

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

STEVEN AND RUTH MITCHELL,

Plaintiffs,

Vs.

RESIDENTIAL FUNDING CORPORATION,
et al.,

Defendants.

Case No. 03-CV-220489-01

Division 4

**ORDER PRELIMINARILY APPROVING
CLASS ACTION SETTLEMENT**

WHEREAS, a class action petition was filed in the above-entitled action (the "Litigation") on July 29, 2003; and

WHEREAS, on December 8, 2006, the Court certified a litigation class in the Litigation, comprised of those persons who obtained a Missouri residential second mortgage loan from Mortgage Capital Resource Corporation ("MCR") on or after July 29, 1997, and which is particularly described in the Court's *Order Certifying Plaintiff Class* (the "Litigation Class"); and

WHEREAS, notice of the Litigation and the *Order Certifying Plaintiff Class* was provided to the members of the Litigation Class, who were also notified of their right to opt out and exclude themselves from the Litigation Class; and

WHEREAS, only two (2) members of the Litigation Class, who were co-borrowers on the same MCR-originated loan, opted out of and excluded themselves from the Litigation Class; and

WHEREAS, Plaintiffs Steven L. and Ruth E. Mitchell ("the Named Plaintiffs") are representatives of the members of the Litigation Class whose second mortgage loans from

Mortgage Capital Resource Corporation were purchased by, assigned to and/or serviced by Wachovia Equity Servicing, LLC (f/k/a TMS Mortgage, Inc., d/b/a "The Money Store"), The Money Store, LLC (f/k/a The Money Store, Inc.), HomEq Servicing Corporation, and/or Wells Fargo Bank, N.A. (collectively, "WFB"); and

WHEREAS, the Named Plaintiffs and WFB have entered into a "Settlement Agreement and Release" (the "Agreement"), which memorializes a negotiated and agreed-upon settlement of all remaining claims in the Litigation as between the Named Plaintiffs as representatives of the members of the Litigation Class whose second mortgage loans from Mortgage Capital Resource Corporation were purchased by, assigned to and/or serviced by WFB (defined in the Agreement as the "WFB Settlement Class"), and WFB, subject to the approval of the Court ("the Settlement"); and

WHEREAS, the Named Plaintiffs have filed a *Motion for Preliminary Approval of Class Action Settlement With Defendant WFB* with the Court.

NOW THEREFORE, upon careful consideration of the *Motion for Preliminary Approval of Class Action Settlement With Defendant WFB*, and after reviewing the Agreement, and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The terms of the Agreement, and the Settlement as provided therein, are approved preliminarily as fair, reasonable and adequate to the WFB Settlement Class as defined in the Agreement, subject to further consideration at the Fairness Hearing described in Paragraph 14 below.

2. The definitions set forth in the Agreement are hereby incorporated by reference into this Order (with capitalized terms as set forth in the Agreement).

3. The Named Plaintiffs and WFB have executed the Agreement in order to settle and resolve the remaining claims and allegations in the Litigation, including any claim for sanctions, as between the WFB Settlement Class and WFB, subject to approval of the Court.

4. Accordingly, for the purpose of a settlement in accordance with the Agreement, and upon review of the *Plaintiffs' Motion for Preliminary Approval of Class Action Settlement With Defendant WFB*, this Court hereby preliminarily certifies the following class of persons as a settlement class (the "WFB Settlement Class"):

All persons who, on or after July 29, 1997, obtained a "Second Mortgage Loan," as defined in § 408.231.1 RSMo, from Mortgage Capital Resource Corporation on real property located in Missouri that was purchased by, assigned to and/or serviced by Wachovia Equity Servicing, LLC (f/k/a TMS Mortgage, Inc., d/b/a The Money Store), The Money Store, LLC (f/k/a The Money Store, Inc.), HomeEq Servicing Corporation, and/or Wells Fargo Bank, N.A., and who did not timely exclude themselves from the litigation class that the Court certified on December 8, 2006.

5. Pursuant to the Agreement, and for purposes of the Settlement only, the Court finds preliminarily as to the WFB Settlement Class that:

- a. The WFB Settlement Class is so numerous that joinder of all members is impracticable;
- b. There are questions of law or fact common to the WFB Settlement Class that predominate over questions affecting only individual members of the WFB Settlement Class;
- c. The claims of the Named Plaintiffs are typical of those of the members of the WFB Settlement Class;
- d. The Named Plaintiffs and Plaintiffs' Counsel will fairly and adequately represent and protect the interests of the members of the WFB Settlement Class; and
- e. Certification of the WFB Settlement Class as proposed is an appropriate

method for the fair and efficient adjudication of the controversies between the WFB Settlement Class and Defendant WFB.

6. For the purpose of this preliminary approval, and for all matters relating to the Settlement, until further order of the Court, the Court appoints the Named Plaintiffs as Representatives of the WFB Settlement Class and R. Frederick Walters, Kip D. Richards, David M. Skeens, J. Michael Vaughan, and Garrett M. Hodes of the law firm Walters Bender Strohbehn & Vaughan, P.C., as Counsel for the WFB Settlement Class (“Plaintiffs’ Counsel” or “Class Counsel”).

7. By this Order, the Court hereby exercises subject matter and personal jurisdiction over the WFB Settlement Class for purposes of evaluating the final certification of the WFB Settlement Class and the fairness and adequacy of the Settlement.

8. The Class Mail Notice, as set forth in Exhibit A to the Agreement, is hereby approved.

9. The Class Mail Notice in a form substantially the same as that set forth in Exhibit A to the Agreement shall be mailed by Class Counsel by first-class mail, postage prepaid, to all members of the WFB Settlement Class (as identified on Exhibit E of the Agreement, which was filed under seal) and any known Chapter 7 bankruptcy trustees of any member of the WFB Settlement Class for any Chapter 7 bankruptcy filed after origination of said individual class member’s loan. Such mailing shall be made within five (5) days of this Preliminary Approval Order.

10. The Agreement contemplates a notice methodology that (a) protects the interests of the Named Plaintiffs, the WFB Settlement Class, and WFB, (b) is the best notice practicable under the circumstances, and (c) is reasonably calculated to apprise the WFB Settlement Class of

the pendency of the remaining claims against WFB, the proposed Settlement, the Agreement, and the class members' right to opt out and exclude themselves from or object to the proposed Settlement. In addition, the Court finds that the notice methodology stated in the Agreement is reasonable and constitutes due, adequate and sufficient notice to all persons entitled to receive notice of the proposed Settlement and meets all applicable requirements of law, including, but not limited to, Mo. Rule 52.08 and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

11. Prior to the Fairness Hearing, Class Counsel shall serve and file a sworn statement of a person with knowledge, evidencing compliance with the provisions of this Order concerning the mailing of the Class Mail Notice.

12. Any member of the WFB Settlement Class desiring exclusion from the WFB Settlement Class shall mail a request for exclusion ("Request for Exclusion") to the Parties' respective counsel. To be valid, the Request for Exclusion must be received on or before **June 25, 2012**. Such Request for Exclusion must be in writing and include: (a) the name, address, telephone number and the last four digits of the social security number of the class member seeking to opt out; (b) a statement that the class member and all other borrowers named on the class member's promissory note are seeking exclusion; (c) the signature of each person who was a party to the promissory note made in connection with the class member's loan, unless such person is deceased or legally incompetent, in which event the opt out submission shall be signed by said deceased or legally incompetent person's personal representative or guardian; and (d) a reference to "Mitchell v. Residential Funding Corporation, et al., Case No. 03-CV-220489-01." Any member of the WFB Settlement Class who does not properly and timely request exclusion from the WFB Settlement Class in full compliance with these requirements shall be included in

the WFB Settlement Class and be bound by any judgment entered in this Litigation with respect to the Class.

13. Within seven (7) days after the deadline for submitting Requests for Exclusion, Class Counsel shall file with the Court a sworn statement to identify those persons, if any, who timely submitted a Request for Exclusion. The Parties shall retain the original Requests for Exclusion and shall promptly furnish the other with copies of any Requests for Exclusion that come into their possession.

14. A hearing (the "Fairness Hearing") shall be held before the undersigned at 9:30 a.m. on July 13, 2012, in Division 4 at the Jackson County Courthouse, 415 East 12th Street, Kansas City, Missouri 64106. At the Fairness Hearing, the Court will consider: (a) the fairness, reasonableness, and adequacy of the Settlement; (b) the entry of any final order or judgment in the Litigation with respect to the WFB Settlement Class; (c) the application for an incentive award for the services rendered by the Named Plaintiffs; (d) the application for attorneys' fees and for reimbursement of expenses by Class Counsel; and (e) other related matters. The Fairness Hearing may be postponed, adjourned or continued by Order of the Court without further notice to the WFB Settlement Class.

15. To be considered at the Fairness Hearing, any person desiring to file an objection or other comment on the Settlement shall be required to file all such objections and comments and all supporting pleadings on or before June 25, 2012, with service upon Class Counsel and Counsel for WFB. The objections of any WFB Settlement Class Member must be in writing, and must specifically include the following: (a) the name, address, and telephone number of the class member filing the objection; (b) a statement of each objection asserted; (c) a detailed description of the facts underlying each objection; (d) any loan documents in the possession or

control of the objector and relied upon by the objector as a basis for the objection; (e) if the objector is represented by counsel, a detailed description of the legal authorities supporting each objection; (f) if the objector plans to utilize expert opinion and/or testimony as part of the objection(s), a written expert report from all proposed experts; (g) if the objector plans to call a witness or present other evidence at the hearing, the objector must state the identity of the witness and identify any documents by attaching them to the objection and provide any other evidence that the objector intends to present; (h) a statement of whether the objector intends to appear at the hearing; (i) a copy of any exhibits which the objector may offer during the hearing; and (j) reference to "Mitchell v. Residential Funding Corporation, et al., Case No. 03-CV-220489-01."

16. No objection to or other comment concerning the Settlement shall be heard unless timely filed in accordance with the guidelines specified above. Class Counsel and Counsel for WFB shall promptly furnish each other with copies of any objections that come into their possession.

17. Any WFB Settlement Class Member who does not make his or her objection in the manner provided in this Order shall be deemed to have waived any such objection and shall forever be barred from making any objection to the Settlement, including but not limited to the propriety of class certification, the adequacy of any notice, or the fairness, adequacy or reasonableness of the Settlement.

18. Submissions of the Parties relative to the Settlement, including memoranda in support of the Settlement, applications for attorneys' fees and reimbursement of expenses by Class Counsel, and any applications for the payment of services rendered by the Named Plaintiffs shall be filed with the Clerk of the Court on or before **June 29, 2012**.

19. Any attorney hired by a WFB Settlement Class Member for the purpose of appearing and/or making an objection shall file his or her Entry of Appearance at the Class Member's expense on or before **June 25, 2012**, with service on Class Counsel and Counsel for WFB as required by the Missouri Rules of Civil Procedure.

20. Any WFB Settlement Class Member may appear at the Fairness Hearing in person, or by counsel if an appearance is filed and served as provided in the Class Mail Notice, and such person will be heard to the extent allowed by the Court. No person shall be permitted to be heard unless, on or before **June 25, 2012**, unless such person has (a) filed with the Clerk of the Court a notice of such person's intention to appear; and (b) served copies of such notice upon Class Counsel and Counsel for WFB as required by the Missouri Rules of Civil Procedure.

21. Any WFB Settlement Class Member may seek to intervene in the Litigation in person, or by counsel if a motion to intervene is filed and served as provided in the Notice. No person shall be permitted to intervene unless, on or before **June 25, 2012**, such person has (a) filed with the Clerk of the Court a valid motion to intervene and (b) served copies of such notice upon Class Counsel and Counsel for WFB as required by the Missouri Rules of Civil Procedure.

22. All other events contemplated under the Agreement to occur after entry of this Order and before the Fairness Hearing shall be governed by the Agreement and the Class Mail Notice, to the extent not inconsistent herewith. Class Counsel and Counsel for WFB shall take such further actions as are required by the Agreement.

23. The Parties shall be authorized to make non-material changes to the Class Mail Notice so long as Class Counsel and Counsel for WFB agree and one of the Parties files a notice thereof with the Court prior to the Fairness Hearing. Neither the insertion of dates nor the correction of typographical or grammatical errors shall be deemed a change to the Class Mail

Notice.

24. All claims against and motions involving Defendant WFB in the Litigation are hereby stayed and suspended until further order of this Court, other than such as may be necessary to carry out the terms and conditions of the Agreement or the responsibilities related or incidental thereto.

25. If Final Approval of the Settlement does not occur, or if the Settlement does not become effective on or before the Effective Date as provided in the Agreement, or if the Settlement is rescinded or terminated for any reason, the Settlement and Agreement and all proceedings had in connection therewith shall be null and void and without prejudice to the rights of the Parties before the Agreement was made, and this Order and all Orders issued pursuant to the Agreement shall be vacated, rescinded, canceled, annulled and deemed "void" and/or "no longer equitable" for purposes of Mo. Rule 74.06, as provided in and subject to paragraph 13 of the Agreement.

26. Neither this Order, the Agreement, nor any of their terms or provisions, nor any of the negotiations between the Parties or their counsel (nor any action taken to carry out this Order), is, may be construed as, or may be used as an admission or concession by or against any of the Parties or the Released Persons of (a) the validity of any claim or liability, any alleged violation or failure to comply with any law, any alleged breach of contract or duty, any legal or factual argument, contention or assertion, or any claim for sanctions; (b) the truth or relevance of any fact alleged by the Named Plaintiffs; (c) the existence of any class alleged by the Named Plaintiffs; (d) the propriety of class certification if the remainder of the Litigation were to be litigated rather than settled; (e) the validity of any claim or any defense that has been or could have been asserted in the Litigation or in any other litigation; (f) that the consideration to be

given to WFB Settlement Class Members hereunder represents the amount that could be or would have been recovered by any such persons if the remaining claims against WFB were retried; (g) the propriety of class certification in any other proceeding or action; or (h) the propriety of the “multiplier” that the Named Plaintiffs requested and proposed in their *Second Application for Award of Attorney’s Fees* in any future petition or application to the Court for an award of additional attorneys’ fees against WFB. Entering into or carrying out the Agreement, and any negotiations or proceedings related to it, shall not in any way be construed as, or deemed evidence of, an admission or concession as to the denials, defenses, or factual or legal positions of WFB, and shall not be offered or received in evidence in any action or proceeding against any Party in any court, administrative agency or other tribunal for any purpose whatsoever, except as is necessary in a proceeding to enforce the terms of this Order and the Agreement; provided, however, that this Order and the Agreement may be filed by WFB in any action filed by or against WFB or any other Released Person to support a defense of *res judicata*, collateral estoppel, release, waiver, good faith settlement, judgment bar or reduction, full faith and credit, or any other theory of claim preclusion, issue preclusion or similar defense or counterclaim. WFB expressly reserves all rights and defenses to any claims and does not waive any such rights or defenses in the event that the Agreement is not approved for any reason.

IT IS SO ORDERED

Date: May 25th, 2012


Justine E. Del Muro, Circuit Judge

Certificate of Service

I certify that I faxed a copy of the foregoing order on May 25th 2012 to:

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