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Attorneys for Plaintiffs and the Class

UNITED STATES DISTRICT COURT**NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION**

ARMANDO PLASCENCIA and MELANIA
 PLASCENCIA, individually and on behalf of
 all others similarly situated,

Plaintiffs,

v.

LENDING 1ST MORTGAGE, LENDING 1ST
 MORTGAGE LLC, EMC MORTGAGE
 CORPORATION, and DOES 1 through 10
 inclusive,

Defendants.

Case No. 4:07-cv-04485-CW

CLASS ACTION**NOTICE OF PROPOSED SETTLEMENT
AND FINAL APPROVAL HEARING**

Settlement Notice Date: _____, 2013

Objection Deadline: _____, 2013

Final Approval Hearing: May 2, 2013,
 at 2:00 p.m.

Courtroom: 2 – 4th Floor
 Judge: Hon. Claudia Wilken
 Complaint Filed: August 29, 2007
 Trial Date: November 5, 2012

1 **NOTICE OF PROPOSED SETTLEMENT AND FINAL APPROVAL HEARING**

2 **PLEASE READ THIS SETTLEMENT NOTICE CAREFULLY.**
3 **THIS IS NOT A LAWSUIT AGAINST YOU.**

4 **YOU MAY BENEFIT FROM READING THIS SETTLEMENT NOTICE AND YOUR**
5 **RIGHTS MAY BE AFFECTED BY THE LAWSUIT AND THIS STIPULATION OF**
6 **SETTLEMENT**

7 THIS NOTICE OF PROPOSED SETTLEMENT IS SENT TO YOU BECAUSE YOU ARE A
8 MEMBER OF THE FOLLOWING CLASS:

9 All individuals who, between August 29, 2003 and May 12, 2011, have or have had a
10 Monthly Option ARM loan, secured by real property located in the United States, that
11 was originally made by LENDING 1st MORTGAGE within the state of California and
12 then sold or owned by LENDING 1st MORTGAGE or EMC MORTGAGE
13 CORPORATION.

14 **I. WHY DID YOU GET THIS SETTLEMENT NOTICE?**

15 This Notice of Proposed Settlement (“Settlement Notice”) is given pursuant to an order of the
16 United States District Court for the Northern District of California (the “District Court”). This
17 Settlement Notice informs you that there is a pending partial settlement in a class action lawsuit that
18 may affect you. The lawsuit is entitled *Plascencia, et al v. Lending 1st Mortgage, et al*, Case No.
19 4:07-cv-04485-CW (the "Action") filed in the United States District Court for the Northern District of
20 California.

21 This Settlement Notice provides notice to you of the terms of the proposed partial settlement in
22 the Class Action, so that if the partial settlement is approved by the Court, it can be implemented and a
23 cash payment can be made to you in accordance with the procedures set forth herein.

24 **II. WHAT IS THE CLASS ACTION ABOUT?**

25 The Class Action was brought on behalf of a class of borrowers who received an Option ARM
26 loan through Lending 1st Mortgage and Lending 1st Mortgage, LLC (collectively “Lending 1st”) from
27 August 29, 2003 through May 12, 2011, the date of the Class Notice (as defined below). The Class
28 Action alleges, among other things, that Lending 1st, EMC Mortgage Corporation (“EMC”), and

1 certain unnamed defendants violated California state law (located at Cal. Bus. & Prof. Code § 17200
2 and the following), and committed fraud. Lending 1st raised its defenses in an answer to Plaintiffs’
3 Third Amended Complaint filed on July 31, 2008.

4 After lengthy good faith bargaining, the Plaintiffs and Class Representatives Armando
5 Plascencia and Melania Plascencia (referred to as “Class Representatives”) and Lending 1st (Class
6 Representatives and Lending 1st together referred to as the “Parties”) have reached a proposed
7 settlement in the Action (the “Settlement”), which Class Representatives, the attorneys acting on
8 behalf of the Class (“Class Counsel”) and Lending 1st believe is fair and reasonable under the
9 circumstances. The proposed Settlement between the Parties is a compromise of disputed claims, and
10 takes into account the fact that Lending 1st is no longer in business, and has no assets to pay any
11 claims. The Parties have negotiated the Settlement in order to avoid further costs, expenses, and
12 uncertainties of continuing the lawsuit, and in view of Lending 1st’s extremely limited ability to pay.
13 The proposed Settlement does not mean, and will not be construed to mean, that Lending 1st has or
14 has not committed any wrongdoing or that the Class would or would not be able to recover anything
15 from Lending 1st if the Action was not settled.

16 Defendant EMC Mortgage Corporation is not a party to this Settlement, and remains a
17 defendant in the Action. This Settlement Agreement is not intended to, and does not, release any
18 claims against EMC.

19 **III. WHAT IS THE STATUS OF THE ACTION?**

20 On or about May 12, 2011, a notice was sent to Class members, pursuant to the Court’s
21 approval on April 13, 2011, notifying members of the Class that the Court certified this Action as a
22 class action pursuant to Federal Rules of Civil Procedure, Rule 23(b)(3) (“Class Notice”).

23 After extensive court proceedings and bargaining, the parties reached an Agreement and
24 Stipulation of Partial Settlement of Class Action (“Settlement Agreement”) stating the terms and
25 conditions of the Settlement of the Action with Lending 1st, subject to approval by the Court. The
26 parties filed a Motion for Preliminary Approval of the Settlement on September 10, 2012 (the
27 “Motion”).
28

1 The Court held a preliminary approval hearing on the Motion on December 6, 2012, and on
2 _____, 2012 it entered an order preliminarily approving the Settlement (the "Preliminary
3 Approval Order") and ordering that this Settlement Notice be sent to all Class members.

4 **IV. WHO IS IN THE CLASS?**

5 The Court has defined the Class as follows:

6 All individuals who, between August 29, 2003 and May 12, 2011, have or have had a
7 Monthly Option ARM loan that:

8 (a) was originated by LENDING 1st MORTGAGE and then sold or owned by
9 LENDING 1st MORTGAGE OR EMC MORTGAGE CORPORATION;

10 (b) was secured by real property in the United States; and

11 (c) was originated or otherwise approved by Defendant LENDING 1st MORTGAGE
12 within the State of California.

13 All people who meet these criteria and who have not excluded themselves from the Class in
14 accordance with the Class Notice are the "Class members."

15 **V. WHAT ARE THE TERMS OF THE SETTLEMENT?**

16 The following description of the proposed Settlement is only a summary. If there is any
17 difference between this summary and the terms of the Settlement Agreement (a copy of which was
18 attached as Exhibit A to the Declaration of Jeffrey K. Berns In Support of the Joint Motion for
19 Preliminary Approval of Partial Class Action Settlement), the terms of the Settlement Agreement shall
20 control. You may obtain a copy of the complete Settlement Agreement by contacting the Settlement
21 Administrator at the address set forth in Section XII, below, or by visiting the Settlement Website
22 located at _____.

23 The proposed Settlement described in this Settlement Notice is being considered for final
24 approval by the Court. If the Court approves the Settlement, the claims against Lending 1st will be
25 dismissed so that they cannot be brought again. Class members who had not previously timely and
26 validly excluded themselves from the Class will be bound by the terms of the Settlement Agreement as
27 described below.

1 As more fully explained in the Settlement Agreement, and if the Court finally approves it, the
2 parties have agreed to a settlement as outlined below:

3 **A. Establishment of a Settlement Fund.**

4 Lending 1st has agreed to deposit \$150,000.00, minus certain ongoing expenses of this lawsuit,
5 (the "Settlement Proceeds") with the Settlement Administrator, Epiq Class Action and Claims
6 Solutions, Inc., to set up a Settlement Fund. This will be accepted as full and complete satisfaction of
7 the claims made in the Action against Lending 1st. Lending 1st shall make the first payment of
8 \$10,000 to the Settlement Administrator within ten (10) days of the Preliminary Approval Order.
9 Lending 1st shall pay the rest of the Settlement Proceeds to the Settlement Administrator within five
10 (5) days after the Final Approval Order Date.

11 Lending 1st's payment of the Settlement Proceeds will fulfill Lending 1st's financial
12 responsibility under the Settlement Agreement, and Lending 1st will have no further obligation to pay
13 any additional money in Settlement of the Action. All payments to the Class members, the Class
14 Representatives, and/or the Settlement Administrator will be paid out of the Settlement Fund.

15 **B. Payment to Class Members.**

16 The Settlement Administrator, on behalf of Lending 1st, shall pay all Class members an equal
17 portion of the Settlement Fund, after deducting from the Settlement Fund: (1) the payment to the
18 Settlement Administrator of up to \$30,000.00; and (2) the payment of up to \$5,000.00 each to the
19 Class Representatives, if the Court approves, for the services they provided to the Class in connection
20 with the prosecution of the Action.

21 Payment of the Class members' shares of the Settlement Fund shall be made by a check from
22 the Settlement Administrator to each Class member (the "Settlement Check"), or jointly to multiple
23 Class members ("Co-Class members") if the loan was made to more than one borrower. Only one
24 Settlement Check will be issued per loan. Neither Lending 1st nor the Settlement Administrator shall
25 have liability to any person arising from any claim regarding the division of any payment made under
26 the Settlement Agreement among Co-Class members or be responsible to any person for any disputes
27 over who should receive any payment made pursuant to the Settlement Agreement.
28

1 Settlement Checks will be issued and mailed to Class members within thirty (30) days after the
2 Final Approval Order Date (as defined in the Settlement Agreement). Settlement Checks can be
3 cashed for ninety (90) days after they are issued and after that, they will be void (“Void Date”).

4 If a Settlement Check is not cashed by the Void Date, the Class member shall forfeit his or her
5 right to payment and will not be entitled to have a Settlement Check reissued or to any further
6 distribution from, or to any further recourse against, Lending 1st or the Settlement Administrator. The
7 Settlement Check will not be deemed to be abandoned property subject to payment to the State. The
8 Settlement Agreement will in all other respects be fully enforceable against the Class member.

9 NOTHING IN THE SETTLEMENT RELIEVES ANY CLASS MEMBER FROM HIS OR
10 HER DUTY TO MAKE PAYMENTS ON THE MORTGAGE LOAN OBTAINED THROUGH
11 LENDING 1ST.

12 **C. Payment to the Class Representatives.**

13 Subject to approval by the Court, the Class Representatives, Armando Plascencia and Melania
14 Plascencia, will each receive up to \$5,000.00 in settlement of their individual and class claims against
15 Lending 1st and in recognition of their services as Class Representatives.

16 **D. Class Counsel’s Attorneys’ Fees and Costs.**

17 Class Counsel will not be seeking compensation for Class Counsel’s services or for costs and
18 expenses relating to the prosecution of the claims of the Class Representatives and Class members
19 against Lending 1st in this action.

20 **E. Distribution of Remainder.**

21 Any check to a Settlement Class member that is returned to the Settlement Administrator with
22 a forwarding address will be re-sent to the address provided and the Settlement Administrator’s
23 database will be updated with the current address information. If any check to a Settlement Class
24 member is uncashed sixty (60) days after the date of the check, the Settlement Administrator shall
25 send a reminder letter to that Settlement Class member. The total amount of all checks that are
26 returned as undeliverable, with no forwarding address, or still uncashed ninety (90) days after the date
27 the check is written shall become part of a fund to be given to The National Consumer Law Center.
28

1 **F. Release.**

2 Under the Settlement Agreement, all Class members who had not previously timely and validly
3 excluded themselves from the Class will be bound by the terms of the Settlement Agreement if the
4 Settlement is approved. Additionally, upon final approval of the Settlement, the Class Representatives
5 and the Class members will be bound by the Release provisions of the Settlement Agreement. The
6 Settlement Agreement provides that:

- 7 1. For good and valuable consideration, the receipt and sufficiency of which are hereby
8 acknowledged, the Class Representatives and Class members, their respective co-
9 borrowers, spouses, or former spouses, who may have or have had an interest in the
10 loan that is the subject of this Settlement Agreement, and the present, former and future
11 respective heirs, executors, administrators, representatives, agents, attorneys, partners,
12 successors, predecessors-in-interest, assigns, employees, and insurers of the Class
13 Representatives and the Class members (collectively, the "Releasing Parties"), hereby
14 remise, release, and forever discharge Lending 1st, and each of its present, former, and
15 future direct and indirect parent companies, including but not limited to its
16 shareholders, directors, officers, insurers, affiliates, subsidiaries, divisions, officers,
17 employees, agents, attorneys, directors, shareholders, assignors, and predecessors-in-
18 interest (but excluding any assignees or purchasers of loans to Class members)
19 (collectively the "Released Parties") from any and all duties, obligations, claims,
20 counterclaims, judgments, demands, lawsuits, actions, causes of action or liabilities,
21 relating to the failure to disclose that the subject loans guaranteed negative
22 amortization. This release shall apply whether arising under local, state, or federal law,
23 whether by statute, contract, common law, or equity. The foregoing Release shall also
24 apply to any and all claims of the Releasing Parties that would be barred by the
25 doctrines of res judicata and collateral estoppel had the issues in this case been litigated
26 by each Class member to a final judgment on the merits, and to any and all past,
27 present, and future claims, administrative or otherwise, actions, causes of action, rights,
28

1 or liabilities, known or unknown, based on or arising from the allegations that are
2 contained in the Complaint, or that could have been asserted in the Complaint, against
3 any of the Released Parties, provided, however, that nothing in this Settlement
4 Agreement shall limit or curtail any Class member's rights with respect to any claims
5 that he or she may have against any assignee or purchaser of Class member's loans that
6 is not a Released Party.

- 7 2. Without limiting the foregoing, the Released Claims specifically extend to and include
8 any claims relating to the origination of the loans that the Class Representatives, Class
9 members, and the Releasing Parties do not know, or suspect to exist in their favor at the
10 time that the Settlement Agreement is executed, or at the time that the Settlement
11 Agreement and the Releases contained therein become effective (i.e., the Final
12 Approval Order Date), which, if known, might have affected their decision to enter into
13 the Settlement Agreement. The Class Representatives, Class members, and the
14 Releasing Parties intentionally and knowingly waive any and all provisions, rights, and
15 benefits conferred by any law of the United States, any state or territory of the United
16 States, or any law or principle of common law or equity that governs or limits a
17 person's release of unknown claims. The Class Representatives, Class members, and
18 the Releasing Parties understand and acknowledge that they may discover facts in
19 addition to or different from those that are currently known or believed to be true with
20 respect to the subject matter of the Released Claims but that it is their intention to fully,
21 finally, and forever settle and release all of the Released Claims, known and unknown,
22 suspected or unsuspected, without regard to the subsequent discovery or current
23 existence of any such additional or different facts, and in furtherance of such intention,
24 the release of these Released Claims shall remain in effect notwithstanding the
25 discovery or existence of any such additional or different facts. The provisions of this
26 paragraph include, without limitation, an express, knowing, and voluntary waiver, to
27 the fullest extent permitted by law, by the Class Representatives and all Class members
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1 and Releasing Parties, of any and all rights or benefits conferred under Section 1542 of
2 the California Civil Code, which provides that:

3 A general release does not extend to claims which the creditor does not know or
4 suspect to exist in his or her favor at the time of executing the release, which if
5 known by him or her must have materially affected his or her settlement with
6 the debtor.

7 The Class Representatives, Class members, and the Releasing Parties understand and
8 acknowledge the significance of this waiver of Section 1542 of the California Civil
9 Code. In addition, the Class Representatives and all Class members and Releasing
10 Parties also expressly, knowingly, and voluntarily waive any and all provisions, rights,
11 and benefits conferred by any law of the United States, any state or territory of the
12 United States, and any law or principle of common law or equity, which is similar,
13 comparable, or equivalent to Section 1542 of the California Civil Code.

14 **VI. FINAL APPROVAL HEARING**

15 The hearing for final consideration and approval of the Settlement (i.e., the Final Approval
16 Hearing), is scheduled to occur on May 2, 2013, at 2:00 p.m. in Courtroom 2 on the 4th Floor of the
17 United States District Court for the Northern District of California at 1301 Clay Street, Oakland,
18 California 94612. The date or time of the hearing may be changed without further notice being sent
19 directly to you. However, if the hearing date or time is changed, notice of the new date and time will
20 be posted online on the settlement website at _____. You may also
21 contact Class Counsel using the contact information set forth in Section VIII below to find out if the
22 hearing date or time has been changed.

23 At the Final Approval Hearing, the Court will hear any objections and arguments concerning
24 the fairness of the proposed Settlement, including any objections and arguments by those Class
25 members who comply with the provisions of the Settlement Agreement as noted in Section VII(B),
26 below. **YOU DO NOT HAVE TO ATTEND THIS HEARING UNLESS YOU OBJECT TO THE**
27

1 SETTLEMENT AND WISH TO APPEAR IN PERSON. IT IS NOT NECESSARY TO APPEAR IN
2 PERSON IN ORDER TO MAKE AN OBJECTION.

3 If the Court approves the Settlement, payment to the Class members will be completed within
4 approximately one (1) month after the entry of an order finally approving the Settlement, unless an
5 appeal is taken. If an appeal is taken, there will be a delay in any payment, and there is the possibility
6 that the Court may not approve the Settlement. If the Settlement is not approved, the Class Action will
7 proceed as if no Settlement Agreement had been attempted, and there will be no payments provided at
8 all. There can be no assurance that if the Settlement is not approved and the Class Action continues to
9 proceed, the Class would recover more than what is provided in the Settlement Agreement, or indeed,
10 recover anything at all.

11 **VII. WHAT ARE YOUR OPTIONS?**

12 **A. Do Nothing.** If you are satisfied with the proposed Settlement, you do not need to do
13 anything. Under the terms of the Settlement Agreement and after the Court's final approval of it,
14 Class members shall receive their share of payment from the Settlement Fund as set forth in Section
15 V(B) above. Please ensure that the Settlement Administrator has your current address, as set forth
16 below in Section X.

17 **B. Right to Object.** If you believe that the proposed Settlement is unfair or inadequate,
18 you may submit an objection to the Court. However, Class members who had previously opted out of
19 the Class have no right to file or present any objection.

20 If you wish to submit an objection, you must send a written objection to the Settlement
21 ("Written Objection") to the Clerk of the District Court, 1301 Clay Street, Oakland, California 94612
22 no later than sixty (60) days after the date of the Settlement Notice (i.e., Written Objections must be
23 sent to the Court on or before _____, 2013). Your objection should reference the name of the
24 case as *Plascencia, et al v. Lending 1st Mortgage, et al*, and the Court's Case number, 4:07-cv-04485-
25 CW. Copies of your written objection must be mailed to Class Counsel and Lending 1st's Counsel
26 postmarked by the same date to the addresses listed in Sections VIII and IX, below.
27
28

1 The Written Objection must contain: (i) a statement of your objection, including the specific
2 grounds for the objection and any other reasons why you desire to be heard; (ii) any legal support you
3 wish to bring to the Court's attention; and (iii) any evidence, documents or writing that you wish to
4 introduce in support of the Written Objection. You may appear at the Final Approval Hearing in
5 person or through counsel at your own expense. If you want to appear in person or through counsel at
6 the Final Approval Hearing, your written objection must also include notice of your intent to appear.

7 A copy of the Parties' Joint Motion for Final Approval of the Settlement, which will include
8 any request that the Court grant a service award to the Class Representatives, will be posted to the
9 settlement website no later than two weeks before the deadline for you to submit objections (or by
10 _____, 2013).

11 The Final Approval Hearing will be the only opportunity for any Class member who objects to
12 the proposed Settlement, the Settlement Agreement, the release of the Released Claims, or the entry of
13 an order directing payment from the Settlement Fund, to appear and be heard.

14 **VIII. WHO REPRESENTS THE CLASS?**

15 The law firms of Berns Weiss LLP, Smoger & Associates, Arbogast Bowen LLP, Seeger
16 Weiss LLP, Williams Cuker Berezofsky, and Spiro Moore LLP represent the Class Representatives
17 and the Class.

18 All notices to Class Counsel as required or permitted to be given by law or by the terms of the
19 Settlement Agreement shall be in writing and shall be sent by first class United States mail, postage
20 prepaid, addressed as follows:

21 Jeffrey K. Berns
22 **BERNS WEISS LLP**
23 20700 Ventura Blvd., Suite 140
24 Woodland Hills, CA 91364
(818) 961-2000

25 **IX. WHO REPRESENTS LENDING 1ST?**

26 The following attorneys represent Lending 1st in connection with this Settlement Agreement.
27 All notices to Counsel for Lending 1st as required or permitted to be given by law or by the terms of
28

1 the Settlement Agreement shall be in writing and shall be sent by first class United States mail,
2 postage prepaid, addressed as follows:

3 Mark S. Tratten
4 **ERICKSEN ARBUTHNOT**
5 100 Howe Avenue, Suite 110 South
6 Sacramento, CA 95825

6 **X. CORRECT ADDRESS**

7 If this notice was sent to you at an address that is not current, or if it was otherwise forwarded
8 to you by the U.S. Postal Service, you should immediately send a letter to the Settlement
9 Administrator, Epiq Class Action and Claims Solutions, Inc., at P.O. Box 4079, Portland, Oregon
10 97208-4079, stating the name of the case and your past and current address. It is important for you to
11 provide your current address to the Settlement Administrator to ensure that you receive your
12 settlement check, if the Settlement is approved by the Court.

13 **XI. AVAILABILITY OF FILED PLEADINGS**

14 This description of the Class Action is general and does not cover all of the issues and
15 proceedings thus far, and provides only a summary of the basic terms of the proposed Settlement. The
16 complete terms and conditions of the proposed Settlement are contained in the Settlement Agreement
17 on file with the Court. All papers filed in the Class Action, including the Settlement Agreement, are
18 available for you to inspect and order copies at your expense at the office of the Clerk of the Northern
19 District Court, 1301 Clay Street, Oakland, California 94612. Certain documents, including the
20 Settlement Agreement and the Motion, are also available online on the settlement website at
21 _____ . You can also request a copy of the Settlement Agreement or the
22 Motion by contacting the Settlement Administrator as set forth in Section XII below.

23 **XII. WHO CAN HELP YOU WITH ADDITIONAL INFORMATION?**

24 Any questions you have concerning this Settlement Notice, the Class Action, or the Class
25 Claim should be directed to the Settlement Administrator, Epiq Class Action and Claims Solutions,
26 Inc., at P.O. Box 4079, Portland, Oregon 97208-4079, phone: (877) 867-7648. All requests for more
27 information, including a copy of the Settlement Agreement or the Motion, should be sent by first class
28

1 mail to the address indicated above. Please include the case name, case number, and your name and
2 return address on any letters that you send.

3 While the Court has approved the sending of this Settlement Notice, it does not mean, and is
4 not intended to mean, that the Court has any opinion as to the claims or defenses asserted by the
5 parties in the Class Action.

6 **PLEASE DO NOT TELEPHONE, SEND INQUIRIES, OR ADDRESS ANY QUESTIONS**
7 **ABOUT THE CASE TO LENDING 1ST MORTGAGE, LENDING 1ST MORTGAGE, LLC,**
8 **EMC MORTGAGE CORPORATION, THE CLERK OF THE COURT, OR THE JUDGE**
9 **ASSIGNED TO THIS CASE.**

10
11 DATED: _____

BERNS WEISS LLP

12 By: _____
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15 626 RXR Plaza
16 Uniondale, New York 11556
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