No. 12-1526

United States Court of Appeals for the First Circuit

In re: Mortgage Foreclosure

No. 12-1839

Collette P. Fitzpatrick v. Mortg. Elec. Reg. Sys., Inc. et al.

No. 12-1720

Thomas D. Gammino v. Mortg. Elec. Reg. Sys., Inc. et al.

No. 12-1721

Julio Fonseca, et al. v. Mortg. Elec. Reg. Sys., Inc. et al.

No. 12-1768

Fritz Barionnette, et al. v. Mortg. Elec. Reg. Sys., Inc. et al.

Appeal from the United States District Court for the District of Rhode Island

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BRIEF OF *AMICUS CURIAE* RHODE ISLAND LEGAL SERVICES, INC.; BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW; NATIONAL CONSUMER LAW CENTER, INC.; DIRECT ACTION FOR RIGHTS AND EQUALITY; AND HOUSING NETWORK OF RHODE ISLAND IN SUPPORT OF PLAINTIFFS-APPELLEES IN AFFIRMANCE

Steven Fischbach (RI #7963)
Rhode Island Legal Services, Inc.
56 Pine Street, Suite 400
Providence, RI 02903
401-274-2652 x182

John Rao (#45867)
Geoff Walsh
National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
(617) 542-8010 x336

Mark Ladov (#1157221)
Matthew Menendez
Brennan Center for Justice at NYU School of Law
161 Ave. of the Americas, 12th Floor
New York, NY 10013
646-292-8354

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* Rhode Island Legal Services, Inc.; National Consumer Law Center, Inc.; Brennan Center for Justice at New York University School of Law; Direct Action for Rights and Equality; and Housing Network of Rhode Island each states that no parent corporation or publicly held corporation owns 10% or more of its stock.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Amici respectfully request leave to participate in oral argument of this case. As explained in the following section, *Amici* have a direct interest in the outcome of this appeal. *Amici* respectfully believe that their experience and expertise could assist the Court in the consideration of the facts and legal questions at issue. Therefore, *Amici* respectfully request leave to participate in oral argument of this case on the calendared date of February 5, 2013. If the Court grants leave, *Amici* are prepared to designate counsel for oral argument and comply with all local rules immediately upon that notice.

INTERESTS OF THE *AMICI*[1]

Rhode Island Legal Services (RILS) has provided legal assistance and representation to thousands of Rhode Island's low-income individuals and families for over four decades. RILS is now expanding to create a Foreclosure Prevention Project, as a result of a recent two-year, $1.57 million grant from the office of Attorney General Peter Kilmartin. RILS does not represent any clients in the group of consolidated cases currently before the Court of Appeals, but expects to represent clients in matters before the federal district court's Special Master in the future. Therefore, RILS has a direct interest in ensuring that Rhode Island's

[1] Pursuant to Rule 29(c)(5), *Amici* state that no counsel for a party has authored this brief in whole or in part and no person or entity, other than *Amici*, their members or their counsel, has made a monetary contribution to the preparation or submission of this brief.

federal mediation program remains in place, so that RILS's current and future clients are able to take advantage of the critical legal protections put in place there to help them save their homes.

The Brennan Center for Justice at N.Y.U. School of Law ("Brennan Center")[2] is a non-partisan public policy and law institute that focuses on core issues of democracy and justice, including the importance of equal access to justice for low-income families. The Brennan Center advocates nationally for the benefits of providing counsel and fair courts to homeowners facing foreclosure, in order to mitigate the costs of unnecessary foreclosures for families, communities and the economy as a whole.

The National Consumer Law Center ("NCLC") is a nonprofit advocacy organization that seeks to build economic security and family wealth for low-income and other economically disadvantaged Americans. NCLC is widely recognized as the nation's premier expert on foreclosure mediation programs, and has used its expertise to promote best practices around the nation.[3] NCLC submits this Brief on behalf of its low-income clients.

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[2] This brief does not purport to represent the opinions of N.Y.U. School of Law.

[3] *See, e.g.*, Geoff Walsh, National Consumer Law Center, *Rebuilding America: How States Can Save Millions of Homes through Foreclosure Mediation* (February 2012), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-foreclosure-mediation.pdf.

Direct Action for Rights and Equality (DARE) is a grassroots membership organization that works on a wide range of issues affecting low income and minority residents of Rhode Island. DARE has organized homeowners and tenants who face their loss of their homes as a result of foreclosures into a statewide Bank Tenant and Homeowner Association. The Association educates its members about the foreclosure process and connects them to legal and financial counseling services. Both DARE and the Association advocate for policies to ameliorate the impact of the foreclosure crisis such as a statewide foreclosure mediation law and a just cause eviction law for tenants and former homeowners who reside in foreclosed properties. One of the Association's members is a plaintiff in a case on the district court's foreclosure docket.

The Housing Network of Rhode Island (HNRI) is a state association of twenty non-profit Community Development Corporations (CDCs), whose activities include housing counseling for homeowners facing foreclosure by HUD certified counselors. HNRI's housing counselors help homeowners avoid foreclosure by negotiating loan modifications and obtaining foreclosure prevention assistance from Rhode Island's Hardest Hit Fund and other sources. HNRI also advocates for policies to ameliorate the impact of the foreclosure crisis on Rhode Island homeowners such as local ordinances requiring mediation between

homeowners and financial institutions prior to foreclosure as well as a statewide mediation law.

INTRODUCTION

Rhode Island, like the nation at large, remains mired in a foreclosure crisis. From January 2009 through December 2011 there were a total of 6,740 actual foreclosures filed throughout Rhode Island.[4] Another 896 foreclosure deeds were filed in the first six months of 2012.[5] In the third quarter of 2012, the state's mortgage delinquency rate was 8.71 percent.[6] If all of these distressed properties are lost to foreclosure, thousands of homeowners and tenants will lose their homes; lenders and investors will lose millions of dollars; and the state will lose millions more in lost revenues and public costs.

This crisis has taken hold of the docket of the Rhode Island federal court; the number of foreclosure-related cases before the court has exploded from a nominal number in prior years to a total of 752 cases active during 2012. (11-mc-0088-M-LDA, Doc. 1740, at 2.)[7] Accordingly, and after consulting with counsel for both

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[4] HousingWorksRI, *Foreclosures in Rhode Island: Third Annual Special Report* 3 (Spring 2012), http://www.housingworksri.org/sites/default/files/HWRISpRprt-Foreclosures2012.pdf.

[5] HousingWorksRI, *2012 Housing Fact Book* 59 (2012), http://www.housingworksri.org/sites/default/files/HWRIfactbook2012.pdf.

[6] *Fewer Reach Foreclosure, Even as Delinquencies Rise*, Providence Journal, Nov. 16, 2012, *available at* http://www.rhodeislandhousing.org/filelibrary/Fewer%20reach%20foreclosure,%20even%20as%20delinquencies%20rise,%2011-16-2012%20Projo.pdf.

[7] The Special Master's Third Report (11-mc-0088-M-LDA, Doc. 1740) is attached as an addendum to this brief.

sides, the court has used its authority to appoint a Special Master tasked with resolving these cases equitably and efficiently. As proven repeatedly by similar programs around the nation, settlement conferences help borrowers and lenders to negotiate affordable loan modifications that restore value to distressed mortgage loans and keep families in their homes.

The issue on appeal is whether this process is a proper use of the court's discretion, and whether it protects the rights of the parties. The record shows that the court's order, as implemented by the Special Master, was a proper exercise of the court's equitable and inherent powers. The process underway is not just fair and efficient; it will save millions of dollars for the parties and the state of Rhode Island. This Court should reject Appellants' claims and affirm the order of the district court.

STATEMENT OF FACTS

Procedural History of the Appeal

This appeal arises out of the response by the federal district court of Rhode Island to a barrage of foreclosure related lawsuits that were initially removed from state court by financial industry defendants. (*See* Brief of the Defendants-Appellants at 12.) To manage this large and growing docket, the district court's Chief Judge assigned all of these cases to a single judge and magistrate. After taking control of the docket, Judge John J. McConnell, Jr. met with counsel who

regularly conduct foreclosures in Rhode Island. Based on those discussions, the court issued a case management Order on August 26, 2011. The Order "established a Master Docket, called for liaison counsel, and stayed all mortgage foreclosure cases in order to manage its large docket and to allow an organized settlement process to proceed unencumbered by the distractions and burdens associated with litigation." *In re Mortgage Foreclosure Cases*, No. 11-mc-88-M-LDA, 2012 WL 3011760, at *2 (D. R.I. July 23, 2012).

Thereafter, pursuant to Fed. R. Civ. P. 53 and the Court's "inherent authority," Judge McConnell appointed former Bank of Rhode Island President and CEO Merrill Sherman as Special Master to oversee settlement conferences and case management. *Id.* He instructed the Special Master to use her banking expertise "to bring consumers and bankers together to accomplish a mutually acceptable solution," while "preserv[ing] in all respects the ability of the parties to have a trial on the merits if this administrative attempt at settlement failed." *Id.* The Special Master has "almost universally received the cooperation of Plaintiffs' and Defendants' counsel" in the settlement conference process. *Id.* However, some, but not all,[8] of the defendants in the Master Docket filed this interlocutory appeal (and the consolidated Petition for a Writ of Mandamus filed in Case No. 12-

[8] For example, Bank of America, historically the nation's largest servicer of residential mortgages, and its subsidiaries did not join in this appeal and have informed the Special Master that they "will continue to participate in the settlement process." *In re: Mortgage Foreclosure Cases*, 2012 WL 3011760, at *1 n.1.

1563) seeking to challenge this case management process. Judge McConnell denied those defendants' motion for a stay of the Special Master program pending appeal in an order that discusses the procedural history of the program at greater length. *See In re Mortgage Foreclosure Cases*, 2012 WL 3011760, at *1-3.

Successful Implementation of the Special Master Program

The Special Master's foreclosure mediation program evolved over the course of several months following her appointment on January 5, 2012, and continues to evolve during the pendency of this interlocutory appeal. After familiarizing herself with the caseload, and setting out initial case management procedures, she held a round of settlement conferences on 131 cases between August 7 and September 13, 2012. (11-mc-0088-M-LDA, Doc. 1740, at 5.) Since then, she has continued to refine the case management process with the input of the parties. This process culminated in the recent issuance of final scheduling rules and guidelines, including specific timelines for both plaintiffs and defendants. (11-mc-0088-M-LDA, Doc. 1740, at 48-59.)

Early in the program's formulation, in response to lenders' concerns that borrowers were getting a free ride, the Court ordered borrower/plaintiffs to make monthly use and occupancy ("U&O") payments into escrow during the pendency of the litigation. *See In re Mortgage Foreclosure Cases*, 2012 WL 3011760, at *3. These fees also begin to establish a payment history that can facilitate loan

modification discussions. (*See* 11-mc-0088-M-LDA, Doc. 299, at 3.) The Special Master holds plaintiffs' U&O payments in a non-interest bearing escrow account, and they can be used to reimburse lenders for property taxes and insurance, or as the parties see fit, once a case is settled. (11-mc-0088-M-LDA, Doc. 1740, at 53). The Special Master has collected over $1.5 million to date in U&O fees from plaintiffs who have defaulted on their mortgage loans. (11-mc-0088-M-LDA, Doc. 1740, at 12.) These payments more than cover any costs that the Appellants incur in participating in the conferences.

Most borrowers have successfully cooperated with this payment obligation; and, the Special Master has not hesitated to urge prompt dismissal of cases where she sees evidence that the plaintiffs are (in her words) "'gaming' the system . . . ." (11-mc-0088-M-LDA, Doc. 1740, at 25.) The Special Master has repeatedly recommended that the district court dismiss cases where the plaintiff has failed to make U&O payments, has failed to provide required information or respond to a lender's settlement offer, or has otherwise failed to negotiate in good faith. As of this date, at least 49 cases have been dismissed for such noncompliance. (11-mc-0088-M-LDA, Doc. 1740, at 13.)

The remaining cases have proven strong candidates for settlement. According to the Special Master's first public report on June 1, 2012 (prior to the docketing of this appeal), the majority of the cases then before her (including 92%

of the cases involving non-foreclosed properties, and 69% of the cases where the foreclosure was completed) involved "*employed* plaintiffs living in these properties as *primary residences.*" (11-mc-0088-M-LDA, Doc. 1740, at 15 (emphasis in original).) These borrowers potentially had the income available to negotiate a settlement that would save the plaintiff's home while mitigating the lender's losses.

The Special Master's optimism was borne out by the initial round of 131 conferences held between August 7 and September 13, 2012. (11-mc-0088-M-LDA, Doc. 1740, at 5.) Already, one-quarter of these cases have been successfully settled with a loan modification or "cash for keys" agreement. (11-mc-0088-M-LDA, Doc. 1740, at 13.) Fifteen homes have been saved through a loan modification – including five cases where the foreclosure had already been completed. (11-mc-0088-M-LDA, Doc. 1740, at 13.) Loan modification or home repurchase negotiations remain underway in 62 (or nearly half) of these cases. (11-mc-0088-M-LDA, Doc. 1740, at 13.) The total rate of successful loan modifications is likely to improve substantially, as the Special Master explains:

> Of the 83 non-foreclosed cases conference in the first round of 131, in 66% of the cases the parties either agreed to or are still in negotiations for loan modifications. Of the 48 foreclosed cases conferenced in the first round of 131, in 38% of the cases the parties either agreed to or are still in negotiations for loan modifications. Since the profile of the cases has shifted to more pre-foreclosures, this should bode well for negotiated, positive resolutions going forward.

(11-mc-0088-M-LDA, Doc. 1740, at 6.)

This high rate of settlement suggests that lenders and investors will save millions of dollars by participating in the program. The Special Master estimates the median mortgage balance of the loans on her docket as $224,000 (as of September 28, 2012). (11-mc-0088-M-LDA, Doc. 1740, at 29.) A study of loans in foreclosure in 2008 estimated that the average loss incurred by the owners of a loan is 57% of the loan's value each time a foreclosure was completed.[9] The foreclosure losses implicit in this scenario are staggering. With losses at this level, the owners of loans on the Rhode Island foreclosure docket are losing about $127,600 (57% of the average loan balance of $224,000) with each completed foreclosure. For the 697 cases on the conference docket as of December 31, 2012, a reasonable estimate of the aggregate losses to investors if all foreclosures are completed on all first mortgages would be $88,937,200. The defendants stand to save millions of dollars if settlements proceed at a rate consistent with similar conference and mediation programs around the country. On the other hand these proceedings will not impair defendants' legal right to foreclose in cases that cannot reach a negotiated settlement.

[9] Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 Conn. L. Rev. 1107 (2009). According to the study, the average value of a loan being foreclosed in the United States was $212,000. The average loss incurred per foreclosure was $124,000 (a loss of 57%). Foreclosure losses for second mortgages were typically 100% of value.

In short, the Special Master's program, which continues to evolve during the pendency of this appeal, is characterized by considered attention to efficient negotiations that hold both sides accountable. Contrary to the impression provided in the Appellants' briefs, settlement conferences have already generated substantial benefits to borrowers and lenders alike. Those benefits are likely to accrue much more quickly now that the process is fully underway.

ARGUMENT

I. The District Court's Order to Stay Litigation and Appoint the Special Master is an Appropriate Use of Judicial Authority.

A. *The District Court Had Inherent Authority to Stay Litigation and Appoint the Special Master in Order to Manage Its Docket Fairly and Efficiently.*

It is well-established that district courts possess considerable inherent power to manage litigation. *See, e.g., Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Zebrowski v. Hanna*, 973 F.2d 1001, 1003-4 (1st Cir. 1992); *Marquis v. F.D.I.C.*, 965 F.2d 1148, 1154 (1st Cir. 1992). This inherent power supplements and is not limited by those expressly granted to the courts under the rules of civil procedure. *Aoude v. Mobil Oil Corp*., 892 F. 2d 1115, 1119 (1st Cir. 1989). The First Circuit has explicitly upheld the district court's use of its inherent power to "order mandatory mediation []as long as the case is an appropriate one and the order contains adequate safeguards." *In re Atlantic Pipe*, 304 F.3d 135, 138 (1st Cir. 2002). The district court's exercise of its inherent power is reviewed

deferentially, applying the abuse of discretion standard. *Id*. at 145. Based on these standards, this Court should affirm the district court's decision to manage its foreclosure docket through the Special Master's conference program.

The hundreds of lawsuits comprising the district court's foreclosure docket are appropriate cases for the exercise of the Court's inherent authority. The order establishing the Special Master's office is consistent with settlement programs implemented by courts and legislatures to manage similarly exploding foreclosure dockets around the country. *See infra*, Argument § II.A. These programs have generated positive and cost-effective results, helping to restore income to lenders while keeping borrowers in their homes. *See infra*, Argument § II.B. These foreclosure cases are, thus, as the First Circuit explained in *Atlantic Pipe*, precisely the type of litigation for which a "fair and expeditious resolution [] often is helped along by creative solutions that simply are not available in the binary framework of traditional adversarial litigation." *In re Atlantic Pipe*, 304 F.3d at 145.[10] In cases such as these, "[m]ediation with the assistance of a skilled facilitator gives parties an opportunity to explore a much wider range of options, including those that go beyond conventional zero-sum resolutions." *Id*.

[10] As the district court explained, "while individual issues set a few of the cases apart from the pack, the Court determined that it would be most efficient to group the cases for case management purposes in order to manage this large docket and to facilitate settlement and/or loan modification discussions." *In re Mortgage Foreclosure Cases*, 2012 WL 3011760, at *2.

As the district court's exercise of its inherent power to require settlement conferences is entirely appropriate, the stay of proceedings pending the completion of negotiations is proper so long as sufficient procedural safeguards are in place. In *Atlantic Pipe*, the First Circuit concluded that the mediation order at issue lacked adequate safeguards, "although it d[id] not fall far short." *Id*. The safeguards absent from the *Atlantic Pipe* order included "limits on the duration of the mediation or the expense associated therewith . . . ." *Id*. at 147. By contrast, the Special Master program here includes numerous safeguards related to time and expense. By only requiring conferences where a plaintiff is willing and able to make U&O payments, and by routinely seeking dismissal when a borrower fails to pay or negotiate in good faith, the Special Master has protected lenders from unnecessary delay and expense and is *more* protective of lenders' rights than any other comparable program in the country. *See infra*, Argument § II.A. Moreover, the Special Master's program will not go on indefinitely, as she recently announced her intention to schedule 100 to 150 conferences monthly going forward, and "to schedule sufficient settlement conferences in the January/February to May timeframe to accommodate wind-down in the late Fall of 2013." (11-MC-0088-M-LDA, Doc. 1610, at 2-3.)

The district court's efforts are comparable to the Loss Mitigation Program ("LMP") implemented by the Rhode Island Bankruptcy Court, which was recently

upheld as an appropriate exercise of the bankruptcy court's inherent powers under the *Atlantic Pipe* decision. *In re Sosa* 443 B.R. 263, 267 (Bankr. D. R. I. 2011). The purposes of the Rhode Island bankruptcy court's LMP are "(1) to encourage and facilitate home mortgage modifications, and thereby reduce foreclosures; and (2) to alleviate Court congestion and delay." *Id.* at 267. In rejecting a challenge to its authority to implement such a program, the bankruptcy court emphasized that the LMP was "far less sweeping or invasive than the mediation order discussed in *Atlantic Pipe,"* and that the "LMP, as designed and intended, does not permit the mediation process to just drift, without direction." *Id*. The same can be said for the Special Master's Program.

The district court's authority to require negotiations "in good faith" is similarly well established, including by cases construing a court's comparable authority to manage pretrial conferences under Fed. R. Civ. P. 16.[11] A loan owner cannot negotiate in good faith over a modification or other alternative to

[11]*See* Fed. R. Civ. P. 16(f)(1)(B) (authorizing sanctions against party who "does not participate in good faith" in pretrial conference); *Negron v. Woodhull Hospital*, 173 Fed. Appx. 77, 2006 WL 759806 (2d Cir. 2006); *Nick v. Morgan's Foods, Inc.*, 99 F.Supp.2d 1056 (E.D. Mo. 2000), *aff'd* 270 F.3d 590 (8th Cir. 2001). *See also Bank of America N.A. v. Lucido*, 950 N.Y.S. 2d 721, 2012 WL 1292732 * 6 (N.Y. Sup. Ct. Apr. 16, 2012) (enforcing mortgagee's obligation to negotiate in good faith under court's general equitable powers); *HSBC Bank USA NA v. McKenna*, 952 N.Y.S. 2d 746, 767 (N.Y. Sup. 2012) (reviewing decisions on good faith participation in foreclosure settlement conferences).

foreclosure and at the same time insist on an immediate, unfettered right to complete a foreclosure. Good faith negotiation over settlement of a mortgage foreclosure is thus impossible without a stay of foreclosure of the mortgage at issue. The district court has used its inherent authority appropriately to ensure "good faith" discussions with a reasonable opportunity to succeed.

B. The District Court's Orders Are Appropriate Exercises of the Courts' Traditional Role in Scrutinizing the Fairness of Foreclosures.

In the American legal system, courts have traditionally played an active role in policing the conduct of parties to a foreclosure.[12] Rhode Island follows this traditional rule for its non-judicial foreclosures. *Manville Covering Co. v. Babcock*, 28 R.I. 496, 68 A. 421, 423 (1907) (mortgagee in exercising power of sale may not do so "in a manner merely arbitrary" but must "act in a business-like manner"). Courts have enjoined foreclosures where the party seeking this relief engaged in inequitable conduct or otherwise had "unclean hands,"[13] even in non-

[12] *Gelfert v. National City Bank of New York*, 313 U.S. 221, 232-33 (1941); *Honeyman v. Jacobs*, 306 U.S. 539, 543-44 (1939); *Richmond Mortgage Corp. v. Wachovia Bank*, 300 U.S. 124, 129-30 (1937). *See also In re Villa Marina Yacht Harbor, Inc.*, 984 F.2d 546, 547-548 (1st Cir. 1993) (upholding authority to require deposit of mortgage payments during foreclosure dispute as rooted in district court's inherent "equity powers[ ] to process litigation to a just and equitable conclusion" (citations omitted)).

[13] *See Fleet Real Estate Funding v. Smith*, 366 Pa. Super. 116, 530 A.2d 919 (1987); *Heritage Bank, N.A. v. Ruh*, 191 N.J. Super. 53, 465 A.2d 547 (1983); *Brown v. Lynn*, 392 F. Supp. 559, 563 (N.D. Ill. 1975).

judicial foreclosure states such as Rhode Island.[14] Where there are viable alternatives to foreclosure and the lender has engaged in a pattern of bad faith negotiations to explore those alternatives, foreclosure is clearly inequitable and should not proceed. The district court's settlement conferences are designed to deter unnecessary and inequitable foreclosures.

The Supreme Court held long ago that restrictions on the exercise of foreclosure remedies do not violate constitutional limits, even when stays of foreclosure and other prohibitions on the collection of mortgage debt may last for several years. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (Minnesota court's granting of two-year stay of foreclosure conditioned on borrower's payment of fair market rental value of property as determined by court did not violate Contracts Clause); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945) (upholding New York ban, in effect since 1933, on collection of principal on mortgage debt). While these rulings specifically addressed challenges to state legislation, the Supreme Court noted that the state statutes in question were

[14] *See Wells Fargo Home Mortgage, Inc. v. Neal*, 922 A.2d 538 (Md. 2007) (applying general equitable principles, court may enjoin non-judicial foreclosure sale where lender did not comply with federal loss mitigation guidelines); *Ghervescu v. Wells Fargo Home Mortgage*, No. E041809, 2008 WL 660248 (Cal. App. Mar. 13, 2008) (unpublished), *decision after remand* 2010 WL 4621734 (Cal. App. Nov. 16, 2010) (same).

built upon a foundation set by centuries of court regulation of foreclosures as part of their inherent judicial powers. *Blaisdell*, 290 U.S. at 446-47. Lenders have no protected property right to the exercise of a particular foreclosure remedy. *See Richmond Mortgage Corp. v. Wachovia Bank*, 300 U.S. 124, 131 (1937).

C. The Issues Addressed in the Conference Program Fall Well Within the District Court's Subject Matter Jurisdiction.

The district court has Article III authority to adjudicate these cases. Borrower-plaintiffs seek to prevent the loss of their homes to foreclosure; they have plainly demonstrated a "concrete and particularized injury in fact" that could be remedied by the court.[15] There is a substantial body of evidence raising concerns about unlawful bank practices,[16] and courts have found that borrowers have standing to challenge improper foreclosures based on such misconduct. *See In re: Lacey*, 480 B.R. 13, 35 (Bankr. D. Mass. 2012) ("[The borrower] has

[15] *See Bailey v. Wells Fargo Bank, NA*, 468 B.R. 464, 475-76 (Bankr. D. Mass. 2012) ("The Debtor has standing to challenge the validity of the Foreclosure Sale because she has demonstrated 'a concrete and particularized injury in fact, a causal connection that permits tracing the claimed injury to the defendant's actions, and a likelihood that prevailing in the action will afford some redress for the injury.'" (quoting *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 317 (1st Cir.2012)).

[16] For example, federal agencies and state governments, including Rhode Island, recently signed a $25 billion settlement with the five largest mortgage servicers over "robo-signing" and other unlawful foreclosure practices. Government continues to investigate and prosecute claims relating to MERS and improper securitization. *See* Gretchen Morgenson, *JPMorgan Unit Is Sued Over Mortgage Securities Pools*, N.Y. Times, Oct. 1, 2012.

standing to challenge the validity of the foreclosure sale to the extent that there is an issue as to whether the entity conducting the foreclosure sale was the actual holder of the mortgage by way of assignment at the time of the notice and sale.").

Many courts agree borrowers have standing to address the legal problems spawned by the securitization of mortgage debt and the current foreclosure crisis. Certain claims focus on the foreclosing party's conduct in reviewing loss mitigation options before foreclosure.[17] Others challenge the authority to foreclose based on defects in documentation of loan ownership. Although all of these issues have been addressed extensively in other jurisdictions, the Rhode Island Supreme Court has not had occasion to rule on them.[18]

[17] *See, e.g., In re JP Morgan Chase Mortgage Modification Litigation*, No. 11–md–02290–RGS, -- F. Supp. 2d --, 2012 WL 3059377 (D. Mass. July 27, 2012); *In re Bank of America Home Affordable Modification Program (HAMP) Contracts Litigation*, 2011 WL 2637222 (D. Mass July 6, 2011).

[18] By contrast, the Supreme Judicial Court of Massachusetts, which like Rhode Island is a non-judicial foreclosure state that follows the "title theory" of mortgages, has found that borrowers have standing to challenge the validity of foreclosures based upon defective loan documentation or a party's failure to hold the mortgage and note. *See Eaton v. Fed. Nat'l Mortgage Ass'n*, 462 Mass. 569 (2012) (foreclosing party must be current holder of note); *Bevilacqua v. Rodriguez*, 460 Mass. 762, 955 N.E. 2d 884 (2011) (foreclosure sale without assignment of mortgage cannot convey valid title to purchaser after sale); *U.S. Bank Nat'l Association v. Ibanez*, 458 Mass. 637, 649, 941 N.E. 2d 40, 51 (2011) (foreclosure sale void where foreclosing party was not current assignee of mortgage).

In any event, the merit of the parties' claims does not affect the authority of the court to hear and manage this docket.[19] None of Appellants' standing claims are ripe for appeal, as the district court has not ruled on them. Appellants have no right to appeal based on an imaginary rule that litigants are entitled to get a ruling from a federal judge by a specific date.

The Appellants assert that a Michigan decision supports a general claim that borrowers cannot challenge a lender's authority to conduct a non-judicial foreclosure sale on the grounds of a defective mortgage assignment. *Livonia Properties Holdings, L.L.C. v. Farmington Road Holdings, L.L.C.*, 717 F. Supp. 2d 724 (E.D. Mich. 2010), *aff'd*, 399 Fed. Appx. 97 (6th Cir. 2010). Courts in Michigan have not given the Appellants' simplistic gloss to this decision. Both

[19] The magistrate judge in *Fryzel v. Mortgage Electronic Registration Systems, Inc.*, No. CA 10-352 M, 2011 WL 9210454 (D. R.I. June 10, 2011) found subject-matter over that case, quoting the Fifth Circuit to explain:

> [W]hether or not a particular cause of action authorizes an injured plaintiff to sue is a merits question, affecting statutory standing, not a jurisdictional question, affecting constitutional standing. In the words of the Supreme Court, once a plaintiff has suffered sufficient injury to satisfy the "case and controversy" requirement of Article III, "jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."

Id. at 31 n.22 (quoting *Blanchard 1986, Ltd. v. Park Plantation, LLC*, 553 F.3d 405, 409 (5th Cir. 2008) (citation omitted))

before and after the *Livonia Properties* decision, courts in Michigan have invalidated foreclosures conducted without a valid mortgage assignment.[20]

The Appellants assert lack of "standing" as a broad shield against virtually any claims that homeowners may wish to bring against them. Given the industry's troubles related to foreclosure documentation and implementation of loss mitigation programs, the desire for such a silver bullet defense is understandable but meritless. At a minimum, it needs to be asserted and tested in real cases, not proffered as a matter of conjecture.

II. The District Court's Order Furthers the Interests of the Parties and the Public in a Just and Efficient Resolution of Rhode Island's Foreclosure Crisis.

A. The District Court's Order is Consistent with Judicial Management of Foreclosure Dockets in Other Jurisdictions.

Like the federal courts, state courts have the inherent power to control their dockets in order to promote settlements and enhance judicial efficiency. Since the foreclosure crisis began in 2008, several state supreme courts have ordered conference and mediation programs designed to encourage settlement of mortgage foreclosure cases by removing them from the general trial track and requiring the parties to participate in loss mitigation reviews under the supervision of a third

[20] *See Davenport v. HSBC Bank*, 275 Mich. App. 344, 739 N.W. 2d 383 (2007); *Lamie v. Federal Home Loan Mortgage Corp*., No. 1:11–cv–156, 2012 WL 1835243, *3-4 (W.D. Mich. May 21, 2012); *Brezzell v. Bank of America*, No. 11–11467, 2011 WL 2682973, *4 n.3 (E.D. Mich. July 11, 2011) (stating that "standing" argument raised by many lenders to dismiss challenges to foreclosures based on invalid assignments is a "bit of a red herring").

party. In 2009, the New Jersey Supreme Court promulgated a rule requiring these conferences statewide.[21] Ohio's Supreme Court issued a general rule for mandatory foreclosure mediation programs that county courts may adopt and revise based on their needs.[22] Courts in several of Ohio's most populous counties, including those serving Cleveland, Toledo, Columbus, and Akron, have had foreclosure mediation programs in effect since 2008.[23] The president judge of the Delaware Superior Court issued an administrative order creating a uniform statewide foreclosure mediation program in 2009.[24] These programs continue to serve thousands of parties in their respective states.[25]

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[21] New Jersey Admin. Office of the Courts, *Foreclosure Mediation* (Oct. 2012), www.judiciary.state.nj.us/civil/foreclosure/11290_foreclosure_med_ info.pdf.

[22]*See* Supreme Court of Ohio & the Ohio Judicial System, *Foreclosure Mediation Resources*, www.supremecourtofohio.gov/foreclosure (last visited Jan. 8, 2013) (model procedures and forms).

[23]*See, e.g.,* Cuyahoga County Pleas Court Annual Reports, http://cp.cuyahogacounty.us/internet/Forms.aspx (last visited Jan. 8, 2013).

[24]Superior Court of the State of Delaware, *Residential Mortgage Foreclosure Mediation Program Admin Directive No. 2011-12* (Jan. 20, 2011), http://courts.delaware.gov/Superior/pdf/Administrative_Directive_2011_2.pdf. This program was later expanded under state statute.

[25] In 2009, the Supreme Court of Florida implemented a statewide mandatory mediation program for foreclosure cases. The Florida court terminated this program in 2011, not because of any inherent defects, but in response to reports of lenders' widespread evasion of the program's requirements. *See* Supreme Court of Florida, *In re Managed Mediation Program for Residential Mortgage Foreclosure Cases*, No. AOSC11-44 (Dec. 19, 2011), www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/12-19-2011_Order_Managed_Mediation.pdf; Assessment Workgroup for the Managed Mediation Program for Residential

Many local state courts have used similar discretion and authority to implement conference or mediation programs for foreclosure lawsuits. The Philadelphia Court of Common Pleas led the way when in 2008 the Court's president judge implemented a "Residential Mortgage Foreclosure Diversion Pilot Program."[26] Under that order, sheriff sales were stayed pending completion of conciliation conferences as documented by the filing of a certificate of completion.[27] Acting under similar authority, other Pennsylvania counties and judicial districts serving Chicago, Milwaukee, Santa Fe, and Louisville have initiated their own foreclosure mediation or conference programs.

Several bankruptcy courts, including the Bankruptcy Court for the District of Rhode Island, have set up conference programs to address loss mitigation issues in foreclosures.[28] The Rhode Island court established its mandatory conference

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Mortgage Foreclosure Cases, *Report to Florida Supreme Court* 4 (Oct. 21, 2011), www.floridasupremecourt.org/pub_info/documents/foreclosure/10-21-2011_Workgroup_Final_Report.pdf.

[26]*See* Philadelphia Court of Common Pleas, *Residential Mortgage Foreclosure Diversion Program*, http://fjd.phila.gov/mfdp (last visited Jan. 8, 2013).

[27]*Id. See also* Joint Gen. Court Regulation No. 2008-01, *available at* http://www.courts.phila. gov/pdf/regs/2008/2008-01-Order-Re-July-1-2008-Sheriff-Sale.pdf.

[28]*See* U.S. Bankruptcy Court, District of Rhode Island, *Local Bankruptcy Rules and Forms*, App. IX (Sixth Amended Loss Mitigation Program and Procedures), http://www.rib.uscourts.gov/newhome/rulesinfo/flashhelp/Local_Rules.htm; John Rao, *Bankruptcy Courts Respond to Foreclosure Crisis With Loss-Mitigation Programs*, 30 Am. Bankr. Inst. L. Rev. 14 (March 2011).

program in late 2009, and has routinely revised its loss mitigation order when "better practices have been identified for improving the program and procedures and its forms."[29] As noted, the bankruptcy court affirmed this program as an appropriate exercise of the court's inherent powers under First Circuit authority. *See In re Sosa* 443 B.R. at 267.

The district court's program is also fully consistent with the statutes enacted by eleven states and the District of Columbia since 2008 mandating mediations or conferences in foreclosure cases. Six of these laws are in now effect in judicial foreclosure states[30] and six are in place in non-judicial foreclosure jurisdictions.[31]

The Special Master appointed by the district court recently issued proposed rules for scheduling document exchanges and conferences that are similar to those in effect in other foreclosure settlement conference programs around the country. (11-mc-0088-M-LDA, Doc. 1740, at 48-59.) The major difference between the

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[29] *See* U.S. Bankruptcy Court for the District of Rhode Island, General Order 11-009, adopting Sixth Amended Loss Mitigation Program and Procedures, *available at* http://www.rib.uscourts.gov/sites/default/files/Rules/General_Orders/11-009.pdf.

[30] Connecticut (Conn. Gen. Stat. Ann. § 8-265ee (2008)); Delaware (Del. Code tit. 10 § 5062C (2012)); Indiana (Ind. Code § 32-30-10.5-8(2009)); Maine (Me. Rev. Stat. tit. 14 § 6321-A (2009)); New York (N.Y. C.P.L.R. 3408 (McKinney 2008)); Vermont (Vt. Stat. Ann. tit.12 § 4631, *et seq*. (2009)).

[31] Hawaii (S.B. 651, 26th Leg. (2011), amending Haw Rev. Stat. § 667-1); Maryland (H.B. 472, 427th Sess. (2010)); Nevada (Nev. Rev. Stat. Ann. § 107.086 (2009)); Oregon (S.B. 1552, 76th Leg. (2012)); Washington (Wash. Rev. Code § 61.24 (2009), *et seq*.); District of Columbia (D. C. Code § 42-815.02 (2011)).

Special Master's program and the examples cited above is that the Special Master has been far more protective of lenders' interests, by uniquely requiring borrowers to make ongoing "Use and Occupancy" payments while their cases are pending. The Master has recommended, and the court has approved, a number of case dismissals when borrowers failed to make these payments. (11-mc-0088-M-LDA, Doc. 1740, at 6.) With the exception of a seldom-used optional provision of the Indiana conference law, none of the more than twenty foreclosure conference programs in the country have required that borrowers make payments as a condition to participation in settlement conferences.

B. Foreclosure Conference Programs Benefit Both Lenders and Homeowners.

As explained in the Statement of Facts, the Special Master's program is already producing dividends for both lenders and borrowers. These benefits are consistent with the positive results demonstrated by foreclosure conference programs nationwide.

For example, The Reinvestment Fund's evaluation of the Philadelphia Diversion Program described above concluded that settlement conferences helped keep borrowers in their homes.[32] Seventy percent of homeowners eligible to

[32]*See* The Reinvestment Fund, *Philadelphia Residential Mortgage Foreclosure Diversion Program: Initial Report and Findings*, (June 2011), *available at* http://www.trfund.com/resource/downloads/policypubs/Foreclosure_Diversion_Initial_Report.pdf.

participate in the diversion program appeared for their settlement conferences, and an agreement was reached in thirty-five percent of those cases.[33] The eviction rate in diversion-eligible cases was reduced nearly five-fold.[34] These solutions were sustainable.[35] And the settlement program did not create additional delays: on average, cases remained in the diversion program for fifty-three days, well within the ten-month time frame typical for the completion of a foreclosure in which the homeowner never appears.[36]

Similar programs in other jurisdictions have achieved comparable results. Data provided by the Connecticut Judiciary covering the period from July 2008 to May 31, 2012 indicates that its foreclosure settlement program completed mediations in 13,844 foreclosure cases. Of the homeowners completing mediation, 55% received permanent loan modifications. Sixty-seven percent of the

[33] *Id*. at 9–11.

[34] *Id.* at 23 (finding that twenty-seven percent of borrowers who would have been eligible for conferences lost their homes before implementation of the diversion program, compared to 5.7% of borrowers in conferences during a comparable six-month period).

[35] *Id*. at 15 (finding 87.5% of homeowners who reached agreements in diversion between June 2008 and June 2009 were still in their homes as of March 31, 2011).

[36] *Id*. at 12.

homeowners completing mediations reached settlements that allowed them to remain in their homes.[37]

Mortgage servicers make most of the critical decisions related to loss mitigation and foreclosures. The servicers' financial incentives do not always align with those of the owners of securitized mortgage debt.[38] Servicers have incentives to pursue foreclosure even when this option does not ultimately benefit the loan owners as much as a loan modification. The problems with mortgage servicers' implementation of major loan modification efforts are well documented.[39] Common problems include lost documents, failure to adhere to time frames for reviews, lack of notices to borrowers of decisions, invalid reasons for denials or cancellations of modifications, and conducting sales before the loss mitigation review has been completed. Foreclosure conferences cut through these

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[37] *See* State of Connecticut, *Judicial Branch Statistics: Foreclosure Mediation Program* (2012), *available at* http://www.jud.ct.gov/statistics/FMP/default.htm.

[38] *See* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755 (Dec. 2011); American Association of Mortgage Investors, White Paper, *The Future of the Housing Market for Consumers After the Housing Crisis: Remedies to Restore and Stabilize America's Mortgage and Housing Markets* (Jan. 2011) *available at* http://the-ami.com/wp-content/uploads/2011/01/AMI_State_AG Investigation_ Remedy_Recommendations_Jan_2011.pdf.

[39] U.S. Gov't Accountability Office, *Foreclosure Mitigation: Agencies Could Improve Effectiveness of Federal Efforts with Additional Data Collection and Analysis*, Report No. GOA-12-296 (June 2012); U.S. Gov't Accountability Office, *Troubled Asset Relief Program: Results of Housing Counselor Survey of Borrower Experiences in the HAMP Program*, Report No. GOA-11-367R (May 2011).

problems and focus on rational decisions that mutually benefit owners of the loans and homeowners.

C. The Fees Required for Foreclosure Conferences are Reasonable Given the Savings Generated for the Parties.

Appellants complain that under the Rhode Island order, all foreclosing servicers and lenders must pay in the aggregate several hundred thousand dollars for the costs of the settlement conferences. In their view, this is exorbitant and unfair; yet in the context of the current American foreclosure crisis, it is not unreasonable at all. The program has already collected over $1.5 million from otherwise non-performing loans and these funds will be available to compensate loan owners for any costs they incur through participation. Already, loan owners are realizing substantial savings through case settlements. *See supra*, at 5-7. Furthermore, the Rhode Island order covers its costs with revenue collected from both borrowers and loan owners. By contrast, many foreclosure conference and mediation programs finance their operations through charges assessed *solely* to foreclosing parties. These are typically a surcharge to a document filing fee associated with a judicial or non-judicial foreclosure. When broken down on a per-case basis, the fees collected in Rhode Island are comparable to those charged to foreclosing parties elsewhere.[40]

[40] Programs that routinely assess these types of charges for each foreclosure include: the District of Columbia ($300), Florida ($400), Hawaii ($350), Maine

By avoiding foreclosures, the cost savings attributable to the Special Master's program extend beyond associated decreases in property values.[41] The indirect cost savings are more extensive.[42] These include loss in value to neighboring properties, lost property tax revenues, and the costs governments incur in inspecting and maintaining foreclosed properties.[43] Local governments incur costs ranging from unpaid water and sewer bills to police services related to foreclosed properties.[44] Many loans in foreclosure are federally-guaranteed and foreclosure-related losses are borne by taxpayers. Even if the Rhode Island program prevents foreclosures in only a small proportion of the cases, the program will have provided significant benefits for its cost.

($200), Maryland ($300), Nevada $200), Vermont (lender pays for cost of mediation at rate agreed upon by mediator), and Washington State ($250).

[41] *See supra* note 9.

[42] *See, e.g,*. United States Congress, Joint Economic Committee, *Sheltering Neighborhoods from the Subprime Foreclosure Storm* (Apr. 2007); G. Thomas Kingsley, Robin E. Smith, and David Price, *The Impact of Foreclosure on Families and Communities: A Primer* (July 2009).

[43] *See* John P. Harding et al., *The Contagion Effect of Foreclosed Properties* (Social Science Research Network, Working Paper No. 1160354, 2008).

[44] *See* Ingrid Gould Ellen, Johnanna Lacoe, and Claudia Ayana Sharygin, *Does Foreclosure Cause Crime?* Furman Center for Real Estate Urban Policy (2011) (showing that a single foreclosed home on a block can lead to as much as a 5.7% increase in violent crime).

III. Appellants' Remaining Arguments Lack Merit.

Appellants contend that the stay included in the order establishing the foreclosure docket is an injunction and deprives them of procedural due process rights. Assuming, *arguendo*, that the stay acts as an injunction, it does not deprive Appellants of any due process rights. Neither due process nor Fed. R. Civ. P. 65 requires that a person be named as a defendant or served with a summons and complaint in order to be subject to a court order. *See Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945); *See also* Fed. R. Civ. P. 65(d). An attorney or servicer legitimately unaware of the stay is protected from any sanctions by the procedures surrounding contempt enforcement.[45] Moreover, those attorneys and mortgage servicers who appear on the foreclosure docket and routinely conduct foreclosures in Rhode Island cannot credibly claim they are blindsided by the stay. Those same attorneys have been intimately involved in the development of the foreclosure docket and have clear notice of the terms of the stay.

Amici dispute the applicability of the Anti-Injunction Act, 28 U.S.C. § 2283 to these proceedings, (Petition for Writ of Mandamus p. 16), even assuming, *arguendo*, that the district court's stay order was equivalent to an injunction. The Anti-Injunction Act can never apply in instances where no judicial proceedings

[45]*See Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 42 (1st Cir. 2000) ("[T]he adjudicative framework surrounding contempt proceedings fully protects nonparties' constitutional rights.").

have been commenced in a state court.[46] Furthermore, an express exception to the Act allows federal courts to enjoin state court proceedings "where necessary in aid of its jurisdiction." 28 U.S.C. § 2283. This exception applies in particular to *in rem* actions.[47]

Nor does the Anti-Injunction Act defeat the federal court's subject matter jurisdiction.[48] As with their broad attacks on borrowers' standing, apparently, Appellants view the district court as unwilling or not competent to rule on the merits of each case, including jurisdictional questions. Instead, Appellants ask this court to rule even though the district court has yet to address either the merits of claims or the jurisdictional issues related to those claims.

Appellants contend that in a small number of the cases on the foreclosure docket, the district court's jurisdiction is barred by final judgments for eviction of the homeowner entered in state court post-foreclosure eviction proceedings, citing the *Rooker-Feldman* doctrine. (Petition for Writ of Mandamus p. 17.) Even where

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[46]*See Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 n. 6 (1st Cir. 1988); *See also* Wright, Miller & Cooper, 17A *Fed. Prac & Proc. Juris.* § 4222 ("But the statute has no application until the proceedings have begun. An injunction can issue from a federal court restraining a party from instituting state proceedings.").

[47]*See James v. Bellotti*, 733 F.2d 989, 993 (1st Cir. 1984). *See generally McNeill v. New York City Housing Authority*, 719 F. Supp. 233, 256 (S.D.N.Y. 1989) (federal court can enjoin pending state court eviction actions under "necessary in aid of jurisdiction exception" to Anti-Injunction Act).

[48]*See Gloucester Marine Railways Corp., v. Charles Parisi, Inc*., 848 F.2d 12, 15 (1st Cir. 1988) ("The Act is not strictly jurisdictional; it merely deprives the federal courts of the power to grant a particular form of equitable relief.").

eviction judgments have been entered, the *Rooker-Feldman* doctrine does not automatically divest the federal court of jurisdiction over all borrowers' claims. First, many borrowers have brought claims that could not have been resolved in an eviction proceeding. In order to address those claims, the court need not overturn a state court eviction judgment, which addresses only possessory rights to the residence. It does not address the parties' monetary claims, including deficiency claims of the lender and monetary claims the borrower may have against parties to the foreclosure. Furthermore, the parties may still negotiate over "cash for keys" after an eviction judgment. Second, in certain instances the borrowers may raise claims involving fraud or other misconduct related to a party's conduct in conducting a foreclosure. An exception to the *Rooker-Feldman* doctrine allows the federal court to determine claims that are not attacking the action of the state court itself. *See Bradbury v. GMAC Mortgage LLC*, 780 F. Supp. 2d 108, 113 (D. Me. 2011) (allowing claim against mortgage lender to proceed).

CONCLUSION

For the foregoing reasons, *Amici* respectfully ask this Court to deny Appellants' request to vacate the Amended Order; deny the request for a writ of mandamus ordering the district court to modify the Amended Order; and affirm that the district court has properly used its authority to manage its docket and encourage equitable results in foreclosure-related litigation.

Respectfully submitted:

/s/ *Steven Fischbach*
Steven Fischbach (RI #7963)
Rhode Island Legal Services, Inc.
56 Pine Street, Suite 400
Providence, RI 02903
401-274-2652 x-182

/s/ *Mark Ladov*
Mark Ladov (#1157221)
Brennan Center for Justice at NYU School of Law
161 Ave. of the Americas, 12th Floor
New York, NY 10013
646-292-8354

/s/ *John Rao*
John Rao (#45867)
National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
(617) 542-8010 x-336

Dated: January 16, 2013

ADDENDUM

SPECIAL MASTER'S THIRD REPORT

JANUARY 8, 2013

In re: Mortgage Foreclosure Cases **Misc. No. 11-mc-M-LDA**

SPECIAL MASTER'S THIRD REPORT

January 8, 2013

Please accept this report as an update of my activities since my October 4 report. Additionally, I will provide a summary of my activities and progress in 2012.

As of December 31, 2012 there were 697 cases under my purview, and over the course of 2012 there had been a total of 752 cases.[1] I have received Appendix A's from plaintiffs in 704 of these cases. Unless otherwise noted, all references and statistical information relate to those 704 cases. The caseload is up significantly from the 228 cases pending as of January 31, 2012.

Of the 752 cases referenced above, 55 cases pending during 2012 have been dismissed, largely for noncompliance.

I. Profile of the Plaintiffs.

A. Statistical Profile – Existing Caseload

Of the 704 cases in which we have Appendix A information, in 262 (or 35%) of them, the properties already have been foreclosed. With respect to the 262 cases involving foreclosed property, 204 of the plaintiffs (or 78%) still live there as a principal residence. Of those 204 cases, in 179 of them (or 69% of the foreclosed population), the primary and/or co-borrowers are employed.

With respect to the 442 cases involving non-foreclosed properties, 392 of the plaintiffs (or 89%) still live there as a principal residence and of these persons, 361 (or 82%) of the primary and/or co-borrowers are employed.

[1] Because of the mechanics of the way cases are transferred from the Court docket to the Special Master database, the cases existing in our database as of December 31, 2012, include only those filed on or before December 17, 2012. The information in this Report is therefore derived from those cases and does not include any cases filed between December 18 and 31, 2012, inclusive.

The median original mortgage size was $226,194. Only 44 of the 704 mortgages were over $400,000.

A fuller summary of the information tabulated from the completed Appendix A forms submitted by the plaintiffs is contained in Tab 1.

Other than the shift to a majority of the cases being non-foreclosed properties, I do not see any statistically significant difference between the profile of the plaintiffs involved in the cases pending with the Court at or about the time of my appointment and those pending now.

The message that can and should be drawn from this information is that the overwhelming majority of these cases can and should be settled through appropriate loan modifications. These are employed people living in their homes who desire to stay and more likely than not have the capacity to repay an appropriate level of debt.

B. Commentary

As this serves as a year-end summary, I think a portion of my October 4 report bears repeating. There is no reason to believe the statistical information set forth below has changed in any material respect.

> Given the mortgage sizes involved, most of which were granted at a high point of the mortgage market, we are dealing with modest housing. Unfortunately, based on the information we are seeing, these properties, generally, have been very hard hit by valuation declines.
>
> As a result of the recent settlement conferences, we have relatively current information on 63 properties which had first mortgages originally $400,000 or less. The mortgages ranged in size from $80,000 to $400,000.
>
> Seventy-three percent (73%) of these houses now have first mortgages that are significantly underwater. The amount underwater ranges from $25,000 to $194,000. The average underwater amount is $165,000 and the median is $79,000. So a typical profile might look like a mortgage of

$255,000 on a house now estimated to be worth $130,000 with an overhang of $125,000; or a $210,000 mortgage on a house now estimated to be worth $153,000 with an overhang of $57,000.

Additionally, given conversations with some of plaintiffs' counsel and cursory review of some of the financial information supplied, it is of concern that many of these plaintiffs overreached in assuming the debt loads they did and remain relatively naïve in what they can afford and what is realistic. Please note that while I believe people are responsible and accountable for their own lack of financial acumen, given the nature of these mortgages, I am concerned that they had plenty of "help" from mortgage originators who convinced the plaintiffs that they were making a financially savvy real estate investment and could afford it. And for better or worse, many people believe if the "bank" lets you have the money, you can afford it.

In the previous paragraph, I referenced the "nature" of these mortgages. All are securitized product. But more importantly than that, from what I can see, virtually none of these mortgages were originated by any bank or credit union that operates locally (i.e., in the State of Rhode Island) with the possible exception of Bank of America and to a much more limited extent, RBS Citizens. Virtually all these mortgages seem to be the product of originations from mortgage brokers or other "outside" lenders that were then operating in what I assume was the "subprime" space.

Finally, there is no question in my mind that some of the plaintiffs are "gaming" the system. However, there also is no question in my mind that the majority of them are not. They are good people who for a variety of reasons (mixed in most cases – from being too aspirational, being too naïve, or being caught up in the real estate boom) overreached and are now suffering consequences in some ways not of their making.

II. Financial Information.

Sullivan & Company CPAs, a mid-sized local accounting firm, was retained early on to assist with handling the Special Master's numerous administrative responsibilities, including, but not limited to, database development, network and email hosting and administration, office space, clerical support, billing, processing, bookkeeping, payroll and other financial matters.

We have billed and collected over $1,500,000 in "use and occupancy" payments. We now hold that amount in escrow. Fees for services rendered and expenses incurred through November 30, 2012 aggregated $323,371.70.

A simple balance sheet is attached as Tab 2.

III. Progress Toward Settlement(s).

I will break this report into several parts, each of which will contain comments and observations. As of December 31 we had scheduled 214 settlement conferences (or 28% of the caseload) and held 155 of them.

One hundred thirty-one (131) of these conferences were held between August 7 and September 13, 2012. While more detail appears in Tab 3, the results may be summarized as follows:

Loan Mod in Negotiation	CFK in Negotiation	Other Negotiation	Settled Pending Documentation	Other, including potential impasse	Dismissed Stipulation Filed
58	23	4	33	12	1
44%	18%	3%	25%	9%	1%

An additional 24 cases were conferenced in December 2012. While more detail appears in Tab 3, the results may be summarized as follows:

Loan Mod in Negotiation	CFK in Negotiation	Other Negotiation	Settled Pending Documentation	Other, including potential impasse	Dismissed Stipulation Filed
13	5	0	3	3	0
55%	21%	0%	12%	13%	0%

A number of key messages can be drawn from the above. First, probable "impasse" has been reached in a statistically low number of cases. Second, the number and percentage of loan modifications either agreed to or still in negotiation is high; this is an indicator that people will be able to remain in their homes. That is even more the case in pre-foreclosure cases. Of the 83 non-foreclosed cases conferenced in the first round of 131, in 66% of the cases the parties either agreed to or are still in negotiations for loan modifications. Of the 48 foreclosed cases conferenced in the first round of 131, in 38% of the cases the parties either agreed to or are still in negotiations for loan modifications. Since the profile of the cases has shifted to more pre-foreclosures, this should bode well for negotiated, positive resolutions going forward.

However, the third point is a more difficult one. The caseload moves slowly and is time-consuming. While the memo I filed on January 3, 2013 contains a number of steps directed at expediting the handling of the caseload, there are inherent delays in the process, particularly when dealing with loan modifications. Anyone who has applied for a mortgage under "normal" circumstances realizes the extensive amount of paperwork, documentation, diligence and time required. These cases are not "normal." There is no question that there are a number of "fault" factors in these delays, but even in the best of circumstances, we are probably looking at close to a four month process from initial conference notification to dismissal stipulation. And many of these cases require considerable monitoring by my office as to both plaintiffs' and defendants' adherence to tight timeframes.

The processes we have implemented and improvements to our database management should allow us to be more effective. However, this is an inherently time consuming process and is beginning to be recognized as such by me.

Finally, I would note that there are some incidental benefits not reflected in the statistics referenced above. For example, one plaintiff attorney has agreed with one defendant's external counsel to attempt to settle future claims before the filing of lawsuits where that particular defendant is the real party in interest because of the success of the settlement process in other cases involving that defendant. In other cases, a defendant secured dismissal agreements for itself in a handful of cases through payment of a nominal settlement amount.

IV. Caseload Management.

Based on comments received at the December 20 forums with counsel to plaintiffs and counsel to defendants, on January 3, 2013, I filed a memorandum containing Settlement Conferences Scheduling and Guidelines. The procedures referenced contain timetables designed to expedite processing. Additionally, we have taken steps to manage the docket more proactively.

Through December 31, 2012, 48 cases have been dismissed for noncompliance with payment orders. Additionally, as of December 31, 2012, 162 more cases were under either Orders to Comply, outstanding Show Cause Orders that may lead to dismissal, or a Court Order specifying contingencies that, if not met, will result in dismissal.[1]

We are implementing processes to seek to remove commercial properties from the Special Master's docket, as well as to review for further recommendation to the Court any unique situations that may not be suited for the Special Master's docket.

[1] As of the date of filing of this report, a significant number of these cases have been brought into compliance.

My intention is to speed processing and I am hopeful we now have the knowledge base and close to sufficient staffing to do so. My intention also is to report back to the Court in April or May as to the effectiveness of our use of the new processes and procedures set forth in my January 3 memorandum.

V. Other Administrative Matters.

I was appointed Special Master by Court Order dated January 5, 2012. The following represents a chronological summary of key events for 2012. For the Court's convenience and reference, I have included as Tabs 4 through 9 to this report, all written reports referenced.

- February 3, 2012 – Initial meetings with plaintiffs' counsel and pro se plaintiffs, and with defendants' counsel.
- February 13, 2012 – first mailing of Appendix A forms to 228 plaintiffs, seeking information in order to, among other items, collect payments in the nature of use & occupancy fees.
- February 23, 2012 – memo containing draft outline of potential procedures and information requests.
- March 29, 2012 – first billing for use & occupancy fees.
- April 11, 2012 – meetings held again with plaintiffs' counsel and pro se plaintiffs, and with defendants' counsel.
- February – April, 2012 – establishment of systems and procedures to (a) bill and collect use & occupancy fees and (b) bill and collect retainers from all parties to cases (nearly 1,750 billed during 2012; more than 2,000 will be billed for the first quarter of 2013).
- May 29, 2012 – Special Master's First Report. (Tab 4)

- July 7, 2012 – Order to Comply for nonpayment of Retainer Fees and Use & Occupancy Fees, and for failure to file Appendix A forms.
- August 8, 2012 – September 13, 2012 – scheduled and heard 131 settlement conferences.
- October 4, 2012 – Special Master's Second Report. (Tab 5)
- October 4, 2012 – Special Master's Overview filed. (Tab 6)
- October 9, 2012 – Meeting held by Court with plaintiffs' counsel, pro se plaintiffs, and defendants' counsel.
- October 24 and 25 – Orders to Comply for Nonpayment of Retainer Fees and Use & Occupancy Fees, and for failure to file Appendix A forms.
- November 15, 2012 – Interim Update filed.by Special Master. (Tab 7)
- November 15, 2012 – Suggestions for Improvement Memorandum filed by Special Master. (Tab 8).
- December 10, 2012 – December 18, 2012: 24 settlement conferences held and 90 reconferences (following up on earlier settlement conferences).
- December 13, 2012 – (Draft) Settlement Conferences Scheduling and Guidelines filed.
- December 20, 2012 - meetings held again with plaintiffs' counsel and pro se plaintiffs, and with defendants' counsel.
- December 20 and 21, 2012 – Orders to Comply for nonpayment of Retainer Fees and Use & Occupancy Fees, and for failure to file Appendix A forms filed.
- December 20, 2012 – Recommendation to Dismiss for noncompliance with Appendix A requirement (from October compliance order).

- December 2012 – significant database development work that enables more meaningful reporting and better procedures for enforcing compliance.
- January 3, 2013 - final Settlement Conferences Scheduling and Guidelines filed. (Tab 9)

The above does not reflect the day-to-day administrative attention being paid to items such as database development to monitor and track the caseload and compliance, case monitoring, scheduling of cases for conferences, telephone calls, correspondence and emails, numerous meetings with the Court and drafting of Orders, responding to requests, the billing and processing involved in handling thousands of invoices.

Respectfully submitted,

Merrill W. Sherman
Special Master

1/8/13
Date

MSW/bh

Tab 1

	As of December 31, 2012		As of January 31, 2012	
	Number/Amount	% of Population	Number/Amount	% of Population
Total Population Summary				
Plaintiffs	752		228	
Appendix As received	704	94%	221	97%
Reside in property as principal residence	596	79%	184	81%
Foreclosed	262	35%	134	59%
Non-foreclosed	442	59%	87	38%
Borrower or co-borrower employed	638	85%	198	87%
Largest mortgage size	1,500,000		1,500,000	
Smallest mortgage size	55,825		55,825	
Median mortgage size	226,194		229,000	
Mortgages > $400,000	44		19	
Foreclosed Population Summary				
Plaintiffs	262		134	
Reside in property as principal residence	204	78%	107	80%
Borrower or co-borrower employed	232	89%	118	88%
Borrower or co-borrower employed and reside in property as principal residence	179	68%	93	69%
Largest mortgage size	984,000		984,000	
Smallest mortgage size	80,000		80,000	
Median mortgage size	224,000		217,375	
Mortgages > $400,000	9		7	
Non-Foreclosed Population Summary				
Plaintiffs	442		87	
Reside in property as principal residence	392	89%	77	89%
Borrower or co-borrower employed	406	92%	80	92%
Borrower or co-borrower employed and reside in property as principal residence	361	82%	72	83%
Largest mortgage size	1,500,000		1,500,000	
Smallest mortgage size	55,825		55,825	
Median mortgage size	229,500		245,000	
Mortgages > $400,000	35		12	

NB: Population details are based on completed Appendix A's; therefore, the total number of foreclosed plus non-foreclosed population fall short of the total number of cases by the 42 Appendix A's that have not been filed.

Tab 2

RI Special Master
Financial Summary
As of December 28, 2012

	Dec. 28, 12
ASSETS	
Current Assets	
Checking	
Escrow Account (Checking) – Use & Occupancy	$1,517,448.07
Escrow Account (Checking) – Retainer Fees	107,531.30
Total Checking	1,624,979.37
Accounts Receivable*	
A/R – Use & Occupancy	134,021.93
A/R – Retainer Fees	56,590.00
Total Accounts Receivable	190,611.93
PAYABLES	
November 2, 2012 Billing	46,753.00
December 1, 2012	Not yet billed
OTHER INFORMATION – 2012 YTD	
Use & Occupancy Billed	1,660,730.00
Use & Occupancy Collected	1,526,708.07
Retainer Fees Billed	440,760.00
Retainer Fees Collected	384,290.00
Actual Fees and Expenses Billed Through Nov. 30	$ 323,371.70

* These figures contain no allowance for potentially uncollectible amounts.

Tab 3

GENERAL BREAKDOWN OF CASES

Total Cases Filed:			**Dismissals**		**Conferences**		
2010	16		Dismissals through settlement stipulation	5	**Held**		
2011	188		Involuntary (sanctioned) dismissals	49	First Round	131	
2012	548		Other (voluntary) dismissals	1	Second Round	24	
Tot	**752**			55	**Total Held**	**155**	
Total dismissed	**55**	**7%**			Scheduled Upcoming	59	
Total Active at 12/31	**697**				**Total Held or Scheduled**	**214**	**28%**

STATUS OF 1st-ROUND CONFERENCED CASES - 131

(August - September, 2012)

	TOTAL		BREAKDOWN Foreclosed	Not Foreclosed
MOD Accepted Png Paperwork	10	8%	5	5
MOD Approved	5	4%	0	5
Modification Under Review	25	19%	8	17
MOD Additional Documents Required	10	8%	2	8
Modification Submission Pending	23	18%	3	20
Exernal Financing Submission Pending	4	3%	4	0
CFK Stipulated Dismissal	1	1%	1	
CFK Accepted Png Paperwork	18	14%	8	10
CFK in Negotiation	23	18%	13	10
Potential Impasse	2	2%	1	1
Dismissed - other reasons	6	5%	3	3
Other	4	3%	0	4
			48	83
Cases In Negotiation/Review or Pending resolution				
Loan Modification	77	65%	22	55
Cash Settlement Cases	42	35%	22	20
	119			
Total Accepted or Approved				
Loan Modifications Accepted or Approved	15	44%	5	10
CFK Accepted or Approved	19	56%	9	10
	34			

STATUS OF 2nd-ROUND CONFERENCED CASES - 24

(December, 2012)

	TOTAL		BREAKDOWN Foreclosed	Not Foreclosed
	1	4%		
	2	8%	2	0
	6	25%	2	4
	3	13%	2	1
	4	17%	0	4
	5	21%	5	0
	3	13%	0	3
	16	76%		
	5	24%		
	21			
	3	100%		
	0	0%		
	3			

SPECIAL MASTER'S REPORT

Please accept this report of my activities through May 29. As the Court is aware, I used January 31, 2012 as an administrative cutoff date. The activities referenced herein largely relate to the 228 cases pending at that time.

INITIAL STAGES

Following my appointment in January 2012, I scheduled a meeting with plaintiffs' counsel and a separate one for counsel to the defendants. These meetings were held on February 3, 2012.

The plaintiffs' attorneys generally were receptive. They thought I could help them communicate more effectively with the defendants, and expressed a willingness to settle on "reasonable" terms. However, as I later discovered, they had not mentioned many of their cases involved houses which already had been foreclosed.

I encountered less than a positive reception from some of the defendants' counsel. My assumption is that the stay of the proceedings was a source of significant frustration to them. Some also expressed that their clients had little interest in settlement, claiming previously broken promises on the part of the plaintiffs and articulated a series of formulaic answers regarding potential resolutions. Nonetheless, a significant number of the defendants' counsel were highly constructive in their comments, suggesting multiple structures that had worked to resolve other of their cases, including suggesting imposition of a "use & occupancy" fee. Defendants' counsel did not hesitate to express legitimate frustration that their clients, whether mortgage holders or property owners, were paying the taxes and insurance on the properties in question, but the plaintiffs were paying nothing, while living in the premises both pre- and post-foreclosure.

Following these meetings, I initiated the first round of information seeking from the plaintiffs. First, I wanted to see whether they would be responsive. Second, I wanted to know: (a) how many of the cases involved property already foreclosed; (b) who was living in the property as a principal residence; (c) whether they were employed; and (d) the size of the first mortgage the plaintiff(s) had defaulted on.

Thus, on February 13, 2012 I sent a form, Appendix A, to counsel for the plaintiffs in the 228 cases pending as of January 31. See Tab 1 for the form.

I received responses in 221 cases. One attorney accounts for all the cases that did not respond, and his clients have failed to respond in 7 of the 8 cases he is handling.

I would note that almost all responses contained some degree of error or incompletion. Virtually all errors and omissions were remedied through follow up with plaintiffs' counsel.

On April 11, 2012 I again held separate meetings with plaintiffs' and defendants' counsel. I reviewed generally the results I had received on the questionnaires. I also discussed the rationale for the monthly bills in the nature of Use & Occupancy payments I had sent to the plaintiffs, as well as my need to receive certain information from the defendants, all as further described below.

Please note, all information in this memo is based on the best information we have at this point. There may be minor adjustments as we receive further information and clarifications.

THE PROFILE OF THE PLAINTIFFS

Of the 221 cases, 134 (or 61%) already have been foreclosed. With respect to the 134 cases involving foreclosed property, 107 of the plaintiffs (or 80%) still live there as a principal residence, and of those persons, 93 (or 69% of the foreclosed population) of the primary and co-borrowers are employed.

With respect to the 87 cases involving non-foreclosed properties, 80 (or 92%) of the primary and co-borrowers are employed.

The median original mortgage size was $229,000. Only 19 of the 221 mortgages were over $400,000. With respect to foreclosed properties, the median original mortgage size is $217,000.

A fuller summary of the information tabulated from Appendix A is contained in Tab 2.

The bottom line "good" news is that there are a significant number of employed plaintiffs living in these properties as primary residences. These cases are worth making a serious effort to resolve through settlement.

USE AND OCCUPANCY PAYMENTS

One of the reasons I requested the plaintiffs to provide me with the size of the mortgage was to enable me to construct something in the nature of a "Use & Occupancy" fee (called a "U&O" payment).

I realized that it would take me months to determine a "perfect" payment amount. Given my experience in this marketplace and belief that the properties are probably worth half of what they were worth at the peak of the market, I determined each plaintiff's payment amount as follows: I reduced the mortgage amount they disclosed in the questionnaire by half, placed a 4% interest rate on that amount, calculated a monthly payment using a 30-year amortization and rounded the result to the nearest $10.

On March 29, 2012, I billed the plaintiffs for "U&O" payments. I sent a letter to plaintiffs' counsel, together with 6 months of payment coupons for their clients. (See Tab 3 for specimen.) Payments were billed for 205 of the cases[1]. These payments will be placed in a non-interest bearing escrow account. Upon settlement of a case they will go to the mortgage holder (or as agreed). If there is no settlement, the Court will determine what to do with the monies.

The reason for the difference between the 228 cases pending and 205 bills was: 7 cases could not be billed because no Appendix "A" form was submitted; in 16 cases the plaintiffs indicated they already were making a Court ordered payment, and thus, my seeking a payment in the nature of a use & occupancy fee was not something I deemed appropriate.

As of May 24, we received payments in 173 of the 205 billed (or 85%). June 1 is the next due date.

THE PROFILE OF THE DEFENDANTS

Virtually every case we have before us is a securitized financing. There are a plethora of defendants, and it is hard to know which one is "in charge." In fact, at the initial meeting with defendants' counsel, several suggested that in a number of cases, the real party in interest is not the named defendant.

[1] One of these bills was sent on May 29, for May & June, in order to place the plaintiff who untimely submitted an Appendix "A" in the same position as the others who have paid.

Thus, I promulgated to the defendants a questionnaire in the form of Exhibit A. (See Tab 4.)

Basically, I wanted to find out who was in charge and had authority to make a decision. Also, given my thoughts as to potential settlement structures, I wanted to get a better sense of the current "value" of the property. Finally, because of the plethora of defendants in each case, I asked the defendants to jointly submit one collective response per case.

The forms were requested to be submitted by May 1. As of May 24, we are still receiving responses and tabulating them. A number of the responses were incomplete or need follow up for other reasons. I am in the process of following up on these, as well as those that have yet to be submitted.

THOUGHTS AS TO POTENTIAL SETTLEMENT STRUCTURES

A. Loans

(1) Potential Structure

For cases involving defaulted loans, I will seek to encourage restructure where the plaintiffs are employed, are timely making payments and the property is a 1-4 residence which they occupy as a primary residence.

Many of the plaintiffs we encounter have properties deeply underwater. Based on years of experience in dealing with distressed debt situations, I have certain fundamental beliefs. One is that in a workout, the resulting debt must be reasonable both in relation to the borrower's ability to pay and in relation to the collateral. Long-term, too great a debt overhang with no real possibility of equity generation can be demoralizing and, in most cases, will not work. Thus, debt relief in the form of principal forgiveness, in most instances, is critical. Any position to the contrary defies common sense and years of private sector workout successes.

That said, there is a legitimate concern with "strategic" default. Namely, if it is too palatable or easy to obtain debt relief, the 90% of borrowers in this country who are not involved in this litigation and many of whom are underwater, but are current on their mortgages, might opt to stop paying.

Thus any resolution must balance these concerns.

The structure I foresee probably will involve:

1. Right-sizing the debt to approximately 90% of the current appraised value of the property.
2. Providing a shared equity appreciation mortgage in favor of the mortgagee, with 80% of equity appreciation going to the mortgagee.
3. Full sworn disclosure from plaintiffs.
4. Additional lump sum payment(s) from plaintiffs to the extent warranted by financial disclosure.
5. Potential reinstatement of any "forgiven" debt if the restructured loan goes into default.
6. The ability of plaintiff to sell home at any time to third party without any adverse consequences, so as not to impede mobility.
7. Full release of claims and clearing of title.

(2) Process

I plan to match completed Appendix "A's" against the information supplied by the plaintiffs and hold conferences, by attorney, covering a number of cases for which information is relatively complete. Assuming an interest in a settlement, either formulated along the lines outlined above or as suggested and mutually supported by counsel, we would seek financial disclosure from the parties.

These cases likely will receive my first attention.

Last week, defendants' counsel submitted a proposed financial disclosure form to me, and I am in the process of reviewing the same. If need be, my intent is to use it, or something similar that I deem suitable, for disclosure and credit evaluation purposes. The form actually may be of greater value with respect to the foreclosed properties represented below.

B. Foreclosed Properties

Intuitively, these are harder to deal with. Because we are facing securitized structures, I do not think a property owner / servicer can simply "erase" a foreclosure and reinstate a loan.

For these properties, I am seeking to enable plaintiffs who present acceptable credit risk profiles to purchase the property, using the proceeds of a pool of locally generated funds. The balance of the settlement structure would be substantially similar to that as referenced above. I spoke to the members of the Rhode Island Bankers Association (RIBA) at their annual meeting on April 12, 2012. I prepared for them a memo containing a description of the program and the rationale behind it. It is contained in Tab 5.

I received positive reception from RIBA members as well as the head of a major local credit union. Additionally, I have spoken with Rhode Island Housing Mortgage Finance Company and the State Attorney General to secure further participation and funds. You have seen my confidential memorandum on this matter.

Again, this program would apply only to: plaintiffs living in a 1-4 dwelling as a primary residence, who are employed and making payments.

Positive resolution of these cases is almost entirely dependent on the creation of the loan fund referenced. I am cautiously optimistic that something can be done.

PROCEEDING WITH CASES

As the Court is aware, for administrative purposes, I have imposed cut off dates. The first one was January 31. Excluding a case the Court removed from the Master's docket, there were 228 cases pending at that time. The following represents my recommended approach to those cases.

These recommendations are based on the information I received, or did not receive, from the plaintiffs.

1. Plaintiffs who have not responded.

   Of the 228 cases, I received responses (that is, completed Appendix A forms) from plaintiffs in 221 of them. The 7 cases that I did not receive responses are listed in Tab 6. All these plaintiffs are represented by Keven McKenna, Esq. I called Mr. McKenna, wrote to him and wrote to him again. The result was an "Appendix A" from one of his 8 pending cases.

I recommend that the Court, at a minimum, lift the stay in these cases. Should the Court wish to impose further sanctions, up to and including dismissal, I would be supportive of those, and in fact, recommend dismissal.

I am not aware of what process the Court wishes to follow, but perhaps you may wish to schedule a hearing and ask Mr. McKenna why his cases should not be dismissed. Assuming he and his clients are given a reprieve (to produce Appendix A's from his clients), I would encourage the Court to specify that ALL U&O payments the other plaintiffs have had to pay will be due in a lump sum forthwith upon billing from Mr. McKenna's clients or be dismissed. To do otherwise would reward what, in layman's terms, I would describe as "bad behavior."

2. Plaintiffs who have failed to make payments.

For those cases that were pending as of January 31, and as to which I received responses (221), I issued 205 bills for monthly payments. For the reasons set forth above, I did not issue bills in 16 cases.

As of May 29, 173 plaintiffs had made monthly payments. Excluding one plaintiff who was billed recently, the 31 listed in Tab 7 were billed and have not made payments.

I have neither the time nor resources to pursue their payments. Additionally, these plaintiffs already are difficult to finance. Their failure to make timely payments at a level of half the original amount indicates a genuine lack of creditworthiness, and / or inability to pay. I will not be able (or willing) to help them restructure with the existing mortgage holder or to find new financing.

At a minimum, I recommend you lift the stay on their cases, and in fact, I recommend you dismiss their cases for failure to comply with my order. Again, I would assume you would hold a hearing on this, but remain firm in my belief that dismissal is appropriate.

3. Plaintiffs who are no longer living at the property.

A number of cases involve foreclosed residences at which the plaintiffs no longer reside. I have a hard time understanding the point of these cases or why the plaintiffs can claim economic damage. Something akin to a "cash for keys" program to settle these may be appropriate. By June 30, I will raise this with counsel for the

plaintiffs. If I do not get either a satisfactory or timely response, I will recommend, at a minimum, your lifting the stay.

4. Plaintiffs in a "unique" situation.

I have received correspondence in under a half dozen cases involving "unique" circumstances: e.g., commercial property; reverse mortgage on a residence where the mortgagor is deceased; a residence that can only be described as a "mansion." I do not believe these cases are appropriate to continue in the Special Master process and would recommend removing them from my purview. These cases are listed in Tab 8. Please note that one of these plaintiffs (Simson, CA No. 11-597) has failed to make the U & O payment. I re-iterate my recommendation of dismissal; I included reference to that case in this section for completeness only.

5. Fannie and Freddie cases.

There are a number of cases involving mortgages held by FNMAE and FHLMC. These entities are both in conservatorship, with the Federal Housing Administration (FHA) appointed as conservator.

My understanding is the FHA has directed both FNMAE and FHLMC to refuse to allow any principal reduction as part of a loan modification. However, FNMAE and FHLMC have accepted "short sales."

I tried to have an informal conversation with a very senior FNMAE official about their policies, practices, potential settlement structures, etc. However, that was "nixed" by its counsel. Under your order, I am aware of my right to order the presence of FNMAE officials to have that conversation. However, at this point, I think it more productive to remove FNMAE / FHLMC cases from the priority list (to the extent they are in categories involving loans or foreclosed properties with employed, paying plaintiffs), and deal with them once other cases begin to show results.

ADMINISTRATIVE MATTERS

I also thought I would give the Court an update on administrative matters. As the Court is aware, we needed database management services for this case, including billing and receivable systems. I retained Sullivan & Company CPAs LLP, a local accounting firm, for

that purpose. They are working on my behalf pursuant to an agreement I negotiated with them at favorable rates, and which I reviewed with the Court before execution. I also have secured part-time services at favorable rates from available finance personnel. The collection and management of the information we need to receive from over 800 parties as well as the tracking of billings and payments, are administrative challenges which I believe we now have well under control.

Additionally, the Court recently ordered a retainer arrangement. We still have not received all April retainer payments, but I have sent reminders. I have given the parties until June 11, 2012 to make payment. Given the number of parties, the administrative complexity and costliness of sending over 800 monthly bills (or even half that number) under $20 each, and then handling tracking payments, would have been a nightmare. Thus, the retainer arrangement, while still complex, is helpful and administratively far more efficient.

One logistical problem remains. I still do not have the name(s) of counsel for approximately 90 defendants named as of January 31. That, in effect, prevents me billing the April 1 retainer to them.

I will be able to report on the status of retainer payments on July 1. That also will be the date for the next retainer billing.

Additionally, we are and will be moving forward on the cases filed after January 31 and prior to April 30 with the Court.

MISCELLANEOUS

As the Court is aware, I have been the President & CEO of three banks, two of which were subsidiaries of publicly traded bank holding companies (of which I also was President & CEO). Many years ago, I practiced law. Though I no longer have a license to practice, I do recall the ins and outs of the securitizations I handled and the workouts I negotiated.

For plaintiffs who are employed and who make timely payments, I am optimistic that we can make progress in the settlement process.

Thank you.

SPECIAL MASTER'S SECOND REPORT

October 4, 2012

On May 31, I forwarded to you a report of my activities through May 29. That report (the "First Report") is filed in the ECF as Document 824.

Please accept this report as an update on my activities since then through September 28, 2012. Again, please note that all information in this memo is based on the best information I have. There may be further adjustments as we receive additional information and clarifications.

As of September 28, there were 581 cases under my purview; I have reviewed Appendix A's from the plaintiffs in 503 of these cases.[1] Unless otherwise noted, all references and statistical information relate to those 503 cases. The caseload is up significantly from the 228 cases pending as of January 31. At one point, I was encouraged that the "pipeline" was slowing. Between August 29 and September 10, no new cases were filed. However, 34 new cases were filed since September 11. I will comment on that further below.

I. THE PROFILE OF THE PLAINTIFFS

A. Statistical Profile.

Of the 503 cases, 215 (or 43%) already have been foreclosed. With respect to the 215 cases involving foreclosed property, 173 of the plaintiffs (or 80%) still live there as a principal residence, and of those persons, 155 (or 72% of the foreclosed population) of the primary and/or co-borrowers are employed.

With respect to the 288 cases involving non-foreclosed properties, 265 (or 92%) of the primary and/or co-borrowers are employed.

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[1]For the one case that is filed as a class action, we are collecting Appendix A's from all plaintiffs, but only using the one as filed by the first named borrower for purposes of these statistics.

The median original mortgage size was $226,000. Only 30 of the 503 mortgages were over $400,000.

A fuller summary of the information tabulated from the completed Appendix A forms submitted by the plaintiffs is contained in Tab 1.

Other than the shift to a majority of the cases being non-foreclosed properties, I do not see any statistical significant difference in the profile of the plaintiffs from the cases referenced in the First Report.

B. Commentary.

Given the mortgage sizes involved, most of which were granted at a high point of the mortgage market, we are dealing with modest housing. Unfortunately, based on the information we are seeing, these properties, generally, have been very hard hit by valuation declines.

As a result of the recent settlement conferences, we have relatively current information on 63 properties which had first mortgages originally $400,000 or less. The mortgages ranged in size from $80,000 to $400,000.

Seventy-three percent (73%) of these houses now have first mortgages that are significantly underwater. The amount underwater ranges from $25,000 to $194,000. The average underwater amount is $165,000 and the median is $79,000. So a typical profile might look like a mortgage of $255,000 on a house now estimated to be worth $130,000 with an overhang of $125,000; or a $210,000 mortgage on a house now estimated to be worth $153,000 with an overhang of $57,000.

Additionally, given conversations with some of plaintiffs' counsel and cursory review of some of the financial information supplied, it is of concern that many of these plaintiffs overreached in assuming the debt loads they did and remain relatively naïve in what they can afford and what is realistic. Please note that while I believe people are responsible and accountable for their own lack of financial acumen, given the nature of these mortgages, I am concerned that they had plenty of "help" from mortgage originators who convinced the plaintiffs that they were making a financially savvy real estate investment and could afford it.

And for better or worse, many people believe if the "bank" lets you have the money, you can afford it.

In the previous paragraph, I referenced the "nature" of these mortgages. All are securitized product. But more importantly than that, from what I can see, virtually none of these mortgages were originated by any bank or credit union that operates locally (i.e., in the State of Rhode Island) with the possible exception of Bank of America and to a much more limited extent, RBS Citizens. Virtually all these mortgages seem to be the product of originations from mortgage brokers or other "outside" lenders that were then operating in what I assume was the "subprime" space.

Finally, there is no question in my mind that some of the plaintiffs are "gaming" the system. However, there also is no question in my mind that the majority of them are not. They are good people who for a variety of reasons (mixed in most cases – from being too aspirational, being too naïve, or being caught up in the real estate boom) overreached and are now suffering consequences in some ways not of their making.

II. USE AND OCCUPANCY PAYMENTS

As of September 28, use and occupancy payments were being billed on 464 of the 503 cases. The cases not being billed are a mix of lack of information, or the plaintiff no longer living at the premises, or the plaintiff claims to already be paying a court ordered U & O fee.

As was the case previously, the payment history has been generally good.

On September 27, we filed with the Court a report of the U & O payments we were holding as of September 15. (See ECF Document 1273.) As of October 3, 2012 we have collected and are holding in escrow over $850,000 in U & O payments.

III. PROGRESS TOWARD SETTLEMENT

Between August 7 and September 13, I held 131 settlement conferences.

A. Scheduling Process.

We used the information provided on the Exhibit A forms supplied by the defendants to facilitate selection. These forms indicated which of the defendants was the "real" party in interest. As the Court is aware, all cases involve multiple defendants and in cases of securitized finance, it can be difficult for a plaintiff to know who is really "in charge." Indeed, some of the responses indicated that parties not named were the real party in interest and had authority to settle.

Some defendants were active in seeking me out to schedule conferences. Others indicated a willingness. As a result, I tried to take defendants with the largest number of cases that, through their respective counsel, had either reached out or otherwise indicated a willingness to meet.

We then scheduled by plaintiff's attorney within defendant groups. While I consider specific settlements confidential, I am appending, as Tab 2, a list of the conferences we held, by defendant, and their present status.

A summary of certain key results is that of the 131 conferences, 81 resulted in requests for loan modifications, with documentation to be submitted in 74 of them, and 33 resulted in "cash for keys" negotiations.

As of this date, approximately nine cases have been resolved pending documentation, and one has been dismissed.

An exception in scheduling was made for FNMA / FHLMC cases. They are involved in a significant number of cases, but were not scheduled because I did not believe the result would be productive. I have made no secret of how troubled I am by these agencies and, to a lesser extent, their respective counsel. Most of the defendant servicers, off the record, describe how bureaucratic and difficult to deal with FNMA and FHLMC are. They already have cost our taxpayers billions. And lawyers who have clients like FNMA / FHLMC have the capacity to litigate indefinitely because their clients are unresponsive to good business solutions. So our taxpayer dollars are being utilized to fund a significant amount of lawyering that may not be productive from a business standpoint. Privately, counsel to other defendants also will say as much.

B. Settlement Issues.

Because of the number of pending modification applications, it is impossible for me to report definitively, at this time, on how productive that process will be. However, there are a number of concerns that have surfaced in the process. Because of these, I have yet to schedule further conferences.

The first concern is my desire to see the results of the loan modification applications. There are to be approximately 74 loan modification applications under review by, or scheduled to be sent to, 8 different servicers. If 90% are rejected, it makes little sense for me to "push" for more modifications. Conversely, if 70% are successful, the meetings will have been productive.

The second concern is administrative in nature.

There are still a number of loan modification packages yet to be submitted or remain incomplete. Of the 74 loan modification packages that were originally to be submitted, 26 have yet to be completed and 11 remain incomplete. Also, some offers have yet to be responded to. Thus, until there is substantial completion, I will not schedule more conferences.

I would note that most of the defendants are represented by larger firms with substantial resources. The plaintiffs' lawyers are sole practitioners or small offices. One lawyer in particular has over 400 of the cases before this Court. While he has added staff and displays serious, deep familiarity with almost every case we have reviewed for settlement, it is difficult for him to respond quickly and thoroughly.

Defendant servicers have repeatedly pointed out to me how delay in their receipt makes a plaintiff less likely to qualify for a modification and how incomplete packages not completed promptly leads to stale info and a need to start the cycle again. As noted, many of the packages submitted were incomplete, despite supposed review by plaintiffs' counsel.

The Court should consider imposing a penalty on plaintiffs' counsel for incomplete packages. Tardy submissions are more understandable, but completions should be taken care of by the plaintiffs and their counsel.

The plaintiffs' counsel occasionally complained of subsequent information requests. However, I believe those to be reasonable. (On the whole, these do not form part of the non-completion difficulties referenced above.)

Finally, I personally am not accustomed to the slow turning of the proverbial wheels of justice. We began settlement conferences on August 7, 2012. Resolution was reached (in the first few weeks) on a number of cases. The Court will note that as of September 30, exactly one dismissed stipulation has been filed. Some of this is due to the (understandably) complex nature of the dismissal agreements being crafted, the need to join all parties, including those not privy to the two-party settlement, etc. However, speed is apparently not one of the hallmarks of our system of justice.

C. The Special Master's office has received a number of requests that are reasonable and should be reflected on by the Court.

I noted earlier that in all cases multiple defendants have been sued. Some have nothing to do with these cases, others have been merged into another defendant, etc. Should the Court have a process for hearing dismissal applications for mechanical or technical reasons separately?

Similarly, in one case defendants allege that the real party in interest was not named because its presence would defeat diversity jurisdiction. Should there be a process for this?

D. Other Matters.

The Special Master's office is largely up to date with entering plaintiffs' information and is now issuing U & O bills on a regular, more timely basis upon receipt of new cases.

Tab 5

	As of September 28, 2012		As of January 31, 2012	
	Number/ Amount	% of Population	Number/ Amount	% of Population
Total Population Summary				
Plaintiffs	581		228	
Appendix As received	503	87%	221	97%
Reside in property as principal residence	438	75%	184	81%
Foreclosed	215	37%	134	59%
Non-foreclosed	288	50%	87	38%
Borrower or co-borrower employed	459	79%	198	87%
Largest mortgage size	$ 1,500,000		$ 1,500,000	
Smallest mortgage size	$ 55,825		$ 55,825	
Median mortgage size	$ 225,900		$ 229,000	
Mortgages > $400,000	30		19	
Foreclosed Population Summary				
Plaintiffs	215		134	
Reside in property as principal residence	173	80%	107	80%
Borrower or co-borrower employed	195	91%	118	88%
Borrower or co-borrower employed and reside in property as principal residence	155	72%	93	69%
Largest mortgage size	$ 984,000		$ 984,000	
Smallest mortgage size	$ 80,000		$ 80,000	
Median mortgage size	$ 224,000		$ 217,375	
Mortgages > $400,000	8		7	
Non-Foreclosed Population Summary				
Plaintiffs	288		87	
Reside in property as principal residence	265	92%	77	89%
Borrower or co-borrower employed	264	92%	80	92%
Borrower or co-borrower employed and reside in property as principal residence	243	84%	72	83%
Largest mortgage size	$ 1,500,000		$ 1,500,000	
Smallest mortgage size	$ 55,825		$ 55,825	
Median mortgage size	$ 228,900		$ 245,000	
Mortgages > $400,000	22		12	

Results of Settlement Conferences
September 30, 2012

	Cash for Keys			Modification					Property Purchase			
Defendant	In Negotiation	Accepted	Rejected	Submission Pending	Additional Information Required	Under Review	Approved	Rejected	External Financing Submission Pending	Approved	Rejected	Total*
1	0	0	0	0	0	0	0	0	0	0	0	0
2	8	0	1	4	10	7	1	0	0	0	0	31
3	3	0	0	0	0	0	0	0	4	0	0	7
4	0	0	0	0	0	0	0	0	0	0	0	0
5	0	0	0	1	0	0	8	0	1	0	0	10
6	1	0	0	6	1	0	0	0	0	0	0	8
7	0	1	0	1	0	0	0	0	2	0	0	4
8	0	0	0	0	0	0	0	0	0	0	0	0
9	12	6	1	14	0	30	0	0	3	0	0	66
Total	24	7	2	26	11	37	9	0	10	0	0	126

Tab 5

	Overall*				
Defendant	In Negotation	Probable Impasse*	Settled Pending Document-ation	Dismissed*	Total*
1	0	1	0	0	1
2	30	1	0	0	31
3	7	0	0	0	7
4	0	1	0	0	1
5	3	0	7	0	10
6	8	0	0	0	8
7	3	0	1	0	4
8	0	1	0	0	1
9	59	2	6	1	68
Total	110	6	14	1	131

* The Overall section is a summary of the Cash for Keys, Modification and Property Purchase categories. A total of 131 settlement conferences were conducted. In 4 of those conferences, no settlement offers were made and resulted in a probable impasse. In another settlement conference, it was determined that the defendant was not a party to the case and was subsequently dismissed. As such, these cases were not included in the Cash for Keys, Modification or Property Purchase categories.

SPECIAL MASTER'S OVERVIEW

October 4, 2012

I today have submitted my second formal status report to you. I also want to take the opportunity to provide to you a less formal report containing a number of my observations and judgments. These are inherently subjective, but I hope they are of value in an overall assessment of what can fairly be termed the "mortgage crisis."

I. Background.

As the Court is aware, I was appointed Special Master in January 2012. I know it was the Court's hope that my background would provide a deep understanding of the mortgage process and mortgage securitizations, as well as engender a respect and comfort level among the corporate defendants. Conversely, as the Court commented to me, it hoped I would approach the situation, given my own civic and charitable engagements, with at least an ounce of human kindness.

From my perspective, I accepted the position with the hope of making a difference. My belief is the national economy fails to move forward as strongly as we would wish for two main reasons. One is the lack of a credible long-term approach to our national debt (a la Bowles-Simpson for example), which would provide stabilization and certainty. The other is the serious overhang caused by the excess housing stock, foreclosed properties and the existence of tens of millions of mortgages underwater and in default. The overhang and pendency of numerous foreclosures creates uncertainty and downward pricing pressure.

We both hoped that we would be a national model for resolution.

My initial expectation was in 3 to 6 months I would get a handle on the situation and predict how successful I could be. It has taken a bit longer, and a 6 to 9 month timeframe would have been realistic. I am now in a position to assess our situation.

II. Summary and Conclusion.

In a litigation context, the Special Master process has value. Through an organized process we were and are able to establish a settlement schedule, force meetings, prod follow up and bring matters to quicker resolution. Additionally, we were and are able to make the process and delays inherent in litigation "fairer" to the mortgage holders through the institution of a use & occupancy fee. Finally, we also have a substantive understanding of the size and locations of the mortgages before us, and some information as to the plaintiffs, their employment status and the value of their properties.

However, my personal hope had been higher. I really wanted to solve the problem. Through these months I have learned that we really face a Gordian Knot that is virtually impossible to unravel. Each participant behaves in a way that is explicable and (often) rational. But the total result is unreasonable, unwieldy and uneconomic.

III. The Gordian Knot.

A. The heart of the problem.

The reason the settlement process – nationally and in the Special Master process – has not been as productive as we want, is that the decision making corporate players – FNMA, FHLMC and the servicers – generally start from a premise that is largely uneconomic for an individual borrower. They do not forgive principal. Rather, they try to figure out what a defaulting borrower can "afford" to pay monthly, and by reducing the interest rate, stretching the amortization out to 40 years and putting a balloon on the back end, leave the principal balance of the mortgage intact.

May I say it directly: This is WRONG!

For the many borrowers who want to stay in their homes, they accept this solution, if offered. But just as these borrowers were probably not astute financially, overleveraged themselves and made imprudent or unrealistic economic decisions earlier, they remain naïve consumers. A defaulting borrower staying in a house which is significantly underwater is economic folly and can have serious adverse, longer-term personal consequences. And, unfortunately, just as the system before encouraged

inappropriate overleveraging, the system now, for a variety of reasons, continues to promote poor economic decisions on the part of average borrowers.

1. The need for principal forgiveness.

One of the touchstones of America's economic success had been personal mobility. Take a Rhode Islander whose mortgage exceeds the value of his/her home by $100,000. What happens next month, next year or in five years to him/her if he/she gets a job offer in Pennsylvania? The overhang is a real problem.

Just recently (September 26) a CNN article contained an expert's view that the housing market would not return to its former highs until 2023 – and even later in certain states.

The outsized overhang is not a healthy situation for either the borrowers or our economy. Thus, even aside from the daunting nature of paying monthly on a restructured mortgage with limited, if any, chance of economic upside, borrowers, in effect, are living with the proverbial Sword of Damocles hanging over their head. If, at any time soon, they want or need to move, they owe a crushing amount. The average American has less than $100,000 saved in an IRA by age 60. Ninety-nine of 100 lack the resources to pay the kind of overhang our system is encouraging with refinancings containing no principal forgiveness.

The best way to restore mobility as well as a sense of hope (yes, the clichéd light at the end of the tunnel) is to RIGHT SIZE the mortgage to (more or less) the present value of the house through principal forgiveness. This forgiveness may be conditional, it may be only to reduce the mortgage to 110 or 120% of the current appraised value, but needs to happen.

2. The arguments against principal forgiveness.

At the macro policy-making level, the primary concern among those unwilling to forgive principal is the so-called "strategic default" issue. There is genuine concern that, given the tens of millions of underwater mortgages, if defaulting borrowers are given forgiveness, it will prompt a new wave of defaults among those paying.

The solution is NOT to refuse forgiveness. The solution is to modify, conditionally forgive to a reasonable level and take a "soft second" that provides that the bulk (say 75%) of the equity appreciation from the date of the modification goes to the mortgage holder. Additionally, the entire debt can be reinstated if the modified loan goes into default. Those elements should be sufficient to prevent widespread strategic default.

A few other factors support this approach. As noted above, most borrowers at age 60 have under $100,000 in their retirement account. Collecting these paper mortgage loan deficiencies simply does not happen. And why force bankruptcies that would tax our system and humiliate borrowers for no good reason? These restructures should be negotiated transactions. Finally, and importantly, the soft second would be structured so as to not bar arms-length sales to unrelated third parties at any time. The holder would collect its share of whatever appreciation, if any, was made and the balance of the mortgage forgiven and discharged. Thus mobility, and yes, hope, would be restored.

3. The lack of traction for the principal forgiveness approach.

One of my mentors once joked that it takes a person with bad business judgment three days to decide the exact opposite of what a person with good business judgment decides in three seconds.

I feel that way in dealing with the bulk of the servicers and mortgage holders.

A. FNMA / FHLMC

First, because of their size and reach, FNMA and FHLMC set the tone. They generally bar principal forgiveness. (FHLMC has recently started some small experiments with this in a limited number of states.) Besides the strategic default issue referenced earlier, they also are driven by political concerns. Congress does not want to appropriate more money; more money would be immediately required if loan modifications included principal reductions.

Ironically, nothing could be worse for FNMA / FHLMC than if every defaulting borrower today stopped litigating and either handed them deeds in lieu of foreclosure or allowed uncontested foreclosures. FMNA and FHLMC would be TOAST. All they would have is the present (reduced) value of the property, marketing and maintenance expenses and a worthless claim against the borrower(s). That would mean immediate and worse losses.

B. The Servicer Issue.

There are a variety of reasons the servicers are limited as well. As indicated earlier, virtually all the mortgages with which I am dealing are securitized product. The mortgages are serviced by large corporate servicers on behalf of investors who hold the mortgages. In reality the investors frequently can be pretty nameless and faceless, having bought tranches of pools held by trustees.

None of these servicing agreements envisioned the widespread default crisis we now face. I am told the servicing agreements generally provide that if the servicer agrees to a write-down of principal, the servicer bears the loss. Thus the servicer is dis-incented to adjust principal. And when a principal write-down does make sense, there is the problem of who to call for permission: one pool can have multiple investors.

The servicers vary widely on approach and flexibility.

Most are fairly rigid. They refuse principal forgiveness, claiming investor limitations and fall back to a series of formulas. Moreover, they see FNMA and FHLMC setting the policy "tone" in this area. However, at least some who process standard mortgage modifications have had the candor to say, "We can get a modification to work [on paper], but we do not think it makes [economic] sense for your client," because of the overhang.

Of greater interest is one servicer with a proprietary algorithm that enables it to automatically propose a restructuring of the loan (without even receiving financial packages from the borrower), generally coupled with significant debt forgiveness. When asked how they were able to do this, its counsel explained:

1. We think our investors are better off with a performing asset now – as opposed to engaging in endless litigation or a lengthy foreclosure and sale process; and

2. We contacted the investors, explained the situation and they uniformly said to us, "Do what you think makes sense."

Thus, at least one servicer actually made the effort to contact investors and has moved expeditiously and effectively to resolve cases.

I can defend the lack of flexibility on the part of the servicers. First, as indicated above, they are keying off the lead of FNMA / FHLMC. Second, since many have millions of mortgages and thousands of employees, the servicer needs to have clear, consistent, written policies and procedures. You cannot have thousands of employees making individual, random judgments. If nothing else, inconsistency can lead to claims of unfair lending practices. And the reality is, on the ground level, their best and highest employees are negotiating deals for $400MM credits, not undervalued homes.

Finally, none of the people who attended on behalf of servicers in response to the settlement conference schedule appear to be senior enough to vary the approach and/or successfully recommend and advocate for fundamental policy changes.

One further note. Perhaps even more frustrating is running up against servicers' short sale / OREO process. There are a number of cases where an offer to buy can be produced. More often than not the response is, "We will have to put it through our OREO process."[1] That would take another six to nine months at a minimum.

C. The consumer advocates.

Even consumer advocates are uncomfortable with debt forgiveness. First, to the extent they are part of any agency holding mortgages, many of their mortgages are underwater. So they are concerned about strategic default. They also

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[1]OREO stands for "other real estate owned." By referencing this process, the lawyer was indicating there was no way to expedite sale of the property, and it would have to go through the servicer's regular process.

encourage people to pay on their underwater mortgages. So they ask why give those who have defaulted a better deal? Finally, they – personally – are uncomfortable giving "deals" to people who default when most of them – personally – have home valuation issues and still pay their mortgages.

D. U.S. Treasury

As the court is aware, I tried to put a mortgage loan program together to facilitate lending to people who would not qualify for modifications or who had been foreclosed. It would be a true public / private partnership, with the private sector – in this case "innocent" local lenders on a voluntary basis – coming up with $10MM to $12MM in mortgage funds. In order to do so, they would need to be provided with a low LTV on the house mortgage. I received a generally positive response from the local financial community.

I looked to the public sector for help, specifically in the form of second mortgages. The state housing agency again worked with the U.S. Treasury to obtain funding. While there was a draft offer of $3.5MM, the business terms were so onerous (and this is after 3 months of negotiations), I am not certain whether it is productive to proceed. The final condition of the draft term sheet said it all: this program could not be more favorable to the borrower than any other program available. As I was told, the U.S. Treasury always says, "Approach us with creative ideas," but when that happens Treasury declines them.

IV. Cutting the Gordian Knot.

I remember a line of verse that began, "If I had world enough and time…

A. Endorse Principal Forgiveness.

There is now more of a debate at the national level about principal forgiveness. It has to happen. Where the borrowers are employed and want to retain their homes, the opening question we need to ask in order to achieve successful mortgage modifications is, "What is a realistic size for the mortgage?" Then the question is whether the borrowers can afford it.

Other terms and conditions of the modifications can be as described above.

B. Force changes to servicer policies through investor contact.

Most major servicers understand how to do commercial workouts. Their banking arms routinely take significant (and timely!) write-downs of "bad" loans. The same must be done here.

Conversations at the CEO level or just below must take place at every major servicer to put in place workouts that make business sense and do not simply kick the can down the road in a way that is harmful to our economy or to the borrowers – with no real benefit to the investors.

Once those policies are in place, the servicers must begin conversations with the investors. There is no question in my mind that the investors will say, "Do what makes the most sense." And that will be the principal forgiveness approach that restores assets to performing status (and dials back litigation) much more quickly.

As Special Master I have not summoned servicer CEO's to appear, or asked defendants to identify all the trustees for the mortgage holders and, in turn, their respective investors and, in turn, their respective CEO's.

I have tried to respect process, contract rights and the room for people to make business judgments different from mine and still be considered operating in "good faith."

And, as is evident, I have been reluctant to impose my business judgment on others.

But without a fundamentally different approach from the servicing community, we will continue to face a mortgage crisis, and the nation will lag economically.

Tab 7

MEMORANDUM

TO: JUDGE JOHN J. McCONNELL, Jr.

CC: AILEEN SPRAGUE, BARBARA HURST

FROM: MERRILL W. SHERMAN, SPECIAL MASTER

DATE: November 15, 2012

RE: INTERIM UPDATE

I thought it would be helpful to update the Court on the steps I have taken since the hearing on October 9, 2012 and the current status of the cases referred to the Special Master. By separate Memorandum, I will outline my thoughts on the input given at the October 9th hearing by the parties who appeared and in subsequent written Suggestions for Improvement filed in response to the Court's request for suggestions.

1. **Previously-held settlement conferences**

As the Court is aware, 131 settlement conferences were held in the late summer. These represented the first batch of conferences held in this matter. We are in the process of updating the status of each of those cases. We are hopeful that by the end of the month we can provide more precise information on the status of all 131 cases. Based on information we currently have, we believe the cases are in the following postures:

Offer accepted – (at or subsequent to conference; paperwork in process):	19
Discussions continuing around offers or subsequent counter-offers	83
Offer(s) rejected, no continuing discussions of which we are aware	5
Procedural issues (i.e., change of counsel, plaintiff *pro se*, wrong deft)	5
Court to enforce settlement	1
Status uncertain	18

We believe these numbers are encouraging. A significant number of the offers accepted and the offers currently under discussion involve loan modifications. A loan modification is a positive outcome in that it reflects agreement by all parties to maintain the plaintiff in his or her home with a financial arrangement acceptable to the defendant(s). Loan modification outcomes are more time consuming than, for example, a "cash for keys" settlement. There is a significant amount of financial disclosure to be provided by the plaintiff, which is sometimes an iterative process. Assuming agreement is reached, there is more documentation necessary to reflect the terms of the agreement.

2. **Upcoming schedule of conferences**

I am continuing to "batch" conferences by defendant; as many of the defendants are located outside Rhode Island and are represented by out of state counsel as well as local counsel, it makes most sense logistically to hold conferences that include at the same time all cases represented by a particular out of state attorney (while I have approved participation by out of state counsel by telephone in preliminary settlement discussions, I have not yet determined whether to excuse physical presence at non-preliminary settlement discussions).

We have scheduled conferences for December and are in the process of filling December's calendar and beginning to schedule for January and February. Scheduling will obviously be greatly influenced by how quickly I can engage a second attorney to preside.

3. **Compliance with Existing Orders**

On October 24, 2012, the Special Master filed an Order (ECF No. 1360) demanding that plaintiffs in 79 cases comply with the Use & Occupancy fee payment schedule in various specified amounts, and that plaintiffs in 10 cases comply with the court fee payment schedule in various specified amounts. Compliance was required by November 1, 2012.

I will shortly file a recommendation for dismissal with respect to the cases of plaintiffs who have failed to comply with this Order.

4. **Defendant Non-Compliance**

A number of defendants have failed to remit retainer fees as of October 31, 2012 (this does not include as-yet unpaid fees billed in October). Clearly the compliance tool of a threatened dismissal is not appropriate for defendant non-compliance and the only appropriate sanction is monetary. I am currently in the process of drafting a recommendation to the Court authorizing a specific monetary sanction for defendant failure to remit court fees due. By mid-December, I will submit that recommendation along with a list of defendants who are in arrears of any retainer billings, including those billed in October.

5. **Rate of New Cases**

The rate of new filings remains significant. In July, 35 cases were referred to me, 30 in August, 40 cases in September, and 16 more in the first half of October.

6. **Administrative Infrastructure**

As the Court is aware, the person I hired as a senior administrator, Tiffany Sy, has left for other employment. Attorney Barbara Hurst has assumed her duties as well as those of a Deputy Special Master, having been appointed such by the Court on November 6, 2012. While the recent storm eliminated the possibility of meaningful overlap of Ms. Hurst and Ms. Sy, and the speed of an effective transition was thus reduced, nonetheless the transition has occurred in an orderly way and it is not anticipated that there will be significant disruption in the administrative process.

I am endeavoring to retain an additional attorney who, along Ms. Hurst, will conduct settlement conferences. The first set of conferences was instructional as to further development

of the process. I have been proceeding deliberately as Special Master. Until I was satisfied that the process would be productive, I did not want to "over-expend" resources without producing a result. I believe we now have sufficient experience to press for an aggressive schedule of conferences beginning next month.

It is important to note that the holding of settlement conferences increases the administrative demands on the project exponentially by adding an additional tier of administrative oversight to what have been the ongoing tasks of (a) setting up new cases with payment schedules and document demands; (b) ensuring compliance with payments and document demands; and (c) scheduling conferences. As we know from the first batch of 131 conferences, proceeding to disposition even when there has been agreement does not occur overnight. We are currently examining mechanisms for spurring these agreements into actual dispositions.

7. Upcoming Issues

As noted in ¶ 1 above, a number of cases have proceeded through settlement conference without achieving a settlement. As to those cases, by the end of December, I will report to the Court whether I believe there has been a good faith attempt to settle by all parties resulting in an "impasse," or whether I believe one or more parties failed to make a good faith attempt to reach a reasonable settlement. Additionally, I think it appropriate for me in referring the case back to the Court to allow for the possibility that the Court will leave the injunction against foreclosure in place in cases where the plaintiff resides in the house. In such cases, I am considering recommending to the Court an adjustment in the U&O payment, operating on the assumption that for the duration of any injunction it is reasonable for the plaintiff to be required to pay something resembling "fair market value" for use and occupancy in the house. Thus, I would

be seeking to adjust the U&O payment to a level that reflects more closely the current value of the house, and annual real estate taxes assessed against the property.

Respectfully submitted.

Merrill W. Sherman/kh
MERRILL W. SHERMAN.
Special Master
50 Holden Street
Providence, Rhode Island 02908

MWS:bh

Tab 8

MEMORANDUM

TO: JUDGE JOHN J. McCONNELL, JR.

CC: AILEEN SPRAGUE, BARBARA HURST

FROM: MERRILL W. SHERMAN, SPECIAL MASTER

DATE: NOVEMBER 15, 2012

RE: SUGGESTIONS FOR IMPROVEMENT

There is a shared desire to move the docketed cases forward expeditiously. One component of that is to increase the number of settlement conferences. By separate memorandum, I have reported to the Court on the current status of the administrative structure and a number of steps designed to bring more cases to conclusion on an efficient timetable, including: (a) adding two attorneys to conduct settlement conferences; (b) filing before year-end reports on cases where settlement conferences were held but failed to reach agreement, based on criteria constituting "impasse" and "good faith attempt to settle"; (c) implementing faster protocols toward dismissal as a sanction against plaintiffs who fail to comply with court-ordered requirements; as well as monthly reports on payments and arrearages of both U&O fees and retainer fees; (d) developing a protocol to impose sanctions upon defendants who fail to comply with court-ordered requirements; .and (e) continuing to prod parties to complete necessary documentation in cases where agreement has been reached.

Addressing some of the filed suggestions.

I am not commenting on all suggestions, and my failure to comment on any suggestion should not signify agreement. I will not comment on any legal matters raised and my failure to

comment does not signify agreement. I will not respond to suggestions that I deem contrary to the Court's intention (for example, the ability to "Opt In" to the process).

My comments are as follows:

a. U & O payments have been calculated based on a rule of thumb, relative to the "value" of the property and reflective of the notion that plaintiffs should not be living in homes without paying.

b. For properties that are post-foreclosure, where the plaintiffs reside in them, the consideration of keeping "families in their homes" remains the same. There are instances where, as part of a settlement, the foreclosure is reversed and a loan modification is put in place. Thus, limiting the Special Master process to pre-foreclosure cases only is not consistent with the Court's objectives.

c. Who the "real party in interest" is in some of the cases remains challenging. We had asked that question in a form initially submitted to the first batch of defendants. It is not always clear to the defendants' counsel who that is. Ultimately, of course, they figure it out. To my knowledge, no settlement conference has been held without a major, "name-brand" defendant, represented by a large and presumably competent firm in the room, taking the position with me that they were the right party to be there and had full authority to act.

d. Timetable and deadlines. The objectives of deadlines are to increase the likelihood of compliance and eventual disposition, and to avoid unnecessary administrative burdens. The reality of this situation is that one lawyer has an overwhelming number of the cases. The deadlines and protocols have to be reasonable with respect to the realities of that representation in order to both increase the likelihood of compliance and thus eventual disposition *and* to avoid creating unnecessary compliance issues that tax the administrative arm

the Special Master without a corresponding gain. Setting artificial and formal deadlines is not necessarily practical and may increase the administrative work for the Special Master.

However, the Special Master is also concerned that the weight of the caseload of a particular law office not be allowed to bog down the process. Thus, there are competing pressures militating toward setting deadlines that will press the resolution of pending cases forward but also toward establishing reasonable time frames that will not unduly interfere with the ability of plaintiffs' counsel to represent its clients. There are already mandatory financial deadlines in place; I am considering mandatory *processing* deadlines if there appears to be no other way to keep this docket moving toward closures within a reasonable period of time.

Respectfully submitted.

Merrill W. Sherman/bh

MERRILL W. SHERMAN,
Special Master
50 Holden Street
Providence, Rhode Island 02908

MWS:bh

Tab 9

OFFICE OF THE SPECIAL MASTER
50 Holden Street, Suite 200
Providence, RI 02908

January 3, 2013

To: Plaintiffs' and Defendants' Counsel; Pro Se Plaintiffs

From: Merrill W. Sherman, Special Master

Re: Final Version - Settlement Conferences Scheduling and Guidelines

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In this memorandum, I am summarizing the approach I plan to take over the coming months. The changes to my draft memorandum of December 11, 2012 reflect a number of the comments made at the sessions I held on December 20, 2012.

While I generally do intend strict adherence, I stress that these are guidelines, and there can be exceptions based on the facts and circumstances of a particular situation.

1. Timetable and the Settlement Conference Process.
Exhibit 1 to this memo contains timeframes and other materials regarding filing of Appendix A's and the Settlement Process.

2. Conference Timeframe.
By January 31, 2013, I plan to publish a general overall settlement conference timeframe. Conferences will continue to be scheduled in the interim. Per suggestions made, older cases will be given higher priority.

3. Good Faith and Impasse.
I will be using these concepts as a basis for my reporting to the Judge.

A. Good Faith.
The absence of "bad faith." I will presume good faith unless and until I determine there has been "bad faith."

B. Bad Faith.

A determination of bad faith can arise from a wide range of conduct, including but not limited to:

1) The refusal or persistent failure to participate in the settlement process in a significant respect (e.g., by not cooperating in scheduling, by not furnishing documents, by not responding in a meaningful way to an offer, etc.)

2) Taking an unreasonable position, given the facts and circumstances of the individual case. What is unreasonable in one case may be reasonable in another (e.g., the amount of a cash for keys offer or counter-offer). Reasonableness is a business / marketplace issue, not a subjective one.

3) Dilatoriness that obstructs the settlement process.

4) A pattern of unreasonable demands on the other party (e.g., for documents or information that is not needed).

C. Impasse.

An "impasse" has been reached when parties have attempted settlement in good faith and there is no reasonable likelihood of the parties reaching an agreement. This can be due to any number of reasons.

I would note that the consequences of bad faith can be different for plaintiffs and defendants. In cases of plaintiffs, I have sought and generally will continue to seek dismissal of cases; for defendants the imposition of fines is appropriate.

4. Identification of a Lead Entity for the Defendants.

As discussed in Exhibit 1 to this memo, a Preconference Notice will go out to all Defendants. It is incumbent on the Defendants to identify the "real party in interest," that is the entity that has the authority to definitely settle the mortgage at issue in the case. If that entity is not a named Defendant, the other Defendants must so disclose and identify the "real party in interest." Such entity hereafter is referred to as the "Lead Entity."

The conference will be scheduled by consulting with counsel to the Lead Entity and the plaintiff. Other parties can attend if they wish by phone or in person. But I will not delay or schedule around them.

5. Planned treatment of cases.

A. Cases where the property is foreclosed.
The Special Master will not insist on rescission of a foreclosure.

1) Where plaintiffs do not reside in the house – absent unusual circumstances, the Special Master will treat these cases as "cash for keys."

The plaintiff, ten (10) days prior to the conference, must produce (1) a copy of original deed evidencing the date he / she / they acquired the property as owners; (2) a copy of mortgage in dispute; (3) a written certificate as to date and amounts of any and all subsequent equity mortgage financing(s) on the property in question; (4) evidence of the date and amount of any down payment made to acquire the property. At that time, the plaintiff also shall produce any documentary evidence that he / she / they have of any claimed economic loss caused as a result of defendants' actions.

The Primary Defendant must produce an appraisal dated not more than six months prior to the conference date.

The Special Master's present view on these cases is essentially as follows. The plaintiffs have moved from the house and are unlikely to return. Whether the foreclosure was wrongful is not relevant to my attempt to see if the parties can agree on a settlement. The plaintiffs borrowed the money; it is owed to someone and presumably has to be paid at some point. As a result of market forces, it is most likely the property is underwater, often deeply underwater.

At issue in the Special Master's mind is only the amount of the plaintiff's economic loss. Unless the plaintiff can demonstrate genuine economic loss, relatively nominal cash for key settlements are expected. The Special Master in these circumstances is guided by business judgment. While plaintiffs' counsel point out that they can tie things up in litigation for extended periods and cloud title, this does not sit well with the Special Master, who is a business person, not a lawyer. Conversely, the Special Master is not swayed when

defendants' counsel take stands "on principle" and express a willingness to establish the "rightness" of their position through protracted litigation.

The Special Master remains open to "special" or "unusual" circumstances, whatever they may be, but neither a plaintiff's seeking settlement based on the "delay" value of resolving the lawsuit nor a defendant's assertion of a "moral hazard" in accommodating plaintiffs ordinarily will constitute these. For example, in cases involving plaintiffs of modest circumstances without egregious bad behavior ("trashing" a house for example; or hiding assets; or untruthfulness in forms submitted to the Special Master), it will be difficult for me to see special circumstances justifying a defendant not making a reasonable settlement proposal.

Conversely, absent special circumstances, plaintiffs making unreasonable or excessive demands will be considered operating in bad faith.

2) Where the plaintiff resides in the house.

Where the Primary Defendant is unwilling to voluntarily rescind the foreclosure, the Special Master believes the plaintiff should either (a) accept a cash for keys offer or (b) be permitted to purchase the property at fair market value.

Cash for keys offers in these cases generally should be larger and reflect relocation expense.

For plaintiffs desiring to purchase the property, they must come to the settlement conference with a preliminary approval letter from a responsible mortgage financer and otherwise demonstrate their ability to close on the transaction.

B. Cases where the property is not foreclosed.

1) Where plaintiff does not reside in the house. I plan to treat these and make the same recommendation as in cases of foreclosed property, and also plan to recommend relief from stay of foreclosure / eviction, absent settlement.

2) Where plaintiff is making regular U & O payments, the Special Master expects a reasonable effort to modify the mortgage, which if consummated, would be exchanged for a release of all claims. If a conventional modification program offered by the Primary Defendant does not result in approval for reasons of affordability, the Special Master expects that a second look will be undertaken at a commercially reasonable mortgage modification. Generally, a commercially reasonable mortgage modification has the following parameters:

a. Not less than the remaining term of the loan, or if longer and within the relevant defendant's guidelines, 30 years;
b. Not greater than a 4% interest rate fixed for 30 years; or not greater than 3.0% adjustable after 5 years;
c. A principal balance of not greater than 120% of the current appraised value of the property;
d. Forgiveness of all indebtedness in excess of such amount (or, at the defendant's election, a shared equity appreciation mortgage as referenced in my earlier report.)

A borrower shall be reviewed for capacity and creditworthiness based on criteria that should exclude prior mortgage defaults, should rely on the payments to the Special Master and shall rely on other generally accepted means and standards when considering loan modifications.

C. Other terms.

In connection with settlements, I expect plaintiffs to be, at a minimum, conditionally released from the amount of debt not incorporated into the repayment terms of the mortgage modification. The release may be conditioned on honoring all terms of the modification for a two year period.

I also expect full general releases and the supplying of all documentation necessary to convey good and clear record and marketable title to the defendants.

D. Miscellaneous.

If impasse is reached, before returning a case to the Judge, at the option of the defendant, I will adjust the U&O payment to more of

a market-driven one. If I am supplied with the current tax bill and an appraisal or BPO not more than 6 months old, I will adjust the U&O payment to the equivalent of (a) the monthly amortization payment on a 30 year mortgage at 4% in the amount of the appraisal value, plus (b) one-twelfth of the annual taxes, rounded to the nearest $10.

6. Settlement/Dismissal Stipulations

The Lead Entity shall have the responsibility of securing dismissal stipulations signed by all named and served defendants in a case.

All dismissal stipulations must contain the following two provisions:

A. A specific directive to the Special Master as to how any Use & Occupancy payments are to be disbursed by her, as follows:

The Use and Occupancy payments made by the plaintiff(s) to the Special Master as a result of these proceedings shall be paid by the Special Master as follows: [specify to whom they should go; if they are to go in entirety to a particular party or be split between two parties, simply say that and identify the party(ies). If there are particular dollar amounts, include those.]

B. A representation as to payments of retainers as follows:

Each of the undersigned parties warrants and represents as to himself / herself / itself that s / he / it has paid all retainer fees billed to that party and waives the return of any retainer fee monies paid to the Special Master as a result of these proceedings.

7. Future Actions

The Special Master has taken action as to refiling of certain previously dismissed cases. The Special Master intends, following consultations, to establish a process for what she, a non-lawyer, termed cases involving "multiple bites of the apple." Additionally, by January 31, the Special Master intends to schedule defendants' identification of properties deemed "commercial" by her for further recommendation(s) by her to the Court.

EXHIBIT 1

- **Within seven (7) days of filing the Complaint:**
  - Plaintiff must file a duly completed Appendix A. If it remains unfiled after that time period *or is incomplete when filed*, a 5-day compliance order will be issued and thereafter a recommendation to dismiss.
  - In the event plaintiff claims the making of any payments in response to Question 9 on Appendix A, the Appendix A form must be accompanied by documentary evidence of the making of those payments for the three month period immediately preceding the date of the complaint. In the event such evidence is not submitted, no recognition will be given to such payments in the Special Master's calculation of U&O payments.

- **Settlement Process**

The Special Master shall notice all parties when she intends to schedule a case for a settlement conference (a "preconference notification").

Foreclosed Cases

- Within fourteen (14) calendar days after receiving a preconference notification, the defendant(s) shall forward to the Special Master and plaintiff's counsel all of the following:
  - The identity of the holder of the note involved in the litigation, and the date on which such entity acquired such note.
  - An identification of the lead entity for the defendants. The Lead Entity shall be the entity with authority to settle the case on behalf of the defendant that is the current holder of the note involved in the litigation. If such entity is different from such holder, the identification shall set forth the basis for such authority and the capacity in which such entity operates (e.g., servicer).
  - The identity of the current (Mortgage) servicer, if different from the Lead Entity.
  - Whether the Lead Entity is willing to rescind the foreclosure and offer a loan to the plaintiff(s). If so, the Lead Entity shall supply the

application forms which the plaintiff(s) need to complete (the "Loan Forms").

- A copy of the latest BPO, appraisal or other valuation of the real estate involved in the litigation.

- All of defendants' counsel must sign the identification of the Lead Entity.
- Within fourteen (14) calendar days after receiving a preconference notification, the plaintiff shall forward to the Special Master and defendants' counsel the following:
  - A statement (the "Initial Position Statement") declaring whether the plaintiff seeks (a) a rescission of the foreclosure and a loan modification or new loan (if made available by a defendant); (b) re-purchase of the property; or (c) "cash for keys."
  - Where the plaintiff seeks re-purchase of the property, he / she is to accompany the statement with documentary proof of preliminary financing approval, a monetary purchase price offer, and a recent appraisal or BPO supporting the purchase price offer.
  - Where the plaintiff seeks cash for keys, he / she shall make a settlement offer. In connection with such offer, the plaintiff shall provide a succinct explanation of any economic loss he/she/they claim to have sustained and shall include documentary evidence of economic loss claimed.
  - Documentary evidence must include:
    (a) A copy of original deed evidencing the date he / she / they acquired the property as owners.
    (b) A copy of mortgage in dispute.
    (c) A written certificate as to date and amounts of any and all subsequent equity mortgage financing(s) on the property in question.
    (d) Evidence of the date and amount of any down payment made to acquire the property. Plaintiff also shall produce any (other) documentary evidence that he / she / they have of any claimed economic loss caused as a result of defendants' actions.

- Within fourteen (14) days after receipt of the Initial Position Statement the Lead Entity shall (a) supply loan forms to plaintiff (if relevant) or (b) respond to the purchase offer on cash for keys offer (the "initial Response"). The Special Master shall be copied on the Initial Response
- Where the plaintiff has sought and the Lead Entity is willing to consider, foreclosure rescission and extending a new loan or entering into a loan modification:
    - (a) The plaintiff within fourteen (14) days of receipt of the Loan Forms, shall duly complete the Loan Forms and supply all required documents to the Lead Entity (the "Loan Package"). The Loan Package must be accompanied by a transmittal letter or email (the "Transmittal Letter") referencing the C.A. No. of the plaintiff's case and the material supplied.
    - (b) The plaintiff shall copy the Special Master on the Transmittal Letter to the Lead Entity.
    - (c) Within two (2) weeks after receiving the Loan Package, the Lead Entity shall notify the plaintiff, with a copy to the Special Master, as to whether the Loan Package is complete and if not, in what respect(s) it is incomplete..
    - (d) Within two (2) weeks of receiving any notice of an incomplete Loan Package, plaintiff shall submit all information requested to the Lead Entity; a copy of the Transmittal Letter shall be furnished to the Special Master.

- Within three (3) weeks of receiving a complete Loan Package, the Lead Entity shall notify plaintiff, with a copy to the Special Master, of its decision. In the event of rejection, reasons shall be provided. If the Lead Entity cannot provide a decision within three (3) weeks, a request for extension may be made with a specific date proposed by which a decision will be made. Where plaintiff has made a cash for keys offer, the Lead Entity shall have seven (7) business days from receipt to accept or make a counter offer.

- In the event of a counter offer, plaintiff shall have five (5) business days to respond.
- The plaintiff and Lead Entity shall copy the Special Master on all responses / proposals, and shall include the case caption and C.A. No. on the same.

Non-Foreclosed Cases

- Within fourteen (14) calendar days after receiving a preconference notification, the defendant(s) shall forward to the Special Master and plaintiff's counsel all of the following:
  - An identification of the Lead Entity.
  - The identity of the holder of the note involved in the litigation and the date on which such entity acquired such note.
  - A copy of the latest BPO, appraisal or other valuation of the real estate involved in the litigation.
  - The application forms which the plaintiff(s) need to complete in order to secure a loan modification (the "Loan Modification Forms").
- All of defendants' counsel must sign the identification of the Lead Entity.
- Within fourteen (14) calendar days after receiving a preconference notification, the plaintiff shall forward to the Special Master and defendant's counsel the following:
  - An Initial Position Statement declaring whether the plaintiff seeks (a) a loan modification; or (b) "cash for keys."
  - Where the plaintiff seeks cash for keys, he/she/they shall make a settlement offer. In connection with such offer, the plaintiff shall include an explanation of and documentary evidence of economic loss claimed, as more fully described above.
  - Where the plaintiff has sought a loan modification:
    (a) Within fourteen (14) days from the later of (i) receipt of the Loan Modification Forms; or (ii) his / her notice to the Special Master that he / she / they desire a loan modification, the plaintiff shall duly complete the Loan Modification Forms and supply all required documents to the Lead Entity (the "Loan Package").

(b) Copy the Special Master on the Transmittal Letter to the Lead Entity.

(c) Within two (2) weeks after receiving the Loan Package, the Lead Entity shall notify the plaintiff, with a copy to the Special Master, as to whether the Loan Package is complete and if not, in what respect(s) it is incomplete..

(d) Within two (2) weeks of receiving any notice of an incomplete Loan Package, plaintiff shall submit all information requested to the Lead Entity; a copy of the transmittal letter shall be furnished to the Special Master.

(e) Within three (3) weeks of receiving a complete Loan Package, the defendant shall notify plaintiff, with a copy to the Special Master, of its decision. In the event of rejection, reasons shall be provided. . If the Lead Entity cannot provide a decision within three (3) weeks, a request for extension may be made with a specific date proposed by which a decision will be made.

- Where plaintiff has made cash for keys offer, the Lead Entity shall have seven (7) business days from receipt to accept or make a counter offer.
    - In the event of a counter offer, plaintiff shall have five (5) business days to respond.
    - The plaintiff and Lead Entity shall copy the Special Master on all responses / proposals, and shall include the case caption and C.A. No. on the same.

Scheduling of Conferences

The Special Master shall schedule a settlement conference for a specific date following communication with the Plaintiff and Lead Entity. An effort will be made to schedule the same at the time the Special Master believes all relevant material will have been submitted, assuming timely compliance with the above referenced deadlines. Responses to requests for date reservations must be made within two (2) days of such request.

Failure to Comply with Timeframe(s)

Except as otherwise provided or determined with respect to Appendix A filings, U & O payments and retainer payments, parties not adhering to these timeframes will be believed by the Special Master to be negotiating in bad faith **unless** prior to the expiration of the relevant timeframe the party requests in writing additional time and explains why such additional time is reasonably necessary.

Other Lead Entity Responsibilities

In the event of settlement of a case, the Lead Entity shall be responsible for securing a signed dismissal stipulation from all named and served Defendants. The stipulation(s) of Defendants who are not Lead Entities, if contained in documents separate from that signed by the Plaintiff and Lead entity, shall contain a dismissal with prejudice and shall (a) direct disposition of any U & O payments held by the Special Master and (b) contain the representations as to payment of retainer bills and release of rights to retainer refunds, required in all dismissal stipulations.

ADDENDUM: TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(a)(7)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: (1) this brief contains 6,933 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point proportionally spaced typeface using Times New Roman font.

/s/ *Steven Fischbach*
Steven Fischbach (RI #7963)

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2013, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are not registered as ECF Filers and that they will be served by priority mail, postage prepaid:

Kenneth N. Boudreau
PO BOX 375
Portsmouth, RI

I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Service List for Case: 12-1526 In Re: Mortgage Foreclosure

Current Associated Cases: 12-1563 In Re: Mortgage Foreclosure, 12-1839 Fitzpatrick v. MERS Inc. et al, 12-1778 Macera v. Pawtucket Credit Union, 12-1795 Macera v. Pawtucket Credit Union, 12-1720 Gammino v. MERS Inc. et al, 12-1768 Barionnette et al v. MERS Inc. et al, 12-1721 Fonseca et al v. MERS Inc. et al

Contact Info	Case Number/s	Service Preference	ECF Filing Status
Corey J. Allard 574 Central Ave Pawtucket, RI 02861 Email: callard@allardlaw.com	12-1526 12-1563 12-1721 12-1768 12-1778 12-1795 12-1839	Email	Active
George E. Babcock 574 Central Ave Pawtucket, RI 02861 Email: george.babcock@babcocklawoffices.com	12-1526 12-1563 12-1721 12-1768 12-1778 12-1795 12-1839	Email	Active
Uwe Benjamin Law Office of George E. Babcock 574 Central Av	12-1526 12-1720 12-1768	US Mail	

Contact Info	Case Number/s	Service Preference	ECF Filing Status
Pawtucket, RI 02861 Email: uwe.benjamin@babcocklawoffice.com	12-1778 12-1795 12-1839		
Gregory N. Blase K&L Gates LLP 1 Lincoln St Boston, MA 02111-2950 Email: gregory.blase@klgates.com	12-1526	Email	Active
Paul J. Bogosian Jr. Moore & Bogosian 49 Weybosset St 4th Flr Providence, RI 02903 Email: pbogosian@moorebogosian.com	12-1526 12-1563	Email	Active
Kenneth N. Boudreau PO BOX 375 Portsmouth, RI	12-1526 12-1563	US Mail	
Shanna M. Boughton Litchfield Cavo LLP 6 Kimball Ln Ste 200 Lynnfield, MA 01940-0000 Email: boughton@litchfieldcavo.com	12-1526 12-1563	Email	Active
Richard E. Briansky Prince Lobel Tye LLP 100 Cambridge St Ste 2200 Boston, MA 02114-0000 Email: rbriansky@princelobel.com	12-1526 12-1563 12-1720 12-1721 12-1768 12-1839	Email	Active
Patricia Ann Buckley Bengtson & Jestings LLP 40 Westminster St Ste 300 Providence, RI 02903 Email: pbuckley@benjestlaw.com	12-1526 12-1563	Email	Active
M. Hamza Chaudary Adler Pollock & Sheehan PC	12-1526	Email	Active

Contact Info	Case Number/s	Service Preference	ECF Filing Status
1 Citizens Plaza, 8th Flr Providence, RI 02903-1345 Email: HChaudary@apslaw.com			
Melissa E. Darigan Partridge Snow & Hahn LLP 180 S Main St Providence, RI 02903-0000 Email: med@psh.com	12-1526	Email	Active
John B. Daukas Goodwin Procter LLP 53 State St Exchange Place Boston, MA 02109-2881 Email: jdaukas@goodwinprocter.com	12-1526	Email	Active
William J. Delaney Delaney Law Firm LLC 91 Friendship St, Ste 1 Providence, RI 02902 Email: wjd@dlfri.com	12-1526 12-1720 12-1768 12-1778 12-1795 12-1839	US Mail	
Marissa I. Delinks Hinshaw & Culbertson LLP 28 State St, 24th Flr Boston, MA 02109 Email: mdelinks@hinshawlaw.com	12-1526 12-1563	Email	Active
Todd Steven Dion Law Office of Todd S. Dion 1319 Cranston St Cranston, RI 02920 Email: toddsdion@msn.com	12-1526 12-1563	Email	Active
Michael B. Doherty Preti Flaherty Beliveau & Pachios LLP 53 State St., 30th Floor Boston, MA 02109 Email: mdoherty@preti.com	12-1526 12-1563	Email	Active
John B. Ennis 1200 Reservoir Ave	12-1526 12-1563	Email	Active

Contact Info	Case Number/s	Service Preference	ECF Filing Status
Cranston, RI 02920-0000 Email: jbelaw@aol.com	12-1720		
Thomas J. Enright Partridge Snow & Hahn LLP 180 S Main St Providence, RI 02903-0000 Email: tje@psh.com	12-1526	Email	Active
Thomas J. Enright Partridge Snow & Hahn LLP 2364 Post Rd Ste 100 Warwick, RI 02886-0000 Email: tje@psh.com	12-1563	Email	Active
Joseph A. Farside Jr. Edwards Wildman Palmer LLP 2800 Financial Plaza Providence, RI 02903-0000 Email: jfarside@edwardswildman.com	12-1526 12-1563	Email	Active
David E. Fialkow Nelson Mullins Riley & Scarborough LLP 1 Post Office Sq 30th Flr Boston, MA 02109 Email: david.fialkow@nelsonmullins.com	12-1526 12-1563	Email	Active
John Joseph Flanagan Torti Flanagan PC 146 Main St Norfolk, MA 02056 Email: jflanagan@torti.com	12-1526 12-1563	Email	Active
John T. Gannon McCorry & Gannon PC 727 Central Ave Pawtucket, RI 02861-0000 Email: jack@mccorryandgannon.com	12-1778 12-1795	Email	Active
Michael Thomas Gass Choate Hall & Stewart LLP	12-1526 12-1563	Email	Active

Contact Info	Case Number/s	Service Preference	ECF Filing Status
2 International Pl Boston, MA 02110 Email: mgass@choate.com			
Jeffrey Howard Gladstone Partridge Snow & Hahn LLP 180 S Main St Providence, RI 02903-0000 Email: jhg@psh.com	12-1526 12-1563	Email	Active
Brian Scott Grossman Prince Lobel Tye LLP 100 Cambridge St Ste 2200 Boston, MA 02114-0000 Email: bgrossman@princelobel.com	12-1526 12-1563 12-1720 12-1721 12-1768 12-1839	Email	Active
Amy B. Hackett Prince Lobel Tye LLP 100 Cambridge St Ste 2200 Boston, MA 02114-0000 Email: ahackett@princelobel.com	12-1526 12-1563 12-1720 12-1721 12-1768 12-1839	Email	Active
Michael R. Hagopian Orlans Moran PPLC Ste 2-L, 45 School St Boston, MA 02108 Email: mhagopian@orlansmoran.com	12-1526	Email	Active
Sean R. Higgins Nelson Mullins Riley & Scarborough LLP 1 Post Office Sq, 30th Flr Boston, MA 02109 Email: sean.higgins@nelsonmullins.com	12-1526 12-1563	Email	Active
Valerie N. Kloecker Hinshaw & Culbertson LLP 28 State St 24th Flr Boston, MA 02109 Email: vkloecker@hinshawlaw.com	12-1526 12-1563	Email	Active

Contact Info	Case Number/s	Service Preference	ECF Filing Status
Thomas R. Lavallee Harmon Law Offices PC 150 California St Newton, MA 02458-0000 Email: tlavallee@harmonlaw.com	12-1526 12-1563 12-1778 12-1795	Email	Active
S. Michael Levin Ste 200 55 Dorrance St Providence, RI 02903 Email: mlevin@smlevinlaw.com	12-1526	Email	Active
Charles A. Lovell Partridge Snow & Hahn LLP 180 S Main St Providence, RI 02903-0000 Email: cal@psh.com	12-1526	Email	Active
Charles A. Lovell Partridge Snow & Hahn LLP 2364 Post Rd, Ste 100 Warwick, RI 02886-0000 Email: cal@psh.com	12-1526 12-1563	Email	Active
Eric B. Mack Edwards Wildman Palmer LLP 2800 Financial Plaza Providence, RI 02903-0000 Email: emack@edwardswildman.com	12-1526 12-1563	Email	Active
Mary Ellen Manganelli Bulkley Richardson & Gelinas LLP 125 High St 16th Floor Boston, MA 02110 Email: mmanganelli@bulkley.com	12-1526	Email	Active
James P. Marusak Gidley, Sarli & Marusak LLP 1 Turks Head Pl Ste 900 Providence, RI 02903-0000 Email: jpm@gsm-law.com	12-1526 12-1563	Email	Active

Contact Info	Case Number/s	Service Preference	ECF Filing Status
Maura Katherine McKelvey Hinshaw & Culbertson LLP 28 State St 24th Flr Boston, MA 02109 Email: mmckelvey@hinshawlaw.com	12-1526 12-1563	Email	Active
Keven Alexander McKenna 23 Acorn St. Providence, RI 02903-0000 Email: kevenm@kevenmckennapc.com	12-1526 12-1563	Email	Active
Robert F. McNelis 715 Branch Ave Providence, RI 02904 Email: RF.McNelis.Esq@gmail.com	12-1526 12-1563	Email	Active
Robert M. Mendillo Harmon Law Offices PC 150 California St Newton, MA 02458-0000 Email: rmendillo@harmonlaw.com	12-1563	Email	Active
Jennifer Janeira Nagle K&L Gates LLP 1 Lincoln St Boston, MA 02111-2950 Email: jennifer.nagle@klgates.com	12-1526	Email	Active
Elizabeth Noonan Adler Pollock & Sheehan PC 1 Citizens Plaza 8th Flr Providence, RI 02903-1345 Email: enoonan@apslaw.com	12-1526 12-1563	Email	Active
Jennifer J. Normand Harmon Law Offices PC 150 California St Newton, MA 02458-0000 Email: jnormand@harmonlaw.com	12-1526 12-1563	Email	Active
Sean Thomas O'Leary	12-1526	Email	Active

Contact Info	Case Number/s	Service Preference	ECF Filing Status
O'Leary & Assoc 9 Mark Fore Dr West Warwick, RI 02893 Email: sto@oleary-law.net	12-1563		
David J. Pellegrino Partridge Snow & Hahn LLP 2364 Post Rd Ste 100 Warwick, RI 02886-0000 Email: djp@psh.com	12-1526 12-1563	Email	Active
Neil David Raphael Raphael LLC 1 Liberty Square, 12th Fl. Boston, MA 02109 Email: nraphael@raphaelllc.com	12-1526 12-1563	Email	Active
Henry F. Reichner Reed Smith LLP 1650 Market Street 2500 One Liberty Place Philadelphia, PA 19103 Email: hreichner@reedsmith.com	12-1526 12-1563	Email	Active
Stephen James Reid Jr. Blish & Cavanaugh LLP 30 Exchange Terr Providence, RI 02903-0000 Email: sjr@blishcavlaw.com	12-1526	Email	Active
David M. Rosen Harmon Law Offices PC 150 California St Newton, MA 02458-0000 Email: drosen@harmonlaw.com	12-1526 12-1563	Email	Active
Douglas R. Sargent Locke Lord LLP 111 S Wacker Dr Chicago, IL 60606 Email: dsargent@lockelord.com	12-1526	Email	Active

Contact Info	Case Number/s	Service Preference	ECF Filing Status
Randolph Bart Totten Adler Pollock & Sheehan PC 1 Citizens Plaza, 8th Flr Providence, RI 02903-1345 Email: btotten@apslaw.com	12-1526	Email	Active
Lauren F. Verni Partridge Snow & Hahn LLP 180 S Main St Providence, RI 02903-0000 Email: lfv@psh.com	12-1526	Email	Active
Patrick T. Voke LeClair Ryan 1 International Pl 11th Flr Boston, MA 02110-0000 Email: patrick.voke@leclairryan.com	12-1526	Email	Active
Joel J. Votolato McCorry & Gannon PC 727 Central Ave Pawtucket, RI 02861-0000 Email: joel@mccorryandgannon.com	12-1778 12-1795	Email	Active
Dean J. Wagner Shechtman Halperin Savage, LLP 1080 Main St. Pawtucket, RI 02860-0000 Email: dwagner@shslawfirm.com	12-1526 12-1563	Email	Active
Harris K. Weiner Salter, McGowan, Sylvia & Leonard 321 S. Main St. Suite 301 Providence, RI 02903-0000 Email: hweiner@smsllaw.com	12-1526	Email	Active
Harris K. Weiner Pine & Cantor 321 S Main St, Ste 302 Providence, RI 02903-0000 Email: hweiner@smsllaw.com	12-1526 12-1563	Email	Active

Contact Info	Case Number/s	Service Preference	ECF Filing Status
Todd D. White Adler Pollock & Sheehan PC 1 Citizens Plaza 8th Flr Providence, RI 02903-1345 Email: twhite@apslaw.com	12-1526 12-1563	Email	Active
Joseph F. Yenouskas Goodwin Procter LLP 901 New York Ave, NW Washington, DC 20001-0000 Email: jyenouskas@goodwinprocter.com	12-1526 12-1563	Email	Active

/s/ *Steven Fischbach*
Steven Fischbach (RI #7963)