("*Warfarin I*") (quoting *Cendant*, 264 F.3d at 232 n. 18,) Here, those factors demonstrates that this Settlement is entitled to the presumption.

First, the Settlement negotiations plainly occurred at arm's-length. Over the course of more than a year, the parties engaged in two formal mediation sessions with Mr. Harkavy, as well as many telephone calls and emails. *See* D.I. 227, Declaration of Jason L. Lichtman in Support of Opening Brief re: Preliminary Approval of Settlement ('Lichtman Dec."), at ¶ 12. These negotiations were comprehensive, often spirited, and always at arm's length. *Id.* In between the formal mediation sessions, the Parties' counsel engaged in numerous one-on-one exchanges with the mediator regarding their respective positions, as well as communication directly between the Parties' counsel in an attempt to find common ground on potential settlement terms. *Id.* All the while, the Parties persisted in strenuously litigating the case.

Second, and as more fully described above, the parties commenced and conducted exhaustive discovery on all relevant issues, including discovery directed to damages suffered by Class Members. Plaintiffs sought, received and analyzed tens of thousands of pages of documents pertaining to the development, marketing and implementation of the Rate Renew

program and conducted six depositions of ING personnel rated to Rate Renew procedures and practices, and also deposed three of ING's experts. Plaintiffs also vetted and retained several experts in connection with this action, including experts capable of performing accurate, up-to-date damages analyses for the Class in the aggregate and for each category of monetary damages suffered by the Class. This discovery and analysis greatly informed Plaintiffs' approach to settlement negotiations and enabled them to seek and obtain the above-described benefits to Class Members.

Concerning the third factor, Class counsel and ING's counsel are experienced and well-respected attorneys in consumer protection and financial services class action litigation. The Parties' counsel unreservedly recommend this Settlement. Courts recognize "significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class." *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 731 (E.D. Pa. 1995); *see also In re Am. Family Enters.*, 256 B.R. 377, 421 (D.N.J. 2000) ("In determining the fairness, adequacy, and reasonableness of a proposed settlement, significant weight should also be given to the belief of experienced counsel that settlement is in the best interest of the class, so long as the Court is satisfied that the settlement is the product of good faith, arms-length negotiations." (quotations omitted)).

Finally, the response to the settlement from Class Members has been overwhelmingly positive. Among the approximately 115,000 individuals who received notice of the settlement, the Court has received objections from only six of them—a miniscule fraction of the overall Class. In addition, only 92 people have chosen to opt-out of the settlement—less than one-tenth of one percent of the total number of persons who received notice. In other words, over 99.9% of the Class members who received notice voiced no dissatisfaction with the terms of the

settlement whatsoever. This small percentage of opt-outs and objections qualifies for the presumption of fairness. *See McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 459 (D.N.J. 2008) (finding that 601 opt-outs and nine objections qualified for a presumption of fairness).

D. The *Girsh* Factors Counsel in Favor of Granting Final Approval.

District courts have broad discretion in determining whether to approve a proposed class action settlement. *Warfarin II*, 391 F.3d at 535. However, in determining whether the Settlement is fair and reasonable, courts in the Third Circuit consider the following factors, commonly known as the *Girsh* factors, as set forth in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975) :

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

See Girsh, 521 F.2d at 157. As set forth below, the application of each of these factors to the Settlement demonstrates the Settlement to be fair, reasonable and adequate.

1. Continued Litigation in this Case Would Be Complex, Expensive, and Prolonged

"The first factor 'captures the probable costs, in both time and money, of continued litigation." *Warfarin II*, 391 F.3d at 535-36 (quoting *Cendant,* 264 F.3d at 233). As the Court knows, this case has been extremely hard fought over the last three years, with extensive motion practice at nearly every turn and including full briefing and a decision on class certification. In fact, immediately prior to reaching a settlement, the parties had three fully briefed and contested

motions pending before the Court: (1) a motion by Plaintiff's to allow additional expert testimony, D.I. 192; (2) a motion by ING for Judgment on the Pleadings, D.I. 173; and (3) a motion by ING to amend the Class Definition, D.I. 196. Beyond the filed motions, the parties anticipated a round of summary judgment motion practice, as well as what promised to be an extensive round of motions *in limine* regarding expert testimony, before a class trial. This continued motion practice would have been prolonged and expensive for both sides, even without factoring in the potential time and expense of a trial in the case.

In addition, both sides had spent significant amounts of time and effort preparing expert witnesses in this case. While a significant portion of this work was done prior to settlement, much of it still remained. This expert preparation, judging from the work completed to date, would have been very expensive in time and money.

This Settlement saves the parties, the Court, and ultimately the Class, from these expenditures. In light of the significant savings realized from a settlement of this case, this factor counsels in favor of final approval.

2. <u>Class Reaction to the Settlement Was Overwhelmingly Positive</u>

This factor "attempts to gauge whether members of the class support the settlement." *Prudential,* 148 F.3d at 318. As noted above, even though individual direct notice was mailed to over 115,000 Settlement Class Members, there have been only six objections and only 92 requests for exclusion. These numbers are substantially lower than many other Third Circuit and other cases approving class settlements. *See, e.g., In re Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 269 (E.D.Pa. 2012) : (holding that 150 requests for exclusion were "virtually *de minimis* in light of the over 13,200 Notices of settlement that were sent (as well as published notices and press releases about the settlement)"); *McCoy*, 569 F. Supp. 2d at 459 (finding that 601 opt-outs and nine objections qualified for a presumption of fairness); *Stoetzner* , 897 F.2d 118-19

(holding that 29 objections in 281 member class – or 10% – "strongly favors settlement"); *Prudential*, 148 F.3d at 318 (affirming conclusion of district court that class reaction was favorable when 19,000 class members opted out of class of eight million and 300 objected); *In re Ikon Office Solutions Securities Litig.*, 194 F.R.D. 166, 175 (E.D. Pa. 2000) (settlement approved where there were 2,500 requests for exclusion from an original notice to 140,000 class members) ; *cf. Anderson v. Torrington Co.*, 755 F. Supp. 834, 847 (N.D. Ind. 1991) (granting final approval over objections from one-third of class members). The low ratio of objectors and opt-outs to Class Members in the case at bar shows the decisively positive response to the Settlement, and thus, the second *Girsh* factor weighs heavily in favor of final approval.

3. <u>Class Settlement Comes After Extensive Litigation and Discovery</u>

"The third *Girsh* factor captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Warfarin II,* 391 F.3d at 537 (internal quotation marks and citations omitted) .

In three years of litigation, the parties litigated the case as fully as it could have been litigated short of summary judgment and trial. See *supra* at 11.

Given the knowledge gained at this point in the case, Class counsel believes that settlement of the case at this stage is sensible and the best decision for the Class. *See Warfarin I,* 212 F.R.D. at 255 (approving a settlement after three years of litigation, with "voluminous documents . . . reviewed and numerous depositions taken and motions filed.") The third *Girsh* factor counsels strongly in favor of settlement.

4. <u>The Risks of Establishing Liability Counsel in Favor of Settlement</u>

The fourth *Girsh* factor "examine[s] what the potential rewards (or downside) of litigation might have been had interim counsel elected to litigate the claims rather than settle

them." *General Motors*, 55 F.3d at 814. "In other words, the court must evaluate the strengths and weaknesses of each case to determine whether settlement is actually a fair method of resolving claims." *Hamilton v. City of Wilmington,* No. 00-635, 2002 WL 1998376, at * 5 (D.Del. Aug. 26, 2002) .

Class counsel is confident that its legal and factual analysis of the case is correct. Nevertheless, Class counsel recognizes that there were significant challenges ahead that would have had to be overcome in order to succeed on summary judgment or at trial. At the time of settlement, ING had a pending motion to de-certify the Class that, if granted, would have likely wiped-out Plaintiff's ability to proceed in this matter. *See* D.I. 196-202. More fundamentally, Plaintiffs still needed to establish that the Rate Renew advertisements in question would indeed be interpreted by a reasonable consumer to promise the Rate Renew program for the life of the loan. Class counsel recognizes that this would be a highly contentious issue with a significant amount of risk. If the Court or a jury were to find that these advertisements did not make an explicit Rate Renew guarantee, then the Class would lose entirely.

In light of these risks, Class counsel believes that the substantial amounts that Class Members will receive pursuant to the settlement is good value for the class. *See Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 115 (E.D. Pa. 2004) (holding that the Court may "give credence to the estimation of the probability of success proffered by [Settlement Class Counsel], who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.") (internal quotation marks and citations omitted). The fourth *Girsh* factor counsels in favor of settlement.

5. <u>The Risks of Establishing Damages Counsel in Favor of Settlement</u>

The fifth *Girsh* factor, similar to the fourth, "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Cendant*, 264 F.3d at 238-39

(*quoting General Motors*, 55 F.3d at 816). "Because establishing damages will be contingent on establishing liability, the same concerns animate both of these elements of the *Girsh* test." *McCoy*, 569 F. Supp. 2d at 461.

The measure of damages in this case was a contentious issue in litigation. Both sides offered competing experts regarding the calculation of damages in this matter. *See* D.I. 192 (Motion to Permit the Expert Testimony of Dr. Marcia Kramer Mayer); D.I. 179 (Notice of Service of, *inter alia*, ING's rebuttal damages expert Bernard Woofley). The parties were set for a classic "battle of the experts" regarding the proper methods for calculating damages. Given the uncertainty inherent in any such "battle of the experts," Class counsel cannot be sure they would have been able to establish any damages, and if so, how much, for all or part of the Class. As such, this factor counsels in favor of settlement. *See Sullivan,* 667 F.3d at 322 (affirming the District Court's holding that "uncertainty attendant to such a battle [of the experts]" counseled in favor of settlement.)

6. **The Risks of Establishing and Maintaining a Class Throughout Trial Counsel in Favor of Settlement**

The sixth *Girsh* factor evaluates the risks of certifying and maintaining a class through a trial. "Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certified if the action were to proceed to trial." *Warfarin II*, 391 F.3d at 537 (quotation and citation omitted).

The Court had previously certified a Class in this case, covering ING mortgage customers in ten states. D.I. 116. The Court has also provisionally certified a settlement Class. D.I. 232. There is no guarantee, however, that either of these classes would be certified before or during trial, and this uncertainty further supports approval of the proposed Settlement. *Prudential*, 148

F.3d at 321 (noting that "a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable"); *see Egg. Prods*., 284 F.R.D. at 273 ("The Court of Appeals for the Third Circuit has recognized: There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." (quotation marks omitted)).

Such risk is particularly real in this case, as ING had a pending motion to de-certify the Class at the time of settlement. Although Class counsel feel strongly about their position in opposing that motion, they also must recognize the possibility that the Court could rule in favor of ING if the case were to return to active litigation. As such a ruling would diminish the possibility of recovery for the Class, this consideration has factored into Class counsel's evaluation of settlement. This factor favors settlement.

7. **The Presumed Ability of ING/Capital One to Withstand a Greater Judgment Does Not Undercut the Rationale for Settlement**

The Third Circuit has interpreted this seventh *Girsh* factor as concerning "whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. Class counsel presumes Capital One's ability to pay a larger settlement or judgment. However, "a defendant's ability to withstand a much higher judgment does not necessarily 'mean that it is obligated to pay any more than what the [class members] are entitled to under the theories of liability that existed at the time the settlement was reached." *Sullivan*, 667 F.3d at 323 (quoting *Warfarin II,* 391 F.3d at 538.

Class counsel focused primarily on whether the amount of the Settlement fund is fair, adequate, and reasonable, not on Capital One's ability to pay a larger judgment or settlement. Class counsel suggest that this factor does not undermine the fairness of the settlement. *See Sullivan*, *id.* ("At bottom, we agree that, in any class action against a large corporation, the

defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement.") (quoting *Weber v. Gov't Empl. Ins. Co.,* 262 F.R.D. 431, 447 (D.N.J. 2009) (internal quotation marks omitted).

8. The Proposed Settlement Is Reasonable In Light of the Best Possible Recovery and All Attendant Risk of Litigation

The eighth and ninth *Girsh* factors assess the reasonableness of the settlement "in light of its monetary and nonmonetary consideration." *Egg Prods.*, 284 F.R.D. at 274. These factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Warfarin II*, 391 F.3d at 538.

This Settlement offers substantial benefits to Class Members. Class counsel estimates that the average payment for each Class Member will be $175, with no claims process in which some Class Members who do not make a claim get zero. The settlement payment to each Class Member is tied directly to the additional costs the Class Member has borne in connection with its Rate Renewals and/or to the amount the Class Member has lost as a result of not having the opportunity to Rate Renew. Thus, the Settlement is designed to provide a relatively individualized measure of relief to Class Members that is tailored to their individual circumstances.

Recognizing that a settlement, by definition, involves Class Members receiving less than the full value of their claims, courts have commonly approved settlements that provide far less than the full value of the Class's claims. *See Warfarin II,* 391 F.3d at 538-39 (approving a 33%

settlement value); *Cendant,* 264 F.3d at 241 (approving a 36-37% settlement value).[6] The Third Circuit has also cautioned "against demanding too large a settlement ... after all, settlement is a compromise, yielding of the highest hopes in exchange for certainty and resolution." *General Motors*, 55 F.3d at 806.

Were Plaintiffs to prevail at trial and on appeal with respect to Price Differential Damages and prejudgment interest, Plaintiffs' expert concluded that Class Members in the certified Class would recover $22,255,937, Class members in California would recover $16,773,149, and Class members in the other states would recover $15,510,575—$54,982,641 in total. Lichtman Dec., at ¶ 13. Of course, Plaintiffs' expert calculations were vigorously disputed by ING and ING's own experts calculated only a fraction of that number. It is not possible based on available information to calculate aggregate Rate Spread Account damages, which, even after a successful trial, would need to be calculated on an individual basis. A $20,350,000 settlement thus represents 37% of known aggregate damages calculated by Plaintiffs' experts – and much more than the aggregate damages ING's expert calculated -- an excellent result for the Class and well within the range of values approved by the Third Circuit.

V. <u>CONCLUSION</u>

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

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[6] *See also In re Ins. Brokerage Antitrust Litig.,* 282 F.R.D. 92, 105 (D.N.J. 2012) (approving a settlement upon certification by Plaintiffs' experts that the settlement represented a "material percentage" of the full value of the claims) ; *In re Ikon,* 194 F.R.D. at 183-84 (approving 5.2% and 8.7% settlement values); *Barel v. Bank of America,* 255 F.R.D. 393, 402 (E.D. Pa. 2000) ; (approving a 5.2% settlement value in a consumer class action case).

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